



Legal Services Directions 2005

as amended

made under section 55ZF of the

Judiciary Act 1903

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2009 (No.1)*

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1 Name of instrument [see Note 1]

This instrument is the *Legal Services Directions 2005*.

2 Commencement

This instrument commences on 1 March 2006.

3 Repeal of previous instrument

The Legal Services Directions issued with effect from 1 September 1999, as amended on 9 February 2000, 28 May 2000, 1 July 2000 and 30 September 2004, are repealed on the commencement of this instrument.

4 Schedule 1

Schedule 1 to this instrument sets out Directions made by the Attorney-General under section 55ZF of the *Judiciary Act 1903*.

Schedule Legal Services Directions

Part 1 FMA agencies

1 Arrangements for legal services

- 1.1 Arrangements made by an FMA agency for the provision of legal services are to ensure the delivery of efficient and effective services.

2 Tied work

- 2.1 Constitutional, Cabinet, national security, public international law and most drafting work undertaken for an FMA agency is tied to government providers of legal services, in accordance with the Directions on *Tied Areas of Commonwealth Legal Work*, at Appendix A.

Note For the application of this provision to Australian Government bodies other than FMA agencies, see paragraph 12.

3 Reporting on significant issues

- 3.1 An FMA agency is to report as soon as possible to the Attorney-General or OLSC on significant issues that arise in the provision of legal services, especially in handling claims and conducting litigation. These issues will include matters where:

- (a) the size of the claim, the identity of the parties or the nature of the matter raises sensitive legal, political or policy issues
- (b) a dispute or disagreement exists between different agencies (whether or not FMA agencies), other than matters arising under legislation which contemplates that two or more agencies may be on different sides in a case
- (c) a significant level of coordination between different agencies is required
- (d) a significant precedent for other agencies could be established, either on a point of law or because of its potential significance for other agencies, or
- (e) a dispute exists with an agency of a State or Territory government.

Note 1 In dealing with personal or sensitive information, agencies need to comply with the *Privacy Act 1988*, the *Freedom of Information Act 1982*, the *Archives Act 1983* and the *Crimes Act 1914*.

Note 2 The obligation to report significant issues also requires the relevant agency to regularly update the Attorney-General or OLSC on any developments involving the significant issue. There may also be more than one issue that should be reported as a significant issue over the course of a proceeding.

Note 3 A fresh obligation to report to the Attorney-General or OLSC will arise on appeal if the significant issue remains relevant to the appeal. The making of an appeal may itself constitute a significant issue.

Note 4 The obligation to report on significant issues extends beyond handling claims and conducting litigation, and includes all significant issues that arise in the provision of legal services.

Note 5 If an agency is unsure about whether an issue is a significant issue that should be reported, it should contact OLSC to discuss the issue.

Note 6 For the application of this provision to Australian Government bodies other than FMA agencies, see paragraph 12.

- 3.2 A claim that is required to be reported by an agency to the Attorney-General or OLSC under paragraph 3.1 is not to be settled without the agreement of the Attorney-General.

4 Claims and litigation by or against the Commonwealth or FMA agencies

Agencies to comply with instructions from the Attorney-General

- 4.1 An FMA agency is to comply with any instructions by the Attorney-General about the handling of claims or the conduct of litigation. In particular, the FMA agency is to comply with an instruction to provide information about a particular claim or litigation, or to provide copies of, or access to, material relating to the claim or litigation.

Note 1 An instruction could relate to such matters as the arguments to be put to the court and the lawyers to handle the matter. (In extreme cases, it could require that the agency change its lawyers in a matter). The need to give instructions could occur, for example, where constitutional or 'whole of government' issues arise or where the proposed conduct of a matter might be inconsistent with the Attorney-General's First Law Officer role (eg the Attorney-General's responsibility for ensuring that the Commonwealth acts as a model litigant). The FMA agency will be responsible for any costs incurred by it or the lawyers involved in complying with the instruction.

Note 2 Other provisions of the Directions may also be relevant to the handling of a claim by or against the Commonwealth, including the requirements:

- (a) to act in accordance with the Directions on *The Commonwealth's obligation to act as a model litigant*, at Appendix B
- (b) to handle monetary claims in accordance with the Directions on *Handling monetary claims*, at Appendix C, and
- (c) for counsel to be engaged in accordance with the Directions on *Engagement of counsel*, at Appendix D.

The Model Litigant Obligation

- 4.2 Claims are to be handled and litigation is to be conducted by the agency in accordance with the Directions on *The Commonwealth's Obligation to Act as a Model Litigant*, at Appendix B, noting that the agency is not to start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution.

Note For the application of this provision to Australian Government bodies other than FMA agencies, see paragraph 12.

Acting in accordance with legal principle and practice

- 4.3 Claims are to be handled and litigation is to be conducted by the agency in accordance with legal principle and practice, taking into account the legal rights of the parties and the financial risk to the Commonwealth (including the agency) of pursuing its rights.

Note 1 Some examples of handling claims and conducting litigation in accordance with legal principle and practice are:

- (a) acting in the Commonwealth's financial interest to defend fully and firmly claims brought against the Commonwealth where a defence is properly available, subject to the desirability of settling claims wherever possible and appropriate, and
- (b) generally enforcing costs orders in favour of the Commonwealth.

Note 2 In addition to the obligations arising under these Directions, the *Financial Management and Accountability Act 1997* imposes obligations on Chief Executives concerning the recovery of amounts owing to the Commonwealth. Amounts should generally be recovered, but it may in some circumstances be appropriate to consider compromise for a lesser amount, deferral of the debt, write-off or waiver of amounts owing. Reference should also be had to any guidance material published by the Department of Finance and Administration on FMA Act obligations and on recovery of amount owing and to any relevant Chief Executive Instructions.

Handling monetary claims

- 4.4 Monetary claims by and against the Commonwealth or the agency (other than claims that are to be determined under a legislative or contractual mechanism) are to be handled in accordance with the Directions on *Handling Monetary Claims*, at Appendix C.

Disclosure of terms of settlement

- 4.5 The agency is only to agree that the terms of settlement are confidential and cannot be disclosed where this is necessary to protect the Commonwealth's interests. Before imposing or agreeing to such a condition, the agency is to satisfy itself, including by raising the matter with a party requesting the condition, that the condition is necessary. The agency should also seek to incorporate an exception to enable voluntary disclosure of the settlement (in whole or in part) to the Parliament or to a Parliamentary Committee. Where practicable, the responsible Minister is to be consulted before an agency agrees to a settlement inhibiting voluntary disclosure to the Parliament or to a Parliamentary Committee.
- 4.5A The agency is to tell the other party to a confidential settlement that disclosure of the settlement may nevertheless be required by law; in particular, to the Parliament or to a Parliamentary Committee which has power to compel disclosure.

Note 2 An example of when it may be in the Commonwealth's interests to agree to a confidential settlement is if the Commonwealth seeks to settle a claim against it on condition that the terms of settlement not be disclosed, with a view to avoiding prejudice in responding to other similar claims against it.

Jurisdiction of State and Territory courts and tribunals

- 4.6 An objection on behalf of the Commonwealth to the jurisdiction of a State or Territory court on the basis that it is not a court authorised under section 56 of the *Judiciary Act 1903* is not to be made by the agency without the approval of the Attorney-General.

Note The High Court has held that section 56 of the Judiciary Act does not limit the jurisdiction conferred on State courts by subsection 39(2) of that Act, but enables the Commonwealth to object to a court proceeding which is not authorised under section 56: *Breavington v Godleman and others* (1988) 169 CLR 41. An objection is normally only to be taken if the Commonwealth is prejudiced by the plaintiff's choice of court (eg due to location of witnesses or differences in applicable law).

- 4.6A The Commonwealth or a Commonwealth agency is not to submit, or object, to the jurisdiction of a State or Territory tribunal, unless approval has been given by the Attorney-General for that position to be taken.

Agencies are to receive written legal advice before starting court proceedings

- 4.7 An FMA agency is not to start court proceedings unless the agency has received written legal advice from lawyers whom the agency is allowed to use in the proceedings indicating that there are reasonable grounds for starting the proceedings. In urgent cases, an FMA agency may start court proceedings on the basis of oral legal advice that there are reasonable grounds for starting the proceedings. Confirmation of that advice is to be obtained in writing at the earliest opportunity.

Responsibility for litigation

- 4.8 In addition to the power to issue directions under section 55ZF of the *Judiciary Act 1903*, the Attorney-General may issue guidelines governing the allocation of responsibility for litigation between FMA agencies, and the handling of litigation where more than one FMA agency may be involved.

Suppression orders

- 4.9 An FMA agency that applies for an order to prohibit or restrict the disclosure or publication of evidence or information (a **suppression order**) in a proceeding:
- (a) may apply for a suppression order only if it considers suppression of the evidence or information to be reasonably necessary to protect the interests of the Commonwealth; and
 - (b) must not apply for a suppression order only to avoid the disclosure or publication of evidence or information that may be embarrassing to the Commonwealth or its agencies.

Note 1 An agency must comply with the relevant rules of court for an application to the court.

Note 2 Paragraph (a) does not prevent an application for a suppression order for evidence or information that may be embarrassing to the Commonwealth or its agencies, if there are legitimate Commonwealth interests to protect.

5 Use of in-house lawyers for court litigation

- 5.1 An FMA agency may only use an in-house lawyer to conduct court litigation as solicitor on the record or as counsel with the approval of the Attorney-General. Factors relevant to giving approval will include:
- (a) whether the agency is able to demonstrate a capacity to conduct the litigation properly and efficiently
 - (b) whether the agency is able to conduct the litigation at a lower cost than using external solicitors, taking into account accrual accounting and, where relevant, competitive neutrality principles, and
 - (c) whether the agency has a statutory charter which gives it an operation independent of government.
- 5.2 The use of in-house lawyers may be approved, either in specific cases or generally, subject to compliance with conditions specified by the Attorney-General.

6 Engagement of counsel

- 6.1 Counsel are to be engaged by or on behalf of an FMA agency in accordance with the Directions on *Engagement of Counsel*, at Appendix D.
- Note* For the application of this provision to Australian Government bodies other than FMA agencies, see paragraph 12.
- 6.2 Briefs to counsel in matters covered by the model litigant policy are to enclose a copy of the Directions on *The Commonwealth's Obligation to Act as a Model Litigant*, at Appendix B, and instruct counsel to comply with the policy.

7 Public interest immunity

- 7.1 If a request or demand to provide documents or information in the conduct of litigation being handled by one agency could give rise to a claim of immunity on a public interest ground for which another agency has administrative responsibility (the PII agency), the agency responsible for the conduct of the litigation is to refer the decision whether to make the claim to the PII agency or that agency's Minister.

Note The appropriate PII agency or Minister will vary according to the nature of the material, and more than one agency or Minister may need to be involved. The following agencies are commonly involved in a claim for public interest immunity:

- (a) the Australian Federal Police for some law enforcement matters
- (b) the Attorney-General's Department (Security and Critical Infrastructure Division) and the Australian Security Intelligence Organisation for national security matters
- (c) the Department of the Prime Minister and Cabinet for Cabinet matters (see also Chapter 7 of the Cabinet Handbook), and
- (d) the Department of Foreign Affairs and Trade for matters relating to relations with foreign countries.

For example, in the course of litigation about a contract with a foreign government agency, a Cabinet document relating to international relations might be identified as relevant to the proceedings. In such a case, the agency responsible for giving instructions on the litigation is to refer the document in question to the Departments of the Prime Minister and Cabinet

and Foreign Affairs and Trade for decision about any public interest immunity claim that might be made.

- 7.2 If a claim for public interest immunity is being resisted by another party in litigation, the PII agency is to be responsible for the handling of the claim after consultation with the agency responsible for the conduct of the litigation. If a disagreement arises as to the handling of the claim, the matter is to be referred to the Attorney-General or OLSC.

Note For the application of this provision to Australian Government bodies other than FMA agencies, see paragraph 12.

8 Reliance on limitation periods

Agencies are to get approval before waiving or agreeing to extend limitation periods

- 8.1 A defence based on the expiry of an applicable limitation period is to be pleaded by an FMA agency, unless approval not to do so is given by the Attorney-General. Approval will normally be given only in exceptional circumstances, for example, where the Commonwealth has through its own conduct contributed to the delay in the plaintiff bringing the claim.
- 8.2 An application for an extension of a limitation period is to be opposed by the agency unless approval to consent to the application is given by the Attorney-General. Approval will normally be given only in exceptional circumstances which would justify not pleading a limitation defence or where it is expected that the application will succeed (in which case not consenting would be likely to result in unnecessary costs and delay.)

When Attorney-General's approval is not required

- 8.3 Although paragraph 8.1 requires an FMA agency to plead a defence based on the expiry of an applicable limitation period, this does not prevent the agency from settling a claim involving a limitation period without the approval of the Attorney-General in the following circumstances:
- (a) where legal advice has been obtained recommending settlement of a claim, based (among other things) on an assessment of the plaintiff's prospects of success regarding the limitation period issue, and
 - (b) to the extent that there are perceived to be weaknesses in the plaintiff's position in that regard, these weaknesses are taken into account when determining an appropriate discount to the offer of settlement.

Meaning of 'limitation period'

- 8.4 Reference to the term 'limitation period' in paragraphs 8.1 and 8.2 is intended to cover only the initial commencement of court proceedings where the court is exercising original jurisdiction. It is not intended to cover, for example:
- (a) time limits applicable to procedural steps in litigation (eg time for filing a statement of claim or providing discovery)

- (b) periods in which to appeal (eg from a single judge of the Federal Court to the Full Court of the Federal Court), or
- (c) time limits that apply to the judicial or merits review of administrative decisions.

9 Assistance to Commonwealth employees in legal proceedings

- 9.1 Financial assistance to a Commonwealth employee for legal proceedings in which the employee is involved is to be provided in accordance with the Directions on *Assistance to Commonwealth Employees for Legal Proceedings*, at Appendix E.

9A Procurement of legal service providers

- 9A.1 An FMA agency must comply with the directions on legal services procurement at Appendix F when procuring legal services from external legal services providers.

10 Sharing of advice within Government

Consultation

- 10.1 If an FMA agency (the requesting agency) wishes to obtain legal advice (whether from an in-house or external source) on the interpretation of legislation administered by another agency (the administering agency), the requesting agency is to provide the administering agency with:
- (a) a reasonable opportunity to consult on the proposal to seek advice
 - (b) a copy of the request for advice
 - (c) a reasonable opportunity to consult on the matter prior to the advice being finalised, including consultation with the requesting agency's legal services provider, as required by the administering agency, and
 - (d) a copy of the advice.

Exceptions to consultation requirement

- 10.2 The requesting agency is not required to provide an opportunity for prior consultation if advice is needed urgently (eg to enable a response to an urgent request by a Minister or a request arising without notice in litigation). However, the requesting agency is to consult the administering agency and copy the request for advice and the advice to the administering agency as soon as practicable thereafter.
- 10.3 Prior consultation is not required, and the request for advice and the advice do not have to be copied to the administering agency, if:
- (a) disclosure would constitute a breach of law
 - (b) a Cabinet, law enforcement or national security matter would be inappropriately disclosed, or

(c) the Attorney-General has granted an applicable exemption from paragraph 10.2.

Where paragraph 10.3 (a) or (b) is applicable, the requesting agency is to inform the administering agency that a request for advice covered by subparagraph 10.3 has been made, and to disclose the substance of advice it receives to the extent that is possible without disclosing information which needs to remain confidential.

Where paragraph 10.3 (c) is applicable, the requesting agency is to comply with any conditions to which the exemption is subject.

- 10.4 Consultation and disclosure are not required for advice on a routine matter which does no more than advise on the application of the law to particular facts, by relying on the settled interpretation of the legislation. Without limiting the requirement, consultation would, however, be required where:
- (a) advice relates to legislative provisions that have not been considered by the courts, is contrary to existing policy or could raise new policy issues in respect of the legislation
 - (b) the matter could create a precedent, or
 - (c) the requesting agency has identified a potential weakness in the legislation.

Responsibility of administering agency

- 10.5 If an administering agency is consulted in accordance with this paragraph, it is to carefully consider the advice given to the requesting agency, to determine whether the advice indicates an ambiguity or other issue in the legislation that should be addressed by remedial action to be taken by the administering agency (such as proposing a legislative amendment to the responsible Minister).

Resolving disagreements about interpretation of legislation

- 10.6 Any disagreement as to the correct interpretation of legislation is to be resolved as far as possible by negotiation between the requesting agency and the administering agency. Issues should be referred to OLSC if further advice is sought from the Solicitor-General to resolve the matter.

Sharing of advice generally

- 10.7 The Attorney-General is entitled to obtain access to any legal advice obtained by the FMA agency (subject to any legislative restriction).

Note Legal professional privilege is not waived by providing advice to the Attorney-General in accordance with these Directions: see section 55ZH of the *Judiciary Act 1903*.

- 10.8 Where an FMA agency receives legal advice that it considers is likely to be significant to other agencies, it is to take reasonable steps to make that advice available to those agencies, subject to paragraph 10.4.

Note 1 The purpose of paragraph 10 is to promote consultation between agencies on the interpretation of legislation with the aim of reaching, as far as possible, consistency in statutory interpretation across the Commonwealth. Agencies are not to act in a manner that

may be inconsistent with or undermine Commonwealth policy in respect of a particular piece of legislation. Concerns about interpretation are to be raised with the administering agency so that it has the opportunity to consider whether the policy requires change, and agencies are to seek to minimise cost by first seeing if the administering agency has an answer to their question rather than commissioning fresh advice.

Note 2 The Administrative Arrangements Orders will not define ‘administering agency’ in all cases, but will provide the starting point. If a department and one of its portfolio agencies have agreed that consultation will be with the portfolio agency, it is recommended that OLSC be notified so that details of those consultation arrangements can be made available on the OLSC website. It is also recommended that OLSC be notified of consultation arrangements where departments share policy responsibility.

- 10.9 The Attorney-General may exempt an agency from compliance with paragraph 10, or particular requirements in this paragraph.

10A Advice on constitutional law matters

- 10A.1 An FMA agency that seeks legal advice on a constitutional law issue from the Australian Government Solicitor (AGS) must:

- (a) at the same time give a copy of the request for advice to the Secretary of the Attorney-General’s Department; or
- (b) for an oral request — as soon as practicable:
 - (i) confirm it in writing; and
 - (ii) give a copy of the request to the Secretary of the Attorney-General’s Department.

- 10A.2 The Attorney-General’s Department or AGS may consult with the Solicitor-General about whether the advice should be given by the Solicitor-General or the AGS.

- 10A.3 The AGS must give a copy of any final advice it gives on a constitutional law issue to the Attorney-General’s Department and to the Solicitor-General.

Note Copies of the Solicitor-General’s advices will be given to the Attorney-General’s Department and AGS.

11 Agency responsibility

- 11.1 The Chief Executive of an FMA agency is responsible for ensuring that:
- (a) the agency’s arrangements for legal services, especially any litigation for which the agency is responsible, are handled efficiently and effectively
 - (b) appropriate management strategies and practices are adopted so as to achieve compliance with these Directions
 - (ba) the agency’s legal services purchasing, including expenditure, is appropriately recorded and monitored and that, by 30 October each year, the agency makes publicly available records of its legal services expenditure for the previous financial year
 - (c) lawyers (whether the Australian Government Solicitor, the Attorney-General’s Department, private lawyers, counsel or in-house lawyers) providing legal services to the agency are aware of, and are

required to assist in ensuring that the agency complies with, these Directions (including compliance by legal services providers with these Directions through contractual arrangements wherever possible)

- (d) the agency gives reports as soon as practicable to the Attorney-General or OLSC about any possible or apparent breaches of the Directions by the agency, or allegations of breaches by the agency of which the agency is aware, and about any corrective steps that have been taken or are proposed to be taken, by the agency
- (da) the agency reports to OLSC about the legal services expenditure and legal work of the agency, using a template approved by OLSC that specifies the matters to be reported, within 60 days after the end of each financial year
- (e) any matters required to be approved by the Attorney-General are raised promptly, and
- (f) any other matters of which the Attorney-General or OLSC is required to be informed are notified promptly.

Note The protection that is to be given to classified material is set out in the *Protective Security Manual* (PSM). It is advisable that the agency's contracts with legal services providers require the providers to maintain an appropriate level of security for classified material (including electronic material) that comes into their possession, as well as material that is subsequently provided by the legal services provider to a third party, in the course of providing services to the agency. Any questions about the requirements of the PSM are to be directed, in the first instance, to the Assistant Secretary, Policy and Services Branch, Protective Security Coordination Centre, Attorney-General's Department.

11.2 The Chief Executive of an FMA agency is responsible for giving to OLSC, within 60 days after the end of each financial year, a certificate setting out the extent to which the Chief Executive believes there has been compliance by the agency with the Directions. The certificate should:

- (a) give details of any apparent or possible breach of the Directions not previously reported to OLSC
- (b) give details of actions taken to address the causes of any breaches of the Directions during the financial year
- (ba) give details of the following 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:
 - (i) the names of appointed persons who have received service;
 - (ii) the title of proceedings in which appointed persons have received service;
 - (iii) the issues raised in proceedings in which appointed persons have received service;
 - (iv) the nature of each document served on an appointed person and the date on which it was served;
 - (v) the date on which the agency or OLSC was advised of the receipt of service of each document by the appointed person; and
 - (vi) any other information requested by OLSC, and
- (c) set out any other information relevant to the agency's compliance with the Directions.

Pro bono work by legal services providers

- 11.3 The Chief Executive of an FMA agency is responsible for ensuring that the agency, when selecting and retaining legal services providers, does not adversely discriminate against legal services providers that have acted, or may act, pro bono for clients in legal proceedings against the Commonwealth or its agencies.
- 11.4 Paragraph 11.3 does not apply if, were a legal services provider to be selected or retained by the agency, an actual conflict of interest would arise between the legal services provider and the agency because of the pro bono work of the legal services provider.
- 11.5 For paragraph 11.4, circumstances in which an actual conflict of interest would arise include the following:
- (a) if a legal services provider already acts for the Commonwealth or a Commonwealth agency in legal proceedings and accepts a request to act pro bono in those proceedings for another client, and
 - (b) if a legal services provider has, because it has previously provided legal services to the Commonwealth or its agencies, confidential information about the Commonwealth or its agencies that would make it unreasonable for the provider to act pro bono for another client against the Commonwealth or agency.

**Part 2 Extended and modified application of the
Directions**

11A Third parties

- 11A.1 An FMA agency is required, when entering into a contract with a third party that includes a right of subrogation in favour of the third party, to use its best endeavours to ensure that the contract includes a provision requiring the third party, and its agents:
- (a) to comply with Appendix B of the Directions when undertaking that litigation on behalf of the Commonwealth, and
 - (b) to consult with that agency if any matters relevant to paragraphs 2 and 10 of the Directions arise in the course of undertaking that litigation on behalf of the Commonwealth.
- 11A.2 The operation of these Directions extends to any legal services which the FMA agency has the ability to control as a result of an indemnity given to, or an arrangement made with, another agency, body or person.

12 Extended application of Directions to non-FMA bodies

- 12.1 This paragraph deals with the application of the Directions to bodies which are not FMA agencies.

Obligations of non-FMA bodies

- 12.2 A non-FMA body which handles claims, or conducts litigation in the name of, or on behalf of, the Commonwealth, is to comply with the Directions in respect of such claims and litigation.
- 12.3 In all other circumstances, a non-FMA body, that is not a government business enterprise prescribed under the CAC Act or a Corporations Act company controlled by the Commonwealth, is to:
- (a) inform the Attorney-General or OLSC of the details of any litigation (including threatened or proposed litigation) which gives rise to constitutional issues and comply with any specific instructions given by the Attorney-General concerning the conduct of the litigation (including as to the choice of lawyers to be used and the arguments to be put on constitutional issues)
 - (b) inform the Attorney-General or OLSC of any claim or litigation proposed to be brought against, or involving, another Commonwealth agency
 - (c) handle claims and conduct litigation in accordance with the Directions on *The Commonwealth's Obligations to Act as Model Litigant*, at Appendix B
 - (d) engage counsel in accordance with the Directions on *Engagement of Counsel*, at Appendix D
 - (e) comply with the requirements of paragraph 7, concerning the handling of claims of public interest immunity, and
 - (f) comply with paragraphs 9A.1, 11.1 (da), 11.2 (ba), 11.3, 11.4 and 11.5.

Attorney-General may make decisions about compliance with Directions

- 12.4 In addition, the Attorney-General may decide that a particular body or person is to comply with some or all of the Directions that apply to FMA agencies.
- 12.5 If the Attorney-General makes a decision under paragraph 12.4, the Attorney-General is to tell the body about the decision.

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

- 12A.1 Persons appointed by the Attorney-General under section 63 of the *Judiciary Act 1903* to receive service are to report to the agency on behalf of which they have received service:
- (a) by close of business on the next business day after they have received service; and
 - (b) using a template approved by OLSC that specifies the matters to be reported.

12A.2 If documentation that is served on a person appointed under section 63 of the *Judiciary Act 1903* is not clear as to which agency the person is to report, the person is to report to OLSC using the template mentioned in paragraph 12A.1 (b).

13 Exemptions from complying with Directions

13.1 The Attorney-General may decide, in relation to a particular FMA agency or other body, that it:

- (a) is not required to comply with some or all of the Directions, or
- (b) is to comply with modified obligations.

13.2 If the Attorney-General makes a decision under paragraph 13.1, the Attorney-General is to notify the agency or body about the decision.

Part 3 Sanctions for non-compliance

14 Sanctions for non-Compliance

14.1 The Attorney-General may impose sanctions for non-compliance with the Directions.

Note Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of a breach of the Directions are set out in the *Compliance Strategy for Enforcement of the Legal Services Directions*. Complaints alleging a breach of the Directions may be made to OLSC at olsc@ag.gov.au.

14.2 When entering into a contract for legal services, agencies are to include a provision stating that the contract includes appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including the termination of the contract in an appropriate case.

Part 4 Dictionary

15 Dictionary

In these Directions, the following terms have the stated meanings:

CAC Act means the *Commonwealth Authorities and Companies Act 1997*.

FMA agency means an agency which is subject to the *Financial Management and Accountability Act 1997*.

litigation, unless otherwise indicated, includes proceedings before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes, and the preparation for such proceedings, and

OLSC means the Office of Legal Services Coordination in the Attorney-General's Department, or any person within the Department on whom the Secretary confers the function of administering these Directions.

General notes

Lawful expenditure

1 Expenditure of public moneys on legal services, in a manner inconsistent with the Directions by an FMA agency, may constitute a breach of the *Financial Management and Accountability Regulations 1997*. Those Regulations require that a person to whom they apply must not approve a proposal to spend public money unless satisfied, after making such enquiries as are reasonable, that the proposed expenditure is in accordance with the policies of the Commonwealth. The Regulations also require approval of a proposal to spend money before an FMA agency enters into a contract, agreement or arrangement involving the expenditure of public money.

Examples of situations which could breach the Regulations include expenditure of public money by an agency in instructing a lawyer:

- (a) to perform tied work - if the lawyer is not authorised to do so
- (b) to act in breach of the model litigant obligations
- (c) not to plead an available limitations period defence without approval, and
- (d) to make a public interest immunity claim in breach of the direction concerning such claims.

Who can institute proceedings in the name of the Commonwealth

2 If an FMA agency wishes to institute proceedings in the name of the Commonwealth, the proceedings will need to be instituted by a person appointed by the Attorney-General under section 61 of the *Judiciary Act 1903*. In these circumstances, if a relevant appointment is not in place, the details should be forwarded to OLSC to enable the issue of an appointment under section 61 to be referred for decision by the Attorney-General.

Appointments under section 61 include appointments of chief executives of FMA agencies and senior Australian Government Solicitor lawyers.

Who can receive service in proceedings to which the Commonwealth is a party

2A Lawyers providing legal services to the Commonwealth or its agencies may be appointed by the Attorney-General under section 63 of the *Judiciary Act 1903*.

Other relevant rules and policies

3 In addition to these Directions, other rules and policies are relevant for the provision of legal services, including:

- (a) the policy on what legal work is undertaken by the Australian Government Solicitor and the Attorney-General's Department on a non-billable basis (information on this policy can be obtained from OLSC and its website)
- (b) the policy on giving indemnities and guarantees by the Commonwealth and its agencies (information on this policy can be obtained from the Department of Finance and Administration or OLSC)
- (c) the policy on insurance and handling of liability claims by Commonwealth agencies that operate under the Commonwealth's self-managed fund for insurable risks, COMCOVER (information on COMCOVER can be obtained from the Department of Finance and Administration)
- (d) the *Parliamentary Entitlements Regulations 1997* which deal with the provision of assistance to Ministers for legal proceedings (information on these Regulations can be obtained from OLSC), and
- (e) *Judiciary Act 1903*, section 63, which deals with service of process when the Commonwealth or a State is a party to a suit.

Directions do not apply in certain circumstances

4 The Directions are not intended to cover the handling of criminal prosecutions and related proceedings unless expressly referred to.

5 The Directions are not intended to override any legislative requirement or authority concerning an agency's functions (in particular, the role of the Director of Public Prosecutions).

Appendix A Tied areas of Commonwealth legal work

Categories of tied work

- 1 Legal work is tied to the Australian Government Solicitor and the Attorney-General's Department if it involves:
 - (a) constitutional law issues
 - (b) national security issues, or
 - (c) the following matters (referred to as 'Cabinet work'):
 - (i) legal advice which is to be considered by Cabinet or relied on in preparing a Cabinet submission or memorandum, or
 - (ii) legal advice on a legislative proposal to be considered for adoption by government or on draft legislation for introduction into Parliament.

Public international law work

- 2 Public international law work of the following kinds is tied to the Attorney-General's Department, the Australian Government Solicitor and also, in relation to sub-paragraphs (a) to (d), the Department of Foreign Affairs and Trade.
 - (a) *International litigation and arbitration (ie Government to Government)*

This work covers proceedings before the International Court of Justice, a World Trade Organisation dispute panel or appellate body, an arbitral tribunal or some other form of internationally constituted tribunal.
 - (b) *Advice involving Australia's or another country's obligations under international law*

This work covers requests concerning Australia's or another country's obligations under international law generally or under a particular treaty to which Australia or the country is a party. It also, more indirectly, covers requests for advice under legislation which implements a treaty where the obligations under that treaty are an issue. For example, a request for advice about whether certain conduct by the Commonwealth is permitted by legislation which implements a treaty might give rise to a question whether Australia had met its international law obligations under that treaty. However, it does not cover advice on procedural aspects of an exercise of power under the legislation where those procedural aspects are unrelated to a question of Australia's international law obligations.
 - (c) *Advice on treaty negotiation*

This work covers legal advice preparatory to, or in the course of, treaty negotiations.

Note Australian treaty practice, as reflected in the Department of Foreign Affairs and Trade manual *Negotiation, Conclusion and Implementation of International Treaties and Arrangements*, will be relevant to this category of advice.

(d) *Advice on implementing a treaty (including bilateral agreements)*

This work includes advice on changes to legislation and practice necessary to become a party to a treaty.

(e) *Domestic litigation involving a significant public international law issue*

This work covers litigation where a court will or may decide whether Australia or another country has acted in conformity with its international law obligations (including as an incidental or indirect aspect of the case). Litigation involving legislation which implements a treaty will not be tied if it merely involves interpretation of that legislation or of the treaty for the purposes of applying that legislation and it does not raise the question whether Australia has complied with its international obligations.

Note 1 A reference to a 'treaty' in this paragraph includes international instruments of less than treaty status (eg memoranda of understanding between Australia and other countries and non-binding declarations and recommendations adopted by international organisations).

Note 2 Litigation referred to in the second sentence of sub-paragraph (e) is to be referred to OLSC if it raises significant issues as described in paragraph 3.1 of the Directions.

Drafting work

3 Drafting work is tied so that only:

- (a) the Office of Parliamentary Counsel is to undertake, or arrange for, the drafting of government Bills and parliamentary amendments of Bills, and
- (b) the Office of Legislative Drafting and Publishing in the Attorney-General's Department is to undertake, or arrange for, the drafting of:
 - (i) Regulations
 - (ii) Ordinances and Regulations of non-self-governing Territories, and
 - (iii) other legislative instruments made or approved by the Governor-General, or published in the Statutory Rules series.

Meaning of 'tied work' and 'tied provider'

3A Work of a kind described in paragraphs 1, 2 or 3 of this Appendix is 'tied work', and legal services providers who, in accordance with those paragraphs, are permitted to undertake tied work are 'tied providers'.

Providers other than tied providers may be approved to do tied work

3B The Attorney-General may give approval for a legal services provider other than a tied provider to undertake tied work. An approval may be subject to conditions, for example:

- (a) that any advice prepared by the provider is to be settled in consultation with, and reflecting any comments made by, a tied provider, and
- (b) that the instructing agency pay the costs of the tied provider to consider and prepare comments about the advice.

Briefing counsel and other legal experts

- 4 Briefing counsel or other legal experts such as academics on constitutional, national security, Cabinet and public international law work is to be done through the Australian Government Solicitor, the Attorney-General's Department in respect of areas where the Department undertakes tied work and the Department of Foreign Affairs and Trade in respect of work it undertakes on public international law. 7

Categories of work not covered by the tied work rules

- 5 The tying of constitutional, national security, Cabinet, public international law and drafting work is not intended to affect:
- (a) the role of the Director of Public Prosecutions or any statutory rights conferred on agencies concerning the conduct of their legal affairs
 - (b) the in-house work currently undertaken by agencies in the negotiation of standard bilateral treaties such as double taxation and social security agreements
 - (c) international law work where the Attorney-General has approved the use of the agency's in-house legal area in the performance of that work, or
 - (d) the role of the Solicitor-General.

Note Where an agency in-house legal unit was exempt from the tied work rules in relation to public international law work under paragraph 5 (b) of the Legal Services Directions issued in September 1999 because a relevant category of public international law work was 'currently undertaken' at the commencement of those Directions, and that work is not exempt under paragraph 5 (b) of the *Legal Services Directions 2005*, an exemption may be sought from the Attorney-General if the agency has recognised expertise in relation to that category of tied legal work.

Public international law work – further rules

- 6 The in-house work referred to in paragraph 5 (b) refers to the in-house preparation of bilateral agreements on specific matters (eg social security) in a standard format which has already been the subject of international law advice from the Office of International Law in the Attorney-General's Department, the Australian Government Solicitor or the Department of Foreign Affairs and Trade. However, it does not extend to agencies using in-house lawyers to undertake constitutional work or, in the absence of approval, court litigation.

When to consult with the Office of International Law

- 7 Where an agency requests advice on a public international law issue from the Australian Government Solicitor, the agency is to notify the Office of International Law to ensure that the Office of International Law has the opportunity to express a view on the matter (whether from a policy or legal perspective).

Note 1 This requirement is intended to ensure compliance with Australia's international obligations and avoid any risk that Australia might take inconsistent positions on international matters which might arise from portfolio-specific policy approaches.

Non-tied providers doing tied work are to provide copies of opinions to OLSC

- 8 If:
- (a) the Attorney-General gives an approval under paragraph 5 (b) for a provider other than a tied provider to do tied work, and
 - (b) in the course of doing the work, that provider prepares an opinion or advice relating to tied work,
- the opinion or advice is to be given to OLSC in an electronically searchable form.
- 9 OLSC may give an opinion, which it has received under paragraph 8, to any tied provider of the relevant category of legal work.

Appendix B The Commonwealth's obligation to act as a model litigant

The obligation

- 1 Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

- 2 The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:
- (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
 - (aa) making an early assessment of:
 - (i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth; and
 - (ii) the Commonwealth's potential liability in claims against the Commonwealth
 - (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
 - (c) acting consistently in the handling of claims and litigation
 - (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
 - (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true
 - (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
 - (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and
 - (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
 - (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
- (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Note 1 The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

Note 2 In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

Note 3 The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

Note 4 The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

Note 5 The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Merits review proceedings

- 3 The obligation to act as a model litigant extends to agencies involved in merits review proceedings.
- 4 An agency should use its best endeavours to assist the tribunal to make its decision.

Note The term 'litigation' is defined in paragraph 15 of these Directions in terms that encompass merits review before tribunals. There are particular obligations in relation to assisting a tribunal engaged in merits review to arrive at a decision. Agencies should pay close attention to the legislation under which a tribunal is established, and any practice directions issued by the tribunal. In the case of the Administrative Appeals Tribunal see in particular subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975* and the explanatory memorandum to the Administrative Appeals Tribunal Amendment Bill 2005.

Alternative dispute resolution

- 5.1 The Commonwealth or an agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).
- 5.2 When participating in alternative dispute resolution, the Commonwealth and its agencies are to ensure that their representatives:
- (a) participate fully and effectively, and
 - (b) subject to paragraph 2 (e) (iv), have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.

Appendix C Handling monetary claims

1 This policy concerns the handling of monetary claims against the Commonwealth or an agency, and monetary claims by the Commonwealth or an agency, other than claims that need to be determined under a legislative mechanism (for example, a Comcare benefit) or under a mechanism provided by contract (for example, an arbitration of a disputed contractual right).

Note An action to enforce a penalty imposed under Commonwealth legislation is not considered to be a monetary claim for the purposes of Appendix C.

Criteria for settlement

2 Monetary claims covered by this policy are to be settled in accordance with legal principle and practice, whatever the amount of the claim or proposed settlement. A settlement on the basis of legal principle and practice requires the existence of at least a meaningful prospect of liability being established. In particular, settlement is not to be effected merely because of the cost of defending what is clearly a spurious claim. If there is a meaningful prospect of liability, the factors to be taken into account in assessing a fair settlement amount include:

- (a) the prospects of the claim succeeding in court
- (b) the costs of continuing to defend or pursue the claim, and
- (c) any prejudice to Government in continuing to defend or pursue the claim (eg a risk of disclosing confidential government information).

3 Settlements for amounts not exceeding \$25,000 may be approved by the Chief Executive of the agency (as defined under the *Financial Management and Accountability Act 1997*), or the Chief Executive's authorised officer, on the basis of a common sense view that the settlement is in accordance with legal principle and practice. However, if a claim, together with any related claim, cannot be settled for \$25,000 or less, it is to be treated as a major claim.

4 Major claims may only be settled if:

- (a) written advice is received from the Australian Government Solicitor or other legal adviser external to the agency that the settlement is in accordance with legal principle and practice, and
- (b) the Chief Executive (or authorised officer) agrees with the settlement.

5 If an agency considers that a claim raises exceptional circumstances which justify a departure from the normal mechanism for settling a claim, it is to refer the matter to OLSC. The Attorney-General may permit a departure from the normal policy, but may impose different or additional conditions as the basis for doing so.

Release

- 6 It should ordinarily be a condition of any settlement involving the payment of money to a claimant that the claimant sign a suitable release and, where appropriate, an indemnity against claims by third parties that arise from the event giving rise to the settlement.
- 6A Paragraph 6 does not apply if the claimant is the Commonwealth.

Appendix D Engagement of counsel

- 1 The Commonwealth policy in engaging counsel is to seek to rely on its position as a major purchaser of legal services in agreeing on the level of fees payable to counsel engaged on behalf of the Commonwealth or its agencies.
- 2 Commonwealth agencies and legal service providers are encouraged to brief a broad range of counsel and, in particular, women. While the selection of counsel needs to take into account the interests of the Commonwealth in securing suitable and expert counsel in a particular case, this is not to occur in a manner which results in a narrow pool of counsel for any particular category of Commonwealth work.

Application

- 3 The policy applies to the engagement of counsel by agencies themselves, by the Australian Government Solicitor, or by private lawyers who are acting for the Commonwealth or its agencies. The policy also applies to lawyers who, although not from the bar, are briefed as counsel in lieu of a private barrister to conduct or advise on litigation for the Commonwealth or its agencies.
- 4 The policy applies to briefs to advise and briefs to appear before courts, tribunals and inquiries. It also applies to the use of counsel to represent the Commonwealth and its agencies in arbitration and other alternative dispute resolution processes. Briefs should ordinarily be marked with an hourly rate up to a maximum daily rate inclusive of conferences, consultations, preparation and other necessary work. A fee on brief (inclusive of preparation time) is only to be marked if it is considered more economical than agreeing to pay a fee based on the appropriate hourly or daily rate for the counsel.

Bankruptcy

- 4A A brief issued to counsel is to contain a condition that, in accepting the brief, counsel is taken to warrant that he or she has not, at any time, been declared bankrupt, unless counsel advises of any such bankruptcy.
- 4B Counsel who have been declared bankrupt, and who have been the subject of an adverse disciplinary finding by a professional body in relation to the circumstances of that bankruptcy, are only to be engaged as counsel with the approval of the Attorney-General.

Note OLSC can provide advice on counsel for whom approval is required under paragraph 4B.

Rules about selection of counsel

- 4C All barristers are to be selected for their skills and competency independently of their gender. An agency is to ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers or to limit the range of barristers being considered for the brief.
- 4D In selecting counsel, all reasonable endeavours are to be made to:
- (a) identify all counsel in the relevant practice area
 - (b) genuinely consider engaging such counsel, and
 - (c) regularly monitor and review the engagement of counsel.

Note Agencies are encouraged to publish annually, in a manner which does not disclose the rates paid to individual counsel, the number and gender of counsel engaged on their behalf, whether engaged directly or through external lawyers, and the comparative value of the briefing for each gender.

Fees payable to counsel

- 4E Any agency that proposes to brief a counsel who does not have an approved rate for performing Commonwealth legal work, is to ask OLSC to approve an initial rate, even if the agency proposes to brief the counsel at a rate below the applicable threshold specified in paragraph 5. If OLSC is asked to approve an initial rate, OLSC is to make a decision about the request within a reasonable time and tell the agency about its decision as soon as practicable after the decision is made.
- 5 Senior counsel are not to be paid a daily rate above \$2,400 (inclusive of GST) without the approval of the Attorney-General. Junior counsel are not to be paid a daily rate above \$1,600 (inclusive of GST) without such approval. Any out of chamber fee is to be treated as part of the daily rate for the purpose of considering the appropriateness of that rate. Where an out of chamber fee is agreed or approved, it is to be marked separately on the brief.
- 6 Hourly rates greater than one-sixth of the daily rate are not to be agreed with counsel unless approved by the Attorney-General.
- 7 A cancellation fee is to be agreed with counsel only in exceptional circumstances (eg to cover the possibility of a matter being resolved shortly before a lengthy trial). Any such fee is to be agreed at the time counsel is engaged for a trial. A cancellation fee greater than two days of counsel's normal Commonwealth rate is to be approved by the Attorney-General before it is agreed with counsel.
- 8 Payment of retainers (concerning counsel's availability for future matters), both new and renewed, is not ordinarily to be agreed with counsel and, if considered to be justified, the terms of the agreement are first to be approved by the Attorney-General.

Approval

- 9 Unless agreed otherwise by the Attorney-General, requests for approval to pay counsel amounts higher than the rates referred to in paragraphs 5 and 6, and approvals required by paragraphs 7 and 8 for cancellation fees and retainers, are to be made to OLSC. Proposals to pay senior counsel in excess of \$5,000 per day (inclusive of GST) will be referred by OLSC to the Attorney-General for decision.
- 10 Approval is to be sought as far as possible in advance of the scheduled date for the delivery of a brief to counsel. In considering a request to pay counsel above the specified rate, the following factors will be taken into account:
- (a) the special expertise or skill of the counsel who is proposed to be briefed
 - (b) the availability of counsel generally to appear in the matter
 - (c) the probable total cost of counsel's fees in the matter
 - (d) the specific request of an agency that a particular person be briefed and the reasons for that preference
 - (e) the importance of the matter, including any special sensitivity, and
 - (f) the normal market daily fee at which the relevant counsel is briefed.
- 11 If approval for a daily fee in excess of \$2400 or \$1600 (as applicable) has been given, subsequent approval for using the same barrister at the approved rate is not required unless, at the time the approval is given, the fee is designated as a 'one-off' rate.

Other matters

- 12 The fees referred to in paragraph 5 are not to be regarded as the standard or starting point for fee negotiations. In many cases, particularly in relation to junior counsel, the normal market rates of counsel may be less, or even considerably less, than the threshold fees.
- 13 Counsel are not to be paid more than reasonable costs of accommodation and travel, taking into account levels applicable to Senior Executive Service officers in the Australian Public Service. Accommodation and class of travel is not to be approved so as to increase the approved Commonwealth daily rate.

Administration of the policy

- 14 OLSC will normally consult the Australian Government Solicitor, in light of its experience with the conduct of Commonwealth litigation and with the engagement of counsel generally, in considering whether a fee in excess of the limits in paragraph 5 of this Appendix should be approved and in making recommendations to the Attorney-General in respect of a request to approve a fee in excess of \$5,000.

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- 15 Subject to the availability of counsel at the approved rates, the choice of counsel is a matter for individual agencies, taking into account any advice from the solicitors instructed by the agency. However, agencies and their instructing solicitors are encouraged to inform OLSC, either in general terms or in relation to a specific matter, if they have any concerns about the operation of the policy.
- 16 To facilitate administration, agencies are to provide OLSC, upon request, with information or access to information about the engagement of all or certain counsel.

Appendix E Assistance to Commonwealth employees for legal proceedings

Application

- 1 Appendix E concerns the handling of requests for assistance in relation to legal proceedings (including potential legal proceedings) as well as inquests, inquiries and subpoenas.
- 1A Appendix E applies to a request for assistance by a person who, at the time of the alleged event or occurrence, was:
- (a) an official employed in an agency to which the *Financial Management and Accountability Act 1997* applies (an FMA agency employee)
 - (b) an official employed by an agency that became an FMA agency, or by a part of an agency that is, at the time that the application is made, within an FMA agency
 - (c) a person employed by a Minister on behalf of the Commonwealth as a member of the Minister's staff under the *Members of Parliament (Staff) Act 1984* (a MOPS Act employee), or
 - (d) a person who held a position that would, following the commencement of the *Members of Parliament (Staff) Act 1984*, have become subject to that Act.
- 2 These Directions do not cover administrative law challenges which do not include damages claims. The costs of defending administrative law challenges are paid by the Commonwealth. However, where an administrative law challenge is coupled with a damages claim, the Directions apply to the defence of the damages claim.
- 2A These Directions do not apply to disciplinary proceedings taken against an FMA agency employee, or a MOPS Act employee, by the employee's employing body.
- 3 Expenditure to assist a Commonwealth employee in respect of activities the employee undertakes for a Commonwealth authority or company covered by the *Commonwealth Authorities and Companies Act 1997* (in particular, by being on the board) is to be approved only to the extent that the employee is not indemnified or insured by the authority or company.

Note See Department of Finance and Administration Finance Circular 1997/19.

General policy

- 4 The general policy underlying the provision of assistance to employees for legal proceedings is the prospect of some benefit to the Commonwealth (which is intended to include the employing agency, even if the agency is not strictly part of the Commonwealth) as a result of the protection of:
- (a) its financial interests (in particular, the avoidance or limitation of the Commonwealth's vicarious liability), or

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- (b) its general interests (in particular, its interest to act properly as an employer in supporting employees who have acted reasonably and responsibly in circumstances where the Commonwealth may not be vicariously liable for their actions).

Criteria for assistance

- 5 Expenditure should normally be approved to assist an employee who is a defendant in civil or criminal proceedings if:
- (a) the proceedings arose out of an incident that:
 - (i) in relation to an FMA agency employee - relates to their employment with the employing agency, or
 - (ii) in relation to a MOPS Act employee - relates to the performance (or non-performance) of their duties assisting the Minister in performing ministerial duties, and
 - (b) the employee acted reasonably and responsibly.
- 6 The criteria in paragraph 5 (b) do not preclude the provision of assistance under the Directions to an employee who has acted, or is alleged to have acted, negligently (ie failed to exercise the legal standard of 'reasonable care' owed in the circumstances). Rather, the criteria are intended to preclude the provision of assistance in circumstances where the Commonwealth is likely to seek contribution or indemnity from the employee if the Commonwealth were itself sued in relation to the same matter. A decision to seek contribution or indemnity will normally be appropriate only where the employee's conduct involved serious or wilful misconduct or culpable negligence.
- 7 If it is not clear whether the employee has acted reasonably and responsibly, it may be appropriate to defer a decision on assistance until the conclusion of the proceedings, or to agree to fund the employee's defence but to defer a decision on whether to fund any costs or damages payable to another party by the employee until after the facts are ascertained, for example, by a court. However, expenditure is not to be approved to assist an employee for proceedings arising out of a motor vehicle incident where the employee's liability is insured or where the employing agency considers that the employee's liability should reasonably have been insured (in particular, where the employee has received an allowance that includes an insurance component).

Basis for approving indemnification of employees against costs or damages

- 8 The indemnification of an employee against any costs or damages payable to another party by the employee (including as a result of agreeing to a reasonable settlement) in civil proceedings is only to be approved on condition that the employee has agreed that the employee's defence will be controlled by the Commonwealth and that the employee will provide all assistance required by the Commonwealth in the conduct of the defence.

- 8A The indemnification of an employee against costs incurred in criminal proceedings against the employee and any penalty payable by the employee as a result of those criminal proceedings is not to be conditional upon that employee agreeing that the employee's defence will be controlled by the Commonwealth. However, an indemnity may be expressed to be subject to the condition that it extends only to expenses to which the agency gives approval.
- 9 Indemnification may be refused if an employee has failed to notify the employing agency of the proceedings within a reasonable time of becoming aware of them and the delay may prejudice the Commonwealth's position.
- 10 Payment of any amount by way of assistance may nevertheless be refused if assistance is not provided as required by paragraph 8 of this Appendix.

Level of assistance

- 11 The assistance may involve approval to pay:
- (a) the costs of an employee's legal representation or related costs of the employee's involvement in the proceedings (for example, to travel to attend the proceedings)
 - (b) any damages and legal costs awarded against the employee
 - (c) a reasonable amount payable by the employee in settlement of the proceedings, and
 - (d) a fine or penalty imposed on the employee.
- 11A Unless the approval expressly applies to an appeal or consideration of a possible appeal, a request for approval to give assistance is not to be taken as applying to an appeal or consideration of a possible appeal.
- 11B Where the approval given under paragraph 11 extends to an appeal, that approval may be revoked by notice given to the employee.
- 12 Approval of expenditure for an employee's legal representation, for related costs or for legal costs payable by the employee to another party is only to be given for an amount that is reasonable, having regard to the nature of the matter. In particular, payments for counsel are to be made in accordance with the Directions on *Engagement of Counsel*, at Appendix D. The employing agency will need to monitor the conduct of the proceedings to ensure that the employee's costs of legal representation and other related costs and the Commonwealth's possible ultimate exposure to liability are within reasonable limits. In addition, the agency is to take appropriate steps to satisfy itself that any legal costs or damages payable by the employee to another party are reasonable.

Note Even if there is no requirement to obtain legal advice in relation to a request for assistance, it may be appropriate in particular cases for an agency to do so. In particular, this may be desirable to ensure that Commonwealth payments for an employee's legal representation are reasonable in the circumstances. Obtaining legal advice in appropriate cases may enable the agency to discharge its obligations under section 44 of the *Financial Management and Accountability Act 1997*.

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- 13 Approval to pay assistance in relation to the defence of an indictable offence is to be limited initially to the preparation and conduct of committal proceedings.
- 14 Approval to pay assistance in the form of a fine or penalty imposed or costs awarded against the employee in criminal proceedings is not to be approved until the fine or penalty is imposed or the costs are awarded.
- 15 Any settlement for which assistance is given under paragraph 10 (c) above is to be in accordance with the Directions on *Handling monetary claims*, at Appendix C.

Note The legal advice obtained by the agency in respect of the settlement of a major claim under this policy may be the same advice as is provided to the employee by their legal adviser. (However, the agency may nevertheless wish to obtain separate legal advice in some cases.)

Inquests and inquiries

- 16 Expenditure may be approved for an employee to be legally represented in connection with an inquest or inquiry and other costs (eg travel) related to the inquest or inquiry if this is in the interests of the Commonwealth and:
- (a) in relation to an FMA Agency employee - relates to their employment, or
 - (b) in relation to MOPS Act employee - relates to the performance (or non-performance) of their duties assisting the Minister in performing ministerial duties.

Approval of expenditure is only to be given for an amount that is reasonable, having regard to the nature of the inquest or inquiry.

- 16A Expenditure may only be approved to a challenge to the validity, or conduct, of an inquiry, with the approval of the Attorney-General.

Note Applications seeking the approval of the Attorney-General under clause 16A should, in the first instance, be referred to OLSC.

Assistance to employees for subpoenas

- 17 Expenditure may be approved for the costs of legal representation and other related costs in responding to a subpoena:
- (a) in relation to an FMA agency employee - relating to their employment, or
 - (b) in relation to a MOPS Act employee - relating to the performance (or non performance) of their duties assisting the Minister in performing ministerial duties.

The approval is only to be given for an amount that is reasonable, having regard to the nature of the subpoena.

- 18 A decision to provide assistance is to be made subject to the condition that the Commonwealth is to be consulted in relation to disclosure or non-disclosure of Commonwealth documents and information to ensure that an appropriate position can be taken.

Assistance to employees as plaintiffs

- 19 Except in the case of actions for defamation, expenditure to assist an employee to institute proceedings in a matter arising from their employment may be approved where this is in the interests of the Commonwealth. For example, it may be appropriate to assist an employee to seek a restraining order against a person arising from alleged harassment in the workplace.
- 20 Expenditure is not to be approved to assist an employee to institute proceedings for defamation arising in the course of the performance of their duties (either for representation or the payment of legal costs). Similarly, assistance is not to be provided for any other action relating to alleged defamation, such as assistance to uphold a person's reputation, legally challenge comments damaging to a person's reputation, or in obtaining an apology (as distinct from a letter merely seeking to correct the record). The policy is the same even if the employee offers to pay to the Commonwealth any damages which they may receive. (Funding defamation proceedings could give rise to a public perception that the Government was seeking to prevent legitimate criticism.)

Who makes the decision to assist

- 21 A decision whether to provide assistance to an employee for legal proceedings is normally a matter for the employing agency. However, where the request for assistance is made by the Chief Executive of an agency (as defined under the *Financial Management and Accountability Act 1997*) the decision is to be made by the responsible Minister. If it is inappropriate for the Minister or the Chief Executive to make a decision on assistance because of their involvement in the proceedings, the request is to be referred to the Attorney-General to enable a decision to be made on how the matter is to be handled.
- 21A A decision whether to provide assistance to an MOPS Act employee is to be made by the Special Minister of State after consultation with the Attorney-General.

Legal representation

- 22 If an employee has been indemnified for any costs or damages payable in civil proceedings, and the Commonwealth is also a party to the proceedings, the solicitors engaged to represent the Commonwealth are also to be engaged to represent the employee. (This will save on legal costs and assist in the proper conduct of the proceedings, while the agreement required under paragraph 8 will avoid a conflict of interest arising.)
- 23 If a decision on assistance has been partially or totally deferred, the employee and the agency are to have separate legal representation. If the employing agency has agreed to pay the cost of the employee's legal representation, the Directions on *Engagement of Counsel*, at Appendix D, apply. If the employing agency provides a full indemnity, the Directions on *The Commonwealth's obligation to act as a model litigant*, at Appendix B, apply.

Sensitive and exceptional cases

24 Any request for assistance which raises sensitive legal, political or policy issues is to be reported to OLSC as soon as possible in writing by the employing agency. The requests are not to be approved without consultation with OLSC.

25 If an agency considers that a request raises exceptional circumstances which justify a departure from the normal policy, it is to refer the matter to OLSC. The Attorney-General may permit a departure from the normal policy, but may impose different or additional conditions as the basis for doing so.

Note 1 Expenditure of public moneys in a manner inconsistent with this policy by an agency covered by the FMA Act may constitute a breach of the Regulations under that Act. The Regulations require that a person to whom they apply must not approve a proposal to spend public money unless satisfied, after making such enquiries as are reasonable, that the proposed expenditure is in accordance with the policies of the Commonwealth. (The Regulations also require approval of a proposal to spend money before an FMA agency enters into a contract, agreement or arrangement involving the expenditure of public money.)

Note 2 In addition to the assistance in relation to legal proceedings that may be provided to employees under this policy, other assistance may also be available. Some examples are set out below.

- (a) Section 73 of the *Public Service Act 1999* enables payments to be made to persons in relation to Commonwealth employment. The equivalent power in the *Public Service Act 1922* was rarely used, but section 73 provides a discretion to enable the reimbursement of legal costs incurred by staff in the course of, or in connection with, their employment in exceptional circumstances.
- (b) The Guidelines for the Provision of Financial Assistance for Legal Costs before Commissions and Inquiries enable payments to be made in accordance with the criteria set out in the Guidelines. The Guidelines are administered by the Legal Assistance Branch in the Attorney-General's Department and apply where the Attorney-General has Ministerial responsibility for the subject-matter of the Commission or inquiry. (Where the Attorney-General does not have this responsibility, assistance may be available from the responsible Minister.) Specific guidelines have also been approved for certain Commissions.
- (c) The Special Circumstances Scheme, also administered by the Legal Assistance Branch, enables financial assistance for legal costs and related expenses to be given to an employee in various circumstances where no other scheme is available. Funding in respect of proceedings brought by or against the employee may be provided, in accordance with the criteria specified in the guidelines for the Scheme.

Appendix F Legal services procurement

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

- 1 A Commonwealth agency must use the common form tender documents to arrange for the procurement of ongoing legal services from 1 or more legal services providers.
- 2 A Commonwealth agency that procures ongoing legal services by signing a Notice of Inclusion Form is taken to comply with paragraph 1 for the procurement.

Exemption from obligation to use common form tender documents

- 3 Paragraph 1 does not apply to a Commonwealth agency that has been exempted by the Attorney-General, under paragraph 13 of the Schedule, from compliance with paragraph 1.

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

- 4 A Commonwealth agency must take the following matters into account when deciding if it will enter into a Deed of Standing Offer or a contract for legal services:
 - (a) the amount and type of pro bono work the legal services provider has carried out or will carry out;
 - (b) whether the legal services provider has signed up to the National Pro Bono Aspirational Target of the National Pro Bono Resource Centre.

Note 1 Paragraph 4 applies whether or not a tender process is to be used to select a legal services provider. The template Request for Tender for the provision of legal services to the Commonwealth provides that pro bono work will be a criterion for evaluation of tenders.

Note 2 For information about the National Pro Bono Aspirational Target, see the National Pro Bono Resource Centre website at <http://www.nationalprobono.org.au>.

Obtaining competitive quotes under a Deed of Standing Offer

- 5 A Commonwealth agency may seek a competitive quote from a legal services provider that is a party to a Deed of Standing Offer only if the agency considers that:
 - (a) the value of the services to be provided is likely to exceed \$80 000; or
 - (b) the expertise of the panel should be tested for a new area of work.

Note This arrangement will be included in all Deeds of Standing Offer.

Reporting to be provided for in Deed or contract

- 6 A Commonwealth agency must ensure that all contracts for legal services and Deeds of Standing Offer that it enters into include a requirement that the legal services provider, within 30 days after the end of each financial year, report to OLSC using a template approved by OLSC that specifies the matters to be reported.

Definitions

7 In this Appendix:

common form tender documents means the following documents approved by the Attorney-General and issued by OLSC:

- (a) the template Request for Tender for the provision of legal services to the Commonwealth; and
- (b) the template Deed of Standing Offer for the provision of legal services to the Commonwealth.

contract for legal services means a contract with a legal services provider for the provision of legal services to the Commonwealth, but does not include a contract under a Deed of Standing Offer.

Deed of Standing Offer means a Deed of Standing Offer that has been completed as required by the template Deed of Standing Offer for the provision of legal services to the Commonwealth.

legal services provider means a legal services provider external to the Commonwealth agency to which the legal services are to be provided, but does not include counsel.

Note For the engagement of counsel, see paragraph 6 of the Schedule.

Notice of Inclusion Form means a Notice of Inclusion Form under a Deed of Standing Offer.

pro bono legal work means any of the following:

- (a) giving legal assistance for free or at a substantially reduced fee to any of the following:
 - (i) individuals who can demonstrate a need for legal assistance but cannot obtain legal assistance or otherwise access the legal system without incurring significant financial hardship;
 - (ii) individuals or organisations whose matter raises an issue of public interest that would not otherwise be pursued;
 - (iii) charities or other non-profit organisations that work on behalf of low income or disadvantaged members of the community, or for the public good;
- (b) conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
- (c) participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
- (d) providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a public interest law clearinghouse;

but does not include:

- (e) giving legal assistance to any person for free or at a reduced fee without reference to whether a person has the capacity to pay; or
- (f) free first consultations with clients who are otherwise billed at a firm's normal rates; or
- (g) legal work provided under a grant of legal assistance; or

- (h) contingency fee arrangements or other speculative work that is undertaken with a commercial expectation of a fee; or
- (i) the sponsorship of cultural and sporting events, work undertaken for business development, and other marketing opportunities; or
- (j) time spent by lawyers sitting on the board of a community organisation (including a community legal organisation) or a charity.

Note This definition is based on the definition of 'pro bono legal services' in the National Pro Bono Aspirational Target Statement of Principles developed by the National Pro Bono Resource Centre, as at 1 September 2008.

pro bono work means any of the following:

- (a) pro bono legal work, including any pro bono legal work that the legal services provider has or will carry out in the Asia-Pacific region;
- (b) unpaid capacity building work in the Asia-Pacific region that the legal services provider has or will carry out;
- (c) other community or charitable work carried out by the legal services provider;

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.

Table of Instruments

Notes to the *Legal Services Directions 2005*

Note 1

The *Legal Services Directions 2005* (in force under section 55ZF of the *Judiciary Act 1903*) as shown in this compilation is amended as indicated in the Tables below.

Table of Instruments

Title	Date of FRLI registration	Date of commencement	Application, saving or transitional provisions
<i>Legal Services Directions 2005</i>	1 Feb 2006 (see F2006L00320)	1 Mar 2006	
<i>Legal Services Amendment Directions 2006 (No. 1)</i>	31 Mar 2006 (see F2006L00961)	3 Apr 2006	—
<i>Legal Services Amendment Directions 2008 (No. 1)</i>	27 June 2008 (see F2008L02332)	1 July 2008	—
<i>Legal Services Amendment Directions 2008 (No. 2)</i>	17 Sept 2008 (see F2008L03486)	18 Sept 2008	—
<i>Legal Services Amendment Directions 2008 (No. 3)</i>	31 Oct 2008 (see F2008L04253)	1 Nov 2008	—
<i>Legal Services Amendment Directions 2009 (No. 1)</i>	28 Jan 2010 (see F2010L00194)	29 Jan 2010	—

Table of Amendments**Table of Amendments**

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Schedule	
Part 1	
Para. 3.2	ad. 2006 No. 1
Note to para. 4.1	rep. 2006 No. 1
Note 1 to para. 4.1	ad. 2006 No. 1
Note 2 to para 4.1	ad. 2006 No. 1
Para. 4.2	am. 2008 No. 1
Para. 4.5A	ad. 2006 No. 1
Note 1 to para. 4.5A	rep. 2006 No. 1
Para. 4.9	ad. 2009 No. 1
Para. 9A	ad. 2008 No. 2
Para. 9A.1	ad. 2008 No. 2
Para. 10.5	am. 2006 No. 1
Note 2 to para. 10.8	rs. 2006 No. 1
Para. 10A	ad. 2008 No. 3
Para. 10A.1	ad. 2008 No. 3
Para. 10A.2	ad. 2008 No. 3
Para. 10A.3	ad. 2008 No. 3
Para. 11.1	am. 2008 No. 1
Para. 11.2	am. 2008 No. 1
Para. 11.3	ad. 2008 No. 1
Para. 11.4	ad. 2008 No. 1
Para. 11.5	ad. 2008 No. 1
Part 2	
Para. 12.1	am. 2006 No. 1
Para. 12.3	am. 2006 No. 1; 2008 No. 2
Para. 12.3A	ad. 2008 No. 1 rep. 2008 No. 2
Para. 12A	ad. 2008 No. 1
Para. 12A.1	ad. 2008 No. 1
Para. 12A.2	ad. 2008 No. 1
Part 4	
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Appendix A	
Note to para. 5	ad. 2006 No. 1
Para. 6	am. 2008 No. 1
Note to para. 6	rep. 2006 No. 1
Note 2 to para. 7	rep. 2006 No. 1
Para. 8	am. 2008 No. 1
Para. 9	ad. 2006 No. 1
Para. 10	rep. 2006 No. 1
Appendix B	
Para. 2	am. 2008 No. 1

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Para. 5	rep. 2008 No. 1
Notes 1, 2 to para. 5.....	rep. 2006 No. 1
Note to para. 5.....	ad. 2006 No. 1 rep. 2008 No. 1
Para. 5.1	ad. 2008 No. 1
Para. 5.2	ad. 2008 No. 1
Para. 6	ad. 2006 No. 1 rep. 2008 No. 1
Appendix C	
Note to para. 1	ad. 2006 No. 1
Para. 6A.....	ad. 2006 No. 1
Para. 7	rep. 2006 No. 1
Appendix F	
Appendix F	ad. 2008 No. 2
Para. 1	ad. 2008 No. 2
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Para. 3	ad. 2008 No. 2
Para. 4	ad. 2008 No. 2
Para. 5	ad. 2008 No. 2
Para. 6	ad. 2008 No. 2
Para. 7	ad. 2008 No. 2
