About us

Cleary Hoare Solicitors provides commercial litigation services with a particular focus on taxation matters. It has extensive experience dealing primarily with two Commonwealth entities: the Australian Taxation Office (**ATO**) and Australian Government Solicitor (**AGS**). It is our experience that both entities often fall short of complying with Model Litigant Obligations (**MLO**) throughout the dispute resolution process – that is, from "pre-litigation steps" to appeals.

Some examples of this non-compliance include:

- where the ATO reaches a policy position (based on internal considerations) and asserts numerous statutory and factual interpretations to support that policy without authority;
- where the ATO issues assessments or amended assessments based on an interpretation of the law which contradicts the ATO's interpretation of the law in respect of another tax provision;
- where the ATO issues preliminary position papers and reasons for decision based on primary and alternative approaches, requiring a taxpayer to respond to both approaches, yet abandons one of the approaches which clearly had no, or very little, prospect of success;
- where the ATO attends a compulsory mediation with two lawyers and two ATO representatives against a self-represented litigant with a diagnosed mental health illness and refuses to actively engage in the mediation for its proper purpose.

The Bill

On Wednesday, 15 November 2017, Senator David Leyonhjelm introduced Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 to the Senate (**Bill**). The Bill will broaden the Commonwealth Ombudsman's investigative powers, which will bring within its ambit the power to enforce MLO issued by the Attorney-General against Commonwealth litigants, which are contained in Legal Services Directions 2005 (**LSD**).

The Bill is commendable and goes some distance towards reminding the Commonwealth, and those acting on its behalf, of the fundamental relationship between the Commonwealth and its subjects. This fundamental relationship is based on, among other things, certain principles – the elementary standard of fair play, good administration and maintenance of public confidence in the integrity of administrative government.

The model litigant obligations are a reflection of those principles and are appropriately "*...more onerous than the duty which all parties and their lawyers have in proceedings before [a] Court to assist in the achieving of the "overarching purpose" of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible*" – *Shord v Commissioner of Taxation* [2017] FCAFC 167 at [169] (see generally Justice Logan's comments at [165]-[174] annexed to this submission). These comments, and others from judicial members, must be kept at the forefront of all Commonwealth employees when engaging in disputes on behalf of the Commonwealth against its subjects.

While the Bill is commendable, there are three issues which ought be considered:

- clarification that the scope of investigations includes "pre-litigation steps";

- the lacuna between the powers of the Ombudsman and Inspector-General Taxation (**IGT**); and

- the prospective nature of the Bill.

Clarification of scope of investigations

Note: "Pre-litigation steps" refer to steps taken, which are related to a dispute, prior to a proceeding having been commenced by a party to the dispute

The litigation process is not defined – it commences sometime before court/tribunal proceedings are on foot and it ends when the parties can effectively "close the books". This is demonstrated by the distinction between "*handling claims*" and "*conducting litigation*", which dichotomy is repeated throughout the MLO (see both LSD and Model Litigant Principles issued by Department of Justice and Attorney-General (Qld) as at 4 October 2010). It is also inherent, for example, in the following obligations in the LSD:

- Paragraph 4.2 – the agency is not to start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution; and

- Paragraph 4.3 – the agency must consider the legal rights of the parties and financial risk to the Commonwealth (and agency) when handling claims and conducting litigation.

Equally, the scope of investigations ought include "pre-litigation steps"; however, on the face of the Bill, the power to enforce the MLO on Commonwealth entities is vested in "courts". This presumes court proceedings are already on foot. If part of the MLO are directed at "pre-litigation steps" but the MLO can only be enforced by a court, it requires the Commonwealth subject to commence proceedings despite a potential contravention of MLO. It surely cannot be the intention of the Bill to require this.

We recommend a suitable alternative to empower the Ombudsman and/or IGT to suspend any action by the Commonwealth entity in respect of the dispute until the contravention has been investigated and remedied. This could, in part, be effected by replacing the word "*proceeding*" with "*dispute*", which would include pre-litigation steps.

Practically speaking, the Commonwealth entity may make a decision based on a demonstrably erroneous interpretation of the law, or potentially at odds with a previous position taken by the Commonwealth in respect of a certain interpretation of the law. A Commonwealth subject may point out this inconsistency and/or error to the Commonwealth entity prior to proceedings having been commenced. In the event the Commonwealth entity nevertheless proceeds with a determination, the Commonwealth subject should have recourse to the Ombudsman and/or IGT. If the Ombudsman and/or IGT discovers a contravention of the MLO, it ought be empowered to suspend any further action (including enforcement action) by the Commonwealth entity and "*make any order/determination it considers appropriate*", to use the words of proposed section 55ZGB.

This example above is based on a certain matter which Cleary Hoare Solicitors has acted. Further, it is not an isolated example.

The lacuna between the Ombudsman and IGT

The Committee would be aware of the creation of the IGT by the *Inspector General of Taxation Act 2003* (Cth) (**IGT Act**). The purpose was primarily to establish a separate authority to the Ombudsman as a result of the complexities inherent in taxation matters.

The IGT Act empowers the IGT to handle issues concerning taxation administration matters and was designed to achieve parity between the powers of the Ombudsman and the IGT. Administration matters do not extend to issues concerning contraventions of, or enforcement of, the MLO. If it did, then parity would not be achieved. This is reflected in proposed section 5B(1) contained in Item 2 of Schedule 2 of the Bill.

The Bill, however, does not provide the same powers to the IGT as the Ombudsman, leaving the ATO effectively immune from enforcement of MLO. Again, it cannot be the intention of the Bill to provide immunity for the ATO only.

Issues concerning the ATO's handling of taxation disputes is well known both in the private sector and the office of IGT – see IGT's Report to the Assistant Treasurer "*The Management of Tax Disputes*" dated January 2015, particularly chapters 3 and 4.

We recommend two alternatives to resolve the inevitable lacuna in respect of enforcement of MLO: either the Bill clarify that the Ombudsman will be the sole repository of power in respect of alleged contraventions of MLO by Commonwealth entities or the Bill includes similar amendments to the IGT Act as well. It is our recommendation that the Ombudsman be the sole repository of power to investigate contraventions of MLO based on:

- the perceived lack of independence within the ATO;
- the inability of the IGT to enforce compliance;
- investigations concerning contraventions of MLOs do not require an understanding of complex taxation matters; and
- over time, a single entity is more suited to handle these complaints in an orderly, principled and predictive manner than multiple entities.

This option would not require amendments to the IGT Act, which obliges the IGT to transfer a complaint "*wholly [or partly] about action other than tax administrative action*" to the Ombudsman – see section 10(1) of the IGT Act. It is noted that investigation of taxation administration matters would remain within the responsibility of IGT in accordance with section 7 of the IGT Act.

Prospective nature of the Bill

Item 7 of Schedule 1 of the Bill states that the provisions will only apply to contraventions of MLO after the commencement date. Item 3 of Schedule 2 is to the same effect in respect of "legal work". This is effectively a "get out of jail free card" for Commonwealth entities. A contravention of MLO ought be investigated as a matter of public interest and public policy regardless of whether it occurred prior to, or after, an arbitrary date of commencement. Further, the contravention may infect a current dispute, which may be either the subject of current court proceedings or "on the cusp" of court proceedings.

Cleary Hoare Solicitors has one particular matter in which the ATO has taken arguably a perverse position in relation to its interpretation of the law and would be subject of a complaint pursuant to the proposed Bill. Unless the ATO's position changes, the matter will inevitably be before the Administrative Appeals Tribunal. In the event the Bill takes a considerable period of time to receive Royal Assent, the Commonwealth subject will be put to significant costs and stress as a direct result of a Commonwealth entity's complete disregard for, and contravention of, the MLO.

Further, Cleary Hoare Solicitors currently has several matters before various courts and tribunals in which the Commonwealth entity has arguably contravened the MLO. Put another way, a Commonwealth subject is presently being put to significant costs and stress in proceedings which are arguably infected by contraventions of the MLO. It is artificial that the particular Commonwealth entity has a "get out of jail free card", and the Commonwealth subject suffers detriment, merely as a result of a date.

Considering the principles discussed at the beginning, the Commonwealth ought not be able to engage in reprehensible conduct without sanction simply because its conduct occurred prior to the Bill. The Bill neither changes the MLO nor the fundamental relationship between the Commonwealth and its subjects.

We recommend that the Bill permits Commonwealth subjects, who are involved in disputes with a Commonwealth entity (whether at the "pre-litigation" stage or before a court/tribunal) as at the commencement date and are allegedly infected by a contravention of the MLO to make a complaint to the Ombudsman. This could be achieved by Item 7 of Schedule 1 and Item 3 of Schedule 2 of the Bill focusing on the stage of the dispute rather than the date of the contravention/legal work being carried out.

We do not suggest that finalised litigation be included.

Minor considerations

There are two further minor considerations. Firstly, proposed section 55ZGA(2) requires the applicant to make an application to the court for an order staying a proceeding. We note that many self-represented litigants are not familiar court proceedings and are unlikely to understand the technical requirements of an application. We recommend changing the word "application" to "request" to avoid undue technicality and possible further expense to the applicant. It is also likely that, by that stage, both the applicant and Commonwealth entity are aware of the complaint and investigation by the Ombudsman and the "request" would be a mere formality and courtesy to the court.

Secondly, we recommend the Committee consider empowering the Ombudsman to make recommendations on appropriate sanctions to the court based on its investigation. Proposed section 55ZGB(2) is effective only when the court is satisfied that there has been, or will likely be, a contravention of the MLO. As the Bill currently reads, presumably this can only occur after a determination by the Ombudsman on the Commonwealth entity's conduct.

It follows that the Ombudsman will be the primary fact-finder and a kind of *amicus curiae* in relation to the applicant's "request". In that role, the Ombudsman should be in a position to provide recommendations as to the nature of the contravention and how it ought be sanctioned, not merely its determination on whether a contravention has occurred or is likely to occur. Without a proper basis, it would seem difficult for a court to make appropriate and relevant orders in relation to the proceeding.

Cleary Hoare Solicitors

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165 The Commissioner is the chief revenue officer of the Crown in right of the Commonwealth. To him falls the high and important responsibility of the general administration of Federal taxation legislation, in particular the responsibility of collecting and recovering tax according to law.

166 In relation to proceedings to which the Commissioner, a Second Commissioner or a Deputy Commissioner is a party, he and these officers, or an officer authorised in writing by the Commissioner, are each entitled to appear personally or, alternatively, by a duly admitted legal practitioner: s 15, TAA. The Commissioner is not, however, ultimately responsible for the Commonwealth's legal business, even in revenue cases. His status is that of a party to litigation, suing not on his own behalf but as a representative of the Commonwealth. The ultimate, overall responsibility for the Commonwealth's legal business vests in the Attorney-General. That responsibility is derived from longstanding, Westminster system convention, arising from the nature of his office as the Commonwealth's First Law Officer and, expressly by statute, by virtue of the Attorney's ability to issue Legal Services Directions either generally or by reference to a particular matter: s 55ZF, *Judiciary Act 1903* (Cth). Given the representative capacity in which the Commissioner is a party to proceedings, he and those who appear for him are subject to the duties in litigation which fall upon the Crown, Ministers and departments, agencies and other officers of the Commonwealth. The Commissioner's high office and important responsibilities mean that he has a special responsibility to lead by example in discharging these duties.

167 It is now more than a century ago that, in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, a case to which a subordinate of the Commonwealth's chief revenue officer of an earlier era, the Comptroller General of Customs, was a party, Griffith CJ felt obliged to state, at 342:

> I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

The "standard of fair play to be observed by the Crown in dealing with subjects" to which Griffith CJ referred was not, in 1912, a new subject. Part of the constitutional history of the United Kingdom and, thus, derivatively, our own, was oppressive, unlawful behaviour by the Crown in the 17th century in the imposition, collection and recovery of taxes and a resultant and vicious civil war leading to regicide and not a republican ideal but military dictatorship.

The later restoration of the monarchy was on terms that evolved into the constitutional separation of powers, legislative, judicial and executive and what we have come to know as the Westminster system of responsible government, each feature of which is to be found in the Australian Constitution. The standard of fair play expected of the Crown and its officers in litigation is a standard in keeping both with the avoidance of behaviours that, in an extreme form, led to the civil war and with the later constitutional settlement. Once this heritage is understood, the requirement for its observance is, or should be, as Griffith CJ stated, "elementary".

168 The standard expected of the Crown is not one diminished by the passage of time since the Restoration, much less since 1912, as this Court and others have, in the circumstances of particular later cases, felt obliged to highlight. Then, as now, there is a vital public interest in the maintenance of confidence in administrative government. This point was well made by Finn J in *Kelson v Forward* (1995) 60 FCR 39 at 66:

> A shared concern both of courts and of public administrators within their particular spheres is with securing "good administration". While the respective emphases in, and understandings of, this may differ on occasion, the concern itself is a manifestly desirable and proper one. In the law, securing good administration can properly be said to be an organising idea for a group of principles which, in exacting procedural fairness, are designed to maintain public confidence in the integrity of administrative government: see e.g. *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Consolidated Press Holding Ltd v Commissioner of Taxation* (1995) 57 FCR 348 at 357-358.
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> In Commonwealth administration the concern has had a somewhat different focus. The reforms of the last decade and more - see generally The Australian Public Service Reformed (December 1992, AGPS) - have seen an accentuated emphasis on service delivery, performance and results. This emphasis has its own, acknowledged risks. As was said in Accountability in the Commonwealth Public Sector (June 1993, AGPS, p 15):
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> > "In moving the public servant's attention to focusing more on results, care has been taken to balance this against the traditional concerns for probity and due process. Due process, fair dealing and the clear requirement to work within the law continue to be mandatory, but are not sufficient in themselves as a focal point for public servants."

For all these reasons, the importance of absolute integrity on the part of the Commissioner and those representing him in the collection and recovery of tax cannot be over-emphasised.

169 The "standard of fair play to be observed by the Crown in dealing with subjects" in litigious business, termed the duty to act as a model litigant, antedates and, if anything, is more onerous than the duty which all parties and their lawyers have in proceedings before this Court to assist in the achieving of the "overarching purpose" of facilitating the just resolution

of disputes according to law and as quickly, inexpensively and efficiently as possible: s 37M and s 37N, *Federal Court of Australia Act 1976* (Cth).

170 As I have observed, the Tribunal's denial of procedural fairness to Mr Shord in relation to the employment issue is patent. After the Tribunal made its decision and published its reasons, that jurisdictional error ought, ideally, upon a study of those reasons, to have been manifest to the Commissioner and to those advising him. Only the Commissioner had been legally represented before the Tribunal and it was via his lawyer that he expressly made the factual concession in question. Had the Tribunal's error been noticed, and it was not, there ought, given the concession, forthwith to have been a proactive acknowledgement of this error in dealings with the Tribunal and those acting for Mr Shord. That may or may not have obviated an appeal under s 44 of the AAT Act.

171 When a s 44 appeal did materialise, raising as a question of law whether the Tribunal was entitled, in relation to s 23AG(7) of the ITAA 1936, to find that Mr Shord was not an employee, another opportunity for the Commissioner to have conceded that, in the circumstances prevailing before the Tribunal, which materially included his factual concession, that the Tribunal's decision entailed this jurisdictional error was lost, apparently because the ramification of the Commissioner's concession was not appreciated. That not having occurred, when, finally, Mr Shord came to identify with precision the procedural fairness error in a proposed further amendment to the notice of appeal, the Commissioner should not just have not opposed the amendment but readily consented to it and actively promoted the upholding of that ground. That is how a model litigant ought to behave. It does not follow from that that the Commissioner was, in the particular circumstances, duty bound to concede the appeal. He was perfectly entitled to advance any reasonably arguable submission which was unaffected by the jurisdictional error he conceded.

172 An example of model litigant behaviour by the Commissioner in a s 44 appeal is offered by *Palmer v Commissioner of Taxation* (1999) 99 ATC 4514. In that case the Tribunal had, by oversight, failed to allow to Mr Palmer particular deductions which necessarily flowed from findings of fact which the Tribunal made. Mr Palmer challenged this failure by way of the statutory appeal to this Court's original jurisdiction but failed to appear on the hearing of the appeal. The Commissioner did not seek the dismissal of the appeal for want of prosecution, based on that non-appearance. Instead, as Dowsett J, at [1], acknowledged, the Commissioner "appropriately and helpfully" drew the Court's attention to the errors and promoted orders

which ensured that there was a variation of the Tribunal's decision which resulted in Mr Palmer's being taxed according to law. An example of model litigant behaviour in the appellate jurisdiction is offered by *SZLPO v Minister for Immigration and Citizenship (No 2)* (2009) 177 FCR 29. The result, initially, in that case was a judgment in favour of the respondent Minister. After that judgment had been handed down, the Minister's solicitor drew to the attention of the Court an omission by the Court to deal with one of the grounds of appeal. The proceedings were reopened and, upon consideration of this other ground of appeal, the Court decided that its earlier judgment should be set aside and that the appeal ought to be allowed.

173 In making these observations, I do not under-estimate the difficulties presented to the Commissioner and his representatives by the unfocussed way in which Mr Shord came to challenge the Tribunal's decision and, for that matter, the judgment of the primary judge. If anything though, those difficulties made it all the more imperative that the Commissioner and those advising him proactively concede the patent jurisdictional error once it emerged with clarity. The fact that an express factual concession had been made before the Tribunal in relation to the fact of employment was not exclusively within the knowledge of the Commissioner and his representatives but it was within their knowledge. It is, to say the least, most regrettable that this patent jurisdictional error was not drawn to the Tribunal's attention by the Commissioner forthwith after the decision was published or, that not having occurred, that it was not appreciated and then conceded in the original jurisdiction or, that also not having occurred, that the absence of error in the Tribunal's conclusion with respect to the employment issue was maintained by the Commissioner until, in the very course of the hearing of the appeal, the exchange with the Commissioner's counsel mentioned earlier occurred. Even more so is this conduct regrettable in light of this Court's recent reminder to the Commissioner of his model litigant responsibilities in another appeal heard in Western Australia: *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166.

174 It has been opined that, "Other than expressing their opinion, however, there are few tools available to the courts to hold government litigants accountable to the standards of conduct expected of model litigant.": Z Chami, "The Obligation to act as a Model Litigant", paper presented at the 2010 Australian Institute of Administrative Law National Administrative Law Forum, Sydney, 22 July 2010: (http://www.austlii.edu.au/au/journals/AIAdminLawF/2010/28.pdf – accessed 19 March 2017). That, with respect, is not so. Departures from model litigant behaviour can, in particular circumstances, constitute professional misconduct,

a contempt of court or an attempt, contrary to s 43 of the *Crimes Act 1914* (Cth), to pervert the course of justice. In the circumstances of the present case, given that the concession but not its ramification was mentioned to the primary judge by counsel for the Commissioner, it appears to me that the lack of a ready concession of the jurisdictional error was just the result of a lack of understanding, removed only by the direct exchange mentioned. Given that experience, and a patent absence of any bad faith, there the matter should rest, save perhaps in respect of costs.

175 I turn then to the remaining issue.

176 In respect of the years ended 30 June 2006 to 30 June 2011 there was a separate issue as to whether Mr Shord was entitled to tax offsets for foreign income tax paid pursuant to s 770-10(1) of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997).

177 Also in respect of this issue, the Tribunal found that Mr Shord had failed to discharge the onus of proof which fell on him. Materially, the Tribunal stated (at [55] and [96]):

> 55. Apart from Brunei, the laws of all countries in which Mr Shord worked during the Relevant Period provided for the imposition of personal income tax. In his Witness Statement (at [21]: see para 49 above) Mr Shord states that his income tax for his overseas work in the Relevant Period was paid directly or on his behalf by his overseas employer. However, there is no evidence of this. Further, there is no evidence that Mr Shord himself paid personal income tax in any of the foreign countries in which he worked during the Relevant Period.
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> 96. Mr Shord has not produced evidence to support an entitlement to any foreign income tax offset, or the quantum of any such offset, during the years ended 30 June 2006 to 30 June 2011. Specifically, there is no evidence that Mr Shord paid any foreign income tax on the foreign source income he derived whilst working overseas in the Relevant Period. Accordingly, Mr Shord has failed to positively establish what must be done to correct the Amended Assessments: *Trautwein v FCT* (1936) 56 CLR 63; [1936] ALR 425; *FCT v Dalco* (1990) 168 CLR 614; 20 ATR 1370; 64 ALJR 166; 90 ATC 4088; 90 ALR 341.

178 Before the learned primary judge, Mr Shord submitted that these conclusions were not reasonably open. This submission was rejected by his Honour. His Honour found that the material placed before the Tribunal by Mr Shord did not rise higher than assertions which were not even specific as to the nature of any tax paid either directly or on his behalf by the entity which had engaged him:

> 31 ... It is correct that the appellant gave evidence that his income tax was paid directly or on his behalf by his employer. The Tribunal noted this at [55].