

## Chapter 2

### Productivity Commission recommendation regarding model litigant obligations

2.1 On 5 September 2014 the Productivity Commission reported to the Australian Government regarding its inquiry into access to justice arrangements. The report was publicly released on 3 December 2014.<sup>1</sup>

2.2 Recommendation 12.3 of the inquiry was as follows:

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 ombudsmen for parties who consider model litigant obligations have not been met.
- State and Territory Governments should provide appropriate assistance for local governments to develop programs to meet these obligations.<sup>2</sup>

2.3 The Explanatory Memorandum (EM) for the bill states that the bill 'enacts this recommendation as it relates to the Commonwealth'.<sup>3</sup> As noted in Chapter 1, the Selection of Bills Committee suggested that the committee may consider whether the bill appropriately responds to the Productivity Commission's recommendation.<sup>4</sup>

#### **The Productivity Commission's inquiry and the government's response**

2.4 The Productivity Commission's inquiry considered a broad range of access to justice issues across states, territories and the Commonwealth, one of which related to model litigant obligations.<sup>5</sup>

2.5 Participants in the Commission's inquiry generally supported model litigant obligations but expressed various concerns. The Commission grouped these concerns

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1 See Productivity Commission, 'Access to Justice Arrangements', <https://www.pc.gov.au/inquiries/completed/access-justice> (accessed 28 November 2018).

2 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014, Volume 1, p. 442.

3 Explanatory Memorandum, Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (Explanatory Memorandum), p. 1.

4 Selection of Bills Committee, *Report No. 15 of 2017*, 7 December 2017, Appendix 1.

5 See Productivity Commission, section 12.2, 'Model litigant rules to address power imbalances', *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014, Volume 1, pp. 429–442.

into three areas—coverage, content and compliance—noting that compliance was the major source of concern.<sup>6</sup> The Commission made the following observations:

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.

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.<sup>7</sup>

2.6 A key point identified by Commission was as follows:

Governments and their lawyers use model litigant rules to guide their behaviour. Evidence on their effectiveness is mixed. While good in theory, in practice it appears that they are not always enforced. Compliance and enforcement need to be more even and transparent.<sup>8</sup>

2.7 On 29 April 2016 the Australian Government released its response to the Productivity Commission's report.<sup>9</sup> With respect to recommendation 12.3, the government noted that the model litigant obligation, set out in paragraph 4.2 and Appendix B of the *Legal Services Directions 2005* (now superseded by the *Legal Services Directions 2017*), requires the Commonwealth and its agencies to act honestly and fairly in handling claims and litigation. The government further stated:

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.

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.

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6 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014, Volume 1, p. 431.

7 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014, Volume 1, p. 18.

8 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014, Volume 1, p. 419.

9 Attorney-General's Department, 'Response to the Productivity Commission's report into access to justice arrangements', <https://www.ag.gov.au/LegalSystem/Pages/response-to-report-into-access-to-justice-arrangements.aspx> (accessed 28 November 2018).

The Compliance Framework, introduced in 2013, emphasised greater agency responsibility for understanding the Directions and ensuring compliance, with the Office of Legal Services Coordination's role being to receive alleged breach notifications to identify systemic issues and deficiencies in understanding or operation of the Directions.

Where an individual is unhappy with the handling of their complaint by an agency, they may seek a review by the Commonwealth Ombudsman.<sup>10</sup>

## 2.8 The EM takes issue with this response:

The Government stated that compliance is a matter between the Attorney-General and the relevant Commonwealth agency or Department, and that any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth. However, this ignores the reality that current model litigant obligations include obligations to not rely on unnecessarily technical arguments, to keep costs to a minimum and to avoid delay, with the consequence that making these obligations enforceable is likely to reduce costs, delays and the use of unnecessarily technical arguments.<sup>11</sup>

## Issues raised in evidence

2.9 Some submitters were of the view that the bill implements the Productivity Commission's recommendation.<sup>12</sup>

2.10 The Rule of Law Institute noted that the Commission's inquiry was 'detailed, thorough and independent'. It also suggested that government departments, 'being the very targets of the model litigant rules, are hopelessly conflicted and their claims should be carefully scrutinised'.<sup>13</sup> Moreover, the Institute took issue with the government's response to the Commission's inquiry, and submitted that the bill 'faithfully carries out' the Commission's recommendation.<sup>14</sup>

2.11 In contrast, the Australian Taxation Office firmly agreed with the government response to the Productivity Commission's report.<sup>15</sup> Further, the Department of Human Services and the Attorney-General's Department both expressed concern that the bill goes beyond the Productivity Commission's recommendation.<sup>16</sup>

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10 Australian Government, *Productivity Commission recommendations implemented by the Australian Government*, April 2016, pp. 4–5.

11 Explanatory Memorandum, p. 1.

12 See, for example, Australian Lawyers Alliance, *Submission 6*, p. 4; Rule of Law Institute of Australia, *Submission 18*, pp. 7–8.

13 Rule of Law Institute of Australia, *Submission 18*, p.5.

14 Rule of Law Institute of Australia, *Submission 18*, pp. 7–8; also see Mr Malcolm Stewart, Vice-Chairman, Rule of Law Institute of Australia, *Committee Hansard*, 14 June 2018, p. 16.

15 Australian Taxation Office, *Submission 3*, p. 7.

16 Department of Human Services, *Submission 1*, p. 3; Attorney-General's Department, *Submission 10*, p. 7.

2.12 The Attorney-General's Department posited that while the recommendation 'focuses on an avenue of complaint to the relevant ombudsmen', the bill proposes that complaints about the obligation could be raised to affect substantive court proceedings, and courts would be expected to adjudicate compliance.<sup>17</sup> A departmental representative explained:

In effect, the Productivity Commission was talking about access to justice on a national basis—Commonwealth, state and territory—and talked about ensuring the model litigant obligation was able to be oversighted by a direct complaint mechanism through to the Ombudsman. In the department's view the bill goes beyond that recommendation by elevating that complaint to a substantive issue that can be brought before the court and then it is unclear in how the court is expected to deal with any report or investigation outcome of the Ombudsman. In terms of the types of people that it applies to, the definition of 'Commonwealth litigant' expands the obligation to more former bodies, former individuals and former Defence Force people as well, which would then result in the obligation being expanded, which I'm not really sure was part of the Productivity Commission's recommendation.<sup>18</sup>

2.13 The Attorney-General's Department highlighted that existing processes, including an avenue of complaint to the Commonwealth Ombudsman, already exist. As such, 'the key elements of the Productivity Commission's recommendation are therefore already in place at the Commonwealth level.'<sup>19</sup>

2.14 In response to the suggestion that the bill is not inconsistent with the Commission's recommendation, the department stated that if it was 'looking to implement that recommendation, we would be limiting it to looking at a role for the Ombudsman.' The bill, it observed, is 'not necessarily inconsistent' with the recommendation, but introducing interaction with a court 'brings in a different layer'.<sup>20</sup>

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17 Attorney-General's Department, *Submission 10*, p. 7.

18 Ms Susan Whitaker, Principal Legal Officer, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 41.

19 Attorney-General's Department, *Submission 10*, p. 11.

20 Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 14 June 2018, p. 42.