

National Principles for Resolution of Disputes

INTERIM REPORT TO THE
ATTORNEY-GENERAL

National Alternative Dispute Resolution Advisory Council

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

Council Membership

The members of the Council during the preparation of this Interim Report were:

Professor the Hon Murray Kellam AO (Chair)

Professor Nadja Alexander

Dr Andrew Bickerdike

Hon Justice Andrew Greenwood

Margaret Halsmith

Ian Hanger AM QC

Norah Hartnett

Tom Howe QC

Stephen Lancken

Dr Gaye Sculthorpe

Lindsay Smith

Warwick Soden

Professor Tania Sourdin

Principles Committee Membership

Professor Nadja Alexander

Hon Justice Andrew Greenwood

Margaret Halsmith

Stephen Lancken

Natasha Mann (NSW Government coopted member)

Warwick Soden

Council Secretariat

Serena Beresford-Wylie (Director)

Bridget Quayle (contact officer for Principles Reference)

Ruba Rashid

Saskia van Zanen

Beth Wellings

Zhen Ye

Terms of Reference

Statement of National ADR Principles

To assist in promoting ADR, raising awareness of it in the Australian community, encouraging national consistency in ADR usage and better informing users of ADR about good practice, the National Alternative Dispute Resolution Advisory Council (NADRAC) is requested to prepare:

1. a statement of key national ADR principles, and
2. a supporting guide for users of ADR services which explains the key principles, the differences between facilitative, advisory and determinative ADR processes and what to expect when using different ADR processes.

The resulting statement and user guide should be provided in a form that is brief, easy to understand and capable of being widely promulgated and promoted both in hard copy format and in a web friendly format.

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

Timeframe: NADRAC is to report by 31 March 2011



Robert McClelland
Attorney-General
1 December 2009

National Principles for Resolving Disputes

THE NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL (NADRAC)

Greater understanding of difference, and communication about those differences at an early stage will help to prevent or minimise many disputes. Where disputes cannot be prevented, there are many ways to resolve them.

Methods of resolution range from informal discussion and negotiation to formal determination by a court and include dispute resolution processes like mediation, conciliation and arbitration.

These principles set out a fundamental approach to dispute resolution that is consistent with better access to justice.

The principles address people involved in dispute and government and service providers. For specific information on the principles, the differences between dispute resolution processes and what to expect when using different dispute resolution processes the Guide to the National Principles for Resolving Disputes should be consulted.

1. People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
2. Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
4. People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.

5. People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
6. Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
7. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

The reference to NADRAC regarding the Statement of National ADR principles requires NADRAC to report to the Attorney by 31 March 2011. NADRAC has prepared this interim report in response to the Department's interest in receiving advice from NADRAC earlier.

NADRAC is aware that there are many initiatives relating to ADR being progressed by the Federal Government and by State and Territory Governments. In particular NADRAC is pleased to see that a *Civil Dispute Resolution Bill* is being drafted to encourage resolution of disputes outside the courts and to improve access to justice by focussing on early resolution of disputes. NADRAC understands that the Bill is based on recommendations 2.1-2.11 of the National Alternative Dispute Resolution Council's (NADRAC's) report entitled *The Resolve to Resolve - Embracing ADR to Improve Access to Justice*¹.

Background

In 2001 NADRAC, in its report to the Attorney-General on 'A Framework for ADR Standards'² identified the following objectives:

- ADR should resolve or limit disputes in an effective and efficient way
- ADR should provide fairness in procedure
- ADR should achieve outcomes that are broadly consistent with public and party interests

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

In the *Resolve to Resolve* report NADRAC stated that:

NADRAC sees strong arguments for the consistent application of some ADR principles in federal, state, and territory legislation. NADRAC considers that a more uniform approach to ADR and

¹ The National Alternative Dispute Resolution Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).

² The National Alternative Dispute Resolution Council, *A Framework for ADR Standards* (2001), page 13-14.

articulation of the core principles relevant to different ADR processes may assist policy and law makers in developing better policy and improving ADR legislation.

NADRAC noted that an ADR Protocol could include principles such as the confidentiality of ADR processes, and some basic conduct requirements for disputants or their representatives. The integrity of different ADR processes including issues of confidentiality is more appropriately dealt with in legislation and not in principles. However, NADRAC does consider it appropriate that confidentiality be addressed in the Guide. In the *Resolve to Resolve* report, NADRAC also expressed the view that in addition to stating various ADR principles, an ADR Protocol could draw together consistent descriptions of ADR processes as set out in the NADRAC Glossary of Terms. NADRAC has noted that the inconsistent use of ADR terms remains a significant issue of concern.

The *Resolve to Resolve*³ report further provided that an ADR Protocol could also provide guidance on the suitability of ADR processes in different circumstances. More specifically, an ADR Protocol may:

- raise awareness of ADR amongst court and tribunal staff, legal professionals, other professionals, the business community and the general public
- emphasise the potential of ADR to assist disputants to resolve their disputes themselves in a way that best suits them
- highlight the distinctions between ADR processes and how various processes can assist in differing circumstances
- draw attention to the responsibility of disputants and their representatives to attempt to resolve their disputes themselves, and if a matter is being considered by a court or tribunal, help ensure that finite court/tribunal resources are not expended inappropriately or unnecessarily
- foster realistic expectations of ADR services amongst potential users including disputants and legal professionals
- provide information about issues such as confidentiality, non-admissibility, and the proper role of different ADR practitioners, including their conduct and any immunity from suit where it applies
- provide information about the expected conduct of participants, legal professionals, other professionals and people who attend to support the participants in the process

³ *ibid* pages 45-46.

- provide information about the relationship between ADR processes and courts and tribunals and how agreements made in ADR processes can be enforced
- address procedural, attitudinal and other barriers to greater utilisation of ADR
- provide advice about how to identify high-quality ADR services and any recognised standards that should apply to them
- raise awareness amongst private ADR providers of the need to evaluate their services and capture data that will support evaluation and research in relation to ADR, and
- provide targeted information for indigenous, ethnic, non-English speaking, disabled and disadvantaged and marginalised groups, including publishing the Protocol in different languages.

On 1 December 2009, as a result of the *Resolve to Resolve* Report, the Attorney-General issued NADRAC with three new references. One of these references asked the Council to prepare:

1. a statement of key national alternative dispute resolution (ADR) principles, and
2. a supporting guide for users of ADR services which explains the key principles, the differences between facilitative, advisory and determinative ADR processes and what to expect when using different ADR processes.

1.2 A STATEMENT OF NATIONAL PRINCIPLES FOR RESOLUTION OF DISPUTES

While the reference asked for ‘alternative dispute resolution (ADR) principles’, NADRAC considered that there was a need to conceptualise ADR more broadly as one key part of the dispute resolution system. Accordingly, NADRAC approached the task as one of identifying the key principles which should be taken into account in resolving civil disputes. NADRAC originally identified seven national principles to be included in principles. Those ‘*Key National Principles for Resolution of Disputes*’ along with an explanatory document were sent to various stakeholders for consultation. NADRAC received 17 responses to the draft principles. The responses are summarised below at Stakeholder Feedback on Key Issues.

NADRAC believes that nationally consistent ADR Principles is a desirable goal. Following correspondence between the NSW and Federal Attorney-General in January 2010, the Director of the NSW Attorney General’s Department’s Alternative Dispute Resolution Directorate accepted NADRAC’s invitation to join the NADRAC Committee developing the National ADR Principles and supporting guide.

Subsequently, the Attorney-General wrote to all State and Territory Attorneys-General encouraging them to request their departments to work together with NADRAC on these issues of mutual interest. In response to that letter, NADRAC was contacted by the Victorian Department of Justice's Appropriate Dispute Resolution Directorate. The Directorate has been closely consulted on the Principles and has offered to work closely with NADRAC's Committee on the development of the Guide.

1.3 THE AIM OF THE NATIONAL PRINCIPLES AND SUPPORTING GUIDE

NADRAC sees the aim of the principles and the supporting guide is to assist to:

- promote ADR methods of resolving disputes so as to support access to justice and social inclusion
- raise awareness of ADR
- encourage consistent ADR usage, and
- support best practice in ADR.

NADRAC advocates the consistent application of principles relating to the resolution of disputes and use of ADR in federal, state and territory legislation, as 'a more uniform approach to ADR and articulation of the core principles relevant to different ADR processes may assist policy and law makers in developing better policy and producing ADR legislation.'⁴

The draft *National Principles for Resolution of Disputes* aims to outline goals for practice in resolving disputes. They are broad, high-level principles that set aspirational goals as to how government, service providers and people should approach the resolution of disputes. They focus on access to the most appropriate dispute resolution process available, and use of those processes to resolve their disputes with the best possible outcome for all concerned.

The emphasis is on ADR being considered as the primary method of dispute resolution with the courts reserved for issues that cannot be resolved fairly with other more appropriate processes.

⁴ibid, page 2.

The principles are not to be interpreted as if they were mandatory injunctions. NADRAC recognises that there are some situations, including some provided by statute, which require people to behave differently or where it may not be possible to meet the objectives established by the principles.

2.1 REFLECTING THE GOALS OF THE CIVIL JUSTICE SYSTEM

In arriving at the set of draft principles NADRAC bore in mind the conclusions reached by the Attorney-General's Department in its September 2009 report: *Access to Justice Report: A Strategic Framework for Access to Justice in the Federal Civil Justice System*.⁵ This report proposed five principles which set out the objectives of the Australian civil justice system.

The five *Access to Justice* principles are:

- justice initiatives should reduce the net complexity of the justice system
- the justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level
- the justice system should be fair and accessible to all
- the justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes, and
- the interaction of the various elements of the justice system should be designed to deliver the best outcomes for users.

The *National Principles for Resolution of Disputes* reflect and embody the *Access to Justice* principles. The principles aim to ensure ADR is used in the Australian community to further the

⁵ Attorney-General's Department, *Access to Justice Report: A Strategic Framework for Access to Justice in the Federal Civil Justice System*, (2009), page 62.

goals of the civil justice system, namely to ensure the accessibility, appropriateness, equity, efficiency and effectiveness of the justice system.

2.2 TWO BROAD CATEGORIES OF PRINCIPLES AND THEIR RATIONALE

The seven principles NADRAC has proposed fall into two broad categories:

1. those principles associated with encouraging people in dispute to use ADR to solve their disputes without accessing courts and tribunals and if they do to continue to consider ADR during those proceedings
2. principles that deal with enhancing community understanding of, and confidence in, ADR services.

The *National Principles for Resolution of Disputes* articulate a vision for the place of ADR in the Australian civil justice system and clear standards in regards to the use of ADR processes.

CATEGORY 1: USING ADR PRIOR TO AND DURING COURT PROCEEDINGS

The first three principles encourage people in dispute to, where appropriate, use ADR processes prior to commencing court or tribunal proceedings and also where litigation has commenced. The principles also refer to the conduct obligations of people who attend dispute resolution processes. The principles recognise that not all disputes can be resolved by ADR. Even where ADR does not finally resolve a dispute it can assist to shorten and clarify litigation allowing disputants to refine, narrow and better manage their dispute.

ADR is commonly more affordable and expeditious than accessing courts or tribunals, and the solutions generated in ADR processes are not limited to legal remedies. Further, as ADR is predicated on disputants being cooperative in contrast to the adversarial nature of court and tribunal processes, the disputants' ongoing relationships are likely to be better preserved through the use of ADR processes.

By promoting use of ADR, those matters which need to be litigated can be litigated more efficiently and effectively.

CATEGORY 2: IMPROVING CONFIDENCE IN AND UNDERSTANDING OF ADR

The second category of principles is aimed at enhancing community understanding of and confidence in ADR services. The principles address this aim by providing that information about ADR is easily accessible to the community, requiring ADR terms be defined and used consistently, and requiring that ADR processes meet sufficient standards. The rationale for these principles comes from NADRAC's *Resolve to Resolve report*, which stated that:

ADR remains significantly under-utilised in many areas, and its overall use can be patchy and idiosyncratic...there is still very limited knowledge of ADR among the broader Australian community.⁶

For Australians to participate more effectively in ADR they need to have a better understanding of ADR and ADR needs to be better promoted in the community. Information about ADR processes must be readily available and disseminated to the public such that people in dispute can develop reasonable expectations of what a particular ADR process will involve. NADRAC thus believes it is critically important for the community to have ready access to information on ADR processes so that people in dispute consider ADR prior to commencing litigation and tribunal proceedings, and so that people are able to choose the ADR process most suitable for their circumstances.

Community understanding and use of ADR will be further strengthened by more consistent and coherent use of ADR terminology. There are many inconsistencies in the way ADR terms are used. For example, ADR terms such as 'mediation' are sometimes used to refer to a variety of processes with different characteristics. These inconsistencies occur not only through informal usage but are also present in legislation. Encouraging uniform description and usage of ADR terms will enable the public to better understand the choices they have available to them when in dispute. Consistent use will also aid the disputants in having more accurate and realistic expectations of ADR processes.

The progressive development of standards for ADR services and practitioners will increase the use of ADR and confidence in ADR services.

⁶ The National Alternative Dispute Resolution Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), page 1.

The National Mediator Accreditation System (NMAS) commenced operation on 1 January 2008. It is an industry based scheme which relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards. NADRAC was closely involved in the development of the NMAS and is happy with its progress. The NMAS is being implemented by a mediation industry body called the National Mediator Accreditation Committee (NMAC). The NMAC, with the support of funding from the Attorney-General, is establishing a National Mediator Standards Board to take over responsibility for administering the NMAS in the near future.

Nationally consistent accreditation standards have been developed to enhance the quality of national mediation services, facilitate consumer education not only about mediation but also other ADR services, build consumer confidence in ADR services, improve the credibility of ADR and help build the capacity and coherence of the ADR field.

Standards are necessary to ensure that vulnerable participants are protected in ADR processes, that disputants have accurate expectations of ADR services, and that ADR services are fair and just for users.

Summary of submissions

The majority of the respondents agreed with the proposed title of using ‘resolution of disputes’ instead of ‘Key National Principles for Alternative Dispute Resolution’ as it affords as wide an application of the principles as possible.

There is now a preamble which discusses prevention of disputes and explains that the principles set out some fundamental approaches to dispute resolution that are consistent with better access to justice.

Principle One

Original draft: encouraging people in dispute to take responsibility for their dispute and to take genuine steps to resolve or narrow their dispute before court or tribunal proceedings are commenced.

The majority of the respondents agreed with the requirement in the draft principle one for people to take genuine steps to resolve their dispute before court or tribunal proceedings are commenced.

NADRAC Response: We have made some changes to our original proposal. The most significant change being taking out the reference to court or tribunal proceedings being commenced, this was taken out as it assumes that all matters will end up in court. Principle one has also been expanded to address the issue of proportionality of processes to the dispute. Some of the respondents requested that we take out reference to people taking responsibility for their dispute as it was expressed that this implied some wrong doing on behalf of all disputants. Whereas NADRAC considers that responsibility in this context is in relation to trying to resolve their dispute not about who was responsible for ‘causing’ the dispute. One respondent asked that arbitration be treated differently from other ADR as they see arbitration as more akin to court proceedings than to ADR. NADRAC agrees that arbitration has become very legalistic, lengthy and costly. NADRAC understands that arbitration is not commonly used for those reasons (reference NADRAC report appendix). However arbitration was originally established

to be a fast and inexpensive alternative to litigation and NADRAC considers the problems with the current process need to be addressed. The SCAGs is looking at this issue and developing a model bill to address the concerns raised about arbitration.

Principle Two

Original draft: encouraging people in dispute to continually consider and re-consider, and where *appropriate* pursue, alternative dispute resolution processes to resolve or narrow their disputes prior to and at all stages of the litigation process.

The feedback in relation to principle two was overall positive with some common suggestions about how to tighten the wording of the draft principle.

NADRAC Response: The premise behind the principle remains the same however the words have been tightened and put in an active tense.

Principle Three

Original draft: ensuring that court and tribunal hearings are primarily reserved, and readily available, for *those* cases that cannot justly be resolved in any other way or in which there is a significant public interest in their being determined by a judge or tribunal member in a public venue.

The majority of the respondents asked that we take out the reference to ‘justly’ and to ‘significant public interest’ in principle three as they are both subjective concepts which could be interpreted too widely.

NADRAC Response: an additional concern about ‘justly’ is that it could be interpreted as being a legal concept. NADRAC has considered those comments and has taken out the reference to there being a significant public interest to a dispute being determined by a judge or tribunal in a public venue. The purpose of this principle was to encourage people to take genuine steps to resolve their dispute without necessarily feeling that there is pressure to make concessions or compromises for the sake of making a compromise. The new principle five addresses this.

Principle Four

Original draft: *ensuring* people in dispute obtain information necessary to enable them to choose the most suitable dispute resolution process for their dispute.

In relation to principle four there was consistent feedback that the word 'ensure' should not be used as it implies a mandatory requirement that is difficult for practitioners or others to comply with.

NADRAC Response: NADRAC accepts this view and has changed the word to 'provide' people in dispute. The original principles four and five have now been combined to make Principle four.

Principle Five

Original draft: *ensuring* people who use dispute resolution services have a sufficient understanding of what they should expect from the process and the practitioner.

Similarly to principle four, there was consistent feedback that the word 'ensure' should not be used. It is too difficult to ensure that people using dispute resolution services have a sufficient understanding of anything.

NADRAC response: NADRAC would reiterate that the Principles should not be read as if they were legislation. Nevertheless, NADRAC has replaced the word 'ensure' with 'providing' and has taken out 'sufficient understanding' and replaced it with 'providing people ... with information'. The original principle five has been combined with principle four.

Principle Six

Original draft: ensuring that dispute resolution services and practitioners meet standards sufficient to protect the users of dispute resolution services from harm and to ensure that dispute resolution services continue to provide an effective and valued service.

Most respondents did not like the reference to protecting the users of dispute resolution services from harm as they felt as though this was impossible to do. If this reference were to stay, the respondents would like to see 'harm' defined.

NADRAC Response: NADRAC would again reiterate that the Principles should not be read as if they were a legislative mandate. Whilst keeping the premise of the principle being one that addresses the issues of standards and effectiveness and affordability, the reference to protection from harm has been taken out.

Principle Seven

Original *draft*: fostering consistent use of dispute resolution terms to clarify differences in the dispute resolution processes available and to enhance community understanding of and confidence in dispute resolution services.

In relation to principle seven the majority of respondents agreed that the promotion of the use of consistent dispute resolution terms was needed. The feedback in relation to this principle was primarily focussed on how to tighten the wording of the principle.

NADRAC Response: The wording of the Principle has been tightened accordingly.

The respondents also offered very helpful suggestions on how to disseminate the principles once they have been agreed to.

There are now two new principles about people's conduct during dispute resolution processes and about people not being pressured to reach an agreement.

In addition to developing the national principles, the reference asked NADRAC to develop a supporting guide for users of ADR services. The report should explain the principles and provides clear, simple and easy to understand information on ways to resolve various disputes by accessing a range of dispute resolution services. NADRAC is working on this guide and is aiming to it finalised by the deadline of March 2011.

It is proposed the Guide comprise a series of fact sheets grouped into sections. The information will also be available on the web in the form of individual fact sheets that can be accessed from a specific contents page or, alternatively, by separate general searches. NADRAC envisages that the principles and the Guide be available on the Access to Justice website which is maintained by the Attorney-General's Department.

Submissions and comments received by NADRAC

Department of Agriculture, Fisheries and Forestry

National Native Title Tribunal

Jennifer David

Health Services Commissioner

Norton Rose

Australian Taxation Officer

Superannuation Complaints Tribunal

Gosnells Community Legal Centre Inc

Law Institute of Victoria

National Legal Aid

LEADR

Comments were received from six Divisions of the Attorney-General's Department.