



AUSTRALIA'S MAGNA CARTA INSTITUTE

RULE OF LAW EDUCATION



ANALYSIS OF MODEL LITIGANT RULES 2020

Why are Model Litigant Rules Important?

In litigation there can be a substantial imbalance of power with the government. Government bodies may have access to substantial resources, powers to investigate and compel people to provide information, and more experience and specialist expertise in dealing with complex and contentious legal matters.

The model litigant rules seek to address this inherent and substantial power imbalance and are important in the administration of the law. They act as a safeguard against the caprice of brute power and provide the community with confidence that the laws will be administered fairly.

The model litigant rules seek to impose the basic duty of fairness on all Commonwealth agencies. To be effective however, they must be **enforceable, and complaints dealt with transparently**.

What are Model Litigant Obligations?

In civil litigation the Commonwealth has a duty to act as a Model Litigant.

Common Law

At common law, there has always been a focus on fair procedure leading to a fair outcome. While all litigants irrespective of who they are arguably strive for the attainment of a just outcome in court proceedings, there are additional expectations placed on government bodies which are legally binding. Furthermore, judicial criticism is an effective way of sanctioning government agencies who do not act in the public interest and/or who seek to impose an unfair burden on the general public, especially for example in the case of unrepresented litigants.

The development of this obligation in conducting litigation can be traced to *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 where Griffith CJ explained it as

*‘[t]he old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects’.*¹

In that case the Court criticised that ‘[t]he Crown should not take technical points’.²

In *SCI Operations v The Commonwealth*³ which concerned the failure of a government agency to refund money within a reasonable time, Beaumont,infeld and Sackville JJ stated that

*‘the position of the Crown itself, especially given its default... should also be taken into account. Otherwise the Crown would be taking, or be seen to be taking, advantage of its own default, whereas it is well established that the Crown must act, and be seen to act, as a model litigant’.*⁴

In *Morley & Ors v Australian Securities and Investments Commission*⁵ the NSW Court of Appeal stated that the principle is ‘not limited to the criminal law’⁶ and extends to civil practice and

¹ *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342

² *Ibid.*

³ (1996) 139 ALR 595

⁴ *Ibid.*, 164.

⁵ [2010] NSWCA 331.

⁶ *Ibid.*, 710.

procedure.⁷ It was critical of ASIC's approach to litigation stating that 'the government agency has no legitimate private interest of the kind which often arises in civil litigation. It acts, and acts only, in the public interest as identified in the regulatory regime'.⁸ The Court also stated,

'ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings... No other person could have brought these proceedings. In partial answer to the first of the questions, whether its failure to call a witness can constitute a breach of the obligation of fairness, in our opinion it can'.⁹

Legislation

Australian Commonwealth, State and Territory government agencies are governed by legislation which requires them to behave to certain standards in the conduct of litigation.

The Commonwealth laws regarding the performance of legal work are the most prescriptive and are set out in Section 55ZF of the *Judiciary Act 1903* and the *Legal Services Directions 2017*. These laws are mirrored in Section 56 of the *Civil Procedure Act 2005* (NSW). In short, federal and state government agencies are required to act honestly and fairly and to ensure the just, quick and cheap resolution of proceedings. The Office of Legal Services Coordination (OLSC) which is a part of the Attorney General's Department is responsible for enforcing failure by federal government agencies to meet requisite standards. In New South Wales, compliance is primarily the responsibility of the head of each agency.

Model litigant obligations can only be enforced by the Attorney General, not private individuals, although the Attorney General and the OLSC can receive complaints from the public about non-compliance.

Legal Services Directions 2017 (Cth) under the *Judiciary Act 1903* (Cth)

In 1999 the *Judiciary Act 1903* (Cth) was amended to enable the Legal Services Directions to be promulgated. Daryl Williams SC, the Attorney General, said in the second reading speech to the Bill that the Directions 'will provide a framework for the conduct of the Commonwealth's legal affairs, but leave prime responsibility for the effective and efficient use of the legal services with agencies'.¹⁰ The amendments also established the Office of Legal Services Coordination 'to assist [the Attorney General] in discharging [his] First Law Officer role'.¹¹

Legal Services Directions 2017 (Cth)

Under section 55ZF of the *Judiciary Act 1903* (Cth), the Attorney-General issued the Legal Services Directions 2017 outlining the Commonwealth's duty in litigation. The Directions provide that as a model litigant, the Commonwealth and its agencies must act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency. (See Appendix B)

⁷ Ibid, 708.

⁸ Ibid, 716.

⁹ Ibid, 728.

¹⁰ Attorney-General Mr Williams Second Reading Speech, House of Representatives Hansard, 3rd December 1998, 1275.

¹¹ Ibid.

The “Model Litigant Rules”, as they are known, oblige the Commonwealth to act as a model litigant. This ‘may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations’.¹²

The Directions also deal with a range of other matters such as engagement of barristers and the use of in-house lawyers for court litigation.

Enforcement of the Obligations

The Office of Legal Services Coordination (OLSC), within the Attorney-General’s Department, assists ‘the Attorney-General in relation to his responsibilities for legal services to the Commonwealth’¹³ by providing guidance notes and educational functions.¹⁴

The OLSC also monitors alleged breaches of the Directions.¹⁵ Breaches are brought to the attention of the Office by way of self-reporting by government agencies, judicial comments, media reports or complaints made directly to the OLSC.¹⁶ (Complaints alleging a breach of the Directions should be made to the relevant agency, but can also be raised with the OLSC at olsc@ag.gov.au)

The Attorney-General is given power by clause 14 of the Directions to impose sanctions for non-compliance with them. Clause 14.2 further provides that:

‘When entering into a contract for legal services, agencies are to include a provision stating that the contract includes appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including the termination of the contract in an appropriate case’.

The Compliance Framework, introduced in 2013, emphasised greater agency responsibility for understanding the Directions and ensuring compliance with the OLSC’s role being to receive alleged breach notifications to identify significant issues and to receive alleged breach notifications to identify systemic issues and deficiencies in understanding or operation of the Directions.¹⁷

The issue of non-compliance with the Directions cannot be raised in proceedings, except by, or on behalf of, the Commonwealth.¹⁸ This places a heavy onus on the Attorney General’s Department to investigate and enforce compliance.

Reporting by the Attorney General’s Department

The Attorney-General’s Department Annual Reports publish statistical data on breaches of the Directions.¹⁹ From 2003 to 2009, the Annual Reports provided information on the number of

¹² Model Litigant Rules Note Number 2. See also the Joint Committee Corporations and Financial Services, Hansard 11 March 2011, CFS 12.

¹³ Explanatory Memorandum, Judiciary Amendment Bill 1998 (Cth), 8.

¹⁴ Joint Committee on Corporations and Financial Services, Hansard 11 March 2011, CFS 12.

¹⁵ Office of Legal Services Coordination, Guidance Note No. 3, Office of Legal Services Coordination Website: <http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Guidance-note-3-compliance-with-legal-services-directions.DOCX>

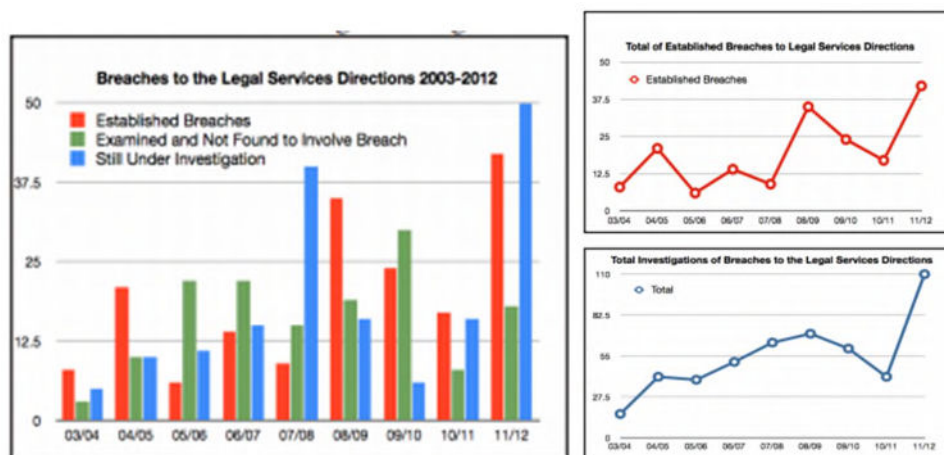
¹⁶ Joint Committee on Corporations and Financial Services, 11 March 2011, CFS 17.

¹⁷ <https://www.ag.gov.au/LegalSystem/Documents/Government-response-to-Productivity-Commissions-report.pdf>

¹⁸ s55ZG(3) Judiciary Act 1903.

¹⁹ OLSC, Guidance Note No 3, see above n 14.

breaches investigated per year, as shown in Table 1 below. However, the 2009-2010 Annual Report did not disclose data or make any statement about compliance with the Legal Services Directions.



From 2017-19, OLSC made changes to its record keeping which increased its capacity to produce data readily, but made it more difficult to compare previous years.²⁰ As a result, there is very little transparency regarding breaches and those under investigation.

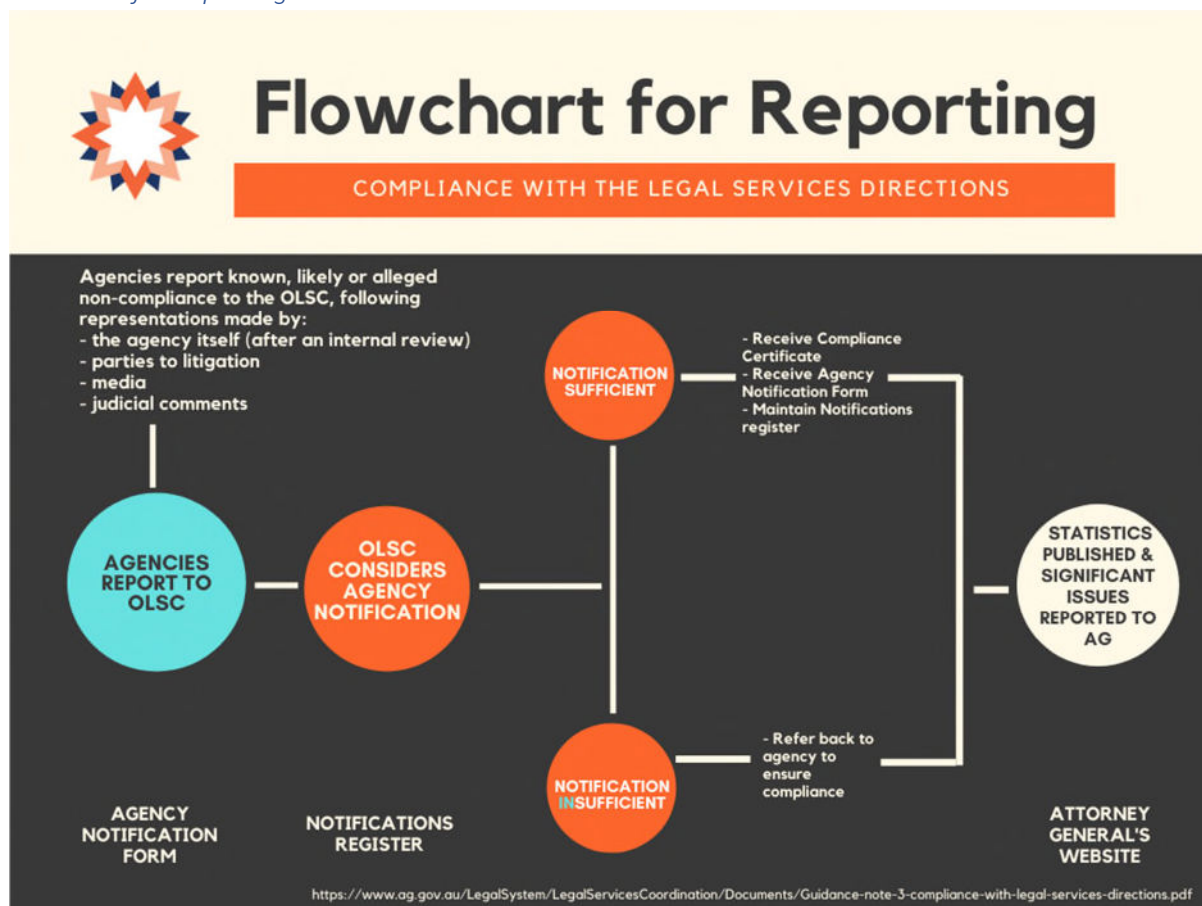
Reporting Process for Breaches of the Legal Services Directions

The data in the above charts was compiled from the AG's Department Annual Reports and the OLSC website. As can be seen in the data collected up to and including 2011-2012, breaches of the model litigant obligations were not separately identified.

In our view, reporting by the Attorney General's Department from 2012 onwards remains inadequate, particularly as far as reporting on significant issues is concerned.

Notwithstanding that both the Legal Services Directions and OLSC Guidance Note No 3 require Commonwealth government agencies to report to the Attorney-General or OLSC on *significant issues* and the types of matters that should be reported are specified by legislation, publicly available information about non-compliance remains scant. As well as failing to identify established breaches of the Legal Services Directions and/or whether there were any significant departures from agencies' obligation to act as model litigants, latest reporting also fails to divulge the particular agencies involved, the nature of the reviews undertaken by the OLSC, the corrective steps taken by agencies to ensure better compliance with the Directions and/or any sanctions imposed by the Attorney-General to deal with recidivist government agencies.

²⁰ <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC-compliance-statistics.pdf>



Criticism of Enforcement and Compliance Framework

It is essential to maintain public confidence in the Government and as a necessary part of that, any alleged non-compliance with the Model Litigant obligations should be recorded, dealt with and the results of any action taken pursuant to that made known to the public. Annual reporting of alleged breaches and the outcome of complaints about non-compliance with model litigant obligations helps maintain public confidence.

Are the Model Litigant rules enforced?

The NSW Court of Appeal in *Morely & Ors v Australian Securities and Investments Commission*²² was critical of ASIC's litigation strategy.²³

Following this case, the Attorney-General's Department was asked about its compliance with the model litigant obligations by the Parliamentary Joint Committee on Corporations and Financial Services hearing on 11 March 2010.^{24 25} In particular, the Committee asked the OLSA representative

²¹ <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Guidance-note-3-compliance-with-legal-services-directions.pdf>

²² [2010] NSWCA 331.

²³ *ibid*, 728.

²⁴ Joint Committee Corporations and Financial Services, 11 March 2011, above n17, CFS 11.

²⁵ 'Oversight of the Australian Securities and Investments Commission' accessed on 11 August 2011

whether the 'office ... conduct[s] its own review of ASIC in terms of all its litigation...[or an] annual review'.²⁶ In response, the representative from the OLSC stated:

*'No...we are a smaller regulator... The general kind of staffing profile in the office would be about 14 people...In terms of the way we approach compliance with the directions, we have to very much be selective in our approach' (Italics added).*²⁷

The representative added 'it is not really that productive for us to scan newspapers and then ring agencies. I think they are a good reporter...We kind of put our efforts into the front end of trying to help people understand how to comply'.²⁸

The Department representative also stated:

'[the] primary role of the OLSC is to facilitate compliance with the directions predominantly through education and outreach. OLSC officers visit agencies and conduct training on the directions. We maintain a website that sets out information, including guidance notes and other information to assist agencies and members of the public who may have concerns about an agency's conduct'.²⁹

In *Morely v ASIC*,³⁰ Spigelman CJ, Beazley and Giles JJA agreed that the range of powers and functions of ASIC mean that 'ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings...No other person could have brought these proceedings'.³¹ However, in ASIC's 2011 submissions to the High Court in *ASIC v Shafron*,³² ASIC submitted that '[w]hilst the role of the Commonwealth as a model litigant influences the way in which it conducts litigation, it does not impinge on the Commonwealth's ability to enforce its substantive rights. The Commonwealth has the same rights as any other litigant...Further, the model litigant standard is unrelated to any question of the statutory powers an agency may possess to bring proceedings'.³³

However, when the Committee questioned the Attorney-General's Department representative in 2009 about ASIC's capability to comply with the model litigant rules the reply was:

*'ASIC is very aware of what its obligations are under the Directions'.*³⁴

*'ASIC does take quite seriously the requirements and attempts to ensure that it complies with the kinds of standards of fairness that the model litigant obligation requires'.*³⁵

²⁶ Ibid CFS 14.

²⁷ Ibid.

²⁸ Ibid, CFS15.

²⁹ Ibid, CFS 12

³⁰ [2010] NSWCA 331.

³¹ Ibid, 728.

³² Case Number S173/2011

³³ High Court of Australia, *ASIC V Shafron* Case Number S173/2011 Applicants Written Submission 17th June 2011, para 54< http://www.hcourt.gov.au/assets/cases/s174-2011/ASIC_App.pdf> accessed on 9th August 2011.

³⁴ Joint Committee on Corporations and Financial Services, 11 March 2009, above n 17, CFS 12.

³⁵ Ibid, CFS 14.

During debate in 1999, under-resourcing of the OLSC appeared to be a key problem. On amendments to the *Judiciary Act 1903 (Cth)* in 1999, Opposition spokesman Senator Nick Bolkus stated that the OLSC had:

[A] wide ranging task. It is a task which covers the breadth of government. The office established to perform such a task was originally staffed by only three people. Given that the Commonwealth manages some 15,000 pieces of litigation per year, it was and continues to be our concern that this function could not be adequately performed with the resources allocated. Now the Government has said that it will apply six staff to this function. However, it is fair to say that our concerns...still remain in respect of the administration of the directions under this part of the government's proposal'. 'In essence, model litigant rules will become meaningless if there is inadequate means to enforce them...the Government should agree to increase the resources of the Office of Legal Services Coordination to ensure it can meet the full range of functions intended for it'.³⁶

A 2005 Australian National Audit Office (ANAO) Report stated that the OLSC relies heavily on reporting either by agencies or on complaints from other sources.³⁷

There is also no formalised complaints system. ANAO further reported that the OLSC does not commonly discover breaches,³⁸ and 'does not proactively monitor agency's compliance with the Directions'.³⁹

The 2009 Blunn Krieger 'Review of Commonwealth Legal Services Procurement'⁴⁰ noted '[w]hile the [Legal Services Directions]... detail requirements and impose a number of restrictions on agencies, they provide little in the way of assistance to those agencies in achieving the delivery of efficient and effective legal services'.⁴¹

³⁶ Senator Balkus Second Reading Speech, 8th March 1999, Senate Hansard, 2402-3.

³⁷ ANAO Legal Services Arrangements in the Australian Public Service Audit Report No 52 (2005), 5.12.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Anthony Blunn and Sibylle Krieger, Review of Commonwealth Legal Services Procurement, 2009 accessed on 11th August 2011.

⁴¹ Ibid, 27 [para 47].

Part 3—Sanctions for non-compliance

14 Sanctions for non-compliance

14.1 The Attorney-General may impose sanctions for non-compliance with the Directions.

Note: Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC. Allegations of non-compliance with the Directions may be raised with OLSC at olsc@ag.gov.au.

14.2 When entering into a contract for legal services, Commonwealth agencies are to include a provision stating that the contract includes appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including the termination of the contract in an appropriate case.

Appendix B—The Commonwealth’s obligation to act as a model litigant

The obligation

1 Consistently with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth and Commonwealth agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

2 The obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency by:

- (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
- (aa) making an early assessment of:
 - (i) the Commonwealth’s prospects of success in legal proceedings that may be brought against the Commonwealth; and
 - (ii) the Commonwealth’s potential liability in claims against the Commonwealth
- (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid
- (c) acting consistently in the handling of claims and litigation
- (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
- (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

⁴²<https://www.legislation.gov.au/Details/F2017L00369/Controls/>

- (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true
- (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
- (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and
- (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or a Commonwealth agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
- (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
- (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Note 1: The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and other Commonwealth agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the Commonwealth agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether AGS, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

Note 2: In essence, being a model litigant requires that the Commonwealth and Commonwealth agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and Commonwealth agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

Note 3: The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

Note 4: The obligation does not prevent the Commonwealth and Commonwealth agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and Commonwealth agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or a Commonwealth agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

Note 5: The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Merits review proceedings

- 3 The obligation to act as a model litigant extends to Commonwealth agencies involved in merits review proceedings.

- 4 A Commonwealth agency should use its best endeavours to assist the tribunal to make its decision.

Note: The term 'litigation' is defined in paragraph 15 of these Directions in terms that encompass merits review before tribunals. There are particular obligations in relation to assisting a tribunal engaged in merits review to arrive at a decision. Commonwealth agencies should pay close attention to the legislation under which a tribunal is established, and any practice directions issued by the tribunal. In the case of the Administrative Appeals Tribunal see in particular subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975*.

Alternative dispute resolution

- 5.1 The Commonwealth or a Commonwealth agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).
- 5.2 When participating in alternative dispute resolution, the Commonwealth and Commonwealth agencies are to ensure that their representatives:
- (a) participate fully and effectively, and
 - (b) subject to paragraph 2 (e) (iv), have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute

Judiciary Act 1903 (Cth)⁴³

Part VIIIC—Attorney-General's Legal Services Directions

55ZF Attorney-General may issue directions

- (1) The Attorney-General may issue directions (*Legal Services Directions*):
 - (a) that are to apply generally to Commonwealth legal work; or
 - (b) that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter.
- (2) The Attorney-General may publish or give notice of Legal Services Directions in any manner the Attorney-General considers appropriate.
- (3) In this section:

Commonwealth legal work means:

- (a) any work performed by or on behalf of the AGS in providing services in accordance with section 55N; or
- (b) any legal work performed by a person for any of the following:
 - (i) the Commonwealth;
 - (ii) a body established by an Act or regulations or by a law of a Territory (other than the Australian Capital Territory or the Northern Territory);
 - (iii) a company in which the Commonwealth has a controlling interest (including a company in which the Commonwealth has a controlling interest through one or more interposed Commonwealth authorities or Commonwealth companies);

⁴³ <https://www.legislation.gov.au/Details/C2016C00836>

- (iv) other persons or bodies referred to in subsection 55N(1), to the extent that the work relates to the person's or body's performance of a Commonwealth or Territory function.

55ZG Compliance with Legal Services Directions

- (1) The following persons or bodies must comply with Legal Services Directions that have been published and with Legal Services Directions of which the person or body has been notified:
 - (a) a person or body referred to in subsection 55N(1);
 - (b) a person or body referred to in subsection 55N(2), in relation to a matter, if the AGS is acting for the person or body in that matter;
 - (c) a person or body in respect of whom the Attorney-General has made a request under subsection 55N(3), in relation to a matter, if the AGS is acting for the person or the body in that matter;
 - (d) a person or body in respect of whom the AGS has made a determination under subsection 55N(4), in relation to a matter, if the AGS is acting for the person or body in that matter;
 - (e) the AGS;
 - (f) a legal practitioner or firm of legal practitioners, in relation to a matter, if the legal practitioner or firm is acting for a person or body referred to in subsection 55N(1) in that matter.
- (2) Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General.
- (3) The issue of non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.

55ZH Legal Services Directions and legal professional privilege

- (1) If a Legal Services Direction requires a person to provide any information, or produce a document or record, to another person, the person must not refuse to comply with the Direction on the ground of legal professional privilege or of any other duty of confidence.
- (2) A person performing Commonwealth legal work (within the meaning of subsection 55ZF(3)) may provide information or produce a document or record relating to that work to the Attorney-General or to a person authorised by the Attorney-General for that purpose.
- (3) If:
 - (a) a person provides information or produces a document or record under subsection (2); and
 - (b) the person would, apart from this subsection, be breaching legal professional privilege or any other duty of confidence in so doing;the person is taken, for all purposes, not to have breached legal professional privilege or the duty of confidence in so providing the information or producing the document or record.

- (4) If a communication that is the subject of legal professional privilege is disclosed under subsection (1) or (2), then, in spite of the disclosure, privilege is taken not to have been waived in respect of the communication.

55ZI Anything done under Legal Services Directions not actionable

- (1) The Attorney-General is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done in compliance, or purported compliance, with a Legal Services Direction.
- (2) A person (other than the Attorney-General) is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done by the person in compliance, or in good faith in purported compliance, with a Legal Services Direction.