Submission by NADRAC in response to the *Issues Paper on the Review of the Legal Services Directions*

Introduction

NADRAC welcomes the opportunity to comment on the *Issues Paper on the Review of the Legal Services Directions.* The submission focuses especially on Issue 12: 'should the Directions impose more specific obligations on agencies in relation to the use of alternative dispute resolution (ADR)?' However, the matters raised in this submission are also relevant to other issues raised in the Department's paper, including Issue 5 (use of in-house lawyers) and Issue 11 (model litigant obligations).

NADRAC believes that Commonwealth agencies should adopt the most effective dispute resolution practices available both to prevent litigation in the first place and to better manage litigation once commenced. More explicit obligations on agencies in relation to the use of ADR, along with other changes to the Directions suggested in this submission, would help to achieve this.

NADRAC notes that the Tonge (2003) report found that few Commonwealth agencies reported using ADR. It agrees with the conclusion in the Department's *Federal Civil Justice System Strategy Paper 2003* (the Strategy Paper) that 'it seems that there is capacity for the greater use of ADR by Commonwealth agencies' (p139) and believes that the increased use of ADR will help to reduce the level, cost and impact of litigation involving Commonwealth agencies.

As reported in the Strategy Paper overseas initiatives have effectively promoted the use of ADR by Government agencies. These include the US President's 1996 Executive Order directing agencies to employ ADR techniques and the UK Lord Chancellor's 2001 Pledge to use ADR in all suitable cases. The UK Pledge resulted in a 1200% increase in the use of ADR in 2003-2003 with estimated savings of over £6m.

Litigation involving Commonwealth agencies is perceived by many people to be often the direct result of either an incapacity or an unwillingness to compromise where such compromise would accord with the Commonwealth's policy and financial interests. The use of ADR, therefore, should not be considered as merely the application of additional formal procedures to the litigation process. ADR needs to be part of a conscious attempt to bring about behavioural, attitude and cultural change in how issues, problems and disputes are managed by Commonwealth agencies. The Directions are one means by which Commonwealth agencies can be encouraged and expected to adopt less adversarial and litigious approaches to dispute resolution.

The Commonwealth is the biggest single litigator, especially in the federal justice system. By being at the cutting edge of dispute management practices, the Commonwealth can directly promote effective dispute resolution in private business and in the broader community and, through this, contribute towards a less litigious society.

Through the Directions the Commonwealth can also further enhance the quality and consistency of ADR services, as recommended in NADRAC's 2001 report *A Framework for ADR Standards*. Such enhancement would capitalise on Australia's reputation as a world leader in the development of ADR.

The Government has indicated its support for the thrust of the recommendations in the ALRC 2000 report, *Managing Justice*, concerning dispute management by Commonwealth agencies, including recommendation 69 that 'each federal department and agency should be required to establish a dispute avoidance, management and resolution plan [which] should be consistent with the model litigant rules'. NADRAC agrees with this approach, especially where an agency is involved in the handling of a significant number of claims and disputes.

NADRAC recognises that government agencies have considerations that may not apply to the same extent in the private sector. These considerations may include, for example, protecting the public interest, legislative constraints, international treaty obligations, parliamentary and public scrutiny, establishing a meaningful prospect of liability, discouraging frivolous claims and the need to create (or avoid) a precedent. These considerations do not reduce the relevance of ADR but require agencies to assess how best to use different forms of ADR at various stages of a matter.

In summary, changes to the Legal Services Directions should be an element of a broader strategy involving:

1. a focus on the prevention of disputes in the first place
2. a commitment to use ADR where disputes occur, both before and during litigation
3. improved dispute resolution practices by those involved in Commonwealth litigation and legal services
4. the development of high standards of ADR practice, and
5. broader whole-of-organisational changes to the prevention, management and resolution of disputes involving Commonwealth agencies.

Part One of this submission outlines these broader strategies. Part Two provides recommendations on specific changes to the Directions. Part Three suggests possible practical steps that could be taken to facilitate the implementation of changes to the Directions.

Part one: General

A focus on dispute prevention

Commonwealth agencies need to anticipate the types of disputes that may arise and to develop strategies to prevent their occurrence. Although some disputes are beyond the control of the Commonwealth, successful strategies exist that can assist in resolving issues and problems before they become significant 'disputes'. These strategies include, for example:

1. building the communication, negotiation and conflict resolution skills of people across the agency

2. in relation to customer complaints and service charters, empowering front line staff to resolve matters at source wherever possible, without requiring the customer to escalate the matter
3. in relation to contracts, the use of partnering, relationship contracting and dispute resolution clauses, and
4. in relation to staff conflicts, building the conflict resolution skills of managers and enhancing dispute resolution procedures within certified agreements.

It is important also to identify and address in a systematic way the factors that drive parties towards or away from litigation. Such factors may involve the agencies themselves, potential litigants and the interaction between them. For example, if the costs and risks of litigation are borne by the legal services section but the costs and risks of settlement by the relevant line area, the line area may not be motivated to avoid litigation. If an agency lacks effective complaints and grievance processes, an aggrieved party may feel that the initiation of legal proceedings is the only means by which they can have their concerns addressed.

Commitment to the use of ADR

Reducing litigation requires a commitment to use ADR from the earliest stage and, wherever possible, prior to formal legal proceedings. In considering the nature of this commitment, a disinction is made between:

1. disputes of a 'corporate' nature, which arise out of an agency's business role, including transactions with suppliers, customers and employees, and
2. legal proceedings that arise out of an agency's public policy and regulatory capacity, that is, its role in representing the interests of the state.

Corporate role

In disputes of a corporate nature, a commitment to ADR would best be expressed as a general presumption to use ADR, except where clearly inappropriate.

The presumptive position creates a perception that the use of ADR is normal and expected, and breaks the nexus between the initiation of, or agreement to use, ADR and a special desire to negotiate or 'settle'. A perception remains among some legal practitioners that a decision to use ADR indicates special features about the particular case, for example, that the Commonwealth has doubts about the merits of its case. Agencies may therefore be reluctant to initiate the use of ADR in order to avoid showing 'weakness'. Moreover, if the use of ADR is seen as an unusual step by the Commonwealth, a decision to initiate ADR may give rise to unrealistic expectations on the part of other parties. Such expectations may inadvertently decrease the chance of settlement. If seen as an 'unusual' step, the motives and rationale behind a decision to use ADR to settle a matter could also be questioned in, for example, a Senate Estimates hearing or the media.

A binding policy position to use ADR, except in defined cases, gives a clear signal that the Commonwealth is willing to use appropriate methods to clarify issues, and to resolve or limit these issues, even if it is confident about the merits of its position.

Such a policy position also provides a degree of protection to agencies and supports their attempts to settle matters out of court.

ADR may be inappropriate for individual cases on various grounds, such as lack of time, lack of availability of ADR, an unmanageable imbalance of power, an inability to identify the parties to the disputes, entrenched conflict or an assessment that there are no reasonable prospects of satisfactory resolution. Agencies should not automatically dismiss the potential of ADR in such matters, however. In the experience of NADRAC members, ADR has led to successful resolution in matters, where, on face value, this would not have appeared to have been possible.

In practical terms, the commitment to use ADR would mean that, with respect to disputes of a corporate nature, an agency would:

- commence legal proceedings itself only after ADR has been initiated and (a) has been declined by the other party or (b) has been attempted without satisfactory resolution
- where it is the respondent to an application (which is more common), suggest, or agree to participate in, ADR at the earliest possible opportunity
- continue to explore, support and facilitate the use of ADR at all subsequent stages in the dispute, and
- in matters where the agency decides that ADR is inappropriate, communicate this position at the earliest possible stage.

Public Policy Role

In relation to matters involving the public policy role of Commonwealth agencies, the commitment may be better expressed as maximising the potential use of ADR to prevent or limit litigation, within any legislative or policy constraints that apply.

In many respects, this commitment is already expressed through various statutory and policy frameworks currently in place. For example, native title matters are mediated in the first instance through the National Native Title Tribunal, administrative appeals are subject to the conciliation and mediation procedures of the Administrative Appeals Tribunal, international disputes may be subject to treaty obligations that mandate the use of ADR and the Australian Competition and Consumer Commission may use various negotiation processes under the *Trade Practices Act 1974* (Cth). In such situations, Commonwealth agencies need to continue to develop their dispute resolution practices, as outlined in the next section.

There may also be types of cases where legislation, Government policy or international treaties prevent the use of ADR, at least at an early stage in proceedings. Possible examples include immigration matters, revenue collection, constitutional cases, government regulation and extradition. Some matters, such as differences between Commonwealth agencies, are not subject to litigation and may need to be resolved at a higher level of government. Special considerations may also apply to disputes involving tied areas of legal work (section 2 of the Directions) and significant issues (section 3.1).

Even where ADR is not regarded as usual practice, however, some form of ADR may well be beneficial for some cases or at particular stages. Agencies therefore need to actively consider such options and use ADR whenever appropriate.

Improved dispute management practices by legal services

The Commonwealth should ensure that its own legal services are at the cutting edge of dispute resolution practice.

As well as preventing disputes and promoting the early use of ADR, agencies and their legal services need to review a matter at all stages in the litigation process in order to assess the value and likelihood of settlement, and to determine the appropriateness of different forms of ADR to facilitate such settlement.

Legal services should be familiar with the range and applications of ADR processes, and know when and how to use such processes for different types of disputes. An increasing range and sophistication of ADR processes is now available, including 'hybrid' processes that combine facilitative, advisory and determinative approaches. The most appropriate form of ADR needs to be used in the right case and at the right time. ADR can and is used at many stages including the pre-litigation stage, pre- and post-filing, after hearing but prior to judgement, at the appeal stage or after court action is finalised. ADR does not only deal with the substantive elements of a dispute but may be used, for example, to clarify technical issues, streamline procedures or deal with ongoing relationship issues between the parties. In complex disputes ADR may need to be multi-staged. For example, informal methods may be used early to clarify and narrow issues and more formal processes used later to deal with substantive issues.

Although statutory, policy and other constraints mean that some litigation involving the Commonwealth is unavoidable, NADRAC is of the view that improved dispute resolution skills and practices on the part of those responsible for the conduct of Commonwealth litigation would assist in avoiding or settling disputes at an earlier stage. Such improvements would also enable the Commonwealth to keep pace with practices in the private business sector.

Court officers, ADR practitioners and legal practitioners have expressed to NADRAC members a degree of concern about the behaviour of Commonwealth agencies as litigants. These concerns include a lack of authority to settle on fair and reasonable terms, and a lack of dispute resolution knowledge and skills on the part of Australian Government officers and of lawyers engaged by the Commonwealth. As with other large organisations, representatives of Commonwealth agencies may well feel uncomfortable about compromising and may prefer to leave difficult decisions to others, including the courts. The comment has also been made that, in assessing criteria for settlement, Commonwealth agencies and their legal advisers may take an overly narrow view and consider only the direct legal costs of litigation and the probability of success in court. There are many other costs and risks that could legitimately be considered, including loss of time, diversion of management focus and damage to business relationships and reputation.

Suggested strategies to improve dispute management practices include:

1. Build the dispute resolution skills of internal and external legal services. Relevant skills include listening, negotiation, facilitation, problem-solving and advocacy skills suited to the non-court dispute resolution environment. For example, in mediation, the use of open-ended questions by legal representatives, which would be inappropriate in a court setting, may be helpful in uncovering issues underlying the dispute.
2. Ensure continuing responsibility on the part of agencies and legal services to explore and promote means to resolve disputes. The engagement of external legal services does not mean that the agency can abdicate its responsibility. Nor can the external legal service assume that the agency has explored all options for settlement prior to engagement. There needs to be continuing discussion between the in-house legal sections and legal service providers about how best to limit litigation or settle the matter, including when and how to use ADR.
3. Select an appropriate person to represent the agency in dispute resolution processes. Such a person needs to be a skilled communicator, be at a sufficiently senior level, have authority to settle and be familiar with the issues. In some situations, however, the person may need to be somewhat removed from the original problem, for example, where the presence of an officer directly involved perpetuates or escalates the dispute.

Facilitating the development of high standards of ADR practice:

ADR services may be provided to Commonwealth agencies by individuals, or by private and public organisations. As well as building the skills of its own legal services, the Commonwealth can contribute to the development of high standards of practice by working with ADR practitioners and organisations to improve their knowledge and skills in dealing with disputes involving government agencies. Commonwealth agencies could also provide feedback to ADR organisations about the effectiveness of different ADR approaches, which would assist the development of improved practices on the part of ADR practitioners.

NADRAC believes that the development of ADR standards is critical to its acceptance and effectiveness in all disputes, including those involving Commonwealth agencies. The Commonwealth can play a direct role in the development of such standards through its own contractual arrangements. Where a Commonwealth agency has control over the engagement of an ADR service provider, it should ensure that the service provider complies with appropriate standards of practice. As the Issues Paper points out, the elements contained in the code of practice in NADRAC's 2001 report on standards are a useful benchmark for assessing compliance.

In doing this, however, agencies need to be conscious of the fact that the credibility and acceptance of ADR depends largely on the independence and impartiality of ADR practitioners and organisations. The Commonwealth therefore may need to be careful about how it engages private ADR providers to ensure that it does not create a situation of real or perceived bias in its favour. Such bias could be created directly, for example, through the nature of its contract for services, or indirectly, for example, through becoming overly familiar with individual ADR practitioners or creating

incentives on the part of an ADR service provider to obtain more Commonwealth work.

Broader systems

The use of ADR and improvements in dispute resolution practices by legal services should be part of a multi-faceted approach across and within Commonwealth agencies. Such an approach would comprise:

1. A high level commitment to reduce the level and cost of government disputes and litigation, including the use of ADR.
2. Building such a commitment into relevant performance measures and reporting mechanisms at the agency, section and individual levels. In this regard, the Australian National Audit Office study of legal services in the Australian Public Service may be pertinent.
3. The development of dispute avoidance, management and resolution plans at an organisational level, as recommended by the ALRC. Such plans are especially important for agencies that handle a significant number of disputes.
4. Building corporate knowledge in preventing and resolving disputes. The establishment of an inter-agency working group to share ideas about effective dispute management practices was recommended by the ALRC. NADRAC supports this recommendation. The outcomes of dispute management processes need also to be continually evaluated.

It is acknowledged that many of the strategies above go beyond the legal services covered by the Legal Services Directions themselves. For example, customer relations, procurement, employment and industrial relations issues may be subject to a range of governing mechanisms that would not necessarily be described as 'legal services'. If poorly handled, however, there is a good chance that such matters could become the source of continuing conflict and lead directly or indirectly to litigation. Legal services therefore have a significant role to play in identifying potential sources of disputes and participating in organisation-wide approaches to dispute prevention, resolution and management.

Part two: Recommendations on the wording of the Legal Services Directions

NADRAC sees ADR as integral to the prevention, management and resolution of disputes. ADR should also be improved continually and applied flexibly, taking into account the different types of issues faced by Commonwealth agencies and the range of contexts in which disputes may arise. For these reasons, NADRAC has not recommended a set of prescriptive steps or a separate appendix on ADR. The changes suggested below are strategic in nature and designed to facilitate the broader changes recommended above. Support for the implementation of these changes will also be important and follow up actions are suggested in Part 3 of this submission.

Suggested amendments are shown below in bold italics. The placement, numbering and precise wording of these amendments may, of course, be dependent on any other changes made to the Directions in the course of the current review.

1. NADRAC recommends the addition of a new clause to the body of the Legal Services Directions, before clause 4.2. The clause should create a presumption that agencies will use ADR as early as possible in all disputes, require agencies that commonly handle a significant number of disputes to develop dispute management plans, and require reporting on the level, nature and outcomes of disputes, including the use of ADR. The suggested wording is:

   Agencies shall use alternative dispute resolution processes to avoid, prevent or limit litigation at the earliest possible stage in all disputes arising out of their corporate role, except where the use of such approaches is clearly inappropriate.

   Agencies which commonly handle a significant number of claims and disputes should develop a dispute avoidance, management and resolution plan.

   Agencies which rarely handle claims or disputes may deal with matters on a case by case basis with reference to these Directions and the Model Litigant Obligations at Appendix B.

   The following sub-section could be included either in the proposed new clause above and/or after clause 11(d):

   Agencies shall monitor and report on the level and outcomes of disputes, and on the use of alternative dispute resolution methods.

2. Amend 4.3 of the Directions by adding the following words

   Claims are to be handled and litigation is to be conducted by the agency in accordance with legal principle and practice, taking into account the legal rights of the parties and the financial ***and other*** risks to the Commonwealth (including the agency) of pursuing its rights.

   And adding to note 1(a):

   In considering the appropriateness of settling claims, 'legal principle and practice' means an assessment both of the legal merits and the relative risks and costs associated with settling the claim or continuing with litigation.

3. Add to clause 4.7:

   A FMA agency is not to start court proceedings unless:

   (a) ***reasonable attempts have been made to resolve or limit the matter through alternative dispute resolution, as outlined in [new clause suggested at point 1 above] and Appendix B, and.***

   (b) the agency has received legal advice from lawyers whom the agency is allowed to use in the proceedings that there are reasonable grounds for starting the proceedings

4. Add a new paragraph at section 5.1:

   An FMA agency may only use an in-house lawyer to conduct court litigation as solicitor on the record or as counsel with the express approval of the Attorney-General. Factors relevant to giving approval will include:

   the extent to which the in-house lawyer has knowledge of alternative dispute resolution techniques and processes.

5. Add a new section after section 6:

   Engagement of alternative dispute resolution practitioners

   In engaging alternative dispute resolution practitioners, consideration is to be given to the practitioner's compliance with relevant professional standards.

6. Add to Clause 11:

   11.1 The Chief Executive of an FMA agency is responsible for ensuring that:

   ...***those responsible for the conduct of litigation, including lawyers providing legal services to the agency, have knowledge of alternative dispute resolution techniques and processes ...***

   ... management strategies include a requirement to consider the desirability of using ADR as either a real preventative option to any proposed litigation or in conjunction with any litigation.

7. Add the following words to the 'General Notes on the Directions':

   1. Unless otherwise indicated, use of the term 'litigation' in these Directions is intended to include proceedings before courts, tribunals, inquiries and in alternative dispute resolution processes. ***Alternative dispute resolution processes may be determinative, such as arbitration, advisory, such as expert appraisal, facilitative, such as mediation, or a combination of these, such as conciliation.***

   Legal services and alternative dispute resolution also include (but do not subsume) proactive processes designed to prevent or limit litigation in the first place.

   'Corporate disputes' refers to disputes that arise out of an agency's business role and its transactions with contractors, suppliers, employees and customers.

8. Amend Appendix B (Model Litigant Obligations):

   (d) endeavouring to avoid, ***prevent and limit the scope of,*** litigation, wherever possible,

using alternative dispute resolution approaches to resolve or limit corporate disputes at the earliest possible stage, except where such approaches are clearly inappropriate

continually reviewing the prospects for settling a case and the means by which such a settlement could be achieved

participating fully and effectively in, ensuring appropriate representation at, and acting in good faith in, alternative dispute resolution processes

9. Amend Appendix C:

   Monetary claims .... If there is a meaningful prospect of liability, the factors to be taken into account in assessing a fair settlement amount include:

   (a) the prospects of the claim succeeding in court,

   (b) the ***risks and*** costs associated with continuing to defend the claim ***Such risks and costs may include time, the cost of legal action, damage to the agency's reputation or its relationships with suppliers, customers or the public.***

Part three: Implementation of changes

Implementation of the changes suggested above will require support, taking into account the need of different agencies. For example, large agencies with a high volume of disputes may need guidance on the development of dispute avoidance, management and resolution plans, whereas small agencies that are rarely involved in litigation may need access to practical resources as and when required.

Strategies to promote better dispute management practices have been suggested in the past by the ALRC and in the Tonge report. NADRAC would be happy to work with the Department to further develop these strategies and to help to identify resource implications.

1. ***Awareness-raising***

   The implications of amendments to the Legal Services Directions, including new ADR provisions, will need to be brought to the attention of CEOs, legal services and other relevant areas. High level communication with agencies with a significant number of disputes would be especially important. In relation to legal services, an edition on ADR in the OLSC Bulletin may be useful.

2. ***Central guidance, information and resources***

   Legal services and other relevant areas in Commonwealth will need ready access to information and guidance on dispute management. There are many useful resources currently in existence, including the proceedings of NADRAC's 2003 conference *ADR: A Better Way to do Business* and the

Department's 1999 conference on the *Management of Disputes Involving the Commonwealth*. A new Australian Standard on *Dispute Management Systems* is also anticipated in the near future.

It would be useful if information about such resources were made available at a central point and through a Web page. The information would need to be updated and further developed over time.

3. ***Best practice case studies***

The context of Commonwealth agencies differ, and approaches to dispute resolution need to be developed to suit the context. ALRC 62 identified several innovative dispute resolution strategies adopted by Commonwealth agencies. Initiatives, such as the ADR program within the Australian Defence Force, provide useful models to other agencies. It would be useful to gather and promote information about these initiatives.

4. ***Skills development and capacity building***

It would be desirable if the Department sponsored or facilitated opportunities for skills development and information exchange. Such opportunities could involve legal services, other relevant areas and ADR practitioners and could comprise formal training courses as well as informal sessions to encourage sharing information about effective ADR practices.

5. ***External ADR services***

It would be useful to provide guidance to agencies about selecting private ADR providers. NADRAC would be willing to work with the Department to develop a guide or checklist that outlines matters that the agency may wish to consider in engaging an ADR practitioner or organisation. Such guidance would encourage initiatives by ADR organisations to develop common accreditation standards for practitioners.

6. ***Model clauses***

The development of model contractual clauses may also be useful in relation to both the use of ADR in contractual disputes and the engagement of legal service providers.

Many Commonwealth agencies currently have dispute resolution clauses within their standard form contracts for the supply of goods and services. It would be useful to examine where these have been used successfully and to develop model clauses that could be adopted by other agencies.

Contracts for the provision of legal service providers to the Commonwealth could also include specific obligations with regard to the use of ADR and adoption of the effective dispute management practices mentioned in this submission.

7. ***Structures***

It may be useful to explore, especially with larger agencies, the possibility of establishing internal working groups or other structures to develop (or refine) dispute management plans and to implement relevant amendments to the Legal Services Directions. Such working groups would report to the CEO and could comprise, for example, senior line management, legal services, human resources, customer services, procurement and other relevant corporate services areas. Such groups could develop core principles applying to the management of all disputes, while recognising that separate structures, systems and approaches may be needed to address particular types of disputes including conflicts over human resource issues, unresolved complaints with customers, contractual disputes with suppliers and inter-agency disputes.

As well as intra-agency groups, an inter-agency working group, such as recommended by the ALRC, would also be useful. In this regard, it is noted that the US Department of Justice established an Office of Dispute Resolution, chaired by the Attorney General which, among other things, coordinated an Interagency ADR Working Group. NADRAC believes, in the Australian context, such a group need not have an ambitious role or be resource intensive, but may simply make use of existing resources and assist in implementing some of the strategies mentioned above. As an interim step,the Attorney-General's Department may wish to meet with other key central agencies, such as the Ombudsman, the Public Sector and Merit Protection Commission and the Department of Finance and Administration, to consider the feasibility and functions of such a group.