



## GUIDANCE NOTE 4

### Recovery of costs

#### Legislation

1. Section 11 of the *Public Governance, Performance and Accountability Rule 2014* creates an obligation on accountable authorities of non-corporate Commonwealth entities to actively pursue debts.
2. Appendix B note 5 of the *Legal Services Directions 2017* 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

3. 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.
4. 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

5. 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

6. 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.