



National Anti-Corruption Commission

FOI 26/14 – Document A

Engagement of Counsel

Extract of the Legal Services Directions 2017 (Cth) (LSDs) - Legal Services Directions 2017 - Federal Register of Legislation

Appendix A – 6 Engagement of counsel

1 Counsel are to be engaged by or on behalf of a non-corporate Commonwealth entity in accordance with the Directions on *Engagement of Counsel*, at Appendix D.

Appendix D—Engagement of counsel

1 The Commonwealth policy in engaging counsel is to seek to rely on its position as a major purchaser of legal services in agreeing on the level of fees payable to counsel engaged on behalf of the Commonwealth or Commonwealth agencies.

2 Commonwealth agencies and legal service providers are encouraged to brief a broad range of counsel and, in particular, women. While the selection of counsel needs to take into account the interests of the Commonwealth in securing suitable and expert counsel in a particular case, this is not to occur in a manner which results in a narrow pool of counsel for any particular category of Commonwealth work.

Application

3 The policy applies to the engagement of counsel by Commonwealth agencies themselves or by private lawyers who are acting for the Commonwealth or Commonwealth agencies. The policy also applies to lawyers who, although not from the bar, are briefed as counsel in lieu of a private barrister to conduct or advise on litigation for the Commonwealth or Commonwealth agencies.

4 The policy applies to briefs to advise and briefs to appear before courts, tribunals and inquiries. It also applies to the use of counsel to represent the Commonwealth or Commonwealth agencies in arbitration and other alternative dispute resolution processes. Briefs should ordinarily be marked with an hourly rate up to a maximum daily rate inclusive of conferences, consultations, preparation and other necessary work. A fee on brief (inclusive of preparation time) is only to be marked if it is considered more economical than agreeing to pay a fee based on the appropriate hourly or daily rate for the counsel.

Rules about selection of counsel

4C All barristers are to be selected for their skills and competency independently of their gender. A Commonwealth agency is to ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers or to limit the range of barristers being considered for the brief.

Fees payable to counsel

4E A Commonwealth agency that proposes to brief a counsel who does not have an approved rate for performing Commonwealth legal work, is to ask OLSC to approve an initial rate, even if the agency proposes to brief the counsel at a rate below the applicable threshold specified in paragraph 5. If OLSC is asked to approve an initial rate, OLSC is to make a decision about the request within a reasonable time and tell the agency about its decision as soon as practicable after the decision is made.

5 Senior counsel are not to be paid a daily rate above \$3,500 (inclusive of GST) without the approval of the Attorney General. Junior counsel are not to be paid a daily rate above \$2,300 (inclusive of GST) without such approval. Any out of chamber fee is to be treated as part of the daily rate for the purpose of considering the appropriateness of that rate. Where an out of chamber fee is agreed or approved, it is to be marked separately on the brief.

6 Hourly rates greater than one sixth of the daily rate are not to be agreed with counsel unless approved by the Attorney General.

7 A cancellation fee is to be agreed with counsel only in exceptional circumstances (eg to cover the possibility of a matter being resolved shortly before a lengthy trial). Any such fee is to be agreed at the time counsel is engaged for a trial. A cancellation fee greater than two days of counsel's normal Commonwealth rate is to be approved by the Attorney General before it is agreed with counsel.

8 Payment of retainers (concerning counsel's availability for future matters), both new and renewed, is not ordinarily to be agreed with counsel and, if considered to be justified, the terms of the agreement are first to be approved by the Attorney General.

Extract of the Public Governance, Performance and Accountability Act 2013 (Cth) (PGPA Act) - Federal Register of Legislation

Subdivision D—Special provisions applying to accountable authorities of non-corporate Commonwealth entities

23 Power in relation to arrangements and commitments

- (1) The accountable authority of a non-corporate Commonwealth entity may, on behalf of the Commonwealth:
 - (a) enter into arrangements relating to the affairs of the entity; and
 - (b) vary and administer those arrangements.
- (2) An **arrangement** includes a contract, agreement, deed or understanding.
- (3) The accountable authority of a non-corporate Commonwealth entity may, on behalf of the Commonwealth, approve a commitment of relevant money for which the accountable authority is responsible

NACC procedure on engaging and appointing external Counsel Assisting

- 1) Any legal practitioner who is employed by the Commission may assist the Commissioner in the role of Counsel Assisting at a hearing.
- 2) Section 265 of the *National Anti-Corruption Commission Act 2022* (Cth) provides that the CEO may appoint a legal practitioner to assist the NACC or a NACC Commissioner as counsel:
 - (a) generally; or
 - (b) in relation to a particular corruption investigation.
- 3) Some factors when considering whether it would be appropriate to engage external counsel as Counsel Assisting include:
 - a. the corruption investigation is, or is likely to be, lengthy or complex,
 - b. internal legal practitioners do not have the capacity or expertise needed to act as Counsel assisting, or
 - c. the corruption investigation will involve, or is likely to involve, public hearings.
- 4) Prior to the engagement of external counsel, a request will be sent to the CEO from the Commission lawyer assisting with the investigation seeking approval under the *Public Governance, Performance and Accountability Act 2013* (Cth) to engage a particular external counsel.