National Alternative Dispute Resolution Advisory Council submission to the Productivity Commission

Inquiry into Access to Justice Arrangements

Introduction

This submission was initially compiled by NADRAC prior to the Council's abolition by the Australian Government on 8 November 2013. It has been completed by NADRAC's former members and is presented to the Productivity Commission as a work by the former advisory council NADRAC. In the below submission, wherever NADRAC is referred to, it is a reference to the former body.

Alternative dispute resolution (ADR) represents one of the most dramatic changes ever delivered in civil justice. There are extensive ADR arrangements supported through schemes and located both within and outside courts and tribunals. ADR is often required before court or tribunal proceedings can commence. In the family, workplace, personal injury and business sector most people will seek to resolve their dispute without recourse to a court or tribunal through an ADR arrangement. Running parallel with all these developments is the emergence of industry based external dispute resolution schemes, which provide dispute resolution that is free for consumers in hundreds of thousands of consumer and trade disputes each year. In addition, in less than 20 years, ADR has been actively adopted by the courts and tribunals of Australia, enabling them to cut swathes through court backlogs.

The success of all these arrangements is due to the ability of ADR to enable parties to engage, communicate and settle their disputes at a fraction of the cost, in a fraction of the time taken by litigation, and often resulting in the preservation of commercial and personal relationships that may have been lost through the use of litigation.

A citizen's access to open and transparent justice administered through an impartial court or tribunal is a cornerstone of democracy and civil society. However, this does not necessarily translate to a citizen's unqualified right to commence and maintain any and all litigation. It will often be appropriate to require prospective and/or actual litigants to attempt to resolve a dispute before and/or after commencing litigation. The majority of disputants cannot (for reasons including cost), or do not want to, litigate. Often, all that is needed is an independent third party to assist the parties to discuss the issues.

It is within this context that NADRAC makes the following observations. Firstly, conventional litigation before courts and tribunals is often inapt and over-utilized. Courts and tribunals are not proxy decision-making bodies to which entities can turn to make the best decision for the parties. Courts and tribunals normally apply law to the dispute, and can only address the legal rights and wrongs of a dispute (as opposed to the suite of interests and concerns which usually underpin

disputes); for these reasons they are rarely able to make the decision the parties would have made but for the dispute. Additionally, the cost and time involved in obtaining a litigated outcome may mean that litigation is an inapt means of dispute resolution. Secondly, ADR is under-utilised through lack of knowledge and facility. Thirdly, ADR needs to be understood as a bundle of versatile tools that enables the extension of civil justice far beyond the areas that courts can or should even reasonably be required to reach.

While this submission addresses many of the issues discussed throughout the Productivity Commission's Issues Paper, NADRAC has focused predominantly on responding to the questions posed in *Chapter 9 – Using informal mechanisms to best effect*.

NADRAC nevertheless notes the importance of acknowledging the complexities inherent in questions addressing the efficiency and effectiveness of the civil justice system. Access to justice is a complex issue and in our view is best considered broadly, encompassing not only the costs of traditional modes of determination, but also appropriate dispute resolution and the role of the public interest. For example, NADRAC acknowledges that whilst ADR is a solution in many cases, this is not universally the case – either from the perspective of the needs or vulnerabilities of the parties or from the efficiency of the system more broadly. To expand on these two points slightly:

- ADR will not necessarily provide the best outcomes where the form of dispute resolution chosen and the setting in which it occurs relies on a degree of empowerment on the part of an individual complainant, particularly an ability to recognise and assert their legal rights, and

- In other instances (for example where conduct affects a wide range of individuals or raises a general issue of public interest) it may be more effective to obtain a judgment, which can be applied to the benefit of others more broadly. The terminology of "appropriate dispute resolution" (rather than the tradition "alternative dispute resolution") acknowledges the breadth of potential civil disputes and the effective means of resolving them.

An improvement in dispute resolution techniques is an improvement in access to justice; it will reduce the frequency of use of judicial and related determination while improving its standing and availability for matters involving the public interest.

In summary, NADRAC's submission makes the following points:

- ***An increase in the knowledge and facilities of ADR would provide greater access to civil resolution for many people***. It would lift the undue burden on courts and tribunals. It would help overcome the problems for access to civil justice presented by distance, economic limitations and economic disadvantage. It would offer a choice to disputants and reduce instances of the misuse of courts and tribunals as proxy decision makers for entities both private and public that find it easier to refer their dispute to a court rather than try to resolve it. It would free up court time for those matters where public interest and efficiency favour a court/tribunal based outcome.

- ***ADR is continuing to develop as an industry.*** Entities offer services as expert determiners, arbitrators, mediators, facilitators or other ADR providers. This development should not be impaired but there is a need to ensure that the mechanisms retain public confidence. Mediation in particular, which can receive confidential information in private session from all parties, is moving towards systems of assured integrity through training, industry insurance and forms of voluntary registration and standards. There is still more work to be done here.

- ***ADR is an emerging industry, of which there is only patchy awareness outside the worlds of larger commercial dispute, family law, civil court or tribunal litigation.*** Were awareness of ADR available at wider business and community levels, it would be more accessible as an avenue for dispute resolution and could assist to resolve disputes in other settings such as clubs, associations, church groups, in the workplace, the vast array of small business disputes, neighbourhood conflict, rural and remote communities and indeed anywhere that civil dispute might exist.

- ***Education about ADR is limited.*** At present ADR is taught in many law schools but still in a limited way. Some non-law tertiary institutions recognize the value of ADR so that it can be found being taught and developed in engineering, building and psychology courses. ADR is a valuable and efficient means of resolving dispute without litigating. It needs to be taught properly in all law schools and as widely outside them at tertiary, business and trade level as possible. Furthermore, knowledge about dispute resolution and the obligation to attempt resolution should be an ordinary part of civics education in schools.

- ***The courts have been leaders in the use and incidental promotion of ADR, especially mediation, for filed cases.*** The courts, however, seem somewhat more ambivalent regarding pre litigation steps. For example, on the one hand courts have been generally less enthusiastic about legislated pre-action protocols that parties must follow before issuing court proceedings on the basis that they may interfere with access to the courts and add an unnecessary and costly step. On the other hand, courts have generally been supportive of what are, in effect, contracts between industry-based schemes and their members regarding the manner in which consumer disputes will be dealt with.[1] The debate about the responsibility to try to settle before litigating and the right of access to the courts poses a false dichotomy. Both propositions are true; they are not irreconcilable or mutually exclusive.

- ***The Civil Dispute Resolution Act 2011 introduced a regime of encouragement on both represented and unrepresented disputants to take genuine steps towards settlement before commencing litigation.*** The Act does not block access to the Court but a failure to take genuine steps can have costs consequences. The Act is without doubt a cause of some inconvenience to Courts. They are asked to assess the reasonableness of conduct that occurs

[1] A useful summary of the latter group of cases can be found on the Financial Ombudsman Service website at http://www.fos.org.au/centric/home_page/cases/case_studies.jsp and then following the link to "Overview of legal cases involving FOS and its predecessors"

prior to action. Many problems were predicted for the Act but its use has proven relatively smooth. Satellite litigation, which was a fear of the adverse impact of the Act, has not occurred. The cost of a genuine steps statement has proven modest if the Act is followed. Its benefits are that it brings to the mind of the angry disputant in a forceful way the need to stop and consider alternatives to litigation. It gives to lawyers an additional tool with which to advise warring disputants. It gives to the Courts/tribunals a power to assess and comment on a use of the court without reasonable action to resolve first. The *Civil Dispute Resolution Act 2011* is a pre-action tool for encouraging reasonable conduct before litigation.

- Finally, this submission endeavours to show ***a need for the collection of data about ADR, including its cost, use, and success rates.*** The capacity of ADR as an avenue for access to justice is substantial and its potential for increasing productivity and the avoidance of waste is just as significant. Both require the collection of data to enable strategic attention to the maximizing of access to ADR.

The benefits of Alternative Dispute Resolution

ADR is usually an umbrella term for processes, other than court/tribunal determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them.[2] ADR processes may be facilitative, advisory, determinative or, in some cases, a combination of these. As the Productivity Commission correctly identified, ADR allows for greater flexibility, choice and confidentiality and can result in more favourable outcomes for all parties involved.[3] ADR has the potential to empower the parties to speak for themselves and determine the outcome of their own disputes. It is cheaper, and often quicker and less stressful for parties (particularly those participants who may not have experienced the formalities of court processes). The flexibility of ADR processes enables parties to have greater control over the process (including choice of ADR practitioner).

ADR is predominantly concerned with interests-based discussions and resolutions (as opposed to a rights-based approach).[4] Industry based schemes operate with reference to fairness (both procedural and substantive), the law and good industry practice. Rights based processes focus on the participants' legal entitlements. Conversely, interests-based processes focus on the participants' underlying needs and concerns. They are focused on outcomes that may be achieved outside those that could be ordered by a court or tribunal. The benefits of ADR in undertaking interests-based processes include people in dispute being able to reach agreements that they are more likely to comply with and which may be more likely to finally resolve the whole dispute. Taking an interests-based approach also has the additional longer-term benefit of encouraging the preservation of personal and business relationships (where this is considered desirable).

ADR is also generally confidential. Many people appreciate the confidential nature of ADR processes as business-related disputes, or disputes of a particularly personal nature, are kept out

[2] NADRAC, *Dispute Resolution Terms* (2003).
[3] Productivity Commission Issues Paper (September 2013), 15.
[4] NADRAC, *ADR in the Civil Justice System - Issues Paper* (2009).

of the public eye. Hearings and decisions of courts and tribunals (including reasons for the decisions) are usually public. This can have significant ramifications for parties.

The benefits of utilising ADR over court processes extend beyond the benefits to the parties in dispute. Greater uptake of ADR mechanisms to resolve disputes has the potential to decrease delay in court processes and ensure that their limited resources are appropriately directed to the most intractable disputes or those involving issues of broader public interest.

The need to promote ADR more widely

ADR is continuing to develop as an industry. Despite its growing prevalence, there continues to be a widespread lack of knowledge and understanding of ADR in the business community, especially small business and among the public at large. That is true for both disputants and the professionals that service them. Apart from big business and government, many participants in the civil justice system may be one-off users who have no previous experience to guide them. Indeed, some users of the civil justice system may have never come across ADR. This represents a significant barrier to accessing justice. It calls for an exposure of information about ADR processes and services that would assist any entity in dispute or inform the professionals from whom they may seek advice about the dispute.

NADRAC acknowledges that there is improvement in awareness, at least in relation to some forms of ADR. For example, industry-based schemes have seen slow but steady improvement in public recognition.[5] Nevertheless, there is still further to go, including awareness among the legal profession, large corporations and government agencies. As NADRAC has previously examined,[6] increasing knowledge and visibility of ADR within the community will significantly strengthen its prominence as an effective avenue to accessing justice.

One way of addressing this is to ensure the availability of high quality, easy to understand information about ADR, including how and where to access it. Increasing awareness and knowledge about how ADR may assist people to resolve their disputes has a number of benefits, including:

- Disputants taking a more proactive approach to resolve their own differences
- Assisting people to make informed choices and selecting for themselves the type of conflict or dispute resolution tools they consider appropriate for their circumstances
- Encouraging people to ask about the use of ADR when seeking professional advice to resolve their disputes and discussing proposed dispute resolution pathways with their professional advisers, and
- Inquiring about or even requesting different processes to resolve their disputes.

There is still some resistance to ADR among some members of the legal profession. Most lawyers are trained about the legal process but often do not have any training or education about ADR. Many studies have highlighted the importance of legal practitioners as gatekeepers to the

[5] See for example ANZ Financial Literacy Surveys 2006, 2009, 2012.
[6] NADRAC, *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction* (2009), Chapters 2, 4.

justice system, including access to ADR, courts and tribunals.[7] Legal practitioners could usefully play a greater role in encouraging their clients to consider all the available options for resolving their dispute (including the benefits that ADR services may offer).

Lawyers already have some obligations to inform their clients about ADR and to encourage its use, for example in the *Civil Dispute Resolution Act 2011* and in the rules of some professional bodies,[8] but NADRAC considers that those obligations could be extended to require that clients be informed about:

- Taking genuine steps to resolve the dispute before commencing any court or tribunal proceedings
- Industry based, private and community-based services that may help resolve their dispute
- Advantages of resolving their dispute voluntarily, if possible, and the benefits of ADR
- Public interest and systemic issue considerations where present
- A lawyer's own likely costs and the likely costs of other parties for which the client may be liable if unsuccessful, and
- Likely timeframes for any legal proceedings.

Promoting ADR widely is an essential component to increasing public awareness about the alternative avenues to accessing justice. Central to this idea is getting information out to the public before they become a party to a dispute in addition to having information readily available for those who are in dispute. There are a number of strategies that can be employed to achieve this, including:

- Identifying specific groups who are particularly prone to disputes and providing them with targeted ADR information
- Equipping legal practitioners with the necessary knowledge and information about ADR to assist them to inform their clients on the best course of action for their dispute
- Identifying bodies within the community that provide support to people who may be a party to a dispute, such as community legal centres, and providing them with the necessary information to give comprehensive advice about ADR options, and
- Increasing education about ADR within primary and tertiary curricula (discussed in further detail below).

The Federal Government is also playing an important leadership role in increasing the use of ADR in Australia. As the biggest single litigator in the federal justice system, the Commonwealth has the potential to influence dispute resolution processes more broadly and to strengthen the use of ADR to improve access to justice.[9] Government agencies have responsibilities relating to ADR under the Legal Services Directions (LSDs).[10] Importantly the

[7] See discussion in H Genn, *Solving civil justice problems: What might be best?* (2005), Scottish Consumer Council Seminar on Civil Justice.
[8] For example Rule 38 Rules of the NSW Bar Association.
[9] NADRAC, *Submission on the Legal Services Directions Issues Paper*, 2004.
[10] The Legal Services Directions (LSDs) are a set of binding rules issued by the Attorney-General about the performance of Commonwealth legal work. The LSDs set out requirements for sound practice in the provision of legal services to the Australian Government, including the requirement to act as 'model litigants' by considering

LSDs recognise the importance of ADR but also that it will not universally be the appropriate solution – providing a practical example of the balancing of efficiency, effectiveness and public interest factors we have alluded to above. NADRAC has also previously recommended Government agencies implement dispute management plans.

NADRAC is of the view that ADR can be significantly strengthened by enhancing the obligations on Government agencies with respect to ADR. NADRAC therefore supports amendment to the LSDs to require agencies to formulate and implement dispute management plans to provide frameworks for a more systematic approach to the consideration and use of ADR. Many agencies often handle large numbers of similar claims. Implementation of tailored dispute management plans could streamline processes and increase efficiency. Dispute management plans can also ensure frameworks are in place to guard against the possibility of the LSD requirements concerning ADR being overlooked. Additionally, NADRAC advocates amendment to the LSDs to extend the requirement to *consider* dispute resolution before starting legal proceedings (see clause 5.1 of Appendix B) to an obligation to use alternative dispute resolution processes except where the use of such approaches is considered inappropriate. While clause 2.1 of Appendix B presently requires Commonwealth government agencies to endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible, including by 'participating in alternative dispute resolution processes where appropriate', the scope of this clause is somewhat unclear (particularly in light of clause 5.1). Accordingly, NADRAC favours imposition of an explicit obligation in Appendix B to the effect that Commonwealth agencies should participate in ADR unless they actually consider that so doing would be inappropriate. Such an explicit obligation would better align Appendix B with the general principle stated in clause 4.2 of the LSDs (that agencies should not start legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution).

Greater education about ADR

Dispute resolution is a fundamental component to the operation of a civil society. Central to this component is equipping people with the knowledge, understanding and skills necessary to recognise situations where the use of ADR will have the most significant impact in resolving disputes. As noted above, a lack of knowledge and awareness about ADR generally, in addition to its availability as an avenue for resolving disputes between parties, continues to exist as a barrier to accessing justice. NADRAC considers the enhancement, and in some cases introduction, of education about ADR and ADR processes as an integral means through which ADR can be strengthened to improve access to justice.

NADRAC has previously identified two opportunities where education and training about ADR can be implemented or enhanced across the Australian education system.

In 2012 and 2013, NADRAC provided submissions to the Australian Curriculum, Assessment and Reporting Authority (ACARA) concerning the development of a draft *Years 3-10 Australian*

---

other methods of dispute resolution before starting legal proceedings, and not commencing legal proceedings unless satisfied it is the most appropriate method of dispute resolution.

Curriculum on Civics and Citizenship.[11] The draft curriculum is designed to develop students' understanding of Australia's political and legal systems and effective participatory citizenship in contemporary Australian society. The aim of the curriculum is to equip students with the knowledge, understanding, skills, values and dispositions to be active and informed citizens in local, national, regional and global contexts.

NADRAC recommended the curriculum incorporate aspects of dispute resolution and conflict management at increasing levels of sophistication in the curriculum from Years 3-8 and as an optional study in Year 9. Teaching such concepts and utilising dispute resolution skills throughout Years 3-9 entrenches an awareness of the proper and healthy nature of dispute. This includes an awareness that dispute, civilly handled, can usually be resolved, and that all citizens can behave in a way that will aid resolution. Young citizens can learn to recognise that if a dispute is unlikely to be resolved quickly or easily there are techniques available to assist them to find resolution that does not necessarily involve judicial intervention or formalised processes.

NADRAC considers the Productivity Commission's endorsement of implementing a national curriculum that identifies dispute resolution as a core principle as a positive step toward strengthening ADR to improve access to justice. Implementing such a curriculum will provide young people with the necessary knowledge and skills to assist them to find resolution to conflict without resorting to the imposition of an outcome determined according to law and applied coercively against another party. Being able to identify situations where the use of ADR is appropriate at critical junctions throughout the dispute process not only benefits individuals accessing justice, but also has widespread benefits to other citizens and the community in which they live.

In 2012, NADRAC published *Teaching Alternative Dispute Resolution in Australian Law Schools* report.[12] To inform the report's findings, NADRAC surveyed a number of Australian law schools to identify where, how and why ADR is taught in the undergraduate, juris doctor and postgraduate law degrees. NADRAC received a total of 27 responses from a total of 32 Australian Law Schools. NADRAC found that, while Australian law schools have moved towards recognising the importance of teaching law graduates about ADR, the increasing availability, use and sophistication of ADR suggests that future and current lawyers need a more in-depth knowledge so that they can participate in ADR processes and advise their clients. As correctly identified by the Productivity Commission, ADR allows for greater flexibility, choice and confidentiality and can result in more favourable outcomes for all parties involved. Education about an interests-based approach to dispute resolution, in addition to a rights-based approach as commonly favoured by the legal profession and courts, achieves this outcome. Additionally, NADRAC considers that law students should be taught to recognise the relevance of ADR not only to advise their clients where appropriate, but also to inform their own approach to conflict management and dispute resolution.

---

[11] NADRAC, *Submission on the Australian Curriculum, Assessment and Report Authority's Civics and Citizenship: Draft Shape Paper* (2012); NADRAC, *Submission on the Australian Curriculum, Assessment and Reporting Authority's Civics and Citizenship: Draft Australian Curriculum* (2013) (Available upon request to the Attorney-General's Department).

[12] NADRAC, *Teaching Alternative Dispute Resolution in Australian Law Schools* (2011).

The role that law schools can play in assisting to achieve these outcomes is immeasurable. Disputants may for a variety of reasons (including ignorance of ADR and fear of litigation), not respond to dispute and live with it often in the face of considerable adverse consequences. Others, however, are more likely to seek legal advice (as opposed to exploring ADR options) at first instance when a dispute arises or escalates. Establishing an education system across all universities that equips future members of the legal profession with appropriate ADR knowledge and skills presents a number of positive benefits into the future. These include:

- Greater consideration of utilising ADR processes at first instance to resolve disputes
- Where appropriate, providing greater flexibility to parties through an interest-based approach (rather than the rights-based approach of the courts) to dispute resolution
- Encouragement of the preservation of existing relationships
- Consideration of a wider range of remedies (including both legal and non-legal remedies), and
- Assistance to parties to solve problems jointly.

NADRAC holds the view that the above listed benefits will strengthen ADR and subsequently improve the ability of disputants to access justice. NADRAC considers the Productivity Commission's support and encouragement to enhance and systemise ADR education in law schools across Australia is significant to achieving these outcomes.

Enhancing the integrity of ADR

As the Productivity Commission identified, ADR (privately or publicly administered) provides for greater flexibility, choice and confidentiality for parties looking to resolve their disputes.[13] The Productivity Commission additionally noted that such advantages need to be weighed against considerations of fairness and equity, which have the potential to be distorted if one party to the dispute can exert excessive influence on the ADR process and outcome.[14] NADRAC added to these considerations instances where it may be more efficient and effective from a system perspective to have a public outcome to a dispute.

In the significant majority of cases where ADR will be appropriate, managing the conduct of those involved in ADR processes has become increasingly important to ensure participants have some protection, and ADR and legal practitioners some accountability, in respect of processes in which disputants are being encouraged to participate.

However, more can be done to continue to enhance the integrity of ADR. NADRAC identifies issues surrounding conduct obligations, confidentiality, and inadmissibility of communications in ADR processes to be important considerations to further support the integrity of ADR.[15] Conduct obligations should extend to the behaviour and attitudes of those participating in ADR processes, including ADR practitioners. Any obligations imposed on ADR practitioners would be appropriately balanced against the need for freedom and flexibility in ADR processes.

[13] *Productivity Commission Issues Paper* (September 2013), 15.
[14] *Productivity Commission Issues Paper* (September 2013), 15.
[15] For further information see NADRAC, *Maintaining and enhancing the integrity of ADR processes – From principles to practice through people* (February 2011).

Currently, mediators accredited under the National Mediation Accreditation System (NMAS) have to undertake to comply with the Practice Standards and adhere to the Ethical Standards of their member organisation.[16] The Practice Standards set out practice and competency requirements for mediators and inform participants and others about what they can expect of the mediation process and mediators. This includes a description of the mediation process, dealing with power imbalances, impartiality requirements, confidentiality, competency and procedural fairness. NADRAC supports this system of regulation for mediators and sees great benefit in extending such accreditation schemes to all ADR practitioners, as well as the development of professional codes of conduct. This has the additional benefit of reaffirming fairness and equity in the ADR process, particularly to counter a potential imbalance of power between disputants.

The confidentiality of communication in an ADR process is widely regarded as an integral element of ADR, because it encourages parties to engage in open, interests-based communications. Indeed, confidentiality can be considered one of ADR's greatest benefits for parties looking to resolve their disputes, particularly in contrast to the public nature of judicial determination. The protection of confidentiality can arise under a number of different instruments, including:

- Private contractual agreements between disputants
- Through common law or equity
- Legislative schemes, or
- Professional codes of conduct for ADR practitioners.

Currently, the protection of confidentiality is afforded in a range of legislative schemes, including the *Family Law Act 1975*, *Federal Court Act 1976* and the *Native Title Act 1993*. NADRAC notes, however, that there is no general, comprehensive statutory provision that prevents participants and practitioners from disclosing matters that are discussed during ADR processes, subject to a consistent set of exceptions. To ensure clarity and assurance of confidentiality for current and prospective ADR participants, NADRAC recommends that legislation be introduced which expressly protects the confidentiality of mandatory ADR processes in the federal civil justice system, subject to recognised, articulated exceptions. The legislation should apply to both participants and ADR practitioners engaging in mandatory ADR processes.

Similar to confidentiality, there are a number of common law principles and legislative provisions that ensure communications made during ADR processes are inadmissible as evidence in legal proceedings. Inadmissibility is another equally important legal protection of the ADR process as it encourages frank and open discussions without fear of public disclosure and prevents ADR processes from being used as an information gathering technique for subsequent use in legal proceedings.

[16] The Mediators Standards Board (MSB) provides accreditation for mediators under the National Mediation Accreditation System (NMAS). The NMAS is a voluntary industry system under which organisations qualify as Recognised Mediator Accreditation Bodies (RMABs) that may accredit mediators.

Legislative provisions, such as under section 131 of the *Evidence Act 1995* (Cth), provide that evidence is not to be adduced of communications made in, or documents prepared in connection with, an attempt to negotiate or settle a dispute. Such provisions sometimes recognise a set of exceptions, but there is little consistency between those exceptions, and their outer limits are often unclear. For instance, the exceptions recognised by s 131 of the Evidence Act 1995 include:

- When full disclosure of evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced
- The evidence tends to contradict or qualify evidence that has already been admitted about the course of an attempt to settle the dispute, and
- The communication or document is relevant to determining liability for costs.

Such unqualified exceptions to inadmissibility may adversely affect the value and perceived integrity of ADR. In order for participants to continue to have faith in the ADR process and continue to utilise such processes as a way to access justice, NADRAC is strongly of the view that (i) as a general rule it should not be possible for any communications made in ADR processes to be subsequently used against a disputant in court proceedings, and (ii) this general rule should be subject to a constrained exception referable to an independent assessment of the public interest.

NADRAC therefore argues that there would be significant benefit in having uniform legislation that clearly deals with the inadmissibility of ADR communications. There should be a general rule against admissibility, subject to one exception. Inadmissibility should not apply in circumstances where a court or tribunal gives leave for ADR communications to be admitted or disclosed. This discretion should only be exercised after taking into account whether any exceptions relating to confidentiality are present (thereby establishing an explicit link between the related concepts of confidentiality and inadmissibility), and the proper administration of justice.

NADRAC acknowledges that current or future provisions relating to confidentiality impact on the transparency and accountability of ADR processes. One means of addressing this challenge is through professional standards and rules as mentioned above. There remains, however, the question of how to evaluate quality in the context of a confidential process. This is an important question that deserves further consideration if confidence in ADR is to be maintained and built upon.

Encouraging greater uptake of ADR in court and tribunal processes

As noted above, and discussed in more detail later in this submission, one of the main limitations that currently exist in relation to ADR is the lack of data or evidence that informs its use and success in resolving civil disputes. The data that is currently available, however, demonstrates:

- The high cost of litigation to disputants and the wider community
- The success of utilising ADR processes as a means of resolving disputes, and

- The ability of pre-action protocols and ADR processes to improve court efficiencies and timeliness in resolving disputes in certain contexts.

It is clear that where a dispute is genuinely individual, formal resolution of disputes within the court system results in far greater costs for disputing parties and the wider community. For litigants, the costs of bringing a matter to court may include the cost of legal representation and court fees. For the public, there is the overall cost of running courts and tribunals. In particular:

- The longer a matter is in court the higher the costs of legal representation, as the number of appearances and work by legal representatives will increase.[17]
- The Report on Government Services for 2013 reported that the average civil court fees paid per lodgement in 2011-12 were $1,962 for the Federal Court, $185 in the Family Courts and $339 in the Federal Circuit Court.[18]
- The average cost to finalise a matter in 2012-13 was:
    - $41,994 for the High Court
    - $21,115 for the Federal Court
    - $5,209 for the Family Court, and
    - $1,160 for the Federal Circuit court.[19]

NADRAC views these costs as a significant barrier to many disputants accessing justice. NADRAC notes successive Commonwealth Attorneys-General have endeavoured to reform court fees and costs so that frequent and well-resourced users pay more to ensure the legal system becomes more accessible to all. NADRAC considers the referral of matters from the courts to other avenues of dispute resolution, including ADR, should be encouraged wherever appropriate. Evidence compiled in the Federal Court Annual Report 2012-2013[20] demonstrates a positive trend toward referral to ADR processes and subsequent resolution of disputes without further judicial intervention. The Federal Court first instituted court annexed mediation in the late 1980's. Courts now refer disputes to various forms of ADR including mediation, arbitration, early neutral evaluation, experts' conferences, court appointed experts, case management conferences and referral to a referee. Of these, the vast majority of cases in the Federal Court are referred to mediation (602 out of 613 matters referred to ADR in 2012-13).

The number of matters referred to ADR has almost doubled over the last 9 years (326 in 2003-04 rising to 613 in 2012-13). The percentage of matters referred by judges to ADR as a proportion of total filings has also increased (5% in 2003-04 to 10% in 2012-13). However, NADRAC

[17] The quantum of legal representation costs will depend entirely on the matter that is to come before the court, the rate charged by the relevant legal counsel, and how far the matter will proceed through the court process before it is finalised or settled. Additionally, a successful party to a dispute may be unable to recover the entirety of these costs.

[18] Report on Government Services 2013, Volume 1, page 7.26.

[19] These average costs are based the total expenses of the court for 2012-13 divided by the number of applications finalised. It is clear, however, that this average is not a true representation of the cost of individual matters that are judicially determined. For example, only 14.6% of applications to the Family Court were judicially determined, whereas 62% of applications were settled by consent orders and the remainder settled or were otherwise settled prior to judicial determination.

[20] http://www.fedcourt.gov.au/publications/annual-reports/2012-13

considers that there is the opportunity for more internal and external referrals in the courts mentioned. The 613 referrals made to internal ADR represented just 26% of applicable filings.

The Administrative Appeals Tribunal (AAT) is an example of tribunal processes that employ effective case management as a means of reducing matters that need formal Tribunal determination. The Tribunal has incorporated alternative dispute resolution as a core element of its review process. Recent data from the Administrative Appeals Tribunal[21] indicates the success of utilisation of ADR processes as 79% of applications received by the Tribunal in 2012-2013 were finalised other than by way of a Tribunal decision on the merits following a hearing.

As noted above, however, courts and tribunals must be mindful to use referrals to ADR appropriately. In particular, it is important to recognise that in some limited instances ADR may be neither efficient nor appropriate. For example, where:

- Conduct affects a wide range of individuals or raises an issue of public interest, it may be more cost effective to obtain a judgment, which can be applied to the benefit of others more broadly, or
- The vulnerability of parties is such that they are unlikely to be able to recognise or assert their interests or rights.

The introduction of pre-action requirements[22] as a means of reducing matters that need a final determination is also an effective means of increasing efficiencies. The Transport Accident Commission (TAC), for example, has reported that since its pre-litigation protocols were introduced in December 2004, there has been a significant decline in the number of review applications being lodged in the Victorian Civil and Administrative Tribunal (VCAT). In 2010 to 2011, there was a finalisation/settlement rate of disputes of 86%.[23] The Dispute Settlement Centre of Victoria (DSCV) is another example. The DSCV aims to deal with small claims matters that may be able to be resolved without court appearances quickly and efficiently.[24] An evaluation undertaken in 2010 and 2011 found that the program was successful in diverting cases from court and therefore improving the timeliness of resolution for those cases through the use of ADR.[25]

The above data demonstrates the effectiveness of ADR as an important avenue to accessing appropriate, timely and efficient justice. NADRAC considers access to justice encompasses avenues other than courts and tribunals. The justice system should be fair and accessible to everyone, including those facing financial and other disadvantage. Access to the justice system should not be dependent on capacity to afford private legal representation. NADRAC therefore recommends the Productivity Commission encourage greater uptake of ADR as an integral component of court/tribunal processes wherever appropriate. The provision of ADR services, particularly in its use as part of court processes, promotes the principles of procedural fairness

[21] Administrative Appeals Tribunal, *Annual Report* 2012-2013.
[22] Pre-action protocols are schemes, protocols and obligations which encourage people to resolve their disputes (with or without the use of ADR) before filing or commencing proceedings with a court or tribunal, *Exploring Civil Pre-action Requirements: Resolving Disputes Outside Courts* (2012), 1.
[23] Exploring Civil Pre-action Requirements: Resolving Disputes Outside Courts (2012), 76.
[24] See http://www.disputes.vic.gov.au/
[25] Timeliness report, 6.35.

and equity by providing avenues for disputants to resolve their disputes and avoid the lengthy and costly processes of fully defended litigation.

Current lack of evidence that exists about the success of ADR

NADRAC notes the Productivity Commission's request for data on the number, proportion and types of disputes resolved through ADR and the satisfaction of disputants with the outcomes of using these mechanisms.[26] NADRAC notes the lack of data or evidence that informs use and success of ADR in resolving civil disputes.

NADRAC considers that there are a number of reasons why this may be the case, including such factors as the confidential nature of ADR processes and the lack of an ADR peak body to systematically collect data and report on ADR. However, NADRAC considers that, inherently, disputes that are resolved through private ADR processes are unlikely to ever reach a forum where its use is reported. For example, some courts report on the use of mandated ADR processes, but this only represents a small proportion of disputes that utilise ADR and is not necessarily indicative of its overall use and success. A gap in evidence continues to exist regarding the use and success of ADR in resolving disputes.

One exception to this is the data produced by industry based dispute resolution schemes. NADRAC understands that the Australian and New Zealand Ombudsman Association will also make submission to the present Inquiry and encourages the Commission to consider the substantial data available under the schemes.

NADRAC also supports the current work of the Attorney-General's Department to develop a framework to underpin a strong, consistent evidence base across the civil justice system, including evidence relating to the use and success of ADR processes in resolving disputes. The Attorney-General's Department submission to the Productivity Commission provides further information about this project.

Currently NADRAC, in partnership with the Attorney-General's Department, has distributed a survey to a sample of ADR practitioners to collect data about:

- The use of different types of ADR processes
- The kind of disputes where ADR is used
- Reasons for disputants undertaking ADR
- The cost of providing ADR services
- Settlement rates, and
- Factors that affect settlement rates.

[26] *Productivity Commission Issues Paper* (September 2013), 16.

NADRAC and the Attorney-General's Department envisage that the results of a survey will be provided to the Productivity Commission mid-late November 2013 to inform further consideration of the issues raised by the Productivity Commission about the efficiency and cost effectiveness of ADR.

NADRAC confirms that Council members are happy to assist the Productivity Commission in any way they can. NADRAC is particularly interested in being involved in upcoming round-table discussions about ADR in the civil justice system. NADRAC commends the Productivity Commission's interest in exploring the various avenues of accessing civil justice, particularly through its focus on informal justice mechanisms such as ADR.

.....

Jeremy Gormly SC

Formerly Chair of NADRAC

(until its abolition on 8 November 2013)

Signed on behalf of its former members.

November 2013