On 22 June 2012 the Full Federal Court handed down its decision in *LVR (WA) Pty Ltd v Administrative Appeals Tribunal [2012] FCAFC 90*. A primary focus of this decision surrounded the Administrative Appeals Tribunal failing to consider some of the appellant’s evidence in making its decision, along with the Tribunal’s substantial copying of one party’s submissions into the reasons for its decision. The Full Court also commented on the conduct of the Commonwealth party in this matter, the Commissioner of Taxation, for failing to disclose to the primary judge certain facts regarding the original Tribunal decision. This Full Court decision reinforces the requirement for government model litigants to act at all times “with complete propriety, fairly and in accordance with the highest professional standards”.

**Administrative Appeals Tribunal**

On 30 July 2010 the Administrative Appeals Tribunal (Tribunal) dismissed an application by LVR (WA) Pty Ltd (LVR) seeking a merits review of a decision by the Commissioner of Taxation (Commissioner). Three days prior to this hearing commencing, LVR filed an affidavit of a Mr Bernard Schokker, despite having been directed to file this material some seven weeks earlier. In the Commissioner’s written submissions filed with the Tribunal, only paragraphs 70 and 71 referred to Mr Schokker’s affidavit, with the preceding 69 paragraphs making no reference.

The Tribunal’s reasons, with the exception of a few words, phrases and sentences, appear to be taken verbatim and without attribution from the first 69 paragraphs of the Commissioner’s written submissions. The Tribunal did not reproduce paragraphs 70 and 71 of these submissions.

**Federal Court**

LVR commenced proceedings in the Federal Court before Gilmore J, seeking judicial review of the Tribunal’s decision on the basis that the Tribunal had not considered Mr Schokker’s affidavit. Neither LVR nor the Commissioner disclosed to the Court that the Tribunal’s reasons were essentially copied in their entirety from the Commissioner’s submissions. The Court was also not provided with copies of the parties’ written submissions tendered during the initial Tribunal hearing. His Honour dismissed the application for judicial review, finding that the Tribunal had considered Mr Schokker’s affidavit when making its determination.

**Full Federal Court**

LVR appealed the Federal Court decision on the basis that his Honour had erred in finding the Tribunal had considered the critical affidavit.

Some days prior to the appeal being heard, the Full Court drew to the attention of the parties the apparent verbatim copying of the Commissioner’s submissions by the Tribunal. Similarly to the parties’ submissions to the Federal Court, neither party addressed this copying issue in their submissions filed with the Full Court as part of the appeal. When questioned on this point during the appeal hearing, the Commissioner argued that LVR had not submitted that the Tribunal had failed to take into account the affidavit because the Tribunal’s reasons were copied. Therefore, the Commissioner was not required to either respond to this point, or raise it in the first instance.

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1 *LVR (WA) Pty Ltd v Administrative Appeals Tribunal [2012] FCAFC 90*
2 *Ibid*, at [42].
The Full Court, consisting of Justices North, Logan and Robertson, noted that approximately 95% of the submissions filed by the Commissioner with the Tribunal were contained in the Tribunal’s reasons. The Full Court also emphasised that the extent of copying was a qualitative, rather than quantitative assessment, and by way of demonstration set out a number of tables in their judgment comparing the Commissioner’s submissions with the Tribunal’s reasons. They also found that the Commissioner’s submissions in paragraphs 70 and 71 regarding the affidavit of Mr Schokker were not copied by the Tribunal.

The Full Court examined the practice of a Court or Tribunal copying a party’s submissions into a judgment or finding, and whilst there are occasions where some copying will be acceptable, in the LVR case this was not so. The Full Court distinguished circumstances where a court or tribunal may use standard clauses, which is acceptable, to the current case. The Full Court upheld the appeal, set aside the Tribunal’s original decision and referred the matter back to the Tribunal for further consideration.

Rather than report on the Full Court’s findings as to when a Court or Tribunal copying a party’s submissions or other material may be acceptable, the remaining focus of this article is on the model litigant responsibilities of government agencies involved in such matters.

**Model litigant principles**

Commonwealth agencies have an obligation to act as model litigants at all times during civil litigation, even when so doing may not be in the best interests of their case. These duties are found in Appendix B of the Commonwealth’s *Legal Services Directions 2005*, made under the *Judiciary Act*.

The model litigant obligations require the Commonwealth and its agencies to:

- act honestly and fairly;
- deal with claims promptly;
- pay legitimate claims without litigation;
- act consistently in the handling of claims and litigation;
- keep litigation costs to a minimum; and
- consider alternative dispute resolution.

Queensland government departments and agencies are also required to abide by similar principles, with its current Model Litigant Principles revised in October 2010. The opening statement in the Queensland principles require the power of the State to be used for the public good and in the public interest, and not as a means of oppression, even in litigation.

The history of model litigant principles dates back many years. In a speech to the Alternative Dispute Resolution in Government Forum in 2008, former Commonwealth Attorney-General, the Honourable

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3 *Ibid*, at [43].
4 *Ibid*, at [58], [61], [65], [68] and [69].
5 *Ibid*, at [129].
6 Appendix B, *Legal Services Directions 2005* made under section 55FZ of the *Judiciary Act 1903* (Cth).
Robert McClelland MP, stated holding the Commonwealth and its agencies to a high standard is not a new concept. Mr McClelland referred to the observation of Chief Justice Griffith in the Melbourne Steamship case of 1912, where his Honour said:

“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.”

This authority has been accepted by many courts since, including Justice Heydon of the High Court in 2012 in *Australian Securities and Investment Commission v Hellicar*. Here, his Honour confirmed the Commonwealth must act as a moral exemplar – exercising its powers for public good – and that it has no legitimate private interest in the performance of its functions.

Model litigant obligations have also extended a duty to agencies making their best endeavours to assist tribunals come to the appropriate decision. These duties were confirmed in the *AAT Amendment Act 2004*, which requires a decision maker (usually the government department appearing before the Administrative Appeals Tribunal) to use their best endeavours to assist it make its decision. This also extends to agencies involved in merits review proceedings.

The model litigant principles do not require the Commonwealth to take a weak approach to legal proceedings. It is still able to act firmly and properly to protect its interests, a point reaffirmed in Mr McClelland’s speech. However the model litigant duty becomes more critical where one party is unrepresented, which may place this party, or the Tribunal, at a disadvantage. In such cases, it is quite proper for a Tribunal to rely upon the Government representatives to make it aware of all relevant facts that may impact on the decision.

The Explanatory Memorandum for the 1999 amendments to the Commonwealth’s model litigant rules states a failure to comply with the model litigant principles does not allow litigants opposed to the Commonwealth to rely on these directions to challenge the Commonwealth’s actions. This is confirmed in section 55ZG(3) of the Judiciary Act that provides non-compliance with a Legal Services Direction may not be raised in any proceeding other than by the Commonwealth.

The above point was recognised by the Full Court, but it was nonetheless critical of the approach taken by the Commissioner. The Full Court was concerned that the extent of copying was not brought to the Federal Court’s attention, requiring his Honour to proceed under the mistaken belief...
that the Tribunal had made its decision regarding the affidavit based on oral submissions alone. The Full Court expressed difficulty in understanding why counsel for the parties did not fully explain these matters to the primary judge, particularly as the same counsel for the Commissioner appeared in both the Tribunal and Federal Court hearings.

In this instance, the Full Court was of the view that the Commissioner had an obligation as a model litigant to fully explain to the primary judge in circumstances where the appellant had failed to do so. The Full Court explained that acting as a model litigant “may require more than merely acting honestly and in accordance with the court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.” The judgment appeared to also give a warning to counsel representing the Crown, as well as its in-house lawyers, to pay scrupulous attention to what the discharge of that obligation requires.

Acting as a model litigant in an adversarial legal system is a balance between representing the Crown’s interest (the public interest), taking a firm position on behalf of the government and, depending on the circumstances, ensuring a court or tribunal is provided with enough facts to make the correct determination. This case reinforces the continuing need for in-house lawyers (and their external legal representatives) to retain their professional independence from their employer (and client) while observing the above factors and their duty to the court. Governments, along with its agencies and departments, must not use their size, resources and power recklessly, or simply to prove a point. The LVR case allowed the Full Court to reinforce the high standards it, and the public, expect. The public demand their democratic representatives to engage fairly with them and act, as Justice Heydon put it, as a moral exemplar.

About the author

Andrew Harris is the Director of Strategic Policy with Fair Work Building & Construction (FWBC) – Brisbane office. He previously held positions of principal lawyer with the Fair Work Ombudsman and FWBC. Andrew is also a member of the Queensland Law Society’s Government Lawyers’ Committee.

The views expressed in this article are those of the author, and do not necessarily represent those of FWBC or the Commonwealth.

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16 Supra, at [40-41].
17 Ibid, at [42].
18 Ibid, at [42].