



NADRAC Notes

Note from the Chairperson

The last six months have been a time of transition for NADRAC.

In August the Attorney-General appointed to Council Ms Helen Bishop, Mr Alan Campbell, Dr Mary Edmunds, the Hon. John Hannaford and Ms Norah Hartnett. We are delighted to welcome these new members who will bring fresh ideas and perspectives. Each has considerable expertise in their own field of endeavour, and, together with continuing members, they provide an excellent balance of qualifications, background and experience. Information on NADRAC's current membership is included in this newsletter.

As well as welcoming new members, I need to acknowledge the valuable work of members whose terms have expired. They are David Bryson, Danny Ford, Susan Gribben, Kathy Mack and Bernadette Rogers. The achievements outlined our 2000-2001 Annual Report are due in no small part to their efforts and skills.

A key event since our last newsletter was the release of our final report on ADR standards. *A Framework for ADR Standards* was launched by the Attorney in June, and has since been widely distributed and used. The launch of this report marks the end of a chapter for NADRAC. However, the development of ADR standards is an ongoing process, involving government, community and private organisations, as well as ADR practitioners themselves. In this newsletter, we announce a new initiative, an ADR standards bulletin board—*Standing for Standards*, to provide updates and share information about how ADR standards are being used and developed in different contexts.

As this newsletter shows, NADRAC will be continuing its work on criteria for referral to ADR, on terminology for ADR, on ADR in courts and tribunals, and on the use of technology in ADR. Members have also identified several additional priorities, and will be developing a detailed work plan in the new year.

Professor Laurence Boulle

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

Council Members

The Attorney General appoints members to the council on the basis of their individual expertise, and not on the basis of their membership of any organisation. Members come from around Australia, and bring to the council a broad range of experience in the area of dispute resolution. Current members of NADRAC are



Professor Laurence Boulle (Chair)

Professor of Law, Bond University; Director, Independent Mediation Services Pty Ltd (Qld); former member of the Law Council of Australia's ADR Committee; Consultant to government and the private sector on dispute resolution issues; Broad expertise in mediation practice and

training; Member of Mediation Panels for Qld Settlement Weeks, Qld Building Tribunal, Legal Aid Office Qld, Qld Community Justice Program and Retail Shop Leases Tribunal.

Professor Boulle has published extensively on ADR and mediation. He is the author of *Mediation: Principles, Process, Practice*, 1996, which has been published in local editions in New Zealand, South Africa, Singapore, Canada and the United Kingdom, and *Mediation Skills and Techniques* published in 2001.

He is editor of the ADR Bulletin and the dispute resolution title in *Laws of Australia*. He has been chair of NADRAC since 1988.



Ms Helen Bishop
Manager, Aboriginal Alternative Dispute Resolution Service, Ministry of Justice WA. Formerly team leader, Aboriginal Affairs Department, WA, case manager, National Native Title Tribunal and area manager Palm Island

Community Corrections, Queensland, and other community work positions in Queensland.

Ms Bishop has expertise in community mediation, and in dispute resolution within Indigenous communities.



Mr Alan Campbell
Consultant, mediator and PhD candidate researching child centred practice issues in family law through the University of SA; formerly Director of the Family Mediation Centre in Victoria, Executive Director of Family Services Aus-

tralia, President Family Services Australia, Director of Mediation, Family Court of Western Australia, and a mediator and psychologist in private practice.

Mr Campbell has broad practical, policy and research experience in family and child mediation.



Dr Mary Edmunds
Member, National Native Title Tribunal; formerly Director of Research, Australian Institute of Aboriginal and Torres Strait Islander Studies; research fellow, South East Arnhem Land Collabora-

tive Research Project (Wollongong University funded by Rio Tinto); research fellow in native title, Australian Institute of Aboriginal and Torres Strait Islander Studies.

A social anthropologist, Dr Edmunds has extensive practical experience in the resolution of complex native title claims, in the management of cases in a tribunal environment, and has in-depth knowledge of cultural issues affecting ADR.

Her writings in the field include a *Guide to mediation and agreement making under the Native Title Act* (co-authored with Diane Smith) and the editing of two volumes on regional agreements.



Ms Barbara Filipowski

Secretary and General Counsel, Sydney Ports Corporation; Ms Filipowski has experience in the banking industry, commercial dispute resolution and business management and administration; formerly Head of Dispute Resolution, Westpac Banking Corporation, where she

was involved in, among others, many large commercial mediations, the mediation of foreign currency loan disputes and farm debt mediation.



Mr Ian Govey

General Manager, Civil Justice and Legal Services, Commonwealth Attorney-General's Department.

His areas of responsibility within the Department include courts and tribunals, alternative dispute resolution, family law, legal assistance and

Commonwealth legal services.

Mr Govey has been appointed by the Attorney-General as an ex officio member of the council.



The Hon. John Hannaford

Director, ADR Solutions (a mediation and arbitration business in Sydney); Adjunct Professor with the Negotiation and Dispute Resolution Programme at the University of Technology Sydney; member ADR Committee and Arbitra-

tion Committee of the Law Society of NSW; formerly NSW Attorney-General with policy responsibility for ADR; holder of other ministerial and parliamentary offices as a member of the NSW Parliament; former chairman of the Australia Council for Europe; previously a lawyer in private practice.

Mr Hannaford has both extensive practical experience and in depth policy knowledge of ADR.



Ms Norah Hartnett

Federal Magistrate, Melbourne, formerly a barrister specialising in family law and a solicitor working in company, insurance and family law; formerly a member of the Victorian Bar Ethics Committee and member of the Family Law Section of the Law Council of Australia.

Trained in mediation, Ms Hartnett has extensive expertise in the use of ADR within the court system.



Mr Warwick Soden

Registrar of the Federal Court of Australia, Sydney; Mr Soden has extensive experience in relation to ADR in the justice system.

He is a member of the Federal Court ADR Committee and the Practice and Procedure Committee in matters concerning ADR. In particular, Mr Soden

has played a major role in relation to ADR programs and initiatives in the Federal Court and the Supreme Court of NSW.

continued on page 4



Mr John Steele

Disability discrimination lawyer, Central Community Legal Service, formerly Training and Development Officer at the Community Mediation Services (SA).

Mr Steele has expertise in community mediation. He is a lawyer who practices community mediation and also trained others in

this aspect of ADR.

He has an interest in developing appropriate models of ADR for particular disputes and facilitating change in the dispute resolution 'culture' in the community.

Hot topics

Standing for Standards

NADRAC's report *A Framework for ADR Standards* was launched in Brisbane by the Attorney-General on 13 June 2001. Close to 80 people attended the launch, which indicates the level of interest in ADR standards. 2000 printed copies of the report have since been distributed, and many more downloaded from the web. Additional printed copies are available on request. The report can also be accessed in pdf or html format from the NADRAC website.

Members have been heartened by the positive feedback on the report. Government and other relevant bodies are considering the report's recommendations, and ADR associations, organisations and practitioners are using the report to develop new or review existing standards.

Many have asked for information about how the standards framework is being used, or wish to share information and ideas about the future for ADR standards. NADRAC has therefore decided to set up a virtual bulletin board *Standing for Standards* which will be placed on NADRAC's web-site and regularly updated. A summary will also be provided in the next edition of NADRAC Notes. The bulletin board will contain short items on topics such as:

- *Examples of how NADRAC's standards framework is being used*

- *Progress on NADRAC's recommendations*
- *New standards being developed or contemplated*
 - *Australia or overseas*
- *Cooperative efforts between ADR organisations to promote quality in ADR*
- *Forthcoming meetings on ADR standards.*

Contributions for the bulletin board, *Standing for Standards*, are invited from ADR practitioners, organisations and associations.

Either e-mail - nadrac@ag.gov.au, or send to NADRAC secretariat, Robert Garran Offices, BARTON ACT 2600.

Please note that any contribution may be published in whole or in part by NADRAC.

Criteria for ADR

What sort of ADR processes suit what parties and what disputes? NADRAC has a keen interest in identifying criteria by which matters are referred, or not referred, to ADR. A survey conducted by NADRAC during 2000 showed that criteria for referral tend to be either intuitive, or specified by legislation. NADRAC developed a list of commonly used criteria for referral, which it provided to the Federal Magistrates Service in December 2000. NADRAC is now in the process of preparing a guide on criteria for referral to ADR.

In the Australian Institute of Judicial Administration (AIJA) issues paper on court connected mediation (see 'ADR and the courts' below), Hilary Astor highlighted the importance of 'fitting the forum to the fuss'. NADRAC agrees that the development of criteria for referral is of particular significance for courts, tribunals and other situations in which parties are required to use specified ADR processes.

Shedding light on ADR

Lack of consistent and comparable data about the use of, and outcomes from, ADR restricts the development of effective ADR programs and practices. Current information on ADR statistics is patchy, and agencies use terms inconsistently. As NADRAC's standards report points out, many decisions about ADR take place in the dark, with little hard evidence to back or refute assertions about the benefits and risks of particular approaches.

NADRAC has started to collect ADR statistics from the annual reports of courts, tribunals, statutory agencies and ADR organisations. After checking with

relevant organisations, NADRAC will provide a consolidated list of these statistics on its web-site. The information will help to identify gaps in data and suggest improved indicators for ADR.

On-line ADR and e-commerce

In March 2001, NADRAC placed on its web-site a background paper on on-line ADR. With the rate of technological advances, many parts of this paper are already out of date! NADRAC has continued research on the subject and consulted with some key experts. It is now considering general principles on the use of technology in ADR.

Since NADRAC's paper was prepared, Treasury's Consumer Affairs Division, in conjunction with the expert group on e-commerce, released a discussion paper on dispute resolution in e-commerce. The focus of the paper is on 'redress for consumers in relation to relatively small value, cross border transactions' and refers to NADRAC's work on standards and on-line ADR. The discussion paper may be obtained from www.selfregulation.gov.au.

Do we need a common language for ADR?

NADRAC has a continuing interest in the use of definitions and terminology in ADR and has undertaken a review of its 1997 paper, *Alternative Dispute Resolution Definitions*. After consulting with a wide range of service providers and policy makers NADRAC has decided both to produce a short, user friendly brochure on ADR terms, and to undertake ongoing consultation regarding the appropriate use of terminology.

Why a common language?

Consistency in terminology for ADR processes ensures that clients of ADR services have realistic and accurate expectations about the processes they are undertaking, provides a basis for legislative and policy development, underpins the development and implementation of standards for ADR service providers and practitioners, facilitates the matching of dispute resolution processes to different disputes and parties, enables effective data collection and evaluation, and is necessary for effective complaint handling.

What prevents a common language?

There are many theoretical and practical differences over the uses of terms for ADR. Public knowledge of the different forms of ADR is low, and many debates take place about what particular ADR processes involve. There are international differences in the

terms used for ADR. Some argue that attempting to define ADR processes constrains practices and reduces flexibility.

A more detailed paper on the arguments for and against a common language may be found at http://www.nadrac.gov.au/aghome/advisory/nadrac/Definitions_Discussion.htm

Your views

- 1 Are there other arguments for or against a common language for ADR?
- 2 Are you aware of any practical difficulties that have arisen as a result of inconsistent usage of ADR terminology?
- 3 What controversies currently exist concerning the use of ADR terms?
- 4 What other factors are you aware of that may impede or promote the development of a common language?

Please respond to any or all of these questions, or other issues concerning ADR definitions. Send to NADRAC secretariat at the address below.

ADR and the courts

As the acceptance and use of ADR grows, the effective use of ADR by courts and tribunals becomes an increasingly important issue. In NADRAC's advice on court ADR, a number of themes have emerged, including:

- Governing legislation for courts should state the objectives sought and include a range of dispute resolution processes.
- The processes need to be clearly and consistently defined to provide a framework for sufficient control and differentiation.
- Lawyers and court staff should advise all clients of the availability of a range of dispute resolution processes.
- Assessment of the suitability of each dispute to a dispute resolution process is essential.
- All or any part of a dispute should be able to be referred to an appropriate dispute resolution process.
- Courts should be able to determine a question of fact or law to assist a non-judicial dispute resolution process.
- Mandatory referral to dispute resolution processes is acceptable in principle despite the apparent unwillingness of the parties to participate in the process.
- Dispute resolution services must be of high quality, with proper standards of training, ethics supervision

and accountability.

- Judicial officers involved in ADR processes should have the same qualifications as any other ADR providers approved by the Court.
- There should be a diversity of providers of dispute resolution services both within the court, and externally.
- Immunity provisions should not prevent consumer recourse against dispute resolution providers.
- Courts should evaluate their dispute resolution processes.

The Australian Institute of Judicial Administration (AIJA) similarly sees court based ADR as a priority. In October it released an issues paper *Quality in Court-connected Mediation Programs*. The paper, written by Prof Hilary Astor, may be ordered through the AIJA (www.aija.org.au). NADRAC has held discussions with the AIJA on the need for research in two key areas, namely criteria for court referral to ADR, and performance measurement of court ADR.

The family law system

A number of recent developments affect ADR (or 'PDR') in family matters.

On 29 August, the report of the Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation*, was released (see <http://www.ag.gov.au/aghomet/commaff/fllad/welcome.html>). Many of the report's recommendations are relevant to ADR. Some touch specifically on NADRAC's work, especially criteria, definitions, standards and research.

On 4 October 2001, the Attorney-General's Department released a consultation paper proposing a quality framework for primary dispute resolution under the Family Law Act 1975 (see <http://www.ag.gov.au/aghomet/commaff/fllad/welcome.html>).

The closing date for submissions is 2 January 2002.

The proposal in the consultation paper is to broaden the approval provisions of the Family Law Act through developing a quality assurance process for PDR service providers. The consultation paper is, in part, a response to NADRAC's 1997 report on the Family Law Regulations. The paper also takes account of NADRAC's discussion paper and report on ADR standards, and asks respondents to comment on how NADRAC's recommendations on standards should be applied to the delivery of PDR services in family law. Terminology for PDR in the family law system has become a hot issue. In NADRAC's view, there is a

critical need to review current legislative provisions with respect to how PDR processes and practitioners are described and defined, and the consequent rights and obligations which apply to parties and practitioners, especially those surrounding confidentiality and immunity. The need for a review has been brought into sharp focus as a result of changes in PDR practices, the increased use of community based organisations to provide a wider range of PDR services and the decision by the Family Court to describe all of its PDR processes as 'mediation'. (see also section above on 'A Common Language for ADR')

Events

Meeting with Chinese delegation

On 31 August 2001, several members of NADRAC and the International Legal Service Advisory Council (ILSAC) met with Mr Zhang Fusen, Minister of Justice, People's Republic of China, and his accompanying delegation. The meeting discussed a broad range of issues affecting ADR.



Mr Zhang Fusen, Minister for Justice, People's Republic of China meets with Professor Laurence Boulle, Chair, NADRAC

Council meetings

NADRAC has held three meetings in 2001.

It met in Adelaide on 15-16 March. Susan Cibau, PDR Coordinator with the Federal Magistrates Service, was a guest speaker at the meeting.

On the evening before the meeting, Council organised a consultative forum involving over 40 people with an interest in ADR. Issues raised in the forum

included perceptions of neutrality, confusion over definitions (especially misunderstandings regarding 'mediation'), promotion of ADR, accreditation and standards, ADR facilities, professional development, research, ADR in courts, new forms of ADR, (including on-line ADR), and the provision of community mediation. Notes from the forum are available on NADRAC's web-site (<http://www.nadrac.gov.au/aghomes/advisory/nadrac/issuepublic.htm>).

A one day short meeting of the then smaller council was held on 7 August at Bond University. Council members also met with ADR practitioners and academics, and were briefed about local and international developments in ADR.

On 25 and 26 October, council members (including the newly appointed members) met in Sydney. A major focus of the meeting was on setting future priorities. Council members appreciated the assistance of Volker Latus (Impart Skills, Gladesville), who facilitated a planning and priority setting workshop. On the evening of 25 October, NADRAC members took the opportunity to meet with the Australian Dispute Resolution Association, the ADR Committee of the Law Society and the Institute of Arbitrators and Mediators Australia. Members are grateful to Shirli Kirschner, Bernadette Murray and Margot McKay who spoke to the council meeting on 26 October.

NADRAC's next meeting will be in Canberra in February 2002. Following the success of the consultative forum in Adelaide, it has been decided to hold a similar event in Canberra.

Canberra readers are invited to a forum to be held from 5.00 to 7.00 pm on Wednesday 6 February 2002 at ARTS HOUSE, corner of Blackall and Macquarie Sts, BARTON ACT.

The forum will

- Provide an update on NADRAC's activities
- Seek your views on significant issues affecting ADR in the ACT and nationally
- Encourage information sharing about developments in ADR.

For further information contact the NADRAC secretariat at the address below.

ContactUs

More information

For more information, explore our web site
www.nadrac.gov.au

You may order publications, or have your name added to our mailing list for further publications. You can do this:

- on-line
- by phone, or
- by completing the form overleaf and posting or faxing to NADRAC.

Calendar

Wed 6 February 2002
NADRAC consultative forum -
Arts House, cnr Macquarie and Blackall Sts,
BARTON, ACT

7 and 8 February 2002
Council meeting -
Canberra

16 and 17 May 2002
Council meeting -
venue TBA

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National Alternative Dispute Resolution Advisory Council Publications

Title	Type Report	Date	html	pdf	Printed copies available
A Framework for ADR Standards	Background paper	April 2001	3	3	-- (152pp)
On Line ADR	Report	Jan 2001	3		www.nadrac.gov.au
Letter of Advice to the Attorney-General on Parenting Plans	Submission	March 2000	3		-- (16pp)
Submission on Franchising Code of Conduct	Working document	March 2000	3		www.nadrac.gov.au
Notes from forums on ADR standards	Discussion Paper	June 2000	3		www.nadrac.gov.au
The Development of Standards for ADR	Guide	March 2000		3	-- (150pp)
A Fair Say: Managing Differences in Mediation and Conciliations	Report	Sept 1999		3	-- (32pp)
Use of ADR in the Federal Magistracy Part 1	Discussion Paper	March 1999	3		www.nadrac.gov.au
Part 2 (Regulations and Rules of Court)		Dec 1999	3		www.nadrac.gov.au
Issues of Fairness and Justice in Alternative Dispute Resolution	Report	Nov 1997		3	-- (205pp)
Primary Dispute Resolution in Family Law	Guide	March 1997		3	-- (78 pp)
Alternative Dispute Resolution Definitions	Report	March 1997	3		-- (12pp)
Annual Reports		1996/97		3	-- (20-30pp)
		1997/98		3	
		1998/99	3		
		1999/2000	3		
		2000/2001	3		

Mail to: NADRAC Secretariat, Robert Garran Offices, BARTON ACT 2600, or Fax: (02) 6250 5911

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