

# **Legal Services Directions 2017**

## **EXPLANATORY STATEMENT**

Issued by the Attorney-General  
under section 55ZF of the *Judiciary Act 1903*

### **INTRODUCTION**

Under section 55ZF of the *Judiciary Act 1903* (Judiciary Act), the Attorney-General may issue legal services directions that are to apply generally to Commonwealth legal work. The power to issue legal services directions was conferred having regard to the Attorney-General's responsibility, as first law officer, for legal services provided to the Commonwealth and its entities, including Commonwealth litigation, and for the provision of legal advice to Cabinet.

### **OUTLINE**

The objective of these Directions is to remake the *Legal Services Directions 2005* (2005 Directions) which sunset on 1 April 2017.

The 2005 Directions were issued under section 55ZF of the Judiciary Act. They are a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act). These Directions are also a legislative instrument for the purposes of the Legislation Act.

Under the sunset regime provided by the Legislation Act, the 2005 Directions were due to sunset on 1 April 2016. On 11 February 2016, the Attorney-General issued a certificate under section 51 of the Legislation Act, to defer the sunset of the 2005 Directions by 12 months to 1 April 2017. The certificate explained that the Secretary of the Attorney-General's Department (AGD) was undertaking a review of Commonwealth legal work. The Review was examining how legal work can be delivered most effectively and efficiently to the Commonwealth, including consideration of changes to the 2005 Directions. The reasons for issuing the certificate of deferral remain valid, but the Legislation Act does not allow the making of a second certificate of deferral. Following consideration of the Review by government, further updates to the Directions are expected.

These Directions preserve all existing arrangements for the management of Commonwealth legal services by the Attorney-General.

These Directions contain minimal changes from the 2005 Directions. These changes include:

- provision of transitional arrangements (Appendix G)
- updating references to entities, jurisdictions, and other organisations
- updating references to documents and guidelines
- updating references to websites, and
- removing typographical and stylistic inconsistencies.

These Directions contain a new Appendix G for application, transitional and savings provisions. Appendix G provides for a seamless transition from all existing arrangements under the 2005 Directions. This will provide certainty to entities.

These Directions are not intended to cover the handling of criminal prosecutions and related proceedings unless expressly referred to, nor to override any legislative requirements or authority concerning an agency's functions (in particular, the role of the Director of Public Prosecutions).

## **PROCESS BEFORE INSTRUMENT WAS MADE**

### **Regulatory Impact Analysis**

Before these Directions were made, their expected impact was assessed using the Preliminary Assessment tool approved by the Office of Best Practice Regulation (OBPR). This assessment indicated that the Directions are unlikely to impact business, community organisations or individuals. This assessment has been confirmed by the OBPR, ID: 21997.

### **Statement of Compatibility with Human Rights Obligations**

A statement of compatibility has been prepared and is at Attachment A.

### **Consultation**

Minimal consultation was undertaken on the making of these Directions as the 2005 Directions are well understood and no substantive alterations to the arrangements under the 2005 Directions have been proposed at this time. The Attorney-General's Department has consulted agencies that are responsible for administering legislation which refers to the 2005 Directions.

### **Statutory preconditions and Parliamentary undertakings relevant to these Directions**

There are no other statutory preconditions or Parliamentary undertakings relevant to the making of these Directions.

## **PROCESSES FOR REVIEW OF THIS INSTRUMENT**

These Directions are subject to tabling and disallowance under Chapter 3, Part 2 of the Legislation Act and sunseting under Chapter 3, Part 4 of that Act.

## **OTHER ISSUES**

### **Matter incorporated by reference**

These Directions do not apply, adopt or incorporate any other matter by reference.

### **More information**

A paragraph by paragraph explanation of provisions that appear in these Directions and not in the 2005 Directions is provided in Attachment B. No explanations have been provided for provisions in these Directions where the only difference from the 2005 Directions is to provide for the following:

- updated references to entities, jurisdictions, and other organisations
- updated references to documents and guidelines
- updated references to websites, and
- removing typographical and stylistic inconsistencies.

## **STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS    ATTACHMENT A**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Legal Services Directions 2017**

These Directions are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Legislative Instrument**

These Directions are a set of binding rules issued by the Attorney-General concerning the performance of Commonwealth legal work. These directions set out requirements for sound practice in the provision of legal services to the Australian Government. They offer tools to manage legal, financial and reputational risks to the Australian Government's interests. They also give Australian Government agencies the freedom to manage their particular risks while providing a supportive framework of good practice.

### **Human rights implications**

AGD has assessed whether these Directions are compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, AGD has formed the view that the instrument does not engage any of those rights or freedoms.

### **Conclusion**

These Directions are compatible with human rights as it does not raise any human rights issues.

**PART 1 – Preliminary****Section 1                      Name**

Section 1 provides that the title of the instrument is the *Legal Services Directions 2017*.

**Section 2                      Commencement**

The instrument commences on the later of 1 April 2017 or the day after the instrument is registered. This will provide a seamless transition from the 2005 Directions.

**Section 3                      Authority**

Section 3 provides that the legislative authority of the instrument is section 55ZF of the Judiciary Act .

**Section 4                      Schedule 1**

Schedule 1 to this instrument sets out Directions made by the Attorney-General under section 55ZF of the Judiciary Act.

**Section 5                      Schedule 2**

Section 5 provides that this instrument repeals the 2005 Directions. The 2005 Directions were due to sunset on 1 April 2017. However, to avoid any confusion as to when the new instrument comes into operation, this repeal provision has been included.

**SCHEDULE 1 – Legal Services Directions****Paragraph 12B              Transition from 2005 Directions**

Paragraph 12B is a provision that does not appear in the 2005 Directions. This provision triggers the operation of the transitional arrangements set out in Appendix G for relevant entities or other bodies. The structure and the placement of this paragraph is consistent with other paragraphs in Schedule 1 which refer to appendices of the Directions for further details on the direction provided by that paragraph.

**APPENDIX G – Application, transitional and saving provisions**

Appendix G facilitates a seamless transition between the 2005 Directions and these Directions.

**Paragraph 1                      Decisions and instruments made before commencement**

Paragraph 1 ensures that a decision or instrument that was in force under a provision of the 2005 Directions will be treated as if it were a decision or instrument made under the equivalent provision of these Directions.

A wide range of decisions were made under the 2005 Directions. The note to paragraph 1 provides examples of types of decisions such as:

- granting exemptions
- giving an agreement, approval or permission
- imposing conditions on an approval, and
- giving an instruction or issuing guidelines

Paragraph 1 is intended to preserve the validity of all such decisions or instruments, consistent with the purpose of maintaining all existing arrangements for the management of Commonwealth legal services.

#### **Paragraph 2                      Processes begun before commencement**

Paragraph 2 provides that a process that began under a provision of the 2005 Directions that was not completed when the 2005 Directions were repealed is to be treated as if it had begun under the equivalent provision of these Directions.

The note provides examples of processes covered by paragraph 2, including consulting a Minister or entity, or referring a decision to a Minister. This provides certainty to entities that processes undertaken in compliance with the 2005 Directions and completed after the commencement of these Directions, will also satisfy the relevant provision of these Directions.

#### **Paragraph 3                      Obligations incurred before commencement**

Paragraph 3 provides that any obligation incurred under a provision of the 2005 Directions continues under the equivalent provision of these Directions.

#### **Paragraph 4                      Financial years**

Paragraph 4 provides that a reference to a financial year in these Directions is to be treated as a reference to any financial years that end after the Directions commence.

#### **Paragraph 5                      Imposing sanctions**

This provision ensures that the Attorney-General may continue to impose sanctions for non-compliance with the 2005 Directions after those Directions are repealed.

#### **Paragraph 6                      References to *Legal Services Directions 2005***

Paragraph 6 provides that where an instrument or document refers to the 2005 Directions prior to the commencement date of these Directions, the reference will be read after the commencement of these Directions as a reference to these Directions.

### **SCHEDULE 2 – Repeal**

#### **Paragraph 1                      The whole of the Directions**

Paragraph 1 repeals the 2005 Directions.