



Australian Government
Australian Taxation Office

Australian Taxation Office Submission

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

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Introduction

1. The Australian Taxation Office (ATO) undertakes a significant proportion of all Commonwealth litigation. The Inspector-General of Taxation (IGT) has found that the ATO is generally complying with its obligations.
2. Despite the ATO being involved in several thousand litigation matters, the reported breaches by the ATO of the model litigant obligations are not of a systemic nature.
3. The ATO supports the continuation of the current position where the compliance with the model litigant obligations is a matter between the Attorney-General and the relevant Commonwealth agency or department.
4. The ATO does not support the Bill in its current form. Elevating the model litigant obligations to a substantive right that can be enforced by court order and permitting the Ombudsman to investigate potential breaches could produce additional delays, technical arguments, costs and impacts to revenue.
5. Rather than provide further protections to the ordinary litigant, the Bill would allow egregious and vexatious litigants to effectively side-step the substantive issues in taxation litigation and delay proceedings by raising alleged contraventions of the model litigant obligation.
6. Within the context of the ATO's debt litigation, this could result in a significant revenue impact and challenge to the integrity of the tax system, due to debt recovery and enforcement being delayed, frustrated, significantly impeded or avoided. Considering the very few instances where any breaches are confirmed, the significant impacts of the proposed Bill for the ATO's operations are not justified.
7. The Bill's effect of removing the protection for even honest or inadvertent mistakes leading to model litigant breaches would not only unnecessarily expose Commonwealth officers to personal sanctions, but may indirectly lead to a culture of risk aversion in decision making. ATO lawyers should have a reasonable expectation when acting in their professional capacity that they would be treated equally to other non-Government lawyers.
8. The ATO holds the firm view that the existing court rules, action for maladministration, professional obligations owed to the courts and law/bar associations and inherent jurisdiction of the court (including the court's ability to make various costs orders against the ATO) are sufficient to deal with any conduct in legal proceedings that may give rise to a finding of non-compliance with the model litigant obligations.

9. The Bill as drafted only applies to courts for the purposes of the *Judiciary Act 1903* (Cwlth). This may provide an incentive for taxpayers to move away from commencing actions in the lower cost and procedurally less rigid Administrative Appeals Tribunal and instead commence actions within the Federal Court in the belief that this confers a tactical advantage.

Background

10. The ATO takes the model litigant obligations as set out in Appendix B to the *Legal Services Directions 2017* (Cwlth) extremely seriously. Conducting ourselves as a 'model litigant' is both a mandatory requirement of Commonwealth agencies and a natural extension of the ATO's contemporary dispute resolution approaches.
11. Being a model litigant requires the ATO to act with complete propriety, fairly, and in accordance with the highest professional standards in handling claims and litigation brought by or against it. The ATO acknowledges and understands that its role in litigation is to assist the Administrative Appeals Tribunal or court to arrive at the right outcome.
12. Under the current compliance framework set out by the Office of Legal Services Coordination (OLSC), the ATO must report to the OLSC potential breaches of the model litigant obligations. This includes allegations of breaches made by taxpayers, judicial commentary indicating a potential breach of the model litigant obligations and ATO staff self-reporting potential breaches.
13. Every year the ATO has millions of interactions with taxpayers, with several thousand litigation matters commenced or received each year covering substantive taxation and superannuation matters, as well as enforcement and recovery of outstanding debt. Within this context:
 - in 2016-17, there were 14 reported breaches of the model litigation obligations that were investigated and finalised, resulting in 2 confirmed breaches
 - in 2015-16, there were 16 reported breaches investigated with 7 confirmed
 - in 2014-15, there were 16 reported breaches investigated with 8 confirmed
 - in 2013-14, there were 23 reported breaches investigated with 3 confirmed
 - in 2012-13, there were 29 reported breaches investigated with 2 confirmed.
14. The incidence of alleged model litigant breaches is very small, with the actual number of confirmed findings against the ATO even smaller. Our analysis shows that any breaches are not of a systemic nature – mainly being confined to minor procedural points, inadvertent errors or time delays. This finding was supported by the IGT in its December 2016 report, [*Review into the Taxpayers' Charter and taxpayer protections*](#). At paragraph 5.78 of this report the IGT stated:

“Against the backdrop of many thousands of cases in which the ATO litigates (either as a plaintiff or defendant) annually, the statistics tend to indicate that the ATO is generally complying with its obligations under the MLO.”

15. It is well established that the model litigant obligations do not prevent the ATO from acting firmly and properly to take all legitimate steps to pursue claims by the ATO or to test or respond to claims against the ATO. As was noted by Heydon J in *Australian Securities and Investments Commissioner v Hellicar* (2012) 286 ALR 501 at paragraph 240, the same procedural rules apply for all litigants and are not modified for model litigants.
16. The ATO remains active to ensure the highest standards are maintained in relation to its litigation work. This includes employing trained lawyers to work on litigation cases, providing regular training (both internal and external to the ATO) on model litigant obligations and engaging external solicitors and counsel for more complex or higher risk matters.

General comments

17. The ATO agrees with the concerns previously expressed in the Governments, 4 April 2016 [response](#) to the 2014 [Productivity Commission Report - Access to Justice Arrangements](#). In response to recommendation 12.1, the Government stated:
“the question of compliance with the Directions, including the model litigant obligations, is a matter between the Attorney-General and the relevant Commonwealth agency or department. Any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth.”
18. Under proposed section 55ZGA of the Bill, the court may make an order to stay proceedings for an appropriate period while an investigation is conducted by the Commonwealth Ombudsman following the lodgement of a complaint. Further, proposed section 55ZGB allows the court to make appropriate orders if the court is satisfied on the application of the applicant that the model litigation obligations have been contravened or are likely to be contravened.
19. Litigation on substantive taxation and superannuation matters can already be time-consuming, complex, lengthy and costly. Further delays are likely to result from courts having the ability to order a stay on proceedings in the circumstances contemplated by the Bill. The possibility exists that any orders made by the court under section 55ZGB could also be challenged (by either the ATO or taxpayers) – resulting in increased delays and costs through additional interlocutory proceedings or appeals.
20. The Bill and explanatory memorandum are unclear as to how the investigation by the Commonwealth Ombudsman of any administrative action relating to contravention of the model litigant obligations interacts with any order made by the court under proposed sub-section 55ZGB(2). That is, does the Court need to consider the investigation and decision

made by the Commonwealth Ombudsman prior to making an order? If this is the case, then it could be considered a fetter on the court's inherent jurisdiction for it to have to consider the decision of an administrative body such as the Ombudsman. If this is not the case, then the obvious question remains – what is the utility and value to be gained by the Commonwealth Ombudsman becoming involved in investigating contraventions of model litigant obligations?

21. The courts already possess an inherent jurisdiction to stay proceedings and make appropriate orders (such as costs orders) so as to control and deal with any abuse of the litigation process. During the course of litigation, the court has a supervisory jurisdiction to ensure that there is procedural fairness between the parties.
22. The current approach where only the Attorney-General can enforce compliance with the *Legal Services Directions 2017* should be retained.
23. The ATO currently conducts litigation within the state and territory court systems (for example, actions to recover debt). The Bill is unclear as to whether the Ombudsman has jurisdiction to investigate any complaint arising from litigation conducted by the ATO, as a Commonwealth litigant, within the state/territory court systems.
24. At item 4 of the explanatory memorandum to this Bill which seeks to explain proposed section 55ZGB, it is stated that the proceeding in which an order is being sought does not have to be the same proceeding from which the complaint about potential contravention of the model litigant obligations arose. The explanatory memorandum provides examples about when the court may consider it appropriate to make an order – this includes the court responding to what it considers to be a past failure to act as a model litigant. This potentially means that an order could be made for a past model litigant breach by the ATO in a prior related proceeding. Such an outcome, while not only patently unfair and punitive, would have the potential to unnecessarily complicate and extend proceedings.
25. An outcome that exposes ATO officers to personal sanctions for contraventions of model litigant obligations may indirectly lead to a culture of risk aversion in decision making, as officers may not be as prepared to overtly and robustly defend the Commonwealth's interests for fear of complaints and subsequent personal action. Rather than the model litigant obligations representing a proper standard of conduct by which the Commonwealth and its agencies behave in the conduct of litigation, they could ironically become a sword by litigants to indirectly influence decision-making by public agencies.
26. The ATO can engage legal firms and counsel when conducting litigation. Apart from potential personal sanctions against Commonwealth officers, the Bill provides for the power of the court to make orders under proposed section 55ZGB to include a 'person acting for the Commonwealth litigant'. This has the result that legal firms or counsel could be both personally subject to any order of the Court, as well as being held personally liable for any contravention, or 'likely contravention', of the model litigant obligations. This may result in legal firms or counsel being reluctant or refusing to act for the ATO in cases,

which in turn impacts the long-term quality and efficiency of the ATO's legal practice and the outcomes the ATO can achieve.

27. While not impacting the ATO directly, the ATO notes that the definition of "Commonwealth Litigant" for the purposes of this Bill includes a minister of the Commonwealth (see section 55N(1) of the *Judiciary Act 1903 (Cwlth)*). This could result in the possible situation of a minister being held accountable for a contravention of the model litigant obligations by their department/agency or even any external legal firm or counsel acting on behalf of the department/agency. This would appear to be an unduly wide ambit for the Bill.

28. The ATO firmly agrees with the position as set out in the Governments, 4 April 2016 [response](#) to recommendation 12.1 of the 2014 [Productivity Commission Report - Access to Justice Arrangements](#):

"While Commonwealth officers owe obligations to the Commonwealth under the Directions, the Directions are not intended to provide a remedy, cause of action or any personal rights in addition to those already available through administrative or judicial review. This was confirmed in Caporale v Deputy Commissioner of Taxation [2013] FCA 427."

29. The ATO holds the firm view that the existing court rules, action for maladministration, professional obligations owed to the courts and law/bar associations and inherent jurisdiction of the court (including the ability to make various costs orders against the ATO) are sufficient to deal with any conduct in legal proceedings that may give rise to a finding of non-compliance with the model litigant obligations. Elevating the model litigant obligations to a substantive right that can be protected by judicial intervention would cause unnecessary complication within the current system.

Impact of the Bill on the conduct of tax, superannuation and debt litigation undertaken by the ATO

30. The legislation administered by the Commissioner contains a number of provisions that operate to protect the integrity of the tax system by securing and recovering the revenue.¹
31. The Bill as proposed may directly interfere with or effectively frustrate the clear intent of the legislative provisions referred to above. It would allow egregious and vexatious taxpayers to side-step the substantive issues within the litigation and create delays by

¹ See, for example, section 175 of the *Income Tax Assessment Act 1936 (Cwlth)* which protects the validity of an assessment notwithstanding any of the provisions of the tax law have not been complied with or sections 14ZZM and 14ZZR of the *Taxation Administration Act 1953 (Cwlth)* which provide, inter alia, that even though a review or appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision any any tax may be recovered as if no review or appeal were pending. For judicial comment on the legislative scheme in relation to tax recover, see *Trade World Enterprise Pty Ltd v Deputy Commissioner of Taxation* [2006] VSCA 191 or *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41.

raising technical arguments regarding alleged non-compliance with the model litigant obligations. In this regard, it is important to note that the proposed Bill does not only deal with actual contraventions of the model litigant obligations but extends it further to situations where a Commonwealth litigant “...*is likely to contravene*...” the obligations. A court order finding a breach of model litigant obligations may allow taxpayers an avenue to attempt to side step an assessment (and the consequential debt) in a manner not contemplated by, and inconsistent with, the existing tax legislation. This could have significant impacts, particularly with respect to the litigation the ATO undertakes to enforce and recover debts.

32. For example, in a situation where the ATO is seeking a freezing order against a taxpayer so as to secure the revenue, an application to the Court by a taxpayer alleging the ATO's breach of the model litigant obligations may result in the court granting a stay of proceedings. Any stay of proceedings in such a situation may provide the taxpayer with an opportunity to dissipate assets, with the result that any outstanding debt may become uncollectable.
33. By way of further example – the impact of the Bill as currently proposed may result in the ATO not being granted summary judgement in a matter simply as a result of the ATO's conduct in the litigation being queried, whether subsequently substantiated or not.
34. The above examples demonstrate that the Bill as proposed unduly removes the focus from the substantive issue actually being litigated and shifts it to the collateral issue of the breach of model litigant obligations. Within the context of the ATO's debt litigation, this could result in a significant revenue impact and challenge the integrity of the tax system, due to debt recovery and enforcement being delayed, frustrated, significantly impeded or avoided. Considering the very few instances where any model litigant breaches are confirmed, the significant impacts of the proposed Bill for the ATO's operations are not justified.
35. The ATO is also concerned that the Bill may significantly impact the way the ATO currently undertakes the general administration of the litigation in which it becomes involved. Several examples are provided below.
36. Paragraph 2(d) of Appendix B to the *Legal Services Directions 2017 (Cwlth)* sets out a specific model litigant obligation - “*endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate*”.
37. The ATO does not always offer to or actually undertakes alternate dispute resolution prior to proceeding to litigation. This decision is carefully made considering a number of factors including: the nature of the issues under consideration (some issues are more suited to successful resolution by alternate dispute resolution); the prior compliance history of the ATO with the taxpayer leading up to the litigation; the risk profile of the taxpayer and the sometimes urgent nature of commencing proceedings (particularly in the ATO's debt

matters). For example, in some cases, alternative dispute resolution has been sought as a way to delay the ATO's recovery action in circumstances where the taxpayer had already taken steps to dissipate their assets or depart the jurisdiction. The ATO is concerned that a breach of model litigant obligations may be alleged in such circumstances, despite the ATO taking steps and making decisions to protect the revenue. Egregious taxpayers may delay or frustrate proceedings by making an application to the court so as to force the ATO to undertake alternate dispute resolution.

38. The model litigant obligations as currently contained within *Appendix B of the Legal Services Directions 2017 (Cwlth)* apply to all claims and litigation brought by or against the Commonwealth or a Commonwealth agency. Under paragraph 3, this obligation specifically extends to Commonwealth agencies involved in merits review proceedings. For the ATO this means we are subject to the same model litigant obligations whether the litigation is conducted within the Administrative Appeals Tribunal or the Federal Court system. The Bill as drafted only applies to courts for the purposes of the *Judiciary Act 1903 (Cwlth)* – there is no consequential amendment within the Bill to allow tribunals to make similar orders. This situation may result in taxpayers commencing actions pursuant to *Part IVC of the Income Tax Assessment Act 1936* within the Federal Court, in preference to the lower cost and procedurally less rigid Administrative Appeals Tribunal. Taxpayers may form the view that commencing procedures within the Federal Court may confer an advantage or an additional avenue to attack the conclusiveness of an assessment that is not available within the Administrative Appeals Tribunal. With regards to taxation and superannuation litigation, this may create access to justice and equity issues as taxpayers of more substantial means who can afford to litigate within the Federal Court could in effect achieve a different outcome than if they had undertaken the litigation within the Administrative Appeals Tribunal.

