

To: Senate Legal and Constitutional Affairs Legislation Committee

26 February 2018

Submission relating to:

JUDICIARY AMENDMENT (COMMONWEALTH MODEL LITIGANT OBLIGATIONS) BILL 2017

Dear Senate Committee,

I am writing as someone whose businesses, and charitable endeavours have been destroyed by an extensive series of abuses by the Office of the Fair Work Ombudsman (FWO) of its obligations as a Model Litigant. The FWO specifically and consciously ignored its obligations as a model litigant, even when these obligations were pointed out to it many times.

An example of the FWO's response when I brought up their obligations:

"(a) compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General: section 55ZG(2) of the Judiciary Act 1903 (Cth) (Judiciary Act); and

*(b) non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth: s 55ZG(3) of the Judiciary Act."*¹

In this the FWO is correct. Even though being a Model Litigant is Government policy² and also the FWO's own litigation policy,³ the FWO's obligations as a Model Litigant are not enforceable and cannot be raised in court, except by the Commonwealth Government itself. Relying upon these paragraphs in a Commonwealth Act dating back to 1903,⁴ the FWO's behaviour is totally unchecked, and the above quote from the FWO⁵ shows that they are well aware of this loophole, and are deliberately exploiting it to avoid accountability.

The FWO uses this loophole as *carte blanche* to behave in ways that would make commercial litigators blush.

The Judge's opinion

In his scathing judgements⁶ against the FWO, Judge Street described the FWO's conduct as "unreasonable" thirty-five times, "unfair" eight times, "inappropriate" seven times, and "improper" six times.⁷

Here are just a few of the comments that Judge Street made about the FWO's conduct:

*"...this is a case where the conduct of the regulator[FWO] fell well short of the standard expected of a regulator."*⁸

*"It is not appropriate for the FWO to depart from the Model Litigant standards that apply to the Commonwealth."*⁹

*"I regard the departure by the FWO from the Model Litigant Policy of the Commonwealth as unreasonable conduct..."*¹⁰

*"That was an improper allegation to make by the FWO and was arguably engagement by the FWO of conduct that might be the subject of professional complaint."*¹¹

*"... was all conduct by the FWO contrary to the Model Litigant standards."*¹²

*"It was misleading conduct by the applicant [FWO] not to disclose that fact to the Court and does not accord with the standards of a model litigant."*¹³

*"That strategy by the FWO was improper."*¹⁴

*"The Court conveyed that it was concerned in relation to the conduct of the applicant [FWO]."*¹⁵

*"The allegations advanced by the FWO in this application in a case were improper conduct by the FWO."*¹⁶

*"For the applicant not to bring to account the very substantial payments made by the respondents was unreasonable and unsatisfactory."*¹⁷

*"It is most unfortunate that the FWO engaged in what the Court concludes was a tactic to remove the representation of Mr Silverbrook in resolving employee complaints."*¹⁸

*"... was again utterly lacking in substance and was inappropriate conduct by the FWO."*¹⁹

*"...the Court found there were steps taken by the applicant prior to the commencement of the proceedings were not in accordance with procedural fairness."*²⁰

The businesses destroyed

I am the founder of a new industry in Australia. This is the industry of inventing at an *industrial scale* and with *industrial efficiency*. This is known as the *Knowledge Industry*.

The Knowledge Industry concept was highly successful. Advanced research projects that I invented initiated and arranged funding for resulted in *more than half* of all Australian inventions *in each year* from 2006 to 2011.²¹ This is more than all patented inventions from the CSIRO, all Australian universities, all Australian companies, and all independent inventors in Australia combined.²²

As there is a negligible demand in Australia for invention and research, the \$800 million in earnings that the Knowledge Industry had brought in so far were *entirely* export earnings, none of which would have occurred otherwise. This was a sustainable and increasing contribution to Australia's balance of trade.

Plans were in place to grow the Knowledge Industry to world-scale - 10,000 scientists and engineers or more. However, the Knowledge Industry employed 500 scientists and engineers when it was destroyed by the FWO. It was in the process of packaging up its more than 13,000 international patents in a roll-out of technologies that would have provided ongoing employment for thousands of STEM-qualified employees.

I have loved Australia, and have spurned many offers to form a *Knowledge Industry* in the US, Asia, and Europe. My endeavours form a case study in an MBA course in the US. As Mr Can Akdeniz, well known US business author, wrote:

*"Much of the work and dedication that people like Silverbrook pour into their projects might never be applauded within their lifetime. Working on global-landscape-altering concepts takes time, and while major advancements have been made and prototypes have been created, these technologies are still in their nascent stages. Some forms of creativity must be undertaken with the understanding that the ultimate benefactors will be your children, or even your grandchildren, long after your life has ended. Silverbrook knows this, and while his name will surely last in annals of creativity and inventions, he may never see some of his most exciting patents fully utilized in a global industry."*²³

For more information on the Knowledge industry and how the FWO destroyed it beyond any possibility of resurrection, please see the attached document: *Australia's Knowledge Industry*. I apologise that it is 22 pages long, but I guarantee that it will be an enlightening read. As I have never sought publicity, it is very likely to be a surprise to you that Australia ever had this capability, or that it was destroyed by a Government department just to *grab headlines*.

The Fair Work Ombudsman, Natalie James, stated:

*"You may know of us because of our litigation. It's true that we take some people to court. That's what grabs headlines."*²⁴

The FWO has consistently abused their obligations as Model Litigant in my matters. The FWO has used more than 30 internal and external lawyers, including one of Australia's top law firms, as well as representation by a top SC, while the FWO's destruction of my businesses led me to be self-represented by necessity, or assisted by lawyers motivated by justice per se.

The FWO's egregious acts

The following is a list of some of the egregious acts committed the FWO during the prosecution of their lawsuits against me.

This is not a list of biased invective – many of the items below are directly quoted from a Federal Judge. In all cases, there is copious evidence linked to the endnotes and in the attached document *Australia's Knowledge Industry*.

The FWO:

- effectively caused the contraventions that they sued me over;²⁵

- did not act in the best interests of the employees,²⁶ the protection of whom is their *raison d'être*;
- conspired to destroy a medical non-profit which was developing a radical new diagnostic technology;²⁷
- misled the court over 1,000 times in the five cases against me;²⁸
- made outrageous and baseless allegations of criminal contempt against my lawyer;²⁹
- lied under oath in court;³⁰
- engaged in improper conduct;³¹
- wrote the affidavits of witnesses, deliberately omitting major payments made to those witnesses;³²
- collaborated with a lawyer paid to conduct a business interference campaign against me;³³
- employed a tactic to thwart my lawyer who was resolving employee complaints;³⁴
- used unfair processes in corresponding with me;³⁵
- conspired with extortionists to force a solvent medical research company into liquidation;³⁶
- made an inappropriate strategic attempt to remove my legal representation;³⁷
- falsely asserted that I had admitted accessorial liability;³⁸
- knowingly took advantage of my father dying of pancreatic cancer;³⁹
- exploited my status as unrepresented litigant;⁴⁰
- denied hundreds of well-known or otherwise well-evidenced truths;⁴¹
- failed to comply with court orders;⁴²
- made false allegations in press releases;⁴³
- refused to properly engage in settlement discussions;⁴⁴
- did not act with procedural fairness;⁴⁵
- failed to comply with the Government's statutory obligations as a Model Litigant;⁴⁶
- also failed to comply with the Government's common-law obligations as a model litigant;⁴⁷
- caused incalculable permanent damage to Australia's economic prospects;⁴⁸ and
- wasted millions of dollars of taxpayers' funds on unreasonable⁴⁹ litigation.⁵⁰

In stark contrast to the FWO, Judge Street's opinion as to my honesty was:

*"I find that Mr Silverbrook was an honest, credible and impressive witness."*⁵¹

*"I find Mr Silverbrook to be a witness of truth."*⁵²

*"Where Mr Silverbrook's evidence might be said to conflict with that of the other oral witnesses about the source and expectation of monies to pay entitlements, I prefer the evidence of Mr Silverbrook."*⁵³

THE FWO'S RESPONSE

The FWO has made a variety of responses to the material here, mostly along the following lines:

The FWO says that they are just enforcing the law

As explained in the attached document *Australia's Knowledge Industry*, the FWO is actually trying to enforce its unique and dangerous interpretation of the law, which is at odds with the accepted interpretation of the same clauses that appear in 98 Commonwealth Acts and several hundred State Acts.

It's under appeal

My cases have travelled from the Federal Circuit Court (FCCA) through the Federal Court of Australia (FCA), to a Special Leave to Appeal to the High Court (HCA). The HCA appeal was not heard, as it was in the middle of the parliamentary citizenship issues, and no appeals were heard at the time. The cases have now returned to the FCCA for a rehearing.

The points of law remain controversial. The matters of fact upon which Judge Street commented remain the same.

The FWO's appeal to the FCA essentially amounted to their assertion that the law permits them to behave as appallingly as they did.⁵⁴ I believe that it is the loopholes afforded by sections 55ZG(2) and 55ZG(3) of the Judiciary Act 1903 that allowed the FWO to keep this matter in the courts for nearly five years. This is at multi-million dollar taxpayer expense, continuing at least two years after all staff have been fully paid all amounts the FWO claimed. Moreover, absent the FWO's intervention, all amounts owing to staff would have been paid in August 2013, before the FWO filed any lawsuits.

During the five-year process, FWO had misled the court more than 1,000 times (yes, I counted, and provide evidence),⁵⁵ and has not yet corrected the vast majority of these misstatements.

To prevent abuses such as this, I believe that the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 should be passed into law.

The FWO responded by smearing me

The *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*⁵⁶ was before parliament. This bill vastly increased the powers of the FWO. I made a submission to the parliamentary committee considering this bill, warning the committee of the FWO's abuses⁵⁷ of the powers that it already had. The FWO countered with an ad-hominem attack:

*"By way of background, the Fair Work Ombudsman filed legal proceedings in 2013 and 2014 in relation to the non-payment of wages and entitlements to 43 employees by five companies that employed the workers. The proceedings also alleged involvement of Mr Silverbrook ... as accessories by virtue of the operation of section 550 of the Fair Work Act. In June 2016, the Federal Circuit Court found that Priority Matters Pty Ltd, Superlattice Solar Pty Ltd, Geneasys Pty Ltd, Silverbrook Research Pty Ltd and Mpowa Pty Ltd contravened workplace laws. The Court ordered more than \$1.15 million in back-payments (plus interest), and imposed \$115,000 in penalties."*⁵⁸

The FWO did not inform the Commission that the contraventions of workplace laws were due almost entirely to the FWO's own actions.⁵⁹ All employees at the Knowledge Industry Companies were very well paid, with many salaried millionaires, and no *vulnerable workers*.

About \$1.15 million in salaries were delayed by more than 3 years due to the FWO's actions, and *these* were the back-payments that the court ordered. Without the FWO's interference, any contraventions caused by the USGoC attacks (see attached document) would have been resolved by August 2013, well before the FWO filed lawsuits in late 2013 and 2014. I explained this to the FWO on many occasions, but the FWO was blinded by the lure of its biggest headline grab⁶⁰ to date.

LIMITATIONS OF MY CRITICISM

I have had dealings with lawyers for many years, in dozens of jurisdictions around the world, and they have been surprised at just how far the FWO has gone to abuse due process and ignore its obligations as a model litigant, and ruin my reputation. I know that I am not the only person to raise the issue of the FWO ignoring its obligations as a model litigant.

However, my criticisms are limited to the FWO and only the FWO. I believe that, in general, the model litigant obligations work well, except in the case of those few Government departments which expressly rely on sections 55ZG(2) and 55ZG(3) of the Judiciary Act 1903 to ignore their regulatory obligations.

Recommendation

My recommendation is simple: the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 should be enacted as soon as possible to prevent further abuses of the model litigant obligations. Enacting the bill should have little to no effect on those Government Departments that are already behaving as Model Litigants.

Importantly, the bill should apply retrospectively in those cases where breaches of the Model Litigant policy have been identified as integral to ongoing litigation. This would give the public confidence in justice being seen to be done, regardless of gaps in timing. After all, Government departments had an obligation to be Model Litigants well before the current bill, and should not have been relying on a loophole from 1903 to behave worse than commercial litigators with no such obligations.

If this bill had been enacted 5 years ago, an industry with great promise for Australia could have been saved.

Yours faithfully,

Kia Silverbrook

Notes and links to references

If you are reading this on paper, or in a format not supporting links, the documents linked to here can be found at <http://bit.ly/KnowledgeIndustry>

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- ¹ Paragraph 15 of [Mediation Summary Statement from FWO - 25 May 2015](#)
- ² The relevant Model Litigant rules at the time were contained in [Legal Services Directions 2005](#)
- ³ [FWO Litigation Policy GN1 \(Guidance Note 1\)](#)
- ⁴ Page 46, paragraphs 55ZG(2) and 55ZG(3) [Judiciary Act 1903](#)
- ⁵ Paragraph 15 of [Mediation Summary Statement from FWO - 25 May 2015](#)
- ⁶ Judge Street's: [Reasons for Primary Judgement](#), [Reasons for Judgement - Recusal](#), and [Reasons for Costs and Penalty Judgement](#)
- ⁷ In Judge Street's: [Reasons for Primary Judgement](#), and [Reasons for Costs and Penalty Judgement](#)
- ⁸ Paragraph 60 of [Judge Street's Reasons for Costs and Penalty Judgement](#)
- ⁹ Paragraph 290 of [Judge Street - Reasons for Primary Judgement](#)
- ¹⁰ Paragraph 293 of [Judge Street - Reasons for Primary Judgement](#)
- ¹¹ Paragraph 287 of [Judge Street - Reasons for Primary Judgement](#)
- ¹² Paragraph 290 of [Judge Street - Reasons for Primary Judgement](#)
- ¹³ Paragraph 92 of [Reasons for Costs and Penalty Judgement](#)
- ¹⁴ Paragraph 291 of [Judge Street - Reasons for Primary Judgement](#)
- ¹⁵ Paragraph 31 of [Judge Street's Reasons for Judgement - Recusal](#)
- ¹⁶ Paragraph 288 of [Judge Street - Reasons for Primary Judgement](#)
- ¹⁷ Paragraph 121 of [Judge Street - Reasons for Primary Judgement](#)
- ¹⁸ Paragraph 288 of [Judge Street - Reasons for Primary Judgement](#)
- ¹⁹ Paragraph 287 of [Judge Street - Reasons for Primary Judgement](#)
- ²⁰ Paragraph 42 of [Reasons for Costs and Penalty Judgement](#)
- ²¹ Many of these inventions were made in 1996-2004 – it typically takes several years for patent applications to be assessed and granted by the US Patent Office (USPTO). Since 2011, my time has been consumed by legal issues, mostly caused by the FWO, and I have not had time to invent.
- ²² Page 2 of [Kia Silverbrook inventions](#) also at page 7 of [Exhibit KS-1 to First Affidavit of Kia Silverbrook](#)
- ²³ Page 580, Fast MBA, by Can Akdeniz, 2014, excerpted at pages 218-225 of [Exhibit KS-1 to First Affidavit of Kia Silverbrook](#)
- ²⁴ Paragraph 4 of a Speech by Natalie James for the National Small Business Summit on 8 August 2014 entitled "[FWO's Deal with Small Business](#)"
- ²⁵ Paragraphs 170-174 of [Judge Street - Reasons for Primary Judgement](#)
- ²⁶ Paragraphs 168, 286 of [Judge Street - Reasons for Primary Judgement](#)
- ²⁷ Paragraphs 15-16 of [Judge Street - Reasons for Primary Judgement](#)
- ²⁸ [Times that the FWO misled the court](#). This 255-page document currently lists 1,077 misleading statements or actions of the FWO in the five Silverbrook matters
- ²⁹ Paragraph 285 of [Judge Street - Reasons for Primary Judgement](#)
- ³⁰ Paragraphs 48-59 of [Appeal Submissions - Contention](#), 24 January 2017
- ³¹ Paragraph 288 of [Judge Street - Reasons for Primary Judgement](#)
- ³² Paragraphs 120-123, 192 of [Judge Street - Reasons for Primary Judgement](#) & Paragraphs 73-76 of [Appeal Submissions - Contention](#), 24 January 2017
- ³³ Paragraphs 202, 447, 506, 385, 417, 134-138, 140, 143-149, 208-214, 221, 439, 469-470, 492, 498-502, 505, 517, 526-529 of [Second Affidavit of Kia Silverbrook](#) & paragraphs 88-89 of [Costs Submissions in Reply](#), 23 September 2016, & [Court Transcripts Judge Street 7-18 March 2016](#): T135.22, T146.19-30, T166.30-T172.14, T201.14-16, T235.19-T238.18, T258.32-T262.10, T329.8-45, T492.24-T493.34, T532.5-15, T558.2-6, T730.44-T731.7
- ³⁴ Paragraphs 170, 283-293 of [Judge Street - Reasons for Primary Judgement](#)
- ³⁵ Paragraphs 164-167 of [Judge Street - Reasons for Primary Judgement](#)
- ³⁶ Paragraphs 168, 286 of [Judge Street - Reasons for Primary Judgement](#)
- ³⁷ Paragraph 288 of [Judge Street - Reasons for Primary Judgement](#)
- ³⁸ Paragraph 15 of [FCCA Judge Street Judgement - Withdrawal of admissions - 9 December 2015](#)
- ³⁹ Paragraphs 24.s. of [JL Affidavit 16 Aug 2016](#)
- ⁴⁰ Paragraphs 66-72 of [Appeal Submissions - Contention](#) 24 January 2017 & Paragraphs 491-492, 498 of [First Affidavit of Kia Silverbrook](#)
- ⁴¹ For example, several hundred paragraphs in [Times that the FWO misled the court](#)
- ⁴² Paragraphs 60-65 of [Appeal Submissions - Contention](#) 24 January 2017 & Paragraph 4 of Judge Street's: [Reasons for judgement - Withdrawal of admissions](#)
- ⁴³ Press releases from the Fair Work Ombudsman: [Businessman, companies face court for allegedly underpaying staff \\$870 000](#) and [Businessman faces further legal action for allegedly underpaying staff \\$1.8 million](#)
- ⁴⁴ Paragraphs 165-166 of [Judge Street - Reasons for Primary Judgement](#)
- ⁴⁵ Paragraphs 115-116 of [Judge Street - Reasons for Primary Judgement](#)
- ⁴⁶ Paragraphs 169, 284, 290, 293 of [Judge Street - Reasons for Primary Judgement](#)
- ⁴⁷ Paragraphs 79-85 of [Appeal Submissions - Contention](#) 24 January 2017
- ⁴⁸ See [Kia Silverbrook inventions](#) and page 16 of [A wide-ranging interview with Kia Silverbrook](#), and paragraphs 25-50 of [JL Affidavit 16 Aug 2016](#)
- ⁴⁹ In the opinion of Judge Street, at paragraphs 121, 122, 123, 161, 172, 292, 293, 294 of [Judge Street - Reasons for Primary Judgement](#)
- ⁵⁰ Actual amounts that the FWO has spent are unknown, but certainly would greatly exceed \$1 million. Kia Silverbrook's costs were over \$1.2 million, even though he did much of the work himself. Judge Street said: "...legal costs have been incurred in an amount of \$1,213,039.05." in paragraph 68 of [Judge Street's Reasons for Costs and Penalty Judgement](#). As the FWO engaged upwards of 30 internal and external lawyers and other staff, and wrote the affidavits of 11 witnesses, the FWO's expenditure was probably much higher than Silverbrook's. By the end of the re-hearings, the FWO's total costs are likely to exceed \$2 million, including 25 FWO employees, Ashurst Lawyers, Arthur Moses SC, Verity McWilliam, and other expenses.
- ⁵¹ Paragraph 126 of [Judge Street - Reasons for Primary Judgement](#)
- ⁵² Paragraph 128 of [Judge Street - Reasons for Primary Judgement](#)
- ⁵³ Paragraph 129 of [Judge Street - Reasons for Primary Judgement](#)
- ⁵⁴ [Notice of Appeal - FWO v Priority Matters and Silverbrook](#). This is one of five Notices of Appeal that are identical except defendant names
- ⁵⁵ [Times that the FWO misled the court](#). This 255-page document currently lists 1,077 misleading statements or actions of the FWO in the five Silverbrook matters
- ⁵⁶ [Fair Work Amendment \(Protecting Vulnerable Workers\) Bill 2017](#)
- ⁵⁷ Submission: [Fair Work Amendment \(Protecting Vulnerable Workers\) Bill 2017 - Submission 037 \(cover letter\)](#) which included the attachment: [Fair Work Amendment \(Protecting Vulnerable Workers\) Bill 2017 - Submission 037 \(knowledge industry\)](#).
- ⁵⁸ This quote is from: [Fair Work Amendment \(Protecting Vulnerable Workers\) Bill 2017 - Submission 037 ROR reply from Natalie James](#)
- ⁵⁹ Paragraph 23 of [Judge Street - Reasons for Primary Judgement](#)
- ⁶⁰ "that's what grabs headlines" from paragraph 4 of a Speech by Natalie James for the National Small Business Summit on 8 August 2014 entitled "[FWO's Deal with Small Business](#)"