

NADRAC Notes

Note from the Chairperson

The Council has been very busy since the last newsletter. It has met in Melbourne, Sydney and Brisbane and provided reports and submissions on workplace relations, small business and the Federal Magistrates Court. The diversity project is nearly completed with *A Fair Say* in the process of being printed and the standards project is nearing its consultation phase. In addition, NADRAC's Website is in the process of being updated to be made more user-friendly. It is intended to include opportunities for feedback and discussion on specific issues.



Professor Laurence Boulle (Chairperson)

These achievements are tinged with sadness because of the resignation from the Council of one of its valued members. Due to pressure of work commitments Kerrie Tim tendered her resignation from the Council. She brought a highly valuable indigenous perspective to Council matters and she will be sorely missed. The Council wishes her well in her endeavours. It is hoped that a replacement will be made as soon as possible.

The coming months will see more work done by the Council in relation to the Federal Magistrates Court. It will also see the release of a discussion paper on standards for ADR practitioners. I encourage all those with an interest in this hotly debated topic to put forward their views in response. It is important that NADRAC receives a wide range of views to enable a workable, comprehensive and inclusive view of standards for ADR practitioners to be compiled.

Professor Laurence Boulle
Chairperson



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The National Alternative Dispute Resolution Advisory Council (NADRAC) was established in 1995 to advise the Federal Attorney-General on high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.

Federal Magistrates Service Project

In January 1999 the Council received a reference from the Attorney-General to advise on those ADR issues that should be addressed in legislative provisions, subordinate legislation or practice guidelines that will be necessary to establish the use of ADR in the proposed Federal Magistrates Court.

The Council reported on the legislative provisions aspect of the reference on 29 March 1999. Some of the areas which the Council considered that the system should address were the:

- inclusion of objectives such as aiming to match people to the dispute resolution process that best meets their needs;
- use of a range of dispute resolution processes to resolve disputes;
- role of legal representatives;
- participation of magistrates in alternative dispute resolution processes as long as they are suitably qualified and do not adjudicate the same matter;

- allocation of a dispute to a particular dispute resolution process being conditional on the dispute being assessed for its suitability to the particular form of dispute resolution that is proposed; and
- mandatory referral to a dispute resolution process with appropriate safeguards.

It must be emphasised that these views are those of the Council and may not necessarily be taken up by the Attorney-General in the final legislation. A more detailed discussion of these issues and others is in the Council's report which is available on the Council's Website.

In accordance with its reference the Council is now proceeding to examine those matters which need to be addressed in the regulations and rules for the Federal Magistrates Court in relation to ADR. Its report on this aspect of the Service is expected to be finalised for the Attorney-General later this year.

SMALL BUSINESS REVIEW PROJECT

A Small Business Review Team was set up within the Commonwealth Attorney-General's Department in 1998 to undertake a review of small business access to the legal system. The Review Team initially released a brief consultation paper in July 1998.

A Suggestions Paper was subsequently released in December 1998, seeking comments on a range of suggestions including:

- an information and brokerage service on dispute resolution for small business;
- computer assisted options for dispute resolution available through the Business Entry Point service on the internet;
- increased screening of cases at point of entry to the courts to identify the most appropriate dispute resolution service.

In its response the Council supported the information and brokerage service on the basis that it is independent and its advisers are adequately trained to assess the appropriateness of a dispute for a particular method of dispute resolution. It also supported the increased screening of cases at the point of entry to the courts as long as regard is had to the nature of the dispute, the parties and the type of resolution being sought.

However, the Council had reservations about the use of computer assisted options for dispute resolution. It considered that many disputes do not lend themselves to this type of classification system. Assessing the most appropriate type of dispute resolution method can realistically only be assessed by a person with expertise in the area.

The Review Team is currently drafting its report setting out its findings and recommendations.

COUNCIL MEETINGS

The Council meets approximately every four months in different locations where possible. This provides an opportunity for the Council to meet with the variety of people involved in various aspects of ADR.

Melbourne

In Melbourne the Council was addressed by the Chief Justice of the Federal Court of Australia, the Hon Chief Justice Michael Black AC. He spoke about the history of ADR in the Federal Court and the current practice for using ADR. At this meeting on 14-15 October 1998, the Council also heard from Ms Nerida Wallace, a legal consultant and mediator, concerning a brochure prepared for use in native title disputes called *Towards Common Ground*.

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Sydney

On 18-19 February 1999 the Council met in Sydney. The Council heard from Ms Janine Ward, Principal Legal Officer of the Commonwealth Attorney-General's Department, on the Government's proposals for the Federal Magistrates Court. The Council was also addressed by Mr David Roberts of the Small Business Review Unit within the Department.

The Council also heard from Mr Paul Lewis, a lawyer-mediator and member of the Australian Dispute Resolution Association. Mr Lewis addressed the Council on a number of topical issues in ADR including compulsory mediation and the cross-cultural awareness of ADR. The Council also met with members of the Alternative Dispute Resolution Committee of the Law Society of New South Wales.

Brisbane

At its most recent meeting on 17-18 June 1999, the Council met in Brisbane. It was addressed by the Senior Judge Administrator of the Supreme Court of Queensland, the Hon Justice Martyn Moynihan. He spoke about the use of ADR in the Supreme Court of Queensland.

The Council also heard from Mr Damien Negus who trained as a mediator with the Community Justice Program in the Queensland Department of Justice. Mr Negus spoke about issues of current importance to the community ADR sector in Queensland. As in Sydney, the Council met with the Alternative Dispute Resolution Committee of the Queensland Law Society.

STANDARDS PROJECT

The issue of standards for alternative dispute resolution (ADR) is a hot topic which has been debated for a long time in the ADR industry - almost as long as the need for a peak ADR body. There is intense interest in the work of NADRAC in this area.

The Charter for the Council requires it to advise the Commonwealth Attorney-General on minimum standards for the provision of services. The previous Council had decided to examine the need for standards for mediators only. It undertook consultation in several major cities during 1996. The current Council decided to examine standards for different types of ADR practitioners, not just mediators.

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Diversity Project

The previous Council produced a Discussion Paper on Issues of Fairness and Justice in Alternative Dispute Resolution in November 1997. Submissions made in response to the discussion paper were generally supportive of the ideas and suggestions contained in the paper. Further, the discussion paper was a comprehensive document within itself and therefore did not lend itself to re-writing as a final report. Instead the present Council decided to produce a more practical document based on the ideas promoted in the discussion paper. That document is called 'A Fair Say'.

'A Fair Say' is a guide for ADR users and practitioners. It explains to potential users of ADR the ways in which they can make the processes of mediation and conciliation work better for them. While a lot of the simple, practical suggestions can be used by all ADR users, the guide focuses on those members of society who may face particular obstacles or barriers to fair treatment in ADR. Those areas are:

- gender
- different cultures
- indigenous Australians

- young and old
- people with disabilities
- sexuality
- geography
- power imbalance through money, position or authority.

The guide is aimed primarily at ADR users but it is hoped that ADR practitioners will also benefit from the guide.

A Fair Say contains many concrete examples of the types of barriers that people can face. By using these examples the Council hopes to increase the guide's impact on, and the understanding by readers, of these messages which can otherwise be too theoretical or difficult to explain.

The guide is currently in the process of being printed. When published, copies of the guide will be distributed widely. Individual copies will be available through the Council Secretariat or on the Council's Website, the details of which are provided on page 4 of this newsletter

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This decision was taken because of the increasing difficulty in deciding whether a particular ADR process falls within one category or another. There are also some ADR processes which use elements of two or more categories. The Council is of the view that this approach would be more helpful than one restricted to just one category. It will also provide a picture of ADR as a whole rather than looking at sectors in isolation.

The Council is taking a broad approach to the issue of setting standards. The overall aim of the paper is to suggest a framework for ADR practitioners, service providers and other relevant parties to develop their own specific standards for their respective contexts. For this reason the paper will deliberately avoid setting out prescriptive standards.

The paper suggests those knowledge, skills and ethics which are the key areas of practice for ADR practitioners.

The Council is concerned to get as clear a picture as possible of what standards and training currently exist for ADR practitioners across the whole spectrum of ADR. The Council would appreciate any assistance that readers can give in providing information about existing standards for ADR. In particular, the Council is aware that there are many standards for mediation practice but relatively little in other areas of ADR such as conciliation, arbitration and case appraisal. Any information can be sent to the Council Secretariat, contact details for which are on page 4.

It is expected that a discussion paper will be available in September 1999. The Council is keen for consultation to be as wide as possible and looks forward to receiving input from the broad spectrum of interested parties including ADR practitioners themselves, service providers, consumers, government, industry bodies and professional associations.

WORKPLACE RELATIONS

In August 1998 the Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, released a discussion paper called *Approaches to dispute resolution: a role for mediation?* NADRAC became aware of the paper in November 1998 and responded in January 1999. The Council supported the use of mediation as a means of resolving workplace relations disputes and considered that most such disputes would be amenable to being mediated, especially those which required the parties to work together in the future. The Council expressed its concerns about the use of mandatory mediation. If mandatory mediation was used then there should be safeguards such as mediation adviser who has a discretion to exclude those cases where special interest or other concerns indicate that mediation is inappropriate.

In May 1999 the Minister for Employment, Workplace Relations and Small Business issued an Implementation Discussion Paper called *The continuing reform of workplace relations: Implementation of More Jobs, Better Pay*. That paper sets out how the Government intends to implement mediation in the area of workplace relations, among other initiatives in the area.

It is proposed to give formal legislative recognition to the provision of mediation services in industrial disputes, for use on a voluntary basis, as an alternative or supplement to the processes of the Commission. The Government proposes that the mediation services would be undertaken by private providers. A mediation agency will be established to accredit mediators, publish a list of accredited mediators, and promote the use of mediation assisted by a user advisory board.

The Council will monitor developments in this area.

NADRAC on the Web

NADRAC may now be found on the Web. The Council has a sub-entry on the Attorney-General's Department home page. Information about the council together with copies of newsletters and recent publications may be found there. The address is:

<http://law.gov.au/aghome/advisory/nadrac.htm>

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