



GUIDANCE NOTE 5

Principles of Constitutional Litigation involving corporate Commonwealth entities

1. Pursuant to paragraph 12.3(a) of the *Legal Services Directions 2017* (the Directions), corporate Commonwealth entities (other than a government business enterprise) must '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 such litigation (including as to the choice of lawyers to be used and the arguments to be put on constitutional issues).' This reflects the particular role and responsibilities of the Attorney-General as First Law Officer of the Commonwealth and the potential 'whole of government' significance of constitutional issues.
2. OLSC has devised the following practical guidelines for entities to follow when a constitutional issue emerges in litigation to which it is a party. These guidelines will help entities comply with their obligations pursuant to paragraph 12.3(a) of the Directions:
 - All entities should, pursuant to paragraph 12.3(a) of the Directions, report to the Attorney-General or OLSC as soon as possible about the details of any litigation (including threatened or proposed litigation) which gives rise to constitutional issues. This will give the Attorney-General's Department and the Australian Government Solicitor (AGS) (at the request of the Department) sufficient time to be involved in any steps concerning the constitutional issues, including giving consideration to draft pleadings, identification of relevant facts, and procedural questions about how and when the constitutional issue might be dealt with.
 - Pending the issue of a *Judiciary Act 1903* section 78B notice and a decision on whether the Attorney-General will intervene in the proceedings, an entity involved in constitutional litigation must comply with any instructions from the Attorney-General or the Attorney-General's Department that could affect the handling or determination of the constitutional issue, including as to the involvement of AGS in handling the matter.
 - If the Attorney-General does not intervene in the proceedings, the entity should (a) clear any submissions on constitutional issues with the Attorney-General's Department, or AGS (at the request of the Department), and (b) comply with any instructions from the Attorney-General or the Attorney-General's Department concerning the conduct of the litigation.
 - If the Attorney-General does intervene in the proceedings, the entity is not to put any submissions on the constitutional issues without the prior approval of the Attorney-General or the Attorney-General's Department. The Attorney-General's Department or AGS (at the request of the Department) will, however, consult closely with the entity in relation to the implications of the constitutional issues for that entity, and will give the body an opportunity to comment on the submissions to be put on behalf of the Attorney-General on the constitutional issues.
 - If the Attorney-General intervenes in a constitutional proceeding, the Attorney-General's Department will usually meet the costs of that intervention. However prior to any decision on intervention being made, or if the Attorney-General does not intervene, the entity involved in the litigation will meet the costs associated with the matter including compliance with these guidelines.

These costs will include any costs arising from the involvement (at the request of the Department) of AGS other than costs associated with the Attorney-General's decision on intervention.

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