

# **MANAGING DISPUTES IN FEDERAL GOVERNMENT AGENCIES**

**ESSENTIAL ELEMENTS OF A  
DISPUTE MANAGEMENT PLAN**

**National Alternative Dispute Resolution Advisory Council**



**NADRAC**  
NATIONAL ALTERNATIVE DISPUTE  
RESOLUTION ADVISORY COUNCIL

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## NADRAC OVERVIEW

1. This document is designed to assist Commonwealth agencies to develop a Dispute Management Plan (Plan), which includes provision for the appropriate use of ADR (Alternative Dispute Resolution) principles and processes.
2. This document provides a guide to the topics and issues which it is recommended agency-specific Plans, as a minimum, address. Each Plan will need to be adapted to suit the needs and specific circumstances of each agency. No single Plan can be devised and applied across all Commonwealth agencies. Accordingly, NADRAC has not attempted to devise a Model Plan which can be 'topped and tailed' by Commonwealth agencies.
3. The Plan should apply to the management of all forms of dispute, both internal and external to the agency ([see information sheet 1](#)). The Plan should also apply from the first point at which a conflict emerges. Indeed, an agency's Plan might usefully deal with the topic of dispute avoidance as well as dispute management. An agency's Plan should not be limited to management of litigated disputes or a particular sub-set of disputes. However, whilst the Plan should deal with all forms of dispute, this does not mean that a 'one size fits all' approach should be taken to all disputes. It will be appropriate for different categories of dispute to be managed in different ways.
4. The development of an effective Plan by each Commonwealth agency will require significant thought and effort. General aspirational statements or targets will not suffice. Each agency's Plan should:
  - clearly set out how the agency proposes to manage its disputes;
  - be formulated in a way which enables the impact of the Plan to be measured and reported upon. NADRAC supports a requirement for agencies to provide meaningful reports each year to the Attorney-General on how disputes are managed under the Plan.

The better the Plan, the easier it will be for an agency head to report against it.

5. Accompanying this document is a Toolkit which explains in greater detail some of the various elements which could be contained in an agency's Plan (this Toolkit is available on the NADRAC website; [www.nadrac.gov.au](http://www.nadrac.gov.au)). Agencies are encouraged to refer to the Toolkit information sheets when developing their Plan, but the matters set out below should be regarded as the primary framework for developing a Plan.

## 1. INTRODUCTION

6. Each agency's Plan should include an Introductory Statement which emphasises the importance of pro-active, fair, co-ordinated, and consistent management of disputes ([see information sheet 2](#)). The Introductory Statement should be specifically endorsed by each agency head.
7. The Introductory Statement could usefully note the following sorts of matters:
  - implementation of the Plan is likely to become a requirement of the *Legal Services Directions*
  - in the case of APS agencies, there is a legal obligation to engage with disputants in ways which uphold the APS Values set out in section 10 of the *Public Service Act 1999*

- the Plan will succeed only if it genuinely influences dispute management behaviours and outcomes (see information sheet 3). The Plan requires specific, practical, relevant statements
- the need for staff to be aware of the Plan (see Section 9) and for relevant data to be captured systematically to enable the impact of the plan to be measured and reported on
- the Plan will need to be reviewed in light of lessons learned from its implementation (see Section 8)
- how queries, and requests for assistance, in relation to the Plan should be dealt with.

## 2. OBJECTIVES OF AN AGENCY'S DISPUTE MANAGEMENT PLAN

8. The essential purposes/objectives of an agency's Plan should be clearly stated. The purposes should take into account the dispute management priorities applicable to each agency, such as reducing staff conflict (including how it is measured) or reducing the number of litigated disputes. It should clearly state how the Plan will be integrated with the broader objectives of the agency, and within their existing policies and plans. The priorities may vary considerably depending on such matters as the size of the agency, the nature and extent of agency disputes, the extent to which disputes have been managed in a sophisticated manner in the past etc. Not all agencies will be at the same stage in the evolution of planned dispute management. It is important that agencies set achievable, realistic, and measurable goals (see information sheets 4 and 5). These goals may be revised in successive iterations of the Plan.
9. Agencies may find it useful to divide their Plans' purposes/objectives into two categories: first, overarching objectives of a broad directional kind (which may have an aspirational component, and may deal with cultural and 'tonal' factors); second, specific shorter-term objectives of a more pragmatic nature.
10. Examples of objectives which might be included in a Plan include to:
  - encourage a coordinated and consistent approach to the management of disputes by the agency
  - focus attention on the benefits (such as improved relationships) that may result from earlier resolution of disputes
  - develop a culture which involves true engagement with disputants, through greater communication and use of ADR processes where appropriate.

## 3. OUTLINE OF MAIN TYPES OF AGENCY DISPUTES

11. Each Plan should set out the sources, nature and extent of the main areas of dispute affecting the agency. It might be useful to analyse/describe the typical features of particular categories of dispute. Disputes may be single-issue or multi-factorial, short-term or long-lived, involve one-off decisions or mass decision-making, concern specific statutory entitlements or ongoing service-delivery relationships, involve large or small amounts of money (or concern matters unrelated to money), involve high risk or low risk issues, etc.
12. It may be helpful for an agency's Plan to recognise the significant or recurring concerns, circumstances, and/or needs which may drive or influence positions adopted by disputants. For instance, the circumstances of disputants interacting with the ACCC in mergers and acquisitions matters are likely to be quite different to the circumstances affecting social security claimants.
13. Electronic versions of an agency's Plan might usefully contain links to relevant primary documents dealing with particular categories of dispute. For example, if disputes with employees are identified as a relevant category, links to relevant Human Resources documents could be inserted and cross-referenced.

#### 4. KEY PRINCIPLES FOR RESOLVING DISPUTES UNDER THE PLAN

14. Each Plan should include the *key principles* which will guide dispute management within the agency in the coming year. The selection of these *key principles* should take account of each agency's particular circumstances, including (i) the purposes/objectives of the particular agency's Plan (see Section 2 above); and (ii) the sources, nature and extent of disputes affecting an agency (see Section 3 above).
15. Different categories of dispute may warrant formulation of different key principles.
16. A number of the APS Values set out in section 10 of the *Public Service Act 1999* might be adapted as key principles guiding dispute management (in particular areas or more generally). For example:
  - the merits of each dispute (including risks for the agency) should be assessed in a timely fashion
  - disputes should be managed in a courteous, honest and respectful manner, which reflects the highest ethical standards of public governance
  - disputes should be managed fairly and flexibly, and in a manner which truly respects the diversity of the Australian community
  - disputes should be managed in a manner which truly recognises that Commonwealth agencies serve the Australian community.
17. Alternatively, agencies may wish to adapt one or more of NADRAC's National Principles for Resolving Disputes (see [information sheet 7](#)), along the following lines:
  - agency staff have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility by the agency itself
  - disputes should be resolved in the simplest and most cost-effective way
  - efforts to resolve disputes using dispute resolution processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings
  - staff should show their commitment to dispute resolution processes by listening to other views, and by putting forward and considering options to resolve the dispute
  - staff should have access to, and seek out information, that enables them to choose suitable dispute resolution processes
  - effective, affordable and professional ADR services which meet acceptable standards should be explored, in appropriate cases, as a means of resolving disputes.

#### 5. A PLAN MUST OPERATE IN THE CONTEXT OF APPLICABLE REGULATORY REQUIREMENTS

18. Each Plan should be formulated in a way which assists the agency to resolve disputes in a cohesive manner, which complies with all applicable regulatory requirements. For instance, the Plan could note the framework applicable to *monetary* claims that currently exists under Commonwealth legislation, policies and guidelines. This framework includes:
  - relevant provisions of the *Financial Management and Accountability Act 1997* and the Regulations concerning payment of Commonwealth monies
  - discretionary provisions applicable to certain bodies which operate under the *Commonwealth Authorities and Companies Act 1997*

- provisions of the *Legal Services Directions* dealing with the Commonwealth's obligations as a model litigant, including through proper consideration of ADR processes as means for resolving or limiting disputes
- Appendix C to the *Legal Service Directions*, which deals with handling of monetary claims, based on an asserted legal entitlement, by and against FMA Act agencies
- the Commonwealth's discretionary payments regime, consisting of the *Scheme for Compensation for Detriment caused by Defective Administration* (the CDDA scheme), act of grace payments (s. 33 of the FMA Act), ex gratia payments (s. 61 of the Constitution), waiver, postponement and/or deferral of debts (s. 34 of the FMA Act), and 'special circumstances' payments under s. 73 of the *Public Service Act 1999* (and equivalents)
- the Commonwealth's Comcover scheme dealing with disputes about an agency's self-insured risks.

19. Each Plan should also note, if appropriate:

- the forms of merits review which apply to particular categories of disputes (eg review by the AAT and other specialist tribunals). Indeed, if an agency's core business includes the making of decisions under statute which attract merits review (such as decisions about migration, workers' compensation, and social security entitlements), the agency's Plan may need to deal in some detail with management of disputes in the context of available merits review.
- judicial review may be available in respect of unresolved disputes. Courts increasingly expect litigants to exercise good faith in exploring settlement options. Again, the Commonwealth's model litigant obligations are relevant in this context, as are case management reforms which require parties to proceedings to use their best endeavours to resolve disputes as quickly, inexpensively and efficiently as possible.
- other accountability mechanisms that may apply to particular disputes, such as review by the Auditor-General, review by the Commonwealth Ombudsman and review by parliamentary committees.

20. An electronic version of an agency's Plan could usefully contain links to primary documents (and other resources) dealing with relevant aspects of the regulatory regime impacting upon resolution of particular sorts of disputes within the agency. For instance, if a particular category of dispute is often the subject of consideration by a parliamentary committee, an agency's Plan could include links to relevant publications such as the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*.

## 6. DISPUTE MANAGEMENT STRATEGIES

21. It is expected that each agency's Plan will include a combination of general and specific strategies for managing disputes ([see information sheet 8](#)). A 'one size fits all' approach to dispute management will usually prove unworkable.

22. Each Plan should, as a minimum, set out key *general* strategies for managing disputes within the agency in the coming year. These general strategies should be directed to resolution of disputes early, efficiently, and fairly. For instance, general strategies may consist of such matters as (i) use of a dispute assessment matrix by staff;<sup>1</sup> (ii) the form and style of communication with disputants; (iii) setting responsiveness targets in communicating with disputants; (v) tracking of disputes; (v)

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<sup>1</sup> A dispute assessment matrix involves classifying the dispute by reference to such matters as subject matter, intractability, longevity, special risk etc and devising an appropriate resolution response.

development of a dispute resolution toolkit for use within an agency which will include information about ADR options and practitioners (such as the names and contact details of mediators and their areas of practice); and (vi) provision of appropriate training to identified staff etc.

23. Specific strategies will usually need to be developed for particular sorts of disputes eg protracted, high risk, and litigated disputes may need to be the subject of special strategies. Examples of specific dispute management strategies include (i) letters of engagement sent to an agency's lawyers including a standard paragraph seeking written advice on settlement and ADR options; (ii) special reporting requirements for particular sorts of disputes; (iii) training of staff in forms of engagement with disputants which appropriately recognise their concerns, circumstances, and/or needs (see paragraph 12 above); and (iv) trialling of pilot programs in particular areas of dispute.
24. Formulation of appropriate general and specific strategies will require each agency to give close attention to the matters dealt with in Sections 2-5 above. In particular, the development of worthwhile strategies depends upon an agency gaining a proper understanding of such matters as (i) the sources, nature, and extent of disputes; (ii) current strengths and weaknesses in dispute management within the agency (noting that weaknesses represent opportunities for improvement); (iii) organisational or cultural changes which may facilitate better management of disputes; (iv) what data may be needed to improve management of disputes in the future; and (v) how such data would be obtained.
25. Consideration of ADR should feature prominently as part of general and specific strategies for resolving disputes under an agency's Plan. In this regard, NADRAC considers that, in an overall sense, there still remains considerable scope for greater use of ADR principles and practices by Commonwealth departments and agencies. An agency's Plan could usefully identify the 'blockers' which exist within an agency against greater use of ADR, and set out strategies for removing these blockers.
26. The strategies set out in a Plan should provide a framework which allows flexibility in responses to particular disputes.

## **7. ASSIGNMENT OF ROLES AND RESPONSIBILITIES**

27. Each agency's Plan should explicitly assign particular roles and responsibilities to identified persons in respect of (i) achieving the Plan's overall objectives; (ii) implementing the general and specific strategies set out in the Plan; and (iii) keeping the Plan under review to ensure a process of continuous improvement in dispute management ([see information sheet 6](#)). Where an agency refers matters to external law firms, the Plan should include provision for the agency to brief the firm on its Plan and require the firm to manage the dispute in accordance with the Plan (unless instructed to do otherwise).
28. All staff will have generally stated roles and responsibilities in relation to dispute management. These should be set out in the Plan.
29. However, it is also important that specific roles and responsibilities are assigned under an agency's Plan; otherwise there will be insufficient accountability. For example, the Plan should clearly set out to whom, and when, particular disputes should be referred. Assignment of roles would ordinarily commence with a statement of the agency head's primary role and responsibility under the Plan.
30. Specific roles and responsibilities under the Plan should be incorporated into the Performance Plans of relevant staff. Each agency's Plan should state this explicitly.

## **8. EVALUATION AND REVIEW**

31. Each agency's Plan should include provisions directed to ensuring that implementation of the Plan is properly evaluated ([see information sheet 10](#)). Staff and customer/stakeholder surveys may be useful evaluation tools.
32. Results from the evaluation would inform revision of all aspects of the Plan, and assessment of the performance of individuals entrusted with specific roles and responsibilities under the Plan ([see information 11](#)). For instance, the results from evaluations of an agency's Plan may provide opportunities to identify specific areas within the agency where disputes are commonplace and assist formulation of proactive strategies for addressing recurring issues (perhaps even before they reach the level of a dispute). It is recommended that the Plan be operational for a fixed term, such as 12 months, before review.

## **9. AWARENESS AND PROMOTION**

33. Each Plan should set out how the content of the Plan will be promoted to staff and, if appropriate, other relevant stakeholders ([see information sheet 12](#)).
34. Mechanisms for promoting awareness of an agency's Plan include (i) a communication strategy to accompany promulgation of the Plan (such as a personal email from the agency head about the importance of the Plan and a poster campaign); (ii) integrating dispute management principles into agency training and publications; (iii) providing the Plan as part of induction materials issued to all new staff; (iv) including the Plan on the agency's intra-net with hyperlinks to it in other electronic publications; (v) requiring staff to pledge support for the Plan; (vi) appointing a dispute management leader to 'champion' the Plan within an agency etc.