

## GUIDANCE NOTE NO 6

*The Office of Legal Services Coordination (OLSC) provides Guidance Notes in order to assist Australian Government Departments and Agencies, and legal services providers (as applicable), to comply with the Legal Services Directions, procure legal services, and deal with legal issues in an efficient and effective manner. OLSC welcomes feedback on this Guidance Note.*

### **Handling litigation involving the Commonwealth during the caretaker period**

This guidance note is to be read in conjunction with the Department of the Prime Minister and Cabinet *Guidance on Caretaker Conventions - updated August 2007*, available at <<http://www.pmc.gov.au/>>.

During the caretaker period, the business of government continues and ordinary matters of administration still need to be addressed. However, successive governments have followed the ‘caretaker conventions’, which aim to ensure their actions do not bind an incoming government and limit its freedom of action. The conventions are not legally binding, nor are they hard and fast rules and as such, their application in individual cases requires judgement and common sense. Further information about the conventions is available in the guidelines issued by the Department of the Prime Minister and Cabinet.

The caretaker conventions may affect the way litigation involving the Commonwealth should be handled and the application of the conventions should be considered on a case-by-case basis. The conventions do not displace the overarching obligation to act to protect the interests of the Commonwealth. Responsibility for observing the conventions ultimately rests with the agency head and the following principles should be taken into account before making decisions on how litigation is to be handled.

- If possible, the taking of substantive steps in legal proceedings that would materially commit an incoming government should be deferred until after the conclusion of the caretaker period, taking into account the circumstances of the matter. In some cases, it may be appropriate to seek an adjournment from the court or tribunal, or seek consent from the other party to delay settlement negotiations, until the result of the election is known.
- If deferral is not possible or appropriate in the circumstances, the agency should take only those steps that are **essential** to the further conduct of the litigation. For example, if the Commonwealth’s right to appeal needs to be preserved, a protective appeal should be lodged.
- In cases where some action is essential, the agency should consider whether the caretaker Minister should be advised to consult (or authorise consultation) with the Opposition before the action is taken, on the grounds that it would be a significant commitment in terms of scale or sensitivity. If the agency would normally instruct in the matter without reference to the Minister, for example on the basis that relevant government and agency policies are well established,

then the agency may be able to issue instructions without consultation, but the agency should still consider whether the significance of the matter, in particular possible controversiality as between the government and the Opposition, is such that consultation would be appropriate. If the agency would need, in accordance with standing arrangements, to seek clearance from the Minister before filing documents or issuing other instructions, then the need for consultation should normally be raised with the caretaker Minister as part of the provision of advice.

- The caretaker conventions restrict provision of policy advice. Factual information about litigation involving the Commonwealth can be provided on request. Factual information can be volunteered in certain circumstances, for example where the Minister is a party to litigation the Minister may be provided with information about a decision handed down (such as the result, whether the Commonwealth's arguments were, broadly speaking, accepted or rejected, and a copy of the judgment). Advice on the policy implications of a decision should not be given unless exceptional circumstances might require an urgent response. In this situation, agencies should consult with the Department of the Prime Minister and Cabinet.

If legal proceedings which may be the subject of an application for Ministerial assistance under the *Parliamentary Entitlements Regulations 1997* are commenced or threatened during the caretaker period, the Office of Legal Services Coordination should be notified as soon as possible.

If further advice is required regarding handling litigation during the caretaker period, the Office of Legal Services Coordination should be contacted for further guidance.

If further advice is required in relation to other issues that arise during the caretaker period, agencies should contact the Government Division in the Department of Prime Minister and Cabinet on (02) 6271 5399.

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