



Australian Government
Attorney-General's Department

YOUR GUIDE TO DISPUTE RESOLUTION





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YOUR GUIDE TO **DISPUTE RESOLUTION**



NADRAC
NATIONAL ALTERNATIVE DISPUTE
RESOLUTION ADVISORY COUNCIL

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ABOUT THIS PUBLICATION

Your Guide to Dispute Resolution is intended to be a web-based resource—for the most up-to-date version, please visit the NADRAC website www.nadrac.gov.au.

What is NADRAC?

NADRAC (or the National Alternative Dispute Resolution Advisory Council) is an independent body that:

- gives policy advice to the Australian Attorney-General about developing ADR (alternative dispute resolution)
- promotes the use of ADR.

More information about NADRAC can be found on its website www.nadrac.gov.au.

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FOREWORD

From the Attorney-General

Access to justice is a priority for the Australian Government. Mostly we talk about access to justice in terms of Australia's court system. Courts play a very important role in helping people to access justice and, as Attorney-General, I have talked about how important it is that our courts are geared as much to the small, one-off litigant as to large corporations.

However, not everyone with a dispute goes to court and access to justice goes beyond access to the courts. It's also about access to information and support to help people with the other, less formal pathways that are used every day to resolve disputes.

Most people resolve their disputes themselves. Others seek assistance from an independent third person or body.

A growing number of people are turning to alternative dispute resolution, where a third person offers professional and independent assistance to reach a solution that is acceptable to everyone involved.

Alternative dispute resolution offers many benefits. It has the flexibility to be tailored to people's needs. The processes are less formal and offer the potential for the people involved to have a bigger say about the outcome of their dispute.

This guide contains basic information about some of the alternative dispute resolution options available, giving practical tips on using alternative dispute resolution and helping people to identify the advantages of the different processes available. For some people, reading this guide may be the first step in understanding that there are many ways to resolve disputes outside of the courts.

I would like to commend the National Alternative Dispute Resolution Advisory Council (NADRAC) for the work they have done in producing this useful guide, in collaboration with my department.

I encourage everyone—whether you have a dispute or work as a dispute resolution practitioner, a lawyer, in a court or tribunal or elsewhere in Australia's justice system—to read this guide.

The Hon Nicola Roxon MP
ATTORNEY-GENERAL

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INTRODUCTION

1.1 What is this guide about?

This guide contains information to help you understand more about managing and resolving disputes, including information about:

- what ADR (alternative dispute resolution) is and the National Principles for Resolving Disputes
- how to identify when you have a dispute
- what you can do to prevent disputes
- ways you can resolve a dispute on your own
- some of the ADR processes you could use to help you resolve a dispute.

ADR describes a collection of processes that you can use to help you resolve a dispute. You can use an ADR process:

- on its own to resolve your dispute
- as part of a court or tribunal process to resolve your dispute.

You can find definitions of the ADR words used in this guide on NADRAC's website at www.nadrac.gov.au.

This guide only relates to 'civil' disputes. It does not discuss 'criminal' disputes.

1.2 What is the aim of this guide?

This guide aims to help you by:

- raising awareness of the variety of dispute resolution processes available, including ADR (alternative dispute resolution) processes
- giving tips on how you can prevent disputes
- encouraging you to try to resolve your disputes outside of the courts and tribunals, for example by using an ADR process
- encouraging you to support and expect high standards in dispute resolution services.

1.3 What is ADR?

ADR (alternative dispute resolution) usually describes dispute resolution where an independent person (an ADR practitioner, such as a mediator) helps people in dispute to try to sort out the issues between them. ADR can help people to resolve a dispute before it becomes so big that a court or tribunal becomes involved. ADR can be very flexible and can be used for almost any kind of dispute; even those that would never go to a court or tribunal.

ADR and you

There are many ADR processes that you can use. Some ADR processes are explained in this guide—mediation, conciliation, neutral evaluation and arbitration. Each ADR process is different. The amount of time an ADR process takes changes depending on the type of process and the details of your dispute.

ADR practitioners are trained to help you and the other people involved to work toward a solution. The role of an ADR practitioner is different depending on the type of ADR process. In some ADR processes, the practitioner can give advice or make decisions for you. You should choose the ADR process that sounds as if it will work for you.

Using ADR can:

- help you to resolve all or some of the issues in your dispute
- provide a fair process
- help you to achieve outcomes that work for everyone involved in the dispute.

You can find out more in NADRAC's *A Framework for ADR Standards*, available at www.nadrac.gov.au.





DISPUTES AND WAYS OF RESOLVING THEM

2.1 What is a dispute?

Disputes are normal.

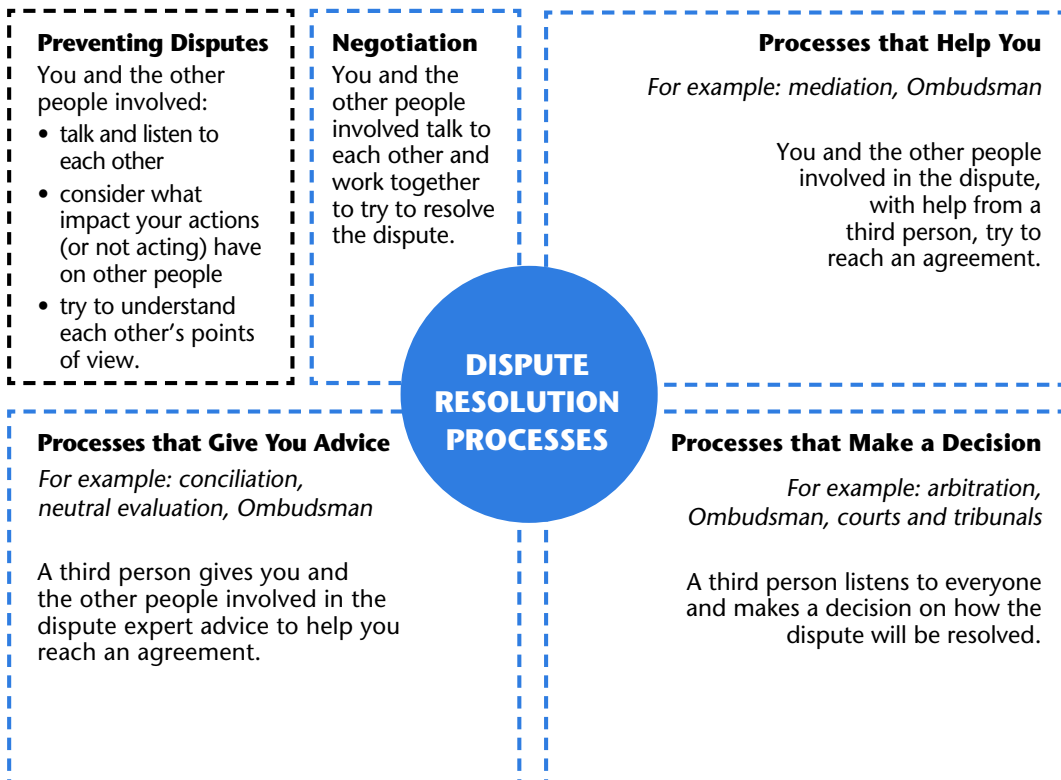
Sometimes things happen that you did not expect, or you will have a different view or disagree with someone about something.

This could be about:

- goals
- information
- how you communicate
- priorities
- the way things should be done
- beliefs.

When this occurs and it stops you from being yourself or harms your relationships, you may have a dispute.

The diagram below shows a number of processes you can use to manage a dispute.



2.2 Ways to manage and resolve your dispute

There are many ways you can respond to a dispute, including by:

- deciding whether you can live with things staying the way they are
- talking to the other people involved and trying to find an outcome (sometimes called ‘negotiating’)
- getting help from an organisation or a person who is not involved in the dispute. This could include:
 - an ADR practitioner, such as a mediator
 - a lawyer or other person who may negotiate for you or give you advice on your legal rights
 - a person trusted by everyone involved in the dispute
 - an Ombudsman
 - a court or tribunal.

Sometimes you can use technology to support a dispute resolution process.

When choosing the best dispute resolution process for you, think about:

- how the other people involved want to manage the dispute
- whether you want an independent person involved and, if you do, what you want them to do
- how structured you want the dispute resolution process to be
- what sort of relationship you want to have with the other people involved
- how much you are prepared to spend—in time and money
- how much control you want over the process
- how much control you want over making a decision or agreement.

2.3 Why choose ADR?

Resolving your dispute through ADR is different from asking a court or tribunal to resolve your dispute.

Using ADR to resolve your dispute can benefit everyone. It means that courts and tribunals can spend their time considering disputes that need a court or tribunal decision.

Flexibility

- ADR processes can be flexible, because the process can be made to suit your particular dispute.
 - Court processes are generally less flexible.

Privacy and confidentiality

- ADR processes and outcomes are usually private and confidential.
 - Hearings and decisions of courts and tribunals (including the reasons for the decision) are usually public.

Self-directed

- In an ADR process you and the other people involved usually choose who the ADR practitioner is. You can also agree about some of the things the ADR practitioner can do.
- When you use a court or tribunal, a decision-maker (such as a judge) is appointed for you. What the decision-maker can do is based on the law.
- In an ADR process you and the other people involved decide on the outcome of the process.
- Courts and tribunals usually control the outcomes of court and tribunal processes.

- In an ADR process you may be able to participate without a lawyer's assistance.
 - You may find a court process difficult without a lawyer.
- ADR processes mean you and the other people involved choose what issues to raise.
 - In a court process, you can only raise issues that are connected with your legal rights.

Cost

- ADR processes can be less expensive than other ways of resolving your dispute.
 - Going to a court can be very expensive. Tribunals can be less expensive but can still involve hearings and legal costs if you are represented.
 - There are also costs in time and effort to think about.

Focus on what is important to you

- ADR processes and outcomes focus on what is important to you and the other people involved.
 - Courts and tribunals focus on legal rights.
- ADR processes may help you and the other people involved to maintain relationships.

Less formal

- ADR processes can be informal.
 - Court and tribunal hearings can be very formal.

Skills

- ADR processes may help you and the other people involved to learn new skills and ideas so that you can prevent future disputes or resolve them earlier.

Outcomes

- Outcomes of a dispute can be your agreement or someone else's decision.
 - When you use an ADR process the outcome can be reaching agreement.
 - When you go to court the outcome will be a judgement.
- For many people outcomes are made up of at least two parts. One part is the practical agreement. Another part is your relationship with the people involved in the agreement.
 - Courts can only reach an outcome that fits the legal facts to the law. Sometimes this can fit your situation well; sometimes the legal facts and the law fit only part of your situation.
 - ADR processes provide the opportunity for you to cooperate to reach an outcome that suits everyone.
 - A court does not try to suit everyone.
- Agreements can sometimes restore or maintain or even improve your relationships with the other people involved.
 - Court proceedings can often end relationships with the other people involved.
- You and the other people involved may be more confident that everyone will do what was agreed, because everyone contributes to the outcome.
 - Outcomes imposed by courts and tribunals are sometimes taken back to court (appealed) because people are dissatisfied.

Even if court or tribunal proceedings have started, you should not give up on ADR. You might still get significant benefits by using ADR rather than proceeding to a court or tribunal hearing.

2.4 What are the National Principles for Resolving Disputes?

NADRAC's National Principles for Resolving Disputes:

- are about using ADR when you have a dispute instead of going to court—and still using ADR even if you do go to court
- offer information about how ADR aims to work so that you know what to expect if you choose to use ADR.
- **National Principle 1: Self-responsibility is the first step**

To resolve your dispute, you need to take responsibility for:

- being clear about what is in dispute
- genuinely trying to resolve the dispute
- seeking support when you need it.

National Principle 2: Early resolution is good resolution

Resolve your dispute in the simplest and most cost effective way, and as early as you can. You can still use ADR processes if you go to court.

National Principle 3: Listen and participate

Show your commitment to the dispute resolution process by listening to other views and by putting forward and considering options to resolve your dispute.

National Principle 4: Be informed when choosing an ADR process

Seek out and use information to help you:

- understand what to expect from different processes and service providers
- choose an appropriate dispute resolution process.

National Principle 5: Use ADR, then the courts

Try to reach an agreement through ADR processes first. If you are unable to resolve your dispute through ADR, then think about using courts or tribunals.

National Principle 6: Ask questions about ADR

Ask about and expect effective, affordable and professional ADR services that meet acceptable standards.

National Principle 7: Share knowledge about ADR accurately

Describe dispute resolution processes consistently to help other people understand and be confident about using ADR.

This is a summary of the National Principles for Resolving Disputes. A full version can be found at www.nadrac.gov.au.



DISPUTE RESOLUTION PROCESSES

3.1 Prevention

Some ways to prevent disputes include:

- Be open to other points of view.
- Give everyone the chance to respectfully communicate their points of view.
- Listen and try to understand other points of view.
- Find out what the other people involved want, for example by asking them.
- Think of the other people involved as 'equal and different'.
- Accept some or all of the needs of the other people involved.

Some tips on communicating to manage differences include:

- Listen...
 - ...for what you have in common. This is a good place for you and the other people involved to start looking for an outcome.
 - ...for what the other people need or are concerned about. Respond reasonably to what they are saying.
 - ...and then check with the other people involved to make sure you have understood them.
- ...then ask questions...
 - that start with 'How can we...' or 'What possibilities are there for...'

- to try to find out what is important to the other people involved, for example by asking 'How is that important to you?'
- about how the other people involved would like to move forward.
- ...respond
 - after listening well. This might involve listening for longer than seems comfortable to you.
 - using 'I think...', 'I'd prefer...' or 'I wonder whether...', instead of 'I want...' or 'I have decided...'
 - making suggestions for an outcome that meets the other people's needs and that you can accept.
 - speaking for yourself; listen to others.
- avoid...
 - reacting to demands or threats.
 - asking questions that accuse, such as 'You did...' or 'You told me that...'
 - saying 'You did...' or 'You are...'. This can lead to blaming instead of focussing on how you are impacted by other peoples' behaviour.
 - saying 'Obviously...'
 - making conclusions about what the other people involved said. If you do make conclusions, check with them that your conclusions are valid.

3.2 Negotiation

You will have used negotiation to resolve a disagreement. The same process works for sorting out a dispute.

Negotiation can be an effective process to resolve a dispute where you and the people involved:

- listen to and are heard by each other
- work out what the disputed issues are
- work out what everyone agrees on
- work out what is important to each person
- aim to reach a workable agreement
- develop options to resolve each issue
- consider what you can do next if you cannot reach an agreement through the negotiation.
- In a negotiation, you and the other people involved in the dispute can agree to:
 - speak for yourselves or be assisted by people, such as your lawyer or another professional
 - only make binding decisions at the end of the negotiation
 - what will be talked about during the negotiation, including what solutions are discussed
 - how the negotiation process will work and how an outcome will be reached
 - whether or not the negotiation will be confidential.

Types of negotiation and when they might be suitable

There are different types of negotiation. The most common type is where you and the other people involved in the dispute

talk about the dispute and try to come to an agreement that works for everyone.

This type of negotiation (sometimes called **direct negotiation**) is suitable as long as you feel comfortable having a conversation with the other people involved in the dispute.

Direct negotiation is particularly suitable if you and the other people involved:

- can have a discussion and make decisions without the assistance of another person
- want to make the decision yourselves
- want to maintain the best possible ongoing relationship
- want to control the outcome, rather than ask someone else to decide
- want to keep discussions confidential
- want to find innovative ways to resolve the dispute, such as an outcome where everybody benefits (sometimes called a **win/win outcome**).

You can also choose to have another person involved in the negotiation who helps run the negotiation and does not take sides. This type of negotiation is more structured, and the way the negotiation process works can be very different.

The type of negotiation you and the other people involved choose depends on how much control you each want to maintain over how the negotiation works and the type of negotiation you feel comfortable using.

Sometimes direct negotiation will not be a suitable process for you to resolve your dispute—for example if you have a difficult or bad relationship with the other people involved.

What role do you have in a negotiation?

In a negotiation, you and the other people involved in the dispute are responsible for:

- deciding what the negotiation process will be, including:
 - when and where the negotiation will take place
 - how decisions will be made
 - how you will communicate
- deciding whether you will negotiate directly with each other or whether you will be assisted by representatives or support people.

How can you be a good negotiator?

Before the negotiation you can:

- talk to the other people before making decisions (talk first, decide last)
- think about what is behind the disputed issues for you and each of the other people involved—what each person's needs or desires are
- try to think of options for outcomes that address what everyone wants
- think about what you will do if you do not reach an agreement at the negotiation
- commit to finding an outcome that benefits everyone
- choose a time and place for the negotiation (if you are meeting face to face) that suits you and the other people involved.

During the negotiation:

- be hard on the problem—talk about all the issues completely

- be soft on the person—avoid blaming the other people involved
- focus on the issues in dispute, not the personalities of the other people involved
- emphasise any common ground you and the other people involved share—common ground makes it easier to understand each other
- think creatively about options that could resolve the dispute
- avoid unfair tactics
- manage your emotions
- make sure that you and the other people involved understand what each other is saying
- communicate well
- look for an outcome that will work for everybody
- be clear that you have reached an agreement with the other people involved—write the agreement down at the end of the negotiation.



3.3 Mediation

Mediation is a process where the participants, with the assistance of an independent person as mediator:

- listen to and are heard by each other
- work out what the disputed issues are
- work out what everyone agrees on
- work out what is important to each person
- aim to reach a workable agreement
- develop options to resolve each issue
- develop options that take into account each person's needs and desires
- discuss what everyone could do as a way of assessing the options and exploring what might lead to an outcome that everyone can live with.

A mediator can help you and the other participants have a respectful, evenhanded discussion and decision making process. Your role is to listen to the other points of view, contribute to the discussion and make decisions.

Mediation may be voluntary, court ordered, or required as part of a contract or external dispute resolution arrangement.

When is mediation suitable?

Mediation may be suitable if you and the other participants:

- think a mediator can set up a respectful discussion on the issues
- feel safe in the presence of each other
- want a third person to assist the discussion
- want to control the outcome, rather than ask someone else to decide the outcome

- want to make the decision yourselves
- want to maintain an ongoing relationship
- want to keep discussions confidential
- want to find innovative ways to resolve the dispute, such as an outcome where everybody benefits (sometimes called a **win/win outcome**).

Support people, such as a friend, your lawyer or other professionals, can attend the mediation to help you if the other participants agree. If you bring your lawyer or other support people to mediation the other participants can bring theirs too.

Mediation may be **unsuitable** if you:

- do not feel safe when communicating (such as talking or emailing) with the other participants
- are forced against your will to participate by the other people involved in the dispute.

What does a mediator do?

Mediators can:

- design a mediation to suit your circumstances
- help you decide whether mediation is suitable for your situation
- use their specialist knowledge and give you some information (but not advice)
- bring the appropriate people together
- explain how the mediation process will work
- provide a supportive environment
- set the guidelines or ground rules for how the mediation will work
- help you and the other participants to understand each person's point of view

- help you and the other participants to stay focused on resolving the dispute
- make sure you and the other participants know and understand what issues have been agreed
- help you and the other participants to keep communication going
- manage interactions so that they are fair
- help you and the other participants to decide whether possible solutions are realistic
- support you and the other participants to try to reach a final agreement that you all agree is appropriate
- refer you to other services that can help you.
- tell you what to agree to—you decide what to do, including whether to stay at mediation
- decide who is right or wrong—everyone is different; the focus of mediation is on finding an outcome that everyone can live with
- give legal, financial or other expert advice—if you choose, your lawyer can give you legal advice and your financial adviser can give you financial advice, before, during and after mediation
- provide counselling—if you choose, your psychologist, psychiatrist or counsellor can give you support before, during and after mediation.

There are some things that mediators do not do. They **do not**:

- take sides—they are there to help each participant
- make decisions—you and the other participants make decisions

Sometimes the mediator can act as a 'messenger'. They listen to you and the other participants separately and communicate ideas between you.

You will usually be asked to attend mediation together so that you can talk to each other directly.



3.4 Conciliation

Conciliation is a process where the participants, with the help of an independent person as conciliator:

- listen to and are heard by each other
- work out what the disputed issues are
- work out what everyone agrees on
- identify areas of common ground
- aim to reach a workable agreement
- develop options to resolve each issue
- receive expert advice and legal information (in some circumstances).

Conciliation can be similar to mediation, although the conciliator's role may be more directive and advisory. The way conciliation works can vary, so if you use conciliation it is important to check what type of conciliation process will be followed.

Conciliation may be voluntary, court ordered, or required as part of a contract. It is often part of a court, tribunal or government agency process.

When is conciliation suitable?

Conciliation may be suitable if you and the other participants:

- want a third person to assist the discussion
- want to reach an agreement on some technical and legal issues
- want advice on the facts in your dispute
- want to control the outcome, rather than ask someone else to decide the outcome
- want to keep discussions confidential.

Conciliation may also be suitable if you have tried mediation and you and the other participants cannot yet agree.

What does a conciliator do?

The role of a conciliator is similar to the role of a mediator. Conciliators usually:

- have specialist knowledge and can give you some legal information
- actively encourage you and the other participants to reach an agreement
- set guidelines or ground rules for how the conciliation process will work
- manage interactions so that they are fair.

There are some things conciliators do not do. They **do not**:

- take sides or make decisions
- tell you what decision to make, although they may make suggestions
- decide who is right or wrong
- provide counselling.

3.5 Neutral evaluation

Neutral evaluation is a process that may happen before a court or tribunal process is started. Sometimes your professional advisors, such as a lawyer or accountant, will suggest that you would benefit from using neutral evaluation. Courts and tribunals sometimes refer people to neutral evaluation.

In neutral evaluation:

- the participants present their points of view and facts to an independent person (an evaluator)
- the evaluator may make decisions about the key issues in dispute and the most effective way to resolve the dispute
- the evaluator is often legally trained and may have expertise in a particular area.

Neutral evaluation conferences can be confidential and work best if participants try to limit the number of documents they bring.

When is neutral evaluation suitable?

Neutral evaluation can be valuable if you think that legal action is the best option to resolve your dispute. It can help you and the other participants reduce the number of issues that a court or tribunal has to consider.

Neutral evaluation may be suitable if you want:

- comments on some or all of the issues in your dispute to help you decide what action to take (for example, whether to use ADR to resolve the dispute or go to a court or tribunal)
- even-handed advice on the subject matter of your dispute or a legal issue.

Generally, participants will attend a neutral evaluation conference where you discuss the dispute.

A neutral evaluation process can also happen in written form. In a written process, each participant gives the evaluator documents that explain the dispute from their point of view. The evaluator then gives all the participants written advice on the dispute.

What does an evaluator do?

Evaluators:

- listen to all sides of the dispute and identify any missing information
- may give you and the other people involved in your dispute an idea of what they think a court or tribunal might decide
- may give you an idea of what an expert in the field would think
- can give you an opportunity to discuss settlement or an agreement between you and the other participants
- can suggest what ADR process you and the other participants could use.

An evaluator can give you advice but **does not** make a final decision. It's your choice whether you accept any assessment or advice an evaluator gives you and how you use that information.

3.6 Ombudsman

Ombudsman offices provide independent review and investigation services. The term 'ombudsman' commonly describes both the person who holds the position of Ombudsman and the office they run.

An Ombudsman office is an independent body that:

- deals with disputes or complaints, including consumer complaints
- often works with government or industry to improve service delivery and administration.

Almost all Ombudsman will encourage you to try to resolve your dispute or complaint with the agency or company before asking them for assistance.

When you ask an Ombudsman office for assistance:

- any assistance they give you is free
- you do not need to be represented (for example, by a lawyer)
- they will try to help you resolve your dispute or complaint quickly and informally.

In Australia, there are three main types of Ombudsman:

- parliamentary Ombudsman, who can help with disputes or complaints about government agencies
- industry-based Ombudsman, who can help with disputes or complaints about service providers, such as banks, insurance companies and utilities
- statutory Ombudsman and commissioners, who can help with disputes or complaints about professionals or how the law applies.

More information

You can find more information about Ombudsman and contact information for many of Australia's Ombudsman offices on the Australian and New Zealand Ombudsman Association (ANZOA) website www.anzoa.com.au.

Ombudsman offices try to make it easy for you to contact them. If you are not sure whether an Ombudsman can help you with a particular type of complaint, you can check with ANZOA at info@anzoa.com.au.

What does an Ombudsman do?

Ombudsman can consider your dispute or complaint and decide what action they can take. Ombudsman offices often have access to a range of measures to help resolve disputes or complaints. These may include:

- managing ADR processes, such as assisted negotiation, mediation and conciliation
- investigating an issue, either on its own or as part of a larger problem
- providing opinions (for example, whether they agree with a decision)
- making recommendations (for example, suggesting that a decision be changed).

Some industry-based Ombudsman can also make decisions that bind service providers, such as electricity companies.

Ombudsman will try to reach an outcome that is fair to everyone involved in the dispute. In reaching an outcome, an Ombudsman will consider:

- what the law says
- any codes of practice that apply
- what is good administrative or industry practice
- what is fair and reasonable in the circumstances of your dispute or complaint.

3.7 Arbitration

Arbitration is a process where you and the other participants present your points of view and facts to an independent person (the arbitrator). The arbitrator then makes a decision based on this information.

Sometimes your professional advisors, such as a lawyer or accountant, will suggest that arbitration would suit your dispute.

Arbitration can be a much more formal and structured process than mediation or conciliation. It can seem very similar to a short form of court or tribunal hearing.

Unlike other forms of ADR, in arbitration:

- there is a much greater need for you and the other participants to produce evidence (facts)
- there may be one arbitrator or a group of arbitrators to hear your dispute
- the dispute may be in a specialist area and the arbitrator may have worked in that area
- usually you and the other participants must agree before the process that the arbitrator's decision will be binding and enforceable.

Arbitration may be voluntary, required under a court order (only made where all of the participants have agreed to attend arbitration) or required as part of a contract. Often, people involved in a dispute over a contract will use arbitration because they agreed in the contract to use it if such a dispute arose.

When is arbitration suitable?

Arbitration may be suitable for you if you and the other participants:

- want a process where a decision is made for you.

Arbitration can be very similar to court processes, but:

- it can be less formal than a court
- it can be quicker than a court
- the hearing and outcomes of an arbitration can be private and confidential.

If you have a commercial or industrial dispute, such as a dispute with your boss or with an employee, you may find that there is an arbitration tribunal that can help you resolve your dispute.

What does an arbitrator do?

Arbitrators may have a legal background or qualifications or expertise in the subject of your dispute.

Arbitrators:

- decide how the process will be run
- ensure that you and the other participants follow guidelines
- are responsible for deciding the outcome of the dispute.

Arbitrators can often make a final and binding decision about the dispute. Generally, you and the other participants will agree before the arbitration happens that you will all accept the arbitrator's decision.

3.8 Courts and tribunals: litigation

Generally, in court and tribunal processes you and the other participants present your points of view and facts to an independent person (such as a judge or a tribunal member). You can do this yourself or be represented by a lawyer. The independent person then makes a decision based on this information.

You will be required by law to follow the decision, except if you successfully appeal it.

Sometimes you will have to take part in alternative dispute resolution before you go to a court or tribunal as part of the court or tribunal process.

Most people who have a dispute resolve it without going to a court or tribunal and most people who start a court or tribunal process settle their dispute by agreement before any final court or tribunal hearing.

Most courts and tribunals will have information about ADR processes that you can use to help you reach an agreement. Many provide ADR services or can refer you to ADR services that are outside the court or tribunal.

Most courts or tribunals expect that you will have tried to use ADR before a court hearing takes place.

You can use all sorts of ADR processes to try to reach an agreement before a hearing takes place, including:

- negotiation
- mediation
- conciliation
- neutral evaluation
- a combination of ADR processes.
- Using a court or tribunal to resolve a dispute

Courts and tribunals encourage people in dispute to try to reach an agreement themselves.

If it is important to you to maintain a good relationship with the people involved in the dispute, then resolving a dispute by reaching an agreement with the other people involved will generally be better than going to a court or tribunal.

Sometimes using a court or tribunal to make a decision on your dispute is necessary. This could be because:

- urgent action is required
- there are serious safety risks involved
- no agreement can be reached through ADR.

Tribunals

Tribunals aim to determine a dispute in a way that is fair, efficient and quick. There is a range of tribunals available that may be able to help you resolve your dispute.

Some tribunals require you to try to resolve your dispute through ADR before they will start a hearing or review your dispute. Often the tribunal will help you organise the ADR session.

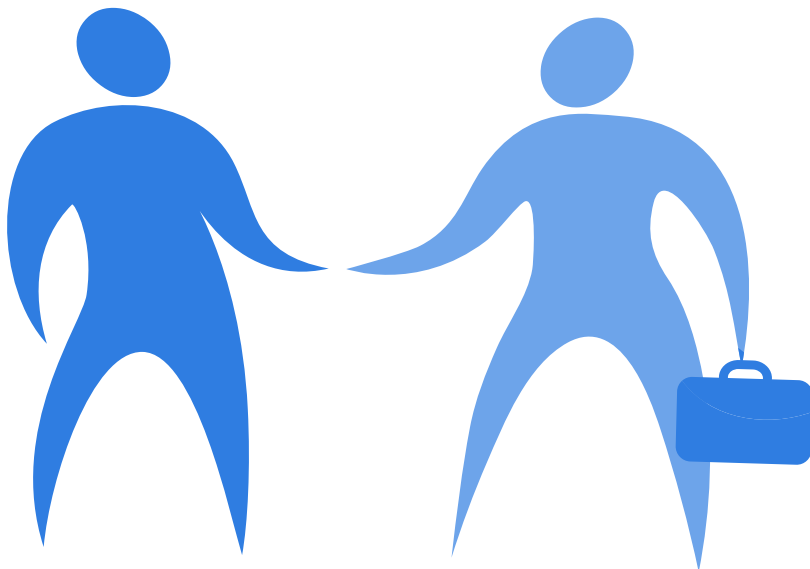
Examples of tribunals include:

- Commonwealth tribunals that review decisions made by Australian Government agencies
- state or territory government tribunals that review decisions by state or territory government agencies
- industry or consumer related tribunals.

Courts

In a court hearing, a judge or magistrate will make a decision on your dispute according to the law. Using a court to determine your dispute involves a much more formal process. Which court you go to will depend on what your dispute is about.

You can find information on the federal courts (and a little bit about state and territory courts) on the Australian Attorney-General's Department website www.ag.gov.au.





SUGGESTIONS TO HELP YOU WHEN RESOLVING DISPUTES

4.1 Preparing for ADR

Being involved in a dispute can be stressful. Feeling prepared may help you feel less stressed and get the most out of ADR.

You might find the following suggestions useful in preparing for your ADR session—even if you've used ADR before. Each ADR process is different. Your ADR practitioner can tell you what you can expect and how to prepare for your session.

- Get advice and support before your ADR session—for example:
 - talk to friends who have used ADR
 - talk to a lawyer or other expert advisers
 - meet with your support person, if you have one, to discuss what you expect from them and how best they can support you (see section below on what a support person can do for you)
 - look up information on the internet.
- Talk to your ADR practitioner before the ADR session and ask any questions you have about how the process will work.
- Tell your ADR practitioner if you are a person with some special needs—letting the ADR practitioner know how they can help you will make the ADR process more useful.
- In preparing for your ADR session, focus on ideas for solving the problem rather than on the personalities of the other people involved in the dispute.
- Think about:
 - what information you may need and collect it to take to the ADR session
 - what issues the other participants may want to discuss in the ADR session
 - what issues you want to discuss in the ADR session
 - what is important to you
 - what might be important to the other participants—this will help you to think of options you may all be able to agree to
 - your Plan B—what will you do if you and the other participants do not reach an agreement? Will you try the same ADR process again or use a different dispute resolution process?

4.2 Questions to ask your ADR practitioner

Your ADR practitioner can tell you what to expect from your ADR session and how you can prepare for it. This can help you to get the most out of it.

You can ask questions at any time in an ADR process. Outlined below are some questions you might like to ask.

How and where will my ADR session be run?

You and the other participants may attend a session in-person or online. You may also attend an ADR session together or separately. The session could be run over several hours, one day or over several days.

If you are meeting in person, you can discuss the set up of the room and location with your ADR practitioner. You could:

- ask where you and the other participants will sit
- let the ADR practitioner know if you have any special needs that need to be taken into account in choosing a location.

Who can attend my ADR session?

If you have them, you and the other participants may want to bring to the ADR session your:

- support people
- legal representatives
- expert advisers.
- Often it is up to the ADR practitioner to decide if it will help the ADR process to have more people present, so if you want to bring someone, ask your ADR practitioner before your session.

What is expected of me in the ADR session?

Your ADR practitioner:

- may expect you to put forward your own ideas about how to resolve the dispute

- will expect that you are
 - willing to listen to the other people involved
 - cooperative and calm.

Your ADR practitioner may stop the ADR session if you or the other participants find it difficult to listen or participate calmly.

Can my ADR practitioner give me advice on issues?

Ask your ADR practitioner about what advice they can and cannot give. This way you will have enough time to prepare and seek appropriate advice from lawyers and other experts.

What if I'm worried about my own or someone else's safety?

You can raise any safety concerns you have with your ADR practitioner before and/or during the ADR session. Your ADR practitioner might:

- arrange for you and the other participants to be in separate rooms during the ADR process
- arrange a teleconference
- advise you that ADR is not appropriate in your situation.

How much will the ADR session cost?

You could ask:

- whether your ADR practitioner is going to charge a fee
- whether you have to pay other costs, such as renting the location used
- how any costs will be shared between you and the other participants.

If you are concerned about the cost of the ADR process, you could ask about financial assistance or whether you can work out a payment plan.

4.3 Support in dispute resolution

Support people generally

Some people prefer to have a support person with them in dispute resolution processes, particularly ADR processes; some do not.

A support person is someone who can:

- give you emotional and practical support
- help you understand the issues in dispute and what is important to you
- gently challenge you if you get stuck on one idea
- take notes or remind you later of things said.

A support person can add value for all the people involved in resolving the dispute. If you ask someone to be your support person, it is best if they are not directly involved in the dispute.

Your support person could be:

- a family member
- a friend
- a work colleague
- a social worker
- a union representative
- a counselling psychologist
- a professional adviser (for example, your lawyer, accountant, financial adviser or financial counsellor).

If you want to have a support person with you during your ADR process you will need to talk to your ADR practitioner to make sure this is okay.

Lawyers

A lawyer may be able to help you resolve your dispute, whether you choose to use an ADR process, an ombudsman or go to a court or tribunal.

It is up to you to decide what you want a lawyer to do for you. If your lawyer cannot help you with something, they will tell you so.

How can a lawyer help you in an ADR process?

Some ADR processes involve lawyers; some do not. Lawyers can give you advice before and after each ADR session, as they may not be present or may take a 'backseat' role during the session. They can also give you advice after the ADR session about what can happen next and how the proposed agreement will work for you.

You decide what to do after listening to your lawyer.

How can a lawyer help you in a court or tribunal?

A lawyer's role in a court or tribunal process is more formal than their role in an ADR process. You can choose whether you just want advice from your lawyer, or whether you want them to present your case to the court or tribunal as well.

You may choose to present your own case to the court or tribunal. Some courts and many tribunals have user-friendly processes to help you.

You decide what to do after listening to your lawyer.

4.4 Your role in ADR

Legal obligations

Sometimes you will need to attend an ADR process because:

- the law requires you to
- a court or tribunal directs you to attend
- a contract you have signed requires you to use an ADR process to try to resolve disputes about it.

In these situations, the law or a court or tribunal may tell you how you must behave during ADR. For example, the law and court or tribunal orders will generally require you to act in good faith.

You are responsible for making sure that you understand what your legal obligations are. If you are unsure about your obligations, you could:

- ask your lawyer
- ask your support person
- check the court or tribunal's website.

Your role in different ADR processes

ADR processes are different and your role can be different too. For example:

- In processes like mediation, you usually have a very active role—your role includes listening, talking and deciding.
- In processes like conciliation, the ADR practitioner may give you advice—your role includes listening, talking and deciding. Your decisions include whether you will accept the ADR practitioner's advice.

- In processes like arbitration, you can have a less active role. You and the other participants present the information and your points of view to the ADR practitioner, who makes the decision based on the information provided.

Sometimes you and the other participants may discuss and/or sign a contract before the first ADR session begins. This contract can outline everyone's roles.

Some suggestions for getting the most out of your ADR session

If you are participating in ADR, you and the other participants are generally expected to make a genuine effort to reach an agreement. This means that during the ADR process you and the other participants:

- approach the ADR process with an open-mind
- listen to the other participants' points of view and suggestions and tell them your own
- talk to the other participants openly about the issues in dispute
- provide information to the other participants— when deciding what information to provide, think about what approach you would like the other participants to take in giving you information
- are available to meet for the ADR sessions.

You may find participating in an ADR process difficult. Making decisions needs all your attention. It is important that you let the ADR practitioner know if you cannot participate in a way that helps you get the most out of the ADR process.

Sometimes your ADR practitioner may tell you and the other participants that they can no longer assist you to resolve your dispute.

There are many reasons why an ADR practitioner may decide to do this. One reason could be that a participant in the ADR session is not participating in a way that means they and others get the most out of the ADR process.

If your dispute is not resolved by ADR it may later go to court. If the court thinks that a participant did not manage their behaviour well during the ADR process, the court could:

- send you and the other participants back to ADR
- require the participant to pay money to the other participants involved (by making a costs order or damages award).

What is important is that you work with the ADR practitioner and the other participants to try your best to reach an agreement that you and the other participants can live with.

4.5 Confidentiality in ADR

ADR processes are usually confidential. This means that what is said and done and written is private to the people involved. Generally it is up to you and the other participants to decide on the level of confidentiality you want.

Having a confidential ADR process means that:

- what is said in the session stays in the session
- anything you or others say or write during or about the ADR process must not be spoken or written about outside of the process
- you can only speak or write about the ADR session to the following people (where they agree to keep what they tell you to themselves):
 - the other participants
 - the ADR practitioner
 - other people involved in the ADR process, such as lawyers and expert advisers
 - people who have asked you to go to the ADR process
 - other people agreed by all participants, such as family members, your GP, specialist doctor or psychologist.

Knowing that other participants will keep the discussions to themselves may mean that you feel:

- more at ease giving information to other participants
- more comfortable actively taking part in the ADR process and making suggestions

- less worried about harm to your personal or business reputation.

What information is confidential?

Information that must be kept confidential can include:

- what you and other participants say during ADR discussions, including ideas about possible solutions
- information created and shared during the ADR sessions
- the discussions between you and the ADR practitioner if you have a private session
- phone calls and emails between you and the other participants
- your thoughts and opinions about how the other participants behaved during the ADR sessions
- reasons why you and the other participants did not reach an agreement.

How can you make sure your information is kept confidential?

You and the other participants can make sure your information is kept confidential by making a confidentiality agreement before your first ADR session. You can have a written or spoken agreement to keep the information private. The people who make and agree to a confidentiality agreement could include:

- you
- the other participants
- the ADR practitioner
- people who aren't directly involved in the ADR sessions, such as your lawyer or support person.

If you have a written agreement, read through it and think about any communications that might not be covered before you sign it.

Think about whether you need a detailed agreement on confidentiality. Make your agreement as detailed as it needs to be by:

- covering all kinds of communication
- outlining any exceptions, where the communications can be discussed publicly
- revising it if necessary.

What exceptions are there to confidentiality?

There are some situations where information may not have to be kept confidential. Some examples include where:

- you and the other participants all agree to make some information public
- you or the other participants discuss the ADR session with people who are directly affected by the outcome, for example children in a family dispute or your company manager in a commercial dispute
- you are seeking professional advice from a lawyer or financial advisor, so long as they keep the information you give them to themselves
- the ADR practitioner discloses information in the ADR session in a way that does not identify you (such as for research or educational purposes)

- you give permission to the ADR practitioner to discuss the ADR process with your and the other participants' lawyers and expert advisors, if they were not present during the ADR session
- the ADR practitioner is required by law to disclose information, for example to report child abuse and actual or possible threat to human life or safety.

Can you use ADR discussions in court?

If you do not reach an agreement using an ADR process, you may then want to use information or discussions from the ADR process in court. Generally your ADR discussions or information cannot be used in this way.

Sometimes you may be able to talk about your ADR discussions in court. The judge will decide when this can occur. Some situations where you may be able to bring your ADR discussions to the attention of the court include where:

- you or the other participants did not act in good faith
- there is fraud involved
- there is criminal behaviour involved
- there are breaches of the law
- the information is from ADR discussions and it is information that is available separately from and independently of the ADR process (that is, the information would be available even if there had not been an ADR process).

You can find out more about confidentiality in NADRAC's report *Maintaining and Enhancing the Integrity of ADR Processes*, available at www.nadrac.gov.au.

4.6 ADR standards

The behaviour of some ADR practitioners is regulated by standards and guidelines set by ADR professional organisations.

Accreditation of mediators

Some areas of ADR, like mediation, have introduced national standards. Mediators can be approved to practice under the Australian National Mediator Standards. You can find a copy of the National Standards at www.msb.org.au.

Not all mediators are approved under these National Standards. You will need to check if your mediator is approved by contacting the organisation that the mediator works for or has been approved by.

Using a mediator who meets the National Standards, or has qualifications in the area of your dispute, means it is more likely that:

- you will receive a high-quality ADR service
- your dispute will be handled properly
- you will achieve an appropriate outcome for all participants.

The National Standards are designed to ensure that, as far as possible, an approved mediator will:

- be of 'good character' (they are honest and fair)
- hold proper insurance
- have at least basic training.

Although these standards are voluntary, NADRAC strongly recommends that you or your lawyer find a mediator that meets the standards.

4.7 How to give feedback about your ADR practitioner

Feedback can include compliments and complaints about the behaviour of ADR practitioners.

Complaining is okay. Complaints often provide the ADR industry with helpful information about how to improve ADR processes. If you are still involved in ADR sessions with the ADR practitioner, resolving your complaint may help to restore trust in your relationship with your practitioner, so that you are comfortable that they will be able to help you resolve your dispute.

Role of ADR practitioners

You can expect your ADR practitioner to be:

- impartial
- independent
- qualified
- professional at all stages of your ADR process
- clear about the process they are using.

What you might compliment or complain about

Your compliment or complaint could be about whether your ADR practitioner:

- managed the relationship between you and the other participants appropriately
- behaved honestly, including in relation to the costs of their services
- behaved professionally

- provided you with certificates and reports, especially when these are required before you can take other steps to resolve your dispute, including going to court.

How you can make a complaint about your ADR practitioner

A mediator accredited under the National Mediation Accreditation System will work for, or be a member of, a Recognised Mediator Accreditation Body (RMAB). You can ask your mediator if they work for an RMAB, and contact that body directly. Your mediator should provide you with the name of their RMAB. Some RMABs may have time limits that require you to make a complaint soon after your mediation.

You can find the contact details of RMABs on the Mediator Standards Board website at www.msb.org.au.

Depending on the RMAB, you may be able to make a complaint:

- in writing
- over the phone
- in person
- in a feedback survey.

If your ADR practitioner is not accredited under the National Mediator Accreditation System, you might be able to make a complaint to:

- the organisation employing the ADR practitioner (if any)
- any professional body or association the ADR practitioner belongs to.

Your ADR practitioner should provide you with the name of their professional organisation before the ADR process starts.

What happens after you make a complaint

It may be possible to solve your complaint immediately, if you are satisfied with:

- knowing that your ADR practitioner will be aware of your complaint
- you and the ADR practitioner hearing each other's point of view
- receiving an apology
- having an error corrected
- being reassured that your ADR practitioner was acting correctly
- a review being undertaken to ensure that an issue was dealt with appropriately.

In other situations, your complaint might take a while to solve. It might help you solve your complaint if you:

- raise it with the ADR practitioner yourself
- put your complaint in writing
- give the organisation working on your complaint more information about your complaint.

When you make a complaint, you can expect to:

- be provided with the opportunity to express your opinion in ways that are reasonable, lawful and appropriate
- have a fair and impartial assessment and, where appropriate, an investigation of your complaint based on the merits of the case
- have a fair hearing
- be informed, at least in general terms, about the actions taken and the outcome of your complaint
- be provided with reasons that explain decisions affecting you
- be treated with courtesy and respect
- communicate your concerns and views without fear of reprisal or other unreasonable response.

You are expected to:

- clearly identify, to the best of your ability, the issues of your complaint
- provide, to the best of your ability, all the relevant information available to you at the time you make the complaint
- be honest in your communications
- disclose any other action you have taken in relation to your complaint
- cooperate with staff who deal with your complaint
- treat staff who deal with your complaint with courtesy and respect.



SOME FINAL TIPS

5.1 Final tips

Disputes are part of ordinary life. Everyone has disputes at some stage. Resolving disputes is generally a good thing. Unresolved disputes can be destructive.

Courts and tribunals are there to decide a dispute after all other reasonable steps have been taken.

Before going to a court or tribunal you could try to resolve your dispute by:

- talking to the other people involved in the dispute
- using an ADR process.

Mostly, people resolve their disputes without help from an ADR practitioner or a court or tribunal. Sometimes people need help. This guide contains information about the types of dispute resolution help available.

There are many dispute resolution processes described in the guide. New dispute resolution processes will develop as people learn more about how to resolve disputes in better, cheaper and faster ways.

5.2 Glossary of ADR terms

NADRAC has prepared a glossary of ADR terms. You can find the glossary on the NADRAC website www.nadrac.ag.gov.au under the 'What is ADR?' tab.

5.3 Where to find this guide?

Your Guide to Dispute Resolution is intended to be a web-based resource. For the most up-to-date version, please visit the NADRAC website www.nadrac.gov.au.

