# Evaluating Quality in Court Annexed Mediation

**Fleur Kingham**
Deputy President
Land and Resources Tribunal (Queensland)*

## Introduction

In this paper, I consider the experience of the Land and Resources Tribunal (Qld) (the Tribunal) in developing an evaluation program for its mediations. Disclaimers first! This does not purport to be a learned exploration of the issue. I have approached it from a very practical perspective – should the Tribunal evaluate its mediations and, if so, what should it evaluate? The Tribunal has not yet commenced evaluation. This will depend on a number of other matters affecting the Tribunal, in particular possible changes to the Tribunal's jurisdiction and structure, which could have a significant impact on the evaluation program. This paper describes the Tribunal's mediation service, its objectives for mediation and examines the issues it has had to consider in preparing to establish an evaluation program. It draws upon US, Canadian and Australian evaluation experience and some of the many critiques that have been made of mediation evaluation.

## Background

The Tribunal is a specialist Tribunal established in late 1999 to deal with mining projects and the tenure, environmental, compensation and native title aspects of those projects. It also has jurisdiction to review certain administrative decisions by state government agencies dealing with mining and environmental issues and has exclusive jurisdiction (in Queensland) for injunctions to restrain activities that threaten items or places of cultural significance.

The Tribunal has significant mediation jurisdiction in relation to all matters that come before it. Under the *Land and Resources Tribunal Act 1999* (LRT Act), the Tribunal has (for exercising its jurisdiction) all the powers of the Supreme Court.[1] This includes the power to order parties to mediate a proceeding that is before the Tribunal. Whilst mediation will not always be ordered, the Tribunal will explore the potential for mediation to assist in resolving matters in dispute before it. The Presiding Members of the Tribunal consider the use of alternative dispute resolution procedures, such as mediation, is consistent with the Tribunal's statutory obligation to "act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it".[2] Mediations may be conducted by LRT Members or by mediators appointed by it. If an LRT Member conducts a mediation, that Member cannot subsequently hear the matter if it is not disposed of at mediation.[3]

The Tribunal also has specific mediation jurisdiction in relation to native title and environmental issues. With respect to native title matters, the Tribunal has jurisdiction to

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* The views expressed in this paper are those of the author. Unless otherwise indicated they do not represent a concluded view by the Tribunal as an institution. The author would like to acknowledge the valuable assistance of the Tribunal's researcher, Ms Rachel Scarrabelotti, in the research for and preparation of this paper.

1 *Land and Resources Tribunal Act 1999* (LRT Act), s.65.

2 Ibid, s. 49(1)(b).

3 Ibid, s. 76.

mediate negotiations between the applicant, the registered native title parties and the State with respect to all mining tenements, other than low impact tenures[4] (the "right to negotiate procedures"). The request for mediation can be made to the Tribunal at any time before a negotiated agreement is reached or the application for the tenement has been referred to the Tribunal.[5] The parties to Indigenous Land Use Agreements may also confer jurisdiction on the Tribunal to mediate matters that arise under those agreements.[6]

With respect to environmental issues, the Tribunal has jurisdiction to mediate[7] disputes about the proposed environmental authorities for mining claims and mining leases.[8] As with the right to negotiate procedures, these disputes can be referred to the Tribunal for mediation prior to the environmental authority otherwise coming before the Tribunal. The Tribunal also has jurisdiction to mediate disputes about certain administrative decisions by the Environmental Protection Agency.[9]

Two of the Presiding Members are trained and experienced in mediation as are a number of the Tribunal staff. The LRT Act provides for a Mediation Referee to be appointed. The Mediation Referee must be legally qualified and have a high level of experience or knowledge of matters such as dispute resolution, mediation and land title and land use issues. The Mediation Referee has not yet been appointed. Their duties will include conducting mediations and managing the Tribunal's mediation service.

The Tribunal also refers matters to the Alternative Dispute Resolution Branch of the Department of Justice and Attorney-General (the ADR Branch). A number of significant disputes have already been resolved with the assistance of their highly skilled mediators.
The style of mediation offered is facilitative involving "a third party providing assistance in the management of the process of dispute resolution …. the third party 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 whereby resolution is attempted."[10]

Certain aspects of the mediation service are currently prescribed by the *Uniform Civil Procedure Rules 1999* (UCPR), that apply to all courts in Qld. The Tribunal has the capacity to develop separate rules for its own procedures but, to date, has chosen to use the standard process wherever possible.

**Tribunal's objectives for mediation**

The Tribunal has developed mediation objectives that take into account the possible objectives outlined by Astor.[11] They also incorporate the objects prescribed by s. 94 of the

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4 Low impact tenements are prospecting permits, low impact exploration permits and low impact mineral development licences. Mediation of the access agreements for these tenements can be requested from the Mining Registrar. *Mineral Resource Act 1989* (MRA), ss 436, 491 & 547.

5 MRA s. 662. This provision and those referred to in the above footnote are inoperative as a result of a decision of the Federal Court in *Central Queensland Land Council Aboriginal Corporation v Attorney-General of the Commonwealth of Australia and State of Queensland* (2002) 188 ALR 200. The Full Federal Court recently heard an appeal against that judgment and reserved its decision.

6 LRT Act, s. 51B.

7 *Environmental Protection Act 1994* (EP Act), s. 221.

8 Ibid, ss 177, 221.

9 Ibid, ss 523, 526 & Schedule 1 Part 1.

10 NADRAC Advisory Council, Alternative Dispute Resolution Definitions, March 1997, p5.

11 Hilary Astor "Quality in Court Connected Mediation Programs: An Issues Paper" AIJA 2001, p5.

*Supreme Court of Queensland Act 1991* (SCA) and the objectives proposed by NADRAC.[12] The Tribunal's mediation objectives are to:

- Facilitate parties resolving disputes themselves;
- Provide a fair mediation process;
- Provide an expeditious process;
- Provide an effective process;
- Provide a cost-effective process; and
- Provide an informal process.

At this stage, I am still uncertain whether the Tribunal should adopt a further objective dealing with the appropriateness of mediation outcomes, rather than subsuming outcome requirements within the objectives of providing a fair and effective process. This issue is discussed later in this paper.

**Should the tribunal evaluate its mediation service?**

The Tribunal, like most courts and tribunals, collects information about the number and nature of our matters and some case management data such as time to resolution and the average time judgment is reserved. Some mediation information is also captured, such as the number of matters referred to mediation and the number settled through mediation. However, there is no systematic evaluation of the quality of the mediation or adjudicative processes provided by the tribunal. The first question I encountered in commencing this project was "why evaluate?". My starting point was the following statement, which I consider sums up the rationales for many mediation evaluation projects:

> *"The legitimacy of courts diverting litigants to alternative processes depends to a great degree upon the quality of those processes and concerns arise when, or if, those processes are perceived to give second class justice."*[13]

I query whether these rationales (courts are diverting litigants to mediation, mediation is an "alternative" process) are relevant to the Tribunal.

The Tribunal does not, as a rule, "divert" litigants to mediation. Mediation in the Tribunal is generally voluntary. Does this obviate the justification for evaluation? I think not, because I do not consider the distinction between voluntary and compulsory mediation is a very relevant distinction in the context of court-annexed mediation.

The Tribunal, as is the case with all courts in Queensland, has the power to order parties to mediation and the UCPR impose obligations upon the parties to mediate in good faith. On one occasion I ordered a reluctant party to mediate and I am aware that at least one of the other members has also done this. So the power is there and, even if exercised rarely, the Members and those parties who regularly appear before us are aware of it.

Even if Members did not have the power to order parties to mediate, I question how "voluntary" is the agreement to a "suggestion" from a Member of a Tribunal (sitting behind a bench, on a raised platform, in front of a coat of arms). I am particularly skeptical about the voluntariness of the agreement if the Member raising mediation is the Member

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[12] NADRAC "A Framework for ADR Standards" April 2001, p13.

[13] Marie Delaney and Ted Wright "Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation" Justice Research Centre, January 1997, para 7.

who will preside at the hearing. There is no suggestion so useful and helpful as one made by the person you have to persuade to find in your favour!

The other rationale is that mediation is an alternative process. Yet mediation is not an alternative to other Tribunal procedures. It is one of the procedures we are required to offer, if requested. Further, it is so fully integrated into our case management procedures that it could not be considered to be an alternative. It is one of a suite of procedures available to parties prior to and, in one recent case, even after a hearing. In the matters that come before me, other more "traditional" pre-trial procedures, such as discovery and interrogatories, are encountered more rarely than is mediation. I understand this is also the case for other Members of the Tribunal.

If mediation can no longer be described as "alternative", what is the justification for so much effort in relation to mediation, when other Tribunal processes are not examined? Before answering that question, it should be noted that the question assumes that there is no justification for evaluation other Tribunal processes. I do not accept that. I expect that Australian tribunals and, perhaps even courts, will soon be required to monitor performance of all their procedures against justice objectives. I am aware from a recent study trip, that Canadian tribunals are already required to survey all users of the tribunal, regardless of the type of process applied in their case.

The Tribunal's mediation objectives are, with one modification, appropriate objectives for all of the Tribunal's procedures. The modification relates to the first objective - "facilitate parties resolving disputes themselves". If you remove the word "themselves" that objective must surely be one of the primary objectives for all tribunals and courts. The other objectives (fair, expeditious, effective, cost-effective and informal process), are relevant to all our procedures because the LRT Act requires our proceedings to be conducted as quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the issues.

The current debate about judicial performance evaluation is already canvassing these issues.[14] A particular concern is whether this challenges judicial independence. I consider that debate is far from over. I have little doubt, however, where it will end – in greater scrutiny of the performance of tribunals and courts.

In the meantime, there are some features of mediation that do contrast with a traditional adjudicative process and may be relied upon to justify evaluation. In particular, mediation is conducted in private and is not easily subject to review. Yet it is endorsed by a process which rests its accountability on procedural fairness (procedure rules and the rules of natural justice), transparency (public hearings, published reasons) and judicial accountability (the appeal system). Whilst I question whether those accountability elements operate as effectively as they could, I do consider there is some merit in the distinction.

[14] See for example Justice Douglas Drummond "Towards a More Compliant Judiciary", (2001) 75 ALJ, p304; Justice Alistair Nicholson AO RFD "In Response to a More Compliant Judiciary", (2002) 76 ALJ, p231; and Stephen Colbran "Judicial Performance Evaluation: Accountability without Compliance", (2002) 76 ALJ, p235.

**Evaluation – whose responsibility?**

Another issue to be considered is whose responsibility it is to evaluate. The Tribunal was established with a mediation brief. Mediation is not a procedure instituted by the Tribunal to deal with caseload issues. Should the responsibility rest with government?

There are strongly held views that responsibility rests with the courts and tribunals, not with government. The US National Standards for Court-Connected Mediation Programs, provide that a court is fully responsible for mediators it employs and programs it operates. Further, that it is as responsible for monitoring the quality of mediators and mediation programs external to the court to which it refers cases, as it is for its own programs.[15] NADRAC, similarly, imposes responsibility upon the courts, but only to the extent that they mandate or compel ADR.[16] Astor's work for the Australian Institute of Judicial Administration on quality, illustrates, I believe, a growing acceptance of responsibility by the Australian judiciary.[17]

**What does evaluation mean?**

The US National Standards recommend that courts collect sufficient accurate information to permit adequate monitoring on an ongoing basis and evaluation on a periodic basis.[18] But what does evaluate mean? Many studies interpret evaluation as a comparative analysis against adjudication. For example, a US guide for Judges and Court Managers defines monitoring as collecting and analysing data in order to assess ongoing operations and evaluation as the comparison of cases referred to ADR with similar cases not referred to ADR.[19]

I have not recommended the Tribunal undertake that type of evaluation. In my view it reflects the evolution of mediation from a process treated with deep suspicion by the legal community, to one enthusiastically endorsed by governments and the judiciary. I believe the debate has moved on from whether mediation can be justified to whether we are doing it well. In that context, a focus on a comparative analysis can distract us from examining whether we are achieving our goals for mediation.

Tyler questions whether it is appropriate to evaluate mediation against case settlement through trials because of the very high proportion of cases that are settled through informal negotiations outside the courtroom. *"Rather than using traditional or idealized trial-based systems of dispute resolution as criteria against which to evaluate alternative dispute resolution programs, it may be more reasonable to define a set of desired attributes for a dispute resolution program and to compare any program to those abstract standards …..… such an effort would ask what goals the justice system is seeking to achieve and then examine the ability of different procedures to achieve those goals."*[20]

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15 Centre for Dispute Settlement & the Institute of Judicial Administration "National Standards for Court-Connected Programs", pp10-11.

16 NADRAC Framework op cit, pp77-78.

17 Astor op cit.

18 Centre for Dispute Settlement op cit, pp10-11.

19 Melinda Ostermeyer and Susan L. Keilitz "Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers", State Justice Institute 1997, pp9-10.

20 Tom R. Tyler "The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities", Denver University Law Review (1989) vol 66:3, p20.

Astor also believes that useful evaluation cannot be carried out unless mediation is evaluated against clearly defined objectives.[21]

It also needs to be recognised that courts and tribunals do not routinely gather the information required to enable a comparison between mediated and non-mediated cases. Nor is the Tribunal in a position to evaluate the impact a mediation process has had on the Tribunal's caseload, for example, because there has never been a "before" to compare with the "after".

The Tribunal is considering a program to gather data that can be monitored on an as needs basis to identify matters requiring attention and that can be analysed periodically against the program's goals. The type of data under consideration is set out below under "elements of monitoring and evaluation program".

**Is evaluation premature?**

Attached to this paper is a chart "Evaluating Mediation in the Land and Resources Tribunal (Qld)" which illustrates the links between the Tribunals objectives, how they will or are already being implemented and how they will be monitored and evaluated. One of the ways in which the objectives will be implemented is through the Tribunal's Mediation Charter and the Mediator's Code of Conduct. In drafting those documents, I drew heavily on NADRAC's recent work on developing ADR standards.

Given the nascent state of mediation standards, is the Tribunal's evaluation project premature? I see this as a chicken and egg situation. Standards, especially about mediator performance requirements, could simplify and standardise the evaluation process. On the other hand, evaluation can contribute to the development of standards by obtaining information from parties about their perceptions of the process.

A suggestion made at a NADRAC forum held in Canberra to consider the NADRAC discussion paper, was that standards should be developed by first identifying issues or problems parties face in the quality of services and then by building standards to address those problems. Otherwise, there is a risk that standards development will be dominated by practitioners' concerns.[22]

The Tribunal proposes to take into account the work done by NADRAC thus far, in designing the evaluation program. It will also regularly review the program to take into account developments, such as further definition of national standards.

**Evaluation program design principles**

To date, the work on this project has been undertaken "in-house". Mediation objectives have been adopted, procedures to implement the objectives have been identified and methods to evaluate the implementation of the objectives have been considered. The next stage of the project is to design the evaluation program, building on that initial work. The Tribunal proposed to elicit expert assistance in that next stage. The expert's brief will be to design an evaluation program that:

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[21] Astor op cit, p37.
[22] NADRAC "A Framework for ADR Standards" April 2001, p129.

- Captures as much information as possible through routine case management and reporting;
- Records information in a format that can be easily and flexibly interrogated;
- Keeps surveys of parties, lawyers and mediators simple and focussed;
- Involves stakeholders on a periodic basis; and
- Involves expert advice through an advisory committee.

The Tribunal anticipates that information will be obtained using:

- Complaints procedure;
- Case management data;
- Exit surveys (party, lawyer and mediator);
- Follow up surveys (party and lawyer); and
- Periodic stakeholder consultation.

The Tribunal proposes to use a number of mechanisms to consider the information collected.

One of my key recommendations is to establish a Mediation Advisory Committee to provide a source of expert advice and an avenue for regular liaison with the Tribunal's stakeholders.

The information gathered will be assessed against the Tribunal's objectives and procedures:

- By the Registrar and President through regular reports on case management data;
- By the President and Mediation Advisory Committee on a case by case and periodic basis for complaints;
- By the Mediation Advisory Committee on a periodic basis for surveys and stakeholder consultation.

The program will be reviewed to respond to developments (eg national standards for mediation and data collection).

**Evaluate what?**

It is evident from the design principles for the evaluation program, that the Tribunal wants to ensure that the program is as targeted as possible and is integrated as efficiently as possible into the Tribunal's case management system. To achieve that objective the Tribunal must carefully consider what information to gather and for what purpose.

I have examined the type of indicators that have been used in mediation evaluation studies and considered what use could be made of that information, in the context of the Tribunal's objectives.

These indicators include participation rates, user rates, settlement rates, trial rates, user satisfaction (process and outcome), mediator satisfaction (process and outcome), compliance, time savings, litigant costs, institution costs, reductions in court backlogs, relationship building, removal of the sources of the problem and quality of outcome.

Given such a comprehensive range of potential indicators (and the above list does not purport to be exhaustive) evaluation programs have the potential to become very complex

and resource intensive. I see a real potential for the Tribunal to invest so much energy and so many resources in data collection and analysis, that there will be little energy, enthusiasm or, most likely, resources left to respond to the evaluation. This concern has affected both the design principles and the measures that have been selected for evaluation.

Attachment A to this paper is a table entitled "Evaluating Mediation in the Land and Resources Tribunal (Qld)". This is an attempt to simply illustrate the link between the Tribunal's mediation objectives, how they are being implemented and how the service could be monitored and evaluated.[23] In developing the table, a number of choices have been made about what data to collect and for what purpose. The following is a discussion of different measurement indicators and the approach that is proposed in relation to each of them.

**Settlement rates**

I have chosen to address this measure first, not because it has prime significance for me, but because of the response I have repeatedly received when discussing this project with lawyers and judicial officers. Many have questioned what there is to evaluate. That surely settlement itself is the measure. If there is a high rate of settlement, then the objective has been met. This approach reduces the program to a single focus – settlement. Further, it denies the courts have any responsibility for ensuring the quality of the mediation process. As is evident from the preceding discussion, I do not share that perspective and consider it to be an abrogation of the responsibility of the judiciary.

I relate these responses because, at a time when there is much activity on data collection standards and mediation performance standards, it is a timely reminder that much work still needs to be done to build a national consensus about the roles and responsibilities of courts and tribunals in relation to ADR. What appeared to me to be self-evident was somewhat mystifying to some of my colleagues and to others an unjustified waste of time, energy and money.

Accepting, then, that settlement is not the only or the prime objective for mediation in the Tribunal, is there any value in gathering information about settlement rates? Settlement rates have been relied upon as indicators of the effectiveness of the process. Some commentators have, however, challenged this assumption. Some discount the evidence of settlement rates by arguing that those who go to mediation are a self-selecting sample. Therefore "*those who choose to enter mediation are more likely to produce an agreement*".[24] There is some evidence to suggest that settlement rates are highest when both sides request mediation.[25] These issues are of particular relevance for a judicial body considering mandatory mediation. Settlement rates in voluntary programs may not necessarily translate to a mandatory system.

Whilst the Tribunal rarely refers against the objection of a party, the Tribunal does have a strong case management focus to its mediation program. It is not inconceivable that increases in caseload in particular types of matters may result in a call for compulsory

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[23] I would like to acknowledge the assistance of Professor Rosemary Hunter of Griffith University in suggesting this approach.

[24] Richard Ingleby "Why Not Toss a Coin? Issues of Quality and Efficiency in the Evaluation of Alternative Dispute Resolution" presented at the Ninth Annual AIJA Conference 18-19 August 1990, p56.

[25] Kenneth Kressel, Dean G. Pruitt and Associates., Mediation Research: The Process and Effectiveness of Third-Party Interventions, Jossey-Bass Publishers, San Francisco 1989, p403.

early mediation. This model is already well entrenched in the Supreme Court of Queensland, for personal injury matters and in Tribunals, such as the Queensland Building Services Tribunal. For this reason, the monitoring and evaluation program will be designed to test whether there is a higher settlement rate amongst those who request mediation. This will contribute to the Tribunal's source of diagnostic information.

In these early stages of evaluation, there has probably been an overemphasis on settlement as an indication of success. This reflects one of the primary motivations for courts and for governments in introducing mediation programs. If settlement is not the only objective, settlement rates may not tell us what we need to know.

Some authors argue that there is little consistency in findings about the rate of settlement in mediation.[26] In particular, settlement rates have been shown to be an unreliable indicator of user satisfaction. A study by Kelly and Gigy[27] found that a significant minority of their sample of divorcing couples who did not reach a mediated settlement nevertheless valued the process because it accomplished other things, such as improving communication or reconciliation. Conversely in the Delaware child support mediation program settlement rates were high, but so were levels of user dissatisfaction.[28]

With those reservations about the conclusions that can be drawn from settlement rates, I consider they are directly relevant to the Tribunal's objective of facilitating parties resolving disputes themselves. There is little point in providing a fair, expeditious, cost-effective process that does not deliver outcomes.

Nevertheless, consistent with the Tribunal's objectives, it is not only complete resolution that we are interested in. Partial settlement or clarification of the issues upon which adjudication is required can also achieve the objective of facilitating parties resolving disputes themselves. Either partial settlement or clarification can also significantly contribute to the Tribunal providing an expeditious process. So too can process agreements between the parties that deal with how the dispute will be managed within the adjudicative process. An expeditious adjudicative process is an objective imposed on the Tribunal by its constituting Act.[29] So, quite apart from the mediation objectives, mediation can contribute to the Tribunal's statutory obligations. It is this that lies at the heart of the Tribunal's integration of mediation into its case management approach.

**User rates**

Some have questioned the value of collecting information about user rates. Ingleby suggests that *"The figures are easier to obtain than to use as a satisfactory basis for conclusions"*.[30] The concern here is what this information discloses about the mediation service. There is certainly a temptation to rely on user rates as an indication of its acceptance by the Tribunal's users and, therefore, as an indication of the quality of the service.

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26 Sandi Caspi "Mediation in the Supreme Court. Problems with the Spring Offensive Report" Australian Dispute Resolution Journal, (1994) vol 5, pp255-6.

27 Kressel and Pruitt op cit, ch 12.

28 Ibid, ch 1.

29 LRT Act s. 49(1) (b) "the tribunal must – (b) act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it".

30 Ingleby op cit, p55.

I accept Ingleby's caution. The Tribunal does not propose to rely upon user rates as a measure of the quality of the service. Nevertheless, I consider user rates can be a useful measure of whether the Tribunal is achieving its objective to "facilitate parties resolving disputes themselves". To achieve this objective, parties need to be aware of the service. User rates provide some indication of awareness. To this end, the number of requests for and references to mediation will be captured by the case management system. Awareness of the service will also be tested through periodic consultation of stakeholders.

**User satisfaction**

Delaney and Wright argue that litigant satisfaction is arguably the only relevant and certainly the only practical criterion by which the quality of non-adjudicated outcomes can be judged, and that satisfaction cannot be assumed merely from the fact of settlement.[31]

Kressel and Pruitt report that general user satisfaction rates in mediation are typically 75% or higher, even where users do not reach a mediated agreement. They warn, however, that *"disputant satisfaction should not be confused with an objective evaluation of the quality of services rendered … at least in the area of divorce mediation, as many as 45 to 50 percent of those surveyed have significant complaints about the mediation experience, regardless of their overall level of satisfaction.*"[32]

For me, this begs the question of what the users in those studies thought they were being asked to assess. What were they satisfied with and why? User satisfaction could be used as a method of assessing many of the Tribunal's mediation objectives – whether it is fair, whether it is effective, whether it is informal and whether it produces appropriate outcomes. The challenge is to design a user satisfaction survey that assists the users to differentiate between their overall impression of the mediation experience and the various contributions to that impression. Whilst it hopes to achieve some level of comfort from the evaluation program, which could be provided by a general satisfaction rating, the Tribunal also seeks a program that assists it to improve the mediation service. This requires a level of specificity that a general user satisfaction rating cannot give.

A general user satisfaction survey is also unlikely to properly deal with the so called "placebo effect" whereby participants "draw benefit from a novel, intriguing and enthusiastically administered form of treatment when the treatment itself has no intrinsic merit. This placebo effect is especially likely to contaminate attitudinal measures, such as general satisfaction, which are precisely the ones on which the evidence in favour of mediation is most impressive."[33]

Research on federally funded family mediation in Sydney concluded that participants who expressed reservations about mediation, when compared with those who expressed more optimistic expectations:

- were less enthusiastic about aspects of the mediators' professional skills;
- were less enthusiastic about the effects of mediation on their relationships with their former partners;
- had lower satisfaction levels with aspects of the mediation outcomes; and

[31] Delaney and Wright op cit, para 9.
[32] Kressel and Pruitt op cit, pp395-396.
[33] Ibid, p400.

- gave lower ratings for fairness of agreements.[34]

This research illustrates some link between party attitude to mediation and satisfaction ratings on a range of issues. If, therefore, user satisfaction is to be relied upon as "the only relevant and certainly the only practical criterion" to evaluate certain objectives, then user survey design must take this into account.

One obvious strategy is to ask open ended rather than closed questions and to seek feedback on, for example, what it was that made the process fair for the particular party. A challenge the Tribunal has yet to face is how to balance the desire for specific qualitative information with the resource demands of obtaining and analysing that information. At this stage, all I can do is raise it as a key issue for advancing the evaluation project.

It is proposed to evaluate a number of the Tribunal's objectives with reference to user satisfaction. The comments made here generally apply to the discussion of each of the objectives.

**Fairness – by whose standards?**

The Tribunal has an objective of providing a mediation process that is fair. Jill Howieson has recently published an excellent paper on perceptions of justice and fairness, which I consider reveals the dilemma for any judicial body seeking to evaluate whether their mediation process is fair.[35] In that paper she draws out distinctions between those factors that legal theorists compared with psycho-social theorists focus on when assessing the fairness of a process.

I hope I have accurately captured Ms Howieson's analysis when I state that, in essence, it is a conflict between subjective and, apparently objective notions of fairness. For psycho-social theorists, procedural justice or the subjective perception of fairness is paramount. For legal theorists, procedural fairness or the ability to conform to objective standards of justice is paramount. Of course, those objective standards are, themselves, a subjective, albeit collective, assessment that certain features represent a fair process. In my view, this is what jurisprudence dealing with procedural fairness or "natural justice" has sought to develop – a consensus about what features represent a fair process. It is worth noting, however, that this has evolved largely from disputes being dealt with in an adjudicative framework. Its direct applicability to a non-adjudicative framework must, therefore, be considered carefully.

After researching plaintiff satisfaction with a range of dispute resolution processes in NSW, Delaney and Wright concluded that there was a higher satisfaction rate for plaintiffs who resolved at pre-trial conference or mediation than through court hearing or arbitration.[36] A number of factors other than cost and delay were significantly related to satisfaction. They include:

- Whether the parties feel they have some control over and participation in the process of resolving their dispute;

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[34] Federally Funded Family Mediation in Sydney, Outcomes, Costs and Client Satisfaction, Attorney-General's Department, July 1996, pp107-8.

[35] Jill Howieson "Perceptions of Procedural Justice and Legitimacy in Local Court Mediation" Murdoch University Electronic Journal of Law, (2002) vol 9:2.

[36] Delaney and Wright op cit, para 46.

- Whether they are treated in a dignified manner;
- Whether they understand the process; and
- Whether they perceive the process to be careful and thorough.[37]

Whilst they know these factors are related to satisfaction and to procedural differences between different methods, Delaney and Wright concluded that they did not know what it is about the procedures themselves that caused litigants to attribute these qualities to them.

This debate is one that is well beyond the capacity of the Tribunal to resolve. My touchstone is the objective of facilitating parties resolving disputes themselves. For this objective, my emphasis is more on the self-determination than the settlement aspect. That is, the parties "resolving disputes *themselves*".

Our civil procedure rules are based on an inherited or developed consensus within the legal profession of what represents fair play. To a certain extent, so are the legislative objectives encapsulated in s. 94 SCA. Nevertheless, mediation is not yet subject to significant constraint by a body of developed jurisprudence. I believe that parties still have an opportunity to define what they consider to be a fair process. As governments, courts and tribunals and service providers move towards some regulation of standards and quality, I hope we will not lose sight of this opportunity. I consider an evaluation program can provide a forum for developing a greater understanding of what are the process features that contribute to a party's perception that the process is fair.

**Fairness – the mediator's role**

NADRAC has reported certain anecdotal comments that reveal concerns or expectations about the role of the mediator in ensuring the process is fair:

- Mediators should treat all parties with respect and equally;
- The mediator's role needs to be explained and be acceptable to the parties, it must be consistently followed and needs to deal with issues such as neutrality, confidentiality, responsibility for obtaining legal or expert advice, suggesting solutions, determining outcome;
- Mediators need to control process to encourage resolution but not be abusive or coercive; and
- Mediators need to be competent to conduct the process.[38]

It has proposed standards for mediators comprised of three elements – skills, knowledge and ethics.[39] For evaluating fairness, I consider the standards for ethics to be of prime importance. In summary, they are:

- Promote the services accurately;
- Ensure effective participation by the parties;
- Elicit information;
- Manage continuation or termination of the process;
- Exhibit lack of bias;
- Maintain impartiality;
- Maintain confidentiality; and

[37] Ibid,paras 111-112.
[38] NADRAC Discussion Paper op cit, p18.
[39] NADRAC Framework for Standards op cit.

- Ensure appropriate outcomes.[40]

The Tribunal intends to use that framework to develop its Mediator's Code of Conduct and complaint procedure and to evaluate mediator performance.

**Fairness – who should mediate?**

A particular issue relevant to fairness that the Tribunal intends to investigate is the question of who should mediate. The LRT Act anticipates Members of the Tribunal will mediate and many parties or their representatives request Member mediation. As outlined in the background section, some cases are mediated by the ADR Branch, some by a single Member and I have just concluded a hybrid model where I co-mediated with an ADR Branch mediator.

The opposing views of judicial involvement in mediation are best summed up by these two quotes:

> *"It is vital that third parties continue to claim that they are independent of the disputants. The best way to do this is for them to be officers of the court."*[41]

> *" A court that makes available a judge or registrar to conduct a true mediation is forsaking a fundamental concept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of the court by one party, in which the dispute is discussed and views expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the courts observe."*[42]

To a certain extent the debate has already been determined for the Tribunal by the terms of the LRT Act. My experience in member mediations is that parties find it difficult to distinguish between the different roles of mediator and adjudicator. Requests for an indication of how the Tribunal would determine a particular issue are frequent. The Tribunal is also part of an approval process that, in itself, can be a contributor to the dispute. There is, therefore, a potential for conflict of interests. I am in the process of preparing the Tribunal's mediation charter, which will include instructions to member mediators.

**Fairness – an appropriate outcome**

This is a question that has produced the most contemplation for the least result to date, and one that I flag as requiring further consideration by the Tribunal. In many of our cases, the Tribunal's role is to make a recommendation to a Minister about the grant or otherwise of a mining lease or environmental permit. An agreement between the parties does not have immediate force, other than as a contract between the parties. It is likely to strongly influence the decision ultimately made. I consider this presents a particular challenge for

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40 Ibid, pp110-114.

41 Richard Ingleby, "Alternative Dispute Resolution and the Courts" 27th Australian Legal Convention Adelaide 1991 (cited in The Australian Law Reform Commission Background Paper 2 – Alternative or assisted dispute resolution, December 1996, p18).

42 L Street Editorial "The Courts and Mediation – A Warning" (1991) vol 2, Australian Dispute Resolution Journal, pp 203-4.

evaluation. I am also concerned that any evaluation took into account the possibility that attitude a party's to mediation can affect their perception of the fairness of the outcome.

Further, the mediation service provided is facilitative not determinative. Mediators are instructed not to provide parties with advice, other than about the mediation process, or to recommend a particular outcome. I consider the standard dealing with ensuring appropriate outcomes is, therefore, less relevant.

**Fostering Relationships**

An oft cited advantage of mediation is its potential to improve the capacity of individuals to negotiate their post-dispute relationship.[43] Many of the Tribunal's parties are required to have ongoing contact over a lengthy period, in some cases decades. Further, much of the Tribunal's jurisdiction relates to disputes about the enforcement of compensation agreements and other types of agreements, such as Indigenous Land Use Agreements.

If mediation can produce durable and workable agreements and improve the parties' capacity to manage their relations without further assistance, it will achieve the Tribunal's objective of providing an effective process. It will also assist in preventing disputes that would otherwise require mediation. To this end, the Tribunal proposes to conduct follow up surveys of parties some 12 months after resolution.

**Cost**

There have been many comparative studies of costs of mediation and litigation. Tyler reports that cost and time are most widely studied aspects of alternative dispute resolution.[44] His assessment of the evaluations is that modest cost savings can occur but that *"the important point … is that both traditional court procedures and alternative procedures offer tremendous opportunities for cost savings."*[45]

It is this important point that the Tribunal intends to focus on, rather than a comparative analysis. The Tribunal's objective is to provide a cost-effective process. Procedures have been developed in furtherance of that objective. The Tribunal does not intend to design its evaluation program to test the claim that mediation is cheaper than adjudication. Cost data will be used as a management tool, rather than as a means of justifying the existence or continuation of the mediation service. Given our statutory requirement to provide mediation, there seems little point in approaching evaluation as a means of justifying what the Tribunal has no choice in providing.

The question of who mediates also has cost implications. Especially at a time when caseloads permit, there is a strong case for using Members to mediate, as it is the Tribunal that bears the costs of the ADR Branch mediators. Cost data will assist the Tribunal to assess whether the use of external mediators is significantly more expensive. When analysed in the context of other information, such as parties' perception of the fairness of the process when Members mediate, the Tribunal should be in a position to make more informed decisions.

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43 Ingleby "Why Not Toss a Coin" op cit, p61.
44 Tyler op cit, p424.
45 Ibid, p426.

## Time

Time is a similar measure to cost. As with cost, the Tribunal is less interested in a comparative analysis than in obtaining management information that will help it assess its service against two objectives – to provide an expeditious process and to provide a cost-effective process.

## Diagnostic information

There are a number of studies that cite circumstances that render a case suitable for mediation or increase the likelihood of resolution. Ingleby asserts that *"those who choose to enter mediation are more likely to produce an agreement"*.[46] There is certainly evidence to suggest that settlement rates are highest when mediation is requested by both sides rather than only one or by the mediation agency.[47]

The relationship between the parties is also relevant to outcomes. Kessel and Pruitt cited the following measures of conflict as correlating negatively with settlement:

- the severity of prior conflict between the parties;
- the level of hostility during the hearing;
- the existence of ideological or cultural differences;
- perceptions about the other party – unreasonable or angry or impossible to communicate with;

and observed that *"the worse the state of the parties' relationship with one another, the dimmer the prospects that mediation will be successful"*.[48]

Mediation isn't mandatory in the Tribunal, but is encouraged by the members in cases they consider may benefit from mediation. The Tribunal currently has no guidelines about which cases may be appropriate to refer. In isolation, relying on personal experience in mediation, anecdotal information and assumptions drawn from whether a matter settles or not, Members are individually developing an unwritten checklist of factors they take into account in deciding whether to refer or to suggest a referral to mediation. But the information base is slender.

Whilst I am reasonably confident that is the norm in most jurisdictions, it is hardly a rigorous basis for decisions by Members and can lead to inconsistent treatment of like matters. I consider the evaluation program has a role to play in addressing this, by fleshing out that information base and providing a firmer basis for suitability criteria. Accordingly, the Tribunal intends to elicit diagnostic information through party, mediator and lawyer survey.

This should assist the Tribunal in its objective to provide an effective process. It could facilitate Members filtering out those cases where mediation is unlikely to succeed. It could also identify factors that need to be taken into account in Tribunal procedures and documentation. For example, reservations about the mediation process may relate to a lack of familiarity or understanding rather than hostility to the process. The former can be addressed. The latter may be inappropriate to address.

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[46] Ingleby "Why Not Toss a Coin" op cit, pp55-56.
[47] Kressel and Pruitt op cit, p403.
[48] Ibid, p402.

Further, one of the factors correlating negatively with settlement is cultural differences. The Tribunal already has significant cultural heritage jurisdiction. Two draft bills propose to confer specific mediation jurisdiction on the Tribunal under a new process for cultural heritage studies and management plans. It could be critical to the effectiveness of that mediation jurisdiction to gain a more sophisticated understanding of the reasons cases involving cultural differences are harder to settle. It would be useful for the Tribunal to be able to monitor the impact of procedural changes designed to deal with those reasons. Thus, diagnostic information can contribute to refining the mediation process to meet the needs of specific types of matters and parties.

**Elements of monitoring and evaluation program**

The matters referred to above have been taken into account in determining what factors would be evaluated and for what purpose. As referred to above, this is best illustrated by the table attached to the paper. In order to gain an overall sense of the information that the Tribunal is considering gathering, I have summarised the data that will be collected and the method of collection below, without reference to the purpose for its collection.

- **Complaints procedure** to allow consideration of concerns about mediator behaviour.

- **Case management data:**
  - Requests for mediation;
  - References to mediation;
  - Cases settled through mediation;
  - Cases in which issues in dispute are clarified or reduced through mediation;
  - Cases involving disputes arising out of mediated agreements;
  - Nature of matter (by Tribunal code);
  - Number of issues;
  - Number of parties;
  - Whether parties represented;
  - Stage at which referred to mediation;
  - Cases achieving process outcomes;
  - Cases involving pre-filing request ;
  - Date of party request for mediation;
  - Date of reference to mediation;
  - Report back date;
  - Number and dates of mediation sessions;
  - Date mediation finalised;
  - Date proceedings finalised; and
  - Actual costs of mediation, including Member time; LRT staff time; mediator costs, if any; location and cost of venue and photocopying and other incidental charges.

- **Party exit survey (in some cases lawyer and mediator survey as well)**:
  - Factors influencing decision to request or not to request mediation (party and lawyer);
  - Whether Tribunal's material assisted preparation (party and lawyer);
  - Whether the mediators assisted parties in the process (party and lawyer);
  - Perceptions about fairness of process (party and lawyer);
  - Factors influencing assessment of fairness (party and lawyer);

- If a Member mediated, whether that affected perceptions about fairness (party and lawyer);
- If dispute arose out of mediated agreement, the cause of the dispute (party, lawyer and mediator);
- Factors that made the dispute suitable or unsuitable for mediation (party, lawyer and mediator);
- Perception of suitability of mediator and their skills (party and lawyer);
- Areas where further training or experience would have assisted (mediator);
- Perceptions of formality (party and lawyer).

- **Party follow up survey (in some cases lawyer follow up survey as well)**:
  - Perceptions about fairness of process (party and lawyer);
  - Factors influencing assessment of fairness(party and lawyer);
  - If a Member mediated, whether that affected perceptions about fairness (party and lawyer);
  - In cases involving process outcomes, about the impact the process outcomes had on the subsequent hearing (party and lawyer);
  - Durability of the mediated agreement (party);
  - Whether capacity to negotiate enhanced (party);
  - Whether relationship with other parties improved (party);
  - Any other perceived benefits arising out of the mediation (party).

- **Stakeholder consultation**:
  - Awareness of the availability of mediation;
  - Understanding of the mediation process;
  - Perception of Tribunal's mediation information;
  - Perception of the fairness of the process;
  - Awareness of the complaint procedure;
  - Knowledge of pre-filing mediation jurisdiction;
  - Perception of the effectiveness of the process;
  - Perception of the formality of the process.

**Where to from here**

The Tribunal is yet to consult stakeholders on the mediation objectives that it has developed. I consider this step is necessary before progressing the project.

I am also reviewing the Tribunal's documentation of its mediation service, its obligations, the mediator's obligations and the parties' obligations and will produce the following package of materials:

- A **Tribunal Mediation Charter** – outlining the Tribunal's mediation service and the Tribunal's commitments, obligations and responsibilities in relation to mediation;
- A **complaints procedure** – outlining a procedure for parties wishing to make a complaint about mediator performance and how the Tribunal will deal with the complaint;
- A **Mediator's Code of Conduct** – defining the role and responsibilities of the mediator and incorporating reporting and other requirements;

- A **Guide to Parties** – describing the mediation process, the roles and responsibilities of the Tribunal, the mediator and the parties and referring parties to further sources of information.

Once these steps are complete, and subject to other timing issues referred to above, the Tribunal proposes to establish a Mediation Advisory Committee and to seek the assistance of qualified and experienced researchers in designing the evaluation program and assisting the Tribunal to implement it.

A closing thought – It would be relatively easy for the Tribunal to collect an impressive array of data and to create an impression of diligence and energy. However, what is more important is what the data demonstrates and how the Tribunal responds to it. I am hopeful, that by degrees, the Tribunal will develop or access the required source of analysis and have the will and flexibility to use the process to effect positive change.

*Annexure*

# Evaluating Mediation in the Land and Resources Tribunal (Qld)

## Mediation Objectives

These objectives have been developed by the Tribunal and incorporate the objects prescribed by s. 94 of the *Supreme Court of Queensland Act 1991* (SCA) and the objectives proposed by NADRAC in "A Framework for ADR Standards" April 2001.

They also take into account the requirements imposed by the *Land and Resources Tribunal Act 1999* (LRT Act) for proceedings before the Tribunal.

## Implementing the Objectives

The Tribunal has designed a mediation service and developed procedures to implement these objectives. In essence the mediation service provided by the Tribunal is:

- Facilitative and interest-based;
- Provided by Tribunal Members who have been trained as mediators or by mediators trained and accredited by the Dispute Resolution Centre of the Department of Justice and Attorney-General (Qld); and
- Free of charge to the parties.

The procedures are documented by:

- "Land and Resources Tribunal Mediation Charter";
- "Mediators' Code of Conduct";
- "Preparing for Mediation before the Land and Resources Tribunal" (information for parties)

Procedures outlined below refer to legislative requirements and where the procedures are documented.

## Monitoring and Evaluating performance

The Tribunal wants to assess whether its mediation objectives are appropriate and are being implemented. It does not propose a comparative evaluation between mediation and adjudication.

The program design requirements are to:

- Capture as much information as possible through routine case management and reporting;
- Record information in a format that can be easily and flexibly interrogated;
- Keep surveys of parties, lawyers and mediators simple and focussed;
- Involve stakeholders on a periodic basis; and
- Involve expert advice through an advisory committee.

- Information will be obtained using:
  - Complaints procedure;
  - Case management data;
  - Exit surveys (party, lawyer and mediator);
  - Follow up surveys (party and lawyer); and
  - Periodic stakeholder consultation.
- Information will be considered against objectives and procedures:
  - By the Registrar and President through regular reports on case management data;
  - By the President and Mediation Advisory Committee on a case by case and periodic basis for complaints;
  - By the Mediation Advisory Committee on a periodic basis for surveys and stakeholder consultation.
- The program will be reviewed to respond to developments (eg national standards for mediation and data collection).

*Annexure*

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| **Facilitate parties resolving disputes themselves**<br><br>"To provide an opportunity to participate in ADR processes in order to achieve negotiated settlements and satisfactory resolution of disputes" s. 94(a) SCA.<br><br>"ADR should resolve or limit disputes in an effective and efficient way" NADRAC objective 1. | • **Provide access to mediation**<br>• Access guaranteed by some legislation (s662(2)(a)(ii) Mineral Resources Act 1989 currently inoperative; s51B LRT Act and s221 Environmental Protection Act 1994);<br>• Tribunal can refer to mediation at the request of one or all parties or of its own motion (r320 UCPR);<br>• LRT Members may mediate or the Tribunal may appoint mediators (s71 LRT Act - r314 UCPR prescribes a process for appointment of mediators although the parties can agree that a person who is not a mediator be appointed to mediate a matter).<br>• **Assist parties to mediate by**:<br>• Providing information about the mediation process (Preparing for Mediation before the Land and Resources Tribunal; Mediation Charter);<br>• Ensuring Mediators assist parties in the process (Code of Conduct). | • **Case management data:**<br>• Requests for mediation;<br>• References to mediation;<br>• Cases settled through mediation;<br>• Cases in which issues in dispute are clarified or reduced through mediation.<br>• **Party and lawyer exit survey**:<br>• Factors influencing decision to request or not to request mediation;<br>• Whether Tribunal's material assisted preparation; and<br>• Whether the mediators assisted parties in the process.<br>• **Stakeholder consultation**:<br>• Awareness of the availability of mediation;<br>• Understanding of the mediation process; and<br>• Perceptions of Tribunal's mediation information. |
| **Provide a fair process**<br>"to introduce ADR processes into the court system to improve access to justice for litigants" s. 94(b) SCA "to safeguard ADR processes – (ii) by extending the same to protection to participants in an ADR process they would have if the dispute were before the Supreme Court" s. 94(d)(ii) SCA.<br>"the tribunal must – (a) observe natural justice" s. 49(1)(a) LRT Act. | • **Instructions to Mediators**:<br>• Exhibit lack of bias by disclosing interests or experiences that may create conflict of interest.<br>• Maintain impartiality by:<br>• treating parties equitably;<br>• providing all parties with the opportunity to explore the issues of importance to them;<br>• refraining from expressing an opinion on the merits of any party's case.<br>• Don't advise parties except on mediation process; | • **Complaints procedure** to allow consideration of concerns about mediator behaviour.<br>• **Party and lawyer exit survey and party follow up survey:**<br>• Perceptions about fairness of process;<br>• Factors influencing assessment of fairness;<br>• If a Member mediated, whether that affected perceptions about fairness. |

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| | • Don't pressure parties into settlement;<br>• Ensure unrepresented parties are treated fairly when mediating with represented parties;<br>• Maintain confidentiality (s73 LRT Act & s112 SCA).<br>• **Complaints procedure** (Code of Conduct and Mediation Charter). | • **Stakeholder consultation:**<br>• Perceptions of the fairness of the process;<br>• Awareness of the complaint procedure. |
| **Provide an expeditious process**<br>"to introduce ADR processes into the court system to reduce delay" s. 94(b) SCA<br>"to provide a legislative framework allowing ADR processes to be conducted as quickly….as possible" s. 94(c) SCA<br>"ADR should resolve or limit disputes in an ……efficient way" NADRAC objective 1<br>"the tribunal must – (b) act as quickly . . . as is consistent with a fair and proper consideration of the issues before it. s. 49(1)(b) LRT Act. | • **Promote awareness of "pre-filing" jurisdiction to mediate** (Mediation Charter)<br>• **Integrate mediation into case management procedures:**<br>• Members to consider and raise mediation with the parties at all relevant stages. (Mediation Charter)<br>• Members and Mediators to encourage process as well as content outcomes (eg agreements on procedural issues, resolving expert evidence, developing agreed statements of facts). (Mediation Charter & Code of Conduct)<br>• **Use pre-mediation conferences to expedite mediation:**<br>• Deal with housekeeping issues (timing, venue etc);<br>• Identify issues;<br>• Identify information needs;<br>• Prepare parties for negotiation; and<br>• Educate parties and lawyers about style of mediation.<br>• **Actively manage mediation timeframes:**<br>• Instruct Mediators to act as expeditiously as possible and to comply with rules (r324 UCPR requires the Mediator to start as soon as possible and to try to finish within 28 days). (Code of Conduct) | • **Case Management Data:**<br>• Cases achieving process outcomes;<br>• Cases involving pre-filing request ;<br>• Date of party request for mediation;<br>• Date of reference to mediation (with facility to cross-reference to presiding member);<br>• Report back date;<br>• Dates of mediation sessions;<br>• Date mediation finalised; and<br>• Date proceedings finalised.<br>• **Party and lawyer follow up survey in cases involving process outcomes,** about the impact the process outcomes had on the subsequent hearing.<br>• **Stakeholder consultation** about knowledge of pre-filing mediation jurisdiction. |

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| | • Referring Member to:<br>  • Advise Mediators if urgent circumstances and of any known logistical impediments to an early mediation session;<br>  • Set a date for the mediator to report on progress (Mediation Charter);<br>• Mediation Referee (or convenor) to monitor timeframes (Mediation Obligations). | |
| **Provide an effective process**<br>"ADR should resolve or limit disputes in an effective…way" NADRAC objective 1 | • **Promote enduring resolution of disputes by achieving workable agreements:**<br>  • Provide mediators with information about formal requirements imposed by legislation (Tribunal's Mediation Charter);<br>  • Identify cause of subsequent disputes arising out of mediated agreements;<br>  • Where appropriate, instruct mediators about raising with the parties potential causes of agreements breaking down.<br>• **Refer appropriate cases to mediation by:**<br>  • Identifying factors that parties and mediators consider make a dispute suitable or unsuitable for mediation;<br>  • Developing guidelines for parties requesting and for Members considering mediation, based on those factors. | • **Case management data:**<br>  • Cases involving disputes arising out of mediated agreements;<br>  • Nature of matter (by Tribunal code);<br>  • Number of issues;<br>  • Number of parties;<br>  • Whether parties represented;<br>  • Stage at which referred to mediation; and<br>  • Whether mediation requested or required.<br>• **Party, lawyer and mediator exit survey:**<br>  • If dispute arose out of mediated agreement, the cause of the dispute;<br>  • Factors that made the dispute suitable or unsuitable for mediation;<br>  • Perception of suitability of mediator and their skills;<br>  • Areas where further training or experience would have assisted. |

*Annexure*

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| | • **Engage suitable mediators by:**<br>  • Using Tribunal Members who have undergone formal mediation training or mediators engaged through the Dispute Resolution Division (JAG);<br>  • Provide ongoing training and development for Tribunal mediators, including seminars, newsletters and discussion forums;<br>  • Implement a complaints mechanism. | • **Party follow up survey:**<br>  • Durability of the mediated agreement;<br>  • Whether capacity to negotiate enhanced;<br>  • Whether relationship with other parties improved;<br>  • Any other perceived benefits arising out of the mediation.<br>• **Stakeholder consultation** about perceptions of the effectiveness of the process. |
| **Provide a cost-effective process**<br>"to introduce ADR processes…to reduce cost.." s. 94(b) SCA<br>"ADR should resolve or limit disputes in an….efficient way" NADRAC objective 1 | • **Adopt procedures that are cost-effective to the Tribunal:**<br>  • Use Tribunal or court facilities wherever possible;<br>  • Use DRC mediators, in particular for regional mediations;<br>  • Use regionally based mediators wherever possible; and<br>  • Adopt procedures to expedite mediations as above.<br>• **Adopt procedures that are cost-effective for the parties:**<br>  • Provide mediation in as convenient a location as possible; and<br>  • Mediations under the auspices of the Tribunal to be free of charge. | • **Record actual costs of mediation**, including:<br>  • Member time;<br>  • LRT staff time;<br>  • Mediator costs, if any;<br>  • Location and cost of venue;<br>  • Photocopying and other incidental charges.<br>  • Monitor number of mediation sessions. |

*Annexure*

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| **Provide an informal process**<br><br>"to provide a legislative framework allowing ADR processes to be conducted…..with as little formality and technicality, as possible" s. 94(c) SCA<br><br>"the tribunal must – (b) act . . . with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it." s. 49(1)(b) LRT Act | • **Instructions to mediators** to eliminate unnecessary formality. (Code of Conduct) | • **Party exit survey** about perceptions of formality.<br><br>• Periodic stakeholder consultation about perceptions of the formality of the process. |