

What are Model Litigants?

Are the Model Litigant Rules imposed on the Australian Commonwealth by the legislature effective?

Background

Intention of the Model Litigant Rules

- Addressing the substantial imbalance of power in litigating against the government
- Government power to investigate, spend money on litigation, compel witness evidence
- Intention to address this imbalance of power
- Impose a duty of fairness on all government agencies
- Intention is to act fairly, but the Rules must be enforceable and deal with all complaints openly and transparently

Australian common law duties

At common law there has always been an intent for a fair process to lead to a fair outcome

- *Melbourne Steamship Company Ltd v Moorhead* (1912) 15 CLR 333

“ the old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects.”

- *SCI Operations v The Commonwealth* (1996) 139 ALR 595

“the position of the Crownshould be taken into account It is well established that the Crown must act, and be seen to act, as a model litigant.”

Criminal law? Civil law?

Morley and Ors v Australian securities and Investments Commission [2010] NSWCA 331

- The NSW Court of Appeal clarified that the principle is “ **not** limited to criminal law”.
- Important clarification :
 - “...the government agency has no legitimate private interest of the kind that often arises in civil litigation. It acts, and only acts, **in the public interest as identified in the regulatory regime**”.
 - “..... Cannot be regarded as an ordinary civil litigant 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.”

Australian Commonwealth

The Commonwealth laws

- Commonwealth laws covering the conduct of litigation now set out certain standards :
 - Judiciary Act 1903 s.55ZF
 - Legal Services Directions 2017
 - Civil Procedure Act 2005 s.56 (NSW)
- All government agencies required to act :
 - honestly
 - fairly
 - ensure just, quick and cheap resolution of proceedings

Who regulates the standards?

Where in the separation of powers does regulation sit?

- The Office of the Legal Services Coordination (OISC)

OISC is part of the Attorney General's Department, responsible for enforcing failure by federal government agencies to meet required standards

Power to impose sanctions for breaches (clause 14 of the Directions)

Provides guidance and education

Model litigant obligations can only be enforced by the Attorney General – not by private individuals.

Legal Services Directions 2017

Commonwealth's duty in litigation

- Legal Services Directions 2017 outlines Commonwealth's duty in litigation
 - Duty has become known as “the **Model Litigant Rules**”
- Goes beyond the requirement for lawyers to act in accordance with their ethical obligations, but **self-regulation in reporting breaches**
- Any question of breach within proceedings can only be raised by the Commonwealth – heavy onus on the Attorney General to investigate and enforce the Rules
- Publication of Annual reports covering breaches – changes to data analysis make it less transparent to see breaches and enforcement – no sanctions published

Reporting Flowchart

Insert from A-G's website – to find and transfer

- Diagram from AG website

Lack of teeth (resources)

Morley v ASIC [2010] NSWCA 331

- OISC:
- 15,000 pieces of legislation pa.
- “ we are a smaller regulator.... about 14 people way we approach compliance with the directions, we have to very much be selective in our approach
- Education and training
- Website
- Guidance notes

What are the obligations?

Same across all states and territories

- Dealing with claims promptly and not causing a delay
- Avoiding unnecessary litigation
- Acting consistently in the handling of claims and litigation
- Minimising the costs of litigation
- Not taking advantage of power
- Not relying on technical defences

Malone : balance of power

Malone on behalf of the Western Kagalou People v State of Queensland [2020] FCA1188

- The engagement of the principles of model litigant in litigation tested in this important 2020 ruling, concerning a Queensland native title claim
- Preceded by *Brandon v Commonwealth* [2005] FCA 109
 - “the Commonwealth is a behemoth of sorts, it is not required to fight with one hand behind its back in proceedings. It has the same rights as any other litigant.....”

Malone #2

Interpretation of the Rules

- Strike out application in a native title claim affecting proprietary rights
- Consideration of the Rules in the strike out –
what did the Court have to consider?
- Outcome – judicial decision against the applicants
- OISC?

Where next?

Are the Commonwealth model litigant rules working?

- What were they meant to do?
- What have they achieved?
- How enforceable are they?
- What lessons learned from the Australian Commonwealth are transferable to other jurisdictions?



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