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## **ADRA Submission – NADRAC Inquiry May 2009**

*Please note that the Australian Dispute Resolution Association opted not to use the term ‘alternative’ when discussing dispute resolution procedures some twenty years ago. It is ADRA’s practice to refer to ‘dispute determination’ (court adjudicated processes) and ‘dispute resolution’ (historically referred to alternative dispute resolution, or ADR.)*

### **2 About ADR — Questions**

*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?*

All organisations should be encouraged to adopt a definitive source of terminology, be it the NADRAC Glossary of dispute resolution terms, or another source. This will assist consumers to understand the process they are committing to. ADRA notes that defining terms does not necessarily involve narrowing the application of methodologies.

*2.2 How does inconsistent use of ADR terms affect consumers and referral to ADR processes by courts, lawyers and others?*

Inconsistent use of terms can be confusing to consumers and practitioners alike. Defining processes will assist in a clearer understanding of all forms of dispute resolution.

*2.3 What are the advantages and disadvantages of adopting common process models for ADR processes, adopting standard definitions or adopting statutory definitions?*

ADRA notes the advantages of consumers and practitioners having a common understanding of dispute resolution processes, rather than adopting common processes. ADRA supports the consideration of definitions that are wide enough to facilitate the broad implementation of processes.

### **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?*

ADRA notes the importance of providing the general community with information about what is involved in different dispute resolution processes.

ADRA also notes that the development of hybrid or blended processes in which the role of the mediator changes has increased the need to improve general understanding of the different processes. A community awareness program involving the use of information brochures and/or information sessions in courts are examples of promotional opportunities that might be explored.

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ADRA particularly notes the advantages of multi-door court house, similar to the Neighbourhood Justice Centre in Victoria, as a vehicle of providing awareness of different dispute resolution processes.

This might include an expansion of centres such as the Community Justice Centres to shopfronts similar to the Medicare shopfront to enable greater access to information on dispute resolution and its advantages. These shopfronts are in shopping centres which would promote a greater awareness of dispute resolution.

*3.2 Which other groups or organisations might benefit from a greater awareness of ADR? How might this be achieved?*

Family doctors, Churches and schools often become aware of conflicts early, before matters get to the stage where other professional such as lawyers are called in. Other professions that would benefit from a greater awareness of dispute resolution processes include counsellors, teachers, human resource professionals, the medical profession more broadly and legal practitioners themselves.

Brochures could be sent to each of these organisations and to professional organisation for distribution.

#### **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?*

ADRA notes that courts may not be suitable venues for dispute resolution processes, particularly with respect to cultures whose experience with courts is particularly negative. ADRA prefers that dispute resolution processes are conducted in a building or space outside the court, whether in a dispute resolution centre or a multi-door courthouse or another alternative venue.

ADRA notes that the provision of court based dispute resolution processes may shift the cost of these processes from the consumer to the state.

*4.4 How effective are the existing ADR services available in courts and tribunals prior to a final hearing?*

ADRA notes that the Industrial Relations Commission of New South Wales recorded that the use of dispute resolution processes resulted in up to 95% of matters being resolved before adjudication.

ADRA also notes that the New South Wales Workers' Compensation Commission resolves up to 75% of matters prior to adjudication.

*4.5 To what extent should judges or other court staff encourage disputants to use ADR (where not required by legislation)?*

This should be done at every stage where appropriate, and should be encouraged.

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ADRA notes the advantages in time and cost savings should judges and court staff encourage disputants to undertake dispute resolution processes.

*4.6 What role should courts have in facilitating or providing ADR?*

ADRA supports the courts bearing the costs of dispute resolution processes. ADRA also supports the provision of dispute resolution processes by courts, in circumstances where those processes are provided by practitioners with appropriate dispute resolution training. If mediation was provided, this should be provided by Nationally Accredited mediators.

*4.7 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?*

It could mean that parties will not, or will not be encouraged to, seriously turn their minds to dispute resolution until after commencing proceedings. By this time emotional and financial expense will have been incurred which might have been avoided. Lawyers should be required to inform clients of all options and conduct extensive risk/cost analyses before preparing to commence proceedings.

ADRA notes that some disputants may rely on free/cheap court dispute resolution services rather than exploring dispute resolution at their own cost.

The Court may be in a position to introduce a fee system where disputants lodging matters with the Courts receive a discount if they have attempted to resolve the dispute before commencing proceedings. ADRA notes that this may involve some difficulties with respect to parties engaging in 'good faith' dispute resolution measures, and gauging whether the parties had engaged in the process in 'good faith'.

*4.8 What are the advantages and disadvantages of requiring court provided ADR services to meet the same standards as private and community based services?*

Any dispute resolution processes provided by the courts should be substantially similar to those processes offered privately and by community based services, where costs permit. ADRA notes the importance of providing a cost effective process in a Consumer Trade and Tenancy Tribunal with respect to a claim for \$60,000, especially when compared with the provision of an appropriate process for a Workers Compensation Commission claim in excess of \$1,000,000.00.

ADRA notes the importance of any practitioner providing dispute resolution processes being properly accredited. In the context of mediation, mediators should be Nationally Accredited.

*Judicial dispute resolution*

*4.9 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?*

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ADRA recognises that the skill sets of the judiciary and the skill sets of other dispute resolution practitioners are not mutually exclusive. Some members of the judiciary may be trained and have the skills to conduct other dispute resolution processes. ADRA notes a potential disadvantage, being that dispute resolution may be perceived as part of the judicial process. ADRA also notes the procedural fairness issues involving judges mediating matters which they later go on to adjudicate.

ADRA again notes the importance of mediation services being delivered by Nationally Accredited mediators.

*4.10 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?*

The Judge is an authority figure who in addition is expected to have expertise in the substance of the dispute. This gives a judge more status than a non-judicial mediator. The negative consequences could be a perception that mediation by a judge is the 'best mediation' available. ADRA notes the inherent difficulties of a judge proceeding to adjudication if the judge has private meetings with the parties during any earlier form of dispute resolution.

Parties may be more receptive to settlement when dispute resolution is delivered by a judge. Lawyers representing parties who re-appear in front of the same judge may be more likely to be predisposed to settlement due to the ongoing nature of the relationship that these lawyers are seeking to maintain with the judge.

*4.12 To what extent might the confidentiality of ADR be undermined if a judge conducts it? What reporting requirements might apply?*

ADRA notes that a judge can maintain confidentiality as required. ADRA also notes the perceived difficulty of a judge who has been provided with confidential material during dispute resolution moving on to an adjudication role.

*4.13 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?*

ADRA notes the differing skill sets required of differing dispute resolution processes and adjudication processes. ADRA notes that these skill sets are not necessarily mutually exclusive. ADRA further notes the importance of judicial training and also notes the importance of any practitioner undertaking mediation being Nationally Accredited.

#### *Court officer provided ADR*

*4.14 What are the advantages and disadvantages of having court staff such as registrars provide ADR services? What role might be most appropriate?*

ADRA notes the importance of dispute resolution being provided by accredited personnel with the appropriate skill sets.

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*4.15 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, e.g. accounting, engineering, psychology, etc?*

ADRA notes the advantages that dispute resolution practitioners with particular expertise bring to dispute resolution processes with respect to the impact that this has regarding the confidence of the parties in the process. Parties appear to have greater confidence in dispute resolution practitioners who have a demonstrated expertise in the subject matter in dispute.

*Private, community and government based ADR*

*4.16 What are the advantages and disadvantages of private ADR services and those provided by industry groups?*

ADRA has observed that dispute resolution services provided by industry groups have a level of expertise and technical understanding that can be of great benefit to the parties in dispute. These processes tend to involve published procedures which also assist the parties in the dispute.

When these processes are free to consumers this is an arguable advantage of industry group provided dispute resolution.

ADRA has observed that dispute resolution services provided by private entities can be quick, personalised and very responsive to the individual matter.

*4.18 What are the benefits and drawbacks of existing government ADR services?*

ADRA supports more research in this area.

*4.19 What are the advantages and disadvantages of courts referring matters to external ADR practitioners?*

Referral to an external mediator may carry an advantage when the parties believe the mediator has relevant expertise beyond that which is available internally. Cost may be an advantage or disadvantage, depending on the circumstances. One situation occurs when the parties can access free services within the court and not outside; another situation occurs where mediation can settle the dispute in a timely way compared with lengthy or protracted legal proceedings.

*4.20 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?*

ADRA notes the advantage of dispute resolution centres which provide consumers with specialised assessment, referral and dispute resolution as follows:

- Clear explanation of the processes available;
- Clear outline of the costs involved; and
- Easy access to expert practitioners.

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ADRA notes the advantages in these bodies being state funded to ensure that the service delivery is unbiased and of a high quality.

Please see the response outlined at 4.1

*4.21 What is the appropriate role of government funding in relation to private and community ADR services?*

Government funded dispute resolution services should feature trained practitioners and assist practitioners by providing centralised communication, training, supervision and accreditation support. Government funded dispute resolution should be available in areas of financial need and physical disadvantage and for indigenous communities.

*4.22 To what extent is there a need for more, or more highly specialised, private, community based or government ADR services?*

ADRA notes the importance of providing culturally appropriate dispute resolution services, and that government ought to fund these services where appropriate.

*4.23 To what extent is there a need to improve the quality of private, community based or government ADR services? How can quality be enhanced?*

ADRA notes the importance of ensuring the government funding meets the dispute resolution needs of all members of the community and that the quality of the dispute resolution services provided can be enhanced by providing funding for accreditation and training purposes.

*4.24 Are there any issues relating to the fees charged for ADR services which need to be addressed?*

The cost of dispute resolution services may be preventing some consumers from accessing dispute resolution services.

## **5 Referral and assessment — 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'.*

*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?*

Lawyers should be trained to recognise styles of negotiation, to acquire skills in ethical negotiation practices. Professionals who deal with human conflict should be made aware of dispute resolution principles and resources.

ADRA supports the ongoing training of lawyers in dispute resolution processes. This will encourage lawyers to provide clients with contemporary models of dispute

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resolution and will ensure that lawyers have the opportunity to provide clients with new and innovative dispute resolution strategies.

*5.2 To what extent is there a need to enhance the understanding of ADR amongst court staff and judges? How might their information and referral functions be enhanced?*

ADRA notes the importance of providing specialised in-house training to court staff and judges to ensure that the dispute resolution processes being recommended/provided by the staff and judges are appropriate.

ADRA also notes that this will provide court staff and judges with an opportunity to canvass all options when assisting parties to resolve their disputes.

*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?*

Dispute resolution education should not be confined to law courses. It should be taught in Commerce, Social Work, Medicine, Education and similar disciplines. It should be compulsory for Law Students to make them rounded dispute resolvers so they no longer focus mainly on litigation. Negotiation theory should be taught. It should be made clear that separate skills training will be required if they want to practise dispute resolution.

## **6 Barriers and incentives — 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'.*

*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?*

ADRA notes that this appears to be consequence of the mindset of the legal professionals involved who do not appear to consider dispute resolution before commencing civil proceedings. This appears to be a common experience with respect to all dispute resolution processes. It may be a consequence of a lack of awareness or inducement to consider dispute resolution processes prior to commencing civil proceedings.

*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?*

ADRA notes that the reasons outlined at 6.1 above would also apply here. Again, inducements to consider dispute resolution processes may be appropriate.

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*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?*

The culture of the legal profession is changing in relation to dispute resolution and will continue to change, particularly as dispute resolution is taught in Law Schools. A useful approach to removing this barrier includes education of legal practitioners and providing inducements during the process to encourage the uptake of dispute resolution.

*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?*

The adversarial system sets up a contest to see who will win, whereas dispute resolution is a co-operative approach to a common problem. The adversarial system and its terminology (applicant-respondent, plaintiff-defendant) creates opponents. Dispute resolution tries to create partners. There needs to be encouragement, if possible, to work together. Perhaps lawyers could be educated to undertake this task.

*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?*

ADRA proposes that legislation be implemented so that the costs accrued during dispute resolution are included in costs in the cause.

*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?*

ADRA supports the promotion of model mediation clauses in order to promote dispute resolution generally. Clauses can be encouraged through promotion to lawyers, particularly in-house lawyers, business managers and small to medium sized business enterprises.

Should such a clause be implied into all contracts, this would arguably improve the uptake of dispute resolution services but may not have the same promotional benefits.

*6.8 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR before commencing litigation?*

ADRA suggests the implementation of community education, resourcing community centres with dispute resolution information and the consideration of a multi-door courtroom as strategies that government could pursue that might provide incentives to parties to consider dispute resolution.

*6.9 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR during litigation?*

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ADRA notes that discounts on Court fees and cost implications may provide an incentive to use dispute resolution before commencing litigation.

*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).*

ADRA notes that this would provide parties with an incentive to engage in dispute resolution processes both prior to litigation and during litigation. This has the arguable benefit of reducing the pressures on the resources of the Court. The Court ought to have discretion to waive costs consequences in circumstances where dispute resolution is not appropriate or suitable.

*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?*

ADRA notes that providing people and organisations with information about the availability of dispute resolution services is an important part of promoting dispute resolution.

*6.12 Would it be helpful to include any of these measures in legislation, court rules or other subsidiary legislation?*

ADRA supports including such measures in legislation, court rules or subsidiary legislation.

*6.13 What are the advantages and disadvantages of:*

*(1) requiring disputants to consider ADR*

ADRA notes that this promotes dispute resolution and gives parties an opportunity to be introduced to dispute resolution concepts and processes.

*(2) requiring disputants to participate in an assessment of the dispute for suitability for ADR*

ADRA notes that this would have the advantage of demonstrating an understanding that not all matters may be suitable for dispute resolution

*(3) introducing statutory provisions requiring litigants to attend ADR before they can file civil proceedings or stating that the default or usual position should be that courts and tribunals should refer matters to ADR, unless the court is persuaded that this is not appropriate*

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ADRA notes the promotional advantages of including dispute resolution services in mainstream dispute determination procedures. ADRA supports the inclusion of a proviso relating to the court being persuaded of the inappropriateness of dispute resolution in certain circumstances.

*(4) making attendance at ADR, or particular types of ADR processes, mandatory in federal civil proceedings*

ADRA notes the advantages of dispute resolution services, and notes that mandating dispute resolution may have the advantage of providing parties who would not have otherwise pursued dispute resolution with an opportunity of developing a settlement without the involvement of the Court

*6.15 What are the advantages and disadvantages of requiring disputants to participate in ADR in good faith/make a genuine attempt to resolve the dispute? If such a requirement was introduced, what should be done to protect the confidentiality and integrity of ADR processes?*

ADRA notes that the attendance at dispute resolution without good faith can be a waste of resources.

The professional decision of the dispute resolution practitioner should be all that is required in determining whether parties attending dispute resolution in good faith. To examine the reasons behind the decision may destroy confidentiality. The Family Law Model is a good example of how this may operate.

*6.16 At what stage of the dispute should any mandatory ADR requirement apply?*

Dispute resolution should be encouraged at every appropriate stage of the dispute resolution/determination process. ADRA notes the importance of promoting a proportional approach to dispute resolution as outlined at 4.8 above.

*6.17 What exceptions to a mandatory ADR requirement would be appropriate?*

A party's physical or mental incapacity or an inability to pay may be considerations for exceptions to mandatory dispute resolution.

The exception might be when the Court deems dispute resolution to be inappropriate in the circumstances.

*6.18 What are the advantages and disadvantages of mandating different types of ADR or having different mandatory requirements for different types of dispute? How should types of dispute be distinguished?*

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ADRA notes the advantage of involving a trained Court Official undertaking the task of discussing with the parties the most appropriate form of dispute resolution in the circumstances.

*6.19 What are the characteristics of disputes for which ADR, or some forms of ADR, would not be appropriate?*

Some examples of disputes which may not be appropriate for dispute resolution include: extreme urgency or imminent danger, a party is dying, a structure is about to collapse.

*6.20 To what extent would it be beneficial to require ADR practitioners to undertake an intake and assessment process to assess the participants' needs, exclude inappropriate cases and refer elsewhere where appropriate?*

ADRA notes the advantages of a detailed intake and assessment process prior to the commencement of any dispute resolution process. ADRA supports the suggestion that some matters ought to be excluded from some types of dispute resolution and ought to be referred elsewhere if more appropriate.

*6.21 If mandatory requirements are introduced, who should provide information about these and what obligations should apply? See for example requirements to provide information under the Family Law Act.*

ADRA supports a multi focussed public information campaign should mandatory requirements be introduced. ADRA would be particularly supportive of a media campaign outlining the different dispute resolution processes. ADRA also supports the installation of dispute resolution shopfronts.

## **Use of ADR in government disputes — Questions**

*7.1 In what type of matter do/should Commonwealth agencies utilise ADR?*

ADRA notes the advantage of utilising dispute resolution in all matters unless there is a clearly expressed reason as to the inappropriateness of dispute resolution in the circumstances.

*7.2 What are the characteristics of disputes where it would be inappropriate for agencies to use ADR?*

Complaints of serious professional misconduct may be inappropriate for dispute resolution.

*7.3 How can agencies improve their use of ADR processes?*

ADRA supports the offering of dispute resolution training to managers within government agencies.

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*7.5 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?*

ADRA notes that it has been observed that organisations which train their staff in dispute resolution services note an increased take-up of dispute resolution.

*7.7 How can Government agencies find mediators? To what extent is assistance in this process required and how might this assistance be provided?*

ADRA notes that a number of organisations provide case management facilities which assist Government agencies in locating an appropriate mediator. ADRA supports the greater promotion of these services.

## **8 Use of ADR techniques — 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'.*

*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?*

ADRA supports this initiative where appropriate.

## **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?*

ADRA would be pleased to assist in the improvement of data collection relating to dispute resolution practices.

ADRA would like to encourage all users and providers of dispute resolution services to develop strategies to assist in the collection of this data.

*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?*

ADRA notes that improved collection of data will assist in evaluating the current delivery of dispute resolution services and will help to improve the future delivery of dispute resolution services.

*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?*

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ADRA notes the inherent difficulty in collecting this data due to the confidential nature of many dispute resolution processes.

*9.4 What might be done to support ADR research and researchers?*

ADRA supports the granting of scholarships for dispute resolution research, and notes the role of both industry and government in the granting of scholarships.