



Australian Government
Attorney-General's Department

'Issues of consistency, standards and compliance'

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AAT/ACT Bar Association Seminar
The obligation to assist: model litigants in AAT Proceedings

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Introduction

Today's seminar reflects the importance of opportunities for cross-fertilisation of ideas between the AAT, the profession and agencies. The AAT is to be congratulated on bringing together in this forum representatives from all of these interested parties.

I plan to build on some issues raised by the Attorney-General in his address this morning.

In doing so I will cover 3 main areas. First I want to say something about the general standards of conduct expected of Commonwealth agencies in litigation and tribunal proceedings.

Then, I will talk about the Legal Services Directions and compliance with them.

Finally, I want to talk about the potential for greater reliance on ADR in resolving disputes with government.

General standards of conduct

I think it is fair to say that the Commonwealth and its agencies are involved in litigation and merits review proceedings more often than any of us would like. In the AAT alone over 6000 new applications are lodged each year.

When it is involved in court and tribunal proceedings, the Commonwealth and its agencies are in a unique position.

First, it is often said that there is a disparity between the resources and information available to agencies of government and those to the other party. This is particularly true when a party is self-represented. Sometimes the 'resource' imbalance is in a practical sense the other way around – but it is a fair comment about cases involving ordinary Australians.

Secondly, the courts and the AAT are part of the ‘justice system’ funded by government with public resources. Those representing the Commonwealth therefore need to be particularly mindful of making the best use of those resources when involved in proceedings, either as departmental instructors or their legal representatives.

Perhaps more fundamentally, government agencies are rightly expected to adhere to various legislative and ethical standards. Guidelines have been developed to make it clear what these obligations mean in practical terms, but it is valid to suggest that there are no “bright lines” that can be drawn to make the rules clear in every case.

These obligations operate in conjunction with lawyers’ duty to the courts, and other standards required of Commonwealth officers, including the values promulgated under the *Public Service Act 1999*.

Of course, the existence of these obligations does not mean that legitimate legal claims should not be pursued. But it does mean that there are standards and obligations to be observed which go beyond what might be expected of other parties involved in court and tribunal proceedings.

One of the main obligations on Commonwealth representatives in litigation is to behave as a model litigant.

While it has its origins in the common law, this ‘model litigant’ obligation is codified in the *Legal Services Directions 2005*, made by the Attorney General under the *Judiciary Act 1903*.

The *Directions* are a legislative instrument, and compliance with them by government agencies is mandatory. Private lawyers who are complicit in a breach of the Legal Services Directions are also in my view acting unlawfully.

While assessing levels of compliance with this - or any other area of regulation - is difficult, overall our sense is that there is a high level of compliance by agencies with the Directions. However, I am confident that there is room for improvement.

The Directions require the Commonwealth and its agencies to:

- act honestly and fairly
- handle claims consistently
- meet high standards of integrity and accountability
- avoid litigation where possible, and keep the costs down when it is necessary, and
- comply with other relevant rules and standards.

The Legal Services Directions specifically state that the obligation to act as a model litigant extends to agencies involved in merits review proceedings. It does this in part by defining litigation as including merits review proceedings.

Of course, merits review proceedings should not be thought of as adversarial proceedings, but as a means of inquiry to find ‘the correct or preferable decision’ in a particular case.

The general obligation for Commonwealth agencies to meet high standards of conduct when their decisions are reviewed by the Tribunal is taken further by subsection 33(1AA) of the *AAT Act 1975*, which requires that, when an administrative decision is reviewed, the person who made the decision must use their best endeavours to assist the AAT in making its decision. The Directions also complement the AAT Act by requiring the Commonwealth to assist the Tribunal in its decision-making process

Section 33 (1AA) was inserted in 2005 in response to a recommendation made by the Australian Law Reform Commission in its 2000 report: *Managing Justice: A Review of the Federal Civil Justice System*.

The ALRC had in fact recommended that ‘The Federal Attorney-General should specify in the model litigant obligations... that agencies and agency representatives in the conduct of federal review tribunal proceedings have duties to assist the tribunal to

reach its decision'.¹ The Legal Services Directions were amended as recommended and the change came into effect in March 2006.

Arguably, putting this requirement into the Administrative Appeals Tribunal Act as well as in the Legal Services Directions gives even more emphasis to the obligation.

The 'model litigant obligation' - that is for agencies to act with complete propriety, fairly, and in accordance with the highest professional standards - is relevant in merits review proceedings. The separate 'duty to assist' in section 33(1AA) recognises that there may be additional actions agencies can take in Tribunal proceedings to ensure the process runs smoothly and the right outcome is reached.

The key point under both section 33(1AA) and the Legal Services Directions is that, rather than seeking to defend their original decision in the Tribunal, agencies need to focus on assisting the Tribunal to arrive at the correct or preferable decision.

This may involve making information easily available to the Tribunal, avoiding delays, presenting new material where relevant, and providing specialist evidence when it may assist. It is also important to stress the critical role of agency internal review.

Agencies need to resist the temptation to simply re-affirm a decision on the basis that this is 'safe' and doesn't involve changing the decision of a colleague in the agency. In this regard, the complexity of many 'rules' that have to be applied and resource constraints are also ongoing challenges that have to be met.

Compliance

So what happens when there's a lack of compliance with the model litigant obligation or the 'duty to assist' in the AAT Act? (For all practical purposes a breach of the statutory duty to assist would also be a breach of the model litigant obligation.)

¹ *Managing Justice*, recommendation 121 (page 655).

If the Commonwealth meets its goal to increase the use of alternative dispute resolution to resolve disputes in which it is involved, these issues may arise less often.

But for matters that do end up in courts and tribunals, the Office of Legal Services Coordination within the Attorney-General's Department administers and provides advice on the Legal Services Directions.

Generally, the Office of Legal Services Coordination relies on mandatory self-reporting, reporting by other government agencies and legal services providers, affected members of the public, and bodies such as the Tribunal.

The OLSC investigates all allegations of potential breaches of the Directions.

It also promotes compliance through an outreach training program, in which training and refresher sessions are provided to Departments and agencies on their obligations under the Directions, and how to meet them.

Where breaches are found, they are reported to the Attorney-General and may also be reported through the Senate Estimates process. We find that the potentially public nature of breach findings provides a further incentive for agencies to comply with the Directions.

Furthermore, public servants clearly do not want to be held responsible for a breach of the Legal Services Directions in a personal sense –and lawyers and law firms feel the same way. The loss of reputation involved is something that everyone would like to avoid

If needed, the Attorney-General has the ability to issue specific directions to agencies to ensure that they conduct claims and litigation to the required standards.

The courts have spoken of the need for government agencies to conscientiously comply with the procedures designed to minimise cost and delay, and the duty to

re-evaluate unsuccessful arguments before seeking to advance them in further matters.²

The Tribunal too has commented on the obligation of agencies to meet the model litigant obligation in proceedings. For example, in 2007 a Senior Member of the AAT described submissions made by a particular department in a matter he was hearing as 'disappointingly brief and unhelpful' and 'less than might have been expected from a model litigant'. OLSC subsequently identified that the underlying issue in this matter involved coordinating the submissions of a number of agencies with different views on aspects of the litigation. OLSC worked closely with the agencies involved to ensure that administrative arrangements were put in place to address this problem.

The Tribunal does not, of course, have any direct role in enforcing or reporting on compliance with the Legal Services Directions. It is not required, or even permitted, to make any determinative finding on compliance with the Directions.

However, the Tribunal's unique view across the range of Commonwealth respondent agencies makes it well-placed to comment on compliance with the requirements of the model litigant obligation and the 'duty to assist'.

The AAT gives feedback to agencies through the agency liaison meetings that are conducted through each Registry. This feedback is an important source of information which can be used by agencies to guide future behaviour and, ideally, to avoid breaches of these obligations occurring.

If the Tribunal has any concerns or comments to make about agency practice in proceedings before it, we would welcome it raising these with the agencies concerned and with the Attorney-General's Department.

² *Shayan Badraie By His Tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors* [2005] NSWSC 1195; *Nelipa v Dr Robertson and the Commonwealth of Australia* [2008] ACTSC 16.

ADR

The Attorney-General mentioned this morning the Government's desire to see greater use made of alternative dispute resolution in the justice system.

He described this as one of the ways in which the Commonwealth can demonstrate 'model conduct'. The focus on ADR in the AAT's process is especially positive and very much in line with the Attorney Generals commitment to increase the Commonwealth's endeavours to resolve as many matters as possible without formal determinative processes.

An important element of this is to ensure that internal review of administrative decisions is effective. This is a critical responsibility for agencies.

The Legal Services Directions were amended last year (2008) to provide that '[t]he Commonwealth or an agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations)'.

The Access to Justice Taskforce in the Attorney-General's Department and the National Alternative Dispute Resolution Advisory Council have both been undertaking work that will recommend ways in which an even greater emphasis can be placed on ADR in the future.

Increased use of ADR holds benefits for agencies and other parties alike, including greater efficiency and flexibility. The AAT is already a leader in this field, resolving around 80% of applications through conciliation undertaken by conference registrars.

More generally in court and Tribunal matters involving government, we are hopeful that we can further improve the system and achieve efficiencies by settling more matters away from determinative proceedings – both through internal review and through enhanced use of ADR processes. This seems likely to require both cultural change and in some areas changes to the framework under which disputes are handled.