

JUDGE NOT LEST YE BE JUDGED: THE TRIALS OF A MODEL LITIGANT

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ABSTRACT

Under the “Legal Practice Guidelines on Values, Ethics and Conduct”, the Australian Taxation Office (“ATO”) as a Commonwealth agency is required to operate as a “Model Litigant”, and to act “with complete propriety, fairly and in accordance with the highest professional standards” in litigation in which the ATO is involved.

The Guidelines play an important role in promoting support for the rule of law and respect for the Australian Taxation Office and the tax system as a whole – key elements in promoting voluntary compliance with the self-assessment tax system.

Appropriately, the Guidelines set “an extremely high bar to jump over”, and the ATO has not always succeeded in satisfying these requirements.

Two recent decisions of the Full Federal Court provide stark illustrations of ATO failures to comply with the Guideline requirements.

In *FC of T v Indooroopilly Childcare Services (Qld) Pty Ltd*, the Court was extremely critical of the ATO’s failure to follow a series of single judge Federal Court decisions, while in *LVR (WA) v Administrative Appeals Tribunal*, a differently constituted Court was critical of the failure by counsel for the ATO to advise the judge at first instance that the AAT’s reasons for its decision were almost wholly copied verbatim and without attribution from the Commissioner’s submissions to the AAT.

While no doubt lapses such as these do not reflect well on the ATO, they offer rich opportunities for analysis of multi-dimensional legal, policy and related issues. How tax teachers “frame” the analysis of such issues may influence the perception and values which students take with them into the real world. Accordingly, as intellectual gatekeepers and moral exemplars, legal academics owe a duty to their students and their profession to approach the analysis of these issues in a critical but balanced way.

I. INTRODUCTION

In recognition of the fact that Commonwealth Government departments and related entities are acting on behalf of the Commonwealth Government (and thus ultimately the Australian public) when conducting litigation, are backed by the extensive resources of the federal government, and have no vested interest in the outcome of litigation beyond ensuring that the proper legal result is reached, the law has long required that such government bodies act properly at all times in conducting litigation in behalf of the Commonwealth.

This obligation has been enshrined in legislation, and as a Commonwealth Government department, the Australian Taxation Office (‘ATO’) is required by Appendix B to the Legal

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Services Directions 2005¹ to act as a ‘model litigant’ and ‘moral exemplar’, applying the highest standards of ethical behaviour when engaged in litigation.² The ATO acknowledges this obligation.³

This is significant, because the belief that the federal government and its agencies are acting properly in conducting litigation is an important element in the expression of the rule of law,⁴ and serves to protect the ‘reasonable expectations of those dealing with public bodies’ and ensure that the powers are exercised for the public good.⁵ And, 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’.⁶

However, the model litigant rules impose very high standards, which the ATO (and other Commonwealth Government departments) have not always been able to meet.

This article explores the model litigant rules and analyses two recent striking examples of situations where the ATO has failed to meet these standards. The article then discusses briefly the question of how tax law teachers, as intellectual gatekeepers and moral exemplars themselves, might approach teaching the legal and ethical dimensions and implications of ATO failure to uphold these important obligations.

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- 1 Many states and territories have similar legislation, as do other jurisdiction such as New Zealand: see Gabrielle Appleby and Suzanne Le Mire, ‘Submission to the Productivity Commission: *Access to Justice Arrangements Issues Paper*’ (4 November 2013), Adelaide Law School <www.pc.gov.au/data/assets/pdf_file/0006/129570/sub063-access-justice.pdf> 2–5; Stephen Lee, ‘The State as Model Litigant’ (Sept 2006), address to VGSO Lunchtime Seminar Series (Sept 2006), 2–3, 15–16; The Law Society of New South Wales, ‘A Guide to Ethical Issues for Government Lawyers’ (2nd edn, 2010) 24–7. In relation to New Zealand see, for example, NZ Lawyer online, ‘Crown Counsel and Tax litigation: Gladiator or impartial truth seeker?’, (19 November 2013) <<http://www.nzlawyermagazine.co.nz/Archives/Issue152/152F4/tabid/2946/Default.aspx>>.
 - 2 Schedule to the Legal Services Directions 2005, made under section 55ZF of the *Judiciary Act 1903* (Cth) ‘Appendix B: The Commonwealth’s obligation to act as a model litigant’ and Legal Services Directions 2005, Briefing Note; see *P & C Cantarella Pty Ltd v Egg Marketing Board* [1973] 2 NSWLR 366, 383; *Scott v Handley (No 2)* [1999] FCA 404, [44]–[45] (Spender, Finn and Weinberg JJ). Mark A Robinson, ‘Administrative Law Update’ (Paper presented to the ADT Annual Members Conference, Sydney, 5 November 2009) 1; Michael Palfrey and Alex Kunzelmann, ‘Amendments to the Commonwealth Legal Services Directions and the new NSW Model Litigant Policy’, (Sept 2008) Clayton Utz, <http://www.claytonutz.com.au/publications/newsletters/government_insights/2008090>.
 - 3 See, for example, ATO, Practice Statement Law Administration *PS LA 2009/9* ‘Conduct of ATO Litigation and engagement of Legal Services branch’ [13]–[17] and ATO ‘Being a model litigant’ in *Your Case Matters* (3rd edn, 27 November 2013) <ato.gov.au>; Tom Brennan, ‘Model Litigant Law and the Legal Services Directions’ (27 August 2013), unpublished, documents.jdsupra.com/8d2e7385-86bf-436d-9bfe-fe4b999eca1f.pdf.
 - 4 Ron Jorgensen and Megan Bishop, ‘The rule of law and the model litigant rules’, (2011) 45/11 TIA 678, 678–9. The model litigant rules have been seen as reflecting a more general obligation of fairness on litigants, and it has been suggested that under s 56 of the *Civil Procedure Act 2005* NSW, ‘[i]n a sense ... every litigant in civil proceedings in this Court is now a model litigant’: *Priest v State of New South Wales* [2007] NSWSC 41, [34] (Johnson J). It has even been suggested that as corporations have come increasingly to resemble governments because of their superior resources, impact on individuals and communities and the extent to which they have come to resemble governments in the provision of goods and services, they too should act as moral litigants: Michelle Taylor–Sands and Camille Cameron ‘Corporate Governments’ as moral litigants’ *Legal Ethics*, (2007) Vol 10, No2, 154 – and see the IMF Australia Ltd ‘Policy for the Model Conduct of Funded Civil Litigation’ <www.imf.com.au>.
 - 5 *Hughes Aircraft v Air Services Australia* (1997) 76 FCR 151 (Finn J) – quoted in Lee, above n 1, 3–4.
 - 6 Jorgensen and Bishop, above n 4, 678. And thus – perhaps – among other things the public’s approach to voluntary compliance, particularly as the Rules are aimed at achieving equity, efficiency and simplicity. As Parsons observed many years ago: ‘A tax will not have ... and will not deserve respect, unless it is coherent in principle and has a claim to fairness ...’: Ross W Parsons, ‘Income Tax – An Institution in Decay’ (2986) 3(3) *Australian Tax Forum* 233, 258. As has been said, the Model Litigant Rules are ‘all about fair play ... ensuring that the public has good reason to trust its public officials and the way its public officials and lawyers conduct litigation affecting rights of its own citizens’: John C Tait ‘The Public Service Lawyer, Service to the Client and the Realm of Law’ (1997) *Commonwealth Law Bulletin* 542, 544 – speaking of the Canadian situation (quoted by Lee, above n 1, 3).

II. THE MODEL LITIGANT RULES

The principles underpinning the model litigant obligations can be traced back to the observations of Chief Justice Sir Samuel Griffith in *Melbourne Steamship Ltd v Moorehead*,⁷ where he lamented in 1912 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.⁸

Translated subsequently into statutory form in Appendix B of the Legal Services Directions 2005, the 'core obligation' is 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'.⁹

The balance of the Appendix goes on to spell out the dimensions of this core obligation, and requires Commonwealth agencies involved in litigation¹⁰ to:

- act honestly and fairly in handling claims and litigation ... by dealing with claims promptly and not causing unnecessary delay (cl 2 (a));¹¹
- 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));¹²
- 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 a claimant who 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) cl 2(g);¹³
- 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));¹⁴
- apologising where the agency is aware that it or its lawyers have acted wrongfully or improperly (cl 2(i));

7 (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).

8 See also similar subsequent comments in for example *P & C Cantarella Pty Ltd v Egg Marketing Board* [1973] 2 NSWLR 366, 383 (Mahoney J); *Australian Securities and Investment Commission v Hellicar* [2012] HCA 17.

9 Brennan, above n 3, provides a useful overview of the Directions and issues; see also Jorgensen and Bishop, above n 4.

10 The Directions apply to litigation before courts, tribunals, inquiries, arbitration and other ADR processes, and to both merits review and judicial review: Directions, Appendix B, *Note 1* and [3]–[5]; Jorgensen and Bishop, above n 4–3, 679; Brennan, above n 3, 7–8.

11 See *Kenny v State of South Australia* (1987) 46 SASR 268, 273 (King CJ).

12 Jorgensen and Bishop (above n 4, 681) criticise the approach taken by the ATO to its test 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.

13 *Young v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155, 166 (Beaumont, Burchett and Goldberg JJ).

14 Compare Brennan above n 3, 7–8.

- in merit review proceedings, using its best endeavours to assist the tribunal to make its decision (cls 3 and 4).

Notes 2–4 to Appendix B expand on these elements and state that being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards (note 2). The notes go on to indicate that this obligation may require more than merely acting honestly and in accordance with the law and court rules, or the requirement for lawyers to act in accordance with the ethical obligation (note 3).

However, the notes indicate that the model litigant obligation does not prevent the Commonwealth and agencies from acting firmly and properly to protect their interests, and taking all legitimate steps to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. Nor do the Rules preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute (note 4).¹⁵

Clearly, these model litigant rules are lofty ideals, and they create ‘an extremely high bar to jump over’,¹⁶ particularly as it has been suggested that the list of obligations (above) imposed by the Directions is not exhaustive,¹⁷ and that judges have tended to be unsympathetic to governmental ‘excuses’ for failure to comply with the Directions.¹⁸

Under cl 14.1 of the Directions, the Attorney-General has a discretion to ‘impose sanctions for non-compliance’,¹⁹ and there is also the possibility that a court hearing a case where the Directions were breached might refuse to award costs to – or even award costs against – the government department involved.²⁰ For example in *Deputy Commissioner of Taxation v Clear Blue Development Pty Ltd (No 2)*, 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’.²¹

However, there are also serious limits to the operation of the Directions. In particular, subsections (2) and (3) of s 55ZG *Judiciary Act 1903* provide, respectively, that compliance with a Direction ‘is not enforceable except by, or upon the application of, the Attorney-General’ and that the issue of non-compliance with a Direction ‘may not be raised in any proceeding except by, or on behalf of, the Commonwealth’.

15 Including seeking and enforcing orders for costs: *Wodrow v Commonwealth of Australia* [2003] FCA 403; *Applicant A226 of 2003 & Ors v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FMCA 17.

16 Lee, above n 1, 9. Lee also provides useful guidelines to the practical operation of the Model Litigant rules (at 9–14). See also Paul Nicols and Chris Peardon (June 2007) ‘Focus: Is the Tax Office turning over a new leaf in its approach to dispute resolution?’ <<http://www.allens.com.au/pubs/tax/fotax28jun07.htm>> and D Bugg, ‘The Government Lawyers’ relationship of trust with their client; developing and maintaining it’ (7 Sept 2011) Inaugural Jack Richardson oration to the Law Society of the ACT, 4–5.

17 Brennan, ‘Model Litigant Law’, above n 3, 9.

18 Ashley Tsacalos, ‘The model litigant policy in the spotlight’ (1 September 2013) mondaq <<http://www.mondaq.com/404.asp?404;http://www.mondaq.com:80/Australia/x/144208>> cf *Kenny v State of South Australia* (1987) 46 SASR 268, 273 (King CJ).

19 See the *Compliance Strategy for Enforcement of the Legal Services Directions*; however, it seems that this process has been ineffective: Gabrielle Appleby and Suzanne Le Mire, ‘Submission – Access to Justice Arrangements’ (4 November 2013), submission to the Productivity Commissioner *Access to Justice Arrangements Issues Paper* <http://www.pc.gov.au/_data/assets/pdf_file/0006/129570/sub063-access-justice.pdf> 4.

20 See, for example, *ACCC v ANZ* [2010] FCA 567; cf *Phillips, in the matter of Starrs & Co Pty Ltd (In Liquidation) v Commissioner of Taxation* [2011] FCA 532 [3] (Lander J). The ATO was ordered to pay indemnity costs in *FC of T v Clark (No 2)* [2011] FCAFC 140; Norton Rose Fulbright, ‘The costs of non-compliance with the Legal Services Directions’ (9 July 2010) <<http://www.nortonrosefulbright.com.au/knowledge/publications/29593>>; Ashley Tsacalos, ‘The model litigant policy in the spotlight’ (August 2011) <<http://www.nortonrosefulbright.com/knowledge/publications/55750>>.

21 [2010] FCA 1224, [48].

Accordingly, a private litigant cannot take steps to enforce a Legal Services Direction.²²

While the Commonwealth Attorney General indicated in 2011 that any breach of the guidelines was ‘unacceptable’,²³ there appear to have been a number of lapses on the part of the ATO – and other Commonwealth departments. Indeed, the Commonwealth Attorney-General identified a total of 35 breaches of the Model Litigant Directions by Commonwealth government departments in 2008–09,²⁴ 24 in 2009–10, 17 in 2010–11, and 42 in 2011–12.²⁵

Commonwealth entities found to have breached the Rules have included:²⁶

- the Commonwealth DPP and AFP;²⁷
- the Commonwealth Ombudsman;²⁸
- Comcare;²⁹
- the ACCC;³⁰ and
- the federal Minister for Immigration.³¹

The ATO has also had a number of well-publicised problems in recent times, including failure to file an affidavit within time after 3 extensions (as a result, the court awarded indemnity costs to the taxpayer);³² a court characterising as ‘preposterous’ an argument by the ATO that action to enforce assessment debts which would result in the taxpayer being bankrupted did not constitute ‘hardship’;³³ refusal by a Court to award professional costs to the ATO because originating process and other documents filed by the ATO did not comply with relevant Federal Court Rules, so that to award professional costs in those circumstances would ‘be to reward work which is not of a standard to be expected of a person asserted to be a solicitor on the

22 Though there is a common law obligation for the Crown to act as a model litigant: Brennan above, n 3, 10, argues 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’; cf Appleby and Le Mire, above n 1, 5; but contrast Jorgensen and Bishop, above n.4, 679, who put the orthodox view; see also *Mahenthirarasa v State Rail Authority of NSW* (2008) 72 NSWLR 273 [16]–[20] (Basten J); Robinson, ‘Administrative Law Update’ above n. 2, 3–4; Lee above n 1, 2–3; but see Christopher Peadon, ‘What cost to the Crown a Failure to Act as a Model Litigant?’ (200) 33(3) *Australian Bar Review*, 239, 248 arguing that failure to observe the model litigant rules is irrelevant to quantum of costs.

23 Quoted in Tscalos, above n 18, 1.

24 Though allegations the Directions have not been observed do not always succeed: *ASIC v Hellicar* [147]–[155], [238]–[240]; Robert Austin, Mark Standen and Carolyn Reynolds, ‘The High Court decides the James Hardie case’ (8 May 2012) <http://www.minterellison.com/files/Uploads/Documents/Publications/NA_20120509_JamesHardieDecision.pdf> 1, 3, 9–10; see also *Western City Developments Pty Ltd v Chief Commr of State Revenue (No 2)* [2010] NSWADTAP 72.

25 Between 1 July 2007 and 31 December 2012 the ATO reported that there were 47 alleged breaches of the Legal Services Directions by the ATO; five of the 30 cases determined were found to involve a breach: ATO ‘Your Case Matters’ above n 3 (Diagram 3.1), ‘Compliance and reporting’ fact sheet, ato.gov.au/.../Research-and-statistics/In-detail/Your-case-matters/?page=21. [Editor: I couldn’t get “inside this url to download the full url – it does not seem to be “cached” or otherwise available – at least to my skill level, and for some reason my system won’t let me insert a “New Comment” here]. However, there are substantial variations between the number of breaches identified by the OLSA and those identified by courts and tribunals: Megan Taylor-Sands and Camille Cameron, ‘Regulating parties in dispute: Analysing the effectiveness of the Commonwealth Model Litigant Rules monitoring and enforcement processes’ (2010) 21(3) *Public Law Review* 188; cf Chris Merritt, ‘Gillard Government Lashed for ‘Ignoring’ Breaches of Model Litigant Rules’, *The Australian* (13 April 2012) <<http://www.theaustralian.com.au/business/legal-affairs>>.

26 Taylor-Sands and Cameron, above n 25. The Attorney-General’s Annual Report 2009–10 identified 35 breaches in 2008/9 [subsequently corrected to 24], leading Civil Liberties Australia to suggest that there had been an apparent decline in the behaviour of government departments: Bill Rowlings, ‘The very model of a model litigant’ <<http://www.cla.asn.au/News/the-very-model-of-a-model-litigant>>; Tscalos, above n 18. From this perspective, the increase to 42 (70% of all cases finalised) in 2011–12 is disturbing.

27 *R v Martens* [2009] QCA 351.

28 *Qantas Airways Ltd v Transport Workers Union of Australia – Fair Work Ombudsman v Transport Workers Union of Australia* [2011] FCA 470.

29 *Moline and Comcare* [2003] AATA 827.

30 *ACCC v ANZ Banking Group Ltd (No 2)* [2010] FCA 567.

31 *Challoner v Minister for Immigration & Multicultural Affairs (No 2)* [2000] FCA 1601; *Wong Tai Shing v Minister for Immigration, Multicultural and Indigenous Affairs* [2002] FCA 1271.

32 *Phillips v Commr of Taxation* [2011] FCA 532.

33 *FC of T v Denlay* [2010] QCA 217.

record for a person to whom model litigant obligations adhere³⁴; and ignoring evidence of the existence of a debt.³⁵

III. TWO STRIKING EXAMPLES OF FAILURE TO FOLLOW THE MODEL LITIGANT RULES: *INDOOROOPILLY* AND *LVR*

Perhaps two of the most striking and illustrative recent examples of breaches of the model litigant rules by the ATO are *FC of T v Indoороopilly Children Services (Qld) Pty Ltd* ('*Indooroopilly*')³⁶ and *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* ('*LVR*').³⁷

A. *Indooroopilly*

The *Indooroopilly* saga began with the decision by Kiefel J in *Essenbourne v Commissioner of Taxation (Commonwealth)*.³⁸ The issue there was whether the taxpayer was entitled to a tax deduction for a payment which it had made to a superannuation fund in relation to an employee share plan, and whether that payment created a taxable fringe benefit. Her Honour held in relation to the fringe benefits issue that payments could only be a taxable fringe benefit where the ATO was able to identify a particular employee to whom the benefit was provided (rather than a general benefit provided to employees at large – as the ATO argued).

The ATO did not accept that Kiefel J's decision correctly stated the law.³⁹ The Commissioner accordingly 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) and accordingly there was no basis on which the ATO could appeal the FBT point. However, the Commissioner noted that the ATO did not accept the correctness of Kiefel J's decision on this issue, 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 subsequently argued its 'general benefit' FBT interpretation over a period of three years in a series of AAT and single judge Federal Court cases⁴⁰ – and 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 ('the group') wanted to set up an employee share scheme under which it would gift a number of its shares to a subsidiary discretionary trust as the corpus of the trust, with the potential class of beneficiaries under that trust limited to employees of Indooroopilly and other 'franchisees' operating related child-care centres. The 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 to the subsidiary. The centre then appealed against the ATO ruling and the case went on appeal to the Full Federal Court, which held that the ATO's general benefit interpretation was wrong.

Following the *Indooroopilly* decision, the ATO capitulated, indicating that it would not seek special leave to appeal the FBT point to the High Court, and – reversing its previous approach – would henceforth apply the law as confirmed by the Full Federal Court.

³⁴ *DC of T v Clear Blue Developments Pty Ltd (No 2)* [2010] FCA 1124, [36]–[48] (Logan J).

³⁵ *AAT Case [2011] James & Anor* Reported in Weekly Tax – Issue 4, 28 Jan 2011: cited in The Rule of Law Institute of Australia, "DRAFT: http://www.apsbullying.com/uploads/8/9/6/8/8968132/rule_of_law_institute_-_model_litigant_rules_key_facts_and_cases.pdf

³⁶ 2007 ATC 4236; Jorgensen and Bishop, above n 4, 680, 682.

³⁷ [2012] FCAFC 90.

³⁸ 2002 ATC 5210; Jorgensen and Bishop, above, n 4, 679.

³⁹ Taxation Ruling TR1999/5, paras 45–9.

⁴⁰ *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); *Spotlights Stores Pty LTV v FC of T* 2004 ATC 4674, 4704 (Merkel J); *Caelli Constructions (Vic) Pty Ltd v FC of T* 2005 ATC 4938, 4950–1 (Kenny J); and *Cameron Brae v FC of T* 2006 ATC 4433 (Ryan J).

For the purposes of this article, the key point in the *Indooroopilly* decision were the comments made by members of the Full Federal Court in relation to the way the ATO had conducted the litigation in the past and before the Full Court, and whether the ATO had acted as a ‘model litigant’.

The Federal Court noted that submissions made to the court by the ATO counsel had suggested that decisions such as *Business World Computers Pty Ltd v Australia Telecommunications Commission*⁴¹ 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 that would bind the Commissioner to apply the single judge decisions to which the respondent was not a party’.⁴²

This position was supported by advice apparently given jointly by the Commonwealth Solicitor-General, the Chief General Counsel of the Australian Government Solicitor, and a senior Counsel⁴³ to the effect that the ATO was not required to follow a single judge decision if, on the basis of ‘robust legal advice’,⁴⁴ there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position and communicated the ATO’s intention to taxpayers.⁴⁵

The Bench reacted strongly to this assertion;⁴⁶ Edmonds J observed 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’.⁴⁷

Allsop J was equally critical, characterising the ATO’s approach as:

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. ... Considered decisions declaring the meaning of a statute are not to be ignored by the executive as *inter partes* rulings binding only in the earlier *lis*.⁴⁸

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 what the courts have declared’.⁴⁹

Justice McHugh was equally critical in a paper presented subsequently to an Australian Bar Association Conference, 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 ...⁵⁰

41 [1988] 82 ALR 499, 504.

42 2007 ATC 4236, [44] (Edmonds J).

43 F18 June 2007, following previous advices given by the first two officers in 2005 and 2006: Justice Edmonds, ‘Recent tax litigation: A view from the Bench’ (2008) 37 *Australian Taxation Review* 79, 89–90.

44 The Solicitor-General advised that ‘internal legal advice provided by an appropriate officer would constitute sufficiently robust and credible advice for this purpose’: quoted by Edmonds, above n 43, 89.

45 Quoted by Edmonds in ‘Recent tax litigation above n 43, 87, 90–2.

46 This is significant, because as Justice Edmonds, writing extra-judicially indicated, ‘the occasions on which the court feels compelled to criticise the Commissioner for the way in which he administers legislation for which he is responsible are very few and far between’: Edmonds, above n 43, 80.

47 2007 ATC, 4236, 4255 (Edmonds J). See also Edmonds, above n 43.

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

49 2007 ATC, 4239.

50 Quoted by Jorgensen and Bishop, above n 4, 679 (n 24).

The strength of the comments by the Full Court on the ATO's approach generated considerable discussion, with some attacking the ATO's approach,⁵¹ others defending it.⁵² It is possible to feel some sympathy for the ATO's dilemma,⁵³ though as Justice Edmonds pointed out, the ATO did not even satisfy the criteria in the advice it relied on to justify declining to follow a series of decisions by single judges of the Federal Court, because it had not taken prompt action to clarify the issue.⁵⁴ Whatever conclusion one draws from the *Indooroopilly* saga, the ATO approach does not seem to sit well with the Model Litigant Rules, and may well have contributed to⁵⁵ the subsequent disturbing findings by the Inspector-General of Taxation. In a 2006 Report, the IGOT found a strong perception in the community and tax profession that the ATO uses litigation to confirm its view of the law for compliance purposes, rather than clarification; that its actions in declining improperly to follow decisions of courts or tribunals has involved the ATO in some cases acting outside the rule of law; and that the ATO's approach was not consistent with the spirit of the model litigant directions.⁵⁶

Given the discussion above of the importance of the Direction in supporting the rule of law and the Constitution, these are worrying findings. Their implications are discussed following analysis of the *LVR* decision.

B. *LVR (WA) Pty Ltd v Administrative Appeals Tribunal*

Some five years after the decision in *Indooroopilly*, the decision in *LVR (WA) Pty Ltd v Administrative Appeals Tribunal*⁵⁷ 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 adequately considering a key affidavit supporting the taxpayer's case (the 'Shokker' affidavit), in circumstances where apparently some 95 per cent of the AAT's reasons, which extended to 59 paragraphs (some 29 pages), were, 'with the exception of a small number of words, phrases and sentences', taken verbatim and without attribution from the Commissioner's written submissions to the Tribunal before the hearing, with a further three or four paragraphs taken from the Commissioner's written reply to the appellant's submissions.⁵⁸

However, the Commissioner's written submissions had not referred to the amended Shokker affidavit – and, probably for that reason, the AAT did not adequately consider that affidavit in its reasons.

In the hearing before a single judge of the Federal Court, neither counsel for the Commissioner or taxpayer drew the judge's attention to the fact that 95 per cent of the tribunal's reasons had been copied verbatim from the Commissioner's various submissions. Again, in preparing written submissions prior to the appeal to the Full Federal Court, neither the (new) counsel for the taxpayer nor counsel for the ATO referred to the fact or extent of the unattributed copying.

51 Jorgensen and Bishop, above n 4, 679–80, commented that the ATO's refusal to follow single-judge decisions 'demonstrates disregard for the fundamental principles underlying the rule of law'; cf M Robertson, 'A disregard of the law – *Commissioner of Taxation v Indooroopilly Children Services (Queensland) Pty Ltd*', 2007 41/11 TIA 635, 636; P Nicols and C Peadon, 'Is the Tax Office turning over a new leaf in its approach to dispute resolution?', Allens Arthur Robinson (2007) *Focus: Tax*.

52 Daryl Davies, 'The relationship between the Commissioner of Taxation and the Judiciary', (2007) 41/11 Taxation In Australia, 630 – and see Robin Woellner, 'Is the ATO a Law unto itself?', (Paper presented at the 62nd ALTA Conference, Perth, 23–26 September 2007), 21–23.

53 Davies above, n 52, 632–3 argued that the ATO might find it difficult to persuade the government to allocate parliamentary time and resources to amend the legislation, and the Federal Court could not have made a declaration on the issue (a point subsequently conceded extra-judicially by Edmonds, above n 43, 92), so that taking the matter on appeal may have been the only approach likely to produce results.

54 Edmonds, 'Recent tax litigation', above n 43, 93 (and see also 92–3, citing Justice McHugh, '*Tensions between the Executive and the Judiciary*' (Paper presented at the Australian Bar Association Conference, Paris, 10 July 2002)).

55 Woellner 'Is the ATO a law unto itself?', above n 52.

56 D Voss, 'Review of Tax Office management of Part IVC litigation – a Report to the Minister for Revenue and Assistant Treasurer' (Attorney-General's Department (Cth), 2006) ch 2.

57 [2012] FCAFC 90 (North, Logan and Robertson JJ).

58 [2012] FCAFC 90, [43]–[77] (North, Logan and Robertson JJ).

Indeed, it was the Full Federal Court which, several days before the hearing, drew the attention of the parties to the extent of the unattributed copying of the Commissioner's submissions by the Tribunal.

The Full Court indicated – not surprisingly – that it had difficulty in understanding why counsel for the parties had not alerted the primary judge to the fact and extent of the unattributed copying, which would have raised the question of whether the AAT had given proper consideration to the issues before it or had constructively failed to exercise its jurisdiction properly.⁵⁹ The Full Court observed that when the appellants failed to explain the position fully to the primary judge, counsel for the Commissioner should have done so, in order to ensure that the primary judge understood the full circumstances.⁶⁰

The members of the Full Court indicated that they were 'gravely concerned that the very unusual circumstances we have outlined above were not sufficiently drawn to the attention of the primary judge',⁶¹ and indicated that the response by counsel for the ATO⁶² on this issue 'was not an adequate or appropriate response'.⁶³

The Court was particularly concerned that there were several occasions where counsel had, for example, referred to or read part of the AAT's reasons to the primary judge without advising the judge that they had been 'taken word for word and without attribution from the Commissioner's submissions to the Tribunal'.⁶⁴

The Full Court commented that if these matters had been drawn to the attention of the primary judge, then submissions would not have been made to the primary judge in the same form, or – if put in that form – would not have been sustained, and it would have been apparent to the primary judge that the Tribunal had failed to consider the substance of the Shokker affidavit.⁶⁵

In light of these circumstances, the Full Court was highly critical of the way the case had been run before the primary judge, and commented that:

42. ... 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 ... [The Crown's] ... 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 has access to greater resources than private litigants. Hence it 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 who are independent of the agency are not involved in the litigation ...

Clearly, the conduct of proceedings in *Indooroopilly* and *LVR* did not reflect well on the ATO or its representatives, and is difficult to reconcile with the ATO's obligation to act as a 'moral exemplar' and model litigant.

III. THE IMPLICATIONS OF DECISIONS SUCH AS *INDOOROOPILLY* AND *LVR*

As a high-profile government department, the ATO is invariably under close public and professional scrutiny, and its actions rarely go unnoticed. Accordingly, breaches by the ATO of the model litigant rules are often well publicised and become widely known.

Breaches of the Model Litigant Rules may therefore have a significant impact because, as noted at the outset, these rules are 'all about fair play ... [and] ensuring that the public has good

⁵⁹ Counsel for the taxpayer before the Full Court had not appeared before the primary judge; counsel for the ATO had appeared in both hearings.

⁶⁰ [2012] FCAFC 90 [40]–[41].

⁶¹ *LVR (WA) Pty Ltd v AAT ('LVR')* [2012] FCAFC 90 [27] (North, Logan and Robertson JJ).

⁶² Counsel for the ATO had apparently indicated that the Commissioner's submissions had simply been responding to the taxpayer's submissions, which had not put in issue whether the AAT had failed to take the Shokker affidavit into account because the AAT's reasons were copied from the Commissioner's submissions: [2012] FCAFC 90, [25] (North, Logan and Robertson JJ).

⁶³ [2012] FCAFC 90 [26] (North, Logan and Robertson JJ).

⁶⁴ [2012] FCAFC 90 [27]–[39]; see particularly [31], [33].

⁶⁵ [2012] FCAFC 90 [78].

reason to trust its public officials and the way [they] conduct litigation affecting rights of its ... citizens'⁶⁶ – as well as operating to protect the rule of law and the Constitution.

Australia operates under a largely self-assessment income tax system, which in turn relies very heavily on voluntary compliance by the vast majority of taxpayers. Jorgensen and Bishop suggest that 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'.⁶⁷ If so, then perceptions among the public and professional tax practitioners that the ATO does not observe proper ethical and moral standards in conducting litigation against taxpayers who – with some notable exceptions – lack the resources and expertise that the ATO can bring to bear, may risk undermining confidence in the ATO. This in turn may undermine confidence in the voluntary compliance system itself – and if significant numbers of taxpayers refused to comply voluntarily, the system would be thrown into chaos and quickly become unmanageable.

In this context, Parsons' words need to be borne carefully in mind: a tax system depends heavily on (among other things) perceptions of fairness to underpin its claim to legitimacy,⁶⁸ and thus its ability to persuade taxpayers to comply voluntarily with its rules. Compliance with the Model Litigant Rules is an important element in maintaining that perception of fairness.

IV. THE ROLE OF (TAX) LAW TEACHERS AS MORAL EXEMPLARS AND INTELLECTUAL GATEKEEPERS: FRAMING THE ANALYSIS

One of the key responsibilities of law teachers as intellectual gatekeepers and moral exemplars is to challenge students, and develop their critical (at both technical and policy levels), analytical, judgemental and other capacities.

This requires a careful and considered approach to contentious issues, because our own experience suggests that some students may be influenced by the value systems and value judgments articulated or modelled by respected academic teachers.⁶⁹

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

There is no objectively 'right' answer to issues such as those raised by the conduct of proceedings in cases such as *Indooroopilly* and *LVR*.⁷⁰ The issues are multidimensional and multilayered, requiring analysis of intertwined legal and social policy factors (for example, are Taylor-Sands and Cameron correct in suggesting that if large corporations are in fact coming to resemble governments in terms of role and influence, should they too be subject to the same model litigant rules?).⁷¹ The cases also raise questions of legal interpretation, forensic analysis, professional judgment, ethics and notions of justice and fairness and the rule of law.

These are complex issues, but precisely because of their tangled skeins, such cases offer a rich opportunity to engage in sophisticated analysis of legal and social rules, mores and policy litigious practice (as a proxy for wider issues of professional legal practice), and human psychology.

As tax law academics and teachers, we need to embrace these opportunities in order to help refine students' critical abilities and legal skills, while ensuring that we observe our own duty as moral exemplars to be balanced in our analysis. If – at one extreme – we use such instances

66 Tait, 'The Public Service Lawyer' above n 6, 544.

67 'The rule of law', above n 4, 678–9.

68 Parsons, above, n 6, 258.

69 Compare, for example, Stephen M Siptroth, 'Forming the Human Person: Can the Seminary Model Save The Legal Profession?' (2007) *Brigham Young University Education and Law Journal* 181; Terry Lovat, 'The New Values Education: A Pedagogical Imperative for Student Wellbeing', *International Research Handbook on Values Education and Student Wellbeing*, Springer, 2010.

70 As Appleby and Le Mire point out (above n 1, 2–3), there is 'continuing uncertainty as to what the model litigant obligations require in particular [difficult] cases' because of the 'inherent tension' in key underpinning concepts such as 'justice' and 'the public interest', which 'are often informed by conflicting principles that will dictate a different outcome depending on which principle is emphasised'.

71 Above n 4, 154 – judged by criteria such as integrity, accountability, conflict of interest and acting in 'good faith': Andrew Crane and Dirk Mason, *Business Ethics* (Oxford University Press, 3rd ed, 2010) 3.

to demonise the ATO (as we have observed sometimes occurs in relation to contentious developments), we may send our students out into the (tax) world with a jaundiced view of the ATO. If – at the other extreme, as also happens – 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.

Optimal treatment requires a fine balance, but if properly achieved it will provide generalisable insights of value to students far beyond the immediate context. Given the sophisticated level of the analysis involved, such issues are probably best left to a later part of the law or business curriculum – perhaps jurisprudence or ethics or, a skills subject if the curriculum contains such components – or perhaps a capstone subject. Alternatively, it is a topic which could be approached incrementally; revisited a number of times over the course of a curriculum, with each visit peeling back further layers of analysis. The preferred approach would depend on the structure and pedagogic rationale of the particular curriculum.

V. HOW THEN SHOULD WE APPROACH THESE ISSUES IN OUR TEACHING?

No doubt there are many equally valid and effective approaches. One possible approach may be to begin by having students explore the role of the Directions and their underpinning policy elements, and note the very high standards required of government departments. In policy terms, are the standards too high? Or perhaps not high enough – or broad enough? Should they encompass powerful private sector bodies as well? How effective are the Rules if they lack a formal enforcement mechanism – or is the ‘informal’ supervision by courts sufficient?

Students could then discuss the technical aspects of the Rules and the factual elements of breaches in cases such as *Indooroopilly* and *LVR* in their context, noting their damaging impact in human and jurisprudential terms, and what we can learn from them in jurisprudential terms, but also discussing real-life aspects – putting themselves in the shoes of counsel for the ATO and taxpayer in such cases.

Students could also discuss the pressures which on occasion lead well-intentioned and dedicated government officers to sub-optimal decisions; we could point out that private litigants also sometime stray from ideal litigious practices (for similar reasons?), and encourage our students to form their own views on these issues.

As moral exemplars, we need to avoid force-feeding students our moral values. Students should be exposed to all the facts, encouraged to discuss the various issues, and then left free to form their own views.

However, as intellectual gatekeepers, having left students to form their own views, we should encourage robust critical discussion of and challenges to these views, and require students to test and defend the adequacy of the bases on which their opinions and conclusions rest. Part of the role of refining a student’s analytical abilities and skills or analysis, articulation and persuasion is to point out inconsistencies or lacunae in their analysis, require them to address these shortcomings, and – if appropriate – refine their approach.

VI. CONCLUSION

The Legal Services Directions 2005 perform an important role in protecting the rule of law, encouraging support for the Constitution and ongoing respect for the ATO and the tax system it administers, evening out inequalities in legal resources and expertise, and encouraging ethical behaviour by Commonwealth government departments engaged in litigation by or on behalf of the Commonwealth.

These Directions set extremely high standards, which the ATO has not always been able to meet. The decisions and judicial comments in *Indooroopilly* and *LVR* are stark illustrations of how a combination of circumstances can result in actions which fall short of the required standards.

Such failures invariably involve interesting and unusual fact situations and invoke a complex interplay of factors, which offer the opportunity for sophisticated analysis. As intellectual gatekeepers and moral exemplars, legal academics owe a duty to their students to embrace the opportunity for analysis of these dynamics in a critical but balanced way.

