

Key National Principles for Resolution of Disputes

EXPLANATORY DOCUMENT

National Alternative Dispute Resolution Advisory Council

MARCH 2010

1. INTRODUCTION

1.1 THE ATTORNEY-GENERAL'S REFERENCE

On 1 December 2009, the Attorney-General issued the National Alternative Dispute Resolution Council (NADRAC) with three new references. One of these references asked the Council to prepare:

1. a statement of key national alternative dispute resolution (ADR) principles, and
2. a supporting guide for users of ADR services which explains the key principles, the differences between facilitative, advisory and determinative ADR processes and what to expect when using different ADR processes.

The proposal for a statement of key national principles and the supporting guide stems from recommendations in NADRAC's most recent report, *The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, which was provided to the Attorney-General in September 2009. The report is available at <http://www.nadrac.gov.au>.

1.2 NATIONAL PRINCIPLES FOR RESOLUTION OF DISPUTES

NADRAC has identified seven key national principles in response to the first part of the Attorney-General's reference. This document aims to explain the rationale underpinning the key national principles NADRAC has devised and proposed in response to the Attorney-General's reference.

NADRAC acknowledges that the Attorney-General's reference asks NADRAC to prepare a statement of key national *alternative dispute resolution (ADR)* principles. However, NADRAC has opted to title the statement of national principles it formulated in response to the reference as '*Key National Principles for Resolution of Disputes*.' The reasoning for this is that NADRAC considers that it is important for ADR to be understood as just one of a set of services and interventions that may assist with the resolution of disputes. NADRAC considers that it is important for the key national principles to conceptualize ADR as just one key part of the broader civil justice system and NADRAC considers that the current title better facilitates that aim. This view appears consistent with the intent of the Attorney-General's reference to NADRAC.

1.3 THE AIM OF THE KEY NATIONAL PRINCIPLES AND SUPPORTING GUIDE

The aim of the principles and the supporting guide is to assist in:

- ◆ promoting ADR
- ◆ raising awareness of ADR in the Australian community
- ◆ encouraging nationally consistent ADR usage, and
- ◆ informing users of ADR about good practice.

NADRAC advocates for the consistent application of some ADR principles in federal, state and territory legislation, as ‘a more uniform approach to ADR and articulation of the core principles relevant to different ADR processes may assist policy and law makers in developing better policy and producing ADR legislation.’¹

1.4 DIFFERENCES OF OPINION, CONFLICT AND DISPUTES IN THE COMMUNITY

Differences of opinion between people are inevitable, and an ordinary part of life. Such differences can have a variety of consequences. When differences of opinion are sufficient to undermine relationships and/or to inhibit achievement of goals, there may be a dispute.

This set of key national principles in response to the Attorney -General’s reference aims to ensure that people have access to the most appropriate dispute resolution process available, and that they use it to resolve their disputes with the best possible outcome.

2. RATIONALE FOR THE KEY NATIONAL PRINCIPLES FOR RESOLUTION OF DISPUTES

2.1 REFLECTING THE GOALS OF THE CIVIL JUSTICE SYSTEM

In arriving at the final set of principles NADRAC bore in mind the conclusions reached by the Attorney-General’s Department in its September 2009 report: *Access to Justice Report : A Strategic Framework for Access to Justice in the Federal Civil Justice System*.² This report proposed five principles which set out the objectives of the Australian civil justice system.

¹ The National Alternative Dispute Resolution Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), page 2.

² Attorney-General’s Department, *Access to Justice Report: A Strategic Framework for Access to Justice in the Federal Civil Justice System*, (2009), page 62.

The five *Access to Justice* principles are:

- justice initiatives should reduce the net complexity of the justice system
- the justice system should be structured to create incentives to encourage people to resolve dispute at the most appropriate level
- the justice system should be fair and accessible to all
- the justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes, and
- the interaction of the various elements of the justice system should be designed to deliver the best outcomes for users.³

The NADRAC key national ADR principles reflect and embody the *Access to Justice* principles. The principles are designed as a set of broad, high-level principles which aim to ensure ADR is used in the Australian community to further the goals of the civil justice system, namely to ensure the accessibility, appropriateness, equity, efficiency and effectiveness of the justice system.

2.2 TWO BROAD CATEGORIES OF PRINCIPLES AND THEIR RATIONALE

The seven principles NADRAC has proposed fall into two broad categories:

1. the first category of principles are those principles associated with encouraging people in dispute to use ADR to solve their disputes prior to and during court or tribunal proceedings
2. the second category of principles deals with enhancing community understanding of, and confidence in, ADR services.

NADRAC considers that it is important for the key national principles to clearly articulate a vision for the place of ADR in the Australian civil justice system and also to articulate clear standards in regards to the use of ADR processes.

³ Attorney-General's Department, *Access to Justice Report: A Strategic Framework for Access to Justice in the Federal Civil Justice System*, (2009), page 62.

CATEGORY 1: USING ADR PRIOR TO AND DURING COURT PROCEEDINGS

The first three principles encourage people in dispute to, where appropriate, use ADR processes to resolve their disputes prior to commencing court or tribunal proceedings. However, the principles also recognise that not all disputes may be appropriate for ADR, and that there are some disputes which have a significant public interest in their being determined by a judge or tribunal member in a public venue. These principles also recognise that ADR not only has value in resolving disputes as an alternative to litigation, but also where litigation has been commenced. NADRAC considers that ADR can be an important adjunct to litigation in allowing disputants to refine, narrow and manage their dispute. The rationale for this conception of the role and position of ADR in the justice system is two-fold.

First, ADR offers many advantages to disputants when compared with litigation, and thus should, where possible, be used prior to litigation or tribunal proceedings being commenced. ADR is commonly more affordable and expeditious than accessing courts or tribunals, and the solutions generated in ADR processes are not limited to legal remedies. Further, as ADR is predicated on disputants being cooperative in contrast to the adversarial nature of court and tribunal processes, the disputants' ongoing relationships are likely to be better preserved through the use of ADR processes.

Second, by promoting use of ADR, the principles help to ensure more affordable and efficient access to justice and ensure that those matters which need to be litigated can be litigated more efficiently and effectively as a result of decreased court and tribunal workloads.

CATEGORY 2: IMPROVING CONFIDENCE IN AND UNDERSTANDING OF ADR

The second category of principles is aimed at enhancing community understanding of and confidence in ADR services, such that use of ADR increases. These principles address this aim by ensuring that information about ADR is easily accessible to the community, that ADR terms are defined and used consistently, and that ADR processes meet sufficient standards. The rationale for these principles comes from NADRAC's *Resolve to Resolve report*, which stated that

ADR remains significantly under-utilised in many areas, and its overall use can be patchy and idiosyncratic...there is still very limited knowledge of ADR among the broader Australian community.⁴

⁴ The National Alternative Dispute Resolution Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), page 1.

NADRAC believes that for ADR to be better utilised by Australians, it has to be better understood and promoted in the community. Information about ADR processes must be readily available and disseminated to the public such that people in dispute can develop reasonable expectations of what a particular ADR process will involve. NADRAC thus believes it is critically important for the community to have ready access to information on ADR processes so that people in dispute consider ADR prior to commencing litigation and tribunal proceedings, and so that disputants are able to choose the ADR process most suitable for their dispute.

Community understanding and use of ADR will be further strengthened by more consistent and coherent use of ADR terminology. There are many inconsistencies in the way ADR terms are used. For example, ADR terms such as 'mediation' are sometimes used to refer to a variety of processes with different characteristics. These inconsistencies occur not only through informal usage but are also present in legislation. Encouraging uniform definitions and usage of ADR terms will enable the public to better understand the choices they have available to them when in dispute. Consistent use will also aid the disputants in having more accurate and realistic expectations of ADR processes.

NADRAC considers that the progressive settling of minimum ADR standards for ADR services and practitioners will increase the use of ADR and confidence in ADR services. Standards are necessary to ensure that vulnerable participants are protected in ADR processes, that disputants have accurate expectations of ADR services, and that ADR services are fair and just for users.

3. STAKEHOLDER FEEDBACK ON KEY ISSUES

NADRAC welcomes your feedback in relation to the national principles on the following issues:

1. The title of NADRAC's statement of Key National Principles

- NADRAC, as explained in section 1.2 above, has titled the statement of principles it composed in response to the first half of the Attorney-General's reference '*Key National Principles for Resolution of Disputes.*' Should this title be retained or should another titled such as the original wording '*Key National ADR Principles*' be adopted?
- What is an appropriate title for the statement of principles?

2. The content and expression of the Key National Principles

- How can each of the principles be expressed and ordered to better accomplish the aims?
- Should the content or expression of the principles be changed in any way, and if so why?
- Which other principles could be considered for inclusion?
- To what extent are the principles incompatible with the obligations of your stakeholders or others involved in ADR?

3. Dissemination of the Key National Principles

- How can the principles (and subsequent guide for the public) be made widely accessible to the public?
- What impact (if any) could the wide dissemination of the principles have on the practice of ADR?

4. What other issues need to be considered?