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Key Cases on Breaches of the Model Litigant Rules

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Note: *This document is updated regularly with new developments regarding the government model litigant obligations and the Commonwealth's Legal Service Directions, see:*
www.ruleoflaw.org.au/priorities/mlrs/
for the latest version.

Cases which the Rule of Law Institute of Australia (RoLIA) has identified which discuss the model litigant obligations are set out below.

Morely & Ors v Australian Securities and Investments Commission [2010] NSWCA 331

Facts

The case concerned the exposure of the James Hardie group to compensate victims of asbestos disease. To facilitate this, the group proposed to establish a Foundation to handle asbestos claims. The proposal was approved by the directors in February 2001 and on the following day a market announcement was made stating that the Foundation would have "sufficient funds to meet all legitimate compensation claims anticipated". It later emerged that the Foundation was underfunded by more than one billion dollars.

ASIC took proceedings against one of the James Hardie companies and the directors for misleading and deceptive conduct for approving the market announcement. The trial judge found in favour of ASIC. The non-executive directors and the company appealed to the NSW Court of Appeal. The appeal focussed on the accuracy of the minute that recorded the board meeting's approval of the market announcement. The appellants argued that ASIC should have called the company's solicitor to give evidence as he had prepared draft minutes before the meeting and was present at the meeting.

Findings of NSW Court of Appeal

The Court found that because ASIC effectively acts as a prosecutor in civil penalty cases, it is under an obligation to act fairly, analogous to duty owed by prosecutors in criminal proceedings. Although there had been no previous case finding that ASIC's model litigant obligations extended to an obligation to call particular witnesses, nevertheless the Court found that given that ASIC had an obligation to present all material evidence to assist the court.

'[706] The relevant case law frequently refers to the obligation of fairness in terms of the duty to act as a "model litigant". This is an appropriate shorthand and has been adopted in formal statements by Australian governments, in the same manner as Directors of Public Prosecutions have set out their duties in formal prosecution policies (see the *Legal Services Direction 2005* made under s 55ZF of the *Judiciary Act (1903)*, with respect to the Commonwealth's "Model Litigant Obligation" at para [4.2], and the *Model Litigant Policy for Civil Litigation* issued by the New South Wales Government on 8 July 2008).

'[707] However, the terminology of "model litigant" should not detract from the flexibility of the idea of an obligation of fairness. The principle of a fair trial is one of the most basic principles of our legal system. It informs and energises many areas of the law. It is reflected in numerous rules and practices. It is continually adapted to new and changing circumstances. It manifests itself in virtually every aspect of our practice and procedure (see generally J J Spigelman, "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 74 ALJ 29). It lies behind the prosecutorial duty, see Whitehorn v The Queen at 603-4 stating that the Crown Prosecutor represents the State, and in the system of criminal justice must "act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one".

Spigelman CJ, Beazley and Giles JJA found that:

'[716] The starting point for any such consideration in the context of enforcement proceedings by a regulatory agency, as distinct from proceedings in which a government corporation may have some commercial interest, is the recognition that the government agency has no legitimate private interest of the kind which often arises in civil litigation. It acts, and acts only, in the public interest as identified in the regulatory regime.

'[717] In such a context the usual rules and practices of the adversary system may call for modification. The most significant modification, likely to be true

of most regulatory regimes, is that the public interest can only be served if the case advanced on behalf of the regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred. It is not sufficient for the purposes of, at least, most regulatory regimes that, in accordance with civil laws of evidence and procedure in an adversary system, one party has satisfied the court of the existence of the relevant facts. The strength and quality of the evidence advanced on behalf of the State is a material consideration, which has received acknowledgement in the case law.

'[719] ASIC was created to administer the laws of the Commonwealth, relevantly with respect to the Act. It has conferred upon it a range of functions and powers, including under the Act and under the ASIC Act.

'[727] Furthermore, ASIC has a range of powers conferring upon it a discretion to give relief from the requirements of the Act by way of an exemption or by way of modification of the provisions of the Act. These encompass the provisions with respect to takeovers, compulsory acquisition, substantial shareholdings, restriction on voting at meetings, compliance with accounts and audit provisions, compliance with standards for protection of investors, and provisions which regulate the transfer of securities. Although none of these provisions are of direct relevance to the present case, they do indicate the extent and nature of the powers available to ASIC.

'[728] The cumulative effect of all these matters is that ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings. This is so particularly for proceedings of the character before this Court. No other person could have brought these proceedings. In partial answer to the first of the questions, whether its failure to call a witness can constitute a breach of the obligation of fairness, in our opinion it can.'

DCT v Denlay [2010] QCA 217

Facts

The Commissioner of Taxation commenced enforcement proceedings against taxpayers for the payment of assessments. The taxpayers sought an order from the court to stay the proceedings as they would be forced into liquidation. The Court ordered the stay of proceedings as there was relevant evidence, which should have been considered by the Commissioner, indicating that they would suffer hardship in having the judgement enforced. The Court stated:

Findings of the Queensland Court of Appeal

'[50] This leads to the appellant's third point, that the loss of their property and consequent inability to prosecute their appeals does not constitute extreme personal hardship. The point may be answered shortly. It is preposterous to contend that the loss of the respondents' entire estate, and with it any chance of demonstrating that the basis for the assessments was wrong so that they should not have lost their property, could not be a hardship rightly called extreme. It is not easy to imagine a greater hardship in this context. Certainly the primary judge cannot be criticised for so regarding it.'

R v Martens [2009] QCA 351

Facts

Martens was convicted in 2006 for sexual intercourse with a person under 16 years of age whilst in PNG. Martens appealed claiming that material evidence vital to his case was withheld or not adequately investigated by the DPP or the AFP. He was informed by the agencies that the evidence did not exist. After he was convicted his wife obtained the evidence. The Queensland Court of Appeal found that the conviction was unreasonable and not supported by evidence and his conviction was quashed.

Findings of the Queensland Court of Appeal

In response to the failure of the Commonwealth DPP to access the relevant evidence and its actions in that regard Muir and Chesterman JJA stated in their judgement:

'[165] The submission does little credit to the Commonwealth DPP. The records are of critical importance. The petitioner, and his advisors, have asserted that fact ever since his arrest in 2004. The evidence, some of which I will mention shortly, indicates that the petitioner has consistently requested the prosecutor to obtain the records which he claimed would exonerate him by establishing that [the victims] complaint is unreliable. The prosecutor did not provide the records. Instead it told the petitioner that they did not exist. They were found after the petitioner's conviction as a result of efforts made by his wife.

'[169] It was...eminently reasonable for him to rely upon the resources of the DPP and the AFP to obtain the records. They undertook the task and informed the petitioner that the records did not exist.

'[170] [I]t is a poor reflection upon the two organisations that one should have failed to find them, and denied their existence, and the other object to their use in the reference on the ground that the petitioner should have obtained them earlier.'

ACCC v Australia and new Zealand Banking Group Ltd (No.2) [2010] FCA 567

Facts

The Federal Court ordered the ACCC to pay 80% of ANZ's costs in light of failure to adhere to its model litigant obligations. In particular, the ACCC failed to issue its notice to answer interrogatories within the time ordered by the Court.

Findings of the Federal Court

'[18] ACCC failed to comply with the earlier order and thus no obligation to answer any of the interrogatories arose in ANZ. It was quite entitled as of right, to refuse to answer any of the interrogatories.

'[22] The suite of interrogatories delivered by the ACCC and then made the subject of the subsequent application for leave consequent upon the hiatus caused by the initial failure to deliver the interrogatories within time contained a wide range of questions which amounted to 98 separate questions... A substantial number of those interrogatories were not framed as clearly and concisely as possible and were not simply directed to only those questions which really required an answer in the particular case having regard to the pleading which put in contest a number of matters which the ACCC sought to have conceded through the interrogatories.

'[26] [T]he ACCC must frame the interrogatory in a way which does not cast an obligation on the other side to do the best it can with the interrogatory and reframe it. The intention must be made clear...if the intention is not clear, the person interrogated does not have an obligation to frame what it perceives to be the intention.'

James and Anor [2011] AAT (Supressed Judgment) - reported in Weekly Tax Bulletin Issue 4, 28 Jan 2011[1]

Findings of the Administrative Appeals Tribunal

'The ATO had simply ignored the evidence of the purchasers having made an express admission in writing, without any qualification at all, of their indebtedness to the taxpayer'.[2]

'The ATOs adverse comments about the two trust instruments is reminiscent of complaints of King Henry VIII in the 16th century who did his best to have trusts abolished altogether because of their tendency to facilitate tax avoidance'.[3]

'The AAT considers it a matter for remark that, during the course of one of the ATO interviews of the taxpayer in 2005, a member of the ATO audit team''thought it appropriate to engage in a contest with Mr James about the applicability of the Statute of Limitations' to a document. The AAT said the period of limitation is 6 years, in both QLD and NZ and that 'the ATO officer wrongly insisted the limitation period was only three years. The ATO officer was quite wrong in his opinion, which in any

1 Obtained from Senate Standing Committee on Economics, Answers to Questions on notice, Treasury portfolio, Additional Estimates 23-24 February 2011, Question Number AET 97.

2 Ibid, page 1.

3 Ibid, page 2.

event was not relevant to Mr James tax liability'.'[4]

Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2) [2010] FCA 1124

Facts

The Commissioner of Taxation sought an order for costs.

Findings of the Federal Court, Logan J

'[48] I do not propose to award professional costs to the Deputy Commissioner. Indeed, so to do would be to reward work which is not of a standard to be expected of a person to be a solicitor on the record for a person to whom the model litigant obligations adhere.' The Deputy Commissioner's outlays are said to be $1,248.86. I order that those costs be the Deputy Commissioner's costs in the winding up'.

Qantas Airways Ltd v Transport Workers Union of Australia [2011] FCA 470

Findings of the Federal Court, Moore J

'[192] The submissions [of the Ombudsman] were, in my opinion, a little too partisan at times for a statutory officeholder. By partisan I mean infused by a measure of zeal rather than detachment. I would have thought that the Ombudsman should aspire to be a model litigant rather than a partisan one. While aspects of the model litigant obligations are found in Appendix B to the schedule to the Legal Directions 2005 (Cth) ... they are broader and more fundamental.'

Phillips v Commissioner of Taxation [2011] FCA 532

Facts

The ATO sought 3 extensions of time from the Court to file an affidavit. The Court ordered that the ATO pay the applicants costs on an indemnity basis.

Findings of the Federal Court, Lander J

'[3] The Commissioner of Taxation is a model litigant and ought to behave as one. The direction of the Court was that the Commissioner file an affidavit within six weeks of the date of the direction. Directions of this Court, of course, have the force of orders. Orders of this Court must be complied with, especially when the party who is obliged to comply is a model litigant.

'[8] Nor does the deponent disclose why the Commissioner thought himself able to simply ignore the direction....This is not the first time that the ATO has failed to comply with a direction which I have made, but I hope it is the last time. The ATO is a well-resourced agency ... of the Crown and a model litigant which is obliged to comply with any directions made by this Court. It is not entitled nor is the Commissioner entitled to disregard any directions of this Court. If the ATO or the Commissioner fails to comply with a direction, the ATO or the Commissioner will have to suffer the consequences.'

Australian Securities and Investments Commission v Hellicar [2012] HCA 17:

Facts

See *Morely & Ors v Australian Securities and Investments Commission [2010] NSWCA 331*

ASIC appealed the Court of Appeal's decision to the High Court.

Findings of the High Court

The High Court allowed the appeal.
The plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) stated at [141] that the proposition that "that the public interest can only be served if the case advanced on behalf of [a] regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred" was wrong. It also queried the Court of Appeal's analogy between the position of ASIC and a prosecutor in a criminal trial was wrong.

4 Ibid.

‘[143] [T]he proposition that the public interest requires that the facts upon which a regulatory agency relies must be facts that “actually occurred” appears to require the regulatory agency to make some final judgment about what “actually occurred” before it adduces evidence. Deciding the facts of the case is a court’s task, not a task for the regulatory authority.

‘[147] It may be readily accepted that courts and litigants rightly expect that ASIC will conduct any litigation in which it is engaged fairly. Nothing that is said in these reasons should be taken as denying that ASIC should do so. But the Court of Appeal concluded that ASIC was under a duty in this litigation to call particular evidence and that breach of the duty by not calling the evidence required the discounting of whatever evidence ASIC did call in proof of its case. Neither the source of a duty of that kind, nor the source of the rule which was said to apply if that duty were breached, was sufficiently identified by the Court of Appeal or in argument in this Court.

In a separate judgement by Heydon J he stated:
‘[237] ASIC as a model litigant. ASIC did not dispute that it had an obligation to conduct proceedings fairly, as a model litigant. But it argued that that obligation did not create duties on it different from those which apply to other litigants in relation to the calling of witnesses in civil proceedings. ASIC accepted that there is, in the words of Griffith CJ, an “old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects”. Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar’.

‘[240] ASIC also did not dispute that it had a duty to act as a “model litigant” pursuant to the Legal Services Directions made under s 55ZF of the Judiciary Act 1903 (Cth). But App B of the directions does not create any specific obligation of the kind which the Court of Appeal relied on. In any event, s 55ZG(3) of that Act provides that noncompliance cannot be raised in any proceeding except by or on behalf of the Commonwealth. The Commonwealth has the same rights as any other litigant. It has the same powers to enforce those rights. That is so whether the Commonwealth is suing or being sued. And it is so even where, as here, no other person could have brought the proceedings. Nothing in the Legal Services Directions suggests that the Commonwealth’s obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that the Court of Appeal’s reasoning contemplated. The Solicitor-General of the Commonwealth correctly submitted that the duty to act as a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants — they apply uniformly’.

LVR (WA) Pty Ltd v Administrative Appeals Tribunal [2012] FCAFC 90

Facts

In proceedings before the Administrative Appeals Tribunal between the Commissioner of Taxation and a number of taxpayer companies, the decision of the AAT in favour of the Commissioner, dismissing the review application of the taxpayers, quoted at length from the Commissioner’s written submissions without attributing that to the Commissioner. The companies appealed to the Federal Court. Again, the Commissioner did not draw the primary Federal Court judge’s attention to this fact. On further appeal it was only brought to the Full Court’s attention a few days before the hearing.

Findings of Full Federal Court

‘24. Some days before this appeal came on for hearing, the Court drew to the attention of the parties the apparent extent of the verbatim copying without attribution of the Commissioner’s submissions by the Tribunal and the apparent history of the drafting of those submissions. Neither of these matters had been addressed in the written submissions of the parties filed for the purposes of the appeal to the Full Court. One of the matters on which the Court sought the assistance of the parties was how it was that submissions came to be put to the primary judge in the form recorded at [26]-[30] of his Honour’s judgment (see above).

‘25. The Commissioner’s response at the Full Court hearing, in relation to “the structure and text of the Tribunal’s decision” referred to by the primary judge at [28] was that that was not the Commissioner’s characterisation but the appellants’ submission and what his Honour was setting out at [28] was the Commissioner’s response to those submissions. It was purely a response to the submission that the appellants had put up: the appellants never said that the Tribunal did not take the Schokker affidavit into account because the Tribunal’s reasons were copied.

‘26 As will appear more fully below, in our opinion this was not an adequate or appropriate response by the Commissioner

‘42. Speaking generally and without reflecting on counsel who appeared before us, being a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards.This obligation may require more than merely acting honestly and in accordance with the law and court rules.
…

[A]s *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 333 at 342 reveals, that expectation, even a century ago, was of long standing. To bring the matter up to the present we note that in *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 28

6 ALR 501, Heydon J said ASIC accepted that there was, in the words of Griffith CJ in *Moorhead*, an “old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects”. Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar ...
In our opinion, counsel representing the executive government must pay scrupulous attention to what the discharge of that obligation requires, especially where legal representatives who are independent of the agency are not involved in the litigation.’

Caporale v Deputy Commissioner of Taxation [2013] FCA 427;

Facts

The applicant argued that the Deputy Commissioner of Taxation had not complied with the Model Litigant Policy in other legal proceedings that the applicant was involved with. The applicant filed for interlocutory relief: that (amongst other things) [3] ‘the court order and consent to the Model Litigant Provisions under Legal Services Directions issues and in relation to the conduct of the Deputy Commissioner of Taxation to be raised and admitted in any legal proceedings relating to the applicant’. Furthermore, the applicant argued that ss 55ZG(2) and (3) were invalid to the extent that they prevented the applicant’s legal rights to raise the issue of non-compliance from arising. The Federal Court declared that Model Litigant Provisions do not give rise to private rights and only the Commonwealth Government can raise the issue of non-compliance.

Findings of the Federal Court Robertson J

[27] Robertson J referred to the above decisions in *Australian Securities and Investments Commission v Hellicar* and *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No. 2)*.

[33] ‘Where it has been sought to enforce the *Legal Services Directions 2005,* it has been said by the Full Court of this Court in *Croker v Commonwealth of Australia [2011] FCAFC 25* at [19] that compliance with the directions was not enforceable by the applicant and could not be raised in any proceeding other than by or on behalf of the Commonwealth’.

[36] ‘It would remain the position that it would be the Commonwealth which would be raising the issue of non-compliance’.

[39] ‘That exercise in the present case yields the result that no private rights are conferred by Appendix B “The Commonwealth’s obligation to act as a model litigant”’.

[44] ‘The terms of these provisions indicate an intention that the Directions are a means of control by the Attorney-General of Commonwealth leg herself. For this reason also, I do not propose to award professional costs to the Deputy Commissioner. Indeed, so to do would be to reward work which is not of a standard to be expected of a person asserted to be solicitor on the record for a person to whom model litigant obligations adhere.

Appendix B
Legal Services Directions 2005 (Cth)*

*accessed 12/09/2013 on Comlaw, see http://www.comlaw.gov.au/Details/F2012C00691 for the authoritative version

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

(aa) 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

(b) 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

(c) acting consistently in the handling of claims and litigation

(d) 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

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

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true

(ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum

(iii) 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

(iv) 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

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

(g) 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

(h) 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

(i) 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.

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