THE MODEL LITIGANT OBLIGATION

[based on a paper presented at the 2011 BSA conference]

Litigation Lawyers

INTRODUCTION

1. The Queensland Building and Construction Commission is a Model litigant.

2. What precisely does this mean? Clearly it means that different duties are owed from a standard litigant – but precisely what different obligations?

3. Frequently, the opposition will allege that the Commission has failed to act as a model litigant, which is said to give some advantage to the other side – usually costs.

4. The purpose of this paper is to explore and identify the model litigant obligation.

WHAT IS THE BASIS IN LAW FOR THE EXISTENCE OF THE MODEL LITIGANT OBLIGATION?

5. The model litigant obligation is an accepted principle at common law in Australia.

6. In *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 Griffith CJ observed (at 342 to 343):

> "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.
>
> 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in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date.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."

7. In *Sebel Products Limited v Commissioners of Customs and Excise* [1949] Ch 409 at 413:

> "The defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the Courts, which derive their authority from the same source and fountain, impose on the officers under their control."

8. It is said to be well settled that government lawyers are required to meet higher professional standards and to conduct themselves in a manner which advances the interests of justice. [see Baston "*Disputes involving the Commonwealth: Observations from the Outside – a Barrister's View*" (1999) 92 Canberra Bulletin of Public Administration 38]

9. In the Commonwealth sphere, pursuant to S. 55ZF of the *Judiciary Act 1903* (Cth) the Attorney General has directed that the Commonwealth and its agencies are to conduct litigation in accordance with *the Directions on the Commonwealth's Obligation to Act as a Model Litigant*.

WHY IS THE COMMISSION A MODEL LITIGANT?

10. From the above, you can see that the Commission is a Model Litigant because it is a statutory authority.

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11. In *Kenny v South Australia* (1987) 46 SASR 268 King CJ states (at 273):

> "The Court and the Attorney-General, to whom the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct of and disposal of litigation. It is extremely important that the Crown Solicitor's office set an example to the private legal profession as to conscientious compliance with the procedures designed to maximise cost and minimize delay and to make the maximum use of the resources committed to the Court."

12. In *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346 Beaumont and Einfeld JJ state (at 368):

> "… whereas it is well established that the Crown must act, and be seen to act, as a model litigant."

13. Most clearly, it is stated in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 by Finn J states (at 196-7):

> "As with any agency of government … it has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve …
> …
> That the law entertains expectations of fair dealing of government and of public bodies is manifest in some number of spheres. First and most obviously, there is the general application of the requirements of procedural fairness to "governmental executive decision-making": *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR at 653; see also Annetts v McCann (1990) 170 CLR 596 – though it needs to be acknowledged that these requirements can in limited circumstances extend to the decision making (characteristically to decisions to expel or discipline members) of non-governmental bodies and associations: see M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996), pp 493-495.

Secondly, there is what Griffith CJ referred to in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342 as:

> "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 … "

This proposition has received significant, recent judicial endorsement in this country most notably in the Full Court of this Court in *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346 at 368, per Beaumont and Einfeld JJ; see also *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125. I note in this particularly the observations of Mahoney J in his dissenting judgment (on grounds not presently relevant) in *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 558-559 in applying the proposition to a local authority – to "a corporation constituted by statute, and discharging public functions":

> "It is well settled that there is expected of the Crown the highest standards in dealing with its subjects: see *Melbourne Steamship Co Ltd v Moorehead* … per Griffith CJ. What might be accepted from others would not be seen as in full accord with the principles of equity and good conscience to be expected in the case of the Crown: see *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [[1973] 2 NSWLR 366 at 383-384]. In my opinion, a standard of conduct not significantly different should be expected of a statutory corporation of the present kind …"

14. In *Brown & Brophy, v Queensland Building Services Authority & Thompson* [2005] QCCTB 110 Member Mr P Lohrisch states (at paragraph 12):

> "In its dealings in the Tribunal, more particularly in review proceedings, the Authority, as a statutory body, stands somewhat in the role of a "model litigant".

AT WHAT MOMENT IN A MATTER DOES THE OBLIGATION COMMENCE?

15. Presumably, the obligation commences when the litigation commences. On this basis, conduct prior to the filing of an application cannot be said to be subject to Model Litigant obligation.

16. Some elements of the obligation must arise when litigation is threatened – eg the obligations to pay valid claims or to avoid litigation.

What Duties Does A Model Litigant Owe?

17. There are a number of general statements in cases, which give indication of the philosophy behind the obligations owed by the Model Litigant.

18. In *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 Finn J states (at 197):

> "This fair play principle has its most common manifestation in the "model litigant" standards exacted from the Crown in legal proceedings: see for example, *Director of Public Prosecutions v Saxon* (1992) 28 NSWLR 263.
>
> In differing ways these instances reflect policies in the law, albeit in specific contexts, (a) of protecting the reasonable expectations of those dealing with public bodies; (b) of ensuring that the powers possessed by a public body, "whether conferred by statute or by contract", are exercised "for the public good": cf *Jones v Swansea City Council* at 71; 174-175 and (c) of requiring such bodies to act as "moral exemplars": government and its agencies should lead by example: *Olmstead v United States* (1928) 277 US 438; Joint Committee of Public Accounts, *Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises, Report 315*, esp par 2.21ff, (AGPS, Canberra, 1992). These policies I consider to be important in the present matter."

19. In *Scott v Handley* (1999) 58 ALD 373 the Full Federal Court stated (at 383-384):

> "As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have for example, spoken positively of a public body's obligation of "conscientious compliance with the procedures designed to minimise cost and delay": Kenny's case, above, at 273; and of assisting "the court to arrive at the proper and just result": *P & C Cantarella Pty Ltd v Egg Marketing Board*, above at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure: Young's case, above, at FCR 166; of not unfairly impairing the other party's capacity to defend itself: *Saxon's* case, above, at 268: and of not taking advantage of its own default: *SCI Operations Pty Ltd*, above, at FCR 368."

USE OF THE STATE'S POWERS

20. The power of the State is to be used for the public good and in the public interest, and not as a means of oppression, even in litigation. However, the community also expects the State to properly use taxpayers' money, and in particular, not to spend it without due cause and due process. This means that demands on the State for compensation for injury or damages should be carefully scrutinised to ensure that they are justified.

21. In *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 Finn J states (at 196-7):

> "As with any agency of government … it has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve …
> …
> That the law entertains expectations of fair dealing of government and of public bodies is manifest in some number of spheres. First and most obviously, there is the general application of the requirements of procedural fairness to "governmental executive decision-making": *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR at 653; see also *Annetts v McCann* (1990) 170 CLR 596 – though it needs to be acknowledged that these requirements can in limited circumstances extend to the decision making (characteristically to decisions to expel or discipline members) of non-governmental bodies and associations: see M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996), pp 493-495.

DUTY TO ACT FAIRLY

22. It is a fundamental principal that the Commission should act fairly.

23. In handling matters:

    23.1 <u>The Commission should act consistently in handling of matters</u>;

    Clearly the Commission should apply to law as it stands, evenly to all members of the public.

    In *Federal Commissioner of Taxation v Indooroopilly Children Services (QLD) Pty Ltd* [2007] FCAFC 16; (2007) 158 FCR 325 the Full Federal Court states (at 326 to 327):

> "I wish … to add some comments about the attitude apparently taken by, and some of the submission of, the appellant. From the material that was put to the Full Court, it was open to conclude that the appellant was administering the relevant revenue statute in a way known to be contrary to how this Court had declared the meaning of that statute. Thus, taxpayers appeared to be in a position of seeing a superior court of record in the exercise of federal jurisdiction declaring the meaning and proper content of a law of the Parliament, but

> the executive branch of the government, in the form of the Australian Taxation Office, administering the statute in a manner contrary to the meaning and content as declared by the Court; that is seeing the executive branch of government ignoring the views of the judicial branch of government in the administration of a law of the Parliament by the former. This should not have occurred. If the appellant has the view that the courts have misunderstood the meaning of a statute, steps can be taken to vindicate the perceived correct interpretation on appeal or by prompt institution of other proceedings; or the executive can seek to move the legislative branch of government to change the statute. What should not occur is a course of conduct whereby it appears that the courts and their central function under Ch III of the Constitution of the Commonwealth are being ignored by the executive in the carrying out of its function under Ch II of the Constitution, in particular its function under s 61 of the Constitution of the execution and maintenance of the laws of the Commonwealth.
>
> …
>
> Considered decisions of the court declaring the meaning of the statute are not to be ignored by the executive as *inter partes* rulings binding only in the earlier *lis*.
>
> There was some inferential suggestion in argument that the appellant was somehow bound by legislation (not specifically identified) to conduct his administration of the relevant statute by reference to his own view of the law and the meaning of the statutory provisions, rather than by following what the courts have declared. It only need be said that any such provision would required close scrutiny, in particular by reference to issues raised by s 15A of the Acts Interpretation Act 1901 (Cth)."

23.2 The Commission should deal promptly with matters and not cause unnecessary delay in handling of matters or litigation;

See *Kenny v South Australia* (1987) 46 SASR 268 King CJ states (at 273):

> "The Court and the Attorney-General, to whom the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct of and disposal of litigation. It is extremely important that the Crown Solicitor's office set an example to the private legal profession as to conscientious compliance with the procedures designed to maximise cost and minimize delay and to make the maximum use of the resources committed to the Court."

23.3 The Commission should engage in alternative dispute resolution;

23.4 The Commission should endeavour to avoid litigation;

23.5 The Commission should keep the costs of litigation to a minimum;

23.6 The Commission should pay legitimate claims, without litigation;

In this regard, the insurance scheme springs to mind.

23.7 The Commission should limit the scope of legal proceedings;

23.8 The Commission should enter into reasonable settlements; and

23.9 The Commission should apologise for the conduct of its lawyers where appropriate.

23.10 The Commission should not unnecessarily delay proceedings;

In *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366, Mahoney J citing English authority, quoted:

> "It has been the practice, which I hope will never be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred."

23.11 The Commission should not seek to take advantage of an impecunious opponent;

In this regard, it has been said that the duty is to assist the Tribunal and unrepresented litigants.

In *Brown, W.W. & Brophy, J.E. v Queensland Building Services Authority & Thompson, K.* [2005] QCCTB 110 Member Mr P Lohrisch states (at paragraph 12):

> "In its dealings in the Tribunal, more particularly in review proceedings, the Authority, as a statutory body, stands somewhat in the role of a "model litigant". That role, it seems to me, involves two prime considerations –
>
> 1) The Authority is placed not only in a position of "defending" a decision made by it, but moreover, is under a parallel obligation to the Tribunal towards ensuring that the Tribunal has all necessary information and evidence before it to "stand in the shoes" of the Authority, as the Tribunal is required to do, in not only reviewing the Authority's decision, but also making the appropriate decision in all of the circumstances. The Authority's obligation in this regard remains the same whether or not such information/evidence is favourable or unfavourable to a determination as to whether the Authority's decision should be confirmed.
>
> In this context it seems to me that the Authority's submission that it is not desirable that the actual decision maker represent the Authority is correct, and that the more objective and dispassionate representation that the Authority's "in-house" lawyers should bring to the matter is clearly desirable and would be of considerable assistance to the Tribunal.
>
> It is not, as the applicant submits, a matter of equalising opportunity in a situation where the complexity of the legal and factual issues involved otherwise would justify the involvement of the representative. Further it seems to me that the factors noted in section 76 (2) (e), as being the factors which the Tribunal is to take into account in an application such as this, requires balancing positive and direct considerations, rather than ignoring such matters in favour of reducing a party's ability to properly represent itself and assist the Tribunal in a complex matter, in an endeavour to achieve equality.
>
> 2) The Authority has an obligation to provide reasonable assistance, particularly in a procedural sense, to a self represented party and not to take unfair advantage of such party. That obligation would include conduct which would serve to reduce the "knowledge gap", to which the applicants' submissions refer, where it is obvious that resolution of the issues might be assisted."

23.12 The Commission should not contest matters it accepts as correct;

23.13 The Commission should not require a party to prove a matter which the state knows to be true;

23.14 The Commission should not rely on technical defences where it has suffered no prejudice;

See *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, where Griffith CJ observed (at 342 to 343):

> "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."

23.15 The Commission should not contest liability if the dispute is really about quantum; or

23.16 The Commission should not pursue appeals unless it believes it has reasonable prospects for success or the appeal is justified in the public interest.

DUTY OF FIRMNESS

24. The Commission must also adhere to principles of firmness.

25. This means:

25.1 The Commission should appropriately test all claims;

25.2 The Commission should contest spurious or vexatious claims;

25.3 The Commission should rely on professional legal privilege where appropriate;

25.4 The Commission should make public interest privilege claims objecting to disclosure of information;

25.5 The Commission should seek security for costs where appropriate;

25.6 The Commission should rely on available statutes of limitation;

25.7 The Commission should oppose oppressive subpoenas;

25.8 The Commission should oppose oppressive discovery;

25.9 The Commission should seek to strike out untenable claims;

25.10 The Commission should act appropriately to protect the state and federal government's interests.

25.11 The Commission should not cave in to spurious or vexatious claims;

25.12 The Commission should not take a soft approach

DUTY TO PROVIDE ASSISTANCE TO THE COURT OF TRIBUNAL

26. As stated by Member Favell in *Lamb, D.C. v Queensland Building Services Authority* [2008] QCCTB 143:

> The Authority is placed not only in a position of "defending" a decision made by it, but moreover, it is under a parallel obligation to the Tribunal towards ensuring that the Tribunal has all necessary information and information before it to "stand in the shoes" of the Authority, as the Tribunal is required to do, in not only reviewing the Authority's decision, but also making the appropriate decision in all of the circumstances. The Authority's obligation in this regard remains the same whether or not such information/evidence is favourable or unfavourable to a determination as to whether the Authority's decision should be affirmed.

DUTY TO DEFEND DECISIONS

27. It can also be seen that in a merits review of an administrative decision, the Commission stands as "Champion of the decision" that it has made.

28. This means that the Commission should stand up for its decision and firmly respond the Application for review. It should not force other interested parties to become involved as parties to the litigation.

AFFECT ON AUTHORITIES RIGHTS

29. The Commission may still enforce rights.

30. For example, in *Wodrow v Commonwealth* [2003] FCA 403 Stone J states (at paragraphs 42 to 43)

> "… the Commonwealth's role as a model litigant influences the way in which the Commonwealth conducts litigation, it does not impinge the Commonwealth's ability to enforce its substantive rights."

RELEVANCE OF COMMONWEALTH RULES

31. In the Commonwealth sphere the Model Litigant obligation has statutory power pursuant to S. 55ZF of the *Judiciary Act 1903* (Cth). Pursuant to that section, the Attorney General has directed that the Commonwealth and its agencies are to conduct litigation in accordance with *the Directions on the Commonwealth's Obligation to Act as a Model Litigant*. , at Appendix B[1].

32. In a paper delivered to the Conference of the Bar Association of Queensland in February 2008, the Honourable Justice Spender of the Federal Court of Australia states:

> "It suffices to say that the obligation for government in state jurisdictions is the same as the obligation of Government to be a model litigant in federal jurisdiction."

33. Therefore the Commonwealth guidelines are a useful yardstick or codification of the rules. A copy is annexed at the end of this paper.

WHAT ARE THE SANCTIONS FOR NON-COMPLIANCE?

34. Breach of the model litigant obligation is frequently raised by an opponent seeking to be entitled to a more favourable decision than if the breach had not occurred.

35. However, in most cases, a breach of the model litigant obligation is not a basis for entitling the opponent to more favourable relief.

36. For example, in *Wodrow v Commonwealth* [2003] FCA 403 a breach of the model litigant obligation (namely a six year delay in of the Commonwealth in filing an application for taxation of costs) was held not to impinge on the Commonwealth's ability to enforce its substantive rights.

37. In *Wodrow* Stone J states (at paragraphs 42 to 43)

> "Although the Commonwealth, through its delay, may have fallen short of its own standards in pursuing the costs order made in 1993, this does not lead to the conclusion that it should be precluded from enforcing the order. I do not think the applicant's case is assisted by the model litigant policy."

38. In *Scott v Handley* (1999) 58 ALD 373 the Full Federal Court states (at 383-384):

> "In the present instance the second respondent (i) was in a position of obvious advantage in relation to unrepresented litigants; (ii) was significantly in default in complying with procedures designed to secure the fair and orderly preparation of the matter for hearing; (iii) served the affidavits on the appellants at an extremely late date with the consequential likely impairment of their capacity to prepare properly for a final hearing; (iv) did not inform His Honour of the default and of its possible consequences; and (v) took advantage of the inability of the appellants to articulate properly the basis for, and to secure, an adjournment. In our view the conclusion is inescapable that the second respondent has fallen considerably short of the standard properly to be expected of the Commonwealth.
>
> The court is conscious and appreciative of the assistance it regularly received from officers and agencies of the Commonwealth particularly in matters in which the other party to litigation is unrepresented. Regrettably, such did not occur in this case. The consequence was, in our opinion, a miscarriage of justice."

39. Pursuant to S. 55ZG(2) of the *Judiciary Act (Cth)*, the Commonwealth the *Legal Services Directions 2005*, can only be enforced by the Attorney General. Sanctions for non-compliance with those directions may include:

    1. The issue of a Direction by the Attorney General in relation to:

        (a) The conduct of a particular matter;

        (b) The use of a particular legal services provider;

    2. Adverse comment on an agency or a provider being made to the Attorney General or the relevant minister.

40. Hence, breach of the *Legal Services Directions*, does not give rights to the opponent.

ASPECTS OF THE COMMISSION'S ROLE AS MODEL LITIGANT

Interaction between Model Litigant and QBCC Act

41. The model litigant obligation requires, amongst other things that the Commission apply the law. Therefore, the upholding of the objects of the *QBCC Act* is a tenet of the obligation. Where

there is any conflict, the statute must override any obligations owed merely due to the Common Law.

42. Of course s 3 of the QBCC Act provides:

> The objects of this Act are –
>
> (a) to regulate the building industry:
>
> (i) to ensure the maintenance of proper standards in the industry; and
>
> (ii) to achieve a reasonable balance between the interests of building contractors and consumers; and
>
> (b) to provide remedies for defective building work; and
>
> (c) to provide support, education and advice for those who undertake building work and consumers.

Representation of Commission by a Lawyer

43. In *Boxall, B.G. & A.M. v Queensland Building Services Authority* [2005] QCCTB 131 Member Mr P Lohrisch states (at paragraph 26):

> "Representation by a lawyer is often allowed to the Authority because it acts in matters before the Tribunal by its in-house lawyers, and because, for it to act otherwise, might not be appropriate or administratively viable. In this context, there is, as I have noted in other decisions to do with representation, an element of the Authority acting as a model litigant, including its role of assisting the Tribunal in the Tribunal's function of standing in the shoes of the Authority in taking a decision in any review proceedings. That assistance includes ensuring that the Tribunal has all relevant information (both favourable and unfavourable to maintenance of the Authority's decision), upon which the Tribunal can reach its decision. That role is not necessarily a role which should ipso facto be compensated by an order for costs in the event that the Authority's decision is confirmed."

44. In *Lamb, D.C. v Queensland Building Services Authority* [2008] QCCTB 143 Member Mr Favell states (at paragraphs 9 to 13):

> "The Tribunal may permit a party to be represented by a lawyer if it is appropriate having regard to all of the circumstances including the matters listed in section 76(2)(e) of the Act.
>
> Section 72(2)(e) was considered in *Brown and Brophy v Queensland Building Services Authority* [2005] CCT Q200-04 where Member Lohrisch stated: "In its dealings in the Tribunal, more particularly in review proceedings, the Authority as a statutory body, stands somewhat in the role of the model litigant ". That role seems to me involves two primary considerations –
>
> 1) The Authority is placed not only in a position of "defending" a decision made by it, but moreover, it is under a parallel obligation to the Tribunal towards ensuring that the Tribunal has all necessary information and information before it to "stand in the shoes" of the Authority, as the Tribunal is required to do, in not only reviewing the Authority's decision, but also making the appropriate decision in all of the circumstances. The Authority's obligation in this regard remains the same whether or not such information/evidence is favourable or unfavourable to a determination as to whether the Authority's decision should be affirmed.
>
> 2) The Authority has an obligation to provide reasonable assistance, particularly in a procedural sense, to a self represented party and not to take unfair advantage of such a party. That obligation would include conduct which would serve to reduce the "knowledge gap", to which the applicant's submissions refer, where it is obvious that resolution of the parties might be assisted.
>
> That was adopted in a decision by Member Sheaffe in *1770 Coastal Constructions Pty Ltd v Queensland Building Services Authority* [2008] CCT QR101-07.
>
> In *Brown and Brophy* the learned Member said that the case before him involved complex legal and factual issues and it was more appropriate that they be addressed by a legal practitioner. It was also stated that any perceived imbalance between the represented and non represented party can be dealt with by the Tribunal. The member said that a party is not entitled to the costs of the proceeding merely because that party is legally represented. After considering these issues the Tribunal held that it was appropriate that the Authority be permitted legal representation but confined it to "in house" lawyers.

> In my opinion those comments are undoubtedly correct. Here, I think that there is the potential for complex, legal and factual issues as was the case in *Brown and Brophy v QBSA*. I think that the Tribunal will benefit from the presence of a legal representative who should be able to present the legal issues in a manor that reflects the model litigant status of the respondent and that will be advantageous to both the applicant and the Tribunal. I do think that the Tribunal has extensive experience in conducting hearings fairly between litigants where one party is not represented and I have no doubt that the same will be able to continue."

Costs when forced to act as Model Litigant

45. In *Andrews, P. G. v Queensland Building Services Authority* [2008] QCCTB 229 Member Mr Lohrisch stated (at paragraphs 4.8 to 4.10):

> "4.8 It is inherently contradictory to the objectives of the CCT Act for a jurisdictional issue in a proceeding to be heard and determined and then to deny the successful party their right to costs where resources have been expended and, as in this case, all possible steps by the Authority as a Model Litigant have been taken to resolve the matter outside of the Tribunal. In these situations, the Authority typically bears the onus of bringing matters of jurisdiction to the Tribunal's attention and in doing so without appropriate compensation, is placing a resource burden on a Statutory and Regulatory Authority disadvantageously.
>
> 4.9 To require any applicant or respondent to address the issue of jurisdiction without any compensation to the successful party for the time and resources expended on such an exercise, is a diversion from the concept that costs are borne by each party, unless the interests of justice require otherwise.
>
> 4.10 Where the Authority, as a Model Litigant , has conducted itself in the appropriate manner and undertaken all steps possible to resolve the matter outside of the Tribunal and in compliance with the relevant provisions of the CCT Act, it is disadvantageous to deny the right to costs for this process where justice requires otherwise, especially in a situation where an applicant has been provided ample opportunity to discontinue a matter, yet elected to proceed with a frivolous and vexatious application."

SUMMARY OF PRINCIPLES

46. It can be seen therefore that:

- We deal even-handedly with all litigants.
- We do not use delaying tactics, for example to force an applicant to run up unnecessary costs, or to try to force an applicant to abandon his or her action because they have run out of money.
- We do not commence legal proceedings, including prosecutions, for ulterior or improper motives.
- We do not defend indefensible claims, or try to avoid legitimate liabilities and do not attempt to avoid disclosure of unfavourable or inconvenient information when it should be disclosed.
- We do not take technical points merely for the sake of taking those points where they do not affect the merits of the case, particularly for the purpose of 'stringing out' the litigation.
- We do not seek to delay implementing the result of litigation by instituting appeals which have no merit. However, the State may be justified in seeking to have the law clarified, if necessary by an appeal, but in such a case may have to be prepared to carry the burden of the costs of the appeal even if it is successful in some respects.
- We do not avoid our obligations to obey court-imposed time limitations and deadlines and we ensure that disclosure of documents is thorough and prompt.
- We are entitled to examine any claim against the Commission thoroughly, and we do not back down if we believe a claim to be spurious or vexatious. We will seek security for costs where appropriate.

- We will act fairly but firmly in the defence of actions against the Commission, and will require a plaintiff to prove his or her case by proper (adequate?) evidence.

- We are entitled to defend a case even if there is no absolute certainty of success, provided that there are reasonable prospects of a successful defence. In doing so, we recognise that litigation is not an exact science and the outcome of a case can often not be predicted with certainty.

- We will defend the Commission's legal professional privilege, and will raise a claim of public interest immunity whenever a legitimate claim can be made.

- The Commission is entitled to rely on the *Limitation of Actions Act 1974* where the time limitation for actions has passed, although it has the right to waive compliance in a particular case if that is thought appropriate.

- We will seek to prevent the courts from being used for improper claims, including claims which are vexatious, for example if they are commenced for some improper or ulterior motives, and will seek to have vexatious litigants declared vexatious in appropriate cases.

- We will generally seek to recover the legitimate legal costs incurred by the State if it is successful in an action, although there is a discretion in the Commission to waive the recovery of costs if a particular case warrants such a waiver.

47. It will be seen that sometimes these duties conflict and that conflict needs to be resolved appropriately – decisively and swiftly.

Appendix B The Commonwealth's obligation to act as a model litigant

The obligation

1 Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

2 The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

(b) making an early assessment of:

(i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth; and

(ii) the Commonwealth's potential liability in claims against the Commonwealth

a. paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;

b. acting consistently in the handling of claims and litigation;

c. endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate;

(iii) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

a. not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true;

b. not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum;

c. monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution; and

d. ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations.

(iv) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim ;

(v) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement;

(vi) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest; and

(vii) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Note 1 The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.
Note 2 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. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.
Note 3 The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.
Note 4 The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)
Note 5 The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Merits review proceedings

3 The obligation to act as a model litigant extends to agencies involved in merits review proceedings.

4 An agency should use its best endeavours to assist the tribunal to make its decision.

Note The term 'litigation' is defined in paragraph 15 of these Directions in terms that encompass merits review before tribunals. There are particular obligations in relation to assisting a tribunal engaged in merits review to arrive at a decision. Agencies should pay close attention to the legislation under which a tribunal is established, and any practice directions issued by the tribunal. In the case of the Administrative Appeals Tribunal see in particular subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975* and the explanatory memorandum to the Administrative Appeals Tribunal Amendment Bill 2005.

Alternative dispute resolution

5 The Commonwealth or an agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).

6 When participating in alternative dispute resolution, the Commonwealth and its agencies are to ensure that their representatives:

(a) participate fully and effectively; and

(b) subject to paragraph 2, have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.

Malcolm Robinson