



Alternative Dispute Resolution in the Civil Justice System

Issues Paper - Summary

March 2009

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ISSUES PAPER - SUMMARY

1. Introduction

The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent advisory body that provides policy advice to the Commonwealth Attorney-General regarding the resolution of disputes without a judicial decision. In 2008, the Attorney-General asked NADRAC to enquire into incentives that would encourage greater use of alternative dispute resolution (ADR), and what barriers need to be removed. NADRAC is to consider:

- whether ADR processes should be mandatory in some cases
- changes to civil procedures and costs structures
- how to overcome practical or cultural barriers to the use of ADR
- whether ADR techniques could be used to enhance court and tribunal processes
- whether greater use of private and community-based ADR services would be beneficial, and
- how to ensure the quality of these services.

NADRAC will advise on strategies to create incentives and to overcome barriers to the use of ADR in federal civil proceedings. NADRAC welcomes your comments on the questions raised in this paper, and other matters you consider are raised by the Terms of Reference, by 15 May 2009. There is no need to address all the issues or answer every question. Comments should be addressed to Ms Serena Beresford-Wylie, Director NADRAC Secretariat, by email to nadrac@ag.gov.au or by mail to:

NADRAC Secretariat
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600.

Please include some details about yourself or your organisation in your submission. NADRAC would like to know how ADR is relevant for you and how frequently you use or participate in ADR processes.

It is intended that all submissions will be published on NADRAC's website. In the interests of confidentiality NADRAC can, upon request, publish your submission anonymously. Also please note that, unless you request otherwise, NADRAC may make responses available in whole or part to others. NADRAC may also publish responses as part of its report or as part of related papers. If you consider any part of your response to be confidential please make this clear in your response.

2. About ADR

ADR is an umbrella term for processes other than judicial determination, in which an impartial person assists disputants to resolve the issues between them. ADR processes may be facilitative, advisory, determinative or a combination. In a facilitative process like mediation, the ADR practitioner assists parties to identify the issues and reach an agreement about the dispute. Advisory processes, such as conciliation or expert appraisal, employ a practitioner to advise the parties about

the issues and/or possible outcomes. Determinative processes, such as arbitration, involve a decision being made by the third party. There are also other types of ADR such as collaborative practice. ADR terminology tends to be used inconsistently, for example, the term ‘mediation’ is used to describe a range of processes. Refer to www.nadrac.gov.au for definitions of a range of ADR processes.

2 About ADR — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal'.

- 2.1 To what extent is there a need for greater consistency in the use of ADR terms? How could this be achieved? What are the risks of greater consistency in the use of terms?
- 2.2 How does inconsistent use of ADR terms affect consumers and referral to ADR processes by courts, lawyers and others?
- 2.3 What are the advantages and disadvantages of adopting common process models for ADR processes, adopting standard definitions or adopting statutory definitions?

3. Promoting public awareness of ADR

A widespread lack of knowledge and understanding about ADR among the public may be one of the most significant barriers to greater use of ADR in the civil justice system. This lack of awareness might mean that disputants do not consider ADR, or that they may deem it to be inappropriate despite there being an appropriate ADR process available. Initiatives for improving public awareness might include a national promotional campaign, a campaign targeted specifically at regular users of the civil justice system, and a statutory requirement for lawyers and courts to provide information about ADR to disputants. Specialised information for minority or disadvantaged communities may be required. It may be useful to precede promotional initiatives with a campaign to encourage ADR practitioners to update their skills and seek accreditation where available.

3 Promoting public awareness — Questions

- 3.1 To what extent is there a need to improve the understanding of ADR and its differing processes in the general community? How might this be achieved?
- 3.2 Which other groups or organisations might benefit from a greater awareness of ADR? How might this be achieved?

4. Provision of ADR services

In the federal civil justice system, ADR service providers are private practitioners and companies, industry groups, government agencies, courts and tribunals and government funded community organisations. The provision of ADR services by the courts raises issues about the most appropriate and effective role for courts, judges and court staff. Some propose that courts should be comprehensive ‘one-stop shop’ dispute resolution centres, while others support varying degrees of separation between ADR service providers and courts. There are questions about how ADR

services should be provided in courts and tribunals, and whether judges should provide some ADR services. ADR processes conducted by judges might have advantages such as greater chance of resolution, but disadvantages such as damage to public perception of the courts, and loss of voluntariness and confidentiality of the ADR process. ADR referral might be faster if it occurs within the court, but the cost of training court staff or judges to conduct ADR services is a relevant consideration.

Issues relating to private and community based ADR services include their quality, availability and cost. Providing ADR services separate from the court structure might help to facilitate a non-litigious approach.

Historically, there have been differing views in the ADR sector regarding the development of consistent standards. There are few reported complaints about ADR services, but this may not indicate that there are no quality issues relating to these services. Two formal national accreditation systems currently exist, the National Mediator Accreditation System and the new accreditation rules for Family Dispute Resolution Practitioners. The National Mediator Accreditation System is a voluntary industry based scheme of minimum approval and practice standards which apply to mediators in all areas of mediation practice. The new accreditation rules for Family Dispute Resolution Practitioners are statutory requirements which must be met before practitioners can be registered.

After initial training and education has been completed, it may be difficult to ensure that practitioners continue to provide high-quality services. In the absence of standards in some areas, ADR processes may be susceptible to changes that reduce their integrity. It may be desirable to develop minimum standards for ADR processes other than mediation and family dispute resolution.

4 Provision of ADR Services — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal' and a reference to 'judge' should be read as including 'tribunal member'

Court services

- 4.1 What are the benefits and drawbacks of court based ADR?
- 4.2 How effective are the existing ADR services available in courts and tribunals prior to a final hearing?
- 4.3 To what extent should judges or other court staff encourage disputants to use ADR (where not required by legislation)?
- 4.4 What role should courts have in facilitating or providing ADR?
- 4.5 To what extent might low cost, efficient court ADR services be a disincentive for disputants to use other ADR services before commencing proceedings? What could be done to overcome that?
- 4.6 What are the advantages and disadvantages of requiring court provided ADR services to meet the same standards as private and community based services?

4 Provision of ADR Services — Questions continued

Judicial dispute resolution

- 4.7 What are the advantages and disadvantages of judges conducting ADR processes? In particular, what are the advantages and disadvantage of judges conducting mediation (as described under the National Mediator Accreditation System)? Are there particular cases where direct participation by judges in ADR is more appropriate?
- 4.8 To what extent is it an advantage of judicial involvement that it improves the chances of resolution? Why might this be the case? To what extent might this have negative consequences?
- 4.9 To what extent might the confidentiality of ADR be undermined if a judge conducts it? What reporting requirements might apply?
- 4.10 To what extent are judges' skills and experience suited to facilitative processes like mediation, advisory processes like conciliation and blended processes like con-arb? How might judges' skills differ?

Court officer provided ADR

- 4.11 What are the advantages and disadvantages of having court staff such as registrars provide ADR services? What role might be most appropriate?
- 4.12 What are the advantages and disadvantages of courts engaging specialist ADR practitioners to provide ADR? What are the advantages and disadvantages of courts engaging ADR practitioners with particular expertise, eg accounting, engineering, psychology, etc?

Private, community and government based ADR

- 4.13 What are the advantages and disadvantages of private ADR services and those provided by industry groups?
- 4.14 What are the advantages and disadvantages of existing ADR services provided by community organisations?
- 4.15 What are the benefits and drawbacks of existing government ADR services?
- 4.16 What are the advantages and disadvantages of courts referring matters to external ADR practitioners?
- 4.17 What are the advantages and disadvantages of providing specialised assessment, referral and dispute resolution centres outside the courts? What would the functions of such bodies be? How might they be resourced?
- 4.18 What is the appropriate role of government funding in relation to private and community ADR services?
- 4.19 To what extent is there a need for more, or more highly specialised, private, community based or government ADR services?

4 Provision of ADR Services — Questions continued

- 4.20 To what extent is there a need to improve the quality of private, community based or government ADR services? How can quality be enhanced?
- 4.21 Are there any issues relating to the fees charged for ADR services which need to be addressed?

5. Referral and assessment

NADRAC has emphasised the importance of making a proper assessment of the suitability of ADR processes for different disputes and clients, and then referring clients to the most appropriate process. This requires an understanding of the different ADR processes available and their particular attributes and benefits. Courts, tribunals, the legal profession and others have a role in referring parties to ADR. Legal practitioners, judges and court/tribunal staff all need a broad understanding of the range of ADR services. Some lawyers may be reluctant to engage with ADR for various reasons. Greater encouragement by legal professional bodies and greater education about ADR in university law courses and ongoing professional development programs may help to improve practitioner awareness. Judges and other court staff may benefit from targeted training about ADR. The imposition of obligations on courts and lawyers to provide parties with information about ADR could also be considered. Other referrers may also need greater understanding of ADR, such as consumer bodies, business associations, psychologists and social workers.

5 Referral and assessment — Questions

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See also questions relating to referral and assessment at Chapter 4, Provision of ADR Services (re specialist referral centres) and Chapter 6, ADR and Litigation (re mandatory referral).

- 5.1 To what extent is there a need to enhance the understanding of ADR and negotiation in legal or other professions? How might the information and referral functions of professionals be enhanced? What are the advantages and disadvantages of introducing compulsory ongoing training about ADR for lawyers?
- 5.2 To what extent is there a need to enhance the understanding of ADR amongst court staff and judicial officers? How might their information and referral functions be enhanced?
- 5.3 To what extent is there a need to increase the emphasis on ADR in university courses? In which faculties? What are the advantages and disadvantages of making ADR a compulsory subject for certain students?

6. ADR and litigation

The Attorney-General has asked NADRAC to look at barriers and incentives to the use of ADR both as an alternative to litigation and during court or tribunal processes. Barriers which prevent people from using ADR might be legal, structural, cultural or practical. Action to create incentives to use ADR might include changing court procedures, improving public awareness of ADR, ensuring high-quality ADR service provision and making ADR mandatory in some cases. Mandatory ADR requirements could be set up in several ways, including a specific legislative pre-filing requirement, pre-action protocols and/or imposition of overriding obligations on lawyers and litigants. Benefits of mandatory ADR might include reduced strain on the court system and less cost and delay for disputants. However, some types of disputes may not be suitable for mandatory ADR. Issues also arise as to the impact on the traditional voluntary nature of ADR and integrity of ADR processes, and whether there is a need for mandatory participation requirements such as 'participation in good faith'. Other issues to consider include the availability of a sufficiently qualified workforce to meet the increased demand that may be generated by a mandatory requirement and how litigants can demonstrate the requirement has been met.

6 Barriers and incentives — Questions

NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal'.

- 6.1 What are the barriers to the use of ADR before civil proceedings are commenced? To what extent, do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?
- 6.2 What are the barriers to use of ADR after civil proceedings have been commenced? To what extent do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?
- 6.3 To what extent and in what ways is the culture of the legal profession a barrier to greater use of ADR? Why? What could be done to remove this barrier?
- 6.4 To what extent and in what ways is the adversarial nature of the civil justice system a barrier to greater use of ADR? Why? What could be done to remove this barrier?
- 6.5 What changes to cost structures and civil procedures could be made to remove practical and cultural barriers to the use of ADR, both before commencing litigation and throughout the litigation process?
- 6.6 To what extent is the cost of ADR services, or inability to recover costs for ADR, a barrier to early use of ADR? What could be done to remove any barrier?
- 6.7 How might the use of the draft model mediation clause at Attachment D assist in overcoming barriers to the use of ADR? How might the use of such a clause be encouraged? Would it be helpful if such a clause were implied into all contracts?
- 6.8 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR before commencing litigation?
- 6.9 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR during litigation?

6 Barriers and incentives — Questions continued

- 6.10 What are the advantages and disadvantages of creating costs consequences for parties who do not attempt ADR? What form might these take? (See also discussion of mandatory ADR below).
- 6.11 What are the advantages and disadvantages of requiring the courts or the legal profession to inform people and organisations in dispute about the ADR services that are available?
- 6.12 Would it be helpful to include any of these measures in legislation, court rules or other subsidiary legislation?

7 ADR in government disputes

The Commonwealth Government has emphasised its commitment to improving and extending its use of ADR, in particular trying to resolve disputes early. The Attorney-General has recently strengthened the ADR requirements of the *Legal Services Directions* 2005, which set out rules which government agencies must follow in managing legal disputes. There may be other action government could take to improve its use of ADR, such as setting up an independent dispute resolution manager to work across agencies, developing guidance on the ADR provisions of the *Legal Services Directions*, improving awareness of ADR, greater training in ADR techniques for government staff, and developing dispute management plans.

7 Use of ADR in government disputes — Questions

- 7.1 In what type of matter do/should Commonwealth agencies utilise ADR?
- 7.2 What are the characteristics of disputes where it would be inappropriate for agencies to use ADR?
- 7.3 How can agencies improve their use of ADR processes?
- 7.4 To what extent do organisational barriers or legislative provisions inappropriately limit or prevent Commonwealth agencies' use of ADR? How can these be overcome?
- 7.5 How can Government agencies find mediators? To what extent is assistance in this process required and how might this assistance be provided?
- 7.6 To what extent would targeted guidance material or training for Commonwealth officers involved in ADR processes assist in the take-up of ADR, as well as in the quality of participation? What type of guidance material or training would be useful?
- 7.7 To what extent do Commonwealth agencies select legal representatives who are good litigators rather than skilled in the resolution of disputes? How can this be overcome?

8. Using ADR techniques to enhance court or tribunal processes

NADRAC has been asked to consider how methods and techniques drawn from ADR may be used to enhance court and tribunal hearings (as distinct from provision of ADR processes as an adjunct to litigation). Examples of techniques developed in ADR which could be used include a less formal approach, allowing the parties to speak for themselves, and encouraging the parties to communicate with each other. Some of these techniques are already used in some courts and tribunals. Techniques developed in ADR are currently used in the family law system through Family Consultants and the Less Adversarial Trial, and in the civil justice system more generally in the receipt of expert evidence. Other ideas for using techniques developed in ADR to enhance court/tribunal processes include producing agreed statements of facts, judicial case appraisal and a dispute management judge. NADRAC welcomes other suggestions for adopting techniques developed in ADR to enhance court and tribunal adjudication.

8 Use of ADR techniques — Questions

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- 8.1 How might a specialist role similar to that of family consultants be useful in other federal courts and tribunals/areas of civil jurisdiction?
- 8.2 How might the less adversarial trial approach be extended or have application in other jurisdictions?
- 8.3 How might concurrent evidence be further extended or applied? In what circumstances could this approach be used effectively?
- 8.4 To what extent would it be useful to introduce:
 - judicial case appraisal
 - a dispute management judge, or
 - increased use of round table case management conferencing?
- 8.5 Are there any other ways in which techniques developed in ADR could be used to enhance the adjudicative process?

9 Data, evaluation and research

There is a lack of comparable data and research about the use and success of, and consumer satisfaction with, ADR in Australia. This can cause problems for the development of appropriate policy and regulatory responses, appropriate referrals and development of standards and best practice models. The lack of comparable data and research may be caused by factors like separate Commonwealth and State/Territory practices and services in ADR, a lack of funding for research and inconsistent use of ADR terminology. Federal courts and tribunals do not seem to be collecting or publishing very much data about their ADR activities, and evaluations conducted by individual ADR service providers may yield subjective data which cannot be generalised. Initiatives to improve the situation might include greater longitudinal research, development of national

performance and activity indicators, greater publication of existing data, and a public clearing house for ADR and civil litigation research.

9 Data, Evaluation and Research — Questions

- 9.1 To what extent is there a need to improve the quality of available national data on ADR? What steps should be taken to identify the data required and improve data collection and research?
- 9.2 To what extent is there a need to improve the quality of evaluations of ADR services? How can ADR services be evaluated, by whom and against what criteria?
- 9.3 What are the advantages and disadvantages of requiring service providers to commission independent evaluations of their services, and of requiring them to publish those evaluations?
- 9.4 What might be done to support ADR research and researchers?