

# CONSTITUTIONAL LAW GUIDEBOOK

## WRITING A LEGAL ADVICE

### **The importance of legal advice-writing**

During your time at Law School, you will have learned how to answer problem-type questions for exams and assignments. This is an important skill, because it trains you how to abstract the relevant facts from the irrelevant, identify the legal issues, state the law relevant to the issues, apply the law to the facts and then come to a conclusion on the issues.

Unfortunately for law students, clients do not want answers in the same format that one would use in answering exam questions. In learning how to write a legal advice (sometimes called an 'opinion') you will build on problem-solving skills and take them one step further, applying them in a way that will be useful during your career. This will be so irrespective of whether you enter private practice or work in a government department or the corporate sector, because if you use your law degree in any of those environments, you are likely to be asked to prepare a legal advice for your employer.

The most important feature of a legal advice which distinguishes it from other types of legal writing is that it must be presented in a specific format. The format I have chosen for the fictional advice that follows is based on that used by the Australian Government Solicitor (AGS). Law firms may have their own formats that differ from that used by AGS, but having learned how to use one format, it will be easy for you to comply with any other, because the objectives of all are the same: to present the information in a way that meets the client's needs as closely as possible.

### **The request for advice**

Although you may sometimes receive an oral request for legal advice, it is most usual for such a request to be written, either in a letter or in an email. This presents the recipient with the first challenge, which is to determine what questions the client wants answered. Some clients provide clear questions, but on other occasions it is necessary to abstract from the client's letter precisely what they are asking. However, because the questions you must answer are the questions the *client* wants answered (rather than the ones you think they should have asked!), it may be necessary to contact the client to ascertain that your understanding of what the questions are corresponds with theirs and, if necessary, to obtain confirmation from the client that they are happy for you to include questions additional to those they asked if you think this is necessary to give full advice. This process of settling the questions is important because, as we will see, you must present the advice in a question and answer format.

The example of a request for legal advice that I have provided is relatively clear - it is apparent from the text of the client's letter what questions they want answered, but that is not always the case.

### **The format of the advice**

The example of a fictional legal advice (given in response to the example of a request for advice) is laid out in a format based on that used by AGS. Although you may not yet be familiar with the specific area of law addressed by the advice (it is covered in Chapter 8 of the book), don't worry about that - the purpose of the example is to familiarise you with the way to present a legal advice.

# CONSTITUTIONAL LAW GUIDEBOOK

You must use this format in drafting your answer to the assignment question. There are a number of stylistic points to note about the answer:

1. Insert page numbers as a footer on the right hand side of the page, omitting the first page. The AGS template does this automatically, but you can do it using the relevant word-processing command.
2. If the client's request for advice contained a reference number, you must cite that number in your advice. If the client's request did not contain a reference number, leave a blank after 'Your ref.'
3. Always include your own reference number, which will usually be the file number allocated to the legal matter by your firm or department.
4. Before the date it is best to put the word **DRAFT** in bold. This is because it is usual for the advice to be initially sent to the client as an email attachment, and for the client to be given time after receiving the advice to decide whether aspects of it need clarification or additional questions need to be answered. If no changes are necessary, the original advice will be signed and sent in final form as a hard copy (with the word **DRAFT**) removed. If further work is done, a new draft advice (with the required change of date) will be emailed for further consideration by the client.
5. Remember to address the advice to the person whom the client has nominated as recipient - which may be a different person from the person who contacted you for the advice.
6. The advice must contain a subject heading, underlined and in bold.
7. The first sentence of the advice acknowledges the request, stating who in the client's office sent the advice, who in your office received it (which may be you or another lawyer who referred it on to you) and the date on which the request was received.
8. The next sentence tells the client how the advice is structured: that you have presented the client's questions with short answers, followed by a longer analysis in the 'Reasons for answers' section. In the case of the AGS, the author of the opinion is speaking on behalf of the organisation as a whole, and so refers to 'we' and 'us' even if they are the sole author of the opinion (other law firms may have a different convention).
9. After this introduction comes the body of the advice. Note the stylistic requirements relating to headings: those for 'Questions and answers' and 'Reasons for answers' are bold and in capitals; the heading entitled 'Background' and each of the client's questions (which become headings in the advice) are bold; headings within the discussion of each question are also in bold.
10. Next follows the client's questions and your brief answers. Note however, that in practice you will be in a position to put the summary answers in only after you have written the advice itself. Each of the client's questions is contained in a numbered, indented

# CONSTITUTIONAL LAW GUIDEBOOK

paragraph and is in italics. Each answer is also indented but is in plain font. The summary answers must enable the client at a glance to know the essence of the legal advice.

11. The next section, 'Reasons for answers', contains the detailed analysis of the client's questions.
12. It begins with a section entitled 'Background', which briefly outlines the factual background of the client's questions (it is perfectly permissible to copy this from the client's request for advice) and any relevant statutes upon which they want advice. There is no hard and fast rule about where to put extracts from statutes - in some cases it is convenient to cite them at the beginning, while in others you may quote statutes in your answers to the specific question to which they are relevant. The AGS template has a word-processing facility whereby section, sub-section and lower divisions in legislation can be reproduced exactly as they appear in statutes. For your purposes it is sufficient to cut and paste legislation from ComLaw, Lexis, Austlii or Westlaw and manually adjust the sections and subsections if this necessary in order to make them look like the statute.
13. Note that if there is a particular statute that is the main focus of the advice, that statute is thereafter referred to as 'the Act' after it is first mentioned (which could be in the opening sentence of the advice, in one of the questions and short answers or in the body of the advice).
14. Note also that when a statute is first mentioned its full citation is given and it is written in italics - for example 'the *Dog Licensing Act 1952 (Vic)*' - but that thereafter it is referred to simply as 'the Dog Licensing Act', with no year, jurisdiction or italics.
15. It is also permissible to use an abbreviation for a statute where such an abbreviation is in common use - so one could write as follows: 's 35 of the *Corporations Act 2001 (Cth)* (the CA Act)' and then refer to 'the CA Act' throughout the advice. Note that the Commonwealth Constitution is simply referred to as 'the Constitution', while State Constitutions are referred to in the same way as any other Act.
16. After the 'Background' section come the reasoned answers to the client's specific questions. Each of the client's questions is reproduced in bold.
17. In this part of the advice you will use the skills of legal analysis you have learned in answering problem questions - that is, applying the law to the issues (the client's questions) leading to a conclusion. In this part of the advice it is vitally important to analyse *all* relevant legal arguments - including those that are *adverse* to your client, and those which you ultimately reject, because otherwise the legal advice will not be comprehensive. Only if the client has been presented with all the pros and cons of their legal position can they make fully informed decisions about what course of action to adopt.
18. The AGS template automatically numbers paragraphs through the advice. You will need to do this using the paragraph-numbering facility of your word-processing programme.

# CONSTITUTIONAL LAW GUIDEBOOK

This numbering is important for purposes of convenient reference to the advice by the client.

19. Note that since, other than in the most clear-cut of cases, no-one can give legal advice with absolute certainty, advices are peppered with phrases such as ‘in our opinion’, ‘it is our view’, ‘although an argument could be made to the contrary’, ‘although a court might find otherwise’, ‘we think it more likely than not’, ‘it is probable that’ *et cetera*. Remember also to include these qualifying phrases in the short answers at the start of the advice.
20. Where case authority is referred to, the full citation of the case must be given every time it is referred to, unless it is referred to in the same numbered paragraph, in which case it can be referred to in an abbreviated fashion. When citing cases, the names of the parties are always in italics, and everything after that is *not* in italics.
21. It is also important to refer to the judge or judges who made the legal finding upon which you rely, and to indicate the page numbers at which their dictum may be found. As an alternative to page numbers, you may refer to paragraph numbers (where the law reports have them), using square brackets. Although searching for specific page numbers is time-consuming, it is a vital legal research skill. A case reference is of little use to a client without this information, particularly if the advice is going to be relied upon in preparing for litigation when the cases have to be cited in court. You will soon become proficient at skim-reading law reports in order to find key passages and at searching for them using legal databases. Where a dictum was part of a dissenting judgment (and thus not binding) this fact should be mentioned.
22. If there are any particularly important judicial statements which encapsulate the law and which are longer than two lines of text, you should quote them in an indented paragraph.
23. The final paragraph of the advice relating to each question should contain your conclusion, which also forms the basis of your short answer at the beginning of the advice, although note that the short answer will be more than a bare conclusion and should state the main reason (although there may be more than one) which led to the answer.
24. The advice should end with a statement as to whether anyone-else in the organisation has read and confirmed your advice (a very common procedure in the case of junior practitioners). You should also tell the client that they can contact you with any questions. Finally, you should insert your signature block with your contact details.

Our ref: 251060

Trade Practices Commission  
P O Box 25  
Canberra, ACT 2600

4 April 2009

Dear Mr / Ms Student

Application of s 152CP of the *Trade Practices Act 1974*

In October 2008 Commission was notified by Froggy Communications Ltd that negotiations between Froggy Communications and National Telephony Ltd over access by Froggy Communications to National Telephony's network had broken down. Froggy Communications then requested that we use our powers under part XIC of the *Trade Practices Act 1974* to arbitrate between Froggy Communications and National Telephony.

However, we are concerned that should the Commission, exercising its arbitration powers, make a determination under s 152CP of the Act requiring National Telephony to provide access to Froggy Communications, the determination might be subject to challenge on the ground that it amounts to an acquisition of property from National Telephony. Is this correct and, if so, upon what basis would compensation have to be paid to National Telephony – could we take the public interest into account in determining such compensation?

We would be grateful to receive your advice by 2 May 2009.

Yours sincerely

Rosa Sparks  
Senior Legal Officer  
Compliance Branch

Our ref. 07326252  
Your ref 251060

DRAFT 28 April 2009

Ms Rosa Sparks  
Senior Legal Officer  
Compliance Branch  
Trade Practices Commission  
P O Box 25  
Canberra, ACT 2600

Dear Ms Sparks

***Application of s 152CP of the Trade Practices Act 1974***

---

Thank you for your letter of 4 April 2008, addressed to Mr Able Student, in which you requested advice on the application of s 152CP of the *Trade Practices Act 1974 (Cth)* (the Act).

Your questions, our answers to those questions, and the reasons for our answers are set out below.

**QUESTIONS AND ANSWERS**

*Q 1* Would a determination by the Australian Competition and Consumer Commission (the ACCC) under s 152CP of the Act requiring National Telephony to provide access to its network to another service provider amount to an acquisition of property?

A Although it would be possible to make arguments to the contrary, we are of the view that a determination made by the ACCC under s 152CP of the Act would not amount to an acquisition of property under s 51(xxxi) of the Constitution, as s 152CP would be more likely to be seen either as a law enacted under s 51(v) of the Constitution rather than under s 51(xxxi).

*Q 2* If compensation was payable, upon what basis would compensation to National Telephony be assessed – would the public interest be taken into account in determining compensation?

A The requirement to pay just terms compensation upon the acquisition of property has been interpreted as requiring that compensation be paid at prevailing market rates. Furthermore, it is not permissible to take the public interest served by the acquisition into account in determining the amount of compensation that is payable.

## REASONS FOR ANSWERS

### Background

1. Froggy Communications Ltd has been engaged in negotiations with National Telephony Ltd, in relation to a request by Froggy Communications Ltd for access to the National Telephony network. Those negotiations have broken down, and Froggy Communications Ltd has requested that the ACCC use the arbitration powers conferred on it by s 152CP of the Act to make a determination in relation to the dispute.
2. Section 152CP appears in Part XIC of the Act, which establishes a telecommunications access regime. Section 152AA, which provides an outline of Part XIC, states that certain telecommunications carriage services may be declared to be 'declared services' by the ACCC. Telecommunications service providers who provide declared services are subject to access obligations – in other words, must provide access to their carriage network to other telecommunications service providers. If the carriage service provider and the entity seeking access to their network cannot agree on the terms of access, then s 152CP of the Act empowers the ACCC to arbitrate their dispute by determining the terms upon which access must be granted.
3. The relevant parts of s152CP of the Act are as follows:

#### **152CP Determination by Commission**

- (1) Unless the Commission terminates the arbitration under section 152CS, the Commission must make a written determination on access by the access seeker to the declared service.
  - (2) The determination may deal with any matter relating to access by the access seeker to the declared service including matters that were not the basis for notification of the dispute. For example, the determination may:
    - (a) require the carrier or provider to provide access to the declared service by the access seeker; or
    - (b) require the access seeker to accept, and pay for, access to the declared service; or
    - (c) specify the terms and conditions on which the carrier or provider is to comply with any or all of the standard access obligations applicable to the carrier or provider; or
    - (d) specify any other terms and conditions of the access seeker's access to the declared service; or
    - (e) require a party to extend or enhance the capability of a facility by means of which the declared service is supplied; or
    - (f) specify the extent to which the determination overrides an earlier determination relating to access to the declared service by the access seeker.
4. A determination by the ACCC may require the transfer of an economically valuable asset from the owner of a network to the party seeking access to the network. However, the question remains as to whether this amounts to an acquisition of property under s 51(xxxi) of the Constitution such as would trigger an obligation to pay just terms compensation.

5. Where acquisition of property does occur, s 152EB of the Act provides as follows:

**152EB Compensation for acquisition of property**

- (1) If:
- (a) a determination would result in an acquisition of property; and
  - (b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated;
- the Commonwealth must pay that person:
- (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
  - (d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.
- (2) In assessing compensation payable in a proceeding begun under this section, the following must be taken into account if they arise out of the same event or transaction:
- (a) any damages or compensation recovered, or other remedy, in a proceeding begun otherwise than under this section;
  - (b) compensation awarded under a determination.
- (3) In this section:

**acquisition of property** has the same meaning as in paragraph 51(xxxi) of the Constitution.

6. The meaning of ‘compensation’ depends upon how that term has been interpreted in cases in which s 51(xxxi) of the Constitution has been applied.

**Would a determination by the Commission under s 152CP of the Act requiring National Telephony to provide access to its network to another service provider amount to an acquisition of property?**

7. Section 51(xxxi) of the Constitution confers on the Commonwealth Parliament a power to make laws for

the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

**When does an acquisition of property occur?**

8. Whether a law is one for ‘the acquisition of property’, thus triggering the obligation to pay just terms compensation, is a matter of characterisation. Prima facie, a law in terms of which the Commonwealth deprives a person of their property rights is a law falling within the scope of s 51(xxxi). Furthermore, it should be noted that in *Minister for the Army v Dalziel* (1944) 68 CLR 261, Starke J held (at 290) that ‘property’ includes

..every species of valuable right and interest, including real and personal property, incorporeal hereditaments, such as rents and services, rights of way, rights of profit or use in the land of another and choses in action.

In light of this definition, the right to access and use National Telephony’s network would be ‘property’ within the meaning of s 51(xxxi).

9. For an 'acquisition' of property to have occurred, it necessary that the Commonwealth have acquired the property either for its own benefit or for that of a third party (see *Smith v ANL Ltd* (2000) 204 CLR 493 at 556-57 per Callinan J). On the facts you have given us, it appears that if the ACCC were to determine that Froggy Communications should be given access to the National Telephony network, it would be ordering the acquisition of property from National Telephony and its acquisition by Froggy Communications.

#### **Exceptions to the requirement to pay compensation**

10. There are circumstances in which an acquisition of property may occur without giving rise to the obligation to pay compensation. It would be possible to construct an argument to the effect that in exercising its powers under s 152CP, the ACCC was regulating the use of National Telephony's network rather than acquiring National Telephony's property. In *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 per Stephen J at 413-16, it was held that where a law of the Commonwealth merely regulates the use of property, rather than acquires property, s 51(xxxi) does not apply (see also *Tasmania v Commonwealth* (1983) 158 CLR 1 per Mason J at 145, per Murphy J at 181 and per Brennan J at 247-8). However, as was stated by Stephen J in *Tooth* (at 313), the boundary between acquisition and regulation is one of degree. In our view, a court would be more likely to characterise a determination requiring National Telephony to give Froggy Communications access to its network as the acquisition of an asset from National Telephony, rather than as the regulation by of National Telephony's own use of that asset.
11. A stronger argument that an exercise by the ACCC of its powers under s 152CP does not amount to an acquisition is that Part XIC of the Act, of which s 152CP is a part, is not a law made under s 51(xxxi) for the acquisition of property, but is rather a law made under s 51(v) relating to telecommunications. In *Mutual Pools and Staff Ltd v Commonwealth* (1994) 179 CLR 155 it was held (per Mason CJ at 171) that where the Commonwealth acquires property as an incidence of the operation of a law enacted under a power other than s 51(xxxi) for the purpose of 'resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship', no acquisition under s 51(xxxi) occurs.
12. Whether this exception to the s 51(xxxi) obligation to pay just terms compensation is applicable depends upon a characterisation of the law which has led to the acquisition. In determining whether laws should be characterised as falling within the scope of s 51(xxxi) or of another power, the High Court has adopted the approach of asking whether the law is an 'appropriate and adapted', or 'proportional', method of achieving a purpose inherent in a head of power other than s 51(xxxi) (see *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 275-6 per Deane and Gaudron JJ and *Airservices Australia v Canadian Airlines International* (1999) 202 CLR 133 per Gleeson CJ and Kirby J at [98-100] and McHugh J at [337] and [348-49]). This process of characterisation is not precise (see dicta by Kirby J in *Smith v ANL Ltd* (2000) 204 CLR 493 at [99 – 108]), but in our view, it is more likely that not that a court would find that Part XIC of the Telecommunications Act is a law which is reasonably appropriate and adapted to the regulation of relationships between the owners of a network (such a National Telephony) and those seeking access to the network (such a Froggy Communications).
13. Although the matter is not beyond dispute, we are of the view that if the ACCC was to use its s 152CP power to order that access be provided by National Telephony to Froggy Communications,

a court would be likely to find an acquisition of property under s 51(xxxi) would not have occurred, and that just terms compensation would not be payable.

**If compensation was payable, upon what basis would compensation to National Telephony be assessed – would the public interest be taken into account in determining compensation?**

14. As stated above, s 152EB of the Act provides that if the Commonwealth *is* found to have acquired property within the meaning of s 51(xxxi), compensation must be paid by the Commonwealth.
15. The High Court has held that ‘just terms compensation’ under s 51(xxxi) means compensation at the market value of the property (*Nelungalo Pty Ltd v Commonwealth* (1948) 75 CLR 495 per Latham CJ at 540).
16. The High Court has addressed the specific issue of whether, in assessing compensation, account is taken of the fact that the acquisition of property is in the public interest – in other words, whether the person from whom the property is acquired should receive less than market value because of that fact. That approach was rejected by Brennan J in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-11, who stated:

In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large.

The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.

This approach was affirmed by Gleeson CJ in *Smith v ANL Ltd* (2000) 204 CLR 493 at 500.

17. In our view, therefore, the public interest would not be taken into account by a court determining just terms compensation if such compensation was payable.

This advice was read by Ms Superior Intelligence, Chief General Counsel, and she agrees with its contents. Please contact me if you have any questions in relation to this advice.

Yours sincerely

**Able Student**

Senior Counsel

Office of General Counsel

Australian Government Solicitor

T 02 6252 1111 F 02 6252 1112

[able.student@ags.gov.au](mailto:able.student@ags.gov.au)