

Alternative Dispute Resolution (ADR) Principles: From Negotiation to Mediation

Professor Tania Sourdin¹⁾

Introduction

Alternative Dispute Resolution (ADR) is now widely used around the world to deal with disputes and conflicts as well as agreement-making and planning. Forms of ADR initially developed in many countries often supported third-party decision-making and therefore tended to be more advisory or decisional and less facilitative (for example, arbitral forms of ADR were introduced in many jurisdictions before mediation). However, in recent years, there has been an increasing emphasis on the more facilitative forms of ADR that are underpinned by interest-based or integrative forms of negotiation and are founded on principles of self-determination. The extent to which these more facilitative forms of ADR, such as mediation, are adopted and adapted varies from country to country and can be a reflection of local cultural and societal norms, dispute resolution and negotiation preferences and the differing approaches to the location and policies that apply to ADR. This article considers the reasons why facilitative forms of ADR have become so popular in many jurisdictions, with a particular emphasis on Australia, and the nature of the ADR processes that have emerged.

In this context, ADR has mostly been defined as an ‘umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’.²⁾ It is noted that

1) Professor of Law and Director, Australian Centre for Justice Innovation (ACJI), Monash University, Victoria, Australia. Contact Tania.Sourdin@Monash.edu. Parts of this article are drawn from Tania Sourdin, *Alternative Dispute Resolution*, 4th ed, Thomson Reuters 2012.

2) National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute*

exceptions now arise in ADR, and not all ADR involves an impartial third party. For example, 'collaborative practice' (referred to in more detail below) involves a team approach and does not ordinarily involve a third party who is an impartial facilitator (although some collaborative team models may promote this).

Generally, however, most dispute resolution processes are classified as facilitative, advisory or determinative or as 'mixed' or 'blended', and this article focuses on the more facilitative forms:³⁾

(a) *Facilitative* processes involve a third party, usually with no advisory or determinative role, providing assistance in managing the process of dispute resolution. These processes include mediation and facilitation.⁴⁾

(b) *Advisory* processes involve a third party who investigates the dispute and provides advice on the facts and possible outcomes. These procedures include investigation, case appraisal and dispute counselling.

(c) *Determinative* processes involve a third party investigating the dispute, which may include a formal hearing, and the making of a determination that is potentially enforceable. These processes include adjudication and arbitration⁵⁾ and may be binding or non-binding.

While there are many reasons why facilitative processes have become more popular in recent years, one critical factor relates to the location of ADR services. Where ADR takes place within the courts or in a court-connected framework, such processes may be more likely to be advisory and be the subject of legal negotiation patterns. Arguably, one reason why facilitative mediation has grown so quickly in Australia is because it is often located outside the court system. While in Australia there has been substantial growth in facilitative ADR both within and outside the court system, in many disputes ADR must be used before court proceedings can be commenced. For example,

Resolution Terms (March 2003). See also NADRAC, *National Principles for Resolving Disputes and Supporting Guide*, (April 2011).

3) Adopting the terminology used in NADRAC, *Alternative Dispute Resolution Definitions* (March 1997).

4) NADRAC, *Alternative Dispute Resolution Definitions* (March 1997), 7.

5) Adopting the terminology used in NADRAC, *Alternative Dispute Resolution Definitions* (March 1997).

in some cases, court proceedings cannot be filed until a certificate has been lodged indicating that the parties have attended a mediation or in other situations parties must have made a 'genuine effort' or made 'reasonable attempts' to resolve the dispute before commencing proceedings.

Within Australia, the most striking example of an extensive mandatory pre-litigation ADR system exists in the family relationships area, and most disputants can expect to attend some form of mandatory ADR before being able to commence proceedings in a court. In the context of civil disputes, a myriad of requirements and obligations require 'would-be litigants' to attempt to resolve disputes as a pre-condition to commencing court proceedings. If court proceedings commence, it is relatively common for matters to be referred to ADR that can be conducted by court registrars and most often by private ADR practitioners (it remains rare for judges to be involved in ADR). The placement of many ADR processes outside the courts has meant that often the forms of ADR are less likely to involve an argument about legal rights and positions (that may not be defined) and are more likely to involve a discussion about needs and interests.

The attraction of the more facilitative forms of ADR (rather than advisory or determinative forms of ADR, such as expert appraisal and arbitration) can also be explained by their lower cost and speed. However, other factors have been relevant. Part of the shift can be described within a cultural context, and management theorists suggest that this shift away from hierarchical adjudicative models of dispute resolution (such as arbitration) to more collaborative decision-making models (such as mediation) has taken place in many management contexts. In this context, the growth of cooperative conflict and dispute resolution processes, such as mediation in the business sector, appears to have emerged in response to changing management and organisational trends. More generally, a focus on self-determination and empowerment is designed to equip citizens with more effective conflict resolution skills and more productive and strategic relationship skills and thus produce a more conflict-competent society.

Other reasons for a focus on facilitative ADR are linked to risk assessments

that have influenced government and industry interest in these models. Government and industry have identified through a series of policy and other initiatives that litigation involvement can be costly, damaging to long-term relationships and risky in terms of outcomes. Facilitative ADR is often well supported as it does not compete with the adjudicative role of the courts and judges, and as it involves self-determination, rather than determination by another, it is more likely to lead to satisfied disputants and compliance with outcomes. These features of facilitative ADR are coupled with relatively high resolution rates that remain high (in many instances, above 80 per cent) even where ADR is mandatory and required as a pre-condition to using the court system.

The shift towards more facilitative forms of ADR has also been supported by significant systemic and other reforms that have included the establishment of a mediator-credentialing scheme and the redefinition of 'justice' to include courts and tribunals as well as the extensive ADR system. As a result of these changes, ADR has been increasingly 'professionalised', and a large number of practitioners, many of whom are non-lawyers, now work in ADR that operates outside the court system. This article considers these changes and the emergence of values and principles that continue to guide the development of these facilitative forms of ADR.

Negotiation Models, Styles and Behaviours

The increased reliance on and interest in facilitative ADR has emerged in tandem with the development of more solid theoretical foundations to explore negotiation behaviours, models and styles. Some of this work has been the product of advances in science and other work in respect of behavioural psychology. For example, in analysing negotiation, there has been a greater understanding that, more often than not, the choices made in negotiation are the result of learned responses. That is, we consider the situation and then without conscious choice use a style or approach we have used before. Or our reaction is driven by our emotional or neurobiological response to the situation

(including the degree to which we consider that we have been respected or dealt with 'fairly'). It is now understood that, in addition, we may not act strategically (or usefully) in a negotiation, and productive negotiation is more likely where people have learned useful negotiation approaches or are assisted by an ADR process.

ADR is necessary partly because many lack a sophisticated understanding of negotiation or are unable to access negotiation skills when in conflict. Many responses in negotiation are driven by basic reactions to conflict that have developed from a young age when we first react to fear or anxiety with a primitive 'fight-or-flight' response – a state in which the body prepares to cope with a threat. Undoubtedly, the responses we have to a negotiation and our communication styles are derived from the approaches we learnt from and in our family groups.

Negotiations can become 'difficult' partly because most of us, when in a negotiation situation, automatically assume a familiar approach without realising that other strategies may be of greater assistance either to resolve the issues or prevent a conflict from reoccurring. For example, it has been suggested that those who are repeatedly stressed as young children can end up with 'overdeveloped' stress responses.⁶⁾ This means that these individuals may be more likely to overreact to situations or be more aggressive in stressful situations that occur when conflict is present. This finding has been linked to higher levels of the stress hormone cortisol and even changes to the brain and the way in which the corpus callosum assists in passing messages from one part of the brain to another.⁷⁾

Responses and reactions in negotiation are also thought to be a reflection of our personality, preferences, experiences, culture, values, education and training. How we respond is determined by our health (mental and physical) as

6) R. Gerson and N. Rappaport, 'Traumatic Stress and Post-traumatic Stress Disorder in Youth: Recent Research Findings on Clinical Impact, Assessment, and Treatment' (2013) 52 *Journal of Adolescent Health* 137.

7) R. Gerson and N. Rappaport, 'Traumatic Stress and Post-traumatic Stress Disorder in Youth: Recent Research Findings on Clinical Impact, Assessment, and Treatment' (2013) 52 *Journal of Adolescent Health* 137.

well and whether or not we are tired. Other differences may be gender and related to age. We may, for example, be more likely to be competitive (and less likely to submit or avoid) in our late teens and early twenties. Indeed, it could be suggested that part of the shift to more facilitative forms of dispute resolution is the product of changing generational views about hierarchical and formal models of control. Simply put, it may be that younger generations expect to have more of a 'say' in decision-making and are less likely to submit to a direction without first voicing an opinion.

The approach taken in negotiation is also determined in part by how we perceive comments, actions or the inactions of others. Our perceptual filters (affected by age, health, education and culture) may encourage us to respond in a certain way. It may be that the context of a situation leads us to interpret an event in a manner that is entirely different from the way in which others interpret the same event. Our response to an issue can in turn determine or heighten the response or reaction of other individuals. For example, if the approach adopted is unconditionally constructive, despite aggravation and irritation, it is less likely that the process used to deal with the negotiation will involve a responding competitive negotiation process. On the other hand, if the response includes a raised voice, a heightened sense of stress and an approach in which personal remarks are traded, it is less likely that the process used to deal with the conflict will be collaborative or cooperative.

Culture also plays a role in how we negotiate. In some societies, there has been a far greater emphasis on collaborative problem-solving approaches and the facilitated resolution of disputes (rather than binding determination of disputes by a third party). There may be a greater tendency to submit and avoid some issues. While this emphasis appears to stem in part from a greater emphasis on social harmony and the role of the society (rather than the individual's rights), the approach may stem from fundamental differences in communication and negotiation patterns and cultural contexts that have become more apparent as our world has become more globalised. Culture may in this sense play an important role in determining dispute resolution process preferences, with some societies being more likely to use facilitative ADR and

others being more likely to need facilitative ADR to address more unhelpful competitive negotiation approaches.

Understandings about negotiation are significant factors in determining the spread and adoption of ADR. For example, many forms of facilitative ADR used in Australia and elsewhere are largely the product of negotiation literature and practice developed over the past 50 years. For example, within western countries, negotiation and conflict theories abounded throughout the Cold War from 1946 until the late 1980s, as nations and individuals struggled to deal with repeated impasse issues and to negotiate complex task and behavioural concerns. A greater emphasis on negotiation strategies and theories emerged in the early 1970s to assist with planning and strategy development and to manage the more complex 'beyond community' relationships that were becoming an increasing feature of modern western business activities. A close examination of the factors that surround a negotiation was seen as essential to determining appropriate negotiation strategies. The interest-based negotiation or bargaining that underpins many early mediation and collaborative models of ADR can be traced back to a variety of negotiation theorists, many of whom developed processes and models in the early 1970s.⁸⁾

Fisher and Ury's *Getting to Yes: Negotiating Agreement Without Giving In*⁹⁾ (and other key self-help negotiation strategy books that emerged from the Harvard Negotiation Project) and the business management industry emerged throughout the 1970s, 1980s and 1990s spawned an industry that informed many about different negotiation strategies. Much of this material focused on transactional negotiation and techniques that were then transplanted into the dispute resolution setting. Some of this negotiation literature reflects on strategies, tactics and 'type' identifiers and is focused in behavioural analysis.¹⁰⁾

8) N. Spigel, B. Rogers and R. Buckley, *Negotiation Theory and Techniques* (Butterworths, Sydney, 1998), referring to Mary Parker Follet in A.M. Davis, 'In Theory: An Interview with Mary Parker Follet' (1992) *Australian Dispute Resolution Journal* 7.

9) R. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin, Boston, 1981); R. Fisher, W. Ury and B. Patton, *Getting to Yes – Negotiating Agreement Without Giving In* (2nd ed, Random House, Sydney, 1991).

10) See C. Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a

Many writers¹¹⁾ have suggested that there are a number of different negotiation strategies and approaches, which appear to underpin the development of different forms of ADR. One approach is defined as an adversarial approach and involves competitive negotiation. In this 'give and take' approach, 'what one party gains the other must lose'.¹²⁾ This form of negotiation can be more prevalent where advisory and determinative forms of ADR, such as expert appraisal, evaluation and arbitration, are used.

Compromisory negotiation patterns¹³⁾ (rather than cooperative approaches) are also derived from the use of positional, competitive or adversarial approaches to negotiation. These approaches are based upon the assumption that 'the parties desire the same goals, items, or values'.¹⁴⁾ The approach is most classically demonstrated as a 'bidding approach'. Some forms of ADR used within a court context and focused on legal rights rather than underlying interests support more compromisory negotiation patterns, and 'conciliation', which is often advisory in Australia and used where there is a one-off dispute (for example, in an insurance dispute) is more likely to support more compromisory patterns of negotiation. This form of negotiation is also referred to as distributive bargaining; essentially, a fixed amount of benefit is divided among those negotiating. Distributive bargaining is often accompanied by positional negotiation.¹⁵⁾

Theory' (1983) 8(4) *American Bar Foundation Research Journal* 905, referring to H. Cohen, *You Can Negotiate Anything: How to Get What You Want* (Bantam Books, New York, 1980); see also R. Brinkman and R. Kirschner, *Dealing With People You Can't Stand* (McGraw Hill, New York, 2002).

11) H. Astor and C. Chinkin, *Dispute Resolution in Australia* (2nd ed, LexisNexis Butterworths, Sydney, 2002). 113.

12) C. Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving: A Study of Strategies in Search of a Theory, American B' (1984) 31 *UCLA Law Review* 754 at 755.

13) H. Astor and C. Chinkin, *Dispute Resolution in Australia* (2nd ed, LexisNexis Butterworths, Sydney, 2002), 117.

14) C. Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving: A Study of Strategies in Search of a Theory, American B' (1984) 31 *UCLA Law Review* 754 at 765.

15) A number of authors draw a distinction between 'creating' and 'claiming' value in a negotiation. See, for example, D. Malhotra and M. Bazerman, *Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond* (Bantam Dell, New York, 2007); D. Lax and J. Sebenius, *3D Negotiation:*

Facilitative forms of ADR, such as many forms of mediation and collaborative law, are often used to create more constructive negotiation environments and recognise that, although everyone negotiates on a regular basis throughout life, many people use processes that could be categorised as distributive, compromisory or positional. Such negotiations can be unsuccessful for one or both of the parties particularly when the problem is complex. Arguably, however, distributive bargaining may be useful where the relationship with the other party is not important, for example, in a one-off transaction or where ethical issues are not relevant.¹⁶⁾ The result may be compromisory, that is, each party must compromise; however, often the result may be that the negotiation fails to secure an agreed outcome for any of the parties involved.

Facilitative ADR Founded on Interest-based Negotiation

Interest-based, problem-solving or integrative negotiation, which is fostered in most facilitative forms of ADR, works towards joint or mutual gains and is popularly referred to as 'win-win' negotiation. It has been developed to support relationships and the resolution of more complex disputes. This style of negotiation assumes that the subject-matter of the negotiation is not fixed but variable. Variations in content can be related to a vast range of options that include timing, apologies, understandings, provision of additional information and new agreements, as well as options of high value to one negotiation participant and of low value to another.

Learning when and how to apply this theory to conflict has been of major interest to ADR practitioners in Australia and led to the development of a number of mediation models. Integrative negotiation assumes that the objectives and interests of the parties are not mutually exclusive. That is, by defining the problem, exploring underlying issues and generating options, the

Powerful Tools to Change the Game in Your Most Important Deals (Harvard Business School Press, Boston, 2006).

16) See R. Lewicki, D. Saunders and J. Minton, *Negotiation* (3rd ed, Irwin McGraw Hill, Singapore, 1999).

parties can create an outcome that satisfies underlying interests (not positions). The dynamics of integrative negotiation are enhanced by training and clear understanding of the processes. There is much research that suggests that joint outcomes are more likely to be achieved where integrative negotiation processes are used. In addition, the integrative negotiation approach is said to enhance both relationships and satisfaction.¹⁷⁾

The integrative negotiation approach is also referred to as collaborative, merit-based, principled, cooperative or problem-solving negotiation where:

- a focus on interests, needs and objectives rather than positions is encouraged;
- a range of options is generated before an outcome is determined after reference to any objective criteria; and
- the issues rather than the people involved in the dispute remain the focus.

The integrative model can assist in decision analysis and support behaviours that can be useful in negotiation. However, to create an integrative negotiation, most find it helpful to prepare and also ensure that all parties have a structure, guidelines and time frame for a negotiation. Most facilitative ADR models support these approaches and focus on gathering information and interest identification before options are developed. A key component of these forms of ADR requires that the alternatives to a negotiated agreement be considered and that communication be supported.

In terms of any mediation, clear communication is seen as a critical aspect. Facilitative ADR practitioners must have a capacity to create a neutral and mutual agenda, to listen, to ask useful, open questions that enable them to check assumptions and understandings as well as the capacity to summarise back to ensure that the disputants have accurately understood the issues and can assist to create a respectful environment.

17) T. Atkin and L. Rinehart, 'Research Report: The Effect of Negotiation Practices on the Relationship Between Suppliers and Customers' (2006) 22(1) *Negotiation Journal* 47.

The Growth in Collaborative Law

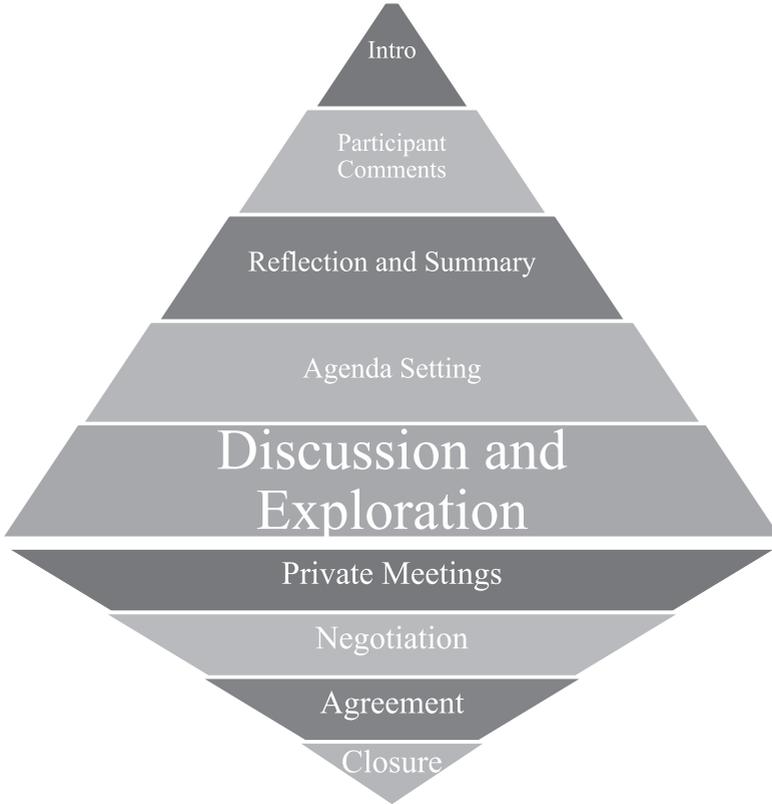
Although mediation is widely used in Australia and is often founded on interest-based approaches, over the past five years, another form of facilitative ADR that supports interest-based negotiation has emerged. 'Collaborative law' or 'collaborative practice' is a form of ADR that has grown in popularity, especially in respect of family disputes. In this process, all participants may decide to use a 'collaborative' process model whereby lawyers and all experts are trained in interest-based negotiation and are focused on the negotiation process with two-hour meetings and guidelines for gathering and exchanging information (collaborative participation agreements normally require the withdrawal of lawyers and others if the negotiation does not result in an agreed outcome, which means that they cannot be involved in any subsequent litigation).

In these forms of ADR, it is increasingly common that a multi-disciplinary team is assembled, all trained in interest-based negotiation to assist the disputants to reach an agreed outcome. This form of ADR is increasingly popular in North America and can include lawyers, financial planning experts and family consultants.

Using Mediation

In most forms of mediation that are based on an integrative negotiation approach, the mediator will not have an advisory role in terms of outcomes but may advise about the process. These processes recognise that advisory, hierarchical, adjudicative and rights-based processes of dispute resolution may not be sufficient to deal with negotiations that involve a careful consideration of future options and interests. The models assume that some preparation will take place and that agreements about confidentiality, authority and exchange of material will operate in the lead-up to mediation. In accordance with many integrative negotiation models, there is a focus on exploring the problem, underlying interests and issues before considering options.

A facilitated mediation process can be represented in the stages as follows:



The process can be adapted to multi-stakeholder conflicts and negotiations in a range of settings. Although these models are used frequently in social, business, industry and complex negotiation areas (including with environmental and intractable conflict), it has been less well used in the political area (in particular, in relation to internal conflict). In the government area, many government departments are now focused on how early dispute resolution can take place, and dispute management plans have been developed by some leading government agencies (such as the Australian Tax Office, the Commonwealth Attorney-General's Department and the Australian Competition

and Consumer Commission) that are all directed at using effective dispute resolution at the earliest possible time.

Future Developments

The developments in the negotiation and dispute resolution area are being informed by neuroscience, neurobiological and behavioural research as well as significant developments in technology (that can support decision-making as well as remote access and other issues). These developments suggest that negotiation styles and processes can be varied to produce better outcomes in different circumstances.

It is now generally accepted that many disputes are unlikely to involve a lawyer and that 'justice' will often be sought outside the court system. There has been much work done over the last decade exploring the objectives of ADR processes and how ADR processes relate to the conventional litigation system. In 2009, the Commonwealth Government report *A Strategic Framework for Access to Justice in the Federal Civil Justice System* noted that many litigants cannot afford either to commence court proceedings or continue with court proceedings. Research on the demographics of those using the higher civil court system suggests that many disputants will not access higher courts because the system is too complex, costly or confusing.¹⁸⁾ The report's major recommendation was for the establishment of a strategic framework for access to justice underpinned by the principles of accessibility, appropriateness, equity, efficiency and effectiveness. A key finding was that an increase in the early consideration (before court proceedings are commenced) and use of ADR has a significant capacity to improve access to justice.

Today, issues relating to training and accreditation are also more settled in Australia, which is partly a result of the relatively small population base. The

18) See Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Attorney-General's Department, Commonwealth of Australia, Canberra, 2009), Part 1, Chapter 2, available at <http://www.ag.gov.au/LegalSystem/Pages/Accessstojustice.aspx> (accessed 20 December 2013).

introduction of the National Mediator Accreditation System (NMAS) together with the Family Dispute Resolution Practitioner (FDRP) registration program has produced greater certainty for many ADR practitioners and resulted in a common system of accreditation.

The NMAS, which is a voluntary 'opt-in' scheme for mediators, became operational in Australia in January 2008 after more than a decade of discussion regarding mediation accreditation and the development of standards in the sector.¹⁹⁾ In the family dispute resolution area, an accreditation system has been phased in since 2007,²⁰⁾ following extensive changes to the *Family Law Act 1975* (Cth) in 2006. The past work of the National Alternative Dispute Resolution Advisory Council (NADRAC)²¹⁾ enabled many issues in this area to be addressed, and 'accredited' mediators are required in most disputes.

The ongoing issues in respect of this new system and the impact of credentialing were explored in 2011, when NADRAC released *Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice Through People* (the 'Integrity' Report), which specifically explored issues relating to confidentiality, admissibility and the immunity of ADR practitioners.²²⁾

There is considerable evidence provided by a number of studies to support the extension of ADR into a range of areas. Many ADR processes are now mainstream as such a large number of Australians have been exposed to them and there has been a paradigm shift in the way that dispute resolution processes are viewed. This change means that relevant future issues focus on the impact

19) See T. Sourdin, *Accrediting Mediators – The New Australian National Mediator Accreditation Scheme*, Report (September 2007), available at Social Science Research Network http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134622 (accessed 20 December 2013).

20) Attorney-General's Department (Cth), *Family Dispute Resolution*, available at <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyDisputeResolution/Pages/default.aspx> (accessed 20 December 2013).

21) NADRAC was a body set up and funded by the Commonwealth Attorney-General.

22) NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice Through People* (February 2011), available at http://www.nadrac.gov.au/about_NADRAC/NADRACProjects/Pages/IntegrityofADRProcesses.aspx (accessed 23 December 2013).

of the continuing institutionalisation and legitimisation of ADR processes and, importantly, how the integrity of ADR processes can be supported. This has been a significant focus in recent years, particularly as accreditation issues have settled and more clarity in this area has been achieved. There is also more 'evidence' about ADR as many schemes that sit outside the court and tribunal system have reporting obligations that require consideration of qualitative and quantitative evaluation work in respect of effectiveness.

The gathering of evidence has been supported by policy initiatives. For example, in 2009, NADRAC released its report *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (the 'Resolve to Resolve' Report), which focused on the supporting structures and cultural change required to enable ADR growth to continue.²³⁾ This work and the core objectives have informed the government-led *Building an Evidence Base for the Civil Justice System* Project, which is creating overarching objectives and criteria to assist in better measuring justice and ADR impacts into the future and will support the collection of common data across the system. Better and clearer definitions of ADR processes have also assisted to increase certainty and assist in comparing studies and work undertaken in different ADR areas (although there is still variation in terms of practice). The changes all reflect an intention to have workable and high-quality ADR options available at all points in a dispute life cycle and to ensure that different models and processes are available to suit the needs of different disputes and disputants.

23) NADRAC, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, (September 2009), available on http://www.nadrac.gov.au/about_NADRAC/NADRACProjects/Pages/ADRandCivilProceedingsReference.aspx (accessed 20 December 2013).

