"The Model Litigant. How good must you be?"

A paper by Mark Robinson SC to the Law Society of South Australia's
Forum 2025 Conference in Adelaide on 13 February 2025

In this session I will delve into topics such as:

- Government lawyers acting as the model litigant in SA and NSW
- What are the responsibilities of federal government lawyers?
- How high is the standard set by the requirements?
- What to do when the model litigant button is pressed by a litigant?

The paper seeks to cover most major model litigant issues in state, territory and federal tribunals and courts.

The Model Litigant in South Australia

In South Australia, most issues concerning the model litigant come down to a bulletin written and published by the SA Crown Solicitor's Office – Legal Bulletin No.2, Crown Solicitor's Office Updated and reissued: 10 June 2011 ("the bulletin").

The bulletin sets out the obligations, and their source. It says:

> When engaged in any form of litigation the Crown and its many instrumentalities and agencies have an obligation to act as a model litigant. The nature of that obligation has been stated clearly by the courts on many occasions. Those principles form part of the common law.

The obligation is sourced in the common law, not in a Ministerial Directive (as in NSW) or in a statute.

There are some exceptions. The following statutes in SA specifically refer to the model litigant and require the responsible government agency to be bound by those principles. They are:

- *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) at section 7(2) where the Crown Solicitor must act as a model litigant;
- *Motor Accident Commission Act 1992* (SA) at section 4A where the Motor Accident Commission "must behave as a model litigant in the conduct of litigation" and is bound by any Crown Solicitor guidelines;
- *Public Sector (Data Sharing) Regulations 2017* (SA) at regulation 4(2)(d)(iii) which is an oblique reference to data that cannot be released.

Also, as a matter of practice, when the SA Crown Solicitor briefs counsel, those counsel are subject to Terms of Engagement which include that counsel must at all times act in accordance with the "Model Litigant" principles (as set out in the bulletin).

Other than this, the bulletin sets out all you really need to know. It refers to "the model litigant obligation". It applies to "the Crown", widely defined to include:

- the State of South Australia;
- any Minister;
- any separately incorporated agency or instrumentality of the Crown, e.g. the various statutory authorities and health units; and
- any administrative unit (i.e. a department or attached office) of the public service, including SA Police. As these are not incorporated, they can only engage in litigation in the name of their Minister.

The bulletin then sets out some of the older common law sources of the obligation.

As to the nature of the obligation, the bulletin provides:

> The obligation to act as a model litigant may often 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 and the Rules of Professional Conduct and Practice. It requires that the Crown act with complete propriety, fairly and in accordance with the highest professional standards
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> More specifically, the model litigant obligation requires that the Crown act honestly and fairly in handling claims and litigation by:
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> (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
> (b) paying legitimate claims without litigation;
> (c) acting consistently in the handling of like claims and litigation;
> (d) endeavouring to avoid litigation, wherever reasonably possible;
> (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
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> (i) not requiring the other party to prove a matter which the Crown knows to be true; and
> (ii) not contesting liability if the Crown knows that the dispute is really about quantum (although that may be appropriate where there is a real dispute as to whether a breach of duty caused the damage alleged by a plaintiff);
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> (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
> (g) not relying on technical defences unless the Crown's interests would be prejudiced by the failure to comply with a particular requirement;
> (h) not undertaking and pursuing appeals unless the Crown believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The

commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the Crown pending proper consideration of the matter, provided that a decision whether to continue the appeal is made as soon as practicable;
(i) assisting the Court and opposing parties to understand the current state of the law by drawing the Court's attention to binding and persuasive relevant case-law and other aids to statutory interpretation;
(j) being courteous and professional when dealing with witnesses, parties and their representatives; and
(k) apologising where the Crown is aware that it or its lawyers have acted wrongfully or improperly.

The model litigant obligations do not prevent the Crown from:

(l) enforcing costs orders or seeking to recover costs;
(m) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
(n) pleading limitation periods;
(o) seeking security for costs;
(p) opposing unreasonable or oppressive claims or processes;
(q) requiring opposing litigants to comply with procedural obligations;
(r) moving to strike out untenable claims or proceedings; or
(s) testing the credibility of a plaintiff or a witness and using lawful means to establish if a claim is fraudulent or exaggerated

In practice, the bulletin explains the principles work as follows:

(a) Act fairly;
(b) Act consistently;
(c) Avoid litigation;
(d) Pay legitimate claims;
(e) Minimise costs;
(f) Do not take technical defences;
(g) Do not take advantage of claimant who lacks resources; and
(h) Do not appeal unless reasonable prospects for success or in public interest

Interestingly, the SA bulletin sets out some examples of behaviors that are <u>not</u> expected of a model litigant. They are:

- The Crown should not play litigation “fast and loose” nor adopt a “win-at-all-costs” strategy.
- The Crown should not use delaying tactics to extract a litigation advantage. Whilst experience suggests that certain time limits and orders are occasionally not complied with due to workload or oversight, such non-compliance should never be a deliberate strategy designed to frustrate an opponent or to secure a practical advantage.

- The Crown should not commence any legal proceedings for any ulterior or improper purpose.
- Maintain objectivity and professional independence. The right advice should always be given from a whole of Government perspective even if that is not what the client was hoping to hear. The client should be constructively assisted to understand why the advice was necessary.
- Avoid personality-driven litigation.
- Avoid oppression in litigation. Avoid flurries of interlocutory applications to scare plaintiffs into submission. "Fight fair".

The Model Litigant in NSW

The Crown and all its emanations and its legal representatives are required both by common law and by a standing direction from the NSW Premier's office to act as a "model litigant" in all dealings in civil litigation generally in courts and tribunals in New South Wales.

The Premier's long-standing and mandatory "Model Litigant Policy for Civil Litigation" is published at
https://dcj.nsw.gov.au/legal-and-justice/strategies-and-plans/information-for-government-lawyers/litigation-involving-government-agencies.html

The policy is contained in the Premier's Memorandum M2016-03-Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse.

They are two separate policies.

The Premier's model litigant policy provides in plain terms that "*the State and its agencies must act as a model litigant in the conduct of litigation*" (clause 2.1). The nature of the obligations referred to in the policy is set out (at [3.1] to [3.4]) relevantly as follows:

3.1 The obligation to act as a model litigant requires ***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. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State and its agencies will act as a model litigant has been recognised by the Courts (citing - *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; *Kenny v South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 and *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 247 CLR 345. (my emphasis)

3.2 The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:

- dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

- 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;
- acting consistently in the handling of claims and litigation;
- endeavouring to avoid litigation, wherever possible. In particular regard should be had to the NSW *Civil Procedure Act 2005* which provides that the overriding purpose of the Act is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings;
- where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
    - not requiring the other party to prove a matter which the State or an agency knows to be true; and
    - not contesting liability if the State or an agency knows that the dispute is really about quantum;
- not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- not relying on technical defences (footnote- A 'technical defence' is commonly understood to be a defence that ' lacks all substantive merit and is supportable only on a narrow or literal appreciation or interpretation that is at odds with clear reality': *Liao v New South Wales* (2014) NSWCA 71 at (356). Statutory defences available to government parties, such as defences under Part 5 of the *Civil Liability Act 2002* (NSW) or "good faith" defence provisions are not considered to be technical defences. Where appropriate, such defences should be pleaded) unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum M1997-26 - Litigation Involving Government Authorities;
- when settling civil claims agencies should consider the use of confidentiality clauses in relation to settlements on a case-by-case basis;
- only undertaking and pursuing appeals where the State or an agency believes it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State 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;
- apologising where the State or an agency is aware that it has acted wrongfully or improperly; and

- providing reasonable assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.

Clause 3.3 and 3.4 provides:

3.3 The State or an agency is not prevented from acting firmly and properly to protect its interests. The obligation does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

3.4 In particular, the obligation does not prevent the State or an agency from:

a) enforcing costs orders or seeking to recover costs;
b) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
c) pleading limitation periods (other than in child abuse actions);
d) seeking security for costs;
e) opposing unreasonable or oppressive claims or processes;
f) requiring opposing litigants to comply with procedural obligations; or
g) moving to strike out or otherwise oppose untenable claims or claims which are an abuse of process

In announcing the policy, the Premier stated, at:
https://arp.nsw.gov.au/m2016-03-model-litigant-policy-civil-litigation-and-guiding-principles-civil-claims-child-abuse

> "The Model Litigant Policy applies to civil claims and civil litigation involving the State or its agencies. Compliance with the Model Litigant Policy is primarily the responsibility of the Head of each individual agency in consultation with the agency's principal legal officer. The Model Litigant Policy is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation." And
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> "The Policy is not expressed to apply to State Owned Corporations. However, as the Policy provides a sound approach to the management of litigation and disputes, I urge share-holding Ministers and Boards of State-Owned Corporations to agree to adopt the Policy by incorporating it into their Statements of Corporate Intent. This Memorandum should therefore be forwarded to all State-Owned Corporations for their consideration"

The Premier expressly stated that compliance with this policy was "mandatory".

The following entities are bound to comply with it – Departments, Executive agencies related to Departments, Advisory Entities (including Boards and Committees), Separate agencies, Statutory Authorities/Bodies and Subsidiaries of the NSW Government established under the *Corporations Act*.

In summary, the NSW Policy:

- requires more than merely acting honestly;
- requires more than acting in accordance with the law and court rules;
- it goes beyond lawyers' ethical obligations;
- It requires that action with complete propriety, fairly and in accordance with the highest professional standards;
- Dealing with litigation and claims promptly;
- Do not cause unnecessary delays;
- Not requiring proof of something known to be true;
- Not taking advantage is a party who is not pecunious;
- Pay out claims or settle;
- Keep the legal costs down;
- Assist the other side sometimes (eg: to identify the correct defendant); and
- While at the same time, all the litigation options may be exercised.

The Common Law

The common law obligation for the Crown to act as a model litigant, was discussed by the New South Wales Court of Appeal in *Mahenthirarasa v State Rail Authority (NSW) (No 2)* (2008) 72 NSWLR 273; [2008] NSWCA 201.

There, the state agency had actively opposed an application that was made in the then Workers Compensation Commission. In later judicial review Supreme Court proceedings, that same agency put on a submitting appearance and thereby neither consented to nor opposed the orders sought. It appeared by its legal representative in the Supreme Court and on the appeal in the Court of Appeal. However, it made no submissions one way or the other, even upon express invitation during the oral hearing from the Court of Appeal for assistance.

The decision under review was set aside for legal error.

In a separate decision on the question of costs, the Court of Appeal ordered the agency to pay the applicant's costs in the Common Law Division and in the Court of Appeal on the usual basis. This was a most unusual order, given the filed appearance.

Basten JA said (at [16]–[20])(with Giles and Bell JJA agreeing):

> In this State, the relevant principles as to the proper role of the executive government were succinctly stated by Mahoney J in *P & C Cantarella Pty Ltd v Egg Marketing Board* (NSW) [1973] 2 NSWLR 366 at 383 in the following terms:
>
> > 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.*** (my emphasis)

As his Honour noted - that principle was not novel, but was to be derived from long-standing authority applied to the Crown in the United Kingdom and reflected in this country in the remarks of Griffith CJ in *Melbourne Steamship Company Ltd v Moorehead* (1912) 15 CLR 333; [1912] HCA 69 at 342. In more recent years, the obligation of the government has been described as an expectation that it will act and be seen to act as a "model litigant": see *Yong v Minister for Immigration & Multicultural Affairs* (1997) 75 FCR 155; 144 ALR 695 at 166E (Beaumont, Burchett and Goldberg JJ).

In *Scott v Handley* (1999) 58 ALD 373; [1999] FCA 404, the Full Court of the Federal Court (Spender, Finn and Weinberg JJ) considered the appropriateness of a refusal to grant an adjournment to litigants in person who claimed they were not ready to proceed to a final hearing, in circumstances where the respondent Minister had served affidavits with new material only six days before the hearing and three months outside the time permitted at a directions hearing: at [39]. One factor considered relevant by the Full Court was that the appellants were unrepresented litigants. The second factor was that the active respondent was an officer of the Commonwealth. Their Honours continued at [43]:

> As such he properly is to be expected to adhere to those ***standards of fair dealing*** in the conduct of litigation that courts in this country have come to expect – and where there has been a lapse therefrom, to exact – from the Commonwealth and from its officers and agencies. (my emphasis)

19 After referring to *Moorehead* and *Cantarella*, their Honours noted that the principles were stated at a level of broad generalisation, and that "the burden of this fair dealing standard is best appreciated in its ***particular exemplifications in individual cases***": at [45]. (my emphasis) They continued:

> [46] 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 a 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.
> …
> [48] During the course of the present hearing counsel for the second respondent acknowledged that had Mrs Scott's submission in this court been put to his Honour, he would have been hard put to resist an adjournment. That concession was properly made. We agree. The second respondent ought to have informed the trial judge of the default. Had this been done, his Honour would have had a different appreciation of the time the appellants had available to them to prepare for the hearing.

20 These principles have for some years been recognised by express statements of the executive government. At the Commonwealth they are to be found in Legal Service Directions issued by the Attorney-General issued under s 55ZF of the *Judiciary Act 1903* (Cth). Similar principles were promulgated by the Government in this State in 2004. As explained by Mahoney JA in *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537; 41 LGRA 116, the principles apply to a statutory corporation. Although in dissent as to the outcome, his Honour considered the approach adopted by the respondent Council in seeking to uphold a compulsory sale of property to recover unpaid rates, pursuant to a defective notice. His Honour noted that, "the council is a corporation constituted by statute, and discharging public functions": at 558F. He continued at 558-559:

> 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 expected from others would not been 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*… In my opinion, a standard of conduct not significantly different should be expected of a statutory corporation of the present kind. (my emphasis)

The Court of Appeal held (at [21]) that if the agency had been of the view that the Commission's order could not fairly be defended, it should have advised the Court of that fact and its reasons for reaching that conclusion. It was inappropriate for the agency (a statutory corporation) to stand by and in effect require the appellant to persuade the Court of the correctness of his position.

In *Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523; [2009] NSWCA 102, the Court of Appeal considered proceedings that were commenced by the Director-General, initially by way of a statutory appeal. He succeeded on a number of the grounds set out there. However, he also commenced further proceedings by way of judicial review which Basten JA described (at [96]) as "not an abuse of process, but the proceedings were otiose". In addition, Basten JA said:

> ...all but two of the grounds of appeal were insubstantial. In support of the various grounds and the summons for judicial review, extensive and repetitive written submissions were filed. These factors imposed on the respondent an unnecessary burden. Particularly in the case of a Government officer pursuing statutory remedies, ***a failure to tailor claims with some care*** to the precise needs of the case, so as to avoid imposing unnecessary burdens on the other party, will usually mean that the officer will not have acted as a model litigant and will not recover the full costs of the proceedings, even if successful. (my emphasis)

In addition to *Mahenthirarasa*, above, there are a number of cases that explain the model litigant principle – for example, *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383 (per Mahoney J); *Melbourne Steamship Company Ltd v Moorehead* (1912) 15 CLR 333; [1912] HCA 69 at 342 (per Griffiths CJ); *Yong v Minister for Immigration & Multicultural Affairs* (1997) 75 FCR 155; 144 ALR 695 at 166E (Beaumont, Burchett and

Goldberg JJ); and *Scott v Handley* (1999) 58 ALD 373; [1999] FCA 404 (Spender, Finn and Weinberg JJ). See also Logue v Shoalhaven Shire Council [1979] 1 NSWLR 537; 41 LGRA 116 (Mahoney JA); *Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523; [2009] NSWCA 102 at [96] (per Basten JA).

Accordingly, the common law adds the following to the Premier's memorandum:

- there is expected of the Crown the highest standards in dealing with its subjects;
- it applies to statutory corporations as well;
- principles of equity and good conscience that apply to the government are higher that what is expected of others;
- duty to assist the court to arrive at the proper and just result;
- expectation that government will act and be seen to act as a "model litigant";
- expected to adhere to standards of fair dealing in litigation;
- principles are stated at a level of broad generalisation;
- the fair dealing standard is best understood by reference to individual cases;
- for example, filing many documents, affidavits late and not assisting an unrepresented litigate to make an adjournment application as a result; and
- duty extends to drafting pleadings and grounds of appeal carefully so as not to burden the other party.

In addition, the Courts have held that, as representatives of public bodies, they must be "moral exemplars" – *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 197C (Finn J).

The Commonwealth Position

For the Commonwealth, the model litigant principles are a big operation.

The requirements are found in the *Legal Services Directions* issued by the Attorney-General issued under s 55ZF of the *Judiciary Act 1903* (Cth). That section relevantly provides:

> 55ZF Attorney-General may issue directions
>
> (1) The Attorney-General may issue directions (Legal Services Directions):
> (a) that are to apply generally to Commonwealth legal work; or
> (b) that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter.

The expression Commonwealth legal work is defined to include the work of the Australian Government Solicitor (AGS) and work for many Commonwealth persons, entities and bodies.

Section 55ZG (Compliance with Legal Services Directions) commands that a number of specified persons or bodies "must comply with Legal Services Directions that have been published" and with Legal Services Directions of which the person or body has been notified.

The list of these persons includes the whole of the AGS and its government clients (listed in section 55N of the Act).

The *Legal Services Directions 2017* (Cth) are a detailed set of binding rules issued by the Attorney-General about the performance of Commonwealth legal work. Schedule 1 contains the Directions.

They are published on the Federal Register of Legislation. See also the Legal Services Directions and guidance notes on the Internet at https://www.ag.gov.au/legal-system/office-legal-services-coordination/legal-services-directions-and-guidance-notes

See also: Litigation involving the Commonwealth at Internet https://www.ag.gov.au/legal-system/publications/litigation-involving-commonwealth

The directions set out requirements for sound practice in the provision of legal services to the Australian Government. They offer tools to manage legal, financial and reputational risks to the Australian Government's interests.

They also give Australian Government agencies the freedom to manage their own particular risks while providing a supportive framework of good practice.

The Office of Legal Services Coordination (OLSC) administers the directions.

The OLSC conducts training workshops on an as-needed basis to help Australian Government agencies understand their obligations under the Legal Services Directions, and how to comply with them.

The OLSC has prepared guidance notes to help agencies to comply with their obligations under the directions. There are many such guidance notes.

Many of the Directions are internal matters, set out for the convenient and efficient dispatch of litigation across the Commonwealth. For example, in Paragraph 3.1, a non-corporate Commonwealth entity is to report as soon as possible to the Attorney-General or OLSC on significant issues that arise in the provision of legal services, especially in handling claims and conducting litigation.

Also in Paragraph 10A, such entities must share constitutional law advice with the AG and the OLSC.

In Appendix B of the Directions, is set out “The Commonwealth’s Obligation to Act as a Model Litigant”.

Paragraph 14 of the Directions (Sanctions for non-compliance) provides:

> 14.1 The Attorney-General may impose sanctions for non-compliance with the

> Directions. Note: Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of non-compliance with the Directions are set out in material on compliance published by OLSC. Allegations of non-compliance with the Directions may be raised with OLSC at olsc@ag.gov.au.
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> 14.2 When entering into a contract for legal services, Commonwealth agencies are to include a provision stating that the contract includes appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including the termination of the contract in an appropriate case.

The Model Litigant Rules in Appendix B of the Directions provide at Item 1:

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

As to merits review proceedings (tribunals such as the new Administrative Review Tribunal - ART), item 3 of Appendix B of the Directions provides the obligation to act as a model litigant extends to Commonwealth agencies involved in merits review proceedings

Item 4 provides that a Commonwealth agency should use its best endeavours to assist the tribunal to make its decision.

The nature of the obligation to act as a model litigant in litigation matters is described in detail in Item 2 of Appendix B of the Directions (Nature of the Obligation). In (selected) summary, it is provided:

- there is an obligation on the Commonwealth and Commonwealth agencies to act as a model litigant;
- It requires that they act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency;
- Note 2 to Item 2 says "In essence, being a model litigant requires that the Commonwealth and Commonwealth agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards."
- dealing with claims promptly;
- do not cause unnecessary delay in the handling of claims and litigation;
- make an early assessment of the prospects of success in legal proceedings
- and of potential liability in claims against the Commonwealth;
- Pay out legitimate claims without litigation (or some of it);
- Manage the scope of litigation;
- act consistently in the handling of claims and litigation;
- keep the legal costs to a minimum;
- do not take advantage of a claimant who lacks the resources to litigate a legitimate claim.
- Don't rely on technical defences;

- Don't take on appeals unless it has reasonable prospects for success, or the appeal is otherwise justified in the public interest;
- apologise where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly; and
- Note 4 to Item 2 says "The obligation does not prevent the Commonwealth and Commonwealth 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 Commonwealth 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"

It is worth noting that section 56(1) of the new *Administrative Review Tribunal Act 2024* (Cth) (ART Act) provides for the decision-maker and any person representing the decision-maker must use their best endeavours to assist the Tribunal to make the correct or preferable decision in relation to the proceeding; and to achieve the Tribunal's merits review objectives (set out in section 9).

The obligation of the non-government party in section 56(2) is more limited (only to the Tribunal's objectives).

Enforcement of the Directives

When the model litigant button is pressed (by anyone) the legal practitioner is required to report it to the Commonwealth agency, who is required to report the complaint to the OLSC. The circumstances and the outcome of the complaint must be reported under the Directions (Schedule 1, paragraph 2.1 of the Directions).

Non-compliance is reported using the Agency Notification Form.

Also, agencies must report as soon as possible to the Attorney-General or OLSC on significant issues that arise in the provision of legal services, especially in handling claims and conducting litigation (Schedule 1, paragraph 3.1 of the Directions).

Under the Directive, Schedule 1, paragraph 11.1(d) it provides:

> "[It is ensured that] the entity gives reports as soon as practicable to the Attorney-General or OLSC about any ***possible or apparent*** breaches of the Directions by the entity, or allegations of breaches by the entity of which the entity is aware, and about any corrective steps that have been taken or are proposed to be taken, by the entity". (my emphasis)

This includes allegations of non-compliance made to the entity, along with circumstances of possible non-compliance of which the entity becomes aware, for example: judicial criticism, media attention, and internal reviews - (OLSC Guideline 3).

The OLSC maintains a Notification Register for such matters.

Even innocent raising of a model litigant issue is sufficient to activate this reporting regime.

It's very much a case of "Don't mention the war!" – All hell might break lose.

Any issue of non-compliance with a Legal Services Direction may not be raised in any court or tribunal proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth - s 55ZG(3) of the *Judiciary Act 1903* (Cth).

Finally, paragraph 11.2 of the Directions requires Commonwealth entities to provide a compliance certificate to OLSC within 60 days of the end of each financial year setting out the extent to which the entity has complied with the Directions.

The Commonwealth Attorney-General is personally briefed on any Commonwealth's non-compliance with the Directions. Statistical information about non-compliance is published on the Attorney-General's Department website (OLSC Guideline 3).

Practical Matters

No one likes to complain. There's a reason for the expression "Tell it to the Judge!" If the complaint is of real substance, it probably should be raised in the court or tribunal. To do so does not rob it if its capacity to also be a Legal Services Direction issue.

They are separate things and processes.

One time I cried of a foul and I sought to invoke the model litigant doctrine in the Administrative Appeals Tribunal. There was a potential "ambush" between the parties in that the Commonwealth's statement of facts and contentions listed 4 issues/complaints and they now wanted to agitate 5 issues. I determined that my complaint worked better as a tribunal application.

After some heated argument, the tribunal determined that the Commonwealth had to abide by the list of issues it had already circulated just prior to the final hearing – see: *Aerolink Air Services Pty Ltd v Civil Aviation Safety Authority* [2003] AATA 1357 at [4]-[7](Senior Member M D Allen).) The Tribunal said (at [7]):

> "What the Respondent attempted in these proceedings was to give certain reasons for its decision and then at the hearing to add to and expand on those reasons, thus altering the case the Applicant had every reason to think it was required to meet upon review. This is clearly contrary to the intent both of the AAT Act itself and the Tribunal's Practice Direction. Apart from being a direct subversion of the principles of modern administrative law, it does not fit at all well with the Respondent's ethical responsibilities as an entity of the Commonwealth to act as a model litigant: see re *Moline and Comcare* [2003] AATA 827 and the directions given by the Attorney General of the Commonwealth"

Thank you.