

## **EXPLANATORY STATEMENT**

Issued by the authority of the Attorney-General

*Judiciary Act 1903*

*Legal Services Amendment Directions 2010 (No 1)*

Section 55ZF of the *Judiciary Act 1903* provides that the Attorney-General may issue directions (Legal Services Directions) that are to apply generally to Commonwealth legal work. 'Commonwealth legal work' is broadly defined in section 55ZF(3) as any work performed by a person for the Commonwealth; or for a body established by an Act or regulations, including a company in which the Commonwealth has a controlling interest.

Schedule 1 repeals the \$2,400 and \$1,600 threshold amounts set out in paragraph 5 of Appendix D to the Directions, and replaces them with amounts of \$3,500 and \$2,300 respectively.

Appendix D sets out directions in relation to the engagement of counsel by agencies themselves, by the Australian Government Solicitor, or by private lawyers who are acting for the Commonwealth or its agencies. The policy applies to briefs to advise and briefs to appear before courts, tribunals or inquiries and to the use of counsel to represent the Commonwealth and its agencies in arbitration and other alternative dispute resolution processes.

The aims of Appendix D are to maximise benefits arising from the Commonwealth's position as a major purchaser of legal services when agreeing on fees payable to counsel, while ensuring that a range of counsel are skilled in undertaking work for the Commonwealth, and that and that they provide services that offer value for money.

Paragraph 5 of Appendix D provides that an FMA agency may engage counsel up to the threshold amounts (currently \$2,400 per day for senior counsel and \$1,600 per day for junior counsel, inclusive of GST) without the Attorney-General's approval. The thresholds were last increased in 2000. At that point, it was considered that \$2,400 and \$1,600 were unusually high amounts beyond which the Attorney-General (by his delegate) should personally consider and approve.

As a large and increasing proportion of counsels' fees are now beyond the thresholds, it is appropriate to increase the thresholds to \$3,500 per day for senior counsel and \$2,300 per day for junior counsel (inclusive of GST). This will allow Commonwealth agencies an appropriate level of freedom to negotiate fees directly with counsel, while preserving the aims of Appendix D and the Attorney-General's oversight role in approving unusually high fees.

These Directions commence on the day after they are registered.

The *Legislative Instruments Act 2003* requires an explanatory statement to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken.

In March 2010, the Office of Legal Services Coordination in the Attorney-General's Department issued a consultation paper on four issues – one of which was the counsel engagement policy as set out in Appendix D to the Directions. Comments and submissions were requested within a six week period following the circulation of the paper, and 28 submissions were received from Commonwealth agencies and major private sector legal services providers. A majority of respondents favoured retaining the existing framework of the counsel engagement and fee structure system, but noted that the threshold fee levels in the Directions no longer accurately reflected the market value of legal services. The majority of respondents supported an increase to those thresholds to reflect the market more accurately.