

## Areas of Need

18 June 2018

*This paper was prepared and settled jointly by the members of ADRAC.*

### **Context:**

#### ***Imagine...***

... that this paper is an Overview from a Report to the current Federal Government.  
... that the Government has recently allocated \$30 billion over 10 years to the provision of dispute resolution throughout Australia in 'areas of need'. The allocation has been made

*following budget forecasts ... and...in the national interests of Australians collectively and individually; in particular, in the interests of progress in civic satisfaction, increase in GDP and access to sustainable justice.*

### **Overview: ADR Areas of Need**

#### ***Introduction***

This Overview of the *Scoping Exercise: Identifying ADR Areas of Need: Report to the Federal Government* by the ADR Peak Body of Australia provides a precis of the background, objective and conclusions of the *Report* followed by recommendations in relation to each of the findings.

The ADR Peak Body of Australia was selected by the Minister for Civil Society with the endorsement of the Attorney-General and the Treasurer to manage the project because

*The ADR Peak Body of Australia (APBA) is a representative, non-government organisation whose membership predominantly consists of other, legally unrelated, organisations of allied interests and objectives and which are recognised within the sector and by other peak bodies in other sectors as generally representative of the whole of the ADR sector.*

*The roles of the APBA, which follow, are particularly aligned with this project:*

- research, policy development, advice to government and their sector*
- advocacy and representation to government and other decision-makers*
- information dissemination within their sector and to the community*
- sector consultation and coordination within their sector*
- sector capacity building to enable better service delivery and functioning of member organisations.<sup>1</sup>*

The *Report* is a scoping study for the *ADR: Areas of Need Project Plan*, the aim of which is to markedly improve access to justice throughout Australia. This Overview is a precis of the *Report*.

The approach of Australians to dispute resolution is bifurcated. For some, resolution is achieved with the assistance of local wisdom and 'common sense'. 'Common sense' ensures that day to day life continues as resolution is reached.

For others, resolution of disputes is achieved by the imposition of professional legal intervention and rules. The legal process requires that day to day life is put on hold while legal processes are followed and a determination is made. People then return to their communities for social and economic restoration.

ADR processes 'fit the forum to the fuss'. Each of the ADR processes varies considerably from each of the others and each has considerable scope for variations within it. ADR provides local access to a variety of approaches to justice. All ADR processes provide procedural guidance; some provide procedural direction; some

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<sup>1</sup> *Unique Peaks: The Definition, Role and Contribution of Peak Organisations in the South Australian Health and Community Services Sector*, SACOSS Information Paper, May 2011, p 3.

ADR processes provide substantive guidance and most can accommodate personal considerations.

### **Objective**

The objective of the Project is to identify areas of need from this *Report*; to fine tune the design of the Project to provide ADR in the areas of need and to conduct research in the 12 to 18 months after the introduction of ADR to the identified areas of need to test the hypothesis that the provision of ADR services contributes significantly to progress in civic satisfaction, increase in GDP and access to sustainable justice. Each person in Australia has welcoming and easy access to information to prepare for participation in dispute resolution and smooth pathways toward participation in voluntary, future-focussed ADR provided by qualified practitioners.

The objective of this *Report* is to provide the set of findings and a set of recommendations to be considered in the design of the Project to follow.

### **Conclusion**

The *Report* provides the results of focus groups throughout Australia in response to three sets of questions grouped by:

- What is a fair ADR process?
- What are reasonable outcomes of ADR?
- What are the areas of need for ADR?

Results demonstrate that Australians from Esperance to Karumba; and from Perth to Hamilton Island; are of the opinion that

- Fair ADR processes 'follow a public, accredited process provided by registered practitioners in which all participants are able to make a "genuine effort" to resolve disputes'
- Reasonable outcomes can be summarised as 'conclusions that are "workable, durable and respectful"'
- ADR processes are needed wherever there are people. However, demographic areas of particularly acute need exist. These areas have been

known for a long time. They comprise, largely, the same demographic groups who have been unable to exercise ready access to courts and tribunals and transport, education, health and other public services.

The *Report* found that Australians regard participants as the arbiters of 'workable', 'durable', 'respectful', 'fair' and providers as the arbiters of 'genuine effort'. The *Report* notes that those interviewed regard this tripartite approach (fair processes; reasonable outcomes; qualified practitioners) as being in the interests of people, communities and the nation.

The *Report* finds that Australians believe that the full range of ADR is needed throughout Australia. Two themes resonated throughout the country:

- ADR that is established in some parts of Australia should be available to all
- involvement in ADR, in addition to resolving disputes, contributes to social participation, sustainable justice and community harmony.

The *Report* draws an analogy between the use of ADR and the use of solar energy: ADR taps the renewable, clean resource of human endeavour and returns it in creative and productive energy.

### ***Findings and Recommendations to guide the Project Plan for Provision of ADR in Areas of Need***

#### ***Finding 1:***

That many forms of ADR are available to people in pockets throughout Australia and that few forms of ADR are available to people throughout Australia. Examples include the availability of Farm Debt Mediation only in New South Wales and the availability of Victim Offender Mediation only in Western Australia.

#### ***Recommendations***

- APBA becomes the designated clearinghouse for all ADR legislation

- The Federal Government prepare a White Paper on 'Areas of need: Access to ADR in Australia'.

***Finding 2:***

Some forms of ADR are available to people throughout Australia: examples include the availability of Family Dispute Resolution and Franchising Mediation

***Recommendation***

- APBA provide an inventory of all ADR legislation, state, territory and national.

***Finding 3:***

There is little or no data collection by providers of ADR and that that which is collected is non-standardised. Examples include the lack of data regarding the range of completion rates of ADR processes; the range of time taken to complete various ADR processes; the lack of public record of outcomes of ADR.

***Recommendation***

- APBA be funded, from the \$30 billion, to develop a data collection program.

***Finding 4:***

ADR terms are used interchangeably between and within regions of Australia. Examples include the tendency of Court annexed ADR to be referred to as mediation whereas beyond the Court system the ADR practice of the Court system is referred to as settlement conferences. A further example is the use of the term conciliation to apply to ADR which is facilitative and not classic mediation.

***Recommendations***

- APBA subcontract ADRAC to draft an ADR glossary for consultation throughout Australia. In some areas of Australia there is ill feeling and vigorous commercial competition between sectors of ADR providers to the extent of compromising the image of ADR among potential users. Examples

include the tendency of Court annexed ADR to be referred to as mediation whereas beyond the Court system the ADR practice of the Court system is referred to as settlement conferences. A further example is the use of the term conciliation to apply to ADR which is facilitative and not classic mediation

- Consideration be given by APBA to holding round table conferences to identify and address the issues among ADR providers

***Finding 5:***

Complaints from ADR users to practitioners' membership bodies are increasing rapidly. Examples include complaints about process, privacy and professionalism

***Recommendation***

- facilitate a membership bodies' Complaints Forum, perhaps through SOCAP (Society of Consumer Affairs Professionals)

***Finding 6:***

Compliance with and respect for the National Mediation Accreditation System (NMAS) is waning. Examples include state Administrative Tribunals no longer requiring mediators to maintain their accreditation; groups offering 'Mediation Style Conferencing' loosely following the standards of NMAS while not registering.

***Recommendation***

- ASB (ADR Standards Board; currently MSB) prepare a White Paper on compulsory registration of ADR providers

***Finding 7:***

There is a dearth of standards for adjudicators, arbitrators et al and mechanisms for applying standards of practice are highly at risk of compromising professionalism. Examples include cronyism and closed shop awarding of gradings to determinative practitioners.

## ***Recommendation***

- Requirements for mediators to become nationally accredited and to maintain registration be reviewed. Examples of requirements for mediator accreditation in other countries include significantly longer and significantly more rigorous processes of education and accreditation as well as ongoing professional development.