Dispute Management Plans and ADR

14 Sep 2016

This paper was prepared and settled jointly by the members of ADRAC.

Three myths relevant to Dispute Management Plans (DMPs) exist: the **first myth** is that large corporate entities adopt sophisticated approaches to dispute management and resolution; the **second myth** is that government departments and agencies also adopt sophisticated approaches to dispute management and resolution; and the **third myth** is that 'good dispute management' happens naturally or organically for entities who are exposed to significant levels of dispute.

On the basis of consultations with (i) legal representatives of large corporates involved in legal disputes, and (ii) a large number of government departments and agencies, ADRAC considers that the truth is much closer to the following:

- generally speaking, large corporate and government entities do not manage disputes in a pre-planned, coordinated, sophisticated and cohesive manner. They make it up as they go along
- only a small percentage of such entities have DMPs
- as a result, resort to ADR as a means of resolving disputes is largely ad hoc, fragmented, inconsistent, and idiosyncratic
- further, the absence of DMPs means that these entities do not self-monitor their management of disputes, let alone capture the sort of data which would be necessary to enable them to do so
- proper planning and management of disputes cannot be undertaken 'along the way'. It is difficult and time-consuming, but is likely to be worthwhile in the long run.

Relevance of DMPs to ADR

ADR is one means of dispute resolution. As noted by NADRAC in its '*Resolve to Resolve*' Report of 2009, DMPs:

> ...help to guard against the possibility of ... ADR being overlooked. Chief Executives could be required to ensure that their agencies comply with such plans. Chief executives could also be required to report against such plans. A reporting requirement could focus agencies' commitment to ADR and provide useful data regarding the uptake and use of ADR by agencies.

In its 2014 report on '*Access to Justice Arrangements*' the Productivity Commission also considered that DMPs would serve very useful functions in assisting agencies to resolve disputes early, including through appropriate use of ADR.[1] The Productivity Commission also noted that having DMPs would assist agencies to gather much-needed data 'on the extent to which they use ADR to resolve disputes, and its relative efficiency and effectiveness'.[2]

Background to development (or non-development) of DMPs

In 2002, the Australian Law Reform Commission recommended that each federal department and agency establish a DMP. In September 2009 NADRAC endorsed this recommendation in its '*Resolve to Resolve*' Report (see at page 119), and suggested that the *Legal Services Directions* be amended so as to impose an express obligation to this effect. In response, the then Commonwealth Attorney-General asked NADRAC to develop a model DMP that could be used to assist agencies to formulate their own DMPs.

NADRAC did so in September 2010, and also developed an information Toolkit to further assist agencies. These documents were formally launched by the then Attorney-General, who requested that all departments and agencies develop their own DMPs. The Attorney-General stated that if departments and agencies did not do so on a 'voluntary' basis, he would give consideration to amending the LSDs to make DMPs mandatory.

In its 2014 report on ‘Access to Justice Arrangements’ the Productivity Commission stated:

> ...the Commission considers that it would be beneficial for all agencies, particularly those with high numbers of disputes, to finalise and release tailored dispute resolution plans **as a priority**. This is consistent with NADRAC’s 2009 recommendation that “ADR can be significantly strengthened by enhancing the obligations of government agencies” (sub. 109, p. 7). (emphasis added)

Despite (i) all of the above exhortations and recommendations; (ii) NADRAC having identified all of the essential elements of a DMP in 2010; and (iii) a couple of agencies having developed DMPs which were available to other agencies as a guide, very few Commonwealth departments or agencies have developed DMPs.[3]

Possible reasons for non-development of DMPs

It is, perhaps, worthwhile to try to identify and understand the reasons for this outcome, as doing so may allow the ‘blockers’ to be removed or addressed.

ADRAC considers that the reasons for non-development of DMPs by Commonwealth departments and agencies are likely to include a combination of the following sorts of factors:

- confusion and/or concerns about publishing the DMPs. For instance, some agencies may have been concerned that their DMPs would be ‘used against them’ by a disputant
- the lack of any real information-base against which to develop a DMP
- being daunted by the apprehended size of the task
- having insufficient resources to devote to the task
- waiting to see what other agencies developed in the hope or expectation of being able to leverage off their DMPs
- cultural resistance, for instance to the transparency and accountability which publication of a DMP might bring. In this regard, NADRAC envisaged that DMPs should ‘be formulated in a way which enables the impact of the DMP to be measured and reported upon’

- the initiative being somewhat swamped by the emerging ‘deregulation agenda’
- lack of conviction that DMPs would be worthwhile on a cost/benefit analysis
- a level of churning referable to such factors as personnel changes, restructuring etc
- agencies ‘over-egging the pudding’, rather than being content to publish a first DMP and then revise it down the track.

Non-development of DMPs in the private sector and at other levels of government

The situation described above concerning DMPs within the Commonwealth public sector appears to be replicated in the private sector and at other levels of government throughout Australia.

Clearly, entities are reluctant to formulate DMPs despite the apparent advantages to them of doing so. Some of the causal factors applying at the Commonwealth level, as set out above, may also be at play in the private sector and at other levels of government.

Nonetheless, it remains highly surprising that DMPs are not more widespread. Most large entities have one or more of the following plans: a fraud control plan; a finance management plan; a governance plan; a business or corporate plan; a succession plan; a marketing plan etc.

Why is it that large entities, involved in myriad disputes, have not developed DMPs?

Essential elements of a DMP

ADRAC considers that the model DMP developed by NADRAC (discussed above) was at the manageable end of the spectrum.

NADRAC suggested that each DMP include the following: an introduction; a description of the objectives of an agency’s DMP; an outline of the main types of agency disputes; a statement of the key principles for resolving disputes under the

DMP; an outline of any applicable regulatory requirements; a statement of general and specific strategies for managing disputes; assignment of roles and responsibilities with respect to dispute management; provisions dealing with evaluation and review; and provision for promoting awareness about the DMP. NADRAC noted that the topic of ADR would arise in relation to a number of these elements.

ADRAC commends this architecture to public and private sector agencies and entities.
ADRAC would be interested to learn of the experience of agencies in formulating and implementing DMPs, particularly as to (i) the costs and benefits of so doing; and (ii) the extent to which DMPs influence the use of ADR and the collection of worthwhile data about a range of dispute management issues.

1. See page 297.

2. Also at page 297.

3. ADRAC is aware of only three DMPs promulgated by Commonwealth agencies - AGD, ATO and the ACCC.