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The State as Model Litigant

Introduction

The Commonwealth and the States all have a common law responsibility to act as a model litigant. There is no model plaintiff principle, model corporate plaintiff principle and certainly not a model litigant-in-person principle – yet whether plaintiff or defendant the State is expected to behave as a model litigant. It doesn't matter which Court, which claim, which area of law the claim involves, whether the Commonwealth or State is plaintiff, defendant or third party, whether the claim is pre-litigation, interlocutory, trial, appeal or even in a costs-recovery phase – the Commonwealth or State must behave as a model litigant.

Far from being a handicap that fetters the State, I see the model litigant obligation as a prism within which to assess the State's conduct to ensure the highest standard of propriety and ethics are met.

In this paper, I will consider:

- The common law basis for the Model Litigant obligation.

- The importance of the Model Litigant obligations.
- What are the Model Litigant obligations?
- How have the courts interpreted the Model Litigant obligations?
- What should the Model Litigant obligations mean in practice?

The State of Victoria as litigant

The State of Victoria is the biggest user of the court system in Victoria. At any one time, there are several hundred cases involving the State in the State Courts and also in the Federal and High Courts.

Most of these cases involve the State being sued as a defendant. The claims against the State are extraordinarily diverse and include:

- Sexual abuse claims by former wards of the State.
- Assault, false imprisonment and malicious prosecution claims against police officers.

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- Charitable trusts, where the Attorney's role is the protector of charities.
- Contempts of court, where the administration of justice is undermined eg publication contempts.
- Applications under the Crimes (Mental Impairment) Legislation by persons found not guilty of criminal charges by reason of insanity.
- Constitutional cases.
- Applications under the Hague Convention to return children to the jurisdiction they were removed from.
- Judicial review.
- Commercial litigation.
- Personal injury claims by persons dying of asbestosis.
- Alleged wrongful seizures by the police and the Sheriff.
- Forged mortgage cases against the Registrar of Titles brought by innocent defrauded registered proprietors of land.
- Inquests.
- Public interest immunity claims.

But no matter in which diverse area of law the State is immersed in litigation, it must behave as a model litigant. In my view, the model litigant principles are best understood in a four stage process:

- Why are the Model Litigant principles important?

- What are the Model Litigant principles?
- How have the Courts interpreted the Model Litigant principles?
- What should the Model Litigant principles mean in practice?

But first a little history.

Common law origin and evolution of the Model Litigant principle

As long ago as 1912, Sir Samuel Griffith, the Chief Justice of the High Court (and formerly an Attorney-General, Premier and Chief Justice in Queensland) made these comments in relation to a technical pleading by the Commonwealth Attorney-General:

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

I am sometimes inclined to think that in some parts – not all – of the Commonwealth the old fashioned, traditional and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.¹

The concept of a standard of 'fair play' by the State is not a peculiarly Australian concept. For example, in a 1949 English case the court criticised the government's technical defence in a tax case and stated:



At the same time I can't help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control...²

Chief Justice King of the South Australian Supreme Court commented in 1987:

The Court and the Attorney-General, to which the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct of and disposal of litigation. It is extremely important that the Crown Solicitor's Office set an example to the private legal profession as to conscientious compliance with the procedures designed to minimise cost and delay.³

These types of judicial comments evolved into the model litigant principles adopted by the Commonwealth in 1997 and by the State of Victoria in 2001.

Why are Model Litigant principles important?

The model litigant rules are very important because they are all about fair play, about how government should conduct its litigation, about ensuring that the public has good reason to trust its public officials and the way its public officials and lawyers conduct litigation affecting rights of its own citizens. The Government must not abuse its power. It must not act arbitrarily or capriciously.

As to the philosophical importance underpinning model litigant principles, a Canadian government lawyer expressed it this way:

In the Canadian context at least, public service lawyers must never forget that they are using the authority of the Minister, the Minister of Justice and Attorney-General; this is crucial in our system of Parliamentary Government where elected officials are responsible and accountable. This reminds us that our authority is not really ours; it is held in trust ... The main duty of the Minister is to enhance respect for the Constitution and the law and thus it flows that this is the main duty of public service lawyers.⁴

Note the compelling view of Justice Finn in the *Hughes Aircraft* case as to the arguable absence of self-interest by the State - its only true interest is a public interest.

As with any agency of government – and I do not mean by this that it is thereby within 'the shield of the Crown' – it has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve.

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

In differing ways these instances reflect policies in the law, albeit in specific contexts, (a) of protecting the reasonable expectations of those dealing with public bodies; (b) of ensuring that the powers possessed by a public body, 'whether conferred by statute or by contract', are



exercised 'for the public good and (c) of requiring such bodies to act as 'moral exemplars': government and its agencies should lead by example.⁵

What are the Model Litigant principles?

The Model Litigant Principles of the State of Victoria are to be found in the Standard Legal Services to Government Panel Contract. Schedule 4 sets out government policies in relation to equal opportunity and also Model Litigant Principles. Clause 2 provides:

In providing Project Services, the Firm shall ensure that the status of the State and any client as a model litigant is not compromised.

For the purposes of sub-clause 2.1 of this Schedule 4, the Attorney-General may, from time to time, issue model litigant principles with which the State is required to comply.

In 2001 the Attorney-General issued such guidelines as follows:

Guidelines on the State of Victoria's Obligation to Act as a Model Litigant

1. In order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation.
2. The obligation requires that the State of Victoria, its Departments and agencies:
 - (a) act fairly in handling claims and litigation brought by or against the State or an agency;

- (b) act consistently in the handling of claims and litigation;
- (c) avoid litigation, wherever possible;
- (d) pay 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;
- (e) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:
 - (i) not requiring the other party to prove a matter which the State or the agency knows to be true; and
 - (ii) not contesting liability if the State or the agency knows that the dispute is really about quantum,
- (f) do not rely on technical defences unless the State's or the agency's interests would be prejudiced by the failure to comply with a particular requirement;
- (g) do not take advantage of a claimant who lacks the resources to litigate a legitimate claim; and
- (h) do not undertake and pursue appeals unless the State or the agency believes that it has reasonable prospects for success or the appeal is

otherwise justified in the public interest.

Notes:

1. The State of Victoria acknowledges the assistance of the Commonwealth in developing these Guidelines. The Guidelines are based on the Directions on the Commonwealth's Obligation to Act as a Model Litigant, which were issued by the Commonwealth Attorney-General pursuant to s 55ZF of the *Judiciary Act 1903*.
2. The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving State Departments and agencies, as well as Ministers and officers where the State provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Victorian Government Solicitor, in-house or private, will need to act in accordance with the obligation to assist their client agency to do so.
3. In essence, being a model litigant requires that the State and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133, 342; *Kenny v State of South Australia* (1987) 46 SASR 268, 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.
4. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.
5. The obligation does not prevent the State and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the State and its agencies and testing or defending claims against them. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable.
6. The obligation does not prevent the State from enforcing costs orders or seeking to recover its costs.

Who is bound by the model litigant guidelines?

On any view, the model litigant guidelines have wide-reaching application.

- Extends to litigation involving State Departments and agencies as well as Ministers and officers where the State

provides a full indemnity in respect of an action for damages brought against them personally.

- Extends to all litigation including before courts, tribunals, inquiries, and arbitration and other alternative dispute resolution processes.
- Extends to all litigation involving the State irrespective of State's status as plaintiff, defendant, third party etc.
- Extends to statutory corporations spending public monies.⁶
- Extends to private lawyers, in-house Government lawyers and VGSO.

Differences between the Commonwealth and State Model Litigant Guidelines

The first note to the State's Guidelines acknowledges that the guidelines are based on the Commonwealth Model Litigant Guidelines issued by the Commonwealth Attorney-General pursuant to s 55ZF of the *Judiciary Act 1903*. The State's Model Litigant Guidelines and the notes attached to the Guidelines almost exactly mirror the Commonwealth's guidelines. But there are some differences:

1. Dealing promptly with claims

The Commonwealth has an additional positive obligation to deal with claims promptly and not cause unnecessary delay in handling claims in litigation. There is no such express obligation in the State guidelines. The absence of an express obligation probably does not matter, having regard to King CJ's comments concerning the desirability of expeditious conduct by the Crown Solicitor's Office.

2. Apology

- The Commonwealth guidelines include a requirement that the Commonwealth apologise where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly. This requirement is wholly absent in the State guidelines.
- Where clients are prepared to settle claims for 'real money', and not merely nuisance value settlements, and plaintiffs are insistent upon an apology as part of any settlement, it would seem appropriate for the State to provide an appropriately worded apology. This accords with the spirit of the model litigant guidelines. It also accords with some areas of tort law where the absence of an apology can increase the humiliation of a plaintiff and increase the damages payable.
- Note that an apology is not to be interpreted as an admission of liability (see ss 141 and 14J of the *Wrongs Act 1958*).

3. Alternative dispute resolution

- The Commonwealth Model Litigant guidelines were revised in 2005 to include a specific guideline encouraging full and effective participation in ADR.
- The 2005 revision also added a specific clause stating that merits reviews were covered by the model litigant principles.



Judicial interpretation of the Model Litigant principles

There are no Victorian cases which have considered the Model Litigant principles since the Victorian Attorney-General issued his Model Litigant guidelines. However, there have been several cases where the Federal Court has looked at the Commonwealth Model Litigant obligations.

In *Challoner v Minister for Immigration & Multicultural Affairs (No 2)* [2000] FCA 1601, Drummond J made an order restraining the Minister for Immigration and Multicultural Affairs from cancelling Mr Challoner's electronic travel authority (in the nature of a visa). Mr Challoner was in detention. Mr Challoner sought to review the cancellation decision. Drummond J proposed an urgent hearing date of 13 November. The Minister's solicitor asked for an even earlier date. On 6 November 2000, his Honour indicated the final hearing could occur the very next day – 7 November 2000. Late on 6 November 2000, the Commonwealth sought to reconvene the court to apply for an adjournment because preferred counsel was not available on 7 November, and the Commonwealth also wished to prepare further materials. His Honour considered that Mr Challoner would require three to four weeks to answer the Commonwealth's proposed material, and that the Minister was not ready to proceed on 7 November, let alone 13 November – the date first proposed by the court.

His Honour criticised the Commonwealth's conduct:

It seems to be immensely regrettable that the Commonwealth has conducted this litigation in the way I have outlined, against the background of Mr Challoner's continued detention, upon

which it has insisted until this late stage. It would be immensely regrettable for any litigant to urge, over the Court's offer of a very expedited hearing, an even quicker hearing and then to put off the hearing in circumstances which includes reasons of the kind that have been advanced on behalf of the Commonwealth. The extent to which that becomes regrettable is enhanced because it is the Commonwealth which has left itself open to this criticism.⁷

In *Wong Tai Shing v Minister for Immigration, Multicultural and Indigenous Affairs* [2002] FCA 1271 Wilcox J ruled that the relevant Minister must answer certain interrogatories. His Honour indicated he would publish written reasons at a later date. The parties were notified the written reasons would be published on 18 October 2002. The day before the reasons were published, the Minister filed an application for leave to appeal from his Honour's ruling.

Not surprisingly, his Honour criticised the Commonwealth's decision to appeal prior to considering the Judge's reasons. His Honour stated:

I would have expected that any litigant, let alone a Commonwealth Minister, to pay the Court the courtesy of considering a judge's reasons for decision before deciding to contend the judge was wrong.⁸

While the Minister's decision to appeal before considering the Judge's reasons does not directly infringe the exact terms of the Model Litigant guidelines, it certainly runs contrary to the spirit of the guidelines. Accordingly, government departments, Ministers etc ought not prematurely announce decisions to appeal prior to consideration of Judge's reasons. To do

otherwise is, at best, discourteous to the court.

In *Wodrow v Commonwealth of Australia* [2003] FCA 403, the court considered a claim against the Commonwealth in tort and contract by a former engineer, who alleged his incapacity for work resulted from chronic anxiety and neurosis caused by his employment with the Commonwealth. Although Mr Wodrow won at first instance, he ultimately failed before the High Court. The Commonwealth sought to enforce a costs order in its favour seven years after the order had been made and Mr Wodrow sought to have the application for taxation of costs dismissed because of inordinate delay inconsistent with the Commonwealth's Model Litigant obligation. Stone J held that the Model Litigant obligations do not prevent the Commonwealth from enforcing costs orders or seeking to recover costs. His Honour held that the Model Litigant obligation '... does not impinge the Commonwealth's ability to enforce its substantive rights'.⁹

In *Applicant A226 of 2003 & Ors v Minister for Immigration & Multicultural & Indigenous Affairs*, Driver FM was concerned about the possible affect of a costs order in favour of the Minister upon the health and welfare of child applicants. He was concerned that it would be inconsistent with the Model Litigant principle to seek costs against an opposing party if there were no intention to enforce the costs order that might be made. However, he ultimately accepted the submissions of the Commonwealth that seeking and enforcing costs orders are separate stages in the handling of proceedings and may turn on different considerations. For example, when a costs order is sought, there may be insufficient

information available regarding the financial circumstances of the party to determine whether enforcement action will be appropriate. Accordingly, there is nothing objectionable in pressing for a costs order against an apparently impecunious party on the basis that if the party's financial circumstances changed for the better, the order might be enforced.¹⁰

The State's behavioural bar – how high is it?

- The overarching obligation is that the State behave as a model litigant for the stated purpose of maintaining 'proper standards in litigation'.
- This obligation to behave as a model litigant requires the State to act positively in five different ways, and to refrain from three specified sorts of behaviour subject to certain qualifications. The positive behaviours required by the State are to act fairly, to act consistently, to avoid litigation where possible, to pay legitimate claims without litigation and to keep litigation costs to a minimum. The three negative injunctions upon the State require the State to not rely upon technical defences, to not take advantage of a claimant who lacks resources and to not pursue appeals unless there are reasonable prospects for success or the appeal is justified in the public interest.
- Note carefully the concise summary in Note 3 of the model litigant principles – in essence being the model litigant requires that the State ... acts with complete propriety, fairly and in accordance with the highest professional standards.

- The obligation to act as a model litigant requires more than merely acting:
 - (a) honestly;
 - (b) in accordance with law and court Rules; and
 - (c) ethically.

The last two bullet points above compel the conclusion that the State's behavioural bar is an extremely high bar to jump over.

The devil in the detail - what do the model litigant principles mean in practice?

Although the model litigant principles can be easily stated, their application often requires matters of fine judgment and degree. It is possible for reasonable lawyers to disagree on the precise application of the model litigant principles in particular circumstances. However, I offer the following views.

Act fairly

- Pervasive obligation applies at all stages of litigation process.
- Do not act arbitrarily, capriciously or in a high-handed fashion.

Act consistently

- The State should not treat citizens arbitrarily – the State should not settle one claim and fight an identical claim. Treat similar claims similarly.
- State can distinguish between different plaintiffs in class action or in a multiple plaintiff litigation scenario, provided principled basis for distinction exists eg different causes

of action, different wrongdoers, different damage suffered by plaintiffs, differing degree of involvement by plaintiffs in underlying facts, etc.

Avoid litigation

- Always be open to ADR at all stages of process. Initiate early mediation or settlement where the State has no viable defences.
- Serve Calderbank offers or offers of compromise under Court Rules.
- Provide preliminary advice as soon as possible on the strengths and weaknesses of your client's position, in particular, whether your client has viable defences which will be upheld by the court.
- Where the State has a claim against someone, try to resolve the claim without issuing court proceedings.
- Many cases for State cannot readily be settled (eg contempts of court, Crimes Mental Impairment cases, judicial reviews).

Pay legitimate claims

- Where liability clear and no defences available, State should try to settle.
- If the plaintiff and the State cannot agree on reasonable compensation, consider serving an offer of compromise, admitting liability, and running a trial on the issue of quantum only. If the plaintiff fails to beat the offer of compromise, the plaintiff may be penalized with an order that it pays the State's costs after the offer was served.



- The guidelines do not require the State to cave in to spurious, vexatious and dubious claims. The State can properly decide to defend such claims.

Minimise costs

- State should try and get to the heart of cases as quickly as possible. Assess the client's defences. Provide preliminary advice as soon as possible. Do not string out the case as long as possible to increase costs, wear down an opponent, or derive some tactical advantage.
- State should avoid over-servicing. Assess reasonable resources required for each file. Avoid creating artificial teams of lawyers to deal with matters capably handled by one solicitor.
- State should carefully consider and use appropriate counsel at government rates, not commercial rates, even where individual clients are prepared to pay commercial rates.
- Every brief to counsel should be marked clearly with the specified fee. Under no circumstances should briefs be sent to counsel unmarked.
- State should embrace truth in pleadings ie should not routinely deny allegations unless proper to do so.
- State should actively consider formal admissions of liability where it has no viable defences.
- State should carefully consider notices to admit served by parties and consider admitting facts or authenticity of documents and not

routinely disputing such facts or documents.

- The State should seek a preliminary trial on a question of law where appropriate, if it will shorten litigation.
- Solicitors must never, ever put their own economic self-interest in fee generation above the client's interest.
- State should make a careful assessment of commercial considerations balanced against other countervailing considerations.

Don't take technical defences

- Unclear what 'technical' defences mean. Any available defences at common law or statute should be pleaded.
- Limitations defences generally pleaded by Commonwealth and by State eg. sexual abuse claims by wards of State.
- The State can and should plead defences open to it (eg s 110(3) of the *Transfer of Land Act* in context of an innocently defrauded registered proprietor of land).
- The obligation to not take technical defences arguably extends to technical points of litigation practice and procedure. For example:
 - late service of documents where no prejudice suffered.
 - incorrect forms for documents.

Don't take advantage of claimant who lacks resources

- The State should not issue applications without a proper purpose just to increase costs pressures on litigants.
- The State should avoid litigation by paper warfare. Develop strategies to ensure the litigation runs on your own timetable and not any unilaterally imposed timetable by lawyers deluging you with faxes, emails etc.
- The State should make a careful assessment of seniority of counsel and not brief counsel disproportionately senior to issues in dispute.
- The State should strike out unmeritorious Statements of Claim. If the State fails to do so, the State may be embroiled in lengthy litigation over a number of years, culminating in potentially lengthy and expensive trials.
- The State should allow plaintiffs to amend the statements of claim if plaintiffs can produce proper claims disclosing viable causes of action.

Don't appeal unless reasonable prospects for success or in public interest

- obtain advice on prospects of success from solicitor and counsel to ensure appeal has sound prospects or is in the public interest.
- Where an appeal is brought in the public interest (eg Mansfield), consider whether the State should agree to not seek costs or even pay the respondent's costs.

The fair but firm principle

It has often been said that the model litigant principles require fairness, but do not preclude firmness. As to firmness, I believe a number of principles can be stated to guide the State in its conduct of litigation:

- There is nothing in the guidelines which precludes the State seeking to win cases.
- The State should properly maintain any claim to legal professional privilege and protect public interest immunity, especially in relation to sensitive documents such as Cabinet documents.
- The State should set aside subpoenas where appropriate to do so. The State should claim costs for setting aside subpoenas and legal costs incurred in responding to subpoenas.
- For a good example of specifically permissible behaviours, the ACT model litigant guidelines specifically do not prevent the ACT from:
 - enforcing costs orders or seeking to recover costs;
 - relying on claims of legal professional privilege or other forms of privilege;
 - pleading limitation periods;
 - seeking security for costs;
 - opposing unreasonable or oppressive claims or processes; or

- requiring opposing litigants to comply with procedural obligations.
- Provided the State is not taking mere 'technical points', the State can and should use the rules of the court to maximum advantage. For example, offers of compromise. The State can derive huge costs advantages and place plaintiffs under extreme pressure to settle by utilising the Rules concerning offers of compromise. A plaintiff who fails to beat at trial an offer served by the State will face a penalty of a costs order after the date when the offer was served.
- Avoid personality driven litigation.
- Avoid oppression in litigation. Avoid flurries of interlocutory skirmishes to scare plaintiffs into submission. Fight fair.

Danger zone one - costs issues

Seeking costs orders

The model litigant guidelines specifically allow the State to seek costs orders. However, there may be cases where the seeking of such a costs order is inappropriate. For example, where the case raises a novel point of public importance.

Note that different considerations may apply to decisions to seek costs orders and to enforce costs orders.

Enforcing costs orders

The model litigant principles specifically allow the State to enforce costs orders. The usual means of enforcement available include obtaining a warrant of seizure and sale and, in appropriate cases, even selling the judgement debtor's interest in land. I would suggest great caution be exercised in any proposed sale of an unsuccessful litigant's interest in land, as such action could conceivably lead to adverse publicity. Careful advice canvassing all the risks should be given. Likewise with bankruptcy.

Seeking security for costs

If a plaintiff loses a trial and appeals, the State is entitled to, and generally should, seek security for its costs incurred in the appeal. In 2003, the State of Victoria sought security for costs from the Court of Appeal in relation to an appeal from a plaintiff who lost a trial. The indisputable evidence before the Court of Appeal was that the plaintiff was completely

Behaviour not expected of a model litigant

As a result of the model litigant principles, there are a number of things the State should avoid in conducting its litigation:

- The State should not play litigation 'fast and loose', nor adopt a 'win-at-all-costs' strategy, nor adopt a 'take no prisoners' approach. The State should avoid conduct which will embarrass the State.
- The State should not use delaying tactics to extract a litigation advantage. Whilst experience suggests that certain time limits and orders are occasionally not complied with, such non-compliance should never be a deliberate strategy designed to thwart an opponent or secure a practical advantage.
- The State should not commence any legal proceedings for any ulterior or improper purpose.

impecunious and could not possibly pay the State's costs if he lost the appeal. The court was initially reluctant to grant such security.

Ormiston JA stated:

It was suggested in an argument, which was barely taken any further for want of authority, that the respondents were not entitled to seek security because in effect the State of Victoria was the respondent or, in the case of the first respondent, the State of Victoria stood behind that person.

It may be in other circumstances and at another time upon argument, some consideration might have to be given to the question, but it seems not presently relevant in this case.¹¹

In a similar claim made by the State within weeks of the above order for security being granted, Buchanan JA said:

I am reluctant to make an order stifling a genuine appeal where the Respondent, the State of Victoria, is in a position to fund its defence of the appeal without relying upon obtaining an order for costs against the appellant.¹²

His Honour considered the appellant's prospects of success were low, and he granted the security sought by the State. However, there is plainly judicial disinclination to grant the State such security.

Danger zone two - litigants in person – do special principles apply?

How do model litigant principles apply to litigants in person? The principles themselves make no distinction between

litigants in person and represented litigants. However, experience and common sense dictate that litigants in person should be treated carefully by the State. The power imbalance between citizen and State is even greater. Litigants in person should be given greater clarification of the process by lawyers acting for the State. For example, clear warning letters should be sent before court applications are made to strike out claims. Give litigants in person a chance to avoid a costs order by terminating proceedings promptly. Be extra fair. Make sure letters you write will withstand critical scrutiny by a judge. Make them as clear as possible. Proceed cautiously!

Enforcement of model litigant principles

Interesting questions here include:

- If there's a breach, who is obliged to report it?
- What if client does not accept legal advice that proposed conduct infringes the guidelines?
- Can a party rely upon breach in Court?

At the Commonwealth level, the Office of Legal Services Co-ordination is charged with monitoring compliance with the model litigant guidelines. Ultimate Commonwealth responsibility rests with AG.

- Compliance with guidelines not enforceable except by Attorney-General.¹³
- Non-compliance cannot 'be raised' in any proceeding except by Commonwealth.¹⁴

- Attorney-General can require production of records or documents and person cannot refuse to comply because of legal professional privilege or duty of confidence.¹⁵

At State level:

- Ensuring compliance is primarily the obligation of the State, and the lawyers assist the State in the process.¹⁶
- As the guidelines are issued by the Attorney, and in his capacity as the first law officer of the State, the Attorney has ultimate responsibility for ensuring that the guidelines are followed.
- In practice, the Office of the Government Legal Services deals with any alleged breaches and reports to the Attorney-General.

Other accountability mechanisms include:

- Auditor General
- Parliamentary questions and inquiries
- Ombudsman
- Media

Future of the model litigant principles

- The model litigant principles are here to stay. They have been operative at Commonwealth level for nine years and, as can be seen from the comments of Griffith CJ, the underlying rationale has been around for almost 100 years.

- There are no reported cases in Victoria referring to model litigant behaviour. This will change in coming years, as their wide-reaching application becomes better known.
- The Victorian Attorney-General in his recent justice statement, expressed a desire to review the model litigant policy with a particular focus on ADR.¹⁷

Bibliography¹⁸

A. *Model Litigant Policies*

1. State of Victoria, Legal Services to Government Panel Contract (2002)
 - Model Litigant Principles (Schedule 4, clause 2);
 - Model Litigant Guidelines
2. Commonwealth Attorney-General's Department, Legal Services Directions
 - Directions on the Commonwealth's Obligation to Act as a Model Litigant (Appendix B)

B. *Journal Articles, Reports and Conference Papers*

3. Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System', *ALRC Report No 89* (2000), [3.129]-[3.147].
 4. Dale Boucher, 'An Ethical Code ... Not a Code of Conduct' (1996) *Canberra Bulletin of Public Administration*, No 79, 3.
 5. Barry Leader, 'The Model Litigant Principle: Can the AGS Stay Competitive?' (1998) *Reform*, No 73, 52.
 6. David Spender, 'Dramatis Personae – The Commonwealth Acting as a Model Litigant' (2002) 13 *Australasian Dispute Resolution Journal* 63.
7. 'The Management of Disputes Involving the Commonwealth: Is Litigation Always the Answer?' (Conference held at Canberra on 22 April 1999).
 - Allan Fels, 'The Growing Importance of Conflict Management' (1999) *Canberra Bulletin of Public Administration*, No 92, 21.
 - Ian Govey & Maia Ablett, 'The Commonwealth as a Litigant: An Insider's View I' (1999) *Canberra Bulletin of Public Administration*, No 92, 24.
 - Dale Boucher, 'The Commonwealth as a Litigant: An Insider's View II' (1999) *Canberra Bulletin of Public Administration*, No 92, 29.
 - The Honorable Justice Daryl Davies QC, 'Disputes Involving the Commonwealth: Observations from the Outside – A Judge's View' (1999) *Canberra Bulletin of Public Administration*, No 92, 34.
 - John Basten QC, 'Disputes Involving the Commonwealth: Observations from the Outside – A Barrister's View' (1999) *Canberra Bulletin of Public Administration*, No 92, 38.
 - PM Meadows, 'Disputes Involving the Commonwealth: Observations from the Outside – A Solicitor's View' (1999) *Canberra Bulletin of Public Administration*, No 92, 41.



- Tom Muecke, 'Disputes Involving the Commonwealth: Observations from the Outside – A Small Business View' (1999) *Canberra Bulletin of Public Administration*, No 92, 48.
- C. Cases**
8. *Challoner v Minister for Immigration & Multicultural Affairs (No 2)* [2000] FCA 1601 (6 November 2000).
 9. *Hughes Aircraft v Airservices Aust* (1997) 76 FCR 151.
 10. *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537.
 11. *NAOY v Minister for Immigration* [2002] FMCA 275 (6 November 2002).
 12. *SCI Operations v Commonwealth* (1996) 69 FCR 346.
 13. *Scott v Handley* (1999) 58 ALD 373.

⁹ *Wodrow v Commonwealth of Australia* [2003] FCA 403, 42.

¹⁰ [2005] FMCA 17.

¹¹ *Dunn v Hughes and Anor* (unreported, Court of Appeal, 22 August 2003)

¹² *Kostiw and Donis v Stefanoski* (unreported, Court of Appeal, 19 September 2003)

¹³ *Judiciary Act 1903* s 55ZG(2).

¹⁴ *Judiciary Act 1903* s 55ZH(3).

¹⁵ *Judiciary Act 1903* s 55ZH(1).

¹⁶ Victorian Model Litigant Guidelines Note 2.

¹⁷ Attorney-General's Justice Statement, 38.

¹⁸ The author acknowledges the most helpful assistance of Chris Young, former research assistant for the Solicitor-General for Victoria, Pamela Tate SC, in compiling this bibliography.

¹ *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

² *Sebel Products v Commissioners of Customs and Excise* (1949) 1 Ch 409, 413.

³ *Kenny v South Australia* (1987) 46 SASR 268

⁴ J Tait, 'The Public Service Lawyer, Service to the Client and the Realm of Law' (1997) *Commonwealth Law Bulletin* 542, 544.

⁵ *Hughes Aircraft v Air Services Australia* (1997) 76 FCR 151.

⁶ *Hughes Aircraft v Air Services Australia* (1997) 76 FCR 151.

⁷ *Challoner v Minister for Immigration & Multicultural Affairs (No 2)* [2000] FCA 1601, [12].

⁸ *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1271.