



Australian Government
Australian Taxation Office

Australian Taxation Office Submission

Response to public submission - Inquiry into Commonwealth Model
Litigant Obligations

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Introduction

1. We refer to your letter of 6 July 2018 attaching a submission received from Mr Michael Shord in relation to the Committee's Inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (JACMLO Bill). You have invited a reply to adverse comments made about the Australian Taxation Office (ATO) and its officers in those submissions, in accordance with Senate resolutions in relation to parliamentary privilege.
2. We note that the Committee is inquiring into JACMLO Bill, which would enact legally enforceable obligations in respect of the Commonwealth Model Litigant Obligations (MLOs). The MLOs are an Appendix to the Legal Services Directions, which govern how the Commonwealth and its agencies should conduct litigation.

ATO response to Mr Shord

3. The ATO rejects the adverse comments and allegations made in the submission. They have no basis.
4. The ATO does not consider that this inquiry is an appropriate forum to discuss individuals' tax affairs generally, our response is therefore limited to comments in Mr Shord's submission concerning the model litigant obligations.

Mr Shord comments page 1 paragraph 1, and page 2 paragraph 1:

5. Mr Shord refers to judicial observations of Logan J in *Shord v Commissioner of Taxation* [2017] FCAFC 167 that the ATO had breached the model litigant obligations.

ATO Response:

6. In the same case, White and Siopis JJ "**expressly disassociated**" themselves from Logan J's comments, stating:

"In our view, **no criticism can be made of the conduct of counsel for the Commissioner or the solicitors who acted for the Commissioner**. To the contrary, in our view, **counsel for the Commissioner acted with propriety in both advancing the interests of her client as a model litigant, and in discharging her duty to the Court**. The same is the case in respect of the solicitors who acted for the Commissioner. We **expressly disassociate ourselves from the observations of Logan J which may be construed as asserting a contrary position.**" [Emphasis added].

7. Further, in the costs proceedings (judgement delivered on 22 February 2018 in WAD 332 of 2016) Siopis and White JJ again at [23] disassociated themselves with the comments of Logan J in the principal judgment:

“Further, we would observe that our principle judgement at [100], **we disassociated ourselves from the criticisms which Logan J made of the Commissioner’s conduct and that of his legal representative. We continue to disassociate ourselves from Logan J’s criticisms of the Commissioner’s conduct and that of his legal representatives** which he has repeated in his reasons for judgement in this costs judgement.” [Emphasis added].
8. In the costs proceedings, Siopis Longan and White JJ made orders that each party pay their own costs.

ATO general comments on conduct as a model litigant

9. Conducting ourselves as a ‘model litigant’ is both a mandatory requirement for Commonwealth agencies and a natural extension of the ATO’s dispute resolution approaches.
10. Being a model litigant requires the ATO to act with complete propriety, fairness, and in accordance with the highest professional standards in handling claims and litigation brought by or against it.
11. Incidences of alleged model litigant breaches by the ATO is very small, and the number of confirmed findings against the ATO even smaller. In 2016-17 the Commissioner of Taxation was a party to over 5,000 legal proceedings including 456 tax or administrative law appeals. Fourteen breaches of the model litigant obligation were investigated and finalised, with two confirmed findings of model litigant breaches by the ATO. In both cases these were procedural issues and were not systemic in nature.

ATO comments on Alternative Dispute Resolution (ADR)

12. The ATO is committed to avoiding litigation. To this end we offer a number of alternative dispute resolution services tailored to the small business market and the nature and complexity of their disputes, including our:
 - free In-House Facilitation service where a trained ATO facilitator, who has no prior knowledge or involvement in the case, facilitates discussions between the ATO and taxpayer to help both parties find a solution, and

- free Dispute Assist service where an independent disputes guide provides support and assistance through the dispute process.
13. These services are designed to guide small business owners through the disputes process, in particular those affected by significant personal circumstances in their lives.
 14. From 1 July 2018 the ATO commenced a pilot of its Independent Review process for small business. The pilot, based on the processes and procedures in place for taxpayers in the large market, will run for 12 months. The pilot will assess the feasibility of extending Independent Review to small business taxpayers (those with income or turnover of less than \$10 million) who have had income tax audits undertaken by the ATO's Small Business line.

Conclusion

15. The ATO takes compliance with the MLO's very seriously, always endeavours to uphold them, and thoroughly investigates alleged breaches, and makes reports to the Office of Legal Services Directions as required.
16. We would like to reiterate that no review, scrutineer or credible source has ever found a pattern of abuse towards small business owners by the ATO.
17. The ATO is committed to supporting small businesses to meet their obligations; and working with them upfront and early, to get things right from the beginning, and to avoid the need for litigation of disputes.

