

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

BUDGET ESTIMATES 2017

Attorney-General's Department

Program: 1.4 Justice Services

Question No. BE17-133

Senator Xenophon asked the following question on 05 June 2017:

In the context of a discussion at Estimates hearings on having equal Commonwealth resourcing on both sides of a test case question, the Attorney stated:

No, I am not thinking about that. What I am thinking about is protecting the legal position of the Commonwealth. The Attorney-General's responsibility is, in any litigation in which the Commonwealth is involved, to do its best to protect the legal position of the Commonwealth. How is this statement balanced with the judicial statement by High Court Chief Justice Griffith in the 1912 case *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 (21 October 1912), when he judicially pronounced:

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in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date.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.

The response to the honourable Senator's question is as follows:

The standard of fair play to be observed by the Crown in dealing with subjects, referred to in the decision of Chief Justice Griffith in *Melbourne Steamship Co Ltd v Moorehead* (1912), is set out in Appendix B to the *Legal Services Directions 2017*. Paragraph 2 of Appendix B provides that 'the obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth...'.

There is nothing in the obligation to act as a model litigant that conflicts with the statement that the Attorney-General's responsibility is to protect the legal position of the Commonwealth. This is clearly stated in Appendix B of the *Legal Services Directions 2017*, at Note 4, which provides:

The obligation does not prevent the Commonwealth and Commonwealth agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and Commonwealth agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or a Commonwealth agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be

appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest).