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NADRAC – ADR in the Civil Justice System Issue Paper - Response

Response to Question No. 2

2.1 If the ADR ‘industry’ can not correctly and uniquely define the nomenclature, it would suggest that there is no difference or that the ‘industry’ does not understand it’s products. There are numerous services provided under the ADR as there are under ‘mediation’. There is already confusion among practitioners. Even the recent standard on mediation provides for advice to be given by the “mediator” yet continues to label this service as mediation. It is the responsibility of the industry in conjunction with the peak body to determine and publicise the products on offer and their associated character which would distinguish it from similar products

2.2 A service is a product which is provided by practitioners to the client or consumer, in exchange for a fee. It is a contractual arrangement. If there is no clarity of the process provided as a result of using generic terms like mediation. How can a client or consumer be expected to know what type of service they are expected to receive? How can a client ask for a service to which there is/are no clear identification and delineation? We have a duty and responsibility to ensure that that the community and the client/consumer are provided a clear representation of the product/service to enable them to make a considered decision as to their requirements and needs.

2.3 There should be no disadvantages in making and providing a clear understanding to both practitioners and clients as to what service is offered and what service is sought. The advantages should be patent! Any information that provides clear understanding in both the service provider and service recipient is to the benefit of the ‘industry’ and the public. It would be unethical to masquerade a service under the guise of a generic heading that blankets numerous possible combinations of approaches.

What ever standard definitions that maybe adopted they will need to be universally accepted around Australia and by app practitioners and associated bodies and standards, codes of practice and promotional material.

[In summary](#)

There is a huge divide between mediation where the parties identify the issues and develop a resolution to a process where at the end the “Expert” provides the solution. If this is not clearly articulated in the definition what is it that we as an industry telling the client? You go to mediation but at the end you receive something other than what you have to expect.

Response to Question 3

All disputes have a common factor that of: reaching a stale mate in negotiations, or an inability to communicate with the other party. In both cases it leads to lack of, or inappropriate communication. As a result alternative mechanisms are sought to resolve the issues.

In general most people are aware of the police and the judicial system as a means for resolving issues. On the other hand very few people have a similar wide knowledge of the availability of mediation or how to avail themselves of these means for dispute resolution. While advertising and promotions are required for their general informative nature there needs to be means by which ‘initial points of contact’ can provide referrals to ADR. These initial points of contact are: the police, local governments, magistrate courts,

community centres, religious centres, clubs and associations, et cetera. These are the locations that should be able to provide information in the form of contact information. We also have a very multicultural society of people from many different countries where legal systems are not as equitable nor independent. The traditional legal system does not provide an adequate mechanism for understanding the differences between people. This is the role of facilitative mediation which not only entertains but actively encourages such disputes not to take place in the future.

Not all matters in dispute require the legal force of the law to be applied. These may include migrant populations, local community social issues, neighbour disputes, club and association friction, work disputes between employee/employee or employee/employer, (and this is not an exhaustive list). Disputes of this nature would be served much better by an ADR process than a legal process. Many disputes escalate over time to a point where one party takes steps to contact the police and or a solicitor. These issues are beyond the activities and scope of the police to handle and should be referred to ADR rather than encouraging parties to head down the path of the judicial system commencing with 'restraining orders' which further inflame the tension and situation. Likewise receiving a letter of demand from a solicitor does little to alleviate the situation.

The solicitor process is more likely than not the action would lead towards legal proceedings being undertaken.

4 Provision of ADR Services Response to Question 4

The term ADR is applied very broadly, from the self determination dispute settlement to judicial determination by a judge mediator. With broad application and the usage of common non specific terms; like "mediation" it creates confusion not only in the public domain but also amongst ADR practitioners. Depending from where the ADR practitioners professional comes from their background and their approach to the practice the resultant different ADR model formats would provide very different responses to the questions posed in this section. This is very likely and specifically the 'negotiation and agreement phases of ADR. While having the same objective; that of resolving or solving issues, approaches to the matters with different concepts, would surely result in very different outcomes. Theoretically facilitative mediation where the parties determine the negotiation and agreement would have an extensive variety of outcomes, while on the other hand negotiations guided by the legal profession mediator would have a precedent flavour to the outcome.

Facilitative mediation is at one end of the scale, while at the other end is the Determinative process. At the facilitative mediation the participants (parties) determine the content and the outcome, while in the determinative process it is a judicial decision where the practitioner or possibly more correctly the adjudicator determines the outcome. It should be considered that the term ADR should not be applied to any process where a third party makes or offers the solution as being ADR process. Maybe it should be termed "Judicial Hybrid ADR". Anything else would not fit or reflect the definition of ADR even the definition proposed by NADRAC which states "...ways of resolving or managing disputes without the need for a judicial decision". How could that definition apply when; a judge or courtroom staff make the determination or a solicitor prompts the most likely legal outcome (based on precedent) on an issue?

In general people resort to the courts as a last option, the costs, the time used to in briefing solicitors/barristers, the protracted time between the case lodgement and the hearing, the uncertainty of outcome, the ongoing friction with the other party, the likelihood of a counter claim, and finally after the decision is handed down the

likelihood of a healing process between the parties would be even further from being a possibility.

Maybe a more productive terminology could be adopted where ADR encompasses Mediation both the facilitative and advisory mediation and all the hybrids remain as ADR.

4.5 The courts are in a very good position to be able to determine cases that would be better served by ADR than the court process. It would depend on what is the focus of the court and whether they are overrun and are banking-up with cases to be heard. Maybe the more critical question that should be posed before determining if the case is to go to ADR is: does the case require a solution or a resolution? A solution is an outcome that addresses the issue in contest. A resolution would where the personal and the substantive issues need to be addressed.

There surely would be a measure of vested interest in making decisions as to the appropriateness of keeping cases for the court as opposed to passing them on to ADR. While I am not privy as to how and when such decisions are made on it would be prudent to suppose that the cases which are redirected to ADR are those that are either not suitable for the courts because of their nature or size of the dispute or because the courts are unable to service the cases in a realistic time frame. In both instances the reasons are quite appropriate for the cases to be passed. The only condition that would need to be stipulated is that the parties are provided with an 'unbiased' list of practitioners.

If the courts are not dealing with large number of cases, would the courts still pass them on to ADR?

Is ADR here only to ease the pressure on the courts or is it a viable and genuine alternative to obtain resolutions?

4.6 I would posit that the ADR that is to be provided by courts should be restricted to those cases that are 'rights' based only. As this is the area of specialisation of the court system. The process where the parties want to be told by the adjudicator: who is right and who is wrong and maybe to what extent/degree.

4.7 ADR is more of a commercial/social process rather than a legal process as such it should not be part of the in house service of the courts. The courts are and rightly so a monopoly and one that deals with issues of dispensing the law. ADR is a means of identifying acceptability and liveability between parties not necessarily the strictness of the law or a precedent. Many disputes are not based in law but in human sociology and psychology and in interrelationships.

4.8 As I do not believe that courts should be providing ADR this question becomes null and void.

4.9 The legal profession is focused on points of law and the outcomes in the form of compensation in terms of \$. In the majority of cases these are 'rights based ADR' and so there are also no ongoing relationships or likely to be any ongoing relationships between the parties. As such a judicial outcome is sought by the parties, then judges and other legal practitioners are certainly much more appropriate than lay mediators.

4.10 The first question that would need to be put forward is; what is meant by a 'resolution' and who deemed it as being resolved? To who's satisfaction was the solution or resolution provided, does a judge's pronouncement of the outcome the sole criteria for the success of the ADR? If the parties accept the judgement does that mean it is a successful ADR outcome? In all the above cases what is the difference between courtroom adjudication and ADR?

Does the judge in ADR declare that she/he is a judge to the parties at the beginning of the process? Is that still ADR? If the judge does not declare their status are they there in the ADR as a judge or a lay practitioner? Or even more appropriate at the intake stage?

Does not ADR mean "ALTERNATIVE" how can it be alternative when a judge sits in judgement of the proceedings and may be providing guidance and proclaim judgement at the end of the process? Maybe this form of DR should have a very different name. Would a judge have to stick to the letter of the law in performing ADR? This situation would seem to be incongruous with the spirit and objectives of ADR mediation.

4.12 Outside my scope of knowledge.

4.13 On the surface at least I would find that the process between adjudication and mediation are poles apart. Would a judge be prepared to sit back and allow emotional discussions, in a social type environment encouraging and fostering the parties to explore the reasons for their behaviour and their reactions to each other? All the training, all the practice all the focus of the legal profession is on points of law. By no means is there inference as to the judge's social context being questioned the question posed is in the framework of professional setting of ADR. Then there is the issue of how the parties perceive the judge mediator. Would the parties consider that they had a real mediation/ADR process or is it a cheaper version of the courtroom process?

4.14 Court staff have undertaken a career in the courts they are also viewed as being part of the judicial system thereby how can the process of ADR be provided by the non-ADR system and staff?

4.15 My extensive number of various mediations have shown me that it is very seldom that both parties come to mediation with the some 'problem'. While to one party it is purely an issue of money or compensation maybe even retribution, the other party has an issue of a social or psychological, cultural or communication as the central issue. The Australian Standards for Development ADR 2000 and Framework for ADR 2001, provide for 'expert/s' this however in most of the mediations provides comfort for only one of the parties at best. A situation of this type skews the balance in one direction and the bias that it creates from the beginning can not be corrected as the 'mediator' the bias. It is also very unclear in the standard as to; at which point of the mediation the mediator declares themselves as to their 'expertise'. Would the lay party be willing to enter an mediation knowing that the mediator is an expert on the subject and expertise of the opposing party? It is blatantly wrong to have the term mediator applied to an individual who intends to use their particular area of expertise to manage a mediation that is to be unbiased and impartial. This applies in all settings and not just to the court appointed ADR practitioners.

4.16 ADR the greatest potential disadvantages are that the ADR practitioner is biased after all they are employed or engaged by a specific industry group. Their livelihood is dependent on the industry group how would it be possible for the practitioner to claim independence, lack of bias, and impartial when one of the parties is a member of the industry and the other party is not? Or one party has a higher profile than the other party.

4.17 I have no knowledge of these services.

4.18 The current government sponsored mediation services such as the “Dispute Settlement Centre Victoria (DSCV), is that they provide the service at no cost to the clients. As with anything that is provided free of charge it is perceived possibly as being of a lesser value. It would be both prudent and beneficial to the Centre to charge a nominal or even a commercial fee for the service. As with any government department that is its sole income is government provided budget is that the budget is mostly inadequate to fully service the Centre and engage in additional projects. An additional income based on services provide would be of benefit to the community in general. And the ‘Centre/s’ would be to a much greater extent self funding, although some Department of Justice funding would need to still be provided.

4.23 It is imperative that the quality of the service and service providers are transparent to the extent that it can be measured or assessed. A difficult situation as mediations are held in camera and preclude direct assessment, nor can the solutions be used to determine the quality of the service provided. Academic qualifications are but a starting point. There is a huge gap between passing an examination or an assessment and the application of the concepts into practice. This is further complicated by the parties in most cases not having an in depth understanding of the ‘what’ the service (product) should be.

Here are 4 point to consider that would provide an improvement of the service;

- One is to provide general information and education to the public prior to mediation session. This would need to be provided by maybe NADRAC (documented brochures and website) and issued by the practitioner to the parties. There might need to be a fee that is paid by every listed mediator to NADRAC through their accreditation/membership fee.
- The other being a post service survey that would provide an evaluative assessment of the mediator/practitioner and the service provided. This should be centrally located and administered by NADRAC. The questions need to be open ended but sufficiently specific to ensure that the information provided reports on the information that is going to be used for the improvement of the future clients, ‘industry, and the mediation service providers’.
- It would no doubt be required to have an incentive/s attached to the questionnaire. There maybe some resistance to such a requirement from some participants but then the certification bodies and the peak body need to be able to ensure that those that are practicing and are listed provide the quality of service that is required. The data thus collected maybe could be provided to the practitioners as a means of feedback. This would also have the affect of informing the practitioner to be able to identify their need for ongoing improvement of their service or competence.
- The feedback to all the practitioners would need to be provided as a collated data or summary, this is to ensure that the privacy of both the parties and the practitioner/s are maintained. This approach could also be utilised to notify individual practitioners of potential problems with their practice/service. I realise the outcry that may be raised, but then all other professions have a similar need to be counselled and or disciplined. The privacy or in-camera service should not be a tool to hide or protect unethical behaviour or poor quality service.

4.24 If ADR is to be provided by private practitioners surely there needs to be an element of free market determination for the service. What maybe considered is that a rebate is provided to the party/parties along similar lines to that of “Medibank” where there is a “standard” or listed fee and any cost over that is born by the party/parties as a personal preference.

5 Referral and assessment

Response to Question 5

5.1 to 5.3 Should there be a need to enhance the understanding of ADR in legal sphere? No more so than making the legal sphere aware of psychiatric, psychological, engineering or accounting! Any person in the legal profession has an equal or even better opportunity to access the information, knowledge or skill of ADR. The focus on the courts should be considered as a back-up to ADR only. The primary focus should be on areas that are closer and earlier in the dispute development. Industry bodies, the police, community centres, local government (including by-law officers), et cetera. By the time the courts become aware of a dispute, the dispute has escalated to a critical point and relationships have been damaged more than need have been.

The greater depth of knowledge that referring individual or agency has the better, however, the responsibility should be in the referral to direct the individual/s to a service centre (a call centre) or to the Internet site, or to printed material all of which should also be available in languages other than English. If as set out is a plausible mechanism the courts then would only need to provide addresses/contacts (telephone number, website address, or provide the documented material)

- It would be cheaper and more effective to train personnel in a call centre and maintain their knowledge that trying to encourage individuals with vested interests to act as referring agents. There are models that might be considered such as the “Drug and Poisons Information Centre” or the “Help Line” or the “Crisis Centre”. The Centre would also be able to post material, provide local lists of practitioners, website addresses, et cetera. Such a centre could be located anywhere in Australia and thus one centre could be adequate to service the needs, this could be further enhanced by providing an 1800 number.
- The objective should be to provide the availability of ADR at the earliest possible stage of the dispute. This would suggest that the point of intervention should be in the general knowledge of the public about the availability of different options for dispute resolution and their individual process and mechanisms.

ADR and Litigation

6 Barriers and incentives

6 Mandatory ADR Response to Question 6

It would seem most unlikely that anyone who wants a resolution to a dispute would choose to use a protracted, complex process such as the judicial system unless the matters at hand are extensive, complex, involving large sums of money and are being tendered under the issue of “rights” that require the rule of law to be applied.

The reason why others with lesser claims and with interest based claims do not choose ADR is because they lack the information, knowledge and understanding to make an informed decision to bring it to ADR.

6.13.3 Is the compulsory attendance a measure to incorporate as an additional step in the judicial process? Would not the compulsory component in ADR contradict the voluntary nature of ADR? If the courts need to resort to direct to compulsory attendance at ADR would not the participation and even less so the negotiations to be done in good faith by participants under such compulsions? What is the objective? If such a mediation was to be presided by a judge would the judgement be final? Would such judgement be open to challenge and taken back to court?

Use of ADR in government disputes?**Response to Question 7**

Outside the area of my knowledge.

8 Use of ADR techniques**Response to Question 8**

Outside my area of knowledge.

9 Data, Evaluation and Research**Response to Question 9**

9.1 The first question that should be asked is what will the purpose of the data be or what information is wanted and why. The current question here is to collect quality data. All data collected needs to be of quality. But the reason for the collection of data needs to have an objective. Such as the quality of practitioners, the quality of the service, the perceptions of the parties/clients. The approach should determine in the first place what is the objective? Then what questions will provide valid information to address the objective.

Maybe it should be a requirement for both practitioners and parties/clients to complete a questionnaire post ADR.

9.2 There is a great need for such research to be undertaken and carried out on an ongoing basis. ADR is coming into the mainstream of dispute resolution, the practitioners, the clients/parties and the judiciary exploring the services and the mix. The information is of a private nature that will need to be maintained and honoured as part of the commitment provided by ADR processes. By the same token there is a need to ensure that the information can be validated, thus there would need to be a means to ensure that practitioners and clients are providing authentic information. The most appropriate body/entity to manage and issue, collect, collate, analyse and report on the ADR is NADRAC. The information should be provided to all registered practitioners as a means of providing feedback on the trends and perception of the public on ADR.

Since this is the first such research it might be most appropriate for the criteria to be whatever the outcome happens to be. Then establish what goals need to be set to improve the services, the competencies of practitioners, the information that needs to be provided to the public.

9.3 Who would be these 'independent' evaluators that would perform these assessments? What data would they use? How would they validate any of the information that they collect. What knowledge or skills would they use in the data collection? How would that assist the overall performance of ADR if different 'independent evaluators use different questions and different objectives and scopes provide for a valid assessment of the ADR service/s. How many practitioner publish negative findings of their service provision.

9.4 NADRAC sits in the best position to be the repository for data collection and resource centre for further research. NADRAC may consider joint research with Universities or other entities that would provide valuable knowledge for the ADR industry.