



Australian Government

Department of Agriculture, Fisheries and Forestry

3 June 2009

Ms Serena Beresford-Wylie
Director
NADRAC Secretariat
Robert Garran Offices
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BARTON ACT 2600

Dear Ms Beresford-Wylie

Thank you for the opportunity to comment on the Council's Issues Paper *Alternative Dispute Resolution (ADR) in the Civil Justice System*, and specifically on strategies to encourage greater use of ADR in resolving government disputes. Feedback is now provided with my apologies for the delay in response.

We support the move by the Attorney-General to strengthen the rules that agencies must follow in managing disputes under the *Legal Services Directions 2005*, and in particular, the promotion of ADR as a means for early resolution of a dispute. ADR processes provide more flexible options that can be both time and cost-effective compared to a judicial review. They can also be tailored to suit the specific needs of the disputing parties.

The department currently participates in a range of ADR processes through review of its administrative decisions and actions by the Administrative Appeals Tribunal, the Privacy Commissioner and the Commonwealth Ombudsman, and through the resolution of discretionary compensation claims and other claims. Further, it has actively sought independent conciliation for complex and/or sensitive employee related disputes. We have also provided instructions to staff on the claims handling and developed dedicated management plans to cater for specific types of disputes.

In our experience, one of the barriers to greater engagement of ADR is confusion over which process should be followed in which circumstance. As you have identified, this confusion can be compounded when part of the dispute may be more properly settled under one regime, and part under another. As it is, understanding of the range of processes for dealing with disputes varies within the private and public sector, not to mention the general public.

Guidance material on the types of resolution processes that suit particular disputes would address this, and some material already exists. For example, the *Commonwealth Procurement Guidelines* outline broad principles for dispute resolution in tendering processes, whereas the *ANAO Best Practice Guide on Developing and Managing Contracts* provides broad direction on independent mediation in contract disputes. The issue is more that there is a proliferation of material on best practice government decision-making and dispute resolution, and that not all ADR processes are reflected in legislation governing the dispute subject matter.

If NADRAC were to bring together advice on the range of ADR options for easy reference as a starting point, this would enable potential litigants to make an informed choice on whether to pursue litigation or an alternate action. It would also reinforce the obligation on Commonwealth

departments and agencies to act as 'model litigants' by helping to identify the best way to settle particular disputes as fairly, quickly and cheaply as possible, and minimise the potential for inconsistency in approach and application. The means for agencies to share information on the success (or otherwise) of various ADR strategies and to find mediators would be of further benefit.

We also agree that consideration would need to be given to the relationship between the settlement of legal claims and claims under discretionary compensation schemes, particularly given the increasing use of legal representation in resolving claims under the latter.

The department would not, however, advocate a mandated approach to the use of ADR in all circumstances. The appropriateness of engaging an ADR process should be determined on a case by case basis, according to the nature and complexity of the dispute. For example, it may be inappropriate in certain cases to utilise ADR for disputes where a coherent position is required in key strategic areas of law, or where jurisdictional issues arise. In other cases, it may be appropriate to use ADR to settle part of a claim only.

I trust the above comment will be of assistance. Should you require any further information or clarification, please contact Ms Leanne Herrick on (02) 6272 5299 or at Leanne.Herrick@daff.gov.au

Yours sincerely



Anne Hazell
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