

## EXPLANATORY STATEMENT

### ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

#### *Judiciary Act 1903*

#### *Legal Services Directions*

##### *Legislative background*

Under section 55ZF of the *Judiciary Act 1903*, the Attorney-General may issue legal services directions applying generally to Commonwealth legal work (as defined in that section) or in relation to Commonwealth legal work performed in relation to a particular matter. The power to issue legal services directions was conferred having regard to the Attorney-General's responsibility, as first law officer, for legal services provided to the Commonwealth and its agencies, including Commonwealth litigation, and for the provision of legal advice to Cabinet.

Legal Services Directions were initially issued under this provision in 1999. They are administered by the Attorney-General with the assistance of the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department. OLSC provides assistance and advice to agencies about the operation of the Directions. OLSC also publishes relevant information about the Directions (such as Guidance Notes on their interpretation and emerging issues) on its website: <http://www.ag.gov.au/olsc>.

##### *Policy background to the Legal Services Directions*

The Directions set out requirements for sound practice in the provision of legal services to the Commonwealth.

The Directions offer important tools to manage, in a whole-of-government manner, legal, financial and reputational risks to the Commonwealth's interests. They give agencies the freedom to manage their particular risks, which agencies are in the best position to judge, while providing a supportive framework of good practice.

For example, the rules about the conduct of tied work ensure that the Commonwealth minimises the risk that portfolio-specific approaches to questions of public international law or constitutional law (for instance) will impair the Commonwealth advancing and maintaining a consistent and clear position on such matters.

Another example of how the Directions provide support for good practice can be found in paragraph 10 which sets out requirements for consultation with an agency in relation to a request for advice concerning the interpretation of legislation administered by that agency. Such requirements minimise both the chance for unnecessary and inefficient duplication of work and the chance of inconsistent positions being taken by agencies on the same legislative provisions.

The Directions are a legislative instrument and have the force of law. Sanctions can be imposed for non-compliance. These sanctions may include the issue of a specific Direction by the Attorney-General, in relation to the conduct of a particular matter or

the use of a particular legal services provider. They may also include adverse comment on an agency or a provider being made to the Attorney-General or the relevant Minister.

### *Review of the Directions*

In 2004, the Attorney-General initiated a review of the Directions. The review did not revisit the fundamental nature and purpose of the Directions issued in 1999. Instead, it sought to address issues that had arisen in the five years during which the Directions had operated. An Issues Paper was circulated to a variety of agencies, legal services providers and other stakeholders. Thirty submissions were received in response to the Paper. The comments made in those submissions have been carefully considered in developing recommendations to the Attorney-General about changes to the Directions.

For clarity and ease of use, the Attorney-General has decided not to amend the existing Directions, but to issue a new instrument which comprises certain changes to the Directions in their previous form.

This Statement explains the provisions of the Directions, and draws attention to aspects of the Directions which differ from those issued in 1999.

### *Snapshot of the Directions*

The Legal Services Directions apply to *Financial Management and Accountability Act 1997* agencies. Certain provisions also apply to other Commonwealth entities (see paragraph 12). Examples of the matters governed by the Directions in relation to agencies are as follows. The following list is not exhaustive – it merely illustrates some of the major topics governed by the Directions.

- Efficient and effective services: An agency must ensure arrangements concerning legal services deliver efficient and effective services. See paragraph 1 of the Directions.
- Tied work: Certain types of legal work for Australian Government agencies, such as constitutional, public international law, Cabinet, national security and legislative drafting work, can only be performed by ‘tied’ providers of legal services (for example the Attorney-General’s Department or the Australian Government Solicitor, depending on the nature of the tied work). Exemptions from these requirements can be granted in appropriate cases. See paragraph 2 and Appendix A to the Directions. One purpose of the tied work rules is to ensure a consistent and coherent legal position is taken in key strategic areas of law.
- Reporting: Agencies are to report to the Attorney-General or OLSC on significant matters arising in relation to claims, litigation or legal services matters. See paragraph 3 of the Directions.
- Claims/ model litigant: Claims and litigation are to be handled in accordance with certain rules, including the obligation on the Australian Government to act as model litigant. See paragraph 4 of the Directions and Appendices B and C. The obligation to act as a model litigant extends to litigation before courts, alternative

dispute resolution procedures, settlement negotiations, and merits reviews proceedings before tribunals.

- In-house lawyers: In-house lawyers may only be used as solicitor on the record or in court litigation with the approval of the Attorney-General. See paragraph 5 of the Directions. This rule is to ensure that the Commonwealth only appears in court with a legal team with sufficient expertise and support to properly advance its case and assist the court.
- Counsel: There are restrictions as to terms of which counsel may be engaged, including a requirement that payment of new rates above specified thresholds require the approval of the Attorney-General. See paragraph 6 of the Directions and Appendix C. A key objective is to ensure a broad range of counsel are skilled in undertaking work for the Australian Government.
- Public Interest Immunity: Issues concerning public interest immunity must be handled in consultation with relevant agencies. See paragraph 7 of the Directions.
- Limitation periods: The general rule is that the Commonwealth is to assert any applicable limitation period. See paragraph 8 of the Directions.
- Legal assistance to employees: Legal assistance may be provided to employees in specified circumstances. See paragraph 9 of the Directions and Appendix E.
- Advice on legislation: Where legal advice is sought on legislation administered by another agency, that agency must be consulted before requesting that advice, subject to certain exceptions. See paragraph 10 of the Directions.
- Agency responsibility: Agency chief executives have a range of specific responsibilities for matters concerning the handling of legal services and compliance with the Legal Services Directions. See paragraph 11 of the Directions. An annual certificate concerning compliance with the Directions must be provided to OLSC.
- Third parties: Where the Commonwealth agrees to a right of subrogation in favour of a third party, the Commonwealth should require the third party to meet certain obligations namely to act as a model litigant in subrogated matters and to consult the agency on tied work matters and interpretation of Commonwealth legislation. See paragraph 11A of the Directions.
- Sanctions: Non-compliance with the Directions can result in sanctions. See paragraph 14 of the Directions.

*Contacting OLS*

Questions about the interpretation and operation of the Directions can be directed to OLS. Contact details are as follows.

Telephone (02) 6250 6611

Facsimile (02) 6250 5968

Mail: Assistant Secretary  
Office of Legal Services Coordination  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Email: [olsc@ag.gov.au](mailto:olsc@ag.gov.au)

Website: <http://www.ag.gov.au/olsc>

## **SECTIONS**

### **Section 1**

Section 1 of the instrument sets out the name of the instrument.

### **Section 2**

Section 2 specifies that the instrument commences on 1 March 2006.

### **Section 3**

Section 3 provides for the repeal of the previous Directions which were issued to take effect from 1 September 1999, as amended from time to time.

### **Section 4**

Section 4 provides that Schedule 1 to the instrument sets out Directions given by the Attorney-General under section 55ZF of the Judiciary Act.

## **SCHEDULE 1: LEGAL SERVICES DIRECTIONS**

Paragraphs 1 – 11A of the Directions apply to Commonwealth agencies (including Departments of State and Parliamentary Departments) which are subject to the Financial Management and Accountability Act, unless special provision is made in accordance with paragraph 13.

The Directions are not intended to cover the handling of criminal prosecutions and related proceedings unless expressly referred to, nor to override any legislative requirement or authority concerning an agency's functions (in particular, the role of the Director of Public Prosecutions).

### **PART 1 FMA Agencies**

#### **Paragraph 1 (Arrangements for legal services)**

Paragraph 1.1 of the Directions provides that arrangements for the provision of legal services to Financial Management and Accountability Act agencies are to ensure they are delivered efficiently and effectively.

Previous paragraph 1.2 has been relocated to paragraph 10.7, because it is closely related to the sharing of information within Government.

Previous paragraph 1.3 has been moved to become new paragraph 11A.2, because it is closely related to the imposition, on third parties, of obligations in relation to the provision of legal services.

#### **Paragraph 2 (Tied work)**

This paragraph creates categories of Commonwealth legal work that must be carried out by one of a limited group of legal services providers, namely the

Attorney-General's Department, the Australian Government Solicitor, the Department of Foreign Affairs and Trade, and the Office of Parliamentary Counsel, depending on the category of work. These areas of legal work are known as 'tied work'. The provision recognises that certain kinds of work have particular sensitivities, create particular risks or are otherwise so bound to the work of the executive that it is appropriate that they be subject to centralised legal service provision.

Previously, paragraph 2 allowed the Attorney-General or the Attorney-General's delegate to approve, either in a specific case or generally, a non-tied provider doing work that would otherwise be tied. This provision is now located in Appendix A, which imposes further requirements and provides more information about the conduct of tied work. The provision allows flexibility (for example, through the imposition of conditions) while managing the sensitivities of tied work in particular cases.

A new note has been included to refer to paragraph 12 as the source of rules in relation to non-Financial Management and Accountability Act agencies.

### **Paragraph 3 (Reporting on significant issues)**

This paragraph imposes on Financial Management and Accountability Act agencies an obligation to report, as soon as possible, to the Attorney-General or OLSC about significant issues arising in the provision of legal services. The paragraph indicates factors which are to be taken into account in determining whether an issue is 'significant' for the purposes of the Directions.

The purpose of imposing the obligation is to facilitate the development of a whole of government approach to matters of broad legal or policy significance.

A series of notes has been added to paragraph 3 to provide agencies with additional guidance in meeting the reporting obligation.

### **Paragraph 4 (Claims and litigation by or against the Commonwealth or FMA agencies)**

Paragraph 4 imposes on Financial Management and Accountability Act agencies various obligations concerning how they deal with claims and litigation. Paragraph 4 includes rules about settling claims and litigation. These obligations reflect the need to protect the legal and financial interests of the Commonwealth, while acting in accordance with the model litigant obligation, which is explained in greater detail in Appendix B to the Directions. The model litigant obligation on the Commonwealth has been recognised by the common law since the earliest years of the Commonwealth, and requires the Commonwealth to deal fairly and honestly with other litigants. It does not, however, prevent the Commonwealth from acting firmly to protect its interests.

A new note has been included to refer to paragraph 12 as the source of rules in relation to non-Financial Management and Accountability Act agencies.

A further new note has been added following paragraph 4.3. The note draws to agencies' attention the obligations placed on Chief Executives concerning the recovery of amounts owing to the Commonwealth under the Financial Management

and Accountability Act. The presence of this note reflects the importance of agencies' awareness of the range of constraints and accountabilities imposed on conduct relating to claims and litigation concerning the Commonwealth.

Three new subparagraphs are included in these Directions. Paragraph 4.6A has been added to clarify the relationship between paragraph 4 and paragraph 3.1 (f). Paragraph 4.7 has been added to require written legal advice before the commencement of court proceedings by a Financial Management and Accountability Act agency. This provision reflects the importance of the Commonwealth not commencing court action without a sound basis for doing so, and provides transparency and accountability of decision-making. New paragraph 4.8 makes explicit the power to make guidelines about the allocation of responsibility for litigation. These guidelines can be found at [www.ag.gov.au/olsc](http://www.ag.gov.au/olsc).

### **Paragraph 5 (Use of in-house lawyers for court litigation)**

This provision restricts the use by agencies of in-house lawyers as solicitor on the record or as counsel. This restriction is a measure which provides an assurance, first, that independent legal advice is being obtained by agencies. Second, by requiring (in effect) the use of specialist litigators, the provision is aimed at maintaining a high level of quality litigation assistance. However, if an agency demonstrates that its in-house lawyers are able to provide assistance of the requisite independence and quality, the Attorney-General may grant an exemption from this provision. Exemptions have been granted in the past, where the relevant criteria were fulfilled.

No change has been made to this provision.

### **Paragraph 6 (Engagement of counsel)**

This provision imposes requirements on engagement of counsel, by reference to Appendix D to the Directions. The purpose of this provision is to ensure that counsel briefed by or on behalf of the Commonwealth are selected on merit, comply with the model litigant obligation, and provide services that offer value for money.

No substantive change has been made to this provision. However, a new note has been included to refer to paragraph 12 as the source of rules in relation to non-Financial Management and Accountability Act agencies.

### **Paragraph 7 (Public interest immunity)**

This provision imposes requirements about the handling of possible public interest immunity claims. It is intended to ensure that claims in relation to particular documents are dealt with in a consultative way between the agency making the claim and the agency with administrative responsibility for the ground on which the immunity is claimed. The provision also provides a mechanism for resolving disputes about claims of public interest immunity. This reflects the importance placed by the Commonwealth on a whole of government approach to litigation, and on the making of public interest immunity claims, in particular.

No substantive change has been made to this provision. However, the language of the provision has been clarified and a new note has been included to refer to paragraph 12

as the source of rules in relation to non-Financial Management and Accountability Act agencies.

### **Paragraph 8 (Reliance on limitation periods)**

This paragraph provides that the Commonwealth is entitled to rely on limitation periods, and provides an approval mechanism for circumstances in which it may be inappropriate to do so. Paragraph 8 also provides for responding to applications for extending a limitation period.

A new paragraph 8.3 has been added, to clarify the relationship between the rules imposed by paragraph 8 and the rules concerning the settling of claims. This paragraph emphasises the importance of there being a sound legal basis for the settling of a claim.

A new paragraph 8.4 has been added, to clarify the scope of the term 'limitation period' in paragraphs 8.1 and 8.2, by identifying certain matters (such as time limits applicable to procedural steps in litigation) to which the term does not apply in the context of paragraph 8.

### **Paragraph 9 (Assistance to Commonwealth employees in legal proceedings)**

Paragraph 9 refers agencies to Appendix E to the Directions for rules about the provision of legal assistance to Commonwealth employees (including persons to whom the *Members of Parliament (Staff) Act 1984* applies).

No change has been made to this provision.

### **Paragraph 10 (Sharing of advice within Government)**

This provision imposes on agencies a requirement to consult on, and share, advices obtained on legislation administered by other agencies. This provision serves two principal purposes. First, it is intended to reduce the incidence of duplication in advices obtained by agencies, thus facilitating the efficient and effective use of resources. Second, it facilitates a whole of government approach on legislation.

Paragraphs 10.1 has been amended to clarify and expand upon the obligation to consult on a request for advice concerning the interpretation of legislation administered by another agency. The new requirements are to provide a copy of the request for advice to the administering agency and to provide a copy of advice in draft form to that agency for comment.

Paragraphs 10.2 and 10.3 have been amended to make clear that where an exception to the requirement to consult is applicable (eg urgency or confidentiality) the administering agency is still to be consulted and informed as far as circumstances allow.

Similarly paragraph 10.4 has been amended to highlight circumstances in which an administering agency should be consulted in seeking advice on legislation, even if the advice is or is expected to be 'routine' in nature. This is designed to effectively 'capture' important insights gained from requesting and obtaining advice, so that the administering agency has the benefit of these.



A new paragraph 10.5 has been inserted to impose on an administering agency an obligation to consider advice that is given about its legislation, and whether that advice indicates that action should be taken to clarify its interpretation. This provides reciprocity, so that an administering agency takes appropriate advantage of insights gained from advice including to overcome difficulties or deficiencies highlighted by the advice, and the maximum advantage is obtained from the Commonwealth's expenditure on the advice.

A new paragraph 10.6 has been inserted to provide a mechanism by which to resolve disputes about the correct interpretation of legislation. The provision requires that agencies seek OLSC's advice before referring unresolved issues to the Solicitor-General.

New paragraph 10.7 is the previous paragraph 1.2.

New paragraph 10.8 has been inserted to further enhance arrangements for the sharing of information between agencies.

New paragraph 10.9 provides for the making of specific exemptions from the requirements of paragraph 10.

Three notes have also been included to provide additional assistance to agencies. Note 1 explains the purpose of paragraph 10, while Note 2 explains how to determine which is the 'administering agency' in a given instance.

### **Paragraph 11 (Agency responsibility)**

Paragraph 11.1 sets out the obligations imposed on Chief Executives of agencies by the Directions. In part, they reflect the obligations imposed on Chief Executives by the Financial Management and Accountability Act, and emphasise the general requirement that Commonwealth resources be used efficiently and effectively. Paragraph 11.1 also imposes on Chief Executives the responsibility to ensure their agency complies with the Directions. This is consistent with the general responsibilities of agency chief executives for efficient and effective expenditure of their budget.

A new paragraph 11.1 (ba) has been added to require Chief Executives to take responsibility for the proper recording, and public reporting, of agencies' legal services expenditure. This is partly in response to the findings of the Australian National Audit Office in its report on legal services arrangements in the Commonwealth public sector. Proper recording will enhance the ability of Chief Executives to engage in decision-making about legal resources that complies with their legal obligation to use resources efficiently and effectively. Making publicly available records about expenditure will enhance transparency.

Paragraph 11.1 (d) now makes it clear that it is not sufficient for an agency merely to remedy a breach. It must also promptly report any possible or apparent breach corrective steps, whether proposed or already undertaken, to the Attorney-General or to the OLSC. This clarification emphasises the importance that the Government places on compliance with the Directions, and on the need for the Attorney-General to

be aware of instances where there has been non-compliance by agencies or their legal services providers.

A new note is also included, directing agencies and legal services providers to the *Protective Security Manual* and to information about that Manual. The note is intended to enhance the awareness of agencies and legal services providers of the requirements for the handling of classified material, and to encourage agencies to include in legal services contracts obligations on providers to comply with those requirements.

A new paragraph 11.2 imposes on Chief Executives a responsibility to certify, on an annual basis, the compliance of their agencies (and their legal services providers) with the Directions. This provision has been inserted in accordance with recommendations made by the Australian National Audit Office, which are aimed at enhancing the confidence that the Australian Government can have in the compliance of agencies with the Directions.

## **PART 2      Extended or modified application of the Directions**

### **Paragraph 11A (Third parties)**

This paragraph is new to the Directions. It is directed to ensuring that where possible third parties who enter into relationships with the Commonwealth are bound by the Directions when exercising a right of subrogation. This provision has been inserted to address the situation in which third parties are entering into litigation in circumstances in which there may be a perception (or a reality) that they represent the Commonwealth. To the extent that the legal, financial or reputational interests of the Commonwealth are at stake, it is desirable to bind such third parties to act as a model litigant and to consult the Commonwealth on tied work (eg constitutional) issues and requests for advice on the interpretation of Commonwealth legislation.

### **Paragraph 12 (Extended application of Directions to non-FMA bodies)**

This paragraph has been completely re-written, to clarify how and when the Directions apply to entities other than Financial Management and Accountability Act agencies. The purpose of this paragraph is to provide for the application of a set of rules to bodies that are not Financial Management and Accountability Act agencies. These rules, while modified to reflect the different character of the bodies to which they apply, are designed to protect the legal, financial and reputational interests that underlie the rest of the Directions.

### **Paragraph 13 (Exemptions from complying with Directions)**

This paragraph is closely based on the former paragraph 12.3 and provides that the Attorney-General can decide to exempt a body from complying with all or part of the Directions, or modify the application of the Directions to a body. This provision is intended to allow for some flexibility to recognise that there may be exceptional circumstances warranting the extended or curtailed application of the Directions.

## **PART 3      Sanctions for non-compliance**

### **Paragraph 14 (Sanctions for non-compliance)**

This new paragraph draws agencies' attention to the range of sanctions available for non-compliance with the Directions. It also requires agencies to provide penalties for breach of the Directions when contracting with legal services providers.

#### **PART 4 Dictionary**

This paragraph contains definitions of four terms used in the Directions: 'Directions', 'FMA agency', 'litigation' and 'OLSC'.

#### **PART 5 General notes**

The notes in Part 5 provide examples, interpretive assistance and further information on issues concerning or closely relating to the Directions.

Note 1 draws agencies' attention to obligations under the *Financial Management and Accountability Regulations 1997*, and how those obligations impact upon the purchase of legal services.

Note 2 draws agencies attention to section 61 of the Judiciary Act which concerns institution of proceedings on behalf of the Commonwealth.

Note 3 draws agencies' attention to other rules and policies that may be relevant to the provision of legal services.

#### **Appendix A (Tied areas of Commonwealth legal work)**

This Appendix amplifies the rule set out in paragraph 2 of the Directions, by providing greater detail about the nature of tied legal work and the rules governing the doing of tied legal work for an agency.

Clause 1 listing categories of legal work is unchanged.

Clauses 2 and 3 setting out the scope of public international law and drafting work respectively are unchanged.

Clause 3A has been inserted to expand on the meaning of 'tied work' and 'tied provider'.

Clause 3B has been inserted to more fully set out the existing power of the Attorney-General, to give approval for a legal services provider other than a tied provider to undertake tied work. An approval may be given subject to conditions.

Clause 4, concerning the briefing of counsel in relation to tied matters is unchanged.

Clause 5, concerning categories of work not subject to the tied work rules has been re-written for clarity.

New clause 6 inserted to amplify the kinds of in-house legal work not subject to the tied work rules under clause 5(b).

New clause 7 has been included to explain the mechanism by which an approval can be granted under clause 5 (c) for in-house legal areas to do public international law work.

New clause 8 imposes a requirement for consultation with the Office of International Law in relation to public international law matters, to ensure perspectives derived from treaty negotiations and other matters in which the Office is involved are taken into account in formulating advice on public international law. Notes have been included to remind agencies and legal services providers about the importance of minimising the risk of agencies taking inconsistent positions on international law, and to provide an example of circumstances in which approval may be granted to allow in-house lawyers to do certain tied work.

New clauses 9 and 10 have been inserted to ensure that the Commonwealth has a central repository of all advice on tied work matters, by requiring that where a non-tied provider is given approval to give advice on tied matter, the advice is to be provided to OLSC, and may be shared with tied providers.

### **Appendix B (The Commonwealth's obligation to act as a model litigant)**

This Appendix explains the nature and scope of the Commonwealth's obligation to act as a model litigant, which has received long-standing recognition in Australian common law.

New clause 2(d) has been inserted to draw agencies' attention to the need, in accordance with the obligation, to consider and participate in alternative dispute resolution.

Note 4 has been clarified to include information about the Commonwealth's obligations and discretions in relation to cases of public interest.

New clauses 3 and 4 and the note following have been inserted to make explicit the requirement that the model litigant obligation extends to agencies involved in merits review processes, and to provide information about the requirement to act as a model litigant in the merits review context.

New clause 5 has been inserted to elaborate on the requirement of the Commonwealth to act as a model litigant in merits review proceedings. These provisions reflect the Government's commitment to the appropriate use of alternative dispute resolution.

### **Appendix C (Handling monetary claims)**

This Appendix imposes rules about how to handle monetary claims. This includes rules about the circumstances in which settlement might be reached. One important difference between these Directions and their predecessor instrument is that these Directions will apply to claims by the Commonwealth, as well as claims against the Commonwealth.

Clause 3 of the Appendix imposes a threshold, above which claims are considered major claims, to be dealt with by specific rules. Under that threshold, the Chief Executive may approve a settlement. Previously, this threshold was \$10,000. During the consultation process, various representations were made to the effect that, over

time, this threshold had ceased to represent a meaningful distinction between minor and major claims. Accordingly, the threshold is increased in these Directions to \$25,000.

The previous note about the expenditure of money has been relocated to Note 1 following paragraph 25 of Appendix E.

A new note (Note 2) has been inserted at the end of the Appendix to clarify the scope of the Appendix, by excluding actions to enforce penalties imposed under Commonwealth legislation.

#### **Appendix D (Engagement of counsel)**

This Appendix imposes rules about the engagement of counsel by or on behalf of the Commonwealth. It is intended to ensure that the Commonwealth obtains high quality legal services while receiving value for money that reflects the Government's position as a major purchaser of legal services.

New clauses 4A and 4B have been included to address the Government's concern that it not brief counsel who have used bankruptcy to avoid taxation obligations. They provide a mechanism for ensuring that proper consideration is given to whether counsel have made improper use of the bankruptcy system to evade taxation or other liabilities, in the decision whether to engage counsel.

New clauses 4C and 4D have been included to give effect to the Government's policy of encouraging agencies to brief a wide range of counsel, with the aim of ensuring that the Government obtains legal services of a high quality. By encouraging the briefing of a wide pool of counsel, the Commonwealth it is better able to ensure that there will always be appropriately qualified counsel to be instructed in Commonwealth matters. The note following clause 4D encourages agencies to report annually on the number and gender of counsel engaged, and on the comparative value of briefing for each gender.

New clause 4E has been inserted to require agencies to ask the OLSC to approve an initial rate for all counsel who have not previously performed Commonwealth work. The clause requires OLSC to deal with such requests promptly. This will help to ensure a consistent application of the counsel fees policy from the first occasion on which counsel acts for the Commonwealth.

The threshold at which the Attorney-General's approval is required has been increased. Previously, counsel could not be paid a daily rate of more than \$3800 (including GST) without the Attorney-General's approval. Following consultation with stakeholders, this threshold will be increased to \$5000 (see clauses 9 and 14).

#### **Appendix E (Assistance to Commonwealth employees for legal proceedings)**

This Appendix imposes rules about how to handle requests for assistance in relation to legal proceedings by persons who are, or who have been, employees of Financial Management and Accountability Act agencies or employees covered by the *Members of Parliament (Staff) Act 1984*. It explains the circumstances in which such persons are eligible for assistance, the kinds of assistance that may be given, the level of

assistance and the relationship between these rules and rules imposed elsewhere in the Directions (for example, by Appendix C).

The former clause 1 has, effectively, been split into three provisions in this new instrument, to make plainer the basis for eligibility under this Appendix. There is no underlying change of policy.

A new clause 2A has been inserted to give effect to the Government's intention that Appendix E not provide a basis for assistance in relation to disciplinary proceedings taken against an employee by the employee's employing body. This policy was strongly supported by respondents to the Issues Paper.

Clause 8 provides that, in relation to defence against *civil* proceedings, the Commonwealth must control the proceedings and the employee must assist the Commonwealth in its conduct of the defence. New clause 8A limits the control that the Commonwealth has in relation to *criminal* proceedings. The Directions now draw a distinction between the Commonwealth's role in defending civil and criminal proceedings. This reflects the fact that any penalty imposed as a result of criminal proceedings will be imposed on the employee personally. This can be contrasted with the situation in civil matters, where the Commonwealth can meet any civil penalty.

New clause 11A has been inserted to ensure that the scope of approvals given under Appendix E are made clear to the employee.

New clause 11B has been inserted to allow the Commonwealth to revoke approval of assistance in relation to an appeal. This provision will give the Commonwealth flexibility to deal with appeals on a case-by-case basis, having regard to the merits (or otherwise) of the appeal, which may not have been apparent when the initial approval was given.

New clause 16A has been inserted to clarify the circumstances in which expenditure will be approved in relation to inquiries.

Clause 20 now makes clearer the circumstances in which assistance will not be granted in connection with defamation cases.

Clause 21A no longer requires the approval of the Minister for Finance and Administration as a precondition of providing assistance to an employee to whom the Members of Parliament (Staff) Act applies. This is expected to streamline the approval process.