



LITIGATION INVOLVING THE COMMONWEALTH

1. The following guidelines are designed to assist Commonwealth agencies in the conduct of litigation involving the Commonwealth or Commonwealth agencies. They are to be read together with the *Legal Services Directions 2017* (the Directions) issued by the Attorney-General under the *Judiciary Act 1903*.
2. OLSC can assist in determining which agency should be responsible for Commonwealth litigation where this is unclear. OLSC has issued guidelines in relation to Responsibility for Handling Litigation involving the Commonwealth to assist in this regard.

Allocation of responsibility for litigation

3. Responsibility for litigation brought or threatened against the Commonwealth or a Commonwealth agency is to be determined by reference to the distribution of responsibilities under the Administrative Arrangements Orders. Thus, the non-corporate Commonwealth entity with functions which relate most closely to the essential issue or issues raised by the litigation should assume responsibility - both for giving instructions and for the cost of the Commonwealth's involvement in the litigation (subject to Comcover's role outlined below). In some cases it will be appropriate for more than one entity to be involved in providing instructions and meeting the costs of handling the case.
4. If a change in entity responsibilities has occurred since the events giving rise to the litigation, the responsible entity will generally be the entity currently responsible for the functions to which the proceedings relate, rather than the entity which had responsibility for those functions at the time of the events giving rise to the proceedings.
5. A Commonwealth agency, whose decision was the subject of review by a tribunal, will be responsible for appearing as a contradictor in any court proceedings challenging the tribunal's decision, if the tribunal itself is not the appropriate contradictor, regardless of whether the challenge relates to the substantive dispute or is confined to the powers of the tribunal and the manner of their exercise.
6. There are two reasons for this. First, the High Court in *The Queen v the Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 (*Hardiman*) held that if a tribunal becomes a 'protagonist' in court proceedings that arise out of a matter which is contested between parties appearing before the tribunal, this compromises the tribunal's impartiality. The concern arises in cases where the impartiality of the tribunal would be compromised in the event that the substantive matter is remitted to the tribunal for reconsideration. The Court concluded that: 'the presentation of a case [to the court]...by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the tribunal (at page 36).' Therefore, the agency needs to play this role.
7. Second, substantive issues in relation to the underlying matter involving the agency may be reviewed by the court. In these circumstances, it is in the Australian Government's interest to have that agency appear in the proceedings.
8. All submissions and contentions concerning the powers, processes, jurisdiction and legal framework for the tribunal must be settled in consultation with the entity responsible for the legislation governing the tribunal.
9. If an underlying factual dispute is with one agency, it remains financially responsible for the litigation even if a public interest or immunity issue becomes or might become predominant in

subsequent litigation and another agency is responsible for those issues. The general handling of these public interest or immunity issues and the drafting and settling of submissions must be agreed to with the agency that has policy responsibility for them.

10. Payment of costs will be a matter for the agency which is responsible, subject to any arrangements with Comcover and, in respect of events prior to the commencement of Comcover on 1 July 1998, to supplementation arranged with the Australian Government [Department of Finance under the Commonwealth's Accounting and Budgeting policies](#).

Comcover's role in managing litigation

11. Comcover, the Commonwealth's self-managed fund for 'insurable risks' has responsibility for the management of claims against its members, including the management of legal services for such claims. Subject to the specific terms and conditions of the cover provided by Comcover, member agencies may be indemnified for all losses, liability and expenses for the claim.
12. Once Comcover accepts a claim, Comcover becomes the agency responsible for the management of the claim, including for any litigation relating to the claim. In most cases, Comcover will use its member agency's lawyers or lawyers from the member's legal panel to handle the claim. Comcover's responsibility includes developing appropriate strategies for the defence and settlement of claims in consultation with the member agency concerned and the Office of Legal Services Coordination (OLSC) in the Australian Government Attorney-General's Department.
13. In carrying out its work, Comcover is bound by the Commonwealth's policies and directions concerning the handling of claims and litigation, including the Directions issued by the Attorney-General under the *Judiciary Act 1903*.
14. Member agencies need to ensure that they comply with their obligation to provide early written notification to Comcover when a claim is made on the agency, or an event occurs that may give rise to a claim against the agency. If member agencies are in any doubt over their cover, they should [contact Comcover](#) for early advice.

Uncertainty regarding allocation of responsibility

15. If no non-corporate Commonwealth entity can be identified as appropriate and willing to accept responsibility for handling litigation, the matter is to be referred to OLSC as soon as possible. Full details should be provided of the action taken to identify the appropriate entity to take responsibility.
16. In consultation with the Department of the Prime Minister and Cabinet (PM&C) as necessary, OLSC will seek to identify the responsible entity and advise the entity and other relevant parties of its view.
17. If there is an ongoing dispute, the matter may be referred to the relevant Ministers, and ultimately the Prime Minister, for resolution.
18. Pending resolution of the identity of a responsible entity, action may need to be taken on an interim basis by one or more entities or by AGS to protect the Commonwealth's interests. This may include consulting OLSC and the Attorney-General to determine what action is in the Commonwealth's interests.
19. Pursuant to section 63 of the *Judiciary Act 1903*, the Attorney-General has appointed certain staff within AGS to receive service of initiating process on behalf of the Commonwealth. Where AGS has been served with initiating process pursuant to that appointment, the agency ultimately identified as responsible will be liable for the costs of steps taken up to that point in the proceedings, including any costs incurred in identifying the agency as client.

20. If OLSC agrees that no client can be identified, because of the broad or unspecified nature of the claim, OLSC will assume responsibility for instructing in the matter and for the costs incurred. OLSC will do this only where it has expressly agreed to accept this responsibility. (Before OLSC will make this decision, an agency involved or AGS will need to provide full details to OLSC, including the action taken to identify an appropriate agency to accept responsibility for the litigation.)

Litigation involving shared responsibility and interests

21. If more than one agency has an interest in particular litigation, the agencies concerned will need to ensure that they comply with the requirements in the Directions which relate to coordination between agencies and reporting to the Attorney-General or OLSC. In particular, it is necessary to report to the Attorney-General or OLSC where:
- a dispute or disagreement exists between different agencies, or
 - a significant level of coordination between different agencies is required. See paragraph 3 of the Directions.
22. In addition, under the Directions:
- if legal advice is required on the interpretation of legislation not administered by a non-corporate Commonwealth entity - the entity responsible for the litigation is normally required to consult the non-corporate Commonwealth entity responsible for administering the legislation and provide copies of the request for advice and the legal advice to the administering entity (see paragraph 10 of the Directions), and
 - if a request or demand to provide documents or information in the conduct of litigation being handled by a non-corporate Commonwealth entity (the litigating entity) could give rise to a claim of immunity on a public interest ground for which another non corporate Commonwealth entity has administrative responsibility (the PII entity), the litigating entity is to refer the decision whether to make the claim to the PII entity or the PII entity's Minister. (eg a decision as to whether to claim public interest immunity in relation to a subpoena seeking production of Cabinet related documents would be referred to PM&C - see paragraph 7 of the Directions).
23. Early and detailed consultation between agencies and sharing of information and legal advice will normally be appropriate.
24. In normal circumstances, the need to consult or involve a second entity on an aspect of the handling of a matter will not result in the second entity having to accept responsibility for a proportion of the costs incurred in handling the matter. For example, the entity responsible for litigation will normally be responsible for the costs resulting from the need to involve PM&C in resisting disclosure of a Cabinet document on public interest immunity grounds even if PM&C wishes to resist disclosure in circumstances where the other entity would not otherwise do so.
25. Consistent with the need to protect the Commonwealth's interests in litigation involving constitutional issues, Commonwealth agencies and their lawyers are required to act in accordance with the Commonwealth's position in relation to such litigation as conveyed by AGS' constitutional litigation area or the Attorney-General (or his or her delegate). The agency responsible for the litigation will normally be responsible for the costs incurred.
26. If more than one non-corporate Commonwealth entity is involved in litigation on behalf of the Commonwealth, it will not normally be appropriate to have different law firms advising the different entities. Any proposal for different entities to engage separate legal advisers for the purpose of conducting the one piece of litigation should be referred to OLSC. For example, it may be necessary for PM&C to engage their own lawyers to advise on a claim of public interest immunity, if the lawyers handling the litigation do not have the necessary expertise to do so. (It should be noted that this guideline is not intended to prevent entities from engaging more than one law firm to conduct litigation where the responsible entity decides that this is necessary to provide the right mix of skills and resources. Rather, it is intended to avoid different parts of the

Commonwealth from adopting an approach based on individual entity interests, rather than those of the Commonwealth as a whole.)

27. As far as possible, the approach outlined in this Part should also apply where Commonwealth agencies are involved, either with another Commonwealth agency or with a non-corporate Commonwealth entity.

Handling of issues arising in conduct of litigation

28. Responses to questions asked in Parliament, including through Estimates and other Committees, are the responsibility of the Commonwealth agency responsible for the litigation. Where matters are raised with another agency (or another Minister), for example in Senate Estimates, the matter should, wherever practicable, be referred to the responsible agency. In some cases the Attorney-General will have a role because of his or her first law officer responsibilities eg where a breach of the Directions is alleged.
29. Any legal costs incurred for work performed by AGS or a private law firm acting in relation to the litigation in responding to questions are therefore normally payable by the agency. This is the case even if the questions are asked of a Minister or the Australian Government Attorney-General's Department.
30. If issues concerning the conduct of litigation are raised with or by the Attorney-General (or his or her delegate) in the Attorney-General's capacity as first law officer, any work undertaken by the responsible agency's lawyers will normally be payable by the agency. Briefing of the Attorney-General (or his or her delegate) on significant matters arising in the course of litigation is similarly the responsibility of the relevant agency.

Office of Legal Services Coordination

Telephone: 02 6141 3642

E-mail: olsc@ag.gov.au

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