

THE OBLIGATION TO ACT AS A MODEL LITIGANT

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The focus of administrative law has traditionally been on process, rather than on outcome. This is so for good reason: a fair procedure provides the safest path to a fair outcome. This principle extends to the conduct of proceedings in a court. Fairness by a government litigant towards an aggrieved opponent will increase the likelihood that the court will arrive at a fair decision. In this way, the delivery of administrative justice requires that government litigants conduct themselves in the course of litigation in a manner which promotes the fairness of the proceedings, and thereby increases the likelihood of those proceedings resulting in a just outcome.

The courts have long expected that government litigants act in proceedings against private litigants in accordance with standards of conduct higher than those expected of their opponents. More recently, the governments of the Commonwealth and some States and Territories have introduced policy guidelines to ensure adherence to those standards. The obligation to adhere to those standards is commonly referred to as the obligation to act as a model litigant.

The obligation to act as a model litigant extends beyond merely obeying the law and abiding by the ethical obligations which apply to legal practitioners. Those other important obligations provide minimum standards of conduct, whereas the model litigant obligation involves striving for more aspirational standards of the highest character. Like so many other legal concepts, aspects of the obligation which lie at its core are uncontroversial and simple to grasp. The duty to assist the court is one such aspect. Some of the aspects of the obligation which lie at its periphery, such as a postulated duty to achieve legal accuracy, are more contentious.

This paper will explore the nature of the model litigant obligation by reviewing the sources from which the obligation arises, the justifications for the imposition of the obligation on government litigants, the content and scope of the duties to which the obligation may give rise and the manner in which compliance with the obligation may be enforced.

Sources of the obligation

Judicial pronouncement

The model litigant obligation can be traced back at least as far as the comments of Griffiths CJ in *Melbourne Steamship Co Ltd v Moorehead*:¹

The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings.

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I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

Other expressions of the obligation include the comments of King CJ in *Kenny v South Australia*² and the Full Federal Court in *Yong Jun Qin v Minister for Immigration & Multicultural Affairs*.³

It is hardly surprising that the primary source of the model litigant obligation is judicial pronouncement. As those who preside over litigation and deliver judgments to resolve controversies, it is to be expected that a body of judicial opinion would develop in respect of the proper conduct of proceedings by government litigants.

More recently, administrative tribunals such as the Administrative Appeals Tribunal have added their own contributions to this field of discourse. The content of those contributions has necessarily been shaped by the nature of the proceedings over which those administrators have presided. In that regard, it is important to note that proceedings in the Administrative Appeals Tribunal are inquisitorial rather than adversarial, although they often take on the appearance of adversarial proceedings.⁴ It is also significant that s.33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that the maker of the decision under review must use his or her best endeavours to assist the Tribunal to make its decision, rather than simply defending the correctness of the original decision. Nevertheless, the views of Members of the Administrative Appeals Tribunal in particular echo very closely the opinions expressed by judicial decision makers in relation to the content of the model litigant obligation.⁵

Legal Services Directions

The obligation to act as a model litigant now emanates from the Executive, as well the Judicial branch. The Commonwealth Attorney-General has issued directions which apply to the performance of Commonwealth legal work. These directions have a statutory basis in Part VIII C of the *Judiciary Act 1903* (Cth). The first version of the *Legal Services Directions* came into effect on 1 September 1999 and has been subsequently amended. Appendix B to the *Legal Services Directions* is entitled, "*The Commonwealth's obligation to act as a model litigant*".

The scope of Appendix B to the *Legal Services Directions* is broad. It extends beyond litigation to the settlement of claims prior to the commencement of proceedings, alternative dispute resolution and merits review proceedings. Note 2 to Appendix B summarises the obligation as follows:

In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.

State and Territory policies

Following the introduction of the *Legal Services Directions* at the Commonwealth level, New South Wales, Victoria, Queensland and the Australian Capital Territory have each introduced their own model litigant policies in the form of guidelines which apply to the provision of legal services in matters involving the agencies of those respective jurisdictions. In New South Wales, Cabinet has approved a policy document which was developed from an earlier policy introduced by the Attorney General's Department of that State.⁶ In Victoria, the government has prepared guidelines which have now been incorporated in the Standard Legal Services to Government Panel Contract, so that they are binding on external providers of legal services to Victorian government agencies.⁷ In Queensland, Cabinet has formalised

a statement of model litigant principles⁸ and in the Australian Capital Territory, the Attorney General has issued its own guidelines.⁹ In each case, the guidelines mirror reasonably closely those set out in Appendix B to the *Legal Services Directions*.

New South Wales Civil Procedure Act

The *Civil Procedure Act 2005* (NSW) s.56(1) provides that "[t]he overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings." Interestingly, one Justice of the Supreme Court of New South Wales has suggested that the effect of that provision is that all litigants in civil proceedings in New South Wales, including private litigants, are required to act in accordance with the model litigant standards which have traditionally been expected only of government litigants.¹⁰ Although it does not appear that that approach has been taken up in subsequent cases, it represents a possible future direction for the model litigant obligation. As legislatures and the courts continue to clamp down on conduct in litigation which increases the strain placed on limited judicial resources, it may well be the case that the courts come to expect all those who appear before them to act in the manner already expected of government litigants.

Justifications for the obligation

Restoring the balance

No single principle provides the sole justification for why government litigants are held to higher standards of conduct than those expected of private litigants. One justification was explained in *Hughes Aircraft Systems International v Airservices Australia* as follows:¹¹

There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.

That is a highly significant justification. It may well be sufficient in itself to justify the imposition of the obligation on government litigants. Yet judicial discourse also points to another more controversial justification, namely that, in order to do justice, the imbalance in power and resources between government and private litigants requires that government litigants act in a manner which is more restrained than that expected of their opponents.

In *Melbourne Steamship Co Ltd v Moorehead*, Griffiths CJ equated the notion that the Crown ought not take technical points with the "*standard of fair play to be observed by the Crown in dealing with subjects*".¹² But why should fairness prevent only one side, and not the other, from being entitled to take technical points? The answer implicit in Griffiths CJ's observations is that, if both sides were equally entitled to engage in conduct such as taking technical points, the government litigant would be in a position of unfair advantage, presumably by reason of the imbalance of power and resources between the parties.

It is indeed the case that, very often, government litigants are better equipped to engage in litigation than their private opponents. Yet this is by no means always the case. In circumstances where it is not the case, the imposition of the model litigant obligation has the potential to provide the private opponent with a positive advantage. This was recognised in *ACCC v Leahy Petroleum Pty Ltd*, where Gray J observed that the obligation "*is of significant value to parties against whom the Commonwealth is involved in litigation*."¹³

Unrepresented litigants

It is, however, certainly the case that there is an imbalance of power and resources when government litigants appear against opponents who are not legally represented. In those circumstances, primary responsibility for ensuring the fairness of the proceedings must lie with the presiding judicial officer. That duty was summarised in *Tomasevic v Travaglini*, where Bell J said:¹⁴

A judge has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, while at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the law and access to justice specified in the International Covenant on Civil and Political Rights are relevant to its proper performance. The assistance to be given depends on the particular litigant and the nature of the case, but can include information about the relevant legal and procedural issues. Fairness and balance are the touchstones.

A related responsibility is that of the court to "*assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy.*"¹⁵

There are limits on how far judges can go to assist unrepresented litigants consistent with their duties to remain impartial and to be seen to remain impartial. These limits were the subject of comment in *Malouf v Malouf*, where Bryson JA noted the danger of affording procedural concessions to an unrepresented litigant to the point where it becomes advantageous to appear without legal representation.¹⁶ Similarly, Flick J has warned that excessive readiness to formulate arguments that could be advanced on behalf of an unrepresented litigant could risk extending to the unrepresented litigant a positive advantage over his or her represented opponent.¹⁷

If, then, judges are limited in their capacity to limit the disadvantages faced by a litigant who appears without legal representation against a represented opponent, some of the remaining imbalance can be made up by that opponent being held to the standards of conduct expected of a model litigant. However, as is the case with judges, even lawyers who act for model litigants are limited in their capacity to assist an unrepresented opponent in the context of adversarial proceedings. This is especially so in view of the fiduciary duties which lawyers owe to their clients. But, at the very least, if represented parties and their lawyers refrain from conduct which would place them at risk of taking advantage of an unrepresented opponent, this would go some way towards redressing the imbalance which is inherent when one party participates in litigation without legal representation.

What this will involve in the circumstances of any particular case will vary widely. However, if one steps back from the perspective of a participant in a particular controversy, and instead views the matter from the broader perspective of ensuring that justice is both done and seen to be done, a reasonably arguable case can be made for the proposition that, at least in circumstances where they appear against unrepresented litigants, comparatively well resourced litigants such as government agencies ought to be held to higher than usual standards of conduct. This will help to avoid a situation in which the represented government litigant takes advantage of its position of power *vis-à-vis* its unrepresented opponent, which the Full Federal Court found had occurred in *Scott v Handley*, and which it criticised accordingly.¹⁸

Content of the obligation

Duty to assist the court

The duty of lawyers to the courts, which trumps even their duties to their clients, is familiar territory. Various practitioners' rules and ethical norms require high levels of candour and honesty in all dealings with judicial officers. What is less clear is how far a lawyer ought to go, whilst acting for a model litigant, to assist the court in circumstances where the provision of that assistance could potentially be injurious to the interests of the lawyer's client.

The case of *Mahenthirarasa v State Rail Authority of New South Wales (No 2)* is illustrative of what the courts expect in terms of receiving assistance from the Executive branch.¹⁹ In that case, the applicant sought to appeal to an Appeal Panel of the New South Wales Workers Compensation Commission. The Authority persuaded a Registrar of the Commission to refuse to permit the appeal to proceed on the basis that certain statutory preconditions had not been satisfied.

The applicant challenged the Registrar's decision unsuccessfully in the Supreme Court of New South Wales and then successfully in the Court of Appeal. In both Courts, the Authority filed a submitting appearance save as to costs, by which it neither consented to nor opposed the orders sought by the applicant.

Basten JA found that it was inappropriate for the Authority to file a submitting appearance and thereby deprive the Court of the assistance of the Executive branch. His Honour cited²⁰ the following observations of Mahoney J in *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)*:²¹

The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.

His Honour went on to review the authorities regarding the standards expected by the courts of the Executive branch in its conduct of litigation, and applied those observations to the circumstances of the case before him as follows.²²

On the appeal, this Court expressly invited the State Rail Authority to reconsider its position and provide assistance to the Court. It declined to do so. Again, it should be assumed that, upon the institution of the appeal, the State Rail Authority gave consideration to whether it should actively defend the benefit it had obtained in the lower Court or concede that the judgment should fairly be set aside. Whatever view was formed, on appropriate advice, this Court did not have the assistance which might have been offered consistently with the view adopted by the State Rail Authority. The principles applicable to a model litigant required it to deal with claims promptly, not to cause unnecessary delay, to endeavour to avoid litigation wherever possible, not to resist relief which it believes to be appropriate and not to decline to provide appropriate assistance to the court or tribunal whether expressly sought or not. It is probable that those principles were not applied.

The case of *SZLPO v Minister for Immigration and Citizenship (No 2)* is significant for its illustration of how the obligation to act as a model litigant is capable of giving rise to duties to act in a manner adverse to the interests of government litigants.²³ In that case, the Full Federal Court had decided an appeal in favour of the Minister for Immigration and Citizenship. Following the handing down of judgment, the Minister's solicitor informed the associate of the presiding judge that the Court had overlooked one of the appellant's grounds of appeal. The Court set aside its earlier orders, proceeded to consider the overlooked ground and, in the result, reversed its decision. The Court expressed its

gratitude to the Minister's solicitor for bringing the oversight to the Court's attention and commended her for acting as a model litigant.²⁴

By acting as a model litigant in the circumstances of this case, the Minister put at risk, and ultimately lost, the benefit of a judgment in his favour. A litigant who did not proceed in that matter may well have kept that benefit. However, when one bears in mind the view expressed in *Hughes Aircraft Systems International v Airservices Australia* that a public body has no legitimate private interest, this result changes in appearance from one in which compliance with the model litigant obligation was injurious to the interests of the Minister to one in which compliance with the obligation served the broader interests of justice.²⁵

Duty not to impose an unfair burden

Another aspect of the model litigant obligation which is uncontroversial in nature is the duty not to impose an unfair burden on one's opponent. The *Legal Services Directions*, for instance, require that Commonwealth legal providers pay legitimate claims without litigation and not put their opponents to proof of matters which they know to be true. Duties such as these flow from a broader duty to minimise the incidence of litigation and, in circumstances where litigation is unavoidable, to keep its costs to a minimum.

A related duty is, if a government litigant is the initiating party to proceedings, to tailor claims with some care to the precise needs of the case.²⁶ Similarly, the model litigant obligation may require a government litigant, if it is the defendant to proceedings, to consider carefully which matters to dispute when filing a defence. The case of *Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning* is one in which the Court found that a materially incorrect assertion made in a pleading gave rise to a breach of the obligation.²⁷

In that case, the Minister for Planning and the Director-General of the Department of Planning filed a joint defence in which they asserted that a particular project comprised critical infrastructure for the purposes of the applicable legislation. The Court found that that assertion caused the plaintiff to believe that it was necessary to continue the proceedings to preserve its rights to challenge the approval of the project. However, documents subsequently produced by the Department disclosed that, when the defence was filed, the Director-General considered that the project did not comprise critical infrastructure and that the Minister was yet to form a view on the matter. The Court criticised the conduct of the government defendants in filing their defence as misconduct, unreasonable and a departure from the standards expected of a model litigant.

Duty of legal accuracy

The duties of model litigants to assist the court and to not impose an unfair burden on their opponents are reasonably non-contentious, despite there being room for debate about the proper scope of those duties. A more contentious duty, for which there is some authority, is that model litigants must attain a high standard of legal accuracy in the positions which they adopt and the submissions which they make before a court. Arguably, Appendix B to the *Legal Services Directions* provides some statutory basis for such a duty insofar as it compels Commonwealth government agencies to act "*in accordance with the highest professional standards*". The attainment of such standards must necessarily involve a level of diligence which goes beyond compliance with procedural obligations,²⁸ and extends to the thorough preparation of cases and exercise of careful consideration of the merits of arguments to be advanced. There are 2 High Court cases which lend support to this postulated duty of legal accuracy.

The first case is *Burrell v R*.²⁹ In that case, the New South Wales Court of Criminal Appeal had dismissed the appellant's appeals against his conviction and sentence for murder. After

the Court's reasons had been published and its orders formally entered, the Court discovered that its reasons contained substantial factual errors and purported to re-open the appeals.

The appellant was granted special leave to appeal to the High Court. The prosecution contested the special leave application and appeal, arguing that the proceedings in the High Court were unnecessary because it was open to the Court of Criminal Appeal to re-open the appeals. The High Court was unanimous in finding that the Court of Criminal Appeal did not have power to act in that way.

Kirby J was critical of the prosecution's contest of the proceedings in the High Court. His Honour observed:³⁰

In the present appeal, both on the relisting before the Court of Criminal Appeal and in this court, the prosecution asserted the existence of the jurisdiction and power of the Court of Criminal Appeal to act as it did. It contested the necessity, or occasion, for this court's intervention. In the light of the outcome of this appeal, it may be hoped that a reconsideration of prosecution practice in this regard will be one outcome. Traditionally, prosecutors for the Crown observed the highest standards as befits a model litigant. Such standards should be maintained. In light of this decision, and others, they will need to be reinforced.

On one reading, Kirby J's observations appear to encompass an obligation of a model litigant to state the law correctly, even in circumstances where the correct state of the law is far from clear. Admittedly, his Honour made those observations in a context in which the prosecution had contested the proceedings in the High Court, notwithstanding its acceptance that the Court of Criminal Appeal's decision was affected by material error. Yet, as his Honour also observed, there was a reasonably arguable basis for the prosecution's position that intervention by the High Court was unnecessary.³¹ In view of the potential significance of the point in dispute, the prosecution appears to have had a sound basis for seeking to clarify the state of the law. In those circumstances, it is open to interpret his Honour's observations in relation to the standards expected of a model litigant as a criticism of the prosecution simply for getting the answer wrong.

The second case is *Roads and Traffic Authority (NSW) v Dederer*.³² In that case, a child had dived from a bridge into shallow water, struck his head on the bottom and become a paraplegic. One of the issues to be resolved was whether it was the RTA or the local council which controlled the bridge from which the child had jumped. Initially, in response to a request from the child's solicitors, the RTA advised the child's solicitors that the RTA controlled the bridge. Acting in reliance on that advice, the child's solicitors commenced proceedings against only the RTA. Some time later, the RTA changed its position and the child's solicitors joined the council as an additional defendant. However, by the time the council was joined, new legislation had come into effect which caused the action against the council to fail.

Heydon J observed that, though no doubt unintentional, the effect of the RTA's conduct was to mislead the child's solicitors into a course of action which deprived the child of an opportunity to obtain a benefit to which he may otherwise have been entitled. His Honour said:³³

It is a truism that statutory bodies of that kind should be model litigants: counsel for the RTA accepted that this was so "without question". A terrible thing had happened to a child. The solicitors for that child were not busybodies. Their request of the RTA was not a trivial one. It was possible that the RTA - a very wealthy and powerful organisation - was liable in tort. It was also possible that the Council - doubtless much less wealthy, but better resourced than the plaintiff and his parents - was liable. There is nothing wrong with wealthy and powerful defendants requiring plaintiffs to prove their cases, but in the circumstances, as a matter of common humanity, not legal duty, the RTA ought not only to have attempted to tell the plaintiff's advisers who controlled the bridge, as it did, but also to have stated the underlying facts correctly.

Heydon J's observations in relation to the Court's expectations of the RTA drew on the disproportionate power relationship between the RTA and the child to provide a foundation for the RTA's model litigant obligation, and on notions of "common humanity" to provide content to that obligation in the form of a duty to do "correctly" what the RTA had attempted, but failed, to do. As with Kirby J's observations in *Burrell v R*, they lend support to the view that model litigants ought to act in accordance with not only the highest standards of fairness, but also the highest standards of legal accuracy.

Admittedly, the observations of Kirby J and Heydon J in these cases provide only limited evidence of a judicial expectation that model litigants ought to attain high standards of legal accuracy. Further, this postulated duty has received only limited endorsement elsewhere.³⁴ Nevertheless, as there is at least some authority for the proposition that a duty to attain high standards of legal accuracy forms part of the obligation to act as a model litigant, it cannot be disregarded.

If such a duty were to receive further judicial attention and development, difficult questions would arise concerning the extent to which the model litigant obligation requires government litigants to actually achieve, as distinct from to endeavour to achieve, the outcomes which the obligation is intended to advance. The distinction is important: duties such as those to assist the court and to not place an unfair burden on one's opponent are directed at process, whereas the postulated duty to attain legal accuracy is directed at outcome. Without further consideration by the courts, however, the possible future directions which this postulated duty might take remain speculative.

Duty of compassion and common humanity

Heydon J's observations in *RTA v Dederer* also provide some support for another contentious aspect of what may, on one view, form part of the model litigant obligation, namely a possible duty to act in a manner which gives sufficient regard to notions of "common humanity". This is another concept which has not received much judicial attention. There is even some authority against it. In *Pinot Nominees Pty Ltd v Commissioner of Taxation*, Siopis J observed:³⁵

Further, although compassionate considerations may from time to time, as a practical matter, weigh with the Commissioner in determining how to deal with the taxation liability of a taxpayer, the question of whether the Commissioner has acted with compassion, is not, without more, a relevant factor in considering whether he has acted unreasonably or failed to act as a model litigant in the conduct and settlement of litigation.

Nevertheless, Siopis J's comments leave room for compassionate considerations, or the notions of common humanity invoked by Heydon J, when taken together with other relevant factors, to influence the content of the model litigant obligation in an appropriate case. It is possible that such considerations may lead courts in future cases to expect more of model litigants in their conduct of litigation.

Limits on the scope of the obligation

Despite the breadth of the model litigant obligation, it is not the case that government litigants must forego invoking their fundamental legal rights and privileges, or that they must "roll over" in the face of determined opposition. As Whitlam J has observed:³⁶

While the Commonwealth is no doubt a behemoth of sorts, it is not obliged to fight with one hand behind its back in proceedings. It has the same rights as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant.

To similar effect are Heydon J's observations in *RTA v Dederer*, that wealthy and powerful defendants are entitled to put plaintiffs to proof of their cases where there is a genuine dispute.³⁷ Further, in *ABB Power Transmission Pty Ltd v ACCC*, the Full Federal Court found that the model litigant obligation did not prevent reliance by the ACCC on well-established legal privileges.³⁸

The picture which emerges from these authorities is that model litigants remain participants in an adversarial system of justice, the efficacy of which depends upon the ability and willingness of the parties to stand up for their own interests. While model litigants are expected to play their role in that system according to higher standards of conduct than those that apply to other participants, they are not required to sacrifice their status as the adversaries of their opponents. Though model litigants have a duty to assist the court, they are not required to assist their opponents.

Enforcement of the obligation

Judicial pronouncement

As it remains the case that the primary source of the model litigant obligation is judicial pronouncement in relation to the standards of conduct expected of government litigants, so it remains the case that the primary method of sanction for departure from those standards is judicial criticism. It is a very bad look for any government agency or legal services provider to be the subject of judicial criticism. It is an even worse look to be subjected to such criticism on a regular or sustained basis. Conversely, it is a good look for a government agency or legal services provider to be commended by the courts for compliance with the model litigant obligation, such as was the case in *SZLPO v Minister for Immigration and Citizenship*.³⁹

Other than expressing their opinion, however, there are few tools available to the courts to hold government litigants accountable to the standards of conduct expected of a model litigant. This is inherent in the nature of the obligation, which is an aspirational goal of fluid content, rather than a minimum standard of a more fixed nature. It is one thing to comment on behaviour which falls short of the highest standards, but an entirely different thing to impose a sanction for that departure. This is all the more so in circumstances where the imposition of any such sanction would have the effect of elevating the obligation into a rule of law, which is discriminatory in its application only to government litigants.

Discretion to award costs

One tool which is, arguably, available to enforce compliance with model litigant standards is the application of the court's discretion in relation to the making of costs orders. The usual rule is that the successful party in litigation will recover from the unsuccessful party a proportion of its costs reasonably incurred in prosecuting or defending the proceedings, unless some conduct of the successful party disentitles it from recovering its costs. The rule is, however, subject to a wide judicial discretion.

There is now a substantial number of cases in which unsuccessful litigants have opposed costs orders sought by successful government litigants, or successful litigants have sought to recover a higher proportion of their costs from unsuccessful government litigants, on the basis that the government litigant has breached its obligation to act as a model litigant. In a large majority of those cases, the court has found that the government litigant had not fallen short of the standards of conduct expected of it. There is also some authority that considerations of whether or not there has been compliance with the model litigant obligation should be treated as irrelevant to the exercise of the discretion whether to award costs.⁴⁰

In some cases, however, the courts have invoked a departure from model litigant standards as one reason, amongst others, for exercising the discretion in relation to costs adversely to government litigants. In *Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning*, the Court ordered that the Minister for Planning and the Director-General of the Department of Planning pay the plaintiff's costs from the time at which they filed the defence which the Court found to be misleading and to have caused the continuation of proceedings which were eventually shown not to be necessary.⁴¹ In *Mahenthirarasa v State Rail Authority of New South Wales (No 2)*, the Court ordered that the Authority pay the applicant's costs, despite it having not taken any active role in opposing the proceedings, and noted that it was the position taken by the Authority before the Commission and its subsequent failure to make any concession in relation to the correctness of the Commission's decision that made the judicial review and appeal proceedings necessary.⁴² Similarly, in *Galea v Commonwealth (No 2)*, the Court found that the Commonwealth had failed to facilitate the just, quick and cheap resolution of the real issues in the proceedings, in accordance with s.56(1) of the *Civil Procedure Act 2005* (NSW) and the standards expected of a model litigant, and relied on these breaches in support of a costs order adverse to the Commonwealth.⁴³

What is notable about these cases is that, although the model litigant breach was in each case raised in the context of the Court making a cost order adverse to the government litigant, it is not at all clear that the breach gave rise to the making of an order any more adverse than would have been made in any event. The filing of the misleading defence in *Parkesbourne-Mummel*, the causation of the commencement and continuation of unnecessary proceedings in *Mahenthirarasa* and the failure to comply with s.56(1) in *Galea* each provided, by themselves, a sufficient rationale for the adverse costs order made, regardless of their Honours' observations in relation to the consequential breaches of the model litigant obligation by the government litigants in those cases.

There is a similarity in that regard between those cases and the decision in *ASIC v Rich*.⁴⁴ In that case, Austin J found that certain breaches of the model litigant obligation alleged by the defendants against ASIC did not take matters any further than they were already taken by his Honour's application of settled rules of law confining ASIC to its pleaded case and affecting the weight that should be placed on evidence led by ASIC.⁴⁵ This case therefore lends support to the view that the existing rules of law and established discretionary considerations, which are equally applicable to all parties, leave the courts limited scope to impose any additional sanction for breach of model litigant obligations within the context of the litigation in which the breach occurred, regardless of the desirability or otherwise of the imposition of any such sanction.

Limitations imposed by the Judiciary Act

In relation to the Commonwealth's obligation to act as a model litigant, as set out in Annexure B to the *Legal Services Directions*, s.55ZG(2) of the *Judiciary Act* provides that compliance with the directions is enforceable only by the Attorney-General or by a court of competent jurisdiction on the application of the Attorney-General. Section 55ZG(3) provides that the issue of non-compliance with the *Legal Services Directions* may not be raised in any proceeding except by or on behalf of the Commonwealth. Section 55ZI has the effect that it is only in very limited circumstances that an act done or omitted to be done in compliance or purported compliance with the *Legal Services Directions* will give rise to any legal liability.

These provisions were relied on by Austin J in *ASIC v Rich* in support of his Honour's finding that the defendants in that case were restricted in their ability to raise the issue of non-compliance by ASIC with its statutory model litigant obligations in the context of those proceedings. Nevertheless, his Honour went on to find that the *Legal Services Directions* may still be "*referred to as an aid to understanding the content of the litigation duty*".⁴⁶

Commonwealth Office of Legal Services Coordination

Clause 11.1(d) of the *Legal Services Directions* requires that certain Commonwealth agencies report any possible or apparent breaches of the *Legal Services Directions* to the Attorney-General or to the Office of Legal Services Coordination ('OLSC') in the Attorney-General's Department as soon as practicable. If the OLSC makes a finding that the model litigant obligation has been breached, it is a matter for the OLSC and the Attorney-General to determine what further action ought to be taken.

Although the OLSC does not publish figures on breaches of the *Legal Services Directions*, it has been kind enough to provide some statistics in relation to the possible breaches reported to it, or otherwise identified by it, since the *Legal Services Directions* came into effect more than a decade ago. Since that time, the OLSC has reviewed 121 cases of possible breaches of the model litigant obligation imposed by the directions, of which 12 resulted in a finding of breach, 96 resulted in a finding of no breach, 5 did not result in any finding and 8 were still being investigated as at May 2010. A spike in the volume of cases, and a corresponding increase in findings of breach, appears to have taken place between 2006 and 2008, while the numbers have dropped back since that time.

The 12 breaches found by the OLSC were for the government litigant in each case relying on a technical defence against counsel's advice and without giving advance notice to the opposing party, threatening to seek personal costs against an opposing party's solicitor, breaching an implied undertaking not to use documents other than in the context of the proceedings in which they were produced, causing unnecessary delay by serving a witness statement in breach of the timetable imposed by the court, failing to making proper discovery, serving subpoenas without giving notice to a party's lawyers, failing to provide an opposing party with relevant documents despite several requests by the court to do so, causing unnecessary delay in the settlement of a claim, failing to correct misstatements made in a pleading, handling a matter improperly, failing to appear at a court date and causing unnecessary delay in the recovery of costs pursuant to a court order. It therefore appears that 3 of the 12 breaches found by the OLSC were for the government litigant causing unnecessary delay in the conduct of proceedings, while a general lack of care and diligence probably contributed to some of the others.

It would be inappropriate to "name and shame" the government agencies against whom the most allegations have been made and breaches found, as such details could only be useful if put in their proper context, which would require a more wide-ranging analysis, including in particular an assessment of the volume of litigation in which those agencies are involved. The relatively low number of breaches found by the OLSC may be taken, however, to suggest that Commonwealth agencies have been very effective in ensuring that they comply with their statutory obligation to act as a model litigant pursuant to the *Legal Services Directions*.

Conclusion

The obligation to act as a model litigant is something that has long been expected of government litigants by the courts. More recently, it has acquired statutory force at the Commonwealth level, and has acquired the status of formal government policy in some States and Territories. The justifications commonly provided for the imposition of the obligation on government litigants, and why similar standards of conduct are not expected of private litigants who utilise judicial resources in their pursuit of justice, are not without their contentious points. Likewise, the precise content of the obligation, like so many other legal principles, is fluid and must be adapted to the circumstances of each particular case. In that sense, the pursuit of model litigant standards of conduct is akin to the pursuit of an aspirational target, whose attainment will rarely be commended but whose non-attainment

will often be chastised. Yet, however it may be justified or interpreted, the model litigant obligation must be kept at the forefront of the minds of all those who perform legal work for government clients. Those who lose sight of it may find themselves being reminded of it, very possibly in a judgment published for all to see.

Endnotes

- 1 (1912) 15 CLR 333 at 342.
- 2 (1987) 46 SASR 268 at 273.
- 3 (1997) 75 FCR 155 at 166 per Beaumont, Burchett and Goldberg JJ.
- 4 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424 to 425 per Brennan J.
- 5 See *Re Moline and Comcare* (2003) 77 ALD 224 at [4] to [13]; *Re VBN and Australian Prudential Regulation Authority* (2006) 92 ALD 259 at [246] to [249]; *Re Summers and Secretary, Department of Family and Community Services* [2005] AATA 125 at [30] to [31]; *Re General Merchandise & Apparel Group Pty Ltd and Chief Executor of Customs* (2009) 114 ALD 289 at [140] to [144]; *Re Pitkin and Secretary, Department of Family and Community Services* (2005) 87 ALD 119 at [4] to [6].
- 6 Available at [http://www.lawlink.nsw.gov.au/lawlink/lms/ll_lms.nsf/vwFiles/CabinetApp-MLP.pdf/\\$file/CabinetApp-MLP.pdf](http://www.lawlink.nsw.gov.au/lawlink/lms/ll_lms.nsf/vwFiles/CabinetApp-MLP.pdf/$file/CabinetApp-MLP.pdf).
- 7 Available at http://www.opp.vic.gov.au/wps/wcm/connect/18c9ac00404a14a4abfafbf5f2791d4a/15_Application_of_model_litigant_guidelines.pdf?MOD=AJPERES.
- 8 Available at http://www.justice.qld.gov.au/data/assets/pdf_file/0006/43881/20100505095729872.pdf.
- 9 Available at http://www.ics.act.gov.au/eLibrary/papers/model_litigant_guidelines.pdf.
- 10 *Priest v New South Wales* [2007] NSWSC 41 at [34] per Johnson J.
- 11 (1997) 76 FCR 151 at 196 per Finn J.
- 12 (1912) 15 CLR 333 at 342.
- 13 (2007) ATPR ¶42-200 at [25].
- 14 (2007) 17 VR 100 at [155].
- 15 *Neil v Nott* (1994) 121 ALR 148 at 150 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.
- 16 (2006) 65 NSWLR 449 at 452.
- 17 *SZJOG v Minister for Immigration and Citizenship* [2010] FCA 244 at [19].
- 18 (1999) 58 ALD 373 at [46] per Spender, Finn and Weinberg JJ.
- 19 (2008) 72 NSWLR 273.
- 20 (2008) 72 NSWLR 273 at [16].
- 21 [1973] 2 NSWLR 366 at 383.
- 22 (2008) 72 NSWLR 273 at [22].
- 23 (2009) 255 ALR 435.
- 24 (2009) 255 ALR 435 at [4] per Lindgren, Stone and Bennett JJ.
- 25 (1997) 76 FCR 151 at 196 per Finn J.
- 26 *Director-General, Department of Aging, Disability and Home Care v Lambert* (2009) 74 NSWLR 523 at 548 to 549 per Basten JA.
- 27 [2009] NSWLEC 155.
- 28 See *Commissioner of Main Roads v Jones* (2005) 215 ALR 418 at [84] per Callinan J.
- 29 (2008) 238 CLR 218.
- 30 (2008) 238 CLR 218 at [93].
- 31 (2008) 238 CLR 218 at [36].
- 32 (2007) 234 CLR 330.
- 33 (2007) 234 CLR 330 at [298].
- 34 See also *Deputy Commissioner of Taxation v Cumins* [2007] FMCA 1841 at [45] to [46] per Lucev FM.
- 35 (2009) 181 FCR 392 at [41].
- 36 *Brandon v Commonwealth* [2005] FCA 109 at [11].
- 37 (2007) 234 CLR 330 at [298].
- 38 [2003] FCAFC 261 at [35] per Heerey, Stone and Bennett JJ.
- 39 (2009) 255 ALR 435.
- 40 *ACCC v Leahy Petroleum Pty Ltd* (2007) ATPR ¶42-200 at [25] per Gray J.
- 41 [2009] NSWLEC 155 at [48] to [52] per Pain J.
- 42 (2008) 72 NSWLR 273 at [23] to [24] per Basten JA.
- 43 [2008] NSWSC 260 at [18] to [21] per Johnson J.
- 44 (2009) 236 FLR 1.
- 45 (2009) 236 FLR 1 at [558] to [567].
- 46 (2009) 236 FLR 1 at [527].