The Use Of Alternative Dispute Resolution in a Federal Magistracy

(The views presented in this report are those of the Council and are not necessarily the views of the Attorney-General)

National Alternative Dispute Resolution Advisory Council
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Table of Contents

(E) METHODS OF EVALUATING THE EFFECTIVENESS OF THE MAGISTRACY'S ADR SERVICES

Issue 13. How should the Court's DR services be evaluated?

(F) ANY RELATED MATTER

Issue 14. Immunity/Confidentiality
Issue 15. Obligation/power to adjourn legal proceedings while other DR is pursued
Issue 16. Court's power/duty to review/enforce an agreement reached via non-judicial DR
Issue 17. Court's power to terminate a non-judicial DR process
Issue 18. Power to make rules about DR processes
Issue 19. Court determination of a question of fact or law arising out of non-judicial DR
Issue 20. Report to the Court by the non-judicial DR provider
Issue 21. Powers of DR service providers
Issue 22. Qualifications for appointment to magistracy
Issue 23. Incentives to use non judicial DR before commencing litigation

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INTRODUCTION

General

In providing for the inclusion of alternative dispute resolution (ADR) within the proposed Federal Magistrate's Court (the Court) NADRAC considers that the focus of the ADR legislative provisions should be twofold:

1. It is important that ADR becomes an integral part of the Court's ethos and practice. To achieve this the legislation must reinforce the concept that judicial adjudication and ADR are different choices within a range of dispute resolution processes. For this reason the legislation should refer not to ADR but to dispute resolution (DR) processes. Where there is a need to distinguish judicial adjudication, it should be specifically identified. Where "ADR" is used in this report or in the legislation it should be understood not as an acronym for alternative DR, but as a description of a DR process other than judicial adjudication.[1] The NADRAC categories [determinative, facilitative, and advisory] can be used to further distinguish types of DR when needed.

2. The second focus of the legislation, and thereby the Court, should be on procedural flexibility and the provision of a range of DR processes to produce the best outcome, especially facilitative DR processes where appropriate.[2] Disputes should be resolved using the DR process most appropriate to the nature of the dispute and to the parties who are in dispute.

NADRAC's perspective

The basis upon which NADRAC has approached this reference is that there are three fundamental principles about which it has previously expressed views and to which it is strongly committed. First, ADR should not be seen as a replacement for judicial adjudication. All DR processes have a role in federal dispute resolution.

Second, the assessment of the suitability of each dispute to a DR process is an essential element in DR design in any federal jurisdiction.

Third, all DR processes must be of high quality and applied responsibly to disputes. There will need to be adequate funding to ensure high quality DR services, whether provided within the court or agency environment or by community services sponsored under government programs. That is, maintaining the integrity of all DR processes is of paramount importance.[3]

The provision by courts of quality DR

On the issue of whether courts exercising federal jurisdiction should provide a range of dispute resolution processes or limit their role only to adjudicate disputes by trial, NADRAC has in the past expressed the view that, provided the integrity of both the judicial process and the non-judicial DR processes concerned is maintained, there would be no objection, in principle, to providing a number of different forms of dispute resolution within the one organisation. The difficult question that must be answered is how the integrity of each process, particularly the judicial process, is to be maintained. NADRAC is aware of criticisms that the provision of mediation by a judge or registrar represents a threat to the public confidence in the courts.[4]

While NADRAC would not necessarily endorse this view, it does raise a very serious issue about the distinctive roles of adjudication and other DR processes within our society. This issue will continue to be debated. However, NADRAC considers that the use of non-judicial DR processes in various forms within the courts is now reasonably accepted.[5] The focus of the debate should not be on whether courts should provide these services, but on how they are provided.

When considering how non-judicial DR services are to be provided by the courts, we need to look at what makes such services of a high quality. For example, NADRAC notes that for a mediation to be effective, a considerable amount of time may often be required. If court resources are not sufficient to allow each mediation to be afforded the time appropriate to the needs of the parties and the nature of the dispute, the Council considers that cases should be referred out of the court to appropriately trained and qualified mediators. Irrespective of whether the mediation occurs in or outside a court, the Council considers that there must be proper standards of mediator supervision and accountability. The Council has some serious reservations about mediation schemes which are established merely as measures to clear backlogs of cases, without any safeguards to maintain the quality of the DR process.

The following issues are considered by NADRAC as being necessary to be addressed in the legislative provisions which create the Federal Magistracy. Where possible they are grouped under the headings used in the terms of reference.

Issue 1. Objectives of various DR processes available from the Federal Magistracy

There should be legislative provision setting out the objectives sought by including a range of DR processes within the Court. Such a provision has an educative value and emphasises the need for a change of culture within the legal and judicial profession about the use of all DR processes.

The objectives should emphasise that the court makes use of a range of dispute resolution services from judicial adjudication through to facilitative and advisory processes. To

emphasise this expanded role of the court the legislation should speak of dispute resolution (DR) processes broadly.

The Council suggests that the objectives in the legislation creating the federal magistracy include:

- increasing community access to appropriate DR;
- using a range of DR processes;
- giving the parties a choice of DR processes;
- aiming to match people to the DR process that best meets their needs;[6]
- providing the parties with the opportunity of retaining as much responsibility for resolving their dispute as possible; and
- enabling better outcomes and greater user satisfaction.

(A) THE TYPES OF ADR PROCESSES THAT SHOULD BE USED IN THE FEDERAL MAGISTRACY

In keeping with the objectives, a wide range of DR processes should be available to suit the range of disputes which the court will hear and to meet the needs of the diverse parties who will bring disputes to the Court. The range of processes available to the parties should provide the Court with sufficient flexibility as to which type of DR process the parties are referred to and allow parties to have a real choice of DR processes.

Issue 2. Types of processes

NADRAC considers that it would be beneficial for the legislation to specifically name those DR processes that the Court may use to resolve disputes. The benefit of specifically naming the processes is that parties will become aware of the existence of choice and seek the process which they see as appropriate for their needs.

It does not necessarily follow that the court will have to provide all these processes within the court. NADRAC considers that it is important that the court not be directed to provide all these processes but that it has the power to effectively manage its own resources. Rather the Court should be in a position either to provide these processes within the Court or to be able to refer parties to appropriate external service providers who can provide these DR processes.

While there are many examples in other legislation of the types of DR processes that are currently provided,[7] in NADRAC's view the legislation should provide that the court will use the following DR processes to resolve disputes:

- mediation;
- conciliation;
- neutral evaluation;
- case appraisal;

- expert appraisal;
- arbitration;
- adversary adjudication; and
- a power of inquiry.[8]

This list of DR processes is not exclusive and the legislation should allow room for the court to use other DR processes which are not listed.

Having specifically named the DR processes being used in the court, NADRAC is of the view that those processes should be defined. Other legislation has defined the processes to varying degrees but generally they are silent on this issue.[9]

NADRAC considers that the definitions described in its 1997 paper *Alternative Dispute Resolution Definitions* should be used in the legislation. A copy of that report is attached for your information.

It is of concern to Council that the definitions used in some jurisdictions will differ from those used by NADRAC,[10] and possibly result in some confusion for people who use both jurisdictions. However, NADRAC's definitions have been used with approval in various fora and it is important that they are used where possible to promote consistent use of terminology.

A power of inquiry is not defined in NADRAC's definitions paper. NADRAC envisages that this power is akin to that provided in section 38(1) of the Magistrate's Court Act 1991 (SA). That sub-section provides that:

> "The following provisions are applicable to the trial of a minor civil action:
>
> a. the trial will take the form of an inquiry by the Court into the matters in dispute between the parties rather than an adversarial contest between the parties;
>
> b. the Court will itself elicit by inquiry from the parties and the witnesses, and by the examination of evidentiary material produced to the Court, the issues in dispute and the facts necessary to decide those issues;
>
> c. the Court may itself call and examine witnesses;
>
> d. the parties are not bound by written pleadings;
>
> e. the Court is not bound by rules of evidence;
>
> f. the Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms."

The legislation should give the Court the power to give directions as it thinks fit (whether or not inconsistent with the rules) for the speedy determination of the real questions between the parties.[11]

NADRAC is of the view that the legislation should give the Court the power to make rules about procedures used for particular DR processes,[12] but that the procedures need not be prescribed in the legislation. Clear definitions will provide a framework for sufficient control

and differentiation, and a rule-making power will allow sufficient flexibility to change the procedures as needed.

Issue 3. Legal representation or other assistance

NADRAC is of the view that the issue of access to legal representation and advice is important and should be addressed in the legislation.

The legislation should provide that parties may have a legal representative but that the representative can be excluded in appropriate cases. The non-judicial DR service provider should also be allowed to exclude a legal representative in some circumstances, especially when the presence of a legal representative substantially aggravates a power imbalance or otherwise hinders such processes.[13]

The Council envisages that other support people such as interpreters, accountants, physical helpers etc, may be necessary in DR processes. Therefore, the legislation should allow parties to use other support persons, with a power to exclude such persons. The proposed clause 46PQ(1)(c) in the Human Rights Legislation Amendment Bill 1998 may be useful as a guide for this provision.

Because different processes require different considerations the Court should have the power to make rules that say who can or cannot be excluded from which DR processes.

Apart from assistance with the DR process it will be important for the court to make use of appropriate ancillary or support services such as information sessions on DR options or other useful information (such as the effects of divorce on children), skills education (such as negotiation and problem solving), financial advice and counselling.

(B) WHO SHOULD PROVIDE ADR PROCESSES USED IN THE FEDERAL MAGISTRACY (INCLUDING TRAINING AND STANDARDS FOR THOSE INVOLVED IN VARIOUS DISPUTE RESOLUTION METHODS)

NADRAC supports a diversity of providers of DR services. Where judicial adjudication is only available within the Court, other DR services can be provided within the Court by suitable staff, by other public organisations or by private providers.

Issue 4. Should legislation set the standards for DR service providers to whom disputes are referred?

NADRAC is of the view that the legislation should address the issue of standards. As the use of a range of DR processes is integral to the Court, it has a responsibility to ensure that the people who provide such services are competent.

Such services can be provided either within the Court itself, by external DR service providers or by a mixture of both. NADRAC recognises that the issue of the extent to which the court provides such services is a matter of resources and therefore does not express a view on this issue.

However, whether the services are provided within the Court or without, they must be of a certain quality. Rather than set standards for such DR service providers within the legislation, NADRAC prefers to give the Court the power to appoint such service providers

and to make rules of court to prescribe the qualifications or standards or certification needed for them.

It is envisaged that the Court would maintain a list of persons or organisations.[14]

If the Court orders parties to use a particular DR process then they must use a person on the list who has been approved and appointed by the Court. To allow parties a choice, where they wish to use a service provider who is not on the approved list, the legislation should also allow the Court to approve and appoint that person for a particular dispute only.

Issue 5. Judges/Magistrates as DR providers

NADRAC is concerned to maintain the integrity of different dispute resolution processes and as a general principle, believes there should be an appropriate distinction maintained between judicial adjudication and other DR processes.[15]

NADRAC is aware that there are significant concerns with having a sitting judicial officer act as a mediator in matters pending before the court, especially in facilitative models of mediation. These concerns relate to the disputants, to perceptions about the integrity of the courts and judicial officers, and to the integrity of the mediation.

The duplication of roles may lead to confusion for disputants about the role of a judicial officer and of non-judicial DR practitioners. The disputants' perception that judicial authority will exist within the facilitative or advisory DR process (just as in the court or hearing room), particularly where it takes place within the court, may cause disputants to believe that they are coerced into agreement by judicial involvement.

In addition, the only forum available for the formal enforcement of legal rights is adjudication by a judicial officer in a court. Judicial time and expertise is a scarce and expensive resource. It can be seen as wasteful for judges to act as DR practitioners in processes which can be provided by others within and without the courts.

Research in the USA suggests that "*there is no basis for thinking that judicial promotion* [of settlement] *leads to a number of settlements that is significantly higher than would otherwise occur to compensate for the ...costs of judicial attention being diverted from adjudication*".[16] Research is similarly inconclusive about the impact of judicial involvement on the quality of settlements.[17]

At the same time, NADRAC recognises that judges can be trained to become effective, appropriate providers of facilitative or advisory DR. Judicial authority may not always undermine party choice, especially in cases where the parties themselves are powerful and well-represented. USA research points out that "*Judicial mediation....aimed at cases in which bargaining is costly promises genuine improvements in the system of justice at a relatively small cost*." [18]

Judges are an integral part of the federal dispute resolution system. They have access to information about the dispute as well as the legal knowledge which may enable them to evaluate a proposed settlement against likely legal outcomes. Thus, judicial involvement in an non-judicial advisory DR processes may be valuable for parties, who may appreciate the assistance of judicial views.

On balance, in the Magistracy, NADRAC is of the view that magistrates should not be prohibited from participating in DR processes other than adjudication, as it is an

unnecessarily rigid demarcation. As a range of DR processes will be integral to the Court, then magistrates should be able to provide some facilitative or advisory DR processes. If they do they would need to have the same qualifications as any other DR provider approved by the Court. These matters should be in legislation rather than the rules.

Issue 6. Should a magistrate adjudicate the same matter in which the magistrate has provided another DR process?

While some may contemplate a judge dealing with the one dispute as a facilitative or advisory DR practitioner and as a judicial officer, NADRAC is concerned about the practice. There is too great a potential for harm if a magistrate proceeds to decide a matter which he or she has already mediated or assisted the parties to resolve by another DR process.

Therefore, NADRAC recommends that the legislation prohibit the practice of a judge judicially resolving a dispute which he or she has attempted to resolve using facilitative or advisory DR methods.[19] However, there could be an exception to this rule if the Court is satisfied that the parties have given their informed consent to the same judge both mediating and judging a matter after they have had legal or other advice on the issue.

Issue 7. Costs

The issue of costs is underlined by the basic question of whether the provision of all DR processes available to the Court should be funded to the same extent as judicial adjudication.

On one view there is an essential difference between judicial adjudication and other forms of DR. Because courts are the only forum in which legal rights can be authoritatively enforced, judicial adjudication is a responsibility of government and must be publicly funded. As other forms of DR do not have this public, rights enforcing power, they are not so clearly the financial responsibility of the government.

NADRAC is concerned that if this view is pursued then the imposition of costs on the use of DR other than adjudication may motivate parties to use adjudication. This is inconsistent with the aim of making all forms of DR integral to the magistracy and to maximise flexibility and choice in matching appropriate DR processes with disputes and disputants.

A similar problem arises when there is a disparity in the cost of any DR service provided directly within a court compared to the costs charged by an outside provider.

The other view is that if DR processes are an integral part of the court system and can be ordered by a court then there is a responsibility on the government to fund these processes to the same extent as judicial adjudication. It must be recognised that, by funding community organisations to provide non-judicial DR processes outside the courts, the government is effectively subsidising some DR processes outside the court system.

NADRAC recognises the current reality of limited government funding and therefore does not express a view on the extent to which all forms of DR should be publicly funded. However, it cautions that for a range of DR processes to be an effective part of the federal dispute resolution system, there will need to be adequate funding to ensure high quality DR services that are either provided within the courts or by community services sponsored under legislative programs.

Conflict is a community cost. If dispute resolution services are not adequately funded at the dispute resolution level it will show up as a component in the health, police, welfare and education budgets to name a few. It is more effective for the cost of conflict to be identified and managed.

In relation to the cost of DR services some principles which NADRAC considers should be borne in mind include:

- the court should promote the appropriate service for the dispute;
- there should be parity of access between those who use in-house DR services and those who use external DR services; and
- where a court orders a party to attend DR which is provided at a fee, it should take into account the parties' means to pay for it.

NADRAC is of the view that the legislation should give the Court the power to make regulations which set fees for Court-provided non-judicial DR.

As a range of DR processes will be integral to the Court, the legislation should give the Court the power to include the cost of all DR processes, whether provided in-house or outside the Court and whether pursued before or after filing the action, in awarding party-party costs.[20]

(C) PROCESSES FOR DECIDING WHICH DISPUTES SHOULD GO TO WHICH ADR PROCESSES AND AT WHAT STAGE IN PROCEEDINGS

Issue 8. Should the Court's power to refer parties to a particular DR process be conditional on assessment for suitability?

NADRAC supports the concept of a court with multiple DR 'doors' provided that the integrity of each DR process is protected. There is a need to avoid the situation in which the participants in a dispute feel forced irrevocably to trade a preferred DR process for a less preferred process. Such a model would demand transparency in both practice and accountability. In addition, there would be a clear need for a strong public, or at least client, education program.

The Council considers that it is preferable for referral decisions to be made by a suitably trained and competent DR assessor who is likely to have the respect of the parties and their representatives. Such a person could assist the parties to make appropriate decisions for their individual circumstances although general guidelines could be developed to which the DR assessor may refer. In some registries of the Magistrate's Court a suitably qualified magistrate may be appropriate as a DR assessor, in other registries it would be better and less costly to have a specialised non-judicial officer performing this function, as it will save the more expensive time of a judicial officer. If a magistrate does exercise the functions of a DR assessor then he or she must have the same qualifications as a specialist DR assessor would require.

There are some fundamental principles for assessing suitability for a DR process. These are:

- The referral should take into consideration the general nature of both the dispute and the type of resolution being sought (without seeking to constrain either).[21] Thus, conciliation may be more appropriate for issues that are more closely 'rights based'

whereas facilitative mediation may be more appropriate to disputes where there is a strong interest in maintaining a long term relationship. However, flexibility of DR processes is essential as a dispute may easily arise where both a rights based outcome and a long term relationship are sought. Disputes between residents and owners of long term care facilities, such as nursing homes, for example.[22]

- This case by case assessment should also consider whether elements of a dispute are amenable to differing non-judicial DR processes. For example, a case appraisal might clarify a factual element of a dispute before the dispute, as a whole, is mediated. Alternatively, disputants may agree that certain elements of a dispute can be resolved through a facilitative DR process and yet seek adjudication on other elements.

There is a considerable need for research on determining what are appropriate ADR processes to suit particular disputes and disputants. Adequate research will allow assessments to be made more reliably and avoid wastage of the jurisdiction's and participants' resources by requiring inappropriate ADR.

NADRAC considers that the legislation should provide for the Court's allocation of a dispute to a particular DR process to be conditional on the dispute being assessed for its suitability to the particular form of DR that is proposed.[23] It should require an assessment and require the court to develop guidelines for the allocation of a dispute to the appropriate DR process.

Even if the parties agree as to the DR process that they would prefer, an assessment of the suitability of the dispute and of the parties to that DR process should still be made in order for the parties to be able to use the DR processes available through the Court.

By including in the legislation a referral conditional upon an assessment NADRAC is conscious that some might consider that the legislation should also include a power to challenge the assessment on strictly limited grounds such as no prospect of resolution, severe power imbalance or indications of violence. However, it is concerned that to do so may unnecessarily clog up the Court's time by encouraging arguments about the process rather than the substantive issues of a dispute.

On balance NADRAC recommends against including in the legislation a provision to allow a challenge to an assessment. It considers that a competent DR assessor who also consults the parties about their preferred DR option should obviate the need for such a provision. NADRAC also considers that information sessions about disputes and DR processes would assist the parties to understand what are the benefits of the various DR options.[24]

There are some disputes for which some types of non-judicial DR are not appropriate. While there will be a DR assessor to direct parties to the most appropriate DR process for them, NADRAC is of the view that the Court in its supervisory role should have the power to refuse to refer parties to ADR.[25] Although it is not anticipated that the Court would use this power often it should have the ability to refuse to refer parties to ADR where public safety or significant public interest issues are at stake.[26]

It is also the role of ADR service providers (particularly facilitative DR providers) to assess the suitability of the parties for the ADR process, and NADRAC would expect them to continue to do so for cases referred to them by the court. Therefore, the Court should have the power to make rules about whether a DR service provider can refuse to provide a DR service if, in his/her assessment, the process is unsuited to the parties.[27]

Issue 9. Should legislation impose a duty, to advise or inform of DR options, on judicial officers, legal representatives and court officers?

NADRAC believes that it should be a requirement that lawyers advise all clients of the availability of a range of DR processes, including the advantages and disadvantages of particular DR processes to their client's needs and the nature of the dispute.

NADRAC notes that the legal community is attempting to deal with this issue. For example, the Queensland Solicitor's Handbook provides that a "*practitioner acting in contentious business should inform the client of relevant avenues available for settlement and the resolution of issues in dispute*"[28] .

The Court should also be empowered to make rules requiring written information about DR processes to be provided within a certain time and requiring legal representatives to certify that they have provided such information. Failure by legal representatives to provide this information could result in a costs sanction against them.

It follows that NADRAC considers that judicial officers and court officers should also have a duty to advise parties about their DR options.

The legislation should require court staff and legal representatives to inform parties about the range of DR processes available within and outside the Court.[29] This should also enable the Court to control the advertising of DR services at the Court. The ways in which information is provided to parties about DR processes should include by video and on the court's home page, and the information itself should be available in several languages.

Issue 10. Should legislation specify that parts of a dispute can be referred to different DR processes?

NADRAC is of the view that the legislation should provide for all or any part of a dispute to be able to be referred to an appropriate DR process.[30] It should also be part of the DR assessor's role to consider whether all or part of a dispute should be referred to a DR process.

Issue 11. Should a range of DR processes be available at any stage of legal proceedings?

As a statement of general principle, NADRAC believes that quality non-judicial DR can be appropriate at most times during the life of a dispute, including at the appeal stage, as long as regard is given to the dynamics of the particular dispute.[31]

NADRAC is aware that there is a generally held view that early intervention is better. However, the Council is of the opinion that early intervention is not always appropriate. For example, it is the Council's experience that each dispute will have times when it is amenable to a non-judicial DR process, just as there will be times when the dispute is not so amenable. That is, a time when a positive resolution is more or less likely to be achieved. The perceptions of the disputants as to when ADR may benefit them may be significant for the timing of effective ADR processes.

The Council's view is that early intervention may be possible where:

- the disputants are able to clarify their cases early in the process of litigation;
- the appropriate stake-holders in a dispute have been identified and where appropriate, joined as parties to the dispute or to the ADR process;

- early entry can save disputants' costs;
- advocates have done sufficient ground work and advised their clients as to the merits or otherwise, of their dispute; and
- the disputants have given informed consent to their participation in the DR process. That is, the disputants know what the DR process chosen can and cannot provide.

Within this framework the Council remains also of the view that self-determination is one of the fundamental inherent characteristics of facilitative DR. Any determination of the suitability of an individual dispute for non-judicial DR should include consultation with the disputants so they can express their views as to the appropriateness of the DR process and, where appropriate, give their 'informed consent' to their participation.[32]

NADRAC considers that the legislation should require the court to make a range of DR processes available at any stage in the resolution of a dispute.[33] Parties should be able to be referred to different DR processes more than once if necessary. However, the court should be wary of parties abusing DR processes through undergoing several non-successful referrals to ADR processes.

(D) THE EXTENT TO WHICH PARTICIPATION IN AN ADR PROCESS SHOULD BE COMPELLED, INCLUDING SANCTIONS FOR NOT COMPLYING WITH AN ADR REFERRAL

Issue 12. Should parties' consent be required before referral to non-judicial DR?

There are differing views in NADRAC and in the broader DR community about whether parties should be compelled to undergo non-judicial dispute resolution processes, and in particular mediation and other facilitative processes. Generally, there is agreement that parties can be compelled to attend an information session about DR processes.

NADRAC acknowledges the argument that because of the consensual nature of mediation, unless the parties are willing to participate, the process is highly likely to fail. While this may be the case in some circumstances, the Council is of the view that it is not always so. In some circumstances, the unwillingness of the parties to go to mediation may not necessarily be an accurate indicator of their capacity to be helped by that process.

While self determination is a fundamental principle of facilitative DR, experience suggests that if parties (and their legal representatives) are not strongly motivated or encouraged to participate in non-judicial DR, few will do so, and many disputes which could reach a quicker or more suitable settlement without litigation might not be resolved.

NADRAC is aware that compulsory referral of cases to case appraisal and mediation in the Queensland Supreme Court has dramatically reduced waiting periods and it is suggested may contribute to the increased acceptance of such referrals.[34]

Accordingly, the Council is of the view that mandatory referral to DR processes is acceptable in principle despite the apparent unwillingness of the parties to participate in the process. This view is predicated on the assumption that the referral is made by a suitably qualified DR assessor[35] and that a discretion remains in the mediator (or other facilitative DR provider) to refuse to continue with a mediation which is inappropriate. In addition, criteria need to be carefully developed for making any such mandatory referrals to mediation.

It follows that NADRAC considers that the legislation should not require the parties' consent before referral to non-judicial DR.[36] As this conclusion is predicated upon accurate assessment by the DR assessor of a dispute, NADRAC recommends that the expertise of the DR assessor be available to magistrates in their decisions to refer parties to non-judicial DR in the course of a case.

Sanctions for non-compliance with a court referral may include costs penalties, contempt, an adverse finding or other appropriate penalty. However, NADRAC recognises that parties cannot be ordered to settle or agree. Thus, NADRAC recommends that penalties for non-compliance should only be imposed for non-attendance at a non-judicial DR process and failure to provide information to a non-judicial DR provider.[37]

(E) METHODS OF EVALUATING THE EFFECTIVENESS OF THE MAGISTRACY'S ADR SERVICES

Issue 13. How should the Court's DR services be evaluated?

NADRAC is of the view that evaluation by the Court of all its DR processes is vital to ascertain the effectiveness of the Court and the relative effectiveness of judicial adjudication and other DR. For this reason all DR processes provided by the Court should be evaluated, and by similar criteria where possible.

The evaluation should not just involve the collection of quantitative data but should also assess the quality of the services being provided and the outcomes achieved. NADRAC is aware that the Productivity Commission is currently developing criteria for the collection of data on alternative dispute resolution by the courts.

The legislation should require an evaluation within 2 years of the establishment of the magistracy. The report should be made to Parliament, through the Attorney-General.[38] It is important that the proposed evaluation is planned for as part of initial administrative decisions made about the Court. After the initial evaluation it is expected that the Court will review the operation of its DR services as part of its administrative processes. Certainly, its annual report should include an evaluation of the operation of all of the Court's DR processes.

(F) ANY RELATED MATTER.

Issue 14. Immunity/Confidentiality

NADRAC has previously expressed the view that broad statutory immunity for facilitative DR providers, such as mediators raises concerns about the inability of parties to bring actions against them for serious misconduct.[39] Judges were originally given such an immunity when acting in their judicial capacity so that the public could be satisfied that they were making judgments free from fear and with complete independence. However, facilitative DR providers have no decision-making or investigatory powers. Statutory immunity provisions place non-judicial DR practitioners in an inviolable position and distinguish them from other professions and service providers, including lawyers (other than advocates) and health care workers.

However, NADRAC notes that it is common for Commonwealth, State and Territory courts to provide mediators with this immunity.[40] The availability of some form of redress for serious misconduct may ameliorate the seemingly unassailable position of mediators.

NADRAC also examined confidentiality and admissibility in the context of the Family Law Act.[41] It considered that the principal purpose of a confidentiality clause for mediators should be to protect the participants in mediation rather than the mediator.

NADRAC is mindful of the tensions between the need to protect the privacy of a mediation (so that the disputants can discuss issues and their resolution in an open and frank manner) and the need for mediators to be accountable for the service they provide. The Council is concerned about the potential for significant confidentiality provisions to prevent effective inquiry into or complaint about serious misconduct of such non-judicial DR practitioners.

The Council's view is that a statutory duty of confidentiality can protect the integrity of ADR processes and clarify the ADR practitioner's role (for both the practitioner and the disputants). However, there are identifiable circumstances where confidentiality should be limited in order to protect the integrity of the ADR process, the judicial process by allowing access to all relevant material, and the safety of the disputants.

For these reasons NADRAC recommends that the legislation should provide immunity for DR providers similar to that for judges of the Court and that legislation should make admissions made during a non-judicial DR process confidential.[42]

However, it is imperative that a complaints procedure be implemented whereby an aggrieved party can obtain redress against a DR providers for serious misconduct. The legislation will, therefore, need to allow evidence to be produced of matters said or done during a non-judicial DR process for the purpose of making a complaint against a non-judicial DR provider for serious misconduct.

NADRAC understands that the magistracy will be exercising concurrent jurisdiction with the Family Court and Federal Court and therefore favours consistency with those legislative provisions where possible. The legislation should limit confidentiality and immunity, recognising the link between them, and provide for a clear avenue of complaints for professional misconduct.

NADRAC notes that counselling receives the protection of the confidentiality or admissibility provisions in the Family Law Act. Some members of NADRAC considered that counselling requires a greater degree of confidentiality than other dispute resolution processes. However, the Council does not have a concluded view on this issue.

Some of the limitations on confidentiality that could be included are:[43]

- by agreement or consent of parties
- whether agreement was reached
- accountability for misconduct or incompetence
- commission of, or threat of, crime
- fraud
- special concerns regarding children

- necessary to administer legislation
- necessary to prevent danger or injury to person or property
- for further referral
- as compelled by other law
- reasonable excuse
- statistics
- offence or fraud during non-judicial DR
- application to terminate non-judicial DR.[44]

Issue 15. Obligation/power to adjourn legal proceedings while other DR is pursued

NADRAC is of the view that this power does not need to be included in the legislation because it is considered to be an inherent power in the Court.

Issue 16. Court's power/duty to review/enforce an agreement reached via non-judicial DR

NADRAC is of the view that the Court should not review all agreements. However, it is concerned that there be some power in the Court to review such agreements.

NADRAC is also of the view that the legislation should include a power for the court to make an order embodying an agreement reached by the use of non-judicial DR, on the application of a party.[45]

Accordingly, the legislation should allow the Court to review an agreement on the application of a party to the agreement.[46] The Court should also have the power to review an agreement reached through non-judicial DR if it is asked to make any orders as a result of the agreement.

Issue 17. Court's power to terminate a non-judicial DR process

NADRAC considers that the legislation should enable the Court to terminate a non-judicial DR process. The legislation should give the Court this power on the application of a party or of its own motion.[47] The dispute resolver should have the power to terminate a non-judicial DR process without applying to the Court.

There was some concern by the Council that allowing a party to bring an application to terminate a non-judicial DR process may frustrate the intent of the legislation in requiring parties to use non-judicial DR to resolve a dispute where possible. It is acknowledged that parties can be made to attend non-judicial DR but they cannot be made to agree. A party can frustrate the non-judicial DR process by not appearing, by not providing information and by not co-operating. The key is whether the parties have acted in good faith throughout the non-judicial DR process. NADRAC is of the view that the assessment for suitability for a non-judicial DR process together with the provision of information about these processes to parties should address most of these concerns.

There will need to be an exception to the non-admissibility provision[48] to allow a party to bring an application to terminate the DR process. The limitation to the confidentiality provision should be restricted to the act of making the application and should not include allowing a party to discuss the content of a mediation.[49]

If the dispute resolver terminates a non-judicial DR process, there should be no right in the parties to bring any action against the dispute resolver as a result of the termination alone. Once the dispute resolver terminates a DR process, then the matter should be referred back to the court or the DR assessor for determination of future procedures.

Issue 18. Power to make rules about DR processes

NADRAC is of the view that the legislation should include a general power for the Court to make rules about all DR processes available within or through the Court.[50] The rule-making process/committee should include providers of facilitative and other non-judicial ADR.

Issue 19. Court determination of a question of fact or law arising out of non-judicial DR

The legislation should provide that the Court can, at any time, determine a question of fact or law to assist a non-judicial DR process. The application can be made by a party or by the dispute resolver.[51]

Issue 20. Report to the Court by the non-judicial DR provider

NADRAC considers that it is important for the dispute resolver to be able to provide reports to the Court, however, there are limitations on what those reports should contain.

Reports can be made for statistical purposes, about attendance (or non-attendance), about the suitability of the process, on the likelihood of a solution and on possible time frames.[52] Generally, however, NADRAC recommends that, especially in mediation, the dispute resolver not be required to report on the content of the mediation or to report on whether a party is cooperative or non-cooperative.

Especially in family law matters, naming a party as being recalcitrant or otherwise obstructionist can have the effect of escalating the conflict between the parties and can potentially create a violent situation. A sophisticated party can appear cooperative, whereas an anxious or ill-advised party may appear uncooperative.

However, while acknowledging these concerns, and concerns about the impact of reporting on confidentiality and possible legal challenges, NADRAC considers that dispute resolvers should be able to report on the non-compliance of parties for refusal to provide information which in the opinion of the dispute resolver it is necessary to resolve the dispute. The production of information is so crucial to the dispute resolution process that the court should be able to be informed of its non-production by a party and be able to impose a sanction for such non-production.[53] However, DR providers should not be required to report on other aspects of cooperation or non-cooperation.

Issue 21. Powers of DR service providers

NADRAC considers that DR providers, other than judicial officers, will need powers appropriate to the nature of the process they are providing.[54]

Some of the powers which might be needed include the power to:

- require the party to appear in person or be represented by someone with authority to settle;
- require the production of information;
- exclude legal representation;[55]
- appoint an expert;
- terminate the process;[56] and
- take sworn evidence.

There are concerns that these type of powers are not appropriate to facilitative DR and that giving facilitative DR providers such powers will undermine the effectiveness of such processes. However, such DR providers could be given very few powers. For this reason, rules should differentiate as to which powers are exercisable under which type of DR process.

If such powers are to be given to non-judicial DR providers, it is important that they are appointed by the Court[57] and it may be appropriate that the DR providers' powers be expressly set out in the referral order.

NADRAC suggests that this legislative provision includes a statement that the powers are provided for the purpose of facilitating agreement or outcomes which best suit the parties' needs. It is concerned that the objective of agreement is given prominence here.

Issue 22. Qualifications for appointment to magistracy

As a range of DR processes is integral to the Court, NADRAC is of the view that, in addition to legal qualifications, magistrates should have substantial experience with non adjudicative DR processes. There should be a general provision in the legislation which requires magistrates to possess this attribute.[58] Although it does not need to be included in the legislation, NADRAC strongly recommends that the selection criteria for magistrates should include a requirement that a person possesses the skills used in facilitative DR such as those involving effective communication, management of conflict and negotiation.

Issue 23. Incentives to use non judicial DR before commencing litigation

In order to promote non-adversarial resolution of disputes before a matter reaches a court, NADRAC considers the legislation should address this issue. The Court should have the power to make rules which allow costs charged by legal practitioners for work performed in pre-litigation DR to be allowed as costs in the litigation, if litigation is necessary, including costs of private DR processes.

NADRAC does not envisage that the protections of the legislation (eg immunity) would extend to pre-filing non-adjudicative DR processes. It is concerned, however, that letters of demand tend to polarise the parties and the dispute escalates quickly to the filing in court of an application. The documentation that is required to be filed in the court entrenches this polarisation of the parties so that any thought of non-adjudicative DR external to the court is not considered by the parties.

NADRAC recommends that the legislation allow the Court to make rules concerning a simple, inexpensive process for initiating action within the court without the formalities of pleadings. Such initiating documentation might require or allow disputants to nominate the DR process or processes sought from the Court, and to indicate which DR processes have been attempted.

National Alternative Dispute Resolution Advisory Council

March 1999

Endnotes

[1] The Laws of Australia LBC Vol 13.1 p 7 [3].

[2] See Alternative Dispute Resolution Definitions, NADRAC, March 1997, p5.

[3] From NADRAC's response to the Australian Law Reform Commission's Issues Paper No 25, p1.

[4] Sir Laurence Street, AC KCMG, *"The Courts and Mediation - A Warning"*, Australian Dispute Resolution Journal 2:4, November 1991.

[5] The Australia and New Zealand Council of Chief Justices Draft Position Paper and Declaration of Principle on Court-Annexed Mediation (page 3) affirms that most courts endorse the principle that mediation plays an important role in the litigation process and this role could be usefully enlarged. It should be noted that the Position Paper is in draft and may be subject to change at the 1 April 1999 meeting of the Council.

[6] In matching the dispute and the parties to the appropriate DR process, party choice of process will always be a significant factor.

[7] Some legislative examples are:

Family Law Act 1975 (FLA): 19B mediation, 19E private arbitration, 19D court approved arbitration
Federal Court of Australia Act 1976 (FCA): 53A mediation, arbitration
Native Title Act 1993 (NTA) : 86A mediation
NSW Community Services (Complaints, Appeals and Monitoring) Act 1983 (CSA): conciliation, solution facilitator
NSW Compensation Court Act 1984 (CCA): 30 pre-hearing conference, arbitration, 38A mediation, neutral evaluation.
NSW District Court Act 1973 (DCA): 163 mediation, neutral evaluation
NSW Health Care Complaints Act 1993 (HCCA): 24 conciliation
NSW Workplace Injury Management and Workers Compensation Act 1998 (WIMWCA): 79 conciliation
Qld Courts Legislation Amendment Act (CLAA): mediation, case appraisal
SA District Court Act 1991 (DCA): mediation, conciliation
Vic County Court Act 1958 (CCA): mediation, arbitration
Vic Magistrates' Court Act 1989 (MCA): pre hearing conference, mediation
Vic Civil and Administrative Tribunal Act 1998 (VCAT): 83 compulsory conference, 88 mediation

[8] See SA Magistrate's Court Act (MCA): 38(1)

[9] Examples of legislative provisions:
NSW Compensation Court Act 1984 (CCA): 38B, C defines mediation, neutral evaluation.
NSW District Court Act 1973 (DCA): 163 mediation, neutral evaluation
NSW Retail Leases Act 1994 (RLA): 67 defines mediation to include giving advice
Qld Courts Legislation Amendment Act (CLAA): 100B ADR process, 100C mediation, 100D case appraisal

[10] For example, "case appraisal" in Queensland.

[11] See NSW Supreme Court Act 1970 (SCA): 76A

[12] Some examples of legislative provisions are:
NSW Community Services (Complaints, Appeals and Monitoring) Act 1983 (CSA): 30 function of conciliation
NSW Health Care Complaints Act 1993 (HCCA): 52 termination by agreement
Qld Courts Legislation Amendment Act (CLAA): 100k case appraisal
SA Magistrate's Court Act (MCA): 38 minor civil actions prescribes inquiry, non-adversarial procedures Vic Retail Tenancies Reform Act 1998 (RTRA): 37 procedure at discretion of conciliator, 40 powers of arbitration, 39 result written/signed
Vic Civil and Administrative Tribunal Act 1998 (VCAT): 83 procedure at discretion of person presiding at conference, Schedule 1 variations in procedure for specific Acts, eg Equal Opportunity - inadmissible even if parties agree.

[13] See issue 21 about the powers of DR service providers.

[14] Some examples of such provisions are:
NSW Compensation Court Act 1984 (CCA): 38H chief justice makes list
NSW District Court Act 1973 (DCA): 164E chief justice makes list
Qld Courts Legislation Amendment Act (CLAA): 100E Senior Judge Administrator to approve mediator, 100F case appraisor, 100G register of ADR professionals
Vic Retail Tenancies Reform Act 1998 (RTRA): 41 panel, nominated by minister.

[15] See discussion of this point in the introduction on page 2.

[16] Galanter, M and Cahill M '"Most cases settle": judicial promotion and regulation of settlement' (1994) 46 Stan LR 1339 at 1388.

[17] *ibid* 1389.

[18] *ibid*.

[19] Some examples of such provisions are:
SA Magistrate's Court Act (MCA): 27 may endeavour to achieve settlement, judge not disqualified from unless acted as mediator
Vic Civil and Administrative Tribunal Act 1998 (VCAT): 88 mediator cannot sit as member of tribunal

[20] Some examples of legislative provisions are:
Federal Court of Australia Act 1976 (FCA): 53AB costs re arbitration
NSW Compensation Court Act 1984 (CCA): 38F cost of mediation/neutral evaluation is cost of court
NSW Land and Environment Court Act 1993 (LECA): 61F costs borne by parties
NSW Local Courts (Civil Claims) Act 1970 (LCA) 21N costs borne by parties

NSW Supreme Court Act 1970 (SCA): 110M costs borne by parties
NSW Workplace Injury Management and Workers Compensation Act 1998 (WIMWCA): 88 costs, as defined, can be borne by employer
Qld Courts Legislation Amendment Act (CLAA): 100M party can't pay costs, court makes appropriate order, including cancel referral
Vic Retail Tenancies Reform Act 1998 (RTRA): 38 costs jointly borne
Vic Civil and Administrative Tribunal Act 1998 (VCAT): 88 party to pay prescribed fee for mediation
See also issue 23 about costs of pre-litigation ADR.

[21] The Laws of Australia LBC Vol 13.6 p 19 [24].

[22] Aged Care Act 1997 (Cth)

[23] Some examples of legislative provisions are:
Qld Courts Legislation Amendment Act (CLAA): 100I refer with factors
Native Title Act 1993 (NTA) : 86B to mediation, unless shown unnecessary, factors listed
NSW Compensation Court Act 1984 (CCA): 38D if court considered appropriate, consent, parties agree to mediator or evaluator
NSW District Court Act 1973 (DCA): 164A if court considered appropriate, consent, parties agree to mediator
Vic County Court Act 1958 (CCA): 47A referral with or without consent
Vic Retail Tenancies Reform Act 1998 (RTRA): 37 conciliation if appropriate, 40 arbitration if conciliation fails or is inappropriate.

[24] See issue 3 concerning support and ancillary services.

[25] See issue 12 where NADRAC expresses the view that consent of the parties is not required for referral to ADR.

[26] An example of a legislative provision is NSW CSA: 23 & 24 - commission can refuse to refer or to accept ADR agreement, if significant public safety/public interest issues

[27] See issue 21 for the power of a DR provider to terminate a DR process.

[28] Rogers B, 'Queensland Law Society Inc' in Duncombe S and Heap J (eds), *Australasian Dispute Resolution*, Sydney: LBC, 1995, 11-3001

[29] Some examples of legislative provisions are:
Family Law Act 1975 (FLA): 14F, 14G, 19J court, legal practitioner and court officers advise of ADR Qld Courts Legislation Amendment Act (CLAA): 100 G, Registrar to keep register of ADR information.

[30] Examples of legislative provisions are:
Family Law Act 1975 (FLA): 19B "any or all of the matters in dispute"
Family Law Act 1975 (FLA): 19D "the proceedings, or any part of them, or matter arising in them"
Native Title Act 1993 (NTA) : 86B(5) "whole or a part"

[31] This view is supported by the Australian and New Zealand Council of Chief Justices in its Draft Position Paper and Declaration of Principles on Court-Annexed Mediation, page 5.

[32] See issue 8 about referral to ADR subject to a suitability assessment.

[33] Examples of legislative provisions are:
Family Law Act 1975 (FLA): 19A, AA, pre-filing mediation
Native Title Act 1993 (NTA) : 86B(5) "at any time in a proceeding"

[34] Recent Supreme Court statistics and anecdotal observations of ADR in Queensland judicial system.

[35] See issue 8 about assessment of disputes.

[36] Some examples of legislative provisions are:
Federal Court of Australia Act 1976 (FCA): 53A mediation without consent, arbitration with consent
Native Title Act 1993 (NTA) : 86B to mediation, unless shown unnecessary, factors listed
NSW Compensation Court Act 1984 (CCA): 38D consent, 38E voluntary
NSW District Court Act 1973 (DCA): 164A consent, 164 B voluntary
NSW Health Care Complaints Act 1993 (HCCA): 24 consent
NSW Retail Leases Act 1994 (RLA): 68 must mediate first
Qld Courts Legislation Amendment Act (CLAA): 100J must attend, sanctions stay case, costs; 100L court can subpoena person to case appraisal, not mediation
SA Magistrate's Court Act (MCA): 32 referral to mediation without consent
Vic County Court Act 1958 (CCA): 47A referral without consent
Vic Magistrates' Court Act 1989 (MCA): 107referral without consent to pre-hearing conference, 108 referral with consent to mediation
Vic Civil and Administrative Tribunal Act 1998 (VCAT): 84 can require party to attend in person or by representative; 87 non-attendance--can proceed in absence, make adverse determination, strike proceedings.

[37] See issue 20 about reports to the court by non-judicial DR providers.

[38] The evaluation must be clear what its purposes are, eg NTA: 86A lists objectives.

[39] Primary Dispute Resolution in Family Law: A Report to the Attorney-General on Part 5 of the Family Law Regulations' Canberra, March 1997, pp 28 - 32.

[40] Some examples of legislative provisions are:
Family Law Act 1975 (FLA): 19 M
Federal Court of Australia Act 1976 (FCA): 53C
NSW Compensation Court Act 1984 (CCA): 38I privilege re defamation, 38K no liability if in good faith
NSW District Court Act 1973 (DCA): 164F, 164 H
NSW Workplace Injury Management and Workers Compensation Act 1998 (WIMWCA): 89 protected if good faith
Qld Courts Legislation Amendment Act (CLAA): 100T mediation immunity as for judge
SA Magistrate's Court Act (MCA): 27 judicial immunity
Vic County Court Act 1958 (CCA): 48C judicial immunity
Vic Retail Tenancies Reform Act 1998 (RTRA): 42 not liable if good faith
Vic Accident Compensation Act 1985: 58A
See also Law Council of Australia - Model Legislation (LC): not liable in negligence if court approved, liable for fraud.

[41] Op cit 39, pp 32 - 37.

[42] The Australia and New Zealand Council of Chief Justices supports the policy of express mediator protection, immunity, confidentiality and non-admissibility of anything said or done during a mediation in a court. See its Draft Position Paper and Declaration of Principle on Court-Annexed Mediation, page 6.

[43] Some examples of legislative provisions are:
Family Law Act 1975 (FLA): 19N, no exceptions
Federal Court of Australia Act 1976 (FCA): 53B, no exceptions
NSW Community Services (Complaints, Appeals and Monitoring) Act 1983 (CSA): 32 confidentiality with exceptions
NSW Compensation Court Act 1984 (CCA): 38J non-disclosure unless consent, necessary to administer legislation, necessary to prevent danger/injury to person/property, for further referral, other law
NSW District Court Act 1973 (DCA): 164G
NSW Workplace Injury Management and Workers Compensation Act 1998 (WIMWCA): 89 conciliation competent, not compellable
Qld Courts Legislation Amendment Act (CLAA): 100S no disclosure by ADR convenor unless reasonable excuse--agreement, statistics, offence/fraud during ADR
Qld Courts Legislation Amendment Act (CLAA): 100U ADR statements inadmissible unless consent.
SA Magistrate's Court Act (MCA): 27 mediator may not disclose except by law; statements "in attempt to settle" inadmissible in "the proceedings or related proceedings"
SA Environment Resources and Development Court Act 1993 (ERDCA): 28B inadmissible in proceedings before court
Vic County Court Act 1958 (CCA): 47B inadmissible in "hearing of the proceeding of anything said or done by any person at the mediationÓ
Vic Retail Tenancies Reform Act 1998 (RTRA): 37 inadmissible in "other proceedings relating to the subject matter of the dispute"
Vic Civil and Administrative Tribunal Act 1998 (VCAT): 83 conference held "in private", 85 compulsory conference - anything said/done inadmissible unless contempt, perjury, sanctions for non-coop, 92 mediation - inadmissible unless consent, Schedule 1 - variations in pro for specific Acts., eg Equal Opportunity Act - inadmissible even if parties agree.
Law Council of Australia - Model Legislation (LC): in confidentiality, inadmissible unless, whether agreement reached.
Law Council of Australia - Model Legislation (LC): mediation can be compelled by law.

[44] See issue 17 about termination of an ADR process.

[45] Some legislative examples are:
NSW Compensation Court Act 1984 (CCA): 38G court can make orders to give effect to agreement
NSW Land and Environment Court Act 1993 (LECA): 61G court orders to give effect
Qld Courts Legislation Amendment Act (CLAA): 100Q, R party can apply for order, after ADR professional files certificate
SA Magistrate's Court Act (MCA): statements court may embody terms in judgement

[46] Some examples of legislation are:
Family Law Act 1975 (FLA): 19F, 19G party can seek review
Federal Court of Australia Act 1976 (FCA): 53AB review and costs
SA Environment Resources and Development Court Act 1993 (ERDCA): 28B: must not accept settlement inconsistent with Act, or prejudice to third party

[47] For a legislative example see NTA: 86C

[48] See issue 14 about immunity/confidentiality.

[49] See issue 20 about reporting.

[50] Some legislative examples are:
Family Law Act 1975 (FLA): 19P
NSW Supreme Court Act 1970 (SCA): 76A general power to make directions

[51] Some legislative examples are:
Federal Court of Australia Act 1976 (FCA): 53AA arbitrator can refer question of law to court
Native Title Act 1993 (NTA) : 86D

[52] Some examples of legislation are:
NSW Health Care Complaints Act 1993 (HCCA): 53 report Qld Courts Legislation Amendment Act (CLAA): 100N, O, P agreement written down, certificate filed with court
Law Council of Australia - Model Legislation (LC): no report to court
Native Title Act 1993 (NTA) : 86E court can request report on "progress"
NSW Community Services (Complaints, Appeals and Monitoring) Act 1983 (CSA): 34 result of proceedings

[53] See issue 12 about non-compliance with a court referral to non-judicial DR.

[54] Some examples of legislation are-
(a) to decide features of process:
Vic Retail Tenancies Reform Act 1998 (RTRA): 37 procedures at discretion of conciliator
Vic Civil and Administrative Tribunal Act 1998 (VCAT): procedures at discretion of person presiding at conference
(b) to compel production of information:
NSW Workplace Injury Management and Workers Compensation Act 1998 (WIMWCA): 80 conciliation can require info, 81 conciliation can provide info to parties, 82 conciliation can summons
(c) to terminate:
Vic Retail Tenancies Reform Act 1998 (RTRA): 37

[55] See issue 3 about legal representation.

[56] See issue 17 about terminating the non-judicial DR process.

[57] See issue 4 about standards for ADR providers.

[58] Sourdin, T. "Educating Judges about ADR *"Journal of Judicial Administration*, (1997) 7, 22.