

**Response to NADRAC's reference concerning the integrity of ADR processes**

**Issue 1: Confidentiality**

The Dispute Resolution Branch provides mediations under the *Dispute Resolution Centres Act (1990)*. There are two elements of confidentiality under this Act:

- Secrecy – mediator / DRC responsibilities in maintaining confidentiality
- Privilege – the conditions under which the process and documents are confidential in relation to court processes

**S37 Secrecy**

(1) A mediator is not competent to commence to discharge the functions of a mediator without first taking an oath before a justice of the peace in or to the effect of the form set out in schedule 1 or making an affirmation in or to the effect of the form set out in schedule 2.

(2) A relevant person may disclose information obtained in connection with the administration or execution of this Act only as follows—

- (a) with the consent of the person from whom the information was obtained;
- (b) in connection with the administration or execution of this Act;
- (c) where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;
- (d) where the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting any such parties in any other manner;
- (e) where the disclosure does not reveal the identity of a person without the consent of the person and is reasonably required for the purposes of research carried out by, or with the approval of, the council;
- (f) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

(3) A relevant person who discloses information obtained in connection with the administration of this Act otherwise than as authorised under subsection (2) commits an offence against this Act.

Maximum penalty—15 penalty units

(4) Despite subsections (2) and (3) a director may, if the director considers it is appropriate in the circumstances, disclose to an agency or court—

- (a) the fact that a dispute resolution process has taken place; and
- (b) whether an agreement was reached as a result of that process.

(5) Before a director may make the disclosure mentioned in subsection (4), the director must—

- (a) tell the parties of his or her intention to make the disclosure; and
- (b) allow the parties a reasonable time, not less than 5 days, to make written representations to the director about the disclosure; and

(c) have regard to the representations.

(6) Subsection (4) does not permit the disclosure of the content of the agreement reached by the parties without the consent of the parties.

(7) This section, other than subsection (1), does not apply in relation to a dispute that is the subject of a referring order.

(8) To remove any doubt, it is declared that the Act that applies to the disclosure of information about a dispute that is the subject of a referring order is the Act under which the referring order is made.

(9) In this section— *relevant person* means a person who is or has been any of the following—

(a) a member of the council or a subcommittee of the council;

(b) a mediator;

(c) a director;

(d) a member of the staff of a dispute resolution centre;

(e) a person making an evaluation under section 34, as in force at any time before its repeal;

(f) a person carrying out research for, or with the approval of, the council.

### **Responses to NADRAC's questions:**

1. What should be the source of confidentiality?

- The legislation under which the mediation is being conducted. E.g. the Dispute Resolution Centres Act 1990  
AND / OR
- Agreement in an ADR Contract between parties to maintain confidentiality

2. Should all ADR processes be subject to confidentiality requirements? If not, which ones should not be subject to confidentiality requirements and why not? Should confidentiality requirements be customised to suit different processes and if so, how?

- Depends on the purpose of the mediation and who the key stake holders are in the results / outcome of the mediation.

3. What exceptions may be required?

- Feed back to courts or tribunals e.g. QCAT.
- Family Law or Workplace

4. To whom should confidentiality belong, including:

- Confidentiality should belong to the parties
- The content of the mediation belongs to the parties present but outcomes may involve / belong to others?

a. Should the participants be able to waive confidentiality?

- Yes. Though a waiver should only be in relation to specific agreed matters negotiated at the end of the session – not at the beginning.
- b. Should the ADR practitioner have a right to veto the waiver?
- No – not if both parties agree
  - Having the right or obligation may be different
5. Should there be processes or circumstances in which a waiver is prohibited?
- Possibly if the waiver impacts on a third party who was not involved in the mediation and has been unable to speak for them selves about the issue of possible waiver
6. Should the law specify who is bound by the waiver?

## Issue 2: Non-admissibility

DRC Act – this is covered in s36 – Privilege

### S36 Privilege

- (1) In this section— *mediation session* includes any steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session.
- (2) Subject to subsection (3), the like privilege with respect to defamation exists with respect to—
- (a) a mediation session; or
  - (b) a document or other material sent to, or produced at, a dispute resolution centre for the purpose of enabling a mediation session to be arranged;
- as exists with respect to proceedings before the Supreme Court and a document produced in these proceedings.
- (3) The privilege conferred by subsection (2) does not extend to a publication made otherwise than—
- (a) at a mediation session; or
  - (b) as provided by subsection (2)(b); or
  - (c) as provided by section 37(2).
- (4) Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body.
- (5) A document prepared for the purposes of, or in the course of, or pursuant to, a mediation session, or any copy thereof is not admissible in evidence in any proceedings before any court, tribunal or body.
- (6) Subsections (4) and (5) do not apply with respect to any evidence or document—
- (a) where the persons in attendance at, or named during, the mediation session and, in the case of a document, all persons named in the document—consent to admission of the evidence or document; or
  - (b) in proceedings instituted with respect to—
    - (i) any act or omission in connection with which a disclosure has been made pursuant to section 37(2)(c); or
    - (ii) an offence under section 37(3) concerning the disclosure of the evidence or document.
- (7) This section does not apply in relation to a dispute that is the subject of a referring order
- (8) To remove any doubt, it is declared that the Act that applies to the mediation of a dispute that is the subject of a referring order is the Act under which the referring order is made.

## Responses to NADRAC's questions:

1. Are the current non-admissibility provisions sufficient to encourage greater use of ADR in the civil justice system?
  - Don't have the data to answer this.
2. Should all ADR processes be subject to non-admissibility? If not, which ones should not be subject to non-admissibility and why not? Should non-admissibility be customised to suit different processes and if so, how?
  - ADR is purpose driven – admissibility and non admissibility could be dependant on this.
3. Are exceptions needed and, if so, what kind of exceptions?
4. Should parties be allowed to agree to the admissibility of things said or done, or admissions made in the course of ADR proceedings?
  - Yes if they both agree. However, the waiver should be negotiated at the end of the mediation in relation to specific admissions / statements which would need to be recorded to avoid disagreement.
5. If so, do ADR practitioners need special protection from being compelled to give evidence?
  - As a part of the process, DRB mediators destroy their notes (taken during the mediation) after the mediation. This would provide a challenge if required to give evidence.
  - Mediators need to be able focus on conducting a session without thinking about how it might affect possible court proceedings.
6. What effect should the parties' agreement to allow into evidence things said or done in the course of ADR proceedings have on the ADR practitioner?
  - Mediation held without confidentiality or privilege could be very difficult indeed. Parties need to be able to trust mediators completely and say whatever they need to say to get it settled, knowing that their statements will not come back to bite them if the effort fails.

### Issue 3: Conduct obligations

DRC Act – good faith is referred to in s35 (1) – Exoneration from liability

#### 35 Exoneration from liability

(1) No matter or thing done or omitted to be done by—

(a) the council or a subcommittee of the council; or

(b) a member of, or a person acting under the direction of or with the authority of, the council or any such subcommittee; or

(c) a mediator; or

(d) a director or a member of the staff of a dispute resolution centre;

if the matter or thing is done in **good faith** for the purpose of executing this Act, subjects any of them to any action, liability, claim or demand.

#### Responses to NADRAC's questions

1. Who should be subject to a conduct obligation?

- Parties should be required to act reasonably – especially when it states this on a referring order
- Mediators should be required to act ethically / responsibly within their role
- By extension, DRB staff should be required to act ethically and responsibly within their role in relation to mediations

2. What could be the ambit of any conduct obligations?

- All professional contact
- Mediation process – preparation, during and follow-up

3. How should conduct obligations be framed?

- According to the expectation or purpose of the mediation

4. Should the framing differ according to ADR process or who is subject to it?

5. Are conduct obligations appropriate in entirely private processes?

- Yes

6. Should conduct applications apply by statute or by private agreement?

- Both or by negotiation

7. At what stage should the conduct obligation apply?

- During the preparation for mediation; during the mediation process and follow-up that is part of the process.

8. How do other jurisdictions use conduct obligations? Can we learn from how other jurisdictions apply conduct obligations?

## Issue 4: Immunity of ADR Practitioners

DRC Act – this is covered in s35 (1) – Exoneration from liability

### S35 Exoneration from liability

(1) No matter or thing done or omitted to be done by—

(a) the council or a subcommittee of the council; or

(b) a member of, or a person acting under the direction of or with the authority of, the council or any such subcommittee; or

(c) a mediator; or

(d) a director or a member of the staff of a dispute resolution centre;

if the matter or thing is done in good faith for the purpose of executing this Act, subjects any of them to any action, liability, claim or demand.

### Responses to NADRAC's questions

1. What impact does immunity have on users of ADR services, particularly where ADR practitioners are negligent or engage in improper conduct.
  - It could mean that ADR practitioners who behave inappropriately are not held accountable for their actions.
  - Immunity removes an important avenue of redress for clients where there has been an actionable civil wrong. While other pathways exist for clients to take action against a mediator practitioner who has acted improperly, negligently or recklessly, they may not result in compensation for the wronged party.
  - Immunity however may also encourage clients to fully engage with the process without fear that the end result will be challenged at a later date on the basis of mediator conduct.
  
2. Is broad immunity from suit appropriate at least in relation to some ADR processes?
  - It is necessary to distinguish between different forms of immunity. Broad immunity generally refers to either 'absolute immunity' or 'qualified immunity' both of which draw their power from statute. Absolute immunity refers to the type of immunity enjoyed by judges, that is, a client is unable to launch any civil action against them. Qualified immunity on the other hand is enjoyed by DRC practitioners in virtue of s35(1) DRC Act 1990 where the phrase 'done in good faith...for the purpose of executing act' does not preclude an action but provides an ADR practitioner immunity so long as they can prove the above.
  - At the mediation end of the spectrum, immunity ensures that the mediators are able to act in a natural, informal and flexible process that could be jeopardized by its removal. At the arbitration end of the spectrum, immunity protects the finality of the ruling. It is suggested that in all ADR processes, qualified immunity is more appropriate than absolute immunity as it ensures that a client has recourse to civil action where improper conduct of the most serious kind has

taken place. How strictly or narrowly a court would interpret 'good faith' and 'for the purposes of executing the act' is unclear.

3. Does the principle that *mediators* should not be conferred immunity unless strong public policy could justify it apply equally to other ADR processes, including advisory (e.g. conciliation) or determinative (e.g. arbitration) processes?

Yes, given that immunity removes a certain layer of accountability, the decision to grant it should not be a light one. The enforcement of a private right via civil action is an integral part of social regulation and natural justice within Australia and any debate regarding immunity needs to carefully weigh the pro's and con's of its removal or retention. While it could be argued that practitioners engaged in determinative processes should enjoy greater immunity due to an increased vulnerability to civil action, this is balanced by the counter-argument that in the face of their determination of parties rights and responsibilities, greater scrutiny should exist of their conduct. Given the potential for misuse of power, absolute immunity should only be conferred for all ADR processes where strong public policy grounds exist.

4. If not, what principle should apply (if any)?
5. Can ADR practitioners sufficiently limit their risks through indemnity insurance?
  - It doesn't limit their risks, but covers them should they become vulnerable to a challenge
  - While ADR practitioners can certainly limit their risk of financial liability through indemnity insurance, this does not protect practitioners from the time consuming aspects of defending a suit, nor possible damage to their professional reputation. While it is uncertain that court action against a mediator or mediation provider would succeed due to the difficulty of proving causality between the mediator's actions or omission and the client's loss, in cases of gross negligence, breach of confidence, actual bias or coercion, it is possible that civil action may be successful. What is potentially of more concern is the impact upon a mediator's faith in the process and the resource cost of defending vexatious and frivolous suits.
6. How does immunity interact with non-admissibility provisions? Do broad non-admissibility provisions indirectly confer immunity?
  - Immunity and non-admissibility are both legal principles that underpin the mediation model and consequently support the integrity of the process. While broad admissibility provisions certainly further the protection afforded to mediators, they do not provide the same level as protection as statutory or contractual based immunity. As an example, if immunity was removed and both parties agreed to waive their right of confidentiality, there is a possibility that the

disclosure of improper conduct by a mediation practitioner could result in civil action.

7. Where immunity is conferred, how could sufficient professional scrutiny of ADR practitioners be ensured?
  - Where the ADR practitioner is employed by a mediation provider, (e.g. the DRC) the service provider should already have processes in place to handle complaints about a practitioners conduct, investigate said complaints and respond accordingly. Responses may include requiring the practitioner to undergo further professional development, temporary suspension or in more extreme circumstances, removal from the employment panel. The requirement of national accreditation, ongoing training and peer feedback are other avenues of ensuring that ADR practitioners are acting ethically and professionally. In terms of widening the scrutiny available, a number of other options exist such as the formation of an independent mediation standards body comparable to the legal services commission and the possibility of forming a review board but the merits of these options are certainly up for debate.
  
8. If immunity is conferred, what other mechanisms could be used to protect users of different types of ADR processes from negligent or improper conduct by the ADR practitioner (i.e. negligent advice or biased determinations).
  - A formal complaints process or ADR watch dog responsible for the integrity of ADR and its delivery