

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 legal services 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.

A compilation of the Directions was prepared on 1 July 2008 to take account of amendments up to the *Legal Services Amendment Directions 2008 (No.1)*.

This Statement explains the provisions of the *Legal Services Amendment Directions 2008 (No.2)*.

Contacting OLSC

Questions about the Directions can be directed to OLSC at:

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 the day after it is registered.

Section 3

Section 3 provides for the amendment of the previous Directions which were revised on 1 July 2008.

SCHEDULE 1: LEGAL SERVICES DIRECTIONS

PART 1 FMA Agencies

Paragraph 9A (Procurement of legal service providers)

New paragraph 9A.1 of the Directions provides that an agency to which the *Financial Management and Accountability Act 1997* applies must comply with Appendix F of the

Directions that sets out the requirements for the procurement of legal services from external legal services providers.

This provision introduces a mandatory framework for use by Commonwealth agencies when procuring legal services.

PART 2 Extended or modified application of the Directions

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

The technical amendments to subparagraph 12.3(d) and 12.3(e) are to enable a new subparagraph to be included in this provision.

A new subparagraph 12.3(f) is 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*, nor government business enterprises under the *Commonwealth Authorities and Companies Act 1997*, nor a Corporations Act body controlled by the Commonwealth. The extended application of the amendments is designed to ensure a consistent approach to legal services tendering.

Paragraph 12.3A is deleted and incorporated into new subparagraph 12.3(f) to avoid duplication within the Directions.

Appendix F (Legal Services Procurement)

Obligation to use common form tender documents to procure ongoing legal services

New paragraph 1 sets out the purpose of new Appendix F and a Commonwealth agency's obligation to use the common form tender documents to procure ongoing legal services.

New paragraph 2 is intended to make it clear that a portfolio agency utilising the procurement arrangements established by another agency under a Deed of Standing Offer is not required to use the common form tender documents.

Exemption from obligation to use common form tender documents

Under new paragraph 3 an agency is able to seek an exemption by the Attorney-General from compliance with either part or the whole of the common form tender package. The inclusion of an exemption is to address any particular requirements that non-FMA bodies may have that would preclude them from using the common form tender package either in part or as a whole.

Matters to be taken into account when engaging a legal services provider

A requirement to take into account a legal services provider's involvement in pro bono work is outlined in new paragraph 4.

Commonwealth agencies are required to take into account certain types of pro bono and community work being undertaken, and to be undertaken, by law firms when engaging them to provide legal services, either through a tender process, or when directly engaged under a contract.

The type of work to be taken into account includes:

- pro bono legal work according to the definition set out in new paragraph 7
- other community or charitable work undertaken under the auspices of the legal services provider, and
- pro bono legal work and unpaid capacity building work undertaken in the Asia-Pacific region

but does not include work carried out by personnel of the legal services provider on their own initiative; for example, work for their local sporting association.

It is intended that the type of work to be taken into account is undertaken under a policy of the legal services provider relating to work that staff may do either of a legal nature or related to community or charitable causes, rather than work undertaken by individual staff on their own initiative; that is, the work is promoted by the legal services provider.

Obtaining competitive quotes under a Deed of Standing Offer

New paragraph 5 is intended to limit the extent to which an agency may require a legal services provider to engage in a further competitive process for work they have successfully tendered to be engaged on the agency's legal services panel.

Agency are only allowed to seek a competitive quote from a panel firm if the value of the work to be undertaken is likely to exceed \$80,000 (inclusive of GST), or the expertise of the panel is untested in the type of work to be undertaken.

Reporting to be provided for in Deed or contract

A reporting requirement is outlined in new paragraph 6. Agencies are required to ensure that all Deeds of Standing Offer and contracts entered into by them with legal services providers contain a clause that requires legal services providers to report to OLSC within 30 days after the end of each financial year using a template approved by OLSC that specifies the matters to be reported.

This reporting will allow for the monitoring of the levels of pro bono work actually undertaken as against the amount of billable income derived by legal services providers from Commonwealth work.

Definitions

The definitions contained in new paragraph 7 provide interpretative assistance and further information on terms used in Appendix F.