

**Submission of the Rule of Law Institute of Australia**

**Senate Legal and Constitutional Affairs Legislation Committee**

**Inquiry into the Judiciary Amendment (Commonwealth Model Litigant  
Obligations) Bill 2017**

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## 1. Introduction

The Rule of Law Institute of Australia makes this submission to the Senate Legal and Constitutional Affairs Legislative Committee as part of the Committee's inquiry into the Judiciary Amendment (Commonwealth Model Litigation Obligations) Bill 2017.

We very much appreciate the Committee accepting this submission after the deadline for submissions has passed, which delay was caused by the illness of the President of the Institute.

## 2. The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians.

The Commission contributes by providing quality, independent advice and information to governments and on the communication of ideas and analysis.

The Productivity Commission was created as an independent authority by an Act of Parliament in 1998, to replace the Industry Commission, Bureau of Industry Economics and the Economic Planning Advisory Commission.

## 3. The Productivity Commission's Report: Access to Justice

The Productivity Commission carried out a detailed, thorough and independent review of the access to justice and concluded that:

“In comparison to self-represented litigants, parties such as governments and big businesses carry a substantial degree of bargaining power – reflecting the economic resources at their disposal and their greater experience and knowledge of the system as repeat users.”

**Nothing has been said by the Attorney Generals Department or any other Government Department in their submissions which challenged this statement.**

4. The powerful position of governments in dealing with individuals

The Productivity Commission went on to say:

“Special power also inheres in the nature of government itself, so judges expect high standards of competence, candour and civility from government parties and their lawyers. These expectations are typically embodied in model litigant rules, which set out acceptable standards and boundaries for the conduct of litigation with the aim of resolving disputes efficiently and appropriately. But there are concerns that model litigant rules lack enforceability, creating weak incentives for governments to comply. Commonwealth, state and territory governments and their agencies (including local governments) should be subject to model litigant obligations (not mere guidelines), with compliance monitored and enforced, including by establishing an independent formal avenue of complaint for parties through the relevant government ombudsmen.” p.18

**In the submissions to this Committee the Attorney General Department and other Government Departments have not challenged the position of government is such that judges rightly expect higher competence, candour and civility from them as found in the model litigant rules.**

**What they do dispute, however, is the finding of the Productivity Commission that these standards of competence, candour and civility should be enforceable, against them. They claim those standards should not be enforced against them, and argue for the present system of non-transparent procedure of handling complaints of non-compliance with the model litigant rules.**

5. The Productivity Commission concluded that the model litigant rules should be enforceable

The Productivity Commission concluded that:

Recommendation 12.3

- The Australian, State and Territory governments (including local governments) and their agencies and legal representatives should be subject to model litigant obligations.
- Compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsman for parties who consider model litigant obligations have not been met.

6. The Government Departments have the onus of establishing to the Committee that the model litigant rules should not be enforceable against them

The review of the access to justice by the Productivity Commission as previously mentioned, was detailed, thorough and independent.

The recommendation of the Productivity Commission was that the model litigant rules should be enforceable obligations, not mere guidelines, including compliance monitored by the government ombudsman.

In seeking to prove that the model litigant rules should not be enforceable obligations the Government Departments are claiming that the model litigant rules should not be enforced against them.

The Government Departments, being the very targets of the model litigant rules, are hopelessly conflicted and their claims should be carefully scrutinised.

**It is submitted that in these circumstances the model litigant rules should be enforceable unless the Government Departments prove to the Committee they should not.**

7. The ABC Program “A Mongrel Bunch of Bastards”

The ABC last month aired a program about the Australian Taxation Office (ATO) entitled “A Mongrel Bunch of Bastards.”

Despite criticism of the program by the Commissioner of Taxation, the ABC has said that it stands by the report, as an important story that’s addressed an issue of real and pressing significance – whistle-blower allegations that small business and individuals have been target by the ATO to achieve revenue goals.

We attach an article from the Australian on the subject.

What is significant about the ABC Program is the disquiet felt today in the community about the culture of one of the largest government departments, the ATO.

The program on national television highlights why this culture needs to be changed and the model litigant rules adopted.

8. The submissions of the Attorney Generals Department and the other Government Departments lack credibility

The submissions of the Attorney General's Department and the other Government Departments to this Committee are all from the one hymn book.

They lack any independence and seek to make sure there is no transparency about how they deal with complaints of non-compliance with the model litigant rules. They want a closed shop where the light of day is not allowed in.

**The Government Departments say “Trust us” and reject “Transparency.”  
There can be no trust without transparency.**

“A lack of transparency results in distrust and a deep sense of insecurity.” - Dalai Lama.

“Openness and transparency are the key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economics.” – OECD

9. The model litigant rules were drafted by the Attorney Generals Department for compliance by Government Departments

The model litigant rules were not drafted by the Productivity Commission or other independent body. They were drafted by the Attorney Generals Department, one Government Department for all Government Departments.

The Bill, before the Committee, does not seek to change the Attorney General's wording. It simply seeks to follow the recommendation of the independent Productivity Commission.

10. The response of the Australian Government to the Productivity Commission

The Australian Government's response to the Productivity Commission report was two-fold.

- That the model litigant rules were not intended to provide a remedy, cause of action or any personal rights;
- That increased costs and delays would result in making the model litigant rules enforceable.

The Bill before the Committee simply provides for an alleged breach of the model litigant rules to be subject to complaint to the Ombudsman and if the complaint is not resolved, for the court to make what order it considers appropriate. This hardly creates a new “remedy, cause of action or a personal right.”

What the Bill before the Committee does is to empower a court to make an order where it considers appropriate in respect of non-compliance with the model litigant rules. It does not make the rules generally enforceable and hardly creates a new “remedy, cause of action or personal right.”

The suggestion that this would result in increased costs and delays is not borne out by the limited effect the Bill would have as described above where any increased costs and delays are likely to be off set in an early resolution of litigation, which is the aim of the model litigant rules.

11. The Bill follows the recommendations of the Productivity Commission

The Government Departments say that their overarching concern is that the Bill goes “well beyond the recommendations of the Productivity Commission.”

There is simply no substance to this claim.

The Productivity Commission recommendation is out in full at paragraph 4. It relevantly provides.... Government Departments should be subject to model litigation obligations (not mere guidelines), with compliance monitored and enforced, **including** a formal avenue of complaint to a government ombudsman.

The recommendation was that the model litigant rules should be “monitored and enforced.” This is what the Bill does in a limited way by allowing a party to refer the matter to the Ombudsman and if not resolved, then allowing a court, to make such order as it considers appropriate.

The recommendation goes on to provide “including” by establishing a formal complaint to the government ombudsman. This is what the Bill does.

12. “Don’t rock the boat” claim

The Government Departments make the “Don’t rock the boat claim” that if a Court makes a series of orders against the Commonwealth and its officers because of breaches of the model litigant rules, it might result in Parliament changing the law and revoking the rules. Therefore, do not rock the boat.

It is unthinkable that the Government Departments would make this submission and believe that in circumstances where there is shown to be breaches of the model litigant rules and the courts make orders Parliament would change the law, not to address the breaches, but abolish the rules.

13. The Government Departments have not established that the present system is transparent, credible or fair

The Government Departments in their submissions assert that the present system **is working from their point of view.**

**But what about the public?**

The Government Departments do not assert that the present system is transparent, credible or fair, but seek to justify its retention on the basis of the reduced costs and delays. Whilst these costs and delays are disputed, there is always a price for transparency, credibility and fairness.

**The Government Departments have not established that the present system is transparent, credible or fair.**

14. Conclusion

The Productivity Commission recommended that the model litigant rules be enforceable obligations, not mere guidelines, with an independent formal avenue of complaint through the ombudsman.

The Bill faithfully carries out this recommendation and should be supported.

Robin Speed  
President of Rule of Law Institute of Australia



## 15. Article in The Australian Newspaper

Q&A: A COLD CASE.  
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THE AUSTRALIAN  
BUSINESS REVIEW

Q&A: DISCUSS *THE  
TEACHER'S PET* WITH  
HEDLEY THOMAS

BOOK >

NEWS OPINION **BUSINESS REVIEW** NATIONAL AFFAIRS SPORT LIFE TECH ARTS TRAVEL HIGHER ED MEDIA PROPERTY

BROADCAST

### Tax chief Chris Jordan tells ABC: we're not a 'mongrel bunch'



Chris Jordan disputed allegations made by *Four Corners*. Picture: AAP

The Australian | 12:00AM May 31, 2018

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JOE KELLY  
Political Reporter | Canberra | @joekellyoz

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Australia's tax commissioner Chris Jordan has attacked the ABC over a *Four Corners* episode, rejecting suggestions his employees were a "mongrel bunch of bastards".

Mr Jordan told a Senate estimates hearing in Canberra that the Australian Taxation Office believed the *Four Corners* story last month was “contrary to the ABC code of practice and editorial policies” and fundamentally inaccurate.

He denied the ATO had deliberately targeted small businesses, saying it had taken several key actions to assist the sector. These included improvements to the administration of the Australian Business Register and moving objections with ABN cancellations to a new “review and dispute resolution” area.

The ATO is also trialling an independent review process for some small business audits from July and has asked the Australian National Audit Office to review the organisation’s debt collection practices.

Mr Jordan said since the *Four Corners* program aired on April 9, the Small Business and Family Enterprise Ombudsman and the Inspector-General of Taxation had publicly called for people to come forward with complaints.

“A number of approaches have been received, but only 62 actual complaints have emerged since 9 April from all sources,” he said.

“The majority of those came direct to us and we have resolved about half of them so far.”

He said the *Four Corners* program failed to meet the basic journalistic standards of independence, integrity, accuracy, impartiality and fair and honest dealings.

“I mean, seriously, how appropriate is it to have the title of the *Four Corners* program *A Mongrel Bunch of Bastards?*” Mr Jordan asked. “It is highly offensive and inaccurate”.

“How would staff of the ABC feel if News Limited splashed across its front pages the ABC was simply a ‘mongrel bunch of bastards’ or that they said the whole of Fairfax is nothing but a ‘mongrel bunch of bastards?’ ”

Mr Jordan said ATO employees were “normal people trying to do a good job for the benefit of the country” and did not set out to “systemically destroy small businesses” or pick on “vulnerable people”.

The ABC said it stood by the report, which was a joint investigation by ABC News and Fairfax media. “(It) was an important story that addressed an issue of real and pressing significance — whistleblower allegations that small business and individuals have been targeted by the ATO to meet revenue goals,” the ABC said in a statement.

“One business owner ... expressed the sentiment that became its title.”

The ABC said the report had prompted “two separate investigations into the revenue office, by the Treasury and by the independent Inspector-General of Taxation, Ali Naroozi”.

“Despite his criticisms, ATO Commissioner Chris Jordan has announced that he has asked the National Audit Office to review debt collection procedures, and announced a trial of an independent review process for certain small business audits. The ABC stands by the report. No official complaint has been received from the ATO. If one is received, it will be investigated according to our usual procedures.”

Mr Jordan said that while he had been commissioner no finding of systemic abuse of small business had been found, including in any of the 44 reports and more than 4700 pages compiled by the Inspector-General of Taxation and the ANAO. “None of that fact was mentioned on *Four Corners*,” he said. “I reiterate there has been no systemic issue of abuse found in these complaints.”



## MORE STORIES

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**SAM BUCKINGHAM-JONES**  
Barnaby Joyce is paying for a lack of self-control, former senator Jacqui Lambie has told the ABC panel show.

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**DARREN DAVIDSON**  
The AFL’s \$2.508bnn media rights deal continues to yield benefits for players.

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