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Submission – Access to Justice Arrangements

Attached is a submission on the Productivity Commission's *Access to Justice Arrangements Issues Paper*.

The Issues Paper raises many important and complex questions around the accessibility of justice in Australia. We have not been able to address the vast majority of these concerns, but instead have made a submission in one area where we have relevant expertise – improving the accessibility of courts, specifically relating to the reform of the government's model litigant rules.

Yours sincerely

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Submission to the Productivity Commission: *Access to Justice Arrangements Issues Paper*

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This submission addresses only one issue that arises from the Productivity Commission's *Access to Justice Arrangements Issues Paper*, the question of the effectiveness of the current federal model litigant rules.

In addition to the submission set out below, we would observe that access to justice is often framed, and rightly so, as an issue about providing additional services and pathways to litigants, and particularly those most in need, to resolve their disputes. However, it is important to acknowledge that access to justice by less well-resourced litigants is impacted by the use of justice resources by government and well-resourced litigants. This is becoming increasing apparent with the rise of mega-litigation in commercial disputes which can remove members of the judiciary for substantial periods (for some years) from their normal duties. As such, we would urge the Productivity Commission to take into account the impact of providing state-funded justice to well-resourced litigants on the justice afforded to the less well-resourced.

ISSUES PAPER POINT 11 – Improving the Accessibility of Courts

How effective are model litigant rules and other existing legislative conduct obligations?

The current articulation and enforcement of the Commonwealth's model litigant rules are in need of reform to provide greater clarity to government litigants and those appearing in matters against government litigants, as well as ensuring unfairness encountered between government litigants and others is properly addressed. In summary, we recommend:

1. that the model litigant rules contained in the *Legal Services Directions* are amended to clarify the factors that will be relevant to determining fairness in a particular case and provide some practical illustrations;

2. that the enforcement of the model litigant rules be amended to:
    a) provide greater certainty about the division of responsibility between the courts and government,
    b) enhance information sharing between the courts and the government; and
    c) establish a complaints mechanism is established within the Attorney-General's Department to receive and resolve complaints, to supplement the current enforcement strategy, which is light-touch education and awareness driven, focussing on self-regulation and reporting by departments and agencies.

We have set out below some background and justification for each of these recommendations.

Recommendation 1: Reforms to articulation of the model litigant rules

Background

Three bases for the model litigant obligation can be identified: the Crown's obligation to justice and the rule of law, the source of the Crown's power in the public trust to be exercised for the public good/in the public interest; and the litigation advantage enjoyed by the Crown. This litigation advantage can exist because of the government's comparable size and resources,[1] and

[1] Camille Cameron and Michelle Taylor-Sands, '"Playing Fair": Governments as Litigants' (2007) 26 *Civil Justice Quarterly* 497, 503.

also because the government is a repeat player with a large amount of resources at its disposal and the higher public profile of government lawyers.[2]

One of the difficulties encountered in the monitoring and enforcement of the model litigant obligations is the inherent tensions that exist in their definition. Concepts such as justice and the public interest are often informed by conflicting principles that will dictate different outcomes depending on which principle is emphasised. This is already evident in the Commonwealth's model litigant rules.

The *Legal Services Directions 2005* (Cth) issued under s 55ZF of the *Judiciary Act 1903* (Cth) now contain a list of the Commonwealth's model litigant rules.[3] Many States and Territories have similar guidelines, which have been modelled largely on the federal rules.[4] Under the *Legal Services Directions*, a government litigant must 'act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency'. Specific obligations are listed. The rules note that they do not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. The Commonwealth has an obligation to treat individuals in litigation fairly but also to pursue its interests and defend the public monies in its custody. Commonwealth agencies may take legitimate steps to test and defend claims made against them and to pursue litigation to clarify points of law even where the other party wishes to settle.

While the model litigant rules provide some guidance as to how government must act in litigation, in difficult cases there is continuing uncertainty as to what they require in particular cases. The most recent litigation involving the directors of James Hardie demonstrates this point. The NSW Court of Appeal found that ASIC had breached its duty of fairness by failing to call a particular witness;[5] the High Court found that it had not.[6] The level of indeterminacy that remains in relation to the duty provides significant uncertainty and can lead, as it did in the James Hardie litigation, to significant additional costs and delay incurred by parties as a result.

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2 Ibid 499-506; Camille Cameron and Michelle Taylor-Sands, '"Corporate Governments" as Model Litigants' (2007) 10 *Legal Ethics* 154, 2.

3 Appendix B. The Directions are issued under *Judiciary Act 1903* (Cth) s 55ZF. See further Michelle Taylor-Sands and Camille Cameron, 'Regulating Parties in Dispute: Analysing the Effectiveness of the Commonwealth Model Litigant Rules Monitoring and Enforcement Processes' (2010) 21 *Public Law Review* 188.

4 See guidelines in New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory: New South Wales LawLink, Legal Services Coordination, 'Model Litigant Policy for Civil Litigation' (8 July 2008) <http://www.lsc.lawlink.nsw.gov.au/agdbasev7wr/lsc/documents/pdf/cabinetapp-mlp.pdf>; Appropriate Dispute Resolution Directorate Victorian Department of Justice, 'Victorian Model Litigant Guidelines' (March 2011) <http://www.justice.vic.gov.au/resources/3/4/34fd7f00459fb2b0b6a2b6e6d4b02f11/revisedmodellitigantguidelines.pdf>; Queensland Department of Justice, 'Cabinet Direction: Model Litigant Principles' (4 October 2010) < http://www.justice.qld.gov.au/corporate/model-litigant-principles>; *Law Officers Act 2011* (ACT) Division 2.2 (Legal Services Directions), *Law Officer (Model Litigant) Guidelines 2010 (No 1)* (ACT). South Australia, Legal Bulletin No 2, *The Duties of the Crown as Model Litigant* (Greg Parker, 10 June 2011) available at: http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Policies%20Proceedures%20Codes/cso-legal-bulletin-number-2.pdf. Western Australia has refused to issue formal guidelines, relying instead on the common law: Western Australia, *Parliamentary Debates*, Legislative Council, 21 September 2010, 6886 (Giz Watson (Greens, WA), Michael Mischin (Parliamentary Secretary representing the Attorney-General, Liberal)).

5 *Morley and Ors v ASIC* (2010) 27 ALR 205.

6 *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17.

Recommendation

We submit that one way to assist government litigants and others in understanding the nature and extent of their obligations would be to provide some key considerations that will be used to determine the content of the obligations in particular situations. An analysis of the cases on the duty of fairness indicates that the courts consider two key criteria when determining whether government litigants have complied with their duty of fairness: justice and equality.[7] In relation to justice, the courts require that litigants assist the court in arriving at a 'proper and just result'.[8] Inevitably this consideration will carry different weight depending on the kind of matter under consideration. For example, the requirements for a just result in a criminal matter might be more exacting than those in a civil matter. The second criterion is that of equality. This element addresses the possibility that the government litigant has an advantage due to its resources and repeat-player status. In the context of particular cases the courts have shown concern about the duty of fairness where one party is unrepresented.[9] In such cases it is logical that the duty of fairness has greater content than it might where both parties are equally well-resourced.

These specific criteria could be included in the preamble to the specific obligations to provide greater clarity to litigants and courts. Further assistance could be provided by practical illustrations, perhaps drawn from the cases, of the way the model litigant obligations have been interpreted by the courts.

Recommendation 2: Reforms to enforcement

Background

The model litigant rules are enforced predominantly through a system of self-monitoring by the government agency. This raises serious questions as to whether breaches of the rules are going unnoticed and the resultant unfairness to litigants unaddressed.

Under the *Legal Services Directions*, Chief Executives must adopt appropriate management strategies and practices to achieve compliance with the Directions.[10] The agency must report to the Attorney-General or Office of Legal Services Coordination (OLSC) as soon as practicable about any possible or apparent breaches or allegations of breaches and corrective steps taken or proposed to be taken.[11] The Chief Executive provides an annual certification to the OLSC setting out the extent of the agency's compliance with the Directions, including apparent or possible breaches not previously reported and any remedial actions taken.[12] When contracting legal services, agencies must include appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including termination of the contract.[13]

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7 The importance of these two factors is also apparent in an analysis of the theoretical literature about fairness: see, for example, D D Raphael, *Concepts of Justice* (Oxford University Press, 2001) 1; John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14(5) *Philosophy & Public Affairs* 223, 227.

8 *P & C Cantarella Pty Ltd v Egg Marketing Board of the State of NSW* [1973] 2 NSWLR 366, 383. This approach has been endorsed in a number of cases, see, for example, *Pacific National (ACT) Ltd v Queensland Rail* [2005] FCA 535, [54].

9 *Scott v Handley* (1999) 58 ALD 373, [1999] FCA 404, [46]. See also, *ASIC v Loiterton* [2004] NSWSC 172, [38].

10 Directions, 11.1(b).

11 Directions, 11.1(d).

12 Directions, 11.2.

13 Directions 14.2.

Monitoring of compliance within the Commonwealth relies almost entirely upon self-regulation, certification and reporting of alleged breaches to the OLSC.[14] The OLSC focuses on education and information sharing.[15] It does not 'police' compliance,[16] or even monitor cases;[17] it rarely discovers breaches.[18]

The Attorney-General and the OLSC can receive complaints from the public.[19] However, in 2013, the new OLSC Compliance Framework indicated that the complaints are not investigated by the OLSC but forwarded to the agencies for 'appropriate action.'[20] A government commissioned report found compliance among Commonwealth departments and agencies to be variable.[21]

Section 55ZG(2) of the *Judiciary Act 1903* (Cth) provides that 'Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General'. Section 55ZG(3) states that:

> 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.

Legal Services Direction 14.1 states that 'the Attorney-General may impose sanctions for non-compliance with the Directions'. The OLSC has suggested that this may take the form of a direction from the Attorney-General as to the conduct of a particular matter or taking remedial action.[22] However, 'A direction would only be made where there is no other more effective means of addressing the identified risk', and it 'is likely to be exceptional.'[23]

At present, this is the total enforcement regime put in place under s 55ZG(2). One of the biggest problems with the current regime of enforcement is there is no real opportunity for persons who appear against the government to lodge a complaint about its conduct in litigation for proper investigation.

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14 Ibid.

15 Office of Legal Services Coordination, 'Compliance Framework', available at http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-%20Compliance%20Framework.PDF (accessed 19 August 2013), p 4-5, see also Taylor-Sands and Cameron, above n 3, 198-200.

16 Australian Law Reform Commission, 'Review of the Adversarial System of Litigation', *Report No 89* (2000) [3.148]; Taylor-Sands and Cameron, above n 3, 198.

17 Commonwealth, *Committee Hansard*, Joint Committee on Corporations and Financial Services, 11 March 2011, CFS 15 (Mrs Janette Dines, Assistant Secretary, Civil Law Division, Attorney-General's Department); Taylor-Sands and Cameron, above n 3, 197.

18 Australian National Audit Office, *Legal Services Arrangements in the Australian Public Services* (2005) 5.12; see also Rule of Law Institute review of the Attorney-General's annual reports detailing investigations of alleged breaches of the LSD, Rule of Law Institute, *Model Litigant Rules, Key Facts and Cases* (12 August 2011) available at http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-8-11-Model-Litigant-Rules-Key-Facts-and-Cases.pdf (accessed 19 August 2013) 11-16; and Taylor-Sands and Cameron, above n 3, 192-8.

19 Taylor-Sands and Cameron, above n 3, 191.

20 Office of Legal Services Coordination, 'Compliance Framework', available at http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-%20Compliance%20Framework.PDF (accessed 19 August 2013), [18].

21 Commonwealth, *Report of the Review of Commonwealth Legal Services Procurement* (Anthony S Blunn and Sibylle Krieger, 6 November 2009) 39.

22 Commonwealth, *Committee Hansard*, Joint Committee on Corporations and Financial Services, 11 March 2011, CFS 12 (Mrs Janette Dines, Assistant Secretary, Civil Law Division, Attorney-General's Department).

23 Legal Services Direction 11.1(d) and 11.2 and Office of Legal Services Coordination, 'Compliance Framework', available at http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/OLSC%20-%20Compliance%20Framework.PDF (accessed 19 August 2013), [16].

While s 55ZG limits the enforceability of the model litigant rules articulated in the *Directions*, it is silent in relation to the courts enforcing common law obligations that rest on government officers and agencies in the conduct of litigation.[24] Under the common law, the model litigant obligation has been enforced through the court's powers to impose costs[25] and stay proceedings in which the government is a litigant,[26] or in extreme cases where failure to meet the model litigant standards has resulted in a miscarriage of justice, overturn the outcome on appeal.[27]

Recommendation 2(a): Greater certainty about division of responsibility between courts and government

We would submit that while there are problems with the current enforcement within the Attorney-General's department, the enforcement of the model litigant obligation should continue to be a shared responsibility between the two branches of government. The courts provide an independent enforcement mechanism, through the award of costs in cases where unfairness is borne by an individual because of the conduct of the government. However, the division of responsibility between the courts and government needs to be more clearly addressed.

The courts operate best when they enforce the model litigant obligation in cases of extreme unfairness to an individual. In other cases, the courts' intervention carries with it the danger of substituting a judge's view on whether a particular course of action was fair with the government's view. Sometimes this will be necessary, but where the competing underlying values are delicately balanced, the intervention is inappropriate and inconsistent with the judicial function. This can be seen in the James Hardie litigation where judicial disagreement as to what was required by fairness in the particular case was evident. Determining whether certain conduct is fair in these difficult cases involves questions of policy-choice that ought to be resolved by government officers, or potentially by the Attorney-General issuing a general direction as to how such matters must be resolved in the future.[28] In these more delicately balanced cases, it may be appropriate for the judge to provide a statement that he or she disagrees with the Crown's conduct in the circumstances but take no further action.

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

Finally, the courts are often operationally limited in terms of the conduct that they can review. Where the duty of fairness attaches to questions of whether the Crown should bring a prosecution

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24 Contra Christopher Peadon 'What Cost to the Crown a Failure to Act as a Model Litigant' (2010) 33 *Australian Bar Review* 239, 248.

25 See, eg, *Mahenthirarasa v State Rail Authority of NSW (No 2)* (2008) 72 NSWLR 273. See also earlier statements in *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 1568 (Mansfield J), [18]; *Nelipa v Robertson and Commonwealth* [2008] ACTSC 16, [97] and [100] (Refshauge J); *Galea v Commonwealth* [2008] NSWSC 260, [17-21] (Johnson J).

26 *R v Mosely* (1992) 28 NSWLR 735; *R v Ulman-Naruniec* [2003] SASC 437; see also *ASIC v Hellicar* [2012] HCA 17, [155] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

27 *ASIC v Hellicar* [2012] HCA 17, [155] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

28 See also Taylor-Sands and Cameron, above n 3, 197.

or appeal, the courts should not become involved. Where the Crown is involved in settlement negotiations and conducts itself other than in accordance with the model litigant rules, the court cannot intervene. The Attorney-General therefore has primary responsibility in this area.

Recommendation 2(b): Enhance information sharing between the courts and the government

One of the criticisms made of the current system is that the Office of Legal Services Coordination relies on self-reporting by agencies and therefore few breaches of the model litigant obligation are picked up. Michelle Taylor-Sands and Camille Cameron have observed that there is a gap between breaches recorded by the OLSC and breaches found in courts and tribunals.[29] OLSC monitoring could be enhanced by the courts working more closely with the OLSC, perhaps by referring identified breaches to the office. The OLSC currently maintains a register of Federal Court and AAT cases in which breaches of the model litigant principles are recorded.[30] However, this is not an exhaustive list and it would appear to be maintained by the OLSC based on its own research and self-reporting by agencies, rather than the court reporting breaches to the OLSC. Judicial statements can also feed into the administrative enforcement of the model litigant rules obligations, including through the implementation of training and education campaigns.

As well as court reporting breaches and judicial dissatisfaction with government conduct in litigation, another option may be the establishment of a standing forum for the courts and Attorney-General's department to share information on the conduct of litigation by the Crown. This forum could provide an opportunity for the court to express concerns about repeat issues that occur in the government's conduct of litigation that they perceive as unacceptable. It also provides a forum for the government to provide greater context to the judges about the administrative, economic and political context within which the litigation is being conducted. If such a forum were to be established it must be conducted within strict limits; discussion of individual cases and concerns from specific pieces of litigation before the courts would be inappropriate.

Recommendation 2(c): establish a complaints mechanism is established within the Attorney-General's Department to receive and resolve complaints

OLSC monitoring could also be improved by establishing a more formal and robust complaints-handling process within the Office so that complaints are not simply forwarded to agencies to investigate and respond.[31] At present, the investigation and monitoring of compliance with the model litigant obligation through the OLSC lacks sufficient transparency.[32] Greater transparency about complaints and transgressions provides private litigants with an understanding of the way in which the model litigant obligation is applied, the standards they can expect, and reassurance that the government's enforcement is sufficiently rigorous. It also provides an opportunity for the government's behaviour to be shaped in positive ways. A transparent complaints procedure will also provide litigants with a sense of redress if they feel wronged by government conduct in litigation.

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29 Ibid 189.

30 Ibid 198-9.

31 See also Cameron and Taylor-Sands, above n 1, 522.

32 In both of their articles on the issue, see Cameron and Taylor-Sands, above n 1, 522; and n 3, 197-8.