

GUIDANCE NOTE NO 4

The Office of Legal Services Coordination (OLSC) provides Guidance Notes in order to assist Australian Government Departments and Agencies, and legal services providers (as applicable), to comply with the Legal Services Directions, procure legal services, and deal with legal issues in an efficient and effective manner. OLSC welcomes feedback on this Guidance Note.

Recovery of costs

Legislation

Section 47 of the *Financial Management and Accountability Act 1997* creates an obligation on Chief Executives to actively pursue debts.

Appendix B note 5 of the Legal Services Directions states that the Commonwealth's obligation to act as a model litigant '*does not prevent it from enforcing costs orders or seeking to recover its costs*'.

Criteria

There are two general presumptions with regard to the Commonwealth's recovery of costs. The first presumption is that the Commonwealth may seek costs where there is a legal basis for doing so. The second presumption is that the Commonwealth may enforce any costs order in its favour. A range of factors are to be taken into account in deciding whether to do either of these things. Factors that would tend to support seeking or enforcing costs include:

- that the other party caused unnecessary expense and delay in the proceedings
- that there is an apparent need to deter vexatious litigation in the future
- that the debtor is apparently able to pay, and
- that the anticipated expense in recovering costs does not outweigh the recoverable or potentially recoverable costs.

In some cases, it may be appropriate to seek a costs order but to defer a decision on enforcing the order (eg where a person's financial circumstances are unclear or as a deterrent to future vexatious litigation).

Costs for in-house counsel

The Commonwealth is entitled to claim costs for its use of in-house lawyers (*Lenthall v Hillson* [1933] SASR 31). However, these costs are limited to the portion of the in-house counsel's or solicitor's salary that was expended on the proceedings, in addition to overheads for the costs of maintenance of premises, legal support staff, photocopying and the like (*Environment Protection Authority v Taylor Woodrow (Aust) Pty Ltd (No2)* (1997) 97 LGERA 368 (Land and Environment Court of NSW)).

Solicitor-General's costs

If the Commonwealth is seeking costs and the Solicitor-General has acted for the Commonwealth, costs should be sought for the Solicitor-General's time. OLSC must be contacted if this situation arises.

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