

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 are an important mechanism to manage, in a whole-of-government manner, legal, financial and reputation 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.

History of the Directions

In 2004, the Attorney-General initiated a review of the Directions of 1999. As a result, a new instrument was issued in 2005.

This Statement explains the provisions of the Directions, and draws attention to aspects of the Directions which differ from those issued in 2005.

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 1 July 2008.

Section 3

Section 3 provides for the amendment of the previous Directions which were issued to take effect from 1 March 2006.

SCHEDULE 1: LEGAL SERVICES DIRECTIONS

PART 1 FMA Agencies

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

Paragraph 4.2 of the Directions provides that claims are to be handled and litigation is to be conducted by the agency in accordance with *The Commonwealth's Obligation to Act as a Model Litigant*, at Appendix B to the Directions.

The amendment will extend the provision to note that the agency is not to start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution. This obligation in relation to commencing legal proceedings will be found at new paragraph 5.1 in Appendix B to the Directions.

Paragraph 11 (Agency responsibility)

A new subparagraph 11.1(da) has been added to require Chief Executives of agencies to report to OLSC within 60 days after the end of each financial year about their agency's legal services expenditure and the legal work of the agency, using a template approved by OLSC. The mandatory use of the template will assist in obtaining consistent information that will in turn allow for a better and more accurate analysis of Commonwealth legal services expenditure.

A consequential technical amendment is required to subparagraph 11.2(b) to enable a new subparagraph 11.2(ba) to be inserted into paragraph 11.2.

A new subparagraph 11.2(ba) imposes a responsibility on Chief Executives of agencies to provide specified details to OLSC on an annual basis about aspects of the agency's use of persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903* to receive service in proceedings to which the Commonwealth is a party.

A new set of provisions (paragraphs 11.3, 11.4 and 11.5) introduce a requirement on the Chief Executives of agencies to ensure that in procuring legal services the agency does not adversely discriminate, subject to an actual conflict of interest arising, against legal services providers that have acted, or may act, pro bono for clients in legal proceedings against the Commonwealth or its agencies.

PART 2 Extended or modified application of the Directions

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

A new paragraph 12.3A has been included to extend the application of the amendments to the Directions to bodies that are not agencies regulated by the *Financial Management and Accountability Act 1997*. The extended application of the amendments is designed to protect the legal, financial and reputation interests that underlie the rest of the Directions.

In particular, by requiring agencies regulated by the *Commonwealth Authorities and Companies Act 1997* to also report on their legal services expenditure, it will provide OLSC with more comprehensive information about legal services purchasing across whole of government.

Paragraph 12A (Obligations of persons appointed under section 63 of the *Judiciary Act 1903* to receive service)

This is a new paragraph that imposes an obligation on persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903* to accept service, to report to the agency on whose behalf service has been accepted, about the receipt of the service using a template approved by OLSC.

The use of a standard Notice will ensure that agencies are aware that, although a particular provider has accepted service, agencies are free (subject to the tied work rules in the

Directions) to instruct the legal services provider of their choice to have carriage of the matter.

General notes

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

Note 2A titled '*Who can receive service in proceedings to which the Commonwealth is a party*' clarifies that lawyers providing legal services to the Commonwealth or its agencies who are appointed by the Attorney-General under section 63 of the *Judiciary Act* are the only persons able to receive service on behalf of the Commonwealth.

Appendix A (Tied areas of Commonwealth legal work)

The technical amendments to paragraph 6 and subparagraph 8(a) are to provide for consistency of language used in the Directions.

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 subparagraph 2(aa) has been inserted to require the Commonwealth and its agencies to make an early assessment of the Commonwealth's or the agency's prospects of success in legal proceedings that may be brought against the Commonwealth or its agencies; and the Commonwealth's potential liability in claims against the Commonwealth or its agencies.

The amendment made to paragraph 2(e)(i) is a technical consequential amendment.

New subparagraphs 2(e)(iii) and 2(e)(iv) are inserted to require the Commonwealth and its agencies to continue to consider other methods for resolving the dispute throughout the course of litigation. This is to make it clear that the consideration of alternate methods of dispute resolution; for example, settlement negotiations or formal alternative dispute resolution; is a continuing obligation.

A new paragraph 5 has been substituted for the previous provision in order to emphasise the importance of agencies doing all they can to resolve disputes without recourse to litigation. The Commonwealth or its agencies are only to start court proceedings if other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations) have been considered.

Paragraph 6 and its note are omitted to ensure consistency in the Directions as the amendments require arrangements to be made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement.