NADRAC
National Alternative Dispute Resolution Advisory Council

22 January 2008

Mr Alan Kirkland
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Mr Kirkland

SUBMISSION ON QUESTION 40-2 - DISCUSSION PAPER 72 REVIEW OF AUSTRALIAN PRIVACY LAW

I refer to the Australian Law Reform Commission's (ALRC) recent request for input from the National Alternative Dispute Resolution Advisory Council (NADRAC) in relation to Question 40-2 in Discussion Paper 72 Review of Australian Privacy Law. Question 40-2 concerns the potential necessity for exemptions or exceptions to the *Privacy Act 1988* (Cth) for alternative dispute resolution (ADR) schemes.

I am grateful for the Commission's willingness to extend the deadline for submissions to enable NADRAC to make comment. The challenges of the Christmas/New Year period have made it difficult for the Council to respond earlier.

NADRAC understands that the issues raised by the Australian Law Reform Commission (ALRC) in Question 40-2 largely reflect issues raised by the Office of the Privacy Commissioner in its earlier review, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005) and contained in the *Joint Submission by Industry Based Alternative Dispute Resolution Schemes* (January 2007).

NADRAC has considered the Joint Submission to the ALRC by the Banking and Financial Services Ombudsman Ltd, the Energy and Water Ombudsman (Victoria), the Financial Industry Complaints Service, the Insurance Ombudsman Service Ltd and the Telecommunications Industry Ombudsman. NADRAC accepts the arguments put by those bodies that the requirements of the present National Privacy Principles (NPPs) are an obstacle to the efficient and effective operation of the dispute resolution schemes operated by those bodies. Further, having considered those arguments, NADRAC is of the view that the requirements of both the present Information Privacy Principles (IPPs) and the NPPs may potentially negatively impact on the efficient and effective operation of other alternative dispute resolution services.

The extent to which the current IPPs and NPPs may affect alternative dispute resolution services

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is difficult to determine in view of the variety of exemptions and exceptions that currently apply under the Privacy Act and the diversity of practices adopted by ADR providers. Nevertheless, NADRAC submits that at a time when governments and courts around Australia, and indeed internationally, are seeking to promote and encourage the use of ADR as a desirable alternative to litigation it is important to ensure that legislation does not unnecessarily diminish the capacity of ADR providers to provide an efficient and effective service.

Outlined below are some issues that the ALRC may wish to take into consideration in drafting its final report on Question 40-2.

Alternative Dispute Resolution

In its 2003 Glossary of Dispute Resolution Terms NADRAC described ADR as: ' … an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.' Sometimes alternative dispute resolution is instead called assisted or appropriate dispute resolution and ADR is also used as an abbreviation in that context. The term ADR is sometimes also used for services that enable parties to prevent or manage their own disputes without outside assistance.

NADRAC's Glossary of Dispute Resolution Terms, a copy of which is attached, indicates the very wide variety of processes that constitute ADR. While NADRAC attempted to make the Glossary comprehensive, ADR is a developing field and it is likely that there may now be other terms to describe processes that come under the umbrella of ADR. Please also note that the Glossary still refers to Primary Dispute Resolution. As you will be aware that term has now been replaced by the term Family Dispute Resolution under the recent amendments to the *Family Law Act 1975*. NADRAC will shortly be updating the Glossary to ensure its currency.

It is also important to note that some processes are hybrid processes that include elements of one or more other processes and that some statutory definitions such as 'family dispute resolution' are merely catch all descriptions that cover a variety of different processes.

NADRAC has argued for consistency in usage of ADR terms. As NADRAC has previously said:

> *…consistent use of terms for ADR processes helps courts and other referring or mandating agencies to match dispute resolution processes to specific disputes and different parties*
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> and
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> *…ensure that those who use, or make referrals to, ADR services receive consistent and accurate information, and have realistic and accurate expectations about the processes they are undertaking*[1].

[1] *ADR terminology: a discussion paper* (2002), p 5.

Nevertheless, there continues to be considerable inconsistency in the way that ADR terms are used. The term mediation, for example, is now often used to refer to processes that are advisory in nature and that might more appropriately be referred to as conciliation. This lack of consistency is confusing and is likely to result in poorer referrals and unrealistic expectations from users and referrers alike.

In essence modern ADR processes, in which an impartial third party assists in the resolution of disputes, are simply a formalisation of the age-old process of private discussions and negotiation between people engaged in a dispute who are attempting to resolve their differences. The role of the impartial third party can be:

- *facilitative* – that is providing a process that seeks to empower the parties to speak for themselves and determine their own solutions whilst also seeking to manage any power imbalances that may affect a person's ability to participate equally
- *advisory* –a role which is similar to the facilitative role but in which the third party also provides expert or professional advice on the issues in dispute as and when required, or
- *determinative* – that is hearing arguments and making a determination (the degree to which determinative processes adopt legal and evidential procedure may differ significantly).

It is noted that the use of the word 'impartial' to qualify the role of the third party has been the subject of academic discussion and some controversy. In large part, the concerns about the use of the word relate to the role of the third party in seeking to manage perceived power imbalances between the parties to the dispute. NADRAC does not consider the word 'impartial' is necessarily inconsistent with that role. NADRAC's use of the word 'impartial' is merely meant to indicate that the third party is not biased towards one party or another and does not seek to influence the outcome in favour of one party or another.

ADR processes largely rely on the good faith of the parties to the dispute and the truthfulness of their statements. While some processes, such as those operated by the industry schemes, include an investigative function to establish certain facts, the processes are not court proceedings and not all the statements on which parties rely would be tested for evidentiary soundness in the way that they would be in court proceedings. Only some determinative processes like arbitration and private adjudication approach the legal and procedural qualities of a judicial process.

ADR processes are aimed at getting each party to outline the full context of the dispute from their perspectives with a view to identifying the underlying interests of each party. While a dispute may seem to be a legal or monetary one, after hearing each party's account it may become apparent that the real concerns of the parties are different. For example, although a person may be legally entitled to compensation they may be more interested in an apology or an undertaking from the other party to behave differently in the future.

In the experience of NADRAC's members the parties' accounts will usually be truthful while representing that party's personal perception of events. In the course of 'telling their story' many parties will include information that seems to them to be important and which may help to indicate how they came to their position but which would be deemed irrelevant in legal proceedings. The accounts will often include personal information including sensitive information about themselves and others whom the person considers to be directly or indirectly involved.

Confidentiality

ADR processes are usually regarded as confidential and that confidentiality is often contained in a contractual agreement between the parties and the provider or may be mandated by legislation. Where there is no contractual or statutory requirement for confidentiality, it may be that the courts will infer confidentially at common law particularly where the dispute involved is a legal dispute which may otherwise have resulted in litigation. Some legislation makes material and information revealed in ADR inadmissible in court proceedings albeit with some exceptions such as for the protection of children.

Information provided in the dispute resolution process should generally be confidential to the process and should not be used for any other purpose (with some limited exceptions such as notification of child abuse). However, in the absence of any overarching legislative or common law requirement to that effect, it is impossible for NADRAC to say either that confidentiality is always maintained or that information revealed in the dispute resolution process is never used for other purposes. There may be arguments for some uniform national requirements in that regard.

Records

In general there does not seem to be any strong need for an ADR provider to keep permanent records of the information provided by the participants during the process. However, there may be reasons to keep temporary records, which may include correspondence, participant's written statements and the practitioner's notes, so that the ADR practitioner can refer the participants back to previous matters that have been raised and ensure that all the issues that have been raised are fully dealt with. In NADRAC's view it would be best for those temporary records to be destroyed upon the termination of the process, provided that there are no legal proceedings on foot in which the content of dispute resolution proceedings would be relevant and admissible (eg arbitrations under the Family Law Act which are subject to review by the Family Court on request of one of the parties).

While there may be no obvious need to keep permanent records of the content of the dispute or the information provided by the participants, NADRAC is aware that some ADR providers may see a business need to do so (for example, to better deal with repeat complainants or disputants)

and that others may have a legal obligation to do so (for example, under archives legislation).

ADR providers may often keep permanent records of the outcome or agreement reached but it would be reasonable to expect that these records do not include personal information about anyone other than the disputants.

National Mediator Accreditation System

The National Mediator Accreditation System commenced on 1 January this year. The scheme comprises Practice Standards and Approval Standards. Where an ADR provider decides to comply with those standards they may become a Recognised Mediator Accreditation Body (RMAB). A new National Mediator Accreditation Committee, comprising RMABs, training and accreditation bodies and professional bodies, is being established with NADRAC's assistance to manage the implementation of the scheme including the establishment of a new permanent implementation body from 2010.

The scheme only applies to mediation and conciliation. It is a voluntary opt-in scheme and for the present there is no method of enforcing compliance with the standards by RMABs. It is possible, that some external complaints mechanism will be established in the future together with some method of assessing RMABs compliance.

The Practice Standards under the Scheme include requirements with respect to confidentiality and record-keeping (page 9 to 10). It is noted that the confidentiality requirements prevent a mediator from disclosing information obtained to anyone who is not a party except in certain circumstances. Those circumstances include where the mediator has the consent of the participants. It is possible that there is a case for extending this to include the consent of any other persons to whom the information relates.

The Practice Standards require that the mediator and their staff should maintain confidentiality in the storage and disposal of client records. While the standards recognise that mediators are not required to retain documents relating to a dispute, they acknowledge that some mediators may choose to retain notes relating to the content of the dispute particularly where duty of care or duty to warn issues are identified.

A copy of the final report on the scheme, the Practice Standards and the Approval Standards can be obtained under the link National Mediator Accreditation at:
www.wadra.law.ecu.edu.au

The ADR Sector

The ADR Sector is a large and varied one. The services of the impartial third party, hereafter referred to as the ADR practitioner, may be provided by a sole practitioner, a partnership, a for profit organisation, a not for profit organisation, as an ancillary role in a organisation whose

main business is something else (including government agencies, private companies, courts and tribunals) or by an organisation established for that specific purpose under an industry scheme. ADR services are provided both by government and private organisations.

While some ADR practitioners can ask significant fees for the service, ADR is not generally considered to be a high profit activity. A considerable proportion of ADR services are provided by government and the not for profit sector. The resources that those organisations have available to them is generally strictly limited and not easily increased. Arguments for increased resources based on legal or regulatory requirements are generally difficult to make. Many ADR providers may fall within the current small business exemption in the Privacy Act, it is difficult to say what proportion and, in any event NADRAC understands the ALRC is proposing to remove that exemption (see later discussion).

ADR practitioners and organisations may deal with any sort of dispute that may arise in the community. This includes personal, family, household, workplace, business and legal disputes including native title disputes. While many ADR practitioners and organisations specialise in particular types of disputes, others are more generic and may be willing to assist in resolving a wide range of disputes. ADR providers may limit the matters they deal with by reference to the characteristics of the parties (eg Indigenous people, NESB people, employees of a particular organisation) or the social status or means of a party (eg legal aid services). They may also ration their services based on a combination of these criteria.

The practices of ADR providers may also differ significantly. Some, like the industry schemes which made a joint submission to the ALRC enquiry, may combine the ADR function with other functions such as investigative or complaints determination functions. Some may keep no written records of information revealed during the dispute resolution process, others may keep some written records for a limited time (eg until the matter is completed), while others may keep permanent files or records. In the case of government agencies it may be that archives legislation requires the keeping of records.

Application of the Privacy Act

NADRAC does not have expertise in the application of the Privacy Act and has had some difficulty in assessing the extent to which the Act may currently apply to ADR providers (eg how many ADR providers may fall within exemptions) and, where it does apply, how the requirements in the present NPPs and IPPs may affect ADR processes and providers.

At the outset NADRAC would like to note that ADR processes are essentially private processes and that organisations or agencies that provide ADR services, whether government or private sector, are generally only facilitating that private process. It is for that reason that it is generally accepted that ADR should be a confidential process. In that vein, ADR seems to fall outside any of the 'chief threats to privacy' that were identified by the ALRC in 1983, ie:

> *Growing Official Powers*. The powers of increasing numbers of public officials to

intrude into the lives and property of Australians are growing.

New Business Practices. New intrusive practices have developed in recent years, such as electronic surveillance, credit reporting and direct marketing.

New Information Technology. The computerisation of personal information has enormous advantages, but it also presents Australian society with new dangers, now well documented and understood.[2]

While NADRAC considers that it is important to protect people's rights to privacy, it must also be acknowledged that in a healthy and functioning community it may be impossible to completely protect one individual's rights to information privacy without potentially interfering with the rights and interests of others. In a web of social interaction, the affairs of one person will be inextricably linked to the affairs of others. Disputes between some members of a community will frequently be linked to the conduct of others, and resolution of those disputes will often rely on the sharing of information that relates to others.

It seems that the Privacy Act may affect the dispute resolution process in five ways:

1. by preventing an agency or organisation who may be a party to a dispute from revealing relevant personal or sensitive information about a person without first obtaining that person's consent
2. by requiring an agency or organisation which provides an ADR service to inform third persons about the collection of information about them
3. by preventing the 'collection' of sensitive information by an ADR provider
4. increasing the time taken to resolve disputes and the costs of the process, thereby diminishing the efficiency and effectiveness of the ADR process and its benefits vis a vis litigation, and
5. by creating uncertainty/ambiguity about the obligations of ADR providers.

These issues are discussed in more detail below.

1. Provision of personal or sensitive information by a party to the dispute

An agency or organisation that is a party to a dispute may be aware of personal or sensitive information about the other party to the dispute or about a third person which is relevant to the claims being made by the other party. The agency or organisation may believe that it cannot reveal that information without first obtaining the consent of the person to whom the information relates. If the information relates to the other party or to someone intimately connected with the other party then it is possible, even likely, that consent will be refused if the information would tend to undermine that party's position. This would be particularly so, where

[2] Australian Law Reform Commission, Privacy, ALRC 22 (1983), xli.

the dispute resolution process in question included a determinative aspect (eg complaints resolution, a med/arb process or arbitration). Where the information concerned a third person that person may refuse consent on principle even though the provision of the information will be subject to confidentiality requirements, would have no other consequences for the person's rights or interests and may be crucial to a fair resolution of the dispute. Consequently, the dispute resolution process would be undermined and may lead to a result that is unjust in the full circumstances.

In addition, the time that would be required to obtain consent may significantly delay the dispute resolution process and a party who is advantaged by a delay may take advantage of that by taking longer to issue a request or to respond to it.

2. Requirement to inform third persons about the collection of information

NADRAC does not see any difficulty with the proposition that the ADR provider should inform the parties to the dispute about its record keeping practices and the uses to which that information will be put. This could be done as part of the initial agreement with the parties.

However, there does seem to be a potential problem with the requirement for ADR providers to inform third persons about information that was revealed in the course of a dispute resolution process. That information that is revealed may reflect a party's perception of the facts/events and, while its use may not affect the rights or interests of the person to whom it relates, that person may still wish to contest the factual accuracy of the account even though doing so may serve no other purpose than to undermine the basis of a resolution reached between the parties. Depending upon the relationship between the party to the dispute and the person to whom the information relates it is possible that controversy will arise about the giving of the information at all which could lead to further disputes or even subsequent legal proceedings. In some circumstances, it is possible a third person could react aggressively leading to violence, harassment or property damage (while there is an exception relating to life and health it does not seem sufficiently wide, see later discussion).

Given that the purpose of collecting the information is only for the purpose of the dispute resolution proceedings, there would seem little point in informing a third person about the fact of collection after the ADR process is complete. However, if they are to be advised before the process is complete, the time involved in doing so is likely to delay the dispute resolution proceedings, particularly where the person concerned wishes to contest the accuracy of the information. While the information may be personal/sensitive it may not include contact information. The ADR provider may incur significant costs in regularly researching/tracking down up to date contact details that are sufficient to enable it to inform any third persons about the 'collection' of the information.

Traditional rules of evidence and procedural fairness only apply in some determinative ADR processes (private adjudication and legal arbitrations). Therefore issues relating to the factual accuracy of statements take on a different type of significance in most ADR processes.

3. Preventing collection of sensitive information

As noted above, the information that is revealed by parties' during a dispute resolution process may include personal and even sensitive information that relates to others. That information may be important to the resolution of the dispute or, while it may be perceived as being relevant by one of the parties, it may have no particular importance at all. The information may be revealed in writing or orally.

The definition of 'record' in the Privacy Act would seem to cover not only permanent but temporary written records kept only for the duration of the dispute resolution process and which are destroyed when the process is terminated.

The prohibition of the collection of sensitive information without consent may be a significant problem for a wide range of ADR providers. It could be time consuming and difficult for ADR providers to erase particular parts of the records (eg particular parts of correspondence or written statements from the parties). Where agencies may have a legal requirement to retain records the deletion of such material may inadvertently place them in breach of other statutory provisions. In the case of temporary records kept for the duration of the dispute resolution, it may mean that issues that are important to one of the participants are not properly addressed with implications for capacity to reach agreement or the duration of any agreement that is reached.

4. Efficiency and effectiveness of the ADR process

The benefits of ADR processes include their relative informality, speed, low cost, empowerment of the parties and their capacity to maintain relationships that would be adversely affected by more adversarial processes. The requirements for consent and notification increase the costs of the dispute resolution process and increase the time involved thereby reducing the efficiency and effectiveness of the processes. It is possible that the requirements could also lead to ancillary disputes and possibly subsequent legal actions. That may, in turn, increase pressure on ADR providers to test all the information provided for accuracy and to provide any third persons mentioned in the process with an opportunity to be represented and to present their views on the accuracy of the information provided in relation to them. That would increase the formality of ADR processes and tend to lead to a more court like process that would be considerably lengthier and more costly.

5. Uncertainty/ambiguity

There is a level of uncertainty and ambiguity in the requirements of the Privacy Act, particularly the requirements of the NPPs and IPPs, that must be troubling for many organisations, including ADR providers. While it seems it is possible for agencies and organisations to seek clarifications from the Privacy Commissioner, that necessarily entails additional costs and time for the agencies and organisations involved. In some circumstances it seems that the result is

Information Sheets issued by the Privacy Commissioner that have no binding legal status. NADRAC believes that it is important for legislation such as the Privacy Act to provide certainty to organisations and, where that is simply not possible, to provide an alternative way for them to obtain legally binding determinations on which they can rely with certainty.

NADRAC is aware that the Office of the Privacy Commissioner has suggested that legislative clarification could be achieved by adding the words 'if any' to the reasonable steps requirement in UPP 3.1 and UPP 3.2 (currently NPP 1.3 and 1.5). NADRAC understands that it is already the case that reasonable steps may, in certain circumstances, include no steps. Adding the words 'if any' to the notification requirements in UPP 3.1 and 3.2 would make that explicit. However, it would not clarify for ADR providers what, if any, steps are reasonable in their particular circumstances. Neither would the proposed amendment address the difficulties for ADR providers created by the requirements in relation to the collection of information, including sensitive information.

The current range of exemptions and exceptions in the Privacy Act also create considerable uncertainty about the extent of the Act's application to ADR providers. Some of the relevant exemptions and exceptions are referred to below.

Personal, family or household purposes It appears that the Privacy Act does not apply to personal information being collected, used or disclosed by an individual for personal, family or household purposes (s7B(1) and s 16E). It could be argued that ADR providers who assist individuals to resolve disputes concerning personal, family or household matters could or should be covered by this exemption, particularly where all the parties to the ADR process are individuals. However, it does not appear that the exemption does operate in that way. If the ADR provider keeps any records of the disclosures it seems the ADR provider would still be subject to the Privacy Act's requirements. If the dispute is between an individual and an agency or organisation, eg a utilities provider, banker, insurer or employer then the agency or organisation would also be covered by the provisions of the Privacy Act which may diminish the capacity of that agency or organisation to participate effectively in the dispute resolution process as already discussed.

Small Business The current small business exemption may exclude many ADR providers given that ADR is not generally a high profit activity and many providers may operate on a budget of less than $3 million per annum. However, that exemption is an arbitrary one and without knowing more about the financial affairs of providers it is difficult to tell exactly what proportion of ADR providers would be exempted by it. In any event, NADRAC notes that the ALRC is proposing that this exemption be removed.

Judicial functions It is unclear to what extent the exemption that applies to the functions of federal courts that are not administrative functions applies to court-provided, court-ordered and court-referred ADR processes. The distinction between adjudicative and administrative

functions is not clear cut.[3] ADR is not intrinsically a judicial function. Nevertheless, it may be regarded as being an exercise of judicial power, for example, where a judicial officer conducts judicial settlement conferences. While there is as yet no Australian authority on the issue, participation by a judge in such a conference is quite likely to be considered to be incidental to the exercise of judicial power even though the settlement conference is a closed procedure without clear procedural rules. This may also be the situation with respect to quasi-judicial officers who participate in settlement conferences.

ADR is frequently integrated into the judicial process without necessarily being an exercise of judicial power. There are, for example, a wide range of circumstances in which ADR may be provided, ordered, or encouraged by courts. Some ADR services are provided by court staff as a regular step in the processing of a matter. Other ADR services are provided externally, but the providers are selected based on a list maintained by the court for that purpose. The parties may be judicially ordered to attend a particular ADR service or to just attempt ADR. Alternatively, they may simply be strongly advised or encouraged by a judicial officer to attend an ADR service. In other cases legislation or court rules may require people to attempt ADR before they can file proceedings (eg family dispute resolution in parenting matters under the Family Law Act). The administrative staff of a court may have an invariable procedure of referring people to selected or approved external ADR providers before proceedings are formally commenced. These issues are equally relevant to tribunals which are also significant providers and users of ADR.

Life and Health There is an exception in the NPPs from the requirement to notify a third person that information has been collected about them where that 'would pose a serious threat to the life or health of an individual'. This would often arise in the context of family disputes, particularly where domestic violence may have been an issue. However, the emotional tensions that surround disputes may mean that it is also an issue in other contexts (eg workplace disputes, neighbourhood disputes, even some commercial disputes). In some cases, property damage and harassment may also be potential outcomes. In many circumstances, the potential threat may not be obvious either to the parties to the ADR process or the ADR provider.

Privacy One of the exceptions in the NPPs to the requirement to provide an individual with access to information about them is that 'providing access would have an unreasonable impact upon the privacy of other individuals'. In the context of ADR proceedings it would seem likely that would often be the case. However, determining if it is the case would be subjective in each case and the ADR provider may not be in a position to adequately judge either whether it would have an 'unreasonable impact' or even the extent to which it would impact upon the parties' privacy. Simply advising a third person of the fact of collection may be a significant intrusion upon the privacy of the parties to the dispute although the exception does not seem to apply in that case.

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[3] *Fingleton* v *R* (2005) 216 ALR 474.

Proposed Unified Privacy Principles

The ALRC has proposed new Unified Privacy Principles (UPPs) to apply to both public sector agencies and private sector organisations. However, it seems to NADRAC that many of the difficulties that may arise for ADR providers under the existing IPPs and NPPs would remain an issue under the proposed UPPs.

Proposed Statutory Cause of Action for Invasion of Privacy

NADRAC also notes that the ALRC has proposed a new statutory cause of action for invasion of privacy and that the proposed cause of action would arise where 'sensitive facts relating to an individual's private life have been disclosed' even though there is no proof of damage. NADRAC wonders whether this might lead to a situation where an ADR provider informs a third person that sensitive facts about their private life were disclosed during a dispute resolution session and the person concerned may then seek to initiate a cause of action against the party to the dispute who disclosed the information. A proposed limitation on the cause of action is that 'the act complained of is sufficiently serious to cause substantial offence to a person of ordinary sensibilities'. However, it is not clear that this limitation would be sufficient to negate the threat of further legal proceedings.

Conclusion

In conclusion, it does not seem that the sort of public ills that the Privacy Act is intended to address, such as government and private sector intrusion into people's lives through activities such as data matching, electronic surveillance and direct marketing, are relevant to ADR services. As previously mentioned, ADR services are essentially a formalisation of a private process of discussion and negotiation to resolve personal and community disputes.

In all the circumstances it does not seem appropriate to require a participant in a dispute resolution process to ask a third person for their consent before they can reveal relevant information which may involve that person, or that an ADR provider should subsequently be required to inform a third person that information about them was revealed or, even less, to offer a third person the opportunity to correct information that was revealed about them (even though that correction may occur after the dispute has been resolved and serve no useful purpose).

Where ADR processes are confidential and where the information provided during the process is not used for any other purpose by either the ADR provider or the parties it seems that a strong case could be made for exempting or excepting ADR from those requirements of the Privacy Act that may damage the process and increase the time and costs involved.

It might also be that there is a case for exempting ADR processes in which the outcome is subject to judicial review and the proceedings are admissible for that purpose, eg arbitrations under the Family Law Act, for those processes are akin to privatised justice and may merit

exemption on the same basis as the judicial functions of the courts.

NADRAC considers that there is a public interest in encouraging members of the community to resolve their disputes in the simplest and most cost effective way without resorting to the courts wherever that is appropriate.

The difficulty at present is that there is no uniform national requirement for ADR service providers that requires either confidentiality or prohibits the provider or the parties from using information they obtain for extraneous purposes. The new National Mediator Accreditation System that commenced on 1 January this year is a step in that direction. Amendments could be made to that scheme to improve the level of protection for personal and sensitive information particularly information relating to third persons. However, it is a voluntary opt-in industry scheme that applies to mediation and conciliation services. Compliance with the scheme's standards is unenforceable.

NADRAC would like to see a solution that is based on principle and provides clear and unambiguous guidance for ADR providers about their obligations. This would avoid the current uncertainty that each ADR provider must face in trying to determine whether and to what extent it is required to comply with the provisions of the Privacy Act.

At the same time, NADRAC is aware that other government and private sector activities may be able to make a similar claim. For example, it seems that government and non-government providers of certain advisory services, such as relationship and financial advice, may also be similarly adversely affected by the Privacy Act's requirements.

I hope that the comments that NADRAC has provided are helpful. As previously noted, NADRAC has no expertise in the Privacy Act and has had some difficulty, particularly in the time available, in determining how its provisions currently apply to ADR providers. For that reason, NADRAC has chosen not to suggest any solutions but merely to highlight the issues as it perceives them. The Council would be happy to provide any further information that it can which may assist the ALRC in its task.

Yours sincerely

Justice Murray Kellam AO
Chair