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**“Judge not lest ye be judged - the trials of a  
Model Litigant”<sup>1</sup>**

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<sup>1</sup> This Paper draws on a paper presented by R Woellner at ALTA in 2007, "Is the ATO a law unto itself?", and the authors thank Prof Stephen Graw for his perceptive comments on that earlier Paper.

As a Commonwealth Government Department, the Australian Taxation Office (“ATO”) is required by Appendix B to the Legal Services Directions 2005<sup>2</sup> to act as a “model litigant”, i.e. as a “moral exemplar” when conducting litigation in behalf of the Commonwealth. The genesis of the principles underpinning the model litigant rooms can be traced back to the observations of Chief Justice Sir Samuel Griffith in *Melbourne Steamship Ltd v Moorehead*<sup>3</sup>, where he lamented that:

“” I cannot refrain from expressing my surprise that [a technical point of pleading] should be taken on behalf of the Crown“. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings.

I am somewhat inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standards of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I’m mistaken”.

Translated subsequently into statutory form, the key underpinning principle in Appendix B is “the obligation” in clause 1, which states that:

“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 litigant in the conduct of litigation”<sup>4</sup>.

The balance of the Appendix goes on to spell out the daunting “nature” of this obligation, and requires agencies involved in litigation<sup>5</sup> to:

- act honestly and fairly in handling claims and litigation... By dealing with claims promptly and not causing unnecessary delay (cl 2 (a))<sup>6</sup>;
- make an early assessment of the prospects of success and the Commonwealth’s potential liability (cl 2(aa));
- pay legitimate claims without litigation... where it is clear that liability is at least as much as the amount to be paid (cl 2(b));
- act consistently in handling claims and litigation (cl 2(c))<sup>7</sup>;

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<sup>2</sup> Schedule to the Legal Services Directions 2005, made under section 55ZF of the Judiciary Act 1903 “Appendix B: The Commonwealth’s obligation to act as a model litigant”; see *P & C Cantarella Pty Ltd v Egg Marketing Board* [1973] 2 NSWLR 366, 383.

<sup>3</sup> (1912)15 CLR 133 at 342. See also *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Quin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155; and *Scott v Handley (No 2)* [1999] FCA 404, [44]-[45] (Spender, Finn and Weinberg JJ).

<sup>4</sup> T Brennan, “Model Litigant law and the Legal services Directions”, provides a useful overview of the Directions and issues (accessed 27 August 2013); R Jorgensen and M Bishop, “The rule of law and the model litigant rules” (June 2011) 45/11 TIA 678. .

<sup>5</sup> the Directions apply both to tribunal at court litigation, and to both merits review and judicial review: Jorgensen and Bishop, above, 679.

<sup>6</sup> See *Kenny v State of South Australia* (1987) 46 SASR 268, 273 (King CJ).

- endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration all cases to alternative dispute resolution before initiating legal proceedings... (cl 2 (d));
- when it is not possible to avoid litigation, keep the cost of litigation to a minimum by various means (cl 2(e)(i)-(iv));
- not take advantage of the claimant lacks the resources to litigate a legitimate claim (cl 2(f));
- not rely on technical defences (unless the Commonwealth's or the agency's interest would be prejudiced by the failure to comply with a particular requirement)l 2(g))<sup>8</sup>;
- not undertake and pursue appeals unless the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest (cl 2(h))<sup>9</sup>;
- apologising with the agency is aware that it or its lawyers have acted wrongfully or improperly (cl 2(i)).
- In merit review proceedings, an agency should use its best endeavours to assist the tribunal to make its decision (cls 3 and 4).

Notes 2-4 to Appendix B summarise the key elements of the model litigant rules in stating that:

*Note 2* In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, and with complete propriety, fairly and in accordance with the highest professional standards...

*Note 3* The obligation to act as a model litigant 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 the ethical obligations.

*Note 4* The obligation does not prevent the Commonwealth and agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing were defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law if the other party wishes to settle the dispute...".

These are indeed daunting standards to reach, particularly as it has been suggested that judges have tended to be unsympathetic to governmental "excuses" for breaches of the Directions<sup>10</sup>,

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<sup>7</sup> Jorgensen and Bishop (above, 681) criticise the approach taken by the ATO to its rest case litigation program on the basis that PS LA 2009/9 para 8 indicates that the ATO makes funding decisions on political rather than legal or meritorious grounds, contrary to the rule of law and the Model Litigant Directions.

<sup>8</sup> *Young v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155, 166 (Beaumont, Burchett and Goldberg JJ).

<sup>9</sup> Compare Brennan (above), 7-8.

<sup>10</sup> A Tsacalos, "The model litigant policy in the spotlight", <http://www.mondaq.com/404.asp?404>; <http://www.momdaq.com:80/Australia/x/144208> (accessed 1 September 2013).

and it is perhaps therefore not surprising (but no less lamentable) that the ATO and other Commonwealth departments have failed to comply with their model litigant obligations on numerous occasions.. However, this reflects the importance of the Directions, because as Jorgensen and Bishop observe, “The quality of the ATO’s compliance with the rule of law and model litigant rules determines the public’s confidence in [the ATO] as an institution”.<sup>11</sup>

There are statutory sanctions for breach of the Directions, including under Cl 14.1 the statutory discretion of the Attorney-General to “impose sanctions for non-compliance”<sup>12</sup>, and the possibility that a court hearing a case where the Directions were breached might award costs against the government department involved.<sup>13</sup>

However, there are also what might be seen as flaws in the structure of the Directions; in particular, under s 55ZG(2),(3) *Judiciary Act 1903*:

- (2) Compliance with a ... Direction is not enforceable except by, or upon the application of, the Attorney-General.
- (3) The issue of non-compliance with a ... Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth”:

Accordingly, a private litigant cannot take steps to enforce a Legal Services Direction. This can lead to anomalous outcomes.<sup>14</sup>

It has been suggested that the list of obligations above is not exhaustive<sup>15</sup>, but in any event they are lofty ideals, representing an important expression of the rule of law<sup>16</sup>. Balancing the strictures of the model litigant principles with the right of an agency to act “firmly and properly to protect its interests” is not easy, and perhaps therefore it is not surprising that the ATO sometimes fall short of the required level.

However, given the importance of the principles, any lapse is undesirable, and the Commonwealth Attorney General indicated in 2011 that any breach of the guidelines was “unacceptable”. Regrettably, there appear to have been a number of lapses on the part of the ATO - not that the ATO is alone in this, as problems have also arisen in other

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<sup>11</sup> R Jorgensen and M Bishop, “The rule of law and the model litigant rules”, (June 2011 45(11) TIA, 678.

<sup>12</sup> The range of sanctions and their application are outlined in *Compliance Strategy for Enforcement of the Legal Services Directions*

<sup>13</sup> See eg *ACCC v ANZ [2010] FCA 567*. In *Deputy Commr of Taxation v Clear Blue Development Pty Ltd (No 2) [2010] FCA 1224*, Justice Logan rejected an application by the ATO for a costs order, commenting that “... to do so would be to reward work which is not of a standard to be expected of a person [who is] a solicitor on the record for a person to whom the model litigant obligations adhere”; cf *Phillips, in the matter of Starrs & Co Pty Ltd In Liquidation v Commr of Taxation [2011] FCA 532*, [3] (Lander J). The ATO was ordered to pay indemnity costs *FC of T v Clark (No 2) [2011] FCAFC 140*.

<sup>14</sup> As for example in *Denlay* (above. Brennan (above), 10, mounts an argument that “the [core] Principle”, as distinct from the Directions, “exists at general law and is enforceable through the general law. The directions, if relevant, will serve merely to elucidate the content of the Principle in a particular case”; contrast Jorgensen and Bishop, above 679, who put the orthodox view.

<sup>15</sup> T Brennan, “Model Litigant Law and the Legal Services Directions”, above, 9.

<sup>16</sup> R Jorgensen and M Bishop, “The rule of law and the model litigant rules”, (2011) 45/11 TIA 678, 678-9.

Commonwealth departments<sup>17</sup>, including: *Morely v ASIC*<sup>18</sup>; *R v Martens*<sup>19</sup>; *Qantas Airways Ltd v Transport Workers Union of Australia - Fair Work Ombudsman v Transport Workers Union of Australia*<sup>20</sup>; *CSR (Vic) v Landrow Properties Pty Ltd*<sup>21</sup>; *Moline and Comcare*<sup>22</sup>; *ACCC v ANZ Banking Group Ltd (No 2)*<sup>23</sup>; and *Shah & Ors v Minister for Immigration and Citizenship & Anor*<sup>24</sup>.

Indeed, the Commonwealth Attorney-General identified a total of 35 breaches of the Model Litigant Directions by Commonwealth government departments in 2008-09<sup>25</sup>, 24 in 2009-10, 17 in 2010-11, and 42 in 2011-12<sup>26</sup>

That said, the ATO has had a number of well-publicised problems in recent times, including:

- *Phillips v Commr of Taxation*<sup>27</sup> (court was critical of the ATO's failure to file an affidavit within time after 3 extensions; awarded indemnity costs to the taxpayer);
- *FC of T v Denlay*<sup>28</sup> (ATO did not regard action in seeking to enforce assessment debts which would bankrupt the taxpayer did not constitute "hardship", an assertion characterised by the Court as "preposterous");
- *DC of T v Clear Blue Developments Pty Ltd (No 2)*<sup>29</sup> (Court was critical of the standard of ATO work in the litigation; refused to award costs to the ATO)
- *AAT Case [2011] James & Anor*<sup>30</sup> (ATO ignored evidence of the existence of a debt).

Perhaps the two most striking and illustrative recent examples of breaches of the model litigant rules by the ATO which are worthy of closer examination are *FC of T v*

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<sup>17</sup> M Taylor-Sands and C Cameron; see below). The Attorney-General's Annual Report 2009-10 identified 35 breaches in 2008/9 [subsequently corrected to 24 – see the Cth Attorney-General (OLS) Fact Sheet below), leading Civil Liberties Australia to suggest that there had been an apparent decline in the behaviour of government departments (B Rowlings, "The very model of a model litigant", <http://www.cla.asn.au/News/the-very-model-of-a-model-litigant> - accessed 1 September 2013. From this perspective, the increase to 42 (70% of all cases finalised) in 2011-12 is disturbing.

<sup>18</sup> [2010] NSWCA 331.

<sup>19</sup> [2009] QCA 351.

<sup>20</sup> [2011] FCA 470;

<sup>21</sup> [2010] VSCA 197.

<sup>22</sup> [2003] AATA 827;

<sup>23</sup> [2010] FCA 567

<sup>24</sup> [2011] HCA Trans 196 (8 August 2011).

<sup>25</sup> Though allegations of breached Directions do not always succeed: *Western City Developments Pty Ltd v Chief Commr of State Revenue (No 2)* [2010] NSWADTAP 72.

<sup>26</sup> "Compliance and reporting" fact sheet, Cth Attorney-General's website – accessed 6 September 2013. In the same periods, the number of alleged breaches which were investigated and found to be compliant with the Directions were: 30 (33.3%) in 2009-10; 8 (32%) in 2010-11; and 18 (30%) in 2011-12.

<sup>27</sup> [2011] FCA 532.

<sup>28</sup> [2010] QCA 217.

<sup>29</sup> [2010] FCA 1124.

<sup>30</sup> Reported in *Weekly Tax* - Issue 4, 28 Jan 2011. Bulletin

*Indooroopilly Children Services (Qld) Pty Ltd*<sup>31</sup> (“*Indooroopilly*”) and *LVR (WA) Pty Ltd v Administrative Appeals Tribunal*<sup>32</sup> (“*LVR*”).

The *Indooroopilly* saga began with the decision by Kiefel J in *Essenbourne v Commr of Taxation (Commonwealth)*<sup>33</sup>, the issue was whether the taxpayer was entitled to a deduction for payment which they had made to a superannuation fund in relation to employee share plan, and whether that payment created a taxable fringe benefit. Her Honour held in relation to the fringe benefits issue that they could only be a taxable fringe benefit where the ATO was able to identify a particular and pleaded in the benefit was provided (rather than a general benefit provided to employees at large).

The ATO had long held the view that the “general benefit” approach was correct<sup>34</sup> and did not accept that Kiefel J’s decision correctly state of the law. The Commissioner then issued a Media Release indicating that the ATO would not appeal against the decision in *Essenbourne* because the Commissioner had in effect “won” the case (as Kiefel J had held that the payment to the fund was not deductible) so that there was no basis on which the ATO could appeal on the FBT point, but that the ATO did not accept the correctness of Kiefel J’s decision on this point, and would - contrary to that decision - continue to apply the “general benefit” interpretation and accordingly disallow objections based on the specific benefit approach.

The ATO remarkably - but true to its word - subsequently argued its “general benefit” FBT point over a period of three years in a series of AAT and single judge Federal Court decisions<sup>35</sup> where the ATO lost on each occasion.

When the opportunity arose again in 2007, the ATO ran the same argument before the Full Federal Court in *Indooroopilly*. In that case, a particular child care centre group wanted to set up an employee share scheme under which it would gift a number of its shares to a discretionary trust as the corpus of the trust, with the potential class of beneficiaries limited to employees of “franchisees” (including *Indooroopilly*) operating related child-care centres. The child-care centre group sought an ATO ruling on whether the issue of its shares would generate a fringe benefit to either its subsidiary or any of the franchisee operations. The ATO ruled that the issue of shares would create a fringe benefit in respect of the franchisees, but not in relation subsidiary. The case then went on appeal to the Full Federal Court, which held that the ATO’s long held interpretation was wrong, and that as indicated by the previous cases a fringe benefit only arise where there the benefit was provided to particular employees.

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<sup>31</sup> 2007 ATC 4236.

<sup>32</sup> [2012] FCAFC 90.

<sup>33</sup> 2002 ATC 5210; Jorgensen and Bishop, above, 679.

<sup>34</sup> see Taxation Ruling TR 9099/5, paras 45-49

<sup>35</sup> *Benstead Services Pty Ltd v FC of T* (AAT) 2006 ATC 2511, 2521 (Hack, McDermott and Kenny); *Walstern v FC of T* 2003 ATC 5076 (Hill J, Federal Court); *Spotlights Stores Pty LTV v FC of T* 2004 ATC 4674, 4704 (Merkel J – Federal Court); *Caelli. Constructions (Vic) Pty Ltd v FC of T* 2005 ATC 4938, 4950-1 (Kenny J, Federal Court); and *Cameron Brae v FC of T* 2006 ATC 4433 (Ryan J, Federal Court).

The ATO indicated that it would not seek special leave to appeal the FBT point to the I Court, but reversing its previous approach, would henceforth apply the law as expounded (or confirmed) by the Full Federal Court.

The present purposes, the key point in the *Indooroopilly* decision were the comments made by members of the court in relation to the way the ATO had conducted the litigation before it, and the question of whether the ATO had acted as a “model litigant” in the litigation.

The Federal Court noted that submissions made by the ATO counsel to the Court had suggested that decisions such as *Business World Computers Pty Ltd v Australia Telecommunications Commission*<sup>36</sup> indicated that:

“8. the fact that there are single judge decisions on the meaning of “fringe benefit” does not mean that the Commissioner was bound to follow those decisions as against tax payers who are not privy to those decisions [and]

9. There is no principle of estoppel would bind the Commissioner to apply the single judge decisions to which the respondent was not a party ...”<sup>37</sup>. This position was supported by advice from the Commonwealth Solicitor-General that as an administrator, the ATO was

“... not part of the judicial hierarchy and is not bound by the doctrines of precedent as is a lower court. Accordingly, in appropriate circumstances, it would be legitimate for [the ATO] to depart from existing judicial decisions in order to produce a further test case seeking to overturn those decisions and uphold the [ATO’s] view as to the correct legal position”.<sup>38</sup>

The Bench reacted strongly to this proposition, with Edmonds J observing that “a proposition such that the Commissioner does not have to obey the law as declared by the courts until it gets a decision that he likes was astonishing”<sup>39</sup>, while Allsop J was equally critical, commenting that:

“... Taxpayers appeared to be in the position of seeing a superior court of record in the exercise of Federal jurisdiction declaring the meaning and proper content of a law of the Parliament, the executive branch of the government, in the form of the Australian Taxation Office, administering the statute in a manner contrary to the meaning and content as declared by the court; that is, seeing the executive branch of government ignoring the views of the judicial branch of government in the administration of a law of the Parliament by the former. This should not have

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<sup>36</sup> [1988] 82 ALR 499, 504.

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<sup>38</sup> Quoted in Jorgensen and Bishop, 679, who note that this advice was subject to a number of caveats. It would be interesting to see the ATO reaction to a taxpayer who declined to follow a decision of a single Federal Court judge which favoured the ATO, on the basis that the taxpayer did not agree with it and wanted to wait for a full court decision before complying (see Jorgensen and Bishop, above, 679-680)!

<sup>39</sup> 2007 ATC, 4255.

occurred. If the [ATO] has the view that the courts have misunderstood the meaning of a statute, steps can be taken to vindicate the perceived correct interpretation on appeal or by prompt institution of other proceedings, or the executive can seek to move the legislative branch of government to change the statute... Considered [determination of a court to determine the meaning of a statute] is a not to be ignored by the executive as *inter partes* rulings binding only in the earlier *lis*".<sup>40</sup>

Allsop J went on to criticise the "inferential suggestion in argument" that the ATO was "somehow" required by unidentified legislation to administer the law in accordance with its "own view of the law and the meaning of statutory provisions, rather than by following the courts have declared".<sup>41</sup>

Subsequently, McHugh J observed in a paper presented to an Australian Bar Association Conference, was equally scathing, commenting that:

"Judicial decisions are not provisional rulings until confirmed by the ultimate appellate court in the system. Until set aside, they represent the law and should be followed ... Even more difficult to justify is the refusal to follow a ruling that is not the subject of appeal merely because the agency regards it as wrong and will test it at the next opportunity ...".<sup>42</sup>

The strength of the comments by the Full Court generated considerable discussion, with some attacking the ATO's approach<sup>43</sup>, while others defended it<sup>44</sup>. It is possible to feel some sympathy for the ATO's dilemma<sup>45</sup>, but it is hard to disagree with Jorgensen and Bishop's comment that the ATO's disregard for single judge decisions "demonstrates disregard for the fundamental principles underlying the rule of law."<sup>46</sup>

Whatever conclusion one draws from the *Indooroopilly* saga, the ATO approach did not sit well with the Model Litigant Directions. As argued elsewhere<sup>47</sup>, regardless of the ATO's

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<sup>40</sup> Allsop J, quoting Marshall CJ in *Marbury versus Madison* 5 US 87, at 111, and Mahoney J in *P & C Canterella v Egg Marketing Board* [1973] 2 NSWLR 366, 383.

<sup>41</sup> 2007 ATC, 4239.

<sup>42</sup> Quoted by Jorgensen and Bishop, above, 679 (fn 24).

<sup>43</sup> see for example M Robertson "A disregard of the law - Commissioner of Taxation v Indooroopilly Children Services (Queensland) Pty Ltd", 2007 41/11 TIA 635, 636; , who argued that the ATO's approach in *Indooroopilly* amounted to a breach of the rule of law at the boundary between the proper roles of the executive and Judiciary under the separation of powers doctrine; while P Nicols and C Peadon, "Is the Tax Office turning over a new leaf used approach to dispute resolution?", Allens Arthur Robinson 2007 Focus- Tax".

<sup>44</sup> D Davies QC "The relationship between the Commissioner of Taxation and the Judiciary", 2000 741/11 TIA, 630 argued that it is difficult to obtain legislative time in Federal Parliament to pass amendments, and declaratory orders would not have been available to the Commissioner in the circumstances, so that taking a matter on appeal was the only practical method for the Commissioner to bring the issue to the Full Federal Court..

<sup>45</sup> As Davies observed, the ATO might find it difficult to persuade the government to allocate parliamentary time and resources to amend the legislation, and it was not clear that the ATO could have obtained declaratory orders (see Woellner, above), so that the ATO's approach may have seemed the only one likely to produce results.

<sup>46</sup> Jorgensen and Bishop, above, 6579-680.

<sup>47</sup> Woellner "Is the ATO a law unto itself?", ALTA 2007, above,



views on the justification of such procedures, the subsequent findings by the Inspector-General of Taxation that the ATO uses litigation to confirm its view of the law for compliance purposes, rather than clarification, and that declining improperly follow decisions of court or tribunal's involved the ATO in some cases acting outside the rule of law reflect a strong perception in the community and tax profession that the ATO's approach was not consistent with the spirit (at least) of the model litigant directions.

Some five years after the decision in *Indooroopilly*, the decision in *LVR (WA) Pty Ltd v Administrative Appeals Tribunal*<sup>48</sup> saw a differently constituted Full Federal Court again highly critical of the ATO's litigious practices.

*LVR* involved an equally extraordinary set of facts. In that case, the AAT had dismissed a taxpayer's claim without (apparently) considering a key affidavit supporting the taxpayer's case. Apparently the reasons of the AAT, which extended to 59 paragraphs (some 29 pages), were "with the exception of a small number of words, phrases and sentences, were taken verbatim and without attribution from the written submissions filed in the Tribunal on behalf the Commissioner. Approximately 95% of the paragraphs of the reasons were so taken from the Commissioner's written submissions filed in the Tribunal before the hearing in the Tribunal ... and a further three or four paragraphs of the Tribunal's reasons were taken from the Commissioner's written reply... to the written submissions of the appellants before the Tribunal." However, the Commissioner's written submissions had not referred to the (amended) content of a key affidavit, and the AAT did not refer to it in its reasons.

Neither counsel for the Commissioner nor counsel for the taxpayer drew the attention of the Federal Court the fact that 95% of the tribunal's reasons had been copied verbatim from the Commissioner's various submissions. This led the Court to observe that:

"24. Some days before this appeal came on for hearing, the Court drew 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 draft although 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...

[25] the Commissioner's response at the Full Court hearing... Was not an adequate or appropriate response...

[27] We remain gravely concerned that the very unusual circumstances we have outlined above were not sufficiently drawn the attention of the primary judge...

31. The Commissioner did not tell the primary judge that [25] of the reasons of the tribunal was taken word for word and without attribution from the Commissioner's reply submissions to the Tribunal...32. Similarly, the primary judge was taken to [48] bracket of the reasons of the Tribunal without being told that that paragraph was

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<sup>48</sup> [2012] FC AFC 90 (North, Logan and Robertson JJ).

copied verbatim from paragraph 45 of the Commissioner's submissions [the court gave other examples of similar instances]...

39. We have given examples of the way the case was conducted before the primary judge. We conclude that neither the extent of the unattributed copying or the fact that what was copied from the Commissioner's submissions did not refer to it was not updated to take account of the Schokker affidavit was drawn to the attention of the primary judge.

40. In our opinion if the appellant's failed fully to explain the position to the primary judge then the can Commissioner should have done so to make sure the primary judge understood the full circumstances.... Neither was the extent of the copying or the history of what was copied apparent to the Full Court from the opening written submission of the parties. We continue to have difficulty in understanding why counsel for the parties did not fully explain these matters to the primary judge. Counsel for the appellants had not appeared in the matter before the Tribunal so that may provide some explanation. But counsel for the Commissioner had so appeared. In addition, the Commissioner was or should have been acting as a model litigant.

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. It also goes beyond the requirement for lawyers to act in accordance with the ethical obligations... The Crown... Powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is large and as X to greater resources the private litigants. Hence 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 independent of the agency are not involved in the litigation...

78 In our opinion, if these matters had been drawn to the attention of the primary judge two things would have followed. First, submissions the primary judge in the form which we have referred would not have been put or, if put, sustained. Second it would have been apparent to the primary judge, as it is to us, that the Tribunal had failed to take into account the substance of the Schokker affidavit. ”<sup>49</sup>

The Full Court's criticism of the approach taken by counsel for both parties is telling, though particularly so in the case of counsel for the Commissioner. It is difficult to understand why the issue of the failure to consider the Schokker affidavit was not put more directly to the primary judge and the Full Court, and the unattributed verbatim copying disclosed - at least by counsel for the Commissioner, who must have been aware from the first instance appeal of the extent of the unattributed copying.

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<sup>49</sup> *LVR (WA) Pty Ltd v AAT* [2012] FCAFC 90, [24]-[42], [78] (North, Logan and Robertson JJ)

Be that as it may, the course of proceedings did not reflect well on the ATO or its representatives, and is difficult to reconcile with the obligation to act as a “moral exemplar” and model litigant.

Of course, as the Full Court pointed out, counsel for the taxpayer also failed to alert the court to the extraordinary unattributed copying, though presumably taxpayer’s counsel before the Full Court had been simply unaware of the issue, since they would have had strong reasons for disclosing the facts to the primary judge and Full Court, as the content of the affidavit was presumably favourable to their case. It seems likely that private litigants sometime stray from the path of ethical rectitude (though the traditional view has been that the standards expected of model litigants is much higher than others<sup>50</sup>)

### **Moral exemplars and intellectual gatekeepers – framing the analysis**

One of our key responsibilities as intellectual gatekeepers (and moral exemplar) is to develop students’ minds and critical, analytical, and judgemental capacity. This cannot be achieved optimally if we adopt a partisan or extreme approach to contentious issues, because experience suggests that (many) students are impressionable, and tend to be influenced by the value systems and value judgments of respected academic teachers.

Accordingly, the way that we react as academics and teachers (through our writings and teachings) to issues such as those thrown up by *Indooroopilly* and *LVR* is important, as it may influence student attitudes and perspectives.

There is no “right” answer to issues such as those exemplified in *Indooroopilly* and *LVR*, which are multidimensional and multilayered - and therefore offer a wonderful opportunity to engage in sophisticated analysis of policy, practice and human frailty. We should embrace these opportunities, and given our responsibilities as intellectual gatekeepers, ensure that we observe our moral duty to be balanced in our analysis. If – at one extreme - we use such instances to demonise the ATO (as we have observed sometimes occurs in relation to contentious provisions), we may send our students out into the (tax) world with a jaundiced view of and approach to the ATO. If – at the other extreme – we pass such instances off as infrequent and inevitable (and matched by similar breaches by taxpayer representatives), we discourage critical thinking and devalue the importance of ethics and the rule of law.

How then should we react?

Perhaps we should point out the role of the Directions, deplore the breaches and note their damaging impact in human and jurisprudential terms, discuss the pressures which lead (mostly) well-intentioned and dedicated government officers to bad decisions and actions,

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<sup>50</sup> Though J Collins and T Webb had argued that the decision in *Priest v State of NSW* [2007] NSWSC 41 imposed the same obligations on private litigants: “We’re all model litigants, says NSW court”, Clayton Utz website 11 May 2007 – accessed 1 September 2013..

point out that private litigants also sometime stray from the litigious ideals, and encourage our students to form their own views on these issues.

**Conclusion:**

The Legal Services Directions 2005 perform an important role in protecting the rule of law and encouraging ethical behaviour by Commonwealth government departments engaged in litigation by were in behalf of the Commonwealth.

These Directions set extremely high standards, standards which the ATO has not always - regrettably - been able to meet. The decisions and judicial comments in *Indooroopilly* and *LVR* are stark illustrations of how the pressures of litigation and human frailty can result in actions which fall short of the required standards. Such failures involve a complex interplay of factors, which offer the opportunity for sophisticated analysis of multidimensional issues. As intellectual gatekeepers and moral exemplar is of value systems, academics aware duty to their students to embrace the opportunity for analysis of these dynamics in a critical but balanced way.

Prof Robin Woellner

Ms Julie Zetler

September 2013.