

**Defence and Industry Conference 2006**

**An Executive Overview of General Counsel Reforms including  
Procurement Improvement Program and Procurement Officer  
Professionalisation Program**

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## Introduction

Good morning Minister, ladies and gentlemen,

It has been a very busy year for General Counsel Division since my presentation at D+I last year. At that time I announced a number of initiatives for which my Division is responsible - some specific to my Division, others that apply across Defence and industry.

We have made good progress on a number of those initiatives, and we have also faced challenges. Today I will update you on those initiatives and their challenges.

## General Counsel Division

A new structure for General Counsel Division was introduced on 1 July, 2005. General Counsel Division follows private sector models for the provision of professional services and is focussed on fostering a customer service culture in an environment of continuous improvement.

The DMO now has an in-house legal team, known as Legal Services, to complement our Financial Investigation Services and Procurement Services. These areas are responsible for the delivery of advice and services to DMO and other areas of Defence undertaking procurement and contracting activity. In addition we have Strategic Reform Section which is responsible for implementing a number of the initiatives I am speaking on today. We are actively recruiting across all areas to employ suitably qualified individuals who share our ethos of excellence & ethics in all things. This will take time, but we are willing to wait for the right individuals with the right skills and cultural fit. We now have 13 lawyers, plus 6 graduates and paralegals and still recruiting. Financial Investigation Services roles continue to expand in supporting projects

and other divisions, such as Industry Division and are also recruiting. Procurement Services where many graduates and new comers to DMO learn Defence business continues to measure its success by the frequency of which its staff are poached by other areas, once trained in our procurement policy and practices.

In October last year, with the commencement of the Legal Services Section, we started a new system for clients to request our services which is web-based. Since that time the Division has received just under 700 formal requests for assistance. This does not include our help desk service or requests which amount to approximately 700 for the same period, nor does it include requests for assistance that are received informally which also occurs frequently. At any one time we are handling at least 100 active matters. Of the formal requests received 98% are allocated to an officer for action on the same day received. Of course this is only part of our work and does not include our policy development and training roles or the advice and support we provide in areas such as responding to audit reports, ministerials, senate estimates etc. This is a big workload and has been undertaken during a period that the Division has been under capacity by almost half in terms of its human resources.

General Counsel Division now has offices in Canberra, Sydney, Melbourne and Perth and is planning its workforce around client demands and needs, including under certain conditions, co-locating with projects for a period of time, to provide consistent and continuous levels of service, as well as increasing our knowledge of our client's business. Of course this is all subject to that familiar challenge – recruiting the right people with the right skills and attitude.

Last year I also spoke of the significance of procurement, legal and contracting policy and practices as a vehicle to achieve a number of things:

- drive best practice commercial outcomes for Defence;
- ensure integrity of process;
- influence cultural change;
- protect the Commonwealth's rights;
- manage Commonwealth risk;
- shape the Defence industry market; and
- implement industry policy such as Skilling Australias Defence Industry

Let me update you now on our initiatives in that field of endeavour.

### **The Procurement Improvement Program**

The Procurement Improvement Program reflects the Governments strong and ongoing commitment to conduct its procurements competitively, with value for money principles foremost in consideration and to ensure that competition for Government business is fair, ethical and transparent.

As announced last year, the Procurement Improvement Program (PIP) is a key reform initiative involving the strategic review and revision of all procurement and contracting policies, practices, templates, guidance and associated training material.

Defence and DMO's new procurement and contracting documentation will, amongst other things:

- contemporise contractual risk allocations and their drafting – by modernising and standardising contracts reflecting DMO's

business requirements and by reflecting current best national and international procurement and contracting practice;

- improve risk management and quality assurance;
- improve efficiency in contract delivery and management for Defence and DMO;
- improve business outcomes for Defence and DMO from procurement processes, including more robust competitive tender processes; and
- provide flexible processes to ensure Defence's and Defence industry's expectations of each other are well understood and capable of being met before signing on the dotted line.

PIP is a three phase program:

- phase 1 – is the extensive review and revision of Commonwealth legislation and policies, Defence policies, templates and practices, international policies and practices relevant to procurement and contracting;
- phase 2 – is the provision of training for Defence Personnel and an awareness program for industry users; and
- phase 3 - investigation of an automated assembly tool for the new contracting and procurement documentation.

The vast proportion of work under phase 1 has been undertaken with draft guidance and templates delivered to General Counsel Division at the end of last year. Since that time focus on detailed development of key templates for Defence's most complex procurements in acquisition and sustainment has been undertaken. Exposure drafts for consultation have been completed. They are now being "red team" reviewed by a group chaired by Deputy CEO prior to release for consultation in mid July. These exposure drafts reflect the Commonwealth's default position

rather than final positions that reflect project specific tendering and negotiation processes. The exposure drafts are designed for our most complex acquisition and sustainment projects. I will be providing a more detailed overview briefing in two sessions tomorrow afternoon in relation to these exposure draft documents. However here is a quick sample about what to expect:

- Commonwealth & Defence objectives – you will see these articulated in the RFT and contracts – this is included so everyone remembers why we are all here and the context of each procurement and contract – protecting Australia’s national interests and equipping Australia’s warfighters
- probity - is a shared interest and responsibility between the Commonwealth and Defence industry – the integrity of procurement processes and contract decisions is of utmost importance. Every one including industry participants are losers if probity is not given this priority. More targeted provisions relating to probity, conflicts of interest and soliciting employees/employment offers are now contained in both the RFT and contracts. These address some of the concerns publicly voiced recently concerning particularly post separation employment. In addition probity process management is embedded in the procurement process more comprehensively than is currently the case with ASDEFCON.
- Skilling – in addition to SADI which enables skills growth and development in the Defence Industry unrelated to specific defence contracts, the new templates under PIP address skilling and training through contracted skilling requirements directly related to the delivery of the supplies or services under contracts. This includes skilling plans and identification of critical staff positions and critical personnel that require highly specialized qualifications, skills or experience.

- The RFT provides for maximum flexibility to ensure that tenderers' responses are fully understood and that Defence's capability needs are fully understood. The selection decision for preferred tenderer should only take place when all material operational, technical, financial and legal terms are agreed and documented – this does not necessarily mean a final contract ready for execution. There are very carefully drafted rules and obligations applying to preferred tenderers to incent speedy execution of the contract and disincent clawback behaviour and excessive delay getting into contract through protracted contract negotiations. Importantly, there is only an obligation to treat tenderers fairly, not identically, since neither tenderers nor their responses are identical to each other – all have their own business structures, processes and products, strengths and weaknesses, pros and cons.
- Turning now to the contracts: they provide for two separate processes for variation – one for scope and one for varying legal terms and conditions – a significant legal risk mitigation strategy for the Commonwealth. They also provide for two formal dispute resolution processes (in addition to the informal) – one expedited dispute resolution process for resolving contract management issues quickly, eg: whether acceptance criteria have been met, as well as formal dispute resolution through litigation for complex legal disputes. The expedited process is new and allows the parties to define the issue, resolve and move on – an important way to ensure the health of contracting relationships in long term contracts.
- We have also introduced a tiered contract governance structure which provides a structured mechanism for relationship development and regular review beyond each party's contract

manager, as well as a mechanism for informal and expedited dispute resolution.

- Liability provisions are structured to reflect the Commonwealth's default position of unlimited liability but also allows for limitations to be negotiated in accordance with the FMA Act and Finance Guidelines and in accordance with the risk profile presented by the specific project
- We recognize contractually the importance of Critical Subcontractors whose participation in a prime contractors response was a significant factor in the prime's selection
- Strong contractual provisions have been included to prevent foreign export controls such as ITARS affecting delivery and Commonwealth use of supplies
- Liquidated Damages for pre-delivery performance issues are designed to take margin but not starve the contract for resources and include incentives for the contractor to make investments to regain schedule
- Key Performance Indicators and Key Performance Indicator Credits to address performance issues have also been introduced

These are just examples. In summary we have not thrown the baby out with the bathwater – a lot of concepts and language you are familiar with in ASDEFCON remain, however, PIP presents a more mature and sophisticated suite of procurement and contracting templates based on a more commercial approach and introduces some new concepts and mechanisms. PIP also anticipates that other contract template hybrids will be required to suit specific project objectives. Acquisition or Sustainment template contracts are not always the most suitable contract model for particular projects.

## **E-Tools: The IDCR Upgrade Project and a Defence Contract Lifecycle Management System**

As an adjunct to the PIP, Officers within the DMO have been working on the development of E-Tools to assist Officers in Procurement and Contract Management. The first sub-project in this development involves an upgrade to the Interim Defence Contract Register (IDCR).

The IDCR has been assessed in relation to its ability to fully comply with Senate Order 192, including its capability to support revised reporting of ongoing long-term contracts. Although the IDCR in its current form offers potential to improve compliance with Senate Order 192, it suffers data quality and integration issues that preclude full compliance. For this reason Defence is upgrading the IDCR to support higher levels of compliance and to add functionality for managing the intellectual property rights obtained by the Department of Defence outside of DSTO. This upgrade will also include collection of earlier, more material contracts which are ongoing in order to assist Defence to comply more fully with the sentiment of the Senate Order. Planning is well advanced and an RFT will be issued to industry as soon as practicable in Financial Year 2006/7.

The DMO believes that full compliance with Senate Order 192 can only be achieved in an efficient and effective manner through the implementation of a contract management system that is fully integrated across the procurement lifecycle.

GCD has proposed that DMO adopt a standardised whole of life approach to the treatment of contracts across Defence as opposed to the ad hoc multiple systems currently in use. We have named this system the DCLMS (Defence Contract Lifecycle Management System).

The DCLMS would comprise a virtual, web-based, interface to existing systems, a Contracts Register containing contract related information to meet a range of contract management functions across the Contract Lifecycle and the addition, as developed, of such initiatives as e-Tendering and Evaluation, e-Contracting (automation of Contracting delivered as part of the PIP), and a safe custodial service for contracts.

At present, there is no standard approach to Contract Management across DMO or Defence, no single authoritative naming convention for contracts, or an authoritative automated process for management of Contract Workflow.

The DCLMS will provide a central system allowing contract information to be entered once, stored and maintained, providing ease of management, searching, reporting, auditing and control.

Accessible information resources are key to providing end user capability with a focus on organising information and facilitating its exchange and access rather than the particular systems and technologies that hold it.

A DCLMS would provide:

- improved contract transparency;
- the development of a shared body of corporate knowledge to allow increased staff mobility between projects and reduction of the costs associated with training and familiarisation;
- increased communication of lessons-learnt between projects and contracts, encouraging best practice in project and contract management across DMO;
- value to project and contract management activities through the reduction of unnecessary process and documentation; and

- integrated, accurate, reliable and up to date contract information to users and core corporate systems.

This would:

- improve operational procedures relating to the use of contract information
- reduce errors and the risk of using incorrect or out of date contract information
- reduce duplication of contract data
- enable efficient recording, relating and organising of project and contract information
- reduce staff costs in the time and effort required to assemble and report on contract related information
- enable statutory reporting obligations to be met.
- allow for
  - searching, retrieval and reporting of different views of contract information in a timely, accurate and efficient manner
  - improved management access and integrated presentation of contract information
  - transparent access to linked items such as supplier information, financial summary information, contract documents and images regardless of where they are held within the DMO IT infrastructure

If approved, a phased programmatic approach to the DCLMS will be adopted with Project Definition and System Design and Acquisition happening in FY06/07, Implementation and Training in FY07/10, and Sustainment FY10 and beyond).

\$475,000 has been identified and approved for a feasibility study which will illuminate the total cost of the system to Defence. With a project of

this size and complexity, constraints due to the necessary interfaces with other Defence IT programs and Defence Industry (to allow for an Industry managed database of tender information) may prove insurmountable in the short term, however by chunking down into manageable and achievable subprojects it should be possible as long as a long term view is held. General Counsel Division believes that a system such as the one described is the best long-term solution for the management of procurement and contracting in Defence and should cause the abatement of ANAO's numerous recommendations in various performance audit reports for improved records and contract management.

Commencement of the feasibility study is expected early in FY 2006/07.

## **PROCUREMENT OFFICER PROFESSIONALISATION PROGRAM (POPP)**

I spoke to you last year about the development of a Nationally Accredited Training Program for Procurement Officers. Work is well advanced on the program and we aim to begin classes in line with first Semester 2007 university timetables.

### **Policy Owner – Defence Procurement and Contracting**

In 2003, Defence conducted a Business Skilling Review to explore appropriate options to improve the effectiveness and efficiency of delivering business skills to Defence personnel. As a result of this Review, DMO was assigned Policy Owner for Procurement and Contracting. As policy owner, DMO has a range of responsibilities including analysis and evaluation of procurement skilling; defining

mandatory and recommended skill requirements; and acting as the final authority for control of procurement skilling.

Under the policy owner framework, I am the Business Process Owner for Procurement and Contracting Policy and Practices across the Defence portfolio and am responsible for developing and defining procurement and contracting business processes; designing, developing and delivering related skilling programs and materials; and acting as the design and development approval authority for procurement and contracting skilling programs.

## The Professionalisation Agenda

Central to our Reform Agenda is the DMO Professionalisation Agenda, which involves the implementation of an integrated, consistent and disciplined approach to up-skilling and professional development of Defence Personnel, with activities closely aligned to business practices. It aims to develop workforce capability through the development of sustainable programs and initiatives to meet both current and emerging skills sets required of the organisation.

The Professionalisation Agenda will:

- provide a range of professional development activities to meet future skill sets and increase the professional standing of DMO;
- maintain high levels of Government and public confidence in the delivery and support of ADF capability by ensuring the work force is able to register its competence against the highest professional standards available;

- improve the attraction, retention and career opportunities of DMO personnel;
- enhance the technical, leadership and commercial skills of DMO personnel; and
- meet the recommendations of the *Defence Procurement Review* (Kinnard Review) and the Defence White Paper, *Defence 2000 – Our Future Defence Force*.

The DMO Professionalisation Agenda incorporates three main elements:

- formal training to achieve qualifications at the certificate, diploma and degree level;
- certifying and chartering processes involving the assessment of competence against the highest professional standards available coupled with ongoing professional development; and
- up-skilling achieved through accredited education and training programs.

The DMO Professional Agenda is being delivered through:

- engaging peak professional bodies to provide best practice certification and chartering awards and continuing professional development programs that enable the workforce to refine and develop skills more effectively while registering competence against the highest professional standards;
- engaging a Strategic Education and Training Supplier (The DMO Institute) to design, develop and administer accredited education and training that is cost effective, suited to a geographically

dispersed workforce and has a focus on innovative contemporary learning approaches.

## **DMO Job Families and Professional Development**

To underpin the DMO Professionalisation Agenda, DMO has implemented a standardised framework of Job Families for its personnel. This work is dynamic and, as such, will continue to be refined over time. However, the current Job Families are: Project Management; Engineering and Technical; Logistics; Legal; and Commercial/Business Management. Procurement is currently included in the Commercial/Business Management category.

The Directorate of Professional Education within the DMO will meet initial and ongoing professional development costs (membership, assessment and accreditation) associated with an employee's primary Job Family on the understanding that it is directly related to their current role.

## **Chartering/Certifying Processes**

A key feature of the DMO Professionalisation Agenda is the implementation of chartering and certifying processes across the DMO Job Families.

As part of this initiative, the DMO is working with a number of professional bodies to provide services to charter/certify personnel against clear professional standards and provide ongoing professional development opportunities.

All Legal Officers working in General Counsel Division are members of the Law Society in their respective states and hold current practising certificates. They are required to undertake mandatory CLE training each year. Most of our Financial Investigators are members of a professional

body or are working towards CPA status. They are also required to undertake mandatory continuing education to maintain their certificates. Our Procurement Officers will be able to join one of a number of professional organisations once they have commenced/completed the Procurement Officer Professionalisation Program.

## Training

DMO has awarded a contract to a triumvirate of educational institutions (The DMO Institute) to source/develop and administer future accredited training and education programs for DMO across its Job Families.

## Current Defence Procurement Training Programs

DMO currently provides the Defence workforce with courses (delivered by a number of external contractors) which provide practitioner based learning in Defence Procurement policies and practices. There are up to 10 courses of varying duration and complexity covering simple procurement to use of the ASDEFCON suite of templates.

General Counsel Division is reviewing and remodelling these courses for incorporation into a broader, internationally focused and best practice Procurement Officer Professionalisation Program. We are using the auspices of the newly launched DMO Institute to locate a COTS program of study in Procurement and Contracting supplemented by additional electives relevant to the procurement of Australian Defence Capabilities. The resulting program will be capable of being accredited by various professional organisations.

It is hoped that the courses will be of interest not just to Defence and Defence Industry but to the wider Industry. It will be the first time that

people interested in procurement can pursue it as a profession in the fullest meaning of that term.

Work has commenced with the DMO Institute to locate a COTS program and the DMO has had an initial briefing from a selection of educational institutions who may be able to provide the program to Defence. Over the next few weeks we will continue this work with the aim of selecting a provider or providers early in the new Financial Year.

Once selected, DMO, through The DMO Institute, will establish a contract with the chosen provider(s) who will be responsible for ensuring the availability of expertise required to design additional Government and Defence specific electives to an existing COTS course in Contracting and Procurement.

DMO will facilitate the input and involvement of subject matter expert representatives from DMO to provide insight and strategy to the development and implementation of the proposed professional program and to ensure that the Procurement Officer Professionalisation Program for Defence will meet the objectives of the DMO Professionalisation Agenda and satisfy Commonwealth legislation and Defence policy.

The program developed by the chosen provider(s) will be aligned with the Australian education system standards to provide a continuum of learning for the career success of Defence personnel.

The additional POPP electives will require Australian Defence specific case studies and scenarios. The chosen provider(s) will provide experts to work in partnership with DMO to develop case studies and scenarios that can be used in the delivery of the program to commence early in 2007.

## New Legal Panel

Defence has moved to a new panel arrangement for the provision of external legal services. The former LSP panel was replaced on 1 June, 2006 by sixteen panels based on separate areas of legal expertise.

Defence Legal has primary carriage of the implementation and management of the new legal services panels. General Counsel Division, is responsible for managing the 'Strategic Commercial' Panel which has 10 member firms.

The new panel arrangements increase the opportunity for legal firms to have access to Defence business and assist Defence and DMO to obtain value for money for external legal services.

Panellists are required to subcontract 10% of work to small/medium enterprise firms to enhance the opportunity for smaller legal firms to have access to Defence business.

Standing offers have been signed with each law firm, transition processes implemented and all ongoing legal matters are being transferred to the new arrangements.

In addition, new arrangements have been developed for the management of the panels in accordance with recommendations contained in the ANAO Performance Audit Report on Legal Services Arrangements in the Australian Public Service. These arrangements will allow Defence to report on the use and expenditure of the legal services panels, and monitor the performance of the legal service providers.

Management includes the engagement and tasking of External Legal Service Providers by General Counsel Division for DMO, and performance monitoring and reporting consistent with the overall framework established by Defence Legal as the entity responsible for Defence wide use of External Legal Service Providers. This will also allow Defence to establish for the first time a central repository of all external legal advice provided to Defence.

## THE YEAR AHEAD

I now turn to the year ahead for General Counsel Division. I do not think I will need to be creative to find things to do – there is plenty!

The coming year will see the following:

- continued implementation and bedding down of the initiatives I have spoken of today and building and consolidating our team
- turning my attention to areas that could be improved or require review – the work we have already done on PIP particularly has identified an additional volume of related or downstream work, including additional contract models
- introducing formal protocols and guidance on obtaining legal sign offs at key points of the procurement process
- establishing a precedent database for legal services
- additional training for General Counsel Division staff, as well as sponsoring “training intensives” for project areas on topics such as risk assessment, liability and insurance, probity etc

- review of Defence's IP Policy and Manual released in 2003 to reflect contemporary practice on IP issues, management and commercialisation
- development of Defence policy and guidance on collaborative ventures between Defence and Defence Industry, particularly in the research and development space, such as co-operative research centres

Preliminary work on some of this has already been scoped and commenced. We will be issuing some request for tenders for consultancy services across a range of disciplines to assist us with these tasks.

## Conclusion

The reform in Defence contracting and procurement policy and practices and the change to a more commercial focus are just some of the challenges we are embracing as part our focus on continuous improvement.

As I said last year, we all know the devil is in the detail. Practical implementation is gathering momentum. The reforms we are undertaking are significant in their strategic and long term impact on Defence procurement and require changes not just to procedures and systems but also cultural change for Defence and Defence industry.

Dr Gumley uses the phrase change is goodness but that sentiment needs to be embraced by each and every member of DMO, the wider Defence community and Industry if we are to be successful in creating a culture of excellence and contract relationships that have the durability and flexibility to stand the test of time.

To be truly successful, DMO will need to attract and retain commercially experienced and qualified personnel to execute its agenda competently and with minimal risk. It is therefore imperative that DMO, as a prescribed agency, is provided with the necessary management team, tools and policies to secure these specialist skills and experience.

In this regard, the AWA framework applicable to DMO and its business is vital as are the opportunities for professionalisation and lifelong learning being offered to existing personnel.

We in the executive must concentrate on fostering a collegiate environment and demand excellence of both ourselves, our staff and Industry in order to meet our aim of equipping those men and women who are protecting our way of life, Australia's Warfighters.

Finally I would like to publicly acknowledge and extend a heartfelt thank you to all members of General Counsel Division for their effort, commitment and support during the last year in the Division's adventures and endeavours.

Gillian M Marks