Dear Professor Kellam

Model Dispute Management Plan

Thank you for the opportunity to comment on a prospective Model Dispute Management plan (the Model) for adaption and use by Commonwealth Government agencies. The Secretary has asked that I respond on his behalf.

Elements of a Dispute Management Plan

The Department of Finance and Deregulation (Finance) agrees that agencies should be encouraged to develop dispute resolution management plans, appropriate for their business requirements, and that a Model would be a useful tool. Noting that agency activities and responsibilities vary greatly, Finance suggests that the Model should promote the following principles:

- Disputes should be managed efficiently, with regard to public policy and the impact on public resources.
- The definition of dispute should not be exhaustive.
- There must be early engagement with all dispute management stakeholders.
- Disputes should be resolved by an agency whenever possible, without recourse to litigation and with a view to minimising expenditure on external legal advisors.
- Agencies must have a system for identifying deficiencies in administration from disputes and for ensuring that such deficiencies are rectified and lessons learned and incorporated into business practices.
Finance is of the view that a holistic approach which utilises all available dispute resolution capabilities accords with the current focus on efficiency, and on simplifying the interface between the Australian Public Service and citizens. Finance is in a unique position to contribute to this approach given that it is both a central policy agency and a delivery agency.

It might also be noted that Chief Executives have responsibilities under section 44 of the Financial Management and Accountability Act 1997 (FMA Act) to ensure the efficient, effective and ethical use of Commonwealth resources, not inconsistent with Commonwealth policies. When adopting or adapting and implementing the Model, Chief Executives will also need to remain mindful of this requirement.

Finance’s Experiences

Finance observes a variety dispute management approaches across portfolios through the administration of the act of grace and waiver of debt mechanisms under the FMA Act, its policy role in the Scheme for Compensation for Detriment Caused by Defective Administration Scheme (CDDA Scheme), as well as through Comcover, as the Australian Government’s self-managed insurer. It is projected that in 2009-10 Finance, through these mechanisms, will deal with wide ranging disputes from other agencies involving more than 10,000 citizens. Such disputes vary from requests for compensation, claims of inequitable or unfair debt, and allegations of legal liability.

There is a threshold issue of whether agency dispute management plans are intended to cover disputes with external parties only, or also to include internal disputes – in particular personnel disputes. Finance assumes the former but NADRAC may wish to also consider the further dimension of internal disputes.

Finance’s experience with FOI disputes and general commercial disputes suggests that these disputes would have no special features compared to other agencies, except that any disputes arising out of an asset sale process could be quite complex – the current dispute with NSW over stamp duty payable on the sale of Sydney Airport is an example.

However, Finance’s responsibility for Commonwealth property management and construction projects is fairly unique in the Commonwealth – only Defence would have a comparable role in Commonwealth property and construction. NADRAC may also wish to consider some of the complexities involved in managing and resolving disputes in this area:

- In managing construction projects, disputes can be large, complex and multi-party. For example, a construction defect may ultimately involve parallel dispute resolution processes under separate contracts with the architect, the main building works contractor and the project superintendent. Multiple parties and multiple contracts inevitably make the dispute much more complex to manage and ultimately resolve.

- Property disputes involving Commonwealth land can arise through Finance’s role as landlord, e.g. over rent or maintenance obligations. The tenants may be other Commonwealth agencies, or private sector bodies. Commonwealth tenant disputes are within the Commonwealth, but as landlord Finance acts on a commercial footing. Disputes with private sector tenants are ordinary commercial disputes.
• Disputes concerning Commonwealth properties can also arise with States or Territories over utility charges and other rates and taxes (e.g. stamp duty), and with environmental regulators. These disputes often raise constitutional issues, so Finance’s position is often heavily influenced by legal advice, and by constitutional policy considerations that are the domain of the Attorney-General’s Department.

• In the ACT, there is also the role of Finance as manager of National Land. Again this involves the ACT government (primarily through ACTPLA) and the NCA. Some National Land is actually owned by private sector bodies (e.g. Edmund Barton Building), which adds further complexity.

Cases which Finance becomes aware of and gain the attention, and criticism, of external agencies and the media (from the Commonwealth Ombudsman for example) include those where there has been a failure to engage all of the Commonwealth’s dispute management capabilities in an available, orderly and timely manner. Finance sees many cases which have lingered for lengthy periods, years in some cases, and caused an inordinate use of resources but the issues were seemingly quite straightforward and early engagement of the suite of capabilities across the Commonwealth may have resolved the matter in a more efficient and effective fashion.

Finance is also seeing a referral of not an insignificant number of matters which are capable of resolution within an agency, in accordance with the delegations and authority of Chief Executives under relevant legislation. Matters in this category include, for example, debts which have not been lawfully imposed and which can be administratively refunded by an agency or where debt treatment options (such as a repayment arrangement which agency officials have been delegated to consider) have not been considered before recourse to ‘last resort’ mechanisms.

Finance has updated and revised Finance Circular 2009/09 – Discretionary Compensation mechanisms and Waiver of Debt Mechanisms to promote more active consideration by agencies of options at the agency level. Finance also works with agencies whenever systemic irregularities become apparent, and is continuing to improve relevant Internet content to increase awareness and educate agencies and citizens as to available remedies.

Finance is of the view that the Model has the capacity to further harmonise all of the dispute management capabilities which are available at the Commonwealth level. This, in turn, will further synergise the interrelated work already being undertaken by Finance and other agencies.

Advantages of a Dispute Management Plan

The Model should perhaps serve as the key aide memoire which draws together relevant policies and practices. For example, at this time the Legal Services Directions 2005 (LSD) do not make reference to discretionary compensation mechanisms such as ex gratia, CDDA and act of grace– whereas the policies on these mechanisms cross-reference the LSD. On the one hand, harmonisation is difficult given the variety and vagaries of cases. However, discourse is continuing on operational level refinement.
The Model as an aide memoire would ensure that regard is had to ‘all’ available dispute management capabilities. This is important in stimulating thought on resolution beyond a legal frame of reference. In this regard, Finance notes that dispute management capabilities recognised and provided for at the Commonwealth level includes:

- Apology
- Explanation and/or copies of documents
- Administrative correction
- Legislative reform
- Referral to relevant agencies
- Internal review mechanisms
- Scheme ‘safety nets’
- Specialist tribunals and review bodies
- Investigatory agencies (e.g. Ombudsman and AFP)
- Delegated functions (see for example ss 34 (1)(b),(c) and (d), and 47 of the FMA Act, and relevant delegations from the Finance Minister and Finance Chief Executive)
- Alternative Dispute Resolution
- Legal Services Directions
- Discretionary provisions given to certain bodies which operate under the Commonwealth Companies and Authorities Act 1997
- CDDA Scheme
- Act of Grace (s33 FMA Act)
- Debt Waiver (s34 FMA Act)
- Ex gratia payments
- Section 73 of the Public Service Act 1999 (and equivalents)

However, the act of grace and waiver of debt powers of the FMA Act, as well as ex-gratia payments, are necessarily of ‘last resort’. The onus and authority appropriately lies with an agency to attempt to resolve/manage a matter for which they have direct involvement or policy responsibility.

As mentioned, Finance recommends that disputes are resolved efficiently. Against this there is the uniqueness, complexity and uncertainty which can often be encountered in disputes. The course of some disputes will also turn to an extent upon the conduct of the complainant. Efficiency in this context dictates that scope and application of dispute management capabilities should be flexible. Efficiency is achieved through a tailored application of the capabilities as against the specific circumstances of each case.
Efficiency also includes the notion that the Commonwealth’s interests are also protected to the appropriate extent. Accordingly, while Finance recommends that matters be resolved within agencies whenever possible, appropriate balance and protection is provided by the recommendation that there should be early engagement with all dispute management stakeholders. For example, it may be necessary to consult internal legal advisers and Comcover as to the terms of a proposed apology. The purpose here is an attempt at resolution at the lowest level while ensuring that the Commonwealth’s interests are not prejudiced. The use of alternative dispute resolution might also elicit information which shapes the application of dispute management techniques and any associated Model. Accordingly, the Model should be sufficiently flexible to allow for various contingencies.

Finance is of the view that an optimal dispute management arrangement should require that any deficiencies are identified and rectified. The authority of agencies should and does extend to rectifying systemic issues. However, Finance is regularly involved with agencies whenever a possible systemic improvement is identified but a temporary and/or immediate remedy is required. In support of this view, Finance notes that CDDA Scheme is predicated upon being an enabler of systemic improvement.

Inclusions in the Model Framework

The Model might also recommend procedural steps which promote good administration in dispute management. While it is recognised that the particulars of a matter may require a customised approach, there are matters of good administration which cut across all disputes, and which can promote efficiency and perceptions without prejudicing the Commonwealth’s legal position. Finance’s view on considerations which fall into this category is set out below.

Expectations / Service obligations

- Complainant has:
  - Right to have a complaint heard and considered
  - Right to be treated with respect
  - Right to be given reasons for a decision
  - An obligation to give full details of complaint / issue at the outset or at an early stage
  - An obligation to explain who did what? When did it occur? What circumstances? What harm or loss resulted? (must quantify and explain estimate) What remedy do they want?
  - Responsibility to act prudently in their own interest
  - Responsibility to act prudently in light of all the circumstances
  - Accountability for the judgements they make regarding the course of dealings with their complaint (for example, the choice to unilaterally decide to institute proceedings or not enter into settlement discussions are relevant considerations to overall dispute management)
• Australian Government agency must:
  o Not presume absence of fault (complaint may be well-founded)
  o At the outset and at all stages of a dispute, consider all resolution options with a view to resolving the dispute in the most efficient manner
  o Investigate complaint appropriately and in a timely manner
  o Engage relevant dispute management capability stakeholders at an early stage
  o Give the complainant a fair hearing
  o Give reasons for a decision
  o Advise the complainant of relevant review options
  o Have a system in place which requires that deficiencies identified in disputes are reported and are acted upon

Dispute Management Practice

• Promptly acknowledge receipt of a complaint and explain the process for handling
• Assign a case officer (to be first point of contact for further inquiries)
• Register the complaint on system for tracking progress in managing the claim (agency should develop and implement such a system – e.g. electronic database - if none exists)
• Act quickly to particularise the issues of complaint
• Identify applicable dispute management capabilities within the agency and more broadly
• Seek further information where necessary
• Look at patterns – any similar complaints? (May identify a broader systemic problem)
• Consult with other agencies, particularly relating to policy or legislative amendment, as required
• Don’t be too ready, or reluctant, to accept responsibility
• Refer case for objective analysis/assessment and remain in close consultation with that area until complaint is resolved

Response Protocols

• Apologise without delay for matters that are Commonwealth responsibility (e.g. administrative error, undue/unreasonable delay etc)
• Formal apology signed off by senior manager (branch head (SES) level at least – more senior if matter is more serious / confirm legal position if required)
• Letter should identify any issues that need further investigation, or provide an explanation where no Commonwealth responsibility is evident on the facts
• Suggest alternative avenues/options that are realistically available.
• Offer appropriate remedy to:
  i) Return the person to position they would otherwise have been in
  ii) Cover financial loss attributable to Commonwealth action/ inaction
  iii) Correct any systemic problem (or explain what steps are being taken in this regard)
Interagency Forum

Finance is now coordinating an Interagency Forum on discretionary compensation mechanisms. The next meeting of the Forum is scheduled for May 2010 and NADRAC would be welcome to attend and discuss the Model. Many of the officers which attend this Forum are also responsible for the management of legal liability claims.

Finance officers are also available to meet with NADRAC to discuss any aspects of these comments.

We trust our comments are of assistance.

Guy Verney
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