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**Convenor, NADRAC ADR in Government Committee**

**ADR in Government Forum**  
**Members Dining Room, Old Parliament House**  
**Wednesday 4 June 2008 6:15 pm.**

I would like to begin by thanking both the Attorney-General and Mr Howe for their insightful and interesting presentations this evening.

I am the Convenor of NADRAC's ADR in Government Committee. NADRAC has been interested in the potential for ADR to assist Government agencies resolve disputes for many years. As Justice Kellam mentioned NADRAC's Charter specifically asks it to advise on the quality, effectiveness and accountability of Australian Government ADR programs and to assist Government agencies to use ADR.

ADR has great potential to assist in the earlier resolution of government disputes. In essence I believe ADR is about communication and a willingness to look at options that will be responsible, legal and fair but which also help to address the real interests and concerns of the other person. Informal dispute resolution processes of this nature could be undertaken by appropriately trained agency staff without the need to involve a third party.

Of course ADR is usually understood to me as a process conducted by an independent third person. Such processes can be facilitative, advisory or determinative. They can be useful where the misunderstanding or even hostility involved is such that more informal processes are unlikely to be successful or have failed. The independent third person can facilitate a fair process in which the participants can discuss the issues calmly and jointly consider what options there may be to resolve the issues. In some cases the issues involved are so technical it is helpful for the independent person to be an expert who can provide advice or even make an informed decision as to the outcome.

Of course, independent does not necessarily mean independent of government. For some disputes it may be sufficient for the independent person to be drawn from another area of the agency that has such an independent role or from another agency that has such a role. The most important issue here is that the person acting in that independent role is very careful to maintain their impartiality and avoid actual or perceived bias.

In larger, more complex disputes that have proved difficult to resolve it will probably be necessary to look to an external practitioner to fill that independent role.

One other important thing to note about ADR is that, although it may be used to resolve the totality of a dispute, it can also be used as a tool to resolve aspects of a dispute including eliciting the facts, clarifying technical issues, clarifying positions, agreeing on processes or generating a greater understanding of interests and positions.

You may be wondering how agencies should go about engaging an external ADR practitioner. Justice Kellam has mentioned the National Mediator Accreditation System that commenced at the beginning of this year. Choosing a dispute resolution practitioner who is accredited under this scheme will help you to ensure that they are competent and will adhere to appropriate standards of conduct and ethics. And where they do not, it ensures that there is a defined standard to which he or she can be held accountable.

Consideration should also be given to whether the practitioner will require any specific technical expertise. If the practitioner is to give advice, they should be required to have the necessary expertise and qualifications to do so.

Anecdotal reports suggest that there is a tendency to engage external ADR practitioners late in the life of the dispute and to use high profile and very expensive ADR practitioners. The truth is that the supply of ADR practitioners exceeds demand and many equally capable, but less high profile and less expensive, practitioners are finding it difficult to sustain an ADR practice.

The fees for ADR practitioners vary considerably. While some services are free, in general I think it is fair to say that they range from a few hundred dollars for a complete process to \$10,000 per day or more.

I believe agencies should be asking whether the matter really warrants a 'big name' or whether a less expensive practitioner could do the job just as well.

The NADRAC website provides information on a range of organisations that provide ADR services. When approaching those services it would be reasonable to enquire about fees and indicate the range that the agency is prepared to pay.

Before I finish this evening, I would like to take the opportunity to briefly outline some strategies that your agency might adopt to put itself at the forefront of dispute management practice.

I think it is important to have senior management support for a strategic or 'big picture' approach to the management of agency disputes.

Where that support does not currently exist you might wish to consider how you can generate that support within your agency. One way to do that may be to develop a paper with some concrete ideas for consideration by your executive management team.

Some of the ideas that you could include are:

- a senior management direction, protocol or practice standard that indicates management's commitment to the prevention and earlier resolution of disputes including a commitment to attempt to resolve all disputes before legal proceedings are commenced
- more training in relationship management and customer focus for staff at the front line
- analysis of the sorts of disputes with which the agency is likely to become involved and any special features of those disputes that may affect the sorts of dispute resolution strategies that are used
- development of a checklist to assist in the early identification of issues or problems that may develop into a dispute
- development of a checklist to identify disputes that are complex or difficult and may warrant greater strategic intervention aimed at resolution
- training of selected agency staff as dispute resolution experts who can be called in as mentors or consultants to assist front line staff to head off or resolve disputes at

an early stage or help to develop a dispute resolution strategy for particular disputes

- use of model dispute resolution clauses in agency contracts which include a requirement to use facilitative or advisory processes such as mediation or conciliation
- developing pilot programs to trial particular dispute resolution strategies
- formation and support for a network of agency staff with an interest in dispute management – ideally such a network would include staff from both the legal and business areas of the agency
- sharing information about dispute resolution strategies with other agencies – for example, through an inter-agency network or working group
- distribution of information about the agency’s dispute resolution policies through an Intranet or other means, and
- collection of data about agency disputes and how they are dealt with as a mechanism to allow future evaluation of the success of particular strategies.

In its report *'Managing Justice'* issued in 2000 the Australian Law Reform Commission recommended that federal departments and agencies should be required to establish a dispute avoidance, management and resolution plan. The Legal Services Directions specifically encourages agencies to do so.

Dispute management plans would provide an umbrella for all of the strategies that I have talked about and serve to inform not only agency staff but also the public about the agency’s approach to disputes. It may reduce your agency’s exposure to litigation by promoting organisational behaviour that addresses conflict at the earliest possible stage.

NADRAC supports the development of such plans and I would urge you to consider what steps could be taken to develop one for your agency.

Together with Justice Kellam and the Director of NADRAC’s Secretariat, I recently met with the Australian Taxation Commissioner, Mr Michael D’Ascenzo and some of his senior staff.

We were very pleased to hear that the ATO is committed to resolving taxation disputes earlier and is considering how ADR techniques and processes can assist in that. The ATO has already started to implement many of the strategies that I have talked about. I think it is a

leader in this area and believe that it would have a great deal of useful information to share with other agencies. The staff at the ATO are to be congratulated in relation to their efforts.

NADRAC is keen to see the establishment of an inter-agency network that would encourage information sharing of that kind. The Office of Legal Services Coordination would need to be involved in establishing a network of that kind and NADRAC will be talking to the Office of Legal Services Coordination about that..

On the topic of information sharing, I think now is a good time to break for informal discussion. I hope that you will use this time tonight to talk to each other and share your experiences and ideas.

Many of the measures I have suggested go beyond the requirements of the Legal Services Directions. They will help agencies to limit their exposure to litigation, while maximising the use of dispute resolution processes. I believe they will help to provide a firm foundation for the new 'resolution culture' proposed by the Attorney General. Bringing about a change to a resolution culture will not be easy, but the goal is an important one. I hope that you will find these suggestions helpful in your work ahead.