

# **The Use of Alternative Dispute Resolution In The Federal Magistracy Part 2: Regulations and Rules of Court**

## **INTRODUCTION**

The Federal Magistrates Service has been set up to create a new culture with an emphasis on appropriate dispute resolution procedures. The intention is also for the Service to operate as informally as possible.

The National Alternative Dispute Resolution Advisory Council (NADRAC) is mindful of these aims and in this advice on the rules and regulations it has attempted to achieve that flexibility and informality. At the same time, NADRAC has looked to promote the new culture in the rules and regulations, which may on occasions justify greater specificity or prescription than would otherwise be the case.

The terms of reference to NADRAC listed matters for it to address. This advice does not follow that sequence of matters but approaches the issues in the sequence in which they would occur when a party uses the Service. Where possible, reference back to the appropriate matter listed in the terms of reference is made.

In its previous advice NADRAC referred to 'DR processes' to reinforce the concept that judicial adjudication and ADR are equally valuable ways in which parties can resolve disputes. While the Federal Magistrates Bill 1999 uses the term 'primary dispute resolution processes' (PDR), NADRAC has in other papers consistently maintained its use of the term 'ADR' and continues to do so here.

## **1. GENERAL PROCEDURE FOR REFERRAL OUT TO AN ADR PROCESS**

The matters discussed under this heading are those that NADRAC considers should be addressed using the rule making power granted under subclause 28(1) of the Bill. They include matters raised under terms of reference 1(c) and 1(f).

### **1.1 Education of parties to the dispute: an informed choice of ADR process**

1.1.1 The parties' choice will always be significant in matching the dispute and the parties to the appropriate ADR process. Generally, the rules should do all they can to assist parties to learn about ADR and to encourage a change in

culture. It is important, therefore, for the court to provide information sessions on ADR options, to make available to the parties a brochure about ADR and to include in the application commencing proceedings questions about the use of ADR.

1.1.2 The information sessions could include information about choice of ADR providers, the powers that an ADR provider can exercise pursuant to a standard court referral and about consent orders. Information about approved ADR service providers might be supplied on video and on the court's home page, and the information itself should be available in several different languages.

1.1.3 Information about ADR processes could also be provided in the form of a brochure. NADRAC recommends that the rules require the court to prepare a brochure on the ADR options that are available to the parties. The court should consider producing the brochure in many languages and including an 1800 number which people could ring for more information about ADR options.

1.1.4 The initiating documents could require information about the use of ADR by the parties. For example, NADRAC recommends that the application commencing proceedings includes a section that:

- requires legal representatives to indicate whether or not they have advised their client of the ADR options and whether they have given their client the court's standard brochure on ADR (referred to in 1.1.2 above);
- requires legal representatives/self represented parties to indicate what ADR process(es) they have already undertaken, if any; and
- indicates to the court what ADR processes the parties seek.

1.1.5 The court's standard brochure should be required to be served with the application commencing proceedings and additional parties should inform the court of the ADR processes that they seek and those that they have tried. Whatever other initial documentation is required by the court of additional parties should include a section which enquires whether they have received information about their ADR options from their legal adviser or elsewhere.

## **1.2 The assessment process within the court**

1.2.1 The Federal Magistrates Court has, under clause 23, a duty to advise parties to use primary dispute resolution processes (if it considers that it would assist the parties to resolve that dispute). The court may, by order, refer proceedings in the Federal Magistrates Court to conciliation (with or without the parties' consent, pursuant to clause 26). In proceedings other than family law or child support proceedings, the court may make orders referring parties to mediation (with or without the parties' consent, pursuant to clause

34), and arbitration (only with the consent of the parties, pursuant to clause 35).

1.2.2 NADRAC is of the view that the court should develop and publish guidelines (that will identify indicators/contra indicators) that relate to the allocation of a dispute to the appropriate ADR process. The Federal Magistrates should use these guidelines when advising parties to attend an ADR process under clause 23, or when making orders under clauses 26, 34 or 35 of the Federal Magistrates Bill. The guidelines themselves should not be included in the rules as it may tend to create more litigation if parties challenge the court's interpretation of the guidelines. Publication of the guidelines by the court, however, will assist in community education about ADR processes.

1.2.3 NADRAC has considered existing guidelines in the Family Law Act and is reviewing the literature on the criteria for assessment of the suitability of particular categories of parties and disputes to particular kinds of dispute resolution processes. NADRAC is developing guidelines based on this information which it will provide in due course. NADRAC recommends that the court develop guidelines based on those that are proposed by NADRAC.

1.2.4 The court should be conscious of the manner in which the guidelines are drafted. NADRAC considers that it is preferable that parties not be referred to an ADR process at all rather than being referred to an inappropriate ADR process. Therefore, it is especially important for the guidelines to indicate circumstances when an ADR process is not suitable.

1.2.5 In making the referral and considering the indicators, one of the factors to be considered is the relationship between the value of the dispute and the cost of referral and the process.

1.2.6 Any decision to refer an individual dispute to an ADR process should be informed by consultation with the parties so that they can express their views about whether the ADR process is appropriate and, where possible, give their informed consent to their participation. Under clauses 22 and 23 of the Bill the court has an obligation to consider whether to advise the parties about primary dispute resolution processes and an obligation to advise the parties to use such a process if it considers it may help the parties to resolve their dispute. In appropriate cases this obligation should include the power to inquire as to the basis for the parties' choice of an ADR process or otherwise to ensure that they are making an informed decision.

1.2.7 While the court must make an assessment before referring a particular dispute to an ADR process, NADRAC is of the view that the ADR practitioner also has an obligation to make an assessment, independent of the court, about whether the ADR process suits the dispute and parties. This matter is one that

NADRAC recommends the *regulations* address and is discussed in greater detail under 4.2 below.

## **2. REFERRAL TO WHOM?**

The matters discussed under this heading are those that NADRAC considers should be addressed using the regulation making power under subclause 29(2)(c).

These matters relate to term of reference 1(b).

### **2.1 The kinds of persons who are eligible to conduct particular ADR processes**

2.1.1 NADRAC recognises the need to regulate the quality of ADR practitioners and is of the view that the regulations should encourage the development of proper standards of ADR practitioner competence and accountability.

2.1.2 NADRAC favours a model based on the approval of ADR service providers centrally by the Attorney-General's Department. NADRAC suggests that ADR service providers be required to take responsibility for quality control by developing their own standards. It recommends that:

- Once an ADR service provider has developed its own standards, it could apply to the Attorney-General to become an approved ADR service provider.
- Part of becoming an approved ADR service provider would be to demonstrate to the Attorney-General that the service provider had developed standards and had an appropriate internal complaints procedure in place. An approved ADR service provider should be required to use explicit, transparent and verifiable procedures to assess mediators for accreditation and for removal of accreditation. It should also take reasonable steps to monitor whether accredited ADR practitioners should remain accredited.
- A list of approved ADR service providers would be maintained by the Attorney-General's Department. While a party can use any ADR practitioner, the court could only refer parties to an approved ADR service provider or an ADR practitioner accredited by an approved ADR service provider.
- An ADR service provider would be approved for a specified period of time, subject to renewal. The approval could be withdrawn or suspended within the specified period if circumstances warrant it.
- The model should also allow for the accreditation of an ADR practitioner to be suspended in appropriate circumstances.

- The only people who are eligible to conduct ADR processes pursuant to a court referral are those who are accredited by an approved ADR service provider as meeting that service provider's standards.
- ADR practitioners accredited by an approved ADR service provider to act as mediators and arbitrators would, provided the matter has been referred out by the court, attract the immunity granted to mediators and arbitrators under Part 4 Division 2 of the Bill.
- ADR practitioners conducting ADR processes where the court has not referred the matter to an ADR process do not get the benefit of the immunity under clause 34 or 35. Even those ADR practitioners who have been nominated by an approved ADR service provider will not get the benefit of the immunity if they conduct the process without a referral from the court.

2.1.3 NADRAC acknowledges that this model is inconsistent with the procedure currently in place for family and child mediators under the Family Law Act. NADRAC has previously indicated that it does not consider the current model for family and child mediators is appropriate and notes that its suggestions for change, although not implemented, have not been rejected by the Government. NADRAC recognises that different systems in place for family and non family related mediation and counselling would cause confusion, not only for the parties to the dispute but for the service providers as well. NADRAC recommends, therefore, that a uniform system be adopted along the lines of the model suggested by NADRAC at 2.1.2 above.

2.1.4 In settling its preferred model NADRAC considered various other models including those found in the family law legislation for child and family mediators and for child and family counsellors, in the Mediation Act 1997 (ACT), in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and in a court-maintained list of ADR providers. NADRAC has expressed its concerns about the regime for child and family mediators in its report to the Attorney General on Part 5 of the Family Law Act, *Primary Dispute Resolution in Family Law*. It notes that this model sets out requirements but has no mechanism for enforcing them.

2.1.5 NADRAC understands that the ACT Mediation Act model has been criticised because approval of an agency is virtually automatic with no critical assessment of whether the standards are being complied with, and that the standards themselves are generally considered to be too prescriptive. Maintenance by the court of a list of approved ADR providers was considered to be too time-consuming for court staff and there could be difficulties assessing providers and removing them from the list.

2.1.6 NADRAC viewed favourably some aspects of the model used for child and family counsellors. and the model proposed under the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.

2.1.7 In deciding on the model outlined in 2.1.2, NADRAC was concerned to ensure that parties receive protection from incompetent ADR practitioners. Parties who use approved ADR service providers will receive protection in the form of accredited ADR practitioners who must comply with certain practice standards. An approved ADR service provider will have to have a complaints procedure through which parties may indicate their dissatisfaction with the conduct of the ADR practitioner. It is anticipated that part of an ADR service provider's approval will involve a requirement to provide information to the Attorney-General about complaints made by parties about the provision of the ADR service provider's services.

## **2.2 The Need for Referral Orders**

2.2.1 The model proposed by NADRAC at 2.1.2 above encourages the parties to go to court to get a referral order before attending an ADR process. Council is aware of the tension between its recommendation and the desire to develop a system that encourages maximum use of ADR processes and is less formal and more flexible than existing systems. Council considers that there are two reasons for requiring parties to get a referral order before attending an ADR process.

2.2.2 NADRAC sees value in having the activation of immunity being conditional upon a judicial decision. Judges have traditionally been provided with immunity to insure that justice is administered independently, without fear and with finality. Immunity is a substantial benefit to ADR practitioners which is not available to other legal service professionals, and in Council's view it should not be given indiscriminately. NADRAC remains concerned that immunity can act as a protection for incompetent ADR practitioners and prevent consumers from obtaining redress. In requiring parties to obtain a referral order from the court, there will also be protections for the parties because there will be more informed matching of disputes with providers and parties through the court assessment. In addition, the ADR practitioner will be given appropriate powers to ensure the ADR process is effectively carried out. NADRAC believes that it is essential for parties to be in a position where they are able to reach a fully informed agreement during an ADR process, based on all relevant information. NADRAC considers that a referral order requiring the production of certain information emphasises the importance of producing that information. Requiring the ADR practitioner to report back to the court will also make the ADR practitioner accountable to the court for the ADR process. A court referral would also serve to give authority to the ADR process.

2.2.3 The main concern with the process of requiring a court referral as a condition for immunity is that it is inconsistent with moves to keep parties out of the court system where possible. ADR practitioners who want immunity will direct parties to the court in the first instance. It is also

inconsistent with current family law regime which gives protections to ADR practitioners just because they meet the requirements in the regulations. However, NADRAC has previously criticised that regime. Also, there is a concern that ADR service providers, ADR practitioners and parties will have to keep track of the regime under which their ADR process is occurring.

2.2.4 NADRAC acknowledges that it is undesirable for parties to have to go to court to get a referral order. This concern can be reduced if obtaining a referral order is a simple process which is as quick, as flexible and as inexpensive as possible, while still having enough of an assessment to make it justifiable. Standard referral orders, which are discussed at 3.1 below, may be of assistance here.

2.2.5 On balance NADRAC is of the view that it is worth requiring court-ordered referrals to ADR as they provide valuable protections for both parties and ADR practitioners.

### **2.3 Federal magistrates as providers of ADR**

2.3.1 Court personnel, including Federal Magistrates, should not be regarded as suitable ADR practitioners merely by virtue of their employment as court personnel. NADRAC is of the view that if Federal Magistrates provide ADR services other than judicial adjudication, they would need to conform to the same standards as other ADR practitioners. NADRAC acknowledges that for Federal Magistrates to provide ADR and adjudicate in the same matter would be contrary to the rules of natural justice (that is, there would be a perception that the decision maker, having been involved in ADR, would be biased).

## **3. THE CONTENT OF REFERRAL ORDERS MADE BY FEDERAL MAGISTRATES**

This section recommends that there should be form referral orders, that those orders should deal with certain matters and that they should specify the powers which an ADR practitioner can use. The powers are provided by the regulations but those powers are activated by the court when a referral order is made. Some matters discussed under this heading are therefore matters that NADRAC considers should be addressed using the rule making power granted under subclause 28(1) while others are matters which need to be addressed under the regulation-making power in subclause 29(2)(a). These issues arise under term of reference 1(f).

### **3.1 Standard Referral Orders**

3.1.1 NADRAC recognises the need for the parties to attend the ADR process and produce information during the ADR process. NADRAC is of the view that the court should order attendance and production of information and

that the rules should prescribe a standard form of orders. NADRAC recommends that the standard referral orders should:

- A. require parties to use an approved ADR service provider or an ADR practitioner accredited by an approved ADR service provider;
- B. require parties to attend the ADR process, or be represented by a person with authority to settle the matter;
- C. require parties to produce certain information (that is, all information that is relevant to the matter in dispute) at a specified time and to a particular person or organisation;
- D. specify that the ADR practitioner has the power to take sworn evidence, granted to ADR practitioners by the regulations, when the court considers it appropriate for the ADR practitioner to exercise that power in the particular case (see 3.3 below); and
- E. allow for the incorporation of matters agreed upon by the parties, such as the allocation of ADR costs.

3.1.2 In relation to the requirement to produce certain information NADRAC recognises that it would be difficult at this time to develop a pro forma list that specifies all the documents to be produced in every case. Over time it may be possible to develop some orders chosen from a set of standard paragraphs as appropriate to the circumstances of the particular case. This would assist with a speedier process. But for the present, the orders made would need to be specific to the type of dispute before the court.

3.1.3 When the court refers parties to an approved ADR service provider or an accredited ADR practitioner, the method of allocation of ADR service providers or ADR practitioners to particular cases is for the court to decide.

3.1.4 In making its orders the court may also need to have regard to the balance between the time and effort required of the ADR practitioner and therefore the cost involved. A mediation into one aspect of the issues in dispute might resolve the whole matter or make the rest of the proceeding before the court very quick and cheap, whereas a mediation of the whole of the dispute could be more expensive than the proposed court process.

## **3.2 The ADR practitioner's powers**

These matters are those that NADRAC considers should be addressed using the regulation making power conferred by subclause 29(2)(a).

3.2.1 NADRAC is of the view that any decision parties make to settle should be as fully informed as possible (that is, based on disclosure of all relevant

information). To this end NADRAC recommends that the regulations should grant powers to all ADR practitioners to:

- require the production of relevant information or documents; and
- include and/or exclude people from attending the ADR process.

3.2.2 NADRAC suggests that the regulations acknowledge that the powers are provided for the purpose of facilitating agreement or outcomes which best suit the parties' needs.

### **3.3 The Power to Take Sworn Evidence**

3.3.1 The power to take sworn evidence is another power that NADRAC considers would be beneficial for ADR practitioners to have in order to obtain all relevant information. However, it is a power that would not be used by certain ADR practitioners such as mediators. NADRAC considers that the regulations should provide for this power to be granted to practitioners in those ADR processes where it is required. It is envisaged that the need for this power would most likely arise in arbitration but possibly also in conciliation and early neutral evaluation.

3.3.2 When the court makes a referral order it will need to specify whether the power to take sworn evidence (as provided in the regulations) will apply to the specific ADR process that is ordered. The rules will need to allow the court to make such a referral order.

### **3.4 The attendance of persons at an ADR process or conference for the purpose of carrying out an ADR process**

The matters discussed under 3.4 are those that NADRAC considers should be addressed using the regulation making power conferred by subclause 29(2)(b).

3.4.1 NADRAC is of the view that, in appropriate circumstances, parties to a dispute should be allowed to have legal representatives and other support people such as interpreters, physical helpers, accountants and other experts attend the ADR process or conference, for the purpose of carrying out a ADR process.

3.4.2 The attendance and/or level of involvement of support people should always be subject to the ADR practitioner's assessment of whether that attendance and level of involvement is appropriate. The ADR practitioner should focus on ensuring that the ADR process is as fair as possible for members of society who may otherwise face particular obstacles or barriers to fair treatment in an ADR process due to gender, culture, race, age, disability, sexuality, geography and power imbalance (through money, position or authority). The regulations should provide that, where the court has referred

a dispute to an ADR process, the ADR practitioner has power to determine whether legal representatives or other support people are able to attend the ADR process or conference, and their level of involvement, for the purpose of carrying out an ADR process.

### **3.5 Notations to Referral Orders**

3.5.1 NADRAC suggests that it would also be helpful for the court to acknowledge certain matters by way of notations in the standard referral orders prescribed in the rules of court. The notations would also act as an information tool for the parties. It is suggested that they include:

- A. the ADR practitioner's independent obligation to assess the suitability of the ADR process in the circumstances of each case referred by the court;
- B. the ADR practitioner's power to include or exclude persons from a conference held for the purpose of carrying out an ADR process, or from the ADR process itself (see discussion under 3.4 above);
- C. the parties' general obligations and duties as participants in an ADR process, including recognition that the parties may choose to terminate the process at any time and that the orders do not go so far as to force the parties to settle their dispute;
- D. the ADR practitioner's obligation to consider the appropriateness of including others who may participate in the ADR process; and
- E. the right of the parties or the ADR practitioner to go back to the court for changes or additions to the referring order if needed.

3.5.2 NADRAC recommends that the court, if possible, institute a system whereby parties or ADR practitioners who need to return to the court for changes or additions to the referring order, can do so by telephone or by electronic means.

3.5.3 Preparing for and participating in an ADR process will require significant time and resources for all parties involved. NADRAC considers that matters not settled in ADR be allocated a date for hearing as close as possible to the completion of the ADR process, to take advantage of this preparation.

## **4. THE PROCEDURES TO BE FOLLOWED BY A PERSON CONDUCTING AN ADR PROCESS IN CARRYING OUT THAT PROCESS**

This section relates to matters in term of reference 1(c) and 1(f).

## **4.1 Prescription of process**

The matters discussed under 4.1 are those that NADRAC considers should be addressed using the rule making power conferred by subclause 28(1).

4.1.1 NADRAC does not wish to prescribe the procedures to be followed within different ADR processes. NADRAC is of the view that its definitions provide sufficient description to distinguish the various processes, and notes that the definitions have been incorporated into the Explanatory Memorandum.

4.1.2 NADRAC recommends that the definitions also be incorporated into the rules of court. Incorporating the definitions into the rules not only makes them accessible, but the process for amending the rules is flexible enough to allow the definitions to be updated, as appropriate. NADRAC envisages that it would publicise any changes to the definitions widely, and it would then be open to the court to incorporate the changes into the rules.

4.1.3 NADRAC notes that there is considerable difference between the NADRAC definitions of particular ADR processes and the definitions already contained in the Family Law Act. The definition of "family and child mediation" in section 4 of the Family Law Act is, for example, very broad. It focuses more on the subject matter to be covered, rather than defining what the mediation process involves. Council is concerned about the interaction between the NADRAC definitions and the definitions contained in the Family Law Act, and suggests that this is a matter that will need to be resolved in order to ensure the satisfactory integration of the Federal Magistrates Service into the existing Federal and Family Court systems.

## **4.2 The ADR practitioner's duty to assess the suitability of the ADR process**

The matters discussed under 4.2 are those that NADRAC considers should be addressed using the regulation making power conferred by subclause 29(2)(a).

4.2.1 NADRAC has recommended that the Federal Magistrate should, before making the referral to an ADR process, have considered whether that ADR process is appropriate for the parties and dispute, in accordance with the guidelines to be developed and published by the court (see discussion at 1.2). NADRAC recognises that the assessment process is ongoing and therefore expects that the ADR provider will also assess the suitability of cases referred by the court.

4.2.2 NADRAC suggests that the matters to be taken into account by the ADR practitioner in making an assessment of the suitability of ADR should be the same as that considered by the court. As the assessment by the ADR

practitioner falls outside the courtroom, NADRAC is of the view that it would be appropriate for the regulations to require ADR practitioners to consider the guidelines developed by the court.. However, the ADR practitioner can also consider other matters when making an assessment of suitability.

### **4.3 Confidentiality and Complaints Handling**

The matters discussed under 4.3 are those that NADRAC considers should be addressed using the regulation making power conferred by subclause 29(1) and/or 29(2)(a).

4.3.1 NADRAC is concerned about protecting users of ADR processes. Clauses 34 and 35 of the Federal Magistrates Bill propose to offer mediators and arbitrators in non family law matters the same immunity as that provided to Federal Magistrates, and section 19M of the Family Law Act already provides immunity to mediators and arbitrators involved in family law matters.

4.3.2 NADRAC is of the view that where an ADR practitioner has been negligent, engaged in misconduct or has significantly departed from their function as an ADR practitioner, it is appropriate that the parties should have redress.

4.3.3 It is appropriate for the contents of some ADR processes to be confidential, in order to maintain the integrity of those processes, to encourage participation in the processes and to provide parties with an opportunity to discuss issues and their resolution in an open and frank manner.

4.3.4 NADRAC is mindful of the tensions between the need to protect the privacy of some ADR processes and the need for ADR practitioners to be accountable for the service they provide. However, NADRAC maintains that the principal purpose of a confidentiality clause or statutory provision for ADR practitioners should be to protect the parties in the ADR process, rather than the ADR practitioner.

4.3.5 NADRAC recommends that the regulations should prescribe that ADR service providers must:

A. have an internal complaint procedure to deal with allegations of negligence and misconduct against individual ADR practitioners;

B. inform the parties to the process of this procedure; and

C. provide information to the Attorney-General about complaints made about particular ADR practitioners.

4.3.6 In NADRAC's view a party with complaint against an ADR practitioner should take that complaint to the ADR service provider in the first instance. If they are dissatisfied with the manner in which that complaint is dealt with, they can raise it with the Attorney-General's Department which is responsible for approving ADR service providers.

## **5. TERMINATION OF THE ADR PROCESS**

The matters discussed under 5 are those that NADRAC considers should be addressed using the regulation making power conferred by subclause 29(2)(a). They relate to terms of reference 1(e) and (f).

5.1 NADRAC has identified three possible scenarios where the ADR process might end:

A. an ADR practitioner assesses the matter is not suitable for an ADR process (this can occur at any stage );

B. a party or ADR practitioner terminates the ADR process (this could be because a party fails to attend or fails to provide information during the process or simply because one or both parties no longer wish to continue); or

C. the process finishes (see under heading 7 "consent orders" for a discussion of the process where parties have reached agreement).

5.2 NADRAC is of the view that the ADR practitioner should, in all circumstances, report back to the court.

5.3 NADRAC identified the need for the rules to prescribe the form of the report from the ADR practitioner. The report to the court signals to the court that the ADR process has ended and might also be used for evaluation purposes. The report should specify:

A. that the process has ended;

B. why the process ended, with tick box options:

- the ADR practitioner assessed that the ADR process was unsuitable;
- a party failed to attend;
- a party has withdrawn;
- the ADR process has been completed;

C. the information that was produced by each party (this may be achieved by attaching a list prepared by each party of all documents produced for the purpose of the ADR process); and

D. whether some issues remain for the court to deal with, answered by 'yes' (meaning 'yes, there are remaining issues for the court') or 'no' (meaning 'no, there are no remaining issues for the court') tick box options.

5.4 In NADRAC's view it is undesirable for the ADR practitioner to be involved in any evaluation of the parties' willingness to co-operate in the ADR process. This is because of the importance of confidentiality and the need to avoid litigation in relation to the conduct of the ADR process. For these reasons the report to the court should involve simple factual statements and any further information (such as recommended in 5.3.C above) should be provided by the parties themselves.

5.5 NADRAC is of the view that evaluation of court-referred ADR processes is desirable and that parties should be asked to provide feedback on the quality of the process. NADRAC has previously been of the view that where ADR processes are part of the court's processes, there is an obligation on the court to ensure that the processes to which people are being referred are of good quality. However, under the model proposed here the quality of the services is being monitored and evaluated by the Attorney-General's Department. It is appropriate therefore that the Department undertake evaluation of ADR practitioners through its regulation of approved ADR service providers.

5.6 NADRAC considers that it would be useful for that evaluation process to include qualitative information gained directly from the parties on a voluntary basis. To ensure the confidentiality of the parties' responses, NADRAC suggests that each approved ADR service provider could consolidate the data collected on court referred ADR before providing it to the Department.

5.7 The court will have an interest in this evaluation process and may undertake some of its own research. NADRAC recommends that the court would be provided with information from the Department for this purpose.

## **6. COSTS OF ADR PROCESSES**

This section relates to term of reference 1(f).

NADRAC notes that the rules of court may make provision for or in relation to the costs of primary dispute resolution under clause 30 of the Federal Magistrates Bill.

6.1 NADRAC recognises that parties may negotiate who will pay the costs of an ADR process themselves. If the parties are unable to agree on how the

costs of an ADR process should be distributed, then NADRAC recommends that the rules of court should provide the following guidance to the Federal Magistrates in exercising their discretion to make costs orders:

A. If the parties settle their dispute themselves (that is, through an ADR process or negotiation), then each party should, ordinarily, pay his or her own costs;

B. If the matter is resolved by judicial decision, then the costs of ADR should be included as party party costs;

C. In both cases, the rules should:

(i) recognise that the costs of ADR may include direct and indirect costs of participating such as legal costs, ADR practitioner costs, costs of experts or of assembling relevant information. If an agreement is reached through an ADR process, there may also be costs of implementing the agreement;

(ii) allow the parties the option of having costs taxed or assessed;

(iii) include a provision specifically allowing for consideration of a party's refusal to either attend an ADR process or to produce information, where attendance or the production of information had been specifically ordered by the Federal Magistrates Court, when assessing costs..

6.2 NADRAC does not suggest that the rules should incorporate a specific schedule of fees for ADR practitioners.

## **7. CONSENT ORDERS**

This section relates to term of reference 1(f).

7.1 NADRAC notes that clause 32 of the Federal Magistrates Bill allows a Federal Magistrate to make an order in terms of an agreement reached by parties to a dispute, on application by the parties and in accordance with the rules of court.

7.2 NADRAC is of the view that it is important for the court to be able to scrutinise any agreement reached by the parties (particularly if one party has, or both parties have, failed to obtain independent legal advice) before making orders in the terms of that agreement. NADRAC notes that the proposed clause 32 allows the court to do that.

7.3 While the court should be able to scrutinise agreements, it should not have to be satisfied that the agreement is fair before making orders in accordance with the agreement. There may be circumstances where the parties have reached an agreement which may not appear to be fair, but it is lawful and

the consequence of a commercial dealing. The important issue is for the court to be concerned that the parties have been fully informed in reaching that agreement.

7.4 NADRAC recommends that the court should make rules to facilitate enquiries before consent orders are made. The enquiries should be made in appropriate cases and should relate to whether the parties have both obtained independent legal or other appropriate advice in relation to the agreement and whether there has been full and frank disclosure of all relevant information by all parties. The court may also wish to enquire into whether there are any unprotected interests. Where independent legal or other appropriate advice has not been obtained by one or both parties to a dispute, the court should consider advising parties of the desirability of so doing before the consent orders are made.

7.5 One way for the court to enquire about whether the parties have disclosed all information is to require the parties to swear or affirm an affidavit, which is part of an application for a consent order, attesting to full and frank disclosure of all relevant matters. The need to swear or attest to such an affidavit before a consent order may be made may also be of assistance to the ADR practitioner in getting the parties to disclose all information during the ADR process.