

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 2

Program 1.1

Question No. 188

Senator Brandis asked the following question at the hearing on 24 May 2012:

Referring to an article in the Australian on 11 May 2012 which referred to the dispute between the Federal Magistrates and the Attorney General.

Seven more federal magistrates have withdrawn from the constitutional challenge aimed at forcing the government to end their exclusion from the judicial pension scheme.

The latest withdrawals come soon after the federal government adopted a more conciliatory approach with the magistrates.

- a) Why did the government need to adopt a more conciliatory approach to this matter?
- b) How has this conciliation manifested itself?
- c) Did there emerge a concern that a heavy handed fight between two arms of government could only serve to damage the rule of law in Australia?
- d) Was it concluded that demands via the discovery process for individual magistrates to hand over particulars of their personal financial affairs was a breach of the crown's obligation to act within the bounds of fairness under the Model Litigant rules.
- e) Did the decision to move down the path of discovering personal financial particulars of individual litigants come from a private law firm acting for the Commonwealth or was it a decision which would have emanated from Canberra?
- f) With hindsight could this matter have been transacted in a way which was less damaging to the independence of the judiciary principle?

The answer to the honourable senator's question is as follows:

- a) The matter of *Baker v Commonwealth of Australia* [2012] FCAFC 121 proceeded to hearing before the Federal Court by way of a special case agreed between the parties. The obligation to act as a model litigant, set out in *the Legal Services Directions 2005*, require the Commonwealth and its agencies to consider using alternative means to handle claims and litigation brought against the Commonwealth or agency.
- b) See response to question (a).
- c) No. The claim was brought by the applicants as individual litigants. At the time of the Full Federal Court hearing of the claim, 24 of 63 federal magistrates were applicants.
- d) As noted in the response to question (a) above, the matter proceeded to hearing by way of a special case.
- e) The Australian Government Solicitor acted for the Commonwealth.
- f) The obligation to act as a model litigant at Appendix B to the *Legal Services Directions 2005* does not prevent the Commonwealth and its agencies from acting firmly and properly to protect its interests.