



# fact sheet

## Commercial disputes

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### Managing problem contracts in government

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This fact sheet provides some tips on avoiding contract and lease disputes and strategies for resolving disputes when they arise.

#### Getting the contract right – avoiding commercial disputes

The best way to deal with disputes is to avoid them in the first place. A large part of avoiding disputes is a well drafted contract. Ensuring that the contract is right in the first place can avoid disputes later on. In order to avoid disputes a contract should be:

- **clear** – key terms should be clearly defined and each party's obligations should be clearly specified in the contract
- **comprehensive** – the contract should cover all aspects of the relationship and cover foreseeable contingencies
- **flexible** – anticipate that changes in scope may occur – plan for the possibility (likelihood) of changes as the contract proceeds – this may be change requested by either party.

#### Planning for the management of disputes – dispute resolution mechanisms in contracts and leases

It is common for contracts (particularly high value or high risk contracts) to specify the dispute resolution process that is to be followed when a dispute arises regarding the contract. When entering into a contract containing a dispute resolution clause you should make sure that you are comfortable with the process that is outlined and would be willing to follow it in the event of a dispute. Where dispute resolution clauses specify a process to be undertaken before a party can commence court proceedings, the courts will generally require the parties to follow this process before commencing proceedings in court. You should be particularly careful where contracts specify that the decisions of a third party (in particular expert determinations) are 'final and binding' as recent case law suggests that courts will not allow parties to appeal to the courts to overrule the decision of a third party in this case.

#### Tip:

- Know your dispute resolution clause. Select the most appropriate dispute methodology and be prepared to follow it.

#### Contract management – avoiding or mitigating disputes

Good contract management can prevent disputes from arising or prevent disputes from escalating. Good contract management involves a clear understanding of the provisions of the contract, ongoing attention to contract performance and frequent, clear and well-documented communication with the other party.

**Tips:**

- Have suitably skilled and experienced resources been allocated to manage the contract, to provide supervision and respond to issues as and when they arise? Inadequate resources will increase the likelihood of misunderstandings, disagreements and increase the potential for problems.
- Clear and prompt communications are important. Make sure that timeframes are met. Keep records of telephone discussions and decisions which are made in meetings. Provide written confirmation of decisions made.
- Don't delay in responding when problems occur. Delay may give rise to claims of waiver, i.e. an assertion that formal legal rights will not be relied upon.

For more information on contract management see AGS Fact Sheet No 14 *Avoiding common legal pitfalls in contract management* and AGS Commercial Note No 22 *Managing contracts in the public sector*.

**Options for resolving disputes**

There are many options for resolving disputes, including several alternative dispute resolution mechanisms. Some of the different alternative dispute resolution mechanisms are briefly discussed below. For more information on alternative dispute resolution mechanisms available to Commonwealth agencies see AGS Legal Briefing No 88 *Alternative dispute resolution for Commonwealth agencies*.

The type of resolution mechanism that is appropriate will depend upon the nature of the dispute, the relationship between the parties and the timeframe for resolution of the dispute. Dispute resolution clauses in contracts will often include one or more of the mechanisms discussed below.

— **Negotiation**

Often the first step in trying to resolve a dispute is to negotiate with the other party to try and reach a mutually acceptable outcome. Negotiations can be formal or informal. Either way, communications with the other party should be documented.

— **Mediation**

Where parties are unable to resolve a dispute by negotiation a third party mediator can be used to assist the parties to agree to a resolution. A mediator may make recommendations that are not binding on the parties or express a view about an issue.

— **Arbitration**

Arbitration is where the parties refer the dispute to a third party for a determination, which they agree to abide by. Arbitration by an expert (expert determination) can be particularly useful where the dispute revolves around a disagreement over an issue of a technical nature.

— **Litigation**

Before commencing formal court proceedings you should check the contract to ensure that any mandated dispute resolution process has been complied with.

**Options for finalising a contract**

**Mutual termination:** Often the preferred approach for finalising a contract where a dispute has arisen is mutual termination. This requires the preparation of a written document containing a discharge of future obligations, releases and payment provisions as appropriate and any necessary ancillary terms such as intellectual property outcomes.

**Unilateral termination:** Most contracts contain provisions which allow for unilateral termination for default and many Commonwealth contracts contain provisions which allow for unilateral termination without default (also known as termination for convenience). Unilateral termination may not be the preferred option in many circumstances and legal advice should be obtained before proceeding with such a step. See AGS Commercial Note No 27 *Termination for convenience*, 3 June 2008, available from the AGS website.

## Compliance with Legal Services Directions

Any contract dispute of a substantial nature where a claim is made by or against the Commonwealth will involve consideration of the Legal Services Directions, including the model litigant obligation (Appendix B) and the policy on handling monetary claims (Appendix C). The Legal Services Directions do not apply to a mechanism provided for by a contract (such as arbitration) but do apply to a negotiated settlement or mediation of a contract dispute. Settlement of claims under the Legal Services Directions is required to be in accordance with legal principle and practice and requires at least a meaningful prospect of liability.

## When to seek legal advice

Legal advice should be sought as early as possible in a commercial dispute. You should not wait until court action is taken against you to seek legal advice. Legal advisers can help resolve disputes quickly by using alternative dispute resolution mechanisms and prevent disputes from proceeding to litigation. Obtaining legal advice early on in a dispute can also prevent you inadvertently varying or waiving your rights under a contract.

## More information

If you require further information about commercial disputes please contact:

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