

RESPONSE TO THE DEVELOPMENT OF STANDARDS FOR ADR NADRAC'S DISCUSSION PAPER MARCH 2000

GENERAL COMMENTS

ADRA would like to take the opportunity to congratulate NADRAC on a comprehensive, timely and well-informed paper. The paper appears to identify the majority of key issues and provided a thorough and meaningful discussion of each issue. We consider that NADRAC's general approach has been appropriate for the consideration of the development of standards for ADR Practice in Australia.

We note that the paper has defined ADR processes in the categories of facilitative, advisory and determinative. ADRA would like to suggest that from this point on that consensus based ADR is separated from determinative ADR. The reasoning for this suggestion is that there is a fundamental difference between a consensual outcome and an imposed outcome which will impact all of the following areas raised for discussion.

That is:

- Context
- Objectives
- Standards
- Education and Training
- Complaints Mechanisms
- Regulation

The ADRA Board would like to focus their comments on several key areas.

STANDARDS

The ADRA Board supports the development of standards for ADR for the following reasons:

- consumer protection
- quality control

With the following considerations:

To what extent should an inquiry into the conduct of an ADR practitioner be conducted in confidence?

REGULATION

To what extent is there a market failure or desirable social objective that would justify the need to consider regulation of the AFR community?

What evidence is there (statistical or anecdotal) that there is a serious problem with the ADR community?

What incentive is there for ADR practitioners and organizations to develop and comply with self-regulatory arrangements?

What type of regulation is appropriate for the ADR community and on what basis?

To what extent should regulation extend to each of:

- (a) developing standards**
- (b) attaining standards**
- (c) maintaining standards**
- (d) enforcing standards?**

For which sectors of the ADR community might self regulation be appropriate?

For which sectors of the ADR community might explicit regulation be more appropriate?

To what extent are there areas of ADR which are currently being over or under regulated by government?

Val Sinclair 9261 3255

ADRA's Response

The Development of Standards for ADR Discussion Paper, NADRAC
March 2000

Written submissions due by 31 July 2000

QUESTION	ADRA agree	ADRA disagree	ADRA should comment
Chapter 1. (p.8)			
1. To what extent is NADRAC's general approach appropriate for the consideration of the development of standards for ADR practice in Australia?	✓ very approp.		✓
2. Are there other approaches you would prefer N to take? Why? How?		N.	
Chapter 2 (p.13 & 18)			
3. Are there any other significant areas in which ADR is practised? What are those areas?	Workplace Form Debt		
4. Are there any other categories of ADR practitioners and service providers? What are those categories?			
5. What other Australian studies have examined the use of ADR?			
6. What other benefits or deficiencies are you aware of or have you encountered?			
7. Are there any differences in the benefits or deficiencies for facilitative, advisory and determinative ADR, respectively? What are they?			
Chapter 3 (p.22)			
8. To what extent are the core objectives for ADR valid?			
9. To what extent are the core objectives equally applicable to facilitative, advisory and determinative ADR?			
10. To what extent are there other objectives of ADR that might distort the core objectives?			Personal Gain?
Chapter 4 (p.28)			
11. Do you agree that standards are needed for ADR? Why? _{of Cal}	✓		✓
12. Are there any arguments for or against the development of standards for ADR?			

training consistent with competency standards; specialist areas and service providers can further develop competencies and qualifications as they see fit; and standards are enforced and regulated.

Please note that the following comments apply to 'facilitative' dispute resolution processes only. The ADRA Board would like to focus specific comments on the following key areas:

2. STANDARDS

The ADRA Board supports the development of **minimum?** standards for ADR for the following reasons:

** Board to supply

- Consumer protection
- Quality control

It also notes the following considerations when developing standards:

** Board to supply

- That initial standards may need to be a base set of acceptable standards for ADR practice in general. These standards would form the basis upon which specialist areas of ADR and service providers could then additional standards as necessary.
- That consumers need to be aware of the type of process, (including framework) that a practitioner is using;
- If a practitioner deems it appropriate to move to another process during a matter, that the standards developed for that process then apply, eg. from facilitative mediation to evaluation of merits of case in court;
- As mentioned previously that facilitative, advisory and determinative processes require different competency standards and standards of practice.

Generally the list of knowledge, skills, ethics and principles relating to standards is comprehensive. We have chosen to comment on a more macro level at this stage, but would welcome the opportunity to contribute on a micro level in fine-tuning the list during the process of developing standards.

3. EDUCATION AND TRAINING

3.1 Training content

The ADRA Board suggests that ADR training could be separated into:

1. Education about principles, objectives, theory and skills required for ADR processes; and
2. Training to practice ADR.

Contents of courses could include the following:

- Understanding of the principles of ADR
- Understanding of philosophy of ADR – eg. risks and benefits, its position in comparison to other dispute resolution frameworks, social objectives etc.
- Understanding of theoretical underpinnings
- Understanding of objectives of framework, eg. Transformative/change agent or agreement focussed (or both). Rights based or interest based.
- Knowledge of conflict theory
- Knowledge of one or more ADR practice models/framework
- Knowledge and practice of key communication skills
- Knowledge and practice of interest based negotiation principles and skills
- Role play simulations practice
- Self knowledge eg. Impact of self on process - values, attitudes, biases, triggers, maintaining personal boundaries, impartiality and neutrality
- Legal and ethical issues
- Subject area knowledge, including legal context
- Intake and Case Management processes
- Conflict diagnosis

3.2 Appropriate Assessment

For Education courses as stated above, the appropriate assessment would involve assessing understanding of principles and key theoretical concepts.

For training courses to practice ADR as stated above the appropriate assessment would involve (not in order of importance):

Theory and knowledge:

- assessing the above theoretical and conceptual knowledge;
- knowledge of legal issues;
- relevant subject area knowledge, eg. Trade Practices, Family Law;
- knowledge of components of ADR model(s) and understanding of objectives of model and application of model;
- understanding of ethical issues and management of ethical dilemmas; awareness of self; understanding of principles of interest based negotiation;

Competency to Practice would include the ability to demonstrate:

- communication skills in practice;
- self awareness in practice;

- impartiality and neutrality in practice;
- management of process; and
- the variety of other competencies that have been documented in the list of skills.

3.3 *Appropriate Teaching Methods*

Teaching methods could include the following:

- Presentation (theory)
- Presentation of practice models
- Demonstration of practice models, live or audio/visual
- Experiential learning with role plays and other skills exercises
- Interactive group discussion
- Group work to develop analytical ability
- Observation/role modelling
- Supervision

3.4 *What scope is there for an organization to allow ADR practitioners, accredited by another organization, to practise with the former organization?*

- (a) Without consistent standards - An organisation should set standards and assessment criteria for its ADR practitioners and then assess whether the other organisation's accreditation meets the standards and criteria set.
- (b) If national or state competency standards were set there would be consistent criteria for organisations to assess the competency of practitioners accredited by other organisations.

3.5 *Appropriate qualifications for trainers*

ADRA suggests that the following qualifications would be appropriate for trainers of ADR theory and practice:

- Workplace Training Institute Accreditation, 'Train the trainer'/adult education/education qualifications (or equivalent), or demonstrated experience in training, teaching, course design;
- ADR qualifications, conflict resolution qualifications, social work, welfare work, counselling, psychology, therapeutic and legal.

3.6 *Ongoing experience for trainers*

Ongoing experience is not a priority for trainers, however trainers need to keep up to date with ADR contexts

3.7 *Selection process for ADR trainees*

Attendance at a basic mediation skills training course would not require a selection process however assessment of competency must be carried out before the trainee can move further onwards to practice mediation or attend further courses such as Advanced skills courses.

3.8 Accreditation of ADR practitioners

- Undergone and established standard of training
- Gained practical experience to an established level (eg. number of mediations)
- Received supervision
- Met the practice requirements for specialist areas of practice, eg. Family Law Act requirements.

3.9 Accreditation of Training Providers

4. ENFORCEMENT OF STANDARDS/COMPLAINTS MECHANISMS

4.1 Code of Conduct

ADRA supports the use of a Code of Conduct/Practice as a means to maintain and enforce standards. The Code would include ethical guidelines and guidelines for practice and refer to minimum competency standards required of practitioners.

ADRA has supported the development of the "Lets Talk Draft Code of Conduct for Mediators" (see attached). ADRA would appreciate comments from NADRAC in regard to this document.

4.2 Complaints handling mechanisms

ADRA suggests that the sequence for referral of consumer complaints and breaches of Code of Conduct could be as follows:

Firstly the complaint should be taken up with the practitioner (***** not sure if appropriate**)

Service Provider (if service provider involved) – what about sole practitioner???

An independent complaints handling body (without prejudice agreements)

4.3 Enforcement of standards

Service Providers

Service Providers should have in place:

- Code of Conduct for practitioners;
- Case management procedures;
- complaints mechanism which would include procedure for handling complaints, specified sanctions if complaint not mediated and an appeal mechanism;
- Ongoing monitoring and evaluation of mediators and mediations.

Complaints Body

ADRA is currently facilitating the unification of like organizations in other states to form a national ADR body. This may be one option for an independent organization which could receive complaints from each state (ie. State jurisdiction of complaints).

Other options include a government agency such as Fair Trading???

4.4 Liability for ADR Practitioners

The issue of immunity should be dealt with on a principle level rather than be managed by having adequate Professional Indemnity insurance.

Facilitative mediators should be immune from legal action with regard to the outcome of the mediation, however this may not be extended to some aspects of the management of the process – ie. Demonstrating action in favour of one party over another. (Is that possible????), false advertising, demonstrated vested interest in outcome, significant conflicts of interest not disclosed.

4.5 Confidentiality in ADR

Common law without prejudice principle should be supported, therefore should not be admissibility of things said or done in mediations in any other dispute resolution forum, with exception of permission of parties and other statutory exceptions.

Practitioners should be bound by confidentiality of mediation with respect to substantive matters, however it is appropriate to reveal matters of process.

Parties should be bound by confidentiality depending on context. (** need to discuss)

5. REGULATION

5.1 *Types of regulation frameworks*

Support government regulation of standards for practitioners and training providers.

training consistent with competency standards; specialist areas and service providers can further develop competencies and qualifications as they see fit; and standards are enforced and regulated.

Please note that the following comments apply to 'facilitative' dispute resolution processes only. The ADRA Board would like to focus specific comments on the following key areas:

2. STANDARDS

The ADRA Board supports the development of **minimum?** standards for ADR for the following reasons:

**** Board to supply**

- Consumer protection
- Quality control

It also notes the following considerations when developing standards:

**** Board to supply**

- That initial standards may need to be a base set of acceptable standards for ADR practice in general. These standards would form the basis upon which specialist areas of ADR and service providers could then additional standards as necessary.
- That consumers need to be aware of the type of process, (including framework) that a practitioner is using;
- If a practitioner deems it appropriate to move to another process during a matter, that the standards developed for that process then apply, eg. from facilitative mediation to evaluation of merits of case in court;
- As mentioned previously that facilitative, advisory and determinative processes require different competency standards and standards of practice.

Generally the list of knowledge, skills, ethics and principles relating to standards is comprehensive. We have chosen to comment on a more macro level at this stage, but would welcome the opportunity to contribute on a micro level in fine-tuning the list during the process of developing standards.

3. EDUCATION AND TRAINING

3.1 Training content

The ADRA Board suggests that ADR training could be separated into:

**AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION (ADRA)
RESPONSE TO THE DEVELOPMENT OF STANDARDS FOR ADR
NADRAC'S DISCUSSION PAPER MARCH 2000**

DRAFT JULY 2000

1. GENERAL COMMENTS

Firstly, ADRA would like to take the opportunity to congratulate NADRAC on a comprehensive, timely and well-informed paper. The paper appears to identify the majority of key issues and provides a thorough and meaningful discussion of each issue.

We consider that NADRAC's general approach is appropriate for the consideration of the development of standards for ADR practice in Australia. However ADRA would like to propose that from this point on ~~that~~ the three ~~categories~~ categories of ADR processes as defined by NADRAC – 'facilitative', 'advisory' and 'determinative' be treated separately for the purposes of discussing and developing standards, appropriate ADR training and a regulatory framework.

The reasoning for this proposal is the fundamental difference between a consensual outcome and an imposed outcome, as well as significant differences between advising and facilitating. We believe that these differences impact significantly on all areas raised for discussion in the paper. That is: context; objectives; standards; education; training, enforcement of standards and regulation.

We believe that the separation of the three processes will assist the clarity of discussion and lead to more appropriate action taken with respect to each process in the areas identified in the paper.

In addition, we believe that the three categories that have been identified are appropriate and meaningful. We would also like to propose a fourth category - that of 'Statutory Conciliation'. We are conscious of making the definitions overly complex, however many Statutory Conciliation processes do not fit under the facilitative umbrella and indeed are a combination of some of the other processes. Statutory Conciliation in the majority has some different imperatives and features that set it apart from the other categories. Some of these include: powers to produce evidence; decision-making powers, time constrictions; numbers of matters; advocates for legislation and therefore rights based process, eg. rights with respect to discrimination law and workers compensation law

As an overview, ADRA supports an ADR environment whereby minimum competency standards are established and enshrined in a Code of Conduct/Practice and/or legislation; training providers are accredited to provide

The Director
NADRAC Secretariat
Civil Justice Division
Attorney-General's Department
National Circuit
BARTON ACT 2600

Dear Mr Syme,

RE: The Development of Standards for ADR Discussion Paper March, 2000

We attach the response to abovenamed paper from the Australian Dispute Resolution Association.

ADRA was formed in 1987 in New South Wales and currently represents individual members and organisational members.
We enclose background information on the organisation.

Yours sincerely,

**AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION (ADRA)
RESPONSE TO THE DEVELOPMENT OF STANDARDS FOR ADR
NADRAC'S DISCUSSION PAPER MARCH 2000**

DRAFT JULY 2000

1. GENERAL COMMENTS

Firstly, ADRA would like to take the opportunity to congratulate NADRAC on a comprehensive, timely and well-informed paper. The paper appears to identify the majority of key issues and provides a thorough and meaningful discussion of each issue.

We consider that NADRAC's general approach is appropriate for the consideration of the development of standards for ADR practice in Australia.

Secondly, as a further general comment we would like to suggest that from this point on that consensus based ADR is separated from determinative ADR in all discussions and subsequent action taken. The reasoning for this proposal is that there is a fundamental difference between a consensual outcome and an imposed outcome, which impacts significantly on all areas raised for discussion in the paper. That is: the knowledge skills and ethics of standards, education, training, complaint mechanisms and regulation. We believe that the separation of consensual and determinative ADR will assist the clarity of discussion and lead to more appropriate action taken with respect to each process in the areas identified in the paper.

We note that the paper has defined ADR processes in the categories of 'facilitative', 'advisory' and 'determinative' and not made the distinction between consensual and determinative only. We suggest that those processes defined as 'determinative' in the paper be discussed separately. **We also suggest that for both consumers and practitioners the distinction between facilitative and advisory processes is an important one and should be reflected in ADR standards.**

The following comments apply to consensual based dispute resolution processes only. The ADRA Board would like to focus specific comments on the following key areas:

*4th category
Conciliation under
statute which
is a combination
of a number of
processes. ✓*

2. STANDARDS

The ADRA Board supports the development of standards for ADR practice for the following reasons:

** Board to supply

- Consumer protection
- Quality control

It also notes the following considerations when developing standards:

** Board to supply

- That initial standards may need to be a base set of acceptable standards for ADR practice in general. These standards could form the basis upon which specialist areas of ADR could then develop additional standards for specific areas of practice.
- That facilitative and advisory processes may require different education, training, competencies and ethical and practice standards.
- That consumers need to be aware what process a practitioner is using and if they are moving from one process to another

3. EDUCATION AND TRAINING

3.1 *Training content*

The ADRA Board suggests that Training courses could be separated into:

1. Education about principles, objectives, theory and skills required for ADR processes
2. Training to practice ADR.

Content could include the following:

- Understanding of the principles of ADR
- Understanding of philosophy of ADR – eg. risks and benefits, its position in comparison to other dispute resolution frameworks, social objectives etc.
- Understanding of theoretical underpinnings

- Understanding of objectives of framework, eg. Transformative/change agent or agreement focussed (or both). Rights based or interest based.
- Knowledge of conflict theory
- Knowledge of one or more ADR practice models/framework
- Knowledge and practice of key communication skills
- Knowledge and practice of interest based negotiation principles and skills
- Role play simulations practice
- Self knowledge eg. Impact of self on process - values, attitudes, biases, triggers, maintaining personal boundaries, impartiality and neutrality
- Legal and ethical issues
- Subject area knowledge, including legal
- Intake assessment and Case Management processes
- Conflict diagnosis
- Dispute System design

3.2 **Appropriate Assessment**

- For education courses as stated above, the appropriate assessment would involve assessing understanding of principles and key theoretical concepts.
- For training courses to practice ADR as stated above the appropriate assessment would involve: assessing the above theoretical and conceptual knowledge; factual knowledge of legal issues; relevant subject area knowledge, eg. Trade Practices, Family Law; knowledge of components of ADR model(s) and understanding of objectives of model and application of model; understanding of ethical issues and management of ethical dilemmas; awareness of self; understanding of principles of interest based negotiation;
- Competency to Practice Assessment would include the following: ability to demonstrate: communication skills in practice; self awareness in practice; impartiality and neutrality in practice; management of process; and the variety of other competencies that have been documented..

3.3 **Appropriate Teaching Methods**

Teaching methods could include the following:

Presentation of Theoretical framework

Practice Models *demonstration of Model in Practice.*

Experiential Learning with role plays *, other exercises.*

Learning outcomes/competency assessment

Practical Experience

Supervision

Interactive group discussion
Group works.
Observation of practice.
Co-Mediation

3.4 What scope is there for an organisation to allow ADR practitioners, accredited by another organisation, to practise with the former organisation? (Could move to reasons for Standards)

1. Without consistent standards - An organisation should set standards and assessment criteria for its ADR practitioners and then assess whether the other organisation's accreditation meets the standards and criteria set.
2. If national or state competency standards were set there would be consistent criteria for organizations to assess the competency of practitioners accredited by other organizations.

3.5 Appropriate qualifications for trainers

ADRA suggests that the following qualifications would be appropriate for trainers of ADR theory and practice.

- Workplace Training Institute Accreditation/Train the trainer/adult education/education qualifications (or equivalent) and demonstrated experience in training, teaching, course design and assessment.
- ADR qualifications and practice experience/conflict resolution qualifications/social science/psychology/therapeutic qualifications

3.6 Ongoing Experience for trainers

- No selection process for education + for Practitioners.*
- 3.7 Selection process for ADR trainees** *not required but trainees should be assessed on mediation competency*
- Basic Skills Training could be available without a selection process for all Interested trainees. Participants would need to meet practice competency requirements before proceeding to advanced and practice oriented Courses. These advanced courses could include training in specialist areas of mediation.

3.8 Accreditation of ADR practitioners

The accreditation of ADR practitioners could be primarily competency based. ADR practitioners could be assessed for competency after they have:

- undergone an established period and standard of training
- gained practical experience to an established level (eg 25 mediations)
- received on-going supervision
- met the practice requirements for specialist areas of practice (eg Family Law Act requirements)

4. ENFORCEMENT OF STANDARDS/COMPLAINTS MECHANISMS

4.1 Code of Conduct

ADRA supports the use of a Code of Conduct as a way to maintain and enforce standards. The Code would include ethical and practice guidelines and then refer to established or regulated practice competencies. ADRA has supported the development of the "Let's Talk Draft Code of Conduct for Mediators" and would appreciate comments from NADRAC in regard to this document. The document has been forwarded to NADRAC by the group for your comments.

4.2 Complaints handling mechanisms

ADRA suggests that the sequence for referral of consumer complaints and breaches of the Code of Conduct could be as follows:

1. The practitioner involved
2. The service provider
3. A complaints body

The Complaints Body

ADRA is currently facilitating the unification of our like organisations in other states to form a national ADR body. This body may be one option for a body which could receive complaints in each state.(ie state jurisdiction of complaints)

The other options are a Government Agency or State Ombudsman

4.3 Enforcement of standards

4.4 Liability for ADR Practitioners

4.5 Confidentiality in ADR

5. REGULATION

ADRA agrees that in view of the mandatory nature of ADR for some sections of the ADR community that there is a need for more than self-regulation. ADRA proposes that the ACT model of Government legislation for an ADR Code of Practice and Competency Standards could be adopted as a national model for regulation of a base set of ethical and competency standards. It would then be a matter for specialist areas of practice to develop or legislate for additional requirements for their area of practice that could refer back to the basic competencies.

5.4 *Types of regulation frameworks*

ADRA'S ROLE

ADRA as an ADR representative body is prepared to assist in the development of standards in any of the following ways:

- Facilitation of discussions with service providers
- Education of our members
- Promotion of the Code of Conduct
- Involvement in the development of competencies and assessment criteria
- The establishment of a Complaints Body
- Education for consumers
- Referral to relevant services for our members such as:
 - Professional Indemnity Insurance
 - Training and Supervision

**AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION (ADRA)
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DRAFT JULY 2000

1. GENERAL COMMENTS

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The reasoning for this proposal is the fundamental difference between a consensual outcome and an imposed outcome, as well as significant differences between advising and facilitating. We believe that these differences impact significantly on all areas raised for discussion in the paper. That is: context; objectives; standards; education; training; enforcement of standards and regulation.

We believe that the separation of the three processes will assist the clarity of discussion and lead to more appropriate action taken with respect to each process in the areas identified in the paper.

In addition, we believe that the three categories that have been identified are appropriate and meaningful. We would also like to propose a fourth category - that of 'Statutory Conciliation'. We are conscious of making the definitions overly complex, however many Statutory Conciliation processes do not fit under the facilitative umbrella and indeed are a combination of some of the other processes. Statutory Conciliation in the majority has some different imperatives and features that set it apart from the other categories. Some of these include: powers to produce evidence; decision-making powers, time constrictions; numbers of matters; advocates for legislation and therefore rights based process, eg. rights with respect to discrimination law and workers compensation law.

As an overview, ADRA supports an ADR environment whereby minimum competency standards are established and enshrined in a Code of Conduct/Practice and/or legislation; training providers are accredited to provide

Attachment 1.

The responses in this draft have been based on a number of questions posed in the NADRAC paper. For your information, following is a selection of the questions from the NADRAC paper that seemed the most appropriate for a representative body to present a response to.

2. STANDARDS

To what extent are service providers in the best position to set standards?

To what extent is consistency in standards between service providers desirable?

Is it preferable to have minimum standards of ADR practice and if so in what areas of ADR practice?

3. EDUCATION AND TRAINING

What is the appropriate content for ADR education and/or training courses?

What is the appropriate assessment to use for ADR education and/or training courses?

What are the most appropriate teaching methods to use to effectively train or educate people in ADR?

What sorts of qualifications are appropriate for individuals who provide training and education in ADR?

To what extent is ongoing experience required of trainers and educators?

What educational or training standards regarding course structure or teaching methods should trainers or educators of ADR practitioners meet, if any?

What types of personal qualities are required of an ADR practitioner?

What type of selection process should be used for those who wish to be trained and/or educated as an ADR practitioner?

Should ADR practitioners be accredited and if so at what stage?

What types of organizations are most appropriate to accredit ADR practitioners?

To what extent is it desirable to have a national organization to accredit ADR practitioners?

4. ENFORCEMENT OF STANDARDS/COMPLAINT MECHANISMS

How appropriate is a code of conduct for the maintenance and enforcement of standards in ADR?

To what extent is the Legal Services Ombudsman an appropriate avenue for resolution of complaints about some ADR practitioners? What are the alternatives?

What considerations need to be taken into account when designing complaints handling mechanisms for the ADR industry?

To what extent, if at all, should government be involved in resolving disputes about ADR practitioners?

What types of redress should be available to parties of an ADR process where the ADR practitioner has breached a Code of Conduct?

What types of sanctions might be appropriate for ADR practitioners who breach a code of conduct?

Who should enforce sanctions against ADR practitioners?

What should be the standard of care for ADR practitioners?

What other areas of liability could there be for ADR practitioners?

What type of immunity, if any is appropriate for facilitative, advisory and determinative ADR practitioners?

To what extent should ADR practitioners rely on professional indemnity insurance for protection from liability?

What effects might immunities and professional indemnity insurance have on standards for ADR practitioners?

To what extent should information disclosed in ADR be admitted in evidence in a court?

To what extent should a party be precluded from disclosing information about an ADR process in which he or she was involved?

To what extent should an ADR practitioner be prevented from disclosing information about an ADR process in which he or she was involved?

What is the appropriate level of admissibility for the various facilitative, advisory and determinative processes?

What are the implications for standards in ADR?

To what extent should an inquiry into the conduct of an ADR practitioner be conducted in confidence?

5. REGULATION

To what extent is there a market failure or desirable social objective that would justify the need to consider regulation of the AFR community?

What evidence is there (statistical or anecdotal) that there is a serious problem with the ADR community?

What incentive is there for ADR practitioners and organizations to develop and comply with self-regulatory arrangements?

What type of regulation is appropriate for the ADR community and on what basis?

To what extent should regulation extend to each of:

- (a) developing standards
- (b) attaining standards
- (c) maintaining standards
- (d) enforcing standards?

For which sectors of the ADR community might self regulation be appropriate?

For which sectors of the ADR community might explicit regulation be more appropriate?

To what extent are there areas of ADR which are currently being over or under regulated by government?

TRANSMISSION VERIFICATION REPORT

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Val to:

1 WEEK

EXTENSION — NADRAC. — Next Monday
~~Wednesday~~

EMAIL TO ALL BOARD.

Process Drafts on legs

• Agree or Disagree
• on certain proposal

Risks & Benefits

Suggest Additional or delete
Comment on Coherence of Language.

- Shengla
- Alex
- Christine
- R. Louise
- John
- David
- Alan

Val Sinclair

9261 3255

From: SBrowning

9589 7364

**AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION (ADRA)
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The reasoning for this proposal is that there is a fundamental difference between a consensual outcome and an imposed outcome, as well as significant differences between a facilitative role and an advisory one. We believe that these differences impact significantly on all areas raised for discussion in the paper. That is: context; objectives; knowledge, skills and ethics of standards; education; training, enforcement of standards, complaints mechanisms and regulation.

We believe that the separation of the three processes will assist the clarity of discussion and lead to more appropriate action taken with respect to each process in the areas identified in the paper.

In addition, we would like to mention that the three categories that have been identified are appropriate and meaningful. However, we would also like to propose a fourth category - that of 'Statutory Conciliation'. We are conscious of making the definitions overly complex, however many Statutory Conciliation processes do not fit under the facilitative umbrella and indeed are a combination of some of the other processes identified. Statutory Conciliation in the majority has different imperatives and features that set it apart from the other categories. Some of these include: powers afforded to Conciliators in conjunction with the conduct of a facilitative process, eg. powers to produce evidence and some decision-making powers; differing procedural issues, eg. time constrictions; differing administrative environments, eg. numbers of matters and investigative process leading up to the facilitative process; and frameworks that are centred

Val, we can work out what to say to Board when you ring.

around being an advocate for the particular legislation and therefore conducting a rights based process with respect to the legislation, eg. rights with respect to discrimination or rights with respect to Workers Compensation.

As an overview, ADRA supports an ADR environment ^{referred to as linked} whereby ~~minimum~~ ^{base set of} competency standards are established and embodied in a Code of Conduct/Practice and/or legislation. Training providers could then be accredited to provide training consistent with these competency standards. It would be expected that specialist areas and service providers would develop additional requirements or qualifications appropriate to their area of practice that would refer to the base set of standards.

Please note that the following comments apply to 'facilitative' dispute resolution processes only. The ADRA Board would like to focus specific comments on the following key areas:

2. STANDARDS

The ADRA Board supports the development of base set of standards for ADR for the following reasons:

The increased awareness of ADR in the community and use of ADR by courts, tribunals, industry and government agencies indicates that the timing is right if not late for the development of standards for ADR.

Some of the reasons for supporting standards include:

Consumer protection

Currently there are not consistent, established means for a consumer to determine the competency of a mediator and there are no benchmarks for training or practice standards. yes.

The current inconsistency in standards, training courses offered and mediation practices has resulted in confusion for consumers and a lack of protection from incompetent, inexperienced and unethical practitioners.

Quality control

It is envisaged that the quality of service provision and the credibility and accountability of service providers would be improved with the implementation of standards.

Industry confusion about objectives and frameworks for practice

There currently exists a great deal of confusion as to the frameworks being used in practice that appear to fall under the same ADR process. These frameworks are given the same name but often differ greatly in objectives, approach and outcomes. This presents much confusion with respect to the expectations for consumers.

The Board also notes the following considerations when developing standards:

- That initial standards would be a base set of acceptable standards for ADR practice in general. These standards would form the basis upon which specialist areas of ADR and service providers could then develop additional standards for specific areas of practice as necessary.
- That consumers need to be aware of the type of process, (including framework) that a practitioner is using;
- If a practitioner considers it appropriate to move to another process during a matter, that the standards developed for that process then apply, eg. from facilitative mediation to evaluation of merits of case in court, or to an advisory process;

Generally the lists of knowledge, skills, ethics and principles relating to standards that have been outlined in the paper are comprehensive. The ADRA Board has chosen to comment on a more macro level at this stage, but would welcome the opportunity to contribute on a micro level in fine-tuning the list during the process of developing standards.

3. EDUCATION AND TRAINING

3.1 Accreditation of Training Providers

The ADRA Board suggests that ADR training providers should be accredited to provide training based on set criteria consistent with a base set of standards. The criteria would include: established course content (broad topics not methods); appropriately qualified and/or experienced trainers and appropriate assessment processes.

3.2 Training content

The ADRA Board suggests that ADR training could be separated into:

- (a) Education about principles, objectives, theory and skills required for ADR processes; and
- (b) Training to practice ADR.

Contents of courses could include the following:

- Understanding of the principles of ADR
- Understanding of philosophy of ADR – eg. risks and benefits, its position in comparison to other dispute resolution frameworks, social objectives etc.
- Understanding of theoretical underpinnings
- Understanding of objectives of framework, eg. Transformative/change agent or agreement focussed (or both). Rights based or interest based.
- Knowledge of conflict theory
- Knowledge of one or more ADR practice models/framework
- Knowledge and practice of key communication skills
- Knowledge and practice of interest based negotiation principles and skills
- Role play simulations practice
- Self knowledge eg. Impact of self on process - values, attitudes, biases, triggers, maintaining personal boundaries, impartiality and neutrality
- Legal and ethical issues
- Subject area knowledge, including legal context
- Intake and Case Management processes
- Conflict diagnosis

3.3 *Appropriate Assessment*

For Education courses as stated above, the appropriate assessment would involve assessing understanding of principles and key theoretical concepts.

For training courses to practice ADR as stated above the appropriate assessment would involve (not in order of importance):

Theory and knowledge:

- assessing the above theoretical and conceptual knowledge;
- knowledge of legal issues;
- relevant subject area knowledge, eg. Trade Practices, Family Law;
- knowledge of components of ADR model(s) and understanding of objectives of model and application of model;
- understanding of ethical issues and management of ethical dilemmas;
- awareness of self; and
- understanding of principles of interest based negotiation;

Competency to Practice would include the ability to demonstrate:

- communication skills in practice;
- self awareness in practice;
- impartiality and neutrality in practice;
- management of process; and
- the variety of other competencies that have been documented in the list of skills.

3.4 *Appropriate Teaching Methods*

Teaching methods could include the following:

- Presentation (theory)
- Presentation of practice models
- Demonstration of practice models, live or audio/visual
- Experiential learning with role plays and other skills exercises
- Interactive group discussion
- Group work to develop analytical ability
- Observation/role modelling
- Co-mediation with experienced mediator
- Practice placement with supervision during placement
- Ongoing supervision

3.5 *Scope for ADR organizations to allow practitioners, accredited by another organization, to practise with them*

- (a) If national or state competency standards were set there would be consistent criteria for organisations to assess the competency of practitioners accredited by other organisations.
- (b) Without consistent standards - An organisation should set standards and assessment criteria for its ADR practitioners and then assess whether the other organisation's accreditation meets the standards and criteria set.

3.6 *Appropriate qualifications for trainers*

ADRA suggests that the following qualifications would be appropriate for trainers of ADR theory and practice:

- Workplace Training Institute Accreditation, 'Train the trainer'/adult education/education qualifications (or equivalent), or demonstrated experience in training course development, design and delivery;
 - ADR qualifications, conflict resolution qualifications, social science, counselling, psychology, therapeutic and legal.
- plus* → *in addition to.*

3.7 *Selection process for ADR trainees*

We suggest that Attendance at a basic mediation skills training course *should* would not require a selection process however assessment of competency must be carried out before the trainee can move further onwards to practice mediation or attend further courses such as Advanced skills courses. *and to practice mediation*

3.8 Accreditation of ADR practitioners

The accreditation of ADR practitioners could be primarily competency based
ADR practitioners could be assessed for competency after they have:

- Undergone an established ~~standard~~ standard of training
- Gained practical experience to an established level (eg. number of mediations)
- Received supervision
- Met the practice requirements for specialist areas of practice, (eg. Family Law Act requirements).

4. ENFORCEMENT OF STANDARDS/COMPLAINTS MECHANISMS

4.1 Code of Conduct

ADRA supports the use of a Code of Conduct/Practice as a means to maintain and enforce standards. The Code would include ethical guidelines and guidelines for practice and refer to a base set of competency standards required of practitioners.

ADRA has supported the development of the "Lets Talk Draft Code of Conduct for Mediators" (see attached). ADRA would appreciate comments from NADRAC in regard to this document.

4.2 Complaints handling mechanisms

ADRA suggests that the sequence for referral of consumer complaints and breaches of Code of Conduct could be as follows:

- (a) If the complainant feels it appropriate the complaint should be firstly taken up with the practitioner to explore remedies;
- (b) If the complainant does not feel it appropriate they may refer complaint to the service provider involved if relevant (see further as to service providers having systems for managing complaints in place);
- (c) If there was no service provider involved and the matter was a direct referral to the practitioner then the matter could be referred to an independent complaints body; X
- (d) If previous attempts to resolve the matter as outlined have not been successful, the matter could be referred to an independent complaints body. ✓

These processes would be carried out on a 'without prejudice' basis.

4.3 Enforcement of standards

Service Providers

Service Providers should have in place:

- Code of Conduct for practitioners;
- Case management procedures;
- Complaints mechanism which would include procedure for handling complaints, specified sanctions if complaint not mediated and an appeal mechanism;
- Ongoing monitoring and evaluation of mediators and mediations.

Complaints Body

ADRA is currently facilitating the unification of like organizations in other states to form a national ADR body. This may be one option for an independent organization that could receive complaints from each state (ie. State jurisdiction of complaints).

Other options include a government agency such as Fair Trading.

4.4 Liability for ADR Practitioners

The issue of ADR practitioner immunity should be dealt with on a principle level rather than be managed by practitioners having adequate Professional Indemnity insurance.

Facilitative mediators should be immune from legal action with regard to the outcome of a mediation, however this may not be extended to some aspects of the management of the process, eg. serious misconduct.

4.5 Confidentiality in ADR

The common law without prejudice principle should be upheld; therefore things said or done in mediations should be inadmissible in any other dispute resolution forum. Exceptions to this are matters revealed with the permission of the parties, statutory exceptions and information that is publicly known prior to the mediation.

Practitioners should be bound by confidentiality of mediation with respect to substantive matters, however it is appropriate to reveal matters of process.

Parties should be bound by confidentiality depending on the particular context.

5. REGULATION

The ADRA Board agrees that in view of the mandatory nature of ADR for some sections of the ADR community that there is a need for more than self-regulation. ADRA proposes that the ACT model of government legislation the "Mediation Act 1997" could be adopted as a national model for regulation of a base set of ethical and competency standards. These standards would be used to register mediators. Specialist areas and service providers would also be able to develop requirements additional to the base set of standards for their particular area of practice or organization as necessary.

An addition ^{to existing} ~~to~~ the ACT legislation ^{a model of legislation} could include criteria for determining an 'approved agency' to register practitioners and criteria for determining an 'approved training provider' to deliver ADR training.

ADRA's role

ADRA as an ADR representative body is prepared to assist in the development of standards in any of the following ways:

- Facilitation of discussions with service providers
- Education of our members
- Promotion of the Code of Conduct
- Involvement in the development of competencies and assessment criteria
- The establishment of a Complaints Body
- Education for consumers
- Referral to relevant services for our members such as:
 - (i) Professional Indemnity Insurance
 - (ii) Training and Supervision

Complaints Body

ADRA is currently facilitating the unification of our like organisations in other states to form a national ADR body. This may be one option for an independent organisation which could receive complaints in each state. (ie state jurisdiction of complaints)

The other options include ^{ω .} government agency such as Fair trading
^

4.4 Liability for ADR Practitioners

The issue of immunity should be dealt with on a principle level rather than be managed by having adequate Professional Indemnity Insurance.

Facilitative mediators should be immune from legal action with regard to the outcome of mediation, however this may not be extended to some aspects of the management of the process eg ~~(deleted)~~ false advertising, demonstrated vested interest in outcome, significant conflicts of interest not disclosed.

4.5 Confidentiality in ADR

Common law without prejudice principle should be supported, therefore **things said or done in mediation should not be admissible in any other dispute resolution forum with the exception of permission by the parties.**

Practitioners should be bound by confidentiality of mediation with respect to substantive matters, however it is appropriate to reveal matters of process.

Parties etc (need to discuss)

5 REGULATION

ADRA agrees that in view of the mandatory nature of ADR for some sections of the ADR community that there is a need for more than self-regulation. ADRA proposes that the ACT model of Government legislation "The Mediation Act 1997" could be adopted as a national model for regulation of a base set of ethical and competency standards for the registration of mediators. It would then be a matter for specialist areas of practice to develop or legislate for additional requirements for their area of practice that could refer back to the base competencies.

ADRA'S ROLE

ADRA as an ADR representative body is prepared to assist in the development of standards in any of the following ways:

- Facilitation of discussions with service providers
- Education of our members
- Promotion of the Code of Conduct
- Involvement in the development of competencies and assessment criteria
- The establishment of a Complaints Body
- Education for consumers
- Referral to relevant services for our members such as:
Professional Indemnity Insurance
Training and Supervision

1 July, 1997

Ms. Michelle McAuslan

Dear Michelle,

RE: A PEAK BODY PROJECT

Thank you for meeting with David Rollinson and myself on Tuesday, 24 June.

I now enclose a copy of ADRA's Explanation Paper on the above project.

At the 1 July Board Meeting it was formally resolved to ask your Board to make a research grant to both hasten and improve the quality of this project. The grant sum which is sought is \$....., based on projected expenditure of resources outlined at Annexure "A".

It is proposed that our Board of Management would engage the services of an appropriate person to co-ordinate and attend each of the several facilitation meetings in Sydney, an estimated six "scoping meetings" with prominent organisations involved in DR and to write and produce an account of the project, on an interim and final basis.

We would be pleased for you to have joint responsibility in relation to the selection of this person, and to consider such other reasonable conditions attaching to any grant.

Yours faithfully,

Paul Lewis
President

Standards for ADR

ADRA has been involved in a number of initiatives to facilitate the development of Standards for ADR.

Let's Talk Code of Conduct for Mediators

The Let's Talk group was established in March, 1998 to discuss issues in relation to ADR Practice. The idea for the group originated from one of ADRA's Peak Body Project facilitation meetings. Let's Talk was established as a non-commercial and non-proprietary network to provide an opportunity for representatives from ADR Organisations to discuss areas of common interest and develop initiatives to benefit the ADR Community.

The outcome of the early meetings was the identification of the desirability of a nationally accepted Code of Conduct for Mediators. A Draft Code of Conduct was developed and circulated for comment to a number of organisations, including NADRAC. Responses from these organisations have been incorporated into the final document. The Code was circulated and presented at the 5th National Mediation Conference in Brisbane. A majority of organisations including the Law Society of NSW Dispute Resolution Committee have decided to endorse the document. The implementation of the Code is now the issue to be considered.

Response to NADRAC's Discussion Paper

In July, 2000 ADRA formulated a comprehensive response to NADRAC's Discussion Paper on behalf of our members. ADRA commented most particularly on the following areas:

- The Development of Standards
- Education and Training – *Accreditation of Training Providers, Training content, Appropriate Assessment, Appropriate Teaching methods, Appropriate qualifications for Trainers, Selection Process for ADR Trainees, Accreditation of ADR practitioners.*
- The Enforcement of Standards/Complaints Mechanisms
ADRA's response supported the implementation of a Code of Conduct for Mediators. A copy of the Let's Talk Code of Conduct was forwarded for consideration
- Regulation
- ADRA's Role

As an organisation representing a large number of members Involved in ADR. ADRA is prepared to assist with the development of Standards in any way considered appropriate for our role and our members

ADRA's response was documented in NADRAC's report 'A Framework for ADR Standards' launched June, 2001