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In-House Briefing Memorandum

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Dispute Resolution as Management Tool for Small Business

Australian Governments have historically been proactive in taking measures to enhance alternative dispute resolution (ADR) in the local and international commercial landscape. However the Abbott Government's recent move to incorporate the functions exercised by the National Alternative Dispute Resolution Advisory Council (NADRAC) into the Federal Attorney General's department has been met with consternation. NADRAC was established in 1995 as an *independent* body to provide co-ordinated advice and research on ADR following the 1994 report of the Hon Justice Ronald Sackville, *Access to Justice – An Action Plan*. Over the past 18 years NADRAC has endeavoured to address ways in which justice could be enhanced and the legal system made fairer, more efficient and more effective through the promotion of ADR. NADRAC's functions have included supporting governmental and professional bodies in developing a culture of dispute resolution agents and providing information to the public regarding ADR processes.¹

The amalgamation has triggered widespread professional concerns as to a loss of independence. Dr Becky Batagol expressed concern that the role of NADRAC

*“cannot be adequately replaced by individual players within the justice system, either the courts, tribunals, dispute resolution practitioners, lawyers, academics or even the Attorney-General's department”.*²

Doubt remains about the ultimate effect of the Federal Government's changes. It remains to be seen what role the new Government will emphasize with respect to ADR. The Federal Attorney-General is also currently evaluating the *Civil Dispute Resolution Act 2011* (Cth) and the Australian Productivity Commission has a current project considering access to justice and civil dispute resolution.

ADR remains an important and, too often, an undervalued tool for small businesses. A 2010 Government study³ revealed that the majority of small businesses that referred disputes to an ADR process were not only satisfied with it as a dispute resolution mechanism but also felt that they had received the best possible advice towards resolving their dispute.

Although initiatives are underway to increase small businesses' awareness of the availability and benefits of ADR,⁴ the role of ADR as constructive measures in the maintenance and management of parties' relationships remains overshadowed by the common perception that introducing outside assistance in disputes represents or reflects damage to the relationship between the parties. Small businesses generally only consider the possibility of ADR once they are in the midst of a dispute. Awareness of ADR options in the course of operating a small business can mean disputes can be managed in a manner more likely to result in commercial relationships being maintained and, in most cases, at lower financial cost than traditional adversarial litigation.

Several ADR options exist including incorporating ADR into contracts or referring an existing dispute to ADR. Mediation can be highly effective businesses in Victoria⁵ as an assisted process facilitating discussion between parties rather than imposing a strict mechanism for resolving the dispute and allowing both parties to air their concerns and better understand each other's concerns.

ADR is generally less costly, can pre-empt problems and pro-actively resolve conflict whilst maintaining the working relationship between the parties.

¹ NADRAC, 'About NADRAC' <http://www.nadrac.gov.au/about_NADRAC/Pages/default.aspx>.

² Becky Batagol, *Dumb Decision – The Closure of NADRAC*, ADR Research Network (2013).

³ *Small Business Dispute Resolution*, prepared by the Department of Innovation, Industry, Science and Research

⁴ Information sessions are regularly conducted by the Victorian Small Business Commissioner across metropolitan and regional Victoria

⁵ The Victorian Small Business Commissioner (VSBC) in 2012-2013 saw 83.1% of mediated disputes settled. Dispute Settlement Centre Victoria handles referrals to mediation from Magistrates Court – i.e., disputes of most claims larger than \$1,000 where mediation appears appropriate.

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