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The Hon Justice Murray Kellam AO
Chair
National Alternative Dispute Resolution Advisory Council
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Justice Kellam,

**NADRAC
Alternative Dispute Resolution in the Civil Justice System
Issues Paper**

Thank you for the opportunity to comment on the Alternative
Dispute Resolution in the Civil Justice System Issues Paper.

ACDC would like to take this opportunity to thank the NADRAC
Secretariat for the tremendous amount of work that they undertook
in the writing of the Issues Paper. The Issues Paper provided ACDC
with an excellent opportunity to discuss some of the difficult and
emerging issues arising out of the practice of ADR.

The NADRAC Secretariat ought to be congratulated on the
outstanding quality of the Issues Paper.

ACDC has provided some comment in relation to some of the issues
raised, which I have attached to this letter.

Should there be any questions in relation to any of the comments
outlined in the attachment, I would be happy to discuss ACDC's
comments further.

Yours sincerely,

Emma Matthews
Chief Executive Officer

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The Hon Trevor Morling, QC

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Dr Simon Longstaff
Executive Director, St James Ethics
Centre (Chair)

Judge Margaret Sidis
NSW District Court

Ms Sue Knights
Masters Co-ordinator, University of
Technology, Sydney

2 About ADR — Questions	Comments
<p><i>NOTE: Where appropriate, a reference to 'court' should be read as including 'tribunal'.</i></p>	
<p>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?</p>	<p>ACDC uses the NADRAC Glossary of ADR terms as the definitive source of terminology. All organisations should be encouraged to adopt a definitive source of terminology, be it the NADRAC Glossary of ADR terms, or another source.</p>
<p>2.2 How does inconsistent use of ADR terms affect consumers and referral to ADR processes by courts, lawyers and others?</p>	<p>ACDC has noted confusion amongst those who attend ACDC Training Courses. There is some difficulty in presenting 'best practice' terminology, as a number of practitioners promote the dropping of the term "alternative". ACDC is of the opinion that the abbreviation "ADR" is now so commonplace that "Alternative Dispute Resolution" should be entrenched.</p>
<p>2.3 What are the advantages and disadvantages of adopting common process models for ADR processes, adopting standard definitions or adopting statutory definitions?</p>	<p>Whilst many practitioners embrace the flexibility of ADR in all its forms, ACDC understands the benefits of common process models and standard definitions. These benefits include clarity amongst users of ADR and a clearer understanding amongst trainees who are seeking to follow a process model during training courses.</p> <p>ACDC does not have a view on the adopting of statutory definitions beyond acknowledging the advantages of a definitive source of definitions.</p>
3 Promoting public awareness — Questions	
<p>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?</p>	<p>ACDC is very supportive of promoting public awareness of ADR in the general community. Through its work in promoting ADR in New South Wales, ACDC is aware that the general community has only a cursory understanding of the features and benefits of ADR. There are a number of different and complementary</p>

	<p>methodologies that could be employed to achieve greater understanding in the general community.</p> <p>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 ADR and its advantages. These shopfronts are in shopping centres which would promote a greater awareness of ADR.</p> <p>This might also include a promotional campaign highlighting the options beyond going to court when there are issues in dispute.</p>
3.2 Which other groups or organisations might benefit from a greater awareness of ADR? How might this be achieved?	<p>ACDC has been pleased to see the benefits of a greater awareness of ADR in small and medium sized businesses and enterprises. In particular, ACDC has noted that Human Resource professionals can be key proponents of change within organisations through the promotion of ADR and ADR principles.</p>
4 Provision of ADR Services — Questions	
<i>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'</i>	
Court services	
4.1 What are the benefits and drawbacks of court based ADR?	<p>ACDC notes that the provision of court based ADR may shift the cost of ADR processes from the consumer to the state.</p>
4.4 How effective are the existing ADR services available in courts and tribunals prior to a final hearing?	
4.5 To what extent should judges or other court	<p>ACDC notes the advantages in time and cost savings should</p>

<p>staff encourage disputants to use ADR (where not required by legislation)?</p>	<p>judges and court staff encourage disputants to use ADR. ACDC also notes the advantages to the parties in terms of creative problem solving.</p>
<p>4.6 What role should courts have in facilitating or providing ADR?</p>	<p>ACDC notes that a policy decision ought to be made as to whether the state or the parties ought to bear the cost of ADR. ACDC also notes the advantages of those providing ADR being properly trained in the ADR processes they are providing.</p>
<p>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?</p>	<p>ACDC notes that some disputants may rely on free/cheap court ADR services rather than exploring ADR at their own cost.</p> <p>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 ADR. ACDC notes that this may involve some difficulties with respect to parties engaging in 'good faith' ADR measures.</p>
<p>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?</p>	
<p>Judicial dispute resolution</p>	
<p>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?</p>	<p>ACDC notes the advantages of a consistent delivery of ADR services. In particular, ACDC notes the advantage of ensuring that mediation services are consistently delivered by NMAS accredited mediators.</p>

<p>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?</p>	<p>Parties may be more receptive to settlement when ADR is delivered by a judge. ACDC notes that this may have some impact on the generation of options by the parties themselves and the ownership of the agreement by the parties.</p>
<p>4.12 To what extent might the confidentiality of ADR be undermined if a judge conducts it? What reporting requirements might apply?</p>	
<p>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?</p>	
<p>Court officer provided ADR</p>	
<p>4.14 What are the advantages and disadvantages of having court staff such as registrars provide ADR services? What role might be most appropriate?</p>	
<p>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, eg accounting, engineering, psychology, etc?</p>	<p>ACDC notes the advantages that ADR practitioners with particular expertise bring to ADR processes with respect to the impact that ACDC has observed this has on the confidence of the parties. ACDC has observed that parties have greater confidence in ADR practitioners who have a demonstrated expertise in the subject matter in dispute.</p>
<p>Private, community and government based ADR</p>	
<p>4.16 What are the advantages and disadvantages of private ADR services and</p>	<p>ACDC has observed that ADR services provided by industry groups have a level of expertise and technical understanding that can</p>

<p>those provided by industry groups?</p>	<p>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 ADR.</p> <p>ACDC has observed that ADR provided by private ADR services can be quick, personalised and very responsive to the individual matter.</p>
<p>4.17 What are the advantages and disadvantages of existing ADR services provided by community organisations?</p>	
<p>4.18 What are the benefits and drawbacks of existing government ADR services?</p>	
<p>4.19 What are the advantages and disadvantages of courts referring matters to external ADR practitioners?</p>	
<p>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?</p>	<p>ACDC notes the advantage of dispute resolution centres which provide consumers with specialised assessment, referral and dispute resolution as follows:</p> <ul style="list-style-type: none"> - Clear explanation of the processes available; - Clear outline of the costs involved; and - Easy access to expert practitioners. <p>ACDC notes the advantages in these bodies being state funded to ensure that the service delivery is unbiased and of a high quality.</p>
<p>4.21 What is the appropriate role of government funding in relation to private and community ADR</p>	<p>Government funded ADR services can assist in the provision of best practice ADR that is reviewable and unbiased.</p>

services?	
4.22 To what extent is there a need for more, or more highly specialised, private, community based or government ADR services?	ACDC notes that one of the advantages of a number of highly specialised, private, community based or government ADR services is increased public profile of ADR. ACDC supports the implementation of each style of ADR service. ACDC also notes the advantages inherent in one, branded shopfront for ADR funded by government.
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?	
4.24 Are there any issues relating to the fees charged for ADR services which need to be addressed?	
5 Referral and assessment — Questions	
<i>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'.</i>	
<i>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).</i>	
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	ACDC supports the ongoing training of lawyers in ADR. This will encourage lawyers to provide clients with contemporary models of ADR and will ensure that lawyers have the opportunity to provide clients with new and innovative dispute resolution

enhanced? What are the advantages and disadvantages of introducing compulsory ongoing training about ADR for lawyers?	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?	ACDC supports the training of court staff and judges in ADR. 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?	ACDC supports the training of as many undergraduates as possible in ADR. ACDC particularly supports the introduction of compulsory ADR training for law undergraduates. ACDC also supports the introduction of ADR subjects in Arts degrees, Social Science degrees, Business degrees, Psychology degrees, Social Work degrees and similar study programmes.
6 Barriers and incentives — Questions	
<i>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'.</i>	
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?	

<p>To what extent do they apply to all types of disputes? Why? How can they be overcome?</p>	
<p>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?</p>	
<p>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?</p>	
<p>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?</p>	
<p>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?</p>	
<p>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?</p>	<p>ACDC supports the promotion of model mediation clauses as an excellent methodology of promoting ADR generally. Clauses can be encouraged through promotion to lawyers, particularly in-house lawyers, business managers and small to medium sized business enterprises.</p> <p>Should such a clause be implied into all contracts, this would</p>

	arguably improve the uptake of ADR 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?	ACDC notes that discounts on Court fees and cost implications may provide an incentive to use ADR before commencing litigation would be examples of some strategies.
6.9 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR during litigation?	ACDC notes that discounts on Court fees and cost implications may provide an incentive to use ADR before commencing litigation would be examples of some strategies.
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).	ACDC notes that this would provide parties with an incentive to engage in ADR processes both prior to litigation and during litigation. This has the arguable benefit of reducing the pressures on the resources of the Court.
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?	ACDC notes that providing people and organisations with information about the availability of ADR services is an important part of promoting ADR.
6.12 Would it be helpful to include any of these measures in legislation, court rules or other subsidiary legislation?	ACDC notes the advantages of the flexibility of court rules.
6.13 What are the advantages and disadvantages of:	
(1) requiring disputants to consider ADR	ACDC notes the promotional benefits
(2) requiring disputants to participate in an assessment of the dispute for	ACDC notes that this would have the advantage of demonstrating an understanding that not all

suitability for ADR	matters may be suitable for ADR
<p>(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</p>	<p>ACDC notes the promotional advantages of including ADR services in mainstream dispute resolution procedures. ACDC supports the inclusion of a proviso relating to the court being persuaded of the inappropriateness of ADR in certain circumstances.</p>
<p>(4) making attendance at ADR, or particular types of ADR processes, mandatory in federal civil proceedings</p>	<p>ACDC notes the advantages of ADR services, and notes that mandating ADR may have the advantage of providing parties who would not have otherwise pursued ADR with an opportunity of developing a settlement without the involvement of the Court</p>
<p>(5) pre-action protocols, and</p>	
<p>(6) overriding purpose obligations?</p>	
<p>6.14 If pre-action protocols were to be introduced, what should these include?</p>	
<p>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</p>	<p>ACDC notes the difficulty of determining whether parties are acting in good faith in the context of ADR services.</p>

<p>to protect the confidentiality and integrity of ADR processes?</p>	
<p>6.16 At what stage of the dispute should any mandatory ADR requirement apply?</p>	<p>ACDC notes the advantages of providing ADR services as early in the dispute resolution process as possible.</p>
<p>6.17 What exceptions to a mandatory ADR requirement would be appropriate?</p>	<p>ACDC notes that one exception might be when the Court deems ADR to be inappropriate in the circumstances.</p>
<p>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?</p>	<p>ACDC notes the advantage of involving a trained Court Official undertaking the task of discussing with the parties the most appropriate form of ADR in the circumstances.</p>
<p>6.19 What are the characteristics of disputes for which ADR, or some forms of ADR, would not be appropriate?</p>	<p>ACDC notes that matters which involve the threat of violence may not be appropriate for ADR.</p>
<p>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?</p>	<p>ACDC notes the advantages of a detailed intake and assessment process prior to the commencement of any ADR process. ACDC supports the suggestion that some matters ought to be excluded from some types of ADR and ought to be referred elsewhere if more appropriate.</p>
<p>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.</p>	<p>ACDC supports a multi focussed public information campaign in circumstances where mandatory requirements were to be introduced. ACDC would be particularly supportive of a media campaign outlining the different ADR processes. ACDC also supports the installation of ADR shopfronts.</p>
<p>6.22 To what extent is the market for ADR services</p>	

<p>in the general federal civil justice system sufficiently mature to support a mandatory ADR requirement while maintaining the integrity and quality of the ADR processes provided?</p>	
<p>Use of ADR in government disputes — Questions</p>	
<p>7.1 In what type of matter do/should Commonwealth agencies utilise ADR?</p>	<p>ACDC notes the advantage of utilising ADR in all matters unless there was a clearly expressed reason as to the inappropriateness of ADR in the circumstances.</p>
<p>7.2 What are the characteristics of disputes where it would be inappropriate for agencies to use ADR?</p>	
<p>7.3 How can agencies improve their use of ADR processes?</p>	<p>ACDC supports the offering of ADR training to managers within government agencies.</p>
<p>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?</p>	
<p>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?</p>	<p>ACDC has observed that organisations which train their staff in ADR services note an increased take-up of ADR.</p>
<p>7.6 To what extent do Commonwealth agencies</p>	

<p>select legal representatives who are good litigators rather than skilled in the resolution of disputes? How can this be overcome?</p>	
<p>7.7 How can Government agencies find mediators? To what extent is assistance in this process required and how might this assistance be provided?</p>	<p>ACDC notes that a number of organisations provide case management facilities which assist Government agencies in locating an appropriate mediator. ACDC supports the greater promotion of these services.</p>
<p>8 Use of ADR techniques — Questions</p>	
<p><i>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'.</i></p>	
<p>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?</p>	
<p>8.2 How might the less adversarial trial approach be extended or have application in other jurisdictions?</p>	
<p>8.3 How might concurrent evidence be further extended or applied? In what circumstances could this approach be used effectively?</p>	
<p>8.4 To what extent would it be useful to introduce:</p>	
<ul style="list-style-type: none"> • judicial case appraisal 	
<ul style="list-style-type: none"> • a dispute management judge, or 	

<ul style="list-style-type: none"> increased use of round table case management conferencing? 	
<p>8.5 Are there any other ways in which techniques developed in ADR could be used to enhance the adjudicative process?</p>	
<p>9 Data, Evaluation and Research — Questions</p>	
<p>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?</p>	<p>ACDC would be thrilled to assist in the improvement of data collection of ADR.</p> <p>ACDC would like to encourage all users and providers of ADR services to develop a strategy to assist in the collection of this data.</p>
<p>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?</p>	<p>ACDC notes that improved collection of data will assist in evaluating the current delivery of ADR services and will help to improve the future delivery of ADR services.</p>
<p>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?</p>	<p>ACDC notes the inherent difficulty in collecting this data due to the confidential nature of many ADR processes.</p>
<p>9.4 What might be done to support ADR research and researchers?</p>	<p>ACDC supports the granting of scholarships for ADR research, and notes the role of both industry and government in the granting of scholarships.</p>