TRADITIONAL, INSTINCTIVE, ELEMENTARY: MODEL LITIGANT PRINCIPLES IN NATIVE TITLE

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THE STANDARD OF FAIR PLAY – THE ORIGINS OF THE MODEL LITIGANT

Melbourne Steamship Co Ltd v Moorehead [1912] HCA 69; (1912) 15 CLR 33, per Griffith CJ at [342]:

> I am sometimes inclined to think that in some parts – not all – of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard 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in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date.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 am mistaken.

MODEL LITIGANT GUIDELINES

- Commonwealth: Appendix B to the *Legal Services Directions 2005* (Cth), issued under Part VIIIC of the *Judiciary Act 1903* (Cth)
- New South Wales: *Model Litigant Policy for Civil Litigation*, Department of Justice
- Victoria: *Victorian Model Litigant Guidelines*, Department of Justice and Regulation
- Queensland: *Cabinet Direction: Model Litigant Principles*, Department of Justice and Attorney-General
- South Australia: *Legal Bulletin No 2: The Duties of the Crown as a Model Litigant*, Attorney-General's Department

WHAT IS THE BURDEN OF THE MODEL LITIGANT STATUS?

- "What is required by fairness is not capable of reduction to a fixed body of rules": *Morley v ASIC* (2010) 274 ALR 205; [2010] NSWCA 331, per Spigelman CJ, Beazley and Giles JJA
- Positive obligations:
  - Conscientiously comply with procedures to reduce costs and delay
  - Avoid litigation wherever possible
  - Comply with time limits
- Negative obligations:
  - Do not take advantage of own default
  - Not taking purely technical points of practice or procedure
  - Do not resist relief which Crown litigant believes is appropriate
  - Not make incorrect statements in pleadings and orders
  - Do not adduce or withhold evidence until late
- Crown is not required to "fight with one hand behind its back": *Brandon v Commonwealth* [2005] FCA 109 per Whitlam J at [11]

THE MODEL LITIGANT IN THE NATIVE TITLE CONTEXT (1)

- Native title claims are cases which demand "acute attention to model litigant obligations": *Archer obh the Djungan People #1 v State of Queensland* [2012] FCA 801 per Logan J at [5]; *Hoolihan obh the Gugu Badhum People #2 v State of Queensland* [2012] FCA 800 per Logan J at [6]
- *Murray obh the Yilka Native Title Claimants v State of Western Australia* [2012] FCA 1455 per McKerracher J at [29]
- *Graham obh the Ngadju People v State of Western Australia* [2012] FCA 1455 per Marshall J at [71]; see also *Graham obh the Ngadju People v State of Western Australia* [2014] FCA 516 per Marshall J at [120]
- *Little obh the Djaku:nde People v State of Queensland* [2015] FCA 287 per Logan J at [73]

THE MODEL LITIGANT IN THE NATIVE TITLE CONTEXT (2)

- *Bennell v State of Western Australia* [2006] FCA 1243 per Wilcox J at [932]:

  > No new factor having since emerged, the State (and the Commonwealth) now seek to reverse their considered earlier decisions and throw away all the work that has been done. 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?

- *Australian Competition & Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 1844 per Gray J at [15]:

  > …large scale litigation often has a profound effect on the lives of people who are caught up in it, an effect much greater than that suffered by those who manage large corporations caught up in similar litigation.

CAN THE MODEL LITIGANT PRINCIPLES BE ENFORCED?

- Section 55ZG(3) of the *Judiciary Act 1903* (Cth):

  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.

- *Qantas Airways Ltd v Transport Workers Union of Australia*:

  …[w]hile aspects of the model litigant obligations are found in Appendix B to the schedule to the Legal Directions 2005 (Cth)… they are broader and more fundamental.

RELEVANCE OF MODEL LITIGANT STATUS TO ISSUE OF COSTS (1)

- *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 1568
- *Nelipa v Robertson and Commonwealth of Australia* [2008] ACTSC 16 per Refshauge J:

  > …it is clear that the obligations to act as a model litigant and the failure to act in that way can be a relevant factor in considering the appropriate order as to costs

- *Galea v Commonwealth of Australia* [2008] NSWSC 260
- *Phillips, in the matter of Starrs & Co Pty Limited (In Liquidation) v Commissioner of Taxation* [2011] FCA 532at [8]-[9]
- *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd [No 2]* (2010) 190 FCR 11; [2010] FCA 1224 per Logan J at [48]:

  > …reward work which is not of a standard expected of a person asserted to be solicitor on the record for a person to whom model litigant obligations adhere…

- *Lolohea v Commonwealth* [2013] FCA 218 per Rares J at [23]-[25]

RELEVANCE OF MODEL LITIGANT STATUS TO ISSUE OF COSTS (2)

- Section 85A(2) *Native Title Act 1993* (Cth):

  > Without limiting the Court's power to make orders under subsection (1), if the Federal Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding, the Court may order the first-mentioned party to pay some or all of those costs.

- *Bennell v State of Western Australia* [2006] FCA 1243 per Wilcox J at [950]
- *Ward v State of Western Australia (No 4)* [2016] FCA 358 per Barker J at [159]:

  > In the result… this is not a case where a deliberate forensic strategy was adopted by a party to a native title proceeding which was properly held to be unreasonable within the terms of s 85A(2) and resulted in an indemnity costs order. The circumstances in this case are more benign, although equally unfortunate…