

13 September 2019

ASQA should behave like a “model litigant”...but many believe that it doesn't

Last month, many praised the good words of Andrew Laming MP, who in his speech to Parliament, amplified hard-hitting issues in the training sector. During his nationwide consultation with Registered Training Organisations (RTOs), Mr Laming said that he repeatedly heard one sentiment: the shortcomings of the regulator, the Australian Skills Quality Authority (ASQA).

Mr Laming, current Chair of the House of Representatives' Standing Committee on Employment, Education and Training, described ASQA's behaviour as “aggressive and adversarial” and said the regulator had developed a “focus on overcompliance” and was imposing serious sanctions on RTOs for trivial non-compliances.

He went on to say,

*One would hope that [ASQA] would demonstrate a form of **model litigant** conduct, meaning that it would not deliberately engage in legal tactics designed to damage the [applicant]... But, increasingly, that is not how RTOs feel.*

Yes, that's right. ASQA has a duty to not to engage in legal tactics. In fact, ASQA has a positive duty to be fair and maintain proper standards in litigation.

This principle is known as the model litigant obligation and applies to all government agencies. Despite having this obligation, many RTOs who are involved in compliance related disputes with ASQA feel that they are experiencing anything but “model” behaviour from ASQA, inside and outside the Tribunal.

The Model Litigant Obligation

In simple terms, the model litigant obligation requires the government (including ASQA) to act honestly and fairly during court and Tribunal cases. Specifically, the *Legal Services Directions 2017* explains government bodies are obliged to be a model litigant and should always:

- deal with claims promptly without causing delay
- act consistently in all matters
- attempt to avoid, prevent and reduce the scope of litigation
- keep costs as low as possible
- try not take advantage of the other party, especially if they lack resources, and
- avoid relying on technical defences.

The obligation does not mean that ASQA lawyers must be kittens in the court room. It does not prevent ASQA from acting firmly to advance its interests.

The model litigant obligation is a well established legal principle that applies to all government agencies and government lawyers. Even as far back as the 1940s the courts recognised that

government should “serve the public interest for which it was created”¹ because it is “the source and fountain of justice”.²

In addition, ASQA has an obligation to assist the Tribunal under section 33 (1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). This section requires that ASQA must focus on assisting the Tribunal to make the correct decision, rather than defending its own original decision. This duty to assist the Tribunal means ASQA should be:

- making information easily available to the Tribunal
- avoiding delays, and
- actively presenting new material (such as evidence of remedial action).

Further, ASQA’s legal practitioners have additional general duties to the Tribunal. These include the duty not to mislead the Tribunal regarding facts or law, the duty to produce all relevant documents under section 37 AAT Act and the duty to disclose the whole of the law, even if they believe it to be unhelpful or inapplicable.

So, is ASQA the “model litigant” or the “malicious litigant”?

Duties, principles, obligations and laws exist yet, many say, ASQA does not relent.

Andrew Laming MP is of the opinion that ASQA is failing in its model litigant obligations.

Mr Laming states ASQA is “using the AAT as a vehicle for extinguishing RTOs” for the “purposes of legal expense, reputational damage and delay”. These tactics fly in the face of ASQA’s duty to act honestly and fairly – to behave as a model litigant.

Where the model litigant principle requires ASQA to act consistently in all cases and reduce the scope of litigation, Mr Laming reports of inconsistent auditors and prosecution for petty breaches.

Mr Laming also comments on the matter of stays, a crucial aspect of most RTOs’ successful appeal against an ASQA decision:

I'm disturbed that virtually every application for a stay may now be refused for no good reason that I can see. A stay is a very important legal option that should be available and should be offered by a model litigant—in this case, ASQA.

Watch Andrew Laming MP’s full speech [here](#).

The Tribunal has noticed ASQA’s model litigant failings too.

In a case last year,³ the Tribunal found that ASQA was being “unnecessarily obstructive” in the proceeding. The member said:

ASQA’s role in these proceedings is that of a model litigant... I accept that ASQA is entitled to act firmly and properly to protect its interests... however when litigation descends into being unnecessarily obstructive and combative, it is of no assistance to the Tribunal.

¹ *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 196, per, Finn J.

² *Sebel Products v Commissioner of Customs and Excise* [1949] Ch 409, 413.

³ *Merc Training Pty Ltd and Australian Skills Quality Authority* [2018] AATA 2298 (17 July 2018) at paragraph 15.

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If you believe that ASQA is not behaving like a model litigant, what can you do?

RTOs have limited recourse if ASQA fails in its model litigant duties in the Tribunal. An RTO can submit a complaint to ASQA. ASQA can take up to 90 days to investigate and respond. Additionally, after exhausting avenues for an internal complaint, an RTO may submit a complaint to the Commonwealth Ombudsman for further investigation which can take another 3 to 6 months. However, if a matter is before the Tribunal, an RTO generally needs the issue to be resolved immediately.

So, the best hope RTOs have is to raise the issue with the Tribunal. If you believe that ASQA may not be behaving like a model litigant in the course of any proceedings before the Tribunal, speak up then and there. Be sure to remind the Tribunal of ASQA's model litigant obligations.

For advice on your rights and assistance, speak with your lawyer.

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Disclaimer: This article has been based on Australian law and practices current as at the date of publication. Information contained in this article constitutes legal information and should not be viewed as legal advice. You should consult with a lawyer before you rely on this information.



rto.legal – legal and compliance services, *only* for RTOs

rto.legal is a commercial law and compliance firm operating out of Brisbane and Sydney and focuses on exclusively supporting the legal and compliance needs of Registered Training Organisations (RTOs) and those seeking to become RTOs throughout Australia.

The firm provides support to RTOs through the delivery of high-quality and cost-effective legal and compliance services based on a deep understanding of the RTO business, and a flexible and highly competitive fee structure.

Why rto.legal

Because we've been there, and we understand.

We understand: (a) what you went through to establish your RTO; (b) how much time, money and hard work you invested to make it a success; and (c) in the current environment, what you need to do to keep your investment safe.

The investment required start and operate an RTO is significant.

This risk of potentially losing everything because of regulatory non-compliance is ever present.

ASQA is growing increasingly intolerant of non-compliant operators and is more inclined to impose sanctions including cancelling existing registrations or rejecting initial applications for registration.

Many people, despite having strong cases, cannot afford to pay the legal fees needed to challenge ASQA decisions.

Consequently, they accept decisions that they may feel were baseless or unfair.

There is no doubt that adherence to the VET Quality Framework is a must for all RTOs and those seeking to become RTOs.

However, no-one should have to accept a baseless or unfair decision because of the potentially high legal fees associated with challenging such a decision.

We are here to help by supporting you with high-quality legal and compliance services and a flexible and highly competitive fee structure.

Services and capabilities

We offer a full commercial law and compliance services including in relation to the following.

- Contesting ASQA decisions – internally with ASQA, through the Administrative Appeals Tribunal or the courts.

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- Applying for initial registration, meeting the requirements of ongoing registration, making changes to a registration and renewing or withdrawing registration.
- Continuing compliance with the VET Quality Framework.
- Representation on ASQA audits.
- Training partnerships, sub-contracting and training delivery.
- Business disposals and acquisitions.

Our Principal

The firm is led by its principal, Zmarak Zhouand.

- Zmarak is a lawyer qualified in Australia and New York with almost 20 years experience.
- He focuses exclusively on the vocational education and training (VET) sector.
- Zmarak has worked in-house and in private practice in Australia and abroad – with leading law firms and major businesses.
- He has owned and been the CEO of CRICOS and domestic RTOs.
- Zmarak understands RTOs and the complex legal and compliance environment in which they operate.
- He is technically strong, commercial and provides high-quality, practical and cost-effective services.
- Zmarak’s services are based on a deep understanding of his clients’ requirements in the context of their business objectives.
- He works with his clients to build strong relationships and is generally available 24/7.

| Admissions/Memberships | Qualifications (University/HE) | Qualifications (VET) |
|--|---|---|
| Legal Practitioner, New South Wales, Australia, 2011 | (Post-Grad) Bachelor of Laws, University of New England, 2000 | Diploma of Training Design & Development |
| Member New York Bar Association, 2014 | Bachelor of Arts, Southern Cross University, 1998 | Diploma of Quality Audit |
| Member, Queensland Law Society, 2019 | Graduate Diploma in Legal Practice, College of Law, 2001 | Graduate Diploma in Strategic Leadership |
| Fellow, Chartered Institute of Arbitrators, 2017 | Diploma in International Commercial Arbitration, Chartered Institute of Arbitrators, 2016 | Graduate Diploma of Portfolio Management |
| | | Advanced Diploma of Leadership & Management |
| | | Diploma of Leadership & Management |

Fees

- Our fees are very competitive and we are generally flexible regarding fee arrangements.
- We understand that clients may have different levels of ability to pay costs.
- We provide full costs disclosure on every matter, both initially and on an ongoing disclosure basis.
- We are open to both fixed-fee and time-based costing (with or without a fee cap).
- In dispute matters involving ASQA, we are also happy to look at contingency fee arrangements – where you only pay if we succeed in your case against ASQA – subject to conditions. We will consider contingency fee arrangements on a case by case basis.
- Overall, we believe that fees for my services should be fair and reasonable, having regard to all the circumstances of the instructions. The circumstances which may affect the level of fees include the following.
 - Time spent on the matter
 - Monetary amount involved
 - Specialist legal knowledge required

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- Number and length of documents
- Place and time of day at which the work was carried out
- Importance and urgency of the matter to you
- Complexity of the matter.
- Time spent on a matter will be one, but not the only factor considered in assessing the level of fees to be charged.

We will always be willing to discuss the basis for charging a matter at the outset.

Our values

- It is an honour to serve our clients in their moments of need.
- We serve our clients with a dedication to excellence, responsiveness, and caring and always with a sense of humble appreciation for the trust placed upon us.
- Our lifeblood has always been and always will be the recommendations of clients.
- Our success depends the satisfaction of our clients.
- The best marketing we can do is good work.
- We aim to exceed expectations.
- We focus on results, not activities.
- We view every client's problem as if it were our own.
- We believe that every client should receive not only a high level of legal representation but also a feeling of service and caring.
- No result is positive and no victory is absolute if a client has felt that their needs were not understood and addressed or that they did not receive our very best.

Contact

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