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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

Submissions regarding the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

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

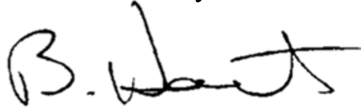
There are two further minor considerations. Firstly, proposed section 55ZGA(2) requires the applicant to make an application to the court for an order staying a proceeding. We note that many self-represented litigants are not familiar court proceedings and are unlikely to understand the technical requirements 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.

Yours faithfully



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