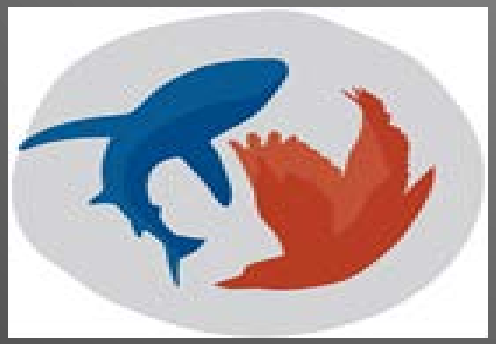
Has Anyone Seen the Model Litigant



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Opening Comments

- "In summary we need to move away from technical legal arguments about the existence of native title": R McClelland, Negotiating Native Title Forum, 29 February 2008, paragraph 5.
- "As a result, Badu and Moa recently asserted shared rights in certain small islands south and west of Badu and Moa, and there was a Consent Determination to that effect. The Commonwealth wasn't a party. Now, on those facts there appears, at least to us, to be a question about the correctness of that determination…": Counsel for the Commonwealth, Transcript of Proceedings: *Akiba v Qld and Others* at p.1878 – 1879.
- "Native Title is an opportunity to create sustainable, long term outcomes for Indigenous Australians": R McClelland, address to 3rd Negotiating Native Title Forum, Vibe Savoy Hotel, Melbourne, 20 February 2009.
- "I have rejected the contentions of the State and of the Commonwealth that the ever expanding regulatory controls placed upon commercial fishing by legislation extinguished any native title right to take fish for commercial purposes" *Akiba* at [16].

Introduction

- The model litigant concept has sound common law roots.
- In 1912 the High Court described it as the, "… old-fashioned tradition, and almost instinctive, standard of fair play to be observed by the Crown …" *Melbourne Steamship* (1912) 15 CLR 333.
- In terms of native title litigation there is an expectation that a government party will act fairly and in good faith.
- The Court (and the community at large) expect a government party to litigation to act as a "moral exemplar"; See *ASIC v Hellicar* 247 CLR 345.

Application of the Model Litigant

- The model litigant obligation applies to the Commonwealth, State and Local Government parties: see *Handley v Scott [1999] FCA 404 at [44]*.
- The obligation is binding on all government agencies including those government agencies that act for the Government parties: see for example *Legal Service Directions 2005 (Cth)*.

Model Litigant Conduct

- The Commonwealth, Victoria, Queensland, NSW and ACT have written policies confirming their obligations on how a Government party should conduct itself in litigation. The remaining States follow common law principles.
- Generally, the written policies require Government parties to act honestly, fairly and with complete propriety. For lawyers acting for Government parties, the model litigant obligation goes beyond what is required by the fundamental duties of solicitors: see *Australian Solicitors Conduct Rules 2012*.
- For the purpose of native title litigation some of the relevant policies are:
  - Minimising delays in proceedings;
  - Making an early assessment on the prospects of success;
  - Settling claims;

Model Litigant Conduct

- Acting consistently;
- Limit the scope of litigation and settle where possible;
- Minimising costs;
- Not undertaking appeals unless there is a prospect of success and the appeal is of a public interest nature;
- Apologising when its lawyers or the Government party has acted improperly.

Enforcement

- Enforcement of the obligation – is there such a thing?
- The Courts have indicated that the model litigant obligation is not a normative expectation but creates enforceable standards: Gabrielle Appleby, 'The Government as Litigant' 37 UNSW Law Journal 94.
- When the government standards fall short of the obligations the following actions may be pursued:

1. *Legal Services Direction 2005 (Cth)*

- compliance done by Government agency monitoring itself. Section 11.1(b) of the *LSD* states:

> The accountable authority of a non-corporate Commonwealth entity is responsible for ensuring that:
> (b) appropriate management strategies and practices are adopted so as to achieve compliance with these Directions.

- The agency must report itself to the Attorney General in the event of apparent, possible or allegations of breaches and steps taken to correct any possible breaches: 11.1(d) *LSD*.

Enforcement

- Non-compliance can lead to sanctions but only on the application of the Attorney General. Section 55ZG of the *Judiciary Act 1903 (Cth)* states:

  (2) Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General.

  (3) 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.

- Suggest therefore that any breach of the obligation will have to be exceptional before the Attorney General makes any application.
- Is this a deficient and inappropriate way of the enforcing the obligation?

Enforcement

2. Costs

- Use of model litigant obligations can be used to inform the court on the question of costs.
- In *Bennell v State of Western Australia [2006] FCA 1243 (Single Noongar Claim)* **Wilcox J awarded costs against the State for filing a late application. His Honour summarised the State's application as follows:**

> (a) Was the order for the separate question validly made?
> (b) If not, is it now open to the State to complain about the order?
> (c) Has the order for the separate question had the result of excluding evidence relevant to issues arising under s 223 of the Act?
> (d) Must authorisation be dealt with prior to determination of the separate question?: at [924].

Enforcement

- His Honour stated, “Counsel for the State seem to believe that the effect of filing the strike-out motion was to prevent anybody taking any further action in relation to the part of WAD 6006 of 2003 before me until … some judge heard that motion; in particular, I would be unable to provide answers to the separate question or announce my findings about the evidence led before me. If counsel are correct, the filing of a strike-out motion, at any time, has an effect similar to obtaining an injunction against a judicial officer. Apparently, according to the State, this is so, even in a case where a party has failed to comply with a direction that any strike-out motion be filed by a particular date, has not sought an extension of time or leave to file out of time, and files an application that is unsupported by any evidence that indicates, in the words of s 84C(1) of the Act, that the relevant application ‘does not comply’ with s 61 or s 62 of the Act: at [940].
- The proposition is breath-taking. In my opinion, it is also incorrect: at [940].

Enforcement (costs cont)

- See also *Mahenthirarasa v State Rail NSW [No 2] (2008) 72NSWLR 273.*
- The Workers Compensation Commission made a decision in favour of the Rail Authority. The Authority opposed the granting of leave to the Commission's Appeal Panel. The Registrar's decision to not allow the matter to proceed to the Appeal Panel was appealed. The Authority did not participate further in the appeal and as the appeal was not opposed the Authority made a submitting appearance. The NSW Court of Appeal made an award against the Authority noting that; 1) it had failed to provide any assistance to the Court and 2) was taking advantage of its initial successful result of leave to appeal being refused: at [63]-[70].

Enforcement

3. Judicial Pronouncement

- Note the following cases:
  - *Melbourne Steamship* – Griffith CJ noted with disapproval that the Comptroller-General made an inappropriate technical pleading which lead to unfairness: at 342-346.
  - *Scott v Handley* – Commonwealth filed late affidavits on an unrepresented party. The Full Court stated; **"The second respondent is … an officer of the Commonwealth. As such he properly is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect – and where there has been a lapse therefrom, to** exact **– from the Commonwealth and from its officers and agencies" at [43].**
  - ***Single Noongar Claim* – The State and the Commonwealth seeking to reverse their considered and earlier position after a long and expensive hearing. Wilcox J stated,** "The word 'unconscionable' springs to mind. Whatever happened to the long-standing principle that the Crown sets an example to others by behaving as a model litigant?" at [932].

Enforcement

4. Procedural Discretion/Remedies

- Failure to meet the obligation may influence procedural discretion.
- Used to address unfairness to a party:

  i) Costs orders – see Heading 2 above;

  ii) Adjournment– see *Hellicar*;

  iii) Stay of proceedings – see *Hellicar*

Cuts Both Ways

- Government parties have a duty to act fairly and with propriety and with the highest professional standards. The Government parties have no advantage in its capacity as a Government party and equally it does not have to suffer any disadvantage as a party: *Hellicar* per Heydon J at [240].
- The model litigant obligation does not require the Government party to, "fight with one hand behind its back" and it can act to protect its interest as it, "… has the same rights as any other litigant…": *Brandon v Cth [2005] FCA 109* at [11].

Case Studies

Ruddick v Vadarlis (2001) FCA 1926 (*Tampa*)

- Asylum seekers kept aboard MV Tampa. The Cth sought costs against Mr Vadarlaris and the Victorian Council of Civil Liberties (VCCL) who were representing the interests of asylum seekers and not their own interests. Mr Vadarlaris and VCCL were represented pro bono.
- Cth argued that the litigation interfered with Australia's executive sovereign power and the action was not justiciable.
- Black CJ and French J made a simple response to this argument stating; " It is not an interference with the exercise of executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope": at [30].
- Further, "It is perhaps useful in this context to recollect that the Constitution, in s 75(v), makes express provision for the judicial review of executive power as an element of the original jurisdiction of the High Court. A like jurisdiction may be, and has been, conferred upon this Court as a Chapter III court" at [31].

Case Studies

Lampton on behalf of the Juru People v State of Queensland [2015] FCA 609 (Juru#3)

- **The Juru people have had three native title determinations. The first was around Cape Upstart: see** *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland (No 2)* [2011] FCA 819 (*Juru#1*). The second around large parts of country around Bowen and surrounds (*Lampton on behalf of the Juru People v State of Queensland* 2014] FCA 736 (Juru#2).
- Juru#3 consists of some 200 parcels of land within the Juru#2 determination area.
- **In Juru#3 the State would not accept that native title existed in the Township areas and if it did it was different to the rights determined in Juru#2. Further, the State maintained that there was insufficient connection for the purpose of section 47B NTA. The Juru#3 Applicant provided numerous affidavits to the State demonstrating continuing connection to the Township areas. However, the State maintained its position and orders were made setting the matter down for trial.**

Case Studies

- The Land Council spent large amounts of money preparing the case for trial. After further reviewing the evidence and few weeks out from the commencement of the trial, the State agreed that the evidence supports continuing connection to the Township areas and the matter proceeded to a consent determination and the rights recognised were the same as Juru#2.
- *Akiba v Queensland* [2010] FCA – During the mediation and trial process, the State and the Commonwealth made very few concessions and put the Applicant to proof of almost all of its case.
- The Cth during its opening address made comments that they do not concede to a number of *in rem* determinations on the basis that they were not a party. They also made submissions to the effect that they question the correctness of several determinations: Transcript of Proceedings *Akiba v Qld and Others* at p.1878 – 1879.
- In response Finn J stated; "It is important to emphasise that the consent determinations, having been made in compliance with s 225 of the NT Act (see s 87(2) and s 94A) have the force and effect contemplated by the Act itself. To reiterate what I said in *Kokatha People v South Australia* [2007] FCA 1057 at [33], it is clear from the text and structure of the Act that a s 225 determination, once made, should be a final, "once and for all" resolution of the extent of native title in relation to a particular piece of land: see *Munn* at [8]; subject only to the possibility of it being varied or revoked on the limited grounds specified in s 13(5). Because such a determination is declaratory of the rights and interests of all parties holding rights or interests in the area, it is commonly and properly described as a judgment *in rem* binding the whole world: *The Wik Peoples v Queensland* (1994) 49 FCR 1; *Western Australia v Ward* (2000) 99 FCR 316 ("*Ward FC*") at 368-369; *Gumana TJ* at [127]; on judgments *in rem* see also 2 *Smith's Leading Cases* 776 (12th ed, 1915)"; at [157].

Case Studies

- The Cth in its submissions argued that the Applicant's evidence characterised the Torres Strait as a 'community' as defined in the Macquarie Dictionary and the Oxford Dictionary and not as a 'society' according to *Yorta Yorta*.
- Finn J ruled; "I reject the implication in the Commonwealth's submission that the Applicant must establish a body of laws and customs which *united* people across Torres Strait. That turns the *Yorta Yorta HC* requirement on its head. The society is required to be united in and by its *acknowledgement and observance* of a body of law and customs": at [169].
- Note that at [49] of the *Yorta Yorta* judgment there is a footnote which states; "We choose the word "society" rather than "community" to emphasise this close relationship between the identification of the group and the identification of the laws and customs of that group".

Closing Comments

- Claims do not have to proceed to trial (see s.87 NTA) to test whether a particular right or interest is exercised or how it sits within Australian law.
- In Queensland, there is a standard clause in consent orders (post *Akiba*) which is stated along the lines of, "take and use the Natural Resources of the area for personal, domestic and non-commercial communal purposes".
- In *Akiba HC*, the HCA was critical of the over fragmentation of rights and interests. Hayne, Keifel and Bell JJ stated; "It was wrong to single out taking those resources for sale or trade as an "incident" of the right that has been identified" at [66].
- In *Akiba* it is said that once a determination is made that laws and customs support the taking of resources, the use made of those resources is irrelevant: at [16], [538]-[540] and [756]-[760]. See also Lisa Strelien, The Right to Resources and the Right to Trade" in "Native Title Mabo to Akiba: A Vehicle for Change and Empowerment".
- However, in my experience the State when negotiating consent determinations insist that the rights and interests are qualified in their operation restricting Traditional Owners from exploiting resources for trade and commerce activity.

Closing Comments

- So, NTRBs and lawyers representing Applicants in negotiations should attempt to take the kind of rights and interests recognised in consent determinations to their highest.
- Do claims need to go trial over and over? I reiterate the words of the former Attorney General; “In summary we need to move away from technical legal arguments about the existence of native title”.

Thank You

Further Reading

- Sean Brennan, 'The Significance of the Akiba Torres Strait Regional Sea Claim Case' in Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment (2015).
- Paul Finn, 'Mabo into the Future' (Paper presented at the Native Title Conference 2012).
- Gabrielle Appleby 'The Government as Litigant' 37 UNSW Law Journal 94.
- *Brown v The State of South Australia* [2010] FCA 875
- *BP (Deceased) on behalf of the Birriliburu People v State of Western Australia* [2014] FCA 715