

## 3.14 LEGISLATION AFFECTING PROCUREMENT

### INTRODUCTION

- 1 This chapter applies to all procurement undertaken in Defence and the Defence Materiel Organisation (DMO).
- 2 This chapter details key Commonwealth, State and Territory legislation that may affect Commonwealth procurements, including:
  - consumer protection legislation;
  - superannuation legislation;
  - workers compensation legislation;
  - taxation legislation;
  - privacy legislation;
  - anti-discrimination legislation;
  - occupational health and safety legislation; and
  - environmental legislation.
3. This chapter does not address the *Financial Management and Accountability Act 1997* (Cth), or the *Financial Management and Accountability Regulations 1997* (Cth). For further information on this legislation refer to chapters 1.2 and 1.4.

### MANDATORY POLICY

- **Any Defence contract for services must require the contractor, its officers, employees, agents and subcontractors to comply with Defence Instruction (General) Personnel 35-3 - *Management and Reporting of Unacceptable Behaviour*.**
- **Procurement officers must ensure that contracts comply with applicable legislative requirements, including those outlined in this chapter.**

### OPERATIONAL GUIDANCE

#### IMPLICATIONS FOR DEFENCE CONTRACTS

- 4 Specific clauses often need to be included in tender and contract documentation to cover issues such as privacy, occupational health and safety and superannuation as a consequence of legislative requirements in these areas. Standard Defence templates will normally include such clauses, but advice should be sought from a procurement or legal specialist if you consider that further clauses may be necessary.
- 5 Where the applicability of specific legislation is uncertain, procurement officers should seek legal advice.

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**APPLICABILITY OF STATE AND TERRITORY LEGISLATION**


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- 6 The application of State and Territory laws to the Commonwealth is a complex area of the law involving questions of Commonwealth immunity and statutory interpretation. Consideration needs to be given to whether the State or Territory legislation is intended to have the effect of binding the Commonwealth and whether the Commonwealth is in fact bound.
- 7 For contractual dealings, it is generally accepted that the Commonwealth can be bound by State and Territory legislation as long as there is no inconsistency with a Commonwealth law and the State and Territory law intends to bind the Commonwealth. This means that when setting up a contract, consideration may need to be given to the possible applicability of relevant State laws, e.g. State environmental and planning laws and laws relating to contracts and rental arrangements. Procurement officers should seek legal advice where the applicability of State and Territory laws is uncertain.

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**CONSUMER PROTECTION LEGISLATION**


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- 8 Key legislation relating to Commonwealth procurement includes the *Trade Practices Act 1974 (Cth)* (TPA) and the *Sale of Goods Acts* and *Fair Trading Acts* in each State and Territory.

**Trade Practices Act 1974**

- 9 The object of the TPA is to promote competition and fair trading and provide for consumer protection. The TPA may imply conditions as to title, correspondence with description, merchantable quality and fitness for purpose into contracts for the supply of goods by a corporation to a consumer. Specific definitions of 'goods', 'consumer' and 'corporation' in the TPA need to be satisfied before the Act can apply. As such the above provisions may not apply to many Simple procurements and most Complex and Strategic procurements.
- 10 The TPA regulates a range of activities designed for consumer protection and prohibits discrimination likely to substantially lessen competition such as:
- Misuse of market power;
  - Exclusive dealings;
  - Resale price maintenance;
  - Acquisitions that would substantially lessen competition;
  - Unconscionable conduct;
  - Misleading or deceptive conduct; and
  - False or misleading representations.
- 11 Where Commonwealth agencies carry on the activities of a business either directly or indirectly, they are bound by the TPA (section 2A). The current legal position is that the TPA does not apply to the Commonwealth in relation to the procurement, sustainment and disposal of goods or services acquired for the defence of the Commonwealth. These are functions of the Commonwealth and do not amount to the carrying on of a business.
- 12 In other words, the current legal position is that Defence, in respect of its procurement activities, is not carrying on a business for the purposes of the TPA. Notwithstanding this, it is best to assume that all interactions with tenderers during the tender process, including briefing sessions and negotiations, are potentially challengeable by them whether or not this challenge occurs under the TPA.

- 13 Further, this does not mean that procurement officers are excused from the need to ensure that all information given to tenderers is accurate and consistent, that all conditions in the tender documentation are adhered to, and that all communications are consistent with those conditions.

#### **Sale of Goods Acts and Fair Trading Acts**

- 14 The *Sale of Goods* and *Fair Trading Acts* in each State and Territory imply certain warranties as to title, quality and fitness for purpose in contracts of sale. Implied warranties include:
- the right of the seller to sell the goods;
  - the goods correspond with the description; and
  - the goods are of merchantable quality and are fit for the purpose for which they were sold.
- 15 These warranties may be applicable to all contracts unless excluded or modified by the terms of the contract. Defence does not normally agree to exclude the warranties implied in the *Sale of Goods* and *Fair Trading Acts* are not excluded.
- 16 Where a potential supplier wishes to modify clauses in the contract documentation issued by Defence, procurement officers should be cautious about accepting clauses which attempt to modify or exclude the provisions of the TPA, *Sale of Goods Acts* or *Fair Trading Acts* and legal advice may need to be sought. For example, a clause that states “all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded” should not be included in a contract.

#### **SUPERANNUATION LEGISLATION**

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- 17 Under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SG Act), an employer is required to provide a minimum level of superannuation support for all employees. The SG Act also provides for an extended definition of the terms ‘employer’ and ‘employee’ for the purposes of the Act.
- 18 Some contractors and consultants are employees for superannuation guarantee purposes only due to the fact that they work under a contract which is wholly or principally for their labour. These contractors and consultants are not common law employees and are therefore not entitled to join the Public Sector Superannuation Accumulation Plan. The Australian Government Employees Superannuation Trust (AGEST) is the appropriate fund in these cases.
- 19 To determine whether there is an obligation to make provision for superannuation contributions for individuals (that is, whether an individual is an employee or an independent contractor), procurement officers need to understand the nature of the arrangements they are entering into with contractors. In this regard, Australian Taxation Office Superannuation Guarantee Rulings (SGR) [SGR 2005/1](#) (who is an employee), [SGR 2005/2](#) (work arranged by intermediaries) and [SGR 2009/2](#) (meaning of the terms ‘ordinary time earnings’ and ‘salary or wages’) are all relevant for determining who is an employee and upon what basis employer superannuation contributions are to be calculated for the purposes of the SG Act.
- 20 If there is a superannuation liability, it is then the responsibility of the procurement officer to calculate the extent of the superannuation contribution and raise a purchase order for the calculated amount. For further advice on superannuation liability for contracted personnel, procurement officers should contact the Directorate of Superannuation on (02) 61272540.

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**TAXATION**

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- 21 Defence may have an obligation to withhold a percentage of the invoiced amount when making payments against invoices submitted by suppliers, depending on the status of the supplier and any agreements they may have with the Australian Taxation Office.
- 22 In accordance with Schedule 1 of the *Taxation Administration Act 1953* (Cth), Defence may be required to withhold 46.5% of all payments where a supplier fails to provide their Australian Business Number. This provision applies to all contracts. There are circumstances however where a person need not have an Australian Business Number and Defence is not required to withhold 46.5%, that is:
- the supply is made to Defence in their capacity as an individual, in the course of an activity that is a private recreational pursuit or hobby;
  - the supply is wholly of a private or domestic nature;
  - the supplier (or the supplier that they represent) is non-resident and not carrying on an enterprise in Australia; or
  - the whole of the payment that they (or the supplier that they represent) will receive for the supply is exempt from income tax.
- 23 The Defence Tax Management Office recommends obtaining and holding on file a signed 'Statement by Supplier' form ([ATO form number NAT 3346-04.2008](#)) to confirm the reason the supplier has not provided an Australian Business Number.
- 24 Defence may incur additional taxation obligations to withhold Pay As You Go taxation instalments, against invoices submitted by the supplier when entering into a contract with certain legal entities, particularly natural persons, sole traders and partnerships. This may occur in the following circumstances:
- the supplier, whether holding an Australian Business Number or not, enters into a voluntary agreement with the Australian Taxation Office to make its payments subject to Pay As You Go withholding; or
  - the supplier is deemed to be an employee of Defence for taxation purposes.
- 25 Where the supplier has elected to have its invoices subject to Pay As You Go instalments, Defence is required to withhold either 20% or another amount agreed between the Commissioner of Taxation and the supplier under a withholding agreement. The supplier is obliged, under its withholding agreement, to advise Defence of the amount of Pay As You Go taxation to be withheld in respect of invoices lodged by them. Before agreeing to action any request to withhold an amount of less than 20%, a copy of the withholding agreement is to be obtained by the procurement officer. A copy of the withholding agreement must be maintained, on file, for a minimum period of five years after the final payment has been made against the contract.
- 26 Where a supplier is deemed to be an employee of Defence, Pay As You Go taxation amounts will be required to be withheld by Defence from payments made under the contract. The employee/employer relationship test, set out in Chapter 4.10, is to be used to determine if a supplier is deemed to be an employee of Defence for taxation purposes.
- 27 Further advice and information about Pay As You Go taxation, withholding agreements and payment summary requirements can be obtained from the Defence Taxation Management Office phone 1800 806 053 or via email at [taxation.management@defence.gov.au](mailto:taxation.management@defence.gov.au).

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**WORKERS COMPENSATION**

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- 28 Employers are obliged by legislation to provide workers compensation coverage, for their employees, against injuries incurred during the course of employment.
- 29 Defence standard templates contain clauses to ensure that the supplier's employees are covered for workers compensation purposes by the supplier. The standard clauses may not cover situations where Defence is contracting with natural persons (individuals) who are unable to obtain workers compensation insurance. In these circumstances, it would be appropriate to ensure that the individual has appropriate personal injury insurance.
- 30 When contracting with a natural person, procurement officers should apply the employee/employer relationship test set out in Chapter 4.10 to assist in determining if the supplier will be deemed to be an employee of the Commonwealth for workers compensation purposes.
- 31 Where it is considered that a supplier, who is a natural person, is an employee of the Commonwealth for workers compensation purposes, that supplier will be covered under the *Safety Rehabilitation and Compensation Act 1988*(Cth) as are other Commonwealth employees.
- 32 Comcare, the workers compensation insurer for the Commonwealth, provides safety, rehabilitation and compensation services to Commonwealth agencies. Further advice on whether contracted personnel will be covered by the Commonwealth workers compensation scheme can be obtained from Comcare by telephone on 1300 366 979, via email at [claims.help@comcare.gov.au](mailto:claims.help@comcare.gov.au) or on the Comcare website <http://www.comcare.gov.au>

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**PRIVACY ACT REQUIREMENTS**

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- 33 The *Commonwealth Procurement Guidelines* (CPGs) require agencies to ensure that service providers are aware of their obligations under the *Privacy Act 1988* (Cth) (Privacy Act) at an early stage, by including appropriate advisory provisions in requests for tender, expressions of interest and other tendering documentation. The ASDEFCON suite of templates include clauses to fulfil this requirement.
- 34 The National Privacy Principles set out minimum requirements for business and private sector organisations, including contracted service providers and subcontractors, in relation to the collection, use, disclosure, quality, security, openness, access and correction of personal information. These principles, like the Information Privacy Principles in section 14 of the Privacy Act that apply to Commonwealth agencies, reflect the Organisation for Economic Co-operation and Development data protection principles. The National Privacy Principles are to be applied in conjunction with the Information Privacy Principles.
- 35 It is a requirement of the Privacy Act that contracted service providers, and subcontractors engaged by them, do not breach the Information Privacy Principles, National Privacy Principles 7-10 and section 16F (*Information under Commonwealth contract not to be used for direct marketing*) of the Privacy Act when engaged under contract to the Commonwealth.
- 36 A 'contracted service provider', for the purposes of a government (Commonwealth or State) contract, is defined in section 6 of the Privacy Act as:
- an organisation that is or was a party to the government contract and that is or was responsible for the provision of services to an agency or a State or Territory authority under the government contract; or
  - a subcontractor for the government contract.

**What is required of Defence?**

- 37 Section 95B (*Requirements for Commonwealth contracts*) of the Privacy Act applies to contracts entered into by Defence from 21 December 2001 onwards. The section requires Defence to include provisions in its contracts to ensure that contracted service providers do not perform an act, or engage in a practice, that would breach an Information Privacy Principle if that act was performed, or the practice engaged in, by Defence.
- 38 Defence is also required to include provisions in its contracts to ensure that such acts or practices are not authorised by a ‘subcontract’, which is defined in subsection 95B(4) of the Privacy Act as:
- a contract under which a contracted service provider for the Commonwealth contract is engaged to provide services to:
    - (a) another contracted service provider for the Commonwealth contract; or
    - (b) any agency,
- for the purposes (whether direct or indirect) of the Commonwealth contract.
- 39 Section 95B of the Privacy Act also applies where contracted service providers and subcontractors are located overseas. The Privacy Commissioner has jurisdiction to investigate a complaint made in relation to services or activities of overseas contracted service providers. Section 95B of the Privacy Act does not apply where the services being provided under the contract are not connected with the function of Defence.
- 40 Contracted service provider obligations under a contract will continue to apply in relation to relevant information after the contract has come to an end. It is important that contracted service providers and their subcontractors are made aware of the long term nature of the requirements and are encouraged to make appropriate arrangements (e.g. in relation to the ongoing storage of relevant information).

**Contracts pre-21 December 2001**

- 41 Contracts entered into prior to 21 December 2001 that do not contain privacy clauses are subject to the National Privacy Principles from 21 December 2001 onwards.
- 42 Where privacy clauses in a contract are consistent with the National Privacy Principles, and the contractor breaches a privacy clause in the contract, they may be deemed to have breached a National Privacy Principle. The Privacy Commissioner has jurisdiction to investigate and take appropriate action.
- 43 Where there is an inconsistency between the National Privacy Principles and a Commonwealth contract, privacy clauses in the contract will prevail. Therefore, privacy clauses in Commonwealth contracts entered into prior to 21 December 2001 are enforceable even where they are inconsistent with the National Privacy Principles.
- 44 Unless extended, Defence is not required to amend contracts they have entered into prior to 21 December 2001. However, it is preferred that contracts be reviewed and amended where they are not consistent with the new legislative provisions unless there are specific reasons for not doing so.
- 45 Similarly, where there is an inconsistency between section 16F of the Privacy Act and the provisions of a Commonwealth contract, unless the contractor is required to undertake direct marketing to meet the requirements or obligations of the contract, then the contractor should be made aware of obligations not to engage in any such act.

### **Clauses to Meet Privacy Act Obligations**

- 46 Contracts entered into, or extended, after 21 December 2001 must comply with the requirements of section 95B of the Privacy Act.
- 47 Defence must include privacy clauses in their contracts to ensure that contractors are aware of their obligations to comply with the Information Privacy Principles, the National Privacy Principles 7-10 and section 16F of the Privacy Act. The ASDEFCON suite of templates is compliant with this requirement. It is not sufficient to only include a blanket clause in a contract stating that the contractor must not breach their privacy obligations in relation to the Privacy Act. Detailed or practical provisions for each requirement are required in order to make a contractor fully aware of their responsibilities under the contract.
- 48 The contractor's obligations under the National Privacy Principles may be varied by a contract to allow the contractor to undertake an act or practice that would allow it to meet the requirements or obligations of the contract, so long as the agency abides by the section 95B requirements of the Privacy Act.
- 49 Obligations of the contractor to protect any personal information continue after the completion or termination of the contract.

### **Health Privacy**

- 50 The Privacy Act has been extended to cover the private health sector throughout Australia. The National Privacy Principles promote greater openness between health service providers and consumers in the handling of health information, and include a general right of access for consumers to their own health records. Health service providers are also required to have documentation available clearly setting out their policies for the management of personal information.

### **Complaints Handling**

- 51 The Privacy Commissioner handles and investigates complaints under the Privacy Act, and has wide ranging powers including the ability to obtain information and take evidence under oath. Even where a contractor is subject to an approved privacy code, the Privacy Commissioner retains jurisdiction to investigate the contractor in relation to its obligations under the Privacy Act. Where the complaint concerns an act or practice of a contractor, it is the contractor, not the contracting agency, who is the respondent in the investigation.
- 52 Under certain circumstances, the contracting agency may be substituted for the contractor as respondent in the event of a dispute. This happens where the contractor is no longer available such as in the event of death, bankruptcy or where the contractor ceases to exist. The Privacy Commissioner is required to give the contracting agency the opportunity of appearing before the Privacy Commissioner and to make an oral and/or written submission concerning the proposed substitution of the contracting agency as respondent.

### **ANTI-DISCRIMINATION LEGISLATION**

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- 53 There are a number of Commonwealth Acts dealing with discrimination in the workplace. These Acts apply to all Australian employers and employees including contract workers, employment agencies and unions.
- 54 Procurement officers need to be aware that the legislation is not only applicable to Defence as an employer of military and civilian personnel, it also applies when selecting suppliers of goods and services. Defence cannot discriminate against a supplier contrary to the legislation and should ensure that the supplier is compliant with the legislation.
- 55 Anti-discrimination legislation which must be complied with includes:

- *Racial Discrimination Act 1975* (Cth);
- *Sex Discrimination Act 1984* (Cth);
- *Human Rights and Equal Opportunity Commission Act 1986* (Cth);
- *Disability Discrimination Act 1992* (Cth); and
- *Age Discrimination Act 2004* (Cth).

An overview of the anti-discrimination laws is contained in Defence Instruction (General) Personnel 34-2 - *Complaints of Discrimination and Harassment through the Australian Human Rights Commission*.

- 56 Defence policy contained in Defence Instruction (General) Personnel 35-3 - *Management and Reporting of Unacceptable Behaviour* also defines discrimination as a category of unacceptable behaviour. For further information see paragraph 65 below.

### **OCCUPATIONAL HEALTH AND SAFETY AND CONTRACTORS**

- 57 Suppliers who provide goods, equipment or services when working on Defence premises must comply with the requirements of the *Occupational Health and Safety Act 1991* (Cth) (OH&S Act). An exception to this is if the supplier is undertaking construction or maintenance work which is deemed to be in control of the supplier. In such instances, the relevant State or Territory Occupational Health and Safety legislation is to be complied with. Whether or not a contractor is in control of a workplace is a question of fact in each case. Where there is doubt, the obtaining of legal advice should be considered.
- 58 The OH&S Act also imposes specific obligations on manufacturers, suppliers, erectors, and installers.
- 59 The *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) detail how the obligations of the OH&S Act are to be fulfilled. Specifically Part 4 – Plant and Part 6 – Hazardous Substances cover most goods and equipment provided to Defence. In the case of Hazardous Substances and some other parts of the regulations, e.g. ‘Confined Spaces’, there is supplementation within the Occupational Health and Safety Code of Practice 2008 and related guidance material.
- 60 In certain cases there are no prescribed Commonwealth legislative safety requirements (outside the general ‘Duty of Care’). In accordance with the OH&S Act, section 4 unless the regulations state otherwise, the Commonwealth is not bound by State and Territory Occupational Health and Safety legislation. An example of this is in the transport, storage and handling of ‘Dangerous Goods’.
- 61 The *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) applies to Commonwealth employment which includes members and employees of Defence. For information on these legislative requirements or Defence ‘Radiation Policy’ contact the Radiation Safety section, Joint Logistics Command. Defence policy on radiation hazard management is contained in *Defence Safety Manual (SAFETYMAN)* Vol 1, part 4.
- 62 The Defence authorised policy on contractor safety management is SAFETYMAN, Volume 1, Part 1. Chapter 8 ‘Contractor Safety Management’. A booklet entitled ‘Contractor Safety Management’ has been prepared by the OHS Branch to assist in complying with this policy. A copy is available on the Defence OH&S website (Publications).
- 63 Within Defence and DMO, the responsible Group/Organisational Executive is to ensure that the contractor follows Occupational Health and Safety standards that are consistent with those

of the Defence organisation through the implementation of a supplier safety management system. Contract safety management is achieved through:

- the selection of contractor's that meet Occupational Health and Safety criteria (specified in request documentation);
- the contract containing appropriate safety clauses and information on explicit safety arrangements;
- the contractor's safety management plan that includes;
- safe work practices;
- risk assessments;
- consultation mechanisms;
- incident reporting;
- sub contractor management;
- induction safety training;
- site safety training; and
- monitoring of the contractors Occupational Health and Safety performance.

64 The obligations of Defence and the supplier under the OH&S Act and common law should be specified in all contract documents so that there are no misunderstandings about who is responsible for the various aspects of Occupational Health and Safety in the workplace. Policy advice on safety issues can be obtained from *SAFETYMAN*.

#### **Unacceptable Behaviour**

65 The OH&S Act, section 16 imposes a duty on Defence to take all reasonably practicable steps to protect the health and safety of its employees. The OH&S Act, section 17 also imposes a duty on Defence to take all reasonably practical steps to protect the health and safety of third parties. This requirement would extend to contractors in the workplace.

66 The requirement to take reasonably practical steps to protect the health and safety of employees and third parties would include the provision of a workplace that is free from harassment, bullying and other forms of unacceptable behaviour. Defence Instruction (General) Personnel 35-3 (DI(G)Pers 35-3) *Management and Reporting of Unacceptable Behaviour* applies to contractors who, under the conditions of contract with Defence must comply with the Instruction. DI(G) Pers 35-3 requires Defence service contracts to include in the conditions of contract a requirement that the contractor, its officers, employees, agents and subcontractors comply with the Instruction.

67 In accordance with DI(G) Pers 35-3 all Defence personnel must undertake annual equity awareness training. The requirement applies to contractors who provide their service in the Defence workplace. Contractors who do not provide their service in a Defence workplace, or infrequently visit the Defence workplace, are not required to complete the training. Contract managers must exercise professional judgment in assessing the training requirement for contractors with a high level of interaction with Defence personnel, but who either do not perform their service in, or infrequently visit, the Defence workplace. Contract managers are responsible for providing access to the training and for ensuring the contractor has met this requirement. It is important that contractors and their subcontractors are made aware of the training requirement. In situations where the contract manager has determined that training will be necessary, this obligation should be included in the contract.

- 68 A complaint of unacceptable behaviour against a contractor that is not resolved informally must be managed in accordance with the Resolution of Disputes clause in the contract. Any subsequent action against the individual arising from the dispute resolution is the responsibility of the contractor.
- 69 For further information on Defence's policy on unacceptable behaviour visit the Fairness and Resolution website at <http://www.defence.gov.au/fr>

## ENVIRONMENTAL LEGISLATION

- 70 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and other environment legislation have implications for procurement officers. These issues are addressed in Chapter 3.16.

## KEY REFERENCES

*Age Discrimination Act 2004 (Cth)*

*Australian Radiation Protection and Nuclear Safety Act 1998 (Cth)*

*Disability Discrimination Act 1992(Cth)*

*Environment Protection and Biodiversity Conservation Act 1999(Cth)*

*Human Rights and Equal Opportunity Commission Act 1986(Cth)*

*Occupational Health and Safety Act 1991 (Cth)*

*Occupational Health and Safety (Safety Standards) Regulations 1994*

*Privacy Act 1988(Cth)*

*Racial Discrimination Act 1975(Cth)*

*Sale of Goods Acts and Fair Trading Acts in each State and Territory.*

*Sex Discrimination Act 1984(Cth)*

*Trade Practices Act 1974 (Cth)*

*Defence Safety Manual SAFETYMAN*

*ASDEFCON (Services)*

*ASDEFCON (Shortform Services)*

*Australian Taxation Office – Superannuation Guarantee Ruling 2005/1, 2005/2, 2009/2*

*Department of Finance and Deregulation - Superannuation Circulars 2006/3 and 2006/4*

*Defence Instruction (General) Personnel 34-2- Complaints of Discrimination and Harassment through the Australian Human Rights Commission.*

*Defence Instruction (General) Personnel 35-3- Management and Reporting of Unacceptable Behaviour*