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Supplementary Submission – Access to Justice Arrangements

Attached is a supplementary submission on the Productivity Commission's *Access to Justice Arrangements Draft Report*. The submission has been compiled by Dr Gabrielle Appleby and Dr Suzanne Le Mire from the Adelaide Law School, University of Adelaide.

Our submission addresses only one chapter of the draft report, Chapter 12, *Duties on Parties*.

Yours sincerely

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**Supplementary Submission
to the Productivity Commission:
*Access to Justice Arrangements Draft Report***

Submission by Dr Gabrielle Appleby and Dr Suzanne Le Mire

Adelaide Law School, University of Adelaide

15 May 2013

This submission supplements the submission we made to the Productivity Commission in this matter on 4 November 2013, in light of the questions posed by the Commission in its Draft Report.

Specifically, we address Draft Recommendation 12.2 and Information Requests 12.3, 12.4 and 12.5.

Subject to our recommendations below, we support Draft Recommendation 12.2.

Information Request 12.3

In relation to Information Request 12.3, we recommend that local governments be made subject to the model litigant requirements. This is consistent with the approach of the courts, which have extended the model litigant obligation to local government,¹ and it is also consistent with the justifications that support the obligation at the State, Territory and Federal level. As we noted in our earlier submission, there are a number of bases for the model litigant obligation. These include 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. The first two justifications, and possibly the third, depending on the local government involved, apply across all levels of government. We would suggest that local governments be bound by the model litigant guidelines applicable at the relevant State or Territory level.

Information Request 12.4

In relation to Information Request 12.4, we make the following observations and recommendations. We recommend that any complaints procedure ought to be crafted by reference to best practice in this area.² A good complaints procedure requires:

- (i) A designated complaints handling body separate from the agencies under investigation and composed of properly qualified individuals. At the federal level, the OLSC may provide this, although it must be kept at least ostensibly separate from the AGS and the legal providers within the Attorney-General's Department. At the State and Territory level, rather than develop a separate (and costly) complaints body, we would suggest that complaints be able to be made to existing accountability mechanisms, such as the Ombudsman.
- (ii) The system sorts complaints so that those involving substantive breaches are considered, to avoid time and resources being spent on frivolous or vexatious complaints;
- (iii) The standards of conduct are public and clear. See our recommendations around the clarity of the current Model Litigant Rules in the *Legal Services Directions* in our submission dated 4 November 2013. In this respect, model litigant guidelines in the States and Territories need to be formalised and promulgated (where this has not yet occurred) in a similar fashion to the Model Litigant Rules in the *Legal Services Directions*.
- (iv) An adequate opportunity to be heard is afforded to both the complainant and the government department or agency involved.

¹ See, eg, *Smith v Ash* [2011] 2 Qd R 175, in which President McMurdo of the Queensland Court of Appeal stated: '[a] local government authority like the Council should conduct itself as a model litigant'.

² This list of factors is developed from Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) *Melbourne University Law Review* (forthcoming).

- (v) The range of consequences is clear and tailored to the types of transgressions and their degree of seriousness.
- (vi) The system is sufficiently transparent to promote public confidence in it.
- (vii) Mechanisms exist to protect the integrity of the complaints process so that it cannot be circumvented by government.
- (viii) The administration of the scheme is fair, accessible and timely.

Information Request 12.5

We do not support the position that model litigant requirements should also apply to non-government litigants in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). The justifications for the application of the model litigant rules flow not only from the disparity in resources between parties, but, we submit, more importantly, from the special position of the Crown and its obligations to pursue the public interest and not private interests. In contrast, non-government parties have legal obligations to pursue private interests. Imposition of the model litigant guidelines on these parties is irreconcilable with these other legal obligations.