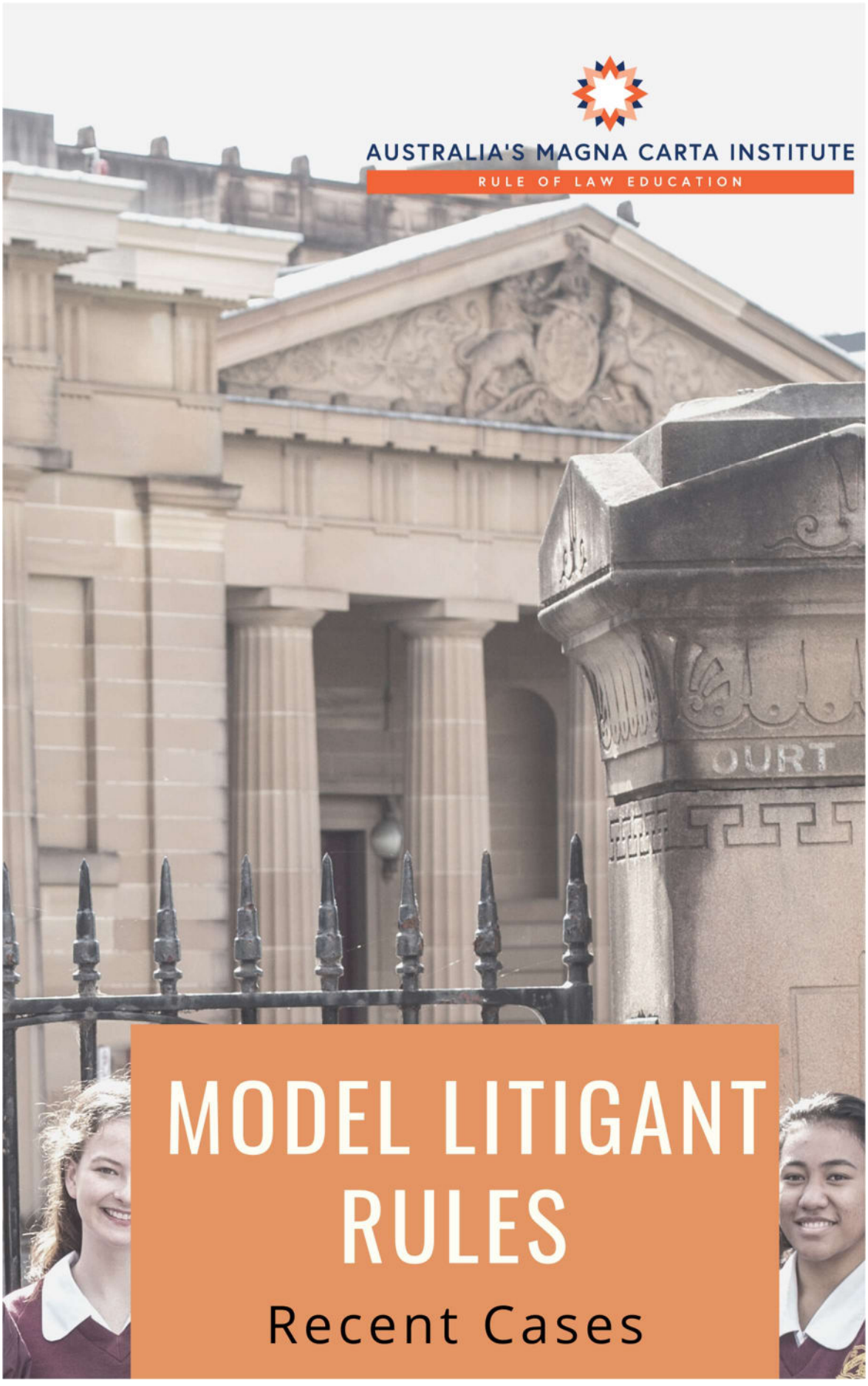

Contents

Cases which the Rule of Law Education has identified which discuss the model litigant obligations are set out below.

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

Facts

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

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

Findings of NSW Court of Appeal

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

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

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

[1] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2010/331.html?context=1;query=[2010]%20NSWCA%20331;mask_path=

establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one".

Spigelman CJ, Beazley and Giles JJA found that:

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

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

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

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

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

DCT v Denlay & Anor [2010] QCA 217[2]

Facts

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

[2] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2010/217.html?context=1;query=[2010]%20QCA%20217;mask_path=

Findings of the Queensland Court of Appeal

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.'

R v Martens [2009] QCA 351 [3]

Facts

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

Findings of the Queensland Court of Appeal

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

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

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

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

[3] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2009/351.html?context=1;query=[2009]%20QCA%20351%20;mask_path=

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

Facts

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

Findings of the Federal Court

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

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

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

James and Anor [2011] AAT (Supressed Judgment) - reported in Weekly Tax Bulletin Issue 4, 28 Jan 2011[5]

Findings of the Administrative Appeals Tribunal

'The ATO had simply ignored the evidence of the purchasers having made an express admission in writing, without any qualification at all, of their indebtedness to the taxpayer'.[6]

'The ATOs adverse comments about the two trust instruments is reminiscent of complaints of King Henry VIII in the 16th century who did his best to have trusts abolished altogether because of their tendency to facilitate tax avoidance'.[7]

'The AAT considers it a matter for remark that, during the course of one of the ATO interviews of the taxpayer in 2005, a member of the ATO audit team ''thought it appropriate to engage in a contest with Mr James about the applicability of the Statute of Limitations' to a document. The AAT said the period of limitation is 6 years, in both QLD and NZ and that 'the ATO officer wrongly insisted the limitation period was only three years. The ATO officer was quite wrong in his opinion, which in any event was not relevant to Mr James tax liability'.'[8]

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[4] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2010/567.html?context=1;query=[2010]%20FCA%20567%20%20;mask_path=

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

[6] Ibid, page 1.

[7] Ibid, page 2.

[8] Ibid.

Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2) [2010] FCA 1124 [9]

Facts

The Commissioner of Taxation sought an order for costs.

Findings of the Federal Court

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

Qantas Airways Ltd v Transport Workers Union of Australia [2011] FCA 470 [10]

Findings of the Federal Court

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

Phillips v Commissioner of Taxation [2011] FCA 532 [11]

Facts

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

Findings of the Federal Court

Lander J 4 Ibid. '[3] The Commissioner of Taxation is a model litigant and ought to behave as one. The direction of the Court was that the Commissioner file an affidavit within six weeks of the date of the direction. Directions of this Court, of course, have the force of orders. Orders of this Court must be complied with, especially when the party who is obliged to comply is a model litigant.

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

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[9] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2010/1224.html?context=1;query=%22clear%20blue%20developments%22%20and%20%22Taxation%22%20;mask_path=

[10] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2011/470.html?context=1;query=[2011]%20FCA%20470;mask_path=

[11] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2011/532.html?context=1;query=[2011]%20FCA%20532;mask_path=

Australian Securities and Investments Commission v Hellicar [2012] HCA 17 [12]

Facts

See Morely & Ors v Australian Securities and Investments Commission [2010] NSWCA 331 ASIC appealed the Court of Appeal's decision to the High Court.

Findings of the High Court

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

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

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

In a separate judgement by Heydon J he stated:

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

'[240] ASIC also did not dispute that it had a duty to act as a "model litigant" pursuant to the Legal Services Directions made under s 55ZF of the Judiciary Act 1903 (Cth). But App B of the directions does not create any specific obligation of the kind which the Court of Appeal relied on. In any event, s 55ZG(3) of that Act provides that noncompliance cannot be raised in any proceeding except by or on behalf of the Commonwealth. The Commonwealth has the same rights as any other litigant. It has the same powers to enforce those rights. That is so whether the Commonwealth is suing or being sued. And it is so even where, as here, no other person could have brought the proceedings. Nothing in the Legal Services Directions suggests that the Commonwealth's obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that the Court of Appeal's reasoning contemplated. The Solicitor-General of the Commonwealth correctly

[12] http://eresources.hcourt.gov.au/showCase/2012/HCA/17

submitted that the duty to act as a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants — they apply uniformly'.

LVR (WA) Pty Ltd v Administrative Appeals Tribunal [2012] FCAFC 90[13]

Facts

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

Findings of Full Federal Court

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

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

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

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

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

6 ALR 501, Heydon J said ASIC accepted that there was, in the words of Griffith CJ in Moorhead, an "old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects". Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is larger and has access to greater resources

[13] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2012/90.html?context=1;query=[2012]%20FCAFC%2090%20;mask_path=

than private litigants. Hence it must act as a moral exemplar ... In our opinion, counsel representing the executive government must pay scrupulous attention to what the discharge of that obligation requires, especially where legal representatives who are independent of the agency are not involved in the litigation.'

Caporale v Deputy Commissioner of Taxation [2013] FCA 427 [14]

Facts

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

Findings of the Federal Court

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

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

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

[39] 'That exercise in the present case yields the result that no private rights are conferred by Appendix B "The Commonwealth's obligation to act as a model litigant"'. [44] 'The terms of these provisions indicate an intention that the Directions are a means of control by the Attorney-General of Commonwealth herself. For this reason also, I do not propose to award professional costs to the Deputy Commissioner. Indeed, so to do would be to reward work which is not of a standard to be expected of a person asserted to be solicitor on the record for a person to whom model litigant obligations adhere.'

Secretary, Department of Social Services & Commonwealth of Australia v Franceso Cassaniti and Maria Cassaniti (No 2) [2015] NSWSC 1795 [15]

[14] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2013/427.html?context=1;query=[2013]%20FCA%20427%20%20;mask_path=

[15] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2015/1795.html?context=1;query=francesco%20cassaniti%20;mask_path=au/cases/nsw/NSWSC

Facts

The respondents argued that the Secretary, Department of Social Services had unjustifiably brought proceedings in a second forum, causing oppression or injustice and used the court's procedures in a way which was unjustifiably oppressive, including making orders for them to pay costs.

Findings of the Supreme Court

Slattery J at [20] referred to the respondents' contention that Commonwealth agencies as model litigants should endeavour "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".

His Honour opined [at 26]: "The model litigant obligations found in the Legal Service Directions are a policy that the Commonwealth has imposed upon itself. It is for the Commonwealth Attorney-General to review compliance with those obligations as expressed in the Directions and to censure those responsible for non-compliance. It is for that reason that Justice GT Pagone, speaking extrajudicially in a speech titled "The Model Litigant and Law Clarification" on 17 September 2008 at the ATP Leadership Workshop, said that the term "model litigant" represents "an ethical, rather than a legal, standard".

Notwithstanding the above, His Honour stated [at 27] that s 55ZG(3) of the Judiciary Act does not prevent a court from considering whether or not the Commonwealth has complied with the courts' expectation at general law to act as a model litigant.

In this case, His Honour did not regard the conduct of the applicants as having failed the court's expectations of a model litigant.

Waste-Away SA v RTWSA (No.2) [2018] SARTWPRP 1 [16]

Facts

This case concerned issues surrounding the amount of statutory payments an injured worker should receive pursuant to the Workers Rehabilitation and Compensation Act 1986 (South Australia). The applicant employer sought a review of the premium calculations which were made over two consecutive financial years by the Respondent: Return to Work Corporation of South Australia ("the Corporation").

Findings

In an interim decision, the Panel [at 34] emphasised that the Corporation was bound to refrain from simply consulting its own interests when determining claims. It also made reference to a particular document the Corporation was bound to act in accordance with as a Model Litigant. Although it was not suggested the Corporation had acted in any way inappropriately to date, the Panel did form the view that further investigations were warranted, in the interests of fairness and justice.

This case is interesting because the Panel made specific mention of the Crown's obligation to act as a model litigant and appended a document entitled: "The Duties of the Crown as a Model Litigant",

[16] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SARTWPRP/2018/1.html?context=1;query=%22model%20litigant%22%20near%20obligations;mask_path=#fn3

issued 10 June 2011 to its decision. See also Footnote [3], which states the Panel decided to append the Guidelines to its decision because it was unlikely the employer would have ready access to them.

Edward Lee's Imports Pty Ltd v Commissioner for Fair Trading [2016] NSWCATOD 165 [17]

Facts

The Applicant made an application to the Civil and Administrative Tribunal to review a Determination made by the Respondent on 20 September 2016. On 12 October 2016, the Tribunal gave directions for the Respondent to file and serve certain documents. The Respondent failed to file and serve the documents by the requisite date. It then emailed the Applicant and advised it was unable to comply with the timetable and would endeavour to do so by a later nominated date. This did not eventuate.

Findings of the Tribunal

The Tribunal member considered in what circumstances the Tribunal has the power to award costs.

The Respondent's argument was that although it had failed to comply with the Tribunal's timetable of 12 October 2016, that this of itself did not amount to a failure to comply with its obligations towards the Tribunal.

Senior Tribunal Member Isenberg observed [at 52]: "A flow-on from the failure by the Respondent to provide the s 58 documents in accordance with the Tribunal's directions is that the substantive hearing has been set back more than four months, thus disadvantaging the Applicant in relation to a matter which the Applicant alleges is critical to the continued operation of its business". Furthermore [at 72]: "The normal statutory procedure requires that parties comply with their obligations to file and serve documents in accordance with the Tribunal's directions. The Respondent failed to do this and no satisfactory explanation has been provided as to the reason for the failure".

The Tribunal member [at 84] referred to the NSW Model Litigant Policy for Civil Litigation. [At 93], he expressed concern about what appeared to be undertakings by the Respondent and a consequent failure on its part to comply with its own timetable, especially as a model litigant. In addition, the Respondent had not given reasonable notice of its likely non-compliance to the Applicant.

The Respondent was ordered to pay the costs of the Applicant.

[17] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATOD/2016/165.html?context=1;query=%22Model%20Litigant%22%20near%20obligations;mask_path=#disp14

Walpole & Secretary, Department of Communities and Justice [2020] FamCAFC 65 (25 March 2020)[18]

Facts

This decision by the Full Court of the Family Court of Australia (Watts, Ryan and Aldridge JJ) allowed an appeal against orders made on 29 November 2019, requiring two children, aged three and two years respectively, to return to New Zealand.

The proceedings involved interpretation of the Family Law (Child Abduction) Regulations 1986 ("the Regulations"), which give effect to the *Hague Convention on the Civil Aspects of International Child Abduction* in Australia.

The case is interesting because apart from examining Australia's obligations under the Abduction Convention, it is also one of the first cases to provide guidance as to how the Family Court might handle cases during the time of COVID-19.

The Abduction Convention provides a mechanism for the prompt return of wrongfully removed or retained children, the aim being to deter the wrongful abduction or retention of children and restore them to their usual place of residence, as well as to ensure the children's' best interests.

The Hon Justice Ainslie-Wallace, who heard the matter at first instance, found the conditions for return of the children as prescribed in the Regulations were satisfied, notwithstanding the fact that the father had a known and lengthy criminal history, the mother had repeatedly returned to the father in a complex relationship dynamic and the children had lived with and been exposed to family violence.

On appeal, the mother opposed the children's return to their father on the basis amongst other things that the totality of the circumstances in which the children would find themselves if they returned to New Zealand was unsafe and intolerable.

The decision to return the children to New Zealand in circumstances where there were strict international travel restrictions in place and Australians were prohibited from leaving the country due to the Australian Government issuing a "do not travel" ban is significant.

Findings

The plurality (Ryan and Aldridge JJ) made a number of interesting (obiter) observations, including being critical of the role of the Secretary of the Department of Communities and Justice and its obligations as a model litigant. They said three things:

1. [At 78]: "We have been troubled by what occurred in this case and it is timely to mention the importance of adherence to Model Litigant guidelines. The NSW Guidelines, which apply to the Central Authority, requires more than merely acting honestly and in accordance with the law and court rules. Essentially, the guidelines require that the Central Authority acts with complete propriety and in accordance with the highest professional standards.

[18] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCAFC/2020/65.html?context=1;query=walpole%20[2020]%20FamCAFC%2065;mask_path=

Relevantly, this includes not requiring the other party to prove a matter which the state or an agency knows to be true."

The Central Authority should have enquired into and divulged the father's criminal record in Australia and New Zealand, rather than requiring the mother and the Independent Children's Lawyer to present that information and essentially 'requir[e] the other party to prove a matter which the state or an agency knows to be true".

Further [At 80]: "Instead, it was left to the mother and the ICL to gather records from New Zealand and domestically. It is no small thing to obtain records from abroad, particularly when time constraints are tight. Fortunately, the mother was granted legal aid, but, what we ask, if she was not? How would this young mother on social security benefits have managed to place this vitally important evidence before the court? The prospect that she would not have been able to do so is obvious."

2. [At 81]: Consideration should be given to the powers of the Central Authority to refuse to present an application. "Regulation 14 states that a Central Authority "may" apply to the court. This is the language of discretion and carries with it the implication that a Central Authority may decide against presenting an application for a return order. We did not hear argument on the point, but we encourage the Commonwealth and Special Commissions who oversee the Abduction Convention to give this matter further consideration".

3. Reform of the Regulations should be considered in view of the *Equality Before the Law: Justice for Women* (ALRC Report No. 69, Part IV – Violence Against Women, Violence and Family Law (1994)). This Report recommended that the Regulations be amended to "…provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child". (Recommendation 9.5). [At 82]: "It seems to us, that an amendment to the Regulations along those lines coupled with an effective discretion reposed in the Requesting and Central Authorities, could only enhance the operation of the Abduction Convention and ensure that it operates as initially intended."

Justice Watts disagreed with the comments relating to the Central Authority in relation to the issue of the father's extensive criminal record. His Honour said [at 84]: "I do not join any criticism as to any lack of complete propriety and professionalism of the Central Authority. Having said that, it is regrettable in this case that neither the primary judge nor this court was provided with an entire set of NSW COPS records. Both the parties were legally represented and the ICL represented the children [i]t would be speculative to comment on who, if anybody, is to blame for that lacuna in the evidence".