

EXPLANATORY STATEMENT

ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

Judiciary Act 1903

Legal Services Amendment Directions 2006 (No. 1)

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. On 29 December 2005, the Attorney-General repealed and replaced those Directions with the *Legal Services Directions 2005*, which commenced on 1 March 2006.

The Directions 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 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.

Amendment of the Legal Services Directions 2005

Following the commencement of the *Legal Services Directions 2005*, some minor corrections and relocations of provisions have been identified as being useful. The amendments set out in this amending instrument also respond to some queries put by the Senate Standing Committee on Regulations and Ordinances.

This Statement explains the amendments of the Directions.

Contacting OLSC

Questions about the interpretation and operation of the Directions can be directed to OLSC. 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

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 3 April 2006.

Section 3

Section 3 provides that Schedule 1 to the instrument sets out amendments of the *Legal Services Directions 2005*.

SCHEDULE 1: AMENDMENTS OF THE LEGAL SERVICES DIRECTIONS 2005

Item 1 (paragraph 3)

Item 1 of the amending instrument inserts after Note 6 to paragraph 3 a provision prohibiting claims reported as significant matters under paragraph 3.1 from being settled without the agreement of the Attorney-General.

This is not a new provision in the Directions. The provision had previously been located at paragraph 7 of Appendix C to the Directions. However, following stakeholder comment, it seemed that the purpose of this provision would be clearer if it were located in paragraph 3 of the Directions.

Item 2 (new note following paragraph 4.1)

This amendment remakes the Note following paragraph 4.1 and inserts a second Note, which was previously Note 1 following paragraph 7 of Appendix C.

Item 3 (new paragraph 4.5A)

This amendment imposes on agencies an obligation to tell other parties to confidential settlements that disclosure of the settlement may nevertheless be required by law. This obligation was previously located in a note following paragraph 4.5, but has been recast as a substantive provision to respond to comments made by the Standing Committee on Regulations and Ordinances.

Item 4 (note following paragraph 4.5A)

The note that previously followed paragraph 4.5 is omitted, because of the amendment made in Item 3.

Item 5 (paragraph 10.5)

This amendment replaces an example given in the text of the provision with a more precise example referring to the kind of action that might be taken by an agency that has, in accordance with the consultation rules set out in paragraph 10 of the Directions, received an indication of an ambiguity in its legislation.

Item 6 (paragraph 10.8, note 2)

In response to comments made by the Standing Committee on Regulations and Ordinances, this note has been amended to recommend, rather than require, that agencies notify the Office of Legal Services Coordination if arrangements are made between departments and agencies about consultation concerning legal advice about the interpretation of legislation.

Item 7 (paragraph 12.1)

This amendment makes clearer the nature of the bodies to which paragraph 12 applies.

Item 8 (paragraph 12.3)

This amendment replaces a reference to a ‘Corporations Law company’ with a reference to a ‘Corporations Act company’. This error was identified by the Standing Committee on Regulations and Ordinances.

Item 9 (Appendix A, paragraph 5)

This amendment inserts a note following paragraph 5. The note explains circumstances in which an exemption may be sought from the tied work rules in relation to public international law work where an exemption existed under the Legal Services Directions issued in 1999. It consolidates and clarifies the explanations that were previously given in notes following paragraphs 6 and 7 of Appendix A, which will now be omitted (see items 10 and 11).

Item 10 (Appendix A, note following paragraph 6)

This amendment omits the note.

Item 11 (Appendix A, note 2 following paragraph 7)

This amendment omits the note.

Item 12 (Appendix A, new paragraph 9)

This amendment locates at new paragraph 9 the text previously located at paragraph 10.

Item 13 (Appendix A, paragraph 10)

This amendment omits paragraph 10, the contents of which will now be located at paragraph 9. This corrects a numbering error.

Item 14 (Appendix B, paragraph 5, note 1)

This amendment omits note 1 following paragraph 5 of Appendix B. Part of the text of this note is now located in new paragraph 6 (see item 15). The rest of the text of this note is now located in a note following new paragraph 6 (see also item 15).

Item 15 (Appendix B, paragraph 5, note 2)

This amendment replaces note 2 and inserts a new paragraph 6. Paragraph 6 elevates to a substantive provision an obligation that previously appeared in note 1 following paragraph 5 of Appendix B. This has been done in response to comments from the Standing Committee on Regulations and Ordinances. Note 1 following new paragraph 6 includes additional text that previously appeared in note 1 following paragraph 5 of Appendix B.

Item 16 (Appendix C, paragraph 1)

This amendment inserts a note to make clear that actions to enforce penalties imposed under Commonwealth legislation are not subject to the rules described in Appendix C because they are not characterised as ‘monetary claims’.

Item 17 (Appendix C, after paragraph 6)

This amendment inserts new paragraph 6A to clarify that, although claims by the Commonwealth will be subject to the other rules in Appendix C, they will not trigger a requirement that the claimant sign a suitable release and indemnity. This is because such a requirement would be contrary to other Commonwealth policies relating to indemnities.

Item 18 (Appendix C, paragraph 7)

This amendment omits paragraph 7 of Appendix C, because the substantive provision and the following notes have now been relocated to paragraph 3 and following paragraph 4.1 of the Directions (see items 1 and 2 respectively).