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8 May 2014

Dr Warren Mundy
Presiding Commissioner
Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003

Dear Dr Mundy

Productivity Commission Draft Inquiry Report April 2014 on Access to Justice – Model litigant guidelines

I am writing to provide comment on Recommendation 12.2 of the above Draft Inquiry Report concerning model litigant guidelines in light of AGS's extensive litigation experience in acting for the Commonwealth and its agencies.

Recommendation 12.2 recommends that the Commonwealth, State and Territory governments and their agencies should be subject to model litigant guidelines, compliance with which needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

Model litigant guidelines, presently in the form of the model litigant obligation under the *Legal Services Directions 2005*[1] (LSDs), have, since 1 September 1999, applied to all Commonwealth agencies, except those few which are 'government business enterprises' for the purposes of the *Commonwealth Authorities and Companies Act 1997* and its regulations.

In essence, the model litigant obligation is an ethical obligation (or, according to Sir Samuel Griffith, a 'standard of fair play'[2]) which courts expect will be observed by the state, and its agencies and officials, in the conduct of litigation. This is not to say conduct which may fail the model litigant obligation could also adversely affect the 'model litigant' party in the granting by a court of relief. However, that adverse effect will not be in consequence of the conduct constituting a breach of the model litigant obligation, but because it bears relevant censure under the law in its own right (eg delay or waste of time – as relevant to the costs-awarding discretion).

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[1] See para 4.2 and Appendix B.

[2] See *Melbourne Steamship Company Limited v Moorehead* (1912) 15 CLR 333, at 342. (For an insightful explanation of the way in which the model litigant obligation applies, see the comments of Heydon J in *ASIC v Hellicar and Ors* [2012] HCA 17 (3 May 2012), at para [240].)

Prior to the introduction of model litigant rules in the LSDs, the courts had treated the state, and its agencies and officials, as subject to the model litigant obligation, and, in our view, would continue to do so, regardless of model litigant guidelines[3].

The great majority of AGS client agencies which become involved in litigation are subject to the model litigant obligation under the LSDs. AGS as an institution has a longstanding culture that attaches great importance to compliance with this obligation. If AGS becomes aware of a potential breach of the obligation, it investigates the matter in liaison with the relevant client agency to consider whether the matter should be reported to the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department. This involves the allocation of considerable resources. In addition, AGS strongly promotes knowledge of and compliance with the LSDs, including the model litigant obligation, in the training and professional development of its lawyers.

As a large organisation handling many matters for the Commonwealth and its agencies, AGS accepts that mistakes may be made from time to time. (AGS has some 300 lawyers spread over 8 offices dealing, with around 8,500 new matters each year.) Inevitably judges or tribunal members will properly raise issues from time to time and their comments are taken seriously. However, as some indication of its diligence in this area, over the last 4 years, AGS has not been implicated in any model litigant breach.

Allegations of breach of the model litigant obligation are relatively easy to make, and can sometimes be made for an ulterior purpose such as the pursuit of some forensic or tactical advantage. Some litigants, particularly self-represented litigants, make allegations of a model litigant breach failure against actions that an agency will properly take to advance or defend its interests in the litigation. Also, again particularly with unrepresented litigants, an allegation of model litigant failure can be made to vent a grievance that on analysis involves a grievance, but does not involve model litigant failure. It is therefore important that any complaint processes be able to discourage or deflect at an early point complaints that are frivolous or vexatious, or otherwise devoid of merit.

More generally AGS believes it is important that the Productivity Commission report reflect the major role AGS, as by far the largest litigator on behalf of the Commonwealth, plays in seeking to ensure the Commonwealth adheres to its model litigant obligation.

Yours sincerely

Ian Govey
Chief Executive Officer

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[3] For example, see *Melbourne Steamship Company Limited v Moorehead (supra)*, at 342; *Kenny v State of South Australia* (1987) 46 SASR 268, at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155, at 166; and *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42, (2007) 234 CLR 330, at 416.