THE GOVERNMENT AS LITIGANT

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I INTRODUCTION

We expect the government as litigant to play fair. The government's obligation to act fairly in the conduct of litigation is frequently invoked by litigants in matters against the government or by judicial officers in litigation that comes before them. But there is still uncertainty about where the government's special obligations to fairness in litigation come from. Further, there is an inherent indeterminacy in notions such as 'fairness' and 'model litigant'. We often define these concepts by reference to extreme transgressions into unfairness; yet short of this there is a significant zone of uncertainty where conflicting principles that underpin the duty of fairness may dictate different outcomes.

Bearing in mind the difficulties of definition and resultant uncertainty as to the content of the duty of fairness, there is a question about whose view of what is 'fair' or 'model' in any particular circumstances should be determinative. This article explores separate attempts by the executive and the judiciary to define and enforce the model litigant obligation. At the federal level in Australia, the executive has attempted to take the enforcement of the obligation away from the courts and into the political arena, relying on education, training and self-monitoring.[1] The courts have responded with a proactive approach to policing the model litigant obligation, relying on their powers to award costs, grant adjournments and stay proceedings to enforce government compliance.[2] The legitimacy of this has recently been questioned.[3] I will explore the extent to which the model litigant obligation is an enforceable obligation under the common law and an argument that it may be constitutionalised as part of the observation of fair process required by Chapter III of the *Constitution*.

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1 See below Part III(E).

2 See below Parts III(A)–(B).

3 See ibid.

In June 2013, the Commonwealth government tasked the Productivity Commission with reviewing Australia's system of civil dispute resolution.[4] As part of its review into access to and quality of justice in Australia, the Productivity Commission will inquire into how effective the Commonwealth government's current model litigant rules are and whether the existing framework to encourage compliance with them should be strengthened or expanded.[5] In this article, I argue that the model litigant enforcement regimes at both the judicial and executive level are deficient. They could be strengthened by increased transparency and cooperation between the branches in recognition of their shared responsibility to justice and the maintenance of an effective justice system.

The article commences with a brief explanation of the different bases for the model litigant obligation that have been proffered and how they might inform its content and enforcement. It then looks beyond abstract statements of the obligation to attempts by the government and the judiciary to articulate specific rules.[6] A series of case studies are then presented. These demonstrate the challenges of determining what amounts to 'proper conduct' on the part of the government litigant in hard cases, and the deficiencies in relying solely on the executive or the judiciary to police the model litigant obligation. I conclude by proposing a number of reforms to the current regime of enforcement of the model litigant obligation that require the executive and judiciary to work together to ensure fairness in government litigation.

II BASIS FOR THE OBLIGATION

In the 1912 case *Melbourne Steamship Co Ltd v Moorehead*, Griffith CJ described the Crown's obligation 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'.[7]

However, while Chief Justice Griffith's statement is often used as the starting point in determining the existence of the model litigant obligation in Australia, to say that the obligation is 'traditional', 'instinctive' or 'elementary' provides little assistance in determining its basis. While there is still disagreement, some assistance can be gained from English authorities and the obligation's further distillation in Australia, which has drawn on these English cases.[8] Three bases can be identified.

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4 Australian Government Productivity Commission, 'Access to Justice Arrangements' (Issues Paper, September 2013) iii–v.

5 Ibid 19.

6 The Commonwealth government's attempt can be discerned by reference to the Commonwealth Model Litigant Rules (*Legal Services Directions 2005* (Cth) app B).

7 (1912) 15 CLR 333, 342 ('*Melbourne Steamship*').

8 See, eg, *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346, 367–71; *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366, 383–4 ('*P & C Cantarella*').

A Obligation to Justice and the Rule of Law

The English decisions have relied upon the idea that the executive must 'maintain the highest standards of probity and fair dealing' because of the Crown's position as 'the source and fountain of justice'.[9] The executive, as part of the Crown, has obligations to assist the judiciary in achieving justice. Some judges have equated the Crown's model litigant obligation with the obligations of probity and fair dealing of judicial officers.[10] If the Crown has responsibility to justice and maintaining litigation standards, the government ought to lead by example, act as the 'model litigant', the 'moral exemplar'.[11]

Justice Mahoney has argued that the model litigant obligation extends from the executive's obligations to justice as part of the 'rule of law':

> 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.[12]

The *Legal Services Directions 2005* (Cth) ('*Legal Services Directions*'), in which the Commonwealth government's Model Litigant Rules are set out, state that the model litigant obligation arises from the responsibility of the Attorney-General (as First Law Officer) for the maintenance of proper standards in litigation.[13]

In the 1987 decision of *Kenny*, King CJ explained that the Court and the Attorney-General have 'joint responsibility for fostering the expeditious conduct of and disposal of litigation'.[14] As such, government lawyers responsible to the Attorney-General must set an example to be followed by the legal profession. Chief Justice King's emphasis on expeditious resolution of litigation has resonances, but is not necessarily directly synonymous, with sourcing the model litigant obligation in the Crown's duty to achieve justice. It may be that slight difference in the *source* of the obligation would dictate a different *outcome* in any given situation; this is returned to below.

B Public Trust/Public Good/Public Interest

Justice Finn's 1997 judgment in *Hughes Aircraft Systems* is often quoted in support of sourcing the model litigant obligation in the government's obligations

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9 *Sebel Products v Commissioner of Customs and Excise* [1949] Ch 409, 413 (Vaisey J). See also *Pawlett v Attorney-General* (1667) 145 ER 550, 550; *Dyson v Attorney-General* [1911] 1 KB 410, 421; *Deare v Attorney-General* (1835) 160 ER 80, 85.

10 See discussion of *Sebel Products v Commissioner of Customs and Excise* [1949] Ch 409, 413 (Vaisey J) and *R v Tower Hamlets LBC* [1988] AC 858 in Camille Cameron and Michelle Taylor-Sands, '"Playing Fair": Governments as Litigants' (2007) 26 *Civil Justice Quarterly* 497, 499 and fn 18.

11 See *Kenny v South Australia* (1987) 46 SASR 268 ('*Kenny*'); *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 ('*Hughes Aircraft Systems*').

12 *P & C Cantarella* [1973] 2 NSWLR 366, 383.

13 *Legal Services Directions* app B cl 1.

14 *Kenny* (1987) 46 SASR 268, 273.

to the public.[15] First and foremost, he explained that public bodies are, ultimately, owned by the Australian community. A public body must serve the community in accordance with its statutory mandate. A public body 'has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve.'[16]

Justice Finn then went on to explain that there were a number of manifestations of a public body's general obligations 'to act fairly towards those with whom it deals at least insofar as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.'[17] While still not providing us with the basis for the obligation, this comment is revealing in that it tells us that the obligation to act fairly on the part of government is limited – it must be balanced against its other obligations to the public interest. These other obligations may be, for example, to secure the conviction and proportionate sentencing of criminals on behalf of the broader community.

Justice Finn also went on to explain where he believes the various obligations of public bodies to act fairly might be found. He says that they reflect policies

(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'; and
(c) of requiring such bodies to act as 'moral exemplars': government and its agencies should lead by example …[18]

Conrad Lohe, the former Queensland Crown Solicitor, has further explained that '[t]he 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.'[19]

In a different context, the Joint Committee of Public Accounts has explained that government entities could be expected to meet more social responsibilities than their private counterparts because they were 'charged with the expenditure of public money', and that 'accountability is the basis for public trust in the operation of government entities.'[20] Section 44 of the *Financial Management and Accountability Act 1997* (Cth) states that chief executives of agencies, which include government departments, 'must manage the affairs of the Agency in a way that promotes the proper use of the Commonwealth resources'; 'proper use' is further defined as 'efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth'.

However, basing the Crown's litigation obligations on the 'public trust', and its obligations to the 'public good' or 'public interest', provides little assistance

15 (1997) 76 FCR 151.
16 Ibid 196; this concept was recently picked up in *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, 169 [716] (Spigelman CJ, Beazley and Giles JJA) ('*Morley v ASIC*').
17 *Hughes Aircraft Systems* (1997) 76 FCR 151, 196.
18 Ibid 197 (citations omitted).
19 Conrad Lohe, 'The Model Litigant Principles' (Paper presented at the Legal Managers' (Breakfast Briefing, Queensland, 28 June 2007) 1.
20 Joint Committee of Public Accounts, Parliament of Australia, *Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises* (1992) 15.

in determining the content of those obligations. Indeed, the idea of 'public interest' has been criticised as unhelpful in this context because of its lack of objective content.[21] Different conceptualisations of the public interest will emphasise often conflicting principles, for example, conflict often arises between the government's obligation to keep the community safe and secure and the government's obligation to respect the rights of individuals within that community. For this reason, some scholars have argued that enunciating core values or ethics of government is superior to relying on the concept of 'public interest' alone.[22] Camille Cameron and Michelle Taylor-Sands have argued that:

> While … core values … may also be criticised for vagueness, as an analytical tool they are superior to 'public interest'. … [T]he core values are a more specific statement of the foundation on which the model litigant obligations are based than is the amorphous concept of public interest.[23]

C Litigation Advantage

Another basis for the model litigant obligation that is often proferred is the litigation advantage brought by government because of its size and resources.[24] Government is a repeat player in the justice system with a large amount of resources at its disposal, and government lawyers often have a higher public profile (for example, the Director of Public Prosecutions ('DPP') or the Solicitor-General).[25] As a repeat player, the government is said to enjoy a number of advantages, including 'greater expertise and access to specialist knowledge in relation to substantive law and court processes'. Further 'the Commonwealth's regular appearances in litigation allow it to build a good reputation before courts and tribunals based on past conduct. This reputation may lead judges to defer to the Commonwealth more frequently than to other litigants', and 'the government's continuing interest in developing rules enables it to litigate the same point repeatedly, which in turn allows it to be selective with the cases it runs (or declines to settle) in order to maximise the chances of obtaining a favourable outcome.'[26]

If the Crown's litigation advantage is accepted as the sole or at least primary basis for the model litigant obligation, this will have repercussions in determining

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21 See Cameron and Taylor-Sands, '"Playing Fair": Governments as Litigants', above n 10, 502.

22 See, eg, Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114, 122; Paul Finn, 'A Sovereign People, A Public Trust' in P D Finn (ed), *Essays on Law and Government: Volume 1 Principles and Values* (The Law Book Company, 1995) 22–32; John C Tait, 'The Public Service Lawyer, Service to the Client and the Rule of Law' (1997) 23 *Commonwealth Law Bulletin* 542, 548.

23 Cameron and Taylor-Sands, '"Playing Fair": Governments as Litigants', above n 10, 503.

24 Ibid.

25 Ibid 504–6. See also Camille Cameron and Michelle Taylor-Sands, '"Corporate Governments" as Model Litigants' (2007) 10 *Legal Ethics* 154, who argue the model litigant obligation should extend to large corporations for these same reasons.

26 Cameron and Taylor-Sands, '"Playing Fair": Governments as Litigants', above n 10, 505–6. See also John Basten, 'Disputes Involving the Commonwealth: Observations from the Outside' (1999) 92 *Canberra Bulletin of Judicial Administration* 38.

its content. It raises a question as to whether the model litigant obligation only, therefore, applies where the Crown 'outguns' its opponents. There are an increasing number of cases in which the Crown appears where it may, in fact, be 'outgunned' by its opponents. One such example is where the corporate regulator, the Australian Securities and Investments Commission ('ASIC'), brings prosecutions against the directors of well-resourced, multi-national companies, some of which equal or exceed the regulator's size, resources, and litigation experience.[27] If, however, a different basis is accepted as supporting the model litigant obligation, such as the Crown's obligation to justice, the rule of law or the public good, the existence or absence of a litigation advantage in any particular circumstance is less relevant (although it could still possibly inform the content of 'justice' in a particular case).

Another important point of contrast between the first two justifications of the model litigant obligation and the justification that rests on the Crown's litigation advantage is that in referring to the first two justifications, judges use the language of 'obligation', 'duty', and 'responsibility'. The language implies an enforceable standard. When the Crown's litigation advantage is used as the justification, it implies a role for the court that is not about enforcing standards. Nonetheless, it may still be enforceable as part of the court's duty to ensure fairness in litigation.

III ARTICULATING AND ENFORCING THE OBLIGATION

To make the model litigant obligation workable in practice for government agencies and legal representatives, it becomes important to articulate it: content must be poured into its abstract form. As has already been explored above, expectations of what may be required by justice or the values that underpin fair dealing may differ. Fairness in any given case will be informed by principles that may pull in opposite directions, for example the principle that expenditure of public monies ought to be accountable and appropriately frugal, may pull against the principle that government ought to deal expeditiously with claims against it; or the principle that government prosecutorial power must be tightly controlled, may pull against the principle that government must work rigorously to secure convictions.

This part explains separate attempts by the government and the courts to articulate and ensure compliance with the model litigant obligation. It reveals a struggle between the two over which branch of government is the most appropriate to extract compliance with the obligation. This is informed by the struggle over the basis of the obligation, set out above.

27 See also discussion in the context of the Australian Competition and Consumer Commission in Cameron and Taylor-Sands, '"Corporate Governments" as Model Litigants', above n 25, 158–9.

A Common Law

Judges will often comment on the government's failure to comply with their view of the model litigant obligation. There is no doubt that the judges have the power to do this. This type of judicial pronouncement on the poor behaviour of government litigants is, on one level, a relatively weak redress for breaching the duty of fairness, although it can and does have some effect. Where judges merely make adverse comment there is no need to identify a supporting power for this action.

However, beyond adverse comment, judges have indicated that the model litigant obligation is not just a normative expectation but creates enforceable standards. The judicial nomenclature includes references to obligations, duties and responsibilities. This position takes the model litigant obligation beyond the expectation that Griffith CJ referred to in *Melbourne Steamship*. In that case, Griffith CJ commented on his surprise and disapproval that a technical pleading point was made by the Comptroller-General, but went on to consider the point, not seeking to remedy any unfairness caused by the Crown's actions.[28] In *Scott v Handley*, the Full Federal Court explained that an Officer of the Commonwealth

> 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.[29]

The courts have been increasingly assertive that the obligation is an enforceable one. Judges use their powers (for example, to grant stays, order the calling of a witness, or make a costs order) to redress any unfairness created by failure to adhere to the obligation. It is not a matter of sanctioning or 'punishing' the government litigant for their behaviour.[30] In this respect at least, the courts are aligned closely with the justification for the obligation that rests on the litigation advantage brought by the Crown, and the Crown's obligations to justice in a particular case.

In *Scott v Handley*, the Full Federal Court (Spender, Finn and Weinberg JJ) overturned the trial judge's decision to refuse an application for an adjournment by the appellants and thereby dismiss the proceedings. The Full Court's decision was based on the ground, revealed after the matter was heard by the trial judge, that the second respondent, the Secretary of the Department of Social Services, had failed to comply with a direction to file and serve affidavits and had, in fact, served three lengthy affidavits on a Friday afternoon only six days prior to the hearing, a default of almost three months.[31] The appellants did not rely upon this as a ground in arguing for an adjournment before the trial judge, and the second respondent failed to bring it to the Court's attention.[32] The Full Federal Court noted that the Crown party 'took advantage of the inability of the appellants to

28 *Melbourne Steamship* (1912) 15 CLR 333, 342–6.
29 (1999) 58 ALD 373, 383 (Spender, Finn and Weinberg JJ) (emphasis added).
30 *Contra* Christopher Peadon, 'What Cost to the Crown a Failure to Act as a Model Litigant' (2010) 33 *Australian Bar Review* 239, 255.
31 *Scott v Handley* (1999) 58 ALD 373, 382 [39].
32 Ibid 382 [40].

articulate properly the basis for, and to secure, an adjournment.'[33] The Full Federal Court found that, in circumstances where the second respondent was an officer of the Commonwealth appearing against an unrepresented litigant, in 'a position of obvious advantage',[34] this conduct amounted to a miscarriage of justice. The trial judge should have granted an adjournment because of the conduct of the second respondent.

Government conduct that amounts to a breach of the model litigant obligation has also been used by the courts as the basis for the resolution of questions relating to costs.[35] For example, in *Mahenthirarasa v State Rail Authority of NSW [No 2]*,[36] the New South Wales Court of Appeal ordered the State Rail Authority pay the applicant's costs in a workers' compensation matter (the Authority was the applicant's employer). The Workers Compensation Commission had initially decided in favour of the Authority. The Authority had opposed the Registrar granting leave to the Workers Compensation Commission's Appeal Panel. The applicant appealed the Registrar's refusal of leave to the Court of Appeal. The Authority did not participate further in the appeal, filing a 'submitting appearance' only. It claimed the Court should not award costs against it because it took no part in the proceedings. The Court of Appeal made the award on the basis that the Authority had failed to provide assistance to the Court, and was taking advantage of its actions in obtaining the order to refuse leave from the Commission's initial decision.[37]

The use of the model litigant obligation to inform the question of costs has been the subject of criticism. In *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd*, Gray J explained that the adoption of the model litigant rules by the Commonwealth government is 'of significant value to parties against whom the Commonwealth is involved in litigation, and to the courts in which that litigation is conducted.'[38] However, judicial attempts to exact the obligations from the government such as through awarding indemnity costs 'might have the result that the Commonwealth abandoned the policy. This would be detrimental to the public good.'[39] I will demonstrate that Justice Gray's

33 Ibid 382 [46].

34 Ibid 382 [42], 383 [46].

35 *Contra* Peadon, above n 30. Peadon argues that the cases are better understood as turning on the particular conduct of the government litigant rather than a failure to act as a model litigant. Once it is accepted that in some of these cases the conduct of the government litigant would not have been dealt with in the same way had the litigant been a private body, Peadon's position appears to be drawing a distinction without a difference.

36 (2008) 72 NSWLR 273. See also earlier statements in *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 1568, [18] (Mansfield J); *Nelipa v Robertson and Commonwealth* [2009] ACTSC 16, [97], [100] (Refshauge J); *Galea v Commonwealth [No 2]* [2008] NSWSC 260, [17]–[21] (Johnson J) set out in Peadon, above n 30, 245–7.

37 See also *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd [No 2]* [2010] FCA 567; *Phillips, Re Starrs & Co Pty Ltd (in liq) v Commissioner of Taxation* [2011] FCA 532; *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd [No 2]* (2010) 190 FCR 11, [48] (Logan J); *Lolohea v Commonwealth* [2013] FCA 218 [23]–[25] (Rares J).

38 [2007] FCA 1844, [25] ('*ACCC v Leahy*').

39 Ibid.

concerns are unfounded. They overlook the existence of the model litigant obligation as a common law expectation of government litigants before it was adopted by the government.

While costs are generally not available in criminal matters, at least at the District and Supreme Court level, the courts have been able to employ the inherent jurisdiction to stay proceedings to ensure that egregious breaches of duties of fairness to a defendant can be remedied while allowing the prosecution to proceed once this has been done.[40] In *R v Mosely*, the Crown appealed against interlocutory orders made by the District Court in a case involving culpable driving that had resulted in the death of one person and serious injury of another.[41] The Crown had applied for an adjournment of the matter on the basis of the unavailability of material witnesses. The trial judge had granted it but also stipulated the Crown must pay the defendant's costs thrown away. In this way, the trial judge had tried to remedy any unfairness to the defendant while ensuring the interests of justice were served. When the Crown attempted to bring the matter on for trial, the defendant made a successful application to have the proceedings stayed until the costs were paid. The Crown appealed against the decision to stay the proceedings on the basis there was never power to award costs against the Crown in a criminal matter. In that appeal, Gleeson CJ indicated that the same objective could have been achieved by the judge refusing to grant an adjournment until the Crown voluntarily paid the costs of the defendant.[42]

In the South Australian decision of *R v Ulman-Naruniec*,[43] after two mistrials caused by the failure by the DPP to meet its disclosure obligations, the third trial was stayed until the DPP paid or undertook to pay the reasonable costs of the accused of the first two trials. Justice Bleby explained that the order was 'of a different character from what one would normally regard as an order for the payment of costs. It is a payment, in effect, for the relief of the unfairness sustained by the accused brought about by the failure to disclose.'[44]

B Basis of an Enforceable Common Law Obligation

In *Australian Securities Investments Commission v Hellicar*,[45] the Solicitor-General for the Commonwealth (Stephen Gageler SC, now Gageler J of the High Court) argued that any obligations of fairness owed under model litigant type principles were not enforceable duties in the court (at least in federal jurisdiction), but rather self-imposed rules.[46] This accords with the government's position in other contexts. For example, the Australian National Audit Office

40 Stays in criminal proceedings where unfairness has led to an abuse of process are accepted precedent: see *Jago v District Court of New South Wales* (1989) 168 CLR 23, 30–1, 34 (Mason CJ); 47–9 (Brennan J).

41 (1992) 28 NSWLR 735, 736.

42 Ibid 738, 740 (Gleeson CJ), 741 (Kirby P and Mahoney JA).

43 (2003) 143 A Crim R 531.

44 Ibid 541–2 [47].

45 (2012) 247 CLR 345 ('*ASIC v Hellicar*').

46 See Transcript of Proceedings, *ASIC v Hellicar* [2011] HCATrans 293 (25 October 2011). See also Peadon, above n 30, 241.

explained why Commonwealth statutory authorities should show a greater degree of social responsibility than other organisations, even if there were no more stringent *legal* obligations on Commonwealth authorities:

> for leadership in a democratic society to be effective it should be based on setting a good example. Or to put it another way, if public sector agencies are not prepared to do so, how can private sector entities be expected to maintain the desired standards. Hence government authorities must … be model corporate citizens.[47]

In *ASIC v Hellicar,* the Commonwealth argued that the common law had never gone so far as to exact the model litigant obligation from the Crown,[48] although the Solicitor-General conceded that the courts were justified in taking the Crown's conduct into account in the exercise of procedural discretions 'when they have not been measuring up to procedural requirements'.[49] So there seems to be acceptance from both the Court and the Commonwealth Crown that there is a legitimate judicial expectation of fairness in relation to procedural matters (which most of the model litigant rules relate to). Further, the court can remedy unfairness in the Crown's conduct in relation to these matters in the exercise of procedural discretions.

The second argument presented by the Commonwealth was that even if there was a common law doctrine that could be picked up in federal jurisdiction by section 80 of the *Judiciary Act 1903* (Cth),[50] section 64 of the *Act* indicates a contrary intention.[51] Section 64 states: 'In any suit to which the Commonwealth … is a party, the rights of parties shall as nearly as possible be the same … as in a suit between subject and subject.'

The Commonwealth Solicitor-General argued:

> as nearly as possible, in section 64 cuts both ways. The Commonwealth as a party in civil proceedings enjoys no procedural advantage by reason of being the Commonwealth, nor does the Commonwealth in civil proceedings suffer any procedural or substantive disadvantage that would not be applicable to a subject or citizen in analogous circumstances.[52]

Ironically, the Commonwealth's arguments about the existence and enforceability of the model litigant rules occurred during oral submissions in the

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47 Evidence from the Australian National Audit Office, quoted in Joint Committee of Public Accounts, above n 20, 13.

48 See Transcript of Proceedings, *ASIC v Hellicar* [2011] HCATrans 293 (25 October 2011) 36–8 (S J Gageler SC) (during argument).

49 Ibid 38, Mr Gageler agreeing to a statement made by Gummow J.

50 Which states:

> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

51 See Transcript of Proceedings, *ASIC v Hellicar* [2011] HCATrans 293 (25 October 2011) 33–5, 39 (S J Gageler SC) (during argument).

52 Ibid 35 (S J Gageler SC) (during argument).

High Court, as these matters had been conceded by ASIC in the earlier proceedings and in their written submissions.[53]

In the end, the majority of the High Court did not decide the question, which it described as 'large'.[54] Instead the Court only *assumed* that ASIC was 'subject to some form of duty, even if a duty of imperfect obligation,[55] that can be described as a duty to conduct litigation fairly.'[56] Justice Heydon accepted 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.[57]

To turn to the substance of the Commonwealth's submission. First, it is important to note the concessions made in the submission that the Court cannot *exact* the model litigant obligation from the Crown, but that, at the least, failure to meet procedural standards may influence procedural discretions. Exactly what amounts to procedural matters and the exercise of procedural discretion was not elaborated on. Case law is increasingly relying upon costs orders to remedy unfairness effected by government litigants, and even using discretions to grant adjournments, or order a stay to do so. These are procedural remedies and, if understood as addressing unfairness caused by government in litigation and not penalising government litigants, it would seem reasonable to assume that the concession would extend to these three discretions. These are fundamentally different to the relief granted by the Court of Appeal in *ASIC v Hellicar*, where the cogency of evidence was discounted because of the failure to meet the obligation,[58] which is a *substantive* outcome rather than a procedural one.[59]

This conclusion is reinforced by the majority position in the High Court decision, when they considered what the consequences might be of ASIC failing to meet a duty of fairness. The Court of Appeal's approach was overturned.[60] Rather, the majority of the High Court said that failure to discharge the duty of fairness could be *procedurally* remedied at trial level by the trial judge directing ASIC to call the witness, staying proceedings until the witness was called, or, where appropriate, by an appellate court overturning the verdict on the basis that a miscarriage of justice had occurred that necessitated a retrial.[61]

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53 Transcript of Proceedings, *ASIC v Hellicar* [2011] HCATrans 294 (26 October 2011) 135 (A S Bell SC) (during argument). Note the Commonwealth's response: at 222 (A J L Bannon SC) (during argument).

54 *ASIC v Hellicar* (2012) 247 CLR 345, 407 [151] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

55 A non-enforceable duty.

56 *ASIC v Hellicar* (2012) 247 CLR 345, 407 [152] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

57 Ibid 435 [240] (Heydon J).

58 *Morley v ASIC* (2010) 247 FLR 140, 184 [795] (Spigelman CJ, Beazley and Giles JJA).

59 This conclusion is supported by the argument put by A J L Bannon SC in Transcript of Proceedings, *ASIC v Hellicar* [2011] HCATrans 295 (27 October 2011) 220.

60 *ASIC v Hellicar* (2012) 247 CLR 345, 408 [155] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

61 Ibid.

To turn then to whether section 64 of the *Judiciary Act 1903* (Cth) operates to rebut the operation of section 80 of that Act. There are two possible ways to argue against this proposition, one grounded in statutory interpretation and the other constitutional.

First, as a matter of statutory interpretation, two arguments could be mounted. The first is that which was argued in the High Court, that the intention of section 64 of the *Constitution* was to remove obstacles to making *claims against the Commonwealth*.[62] It could also be argued that for the Commonwealth's rights to be 'as nearly as possible … the same' as those of a subject, the courts must take into account the differences in the nature of the parties and the Crown's obligations to justice (including the expeditious conduct and disposal of litigation), the rule of law and the public good. An even stronger argument may be that the litigation advantages enjoyed by the Crown dictate that to be treated 'as nearly as possible' the same requires the Crown to be treated differently.

Second, there are hints in the oral argument in *ASIC v Hellicar* by Gummow and Crennan JJ that the model litigant obligation may in some way be constitutionalised by the requirements of Chapter III. In his questioning of the Solicitor-General, Gummow J suggests at one point that it may be an attribute of federal judicial power.[63] Justice Crennan indicates that it is always associated as a subset of the principle of fairness.[64] The High Court's 2013 Chapter III decision, *Condon v Pompano*,[65] supports an argument that the ability to extract the model litigant obligations from the government is part of maintaining a fair process in a Chapter III court.

In *Condon v Pompano*, the Court considered the constitutionality of the *Criminal Organisation Act 2009* (Qld), and specifically the regime established for placing criminal intelligence before the Supreme Court. This involved the Supreme Court in a separate hearing to determine whether information was 'criminal intelligence'. Criminal intelligence could be used, but not disclosed, in substantive applications under the *Act*, including in an application for a declaration against an organisation and in an application for control orders against members of declared organisations.[66]

In *Condon v Pompano*, all of the judgments accepted that procedural fairness was an essential or defining characteristic of a Chapter III court. Chief Justice French indicated that two of the factors that contributed to the constitutionality of the scheme were the maintenance of the court's inherent power to order the provision of particulars to make sure the process remained fair to the respondent and also the court's ability to have regard to 'degrees of unfairness to the

62 Transcript of Proceedings, *ASIC v Hellicar* [2011] HCATrans 293 (25 October 2011) 159–60 (A S Bell SC).
63 Ibid 37 (Gummow J).
64 Ibid 39 (Crennan J).
65 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458.
66 *Criminal Organisation Act 2009* (Qld) pt 6.

respondent' in determining whether to accept criminal intelligence in a substantive hearing.[67] Justices Hayne, Crennan, Kiefel and Bell relied on the Supreme Court's overarching discretion in the legislation to determine whether the public interest in retaining confidentiality of criminal intelligence 'outweighs any unfairness to the respondent'.[68] Justice Gageler found that that the legislation only avoided incompatibility with Chapter III of the *Constitution* because it did not remove the Supreme Court's inherent jurisdiction to stay a substantive application (that is, make an order suspending the application) where 'practical unfairness to a respondent becomes manifest'.[69]

While they differed in emphasis, it is clear from each of the judgments that the maintenance of a court's ability to regulate its processes and ensure fairness between the parties is an essential characteristic of a Chapter III court. While the High Court has not been asked to consider directly the question of whether the court's power to enforce model litigant standards is part of an essential characteristic of a Chapter III court, it is clear that its focus is now on maintaining the court's ability to achieve fairness between the parties. One of the justifications of the model litigant obligation is to remedy unfairness that may exist because of the Crown's size, resources and litigation experience. If this is accepted, it would seem plausible that the Court may find in future that the maintenance of the Court's powers to exact the model litigant obligation from the Crown is also an essential characteristic. If the model litigant obligation could be constitutionalised in this way, arguments about the operation of section 64 of the *Judiciary Act 1903* (Cth) become moot.

C Content of the Common Law Obligation

As the courts have developed the common law requirements of the model litigant, they have not felt constrained by the articulation of the rules by the government, for example by the Commonwealth in the *Legal Services Directions* (or equivalent State instruments – these are discussed in more depth below). Justice Moore of the Federal Court commented in *Qantas Airways Ltd v Transport Workers' Union of Australia*,[70] that '[w]hile aspects of the model litigant obligations are found in Appendix B to the schedule to the *Legal Services Directions 2005* (Cth) … they are broader and more fundamental.'[71]

The courts have held that the model litigant obligation extends to:[72]

- not taking a technical point of pleading, practice and procedure;[73]

67 *Condon v Pompano* (2013) 87 ALJR 458, 482 [87].
68 Ibid [162], quoting *Criminal Organisation Act 2009* (Qld) s 72(2).
69 Ibid [178], [212].
70 (2011) 280 ALR 503.
71 Ibid 543 [192].
72 Many of these case examples are taken from Cameron and Taylor-Sands, '"Playing Fair": Governments as Litigants', above n 10; Rule of Law Institute of Australia, *The Model Litigant Rules: Key Facts and Cases* (12 August 2011) <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-8-11-Model-Litigant-Rules-Key-Facts-and-Cases.pdf>; Zac Chami, 'The Obligation to Act as a Model Litigant' (2010) 64 *AIAL Forum* 47; Peadon, above n 30.

- complying with time limits in legislation or in a court order to ensure expeditious conduct of and disposal of litigation;[74]
- not adopting a litigation strategy that aims to impair the other party's capacity to defend itself (for example, by impairing the party's capacity to obtain legal representation);[75]
- not taking advantage of own default, for example, failing to issue an order;[76]
- not making incorrect statements in pleadings and orders;[77]
- not adducing late evidence, or withholding evidence until the commencement of the hearing;[78]
- exercising reasonable diligence in locating witnesses to be called at hearing;[79]
- adducing evidence relevant to the matter even if that evidence would substantiate the case of the other party;[80]
- providing accurate responses to factual inquiries from the other party's solicitors;[81]
- making appropriate concessions,[82] and not taking every point in proceedings, particularly where they are unreasonable;[83]
- dealing with an individual's claims consistently and displaying consistent conduct throughout a hearing;[84]
- informing the court of the full circumstances of the case;[85]

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73 *Melbourne Steamship* (1912) 15 CLR 333, 342; *Yong v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155, 166–7.

74 *Kenny* (1987) 46 SASR 268; *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd [No 2]* [2010] FCA 567.

75 *DPP (Cth) v Saxon* (1992) 28 NSWLR 263, 267–8 (Kirby P); see also *Challoner v Minister for Immigration & Multicultural Affairs [No 2]* [2000] FCA 1601, [10] (Drummond J).

76 *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346, 368.

77 *Lolohea v Commonwealth* [2013] FCA 218, [23]–[24] (Rares J); *Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning* [2009] NSWLEC 155.

78 *R v Martens* (2009) 262 ALR 106, 144 [170]; although in the context of a tribunal, see also *Re Bessey v Australian Postal Corporation* (2000) 60 ALD 529.

79 *Badraie v Commonwealth* (2005) 195 FLR 119, 140 [111], 141 [113], [115] (Johnson J).

80 *Australian Securities and Investments Commission v Activesuper Pty Ltd [No 1]* [2012] FCA 1519, [64] (Dodds-Streeton J); although in the context of a tribunal, see also *Broadbent v Minister for Immigration and Multicultural Affairs* [2000] AATA 822.

81 *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, 416 [298] (Heydon J).

82 *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* (2011) 195 FCR 123, 130 [20].

83 *Galea v Commonwealth [No 2]* [2008] NSWSC 260, [13] (Johnson J).

84 *Bennell v Western Australia* (2006) 153 FCR 120, 349 [932] (Wilcox J); *Elliott v Nanda* (2001) 111 FCR 240, 299–300 [189]–[194] (Moore J).

85 *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 175–6 [40]–[42] (North, Logan and Robertson JJ).

- bringing to the court's attention arguments of the other side where it appears the court has overlooked them even after judgment has been handed down;[86]
- providing assistance to the court and not simply submitting to the order of the court;[87]
- demonstrating willingness to settle in appropriate cases;[88]
- not claiming legal professional privilege simply to prevent documents falling into the hands of a potential claimant;[89]
- not bringing otiose proceedings and filing extensive and repetitive submissions;[90]
- prosecuting matters in a way which, within reason, minimises costs;[91] and
- not taking extreme, 'preposterous' or 'tenuous' points.[92]

There is a significant amount of overlap between this list of obligations developed by the courts and that developed by the Commonwealth in its *Legal Services Directions*, although by its nature this list is limited to justiciable matters that come before the court, a limit that does not apply to the *Directions*.

D Should the Court Be Balancing Competing Visions of Fairness?

The articulation by the courts of more specific obligations no doubt assists the government litigant and its legal representatives in preparing a case. But there remains an inherent tension between the public interest in requiring government litigants to act fairly with respect to the opposing party's claims, with the public interest in government defending its claims, and claims made against it, as a party in an inherently adversarial process and as the custodian of public monies. Justice Whitlam explained that the government is not obliged 'to fight with one hand behind its back in proceedings. It has the same rights as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant.'[93]

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86 *SZLPO v Minister for Immigration and Citizenship [No 2]* (2009) 177 FCR 29, 29 [4] (Lindgren, Stone and Bennett JJ); *Laing v Central Authority* [1999] FamCA 100.

87 *Mahenthirarasa v State Rail Authority (NSW) [No 2]* (2008) 72 NSWLR 273, 279 [22] (Basten JA).

88 *Australian Competition and Consumer Commission v King Island Meatworks & Cellars Pty Ltd* (2013) 99 IPR 548, 563 [83] (Murphy J); although in the context of a tribunal see also *Arulanantham v Comcare* [2000] AATA 92.

89 *Queensland v Allen* [2012] 2 Qd R 148, 170 (Fryberg J).

90 *Director-General, Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523, 548–9 [96] (Basten JA).

91 *Smith v Ash* [2011] 2 Qd R 175, [18] (McMurdo P).

92 *Deputy Commisioner of Taxation v Denlay* (2010) 80 ATR 109. See also Rule of Law Institute of Australia, *Key Cases on the Breach of the Model Litigant Rules* (September 2013), 3 <http://www.ruleoflaw.org.au/wp-content/uploads/2013/10/Rule-of-Law-Institute-Key-Cases-on-Breaches-of-the-Model-Litigant-Rules.pdf>; *Solak v Registrar of Titles* (2011) 33 VR 40, 57 [86] (Warren CJ).

93 *Brandon v Commonwealth* [2005] FCA 109, [11] (Whitlam J).

The court's adoption of a role for itself in enforcing the resolution of what fairness may require in a particular case means that it will have to undertake a balancing of competing interests. The difficulties of the court adopting this role where the competing arguments may be finely balanced is demonstrated in the case studies below.

E Legal Services Directions

The *Legal Services Directions* issued under section 55ZF of the *Judiciary Act 1903* (Cth) contain a list of the Commonwealth's model litigant rules.[94] Many states and territories have similar guidelines, modelled largely on the federal rules, although these generally lack an enforcement framework that is as extensive as the Commonwealth's.[95] The Commonwealth guidelines are the most comprehensive and sophisticated; even so, they demonstrate the shortfalls in terms of definition and enforcement in this arena.

The Commonwealth introduced its model litigant rules in 1999, at the same time as the provision of legal services to government underwent a significant restructure. The Australian Government Solicitor was established as a separate statutory authority and many areas of legal work were opened up to competition with the private sector. The *Report of the Review of the Attorney-General's Legal Practice*,[96] on which these reforms were based, recommended that to support the Attorney-General and ensure the Attorney's obligations as First Law Officer were not undermined, the Office of Legal Services Coordination ('OLSC') must be established. The OLSC was tasked with overseeing compliance with the *Legal Services Directions*, issued by the Attorney-General.

The Commonwealth's move to articulate the model litigant rules in the *Legal Services Directions* must be seen as part of this larger move to allow for

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94 *Legal Services Directions* app B. For further analysis of the operation and effectiveness, see Michelle Taylor-Sands and Camille Cameron, 'Regulating Parties in Dispute: Analysing the Effectiveness of the Commonwealth Model Litigant Rules Monitoring and Enforcement Processes' (2010) 21 *Public Law Review* 188.

95 See guidelines in New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory: Legal Services Coordination, *Model Litigant Policy for Civil Litigation* (8 July 2008) New South Wales Attorney General & Justice LawLink <http://www.lsc.lawlink.nsw.gov.au/agdbasev7wr/lsc/documents/pdf/cabinetapp-mlp.pdf>; Department of Justice, Government of Victoria, *Victorian Model Litigant Guidelines* (March 2011) <http://assets.justice.vic.gov.au/justice/resources/21628682-b10c-437c-85d7-e7ebbbc34cf6/revisedmodellitigantguidelines.pdf>; Department of Justice and Attorney-General, Government of Queensland, *Cabinet Direction: Model Litigant Principles* (4 October 2010) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/164679/model-litigant-principles.pdf>; Greg Parker, 'The Duties of the Crown as Model Litigant' (Legal Bulletin No 2, Attorney-General's Department (SA), 10 June 2011) <http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Policies%20Proceedures%20Codes/cso-legal-bulletin-number-2.pdf>; *Law Officers Act 2011* (ACT) div 2.2; *Law Officer (Model Litigant) Guidelines 2010 (No 1)* (ACT). Western Australia has refused to issue formal guidelines, relying instead on the common law: see Western Australia, *Parliamentary Debates*, Legislative Council, 21 September 2010, 6886 (Giz Watson and Michael Mischin, Parliamentary Secretary representing the Attorney-General).

96 Basil Logan, David Wicks and Stephen Skehill, *Report of the Review of the Attorney-General's Legal Practice* (1997) [10.57]–[10.66].

outsourcing of government legal services and the consequent efforts to maintain litigation standards and assist the Attorney-General in meeting the office's obligation to justice in a newly decentralised environment. Outsourcing carries with it dangers of increased inconsistency in government positions, particularly in relation to whole of government and public interest issues. Opening up government legal services to competition also carries with it the danger that, in the hyper-competitive private sector, whole of government and public interest issues would be given little weight as against the top priority afforded to the 'client' department's or agency's short-term agenda.

Underlying the move to articulate the model litigant rules may also have been a desire from those within government for greater certainty through articulation. It may also have been that the move was an assertive one, at a time when the courts were starting proactively to articulate and exact compliance with the obligations, the government moved to try to limit the ability of litigants to raise model litigant failures in the courts.[97] If this was the intention, it may be working, remembering that in *ACCC v Leahy*, Gray J referred to the adoption of the model litigant rules by the Commonwealth as an encouraging move, and the courts ought to refrain from enforcing them lest the Commonwealth resile from that position.[98]

Under the *Legal Services Directions*, the obligation is, generally speaking, to 'act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency'.[99] Note 2 to the rules indicates that they go beyond the normal ethical obligations of private practitioners. Note 2 also indicates that 'in essence' the obligation is to 'act with complete propriety, fairly and in accordance with the highest professional standards.'

Under the *Legal Services Directions*, the obligation attaches to the government litigant and not the government lawyer, but the lawyer has an obligation to assist the client to conform to these obligations. Further, section 55ZG of the *Judiciary Act 1903* (Cth) provides that both the agency and lawyers acting for that agency must comply with the *Legal Services Directions*.

A number of specific obligations are listed in paragraph 2 of appendix B:

> (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

97 The 1990s saw many of the now seminal model litigant cases decided, including *Hughes Aircraft Systems* (1997) 76 FCR 151 and *Scott v Handley* (1999) 58 ALD 373.

98 See *ACCC v Leahy* [2007] FCA 1844, [25].

99 *Legal Services Directions* app B cl 2.

(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 agencies interests would be prejudiced by the failure to comply with the 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 4 indicates that the model litigant obligation does not, however, prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests, reflecting the conflicting nature of many of the principles contained within the public interest concept. The Commonwealth has an obligation to treat individuals in litigation fairly but also to pursue its interests (as the interests of a democratically elected government) and defend the public monies in its custody. Commonwealth agencies may take legitimate steps to test and defend claims made against them and to pursue litigation to clarify points of law even where the other party wishes to settle:

> 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.)

But then Note 5 goes on to state that '[t]he obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.' As will be demonstrated in the case examples below, the tension between the principles is often difficult to reconcile objectively in practice.

The nature of the *Legal Services Directions* makes them difficult to enforce. Under the *Legal Services Directions,* compliance with the model litigant rules

rests predominantly on self-monitoring by the government agency. There is a requirement for chief executives to adopt appropriate management strategies and practices to achieve compliance with the *Legal Services Directions*.[100] The agency must report to the Attorney-General or OLSC as soon as practicable about any possible or apparent breaches or allegations of breaches and corrective steps taken or proposed to be taken.[101] The chief executive provides an annual certification to the OLSC setting out the extent of the agency's compliance with the *Legal Services Directions*, including apparent or possible breaches not previously reported and any remedial actions taken.[102] When contracting legal services, agencies must include appropriate penalties in the event of a breach of the *Legal Services Directions* to which the legal services provider has contributed, including termination of the contract.[103]

There are no sanctions that automatically attach to non-compliance with the *Legal Services Directions*; section 55ZG(2) of the *Judiciary Act 1903* (Cth) provides that 'Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General'. Section 55ZG(3) states that '[t]he issue of non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.'

It is not clear how enforcement by the Attorney-General under section 55ZG would be achieved. Paragraph 14.1 of the *Legal Services Directions* simply states that 'the Attorney-General may impose sanctions for non-compliance with the Directions'. In terms of 'sanctions' the OLSC has suggested that this may take the form of a direction from the Attorney-General as to the conduct of a particular matter or the taking of remedial action.[104] Although the OLSC has stated '[a] direction would only be made where there is no other more effective means of addressing the identified risk', and that issuing a direction 'is likely to be exceptional.'[105]

At present this is the sum of what has been put in place for enforcement under section 55ZG(2), although the language of sections 55ZG(2) and (3) appears to contemplate the Attorney-General *applying* for the enforcement of the *Legal Services Directions* in a court.

Monitoring of compliance within the Commonwealth relies almost entirely upon self-regulation, certification and reporting of alleged breaches to the OLSC.

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100 *Legal Services Directions* pt 1 para 11.1(b).

101 Ibid para 11.1(d).

102 Ibid para 11.2.

103 Ibid para 14.2.

104 Evidence to Joint Committee on Corporations and Financial Services, Parliament of Australia, Sydney, 11 March 2011, 12 (Janette Evelyn Dines, Assistant Secretary, Civil Law Division, Attorney-General's Department).

105 *Legal Services Directions* pt 1 paras 11.1(d), 11.2, and Attorney-General's Department (Cth), *Legal Services Directions 2005: Compliance Framework*, 4 [16] <http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-%20Compliance%20Framework.PDF>.

The OLSC is a 'smaller regulator'[106] that 'aims to encourage and support compliance with the Directions'.[107] The predominant focus of the OLSC is on education and information gathering.[108] It relies on reporting of breaches and does not 'police' compliance,[109] or monitor judicial commentary on the model litigant obligation;[110] it rarely discovers breaches of its own accord.[111]

The Attorney-General and the OLSC can receive complaints from the public. In 2011, the Assistant Secretary responsible for the OLSC explained that due to resourcing restrictions, not all of these were investigated.[112] In 2013, the new OLSC Compliance Framework indicated that complaints are not investigated by the OLSC but forwarded to the agencies for 'appropriate action.'[113] Compliance among Commonwealth departments and agencies has been found to be variable.[114]

Paul Finn has commented that the *Legal Services Directions* create a framework of monitoring and enforcement without input from litigants:

> the burdens of the Directions so far as legal representatives are concerned is to regulate their relationship with the Commonwealth. Parties who are involved in litigation with the Commonwealth and its agencies are strangers to that regulation. They cannot enforce the Legal Services Directions; they cannot raise non-compliance with them in any proceeding whether in a court or otherwise. And there's the rub.[115]

While section 55ZG limits the enforceability of the model litigant rules articulated in the *Legal Services Directions*, it is silent in relation to the courts enforcing common law obligations that rest on government officers and agencies in the conduct of litigation.[116]

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106 Evidence to Joint Committee on Corporations and Financial Services, Parliament of Australia, Sydney, 11 March 2011, 14 (Janette Evelyn Dines, Assistant Secretary, Civil Law Division, Attorney-General's Department).

107 Attorney-General's Department (Cth), above n 105, 2 [9].

108 Ibid 4–5. See also Taylor-Sands and Cameron, above n 94, 198–200.

109 Australian Law Reform Commission, 'Review of the Adversarial System of Litigation' (Report No 89, 2000) [3.148]; Taylor-Sands and Cameron, above n 94, 198.

110 Evidence to Joint Committee on Corporations and Financial Services, Parliament of Australia, Sydney, 11 March 2011, 15 (Janette Evelyn Dines, Assistant Secretary, Civil Law Division, Attorney-General's Department); Taylor-Sands and Cameron, above n 94, 197.

111 Australian National Audit Office, *Legal Services Arrangements in the Australian Public Services* (2005) [5.12]; see also Rule of Law Institute review of the Attorney-General's annual reports detailing investigations of alleged breaches of the *Legal Services Directions*: Rule of Law Institute of Australia, above n 72, 11–16; Taylor-Sands and Cameron, above n 94, 192–8.

112 Evidence to Joint Committee on Corporations and Financial Services, Parliament of Australia, Sydney, 11 March 2011, 17 (Janette Evelyn Dines, Assistant Secretary, Civil Law Division, Attorney-General's Department).

113 Attorney-General's Department (Cth), above n 105, 6 [18].

114 Anthony S Blunn and Sibylle Krieger, 'Report of the Review of Commonwealth Legal Services Procurement' (Attorney-General's Department (Cth), 2009) 39 [108].

115 Paul Finn, *The Crown as a Model Litigant: The Crown as a Litigator* (Law Society of South Australia, 2005) 4.

116 *Contra* Peadon, above n 30, 248.

IV CASE STUDIES

We now turn to a number of high profile, contentious case studies where questions arose about the application, content and enforceability of the Crown's model litigant obligation. The case studies have been chosen because they demonstrate the difficulties of articulating the obligation in a way that provides guidance for the Crown and its legal representatives in hard cases. They also demonstrate that sometimes the courts will be ill-equipped to enforce compliance with the model litigant obligation, and will highlight the need for greater cooperation between the executive and the courts to achieve more comprehensive compliance.

A *Tampa* Litigation

In *Ruddock v Vadarlis*,[117] the appeal in the *Tampa* litigation, the Commonwealth sought an order for costs against Eric Vadarlis, a Melbourne solicitor, and the Victorian Council for Civil Liberties ('VCCL'). Vadarlis and the VCCL had brought an action on behalf of 433 asylum seekers being forcibly kept aboard the MV Tampa by Australian SAS troops. Vadarlis and the VCCL were successful at first instance in the Federal Court before North J,[118] but then unsuccessful on appeal in a 2:1 decision. Their application for special leave to appeal was refused by the High Court on the basis that, by then, the asylum seekers had been transported to either Nauru or New Zealand and therefore the question of their detention no longer arose. Further, the Commonwealth Parliament had passed laws purporting to empower retrospectively the relevant Commonwealth officers in their actions on board the MV Tampa and thereby preventing any further challenge.[119]

The Commonwealth sought its costs against Vadarlis and the VCCL. During the conduct of the hearing itself, the Commonwealth had been commended for acting in good faith and facilitating the expeditious hearing of the matter, including a mammoth discovery effort.[120] The Court refused to exercise its discretion to award costs to the Commonwealth as the successful party in the appeal. Chief Justice Black and French J noted that there were strong factors weighing against making the order,[121] including, inter alia, that:

(a) the proceedings raised novel and important questions of law concerning the alleged deprivation of the liberty of the individual, the executive power of the Commonwealth, the operation of the *Migration Act 1958* (Cth) and Australia's obligations under international law;

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117 (2001) 110 FCR 491 ('*Tampa*').

118 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

119 *Border Security Legislation Amendment Act 2002* (Cth).

120 See *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452, 463 [35], 464 [37].

121 Justice Beaumont dissented on the question of costs.

(b) the questions the case raised were difficult and there was divided judicial opinion on them;

(c) the refusal of special leave by the High Court was partly attributable to actions taken by the Commonwealth; and

(d) there was no financial gain to either Vadarlis and VCCL, who had been represented pro bono.[122]

In addition, the case

> involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the Commonwealth to act as it did with respect to the rescued people was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist.[123]

As set out above, the Notes to the Commonwealth *Legal Services Directions* state: 'In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)'.

However, in the *Tampa* litigation, the Commonwealth not only failed to offer to meet the costs of Vadarlis or the VCCL, but it sought its own costs against two litigants acting not in their own personal interests but for the interests of the asylum seekers. Further, both Vadarlis and VCCL were represented pro bono. There seems to be little a court can do in the circumstances other than refuse the application. Under the model litigant obligation, it is arguable that the application ought never have been made in the first place, in which case simply refusing it would be an insufficient sanction. But this then raises a question of when litigation is taken in the 'public interest', the answer to which the Commonwealth took a very different position to that of the judges.

Chief Justice Black and French J commented on an argument made by the Commonwealth in its submissions on this point. The argument was that this challenge was made to the exercise of an executive power central to Australia's sovereignty, as such the litigation was 'therefore an interference with an exercise of executive power analogous to a non-justiciable "act of State"'.[124] The argument is quite extraordinary. Not only does its premise beg the question the case had to answer, the argument itself is alarming. As Black CJ and French J responded: 'It is not an interference with the exercise of executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope.'[125]

Justice Mahoney said in *P & C Cantarella* that where there is any difficulty in ascertaining what the law is, the executive ought to seek guidance from the court, *or* 'afford the citizen the opportunity of approaching the court, to clarify

122 *Ruddock v Vadarlis [No 2]* (2001) 115 FCR 229, 241 [28].
123 Ibid 242 [29].
124 Ibid [30].
125 Ibid.

the matter.'[126] The position taken by the Commonwealth in the *Tampa* litigation raises questions about whether the model litigant obligation requires the government to refrain from seeking orders and making submissions such as it did in this case, that is refrain from submissions that argue for protection of government power from attack by individuals.

The case then raises questions about how such an obligation could be enforced and the appropriate role of the courts and executive in doing so. It could perhaps be enforced in the courts through an order requiring the government to meet the costs of the parties involved. However this would run counter to the Commonwealth's success in the court on the substantive issues and would be an extraordinary step that goes beyond remedying unfairness and towards punishing the government for its conduct. A more appropriate sanction may be in these circumstances for the Attorney-General to issue directions to prevent a similar position being taken by the Crown in future litigation, however this relies on political will to be effective.

B Mr Nichols

Mr Rodney Nichols went to a Centrelink Customer Service Centre in Tasmania to respond to a request for further information sent to him in relation to his pensioner education supplement payments. While he was there he was asked to wait in a queue with other patrons. Mr Nichols had prostate cancer, and the amount of waiting required would have caused him serious pain. When he approached the staff and explained his situation, he was told that he had to wait in the queue, although he could have a chair if he wished. He left the Centre, and suffered anxiety and humiliation from the incident. Mr Nichols lodged a complaint with the Anti-Discrimination Commission of Tasmania against Centrelink, and after conciliation led to no resolution, his complaint was referred to the Anti-Discrimination Tribunal. He claimed three things: an apology from Centrelink, an assurance that Centrelink would review its procedures regarding disabled people, and the payment of a small sum to compensate him for medical expenses incurred from the resultant stress from the incident.[127]

The Commonwealth filed an application in the Federal Court for an injunction restraining the Tribunal from hearing the complaint. The Commonwealth objected to the jurisdiction of the Tribunal on two bases: first, that it was not bound by the *Anti-Discrimination Act 1998* (Tas) because the *Act* did not apply to the Commonwealth Crown; and second, that even if the *Act* purported to so apply, it would be in breach of the *Commonwealth Constitution* which requires any matter involving the Commonwealth as a party to be heard in a court exercising federal jurisdiction. The last point raised the question of whether the Tribunal was a 'court of a State'. The matter was referred to the Full Federal Court for determination.

126 *P & C Cantarella* [1973] 2 NSWLR 366, 383.
127 *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 118 [158].

At the hearing, the Court was told that Mr Nichols had been diagnosed with terminal cancer and had only a short period of time to live. The Court implored the Commonwealth to attempt to settle the matter, or, if it was determined to continue with it, to seek instructions from the Attorney-General to remove it to the High Court for it to be dealt with conclusively for Mr Nichols. Both requests came to nought.

In the judgment, Weinberg J wrote:

> I cannot leave these reasons for judgment without expressing my disapproval of the fact that the parties felt it necessary to pursue the matter to the extraordinary lengths that they have. Mr Nichols is dying. Mr Walters maintained throughout this proceeding that his client had only three, very modest, requests. …
>
> I understand that those Centrelink employees, who Mr Nichols claims behaved with insensitivity towards him, may have a different recollection of what occurred on the day in question. They may feel strongly that no apology of any kind is warranted. Nonetheless, this is not a case for standing rigidly on principle. It ought to have been possible, with only a modicum of goodwill and some commonsense, to have resolved this matter through mediation. Large sums of taxpayers' money have been spent on conducting highly complex litigation when, with a little flexibility, a satisfactory resolution could easily have been achieved.
>
> I can understand the Commonwealth's wish to have the law, as stated in *Commonwealth v Wood,* reconsidered (although it chose not to appeal the judgment in that matter). Plainly, it is important to determine whether the Commonwealth is subject to the *Anti-Discrimination Act* and other like statutes. Nonetheless, it is difficult to think of a less suitable vehicle than that of Mr Nichols' complaint to test the correctness of the reasoning in that case.[128]

If the model litigant obligation was sourced in the Crown's obligation for 'fostering the expeditious conduct of and disposal of litigation'[129] and not 'justice', there would be little to justify the Crown's behaviour.

One of the key indicators of unfairness in this case is the enormous power imbalance between Mr Nichols and the Commonwealth. When weighing up competing interests in making determinations about public interest and where fairness may lie, one relevant factor will be the relative resources available to the parties. The case demonstrates the difficulty of reconciling competing public interest concerns. The Commonwealth saw public interest in clarifying a difficult question of statutory construction and constitutional law that had the potential to impact on many cases across the country. The Court expressed concern about the impact on a vulnerable individual who had become collateral damage in the Commonwealth's quest for legal clarification.[130]

The case also demonstrates the limited tools that the court has to enforce fairness against the government. Despite the judges' perception that the proceedings were inherently unfair, they were required to exercise their judicial duty and hear and determine the matter; the courts can certainly not force settlement. The Court made no order as to costs pursuant to the Commonwealth's

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128 Ibid 118–19 [158]–[160] (citations omitted).

129 *Kenny* (1987) 46 SASR 268, 273 (King CJ).

130 See, eg, *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 119 [160] (Weinberg J).

undertaking that it would not seek costs against Mr Nichols.[131] As with the *Tampa* litigation, this seems to be an insufficient remedy for Mr Nichols, an individual with serious health problems dragged through litigation in the Federal Court to settle a very minor dispute. Given the public interest in having the matter decided for future cases involving the Commonwealth, perhaps the Court could have required the Commonwealth meet Mr Nichols' costs of running the appeal (although again this would run counter to the Commonwealth's success in the court on the substantive issues). However, unlike in the *Tampa* litigation, such a move would not have been about punishing the Crown but alleviating some unfairness borne by an individual litigant because of the pursuit of broader public interests by the Crown.

C Mr Nemer

Controversy around the Nemer matter arose when the South Australian Attorney-General directed the DPP to institute an appeal against the three-year, three-month suspended sentence imposed on Mr Nemer by the Supreme Court. Mr Nemer had entered into a plea bargain with the DPP. At the sentencing hearing, the DPP had submitted that a suspended sentence was not 'outside' the scope of the sentencing discretion and that 'it would not be appealable if your Honour did decide to go down that path.'[132]

Mr Nemer had shot Mr Williams in the face with a handgun while Mr Williams was delivering newspapers. Mr Nemer pleaded guilty to endangering life, although he had also been charged in the alternative with attempted murder and wounding with intent to do grievous bodily harm.

The DPP had initially refused to appeal the sentence, arguing that the appeal would not succeed.[133] The Premier ordered the Solicitor-General to investigate the handling of the case by the DPP and advise on the merits of an appeal. The Solicitor-General advised that the sentence ought to be appealed; the Acting Attorney-General directed the DPP to appeal.[134] The appeal was ultimately successful and a new sentence of four years and nine months with a non-parole period of one year and nine months was imposed. The case raises serious questions about the relationship between the law officers, but that is not why it is relevant here.

The relevant issue here is the conduct of the DPP: whether the duty of fairness restricted the DPP from appealing the sentence, particularly when the DPP had assured the judge the sentence imposed was within the realm of the judge's discretion. The focus for this article is on the conduct of the government party, although it must be accepted that there is an argument that any unfairness that occurred in this case was brought about by the conduct of the sentencing judge. It was the sentencing judge who had the final decision as to the length of

131 Ibid 119 [164] (Kenny J).
132 *Nemer v Holloway* (2003) 87 SASR 147, 149 [4] (Doyle CJ).
133 Ibid 149 [6].
134 Ibid 149–50 [7]–[9].

sentence imposed on Mr Nemer. The error made by the sentencing judge was corrected on appeal. An important question for determining whether the Crown acted as the model litigant is whether the conduct of the DPP in the sentencing hearing contributed to the sentencing judge failing to impose an appropriate sentence. If the DPP had submitted to the trial judge that a fully suspended sentence was inappropriate and outside the appropriate sentence, would Mr Nemer have been given an appropriate sentence at first instance?

'Fairness' in this case can be viewed from two valid but competing perspectives. The first is the perspective of Mr Nemer, sentenced by a judge on the basis of a submission as to appropriate sentence made by the DPP. The second is to the community, who felt outraged at the leniency of the sentence in comparison to the crime committed. The case also raises questions as to whether concessions or submissions made by the Crown or the Crown's representatives can be transgressed in subsequent litigation in a matter, such as in an appeal.[135]

There are strong arguments that the government must maintain a consistent position in its dealings with individuals and that resiling from submissions and concessions is inconsistent with this obligation and unfair to the other side. The courts have been clear that the model litigant should not resile from concessions made in pleadings. However, the government also has an obligation to assist the court in coming to the correct legal position, and an obligation to the community to seek justice for criminal acts. Ideally, the Crown would never make a mistake in its initial pleadings and submissions. But sometimes errors in legal argument occur, and the question is whether the Crown is bound by its errors (that is, should a court refuse to accept an argument that was conceded in the court below), or ought to be allowed to change its position, perhaps to the detriment of the individual in the matter, but for a larger public benefit?

When the question of whether the Crown can resile from previous submissions arises in the criminal context, it becomes even more complex as if the court were to attempt to enforce such a position, it would be closely akin to the court reviewing the prosecutorial discretion, a role the court has steadfastly refused to take to date.

By viewing the principle of fairness from the twin perspectives of the individual involved and the community, the truly difficult task of reconciling competing public interest values becomes apparent. The court is probably ill-equipped to make a determinative judgment as to which value must trump and dictate the model litigant's path. However, the court could use its powers to achieve some balance between the competing values, refusing to hear the appeal or staying the proceeding until the Crown pays, or undertakes to pay, the costs of the other side in situations where the conduct of the Crown has caused unfairness. In this way, the court avoids transgressing its proper role but maintains the integrity and fairness of its process.

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135 For an interesting and contemporary example of this, see *Dietman v Karpany* (2012) 112 SASR 514, in which, on appeal, South Australia retreated from a concession in the Magistrates' Court in relation to the existence of native title.

D Messrs Karim, Lahaiya, Bayu, Magaming and Alomalu

The *Migration Act 1958* (Cth) creates a legislative scheme that contains a number of offences in relation to people smuggling with significant overlap between the offences. An individual's conduct may be prosecuted under more than one of the provisions, albeit they differ in some respects (for example, under section 233A it is an offence to bring a single non-citizen without a visa into Australia, whereas under section 233C it is an offence to bring at least five non-citizens without a visa into Australia). Some of these offences have mandatory minimum penalties, for example a mandatory minimum penalty is attached to convictions under section 233C but not under section 233A. Messrs Karim, Lahaiya, Bayu, Magaming and Alomalu were all convicted under provisions that required a mandatory minimum penalty to be applied. The group appealed against the sentence raising a constitutional challenge to the scheme based on Chapter III of the *Constitution*. The Court of Appeal rejected that challenge;[136] its particulars and the reasoning are not relevant here.[137]

What is relevant is the existence of a discretion in the prosecutor to choose between two offences that criminalise the same conduct: one that carries with it mandatory minimum penalties and the other that does not. President Allsop stated that, while not relevant to the constitutionality of the scheme:

> Here, in relation to these offences, an illiterate and indigent deckhand having little or no knowledge of, or contact with, the organisers of the smuggling, and knowing little about the voyage in respect of which he or she was charged, pondering his or her incarceration for five years for a first offence, could legitimately conclude that, at a human level, he or she had been treated arbitrarily or grossly disproportionately or cruelly.[138]

President Allsop's comments go primarily to the severity of the legislative scheme. But they also rest on the exercise of the prosecutorial discretion. He went on to say that the subsequent actions of the Commonwealth Attorney-General may have reflected the potential injustice in the scheme. The Attorney-General issued a direction to the DPP that prosecutions under the provision that attracted the mandatory minimum sentence were 'not to be instituted, carried on or continued against a crew member, unless it was a repeat offence, or the person's role extended beyond being a crew member or a death had occurred on the voyage.'[139] That direction has subsequently been repealed by the new Attorney-General.[140]

The prosecutor's decision to prosecute under one offence provision where another is available has been the subject of judicial commentary in the past. In *Smith v Ash*,[141] the Court considered the prosecutorial discretion of a local government body to prosecute parking fines in the Magistrates Court or under the

136 *Karim v The Queen* (2013) 83 NSWLR 268.
137 It was considered on appeal by the High Court: *Magaming v The Queen* [2013] HCA 40.
138 *Karim v The Queen* (2013) 83 NSWLR 268, 299 [121].
139 Commonwealth, *Commonwealth of Australia Gazette*, No GN 35, 5 September 2012.
140 Commonwealth, *Commonwealth of Australia Gazette*, No C2014G00412, 4 March 2014.
141 [2011] 2 Qd R 175.

State Penalties Enforcement Act 1999 (Qld) which provided a streamlined process for the enforcement of fines. President McMurdo stated that '[a] local government authority like the Council should conduct itself as a model litigant and ordinarily prosecute such matters in a way which, within reason, minimises its costs and the cost to the State.'[142] In that case, the Council's decision to pursue a cooperative defendant in the Magistrates Court resulted in the Magistrate refusing to award costs in favour of the Council.

As in *Nemer v Holloway*, the case raises real questions about the extent to which there can be an enforceable model litigant obligation against the state in the exercise of its prosecutorial discretion. While, of course, that discretion must be exercised fairly, are the courts the most appropriate bodies to police that requirement? Courts have, in the past, refused to consider the legality of prosecutorial discretions under judicial review. Would enforcing a duty of fairness involve the courts in this question through the back door? In such a case, it would seem appropriate for the review of the prosecutorial discretion to occur at the government level. Indeed, this occurred in the present case, with the Attorney-General issuing a general direction to the DPP to prevent the prosecution of crew members under the provisions to which a mandatory sentence attach in the future unless aggravating circumstances exist. However, the fragility of relying on government to monitor and enforce its own compliance is highlighted by the revocation of the direction by the subsequent Attorney-General.

V CONCLUSIONS AND RECOMMENDATIONS

At the Commonwealth level, the Crown's model litigant rules are now grounded in the *Legal Services Directions*, enforced by the Attorney-General through a light-touch system of self-monitoring and reporting, and the common law through the court's procedural powers to impose costs and stay proceedings in which the government is a litigant, or in extreme cases where failure to meet the model litigant standards has resulted in a miscarriage of justice, overturn the outcome on appeal.

The case studies have demonstrated that it cannot be the sole responsibility of either the executive or the judiciary to enforce the model litigant obligation. The institutional constraints in which the branches operate mean that enforcement must continue to be a shared responsibility. There is certainly a role for the courts to provide an independent enforcement mechanism, predominantly through the award of costs in cases where unfairness is borne by an individual because of the conduct of the government. This is *not* the imposition of a penalty or sanction, but the remedying of unfairness. It may also act to stimulate compliance with the model litigant obligations and their internal policing. In a study of formal and

142 Ibid 180 [18].

informal judicial discipline systems, Charles Gardner Geyh found that the possibility of disciplinary sanctions can serve as the 'shotgun behind the door'.[143] In a study of corporate compliance programs, Christine Parker found that to be effective, training and education must be backed up with incentives, rewards and sanctions.[144]

However, the courts' powers should be and are limited by a number of operational and conceptual hurdles. First, the courts operate best when they enforce the model litigant obligation in cases of extreme unfairness to an individual. In other cases, the courts' intervention carries with it the danger of substituting the government's view on whether a particular course of action was fair with a judge's view. Sometimes this will be necessary, but where the competing underlying values are delicately balanced, the intervention is inappropriate and inconsistent with the judicial function. These are questions of policy that ought to be resolved by government officers, or potentially by the Attorney-General issuing a general direction as to how such matters must be resolved in the future (as occurred in the case of Messrs Karim, Lahaiya, Bayu, Magaming and Alomalu).[145]

In these more delicately balanced cases, it may be appropriate for the court to exercise restraint, but for the judge to provide a statement that he or she disagrees with the Crown's conduct in the circumstances. Chastising the government for failing to comply with model litigant obligation seems, on one level, a pretty weak alternative. However, where there is a regulatory framework around compliance with the model litigant obligation such as in the Commonwealth, these statements can feed into the administrative enforcement of these obligations, including through the implementation of training and education campaigns.

One of the criticisms made of the federal system is that the OLSC relies on self-reporting by agencies and therefore few breaches of the model litigant obligation are picked up. Michelle Taylor-Sands and Camille Cameron have observed that there is a gap between breaches recorded by the OLSC and breaches found in courts and tribunals.[146] OLSC monitoring could be enhanced by the courts working more closely with the OLSC, perhaps by referring identified breaches to the office. The OLSC currently maintains a register of Federal Court and Administrative Appeals Tribunal cases in which breaches of the model litigant principles are recorded.[147] However, this is not an exhaustive list and it would appear to be maintained by the OLSC based on its own research and self-reporting by agencies, rather than the court reporting breaches to the Office. OLSC monitoring could also be improved by establishing a more formal

143 Charles Gardner Geyh, 'Informal Methods of Judicial Discipline' (1993) 142 *University of Pennsylvania Law Review* 243, 283.

144 Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press, 2002) 121–4.

145 See also Taylor-Sands and Cameron, above n 94, 197.

146 Ibid 189.

147 Ibid 198–9.

and robust complaints-handling process within the Office so that complaints are not simply forwarded to agencies to investigate and respond to.[148]

At present, the investigation and monitoring of compliance with the model litigant obligation through the OLSC lacks sufficient transparency.[149] Greater transparency about complaints and transgressions provides private litigants with an understanding of the way in which the model litigant obligation is applied, the standards they can expect, and reassurance that the government's enforcement is sufficiently rigorous. It also provides an opportunity for the government's behaviour to be shaped in positive ways. A transparent complaints procedure will also provide litigants with a sense of redress if they feel wronged by government conduct in litigation. In contrast to the government's process, the process for complaining about government conduct in the courts is transparent. This may partly go to explaining why complaints are so frequently made in the courts.[150]

Second, the courts will often be poorly situated to make determinations about what fairness requires when there is a question about whether government resources can support certain actions, such as the expeditious location of witnesses or the expeditious testing of forensic evidence. The court necessarily has less access to the full circumstances surrounding the conduct of the case and the available government resources. A judge is limited to observing the conduct of the Crown in court and receiving evidence of the Crown's conduct of the litigation outside of court. This no doubt gives the judge some appreciation for the different pressures and priorities that press upon the Crown, but remains a snapshot that often will not reveal the complexities of the entire situation.

Finally, the courts are often operationally limited in terms of the conduct that they can review. The case studies of Mr Nemer and Messrs Karim, Lahaiya, Bayu, Magaming and Alomalu demonstrated that where the duty of fairness attaches to questions of whether the Crown should bring a prosecution or appeal, the courts should not become involved. Further, the case of Mr Nemer demonstrated that where the Crown is involved in settlement negotiations and conducts itself other than in accordance with the model litigant rules unless the matter comes before the court, the court cannot intervene.

Enforcement of the model litigant obligation requires systems at both the executive and judicial levels. These systems would be greatly enhanced by relatively simple reforms and greater information sharing. I have already argued that the courts should be referring breaches of or concerns relating to the model litigant obligation to the government. Another option may be the establishment of a standing forum for the courts and Attorney-General's Department to share information on the conduct of litigation by the Crown. This forum could provide an opportunity for the court to express concerns about repeat issues that occur in

148 See also Cameron and Taylor-Sands, '"Playing Fair": Governments as Litigants', above n 10, 522.

149 A criticism that is strongly made by Cameron and Taylor-Sands in both of their articles on the issue: see Cameron and Taylor-Sands, '"Playing Fair": Governments as Litigants', above n 10, 522; Taylor-Sands and Cameron, above n 94, 197–8.

150 Although there may be many other reasons for this, including as part of a general litigation strategy.

the government's conduct of litigation that they perceive as unacceptable. It also provides a forum for the government to provide greater information to the judges about the administrative, economic and political context within which the litigation is being conducted. It is not the place in this article to offer a detailed set of rules that might govern such a forum, but it can be stated that it must be conducted within strict limits; discussion of individual cases and concerns from specific pieces of litigation before the courts would be inappropriate.

Education, support and self-regulation within the Attorney-General's Department must work in tandem with the oversight of the courts to achieve the lofty goal of the government as a model litigant.