



Office for the Arts, Department of the Prime Minister and Cabinet

ADMINISTRATION OF FUNDING AGREEMENTS WITH
REGIONAL AND REMOTE INDIGENOUS ORGANISATIONS

December 2010

Report by the Commonwealth Ombudsman,
under the *Ombudsman Act 1976*

REPORT NO. **16|2010**

Reports by the Ombudsman

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EXECUTIVE SUMMARY

Indigenous organisations working in regional and remote areas face unique challenges, particularly when their funding is largely derived from government grant programs.

Complex grant requirements and a failure to adequately support Indigenous organisations to meet reporting requirements increase the risk that these organisations will fail, even where the programs are being delivered successfully. Onerous administrative requirements applied without adequate attention to program objectives risk using up a disproportionate amount of funding and resources which would be more appropriately applied to the program.

What is needed is a focus on delivering services efficiently whilst simplifying and reducing the burden of administrative and reporting requirements.

This report explores some of these challenges and outlines five principles for better administration by government agencies of funding agreements with regional and remote Indigenous organisations:

Principle 1—Providing support and finding solutions

Assessing capability, providing appropriate training and support, and finding creative solutions

Principle 2—Simplifying reporting

Simplifying reporting regimes and easing the administrative burden

Principle 3—Resolving disputes

Promoting effective dispute resolution and complaint handling procedures

Principle 4—Meeting obligations

Ensuring that Program Funding Agreements (PFAs) contain and clearly explain all relevant obligations

Principle 5—Communicating effectively

Ensuring quality in decision making, clear reasoning and notification

PART 1—INTRODUCTION

1.1 In March 2009, the Commonwealth Ombudsman received a complaint from the board of a remote Aboriginal corporation (referred to in this report as Organisation A) about the administration of a Program Funding Agreement (PFA). The Indigenous organisation's activities involved the media.

1.2 The complaint concerned the 2008-2009 financial year and a PFA which was, at that time, funded by the Department of the Environment, Water, Heritage and the Arts (DEWHA).¹ In late 2010, following Machinery of Government changes, responsibility for the arts, and the program under which Organisation A was funded, transferred from DEWHA to the Office for the Arts in the Department of the Prime Minister and Cabinet. However, as this investigation concerned the actions of DEWHA, as it was then, it is DEWHA which is referred to throughout the body of this report. Reflecting the changes to portfolio responsibilities, the recommendation made at the end of this report is directed to the Office for the Arts.

1.3 Although the investigation of this individual complaint has been the catalyst for this report, it also reflects the issues and feedback received by this office during community consultations and the investigation of other complaints from Indigenous communities and organisations. The purpose of this report is to draw together lessons learnt from this investigation that are relevant to other areas of government involved in administering funding agreements with regional and remote Indigenous organisations.

1.4 The administrative issues canvassed are not unique to funding agreements administered by DEWHA. Any agency involved with the funding of regional and remote Indigenous organisations can experience similar problems.

Relevant documents

1.5 A range of legislative, policy and other documentation have been taken into account in the investigation of this complaint and the broader issues it raises.

- The *Commonwealth Grant Guidelines, July 2009, Policies and Principles for Grants Administration* (the CGGs) set out the policy framework for grants administration for agencies subject to the *Financial Management and Accountability Act 1997*. The CGGs recognise the need to work collaboratively and in partnership with grant recipients. They are intended to improve the effectiveness and transparency of grants administration. The principles for good grants administration contained in Part Two of the CGGs are particularly relevant to this report.²
- The Australian Government's *General terms and conditions - Funding Agreements relating to Indigenous Programs* (the General terms and conditions) is an annual, whole of government publication which contains generic terms and conditions that apply to Indigenous program PFAs. This report refers to the

¹ DEWHA is now the Department of Sustainability, Environment, Water, Population and Communities.

² The 2010 report of the Australian National Audit Office (ANAO), *Implementing better practice grants administration*, has been designed to complement the Commonwealth Grant Guidelines and is a useful companion reference to assist agencies to understand and comply with key obligations.

2008-2009 General terms and conditions which were current at the time this complaint was investigated.

- The Program Funding Agreement referred to in this report is the PFA between Organisation A and DEWHA for 2008-2009. A PFA consists of:
 - the Letter of Offer from the relevant agency
 - schedules setting out the individual project activities (including any annexures and documents incorporated by reference)
 - a booklet containing the General Terms and Conditions.

PART 2—BACKGROUND

The complaint

2.1 In July 2008, Organisation A signed a Program Funding Agreement (PFA) with DEWHA. The PFA consisted of funding schedules allocated for three different activities, each of which included reporting requirements.

2.2 At an early stage during the 2008-2009 funding period, Organisation A experienced difficulties in providing the relevant reporting information for DEWHA. It struggled to provide reports according to the timing sequence under the agreement and had difficulty addressing performance indicators.

2.3 Initial attempts were made by DEWHA to clarify the requirements and Organisation A made attempts to satisfy these requirements. However, DEWHA had concerns about the quality of the reported information. The first quarterly instalment of funding had been released when the agreement was signed, but subsequent instalments were withheld by DEWHA pending resolution of the reporting issues.

2.4 Organisation A contended that it had fulfilled its responsibilities under the PFA in delivering the programs and was entitled to the funds. It stated that it did not believe the reasons for withholding funding had been clearly explained. It requested that the areas of non-compliance with the PFA be clarified and asked to meet with DEWHA to resolve the situation. DEWHA agreed to hold a meeting although, for a range of reasons, a meeting did not take place.

2.5 Despite frequent email contact between DEWHA, Organisation A and its instructed representatives, these issues were not resolved. DEWHA took action to terminate the PFA in September 2009 without releasing further funds.

2.6 Throughout the course of the investigation, the Ombudsman's office obtained documents and information from both Organisation A and DEWHA. The office also met with DEWHA to gain an understanding of its perspective of the issues.

2.7 The investigation considered whether the reporting requirements were made clear to Organisation A and whether it was properly assisted to meet its obligations given that it is an Indigenous corporation in a remote location. The Ombudsman's office was also mindful that Organisation A had a limited pool of people available with the requisite expertise and skills.

2.8 A review of the information the office received revealed areas for improvement in the administration of the funding agreement. The office also expressed concern about the process followed in terminating the agreement and how communication between the parties had been managed.

2.9 DEWHA was provided with a report setting out the preliminary views of the office and containing a number of recommendations. DEWHA responded positively to the majority of the recommendations, one of which was to revisit the decision to terminate the agreement. From this point, DEWHA adopted a revised approach to engaging with Organisation A and dealt with a consultant who was initially engaged by Organisation A, but later worked on a voluntary basis, to address the differences between the parties. DEWHA and Organisation A ultimately came to an agreement

which resulted in the release of the majority of the funds which had been withheld under the 2008-2009 PFA.

2.10 DEWHA also accepted a number of broader recommendations regarding procedures and processes for administering funding agreements with regional and remote Indigenous organisations.

PART 3 – LAYING THE GROUNDWORK FOR SUCCESS: PRINCIPLES FOR THE EFFECTIVE ADMINISTRATION OF FUNDING AGREEMENTS

Principle 1—Providing support and finding solutions

Assessing capability, providing appropriate training and support, and finding creative solutions

Organisation A encountered significant difficulties in understanding and meeting the complex reporting requirements of its 2008-2009 Program Funding Agreement (PFA) with DEWHA. This was evident at a reasonably early stage in the various communication exchanges between the parties. The challenges Organisation A faced in accessing specialist services to assist it to comply with the requirements were also apparent.

The majority of communication between DEWHA and Organisation A was carried out via email. Although DEWHA made attempts to clarify the reporting requirements via email, it was clear that Organisation A continued to find it difficult to understand what further information DEWHA required.

3.1 The Commonwealth Grant Guidelines (CGGs) promote key principles of robust planning, design, collaboration and partnership in grants administration. These principles are particularly relevant to agencies dealing with regional and remote Indigenous organisations which may encounter additional challenges when complying with funding regimes. Key elements of these principles include:

- *encouraging a constructive and cooperative relationship between the administering agency, the grant recipient and other relevant stakeholders*
- *promoting effective consultation, with a shared set of understandings and expectations*
- *being aware of the needs and interests of grant recipients – and not assuming that the same approach will suit all circumstances, regardless of the scale or purposes of the grant in question or the performance record of the grant recipient.*³

3.2 In the context of reporting requirements, the CGGs support a creative and flexible approach which caters to the needs of grant recipients while ensuring that quality reporting information is provided.

Our investigation indicates that the CGGs encourage a more supportive and creative approach than was adopted by DEWHA in their dealings with Organisation A. More telephone contact or face to face meetings would have helped. Reporting templates and training for key staff responsible for preparing the reports would have also assisted Organisation A.

³ Department of Finance and Deregulation, *Commonwealth Grant Guidelines—Policies and Principles for Grants Administration*, Financial Management Guidance No. 23, July 2009, page 24.

The primary approach adopted by DEWHA in attempting to clarify the requirements via email from DEWHA's state office proved insufficient. The failure to apply creative and flexible solutions to the difficulties Organisation A was encountering led to a situation where the agreement was terminated while available indicators (albeit incomplete) suggested the program was being delivered successfully. A state government department that became involved in assisting Organisation A to resolve its funding situation also expressed concern about the lack of clarity or explanation for the information being requested by DEWHA.

Ultimately, following the intervention of the Ombudsman's office, the reporting issues were resolved through the involvement of an external consultant who travelled regularly to Organisation A to assist it with its reporting.

Ombudsman's observations

3.3 Remote and regional communities often face a challenge in gaining access to people with the skill sets or the training necessary to deliver and report on government grant programs. This can be true at all levels of an organisation, from the management board to staff and volunteers. Sometimes those with the required skills are overcommitted or simply not available and organisations may be unable to access professional support. High travel costs will draw on critical resources that are intended to deliver the desired program outcomes.

3.4 One consequence of these resource constraints in regional and remote communities is that individuals may hold multiple roles and positions. The potential for conflicts of interest is greater than would usually be found in urban settings.

3.5 Skills shortages in regional and remote areas will mean agencies need to consider providing the following:

- training to key staff and board members on their obligations and the requirements under funding agreements
- templates and example reports to assist organisations to comply with their reporting requirements
- face-to-face contact rather than relying solely on telephone or email contact⁴
- guidance and support to individuals who hold multiple roles so they can recognise the potential for, and manage any conflict of interest.

3.6 Such support will be particularly important where an entity is newly funded or facing additional or unexpected challenges such as changes in leadership or management. This support from agencies will help to increase the capacity for success within the local community. This will ultimately benefit the organisation, the community and government agencies supporting activities within the area.

⁴ The ANAO comments that, where possible, decentralising responsibility of grant monitoring will increase the ability to bring local knowledge to bear and support effective communication between officials and funding recipients. The ANAO also offers suggestions in its report on how agencies can avoid the risk of inconsistency in the monitoring process in doing so. That principle is particularly relevant to agencies dealing with regional and remote organisations. ANAO, op. cit, page 102.

Principle 2—Simplifying reporting

Simplifying reporting regimes and easing the administrative burden

The PFA schedules that applied to Organisation A required it to provide performance and financial reporting information for three activities against four different timing sequences.

Reports were to be based on Key Performance Indicators in the PFA schedule. However the specific requirements for the reports were contained in the General terms and conditions booklet and not included in the PFA.

3.7 The CGGs support synchronisation of reporting requirements. They state that, where possible and appropriate, consideration should be given to aligning reporting requirements with a recipient's internal reporting system.⁵

3.8 The CGGs encourage agencies to consider the volume, detail and frequency of reporting requirements in light of the specific circumstances of the grant recipient. They suggest that agencies determine the extent to which a grant activity may interact with programs run by other bodies, including other levels of government. Appropriate consultation and co-operation with these other bodies can assist to avoid duplication of effort and improve outcomes for recipients and government.⁶

3.9 The CGGs also state that it is important to consider the specific focus of agency reporting requirements. They promote an outcomes orientation and discourage agencies from placing too much weight on quantitative indicators at the expense of qualitative factors.⁷ Agencies are also encouraged to seek stakeholder input when developing or modifying grants. Good working relationships with stakeholders will help reduce compliance costs for grant recipients.⁸

Different reporting sequences made it more difficult for Organisation A to provide timely reports to the satisfaction of DEWHA. Some problems could have been avoided if DEWHA had given greater consideration to simplifying and synchronising the reporting requirements at the time of formulating the grant requirements.

Despite these difficulties, it was generally recognised that Organisation A delivered a successful program. This was overshadowed however by DEWHA's concerns about the quality of reports provided. Ultimately, this threatened the future delivery of the service to the community.

Ombudsman's observations

3.10 The Coordinator-General for Remote Indigenous Services⁹ has commented on the issue of complex reporting regimes for remote Indigenous organisations. The

⁵ Commonwealth Grant Guidelines, op. cit, page 19.

⁶ Commonwealth Grant Guidelines, op. cit, page 21.

⁷ The guidelines promote the principle of proportionality in ensuring that key program design features and related administrative processes are commensurate with the scale, nature, complexity and risks associated with the granting activity. Commonwealth Grant Guidelines, op. cit, page 19. The ANAO also comments on the problems associated with failing to relate performance measures to operational and strategic objectives or outcomes. ANAO, op. cit, page 107. We also note in this regard DEWHA's advice that whole of government Indigenous performance reporting indicators were implemented during 2009-10.

⁸ Commonwealth Grant Guidelines, op. cit, page 21.

⁹ Coordinator-General for Remote Indigenous Services: *Six Monthly Report – July – November 2009*, [http://www.cgri.gov.au/userfiles/file/FAHCSIA_1932_CGRISREPORT\[LO-RES_A4\].pdf](http://www.cgri.gov.au/userfiles/file/FAHCSIA_1932_CGRISREPORT[LO-RES_A4].pdf), page 103.

Coordinator-General observed that in almost every community visited, representatives of service providers pointed to deficiencies in government programs which hindered their implementation at the local level. Among the concerns most commonly raised was ‘the myriad of contracts, reporting requirements and funding periods and the inability to tailor national, State and Territory programs to suit local circumstances.’¹⁰

3.11 The Coordinator-General recommended that Commonwealth and Territory governments examine the use of more flexible funding approaches which align service delivery and provide some flexibility to modify inputs to help achieve the Closing the Gap outcomes. He also recommended streamlining reporting and reducing red tape.¹¹

3.12 The Ombudsman’s office has also consulted with organisations receiving funding under a range of programs in the NT. Many organisations working in this area have confirmed that they struggle with the administrative burden and costs associated with adhering to detailed reporting requirements. Even organisations that receive funding from a single government agency have voiced concerns that the reporting requirements can be complicated and consume a substantial proportion of resources that should be directed to the delivery of the funded service or program.

3.13 Where entities receive funds from multiple sources, the complexity can increase exponentially, along with the administrative burden. This increases the risk that organisations will become non-compliant with reporting requirements. Furthermore there is the heightened risk that using a large proportion of resources in satisfying administrative requirements will result in the failure to deliver the services which they are funded for.¹²

3.14 Concerns have been raised with this office that the often short term nature of government funding decisions limits the ability of organisations to plan their work and retain staff. The process of applying for funding consumes substantial resources. Organisations involved in the process presented convincing arguments in favour of longer term funding cycles.¹³

¹⁰ Ibid, page 103. Other concerns included: the failure to build appropriate salary and housing considerations into funding agreements to attract and retain high quality staff; and fragmented and one off leadership and governance training and support which envisages program rather community accountability and ignores the multiple roles individuals may have in a remote community. In his report, the Coordinator-General also acknowledged that the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) had achieved considerable efficiencies through its ‘red tape reduction’ activities in mainstream and Indigenous communities, reducing the complexity of funding agreements and standardising the period of contracts.

¹¹ Ibid, page 104

¹² During a community consultation held by the Ombudsman’s office, we were informed that little support is provided to smaller organisations to assist them to meet administrative and governance requirements and that Indigenous organisations could be expected to benefit from additional support and training to meet their reporting obligations. However, as this is not always available, their ability to build capacity is limited and the risk of failure increases. A number of small organisations stated that the majority of funding and grant arrangements do not include funds for the administrative costs associated with the funding agreement. One small organisation explained that it is required to report four to five times in a year whereas larger organisations are often only required to report annually. *Commonwealth Ombudsman, Community Round Table meeting, Darwin, 10 February 2010.*

The ANAO has also stated that poorly designed performance systems can adversely affect the performance of the program they are measuring. ‘Care should be taken to ensure that performance information relevant to grant activity is not over specified to the detriment of the efficient conduct of the program.’ ANAO, op. cit, page 107.

¹³ In its Second Report for 2009, the Senate Select Committee on Regional and Remote Indigenous Communities recommended that the Commonwealth commit to longer term program funding so that organisations can enjoy greater funding certainty and offer staff greater job security. See recommendation 8 of the report at http://www.aph.gov.au/Senate/committee/indig_ctte/reports/2009/report2/b02.htm

3.15 In summary, our complaint investigations and consultations with non government organisations and communities point to the need for agencies to consider, at the point of grant or funding:

- how reporting can be simplified
- how their requirements might be accommodated within existing reporting processes to minimise duplication
- whether their requirements are sufficiently clear to the grant recipient, including the timing sequence for reporting, i.e. reporting periods and due dates
- whether additional funding should be provided to support the organisation to meet the compliance and associated administrative costs
- whether longer term funding structures will deliver better outcomes, including maximising efficiencies and directing resources to program delivery rather than focusing on administrative compliance.

Principle 3—Resolving disputes

Promoting effective dispute resolution and complaint handling procedures

Organisation A's funding agreement did not contain specific dispute resolution provisions. Instead, the PFA referred the grant recipient to the dispute resolution provisions contained within the General terms and conditions booklet.

Once it became clear that the issues of concern about the PFA could not be resolved and that a dispute had developed, neither DEWHA nor Organisation A utilised the dispute resolution provisions or pursued alternative dispute resolution. It is possible that Organisation A was not aware of the existence of the process in the General terms and conditions as it had requested on numerous occasions that the matter be escalated or referred to an area within DEWHA where the issue could be resolved.

3.16 Every funding agreement should provide a dispute resolution or complaint handling mechanism aimed at the proactive management and resolution of issues. The CGGs draw attention to this need.¹⁴

3.17 The Model Litigant Code (the Code)¹⁵ also reflects the principle that agencies should endeavour to avoid, prevent and limit the scope of legal proceedings by participating in alternative dispute resolution.¹⁶

¹⁴ Commonwealth Grant Guidelines, op. cit, page 23.

The ANAO also encourages agencies to identify the process by which complaints and other queries about granting programs will be handled, regardless of whether formal review or appeal processes are available in relation to a decision under a program. 'The establishment of documented processes for the consistent and timely handling of complaints and queries will promote sound public administration and assist in maintaining public confidence in the integrity of the program'. Op cit page 48.

¹⁵ *Legal Services Direction 2005: Appendix B: The Commonwealth's obligation to act as a model litigant.* In addition to being binding on Commonwealth agencies and departments, it is the view of this office that the principles contained in the Code concerning alternative dispute resolution also reflect good administrative practice.

¹⁶ At page 18 of the Australian Government Solicitor's (AGS) Legal Briefing 83, *Grants and Funding Programs: Legal Issues*, 17 November 2009, the AGS comments that 'an agency contemplating terminating a funding agreement needs to carefully consider any alternatives to, and possible consequences of, deciding to terminate the agreement, and seek legal advice on the proposed termination. This advice may need to cover issues such as using dispute resolution solutions before resorting to litigation.'

3.18 Agencies should try to resolve issues or concerns arising under funding agreements through mediation or conciliation at an early stage, particularly where agencies rely upon complex legal instruments that are open to interpretation. Under these conditions dispute resolution procedures will be of great benefit in minimising litigation. These dispute resolution procedures should be clearly outlined in the funding agreements.

Resolution of Organisation A's situation may have benefited from an early referral to a dispute resolution process. Tensions between Organisation A and DEWHA had developed over time and these had diverted the focus from the facts at hand and possible solutions.

Although DEWHA had escalated the matter internally in an attempt to address the issues that arose, a formal process to resolve the dispute was not pursued. The involvement of the Ombudsman's office demonstrated that engagement with an independent dispute resolution process was beneficial and likely to have resolved the matter at a much earlier stage.

Ombudsman's observations

3.19 Agencies should ensure that parties to funding agreements and relevant departmental staff are aware of the existence of dispute resolution processes. Clear documentation of the process is needed and specific training for agency staff and within funding organisations on the processes may also be required.

3.20 It is important that agencies are proactive regarding dispute resolution. Early intervention is especially relevant in smaller regional and remote settings where access to professional advice is limited. There may also be a need to address the risks associated with the multiplicity of roles that individuals may have. Even where a funded organisation does not access a dispute resolution procedure, agencies should consider treating as a trigger any interactions which clearly point to the existence of a dispute and instigate the relevant process.

3.21 Agency staff should familiarise themselves with the latest version of the General terms and conditions, especially the dispute resolution provisions.

3.22 Agencies should also ensure that:

- funding agreements contain clear complaint and dispute resolution procedures
- parties to agreements are made aware of the procedures and, where appropriate, provide training
- staff are encouraged and trained to be proactive, mediate disputes and utilise the dispute resolution procedures set out in the PFA
- contact details, including agency addresses, are always current and that organisations are notified promptly of any changes.

Principle 4—Meeting obligations

Ensuring that Program Funding Agreements (PFAs) contain and clearly explain all relevant obligations

In the course of our investigation DEWHA made reference to a clause in the General terms and conditions which provided that a PFA can be cancelled if the entity or organisation is in breach of another PFA that the entity holds, even if the other PFA is with another agency. DEWHA informed us that this clause was the basis for withholding funds and ultimately terminating all three of the PFA schedules it held with Organisation A (even though reporting deficiencies had been identified under only one of the schedules).

That clause was located in the General terms and conditions booklet and was not referred to in the schedule. It was apparent that Organisation A was not fully aware of conditions relating to the termination of PFAs.

In the circumstances, it would have been appropriate to include the clause from the General terms and conditions in the schedule to the funding agreement and make an explicit cross-reference to its existence in the General terms and conditions booklet. At the least, it should have been clearly brought to Organisation A's attention as soon as reporting issues arose.

3.23 Funding agreements will often refer to a set of standard terms and conditions which are located in a document separate to the agreement. In the context of Indigenous programs, these additional provisions are contained in the annual General terms and conditions booklet. Funding agreements make reference to this and a copy is provided to the parties upon signing a PFA.

3.24 The CGGs state that well-drafted funding agreements are an opportunity to clearly document the expectations of both parties regarding the delivery of the granting activity.¹⁷ This consideration applies equally to the use of standardised terms and conditions and it is important that the use of such terms is considered in light of the circumstances of each individual granting activity.

Ombudsman's observations

3.25 Agencies should ensure that any significant clauses or obligations contained in a set of generic terms and conditions are clearly brought to the attention of the funded entity. In some situations, it may not be appropriate to simply direct attention to the additional booklet, and it may be necessary to clarify clauses in the PFA. In making this assessment agencies should have regard to the skills and experience of the funded organisation as well as their access to professional assistance.¹⁸

¹⁷ Commonwealth Grant Guidelines, op. cit, page 24.

¹⁸ Whilst supportive of the concept of standardisation of funding requirements for grants to community organisations, the Australian Government Solicitor (AGS) comments that there is a limit to which standardisation can and should be taken, and agencies 'should consider the most appropriate agreement for the community grant program which they are considering'. The AGS comments that although many agencies have adopted consistent positions on key policy issues for similar types of community grants programs, these positions do not inhibit the flexibility of agencies to change the agreement to suit particular programs. In some circumstances there will need to be a tailoring of the terms and conditions. See Australian Government Solicitor, op. cit. pages 12, 17 and 22.

3.26 In summary, agencies should ensure that:

- significant clauses or obligations in other documents are also outlined in the schedule to funding agreements
- where reference is made to an external set of terms or conditions, the existence of the additional terms or conditions and their implications are clearly understood by the funded organisation.

Principle 5—Communicating effectively

Ensuring quality in decision making, clear reasoning and notification

On 1 September 2009, DEWHA issued a formal notice of breach under the PFAs which provided Organisation A with 20 days to respond and rectify the identified breaches. That notice provided a contact address which was different from the address included in the PFA, although the process for formally notifying of a change of address had not been followed. Organisation A responded to the breach notice on 3 September 2009 and sent the response to the address listed in the PFA. As DEWHA had moved offices this response was not received. On 23 September 2009, DEWHA provided Organisation A with written notification of the termination of the PFAs on the grounds identified in the breach notice.

After being made aware of Organisation A's response to the breach notice, DEWHA considered the additional information provided by Organisation A. That information did not lead DEWHA to alter its earlier decision. On 28 September 2009 confirmation of the termination was provided to Organisation A.

3.27 The Ombudsman's office has previously commented on the quality of decision notification provided by agencies¹⁹. These comments are also relevant in the program funding context where decisions regarding agreements can have significant implications for funded entities. It is important that decision or notification letters affecting an organisation's rights under a funding agreement are drafted in such a way that they can be clearly understood.²⁰

3.28 The Administrative Review Council's *Decision Making Best Practice Guide* series emphasises the importance of clearly communicating the basis of a decision to an affected party. *Best Practice Guide 4: Reasons* usefully sets out the information that decision makers should provide when notifying a person or organisation of a decision which affects them. The Guide states that when providing reasons for a decision:

- The actual reasons relied upon by the decision maker at the time of making the decision must be stated. Every decision should be amenable to logical explanation.
- The statement must detail all steps in the reasoning process that led to the decision, linking the facts to the decision.

¹⁹ In a 2007 report titled '*Department of Immigration and Citizenship – Notification of Decisions and Review Rights for Unsuccessful Visa Applications*', the office commented on the importance of quality decision and notification letters (in the immigration context).

²⁰ In the context of terminating a funding agreement, the AGS comments that agencies will usually exhaust all other options (such as providing the grant recipient with the opportunity to rectify the default) before terminating. Where an agency elects to terminate an agreement for default it must comply with any procedures set out in the agreement relating to the power to terminate for default. See Australian Government Solicitor, *op. cit.*, page 19.

- The statement should enable a reader to understand exactly how the decision was reached; they should not have to guess at any gaps.²¹

The breach notice issued to Organisation A under the PFA did not contain sufficient detail to enable the organisation to understand the breaches and take steps to address them. The notice did not refer to the provisions which had been breached and failed to explain why the information Organisation A had previously provided was not to DEWHA's satisfaction.

In addition, the termination decision did not provide adequate explanations or reasons. It did not address each of the grounds that had been included in the breach notification nor did it address the response to the breaches that Organisation A had provided and why Organisation A's response had failed to satisfy DEWHA.

As a result Organisation A was not able to sufficiently address the breaches. Both of these notices had been considered by DEWHA's legal section. Ultimately, following the intervention of this office, these issues were clarified to DEWHA's satisfaction.

Ombudsman's observations

3.29 Effective communication throughout decision making processes becomes particularly important where there are additional barriers such as remote location, cultural differences and language barriers. In dealing with regional and remote Indigenous organisations it is likely that some or all of these barriers will have an impact upon the ability of individuals, and therefore an organisation's ability to understand agency communication. These barriers will also impact upon their ability to respond.

3.30 In summary, agencies should ensure that decision and notification letters issued under funding agreements:

- set out the decision and the reasons for the decision
- refer to the relevant contractual/funding agreement provisions
- list the conclusions on material facts
- refer to the evidence for the conclusions
- identify the decision maker and provide information that will enable the recipient to contact the decision maker to clarify the notice or decision
- explain rights of reply and reflect any formal processes included in the funding agreement such as how an organisation can respond or reply
- provide information on any relevant internal or external review and complaint avenues.

²¹ Administrative Review Council, Decision Making Best Practice Guide 4: *Reasons* released in August 2007.

PART 4—RECOMMENDATION

4.1 On 8 July 2010, the Government announced a review into its investment in the Indigenous broadcasting and media sector. This review will aim to ensure that the resources allocated to Indigenous broadcasting deliver the best outcomes for Indigenous people.²²

4.2 The terms of reference for the review were developed in consultation with the Indigenous broadcasting and media sector. The issues raised in this report resonate particularly well with two of the review's main aims:

- assess future options for funding the delivery of Indigenous broadcasting and media in light of future challenges and opportunities and uncertainty about the sustainability of existing funding models and taking into account regional and cultural language requirements
- develop a robust performance framework for the Indigenous broadcasting and media sector.

4.3 The observations and the principles outlined in this report should be taken into account when administering funding agreements with regional and remote Indigenous organisations. The report should also be considered in the context of the broader review of Indigenous broadcasting and media sector.

Recommendation

It is recommended that the Office for the Arts consider the principles and observations made in this report in reviewing its approach to administering funding agreements with regional and remote Indigenous organisations.

The five fundamental principles we wish to draw attention to in this report are:

1. Providing support and finding solutions
2. Simplifying reporting
3. Resolving disputes
4. Meeting obligations
5. Communicating effectively

They aim specifically to improve the way government administers funding agreements with Indigenous organisations. The focus is on finding a clearer path, better understanding and improved results.

We also suggest that the Office for the Arts forward this report for consideration by the Indigenous broadcasting and media review panel.

²² Joint Media Release, the Hon Peter Garrett MP, the Minister for Environment Protection, Heritage and the Arts, the Hon Jenny Macklin MP, the Minister for Families, Housing, Community Services and Indigenous Affairs, Senator The Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 8 July 2010. <http://www.environment.gov.au/minister/garrett/2010/mr20100708.html>.

APPENDIX A – AGENCY RESPONSE

The Office for the Arts commented on an initial draft of this report. Its comments against specific issues were considered and, where appropriate, addressed in the report itself. On 19 November 2010, the Office for the Arts provided the following response in respect of the report and its recommendations.

Response to Recommendations

The Office for the Arts has considered the principles and observations made in the report. The Office for the Arts continues to review its approach to administering funding agreements with regional and remote Indigenous organisations and as a result:

- there has been a focus on clearer contract development and administration in the Department's State and Territory Offices;
- contract management and negotiation of schedules continues to occur in negotiation with funded organisations as part of the annual funding rounds for the arts, culture, heritage, language and broadcasting programs; and
- funding agreements continue to be administered under the Department of Families, Housing, Community Services and Indigenous Affairs Grant Management System in a whole of government context.

As part of administration of the 2012-13 administration of the arts and culture programs the Department aims to streamline application, guidelines and assessment processes. In addition the Department continues to encourage organisations to apply for triennial funding.

The Office for the Arts agrees to forward a copy of the Ombudsman's report to the independent review panel undertaking the national review into the Indigenous broadcasting and media sector.

Update regarding organisations progress

The Office for the Arts negotiated a new funding agreement with Organisation A in March 2010. The organisation has put in place a new Board of Management, a new manager and has a majority of new broadcasting, administration and cleaning staff.

The Office for the Arts staff visited the organisation and met with the new board and management in April 2010.

The New South Wales State Office has regular face to face, written and telephone contact with the organisation, as part of their administration of the funding agreement.

Organisation A was funded again in 2010-11.