



National
Alternative
Dispute
Resolution
Advisory
Council

The Development of Standards for ADR

Discussion Paper

March 2000

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DISCUSSION PAPER

The Development of Standards for ADR

National Alternative Dispute Resolution Advisory Council

Submissions

The National Alternative Dispute Resolution Advisory Council (NADRAC) is seeking public comment on the issues raised and the suggestions canvassed in this Discussion Paper.

NADRAC welcomes comment from any source but is particularly keen to elicit comment from all persons and organisations with an interest in alternative dispute resolution (ADR) including:

- ADR practitioners;
- ADR service providers;
- parties who have used or are using ADR;
- advisers to parties involved in ADR;
- those who refer parties to ADR;
- government agencies funding or using ADR;
- those involved in training or educating ADR practitioners;
- industry associations or organisations using or advocating ADR;
- community groups with an interest in ADR;
- courts and tribunals.

There are questions at the end of each chapter. Responses can address all or any of the questions, or respond generally to the issues raised. It would be helpful if respondents could indicate the relevant chapter and numbered section to which their comments relate.

Following the consultation, NADRAC will produce a report for the Attorney-General containing its recommendations.

Responses to the Discussion Paper are requested by close of business

31 July 2000 and can be sent to:

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The objectives of this chapter are to describe the functions of NADRAC in relation to ADR standards, to define some basic terms, to indicate the scope and boundaries of this paper, and to indicate NADRAC's approach to its task.

Introduction

1.1 NADRAC and its role

The National Alternative Dispute Resolution Advisory Council (NADRAC) was formed in October 1995 to provide the Commonwealth Attorney-General with independent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.

NADRAC's Charter requires it to advise the Attorney-General on 'minimum standards, training, qualifications and associated issues in relation to the providers of ADR services.'

NADRAC originally commenced investigation of standards for mediators only, but has now decided to discuss the issue of standards for the full range of providers of ADR services.

1.2 The continuing rise and development of ADR

Over the last two decades Australian society has sought more informal mechanisms to resolve its disputes, rather than formal resolution of disputes by the courts (judicial adjudication) based on the application of legal rules to agreed or determined facts. In response to the perception that formal legal procedures had become very technical, time-consuming and expensive, ADR processes aim to provide the more flexible services of skilled helpers. These skilled helpers can assist in the resolution of disputes through a range of methods excluding judicial adjudication.

The potential scope for the use of ADR processes in the future is considerable. If, as seems likely, the occurrence of conflict in society

increases and the costs of the judicial system remain high, ADR will assume greater prominence both within and outside the legal system in the next century.

Astor and Chinkin¹ described the growing use of ADR in Australia in the 1980s and early 1990s and that growth has continued throughout the mid and late 1990s. It has resulted in the widespread use of ADR in schools and community organisations, in tribunals and government agencies, in private commercial organisations and industry dispute resolution schemes. All court systems in Australia, at both Commonwealth and State levels, make provision for ADR, and it is proposed to be an integral part of the new Federal Magistrates Service. There is growing interest in ADR among the legal and other professions. There is an emerging literature, and ADR is studied increasingly in educational institutions throughout the country.

These developments are the product of the complex interaction of government policies, economic and budgetary pressures, consumer demand, theoretical understanding, technological innovation and developments in global trade. It is envisaged that these factors will lead to the continued expansion of ADR into new areas as governments and the private sector recognise the prohibitive costs, financial and non-financial, of the legal system. There will also be the development of different forms of ADR as existing forms fail to meet emerging needs.²

ADR has made a valuable contribution to the resolution of disputes in Australian society that should be recognised and nurtured. However, as ADR is increasingly used and developed, there are pressures from some quarters for improvements in the competencies of practitioners, and the accountability of both individual practitioners and service-providers in the ADR community. This Discussion Paper on ADR standards is, in part, a response to those pressures.

1.3 The scope of this Discussion Paper

The terms of NADRAC's Charter require it to consider the following matters in relation to standards for providers of ADR services:

¹ Astor, H & Chinkin, C. *Dispute Resolution in Australia*, Butterworths, 1992.

² Boulle, L. 'Trends in Dispute Resolution: Where are We Heading?', Unpublished paper presented at the Conference *The Management of Disputes Involving the Commonwealth: Is Litigation Always the Answer?*, Canberra, 22 April 1999.

- minimum standards for the provision of alternative dispute resolution services;
- minimum training and qualification requirements for alternative dispute resolution practitioners including the need, if any, for registration and accreditation of practitioners and dispute resolution organisations; and
- appropriate professional disciplinary mechanisms.

When considering the issue of minimum standards, NADRAC is also required by its Charter to examine:

- the respective responsibilities of the courts and tribunals, government, and private and community sector agencies for the provision of high quality alternative dispute resolution services;
- ethical standards for practitioners;
- the role of lawyers and other professional advisers in alternative dispute resolution;
- legal and practical issues arising from the use of alternative dispute resolution services, such as the liability or immunity of practitioners, the enforceability of outcomes and the implications of confidentiality; and
- the accessibility of alternative dispute resolution services.

In considering how to approach its task, NADRAC took account of its Charter requirements and other relevant considerations, including the enormous diversity of situations in which ADR is practised. This diversity means that ADR standards have to balance many factors, including the requirements of different ADR users, the needs of different ADR practitioners, the differing views of the need for accountability and good practice, and societal interest in the promotion of high quality ADR. It also felt the need to take account of practical considerations, such as resources and capabilities, as well as comparative developments in other professions, and international developments in this area.

There is not only wide diversity in the practice of ADR but, as NADRAC has previously noted, there are also constant changes in the way ADR is practised and continuing development of new ADR services.

To be able to provide effective, consistent advice to the Attorney-General, one of the first tasks undertaken by NADRAC was the development of working definitions for the key ADR processes (the Definitions Paper).³

In the Definitions Paper, NADRAC categorised the many different ADR processes available by dividing them into three types:

- facilitative processes;
- advisory processes; and
- determinative processes.

NADRAC envisaged that the “qualities and qualifications required by the third party, the nature of their responsibilities to the parties to the dispute and the outcome to be expected from the process will vary from one category to another.”⁴

The Definitions Paper then went on to describe and distinguish the various individual processes within each category, for example, mediation and case appraisal.

NADRAC also began work on the development of ADR standards, which involved consultations with the ADR community, but this preliminary work was restricted to mediation only.

NADRAC has now decided in this Discussion Paper to explore the issue of standards in relation to all three categories of ADR. It is of the view that to consider one category or sub-category of ADR practice in isolation from the rest fails to reflect the overlap and similarities among many areas of ADR practice. However, NADRAC is aware that exploring the development of standards for all ADR practitioners is an ambitious task.

Although the paper applies to all categories of ADR, it focuses primarily on facilitative and advisory ADR because these are the major areas of ADR practice in Australia today. In relation to determinative ADR, the Discussion Paper does not deal at all with commercial arbitration under legislation as this sub-category has well developed standards already in place.

³ National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions*, March 1997.

⁴ *ibid*, p 4.

1.4 NADRAC's approach to standards

A standard is generally taken to mean “a published document which sets out technical specifications or other criteria necessary to ensure that a material or method [or person] will consistently do the job it [or he or she] is intended to do”.⁵

Generally, standards for service providers are expected to describe what tasks are to be performed in the provision of the service, how those tasks are to be performed and to what level of proficiency. Standards can vary according to the degree of specificity that is desired and whether the level of proficiency is to be set at a minimum, desirable or optimal level.

Given the wide range of ADR processes and the diversity of situations and circumstances in which they are practised, NADRAC has formed the view that it is not possible to develop and propose a single prescriptive set of standards which will cover all ADR service provision even in the most general and minimal way.

Further, while it is both possible and desirable for standards to be developed for particular ADR processes, NADRAC is of the view that specific standards should not be determined by a single body or institution, such as NADRAC. Rather such development should involve the service providers and wide consultation with all other stakeholders. This process should take into account all relevant needs and objectives, and allow for any resulting standards to be regularly reviewed in the light of changing requirements.

NADRAC has therefore attempted to describe in this Discussion Paper, a provisional framework for approaching and undertaking the development of standards in any area of ADR, rather than attempt to prescribe standards for any or all areas of ADR practice. After consideration of all responses to the Discussion Paper, NADRAC will prepare a final report on the subject.

⁵ Standards Association of Australia, *Annual Report*, 1997, p 20.

Terminology

1.5 Alternative Dispute Resolution (ADR)

NADRAC uses its own definitions of ADR:

Facilitative ADR processes

“Facilitative processes involve a third party providing assistance in the management of the process of dispute resolution. Generally the third party has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process whereby resolution is attempted.”⁶

This category of ADR includes the processes of mediation, conciliation and facilitation.

Advisory ADR processes

“Advisory processes involve a third party who investigates the dispute and provides advice as to the facts of the dispute, and, in some cases, advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.”⁷

This category of ADR includes the processes of investigation, expert appraisal, case appraisal, case presentation, mini-trial and dispute counselling.

Determinative ADR processes

“Determinative processes involve a third party investigating the dispute (which may include the hearing of formal evidence from the parties) and making a determination, which is potentially enforceable, as to its resolution.”⁸

This category of ADR includes the processes of adjudication, arbitration, expert determination, private judging, fact finding and early neutral evaluation.

⁶ National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions*, March 1997, p 5.

⁷ *ibid*, p 9.

⁸ *ibid*, p 10.

Generally, in this Discussion Paper, reference is made to the three broad categories of ADR and not to specific processes, for example, mediation and case appraisal. In some cases it is appropriate to make reference to specific processes and also to hybrid processes, such as med-arb (mediation-arbitration). Where the Discussion Paper refers to specific ADR processes they have the same meaning as in the NADRAC ADR Definitions Paper.

1.6 The concepts of ADR practitioner and ADR service-provider

NADRAC has drawn a distinction in this Discussion Paper between the ‘ADR practitioner’ who is an individual who resolves disputes using ADR, and the ‘ADR service provider’ which is usually an organisation which provides or refers the services of ADR practitioners to the public.

ADR practitioners work privately or in association with ADR service providers. There are both commercial and government ADR service providers.

1.7 Parties

Many different terms can be used for those whose disputes are dealt with in ADR processes: ‘users’, ‘disputants’, ‘participants’, ‘parties’ and ‘consumers’. Each term has its strengths and shortcomings. After considerable deliberation NADRAC decided to use ‘party’ and ‘parties’ in preference to the other terms on the grounds that they are already used in many ADR contexts and would be understood as well by outside persons. Nevertheless, it is acknowledged that for some the chosen terms may have legalistic and adversarial connotations.

1.8 The ADR community

In this Discussion Paper the Council uses the term ‘ADR community’ to refer to all those persons and entities who have an interest in ADR. This would include practitioners, service providers, parties, parties’ advisers or representatives, governments, courts, ADR bodies and professional associations. A ‘stakeholder’ is an individual or agency that has an interest in developing standards for ADR practitioners.

The structure of this paper

- Chapter One indicates the scope of this Discussion Paper.
- Chapter Two considers the various contexts for ADR in Australia and claims made about ADR in research studies and from anecdotal sources.
- Chapter Three sets out the objectives of ADR.
- Chapter Four considers the advantages and disadvantages of standards for ADR.
- Chapter Five notes existing standards for ADR practice.
- Chapter Six considers the knowledge, skills and ethics that could form the basis of ADR standards.
- Chapter Seven sets out general principles to guide practitioners, service providers or other organisations in the development of standards.
- Chapter Eight provides some guidance as to how those standards might be developed, based on the aspects of ADR practice discussed in Chapters Six and Seven, in the specific areas of family mediation, school peer mediation, statutory conciliation and commercial mediation.
- Chapter Nine deals with education, training, qualifications and accreditation of ADR practitioners.
- Chapter Ten addresses the ways in which standards may need to be maintained.
- Chapter Eleven looks at the enforcement of standards, including issues of confidentiality and immunity.
- Chapter Twelve considers the broad issue of the type of regulation that may be appropriate for the ADR industry.

Q1. To what extent is NADRAC's general approach appropriate for the consideration of the development of standards for ADR practice in Australia?

Q2. Are there other approaches you would prefer NADRAC to take? Why? How?

The provision of ADR in Australia

The objective of this chapter is to describe, generally, the contexts in which ADR is practised in Australia by reference to the organisations and individuals who provide ADR, to show the diversity of ADR practice and to describe broadly where ADR is currently used. The chapter also describes the views that parties have of the ADR process as shown in Australian survey studies and provides some anecdotal accounts of ADR as it is being practised.

Contexts for ADR

This Chapter describes various ADR processes against a background of the categories detailed in Chapter One. It also refers broadly to ways in which parties in Australia view ADR at the current time.

What follows is a general description of practitioners and service providers who provide ADR in Australia. While specific examples have been referred to in some cases, it is not intended to be an exhaustive description.

The general description gives some idea of the diversity of those who practise ADR, the different models or types of ADR that are used and the range of parties who are likely to encounter ADR. NADRAC has already dealt with, in some detail, the differing needs of parties who are likely to use ADR.⁹

2.1 Community ADR

Each State and Territory has centres, funded by the State or Territory government, which offer ADR services. They include the Community Justice Centres in New South Wales, the Resolution Centre in the Australian Capital Territory, Dispute Resolution Centres in Queensland, Dispute Settlement Centres in Victoria and Community Mediation Services in South Australia. There are also centres in Western Australia, Tasmania and the Northern Territory.

⁹ National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, November 1997 and *A Fair Say*, 1999.

These centres provide mediation and other dispute resolution services to the community to deal mainly with neighbourhood disputes and public issue disputes. In some States and Territories school-based peer mediation schemes have been established to deal with disputes in the school community. Many centres have operated, or currently operate, victim - offender mediation programs.

Other community organisations funded by government provide mediation services for family or relationship disputes. This category includes a range of organisations each affiliated with one of three family services industry-representative bodies; Family Services Australia, Relationships Australia, and Centacare.

2.2 Courts and tribunals

Courts and tribunals in both State and Federal jurisdictions make use of ADR. The main forms of ADR which are used are pre-trial conferences, mediation, arbitration, early neutral evaluation, expert appraisal and settlement negotiations.¹⁰ The ADR process can be mandatory or voluntary depending on the jurisdiction and the type of ADR being used.

In the Family Court, conciliation conferences have been mandatory since 1975 and voluntary mediation services have been provided since 1992.¹¹ Since the introduction of the Family Law Reform Act 1995 (Cth) parties have been encouraged to use 'primary dispute resolution' methods that are defined as counselling, mediation and arbitration. However, arbitration in terms of this scheme has not been used to date.¹²

The Federal Court initiated an 'assisted dispute resolution program' in 1987, with mediation and arbitration being available to the parties.¹³ However, while mediation has been used to resolve cases, arbitration has been little used.¹⁴ Most mediation involves consumer protection disputes under the Trade Practices Act 1974 (Cth). Under its individual docket system for case management, the court can also hold pre-trial settlement conferences to attempt to resolve a dispute or at least to clarify the issues in dispute.

¹⁰ Boulle, L. and Mack, K. *Laws of Australia, Dispute Resolution*, 13.1 [22].

¹¹ *ibid*, 13.1 [24].

¹² Australian Law Reform Commission. Issues Paper 25, *Review of the adversarial system of litigation. ADR - its role in federal dispute resolution*, June 1998, para 3.57.

¹³ A pilot program of early neutral evaluation was conducted in the Perth Registry in 1992-3 but relatively few cases were referred to it. See Boulle, L. and Mack, K. *Laws of Australia* 13.1 [23].

¹⁴ Australian Law Reform Commission. *op. cit.*, paras 3.57 & 3.18.

The Administrative Appeals Tribunal (AAT) routinely uses the ADR processes of pre-hearing conferences and mediation if the parties consent. Mediation has been used in all registries since 1993.¹⁵ The AAT is also piloting conciliation conferences to encourage earlier consideration of the merits of a case.¹⁶

The National Native Title Tribunal uses a model of mediation adapted for complex, multi-party disputes.¹⁷ Unless the Federal Court determines otherwise, all native title applications must be referred to the Tribunal for mediation.

Other Commonwealth tribunals such as the Superannuation Complaints Tribunal, use ADR processes. The Tribunal attempts to resolve complaints about superannuation and trustee decisions by using conciliation. The Australian Industrial Relations Commission arbitrates and conciliates disputes in relation to workplace relations matters. It is proposed to supplement the range of processes offered by the Commission with mediation provided by private practitioners.¹⁸

The use of ADR processes is widespread throughout State and Territory courts. The processes used include mediation, arbitration, early neutral evaluation, case appraisal, expert referees, conferences and various informal and inquisitorial approaches to settling disputes.¹⁹ There are also various tribunals in the States and Territories which use ADR processes such as Commercial Tribunals, Consumer Claims Tribunals, Small Claims Tribunals, Building Disputes Tribunals and Residential Tenancies Tribunals.²⁰

2.3 Government agencies

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

¹⁵ Boulle, L. and Mack, K. op. cit., 13.1 [25].

¹⁶ Rose, A. 'Federal government in civil litigation and dispute resolution', Unpublished paper presented at the Conference *The Management of Disputes Involving the Commonwealth: Is Litigation Always the Answer?*, 22 April 1999.

¹⁷ Australian Law Reform Commission. op. cit., paras 3.57 & 4.2.

¹⁸ Reith MP, The Hon. P. Implementation Discussion Paper *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay*, May 1999, pp 19-20.

¹⁹ Boulle, L and Mack, K. op. cit., Dispute Resolution 13.1 [28].

²⁰ Heap, J. 'Courts and Tribunals', Duncombe, S. & Heap, J. H., op. cit., [4.340-4.1630].

aid commissions around the country are funded by the Commonwealth Government to deliver mediation and conferencing services for family disputes.²¹

Diversory conferencing schemes operate in each of the States and Territories. The aim of conferencing is to divert offenders from the criminal justice system by offering them the opportunity to attend a conference to discuss and resolve the offence instead of being charged and appearing in court. These schemes vary from jurisdiction to jurisdiction in terms of eligibility, agency responsibility and legislative basis. Those conducting diversory conferencing schemes include the police, justice authorities and community organisations.²²

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

2.4 Industry dispute resolution schemes

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

The current schemes include the Telecommunications Industry Ombudsman, the Electricity Ombudsman (TAS and VIC), and the Energy Ombudsman (NSW). They also include various financial disputes schemes such as the Australian Banking Industry Ombudsman, the General Insurance Enquiries and Complaints Scheme, the Life Insurance Complaints Service, the Financial Services Complaints Resolution Scheme, the Insurance Brokers Dispute Facility and the Credit Union Dispute Reference Centre.

²¹ Dewdney, M. in Duncombe, S. & Heap, J. op. cit., [3.2790].

²² Australian Institute of Criminology, website : www.aic.gov.au

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

Other industries have set up schemes to resolve disputes but these usually involve referral of a complaint to a private mediator or arbitrator for resolution.²³

2.5 Private ADR providers

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

This short summary of who provides ADR and the type of ADR that they provide gives some idea of the range of services that are involved. An ADR service can involve the government or private sector, it can involve negotiation or arbitration, it can deal with criminal or commercial issues, and it can have a legal or non-legal context.

Q3. Are there any other significant areas in which ADR is practised? What are those areas?

Q4. Are there any other categories of ADR practitioners and service providers? What are those categories?

Parties' views about ADR

ADR has developed in response to the needs of people and organisations for dispute resolution systems that are more responsive, less alienating, cheaper, quicker and provide more satisfactory outcomes. The development of standards should take account of the views, perceptions and expectations of parties relating to the practice of ADR.

²³ Examples of industries where this type of ADR is used are franchising, chartered accountants, furnishing and internet service providers.

The ADR community claims a range of benefits for ADR over judicial determination or unassisted negotiation between parties and their representatives. In respect of all categories of ADR, the claim is made that they are quicker, cheaper, more flexible and more responsive to party needs than other processes. In respect of facilitative ADR, it is claimed that the parties have control over the process and responsibility for the outcome and that it can better allow for existing relationships to continue and prosper.

In terms of shortcomings, when ADR is a compulsory step in court procedures it can draw out the litigation process. Where one party uses ADR with the intent of deliberately delaying the proceedings, the other party may see it as an abuse of the court process. In addition, the private nature of ADR may result in unfair procedures or outcomes in the absence of clear standards and forms of accountability.

There are two main sources of knowledge about how parties in Australia perceive ADR. The first comprises those research studies undertaken in various ADR programs. The second comprises the anecdotal evidence from the ADR community. Both give only a limited insight into the topic.

2.6 Research studies

Most Australian research in this area has concentrated on two aspects of ADR, the objective results of ADR processes (mostly mediation) and the subjective views of parties, practitioners and legal representatives. The former are mainly quantitative in nature, and the latter are mainly qualitative. These research studies²⁴ generally reveal similar findings about the operation of mediation in particular:

²⁴ Love A, Moloney L & Fisher T, *Federally Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction*, Attorney-Generals' Department, 1995; Bordow S & Gibson D, *Evaluation of the Family Court Mediation Service*, Family Court of Australia Melbourne, 1994; McNair, *Family Mediation National Poll*, September 1995; Dewdney M, Sordo B & Chinkin C, *Contemporary Developments in Mediation within the Legal System and Evaluation of the 1992-3 Settlement Week Program*, Law Society of New South Wales, Sydney, 1994; Moloney L, Fisher T, Love A & Ferguson S, *Federally Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction*, Commonwealth Attorney-Generals' Department, 1996; Keys Young, *Research/Evaluation of Family Mediation Practice and the Issue of Violence Final Report*, Commonwealth Attorney-General's Department, 1996; Tow D & Stubbs M, 'The Effectiveness of Alternative Dispute Resolution Methods in Planning Disputes' *Australian Dispute Resolution Journal*, February 1997, pp 267-281; Lambeck F, 'Rental Bond Disputes: A Comparison of Different Dispute Resolution Mechanisms for Rental Bond Disputes in the Australian Capital Territory' *Australian Dispute Resolution Journal*, February 1997, pp 27-41; Fisher J & Blondel M, *Couples Mediation: A Forum and A Framework*, New South Wales Marriage Guidance, 1993; Schwartzkoff J & Morgan J, *Community Justice Centres - A Report on the New South Wales Pilot Project 1979-1981* 1982; Prior A, 'What Do Parties Think? A Follow-Up Study of the Marriage Guidance South Australia Family Mediation Project', 1993-4 *Australian Dispute Resolution Journal*, 99; Delaney, M. and Wright, T. *Plaintiffs' Satisfaction with Dispute Resolution Processes*, Justice Research Centre, 1997.

- there is consistently a very high rate of agreement reached by parties at mediation;
- there is a high level of satisfaction with the fairness of the mediation process;
- there is a high level of satisfaction with the fairness of the mediated outcome;
- most mediated agreements are shown to be durable over time;
- the overall level of awareness of family mediation is quite low;
- some parties are unsuited to mediation due to violence or power imbalance;
- most women who use mediation feel that they have equal influence over the terms of the agreement and report increased confidence in their ability to stand up for themselves and handle future disagreements;
- there are very high rates of satisfaction with the professional skills and impartiality of mediators;
- an overwhelming majority of parties felt that they had been given a chance to have their say;
- a majority of parties believe that mediation gave them an opportunity to understand the other party's point of view;
- most pre-trial conference and mediation parties felt that they had more control over the outcome of their dispute than did parties who used litigation or arbitration;
- one of the most frequently identified benefits relating to mediation as an alternative to court action is the avoidance of stress, tension and the trauma of a possible court hearing; and
- most lawyers rated mediation as effective to highly effective.

Industry dispute schemes also show a high level of satisfaction with the service provided.²⁵ Most parties were particularly impressed with being able to speak directly to someone who could handle the complaint from the outset and with the overall lack of regimentation, policies or procedures which were considered obstacles to a fair and efficient hearing.²⁶

These survey results must be viewed with caution in the light of the following factors. First, most of the surveys relate to family mediation.

²⁵ Telecommunications Industry Ombudsman, 1997-8, Annual Report, p 14.

²⁶ *ibid*, p 20.

While this is an important type of mediation, it is only one type of ADR and there are many different contexts in which ADR is practised.

Secondly, the surveys themselves are limited in that the questions asked of the parties often use terminology which is capable of having different meanings, without clarifying which meaning is intended by the respondent. This leads to an appearance of objectivity that can be illusory.²⁷ Some surveys are also based on small samples²⁸, in some cases there is a lack of control groups²⁹ and others fail to provide for cross referencing of responses.³⁰

Thirdly, the survey findings highlight majority views, but there is often a significant minority with different opinions. Both positive and negative views are reflected in anecdotal comments about the ADR used, a sample of which follows:

“I felt for the first time my ex-husband who had bullied me for years and who sought to reduce me to ‘nothing’ (his words) finally saw that I had equal rights; was given dignity via the mediation and confidence myself to speak out.”³¹

“Mediation isn’t final from my point of view. I felt that I was pushed into mediation and agreement because legal aid refused to avoid this and go straight to court. I would have much preferred to go to court as it’s final and my child’s father can’t push me around.”³²

“I appreciated being treated as an equal by the mediator instead of an inferior person like most court cases do.”³³

“Mediators should not attempt to act as judge, they should be able to accept having their statements questioned and should encourage questions.”³⁴

“A problem is that mediation assumes that the parties have a commitment to achieving a workable outcome...its value is low where a party uses it to appear to be doing the ‘right thing’.”³⁵

²⁷ Ingleby, R. *In the Ball Park: Alternative Dispute Resolution and the Courts*, Australian Institute of Judicial Administration Incorporated, 1991 at p 7.

²⁸ Chinkin, C. & Dewdney, M. “Settlement Week in New South Wales: An Evaluation”, *Australian Dispute Resolution Journal*, May 1992, p 93, at p 114.

²⁹ Ingleby, R, op. cit., at p6.

³⁰ Caspi, S. ‘Mediation in the Supreme Court: Problems with the Spring Offensive Report’, *Australian Dispute Resolution Journal*, November 1994, p 250, at p 254.

³¹ Moloney, L. Fisher, T. Love, A. & Ferguson, S. *Managing Differences: Federally-Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction*. Attorney-General’s Department, 1996, p 105.

³² *ibid.*

³³ Dewdney, M, Sordo, B & Chinkin C, *Contemporary Developments in Mediation within the Legal System and Evaluation of the 1992-3 Settlement Week Program*, The Law Society of New South Wales, 1994, p 82.

³⁴ *ibid.*, p 83.

³⁵ Fisher, L, & Blondel, M, op. cit., p 26.

“In retrospect mediation, which was my idea, was a total waste of time and money.”³⁶

“I had strong feelings that: mediators anti-me or anti-men: did not respect confidentiality; did not mediate in a way which encouraged resolution; a thorough waste of time and money: mediators had a pattern of work, obviously taught but ineffective; did not attempt to mediate or conciliate. When my wife lost her temper and ended sessions - no attempt to retrieve situation. Two very nice people but not pro-active, not mediators, not conciliators, did not actively seek a resolution.”³⁷

“I felt she was going overboard to be fair to him because she was a woman and did not want to look as though she was ganging up on him with me. However, this meant she let him drag up all sorts of things and accuse me of psychologically damaging my kids when they were with me, for three or four sessions, without actually agreeing on anything.”³⁸

“I found it crazy that one mandatory requirement for mediation was one had to be a solicitor, yet could not give legal advice....she may as well have been a tram driver.”³⁹

2.7 Other anecdotes about ADR

While there are few statistics on the number and nature of complaints about ADR, there are some stories emerging about examples of bad practice. The consultation which NADRAC undertook in 1996 revealed some instances of such practices.

“In the past, at least one judge has been known to designate a lawyer as a mediator, even though the lawyer had never practised as a mediator and didn’t know what mediation was.” (Melbourne)

“There is anecdotal evidence of people being invited to participate in a statutory mediation process and then finding that the process is nothing like mediation. Accordingly, there is no informed decision to participate on the part of the consumer.” (Canberra)

“In a recent case the NSW Supreme Court refused to examine what happened in a mediation even though there were allegations of duress involved.” (Sydney).

³⁶ *ibid.*

³⁷ Keys Young, *Research /Evaluation of Family Mediation Practice and the Issue of Violence Final Report*, Attorney-General’s Department, 1996, p 80.

³⁸ *ibid.*, p 99.

³⁹ Bordow, S & Gibson, J, *Evaluation of the Family Court Mediation Service Research Report No 12*, Family Court of Australia, 1994, p 108.

Main benefits and deficiencies ADR

The survey studies bear out some of the claims of ADR that it is generally quick, fair and informal and that the parties value it. There is also some evidence that ADR is usually cheaper than litigation. However, it should be noted that there have been criticisms of the research methodology used to substantiate these findings.

Some of the above comments and anecdotes appear to criticise ADR for its lack of accountability. They also indicate a number of expectations and concerns in relation to process which standards, especially for mediators, may need to address such as:

- parties want to be treated respectfully and equally by the third party during the process;
- the commitment of all parties to participate in the process is necessary if it is to be effective;
- the role of the third party needs to be clearly explained and acceptable to the parties, and consistently followed during the process: particularly in relation to neutrality, confidentiality, and responsibility for giving legal or other expert advice, suggesting solutions or determining the outcome;
- the suitability of any ADR process in a particular case needs to be carefully assessed and the process terminated if it becomes clear it is wasting time and resources;
- mediators need to control the process so that it encourages parties to achieve settlement or resolution of their dispute, but is not abusive of one party or coerces any party into agreement;
- ADR practitioners need to be competent to conduct the ADR process; and
- limiting the confidentiality of the ADR process where agreements have been obtained under duress.

Q5. What other Australian studies have examined the use of ADR?

Q6. What other benefits or deficiencies are you aware of or have you encountered?

Q7. Are there any differences in the benefits or deficiencies for facilitative, advisory and determinative ADR, respectively? What are they?

Objectives of ADR

This chapter looks at the objectives of ADR from the point of view of a range of different parties. It considers what different individuals and groups are aiming to achieve by using ADR and proposes some basic overall goals for ADR.

The increasing use of various forms of ADR in Australia has been noted in Chapter Two. This current chapter deals with the various objectives of ADR in order to establish a starting point for the development of standards. There are widely varying objectives which at times can be inconsistent or in conflict with each other.

There are also different categories of ADR objectives. Objectives vary as to whether they involve short term, medium term or long term needs and requirements. Some objectives are express and overt, others are implied and covert. Some objectives can be described in terms of expressed policy or researched findings, others are extrapolated from trends and circumstances relevant to the practice of ADR.

Here, a brief overview is provided of some of the objectives of ADR, mainly from a short term and overt perspective.

3.1 The objectives of ADR parties

Users of ADR services usually want settlement of their dispute and durability in the sense that the settlement lasts over time.

In addition, those involved in disputes invariably want a settlement that accommodates their particular interests to the fullest extent possible in the circumstances.

To ensure a lasting agreement, the outcome may need to be within the parameters of what is generally acceptable in similar situations to minimise the possibility of pressure from outside parties to change it.

As noted in Chapter Two, parties also have objectives in relation to the ADR process.⁴⁰ They want it to be suitable for their dispute, affordable, conveniently located, available within a reasonable timeframe, understandable and intelligible.

Consumers of any professional services expect to be treated fairly and respectfully in all their dealings with providers. They also need to be confident in the impartiality, neutrality, knowledge and skills of the provider.

In ADR, parties expect to be shown empathy by the ADR provider and to be empowered to participate effectively in the process as required. They need adequate information about the issues before making decisions. They may also want the impact of the dispute and its outcome on relationships to be addressed. They will expect some form of accountability if services are not performed satisfactorily.

3.2 The objectives of ADR practitioners

The practitioners of ADR services have had a large impact on the growth of ADR in recent years. Their objectives differ in terms of their personal background, their perceptions about the nature and values of ADR, and the context in which they practice.

ADR practitioners are likely to have some or all of the following objectives:

- developing their skills, knowledge and expertise;
- developing a commercially viable practice;
- providing good services to their clients and having satisfied clients;
- creating an increased demand for ADR services;
- having societal and government recognition of the value and status of ADR; and
- contributing towards some of the societal benefits which it is claimed ADR can provide.

⁴⁰ For a discussion of the factors parties look for in the conduct of the process see Lewis, S. & Condliffe, P. 'Slaying Dragons: Evaluating Mediator Services' *Australian Dispute Resolution Journal*, 10(2), May 1999, p 131 at p 133.

3.3 The objectives of governments

Governments have a wider set of immediate objectives in promoting the use of ADR, because they view ADR in the broader context of the public interest. Governments are likely to have some or all of the following objectives:

- fulfilling the government's responsibility for providing a system to resolve disputes in a constructive manner;
- resolving conflicts which have arisen at the earliest appropriate time;
- preventing conflicts from becoming socially disruptive;
- achieving efficiencies in the provision of those dispute resolution services provided by the state;
- reducing the demand for expensive dispute resolution services; and
- ensuring parties make use of appropriate dispute resolution services.

3.4 Broad societal objectives

Apart from the short term objectives of the above interest groups, ADR can serve broader societal needs and goals, mainly in the longer term.

The vision for ADR is the achievement of a just and harmonious society. Within this vision, society is likely to have some or all of the following objectives:

- providing a variety of mechanisms for the resolution of conflict which cannot be resolved by the parties themselves;
- minimising the cost, time and personal disruption involved in the processes for resolving disputes as much as the nature of the dispute will allow;
- minimising the level and amount of disruptive conflict; and
- encouraging or teaching people to deal with their own conflict unassisted in the future.

3.5 Common, conflicting and 'core' objectives

It is clear from the above overview that there are both common and competing objectives when the goals and needs of different interest groups in the ADR community are taken into account. The same would apply to other occupational and professional services.

It is NADRAC's view that the common or core objectives for ADR which will need to inform the development of standards are that ADR:

- resolves disputes;
- uses a process which is considered by the parties to be fair;
- achieves acceptable outcomes;
- achieves outcomes that are lasting; and
- uses resources effectively.

With these objectives in mind, the Discussion Paper now looks at the need for the development of standards.

Q8. To what extent are these core objectives for ADR valid?

Q9. To what extent are the core objectives equally applicable to facilitative, advisory and determinative ADR?

Q10. To what extent are there other objectives of ADR that might distort the core objectives?

Advantages and disadvantages of ADR standards

This chapter considers the arguments for and against the need for standards in ADR.

To what extent should the suggested core objectives of ADR be promoted through the development of standards for ADR practice? And to what extent are they already promoted through existing documented standards?

While it may be assumed that documented standards would enhance or improve ADR performance, there are arguments for and against the development of such standards.

Arguments for standards for ADR

In this section of the Discussion Paper NADRAC refers mainly to the views of the ADR community as recorded in its 1996 consultation process.

4.1 Practitioner accountability

It is argued that documented standards would ensure greater accountability of practitioners. ADR is often confidential and free from public scrutiny. In facilitative ADR, the discussions are usually confidential. In determinative ADR, such as is used in industry dispute schemes, the manner in which disputes are investigated and resolution is negotiated, conciliated or determined is not usually accessible to the general public. In private judging, the ADR session is free from public scrutiny. Furthermore, the terms of any agreement in facilitative ADR may prohibit disclosure of the outcome to outside bodies.

Because of the confidentiality of the process and outcome, it is argued that there should be ways of holding practitioners accountable for the manner in which they conduct the dispute resolution process.

In NADRAC's previous consultative process in relation to mediation, concern was also expressed over the lack of accountability through professional associations:

“With a freelance private mediator, there is a possibility of professional misconduct, there being no professional body for mediators to provide them with necessary backup or discipline.”

“While there may not be a great deal of evidence of “charlatans” in the field, there is growing evidence of people who influence or bias outcomes.”⁴¹

4.2 Informed consumer choice

It is argued that documented standards would provide a source of information to enable consumers to know what to expect of an ADR practitioner, a basis for choosing a particular type of ADR, and an ‘industry norm’ against which to measure the performance of the practitioner.

This point was also referred to in NADRAC's consultative process:

“If consumers don't know what the mediation process is and what is or is not best practice, how can they know what they are getting?”⁴²

“As mediation becomes more popular, with increasing numbers of people ‘jumping on the bandwagon’, there is a consequential increasing need to apply standards to ensure there are basic minimum standards to protect the consumer.”⁴³

“Rather than restrict the ‘free market’, standards are likely to provide greater freedom for mediators to practice and greater choice for consumers than is offered by existing organisations.”⁴⁴

4.3 Credibility of ADR and its practitioners

Surveys show that there is little awareness of some types of ADR. Where there is awareness there may be a reluctance to try something new. Documented standards would improve the awareness of ADR and its status and reputation in the community. They would provide practitioners with

⁴¹ NADRAC consultation forum, Canberra, 5 December 1996.

⁴² *ibid.*

⁴³ *ibid.*, Melbourne, 29 May 1996.

⁴⁴ *ibid.*, Sydney, 29 August 1996.

goals to aspire to and demonstrate to the community that ADR practitioners and service providers are comparable with other professions and occupations.

The following points were made in the consultative process:

“The existence of ‘whispering accreditation’ was acknowledged as a problem, with the result that some mediators get most of the work while others get little work, leading to loss of skills.”⁴⁵

“What being professional means is being accredited and accepted by the community with the responsibility for the exercise of power over them.”⁴⁶

4.4 Credibility of service providers

It is argued that ADR service providers have a responsibility for the standards of their practitioners. Standards would give service providers objective criteria against which to assess competency and to provide some consistency between different service providers.

“A feature of the development of ADR in Australia has been the proliferation of organisations and groups with different approaches and techniques, failing to encourage any consistency of standards and creating confusion for consumers.”⁴⁷

“There is the possibility of conflict between accrediting bodies as to whose accreditation is of the highest standard, also there is the issue that there are many other professions offering mediation. One way of dealing with this is to implement a diverse accreditation system, with specific standards for various sorts of mediations.”⁴⁸

4.5 Government accountability

It is argued that as governments are increasingly legislating to require parties to attend ADR, such as in the litigation context, in farm debt mediation and in workplace relations matters, they need to be accountable for the competence of practitioners performing these services.

⁴⁵ *ibid*, Melbourne, 29 May 1996.

⁴⁶ *ibid*, Adelaide, 24 October 1996.

⁴⁷ *ibid*, Sydney, 29 August 1996.

⁴⁸ *ibid*, Adelaide, 24 October 1996.

It is also argued that, where a government is providing funding for ADR services, it must monitor the performance of those services. This is to ensure that the government and thereby the community feel they are achieving the benefits of ADR. The development of standards would promote this accountability.⁴⁹

“If courts are increasingly requiring people in the justice system to go to mediation, then there is an obligation on the State to develop some method of assuring the quality of mediation services concerned”⁵⁰

“It is not appropriate for the courts to develop an accreditation system for mediation, responsibility lies with the government.”⁵¹

“If governments legislate to recognise mediation services and give them (mediators) immunity from suit, as is the case under the Family Law Act, then there is an obligation on government to institute measures to protect parties of those services.”⁵²

“In the future, more and more members of community will be diverted from the courts to ADR processes and there is an obligation to ensure some minimum standards are in place at the outset, together with appropriate complaints mechanisms.”⁵³

“Until now, there was really no need for uniform standards. We are now facing the situation where courts are forcing people to go to mediation. Therefore, some sort of protection needs to be provided by government or the courts for people forced into mediation.”⁵⁴

Agruments against standards for ADR

4.6 Restriction of the market

It is argued that having documented standards will restrict those who wish to practise ADR and will limit competition. This is because standards invariably result in entry requirements to the benefit of those practitioners who have those requirements and to the disadvantage those

⁴⁹ For example the Approval Requirements for Family Relationships Services are used as the basis for approving organisations for Commonwealth Government funding under the Family Relationships Services Program.

⁵⁰ NADRAC consultation forum, Sydney, 29 August 1996.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*, Melbourne, 29 May 1996.

⁵⁴ *ibid.*, Canberra 5 December 1996.

who do not. There is a particular concern amongst community-based ADR practitioners that experienced practitioners who do not possess certain requirements, for example, tertiary or professional qualifications, will be denied the right to practise.

“There is a need to avoid the creation of a professional ‘closed shop’ similar to that in the legal profession.”⁵⁵

“The imposition of standards or accreditation mechanisms will restrict the ‘free market’.”⁵⁶

4.7 No current need

It is argued that there is no current need for standards in ADR because there is sufficient protection for parties in having a choice of ADR practitioners. Also, it is generally assumed that standards lead to regulation (see Chapter 12) and that this is not required in the current stage of ADR development.

“Parties should be free to select the mediator of their choice irrespective of whether they are trained or not.”⁵⁷

“The proposal to regulate mediation is a classic example of the over-regulation of society (i.e. mediation has worked well on the basis of goodwill and there is no need for regulation).”⁵⁸

4.8 Diversity of ADR practice

It is argued that it is impossible to draft standards which would be applicable to every possible type of ADR and context.

“It may not be possible to impose standards on communities such as those of a non-English speaking background where disputes are mediated by local community leaders.”⁵⁹

“Self regulation by mediators/ mediator organisations would be difficult because of the wide variation in the services provided under the title ‘mediation’.”⁶⁰

⁵⁵ *ibid*, Brisbane, 19 April 1996.

⁵⁶ *ibid*, Sydney, 29 August 1996.

⁵⁷ *ibid*, Melbourne, 29 May 1996.

⁵⁸ *ibid*.

⁵⁹ *ibid*, Melbourne, 29 May 1996.

⁶⁰ *ibid*, Canberra, 5 December 1996.

4.9 Standards hinder creativity

It is argued that standards would impose a particular structure on the practice of ADR and stultify the development of creative ways of resolving disputes. Some consider that the evolution of ADR into the different processes that currently exist would not have occurred if there were standards.

“The process of imposing regulation contrasts with the fundamental philosophy of mediation.”⁶¹

“Mediation is an emerging process and regulation of standards may restrict the development of the field.”⁶²

Need for standards to promote objectives of ADR

NADRAC acknowledges the wide variety of views about the need for standards. From the arguments, research and anecdotal experiences of ADR mentioned in Chapter Two it is clear that some people are dissatisfied with how ADR is currently operating and that the achievement of the objectives of ADR may be inhibited without the development of standards.

NADRAC is of the view that the development of standards would permit promotion of the objectives of ADR, minimise dissatisfaction with its operation, promote service provider and practitioner accountability and promote the appropriate use of ADR. This approach is consistent with international developments.⁶³

Q11. Do you agree that standards are needed for ADR? Why?

Q12. Are there any other arguments for or against the development of standards for ADR?

⁶¹ *ibid.*

⁶² *ibid.*, Canberra, 5 December 1996.

⁶³ The USA Society of Professionals in Dispute Resolution has established a Committee to explore and recommend action on issues such as developing a system for accrediting dispute resolution programs, developing a system for certification of members and recommending ways of attaining competency at a basic and advanced level. Society of Professionals in Dispute Resolution Progress Committee on Credentials, Competencies and Qualifications (3CQ), Progress Report, September 1999.

Existing standards for ADR

This chapter refers to some examples of documented standards that currently exist, and the types of matters that they cover.

In Australia there are already documented standards for some ADR practitioners and service providers. They relate mainly to mediators and arbitrators and have been developed by various groups over the years. Standards have been developed for the legal profession (bar associations and law societies), community organisations (eg community justice centres), courts and statutory agencies (eg Family Court mediator standards) and other professional associations (eg LEADR, Institute of Arbitrators and Mediators Australia). In the Australian Capital Territory, mediation competency standards have been developed by the ACT Community Services and Health Industry Training Advisory Board.⁶⁴ Excerpts of some current Australian standards are at **Appendix 1**.

While standards vary in their content, detail and comprehensiveness, the key areas common to most include the following:

5.1 Fairness

A fairness standard is reflected in provisions such as “members are expected to act fairly and in the best interests of all parties”,⁶⁵ “a mediator must in no circumstances attempt to coerce the parties to settle a dispute”, and “the mediator should if he/she considers it would facilitate settlement, recommend disclosure of relevant information”.⁶⁶

⁶⁴ ACT Community Services and Health Industry Training Board, ACT Competency Standards for Mediators, December 1995.

⁶⁵ Institute of Arbitrators & Mediators Australia, Practice Note 2 - Professional Conduct.

⁶⁶ NSW Law Society.

5.2 Practitioner competence

This is reflected in provisions such as, “a mediator must not mediate unless the mediator has the necessary competence to do so”,⁶⁷ and “commitment to upgrade skills and knowledge”.⁶⁸

5.3 Advertising and publicity

This is reflected in provisions such as “a mediator must not engage in misleading or deceptive publicity or advertising”.⁶⁹ It can also cover the wider duty, such as “mediators should take care that any public statements or claims they make as to the mediation process, costs and benefits...are fair and accurate”.⁷⁰

5.4 Confidentiality

This is reflected in provisions such as “any information received by mediators in the course of the mediation is confidential and may not be discussed within the Community Justice Centres. Mediators will not reveal any information given to anyone outside the negotiation including police, relatives of the parties, the referring agency and the media”.⁷¹ It can also include non-disclosure by parties such as “all parties in the mediation are at all times to maintain confidentiality about all matters arising during the mediation”.⁷²

There are various exceptions to the confidentiality required of ADR practitioners, including prior consent of the parties,⁷³ disclosure required by law⁷⁴ and to prevent a serious and imminent threat to life, health or property of a person.⁷⁵

5.5 Communication issues

This is reflected in provisions such as “mediators educate the parties and involve them in the mediation process by explaining the process to

⁶⁷ Law Council of Australia, *Ethical Standards for Mediators*.

⁶⁸ ACT Community Services and Health Industry Training Advisory Board, *op. cit.*, 7.5.4.

⁶⁹ Law Council of Australia *op. cit.*

⁷⁰ Alternative Dispute Resolution Branch, Courts Division, Queensland Department of Justice, *Code of Ethics*.

⁷¹ NSW Community Justice Centres, *Code of Professional Conduct for CJC Mediators*.

⁷² Law Institute of Victoria, *Mediation: A Guide for Victorian Solicitors*.

⁷³ NSW Law Society.

⁷⁴ Queensland Law Society, *Standard of Conduct for Solicitor Mediators*, 5.1.1.

⁷⁵ Family Law Regulations part 5, Division 2 regulation 67(b).

them... encouraging them to speak directly to each other about the issue in dispute”.⁷⁶ They can include rules about separate sessions in mediation and the need for care in communicating, such as “arbitrators should be particularly careful in communicating with parties...inappropriate communications may prejudice the actual or perceived achievement of justice”.⁷⁷

5.6 Conduct during proceedings

This is reflected in provisions such as, “arbitration proceedings should be conducted with appropriate dignity and formality”⁷⁸ and the responsibility of mediators “to manage and control the mediation process”.⁷⁹ They sometimes propose specific responsibilities on a practitioner, such as to ensure that “the parties are aware of the fact that they have the right to be legally represented”.⁸⁰

5.7 Neutrality and impartiality

This is reflected in provisions such as, “the mediator shall before and during mediation process disclose to the parties any circumstances which may cause or have any tendency to cause a conflict of interest”⁸¹ and, “mediators are committed to assist all parties in reaching a mutually satisfactory agreement and not to favour any one party over another”.⁸²

5.8 Termination and settlement

This is reflected in provisions such as, “a mediator must terminate the mediation if; (i) requested to do so by a party; or (ii) the mediator is no longer satisfied that the mediation is appropriate”.⁸³ Guidance is also given about formalising any agreement, such as “where the parties have reached an agreement the mediator shall ensure that the agreement be reduced to writing and signed by the parties”.⁸⁴

⁷⁶ Alternative Dispute Resolution Branch, *op. cit.*

⁷⁷ Institute of Arbitrators & Mediators Australia, *op. cit.*

⁷⁸*ibid.*

⁷⁹ Law Institute of Victoria, *op. cit.*

⁸⁰ Queensland Law Society, *op. cit.*, 3.1.9.

⁸¹ Law Society of South Australia: *Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators*, 1994, 5.2.

⁸² NSW Community Justice Centres, *op. cit.*

⁸³ Family Law Regulations part 5, Division 2 regulation 64(c).

⁸⁴ Law Society of South Australia, *op. cit.*

5.9 Professional responsibilities

This is reflected in provisions such as “it is not acceptable to criticise a co-mediator in front of the parties”,⁸⁵ and to observe relevant codes so that they “operate within ethical guidelines”.⁸⁶

5.10 Agreement on fees

This is reflected in provisions such as, “the fees to be charged for mediation and any related costs and shall agree with the parties on how the fees will be shared and the manner of payment”.⁸⁷

5.11 Qualifications and training

This is reflected in provisions such as “a personal aptitude to undertake the work”.⁸⁸

Limitations on current standards

In reviewing the contents of the existing documented standards referred to in this chapter and in **Appendix 1**, NADRAC notes that, while they have been developed independently of each other, they nevertheless have a number of common threads or themes. These themes provide a useful basis for developing standards, which is consistent with the principle of advisory and facilitative ADR.

In NADRAC’s view the existing documented standards generally give more detailed attention to ethics and, with rare exceptions, have limited focus on knowledge and competence. However, they are the starting point for much of the content described in Chapter Six.

Q13. What other documented standards of practice have been developed in Australia in the ADR area?

Q14. What other key areas are covered in documented standards?

⁸⁵ Alternative Dispute Resolution Branch op. cit.

⁸⁶ ACT Community Services and Health Industry Training Advisory Board, op. cit., 7.1.

⁸⁷ Law Society of South Australia, op. cit.

⁸⁸ Family Services Council, Mediation Standards, 4.1.1.

The content of standards

This chapter describes the knowledge, skills and ethics that could form the basis for the development of standards.

Chapter 4 referred to the debate about whether standards should be developed for ADR, and outlined the arguments for and against standards.

Chapter 5 outlined some of the key areas common to existing standards. This chapter draws upon those existing standards and explores in detail the potential content of standards.

In considering the content of standards NADRAC has found it useful to classify them into three broad areas only:

- **Knowledge** refers to an understanding of relevant theories, principles, practices, their application and other aspects of knowledge.
- **Skills** refers to the practical competencies which an informed observer would identify when observing an ADR practitioner at work.
- **Ethics** refers to the attitudes, behaviours and values associated with ADR practice.

NADRAC has deliberately chosen to approach this chapter descriptively and not prescriptively. The knowledge, skills and ethics described provide a basis for developing ADR standards and are presented here with the aim of soliciting comment from the ADR community.

NADRAC has avoided referring to the individual dispute resolution processes, or to particular stages of those processes. To do so might imply

some preference for a particular model, for example, mediation or conciliation, which uses those stages. ADR comprises many diverse ways of resolving disputes and it would be detrimental to this diversity to favour a particular model and thereby detract from the relevance of standards to a variety of dispute resolution processes.

What follows is a description of the knowledge, skills and ethics NADRAC believes may be useful, desirable or necessary in some or all ADR processes. The list consists of a broad range of knowledge, skills and ethics from which the appropriate ones can be chosen as they apply to a particular ADR process. The application to some particular ADR processes is dealt with in Chapter Eight. No measure for a standard or desired level of performance is specified. There are many overlaps between the three categories, for example, the communication element involves knowledge, skills and ethics.

Knowledge

Council has identified nine areas of knowledge.

6.1 Knowledge about conflict

This refers to knowledge about the following aspects of conflict:

- how conflict arises between individuals and groups, and within groups;
- the different kinds of conflict that give rise to disputes;
- potential sources of conflict around objectives, values, interests, relationships, information and structures;
- how conflict can be diagnosed in terms of its various attributes;
- the different procedural, psychological and substantive interests that form the subject of conflict;
- patterns of conflict escalation and the factors that contribute to that escalation;
- factors which can cause conflict to de-escalate, including the interventions of ADR practitioners;
- appropriate dispute resolution interventions for different kinds of conflict; and

- the significance of timing in relation to the management and resolution of conflict.

6.2 Knowledge about culture

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

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

6.3 Knowledge about negotiation

This refers to knowledge about aspects of negotiation:

- the role of preparation for the parties in negotiation;
- parties' capacity and ability to negotiate and make decisions;
- the processes of negotiating;
- the rituals, process and stages of different models and styles of negotiation;
- the potential impact of power on negotiating behaviour, particularly a party's perceptions of their own and the other side's power;
- the significance of a safe negotiating environment in which parties can accept or give up power in order to reach agreement;
- problem-solving processes and strategies, for example, how to generate ideas and options through brain-storming;

- appropriate ways for dispute resolution practitioners to use their negotiation knowledge to intervene in and assist the negotiation process;
- predictable tactics, problems and deadlocks which can arise in negotiation, and strategies for dealing with them; and
- the information that parties need to make their own decisions, and how it can be collected and analysed.

6.4 Knowledge about communication

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

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

6.5 Knowledge about context

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

- the legal, social, cultural, economic and institutional context of the dispute;
- other dispute resolution procedures that precede or follow an ADR intervention within a particular context ;

- relevant relationships, such as couple, family and group relationships;
- availability of professional, academic, technical, community and educational resources for party use or referral;
- the legal and social standards that would be applicable if the case was taken to a court or other forum following a particular ADR process;
- the significance of the diversity of the parties involved in ADR;⁸⁹ and
- the structures, resources, processes and requirements of the service provider.

6.6 Knowledge about procedure

This refers to knowledge about the different procedural elements and requirements of a particular ADR context:

- the theory, systems and methods of the relevant dispute resolution processes, and their suitability for particular situations;
- the management and conduct of a dispute resolution process, and how the practitioner structures and adapts the process in the most appropriate way;
- stages of a dispute resolution process, and how they can be used most effectively;
- how to deal with non-compliance with procedural requirements;
- how to ensure procedural fairness;
- criteria for exercising discretion on procedural matters, for example, adjournments, consultations with individual parties, and duration; and
- how to identify who may be interested parties and how to ensure their appropriate participation.

6.7 Knowledge about self

This refers to knowledge about how an ADR practitioner can be aware of and reflect on what they contribute to the process of dispute resolution:

⁸⁹ National Alternative Dispute Resolution Advisory Council, *A Fair Say*, 1999.

- the ADR practitioner's effect on the parties and their effect on him or her;
- the dynamics of the relationship between the practitioner and the parties;
- the inter-action of different values, beliefs, assumptions and prejudices, and their effect on the process;
- clarity over professional and personal boundaries, the knowledge of how to retain professional warmth, empathy and objectivity while keeping personal feelings and experiences in abeyance;
- awareness of one's own interpersonal communication style and the effect it has on others; and
- awareness of personal responses to conflict and high emotion.

6.8 Knowledge about decision-making

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

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

6.9 Knowledge about matching ADR to disputes

This refers to knowledge about screening and streaming appropriate cases for ADR processes:

- what dispute resolution forum is most appropriate for what kind of dispute;

- what is the best time in the development of a dispute for an ADR intervention;
- the information parties require to make their own choice of dispute resolution process;
- the substantive, psychological and procedural needs of parties that affect the choice of a particular ADR process;
- the advantages and disadvantages of various dispute resolution processes, and their alternatives;
- issues of confidentiality, duty of care and procedural fairness during the assessment or intake process; and
- indications that a dispute would be inappropriate for an ADR process.

Q15. To what extent are the nine areas of knowledge described relevant to the practice of facilitative, advisory and determinative ADR?

Q16. What other knowledge might be generally relevant to the practice of facilitative, advisory and determinative ADR?

Skills

In this section NADRAC has focussed on the skills involved in conducting ADR processes.

The order in which the skills are listed in each category is not intended to signify a particular level of importance for each skill, nor is it intended to signify a particular point in time at which a skill should be used. The skills can be used at whatever time they are appropriate in an ADR session.

6.10 Assessing a dispute for ADR

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

- accurately and concisely analysing the presenting issues to assess the most suitable process;
- accurately and effectively referring parties to other services which may be more appropriate;
- understanding the emotions and expectations of parties;
- determining the parties' readiness to consider and commit to ADR processes, rather than continue the fight;
- preparing and counselling parties in preparation for an ADR process;
- assessing power differentials between parties, including the timely and effective exclusion of ADR where appropriate; and
- providing accurate, timely and relevant information about the ADR processes available, and other resources.

6.11 Gathering and using information

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

- collecting and organising data;
- assisting parties to provide appropriate information;
- investigating and dealing with gaps in information;

- managing the way information is presented, tested and evaluated;
- drawing inferences or deductions from information; and
- applying relevant rules and principles of evidence.

6.12 Defining the dispute

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

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

6.13 Communication

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

- effective, accurate and clear communication with the parties;
- checking with parties that they are clear about what is going on, and responding to their queries;
- showing understanding by use of listening and questioning skills;
- summarising, paraphrasing and reframing;
- appropriate use of language and terminology;
- use of verbal and non-verbal communication techniques; and
- appropriate writing and recording.

6.14 Managing the process

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

- establishing the appropriate venue, rooms, seating and other aspects of the physical environment;

- organising appropriate facilities and amenities for the parties;
- maintaining a favourable and safe environment for all participants;
- ascertaining and developing the capacity and ability of all parties to participate in the process;
- maintaining party commitment to the process;
- maintaining procedural fairness for all parties involved in the process;
- complying with statutory, contractual and procedural requirements;
- adapting the process to suit the needs of the parties and the dispute; and
- adapting the process to deal with the use of more than one ADR practitioner in the same dispute.

6.15 Managing interaction between the parties

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

- choosing appropriate mechanisms to prevent escalation of the dispute;
- identifying, acknowledging and normalising conflicting behaviours;
- dealing with hostility, emotion and deviations from expected behaviour during the process;
- using rules and behavioural guidelines as required by the circumstances;
- separating the personal issues from the substantive issues; and
- identifying and managing expectations.

6.16 Negotiation

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

- assisting parties to prepare for negotiations;
- assisting parties to identify options and make choices;
- using creative and inventive problem-solving strategies;
- assisting parties to identify agreements and decisions made, and future action required;

- identifying agreements and decisions made, and future action required;
- ensuring legislative and other constraints are identified and taken into account;
- focusing on interests (exploration of interests) where appropriate;
- assisting parties to make and respond to offers, linking and packaging; and
- managing blockages, loss of face and final closures.

6.17 Being impartial

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

- an even-handed conduct of the process;
- avoiding any appearance of partiality or bias through word or conduct;
- ensuring an appropriate degree of party responsibility for the outcome and the process;
- hearing all parties to a dispute and considering all relevant arguments before a decision is made;
- giving all parties an opportunity to present their point of view before a decision is made;
- giving all parties an opportunity to respond to any adverse material which could influence a decision affecting them;
- acting without actual or perceived bias;
- ensuring legislative and other constraints are identified and taken into account; and
- displaying sincerity and integrity, and building and maintaining trust.

6.18 Making a decision

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

- ensuring the decision is consistent with the powers vested in the ADR provider;

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

6.19 Concluding the ADR process

In facilitative and advisory ADR processes, this refers to the skills required to consolidate an agreement by the parties. These skills can be demonstrated by:

- ensuring parties clearly understand the agreement, and their roles and responsibilities;
- enabling parties to reach agreement across the final blockages and gaps;
- managing the rituals of closure;
- managing any lack of agreement, the termination of the process and the exit of the ADR practitioner;
- testing the agreement and its implementation for workability and durability;
- drafting the agreement in clear and unambiguous terms; and
- making appropriate referrals if necessary.

Q17. To what extent do these skills accurately reflect the needs of facilitative, advisory and determinative ADR?

Q18. What other skills might be relevant to the practice of facilitative, advisory and determinative ADR?

Ethics

Ethics refers to the attitudes, behaviours and values associated with ADR practice.

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

In this section the focus is on the ADR practitioner although similar obligations may be required of service providers.

6.20 Promoting services accurately

Ethical issues arise for an ADR practitioner when advertising his or her services. These issues involve:

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

6.21 Ensuring effective participation by parties

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

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

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

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

6.22 Eliciting information

Most ADR processes rely on developing a clear understanding of the reasons for the dispute. To achieve this the parties may need to be encouraged to describe their own perceptions and needs clearly and as completely as possible. ADR practitioners need to be aware of the scope of their duty to elicit relevant information, and encourage the parties to obtain, check and share information.

Where determinative ADR is used, ADR practitioners may have a wide discretion to decide what information is relevant.⁹⁰ However, where

⁹⁰ Australian Commercial Disputes Centre, *Guidelines for Arbitration*, paragraph 8(c).

facilitative ADR processes are being used, the ADR practitioner may need to consider issues such as:

- whether an ADR practitioner can contradict a party (e.g. by physical evidence or prior inconsistent statement);
- whether there is any scope for discrediting a party before their colleagues (on the same side of the dispute) in order to verify the relevant facts;
- the kinds of information that may only be raised for discussion in private sessions; and
- whether recommendations or decisions may be restricted to agreed issues in dispute, or to other related issues as well.

6.23 Effectively controlling the process

Some ADR processes end with an expert recommendation and not a final decision. In others, the parties or the ADR practitioner make decisions with a view to ending the dispute. In all cases ADR practitioners are expected to perform their duties diligently and promptly so they are completed within a reasonable time-frame.

According to the ADR process involved, the ADR practitioner may need to consider, whether to:

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

6.24 Exhibiting neutrality

Neutrality refers to an ADR practitioner's independence and lack of personal interest in the outcome. An ADR practitioner might be regarded as neutral where he or she approaches the subject matter of the dispute with an open mind, free of preconceptions or predisposition towards either of the parties.

The importance of an appearance of neutrality is that the parties can be satisfied that the ADR practitioner is not biased against them, and that they can trust the ADR practitioner to conduct the process fairly.

Neutrality requires that the ADR practitioner disclose to all parties whether there is any:

- existing or prior relationship between the ADR practitioner and any party;
- other prior contact between the ADR practitioner and the parties;
- interest in the outcome of the particular dispute;
- likelihood of present or future conflicts of interest; or
- personal values, experience or knowledge of the ADR practitioner which might affect impartiality, given the nature of the subject matter and the characteristics of the parties.

6.25 Maintaining impartiality

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

Impartiality requires the ADR practitioner to:

- conduct the process in a fair and even-handed way;
- generally treat the parties equally (i.e. spending approximately the same time hearing one statement as others or approximately the same time in separate session with one as with another);⁹¹
- not accept advances, offers or other gifts from parties;
- give advice or allow representation, support or assistance equally to parties; and
- organise the venue, times or seating in a way which suits all parties.

⁹¹ See also National Alternative Dispute Resolution Advisory Council, *A Fair Say*, 1999.

6.26 Maintaining confidentiality

Some ADR processes are considered to be essentially private (e.g. mediation) and some are not (e.g. facilitation of public consultations). It is important that the practitioner and parties in any ADR process have, as far as possible, a clear and common understanding of the extent of confidentiality and the limits of confidentiality.⁹²

Confidentiality may require an ADR practitioner to:

- Not disclose information provided by one of the parties in an ADR session to the other party. (In mediation or conciliation, information may be conveyed to the practitioner during a separate private session. In other ADR processes it may be necessary for all information to be made available to both parties.)
- Not disclose information about the dispute to third parties. (At common law, negotiations undertaken with a view to resolving a dispute are privileged. In some cases, mostly in facilitative ADR processes, statutory provisions extend this common law protection. The issue is discussed further in Chapter Eleven.)

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

6.27 Ensuring appropriate outcomes

Depending on the context, the outcome of an ADR process needs to comply with certain requirements. In particular, an ADR practitioner may need to consider or get advice on whether:

- the interests of third parties are appropriately protected or at least not unnecessarily or unjustifiably threatened;
- the outcome, particularly in determinative ADR, is fair as between the parties;
- a decision, particularly in determinative ADR, is one which a reasonable person could have made in the circumstances;

⁹² The issue of non-disclosure by the parties of information about the dispute to third parties is an aspect of confidentiality that relates to the parties rather than the practitioner. It is not dealt with in this paper.

- an agreement condones an illegal activity;
- an agreement is legally void or voidable;
- a decision, particularly in a determinative ADR process, is legally valid; and
- any advice, agreement or decision does not involve unlawful or unjustifiable discrimination.

Q19. To what extent do these ethical duties accurately reflect the principles and requirements of facilitative, advisory and determinative ADR?

Q20. What other ethical duties might be relevant to the practice of facilitative, advisory and determinative ADR?

General principles underlying the development of standards

In this chapter the Council considers the principles that might govern the development of standards.

The previous chapter has outlined the knowledge, skills and ethics that might be included in documentary standards. These provide the basis for the development of standards by relevant parties in terms of the principles set out in this chapter.

NADRAC takes this approach for two reasons. The first is that it is consistent with one of the societal purposes of ADR: that a consensual and collaborative process results in ownership of the outcome, and its effective implementation.

The second is that the ADR community in Australia is diverse and does not currently have a peak body (or bodies) which could provide a centralised source of consultation and coordination on these issues across different contexts.

From its vantage point, NADRAC therefore proposes the following principles, derived from the aims and objectives of ADR as outlined in Chapter Three, to act as a unifying frame of reference for the development of standards.

1. The development of standards should occur through consultative processes that are acceptable to the ADR community and no one body, organisation, association or governmental agency should attempt to impose standards unilaterally.

2. Standards should be developed in light of the objectives of ADR which have been suggested in Chapter Three.
3. All standards should recognise the particular circumstances in which the relevant ADR process is carried out.
4. Standards should balance the needs not only of parties and providers of ADR processes but also broader societal interests and needs.
5. Standards should take account of the current state of theoretical and comparative knowledge in the area, and be informed by actual ADR practice.
6. Standards should be based on a realistic appraisal of resources, private and public, which are available for the conduct of ADR processes.
7. ADR standards need to be supported by an appropriate balance of government regulation, professional self-regulation, public accountability, legal redress and competitive market forces.
8. The responsibility for upholding and enforcing standards should likewise involve practitioners, service-providers, professional bodies, consumer bodies and government organisations.
9. Standards should be able to be changed and adapted through appropriate consultative arrangements where circumstances require it and, in most cases, this will involve a continuous raising of standards over time.

Q21. To what extent are these principles relevant to guiding the development of standards?

Q22. What other principles are relevant for guiding the development of standards?

How to develop standards

In this chapter NADRAC takes four contexts in which ADR is practised and shows how a service provider in each context might consider the development of standards relevant to its practitioners.

The aspects of ADR practice outlined in Chapter Six will need to vary according to the type of ADR process being used. Standards developed by service providers, based on the principles in Chapter Seven, will need to take into account these variations.

The four contexts for ADR used in this chapter show how knowledge, skills and ethics can apply differently according to the context. It is hoped that these examples will demonstrate how service providers can develop their own standards, according to their circumstances.

NADRAC does not use terms such as ‘best practice’ and ‘minimum standards’. Instead it prefers to give examples to guide service providers in their task of creating levels of performance which their practitioners are expected to attain.

8.1 Application of the standards

In order to meet the objectives of ADR in different contexts, the areas of ADR practice discussed in Chapter Six may need to be varied. The areas may need to be altered by:

1. adding additional standards about knowledge, skills or ethics;
2. deleting some standards that do not apply;

3. defining the standards in order to reflect the particular context;
4. deciding what are the priorities of some standards in relation to others;
5. establishing measures for the standards; and
6. setting the appropriate level of proficiency for the standards.

Examples of standards in context

8.2 Example 1: Statutory conciliation

In Australia there are forms of ADR practised where the roles and powers given to practitioners range from the facilitation of disputes to decision-making, if agreement cannot be achieved.

For example, in the workers' compensation field in Victoria, conciliation is the mandatory first step of appeal for disputes arising from a work-related injury claim. Disputes usually arise after an adverse decision by an employer/insurer about a worker's claim. Conciliators conduct multiparty conferences among workers, their assistants, employers and insurers (who are regular attendees).

Conciliators in Victoria possess a range of powers to bring closure to disputes and prevent escalation of the matter into the courts. They include powers to:

- Examine insurer decisions on the basis of documentation provided against established principles of proper and sound decision-making;
- Facilitate or mediate disputes through discussion of the issues in order to reach agreement;
- Make recommendations, which in law protect those accepting such a recommendation from admission of liability;
- Suspend or adjourn matters, and request further information to be supplied;
- Refer medical questions in dispute to a Medical Panel for a binding decision;

- Prevent the use of material formally requested from a party, but not submitted by that party, in any subsequent legal proceedings;
- Conclude conciliation by a decision that agreement is not achievable, and then decide whether or not the employer/insurer has an arguable case for the denial of liability;
- If there is an arguable case, decide whether the claimant has taken all reasonable steps to settle the dispute, and if not, prevent the party from proceeding to court until such steps are undertaken; and
- If there is no arguable case, issue a Direction that weekly payments be made or continue to be made for up to 36 weeks, or that medical and like services up to \$2,000 be paid, without a party so directed being held liable for the claim.

There are particular areas of knowledge, skills and ethics that ADR practitioners in this field require to manage their roles and powers.

Knowledge

The conciliator requires significant contextual knowledge such as the relevant law, claims administration, industrial rights and responsibilities, and medical technicalities. In order to be fair, and be perceived to be fair by all parties, knowledge is required of due process requirements at different stages as the dispute resolution process shifts from facilitation to decision-making. In the industrial context of workers' compensation disputes, awareness of the issues of cultural and linguistic diversity are also important knowledge requirements.

Skills

Conciliators require a range of skills relating to their procedural obligations, including managing the process flexibly, fact-finding and making a good decision. Parties need to be made aware by the conciliator of the various roles that the conciliator possesses, and have them identified clearly at the start of the process and signalled when they are about to occur. The conciliator requires critical judgement skills to be able to carry out the transition from one role to another, and to time it according to the needs of the parties and the nature of the dispute.

Conciliators require high skill levels in structuring information, in analysis and, in some cases, in providing reasons for decisions as required. Skills in using interpreters effectively are also required.

Ethics

There are particular ethical challenges for conciliators in this context including effective participation by the parties (for example, if a party attends unassisted), impartiality (where repeat participants attend with a one-off party), and ensuring appropriate outcomes (ensuring that the agreement is consistent with the legal framework).

Given the usual volume of cases and other demands in this context, there are also ethical responsibilities within the group of conciliators for their own and each other's professional and personal development and wellbeing.

8.3 Example 2: Commercial ADR

The development of standards in commercial ADR might require attention to the following particular issues.

Knowledge

There might need to be substantive legal knowledge in relevant areas, for example trade practices legislation and case law, corporations law or building law. Procedural legal knowledge might be needed, for example, in relation to jurisdictional matters, rules of court and time limits.

In particular, knowledge of business practice and convention in specific areas might be needed, such as commercial leasing, construction agreements or international contracting. In addition, an understanding of current national and international economic and trading factors which give rise to commercial conflicts and disputes might be relevant.

Knowledge of the levels of authority within an organisation and a party's capacity to make decisions on behalf of a company may also be useful.

Skills

In commercial mediation it may be relevant to have skills in dealing with high-powered business people who have considerable economic power and

leverage, extensive resources, access to advisers and tight timeframes. It might also be necessary to have the ability to follow complex analyses of books of accounts, business plans, commercial contracts and other business documents.

It might be particularly important to have communication skills appropriate for different levels of business, and the ability to use and explain technical terms relating to business or specific categories of business disputes. In addition, negotiation skills appropriate for the hard bargaining required for commercial settlements might be relevant.

An ability to manage the different interests inherent in multi-party disputes may be an important skill in this context.

Ethics

The ethics required of a commercial mediator might include the maintenance of impartiality in the context of shuttle mediation often used in commercial ADR. In addition, a commercial mediator might be required to balance appropriately the power between the parties in situations where a major corporate player is involved.

Upholding of fiduciary obligations where commercially-sensitive information is provided in an ADR process, for example in the separate sessions of mediation, may also be necessary for commercial mediators.

8.4 Example 3: School peer mediation

Peer mediation programs have been developed in many primary and secondary schools around Australia. They have the role of introducing the general community to the advantages of resolving conflict by addressing needs. While young practitioners, especially those at primary school, cannot be expected to acquire the same degree of knowledge and skill as their adult counterparts, they commonly deal with disputes that the adult community regards as serious, for example, allegations of assault, theft and discrimination.

Knowledge

As far as conflict theory is concerned, standards might need to require school peer mediators to have a basic understanding of patterns of

conflict escalation, identification and relevance of feelings, appreciation of individual values and needs, and of the range of responses to conflict situations.

Contextual knowledge can be gained from day-to-day experience as a member of the school community.

Awareness of the elements of communication and the need for clarity may need to be the subject of standards. The use of prepared outlines and sets of strategic questions can enhance familiarity with the steps of a set procedure. Standards may be needed that require knowledge of the facilitative role and appreciation of the dynamics of bargaining.

Skills

In a school peer mediation program it is likely that cases are selected as appropriate for the application of a single, well-defined process. They are likely to involve a limited range of predictable subject-matter areas with recurring themes. Adult supervisors are likely to be accessible at all stages of the process. The standards required of the peer mediators might need to reflect these factors.

Standards for school peer mediators may need to deal with acquiring and practicing clear and effective communication. They might also need to deal with skills in managing the participation of, and interaction between, the parties, maintaining an even-handed approach, separating the parties from the issues, focusing on and clarifying interests, identifying choices and external constraints, and facilitating a fair bargaining process.

Ethics

The ethics of a school peer mediation program need to be developed in the context of the norms of the school, as well as those of the ADR community generally.

In particular standards for school peer mediators might need to have regard to ensuring that school students do not use the program for inappropriate reasons, for example, getting to know the mediator for social reasons. Ethical standards might also involve the need for confidentiality, impartiality and neutrality in a close school environment.

The standards may need to address the need to limit confidentiality for reasons of protection of persons or school property.

Standards for school peer mediators may need to require that the parties are physically and psychologically safe, and that mediated agreements comply with school norms. Another issue to be considered in developing standards in this area is that self determination is being promoted in a school environment where students may expect an imposed decision or only one correct solution to a problem.

8.5 Example 4: Family mediation

Mediation is being used increasingly to resolve a broad range of family conflicts and disputes between family members. For example: State and Commonwealth Governments, concerned about the increase in youth homelessness have funded adolescent/parent mediation services; and disputes about the provisions and administration of wills and the care of elderly family members are often mediated, usually by community organisations or private mediators.

In addition, the Commonwealth Government has funded community-based organisations to provide divorce mediation services and the Family Court also provides mediation as a separate service, distinct from conciliation counselling and conferencing. Both the Family Court's mediation services, and those of the funded community based organisations, are required to comply with the Family Law Act and its regulations, including obligations in relation to confidentiality, the needs of children, reporting of child abuse and screening for a history of violence between the parties.

So, in the case of separation and divorce mediation there are some standards already in place. In addition, further contractual conditions and standards are imposed on organisations receiving Government funding for family mediation and aspirational, or best practice, standards have also been developed.⁹³

The objectives of separation and divorce mediation are often much broader than just dispute resolution and can include:

- the restructuring of family relationships arising out of the separation and divorce of a couple;

⁹³ See Family Services Council, *Mediation Standards for organisations approved by the Federal Attorney-General*.

- facilitation of the necessary decision making in relation to a range of practical issues such as how and when separation will occur, future parenting responsibilities and plans, division and allocation of responsibility for all property and debts, and ongoing financial support of each parent and child; and
- the resolution or management of any conflict occurring within family relationships and of particular disputes on any of the issues.

In addition, family conflict and interaction during the process of separation and divorce is often emotionally intense and complex and may include violence, fear and severe power imbalance between family members.

To achieve all these objectives within such a complex and changing context it may be necessary for some standards requiring additional or specialised knowledge, skills and ethical behaviour.

Knowledge

Mediators may need to have considerable understanding of the stages and effects of separation, divorce and repartnering for all family members, including children. A detailed knowledge may be necessary of how different family members interact and communicate and how conflict arises and escalates, particularly in the couple relationship and that of parent and child. Knowledge of the nature, use and effects of power, coercion, control, abuse and violence in family relationships may be regarded as essential.

It may also be desirable for mediators to have sufficient knowledge of patterns of parenting after separation, the likely financial and economic consequences of separation and divorce and resources which may assist family members through both the separation and mediation processes. Knowledge of relevant legislation may also be desirable, in order to assist the parties to identify and discuss the range of options and their respective legal advice.

Skills

Because there is considerable risk of violence occurring during the separation process and of severe power imbalance between the parties,

mediators may need highly developed assessment skills to determine the suitability of mediation in a particular case. Mediators may also need to modify the process in appropriate cases, in order to minimise power imbalance and maximise safety for all family members.

These skills include ability to:

- identify the sources of power and disadvantage for each party arising from their differences and diversity; and
- assess each party's capacity and disposition to use and abuse power in the relationship (and during the mediation process), and to negotiate effectively for himself or herself, or with coaching, information and support.

Because communication patterns in family relationships are usually entrenched, emotionally complex and at times non verbal, a mediator may need sophisticated communication skills to be able to translate what is going on for each party and promote positive communication between them.

A mediator may also need particular skills in managing emotionally intense conflict including assessing the appropriate length of a mediation session and conducting private sessions.

Ethics

The intensity and familiarity of family conflict can affect mediators powerfully and unconsciously. It may therefore be necessary for high standards in relation to self-awareness, supervision of casework and willingness to inform the parties of any difficulty, and to withdraw as mediator if necessary.

The potential for power imbalance and/or violence during separation may place an obligation on the mediator to take particular care to assess whether it is both appropriate and safe for family members to attend mediation, and decide not to proceed if necessary.

The emotional complexity and the importance of gender to many issues in family mediation may affect the capacity of a sole mediator to manage the case or to be neutral and perceived to be so. Co-mediation may need to be considered or offered in certain circumstances, if mediation is to proceed.

Many family disputes affect or involve children directly or indirectly. Children are particularly vulnerable during separation and divorce. Decisions may have to be made about how their interests will be identified and addressed, and whether children will be informed and consulted about the issues or be parties to the mediation. Accordingly, standards may need to be very specific about the mediator's responsibility for protecting children's interests and screening for or reporting child abuse.

Parties are often unrepresented when they attend mediation and have not had legal advice before they attend the first meeting. In those circumstances it may be necessary for the mediator to address the parties' need for independent legal advice and to structure the mediation process over several sessions to enable this to occur. This may also be desirable for other reasons, as the couple may need to make temporary arrangements on many matters when they first separate and it may be some time before they are ready to negotiate a permanent settlement. Where the mediator is also a lawyer, there may also be an obligation to clarify the mediator's role with regard to provision of legal information which may be construed as advice.

Q23. To what extent are service providers in the best position to set standards?

Q24. To what extent is consistency in standards between service providers desirable?

Q25. Is it preferable to have minimum standards of ADR practice and if so in what areas of ADR practice?

Attaining standards

In this chapter consideration is given to how practitioners can attain standards that have been developed. Achievement is considered in terms of the training, education, qualifications and accreditation of ADR practitioners.

While Chapters Six, Seven and Eight focus on the content and creation of standards for ADR practitioners, Chapters Nine, Ten and Eleven explore the issues involved in attaining, maintaining and enforcing standards.

Chapter Nine deals with the issues of training, education and accreditation as a means of ensuring practitioners actually attain a certain level of competency before they commence practice.

Chapter Ten deals with the issues that might need to be considered by the various stakeholders so that observance of standards is supported and encouraged.

Chapter Eleven looks at the enforcement of standards where they are breached. It also covers related issues such as immunity, admissibility and confidentiality.

Shared responsibilities

NADRAC is of the view that the development, attainment, maintenance and enforcement of standards should be a shared responsibility of different parties in the ADR community, particularly in the early

development of ADR. This view is shared by the Society of Professionals in Dispute Resolution (SPIDR) in the United States, namely that “competence and quality in practice is a shared responsibility”.⁹⁴

It is inconsistent with the objectives of ADR for responsibility for standards to be allocated solely to any one group. NADRAC envisages that the various stakeholders who need to be consulted include the parties who use ADR services, individual ADR practitioners, service providers, industry associations, educational institutions and government. This theme is further developed in Chapters Ten and Eleven.

Accreditation

Before discussing training and education, it is necessary to elaborate on what this paper means when it uses the term ‘accreditation’. NADRAC notes that this term can have different meanings for different people. In addition there are other terms such as ‘registration’, ‘certification’ and ‘licensing’ which can be confused with ‘accreditation’ and each other.⁹⁵ It will therefore be helpful to clarify how the term is used in this paper.

Most of these terms are defined in terms of whether a person has been approved according to a prescribed set of criteria. The difference between the definitions revolves around the criteria and the method by which the approval was given.

NADRAC defines accreditation of ADR practitioners to mean the recognition or approval by an organisation that a person meets certain levels of education, training and/or performance that the organisation requires in order for him or her to practice ADR.⁹⁶

This would include those who have acquired the relevant level of performance through experience. It implies that there is some assessment process by the organisation to ensure that the claimed levels of education, training and/or performance are met. An organisation could be a service provider or a court or tribunal.

At present all accreditation of ADR practitioners in Australia is restricted in some way. It may be confined to:

⁹⁴ Society of Professionals in Dispute Resolution, *Ensuring Competence and Quality in Dispute Resolution Practice*, April 1995, p 3.

⁹⁵ New South Wales Law Reform Commission, *Training and Accreditation of Mediators*, LRC 67, September 1991.

⁹⁶ Boulle, *op. cit.*, p 232.

- a particular field of practice, for example, a dispute area like family law;
- employment with a particular organisation, for example, community justice centres; or
- a particular time period, for example, it may lapse after a set period of years.

In addition there is little or no mutual recognition by the various organisations of the other organisations' accreditation schemes, for the purpose of allowing individual ADR practitioners to practise within other organisations as a matter of right.

Some use the term 'accreditation' to refer to the approval by an agency (for example, a government department) to an ADR organisation to accredit ADR practitioners. NADRAC does not use the term 'accreditation' in this sense in this Discussion Paper.

Accreditation can be used to refer to the recognition or approval by an organisation that an education or training course meets certain criteria as to content and assessment. Accreditation also has relevance in relation to maintaining standards once they have been developed. This aspect of accreditation is dealt with in Chapter Ten.

Education and Training

In relation to attaining standards, the issue of how a person becomes qualified to practise ADR requires consideration. There is a view in relation to facilitative ADR that good mediators are born and not trained; however there are also many institutions offering different courses all leading to some sort of mediator qualification.

One way in which a person can attain the relevant knowledge, skills and ethics to practise ADR is to undergo a relevant course of education or training.

This chapter looks first at the type and content of current education and training courses, and then at the qualifications required of those who instruct in such courses. Education and training courses are treated separately here, although there is considerable overlap.

While it is sometimes necessary to refer to particular institutions to indicate a specific type of course or qualification, NADRAC has described

the courses in general terms and avoided naming particular institutions as far as possible.

9.1 Current education courses

There are many tertiary institutions currently offering courses in ADR. A summary of some of the education courses offered is at **Appendix 2**.

Courses are available at undergraduate level as well as at the post-graduate level. In addition, there are individual units on ADR which are offered as part of other, non-ADR specific, tertiary courses.

Many courses claim to enhance the graduate's employment opportunities as a mediator or arbitrator. Only some of them specifically address the requirements under the Family Law Act and regulations or other guidelines put out by the various law societies in each State and Territory, so that completion of the course will enable them to practise in those areas.

In content these courses include topics such as comparative dispute resolution, theories of conflict, family mediation, arbitration, commercial arbitration, dispute systems design, negotiation and environmental dispute resolution.

The teaching methods generally used include lectures, tutorials, practical exercises and small group activities. The assessment of a student's acquisition of the relevant knowledge is usually done through essays, assignments or examination, and there is also some use of tutorial participation, seminar presentations, and preparation for and participation in practical exercises.

Successful completion of an undergraduate course which either includes dispute resolution as a subject or focuses solely on dispute resolution usually leads to a Bachelor of Laws, Bachelor of Legal Studies or Bachelor of Arts (Justice Studies) qualification. The successful completion of a post-graduate course leads to a qualification such as a Graduate Diploma in Legal Studies, a Graduate Diploma in Dispute Resolution, or a specialist Master of Laws or Master of Legal Studies or Masters in Dispute Resolution.

9.2 Current training courses

There are many ADR training courses for processes such as mediation, negotiation, facilitation, arbitration, family arbitration, expert

determination and neutral evaluation. A summary of some of the training courses offered is at **Appendix 3**.

Professional associations, community organisations, ADR consultants and tertiary institutions provide training courses. Training courses can run from 1 day to 4 months, depending on the institution and the dispute resolution process involved.

Arbitration courses can include topics such as contract law, commercial arbitration legislation, references to arbitration, preliminary conferences, the arbitrator's contract with the parties, arbitration procedures and the duties of an arbitrator and of the parties. The teaching methods used include structured practical exercises that assess understanding of substantive and procedural matters, and general knowledge of the process.

Mediation training courses cover topics such as mediation process, communication skills, creative problem-solving, managing conflict, the negotiation process, mediation practice, and legal and ethical issues. Courses in specialised areas, such as family mediation, also involve training in violence issues, the dynamics of separation and family conflict, and the needs of children.

Training courses are also offered in specialised areas such as commercial mediation, workplace grievance mediation, construction and building dispute mediation, conflict resolution, complaints handling and designing dispute resolution systems.

The usual teaching methods used are presentations, demonstrations, simulations and role plays, critical reflection and inter-active discussion.

In many cases there is no formal assessment, and an attendance certificate is given for completion of the course. In some cases completion of the course can also lead to accreditation by the organisation as qualified to practice in the ADR process covered by the course. Some courses have a further requirement of the completion of a certain number of practical ADR sessions before the person is permitted to practise in that area.

This brief overview shows the variation in education and training that is available to persons who wish to become involved in ADR. It also indicates that there are many areas of ADR practice for which there is little or no specific education or training available, especially in advisory and determinative ADR.

NADRAC is aware that there is concern that a person can undertake a three or four day course in ADR techniques and commence to practise without any further requirements. There is also another concern that people with certain qualifications may be assumed to need less training than others who do not have those qualifications.

Education and training courses may need to address the knowledge, skills and ethics referred to in Chapter Six if they are to produce people who are adequately trained to practise ADR.

Q26. What is the appropriate content for ADR education and/or training courses?

Q27. What is the appropriate assessment to use for ADR education and/or training courses?

Q28. What are the most appropriate teaching methods to use to effectively train or educate people in ADR?

Q29. What scope is there for an organisation to allow ADR practitioners, accredited by another organisation, to practise with the former organisation?

Qualifications for trainers and educators of ADR practitioners

Even if the content of the training and education courses deals appropriately with the knowledge, skills and ethics required of prospective ADR practitioners, there is a question as to whether those who teach the courses need certain qualifications to conduct this training.

It is understood that many of those who currently train prospective ADR practitioners do not have academic qualifications in ADR. This situation is gradually changing as universities produce graduates and post-graduates in ADR disciplines.

While NADRAC has no firm view at this stage on whether trainers or educators should have academic qualifications, it needs to raise the question of whether they should themselves possess the knowledge, skills and ethics referred to in Chapter Six. Likewise consideration should be given to whether trainers and educators of ADR practitioners should also be involved in continuing professional development and in the practice of ADR.

Q. What sort of qualifications are appropriate for individuals who provide training and education in ADR?

Q. To what extent is ongoing experience required of trainers and educators?

Q. What educational or training standards regarding course structure or teaching methods should trainers or educators of ADR practitioners meet, if any?

Entry requirements for ADR courses

A related issue is whether there should be restrictions on the type of person who receives ADR training or particular ADR training.

At present there are some limited requirements for those wishing to undertake some kinds of ADR training. For example, the Family Law Regulations require persons to have an appropriate tertiary qualification i.e. law, social work, psychology or other appropriate qualification before they undertake at least five days' training in mediation which includes one course of at least 3 days' duration.⁹⁷ But for many training courses there is no prerequisite.

There is a debate about whether the practice of facilitative ADR, in particular, requires certain innate qualities in the practitioner, or whether

⁹⁷ Regulation 60, Family Law Regulations 1984, as amended.

these qualities can be learnt or developed through a training course. It has been suggested that the type of person needed for facilitative ADR is someone who is flexible, non-judgmental, self aware, assertive, and has empathy for others, a sense of humour and no unresolved personal experiences.⁹⁸ Apart from the difficulty of finding such people, there is the difficulty of assessing whether they have these qualities. In relation to conciliation recruitment, it has been suggested that a variety of approaches is needed to assess these qualities including written work, panel interview, referee reports and video role-play.⁹⁹

The Family Law Regulations seem to assume that the appropriate tertiary qualification ensures a capacity to acquire the necessary competence in mediation after five days' training. There is no requirement for the trainers to assess competence at the end of the five days' training or on completion of the 10 hours' supervised mediation required in the ensuing 12 months. This is a matter of considerable concern for a range of reasons for many family law mediators.¹⁰⁰

Whether there should be an initial assessment process prior to training may depend on the extent to which any of the following considerations need to be taken into account in the particular context, including the:

- need to train as many people as possible in ADR in order to promote the appropriate use of ADR processes;
- resources available for training;
- duration of the training and the likelihood of a trainee on completion being assessed as incompetent to practice;
- need for practitioners with certain attributes;
- need for a certain number of new practitioners to be accredited; and
- level of demand for the services of ADR practitioners.

For example, where sessional or volunteer ADR practitioners are employed in community based programs with limited resources, it may be desirable to assess for capacity to acquire competence prior to training as well as an assessment on completion and periodically thereafter.

⁹⁸ New South Wales Law Reform Commission, *op. cit.*, paras 3.31-3.33.

⁹⁹ Bryson, D. & McPherson M, 'Pathways to learning: conciliator core competencies', *The ADR Bulletin*, (1998) 1 ADR, pp 45-46.

¹⁰⁰ National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law*, 1997, p 41 ff.

Q30. What types of personal qualities are required of an ADR practitioner?

Q31. How do those qualities need to vary for the different types of ADR that are practised ?

Q32. What type of selection process should be used for those who wish to be trained and/or educated as an ADR practitioner?

Accreditation or registration of ADR practitioners

As mentioned previously, accreditation of an ADR practitioner in this Discussion Paper refers to the recognition or approval by an organisation that a person meets certain levels of education, training and/or performance that the organisation requires in order for that person to practice ADR. It implies that there is some assessment process by the organisation to ensure that the claimed levels of education, training and/or performance are met.

9.3 Accreditation as an ADR practitioner

In the ADR context, there are various arrangements which have been described as accreditation of ADR practitioners. A summary of some of the main requirements for current approval procedures by various bodies is at **Appendix 4**.

For example, a person can undertake a LEADR course and apply to be accredited by LEADR as a mediator in its provisional panel. In this sense accreditation refers to the approval by an organisation that an individual meets certain criteria in relation to ADR and will therefore be recommended by the organisation to conduct ADR processes. The criterion is the completion of a 4 day LEADR course with informal assessment but no grading.

A second arrangement is family mediation under the Family Law Act. The Chief Justice of the Family Court may approve a person as a court mediator if, in his opinion, that person is suitable by reason of his or her training and experience. Under the Act community mediators or private mediators can only provide family and child mediation if they meet the qualifications, training and experience as specified in the Act. In this sense ‘accreditation’ refers to satisfying statutory requirements. The adequacy of those qualifications in individual cases is not assessed.¹⁰¹

In the Australian Capital Territory, under its Mediation Act (1997), any organisation can apply to be an approved agency for the purposes of the Act. Any person may apply to an approved agency for registration as a registered mediator under the Act. The agency must register the person if they achieve the prescribed standards of competency, pay the required fee and satisfy any other agency requirements. NADRAC is informed that the approval of agencies for registration involves no real assessment process.

In some contexts, being accredited may confer immunity from civil suit upon an ADR practitioner. This issue is discussed in more detail in Chapter Eleven. As immunity confers a benefit on practitioners that they would not otherwise have, it creates an inducement for ADR practitioners to become accredited in those cases. As a consequence practitioners may seek accreditation for the immunity it provides rather than for the approval to practise.

Accreditation often requires a person to have obtained tertiary qualifications. In mediation, in particular, many practitioners originated through the community movement and do not necessarily have tertiary qualifications. Often existing accreditation arrangements do not take this type of practitioner into account.

Thus accreditation arrangements may need to take into account issues of immunity, statutory requirements, and assessment of a person’s qualifications, training, experience or general competency to practice ADR.

Given the current piecemeal nature of accreditation of ADR practitioners the issue arises as to whether more mutual recognition is warranted. NADRAC is aware that there are different views about the need for accreditation of ADR practitioners.

¹⁰¹ id.

9.4 Arguments for requiring accreditation

Some argue that, because there is currently no general requirement for a person to be qualified to practise ADR, there is the potential problem of a person being incapable of meeting any or most of the standards which exist for the particular ADR practised. A person can hold himself or herself out to be an ADR practitioner without having any training or any adequate training or any assessment as to that person's level of competency.

Further, where the ADR session is practised in private there is often no way of knowing whether the ADR practised was of a sufficient standard. Mediated agreements, for example, are not generally subject to review or appeal.¹⁰²

There is also a view that in areas where ADR is compulsory, there is a greater need for accreditation of practitioners.

9.5 Arguments against requiring accreditation

Some argue that requiring ADR practitioners to be accredited through requirements such as tertiary qualifications can create obstacles which would limit the number of persons who could practise ADR. Some who practise community ADR doubt the need for formal training and qualifications on the basis that it does not recognise the value of longstanding experience and proven performance in the field.

Another argument against accreditation relates to the diversity of ADR. It is argued, in respect of mediation, that if one professional body is solely responsible for accrediting mediators then the training would reflect that profession's requirements and not those of other dimensions of mediation.¹⁰³ This diversity of ADR is seen as one of the main guarantees of its accessibility.

9.6 Responsibility for accrediting ADR practitioners

Bound up with the issue of accreditation is the question of who should take responsibility for accrediting ADR practitioners.

¹⁰² Astor, A & Chinkin C, *op. cit.*, pp 225-226.

¹⁰³ *ibid* p 224.

Currently ADR practitioners are mostly accredited by organisations that carry out the training and also act as service providers in recommending or referring ADR practitioners.

The options for who could take responsibility for accrediting ADR practitioners include training or education institutions, service providers who provide or refer ADR practitioners, courts and tribunals and government. It is preferable that the institution that is in the best position to verify that an ADR practitioner meets and continues to meet the required standards should be responsible for accreditation. The appropriate institution may vary according to the context in which ADR is practised. However, it would seem that training and education institutions might not be in a position to verify that practitioners continue to meet the required standards.

Q33. Should ADR practitioners be accredited and if so at what stage?

Q34. What types of organisations are most appropriate to accredit ADR practitioners?

Q35. To what extent is it desirable to have a national organisation to accredit ADR practitioners?

Maintaining standards

In this chapter there is a discussion of the issues involved in maintaining standards.

Once standards have been attained, the question arises as to how they should be maintained and by whom. There are many ways in which this might be ensured and this chapter focuses on some of the measures that service providers, practitioners and others could use.

Consistent with the approach in Chapter Nine it is suggested that the maintenance of standards is a shared responsibility of the various stakeholders.

Service provider responsibilities

Service providers have been defined earlier in the paper as organisations that provide or refer the services of ADR practitioners to the public. This definition includes courts and tribunals and professional organisations which refer or recommend ADR practitioners to the public, as well as those organisations which provide ADR practitioners from within their organisation.

NADRAC's view is that service providers have a major responsibility for the maintenance of standards. In many cases it will be the service provider that develops the standards and has a role in ensuring that the standards are maintained. The following suggestions are ways in which this could be advanced.

10.1 Leadership

In line with the principles expressed in Chapter Seven, NADRAC considers that service providers could be expected to provide leadership, for example, by underpinning the values of the organisation in a vision or mission statement.¹⁰⁴ It may also be appropriate to have a code of conduct for the organisation that reflects the values, standards and other important aspects of the organisation's service and commitment. Service providers could also, from time to time, reinforce the fact that practitioners should maintain a customer service ethic for the organisation, for example that clients are treated with respect and in a sensitive manner.

10.2 Codes of conduct

A code of conduct is a document, usually prepared for an organisation or an industry, which includes the standards expected of members and also sets out the consequences if the member does not follow the code of practice. The aim of a code of conduct is to inform both members and the public about the values of the organisation, the standards it adheres to and the procedures for dealing with complaints. It can be an important mechanism for promoting the organisation and for maintaining standards among practitioners.

A code of conduct would normally be produced by a service provider in consultation with its practitioners and other stakeholders. It is usually expressed in clear language and is readily available to practitioners and parties.¹⁰⁵

A service provider developing a code or statement could initially consider the 'core values' of the organisation and the minimum prescriptive requirements necessary to ensure they are reflected in the delivery of its service. A code of conduct might be expected to take into account the ethical principles mentioned in Chapter Six. A helpful exercise for a service provider in developing ethics for a code of conduct could be to consider the significant dangers that might be faced by parties if the dispute resolution process went badly wrong. Such an assessment could be refined from experience and inform the maintenance of standards.

¹⁰⁴ For example, see *A Guide to Approval Requirements for Family Relationships Services*, Attorney-General's Department, p 7.

¹⁰⁵ For guidance on how to prepare a code of conduct, see *Fair Trading Codes of Conduct: Why have them, How to prepare them - A guide prepared by the Commonwealth, State and Territory Consumer Affairs Agencies*, October 1996.

It could be a responsibility of the service provider to ensure that the full code of conduct is acknowledged by, and continually available to, all individual practitioners, and that the implications of any breach are made clear.

10.3 Management systems

It would be appropriate for service providers to have mechanisms in place to ensure that the ADR practitioners it provides or recommends have appropriate training and/or qualifications to meet the standards which have been set. Part of this role could also be to monitor the performance of those ADR practitioners to ensure that the standards are maintained.¹⁰⁶

10.4 Training and Development

Service providers should ensure that initial and continuing training, professional development and support of individual practitioners is based on performance and appropriate to the demands of delivering high quality service. A planned approach to training and access to development opportunities are aspects of this responsibility.¹⁰⁷ If the ADR practitioners are employees of the service provider then the organisation needs to ensure that appropriate funds and time are made available for continuing upgrade of skills and knowledge.

10.5 Party Feedback

An important part of maintaining standards is to obtain feedback from the parties about whether the standards are being met from their perspective. The feedback can be oral or written but anonymity may be important. It could be sought from the parties individually immediately after the ADR process, as well as later. Alternatively, feedback could be sought through the use of focus groups.

Part of the role of feedback is to provide the opportunity for the parties to make a complaint about an unsatisfactory service that has been provided. An accessible complaint procedure could also be used to ensure that practice inconsistent with the code of conduct is brought to the attention of the service provider. The complaint procedures should reflect the principles of procedural fairness.¹⁰⁸

¹⁰⁶ *ibid*, p 24.

¹⁰⁷ Attorney-General's Department, *A guide to Approval Requirements for Family Services*, p 19.

¹⁰⁸ *ibid*, p 28.

10.6 Record keeping

The collection of data about performance provides a means to compare performance over time. Records could be kept about ADR sessions including such matters as types of disputes, parties, outcomes, time taken and costs involved.

10.7 Research and evaluation

A service provider could promote and participate in research and evaluation of the ADR process for which it provides or recommends practitioners. This commitment to the ongoing development of the ADR process provides valuable information to assist in improving standards.

Q36. What other mechanisms can be used by service providers to maintain standards?

Q37. What examples of good practice can you provide?

Q38. How does the context govern the mechanisms used?

Government responsibilities

Where government is involved in the maintenance of standards it needs to keep appropriate records, ensure service providers and practitioners are aware of the standards and their respective responsibilities, monitor the compliance of practitioners with standards, and provide an accessible complaint procedure.

Practitioner responsibilities

ADR practitioners need to consider the maintenance of standards by methods such as continuing education and training, relevant experience, monitoring, party feedback, debriefing, record keeping, peer support and observing a code of ethics.

10.8 Continuing education and training

Individual practitioners should be involved in continually upgrading their skills, knowledge and ethics by undertaking skills audits, undergoing regular refresher training courses and reading relevant current literature. Membership of a professional organisation would facilitate some of these activities.

10.9 Relevant experience

ADR practitioners should also ensure that their practical experience is kept current and relevant by regularly practising ADR, observing other practitioners in their work and participating in co-ADR processes where relevant (such as co-mediation).

10.10 Monitoring

The performance of practitioners should be monitored, by themselves as well as by their service provider. The monitoring would compare the performance against the standards set by the service provider. An effective way to self monitor would be to debrief with a peer practitioner or a supervisor.

10.11 Party feedback

A very important part of maintaining standards is to obtain feedback from the parties about whether the standards are being met from their perspective. The feedback can be oral or written. It could be sought from the parties individually immediately after the ADR process, as well as after a longer time. Alternatively, feedback could be sought through the use of focus groups.

10.12 Record keeping

The collection of data about performance provides a means to compare performance over time. Records could be kept about ADR sessions including such matters as types of disputes, parties, outcomes, time taken and costs involved.

10.13 Peer support

As ADR is an expanding and developing field of practice, a practitioner needs to be aware of developments that will impact on the way in which he or she practices ADR. Maintaining contacts with peer practitioners can assist with the exchange of ideas and may point to a need to revise standards in accordance with current practice. Ways to seek peer support include discussion of case studies, conferences, mentoring, observing other practitioners during an ADR process and networking.¹⁰⁹

10.14 Research and evaluation

A practitioner can maintain standards by promoting and participating in research and evaluation of the ADR process in which he or she participates. This commitment to the ongoing development of the ADR process provides valuable information to improve standards.

Q39. What other mechanisms can be used by ADR practitioners to maintain standards?

Q40. What examples of good practice can you provide?

Q41. How does context govern the mechanisms used?

Parties' responsibilities

The parties who use ADR can have a role to play in maintaining and supporting standards for ADR practitioners. They can inform themselves about the ADR process being used and what is expected from ADR practitioners. They can also participate, as appropriate, in the relevant ADR process.

They have a responsibility to inform themselves about the standards expected of the ADR practitioner and bring any breach of those standards to the attention of the practitioner in the first instance. They could ask a service provider for a copy of its code of practice and whether a complaints procedure is available.

¹⁰⁹ See Bryson, D, 'Guidelines for ADR practitioner peer support and development' *The ADR Bulletin*, (1998), Vol 1, No 1, pp 12-13.

Enforcement of standards

In this chapter the issues surrounding how to enforce standards are discussed, including legal and other forms of redress, and issues which affect liability such as immunity and confidentiality.

The previous chapters have considered what standards should contain, how they can be formulated and how they can be maintained. When standards are not complied with there may need to be some mechanism to deal with the practitioner who has breached those standards. Where a party has been affected by the failure to comply with those standards there may also need to be some consideration about redressing any loss or disadvantage he or she has suffered as a result.

This chapter looks at the options that might be available for sanctions and remedies without making assumptions about the underlying regime that would be responsible for their implementation. The following chapter deals with the related issue of whether the ADR industry should be regulated, and if so, what form that regulation should take.

As was the case in Chapters Nine and Ten, it is suggested here that the enforcement of standards might be the responsibility of more than one stakeholder.

11.1 Service provider responsibilities

A breach of standards may come to the attention of a service provider in the course of monitoring the conduct of ADR practitioners or through

normal client feedback procedures. It may also occur as a result of a direct complaint by a party about a particular ADR practitioner.

Where the breach comes to light as a result of monitoring or feedback, the service provider should have a procedure in place that follows the principles of procedural fairness, such as allowing the practitioner an opportunity to answer the alleged breach. That procedure should be well known to practitioners.

If the breach is found to have occurred, the service provider may need to activate any sanctions against the practitioner that are set out in its code of conduct. Sanctions could vary according to the service provider and may simply involve further training if there has been a breach of a standard in relation to skills or knowledge. The issue of sanctions is dealt with in more detail below.

Where a service provider learns of a breach through a complaint made by a party, the party could be referred to the complaints handling mechanisms set out in a code of conduct, if the organisation has one.

Effective codes of conduct can contain provisions requiring industry members to react promptly and fairly to complaints by having internal complaints mechanisms¹¹⁰ and by developing a fair and independent dispute resolution scheme.¹¹¹

Setting up an effective internal complaints mechanism may be easier for some sectors of the ADR industry than for others. For example, in a community sector organisation, where there are many offices scattered throughout the State and limited resources, it may be difficult to monitor complaints.

Another aspect of complaints handling can be that of informing parties about the procedures that are in place to deal with complaints. Without effective dissemination of easily understood information, parties may not be aware of how and to whom they can complain.

11.2 Industry association/ government responsibilities

Where government funding is provided to an ADR service provider conditional upon its practitioners complying with certain practice standards, and a practitioner provided or recommended by that service provider has breached those standards, the government would be

¹¹⁰ Standards Australia, Standard on Complaints Handling AS 4269-1995.

¹¹¹ Department of Industry Science and Tourism, Codes of Conduct Policy Framework, March 1998, p 17.

concerned that the breach was appropriately dealt with and that it was kept informed of developments. It is hard to see how the government itself would have a role in enforcing the standards except indirectly through the withholding of funding should the service provider fail to discipline the practitioner.

In some industries, there are industry associations that have an interest in maintaining the reputation of the industry as a whole, and thereby assist service providers to sanction defaulting members or provide redress to disaffected parties. In some cases the government has set up an agency, such an ombudsman, to provide an avenue for complaints which is external to the service provider and the industry.

If the service provider cannot resolve complaints internally there may need to be some sort of independent external dispute resolution scheme. The complaint could then be referred to an independent body that can hear both parties. Such a scheme could be set up either by industry or by government.

An independent dispute resolution scheme or ombudsman has been set up by industries in the areas of banking, insurance, essential utilities and telecommunications. An ombudsman has been set up by the federal government in relation to private health insurance, and by the Victorian government in relation to legal services. However, it may be premature to expect the ADR industry to set up such a scheme given the lack of cohesion, the lack of a national industry body, the still developing nature of the industry, and the lack of a large body of complaints.

The issue is whether the need for an independent dispute resolution scheme is so great as to warrant government intervention to address the lack of industry commitment. One alternative may be to use an existing dispute scheme or ombudsman to hear such disputes, such as the Legal Services Ombudsman. However, this would have drawbacks, as it is not a national scheme and is associated with one profession only.

The most that may be achievable is an avenue of complaint to say, fair trading departments or the Australian Competition and Consumer Commission, which have a presence in each State and Territory. These agencies would not normally be in a position to provide redress or sanctions unless there was a breach of the trade practices legislation, but they may be in a position to collect information about complaints on a national basis.

At this stage NADRAC is not able to identify any one organisation that could deal with complaints about ADR on a national basis.

11.3 Practitioner responsibilities

A practitioner's responsibilities could include cooperating with a service provider where a breach of a standard was raised with him or her. Where a complaint is made about an ADR practitioner it could be expected that a competent practitioner would treat the complaint seriously and, where possible, cooperate with the party to resolve the complaint.

11.4 Parties' responsibilities

A party involved in an ADR process may have the responsibility of providing feedback as requested by a service provider. A party might also be expected to act reasonably and responsibly in reporting any breach of standards by an ADR practitioner. This responsibility might also apply to third parties.

This might involve raising the breach with the ADR practitioner in the first instance. If the matter is unable to be resolved satisfactorily then the party may need to raise the issue with the service provider if one was involved. If the ADR session took place under the auspices of a court or tribunal then the party may be able to raise the issue with the court administration.

Q42. How appropriate is a code of conduct for the maintenance and enforcement of standards in ADR?

Q43. What considerations need to be taken into account when designing complaints handling mechanisms for the ADR industry?

Q44. To what extent, if at all, should government be involved in resolving disputes about ADR practitioners?

Q45. To what extent is the Legal Services Ombudsman an appropriate avenue for resolution of complaints about some ADR practitioners? What are the alternatives?

Q46. What types of redress should be available to parties of an ADR process where the ADR practitioner has breached a code of conduct?

11.5 Sanctions

In addition to redress for parties dissatisfied with the ADR process, an effective code of conduct could also contain sanctions for breaches of the code or for failure of a practitioner to remedy a complaint where it was required. Sanctions serve to deter breaches and indicate the commitment of an industry to regulating the conduct of its members.

Sanctions can include reprimanding the practitioner concerned, imposing a financial penalty, publicly naming the practitioner and suspending or expelling the practitioner from practice. Where the code of conduct is breached and the complaint is valid, there are various forms of redress that can be provided to dissatisfied parties. They include a simple apology, a refund of fees charged and corrective advertising.

The sanctions may need to be enforced in some way, usually by the ADR organisation of which the ADR practitioner is a member.

Q47. What types of sanctions might be appropriate for ADR practitioners who breach a code of conduct?

Q48. Who should enforce sanctions against ADR practitioners?

Legal avenues of redress

There may be legal avenues of redress where ADR practitioners breach standards. The following gives a general picture of what legal action might be available to a party and some issues that impinge on whether an ADR practitioner may be legally liable.

11.6 Legal causes of action

A party who considers that an ADR practitioner has caused them to suffer loss or damage can have legal causes of action against an ADR practitioner for breach of contract, tort or breach of fiduciary duty.

To establish a breach of contract there needs to be an express or implied term in a contract between the ADR practitioner and the party, a breach of that term and damage occurring as a result of the breach by the ADR practitioner.

For a negligence action to be successful there needs to be a duty of care owed by the ADR practitioner to the party, a failure by the ADR

practitioner to attain the appropriate standard of care, and reasonably foreseeable damage resulting from that failure.

To establish a breach of fiduciary duty the ADR practitioner needs to be found to be in a position of trust in relation to the party and to have breached that duty.

It has been argued that all of these causes of action have little applicability to facilitative ADR practitioners. In the case of breach of contract and negligence it is argued that what is a reasonable standard is still indeterminate and that causation and damages would be difficult to prove as the parties are responsible for any agreement. In the case of a breach of fiduciary duty it is argued that facilitative ADR does not fit the traditional model of a fiduciary relationship because the facilitative ADR practitioner appears to owe a duty not to one party but to both or neither.¹¹²

In the case of an advisory or determinative ADR practitioner, these arguments may not be as strong and a court may be more willing to find a fiduciary duty, or grounds for an action in contract or tort, on the basis that such an ADR practitioner has a more direct role in any agreement reached.

Q49. What should be the standard of care for ADR practitioners?

Q50. What other areas of liability could there be for ADR practitioners?

Q51. In what ways are facilitative, advisory and determinative ADR practitioners different in relation to the extent of their legal liability?

Factors which affect liability

11.7 Immunity

While there is no general immunity from legal action for ADR practitioners, immunity can be provided by contract and a statutory immunity has been afforded to some facilitative and determinative ADR practitioners.

¹¹² Boule, L., *Mediation: Principles, Process, Practice*, Butterworths, 1996, pp 251-252.

In the Family and Federal Courts mediators and arbitrators have the same protection and immunity as a judge has in performing the functions of a judge.¹¹³ In legislation establishing the community justice centres in New South Wales and their equivalents in Queensland and Victoria, mediators are provided with immunity for anything done in good faith in the execution of their statutory duties.¹¹⁴ Under commercial arbitration legislation, arbitrators are provided with immunity for negligent acts that are not fraudulent.¹¹⁵

The following reasons are advanced for providing facilitative ADR practitioners with immunity:

- it allows mediations to be conducted according to the circumstances of the case;
- there is no fear of being sued for an error of judgment;
- liability might deter a valuable social development, namely mediation;
- the low rates of pay for some mediators; and
- because most mediators operate under the control of a court or agency, there is some guarantee of standards being maintained.

On the other hand judges have traditionally been provided with immunity to ensure that justice is administered independently, without fear and with finality. As mediators do not have a determinative role it may be inappropriate for facilitative ADR practitioners to have immunity.¹¹⁶ In addition the immunity is seen as inappropriate where ADR is mandatory or based on the user pays principle.

In its consideration of the family law immunity provision, NADRAC canvassed the arguments for and against immunity for mediators in that context. Arguments for immunity included that many other statutes give immunity, it helps to reduce the number of cases coming before the courts, and parties can misinterpret words and actions of mediators particularly in family disputes. Arguments against immunity included that mediators are not judges who require protection in making decisions, counsellors can do similar work to mediators and do not have immunity,

¹¹³ *Family Law Act 1975* (Cth) s19M, *Federal Court of Australia Act 1976* (Cth) s53C.

¹¹⁴ See *Community Justice Centres Act 1983* (NSW) s27, *Dispute Resolution Centres Act 1990* (Qld) s35, *Evidence Act 1958* (VIC) s21N.

¹¹⁵ See, for example, *Commercial Arbitration Act 1984* (NSW) s51.

¹¹⁶ Boulle, L. *op. cit.*, pp 254-5, but see Astor H. & Chinkin C., *op. cit.*, pp 240-1 who argue that it is precisely because parties to a mediation are the ones responsible for the outcome, that the mediator should not be liable.

and mediators should have the skills to ensure that their words and actions are not misunderstood. NADRAC favoured a reduction in the level of immunity on the basis that serious misconduct or negligence by mediators could otherwise go unchecked.¹¹⁷

Another alternative may be to have ADR practitioners obtain appropriate professional indemnity insurance. Where the practice of facilitative ADR is part of another professional practice, for example, a legal practice, practitioners may be covered by their existing professional indemnity insurance.

Q52. What type of immunity, if any, is appropriate for facilitative, advisory and determinative ADR practitioners?

Q53. To what extent should ADR practitioners rely on professional indemnity insurance for protection from liability?

Q54. What effects might immunities and professional indemnity insurance have on standards for ADR practitioners?

11.8 Confidentiality/inadmissibility

Another factor which impacts on a party's ability to bring a successful legal action against an ADR practitioner, is the existence of rules which prevent disclosure by an ADR practitioner of anything that is said or done during an ADR session.

At common law the basis for the protection of such information from disclosure rests on the without prejudice privilege which prevents the use of information disclosed during negotiations aimed at settling a dispute. Other possible common law privileges, which could apply to ADR, are legal professional privilege or marital privilege, although there is as yet no certainty on the applicability of either in this context.¹¹⁸

The protection afforded by the common law has been extended in some cases by legislative provisions. There is no general statutory protection against disclosure of statements made in ADR. In community justice centre legislation, with some exceptions, anything said, any admission made or document prepared in a mediation session is not admissible

¹¹⁷ National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law*, 1997, paras 3.43-3.56.

¹¹⁸ Duncombe, S. & Heap, J. H., *op. cit.*, para [7.160 & 7.200].

before any court, tribunal or body. Exceptions include consent of all parties and need to prevent or minimise injury to person or property.¹¹⁹ In Family and Federal Court mediations, evidence of anything said or any admission made is not admissible in any court.¹²⁰

These legislative provisions may preclude admission of information into evidence but they do not exclude disclosure of the information to the world at large.¹²¹ Family law mediators are prohibited from disclosing any communication or admission made to them during mediation unless it is reasonably necessary to do so to protect a child or prevent the commission of an offence.¹²² In its report on primary dispute resolution in family law NADRAC acknowledged that while family law mediators may disclose certain information under the regulations, the legislation would prevent that information from being used in court proceedings. This anomaly was considered to be necessary to balance the competing objectives of protecting clients and maintaining the integrity of the mediation process.¹²³

The statutory provisions generally do not prevent the parties to mediation from disclosing matters that are discussed in mediation or other ADR session. It is common for parties to a mediation to enter into a mediation agreement prior to the mediation. Those agreements generally include provisions that the mediator and the parties will not disclose any information received by them in a mediation, with certain exceptions such as being required by law to do so.¹²⁴

The arguments for inadmissibility into evidence in court include the argument that ADR practitioners would be unwilling to practise for fear of being called to give evidence in court. Without statutory protection, litigation surrounding the ADR processes could ensue, thus increasing costs associated with the process. It is further argued that the lack of evidentiary safeguards in facilitative and advisory ADR, in particular, requires there to be some protection afforded to information disclosed in an ADR session.¹²⁵

The arguments against inadmissibility into evidence of information disclosed in an ADR session centre around the effective administration of

¹¹⁹ Community Justice Centres Act 1983 (NSW) s28.

¹²⁰ Family Law Act 1975 (Cth) s19N, Federal Court of Australia Act 1976 (Cth) s53B.

¹²¹ Duncombe, S. & Heap, J. H., op. cit., para [7.230].

¹²² Family Law Regulations 67.

¹²³ National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law*, paras [3.57]-[3.77].

¹²⁴ Duncombe, S. & Heap, J. H., op. cit., para [7.240].

¹²⁵ Astor H. & Chinkin C., op. cit., p 237.

justice, that a court needs to have all available evidence before it and there needs to be some judicial control over the private resolution of disputes. There is also the issue of third parties being affected by the outcomes of an ADR process, and needing to access information to assert their rights.

The reasons in favour of the confidentiality of ADR sessions include the need to engender the confidence of the parties in the process, especially in facilitative ADR. Without the promise of confidentiality, people may be unwilling to participate in the ADR process or may not be sufficiently open and honest in their communication within an ADR process to produce a workable outcome.

NADRAC is of the view that the confidentiality provisions in the family law legislation should not protect the mediator from proceedings for serious misconduct. Accordingly, evidence about a mediator's conduct should be admissible in such proceedings (but not otherwise) and any confidentiality provision should include this exception.¹²⁶

Q55. To what extent should information disclosed in ADR be admitted into evidence in a court?

Q56. To what extent should a party be precluded from disclosing information about an ADR process in which he or she was involved?

Q57. To what extent should an ADR practitioner be prevented from disclosing information about an ADR process in which he or she was involved?

Q58. What is the appropriate level of confidentiality or admissibility for the various facilitative, advisory and determinative ADR processes?

Q59. What are the implications of confidentiality arrangements for standards in ADR?

Q60. To what extent should an inquiry into the conduct of an ADR practitioner be conducted in confidence?

¹²⁶ National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law*, 1997, para [3.71].

To what extent should the ADR community be regulated?

In this chapter there is a discussion about whether the ADR community should be regulated.

This chapter discusses the different ways in which regulation of an industry or a profession can occur. The implications of regulation of the ADR community are then considered.

NADRAC has avoided describing the ADR community as an industry in this Discussion Paper because of the debate within the community as to whether ADR is an industry or a profession. Nevertheless, the discussion of regulation of an industry in this chapter is considered of relevance to the ADR community.

Regulation has been defined as “including any law or ‘rule’ which influences the way people behave. It is not limited to government legislation and it need not be mandatory”.¹²⁷ In the context of the ADR industry, regulation involves the concepts of control by the use of rules, the rules are specific to the ADR industry (rather than general to all industries, such as fair trading legislation) and the rules relate to the development, attainment, maintenance and enforcement of standards. In

¹²⁷ Productivity Commission, *Grey Letter Law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation*, December 1997, p 2.

this Discussion Paper the notion of regulation comes down to the issue of: 'Where does responsibility for ADR standards rest?' Where no regulation exists it is left to the consumer to enforce standards using existing legal mechanisms.

Regulation could relate to one or more of the development, attainment, maintenance or enforcement of standards. For example, regulation could require service providers to develop a code of practice but without any enforcement obligation.

12.1 Types of regulation

At one end of the regulation spectrum there is a system involving no regulation. Members of the industry are free to conduct their business as they see fit with no accountability except that provided by the forces of competition. This approach presumes that incompetent practitioners will not survive because consumers will use the services of the more competent members of the industry. This presumption rests on the premise that consumers have sufficient knowledge of the services provided to know when a service is competent or not, and can therefore exercise informed choice in whom they use.

The next stage in the spectrum is self-regulation. This is where members of an industry regulate themselves without any interference from government. An industry or parts of an industry will organise themselves into groups, providing benefits for their members in return for some regulation of the members' conduct. For self-regulation to operate effectively, the members of the industry must find that the benefits of being regulated outweigh the cost of being regulated.

Between self regulation and regulation there is a hazy area called 'quasi-regulation'. This area of regulation is where an industry appears to be regulating itself, but does so because of the threat, actual or implied, of government intervention. Most of what is known as 'self regulation' would in fact fall into this category, such as where an industry introduces a voluntary code of conduct because the government threatens explicitly or implicitly to introduce legislation or otherwise control that industry if it does not (for example, the 'voluntary' code of banking practice, or more recently the film distribution industry code of practice).

Coregulation, where industry develops its own arrangements with government legislative backing, involves explicit government enforcement. It is similar to direct government regulation.

At the end of the spectrum is direct government regulation. This usually involves primary and/or subordinate legislation. The legislation can itself prohibit certain conduct or it can give legislative force to industry codes of conduct, by making existing codes mandatory or by adopting a code in its entirety into the legislation or subordinate legislation. Another arrangement is where the Government encourages certain conduct by providing benefits only to those who comply with legislation or by not giving benefits to those who do not comply.

12.2 Government regulatory policy

The current government's general presumption is that competitive market forces deliver greater choice and benefit to consumers than a non-competitive market. There may be a need for intervention where there is a market failure or a demonstrated need to achieve a particular social objective. Examples of market failure are where there is weak competition, insufficient information to make informed choices, high transaction costs, an under-supply of public goods, and the price of the good or service does not reflect the actual cost of the good or service to society. Social objectives such as a humane society, law and order, public health and public safety may also point to the need for government intervention.¹²⁸

Where the market failure or social objective is of sufficient significance and is unlikely to be corrected over time by the market itself, the Government may intervene. However, the preferred form of intervention in such cases is effective self regulation.¹²⁹

Current regulation of ADR in Australia

At present the ADR industry is regulated in a number of different ways reflecting its wide diversity. Some aspects of those different ways are described in the following sections.

¹²⁸ Department of Industry Science and Tourism, *Codes of Conduct Policy Framework*, March 1998, pp 10-11.

¹²⁹ *ibid*, p 3.

12.3 Direct government regulation

There are some general legislative controls for mediators in the ACT.¹³⁰ However, in other States and Territories legislation which provides for the accreditation of mediators or conciliators relates to the specific area in which a mediator or conciliator might practice, for example, Community Justice Centres and farm debt mediation in New South Wales¹³¹, Dispute Resolution Centres in Queensland,¹³² and mediators in the Family Court of Australia.¹³³

Generally, the ACT legislation is the only statute that prescribes some standards of conduct for mediators. Other legislation merely requires a person or body to accredit or appoint to a list 'suitably qualified' mediators or conciliators. Under the ACT legislation, mediators are registered for three years and the registration may be cancelled if the approved agency is satisfied that certain criteria have not been met.

12.4 Quasi-regulation

There appears to be little of this type of regulation in the ADR field. It may be that government does not see the need to regulate the industry and therefore does not put any pressure on the industry to organise itself. This may be because the industry is still in its infancy and without evidence of complaints about the industry, there is no great push for intervention.

Possible quasi-regulation in the ADR industry may include the Standards Association of Australia Standard for the Prevention, Avoidance and Resolution of Disputes and private dispute schemes such as the Australian Banking Industry Ombudsman.

¹³⁰ *Mediation Act 1997* (ACT) which provides for the registration of mediators. It does not make it an offence for a mediator to practice when he or she is unregistered, but it provides certain legal protections, such as protection from defamation, to registered mediators.

¹³¹ *Community Justice Centres Act 1983* (NSW) provides for the accrediting of a person as a mediator for a Community Justice Centre. The *Farm Debt Mediation Act 1994* (NSW) provides for the accreditation by the NSW Rural Assistance Authority of suitably qualified and experienced persons as mediators under the Act.

¹³² *Dispute Resolution Centres Act 1990* (Qld).

¹³³ *Family Law Act 1975* (Cth).

12.5 Self regulation

Some professional and community-based organisations require their members who wish to mediate to have undergone certain training provided by their organisation, and to abide by a code of conduct and ethics. These professional organisations mostly involve the practice of mediation by legal practitioners. LEADR and the law societies in each State and Territory are examples of this type of occupational control. The Institute of Arbitrators and Mediators also provides this type of self regulation.

There are also ADR practitioners who practise ADR as an adjunct to their principal activity. For example, there are real estate agents, lawyers, accountants, and the like who practise ADR but are regulated in their capacity as lawyers, real estate agents or accountants rather than in their capacity as ADR practitioners.

12.6 No regulation

There are many areas of ADR practice that are unregulated. A person can hold herself or himself out as a practising mediator without any specific control over his or her conduct, whether or not she or he has completed a relevant course or had any experience in mediation. The only control is that generally provided by Commonwealth, State and Territory fair trading legislation such as the *Trade Practices Act 1974* (Cth) which prohibit misleading and deceptive conduct.

It is not only mediation that is relatively unregulated. Other dispute resolution service providers such as conciliators, facilitators, investigators, case appraisers, private judges, arbitrators, expert determinators and early neutral evaluators have no specific control over the quality of the service that they provide.

12.7 How should the ADR industry be regulated?

There are certain criteria that have been developed which indicate which type of regulation is best suited to a particular industry. It may be that the ADR industry is so diverse that the criteria may apply to only parts of the ADR industry.

The Office of Regulation Review examines legislation at the Commonwealth level (and there are similar bodies in each State and Territory) to determine whether regulation by way of legislation is necessary or whether other forms of regulation would be better suited to the industry concerned.

In the view of the Office of Regulation Review:

“Regulation will be unnecessary where:

- there is no strong public interest concern, in particular, no major health and safety concern;
- the problem is a low risk event, of low impact/significance;
- the problem can be fixed by the market itself. For example, there may be an incentive for individuals and groups to develop and comply with self regulatory arrangements (industry survival, market advantage).”¹³⁴

Self regulation is more likely to be successful if there is:

“• adequate coverage of industry concerned¹³⁵

- a viable industry association
- a cohesive industry with like minded/motivated parties committed to achieve the goals;
- evidence that voluntary participation can work - effective sanctions and incentives can be applied, with low scope for the benefits being shared by non-parties; and
- a cost advantage from tailor-made solutions and less formal mechanisms such as access to quick complaints handling and redress mechanisms.”¹³⁶

In addition another relevant factor is the type of standards which are existing or proposed.¹³⁷ This factor is important because the industry must be willing to support the standards proposed. If they are specific they are more capable of enforcement but industry members may consider them

¹³⁴ Office of Regulation Review, *A Guide to Regulation*, Second Edition, December 1998, p D4.

¹³⁵ An industry association represents those members of an industry which join the association. Coverage of an industry refers to the amount of industry members that an industry association represents. Where an association does not represent a majority of industry members, then it will not be able to deliver effective self regulation. See *Codes of Conduct Policy Framework*, Department of Industry, Science and Tourism, March 1998, p 16.

¹³⁶ Office of Regulation Review, *op. cit.*, pp D4-D5.

¹³⁷ Department of Industry, Science and Tourism, *op. cit.*, p 17.

too prescriptive. If they are too general they may be less capable of effective enforcement but give industry more flexibility.

On the other hand **quasi-regulation** may work better where:

- “• there is a public interest in some government involvement in regulatory arrangements and the issue is unlikely to be addressed by self regulation;
- there is a need for an urgent, interim response to a problem in the short term, while a longer term regulatory solution is being developed;
- government is not convinced of the need to develop or mandate a code for the whole industry;
- there are cost advantages from flexible, tailor-made solutions and less formal mechanisms such as access to a speedy, low cost complaints handling and redress mechanism; and
- there are advantages in the government engaging in a collaborative approach with industry, with industry having substantial ownership of the scheme.”¹³⁸

Explicit government regulation is said to be the appropriate regulatory form where:

- “• the problem is high risk, of high impact/significance;
- the government requires the certainty provided by legal sanctions;
- universal application is required;
- there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles and no possibility of effective sanctions being applied: and
- existing industry bodies lack adequate coverage of industry parties, are inadequately resourced or do not have a strong regulatory commitment.”¹³⁹

In addition to the criteria laid down by the Office of Regulation Review, it may be that explicit government regulation for an industry might also be appropriate where government requires consumers to use the services of that industry. For example, in NSW farm debt matters, parties are required to use mediation before litigation and in federal civil matters parties can be required to undergo mediation or arbitration without their consent.

This principle has been expressed by the Society of Professionals in Dispute Resolution, in relation to the need for standards for dispute

¹³⁸ Office of Regulation Review, op. cit., p D5.

¹³⁹ ibid, p D5.

resolution providers, as “the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be”.¹⁴⁰

On the basis of these criteria, the ADR community could possibly be described as follows:

1. There is market failure in the sense that there is imperfect competition such that consumers of ADR services do not have adequate information to make informed decisions. There could also be a social objective in the sense that society considers it desirable to resolve its disputes amicably and fairly, and that an unregulated ADR community may not deliver these outcomes.
2. However, in terms of the type of regulation to be considered, there is no serious problem - no strong public interest concern currently to be remedied. Enquiries made to State and Territory law societies and legal ombudsman reveal virtually no complaints by parties about the way in which lawyers practise ADR.¹⁴¹ While the lack of recorded complaints may be due to the absence of a central body to which complaints can be made, there is nevertheless no hard statistical data upon which to base a conclusion that a serious problem exists.
3. There is no viable industry association for the ADR community as a whole. It could even be said that there is no viable industry association that covers a sector of the ADR community with the possible exception of arbitrators.¹⁴² As described in Chapter Two there are several State or Territory-based organisations, but there is no national body that could be said to represent the interests of most ADR practitioners. While there have been some attempts to create a national ADR body, all have failed.

¹⁴⁰ Society of Professionals in Dispute Resolution, *American Arbitration, Qualifying Neutrals: The Basic Principles*, April 1989, p 2.

¹⁴¹ For example, the annual report of the Victorian Legal Services Ombudsman has no category for ADR complaints. Most law societies and legal ombudsman collect complaints by subject category and not according to whether the practitioner was undertaking legal work or mediation work at the time.

¹⁴² The Institute of Arbitrators and Mediators Australia is a national organisation which has chapters in all States and Territories with the exception of Tasmania. See Duncombe, S., & Heap, J. H., *op. cit.*, pp 12-53.

4. It follows that if there is no viable industry association then there is not adequate coverage of the industry by an association.
5. The ADR community is not a cohesive industry. ADR practitioners value the diversity of the community and favour flexibility over uniformity.
6. There is a public interest in some government involvement in regulatory arrangements, particularly where ADR is being promoted by and/or mandated by governments as an adjunct to the court system¹⁴³ or in its own right.¹⁴⁴ This is unlikely to be addressed by self regulation.

Some of these factors would tend to lead to the conclusion that self regulation or quasi-regulation may be more appropriate for most of the ADR community than would explicit government regulation. However, in view of the mandatory nature of ADR for some sectors of the ADR community there may be a need for more than self regulation.

Q60. To what extent is there a market failure or desirable social objective that would justify the need to consider regulation of the ADR community?

Q61. What evidence is there (statistical rather than anecdotal) that there is a serious problem with the ADR community?

Q62. What incentive is there for ADR practitioners and organisations to develop and comply with self-regulatory arrangements?

Q63. Which type of regulation is appropriate for the ADR community and on what basis?

...continued

¹⁴³ For example, in family law matters.

¹⁴⁴ For example, in workers compensation and workplace relations matters.

Q64. To what extent should regulation extend to each of:

- (a) developing standards;**
- (b) attaining standards;**
- (c) maintaining standards; and**
- (d) enforcing standards?**

Q65. For which sectors of the ADR community might self regulation be appropriate?

Q66. For which sectors of the ADR community might explicit regulation be more appropriate?

Q67. To what extent are there areas of ADR which are currently being over or under-regulated by government?

APPENDIX

**Excerpts from some ADR
standards and guidelines**

Note:

These excerpts have been gathered by NADRAC over the past 5 years to assist it in its examination of the issue of ADR standards. They are not intended to form an exhaustive and current list of ADR standards, guidelines, education and training resources, or accreditation requirements.

APPENDIX 1 — Excerpts from some ADR standards and guidelines

ORGANISATION	EXCERPT FROM STANDARDS
<p>The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p>Fairness</p> <p>It is fundamental to the arbitration process that justice should not only be done but should also be seen to be done.</p> <p>Members acting as arbitrators must refrain from performing, causing, or permitting any action to be done which could lessen, or be perceived to lessen the likelihood of justice being done to the parties in dispute.</p> <p>In mediation and other forms of dispute resolution where solutions are not imposed upon the parties, members are expected to act fairly and in the best interests of all parties.</p>
<p>Family Law Regulations</p>	<p>64. In providing family and child mediation services under the Act, a community mediator or private mediator:</p> <p>(a) must ensure that, as far as possible, the mediation process is suited to the needs of the parties involved (for example, by ensuring that suitability of the mediation venue, the layout of the mediation room and the times at which mediation is held).</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>7.1 The mediator should if he/she considers it would facilitate settlement, recommend disclosure of relevant information.</p> <p>7.2 The mediator may encourage participants to obtain independent expert information and advice.</p>
<p>NSW Community Justice Centres Code of Professional Conduct for CJC Mediators</p>	<p>Mediators are committed to assist all parties in reaching a mutually satisfactory agreement and not to favour any one party over another. They must not play an adversarial role in the dispute resolution process.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p>	<p>The goal of negotiations and mediation is a settlement that is seen as fair and equitable by all parties. The mediators' responsibility to the parties is to help them reach this kind of settlement.</p>
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>7.1 A mediator must in no circumstances attempt to coerce the parties to settle a dispute. 7.2 The mediator must inform the parties that they are under no obligation to make offers and concessions to settle and of their right to withdraw at any time. 7.3 A mediator must not try to impose his or her interpretation of the law on the parties as applied to the facts of a particular dispute.</p>
<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>3.2 The mediator does not impose a solution upon the parties. It is not the function of mediation for the mediator to attempt to coerce the parties into agreement nor should any mediator make any decision for the parties. The mediator may only raise with and help the parties to explore options for eventual agreement. The mediator shall not give legal advice to the parties.</p>
<p>WorkCover Conciliation Service (Vic) Code of Conduct & Protocols</p>	<p>A conciliation officer ensures that all parties are able to discuss and negotiate their interests in a fair and orderly manner and endeavours to ensure that any agreement reached is fair, equitable, lawful and has the capacity to endure over time.</p>
<p>ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators</p>	<p>2.1.3 Parties are given time and attention that includes adequate consideration of parties' needs.</p>
<p>Practitioner Competence</p>	
<p>The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p>All members who offer their services as arbitrators or mediators have an obligation to achieve and maintain a high level of professional competence, as well as in their own professions or callings.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Law Council of Australia Ethical Standards for Mediators</p>	<p>A mediator must not mediate unless the mediator has the necessary competence to do so and to satisfy the reasonable expectations of the parties.</p> <p>A person who agrees to act as a mediator holds out to the parties and the public that she or he has the competence to mediate effectively.</p>
<p>Family Law Regulations Part 5, Division 2</p>	<p>59(2) The Chief Justice or Chief Judge may approve a person only if the Chief Justice or Chief Judge, as the case requires, considers that the person is suitable by reason of the person's training and experience.</p>
<p>NSW Community Justice Centres Code of Professional Conduct for CJC Mediators</p>	<p>Other sections of CJC's code of Professional Conduct for Mediators cover mediator's obligations as employees of the CJC's, and their responsibilities toward the public and other unrepresented parties, to upgrade their skills and theoretical grounding through further education and to promote the profession by encouraging and/or participating in allied research.</p>
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p>	<p>Those who engage in the practice of mediation must be dedicated to the principle that all disputants have a right to negotiate and attempt to determine the outcomes of their own conflicts.</p> <p>At no time will a mediator offer legal advice to parties in dispute.</p>
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>3.1.3 Unless the circumstances otherwise require or the parties consent, the mediator will ensure that in a case requiring special skill or experience or a case of great factual complexity that the process to be adopted is fully discussed with the parties, and in particular, the appointment of a co-mediator is considered;</p>
<p>ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators</p>	<p>7.5.1 Specialist advice/further training is sought where the need is identified</p> <p>7.5.2 Agency guidelines are observed in relation to professional development</p> <p>7.5.3 Current industry practice is appraised and applied to improve mediation process</p> <p>7.5.4 Commitment to upgrading skills and knowledge is evident through regular participation in a review mechanism</p> <p>7.5.5 Current and likely future needs are evaluated and action taken to keep abreast of evolving trends in mediation</p>
<p>Standards for Court-Connected Mediation in Victoria</p>	<p>2.2 A person is not eligible to be a mediator unless this is justified by their experience as a mediator and training in a recognised mediation training course.</p>

ORGANISATION	EXCERPT FROM STANDARDS
Advertising and Publicity	
<p>The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p>Members may advertise the availability of their services as arbitrators and/or mediators provided this is done in a factual and dignified way. Advertising should be limited to the alphabetical and classified sections of telephone and other directories: listing name, initials, post-nominals, a simple reference to their profession or calling, street address and telephone number. Display advertisements should not be used. Should display advertisements be used in connection with a members' profession or calling, these should not include reference to a member's practice as an arbitrator or mediator.</p> <p>A mediator must not engage in misleading or deceptive publicity or advertising.</p> <p>A mediator must not make any false or misleading statement including statements or claims as to the mediation process, its costs and benefits, or the mediator's role, skills, or competence.</p>
<p>Law Council of Australia Ethical Standards for Mediators</p>	<p>Regulation 68 refers to Advertising in Family Court registries, 'Advertising of counselling, mediation and arbitration services'. The Registrar of each Family Court has the authority to approve the advertising of these services in local family court registries. This authority extends to the type, size, design and placement of the advertisement.</p> <p>Mediators will not make false, misleading or unfair statements or claims about the mediation process, its costs and benefits, or about their role as mediators, their skills and qualifications. Mediators will not use any form of publicity to enhance their own position.</p>
<p>Family Law Regulations Part 5, Division 3</p>	<p>Mediators should take care that any public statements or claims they make as to the mediation process, costs and benefits, of their role, skills and qualifications, are fair and accurate.</p> <p>Publicity shall not be used by a mediator to enhance his or her own position.</p>
<p>NSW Community Justice Centres Code of Professional Conduct for CJC Mediators</p>	<p>3.1.2 Unless the circumstances otherwise require or the parties consent, the mediator will ensure that he or she does not make any false misleading or unfair statement or claim about the mediation process or his or her ability as a mediator.</p>
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p> <p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	

ORGANISATION**EXCERPT FROM STANDARDS**

WorkCover Conciliation Service (Vic)
Code of Conduct & Protocols

The Conciliation Service is committed to the provision of accessible information to all parties. A multi-lingual brochure is attached to an adverse Notice from an insurer informing the worker of the telephone Hotline. The Hotline gives information about the conciliation process. A conciliation conference (sub-titled in to 3 languages) video and manual (9 languages) is available to all parties.

Standards for Court-Connected Mediation in Victoria

3.4 The mediator should not make exaggerated claims about the potential benefits of the mediation process.

Confidentiality

Members should exercise the greatest care in maintaining confidentiality in all matters relating to a dispute. Information relating to the proceedings or the identity of the parties should not be released to persons other than those directly involved in the proceedings.

The Institute of Arbitrators & Mediators Australia
Practice Note 2 - Professional Conduct

Law Council of Australia
Ethical Standards for Mediators

Subject to the requirements of the law a mediator must maintain the confidentiality required by the parties.

Family Services Council Mediation Standards

Organisations and mediators shall maintain principles of confidentiality, both within and external to the process, as specified under Section 19K of the Family Law Act 1975 and Regulation 66.

Family Law Regulations
Part 5, Division 2

67. In providing family and child mediation services, a private mediator must not disclose any communication or admission made to him or her in the mediator's capacity as a family and child mediator unless the mediator reasonably considers that it is necessary for him or her to do so to protect a child; or prevent or lessen a serious and imminent threat to the life or health of a person; or the property of a person; or report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person; or intentional damage to property of a person or a threat of damage to property; or enable the mediator to discharge properly his or her functions as a family and child mediator; or if a child is separately represented by a person under an order under 68L of the Act - to assist the person to represent the child properly.

ORGANISATION	EXCERPT FROM STANDARDS
<p>Australian Commercial Disputes Centre Guidelines for Commercial Mediation</p> <p>Guidelines for Expert Determination</p> <p>Guidelines for Arbitration</p>	<p>The parties agree that as far as possible, the mediation is confidential and third parties attending sign a confidentiality agreement.</p> <p>Confidential information disclosed to the Expert by the parties or by others attending the course of the Expert Determination shall not be divulged by the Expert, unless authorised in writing by both parties.</p> <p>The parties agree that as a condition of being present or participating in the arbitration, they will, unless otherwise compelled by law, preserve total confidentiality in relation to the course of proceedings within the arbitration and in relation to any exchanges that may come into their knowledge, whether oral or documentary, concerning the dispute passing between any of the parties within the arbitration.</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>6.1 The mediator shall not voluntarily disclose information obtained during the mediation process without the prior consent of both parties.</p> <p>6.5 The mediator shall, prior to entering into the mediation process, obtain all parties' agreement not to require the mediator to give evidence or to produce documents in any subsequent legal proceedings concerning the issues to be mediated upon.</p> <p>6.8 The mediator shall maintain confidentiality in the storage and disposal of records.</p>
<p>NSW Community Justice Centres Code of Professional Conduct for C.J.C. Mediators</p>	<p>Any information received by mediators in the course of the mediation is confidential and may not be discussed within the C.JCs. Mediators will not reveal any information given to anyone outside of the negotiation including police, relatives of the parties, the referring agency and the media.</p>
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p>	<p>Mediators and staff shall not give information to any parties outside of the negotiations including police, relatives of the parties, the referring agency or the media (subject to some exceptions).</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>5.1 A mediator must treat all information revealed in a mediation as confidential except for information that a mediator is required to divulge by statute, judicial decision, or by professional standards of conduct; that in the opinion of the mediator indicates a danger of physical harm to a party to the mediation or a third party; that the parties have agreed may be disclosed by the mediator; that the mediator informs the parties at the outset will not be protected; or that is directly relevant to alleged unethical conduct by a solicitor involved in a mediation.</p>
<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>6.1 The mediator shall not disclose information received or obtained during the mediation process without the prior written consent of the parties.</p> <p>6.2 The obligations of a practitioner relating to confidentiality and any limits on confidentiality as between practitioner and client shall apply between the mediator and the parties.</p>
<p>WorkCover Conciliation Service (Vic) Code of Conduct & Protocols</p>	<p>The Conciliation Service conducts a productive process which requires parties to actively participate in the proceedings and to exchange all information relevant to the existence of the dispute. A Conciliation Officer has discretion about the dissemination of information and documentation depending on the circumstances of the case. In exercising this discretion, a Conciliation Officer will be mindful to balance the needs of the parties, the objective of resolving the dispute and the confidentiality provisions required by the legislation and the Ministerial Guidelines.</p>
<p>ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators</p>	<p>2.2.2 Boundaries of confidentiality and privacy are clear to parties.</p>
<p>Standards for Court-Connected Mediation in Victoria</p>	<p>5.1 Unless otherwise ordered by the Court, the mediator shall not communicate with the Judge who has referred the case to mediation concerning the mediation unless in relation to the termination or continuation of the mediation.</p> <p>5.2 Subject to the provisions of statute and common law, the mediator has an obligation not to make any voluntary disclosure of any statements made during the course of mediation.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p>Communication Issues</p> <p>Arbitration</p> <p>Arbitrators should be particularly careful in communicating with parties. Not only may inappropriate communications prejudice the actual or perceived achievement of justice, it may also lead to the arbitrator being asked to ‘stand down’, being removed from office by the court, or having an award set aside by the court.</p> <p>Wherever possible communication should be in writing, with all parties being forwarded copies of correspondence emanating from the arbitrator.</p> <p>Mediation</p> <p>In mediation contact with the parties separately may frequently be necessary but should only be done with the full knowledge and agreement of all concerned.</p>
<p>Australian Commercial Disputes Centre Guidelines for Expert Determination Guidelines for Arbitration Guidelines for Commercial Mediation</p>	<p>(c) the Expert may meet separately with both parties to discuss the dispute, unless one or both of the parties do not want separate meetings to occur, in which case the Expert will only meet jointly with the parties.</p> <p>(a) In reaching a determination on the matter in issue, the Arbitrator is to proceed to a hearing unless the parties agree to proceed by documents only. The arbitrator may take oral evidence and receive documentary evidence on subpoena issued by the parties.</p> <p>(a) Each party (with their advisers) may meet separately with the Mediator.</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>6.4 Information received by the mediator in private session shall not be revealed to other parties without prior permission from the party from whom the information was received.</p> <p>6.6 The mediator shall inform the parties that, in general, communication between them, and between them and the mediator; during the preliminary conference and the mediation, are agreed to be confidential.</p>
<p>NSW Community Justice Centres Code of Professional Conduct for CJC Mediators</p>	<p>Mediators will allow and encourage parties to make decisions which are appropriate for themselves by helping them to clarify their own positions and crystallise available alternatives.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p>	<p>Mediation is a participatory process. Mediators educate the parties and involve them in the mediation process by explaining the process to them, by seeking their agreement to use it, and by encouraging them to speak directly to each other about the issues in dispute.</p>
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>5.2 A mediator must not reveal any information obtained from a party in a caucus or private meeting during the course of the mediation to the other party or parties without first having gained the permission of that party to reveal the information.</p> <p>5.6 The mediator must inform the parties that the mediation is conducted on a without prejudice basis and that no information disclosed during the mediation can be used in any subsequent court proceedings without the consent of the other party/parties.</p>
<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>6.4 Information received by the mediator in separate sessions shall not be revealed to the other party or parties without prior permission from the party from whom the information was received.</p>
<p>WorkCover Conciliation Service (Vic) Code of Conduct & Protocols</p>	<p>The Conciliation Service will deal directly with all parties and encourage discussions between the parties wherever possible to resolve the dispute. Explanations of the processes and the medical and legal issues involved will be in simple language.</p>
<p>ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators</p>	<p>3.1 Parties are encouraged to listen to each other respectfully and without interrupting.</p> <p>4.1.1 Parties communicate directly with each other to their level of ability and willingness.</p> <p>5.1.4 Opportunities are provided for parties to think clearly and discuss concrete proposals.</p>
<p>Standards for Court-Connected Mediation in Victoria</p>	<p>3.1 The mediator should introduce themselves to the parties, introduce the parties to each other if necessary and determine the mode of address to be adopted during the mediation.</p> <p>4.6 The parties and their legal representatives can be seen separately and the parties can be seen in the absence of their legal representatives.</p>

ORGANISATION	EXCERPT FROM STANDARDS
	<p data-bbox="327 814 357 1163">Conduct during Proceedings</p> <p data-bbox="380 144 467 1163">Arbitration proceedings should be conducted with appropriate dignity and formality and the arbitrator should insist that he or she be referred to as 'Mr Arbitrator' or 'Sir' or 'Madam Arbitrator' or 'Madam' respectively and not by his or her given name.</p> <p data-bbox="482 500 512 1163">Mediation proceedings may be conducted in a less formal manner.</p>
<p data-bbox="380 1245 462 1658">The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p data-bbox="529 167 585 1163">A mediator must prepare for and conduct the mediation diligently, and with due regard to the fact that an agreed outcome requires the uncoerced consent of the parties.</p>
<p data-bbox="529 1407 585 1658">Law Council of Australia Ethical Standards for Mediators</p>	<p data-bbox="602 167 658 1163">2.3.1 A mediator shall recognise that mediation is based on voluntary participation, on informed choice, and on consensual, non-coercive methods of achieving agreement.</p>
<p data-bbox="602 1199 631 1658">Family Services Council Mediation Standards</p>	<p data-bbox="677 182 733 1163">64. In providing family and child mediation services under the Act, a community mediator or private mediator:</p> <p data-bbox="749 872 779 1087">(b) must ensure that:</p> <p data-bbox="782 344 811 1030">(i) mediation is provided only in accordance with this Division; and</p> <p data-bbox="814 135 844 1030">(ii) any record of the mediation is stored securely to prevent unauthorised access to it...</p>
<p data-bbox="677 1414 706 1658">Family Law Regulations</p>	<p data-bbox="857 753 887 1163">8. Conduct of Expert Determination</p> <p data-bbox="903 135 986 1087">(a) When conducting an Expert Determination, the Expert shall: (i) act as an Expert and not as an arbitrator, (ii) proceed in such a manner as the Expert thinks fit without being bound to follow the rules of natural justice or the rules of evidence.</p>
<p data-bbox="759 1254 788 1658">Australian Commercial Disputes Centre</p> <p data-bbox="805 1317 834 1658">Guidelines for Expert Determination</p> <p data-bbox="850 1416 880 1658">Guidelines for Arbitration</p> <p data-bbox="896 1311 926 1658">Guidelines for Commercial Mediation</p>	<p data-bbox="1005 891 1034 1163">12. Award of Arbitrator</p> <p data-bbox="1051 144 1107 1087">(b) The arbitrator in determining the matter shall proceed as he/she thinks fit without being bound to observe the rules of evidence.</p>
	<p data-bbox="1123 864 1153 1163">6. Authority of Mediator</p> <p data-bbox="1169 154 1225 1087">(a) The mediator does not have the authority to impose a settlement on the parties, but will attempt to help them to reach a satisfactory resolution of their dispute.</p>

ORGANISATION**EXCERPT FROM STANDARDS**

NSW Law Society Revised Guidelines for Solicitors who act as Mediators	The mediator should define and describe the process of mediation and its cost to the parties before they reach an agreement to mediate. He/she should give an overview of the process and assess the appropriateness of mediation for the participants.
NSW Community Justice Centres Code of Professional Conduct for CJC Mediators	The mediators must not make decisions for the parties even where parties may wish to solicit a recommendation for settlement from the mediators. Mediators will ensure the parties' voluntary attendance at mediation and the freedom to leave at any time. Mediators must explain the mediation process to the parties and involve them in it to help them resolve their dispute and handle future conflicts more creatively and productively.
Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators	Mediation is not the answer to every type of conflict. Intake staff should be aware of all procedures for dispute resolution. They should provide information to parties about all the avenues available to them and assist them to decide the most appropriate option, based on the outcome sought by the party concerned.
Queensland Law Society Standard of conduct for Solicitor mediators	3.1.4 Unless the circumstances otherwise require or the parties consent, the mediator will ensure that the parties involved in a mediation understand the elements of the mediation process and the function of the mediator, and the way in which that particular mediation is to be conducted. 2.1 A mediator is required to assess the suitability of a matter for mediation, provide structure and control throughout the mediation conference, promote interest-based bargaining among the parties, assist the communication process between the parties and terminate the mediation when appropriate.
Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators	4.10 The mediator at the commencement of the mediation, shall establish rules with the parties as to the conduct of each party with respect to each other and the mediator during the mediation process.

ORGANISATION	EXCERPT FROM STANDARDS
WorkCover Conciliation Service (Vic) Code of Conduct & Protocols	The Conciliation Officer ensures the parties involved in a conference understand what is expected of them, the functions of the Conciliation Officer and the way in which the conference is to be conducted. The Conciliation Officer decides how the conference is to be conducted, including whether joint or separate meetings of the parties are held.
ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators	<p>2.1 Create atmosphere for mediation</p> <p>2.3 Clarify roles and processes</p>
Standards for Court-Connected Mediation in Victoria	<p>3.5 The mediator should outline the rules relative to the process.</p> <p>4.1 The mediator has no authority to impose a solution on the parties.</p> <p>4.11 The mediator should not advise as to the orders which the mediator believes the court would make.</p>

Neutrality and Impartiality

The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct	<p>Conflict of Interest</p> <p>It is essential that there be no conflict of interest on the part of any arbitrator. Similarly, in mediation, in the interests of fairness, it is also essential that there be no conflict of interest on the part of mediator.</p> <p>If a potential conflict of interest is perceived, the arbitrator or mediator should withdraw unless satisfied that the conflict will not prejudice the fairness or proceedings. Nonetheless, even in this circumstance the matter should be disclosed to the parties.</p>
Law Council of Australia Ethical Standards for Mediators	<p>Impartiality</p> <p>A mediator may mediate only those matters in which the mediator can remain impartial and even handed. If at any time the mediator is unable to conduct the process in an impartial manner the mediator must withdraw. Accordingly, a mediator must avoid: (i) partiality or prejudice; and (ii) conduct that gives any appearance of partiality or prejudice.</p>

continued

ORGANISATION

Law Council of Australia
Ethical Standards for Mediators

EXCERPT FROM STANDARDS

Impartiality cont'd

Before the mediation begins, the mediator must disclose all actual and potential conflicts of interest known to the mediator. Disclosure must also be made if conflicts arise during the mediation.

After making disclosure the mediator may proceed with the mediation if all parties agree and the mediator is satisfied that the conflict will not preclude the proper discharge of the mediators duties.

Family Services Council Mediation Standards

2.3.2 Mediators have an obligation to maintain impartiality towards all parties at all times. Impartiality, or lack of bias towards the parties and the issues, implies a commitment to assist all parties to reach a mutually satisfactory agreement regardless of personal and/or cultural characteristics, background or performance at the mediation. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obliged to withdraw.

2.3.3 If at the time of referral a mediator is aware of any actual or potential conflicts of interest the mediator shall not accept the referral. Regulation 65 specifies the minimum requirements of mediators concerning conflicts of interest. The need to protect against conflicts of interest also governs conduct after mediation.

Family Law Regulations
Part 5, Division 2

65. (1) If, in relation to a person who is a party to a dispute that is the subject of mediation, or any other party to that dispute, a community mediator or private mediator:

- (a) has acted previously in a professional capacity (otherwise than as a family and child mediator, a family and child counsellor or an approved arbitrator); or
- (b) has had a previous commercial dealing; or
- (c) is a personal acquaintance;

the mediator may provide family and child mediation services to the person only if;

- (d) each party to the mediation agrees; and
- (e) the previous professional dealing (if any) does not relate to any issue in the dispute; and
- (f) the previous commercial dealing or acquaintance (if any) is not of a kind that could reasonably be expected to influence the mediator in the provision of his or her mediation services.

continued

ORGANISATION	EXCERPT FROM STANDARDS
<p>Family Law Regulations Part 5, Division 2 cont'd</p>	<p>(2) If a community mediator or private mediator has provided family and mediation services to a person, the mediator must not use any information acquired from the mediation:</p> <p>(a) for personal gain; or</p> <p>(b) to the detriment of any person.</p>
<p>Australian Commercial Disputes Centre Guidelines for Expert Determination Guidelines for Arbitration Guidelines for Commercial Mediation</p>	<p>Neutrality of Expert/Arbitrator/Mediator</p> <p>If the Expert/Arbitrator/Mediator becomes aware of any circumstance that might reasonably be considered to affect adversely his or her capacity to act independently or impartially, the Expert/Arbitrator/Mediator must inform the parties immediately. The Expert/Arbitrator/Mediator must in such circumstances terminate the proceedings, unless the parties agree otherwise.</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>5.1 The mediator shall maintain impartiality towards all participants at all times during the mediation process. Impartiality means freedom from favouritism or bias in word or action. The mediator shall not play an adversarial role and shall maintain a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.</p> <p>5.2 If the mediator believes or any one of the participants states that the mediator's background or personal experiences or relationships would prejudice the mediator's performance or detract from his/her impartiality, the mediator shall withdraw from the mediation unless all parties agree to proceed after full disclosure of all relevant facts relating to the issue of neutrality.</p> <p>If the mediator has at any time prior to the mediation provided legal, counselling or any other services or has had any social or professional relationship with any of the participants, he/she shall not proceed with the mediation. If after full disclosure, all parties to the mediation agree, the mediator may proceed.</p>
	<p>The mediator shall disclose any circumstances to the participants which may cause or have any tendency to cause a conflict of interest. In particular a mediator who is a partner or an associate of any legal counsel retained by either of the parties should not act as mediator without the fully informed consent of all the parties.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>NSW Community Justice Centres Code of Professional Conduct for CJC Mediators</p>	<p>Mediators will reveal any affiliations of a monetary, psychological, associational or authoritative nature they might have with any of the disputants, which might cause a conflict of interest or affect the mediator's perceived or actual neutrality in the performance of their duties. If any one of the mediators or any of the parties considers that a mediator's background might bias his or her performance, then the mediator will disqualify himself or herself from mediating.</p>
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p>	<p>Mediators should identify and reveal any associations with or prior knowledge they may have about, a party that might cause a conflict of interest or affect the perceived or actual neutrality of the mediator during a mediation session. If the mediator (or any of the parties) feel that their background could result in bias for or against a party, or that the mediator stands to gain in any way from the outcome of the mediation, that the mediator should disqualify himself or herself from mediating.</p> <p>Mediators are required to maintain a posture of impartiality towards all parties.</p>
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>4.1 A mediator must maintain impartiality towards all parties.</p> <p>4.2 A mediator must disclose promptly to the parties any circumstances which may constitute a possible bias, prejudice or impartiality and is under a continuing duty to disclose to the parties any such circumstances that might arise during the mediation.</p> <p>4.3 A mediator must not accept any gift, favour, loan, or any other item of value to the mediator personally or to the firm in which the mediator works, from a party, a lawyer or any other person involved in any pending or ongoing mediation.</p> <p>4.5 A mediator must disclose all monetary, psychological, emotional, associational or authoritative factors that he or she has with any of the parties or the subject of the dispute that may cause or have a tendency to cause a conflict of interest or affect the perceived or actual neutrality of the mediator in the performance of his or her duties and will request the parties' consent to proceed having made this disclosure.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>5.1 The mediator shall at all times maintain impartiality towards the parties.</p> <p>5.2 The mediator shall before and during the mediation process disclose to the parties any circumstances which may cause or have any tendency to cause a conflict of interest.</p> <p>5.3 A mediator who is a partner, employer or fellow employee of any practitioner, legal counsel or law clerk retained by either of the parties shall not act as mediator for the parties.</p> <p>5.4 A mediator shall not act in any capacity for either of the parties upon the conclusion of the mediation process save and except in situations which do not relate to the issues mediated between the parties and to which the parties agree.</p>
<p>WorkCover Conciliation Service (Vic) Code of Conduct & Protocols</p>	<p>The Conciliation Service will be impartial in its dealing with all parties: impartiality means freedom from favouritism and bias both in word, action and appearance and implies a commitment to equally assist all parties in reaching a mutually satisfactory resolution.</p>
<p>ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators</p>	<p>3.2.1 Parties' concerns and priorities are encapsulated in the agenda without bias towards any party.</p> <p>7.1.1 Contact and relationship with parties complies with agency /industry/ organisational policy.</p>
<p>Standards for Court-Connected Mediation in Victoria</p>	<p>4.2 The mediator has a duty of impartiality to the parties.</p> <p>4.3 The mediator should not behave in any way which displays favouritism or bias to either party.</p>

Termination and Settlement

<p>The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p>A negotiated settlement is generally the best result in any dispute.</p> <p>The commencement of arbitration proceedings should not be seen as a barrier to a negotiated settlement between the parties. Arbitrators should make this clear to the parties and should take whatever steps are practicable to encourage settlement at any stage during the proceedings if there seems some prospect of this being achieved.</p>
<p>Law Council of Australia Ethical Standards for Mediators</p>	<p>A mediator may terminate the mediation if the mediator considers that: (i) any party is abusing the process; or (ii) there is no reasonable prospect of settlement. If the mediation results in a settlement between the parties, the mediator should encourage the parties to record those terms of settlement in writing.</p>

<p>Family Law Regulations Part 5, Division 2</p>	<p>64. In providing family and child mediation services under the Act, a community mediator or private mediator:</p> <p>(c) must terminate the mediation if:</p> <ul style="list-style-type: none"> (i) requested to do so by a party; or (ii) the mediator is no longer satisfied that mediation is appropriate.
<p>Australian Commercial Disputes Centre Guidelines for Arbitration Guidelines for Commercial Mediation</p>	<p>11. The arbitration may be terminated by the handing down of an award or by the execution of a prior settlement agreement.</p> <p>12. The mediation may be terminated by the mediator if, after consultation with the parties the mediator forms the view that he or she will be unable for whatever reason to assist the parties to achieve a resolution of the dispute.</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>8.4 (i) Each of the parties and the mediator has the right to withdraw from mediation at any time and for any reason.</p> <p>(ii) If the participants reach a final impasse, the mediator should not prolong unproductive discussions which will result merely in a waste of costs to the participants.</p> <p>(iii) If mediation has terminated without agreement, the mediator should suggest that the parties obtain additional professional services as may be appropriate.</p>
<p>NSW Community Justice Centres Code of Professional Conduct for CJC Mediators</p>	<p>A mediator's satisfaction with the agreement is secondary to that of the parties.</p> <p>If the parties do not reach a mediated agreement, the mediators will suggest that, because of the deadlock, the negotiations should be terminated and will refer the parties to other means of dispute resolution.</p>
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p>	<p>It is suggested that a mediation should be terminated where a party is unwilling to honour mediator's basic guidelines; where one of the disputants is so seriously deficient in information that any ensuing agreement would not be based on informed consent; where domestic violence or fear of violence is suspected; where a party indicates agreement, not out of a free will, but out of fear of the other party; in cases involving child abuse or sexual abuse; where there is a 'serious personal pathology'; where the parties are hoping to gain some tactical or strategic advantage; where the parties are so bitter and conflict-ridden that they are unable to separate their own emotions and feelings from the actual dispute; or if the parties reach an agreement which the mediator believes is illegal.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>6.1 A mediator must terminate a mediation in the following circumstances:</p> <ul style="list-style-type: none"> 6.1.1 when a full agreement has been reached by the parties; 6.1.2 where the agreement the parties want to conclude is illegal in some respects; 6.1.3 when the parties have reached an agreement on some issues but an impasse on some others, and an adjournment is not appropriate or has been unsuccessful, at the same time discussing with the parties possible ways in which the unresolved issues may be conveniently dealt with; 6.1.4 where it becomes apparent that an agreement cannot be achieved out of the free will of the parties due to the threat of physical violence or some other power imbalance between the parties; 6.1.5 where it becomes apparent that one of the parties is not committed to the process and may rather be seeking to gain some tactical advantage in the dispute; 6.1.6 where the relationship of the parties is so bitter, violent or conflict-ridden that it is impossible to have them focus in any meaningful way on the issues in dispute. <p>6.2 A mediator may terminate a mediation in the following circumstances:</p> <ul style="list-style-type: none"> 6.2.1 where a party or his or her legal representatives are unwilling or unable to observe the mediator's procedural guidelines 6.2.2 where there is a major and material deficiency in the information revealed in the mediation; or 6.2.3 where the mediator forms the view that it is appropriate in all the circumstances.
<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>4.8. The mediator shall inform the parties that any of them or the mediator has the right to suspend or terminate the process of mediation at any time.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>WorkCover Conciliation Service (Vic) Code of Conduct & Protocols</p>	<p>If a mutually acceptable agreement is not possible, the Conciliation Officer may facilitate a referral to a Medical Panel; make Recommendations to the parties; or in the case of weekly payment disputes consider whether or not there is a “genuine dispute”, or give Directions for the commencement or reinstatement of payments for a period of time.</p>
<p>ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators</p>	<p>6.1.1 Outcomes are positive in direction, prioritised and represent parties’ feelings, needs and interests on resolved and unresolved issues.</p>
<p>Standards for Court-Connected Mediation in Victoria</p>	<p>6.1 The mediator should terminate the mediation if the mediator reasonably believes that the parties are abusing the process, that a miscarriage of justice is likely to eventuate or that there is no reasonable prospect of settlement eventuating.</p>

Professional responsibilities

<p>The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p>All members are expected to be of good standing within their own professions or callings and to abide by all ethical codes and customs proper to those professions. Members should regularly read Institute publications, including the journal and practice notes, other journals dealing with dispute resolution, and relevant textbooks. Members should attend Institute continuing educational activities.</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>3.3 It is the responsibility of solicitor mediators to engage in annual continuing mediation education as part of their CLE program to ensure that mediation skills are current and effective. 9.1 A mediator may, if the parties desire, act where another mediator is already employed. He/she may consult with the other mediator with the parties’ consent.</p>
<p>NSW Community Justice Centres Code of Professional Conduct for CJC Mediators</p>	<p>Mediators must carefully avoid any criticism of their co-mediator during mediation but can accept differences of opinion which will arise from time to time. The means adopted by the mediators in the resolution of any conflict which arises can be a useful learning experience for the disputants.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators</p>	<p>Mediators must not use their position for personal gain or advantage.</p> <p>Individual mediators have the responsibility to constantly upgrade their skills and theoretical grounding and are expected to seek further development of their skills and knowledge in each year of practice.</p> <p>Mediators have a responsibility to offer each other constructive feedback on their performance as part of their debriefing at the conclusion of a mediation session. It is not acceptable to criticise a co-mediator in front of the parties. If the difference of opinion is very serious, mediators should call a short break while they discuss how to proceed. Mediators have a responsibility to alert program staff to any concerns about the performance of a co-mediator.</p>
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>8.1 A mediator may, if all of the parties to a mediation agree, act where another mediator has already been engaged. He or she may consult with the other mediator with the consent of all the parties.</p> <p>8.2 A mediator may report any unethical conduct in a mediation by a solicitor for one of the parties to the President of the Queensland Law Society.</p>
<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>8. A mediator may co-mediate with any person whether or not that person is a mediator as defined in these guidelines.</p>
<p>ACT Community Services and Health Industry Training Advisory Board ACT Competency Standards for Mediators</p>	<p>7.2.1 Self evaluation is undertaken in conjunction with supervisors and/ or peers.</p> <p>7.2.2 Open and evaluative feedback is given to co-mediator.</p>
<p>Standards for Court-Connected Mediation in Victoria</p>	<p>2.3 A person is not eligible to be a mediator unless they engage in continuing education.</p> <p>2.11 The mediator should not use the mediation to promote his or her legal practice.</p> <p>5.5 The mediator is an officer of the court when bona fide acting pursuant to the referral to mediation.</p> <p>5.6 The mediator shall not use any information gained from the mediation for private gain.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>The Institute of Arbitrators & Mediators Australia Practice Note 2 - Professional Conduct</p>	<p>Agreement on fees The arbitrator or mediator must be paid fees and expenses by the parties involved. Members should therefore advise the parties to a dispute of their scale of fees, including cancellation fees, if any, not later than the Preliminary Conference.</p>
<p>Law Council of Australia Ethical Standards for Mediators</p>	<p>A mediator must fully disclose his or her fees to the parties.</p>
<p>Australian Commercial Disputes Centre Guidelines for Expert Determination Guidelines for Arbitration Guidelines for Commercial Mediation</p>	<p>The parties agree to equally share all costs relating to the assistance provided by ACDC including room hire, ACDC's registration fee, any further administration fee, and the arbitrator's/expert's/mediator's fee for all the time expended by ACDC and the arbitrator/expert/mediator in the conduct of, or in connection with, the arbitration/expert determination/mediation and any other disbursements.</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>4.7 The mediator should explain the fees for mediation and reach an agreement with the parties regarding payment.</p>
<p>Queensland Law Society Standard of conduct for Solicitor mediators</p>	<p>3.1.6 Unless the circumstances otherwise require or the parties consent, the mediator will ensure that the mediation fees are explained and an agreement reached with the parties regarding payment prior to the mediation commencing.</p>
<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>4.3 The mediator shall explain the fees to be charged for mediation and any related costs and shall agree with the parties on how the fees will be shared and the manner of payment.</p>
<p>Standards for Court-Connected Mediation in Victoria</p>	<p>3.15 The mediator should discuss the costs of the process with the parties and the arrangements for payment of those costs. The mediator should stress that there is no relation ship between the fees charged for a mediation and the outcome of the mediation.</p>

ORGANISATION	EXCERPT FROM STANDARDS
<p>Family Law Regulations Part 5 Division 2</p>	<p>Qualifications and Training</p> <p>(1) Subject to regulation 61, and except as provided by subregulation (3), a person may provide family and child mediation as a community mediator only if the person:</p> <ul style="list-style-type: none"> (a) has been awarded an appropriate degree, diploma or other qualification by a university, college of advanced education or other tertiary institution of an equivalent standard: and (b) has completed at least 5 days training in mediation, including at least 1 training course of a duration of at least 3 days; and (c) has engaged in at least 10 hours of supervised mediation in the 12 months immediately following completion of that training. <p>(2) An appropriate degree, diploma or other qualification is one that represent:</p> <ul style="list-style-type: none"> (a) a course of study that is, or is the equivalent of, at least 3 years of full time study (i) in law; or (ii) in a social science (for example, psychology or social work); or (iii) that includes the equivalent of 2 full time years study in a social science; or (b) a course of study that is, or is the equivalent of, at least 1 year of full time study in: (i) mediation; or (ii) dispute resolution.
<p>Australian Commercial Disputes Centre Guidelines for Expert Determination Guidelines for Arbitration Guidelines for Commercial Mediation</p>	<p>Upon agreement to arbitrate/seek an expert determination/mediate the ACDC will send the parties career details of appropriately qualified arbitrators/experts/mediators.</p>
<p>NSW Law Society Revised Guidelines for Solicitors who act as Mediators</p>	<p>3.1 No solicitor shall act as a sole mediator unless he/she has satisfactorily completed an approved course and has had appropriate mediation experience or such experience as may be approved by the Dispute Resolution Committee of the Law Society of New South Wales.</p>

ORGANISATION	EXCERPT FROM STANDARDS
Queensland Law Society Standards of Conduct for Solicitor Mediators	3.1.1 Unless the circumstances otherwise require or the parties consent, the mediator will ensure that he or she is adequately trained and is committed to the concept of further education and training in the field of mediation.
Alternative Dispute Resolution Branch, Queensland Department of Justice and Attorney-General Code of Ethics for Mediators	Mediators learn their skills through their initial training, practical experience, in-service training and supervision.
Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators	9.1 The Law Society may approve persons to act as mediators who have undertaken an approved course and have been admitted as a legal practitioner in Australia.
Standards for Court-Connected Mediation in Victoria	2.1 Mediators should file at Court a document setting out their qualifications, experience and expertise.

**ADR education and training
offered by tertiary institutions**

APPENDIX 2 — ADR education and training offered by tertiary institutions

What follows is a summary of short courses and postgraduate awards available through Tertiary Institutions.

Many Universities offer subjects in dispute resolution as part of a Bachelor Degree. These have not been included here, except in the case of the subject Commercial Alternative Dispute Resolution offered by Monash University (because upon completion of the subject, graduates will satisfy the requirements of the Victorian Law Institute for enrolment on the panel of eligible mediators).

Bond University

The School of Law offers two postgraduate qualifications in dispute resolution.

- Masters in Dispute Resolution

Subjects that may form part of a specialist Master of Laws include: Theory and Principles of Dispute Resolution; Negotiation; Mediation; Dispute Systems Design; Chinese Negotiation; International Commercial Arbitration; Commercial Arbitration; Construction Law & Dispute Management; Environment & Planning Dispute Resolution; Individual Study in Law and Family Mediation - Theory & Skills; Individual study in an area of Conflict Management.

- Diploma in Dispute Resolution (4 subjects)

The Dispute Resolution Centre, at the School of Law, runs a variety of short courses and subjects to make up undergraduate and postgraduate courses, apart from those listed above, these include:

- Alternative Dispute Resolution, Undergraduate - 14 weeks duration. This can be taken as a subject for an undergraduate law degree or as a stand alone short course;
- Chinese Negotiation, Postgraduate - 6 days duration;
- Basic Mediation course, and Foundation Family Mediation Course - 3 days duration, in conjunction with Australian Institute of Family Law Arbitrators and Mediators (“AIFLAM”);
- Commercial Negotiation Strategies for Lawyers - 2 days duration;
- Negotiation, Postgraduate - 6 days duration;
- Advanced Mediation Course, short course - 4 days duration, in conjunction with AIFLAM;
- Theory and Skills of Family Mediation, short course or postgraduate - 5 days duration, (satisfies regulations under the Family Law Act);
- Advanced Commercial Negotiation, Postgraduate - 5 days duration
- Family Arbitration, short course - 3 days duration,
- Advanced: Representing Clients in Negotiation and Mediation, short course - 2 days duration.

Charles Sturt University	<p>The School of Financial Studies offers: a Graduate Certificate in Commercial Dispute Resolution. by distance education. Subjects are the same as those studied in the Graduate Certificate in Dispute Resolution, above.</p>
Griffith University	<p>The Law School offers an Alternative Dispute Resolution Clinic in conjunction with the ADR Branch of the Queensland Department of Justice and Attorney General. The subject aims to use all three approaches referred to in the Australian Law Reform Commission's paper Rethinking Legal Education and Training, namely "imparting descriptive information about processes, theoretical information about conflict and dispute management as well as skills based experiential learning programs (sic)". The course involves an intensive one week teaching workshop, a seminar program and placements with the ADR Branch of the Queensland Department of Justice and Attorney General.</p>
La Trobe University	<p>The Faculty of Law and Management offers several postgraduate courses in dispute resolution.</p> <ul style="list-style-type: none"> • The aim of the Graduate Certificate in Conflict Resolution is to provide an integrated program of theory and practical skills, particularly in negotiation and mediation. • The Graduate Diploma in Conflict Resolution provides a program of theory, practical skills and research in conflict resolution - particularly negotiation and mediation. • The Graduate Diploma in Family Law Mediation is designed to meet and exceed the requirements of the 1996 amendments to the Family Law Regulations regarding the qualifications for family law mediators operating under the Family Law Act. • The Graduate Certificate in Conciliation and Ombuds Studies provides a theoretical background and skills training in dispute resolution within a variety of regulatory, statutory and administrative frameworks.
Monash University	<p>The Law Faculty offers a subject called</p> <ul style="list-style-type: none"> • Commercial Alternative Dispute Resolution. This subject covers the process and principles of mediation. Participants gain practical skills through simulation exercises, videos and modelling. Upon completion of the subject, students will satisfy the requirements of the Law Institute for enrolment on the panel of eligible mediators (in Victoria).

Queensland University of Technology

The Law School offers a three day

- Mediation Skills Training Course. This course is designed for people who are interested in practising mediation. The course looks at the theoretical and practical sides of mediation, from the anatomy of a mediation through to the development of skills and participation in three mediation sessions (two sessions as a mediator). The course is recognised by the Queensland Law Society and the Bar Association (Qld). Participants who successfully complete the course and who have been legal practitioners for at least five years (and hold current membership of the law society) may apply to the Queensland Law Society to become a Law Society Approved Mediator.

RMIT University

The university offers students the opportunity to undertake

- “vocational specialisation” in Alternative Dispute Resolution. This is a four subject sequence comprising - Alternative Dispute Resolution, Mediation, Cross Cultural Practice and Family Law.

University of Adelaide

The University offers:

- a Professional Certificate in Arbitration and Mediation, which was jointly developed by the University and the Institute of Arbitrators and Mediators Australia. The year long program looks at arbitration, mediation and alternative dispute resolution and their role in the legal system. On completion, participants qualify to practise as arbitrators.

The Professional Certificate is co ordinated by the University of Adelaide and offered in conjunction with Law Schools throughout Australia in Queensland, NSW, ACT, SA, WA and Tasmania. (See entry in Appendix 3 under “The Institute of Arbitrators and Mediators Australia”).

University of Melbourne

The Faculty of Law runs:

- a Graduate Diploma in Dispute Resolution and Judicial Administration. Participants choose four subjects from: The Administration of Criminal Justice; Advanced Civil Procedure, Alternative Commercial Dispute Resolution in Asia; Alternative Dispute Resolution; Commercial Dispute Resolution; International Dispute Resolution; Insurance Litigation; Judicial Administration; Medical Litigation and Principles of Public and International Law. “Alternative Dispute Resolution” is an intensive 5 full day subject.

University of Queensland	<p>The Law School offers</p> <ul style="list-style-type: none"> • “Mediation” - a five day intensive course “to equip students with the skills to mediate disputes and educate participants in the theory of mediation”. The course is highly interactive and skills focussed and participants are required to submit written assessment tasks as well as to participate in a mediation simulation. <p>Participants who successfully complete the course and who have been legal practitioners for at least five years (and hold current membership of the Queensland Law Society may apply to the Law Society to become a Law Society Approved Mediator.</p>
University of South Australia	<p>The Division of Education, Arts and Social Sciences, University of South Australia, offers three courses in dispute resolution which nest into each other:</p> <ul style="list-style-type: none"> • Graduate Certificate in Mediation (Family). Applicants need an undergraduate degree or equivalent. Two of the three subjects are taught in five day blocks in semester breaks - ‘Mediation Process, Concepts and Skills’ and ‘Advanced Family Mediation Theory and Practice’. The third subject, ‘Family Law for Mediators’ is available in external or internal mode. The course is taught over two semesters and is available to local, interstate and overseas students. It is equivalent to a full semester load but can be taken part-time. In 2001 this course may be expanded to include a specialisation in workplace mediation. Relationships Australia (SA) independently offers 20 weeks of practice experience to graduates of this course, but does not offer accreditation or a qualification. • The Graduate Diploma in Conflict Management (one year full-time) and the Masters of Conflict Management (one and half years full time). Applicants need an undergraduate degree or equivalent. Many of the subjects are taught in five day blocks in semester breaks enabling students to complete the courses from a distance. These are generic courses - students can choose from core subjects such as: ‘Conflict Theory’, ‘Mediation Process, Concepts and Skills’, ‘Communication and Conflict’, ‘Community and Restorative Justice’, ‘Culture and Disputing’ and ‘Interpersonal Violence’ - and can also select other subjects according to specialisation or field of practice (e.g. family mediation, workplace/labour relations, children in the legal process, community mediation, international relations). A supervised practice placement is optional in both courses as part of the qualification, with supervision offered in a wide range of agencies including (to date): Relationships Australia, Centacare, the Child Support Agency, Family Court of Australia, and the Equal Opportunity Commission. A minor thesis and research subject option is available in the Masters course. Both courses can be taken part time.

**University of Southern
Queensland**

The “Career Development unit” in Dispute Resolution comprises four modules: Introduction to Dispute Resolution; Negotiation; Mediation - theory and practice and Introduction to Dispute Systems Design - theory and practice. The Handbook describes the unit as “... an excellent course for those who [wish] to be part of the culture change which is needed to deal successfully with the increasingly complex social dilemmas faced by contemporary society...” The introductory module is eight weeks long, while the remaining modules run for four weeks each.

**University of Technology,
Sydney**

The Faculty of Law offers two postgraduate courses in dispute resolution -

- the Graduate Certificate in Dispute Resolution and
- the Master of Dispute Resolution.

Both programs comprise a mixture of experience based learning and lectures. Subjects are taught in intensive block mode over four full days of lectures, workshops and seminars.

Applicants are required to have a Bachelor’s degree from an Australian University (or an equivalent tertiary qualification). Applicants may be conditionally admitted if they “demonstrate equivalent work experience and the ability to undertake projects at an advanced level”.

**University of Western
Sydney, Macarthur**

The Faculty of Arts and Social Sciences at the University of Western Sydney Macarthur offers the following multi-disciplinary “skills based” post graduate awards in mediation:

- Graduate Certificate in Mediation; and
- Graduate Diploma in Mediation Practice.

Applicants for the Graduate Diploma need an appropriate undergraduate degree, and applicants for the graduate certificate need an appropriate undergraduate degree or an equivalent of two or three year qualification from TAFE. The Graduate Diploma has two practice-based subjects (one per semester) enabling students to specialise in a career specific stream (e.g. family mediation, commercial mediation or community mediation). The Graduate Certificate consists of the first four subjects of the six subjects Graduate Diploma - ‘Principles, Issues and Directions in Mediation Theory’, ‘Ethics’, ‘Roles and Responsibilities in Mediation Practice’, ‘Applications of Mediation and Models Design’, ‘The Mediator in Practice’, ‘Mediation Training’ and ‘Advanced Mediation Training’.

**ADR education and training
offered by community and
other organisations**

APPENDIX 3 — ADR education and training offered by community and other organisations

The Accord Group

The Accord Group offers courses around Australia and in Asia. The courses are taught by full-time ADR specialists and include: Introductory Mediation Course; Mediation Training Course; Advanced Mediation Workshop; Commercial Mediation Training Course (this course meets the necessary requirements for people seeking accreditation as mediators by various law societies in Australia), Personal Injury Mediation, Mediation and Y2K disputes, and The Art of the Deal (a principled negotiation training course).

The Accord Group also conducts in-house training courses in mediation, negotiation and conflict resolution. Their clients include KPMG, the University of Sydney, the Hong Kong Equal Opportunity Commission, Austel and John Fairfax Publications.

Australian Commercial Disputes Centre

The Australian Commercial Disputes Centre (ACDC) regularly conducts mediation training courses in addition to providing case management services, consulting services in ADR training and dispute resolution system design, and general information about all aspects of alternative dispute resolution. ACDC also administers the Credit Union Dispute Reference Centre.

Current open mediation training courses run by ACDC include Commercial Mediation, Workplace Grievance Mediation, Local Government Planning & Development Mediation, and a one day Advanced Skills Seminar. These courses are held in-house if required. ACDC also offers training courses in dispute avoidance strategies and techniques.

Participants who successfully pass the evaluation component of ACDC's mediation training course receive a Certificate of Mediation.

Australian Institute for Relationship Studies (Relationships Australia)

Relationships Australia (NSW) offers four courses in mediation:

- **Course in Mediation:** (VETAB accredited) This course develops a basic theoretical understanding of mediation as well as providing a practical application of the mediation process. It runs for 16 weeks, including a 20 hour placement and 116 hours of tuition. Assessment is by set reading assignments and mediation practice. Upon successful completion of the course, graduates may progress to further study at the Post Graduate Certificate or Post Graduate Diploma level;
- **Family Mediation Training:** this course is suitable for lawyers, social workers and psychologists (or others with appropriate tertiary qualifications) who want to practise as family and child mediators. The course conforms to the requirements in the Family Law Act and Regulations, and upon completion, graduates may undertake 10 hours of supervised mediation (see below) to enable them to practise in the Family Law area;
- **Supervised Mediation:** RA offers 10 hours of supervision of mediations in order to bring participants within the category of people who may practise as family and child mediators;
- **Formal supervision for mediators:** RA offers formal supervision of practising mediators. This course is a way for practising mediators to maintain control over the quality of their practice, and, upon satisfactory completion of 10 hours of supervised mediation, mediators may satisfy the requirements under the Family Law Act and Regulations to become family and child mediators.

Community Justice Centres (NSW)

The Community Justice Centres (CJC) offer training in mediation to those people who are committed to practising as Community Justice Centre mediators. The training is done on an 'as needs' basis through the directorate and under the supervision of the local CJC co-ordinators. Participants are selected, trained and supervised by the CJC coordinators.

- **The Basic Training Course** involves 78 hours of training over a period of 6-8 weeks. Assessment is through an ongoing system of supervision and feedback. Successful completion of the course means trainees are eligible for accreditation by the Minister under the Community Justice Centres Act 1983. Trainees must, in addition to completing the course, undertake a number of mentored sessions under the supervision of experienced and trained mentors. Mediators must be available to mediate on an as needs basis, and meet re-accreditation requirements.

Community Mediation Services of South Australia

The Community Mediation Services of South Australia (CMS of SA) selects applicants to undertake its mediation training course in accordance with confidential trainee selection guidelines. Those trainees who are selected participate in forty five hours of class work (theory and role play) in the following areas:

- Community Mediation Services; Alternative Dispute Resolution / Intake options; Legal and Technical Information; Communication Skills; Conflict Analysis and Resolution Strategy Theory; Preliminaries to Mediation; The Mediation Process; Mediation Strategies; Generation and Negotiation of Options; Agreements and Practice and Review.

The CMS of SA may select people who have successfully completed its training course to practise as a mediator at the CMS Centres.

Community Mediation Service Tasmania

The Community Mediation Service of Tasmania (CMST) provides training in:

- Family and Child Mediation: to gain a Certificate of Attendance participants must successfully complete a 5 day Family Mediation Course available to people with qualifications in Law or Social Science and an additional 12 hour course of supervised roleplay practice. To gain a Certificate of Completion with supervised practice both courses must be completed.
- Mediation and Conflict Resolution Skills Course: to gain a Statement of Attainment participants must complete a five day course and an additional 2 day Skills Audit. CMST hopes to be a nationally registered training organisation in January 2000. This is a nationally accredited course.
- National Communication Skills Modules (including Dealing with Conflict).

Department of Justice and Attorney General Alternative Dispute Resolution Branch: QLD Dispute Resolution Centres

To become a mediator with the Dispute Resolution Centres (DRC), applicants must go through a selection process involving group and individual interviews, then complete a training course on the techniques of the mediation process, run by the DRC. The course generally runs for a week, and participants are assessed by their peers and by the trainers. The Department's Director of Courts advises the Attorney General on who should be accredited to practise as mediators with the DRC.

Dispute Settlement Centre of Victoria	<p>The Dispute Settlement Centre of Victoria (DSC) trains its own mediators (although it has not needed to run any courses in the last two to three years).</p> <p>The DSC selects participants for its training courses on the basis of their life experience and ability to communicate (after assessment at group and individual interview). There is no requirement that participants have a Bachelor Degree in Law or Social Science. The training course run by the DSC is 60 hours long, and covers the theory and practice of mediation. Participants are also required to engage in self reflection (how they deal with conflict themselves).</p> <p>The DSC has adopted the ACT competency standards.</p>		
The Institute of Arbitrators and Mediators Australia	<p>The Institute of Arbitrators and Mediators Australia (IAMA) offers a one-day introductory arbitration course. The course is conducted at Chapter level as a preface to the General Arbitration course. Attendance at the introductory course is not a prerequisite to attending the General Course although it is useful, particularly for non-lawyers, to understand what may be new terminology and areas of law. The program includes the following topics and panel discussion sessions; the Commercial Arbitration Act, an introduction to the law of contract, scope of references to arbitration, the preliminary conference and the arbitrator's contract with the parties, arbitration procedures and the duties of the arbitrator and the parties.</p> <p>The Office of Continuing Education of the University of Adelaide and the IAMA jointly developed a Professional Certificate in Arbitration and Mediation which was piloted in 1997.</p> <p>The new courses have been designed to diffuse course material over a 13 week period that allows students adequate time to reach a better understanding of its content. The courses also provide structured practical exercises that assess a student's understanding of substantive and procedural matters, and their general knowledge of the process itself.</p> <p>The courses are also being developed in distance-mode. It is envisaged that distance-mode programs will be supported by seminars and tutorials provided by Chapters Committees. In the case of regional and international programs, the courses will be delivered by technological means including mail, teleconferencing, video conferencing etc.</p> <p>The courses will be run in the following universities :</p>		
SA	University of Adelaide (coordination role)	NSW	University of Technology Sydney (UTS)
VIC	Deakin University	QLD	Queensland University of Technology (QUT)
ACT	Australian National University (ANU)	WA	University of WA
Tasmania	University of Tasmania		

continued

**The Institute of Arbitrators
and Mediators Australia**
cont'd

Chapters of the IABA conduct a 'pupillage' program for those members wishing to obtain the necessary practical experience to assist them prior to attending a Grading Interview.

Chapters conduct continuing educational activities on a regular basis including seminars, forums, lectures, tutorials, moot arbitrations, etc.

A Master Class is organised each year in each Chapter for Grade 1 and Grade 2 arbitrators. The Class is interactive with participants submitting a question, statement or issue (prior to the meeting) to be considered and deliberated by the group in open forum. Each arbitrator's performance/contribution to the Master Class is assessed and is taken into consideration by the Review Committee at each triannual review.

Mediation training courses of a minimum three day duration are conducted in each Chapter each year. The course is followed by a one day mediation accreditation day where prospective mediators are required to conduct a simulated mediation and to participate in two additional mediation simulations (as a party to the dispute). An examination on ethical issues is also included as a part of the accreditation day assessment.

The IAMA has recently developed a training course for Expert Determination to supplement the Institute's new Expert Determination Rules. These courses are also held in each Chapter each year and are conducted over two one-half days or one full-day.

The IAMA grades arbitrators under the rules of the IAMA:

- Grade 1 Those with wide experience in arbitration who are able to deal with large and/or complex arbitrations.
- Grade 2 Those who are judged to be able to conduct arbitrations of medium size or which are straightforward within the arbitrators fields of expertise.
- Grade 3 Those with less experience who are judged to be able to conduct small arbitrations which may call for knowledge in restricted or specialised fields.

Participants will have the opportunity to practice the following skills: hearing the story, isolating the issues, mapping the conflict, setting the agenda, identifying common ground, exploring the options, managing neutrality, utilising cooperative power, managing emotions, creating agreements, reality testing agreements, writing the agreement.

'Lawyers engaged in Alternative Dispute Resolution'

'Lawyers engaged in Alternative Dispute Resolution' (LEADR) offers training in mediation, negotiation and other forms of dispute resolution. Its core training involves:

- The LEADR Mediation Workshop which is conducted over 4 days and provides an introduction to the theory and skills in mediation through lectures, discussions, demonstrations and roleplay. Where participants do not require accreditation as a LEADR mediator they may arrange to attend the first three days of the workshop only.
 - The LEADR Advanced Mediation Workshop is designed for experienced mediators and concentrates on advanced theory and principles of mediation.
 - Short courses on skills for mediators and negotiators. These sessions are usually conducted over a three hour period and provide updates and refreshers on skills for interest-based dispute resolvers.
 - Personality, mediation and mediators is a one day workshop which looks at the mediator's personality type (as classified by Myers - Briggs and Keirsley and Bates) and how that can influence the process.
 - Lawyers and Advisers in Mediation is a one or two day workshop designed to inform lawyers and other professional advisers about the process and expectations of mediation so that they are well prepared to advise their clients on the suitability of mediation in their particular circumstances. Preparation tools for advisers to assist their clients throughout a mediation are also discussed.
 - Special courses designed specifically for particular clients.
- LEADR is also an approved agency within the meaning of the Mediation Act (ACT). LEADR maintains a panel of mediators registered under this Act.

Resolution Centre (ACT)
(formerly the Conflict Resolution Centre)

The Resolution Centre (ACT) offers mediator training in three stages:

- Module 1: Mediation Process: This module concentrates on the process and structure of mediation and adopting the role of mediator. Upon successful completion of the module participants should be able to plan and prepare a mediation, establish a mediation climate and create a framework for mediation;
- Module 2: Mediation Practice: The module looks at facilitating negotiations and mediation strategies and techniques. Upon successful completion, participants should, in addition to the competencies in module 1, display an ability to facilitate exploration, promote negotiation and identify outcomes;
- Module 3: Supervised mediation/ provisional accreditation: This module is available only to those who can gain a placement in a mediation agency, or who have their own existing client base. This stage involves on the job training and supervision. Upon successful completion, participants should demonstrate competence in maintaining standards in a professional or agency setting.

UNIFAM

UNIFAM offers 3 courses in mediation:

- Four day training in mediation: This is a four day intensive practical training course. Participants who successfully complete the course “will be able to use the mediation model in a variety of settings”. The course will accredit participants with a law or social science degree to mediate in the family law context within the meaning of the Family Law Act and Regulations;
- Advanced microskills for mediators: This is a one day training course for mediators with a minimum of 12 months experience. The course explores the skills of interventive questioning and reframing.
- Peer mediation: yes they can solve problems at school without violence! This course is designed for those who work with young people in schools or youth centres and concentrates on how to develop and implement a peer to peer based dispute resolution program.

ADR accreditation requirements

APPENDIX 4 — ADR accreditation requirements

Australian Commercial Disputes Centre

The Centre issues a “Certificate of Accreditation” to applicants who have completed the Centre’s training course and who successfully complete:

- (i) a one and a half hour role play simulation;
- (ii) a short oral exam; and
- (iii) a written exam.

Community Justice Centres NSW

The Community Justice Centres Act 1983 provides that the Minister may accredit a person as a mediator for the Community Justice Centres on the recommendation of the Director, such recommendation to be in accordance with the guidelines, namely:

- (i) Applicants must have completed an approved training course on the theory and practice of mediation (attendance at a minimum of 80% of training sessions is required);
- (ii) trainees must be assessed as proficient in all phases of the mediation process on at least two occasions;
- (iii) Trainees must demonstrate an understanding of the philosophy of the Community Justice Centres and the provisions of the Community Justice Centres Act; and
- (iv) Trainees must also demonstrate a commitment to the development of mediation skills and undertake to devote a reasonable amount of time for mediation and continuing training.

First time accreditation is for one year, and three years after that. Accreditation may be revoked by the Minister where the mediator has not mediated for 12 months, or has failed to satisfy the criteria above, or has demonstrated a significant lack of cooperation with the Centre.

Dispute Resolution Centres QLD

The Dispute Resolution Centres Act 1990 is based on the NSW CJC Act. It allows for the Minister to accredit mediators on the recommendation of the Director of a Dispute Resolution Centre, such recommendation to be made in accordance with the DRC Council’s policy, guidance and directions.

Family Law Regulations
(CTH)

There are special requirements under the Family Law Regulations in relation to the provision of family and child mediation

Community mediators and private mediators - qualifications, training and experience

60. (1) Subject to regulation 61, and except as provided by subregulation (3), a person may provide family and child mediation as a community mediator or private mediator only if the person:
- (a) has been awarded an appropriate degree, diploma or other qualification by a university, college of advanced education or other tertiary institution of an equivalent standard; and
 - (b) has completed at least 5 days training in mediation, including at least 1 training course of a duration of at least 3 days; and
 - (c) has engaged in at least 10 hours of supervised mediation in the 12 months immediately following completion of that training.
- (2) An appropriate degree, diploma or other qualification is one that represents:
- (a) a course of study that is, or is the equivalent of, at least 3 years of full time study:
 - (i) in law; or
 - (ii) in a social science (for example, psychology or social work); or
 - (iii) that includes the equivalent of 2 full time years study in a social science; or
 - (b) a course of study that is, or is the equivalent of, at least 1 year of full time study in:
 - (i) mediation; or
 - (ii) dispute resolution.
- (3) Subject to regulation 61, a person may provide family and child mediation if the person has provided mediation of that kind for a total of at least 150 hours since 11 June 1991, of which at least 50 hours has been provided since 11 June 1994, and:
- (a) the person:
 - (i) enrolls in a course of study of a kind described in subregulation (2) before the end of 31 August 1998; and
 - (ii) is not excluded from completing the course by reason of the person failing to pass any of its requirements; and

continued

Family Law Regulations
(CTH) cont'd

- (iii) completes the academic requirements of the course at, or before, the end of 7 academic years of the relevant institution; or
- (b) the person provides the mediation through a non-profit organisation:
 - (i) that is funded wholly or partly by the Commonwealth, or by a State or Territory; and
 - (ii) a substantial part of the functions of which is the provision of family and child mediation services.
- (4) A person described in paragraph (3)(b) must not provide family and child mediation after 31 August 1998, unless the person is otherwise eligible to provide the mediation under this regulation.
- (5) In this regulation:
 - “supervised mediation” means mediation that is supervised by:
 - (a) an experienced court mediator or community mediator; or
 - (b) a person who is the regular provider of a training course of a kind described in paragraph (1)(b); or
 - (c) a person who is:
 - (i) an experienced dispute mediator; and
 - (ii) a practising member of:
 - (A) the Law Society of a State or Territory; or
 - (B) the Bar Association of a State or Territory; or
 - (C) the Australian Psychological Society Limited; or
 - (D) the Australian Association of Social Workers Limited.

Arbitration

The Institute has a Register of Practising Arbitrators, which identifies members who are available to act as arbitrators and who are, in the opinion of the Council, suitably qualified to act as arbitrators. Only members of the Institute may apply to be graded and registered.

Any member seeking grading and entry on the Register of Practising Arbitrators must:

- (i) make a written application for grading and listing on the panel on which the applicant may consider that she or he is qualified to be listed and provide details of qualifications and experience in the applicant's profession and in the field of arbitration;
- (ii) satisfy the Council that she or he has the academic knowledge and experience appropriate for an arbitrator (that is, by completion of a University Course approved by the Council, or by examination or by other qualification);
- (iii) be interviewed and recommended by a committee appointed by Council and provide relevant information to the committee for the purpose of assessment.

Assessment is based on the applicant's judicial capacity, decision making capacity, personality (ability to relate to people), attendance at and satisfactory completion of a University Course approved by Council, or of the Institute's general and advanced courses, qualifications, standing in her or his field of expertise, experience as an arbitrator, experience as a court appointed expert or referee, experience as an expert witness, experience as a lawyer, experience as a pupil, contract administration experience, knowledge of contract documents and their application, knowledge of arbitration procedures and laws, knowledge of substantive laws and satisfactory completion of grading examinations.

Mediation: Mediation Accreditation Policy

The Institute has a published List of Mediators. Applicants must:

- (i) be a member of the Institute;
- (ii) have successfully completed a recognised mediator training course (for example, courses run by the IAMA, Bond University, the Australian Commercial Dispute Centre and LEADR) with a minimum duration of three days;
- (iii) successful conduct of at least one simulated or actual mediation (may be included in or held in conjunction with (ii));
- (iv) successful completion of an examination on mediation topics (may be included in or held in conjunction with (ii));
- (v) professional interview and report ; and
- (vi) provision of two favourable independent references.

continued

<p>Institute of Arbitrators and Mediators Australia</p>	<p>Mediation: Mediation Accreditation Policy cont'd Accreditation of mediators will be reviewed on a three yearly basis. Criteria for maintaining accreditation are:</p> <ul style="list-style-type: none"> (i) conduct of at least three mediations in the preceding three year period; and (ii) demonstration of continuing professional development/ skills training; and (iii) professional interview and report where there are any negative reports or complaints received during the review period.
<p>Law Institute of Victoria Specialist Accreditation in Mediation for Victorian Solicitors</p>	<p>Full members of the Law Institute of Victoria who hold a current practising certificate and who are engaged in legal work may apply to the Institute for accreditation as a mediator. Applicants are assessed on their knowledge of rules and practices relating to the powers and duties of a mediator and issues such as confidentiality, appropriate levels of intervention in the mediation process and liability of mediators. Applicants are also expected to have a knowledge of any relevant policy or code of practice of the Law Institute of Victoria or the Law Council of Australia. Applicants must take home a written exam (conducted over a weekend) and participate in a simulated mediation in the role of mediator.</p>
<p>Law Society of NSW Guidelines for those involved in Mediations: mediation accreditation</p>	<p>For practitioners to be accredited as mediators by the NSW Law Society they need to have satisfactorily completed an approved course and have appropriate mediation experience.</p> <p>1. "An approved course" is one which satisfies the following criteria:</p> <ul style="list-style-type: none"> (a) No less than 50% of the course involves skills based training which should generally include at least two simulated mediations where each participant acts as mediator. (b) An evaluation component to enable the trainers to assess each participant. (c) A course length of not less than 4 days or 28 hours. (d) For those solicitors who have already undertaken courses, approved courses include, as at the date hereof, those courses conducted by the following organisations:

continued

Law Society of NSW

Guidelines for those involved
in Mediations: mediation
accreditation
cont'd

- (i) Australian Commercial Disputes Centre (ACDC)
 - (ii) BOND University (Qld)
 - (iii) CDR Associates (Colorado USA)
 - (iv) Community Justice Centres
 - (v) Family Mediation Centre (UNIFAM)
 - (vi) Lawyers Engaged in Alternative Dispute Resolution (LEADR)
 - (vii) Marriage Guidance Council
 - (viii) University of Technology, Sydney
 - (ix) other training courses approved by the Dispute Resolution Committee from time to time.
2. “Satisfactory Completion” means that the solicitor has been formally assessed during the training course as able to act as a sole mediator.
3. “Appropriate mediation experience” means that the solicitor has conducted at least one co-mediation with an experienced mediator or has undertaken simulated experience as a mediator after the initial training course.
4. Factors which the Dispute Resolution Committee would take into account when exercising its discretion to approve experience other than as in 3 above include any one or more of the following:
- (i) experience in representing parties at a mediation;
 - (ii) regional factors, eg isolation;
 - (iii) relevant legal experience;
 - (iv) public interest factors such as urgency.

Law Society of Queensland
How to Become a Law Society Approved Mediator (LAM)

To successfully become a Queensland Law Society accredited mediator applicants must have:

- (i) current membership with the law society;
- (ii) legal practitioner for at least five years; and
- (iii) attended a training course approved by the Society.

An “approved training course” is one that

- (i) comprises at least 24 contact hours;
- (ii) includes a theoretical background to mediation and negotiation as well as practical training sessions;
- (iii) is taught by at least two mediators who have relevant theoretical and practical background;
- (iv) involves each participant in at least two simulations (or equivalent) as the mediator and (v) in at least one simulation, the participant is observed by a tutor who is able to debrief on an individual or group basis with the participant.

Course that are conducted at the following organisations have been approved by the Law Society:

- Bond University School of Law
- Dispute Resolution Centre
- Institute of Arbitrators
- LEADR
- Mediate Today and the ADR Branch (Department of Justice)
- Queensland University of Technology three day course
- The Accord Group
- The University of Queensland Law School

<p>Law Society of South Australia Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</p>	<p>Accreditation of mediators</p> <p>The Law Society may approve persons to act as mediators who have undertaken an approved course; and have been admitted as a legal practitioner in Australia.</p> <p>Approved Courses</p> <ul style="list-style-type: none"> • Graduate Certificate in Mediation (Family) - one year course through the University of South Australia and University of Adelaide. The course involves candidates sitting for three subjects each of which has an assessment. This is the most intensive course found in South Australia at the present time. • LEADR - four day workshop and theory course including assessment. • Bond University - three day workshop and theory course. • Other recognised post graduate courses at universities or institutes which may be completed in Australia or outside Australia and approved by the Law Society of South Australia. • The Marriage Guidance Council (Relationships Australia) • Any other training course as may be approved by the Law Society of South Australia from time to time.
<p>LEADR</p>	<p>All Panel members must have satisfactorily completed a four day mediation training course with an evaluation component and must have current LEADR membership. Most of the panel members have been trained by LEADR. There are three LEADR mediation panels:</p> <ul style="list-style-type: none"> (i) LEADR Advanced Panel requires legal qualifications and a minimum of ten mediations; (ii) LEADR Panel requires legal qualifications and there is no minimum number of mediations required; (iii) LEADR Professional panel does not require legal qualifications, and there is no minimum number of mediations required.

**The Mediation Act 1997
(ACT)**

The ACT Law Society no longer offers accreditation of mediators. Mediators may apply for “registration” with an “approved agency” under the Mediation Act.

“Approved Agencies” are outlined in the Mediation Regulations, and include:

- LEADR Inc;
- Mediation Works;
- Relationships Australia (Canberra and Region Inc);
- The Institute of Arbitrators and Mediators Australia;
- The Conflict Resolution Centre (now the Resolution Centre);
- Training for Health and Community Services Inc

Section 5 of the Mediation Act requires that Approved Agencies shall approve an application and register the applicant if:

- (a) the applicant pays the required fee to the agency;
- (b) the agency is satisfied that the applicant has achieved the standards of competency prescribed in the document “ACT Competency Standards for Mediators” published by the ACT Community Services and Health Industry Training Advisory Body) and
- (c) the applicant satisfies any requirements of the agency that relate to mediators.

Under section 6, the registration expires three years after the day on which the applicant was registered. Section 7 requires the registered mediator to apply for renewal of the registration before the expiry of her or his registration, and registration should be renewed if the mediator would meet the initial registration requirements in section 5 and can show that she or he has undertaken further education in matters relating to mediation as is approved by the agency.

New South Wales Bar Association

The Bar Association maintains a list of barristers who have expressed an interest in acting as mediators. Applicants must have:

- (i) a practising certificate issued by the NSW Bar Association;
- (ii) professional indemnity insurance in respect of her or his practice as a barrister;
- (iii) satisfactorily completed a training course in mediation approved by the Alternative Dispute Resolution Committee of the New South Wales Bar Association (courses unlisted);
- (iv) a minimum of five years practice as a barrister in Australia;
- (v) experience in mediation to the value of at least ten points, calculated as follows:
 - * three points for acting as a mediator,
 - * two points per mediation for acting as a mediator,
 - * two points per mediation for having represented a party at a mediation;
- (vi) 'good repute and manner, demeanour and presence'; and
- (vii) approval by the ADR Committee of the NSW Bar Association.

Queensland Bar Association

The responsibility for ADR has been delegated to Barristers Services Pty Limited. That Company runs Dispute Resolution Services and the Bar Dispute Resolution Centre at the Inns of Court. The criteria used for approving mediators are as follows:

- (a) Satisfactory completion of an approved course (currently 3 day); and
- (b) At least five (5) years standing in actual practice as a legal practitioner; and
- (c) Significant and relevant life experience.

The Board would not depart from this approach except in the most exceptional circumstances. It is, however, looking at the possibility of imposing additional requirements requiring re-accreditation and continuing professional training in mediation. A system of advanced mediation training may well be a future requirement for continuing accreditation. All members of the Association are required to have professional insurance of not less than \$1M. Mediators and those involved in mediation are covered by the Bar's disciplinary regime as "Barristers Work" is defined to include, amongst other things, mediation and arbitration.

