

Department of Families, Housing, Community Services and Indigenous Affairs
Submission on NADRAC issues paper:
Alternative Dispute Resolution in the Civil Justice System

General comments

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) welcomes the increased focus on ADR as a mechanism for resolving or managing disputes. FaHCSIA shares the concerns of NADRAC that there may be a number of factors that operate as barriers to the use of ADR. For example, ADR may be readily dismissed as a viable option if there is a perception that there is little room for negotiation, such as where legislation contains criteria that are fixed. FaHCSIA considers that there may be a need for a “culture change” in attitudes to the use of ADR. Appropriate training and raising awareness of ADR would also assist Commonwealth officers in identifying additional cases that might be susceptible to ADR.

2. FaHCSIA (and agencies such as Centrelink on instruction from FaHCSIA) identifies cases that are susceptible to settlement and follows the *Legal Services Directions 2005*, participating in ADR where appropriate. In conjunction with sister agencies (such as the Department of Human Services, the Department of Education, Employment and Workplace Relations and Centrelink), FaHCSIA is exploring ways in which the use of ADR can be expanded, particularly in social security and family assistance matters. However, FaHCSIA recognises that not all cases are susceptible to settlement or the use of ADR. Also, FaHCSIA wishes to emphasise that the costs/benefits of ADR need to be carefully considered and its use carefully weighed against other options for settling disputes which may be more cost effective.

About the Department

3. FaHCSIA is responsible for¹:
 - (a) Income security policies and programs for families with children, carers, the aged and people in hardship;
 - (b) Services for families with children, people with disabilities and carers;
 - (c) Community support services, excluding the Home and Community Care program;
 - (d) Family relationship services;
 - (e) Housing policy co-ordination, welfare housing and rent assistance;
 - (f) Women’s policies and programs;
 - (g) Indigenous policy co-ordination and the promotion of reconciliation;
 - (h) Community development employment projects; and
 - (i) Child support policy.

¹ See Administrative Arrangements Order of 25 January 2008 as amended by an Order in Council dated 1 May 2008.

FaHCSIA's involvement in civil disputes before the Tribunals and courts

4. The majority of civil disputes involving FaHCSIA concern the review of a decision made under the social security law or the family assistance law by:
 - (a) the Centrelink Authorised Review Officer under the social security law or family assistance law; or
 - (b) the Social Security Appeals Tribunal (SSAT);
 - (c) the Administrative Appeals Tribunal (AAT) (consideration of the issue whether the AAT decision should be appealed to the Federal Court of Australia on a question of law).

5. FaHCSIA also has involvement in a lesser number of civil disputes. These disputes vary considerably in their nature, but include:
 - (a) various employment related matters or complaints, for example, involving staff claims for workers compensation under the *Safety, Rehabilitation and Compensation Act 1988*, complaints before the Australian Human Rights Commission or Australian Industrial Relations Commission;
 - (b) common law claims (including commercial claims) against the Commonwealth from third persons such as contractors etc; and
 - (c) matters involving the insolvency of various Indigenous organisations or involving the protection of the Commonwealth's interests.

Civil disputes involving a Centrelink decision about a payment under the social security or family assistance law

6. A large number of these decisions involve age pension, disability support pension, carer payment, carer allowance and family tax benefit. The decisions, for example, relate to the following kinds of decisions:
 - (a) not to grant a pension, benefit or allowance, eg, age pension;
 - (b) the rate at which an entitlement is to be paid (this often depends on matters such as the application of the income and assets test to the income and assets of the customer);
 - (c) the suspension or cancellation of a payment;
 - (d) the raising of debts relating to the payment and the rate at which they are recovered (this also raises issues of full or partial waiver)

7. FaHCSIA has a service delivery arrangement with Centrelink, the Commonwealth Services Delivery Agency for services in connection with FaHCSIA payments (including decision-making) to be performed by Centrelink.

8. With respect to family assistance, FaHCSIA and the Department of Employment, Education and Workplace Relations (DEEWR) delivers family assistance through the Family Assistance Office (the FAO). The FAO comprises service delivery centres located in Medicare Australia offices, Centrelink Customer Service Centres and Australian Taxation Office shopfronts.

9. Decisions under the social security law are made under delegation for the Secretary by Centrelink officers and decisions under the family assistance law are made under delegation by officers within the FAO.
10. With respect to the parts of the social security law administered by FaHCSIA, the Secretary, FaHCSIA, in accordance with the service arrangements has delegated certain powers under the social security law to the Chief Executive Officer (CEO) Centrelink under subsection 234(2) of the *Social Security Administration Act 1999*. In turn, under subsection 12(3) of the *Commonwealth Services Delivery Agency Act 1997*, the CEO Centrelink has delegated those powers to various officers within Centrelink to make the decisions, as appropriate. In addition to this, the Secretary, FaHCSIA has delegated his powers under the social security law to officers within FaHCSIA.
11. With respect to the parts of the family assistance law administered by FaHCSIA, the Secretary, FaHCSIA, in accordance with the service arrangements applying to the FAO has delegated certain powers under subsection 221(1) of the *A New Tax System (Family Assistance)(Administration) Act 1999* to officers of FaHCSIA, Centrelink, the Australian Taxation office and Medicare Australia. In addition, the CEO, Centrelink may also delegate the family assistance powers delegated to him to Centrelink staff under subsection 12(3) of the *Commonwealth Services Delivery Agency Act 1997*.
12. In support of these arrangements, FaHCSIA is responsible for policy relevant to the parts of the social security law and the family assistance law it administers. This policy is made available to various decision-makers to assist them in their decision-making.
13. Under the service delivery arrangements, the Centrelink Legal Services and Procurement Branch works closely with FaHCSIA Legal and provides advocacy services for the Secretary and represents the Secretary, FaHCSIA at hearings of the AAT.
14. The FaHCSIA Legal area of FaHCSIA (and in turn the various policy areas of FaHCSIA) become involved in the consideration of these matters when they are referred to the Department by Centrelink after scrutiny by the Centrelink Legal Services and Procurement Branch. Matters referred to FaHCSIA Legal include:
 - (a) SSAT decisions for appeal consideration by the Secretary, FaHCSIA to the AAT (this includes, for example, SSAT decisions which indicate issues concerning the application or non-application of FaHCSIA policy);
 - (b) matters before the AAT (these can involve customer as well as appeals by the Secretary) for Departmental direction/instruction;
 - (c) AAT decisions for appeal consideration by the Secretary, FaHCSIA to the Federal Court.
15. It is not uncommon for disputes to be settled during the course of discussions between Centrelink and FaHCSIA. In discussions and recommendations to the various policy areas, the requirements of the *Legal Services Directions* are followed.

Other kinds of civil disputes involving FaHCSIA

16. From time to time FaHCSIA is also involved in disputes concerning the administration of Commonwealth rights and interests created as a result of funding provided to Indigenous organisations by the Aboriginal and Torres Strait Islander Commission and the Commonwealth. These disputes typically involve either:
- (a) a breach of an obligation arising under a funding agreement, a purposes agreement (which provides that grant funded property must only be used for an agreed purpose), or the *Aboriginal and Torres Strait Islander Amendment Act 2005* (the ATSIIC Amendment Act);
 - (b) the winding up of an Indigenous organisation in circumstances where the Commonwealth holds rights and interests over assets of the organisation; or
 - (c) a challenge by an Indigenous organisation of the validity of Commonwealth caveats over the organisation's property (where the Commonwealth has lodged caveats on the basis of rights and interests created under funding agreements, purposes agreements and the ATSIIC Amendment Act)

Responses to specific questions in the issues paper

Question 6.16 - At what stage of the dispute should any mandatory ADR requirement apply?

17. In the case of appeals under the social security law or the family assistance law, FaHCSIA does not support the introduction of any form of mandatory ADR requirement at any stage of the dispute process.
18. Many disputes involving a Centrelink decision under the social security law or the family assistance law do not involve a large amount of money and the cost/benefit of any mandatory ADR should be carefully assessed (contrast commercial matters which may involve very significant amounts of money).
19. Centrelink decisions are subject to multiple levels of review. The decision is made at first instance by the Centrelink Original Decision Maker (ODM). Customers are encouraged to discuss the decision with the ODM if they are dissatisfied with the decision. The ODM may review their own decision at the request of the customer and this may lead to resolution of many disputes – for example, if the customer provides new information that satisfies Centrelink. If the customer is still dissatisfied with the decision, he or she may seek formal review by the Authorised Review Officer (ARO). Again, many matters may be resolved at this stage. If the customer is still dissatisfied with the decision, in many cases they can seek external merits review by the Social Security Appeals Tribunal (SSAT) and then again to the Administrative Appeals Tribunal (AAT). Arguably, the processes of review involve processes that achieve a similar outcome to ADR without extra expense. Discussions between FaHCSIA and Centrelink about particular matters referred to FaHCSIA by Centrelink often lead to resolution of matters. Sometimes, these discussions trigger requests for additional information from Centrelink and/or the customer which facilitate the early resolution of matters.

20. FaHCSIA considers that the *Legal Services Directions 2008* (the Directions) strike the right balance. The Directions do not make the use of ADR mandatory nor preclude its use. Rather, the Directions require an agency to give consideration to ADR and to participate in it where appropriate². In practice, this gives sufficient flexibility to use ADR where a particular case has potential to be settled without the need for a formal hearing of the tribunal or court. Instead of making the use of ADR mandatory, FaHCSIA considers that it is more appropriate to address other barriers to the use of ADR (such as a lack of awareness or cultural barriers to its use) through measures such as appropriate training.

21. With respect to the other types of matters involving FaHCSIA, the department follows the Directions and, where appropriate, participates in ADR.

22. In cases concerning the winding up of Indigenous organisations, FaHCSIA generally reaches a negotiated outcome with the relevant liquidator, but does not usually rely upon formal ADR processes.

23. The terms and conditions of the funding agreements that apply to the funding of Indigenous programs generally include a dispute resolution clause that provides for a dispute arising during the agreement to be submitted to ADR. If the dispute is unable to be resolved by informal discussion or through direct negotiation, FaHCSIA is required to pursue ADR.

7.1 - In what type of matter do/should Commonwealth agencies utilise ADR?

24. In the case of disputes arising under the social security law or the family assistance law, it is difficult to comprehensively describe all the possible types of matter in which ADR may be useful.

25. In practice, FaHCSIA gives consideration to the circumstances of each matter referred to it and attempts to identify cases which might be susceptible to settlement.

26. Having regard to the various types of disputes that commonly arise under the social security law or the family assistance law and **subject to identification of appropriate cases**, the use of ADR may have some potential to resolve disputes involving the following kinds of decision:

(a) decisions involving statutory discretions such as, for example:

- the decision to treat the whole or part of a compensation payment as not being made on the basis that special circumstances exist - section 1184K, *Social Security Act 1991*; and
- the decision to waive the Commonwealth's right to recover all or part of a debt on the basis that special circumstances exist - section 1237AAD, *Social Security Act 1991*;

(b) decisions where there is disagreement about a factual situation, for example:

² See paragraph 2(b) and paragraphs 5.1 and 5.2 of Appendix B.

- a dispute as to whether the whole or part of a debt is attributable solely to an administrative error - section 1237A, *Social Security Act 1991*;
- a dispute about when arrears of a payment can be backdated to (this may depend on, for example a finding when Centrelink gave notice of the matter in question); and
- a dispute as to when a customer entered into, or ceased to be in, a marriage like relationship (for example, if more than one specific date is open on the evidence).

7.2 - What are the characteristics of disputes where it would be inappropriate for agencies to use ADR?

27. The use of ADR may have less potential where a dispute centres over procedural issues, such as whether a customer should be granted a stay order or an extension of time. It may also have less potential in disputes involving issues of qualification, eligibility and entitlement where the legal criteria are fixed and there is no dispute as to the underlying factual issues and policy.

28. ADR may also be inappropriate in circumstances where it is necessary for FaHCSIA to take immediate action to protect Commonwealth rights and interests over grant funded property (e.g. where an Indigenous organisation is intending to dispose of an asset in breach of its obligations under a funding agreement, purposes agreement or the ATSIC Amendment Act).

7.3 - How can agencies improve their use of ADR processes?

29. FaHCSIA considers that agencies can improve their use of ADR processes by increasing awareness of officers about the processes and by offering relevant training to officers who may become involved in dispute settlement.

30. Whilst technically not ADR, processes that encourage open communication with the customer and flow of information between the parties) are useful, particularly at the earliest stages of a dispute. Information from Centrelink indicates that a significant percentage of decisions made by the original decision maker are in fact changed or varied by the ARO. It is likely that some matters which had reached the stage where the customer had appealed to the SSAT or the AAT could have been avoided had the exchange of certain information occurred earlier.

7.5 – To what extent would targeted guidance material or training for Commonwealth officers involved in ADR assist in the take-up of ADR, as well as in the quality of participation? What type of guidance material or training would be useful?

31. FaHCSIA is of the view that the training and skills of Commonwealth officers involved in the ADR process is of particular importance to the take-up of ADR. Training and greater awareness of ADR may also address cultural barriers to its use they may contribute to the failure to properly consider it in many disputes.

32. As we understand the question, the reference to Commonwealth officers “involved in the ADR process” applies **both** to Departmental staff who participate in the

process on behalf of an agency **and** Commonwealth officers employed by Commonwealth complaints handling agencies, tribunals and courts to conduct ADR sessions. If the role of a mediator or conciliator is performed poorly, the reputation of ADR will not be enhanced. Similarly, ADR processes will be enhanced by having Departmental staff who are thoroughly conversant with the ADR processes, who are skilled (or creative!) in recognising areas where a matter might be negotiated and who are skilled in negotiation.

7.6 – To what extent do Commonwealth agencies select legal representatives who are good litigators rather than skilled in the resolution of disputes?

33. The factors that go to selection of a particular representative for the Commonwealth in a legal dispute are complex and depend on the matter at hand. FaHCSIA is aware of its obligations under the *Legal Services Directions 2005* and takes ADR very seriously. FaHCSIA takes account of the representative's skills in the resolution of disputes although it is our experience that skilled litigators are also likely to be skilled at dispute resolution. In some matters, the skills of the representative in the resolution of disputes may be a primary reason for their selection.

7.7 – How can Government agencies find mediators? To what extent is assistance in this process required and how might this assistance be provided?

34. In the majority of matters, FaHCSIA utilises any services provided through the complaints handling organisation, tribunal or court in question. If a mediator was required outside the context of one provided through the complaints handling organisation etc, FaHCSIA may seek advice from one of its panel firms about a suitable person given the nature of the matter concerned.