



RULE OF LAW
INSTITUTE OF AUSTRALIA

info@ruleoflaw.org.au
www.ruleoflaw.org.au

17 December 2015

Mr Andrew McLoughlin
Deputy Inspector-General of Taxation

Dear Andrew

**Submission to Review into the Taxpayers Charter and Taxpayers Protections and
Model Litigant Rules**

The Rule of Law Institute of Australia thanks the Inspector General of Taxation for the opportunity to make a submission to this Inquiry.

The Institute is an independent, non-partisan, not-for-profit body. It does not receive any government funding. The Institute currently employs three high school teachers who predominately teach Rule of Law in secondary schools in Victoria, New South Wales and Queensland including regional areas.

The objectives of the Institute include reducing the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

The model litigant rules are very important in the administration of law. Nowhere is this more so than in the administration of tax laws, which are complex and uncertain.

Taxpayers need to be confident that the tax laws will be administered fairly. The model litigant rules seek to impose the basic duty of fairness on all Commonwealth agencies, including the ATO. These rules should be enforceable and complaints dealt with transparently.

We enclose our submission.

Yours faithfully

Robin Speed
President

REVIEW INTO THE TAXPAYERS CHARTER AND TAXPAYERS PROTECTIONS

SUBMISSION ON MODEL LITIGANT RULES

1. The Rule of Law Institute of Australia supports the recommendation of the Productivity Commission that the Australian Taxation Office, as an agency of the Commonwealth, be subject to enforceable model litigant rules, including the establishment of a formal avenue of complaint to a government ombudsman.

2. The Institute submits that the recommendation is best achieved by having the Inspector-General of Taxation deal with complaints of breaches of the model litigant obligations by the Australian Taxation Office, subject to the overriding jurisdiction of the courts.

3. The Institute further submits that the Inspector-General should monitor complaints of breaches of the model litigant obligations by the Australian Taxation Office and publicly report annually on them.

1. AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION

The Australian Government Productivity Commission has made the following recommendation:

RECOMMENDATION 12.3

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 compliance 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.

Access to Justice Arrangements (2014)

2. THE ATO IS AN AGENCY OF THE COMMONWEALTH

The Productivity Commission has recommended that the Commonwealth and its agencies be subject to enforceable model litigant obligations. The Australian Taxation Office (ATO) is a Commonwealth agency.

The ATO administers a complex tax system, which is one of the most difficult to understand and apply in the world.

“Opening the Tax Act is like entering the door to a parallel universe,”

Chief Justice Keane told The Australian Financial Review in his first interview in the job. Federal tax legislation runs to almost 16,000 pages.

“It’s really hard. At the end of the day, our job is to make the best we can out of what emerges from the sausage machine.”

Chief Justice of the Federal Court, Patrick Keane quoted in the Australian Financial Review in 2011.

Notwithstanding this complexity, the responsibility for understanding and applying the system falls not on the ATO, but on the least able to do so, the Australian taxpayer, who neither created nor administrates the system.

Self-assessment is of no benefit to taxpayers.

It imposes on them the responsibility of getting their assessment correct.

A taxpayer must lodge a tax return and make his or her assessment of tax within 4 months of year end.

The ATO then has up to 2 years or 4 years (for business taxpayers and others) to check the assessment and if it thinks the assessment is wrong to issue an amended assessment.

In issuing an amended assessment interest is imposed from the date the taxpayer’s tax return was due and in addition, a penalty of up to 75% of the tax in question may be payable.

The amended assessment is subject to objection rights and to appeal rights to the courts. However, the cost of litigating a dispute with the ATO in court is far beyond the reach of the vast bulk of taxpayers and only open to the wealthy or big business.

The overwhelming majority of taxpayers want to comply with the system but they make mistakes in working out what is required of them and they make mistakes as to compliance.

The ATO is perceived by taxpayers as all powerful, and this perception is frequently the reality.

In this environment it is essential that taxpayers believe that the ATO will administer the system fairly.

If they consider that the ATO has not acted fairly it is essential the perceived breach is promptly reviewed by another independent Government department, such as the Inspector-General for Taxation and if necessary, action is taken in court to force compliance.

It is also essential to maintain the integrity of the system that alleged breaches are properly recorded and the results of enforcement known. Public recording of alleged breaches and the outcome of complaints helps to maintain confidence in the fairness of the system.

The Productivity Commission's recommendation applies to the Commonwealth and all its agencies.

The ATO is a Commonwealth agency and there is no reason to exempt the ATO from the recommendation.

No comment is made on any other Commonwealth agency, which may not administer such a complex system, with the perceived and actual power of the ATO.

3. CONTENT OF MODEL LITIGANT RULES

The Commonwealth and its agencies have been subject to the model litigant rules contained in “Appendix B” to the Legal Services Directory 2005 for over ten years.

They have every opportunity to be fully aware of them and what is required.

The Rule of Law Institute submits that these rules should now be the rules which are enforceable.

4. COURT ENFORCEMENT OF MODEL LITIGANT RULES

The Rule of Law Institute supports the recommendation of the Productivity Commission that the model litigant rules be made enforceable.

Court enforcement is the necessary overriding sanction for a breach of the rules.

If any breaches are found, it would be up to the court to make appropriate orders.

It is however, expensive and often is not quick to apply to a court for an order of compliance. As the Productivity Commission recognised there needs to be in addition, a formal avenue of complaint to government ombudsmen for parties who consider model litigant obligations have not been met.

5. THE PRODUCTIVITY COMMISSION RECOMMENDED A FORMAL AVENUE OF COMPLAINT OF BREACHES TO A GOVERNMENT OMBUDSMAN

The Productivity Commission recommended that in addition to court enforcement there be a formal avenue of complaint to a government ombudsman for parties who consider the model litigant obligations have not been met.

Taxation matters require a government ombudsman which specialises in tax.

The Inspector General of Taxation fulfils this role.

His sole function is taxation.

He has the staff who are tax experts, he has the staff who are trained to deal with tax complaints and he has the public credibility to fulfil the role.

It is submitted that the Inspector-General handle complaints of breaches of the model litigant rules.

6. THE PROCEDURES AND POWERS OF THE INSPECTOR-GENERAL

To ensure that taxpayers have confidence that the ATO will discharge the model litigant obligations it is necessary that the Inspector General has strict procedures and appropriate powers to handle complaints. Strict procedures are required for the taxpayer and to prevent undue interference with the proper administration of the ATO.

The following is suggested:

- (1) A taxpayer should be required to lodge a short written statement of the complaint with the Inspector-General and the ATO, and pay an appropriate fee.
- (2) Within 56 days the ATO should be required to respond. In this period the ATO may rectify the situation to the satisfaction of the taxpayer.
- (3) If the ATO does not respond within the 56 days a breach should be assumed.
- (4) If the ATO responds the taxpayer should be given a copy and in turn, be required to respond within a further 28 days.
- (5) The Inspector General should be required to make a finding within a further 28 days whether there has been a breach or an assumed breach.

The finding of the Inspector-General would not be enforceable.

It is expected that the ATO will voluntarily comply with a finding of a breach by the Inspector-General.

But if not, the taxpayer may commence court action for a breach and if the Inspector-General has found that there was a breach, the onus of proof would be on the ATO to prove there was no breach.

7. CULTURE OF THE ATO

It is important that taxpayers are treated fairly and have no reason to fear discrimination from the ATO for complaining.

In this regard it is essential that the culture of the ATO changes to recognise that officers must act fairly and must be seen to so act. It needs to acknowledge and embrace the model litigant rules as setting acceptable standards and boundaries, with the aim of resolving disputes efficiently and appropriately.

The role of the ATO has to be one of administering the law fairly regardless of what tax is at issue. It should not be seen as seeking to interpret the law to get the maximum tax. An air of neutrality needs to be maintained, as the ATO has no private interest. This is why the Australian Government Solicitor should act for the ATO rather than a commercial firm of solicitors. The Australian Government Solicitor brings an air of neutrality, which a commercial firm of solicitors cannot.

8. THE PRODUCTIVITY COMMISSION HAS RECOMMENDED THAT BREACHES BE MONITORED

The Productivity Commission has recommended that breaches of the model litigant obligations be monitored by a Government ombudsman.

This is essential to have faith in the fairness of the system.

At present the treatment of complaints is not transparent.

It is therefore not surprising that taxpayers consider this means one rule for them and another for the ATO. It leads to dissatisfaction and a belief that taxpayers are not treated fairly.

It is submitted that as the Inspector-General is considered the appropriate body to handle complaints, it should monitor and report on breaches.

The Inspector General should publish in his public annual report details of the alleged breaches and the results of the complaints.

9. AT PRESENT THERE IS NO PUBLIC MONITORING OF COMPLAINTS

At present there is no public monitoring of complaints of breaches of the model litigant obligations.

Within the Attorney General's Department is a special section, the Office of Legal Services Coordination (OLSC) that coordinates and administers the model litigant obligations. The OLSC is not responsible for the provision of legal advice to agencies on the application of the obligations in particular circumstances, or for the handling of agency legal issues, their legal matters, or the legal risk of agencies. Its role is essentially educational.

Commonwealth agencies are required to report to the OLSC as soon as practical about any possible or apparent breaches of the model litigant obligations.

After each financial year the accountable authority of each Commonwealth agency must provide a certificate setting out the extent to which they believe the agency has complied with the model litigant obligations.

The Attorney General's Department Annual Reports has published statistical data on breaches of the Legal Services Directions 2005, of which the model litigant rules are part. The Annual Reports provide information on the number of breaches investigated per year, as shown on Table 1 below. However, they do not disclose specific data about breaches of the model litigant obligations as distinct from other breaches.

The table below sets out the data recorded on breaches from the Attorney-General's Department Annual Reports and the Office's website from 2003 onward.

Year	Established Breaches	Examined and not Found to Involve Breach	Still Under Investigation	Carried Forward	Total
03/04	8	3	5	-	16
04/05	21	10	10	5	41
05/06	6	22	11	10	39
06/07	14	22	15	11	51
07/08	9	15	40	15	64

08/09	35	19	16	40	70
09/10	24	30	6	16	60
10/11	17	8	16	6	41
11/12	42	18	50	16	110

Data for 2013/14 and 2014/15 is reported on the OLSC’s website in the following manner (accessed 18/12/2015):

	Matters Carried Forward	New matters	Examined and found non-compliant	Examined and found compliant	Matters still under review at year end
2014-15	42	90	30	77	10
2013-14	10	67	5	30	42

“In 2014–15, OLSC recorded 30 substantiated instances of non-compliance. Of these matters:

- Sixteen related to the model litigant obligations
- Five related to the performance of tied work by non-tied work providers
- Five related to procuring legal services from external legal providers not listed on the Legal Services Multi-Use List
- Two related to the engagement of counsel without an approved Commonwealth rate
- Two related to the process for seeking constitutional law advice
- One related to the process around reporting on significant issues.

One instance of agency non-compliance comprised two issues.”

(Office of Legal Services Coordination website, accessed 18/12/2015, <<https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Complianceandreporting.aspx>>)

The Attorney-General’s Department was asked about its compliance with the model litigant obligations by the Parliamentary Joint Committee on Corporations and Financial Services hearing on 11 March 2011 (Joint Committee Corporations and Financial Services, 11 March 2011 above n17, CFS 11) (‘Oversight of the Australian Securities and Investments Commission’). In particular, the Committee asked the Office representative whether the ‘office ... conduct[s] its own review of ASIC in terms of all its litigation ... [or an] annual review’ (Ibid, CFS14). In response, the representative from the Office stated:

‘No ... we are a smaller regulator ... The general kind of staffing profile in the office would be about 14 people ... In terms of the way we approach compliance with the directions, we have to very much be selective in our approach’.

The representative added ‘it is not really that productive for us to scan newspapers and then ring agencies. I think they are a good reporter ... We kind of put our efforts into the front end of trying to help people understand how to comply’ (Ibid, CFS15).

The Office representative also stated:

‘[the] primary role of the OLSC is to facilitate compliance with the directions predominantly through education and outreach. OLSC officers visit agencies and conduct training on the directions. We maintain a website that sets out information, including guidance notes and other information to assist agencies and members of the public who may have concerns about an agency’s conduct (Ibid, CFS12).

When the Committee questioned the Attorney-General’s Department representative in 2009 about ASIC’s capability to comply with the model litigant rules the reply was:

‘ASIC is very aware of what its obligations are under the Directions.’

‘ASIC does take quite seriously the requirements and attempts to ensure that it complies with the kinds of standards of fairness that the model litigant obligation requires.’

During debate in 1999 under-resourcing of the Office appears to be a key problem.

On amendments to the *Judiciary Act 1903 (Cth)* in 1999, Opposition spokesman Senator Nick Boukus stated that the Office had:

[A] wide ranging task. It is a task which covers the breadth of government. The office established to perform such a task was originally staffed by only three people. Given that the Commonwealth manages some 15,000 pieces of litigation per year, it was and continues to be our concern that this function

could not be adequately performed with the resources allocated. Now the Government has said that it will apply six staff to this function. However, it is fair to say that our concerns ... still remain in respect of the administration of the directions under this part of the government's proposal.'

'In essence, model litigant rules will become meaningless if there is inadequate means to enforce them ... the Government should agree to increase the resources of the Office of Legal Services Coordination to ensure it can meet the full range of function intended for it.' (Senator Balkus Second Reading Speech, 8th March 1999, Senate Hansard, 2402-3).

In 2005 the Australian National Audit Office Report stated that the Office relies heavily on reporting either by agencies or on complaints from other resources. There is also no formalised complaints system. The Report further noted that the Office does not commonly discover breaches, and 'does not proactively monitor agency's compliance with the model litigant obligations'.

The 2009 Blunn Krieger 'Review of Commonwealth Legal Services Procurement' noted [w]hile the [Legal Services Directions] ... detail requirements and impose a number of restrictions on agencies, they provide little in the way of assistance to those agencies in achieving the delivery of efficient and effective legal services'.

END