

## DRAFT

### The Model Litigant Rules: Key Facts and Cases

In civil litigation the Commonwealth has a duty to act as a Model Litigant.

The development of this obligation on the Commonwealth in conducting litigation can be traced to *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 where Griffith CJ explained this as '[t]he old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects'.<sup>1</sup> The Court continued its criticism stating that '[t]he Crown should not take technical points'.<sup>2</sup> The Courts have also expressed the idea of the model litigant principle in reference to specific acts of alleged default by the relevant government agency. In *SCI Operations v The Commonwealth*<sup>3</sup> Beaumont, Einfeld and Sackville JJ stated that 'the position of the Crown itself, especially given its default... should also be taken into account. Otherwise the Crown would be taking, or be seen to be taking, advantage of its own default, whereas it is well established that the Crown must act, and be seen to act, as a model litigant'.<sup>4</sup>

More recently, the Court in *Morley & Ors v Australian Securities and Investments Commission*<sup>5</sup> stated that the principle is 'not limited to the criminal law'<sup>6</sup> and extends to civil practice and procedure.<sup>7</sup> The Court was critical of ASIC's approach to litigation stating that 'the government agency has no legitimate private interest of the kind which often arises in civil litigation. It acts, and acts only, in the public interest as identified in the regulatory regime'.<sup>8</sup> The Court also stated 'ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings...No other person could have brought these proceedings. In partial answer to the first of the questions, whether its failure to call a witness can constitute a breach of the obligation of fairness, in our opinion it can'.<sup>9</sup>

#### Legal Services Directions 2005 under the *Judiciary Act 1903* (Cth)

In 1999 the amendments to the *Judiciary Act* were introduced into Parliament. The amendments established a head of power for the Legal Services Directions to be promulgated. Mr Williams, the Attorney General, said in his second reading speech that the Directions 'will provide a framework for the conduct of the Commonwealth's legal affairs, but leave prime responsibility for the effective and efficient use of the legal services with

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

<sup>2</sup> *Ibid.*

<sup>3</sup> (1996) 139 ALR 595.

<sup>4</sup> *Ibid.*, 164.

<sup>5</sup> [2010] NSWCA 331.

<sup>6</sup> *Ibid.*, 710.

<sup>7</sup> *Ibid.*, 708.

<sup>8</sup> *Ibid.*, 716.

<sup>9</sup> *Ibid.*, 728.

agencies'.<sup>10</sup> The Bill established the Office of Legal Services Coordination 'to assist [the attorney general] in discharging [his] First Law Officer role'.<sup>11</sup> The relevant provisions were as follows:

### **Part VIII C—Attorney- General's Legal Services Directions**

#### **Section 55ZF: Attorney- General may issue directions**

(1) The Attorney- General may issue directions (*Legal Services Directions*):

- (a) that are to apply generally to Commonwealth legal work; or
- (b) that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter.

(2) The Attorney-General may publish or give notice of Legal Services Directions in any manner the Attorney-General considers appropriate.

(3) In this section: *Commonwealth legal work* means:

- (a) any work performed by or on behalf of the AGS in the performance of its functions; or
- (b) any legal work performed by a person for any of the following:
  - (i) the Commonwealth;
  - (ii) a body established by an Act or regulations or by a law of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island);
  - (iii) a company in which the Commonwealth has a controlling interest (including a company in which the Commonwealth has a controlling interest through one or more interposed Commonwealth authorities or Commonwealth companies);
  - (iv) other persons or bodies referred to in subsection 55N(1), to the extent that the work relates to the person's or body's performance of a Commonwealth or Territory function.

#### **Section 55ZG: Compliance with Legal Services Directions**

(1) The following persons or bodies must comply with Legal Services Directions that have been published and with Legal Services Directions of which the person or body has been notified:

- (a) a person or body referred to in subsection 55N(1);
- (b) a person or body referred to in subsection 55N(2), in relation to a matter, if the AGS is acting for the person or body in that matter;

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<sup>10</sup> Attorney-General Mr Williams *Second Reading Speech*, House of Representatives Hansard, 3<sup>rd</sup> December 1998, 1275.

<sup>11</sup> *Ibid.*

- (c) a person or body in respect of whom the Attorney-General has made a request under subsection 55N(3), in relation to a matter, if the AGS is acting for the person or the body in that matter;
- (d) a person or body in respect of whom the CEO has made a determination under subsection 55N(4), in relation to a matter, if the AGS is acting for the person or body in that matter;
- (e) the AGS;
- (f) a legal practitioner or firm of legal practitioners, in relation to a matter, if the legal practitioner or firm is acting for a person or body referred to in subsection 55N(1) in that matter.

(2) Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney- General.

(3) The 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.

**Section 55ZH: Legal Services Directions and legal professional privilege**

(1) If a Legal Services Direction requires a person to provide any information, or produce a document or record, to another person, the person must not refuse to comply with the Direction on the ground of legal professional privilege or of any other duty of confidence.

(2) A person performing Commonwealth legal work (within the meaning of subsection 55ZF(3)) may provide information or produce a document or record relating to that work to the Attorney-General or to a person authorised by the Attorney-General for that purpose.

(3) If:

(a) a person provides information or produces a document or record under subsection (2); and

(b) the person would, apart from this subsection, be breaching legal professional privilege or any other duty of confidence in so doing;

the person is taken, for all purposes, not to have breached legal professional privilege or the duty of confidence in so providing the information or producing the document or record.

(4) If a communication that is the subject of legal professional privilege is disclosed under subsection (1) or (2), then, in spite of the disclosure, privilege is taken not to have been waived in respect of the communication.

55ZI Anything done under Legal Services Directions not actionable

(1) The Attorney-General is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done in compliance, or purported compliance, with a Legal Services Direction.

(2) A person (other than the Attorney-General) is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done by the person in compliance, or in good faith in purported compliance, with a Legal Services Direction.

### **Legal Services Directions 2005:**

Under section 55ZH of the *Judiciary Act 1903* (Cth) the Attorney-General enacted the *Legal Services Directions 2005* Appendix B, outlining the Commonwealth's duty in litigation. The obligation to act as a model litigant requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency. Appendix B is outlined below:

The obligation:

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

Nature of the obligation:

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

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

(aa) making an early assessment of:

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

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

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

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

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

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

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

- (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum
- (iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and
- (iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or an agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations
- (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
- (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement
- (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
- (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

The Model Litigant rules place an obligation on the Commonwealth to act as a model litigant, however, this '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'.<sup>12</sup>

### **Enforcement of the Code:**

The Office of Legal Services Coordination (OLSC), established within the Attorney-General's Department, assists 'the Attorney-General in relation to his responsibilities for legal services to the Commonwealth'<sup>13</sup> providing guidance notes and educational functions.<sup>14</sup>

The OLSC investigates alleged breaches of the Code.<sup>15</sup> Breaches are brought to the attention of the Office by way of self-reporting by government agencies, judicial comments, media reports or complaints made directly to the OLSC.<sup>16</sup>

The Attorney-General is briefed on the details of any substantiated breaches and enforces compliance with the Directions<sup>17</sup> by imposing sanctions.<sup>18</sup> Part 3 of the Legal Services

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<sup>12</sup> Model Litigant Rules Note Number 2. See also the Joint Committee Corporations and Financial Services, Hansard 11 March 2011, CFS 12.

<sup>13</sup> Explanatory Memorandum, *Judiciary Amendment Bill 1998* (Cth), 8.

<sup>14</sup> Joint Committee on Corporations and Financial Services, Hansard 11 March 2011, CFS 12.

<sup>15</sup> Office of legal Services Coordination, Guidance Note No 3, Office of Legal Services Coordination Website <[http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment\\_LegalServicesDirections2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment_LegalServicesDirections2005)> accessed on 11 August 2011 .

<sup>16</sup> Joint Committee on Corporations and Financial Services, 11 March 2011, CFS 17.

<sup>17</sup> s55ZG(2) of *Judiciary Act 1903*.

<sup>18</sup> Part 3 of the *Legal Services Directions 2005*.

Directions outline that ‘the Attorney-General may impose sanctions for non-compliance with the Directions’. The ‘Note’ directly following the section states:

*Note:* Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of a breach of the Directions are set out in the *Compliance Strategy for Enforcement of the Legal Services Directions*. Complaints alleging a breach of the Directions may be made to OLSC at [olsc@ag.gov.au](mailto:olsc@ag.gov.au).

However, according to the OLSC website they are ‘currently reviewing the compliance and enforcement strategy’<sup>19</sup> and there is no information currently available on the sanctions imposed by the Attorney-General.

Furthermore, under the Directions section 14.2 states:

‘When entering into a contract for legal services, agencies are to include a provision stating that the contract includes appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including the termination of the contract in an appropriate case’.

The issue of non-compliance cannot be raised in proceedings, except by, or on behalf of, the Commonwealth<sup>20</sup> and this means there is a heavy onus on the Attorney General’s department to investigate and enforce compliance.

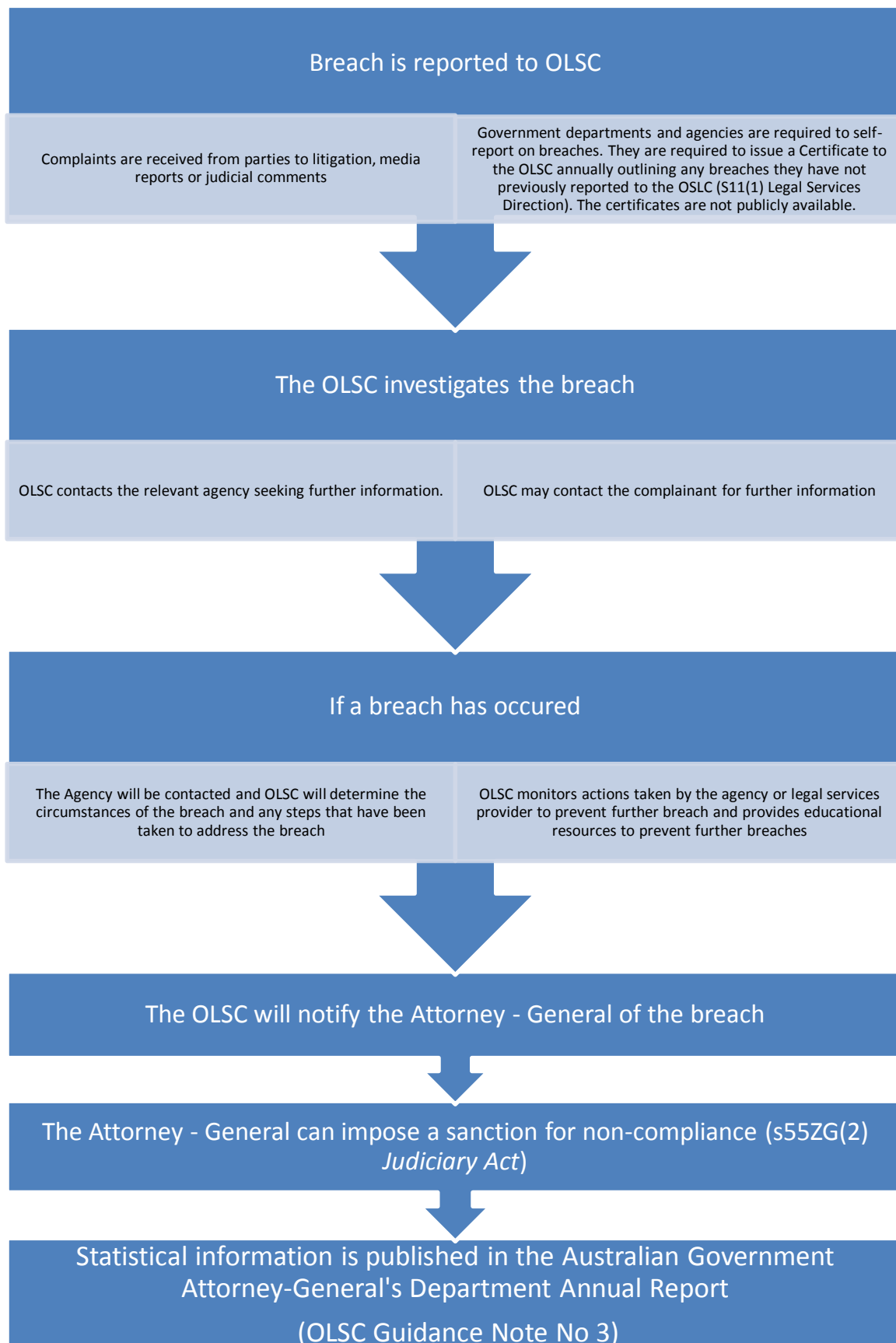
The flow chart below outlines the enforcement process as it currently stands.

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<sup>19</sup> See Attorney General’s Department website < [http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment\\_ComplianceandEnforcementStrategy](http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment_ComplianceandEnforcementStrategy) > accessed 11 August 2011.

<sup>20</sup> s55ZG(3) *Judiciary Act 1903*.

**Chart 1: Enforcement Flow Chart**



## The Parliamentary Joint Committee on Corporations and Financial Services Hearing 11 March 2011<sup>21</sup>

The Court in *Morely & Ors v Australian Securities and Investments Commission*<sup>22</sup> was critical of ASIC's litigation strategy.<sup>23</sup> Following this case, the Attorney-General's department were asked numerous questions on the Model Litigant Rules during the PLCCFS.<sup>24</sup> The Committee asked the representative from the OLSC whether the 'office ... conduct[s] its own review of ASIC in terms of all its litigation...[or] annual review'.<sup>25</sup> In response, the representative from the OLSC stated:

'No...we are a smaller regulator... The general kind of staffing profile in the office would be **about 14 people...In terms of the way we approach compliance with the directions, we have to very much be selective in our approach**' (Italics added).<sup>26</sup>

The representative continued by adding 'it is not really that productive for us to scan newspapers and then ring agencies. I think they are a good reporter...We kind of put our efforts into the front end of trying to help people understand how to comply'.<sup>27</sup>

The Department representative also stated:

'[the] primary role of the OLSC is to facilitate compliance with the directions predominantly through education and outreach. OLSC officers visit agencies and conduct training on the directions. We maintain a website that sets out information, including guidance notes and other information to assist agencies and members of the public who may have concerns about an agency's conduct'.<sup>28</sup>

In *Morely v ASIC*<sup>29</sup> Spigelman CJ, Beazley and Giles JJA agreed that the range of powers and functions of ASIC mean that 'ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings...No other person could have brought these proceedings'.<sup>30</sup> However, in ASIC's submissions to the High Court in a recent case of *ASIC v Shafron*<sup>31</sup> ASIC submitted that '[w]hilst the role of the Commonwealth as a model litigant influences the way in which it conducts litigation, it does not impinge on the Commonwealth's ability to enforce its

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<sup>21</sup> 'Oversight of the Australian Securities and Investments Commission'

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=11%20march%202011%20dines;rec=4;resCount=Default>> accessed on 11 August 2011.

<sup>22</sup> [2010] NSWCA 331.

<sup>23</sup> Ibid, 728.

<sup>24</sup> Joint Committee Corporations and Financial Services, 11 March 2011, above n17, CFS 11.

<sup>25</sup> Ibid CFS 14.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid, CFS15.

<sup>28</sup> Ibid, CFS 12.

<sup>29</sup> [2010] NSWCA 331.

<sup>30</sup> Ibid, 728.

<sup>31</sup> Case Number S173/2011



substantive rights. The Commonwealth has the same rights as any other litigant...Further, the model litigant standard is unrelated to any question of the statutory powers an agency may possess to bring proceedings'.<sup>32</sup>

When the Committee questioned the Attorney-General's Department on ASIC's ability to comply with the model litigant rules they replied:

'ASIC is very aware of what its obligations are under the Directions'.<sup>33</sup>

'ASIC does take quite seriously the requirements and attempts to ensure that it complies with the kinds of standards of fairness that the model litigant obligation requires'.<sup>34</sup>

Senator Bolkus stated in his second reading speech on the amendments to the *Judiciary Act* on 8<sup>th</sup> March 1999 that the OLSC task was;

[A] wide ranging task. It is a task which covers the breadth of government. The office established to perform such a task was originally staffed by only three people. Given that the Commonwealth manages some 15,000 pieces of litigation per year, it was and continues to be our concern that this function could not be adequately performed with the resources allocated. Now the Government has said that it will apply six staff to this function. However, it is fair to say that our concerns...still remain in respect of the administration of the directions under this part of the government's proposal'.<sup>35</sup>

'In essence, model litigant rules will become meaningless if there is inadequate means to enforce them...the Government should agree to increase the resources of the Office of Legal Services Coordination to ensure it can meet the full range of functions intended for it'.<sup>36</sup>

An Australian National Audit Office Report stated that the OLSC relies heavily on reporting either by agencies or by complaints from other sources.<sup>37</sup> However, it is important to note that there is no formalised complaints system. ANAO further reported that the Office does not commonly discover breaches,<sup>38</sup> and 'does not proactively monitor agency's compliance with the Directions'.<sup>39</sup>

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<sup>32</sup> High Court of Australia, *ASIC V Shafroon* Case Number S173/2011 Applicants Written Submission 17<sup>th</sup> June 2011, para 54< [http://www.hcourt.gov.au/assets/cases/s174-2011/ASIC\\_App.pdf](http://www.hcourt.gov.au/assets/cases/s174-2011/ASIC_App.pdf)> accessed on 9<sup>th</sup> August 2011.

<sup>33</sup> Joint Committee on Corporations and Financial Services, 11 March 2009, above n 17, CFS 12.

<sup>34</sup> *Ibid*, CFS 14.

<sup>35</sup> Senator Bolkus Second Reading Speech, 8<sup>th</sup> March 1999, Senate Hansard, 2402.

<sup>36</sup> *Ibid*, 2403.

<sup>37</sup> ANAO *Legal Services Arrangements in the Australian Public Service* Audit Report No 52 (2005), 5.12.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

The Blunn Krieger 'Review of Commonwealth Legal Services Procurement'<sup>40</sup> noted '[w]hile the LSDs... detail requirements and impose a number of restrictions on agencies, they provide little in the way of assistance to those agencies in achieving the delivery of efficient and effective legal services'.<sup>41</sup>

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<sup>40</sup> Anthony Blunn and Sibylle Krieger, Review of Commonwealth Legal Services Procurement, 2009 <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF/\\$file/REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF/$file/REPORT+OF+THE+REVIEW+OF+COMMONWEALTH+LEGAL+SERVICES+PROCUREMENT.PDF)> accessed on 11<sup>th</sup> August 2011.

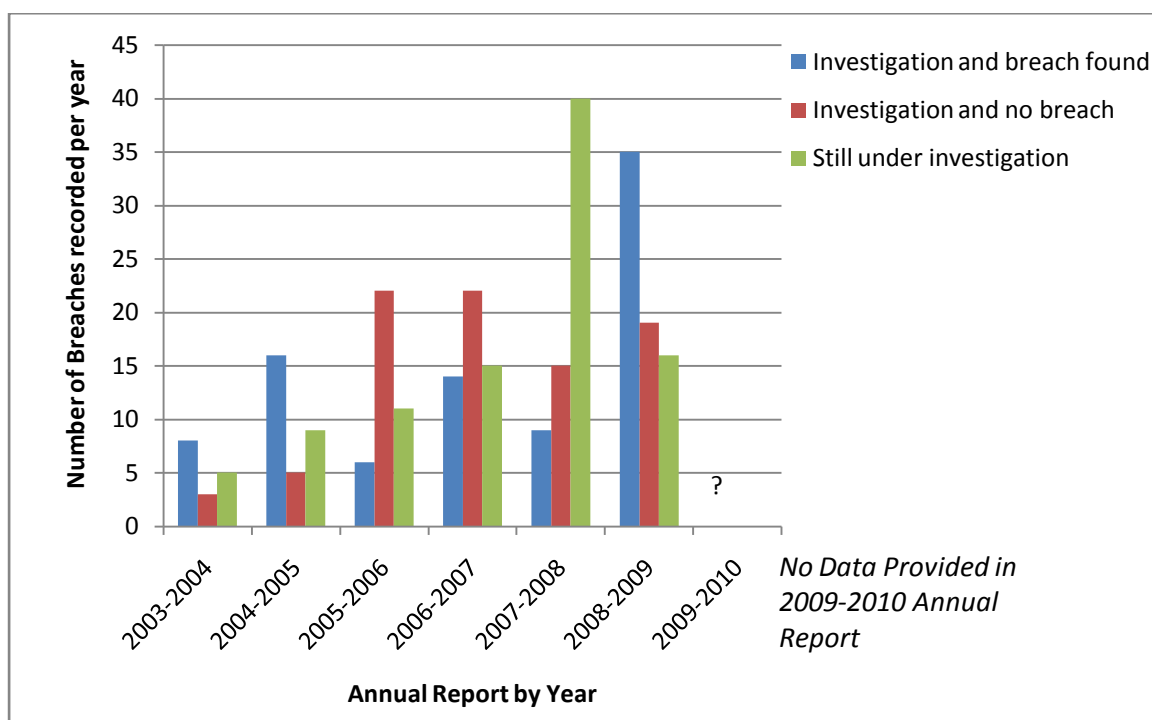
<sup>41</sup> Ibid, 27 [para 47].

## Reporting by the Attorney General’s Department

The Attorney-General’s Department Annual Reports publish statistical data on breaches to the Directions.<sup>42</sup> From 2003 to 2009 the Annual Reports provided information on the number of breaches investigated per year, as shown in Table 1 below. It is important to note that the 2009-2010 Annual Report did not disclose data or make any statement on compliance with the Legal Services Directions.

The Chart below represents the data recorded in the Attorney-General’s Department Annual Reports in the respective years.

**Chart 2: Number of Breaches of the Legal Services Directions as reported in the Attorney-General Department Annual Reports 2003-2004 to 2009-2010:**



<sup>42</sup> OLSC, Guidance Note No 3, see above n 14.

## **Exhibits on Model Litigant Rules published in the Attorney-General's Department Annual Report 2001-2010**

### **Annual Report 2001-2002 (page 63)**

OLSC provided advice to a number of agencies on their model litigant obligations, including whether certain arguments would be regarded as technical defences. OLSC also investigated eight complaints alleging multiple breaches of the model litigant obligations by Commonwealth agencies. The obligations require Commonwealth agencies to act with complete propriety, fairly and in accordance with the highest professional standards. Two breaches were identified. However, remedial action had been taken prior to the complaints being made to OLSC. The remaining six complaints were found not to constitute breaches of the model litigant obligations.

### **Annual Report 2002-2003 (page 63)**

to the satisfaction of OLSC. OLSC also investigated seven complaints that the Commonwealth breached its obligation to act as a model litigant (four by legal service providers and three by individuals) and found none of the allegations of breaches to be substantiated. There are four complaints currently being investigated (two by legal practitioners and two by individuals). The complaints include unnecessary delay, failure to mediate, relying on technical defences, failure to make part payment of damages and taking advantage of a litigant who lacked resources.

The Department investigated 16 possible breaches of the Directions. Of these, eight were established to be breaches, three were found not to involve any breach, and five remained under investigation at the end of the reporting period. The substantiated breaches related to:

- failure by an agency to act as a model litigant, for example through inappropriate refusal to accept service of a document in one case
  - performance of tied legal work without approval
  - engagement of counsel above the rate that requires approval, without obtaining that approval, and
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- an agency's failure to consult a Department in obtaining advice relating to legislation administered by that Department.

An additional matter reported in the previous financial year was found to involve the performance of tied work without approval.

Annual Report 2004-2005 (page 52)

**Table I: Investigation of breaches of the Legal Services Directions**

	2003-04	2004-05
Established breaches	8	16
Examined and found not to involve breaches	3	5
Still under investigation at year end	5	9
<b>Total</b>	<b>16</b>	<b>30</b>

The substantiated breaches related to performance of tied legal work without approval, and the engagement of counsel above the threshold rates without approval.

During the year, we also considered 82 individual applications for approval of counsel fees as required under the Directions.

Annual report 2005-2006 (page 52)

**Table 1: Investigation of breaches of the Legal Services Directions 2004-05 and 2005-06**

	2004-05	2005-06
Established breaches	21	6
Examined and found not to involve breaches	10	22
Still under investigation at year end (all now completed)	10	10

Note: The figures for 2004-05 breaches differ from those reported in the 2004-05 annual report. One investigation was inadvertently omitted from the statistics in that report. The figures shown above for completed 2004-05 investigations include the outcomes of the 10 investigations that were still under investigation at the end of 2004-05 but that have since been completed.

Annual Report 2006-2007 (page 48)

**Table 1: Investigations of breaches of the *Legal Services Directions*, 2005-06 to 2006-07**

Year	Established breaches	Examined and found not to involve breaches	Still under investigation at year end
2005-06	6	22	11
2006-07	14	22	15

Note: The figures for 2005-06 breaches under investigation at year's end differ from those reported in the 2005-06 annual report. One investigation was inadvertently omitted from the statistics in that report.

Annual Report 2007-2008 (page 40)

**Table 1: Investigation of breaches of the legal services directions, 2006-07 to 2007-08**

Year	Established breaches	Examined and found not to involve breaches	Still under investigation at year end
2006-07	14	22	15
2007-08	9	15	40

In considering breaches, we discussed with the relevant agency or law firm the obligations under the Directions, appropriate remedies and steps to be taken to avoid future breaches.

The Division considered 397 counsel fee applications in a timely and responsive manner, as required by the Directions (see Table 2).

**Table 5: Performance indicators, Output 1.2—Support for the Attorney-General as First Law Officer, constitutional policy, personal insolvency, and international legal services**

Key performance indicators	2008–09 target	Result
Maintain and enhance the framework for coordination of Commonwealth legal services arrangements	Conclude investigation of 30 alleged breaches of the Legal Services Directions	Achieved 54 investigations of alleged breaches were concluded; 35 of these were established to be breaches and 19 did not involve a breach; 16 remain undetermined. The overall number of breaches remains relatively constant and relatively low.

In the areas of specialist support to the Attorney-General as First Law Officer and strengthening links across government in relation to legal services, key achievements in 2009–10 include the completion of the review of Commonwealth Legal Services Procurement (the Blunn Krieger review) focusing on procurement and informed purchasing, the commencement of a major review and rewrite of the Legal Services Directions 2005, and the appointment of a significant issues advisor within the Department to provide enhanced support to significant Commonwealth legal issues.



**Model Litigant relevant cases which RoLIA has identified:**

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

ASIC failed to call a witness which was the solicitor who acted for the company and attended a meeting which was crucial to the evidence. The Court declared that ASIC had a duty of fairness to present all material evidence to assist the Court.

Spigelman CJ, Beazley and Giles JJA found that:

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

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

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

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

[728] The cumulative effect of all these matters is that ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings. This is so particularly for proceedings of the character before this Court. No other person could have brought these proceedings. In

partial answer to the first of the questions, whether its failure to call a witness can constitute a breach of the obligation of fairness, in our opinion it can.

## **2. *DCT v Denlay* [2010] QCA 217**

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

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

## **3. *R v Martens* [2009] QCA 351**

Martens was convicted in 2006 for sexual intercourse with a person under 16 years of age whilst in PNG. Martens appealed to the Criminal Court of Appeal claiming that material evidence vital to his case was withheld, not adequately investigated by the DPP or the AFP. He was informed by the agencies that the evidence did not exist. After he was convicted his wife obtained the evidence. The Court found that the conviction was unreasonable and not supported by evidence and his conviction was quashed. In response to the failure of the Commonwealth DPP to access the relevant evidence and its actions in that regard Muir and Chesterman JJA stated in their judgement:

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

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

**[170]** [I]t is a poor reflection upon the two organisations that one should have failed to find them, and denied their existence, and the other object to their use in the reference on the ground that the petitioner should have obtained them earlier.

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

The Federal Court ordered that the ACCC pay 80% of ANZ's costs considering the failure of ACCC's adherence to the model litigant obligations. The ACCC failed to issue its notice to answer interrogatories within the time ordered by the Court. Greenwood J noted that:

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

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

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

#### **5. AAT Case [2011] James and Anor (reported in Weekly Tax Bulletin Issue 4, 28 Jan 2011, Suppressed Judgement)<sup>43</sup>**

The Administrative Appeals Tribunal was critical of the ATO's stance in proceedings:

'The ATO had simply ignored the evidence of the purchasers having made an express admission in writing, without any qualification at all, of their indebtedness to the taxpayer'.<sup>44</sup>

'The ATOs adverse comments about the two trust instruments is reminiscent of complaints of King Henry VIII in the 16<sup>th</sup> century who did his best to have trusts abolished altogether because of their tendency to facilitate tax avoidance'.<sup>45</sup>

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

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<sup>43</sup> Obtained from Senate Standing Committee on Economics, Answers to Questions on notice, Treasury portfolio, Additional Estimates 23-24 February 2011, Question Number AET 97.

<sup>44</sup> Ibid, page 1.

<sup>45</sup> Ibid, page 2.

limitation period was only three years. The ATO officer was quite wrong in his opinion, which in any event was not relevant to Mr James tax liability'.<sup>46</sup>

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

Logan J stated in response to a request from the Commissioner of Taxation for an order as to costs:

**[48]** I do not propose to award professional costs to the Deputy Commissioner. Indeed, so to do would be to reward work which is not of a standard to be expected of a person to be a solicitor on the record for a person to whom the model litigant obligations adhere.

#### **7. Qantas Airways Ltd v Transport Workers Union of Australia – Fair Work Ombudsman v Transport Workers Union of Australia [2011] FCA 470**

Moore J commented on the tenor of the submissions by the Ombudsman as:

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

#### **8. Phillips v Commissioner of Taxation [2011] FCA 532 Federal Court of Australia**

Lander J was critical of the failure of the Commissioner of Taxation to file an affidavit within the time required. The ATO had sought 3 extensions from the Court to file an affidavit. The Court ordered that the ATO pay the applicants costs on an indemnity basis. The Judge remarked:

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

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

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<sup>46</sup> Ibid.

Commissioner entitled to disregard any directions of this Court. If the ATO or the Commissioner fails to comply with a direction, the ATO or the Commissioner will have to suffer the consequences.

### **9. ACCC v Metcash [2011]**

The Sydney Morning Herald's Elisabeth Sexton reported on 22 March 2011<sup>47</sup>

## **ACCC's Metcash denial**

Elisabeth Sexton

March 22, 2011

THE competition regulator has denied running its Federal Court case to block Metcash's takeover of Franklins on a false basis or breaching its duty to the court by deliberately withholding relevant material.

The denial came after the court heard more details of a December 14 meeting involving two senior executives of Woolworths and seven representatives of the Australian Competition and Consumer Commission, including its chairman, Graeme Samuel.

An ACCC file note of the meeting recorded Mr Samuel saying there was "some possibility" Woolworths could gain approval for a joint bid for Franklins with small Queensland grocery wholesaler SPAR Australia if Woolworths was a "silent private equity partner".

The response to the allegations Metcash made on Friday was delivered by Tim Grimwade, the general manager of the ACCC's mergers and acquisitions group.

Mr Grimwade, who attended the December meeting, agreed under cross-examination that Woolworths had proposed becoming an owner of all or part of Franklins, and thus becoming a wholesaler of groceries to independent supermarkets in competition with Metcash.

Mr Grimwade said he had been in court on March 14 when the ACCC's barrister, Norman O'Bryan, SC, said that Woolworths and Coles "never have, never will" extend their internal wholesaling operations to independents.

"When you heard it, I take it there must have been a shudder in your heart as to its falsity?" asked Justin Gleeson, SC, for Metcash.

"No," Mr Grimwade replied.

He did not accept that the ACCC needed to modify its case, nor that "as a matter of fairness" it should have provided its notes of the December meeting.

Woolworths "was really only interested in getting its hands on some Franklins stores" and was not interested in being a "long-term" wholesaler to independents, he said.

However, Mr Grimwade agreed it was relevant to one part of the ACCC's statement of claim for the court to know that Woolworths had three options for obtaining Franklins stores.

That was in relation to breaking up Franklins, an option considered by its South African owner, Pick n Pay Retailers, in case the Metcash deal was blocked.

A Woolworths file note of the meeting said Mr Samuel said "no" to its first option, which was "we acquire some stores".

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<sup>47</sup> <http://www.smh.com.au/business/acccs-metcash-denial-20110321-1c3r9.html>

The second option was "we fund or part fund with others to set up business and we get some stores as part of [payment/payout] & exit after 2-3 years", which Woolworths recorded Mr Samuel as saying "has potential". The last option was "we buy lot & set it up independently and exit in 5 years", to which Mr Samuel responded "difficult to see how we can buy it without having control".

On Friday Tony Bannon, SC, for Woolworths, said his client wanted these parts of the file note to remain confidential because they were "still potentially alive" if Justice Arthur Emmett prevented Metcash from buying Franklins.

Yesterday, in a development that supported Metcash's position on the significance of the meeting, Mr Bannon abandoned his confidentiality application.

He said after reviewing the material it "might be difficult" to persuade Justice Emmett to impose a confidentiality order "in circumstances including the ACCC having to justify its course of action".

RoLIA welcomes your comments.

12 August 2011.