



**Alternative Dispute Resolution in Victoria:  
Supply-Side Research Project**

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**RESEARCH REPORT**

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*Alternative Dispute Resolution in Victoria: Supply-Side Research Project*  
RESEARCH REPORT

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## *Executive Summary*

### *Background*

On 25 November 2005, the Justice Executive Committee, Victorian Department of Justice approved initiation of the *Contemporary Justice Service Delivery – ADR project*. The project is overseen by a Project Board comprising the Executive Directors of Courts, Consumer Affairs, Legal & Equity, and Corporate Services and chaired by the Executive Director Consumer Affairs. Alternative Dispute Resolution (ADR) is one of a number of strategic priorities for the Victorian Department of Justice. An interim project deliverable is a report on arrangements for the supply of ADR in Victoria based on qualitative and quantitative research conducted on key providers of ADR services. This research comprises interviews with key stakeholders, including courts and tribunals, industry ombudsmen, commissioners, government agencies and academics. This research report represents that deliverable (the Research Report).

### *The Significance of ADR*

The development and use of ADR has received support from governments overseas and within Australia at both a commonwealth and state level. The development of both private and public ADR services in Victoria have been strongly supported by the Victorian Government. Government support for the development of public ADR is motivated by a range of factors, most importantly:

- enhancing citizens' access to dispute resolution processes;
- enhancing citizens' participation in dispute resolution processes;
- reducing costs and delays in the court system; and
- other social policy objectives such as facilitating cost effective redress of disputes and facilitating access to dispute resolution services for vulnerable and disadvantaged citizens.

In the Attorney General's Justice Statement released in 2004, the Victorian Government identified the importance of the early resolution of civil disputes.

### *Methodology*

The Research Report examines the supply-side of ADR, that is, the key Victorian institutional arrangements that provide ADR. The Research Report examines ADR in Victoria by asking and answering the following questions:

- What is "ADR"?
- Who provides ADR in Victoria?
- When is it appropriate to use ADR services?
- What ADR services should government provide and/or fund (both directly and indirectly)?
- What are the key issues in designing best practice for ADR in Victoria?
- What are the key issues for the Victorian Government as identified by ADR stakeholders?

The methodology utilised for the Research Report comprised three elements:

- Structured interviews with senior representatives of key ADR stakeholders;
- Questionnaires completed by key ADR stakeholders; and
- Literature review.

## *What is ADR?*

What, however, do we mean by the term “ADR”? It is widely agreed among academics and practitioners of ADR, that ADR is difficult to define. Despite the fact that ADR is widely used in Australia, the literature review reveals no agreed single definition of ADR or of the various ADR processes. Despite the absence of an agreed single definition of ADR, there is broad commonality to the definitions of ADR. The following common elements of ADR can be identified:

- ADR includes a range of dispute resolution processes;
- ADR does not include litigation;
- ADR is a structured informal process;
- ADR normally involves the intervention of a neutral third party; and
- ADR processes can be non-adjudicatory.

The literature reviewed reveals two primary debates about the definition of the term “ADR”:

- Which ADR processes should be included within the term “ADR”? and
- What is the meaning and significance of the ADR acronym? In particular, is ADR ‘alternative’ or ‘appropriate’?

The literature reviewed indicates that there remains some debate about whether the terms “negotiation” and “arbitration” should be included within the term “ADR”. However, despite these debates, the literature reveals widespread agreement that both negotiation and arbitration should be recognised as ADR processes.

The acronym ADR is commonly used to refer to “Alternative Dispute Resolution”. The literature reviewed indicates that there is contention about the meaning and use of the ADR acronym. The use of a range of other synonyms for ADR including ‘appropriate’, ‘additional’, ‘assisted’, ‘administrative’, or ‘amicable’ dispute resolution have been identified in an attempt to remedy the positioning of ADR as an alternative to litigation. In addition to debate regarding the meaning of “A” in ADR, the literature reveals that there is also debate regarding the meaning of “D” and “R”. Is ADR about resolving conflicts or resolving disputes? Is ADR about resolution or settlement or management of disputes? Again, the literature reveals that some authors use these terms interchangeably, while others seek to distinguish them.

## *The History of ADR in Victoria*

It is difficult, and ultimately unhelpful, to examine the history and development of ADR in Victoria in isolation from the broader development of ADR in Australia. The practice of ADR has a long history in Australia. The early focus of ADR in Australia was on collective dispute management using adjudicative processes, in particular conciliation and arbitration. In the 1960s and 1970s, access to justice emerged as a key area of community concern in Australia. The access to justice concerns of the 1960s and 1970s focussed on the development and use of ADR on the periphery of the litigation system. Three important ADR developments occurred during this time:

- development of the Ombudsman in Australia;
- development of a system of tribunals; and
- development of Community Justice Centres.

While the early development of ADR in Australia was seen to occur on the periphery of the formal legal system, its success in these areas, and its perceived benefits when compared with litigation in the courts, saw it increasingly expand its reach into the formal justice system.

Following the Sackville report into access to justice, the development of NADRAC created a body to provide policy advice to the Federal Government and courts about developing a high quality, accessible, integrated Commonwealth ADR system. Over the past 10 years ADR processes have increasingly become part of the court system. Today, the debates about the use

of ADR within courts focus on whether court referral to ADR should be discretionary or mandatory and whether participation in ADR should be voluntary or compulsory, rather than desirability of courts using ADR processes. Government departments and agencies also provide very significant levels of ADR services, for example, the ADR services provided by Consumer Affairs Victoria.

Self-regulatory and co-regulatory frameworks, and the deregulation and privatisation of formerly government-owned services, has provided the basis for the development of codes and an expansion of industry codes of practice, private internal dispute resolution and industry ADR schemes as key methods to resolve consumer disputes. These dispute resolution methods have emerged most notably in the financial services, insurance, telecommunications and energy industries, for example, the Energy and Water Ombudsman Victoria and the Banking and Financial Services Ombudsman.

As the use of ADR within courts and tribunals has increased, so too has the acceptance and use of ADR within the legal profession. Today ADR is an accepted area of study within law degrees and a number of postgraduate courses in ADR are also available. A range of professional organisations have also developed such as LEADR that undertake education, training and promotion of ADR within the legal profession. The “ADR profession” includes not just the established legal profession but also includes the emergence of a new group of ADR professionals, particularly counsellors, mediators and arbitrators. Online services are emerging as a new area in the provision of ADR services. Online services have attracted attention in Europe, particularly for the resolution of cross border consumer disputes.

### *Who Provides ADR in Victoria?*

Who undertakes ADR? What are the types of ADR processes used? How are the services funded?

The Research Report documents a supply-side framework for ADR in Victoria, however, the ADR suppliers examined are not intended to be an exhaustive, all-inclusive list of ADR service providers in Victoria. The ADR suppliers included in the framework are a cross-section of the key suppliers of ADR services in Victoria and intended to demonstrate the breadth of provision of ADR. The majority of the suppliers included in this framework have participated as stakeholders in both the interview and the questionnaire processes that have informed the Research Report.

Societal transactions and interactions will, it can be observed, sometimes lead to disputes. Whether it is neighbours disputing the levels of noise emanating from their households, consumers complaining about faulty goods or small businesses concerned with the conduct of larger businesses, disputes are widespread. Those disputes, in a certain number of cases find their way into the “market for justice”, a sub-market of which is the “market for ADR”. The market for ADR, like other markets, is characterised by those who provide services, the supply-side, and those who use services, the demand-side. Within, the supply-side, we can see further categorisation evident. There exists both a public and private supply. Within, the categories of public and private, further distinctions are evident.

### *The Benefits and Problems of ADR*

An understanding of the benefits and problems of ADR, which in turn reveal risks and opportunities, is crucial to a proper framing of best practice provision of ADR in Victoria.

It is generally agreed that modern ADR has developed as a response to a number of perceived deficiencies of the traditional court system. The benefits and problems with ADR are well documented in the literature. It is undeniable that ADR possesses a range of benefits that make

it a particularly attractive form of dispute resolution. However, there is also a range of problems associated with the use of ADR.

Compared to traditional court based dispute resolution methods, ADR is widely thought to possess a range of advantages. Suggested advantages of ADR include that:

- ADR is cost effective;
- ADR is non-adversarial;
- ADR is flexible;
- ADR is quick and convenient;
- ADR is informal;
- Disputing parties retain more control of the dispute resolution process; and
- ADR offers a wider and more adaptable range of remedies.

Suggested problems with ADR include that:

- ADR lacks the formal checks and balances of the court system;
- Issues as to whether dispute resolution processes are always fair;
- The binding nature and enforceability of outcomes; and
- Enforcement and admissibility.

### *When should government fund ADR services?*

A law and economics analysis of the use of ADR within the civil justice system may offer insight into the development of a more efficient civil justice system. It may also serve to identify and balance the costs and benefits that arise from government participation in the promotion and development of ADR within the justice system. Economic analysis of ADR does not necessarily dictate the policy choices we make, but it does reveal the true costs of those choices. Knowledge of the cost (and benefit) of public policy choice is a necessary step in making informed, good public policy.

The Research Report considers the use of ADR within the civil justice system. The civil justice system consists of both public and private dispute resolution services.

There are five major public suppliers of dispute resolution services:

- Courts;
- Tribunals;
- Statutory ADR suppliers;
- Government departments; and
- Community ADR suppliers.

Generally speaking, public dispute resolution suppliers are primarily funded using taxpayer monies.

There are three major categories for the private supply of dispute resolution services:

- Internal ADR within private commercial organisations;
- Industry ADR schemes; and
- Other private providers such as barristers, solicitors and private mediators.

Generally speaking, private dispute resolution suppliers are primarily privately funded without using taxpayer monies.

The rationale for government involvement in, and government funding of, civil justice services is essentially that civil justice may be viewed as a public good as there are social benefits that flow to the public/community as a result of effective and efficient resolution of civil disputes. As civil justice is seen as a public good, taxpayers primarily pay for the operation of a range of public dispute resolution services.



## ***Issues in Designing Best Practice ADR in Victoria***

The Research Report identifies the following issues to consider in designing best practice provision of ADR.

1. Should there be agreed definitions of ADR?
2. Issues with referral to and from ADR suppliers
3. Problems with awareness and promotion of ADR
4. Should there be a central access point for ADR services?
5. Achieving critical mass in ADR service providers
6. Problems caused by variable qualifications, training and accreditation of ADR practitioners
7. Variation of quality of ADR
8. The role of government and the private sector in funding ADR services

## ***Recommendations***

### ***Should there be agreed definitions of ADR?***

As part of a best practice strategy for ADR provision in Victoria, the regulation, facilitation or self-regulation of agreed definitions of ADR and ADR processes may be warranted. Such definitions may be best designed as general definitions that can be tailored within the context of their use, for example, either by a court, regulator or non-court service.

### ***Issues with referral between ADR suppliers***

There may be an appropriate role for government in working with ADR suppliers to address “referral loss”. Referral loss could be addressed by obtaining better data on referrals and referral “follow-up”, and by working towards agreed practice for appropriate/inappropriate referral to and from ADR, and for monitoring referrals. In the first instance, government may wish to consider establishing a pilot for improved referral protocols for significant referral pathways, for example, working with agencies that have recorded a high number of referrals and/or that receive a very large number of disputes. One referral pathway that received particular attention during the stakeholder interviews was that between CAV and VCAT - this could also be an option for initial attention. A further significant referral issue is the lack of referral to key enforcement agencies of disputes that would otherwise represent a breach of the law.

Finally, both the stakeholder interviews and the literature review suggest that consideration of pre-litigation ADR referrals may be of merit. For example, the government might wish to work with the courts to achieve mandatory pre-lodgement or pre-hearing ADR in the civil jurisdiction - with the undertaking of a cost-benefits analysis before implementation or following a pilot.

### ***Problems with awareness and promotion of ADR***

There may be a role for government in providing “umbrella” ADR awareness programs, as well as working with ADR providers on population-targeted initiatives designed to increase the awareness of ADR provision. To the extent that government is a significant funding provider for ADR the lack of evaluation of the effectiveness of consumer awareness spending by ADR providers appears to be undesirable. Government may wish to consider working with ADR providers on developing best practice awareness programs that include elements of market testing and appraisal to ensure that promotional monies are being spent effectively.

Finally, there may also be a need to consider the particular needs of certain populations, including those from CALD communities, indigenous Victorians, youth and low-income dispartants.

### ***Should there be a central access point for ADR services?***

There appears to be a case to consider a greater use of centralised access points for ADR services for efficiency and effectiveness reasons. Centralising entry to ADR services is, in fact, already being utilised. It would, however, be very difficult to create one central access point for ADR that “covers the field”. In short, there are so many different areas of endeavour to which ADR now applies, combined with multiple levels of government and regulatory responsibility, as well as a mix of both private and public funding, that the task of creating a sole access point may simply not be feasible (or, indeed, desirable).

### ***Achieving critical mass in ADR service providers***

There appear to be legitimate reasons to consider critical mass issues in the establishment of new agencies – for example, it may be sensible to consider a whole-of-government checklist of matters to consider when establishing a new ADR service. In short, such a checklist could be a useful policy design tool to ensure that ADR services are optimised.

### ***Problems caused by variable qualifications, training and accreditation of ADR practitioners***

There may be an important best practice role for Government in undertaking leadership in developing standards for training, qualification and accreditation of ADR practitioners, as well as standards for ADR services, for obvious reasons of effectiveness and efficiency. Of course, such best practice may need to be at a high-level, to ensure sufficient flexibility in application of standards as well as appropriate to the agency utilising the accreditation.

Moreover, other considerations will need to apply, particularly if any such move to quality standardisation was to be mandated. Careful cost/benefit analysis, combined with interstate and international comparatives may be required to ensure that standardisation does not introduce greater compliance and other costs than benefits achieved. In particular, potential to distort the efficient operation of the ADR market, for example by creating barriers to entry, in terms of creating artificial demand costs for suitably qualified staff would need to be considered.

### ***Variation in quality of ADR***

There appears to be a case to consider the development of comprehensive Key Performance Indicators (KPIs) for ADR services. Such KPIs could incorporate performance data and performance reporting based on benchmarks for best practice outlined in the Research Report. These KPIs would enhance comparison, funding efficiency and performance improvement.

### ***The role of government and the private sector in funding ADR services***

Government does have an important role in funding ADR services, particularly where there are other social goods associated with the services provided. Moreover, access to affordable ADR services for low-income or vulnerable consumers is an obvious area for government support.

There may be a case, however, for greater utilisation of cost recovery where the participants to the process are otherwise resourced and the benefits that flow from utilising ADR services are able to be captured between the participants (that is, they are true private benefits in the strict economic sense).

It also appears to be sensible to consider whether some industries could, as a whole, be providing greater support for ADR. At the moment there are industries in which disputes occur that do not necessarily make a contribution to ADR services comparable to industries that have

created (or are members of) recognised industry-based dispute resolution schemes. There does not appear to be obviously good reasons why this is the case.

### *Summary of the ADR Sector's Key Issues*

Stakeholders were asked to identify their priority issues for the ADR sector, and in particular, issues that may involve the participation of the Victorian Government. Most stakeholders identified two or three key issues. The issues are:

- Examining the efficiency of referrals and links between ADR providers;
- Increasing awareness/promotion of ADR;
- Developing a whole of government framework for ADR and articulating that framework;
- Examining opportunities for economies of scale and scope efficiencies;
- Undertaking appropriate analysis before establishing new (particularly small) stand-alone agencies;
- Increasing the use of ADR generally and ADR in courts specifically;
- Driving higher standards generally in schemes;
- Developing uniform accreditation standards;
- Developing uniform training standards; and
- Increasing resources to ADR providers.

## *Foreword*

I am delighted to present the Research Report examining the supply side of ADR in Victoria.

Effective, efficient dispute resolution that is expeditious and affordable is widely regarded as critically important for Victorians and has a range of potential beneficial impacts. These include preserving positive relationships, remedying individual detriment, increasing confidence in the use of markets (and the justice system) and providing pricing signals to industries to optimise their internal dispute resolution processes.

The development of ADR has occurred over an extended period of time. During this period, views have developed and changed regarding the best practice of ADR. An analysis of the meaning of the term ADR, as well as the history and current practice of ADR in Victoria, is timely, as is an analysis of the role of government in the provision of ADR.

The Research Report compiles and analyses the views of key senior ADR stakeholders in Victoria. In doing so, the Research Report presents an exciting and unique opportunity to better understand the past, present and possible futures of Victorian ADR.

### *Acknowledgments*

In preparing the Research Report I have received invaluable support, and feedback, from the staff of the Department of Justice, in particular Dr. David Cousins, Paul Myers, Lynn Kirk and Russell Bancroft. I have also received very helpful guidance and comments from the Department of Justice ADR Project Board: Dr David Cousins (Chair), Director, Consumer Affairs Victoria, Elizabeth Eldridge, Executive Director, Legal and Equity, John Griffin, Executive Director, Courts, Dr Claire Noone, Executive Director, Corporate Services. I acknowledge and appreciate their insights and support in preparing the Research Report. I have also received research and drafting assistance from Tracey Atkins, final year law student.

I record my sincere appreciation of the time generously given, and interest shown, by each of the ADR stakeholders interviewed as well as the contributions made to the interview process by Department of Justice staff, Paul Myers, Lynn Kirk and Russell Bancroft.

### *Important Note About Reading The Research Report*

The Research Report, at 220 pages in length, is a long document – such as was necessary to consider the issues addressed. I realise, however, that not every reader will have the time and/or need to consider the Research Report in its entirety. Accordingly, the reader should be aware that both Chapter Nine and Chapter Ten of the Research Report have been designed to be read as stand-alone chapters. Chapter Nine contains a comprehensive analysis of the issues identified in the preceding chapters of the Research Report that are relevant to designing best practice ADR. Where helpful for the reader, these issues include some summary of consideration given in previous chapters. Chapter Ten sets out issues identified by interviewed stakeholders that they consider relevant for government to consider in designing and implementing ADR strategies.

Accordingly, the Research Report can be read as a document from beginning to end, but a very useful alternative for readers would be to consider the Executive Summary, Chapter Nine and Chapter Ten as a separate (and much more manageable) Report.

## ***Chapter One: Introduction***

### ***1.1 What is ADR?***

There is no agreed single definition of ADR, or of the elements that constitute ADR processes and services. The following common elements of ADR can, however, be identified:

- ADR includes a range of dispute resolution processes;
- ADR does not include litigation;
- ADR is a structured informal process;
- ADR normally involves the intervention of a neutral third party; and
- ADR processes can be non-adjudicatory.

The definition of ADR is explored in detail in Chapter Three.

### ***1.2 Policy Context for the Research Report***

The development and use of ADR has received support from governments overseas and within Australia at both a federal and state level. The development of ADR in Victoria has been strongly supported by the Victorian Government. The Victorian government has supported the development of both private and public ADR services.

Government support for the development of public ADR is motivated by a range of factors, most importantly:

- enhancing citizens' access to dispute resolution processes;
- enhancing citizens' participation in dispute resolution processes;
- reducing costs and delays in the court system;<sup>1</sup> and
- other social policy objectives such as facilitating cost effective redress of disputes and facilitating access to dispute resolution services for vulnerable and disadvantaged citizens.

Recent Victorian government initiatives to promote ADR address these issues.

#### ***1.2.1 Recent Victorian Government Initiatives To Promote ADR***

The Victorian government has recognised that the expanded use of ADR within the Victorian civil justice system offers benefits for the development of a fair and accessible dispute resolution system. According to Victorian Attorney-General, the Honourable Rob Hulls:

All societies need to find effective ways for resolving disputes between their members. While these disputes may be private, Governments still play an important role in establishing the means by which these disputes can be resolved in order that the rule of law may be effective and justice be achieved ... the traditional method of dispute resolution has been adversarial and highly dependent on legal advocacy to navigate the law's complexities. While this method is most appropriate for more complex matters, it is my belief that the starting point for the resolution of any civil dispute should be the lowest possible level of intervention ... I see [value] in minimising the costs of disputes, in providing more efficient resolution and in ensuring that non-adversarial processes and remedies are available and adaptable to the needs and particular vulnerabilities of the disputants. Perhaps most importantly, this is my belief because I am convinced that the law can only benefit where parties feel they have participated in the decisions that will ultimately affect them.<sup>2</sup>

<sup>1</sup> Australian Law Reform Commission, Issues Paper 25: Review of the Adversarial System of Litigation – its Role in Federal Dispute Resolution (1998) [2.51].

<sup>2</sup> R Hulls, 'Justice Statement a "Groundbreaking Analysis of the Attorney-General's Entire Portfolio"' (2004) 128 Victorian Bar News, 10.

### **1.2.1.1 Justice Statement**

In the Attorney General's *Justice Statement* released in 2004, the Victorian Government identified the importance of the early resolution of civil disputes. The *Justice Statement* recognises that ADR has an important role to play in ensuring the resolution of civil disputes at the earliest possible stage. It also recognises that in this regard improving access to ADR processes is an important part of building a cohesive community that respects rights and diversity.

### **1.2.1.2 Department of Justice Strategic Priorities 2006**

The Department of Justice has identified ADR as a Strategic Priority for the civil justice system. The Department has recognised the challenge of accommodating the growth in demand for ADR in Victoria as well as the benefits of ADR processes. The Department's *Strategic Priorities 2006* state:

Demand for Alternative Dispute Resolution: There has been growth in demand for alternative dispute resolution, which offers a cost-effective and non-adversarial environment for resolving disputes.<sup>3</sup>

### **1.2.1.3 Contemporary Justice Service Delivery – ADR Project**

This research report forms part of the Victorian Government's commitment to the development and promotion of ADR in Victoria. This Research Report constitutes one component of the Department of Justice's *Contemporary Justice Service Delivery – ADR project*.

## **1.3 A Snapshot of ADR in Victoria**

The following snapshot, provided in tabular form, gives an indication of the significance of the supply of ADR in Victoria.

The data contained in Table 1 was obtained from responses to a questionnaire returned by 18 key Victorian ADR suppliers (full information on the methodology of the Research Report is contained in Chapter 2). The figures will, therefore, under-represent the number of contacts made to all ADR suppliers, on the basis that there are more than 18 suppliers of ADR in Victoria. Moreover, if the number of contacts were to include contacts with government departments, businesses and others who are the cause of the complainant behaviour (complainants seeking "internal dispute resolution"), the number would undoubtedly be much greater. The figures do not include ADR services provided by industry ombudsmen where data provided by the ombudsmen represents national complainant behaviour that is not disaggregated to the state or territory level.

**Table 1: Survey Findings – Contacts with Selected ADR Suppliers 1 July 2005 to 30 June 2006**

Total number ADR suppliers	18
Total number of contacts made to ADR suppliers	1,002,000
Matters referred to other agencies by agencies	29,000
Information enquiries responded to by agencies	92,000
Cases subject to mediation	31,000
Cases resulting in a determination	102,000

<sup>3</sup> Department of Justice, 'Strategic Priorities 2006: A Statement of Our Focus and Direction' (2006), 6.

## ***1.4 Background to the Research Report***

ADR is one of a number of strategic priorities for the Victorian Department of Justice. On 25 November 2005, the Justice Executive Committee approved initiation of the *Contemporary Justice Service Delivery – ADR* project. The project is overseen by a Project Board comprising the Executive Directors of Courts, Consumer Affairs, Legal & Equity, and Corporate Services. The Project Board is chaired by the Director of Consumer Affairs Victoria.

An interim project deliverable is a report on arrangements for the supply of ADR in Victoria based on qualitative and quantitative research conducted on key providers of ADR services. This research comprises interviews with key stakeholders, including courts and tribunals, industry ombudsmen, commissioners, government agencies and academics. This Research Report represents that deliverable.

### ***1.4.1 Key Performance Indicators***

As part of the background to the Research Report, the need for the development of performance indicators has been suggested. The development of performance indicators, and performance reporting, can assist government in better assessing and assisting the effective and efficient delivery of ADR services. Currently, it is considered that there is insufficient information upon which government can base those assistance decisions.

## ***1.5 Scope of the Research Report***

The Research Report examines the supply-side of ADR – the key Victorian institutional arrangements that provide ADR.

ADR in Victoria is undertaken by a wide range of government, industry and judicial bodies. While the Government is a significant supplier of ADR, independent statutory authorities and non-government bodies also supply ADR to consumers. Over the last fifteen years, industry-funded ADR has also become an important part of the supply side of the market for ADR services.

The Research Report examines ADR in Victoria by asking and answering the following questions:

- What is “ADR”?
- Who provides ADR in Victoria?
- When is it appropriate to use ADR services?
- What ADR services should government provide and/or fund (both directly and indirectly)?
- What are the key issues in designing best practice for ADR in Victoria?
- What are the key issues for the Victorian Government as identified by ADR stakeholders?

## ***1.6 Process of the Research Report***

The following is an overview of the process undertaken to prepare the Research Report. A detailed analysis of the processes undertaken is set out in the following chapter examining Research Report methodology.

### ***1.6.1 Stage 1: An Analysis of the Meaning of ADR***

What do we mean by the term “ADR”? As indicated above, the development of Victorian dispute resolution processes has occurred over a long period of time in a wide variety of settings. During this period of time, views have developed and changed regarding the best practice of ADR.

In this stage of the Research Report, an analysis of the past and present meanings of ADR was undertaken. This comprised of identification, and then analysis, of:

- articles published in Australian and international journals (both scholarly and non-scholarly);
- books published in Australia and internationally (both scholarly and non-scholarly)
- organisational websites; and
- reports of government and consultants' inquiries into dispute resolution in Victoria, Australia and internationally.

This theoretical analysis led to the development of an accurate understanding of the term "ADR".

### ***1.6.2 Stage 2: An Analysis of the Practice of ADR***

In this stage of the Research Report, the history and current practice of ADR in Victoria was examined. This comprised:

- setting out the historical development of institutional arrangements for ADR; and
- setting out the current institutional arrangements for ADR in Victoria.

The framework or "map" takes into account dispute resolution undertaken by government (for example Consumer Affairs Victoria), industry (for example, the Banking and Financial Services Ombudsman), judicial and quasi-judicial bodies (for example, the Victorian and Civil Administrative Tribunal) and independent statutory authorities (for example, the Health Services Ombudsman).

### ***1.6.3 Stage 3: Stakeholder Information***

The critical aspect of the Research Report was the undertaking, and analysis, of information provided by key Victorian ADR stakeholders. These stakeholders were chosen to represent a wide range of views about ADR in Victoria and were sourced from a wide range of government, non-government, industry and judicial bodies. Information was gathered utilising "one-on-one" style interviews, guided by a series of set questions as well as a follow-up questionnaire survey. The two methods were designed, respectively, to elicit data of a qualitative and quantitative nature.

### ***1.6.4 Stage 4: Preparation of Draft Research Report***

The consultant prepared a Research Report in draft form on the supply side of the ADR in Victoria incorporating the material gathered regarding the theory and practice of ADR, a critical analysis of that material and a qualitative and quantitative analysis of the data gathered through the stakeholder consultation process. The draft research report addressed the key questions posed in section 1.5 above.

### ***1.6.5 Stage 5: Preparation of Final Research Report***

The consultant has prepared the Research Report in final form incorporating comments of the Department of Justice.

## ***1.7 Format of the Research Report***

The Research Report has been separated into eight chapters as follows:

- Chapter One: Introduction
- Chapter Two: Methodology
- Chapter Three: What is ADR?
- Chapter Four: The History of ADR in Victoria
- Chapter Five: Who provides ADR in Victoria?



- Chapter Six: The Practice of ADR in Victoria
- Chapter Seven: When should ADR be utilised to resolve a dispute? The benefits and problems of ADR
- Chapter Eight: When should government fund ADR services?
- Chapter Nine: Issues in designing a Best Practice ADR Strategy
- Chapter Ten: What are the ADR sector's priority issues?
- Chapter Eleven: Bibliography

The Research Report also contains a number of appendices:

- Appendix 1: Letter inviting participation in stakeholder interviews
- Appendix 2: Interview questions document sent to stakeholders
- Appendix 3: Letter inviting participation in questionnaires
- Appendix 4: Questionnaire
- Appendix 5: Timeline of key developments in Australian ADR
- Appendix 6: Glossary
- Appendix 7: Detailed information about key stakeholder organisations
- Appendix 8: Map of the supply of ADR services in Victoria

## ***Chapter Two: Methodology***

### ***2.1 Introduction***

The methodology for the Research Report has been designed to deliver on the requirements of the Department of Justice for the study of the supply-side of ADR in Victoria. In particular, the Department of Justice sought an evaluation of qualitative and quantitative research conducted on the key providers of Victorian ADR services.

The methodology utilised in the Research Report is in three parts:

- Structured interviews with senior representatives of key ADR stakeholders;
- Questionnaires completed by key ADR stakeholders; and
- Literature review.

Each will be examined in turn.

### ***2.2 Interviewing Selected Stakeholders***

The critical methodological aspect of the Research Report has been interviews with a range of ADR stakeholders designed to elicit qualitative data to be utilised in evaluating the provision of ADR in Victoria.

#### ***2.2.1 Identification of Stakeholders***

The selected stakeholders were initially identified by the consultant and settled in consultation with the Department of Justice. The key stakeholders were chosen to represent a wide range of views about ADR in Victoria. The stakeholders represent courts, tribunals, government, statutory authorities, private providers and academia. In all cases, the stakeholders interviewed were very senior members of the selected organisations. This was deliberately intended for two reasons.

First, as the stakeholder interviews were designed to examine “big picture” questions, that is high-level policy and practice questions regarding ADR, it was considered by the consultant that very senior organisational representatives would be in the best position to comment on high-level issues. Moreover, to the extent to which the stakeholders were asked to consider issues beyond their own organisation, it was once again considered that senior representatives would be in the best position to offer views that extend beyond their own organisational experience.

Second, the stakeholder interviews represented a valuable opportunity for staff of the Department of Justice with an ongoing remit on ADR to establish networks with ADR suppliers in Victoria and that these networks were best established, in the first instance, at senior levels.

All selected stakeholders either directly supply ADR services in Victoria or have an integral role in governing, monitoring, funding, evaluating or studying the supply of ADR services in Victoria. It should be noted that some of the selected stakeholders supply ADR services more broadly than Victoria, providing ADR services across Australia. To include only those stakeholders that exclusively supply ADR services in Victoria would have created an artificial distinction that would have seen a range of critical ADR providers eliminated from the stakeholder sample (for example, industry-ombudsman schemes operating on a national basis). Having said that, where stakeholders operate outside Victoria, the answers sought from them have generally been tailored to Victorian experiences of ADR.

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**Table 2: Stakeholders Interviewed for Supplier Study**

Interviewee's Name & Title		Organisation
Mark Brennan	Commissioner	Office of the Victorian Small Business Commissioner Level 2, 55 Collins St Melbourne
Dr David Cousins	Executive Director, Consumer Affairs	Department of Justice 121 Exhibition Street Melbourne
Elizabeth Eldridge	Executive Director, Legal & Equity	Department of Justice Level 26, 121 Exhibition Street Melbourne
Ian Gray	Chief Magistrate	Victorian Magistrates' Court Level 7, 233 Williams St Melbourne
John Griffin	Executive Director, Courts	Department of Justice 121 Exhibition Street Melbourne
James Hartnett	Ombudsman	Public Transport Industry Ombudsman Level 14, 31 Queen St Melbourne
Fiona McLeod	Ombudsman	Energy and Water Ombudsman Victoria Level 19, 31 Queen St Melbourne
Victoria Marles	Commissioner	Legal Services Commissioner Level 10, 330 Collins St Melbourne
Alison Maynard	CEO	Financial Industry Complaints Service Level 13, 31 Queen St Melbourne
Justice Stuart Morris	President	Victorian Civil and Administrative Tribunal 55 King St Melbourne
Colin Neave	Ombudsman	Banking and Financial Services Ombudsman Level 5, 31 Queen St Melbourne
Sam Parrino	Ombudsman	Insurance Ombudsman Service 31 Queen St Melbourne
Tony Parsons	Director	Victoria Legal Aid 350 Queen St Melbourne
John Pinnock	Ombudsman	Telecommunications Industry Ombudsman Level 15, 114 William St Melbourne
Mark Richards	Customer Ombudsman	AAMI Level 3, 616 St Kilda Rd Melbourne
Tania Sourdin	Professor	School of Law La Trobe University (City Campus) Level 2, 215 Franklin St Melbourne
Helen Szoke	CEO	Victorian Equal Opportunity & Human Rights Commission Level 3, 380 Lonsdale St Melbourne
John Taylor	Deputy Ombudsman	Victorian Ombudsman Level 3, 459 Collins St Melbourne
Neil Taylor	General Manager, Dispute Resolution	Consumer Affairs Victoria 121 Exhibition Street Melbourne
Greg Tilse	Senior Policy Officer	Department of Justice 121 Exhibition Street Melbourne
Helen Versey	Acting Commissioner	Privacy Commissioner Level 11, 10-16 Queen St Melbourne
Beth Wilson	Commissioner	Office of the Health Services Commissioner Level 30, 570 Bourke St Melbourne
Teresa Zerella	Manager	Dispute Settlement Centre Victoria Level 4, 456 Lonsdale St Melbourne

### **2.2.2 Contact With Key Stakeholders**

A letter (or in the case of Department of Justice staff, a memo) inviting participation in the interview process was prepared by the consultant and settled by the Department of Justice. The letter appears at Appendix 1.

### **2.2.3 The Interviews**

The Research Report has been informed by interviews with key ADR stakeholders. Each interview was recorded using a digital recording device, transferred to the consultant's computer, transferred to a CD and then transcribed to a full written transcript by the Department of Justice. All recordings and transcripts held (electronically) by the consultant, as well as paper transcripts will be disposed of by the consultant on completion of the consultancy.

### **2.2.3.1 Number of Interviews Undertaken**

A total of twenty-three interviews were undertaken.

### **2.2.3.2 Design of Interview**

The interviews aimed to reveal a range of qualitative data relevant to the project goals. The interviews were guided by a standard set of twelve questions and took between 45–60 minutes to complete. The guided questions served two purposes:

- to facilitate the interview process, ensuring that it was timely and effective for participants as well as ensuring consistency across stakeholder interviews; and
- to provide a set of qualitative data to be used in analysing the supply of ADR in Victoria.

The guided questions were compiled by the consultant and settled by the Department of Justice.

The guided questions sought information about:

- Definition of ADR
- Supply-side framework
- Funding mechanisms
- Best practice models
- Quality assurance
- Role of Government

The guided interview questions were contained in a document that was sent to each stakeholder to be interviewed. The interview guide is reproduced at Appendix 2.

### **2.2.3.3 Format of Interview**

Stakeholder participation in interviews ranged from one representative per agency to several from one agency. I attended all interviews and Department of Justice staff, Paul Myers, Lynn Kirk and Russell Bancroft, between them, attended all interviews.

### **2.2.3.4 Confidentiality**

To promote full and frank contribution by stakeholders, interviewees were advised that stakeholder comments quoted in the Research Report would not be attributed to individual stakeholders without an express request from the Department of Justice.

### **2.2.3.5 Commentary on Stakeholder Interviews**

Engagement by stakeholders with the interview process was very pleasing. All stakeholders approached agreed to be interviewed and all gave extensive, highly informative answers. Stakeholders were positive about the project and the Government's interest in promoting study of ADR in Victoria.

The stakeholder interviews, as intended, have also created a useful senior-level entry-point for ongoing consultation between the Department of Justice and ADR providers.

## ***2.3 Survey of Key Stakeholders***

The second critical methodological aspect of the Research Report has been the undertaking of a survey with the selected ADR stakeholder organisations to collect quantitative data to be utilised in analysing the provision of ADR in Victoria. The questionnaire was not part of the project methodology as originally proposed, however, in designing the guided interview questions, it became apparent that a two-part process of interview and survey would be the optimum method for eliciting the appropriate qualitative and quantitative data.

During the stakeholder interview process, the consultant advised interviewees that the Department of Justice had designed a follow-up questionnaire document designed to elicit quantitative data to be utilised in evaluating the provision of ADR in Victoria. The key stakeholder interviewees were further advised that the questionnaire would be forwarded to them with a view to a person within their organisation completing and returning the questionnaire. The questionnaire document was subsequently sent to each of the key stakeholder organisations that had been interviewed. Where multiple interviewees from the one organisation (for example, the Department of Justice) were interviewed, only one questionnaire was sent to that organisation.

### ***2.3.1 Organisations Participating in the Survey***

The following organisations responded to the follow-up survey<sup>4</sup>:

- Accident Compensation Conciliation Service
- AAMI
- Banking and Financial Services Ombudsman
- Consumer Affairs Victoria
- Dispute Settlement Centre Victoria
- Energy and Water Ombudsman (Victoria)
- Financial Industry Complaints Service Limited
- Health Services Commission
- Legal Services Commission
- Magistrates' Court
- Ombudsman Victoria
- Public Transport Ombudsman (Victoria)
- Telecommunications Industry Ombudsman
- Victoria Legal Aid
- Victorian Civil and Administrative Tribunal
- Victorian Equal Opportunity and Human Rights Commission
- Victorian Privacy Commission
- Victorian Small Business Commission

At the time of writing the Research Report, a questionnaire response had not been received from the Insurance Ombudsman Service.

The following individuals participated in the qualitative phase of the supplier study but were not asked to complete a survey questionnaire:

- Dr David Cousins, Director, Consumer Affairs Victoria
- Elizabeth Eldridge, Executive Director – Legal and Equity, Department of Justice
- John Griffin, Executive Director – Courts, Department of Justice
- Professor Tania Sourdin, La Trobe University
- Neil Taylor, Consumer Affairs, Department of Justice
- Greg Tilse, Legal & Equity, Department of Justice

### ***2.3.2 Contact With Selected Stakeholders***

<sup>4</sup> ACCS was included in the questionnaire phase only.

A letter (or in the case of Department of Justice staff, a memo) inviting completion of the survey questionnaire was prepared by the consultant and settled by the Department of Justice. The letter appears at Appendix 3.

### ***2.3.3 Survey Questionnaire***

As noted, the Research Report was informed by a questionnaire completed by key organisations providing ADR.

#### ***2.3.3.1 Number of Questionnaires***

A total of nineteen questionnaires were sent to stakeholder organisations. The response rate was 94% (18).

#### ***2.3.3.2 Questionnaire Design***

The survey questionnaire was designed jointly by the consultant and the Department of Justice. The questionnaire was designed for ease of use and timeliness of completion and was deliberately kept to the minimum length (five pages covering 44 questions) necessary to collect the appropriate data. The questionnaire was designed to provide information about:

- the way matters are progressed within agencies;
- the types of matters dealt with;
- the types of services provided, for example, complaint handling, mediation, other types of determination;
- how services are funded;
- how services are promoted; and
- approaches to quality assurance and performance measurement.

The questionnaire was designed to be completed by a person other than the senior representative of the key stakeholder organisation who was interviewed, although in some cases, this is the person who has completed the questionnaire. The questionnaire was distributed by email and designed for electronic completion, however, respondents were given the option of providing a hard-copy response.

The survey questionnaire appears at Appendix 4.

#### ***2.3.3.3 Important Note on Data Discrepancy***

In certain cases there are some discrepancies between the data revealed through the interview process and that revealed through the survey process. These discrepancies appear to arise due because the person who completed the questionnaire differed from the person who undertook the interview.

## ***2.4 Literature Review***

The methodology utilised to prepare the Research Report incorporated an extensive literature review that consisted largely of the identification and analysis of literature relevant to ADR in Victoria. The literature reviewed includes:

- articles published in Australian and international journals (both scholarly and non-scholarly);
- books published in Australia and internationally (both scholarly and non-scholarly);
- websites belonging to ADR organisations;
- reports of government and consultants' inquiries into consumer advocacy in Victoria, Australia and internationally; and
- commentary by academics, regulators and consumer advocates available in the popular media (internet, print, radio and television).

A complete Bibliography appears in Chapter Eleven.

The literature reviewed is deliberately diverse to enhance the robustness of the conclusions drawn in the Research Report. Adding to the significant scope of these materials, the consultant brought ten years' professional experience in ADR to inform each stage of the Research Report.

### ***2.5 An Important Note About the Limitations of the Research Report***

The Research Report was commissioned by the Department of Justice. The budget for the Research Report allowed for a total of 55 days' work inclusive of all aspects of the Research Report. Given the complexity and scope of the topic, 55 days of work is, in fact, a limited amount of time. Accordingly, this paper does not purport to be a definitive, nor exhaustive, analysis of all of the issues relevant to an account of ADR in Victoria.

## Chapter Three: What is ADR?

### 3.1 Introduction

What do we mean by the term “ADR”? It is widely agreed among academics and ADR practitioners that ADR is difficult to define<sup>5</sup>. Despite the fact that ADR is widely used in Australia, the literature reveals no agreed single definition of ADR or ADR processes.

### 3.2 Definitions of ADR

The following are a range of definitions of ADR currently in use in Australia.

NADRAC defines ADR as:

ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.<sup>6</sup>

Sourdin defines ADR as:

[ADR is] used to describe the processes that may be used within or outside courts and tribunals to resolve or determine disputes (and where the processes do not involve traditional trial or hearing processes) ... the term ADR describes processes that are non-adjudicatory, as well as adjudicatory, that may produce binding or non-binding decisions. It includes processes described as negotiation, mediation, evaluation, case appraisal and arbitration.

The Access to Justice Advisory Committee defines ADR as:

[ADR] is an expression susceptible to many definitions. It can be given a very broad meaning and embrace any mechanism for resolving disputes other than court-based adjudication, including non-judicial adjudication (arbitration and expert determination) as well as consensual resolution mechanisms ... [or]<sup>8</sup> a narrower definition one that focuses on ADR as being consensual or non-adjudicative.

The *Dictionary of Conflict Resolution* defines ADR as:

[A] catchall generic term referring to ways in which a society with a formal, state sponsored adjudicative process attempts to resolve disputes without using that process. It is a class of dispute resolution mechanisms and is commonly understood to include alternatives to the formal adversary method of trial or litigation, as that process is understood in Western, particularly common law, systems.<sup>9</sup>

The *Encyclopaedia of Conflict Resolution* defines ADR as:

<sup>5</sup> See for example H Astor & C Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002); T Sourdin, *Alternative Dispute Resolution* (2<sup>nd</sup> ed, 2005); L Boule, *Mediation: Principles, Process, Practice* (2<sup>nd</sup> ed, 2005) and NADRAC, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003).

<sup>6</sup> NADRAC, above n 4.

<sup>7</sup> Sourdin, above n 4, 3. This definition was also used in Australian Law Reform Commission, *Alternative or Assisted Dispute Resolution: Background Paper 2* (December 1996).

<sup>8</sup> Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), 277.

<sup>9</sup> D Yarn (Ed), *Dictionary of Conflict Resolution* (1997), 17 as cited in G Tillett *Terminology in Dispute Resolution: A Review of the Issues and Literature* (2004) 15 Australian Dispute Resolution Journal, 180.



ADR is a broad term<sup>10</sup> that encompasses all forms of dispute resolution other than court-based adjudication.

Riekert defines ADR as:

All forms of dispute resolution other than litigation; dispute resolution processes that leave the form and content of any settlement to the parties; non-litigious processes with the intervention of an outside party.<sup>11</sup>

Laurence Street defines ADR as:

[T]he letters “ADR” are gaining a wider currency in ordinary usage, so are they gaining a broader connotation extending beyond mere dispute resolution processes. Recognising this, the letters should be seen in their own right as describing a holistic concept of a consensus-oriented approach to dealing with potential and actual disputes or conflict. The concept<sup>12</sup> encompasses conflict avoidance, conflict management, and conflict resolution.

### ***3.2.1 Common Elements of Definitions of ADR***

Despite the absence of an agreed single definition of ADR, there is broad commonality to the definitions of ADR provided above.

By examining the above definitions the following common elements of ADR can be identified:

- ADR includes a range of dispute resolution processes;
- ADR does not include litigation;
- ADR is a structured informal process;
- ADR normally involves the intervention of a neutral third party; and
- ADR processes can be non-adjudicatory.

### ***3.2.2 Common Elements of Definitions of ADR Identified by Stakeholders***

Some of the common elements of ADR identified by the literature were also recognised by the stakeholders. Stakeholders consistently recognised that:

- ADR includes a range of dispute resolution processes; and
- ADR does not include litigation.

There was less discussion by stakeholders about:

- ADR as a structured informal process; and
- ADR involving the intervention of a neutral third party.

There was little discussion by stakeholders about the adjudicatory nature of ADR processes, although it was clear that many stakeholders considered arbitration to be an ADR process.

One stakeholder made explicit reference to the NADRAC definition of ADR, while another provided a definition almost identical to the NADRAC definition.

*Stakeholder Comment*

*When we do our training, our mediation training, we talk about [ADR as] a spectrum of services or practices and we use the NADRAC definition to assist us in that. I think of ADR as kind of umbrella term for a range of dispute resolution methodologies, ranging from arbitration through to conciliation, mediation”.*

<sup>10</sup> H Burgess and G Burgess, *Encyclopaedia of Conflict Resolution* (1997), 8 as cited in Tillett above n 8, 180.

<sup>11</sup> J Riekert, ‘Alternative Dispute Resolution in Australian Commercial Disputes Quo Vadis?’ (1990) 9 *Australian Construction Law Newsletter*, 17-25, quoted in H Astor and C Chinkin, *Dispute Resolution in Australia* (1<sup>st</sup> ed, 1992), 68.

<sup>12</sup> L Street, ‘ADR: A Generic, Holistic Concept’ (April 2002) *Australian Law Journal* at <http://www.laurencestreet.com.au/pub.htm>

### 3.2.3 Other Issues Identified By The Stakeholders

The stakeholders also identified a range of other issues that were not commonly articulated in the ADR literature, including the consensual nature of ADR, and the capacity of ADR to empower disputants to resolve their own problems.

One stakeholder identified the consensual nature of dispute resolution as being an important defining feature of ADR.

*Stakeholder Comment*

*To my way of thinking it means resolving a dispute by getting a consensual outcome with the assistance of the system. Now how the system provides the assistance to get a consensual outcome can vary. And hence it's not just one method of ADR but I think the essence of it is to use the resources of the system to get a consensual outcome, not necessarily for the whole dispute either but at least of some of the dispute.*

One stakeholder identified the capacity of ADR to empower disputants to resolve their own problems as being an important defining feature of ADR.

*Stakeholder Comment*

*... one thing that characterises a lot of these different processes is that the power to resolving a dispute has to a certain extent been taken away from the State and given back to the parties who've got the dispute. That happens in varying degrees. In arbitration, parties would take their power to at least nominate an arbitrator as distinct from a state appointed person to make the decision. In mediation that's where there is a strong focus on empowerment for the parties and that gets the best results; the ideal results, which is why we use it as a form when third party intervention is needed.*

## 3.3 Debates About the Definition of the Term ADR

The literature reviewed reveals two primary debates about the definition of the term "ADR":

- Which ADR processes should be included within the term "ADR"? and
- What is the meaning and significance of the ADR acronym? In particular, is ADR 'alternative' or 'appropriate'?

### 3.3.1 Which ADR Processes Should Be Included Within The Term "ADR"?

The literature reviewed indicates that there remains some debate about whether the terms "negotiation" and "arbitration" should be included within the term "ADR".

Some writers argue that *negotiation* should not be included within the definition of ADR. It is argued that negotiation should be excluded, as it does not require third party intervention. Alternatively, where negotiation is used with third party intervention it is not a discrete ADR process, but rather a tool of the trade of the ADR practitioner.<sup>13</sup>

Some writers argue that *arbitration* should not be included within the definition of ADR. At the heart of this debate is the philosophical belief of some ADR proponents that ADR processes seek to "resolve" disputes through consensual interaction between the disputants. The rationale for the exclusion of arbitration is that arbitration (like litigation) is a determinative process and not a consensual process. In this context, determinative

<sup>13</sup> Riekert, above n 10.

processes are not viewed as dispute “resolution” processes as the outcome of the dispute is “decided” by the court or arbitrator.<sup>14</sup>

However, despite these debates, the literature reveals widespread agreement that both negotiation and arbitration should be recognised as ADR processes.<sup>15</sup>

Some stakeholders interviewed also expressed different views about processes that should be included as recognised ADR processes.

*Stakeholder Comment*

*On the far left for example you might have negotiation, where you don't have an external third party and then as you move more towards the court system you've got mediation and conciliation as an alternative to the courts but you have an external third party assisting in whatever way. I think that you'll find that the industry schemes make use of both. They are not part of the negotiation of the outcome, but I would still see it as an ADR exercise.*

In particular some stakeholders identified provision of information and advice as ADR processes.

*Stakeholder Comment*

*Mediation and conciliation are typical methods that are used in ADR. In our context ... I view ADR as broader than just simply that interventionary type approach. It also includes providing information and advice. So I see enquiries in particular as very much a part of our ADR approach, it's the first level if you like in providing people with sufficient information and advice to be able to resolve their own disputes. I think ADR is broader than just that strict mediation conciliation issues.*

Another stakeholder identified that the provision of information and advice was an ADR process and had an important function in preventing disputes.

*Stakeholder Comment*

*Obviously it is important to avoid disputes and maybe to resolve disputes in some cases by giving people information about their rights and what the law is, and so in a sense [ADR is] part of that whole process.*

Another stakeholder identified that internal dispute resolution (IDR) processes should not be included as ADR processes.

*Stakeholder Comment*

*"I see it as third party dispute resolution, so it's external dispute resolution in my view. So I wouldn't include internal business dispute resolution".*

### **3.3.2 What is the Meaning & Significance of the ADR Acronym? Is ADR 'Alternative' Or 'Appropriate'?**

The acronym ADR is commonly used to refer to “Alternative Dispute Resolution”. The literature reviewed indicates that there is contention about the meaning and use of the ADR acronym. The debate regarding the meaning and significance of the ADR acronym is important as it relates to theoretical questions about the relationship between ADR processes and traditional legal processes.<sup>16</sup>

<sup>14</sup> This distinction is clearly articulated by Street, above n 11. For a discussion about arbitration as a form of ADR see L Nottage, 'Is (International Commercial) Arbitration ADR?' (May 2002) *The Arbitrator and the Mediator*, 84.

<sup>15</sup> Sourdin, above n 4, 37.

<sup>16</sup> M Lewis and L McCrimmon, *The Role of ADR Processes in the Criminal Justice System: A View from Australia* (Paper presented at the ALRAESA conference in Uganda, 6 September 2005).

The use of a range of other synonyms for ADR including ‘appropriate’, ‘additional’, ‘assisted’, ‘administrative’, or ‘amicable’ dispute resolution have been identified in an attempt to remedy the positioning of ADR as an alternative to litigation.<sup>17</sup>

One stakeholder recognised the range of synonyms used for ADR and the attempt by the ADR “industry” to reconstruct the definition.

*Stakeholder Comment*

*It has undergone a series of reconstructions. Its original meaning was Alternative Dispute Resolution. The Industry has developed the terms Primary Dispute Resolution and Appropriate Dispute Resolution.*

### **3.3.2.1 Alternative Dispute Resolution: “Alternative” to What?**

Historically, ADR has been viewed as an “alternative” dispute resolution mechanism to traditional court based litigation. In this context, some authors have sought to define ADR by contrasting it with litigation as the dominant form of court based dispute resolution in Australia.<sup>18</sup> Put simply, ADR is used to define dispute resolution processes that are an “alternative” to litigation in the court system.

Many of the stakeholders interviewed identified that, at its most basic level, ADR was an alternative to litigation in the court system. This was the most commonly recognised definition of ADR amongst stakeholders.

*Stakeholder Comment*

*...in general terms ADR is any process that is outside of the litigation process... the key word is alternate. It's got to be an alternate to something. I've always interpreted it to be the alternate to the formal legal system. I would define it as an alternative to the court-judicial system. I think its just dispute resolution outside the Court and Tribunal system at both Commonwealth and State levels. It's a non-court based approach to dispute resolution. It just covers ... a wide range of alternatives to the court system. Generally for me the process of ADR is looking at an alternative from the traditional way that the Courts operate with the Magistrate, Judge or Tribunal Member sitting on a bench hearing both sides and then adjudicating through a jury process or using their own powers. It really encompasses a very broad range of practises which has to be an alternative to something. So perhaps the best way to look at it is an alternative to formalised dispute resolution which overwhelmingly is the case of courts and tribunals established by the State.*

Some stakeholders sought to place the development of ADR as an alternative to litigation in a social context.

*Stakeholder Comment*

*It arose because the court structure were cumbersome, too expensive, took too much time for certain type of disputes.*

Other stakeholders also recognised some of the benefits of ADR over litigation in the courts.

*Stakeholder Comment*

*At the highest level it's about using low-cost systems that deliver justice that meet the needs of the parties in a quick and efficient manner, without going through the traditional (court) hierarchy. I suppose broadly it's just a dispute resolution process as an alternative to traditional court processes. Basically it provides a more timely and cost effective outcome for both parties.*

However, the literature reveals several problems with this definition.

#### **3.3.2.1.1 The Term “Alternative” Is Historically And Socially Inaccurate**

<sup>17</sup> Astor and Chinkin, above n 4, 78. Sourdin, above n 4, 2.

<sup>18</sup> Riekert, above n 10.

The historical view of ADR as an “alternative” dispute resolution mechanism to litigation in the court system may be inaccurate. Astor and Chinkin argue “concentration upon ADR processes as ‘the other’ [alternative to litigation] bestowed a primacy on litigation that is historically and socially misleading”.<sup>19</sup> In other words, in reality the majority of disputes have been (and continue to be) resolved without the use of litigation in the court system, including by ADR processes.

### **3.3.2.1.2 The Distinction Between ADR & Litigation in the Court System Is No Longer Sustainable**

The historical view of ADR as an “alternative” dispute resolution mechanism to litigation in the court system is no longer sustainable. Current practice demonstrates that ADR and litigation “are not homogenous, separate and opposed entities”.<sup>20</sup>

Today ADR processes are accepted as mainstream dispute resolution methods and are widely used in a variety of dispute resolution contexts, including the court system. As Astor and Chinkin have noted “[t]he institutionalisation of ADR within courts, government departments and private enterprises means that it must be viewed as part of the overall schema of dispute handling”.<sup>21</sup> On this basis it has been noted that the dichotomy between ADR and traditional litigation in the court system is no longer conceptually or empirically sustainable.<sup>22</sup>

Most stakeholders interviewed recognised that the courts are increasingly using ADR, however only a few stakeholders included court ADR processes when asked what they understood the term ADR to mean. These stakeholders stated:

*Stakeholder Comment*

*The formal text book definition says it’s an alternative means of dispute settlement outside courts/tribunals. But it can also mean a way of resolving disputes where there is no court involved, for example, neighbourhood disputes.*

### **3.3.2.1.3 ADR is not a Complete Substitute for the Court System**

Sir Laurence Street has argued that ADR is not a true “alternative” or substitute for the court system. Instead, he argues, ADR may be seen as an “additional” supplement to the court system, rather than an alternative to it. He states:

It is not in truth ‘Alternative’. It is not in competition with the established judicial system ... nothing can be alternative to the sovereign authority of the court system. We cannot tolerate any thought of an alternative to the judicial arm of the sovereign in discharge of responsibility of resolving disputes between state and citizen or citizen and citizen. We can, however, accommodate mechanisms which operate as Additional or subsidiary processes in the discharge of the sovereign’s responsibility. These enable the court system to devote its precious time to the more solemn task of administering justice in the name of the sovereign.<sup>23</sup>

Only one stakeholder expressed a view that ADR should be seen as “additional” dispute resolution.

*Stakeholder Comment*

*I probably see it as Additional Dispute Resolution rather than alternative to the legal mode ...I would probably speak of it as being additional... I think the reality is that there’s a lot of blending, in the courts and at the determinative end as well.*

<sup>19</sup> Astor and Chinkin, above n 4, 77.

<sup>20</sup> Ibid, 39.

<sup>21</sup> Astor and Chinkin, above n 4, 79.

<sup>22</sup> Lewis and McCrimmon, above n 15.

<sup>23</sup> L Street, ‘The Language of ADR’ (1992) 66 *Australian Law Journal*, 194. at <http://www.laurencestreet.com.au/pub.htm>

### 3.3.3 Appropriate Dispute Resolution

In order to overcome the limitations of the definition of ADR discussed above some commentators prefer the use of the term “Appropriate Dispute Resolution”. It is argued that the term “Appropriate Dispute Resolution” recognizes that:

#### 3.3.3.1 ADR Processes are not a Second Best Option to Going to Court

The capacity of ADR processes to deliver justice has been questioned, for example by Sir Gerard Brennan who notes that “solutions reached by diversionary procedures may deliver cheaper but also a less satisfying form of justice”.<sup>24</sup> However, it has been recognised that in some circumstances the use of ADR processes will not be a second best option to going to court, rather, ADR may be the best or most appropriate dispute resolution method.

#### 3.3.3.2 ADR May be the Best or Most Appropriate Dispute Resolution Method in Certain Circumstances.

In some circumstances ADR may be the best or most appropriate dispute resolution method. It has been recognized that ADR may possess a number of benefits over litigation in the courts. Rather than an “alternative” to litigation in the courts, ADR processes may be better suited or more appropriate to the needs of some cases or some disputants.

The following are examples of circumstances in which ADR may be the best or most appropriate method of dispute resolution:

- Where a dispute has a low monetary value and litigation in the courts is not a cost effective option;
- Where the preservation of ongoing relationships between disputants is important, such as in family law matters, neighbourhood disputes and commercial disputes;
- Where a particular remedy (for example an apology is sought) which is not otherwise available using litigation in the courts.

Some stakeholders discussed ADR as an “appropriate” form of dispute resolution. There were different opinions expressed about the suitability of the term “appropriate dispute resolution”.

#### *Stakeholder Comment*

*Well I still prefer the expression that means Alternative Dispute Resolution, I have heard people who use plenty of other words for the A including Appropriate Dispute Resolution and so on and so forth. But to my way of thinking that's confusing because sometimes the appropriate method to resolve a dispute is adjudication and when people talk about ADR they are not talking about adjudication. So I still personally prefer the concept of Alternative Dispute Resolution.*

#### 3.3.3.3 ADR As The Primary Method of Dispute Resolution

One stakeholder recognised that ADR is now so popular that it is no longer an alternative form of dispute resolution but a primary form of dispute resolution. Within the family law area ADR has been renamed “primary dispute resolution” for this reason.

#### *Stakeholder Comment*

*There is a view around now that industry-based ombudsman schemes or, that alternative dispute resolution, is no longer alternative but it is the primary form of dispute resolution in this country. In the sense that you know many more people go through all the forms of alternative dispute resolution than go through the courts, and that's numerically demonstrable. I haven't talked about it before, but the view was put to me that it's no longer alternative dispute resolution, you know conciliation, mediation they're the primary forms of dispute resolutions in Australia.*

<sup>24</sup> G Brennan ‘Key issues in Judicial Administration’ (1996) 6 *Journal of Judicial Administration*, 141-142.

### 3.3.4 ADR, Conflicts & Disputes, Resolution, Settlement & Management

In addition to debate regarding the meaning of “A” in ADR, the literature reveals that there is also debate regarding the meaning of “D” and “R”.<sup>25</sup>

#### **“D”: Dispute Resolution or Conflict Resolution?**

Is ADR about resolving conflicts or resolving disputes? In this context what is the difference between a conflict and a dispute? The literature reveals that some authors use these terms interchangeably, while others seek to distinguish the two. For example, according to the *Dictionary of Conflict Resolution*:

A dispute exists after a claim is made and rejected. A conflict, however, can exist without a claim being made. Thus, although a dispute cannot exist without a conflict, a conflict can exist without a dispute.<sup>26</sup>

#### **“R”: Resolution or Settlement?**

Is ADR about resolution or settlement or management of disputes? Again, the literature reveals that some authors use these terms interchangeably, while others seek to distinguish them. For example, according to Laurence Street and NADRAC, the concept of ADR may encompass conflict avoidance, conflict management, and conflict resolution.<sup>27</sup>

## 3.4 Other Definitional Issues Raised by Stakeholders

One stakeholder opined that the definition of ADR can vary according to the context in which it is used.

#### *Stakeholder Comment*

*[ADR] means different things by jurisdiction and within jurisdictions. ADR in the Magistrates' Court could embrace the whole concept of therapeutic jurisprudence, the whole concept of how courts are shifting from the traditional adversarial model using the coercive powers of the Magistrate, to actually applying a management model which is very dependent, whether its family violence, or the Koori Court - where the Aboriginal elders are far more involved in the resolution of the issue, through to some of the more recent initiatives in terms of sexual assault areas.*

<sup>25</sup> See for example Tillett, above n 8.

<sup>26</sup> Yarn, above n 68 as cited in Tillett, above n 68, 180.

<sup>27</sup> Street, above n 11.

## Chapter Four: The History of ADR in Victoria

### 4.1 Introduction

It is difficult, and ultimately unhelpful, to examine the history and development of ADR in Victoria in isolation from the broader development of ADR in Australia. Consequently, this chapter will examine the history and development of ADR in Australia, and will, where appropriate, provide information relating to the Victorian experience.

The practice of ADR has a long history in Australia. Indeed, some commentators have identified that the emergence of ADR in Australia can be traced from indigenous systems of justice. The increased popularity of ADR in Australia, and in other common law countries, is a more recent phenomenon that has occurred over the past 25 years.

The emergence and development ADR in Australian society may be seen as a result of a range of historical, cultural and other social factors,<sup>28</sup> that this section will seek to explore.

### 4.2 ADR & Indigenous Communities – A Kinship System of Rights & Dispute Resolution

Indigenous communities have a long history of using techniques we now define as ADR to resolve conflict, although they possess limited resemblance to Western ADR models.<sup>29</sup> Astor and Chinkin have noted that the use of ADR techniques by indigenous communities precedes white settlement of Australia. Dispute resolution processes used by indigenous communities arose out of cultural norms, namely a kinship system of rights and obligations, and aimed to restore harmony in the community.<sup>30</sup> Dispute resolution techniques used by indigenous communities included exclusion, compensation and shaming.<sup>31</sup>

### 4.3 Early ADR in Australia – Adjudicative Processes & Labour Market Disputes

The early focus of ADR in Australia was on collective dispute management using adjudicative processes, in particular conciliation and arbitration. The use of arbitration in Australia commenced at the time of British settlement. Arbitration was established in England in the late 1600s.<sup>32</sup> Australia's use of arbitration was inherited from the British law in the form of the UK *Arbitration Act 1697*, which allowed parties to refer a civil action to arbitration, and for the resulting arbitration award to be enforceable as a judgement of the court.<sup>33</sup>

Historically, arbitration and conciliation have been used in Australia as collective dispute management processes to resolve labour market disputes. Section 51 (xxxv) of the Australian Constitution provides for the use of arbitration and conciliation for the prevention of industrial disputes. The *Conciliation and Arbitration Act 1904* (Cwth) established the Commonwealth Court of Conciliation and Arbitration. Following a number of High Court decisions that the exercise of judicial power by an arbitral body was unconstitutional, the arbitral and judicial functions of the

<sup>28</sup> Sourdin, above n 4, 11.

<sup>29</sup> Boule, above n 4, 50.

<sup>30</sup> Ibid.

<sup>31</sup> Astor and Chinkin, above n 10, 5.

<sup>32</sup> Sourdin, above n 4, 11.

<sup>33</sup> Astor and Chinkin, above n 10, 6.



Court were later divided between the Conciliation and Arbitration Commission and the Industrial Court respectively.<sup>34</sup> From this time on, arbitration emerged as the primary method for making awards and settling industrial disputes in Australia. However, Condliffe has noted that use of conciliation and arbitration to resolve labour market disputes has “progressively developed into a rather formal, litigious system”.<sup>35</sup>

#### ***4.4 ADR at the Periphery of the Justice System***

In the 1960s and 1970s, access to justice emerged as a key area of community concern in Australia. Astor and Chinkin explain the emergence of access to justice concerns as follows:

From about the 1960s onwards there has been a perceived tension between the promise of substantive justice and its delivery by the formal justice system. This tension has motivated the international movement associated with access to justice that has urged various methods for enhancing substantive justice ... These [methods] include the creation of additional institutions such as the ombudsman and administrative tribunals, which increasingly draw on the philosophies of ADR.<sup>36</sup>

The notions of community participation, empowerment and self-determination were also central concerns of the access to justice movement. Indeed these notions of community participation, empowerment and self-determination are widely recognised as the roots of the modern ADR movement. As Condliffe notes:

Most arbitration, ombudsmen and tribunal systems provide alternatives to traditional litigation but do not necessarily provide for the self-determination of the disputant parties, which is central to mediation programs. It was this emphasis which tied mediation to the rise of communitarian and consumer rights ideals and projects of the time which marks the beginning of the modern ADR movement.<sup>37</sup>

The access to justice concerns of the 1960s and 1970s focussed on the development and use of ADR on the periphery of the formal litigation system. Three important ADR developments occurred during this time: the development of the Ombudsman in Australia; the development of a system of tribunals and the development of Community Justice Centres. Each of these developments will be considered in turn.

##### ***4.4.1 The Development of The Ombudsman In Australia***

The word Ombudsman can be loosely translated as “the representative of the people”. The Ombudsman is an impartial and independent person who can investigate and resolve disputes between citizens and government. The Ombudsman is an important mechanism to ensure the accountability of public administration in democratic societies.<sup>38</sup>

While the origins of the Ombudsman can be traced back to 1809 when the Swedish Riksdag created the office, it was not until the 1960s and 1970s that Ombudsmen were introduced in common law countries.<sup>39</sup>

Ombudsmen were first introduced in Australia in the 1970s. Australia's first Ombudsman was appointed in Western Australia in 1971. Soon after, Ombudsmen were appointed in Victoria in

<sup>34</sup> Department for Constitutional Affairs, DCA Research Series No. 8/05: Administrative Justice and Alternative Dispute Resolution: The Australian Experience (2005), 51.

<sup>35</sup> P Condliffe, ‘A Short History of Alternative Dispute Resolution in Australia: 1975-2000’, (2000) 19 *The Arbitrator*, at <http://www.iama.org.au/journal/jn200011/condliffe01.htm> accessed 16/10/2006.

<sup>36</sup> Astor and Chinkin, above n 4, 12-13 (footnotes omitted).

<sup>37</sup> Condliffe, above n 34.

<sup>38</sup> A detailed discussion of the history and development of the Ombudsman in Australia can be found at the Commonwealth Ombudsman website at <http://www.ombudsman.gov.au>

<sup>39</sup> The plural form of Ombudsman is correctly Ombudsmanner (based on its Swedish derivation). The plural adopted for the Research Report is Ombudsmen.

1972, and in Queensland and New South Wales in 1974. The first Commonwealth Ombudsman was appointed in 1977.<sup>40</sup>

The introduction of the Commonwealth Ombudsman in Australia forms part of what has been termed the “new administrative law”. The impetus for the development of the “new administrative law” was the increase in the number and complexity of administrative processes of government in Australia during the 1960s and 1970s. As access to justice through the courts was beyond the reach of ordinary Australians, citizens possessed no realistic or affordable means to test administrative actions or decisions.<sup>41</sup>

To overcome these problems a range of measures were introduced to provide a coordinated approach to administrative law and administrative review. Together, these measures constitute the “new administrative law”. The structure provided by the “new administrative law” is as follows:

- the office of the Commonwealth Ombudsman (established by the Ombudsman Act 1976);
- a general administrative appeals tribunal called the Administrative Appeals Tribunal (established by the *Administrative Appeals Tribunal Act 1975*);
- a new system of judicial review (established by the *Administrative Decisions (Judicial Review) Act 1977*); and
- a body to monitor and review the new administrative law structure called the Administrative Review Council (established by the *Administrative Appeals Tribunal Act 1976*).<sup>42</sup>

Within this structure the role of the Ombudsman is to investigate and seek to resolve complaints concerning administrative actions by government departments and public statutory bodies. The Victorian Ombudsman also investigates complaints concerning officers or employees of any municipality to which the *Ombudsman Act 1973* (Vic) applies.

#### ***4.4.2 Development of a System of Tribunals***

Over approximately the last 30 years, a large number of specialist tribunals have been developed. The development of tribunals created alternatives to the courts and in this respect is alternative dispute resolution, although tribunals can be more or less “court-like” depending on the processes they adopt.

In Victoria a number of tribunals have consolidated into the Victorian Civil and Administrative Tribunal (**VCAT**). VCAT is a consolidation of twelve separate boards and tribunals. VCAT has two divisions - the Administrative Division and the Civil Division.

VCAT deals with various disputes, including small civil claims, domestic building works, residential tenancy matters, retail tenancy matters, consumer matters, guardianship and administration, credit matters, discrimination and human rights matters and others. Disputes are either heard at a hearing or by mediation.<sup>43</sup>

A form of ADR, mediation, is used extensively in the Anti-Discrimination List, Domestic Building List, Planning and Environment List, and Retail Tenancies List.<sup>44</sup>

#### ***4.4.3 Community Justice Centres***

Although Ombudsmen and tribunals provided alternatives to traditional court based dispute resolution they did not, necessarily, address issues of empowerment and self-determination of the parties.

<sup>40</sup> Commonwealth Ombudsman website at <http://www.ombudsman.gov.au>

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> VCAT website at <http://vcat.vic.gov.au>

<sup>44</sup> Ibid.

Abel explains the progressive, community values that ADR sought to embody:

...the preference for harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all citizens to participate in decision making rather than limiting authority to the professionals, that are familiar rather than esoteric, and that strive for and achieve substantive justice rather than frustrating it in the name of form.<sup>45</sup>

These progressive, community values are reflected in the development of Community Justice Centres (CJCs). The establishment of CJCs was an important development in the provision of ADR in Australia.

The role of CJCs was to provide an informal, accessible, low cost dispute resolution service to the community. CJCs focus on assisting disputants to be responsible for the resolution and outcome of their own disputes.

CJCs were established in NSW in 1983, Victoria in 1987 (in Victoria CJCs were called neighbourhood mediation centres) and QLD in 1990<sup>46</sup>. Based in the community, CJCs are government funded. CJCs were modelled on neighbourhood justice centres in operation in the United States. CJCs aimed to provide access to information and dispute resolution to all sections of the community. In particular CJCs sought to use ADR methods, particularly mediation, to resolve household and neighbourhood disputes. The use of mediation and other ADR techniques by CJCs operated on the periphery of the formal litigation system as the disputes that they sought to resolve had "little legal content."<sup>47</sup>

CJCs have been credited with pioneering the use of mediation in neighbourhood disputes, victim offender mediation and family mediation.<sup>48</sup>

In an interesting shift, CJCs are now called Dispute Settlement Centres and have been brought into government ADR service provision. Today, Dispute Settlement Centre Victoria continues to help Victorians to resolve their own disputes by providing free or low cost mediation and facilitation services.

## ***4.5 ADR in the Formal Legal System***

While the early development of ADR in Australia was seen to occur on the periphery of the formal legal system, its success in these areas and its perceived benefits when compared with the litigation in the courts, saw it increasingly expand its reach into the formal justice system.

### ***4.5.1 The Family Court - Pioneering ADR***

The establishment by the Commonwealth Government of the Family Court in 1975 was an early example of the use of ADR practices, particularly mediation and conciliation, within Courts. The Court's focus on mediation and conciliation evolved out of the use of counselling in family disputes.

Government support for the use of ADR in the Family Court was based on two beliefs. Firstly, that as family law matters involved ongoing relationships disputes, they should be settled with a minimum of bitterness and distress. Secondly, litigation was viewed as detrimental to the interests of the children. Therefore, the philosophy underlying the use of ADR processes in the

<sup>45</sup> R Abel, *The Politics of Informal Justice* (vol 1) (1982), 310 as cited in Astor and Chinkin, above n 4, 37.

<sup>46</sup> Condliffe, above n 34.

<sup>47</sup> Boule, above n 4, 143.

<sup>48</sup> Condliffe, above n 34.

Family Court was that the non-adversarial nature of ADR processes was better suited to the resolution of family disputes than litigation.

The Family Court emphasised dispute resolution without the need for litigation. It also sought to emphasise informality, disputant empowerment and pre-trial dispute resolution processes.<sup>49</sup> According to Astor and Chinkin:

Before the court was established criticism had been addressed to problems with the court structure and the legalistic procedures which face married couples should they turn to the law to resolve their personal problems. The new court was designed as a 'helping court' with active pre-divorce and post-divorce counselling facilities to assist reconciliation and to provide for the reduction of bitterness and distress and the alleviation of ongoing post-divorce problems. The judiciary were to be chosen for their experience and understanding of family problems. Judges were to develop a new type of court where they would act with the minimum of formality, coordinating the work of ancillary specialists, encouraging conciliation and only applying the judicial powers of the court as a last resort. The new Family Court judge was not to be a counsellor but he should control proceedings, advance optional solutions and create the 'climate' for settlement.<sup>50</sup>

While some critics have argued that the Family Court has failed to fulfil its potential in relation to informality, disputant empowerment and pre-trial dispute resolution, its ADR focus has nonetheless contributed to the development of ADR within Australian courts and tribunals.<sup>51</sup>

The use of ADR in the Family Court has continued to increase since its inception. The use of ADR within the Family Court is now seen to be such an integral part of the operation of the court that it has been renamed "Primary Dispute Resolution" (PDR). The term PDR suggests that rather than be viewed as an "alternative" form of dispute resolution, these methods are to be seen as the "primary" method of dispute resolution in this court. PDR includes counselling, mediation, arbitration, neutral evaluation, case appraisal, and conciliation. The National Alternative Dispute Resolution Advisory Council (NADRAC) defines PDR as follows:

PDR (Primary Dispute Resolution) is a term used in particular jurisdictions to describe dispute resolution processes which take place prior to, or instead of, determination by a court. The Family Law Act 1975 (Cwth) 'encourages people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made' (section 14). The Federal Magistrates Act 1999 defines primary dispute resolution processes as 'procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth, and includes: (a) counselling; and (b) mediation; and (c) arbitration; and (d) neutral evaluation; and (e) case appraisal; and (f) conciliation' (section 21).<sup>52</sup>

#### ***4.5.2 The Sackville Report***

In the early to mid 1990s access to justice concerns again occupied social and political debates. Many people in the community believed access to justice through the formal litigation system to be inaccessible due to cost, delay, formality, complexity of proceedings and the use of technical language. The then Chief Justice of the High Court Sir Gerard Brennan stated:

Consider the present position. The courts are overburdened, litigation is beyond the reach of practically everybody but the affluent, the corporate or the legally-aided litigant ... it is not an overstatement to say that the system of administering justice is in crisis.<sup>53</sup>

<sup>49</sup> Ibid.

<sup>50</sup> Astor and Chinkin, above n 4, 17 (footnotes omitted).

<sup>51</sup> Condliffe, above n 34.

<sup>52</sup> NADRAC, above n 4.

<sup>53</sup> F Brennan and T Eichelbaum, 'Key Issues in Judicial Administration' (Paper presented to the 15th Annual Conference of the AIJA, 1996).

*Access to Justice: An Action Plan* (the Sackville report) is the major report into access to justice in Australia. The Sackville report recommended a range of changes designed to improve the accessibility of the legal system.

In relation to the use of ADR, the Sackville report noted that ADR could play an important role in increasing access to justice.<sup>54</sup> ADR offered a range of benefits over litigation in the court system including that ADR was seen to be cheaper, less formal, procedurally simpler, less subject to delay and less use of technical language than the court system.<sup>55</sup> To this end the report stated: “ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes”.<sup>56</sup>

The significance of the Sackville report for ADR was an acknowledgement that ADR should no longer exist on the periphery of the formal litigation system. Instead, ADR should be integrated into the formal litigation system to assist in overcoming a range of problems associated with its operation.

The Sackville report recommended that a national ADR advisory body be created to provide policy advice to the Federal Government and courts about developing a high quality, accessible, integrated commonwealth ADR system.<sup>57</sup> NADRAC was established in 1995.

NADRAC describes their role as follows:

NADRAC’s role is to advise the Commonwealth Attorney-General on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision and promotes the use of ADR. NADRAC has provided advice on such matters as ADR standards, criteria for referral to ADR, diversity in ADR, ADR in small business, the use of technology in ADR, ADR research and Indigenous dispute resolution.<sup>58</sup>

The Sackville Report also acknowledged the important role of ADR in case management and supported the use of court annexed ADR. The report noted:

There are strong arguments in favour of court-annexed ADR. They include the reduction of costs associated with the early resolution of a dispute and the increased capacity of a court to cope with its caseload. In short, it is argued court-annexed ADR provides an opportunity to make better use of existing resources, to speed decision-making and to enhance the acceptability and quality of decisions, all in a forum where disputes are traditionally resolved.<sup>59</sup>

The report did not support a statutory scheme for the accreditation of mediators at this time.<sup>60</sup>

The 2004 Victorian Attorney-General’s Justice Statement represents another significant step in the recognition of the importance of ADR in increasing access to justice. The Justice Statement is discussed at 1.2.1.1 above.

### **4.5.3 ADR In Courts**

Over The Past 10 Years ADR Processes Have Increasingly Become Part of The Court System.

<sup>54</sup> Access to Justice Advisory Committee, above n 7, 278.

<sup>55</sup> Boule, above n 4, 148. Boule also notes that not all of these claims can necessarily be substantiated.

<sup>56</sup> Access to Justice Advisory Committee, above n 7, 278.

<sup>57</sup> Ibid, 300.

<sup>58</sup> NADRAC, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (2006).

<sup>59</sup> Access to Justice Advisory Committee, above n 7, 293.

<sup>60</sup> Ibid.

The Literature Reviewed Reveals Two Views About The Use of ADR Within The Courts. In The First instance the role of ADR is as an alternative to litigation in the court system (that is, the dispute is not resolved in the courts). Here ADR is seen as being separate from litigation, but complimentary to it. In this context the role of ADR is to divert matters from the litigation system. As Sourdin explains:

From this perspective, the role of ADR is to reduce the burden on the courts by ensuring that only those disputes which cannot, or should not, be resolved by other means end up in court. It is in this light that mechanisms for referring disputes to ADR have increasingly been incorporated in to the Australian court system.<sup>61</sup>

Pre-filing and post-filing ADR are examples of the use of ADR processes to divert disputes from the litigation system.

Secondly, the role of ADR is to reform litigation practice within the court system. Here ADR is incorporated into the operation of the court to deliver a range of benefits. Here, the matter is resolved in the courts but by the use of an ADR mechanism (for example, the compulsory use of mediation in certain cases by courts). Condliffe has identified three broad trends in relation to the use of ADR to reform litigation practice in the court system:

1. Self-Governing Courts

A number of courts (for example, the High Court and the Federal Court) have been made self-governing. As a result, these courts have assumed responsibility for their own workloads and resources. Managing their own workloads and resources has had the effect of sensitizing these courts to cost pressures on the court and court clients. In this context, some courts use ADR processes in an attempt to reduce court operating costs;<sup>62</sup>

2. Case Management

The development of case management in courts has forced courts to use more flexible methods of dispute resolution to overcome problems with court lists and processes. In this context, some courts use ADR processes to promote early settlement of disputes or to divert disputes from the traditional court system;<sup>63</sup> and

3. Better Quality Court Services

Some courts have sought to adopt various ADR processes to make their services more “accountable, client centred and efficient”.<sup>64</sup> Today, courts in all Victorian jurisdictions use some form of ADR process.

The literature reviewed reveals that current debates about the use of ADR within courts focus on whether court referral to ADR should be discretionary or mandatory and whether participation in ADR should be voluntary or compulsory, rather than desirability of courts using ADR processes.

## ***4.6 Government Provided ADR***

Government departments and agencies will also provide very significant levels of ADR services. For example, the ADR services provided by Consumer Affairs Victoria.

<sup>61</sup> T Sourdin ‘Legislative Referral to Alternative Dispute Resolution Processes’ (2001) 12 *Australian Dispute Resolution Journal*, 180.

<sup>62</sup> Condliffe, above n 34.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

## ***4.7 Development of Industry Codes of Practice, Private IDR & Industry ADR Schemes***

Since the 1980s, commentators have speculated that the rise of so-called “free-market” ideologies has brought with it reduced government intervention and a belief that industries have a role in regulating themselves. Government support for market-based regulation is based on a belief that self-regulation offers benefits for industry and consumers alike.<sup>65</sup>

This self-regulatory framework (and the deregulation and privatisation of formerly government-owned services) has provided the basis for the development of codes and an expansion of industry codes of practice, private internal dispute resolution and industry ADR schemes as key methods to resolve consumer disputes. The avoidance of “heavier-handed” mechanisms has provided an incentive for private industry-based dispute resolution schemes to develop. In this sense, industry-schemes serve the interests of businesses as well as consumers. These dispute resolution methods have emerged most notably in the financial services, insurance, telecommunications and energy industries, for example, the Insurance Ombudsman Service and the Energy and Water Ombudsman Victoria.

ADR services also exist in co-regulatory frameworks as well as those where there is a more extensive government regulatory role (including, for example, economic regulation and licensing).

### ***4.7.1 Industry Codes of Practice***

Industry Codes of Practice Are The Most Widely Used Form of Industry Self-Regulation In Australia. Although The Content of Codes of Practice Varies From Industry To Industry, It Will Usually set out agreed standards and responsibilities for participating businesses or for an industry. Sometimes industry codes of practice will be expressed as general statements of principle about the operation of a business or industry, or guaranteed business practices and standards. Standards may relate to values, disclosure information, customer service or complaints handling procedures. Some codes of practice will also provide for consumer dispute resolution through a recognised industry scheme.<sup>66</sup>

Industry compliance with a code of practice may be voluntary or mandatory. Mandatory compliance may be a condition of membership of a professional or industry association. It may also be a legislative requirement or a requirement for licensing.<sup>67</sup> Codes have been developed in a range of industries including life insurance, general insurance, insurance brokers, financial planners, banking, credit unions and direct marketing.

### ***4.7.2 Private Internal Dispute Resolution Schemes***

Within the self-regulation framework many businesses have developed their own private internal dispute resolution schemes. Internal dispute resolution is an important consumer dispute resolution mechanism as it promotes the resolution of consumer disputes directly with the business concerned.

Internal dispute resolution schemes vary from business to business. It may be a requirement of an industry code or license that an internal dispute resolution scheme take a particular form or meet particular standards. Some businesses may have only a short dispute resolution policy or process, while large businesses may have an entire department to deal with complaints

<sup>65</sup> For a detailed discussion of industry codes of practice, internal dispute resolution and industry ADR schemes see C Field, *Current Issues in Consumer Law and Policy* (2006), 85-102.

<sup>66</sup> *Ibid.*, 86.

<sup>67</sup> *Ibid.*

handling. Indeed some businesses, such as AAMI, have established their own internal Ombudsman schemes.

I have previously observed that internal dispute resolution is an important dispute resolution process as:

[Internal dispute resolution] is suggested to be more cost-effective, more timely, and probably more likely to lead to successful ongoing relationships with consumers. [Internal dispute resolution] processes are not necessarily about the consumer winning, but they are about resolving disputes expeditiously, fairly and affordably.<sup>68</sup>

#### **4.6.3 Industry ADR Schemes**

Industry ADR schemes first emerged in Australia in the early 1990s. Like industry codes of practice and private industry dispute resolution, industry ADR schemes are essentially a product of industry self-regulation.

I have also observed that industry ADR schemes have had a profound effect on dispute resolution:

Industry schemes have changed the landscape in relation to consumer dispute resolution in Australia. The courts and tribunals remain too inaccessible to many consumers because of their cost. In contrast, industry schemes provide consumers with a free dispute resolution mechanism by which to seek to resolve their consumer complaints.<sup>69</sup>

Industry ADR schemes aim to provide individual consumers with a quick, inexpensive, informal and flexible method for resolving disputes with service providers without the need for a judicial decision. Industry ADR schemes are generally funded by a levy on member institutions.<sup>70</sup>

The first industry ADR scheme developed was the Australian Banking Industry Ombudsman (now the Banking and Financial Services Ombudsman). The impetus for the development of the scheme was the “high cost of litigation, the inability of the average consumer to contest matters in court against a bank and the inadequate in-house dispute resolution mechanisms of banks”.<sup>71</sup>

There are a number of industry ADR schemes currently operating in Australia. Industry schemes cover a wide range of industries including banking and financial services, insurance, utilities and telecommunications. Industry schemes may operate at a national or state level. The following is a list of some of the major industry schemes currently in operation:

##### **NATIONAL SCHEMES**

- Telecommunications Industry Ombudsman
- Banking and Financial Services Ombudsman
- Insurance Ombudsman Service
- Financial Services Industry Complaints Service
- Private Health Insurance Ombudsman

##### **VICTORIAN SCHEMES**

- Energy and Water Ombudsman Victoria
- Public Transport Industry Ombudsman (Victoria)

<sup>68</sup> Ibid, 90.

<sup>69</sup> Ibid, 92.

<sup>70</sup> Ibid, 93

<sup>71</sup> House of Representatives Standing Committee on Finance and Public Administration, *A Pocket Full of Change: A Report*, (1991), [20.76].



Membership of an industry ADR scheme can be voluntary or mandatory. In some sectors, membership of an industry ADR scheme may be a legislative requirement, a requirement for licensing, or a requirement under an industry code.<sup>72</sup>

*Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (the Benchmarks) have been developed by the Commonwealth Department of Industry, Science and Tourism. The Benchmarks identify standards in relation to accessibility, independence, fairness, accountability, efficiency and effectiveness of industry ADR schemes. In some sectors, such as financial services, compliance with the Benchmarks may be a requirement for approval as an industry ADR scheme.<sup>73</sup>

Industry ADR scheme members agree to submit their consumer disputes to the applicable industry scheme for resolution. Most industry ADR schemes use investigation and conciliation to attempt to resolve disputes. Where a resolution cannot be reached using these processes, most schemes provide for a determination to be made.

A decision of an industry ADR scheme is binding on a consumer *if the consumer accepts the decision*. If the consumer chooses not to accept the decision, they can pursue any other remedies available to them, such as litigation in the courts. A decision of an industry ADR scheme is binding upon the scheme member if the consumer accepts the decision. Failure by a scheme member to comply with a decision may result in a range of sanctions including industry self-regulatory sanctions or sanctions imposed by an industry regulator (such as withdrawal of an operational license).<sup>74</sup>

#### ***4.8 ADR in Commercial Matters***

As Sourdin has noted, the growth in the use of ADR processes outside the court system has occurred primarily in two sectors – the community sector (particularly Dispute Resolution Centres) and the business sector.<sup>75</sup>

Within the business sector processes such as arbitration and senior executive appraisal are commonly used, while more formal dispute resolution processes are contained in the Commercial Arbitration Acts in each state and territory.

The primary motivation for the expanded use of ADR in commercial disputes is that ADR offers a range of benefits to businesses when compared with litigation in the courts. Firstly, ADR is cheaper than litigation and the cost of dispute management can have an impact on the profitability and viability of a business.<sup>76</sup> According to Associate Professor George Cho:

Mediation is much cheaper than litigation and it has been estimated that mediation of commercial disputes costs 5% of the cost of litigating or arbitrating the same matters.<sup>77</sup>

Secondly, the non-adversarial nature of ADR processes is viewed as more likely to promote and preserve long-term commercial relationships and goodwill than litigation in the courts. Today dispute resolution clauses are common in commercial contracts.

<sup>72</sup> For example, Australian Securities and Investment Commission (**ASIC**) requires all holders of Australian Financial Services Licenses to be a member of an approved industry scheme.

<sup>73</sup> ASIC Policy Statement 139 – Approval of External Complaints Resolution Scheme is based on the Benchmarks.

<sup>74</sup> Field, above n 64, 96.

<sup>75</sup> Sourdin, above n 4, 136.

<sup>76</sup> Ibid, 142.

<sup>77</sup> G Cho, *E-DR Will it Work and What Are the Barriers?*, 6 at <http://www.leadr.com.au/CHO.PDF>

## ***4.9 Development of an ADR Profession***

According to Astor and Chinkin, “contemporary ADR has its roots in a reaction against professional control of dispute resolution”.<sup>78</sup> However, the increased use of private and public ADR has resulted in the emergence of an ADR profession. While some ADR practitioners are lawyers by training, other ADR practitioners come from a range of backgrounds.

### ***4.9.1 ADR and the Legal Profession***

As The Use of ADR Within Courts And Tribunals Has Increased, So Too Has The Acceptance And Use of ADR Within The Legal Profession. The Use of ADR Within The Legal Profession Has Increased for a number of reasons, both financial and professional. As Astor and Chinkin have recognised “the competitive nature of legal practice creates pressure on lawyers to offer a wide range of legal services – including ADR – even by those who remain sceptical. Others use ADR because they confront it in courts and tribunals”.<sup>79</sup> It has also been noted that some of the early and most prominent ADR practitioners are retired judges.<sup>80</sup>

Today ADR is an accepted area of study within law degrees and a number of postgraduate courses in ADR are also available.

A range of professional organisations have also developed such as LEADR that undertake education, training and promotion of ADR within the legal profession.

Law societies in each state and the Law Council of Australia have also participated in the development and use of ADR within the legal profession.

In Victoria, the Victorian Bar maintains a register of barristers who have fulfilled the necessary requirements to be approved as mediators by the Victorian Bar.<sup>81</sup> The Law Institute of Victoria also maintains a register of solicitors who have fulfilled the necessary criteria to be approved as mediators by the Law Institute of Victoria.<sup>82</sup>

### ***4.9.2 Other ADR Professionals***

The “ADR profession” includes not just the established legal profession but also includes the emergence of a new group of ADR professionals, particularly counsellors, mediators and arbitrators.

The “ADR profession” has been described as a significant and growing “industry” of practitioners with different professional backgrounds.<sup>83</sup> While some members of the “ADR profession” are lawyers by training, ADR practitioners may come from a range of backgrounds.

In the absence of a single accreditation system the qualifications, training and registration of ADR practitioners will vary.

There are a number of professional ADR associations including The Institute of Arbitrators & Mediators Australia, LEADR, the Australian Commercial Dispute Centre and the Australian Dispute Resolution Association who maintain panels of ADR practitioners with recognised qualifications and experience in a range of areas. In some cases these organisations also provide accreditation of ADR practitioners.

<sup>78</sup> Astor and Chinkin, above n 4, 10.

<sup>79</sup> Ibid, 39.

<sup>80</sup> Such as Laurence Street.

<sup>81</sup> [www.vicbar.com.au](http://www.vicbar.com.au)

<sup>82</sup> [www.liv.asn.au](http://www.liv.asn.au)

<sup>83</sup> Australian Law Reform Commission, above n 1, [2.2].

The emergence of an ADR profession, particularly the “new” ADR profession, has raised a number of significant issues that will affect the future development of quality ADR services. These issues include:

- standards of ADR practitioners;
- accreditation of ADR practitioners;
- discipline of ADR practitioners; and
- immunity of ADR practitioners.

#### ***4.10 Online ADR***

Online services are emerging as a new area in the provision of ADR services. Online services have attracted attention in Europe, particularly for the resolution of cross border consumer disputes.

NADRAC has identified and described three different forms of online ADR:

On-line dispute resolution, ODR, eADR, cyber-ADR are processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically, especially via e-mail. See also automated dispute resolution processes.

Automated dispute resolution processes are processes conducted through a computer program or other artificial intelligence, and do not involve a ‘human’ practitioner. See also blind bidding and on-line dispute resolution.

Automated negotiation (or blind-bidding) is ‘a form of computer assisted negotiation in which no practitioner (other than computer software) is needed. The two parties agree in advance to be bound by any settlement reached, on the understanding that once blind offers are within a designated range ... they will be resolved by splitting the difference. The software keeps offers confidential unless and until they come within this range, at which point a binding settlement is reached’. See also automated dispute resolution processes. (Consumers International (2000) Disputes in Cyberspace)<sup>84</sup>

Consumer Affairs Victoria, the Dispute Settlement Centre Victoria, the Victorian Equal Opportunity and Human Rights Commission, and the Victorian Civil and Administrative Appeals Tribunal have pioneered the use of online ADR processes in Victoria. These organizations have recently developed an online dispute resolution service. The online dispute resolution service uses a step-by-step process that provides consumers with information about a range of possible dispute resolution strategies. The online service provides information in a range of areas including fencing and landlord-tenant disputes.<sup>85</sup>

#### ***4.11 Timeline of Key Developments in Australian ADR***

A timeline appears at Appendix Five.

#### ***4.12 Conclusion: The Growth of ADR in Victoria***

Over the last 30 years there has been a continued growth in the use of ADR as a dispute resolution mechanism in Australia. Today most litigation matters are resolved without a hearing through direct negotiations between parties, conciliation, mediation and other processes. The decline in the use of litigation as a dispute resolution process, and the increased use of the various ADR processes was noted by then Chief Justice Sir Gerard Brennan:

[T]he full-scale trial can no longer be regarded as the paradigm method of dispute resolution, even for complex disputes involving subjects of high value ... alternative

<sup>84</sup> NADRAC, above n 4.

<sup>85</sup> See <http://www.justice.vic.gov.au/CA256D3400249126/HomePage?ReadForm&1=Home~&2=~&3=~>

means of dispute resolution, conducted pursuant to the private agreement of the parties, can be expeditious, flexible and tailored to particular needs.<sup>86</sup>

During this time there has been a notable increase in the range of disputes in which ADR is used and an increase in the range and number of organisations supplying ADR services. ADR is now widely used and promoted as a dispute resolution method across a diverse area of practice including: commercial disputes, neighbourhood disputes, consumer disputes, family law disputes, pre-litigation procedures and post-litigation procedures.

In some circumstances ADR may be the best or most appropriate dispute resolution method. ADR may possess a number of benefits over litigation in the courts. Rather than an “alternative” to litigation in the courts, ADR processes may be better suited or more appropriate to the needs of some cases or some disputants.

#### ***4.12.1 Problems Associated With The Growth of ADR In Victoria***

Victorian Attorney General Rob Hulls has recognised the expanded use of ADR in Victoria. He has also noted a range of the problems that the expanded use of ADR has caused:

The use of ADR has grown exponentially across the State and around the country over the last 25 years or so. However, this growth has not been accompanied by a systematic or planned development, or even by a consistency on the part of those who facilitate or assist in these resolution processes. Consequently, methods currently used range from neighbourhood processes designed to minimise formality; through private and court-based mediation to fully fledged commercial arbitration proceedings. Some providers belong to professional associations, while others engage in ADR as part of other professional activity, a breadth which makes it impossible to quantify the level of demand for these types of services.<sup>87</sup>

At least two matters are raised by this observation.

##### ***4.12.1.1 Problems In Quantifying Demand For ADR In Victoria***

The increase in the use and provision of ADR has resulted in it being difficult to accurately quantify the overall use of ADR and the level of demand for ADR due to the diversity of contexts within which ADR is used. This issues deserves (and is receiving from the Department of Justice) serious investigation – demand (and unmet demand) for services, willingness to pay and consumer preference generally are of critical relevance to those who provide ADR services as well as those who fund those services and set the policy parameters in which they operate. The issues are not, however, of immediate relevance to the Research Report. Rather they are being investigated through a separate demand-side study being undertaken parallel to the Research Report as well being investigated through a range of other policy and project initiatives of the Department of Justice.

##### ***4.12.1.2 Problems Caused By The Absence of Planned Development & Consistency of Usage In Victoria***

The nature of the development of ADR has resulted in a lack of agreed definitions, understandings, processes and applications which give rise to a series of challenges to those who provide ADR services as well as those who fund those services and set the policy parameters in which they operate. It is almost necessarily the case that where incremental and fragmented – even piecemeal – development occurs there will be variable levels of practice. Within this there is either likely to be no best practice framework, or if there is, such a framework is unlikely to be universally applied.

<sup>86</sup> Brennan, above n 23, 139–140.

<sup>87</sup> Hulls, above n 2.

## ***Chapter Five: Who Provides ADR in Victoria?***

### ***5.1 Introduction***

In the previous chapter I examined the meaning of the term ADR. This chapter will provide an overview of the current supply of ADR services in Victoria. It will examine who undertakes ADR, the types of ADR processes used and how the services are funded. The ADR suppliers examined in this chapter are not intended to be an exhaustive, all-inclusive list of ADR service providers in Victoria. The ADR suppliers included in the framework are a cross-section of the key suppliers of ADR services in Victoria intended to demonstrate the provision of ADR services. The majority of the suppliers included in this framework have participated as stakeholders in both the interview process and the questionnaire survey underpinning the Research Report.

### ***5.2 Who Supplies ADR Services in Victoria?***

#### ***5.2.1 Introduction***

Societal transactions and interactions will sometimes lead to disputes. Whether it is neighbours disputing the levels of noise emanating from their households, consumers complaining about faulty goods, or small businesses concerned with the conduct of larger businesses, disputes are widespread. A certain number of those disputes find their way into the “market for justice”, a sub-market of which is the “market for ADR”. The market for ADR, like other markets, is characterised by those who provide services, the supply-side, and those who use services, the demand-side. Within, the supply-side, we can see further categorisation evident. There exists both a public and private supply (although the distinctions between them is not conceptually neat – see discussion below). Within, the categories of public and private, further distinctions are evident.

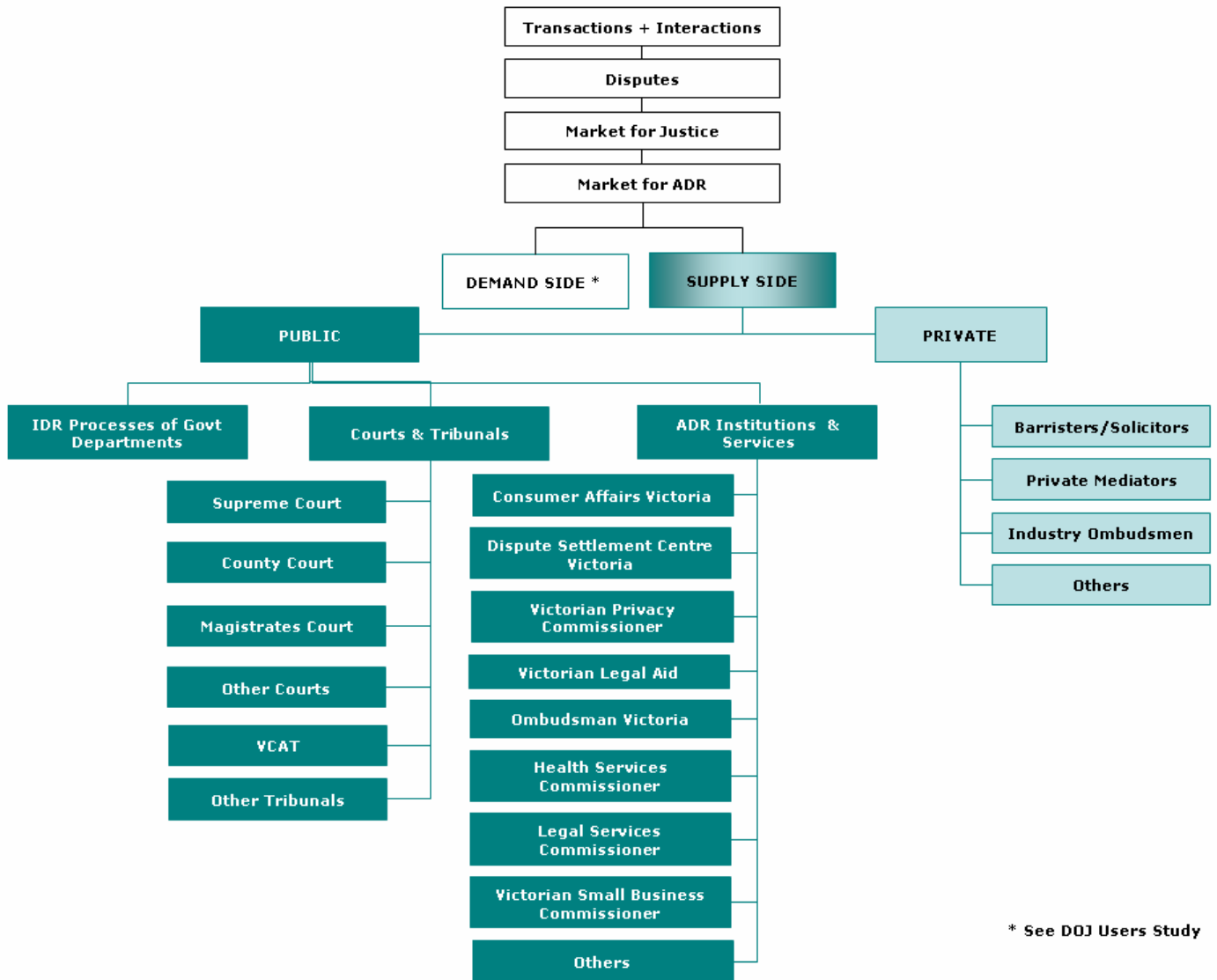
#### ***5.2.2 The Conceptual Distinction Between Public & Private Supply***

Distinctions between private and public provision of ADR services are not as conceptually neat as they might otherwise appear. For example, where a disputant, otherwise utilising the services of private mediation is in receipt of a grant of legal aid, the distinction is perhaps less sustainable. Industry ombudsman schemes, which would generally be classified as private suppliers of ADR, may rely upon government for part of their legitimacy – this is the case, for example, with most industry ombudsman schemes where governments or independent regulators require a scheme’s existence as a part of legislation or as part of a licence for a business to operate in a market. While funding of industry ombudsman schemes is generally thought of as private, the costs of the scheme are generally recovered across a large base of Victorians, being the consumers who use the services provided by the members of the industry-scheme.

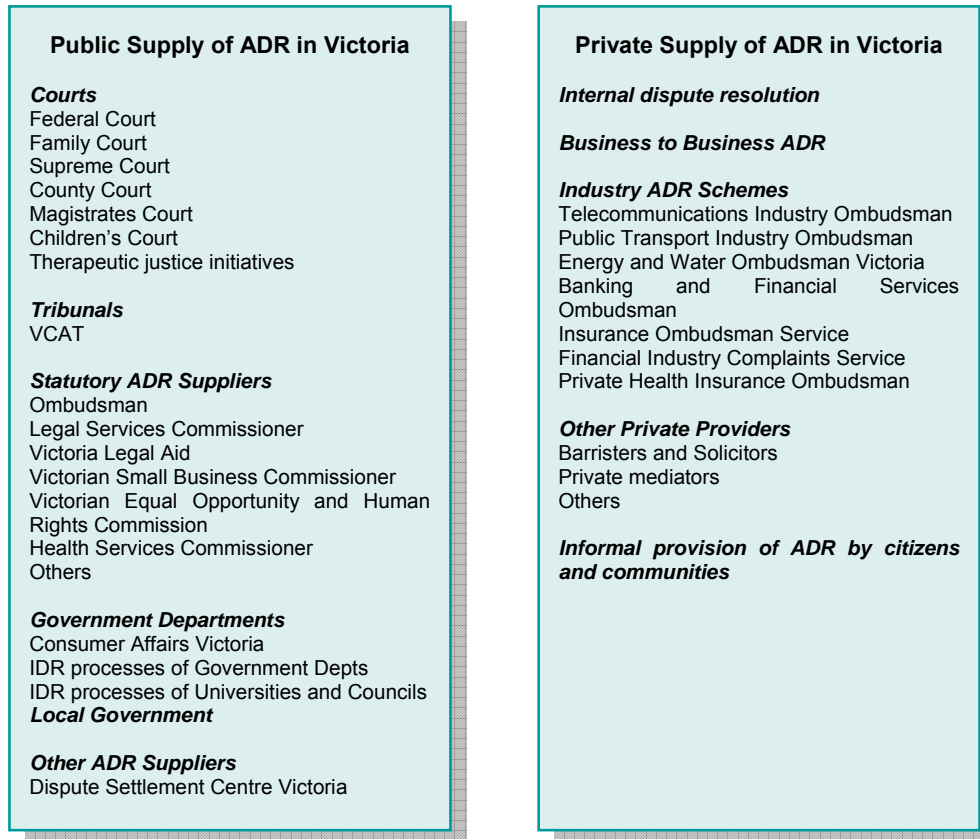
#### ***5.2.3 A Chart of the Supply-Side of ADR In Victoria***

Figure 1 on the next page is not intended to represent an all-inclusive framework of ADR provision in Victoria. Rather it represents a key cross-section of ADR service provision in Victoria. Accordingly, not every organisation providing ADR in Victoria is listed, but “Other” boxes in the chart identify that there are a range of organisations, such as the Victorian Children’s Court or the Accident Compensation Conciliation Service, which also exist within the framework.

Figure 1: Chart of ADR Supply in Victoria



### 5.2.4 The Supply-Side Framework of ADR In Victoria



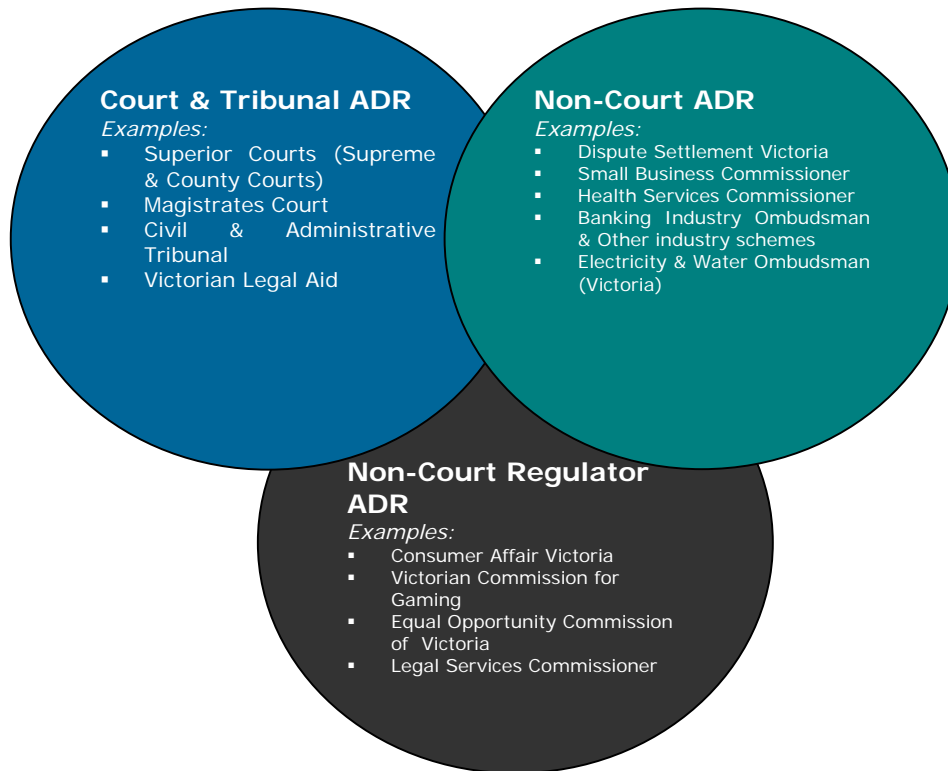
#### 5.2.4.1 Areas of ADR Activity

Figure 2 on the following page provides an alternative method of framing the ADR sector's structure that emphasises the institutional context in which ADR takes place over the public or private distinction above. Figure 2 first distinguishes the court and tribunal environment, which is traditionally associated with litigation and for which ADR serves as an adjunct to their traditional dispute resolution function, from the non-court environment where ADR is the sole form of dispute resolution. Application of ADR processes within the court and tribunal environment raises a series of issues and opportunities specific to these institutions, which will guide the use of ADR.

A further distinction can be made within the non-court environment between regulatory agencies performing an ADR function and those organisations with the sole purpose of providing ADR. ADR for regulatory agencies is often an adjunct to their traditional investigation and enforcement function. The adoption of ADR within regulatory agencies will, as with the courts and tribunals raise issues for these agencies, which will similarly guide the use of ADR.

The diagram serves to highlight the way in which the adoption of ADR represents, on the one hand, a broader process of change within established institutions, and on the other, the emergence of a distinct and specialised sector that is coincidentally largely private.

Figure 2: Alternative Structure for ADR Sector<sup>88</sup>



### 5.2.5 Detailed Information About Key Stakeholders

Detailed information about the stakeholders examined in the Research Report is at Appendix 6.

### 5.2.6 Map of the Supply of ADR in Victoria: An Expanded List of ADR Providers in Victoria

A map of the supply of Victorian ADR, including the stakeholders examined in the Research Report and a range of other important providers of ADR in Victoria appears at Appendix 7.

### 5.2.7 Stakeholder Perceptions of the Framework for the Supply of ADR Services in Victoria

Stakeholders were asked to identify the current framework for the supply of ADR in Victoria. Or, in other words, who from their perspective, undertakes ADR in Victoria?

Stakeholders identified a range of public suppliers of ADR and private suppliers of ADR. Stakeholders almost unanimously identified a broad supply-side framework of ADR in Victoria.

Stakeholders have, it should be observed, taken different approaches to their consideration of the Victorian ADR framework, for example some stakeholders have defined ADR locating it as

<sup>88</sup> This framework is from unpublished work by Paul Myers, Department of Justice, 2007.



an alternative to the courts. Another starting point is public/private provision which may focus on responsibility of government/funding.

Public suppliers of ADR in Victoria identified by the stakeholders included:

- Courts;
- Tribunals;
- Statutory ADR suppliers such as the Ombudsman Victoria and the Victorian Equal Opportunity and Human Rights Commission;
- Government departments such as CAV; and
- Community ADR suppliers.

Private suppliers of ADR in Victoria identified by the stakeholders included:

- Internal dispute resolution within private commercial organisations;
- Industry ADR schemes;
- Barristers and solicitors; and
- Private mediators.

Some stakeholders provided detailed descriptions of a broad supply-side framework of ADR in Victoria. It was typical for stakeholders to see ADR falling “into a range of broad categories”. This included, “Government ADR services, such as CAV, statutory agencies, such as the Equal Opportunity Commission as well as the Industry based Ombudsman schemes and ADR processes that precede court”.

*Stakeholder Comment*

*In Victoria, if you're talking about ADR in its broader sense, you have all the Ombudsman schemes, you've got the Family Court, you've got the Courts in some form or other. You've got Equal Opportunity; you've got WorkCover that provides conciliation. You've got Family Mediation Centre, you've got Relationship Australia, and you've got some church groups who also provide mediation, there are some programmes around restorative justice.*

*If you want to take it in its broader sense, most workplaces have someone trained up and doing mediation within the HR area. If we are talking about the ADR industry as distinct from ADR as a service then I'd be talking about anybody that involves those industry schemes. But I would also include private suppliers, lawyers who are providing mediation as part of their practices, arbitrators; the Institute of Arbitrators and Mediators all of those private suppliers as an industry.*

*But then even ADR as a service can be even broader so that you've got people that provide mediation informally, like in certain cultural groups. There may be an ADR component to services that are contracted out by government. But it's also being picked up by the court system, I think that just about every court has some kind of ADR function.*

Some stakeholders provided general descriptions of a broad supply-side framework of ADR in Victoria. In essence, within this view ADR includes any dispute mechanism that is an alternative to the courts. Although VCAT was included within this framework, interestingly the courts were not. This stakeholder also identified the overlap between some ADR suppliers.

One stakeholder described ADR as “effectively an alternative to the courts, but behind that it is extremely wide”. Within that definition, ADR fell into either “industry based schemes, your banking ombudsman, your credit people ...your transport ombudsman scheme” or “your general schemes which would be CAV conciliation, VCAT, Dispute Settlement Centre Victoria that deal with different types of disputes” dealing with different, but occasionally overlapping disputes.

Private mediators and Internal ADR within private commercial organisations were the suppliers recognised less frequently by stakeholders as part of the supply-side framework.

*Stakeholder Comment*

*“It's incredibly diverse. You have private ADR. You've got statutory type of ADR such as the Health Services Commissioner and you have industry based ADR, which is different again. You have court*

*directed ADR.. You've got the fact that mediations occur in the court system. So it's just a wide variety of ADR mechanisms in Victoria I would say".*

*Stakeholder Comment*

*Well I mean obviously I am aware of there being a fairly large group of private practitioners who provide a range of services across the board for people who want mediators in situations where they are in strife not necessarily as I say where they intend to head to court but where it is appropriate to bring in a mediator, for example – work place disputes, where its again not necessarily heading towards the industrial commission but where the employer would employ a mediator in a work place conflict.*

One stakeholder identified the supply-side framework of ADR in Victoria to include those organisations assisting disputants to get a consensual solution. Again, this framework does not include ADR in the courts.

*Stakeholder Comment*

*Well I think it embraces helping people getting a consensual solution. I embrace in the system all aspects of Government, whether in a departmental sense or a Court sense, so I would include what the Victorian Small Business Commissioner does, what Consumer Affairs Victoria does, to an extent, part of what CAV does. I don't think a lot is to be served by seeking to precisely define the boundaries of ADR.*

One stakeholder identified that given the breadth of the supply-side framework of ADR in Victoria the Victorian government needs to play a gatekeeper role within the system.

*Stakeholder Comment*

*I think you can identify it [a framework], and I think that the government needs to play a role in terms of operating as a gateway... If you undertake ADR you've got the External Dispute Resolution services, you've got the Internal Dispute Resolution services, you've got the privates and then you've got the State funded instrumentalities and then you've got the federal and then you've got select areas for example the indigenous dispute resolution or where you've got major community conflict, so there's kind of a spread.*

A number of stakeholders identified that there is not a cohesive supply-side framework of ADR in Victoria. The lack of a cohesive supply-side framework of ADR was not viewed as problematic. On the contrary, it was generally identified to possess a range of advantages such as allowing flexibility and variation between suppliers. In other words, the flexibility of the framework was seen to correspond with the flexible nature of the ADR processes themselves.

*Stakeholder Comment*

*... the word framework implies there's some kind of cohesion about it and I am not sure that there is ... [T]here are a lot of ADR bodies around, but there is no particular framework around the mechanisms that exist. There are organisations like the Mediation Association of Victoria, the National Alternative Dispute Resolution Advisory Council and LEADR ...not organisations which purport to play some kind of oversight (role) exactly, but some kind of national or peak body role for ADR services throughout Australia ...So if you mean framework where you can look at it like an organisational chart, where this sits there, and that sits there, and it all sits under this, well it's not like that at all. But I don't know that it has to be ... if we accept the proposition that it's a primary form of dispute resolution in Australia. Maybe we need that kind of variety and flexibility and that's one of its strengths. I think that it is flexible and easy for people to access, and can spring up where it's needed. A new industry [has developed] – good! We [will] need an ombudsman, we [will] need internal dispute resolution within the industry's company but you also need an external dispute resolution mechanism for customers to go to if they aren't able to resolve their complaint internally. So I wouldn't say anyone in particular undertakes ADR in Victoria, we are doing all sorts of different things in relation to ADR.*

*Stakeholder Comment*

*The good thing about ADR processes, and offices that are in place at the moment, is that there is a lot of flexibility and difference in them and I wouldn't want to make it too rigid otherwise we will be going back to kind of model that the Courts follow.*

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## Chapter Six: The Practice of ADR in Victoria

### 6.1 Overview

Empirical research examining the way that legal disputes are resolved in practice has produced an analytic model known as the “dispute resolution pyramid”.<sup>89</sup> This diagram below is an illustration of what the dispute resolution pyramid may look like.

Figure 3: Dispute Resolution Pyramid



As the diagram illustrates the most common response to problems or disputes that arise is for a disputant to take no action at all. A range of reasons have been cited for the failure of disputants to take action including “that they believe that the costs of legal advice and assistance are not affordable, they are alienated from the institutions and processes of the law and mystified by court procedures and the world of the legal profession, and they lack trust in the system”.<sup>90</sup>

In a large number of matters disputants will attempt informal negotiation. Fewer still disputants will seek advice or assistance.

ADR processes occupy the second tier of the pyramid. Commonly used ADR processes include mediation, conciliation and arbitration.

Litigation occupies the apex of the pyramid. Research indicates that only a very small proportion of all disputes are resolved by litigation in the court system.

<sup>89</sup> W Felstiner, R Abel and A Sarat, 'Naming, Blaming and Claiming: The Emergence and Transformation of Disputes' (1980-1981) *Law and Society Review*, 631.

<sup>90</sup> Astor and Chinkin, above n 4, 49 (footnotes omitted).

## ***6.2 Defining ADR Practice***

NADRAC has classified alternative dispute resolution processes as: facilitative, advisory, determinative or hybrid. In the absence of agreed definitions and agreed practice of ADR processes this classification system provides a useful starting point for gaining an understanding of the characteristics of the various ADR processes.

### ***6.2.1 Facilitative Dispute Resolution Processes***

The role of the neutral third party in facilitative dispute resolution processes is to identify the disputed issues and possible options. According to NADRAC:

Facilitative dispute resolution processes are processes in which a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute.<sup>91</sup>

Mediation, facilitation and facilitated negotiation are examples of facilitative dispute resolution processes.

### ***6.2.2 Advisory Dispute Resolution Processes***

The role of the third party neutral in advisory dispute resolution processes is to provide advice about the facts and how desirable outcomes may be achieved. According to NADRAC:

Advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved.<sup>92</sup>

Expert appraisal, case appraisal, case presentation, mini-trial and early neutral intervention are examples of advisory dispute resolution processes.

### ***6.2.3 Determinative Dispute Resolution Processes***

The role of the third party neutral in determinative dispute resolution processes is to evaluate the dispute and make a final determination. According to NADRAC:

Determinative dispute resolution processes are processes in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination.<sup>93</sup>

Arbitration, expert determination and private judging are examples of determinative dispute resolution processes.

### ***6.2.4 Hybrid Dispute Resolution Processes***

In hybrid dispute resolution processes the third party neutral may play multiple roles. NADRAC provides the following practical example:

For example, in conciliation and in conferencing, the ADR practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In hybrid processes, such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).<sup>94</sup>

<sup>91</sup> NADRAC, above n 4.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> NADRAC, above n 57, 25.

One stakeholder identified the value of the classification of ADR processes as facilitative, advisory and determinative.

*Stakeholder Comment*

*"I always stream it into the facilitated advisory and determinative parts of ADR, and I think that's a good working definition when one tries to evaluate it or set up systems ...To me ADR processes can be facilitative processes, advisory processes or determinative processes.*

*Under facilitative I would put probably transformative or facilitative forms of mediation. Clearly some mediation that takes place in Victoria is more advisory than anything else, like evaluative forms of mediation. Conciliation usually fits in under the advisory so does expert appraisal and early neutral evaluations. Determinative processes move more towards arbitration".*

### 6.3 Descriptions Based on Objectives, Strategies or Types of Dispute

NADRAC has also recognised that descriptions of ADR processes may be based on objectives, strategies or types of dispute. NADRAC states:

Various ADR processes may also be described according to their objectives, the specific strategies used or the type of dispute. For example, in transformative mediation the mediator aims to enhance relationships and understanding between the parties, while in evaluative mediation the mediator may suggest solutions. In co-mediation, two mediators work as a team.<sup>95</sup>

Boulle has also recognised four different types of mediation based on objectives: settlement mediation, facilitative mediation, therapeutic mediation, and evaluative mediation.<sup>96</sup>

### 6.4 Commonly Recognised ADR Processes

There are a large number of dispute resolution processes that have been identified as ADR processes. NADRAC has developed a glossary of dispute resolution terms. This glossary is extracted from *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003), and is set out at Appendix Six.

The ADR processes most commonly recognised by the stakeholders were negotiation, mediation, conciliation and arbitration.

*Stakeholder Comment*

*[There are] four processes, negotiation, mediation, conciliation and arbitration. ... I think of ADR as kind of an umbrella term for a range of dispute resolution methodologies, ranging from arbitration through to conciliation, mediation.*

Other stakeholders provided their own particular definitions of the various ADR processes.

*Stakeholder Comment*

*ADR has a few components to it ...You would be well aware that a lot of people don't know the difference between mediation, arbitration, conciliation or whatever. Perhaps a good way to start with this question is to give my definition of them, which is that arbitration is almost tantamount to a Court-like proceeding where the arbitrator hears the arguments of both sides; it's likely to have formal evidence taken and assessed and then [the arbitrator] determines and makes decisions which bind the parties. The arbitrator says, "this is the way that the matter is going to be resolved and you are both bound by it.*

*Conciliation ... is a less formal situation where the parties put their side of the story to the conciliator ... he doesn't test the evidence as such in a sense of being persuaded that the evidence stands up but*

<sup>95</sup> Ibid.

<sup>96</sup> Boulle, above n 4, 44-45.

*effectively what the conciliator does and says is “assuming that you are both telling the truth, my view is that you win and you lose. So he expresses a view.*

*Mediation ... is where the mediator allows the parties to resolve between themselves what is the best outcome, so it’s a facilitative process. The mediator should not express a view of “you’re right and you’re wrong”. The mediator should help the parties arrive at a situation where they say “this is the way we are going to determine this matter, no one else is going to determine it for us but we are going to do it.*

*Basically that’s the way I look at ADR and of course it’s obviously, in every sense of the word, an alternative to formal court or tribunal processes.*

## 6.5 Objectives of ADR

The Victorian Government’s eight principles to guide the development of a fair and accessible dispute resolution system are:

### FAIRNESS

Dispute resolution processes must be fair and seen to be fair by the disputants and the broader community. Principles of natural justice must be applied that provide the opportunity for each disputant to make their case and to have a “voice” in the process. Where third parties are used in the process, such as mediators or judges, they must be impartial and free from bias.

### TIMELINESS

In general, disputes should be settled as early as possible. While some disputes must be given time, either for issues to crystallise or where the parties’ positions are materially changing, most disputants wish to resolve them at the earliest opportunity. Dispute processes should minimise the opportunities for delay and focus on identifying the issues at stake and agreeing on the process to resolve them.

### PROPORTIONALITY

The cost and complexity of the process should be proportionate to the subject matter of the dispute. Matters involving significant public interest, difficult points of law or large sums of money will require more elaborate processes, while more routine or minor disputes should be resolvable using relatively informal and inexpensive processes. The Government will encourage policies that minimise the cost and complexity of dispute resolution that is appropriate to the nature of the dispute.

### CHOICE

Different dispute resolution pathways should be available to reflect disputants needs and expectations. However, not all pathways need to be provided by the Government, and many industry dispute resolution schemes have been established that have no government involvement. Dispute resolution processes should also be sufficiently flexible to allow further choices to be made during the course of a matter as the issues are developed.

### TRANSPARENCY

The processes should be clear and simple to allow users to navigate their way through the process as easily as possible. In the courts stream, rules of civil procedure should be consistent between the different jurisdictions.

### QUALITY

Disputants should be confident that no matter which pathway they choose it will provide a level of quality of the service appropriate to the nature of the dispute.

### EFFICIENCY

Dispute resolution procedures should aim to maximise the efficient use of available resources to resolve disputes.

### ACCOUNTABILITY

Information about disputes and outcomes, including resolution times and associated costs should be published. This facilitates evaluation of the efficiency of dispute

resolution processes as well as the identification of systemic issues that may in turn demand a public policy response, for example, a change in legislation, information strategy or enforcement activity.<sup>97</sup>

In its discussion paper *The Development of Standards for ADR*, NADRAC suggested five core objectives for ADR:

- To resolves disputes
- To uses a process that is considered by the parties to be fair
- To achieve acceptable outcomes
- To achieve outcomes that are lasting
- To use resources effectively<sup>98</sup>

After extensive consultation, these objectives were revised by NADRAC in *A Framework for ADR Standards*. This paper identified three core objectives of ADR:

- To resolve or limit disputes in an effective and efficient way;
- To provide fairness in procedure; and
- To achieve outcomes that are broadly consistent with public and party interests.<sup>99</sup>

NADRAC believes that these objectives will be common for most disputants, practitioners, service providers, government and the community.

<sup>97</sup> Department of Justice, *New Directions for the Victorian Justice System 2004-2014: Attorney General's Justice Statement* (2004), 35.

<sup>98</sup> NADRAC, *The Development of Standards for ADR: Discussion Paper* (2000), 2.

<sup>99</sup> NADRAC, *A Framework for ADR Standards* (2001), 13-14.



## ***Chapter Seven: When Should ADR be Utilised to Resolve a Dispute? The Benefits & Problems of ADR***

### ***7.1 Introduction***

In chapter three of the Research Report I critically analysed the meaning of ADR. In chapter four I examined the history of ADR in Victoria. In chapter five I developed a framework for the supply-side of ADR in Victoria and then followed this in chapter six by reviewing the practice of ADR in Victoria. In this chapter, I will comprehensively assess a variety of benefits and problems that underlie the provision of ADR in Victoria. An understanding of the benefits and problems, which in turn reveal risks and opportunities, is crucial, in my view, to a proper framing of best practice provision of ADR in Victoria.

### ***7.2 The Benefits of ADR***

It is generally agreed that modern ADR has developed as a response to a number of perceived deficiencies of the traditional court system. To this end, the Access to Justice Advisory Committee noted that the court system:

- is often plagued by long delays;
- is often expensive;
- has a very formal atmosphere, which can intimidate parties; and
- relies on winner-take-all outcomes, rather than on compromise of agreement between the parties.<sup>100</sup>

Compared to traditional court based dispute resolution methods, ADR is widely regarded to possess a range of advantages. Suggested advantages of ADR include that:

- ADR is cost effective;
- ADR is non-adversarial;
- ADR is flexible;
- ADR is quick and convenient;
- ADR is informal;
- Disputing parties retain more control of the dispute resolution process; and
- ADR offers a wider and more adaptable range of remedies.

#### ***7.2.1 ADR Is Cost Effective***

The belief that ADR is less costly than litigation is a primary reason for the promotion of ADR by governments.<sup>101</sup>

The literature reviewed reveals divergent views about the cost effectiveness of ADR processes.

While some organisations, believe that there are substantial cost savings to be made using ADR,<sup>102</sup> others are more reserved about the cost savings to be made using. For example, in relation to court-connected ADR, Astor and Chinkin note:

<sup>100</sup> Access to Justice Advisory Committee, above n 7, 278.

<sup>101</sup> Astor and Chinkin, above n 4, 53.

<sup>102</sup> Cho, above n 76, 6.

To the extent that research in Australia and elsewhere can be summarised, it would appear likely that court-connected ADR rarely resolves cases that would otherwise have gone to trial. It does not appear to produce significant cost savings. What it may achieve is early and appropriate resolution of cases that would settle anyway.<sup>103</sup>

A number of stakeholders recognised that ADR can provide a more timely and cost effective outcome for both parties. ADR may have the capacity to lower the social costs of disputing by facilitating the early resolution of disputes or by preventing the escalation of disputes, which may in turn have the effect of promoting social cohesion.

*Stakeholder Comment*

*Government is also a beneficiary of ADR when its done properly. It saves the government resources when it's done properly. It saves the government resources if you can prevent conflict from escalating at an early point.*

*Stakeholder Comment*

*Unresolved conflict in the community [can impact upon] people's health. Disputing behaviour; it escalates, people just keep going back to the doctors. The police get called in all the time. Local government gets dragged in. Then if they end up in court they might end up in gaol. There could be a murder. I mean this is serious*

### **7.2.1.1 Methodological Problems With Research About the Cost of ADR**

The literature reviewed also reveals a number of methodological problems with determining the costs and benefits of ADR. The most significant of these is that most of the research in relation to costs compares the cost of dispute resolution using ADR to the cost of dispute resolution using litigation in the courts. The problem with this comparison is that it is widely recognised that the vast majority of civil matters are resolved outside the formal court system and only a small percentage of cases will proceed through to a final hearing, indeed, VCAT estimates that 95% of all substantial civil cases will settle before a judgement or determination.<sup>104</sup>

### **7.2.1.2 To Be Cost Effective ADR Needs to Resolve a Dispute**

It is widely recognised in the literature (and is indeed logical) that ADR will not always be cheaper than litigation.

ADR will only be less costly than litigation where a dispute is successfully resolved.

If a dispute cannot be successfully resolved using ADR and the dispute proceeds to litigation in the courts, the use of ADR will generally serve to increase the cost of the dispute. In other words, ADR creates an additional layer to the dispute resolution process.

In some cases this additional cost may be offset where the ADR process has:

- resolved part of the dispute;
- narrowed the issues in dispute;
- identified the issues in dispute to allow "organisation" of the dispute (for example, this is considered particularly useful in native title matters);<sup>105</sup> or
- otherwise facilitated a shorter hearing time.<sup>106</sup>

The same factors also impact on the length of time taken to resolve a dispute.

<sup>103</sup> Astor and Chinkin, above n 4, 59.

<sup>104</sup> Victorian Civil and Administrative Appeals Tribunal, *Victorian Civil and Administrative Tribunal Annual Report 2003-2004* (2004), 14.

<sup>105</sup> Australian Law Reform Commission, above n 1, 4.

<sup>106</sup> *Ibid.*

### **7.2.2 Private ADR Processes**

Private ADR processes enable disputants to seek redress without the need to access the formal court system. The use of private ADR providers, such as barristers, solicitors and private mediators will generally be at a cost to disputants.

The literature reveals a diversity of findings about the capacity of ADR to reduce legal costs. For example UK research involving the use of mediation in the county court found that while there was evidence that mediation was able to speed up settlement, it was less clear as to whether mediation saved costs. It also found that where the parties failed to reach a resolution using ADR processes, and then go on to litigate, it was possible for the costs of disputants to increase.<sup>107</sup>

The capacity of a disputant to access and satisfactorily resolve a complaint using private ADR serves to divert complaints from the formal court system. Diversion from the formal court system may offer cost savings to disputants who are able to avoid protracted litigation. It also offers cost savings to the taxpayer funded court system.

### **7.2.3 Industry ADR Schemes**

Like other private ADR processes, industry ADR schemes enable disputants to seek redress without the need to access the formal court system. The use of industry schemes, however, is generally free or at minimal cost to disputant consumers.

Industry schemes are generally funded by a levy on member institutions.

The capacity of a disputant to access and satisfactorily resolve a complaint using an industry ADR scheme serves to divert complaints from the formal court system. In this case diversion from the formal court system will offer cost savings to disputants (as the cost to the disputant consumer for using the industry ADR scheme is either free or low) who are able to avoid protracted litigation. As industry schemes are funded by industry they offer cost savings to the taxpayer funded court system.

### **7.2.4 ADR in the Courts**

ADR has two roles within the courts. In the first instance the role of ADR is as an alternative to litigation in the court system. Here ADR is seen as being separate from litigation, but complimentary to it. In this context the role of ADR is to divert matters from the litigation system. As Sourdin explains:

From this perspective, the role of ADR is to reduce the burden on the courts by ensuring that only those disputes which cannot, or should not, be resolved by other means end up in court. It is in this light that mechanisms for referring disputes to ADR have increasingly been incorporated in to the Australian court system.<sup>108</sup>

Pre-filing and post-filing ADR are examples of the use of ADR processes to divert disputes from the litigation system. The ALRC notes:

Policy makers have adopted two major approaches to questions of when and what ADR processes should be used in the resolution of disputes. One approach has been to introduce ADR early into the life of the dispute before it reaches the court and tribunal setting. This approach encourages ADR use in industry and the general community for particular types of disputes and is called ... 'pre-filing' ADR. The other approach, 'post-filing' diversion, involves diverting as appropriate, disputes that have reached the court and tribunal setting into ADR processes.<sup>109</sup>

<sup>107</sup> Department for Constitutional Affairs, *Alternative Dispute Resolution – A Discussion Paper* (2000), [4.2]

<sup>108</sup> Sourdin, above n 60, 180.

<sup>109</sup> Australian Law Reform Commission, above n 1, [5.3].

Secondly, the role of ADR is to reform litigation practice within the court system. Here ADR is incorporated into the operation of the court to deliver a range of benefits. Three broad trends can be identified in relation to the use of ADR to reform litigation practice in the court system: self-governing courts, case management, and better quality court services.<sup>110</sup>

All Victorian Courts use ADR in some part of their operation.

Central to debates about the use of ADR within courts is whether court referral to ADR should be mandatory or voluntary and whether participation in ADR should be mandatory or voluntary. This debate may also have cost implications for the provision of ADR in the court system. For example, a US study of the introduction of mandatory case management and ADR in the federal courts (introduced by the *Civil Justice Reform Act 1990*) concluded that case management may reduce costs to courts and taxpayer but increased cost in legal fees of disputants.<sup>111</sup>

The literature reviewed also reveals that there remains substantial debate about the role of the court in providing ADR services.

The ALRC has identified four advantages of referral to internal court based ADR practitioners. These advantages are as follows:

- ADR may be readily available at any stage of court and tribunal proceedings and access to it may be better integrated into the court or tribunal processes;
- the court or tribunal may be able to maintain a higher degree of quality control over ADR personnel, their standards and the process;
- if neutrals are officers of the court or tribunal they may be able to make directions to prepare a matter for hearing;
- if neutrals are officers of the court or tribunal their independence in the ADR process is guaranteed.<sup>112</sup>

Some commentators have been critical of the use of judges and court officials to conduct mediation. Street argues that the use of judges and court officials threatens public confidence in the integrity and impartiality of the court and compromises the role of the judge whose primary responsibility is for judging and not promoting settlement between parties.<sup>113</sup>

Similarly, other commentators have argued that constitutional impediments may prevent judges playing a role in meditation in the courts.

Sourdin has noted that the issue of the role of the decision maker in mediation has not been viewed with such concern in the context of tribunals.<sup>114</sup>

### ***7.2.5 ADR Is Non-Adversarial***

ADR processes have the capacity to adopt a more inquisitorial rather than adversarial style. The adversarial nature of the process will vary between ADR processes. The variation in the adversarial nature of the ADR processes may be illustrated as follows.<sup>115</sup>

<sup>110</sup> Condliffe, above n 34.

<sup>111</sup> J Kalikak, T Dunwirth, L Hill, D McCaffrey, M Oshiro, N Pace, M Vaiana 'Just Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act' (1997) 49 *Alabama Law Review*, 30 in Astor and Chinkin, above n 4, 52.

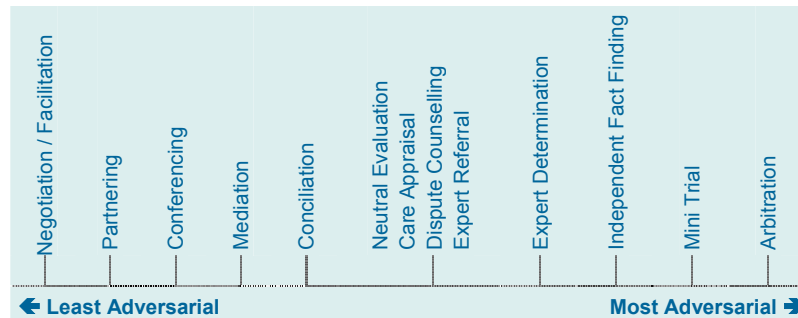
<sup>112</sup> Australian Law Reform Commission, above n 1, [5.82].

<sup>113</sup> L Street 'Note of the Detachment of Judges to Mediation' (2006) 17 *Australian Dispute Resolution Journal*, 188.

<sup>114</sup> T Sourdin, 'Facilitating the Resolution of Disputes Before Tribunals' (Paper presented at the AIJA conference, 2005).

<sup>115</sup> This diagram has been adapted from Sourdin, above n 4, 20.

Figure 4: Variation in the Adversarial Nature of ADR Processes



The non-adversarial nature of ADR processes is of particular importance where the preservation of ongoing relationships between disputants is important. For this reason the ADR processes may be particularly suited to the resolution of commercial disputes, consumer disputes, family law disputes and neighbour disputes.

Stakeholders recognised the benefits of using ADR where disputants sought to retain an ongoing relationship, for example neighbour disputes.

*Stakeholder Comment*

*Take a ... neighbourhood dispute, they are going to still have to live next door to each other. What's probably more important... is that they actually find a solution both of them can live with. So the type of intervention has to be matched to the area of law.*

### 7.2.6 ADR Is Flexible

ADR processes offer a more flexible approach to dispute resolution than the courts.

#### 7.2.6.1 Adapting Processes To User Needs

As the practice of ADR is flexible it is possible to adapt ADR processes to the needs of the case or the need of the disputants. Here Condliffe notes that:

Flexibility of the [ADR] process allows adaptation of the process to the needs and culture of the disputants. Participants can agree to apply their own values to the dispute. Potentially this flexibility can lead to greater freedom from any substantive, systemic bias of the dominant culture.<sup>116</sup>

One stakeholder identified that ADR processes may be adapted to suit the needs of the disputants.

*Stakeholder Comment*

*When people first call in, ... we look to what their needs are and what kind of process they want. Sometimes somebody is very adamant that they want a decision but when you talk them through what actual resources are going to be involved and the time involved and the stress involved, sometimes, something that at first sounds counter-intuitive - like sitting in a room and trying to get an agreement with someone you hate - actually at the end of the day does sound like maybe the best way to go.*

<sup>116</sup> Condliffe, above n 34.

### 7.2.6.2 Accommodation of Non-Legal Principles

ADR processes can accommodate a range of non-legal principles. For example, industry scheme decision-makers are able to consider a broader range of factors than those considered by a court. These factors include applicable industry codes or guidelines, good industry practice and what is fair and reasonable in the circumstances. In addition, industry scheme decision makers are generally not bound by the rules of evidence or by previous decisions.<sup>117</sup>

### 7.2.7 ADR Is Quick And Convenient

The early resolution of disputes has a range of benefits for disputants, the taxpayer funded court system and the public in general. Duggan explains the range of benefits that flow from the early resolution of disputes as follows:

A contract determines the outcome of the parties' negotiations. It avoids uncertainty and saves them the further transaction costs they would incur if the negotiations continued. A dispute keeps the outcome of the parties' engagement in suspense. It prolongs uncertainty and increases their transaction costs. Contracts lead to beneficial exchanges. Disputes lead to costly stand-offs. Dispute resolution benefits the parties in the same way a contract does. It determines the outcome between them, avoids uncertainty and saves further transaction costs.<sup>118</sup>

To ensure the early resolution of disputes, and to minimize the costs of disputing, dispute resolution methods should seek to minimise delay.

In some circumstances ADR can improve time taken to resolve disputes. ADR is likely to save time where disputants agree to use ADR and a settlement is reached.

### 7.2.8 ADR Is Informal & Less Stressful

ADR Processes And Locations Are Generally More Informal And Less Intimidating Than Using The Formal Court System.

It Is Widely Accepted That Courts Can Be Intimidating To Those Who Are Not Legal Professionals. Research conducted in the UK has found that many disputants undertaking litigation in the County Court found the formal court hearing to be intimidating. The research also found that many disputants who funded their own litigation "suffered anxiety about their mounting legal bills and the possibility of having to pay the costs of the other party".<sup>119</sup>

One stakeholder identified that ADR had the potential to divert disputants from the stresses of litigation.

#### *Stakeholder Comment*

*ADR can divert people from the trauma of litigation. Litigation is a traumatic field - personal and monetary. The whole experience is disempowering for the small person.*

However, the formality of litigation in the courts possesses a range of safeguards for the protection of disputants.

### 7.2.9 Disputing Parties Retain More Control of The Dispute Resolution Process

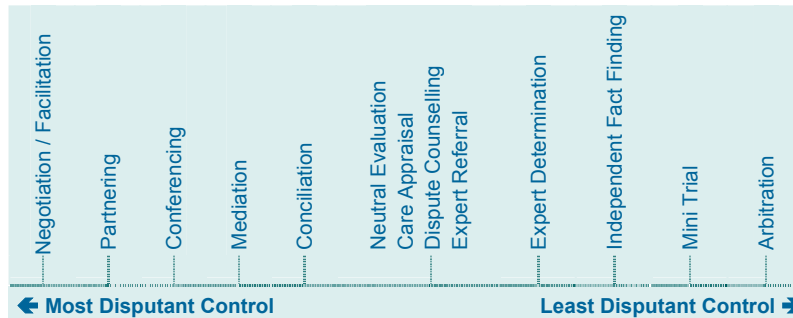
<sup>117</sup> Field, above n 64, 97.

<sup>118</sup> A Duggan, 'Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics Perspective' (Paper presented at the 8th International Consumer Law Conference, Auckland, April 2001), 1.

<sup>119</sup> Department for Constitutional Affairs, above n 105, [4.4].

ADR processes will generally allow disputing parties to retain more control of the dispute resolution process than litigation in the courts. The variation in disputant control between ADR processes may be illustrated as follows:<sup>120</sup>

Figure 5: Variation in Disputant Control Between ADR Processes



Facilitative ADR processes (for example mediation and conciliation) generally focus on consensual decision-making between disputants. Consensual decision-making allows the disputants to author an agreement that accommodates their needs and interests. The capacity of ADR processes to provide a mutually agreed outcome can be contrasted with the “winner takes all” outcome of litigation in the courts.

The capacity for the parties to retain more control over the process has also been identified as an important benefit of ADR in the UK. The UK Department for Constitutional Affairs notes:

Mediations, in particular, often start by giving the parties themselves the chance to tell their own stories, and identify the issues that are important to them, in their own way. The processes might be considered more constructive, rather than looking for weaknesses in the other side's case, there is a greater concentration on what would constitute a mutually satisfactory solution. Parties therefore review what is really important to them, and what they are prepared to give up. Many ADR processes do not have the stark result of litigation, with one party getting everything and the other getting nothing; they lead to a settlement with benefits to both sides.<sup>121</sup>

Similarly, a study of company directors in Australia concluded that they perceived that control of the conflict management process was lost during litigation and that this was an important advantage of ADR processes.<sup>122</sup>

One stakeholder identified that that capacity of ADR processes, particularly mediation, to empower disputants.

*Stakeholder Comment*

*One thing that characterises a lot of these different [ADR] processes is that the power to resolve a dispute has to a certain extent been taken away from the State and given back to the parties who've got the dispute. That happens in varying degrees. In arbitration parties would take their power to at least nominate an arbitrator as distinct from a state appointed person to make the decision. In mediation that's where there is a strong focus on empowerment for the parties and that gets the best results; the ideal results.*

**7.2.10 ADR Offers A Wider And More Adaptable Range of Remedies**

ADR processes can offer a wider range of remedies than litigation in the court system.

<sup>120</sup> This diagram has been adapted from Sourdin, above n 4, 20.

<sup>121</sup> Ibid, [4.6].

<sup>122</sup> Condliffe, above n 34.

Ramsay has recognised that disputants often seek remedies such as an apology that are not otherwise accommodated by litigation within the formal court system. Ramsay notes:

Litigants were often seeking an intangible benefit such as wishing to tell their story, but this clashed with the court's need to process claims efficiently. In addition, individuals were often pursuing an agenda different from that of the court and often misperceived the power of the court to seek out and punish the other party...The authors concluded that the law often defines the problems of ordinary people in a manner which may have little meaning for them and which does not offer them the remedies which they desire.<sup>123</sup>

The New South Wales Law Reform Commission has also recognised that mediation can provide a greater range of remedies than those available through the courts including:

An apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so.<sup>124</sup>

A number of stakeholders identified that an apology was an important remedy that was frequently sought by service users.

*Stakeholder Comment*

*"An apology is still incredibly important to people. You see people are angry - if they get a genuine apology they let go".*

## **7.3 Problems with ADR**

### **7.3.1 ADR Lacks the Formal Checks & Balances of the Court System**

Perhaps the most significant criticism of ADR is its failure to incorporate the formal checks and balances offered by the court system. On this basis it has been argued that ADR is less able to guarantee justice than the court system. To this end NADRAC has noted:

Whilst litigation has many problems as a dispute resolution mechanism, it nevertheless contains many safeguards of fairness and justice. Power imbalances between the participants can be ameliorated by legal representation. Procedural and evidentiary rules ensure that each person has a chance to present their case and to challenge the arguments and evidence of the other person. There are enforceable procedures which ensure that each person has access to relevant evidence so that the dispute is decided on the basis of appropriate disclosure of information. There is a well qualified and respected third party decision maker who evaluates the evidence and arguments of the parties and who makes a decision according to established principles. The process of litigation is open and observable and decisions are subject to appeal.<sup>125</sup>

### **7.3.2 Dispute Resolution Processes Must Be Fair**

Fairness is a key principle in the supply of dispute resolution services. Fairness embodies the dual requirements that dispute resolution processes must be fair and be seen to be fair by both the disputants and the broader community, or in other words is both objectively and subjectively fair.<sup>126</sup> Fairness includes procedural fairness and substantive fairness.

<sup>123</sup> I Ramsay, 'Consumers' Access to Justice' Paper presented at the 8<sup>th</sup> International Consumer Law Conference, Auckland, April 2001), 23.

<sup>124</sup> NSW Law Reform Commission, *Report 106: Community Justice Centres* (2005), [1.29] (footnotes omitted).

<sup>125</sup> NADRAC, *Issues of Fairness and Justice in Alternative Dispute Resolution: Discussion Paper* (1997).

<sup>126</sup> For a detailed discussion of perceptions of fairness see J Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9 *Murdoch University Electronic Journal of Law*.



### 7.3.2.1 Procedural Fairness

Procedural fairness in the context of dispute resolution embodies a range of requirements including principles of natural justice, impartiality of decision makers, and lack of power imbalances between the parties.<sup>127</sup>

It is well documented within the literature reviewed that ADR does not possess the same procedural fairness safeguards as the courts.<sup>128</sup>

#### 7.3.2.1.1 Impartial Decision Makers

Third party decision makers or dispute resolution practitioners must be impartial and free from bias.

The literature reviewed reveals that in some cases the impartial nature of the dispute resolution practitioner in ADR processes has been questioned. For example, in an Australian study of ADR within the family law context one respondent stated:

I felt she was going overboard to be fair to him because she was a woman and did not want to look as though she was ganging up on him with me. However, this meant she let him dragging up all sorts of things and accuse me of psychologically damaging my kids when they were with me, for three or four sessions without really agreeing on anything.<sup>129</sup>

Similarly, a major criticism of industry ADR schemes is their to potential lack independence from industry. Industry schemes have a close relationship with, and are indeed funded by, the industry that they investigate. While this close relationship produces a range of benefits including “the capacity to generate specialist knowledge which can reduce hearing times, reduce errors in decision-making and increase the capacity to identify systemic issues within an industry”<sup>130</sup> it has also resulted in criticism of bias.<sup>131</sup> Industry ADR schemes have attempted to overcome this problem through the use of benchmarks and other regulatory measures.<sup>132</sup>

It is not intended to suggest that this is a problem with all (or even the majority of) ADR proceedings, or indeed that there is widespread dissatisfaction with ADR processes. However, dissatisfaction with the impartiality of ADR practitioners, standards of practice or ethics of the ADR practitioner have been identified by the literature reviewed in a range of contexts.<sup>133</sup> Indeed, the issues of impartiality, standards and ethics of ADR practitioners are often interrelated. The literature, particularly work by NADRAC, identifies that further work is required in these areas.

The issue of fairness also raises question about who should conduct ADR processes. In particular, these debates focus on the appropriateness of using court personnel to conduct ADR processes, particularly mediation. Within this debate there are two opposed viewpoints. On one hand it is argued that it is both appropriate and efficient for officers of the court to undertake

<sup>127</sup> Astor and Chinkin, above n 4, 57.

<sup>128</sup> Ibid, 57-75; O Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal*, 1073-1090; C Menkel-Meadow, ‘Judges and Settlement: What Part Should Judges Play?’ (October 1985) *Trial*, 78.

<sup>129</sup> Keys Young, Research/Evaluation of Family Mediation Practice and the Issue of Violence Final Report (1996), 99 as cited in NADRAC, above n 97, 28.

<sup>130</sup> Field above n 64, 98.

<sup>131</sup> For a discussion about the TIO and the perception of bias see K Primrose, ‘The Telecommunications Industry Ombudsman Scheme: Consumer Safeguard or Clever Scam?’ (2001) 8 *Competition and Consumer Law Journal*, 311.

<sup>132</sup> Independence is also a requirement of ASIC *Policy Statement 139 – Approval of External Complaints Resolution Scheme*. Governing bodies must have established a policy that sets out, amongst other things, that the overseeing body should comprise “equal numbers of consumer and industry representatives and an independent Chair” (at PS 139.26). Further, “[a] scheme must be: entirely responsible for the handling and determination of complaints; accountable only to the scheme’s overseeing body; and adequately resourced to carry out their respective functions” (at PS 139.24).

<sup>133</sup> See for example NADRAC, above n 97, 28.

mediation. On the other hand, it is argued that the judicial role is unacceptably compromised by undertaking mediation. Here Street argues:

A court that makes available a judge or registrar to conduct a true mediation is forsaking a fundamental concept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of the court by one party, in which the dispute is discussed and views expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the courts observe.<sup>134</sup>

#### **7.3.2.1.2. Power Imbalances Between The Parties**

Equality in bargaining power between the parties is an important aspect of fairness in dispute resolution processes. Inequality of bargaining power between the parties increases the risk that one party may be pressured into accepting a disadvantageous settlement.<sup>135</sup> Fiss argues that litigation is better able to provide protection from power imbalances between the parties.<sup>136</sup> The use of lawyers in litigation is seen as particularly important in reducing the effect of power imbalances between the parties in this context.

The capacity of ADR processes to provide appropriate protection to the weaker party where an inequality of bargaining power exists between them remains a contentious issue within the literature reviewed.<sup>137</sup>

#### **7.3.2.1.3 Judicial Review**

The right of judicial review is a fundamental procedural safeguard of the court system. Astor and Chinkin explain the importance of judicial review as follows:

“fundamental principles of due process provide guarantees against oppressive or arbitrary treatment. Rights of appeal are a protection against idiosyncrasy and error”.<sup>138</sup>

Rights of judicial review are generally not applicable to outcomes reached using most ADR processes as the outcomes represent a consensual agreement of the parties.

#### **7.3.2.1.4 Publicity & Transparency**

While some users may view the confidentiality of outcomes reached using ADR processes as a benefit, it may also create a range of problems.

The confidential nature of ADR processes “privatises” dispute resolution. Unlike litigation in the courts, which occurs in the public domain, ADR processes are generally private and confidential. The “privatisation” of dispute resolution by ADR processes has a number of problems. The problems have been identified and summarised by the UK Department for Constitutional Affairs:

An effective civil justice system is important to civil society, not just those actually involved in a dispute. In considering the potential effect on the system as a whole, critics have argued that increased use of ADR, by moving dispute resolution from the public to the private sphere, will prevent the law from developing to meet changing circumstances. Keeping information about the details of settlements out of the public domain prevents their use as comparators and may lead to an increase in the number of claims which are disputed. Private settlements may not take into account the wider implications of the dispute, and may weaken the impact of legislation, for example in the areas of

<sup>134</sup> L. Street, ‘The Courts and Mediation – A Warning’ (1991) 2 *Australian Dispute Resolution Journal*, 203-204.

<sup>135</sup> Astor and Chinkin, above n 10, 54.

<sup>136</sup> Fiss, above n 126.

<sup>137</sup> Astor and Chinkin, above n 10, 54-55.

<sup>138</sup> Astor and Chinkin, above n 10, 57.

environmental protection or discrimination. It is equally necessary to be sure that ADR processes are equally accessible to all sections of the community, and treat all alike.<sup>139</sup>

The Federal Civil Justice Review concluded that in order to interpret legislation and ensure the evolution of the common law it is important that a proportion of disputes continue to be resolved through judicial decision.<sup>140</sup>

In addition, the “privatisation” of dispute resolution by ADR processes makes the identification of systemic issues that may require a public policy response very difficult.

As a result of the “privatisation” there is little publicly available information about outcomes achieved using ADR processes. The absence of such information makes evaluation of the effectiveness and efficiency of ADR services extremely difficult.

### **7.3.2.2 Substantive Fairness**

Substantive fairness relates to the outcome of the dispute itself. Litigation is better able to provide safeguards to ensure that outcomes of disputes are substantively fair. As NADRAC notes, safeguards which seek to ensure the substantive fairness of outcomes is of particular importance to vulnerable disputants. NADRAC states:

By embracing the advantages of ADR however, there is a danger that the participants may lose some of the safeguards available to them under the formal justice system. For example, in ADR processes such as mediation, procedural fairness may be maintained, but there is no third party decision maker who decides what is a just outcome. The participants must decide this for themselves. Without an “umpire” the participants may come to an agreement which is significantly outside community norms. It could be argued that departing from community norms is acceptable if that is what the participants wish to do. However, the problem with giving control to the participants rather than a third party decision maker, is that the agreement may do grave injustice to one of the participants, or fail to take into account the interests of vulnerable third parties or of matters of public interest.<sup>141</sup>

Consequently there is potential for outcomes reached using ADR processes to depart from community norms, or to fail to protect the rights of the disputants.<sup>142</sup>

### **7.3.3 The Binding Nature & Enforceability of Outcomes**

The enforceability of outcomes is an important feature of dispute resolution processes. A decision of a court is legally binding and is enforceable on the parties to the dispute in a court of law. The decision of a court enables the final resolution of a dispute.

Most ADR processes do not produce legally binding outcomes. Decisions made using arbitration are binding on disputants. However, outcomes reached using other ADR processes such as negotiation, mediation or conciliation are not of themselves binding.

Parties to a dispute can make outcomes reached using ADR processes such as negotiation, mediation or conciliation legally binding by including them in an agreement for settlement. Once the settlement agreement is signed by the parties it becomes a binding and enforceable contract.

NADRAC notes that most mediated agreements are in fact complied with.<sup>143</sup> However, where a dispute arises about an agreement or one party seeks to enforce the agreement and the other

<sup>139</sup> Department for Constitutional Affairs, above n 105, [4.14].

<sup>140</sup> Civil Justice Review, Federal Civil Justice System: Strategy Paper 135 (2003), 132.

<sup>141</sup> NADRAC, above n 123, 16.

<sup>142</sup> See also Astor and Chinkin, above n 10, 55-56.

<sup>143</sup> NADRAC, above n 57, [11.34].

party seeks to withdraw from it, litigation may be necessary to enforce the agreement. Ultimately, NADRAC has noted that uncertainty regarding the enforceability of ADR agreements “has the potential to undermine the effectiveness of ADR processes, as well as encouraging litigation”.<sup>144</sup>

### **7.3.3.1 Industry ADR Schemes & Binding Decisions**

The binding nature of industry ADR scheme decisions is unique.

Decisions of industry schemes are only binding on a consumer *if the consumer accepts the decision*. If the consumer does not accept the decision they may pursue remedies available to them under the general law, including litigation in the courts.

Failure by a scheme member to comply with a decision may result in a range of sanctions including: industry self-regulatory sanctions (for example, expulsion from an industry association) and/or sanctions imposed by an industry regulator (including withdrawal of an operational licence).

### **7.3.4 Enforcement & Admissibility**

The Enforcement of ADR Agreements Also Raises The Issue of Admissibility of ADR agreements. As NADRAC explains:

The main difficulty in relation to the enforcement of ADR agreements occurs where one party wishes to rely on the agreement and the other party wishes to withdraw from it. In such cases, one party will usually claim that the agreement was not final, but an interim document created during an ADR process such as mediation. Such documents would usually be inadmissible, and therefore not enforceable.<sup>145</sup>

NADRAC discusses the issues of enforcement and admissibility in more detail in its recent report *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters*. This report is available on NADRAC’s website at [www.nadrac.gov.au](http://www.nadrac.gov.au).

### **7.3.5 Conclusion: Balancing the Benefits & Problems with ADR**

The benefits and problems with ADR are well documented in the literature.<sup>146</sup> It is undeniable that ADR possesses a range of benefits that make it a particularly attractive form of dispute resolution. However, there is also a range of problems associated with the use of ADR.

When examining the benefits and problems with ADR, ADR is generally contrasted with litigation in the courts. When undertaking this assessment it is important to proceed with caution. As Astor and Chinkin explain this examination should be undertaken in a balanced and analytical way as:

Litigation is not an unmitigated problem and ADR is not an unalloyed benefit. The reality behind the rhetoric of ADR is sometimes not appealing, and litigation does have advantages as a method of resolving some disputes.

When contrasted with litigation it is clear that there are a range of attractive benefits to be offered by ADR, including cost benefits, flexibility, speed, informality, increased disputant control and a wider range of remedies. However, it is well demonstrated that ADR does not possess the same procedural safeguards and quality controls as litigation in the courts. It may also have other effects – such as reducing certainty through the loss of precedents created by court-resolved disputation (although the vast majority of disputes would always be resolved at a non-precedential level of the court hierarchy).

<sup>144</sup> Ibid, [11.29].

<sup>145</sup> Ibid, [11.3].

<sup>146</sup> See for example Astor and Chinkin, above n 10.

This does not mean that ADR is not a useful and valuable dispute resolution tool. It is simply a warning that a rational, evidence based approach is required to evaluate the benefits and problems with ADR before adopting ADR processes.

Such analysis was clearly taken in the UK prior to the adoption of the civil reforms contained in the Woolf report. In this context Sir Peter Middleton concluded:

I do not accept the argument that limitations on the procedures that parties can currently adopt would reduce the quality of justice. Justice does not depend solely on an exhaustive decision-making process. Timeliness and affordability are equally aspects of justice. It is no justice, if a decision can only be reached after excessive delay or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less cost is likely to result in a net improvement in a world where resources are limited.<sup>147</sup>

In this case, the analysis of the benefits and problems of reform of the civil justice system concluded that benefits of reforms to reduce cost and time of processing claims outweighed any compromise to the procedural safeguards and quality of the justice services delivered.

<sup>147</sup> P Middleton, *Review of Civil Justice: Report to the Lord Chancellor by Sir Peter Middleton* (September 1997) as cited in I Scott, 'Keynote Address' (Paper presented at AIJA Conference, 2004), 32.

## ***Chapter Eight: When Should Government Fund ADR Services?***

### ***8.1 A Law & Economics Analysis***

A law and economics analysis of the use of ADR within the civil justice system may offer insight into the development of a more efficient civil justice system. It may also serve to assist in our assessment of the costs and benefits that arise from government participation in the promotion and development of ADR within the justice system.

In short, economics, in predicting and testing impact, allocative and distributive, of alternative legal regimes, offers powerful and indispensable insights about the implications of alternative policy choices ... and forces us to confront the full opportunity costs of our choices.<sup>148</sup>

Put another way, an economic analysis of ADR does not dictate the policy choices we make, but it does reveal the true costs of those choices. Knowledge of the cost (and benefit) of public policy choice is a necessary step in making informed, good public policy.

### ***8.2 How is ADR Funded?***

The Research Report considers the use of ADR within the civil justice system. The civil justice system consists of both public and private dispute resolution services.

There are five major public suppliers of dispute resolution services:

- Courts;
- Tribunals;
- Statutory ADR suppliers;
- Government departments; and
- Community ADR suppliers.

Generally speaking, public dispute resolution suppliers are primarily funded using taxpayer monies. It is acknowledged that public suppliers of dispute resolution services also receive funding from other sources, such as user fees and charges that may even be charged on a full cost recovery basis. However, without the primary funding received using taxpayer monies, these services would not be able to operate at anywhere close to current levels, and in some cases may not be able to operate at all.

There are three major private suppliers of dispute resolution services:

- Internal ADR within private commercial organisations;
- Industry ADR schemes; and
- Other private providers such as barristers and solicitors and private mediators.

Generally speaking, private dispute resolution suppliers are primarily privately funded, in other words without using taxpayer monies. Internal dispute resolution within private commercial organisations is funded by the commercial organisation to which it belongs (and ultimately by the consumers of the organisation's products or services). Industry ADR schemes are funded by member organisations in the industry to which they belong (and again, ultimately by the consumers of the member organisation's products or services). Other private providers such as barristers and solicitors and private mediators are generally funded by the disputants

<sup>148</sup> M Trebilcock, 'Introduction to Law and Economics' (1997) *Monash University Law Review*, 156-157.

themselves, however, it is noted that where a disputant is in receipt of a grant of legal aid this distinction is perhaps less sustainable.

### ***8.3 Why Should Governments Play a Role in the Delivery of Civil Justice Services?***

The rationale for government involvement in, and government funding of, civil justice services is essentially that civil justice may be viewed as a public good as there are social benefits (or, as economists would refer to them, positive externalities) that flow to the public/community as a result of effective and efficient resolution of civil disputes. As civil justice is seen as a public good, taxpayers primarily pay for the operation of a range of public dispute resolution services.

#### ***8.3.1 Adjudication Lowers the Social Cost of Disputes***

Adjudication Lowers The Social Cost of Disputes By Facilitating Orderly Dispute Resolution. Effective And Orderly Dispute Resolution Can Generate Increased Confidence in the justice system as it promotes understanding of citizen's rights and responsibilities and confidence in the capacity of the justice system to uphold their rights. In this way effective dispute resolution promotes increased community cohesion and business efficiency. Duggan refers to this as the "corrective justice function" of civil law adjudication.<sup>149</sup>

#### ***8.3.2 Adjudication Avoids Disputes***

Adjudication in the civil justice system avoids disputes by generating rules (or precedent) to guide future behaviour. In this context precedent creates a guide that is consistent and predictable which allows individuals to take appropriate cost-effective measures to avoid liability in the future. Duggan refers to this as the "deterrence function" of civil law adjudication.<sup>150</sup>

According to Duggan, "[t]he spill over effects of the corrective justice function and the deterrence function [of adjudication in the civil justice system] help explain why governments subsidise the system".<sup>151</sup> To this end the aim is to encourage the optimal amount of litigation by transferring some of the costs to the litigant in using the system into social benefits for the community.

While there is an important role for the government to play in the delivery of both private and public civil justice services civil justice services, the scope of the government role, and the level of government funding can sensibly be examined.

### ***8.4 Defining the Scope of a Government's Role in the Provision of Civil Justice Services***

According to Trebilcock, "most civil justice services can be priced and rationed".<sup>152</sup> As these services can be priced and rationed, price signals may be used as an incentive (or disincentive) to consumers of dispute resolution services to choose the most efficient mechanism to resolve their dispute:

<sup>149</sup> A Duggan, 'Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics Perspective' in T Telfer (Ed) *International Perspectives on Consumers' Access to Justice* (2003), 46.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> M Trebilcock, 'Rethinking Consumer Protection Policy' in T Telfer (Ed) *International Perspectives on Consumers' Access to Justice* (2003), 80.

From a law and economics perspective ... virtues are often seen in simply creating socially appropriate incentive structures and letting individuals make choices, in this case as to which institutional avenue of redress to pursue in light of this incentive structure<sup>153</sup>

To provide an effective price signal to users of the civil justice system, it may be, at least in some circumstances, public civil justice services should be priced at their fully allocated social cost. It is likely that this could have at least two effects. First, incentives for disputants to use ADR might increase as ADR may be able to be provided for a lower cost than litigious solutions. Second, the fully allocated cost of dispute resolution generally (including ADR) would create incentives for disputants to resolve disputes without third party involvement. Trebilcock notes :

In the present context, to the extent that we believe that the formal court system is both overburdened and over utilised from a social perspective, I would argue that the presumptive response should be to price the services provided by this system at fully allocated social cost so that all litigants utilising the system perceive not only their private costs but also the full social costs of the services provided. This is likely to have at least two effects: in many cases to induce settlement rather than litigation, and in other cases to utilise alternative forms of dispute resolution as a substitute for formal litigation.<sup>154</sup>

By providing public civil justice services at their full cost, competition between public and private civil justice services (including ADR) could also increase substantially:

Supposing, as a presumptive matter, that all court services were priced at their fully allocated social cost; while this would not entail, obviously, any radical privatisation of the court system, it would promote a significant degree of competition amongst alternative providers of civil justice. In addition, it would provide more resources to the public civil justice system, which could conceivably be applied to increase the supply of services.<sup>155</sup>

Overall, it is important to remember that even services which are suggested to be free are not, generally, actually free, even to the consumers of the service. The consumer of the service will likely be making a contribution to the provision of the service through the general revenue that governments collect.

Additionally, despite the unquestioned benefits of a civil justice system, and ADR, it must also be recognised that spending more money on civil justice mechanisms (including ADR) will not necessarily always enhance community welfare:

It is not true that increasing access to justice is always welfare increasing. First, producing justice in the sense of the services of the courts and the legal system has a cost. Increasing the provision of legal services has inputs which could produce other goods and services. The benefits from improving access to justice services must be compared with the benefits foregone from a smaller output from other commodities.

Second, justice services are peculiar commodities. In many cases individuals use them to define and enforce legal rights against others. But once a legal dispute has arisen the enhancement of one person's rights is necessarily the diminution of another's. Justice services are different from other services such as health care: one person's consumption of health care may make that person better off but it does not make anyone else directly worse off. Even if a costless increase in the supply of legal services is possible it would not necessarily be welfare enhancing.<sup>156</sup>

The New Zealand *Justice for All* report of the NZ Law Commission "recommends that fees for mediation should be set at reasonable rates that share the funding task between the parties and the state. Free mediation might lower the incentive to resolve disputes, but on the other hand fees must not be so high as to financially penalise parties when they are required to undertake the process".<sup>157</sup>

<sup>153</sup> Ibid, 81.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid, 82.

<sup>156</sup> H Gravelle, 'Regulating the Market for Civil Procedure' in Zuckerman and Cranston (Eds) *Reform of Civil Procedure: Essays on Access to Justice* (1995), 279.

<sup>157</sup> T Gault, 'Proportionality – Cost Effective Justice: The New Zealand Response' (Paper presented at the AIJA conference, 2004), 5.



Where mandatory referral to ADR at the court's expense has been instituted in the USA, research by the RAND Corporation has found the cost savings to the taxpayer funded justice system to be disappointing. The research has found that the use of mandatory ADR has attracted cases into the court system that would not otherwise be there. It concludes, "the aggregate cost to the court of providing arbitration hearings to thousands of cases may offset any public cost savings from reductions in the trial caseload".<sup>158</sup>

While these results may not translate directly to the Australian context, they nonetheless raise the important issue that mandatory referral to ADR at the expense of the court may not return the expected cost savings to the court.

### ***8.5 Proportionality in Dispute Resolution***

The concept of proportionality in dispute resolution seeks to balance the cost of access to dispute resolution with the benefits to society and the citizen in resolving civil disputes.

Proportionality has emerged as a relatively new concept in the ADR literature. Put simply, proportionality in dispute resolution recognises the need for dispute resolution procedures and their cost to be proportionate to the nature of the issues involved. Scott explains the "proportionality objective" as follows:

Specifically, this means dealing with the case in ways which are proportionate (i) to the amount of money involved, (ii) to the importance of the case, (iii) to the complexity of the issues, and (iv) to the financial position of each party.<sup>159</sup>

The issue of proportionality has been extensively examined and promoted in the UK, particularly by the Woolf Report. Increasingly the issue of proportionality is being considered and adopted in other countries including Australia and New Zealand.<sup>160</sup> Discussions about proportionality may be divided into two broad categories: proportionate procedures and proportionate costs.

Proportionate procedures focus on the design of court structures and processes so that they ensure that individual cases are developed in a way that is proportionate to the value, importance and complexity of the dispute.

Proportionate costs focus on the legal costs incurred by the disputants. In this context the amount of money that a disputant should be expected to pay to pursue or defend a dispute should be proportionate to the value, importance and complexity of the dispute.<sup>161</sup>

Proportionality is a particular issue for low value claims. As ADR can provide a cheaper method of dispute resolution than litigation in the court system it may be better suited as a dispute resolution method for low value disputes which would not be cost efficient to resolve using litigation in the courts.

In this context Cope argues that ADR is most suited to low value disputes:

ADR is, thus, most suited to industries where, without this alternative, disputes would be dropped and not pursued through the court system. Hence, arguments that ADR has less safeguards to guarantee justice and a lack of precedent break down because, in the absence of ADR, these benefits would still not be realised.<sup>162</sup>

<sup>158</sup> As cited in Department for Constitutional Affairs, above n 105, [13].

<sup>159</sup> I Scott, above n 145, 7.

<sup>160</sup> In 2004 the Australian Institute of Judicial Administration annual conference specifically addressed this issue. The conference was entitled "Proportionality – cost effective justice?"

<sup>161</sup> I Scott, above n 145, 7.

<sup>162</sup> D Cope, 'Resolving Consumer Disputes' (Paper prepared for Consumer Affairs Victoria, 2006), 21.

## ***8.6 Social Justice Policy Objectives***

Cope has identified the delivery of social justice policy objectives as a further social benefit which may necessitate a role for government in the provision of civil justice services. Cope notes:

Delivering justice or social objectives may require government involvement in ADR. The nature of that involvement would depend on what the government is seeking to achieve. It may involve, in the first instance, ensuring that ADR is available to disadvantaged groups, but it may also affect approaches to charging for ADR and the way services are delivered.

Cope has further identified the following key social policy objectives for the Victorian government that are advanced by accessible, unbiased ADR:

- . Facilitating cost effective redress of small disputes, and
- . Improving vulnerable and disadvantaged consumers' access to dispute resolution services.<sup>163</sup>

<sup>163</sup> Ibid.

## ***Chapter Nine: Issues in Designing a Best Practice ADR Strategy***

Following from the analysis contained in the Research Report, a number of key issues can be identified that may be appropriate to consider in designing a best practice ADR strategy by the Victorian Government.

### ***9.1 Issue One: Should There be Agreed Definitions of ADR?***

#### ***9.1.1 Defining ADR***

It is widely agreed among academics and practitioners of ADR, that ADR is difficult to define.<sup>164</sup> Despite the fact that ADR is widely used in Australia, the literature reviewed reveals no agreed single definition of ADR. Tillett has noted:

The rapid expansion of alternative dispute resolution has not been matched by the development of a consistent language within the field. Different organisations, different writers and different practitioners use the same terms in different ways, or describe the same processes by different terms.<sup>165</sup>

At its most basic, ADR is defined as a general umbrella term used to describe a range of processes for resolving a dispute other than by litigation in the formal court system.

There is also commonality to the elements of ADR. The common elements of the various definitions of ADR include:

- ADR is a structured informal process;
- that involves the intervention of a neutral third party; and
- includes a range of dispute resolution processes such as conciliation, mediation and arbitration.

Historically, ADR has been viewed as an “alternative” dispute resolution mechanism to litigation in the court system. In this context, some authors have sought to define ADR by contrasting it with litigation as the dominant form of court based dispute resolution in Australia.

#### ***9.1.2 Debates About The Definition of The Term “ADR”***

The Literature Reviewed Reveals That There Are Currently Two Primary Debates About The Definition of The Term “ADR”:

- Which ADR Processes Should Be Included Within The Term “ADR”? And
- What Is The Meaning And Significance of The ADR Acronym? In Particular, Is ADR ‘Alternative’ Or ‘Appropriate’?

The Debate About The Meaning And Significance of The ADR Acronym Is Perhaps The More Important of These Two Debates. The Acronym ADR Is Commonly used to refer to “Alternative Dispute Resolution”. The use of other synonyms for ADR including “Appropriate Dispute Resolution” has been identified in an attempt to remedy the positioning of ADR as an alternative to litigation.

<sup>164</sup> See for example Astor and Chinkin, above n 4; Sourdin, above n 4; Boule, above n 4 and NADRAC, above n 4.

<sup>165</sup> Tillett, above n 8, 178.

Many commentators prefer the term “Appropriate Dispute Resolution” as they believe that ADR should not be viewed as a second best option to going to court. Rather than an “alternative” to litigation in the courts, ADR processes may be better or more appropriate to the needs of some cases or some disputants.

The lack of consistency in definitions of ADR processes was identified by stakeholders. The lack of consistency was identified as a particular problem in relation to consumer understanding and expectation of ADR services.

*Stakeholder Comment*

*“Part of the point about ADR is that you’re getting a whole range of processes and there’s not a lot of consistency in what the processes are called, creating different expectations. The labelling of the different types of ADR would certainly help consumers and what they can expect ... I’m not sure that the community out there understand the slight variation of what’s facilitative and what’s directive”.*

### **9.1.3 Absence of Agreed Practice of ADR Processes**

Even where consistent definitions of ADR processes are adopted there may remain variations in practice. In this context the ALRC has noted that statutory definitions of ADR processes in some jurisdictions have resulted in the consistent use of definitions, however, despite this there remains substantial variation in practice:

The Commission has examined variation in the way in which ADR processes are defined and used in Australian courts and tribunals. An early difficulty with this research is that processes are described similarly in legislation and rules but their application may vary greatly in practice ... The variations mainly relate to the position and role of the neutral facilitator.<sup>166</sup>

Some stakeholders noticed a difference in practice adopted by mediators within their organisation. One stakeholder attributed this variation in practice to a difference in style among practitioners.

*Stakeholder Comment*

*“We have a [large] panel of mediators... They’ve got different styles amongst them. When I speak about this I use the extreme. Some mediators have a style where they are warm and fuzzy and they get people into the room and say “let’s be lovely to each other and when we sort this out we will be friends and get on and do our business together in the future”. Other mediators have a style which I describe as taking the parties into involuntary confessions room and sorting out some sort of resolution there. Exactly what they do doesn’t interest me so much because if they’re maintaining an almost 80% success rate I am happy with the way that they are doing things. So if it’s a matter of style, I wouldn’t be prescriptive about style. I think that we would look more at what the nature of the dispute is, do we want to have someone to mediate that dispute who has a forceful manner or do we want to have someone mediating that particular dispute who’s got a more gentle approach”.*

Another stakeholder provided the following example of variations in practice experienced in mediation.

*Stakeholder Comment*

*“I’ll just give you an example of what one of our mediators told us. He went to a pre-hearing conference and he was told it was a mediation. This was a number of years ago. And he had a situation where he was expecting a situation where he would be talking to the other person face to face, they would be discussing the issues openly and trying to find options to resolve [the dispute]. He was instead taken into a room by himself and lectured about how expensive this was going to be and told to think about it. And then he came back and was told “well haven’t you made an offer yet?” So his expectations were very different from his understanding of mediation and what it was like”.*

<sup>166</sup> Australian Law Reform Commission, above n 1, [3].

One stakeholder attributed the difference in practice as an attempt by ADR practitioners to match the practice to the nature or requirements of the dispute.

*Stakeholder Comment*

*“There are lots of different [practice] models and there shouldn’t just be one within an ADR agency, ... there will be quite a lot of significant work differences between conciliators, for example, some will be very hands on, some would go visit people in their homes, others will work by telephone, it would depend what the dispute is”.*

### **9.1.4 Mediation: An Illustration of the Definitional & Practice Variations of ADR Processes**

Given The Extremely Large number of recognised ADR practices it is not possible to provide an in-depth analysis of the problems associated with the definition and practice for each individual process. Instead, the process of mediation will be examined to provide an illustration of these problems. Mediation has been chosen as it is the most widely used of all ADR processes among the stakeholder group.

#### **9.1.4.1 The Definition of Mediation**

Despite the fact that mediation is widely used in Australia, the literature reviewed reveals no agreed single definition of mediation.

The following are a range of different definitions of mediation currently used in Australia.

NADRAC defines mediation as:

**Mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is ‘a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute’.<sup>167</sup>

Boulle defines mediation as:

Mediation is a decision-making process; in which parties are assisted by an outside intervener, the mediator; who attempts to assist the parties in their process of decision making; and reach an outcome to which each of them can assent; and without the mediator having a binding decision making capability.<sup>168</sup>

Street defines mediation as:

Mediation is an informal process aimed at enabling the parties to a dispute to discuss their differences in total privacy with the assistance of a neutral third party (mediator) whose task it is first to help each party to understand the other party’s view of the matters and then to help them to make a dispassionate, objective appraisal of the total situation. As part of the process the mediator talks confidentially with each party. The object is to help the parties to negotiate a settlement. The discussions are wholly without prejudice. Nothing that is said by either party can be used or referred to in any proceedings (e.g. in a court case). The mediator arranges and chairs the discussions and acts as an intermediary to facilitate progress towards settlement.<sup>169</sup>

<sup>167</sup> NADRAC, above n 4.

<sup>168</sup> Boulle, above n 4.

<sup>169</sup> L Street, *Mediation: A Practical Outline* (5<sup>th</sup> edition, 2003).

#### **9.1.4.2 Common Elements of Definitions of Mediation**

Despite the absence of an agreed single definition of mediation, there is broad commonality to the definitions of mediation provided above.

By examining the above definitions the following common elements of mediation can be identified:

- Mediation is a form of ADR;
- Mediation involves the intervention of a neutral third party;
- Mediation is a consensual dispute resolution process; and
- Mediation is non-adjudicatory.

#### **9.1.4.3 Mediation And Conciliation: What Is The Difference?**

As Tillett has recognised, there is also a tendency within ADR literature and practice for practitioners to use different ADR terms to describe the same process.<sup>170</sup> This problem is particularly visible in relation to the use of the terms mediation and conciliation.

The terms mediation and conciliation are often used interchangeably within literature and practice. Even where commentators seek to explain the difference between mediation and conciliation it appears that there is little practical difference between the two processes. For example, according to Street:

There is no difference in principle between mediation and conciliation; both are often described as ADR – Alternative Dispute Resolution. Both are consensus-oriented mechanisms serviced by a neutral facilitator in which ultimate control of how to resolve the dispute rests with the parties. Some say that conciliation requires a more positive, ‘hands on’ approach in which non-binding expressions of opinion or suggestions may be provided by the neutral facilitator. If the parties require this approach, it can be adequately encompassed within the inherent flexibility of the [mediation] process.<sup>171</sup>

#### **9.1.4.4 The Practice of Mediation**

Substantial differences in the practice of mediation can also be identified. Boulle has developed four separate mediation models that explain the different styles of mediation practice:

- I. Settlement mediation: the objective of the mediation is to assist the disputants to reach a compromise;
- II. Facilitative mediation: the objective of the mediation is to promote negotiation in terms of the disputants underlying needs and interests rather than their legal entitlements;
- III. Therapeutic mediation: the objective of the mediation is to deal with the underlying cause of the disputants problem, with a view to improving their relationship through empowerment; and
- IV. Evaluative mediation: the objective of the mediation is to reach a settlement according to the legal rights of the disputants.<sup>172</sup>

Facilitative mediation is seen as the “orthodox” view of mediation. According to Boulle, most mediation scholarship, training and practice (particularly in community, neighbourhood and family disputes) adopt a facilitative model of mediation practice.<sup>173</sup> However, most court connected, commercial and industry based mediation adopts an evaluative model of mediation practice.

<sup>170</sup> Tillett, above n 8.

<sup>171</sup> Street, above n 167.

<sup>172</sup> Boulle, above n 4, 45-45.

<sup>173</sup> Boulle, above n 4, 43.

### ***9.1.5 Why is it Important to Define ADR?***

ADR has a wide range of uses and is used across a wide range of settings. A range of agencies supply ADR services including:

- Private suppliers of ADR services
  - Internal ADR within private commercial organisations
  - Industry ADR schemes
  - Other private providers such as barristers and solicitors and private mediators
- Public suppliers of ADR services
  - Courts
  - Tribunals
  - Statutory ADR suppliers
  - Government departments
  - Community ADR suppliers

ADR is also widely used and promoted as a dispute resolution method across diverse areas of practice including: commercial disputes, neighbourhood disputes, consumer disputes, family law disputes, pre-litigation procedures and post-litigation procedures.

For this reason commentators have suggested that it may not be possible to construct a definition of ADR and the various ADR processes that is applicable across the wide range of settings in which ADR is used.<sup>174</sup>

There is a continuing philosophical debate among ADR practitioners about the extent to which ADR process should be defined. Sourdin summarises this debate as follows:

Some practitioners adopt the view that definitions adopted for ADR processes should be as broad as possible. This approach to definitions means that practitioners can vary processes, not follow strict process models or guidelines, and vary the dispute resolution approach according to the dispute. Other practitioners take the view that clear definitions are essential to enable ADR processes to develop. In this regard, some practitioners are concerned that there may be confusion among consumers of ADR because of definitional variations.<sup>175</sup>

However, the extent to which ADR processes should be defined is not only a matter for academic debate, but may have a significant impact on the practice and future development of ADR in Australia. The United Kingdom Department for Constitutional Affairs noted of ADR in Australia:

The definitional problem is not merely an academic debate as the confusion about terms can prevent public agencies imparting clear information and can therefore act as an obstacle to growing public confidence. It is also likely that as more courts and tribunals make use of ADR procedures there will be a greater need to develop consistent understandings of relevant terms.<sup>176</sup>

For this reason it is necessary to consider the benefits and problems of universal ADR definitions.

### ***9.1.6 Benefits of Universal Definitions of ADR And ADR Processes***

Universal definitions of ADR and ADR processes have a number of benefits for users of ADR services, providers of ADR services, governments and courts and the administration of justice.

<sup>174</sup> Astor and Chinkin, above n 10, 80.

<sup>175</sup> Sourdin, above n 4, 18.

<sup>176</sup> Department for Constitutional Affairs, above n 33, 56.

Tillett has succinctly outlined the importance of universal definitions for the success of ADR in Australia, including the important role to be played by government in the development of such definitions:

As the study, the practice and the profession of alternative dispute resolution develop, there will be a greater need for consistent use of specialist terminology, both to facilitate study, research and dialogue within the field and to facilitate the provision of information to consumers and potential consumers. It will probably prove impossible, even if it were desirable, for a single language to be developed. It is likely that practitioners from different intellectual and theoretical frameworks will use the same terms with different meanings, or different terms with the same meaning.

The problem for the consumer, however, needs to be addressed because alternative dispute resolution processes, traditionally seen as voluntary and consumer chosen (with the maxim caveat emptor clearly applying), are increasingly being prescribed or otherwise imposed. Presumably, at least in the areas of statutory alternative dispute resolution there is an urgent need to develop, and the possibility of developing, a consistent language. Equally, it will be effectively impossible to address questions relating to any proposal for the accreditation of practitioners within the alternative dispute resolution field without consistent definitions.<sup>177</sup>

### ***9.1.7 Problems With Universal Definitions of ADR & ADR Processes***

While there are numerous benefits to universal definitions of ADR and ADR processes, there are also associated problems. Some commentators have noted that universal definitions have the capacity to constrain the use of ADR in practice. To this end Boule argues that definitions are “simply unable to encompass the flexibility and creativity” of ADR practice.<sup>178</sup>

Similarly, NADRAC argues that some diversity of definitions may be required to reflect the diversity of contexts of ADR in practice. NADRAC states “terms do not exist in a vacuum and the meaning and implications of particular words depend largely on the context in which they are used”.<sup>179</sup>

NADRAC has also argued that while universal definitions may be useful, they will not achieve improvements in ADR practice:

While consistent definitions and descriptions are useful, they are inadequate tools to achieve improvements to practice, law or service delivery ... issues of practice may be better addressed through regulation or codes of practice in specific areas, rather than by a stand alone definition. Regulations or codes would clearly spell out practitioner roles and responsibilities, and the consequences associated with non-compliance.<sup>180</sup>

### ***9.1.8 Definitions of ADR And ADR Processes Within Legislation***

Despite the benefits of universal definitions of ADR and ADR processes, NADRAC has warned against including prescriptive definitions within legislation.

In NADRAC’s view, it is not particularly helpful to provide definitions in legislation except where it is proposed to:

- list the types of ADR that are permitted in a particular context ...
- limit the categories or qualifications of persons authorised to carry out ADR ... or
- provide defined circumstances for certain outcomes, e.g. immunity from suit or non-admissibility in any court action.

<sup>177</sup> Tillett, above n 8, 186.

<sup>178</sup> Boule, above n 4, 12.

<sup>179</sup> NADRAC, above n 4, 2.

<sup>180</sup> Ibid.



In some cases it may be desirable to ensure flexibility by permitting some of these matters to be dealt with in legislative instruments, in particular, in regulations or rules of court.<sup>181</sup>

### **9.1.9 Conclusion**

The lack of a single definition of ADR may have a significant impact on the practice and future development of ADR in Australia. Defining ADR is arguably increasingly important as levels of prescription of ADR services increase. There are a range of benefits of a universal definition of ADR for users of ADR services, providers of ADR services, governments and courts. In summary, the development of consistent definitions of ADR may:

- Assist ADR users to develop realistic expectations about the processes they are undertaking, which may enhance user confidence and acceptance of ADR services;
- Assist referral agencies (including courts) to match ADR processes to disputes, which may improve ADR outcomes;
- Assist ADR suppliers to provide clear and consistent marketing information about the nature of the ADR services;
- Assist suppliers of ADR services to develop consistency in practice;
- Assist in the development of standards, codes of conduct and ethical requirements of ADR providers;
- Assist in the development of qualifications and accreditation of ADR providers;
- Assist government and suppliers of ADR services with policy and program development and evaluation;
- Assist government in creating consistency of terminology used in legislation; and
- Assist government tender processes and reporting processes for the supply of ADR services.<sup>182</sup>

In particular, in the market for ADR, a clear information market failure has been identified, that warrants, for the efficiency of the market (and consumer's confidence in that market), attention. Clear definitions will be a starting point for such information disclosure.

The Research Report supports, on the balance of the Report as a whole, defining ADR to mean alternative dispute resolution as opposed to appropriate dispute resolution. It is acknowledged that ADR plays, and should continue to play, an important role within Victorian Courts and tribunals. However, the majority of the academic literature reviewed, stakeholder comments in relation to the definition of ADR and stakeholder comments in relation to community perceptions show a familiarity with, and a common acceptance of defining ADR as an alternative to traditional court-based resolution (primarily litigation). Likewise, the Research Report is suggestive of a "higher-level" definition to ensure flexibility of application of ADR.

#### **Recommendation**

As part of a best practice strategy for ADR provision in Victoria, the regulation of, or the facilitation of self-regulation of, agreed definitions of ADR and ADR processes may be warranted. Such a definition may be best designed as a general definition that can be tailored within the context of its use (for example, either by a court, regulator or non-court service).

## **9.2 Issue Two: Issues with Referral Between ADR Suppliers**

### **9.2.1 Court Referral To ADR**

NADRAC has recommended the development of guidelines for referral to ADR to enable assessment of a dispute's suitability to ADR.

<sup>181</sup> NADRAC, above n 57, [4.20] – [4.21].

<sup>182</sup> NADRAC, above n 4, 1 and Boule, above n 4, 10-12.

### 9.2.2 When Is ADR A Suitable Dispute Resolution Method?

The ALRC has identified five factors that are relevant when assessing whether a dispute is suitable for resolution using ADR processes. These factors are:

- the nature of the dispute and the interests affected;
- the nature of the parties involved, including whether they are single or multi-party litigants; whether they are government or other public body litigants, corporations or non-public bodies, institutions or private individuals; their experience of dispute resolution processes; their cultural background; and whether or not they are legally represented;
- the factual and legal complexity of the dispute;
- the cost of resolution. If all other factors are equal, the costs of resolving the dispute should be proportionate to the amount in dispute; and
- whether there are trained ADR neutrals available to assist in resolving the dispute.<sup>183</sup>

### 9.2.3 When Is ADR Not A Suitable Dispute Resolution Method?

According to the Supreme Court of New South Wales ADR Steering Committee, referral to ADR should proceed on the basis that, at least in the first instance, “no case is **not** suitable for referral”.<sup>184</sup>

Despite the starting point adopted by the Supreme Court of New South Wales ADR Steering Committee, it is widely recognised in the literature reviewed that not all disputes will be suitable for resolution using ADR processes.

The ALRC has identified five factors that may indicate where the use of ADR processes is not suitable to resolve a dispute. These factors are:

- when a definitive or authoritative resolution of the matter is required for precedential value;
- when the matter significantly affects persons or organisations who are not parties to the ADR process;
- when there is a need for public sanctioning of conduct or where repetitive violations of statutes and regulations need to be dealt with collectively and uniformly;
- when a party is, or parties are, not able to negotiate effectively themselves or with the assistance of a lawyer; and
- in family law matters, a history of family violence.<sup>185</sup>

### 9.2.4 Matching ADR Processes And Disputes

There is debate within the literature reviewed about the capacity to successfully match disputes and ADR processes. A range of the literature is based on an assumption that it is possible to “match” ADR processes with a particular kind of dispute. Research undertaken for NADRAC has concluded that matching of disputes with ADR processes may not be possible in practice.

The research report *Court Referral to ADR: Criteria and Research* undertaken for NADRAC examined the possibility of establishing a set of criteria to provide a checklist to guide court referral to ADR. Mack concludes that in reality such “matching” may not be possible. Mack states:

The reality is that there are very many components, and they are all moving targets. They are variable<sup>186</sup> in many dimensions, they are dynamic and they exert mutual influence on each other.

<sup>183</sup> Australian Law Reform Commission, above n 1, [5.5].

<sup>184</sup> Supreme Court of NSW, *ADR Strategies & Proposals for the Future: Recommendations of the ADR Steering Committee* (1995) Appendix B as cited in Australian Law Reform Commission, above n 1, [5.7].

<sup>185</sup> Australian Law Reform Commission, above n 1, [5.6].

<sup>186</sup> Mack, K *Court Referral to ADR: Criteria and Research* (2003), 2.

Mack concludes that it is not productive to search for a generalised ADR referral checklist. Mack states:

In light of the complex and dynamic qualities, which go into the process of matching, the search for generally applicable criteria will not be a productive strategy. It is more valuable to use research to identify areas in which each individual court must make specific choices, and to provide guidance for each court to design its own referral processes and criteria, in light of particular local features such as program goals, jurisdiction, case mix, potential ADR users, local legal profession and culture, internal resources and external service providers.<sup>187</sup>

### ***9.2.5 Court Based Efforts To Establish Referral Criteria***

Prior to Mack's research some courts and tribunals had established their own referral criteria to assist with matching of ADR processes and disputes. The objective of the referral criteria was to assist with selection of suitable disputes for referral to ADR.

Perhaps the best documented of these efforts is the referral criteria established by the Supreme Court of New South Wales ADR Steering Committee. The referral criteria include factors favouring referral to mediation, conciliation and arbitration.

#### ***Referral to Mediation***

Factors favouring referral to mediation are:

- The matter is complex or likely to be lengthy.
- The matter involves more than two parties.
- The parties have a continuing relationship.
- Either party could be characterised as a frequent litigator or the subject matter is related to a large number of other disputes.
- The possible outcome of the matter may be flexible, and with differing contractual or other arrangements to be canvassed. Poor compliance rates in similar types of matters could be considered in respect of this factor.
- The parties have a desire to keep a matter private or confidential.
- The parties can reach a view as to likely outcomes should the matter proceed further, that is, it is an appropriate time for referral.
- The dispute has a number of facets some of which may be litigated or argued about separately in the future.
- In the family law area, it has been proposed that mediation not be used -
  - where there is a history of violence or fear of violence between parties;
  - where there are allegations of child abuse or sexual abuse or a serious personal pathology;
  - where a party is unwilling to honour basic guidelines of the mediation process by, for example, continuously seeking to intimidate the other party during the mediation process;
  - where "one of the parties is so seriously deficient in information that any ensuing agreement would not be based on informed consent";
  - where the parties are not bona fide and the process is used as a "fishing expedition" for information or as an attempt to delay proceedings;
  - where counselling or therapy may be required;
  - where the parties may reach an illegal, grossly inequitable agreement or one which disadvantages an unsuspecting third party.<sup>188</sup>

#### ***Referral to Conciliation***

Factors favouring referral to conciliation are:

<sup>187</sup> Ibid.

<sup>188</sup> Australian Law Reform Commission, above n 1, [5.1].

- The matter involves expert or legal issues.
- Liability is not an issue.
- A party to the dispute is a government entity or an insurer.
- The parties have a desire to keep a matter private or confidential.
- Where parties have different assessments of the case based on different interpretations of law or different conclusion from agreed facts.<sup>189</sup>

#### **Referral to Arbitration**

Factors favouring referral to arbitration are:

- Whether an insurance company is liable in full or part.
- Where receiving a binding opinion is relevant.
- Where parties wish to avoid negotiations with the other side or where a party is unable to focus on issues, receive advice or negotiate.
- Where a matter involves the quantification of a dispute.
- Where privacy is a concern.
- Where delays in the court system are lengthy.
- Where the decision requires expert knowledge, arbitration may be preferred to trial processes.
- Where arbitration can be 'on the papers' or flexible forms of arbitration are desirable.
- Where arbitration is likely to provide a final result with little likelihood of appeals succeeding.<sup>190</sup>

Stakeholders identified the importance of intake processes for determining the type of ADR process best suited to the needs of the dispute and the disputants.

#### *Stakeholder Comment*

*"If somebody came in here and they said we want you to provide an arbitrator, we wouldn't just tell one of our mediators "Well guess what, you are arbitrating today"... We might send them somewhere else. We would probably go through an intake process with them to see what it is they were trying to achieve. Then we would probably make some recommendations around what might suit them the best. I think that's something that doesn't happen. The intake process is missing from a lot of the ADR processes".*

#### **9.2.6 Court & Tribunal Referral to ADR & Participation in ADR**

The literature reviewed reveals three primary issues in relation to court and tribunal referral to ADR:

- whether referral to ADR should be discretionary or mandatory;
- whether participation in ADR should be voluntary or compulsory; and
- the need for guidelines to assist with appropriate referral to ADR.

In its report, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters*, NADRAC provides the following figure that illustrates the options for referral to, and participation in, ADR.<sup>191</sup>

<sup>189</sup> Ibid.

<sup>190</sup> Australian Law Reform Commission, above n 1, [5.1].

<sup>191</sup> NADRAC, above n 57, [5.6].

**Figure 6: Options for Referral To & Participation in ADR**

REFERRER	PARTIES
<b>DISCRETIONARY REFERRAL ►</b> Referrer <i>may</i> refer parties to ADR	<b>VOLUNTARY PARTICIPATION</b> Parties must consent to referral
	<b>COMPULSORY PARTICIPATION</b> Parties' consent is not required
<b>MANDATORY CONSIDERATION ►</b> Referrer <i>must consider</i> referring parties to ADR	<b>VOLUNTARY PARTICIPATION</b> Parties must consent to referral
	<b>COMPULSORY PARTICIPATION</b> Parties' consent is not required
<b>MANDATORY REFERRAL ►</b> Referrer <i>must refer</i> parties to ADR	<b>VOLUNTARY PARTICIPATION</b> Parties must consent to referral
	<b>COMPULSORY PARTICIPATION</b> Parties' consent is not required

There is agreement within the literature reviewed that where referral to, or participation in, ADR processes is mandatory, government intervention to regulate the quality of ADR will be required. For example, Tillett states:

In fields where consumers freely choose to use the services offered in the open market place, and the state neither requires nor promotes the services on offer, it may be appropriate to allow the field and its practitioners to remain unregulated. This assumes, however, that the state has no responsibility even to protect the uninformed or gullible from potential harm. The increasing promotion of alternative dispute resolution by governments at all levels, and the increasing imposition of such resolution by statute, by courts and by contract, means that adopting this kind of "open market" position becomes less and less justifiable.<sup>192</sup>

## 9.2.7 Court & Tribunal Referral to ADR

### 9.2.7.1 Options For Court & Tribunal Referral to ADR

As can be seen from the diagram above, there are three options for courts and tribunals when referring disputes to ADR.

- Discretionary referral: The referrer may refer parties to ADR;
- Mandatory consideration: The referrer *must consider* referring parties to ADR; or
- Mandatory referral: The referrer *must refer* parties to ADR.<sup>193</sup>

### 9.2.7.2 Should Court & Tribunal Referral to ADR be Mandatory?

NADRAC is supportive of mandatory referral to ADR in some circumstances. One problem with NADRAC's report *Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters* in this area is that it conflates the dual issues of referral to ADR and participation in ADR.<sup>194</sup> Although, if mandatory referral is to be adopted, NADRAC believes that disputes should be assessed for suitability to ADR before referral takes place.

In the UK the issue of mandatory referral was considered by the Woolf report.<sup>195</sup> The report concluded that compulsory ADR should not be recommended either as an alternative to litigation in the courts or as a preliminary to litigation.<sup>196</sup>

<sup>192</sup> Tillett, above n 8, 187.

<sup>193</sup> NADRAC, above n 57, [5.6].

<sup>194</sup> See *Ibid.*, [5.20] – [5.28].

<sup>195</sup> Lord Woolf, Access to Justice: Final report to the Lord Chancellor on the Civil Justice System in England and Wales (1996) (Woolf report)

<sup>196</sup> *Ibid.*

In the US compulsory ADR has been introduced in some jurisdictions due to the lack of resources available for civil trials.

Mandatory referral to ADR was not supported by all stakeholders. Some stakeholders expressed the view that disputants should be entitled to their day in court.

*Stakeholder Comment*

*“I am against compulsory ADR, I think that the benefit it produces are outweighed by the delay cost in particular, but that shouldn’t be understood to be that I am against ADR, I am very much in support of ADR, but I think it should be on a case by case basis. What that means though is that the body responsible for the adjudication must also be involved in ADR, and it can be involved in ADR either by directly supplying it or by referring out.”*

Some stakeholders were actively seeking mandatory referral in their jurisdiction.

*Stakeholder Comment*

*“We make a practice of encouraging people to go to mediation, we do not have a properly developed and mature system of referral out to mediation nor do we yet have the power of compulsory referral of that category of dispute to mediation in this State and we should have one”.*

Mandatory ADR raised issues about the quality of ADR services, such as training and accreditation.

*Stakeholder Comment*

*“One of the things that we looked at was a compulsory [ADR] process prior to initiation of litigation ...[then] there had to be proper certificates from people to say that there was an attempt to resolve it through a different process ...That then raised issues about qualifications, registration, accreditation - you know, anyone can put out their shingle and say that they are a mediator - and were there then liability issues for the State in terms of using or referring to mediators to resolve some of these issues? And obviously [there is then] the whole element of enforcement. How would you deal with enforcement?”*

### **9.2.7.3 Cost Implications of Mandatory Referral to ADR**

Perhaps the primary danger in mandatory referral to ADR is that ADR may serve to add an additional layer of complexity and cost to a dispute.

Where mandatory referral to ADR at the court’s expense has been instituted in the USA, research by the RAND Corporation found the cost savings to the taxpayer funded justice system to be disappointing. The research found that the use of mandatory ADR had attracted cases into the court system that would not otherwise have been there. It concluded, “the aggregate cost to the court of providing arbitration hearings to thousands of cases may offset any public cost savings from reductions in the trial caseload”.<sup>197</sup>

While these results may not translate directly to the Australian context, they nonetheless raise the important issue that mandatory referral to ADR at the expense of the court may not return the expected cost savings to the court.

### **9.2.8 Participation In ADR**

#### **9.2.8.1 Options For Participation In ADR**

There are two options for participation in ADR:

- Voluntary participation: Parties must consent to referral to ADR; or
- Compulsory participation: Parties’ consent to referral to ADR is not required.

<sup>197</sup> As cited in Department for Constitutional Affairs, above n 105.

### **9.2.8.2 Arguments For And Against Compulsory Participation**

NADRAC has summarised the arguments in favour of court ordered compulsory participation in ADR. Court ordered compulsory ADR can:

- force parties to consider settlement before legal costs escalate;
- overcome the risk that parties will fail to suggest ADR from fear they will appear weak to the other party;
- ensure that court/tribunal time is not taken up with disputes which could be resolved less expensively in another process and that only those disputes incapable of reaching a negotiated settlement are put before the court or tribunal;
- ensure that parties to tribunal/court proceedings have the opportunity to attempt ADR irrespective of their counsel's view of the process or of any prejudice held by particular legal practitioners against ADR;
- allay any fears about the neutrality of the ADR practitioner because the practitioner is being appointed by an impartial third party; and
- ensure parties with disputes that are suitable for ADR but who otherwise may not have attempted ADR, can engage in ADR.<sup>198</sup>

On the other hand, NADRAC has identified the following arguments against court ordered non-consensual participation in ADR:

- consensual participation is the fundamental assumption of most ADR methods and a key source of its legitimacy;
- settlement at an ADR process is more likely to occur if the parties are naturally ready to settle, rather than obliged to participate;
- the process might stop being an alternative to litigation and become part of the judicial process, which in time may affect the way in which it is used;
- compulsory participation is inappropriate in certain circumstances or for certain types of disputes (for example where there is inequality between the parties or a history of violence);
- compelling people to participate in ADR may increase the rate of inappropriate referral and may create a situation where parties participate in ADR as a purely procedural step, with little commitment to the process;
- ADR may be used as a case management tool by courts and tribunals, rather than as a mechanism for considered and deliberative ADR;
- some research indicates that court-annexed ADR does not lead to overall savings for courts and tribunals, and ancillary costs such as ADR practitioner fees, extensive preparations resulting in increased lawyers' fees, and unanticipated effects of ADR can all increase the net costs involved; and
- a party who does not want to participate in ADR and is yet compelled to do so may not participate in good faith, rendering the process unsuccessful and perhaps even harmful, by increasing costs and delay.<sup>199</sup>

### **9.2.8.3 Should Participation In ADR Be Compulsory?**

NADRAC recommends that compulsory participation in ADR should only be used where there are appropriate safeguards relating to the assessment of the dispute and the quality of ADR processes: NADRAC states:

Participation in ADR should be compulsory only where there is appropriate assessment of whether the dispute is suitable to be referred to ADR and where appropriate professional standards are maintained and enforced.<sup>200</sup>

<sup>198</sup> NADRAC, above n 57, [6.23] (footnotes omitted).

<sup>199</sup> Ibid.

<sup>200</sup> Ibid, [6.26].

#### **9.2.8.4 Sanctions For Non-Participation In ADR**

The literature reviewed also raises the issue of sanctions for non-participation in ADR. The need for sanctions to promote compliance is a particular issue where compulsory participation in ADR is required. Where sanctions are used they normally take the form of cost penalties.<sup>201</sup>

#### **9.2.9 Other Forms of Regulatory Referral**

There are other ways in which parties can be compelled to participate in ADR in the regulatory context. For example, where failure of a trader to participate could mean disciplinary action, a regulator may utilise ADR mechanisms as part of, or instead of, other enforcement mechanisms available under legislation or licence.

#### **9.2.10 Referral Loss**

The responses to the questionnaire raise potentially concerning issues as to “referral loss” throughout the supply system. A total of nine agencies did not undertake any follow-up to determine whether customers actually accessed the agencies to which they were referred.

<sup>201</sup> See for example Family Law Rules 2004.



**Table 3: Does your agency follow up to ensure that clients accessed the agency to which they were referred?**

ADR Agency	No	Yes - Occasional/ Periodically	Yes - Always
AAMI	◆		
Banking & Financial Services Ombudsman		◆	
Consumer Affairs Victoria	◆		
Dispute Settle Centre Victoria		◆	
Energy & Water Ombudsman Victoria		◆	
Financial Industry Complaints Service	◆		
Health Services Commissioner		◆	
Legal Aid Victoria			◆
Legal Services Commissioner	◆		
Magistrates Court		◆	
Ombudsman Victoria		◆	
Public Transport Ombudsman	◆		
Victorian Small Business Commissioner	◆		
Telecommunications Industry Ombudsman	◆		
Victorian Civil & Administrative Tribunal	◆		
Victorian Privacy Commissioner	◆		

**Table 4: What were the key findings of your most recent follow-up or referrals audit?**

ADR Provider	Key Finding of Referrals Follow-up
Banking & Financial Services Ombudsman	Survey is in progress and results not yet available.
Dispute Settlement Centre Victoria	48% of survey respondents described their referral as helpful or very helpful.
Energy & Water Ombudsman Victoria	75% reported that their issue had been resolved through the Referral to a Higher Level process 91% reported satisfaction with the Referral to a Higher Level process 62% reported that the matter was resolved in 24 hours. Note: scheme participants contact the clients, it is not up to the clients to make contact.
Health Services Commissioner	Most clients moved onto the recommended agency.
Legal Aid Victoria	In 2005 VLA conducted a major referrals research project – the findings are presently being acted upon. When LAV's RDM refers a client to a service it does a 'hot referral'.
Magistrates Court	Clients choose their own mediator, except in family violence cases. A client may choose from another source acceptable to the court.
Ombudsman Victoria	Most clients moved onto the recommended agency.

Another significant issue identified by stakeholders was the lack of coordination of referrals within the system.

One stakeholder raised a concern about the extent to which systemic issues identified by dispute resolution schemes, or other issues requiring a regulatory response (such as breaches of the Fair Trading Act) are forwarded to CAV.

*Stakeholder Comment*

*“A lot of complaints would be appropriately resolved in a dispute resolution context... but there are some that actually raise significant issues in terms of breach of the law ... there is a need for a feed back loop from the schemes [about these issues]”.*

One stakeholder identified that within the ADR supplier framework there was a problem with consumers dropping out of the system following referral - as a result the consumer's dispute remained unresolved.

*Stakeholder Comment*

*“I think a big problem that we would see is people that come to [our agency] and are referred to VCAT and for whatever reason, probably a whole range of reasons, they don’t take further action. There are a lot [of disputants] that drop out of the system. In a number of areas we have tested this and it seems to be quite consistent and I think that’s a bit of concern. So where we say we can’t resolve this at conciliation, you can go to VCAT and they can give you a determination - do they ever get their answers? Often they don’t.*

*I think there are some other issues there in terms of when they do get to VCAT in many cases they are asked to go through a mediation process again in effect. Conciliation hasn’t worked here so we will go through mediation. The outcome is often not one that is to the satisfaction of both parties because they realise that it’s going to be somewhere in the middle and they have been forced to agree a lot of times. The feed back to us is that people just want a determination and it in a sense what VCAT is set up to do”.*

### **9.2.11 Conclusion**

There is disagreement about referral protocols to and from ADR services, particularly around the identification of when matters are appropriate to refer to ADR, or away from ADR, as well as whether such referrals should be mandatory or voluntary. This raises issues as to whether some users of civil justice systems are receiving inappropriate dispute resolution services which could result in loss of confidence in processes and outcomes, efficiency losses and variable effectiveness of dispute resolution.

It is also the case that there appears to be problems with “referral loss” throughout the supply-side system. In short, there is simply too much that is unknown about those users who are referred to other preferred suppliers. It is worthwhile asking whether in fact this matters - many of those who are “lost” may, in fact, find resolution with another ADR provider in the supply system and in fact be captured in their data as having done so. It would simply be the case that the original referrer does not know this, not that it didn’t happen. Given the significant funding provided by government for ADR services, however, such “referral loss” could result in expenditure inefficiencies. This is the case where inappropriate referrals which are pursued by users result in unnecessary resource allocation within referred providers (which would not have been incurred if referral had been appropriate). Additionally, where users are referred, but “drop-out” of the system, and by doing so, their problem escalates, further costs may be necessary to resolve the escalated dispute that would have not otherwise have been incurred. Further, to the extent to which government is also concerned with overall levels of consumer detriment, being unsure whether those with detriment, who have had a first experience of an ADR service, have in fact been supplied with a service after referral may be worthy of further consideration. In part, these issues may require a different approach to referrals – one that sees referrals as a separate service to which quality benchmarks must be set and achieved.

#### Recommendation

There may be an appropriate role for government in working with ADR suppliers to address “referral loss”. Referral loss may be addressed through obtaining better data on referrals and referral “follow-up”, as well as working towards agreed practice for appropriate and inappropriate referral to and from ADR (as well as monitoring of referral). In particular, government may wish to consider, in the first instance, establishing a pilot for improved referral protocols for significant referral pathways, for example, working with agencies that have either recorded a high number of referrals or receive a very large number of disputes. One referral pathway that received particular attention during the stakeholder interviews was that between CAV and VCAT and this may also be a matter for initial attention. A further referral issue considered of significance is the lack of referral to key enforcement agencies of disputes that would otherwise represent a breach of the law.

Finally, both the stakeholder interviews and the literature review suggest that consideration of pre-litigation ADR referrals may be of merit. For example, the government might wish to work with the courts to achieve mandatory pre-lodgement or pre-hearing ADR in the civil jurisdiction (with the undertaking of a cost/benefits analysis either before implementation or after a trial implementation).

### ***9.3 Issue Three: Problems With Awareness & Promotion of ADR***

#### ***9.3.1 Lack of Consumer Awareness And Understanding of ADR***

Lack of consumer awareness and understanding about ADR is a significant problem with ADR. Consumer awareness of ADR is important to ensure appropriate usage and acceptance of ADR processes. NADRAC notes that currently, consumer awareness about ADR and ADR processes is low:

Most service users have little awareness of ADR generally, let alone the fine distinctions among particular ADR<sup>202</sup> processes such as facilitation, mediation, conciliation and conciliation counselling.

In the UK a similar lack of awareness and preparedness to use ADR processes has been recognised:

There are what appear to be strong arguments for using ADR processes in a wide variety of cases. Yet people do not do so. Even where ADR is available conveniently and very cheaply, very few use it. It is not altogether clear why this is so ... One possibility is that people do not realise that there are alternatives to litigation. It is important to help them to judge whether ADR is a good option for their problem.<sup>203</sup>

Promotion of ADR may require institutional direction to encourage disputants to use ADR services in preference to having their “day in court”.

<sup>202</sup> NADRAC, *ADR Terminology: A Discussion Paper* (2002).

<sup>203</sup> Department for Constitutional Affairs, above n 105, [4.8].

*Stakeholder Comment*

*“I think professionals, white collar professionals have taken to the philosophy of alternative dispute resolution but I don’t think that broad-based consumers, until probably the last 5-10 years, have taken to it to the same extent. They want their day in court, they want some kind of authority around this. They don’t want to sit on the other side of the table with the person that they are in dispute with.”*

### **9.3.2 Conclusion**

Information disclosure is probably the key corrective device used in modern markets to address market failure (asymmetric information problems). Disclosure of information protects consumers from being misled and helps activate markets (improving competition and thereby economic efficiency) by ensuring consumers are best informed to express their preferences in markets. The situation with information disclosure in markets is analogous to the need for good awareness of the supply of ADR. Awareness of the provision of ADR services can have a range of beneficial effects. First, users who suffer detriment are more likely to know that there are services that can be utilised to resolve their dispute, thus preventing the undesirable escalation of disputes. Second, awareness of dispute resolution services will make it more likely that users efficiently choose the most appropriate ADR provider. Knowledge of ADR terminology, also desirable, is in part predicated on addressing the wide variation in ADR definitions - a matter already addressed in this chapter.

Knowledge of ADR services can also have a positive effect on the market for civil justice – the better informed disputants are about the suitability of ADR, the more likely that they will express preferences that align with their actual needs for ADR, thus leading to efficiency improvements in the market for civil justice.

The responses to the Questionnaire raise concerns regarding the effectiveness and efficiency of awareness methods used to promote community awareness of ADR services. Approximately half the agencies surveyed did not assess the levels of community awareness of their services, despite undertaking community awareness activities.

#### **Recommendation**

There may be a role for government in providing “umbrella” ADR awareness programs, as well as working with ADR providers themselves on population-targeted initiatives designed to increase the awareness of ADR provision. To the extent that government is a significant funding provider for ADR services, the lack of evaluation of the effectiveness of consumer awareness spending by ADR providers appears to be undesirable. Government may wish to consider working with ADR providers on developing best practice awareness programs that include elements of market testing and appraisal to ensure that promotional monies are being spent effectively.

Finally, there may also be a need to consider the particular needs of certain populations, including those from CALD communities, indigenous Victorians, youth and low-income disputants.

### **9.4 Issue Four: Should There be a Central Access Point for ADR Services?**

Problems of referral loss and inappropriate referrals, as well as problems with consumer awareness, might suggest many possible solutions. One potential solution (at least in part) to these problems is the creation of a central access point for ADR services. Stakeholders raised the issue of the creation of a central access point, or single “gateway” for ADR services.

*Stakeholder Comment*

*“I think you can identify it [a supply side framework], and I think that the government needs to play a role in terms of operating as a gateway...”*

*If you undertake ADR you’ve got the External Dispute Resolution Services, you’ve got the Internal Dispute Resolution Services, you’ve got the privates and then you’ve got the State funded instruments and then you’ve got the federal and then you’ve got select areas for example the indigenous or where you’ve got major community conflict, so there’s kind of a spread”.*

Centralised entry to ADR services is, in fact, already being utilised in the supply framework in Victoria. It is, arguably, a component of a larger observed trend to consolidate ADR service provision. This is evident in overseas jurisdictions as well, for example, in the UK where a range of financial services dispute resolvers joined to create the Financial Services Ombudsman. In Australia, financial services dispute resolvers now offer a single “gateway” in the form of a universal phone number. Likewise, initiatives such as the Department of Justice on-line ADR system, is another form of creating single access points for disputants.

In effect, there are some agencies, that by function of the referral numbers, are presently, centralising complaint numbers.

Recommendation

There appears to be a case to consider a greater use of centralised access points for ADR services for efficiency and effectiveness reasons. Centralising entry to ADR services is, in fact, already being utilised. It would, however, be very difficult to create one central access point for ADR that “covers the field”. In short, there are so many different areas of endeavour to which ADR now applies, combined with multiple levels of government and regulatory responsibility, as well as a mix of both private and public funding, that the task of creating a sole access point may simply not be feasible (or, indeed, desirable).

### **9.5 Issue Five: Achieving Critical Mass in ADR Service Providers**

Within the framework of ADR supply, we can observe wide variation in the size of suppliers – from large agencies (of which a component may be dedicated to ADR service provision), reasonably large ADR-dedicated agencies, through to small agencies.

Although agency size does vary, it could broadly be characterised as diverse and small. An issue arises for the future then – should consideration be given to the optimal size of ADR services to ensure the most effective and efficient delivery of ADR services?

*Stakeholder Comment*

*“I think it would be useful to have an articulated sort of policy view of ADR ... a framework of a whole of government commitment to ADR ... Where you would say there’s got to be a initial cost benefit exercise ... after these questions there may be a political agenda, but you have to really be forced to ask the question is this the most efficient, effective way to resolve disputes [before establishing new agencies]?”*

Recommendation

There appears to be legitimate reasons to consider critical mass issues in the establishment of new agencies – for example, it may be sensible to consider a whole of government checklist of matters to consider when establishing a new ADR service. In short, such a checklist could be a useful policy design tool to ensure that ADR services are optimised.

## 9.6 Issue Six: Problems Caused by Variable Qualifications, Training & Accreditation of ADR Practitioners

There are a number of significant issues identified by the literature reviewed and by the stakeholders that will affect the future development of ADR services, particularly:

- Training and accreditation of ADR practitioners;
- Discipline of ADR practitioners; and
- Immunity of ADR practitioners.

The significance of these issues lies not only in improving the quality of ADR services, but also in protecting consumers of ADR services, and possibly increasing consumer acceptance of ADR services. While there have been attempts by NADRAC and others to address some of these issues, many of them remain largely unresolved.

### 9.6.1 Training And Accreditation of ADR Practitioners

There is currently no single national organization that trains and/or accredits ADR practitioners. Rather, a number of bodies, including for example the Australian Commercial Disputes Centre and LEADR, undertake training and accreditation.

NADRAC provides a good explanation of accreditation. According to NADRAC:

Accreditation is a process of formal and public recognition and verification that an individual (or organisation or program) meets, and continues to meet, defined criteria. An accrediting body or person is responsible for the validation of an assessment process or processes, for verifying the ongoing compliance with the criteria set through monitoring and review, and for providing processes for the removal of accreditation where criteria are no longer met. There are a variety of terms used which fit either of the above definitions. These terms include 'approval', 'registration', 'licensing', 'recognition', 'certification' and 'credentialing'.<sup>204</sup>

NADRAC has recognised the importance of common national standards for the accreditation of mediators for improving the quality of ADR and to protect consumers. NADRAC states:

[T]he development of common national standards for mediator accreditation are needed in order to maintain and improve the quality and status of ADR and to protect users of ADR services. This would also assist in promoting Australia's international dispute resolution profile.<sup>205</sup>

NADRAC has undertaken a significant amount of work in relation to the establishment of a uniform national accreditation system for mediators. This has included a workshop on mediator accreditation at the 7th National Mediation Conference in 2004 and a subsequent discussion paper *Who says you're a Mediator? Towards a National System for Accrediting Mediators*. NADRAC has since drafted a National Mediation Accreditation System and a National Mediator Standard.<sup>206</sup>

The accreditation system proposed by NADRAC allows for the accreditation of individual mediators as well as organisations that accredit mediators.

The objectives for the accreditation system are:

- to enhance the quality and ethics of mediation practice;
- to protect consumers of mediation services;
- to build consumer confidence in mediation services; and

<sup>204</sup> NADRAC, above n 57, [7.6]. Further information about accreditation of mediators is contained in NADRAC *Who Says You're a Mediator? Towards a National System for Accrediting Mediators* (2004). This report is available on NADRAC's website at [www.nadrac.gov.au](http://www.nadrac.gov.au).

<sup>205</sup> NADRAC, above n 57, [7.1].

<sup>206</sup> NADRAC, above n 57, [7.3].

- to build the capacity and coherence of the mediation field.<sup>207</sup>

Stakeholders viewed training and standards as important to the success of ADR outcomes. Stakeholders commonly recognised that the level of training and experience of ADR practitioners varied. Stakeholders expressed concern that the short ADR training courses currently on offer were inadequate.

*Stakeholder Comment*

*“What is an important factor in a regulation system? Should you be having a code of ethics? Should you have minimum training standards. Who the trainers are in terms of currency of competencies? And it just seems to me that the industry has one standard for one profession and requires another standard for another. The thing that I really think that we need to think about it seriously is that we don’t want to make any ADR process or service second rate. That it’s only for people who can’t afford court”.*

*Stakeholder Comment*

*“I entered mediation when it was generally non-professional people who were skilled up in something like a dispute settlement centre model and that was used across the board. I think that there has been a professionalisation of mediation. I think what happens though is a whole lot of people do mediation courses and then want to look at entering into it and that they think that because they have done a 5 day course, think that they’ve got skills and that they should be able to do it.”*

Some stakeholders required high levels of training and experience prior to appointment as an ADR practitioner.

*Stakeholder Comment*

*“[To be a practitioner in] our programme... you’ve got to have been in your profession for about 15 years and then practice in ADR for 5 years”.*

*Stakeholder Comment*

*“[Our ADR practitioners] have done [some sort of formal accreditation or training]. They are extremely experienced. They have been in the agency for a long time... so they have an enormous depth of practical experience”.*

Other stakeholders focussed less on the formal qualifications of ADR practitioners and viewed ADR as a broad skill applicable across a range of ADR disputes.

*Stakeholder Comment*

*“We take a broad view and say it’s a community kind of skill anybody can have but in terms of an industry people do need to be trained.”*

Accreditation of practitioners received wide support from the stakeholders. In the absence of an accreditation system most stakeholders had developed their own training programs. Some stakeholders had also developed their own set of training competencies.

Some cooperation between stakeholders in the development of training was recognised, particularly in the industry ADR schemes.

*Stakeholder Comment*

*“[Accreditation is important] and all I can tell you is what I am doing. In the Australian and New Zealand Ombudsman Association (ANZOA) we have an interest group called the Learning and Development Interest Group. ANZOA has 16 members: we have Parliamentary ombudsman, and industry ombudsman and obviously it’s Australia and New Zealand. One of the projects in the Learning and Development Interest Group is to explore a possible qualification for the conciliator/investigator/investigations officer role across all of the ombudsman schemes. If we had something like that and we were recruiting and*

<sup>207</sup> Ibid [7.46].

someone could say “we’ve got the blah blah” you would know exactly what level of competence they have achieved by having got that qualification. And so we are sort of thinking of ourselves more as an ADR industry in which people can move around, but having met certain standards of performance and competence.”

*Stakeholder Comment*

“Yes, well I don’t have a problem with [mandatory accreditation] at all. We actually have a competency-based framework for two roles here... So we’ve already got a kind of a basis for possibly moving forward. One or two of the other schemes have also done competency-based frameworks for their main roles”.

### 9.6.2 Discipline of ADR Practitioners

Consumer complaints and practitioner discipline are important quality control measures. The absence of an accrediting body makes it difficult for ADR service users to make a complaint about an ADR practitioner and for disciplinary procedures to be initiated against an ADR practitioner.

NADRAC has noted that although complaints against lawyer ADR practitioners may be directed to the law society in each state, there may be no recourse where a complaint is made about a non-lawyer practitioner.<sup>208</sup>

Indeed, the need for an appropriate complaints and disciplinary mechanism for ADR practitioners has benefits for the reputation of ADR practitioners and confidence in ADR in the community. NADRAC notes:

NADRAC is of the view that the best method of ensuring accountability and maintaining both the standards of practice and public faith in the ADR process is to have clear, transparent accreditation systems in place, with sanctions for breaches of professional standards. If ADR practitioners are bound by professional standards of which the public is made aware, the reputation of ADR practitioners would be enhanced, increasing public faith in ADR as a viable alternative to litigation.<sup>209</sup>

### 9.6.3 Immunity of ADR Practitioners

Immunity from civil action in the performance of duties may be provided in three ways: common law immunity, statutory immunity and contractual immunity. NADRAC explains the application of immunity to ADR practitioners:

Immunity may be provided in three ways. First, the common law extends judicial immunity to judges, other participants in the judicial system and quasi-judicial officers and bodies such as tribunals. In very limited circumstances this immunity may extend to an ADR practitioner. However, the general view is that common law immunity does not provide ADR practitioners with immunity generally. Secondly, a statute may provide that an ADR practitioner is not liable for any civil action arising out of his or her conduct as a practitioner (statutory immunity). Finally, an ADR practitioner’s civil liability may be excluded or limited by agreement between the parties (contractual immunity). The validity of such clauses depends on the nature of the liability that is sought to be excluded and the applicable law in the jurisdiction where the contract is made.<sup>210</sup>

NADRAC does not recommend that ADR practitioners be given broad statutory immunity from civil suit.<sup>211</sup> However, in the absence of immunity from civil suit the need for appropriate professional indemnity insurance requires consideration to ensure appropriate protection of consumers of services provided by ADR practitioners.

<sup>208</sup> NADRAC, above n 57, [7.41] – [7.42].

<sup>209</sup> Ibid, [7.49].

<sup>210</sup> Ibid, [8.10].

<sup>211</sup> Ibid, [7.33].



Legal liability of ADR practitioners and ADR organisations was a key issue identified by some stakeholders.

*Stakeholder Comment*

*“I think that the government might think more generously about the kind of protection it offers, institutions who are prepared to set up ADR services. We are talking about the immunity provisions and the State Government have a policy around good faith immunity versus judicial immunity. I think that they will give courts judicial immunity for their ADR services but they won’t give non-courts that”.*

#### 9.6.4 NADRAC Views On Standardisation

According to NADRAC the development of standards for ADR practitioners has a range of benefits. These benefits include:

- enhancing the quality of ADR practice;
- protecting consumers;
- facilitating consumer education about ADR;
- building consumer confidence in ADR services;
- improving the credibility of ADR; and
- building the capacity and coherence of the ADR field.<sup>212</sup>

There is currently no uniform standard for ADR services. NADRAC notes that a range of organisations have developed their own standards for ADR including:

- community organisations;
- governments;
- courts;
- statutory agencies;
- professional associations;
- industry groups;
- training advisory bodies; and
- other standards-setting bodies.<sup>213</sup>

NADRAC notes that the following standards may also apply to ADR services<sup>214</sup>:

- Community Services and Health Industry Skills Council national competency framework for family counsellors, family dispute resolution practitioners and workers in Children’s Contact Services;<sup>215</sup>
- National Training Information Service *Competency Standards for ADR*,<sup>216</sup>
- Institute of Arbitrators and Mediators Australia *Principles of Conduct for Mediators (2003)*;<sup>217</sup>
- Institute of Arbitrators and Mediators Australia *Rules of Professional Conduct (1996)*;<sup>218</sup>
- Australian Standard AS 4608-2004: *Dispute Management Systems*<sup>219</sup> a guide for the development and application of an effective dispute management system; and
- Australian Standard AS ISO 10002-2006: *Customer satisfaction - Guidelines for complaints handling in organisations*.<sup>220</sup>

In addition, the following standards may also apply to industry ADR schemes:

- Australian Securities and Investment Commission Policy Statement 139 – Approval of External Complaints Resolution Scheme; and

<sup>212</sup> NADRAC, above n 57, [ 7.50].

<sup>213</sup> Ibid, [7.13].

<sup>214</sup> Ibid, [7.14]. Web references below are provided by NADRAC

<sup>215</sup> See <http://www.cshisc.com.au>

<sup>216</sup> See <http://www.ntis.gov.au>

<sup>217</sup> See <http://www.iama.org.au/docs/medtrconduct.doc>

<sup>218</sup> See <http://www.iama.org.au/docs/rulesconduct.doc>

<sup>219</sup> Published by Standards Australia, and available at [www.standards.com.au](http://www.standards.com.au)

<sup>220</sup> Published by Standards Australia and available at [www.saiglobal.com](http://www.saiglobal.com)

- Department of Industry Science and Tourism, Benchmarks for Industry – Based Customer Dispute Resolution Schemes (August 1997)

Maintaining the current system of multiple standards can waste resources as organizations seek to create their own standards. It can also create difficulty for ADR practitioners who need to understand and comply with a diverse range of standards.<sup>221</sup>

NADRAC has recommended the development of essential standards in key areas and suggested that all ADR service providers adopt and comply with a code of practice.<sup>222</sup> NADRAC has noted that although standards need to be developed to suit the context in which ADR services are provided, minimum standards should apply to all ADR service providers.<sup>223</sup>

NADRAC argues that unless practitioner standards are regulated and maintained, parties should not be compelled to participate in ADR.<sup>224</sup> Indeed, where parties are compelled to participate in ADR, NADRAC believes that rule-makers, courts and tribunals will “have a special responsibility for ensuring appropriate standards are maintained in the delivery of their dispute resolution services”.<sup>225</sup>

There was support evident in the stakeholder interviews for a role for government in the area of ADR standards.

*Stakeholder Comment*

*“I think that [government intervention in relation to standards and benchmarks] would be very desirable. I think that the industry has accepted that that’s not going to happen on a national basis. If you want to be a mediator in ACT though, there is actually a formal mediation qualification that you have to do and there is an accreditation. I think that is the only jurisdiction with that. They say it [the ACT accreditation system] works really well. I think it works well because it’s a small jurisdiction and they all know each other. I think you’ve got to have some basis of what it means, what is it. Often mediation is used here in terms of it’s a mediation qualification, and there are what I call old school people who say that mediation has to be non-directive. So I think what’s actually happened is the jurisdictions have said ‘if you want to work in our jurisdiction you’re going have to have some kind of qualification plus your ADR training’”.*

**Recommendation**

There may be an important best practice role for Government in undertaking leadership in developing standards for training, qualification and accreditation of ADR practitioners, as well as standards for ADR services, for obvious reasons of effectiveness and efficiency. of course, such best practice may need to be at a high-level, to ensure sufficient flexibility in application of such standards as well as appropriate to the agency utilising the accreditation.

Moreover, other considerations will need to apply, particular if any such move to quality standardisation was to be mandated. Careful cost/benefit analysis, combined with interstate and international comparatives may be required to ensure that standardisation does not introduce greater compliance and other costs than benefits achieved. In particular, potential to distort the efficient operation of the ADR market, for example by creating barriers to entry, in terms of creating artificial demand costs for suitably qualified staff would need to be considered.

<sup>221</sup> NADRAC, above n 57, [7.44]

<sup>222</sup> NADRAC, above n 97, 71

<sup>223</sup> NADRAC, above n 57, [7.27]

<sup>224</sup> Ibid, [7.32]

<sup>225</sup> Ibid, [7.35].

### 9.7 Issue Seven: Variation in Quality of ADR

It is an important requirement of dispute resolution processes that disputants can be confident about the quality of the service provided. Issues of quality control are of particular importance to the practice of ADR if it is to be seen as an alternative to litigation. NADRAC explains:

For ADR to be a viable alternative to litigation, disputing parties need to have confidence that the quality of the ADR service to be provided will meet the standards of professionalism, accountability and ethical conduct the community expects from those providing legal and court-related services. Public awareness of how these practitioner standards are met through training and accreditation, and how any complaints are dealt with, also help build consumer confidence.<sup>226</sup>

Most stakeholders identified that there was a variation in performance standards between ADR suppliers.

*Stakeholder Comment*

*“I think performance standards vary enormously, I think that the industry based ombudsman schemes generally do a very good job but again there I think there is room for improvement, I think there is much more scope for some of the industry based schemes to get rid of written complaints, and remove some of the formality that its still in the processes. But they are very good model for consumers to use and feel part of. I mean VCAT... it’s supposed to be part of the ADR landscape but it doesn’t feel very informal ...it’s more of an arbitrated style of mechanism”.*

Lack of consistency in performance measures was identified as a problem when assessing the performance of ADR suppliers.

<sup>226</sup> NADRAC, above n 57, [7.3] (footnotes omitted).

*Stakeholder Comment*

*“In that framework I think the general response is we actually don’t have a good handle on just how well these are performing, because we don’t have consistencies in performance indicators, forms of measurements. In any event the judgement about how these different schemes are working is all a bit complex. It’s just not a single criterion that you look at – it’s multiple criteria. So you know the scheme may be working extremely well in one sense, resolving 100% disputes but that might be because it has some draconian powers that it imposes on business for example. Or the scheme may be extremely high cost, gold plated scheme. Yet a good scheme might be a much cheaper scheme that’s a bit more rough and ready. The question here is how do you make this judgement? It’s an interesting question.*

*I think that ... you have to have some sort of consistencies in reporting and I don’t think we actually have that when we look at it. When I last looked at it just in terms of the industry schemes there is some quite good reporting but its mixed from year to year. And it’s variable when you look at it across the different schemes again ... If anything I think the industry schemes are better [at reporting than the other schemes]”.*

### **9.7.1 Conclusions**

There is some agreement in the literature reviewed that issues of quality control in ADR may require government intervention. For example, NADRAC notes:

[T]here is a significant public interest in promoting community acceptance of ADR, and there are significant risks associated with unsatisfactory ADR service provision. Market principles do not readily apply to much of ADR, due to the lack of consumer and public knowledge about ADR, the one-off nature of most ADR service provision, mandatory requirements concerning the use of many forms of ADR, and the fact that ADR practitioners have responsibilities to clients seeking conflicting outcomes. It is unlikely that a totally free market would build community confidence in ADR, promote the use of ADR or address the risks associated with ADR service provision.<sup>227</sup>

In particular there is agreement that where referral to ADR or participation in ADR are mandatory government intervention in regulating the quality of ADR processes is essential. Regardless of whether participation is mandatory, government has an interest in quality where it is a supplier or funder of ADR or where it forms part of a regulatory scheme.

Consideration may be warranted of a greater role for government in ensuring consistent quality assurance mechanisms.

#### **Recommendation**

There appears to be a case to consider the development of comprehensive Key Performance Indicators (KPIs) for ADR services. Such KPIs could incorporate performance data and performance reporting based on benchmarks for best practice outlined in the Research Report. These KPIs would enhance comparison, funding efficiency and performance improvement.

## **9.8 Issue Eight: The Role of Government & the Private Sector in Funding ADR Services**

### **9.8.1 The Funding of the Public Supply of ADR Services in Victoria**

Generally speaking, public ADR suppliers are primarily funded using government revenue. It is acknowledged that public suppliers of ADR services may also receive funding from other sources, such as user fees and charges and may even recover some costs on a full cost recovery basis. However, without the primary funding received from government, these services would either not be able to operate, or not at anywhere close to current levels.

<sup>227</sup> NADRAC, above n 97, [4.22].

**Table 5**

ADR Supplier	Yes, clients pay for services	What do you charge fees for ?	Govt Funded	Govt Source	Funding Type
Consumer Affairs Victoria			◆	Vic	Note 2
Dispute Settlement Centre Vic		Training	◆	Vic	Ongoing
Equal Opportunity Commission Vic			◆	Vic	Ongoing
Health Services Commission			◆	Vic	Ongoing
Legal Services Commission				Vic & Public Purpose Fund	Ongoing
Ombudsman Victoria			◆	Vic	Ongoing
Magistrates' Court		Filing fee for civil procedures (not family violence)	◆	Vic	Ongoing
Victorian Small Business Commissioner			◆	Vic	Ongoing
Victorian Privacy Commissioner			◆	Vic	Ongoing
Victoria Legal Aid	◆	Table Note 3	◆	CW	Note 1
Victorian Civil & Admin Tribunal		Variable application fees	◆	Vic	Ongoing

Table Note 1: Commonwealth surplus funds held by VLA

Table Note 2: On-going and cost recovery from various licensing trust funds established under legislation

Table Note 3: This issue is not clear cut. RDM does not charge for its services, however the client may be required to pay to use the services. For example VLA has a client contribution charge that may apply for the grant of legal aid. So what the client is paying for is not RDM but a contribution for their lawyer's fees. (The client is still represented by their lawyer when they come to RDM.) Where a client is not legally aided they are fully responsible for their legal fees. Clients are not required to pay a client contribution charge to access the RDM, as it would be a major disincentive for clients to use the service. To encourage clients to use the service, it must be cheaper for a client to use RDM than going to court. There is also a trade-off benefit for VLA – if we can resolve the matter through RDM then we save the organisation money in funding the matter to litigation.

### ***9.8.2 The Funding of The Private Supply of ADR Services In Victoria***

Generally speaking private ADR suppliers are primarily privately funded, in other words without using government monies.

Many businesses have developed their own private internal dispute resolution schemes. Internal dispute resolution promotes the resolution of consumer disputes directly with the business concerned. Internal dispute resolution schemes vary from business to business. It may be a requirement of an industry code or license that an internal dispute resolution scheme take a particular form or meet particular standards. Some businesses may have only a short dispute resolution policy or process, while large businesses may have an entire department to deal with complaints handling. These internal ADR processes within private commercial organisations are funded by the commercial organisation to which it belongs (and ultimately by the consumers of the organisation's products or services).

There are a number of industry ADR schemes currently operating in Australia. Industry schemes cover a wide range of industries including banking and financial services, insurance, utilities and telecommunications. Industry schemes may operate at a national or state level. Industry schemes are funded by member organisations in the industry to which they belong (and again, ultimately by the consumers of the member organisation's products or services). The schemes calculate the amount of the levy to be paid in different ways. It is common for a component of the levy to be based on the number of complaints made concerning that member as well as the time it takes to resolve complaints following referral to the scheme. As a result, the levy amount can

vary between scheme members; it can also vary from year to year for the same member. Where the levy amount is directly linked to the number of complaints received there exists an economic incentive for members to resolve consumer complaints before they progress to the industry scheme. This economic incentive has the potential to encourage members to develop effective private internal dispute resolution schemes.

Other private providers such as barristers and solicitors and private mediators are generally funded by the disputants themselves.

Only one agency has identified charging users for the use of ADR services. This is a separate issue as to whether there is an agency fee, for example, the fees charged by VCAT or VLA. There is, however, wide variation within agencies regarding how costs are recovered.

### **9.8.3 A Greater Role For Industry Funding of ADR**

There Is Wide Support Among Stakeholders For Industry To Play A greater role in funding of ADR services.

A number of stakeholders identified the capacity for industry to play a greater role in funding ADR services based on the industry ADR scheme model.

#### *Stakeholder Comment*

*“In terms of industry schemes as you probably gather from [my earlier] comments, I am a great believer that if industries are serious about running their own industry schemes then that is where disputes should be resolved... Some of the strategies that they are using are good examples and models that clearly demonstrate good practice”.*

#### *Stakeholder Comment*

*“Probably my view is that where there is an industry where you can... [dispute resolution] should be handled by the industry, funded by the industry. There are areas that are going to fall outside that situation, for instance the fence industry and things like that, where there is no real “industry” involved. So I think there is certainly a role for government in mopping up those areas that fall out side the industry based schemes. There is a need for some sort of dispute resolution other than through the courts”.*

It was noted that overseas, particularly in the UK, the industry ADR scheme model is very popular, and receives strong support from government. Government support for industry ADR models in the UK also extends to requiring mandatory scheme membership.

#### *Stakeholder Comment*

*“Well definitely [there is a scope for industry to be part of establishing new schemes in Victoria], absolutely, I mean you just have to look at the UK. They’ve got Funeral Ombudsman they’ve got, Estate Agent Ombudsman, Surveyors Ombudsman. I mean they love the industry based Ombudsman model. There has also been some shift in the model in the UK. The Insurance Ombudsman, the Banking Ombudsman and a number of others were formed into a Statutory Financial Ombudsman Service a few years ago. [The scheme is statutory, but it is] still industry based, the industry still pays according to the number of complaints against them. So that has been a sort of shift in the model in the UK, they love that form of dispute resolution in the UK”.*

#### *Stakeholder Comment*

*“There is a scheme in the UK called the Ombudsman for the Estate Agents. But it’s a voluntary scheme and they have only got about 60% coverage of the industry. The government has had a lot of gripes about the efficacy of that particular ombudsman scheme and the government has stepped and said “we are going to make it mandatory.” So they are actually going to legislate to make it mandatory, and then it’s going to be up to the Real Estate Industry to work out how they are going to make it a more effective scheme”.*

However, most stakeholders believed that there would be a number of industries where the development of industry scheme models would not be feasible, for example where there are a large number of small players operating in an industry.

*Stakeholder Comment*

*“In terms of the role of the Victorian Government, to some extent it is almost the backstop role you could say in some cases. Where we have industries like banking, energy and so on, there are different motivations and different reasons why [dispute resolution services] have been set up. Nevertheless those industries are quite capable in effect of running and funding an ADR scheme. You can extend that list out, why not building as well, and so on.*

*There would be some areas though, for whatever the reason may be, maybe it’s a bunch of small players in an industry, lets say dry cleaners for example, they’re not able to fund such a scheme... So in the absence of the industry based schemes there is a back stop being played by CAV”.*

*Stakeholder Comment*

*“The funding issue I guess can become problematic. There’re some well-defined industries and the Industry Ombudsman Scheme is a good example where the industries themselves can fund the ADR scheme. But it becomes more problematic when you deal with those... industries where you don’t have that cohesive group that you can draw the funds from. So in terms of funding there maybe some need for a supportive type responsibility for government around those schemes ...so it could be a model that encompasses issues like user pays, industry involvement and government funding as well”.*

Industry scheme stakeholders believed that even where there are a large number of small players operating in an industry an industry ADR scheme could operate successfully.

*Stakeholder Comment*

*“And you know and if there is a dispute [with a builder] why wouldn’t you recover it from the builder? And there’s lots of models which are working well, just by way of example the TIO, that have 1000’s and 1000’s of members who are sole traders. So the TIO has as members dads and their sons who operate internet service provision companies out of their garage. Now they are still expected to pay for the costs of a consumer lodging against them with the TIO. Similarly there is lots of financial planners who are one-person shows. They’ve got licences but they are expected under the FICS charter and under ASIC licensing: they are required to participate in some kind of dispute resolution mechanism for their industry and they are required to pay for the cost of that. So why should the builder not be part of something, why should any industry in Australia not operate in the same way. You have got single operators in industries where we have ombudsman schemes in that model. ... the cost of setting up a robust and appropriate dispute resolution mechanism for consumers in particular industry is a drop in the ocean for them. Again, its completely driven by their own behaviour. If they are paying, it means that they are not fixing their consumer complaints”.*

It was widely recognised by stakeholders, particularly the industry ADR schemes that there was no need for government to directly fund industry ADR schemes. Many stakeholders recognised a role for government in addressing areas of quality, consistency, training, accreditation and promotion.

*Stakeholder Comment*

*“I don’t really feel that the government should have a significant role in provision of ADR. I think that a more appropriate approach would be around the regulation of ADR.*

*And it goes back to this issue of consistency, accountability and efficiency. If government has that role in regulating service providers ... then the focus could be ensuring the quality, consistency and efficiency of those that are providing ADR. Again the issues around accreditation for practitioners would be matters that I would’ve thought appropriate for government. That would be my view”.*

*Stakeholder Comment*

*“From the point of view of funding, I’d hate to see the government duplicate the funding process. Industry is at the moment funding the process, if the government wants to in effect improve it, the funding should be directed to areas other than where industry is directing it, maybe other areas of education and training and support. Publicity and promotion, quality standards, these sorts of areas are areas that you can look at. But it’s pointless offering money to the industry schemes, when industry schemes are getting money from the industry”.*

#### **9.8.4 The Price of ADR Services**

There is wide support amongst stakeholders for free access to ADR. There is some support amongst stakeholders for greater user pays mechanisms for ADR (and broader support again for discussing the issue), although it is not a key self-identified issue of agencies.

Generally stakeholders demonstrated a willingness to consider a model that included user pays options for cost recovery.

*Stakeholder Comment*

*“Whether the people should pay directly or indirectly [for dispute resolution services] is an interesting one from our point of view. We have never contemplated it for consumers coming into the system. If we were required to handle disputes for builders lets say ... should the builder pay for that? There are some interesting issues whether people should pay or not. I suppose you could take the view that if the market itself won’t throw up a model to deal with a dispute, because it happens to be in the interest of those in the industry to have such a thing in place, well I suppose there might at some sort of argument to get the government to provide some sort of service like that. I haven’t really thought it through to be honest, but it would still be quite a big step for us to contemplate charging consumers”.*

Stakeholders identified that there may be a market for user pays ADR.

*Stakeholder Comment*

*“We don’t have a means test or any sort of criteria like that. But you know there could be a system like that [where the user pays] to some extent. I mean “gold plated” mechanisms might be expected to provide a quicker resolution or a quicker response. So there might be some [capacity for] market selection”.*

One of the problems identified with a user pays system was the difficulty in calculating costs to enable cost recovery.

*Stakeholder Comment*

*“In order for us to make assessments [of the actual costs] for some of the schemes you do actually need to know the resource cost of what ever they are charging. That charge may be quite different from the actual costs in running the scheme. If for example efficiency was a factor, you would want to have a very clear idea of what those total costs were”.*

*Stakeholder Comment*

*“I think it’s a matter of then costing it...nothing is free in society. How do you then cost it? Do you make it \$100 for a dispute which ends up to be a total which is nowhere near a total cost recovery type situation or do you make it a real user pay system and if you’re a mediator and sit down with the parties and charge them \$250 per hour does the first party have to pay \$250 ...it just goes against the cost effective advantage ADR has”.*

The industry ADR schemes were seen to provide a good cost recovery model.

*Stakeholder Comment*

*“I think [cost recovery] is one of the strengths of the industry based ombudsman model. We charge companies and authorities in my scheme according to the number of complaints against them. So I have a four-tiered case handling charging structure. I have four types of cases, depending on its simplicity*



through to its complexity. And there are four separate charges. A simple sort of matter which can be dealt with by giving information or referral back to the company or authority is the first level which is called an inquiry and then I have three levels of complaint, level 1, 2 and 3.

Level 1 is a particular charge and if the company or authority doesn't settle at level 1, it gets upgraded to level 2 and a higher and separate and incremental charge is then levied and then if they don't settle at level 2 it goes to level 3 and then I charge them per minute of our time to resolve their case.

As well as that I have a combination of fixed and variable fees about 11% of my annual budget is it's fixed. So we have bandwidth, if you have low customer numbers you pay \$2,000. So it's \$2,000, \$5,000, \$10,000 and \$20,000 per annum depending on your customer size.

Then 89% of my annual budget is complaints based and therefore completely within the control of the company or the authority".

*Stakeholder Comment*

"[The costs are really in the hands of the industries themselves]. Absolutely, and they know that. It's sort of hard for them to argue about the budget for the scheme because it's completely driven by complaints."

While cost recovery is desirable, there is a need to balance economic principles with the role of the justice system in minimising disputes and building social cohesion.

*Stakeholder Comment*

"I think there comes a point where there should be full cost recovery but if you are looking at community issues and disputes then it is in the government's interest to have free services like DSCV or CAV. Its about public value, harmony within the community and building social cohesion to minimize disputes. What we see with some of the cases that we deal with, a homicide case (for example) is a dispute that has gone horribly wrong .. if there (had been) ... an appropriate intervention (it might have been different). The Government pays a far greater price where the intervention is too late. If its (a dispute) between a large utility and an individual where a company is acting inappropriately then perhaps they (the company) should be paying and making a contribution to the dispute resolution. And then at the extreme end of it there's the Courts. Courts are very costly intervention to resolve disputes and there has to be some form of discouragement from people using courts as a place of first call to sort out their civil disputes, and if they want to use those services then yes they have to pay for it and I would argue strongly that they should be paying a lot more than they are now ...So it has to be balanced with the economic issues as well".

*Stakeholder Comment*

"I think that that the State must provide in a civilised society is a system of civil law, and what stops people shooting each other is that we have a system of civil law and its very important for the maintenance of ordering ... for people who suffer injury, as a result of breach of contract, or unfair conduct, or whatever have a remedy so I see that as a fair resolution of civil disputes as much more than benefitting the parties to the dispute, I think it's [about] maintaining order in society, and therefore I think it's legitimate to try to capture some of the costs back from the parties but I think that when we are talking about the sorts of cases we do ...I think there is a limit to that".

There was wide support for free ADR services on the basis that cost recovery can act as a barrier to entry for some disputants.

*Stakeholder Comment*

"There is a reluctance and the resistance to do that [cost recovery]. The typical argument is that it creates barriers and you will know from your experience with this organisation, that the emphasis on vulnerability, disadvantage and making our services available to those who most need them... To be honest I think if we were to do a thorough analysis of our clients for instance, the percentage of those that might fall in to that level of disadvantage that the user pays system will create a barrier, I don't think it would be significant. I think we could look at a model of user pays as long as there were the safe guards built into that to ensure that we were not creating barriers for those who would desperately benefit from the service. A cost would be a barrier to them".

*Stakeholder Comment*

*“It’s such a tricky question in terms of cost recovery and you have to look at it sector by sector. It seems to me quite clear that the government should be supporting ADR in specific areas, where consumers simply don’t have the funds to participate.*

*Health care is one area of course, indigenous Victorians is another. I mean there are multiple areas, if you are looking at children court cases or other areas. You are never going to be able to recover cost”.*

Other stakeholders did not believe that a fee represented a barrier to entry for most disputants.

*Stakeholder Comment*

*“I think that a small price signal for a person initiating the dispute is generally a normal thing ...I think that the fact that you have to pay to initiate a dispute, is a good thing rather than making it free. I don’t think it provides a significant obstacle to people achieving justice.”*

Stakeholders identified that cost recovery models had been pursued with varying levels of success elsewhere.

*Stakeholder Comment*

*“Well [cost recovery] is problematic, it’s a model they use in South Australia in the mediation service area ... The difficulty that they find is a lot conflict is surprisingly between people who have it and people who have not, and the question is making both of them pay the equal amount or pay the equal costs”.*

One stakeholder identified that the lack of a consistent definition of ADR processes will impact on consumers willingness to pay for dispute resolution services, as consumers do not know what it is that they are paying for.

*Stakeholder Comment*

*“I think there are a number of things [to do with a willingness to pay for mediation]. People don’t know what they’re purchasing... So there hasn’t been common sense around that. So what are you actually paying for?”*

### **9.8.5 Conclusion**

What is the proper role for government in funding ADR services? It is clear that there is widespread support among stakeholders for affordable access to justice for disputants as a matter of principle. of course, the provision of ADR services by government is not costless. It is either an opportunity cost to government of monies that could be spent in other areas of economic and social activity or, alternatively, it is unnecessary revenue that is being raised from the community to fund government services.

It should also be noted that the principle of affordable (and sometimes free) access to justice is not applied uniformly. Put simply, some services are free to access while like services in another agency are not free to access. The differences in funding arrangements for ADR service provision, as well as the methods for cost recovery utilised across the supply framework appear to have arisen for a range of reasons. There is good reason to consider, from a first principles perspective, the funding and cost-recovery mechanisms for the supply of ADR in Victoria. In particular, thought might be given to why differences exist in funding mechanisms and whether these mechanisms are based on robust policy reasons or not. It would also be helpful to assess whether there is preferencing among both the cohort of demand-side participants in the ADR market, and the community more generally, for levels of funding for the various types of ADR services.

There is clear acknowledgment among stakeholders of the various public goods to which access to ADR promotes. For example, social cohesion, confidence in use of markets, reduction in escalation of disputes and civil participation values. Agencies that provide ADR might also have a range of other critically valued functions, for example, broad performance raising and

accountability. Less obvious is how these various goods should be valued. Considering these issues requires undertaking careful thought about the values we are seeking to promote and protect, understanding the costs and benefits of these values (and services), including appropriating a benefit to the social goods that emanate from the provision of ADR.

The debate, discussion and consideration that would occur in developing the metrics to be analysed would in itself have value. Perhaps the important point here is not that this sort of analysis necessarily would alter access to justice and ADR models (although it may help us tailor services to meet consumer preferences), but it would reveal to us the true cost of the policy choices we make.

Should industry (and consumers) have a greater role in the funding of ADR? Questions arise as to whether participants in ADR processes should contribute a greater amount to the provision of those services. Here equity and efficiency intersect. Encouraging access to justice generally, as well as access for those unable to afford access to justice if it is priced excessively, is a social good nominated by almost all stakeholders. At the same time, lack of price signalling to participants can create clear inefficiencies in resource allocation. It appears that there is a case for consideration by government of the fees that are charged by providers (including the variances in these fees not immediately explicable on policy grounds) to see whether there is a case for greater cost recovery.

#### Recommendation

Government Does Have An Important Role In Funding ADR Services, Particularly Where There Are Other Social Goods Associated With The Services Provided. Moreover, access to affordable ADR services for low-income or vulnerable consumers is an obvious area for government support.

There may be a case, however, for greater utilisation of cost recovery where the participants to the process are otherwise resourced and the benefits that flow from utilising ADR services is able to be captured between the participants (that is, they are true private benefits in the strict economic sense).

It also appears to be sensible to consider whether some industries could, as a whole, be providing greater support for ADR. At the moment there are industries in which disputes occur that do not necessarily make a contribution to ADR services comparable to industries that have created (or are members of) recognised industry-based dispute resolution schemes. There does not appear to be obviously good reasons why this is the case.

## Chapter Ten: What Are The ADR Sector's Priority Issues?

Stakeholders were asked to identify their priority issues for the ADR sector, and in particular, issues that may involve the participation of the Victorian Government. Most stakeholders identified two or three key issues. The issues are:

- Examining the efficiency of referrals and links between ADR providers;
- Increasing awareness/promotion of ADR;
- Developing a whole of government framework for ADR and articulating that framework;
- Examining opportunities for economies of scale and scope efficiencies;
- Undertaking appropriate analysis before establishing new (particularly small) stand-alone agencies;
- Increasing the use of ADR generally and ADR in courts specifically;
- Driving higher standards generally in schemes;
- Developing uniform accreditation standards;
- Developing uniform training standards; and
- Increasing resources to ADR providers.

### 10.1 Examining the Efficiency of Referrals & Links Between ADR Providers

A number of problems with referrals between ADR suppliers were identified. A need for greater coordination of referrals between ADR agencies is required.

Failure to appropriately coordinate referrals can result in consumers dropping out of the system prior to resolution of their dispute.

#### *Stakeholder Comment*

*"I think a big problem that we would see is people that come to [our agency] and are referred to VCAT and for whatever reason, probably a whole range of reasons, they don't take further action. There are a lot [of disputants] that drop out of the system. In a number of areas we have tested this and it seems to be quite consistent and I think that's a bit of concern. So where we say we can't resolve this at conciliation, you can go to VCAT and they can give you a determination - do they ever get their answers? Often they don't."*

Failure to identify and report systemic issues or other issues requiring a regulatory response (such as breaches of the Fair Trading Act) to CAV can undermine the effectiveness of CAV's regulatory role and other government policy objectives.

#### *Stakeholder Comment*

*"A lot of complaints would be appropriately resolved in a dispute resolution context... but there are some that actually raise significant issues in terms of breach of the law ... there is a need for a feed back loop from the schemes [about these issues]"*

### 10.2 Increasing Awareness & Promotion of ADR

Education in schools was identified as an appropriate method to raise awareness by a number of stakeholders.

*Stakeholder Comment*

*“What I would like to see myself is greater focus towards arming individuals as they come through the school system and enter the work force in to the whole range of self help issues, self help units that they can employ. That is, knowing where to go. Not being automatically predisposed to go towards the courts or the law systems... There’s far more people who don’t know what their rights are, don’t know where to go, don’t know that they can complain, don’t know that they can seek alternate resolutions to their problems. So I would like to see that as a greater focus”.*

*Stakeholder Comment*

*“I certainly like to look at community education but really target it at schools and at vulnerable communities”.*

A number of stakeholders commented on the importance of marketing their services to ensure accessibility.

*Stakeholder Comment*

*“So we have to find cleverer ways of making ourselves known. If I’ve failed it’s on the accessibility issue and that is a continuing challenge”.*

Promotion of ADR options by solicitors was also identified as a priority.

*Stakeholder Comment*

*“I’d really seriously look at some sort of process that when clients get advice from a solicitor that they actually talk to them about alternatives to going to court. So that there is some compulsion, I mean I’m not sure how you would do it... whether that has a cost incentive, or whether that’s a mandated thing. But that there would be some guarantee that when someone attends a solicitor or a community legal centre or what ever that they are given the facts in terms of the law. But that they are also counselled in terms of what other options there might be”.*

### **10.3 Developing & Articulating a Whole-of-Government Framework for ADR**

*Stakeholder Comment*

*“I think this question of developing the overall framework for the provision of ADR by government is a really critical one. Where you have a lot of different departments and differences even within departments, even within portfolios all doing our own thing, I think that’s not necessarily a recipe for getting the best overall outcome ... there [needs to be] to be some sort of broader perspective [on ADR] to force people to consider the linkages across the whole system”.*

*Stakeholder Comment*

*“Government needs to understand ADR so that when dealing with government agencies they have an understanding of what it’s about. A number of government agencies lack understanding of how ADR is supposed to be conducted”.*

### **10.4 Examining Opportunities for Economies of Scale & Scope Efficiencies**

Stakeholders from both industry schemes and government recognized the benefits of economies of scale in providing ADR services. There is a need for further examination of economies of scale and scope efficiencies across the ADR supply-side framework.

*Stakeholder Comment*

*"I would like to see for example, some of these ADR schemes being told that they are too small to survive. To perform the role of an ADR scheme, and what an ADR scheme should do in the 21<sup>st</sup> century these schemes are unable to do so".*

### **10.5 Undertaking Appropriate Analysis Before Establishing New Stand-Alone Agencies**

Taking an analytical, "big picture" view before establishing new (particularly small) stand-alone agencies and ADR projects was identified as a priority. This analysis should include a costs and benefits analysis, as well as consideration of the current framework for supply of ADR services.

*Stakeholder Comment*

*"I think it would be useful to have an articulated sort of policy view of ADR ... a framework of a whole of government commitment to ADR ... Where you would say there's got to be a initial cost benefit exercise ... after these questions there may be a political agenda, but you have to really be forced to ask the question is this the most efficient, effective way to resolve disputes [before establishing new agencies]?"*

### **10.6 Increasing the use of ADR Generally & Specifically in the Courts**

Many stakeholders believed that increasing the use of ADR in Victoria was a priority for the Victorian government.

*Stakeholder Comment*

*"Probably more of it [ADR]. And more opportunities for the members of the public to go somewhere and take their complaint to and get them resolved,...in any area. ... People who go away without having been listened to remain unhappy and disgruntled and they need to have the opportunity to be heard; we can learn so much from consumer complaints".*

The courts were identified as a particular area where further development and use of ADR is required.

*Stakeholder Comment*

*"But I think there is a lot more work that can be done in terms of the Courts being more people friendly. And one way of doing that is by creating and supporting better ADR structures within the Court. It's a bit like alternative medicine in a sense when you look at it, it's like a hospital sort of only doing surgery but not giving dietary or other advice to people who come in a medical problem. You actually want something which is a bit more holistic within the court. The difficulty is in propping up and adding to the courts already in terms of bureaucratic structures. But then I would think that actually there is something that could be done within the existing structures".*

One stakeholder also identified that there was a need for increased use of ADR to resolve government disputes.

*Stakeholder Comment*

*"One thing I would like to see too is greater adoption of ADR practice by government itself. For example in resolving disputes between different areas of government".*

### **10.7 Driving Higher Standards Generally**

Most industry scheme stakeholders identified that there was a need for the Victorian government to develop higher standards for industry scheme membership.

*Stakeholder Comment*

*“From the point of view of a wish list I’d like to see the government really raise the bar for ADR schemes. I think it’s too easy to become an ADR scheme. I think you need to have the economies of scale. I think to be an effective ADR scheme you’ve got to branch out, you’ve got to be an effective player. Your role must to improve industry standards. Not just simply resolve a dispute between A & B”.*

## **10.8 Developing Uniform Accreditation Standards**

*Stakeholder Comment*

*“I think ... accreditation... would be good. I’m sure that you could come up with something ... the sort of generic skills and competencies that are accredited.”*

Stakeholders supported different mechanisms for an accreditation framework. Some stakeholders discussed, and showed support for, the proposed National Mediator Accreditation Scheme.

*Stakeholder Comment*

*“The National Mediator Accreditation Scheme will introduce an accreditation framework across the board for mediators. The trouble is all the rest of them. I think accreditation is one of the big issues; it’s clearly something the government has to attend to. I don’t think it has attended to it adequately in Victoria. Australia wide, that national mediation accreditation scheme has moved on. I think you do need accreditation for a range of reasons. One of them is about the actual services that are provided and making sure that there is some consistency and transparency. There are big issues in terms of what consumers have a right to expect as well”.*

While other stakeholders identified the benefit of a *Mediation Act* to address issues of quality control including accreditation, training and consumer complaints.

*Stakeholder Comment*

*“We would look at introducing a Mediation Act for Victoria. So that will have some remedies around who can, who can’t mediate, who can train, who can’t train... When it comes to your accessibility that has to be built in to the Mediation Act. I think in terms of the Mediation Act there would probably need to be some sort of register, some sort of complaints body in terms of consumer complaints about anything that went wrong within a mediation”.*

## **10.9 Developing Uniform Training Standards**

The issues of uniform accreditation standards and uniform training standards were often discussed together, particularly in the context of developing best practice or quality assurance standards. Generally stakeholders commented that training was an important aspect of ensuring quality and consistency in approach in ADR provision.

*Stakeholder Comment*

*“It’s around quality and consistency. What sits underneath that is training and accreditation, consistency or our terminology. We are talking similar things but differently. Best practice accountability and reporting [are necessary]”.*

## **10.10 Increasing Resources for ADR Providers**

A need to increase resources to allow for the development and expansion of ADR was identified most often by government funded ADR suppliers. Generally industry ADR schemes did not identify lack of resources as a problem for their scheme.

*Stakeholder Comment*

*"[Another priority]... is to better resource and support our own staff in running their own pre-hearing conferences and that's a wholly internal issue of course but we are looking at that again at the moment".*

Neighbourhood disputes were identified by some stakeholders as a priority for increased ADR provision. Some stakeholders also said that any increase in resources for ADR for neighbourhood disputes may represent an investment in offsetting later government costs if the dispute was to escalate.

*Stakeholder Comment*

*"For me neighbourhood disputes. But obviously ...look at it closely...280,000 of them p.a. and they are significant cause of concern for people. But that is something that would require indefinite dollars, but if you base it on the 6 known hot spots it wouldn't cost that much ...it could be an investment effectively in offsetting other dollars".*

## **10.11 Other Identified Priority Issues**

### **10.11.1 Online ADR**

One stakeholder identified the need to expand the use of online ADR and other innovative methods of ADR provision.

*Stakeholder Comment*

*"We've got emerging technologies, e-commerce ... Provision of online ADR is ,an area that we really need to move into. Thats another priority around ADR - it needs to be more innovative, we need to keep in tune with changing markets and changing technologies and make sure that we keep in front".*

### **10.11.2 Focus Areas For ADR Development**

Some stakeholders identified particular focus areas for development. The area most commonly discussed by stakeholders was neighbourhood disputes. Other areas included indigenous issues, children (particularly teenager and parent conflict) and workplace dispute resolution.

*Stakeholder Comment*

*"Well for me [a] priority issue... is a capacity to refer what are in truth neighbourhood type disputes out of court into a mediation environment, a settlement environment. A low cost, simple, affordable, accessible settlement environment... that's my number one priority".*

*Stakeholder Comment*

*"Probably the first one is indigenous Victorians. I have particular concerns in relation to that area. Community conflict issues are significant in regional areas and there is no support and no development of conflict resolution leadership and communication skills in those areas, and there is no network either".*

*Stakeholder Comment*

*"[Another priority area] ... youth. In that I would build in supporting more conflict resolution in the education area across the board. Victoria has a reasonable record in that regard it does have a few mediation schemes that operate things like that, that operate particularly at the primary school level".*

*Stakeholder Comment*

*"Workplace dispute resolution is another hot topic of mine, because there are so many dysfunctional work places out there. Whether or not that's a responsibility of the Victorian government? I think to some extent it is. It's really just about making people happier & getting on with their lives & being able to manage conflict better".*



### ***10.11.3 Accessibility of ADR Schemes***

Ensuring accessibility of ADR schemes, particularly for vulnerable groups was also a stakeholder priority.

*Stakeholder Comment*

*“We would also be looking at accessibility of ADR services. Particularly targeting vulnerable groups”.*

## Chapter Eleven: Bibliography

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## ***Appendix 1: Letter Inviting Participation in Stakeholder Interviews***

Dear XXX

I write to seek your participation in research being conducted by the Department of Justice (the Department) into dispute resolution in Victoria.

This research is one component of the Department's 2006-07 ADR Priority. It is intended that the research findings will inform development of a model of best practice for ADR service provision and help shape recommendations to the Victorian Government on its role in ADR funding and service provision.

Learning from the experiences of expert agencies involved in dispute resolution will be critical to building a sound understanding of the nature and scope of disputation in Victoria and of the various approaches taken to assist parties to resolve disputes. The provider/stakeholder research will comprise one-to-one interviews with 20-25 spokespersons representing key agencies. Community surveys will also be conducted to gather data from consumers and small business persons about their experiences of, attitudes to, and levels of awareness of, ADR options.

I would be delighted if you would participate in the project by agreeing to an interview. The interview will be guided by a standard set of questions and will take 30-45 minutes. Information gathered in the course of interviews will be used only for the purposes of the Department's ADR Priority. It is not intended that individual stakeholders will be identified in any reports arising from this study, without the prior agreement of the individuals and agencies concerned.

Chris Field Consulting has been engaged to assist the Department with this research; Chris will conduct the interview and will seek your agreement to recording the interview to enable him to focus fully on your discussion. Chris will contact your assistant shortly to arrange a time to meet during July or August.

Thank you for your assistance in this important project.

Yours sincerely

**Dr David Cousins**  
**Director**

## *Appendix 2: Interview Guide Sent to Stakeholders*

### Alternative Dispute Resolution in Victoria - Supply-Side Research Interview Questions August 2006

#### **1 Background**

The development of alternative dispute resolution (**ADR**) has occurred over an extended period of time. During this period, views have developed and changed regarding the best practice of ADR. An analysis of the past and present theory of ADR, as well as the history and current practice of ADR in Victoria, is timely.

The Department of Justice (**the Department**) is undertaking research into ADR in Victoria. This research is one component of the Department's 2006/7 ADR Priority. It is intended that the research findings will inform development of a model of best practice for ADR service provision and help shape recommendations to the Victorian Government on its role in ADR funding and service provision.

Learning from the experiences of expert agencies involved in dispute resolution will be critical to building a sound understanding of the nature and scope of disputation in Victoria and of the various approaches taken to assist parties to resolve disputes. The provider/stakeholder research will consist of three components. First, one-to-one interviews with twenty spokespersons representing key agencies. Second, a short questionnaire to be completed by each agency. Third, community surveys will be conducted to gather data from consumers and small business persons about their experiences of, attitudes to, and levels of awareness of, ADR options.

#### **2 The Interview**

The interview will be guided by a standard set of questions set out below. It is anticipated that the interview will take between 30 and 45 minutes to complete. Subject to your agreement, interviews will be recorded to enable the interviewer to focus fully on your answers. The interview will be conducted by Chris Field. A staff member from Consumer Affairs Victoria will also attend the interview.

#### **3 Use of Information**

Information gathered in the course of interviews will be used only for the purposes of the Department's ADR Priority. It is not intended that individual stakeholders will be identified in any reports arising from this study, without the prior agreement of the individuals and agencies concerned.

#### **4 Questions**

##### **Introduction**

1. What do you understand the term "ADR" to mean? Put another way, how would you define ADR?

2. What is the current framework for the supply of ADR in Victoria? In other words, who, from your perspective, undertakes ADR in Victoria?
3. In your view, how are the key institutional arrangements that supply ADR performing?

### **Funding**

4. What should the role of the Victorian Government be in (a) providing ADR services (both directly and indirectly) and (b) in funding ADR services?
5. What should the role of industry be in (a) providing ADR services (both directly and indirectly) and (b) in funding ADR services?
6. Is there scope for greater cost recovery by ADR schemes (for example, user charges, industry-contribution etc)?

### **Best Practice Models**

7. Is there an identifiable best practice for ADR in Victoria, and if so, what is that best practice?
8. Are there characteristics of your model of ADR that you would consider unique and how have they affected the services you offer and their effectiveness?

### **Quality Assurance**

9. Do you believe that a single quality assurance mechanism that would apply universally to ADR processes (both public and private) would be valuable (and feasible)?

### **Role of Government**

10. What would you see as the priority ADR issues requiring coordination within your sector and across ADR in general?
11. Are there existing mechanisms for addressing these priority issues and are they sufficient?
12. Which priority issues would require coordination by government?

### **Follow-up**

The interview will be followed by a short discussion regarding the questionnaire that will be requested to be completed by each of the agencies (including identifying an appropriate contact person in relation to the questionnaire).

## **5 About the Consultant**

### **5.1 Chris Field Consulting Pty Ltd**

Chris Field Consulting Pty Ltd has been engaged to assist the Department with this research. Chris Field is the sole director and shareholder of Chris Field Consulting Pty Ltd and will be responsible for undertaking the work on the consultancy.

### **5.2 Chris Field – Short Biography**

Chris Field is a Member (part-time, 3 days per week) of the Economic Regulation Authority, the independent regulator of the Western Australian gas, electricity, rail and water industries. He was appointed to this position by the Western Australian Government in March 2004 for a term of five years. Chris is also an Adjunct Professor at the University of Western Australia where he is assisting to establish the Centre for Advanced Consumer Research. The Centre is expected to be launched in December 2006. He is also an Adjunct Professor at La Trobe University. He teaches intensive units in advanced consumer law at both universities and is the author of the academic text, *Current Issues in Consumer Law and Policy*, Pearsons Australia (forthcoming).

Chris is Chair of the Consumer Utilities Advocacy Centre and a Director of the Energy and Water Ombudsman Victoria. He also undertakes selected consultancy work. His most recent consultancy was for Consumer Affairs Victoria for whom he produced the publication, "Consumer Advocacy in Victoria: Research Paper No 7, March 2006". Prior to his appointment to the Economic Regulation Authority, Chris was widely regarded as one of Australia's leading consumer advocates, well known for his work as the Executive Director of the Consumer Law Centre Victoria for seven years and the Chair of the Australian Consumers' Association for four years. Prior to working at the Consumer Law Centre Victoria, he was employed as a lawyer at Arthur Robinson & Hedderwicks (now Allens Arthur Robinson). He holds Arts and Law (Honours) degrees.

## **6 Contact Information**

Chris Field Consulting Pty Ltd ACN: 116 767 045 ABN: 22116767045  
Office address: 4A Clarendon Street Armadale Vic 3143  
Telephone: (03) 9500 4514  
Fax: (03) 9500 2401  
Mobile: 0419 598 836



## ***Appendix 3: Letter Inviting Participation In Survey***

Mr XXX

Dear Mr XXX

Thank you for participating in the research being conducted by the Department of Justice (the Department) into Alternative Dispute Resolution (ADR) in Victoria.

I appreciate your generosity of time in recently undertaking an interview with Chris Field as part of this research. As discussed at the interview, the research will also involve a short questionnaire to be completed by each participating agency. This questionnaire will enable the collection of a range of information about the ADR services provided by your agency.

Information gathered in the course of the questionnaire process will be used only for the purposes of the Department's ADR Strategic Priority. It is not intended that individual stakeholders will be identified in any reports arising from this study, without the prior agreement of the individuals and agencies concerned.

The questionnaire is attached to this letter. I would be grateful if the questionnaire could be completed and returned within three weeks. The questionnaire will be emailed separately to you to allow for it to be completed electronically, if this is more convenient. Accordingly, the due date for the questionnaire is Friday 20 October. The questionnaire should be returned to me. If you require further information in relation to the questionnaire please contact Russell Bancroft, Senior Policy Adviser, Department of Justice on 8684 6480.

Thank you for your assistance in this important project.

Yours sincerely

Paul Myers  
Director  
Alternative Dispute Resolution Strategy  
Department of Justice

## Appendix 4: Survey Questionnaire

### ALTERNATIVE DISPUTE RESOLUTION STRATEGY 2006 STAKEHOLDER SURVEY

#### Purpose of Survey

This questionnaire is designed to assist the Victorian Department of Justice to better understand alternative dispute resolution (ADR) service provision in Victoria.

The Department's ultimate aim is to promote best practice, accordingly, the questions cover:

- the way matters are progressed within your agency;
- the types of matters dealt with;
- the types of services provided e.g., complaint handling, mediation, other types of determination;
- how services are funded;
- how services are promoted;
- approaches to quality assurance and performance measurement.

We also ask you to share some data with us. We are aware of definitional problems so we have endeavoured to use terminology that is as precise as possible.

As we may need to follow up some of your answers, we ask you to include details for a suitable contact person within your organisation.

#### Contact Point at Department of Justice

If you encounter problems with the questionnaire, or you wish to clarify any aspect of the survey, please contact Russell Bancroft on 03 8684 6480 or send an email to russell.bancroft@justice.vic.gov.au.

#### Instructions

The questionnaire has been e-mailed to allow for electronic completion and return.

Please select the "Print Layout" option from the VIEW menu so that you can see the footnotes to the questionnaire.

You will be able to complete some questions by marking one or more checkboxes like this . To mark your preferred box, place your mouse pointer on the box and **double** click – a dialogue box will open. Next, point and double click on the radio button to the left of the "Checked" option and then click the OK button. The check box will now look like this  - if you check the wrong box please use the "Undo Typing" option on the EDIT menu.

You should select one checkbox in response to questions which offer checkbox responses except where you are asked to *Check all relevant boxes*.

For some questions we ask you to type a response. You can do this by clicking inside the response box before your commence typing – the box will automatically expand to take your full answer. A completed answer will look like this:

This is my answer to question fifty six.

Several questions apply only to industry ombudsman schemes. These questions are marked with a ♦ symbol. Please select "Not Applicable" if you believe that the question is not applicable to your organisation.

### Returning Your Completed Questionnaire

We would be grateful if you would return your completed questionnaire by **20 October 2006**.  
The email address for questionnaire return is russell.bancroft@justice.vic.gov.au.

If you wish to return the questionnaire by post please address it to:

Paul Myers  
Director Alternative Dispute Resolution Strategy  
Department of Justice  
GPO Box 123A  
Melbourne VIC 3000

Questionnaire

### Agency Identification

Please provide the full name of your agency or ADR service.

### Your Agency's ADR Process

Please outline the key steps in your agency's ADR process. For example, this could include:  
Written complaint received → matter referred to case officer → case officer determines course of  
action → referred to other agency *OR* referred to mediator → etc.

What is your process for assigning matters to ADR practitioners within your agency?

### Coverage of the Scheme

What types of ADR services does your agency provide? *Check all relevant boxes.*

- Information provision in response to enquiries
- Complaint handling
- Mediation – i.e. where the mediator has no advisory or determinative role
- Conciliation
- Arbitration
- Other ... *please describe in the box below*

Does your agency impose any restrictions or limits on access to your ADR service? *Check all relevant boxes.*

- No
- Yes – there are limits on the \$ value of matters we can deal with
- Yes – there are time limits
- Yes – we only accept claims/complaints from consumers
- Yes – other ... *Please describe in the box below*

What geographic area does your agency service? *Check one box only.*

- Victoria only
- Australia-wide
- Other .... *Please describe in the box below*

◆ Is membership of your service a condition of licence in your industry? *Check one box only.*

- Yes – go to Q9
- No
- Not applicable – go to Q9

◆ If membership of the scheme is not a licence requirement, is there some other entitlement for members of the scheme? *Check all relevant boxes.*

- No other entitlement
- Use of scheme logo
- Access to training programs
- Other .... *Please describe in the box below*

### Referral Pathways

Please list the names of the agencies that commonly refer clients to your service?

Please list the names of agencies to which you commonly refers clients who fall outside the jurisdiction or scope of your agency.

Does your service follow-up to ensure that clients accessed the agency to which they were referred by you? *Check one box only.*

- No – go to Q13
- Yes – periodically or occasionally (e.g. by sample surveys, case studies or independent audits)
- Yes - always

What were the key findings of your most recent follow-up or referrals audit? For example, are most clients moving on to the recommended agency?

### Funding

Do applicants pay to use your agency's services? *Check one box only.*

- No – Go to Q15
- Yes

What fees do you charge for services? Please specify \$ amounts for each service type of service.

Does your agency receive government funding? *Check one box only.*

- No – go to Q18
- Yes

Please indicate the source/s of government funding provided to your agency. *Check all relevant boxes.*

- Victorian Government
- Commonwealth Government
- Other State or Territory Government

Please indicate the type/s of funding provided. *Check all relevant boxes.*

- Establishment funding
- Ongoing funding for operations (full or partial)
- Other

◆ Do industry members of your scheme pay a membership fee? *Check one box only.*

- No – go to Q20
- Yes
- Not applicable – go to Q20

Is your membership fee: (*Check one box only*)

- A flat rate
- Based on the number of complaint received in relation to each member

**Governance – For Industry Ombudsman Schemes Only**

Does your industry scheme have a board of management? *Check one box only.*

- No – go to Q22
- Yes

Please outline the structure of your board of management and the method of appointment.

**Remedies**

What are the main remedies available to applicants/complainants? *Check all relevant boxes.*

- Monetary compensation
- Reversal of the decision that is the subject of the dispute
- Other – *please describe in the box below*

Are your agency's decisions legally binding? *Check one box only.*

- No
- Yes – go to Q26

How are your agency's decisions enforced?

What appeal process is available to applicants and/or respondents who are dissatisfied with a decision?

**User Perceptions**

What mechanisms do you use to ensure that users see the scheme as independent and impartial?

What mechanisms do you use to address potential imbalances of power between the parties to a dispute? For example, are the parties given access to an interpreter service?

**Promotion of the Service**

What methods are used to promote community awareness of your agency/ service? *Check all relevant boxes.*

- Agency website
- Links or content on other's websites
- Printed brochures
- Print media advertising
- Electronic media advertising
- Other ... *please describe in the space below*

Are any of your agency's promotional materials published in languages other than English? *Check one box only.*

- No
- Yes – *please list the languages in which material is made available*

Does your agency assess the level of community awareness of its services? *Check all relevant boxes.*

- No
- Yes, by community surveys
- Yes, by independently conducted audits
- Yes, by other means – *please describe the methods used*

What options are available to persons wishing to make a complaint/claim or inquiry to your agency? *Check all relevant boxes.*

- Information enquiries may be made by telephone
- Information enquiries may be made by email and/or online via the website
- Information enquiries may be made by letter
- Information enquiries may be made in person at our business premises
- Complaints/claims may be lodged by telephone
- Complaints/claims may be lodged by email and/or online via the website
- Complaints/claims may be lodged by letter
- Complaints/claims may be lodged in person at our business premises

#### Quality Assurance & Staff Training

What quality assurance methods/systems does your agency use in relation to its ADR services?

What qualification/accreditation *must* be completed by ADR practitioners employed by your agency?

- None – go to Q35
- All require ... *please specify compulsory accreditation/qualification*

What other qualifications/accreditation do most ADR practitioners in your service have?

What *additional* training, internal and/or external, does your agency provide to its ADR practitioners?

#### Performance Measurement

Please list the key performance indicators used by your agency to track the performance of its ADR services.

What other types of data does your agency collect in order to monitor the performance of the service?

Are the key performance indicators independently monitored or audited? *Check one box only*

- Yes
- No – go to Question 40

Please attach the results from the most recent audit of your performance indicators.

- Audit results will be attached to completed questionnaire & emailed
- Audit results will be posted separately
- Audit results are not available

#### Statistical Data

Please provide the following data in relation to your ADR service for the period 1 July 2005 to 30 June 2006

If your agency does not record data on a financial year basis please provide data for the most recent 12-month period and indicate here

the period to which the data applies.

Number of contacts made (includes enquiries & complaints received):

How many matters were referred to other agencies i.e. no further action was taken by your agency?

How many information enquiries were responded to?

How many cases were referred back to the original service or product supplier (i.e. the other party to the dispute) without further involvement by your service?

How many cases were subject to mediation - i.e. cases where no advisory or determinative role was adopted?

How many cases resulted in a *determination*<sup>228</sup> by your agency?

What is the average number of days taken by your agency to complete the following processes:

A. The number of days from lodgement of a complaint to a decision on what action to take i.e. referral to another agency or referral to agency's internal ADR processes.

B. The number of days from the decision on how the matter will be handled within your agency to the final resolution of the case.

Do the measures given in response to Q41 refer to business days or calendar days? *Check one box only.*

- Business days  
 Calendar days

### Research

Has your agency ever conducted a survey of clients or potential clients to determine what they want from your service or whether the service they received met their needs?

### Contact Point At Your Agency for Follow-up

Please provide the following details for the person at your agency we can contact if we need to clarify any information provided on this questionnaire.

Name:	<input type="text"/>
Position Title:	<input type="text"/>
Email:	<input type="text"/>
Address:	<input type="text"/>
Telephone No:	<input type="text"/>

<sup>228</sup> "Determination" includes situations where the dispute resolution practitioner has an advisory or determinative role.

## Appendix 5: Timeline of Key Developments in Australian ADR

The following timeline for the development of ADR in Australia has been extracted from P Condliffe, 'A Short History of Alternative Dispute Resolution in Australia: 1975-2000'.<sup>229</sup> This timeline provides a summary of some key developments in Australian ADR.

### Some Key Developments in Australian ADR

- 1892 *Courts of Conciliation Act* (Qld.)
- 1904 Arbitration and Conciliation Court (Cwth) provides for informal conferences.
- 1929 *Conciliation Act* (SA) provides for pre-trial interviews.
- 1931 *Courts of Conciliation Act* (Qld.) amended to streamline procedures.
- 1965 Consumer Protection Council, [Victoria]
- 1973 Small Claims Tribunal, [Victoria]
- 1974 Consumer Claims Tribunal (NSW) adopted neutral third party referees.
- 1975 *Family Law Act* (Cwth) provides for counselling and conferences.
- 1975 Institute of Arbitrators established.
- 1977 *Anti-discrimination Act* (NSW) provides for conciliation.
- 1979 Land and Environment Court (NSW) provides for conferences.
- 1980 Community Justice Centres (NSW Pilot Project) Act (1979).
- 1983 *Community Justice Centres Act* (NSW) provides for community based services.
- 1984 Norwood (South Australia) Community Mediation Service established.
- 1985 Noble Park (Vic.) Family Mediation Centre established.
- 1985 Australian Commercial Dispute Centre established.
- 1987 Neighbourhood Mediation Centres established by Victoria Legal Aid.
- 1988 ACT Conflict Resolution Service established.
- 1990 *Dispute Resolution Centres Act* proclaimed (Qld.) establishing Community Justice Program now known as Dispute Resolution Centres.
- 1991 *Courts (Mediation and Arbitration) Act* (Cwth) introduces voluntary (since 1997 mandatory as well) mediation to the Federal Court.
- 1991 Canberra Mediation Service established.
- 1993 Administrative Appeals Tribunal (Cwth) introduced mediation conferences.
- 1994 *Farm Debt Mediation Act* (NSW) gives farmers the opportunity to go to mediation in enforcement actions under a farm mortgage.
- [1994 Sackville Report leading to creation of NADRAC]
- 1995 *Family Law Reform Act* (Cwth) establishing centrality of "Primary Dispute Resolution."
- 1996 *Native Title Act* (Cwth) amendments gave increased emphasis to mediation before the Native Title Tribunal.
- 1996 *Workplace Relations Act* (Cwth) referred to mediation for the first time in Industrial disputes.

<sup>229</sup> Condliffe, above n 34.



## Appendix 6: Glossary

There are a large number of dispute resolution processes which have been identified as ADR processes. The following glossary was extracted from: NADRAC, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003).

**Adjudication** is a process in which the parties present arguments and evidence to a dispute resolution practitioner (the adjudicator) who makes a determination which is enforceable by the authority of the adjudicator. The most common form of internally enforceable adjudication is determination by state authorities empowered to enforce decisions by law (for example, courts, tribunals) within the traditional judicial system. However, there are also other internally enforceable adjudication processes (for example, internal disciplinary or grievance processes implemented by employers).

**Arbitration** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

**Automated dispute resolution processes** are processes conducted through a computer program or other artificial intelligence, and do not involve a 'human' practitioner. See also blind bidding and on-line dispute resolution.

**Automated negotiation** (or blind-bidding) is 'a form of computer assisted negotiation in which no practitioner (other than computer software) is needed. The two parties agree in advance to be bound by any settlement reached, on the understanding that once blind offers are within a designated range ... they will be resolved by splitting the difference. The software keeps offers confidential unless and until they come within this range, at which point a binding settlement is reached'. See also automated dispute resolution processes. (Consumers International (2000) *Disputes in Cyberspace*)

**Case appraisal** is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved.

**Case presentation** (or Mini-trial) is a process in which the parties present their evidence and arguments to a dispute resolution practitioner who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved. See also mini-trial.

**Combined or hybrid dispute resolution processes** are processes in which the dispute resolution practitioner plays multiple roles. For example, in conciliation and in conferencing, the dispute resolution practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In hybrid processes, such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).

**Co-mediation** is a process in which the parties to a dispute, with the assistance of two dispute resolution practitioners (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Community Mediation** is mediation of a community issue.

**Conciliation counselling** is a term used previously to describe some of the processes used by counsellors in the Family Court of Australia to assist parties to settle disputes concerning children. The Court now uses the term mediation to describe these processes.

**Conciliation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Note: there are wide variations in meanings for ‘conciliation’, which may be used to refer to a range of processes used to resolve complaints and disputes including:

- Informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute
- Combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement’.

**Conference/Conferencing** is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

**Consensus building** is a process where parties to a dispute, with the assistance of a facilitator, identify the facts and stakeholders, settle on the issues for discussion and consider options. This allows parties to build rapport through discussions that assist in developing better communication, relationships and agreed understanding of the issues.

**Counselling** refers to a wide range of processes designed to assist people to solve personal and interpersonal issues and problems. Counselling has a specific meaning under the Family Law Act, where it is included as a Primary Dispute Resolution process (see PDR).

**Determinative case appraisal** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the appraiser) who makes a determination as to the most effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute.

**Dispute counselling** is a process in which a dispute resolution practitioner (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.

**Diversionsary, victim-offender, community accountability, restorative and family group conferencing** are processes which aim to steer an offender away from the formal criminal justice (or disciplinary) system and refer him/her to a meeting (conference) with the victim, others affected by the offence, family members and/or other support people. The practitioner who facilitates the conference may be part of the criminal justice system (for example, a police or corrections officer) or an independent person.

**Early neutral evaluation** is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.

**Education** for self-advocacy is a process in which a party to a dispute is provided with information, knowledge or skills, which assist them to negotiate directly with the other, party or parties. See also dispute counselling and decision-making for one.

**Evaluative mediation** is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution. (See also combined processes). Note: evaluative mediation may be seen as a contradiction in terms since it is inconsistent with the definition of mediation provided in this glossary.

**Expert appraisal** is a process in which a dispute resolution practitioner, chosen on the basis of their expert knowledge of the subject matter (the expert appraiser), investigates the dispute. The appraiser then provides advice on the facts and possible and desirable outcomes and the means whereby these may be achieved.

**Expert determination** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a determination.

**Expert mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Facilitated negotiation** is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a dispute resolution practitioner (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Facilitation** is a process in which the parties (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Fact finding** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the investigator) who makes a determination as to the facts of the dispute, but who does not make any finding or recommendations as to outcomes for resolution. See also investigation.

**Family and child mediation** is defined in the Family Law Act as 'mediation of any dispute that could be the subject of proceedings (other than prescribed proceedings) under [the] Act and that involves (a) a parent or adoptive parent of a child; or (b) a child; or (c) a party to a marriage' (section 4). See also PDR.

**Fast-track arbitration** is a process in which the parties to a dispute present, at an early stage in an attempt to resolve the dispute, arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination on the most important and most immediate issues in dispute.

**Hybrid dispute resolution processes** - see combined dispute resolution processes.

**Indigenous dispute resolution** refers to wide range of processes used to resolve dispute involving Indigenous people, including the various processes described in this glossary. Other examples include elder arbitration, agreement-making and consensus-building. In the Australian context the term Indigenous (capital 'I') refers specifically to the Aboriginal and Torres Strait Islander peoples.

**Indirect negotiation** is a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a dispute resolution practitioner (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Industry dispute resolution:** Industry specific dispute resolution schemes deal with complaints and disputes between consumers (including some small business consumers) and a particular industry. Schemes are usually funded by the industry but governed by an equal number of industry and consumer representatives. Some schemes are required to meet standards established by ASIC. If the industry member and consumer do not reach agreement, most schemes have the power to make a determination. The determination is binding on the industry member, but not the consumer who can choose to accept or reject the determination. Depending on the scheme, the power to make the determination lies with an Ombudsman, panel or referee.

**Inter-mediation** is 'a process similar to mediation ... the ... [dispute resolution practitioner] interacts with the parties in dispute to assess all relevant material, identify key issues ... and helps to design a process that will lead to resolution of the dispute. (Commonwealth Office of Small Business 2001, Resolving Small Business Disputes)

**Investigation** is a process in which a dispute resolution practitioner (the investigator) investigates the dispute and provides advice (but not a determination) on the facts of the dispute. See also fact finding.

**Judicial dispute resolution (or judicial ADR)** is a term used to describe a range of dispute resolution processes, other than adjudication, which are conducted by judges or magistrates. An example is judicial settlement conference.

**Med-arb** see Combined processes

**Mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'.

**Mini-trial** is a process in which the parties present arguments and evidence to a dispute resolution practitioner who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved. See also case presentation.

**Multi-party mediation** is a mediation process, which involves several parties or groups of parties.

**Ombudsman (or Ombud)** is a person who 'functions as a defender of the people in their dealings with government. ... In Australia, there is a Commonwealth Ombudsman as well as state and territory ombudsmen. ... In addition, a number of industry ombudsmen have been appointed, whose responsibility it is to protect citizens' interests in their dealings with a variety of service providers, especially in industries previously owned or regulated by governments, for example telecommunications, energy, banking and insurance'. (Commonwealth Ombudsman Home page: [http://www.ombudsman.gov.au/about\\_us/default.htm](http://www.ombudsman.gov.au/about_us/default.htm))

**On-line dispute resolution, ODR, eADR, cyber-ADR** are processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically, especially via e-mail. See also automated dispute resolution processes.

**Partnering** involves the development of a 'charter based on the parties' need to act in good faith and with fair dealing with one another. The partnering process focuses on the definition of mutual objectives, improved communication, the identification of likely problems and development of formal problem-solving and dispute resolution strategies.

**PDR (Primary Dispute Resolution)** is a term used in particular jurisdictions to describe dispute resolution processes which take place prior to, or instead of, determination by a court. The Family Law Act 1975 (Cwth) 'encourages people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made' (section 14). The Federal Magistrates Act 1999 defines primary dispute resolution processes as 'procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth, and includes: (a) counselling; and (b) mediation; and (c) arbitration; and (d) neutral evaluation; and (e) case appraisal; and (f) conciliation' (section 21). See also ADR.

**Private judging** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner chosen on the basis of their experience as a member of the judiciary (the private judge) who makes a determination in accordance with their opinion as to what decision would be made if the matter was judicially determined.

**Restorative conferencing** (see diversionary conferencing)

**Senior executive appraisal** is a form of case appraisal presentation or mini-trial where the facts of a case are presented to senior executives of the organisations in dispute.

**Shuttle mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement without being brought together. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. The mediator may move between parties who are located in different rooms, or meet different parties at different times for all or part of the process.

**Statutory conciliation** takes place where the dispute in question has resulted in a complaint under a statute. In this case, the conciliator will actively encourage the parties to reach an agreement which accords with the advice of the statute.

**Victim-offender mediation** is a process in which the parties to a dispute arising from the commission by one of a crime against the other, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on

the content of the dispute or the outcome of its resolution, but may advise on or determine the process.<sup>230</sup>

<sup>230</sup> NADRAC, above n 4.

## ***Appendix 7: Detailed Information About Key Stakeholder Organisations***

This section provides detailed information about the ADR services provided by each of the key stakeholder organisations. The information is drawn from the stakeholder surveys where appropriate. Detailed information is provided about all key stakeholder organisations that completed and returned the stakeholder survey. The organisations are presented in alphabetical order.

Detailed information is provided about the following key stakeholder organisations:

1. AAMI Consumer Appeals Service
2. Banking and Financial Services Ombudsman
3. Consumer Affairs Victoria
4. Dispute Settlement Centre Victoria
5. Energy and Water Ombudsman Victoria
6. Financial Industry Complaints Service
7. Legal Services Commissioner
8. Magistrates' Court
9. Office of the Health Services Commissioner
10. Office of the Victorian Privacy Commissioner
11. Ombudsman Victoria
12. Public Transport Ombudsman
13. Telecommunications Industry Ombudsman
14. Victoria Legal Aid – Roundtable Dispute Management
15. Victorian Civil and Administrative Appeals Tribunal
16. Victorian Equal Opportunity and Human Rights Commission
17. Victorian Small Business Commissioner

Detailed information is not provided about the Insurance Ombudsman Service as at the time of writing the Research Report a questionnaire response had not been received.

### ***Note About Statistical Information***

The detailed information about key stakeholders contained in this section includes statistical information relating to enquiries and complaints. This statistical information has been drawn from the stakeholder surveys and other publicly available information, such as annual reports. Unless otherwise specified, statistical information relates to the 2005-2006 financial year.

It is noted that the collection of accurate statistical information that allows comparison of the activities of the stakeholder organisations is difficult. Caution should be taken when interpreting this data. Differences in the definition of ADR processes and differences in case management and data collection processes exist across the stakeholder organisations. For example, some organisations define mediation to include an advisory function, some organisations do not differentiate between mediations, conciliations and arbitrations, and some organisations do not differentiate between enquiries and complaints.

<b>AAMI Consumer Appeals Service</b>	
<b>Role</b>	Dispute resolution within private commercial organisation
<b>Type of disputes</b>	AAMI customer disputes
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
<b>Limits on eligibility:</b>	
Monetary limits	■ No
Time limits	■ No
Other	■ No
Consumer applicants only	■ Yes
Geographic limits	■ National
<b>Type of remedies</b>	Decision reversal
<b>Enforcement of decisions</b>	Not applicable
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Private company
<b>Statistical information</b>	
<b>Contacts (inc. enquiries &amp; complaints)</b>	2,095
<b>Referrals to other agencies</b>	1
<b>Information enquiries responded to</b>	Data not available
<b>Referrals back to original service/supplier</b>	1,015
<b>Mediations</b>	0
<b>Determinations</b>	1,080



<b>Banking and Financial Services Ombudsman</b>	
<b>Role</b>	The Banking and Financial Services Ombudsman (BFSO) provides a free, independent dispute resolution service to resolve complaints about banks and other non-bank affiliated members.
<b>Type of disputes</b>	A complaint can be lodged with the BFSO if: <ul style="list-style-type: none"> <li>■ the complainant is an individual or small business;</li> <li>■ it relates to a financial service provided by a member; and</li> <li>■ it relates to financial or non-financial loss.</li> </ul>
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> <li>■ Finding – may be accepted or rejected by the member or disputant.</li> <li>■ Recommendation – made if finding is rejected; may be accepted or rejected by the member or disputant.</li> <li>■ Determination – made if member rejects recommendation; binding on member.</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	■ Yes
<b>Time limits</b>	■ Yes
<b>Other</b>	<ul style="list-style-type: none"> <li>■ Complaints must be against scheme members.</li> <li>■ Will not investigate matters solely related to a financial service provider's commercial judgement.</li> <li>■ Will not investigate matters relating to a practice or policy of the financial service provider.</li> <li>■ Will not investigate any matter that is being or has been considered by any court, tribunal, arbitrator, independent conciliation body or statutory ombudsman unless the parties consent.</li> <li>■ Will not accept complaints where there is a more appropriate ADR scheme.</li> <li>■ At discretion of BFSO, will not accept complaints by very wealthy individuals.</li> </ul>
<b>Consumer applicants only</b>	■ Consumers and small businesses.
<b>Geographic limits</b>	■ National
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> <li>■ Non monetary orders e.g. amendment to records</li> </ul>
<b>Enforcement of decisions</b>	Non-compliance by member reported to ASIC
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	<ul style="list-style-type: none"> <li>■ membership fees comprise a combination of an annual levy and a fee for each dispute that is lodged against a member. The fee charged for each dispute increases depending on the stage at which the dispute is resolved</li> </ul>
<b>Membership</b>	License requirement in the industry.
<b>Statistical information</b>	
<b>Contacts (inc. enquiries &amp; complaints)</b>	39,885
<b>Referrals to other agencies</b>	4,925
<b>Information enquiries responded to</b>	33,559
<b>Referrals back to original service/supplier</b>	25,464
<b>Mediations</b>	85 (through negotiated settlement) 7 (through conciliation)
<b>Determinations</b>	102 case manager findings 55 Ombudsman recommendations 0 Ombudsman determinations

<b>Consumer Affairs Victoria</b>	
<b>Role</b>	The <i>Fair Trading Act</i> 1999 (Vic) allows the Director of Consumer Affairs Victoria (CAV) to conciliate complaints between purchasers and suppliers of goods or services. The Director may also mediate disputes between traders where required in the public interest.
<b>Type of disputes</b>	General conciliation services: consumer and tenancy Two specialist conciliation services: <ul style="list-style-type: none"> <li>■ Building Advice and Conciliation Victoria</li> <li>■ Estate Agents Resolution Service</li> </ul>
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Educational programs &amp; publications,</li> <li>■ Coaching businesses on how to deal with problems,</li> <li>■ Trader liaison</li> <li>■ Outsourced advocacy</li> <li>■ Proactive action on systemic issues</li> <li>■ Proactive legislative action through creation and review of legislation and codes of practice.</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	No
<b>Other</b>	Conciliation policy details criteria which determine whether a complaint is suitable for further action: <ul style="list-style-type: none"> <li>■ Is the matter likely to be settled?</li> <li>■ Is the matter within CAV's jurisdiction?</li> <li>■ How serious is the matter?</li> <li>■ Does the matter involve a breach of the legislation that is better dealt with by compliance or enforcement action?</li> <li>■ Are there other or better ways to deal with the matter?</li> </ul> Criteria are a guide only. CAV has overarching goals that allow flexibility and may provide additional grounds for action e.g. consumer protection, market regulation and public interest roles.
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	CAV has extra-territorial jurisdiction under the <i>Fair Trading Act</i> 1999 (Vic) & has jurisdiction where a business is located in Victoria, or where the good or service is supplied to Victoria.
<b>Type of remedies</b>	Monetary Decision reversal Refund of fees or other monies paid Repair or replacement of goods
<b>Enforcement of decisions</b>	Conciliation outcomes not enforceable, but may be referred to VCAT for arbitration
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Victorian Govt; cost recovery from licensing trust funds
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	589,000
<b>Referrals to other agencies</b>	Information not provided and not published
<b>Information enquiries responded to</b>	Information not provided and not published
<b>Referrals back to original service</b>	0 <sup>231</sup>
<b>Mediations</b>	CAV does not "mediate" disputes, however, 8433 cases were subject to "conciliation".
<b>Determinations</b>	Not applicable

<sup>231</sup> CAV classifies all actions as conciliations. In the financial year 2005-06 CAV conciliated 8433 matters.

<b>Dispute Settlement Centre Victoria</b>	
<b>Role</b>	Provides low cost dispute resolution service to all communities in Victoria to assist people to resolve their own disputes.
<b>Type of disputes</b>	DSCV provides assistance with a wide range of disputes, primarily community or neighborhood disputes.
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Assisted settlements, facilitation service.</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	No
<b>Other</b>	<ul style="list-style-type: none"> <li>■ Assessment is made for suitability to mediation if client wishes to progress the matter further.</li> <li>■ Family law matters may be referred to accredited family law mediation services.</li> </ul>
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Agreed process for future communications</li> <li>■ Apology</li> <li>■ Refund of fees or other monies paid</li> <li>■ Return of goods</li> </ul>
<b>Enforcement of decisions</b>	Agreements between parties can be made binding by entering into a contract. Parties must consent to admissibility of agreement in court.
<b>Charges/cost to applicant</b>	Nil Fee for training
<b>Source of funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts inc. enquiries &amp; complaints</b>	13,923
<b>Referrals to other agencies</b>	Not applicable
<b>Information enquiries responded to</b>	948
<b>Referrals back to original service</b>	Not applicable
<b>Mediations</b>	1,398
<b>Determinations</b>	Not applicable

<b>Energy and Water Ombudsman Victoria</b>	
<b>Role</b>	Investigates and resolves disputes between Victorian electricity, gas and water providers and their customers.
<b>Type of disputes</b>	Electricity, gas, water, LPG
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> <li>■ Referral</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	Yes
<b>Time limits</b>	Yes
<b>Other</b>	If matter goes to Binding Decision monetary limit of \$20,000, or if all parties agree \$50,000. Ombudsman has discretion in relation to time limits. Complainants must be customers, persons 'directly affected' or authorised representatives.
<b>Consumer applicants only</b>	No (approximately 7% of inquiries are from businesses)
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> <li>■ Apology</li> <li>■ Bill adjustment or waiver</li> <li>■ Payment plan</li> <li>■ Provision of service</li> </ul>
<b>Enforcement of decisions</b>	Non-compliance by member is a breach of scheme requirements and licence, legislative or industry code obligations regarding scheme participation.
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	<ul style="list-style-type: none"> <li>■ Funded by industry members</li> <li>■ Membership fee based on a fixed annual fee and a variable fee based on number of complaints received.</li> </ul>
<b>Membership</b>	<ul style="list-style-type: none"> <li>■ License requirement for electricity, gas and metropolitan water providers.</li> <li>■ Legislative requirement to participate in an approved scheme for non-urban water providers.</li> <li>■ Voluntary membership for LPG retailers.</li> </ul>
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	17,763
<b>Referrals to other agencies</b>	874
<b>Information enquiries responded to</b>	1,245
<b>Referrals back to original service</b>	5,020
	Additional 5,277 complaints referred to high level reps at member companies
<b>Mediations</b>	4,728
<b>Determinations</b>	0

<b>Financial Industry Complaints Service Ltd</b>	
<b>Role</b>	Provides free advice and assistance to consumers to help them in resolving complaints relating to members of the financial services industry.
<b>Type of disputes</b>	<ul style="list-style-type: none"> <li>■ Life insurance</li> <li>■ Superannuation</li> <li>■ Funds management</li> <li>■ Financial advice</li> <li>■ Investment advice</li> <li>■ Sales of financial and investment products.</li> </ul>
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Arbitration</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	Yes
<b>Time limits</b>	Yes
<b>Other</b>	Other limitations outlined in FICS Rules
<b>Consumer applicants only</b>	Yes
<b>Geographic limits</b>	National
<b>Type of remedies</b>	Monetary Decision reversal Release from contractual obligation
<b>Enforcement of decisions</b>	Non-compliance by member may result in expulsion from scheme.
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Funded by industry members Membership fee based on annual levy and fee per complaint based on member's size. Higher fee as complaint escalates.
<b>Membership</b>	License requirement in the industry
<b>Statistical information<sup>232</sup></b>	
<b>Contacts (inc. enquiries and complaints)</b>	14,369
<b>Referrals to other agencies</b>	1,000 (approx)
<b>Information enquiries responded to</b>	1,165 (new complaints)
<b>Referrals back to original service</b>	50
<b>Mediations</b>	212
<b>Determinations</b>	262

<sup>232</sup> Statistical information relates to 2005 calendar year.

<b>Legal Services Commissioner</b>	
<b>Role</b>	Responsible for the receipt, investigation and resolution of any complaints against lawyers.
<b>Type of disputes</b>	Complaints against lawyers
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	Yes
<b>Time limits</b>	Yes
<b>Other</b>	No
<b>Consumer applicants only</b>	Civil complaints by consumers only. Disciplinary complaints can be made by anyone.
<b>Geographic limits</b>	Complaints accepted from any location, but practitioner must be Victorian.
<b>Type of remedies</b>	Monetary
<b>Enforcement of decisions</b>	In Magistrates' Court
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Private statutory fund
<b>Statistical information*</b>	
<b>Contacts (inc. enquiries &amp; complaints)</b>	3,318
<b>Referrals to other agencies</b>	NA
<b>Information enquiries responded to</b>	2,100
<b>Referrals back to original service</b>	NA
<b>Mediations</b>	554
<b>Determinations</b>	21

\* Data relates to the period 12 December 2005 to 30 June 2006, the organisations first reporting period.

<b>Magistrates' Court</b>	
<b>Role</b>	Victorian court
<b>Type of disputes</b>	ADR is often used in: <ul style="list-style-type: none"> <li>■ General civil</li> <li>■ Industrial civil and Work Cover civil</li> <li>■ Family violence</li> </ul>
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Pre-hearing conference</li> <li>■ Can refer disputes under \$10,000 to arbitration.</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	Yes
<b>Time limits</b>	No
<b>Other</b>	No
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> <li>■ Refund of fees or other monies paid</li> <li>■ Return of goods</li> </ul>
<b>Enforcement of decisions</b>	Through court order
<b>Charges/cost to applicant</b>	Nil Filing fee for civil proceedings (except family violence) Mediators (other than Registrars) may charge fee.
<b>Source of funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	Data not available
<b>Referrals to other agencies</b>	Data not available
<b>Information enquiries responded to</b>	Data not available
<b>Referrals back to original service</b>	Data not available
<b>Mediations</b>	3,254 ( Pre-hearing conferences and mediations).
<b>Determinations</b>	9,234 (Where case is defended. Does not include default orders).

<b>Office of the Health Services Commissioner</b>	
<b>Role</b>	Receives and resolves complaints about health services.
<b>Type of disputes</b>	<ul style="list-style-type: none"> <li>■ Health services, disclosure of health information and access to health information.</li> <li>■ Also has jurisdiction over any participant in the health sector, including “alternative” medicine, dentistry and pharmacy.</li> </ul>
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	Yes
<b>Other</b>	Commissioner has discretion to extend time limits in certain circumstances.
<b>Consumer applicants only</b>	Yes
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> <li>■ Access to expert advice</li> <li>■ Apology</li> <li>■ In-kind compensation</li> <li>■ Procedural change</li> <li>■ Refund of fees or other monies paid</li> </ul>
<b>Enforcement of decisions</b>	Agreements between parties enforced by release documents. Agreements regarding procedural changes reviewed and reopened if unsatisfactory.
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	10,824
<b>Referrals to other agencies</b>	1,645
<b>Information enquiries responded to</b>	8,667
<b>Referrals back to original service</b>	Records not kept
<b>Mediations</b>	283 (conciliated)
<b>Determinations</b>	Not applicable



<b>Office of the Victorian Privacy Commissioner</b>	
<b>Role</b>	Handles complaints about privacy regarding Victorian government agencies and local councils.
<b>Type of disputes</b>	Privacy
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	No
<b>Other</b>	<ul style="list-style-type: none"> <li>■ Commissioner can accept a complaint outside the time limits at his discretion.</li> <li>■ Complaint must be in jurisdiction.</li> </ul>
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	Victoria only. Jurisdiction is Victorian public sector but complainant does not have to be resident in Victoria.
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Apology</li> <li>■ Procedural change</li> </ul>
<b>Enforcement of decisions</b>	Not answered
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	2,548
<b>Referrals to other agencies</b>	1,540
<b>Information enquiries responded to</b>	2,446
<b>Referrals back to original service</b>	213
<b>Mediations</b>	46
<b>Determinations</b>	36

<b>Ombudsman Victoria</b>	
<b>Role</b>	An independent officer of the Victorian Parliament. The aim of the Ombudsman is to promote fair and reasonable public administration.
<b>Type of disputes</b>	Complaints about state government departments, most statutory authorities and local government authorities.
<b>Type of ADR process</b>	Complaint handling
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	No
<b>Other</b>	No
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> <li>■ Apology</li> <li>■ Procedural change</li> <li>■ Issue addressed</li> </ul>
<b>Enforcement of decisions</b>	Not applicable
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	14,967
<b>Referrals to other agencies</b>	11,587
<b>Information enquiries responded to</b>	8,000 (approx)
<b>Referrals back to original service</b>	5,000 (approx)
<b>Mediations</b>	Not applicable
<b>Determinations</b>	1,800 (approx)

<b>Public Transport Ombudsman</b>	
<b>Role</b>	The Public Transport Ombudsman (PTO) resolves complaints by public transport users.
<b>Type of disputes</b>	Public transport
<b>Type of ADR process</b>	Information Complaint handling Conciliation
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	Yes
<b>Time limits</b>	Yes
<b>Other</b>	Other restrictions on jurisdiction are outlined in clauses 3 and 4 of the PTO Charter
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	Monetary Decision reversal Order to do or refrain from action
<b>Enforcement of decisions</b>	Non-compliance by member may result in expulsion from scheme.
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Funded by industry members Membership fee based on number of complaints
<b>Membership</b>	License requirement in the industry.
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	1,225
<b>Referrals to other agencies</b>	Information not provided and not published
<b>Information enquiries responded to</b>	Information not provided and not published
<b>Referrals back to original service</b>	Information not provided and not published
<b>Mediations</b>	Information not provided and not published
<b>Determinations</b>	0

<b>Telecommunications Industry Ombudsman</b>	
<b>Role</b>	The Telecommunications Industry Ombudsman (TIO) provides a free dispute resolution process for disputes between consumers and telecommunications service providers and Internet service providers.
<b>Type of disputes</b>	Telecommunications
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> <li>■ Recommendations and binding determinations.</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	Yes
<b>Time limits</b>	Yes
<b>Other</b>	The jurisdiction and powers of the TIO are set out in statute. Section 128 of the <i>Telecommunications (Consumer Protections and Standards) Act 1999</i> (Cwth) provides the TIO with a statutory monopoly on the resolution of consumer disputes within the telecommunications industry.
<b>Consumer applicants only</b>	Yes
<b>Geographic limits</b>	National
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> </ul>
<b>Enforcement of decisions</b>	Through the Australian Communications and Media Authority
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Funded by industry members Membership fee based on number of complaints
<b>Membership</b>	Requirement under the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i> (Cwth)
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	107,601
<b>Referrals to other agencies</b>	Data not available
<b>Information enquiries responded to</b>	20,008
<b>Referrals back to original service</b>	80,000
<b>Mediations</b>	Not applicable
<b>Determinations</b>	7

<b>Victoria Legal Aid Roundtable Dispute Management (Victoria)</b>	
<b>Role</b>	Victoria Legal Aid Roundtable Dispute Management (Victoria) is Victoria Legal Aid's ADR service.
<b>Type of disputes</b>	Family law
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Conciliation</li> <li>■ Case management, professional advice, education &amp; referral.</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	No
<b>Other</b>	One client must be eligible for legal aid. Means & merit tests apply to grant of legal aid. Once one person has qualified for legal aid any subsequent person involved in the dispute may join.
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	Resolution of family law disputes
<b>Enforcement of decisions</b>	Not answered
<b>Charges/cost to applicant</b>	Yes Does not charge a fee; may require contribution fee for legal aid
<b>Source of funding</b>	Commonwealth Government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	386 conferences
<b>Referrals to other agencies</b>	Not applicable
<b>Information enquiries responded to</b>	Not applicable
<b>Referrals back to original service</b>	Not applicable
<b>Mediations</b>	Not applicable
<b>Determinations</b>	Not applicable

<b>Victorian Civil and Administrative Appeals Tribunal</b>	
<b>Role</b>	Victorian tribunal
<b>Type of disputes</b>	ADR is often used in: <ul style="list-style-type: none"> <li>■ Anti-Discrimination List</li> <li>■ Domestic Building List</li> <li>■ Planning and Environment List</li> <li>■ Retail Tenancies List.</li> </ul>
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Arbitration</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	No
<b>Other</b>	A judgement is made on which cases are suited to ADR.
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	No
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> </ul>
<b>Enforcement of decisions</b>	Court orders
<b>Charges/cost to applicant</b>	Nil for mediation Application fee
<b>Source of funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	90,000
<b>Referrals to other agencies</b>	0
<b>Information enquiries responded to</b>	Information not provided and not published
<b>Referrals back to original service</b>	Information not provided and not published
<b>Mediations</b>	1,500 (approx)
<b>Determinations</b>	90,000 (approx)

<b>Victorian Equal Opportunity and Human Rights Commission</b>	
<b>Role</b>	Receives complaints about discrimination, sexual harassment and racial and religious vilification. Provides information and education about equal opportunity and human rights. Seeks to reduce discrimination and has specific statutory and reporting functions under the Charter of Human Rights and Responsibilities.
<b>Type of disputes</b>	Discrimination
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	Yes
<b>Other</b>	Complaint must be in writing and include contravention of <i>Equal Opportunity Act 1995</i> or <i>Racial and Religious Tolerance Act 2001</i>
<b>Consumer applicants only</b>	No
<b>Geographic limits</b>	Victoria only
<b>Type of remedies</b>	<ul style="list-style-type: none"> <li>■ Monetary</li> <li>■ Decision reversal</li> <li>■ Apology</li> <li>■ Donation to charity</li> <li>■ In-kind compensation</li> <li>■ Procedural change</li> <li>■ Provision of service</li> <li>■ Withdrawal of publication</li> <li>■ Training</li> </ul>
<b>Enforcement of decisions</b>	Not applicable
<b>Charges/cost to applicant</b>	Nil
<b>Source of funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	9,686
<b>Referrals to other agencies</b>	Information not provided and not published
<b>Information enquiries responded to</b>	7,517
<b>Referrals back to original service</b>	Information not provided and not published
<b>Mediations</b>	748
<b>Determinations</b>	Not applicable

<b>Victorian Small Business Commissioner</b>	
<b>Role</b>	The Victorian Small Business Commissioner (VSBC) investigates and mediates complaints involving small businesses regarding retail tenancy disputes, regulated contract disputes and unfair market practices. The VSBC also helps to ensure that Government practices are business friendly.
<b>Type of disputes</b>	<ul style="list-style-type: none"> <li>■ Business-to-business disputes</li> <li>■ Business tenancy disputes</li> <li>■ Owner drivers and forestry contractors disputes</li> </ul>
<b>Type of ADR process</b>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Arbitration</li> </ul>
<b>Limits on eligibility</b>	
<b>Monetary limits</b>	No
<b>Time limits</b>	No
<b>Other</b>	Restrictions on consumer related and industrial matters.
<b>Consumer applicants only</b>	One party must be a small business.
<b>Geographic limits</b>	One party must have a connection with Victoria.
<b>Type of remedies</b>	Agreed commercial outcome Specific performance of obligation
<b>Enforcement of decisions</b>	Not applicable
<b>Charges/cost to applicant</b>	Nil Parties to conciliation pay fee directly to mediator. Standard fee is \$95 each. SBC pays subsidy of \$400 to mediator.
<b>Funding</b>	Victorian government
<b>Statistical information</b>	
<b>Contacts (inc. enquiries and complaints)</b>	70,383
<b>Referrals to other agencies</b>	Data not available
<b>Information enquiries responded to</b>	5,860
<b>Referrals back to original service</b>	0
<b>Mediations</b>	364
<b>Determinations</b>	0



## Appendix 8: Map of the Supply of ADR Services in Victoria

Public Supply of ADR Services			
Geographic Limits	ADR Supplier	Types of Disputes	Types of ADR Processes
<b>COURTS</b>			
Commonwealth of Australia	High Court of Australia	Highest court in Australian judicial system Interpret & apply laws of Australia Decide cases of special federal significance Appeals from Federal, State & Territory courts	Not applicable
Commonwealth of Australia	Family Court of Australia	Family law	<ul style="list-style-type: none"> <li>■ Counselling</li> <li>■ Mediation</li> <li>■ Conciliation</li> </ul>
Commonwealth of Australia	Federal Court	ADR used in: <ul style="list-style-type: none"> <li>■ Business practices</li> <li>■ Discrimination</li> <li>■ Shipping</li> <li>■ Patents</li> <li>■ Copyright &amp; designs</li> </ul>	Mediation
Commonwealth of Australia	Federal Magistrates Service	Family law	<ul style="list-style-type: none"> <li>■ Conciliation counselling</li> <li>■ Conciliation conferences</li> <li>■ Mediation</li> <li>■ Pre-trial conferences</li> </ul>
State of Victoria	Supreme Court	ADR used in Commercial list	Mediation
State of Victoria	County Court	ADR used in: <ul style="list-style-type: none"> <li>■ Damages list</li> <li>■ Business list</li> </ul>	Mediation
State of Victoria	Magistrates Court	ADR used in: <ul style="list-style-type: none"> <li>■ General civil</li> <li>■ Industrial civil &amp; Work Cover civil</li> <li>■ Family violence</li> </ul>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Pre-hearing conference</li> </ul>
State of Victoria	Children's Court	ADR used in Family division	<ul style="list-style-type: none"> <li>■ Pre-hearing conferences</li> <li>■ Conciliation counselling</li> </ul>
State of Victoria	Neighbourhood Justice Centre	ADR used in: <ul style="list-style-type: none"> <li>■ Civil</li> <li>■ Support services</li> <li>■ Mediation &amp; crime prevention programs</li> </ul>	Mediation
State of Victoria	State Coroner's Office of Victoria	Coronial investigations Inquests	Not applicable
<b>TRIBUNALS</b>			
Commonwealth of Australia	Administrative Appeals Review Tribunal	General & veterans Tax division Small tax division	<ul style="list-style-type: none"> <li>■ Conciliation</li> <li>■ Mediation</li> <li>■ Conferences</li> </ul>
Commonwealth of Australia	Australian Industrial Relations Commission	Industrial relations	Conciliation
Commonwealth of Australia	Human Rights & Equal Opportunity Commission	Human rights Discrimination	Conciliation
Commonwealth of Australia	Migration Review Tribunal	Review of visa & visa related decisions	Not applicable

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Public Supply of ADR Services			
Geographic Limits	ADR Supplier	Types of Disputes	Types of ADR Processes
Commonwealth of Australia	National Native Title Tribunal	Native title Compensation applications Future act determination applications Indigenous Land Use Agreements	<ul style="list-style-type: none"> <li>■ Mediation</li> <li>■ Facilitation of agreements</li> </ul>
Commonwealth of Australia	Refugee Review Tribunal	Reviews decisions to review or cancel protection visas	Not applicable
Commonwealth of Australia	Social Security Appeals Tribunal	Review of social security related decisions	Not applicable
Commonwealth of Australia	Superannuation Complaints Tribunal	Superannuation Annuities Retirement savings accounts	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> <li>■ Conciliation</li> <li>■ Determination</li> </ul>
State of Victoria	Racing Appeals Tribunal	Appeals against certain decisions by Racing Victoria, Harness Racing Victoria & Greyhound Racing Victoria	Not applicable
State of Victoria	Victims of Crime Assistance Tribunal	Assistance to victims of violent crime	Not applicable
State of Victoria	Victorian Civil & Administrative Tribunal	ADR used in: <ul style="list-style-type: none"> <li>■ Civil claims</li> <li>■ Credit</li> <li>■ Anti-Discrimination</li> <li>■ Domestic Building Planning &amp; Environment</li> <li>■ Retail Tenancies</li> <li>■ Occupational &amp; business regulation</li> </ul>	<ul style="list-style-type: none"> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Arbitration</li> <li>■ Conferences</li> <li>■ Directions hearings</li> </ul>
<b>STATUTORY ADR SUPPLIERS</b>			
Commonwealth of Australia	Aged Care Complaints Resolution Scheme	Aged care services	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> </ul>
Commonwealth of Australia	Australian Broadcasting Authority	National free-to-air radio & television, pay television, digital broadcasting & internet content regulator	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> </ul>
Commonwealth of Australia	Australian Competition & Consumer Commission	National competition & consumer protection regulator	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Investigation</li> <li>■ Enforcement</li> </ul>
Commonwealth of Australia	Australian Securities & Investment Commission	National corporate, markets & financial services regulator	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Investigation</li> <li>■ Enforcement</li> </ul>
Commonwealth of Australia	Commonwealth Ombudsman	Complaints about Commonwealth government departments	Investigation
Commonwealth of Australia	Defence Force Ombudsman	See Commonwealth Ombudsman above	
Commonwealth of Australia	Office of the Federal Privacy Commissioner	<ul style="list-style-type: none"> <li>■ Privacy issues relating to Commonwealth or ACT government agencies</li> <li>■ Consumer credit reporting,</li> <li>■ Personal tax file numbers,</li> <li>■ Spent convictions &amp; private businesses</li> </ul>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> </ul>
State of Victoria	Accident Compensation Conciliation Service	Complaints about Work Cover claims	Conciliation
State of Victoria	Building Practitioners Board	Registration of builders Disciplinary action against builders	<ul style="list-style-type: none"> <li>■ Complaint handling</li> <li>■ Investigation</li> </ul>
State of Victoria	Environment Protection Authority	Prevention & control of pollution on land, in water & in air & industrial noise	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Investigation</li> <li>■ Enforcement</li> </ul>
State of Victoria	Legal Services Commissioner	Complaints against lawyers	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> </ul>

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<b>Public Supply of ADR Services</b>			
<b>Geographic Limits</b>	<b>ADR Supplier</b>	<b>Types of Disputes</b>	<b>Types of ADR Processes</b>
State of Victoria	Office of the Health Services Commissioner	Health services	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
State of Victoria	Office of the Victorian Privacy Commissioner	Privacy	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
State of Victoria	Ombudsman Victoria	Complaints about state government departments, most statutory authorities & local government authorities	Complaint handling
State of Victoria	Victorian Small Business Commissioner	Small business, retail tenancy	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Arbitration</li> </ul>
State of Victoria	Victoria Legal Aid – Roundtable Dispute Management	Family law conferencing	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Conciliation</li> <li>■ Case management</li> <li>■ Professional advice</li> <li>■ Education</li> <li>■ Referral</li> </ul>
State of Victoria	Victorian Equal Opportunity & Human Rights Commission	Discrimination Human rights	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
<b>GOVERNMENT DEPARTMENTS &amp; OTHER GOVERNMENT ORGANISATIONS</b>			
Commonwealth of Australia	Australian Taxation Office	Administers legislation for taxes & excise	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints Handling</li> <li>■ Investigation</li> <li>■ Enforcement</li> </ul>
State of Victoria	Consumer Affairs Victoria	General conciliation services Two specialist conciliation services. See: <ul style="list-style-type: none"> <li>■ Building Advice &amp; Conciliation Victoria</li> <li>■ Estate Agents Resolution Service</li> </ul>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Educational programs &amp; publications</li> <li>■ Displays at exhibitions</li> <li>■ Coaching businesses on how to deal with problems</li> <li>■ Trader liaison</li> <li>■ Outsourced advocacy</li> <li>■ Proactive action on systemic issues</li> <li>■ Proactive legislative action through creation &amp; review of legislation &amp; codes of practice.</li> </ul>
State of Victoria	Consumer Affairs Victoria & Building Commission Building Advice & Conciliation Victoria	Domestic building disputes	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Conciliation</li> </ul>
State of Victoria	Consumer Affairs Victoria Estate Agent's Resolution Service	Real estate	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Conciliation</li> </ul>
State of Victoria	Victorian Commission for Gaming Regulation	Regulation of gambling	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Investigation</li> <li>■ Enforcement</li> </ul>
State of Victoria	Victorian WorkCover Authority	Compliance with Victorian accident compensation laws	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Compliance</li> <li>■ Enforcement</li> </ul>

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Public Supply of ADR Services			
Geographic Limits	ADR Supplier	Types of Disputes	Types of ADR Processes
Commonwealth of Australia & State of Victoria	Internal dispute resolution processes of government departments	Complaints about government departments	
Commonwealth of Australia & State of Victoria	Internal dispute resolution processes of Universities & Councils	Complaints about Universities & Councils	
COMMUNITY ADR SUPPLIERS			
State of Victoria	Dispute Settlement Centre Victoria	Wide range of disputes, primarily community or neighborhood disputes	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Assisted settlements</li> <li>■ Facilitation service</li> </ul>

Private Supply of ADR Services			
Geographic Limits	ADR Supplier	Types of Disputes	Types of ADR Processes
INTERNAL ADR WITHIN PRIVATE COMMERCIAL ORGANISATIONS			
State of Victoria	Private commercial organisations	Many commercial organisations have developed their own internal ADR process. Internal ADR promotes the resolution of consumer disputes directly with the business concerned e.g. AAMI Consumer Ombudsman	Complaint handling
INDUSTRY ADR SCHEMES			
State of Victoria	Banking and Financial Services Ombudsman	Banking services	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> <li>■ Finding</li> <li>■ Binding determination</li> <li>■ Non-binding recommendation</li> </ul>
State of Victoria	Credit Union Dispute Resolution Centre	Credit unions	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>
State of Victoria	Financial Industry Complaints Service	<ul style="list-style-type: none"> <li>■ Life insurance</li> <li>■ Superannuation</li> <li>■ Funds management</li> <li>■ Financial advice</li> <li>■ Investment advice</li> <li>■ Sales of financial and investment products.</li> </ul>	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Conciliation</li> <li>■ Arbitration</li> </ul>
State of Victoria	Insurance Brokers Dispute Facility	Disputes between consumer and insurance broker or financial service provider (other than insurance company) concerning a general or life insurance policy.	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>
State of Victoria	Insurance Ombudsman Service	Insurance Limited jurisdiction in relation to third party insurance complaints	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> <li>■ Binding determination</li> <li>■ Non-binding recommendation</li> </ul>
State of Victoria	Private Health Insurance Ombudsman	Private health insurance	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> <li>■ Mediation</li> </ul>
State of Victoria	Telecommunications Industry Ombudsman	Telecommunications	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>

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Private Supply of ADR Services			
Geographic Limits	ADR Supplier	Types of Disputes	Types of ADR Processes
State of Victoria	Energy and Water Ombudsman (Victoria)	Electricity, gas, water, LPG	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> <li>■ Referral</li> </ul>
State of Victoria	Public Transport Ombudsman	Public transport	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaint handling</li> <li>■ Conciliation</li> </ul>
<b>PROFESSIONAL ASSOCIATIONS<sup>233</sup></b>			
National	Association of Financial Advisors	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Australasian Institute of Banking and Finance	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Australian Antique Dealers Association	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Informal Conciliation</li> </ul>
National	Australian Dental Association	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Australian Direct Marketing Association	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Australian Funeral Directors Association	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Australian Furniture Removers Association	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Certified Practising Accountants Australia	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Financial Planning Association of Australia	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Fire Protection Association of Australia	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Institute of Actuaries of Australia	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Institute of Chartered Accountants in Australia	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Institution of Surveyors	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Mortgage Industry Association of Australia	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Retirement Village Association of Australia	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
National	Royal Australian Institute of Architects	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
Victoria	Building Commission	Complaints about registered builders	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
Victoria	Caravan Industry Association	Complaints against members	<ul style="list-style-type: none"> <li>■ Information</li> <li>■ Complaints handling</li> </ul>
<b>OTHER PRIVATE PROVIDERS OF ADR</b>			

<sup>233</sup> There are a large number of professional associations that receive complaints about members and breaches of the professional association's code of conduct (if applicable). This list of professional associations is not exhaustive. The information contained in this section is found in the Department of Treasury, *The Australian Consumer Handbook 2003* (2003).

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Private Supply of ADR Services			
Geographic Limits	ADR Supplier	Types of Disputes	Types of ADR Processes
National	Australian Commercial Dispute Centre	<ul style="list-style-type: none"> <li>■ Professional ADR association</li> <li>■ ADR training</li> <li>■ ADR accreditation</li> <li>■ Register of approved ADR professionals</li> </ul>	<ul style="list-style-type: none"> <li>■ Conciliation</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>
National	Institute of Arbitrators and Mediators Australia	<ul style="list-style-type: none"> <li>■ Professional ADR association</li> <li>■ ADR training</li> <li>■ Register of approved ADR professionals</li> </ul>	<ul style="list-style-type: none"> <li>■ Conciliation</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>
National	LEADR	<ul style="list-style-type: none"> <li>■ Professional ADR association</li> <li>■ ADR training</li> <li>■ ADR accreditation</li> <li>■ Register of approved ADR professionals</li> </ul>	<ul style="list-style-type: none"> <li>■ Conciliation</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>
National	Law Institute of Victoria	<ul style="list-style-type: none"> <li>■ Professional association for lawyers</li> <li>■ Register of approved ADR professionals</li> </ul>	<ul style="list-style-type: none"> <li>■ Conciliation</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>
National	Victorian Bar	<ul style="list-style-type: none"> <li>■ Professional association for barristers</li> <li>■ Register of approved ADR professionals</li> </ul>	<ul style="list-style-type: none"> <li>■ Conciliation</li> <li>■ Mediation</li> <li>■ Arbitration</li> </ul>
<b>INFORMAL PROVISION OF ADR BY CITIZENS &amp; COMMUNITIES</b>			
National	Informal ADR may be provided by citizens and communities e.g. neighbours resolving a fencing dispute between themselves		

## ***About the Author***

The Research Report has been prepared by Chris Field as Principal of Chris Field Consulting Pty Ltd. I have also received research and drafting assistance from Tracey Atkins, final year law student. The views in the Research Report do not purport to represent the views of any other organisation with which the author has been, or is, involved.

Professor Chris Field is a Member of the Economic Regulation Authority, the independent economic regulator for Western Australia (3 days per week). He also holds a Professorial Chair in Consumer Law and Policy at La Trobe University (2 days per week). Chris is also Chair of the Consumer Utilities Advocacy Centre, a Director of the Energy and Water Ombudsman Victoria and an Adjunct Professor in the Centre for Advanced Consumer Research at the University of Western Australia. Chris is the principal of Chris Field Consulting Pty Ltd and has undertaken consultancy work for Consumer Affairs Victoria, the Victorian Department of Justice and AAMI.

Chris is widely recognised as one of Australia's leading experts on consumer policy. He is establishing the Centre for Consumer Law and Policy at La Trobe University, a joint initiative of the Victorian Government and La Trobe University and was involved in establishing the Centre for Advanced Consumer Research at the University of Western Australia, a joint initiative of the Western Australian Government and the University of Western Australia. He teaches advanced consumer law, policy and economics at both universities. He is the author of the university textbook *Current Issues in Consumer Law and Policy* (Pearson Education Australia 2006) as well as numerous articles in scholarly journals on consumer law, policy and economics. He is also the "Consumer Dealings" section editor of the *Australian Business Law Review*.

Prior to his appointment to the Economic Regulation Authority, Chris was widely regarded as one of Australia's leading consumer advocates, well known for his work as the Executive Director of the Consumer Law Centre Victoria for seven years and the Chair of the Australian Consumers' Association for four years. Prior to working at the Consumer Law Centre Victoria, he was employed as a lawyer at Arthur Robinson & Hedderwicks (now Allens Arthur Robinson). He holds Arts and Law (Honours) degrees.

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