

# The Need for a Peak Body in ADR

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*This paper was settled jointly by the members of ADRAC*

## **What is the current situation?**

ADR practitioners are not governed, regulated, overseen or managed by a peak body in Australia. At present, ADR practitioners can be members of, and be accredited by, a range of professional bodies, for example the law institutes and bars of the respective States and Territories, ADR membership bodies such as the Resolution Institute or the Australian Dispute Resolution Association (ADRA), and bodies like the Australian Centre for International Commercial Arbitration (ACICA). These bodies play an important role in protecting consumers and upholding a high standard of ADR practice, but none of them can be described as a peak representative or disciplinary body.

## **Why might the ADR profession require a peak body?**

Many ADR professionals have expressed concern relating to the absence of a peak body. In its 2001 Report to the Commonwealth Attorney-General, A framework for ADR Standards, the National Alternative Dispute Resolution Advisory Council (NADRAC) noted that the 'existing structures... do not necessarily meet the needs of the ADR field... [as] the very diversity of ADR means that it has no particular allegiance with existing professions, industries or organisations.'<sup>1</sup>

Arguably, there is a need for the establishment of a single, overarching body that can control the composition and conduct standards of the profession, and monitor those who practise under the broad 'umbrella' of ADR. Without a peak disciplinary body,

the performance of ADR practitioners cannot be effectively measured, let alone enforced, against a uniform set of consistent standards.

The absence of a peak body therefore gives rise to accountability and governance issues.

### **What functions could a peak body fulfil?**

First, a peak body could be responsible for overseeing the development, implementation and enforcement of standards for ADR organisations and practitioners. Beyond setting standards, the peak body could also collect and disseminate information about good practice and developments in the national and international ADR community.

Second, a peak body could be the primary source of quality assurance in the industry. It could administer the accreditation and registration of ADR professionals. This is not only integral to preserving a high standard amongst practitioners, but is important in ensuring that educators or trainers in ADR are appropriately qualified.

Third, a peak body could allow disputants to lodge complaints about ADR practitioners. ADRAC considers that ADR cannot be truly professionalised until a centralised body is established to receive, investigate and resolve such complaints. This allows for accountability on the part of individual practitioners or organisations, and also provides transparency in relation to the ADR industry as a whole.

Fourth, the peak body could function as a reliable provider of training and ongoing professional development. This would provide for consistency when implementing core ADR principles and techniques. A Continuing Professional Development (CPD) scheme, similar to those in the legal and medical fields, could be introduced to ensure that all practitioners remain up to date with advancements in the profession, both in theory and practice.

Fifth, a peak body could represent the profession in engaging with government and other stakeholders on issues of importance. Commonly, peak bodies are the result of financial contribution by an industry to a common entity that acts as a lobbyist for

that industry with government. Industries who engage in this form of cooperation are either already regulated and seek amendment or they seek regulation of the industry. Professional bodies can often add a role as lobbyist and in that way, extend from a more usual collegiate role concerned with internal professional or 'guild' matters to one as a peak body, concerned with government or public issues. Naturally, there are real benefits for government in having a single industry voice with which to deal. Achieving that single voice might depend greatly on the size and the resources of the industry in question, but more especially it will depend on the degree to which government involvement is sought or is opposed.

In the dispute resolution field, there is little regulation at present. It is argued by many that there is less than regulation than is desirable. The field of arbitration has some degree of regulation. The field of mediation is referred to in court procedures mainly to encourage or compel attendance. The Mediator Standards Board in many ways appears to be a precursor to the type of body that might result from mediation standards legislation. A peak body may emerge from consideration of such regulatory issues, and it may ultimately have to manage them.

Sixth, a peak body could enable cooperation and collaboration between ADR practitioners at a national level, and could oversee the collection and analysis of ADR-related data across Australia to identify such matters as hot topics, weak spots, areas for reform etc.

### **How are other professions regulated?**

In Australia, legal practitioners are members of the law institute or bar association of the State or Territory in which they practice. Strictly speaking, the national peak body is the Law Council of Australia, which is an association of all the law societies and bar associations in the country. However, the rules and processes regarding admission, CPD and complaints vary to some degree in each jurisdiction. Although efforts have been made to roll out a uniform national law amongst all States and Territories, this has not yet come to fruition. The Australian Solicitors' Conduct Rules have been adopted in New South Wales, Victoria, Queensland and South Australia. According to the Law Council of Australia, the law societies in the remaining states

and territories 'continue to work towards adoption of the Rules according to the processes and approvals set out in their respective local legal profession regulatory arrangements.'<sup>2</sup> The peak body therefore serves more of a representative role, as opposed to actively governing and regulating legal practice nationwide.

In contrast, the Australian Health Practitioner Regulation Agency (AHPRA) operates under a statute-based National Registration and Accreditation Scheme. A total of 14 health professions are regulated by nationally consistent legislation. According to AHPRA's website, the board of each health profession 'has entered into a health profession agreement with AHPRA which sets out the fees payable by health practitioners, the annual budget of the Board and the services provided by AHPRA'.<sup>3</sup> AHPRA is therefore a central point for accreditation, continuing professional development, complaints, concerns, publications, resources and registration. Notably, AHPRA is a government agency.<sup>4</sup>

In the engineering sphere, Engineers Australia serves as a peak body. It is responsible for program accreditation, migration skills assessments for international engineers, professional development and the award of chartered status for engineers. It also facilitates a 'detailed and regulated process for handling complaints.'<sup>5</sup> It is a private corporation with a board of members, and is not formally associated with the government.

### **What shape or form should a peak body in ADR take?**

Evidently, there is no single model structure for a peak body. Given that ADR is less confined by jurisdiction-based legislation and rules than is the legal profession, ADRA is not attracted to the Law Council-type model of a peak body comprising stated-based constituent bodies.

ADRA does not consider a structure like AHPRA's to be suitable either. It agrees with the position held by NADRA in 2001 that the government ought to support the peak body, but should not lead it.

ADRA maintains that the leaders in the ADR field should instead take charge.

A model similar to that of Engineers Australia seems to be most appropriate for the ADR industry in Australia. It is a private body, founded by professionals in that field. It has a strong degree of control over the engineering profession, and is seemingly accepted by the government as an identifiable 'go-to' peak body. This is evidenced by the fact that Engineers Australia is listed as the designated assessing authority for engineering occupations by the Department of Immigration and Border Protection.<sup>6</sup>

ADRAC is of the view that the ADR community should therefore aspire to create a national peak body of similar design to Engineers Australia; one that is led by the ADR industry, and recognised by government.

### **What role could ADRAC play?**

ADRAC primarily functions as a non-aligned and independent think tank which does not represent any particular group or set of interests. ADRAC was not established as a peak body, and is not attracted to developing into a peak membership-type body. However, ADRAC supports the creation of a peak ADR membership body in Australia.

1. National Alternative Dispute Resolution Advisory Council, Report to the Commonwealth Attorney-General - A Framework for ADR Standards, (April 2001) 4.64.

2. <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>.

3. <http://www.ahpra.gov.au/about-ahpra/who-we-are.aspx>.

4. Another example of a well-structured peak body in the health industry is the Australian Psychological Society (APS). It is governed by a board, which is supported by board committees and advisory groups. APS provides information bulletins to practitioners, expert advisory services, ethics resources, professional indemnity insurance and member recognition programs. It represents over 21,000 members. Unlike AHPRA, APS is not a government body.

5. <https://www.engineersaustralia.org.au/About-Us/Complaints>.

6. <https://www.engineersaustralia.org.au/For-Migrants/Migration-Skills-Assessment>.