



New South Wales  
Law Reform Commission

Consultation  
paper

**16**

**Dispute resolution:  
frameworks in  
New South Wales**

April 2014  
[www.lawreform.lawlink.nsw.gov.au](http://www.lawreform.lawlink.nsw.gov.au)





**New South Wales  
Law Reform Commission**

**Consultation  
Paper**

**16**

**Dispute resolution:  
frameworks in  
New South Wales**

**April 2014  
[www.lawreform.lawlink.nsw.gov.au](http://www.lawreform.lawlink.nsw.gov.au)**

© New South Wales Law Reform Commission, Sydney, 2014

**Copyright permissions**

This publication may be copied, distributed, displayed, downloaded and otherwise freely dealt with for any personal or non-commercial purpose, on condition that proper acknowledgment is included on all uses.

However, you must obtain permission from the NSW Law Reform Commission if you wish to:

- charge others for access to the publication (other than at cost);
- include all or part of the publication in advertising or a product for sale; or
- modify the publication.

**Disclaimer**

While this publication has been formulated with due care, the NSW Law Reform Commission does not warrant or represent that it is free from errors or omission, or that it is exhaustive.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Readers are responsible for making their own assessment of this publication and should verify all relevant representations, statements and information with their own professional advisers.

**Other publication formats**

The NSW Law Reform Commission is committed to meeting fully its obligations under state and Commonwealth anti-discrimination legislation to ensure that people with disabilities have full and equal access to our services.

This publication is available in alternative formats. If you require assistance, please contact the Commission (details on back cover).

**Cataloguing-in-publication**

Cataloguing-in-publication data is available from the National Library of Australia.

ISSN 18346901

ISBN 978 1 922254 00 9 (electronic)

## Make a submission

---

We seek your responses to the questions in this Consultation Paper. To tell us your views you can send your submission by:

**Post:** GPO Box 5199, Sydney NSW 2001

**DX:** DX 1227 Sydney

**Email:** [nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call (02) 8061 9270.

**The closing date for submissions on this Consultation Paper is Monday, 17 June 2014.**

### Use of submissions and confidentiality

We generally publish submissions on our website and refer to them in our publications.

We will normally publish your submission unless you request confidentiality for all or part of the document (see our Privacy and Information Management Policy for further details). Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).

In other words, we will do our best to keep your information confidential, but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

### About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:

<http://www.lawlink.nsw.gov.au/lrc>

## Table of contents

---

<b>Make a submission .....</b>	<b>iii</b>
<b>Terms of reference .....</b>	<b>vi</b>
<b>Questions.....</b>	<b>vii</b>
<b>1. Background .....</b>	<b>1</b>
<b>Terms of reference .....</b>	<b>1</b>
<b>The ADR revolution.....</b>	<b>2</b>
Accreditation of ADR practitioners .....	3
<b>Improving the existing provisions and expanding the availability of ADR .....</b>	<b>3</b>
<b>This consultation paper .....</b>	<b>5</b>
<b>2. Existing statutory provisions – overview.....</b>	<b>7</b>
<b>A variety of provisions and piecemeal coverage .....</b>	<b>7</b>
<b>Overview of main general statutory mediation schemes .....</b>	<b>8</b>
<b>3. Existing statutory provisions - types of disputes and dispute resolution .....</b>	<b>13</b>
<b>Types of disputes.....</b>	<b>13</b>
Court-connected disputes.....	14
Disputes about rights, entitlements or obligations under particular statutes .....	17
Complaints.....	19
Unspecified disputes .....	20
<b>Types of dispute resolution .....</b>	<b>21</b>
A need for standardised terminology or a broad umbrella term? .....	22
Mediation .....	24
Conciliation .....	26
Neutral evaluation.....	27
Arbitration .....	28
Expert determination .....	29
Negotiation .....	30
<b>4. Existing statutory provisions – initiating and participating in ADR .....</b>	<b>31</b>
<b>Initiating ADR .....</b>	<b>31</b>
When the referrer initiates or encourages ADR .....	32
When the parties request or initiate ADR.....	35
<b>Who conducts the ADR .....</b>	<b>37</b>
Referrer conducts the ADR.....	37
Referral to other bodies for ADR .....	37
<b>Parties’ participation.....</b>	<b>38</b>
Obligation to participate .....	38
Voluntary participation in ADR processes.....	39
Good faith participation.....	40
Consequences of failure to participate .....	41

<b>5. Existing statutory provisions – practice, procedures and enforcement</b> .....	<b>43</b>
<b>Practice and procedure of ADR sessions</b> .....	<b>43</b>
<b>Representation of parties</b> .....	<b>45</b>
Provisions allowing parties to have representation or support personnel .....	<b>45</b>
Restrictions on representation.....	<b>46</b>
<b>Presence of other people in ADR sessions</b> .....	<b>46</b>
<b>Adjournment of the ADR processes</b> .....	<b>47</b>
<b>Termination and conclusion of ADR processes</b> .....	<b>48</b>
Provisions allowing parties or ADR practitioners to terminate proceedings.....	<b>48</b>
Provisions regarding the conclusion of ADR processes .....	<b>49</b>
<b>Costs of ADR</b> .....	<b>49</b>
<b>Enforceability of agreements</b> .....	<b>51</b>
<b>Other impacts of agreements and other outcomes of ADR</b> .....	<b>52</b>
<b>6. Existing statutory provisions - ADR practitioners</b> .....	<b>55</b>
<b>Appointment and accreditation of ADR practitioners</b> .....	<b>55</b>
Who may appoint ADR practitioners.....	<b>55</b>
Who may be appointed.....	<b>56</b>
Termination of appointments .....	<b>57</b>
<b>Control and independence of ADR practitioners</b> .....	<b>57</b>
<b>Miscellaneous powers and obligations of ADR practitioners</b> .....	<b>58</b>
<b>Immunity of ADR practitioners</b> .....	<b>59</b>
<b>7. Existing statutory provisions – use of information</b> .....	<b>61</b>
<b>Non-disclosure of information</b> .....	<b>61</b>
<b>Inadmissibility of evidence</b> .....	<b>63</b>
<b>Privilege with respect to defamation</b> .....	<b>65</b>
<b>8. Types of provisions generally not included in statutes</b> .....	<b>67</b>
<b>Applying practice and accreditation standards</b> .....	<b>67</b>
<b>Enforcing practice standards</b> .....	<b>68</b>
<b>Ensuring independence and impartiality</b> .....	<b>71</b>
<b>Identifying and managing power imbalances</b> .....	<b>71</b>
<b>Suspending limitation and prescription periods</b> .....	<b>73</b>
<b>9. The regulatory framework</b> .....	<b>75</b>
<b>Relationships between various forms of regulation</b> .....	<b>75</b>
<b>Acts and Regulations</b> .....	<b>76</b>
<b>Contracts</b> .....	<b>77</b>
Agreements to undertake ADR if dispute arises .....	<b>77</b>
Agreements to undertake ADR after the dispute has arisen.....	<b>78</b>
<b>Codes of practice and guidelines</b> .....	<b>79</b>
Governing ADR proceedings.....	<b>79</b>
Governing ADR practitioners.....	<b>81</b>
Governing lawyers in ADR proceedings .....	<b>83</b>
Guidelines for parties to ADR proceedings.....	<b>83</b>
<b>Model provisions</b> .....	<b>84</b>
<b>Appendix A: Existing NSW statutory provisions that deal with ADR</b> .....	<b>85</b>

## **Terms of reference**

---

Refer to the Law Reform Commission an inquiry, pursuant to section 10 of the *Law Reform Commission Act 1967*, aimed at improving legislative provisions dealing with alternative dispute resolution.

Specifically, the Commission is to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court ordered mediation and alternative dispute resolution.

In undertaking this review the Commission should have regard to:

- the desirability of just, quick and cheap resolution of disputes through use of mediation and other forms of dispute resolution in appropriate contexts
- issues of referral powers (including timing of referrals), confidentiality, status of agreements reached, and proper protections required for the parties, mediators, and others involved in dispute resolution
- the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution
- any related matters the Commission considers appropriate.

The Commission need not review dispute resolution under the *Commercial Arbitration Act 2010* or the *Industrial Relations Act 1996*.

[Received 01 March 2013]



# Questions

---

2. Existing statutory provisions – overview		page
2.1	(1) In what ways can existing statutory ADR provisions be improved? (2) What areas require ADR provisions where none are currently provided? (3) What existing ADR provisions are unnecessary?	7
3. Existing statutory provisions - types of disputes and dispute resolution		page
3.1	<b>Types of disputes</b>  (1) Should the type or category of dispute determine what ADR provisions should apply in a particular case? (2) If so, what ADR provisions should apply to what types of dispute?	13
3.2	<b>A need for standardised terminology or a broad umbrella term?</b>  (1) What problems have been caused by the lack of standard ADR terminology and definitions? (2) In what circumstances would it be desirable to use standard terminology and definitions for ADR processes? (3) In what circumstances would it be better to use a broader, more flexible term that incorporates the possibility of many different types of ADR? (4) In what circumstances would it be better to use a narrower, more restricted term that limits the types of ADR that can be used? (5) What types of ADR are suitable for the different types of disputes?	22
3.3	<b>Mediation</b>  (1) What problems have been caused by existing uses and definitions of the term “mediation”? (2) What problems have been caused by the absence of a definition of mediation? (3) What definitions of “mediation” should be used in what circumstances?	24
3.4	<b>Conciliation</b>  (1) What problems have been caused by existing uses and definitions of the term “conciliation”? (2) What problems have been caused by the absence of a definition of conciliation? (3) What definitions of “conciliation” should be used in what circumstances?	26
3.5	<b>Neutral evaluation</b>  (1) What problems have been caused by existing uses and definitions of the term “neutral evaluation”? (2) What problems have been caused by the absence of a definition of neutral evaluation? (3) In what circumstances should neutral evaluation be used? (4) What definitions of “neutral evaluation” should be used in these circumstances?	27
3.6	<b>Arbitration</b>  (1) What problems have been caused by existing uses and definitions of the term “arbitration”? (2) What problems have been caused by the absence of a definition of arbitration? (3) What definitions of “arbitration” should be used in what circumstances?	28

<b>3.7</b>	<b>Expert determination</b>	<b>29</b>
	(1) What problems have been caused by existing uses and definitions of terms in the nature of expert determination?	
	(2) What problems have been caused by the absence of a definition of such terms?	
	(3) What terminology and definitions should be used in what circumstances?	
<b>3.8</b>	<b>Negotiation</b>	<b>30</b>
	(1) What problems have been caused by existing uses and definitions of the term “negotiation”?	
	(2) What problems have been caused by the absence of a definition of negotiation?	
	(3) What definitions of “negotiation” should be used in what circumstances?	

**4. Existing statutory provisions – initiating and participating in ADR**

**page**

<b>4.1</b>	<b>Compulsory referral</b>	<b>32</b>
	(1) In what circumstances should a referrer be required to refer matters to ADR?	
	(2) How should provisions requiring such referral be expressed?	
<b>4.2</b>	<b>Discretionary referral</b>	<b>33</b>
	(1) In what circumstances should a referrer be able, but not required, to refer matters to ADR?	
	(2) How should provisions enabling but not requiring referral to ADR be expressed?	
	(3) In what circumstances should a provision set out the conditions to be met before a referrer can refer a matter to ADR?	
	(4) How could such conditions be expressed?	
<b>4.3</b>	<b>When one or more party applies for referral</b>	<b>35</b>
	(1) In what circumstances should one or more parties to a matter be able to request that the matter be referred to ADR?	
	(2) In what circumstances should a referrer have a discretion to deal with an application for ADR?	
	(3) How should provisions which set out the referrer’s discretion to deal with an application for ADR be expressed?	
	(4) In what circumstances should a provision set out the grounds on which a referrer could dismiss an application for ADR?	
	(5) How should provisions that set out the grounds on which a referrer can dismiss applications be expressed?	
<b>4.4</b>	<b>Where an attempt at ADR is required before proceeding</b>	<b>36</b>
	(1) In what circumstances should parties be required to attempt ADR before a matter can proceed?	
	(2) How should such provisions be expressed?	
<b>4.5</b>	<b>Where the referrer conducts the ADR</b>	<b>37</b>
	(1) In what circumstances should provisions allow a referrer to conduct the ADR proceedings?	
	(2) How should such provisions be expressed?	
<b>4.6</b>	<b>Referral to other bodies for ADR</b>	<b>37</b>
	(1) In what circumstances should a provision deal with referral to other bodies for ADR?	
	(2) How should such provisions be expressed?	

4.7	<b>Obligation to participate</b>	38
	(1) In what circumstances should a provision require parties to participate in or attend ADR processes?	
	(2) How should such compulsory provisions be expressed?	
4.8	<b>Voluntary participation in ADR processes</b>	39
	(1) In what circumstances should a provision give the parties a choice to participate in ADR processes?	
	(2) How should such a provision be expressed?	
4.9	<b>Good faith participation</b>	40
	(1) In what circumstances should a provision require parties to participate in ADR in good faith?	
	(2) How should such provisions be expressed?	
4.10	<b>Consequences of failure to participate</b>	41
	(1) In what circumstances should a provision deal with the consequences of a party's failure to participate in ADR?	
	(2) How should such provisions be expressed?	
<b>5. Existing statutory provisions – practice, procedures and enforcement</b>		<b>page</b>
5.1	<b>Practice and procedure of ADR sessions</b>	43
	(1) In what circumstances should provisions set out the practice and procedures for ADR sessions?	
	(2) How should such provisions be expressed?	
	(3) In what circumstances should provisions allow ADR practitioners to determine the procedure that should be followed?	
	(4) How should such provisions be expressed?	
5.2	<b>Representation of parties</b>	45
	(1) In what circumstances should provisions deal with parties' representation in ADR sessions?	
	(2) How should such provisions be expressed?	
5.3	<b>Presence of other people in ADR sessions</b>	46
	(1) In what circumstances should provisions deal with the presence of other people in ADR sessions?	
	(2) How should such provisions be expressed?	
5.4	<b>Adjournment of the ADR processes</b>	47
	(1) In what circumstances should provisions deal with the adjournment of ADR processes?	
	(2) How should such provisions be expressed?	
5.5	<b>Provisions allowing parties or ADR practitioners to terminate proceedings</b>	48
	(1) In what circumstances should provisions deal with the parties' ability to terminate an ADR session?	
	(2) How should such provisions be expressed?	
	(3) In what circumstances should provisions deal with an ADR practitioner's ability to terminate an ADR session?	
	(4) How should such provisions be expressed?	

5.6	<b>Provisions regarding the conclusion of ADR processes</b>	49
	(1) In what circumstances should provisions deal with the conclusion of ADR processes?	
	(2) How should such provisions be expressed?	
5.7	<b>Costs of ADR</b>	50
	(1) In what circumstances should provisions deal with the costs of ADR?	
	(2) How should such provisions be expressed?	
5.8	<b>Enforceability of agreements</b>	51
	(1) In what circumstances should provisions deal with the enforceability of agreements arising from ADR processes?	
	(2) How should such provisions be expressed?	
5.9	<b>Other impacts of agreements and other outcomes of ADR</b>	52
	(1) In what circumstances should provisions deal with other impacts of agreements and other outcomes of ADR?	
	(2) How should such provisions be expressed?	

**6. Existing statutory provisions - ADR practitioners**

**page**

6.1	<b>Appointment and accreditation of ADR practitioners</b>	55
	(1) In what circumstances should provisions deal with the appointment and accreditation of different types of ADR practitioners?	
	(2) How should such provisions be expressed?	
6.2	<b>Control and independence of ADR practitioners</b>	57
	(1) In what circumstances should provisions deal with the control and independence of different types of ADR practitioners?	
	(2) How should such provisions be expressed?	
6.3	<b>Miscellaneous powers and obligations of ADR practitioners</b>	58
	(1) In what circumstances should provisions set out the powers and obligations of different types of ADR practitioners?	
	(2) How should such provisions be expressed?	
6.4	<b>Immunity of ADR practitioners</b>	59
	(1) In what circumstances should provisions deal with the immunity of ADR practitioners?	
	(2) How should such provisions be expressed?	

**7. Existing statutory provisions – Use of information**

**page**

7.1	<b>Non-disclosure of information</b>	61
	(1) In what circumstances should provisions deal with non-disclosure of information?	
	(2) How should such provisions be expressed?	
7.2	<b>Inadmissibility</b>	63
	(1) In what circumstances should provisions deal with inadmissibility of evidence in later proceedings?	
	(2) How should such provisions be expressed?	

7.3	<b>Privilege with respect to defamation</b>	65
	(1) In what circumstances should provisions deal with the privilege with respect to defamation in ADR processes?	
	(2) How should such provisions be expressed?	
<b>8. Types of provisions generally not included in statutes</b>		<b>page</b>
8.1	(1) What other types of provisions could be included in statutory schemes for ADR?	67
	(2) In what circumstances should they apply?	
8.2	<b>Applying practice and accreditation standards</b>	
	(1) In what circumstances should provisions apply practice and accreditation standards to ADR practitioners?	67
	(2) How should such provisions be framed?	
	(3) What alternatives are there for dealing with practice and accreditation standards?	
8.3	<b>Enforcing practice standards</b>	68
	(1) In what circumstances should provisions enforce ADR practice standards?	
	(2) How should such provisions be framed?	
	(3) What alternatives are there for enforcing ADR practice standards?	
8.4	<b>Ensuring independence and impartiality</b>	71
	(1) In what circumstances should provisions aim at ensuring independence and impartiality of ADR practitioners?	
	(2) How should such provisions be framed?	
8.5	<b>Identifying and managing power imbalances</b>	71
	(1) In what circumstances should provisions identify and manage power imbalances between participants in ADR sessions?	
	(2) How should such provisions be framed?	
8.6	<b>Suspending limitation and prescription periods</b>	73
	(1) In what circumstances should provisions suspend any limitation and prescription periods while ADR is attempted?	
	(2) How should such provisions be framed?	
<b>9. The regulatory framework</b>		<b>page</b>
9.1	<b>Relationships between various forms of regulation</b>	75
	(1) How should ADR be regulated in different contexts?	
	(2) What role should different forms of regulation play?	
9.2	<b>Acts and Regulations</b>	76
	(1) What role should Acts and Regulations play in regulating ADR?	
	(2) In what circumstances would provisions in Acts and Regulations be appropriate for regulating ADR?	
	(3) What provisions that regulate ADR in current Acts and Regulations are inappropriate?	

<b>9.3</b>	<b>Contracts</b>	<b>77</b>
	(1) What role should contracts play in regulating ADR?	
	(2) In what circumstances would contractual provisions be appropriate for regulating ADR?	
<b>9.4</b>	<b>Codes of practice and guidelines</b>	<b>79</b>
	(1) What role should codes of practice and guidelines play in regulating ADR?	
	(2) In what circumstances would codes of practice or guidelines be appropriate for regulating ADR?	
	(3) What should the codes of practice or guidelines contain?	
<b>9.5</b>	<b>Model provisions</b>	<b>84</b>
	If Acts and Regulations, contracts or guidelines were to be used to govern ADR in different contexts:	
	(a) what model provisions could be developed, and	
	(b) how could they be applied?	

# 1. Background

---

## In brief

Alternative dispute resolution (ADR) is generally regarded as providing many benefits for disputing parties, especially in reducing costs and delays as compared with litigation. In NSW, about 50 statutes provide for some form of ADR in a wide variety of contexts. Our terms of reference require us to consider improving or updating the legislative provisions dealing with ADR and to consider the possibility of recommending a consistent model or models for ADR.

Terms of reference.....	1
The ADR revolution.....	1
Accreditation of ADR practitioners.....	3
Improving the existing provisions and expanding the availability of ADR.....	3
This paper.....	5

## Terms of reference

---

- 1.1 On 1 March 2013, the Attorney General asked us to review statutory provisions for ADR. The terms of reference for the review are as follows:

Refer to the Law Reform Commission an inquiry... aimed at improving legislative provisions dealing with alternative dispute resolution.

Specifically, the Commission is to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court ordered mediation and alternative dispute resolution.

In undertaking this review the Commission should have regard to:

- the desirability of just, quick and cheap resolution of disputes through use of mediation and other forms of dispute resolution in appropriate contexts
- issues of referral powers (including timing of referrals), confidentiality, status of agreements reached, and proper protections required for the parties, mediators, and others involved in dispute resolution
- the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution
- any related matters the Commission considers appropriate.

The Commission need not review dispute resolution under the *Commercial Arbitration Act 2010* or the *Industrial Relations Act 1996*.

- 1.2 For the purposes of this review we take alternative dispute resolution (ADR) to be a term that encompasses processes, other than determination by a court or tribunal,

in which “an impartial person assists those in a dispute to resolve the issues between them”.<sup>1</sup> We do not include within the term processes or approaches that allow parties to manage their own disputes without the assistance of a neutral third party, such as commercial contractual negotiations and settlement negotiations.

## The ADR revolution

---

- 1.3 ADR is widely seen as beneficial, not only as an “alternative” or adjunct to formal litigation, but also when used to help resolve a wide variety of disputes in other contexts.
- 1.4 As stated in our terms of reference, ADR is often seen as offering, where appropriate, a means of achieving a just, quick, cheap resolution of disputes. These benefits are referred to in various forms throughout the ADR literature.
- 1.5 In the context of litigation, other benefits for parties include that ADR can keep disputes private (instead of being exposed in public hearings) and provide more flexible outcomes than court or tribunal orders can necessarily achieve.
- 1.6 Some ADR processes, while not avoiding litigation, may help case management, for example, by narrowing the issues in dispute.
- 1.7 It has been noted that the success of mediation cannot be measured merely by savings in money and time in the context of litigation:

The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.<sup>2</sup>
- 1.8 Outside of the context of litigation, ADR can also be beneficial, for example, by achieving an earlier or more satisfactory resolution of disputes, being less stressful for the parties and providing access to therapeutic remedies, such as counselling, more quickly. In community and commercial (contractual) settings it can also be useful in preserving, repairing or improving ongoing relationships.
- 1.9 The increasing provision for ADR in NSW Acts and Regulations over the past 35 years shows that policy makers consider that ADR is a useful mechanism.
- 1.10 Leaving aside industrial conciliation and arbitration, one of the earliest Acts to provide for a form of ADR in NSW was the *Community Justice Centres (Pilot Project) Act 1980* (NSW) which provided for community mediation. The pilot scheme was made permanent by the *Community Justice Centres Act 1983* (NSW) and the provisions in this Act provided models for many subsequent provisions, such as the *Courts Legislation (Mediation and Evaluation) Amendment Act*

---

1. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 4.
2. Council of Chief Justices of Australia and New Zealand, “Declaration of Principle on Court-Annexed Mediation” (1999) reported in J J Spigelman, ‘Address to the LEADR Dinner’ (Speech, LEADR Dinner, Sydney, 9 November 2000).



1994 (NSW), which enabled a number of courts to develop procedures to support the growing number of parties resorting to ADR.<sup>3</sup>

- 1.11 Now, in NSW, about 50 statutes provide for some form of ADR in a wide variety of contexts. A table of relevant provisions is set out in Appendix A. The variety of types of provisions is outlined later in this consultation paper.

### Accreditation of ADR practitioners

- 1.12 An important development in the field of ADR in the past decade has been the accreditation of ADR practitioners. While some ADR providers had developed their own voluntary standards and industry codes, for many years the training and appointment of ADR practitioners was largely unregulated and there were no common standards.
- 1.13 Following much preliminary work by the National Alternative Dispute Resolution Advisory Council,<sup>4</sup> the National Mediator Accreditation System (NMAS) was established in 2008. This system allows mediators to be voluntarily accredited by Recognised Mediator Accreditation Bodies (RMABs). Accredited mediators must then comply with the system's Approval Standards and Practice Standards.
- 1.14 In NSW, RMABs include the NSW ADR Directorate (part of the Department of Attorney General and Justice), the NSW Bar Association, and the Law Society of NSW and various ADR professional and commercial associations, including the Accord Group, Mediate Today, the Royal Institution of Chartered Surveyors, LEADR - Association of Dispute Resolvers, the Institute of Arbitrators and Mediators, Conflict Solvers, the Chartered Institute of Arbitrators, the Australian Mediation Association, and the Australian Dispute Resolution Association.
- 1.15 The NSW ADR Directorate can accredit, under NMAS, mediators working in courts, tribunals, Community Justice Centres and other areas of the Department of Attorney General and Justice.
- 1.16 Many ADR practitioners operating under the statutory provisions outlined in this paper will, in practice, be accredited. However, no existing Acts or Regulations currently require accreditation under NMAS.<sup>5</sup>

### Improving the existing provisions and expanding the availability of ADR

- 1.17 In accordance with the terms of reference, the principal aim of this project is to improve or update the legislative provisions dealing with ADR. In achieving this aim,

3. NSW, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1857-1859.

4. See National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (2001); National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003); National Alternative Dispute Resolution Advisory Council, *Who Says You're a Mediator? Towards a National System for Accrediting Mediators* (2004).

5. See para [6.2]-[6.7].

we will consider the possibility of recommending a consistent model or models for ADR in the statutory context.

- 1.18 One question which immediately arises is whether the existing patchwork of provisions over such a diverse area contributes to uncertainty. For example, will ADR clients be discouraged or become dissatisfied if they are not clear about what types of dispute resolution are available and what safeguards are available in particular contexts?
- 1.19 Other questions are:
- do some of the existing provisions appropriately encourage ADR
  - do some of the existing provisions inappropriately prevent it, and
  - are some of the existing provisions simply inappropriate to the disputes contemplated by the individual provisions?
- 1.20 Questions can also be asked about the need, in both general and particular contexts, for safeguards to protect participants and to overcome concerns about the potential for ADR in some cases to be conducted ineffectively or inappropriately or to deliver injustice. For example, ADR may be inappropriate where there is a clear power imbalance between the parties or where there has been violence in the relationship. There has also been considerable debate about the appropriate time to engage in ADR in different contexts.
- 1.21 In approaching these and similar questions, two things need to be noted. First, the expression “where appropriate” is an important qualifier. For example, it may be accepted that there are circumstances where ADR will not deliver a just, quick, and cheap resolution of disputes and will, therefore, be inappropriate. It has also been suggested that ADR can be a means of circumventing justice, and if unsuccessful it can lead to additional cost and lengthier disputes. In some cases, it has been suggested, parties may use it cynically to draw out disputes.<sup>6</sup>
- 1.22 Secondly, the benefits offered by ADR are often compared with the alternative of litigation. In some cases, however, ADR may be taking the place of less structured negotiation and agreement, especially in situations where litigation was never going to be an outcome. It is possible that in many disputes, the parties can resolve issues themselves without resort to litigation and without the assistance of a third party or a formal legislative or other regulatory framework to guide them. The question then becomes whether dispute resolution can provide a better, more effective means for resolving these other types of disputes.
- 1.23 Any model provisions that we develop may have an application beyond the existing statutory coverage. They could, for example, be added to statutory schemes in other appropriate contexts or could also be used outside of the statutory schemes in codes of practice and guidelines. They could also be used as model provisions for dispute resolution clauses in commercial and other contracts.

---

6. T Sourdin, "Poor Quality Mediation - a system failure?" (2010) 11 (8) *ADR Bulletin* 1, 5.

## This consultation paper

---

- 1.24 This consultation paper aims to provide a broad overview of the wide variety of provisions in the NSW statute book and to encourage responses from stakeholders about ADR in general as well as in more specific contexts:
- **Chapter 2** introduces the broad themes of chapters 3-7 which examine the different types of existing provisions.
  - **Chapter 3** details the variety of disputes covered by the different provisions, and the different types of dispute resolution identified in those provisions.
  - **Chapter 4** details the provisions that deal with initiating and participating in ADR.
  - **Chapter 5** sets out the provisions that deal with ADR practitioners.
  - **Chapter 6** sets out the provisions that deal with procedures to be followed in ADR sessions and the enforcement of agreements arising from them.
  - **Chapter 7** sets out the provisions that deal with the use of information obtained in the course of ADR sessions and related activity.
  - **Chapter 8** examines some possible provisions that are generally absent from all schemes and asks whether these provisions should be used either generally or in specific contexts.
  - **Chapter 9** considers some of the possible methods of regulating ADR proceedings and the conduct of people involved in those proceedings through the use of model provisions, legislation, contracts, and codes of practice and guidelines.



## 2. Existing statutory provisions – overview

---

### In brief

Statutory ADR provisions are varied in detail and coverage and are often inconsistent. This can be seen even in the three main statutory mediation schemes under the *Community Justice Centres Act 1983* (NSW), the *Civil Procedure Act 2005* (NSW) and the *Civil and Administrative Tribunal Act 2013* (NSW). We ask how existing statutory provisions can be improved.

A variety of provisions and piecemeal coverage .....	7
Overview of main general statutory mediation schemes .....	8

### Question 2.1

- (1) In what ways can existing statutory ADR provisions be improved?
- (2) What areas require ADR provisions where none are currently provided?
- (3) What existing ADR provisions are unnecessary?

## A variety of provisions and piecemeal coverage

---

- 2.1 The provisions in NSW statutes that make some reference to ADR are listed in Appendix A. They range from simple provisions encouraging or mandating resort to some form of ADR,<sup>1</sup> to detailed regimes that prescribe procedures and obligations, and offer protections and safeguards for participants. This and the following five chapters set out the details of these provisions.
- 2.2 The survey that follows shows that there is little or no consistency in the provisions used, or terms employed. The provisions are not consistently drafted or consistently applied across types of dispute. There are both gaps in coverage and overlapping provisions. In most cases, the reasons for these differences do not appear to rely on considered decisions regarding matters of principle or practice, but rather appear to be historical artefacts or inadvertent.<sup>2</sup>

---

1. *Employment Protection Act 1982* (NSW) s 13; *Criminal Procedure Act 1986* (NSW) s 203; *Mining Act 1992* (NSW) s 147; *Petroleum (Onshore) Act 1991* (NSW) s 69J; *Police Act 1990* (NSW) s 176; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 355; *Apprenticeship and Traineeship Act 2001* (NSW) s 40, 50; *Government Information (Information Commissioner) Act 2009* (NSW) s 19(1)(c).

2. See D Spencer and S Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2nd ed, Lawbook Co, 2009) [9.15]-[9.25]; T Altobelli, "New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination" (1997) 8 *Australian Dispute Resolution Journal* 200, 203-207.

2.3 The questions in Question 2.1 apply to all the provisions described in chapters 3-7. We have asked more specific questions about particular types of provision throughout these chapters as the issues arise.

## Overview of main general statutory mediation schemes

2.4 Table 2.1 summarises the provisions in the three main general statutory regimes in NSW. They cover mediations:

- conducted by Community Justice Centres mediators under the *Community Justice Centres Act 1983* (NSW)
- referred by the Supreme Court, Land and Environment Court, Industrial Relations Commission, District Court, Dust Diseases Tribunal and the Local Court under Part 4 of the *Civil Procedure Act 2005* (NSW), and
- referred by the NSW Civil and Administrative Tribunal (NCAT) as part of its power, where appropriate, to use (or require the parties to use) “any one or more resolution processes” under s 37 of the *Civil and Administrative Tribunal Act 2013* (NSW).

2.5 Although the provisions are mostly the same or similar, and many had their origins in the *Community Justice Centres Act 1983* (NSW), there are key differences, not all of which can be explained by the fact that each regime deals with disputes in vastly different environments: disputes in the community, disputes in the context of civil litigation in the courts and disputes arising in the jurisdiction of NCAT.

**Table 2.1: Summary of mediation provisions: Community Justice Centres, Civil Procedure Act and NSW Civil and Administrative Tribunal (NCAT)**

	CJCs	Civil Procedure Act	NCAT
Definition of mediation	(a) the undertaking of any activity for the purpose of promoting the discussion and settlement of disputes	A structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.	
	(b) the bringing together of the parties to any dispute for that purpose, and	Includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session (only for defamation privilege, inadmissibility).	
	(c) the follow-up of any matter the subject of any such discussion or settlement.		
Initiation/referral	Parties may voluntarily request mediation.		
	Court or tribunal may order mediation under other provisions.	Court may refer civil proceedings “if it considers the circumstances appropriate” with or without the parties’ consent.	NCAT may, where appropriate, use (or require the parties to use) “any one or more resolution processes”.

## Existing statutory provisions - overview Ch 2

	CJCs	Civil Procedure Act	NCAT
		Courts/tribunals may also refer to CJCs for mediation and the referral will be treated as if it were a referral to mediation under the provisions.	
Pre-mediation	Director of CJCs may decide not to accept a referral or request.		
Matters covered	No limits in Act, but Director of CJCs may exclude specified classes of disputes.	Civil proceedings before the relevant court or tribunal.	Proceedings before NCAT.
Mediators – appointment		Parties can agree on a mediator.	
	Director of CJCs assigns one or more mediators to conduct mediation.	Court may appoint mediator. There is a practice note for appointment of mediators in Supreme Court proceedings.	Tribunal may appoint mediator.
Mediators – qualification	Mediators are appointed by the Secretary of DAGJ on the recommendation of the Director of CJCs.	Mediator may, but need not, be a listed mediator.	Mediator may be: <ul style="list-style-type: none"> <li>▪ from a list of people the President considers "to be suitable to be mediators"</li> <li>▪ a registrar</li> <li>▪ a member of the Tribunal, or</li> <li>▪ any other person the Tribunal "considered to be qualified to act as the mediator".</li> </ul>
Mediators – immunity from liability	Immune from "any action, liability, claim or demand" for any act or omission "done in good faith" for the purpose of executing the Act.	Has same protection and immunity as a judicial officer of the court has in the exercise of his or her functions as a judicial officer.	Has same protection and immunity as a member of the Tribunal has in the exercise of his or her functions as a member.
Participation	Attendance and participation voluntary. Party may withdraw at any time.	Duty of each party to participate, in good faith, in the mediation.	
Representation	Party may be accompanied by or represented by another person, subject to discretion of Director or mediator to exclude if "the presence of the person may frustrate the purpose or conduct" of the mediation.	<p>Officer of a corporation "having authority to settle the proceedings" must attend.</p> <p>Officer of an insurer "having authority to settle the proceedings" must attend.</p> <p>Barrister or solicitor may also accompany a party at the mediation session.</p> <p>A person (other than a barrister or solicitor) who must attend a mediation may do so by telephone, video link or other form of communication, but only with the court's or mediator's leave.</p>	

	CJCs	Civil Procedure Act	NCAT
Procedure	Director of CJCs determines procedure for commencing and conducting mediation.	The court may give directions “regulating the practice and procedure to be followed in a mediation, including the preparation and service of documents”.	
		Subject to the uniform rules and any relevant practice notes, a mediator may, by order, give directions as to the preparation for, and conduct of, the mediation.	A mediator may “by order, give directions as to the preparation for, and conduct of, the mediation”.
	Mediation to be “conducted with as little formality and technicality and with as much expedition, as possible”.	Within 7 days of the referral, the mediator must appoint a time for the mediation and notify the parties. The mediator may also appoint a time for a preliminary meeting of the parties. The parties and the mediator must “conduct the mediation with the object, so far as practicable, of completing the mediation within 28 days”.	
	Rules of evidence do not apply.		
	Director or mediator may terminate mediation at any time.		
Giving effect to agreements	Agreement not enforceable “unless the parties agree in writing that the agreement is to be enforceable”.	The court/tribunal may make orders to give effect to any agreement or arrangement arising out of a mediation session.	
Inadmissibility in proceedings	Evidence of statements or admissions made in mediation – not admissible in any proceedings.		
	Any document (or copy) prepared for purpose etc of mediation – not admissible in any proceedings.		
	Exceptions:		
	<ul style="list-style-type: none"> <li>▪ consent of people in attendance at mediation</li> </ul>	<ul style="list-style-type: none"> <li>▪ consent of people in attendance at, or identified during, mediation</li> </ul>	
		<ul style="list-style-type: none"> <li>▪ consent of all people specified in document</li> </ul>	
	<ul style="list-style-type: none"> <li>▪ document is evidence of fact of (enforceable) agreement and substance of agreement</li> </ul>	<ul style="list-style-type: none"> <li>▪ document is evidence of fact of agreement and substance of agreement (if parties apply for order to give effect)</li> </ul>	
<ul style="list-style-type: none"> <li>▪ proceeding commenced because mediator had reasonable grounds to believe disclosure necessary to prevent or minimise the danger of injury to any person or damage to any property</li> </ul>			



	CJCs	Civil Procedure Act	NCAT
	<ul style="list-style-type: none"> <li>proceeding commenced because mediator had reasonable grounds to suspect child a risk of significant harm.</li> </ul>		
Non-disclosure of information	Mediator may not disclose information except:		
	<ul style="list-style-type: none"> <li>with consent of supplier of the information</li> </ul>		
	<ul style="list-style-type: none"> <li>in connection with administration or execution of Act/provisions</li> </ul>		
	<ul style="list-style-type: none"> <li>if there are reasonable grounds to believe it is necessary to prevent or minimise the danger of injury to any person or damage to property</li> </ul>		
	<ul style="list-style-type: none"> <li>if it is reasonably required to refer one or more parties (with consent) to another person or body to help resolve the dispute or to assist in any other manner</li> </ul>		
	<ul style="list-style-type: none"> <li>if a State or Commonwealth law (not subpoena or compulsory process) requires disclosure</li> </ul>		
	<ul style="list-style-type: none"> <li>if there are reasonable grounds to suspect a child is at risk of significant harm</li> </ul>		
<ul style="list-style-type: none"> <li>if it is reasonably required for approved research or evaluation (de-identified if without consent)</li> </ul>			
Defamation privilege	Same privilege as exists for judicial proceedings and a document produced in judicial proceedings.		
		Also extends to information disclosed as an exception to the confidentiality provisions.	
Costs of mediation	No cost to parties.	Parties must pay the costs of mediation (including the costs payable to the mediator): <ul style="list-style-type: none"> <li>if the court orders, in such manner as the order specifies,</li> <li>in such proportions as they agree among themselves.</li> </ul>	Parties must pay the costs of mediation (including the costs payable to the mediator): <ul style="list-style-type: none"> <li>if the Tribunal orders, in such manner as the order specifies,</li> <li>in such proportions as they agree among themselves</li> </ul> unless the Tribunal decides to bear the costs itself.



### 3. Existing statutory provisions - types of disputes and dispute resolution

---

#### In brief

Existing statutory provisions cover a variety of types of disputes and a variety of forms of dispute resolution. We ask what ADR provisions should apply to the different types of dispute. We also ask what problems may have arisen from the existing use of terms to describe particular types of dispute resolution and what terminology should be adopted.

<b>Types of disputes</b> .....	<b>13</b>
Court-connected disputes.....	<b>14</b>
<i>Pre-action ADR requirements</i> .....	<b>14</b>
<i>ADR after litigation has commenced</i> .....	<b>15</b>
<i>ADR available in proceedings generally</i> .....	<b>15</b>
<i>ADR available in specific proceedings</i> .....	<b>16</b>
Disputes about rights, entitlements or obligations under particular statutes .....	<b>17</b>
Complaints.....	<b>19</b>
Unspecified disputes .....	<b>20</b>
<b>Types of dispute resolution</b> .....	<b>21</b>
A need for standardised terminology or a broad umbrella term? .....	<b>22</b>
Mediation .....	<b>24</b>
Conciliation .....	<b>26</b>
Neutral evaluation.....	<b>27</b>
Arbitration .....	<b>28</b>
Expert determination .....	<b>29</b>
Negotiation .....	<b>30</b>

- 3.1 This chapter details the variety of disputes covered by the different provisions, and the different types of dispute resolution provided for.

#### Types of disputes

---

##### Question 3.1

(1) Should the type or category of dispute determine what ADR provisions should apply in a particular case?

(2) If so, what provisions should apply to what types of dispute?

- 3.2 The ADR processes that are governed by the statutes in this review apply to disputes arising in a wide range of circumstances. The existing provisions, however, fall into four very broad categories:

- court-connected disputes

- disputes about rights, entitlements or obligations under particular statutes
- complaints, and
- unspecified disputes that may include the types of dispute already listed, or general disputes that are otherwise uncategorised, including interpersonal disputes that do not relate to or have only a minor connection with legal rights or duties, such as disputes between neighbours that do not relate to subjects covered by more specific ADR provisions.

As will be seen, each of these broad (and sometimes overlapping) categories may encompass a number of sub-categories.

- 3.3 One issue to be considered, when answering the questions in chapters 5-7, is whether there is a case for adapting the ADR provisions to the type of dispute, thereby achieving a level of consistency within each of these broad categories. Court-connected disputes in the different courts and tribunals might be amenable to a set of consistent provisions that, for example, offer protections to litigants who participate in ADR. On the other hand, ADR provisions for disputes about rights, entitlements, or obligations under particular statutes could arguably be tailored to suit their individual contexts.

### Court-connected disputes

- 3.4 Court-connected disputes are disputes that arise in the context of litigation in courts or tribunals. The provisions can be categorised in a number of ways. First, those about ADR processes that must be undertaken before the action commences and those about ADR processes that can or must take place at any other time during the course of litigation. Within the second category there are those that apply generally in all proceedings before a court or tribunal and those that apply only to specific proceedings within a court or tribunal.

### *Pre-action ADR requirements*

- 3.5 A limited number of pre-action (or pre-filing) requirements are currently available:
- a creditor cannot commence enforcement action on a farm debt unless the debtor is given the opportunity to request mediation<sup>1</sup>
  - a claimant cannot commence court proceedings for work injury damages unless he or she has referred the claim for mediation<sup>2</sup>
  - a dispute under the *Retail Leases Act 1994* (NSW) cannot be subject to court proceedings without a certificate from the Registrar of Retail Tenancy Disputes that mediation of the dispute has failed or that mediation is otherwise unlikely to resolve the dispute.<sup>3</sup>
- 3.6 One other provision provides that proceedings in relation to a matter or dispute involving a small business cannot commence before any court until there has been

---

1. *Farm Debt Mediation Act 1994* (NSW) s 8, 9.

2. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A.

3. *Retail Leases Act 1994* (NSW) s 68.

an attempt to resolve it using the ADR services provided by the Small Business Commissioner, but only if the Commissioner has decided, upon application, to assist in resolving the matter or dispute.<sup>4</sup>

3.7 In 2010, mandatory pre-filing ADR requirements were enacted in NSW. These were to apply to most civil litigation (subject to exceptions) and required, among other things, that the parties “take reasonable steps ... to resolve the dispute by agreement, or ... to clarify and narrow the issues in dispute in the event that civil proceedings are commenced”.<sup>5</sup> Under this scheme, reasonable steps included, but were not limited to:

- (d) considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes,
- (e) taking part in alternative dispute resolution processes.<sup>6</sup>

However, the scheme was not universally supported and was recently repealed before it was implemented.<sup>7</sup>

#### *ADR after litigation has commenced*

3.8 Once litigation is underway, a court or tribunal can refer matters to ADR processes under a number of different provisions.

3.9 Some court-connected ADR can be “court-annexed”, that is, conducted by officers of the court, usually registrars. For example, a registrar of the Supreme Court may conduct a mediation referred by the Supreme Court, if the parties do not agree on a mediator.<sup>8</sup> In other cases, the parties must accept the court-annexed order, for example, a Commissioner will preside over a conciliation conference ordered by the Land and Environment Court.<sup>9</sup>

#### *ADR available in proceedings generally*

3.10 Some ADR provisions can be applied to any proceeding before a specified court or tribunal:

- The NSW Civil and Administrative Tribunal (NCAT) may, where appropriate, use (or require the parties to use) “any one or more resolution processes”.<sup>10</sup>
- The Supreme Court, Land and Environment Court, Industrial Relations Commission, District Court, Dust Diseases Tribunal and the Local Court may:

---

4. *Small Business Commissioner Act 2013* (NSW) s 17(1).

5. *Civil Procedure Act 2005* (NSW) s 18E(1) (repealed).

6. *Civil Procedure Act 2005* (NSW) s 18E(2) (repealed).

7. *Courts and Other Legislation Further Amendment Act 2013* (NSW). A similar scheme was also enacted and repealed in Victoria: *Civil Procedure Act 2010* (Vic) s 32-36, repealed by *Civil Procedure and Legal Profession Amendment Act 2011* (Vic) s 7.

8. Supreme Court of NSW, “Supreme Court - Mediation” (Practice Note No SC Gen 6, 2010) cl 8.

9. *Land and Environment Court Act 1979* (NSW) s 34(2).

10. *Civil and Administrative Tribunal Act 2013* (NSW) s 37.

- (a) where appropriate, refer civil proceedings (or part) for mediation (with or without consent of the parties)<sup>11</sup>
- (b) refer a claim for the recovery of damages or other money (or any equitable or other relief ancillary to the claim) to an arbitrator<sup>12</sup>
- (c) refer the proceedings or any question or issue arising in any proceedings to a referee appointed by the court for inquiry and report.<sup>13</sup>

### *ADR available in specific proceedings*

- 3.11 In addition to the provisions that apply generally, some specific provisions make ADR available in particular court or tribunal proceedings.
- 3.12 The relationship between the general and specific provisions is not clear. For example, in at least one family provision matter, the Supreme Court made the order for mediation under the general provision in s 26 of the *Civil Procedure Act 2005* (NSW) even though there is a specific provision in the *Succession Act 2006* (NSW) stating that the Court must, absent special reasons, refer a family provision application for mediation.<sup>14</sup>
- 3.13 Some of the specific provisions may be the result of deliberate policy following years of experience in a particular jurisdiction. The conciliation provisions available in the Land and Environment Court are an example of this.<sup>15</sup>
- 3.14 The specific provisions are to the following effect:
  - Parties to a care application to the Children's Court can be ordered:
    - by the Children's Registrar to attend a dispute resolution conference<sup>16</sup>
    - by the Children's Court to attend an alternative dispute resolution service.<sup>17</sup>
  - The Children's Court may adjourn an application for an order approving an alternative parenting plan to allow for mediation.<sup>18</sup>
  - A court may, if it thinks it just, in relation to proceedings under the *Co-operatives Act 1992* (NSW):
    - give a direction requiring mediation<sup>19</sup>

---

11. *Civil Procedure Act 2005* (NSW) s 26(1).

12. *Civil Procedure Act 2005* (NSW) s 28.

13. *Uniform Civil Procedure Rules 2005* (NSW) r 20.14.

14. *Boardman v Boardman* [2012] NSWSC 1257 [12]-[14].

15. B J Preston, "Conciliation in the Land and Environment Court of NSW: History, Nature and Benefits" (2007) 13 *Local Government Law Journal* 110; B J Preston, "The use of alternative dispute resolution in administrative disputes" (Symposium on "guarantee of the right to access to the administrative jurisdiction", 10th anniversary of the Supreme Administrative Court of Thailand, 9 March 2011) 14.

16. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65.

17. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65A.

18. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 117.

19. *Co-operatives Act 1992* (NSW) s 105E(1)(b).

- appoint an independent person to investigate and report to the Court on the co-operative's financial affairs, the facts or circumstances giving rise to the cause of action or the costs incurred in the proceedings.<sup>20</sup>
- In an application for an apprehended personal violence order, the Local Court or the Children's Court may refer a protected person and the defendant for mediation under the *Community Justice Centres Act 1983* (NSW).<sup>21</sup>
- The Dust Diseases Tribunal must refer a claim for mediation that is subject to the claims resolution process under the *Dust Diseases Tribunal Act 1989* (NSW).<sup>22</sup>
- The Land and Environment Court:
  - may (or must in certain cases)<sup>23</sup> arrange a conciliation conference between the parties (with or without their consent)<sup>24</sup>
  - may refer any matter for neutral evaluation (with or without the consent of the parties).
- In the Local Court's Small Claims Division, a Magistrate or an Assessor is not to give judgment or make a final order in proceedings unless he or she has used his or her best endeavours to bring the parties to a settlement.<sup>25</sup>
- The Supreme Court or District Court must, unless there are special reasons, refer an application for a family provision order for mediation before it considers the application.<sup>26</sup>

### Disputes about rights, entitlements or obligations under particular statutes

- 3.15 A wide range of ADR provisions apply to a variety of disputes about rights, entitlements and obligations under various statutes. The disputes can be between a very limited range of parties and be about some quite narrow issues.
- 3.16 Some of the issues can be between regulators and their clients, including:
- objections to grants of access licences and applications for approvals under the *Water Management Act 2000* (NSW)<sup>27</sup>
  - objections to grants of approvals of controlled works under the *Water Act 1912* (NSW)<sup>28</sup>

---

20. *Co-operatives Act 1992* (NSW) s 105E(1)(d).

21. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21(1).

22. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 34(1).

23. *Land and Environment Court Act 1979* (NSW) s 34AA – some proceedings pending in Class 1 of the Court's jurisdiction.

24. *Land and Environment Court Act 1979* (NSW) s 34 - proceedings pending in Class 1, 2, 3 of the Court's jurisdiction.

25. *Local Court Act 2007* (NSW) s 36(1).

26. *Succession Act 2006* (NSW) s 98(2).

27. *Water Management Act 2000* (NSW) s 62, 93.

28. *Water Act 1912* (NSW) s 170B.

- objections to increases in site fees under the *Residential (Land Lease) Communities Act 2013* (NSW)<sup>29</sup>
- disputes about refusals by Racing NSW to approve proposed broadcasting arrangements<sup>30</sup>
- dissatisfaction with a determination of an appeal by an accrediting agency under the *Electricity Supply (General) Regulation 2001* (NSW)<sup>31</sup>
- disputes relating to NSW Aboriginal Land Council decisions to approve or not to approve a land dealing<sup>32</sup>
- responses by the Director-General of the Department of Family and Community Services to reports that children or young people are in need of care and protection<sup>33</sup>
- responses of the Industrial Relations Commission to reports concerning the termination of employees under the *Employment Protection Act 1982* (NSW),<sup>34</sup> and
- appeals against the Police Commissioner's orders with respect to a police officer's misconduct or unsatisfactory performance.<sup>35</sup>

3.17 Some issues can be between different parties under a statutory scheme, including:

- disputes concerning strata schemes<sup>36</sup>
- disputes about access arrangements for prospecting titles<sup>37</sup>
- disputes between operators and residents of retirement villages<sup>38</sup>
- retail tenancy disputes<sup>39</sup>
- costs disputes between legal practitioners and their clients<sup>40</sup>
- costs disputes between licensed conveyancers and their clients<sup>41</sup>
- disputes arising in connection with the residential communities under the *Residential (Land Lease) Communities Act 2013* (NSW)<sup>42</sup>
- claims for payment of compensation from the Torrens Assurance Fund<sup>43</sup>

---

29. *Residential (Land Lease) Communities Act 2013* (NSW) s 69.

30. *Thoroughbred Racing Act 1996* (NSW) s 29G.

31. *Electricity Supply (General) Regulation 2001* (NSW) pt 9 div 4.

32. *Aboriginal Land Rights Act 1983* (NSW) s 239A.

33. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37.

34. *Employment Protection Act 1982* (NSW) s 13.

35. *Police Act 1990* (NSW) s 176.

36. *Strata Scheme Management Act 1996* (NSW) pt 2.

37. *Petroleum (Onshore) Act 1991* (NSW) pt 4A; *Mining Act 1992* (NSW) pt 8 div 2.

38. *Retirement Villages Act 1999* (NSW) s 122.

39. *Retail Leases Act 1994* (NSW) pt 8 div 2.

40. *Legal Profession Act 2004* (NSW) pt 3.2 div 8.

41. *Conveyancers Licensing Act 2003* (NSW) s 44.

42. *Residential (Land Lease) Communities Act 2013* (NSW) pt 12.



- disagreements between Aboriginal negotiating panels and Aboriginal Land Councils about negotiations for leases<sup>44</sup>
- disputes about the operation of the *Aboriginal Land Rights Act 1983* (NSW) or its regulations,<sup>45</sup> and
- differences between a child or young person and his or her parents that are so serious that it is no longer possible for them to continue living together.<sup>46</sup>

## Complaints

3.18 Some disputes that are subject to ADR provisions are effectively treated as “complaints”. They can involve complaints about products and services, professional conduct, breaches of Acts, regulations or codes, and other forms of misconduct, including:

- consumer complaints about products and services provided by legal practitioners<sup>47</sup>
- complaints about the professional conduct of architects,<sup>48</sup> accredited building professionals,<sup>49</sup> veterinary practitioners,<sup>50</sup> health practitioners,<sup>51</sup> and members of occupational associations<sup>52</sup>
- complaints about breaches of codes, agreements, procedures, and statutes such as:
  - Health Privacy Principles, health privacy codes of practice, or provisions dealing with access to, and retention and amendment of, health information,<sup>53</sup>
  - apprenticeships and traineeships,<sup>54</sup> and
  - provisions of the *Anti-Discrimination Act 1977* (NSW) or its regulations,<sup>55</sup> and
- complaints about various other sorts of misconduct, including:
  - complaints to the Ombudsman about the conduct of a public authority,<sup>56</sup>

---

43. *Real Property Act 1900* (NSW) s 135.

44. *National Parks and Wildlife Act 1974* (NSW) s 71K.

45. *Aboriginal Land Rights Act 1983* (NSW) s 239.

46. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 114.

47. *Legal Profession Act 2004* (NSW) pt 4.3.

48. *Architects Act 2003* (NSW) s 40.

49. *Building Professionals Act 2005* (NSW) s 24.

50. *Veterinary Practice Act 2003* (NSW) s 43.

51. *Health Care Complaints Act 1993* (NSW) pt 2 div 8-9.

52. *Professional Standards Act 1994* (NSW) sch 1 cl 6(c).

53. *Health Records and Information Privacy Act 2002* (NSW) s 46.

54. *Apprenticeship and Traineeship Act 2001* (NSW) s 40, 50.

55. *Anti-Discrimination Act 1977* (NSW) s 91A.

56. *Ombudsman Act 1974* (NSW) s 13A.

- complaints to the Information Commissioner about the conduct of an agency in the exercise of functions under an Information Act,<sup>57</sup> and
  - complaints to the Privacy Commissioner about the alleged violation of, or interference with, the privacy of an individual.<sup>58</sup>
- 3.19 A provision in the *Local Government Act 1993* (NSW), while not establishing a complaints procedure like the ones described above, provides that the Director General of the Department of Local Government may also order mediation as part of disciplinary action against a local government councillor who has engaged in misconduct.<sup>59</sup>

### Unspecified disputes

- 3.20 Some ADR provisions do not specify types of dispute on the types of disputes that may be subject to ADR processes nor place restrictions on them.
- 3.21 A primary example is the provision concerning mediation conducted by Community Justice Centres. The *Community Justice Centres Act 1983* (NSW) does not specify which disputes may be brought to mediation under its provisions. However it does leave open the possibility of excluding some disputes. The Director of Community Justice Centres may:
- refuse to accept any dispute on a case by case basis,<sup>60</sup> and
  - exclude specified classes of disputes.<sup>61</sup>
- 3.22 The Director may also determine that specified classes of disputes may be the subject of mediation sessions.<sup>62</sup>
- 3.23 The *Legal Aid Commission Act 1979* (NSW) provides for ADR but does not specify the types of disputes covered. The relevant provisions state that “the Commission may arrange for a matter, or any aspect of a matter, to be dealt with by alternative dispute resolution if the Commission considers it appropriate to do so”. It may have been contemplated that the dispute could be about a matter that is subject to an application for legal aid since the same provision adds that the Commission may arrange for ADR before or after the determination of an application for legal aid in respect of the matter.<sup>63</sup> This does not, however, in its terms place any specific limitation on the nature or type of dispute that may be covered.
- 3.24 The *Small Business Commissioner Act 2013* (NSW) allows the Small Business Commissioner to provide dispute resolution services if “an application is made to the Commissioner for assistance in resolving a complaint or other dispute involving

---

57. *Government Information (Information Commissioner) Act 2009* (NSW) s 19(1).

58. *Privacy and Personal Information Protection Act 1998* (NSW) s 49.

59. *Local Government Act 1993* (NSW) s 440(2)(f).

60. *Community Justice Centres Act 1983* (NSW) s 20(3).

61. *Community Justice Centres Act 1983* (NSW) s 22(1).

62. *Community Justice Centres Act 1983* (NSW) s 22(1).

63. *Legal Aid Commission Act 1979* (NSW) s 60C(1).

a small business and the Commissioner decides to deal with the complaint or dispute”. While the content of the dispute is not specified (except that it involves a small business in some way), the dispute may “not be the subject of any proceedings before any court unless and until the Commissioner has certified in writing that alternative dispute resolution services provided by the Commissioner under this Act have failed to resolve the matter or dispute”.<sup>64</sup>

## Types of dispute resolution

---

- 3.25 The statutory provisions do not consistently use the terminology or define the terms that identify the various forms of ADR. There is much overlap between the terms used.
- 3.26 Some provisions use the broad umbrella term “alternative dispute resolution” alone,<sup>65</sup> others use it in addition to other more specific forms of ADR,<sup>66</sup> others use it and then explain the term by a list of examples of more specific types of ADR.<sup>67</sup> Some of the lists are inclusive and some exclusive. Some use other broad terms such as “informal process”,<sup>68</sup> “dispute resolution”<sup>69</sup> or, more recently, in the Administrative and Civil Tribunal legislation, “resolution process” (which is described as including “alternative dispute resolution”).<sup>70</sup>
- 3.27 Specific types of ADR referred to in the various Acts and Regulations include:
- mediation
  - neutral evaluation
  - conciliation
  - arbitration
  - negotiation, and
  - expert determination.
- 3.28 “Mediation” is the most commonly used of the terms. Others are used less frequently and often without elaboration or definition.

---

64. *Small Business Commissioner Act 2013* (NSW) s 17(1).

65. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37; *Small Business Commissioner Act 2013* (NSW) s 17.

66. *Architects Act 2003* (NSW) s 40(3); *Retail Leases Act 1994* (NSW) s 67; *Veterinary Practice Act 2003* (NSW) s 43(3).

67. *Electricity Supply (General) Regulation 2001* (NSW) cl 126; *Legal Aid Commission Act 1979* (NSW) s 60B.

68. *Government Information (Information Commissioner) Act 2009* (NSW) s 19(1)(c).

69. *Children’s Court Rule 2000* (NSW) cl 24.

70. *Civil and Administrative Tribunal Act 2013* (NSW) s 37(2). See also *Conveyancers Licensing Act 2003* (NSW) s 44(5).

## A need for standardised terminology or a broad umbrella term?

### Question 3.2

- (1) What problems have been caused by the lack of standard ADR terminology and definitions?
- (2) In what circumstances would it be desirable to use standard terminology and definitions for ADR processes?
- (3) In what circumstances would it be better to use a broader, more flexible term that incorporates the possibility of many different types of ADR?
- (4) In what circumstances would it be better to use a narrower, more restricted term that limits the types of ADR that can be used?
- (5) What types of ADR are suitable for the different types of disputes?

3.29 NADRAC has identified the inconsistent use of ADR terminology as a significant issue of concern. Some of the disadvantages of inconsistent definitions include that:

- participants may have unrealistic expectations of certain processes
- some disputes may be inappropriately referred, and
- meaningful research and evaluation could be impeded.<sup>71</sup>

3.30 There may also be problems if protections are available or rights arise only when particular forms of ADR are used.<sup>72</sup> For example, some parties' previous experience of widely defined "mediation" in some contexts may lead to problems engaging with more narrowly defined "mediation" in other contexts. In the US, the Model Standards of Conduct for Mediators police the boundaries between mediation and other forms of ADR quite strictly because of the protections available to "mediation" in some statutes:

A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.<sup>73</sup>

3.31 There is a tension between the need for consistent and accurate information about ADR processes and the need to preserve desirable flexibility in ADR processes and procedures in some circumstances. Defining creates certainty, but at the risk of losing flexibility.<sup>74</sup>

3.32 The newly enacted *Civil and Administrative Tribunal Act 2013* (NSW) has avoided any reference to particular ADR terms by referring to a "resolution process":

71. National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction* (2009) [3.57]-[3.58].

72. See, eg, National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction* (2009) [3.55].

73. American Arbitration Association, American Bar Association, Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005) Standard 6.A.6.

74. T F Bathurst, "The role of the courts in the changing dispute resolution landscape" (2013) 35 *University of New South Wales Law Journal* 870, 874.

A **resolution process** is any process (including, for example, alternative dispute resolution) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings.<sup>75</sup>

- 3.33 Another example of an expansive definition can be seen in Victoria. The Commercial Court of the Supreme Court of Victoria can, at any stage of a proceedings, direct that the matter be referred “for such alternative form of dispute resolution as may seem appropriate to the circumstances of the proceeding with a view to disposing of the proceeding more efficiently, quickly and economically than by trial”.<sup>76</sup> The Court’s practice note observes that the forms of ADR available are very broad and the definition of “appropriate dispute resolution” - which includes (but is not limited to) mediation, early neutral evaluation, judicial resolution conference, settlement conference, reference to a special referee, expert determination, conciliation, arbitration<sup>77</sup> – “serves to illustrate the scope, possibilities and flexibility of ADR, particularly when the possible combination of processes is considered”.<sup>78</sup> However, the practice does offer a standard mediation order<sup>79</sup> and a standard order for reference to a special referee.<sup>80</sup>
- 3.34 NADRAC, in an attempt to standardise the use of ADR terms, has proposed a set of descriptions that can be adopted in legislation and policy documents.<sup>81</sup> These are mentioned, where relevant, in the following paragraphs.
- 3.35 If terms were consistently defined and standardised, they might still need to be subject to special provisions that alter the standard definitions, in some particular contexts.<sup>82</sup>
- 3.36 A question also arises about fitting the types of dispute resolution (once described) to the different types of dispute.
- 3.37 For example, neutral evaluation - or a term broad enough to encompass neutral evaluation - might be appropriate for disputes that may be litigated, particularly at the early stage of the dispute. However, neutral evaluation would not be needed for disputes that will never end in litigation, such as minor consumer disputes or complaints. A framework that encompassed such a term would, therefore, be unnecessary in the latter context.

---

75. *Civil and Administrative Tribunal Act 2013* (NSW) s 37(2) inserted by *Civil and Administrative Tribunal Amendment Act 2013* (NSW).

76. Supreme Court of Victoria, Practice Note No 10 of 2011 – Commercial Court, 28 November 2011 [10.1].

77. *Civil Procedure Act 2010* (Vic) s 3 (definition of “Appropriate Dispute Resolution”).

78. Supreme Court of Victoria, Practice Note No 10 of 2011 – Commercial Court, 28 November 2011 [10.1].

79. Supreme Court of Victoria, Practice Note No 10 of 2011 – Commercial Court, 28 November 2011, sch 6.

80. Supreme Court of Victoria, Practice Note No 10 of 2011 – Commercial Court, 28 November 2011, sch 7.

81. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003).

82. See National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction* (2009) 41.

- 3.38 So too, expert determination might be suitable for matters being litigated in the Commercial List of the NSW Supreme Court, but might not be suitable for a matter in the Small Claims Division of the Local Court.
- 3.39 Mediation, on the other hand, is more likely to be suitable for dealing with part or all of most disputes.

## Mediation

### Question 3.3

- (1) What problems have been caused by existing uses and definitions of the term “mediation”?
- (2) What problems have been caused by the absence of a definition of mediation?
- (3) What definitions of “mediation” should be used in what circumstances?

- 3.40 The term “mediation” is used in some Acts and Regulations without definition.<sup>83</sup> Other Acts and Regulations have adopted the following standard definition of mediation:

**mediation** means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.<sup>84</sup>

- 3.41 Some Acts have adopted an expansive definition of mediation to include other forms of formal and informal dispute resolution. For example, the *Retail Leases Act 1994* (NSW) provides:

mediation is not limited to formal mediation procedures and includes the following:

- (a) preliminary assistance in dispute resolution, such as the giving of advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute,
- (b) other appropriate forms of alternative dispute resolution.<sup>85</sup>

- 3.42 The Community Justice Centres Act 1983 (NSW) provides:

**mediation** includes:

- 
83. *Aboriginal Land Rights Act 1983* (NSW); *Architects Act 2003* (NSW); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Co-operatives Act 1992* (NSW); *Residential (Land Lease) Communities Act 2013* (NSW); *Small Business Commissioner Act 2013* (NSW); *Dust Diseases Tribunal Regulation 2013* (NSW); *Legal Profession Act 2004* (NSW); *Local Government Act 1993* (NSW); *National Parks and Wildlife Act 1974* (NSW).
84. *Poultry Meat Industry Regulation 2008* (NSW) cl 12(5); *Administrative Decisions Tribunal Act 1997* (NSW) s 101(1) (repealed); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2; *Civil Procedure Act 2005* (NSW) s 25; *Community Land Management Act 1989* (NSW) s 65; *Strata Schemes Management Act 1996* (NSW) s 127. *Thoroughbred Racing Act 1996* (NSW) s 29G(1) includes this passage as a note (which, however, does not form part of the Act).
85. *Retail Leases Act 1994* (NSW) s 67(1).

- (a) the undertaking of any activity for the purpose of promoting the discussion and settlement of disputes,
- (b) the bringing together of the parties to any dispute for that purpose, and
- (c) the follow-up of any matter the subject of any such discussion or settlement.

This expanded definition, therefore, applies to disputes under other Acts and Regulations that are referred to Community Justice Centres for “mediation”.<sup>86</sup>

3.43 Such expanded definitions of mediation have implications for the coverage of various protective provisions, such as those dealing with the disclosure or non-disclosure of information arising in the context of a mediation or the inadmissibility in later proceedings of statements made in the course of a mediation.<sup>87</sup>

3.44 Some provisions set out inclusive and exclusive lists of mediators’ functions or duties, including what they cannot do.<sup>88</sup> For example, the *Residential (Land Lease) Communities Act 2013* (NSW) provides:

- (1) A mediator has the following functions in a mediation:
  - (a) to encourage the settlement of the dispute or other matter by facilitating, and helping to conduct, negotiations between the parties,
  - (b) to promote the open exchange of information relevant to the dispute or other matter by the parties,
  - (c) to provide to the parties information about the operation of this Act relevant to a settlement of the dispute or other matter,
  - (d) to help in the settlement of the dispute or other matter in any other appropriate way.
- (2) A mediator does not have the power to determine any matter in dispute, whether or not the parties request or consent to such action.<sup>89</sup>

3.45 NADRAC has proposed the following descriptions of mediation:

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. ...

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>90</sup>

---

86. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 44(5); *Civil Procedure Act 2005* (NSW) s 26(2A); *Criminal Procedure Act 1986* (NSW) s 203; *Local Court Rules 2009* (NSW) r 4.3(2)(b).

87. See para [7.1]-[7.15].

88. *Farm Debt Mediation Act 1994* (NSW) s 13; *Residential (Land Lease) Communities Act 2013* (NSW) s 150; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 38(1).

89. *Residential (Land Lease) Communities Act 2013* (NSW) s 150.

- 3.46 The descriptions that emphasise that the mediator does not have a determinative or advisory role may run counter to some existing provisions. For example, the *Water Act 1912* (NSW) refers to the Ministerial Corporation having regard to “any findings or recommendations made by the person appointed to conduct the mediation session”.<sup>91</sup> In such cases, it may be that the term “mediation” has an expanded meaning that has not been made explicit in the relevant provisions.

## Conciliation

### Question 3.4

- (1) What problems have been caused by existing uses and definitions of the term “conciliation”?
- (2) What problems have been caused by the absence of a definition of conciliation?
- (3) What definitions of “conciliation” should be used in what circumstances?

- 3.47 A large number of Acts and Regulations use “conciliation” and other related forms (conciliate, conciliator) without providing a definition.<sup>92</sup>
- 3.48 Only one Act, the *Health Care Complaints Act 1993* (NSW), specifies what conciliation involves by setting out the role of a conciliator:

#### 49 Role of conciliator

The function of a conciliator is:

- (a) to bring the parties to the complaint together for the purpose of promoting the discussion, negotiation and settlement of the complaint, and
- (b) to undertake any activity for the purpose of promoting that discussion, negotiation and settlement, and
- (c) if possible, to assist the parties to the complaint to reach agreement.

**Note.** A conciliator has no power to impose a decision on the parties, to make a determination or to award compensation.<sup>93</sup>

- 3.49 NADRAC describes conciliation as being:

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

90. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 9.

91. *Water Act 1912* (NSW) s 170B(7).

92. *Aboriginal Land Rights Act 1983* (NSW); *Anti-Discrimination Act 1977* (NSW); *Apprenticeship and Traineeship Act 2001* (NSW); *Building Professionals Act 2005* (NSW); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Community Land Management Act 1989* (NSW); *Employment Protection Act 1982* (NSW); *Government Information (Information Commissioner) Act 2009* (NSW); *Health Records and Information Privacy Act 2002* (NSW); *Privacy and Personal Information Protection Act 1998* (NSW); *Professional Standards Act 1994* (NSW); *Strata Schemes Management Act 1996* (NSW); *Work Health and Safety Act 2011* (NSW).

93. *Health Care Complaints Act 1993* (NSW) s 49.



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.<sup>94</sup>

3.50 However, NADRAC also provides a note on “conciliation”:

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’.<sup>95</sup>

3.51 The activities that comprise conciliation overlap considerably with the activities that comprise mediation under the various statutes. For example, there would seem to be little difference between mediation and the role of mediators in some Acts and the role of conciliator under s 49 of the *Health Care Complaints Act 1993* (NSW). NADRAC has noted:

‘mediation’ is a purely facilitative process, whereas ‘conciliation’ may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term ‘mediation’ should be used where the practitioner has no advisory role on the content of the dispute and the term ‘conciliation’ where the practitioner does have such a role. NADRAC notes, however, that both ‘mediation’ and ‘conciliation’ are now used to refer to a wide range of processes and that an overlap in their usage is inevitable.<sup>96</sup>

## Neutral evaluation

### Question 3.5

- (1) What problems have been caused by existing uses and definitions of the term “neutral evaluation”?
- (2) What problems have been caused by the absence of a definition of neutral evaluation?
- (3) In what circumstances should neutral evaluation be used?
- (4) What definitions of “neutral evaluation” should be used in these circumstances?

94. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 5.

95. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 5.

96. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 3.

3.52 Neutral evaluation is a term that is used less frequently in NSW legislation, particularly since a number of provisions that refer to neutral evaluation have been repealed with the recent establishment of NCAT.<sup>97</sup> Two Acts use the term without definition.<sup>98</sup>

3.53 The *Land and Environment Court Rules 2007* (NSW) is now the only instrument that defines neutral evaluation:

**neutral evaluation** means a process of evaluation of a dispute in which the evaluator seeks to identify and reduce the issues of fact and law in dispute, including by assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings (including any likely findings of liability or the award of damages).<sup>99</sup>

3.54 NADRAC has not provided a description of neutral evaluation, but has described "early neutral evaluation":

**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.<sup>100</sup>

## Arbitration

### Question 3.6

- (1) What problems have been caused by existing uses and definitions of the term "arbitration"?
- (2) What problems have been caused by the absence of a definition of arbitration?
- (3) What definitions of "arbitration" should be used in what circumstances?

3.55 Our terms of reference exclude arbitration under the *Industrial Relations Act 1996* (NSW) and the *Commercial Arbitration Act 2010* (NSW). Two Acts that refer to arbitration define it as arbitration under the *Commercial Arbitration Act 2010* (NSW).<sup>101</sup> One other Regulation states that arbitration is arbitration under the *Commercial Arbitration Act 2010* (NSW) but "subject to the provisions of this clause".<sup>102</sup> Another Act refers to the possibility of conciliation or arbitration by the

97. *Administrative Decisions Tribunal Act 1997* (NSW) s 101(2); *Agricultural Tenancies Act 1990* (NSW) s 22; *Residential Parks Act 1998* (NSW) s 91(6)(b); *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) pt 5 div 2.

98. *Real Property Act 1900* (NSW) s 135; *Water Management Act 2000* (NSW) s 62, 93.

99. *Land and Environment Court Rules 2007* (NSW) pt 6.2(1).

100. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 6.

101. *Aboriginal Land Rights Act 1983* (NSW) s 240; *Poultry Meat Industry Regulation 2008* (NSW) cl 12.

102. *Electricity Supply (General) Regulation 2001* (NSW) s 126.

Industrial Relations Commission “in such manner as the Commission considers appropriate”.<sup>103</sup>

3.56 The term “arbitration” is used without further elaboration in a number of other statutes.<sup>104</sup>

3.57 NADRAC has described arbitration as:

a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.<sup>105</sup>

## Expert determination

### Question 3.7

(1) What problems have been caused by existing uses and definitions of terms in the nature of expert determination?

(2) What problems have been caused by the absence of a definition of such terms?

(3) What terminology and definitions should be used in what circumstances?

3.58 NADRAC has described expert determination as:

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.<sup>106</sup>

3.59 Two sets of provisions incorporate a type of ADR that fits this description:

- NCAT can refer a conveyancing costs dispute to be assessed by an independent expert.<sup>107</sup>
- A court may, at any stage of proceedings before it, refer the whole of the proceedings or any question arising in the proceeding to a referee for inquiry and report.<sup>108</sup> This form of reference to a referee is a particular feature of proceedings in the Technology and Construction List of the Equity Division of the Supreme Court.<sup>109</sup>

103. *Entertainment Industry Act 2013* (NSW) s 20.

104. *Civil Procedure Act 2005* (NSW) pt 5; *Uniform Civil Procedure Rules 2005* (NSW) pt 20 div 2; *Work Health and Safety Act 2011* (NSW) s 142; *Mining Act 1992* (NSW) s 143-155; *Petroleum (Onshore) Act 1991* (NSW) pt 4A.

105. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 4.

106. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (2003) 7.

107. *Conveyancers Licensing Act 2003* (NSW) s 44.

108. *Uniform Civil Procedure Rules 2005* (NSW) pt 20 div 3.

109. *Halsbury's Laws of Australia* [325-650].

## Negotiation

### Question 3.8

- (1) What problems have been caused by existing uses and definitions of the term “negotiation”?
- (2) What problems have been caused by the absence of a definition of negotiation?
- (3) What definitions of “negotiation” should be used in what circumstances?

- 3.60 Negotiation is a broad term that has a meaning beyond the field of dispute resolution by third parties. It is sometimes difficult to draw the line between various forms of ADR and negotiation of this sort. Examples of negotiation that do not fall within the scope of dispute resolution by third parties include contractual negotiations in the commercial context, and settlement or compromise negotiations in the context of litigation.
- 3.61 As noted above, the definition “mediation” used in some statutes identifies it as a species of “structured negotiation process”.<sup>110</sup> However, the *Electricity Supply (General) Regulation 2001* (NSW) defines “alternative dispute resolution procedures” as including “negotiation, conciliation and mediation”.<sup>111</sup>

---

110. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 38(1); *Poultry Meat Industry Regulation 2008* (NSW) cl 12(5); *Administrative Decisions Tribunal Act 1997* (NSW) s 101(1) (repealed); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2; *Civil Procedure Act 2005* (NSW) s 25; *Community Land Management Act 1989* (NSW) s 65; *Strata Schemes Management Act 1996* (NSW) s 127. *Thoroughbred Racing Act 1996* (NSW) s 29G(1) includes this passage as a note (which, however, does not form part of the Act).

111. *Electricity Supply (General) Regulation 2001* (NSW) cl 126.

## 4. Existing statutory provisions – initiating and participating in ADR

---

### In brief

Existing statutory provisions that deal with initiating and participating in ADR vary considerably. We ask about the circumstances in which such provisions are necessary and how these provisions should be expressed.

<b>Initiating ADR</b> .....	<b>31</b>
When the referrer initiates or encourages ADR .....	<b>32</b>
<i>Compulsory referral</i> .....	<b>32</b>
<i>Discretionary referral</i> .....	<b>33</b>
<i>Encouraging settlement</i> .....	<b>34</b>
When the parties request or initiate ADR .....	<b>35</b>
<i>One or more party applies for referral</i> .....	<b>35</b>
<i>Where an attempt at ADR is required before proceeding</i> .....	<b>36</b>
<b>Who conducts the ADR</b> .....	<b>37</b>
Referrer conducts the ADR.....	<b>37</b>
Referral to other bodies for ADR .....	<b>37</b>
<b>Parties' participation</b> .....	<b>38</b>
Obligation to participate .....	<b>38</b>
Voluntary participation in ADR processes .....	<b>39</b>
Good faith participation.....	<b>40</b>
Consequences of failure to participate .....	<b>41</b>

- 4.1 The provisions which deal with initiating and participating in ADR illustrate the great variety of statutory regimes that are currently in place. Likewise, there is diversity in the provisions that deal with whether parties are required or compelled to participate once they have been referred.

### Initiating ADR

---

- 4.2 Some provisions appear to require the relevant referrer (be it a court, tribunal, government agency, or other body or individual) either:
- to act positively by referring the parties to a dispute to ADR or arranging the ADR, or
  - simply to require them to allow the ADR to take place if the parties agree.

Others give the referrer a discretion to refer the parties to ADR or to make arrangements for it to take place.

- 4.3 Another category of provisions effectively leave it to the parties to agree to undertake some form of ADR either because they cannot proceed without attempting ADR, or because they have voluntarily agreed to attempt ADR.
- 4.4 Some overlap between these categories may merely come down to a question of expression. For example, there would appear to be little difference between the cases where a referrer must initiate or allow an ADR procedure to take place if the parties agree, and the cases where the parties have simply agreed to undertake an ADR procedure.
- 4.5 A further related category simply requires the court or other decision maker to attempt to bring the parties to a settlement before making a decision or otherwise proceeding in accordance with the statute.
- 4.6 The categories set out below can apply at different stages of a dispute. For example, in cases where litigation is contemplated, some provisions allow or require the ADR to take place once the litigation is in progress, while others allow or require the ADR to take place before filing. Such matters may need to be taken into account when answering the relevant questions.

## When the referrer initiates or encourages ADR

### *Compulsory referral*

#### **Question 4.1**

- (1) In what circumstances should a referrer be required to refer matters to ADR?
- (2) How should provisions requiring such referral be expressed?

- 4.7 Some provisions require the referrer to refer disputes for ADR,<sup>1</sup> where certain preconditions are met, such as where:
- legal proceedings are proposed<sup>2</sup>
  - the claim is subject to a dust diseases claims resolution process<sup>3</sup>
  - legal proceedings are pending,<sup>4</sup> or
  - sufficient information has been provided to demonstrate reasonable concerns about the grant of an approval.<sup>5</sup>

1. *Aboriginal Land Rights Act 1983* (NSW) s 239A; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 34; *Land and Environment Court Act 1979* (NSW) s 34AA; *Privacy and Personal Information Protection Act 1998* (NSW) s 49; *Strata Schemes Management Act 1996* (NSW) s 128; *Succession Act 2006* (NSW) s 98(2); *Water Act 1912* (NSW) s 170B(1).

2. *Aboriginal Land Rights Act 1983* (NSW) s 239A.

3. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 34.

4. *Land and Environment Court Act 1979* (NSW) s 34AA.

5. *Water Act 1912* (NSW) s 170B(1).

In such cases the referral is essentially automatic once the preconditions are met.

- 4.8 In other cases, referral is a default position, but not always required. For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) includes a provision that generally requires a Children’s Registrar to arrange and conduct an ADR session but subject to a discretion to defer (where the Registrar believes the conference should be deferred until a later time in proceedings),<sup>6</sup> or not to refer the matter if:
- (a) there has been a defended hearing in relation to an application for an assessment order under section 53, an interim care order under section 69, or a care order under section 70, and the Children’s Registrar considers that no useful purpose will be served by a dispute resolution conference, or
  - (b) the parties consent to dispense with the dispute resolution conference, or
  - (c) there are circumstances, identified by the Children’s Court Rules, in which the requirement for a dispute resolution conference may be dispensed with.<sup>7</sup>

### *Discretionary referral*

#### **Question 4.2**

- (1) In what circumstances should a referrer be able, but not required, to refer matters to ADR?
- (2) How should provisions enabling but not requiring referral to ADR be expressed?
- (3) In what circumstances should a provision set out the conditions to be met before a referrer can refer a matter to ADR?
- (4) How could such conditions be expressed?

- 4.9 Some provisions give the referrer the discretionary power to attempt or arrange some form of ADR between the parties or to refer the parties to ADR.
- 4.10 Some of the provisions do not elaborate on the discretion,<sup>8</sup> but others require the decision maker to consider or think that:
- pursuing the particular form of ADR would be just,<sup>9</sup> or
  - the form of ADR would:
    - be appropriate in the circumstances<sup>10</sup>

6. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65(1).

7. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65(1A).

8. *Uniform Civil Procedure Rules 2005* (NSW) r 20.14; *Local Government Act 1993* (NSW) s 440(2)(f); *Land and Environment Court Act 1979* (NSW) s 34(1); *Police Act 1990* (NSW) s 144(3); *Professional Standards Act 1994* (NSW) sch 1 cl 6; *Government Information (Information Commissioner) Act 2009* (NSW) s 19.

9. *Co-operatives National Law* (NSW) s 584(1)(b) (*Co-operatives (Adoption of National Law) Act 2012* (NSW) Appendix).

- be thought fit for the just, efficient and timely management of proceedings,<sup>11</sup> or
  - expeditiously resolve the complaint.<sup>12</sup>
- 4.11 Some statutes include express provisions that the decision maker can decide to pursue ADR with or without the consent of the parties.<sup>13</sup>
- 4.12 Others specify that the decision maker can, additionally, act on the application of one or more of the parties.<sup>14</sup>
- 4.13 On the other hand, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) currently stipulates that an APVO matter is not to be referred to mediation if the court is of the opinion that:
- (a) there has been a history of physical violence to the protected person by the defendant; or
  - (b) the protected person has been subject to conduct amounting to a personal violence offence by the defendant; or
  - (c) the protected person has been subject to conduct by the defendant amounting to an offence under section 13; or
  - (d) the defendant has engaged in conduct amounting to harassment relating to the protected person's race, religion, homosexuality, transgender status, HIV/AIDS infection or disability; or
  - (e) there has been a previous attempt at mediation in relation to the same matter and the attempt was not successful.<sup>15</sup>

### *Encouraging settlement*

- 4.14 A number of provisions require a judicial officer or other decision maker to attempt<sup>16</sup> or use his or her best endeavours<sup>17</sup> to bring parties to a settlement before making a decision or otherwise proceeding in accordance with the statute. It is not clear what form of dispute resolution is envisaged under these provisions. Two of them are

---

10. *Civil Procedure Act 2005* (NSW) s 26(1); *Land and Environment Court Rules 2007* (NSW) r 6.2(2); *Civil and Administrative Tribunal Act 2013* (NSW) s 37(1); *Building Professionals Act 2005* (NSW) s 24(1); *Legal Aid Commission Act 1979* (NSW) s 60C; *Legal Profession Act 2004* (NSW) s 336(3), 517(1); *Anti-Discrimination Act 1977* (NSW) s 91A(2); *Health Records and Information Privacy Act 2002* (NSW) s 46(1); *Conveyancers Licensing Act 2003* (NSW) s 44(2); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37(1).

11. *Local Court Rules 2009* (NSW) r 4.3.

12. *Architects Act 2006* (NSW) s 40(2).

13. *Civil Procedure Act 2005* (NSW) s 26(1); *Land and Environment Court Act 1979* (NSW) s 34(1); *Land and Environment Court Rules 2007* (NSW) r 6.2(2).

14. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65A(1).

15. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21(2). Amendments to this Act, expected to commence later in 2014, require the court to refer an APVO matter for mediation under the CJC Act "unless it is satisfied there is good reason not to do so". The court may then use the matters listed in s 21(2) in determining whether there is a "good reason": *Crimes (Domestic and Personal Violence) Amendment Act 2013* (NSW) sch 2 [1]-[3].

16. *Apprenticeship and Traineeship Act 2001* (NSW) s 40(1), s 50.

17. *Local Court Act 2007* (NSW) s 36(1); *Petroleum (Onshore) Act 1991* (NSW) s 69J(2).



accompanied by provisions allowing for the decision maker to ratify the parties' resulting agreements.<sup>18</sup>

- 4.15 Two other statutes require the relevant decision maker to “endeavour”<sup>19</sup> or “endeavour by all means it considers proper and necessary”<sup>20</sup> to resolve the claim or complaint by conciliation.

### When the parties request or initiate ADR

- 4.16 Some provisions give the task of initiating the ADR process to one or more of the parties to the dispute. The parties generally initiate the ADR process by applying to a decision maker to refer the matter.

#### *One or more party applies for referral*

##### **Question 4.3**

- (1) In what circumstances should one or more parties to a matter be able to request that the matter be referred to ADR?
- (2) In what circumstances should a referrer have a discretion to deal with an application for ADR?
- (3) How should provisions which set out the referrer's discretion to deal with an application for ADR be expressed?
- (4) In what circumstances should a provision setting out the grounds on which a referrer could dismiss an application for ADR?
- (5) How should provisions that set out the grounds on which a referrer can dismiss applications be expressed?

- 4.17 Some provisions simply provide that a party may apply for ADR.<sup>21</sup> Other provisions provide that a party may apply and the referrer may refer the matter to ADR if the circumstances of the case are appropriate.<sup>22</sup>
- 4.18 Some provisions also specify the grounds on which an application can be rejected. For example, the relevant decision maker may dismiss an application for ADR where the application is “frivolous, vexatious, misconceived or lacking in substance”.<sup>23</sup>
- 4.19 One provision allows a party (in this case the Registrar General) to participate in proceedings in the nature of mediation or neutral evaluation.<sup>24</sup> The statute does not

18. *Local Court Act 2007* (NSW) s 36(2); *Petroleum (Onshore) Act 1991* (NSW) s 69J(1).

19. *Privacy and Personal Information Protection Act 1998* (NSW) s 49(1).

20. *Police Act 1990* (NSW) s 176.

21. *Small Business Commissioner Act 2013* (NSW) s 15.

22. *Strata Schemes Management Act 1996* (NSW) s 128; *Community Land Management Act 1989* (NSW) s 66(2); *Strata Schemes Management Act 1996* (NSW) s 128(2).

23. *Community Land Management Act 1989* (NSW) s 67(1); *Strata Schemes Management Act 1996* (NSW) s 130(1). See also *Electricity Supply (General) Regulation 2001* (NSW) cl 131(1)(f).

24. *Real Property Act 1900* (NSW) s 135(2).

otherwise suggest how the ADR is to be initiated. Presumably one or more of the parties initiate ADR in such a case.

*Where an attempt at ADR is required before proceeding*

**Question 4.4**

- (1) In what circumstances should parties be required to attempt ADR before a matter can proceed?  
 (2) How should such provisions be expressed?

4.20 Some provisions simply provide that a dispute cannot proceed under the relevant statutory provisions unless ADR has been attempted. In these cases it would appear that the parties must take steps themselves to initiate proceedings to attempt the relevant form of ADR if they want to progress the matter. These provisions apply as follows:

- The principal registrar must not accept an application for an order to resolve an issue relating to a community scheme under the *Community Land Management Act 1989* (NSW) unless satisfied that mediation was attempted but was unsuccessful or the matter is not appropriate for mediation (a matter is not appropriate for mediation if each party has not agreed to have the matter mediated).<sup>25</sup>
- A creditor cannot commence enforcement action on a farm debt unless the debtor is given the opportunity to request mediation.<sup>26</sup>
- A claimant cannot commence court proceedings for work injury damages unless he or she has referred the claim for mediation.<sup>27</sup>
- A dispute under the *Retail Leases Act 1994* (NSW) cannot be subject to court proceedings without a certificate from the Registrar of Retail Tenancy Disputes that mediation of the dispute has failed or that mediation is otherwise unlikely to resolve the dispute.<sup>28</sup>

4.21 In the case of disputes under the *Community Land Management Act 1989* (NSW) the relevant provision expressly states that “the applicant may apply to the Director-General for mediation of the matter in accordance with Division 2 or may make other arrangements for the mediation of the matter”.

4.22 In the case of claims for work injury damages, the relevant provision states that a “claim is referred for mediation by being referred to the Registrar for mediation by a mediator”.<sup>29</sup>

25. *Community Land Management Act 1989* (NSW) s 64.

26. *Farm Debt Mediation Act 1994* (NSW) s 8, 9.

27. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A.

28. *Retail Leases Act 1994* (NSW) s 68.

29. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A(5).

## Who conducts the ADR

- 4.23 The following paragraphs deal with situations where the referring person or body conducts the ADR or refers the ADR to an external body (such as Community Justice Centres). The majority of provisions allow for referral to an ADR practitioner. These provisions are discussed in the context of the appointment and accreditation of ADR practitioners in chapter 6.

### Referrer conducts the ADR

#### Question 4.5

- (1) In what circumstances should provisions allow a referrer to conduct the ADR proceedings?
- (2) How should such provisions be expressed?

- 4.24 Some provisions provide for mechanisms that enable the referring body or person to attempt to resolve a dispute by the relevant form of ADR.<sup>30</sup>
- 4.25 A number of these provisions specifically allow the referrers to be assisted by others, for example:<sup>31</sup>
- in the case of the *Architects Act 2003* (NSW) and *Veterinary Practice Act 2003* (NSW), any person the board considers has relevant expertise in mediation or ADR<sup>32</sup>
  - in the case of the *Building Professionals Act 2005* (NSW), one of the officers of the board,<sup>33</sup> and
  - in the case of the NSW Ombudsman, a mediator.<sup>34</sup>

### Referral to other bodies for ADR

#### Question 4.6

- (1) In what circumstances should a provision deal with referral to other bodies for ADR?
- (2) How should such provisions be expressed?

30. *Aboriginal Land Rights Act 1983* (NSW) s 106(3)(g), 239(2), (3)(a); *Anti-Discrimination Act 1977* (NSW) s 91A(2); *Architects Act 2003* (NSW) s 40(2); *Building Professionals Act 2005* (NSW) s 24(2); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65(2A); *Government Information (Information Commissioner) Act 2009* (NSW) s 19; *Land and Environment Court Act 1979* (NSW) s 34(2); *Legal Profession Act 2004* (NSW) s 518; *Local Court Act 2007* (NSW) s 36(1); *Ombudsman Act 1974* (NSW) s 13A(2); *Veterinary Practice Act 2003* (NSW) s 43(2).

31. *Architects Act 2003* (NSW) s 40(3); *Building Professionals Act 2005* (NSW) s 24(3); *Ombudsman Act 1974* (NSW) s 13A(2); *Veterinary Practice Act 2003* (NSW) s 43(3).

32. *Architects Act 2003* (NSW) s 40(3); *Veterinary Practice Act 2003* (NSW) s 43(3).

33. *Building Professionals Act 2005* (NSW) s 24(2).

34. *Ombudsman Act 1974* (NSW) s 13A(2).

- 4.26 Some provisions enable:
- the court to order adjournment to allow for mediation sessions under the *Community Justice Centres Act 1983* (NSW),<sup>35</sup> or
  - the referring body to refer the matter for mediation under the *Community Justice Centres Act 1983* (NSW).<sup>36</sup>
- 4.27 Other provisions simply state that they do not prevent the use of “resolution processes” under the *Civil and Administrative Tribunal Act 2013* (NSW).<sup>37</sup>
- 4.28 Where a court or tribunal has ordered that a dispute be referred to Community Justice Centres for mediation under a compulsory provision, if the Director declines to accept the dispute, the Director must give the referring court or tribunal notice of the decision and the reason for it.<sup>38</sup>

## Parties’ participation

---

- 4.29 Opinion is divided about whether ADR processes should be compulsory (requiring the parties to participate) or voluntary (giving the parties a choice as to whether they participate). Current ADR provisions cover both possibilities, and vary from requiring parties to participate and specifying consequences for failure to do so, to allowing parties to consent to ADR processes, to not specifying any participation requirements.

## Obligation to participate

### Question 4.7

(1) In what circumstances should a provision require parties to participate in or attend ADR processes?

(2) How should such compulsory provisions be expressed?

- 4.30 Some provisions may have the effect of requiring parties to a dispute to participate in ADR by:
- allowing ADR to be ordered between the parties with or without their consent,<sup>39</sup> or
  - requiring that one or more people<sup>40</sup> (or their legal representatives in some cases)<sup>41</sup> attend ADR processes.

35. *Local Court Rules 2009* (NSW) r 4.3(2)(b); *Criminal Procedure Act 1986* (NSW) s 203.

36. *Associations Incorporation Regulation 2010* (NSW) sch 1 cl 10; *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 6(3); *Civil Procedure Act 2005* (NSW) s 26; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21(1); *Criminal Procedure Act 1986* (NSW) s 203.

37. *Conveyancers Licensing Act 2003* (NSW) s 44(5); *Retirement Villages Act 1999* (NSW) s 123(1).

38. *Community Justice Centres Act 1983* (NSW) s 20A.

39. *Land and Environment Court Act 1979* (NSW) s 34AA; *Civil Procedure Act 2005* (NSW) s 26(1); *Land and Environment Court Rules 2007* (NSW) r 6.2(2).

- 4.31 Of the 13 provisions that provide for mandatory ADR referral, seven do not specify whether there is an obligation on the parties to participate in ADR processes.<sup>42</sup> Similarly, eight of the 17 provisions which allow for optional referral to ADR processes do not specify whether there is an obligation on the parties to participate in those processes.<sup>43</sup>
- 4.32 In the case of claims for work injury damages, the defendant cannot decline to participate in mediation unless “the defendant wholly disputes liability in respect of the claim”.<sup>44</sup>

## Voluntary participation in ADR processes

### Question 4.8

(1) In what circumstances should a provision give the parties a choice to participate in ADR processes?

(2) How should such a provision be expressed?

- 4.33 Most provisions dealing with parties’ voluntary participation in ADR processes operate in one of two ways. First, some provide a space for ADR to occur by allowing parties to participate voluntarily in the ADR processes referred, recommended or organised by the court, body or relevant person. These provisions are generally framed as:
- referring the parties to ADR with their consent<sup>45</sup>
  - recommending,<sup>46</sup> suggesting<sup>47</sup> or proposing<sup>48</sup> that the parties undertake ADR, or
  - stating that participation in ADR processes is voluntary.<sup>49</sup>

- 
40. *Anti-Discrimination Act 1977* (NSW) s 91A(2); *Health Records and Information Privacy Act 2002* (NSW) s 46(2), 46(3); *Legal Aid Commission Act 1979* (NSW) s 60C; *Local Government Act 1993* (NSW) s 440I(2); *Local Court Rules 2009* (NSW) r 2.5; *Legal Profession Act 2004* (NSW) s 336(3), 517(1); *Privacy and Personal Information Protection Act 1998* (NSW) s 49; *Small Business Commissioner Act 2013* (NSW) s 18(1); *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(1); *Water Act 1912* (NSW) s 170B(1).
41. *Community Land Management Regulation 2007* (NSW) cl 11; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 40.
42. *Aboriginal Land Rights Act 1983* (NSW) s 239A; *Petroleum (Onshore) Act 1991* (NSW) s 69J(1); *Local Court Act 2007* (NSW) s 36(1); *Retail Leases Act 1994* (NSW) s 68(1); *Succession Act 2006* (NSW) s 98(2); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65.
43. *Architects Act 2006* (NSW) s 40(2); *Building Professionals Act 2005* (NSW) s 24(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65A(1); *Co-operatives Act 1992* (NSW) s 105E(1)(b); *Co-operatives (Adoption of National Law) Act 2012* (NSW) s 584(1)(b); *Government Information (Information Commissioner) Act 2009* (NSW) s 19; *Local Court Rules 2009* (NSW) r 4.3(2)(b); *Professional Standards Act 1994* (NSW) sch 1 cl 6.
44. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A(3).
45. *Aboriginal Land Rights Act 1983* (NSW) s 239; *Residential (Land Lease) Communities Act 2013* (NSW) s 147(1); *Uniform Civil Procedure Rules 2005* (NSW) r 20.3, 20.8.
46. *Building Professionals Act 2005* (NSW) s 24(1).
47. *Legal Profession Act 2004* (NSW) s 516(2), 517(2).
48. *Water Management Act 2000* (NSW) s 62(6).
49. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37; *Community Justice Centres Act 1983* (NSW) s 23 (except where court or tribunal ordered); *Electricity Supply*

4.34 Alternatively, some provisions enable parties to request or initiate ADR, for example:

- parties can apply to the relevant body to facilitate ADR,<sup>50</sup> or
- a specified party may:
  - in certain circumstances, request ADR and the other specified party may agree or decline to mediate,<sup>51</sup> or
  - request that the other party agree to the appointment of an ADR practitioner.<sup>52</sup>

4.35 Other provisions include:

- negatively framed provisions, such as a party may decline to participate in mediation in certain circumstances,<sup>53</sup> or a party may opt out of the mediation after an application for mediation has been made, but only under certain conditions,<sup>54</sup> and
- a provision that states that parties are not prevented from establishing their own mechanisms for the purpose of attempting to resolve disputes.<sup>55</sup>

## Good faith participation

### Question 4.9

- (1) In what circumstances should a provision require parties to participate in ADR in good faith?
- (2) How should such provisions be expressed?

4.36 Some provisions require one or more of the parties to participate in good faith. Of the ADR provisions which contain good faith obligations, all but one require all of the parties to an ADR process to act in good faith for the course of the mediation

---

(General) Regulation 2001 (NSW) cl 131(3)(c); *Healthcare Complaints Act 1993* (NSW) s 48, s 58D; *Ombudsman Act 1974* (NSW) s 13A; *Residential (Land Lease) Communities Act 2013* (NSW) s 144(2), 149(1).

50. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65A, 114; *Community Land Management Act 1989* (NSW) s 66; *Electricity Supply (General) Regulation 2001* (NSW) cl 130(1), 132(1); *Entertainment Industry Act 2013* (NSW) s 20(1); *Legal Profession Act 2004* (NSW) s 336; *Poultry Meat Industry Regulation 2008* (NSW) cl 12; *Professional Standards Act 1994* (NSW) sch 1 cl 5; *Residential (Land Lease) Communities Act 2013* (NSW) s 145(1); *Retail Leases Act 1994* (NSW) s 66(1); *Strata Schemes Management Act 1996* (NSW) s 128(1), 129(1); *Strata Schemes Management Regulation 2010* (NSW) cl 24(1); *Thoroughbred Racing Act 1996* (NSW) s 29G.

51. *Farm Debt Mediation Act 1994* (NSW) s 9, s 9A.

52. *Mining Act 1992* (NSW) s 143; *Petroleum (Onshore) Act 1991* (NSW) s 69F.

53. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A(3).

54. *Residential (Land Lease) Communities Act 2013* (NSW) s 69.

55. *Retirement Villages Act 1999* (NSW) s 125(1).

proceedings.<sup>56</sup> The *Thoroughbred Racing Act 1996* (NSW), however, requires only Racing NSW to act in good faith in the mediation.<sup>57</sup>

- 4.37 Three provisions which require mandatory referral to ADR<sup>58</sup> and three provisions which enable (but do not require) referral to ADR<sup>59</sup> require the parties to participate in good faith. Two provisions which allow parties to participate voluntarily in ADR processes require them to participate in good faith.<sup>60</sup>
- 4.38 There are differences in the terminology used in these provisions:
- In one provision, the obligation to act in good faith is framed as a requirement to use “reasonable endeavours” to participate in the mediation.<sup>61</sup>
  - Most provisions impose a “duty” on each party to participate in good faith,<sup>62</sup> while two simply state that parties “must” participate in good faith.<sup>63</sup>
  - One provision frames the obligations negatively, providing that a person is taken to have failed to take part in a mediation session if they have not participated in good faith.<sup>64</sup>
- 4.39 In the case of Dust Diseases litigation, if the parties fail to participate in good faith,<sup>65</sup> the Dust Diseases Tribunal may omit the costs of mediation in an award of costs to a successful party.<sup>66</sup>

## Consequences of failure to participate

### Question 4.10

- (1) In what circumstances should a provision deal with the consequences of a party’s failure to participate in ADR?
- (2) How should such provisions be expressed?

- 4.40 Some provisions specify the consequences of a party’s failure to participate in ADR processes.<sup>67</sup> These include provisions that:

56. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 7; *Civil Procedure Act 2005* (NSW) s 27; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 38(2); *Land and Environment Court Act 1979* (NSW) s 34(1A); *Land and Environment Court Rules 2007* (NSW) r 6.2(4); *Residential (Land Lease) Communities Act 2013* (NSW) s 69; *Water Act 1912* (NSW) s 170B(5).
57. *Thoroughbred Racing Act 1996* (NSW) s 29G(2).
58. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 38(2); *Land and Environment Court Act 1979* (NSW) s 34(1A) – see s 34AA; *Water Act 1912* (NSW) s 170B(5).
59. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 7; *Civil Procedure Act 2005* (NSW) s 27; *Land and Environment Court Act 1979* (NSW) s 34(1A) – see s 34(1).
60. *Residential (Land Lease) Communities Act 2013* (NSW) s 69; *Thoroughbred Racing Act 1996* (NSW) s 29G(2) – note that only Racing NSW is required to act in good faith.
61. *Residential (Land Lease) Communities Act 2013* (NSW) s 69.
62. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 7; *Civil Procedure Act 2005* (NSW) s 27; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 38(2); *Land and Environment Court Act 1979* (NSW) s 34(1A); *Land and Environment Court Rules 2007* (NSW) r 6.2(4).
63. *Thoroughbred Racing Act 1996* (NSW) s 29G(2).
64. *Water Act 1912* (NSW) s 170B(5).
65. Evidenced by a certificate to that effect: *Dust Diseases Tribunal Regulation 2013* (NSW) cl 38(3).
66. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 50(3).

- make such failure an offence subject to a monetary penalty<sup>68</sup>
- in relation to costs and consumer disputes,<sup>69</sup> make such failure on the part of a Legal Practitioner capable of being unsatisfactory professional conduct or professional misconduct
- allow a decision maker to dismiss an application or objection,<sup>70</sup> or
- allow the small claims division of the Local Court to dismiss a plaintiff's claim and/or defendant's defence for failure to attend.<sup>71</sup>

4.41 The *Farm Debt Mediation Act 1994* (NSW) enables a farmer in default to request mediation with a creditor. While the creditor may agree or decline to mediate, a creditor's refusal to mediate may result in an exemption certificate being issued to the farmer. Further, the relevant legislation ceases to apply to the disputed mortgage where a farmer who requested mediation subsequently refuses to mediate.<sup>72</sup>

---

67. *Anti-Discrimination Act 1977* (NSW) s 91A(3); *Health Records and Information Privacy Act 2002* (NSW) s 46; *Small Business Commissioner Act 2013* (NSW) s 18(2); *Legal Profession Act 2004* (NSW) s 336, 517; *Local Court Rules 2009* (NSW) r 2.5(7); *Water Act 1912* (NSW) s 170B(3), 170B(4); *Water Management Act 2000* (NSW) s 62(7).

68. *Anti-Discrimination Act 1977* (NSW) s 91A(3); *Health Records and Information Privacy Act 2002* (NSW) s 46(3); *Small Business Commissioner Act 2013* (NSW) s 18(2).

69. *Legal Profession Act 2004* (NSW) s 336(3), 517(3).

70. *Water Act 1912* (NSW) s 170B(3), 170B(4); *Water Management Act 2000* (NSW) s 62(7).

71. *Local Court Rules 2009* (NSW) r 2.5(7), 2.5(8).

72. *Farm Debt Mediation Act 1994* (NSW) s 9, 9A.



## 5. Existing statutory provisions – practice, procedures and enforcement

---

### In brief

Existing statutory provisions that deal with practice and procedures to be followed in ADR sessions and the enforcement of agreements arising from them vary considerably. We ask about the circumstances in which such provisions are necessary and how these provisions should be expressed.

Practice and procedure of ADR sessions .....	43
Representation of parties .....	45
Provisions allowing parties to have representation or support personnel .....	45
Restrictions on representation .....	46
Presence of other people in ADR sessions .....	46
Adjournment of the ADR processes.....	47
Termination and conclusion of ADR processes.....	48
Provisions allowing parties or ADR practitioners to terminate proceedings.....	48
Provisions regarding the conclusion of ADR processes .....	49
Costs of ADR .....	49
Enforceability of agreements .....	51
Other impacts of agreements and other outcomes of ADR .....	52

### Practice and procedure of ADR sessions

---

#### Question 5.1

- (1) In what circumstances should provisions set out the practice and procedures for ADR sessions?
- (2) How should such provisions be expressed?
- (3) In what circumstances should provisions allow ADR practitioners to determine the procedure that should be followed?
- (4) How should such provisions be expressed?

- 5.1 The practice and procedure of ADR sessions may be determined by:
- the ADR practitioner, in such manner as he or she determines,<sup>1</sup> or by giving directions,<sup>2</sup> or

---

1. *Entertainment Industry Act 2013* (NSW) s 20(2); *Farm Debt Mediation Act 1994* (NSW) s 14(1); *Health Records and Information Privacy Act 2002* (NSW) s 46(5); *Mining Act 1992* (NSW) s 148(1); *Petroleum (Onshore) Act 1991* (NSW) s 69K(1); *Privacy and Personal Information Protection Act 1998* (NSW) s 49(5).

2. *Children's Court Rule 2000* (NSW) r 25; *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 12; *Civil Procedure Act 2005* (NSW) s 32; *Community Justice Centres Act 1983*

- an applicable instrument, such as regulations<sup>3</sup> or rules.<sup>4</sup>
- 5.2 Some provisions deal with issues such as:
- how ADR sessions are to be conducted, for example, with as little formality and technicality, and with as much expedition as possible<sup>5</sup>
  - the nature of ADR processes, for example, not being limited to formal mediation, and including preliminary assistance in dispute resolution, such as the giving of advice to ensure parties are aware of their rights and obligations<sup>6</sup>
  - the inapplicability of the rules of evidence.<sup>7</sup>
- 5.3 In addition, the *Uniform Civil Procedure Rules 2005* (NSW) make specific provision for:
- the time frame in which mediation ordered under the *Civil Procedure Act 2005* (NSW) should aim to be completed – 28 days,<sup>8</sup> and
  - the possibility of parties participating in mediation via telephone, video link or any other communication with the leave of the court or mediator.<sup>9</sup>
- 5.4 Finally, the *Electricity Supply (General) Regulation 2001* (NSW) requires an accrediting agency to establish an ADR procedure which meets specific criteria, such as:
- independence of the ADR procedure from the agency
  - accessibility and convenience for the appellant, operating without cost to the appellant
  - allowing the appellant to choose whether to be bound by the determination.<sup>10</sup>

---

(NSW) s 21; *Community Land Management Regulation 2007* (NSW) cl 10; *Land and Environment Court Rules 2007* (NSW) r 6.2(6); *Strata Schemes Management Regulation 2010* (NSW) cl 23; *Uniform Civil Procedure Rules 2005* (NSW) r 20.2.

3. *Residential (Land Lease) Communities Act 2013* (NSW) s 69(7).  
4. *Residential (Land Lease) Communities Act 2013* (NSW) s 144(4); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A(6).  
5. *Community Justice Centres Act 1983* (NSW) s 21(2); *Farm Debt Mediation Act 1994* (NSW) s 14(2); *Mining Act 1992* (NSW) s 148(2); *Petroleum (Onshore) Act 1991* (NSW) s 69K(2).  
6. *Legal Profession Act 2004* (NSW) s 336(5), 519; *Retail Leases Act 1994* (NSW) s 67.  
7. *Community Justice Centres Act 1983* (NSW) s 21(3); *Farm Debt Mediation Act 1994* (NSW) s 14(3); *Uniform Civil Procedure Rules 2005* (NSW) r 20.20(2)(b).  
8. *Uniform Civil Procedure Rules 2005* (NSW) r 20.5.  
9. *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(2).  
10. *Electricity Supply (General) Regulation 2001* (NSW) cl 131(1).

## Representation of parties

### Question 5.2

- (1) In what circumstances should provisions deal with parties' representation in ADR sessions?
- (2) How should such provisions be expressed?

### Provisions allowing parties to have representation or support personnel

5.5 Some provisions allow or require parties to be represented at an ADR process in the following ways:

- A party may be “legally represented”.<sup>11</sup>
- A party may be “accompanied by that party’s barrister or solicitor” unless the mediator or court otherwise directs.<sup>12</sup>
- A party may be accompanied or represented by another person at a CJC mediation, subject to exclusion if the Director of CJs is of the opinion that the presence of the person may frustrate the purpose or conduct of the mediation.<sup>13</sup>
- A party may be represented by a person who is not an legal practitioner if:
  - (a) the party is a corporation and the representative is an officer or employee of the corporation, or
  - (b) all parties to the proceedings agree to the representation and the mediator is satisfied that it will not unfairly disadvantage an unrepresented party, or
  - (c) the mediator is satisfied that the party is unable to present the party’s case properly without assistance.<sup>14</sup>
- A party may be accompanied by a person, whether or not as a legal advisor or agent, to act as an advocate and to assist in the presentation of the party’s case.<sup>15</sup>
- In the case of arbitration under the *Civil Procedure Act 2005* (NSW), a party has the same rights to representation by a barrister, solicitor or otherwise as the party would have in court proceedings.<sup>16</sup>
- In the case of arbitrations about access arrangements for prospecting titles, a party may be represented by a person who is not a legal practitioner, or by a

11. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65(3).

12. *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(1)(b).

13. *Community Justice Centres Act 1983* (NSW) s 21(4).

14. *Residential (Land Lease) Communities Act 2013* (NSW) s 152.

15. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318C.

16. *Civil Procedure Act 2005* (NSW) s 48.

person who is a legal practitioner, with the agreement of the parties and leave of the arbitrator.<sup>17</sup>

- Each party or a legal representative must attend.<sup>18</sup>
- Each party or legal or other representative with the authority to settle must attend.<sup>19</sup>
- If a party is a corporation, an officer of the corporation "having authority to settle the proceedings" must attend, and if an insurer controls a party's conduct of the proceedings, an officer of the insurer "having authority to settle the proceedings" must attend.<sup>20</sup>
- For certain classes of proceedings, the Land and Environment Court may arrange a conciliation conference between the "parties or their representatives".<sup>21</sup>

### Restrictions on representation

5.6 A number of provisions prevent the parties from being legally represented at all.<sup>22</sup> In some cases, no representation is allowed unless certain criteria are met, such as:

- leave of the referring body is given,<sup>23</sup> or
- it appears to the mediator that an agent should be appointed to facilitate mediation and has sufficient knowledge of the issue to enable the agent to represent the party effectively.<sup>24</sup>

### Presence of other people in ADR sessions

---

#### Question 5.3

- (1) In what circumstances should provisions deal with the presence of other people in ADR sessions?
- (2) How should such provisions be expressed?

5.7 Some provisions provide for and regulate the presence of people other than the parties, their representatives and the ADR practitioner at ADR processes. Some provisions of this type provide that:

- a party may be accompanied by or represented by another person,<sup>25</sup> or

---

17. *Mining Act 1992* (NSW) s 146(2); *Petroleum (Onshore) Act 1991* (NSW) s 69I(2).

18. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 40.

19. *Community Land Management Regulation 2007* (NSW) cl 11(1); *Strata Schemes Management Regulation 2010* (NSW) cl 24(1).

20. *Uniform Civil Procedure Rules 2005* (NSW) r 20.6(1)(a).

21. *Land and Environment Court Act 1979* (NSW) s 34(1).

22. *Professional Standards Act 1994* (NSW) sch 1 cl 9; *Health Care Complaints Act 1993* (NSW) s 50(1).

23. *Anti-Discrimination Act 1977* (NSW) s 91B; *Health Records and Information Privacy Act 2002* (NSW) s 46(4); *Privacy and Personal Information Protection Act 1998* (NSW) s 49(4).

24. *Farm Debt Mediation Act 1994* (NSW) s 17(1).

- an ADR practitioner (or other specified decision-maker) may:
    - give leave to other people to attend an ADR session,<sup>26</sup> or
    - exclude any person apart from the parties and their representatives,<sup>27</sup> or
    - exclude a person other than a party from attending ADR processes if their presence may frustrate the purpose of the mediation session.<sup>28</sup>
- 5.8 Other provisions permit other people to be present during ADR processes for the purposes of assisting<sup>29</sup> or advising<sup>30</sup> a party in their claim, and specify which parties this is available to, for example:
- in the case of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), a party who is an injured worker<sup>31</sup>
  - in the case of the *Farm Debt Mediation Act 1994* (NSW), a farmer (the advisor need not be legally or professionally qualified)<sup>32</sup>
  - in the case of *Health Care Complaints Act 1993* (NSW), a complainant or other party to the complaint who would be disadvantaged without the assistance.<sup>33</sup>
- 5.9 The *Children and Young Persons (Care and Protection) Act 1998* (NSW) contains a number of provisions which enable the Court to restrict the presence of certain people during ADR processes, including the child or young person,<sup>34</sup> or any other person (even if the person is directly interested in the proceedings concerned),<sup>35</sup> if the Court believes it is in the best interests of the child.<sup>36</sup>

## Adjournment of the ADR processes

---

### Question 5.4

- (1) In what circumstances should provisions deal with the adjournment of ADR processes?
- (2) How should such provisions be expressed?

- 
25. *Community Justice Centres Act 1983* (NSW) s 21(4).
  26. *Community Land Management Regulation 2007* (NSW) cl 11(2); *Strata Schemes Management Regulation 2010* (NSW) cl 24(2); *Farm Debt Mediation Act 1994* (NSW) s 14(5)(b).
  27. *Residential (Land Lease) Communities Act 2013* (NSW) s 151(1).
  28. *Community Justice Centres Act 1983* (NSW) s 21(5).
  29. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318C; *Health Care Complaints Act 1993* (NSW) s 50(2).
  30. *Farm Debt Mediation Act 1994* (NSW) s 17(4).
  31. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318C.
  32. *Farm Debt Mediation Act 1994* (NSW) s 17(4).
  33. *Health Care Complaints Act 1993* (NSW) s 50(2).
  34. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104(2).
  35. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104A(2), 104A(4).
  36. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 104A(3).

- 5.10 Four ADR provisions permit the person conducting an ADR session to adjourn those proceedings.
- 5.11 One provision allows adjournment of proceedings at any stage to enable the parties to negotiate,<sup>37</sup> while another provides that the adjournment is at the discretion of the mediator.<sup>38</sup>
- 5.12 Another provision allows a Commissioner of the Land and Environment Court to adjourn a conciliation conference to a time and place fixed in consultation with the Registrar if the Commission is satisfied that there is a good reason to do so.<sup>39</sup>
- 5.13 Another provisions allows an ADR practitioner to adjourn a session if it appears that a party would be significantly disadvantaged because of the length of a session.<sup>40</sup>

## Termination and conclusion of ADR processes

---

### Provisions allowing parties or ADR practitioners to terminate proceedings

#### Question 5.5

- (1) In what circumstances should provisions deal with the parties' ability to terminate an ADR session?
- (2) How should such provisions be expressed?
- (3) In what circumstances should provisions deal with an ADR practitioner's ability to terminate an ADR session?
- (4) How should such provisions be expressed?

- 5.14 Some ADR provisions permit parties to ADR processes to withdraw from<sup>41</sup> or terminate<sup>42</sup> proceedings. Four of these provisions impose notice requirements in order to do so,<sup>43</sup> involving the parties to the mediation, the ADR practitioner and others.
- 5.15 Some provisions also permit the ADR practitioner or an administrator to withdraw from or terminate the ADR process.<sup>44</sup>

---

37. *Employment Protection Act 1982* (NSW) s 13(b).

38. *Residential (Land Lease) Communities Act 2013* (NSW) s 151(3).

39. *Land and Environment Court Act 1979* (NSW) s 34(6).

40. *Farm Debt Mediation Act 1994* (NSW) s 14(1A).

41. *Community Justice Centres Act 1983* (NSW) s 23(2); *Ombudsman Act 1974* (NSW) s 13A; *Residential (Land Lease) Communities Act 2013* (NSW) s 147(2), 151(4).

42. *Community Land Management Regulation 2007* (NSW) cl 12(2); *Electricity Supply (General) Regulation 1991* (NSW) cl 131; *Health Care Complaints Act 1993* (NSW) s 52(1)(a); *Mining Act 1992* (NSW) s 153; *Petroleum (Onshore) Act 1991* (NSW) s 69P; *Strata Schemes Management Regulation 2010* (NSW) cl 26.

43. *Community Land Management Regulation 2007* (NSW) cl 12(2); *Strata Schemes Management Regulation 2010* (NSW) cl 26(2); *Mining Act 1992* (NSW) s 153(1); *Petroleum (Onshore) Act 1991* (NSW) s 69P(1).

44. *Community Justice Centres Act 1983* (NSW) s 24(2); *Community Land Management Regulation 2007* (NSW) cl 12(1); *Electricity Supply (General) Regulation 1991* (NSW) cl 131; *Ombudsman*

- 5.16 The basis for the distinction between the terminology “withdraw from” and “terminate” is not clear in any of the provisions.

### Provisions regarding the conclusion of ADR processes

#### Question 5.6

- (1) In what circumstances should provisions deal with the conclusion of ADR processes?
- (2) How should such provisions be expressed?

- 5.17 Some provisions set out the effects of parties reaching agreement or failing to reach an agreement:
- Where parties have reached an agreement, the conciliation process will be concluded, or the decision-maker must dispose of proceedings in accordance with the decision in writing and on the basis of what occurred at the conciliation conference or a hearing.<sup>45</sup>
  - Where parties have failed to reach an agreement, the ADR facilitator may terminate proceedings,<sup>46</sup> but in one case, only if the mediator believes that:
    - (a) it is unlikely that the parties will reach an agreement; or
    - (b) a significant issue of public health or safety has been raised.<sup>47</sup>

### Costs of ADR

#### Question 5.7

- (1) In what circumstances should provisions deal with the costs of ADR?
- (2) How should such provisions be expressed?

- 5.18 A number of ADR provisions stipulate that the costs of ADR processes are to be borne in the following ways:
- There are no costs to parties, in some cases unless:
    - the parties opt for ADR outside the scheme established by the accrediting agency, (in which case the parties bear their own costs and the costs of the ADR practitioner are borne equally),<sup>48</sup> or
    - the responsible agency decides otherwise (for example, Legal Aid may defray ADR expenses or require the applicant to meet those expenses).<sup>49</sup>

---

*Act 1974 (NSW) s 13A(3); Residential (Land Lease) Communities Act 2013 (NSW) s 147(2), 151(4); Strata Schemes Management Regulation 2010 (NSW) cl 26(1).*

45. *Land and Environment Court Act 1979 (NSW) s 34(3)-(4).*

46. *Land and Environment Court Act 1979 (NSW) s 34(4).*

47. *Health Care Complaints Act 1993 (NSW) s 52(3).*

48. *Electricity Supply (General) Regulation 2001 (NSW) cl 131(1)(d) and (e).*

- Costs are borne by one party only (for example, Racing NSW or the prospecting party).<sup>50</sup>
- Costs are borne by one party only unless the ADR practitioner determines otherwise.<sup>51</sup>
- One party is not liable for costs, for example, the NSW Rural Assistance Authority.<sup>52</sup>
- The parties are to pay “their own costs associated with the mediation”.<sup>53</sup>
- Costs are borne by one or more parties:
  - according to agreement, or, failing agreement, according to Tribunal ordered costs<sup>54</sup> or equally<sup>55</sup>
  - according to agreement if mediation results in settlement of the claim, or by the defendant (or all defendants in equal shares) if mediation does not result in settlement of the claim<sup>56</sup>
  - according to the determination of the court<sup>57</sup>
  - according to a court order, or in any other case, in such proportions as the parties agree<sup>58</sup>
  - if the ADR practitioner makes an order as to costs, then according to that order<sup>59</sup>
  - according to the regulations, which may specify the costs particulars,<sup>60</sup> or
  - jointly<sup>61</sup> or in equal proportions.<sup>62</sup>

5.19 In most cases, costs are met (in whatever proportion) by the parties to the proceedings. However, in the case of the *Retail Leases Act 1994* (NSW), the costs are met (in whatever proportion) only by the “person or persons applying for the mediation”.<sup>63</sup>

---

49. *Legal Aid Commission Act 1979* (NSW) s 60C.

50. *Thoroughbred Racing Act 1996* (NSW) s 29G(4); *Water Management Act 2000* (NSW) s 93(7); *Mining Act 1992* (NSW) s 152; *Petroleum (Onshore) Act 1991* (NSW) s 69O.

51. *Electricity Supply (General) Regulation 2001* (NSW) cl 133(1).

52. *Farm Debt Mediation Act 1994* (NSW) s 12(2).

53. *Strata Schemes Management Regulation 2010* (NSW) cl 25.

54. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 8.

55. *Retail Leases Act 1994* (NSW) s 66(2).

56. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 50(1)(a) and (b).

57. *Uniform Civil Procedure Rules 2005* (NSW) r 20.18.

58. *Civil Procedure Act 2005* (NSW) s 28, *Land and Environment Court Rules 2007* (NSW) r 6.2(5).

59. *Civil Procedure Act 2005* (NSW) s 54; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318D(2).

60. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318H.

61. *National Parks and Wildlife Act 1974* (NSW) s 71K(3).

62. *Electricity Supply (General) Regulation 2001* (NSW) cl 131(3)(e).

63. *Retail Leases Act 1994* (NSW) s 66(2).



- 5.20 One provision enables the court to require each party, prior to the court referring a matter to mediation, to state the proportions in which the costs are to be borne and the terms of such an agreement.<sup>64</sup>

## Enforceability of agreements

### Question 5.8

(1) In what circumstances should provisions deal with the enforceability of agreements arising from ADR processes?

(2) How should such provisions be expressed?

- 5.21 All provisions which provide for the enforcement of agreements arising from ADR processes include requirements the parties must fulfil in order to render agreements enforceable, for example:
- Requiring that the settlement is in writing and signed<sup>65</sup> and lodged with the NSW Civil and Administrative Tribunal (NCAT).<sup>66</sup>
  - Requiring that the parties agree in writing that the agreement is to be enforceable, except where the mediation was by order of a court or tribunal.<sup>67</sup>
  - Requiring NCAT to be satisfied that it would have the power to make a decision in the terms of the agreed settlement.<sup>68</sup>
  - Enabling<sup>69</sup> or requiring<sup>70</sup> the court, agencies or office holders to make orders to give effect to an agreement or arrangement arising out of ADR processes. Two provisions require the arbitrator to give effect to any settlement made between parties through conciliation held during the course of an arbitration.<sup>71</sup>
- 5.22 The *Anti-Discrimination Act 1977* (NSW) enables NCAT, following an application by a party, to register a recorded conciliation agreement that could have been subject of an order in proceedings relating to a complaint.<sup>72</sup> Registered agreements are taken to be an order of NCAT and may be enforced accordingly.<sup>73</sup>
- 5.23 The *Farm Debt Mediation Act 1994* (NSW) enables the parties to enter into a heads of agreement if they consent to a document setting out the main points of

64. *Uniform Civil Procedure Rules 2005* (NSW) r 20.3(c).

65. *Residential (Land Lease) Communities Act 2013* (NSW) s 151.

66. *Civil and Administrative Tribunal Act 2013* (NSW) s 59(1)(a).

67. *Community Justice Centres Act 1983* (NSW) s 23(3).

68. *Civil and Administrative Tribunal Act 2013* (NSW) s 59(1)(b).

69. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 9(1); *Community Land Management Act 1989* (NSW) s 68(1); *Dust Diseases Tribunal Regulation 2013* (NSW) cl 47(1); *Strata Schemes Management Act 1996* (NSW) s 131.

70. *Conveyancers Licensing Act 2003* (NSW) s 46; *Local Court Act 2007* (NSW) s 36(2); *Petroleum (Onshore) Act 1991* (NSW) s 69J(2).

71. *Mining Act 1992* (NSW) s 147(2); *Petroleum (Onshore) Act 1991* (NSW) s 69J(2).

72. *Anti-Discrimination Act 1977* (NSW) s 91A.

73. *Anti-Discrimination Act 1977* (NSW) s 91A(9).

agreement.<sup>74</sup> A subsequent instrument entered into between the farmer and a creditor pursuant to the heads of agreement must reflect its content. A creditor who fails to comply with this requirement is guilty of an offence, the maximum penalty for which is 100 penalty units.<sup>75</sup>

## Other impacts of agreements and other outcomes of ADR

### Question 5.9

(1) In what circumstances should provisions deal with other impacts of agreements and other outcomes of ADR?

(2) How should such provisions be expressed?

5.24 Some provisions deal with the ways in which the relevant court or agency can reach a decision or make an order having regard to any agreement between the parties or any other outcome of the ADR process, for example:<sup>76</sup>

- The *Water Act 1912* (NSW) states that the Ministerial Corporation is to have regard to the outcome of mediation sessions, and the findings and recommendations of the mediator, in determining whether to grant an approval.<sup>77</sup>
- The *Succession Act 2006* (NSW) allows the court to make an order based on a written agreement arising from mediation conferences, for the parties to use in relation to further matters before the court.<sup>78</sup>
- The *Entertainment Industry Act 2013* (NSW) enables the Industrial Relations Commission to may make orders it considers fair and reasonable in the circumstances.<sup>79</sup> A person who fails to comply with these orders is guilty of an offence, the maximum penalty for which is 50 penalty units or imprisonment for 6 months, or both.<sup>80</sup>
- The *Uniform Civil Procedure Rules 2005* (NSW) enable the court, in regards to the report of a court-appointed referee,<sup>81</sup> to do any of the following:
  - adopt, vary or reject the report in whole or in part
  - ask the referee to explain the report
  - remit any matter to the referee for a further report, or

74. *Farm Debt Mediation Act 1994* (NSW) s 11AA.

75. *Farm Debt Mediation Act 1994* (NSW) s 11C.

76. *Civil Procedure Act 2005* (NSW) s 39(2), s 40(a)-(b); *Entertainment Industry Act 2013* (NSW) s 20(3), 20(4); *Succession Act 2006* (NSW) s 98(3); *Thoroughbred Racing Act 1996* (NSW) s 29G(3); *Uniform Civil Procedure Rules 2005* (NSW) r 20.14, 20.24; *Water Act 1912* (NSW) s 170B(7).

77. *Water Act 1912* (NSW) s 170B(7).

78. *Succession Act 2006* (NSW) s 98(3).

79. *Entertainment Industry Act 2013* (NSW) s 20(3).

80. *Entertainment Industry Act 2013* (NSW) s 20(4).

81. *Uniform Civil Procedure Rules 2005* (NSW) r 20.14.

- decide any matter on the evidence taken before the referee.<sup>82</sup>

5.25 The *Thoroughbred Racing Act 1996* (NSW) anomalously states that Racing NSW only (as opposed to any other party) is not bound by any decision or findings of the mediator.<sup>83</sup>

---

82. *Uniform Civil Procedure Rules 2005* (NSW) r 20.24(1).

83. *Thoroughbred Racing Act 1996* (NSW) s 29G(3).



## 6. Existing statutory provisions - ADR practitioners

---

### In brief

Existing statutory provisions that deal with ADR practitioners vary considerably. We ask about the circumstances in which such provisions are necessary and how these provisions should be expressed.

<b>Appointment and accreditation of ADR practitioners.....</b>	<b>55</b>
Who may appoint ADR practitioners.....	55
Who may be appointed.....	56
Termination of appointments .....	57
<b>Control and independence of ADR practitioners .....</b>	<b>57</b>
<b>Powers and obligations of ADR practitioners .....</b>	<b>58</b>
<b>Immunity of ADR practitioners .....</b>	<b>59</b>

- 6.1 This chapter considers provisions that deal with ADR practitioners, including their appointment, accreditation, independence, powers, obligations and immunities. In referring to them, we have generally adopted the term “ADR practitioner” (rather than mediator, arbitrator, conciliator, neutral evaluator, referee, etc) because of the lack of consistency in the terminology adopted in the various statutes to describe the types of ADR.

### Appointment and accreditation of ADR practitioners

---

#### Question 6.1

- (1) In what circumstances should provisions deal with the appointment and accreditation of different types of ADR practitioners?
- (2) How should such provisions be expressed?

### Who may appoint ADR practitioners

- 6.2 Some provisions specify who may appoint ADR practitioners:
- a court, agency or office holder can make the appointment, either:
    - without further guidance,<sup>1</sup> or

---

1. *Uniform Civil Procedure Rules 2005* (NSW) r 20.14, 20.15; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 37(3); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A(5); *Architects Act 2003* (NSW) s 40(3); *Veterinary Practice Act 2003* (NSW) s 43(3); *Health Care Complaints Act 1993* (NSW) s 86(2)(c), 89(1); *Residential (Land Lease) Communities Act 2013* (NSW) s 148(1); *Community Justice Centres Act 1983* (NSW) s 20(2), 20A(3)(a); *Water Act 1912* (NSW) s 170B(2); *Civil Procedure Act 2005* (NSW) s 36(1); *National Parks and Wildlife Act 1974* (NSW) s 71K(1).

- with further guidance, such as in consultation with other people, or in accordance with criteria developed by a Minister,<sup>2</sup> or
- the parties can select the ADR practitioner jointly between themselves,<sup>3</sup> or
- one party can select the ADR practitioner, subject to the other party accepting or rejecting the choice,<sup>4</sup> or
- the referrer can appoint the ADR practitioner if the parties have not reached agreement,<sup>5</sup> or
- the statute provides that either of the first two methods is possible.<sup>6</sup>

### Who may be appointed

6.3 The provisions that qualify who may be appointed as ADR practitioners take two broad approaches, either by using:

- terms that require that the ADR practitioner be “suitable”,<sup>7</sup> “suitably qualified and experienced”,<sup>8</sup> or “with appropriate expertise or experience”,<sup>9</sup> or
- lists, for example, where the ADR practitioner is to be chosen from:
  - in the case of the Dust Diseases Tribunal, a list of people nominated jointly by the NSW Law Society and Bar Association, or failing such a nomination, people chosen by the Tribunal President,<sup>10</sup> or
  - in the case of courts and tribunals subject to the *Civil Procedure Act 2005* (NSW), a list of mediators appointed in accordance with a practice note, or a list of arbitrators appointed from among former judicial officers, and nominated barristers and solicitors,<sup>11</sup> or
  - in the case of the NSW Civil and Administrative Tribunal (NCAT), a list of people considered by the Tribunal President to be suitable to be mediators.<sup>12</sup>

6.4 Four provisions state that any person may be appointed as an ADR practitioner.<sup>13</sup> Of these, two provisions require the parties to agree to the appointment of that person.<sup>14</sup>

- 
2. *Legal Profession Act 2004* (NSW) s 520(2); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318F(1).
  3. *Water Management Act 2000* (NSW) s 62(6), 94(6).
  4. *Farm Debt Mediation Act 1994* (NSW) s 12A(1).
  5. *Electricity Supply (General) Regulation 2001* (NSW) cl 131(3), 132(5); *Land and Environment Court Rules 2007* (NSW) r 6.2(3); *Mining Act 1992* (NSW) s 144(1); *Petroleum (Onshore) Act 1991* (NSW) s 69G(1).
  6. *Civil Procedure Act 2005* (NSW) s 26(2); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 6(1); *Dust Diseases Tribunal Regulation 2013* (NSW) cl 37.
  7. *Civil Procedure Act 2005* (NSW) s 36(1).
  8. *Farm Debt Mediation Act 1994* (NSW) s 12(1).
  9. *Residential (Land Lease) Communities Act 2013* (NSW) s 148(1).
  10. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 37(3).
  11. *Civil Procedure Act 2005* (NSW) s 26, 36(2).
  12. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 6(2).

- 6.5 No statute currently refers to accreditation under the National Mediator Accreditation System as a means of identifying relevantly qualified ADR practitioners.

### Termination of appointments

- 6.6 The provisions dealing with the termination of appointments of ADR practitioners provide either for removal of the ADR practitioner from office:
- by the ADR practitioner themselves (by resigning)<sup>15</sup>
  - by others - for example, the President of the NSW Workers Commission,<sup>16</sup> or the senior judicial officer of a court or tribunal under the *Civil Procedure Act 2005* (NSW),<sup>17</sup> or
  - by deemed removal (for example, if the ADR practitioner becomes mentally incapacitated,<sup>18</sup> or where the practitioner is unwilling or unable to act).<sup>19</sup>
- 6.7 It is not clear what effect removal of a practitioner from office has on ADR processes that have already commenced.

### Control and independence of ADR practitioners

#### Question 6.2

- (1) In what circumstances should provisions deal with the control and independence of different types of ADR practitioners?
- (2) How should such provisions be expressed?

- 6.8 One provision provides for the autonomy of the ADR practitioner, stating that he or she is not subject to direction and control in referred ADR processes.<sup>20</sup>
- 6.9 In one instance mediators are, in the exercise of their functions, subject to the general control and direction of the Registrar.<sup>21</sup>
- 6.10 One provision refers simply to an “independent” mediator or evaluator,<sup>22</sup> while another requires that the ADR procedures established by the accrediting agency operate independently of that accrediting agency.<sup>23</sup>

13. *Community Justice Centres Act 1983* (NSW) s 5; *Mining Act 1992* (NSW) s 143(2); *Petroleum (Onshore) Act 1991* (NSW) s 69F(2); *Uniform Civil Procedure Rules 2005* (NSW) r 20.15.

14. *Mining Act 1992* (NSW) s 143(2); *Petroleum (Onshore) Act 1991* (NSW) s 69F(2).

15. *Civil Procedure Act 2005* (NSW) s 36(5). Note that it is not clear whether this refers to resignation from commenced ADR processes or from a list of potential ADR practitioners for use by the court.

16. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318F.

17. *Civil Procedure Act 2005* (NSW) s 36(3)-(4).

18. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318F(5).

19. *Workers Compensation Commission Rules 2011* (NSW) r 17.11.

20. *Health Care Complaints Act 1993* (NSW) s 57.

21. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318F(2).

## Miscellaneous powers and obligations of ADR practitioners

---

### Questions 6.3

(1) In what circumstances should provisions setting out the powers and obligations of different types of ADR practitioners?

(2) How should such provisions be expressed?

- 6.11 In the case of orders for reference, where the court has referred a matter for inquiry to a referee, the court may direct the referee to make further reports and give other directions as necessary,<sup>24</sup> including on application by the parties or referee.<sup>25</sup> While the court is empowered to give directions about the conduct of proceedings under the reference,<sup>26</sup> the referee may conduct the reference as he or she sees fit.<sup>27</sup>
- 6.12 In the case of orders for reference, the referee is required, unless ordered otherwise, to submit a written a report to the court on the matters referred to the referee, stating his or her opinion and reasons for that opinion, which must be sent to the parties.<sup>28</sup>
- 6.13 Two provisions require that an arbitrator act according to “equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms”.<sup>29</sup>
- 6.14 Some provisions impose other requirements on ADR practitioners, such as those requiring the practitioner to:
- prepare a report<sup>30</sup> or written summary at the conclusion of proceedings,<sup>31</sup> or
  - where mediation is not successful, to certify:
    - the final offers of settlement made by the parties in the mediation,<sup>32</sup> or
    - that the mediation has been attempted but was not successful.<sup>33</sup>
- 6.15 In the case of Dust Diseases litigation, where parties have failed to settle a claim through mediation before the mediation is required to be completed, the mediator

---

22. *Water Management Act 2000* (NSW) s 62(6), 94(6).

23. *Electricity Supply (General) Regulation 2001* (NSW) cl 131(1)(a).

24. *Uniform Civil Procedure Rules 2005* (NSW) r 20.17.

25. *Uniform Civil Procedure Rules 2005* (NSW) r 20.21.

26. *Uniform Civil Procedure Rules 2005* (NSW) r 20.20(1).

27. *Uniform Civil Procedure Rules 2005* (NSW) r 20.20(2)(a).

28. *Uniform Civil Procedure Rules 2005* (NSW) r 20.23.

29. *Mining Act 1992* (NSW) s 148(2); *Petroleum (Onshore) Act 1991* (NSW) s 69K(2).

30. *Health Care Complaints Act 1993* (NSW) s 53.

31. *Farm Debt Mediation Act 1994* (NSW) s 18.

32. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318B.

33. *Legal Profession Act 2004* (NSW) s 521.



must require the parties to agree on the issues in dispute and relevant facts,<sup>34</sup> and to file a certificate containing these details with the registrar.<sup>35</sup>

## Immunity of ADR practitioners

### Question 6.4

(1) In what circumstances should provisions deal with the immunity of ADR practitioners?

(2) How should such provisions be expressed?

- 6.16 Many ADR provisions have the effect of protecting ADR practitioners from liability, action, claim or demand for matters, things done, or things omitted to be done in good faith in the course of ADR processes under the relevant provisions or in the course of administering the relevant provisions.<sup>36</sup>
- 6.17 Alternatively, some provisions afford the ADR practitioner the same protection and immunity as:
- a judicial officer of the court<sup>37</sup>
  - a judge of the Supreme Court,<sup>38</sup> or
  - a member of NCAT.<sup>39</sup>
- 6.18 One provision enables the corresponding regulations to make provision for the mediation of disagreements including the exoneration of mediators from liability<sup>40</sup> but the regulations make no such provision.

34. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 41(1).

35. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 41(2).

36. *Aboriginal Land Rights Act 1983* (NSW) s 242(2)(d); *Community Justice Centres Act 1983* (NSW) s 27(1); *Community Land Management Act 1989* (NSW) s 70A; *Farm Debt Mediation Act 1994* (NSW) s 18; *Health Care Complaints Act 1993* (NSW) s 96(1); *Legal Aid Commission Act 1979* (NSW) s 60G; *Legal Profession Act 2004* (NSW) s 524; *Mining Act 1992* (NSW) s 154; *Petroleum (Onshore) Act 1991* (NSW) s 69Q; *Residential (Land Lease) Communities Act 2013* (NSW) s 155; *Strata Schemes Management Act 1996* (NSW) s 134; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318G.

37. *Civil Procedure Act 2005* (NSW) s 33, 55.

38. *Retail Leases Act 1994* (NSW) s 66(3).

39. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2

40. *National Parks and Wildlife Act 1974* (NSW) s 71K(4).



## 7. Existing statutory provisions – use of information

---

### In brief

Existing statutory provisions that deal with the use of information obtained in the course of ADR sessions and related activity vary considerably. We ask about the circumstances in which such provisions are necessary and how these provisions should be expressed.

Non-disclosure of information .....	61
Inadmissibility .....	63
Privilege with respect to defamation .....	65

### Non-disclosure of information

---

#### Question 7.1

(1) In what circumstances should provisions deal with non-disclosure of information?

(2) How should such provisions be expressed?

- 7.1 Some ADR provisions prohibit certain specified people from disclosing information obtained in the context of ADR except in certain circumstances. Sometimes this is expressed positively as allowing disclosure only in certain circumstances.<sup>1</sup>
- 7.2 There would appear to be no logical reason why some statutes that provide for ADR include these provisions, while others do not.
- 7.3 The list of circumstances in which disclosure is permitted generally follow the same form, although sometimes they vary slightly in expression and some details.
- 7.4 The circumstances almost always include that:
- the consent of the person from whom the information was obtained is required (one, however, refers only to “the consent of the person to whom the information relates”<sup>2</sup>)
  - the information is required to administer or execute the relevant ADR provisions<sup>3</sup>

---

1. Prohibition: *Farm Debt Mediation Act 1994* (NSW) s 16; *Health Care Complaints Act 1993* (NSW) s 58; Permission: *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(5); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 11; *Civil Procedure Act 2005* (NSW) s 31; *Community Justice Centres Act 1983* (NSW) s 29; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49(7); *Community Land Management Act 1989* (NSW) s 70; *Legal Aid Commission Act 1979* (NSW) s 60F; *Residential (Land Lease) Communities Act 2013* (NSW) s 154; *Strata Schemes Management Act 1996* (NSW) s 133.

2. *Residential (Land Lease) Communities Act 2013* (NSW) s 154(a).

- there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property<sup>4</sup>
  - the information is reasonably required to refer the parties to a form of ADR elsewhere and the parties have consented to the disclosure<sup>5</sup>
  - there is a requirement imposed under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.
- 7.5 Some statutes identify other circumstances where disclosure is permitted, that is, where:
- the information has been de-identified and used for the purposes of research<sup>6</sup>
  - there is an “other lawful excuse”<sup>7</sup>
  - the disclosure is reasonably required to refer any person conducting the ADR or a legal practitioner attending the ADR to an appropriate body for any professional misconduct alleged to have been committed in connection with the ADR.<sup>8</sup>
- 7.6 Two of the provisions also deal with the situation where the ADR professional has reasonable grounds to suspect that a child is at risk of significant harm under s 23 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).<sup>9</sup>
- 7.7 Some impose a penalty for contravening a non-disclosure provision, for example, the *Farm Debt Mediation Act 1994* (NSW) imposes a maximum penalty of 20 penalty units or imprisonment for 6 months or both;<sup>10</sup> and *Health Care Complaints Act 1993* (NSW) imposes a maximum penalty of 10 penalty units or imprisonment for 6 months or both.<sup>11</sup>
- 7.8 The provisions in all cases target the ADR practitioner (usually, but not always, a “mediator”) but some also include administration and support staff,<sup>12</sup> researchers,<sup>13</sup> or any (other) person.<sup>14</sup> Again, there would appear to be no reason in principle why some provisions cover a wider range than simply the ADR professional. This is

---

3. Not under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

4. Not under the *Farm Debt Mediation Act 1994* (NSW).

5. Not under the *Health Care Complaints Act 1993* (NSW).

6. *Community Justice Centres Act 1983* (NSW) s 29(2)(d).

7. *Farm Debt Mediation Act 1994* (NSW) s 16(e).

8. *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(6).

9. *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(5)(c); *Community Justice Centres Act 1983* (NSW) s 29A: This was the result of a recommendation in NSW Law Reform Commission, *Community Justice Centres*, Report 106 (2005) [6.26], rec 9.

10. *Farm Debt Mediation Act 1994* (NSW) s 16.

11. *Health Care Complaints Act 1993* (NSW) s 58.

12. *Community Justice Centres Act 1983* (NSW) s 29(2); *Health Care Complaints Act 1993* (NSW) s 58.

13. *Community Justice Centres Act 1983* (NSW) s 29(2).

14. *Farm Debt Mediation Act 1994* (NSW) s 16; *Residential (Land Lease) Communities Act 2013* (NSW) s 154.

especially the case when codes of practice or conduct and contracts may already prohibit the ADR practitioner from disclosing information,<sup>15</sup> but other participants in the process are not so bound.

## Inadmissibility of evidence

### Question 7.2

(1) In what circumstances should provisions deal with inadmissibility of evidence in later proceedings?

(2) How should such provisions be expressed?

7.9 Some ADR provisions render inadmissible certain evidence arising during, or in connection with, the ADR process.<sup>16</sup>

7.10 In general, all make provision to the effect that anything said (any statement or admission made) in the course of or in connection with an ADR process is not admissible in any proceedings.

7.11 All, apart from four,<sup>17</sup> extend beyond statements and admissions to either:

- things done,<sup>18</sup> or
- documents prepared in relation to the ADR process.<sup>19</sup>

“Things done” might include “documents prepared” but “documents prepared” would not include all “things done”.

7.12 Some elaborate on “proceedings”. For example, some specify:

- “legal” proceedings<sup>20</sup>

15. See, generally, para [9.11]-[9.15].

16. *Anti-Discrimination Act 1977* (NSW) s 91A(4); *Building Professionals Act 2005* (NSW) s 24(4)-(7); *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(2)-(4); *Community Justice Centres Act 1983* (NSW) s 28(4)-(6); *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49(4)-(6); *Farm Debt Mediation Act 1994* (NSW) s 15; *Health Care Complaints Act 1993* (NSW) s 51; *Health Records and Information Privacy Act 2002* (NSW) s 46(6); *Land and Environment Court Act 1979* (NSW) s 34(10)-(12); *Legal Aid Commission Act 1979* (NSW) s 60E; *Legal Profession Act 2004* (NSW) s 521 and 522; *Ombudsman Act 1974* (NSW) s 13A(4); *Residential (Land Lease) Communities Act 2013* (NSW) s 153; *Retail Leases Act 1994* (NSW) s 69; *Small Business Commissioner Act 2013* (NSW) s 19; *Water Act 1912* (NSW) s 170B(6).

17. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2(2); *Retail Leases Act 1994* (NSW) s 69; *Small Business Commissioner Act 2013* (NSW) s 19; *Water Act 1912* (NSW) s 170B(6).

18. *Anti-Discrimination Act 1977* (NSW) s 91A(4); *Health Records and Information Privacy Act 2002* (NSW) s 46(6); *Residential (Land Lease) Communities Act 2013* (NSW) s 153.

19. *Building Professionals Act 2005* (NSW) s 24(5); *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(3); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 10(4); *Civil Procedure Act 2005* (NSW) s 30(4); *Community Justice Centres Act 1983* (NSW) s 28(5); *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49(5)(a); *Farm Debt Mediation Act 1994* (NSW) s 15(1); *Health Care Complaints Act 1993* (NSW) s 51(2); *Land and Environment Court Act 1979* (NSW) s 34(11)(b); *Legal Aid Commission Act 1979* (NSW) s 60E(2); *Legal Profession Act 2004* (NSW) s 522(1)(b); *Ombudsman Act 1974* (NSW) s 13A(4).

- proceedings before a court, tribunal or body<sup>21</sup>
- any proceedings in a court (or tribunal) or “before a person or body authorised to hear and receive evidence”<sup>22</sup>
- any subsequent investigation/hearing (of the complaint).<sup>23</sup>

7.13 Other provisions, however, are limited to proceedings “relating to the complaint”.<sup>24</sup>

7.14 Some allow for exceptions where:

- specified people agree to the admission of the evidence, such as:
  - the parties<sup>25</sup>
  - the person who made the statement or admission<sup>26</sup>
  - people who attended the ADR process<sup>27</sup>
  - people named in the evidence or document<sup>28</sup>
- the evidence is of the outcome of the ADR process (either a certificate, agreement, contract, deed or other document)<sup>29</sup>
- the circumstances fall within one of the exceptions to non-disclosure<sup>30</sup>

- 
20. *Retail Leases Act 1994* (NSW) s 69; *Small Business Commissioner Act 2013* (NSW) s 19(3); *Water Act 1912* (NSW) s 170B(6).
21. *Building Professionals Act 2005* (NSW) s 24(4), (5); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2(2), cl 10(4); *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(2); *Civil Procedure Act 2005* (NSW) s 30(4); *Community Justice Centres Act 1983* (NSW) s 28(4), (5); *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49(4); *Health Care Complaints Act 1993* (NSW) s 51(1); *Land and Environment Court Act 1979* (NSW) s 34(11); *Legal Aid Commission Act 1979* (NSW) s 60E(1),(2); *Residential (Land Lease) Communities Act 2013* (NSW) s 153.
22. *Farm Debt Mediation Act 1994* (NSW) s 15(1); *Legal Profession Act 2004* (NSW) s 522(1); *Ombudsman Act 1974* (NSW) s 13A(4)(b).
23. *Anti-Discrimination Act 1977* (NSW) s 91A(4); *Ombudsman Act 1974* (NSW) s 13A(4)(a).
24. *Anti-Discrimination Act 1977* (NSW) s 91A(4); *Health Records and Information Privacy Act 2002* (NSW) s 46(6).
25. *Land and Environment Court Act 1979* (NSW) s 34(12); *Residential (Land Lease) Communities Act 2013* (NSW) s 153.
26. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 2(2).
27. *Building Professionals Act 2005* (NSW) s 24(6); *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(4)(a); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 10(5)(a); *Civil Procedure Act 2005* (NSW) s 30(4); *Community Justice Centres Act 1983* (NSW) s 28(6)(a); *Health Care Complaints Act 1993* (NSW) s 51(3); *Legal Aid Commission Act 1979* (NSW) s 60E(3)(a).
28. *Building Professionals Act 2005* (NSW) s 24(6); *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(4)(a); *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 10(5)(a); *Civil Procedure Act 2005* (NSW) s 30(4); *Health Care Complaints Act 1993* (NSW) s 51(3).
29. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 9(2); *Civil Procedure Act 2005* (NSW) s 29(2); *Community Justice Centres Act 1983* (NSW) s 28(6)(c); *Farm Debt Mediation Act 1994* (NSW) s 15; *Land and Environment Court Act 1979* (NSW) s 34(10); *Legal Profession Act 2004* (NSW) s 521, 522(2); *Small Business Commissioner Act 2013* (NSW) s 19(2).
30. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49(6)(b). Exceptions to non-disclosure across the various schemes are set out at para [7.3]-[7.6].

- disclosure was permitted because there were reasonable grounds to believe that the disclosure was necessary to prevent or minimise the danger of injury to a person or damage to property<sup>31</sup>
  - proceedings were instituted as a result of a disclosure made because there were reasonable ground to suspect that a child or young person is at risk of significant harm.<sup>32</sup>
- 7.15 Some further provide that subpoena or other procedure cannot require a person to produce inadmissible evidence.<sup>33</sup>

## Privilege with respect to defamation

---

### Question 7.3

- (1) In what circumstances should provisions deal with the privilege with respect to defamation in ADR processes?
- (2) How should such provisions be expressed?

- 7.16 A number of provisions extend the privilege with respect to defamation to ADR processes. These provisions generally follow the same format. They state that the same privilege regarding defamation that exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to the content of the ADR session, documents or other materials sent in connection to it, and for the purpose of enabling an ADR session to be arranged.<sup>34</sup>

---

31. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 10(5)(b); *Legal Aid Commission Act 1979* (NSW) s 60E(3)(b); *Civil Procedure Act 2005* (NSW) s 30(4).

32. *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 19(4)(b); *Community Justice Centres Act 1983* (NSW) s 28(6)(b).

33. *Building Professionals Act 2005* (NSW) s 24(7); *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49(5)(b); *Health Care Complaints Act 1993* (NSW) s 51(4).

34. *Civil and Administrative Tribunal Regulation 2013* (NSW) sch 1 cl 10; *Civil Procedure Act 2005* (NSW) s 30; *Community Justice Centres Act 1983* (NSW) s 28; *Community Land Management Act 1989* (NSW) s 69; *Dust Diseases Tribunal Regulation 2013* (NSW) cl 49; *Land and Environment Court Act 1979* (NSW) s 34(10A), 34(10B); *Legal Aid Commission Act 1979* (NSW) s 60D; *Strata Schemes Management Act 1996* (NSW) s 132.





## 8. Types of provisions generally not included in statutes

---

### In brief

We have identified some issues that existing statutory provisions generally do not cover. These particularly relate to applying and enforcing practice and accreditation standards. Some or all of these issues may be more appropriately dealt with by non-statutory regimes. We ask whether these or any other provision should be included in statutory regimes and about the circumstances in which any such provisions should apply.

Applying practice and accreditation standards .....	67
Enforcing practice standards.....	68
Ensuring independence and impartiality .....	71
Identifying and managing power imbalances.....	71
Suspending limitation and prescription periods.....	73

### Question 8.1

- (1) What other types of provisions could be included in statutory schemes for ADR?
- (2) In what circumstances should they apply?

- 8.1 As already observed, each of the provisions outlined in chapter 3 are present in some statutes but not others. This chapter examines some possible provisions that are generally absent from all statutory schemes and asks whether these provisions should be used either generally or in specific contexts.
- 8.2 It is possible that some of these provisions may not be appropriate for legislation but may be more appropriately included in codes of practice or guidelines as part of a self-regulatory scheme such as an ADR practitioner accreditation scheme.<sup>1</sup>

### Applying practice and accreditation standards

---

#### Question 8.2

- (1) In what circumstances should provisions apply practice and accreditation standards to ADR practitioners?
- (2) How should such provisions be framed?
- (3) What alternatives are there for dealing with practice and accreditation standards?

---

1. See ch 9.

- 8.3 At present, the statutory provisions do not set out practice standards that ADR practitioners must follow.
- 8.4 In NSW, a variety of practice and accreditation standards and principles of conduct apply to ADR practitioners who are accredited under the National Mediator Accreditation System (NMAS), as well as, for example, ADR practitioners who are members of the Law Society or the Institute of Arbitrators and Mediators Australia. These are outlined in Chapter 9.<sup>2</sup>
- 8.5 Some standards are already incorporated into many of the statutes, such as confidentiality, non-disclosure of information, and the termination of proceedings. The possibility of incorporating some further specific standards – independence and impartiality and identifying and managing power imbalances - is discussed in more detail below.
- 8.6 One possible approach to applying practice and accreditation standards would be to refer to the NMAS standards in legislation or to require that ADR practitioners be accredited under NMAS.

## Enforcing practice standards

---

### Question 8.3

- (1) In what circumstances should provisions enforce ADR practice standards?
- (2) How should such provisions be framed?
- (3) What alternatives are there for enforcing ADR practice standards?

- 8.7 Question arises about enforcing practice and accreditation standards once they have been established. The existing statutory provisions do not include mechanisms for enforcing practice standards. Failing to adhere to practice standards can lead to poor quality ADR, for example, where an ADR practitioner has failed to:
- display impartiality
  - address negative behaviours of parties or their representatives (for example, bullying or intimidation), or
  - meet required standards of conduct, competency, or effectiveness.<sup>3</sup>
- 8.8 It is particularly important to address such questions of quality for ADR that is an alternative to traditional court or tribunal adjudication, as the Irish Law Reform Commission has recently observed:

To the extent that mediation resolves a dispute which may otherwise have been decided by litigation in court, the questions of the training quality and accountability of mediators are crucial matters that must be considered.<sup>4</sup>

---

2. Para [9.12]-[9.14].

3. See T Sourdin, "Poor Quality Mediation - a system failure?" (2010) 11 (8) *ADR Bulletin* 1.

- 8.9 Litigation is often out of the question because of the immunities currently available, either in statute or in contract.<sup>5</sup> One survey of US case law observed a “surprising dearth of cases alleging mediator misconduct or ethical violations”.<sup>6</sup>
- 8.10 Even if an ADR practitioner has immunity, a question then arises as to whether there should be some complaints mechanism for dealing with unsatisfactory performance. The statutory provisions are currently silent on this point, although the *Ombudsman Act 1974* (NSW) expressly excludes from its reach conduct of a mediator at a mediation session under the *Community Justice Centres Act 1983* (NSW).<sup>7</sup>
- 8.11 Outside of the statutory schemes in NSW, any ADR practitioners who are accredited under the NMAS must, as a condition of ongoing approval, comply with the scheme’s Practice Standards and seek re-approval in accordance with the scheme’s Approval Standards every two years.<sup>8</sup>
- 8.12 The Approval Standards state that a Recognised Mediation Accreditation Body “must have a complaints system that either meets Benchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute”.<sup>9</sup>
- 8.13 The extent to which such complaints systems are available is not clear on the websites of all RMABs. Some RMABs have published detailed procedures. For example, LEADR has a policy that deals with “Compliments, Suggestions and Complaints” which sets out a procedure for dealing with complaints about a member (who may be a mediator, or, other ADR practitioner). Steps that may be taken include:
- taking the complaint no further,
  - referring [the complainant] to another avenue for making the complaint,
  - informing the Member about the complaint and inviting a response,
  - following one or other ADR processes to resolve the complaint, or
  - referring it to be addressed according to LEADR's Constitution and By-Laws dealing with Concerns, Complaints and Investigations into the conduct of Members.
- 8.14 LEADR’s by-laws for investigating and disciplining members provide that, after the investigating committee has investigated and the member has provided any response, the board “will determine by majority whether or not to terminate the

---

4. Ireland, Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation*, Report 98 (2010) [3.154].

5. See para [6.16]-[6.18].

6. J R Coben and P N Thompson, "Disputing Irony: A Systematic Look at Litigation About Mediation" (2006) 11 *Harvard Negotiation Law Review* 43, 95.

7. *Ombudsman Act 1974* (NSW) sch 1 cl 18.

8. *National Mediator Accreditation Standards: Approval Standards*, cl 1.3.

9. *National Mediator Accreditation Standards: Approval Standards*, cl 3.6(c).

Member's membership of LEADR or take other disciplinary action against the Member, and if so what that disciplinary action should be".<sup>10</sup>

8.15 Codes of conduct in other jurisdictions include complaints mechanisms aimed at enforcing practice standards.

8.16 The Centre for Effective Dispute Resolution (CEDR) in England, as part of its dispute resolution service, has a code of conduct for third party neutrals (this includes mediators) which includes a clause dealing with complaints:

The Neutral will respond to, and co-operate with, any complaints procedure initiated by a party through CEDR Solve in relation to the Process in which the Neutral acted, including attending (without charging a fee or claiming any expense for attending) any meeting convened by CEDR Solve as part of that complaints procedure.<sup>11</sup>

8.17 On its website, CEDR undertakes, as part of its complaints process, to:

- Acknowledge the receipt of your complaint within five working days with an indication of how long it will take to send you a detailed response. (If you do not receive an acknowledgement within this timeframe please contact us in the event that it has not been received.)
- Investigate your complaint carefully and thoroughly.
- Write back to you with a full reply within 14 working days (occasionally we may need longer than this but this will be indicated in the acknowledgment letter).
- Should you not be satisfied with the response, the matter will be referred to CEDR's Chief Executive to be considered further and may include a meeting with all concerned parties in an effort to reach a satisfactory conclusion.<sup>12</sup>

8.18 The Chartered Institute of Arbitrators in the UK has set up a detailed complaints procedure that applies to arbitrators who are members of the Institute. It involves review by an independent Professional Conduct Committee, a Peer Review Panel and a Disciplinary Tribunal with power to reprimand, warn, suspend or expel a member.<sup>13</sup>

8.19 The Irish Law Reform Commission has recently recommended the development of a statutory Code of Conduct for Mediators and Conciliators that would improve knowledge, skills and ethical standards; promote standards and quality in practice; and protect "the needs of consumers of mediation or conciliation services and the provision of accountability where they are not met".<sup>14</sup> The proposed code would set

---

10. LEADR, By-laws for the investigation and discipline of members (revised, 2012) cl 2.

11. Centre for Effective Dispute Resolution, *CEDR Solve Code of Conduct for Third Party Neutrals* (2008) cl 8.

12. Centre for Effective Dispute Resolution, "Complaints Procedure" <<http://www.cedr.com/miscellaneous/terms.php>>.

13. Chartered Institute of Arbitrators, *How CI Arb Investigates Complaints of Misconduct against its Members*.

14. Ireland, Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation*, Report 98 (2010) [11.05].

out “uniform complaints, disciplinary and grievance procedures to be enforced by all professional mediation and conciliation bodies” which the Commission observed:

would ensure that such procedures are open and transparent and that all mediators and conciliators would be subject to the same procedures and sanctions for complaints or misconduct.<sup>15</sup>

## Ensuring independence and impartiality

---

### Question 8.4

(1) In what circumstances should provisions aim at ensuring independence and impartiality of ADR practitioners?

(2) How should such provisions be framed?

- 8.20 Apart from mentions of “independence” in a couple of Acts,<sup>16</sup> there is currently nothing in the existing provisions aimed at ensuring the independence or impartiality of ADR practitioners.
- 8.21 Codes of practice and guidelines generally cover such issues. For example, the NMAS practice standards deal with impartiality in the section on impartial and ethical practice.<sup>17</sup> The Law Society’s guidelines for those involved in mediations also state that mediators must be impartial and set out procedures for dealing with situations where the mediator’s impartiality may come into question (particularly in situations of conflict of interest).<sup>18</sup> This is also the case with the European Commission’s European Code of Conduct for Mediators.<sup>19</sup>
- 8.22 A question arises in this context whether goals of justice or fairness in the sense they apply in litigation are, or can be, goals of ADR. This question arises especially in circumstances where ADR is an alternative to court or tribunal adjudication.

## Identifying and managing power imbalances

---

### Question 8.5

(1) In what circumstances should provisions identify and manage power imbalances between participants in ADR sessions?

(2) How should such provisions be framed?

- 
15. Ireland, Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation*, Report 98 (2010) [11.29].
16. *Water Management Act 2000* (NSW) s 62(6), 94(6); *Electricity Supply (General) Regulation 2001* (NSW) cl 131(1)(a). See also para [6.8]-[6.10].
17. Mediator Standards Board, *National Mediator Accreditation Standards: Practice Standards* (2012) part 5.
18. Law Society of NSW, *Dispute Resolution Kit* (2012) 15-16 [5.1]-[5.4].
19. *European Code of Conduct for Mediators* (2004) cl 2.

8.23 It is important to identify and deal with power imbalances in ADR because they can influence any resulting agreement and render the result unfair to the party who has been adversely affected by the imbalance.

8.24 The power imbalance can be physical, for example where violence is present or threatened, or it can be non-physical, for example, economic or psychological. The possibility of violence can arise in any ADR process, but it is especially likely to arise in mediation surrounding Apprehended Personal Violence Orders and mediation under the *Criminal Procedure Act 1986* (NSW).<sup>20</sup>

8.25 In many cases, an ADR practitioner can deal with problems before they arise through a general discretion to accept a dispute for ADR. For example, the NMAS Practice Standards make the following provision regarding “power issues”:

Mediators shall have completed training that assists them to recognise power imbalance and issues relating to control and intimidation and take appropriate steps to manage the mediation process accordingly.

1. Some disputes may not be appropriate for mediation processes because of power imbalance, safety, control and/or intimidation issues.
2. If at any time abuse is present, or implied or threatened, the mediator shall take appropriate measures to ensure the safety of participants. Options include:
  - (a) activating appropriate pre-determined security protocols;
  - (b) using video conferencing or other personal protective and screening arrangements;
  - (c) requiring separate sessions with the participants;
  - (d) enabling a friend, representative, advocate, or legal representative to attend the mediation sessions;
  - (e) referring the participants to appropriate resources; and
  - (f) suspending or terminating the mediation session, with appropriate steps to protect the safety of the participants.<sup>21</sup>

8.26 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) gives the court the option of not referring an apprehended personal violence order matter to mediation:

if the court is of the opinion that:

- (a) there has been a history of physical violence to the protected person by the defendant, or
- (b) the protected person has been subjected to conduct by the defendant amounting to a personal violence offence, or

---

20. *Criminal Procedure Act 1986* (NSW) s 203.

21. Mediator Standards Board, *National Mediator Accreditation Standards: Practice Standards* (2012) 5-6.

- (c) the protected person has been subjected to conduct by the defendant amounting to an offence under section 13, or
  - (d) the defendant has engaged in conduct amounting to harassment relating to the protected person's race, religion, homosexuality, transgender status, HIV/AIDS infection or disability, or
  - (e) there has been a previous attempt at mediation in relation to the same matter and the attempt was not successful.<sup>22</sup>
- 8.27 Currently no express statutory provisions set out an ADR practitioner's responsibilities where physical or other forms of power imbalance are present whether identified before or after the ADR session has commenced.

## Suspending limitation and prescription periods

---

### Questions 8.6

- (1) In what circumstances should provisions suspend any limitation and prescription periods while ADR is attempted?
- (2) How should such provisions be framed?

- 8.28 The question of limitation and prescription periods applying to legal proceedings related to matters that have been submitted to ADR does not appear to have arisen in NSW. The question is only relevant to attempts to resolve disputes that take place before the commencement of civil proceedings.<sup>23</sup>
- 8.29 The European directive on certain aspects of mediation in civil and commercial matters directs member states to ensure that parties to mediation are "not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process".<sup>24</sup>
- 8.30 The earlier draft of the directive included an article that proposed suspending the running of any period of prescription or limitation regarding the claim that is being mediated when:
- (a) the parties agree to use mediation,
  - (b) the use of mediation is ordered by a court, or

---

22. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21(2). Amendments to this Act, expected to commence later in 2014, require the court to refer an APVO matter for mediation under the CJC Act "unless it is satisfied there is good reason not to do so". The court may then use the matters listed in s 21(2) in determining whether there is a "good reason": *Crimes (Domestic and Personal Violence) Amendment Act 2013* (NSW) sch 2 [1]-[3].

23. See para [3.5]-[3.7].

24. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

- (c) an obligation to use mediation arises under the national law of a Member State.<sup>25</sup>

- 8.31 The draft directive also provided the prescription or limitation period resumes running “from the time the mediation ended without a settlement agreement, counting from the date when one or both of the parties or the mediator declares that the mediation is terminated or effectively withdraws from it”.<sup>26</sup>
- 8.32 The Irish Law Reform Commission, in its recent report on ADR, recommended that “where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period ... may apply, the parties ... may agree in writing to suspend the running of any relevant limitation period from the commencement of the mediation or conciliation to the termination of the mediation or conciliation”. The aim of the provision was to provide certainty to the parties. It would also have the effect of preventing some parties from using ADR as a delaying tactic.<sup>27</sup>

---

25. *Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters* [SEC(2004) 1314] art 7(1).

26. *Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters* [SEC(2004) 1314] art 7(1).

27. Ireland, Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation*, Report 98 (2010) [4.78]-[4.79].



## 9. The regulatory framework

---

### In brief

In addition to statutory provisions, contract, codes of practice, guidelines and other legal frameworks can regulate ADR. We ask about the role that the different forms of regulation should play and how they should interact with each other.

<b>Relationships between various forms of regulation</b> .....	<b>75</b>
<b>Acts and Regulations</b> .....	<b>76</b>
<b>Contracts</b> .....	<b>77</b>
Agreements to undertake ADR if dispute arises .....	<b>77</b>
Agreements to undertake ADR after the dispute has arisen.....	<b>78</b>
<b>Codes of practice and guidelines</b> .....	<b>79</b>
Governing ADR proceedings.....	<b>79</b>
Governing ADR practitioners .....	<b>81</b>
<i>National Mediator Accreditation System</i> .....	<b>81</b>
<i>Other guidelines and rules</i> .....	<b>81</b>
Governing lawyers in ADR proceedings .....	<b>83</b>
Guidelines for parties to ADR proceedings.....	<b>83</b>
<b>Model provisions</b> .....	<b>84</b>

- 9.1 The terms of reference ask us to consider the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution. This chapter considers some of the possible methods of regulating ADR proceedings and the conduct of people involved in those proceedings through the use of legislation, contracts, and codes of practice and guidelines.

### Relationships between various forms of regulation

---

#### Questions 9.1

- (1) How should ADR be regulated in different contexts?
- (2) What role should different forms of regulation play?

- 9.2 In light of the primary focus of this review being the statutory provisions that provide for mediation and other forms of dispute resolution, one of the overarching questions must be how the various other forms of regulation relate or could relate to the statutory frameworks.
- 9.3 As already noted, the standards contained in the codes of practice and guidelines overlap with the standards contained in some of the statutory provisions, for example, provisions on confidentiality, disclosure of information and termination of ADR proceedings.

- 9.4 Should the role of legislation be to override other provisions (whether in codes of practice, guidelines, or contracts), fill gaps left by the other provisions, or simply to support the operation of the other forms of regulation?

## Acts and Regulations

---

### Question 9.2

- (1) What role should Acts and Regulations play in regulating ADR?
- (2) In what circumstances would provisions in Acts and Regulations be appropriate for regulating ADR?
- (3) What provisions that regulate ADR in current Acts and Regulations are inappropriate?

- 9.5 As already noted, the provisions in existing Acts and Regulations are diverse, not uniform and not used in all cases. Indeed some provisions may not be appropriate for all circumstances. A wider question is whether, in some cases, legislation is needed at all.
- 9.6 The National Alternative Dispute Resolution Advisory Council (NADRAC) has produced a guide for government policy makers that sets out questions to ask when contemplating the need for ADR provisions in Acts and Regulations, as opposed to other forms of regulation or, indeed, no regulation at all:

When contemplating initiatives involving ADR mechanisms, several initial questions need to be asked about the need for, and nature of, any legislative provisions that might deal with those mechanisms. They are:

1. What are the risks or problems to be addressed?
2. Is there a need for legislation to deal with that risk or problem? For example, could the issue be dealt with better by relying on:
  - (a) the common law
  - (b) contractual arrangements between the parties and the ADR practitioner or service provider
  - (c) codes of practice or other self-regulatory mechanisms, or
  - (d) existing overarching legislation?
3. If a legislative provision is considered necessary or desirable, what formulation is most appropriate? For example:
  - (a) does other legislation provide a useful model, and
  - (b) to what extent should the provision be consistent with other legislation?

4. Is the type of legislative instrument that is most appropriate:
  - (a) an Act, or
  - (b) regulations?<sup>1</sup>

## Contracts

---

### Question 9.3

- (1) What role should contracts play in regulating ADR?
- (2) In what circumstances would contractual provisions be appropriate for regulating ADR?

9.7 Contracts governing ADR can be entered into before or after a dispute arises.

### Agreements to undertake ADR if dispute arises

9.8 The first possibility is that parties to an agreement can include a clause in their contract that provides for ADR in the case of dispute (usually contained in commercial contracts). Examples include:

- **Law Society of NSW's model clause** which provides for pre-filing mediation, so that a party cannot commence legal or arbitration proceedings (apart from urgent interlocutory relief) unless the party has participated in mediation under the clause. The clause requires the parties to mediate the dispute "with a genuine commitment to participate" and in accordance with the Law Society's mediation guidelines.<sup>2</sup> The model clause also provides that if a party refuses to participate that party is deemed to have consented to a decree of the Supreme Court of NSW that it will specifically perform the agreement to mediate.<sup>3</sup>
- **NADRAC's model clause** which is closely based on the Law Society of NSW's precedent.<sup>4</sup> The major point of difference is that the NADRAC clause requires the parties to act "in good faith, and in accordance with the Practice Standards articulated in the National Mediator Accreditation System".<sup>5</sup>
- **Australian Commercial Dispute Centre's (ACDC) model ADR clauses** which cover a variety of ADR processes including mediation, conciliation, expert determination and arbitration:
  - The mediation and conciliation clauses are very similar in content, providing that if a dispute arises out of the contract, the parties agree to endeavour to settle the dispute by mediation/conciliation administered by the ACDC

1. National Alternative Dispute Resolution Advisory Council, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters* (2006) [2.1].

2. Law Society of NSW, *Dispute Resolution Kit* (2012) 36.

3. The Supreme Court's power to order mediation with or without the consent of the parties to the proceedings may be found in *Civil Procedure Act 2005* (NSW) s 26(1).

4. National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution in the Civil Justice System* (2009) 27.

5. National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution in the Civil Justice System* (2009) 59.

before having recourse to arbitration or litigation. The clauses further state that the mediation/conciliation will be conducted in accordance with the procedures contained within the *ACDC Guidelines for Commercial Mediation*<sup>6</sup> and *Guidelines for Commercial Conciliation*<sup>7</sup> respectively.

- The expert determination clause stipulates that the parties agree to settle the dispute by expert determination administered by the ACDC, which shall be conducted in accordance with the *ACDC Rules for Expert Determination*, setting out the procedures to be adopted, process of selection of the expert and costs involved.<sup>8</sup>
- The arbitration clause provides that the parties agree to refer their dispute for arbitration conducted by the ACDC with reference to the *ACDC Rules for Arbitration* that are deemed incorporated into the agreement.<sup>9</sup>
- **Centre for Effective Dispute Resolution’s (CEDR) *Model ADR Contract Clauses*** which range from simple core mediation clauses<sup>10</sup> to provisions about parallel court proceedings,<sup>11</sup> to clauses preventing the commencement of arbitration or court proceedings until after mediation conferences have been terminated,<sup>12</sup> and international mediation clauses.<sup>13</sup>

### Agreements to undertake ADR after the dispute has arisen

9.9 The second possibility is that, after a dispute has arisen, parties can enter into an agreement about the ADR procedures they will follow. Examples include:

- **Law Society of NSW’s *Agreement to Mediate*** which operates between the mediator and the participants and covers questions such as mediator impartiality and conflicts of interest, the parties’ use of best endeavours, representation of the parties, confidentiality, suspension or termination of the mediation, exclusion of liability for the mediator, enforcement of a settlement agreement, and the costs of the mediation.<sup>14</sup>
- **CEDR’s *Model Mediation Agreement*** operates between CEDR, the parties and the mediator, and deals with issues including authority, confidentiality, fees and the status of agreements.<sup>15</sup> CEDR has also produced a ***Model Early Neutral Evaluation Agreement*** and ***Model Expert Determination Agreement***, which contain clauses on independence, confidentiality, the option to refer to mediation, liability and fees,<sup>16</sup> and for the *Expert Determination Agreement* specifically, implementation of the decision.<sup>17</sup> This is in addition to

---

6. Australian Commercial Dispute Centre, *Dispute Resolution Sample Clauses* (2012) 1.  
 7. Australian Commercial Dispute Centre, *Dispute Resolution Sample Clauses* (2012) 2.  
 8. Australian Commercial Dispute Centre, *Dispute Resolution Sample Clauses* (2012) 3.  
 9. Australian Commercial Dispute Centre, *Dispute Resolution Sample Clauses* (2012) 4.  
 10. Centre for Effective Dispute Resolution, *Model ADR Contract Clauses* (2010) 6.  
 11. Centre for Effective Dispute Resolution, *Model ADR Contract Clauses* (2010) 8.  
 12. Centre for Effective Dispute Resolution, *Model ADR Contract Clauses* (2010) 9.  
 13. Centre for Effective Dispute Resolution, *Model ADR Contract Clauses* (2010) 11.  
 14. Law Society of NSW, *Dispute Resolution Kit* (2012) 27-30.  
 15. Centre for Effective Dispute Resolution, *Model Mediation Agreement* (2012) 1-3.  
 16. Centre for Effective Dispute Resolution, *Model Early Neutral Evaluation Agreement* (2001) 2-4;  
 Centre for Effective Dispute Resolution, *Model Expert Determination Agreement* (2013) 1-4.  
 17. Centre for Effective Dispute Resolution, *Model Expert Determination Agreement* (2013) 3.

supplementary guidance notes for both Model Agreements covering issues such as procedure.<sup>18</sup>

## Codes of practice and guidelines

### Question 9.4

- (1) What role should codes of practice and guidelines play in regulating ADR?
- (2) In what circumstances would codes of practice or guidelines be appropriate for regulating ADR?
- (3) What should the codes of practice or guidelines contain?

- 9.10 A range of codes of practice and guidelines applies in ADR contexts, some being mandatory and others advisory. Some can be, and are, incorporated by agreement of the parties to a dispute or potential dispute. These instruments can apply to ADR proceedings, ADR practitioners, parties and legal representatives, and are not mutually exclusive in application.

### Governing ADR proceedings

- 9.11 Numerous guidelines and codes of practice can apply to govern the conduct of ADR proceedings themselves. Examples include:
- **Institute of Arbitrators and Mediators Australia's *Mediation Rules*** bind parties where they have agreed that a dispute arising between them will be submitted to mediation in accordance with the Rules. The Rules are, however, subject to any applicable law which deals with mediation and to any agreement between the parties relating to the mediation process. These Rules govern issues such as mediator appointment, ADR procedure (including confidentiality, role of the mediator and parties, and termination), as well as general provisions as to costs, subsequent proceedings and liability of the mediator.<sup>19</sup>
  - In the area of consumer disputes, the Institute of Arbitrators and Mediators Australia has also established a **Consumer Dispute Resolution Scheme** that sets out two processes to resolve consumer claims against manufacturers or suppliers of goods or services.
  - **ACDC** provides guidelines for mediation in both commercial and workplace contexts and conciliation for commercial disputes, in addition to rules for expert determination and domestic arbitration.
    - ***Guidelines for Commercial Mediation and Guidelines for Commercial Conciliation*** may be invoked by the parties referring the dispute to ACDC either voluntarily, by Court order or as a consequence of an ACDC mediation clause in the contract, and the parties will be bound by the

18. Centre for Effective Dispute Resolution, *Model Early Neutral Evaluation Agreement* (2001) 5-6; Centre for Effective Dispute Resolution, *Model Expert Determination Agreement* (2013) 5-6.

19. Institute of Arbitrators and Mediators Australia, *Mediation Rules* (2007) 1-6.

terms.<sup>20</sup> The **Guidelines for Workplace Mediation** stipulate that if the parties have invoked the *Guidelines*, its terms are binding and parties are to participate fully in the mediation process.<sup>21</sup> These three *Guidelines* are similar in content, containing a framework for the mediation and conciliation procedure including issues such as selecting a mediator, neutrality and authority of the mediator, representation and attendance, confidentiality, enforcement of settlement agreements and liability.<sup>22</sup> In addition, the *Commercial Guidelines* provide specifically for notification of parties to the dispute of the nature of the dispute and the solution the party seeks.<sup>23</sup> The *Workplace Guidelines* provide specifically for requests for mediation, identification of issues and privacy.<sup>24</sup>

- **Rules for Expert Determination** state that parties which enter into a binding agreement to submit their dispute for expert determination are, if they invoke these Rules, deemed to have agreed to be bound by their terms.<sup>25</sup> The Rules cover issues such as notification of parties to the dispute, expert selection and neutrality, representation and attendance, liability and fees.<sup>26</sup>
- **Rules for Domestic Arbitration** provide that parties submit a dispute to an arbitrator of their choice and the arbitrator makes an award binding on the parties.<sup>27</sup> These Rules include notification of parties to the dispute, arbitrator selection, neutrality and authority, procedure, confidentiality, termination and liability.<sup>28</sup>
- **International Chamber of Commerce’s Mediation Rules** address their application in situations where there is and is not an existing agreement to refer to the Rules, as well as mediator selection and fees, conduct of the mediation, termination and confidentiality.<sup>29</sup>
- **CEDR’s Model Mediation Procedure** covers referral to mediation, mediator selection, preparation for conferences, mediation procedure, conclusion and confidentiality.<sup>30</sup>
- **Chartered Institute of Arbitrator’s Arbitration Rules and Practice Guideline on Mediation Rules** covers similar issues including ADR initiation, appointment of the mediator, procedure, confidentiality and costs.<sup>31</sup> In addition, the *Mediation*

---

20. Australian Commercial Dispute Centre, *Guidelines for Commercial Mediation* (2012) 1; Australian Commercial Dispute Centre, *Guidelines for Commercial Conciliation* (2012) 1.

21. Australian Commercial Dispute Centre, *Guidelines for Workplace Mediation* (2012) 1.

22. Australian Commercial Dispute Centre, *Guidelines for Commercial Mediation* (2012) 2-7; Australian Commercial Dispute Centre, *Guidelines for Workplace Mediation* (2012) 2-7.

23. Australian Commercial Dispute Centre, *Guidelines for Commercial Mediation* (2012) 2.

24. Australian Commercial Dispute Centre, *Guidelines for Workplace Mediation* (2012) 2, 4.

25. Australian Commercial Dispute Centre, *Rules for Expert Determination* (2012) 1.

26. Australian Commercial Dispute Centre, *Rules for Expert Determination* (2012) 2-5.

27. Australian Commercial Dispute Centre, *Rules for Domestic Arbitration* (2012) 1.

28. Australian Commercial Dispute Centre, *Rules for Domestic Arbitration* (2012) 2-8.

29. International Chamber of Commerce International Centre for ADR, *ICC Mediation Rules* (2014) cl 1-10.

30. Centre for Effective Dispute Resolution, *Model Mediation Procedure* (2010) 1-6.

31. Chartered Institute of Arbitrators, *Arbitration Rules* (2000) 1-11, Chartered Institute of Arbitrators, *Practice Guidelines 4: Mediation Rules* 1-4.

*Rules* provide for disqualification and replacement of a mediator where there is a conflict of interest or compromise of independence.<sup>32</sup>

## Governing ADR practitioners

- 9.12 In addition to the National Mediator Accreditation System (NMAS) which applies to accredited ADR practitioners operating in NSW, there are a number of models for governing the conduct and practice of ADR practitioners in NSW broadly. Numerous models are also available from international jurisdictions.

### *National Mediator Accreditation System*

- 9.13 The features of the NMAS are as follows:
- Mediators voluntarily accredited by Recognised Mediator Accreditation Bodies (RMABs) under the NMAS are required to comply with the system's Approval Standards and Practice Standards.<sup>33</sup> Accreditation under the NMAS is, however, not expressly required for any of the statutory schemes of mediation in NSW.
  - The **Approval Standards**, which apply to mediators seeking accreditation under the NMAS, specify requirements for mediators seeking to obtain approval under the voluntary national accreditation system and define minimum qualifications and training.<sup>34</sup>
  - The **Practice Standards**, covering mediators operating under the NMAS specify practice and competency requirements for mediators and inform participants and others about what they can expect of the mediation process and mediators.<sup>35</sup> The Practice Standards require a mediator, for example, to respect the confidentiality of participants, manage power imbalances, be impartial, and to conduct the mediation process in a procedurally fair manner.<sup>36</sup>
  - Both Standards acknowledge that where mediators practise under existing legislative frameworks, the legislative requirements will override the Practice Standards to the extent of any inconsistency.<sup>37</sup>

### *Other guidelines and rules*

- 9.14 Other guidelines and rules include:
- **Law Society of NSW's Guidelines for Legal Practitioners who Act as Mediators** applies to all solicitors who act as mediators "in the ordinary course of providing legal services in private practice".<sup>38</sup> They include provisions relating

32. Chartered Institute of Arbitrators, *Practice Guidelines 4: Mediation Rules 2*.

33. Mediator Standards Board, *Approval Standards* (2012) 1; Mediator Standards Board, *Practice Standards* (2012) 1.

34. Mediator Standards Board, *Approval Standards* (2012) 1.

35. Mediator Standards Board, *Practice Standards* (2012) 1.

36. Mediator Standards Board, *Practice Standards* (2012) 6-7, 10-11.

37. Mediator Standards Board, *Approval Standards* (2012) 2; Mediator Standards Board, *Practice Standards* (2012) 2.

38. Law Society of NSW, *Dispute Resolution Kit* (2012) 13.

to qualifications, impartiality, confidentiality, disclosure of information, termination, and the attendance of observers and support people.<sup>39</sup>

- **Law Council of Australia's *Ethical Guidelines for Mediators*** provides an ethical framework for mediators, incorporating issues such as the need for impartiality, confidentiality, how to avoid conflicts of interest, the mediator's competence and ethical advertising, termination of mediation, recording settlement and fees.<sup>40</sup>
- **Institute of Arbitrators and Mediators Australia's *Principles of Conduct*** are intended to apply to all types of mediation, but are subject to legislative arrangements and contractual agreements. These Principles cover issues such as the self-determinative nature of mediation, impartiality, competence, confidentiality, advertising, fees, and the mediator's duty to improve the mediation process.<sup>41</sup>
- **European Commission's *Code of Conduct for Mediators*** to which individual mediators or organisations providing mediation may voluntarily commit. It covers competence, appointment, independence and fees of mediators, in addition to mediation procedure, settlement and confidentiality.<sup>42</sup>
- **CEDR's *Code of Conduct for Third Party Neutrals*** applies to people acting as mediators or independent ADR facilitators in the UK. It provides for facilitator competence, fees, independence and neutrality, as well as parties' withdrawal from the process and complaints.<sup>43</sup>
- **Chartered Institute of Arbitrators' *Code of Professional and Ethical Conduct for Members*** guides members of the Institute who are ADR practitioners as to the ethical conduct of ADR duties they owe both on behalf of and independently of the Institute, dealing with issues such as integrity, conflicts of interest, conduct and confidentiality.<sup>44</sup>
- **American Bar Association's *Model Standards of Conduct for Mediators*** provides ethical guidelines for mediators. In addition to standard content such as conflicts of interest, confidentiality and fees, the Model Standards discuss the need to support parties' self-determination, and for mediators to ensure the quality of the process and advance the practice of mediation such as by participating in education efforts and striving to make mediation services more accessible.<sup>45</sup>
- **Law Reform Commission of Ireland's *Code of Conduct for Mediators and Conciliators*** is an example of how the accreditation, training and regulation of ADR practitioners can also be governed by statute. This statutory document aims to improve skills and ethical standards of ADR facilitators, promote quality of practice, and provide accountability in the provision of ADR services, and is designed to complement the existing framework for the regulation of ADR

---

39. Law Society of NSW, *Dispute Resolution Kit* (2012) 14-19.

40. Law Council of Australia, *Ethical Guidelines for Mediators* (2011) 4-9.

41. Institute of Arbitrators and Mediators Australia, *Principles of Conduct for Mediators* (2003) 1-3.

42. European Commission, *European Code of Conduct for Mediators* (2004) 1-3.

43. Centre for Effective Dispute Resolution, *Code of Conduct for Third Party Neutrals* (2008) 1-3.

44. Chartered Institute of Arbitrators, *Code of Professional and Ethical Conduct for Members* (2009) 1-3.

45. American Bar Association, *Model Standards of Conduct for Mediators* (2005) 3-9.



practitioners undertaken by ADR professional bodies.<sup>46</sup> Enforcement of the statutory Code is suggested either to be self-regulated by ADR professional bodies responsible for disciplining members in breach, or carried out by a regulatory body with its own disciplinary procedures.<sup>47</sup>

## Governing lawyers in ADR proceedings

9.15 Lawyers who take part in ADR proceedings as representatives are also subject to professional standards or guidelines:

- **Law Society of NSW's *Professional Standards for Legal Practitioners in Mediation*** discusses the role of legal practitioners in both preparing clients for mediation, and in the mediation itself, dealing with a number of issues including confidentiality, good faith participation, and mediation conduct standards.<sup>48</sup>
- **Law Council of Australia's *Guidelines for Lawyers in Mediations*** provides assistance to lawyers representing clients in the mediation of disputes, covering areas such as the timing of mediation, preparation for and conduct of the mediation, confidentiality and good faith requirements and post-conference requirements.<sup>49</sup>

## Guidelines for parties to ADR proceedings

9.16 Finally, a number of guidelines are available for parties participating in ADR:

- **Law Society of NSW's *Guide to the Rights and Responsibilities of Participants*** explains to parties what they can expect of the mediator and the mediator's role in the proceedings, in addition to what parties can expect at different stages of the mediation process itself. It also discusses the obligations of the parties in the course of mediation, such as attendance and preparation.<sup>50</sup>
- **Law Council of Australia's *Guidelines for Parties in Mediations*** provides guidelines for parties engaged in mediation, providing information about the mediation process, the role of the parties and representatives, confidentiality, attendance, resolution, termination and post-mediation procedures. It also provides a practical guide about how to select a mediator and prepare for mediation.<sup>51</sup>
- **NADRAC's *Your Guide to Dispute Resolution*** provides information to individuals about managing and resolving disputes using ADR processes, providing guidance about how to prepare for ADR sessions, how the sessions are conducted and costs. It further discusses legal and non-legal support

46. Law Reform Commission of Ireland, *Alternative Dispute Resolution: Mediation and Conciliation* (2010) 180.

47. Law Reform Commission of Ireland, *Alternative Dispute Resolution: Mediation and Conciliation* (2010) 185.

48. Law Society of NSW, *Dispute Resolution Kit* (2012) 20-21.

49. Law Council of Australia, *Guidelines for Lawyers in Mediations* (2011) 3-8.

50. Law Society of NSW, *Dispute Resolution Kit* (2012) 22-25.

51. Law Council of Australia, *Guidelines for Parties in Mediations* (2011) 3-10.

available to parties, confidentiality, what participation is expected of parties and their legal obligations.<sup>52</sup>

## Model provisions

---

### Questions 9.5

If Acts and Regulations, contracts or guidelines were to be used to govern ADR in different contexts:

- (a) what model provisions could be developed, and
- (b) how could they be applied?

- 9.17 One option might be to develop model provisions (either sole options or alternatives) that could be:
- applied, by statute, across the board in all cases, or
  - applied, through a mix of statute or other forms of regulation (such as contracts, codes of practice or guidelines), on a case by case basis.
- 9.18 In the second option, the use of model provisions would depend very much on needs in the particular case, as some provisions might not be appropriate in every circumstance. For example, the *Civil Procedure Act 2005* (NSW) provides that an arbitration award is final and conclusive, and is taken to be a judgment of the referring court if it is expressed to be made by consent of all parties on the date it is received by the referring court, or in any other case, at the expiry of a period of time after it is sent to the parties.<sup>53</sup> Such a provision would be appropriate in the context of formal arbitration, but would not be appropriate in other contexts involving other forms of ADR.

---

52. NADRAC, *Your Guide to Dispute Resolution* (2012) 26-35.

53. *Civil Procedure Act 2005* (NSW) s 39(2), s 40(a)-(b).

## Appendix A: Existing NSW statutory provisions that deal with ADR

Act or Regulation	ADR provisions
<i>Aboriginal Land Rights Act 1983</i>	s 239A, s 239
<i>Anti-Discrimination Act 1977</i>	pt 9 div 2 subdiv 3
<i>Apprenticeship and Traineeship Act 2001</i>	s 40, s 50
<i>Architects Act 2003</i>	s 40
<i>Associations Incorporation Regulation 2010</i>	sch 1 cl 10
<i>Building Professionals Act 2005</i>	s 24
<i>Children and Young Persons (Care and Protection) Act 1998</i> Children and Young Persons (Care and Protection) Regulation 2012 Children's Court Rule 2000	s 37, s 65, s 65A, s 114, s 117 cl 19 cl 24, 25
<i>Civil and Administrative Tribunal Act 2013</i> <i>Civil and Administrative Tribunal Regulation 2013</i>	s 37, 59 sch 1
<i>Civil Procedure Act 2005</i> <i>Uniform Civil Procedure Rules 2005</i>	pt 4, pt 5 pt 20
<i>Community Justice Centres Act 1983</i>	
<i>Community Land Management Act 1989</i> Community Land Management Regulation 2007	pt 4 div 2 and s 64 pt 3
<i>Conveyancers Licensing Act 2003</i>	s 44
<i>Co-operatives Act 1992</i> see also Co-operatives National Law s 584(1)	s 105E(1)(b)
<i>Crimes (Domestic and Personal Violence) Act 2007</i>	s 21
<i>Criminal Procedure Act 1986</i>	s 203
<i>Dust Diseases Tribunal Regulation 2013</i>	pt 4 div 4
<i>Electricity Supply (General) Regulation 2001</i>	pt 9 div 4
<i>Employment Protection Act 1982</i>	s 13
<i>Entertainment Industry Act 2013</i>	s 20
<i>Farm Debt Mediation Act 1994</i>	
<i>Government Information (Information Commissioner) Act 2009</i>	s 19
<i>Health Care Complaints Act 1993</i>	pt 2 div 8, pt 2 div 9

CP 16 Dispute resolution: frameworks in NSW

Act or Regulation	ADR provisions
<i>Health Record and Information Privacy Act 2002</i>	s 46
<i>HomeFund Commissioner Act 1993</i> (Office disbanded in 1998)	s 8
Land and Environment Court Act 1979 Land and Environment Court Rules 2007	s 34, s 34AA pt 6.2
<i>Legal Aid Commission Act 1979</i>	pt 3A
<i>Legal Profession Act 2004</i>	pt 3.2 div 8, pt 4.3
<i>Local Court Act 2007</i> Local Court Rules 2009	s 36 rule 2.5, rule 4.3
<i>Local Government Act 1993</i>	s 440I
<i>Mining Act 1992</i>	pt 8 div 2
<i>National Parks and Wildlife Act 1974</i>	s 71K
<i>Occupational Associations (Complaints and Discipline) Code</i> (Professional Standards Act 1994 sch 1)	cl 6, 9
<i>Ombudsman Act 1974</i>	pt 3
<i>Petroleum (Onshore) Act 1991</i>	pt 4A
<i>Police Act 1990</i>	s 176
<i>Poultry Meat Industry Regulation 2008</i>	cl 12
<i>Privacy and Personal Information Protection Act 1998</i>	s 49
<i>Real Property Act 1900</i>	s 135
<i>Residential (Land Lease) Communities Act 2013</i>	s 69, pt 12, div 1 and 2
<i>Retail Leases Act 1994</i>	pt 8 div 2
<i>Retirement Villages Act 1999</i>	pt 8 div 2
<i>Small Business Commissioner Act 2013</i>	s 17-19
<i>Strata Schemes Management Act 1996</i> <i>Strata Schemes Management Regulations 2010</i>	ch 5 pt 2 pt 8
<i>Succession Act 2006</i>	s 98
<i>Thoroughbred Racing Act 1996</i>	s 29G
<i>Veterinary Practice Act 2003</i>	s 43(3)
<i>Water Act 1912</i>	s 170B
<i>Water Management Act 2000</i>	s 62, s 93

## Existing NSW statutory provisions that deal with ADR Appendix A

Act or Regulation	ADR provisions
<i>Work Health and Safety Act 2011</i>	s 142(2)
<i>Workplace Injury Management and Workers Compensation Act 1998</i> <i>Workers Compensation Commission Rules 2011</i>	ch 7 Pt 6 div 4, s 355 r 17.9-17.12



**Law Reform Commission**  
Attorney General & Justice

**NSW Law Reform Commission**

Level 13 Swire House  
10 Spring Street  
Sydney NSW 2000 Australia

GPO Box 5199  
Sydney NSW 2001 Australia  
DX 1227 Sydney

Phone: 02 8061 9270  
Fax: 02 8061 9376  
Email: [nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)  
Internet: [www.lawreform.lawlink.nsw.gov.au](http://www.lawreform.lawlink.nsw.gov.au)

ISSN 18346901  
ISBN 978 1 922254 00 9