

5-1-1998

# Towards consistency in ADR terms

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## Recommended Citation

(1998) "Towards consistency in ADR terms," *ADR Bulletin*: Vol. 1: No. 1, Article 3.  
Available at: <http://epublications.bond.edu.au/adr/vol1/iss1/3>

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## Policy developments

# Towards consistency in ADR terms

It is well-known that the various ADR terms have different connotations for different groups in society. In March 1997 the National Alternative Dispute Resolution Advisory Council (NADRAC) produced a set of ADR definitions designed to promote common understanding of the particular process under consideration or discussion. NADRAC is an independent advisory council charged with providing the Attorney-General with policy advice on the development of high quality ways of resolving disputes without the need for a judicial decision. NADRAC recognised the value of flexibility and diversity in the practice of dispute resolution and did not seek to impose the definitions on any organisations. However they can provide a good point of reference — in particular where legislatures use ADR terms without adequate definition in the relevant statutes.

The definitions contained in the paper are 'benchmark' definitions which will enable ready comparisons to be made, regardless of the range of names which might attach to particular ADR processes. Because ADR processes and procedures are constantly evolving, the NADRAC definitions are designed to do no more than reflect the current ADR climate. The NADRAC paper recognised that they will need to be updated on a regular basis to embrace new developments and usages.

As *The ADR Bulletin* will be using many of these terms in future issues, some of the important ones are reproduced here, without any specific endorsement of the actual definitions.

1. Processes which are facilitative (that is the third party has no determinative or advisory role on the content of the dispute, but may advise on the process).

“The definitions contained in the paper are ‘benchmark’ definitions which will enable ready comparisons to be made...”

**Mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (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.

**Therapeutic mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement, and in this process seek also to resolve intra-personal and interpersonal difficulties in their relationship. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Community mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), chosen from a panel representative of the community in general, identify the disputed issues,

develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Co-mediation** is a process in which the parties to a dispute, with the assistance of two neutral third parties (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediators have no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Shuttle mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement without being brought together. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. The mediator may move between parties at different times for all or part of the process.

**Expert mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Conciliation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the



“The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role.”

➤ disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

**Statutory conciliation** is a process in which the parties to a dispute which has resulted in a complaint under a statute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted, 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 which accords with the requirements of that statute.

**Facilitation** is a process in which the parties (usually a group), with the assistance of a neutral third party (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Facilitated negotiation** is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a neutral third party (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of negotiation.

2. Processes which are advisory (that is the third party provides advice only as to the facts of the dispute and in some cases as to outcomes).

**Investigation** is a process in which a third party (the investigator) investigates the dispute and provides advice (but not a determination) as to the facts of the dispute.

**Expert appraisal** is a process in which a third party, chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert appraiser) investigates the dispute and provides advice as to the facts of the dispute and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

**Case appraisal** is a process in which a third party (the case appraiser) investigates the dispute and provides advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

**Case presentation** is a process in which the parties to the dispute present their evidence and arguments to a third party who provides advice as to the facts of the dispute, and, in some cases, advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

**Mini-trial** is a process in which the parties present arguments and evidence to a neutral third party who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

**Dispute counselling** is a process in which a third party (the dispute counsellor), investigates the dispute and provides the parties or a party to the dispute with advice regarding the issues which should be considered, possible, probable and the desirable outcomes and the means whereby these may be achieved.





➤ 3. Process which are determinative (that is the third party, after investigating the dispute, makes a determination which is enforceable or potentially enforceable.)

**Adjudication** is a process in which the parties present arguments and evidence to a neutral third party (the adjudicator) who makes a determination which is enforceable by the authority of the adjudicator. The most common form of internally enforceable adjudication is determination by State authorities empowered to enforce decisions by law (for example, courts, tribunals) within the traditional judicial system. However, there are also other internally enforceable adjudication processes (for example, internal disciplinary or grievance processes implemented by employers).

**Arbitration** is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination.

**Expert determination** is a process in which the parties to a dispute present their arguments and evidence to a neutral third party chosen on the basis of their specialist qualification or experience in the subject matter of the dispute, (the expert) who makes a determination.

**Fast-track arbitration** is a process in which the parties to a dispute present, at an early stage in the attempt to resolve the dispute, arguments and evidence to a neutral third party (the arbitrator) who makes a determination on the most important and most immediate issues in dispute.

**Private judging** is a process in which the parties to a dispute present arguments and evidence to a neutral third

party chosen on the basis of their experience as a member of the judiciary (the private person) who makes a determination in accordance with his or her opinion as to what decision would be made if the matter were judicially determined.

“The most common form of internally enforceable adjudication is determination by State authorities empowered to enforce decisions by law (for example, courts, tribunals) within the traditional judicial system.”

**Fact finding** is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the investigator) who makes a determination as to the facts of the dispute, but who does not make any finding or recommendations as to outcomes for resolution. ●

*For further elaboration of these matters see the NADRAC paper ‘Alternative Dispute Resolution Definitions’, Canberra, March 1997. NADRAC may be contacted as follows: Robert Garran Offices, National Circuit, Barton, ACT, 2600; Fax 02 650 5904; email NADRAC@ag.gov.au*

## Contributions

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Please submit articles or notes to:  
Publishing Editor

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Nick O'Halloran  
Prospect Media Pty Ltd  
ACN: 003 316 201  
Level 1, 71-73 Lithgow St  
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