

Annexure C



# **ADMINISTRATIVE APPEALS TRIBUNAL**

## **ALTERNATIVE DISPUTE RESOLUTION (ADR) GUIDELINES**

**June 2006**

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## **Legislative Framework**

**Administrative Appeals Tribunal Act 1975, Section 2A:** *In carrying out its functions the tribunal must pursue the objective of providing a mechanism for review that is 'fair just economical informal and quick.'*

ADR processes are defined in section 3(1) of the AAT Act as:

“procedures and services for the resolution of disputes, and includes:

- (a) conferencing; and
- (b) mediation; and
- (c) neutral evaluation; and
- (d) case appraisal; and
- (e) conciliation; and
- (f) procedures or services specified in the regulations;

but does not include:

- (g) arbitration; or
- (h) court procedures or services.

Paragraphs (b) to (f) of this definition do not limit paragraph (a) of this definition.”

Definitions and process models for the various forms of ADR processes are annexed to these guidelines.

## **Objectives of ADR Processes**

There are a number of identified objectives that should inform the Tribunal's use of ADR processes. ADR processes should:

- resolve or limit the issues in dispute;
- be accessible;
- use resources efficiently;
- resolve disputes as early as possible;
- produce outcomes that are lawful, effective and acceptable to the parties and the Tribunal;
- enhance the satisfaction of the parties.

As a general principle, all disputes are potentially suitable for referral to ADR.

## ***Objective of ADR Referral Guidelines***

These guidelines aim to:

- give effect to the Tribunal's legislative objectives through the utilisation of a range of ADR processes to respond to and meet the differing needs of the parties in each application;
- ensure consistency in ADR referrals made by Tribunal members and officers.
- educate parties in the expectations and procedures of the Tribunal in ADR referral.

## ***Who will make a referral to an ADR process?***

On receipt of an application, Registry staff will refer all applications to Conferencing unless the District Registrar forms the view there are compelling reasons to deviate from this practice. Thereafter, any Member or Conference Registrar may refer an application to an ADR process.

Most referrals to an ADR process will be made by the Conference Registrar after consultation with the parties at the first Conference.

## ***General principles to consider when referring to an ADR process.***

When deciding if an ADR process will assist in the resolution of the application, the Member or Conference Registrar must consider:

- Capacity of the parties to participate effectively
- Whether the parties are represented
- Context of the application including the history of past applications by the applicant
- Any identified need for urgency
- Number of parties involved in the application
- Complexity of the issues in dispute
- Bona fides of the parties
- Cultural factors
- The safety of the parties
- The likelihood of an agreed outcome or reduced issues in dispute
- Relative cost to the parties of an ADR process and a determination
- Case management requirements of the Tribunal
- Whether an ADR process might offer a more flexible solution than a determination
- Whether public interest issues require a determination.

## ***Specific Considerations***

When deciding which ADR process would be most appropriate the Member or Conference Registrar should exercise sound judgment and discretion, taking into account the following considerations:

- Attitudes of the parties
- Benefits of involving other persons in the ADR process
- Cost of each ADR process to the parties
- Stage of preparation of the application
- Progress of other applications which may impact on any decision
- Nature of the issues in dispute; ie: law, expert evidence, credit
- Impediments to settlement
- Any previous ADR attempts
- Availability of participants with authority to settle.

## ***Selecting the most appropriate ADR process***

### **Factors favouring Conferencing**

It is standard practice to refer all matters to a Conference. If the matter remains unresolved, indicators for subsequent Conferences may be:

- further information or investigation is needed
- either party needs to take advice/instructions and reconsider the application in light of the discussion
- the parties are waiting for a decision to be made in an unrelated but relevant matter
- further applications need to be joined with the current application.

### **Factors Favouring Mediation**

- The matter is complex or likely to be lengthy
- The matter involves more than two parties
- Desire of parties to keep the dispute confidential
- Commercial considerations are important
- There will be an ongoing relationship and future disputes could be limited by an exploration of the issues or explanation of the system
- An apology, concession or explanation from the Agency could assist resolution
- Flexible options need to be explored

### **Factors Favouring Conciliation**

- Commercial considerations are important
- Desire of the parties to keep the dispute confidential
- The parties would benefit from advice on possible settlement options
- There is a conflict in expert opinion or evidence

## **Factors Favouring Neutral Evaluation**

- Identification of a legal and/or factual issue that is decisive
- Agreement about the nature and impact of the issue
- Willingness to have application or identified issue evaluated
- Most investigations and gathering of evidence has been completed
- Convenience of evaluating on the papers without the need for parties to be present.

## **Factors Favouring Case Appraisal**

- There is a dispute in relation to an evidentiary or factual issue
- The hearing is likely to be lengthy
- Parties willing to give proper consideration to appraisal of evidential arguments and prediction of outcome
- Additional independent investigation may assist in resolution
- Availability of an expert opinion may further negotiations
- Convenience of evaluating on the papers without the need for parties to be present.

## ***Who is to conduct the ADR process?***

In recommending to the State or Territory Coordinator a suitable person to conduct the ADR process, the Member or Conference Registrar making the referral will consider:

- relevant skills and knowledge
- expertise in the area of the dispute
- views of the parties
- any previous involvement in the dispute

## ***Costs of the ADR Process***

Where there is a direction to attend an ADR process and it will be conducted by a Tribunal Member or Officer, there will be no charge to the parties. However, they will be responsible for bearing their own costs of participating in the ADR process.

Where the parties request an external ADR Practitioner, they will be responsible for any associated costs.

# Administrative Appeals Tribunal

## Conference Process Model

### *Definition*

Conferencing/conference is defined by the Tribunal as:

A meeting conducted by a Tribunal member or officer of the Tribunal (conference convenor) with the parties and/or their representatives.

Conferences provide an opportunity for the Tribunal and the parties to:

- discuss and define the issues in dispute;
- identify further evidence that needs to be gathered;
- explore whether the matter can be settled; and
- discuss the future conduct of the matter, including referral to further ADR processes or progress to a hearing, where settlement is not possible.

Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

### *The Conference Process*

The process has multiple 'stages' and often involves more than one conference. The process is informal, flexible and its course depends on the assessment of the conference convenor as to what is appropriate for the particular case.

The conference convenor uses discretion to determine whether, and in what order, the stages are addressed. The conference convenor will:

- assist the parties to clarify their own interests and understand the interests of the other parties;
- identify and deal with case management issues; and
- make any appropriate referral to another ADR process.

The conference convenor will explain the procedure for the finalisation of the matter in the AAT should it not be resolved during the conference process and may give suggestions or advice as to narrowing issues in dispute, ADR options, preparation for hearing and options for resolution.

## **1. Preparation and Explanation of Process**

The conference convenor outlines the purpose and process of the conference including their role. The conference convenor also explains the process at the Tribunal if the dispute is not resolved.

## **2. Issue Identification**

Each party, with the assistance of the conference convenor, outlines the dispute from his or her perspective. With the assistance of the conference convenor, the parties narrow the issues in dispute and clarify the legal framework within which the dispute is to be determined. There may also be a discussion about any further evidence that needs to be gathered.

## **3. Case management**

At the end of the first conference, the matter may be listed for another conference or some other ADR process or proceed to hearing. Depending on the progress of the matter, the conference convenor may make directions after the first, second or subsequent conference. Directions are generally made in consultation with the parties.

## **4. Resolution**

Using ADR techniques, the conference convenor will assist the parties to explore resolution options. This may occur during the first and/or subsequent conference(s).

## **5. Referral to other ADR processes**

The conference convenor will consider the ADR referral guidelines and where appropriate make a referral to another ADR process.

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If the matter has not resolved, the conference convenor will discuss with the parties the next steps to be taken, including the need to obtain any further material. If appropriate, directions may be issued by the Tribunal.

In all ADR processes the parties must act in good faith (section 34A).

## **Administrative Appeals Tribunal**

### **Mediation Process Model**

#### ***Definition***

Mediation is defined by the Tribunal as:

A process in which the parties to a dispute, with the assistance of a Tribunal Member, officer of the Tribunal or another person appointed by the Tribunal (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

#### ***The Mediation Process***

The process has seven stages.

Stages 1–4 and 6–7 are usually conducted in joint session. Stages 1–4 focus on the past and present and stages 6–7 focus on the future. At all stages, the mediator will assist the parties to define their own interests and needs and understand those of the other parties.

Referral to mediation will usually take place following a conference.

#### **1. Preparation and Mediator's Opening Statement**

The opening statement includes a brief description of the role of the mediator and participants, the mediation process and any ground rules.

#### **2. Parties' Statements and Mediator's Summaries**

Each party presents a statement of the dispute from his or her perspective. Parties' statements are noted and summarised back by the mediator, checking with the parties for accuracy. The advantages of this procedure include:

- assuring the parties that their concerns have been heard by the mediator and each other;
- providing opportunities to create a positive social atmosphere conducive to effective negotiation; and
- providing two opportunities for an appreciation of each party's perspective.

Emerging needs and options for resolution are acknowledged for use later in the mediation.

### **3. Identification and Listing of Issues (Agenda Setting)**

The use of a whiteboard or equivalent may allow parties to refer to the topics or issues during the mediation. The listed issues form the basis for more effective negotiation and co-operative problem-solving. The topics are expressed in neutral and, whenever possible, mutual terms.

### **4. Joint Exploratory Discussion**

Parties are encouraged to focus on a topic for discussion or negotiation from the list of issues. The mediator encourages parties to communicate directly with each other. The parties' interests and needs are further clarified.

### **5. Private Meeting**

Parties are provided with the opportunity to express opinions and give information privately to the mediator if they feel more comfortable doing so than in joint sessions. The private meeting can also assist parties to prepare to negotiate, generate options and ensure that particular proposals are realistic.

### **6. Joint Negotiation**

This provides the basis for joint problem solving, exploring the agreement and may be followed by further private meetings and joint sessions where necessary.

### **7. Final Session**

In the final session, the parties meet together in the presence of the mediator to discuss issues and possible options for resolution. The mediator facilitates final negotiations and fine-tuning of the agreement. Alternatively, the mediation may need to be adjourned or terminated.

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Stages 1–4 usually take place in order. Other stages, with the exception of the concluding joint session are seen as optional depending on the circumstances.

If the matter has not resolved, the mediator will discuss with the parties the next steps to be taken, including the need to obtain any further material. If appropriate, directions may be issued by the Tribunal.

In all ADR processes the parties must act in good faith (section 34A).

# Administrative Appeals Tribunal

## Neutral Evaluation Process Model

### *Description*

Neutral Evaluation is understood by the Tribunal as:

An advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, *assists the parties to resolve the dispute* by providing a non-binding opinion on the likely outcomes. Neutral Evaluation is used when the resolution of the conflict requires an evaluation of both the facts and the law. The opinion may be the subject of a written report which may be admissible at the hearing.

### *Neutral Evaluation Process*

Neutral Evaluation may be undertaken at any time in the Tribunal process. Neutral Evaluation is a process of assessing a dispute in which the evaluator seeks to identify and limit the issues of fact and law that are in dispute and, by that process, assist the parties to resolve the dispute.

The Neutral Evaluation process is undertaken in confidence and without prejudice to the parties. Neutral Evaluation will usually be conducted in the presence of the parties, following the receipt of oral or written submissions, but may be conducted on the papers alone. The evaluator will determine the method of evaluation in consultation with the parties. Where the evaluation is conducted in the presence of the parties, the Applicant and the Respondent are expected to attend in person. Representatives may play an active role in the process, with a focus on the parties' prospects of success and consequently the outcome of the issues to be determined.

The evaluator examines factual information provided by the parties, listens to the parties submissions and provides a non-binding opinion. An oral opinion will usually be given on the same day following a brief adjournment. In more complex matters, the evaluator may issue a written opinion within 48 hours of the Evaluation.

#### **1. Preparation and Referral**

Referral to Neutral Evaluation will usually take place following a conference in which the conference convenor may make directions for the provision and

exchange of documents in preparation for the Evaluation. The conference convenor, in consultation with the parties, may prepare a list of suggested factual and/or legal issues in dispute or questions for determination in the Evaluation. A date for the Evaluation will be set at the conference or shortly after.

The evaluator may conduct a telephone directions hearing prior to the evaluation to discuss or amend the list of suggested issues and/or questions. The parties are encouraged to discuss with each other and the evaluator whether they may want the neutral evaluation process to include the possibility of settlement discussions instead of, or in addition to, a formal evaluation.

## **2. Evaluator's Opening Statement**

The evaluator will explain the process and his/her role to the parties and/or their representatives.

The evaluator will focus specifically on key issues raised by the facts of a case (as presented by the parties) and relevant questions of law.

## **3. Identification and Listing of Issues**

At the commencement of the Neutral Evaluation, the evaluator may seek endorsement from the parties as to the agreed list of issues and/or questions for determination and make any appropriate changes.

The parties are encouraged to prioritise issues for discussion from the agreed list of issues in dispute. The evaluator may facilitate negotiations between the parties and may hold private meetings in order to explore options with either party prior to the giving of an opinion.

## **4. Parties Presentations**

The parties present their cases on the agreed issues either by written submissions, by oral presentation, or by a combination of both.

The evaluator manages the length of any oral presentations. The evaluation process will be informal; rules of evidence will not apply and there will be no formal examination or cross-examination of parties. The evaluator considers the factual information and applicable law as presented by both parties. The evaluator may ask questions and will summarise the submissions and presentations made by the parties. The parties are encouraged to ask clarifying questions of each other.

## **5. Evaluator's Oral Opinion**

At the conclusion of the Evaluation, the evaluator will offer the parties a non-binding oral opinion on the issues in dispute, based on an objective, independent and impartial analysis of the evidence available at the time of the evaluation. This opinion may include advice as to the possible or probable outcomes.

The purpose of the non-binding opinion is to provide the parties with an objective basis for further negotiation. The evaluator's non-binding opinion will indicate how the key disputed issues between the parties may be resolved and suggest options to the parties for negotiation and compromise.

As the Evaluation will also include an opinion regarding legal issues, the parties should be in a position to re-assess their risks regarding the final outcome of the dispute and that risk re-assessment will provide the parties with an objective basis for proceeding with further negotiations.

## **6. Concluding Joint Session**

The evaluator will usually facilitate settlement negotiations following the giving of the opinion. Where an opinion has been given on the papers, a face-to-face or telephone session will be convened within 7 days to discuss possible settlement options or to prepare the matter for hearing. Where possible, this will be conducted by the evaluator.

Where agreement between the parties is reached and the matter is settled, the evaluator must ensure that the terms of settlement are in accordance with the law, before making a consent decision.

If settlement is not reached, the evaluator may record a plan or make directions to identify and exchange further relevant information which may assist in achieving resolution through the use of some other ADR process or to progress the matter to a hearing.

The fact that an Evaluation has occurred will be reported to the Tribunal hearing the application. However, the details of the Evaluation will not be reported unless all parties consent.

## **7. Evaluator's Written Opinion**

If the matter has not resolved by negotiation, the evaluator may, at the request of a party, give a written opinion about the factual and legal issues in dispute. The report will only be a summary of the likely outcome at a hearing of the evaluated factual and legal issues based on the evidence available at the

time of the Evaluation. The opinion may be admitted in evidence at the Tribunal hearing unless a party objects.

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As in all ADR processes, the parties involved in a Neutral Evaluation must act in good faith (section 34A).

# Administrative Appeals Tribunal

## Case Appraisal Process Model

### *Description*

Case Appraisal is understood by the Tribunal as:

An advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, *assists the parties to resolve the dispute* by providing a non-binding opinion on the facts and the likely outcomes. The opinion is an assessment of facts in dispute. The opinion may be the subject of a written report which may be admissible at the hearing.

### *Case Appraisal Process*

Case Appraisal may be undertaken at any time in the Tribunal process. Case Appraisal is a process of assessing the facts in a case and by that process assisting the parties to resolve the dispute.

The Case Appraisal process is undertaken in confidence and without prejudice to the parties. Case Appraisal will usually be conducted in the presence of the parties, following the receipt of oral or written submissions, but may be conducted on the papers alone. The appraiser will determine the method of appraisal in consultation with the parties. Where the appraisal is conducted in the presence of the parties, the Applicant and the Respondent are expected to attend in person. Representatives may play an active role in the process, with a focus on the outcome of the issues to be determined and consequently the parties' prospects of success.

The case appraiser reviews and analyses factual information provided by the parties, listens to the parties' submissions and provides a non-binding opinion. An oral opinion will usually be given on the same day after a brief adjournment. In more complex matters, the appraiser may issue a written opinion within 48 hours of the Appraisal.

### **3. Preparation and Referral**

Referral to Case Appraisal will usually take place following a conference in which the conference convenor may make directions for the provision and

exchange of documents in preparation for the Appraisal. The conference convenor, in consultation with the parties, may prepare a list of suggested factual issues in dispute or questions for determination in the Appraisal. A date for the Appraisal will be set at the conference or shortly after.

The parties are encouraged to discuss with each other and the appraiser whether they may want the appraisal process to include the possibility of settlement discussions instead of, or in addition to, a formal evaluation.

#### **4. Appraiser's Opening Statement**

The appraiser will explain the process and his/her role to the parties and/or their representatives.

The appraiser will focus primarily on the facts of the case.

#### **3. Identification and Listing of Issues**

At the commencement of the Case Appraisal process, the appraiser may seek endorsement from the parties as to the agreed list of factual issues and/or questions for determination and make any appropriate changes.

The parties are encouraged to prioritise issues for discussion from the agreed list of factual issues in dispute. The appraiser may facilitate negotiations between the parties and may hold private meetings in order to explore options with either party prior to the giving of an opinion.

#### **4. Parties Presentations**

The parties present their cases on the agreed issues either by written submissions, by oral presentation, or by a combination of both. The appraiser manages the length of any oral presentations. The appraisal process will be informal; rules of evidence will not apply and there will be no formal examination or cross-examination of parties. The appraiser considers the facts presented by both parties. The appraiser may ask questions and will summarise the presentations made by the parties. The parties are encouraged to ask clarifying questions of each other.

#### **5. Appraiser's Oral Opinion**

At the conclusion of the Appraisal the appraiser will offer the parties a non-binding oral opinion on the factual issues in dispute, based on an objective, independent and impartial analysis of the factual information and materials available at the time of the Appraisal. This opinion may include advice as to the possible or probable outcomes.

The purpose of the non-binding opinion is to provide the parties with an objective basis for further negotiation. The appraiser's non-binding opinion

will indicate how the key disputed issues between the parties may be resolved and to then suggest options to the parties for negotiation and compromise.

The parties should be in a position to re-assess their risks regarding the final outcome of the dispute and that risk re-assessment will provide the parties with an objective basis for proceeding with further negotiations.

## **6. Concluding Joint Session**

The appraiser will usually facilitate settlement negotiations following the giving of the opinion. Where an opinion has been given on the papers, a face-to-face or telephone session will be convened within 7 days to discuss possible settlement options or to prepare the matter for hearing. Where possible, this will be conducted by the appraiser.

Where agreement between the parties is reached and the matter is settled, the appraiser must ensure that the terms of settlement are in accordance with the law, before making a consent decision.

If settlement is not reached, the appraiser may record a plan or make directions to identify and exchange further relevant information which may assist in achieving resolution through the use of some other ADR process or to progress the matter to a hearing.

The fact that a Case Appraisal has occurred will be reported to the Tribunal hearing the application. However, the details of the Appraisal will not be reported unless all parties consent.

## **8. Appraiser's Written Opinion**

If the matter has not resolved by negotiation, the appraiser may, at the request of a party, give a written opinion about the factual issues in dispute. The report will only be a summary of the likely outcome at a hearing of the factual issues in dispute based on the evidence available at the time of the Case Appraisal. The opinion may be admitted in evidence at the Tribunal hearing unless a party objects to the admission of the opinion.

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As in all ADR processes, the parties involved in a Case Appraisal must act in good faith (section 34A).

# Administrative Appeals Tribunal

## Conciliation Process Model

### *Definition*

Conciliation is defined by the Tribunal as:

A process in which the parties to a dispute, with the assistance of a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with the requirements of the statute.

### *The Conciliation Process*

The process has five stages. It is intended to be flexible and informal. The conciliator may:

- give advice on the case management processes or the practice of the AAT;
- offer opinions as to the issues of factual or legal dispute between the parties;
- give advice about the costs implications and other non legal consequences; and
- ask parties to explain any decision making constraints

Referral to conciliation will usually take place following a conference.

#### **1. Preparation and Conciliator's Opening Statement**

The opening statement includes a brief description of the role of the conciliator and participants, the conciliation process and any ground rules.

#### **2. Parties' Statements**

Each party or their representative provides a statement about the dispute from their perspective.

Emerging interests, needs and options for resolution are acknowledged for use later in the conciliation.

### **3. Joint Exploratory Session and Discussion**

The conciliator will take an active role, summarising views and options and may also discuss with the parties the strength and weaknesses of their case.

The conciliator encourages parties to communicate directly with each other. The parties' interests are further clarified.

This provides the basis for joint problem solving, raising options for agreement and may be followed by further joint sessions where necessary.

During this stage, the parties may take a break from joint session to give lawyers instructions and consider offers or advice.

### **4. Private Meetings**

The conciliator may hold private meetings with each of the parties. The conciliator may reality test alternatives and options and comment about potential outcomes and the strengths and weaknesses of each party's case.

### **5. Concluding Joint Session**

There may be a need for additional joint sessions. The conciliator will assist the parties to narrow the issues in dispute.

The conciliator facilitates final negotiations and fine-tuning of the agreement. Alternatively, the conciliation may need to be adjourned or terminated.

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If the matter has not resolved, the conciliator will discuss with the parties the next steps to be taken, including the need to obtain any further material. If appropriate, directions may be issued by the Tribunal.

In all ADR processes, the parties must act in good faith (section 34A).