



## GUIDANCE NOTE NO 12

### Use of Alternative Dispute Resolution (ADR)

#### Key Points

1. **Always consider alternatives to litigation:** steps to resolve disputes, including using ADR processes, should be taken as early as possible and both before and throughout any court or tribunal proceedings
2. **Proactively manage disputes:** effective use of ADR includes seeking independent legal advice early on, to identify when decisions should be elevated to senior levels, what issues and potential settlement terms could be discussed in ADR and when pre-approval of possible settlement terms should be sought
3. Build an evidence base about how disputes are managed and resolved: this will help inform consistent adoption of best practice

#### What is ADR?

4. Alternative Dispute Resolution or ADR is an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also mean *assisted* or *appropriate* dispute resolution. The main types of ADR are mediation, conciliation and arbitration.

#### ADR and Commonwealth Agencies

5. The use of ADR by Commonwealth agencies has been strongly encouraged by successive Governments and is consistent with:
  - the [Strategic Framework for Access to Justice](#), which encourages a broad understanding of Australia's justice system and focuses on disputes being resolved early and at the most appropriate level, and
  - the strong encouragement for agencies to adopt a strategic approach to dispute management, such as by reviewing existing or developing new dispute management strategies or plans.
6. The Commonwealth Attorney-General has policy responsibility for ADR, which falls under the broader policy focus on access to justice.

#### *Legal Services Directions*

7. Paragraph 4.2 of the *Legal Services Directions 2017* (the Directions) requires Commonwealth agencies to act in accordance with the Commonwealth's obligation to act as a model litigant at Appendix B (the Model Litigant Obligation). The obligation relates to the handling of claims and the conduct of litigation.
8. The Directions (including the Model Litigant Obligation) were amended in 2008 to emphasise the value of using ADR to resolve disputes where appropriate. Appendix B sets out the requirement for agencies to consider using ADR to resolve their disputes, as an alternative or in addition to legal proceedings.

9. The Model Litigant Obligation specifically requires agencies to:
- not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution (Paragraph 4.2) after considering other methods of dispute resolution (Appendix B, Paragraph 5.1). This obligation requires agencies to actively consider the most appropriate process for resolving a particular dispute, which may include ADR processes.
  - try to avoid, prevent and limit the scope of legal proceedings wherever possible, including consideration of and participation in ADR before commencing legal proceedings and participating in ADR where appropriate (Appendix B, Paragraph 2(d)).
  - monitor the progress of litigation and use appropriate methods to resolve the litigation, including settlement offers, payments into court or ADR (Appendix B, Paragraph 2(e)(iii)).
  - ensure that representatives of the Commonwealth and Commonwealth agencies participate fully and effectively in ADR and have authority to settle the dispute (Appendix B, Paragraph 5.2).

### ***Obligations under the Civil Dispute Resolution Act 2011***

10. Early consideration of dispute resolution options by Commonwealth agencies, including use of ADR, is consistent with the objective of the [Civil Dispute Resolution Act 2011](#). The Act, which commenced on 1 August 2011, encourages parties to take genuine steps to resolve disputes before commencing certain proceedings in the Federal Court of Australia and the Federal Magistrates Court of Australia.
11. The Civil Dispute Resolution Act requires agencies to file a 'genuine steps' statement indicating what steps (if any) they have taken to resolve a dispute before commencing legal proceedings. What action constitutes a 'genuine step' is up to the parties to determine within the context of their particular dispute and could include participating in an ADR process. The Act allows the Court to take this into account when exercising its discretion to award costs, as well as impose other consequences (for example, through case management) for agencies who do not comply with their obligations.<sup>1</sup>
12. More information about the Civil Dispute Resolution Act is available on the [Attorney-General's Department's website](#).

### **The benefits of ADR**

13. Using ADR to resolve disputes may assist Commonwealth agencies to:
- tailor the process to suit the needs of the agency and the other disputants, including addressing concerns about privacy and confidentiality and accommodating special needs.
  - provide the opportunity for direct communication between the agency and the other disputants.

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<sup>1</sup> The Civil Dispute Resolution Act allows the Court, when exercising its powers and performing its functions, to consider whether:

- a genuine steps statement was filed, and
- genuine steps were taken.

The Federal Court decision of [Superior IP International Pty Limited v Ahearn Fox Patent and Trade Marks Attorneys \[2012\] FCA 282](#) indicates that courts are prepared to impose consequences for parties who do not comply with their obligations under the Act.

- create an environment that may be less formal and more relaxed.
- foster better relationships between the agency and the other disputants (particularly where the emphasis is on joint problem solving and communication rather than a more narrow focus on investigation and advice).
- narrow the issues in dispute.
- enhance the reputation of government generally and the agency, including the Commonwealth Government's reputation as a model litigant.
- allow the consideration of a wider range of remedies, including both legal and non-legal remedies.
- resolve the dispute at a comparatively lower cost than legal proceedings.

## What should Commonwealth agencies consider when entering into and undertaking ADR?

### *Considerations under the Legal Services Directions*

14. A starting point for Commonwealth agencies deciding whether to use ADR to resolve a dispute is that the Directions require agencies to:
  - not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute (Paragraph 4.2), and
  - consider other methods of dispute resolution (Appendix B, Paragraph 5.1).
15. Other considerations stemming from the Directions include:
  - **Reporting of significant issues:** A non-corporate Commonwealth entity and a Commonwealth entity that was an Agency (within the meaning of the *Financial Management and Accountability Act 1997*) on 30 June 2014 are required to report to OLSC any significant issues that arise in the provision of legal services (Paragraph 3.1).
  - **Settling disputes generally:** When a non-corporate Commonwealth entity (or a corporate Commonwealth entity (other than a government business enterprise) under paragraph 12A) settles a dispute, an entity is only to agree that the terms are confidential and cannot be disclosed where this is necessary to protect the Commonwealth's interests (Paragraph 4.5).
    - If confidentiality is required, entities must inform the other parties to the settlement that disclosure of the terms may still be required by law, such as to Parliament or a Parliamentary Committee (Paragraph 4.5A).
  - **Settling monetary claims:** Non-corporate Commonwealth entities (or corporate Commonwealth entities (other than a government business enterprise) under paragraph 12A) considering settling monetary claims must do so in accordance with legal principle and practice (Appendix C, Paragraph 2).
    - This requires, before a monetary settlement can be reached, the establishment of the existence of at least a meaningful prospect of liability (Appendix C, Paragraph 2).
    - Entities cannot enter a monetary settlement merely due to the costs of defending a clearly spurious claim (Appendix C, Paragraph 2).
    - Entities may only enter into monetary settlements over \$100,000 if they have received written advice from AGS (or an external legal adviser) that the

settlement accords with legal principle and practice and the accountable authority, or the accountable authority's delegate, agrees with the settlement terms (Appendix C, Paragraph 4).<sup>2</sup>

- **Engagement of counsel:** The rules surrounding engagement of counsel apply to counsel representing an agency in an ADR process (see Appendix D).
  - These rules do not apply to counsel who are engaged to act in the capacity of an ADR practitioner – eg:, counsel who are acting as a mediator or arbitrator.

### ***Caretaker Convention***

16. OLSC has prepared [Guidance Note No. 6 Dispute Resolution during the caretaker period](#) to advise agencies on the considerations as to whether they should continue ADR processes during a caretaker government.

### ***General Considerations***

17. When deciding whether ADR is appropriate, Commonwealth agencies should consider obtaining early independent legal advice on whether there is a legitimate basis to settle a matter and, if so, what range of possible settlement terms exists. For matters to which Appendix C of the Directions apply,<sup>3</sup> such advice would address:
  - whether at least a meaningful prospect of liability could be established (i.e. that there is at least an arguable case that the Commonwealth would be found to be liable)
  - that any proposed settlement would be in accordance with legal principle and practice.
18. Agencies should note that:
  - advice from counsel can be especially helpful for larger or more contentious matters.
  - not all facts or evidence may need to be finalised in order for an agency to obtain advice that a meaningful prospect of liability exists, and that any proposed settlement is in accordance with legal principle and practice.
  - the legal advice should identify what, if any, further information is needed to formulate a reasonable range of possible settlement terms.
  - the legal advice should be used to weigh the foreseeable costs and benefits in pursuing the matter through the court process as opposed to reaching an early settlement within an appropriate range.
  - the legal advice may assist agencies in determining whether the decision to seek settlement, engage in ADR, or proceed to litigation, should be elevated to senior levels at an early stage of the dispute.
19. Additionally, agencies could consider whether the subject matter of the dispute and its context are appropriate for ADR (such as who the other parties are, how the dispute arose etc). It is important that agencies consider the views of the other parties involved, including on the matters outlined below, when deciding whether to undertake ADR.
20. Some general matters agencies should consider include:

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<sup>2</sup> The threshold value for a major claim at Appendix C of the Direction was raised from \$25,000 to \$100,000 as of 1 July 2018.

<sup>3</sup> That is, monetary claims

- the nature of the dispute – is the dispute about a matter that could be resolved by ADR or is a judicial decision needed?
- the sensitivity of the dispute.
- what issues to take to ADR. Agencies could discuss with their legal areas whether the whole dispute could be considered in an ADR process or only some issues.
- what settlement terms might be discussed in the ADR process. Agencies could discuss possible terms of agreement with their legal areas and also consider seeking pre-approval at the appropriate level for these terms, to enable a final agreement to be reached if ADR is successful.
- who the other parties involved in the dispute are and the importance and type of relationship the agency wants to have with them.
- the capacity of the other parties to participate effectively in ADR. For example:
  - Are the other parties from a non-English speaking background?
  - Are there other cultural factors that may play a role in an ADR process?
  - Is the dispute a highly complex matter (such as very technical or legal)?
- whether the other parties involved are willing to commit to an ADR process and any outcome it achieves.
- what level of control the agency and the other parties want over the process.

### **Choosing an ADR process**

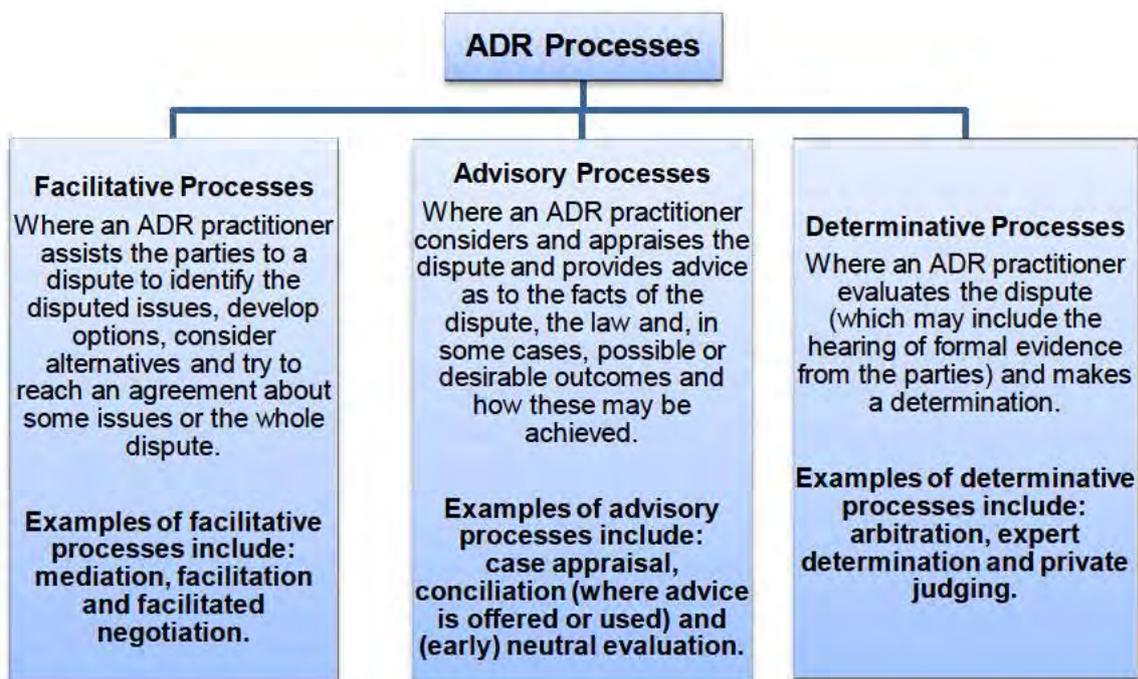
21. ADR processes can vary greatly in terms of:

- the responsibilities of the parties
- the responsibilities and qualifications of the ADR practitioner, and
- the possible outcomes.

22. Commonwealth agencies may find it beneficial to consider the different categories of ADR in deciding which ADR process would work best for their dispute:

- facilitative,
- advisory or
- determinative.

23. The views of the other parties involved should also be considered.



24. For more information about the different categories of ADR and the various ADR processes within each category, see Appendix A to NADRAC's [A Framework for ADR Standards](#).

### Choosing an ADR provider or practitioner

25. Generally, in choosing an ADR provider or practitioner Commonwealth agencies should consider:
- the type of ADR process they and the other parties have agreed to use.
  - whether there are any guidelines within the agency about choosing ADR practitioners, for example in an agency's dispute management plan.
  - whether there is any particular knowledge or skills the ADR practitioner will need.

### **Rules for engagement of counsel under the Legal Services Directions**

26. The rules surrounding engagement of counsel (see Appendix D) do not apply to:
- ADR practitioners, and
  - counsel who are engaged to act as an ADR practitioner.

### **Mediators**

27. Agencies are strongly encouraged to use mediators who are accredited under the National Mediator Accreditation System (NMAS). Mediators accredited under NMAS will:
- comply with the NMAS Approval Standards and the Practice Standards and any relevant legislation
  - have appropriate competence, in terms of their qualifications, training and experience
  - be insured

- be of good character, and
  - have a process for receiving your feedback or complaint.
28. Information about finding an NMAS-accredited mediator is available on the [Mediator Standards Board website](#).
29. The Law Council of Australia has prepared [guidelines for parties and lawyers using mediation](#).

### **Resources to find ADR practitioners**

30. The [Australian Government Access to Justice website](#) may assist agencies looking for an ADR practitioner.
31. Peak ADR membership bodies may also be able to assist agencies to find an ADR practitioner:
- [Australian Mediation Register](#)
  - [LEADR & IAMA](#)
32. Many State and Territory law societies and bar associations also maintain lists of their members who offer ADR services in addition to legal services.

### **Keeping track of how things are going**

33. Commonwealth agencies are encouraged to build an evidence base about how disputes are managed and resolved. This could assist to highlight the extent to which better dispute management practices save time and money and lead to more consistent adoption of best practice. The proper use of Dispute Management Plans can also assist individual agencies to develop a better information base.

### **Further Information**

34. For further information about ADR and its impact on Commonwealth agencies, please visit [Attorney-General's Department Access to Justice website](#).

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