

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
BUDGET ESTIMATES 2017

Attorney General's Department

Program: 1.1 AGD Operating Expenses - Civil Justice and Legal Services

Question No. BE17-015

Senator Kakoschke-Moore asked the following question on 24 May 2017:

Senator KAKOSCHKE-MOORE: To clarify, there will not be a review of the legal services direction?

Senator Brandis: This issue has not been raised with me before, so I have not thought about it. I am not minded to unless I was persuaded that there is a manifest deficiency in the way the legal services direction operates.

Senator KAKOSCHKE-MOORE: In this instance, it has operated to the effect that in a test case, which the Commonwealth brought to the courts, the Commonwealth was able to grant itself five times the legal power that it granted the respondent.

Senator Brandis: As I said, I do not know enough about the case or what the issues were. In fact, I know nothing about the case—

CHAIR: Perhaps, if you were to take it on notice, and then, if there is a fuller answer that might help Senator Kakoschke-Moore, that might be the way to do it—if you can add something to what has already been said.

Senator Brandis: I am not quite sure what question I am taking on notice. I do not need to take on notice the question 'Am I considering changing the legal services direction?' because I am not.

CHAIR: Perhaps I should not have started when you were not here, Attorney, but my assessment of the thing is that, if it were taken on notice, a complete answer could be given to the senator. There is some merit, in my view, in what she says. Although, I will make the point that, unfortunately, that is the legal system. If you ever want to take on one of the corporate giants, senator, you will find you are always out gunned and out spent in legal fees.

Senator KAKOSCHKE-MOORE: Perhaps, Attorney, to assist in your consideration you can have a look at the question and the response that was given to Senator Xenophon's question by you. And then have a look at the Hansard of the discussion that took place prior to your—

Senator Brandis: I am very happy, given that you have raised it in good faith, to consider what you say. That might be a better and more satisfactory way of dealing with the matter than for me to take on notice a question when I do not even know really what the question is. Why don't I say to you that I will look at what you have said in the committee this afternoon and I will consider the matter and get some advice.

The response to the honourable Senator's question is as follows:

Paragraph 2 of Appendix B to the *Legal Services Directions 2017* provides that 'the obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth...'

Appendix B of the *Legal Services Directions 2017*, at Note 4, further provides:

The obligation does not prevent the Commonwealth and Commonwealth agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and Commonwealth agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or a Commonwealth agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)

The payment by the Commonwealth of another party's costs in a test case when it is in the public interest to do so is consistent with the Commonwealth's obligation to act as a model litigant. There is no additional obligation to ensure that another party's costs equal the costs incurred by the Commonwealth.