



## GUIDANCE NOTE 9

### Appointment to receive service under section 63 of the *Judiciary Act 1903* (Cth)

#### What does 'receive service' mean and how does an appointment under section 63 of the *Judiciary Act* work?

1. When a court proceeding is initiated, the court rules in each jurisdiction require that the originating documents are to be served on the responding party. Court rules may also require service of certain other documents through the course of proceedings. Receiving service is the formal acknowledgement of the receipt of those documents by the responding party.
2. Section 63 of the *Judiciary Act 1903* (Cth) provides that where the Commonwealth is named as a party to a suit, any documents in the proceeding required to be served are to be served on the Commonwealth Attorney-General, or upon a person appointed by the Attorney to receive service.
3. To ensure that complex applications are directed to the most appropriate Commonwealth agency (and considered swiftly by the appropriate person within that agency); there are restrictions on who may receive service on behalf of the Commonwealth.
4. The Attorney-General's appointment of persons under s 63 of the *Judiciary Act* has the effect that the appointed person is authorised to receive service of documents on behalf of the Commonwealth. Most often they will be the originating documents in a matter, such as the Claim or Application, but depending on the court rules in each jurisdiction, can include interlocutory applications, submissions and affidavits.
5. Service on "the Commonwealth" as a party to a suit should be distinguished from service on a specifically named "Department" or "Minister". The Commonwealth may become involved in proceedings where a Department or Minister has also been named as a respondent to the proceeding, or a Department or Minister may be the subject of a subpoena, or an order for third party discovery.

#### Consequences of receiving service on behalf of the Commonwealth

6. The consequences of effective service under s 63 are:
  - the relevant court deadlines immediately start to run
  - there is an immediate need to identify the appropriate Commonwealth agency to take any relevant action on behalf of the Commonwealth, and
  - there may be an immediate need to take measures to protect the Commonwealth's interests in the litigation.
7. People taking action against the Commonwealth may not be represented by lawyers, and also may not be aware of the technicalities of service of process. In these circumstances, the Commonwealth should rarely take issue with service where it has not been effected within the rules of court and the *Judiciary Act*, provided that the relevant part of the Commonwealth has been made aware of the proceedings in sufficient time to protect its interests.

8. When service of documents is effected on someone appointed by the Attorney-General under s 63, and it is not clear which agency the documents should be directed to, the person who has received service should immediately contact OLSC. OLSC will then determine which agency, on behalf of the Commonwealth, is to take responsibility for the matter in line with the Guidelines on Litigation involving the Commonwealth, as issued by the Attorney-General.

### **Relevant Considerations in appointments under s 63**

9. Law firms and individual private sector lawyers providing legal services to the Commonwealth or its agencies may apply to OLSC to be appointed by the Attorney-General under s 63 of the Judiciary Act.
10. In determining whether to appoint a firm, and lawyers within a firm, to receive service on behalf of the Commonwealth, the Attorney-General will consider (although this is not an exhaustive list) the following:
  - Whether the firm and lawyer seeking appointment have sufficient professional experience, and whether individual lawyers are appropriately senior (the equivalent of SES / Senior Associate / Partner).
  - Whether the firm and lawyer seeking appointment have experience in handling Commonwealth claims and litigation, and are ordinarily able to identify the relevant Commonwealth agency to manage the matter, and
  - Whether the firm and lawyer have the administrative resources to ensure that notice is given to the correct responding party properly and efficiently, as soon as possible after receipt of service.
11. Paragraph 12A.1 of the *Legal Services Directions 2017* (the Directions) requires persons appointed to receive service to provide a standard Notice to the relevant Commonwealth agency confirming receipt of service and forwarding the process documents. The Notice should include words to the following effect:

*Although **[Name of Law Firm]** has accepted service of these documents, you are not required to instruct **[Name of Law Firm]** to act in this matter. Now that service has been effected on the Commonwealth, it is open for you to instruct the law firm of your choice (which may include **[Name of Law Firm]**) to handle the matter.*

### **How can my firm or I apply to be appointed under s 63?**

12. Requests for appointment should be made to the Attorney-General, via OLSC, in the first instance.
13. The application should:
  - provide the curricula vitae of the lawyers nominated for appointment, detailing their professional experience and experience in handling Commonwealth claims and litigation
  - address the capacity of other staff with the firm (such as mailroom attendants and receptionists) to deal with service of documents correctly and promptly, and
  - describe the processes and procedures to be put in place to ensure that service is dealt with properly, swiftly and efficiently.
14. The above list is not an exhaustive list, and OLSC may request further information in relation to the application to assist in the decision-making process.

15. The decision to appoint an applicant under s 63 has not been delegated by the Attorney-General.

### **Locations to effect service of court documents on the Commonwealth**

16. The [AGD website](#) provides a list of locations to effect service on the Commonwealth in each capital city.

### **Reporting requirements under the Directions**

17. Within 60 days after the end of each financial year, accountable authorities of non-corporate Commonwealth entities and a Commonwealth entity that was an Agency (within the meaning of the Financial Management and Accountability Act 1997) on 30 June 2014, must provide to OLSC a Certificate of Compliance which outlines, amongst other things, the entity's use of persons appointed under s 63 of the Judiciary Act to receive service in proceedings to which the Commonwealth is a party (subparagraph 11.2(ba)). Similarly, subparagraph 12.3(f) of the Directions extends this aspect of the compliance reporting to most corporate Commonwealth entities.

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