

6 July 2011

General Manager
Small Business and Deregulation Branch
Department of Innovation, Industry, Science and Research
GPO Box 9839
Canberra ACT 2601

Dear Mr Joyce

Comments on Options Paper - Resolution of Small Business Disputes

The National Alternative Dispute Resolution Advisory Council (NADRAC) welcomes the opportunity to provide comment on the *Resolution of Small Business Disputes Options Paper*.

NADRAC is very supportive of the objectives of this project including the need to explore affordable and accessible dispute resolution options for the direct benefit of small business. It agrees that there is a need to avoid overlap or duplication with existing dispute resolution services for small business and supports strengthening and supplementing those services, where appropriate.

NADRAC's expertise is in alternative dispute resolution (ADR) generally, rather than small business disputes specifically. As such, and in line with its Charter, NADRAC's comments will be directed at promoting the use and raising the profile of ADR including advising on what key principles should be included in any form of dispute resolution for small business. Much of the work NADRAC has completed recently and in the past underpins several questions raised in the Options Paper.

At the outset, NADRAC suggests that any dispute resolution services for small business should be time-efficient, informal and ultimately effective for small business. NADRAC has recently developed key principles that it considers should be taken into account in resolving civil disputes. These principles set out a fundamental approach to dispute resolution that is consistent with better access to justice and may be helpful to your deliberations. The emphasis is on ADR as the primary method of dispute resolution, with litigation reserved for issues that cannot be resolved fairly any other way. The *National Principles for Resolving Disputes* are Attachment A. In addition, NADRAC has developed a dispute resolution guide that compliments the Principles. This is available on NADRAC's website at www.nadrac.gov.au.

Defining ADR terms

NADRAC considers that there are important reasons for pursuing consistent use of ADR terminology. This will allow small business in dispute to develop reasonable expectations of what various ADR processes will involve and make informed choices about the most suitable approach to take for their circumstances. A copy of NADRAC's *Glossary of ADR Terms* is [Attachment B](#).

Quality ADR services

NADRAC strongly emphasises the importance of access to quality ADR services. Effective, affordable and professional ADR services that meet acceptable standards should be readily available to small business as a means of resolving their disputes. NADRAC advocates that small business dispute resolution services should only refer or use mediators who meet the minimum requirements of accreditation under the National Mediator Accreditation System.

A centralised portal for small business disputes

NADRAC is of the view that the current difficulties surrounding the access by small business to information about ADR and dispute resolution services is a significant barrier to its use. Educating small business to see ADR as a valuable option to manage their disputes is of significant value. Providing small business with clear and meaningful information about ADR will enable them to make informed choices about how to manage their dispute.

For those not yet inclined to seek professional help or the assistance of the courts, NADRAC believes providing an online central information gateway could offer a convenient, easily accessible source of information for small business. NADRAC also sees benefit in a 'consultant' figure to further increase the accessibility of this information service – for example, a 'help line' or dedicated e-mail box to answer queries and assist small business to identify what options are available to them.

NADRAC notes the need for any system at the federal level to complement state and territory small business commissioners and dispute resolution services so that existing services are not duplicated or undermined. NADRAC sees benefit in providing a holistic national approach by tying together both federal and state information services. This would make the information gateway even more comprehensive and contribute to avoiding competition between systems and thus potential confusion for users.

Data Collection

The importance of data collection and evaluation of any small business dispute resolution option is critical to its ongoing success. Evaluation, research and evidence-based policy and program development all depend upon the availability of sound quantitative and qualitative data. NADRAC has long supported the need for comparable empirical data concerning the provision

and use of ADR to fully assess ADR services, build upon them and ensure that they meet appropriate standards. NADRAC advocates that collecting and publishing comparable data using uniform criteria and benchmarks (as to the use and performance of ADR processes) is critical to assessing ADR services and ensure they meet the needs of small business.

Finally, NADRAC supports filling any gaps in the system for small business as a matter of priority. NADRAC would be pleased to assist in further advice if filling those gaps involves an ADR service.

NADRAC also recognises the ongoing need to consult the small business sector about the options and any proposed changes to small business dispute resolution services. This is particularly necessary given that people access services in many different ways.

Thank you for the opportunity to comment on this project. NADRAC would be pleased to respond to any questions arising from the above comments and is available for further consultation if required.

Yours sincerely



Allison Wood
Director
NADRAC Secretariat

ATTACHMENT A

National Principles for Resolving Disputes

Greater understanding of difference, and communication about those differences at an early stage, will help to prevent or minimise many disputes. Where disputes cannot be prevented, there are many ways to resolve them.

Methods of resolution range from informal discussion and negotiation to formal determination by a court and include dispute resolution processes like mediation, conciliation and arbitration.

These principles set out a fundamental approach to dispute resolution that is consistent with better access to justice.

The principles address people involved in dispute and government and service providers. For specific information on the principles, the differences between dispute resolution processes and what to expect when using different dispute resolution processes the Guide to the *National Principles for Resolving Disputes* should be consulted.

1. People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
2. Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
4. People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
5. People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
6. Effective, affordable and professional ADR services that meet acceptable standards should be readily available to people as a means of resolving their disputes.
7. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

Glossary of ADR Terms

A

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 participants to prevent or manage their own disputes without outside assistance. See also *FDR*.

Adjudication is a process in which the participants 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).

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. Advisory processes include *expert appraisal*, *case appraisal*, *case presentation*, *mini-trial* and *early neutral evaluation*.

Arbitration is a process in which the participants 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 participants 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*).

C

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 participants 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*.

Clients are individuals or organisations that engage dispute resolution service providers in a professional capacity. A client may not necessarily be a participant to a dispute, but may engage a dispute resolution service provider to assist the resolution of a dispute between others.

Collaborative Law is a form of collaborative practice where the process is led by lawyers representing each of the participants and it has been agreed that the lawyers will cease to act for their client if the matter proceeds to litigation. See also *Collaborative Practice*.

Collaborative practice is a facilitative approach to resolving disputes, where the participants, and other experts such as lawyers sign an agreement to focus on negotiation and settlement rather than litigation. It is essentially focussed on a collaborative and interest based negotiation. All participants are members of a problem solving team who agree to disclose all information and also agree to negotiate in a constructive manner (often by agreeing to communication and other protocols). In most collaborative models, participants wishing to engage in the collaborative process are supported by a lawyer. The participants must also be prepared to participate actively in a process of open negotiations, aimed exclusively at settlement.

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 participants 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.

Community Mediation Service is a mediation service provided is by a non-government or community organisation.

Community mediator is a mediator chosen from a panel representative of the community in general.

Conciliation counselling is a term used previously to describe some of the processes used by counsellors in the Family Court of Australia to assist participants to settle disputes concerning children. The Court now uses the term *mediation* to describe these processes.

Conciliation is a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

Note: the term 'conciliation', may be used broadly to refer to other processes used to resolve complaints and disputes including:

- informal discussions held between the participants and an external agency in an endeavour to avoid, resolve or manage a dispute
- combined processes in which, for example, an impartial practitioner facilitates discussion between the participants, 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 conducted by a conference chair or convenor in which the participants and/or their advocates discuss issues in dispute. Conferences are often used by organisations with a regulatory or statutory responsibility and the conference chair or convenor may provide advice on the issues in dispute or possible options for its resolution. The term conference is often used to refer to processes in courts, tribunals and regulatory agencies that are similar to conciliation and may sometimes be referred to as 'conciliation conferences'.

Consensus building is a process where participants 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 participants 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. *Family Counselling* has a specific meaning under the Family Law Act.

D

Determinative dispute resolution processes are process in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the participants) and makes a determination. Examples of determinative dispute resolution processes are *arbitration*, *expert determination* and *private judging*.

Determinative case appraisal is a process in which the participants 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 participants or a participant to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.

Dispute resolution refers to all processes that are used to resolve disputes, whether within or outside court proceedings. Dispute resolution processes may be *facilitative*, *advisory* or *determinative* (see descriptions elsewhere in this glossary). Dispute resolution processes other than formal judicial determination are often referred to as *ADR*.

Dispute resolution practitioner is an impartial person who assists those in dispute to resolve the issues between them. A practitioner may work privately as a statutory officer or through engagement by a dispute resolution organisation. A sole practitioner is a sole trader or other individual operating alone and directly engaged by clients.

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.

E

Early neutral evaluation is a process in which the participants 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 participant to a dispute is provided with information, knowledge or skills, which assist them to negotiate directly with the other, participant or participants. 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 participants, 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 participants 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 participants 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.

F

Facilitated negotiation is a process in which the participants 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 participants (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 participants 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.

Facilitative dispute resolution processes are processes in which a *dispute resolution practitioner* assists the participants to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are *mediation, facilitation* and *facilitated negotiation*.

Fact finding is a process in which the participants 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*.

FDR (Family Dispute Resolution) Family dispute resolution is a process conducted by an independent practitioner to assist people affected, or likely to be affected by separation or divorce, to manage and to resolve some or all of the issues arising between them without going to court. A legal definition can be found in the *Family Law Act 1975*. The term 'family dispute resolution' is an umbrella term that covers many different sorts of ADR processes. Mediation and conciliation can both be types of family dispute resolution.

A **Family Dispute Resolution Practitioner** is a person who has training and experience in conducting Family Dispute Resolution. They must fall within one of the categories of family dispute resolution practitioners listed in section 10G of the Family Law Act.

Requirements for the accreditation of Family Dispute Resolution Practitioners are set out in the Family Law Regulations. See also *Registered Family Dispute Resolution Provider*.

Fast-track arbitration is a process in which the participants 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.

H

Hybrid dispute resolution processes - see **combined dispute resolution processes**.

I

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 participants 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 refers to industry specific dispute resolution schemes used to 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 participants 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*.

J

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.

M

Med-arb see **Combined processes**

Mediation is a process in which the participants 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.

Mini-trial is a process in which the participants 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 participants or groups of participants.

O

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](#)).

Online 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*.

P

Partnering involves the development of a charter based on the participants' 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.

Participants are persons or bodies who are in a dispute that is handled through a dispute resolution process.

Private judging is a process in which the participants 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.

R

Referrers (or **referring agencies**) are individuals and agencies that suggest, encourage, recommend or direct the use of dispute resolution (or other) services. Examples are courts, legal practitioners, community agencies, professionals, friends and relatives.

A **Registered Family Dispute Resolution Provider** is an individual or organisation who has met the required standards of training, experience and suitability for inclusion on the Family Dispute Resolution Register. Registered Family Dispute Resolution Providers can conduct family dispute resolution and, if needed, issue a certificate for participants to take to court to confirm that an attempt at family dispute resolution was made. Registered Family Dispute Resolution Providers may be community, government-funded or private sector organisations or private practitioners. People can choose the Registered Family Dispute Resolution Provider who they think will best meet their needs. The Register of Family Dispute Resolution providers is available at <http://fdrrregister.familyrelationships.gov.au/Search.aspx>. See also Family Law Regulations.

Recognised Mediator Accreditation Body (RMAB)

An RMAB is an organisation that accredits mediators in accordance with the National Mediator Accreditation System's Practice Standards and Approval Standards. More information is available in the [Approval Standards](#).

Restorative conferencing (see *diversionary conferencing*).

S

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.

Service users (or **consumers**) are those who seek, use or receive dispute resolution (or other) services. They may not necessarily be involved in a dispute, have engaged a service provider or have participated directly in dispute resolution processes, but may seek information or other assistance from the dispute resolution service provider.

Shuttle mediation is a process in which the participants 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 participants who are located in different rooms, or meet different participants 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 participants to reach an agreement which accords with the advice of the statute.

V

Victim-offender mediation is a process in which the participants 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.