

Speech by the Chair of NADRAC  
Professor the Hon Murray Kellam AO

Launch

*The Resolve to Resolve – Embracing ADR to improve  
access to justice in the federal jurisdiction*

Parliament House

4.00 pm, 4 November 2009

**[Welcome]**

1. Mr Attorney, Deputy Chief Justice Faulks, Family Court of Australia, Federal Magistrate Neville, Mr Graeme Neate, President of the National Native Title Tribunal, Sir Laurence Street and other friends and colleagues who have an interest in ADR.
2. First, thank you, Attorney, for launching NADRAC's report: *The Resolve to Resolve — Embracing ADR to improve access to justice in the Federal jurisdiction*.

**[Introduction]**

3. At a speech given in Sydney in September 2005, the Hon Justice McClellan stated:

*One of the indicia of a civilised society is that  
it provides a process for the peaceful  
resolution of disputes between citizen and*

*citizen and the citizen and the State. The fundamental objectives of the process are that it be fair, efficient, and its decisions accepted by the community as just. A fair system must be accessible.*<sup>1</sup>

4. As its title already reveals: NADRAC's report  
*The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*

is about exactly that — making the peaceful resolution of disputes, in a fair, efficient and just way, the focus of a civil justice system that is accessible by all.

### **[The Report]**

5. On 13 June 2008, the Attorney-General wrote to NADRAC requesting that it enquire into and identify strategies to remove barriers and provide incentives for greater use of ADR as an alternative to civil proceedings and during the court or tribunal process.
6. The letter of reference also asked NADRAC to provide advice on strategies for litigants, the legal profession, tribunals and courts as well as initiatives the Government might take, including legislative action.
7. The Attorney-General specified six particular areas for NADRAC to consider, including:
  - a. whether mandatory requirements to use ADR should be introduced

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<sup>1</sup> The Hon Justice P McClellan, Courts in the 21st Century – Should we do things differently?, Chief Judge at Common Law, Supreme Court of New South Wales, September 2005.

- b. changes to cost structures and civil procedures to provide incentives to use ADR
  - c. the removal of practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
  - d. the potential for greater use of ADR processes and techniques by courts and tribunals, including by judicial officers, and
  - e. whether there should be greater use of private and community-based ADR, and
  - f. services and how to ensure that such services meet appropriate standards.
8. As requested by the Attorney, NADRAC consulted broadly to prepare this report.
9. On 26 March 2009, NADRAC released a comprehensive Issues Paper and evaluated over 60 submissions which it received in response.
10. Also, NADRAC conducted more than 50 face-to-face consultations with key-stakeholders between February and June 2009.
11. The many quotes from and references to those submissions and consultations in the report are testimony that they significantly informed NADRAC's report.
12. As the Attorney-General has noted much progress has been made in the use of ADR – but much remains to be done.

### **[ADR and civil justice]**

13. NADRAC's report takes a holistic view of the civil justice system.

14. We view it as comprised of many various parts of which courts and tribunals are but one.
15. Justice can be obtained in many different ways — and well before courts and tribunals are asked to get involved.
16. A decision by a court or tribunal is not the only way that people can achieve a peaceful resolution of their disputes that is fair and efficient and perceived by the community to be just.
17. ADR processes that provide for the consensual resolution of disputes in a fair, efficient and easily accessible process will also meet those criteria.

### **[Early dispute resolution]**

18. NADRAC believes that disputes should be resolved at the earliest possible opportunity.
19. The civil justice system must therefore be geared towards encouraging the early resolution of disputes.
20. Encouragement should be provided at every step.
21. Two sets of recommendations that aim at providing such encouragement have been referred to by the Attorney. They were:
  - the recommendations concerning the pre-action or genuine steps requirement, and
  - the important role ADR techniques can play to enhance court processes.
22. NADRAC believes that these recommendations will contribute to increasing the accessibility of the civil justice system because the genuine steps requirement encourages people to talk to resolve their disputes and discourages them from rushing off to court

without having taken genuine steps to resolve the dispute.

23. And, the greater use of selected ADR techniques to enhance court and tribunal procedures will begin to encourage transformation of adversarial litigation culture.

### **[Judicial mediation]**

24. However, the Council's report makes it clear that it does not support the practice of judicial mediation, except in exceptional circumstances.
25. The report lists a number of questions that surround judicial mediation and argues that the specific hallmarks of mediation, including private sessions, would seem incompatible with the traditional role of federal judges and federal courts.
26. And where exceptional circumstances do arise, NADRAC would argue:
  - first, that the judge does not continue to hear the matter if it continues to trial, and
  - secondly, that judges who mediate are accredited under the National Mediator Accreditation Standards.

### **[Quality in ADR]**

27. Referring to the National Mediator Accreditation System leads me to another very important aspect of the report.

28. The accessibility of the civil justice system must be complemented by measures that can ensure outcomes of the highest standards.
29. Promoting quality in the ADR sector has been a key interest for the Australian Government since NADRAC's inception in 1995.
30. Many of you will be aware of the role NADRAC played in encouraging the development, and supporting the implementation, of the industry-based National Mediator Accreditation System.
31. It should therefore be no surprise that ensuring quality is a significant focus of this report.
32. NADRAC has made recommendations concerning the collection, publication and evaluation of comparable data generated by the provision of ADR services.
33. Echoing recent speeches by the Prime Minister, senior bureaucrats and findings of overseas studies, NADRAC considers that such data is crucial to the development of sound policy, based on facts or compelling statistical evidence.
34. NADRAC's report also addresses the many complex issues that are raised by factors such as confidentiality, non-admissibility and conduct obligations for participants and practitioners in different ADR processes.
35. These issues are central to maintaining the integrity of ADR processes and, so, to ensuring that ADR outcomes are acceptable ones.

### **[New references]**

36. I am grateful to the Attorney-General for the confidence he has shown in NADRAC today by giving us three new references.
37. At the same time I must admit to be being just a little bit daunted by the very significant workload that those references will entail.
38. In some ways, I know that NADRAC has only itself to blame since the new references build upon recommendations that NADRAC itself made in this report.
39. However I must say that I, and I am sure all the NADRAC members will join me in this, happily accept the challenge that the Attorney is giving us and very much look forward to working with him to cement the place of ADR within Australia's civil justice system.

### **[Acknowledgments]**

40. I would like to conclude my speech by thanking the many people who were instrumental in the preparation of this report.
41. I have mentioned at the outset that we received in excess of 60 submissions and consulted with more than 50 stakeholders.
42. The Council is indebted to those who followed our invitations and sacrificed their valuable time to attend our consultations and/or prepared detailed submissions.

43. As a chair, I would like to thank my fellow council members for their input, the discussions and the enthusiasm with which they took up the opportunity to work on this important document.
44. Also, I would like to thank NADRAC's secretariat which, especially in the lead-up to the due date, worked tirelessly and under enormous pressure, to bring together the report in its final form.
45. Finally, I would like to thank the Attorney for his reference, for his kind words about our report, for agreeing to launch the report today and lastly, and most importantly, for his strong endorsement and support for ADR as a key component of the civil justice system.