

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE  
ATTORNEY-GENERAL'S DEPARTMENT

**Output 1.2**

**Question No. 18**

**Senator Ludwig asked the following question at the hearing on 14 February 2006:**

Legal Services Directions:

- (a) please provide details of the four breaches of the legal services directions.
- (b) what directions have been issued in respect of remedial action?

**The answer to the honourable senator's question is as follows:**

In the current 2005–06 financial year to 7 March 2006, OLSC has recorded four breaches. Details of those and remedial action taken are as follows:

1. The Australian Customs Service breached the model litigant policy and the Australian Government Solicitor (AGS) was involved in the breach. The breach occurred through the failure to abide by an implied undertaking to the Federal Court not to use, for any extraneous purpose, documents filed pursuant to a court's compulsory processes/orders but not received into evidence.

To prevent such breaches in the future, Customs have developed a Customs Legal Service Instruction (LSI) outlining the requirements for use of information obtained through a compulsory court process. The LSI has been issued to all Customs staff and included on the Customs intranet.

AGS have taken the following steps to remedy and prevent further breaches:

- i. they obtained an order from the Federal Court permitting the Commonwealth, its servants and agents to be released from their implied undertaking, so as to permit the continuing use of a particular affidavit in the relevant proceedings
  - ii. they published a Legal Briefing on the topic of Implied Undertakings and distributed it to Commonwealth clients
  - iii. they reminded all AGS lawyers of the obligations pertaining to Implied Undertakings, and
  - iv. they revised their internal guidance material for AGS lawyers to include information on these obligations.
2. The Dairy Adjustment Authority (DAA) engaged counsel at rates above the threshold limit set by the Directions without approval from OLSC.

The DAA has amended its internal guidelines relating to matters before the Administrative Appeals Tribunal (AAT) to require that the Directions be

complied with in relation to the conduct of appeals before the AAT, varied its services contract with its legal service provider requiring general compliance with the Directions and has implemented internal guidelines for instructing external lawyers to ensure that the Directions are adhered to when briefing external lawyers.

3. The Australian Taxation Office (ATO) engaged a senior counsel at a rate that had one-off approval for another agency, but which was in excess of that counsel's generally approved rate.

The ATO has reviewed its existing instructions to its legal staff to ensure that on any occasion it is proposed to engage counsel at rates in excess of those set out in paragraph 5 of Appendix D of the Directions, officers first check with OLSC as to whether approval has been given for the higher rate. OLSC has received a copy of these revised instructions to the ATO's legal staff.

4. The ATO breached the model litigant obligation by not honouring an undertaking to withdraw a statutory demand.

The ATO took remedial action by tightening procedures to ensure improved case management and follow up. An appropriate costs order was made in favour of the taxpayer in this case.

No matter specific Directions have been issued in respect of remedial action during 2005/06.