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Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

(Public)

THURSDAY, 14 JUNE 2018

SYDNEY

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Thursday, 14 June 2018

Members in attendance: Senators Kim Carr, Hinch, Leyonhjelm, Ian Macdonald, Pratt.

Terms of Reference for the Inquiry:

To inquire into and report on:

Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017.

WITNESSES

BRODNIK, Ms Kate, Senior Policy Solicitor, Queensland Law Society **20**

DUNN, Mr Matt, General Manager, Policy, Public Affairs and Governance, Queensland Law Society **20**

GIFFORD, Mr Cameron, First Assistant Secretary, Attorney-General's Department **34**

KLUGMAN, Dr Kristine, President, Civil Liberties Australia **9**

LAYSON, Ms Sally, Treasurer, Rule of Law Institute of Australia **14**

MANTHORPE, Mr Michael, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman **43**

MORRISON, Dr Andrew RFD AC, National Spokesperson, Australian Lawyers Alliance **20**

PHILLIPS, Mr Ken, Executive Director, Self-Employed Australia **1**

ROWLINGS, Mr William, Chief Executive Officer, Civil Liberties Australia **9**

STEWART, Mr Malcolm, Vice-Chairman, Rule of Law Institute of Australia **14**

TANNA, Mr Grahame, Acting Deputy Commissioner, Review and Dispute Resolution, Australian Taxation Office **25**

TAYLOR, Mr Ken, President, Queensland Law Society **20**

TODD, Mr Jonathan, ATO General Counsel, Australian Taxation Office **25**

WALSH, Mr Rodney Lee, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman **43**

WANDMAKER, Ms Kate, Principal Lawyer, Office of the Commonwealth Ombudsman **43**

WHITAKER, Ms Susan, Legal Officer, Attorney-General's Department **34**

PHILLIPS, Mr Ken, Executive Director, Self-Employed Australia

Committee met at 10:06

CHAIR (Senator Ian Macdonald): I call to order this hearing of the Senate Legal and Constitutional Affairs Legislation Committee dealing with an inquiry into a bill that's been submitted to the Senate called the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017. These are public proceedings being broadcast live via the web. All witnesses should be aware that, in giving evidence to the committee, they are protected by parliamentary privilege, and it's unlawful for anyone to threaten or disadvantage a witness on account of the evidence given to a committee. Any such action may be treated by the Senate as a contempt.

The purpose of this hearing is to, as I mentioned, support the committee's inquiry's into the model-litigant-obligations bill. I do note from the written submissions we have received and from the bill itself that the bill relates to the conduct of Commonwealth litigants. I appreciate that witnesses may give evidence in relation to particular litigants. If any witness names or reflects adversely on a particular individual or organisation, the resolutions of the Senate and, quite frankly, natural justice require that the committee bring this evidence to the attention of the named individual or organisation and allow them an opportunity to respond.

The committee prefers to take evidence in public; however, under the Senate resolutions, witnesses have the right to request to be heard in camera. If anyone is in that situation, they should let the committee know as soon as possible, and the committee can then determine whether or not to take the evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken.

The committee has agreed that answers to questions on notice at today's hearing be returned by 12 pm on 18 June. If witnesses do take questions on notice, it's likely that the witnesses will not have access to the *Hansard* transcript until after that deadline has passed. We have set 18 June as the time when questions taken on notice should be returned, but sometimes that's a bit hard if the *Hansard* is not out by then. In all likelihood, it would be out about then or a little bit later, but, if it's not possible to do that by 18 June, the answers should be provided as soon as possible after 18 June so the committee can see them.

We also, as Senate committees, acknowledge that there could be media interest, and we allow the media to be here subject to the witnesses to the witnesses not having any objection and subject, of course, to certain protocols of which I think the media are aware, relating to not recording any of the written material of either the senators or the witnesses. Apart from that, the media are welcome here.

With that, Mr Phillips, I welcome you as a representative of Self Employed Australia. I understand we have provided you with some information on parliamentary privilege and protection of witnesses. We ask you to make an opening statement. We do have your submission. At the end of your opening statement I'll ask members of the committee to put some questions to you. Over to you.

Mr Phillips: Thank you very much. I congratulate the committee on the initiative of this bill. We see it as an exceedingly important bill. We are very strongly in favour of it and we are delighted by and thank you for the opportunity to put our views to you in terms of support for the bill. I'd also like to thank the secretariat for their communication with me over the last few weeks in guiding me in terms of the process and certain frameworks around that. I hope that I stick to those frameworks and remember them.

A point of clarification to start off with: I'm not a lawyer. I'm not an accountant. I am a small-business person, and so the comments I make are within the ambit of the pub test, for want of a better phrase—how the small-business person would see things—and so, if I have put positions or made statements that are not strictly in accordance with the law, I'm more than happy to have eminent lawyers correct me on those things.

CHAIR: I'm not sure there are any of them here, actually!

Senator LEYONHJELM: There are lawyers; it's the eminence!

CHAIR: Indeed!

Mr Phillips: I also note that our submission was published only yesterday and that the ATO was given an opportunity to read our submission before it was published and to write a response. To make you aware: I have not read that response, so I don't know about it or its content. I'm not in a position to make comment on that and won't.

CHAIR: Have we made that available to you?

Mr Phillips: It was published, but it was only last night, and I haven't had time to read it.

The other thing to note in terms of clarification is that I'm aware that the model-litigant bill and its principles apply only to litigation. Effectively, that means that, in terms of the narrowness of the bill, we are really only

talking of something that would arguably apply in, say, a Federal Court case. An action under the Administrative Appeals Tribunal would not be covered by this. We have made a recommendation in our submission to have the bill amended so it does include the AAT. The reason for that is that, of course, we look at all of this from the perspective of small-business owners. I will also clarify that my comments are only in terms of the Australian Taxation Office and small business, not the big-end-of-town stuff. We make no comment about any other Commonwealth entity in this respect. But, for all small businesses and self-employed who are in dispute with the Taxation Office, the first port of notional judicial representation is the AAT, and so we would be pleased to see the AAT embraced by this bill.

The other point in our submission is that we've spent a lot of time talking about the behaviour of the ATO towards small business in all of the lead-up to litigation, so a lot of our submissions on the face of it are not relevant specifically to the bill. The reason that we have put all of that information together is that the behaviour of the ATO in the lead-up to litigation really is determinative of the way they behave in litigation. It's particularly relevant to give you the background and understanding of what happens in the litigation process to understand what has led to that. That's why we've put a lot of emphasis on that.

There are, however, a number of cases that have gone through to litigation where comments by the judiciary on the behaviour of the ATO with their model litigant approaches are highly relevant. There is the Shord case, which we have detailed in our submission, in particular the comments by Justice Logan in relation to the ATO. He would have said non-behaviour towards model-litigant requirements is highly relevant to this inquiry, I think. We've also noted on the front page of our submission that the comments by the retired Federal Court judge Richard Edmonds are extremely relevant. He in his letter to the *Financial Review* and a subsequent follow-up made the comment that the ATO effectively ignores at its whim the decisions of single judges. I think those comments by both Justice Logan and retired court judge Richard Edmonds are extremely relevant to this inquiry. If in questions you wanted some explanations on the Logan case, I can give you some more detail on that.

To give you a background history of me and our relationship with the ATO: we were formed about 18 years ago, in 2000. We had at that time extensive discussions with Treasury. We were a key unpaid consultant with Treasury over the design of PAYG, BAS—all of that reform program, which we considered to be the largest reform to the administration of tax collection in Australia. We know and understand the principles that Treasury were applying at that time to the PAYG personal service income tax laws and so forth. You would understand those.

We have had extensive dealings with the Taxation Office over 15 years plus. I have been on ATO small-business consultative committees for most of that time. I've got to say sitting through a five-hour ATO meeting is not the most enlivening of experiences, but, even though they might not be exciting, they give us insight. We have worked very closely with the Taxation Office. The Taxation Office is terribly interested in being involved with people in the small-business area in terms of the processes, but there has been a breakdown in that relationship. I think the comments by the tax commissioner about us demonstrate the breakdown in relationship. To their credit, they have bent over backwards with us, and there are a lot of people in the Taxation Office who I have dealt with who I have enormous respect for. Their behaviour has always been professional and polite, but the outcome of the behaviours of the ATO speak to a different story. We are absolutely on the public record that that story is one of an outcome of systemic abuse of small-business people.

Our observation is that if you are upright, honest and completely forthright with the ATO you run quite a high risk of getting abused through the system. Conversely, if you play shenanigans and have an intent not to pay tax, you have a fairly high chance of getting away with it. Our interest is in a taxation system that has integrity. The importance of your bill is that it provides a trigger. If the Taxation Office finds itself in the Federal Court, knowing that it has to comply with model litigant obligations, that trigger will in our view flow down through the system, because they will not want circumstances that could lead to a stay in the Federal Court. It will have limited application for small-business people, because most small-business people can't afford to get to the Federal Court.

So, we see the bill as a very important trigger. On its own it's not sufficient, but extremely important, and we're well and truly behind it. We've been very public that we believe the Taxation Office requires a royal commission. We published our views on the reform that's required—essentially the breaking up of the ATO into two separate organisations—and we stand by that. We see the model litigant bill within the context of the broader reform that we believe is absolutely essential to bring greater integrity to the tax collection system. And I think that's probably all I need to say.

CHAIR: Thanks very much, and thank you for your submission, which contains a lot of information. Could you just give a random selection for the committee on cases where the ATO has acted in a way that you believe is not appropriate as a model litigant?

Mr Phillips: We supplied you—and you have chosen at this stage to keep it not public—the submission we made to the Inspector-General of Taxation, back in August last year, on their behaviour. To understand the behaviour of the Taxation Office it's necessary to understand, unfortunately, the intimate, almost day-by-day interface. We're well aware that parliamentarians and Senate committees and so forth don't have the time to go through that exercise. It's quite exhausting. But one can only understand if they have lived through the detail, and we have lived through the detail with quite a number of people, so we've got the body of experience. The very, very detailed—13½ thousand words—submission that you've got there gives you that detail.

Senator LEYONHJELM: What the chair was referring to is that we don't necessarily know all those details just because they're in your submission, although we all have that submission.

Mr Phillips: I'll give you the summary.

Senator LEYONHJELM: Give us a quick summary and perhaps at the end of it—

Mr Phillips: The Rod Douglass case—

Senator LEYONHJELM: Yes, that'll do.

CHAIR: And, by the way, the committee did decide earlier that we would accept that as a submission, so it will be published and go to the tax office, for the reasons I mentioned before.

Mr Phillips: The Taxation Office have had that submission since August. The Rod Douglass case, in essence--Rod Douglass was operating a partnership in 2006. Commissioner Carmody put out a statement that said that if you were a partnership you could divide the income between partners based on court rulings. Rod was doing exactly what that said. It came to about 2012 or 2015 and the Taxation Office had changed their view on the situation, and they turned around and retrospectively said that Rod Douglass had committed fraud and evasion so therefore they could eliminate the two-year limitation; they could go back to 2006. They issued him a bill for $440,000. The basis for fraud and evasion—one of the bases—was that he hadn't had an accountant's professional advice in filling out his tax return; he'd done his own tax return. I don't call that fraud. He had on all occasions declared all income at all times and been completely upfront. We supported Rod and battled that through to the Federal Court. After an 18-month or two-year period of being put through hell, the Taxation Office said in court, 'Look, we made a mistake and we withdraw.' Alleging that someone has committed fraud is a pretty heavy scene.

CHAIR: We don't really want to get into too many individual cases, but in that case, were all your costs paid and was Mr Douglass satisfied?

Mr Phillips: We are very fortunate to have some lawyers who are very generous and committed to justice. The court costs at the Federal Court level were awarded to Rod.

Senator KIM CARR: Can I ask you about Ms Petaia. You say in your submission that she got a rare apology from the ATO but is still being put through hell. What's the background of that?

Mr Phillips: So much of this and the behaviour of the ATO I liken to what happens with the churches over the sexual abuse cases and with the banks over their behaviour. At all times, it's 'deny, deny, deny'. To the credit of, I think, the deputy commissioner, they recognised that they had made a mistake and they apologised to her. They then said, 'Let's go through a compensation process.' My observation of that compensation process is a revictimisation of the victim, just as we saw with the churches and just as we saw with the banks. Large organisations behave in a particular way. It doesn't matter if that large organisation is a private sector or public sector organisation. There are certain dynamics within an organisation that cause it to behave in a certain way. Our view is that Helen Petaia had been revictimised.

Senator PRATT: Mr Phillips, is this issue in terms of a systemic culture within the ATO? I would imagine that it's not just at the point where people go to court that these issues arise, and that many people have to resolve their issues with the ATO before they ever get to court. Do you think this bill will influence things on behalf of the broader small business community dealing with the ATO? Do we need to look to driving other forms of cultural change within the agency and not just in the courts?

Mr Phillips: This bill, on its own, will have limited impact for business. It probably will have more impact for high-wealth individuals and so forth who wind up in that case. The answer is yes. We've been very clear in our submission about what needs to be done. It's not just cultural reform. An organisation will behave according to the remit that it has. The tax commissioner is the tax office, under statute. The tax commissioner has the power of a dictator. If you have dictatorial powers, those powers will be abused. So the culture is a product of the dictatorial

powers the tax commissioner has. Our view is that there is effectively no oversight of those dictatorial powers, and that oversight needs to occur and it needs to be institutionalised. If you can institutionalise that oversight, you then will get the cultural reform.

Senator PRATT: Separate to being a model litigant?

Mr Phillips: Yes, in terms of behaviour from the very beginning, right through to being in court.

CHAIR: Mr Phillips, you thanked the committee for bringing this bill forward. I should say that it's not really the committee as such; this was put up by a private senator, who happens to be Senator Leyonhjelm. We thought he might start the questioning. It is his bill that the Senate is inquiring into.

Senator LEYONHJELM: Thank you. I note your concerns that this is not the full answer. I also note your concerns that most small-business people would not take it through to the Federal Court, where the model litigant legislation, should it become an act, would apply. But I ask whether you think that, nonetheless, the ATO would never know in any particular instance whether a taxpayer was likely to take it all the way through to the Federal Court, knowing that failure to adhere to model litigant rules, even though they are not obligatory until it gets to the pre-trial stage, would nonetheless influence ATO behaviour. I am optimistic that it might, but I'm wondering what your view is.

Mr Phillips: I think there is no question of it, which is why we so strongly support the bill. I think the Shord case, with the comments by Justice Logan, was a severe embarrassment to the taxation office because it exposed their behaviour over a long period of time. The taxation office does not want to be embarrassed and their lawyers do not want to be embarrassed. If the potential for a stay were to occur, or even an application for a stay were to occur, I think that would modify the behaviours.

Senator LEYONHJELM: Of the cases you have mentioned in your submission, you might like to choose which this might have had the greatest influence on, had this been law at the time these cases were occurring. You have mentioned in your submission Rod Douglass, Helen Petaia, Mark Freeman and Mr Shord. In those instances, which ones do you think would have most benefitted by having this is an act?

Mr Phillips: I think all of them.

Senator LEYONHJELM: At what point do you think that would have had an influence? Take us through a bit of detail there.

Mr Phillips: For example, on the issue of fraud, the taxation office in our view concocts allegations of fraud and that allegation becomes at law a fact and not an allegation, which you then have to unprove. There is a whole string of processes that need to occur around that. If that thing gets into court, as with the Rod Douglass case, where the taxation office had to back down and say they had made a mistake, that opens up a whole series of sequences of processes and behaviours and games that they have played to get to that point. So it is the exposure of their internal processes: have they operated at least within the principles of a model litigant and does that then get to the point, in court, of the application of the act itself of the model litigant obligations. For example, in Helen Petaia's case I would have thought that there would have been a constraint on alleging that she had committed fraud.

Senator LEYONHJELM: Helen Petaia's case is the one that came to mind. In her case, she had received R&D grants that turned out to be perfectly legitimate R&D grants. She treated them accordingly for tax purposes. The ATO said they were income and they weren't R&D grants and were taxable income. You'll have to refresh my memory on the facts here. They denied her access to documents or something along those lines?

Mr Phillips: It is incredible stuff. The stories are quite fantastical.—

Senator LEYONHJELM: At what point would the influence of the model litigant obligations, assuming they were binding obligations if the bill were passed—at what point do you think the ATO would have said 'Yes, we are not doing the right way here.'

Mr Phillips: That is very hard to tell, because these things stretch out for such a long period of time, where people do get literally cooked over a very long period of time. One would hope that there is a point within the discipline of the ATO, and their checking systems, where someone goes, 'We've got a problem here.' They claim that they have those checking systems, but those checking systems quite clearly fail.

Senator LEYONHJELM: Which was the case where a woman's documents were all seized and because they had been seen seized she was unable to prove her bank loan—

Mr Phillips: That was the Mrs Baia case. That was a court case that I found quite amazing. She had money deposited into an account. Her records had been seized. She said that the records showed that the money was a loan, and applied to the court to have those records brought out to prove her case. The Taxation Office said that it

would be too onerous to produce those documents, and I was staggered that the court agreed with them and didn't require the documents to be produced.

Senator LEYONHJELM: So, because of the onus to disprove the ATO's allegations, the ATO had the documents she needed to disprove that and they wouldn't release them?

Mr Phillips: There is no onus on them to behave according to the normal principles of justice.

Senator LEYONHJELM: In that case, what would the model litigant obligations have done, had they been binding?

Mr Phillips: Such things as, if we go to the specifics of the model litigant obligations—which I've gone through in our submission:

… endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible.

Have they done that? I would say that the non-production of a document that would demonstrate the facts of a case would be something where you would think ordinary people would say, 'Look, you produce that, because that would avoid, prevent and limit the scope of legal proceedings.'

Senator LEYONHJELM: And it was legal proceedings in that instance?

Mr Phillips: Yes.

Senator LEYONHJELM: All she would have needed to do to invoke the effect of the model litigant bill would have been to make a complaint to the Ombudsman and, from then on, the court could have considered it?

Mr Phillips: My understanding of what the bill would have done is it would have enabled her lawyers at the time to make an application to the court for a stay of the proceedings to consider the model litigant behaviour.

Senator LEYONHJELM: I think the first step would have been a complaint to the Ombudsman—that doesn't need to have been responded to; they just need to make a complaint to the Ombudsman first—and, from then on, she could've asked the court for a stay of proceedings; I think that's correct. In that case, you think that may have—

Mr Phillips: There's no question. Take the Shord case: the Shord case was an extraordinary sequence of events. Mr Shord was a deep sea diver who worked overseas. Whether or not he had to pay tax here depended upon whether he was defined as an employee or not. The Taxation Office was saying he was not an employee; he was saying he was, when he went and worked overseas. It went to the AAT. There was a submission by the Taxation Office to the AAT that he was not an employee. But then, in the AAT hearing, the Taxation Office said, 'Look, we now agree he was an employee,' so it should've settled the matter. The decision that came out of the AAT was essentially a cut-and-paste of the ATO's earlier submission, as if what had happened in the AAT hearing hadn't occurred. The AAT ruled that he was not an employee. This was flipping backwards and forwards. Surprise, surprise: the Taxation Office didn't turn around and correct the AAT and say, 'No, no, this is wrong.' They then took it to the Federal Court and maintained their position in the Federal Court. This just seemed, again, to defy the idea of model litigant behaviour. You would have expected the ATO to stand up and say: 'Excuse me, there's an error here. We have submitted that the person was an employee, and the case should be withdrawn.' Instead, they took the technical advantage. To me, that would've been a clear breach of model litigant obligations.

Senator LEYONHJELM: I think the bill is intended to address more than malicious intent, which is taking technical advantage of the ATO's resources and knowledge, and, as you said, the advantage given to it by the law, which is that it's allowed to assert things that then have to be disproved by the taxpayer. In that context, fairness by the tax office—not taking advantage of its size, its resources, its superior knowledge and all those sorts of things in an unfair way—should not be permitted.

Mr Phillips: The Taxation Office operates under laws that are quite unlike any other principles of justice that apply in the community because what they say becomes a fact at law, not an allegation, and you have to unprove that. Because of those awesome powers, what we would call dictatorial powers, we are reliant on the Taxation Office to behave in a fair, reasonable and just manner. And when they don't, which we say is quite often, the potential for abuse and the actual abuse that occurs is quite palpable. They need the institutional constraint, and the bill would go a long way in that direction.

Senator LEYONHJELM: Your reservation about it was that it should also include the AAT, but the ATO knows that any decision in the AAT can be appealed to the Federal Court. The assumption made when the bill was being prepared was that that would be pretty influential. But you're not convinced of that?

Mr Phillips: It's going to be extremely influential for people in high-income areas who can afford to pay for the lawyers. It will be considerably more limited for ordinary people who cannot afford the legal expense. To go to the AAT, if you can't come up with about 40 grand to fight this through, you're not in the ballpark. So you're

dead before you start on this. And the ATO win most of their cases against small business people because the people cannot afford to follow it through. If you want to go to the Federal Court after the AAT, add another 40 grand, minimum, to it. Most claims in the small business area are $50,000 or $60,000—or whatever it might be—and the ATO know that they've got this advantage, and they just require people to cut deals.

CHAIR: Sorry, it's $40,000 to go to the AAT?

Mr Phillips: If you're going to line up your accountants and your lawyers and all the rest, you'll go through 40 grand pretty quickly. This is not a cheap system; this is a highly expensive system.

CHAIR: The AAT, of course, are supposed to be an easy way of dealing with administrative decisions.

Mr Phillips: This is why we've called for a small business tax tribunal. The AAT is not working.

Senator LEYONHJELM: I think they are cheaper than the court. But 'relatively' is all we're talking about.

Mr Phillips: In the AAT, of course, there's no cost jurisdiction, so what happens is you have to bear your own costs. Even if you're completely in the right, you're going to lose anyway because you're going to do tens of thousands of dollars before you even start.

CHAIR: How would you suggest that the small business tax tribunal—

Mr Phillips: We've looked at the immigration tribunal and the modelling around that, and we're very interested in that because our understanding is—again, I'm not a lawyer—that an application fee is $1,600, and the tribunal in the immigration area makes a decision which it imposes upon the immigration department. If the applicant has lost, they can still go to the courts. And, we understand, if they win they get back $800, and the immigration department can't appeal that. So, once again, I'm not a specialist in the area, but that sort of modelling is of a great deal of interest to us.

CHAIR: Have you ever made a submission to anyone about that?

Mr Phillips: We haven't had an opportunity to. We'd be very keen to.

CHAIR: You've never written to the Treasurer, for example, to say, 'You should do this'?

Mr Phillips: No, we put things out in the public domain. The process that we're undergoing at the moment is to get the issue on the table. The big issue that's been out there up to date is: 'There's no problem. There's nothing to see here, folks.' We're in the process of saying: 'There is something to see here. This is quite serious stuff.' And we really appreciate today's hearing because it does give us the opportunity to put in a public way the sorts of solutions that we're looking at.

Senator LEYONHJELM: Just on that, you did a good job of putting your view into the public domain on the *Four Corners* program, and then that was raised in estimates. So the tax office had a response to some of the suggestions that were raised there. You've made a supplementary submission, responding to the ATO's response, so you're putting it into the public domain. You might like to talk about that. But the chair's suggestion that a recommendation for a solution rather than the identification of a problem, or the repeating of the existence of a problem, can sometimes be more constructive—perhaps you'd also like to talk about that.

Mr Phillips: We, for example, spent eight years advocating to get the unfair laws through, which are now in. We're delighted with those. When we first started with that, we had people in Treasury tell us, 'There's no problem because we never get any complaints.' And now the ACCC say there is something in the order of two million contracts to be corrected. So, we've always taken the position—and we take the position here—of: describe the problem but offer a solution. We certainly have done that and would be prepared to go through that in more detail. One of the things that we accept, in offering a solution, is that what we might say isn't necessarily the outcome that may be achieved, because other people take it over and see the whole thing. It's the principles of the solution, and often you wind up with solutions that achieve the outcome in a way that we haven't particularly—

Senator HINCH: Following up on that, you said in your opening comments that you thought the ATO should be broken up into two organisations. Can you expand on that a bit.

Mr Phillips: At the moment what we have is: the ATO is the policeman, the DPP—the prosecutor—the judge, the jury and the financial hangman, all in one organisation. That breaches normal principles of good quality policing, and the Taxation Office is just a police force, no more. It's a collection agency and a police force. Under good policing, you have a police department that has to apply to the DPP and put its case about a prosecution. The DPP turns around and says: 'Look, you haven't done your homework. Go away and do it, do it properly and bring it back to us.' The ATO says that internally it has that sort of check, but it doesn't work. The dynamic inside the ATO is that everyone is protecting each other's situations.

So, what we're saying is to break the ATO up into two organisations—effectively the policeman and the DPP—and apply that good-quality principle of Public Service arrangements to the ATO. Further, having the tax commissioner as a tax dictator is really not acceptable in this day. That might've been okay in 1936, when the position was created. We're much more in favour of the tax commissioner being more like the ACCC—that is, chairman of the board, reportable to a board—and having that in both organisations. What we're saying is: have a look at what already happens in terms of institutional arrangements in the Public Service and apply those to the ATO. One of the primary protections that the people have against abuse of the system is that the state has institutions competing and checking each other. That does not occur with the Taxation Office.

CHAIR: Mr Phillips, we're rapidly running out of time. Senator Hinch has some more questions. I know Senator Pratt does, and I do too.

Mr Phillips: I'm aware I've gone well over my time.

CHAIR: No, that's our doing, not yours. Your proposal to split the tax office—has that ever been made seriously to the Treasurer of the time?

Mr Phillips: Not officially. We've certainly published it. We've put it out there in the public domain. We've got papers on it. The Taxation Office is well aware of it, I can tell you now.

CHAIR: Have you had any response?

Mr Phillips: Zero.

CHAIR: As a question on notice from me, could you summarise your summary of that into one page and send it to the committee, just very briefly. Similarly on your proposal for a migration division, a tax division of the AAT—could you do that as a question on notice on one page.

Mr Phillips: A page on each page or a page for the whole lot?

CHAIR: A page on each. I won't speak for the rest of the committee, but the chairman is a simple mind—

Mr Phillips: You require summaries.

CHAIR: We don't need to draw the fine details, but it's important that the committee can perhaps recommend to the government that this be looked at.

Mr Phillips: I have a range of very knowledgeable tax lawyers who have put a whole lot of stuff to us, and I've said the same thing.

CHAIR: Well, you know what I mean. It's for others then to go through and do the parliamentary drafting, and this bill is a very good attempt at that. If you can give us the ideas of that. I think you've mentioned it in your submission, but, as a question on notice—

Mr Phillips: A lot of this would be revisiting the proposals by Joe Hockey, when he was Treasurer, to split the ATO.

CHAIR: Joe proposed that?

Mr Phillips: Yes. It went nowhere.

CHAIR: But he was the Treasurer.

Mr Phillips: Yes.

CHAIR: Perhaps that justifies the comments you're making. The Law Council say:

… the Bill does not, as a matter of substance, provide any additional power to a Court that does not already exist by reason of the common law and the Rules of the Court.

And there's some comment about the rules of the court. In fact, I see that in your submission in your opening pages you indicate that the court has said in a couple of very notable cases that the tax office has not been the model litigant. How would you answer the Law Council's suggestion that that power already exists and this bill doesn't take it any further?

Mr Phillips: I'm not a lawyer and I wouldn't dare seek to respond to lawyers' views on this, because I don't know. What I look at is the general policy principles that would apply within a normal understanding of justice. What I do know is that when you read the model litigant requirements there are innumerable twists and turns in there, and potential outs. The legal arguments that would go around whether or not you had complied with model litigant obligations or not would be quite extensive.

CHAIR: You're talking about tax, of course, but this applies across a whole range of issues in which the Commonwealth government is involved in litigation. I agree with the proposal of this motion and you, that the Commonwealth should just play it straight down the line. If they win, they win; if they lose, they lose. It's up to

the courts to make those decisions. They put the facts and they put them fairly and they engage in a lot of the tricks of the trade that my former profession engages in as a matter of course, because that's how you win and lose things.

Mr Phillips: I've been sitting at the back of courts with cases and so forth and read a lot of judgements and so forth—why, I don't know, but I do. The Taxation Office—and, once again, I can't comment on the rest of the Commonwealth—certainly play every legal game that they can. Every technical trick that might be available is played. Every delay, every appeal—everything that you can possibly do. The honourable profession plays every game that it can no matter where you're sitting, and that's what we've certainly observed.

Senator LEYONHJELM: The argument would be that the current model litigant rules exist, but at least some Commonwealth agencies don't apply them. The Law Society argument is that because they exist that's all that's required. What you would be arguing, I think, is that their mere existence doesn't compel the Commonwealth to comply with them, and that this bill would introduce that compulsion aspect?

Mr Phillips: The model litigant obligations have no teeth as they currently stand—absolutely no teeth. It's up to the Commonwealth—

CHAIR: Because they're a legal service direction rather than a legislated—

Mr Phillips: From a practical point of view, who are you going to appeal to? You're appealing to the institutions that are the ones that are supposed to have the obligation. This is why you need something that you can go to the judiciary with. This is the traditional constitutional division of power. The judiciary are the people who are supposed to be overseeing the behaviour of the Commonwealth. If we don't give those teeth to the judiciary, the model litigant obligations are simply words on paper.

CHAIR: The one-page I asked you about, the splitting of the tax department, perhaps an easier way might be if there is a published account of what Mr Hockey was proposing as Treasurer. If you could refer that to us, that might be—

Mr Phillips: We have identified some people who were advisers to Joe Hockey at the time. We haven't spoken to them, so we haven't been able to—

CHAIR: Well, back to plan 1.

Mr Phillips: There are some people around that should be talked to.

Senator PRATT: The Commonwealth Ombudsman have made a submission to this inquiry. I wondered if you might comment on their current oversight in relation to the ATO and the effectiveness of that, noting that they currently already have the power to oversee model litigant complaints, and whether that's happening effectively or not.

Mr Phillips: Again, I'm not a lawyer, so I have to make comment within the terms of an average person's understanding of it without the specifics of it. If I make errors in my comment, I apologise up-front. Certainly with the IGT, who has oversight—the IGT can give reports and they have no legal consequence. The Ombudsman can make reports. Whether those reports have legal force, I don't know. My understanding is probably not, but I stand to be corrected on that. I don't believe that the Ombudsman can force the ATO into a situation. They make a report and the ATO voluntarily chooses to. I stand be corrected.

Senator PRATT: You think that the ATO is effectively ignoring the Ombudsman's finding? It might be a little bit more complicated than that—

Mr Phillips: According to retired court judge Richard Edmonds, the ATO is prepared to and regularly does ignore the decisions of a court. Who else are they going to ignore?

Senator PRATT: We'll have to ask the Ombudsman whether the ATO—what they do in response to their reports and findings about individual complaints. Thank you.

CHAIR: Thanks very much, Mr Phillips. We do appreciate your submissions and your evidence today. If you could let us have those—

Mr Phillips: My thanks for your interest and the guidance of the secretariat.

KLUGMAN, Dr Kristine, President, Civil Liberties Australia

ROWLINGS, Mr William, Chief Executive Officer, Civil Liberties Australia

Evidence was taken via teleconference—

[10:58]

CHAIR: I now welcome representatives from Civil Liberties Australia. I suspect that you've been to Senate committees before and understand what the proceedings are all about, so I won't go through the formalities, except to say that I understand that you have been made aware of parliamentary privilege and the protection of witnesses—is that correct?

Dr Klugman: That's correct.

CHAIR: I invite you to make an opening statement, and then we will ask you some questions. We have your written submission, which we've labelled as submission No. 15.

Dr Klugman: Thank you for the opportunity to be part of the hearing on model litigant obligations. Our main points are in our submission, which we again commend to you. We note that the Attorney-General's Department has provided a specific response to our submission. Commenting briefly on the AGD response, we say this. Firstly, the department acknowledges that its website has wrong information on it and says it will fix it. This demonstrates our main contention—that the AGD pays so little attention to its model litigant obligations that it doesn't even review its MLO website on a regular basis—because the information has been wrong for years.

Secondly, it's important to understand what our comments about contingent liability provisions involve. Basically, there are cases where the AGD believes it can change the law in its favour. The current settled case law is against the AGD, but the department wants to overthrow that. People have gone to the court or tribunal, probably on the advice of lawyers that their case is rock-solid based on precedent cases, only to find that suddenly the AGD has decided to challenge the precedents that are well-established, even though the AGD knows that the current legal situation is against them. You can imagine the extra time, anguish and costs involved to be visited on some poor individual or small business when a massive agency like the AGD makes such a decision.

The process is happening across other agencies: Centrelink, maybe five or 10 times the number of contingency cases; Comcare likewise; Defence also; and so on across the Commonwealth departments and agencies. The overall impact may be huge. It's all founded on the attitude and culture within AGD in relation to model litigant obligations. That is where the main problem lies. The Leyonhjelm bill will go some way to helping the situation, but culture change in the AGD must be part of a proper solution. In the past week we've sounded out some former very senior members of the Commonwealth Ombudsman's office and a current sitting member of the Administrative Affairs Tribunal, and we'd be happy to share their firsthand comments with you during these discussions. They and we have some suggestions or recommendations the committee may choose to make.

CHAIR: Mr Rowlings, do you want to add anything to that?

Mr Rowlings: No, thank you.

Senator PRATT: You highlighted in your submission issues with agencies other than the ATO. Can you give us some examples of the kinds of impacts on people who have legal proceedings with the Commonwealth?

Mr Rowlings: This whole thing goes back many years. There have been many inquiries into this. For example, Professor Sue Tongue undertook an inquiry in 2003. We've been working on it since 2008, although other priorities have intervened. I have examples from 2006 in an article I wrote that I can give you, which illustrate what happens in other agencies. For example, a former employee of the Department of Health was battling Comcare in the AAT, a case in 2008 which looked decidedly shaky when Comcare tabled about 70 department provided documents. Fortunately, the plaintiff had a full copy of her file from years earlier. Two documents she had copies of, which the department did not table, were the keys to her winning the case. Was this a genuine, accidental mistake by the department, to miss tabling those two specific documents? Perhaps, but lawyers say that such stories are not unusual. Would you like to know another case?

Senator PRATT: Yes, that's helpful.

Mr Rowlings: The problem in this case may come from the processes within the particular department. Centrelink in October 2008 replied less than fulsomely to a letter from us, Civil Liberties Australia, asking why Centrelink required a first-time age pension applicant to (a) state why he had separated from his wife and (b) provide a copy of his will. Centrelink's reply went into great detail about the Social Security Act 1991 subsections 4(2) and 4(3). These subsections give the clear impression that the chance of succeeding with an application is minuscule. What Centrelink failed completely to do in this letter was point to the very next clause, subsection

4(3A). That clause, which I can read to you if you like, put an entirely different spin on the applicant's entitlement to fair treatment and on whether or not they would win the case. That's another classic example of how selective reporting by departments can skew and make life difficult for people trying to get a fair go from the Commonwealth government.

Senator PRATT: All of those examples would present a breach of model litigant behaviour, in your view?

Mr Rowlings: You asked me for examples. Those are but two, and there are hundreds, probably thousands, maybe tens of thousands over the past 10 years—certainly thousands. The people to whom we spoke and whose opinions we asked for confirmed that they run into it all the time in their dealings in the Ombudsman's office and in the AAT.

Senator PRATT: It hadn't quite occurred to me the extent to which the Commonwealth might choose to be selective in the evidence it presents for the purpose of winning a case rather than doing its job and upholding the law as it should stand.

Mr Rowlings: It's quite clear that that happens. There's absolutely no doubt that the government is extraordinarily selective. The government operates on a win-at-all-costs basis. That is exactly what it does. It employs commercial lawyers whose attitude is that. If a department didn't have that attitude when it went to a commercial operation, which it did roughly 10 years ago, with outside lawyers that culture was imported into the Commonwealth government, and that's where problem started.

Senator PRATT: What in that sense is your critique of the public purpose behind—because the Commonwealth agencies should be standing for the public interest rather than winning. Surely that's the frame within which they should be operating. This is not commercial law, for example, where you have one side versus another. Surely at the heart of the Commonwealth's operations should be the public interest.

Dr Klugman: Absolutely, you're entirely right. The problem is the power imbalance that exists between the state and its citizens, and the fact that the government should not purport to exercise rights they do not have at law when they are pursuing these model litigants' claims.

Senator PRATT: Surely no-one before the courts should be pursuing claims that they do not have at law. There are many imbalances within the system.

Dr Klugman: Of course there are, but one would think, under the model litigant requirements of the government, they should not be in this situation of pursuing unfairly against little people and businesses.

Mr Rowlings: Senator Pratt, your question goes to the nub of the issue. It is the attitude that stems from the fact that the model litigant obligations are not taught throughout the Public Service, which is, in our opinion, a responsibility of the Attorney-General's Department. The Attorney-General's Department takes an extraordinarily passive view as to whether it should educate people throughout the service, including the people in departments and agencies, on a regular basis—and also the lawyers who provide services to the government. We believe that it should be a constant education process, and that does not occur. On the other hand, there should also be constant monitoring of the problem by the Office of Legal Services Coordination and the AGD on a regular and consistent and religious basis. They should be holding audits of departments.

The process at the moment is that the departments self-report. That's the way AGD monitors the model litigant obligations. I'll give you an example of how self-reporting might work. Imagine, if the banks had to self-report to ASIC, how well the banks would abide by those self-reporting obligations. That's the sort of problem we have with ASIC and the banks at the moment. Exactly the same principle applies to the problems with the model litigant obligations and the Attorney-General's Department not acting as the person who polices them.

CHAIR: You raise a point about contracting out legal services to commercial firms, who—and it's what they're paid for—run a case to win; whereas I think you're saying, and I'd certainly be saying, that the government is there to apply the law fairly and in an unbiased way. If the courts decide they win, they win; if the courts decide they lose, they lose; but they shouldn't win or lose on the basis of technicalities and legal expertise, as one might call it, in promoting a side of the case rather than what the actual law and results should be. Is that how you see what's happening?

Dr Klugman: Certainly since the outsourcing of legal services the problem has got worse, because, as you say, those lawyers want to win at all costs. As one of our experts said, it's not their profits; they don't care how much they charge. Our concerns over the model litigant principles arise not only from the experts to whom we've been talking but from complaints we get from individuals that have been screwed over by this system. They come to Civil Liberties Australia and they go to the Ombudsman. The Leyonhjelm bill is a good move, but it's trying to get the Ombudsman to do what the Attorney-General's Department should have been doing all along.

CHAIR: I think the thing is, though, that it does provide a means of enforcement, which seems to be lacking at the moment. I'll go to Senator Leyonhjelm now to ask you a couple of questions.

Senator LEYONHJELM: Thank you for your submission. I'm wondering if I could get you to comment on the Attorney-General's Department submission. Have you read that at all?

Mr Rowlings: The one in reference to us?

Senator LEYONHJELM: No. There is a separate submission to this inquiry, in addition to their response to your critique.

Mr Rowlings: No, I haven't read that.

Senator LEYONHJELM: Essentially what they are saying—and this will go to your submission anyway—is that this bill is unnecessary, that it raises practical and policy issues and that it has drafting issues. It says:

The department does not consider there is any evidence of systemic issues with agency compliance with the model litigant obligation, the way issues are identified and dealt with or that the existing compliance mechanisms are inadequate.

Your submission, to a fair extent, addresses that as well. Would you like to respond?

Mr Rowlings: Yes, we would. Certainly the AGD would say that, wouldn't they? I mean, they can't see anything else. But basically they haven't been doing their job. It's the responsibility of the first law officer to abide by the law. This is a law of the land—the model litigant obligations. It's a statutory requirement. It's not something they should be avoiding. But their interpretation of how diligently they do it is exactly the problem. If they say they've been doing the job—the problem is that none of us know, because we don't get the information. They don't provide the information of how many problems there are. They don't look for the information of how many problems there are. Therefore, they can say what they like. To some extent, we can say what we like as well.

What we believe and what the two people we spoke to said—remember, they are a very senior person in the Ombudsman's office and a current member of the AAT—was that what's required is an audit of what the situation is now, so that we are all going from the basis of what reality is. There are many ways of doing that audit, and we'd be happy to make further submissions to you. The first thing is that AGD should not be responsible for running that audit. We don't believe they can be trusted on this, and their response tells you exactly that they can't be trusted. We would say that it should be a private-sector body. If AGD is to run audit process then it needs to have a management committee that includes people like us from Civil Liberties or from human rights, somebody from the Law Council, somebody from the Australian Lawyers Alliance, so that that committee has a panel that outnumbers the AGD people, because AGD won't look for what's wrong.

There are a number of ways of doing the audit. One would be to ask everyone who had litigation with the Commonwealth for a one-page report on how they found their litigation and how they found the process at the end of it. That could be done simply in the case of the AAT. It could be done in relation to Defence and their ROG inquiry, for example. It could be done throughout other government departments. Then, by that mechanism, we would all know what the exact problem is. I suspect very strongly you would find that the problem is at least as great as we say it is.

Senator LEYONHJELM: Part of the Attorney-General's proposition is that there's no problem and nothing to see here, and that this bill is unnecessary as a consequence of that. I think you're arguing that the Attorney-General's Department wouldn't know whether there's a problem or not, because they don't look. Would that be accurate?

Mr Rowlings: That's entirely accurate. Can I read to you something that is an article that's on our website. The article relates to the SAS issue in the Australian Defence Force. Just as a throwaway line in this article, the author, who is the wife of a serving member, says:

Many current and former members—

Defence, that is—

express their frustration on social platforms over the infinite resources Defence legal services has at its disposal to counter complaints. They complain that the supposed procedural fairness within Defence is rarely afforded to complainants …

That's a throwaway line in an article that's not about that issue. So, you can see that in Defence there's a huge problem—just in Defence by itself.

Comcare is rife with it. The Australian Public Service is extraordinarily poorly treated by Comcare. We asked one of the two people we're quoting if they would give us an estimation out of 100 of the extent to which they thought a department was a good complier with model litigant obligations. We said: what do you think? Would you mark them at 40 per cent, 60 per cent? What do you think? The person said the rating for Comcare would be

30; the rating for Veterans' Affairs would be 30—and there's a major systemic problem in Veterans' Affairs, which we haven't mentioned yet. He said Social Security can actually be good; he would rate them at 70 out of 100.

It depends on the culture of the agency. The worst ones tried to wear out the person complaining, and that's exactly what happens. That's the deep-pocket syndrome, where they've got so much money and so many resources that people just get fed up and give up.

Senator LEYONHJELM: The previous witness raised concerns as to whether or not the bill goes far enough, in that it doesn't refer to the AAT. It is only applicable to courts. Do you have a view on that?

Mr Rowlings: Yes, many of these cases are fought out in the AAT. You need to understand the procedure from the person's viewpoint. Let's say somebody has a problem in Defence or in Comcare. They make a complaint, and that complaint goes back and forth within the department for quite a while. It takes many months. The department will say, 'You need to give us more documents.' They also won't tell you what documents they want. Eventually, they get to that complaint, then it is reviewed and then it is decided within the department. The department then has an appeals process, so the person goes through that appeals process. I do not know what the timing of that is. You would think six months would be a minimum.

From there, to get before the AAT, it's about another 12 months, probably. Certainly, 12 or 18 months overall would not be unusual for somebody who has a complaint and is trying to get a fair go from the Commonwealth government. At the end of it, they are stuck in the AAT. If the AAT gives them a good decision, that's fine. They're only resource beyond that is to go to the Federal Court. At that stage, people just give up. They almost invariably give up, even if they have got a good case. I put to you the situation about the Attorney-General's Department, or these agencies, deciding that they are going to run a case because it's a test case, from their perspective, where the law is quite clear. You can see to what extent the frustration must have built up in these individuals. The individuals numbered in the tens or hundreds every year, because the department continues to run these test cases.

Senator LEYONHJELM: The question would be whether a Commonwealth litigant would be influenced by the model litigant rules being obligatory, knowing that they would only actually be enforceable if the case went all the way to the Federal Court, past the AAT and various other processes. There are some suggestions that it would be influential because they would never know in any particular case whether it might go to the Federal Court ultimately; but, as you just made the point, most wouldn't go the Federal Court. In fact, that would be fairly unusual, so therefore they might take the chance that the obligations or the mandatory aspect of the model litigant rules really don't apply to them. What's your view on that?

Mr Rowlings: The minute most people get into a dispute with the government, they start to do research. One of the early things they come across is the model litigant obligations and they think to themselves, 'You beaut. They've got to treat me fairly.' What they run up against is that the model litigant obligations are not interpreted in the way that you and I would interpret them. They are interpreted in an extraordinarily legally, smart lawyering way by the Attorney-General's Department and the departments and agencies of the Commonwealth.

Dr Klugman: I would like to make one more point. The CLA, as a civil liberties organisation, can criticise the Attorney-General's Department without fear of our funding being cut. That is because we do not get funding from the government. Many of these issues would arise more if legal aid centres weren't as vulnerable as they are to pressure from the government over funding. They are not allowed to criticise government policy, so it is left to groups like ours, who don't get that funding, to speak up for a fair go.

Senator HINCH: Senator Leyonhjelm has touched on this: in the department's analysis of the bill, they keep stressing that the bill is unnecessary because litigants have the ability to lodge a complaint with the Commonwealth Ombudsman within the existing jurisdiction and therefore, because of these mechanisms, they say the bill is unnecessary. What is your reaction to that?

Mr Rowlings: One of the people to whom we asked questions this week was a former very senior person within the office of the Commonwealth Ombudsman. I can read you what his comments were, if that would help. The comments are not terribly long:

Given the power imbalance which exists between the State and it's citizens and the fact that governments should not purport to exercise rights they do not have at law (the context for the comments below):

1. the State should itself acknowledge the primacy of the rule of law;

2. where the State is aware it is purporting to exercise a right it knows it does not have, it must not exercise that right;

3. the model litigant regime with which the Australian government **has committed to comply** requires it not to take action to enforce rights where it clearly has no legal right to do so and to behave fairly (to citizens) when legal actions brought by

government are on foot (i.e. not delay responses to requests to file documents, fully disclose the existence of documents in the discovery process, etc);

4. there have been occasions recently (robo debt, ATO aggressive pursuit of taxpayers) where not only legal rights have been in doubt but also the actions taken suggest a lack of appreciation of the adverse effect on the overall wellbeing of individual citizens and families and small businesses;

5. a step which could be taken would be to require government agencies to subject themselves to an 'Audit' by another agency of their compliance with the model litigant principles—

We have suggested a private research brief or we would suggest that the Australian National Audit Office would a useful place to conduct such an audit across a number of key agencies. The next point the person makes is:

6. it's unclear as to whether compliance with the principles is being monitored—

Remember, this is somebody who is a former very senior person in the Commonwealth Ombudsman's office. He says:

7. monitoring could well be cost effective given that agencies would think twice about pursuing rights if there was a doubt about whether those rights exist;

8. monitoring by an agent such as the Commonwealth Ombudsman would make sense given the independence of that agency and its focus on effective and efficient public administration. N.b. that it needs adequate funding to do this extra job.

That's the end of the comments.

CHAIR: Thank you very, very much for your written submission and what you have told us today. We very much appreciate that. Again, thank you very much for your help.

Proceedings suspended from 11:27 to 11:35

LAYSON, Ms Sally, Treasurer, Rule of Law Institute of Australia

STEWART, Mr Malcolm, Vice-Chairman, Rule of Law Institute of Australia

CHAIR: I call back to order the Senate Legal and Constitutional Affairs Legislation Committee's hearing into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017. I welcome to the table representatives of the Rule of Law Institute. We have provided you details about parliamentary privilege and that these are actually proceedings of parliament. We have received your submission. We will now ask you to make a short opening statement and then we will ask you some questions.

Mr Stewart: We employ a number of teachers who teach legal studies students about courts. We have about four teachers who go around the schools. They also bring school students into Sydney to go through the courts to educate them about the way the judicial system works in practice. I will just mention why this is an issue for the rule of law. If you go onto our website, we have been banging on about the model litigant provisions and making them more than simply guidelines since 2010. There is an enormous number of resources there, mostly meant for students to access but members of the public can also access those. They explain exactly what the directions mean and what the model litigant rules are.

The model litigant guidelines, which we wish to have made obligations, are important because they really do sit at the juncture of the three fundamental components of our legal system: the judiciary, which is self-explanatory; the executive, which is also its self-explanatory; and parliament. Parliament is here looking at whether or not it should make these rules that really exist so far as the executive, the courts and people who are subjects of the land, and citizens who vote for politicians in parliament are concerned. So these model litigant rules sit at the juncture of those three fundamental parts, if I can put it that way.

I will add a couple of things so that it is clear. I don't know whether or not these have been mentioned already and, if they have, I apologise. But there is one aspect of the legal services direction that I should point out to you that does make the model litigant rules an obligation. It exists in what might be described as clause 11A, in circumstances where a government department seeks to fund another entity that is separate from it. In fact, an easy example would be the tax office seeking to give indemnity to liquidators, which is quite proper and they do it all the time, to commence proceedings to recover funds that might be owed to the tax office by the particular company concerned. There is an obligation on the government department to contractually require whoever that third party is to comply with the model litigant rules. So if those model litigant rules are breached, the government department can contractually force those rules against that third party. It is also a requirement that the government department make sure that that provision requiring the third party to comply with the model litigant rules is in the contract. I just wanted to mention that point.

I will also deal briefly with the Law Council's submission. I wasn't troubled so much by all the submissions from the government departments; I was slightly troubled by the Law Council and why it had taken the view that it had. It starts its submission by referring to the fact that it represents—'acts for', I think it says—60,000 lawyers across Australia, of which I'm one. I've had extensive experience in litigation, and still do, including against state and government departments and a lot of that, so I would seek to answer any questions you may have in my professional capacity in that regard.

In respect of the Productivity Commission: I will just mention for a second the submissions that the Law Council made to the Productivity Commission, which of course is a completely independent body. I will deal with this quickly, but I think you should know about it; it's important. The first submission they made, which was in November 2013, referred to the New South Wales Bar Association submission, which covered a great deal. It was a very impressive submission about the model litigant rules and what you would do. It simply made the point that lawyers were going to take different views as to whether there should be further sanctions or not. Well, great. We can put that submission to one side. It's a bit different to the submission they're making now.

That was only their first submission. Their second submission was more interesting. It was actually responding to the draft recommendation of the Productivity Commission, and I would like to read it onto the record. The draft recommendation of the Productivity Commission was:

> Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

The response by the Law Council was:

> The Law Council supports this Draft Recommendation, in principle, …

If we can just stop there—

CHAIR: Just before you go on: it's in your submission, and you said:

Commonwealth, state and territory governments and their agencies (including local governments) should be subject to model litigant obligations …

What you said just now was 'guidelines'.

Mr Stewart: Sorry, I did use the word 'guidelines' as far as the draft recommendation went. You're quite right, Senator. But what the Productivity Commission went on to say was:

Compliance needs to be strictly monitored and enforced—

So the Law Council was responding to the 'enforced' part—

including by establishing a formal avenue of complaint to government ombudsman for parties who consider model litigant obligations have not been met.

CHAIR: Yes.

Mr Stewart: So that was what they were supporting. But it does go further.

The Productivity Commission also sought the views of the Law Council as to whether the model litigant requirements should be imposed against local governments. Again, the Law Council submitted that it would be desirable to subject all levels of government to the model litigant guidelines. Now, I agree that they are 'guidelines' in that case. The guidelines would most effectively be administered by the court. That's important for a submission, and I want to come back to that a bit later.

It then went on to say, in response to an information request by the Productivity Commission—and I apologise for labouring this—which sought advice on how the draft recommendation, in terms of what you've just mentioned, Senator, should be enforced and might be best implemented. It said:

The Law Council does not have a strong view about this. It may be that courts and tribunals could play a role in enforcing the guidelines. It could also be an appropriate role for a government ombudsman, …

So that is what they've said, and I'm happy to table these documents. I'm quoting where they have come from but I'm more than happy to table fresh copies of those.

As I see it, sitting here, there has been a bit of flip-flopping going on by the Law Council, which may well be explained just by change of personnel. I'm not suggesting the same person reached a different view. We go from the situation where some lawyers may agree and some may not. It seemed to be very positive in moving these things forward from guidelines to enforcement obligations, but then we are backing away from it in the latest submission that you have already seen. So I will make those points about that.

I will also mention comments made by Civil Liberties Australia a little earlier about the resources. What they said is 100 per cent correct, but I just want to add also that it's not just those resources in terms of litigation that we need to focus on. Indeed, most of these government departments and bodies have very extensive resources that exist prior to the litigation in terms of information and document gathering. This is to the extent that, in many cases, the right to avoid self-incrimination is removed entirely. You can't claim that right and really have to answer those questions. That is not a question that I want to debate here; I simply want to say that that is what's occurring. How an individual competes with these massive resources that exist prelitigation as well as during the litigation is certainly a question that I want to mention.

The last thing I want to mention relates not just to the Law Council submission but also to a number of other submissions, and that is that you can deal with this in other ways. One of the things that the Law Council says is that if anyone has exceeded what they should have done that it can be dealt with under the professional misconduct rules. That may well be possible if it goes that far—that's in the last paragraph of their current submission. We need to deal with these things during the current court process. If there is a court process going on, where a litigant gets a whiff that that might be some breach in the model litigant rules, it needs to be dealt with on the spot. It can't be dealt with two or three years later, after litigation has finished and appeals have been exhausted. Part of what is good about this bill is that it deals with it during the course of the litigation.

CHAIR: Thank you very much, Mr Stewart. Ms Layson, do you want to add anything?

Ms Layson: No.

CHAIR: Senator Leyonhjelm.

Senator LEYONHJELM: I have two lines of questions. In the event that the bill becomes law, how do you envisage it might work? What sorts of orders might a court make where it is satisfied that the Commonwealth has contravened the model litigant rules?

Mr Stewart: That is a very good question. The way the bill operates is that there is initial recourse to getting a stay of the proceedings. That is entirely a matter for the discretion of the court. I think all Federal Court judges would be loath to grant a stay. There are sections of the Federal Court of Australia Act that require litigation to be conducted, in a very general sense, speedily and efficiently. One could envision an extreme circumstance where, if you are not going to produce a document that we think you should produce under the model litigant obligations, then I will grant a stay until that is provided. But it wouldn't just be a general stay. In terms of how it operates, obviously the complaint goes to the Ombudsman. The Ombudsman prepares a report. And then an application would simply be made by the non-government litigant, if I can put it that way, to seek whatever relief they think is appropriate with the court and have it dealt with pretty quickly. I think all Federal Court judges operate on a docket system now, where you simply have the same judge all the time. So they will be well aware of the issues. It is not as if a judge would have to start from scratch on it. So it is something that can be dealt with, I think, quite quickly.

Senator LEYONHJELM: The assertion has been made in a couple of the government submissions that getting the court to do those sorts of things would increase costs and delays. The suggestion is that it is undesirable on those grounds. What are your views on that?

Mr Stewart: If all that is happening is that for some reason, by mistake or otherwise, there is a genuine failure to comply with the obligations and that has been brought out, one would hope that that would be fixed at the Ombudsman stage. I think the last thing any government department would want to do would be to have that debated in an open court, where anyone can turn up and say that you haven't been complying. Nobody wants that. Part of the beauty of this going to the Ombudsman is that most of them will be resolved at that juncture, either way. Assuming a litigant has a right—and I accept the possibility that you can get extreme litigants as well—if the court was of the view that the process was being abused then, for the reasons and the sections that I have just referred to, which are 37N and 37M of the Federal Court Australia Act, the judge is required, as are the parties, as are their lawyers, to conduct the proceedings speedily, efficiently and with as little cost as possible. So I don't see that as an issue.

Senator LEYONHJELM: In your submission you have spent some time addressing the Attorney-General's complaints that the bill is not consistent with the recommendations of the Productivity Commission. Would you like to take us through that.

Mr Stewart: I didn't write the submission, Mr Speed did. So I'm not as familiar with that as I should be. I do apologise. I have mostly focused on the Law Council's submission. I have no difficulty with the Attorney-General or the people who work in his department, including the Australian Government Solicitor, who I deal with all the time. I'm sorry, I don't have it on the tip of my tongue.

CHAIR: Can I just say that the submission is very clear—and even our simple minds can follow it.

Mr Stewart: I do apologise. I can't help.

Senator HINCH: The department says it goes well beyond the recommendations of the Productivity Commission.

Mr Stewart: I completely disagree with that.

Senator HINCH: Yes, I thought you would.

Senator LEYONHJELM: That is where I was going.

Senator HINCH: Sorry.

Mr Stewart: The statement is well-made towards the front of the submission as to what the Productivity Commission said: 'Precisely what is it that is said to be wrong in dealing with it?' Ultimately, the court concerned has to be able to decide these things. It can't be left until after the court process. As I said, I think the Ombudsman is a good mechanism of keeping it out of the court process because I think it will get resolved at that stage. These model litigant guidelines are actually very good. They are very detailed. It is not just a question of saying we are going to treat everyone with fairness; they actually go into 15 obligations which are specifically set out as to what you have to do. I suspect that, when they were drafted, the draftsman might not have realised that someone was going to turn around and say, 'Let's give them teeth.' But that seems to me to be what the concern is. I am concerned down the track if someone tried to water these down, but I wouldn't think they would do that.

CHAIR: You said that a judge could, under the common law or under the rules of the court, say to a litigant: 'You haven't produced a document so, in these extreme circumstances, I'm going to stay the issue until you do.'

Mr Stewart: Certainly under the bill as proposed, yes.

CHAIR: Oh, I thought you were saying it was already within the power of the court to do that.

Mr Stewart: No. The Law Council submission talks a lot about the common law, and a number of others say the common law is good enough. What were the Productivity Commission doing? Are they a bunch of—

CHAIR: But you are saying the court is loath to stay proceedings because it adds to costs et cetera. So this bill would require the judge—

Mr Stewart: No. It is pure discretion. What this bill does is give a discretion as to whether a stay is granted—

CHAIR: By the court?

Mr Stewart: By the court. So the judge has complete—

CHAIR: You are saying the court doesn't have that power under the rules of the court or under the common law at the present time?

Mr Stewart: No, in fact it has a lot of powers under the Federal Court rules, and the act, to stay proceedings for various reasons. It does not have the power to stay the proceedings for breach of the model litigant obligations. What this bill does is introduce the ability to stay. There are a lot of reasons you can get a stay. Non-compliance with court rules might lead the other side to get a stay. There is a whole raft of powers to grant a stay. This would add to that bevy of reasons to get a stay. I was trying to make the point that, even if the bill is introduced, I think it is only in extreme circumstances that a court would grant a stay. At least initially, it is much more likely to try and redress in some specific way the breach of the obligations of the model litigant rules should the bill be passed. Only after that, if that wasn't remedied at that point, would you expect the court to grant a stay in these proceedings. It might, for example, be a litigant suing a Commonwealth department. In that case, you wouldn't be asking for a stay at all—you would want the proceedings to continue—so you would deal with it in some other way. If the Commonwealth is suing a litigant for a breach of the model litigant rules, the court may well be minded more in those circumstances to grant a stay. On the exercise of judicial discretion: every Federal Court judge that I know is very sensible and proper about procedure like this and won't grant a stay unless they are absolutely have to.

CHAIR: Senator Leyonhjelm. Sorry to interrupt.

Senator LEYONHJELM: Mr Stewart, I would like to return to the point you made in your opening statement about the Law Council's position, which you described as 'flip-flopping'. We also found that curious. I found it curious. I also found it curious that they claim they are representing all of Australia's lawyers, yet some of their member organisations have put in submissions in support of the bill. What are your thoughts on that?

Mr Stewart: Exactly right. The one I referred to is the New South Wales Bar Association, which went through it in some detail. They didn't actually say this is okay; they said that when the recommendations come back from the Productivity Commission, including the one that made obligations, they are going to deal with those things which they think are problematic or unworkable. They didn't touch on the model litigant provisions. By implication, they are saying that is fine.

Senator LEYONHJELM: The Civil Liberties Australia witnesses we heard from previously said one of the sources of this problem of non-compliance with the model litigant guidelines as they now are is attributable to the fact that the government is now using commercial lawyers to pursue its legal matters. Their natural approach is to win and, from their point of view, any means are legitimate to achieve that, that is what they are paid for. Because the model litigant rules are not obligatory, they feel they are entitled to ignore them if it means winning. Is the Law Council likely to be influenced by the fact that major law firms are doing a lot of work for the Commonwealth government and in particular the Attorney-General's Department?

CHAIR: That's almost—

Senator LEYONHJELM: I'm asking him his opinion.

Mr Stewart: I am on the other side of a major matter at the moment where the Commissioner of Taxation is funding some liquidators and they have engaged a big firm. The commission is footing the bill for the whole lot. If the costs haven't reached $20 million by now, I would be surprised. It is difficult to respond to that. And it is very difficult on a subconscious level. I can sit here and say the last thing I would think about is costs and I put my own interests behind that of my clients. I have been doing for over 30 years now and I don't worry too much about it. But I know from experience that not everyone thinks the same way as I do—and I suspect that most of them don't—

Senator LEYONHJELM: Organisations often have only one person who writes a submission. They are a busy organisation. So that submission is purported to represent the organisation, without an awful lot of seeking of authority.

Mr Stewart: I am used to that. We had the problem with the Law Society in the context of the same-sex marriage debate. The Law Society came out and said it represented all lawyers and was in favour of this. That wasn't the case at all—and that was stopped. I know that the Attorney-General and other government have a problem when organisations like the AMA come out and make the same statements. I hear them on television all the time and I think: I bet that's not the view of all of them. It is put out there as if it is the view of all of them; but it is not.

CHAIR: I am a one-time member of the Law Council of Australia. We did invite them to attend, but they said they couldn't contribute anything more than they had written. As I understand it—my information is 30 years old, but, Mr Stewart, you would know—the Law Council of Australia has a subcommittee of people interested in that particular topic. When the subcommittee make a submission, they don't consult the 60,000 lawyers around Australia. So it obviously has to be a subjective view.

Mr Stewart: Absolutely correct. What I think has happened here is what I said earlier: the personnel have changed either within the executive or the people who wrote the submissions. And I understand that. You are already onto it, but I wanted to say that there are different views.

CHAIR: And I think that is very obvious from what you and other lawyers have told us.

Senator LEYONHJELM: I will change the topic a bit. I won't go looking for conspiracies! One of the suggestions from our first witness today was that the bill has a gap in that it doesn't address AAT cases; it only makes the model litigant obligations mandatory once it hits the court or in preliminary matters leading to the court so that a party to an action could raise it in court. The point was made that not many cases, especially those involving small litigants, actually make it through to the court. And the suggestion was made that the bill ought to be amended to include the tribunal. What's your view?

Mr Stewart: I wasn't aware of that. It most certainly should be. I know that the legal services direction does apply in the model litigant guidelines across tribunals.

Senator LEYONHJELM: They apply across government but they are not binding.

Mr Stewart: No, I am aware of that. As I understand it, they are not binding in the AAT as it exists at the moment. I thought your question was directed to whether the bill also covered it and would make that applicable to the AAT. If the answer is no, I have no difficulty with that amendment at all. I will point out that there is an obligation under the Administrative Appeals Tribunal Act for all government departments to provide assistance to the tribunal—which is really just another government department—to make its decisions. So that is that obligation. But I think the model litigant guidelines/obligations go a lot further than that and deal not so much with the government department vis-a-vis the tribunal but with the government department vis-a-vis the litigant. I would just point that out.

Senator LEYONHJELM: So you think it would benefit from that amendment?

Mr Stewart: Yes, certainly.

Senator PRATT: Do you think the volume of cases pursued by the Commonwealth would change if these provisions were mandatory? Also, would it change the profile of who wins and who loses the cases?

Mr Stewart: I don't think so, Senator. You might be very disappointed and I think all of us would be very disappointed if that were the case, because it would even mean that the Commonwealth is giving up on cases where it might have a legitimate interest. I deal a lot with the tax office and they are not shy in coming forward. If it did reduce it, it would either mean that they are doing too many now or they are giving up. I wouldn't expect that to be the case. It might make a small difference. I think genuinely most public servants in my experience really do a good job, and so I think it is unusual and rare cases where this thing rises. I know there is reference to systemic stuff and that sort of stuff, but it is unusual. In the scheme of things, we are talking about a small number over a larger number.

Senator PRATT: Which indicates to your sense that, in cases pursued by the Commonwealth, the Commonwealth have a position that they do feel they are genuine and they are not being opportunistic in what they are doing.

Mr Stewart: Yes, absolutely, in most cases.

CHAIR: I don't think I've got anything more. Mr Speed's submission, you were saying, was, I think, very clear. I have clarified the one aspect that you had. The outcome is not going to change dramatically if this is done. It just means that the little person might have a bit better chance of getting the facts determined by the court.

Thank you very much, Mr Stewart. Thank you, Ms Layson. I was just saying to Senator Leyonhjelm that I also appreciate it when distinguished lawyers are here and we calculate your charge-out time and understand that not only have you been helpful but you have made a contribution financially to being here. So, thank you very much.

Mr Stewart: I should clarify that remark, Senator, and say that the position that I and Mr Speed hold in Magna Carta and the Rule of Law Institute are both honorary. You can't get paid for doing this. It is true that it takes me away from other billable time, but I am more than happy to come down here and assist the senators, if I can—and I will. This is not my first time here. It is probably up to about a dozen. So I am more than happy for that to continue.

CHAIR: Thank you very much for that public service.

BRODNIK, Ms Kate, Senior Policy Solicitor, Queensland Law Society

DUNN, Mr Matt, General Manager, Policy, Public Affairs and Governance, Queensland Law Society

MORRISON, Dr Andrew RFD AC, National Spokesperson, Australian Lawyers Alliance

TAYLOR, Mr Ken, President, Queensland Law Society

[12:03]

Evidence by Ms Brodnik, Mr Dunn and Mr Taylor was taken via teleconference

CHAIR: Welcome to the Senate Legal and Constitutional Affairs Legislation Committee's hearing into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017. We are now calling to give evidence to the committee as a group: the Australian Lawyers Alliance, who have made a written submission, which we have numbered as submission No. 6, and the Queensland Law Society by teleconference, who have made a written submission, which we have numbered as submission No. 5. All witnesses have been given information on parliamentary privilege and the protection of witnesses. I'll ask both the Queensland Law Society and the Australian Lawyers Alliance to make short opening statements and then the committee will ask you questions. We might start with Dr Morrison.

Dr Morrison: First of all, the Australian Lawyers Alliance is supportive of this legislation. The clear objective is to make the model litigant rules work as they should in the interests of access to justice. I have been involved over the years in a number of cases against the Commonwealth. I can recall, for example, one case where I lodged a complaint in respect of the model litigant rules. After the case was over, I received an expression of regret, which didn't assist at all because the case was concluded by then. So I fully agree with the comments that you have heard from those who appeared before me about the desirability of dealing with those sorts of problems whilst the case is in progress and not at the end of it.

The model litigant rules really depend upon the way in which legal services directives are issued. I will give you one example which is very troubling and which is a current problem. A legal services directive issued on 4 May 2016 arose out of the royal commission into institutional responses to child sexual abuse, with which you would clearly be very familiar. That was a directive not to plead a defence to a time barred child abuse claim nor to oppose any extension of time that was sought. So far, so good. We know, of course, that most states and territories have already removed all limitation periods for child sex abuse cases and, indeed, in respect of the more advanced states, for cases of physical abuse as well. New South Wales and Victoria have done that. But this directive expires on 30 April next year and, thereafter, the Commonwealth will revert to its practice of making life as difficult as possible for litigants. There is nothing to indicate that the Commonwealth intends to extend that directive.

If the model litigant rules are to mean anything, the Commonwealth needs to do that which it says it's intending to do—namely, provide justice to victims. After all, we know, for example, that the royal commission said that the average time—on 6,000 interviews—from last abuse to first complaint was 22 years. A two-year period for waiving the limitation period doesn't go anywhere towards meeting the problem, and clearly there is no consistency between that legal services directive and the objectives of the model litigant rules. That is very troubling.

The same can be said, for example, about the proposals by the Commonwealth to exclude children who have been abused in immigration detention, who were placed there by the Commonwealth, from the redress scheme—they don't exclude them from bringing civil litigation—but also to exclude those convicted of serious criminal offences, which may in many cases have been, at least in part, a result of the abuse which occurred. They are very troubling matters.

The Commonwealth really should get enormous credit for getting the redress scheme together and for getting some very difficult states and territories on board, but the Commonwealth also needs to live up to the significant imperatives which lie behind the model litigant rules, and those are providing fair, quick and just solutions to those who have a claim against the Commonwealth. At the moment, I don't see that happening, and I'm troubled. For example, I've got one of the HMAS *Leeuwin* cases. We'll get our litigation on before 30 April, but why should there be that imperative? Why shouldn't you be trying to settle it without having to resort to litigation? The model litigant rules really should apply to the way in which the legal services directives are drafted, and that's what troubles us.

CHAIR: Dr Morrison, the statute bar for child sex offences really should be addressed in the Crimes Act rather than in the model litigant rules, surely?

Dr Morrison: No. The statutory bar depends upon where the action is brought. Bear in mind that the limitation periods are largely created by the states and territories, and the Commonwealth can take advantage of any bars which are in place. For example, the limitation bar hasn't been lifted in Western Australia or, I think, adequately in South Australia as yet. The Commonwealth is fully at liberty to take advantage of that in respect of claims, for example, arising out of Woomera detention centre.

Senator HINCH: I just make the point to Dr Morrison, if you're going down that track any further, that I'm the chair of a joint parliamentary committee inquiry into redress, and I'd love to have your input on that directly to our committee, because I was unaware that it runs out in April of next year.

Dr Morrison: Thank you. We'll take that on board and get something to that committee.

CHAIR: Had you finished?

Dr Morrison: Yes, I had, thank you.

CHAIR: We'll go to the Queensland Law Society now. Mr Taylor, do you want to open?

Mr Taylor: Yes, thank you, Senator. Thank you for the opportunity to appear, albeit by telephone, before the committee today. The Queensland Law Society is the peak professional body for Queensland's legal practitioners. We represent and promote nearly 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits that solicitors provide. The Law Society also assists the public by advising government on improvements to law affecting Queenslanders and working to improve their access to the law.

The Law Society supports the enforceable model litigant obligations. We consider it appropriate for the Commonwealth Ombudsman to investigate complaints about contraventions of model litigant provisions, certainly at first instance, and providing that there are adequate resources directed to the Ombudsman for this purpose. This is because we consider that the decisions made by the Commonwealth as a party to a proceeding are an exercise of executive power.

That's why we consider that there are deficiencies in the bill. We believe the concept of accountability and oversight has merit, and we encourage the government either to propose appropriate amendments to this bill or to introduce alternate legislation which implements the recommendations of the Productivity Commission following its report *Access to justice arrangements*, published on 5 September 2014. In conjunction with Mr Dunn and Ms Brodnik, I'm happy to answer any questions from the committee.

CHAIR: Thank you very much, Mr Taylor. As you know, this is a private senator's bill, and it's actually Senator Leyonhjelm's bill, so I might ask Senator Leyonhjelm to start the questioning.

Senator LEYONHJELM: Thank you, Chair. Mr Taylor, I have your submission, but, for the benefit of the committee, could you elaborate on where you think the deficiencies in the bill lie, notwithstanding the fact that you support it.

Mr Taylor: Yes. There's some issue there too, sorry, about the appropriateness of the Ombudsman to deal with the complaints. We believe that also there's the issue about whether the court should have the ability to stay a proceeding. We think that that's where that should lie, not with the Ombudsman. Basically, we're saying that the court holds that power to control its own litigation.

The complaint process—while the Ombudsman has a role to play—should be dealt with at the same time as the litigation is proceeding. The complaint process itself should not be able to be utilised by a vexatious litigant—I think the term's been used before—or by having unmeritorious complaints to otherwise interfere with the conduct of the primary litigation. The complaint process should run parallel to the litigation, be dealt with at the same time and be dealt with basically on the side by the Ombudsman, who can then make their findings known to the parties. If the parties wish to bring those findings to the court, the court can make the decision then as to whether or not a penalty should be applied, whether that be a monetary penalty or in fact a stay of proceedings or some other decision.

Senator LEYONHJELM: At the risk of displaying that I don't understand my own bill, I thought that's exactly what the bill did—that a complainant involved in litigation with the Commonwealth would have to lodge a complaint with the Ombudsman, but, having lodged that, they could then go to the court and bring to the court's attention the failure of the Commonwealth to comply with the model litigant rules and that in fact the court wouldn't need to take account of what the Ombudsman thought. Is that not your understanding of how it would work?

Ms Brodnik: I believe that's what was most likely intended by proposed sections 55ZGA and 55ZGB. Those sections list the circumstances in which a court may either stay a proceeding or make appropriate orders. Our

suggestion was that, in the various circumstances upon which an applicant might find themselves before a court—whether or not they've made a complaint to the Ombudsman; how that complaint's so far been dealt with; whether it's been referred out—potentially that process should be separate so any order that a court might need to make isn't dependent on what stage of the complaint the Ombudsman's process or any other process is up to but on whether or not the court thinks and is satisfied that a model litigant provision has been breached and, if that is the case, what appropriate orders then need to follow from that breach. So our suggestion in our written submission, as you can see, is just to simplify those sections to confirm that it's not necessarily dependent on what process an Ombudsman's complaint is up to but really what the court has regard to in considering that litigation.

Senator LEYONHJELM: Just to understand: you think it would be improved by placing no obligation on the complainant to complain to the Ombudsman prior to raising a breach of model litigant obligations with the court?

Ms Brodnik: Yes, because we see those as two separate processes. On one hand, the Ombudsman's complaint could comprise complaints that happened outside the litigation, whereas the court would really be concerned with the litigation process, so there does not necessarily need to be one for the other to occur.

Senator LEYONHJELM: I understand. Thank you very much. Another issue that was raised by an earlier witness was whether or not the obligation to comply with the rules ought to also be applicable to the AAT. The first witness we heard today suggested that a lot of litigants, particularly small business, wouldn't go further than the tribunal to the Federal Court; therefore, they wouldn't come under these rules that are enforceable by the court. What's your view on that?

Mr Taylor: It hasn't been one we've specifically considered, but I think we couldn't see any prima facie reason why it wouldn't extend.

Senator LEYONHJELM: My thinking was that the Commonwealth party to litigation would never know when a case was going to go all the way through to the Federal Court, even having been dealt with by the AAT before that, and therefore that knowledge that their behaviour, their compliance with model litigant rules, might be raised in a court would influence the way they dealt with a case up to that point. But the other view is that very few cases would actually go through to the Federal Court; therefore, a Commonwealth department could take the view that the model litigant rules don't apply, because there's little prospect that they'll ever be raised in a courtroom. Do you have a view?

Mr Taylor: Nothing firm, but the overall consideration would be that it's difficult to see a barrier, really, to having those model litigant rules extending to hearings in the tribunal. That would be our initial view.

Senator LEYONHJELM: Dr Morrison, do you have a view?

Dr Morrison: Yes. We would certainly think there is no reason in principle why the rules shouldn't apply to the AAT and the remedies apply to the AAT. It seems a matter of common sense that they should. One point that should be made is that there's been continual reference to the Federal Court. A great deal of the litigation that the Commonwealth engages in comes through the state supreme courts. I've run cases of injury in immigration detention against the Commonwealth in state supreme courts.

There are some significant difficulties in principle which arise out of the idea of a judge listening to a dispute about the way in which litigation is being conducted, as distinct from the litigation itself. I've been an acting district court judge. I did a couple of stints some considerable time ago. Judges for the most part wish to only hear what they should hear in the particular case and not be influenced by matters which are extraneous to the cause of action which they're trying to determine. That's a concern. Now, it may be that, in a particularly blatant case, a judge would intervene as of right in any event if a party acts inappropriately or improperly. A judge is already empowered to act, and there are remedies.

But I think the approach of going first to the Ombudsman has much virtue. And it would be a very rare case, I would think, where a judge would need to become involved, except perhaps as a consequence upon clear findings by the Ombudsman that something improper had occurred, and then the judge may need to take that into account in assessing what, if any, procedural remedies were required. But, for my part, I wouldn't like to see a situation where the judge is the first port of call, because our judges do their very best to keep focused upon what's in the particular case and where the evidence leads them—and that's properly so, in the interests of justice.

Senator LEYONHJELM: Yes. I would envisage a situation where a party to a case involving the Commonwealth, where they were aggrieved by the way the Commonwealth was conducting the case, would potentially use a complaint to the Ombudsman as a warning to the Commonwealth: 'Look, in my view, I have a legitimate complaint about the way you are conducting this case. As an initial step I'm going to lodge a complaint with the Ombudsman. If you don't change the way you're doing this, I will raise it in the court itself.' But I may be wrong about that. I'm no practising lawyer.

Dr Morrison: I'm sure that would be the implication behind the initial complaint to the Ombudsman—that there is the possibility of taking it to the court later. But I think for the most part judges would be very hesitant to become involved, except in a very clear-cut case where it affected the interests of justice and the way in which the court proceedings were to be determined.

Senator LEYONHJELM: Did you hear our first witness today?

Dr Morrison: I heard the witness immediately preceding me; I didn't hear any earlier witness today.

Senator LEYONHJELM: The first witness talked about the ATO not releasing documents, generally being very difficult to get on with and not facilitating the facts to be presented to the court. In that situation, would the state supreme courts, in your experience, be inclined to do anything about the progress of the case in the absence of binding model litigant rules?

Dr Morrison: If there is an entitlement to access to the documents and the Commonwealth is being difficult about providing them, enforcement of a subpoena is well within every judge's authority, state or federal. I don't see any practical difficulty about pursuing that. That's something we litigate every day of the week in state and federal courts. Defendants frequently don't wish to reveal all the material they have, and they make claims for privilege, which may or may not be justified. State and federal courts are well equipped to deal with those sorts of issues. They are part and parcel of the ordinary litigation of the court and are very properly dealt with by a judge. They're often dealt with prior to hearing by a registrar and by a judge on referral, who may not be the judge who's hearing the case—and that has its advantages, too—but there are remedies for that.

I think for the most part the problem arises when there is material in the possession of the Commonwealth that the other party doesn't know about and it gradually emerges during the course of the case that that material may exist, and there hasn't been a subpoena issued for it. But there is still a remedy there. Judges can issue a subpoena during the course of litigation, returnable at very short notice.

Senator LEYONHJELM: Given that those options are available to a court already, what additional safeguards will enforceability of the model litigant obligations bring? You indicated that you supported them, and your arguments were very coherent. In terms of additional options for a plaintiff in a case against the Commonwealth what would the enforceability of the model litigant obligations bring?

Dr Morrison: If the behaviour is behaviour which falls short of a reach of court rules, or court orders, but which is nonetheless designed to delay or make more difficult the tasks of bringing a case to fruition, then it may be that the new rules will then have some useful affect in permitting a court to enforce that which previously the court wouldn't wish to become involved in, so I see an advantage in that respect.

I think the primary focus should be on the Ombudsman remedy, because that is the quickest and most practical remedy and one which doesn't drag a judge away from the judge's primary function of determining the facts in the case and applying the law—by reference to scuffles at the side in relation to procedural matters, which may or may not be ultimately a matter which will be relevant to the determination of the case. Judges would prefer to stay out of that, but in an extreme case giving the power to be involved is appropriate, because it may be that there is a case in which an adjournment, a cost order, might be beneficial and be just. In my view, the Ombudsman first in 99.9 per cent of cases.

Senator LEYONHJELM: Mr Taylor, did you hear what Dr Morrison had to say?

Mr Taylor: Yes.

Senator LEYONHJELM: Your view is that the Ombudsman and the court should basically run parallel and not look to each other. In view of what Dr Morrison has just said, how would you respond?

Mr Taylor: No. The court and the Ombudsman running parallel in as much as the Ombudsman is dealing with the complaint but the court, at the same time, is dealing with the primary litigation. Then after the Ombudsman has dealt with the complaint, then it might be a matter for the parties to bring that before that court then if it requires a court intervention. Essentially what Dr Morrison has said is in line with our view.

Senator LEYONHJELM: In practical terms, you're talking about the same thing anyway?

Mr Taylor: Yes.

CHAIR: Mr Taylor, in your proposed amendments to 55GB(2) you make what I suspect are two subsidiary arguments to your principal argument. One is that the bill says that the remedy of the court is to stay proceedings, whereas you're suggesting that it would be better for the court to make any order it considers appropriate, is that—

Mr Taylor: Yes. It just provides the greatest scope for the court who has the conduct of the litigation to be able to have an unfettered discretion, essentially to run the litigation as it sees fit and to bring it to the appropriate point.

CHAIR: The other point you raise is that in the bill before us you don't consider it appropriate that it requires the complaint to the Ombudsman that the Commonwealth litigant has contravened, or is 'likely' to contravene, the model litigant obligations. You don't like the 'likely' to contravene the model litigant obligations. Could you elaborate on that perhaps?

Mr Taylor: That's correct. It creates a significant degree of uncertainty to have that provision there, and, as a generally principle, we do not like to see aspects involved in litigation or in legislation which create that uncertainty. I think if the breach is there by all means it needs to be acted upon. In our view, the term 'likely' creates that unnecessary degree of uncertainty.

CHAIR: Thanks very much for that. I appreciate that. There being no other questions from the committee, Mr Taylor and your crew, and Dr Morrison, thank you very much for your time here. As I mentioned to the previous witnesses, we do appreciate that, rather than assisting the committee, you could be out earning chargeable dollars for the time you spend in this committee, so we really do appreciate your public service in giving your thoughts to the committee. So thank you very much.

Dr Morrison: We appreciate the opportunity to appear. Thank you.

Mr Taylor: We certainly appreciate the opportunity as well; it's just unfortunate that we couldn't be there in person.

CHAIR: That's fine. With that, we'll suspend for the lunch break.

Proceedings suspended from 12:35 to 13:39

TANNA, Mr Grahame, Acting Deputy Commissioner, Review and Dispute Resolution, Australian Taxation Office

TODD, Mr Jonathan, ATO General Counsel, Australian Taxation Office

CHAIR: I call back to order this meeting of the Senate Legal and Constitutional Affairs Committee in its inquiry into the Amendment (Commonwealth Model Litigant Obligations) Bill 2017. I welcome officers from the Australian Taxation Office. No doubt they've been to Senate committees before and know all the rules about being part of Senate proceedings and that witnesses can't be threatened as a result of evidence they've given. We did indicate earlier that the committee is happy to have the media here, but only on the basis that they don't film witnesses if witnesses object. I understand that, in your positions as public servants, you don't particularly want to be in that position. The media understand that. We're happy for them to photograph us as politicians. In fact, the more that we can get the better. That's because we're politicians, I guess. That's why everyone hates us, I guess! We'll proceed on that basis, with thanks to the media for their cooperation on that.

Mr Tanna and Mr Todd, do you have an opening statement? I should just say that there have been a number of comments made specifically referring to individual Taxation officers and the office as a group which were 'adverse'—what the committee think might be adverse comments, in their definition. We sent them to the ATO and invited the ATO to make a response. I think that's happened in every case so that both sides are on the record. If you have an opening statement, we'll hear that now. Otherwise, we'll ask some questions. There are other senators with us who are a fraction late and will join us later. At the moment, over to you if you have an opening statement.

Mr Todd: I don't have a formal opening statement, but I might just summarise our written submission. Basically, we had three main points: the proposed bill may lead to delays in litigation; many issues overlap with what are already the inherent powers of the courts and can be dealt with in the inherent powers of the courts in their jurisdiction; and we take our modelling obligations very seriously. We fully investigate complaints and we do proper reports to the ALRC with full reasons. We provide reasons to the complainant as well. I note that our main submission has been agreed with in full by the Attorney-General's Department, the Department of Human Services, the Council of the Law Society of South Australia, the Home Affairs portfolio, the Commonwealth Ombudsman, the Law Council of Australia and the Department of Defence. I also note that the Attorney-General's Department, the Ombudsman and the Department of Human Services have also raised some other concerns regarding court powers and procedures and their interaction with the Ombudsman's office, with which we also agree. That's all. Thank you.

CHAIR: Thank you very much for that. I always recognise that you guys, as public servants, have a difficult job to do. It's not easy. But you'd be aware there have been a lot of complaints about the Taxation Office and the way they prosecute some of their litigation. It may or may not be true, but that's the evidence that's been given. I start the questioning by just clarifying. As I understand this bill, it would give the Ombudsman the power to look at allegations of the failure to have followed model litigant rules and it would allow the court to do something on the recommendation of the Ombudsman. That's not a terribly accurate summary.

Senator LEYONHJELM: It wouldn't require the recommendation of the Ombudsman. It just needs a complaint to be lodged with the Ombudsman.

CHAIR: Okay.

Mr Tanna: I think what you've just raised is very important in terms of looking at the detail of what the bill says. That's the genesis of our concern: whether this will achieve the aim. As I understand it, someone would complain to the Ombudsman and then that would trigger the right to apply to the court for a stay. The thing is, if the Ombudsman's report is that they're not going to investigate or they say there's been no breach, does that mean the court's bound by that? It's not quite clear from that.

Senator LEYONHJELM: My interpretation of it is that the Ombudsman must be involved. **A** breach of model litigant obligations can't be raised unless a complaint has been lodged with the Ombudsman, but the Ombudsman's process from then on has no influence on the court addressing the complaint.

CHAIR: But the court is required to deal with it if a complaint is made to the Ombudsman.

Senator LEYONHJELM: That's right. They don't have to take into account what the Ombudsman is doing, but it's a threshold obligation. Before the court can take the breach of obligation claim into account, a complaint must be lodged with the Ombudsman.

CHAIR: In answer to Mr Tanna's question, there are two separate streams, and the fact that the Ombudsman finds no fault still doesn't mean the court can't look into it and make its own decision on whether there has been a breach of the model litigant obligations.

Senator LEYONHJELM: That's right.

Mr Tanna: If the court gives a stay to enable that to occur, that would be seen as a delay. Say it's a tax case and you've got a dispute about your deduction and you're claiming a breach of model litigant, what you're complaining about is conduct. If the conduct is such—

CHAIR: Or failure to produce documents that might have an influence on the court's decision.

Mr Tanna: That's correct. But you'd raise that with the court.

Mr Todd: If the court has a hearing jurisdiction—

Mr Tanna: The court can already deal with that.

CHAIR: There has been a suggestion from another witness today that perhaps it should be amended not to require a stay of 60 days but to require such order as the court deems appropriate in the circumstances.

Mr Tanna: But you're just stating what the court can do anyway. You could go to court and say, 'These documents weren't filed,' or complain about other conducts that are procedural, which might have the consequence of a cost order against you or which might elicit some criticism from the court with, as that's in the public domain, the reputational risk and so forth that goes with that or which might be relevant to the substantive issue. If it's relevant to the substantive issue, the court should deal with it quickly anyway. I suppose the concern is: why would you want to delay it by having the Ombudsman look at that issue when you really should be raising it with the court?

CHAIR: This is a slightly unusual way to run a Senate committee in that you're asking us questions.

Mr Tanna: Sorry, it's just that I think the detail is important.

CHAIR: I'm personally very interested in it, and I think, in contravention of the normal committee rules, this exchange might be useful, because Senator Leyonhjelm, obviously, is the promotor of the bill and knows a lot more about it than I. Also, the questions you raise are valid ones, and I'm sure Senator Leyonhjelm can give an explanation of those because it is important. I'm inclined to think this is not a bad idea.

Some of the evidence we've got from the majority of lawyers—not all—is that the accountability aspect is very important, because, if you do breach the rules, there isn't any penalty, except, as you and the Law Council said, the court has a common law obligation and there are the rules of the court. Other lawyers who are very experienced in litigation appeared before us, which the Law Council didn't, and dismissed the rules of the court and the common law as valid arguments.

Mr Todd: The courts have inherent powers to order costs—indemnity costs, costs against the lawyers acting, if that's appropriate, which has happened not to us but to other parties in litigation in recent years. They've got full powers to run the proceedings as they see fit, to make orders for the production of documents, to stay the proceedings to ensure there's fairness between the parties. I suppose we have some difficulties working out exactly where the legislation arrives at, but, if the Ombudsman and the courts are in parallel, what happens if they arrive at a different outcome in terms of their view of these things?

In addition, for really serious breaches of model litigant guidelines, you'd probably also be in the territory where you've possibly breached professional standards and things like that, and there are other remedies in that way as well.

Senator LEYONHJELM: I don't think those accusations are valid. Yes, the court has powers to intervene in cases on the grounds of natural justice. We addressed this with some of the previous witnesses—the lawyers, in particular, who are engaged in litigation practices—and the point they made was that not all the complaints or the breeches of the model litigant rules as they currently stand amount to denials of natural justice or any of that sort of thing. If you look at some of the obligations, the obligations include keeping the costs of litigation to a minimum by:

… not taking advantage of a claimant who lacks the resources to litigate a legitimate claim … not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement … not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success …

And that's just the tip of the iceberg, really. There's a lot in those existing model rules that wouldn't come under the common-law criteria, or a court might not be inclined to take them into account. Whereas this bill, if enacted, would provide for a plaintiff or complainant, whatever side they're on, to raise them. And where a court says,

'Okay, I accept that the Commonwealth is in breach of those rules'—they are pre-existing rules; they're not new rules and they already apply there, but they are there as guidance rather than as mandatory—the court then has discretion as to whether or not to do anything about it. To suggest that that would somehow lead to a court doing something inappropriate—that's a reflection on the court. I think you have to assume that a court is grown-up enough and mature enough to say, 'This is material or not material,' and to act on that, wouldn't you say?

Mr Tanna: The problem is what remedy, what relief, are we asking the court to give that is not within its powers already? For example, if you have a dispute about a deduction or your have a dispute about another tax matter, and then you've got a model litigant complaint—we'll assume it's one of the one's you've just mentioned—there is an issue there about: surely the court's not going to decide that you've got a valid deduction because there's been a breach of the model litigant guidelines?

Senator LEYONHJELM: No.

Mr Tanna: So the question is: what relief are you seeking? That's what's I'm finding difficulty—

Senator LEYONHJELM: Are you arguing that the court, under the common law, doesn't have any idea what relief to give and therefore it won't have any idea what relief to give if the model litigant rules apply? They're in the same boat.

Mr Tanna: There might be costs orders. But with some of the things you just mentioned, to have to substantiate that would, I would have thought, be quite costly and complex in some cases. The applicant would have to establish the breach. And with the things that you have mentioned that don't necessarily go to the substantive issue, you'd have to establish that. That could be costly and cause delay, and it's not relevant to the substantive issue. It's not that it shouldn't be investigated somewhere and there shouldn't be some remedy, whether it's administrative, political or whatever, the issue is: what are you asking the court to do that it can't do already?

Senator LEYONHJELM: No, that's not the right question. The right question is: we're asking the court to do something it can do already, but in a broader range of circumstances—not just in common-law breaches of natural justice but also in breaches of the model litigant rules. So there's no change in the court's ability or power or the scope of its authority; it is a broadening of the circumstances in which the court can exercise those existing powers.

Mr Tanna: Then I suppose the concern is that to establish those would be costly. And it would be time consuming. It would cause delay. In those situations, there would be a difficulty in seeing how the court could come to a conclusion on the substantive issue in dispute—whatever that might be; whether it were tax or immigration or whatever—on the basis of a breach of the model litigant. There seems to be one remedy and the remedy doesn't seem to be relevant to the substantive issue in dispute. That's what I'm saying.

Senator LEYONHJELM: Whether it's costly or not will of course depend on the complainant and the circumstances of each case, but whether or not the court can decide the substantive issue and achieve a just outcome is the question that has motivated this bill. We have heard, even today, in evidence, of cases where a just outcome could not be achieved because of the behaviour of the ATO as a litigant—in one particular case, inserting statements so as to falsify a document to allege a tax debt, and then withdrawing the allegation once the falsification was discovered. So there are many cases—and we've only heard about three or four in this hearing, but there are many cases—where the plaintiff would argue that the substantive issue can't be justly considered by the court because the ATO, or another Commonwealth litigant—it's not a matter just for the ATO—or another Commonwealth agency is doing something which prevents that outcome from occurring. That's the point of it. So the purpose of the bill is to ensure that, when the Commonwealth engages in this litigation, it does not do anything to prevent the court from reaching a just outcome.

Mr Tanna: If that were the case—if it were relevant to the substantive issue—then you'd raise it with the court anyway. You'd be entitled to do so. And you'd raise it immediately with the court. So if something has been done that's unlawful or a breach of the rules, then you would raise it with the court because, if it's relevant to the substantive matter, you don't need the process of going to the Ombudsman. You would raise it with the court because it's relevant to the determination of the issue.

Senator LEYONHJELM: To repeat: the bill provides for a complaint to the Ombudsman, but you don't have to wait for the Ombudsman to investigate and reach a conclusion. If the plaintiff prefers, they can raise it directly with the court. I would imagine that, it having been drawn to the attention of the court, in many cases the court would say—depending on the circumstances and the facts of the case—'Okay; I might await the Ombudsman's view on this.' The plaintiff may or may not decide that the time involved in that is appropriate, considering the question of delay that you just raised. My point is simply that these rules already exist. These legal guidelines

already exist. But the evidence we have heard, and the motivation for introducing this bill, is that there are no consequences when they are not followed; therefore, they need to be made binding so that they can be raised in proceedings and ensure that they don't exist just in theory; they exist in practice.

Mr Todd: In terms of the broader reach of those ones that don't go to the courts in the hearing jurisdiction, by the nature of them, I think it would be somewhat problematic to have a court getting involved in deciding those in the course of the proceedings, and they are more amenable to being reviewed by the Ombudsman or Attorney-General's, as we have under the existing system, outside of the proceedings.

Senator LEYONHJELM: But the problem, of course, is that, if you don't have a court looking at how well the Commonwealth is abiding by these model litigant obligations and if you're saying that they're outside the scope of what a court might consider, what recourse does any plaintiff have if they're not complied with?

Mr Todd: If they're serious enough to affect the substantive outcome of the proceedings, they're something that the court will deal with in the proceedings.

Senator LEYONHJELM: Why do they exist? You're implying that some of them are too trivial to worry about.

Mr Todd: I'm not implying that at all. I'm implying that there's an appropriate mechanism for dealing with that through our being accountable to the Attorney-General's Department or, if you change it, to the Ombudsman to give an explanation with reasons as to what happened and why, and, if there are systemic issues, they're then addressed by the Attorney-General's Department.

Senator LEYONHJELM: The Civil Liberties Australia evidence we heard this morning was that the Attorney-General's Department pays no attention to this issue whatsoever and, therefore, that's a theoretical remedy, if you like, or a theoretical approach to abiding by these rules.

Mr Todd: I reject that. When we get an allegation, we investigate it thoroughly. We do a thorough, factual examination and we provide reasons to the Attorney-General's Department. They either agree with it or disagree with it and send it back, and we provide reasons to the complainant as well. So they're thoroughly investigated and examined by the Attorney-General's Department.

Mr Tanna: Senator, the other things that you've mentioned there—and I'm just looking at the model litigant obligations—that would not affect the decision or the substantive issue, I presume there's a policy reason why they are dealt with administratively and with their political consequences. If you're able to raise the issues you're talking about for determination by a court, they're different issues. They're not the issue in dispute. If they are relevant to the issue in dispute, that's fine. But, if they're not, putting that on the applicant to have to establish some of these things, I'm not saying that these are not important; they are. But, forgetting about the commissioner or the Commonwealth agency, I'm thinking of it from the cost of the delay involved and the lawyers' fees and so forth in having to establish some of these, particularly when you're looking at actions that occur within the organisation. Whether you go through discovery or FOI or whatever else, I would have thought that it's going to necessarily cause delay and cost in respect of the final determination of the issue in dispute. That's where I'm coming from.

Senator LEYONHJELM: I don't accept your argument of additional cost and delay necessarily. But, even if we accepted for the sake of the discussion that what your were saying was appropriate, is there not a case for arguing that the Commonwealth should behave itself in court in all instances according to the existing rules. There's nothing new about these model litigant rules; they are already there. What this would do is bring to the attention of a court that the Commonwealth is not abiding by these rules. As I said, leaving aside the cost and delay argument, is there not merit in that?

Mr Todd: They can already come to the attention of the court in the right circumstances.

CHAIR: We had a witness today—I don't know whether it was relating to the tax office—someone who was saying that two sections of the act were mentioned in the pleadings which made the defendant, the citizen, look like he was on a loser. What the Commonwealth government department involved didn't do was provide the third paragraph of that same section, which more or less exculpated the ordinary citizen, the respondent, completely. And if all three had been put in, it would have been an open-and-shut case for the respondent, but it wasn't. That's not very well put, but, if that was drawn to the court's attention, the court would say, 'That's very naughty; he should have put that in.' But someone's had to find the third one. What is the penalty? What's the obligation so that that won't happen in the future?

Mr Tanna: You allow the appeal. You allow the judge to decide in your favour.

CHAIR: It's got to that point with lots of interlocutory proceedings that may not have been necessary had the model litigant rules been followed from day one and they had said, 'Here's paragraph 1 and here's paragraph 2; but also I should bring to the defendant's and the court's attention paragraph 3, which makes it an open-and-shut case.'

Mr Tanna: You would bring attention to that. You wouldn't worry about sending that out externally. You would raise it with the court. If that is the difference between winning and losing then you win.

Mr Todd: So there would costs—

Mr Tanna: Yes.

Senator LEYONHJELM: It is dependent on the litigant being willing to take it all the way through. Evidence we also heard is that that will probably occur in the case of larger businesses and high-wealth individuals but most small businesses would quit at that stage because pushing it right through to the point where they might win could mean several stages of legal process. It wouldn't be necessary if compliance with the rules had occurred during the previous processes.

Mr Todd: I can't comment on that particular case, because I don't know what it's about. But I would have thought that was the sort of issue you would have hoped would get resolved at the first directions hearing. If it's a matter of pleading like that, you would expect the parties to resolve that fairly early and the matter would be struck out or fixed.

CHAIR: Again, there are lawyers and there are lawyers. The more you pay, the better your lawyer. I say that as a one-time, many moons ago, former lawyer. But the Commonwealth should not have a stake in it. It should just put the facts and let the court decide.

Mr Tanna: That is exactly right, and we take that very seriously. Particularly in AAT matters where people are self-represented, the commission takes a very strong position on making sure we put the case of the applicants—

Mr Todd: And the evidence—

CHAIR: The complaints we as parliamentarians get is to the contrary. Perhaps we only get one per cent and the other 99 per cent do the right thing. But it's the one per cent that concern us. On a slightly different topic, to take a hypothetical, an action could be between a major multibillionaire Australian fighting, say, a Chinese mining company over a Western Australian deal, both with very, very highly paid lawyers and teams of QCs using every trick in the book to delay interlocutory proceedings and ask for everything that those highly paid commercial lawyers and QCs are paid to because that their business. That's one set of actions. The next set of actions could well have the same lawyers on one side and a poor taxpayer on the other. There is a difference between the first example I mention and the second, which imposes a greater obligation on the Commonwealth to ensure the model litigant rules are followed. I accept that if you are having a fight with the tax office you feel like, 'The tax office is always bad and I am always right.' I accept that. But there are just so many complaints from people—little people—who simply cannot afford the $40,000, $50,000 or $80,000 to continue the litigation because they think they are done because they have only read paragraphs 1 and 2 and haven't read paragraph 3.

Mr Tanna: On that, with the commissioner and the reinvention program within the ATO in the last few years there has been a big focus in the area that I am in—review of dispute resolution—on resolving matters before they go to the tribunal. We use things like an independent review. That is for the large market. We have what we call a faster, intensive triage where we have specific groups around the country looking at objections that come in and seeing whether they can be determined very quickly or whether follow-up needs to be done. In a number of cases, we find that what people are complaining about is not a technical issue; they're really saying, 'We can't pay now.' So we enter a payment arrangement; it's a trigger for that. The other thing we have is Dispute Assist, which is a number of offices where we help self-represented taxpayers with personal issues—domestic violence and so forth—through the system. We don't represent them, obviously, but we help them with the system. We're now implementing the small business independent review. We're doing a pilot in South Australia and Victoria for small businesses under $10 million. We'll see how that goes for 12 months and see how successful that is.

CHAIR: Is that sort of like the migration division of the AAT, only relating to small business and tax?

Mr Tanna: It's an independent review.

CHAIR: Within the department?

Mr Tanna: That's right. Just like we have an independent review that's worked very well for the large market—those over $250 million. We've had that for the last two years, and that's worked very well. We've only had one matter that's gone on to litigation out of the 20-odd matters that have been reviewed. So the independent

review for small business will occur before the assessment is issued—again, another avenue for trying to resolve disputes as cheaply and efficiently as possible before they even get to the assessment stage.

Senator LEYONHJELM: Mr Tanna, I think all of that is commendable. In many respects, the fact that you are doing all of that acknowledges that things could improve. There is your own evidence—the survey of 670 small businesses you did in 2017, which cost $973,000, according to my indication. It indicated a widespread belief that the ATO acts unfairly towards small business, so there's room to improve, obviously. There are complaints to the effect that, once a matter gets down the track and is heading towards court, there is room for improvement by the ATO as well—and not just the ATO, but Comcare and other agencies have also been mentioned today. That's the proposition. So if there is room for improvement that you guys acknowledge, why isn't there room for improvement once the process gets past this mediation, discussion and negotiation phase?

Mr Tanna: I suppose that's the question: what is the legislation, as drafted, going to achieve in terms of getting people efficient resolution of their tax or migration issue? I understand your concern about what I suppose you'd call the non-technical issues that are important in relation to our conduct. The thing is, my concern is that they're being conflated. Not for a minute do we not take our obligations seriously. The question is: how will this legislation achieve what you're wanting to achieve for the normal, everyday person, except to reduce the delay, to reduce the cost and to get their issues resolved quicker? It just seems that to conflate the model litigant issues that don't go to the substantive issue or to the Commonwealth entity's conduct, which are all relevant to the hearing, with the actual substance and determination of the dispute, I think, is going to make the whole process more costly, more delayed and more uncertain. That's the concern: the conflating of it.

Senator LEYONHJELM: Well, there are those who take a different view, and their argument obviously is reinforced by some of the cases that have been mentioned in the submissions: the case of Rod Douglass, where the ATO relied on technical arguments; the case of Helen Petaia and Mark Freeman, who—

Mr Todd: They aren't litigation cases, though.

Senator LEYONHJELM: No, but they did end up being litigation.

Mr Todd: No, they're not. The Douglass one is, but the other two are not litigation cases; they never have been.

Senator LEYONHJELM: All right. Well, the argument has been made that the fact that they may end up becoming litigation would have a motivating factor for the ATO to comply with the model litigant rules in the possibility that failure to comply with them could be raised in subsequent litigation.

Mr Todd: With those cases we've made every effort, having regard to the PGPA Act, the guidelines for CDDA and the claims provisions of the legal services directions, to resolve them properly, and we had proper regard to that and put extensive efforts into that. So, I just don't agree with that assertion.

Senator LEYONHJELM: Okay.

Mr Tanna: And on the Douglass matter—and there's a limit to what I can say about it—I presume you're talking about the evasion opinion. That's where I suppose the system actually worked without having to—I mean, this legislation wouldn't change that situation, because the decision at audit and then objection was that there was evasion. But after the matter was raised it went to the Inspector-General, who made a finding that there was no issue in relation to the audit activity but when it came to litigation and a Federal Court action was commenced we got advice. And after getting advice from counsel we took the view that the objections and the views of the audit people were not correct. Now, saying that something's not correct or that we've got it wrong doesn't equal a breach of the model litigant—

Senator LEYONHJELM: No.

Mr Tanna: And we said that we accepted, after we got the advice, that it was wrong and we took the appropriate action for the Federal Court proceedings, even though technically they weren't the right proceedings to take, and we raised that with the taxpayer—that it wasn't the right proceedings, that we let it go and let it be dismissed. We agreed to pay the costs. But the point is that it worked anyway. I don't see how this legislation could have had any other assistance. You raised the fact that there was no evasion in the AAT, where the appeal was already. If you want a tax appeal in the AAT, you can say to the AAT that there was no evasion and the AAT stands in the shoes of the commissioner and can determine it without—they don't review the commissioner's decision; they come to their own view. So, there was an existing avenue there to disagree with or to challenge the evasion decision. That was already there.

Senator LEYONHJELM: How often has the Attorney-General admonished the ATO for noncompliance with the model litigant rules?

Mr Todd: We've had them make some recommendations from time to time. In the current financial year we've had 10 investigations of allegations finalised in which we've taken the view that there were two breaches and had that confirmed by the Attorney-General. In the previous year it was 14 alleged breaches investigated and two breaches confirmed. The Attorney-General's role is to look into the report we give them and approve it. We usually make our own recommendations. If the Attorney-General thinks there's something more to be done they will recommend that to us. But their main concern is if there's something that's obviously of significance that is of a systemic nature. These allegations are often self-reported by us or our lawyers, and they're fairly diverse in nature. We identify systemic failings, and they're often fairly procedural as well. Litigation is very intense and difficult, and obviously it's hard to do it to a standard of perfection.

Senator LEYONHJELM: How many litigants have raised with the Attorney-General's Department a failure by the ATO to comply with the model litigant rules—the existing legal service directives—to your knowledge?

Mr Todd: They come in to us through a variety of channels: Attorney-General's; the IGT; the lawyers for the other party; the other party; or ourselves. In terms of how many through each of those channels, I couldn't answer that.

CHAIR: We might ask the Attorney-General's Department. They're on next.

Senator LEYONHJELM: It's a very relevant question. The essence of your argument is that compliance is a matter between the Attorney-General and the relevant Commonwealth agency. The question that I'm interested in is: is the Attorney-General's Department doing anything about that?

Mr Todd: They look at the reports we give them. If an allegation was made to them, they would refer it on to us to investigate.

CHAIR: Can I go back to my hypothetical example of two highly-paid commercial firms' teams of QCs dealing in a case against a Chinese mine. If that same firm is then engaged by the Commonwealth to prosecute a case, what tuition is given to those major international legal firms about the model litigant rules and what has to be done so that you can say to them: 'You're no longer fighting a Chinese mining company; you've got to comply with the model litigant rules. If something needs to be disclosed, you've got to disclose it. If an interlocutory proceeding is not necessary, don't take it. Don't put undue time limits on responses to pleadings'? What tuition is given?

Mr Todd: We provide a copy of the litigant guidelines in every brief to an external firm and we draw their attention to it orally and in writing. Usually we have a panel of firms off of the legal services multiuser list. Those firms are of a relatively small number, and we use them all the time. They're usually people who are very familiar with litigating with the Commonwealth. In those large firms, the people who tend to act for the ATO tend to be tax litigation specialists. They wouldn't be the same people who are acting in those other types of matters. The people who act for us are very much aware of those obligations and take them very seriously.

Mr Tanna: I think it's actually included in the agreements.

Mr Todd: As well as that, yes.

Mr Tanna: In every brief we send to counsel, because the barrister's normally the front, they get a copy of the model litigant guidelines.

CHAIR: You say you think it might be in the agreement. Do you ever require an acknowledgement from your contracted lawyers that, yes, they do understand that this is a different—

Mr Todd: Yes. I'm pretty sure that's included in the terms of the agreement when they sign on to be a member of our panels.

CHAIR: In cases where there have been suggestions that lawyers acting for the tax office haven't followed the guidelines, do you think that a piece of legislation that says, 'You've actually got to do that,' would make them any more responsive or do you think they're as responsive as they're ever going to be, because they're perfect already?

Mr Todd: I don't think they're perfect already! We take this obligation very seriously. It's in a direction that's subordinate legislation and sets out principles, so it's already taken very seriously. We always endeavour to comply with it.

CHAIR: Sorry; the subordinate legislation?

Mr Todd: The legal services directions count as subordinate—

Senator LEYONHJELM: They're not binding. They're not really subordinate legislation; they're guidelines.

Mr Todd: Legally, that's what they are.

Senator LEYONHJELM: They're called guidelines.

Mr Todd: Yes, they're guidelines. I would've thought that sometimes moral guidelines were more persuasive than the rules.

Senator LEYONHJELM: You would think so, except the evidence would suggest that there are cases where the ATO, and not only the ATO but other Commonwealth litigants, don't conform to them. That's the issue. Even if the Commonwealth does comply with the model litigant obligations 90 per cent of the time, I cannot see any harm in making them binding for the 10 per cent of time where they don't. Considering the cases that have been raised with us and that lawyers who have experience in handling actual cases support the necessity for them, I'm inclined to agree that, even if it's only 10 per cent, it's still worth doing.

Mr Todd: It think it's at 0.03 per cent. That was the figure we calculated.

Senator LEYONHJELM: But that's just of what you're aware of.

Mr Tanna: In the case of private firms, if that were a systemic thing within the firms then basically they would be sacked. They know that we take it very seriously, and in fact I've had matters brought to my attention by a panel saying: 'There's a risk here. This might be a breach of a model litigant.' That's particularly when you've got a firm like the Australian Government Solicitor, who are on our panel. They are very attuned to breach.

CHAIR: Do you see a difference between guidelines and obligations? Currently they are guidelines. What, as I understand in a broad sense, this bill is intended to do is to make it not just a guideline that you can follow or not follow but an actual obligation enforced by some sort of legislative penalty.

Mr Tanna: That's the thing: what are we asking the court to do? Are you asking the court to find in favour of the applicant because there's been a breach? If it's relevant to the substantive issue then that might be relevant, but if it's not—

Senator LEYONHJELM: These are not new rules, though. As you and Mr Todd have pointed out previously, a litigant can raise these matters with the court already. The court's not going to be doing anything different. The only difference is that this will give a litigant an opportunity to say to the court, 'This can't be determined on a fair and just basis, because the Commonwealth is behaving in an unjust manner.' The court's powers to determine what the consequences of that should be are no different from what they are under natural justice principles.

Mr Tanna: Yes, but that's my very point—the fact that, if it is relevant, the court can still do it; it doesn't need this legislation.

Senator LEYONHJELM: We're going around in circles. It doesn't change the power of the court at all. What it does do is broaden the scope within which those powers can be exercised. But we have said this before, so—

Mr Tanna: We did have some concerns with putting personal sanctions on people. That will possibly lead to an overly cautious approach as well, because you're then going to apply a standard of avoiding the accusation rather than avoiding the accusation that a court would subsequently uphold. That's a possibility as well. But it's hard to comment further on that when it's unclear what the nature of it is.

Could I also point out something in relation to the SEA evidence given this morning. I'd like to emphasise our statement rebutting the adverse statements made. They've drawn your attention to the statements of one judge in that matter, and the majority, as we've set out in our written response to that, completely dissociated themselves from those comments and agreed that the commissioner hadn't breached the model litigant guidelines in that case. I just want to put that on the record. And, in the subsequent costs judgement, all three judges agreed each party should pay their own costs in that matter.

Senator LEYONHJELM: All right. I think I'm going round in circles now.

Mr Tanna: Could I just add something, Chair?

CHAIR: Yes, please. But we are running out of time.

Mr Tanna: Of course we want to do the best for small business. There have been statements about having a tribunal for small business. There is one there already. It's the AAT, the Administrative Appeals Tribunal. It's a very competent body. If there are—

CHAIR: Mr Tanna, could I interrupt. I've asked the people who raised that to give me one page, of what I understand is a 100-page submission, on what is proposed. The idea was that a special division of the AAT, like the migration division, which has particular rules and particular expertise—

Mr Todd: There was a small tax claims division of the AAT, which was abolished a few years ago, and they do have some specialist tax members.

Senator LEYONHJELM: Yes, there was.

CHAIR: What happened to that?

Mr Todd: I think it was absorbed into the main body of the AAT.

Senator LEYONHJELM: Self-Employed Australia did make the point that the entry price for the AAT was $40,000 and for a lot of businesses that would be prohibitive.

Mr Todd: It would be nice if there were a really simple solution to these cases that was less costly, but I think that's actually a very difficult problem. The AAT is a no-cost jurisdiction, so if you lose you don't have to bear the commissioners' costs and if you win you get your application fee refunded. But, unfortunately, the idea that you can somehow have someone come along and quickly and instantly determine these sorts of disputes, just like that, without the need for representation and examination of what's often a lot of evidence. Don't forget that, with the commissioners' cases, we're strangers to the transaction. We come in and audit it. We're not a party to it, so that's quite different as well. And then, when the AAT is standing in the commissioner's shoes, it's the same thing. I think it's very hard to come up with a much simpler solution than what the AAT provides.

CHAIR: Does the ANAO ever look at alleged complaints about breach of model litigant obligations? Perhaps I should ask the Attorney-General's Department that.

Mr Todd: We have had various reviews from the IGT and the ANAO. The ANAO has done quite a lot of reviews into various aspects of the ATO's administration, but not specifically into the model litigant rules, I think, because really they would be for Attorney-General's. They have done a lot of reviews over the past five years, but not into the model litigant rules, I don't think. But there was a parliamentary inquiry, of course, a bit over two years ago into disputes with the ATO.

CHAIR: You have made comments in your response to the Productivity Commission proposal which broadly, I think, were the genesis of this bill.

Senator LEYONHJELM: Narrowly. I would argue that the bill is exactly what the Productivity Commission recommended.

CHAIR: You've responded to the Productivity Commission, have you?

Mr Todd: I think we did. We certainly responded to the House of Representatives Standing Committee on Tax and Revenue inquiry into tax disputes, which also covered a lot of this sort of ground.

CHAIR: Okay. We'll have a look at those too. Thanks very much for your time. We're always time constrained, but we do appreciate the help you've given to the committee in explaining a few of those things. I'm not sure that we've asked for anything to be taken on notice, but, if we have, could you get that back to us as soon as possible.

Mr Tanna: Thank you very much.

GIFFORD, Mr Cameron, First Assistant Secretary, Attorney-General's Department

WHITAKER, Ms Susan, Legal Officer, Attorney-General's Department

[14:32

CHAIR: I welcome officers from the Attorney-General's Department. We have your submission, which we've labelled No. 10. You've probably been before a number of parliamentary committees, so you know the rules—parliamentary privilege, the protection of witnesses et cetera. The media seem to have lost interest in you! But, if they do turn up, we only allow them to film if the witnesses agree. The previous witnesses preferred not to be filmed. So you can let us know if that occurs. Do you have any comments on the capacity in which you're appearing?

Mr Gifford: I'm First Assistant Secretary, Civil Justice Policy and Programs Division of the Attorney-General's Department.

CHAIR: Is there anything you'd like to say as an opening statement?

Mr Gifford: Yes, thank you. We have actually prepared an opening statement. I will give you a little bit of context in terms of our view of the obligation and the compliance framework. The Attorney-General has responsibility for the maintenance of proper standards by the Commonwealth in litigation. The obligation to act as a model litigant has been recognised as a common-law obligation upon the Commonwealth since 1912. As espoused in the well-known Melbourne Steamship High Court case, it requires the Commonwealth to conduct itself with a standard of fair play.

Until the early 1990s, the Attorney-General's Department was the sole provider of legal services for the Commonwealth, and this included the conduct of litigation. From 1 July 1995, competition for the provision of legal services was introduced by enabling private firms to be engaged directly by agencies. In anticipation of this change, the first iteration of the directions was issued by the Attorney-General's Department in 1994. These directions existed to ensure the continuation of a coordinated and consistent approach to Commonwealth legal work and included reference to the obligation to act as a model litigant. In 1999 the directions were first issued by an Attorney-General under the Judiciary Act and introduced the codified version of the model litigant obligation. The present Legal Services Directions of 2017 continue to require the Commonwealth to act as a model litigant in handling claims and litigation, and operate in addition to the common-law obligation.

The directions act as a vital tool for achieving effective oversight and coordination of Commonwealth legal work. The Commonwealth consists of over 150 agencies. It's important to understand the breadth, complexity and variety of work undertaken across the Commonwealth when assessing the effectiveness of compliance with the model litigant obligation. At any one time the Commonwealth may be engaged in tens of thousands of actions. For example, in January this year the Home Affairs portfolio alone had an active litigation case load of 7,425 matters.

The breadth of matters facing the Commonwealth is further complicated by the varied types of litigants the Commonwealth is engaged with. For example, the Commonwealth may find itself engaged in litigation against a self-represented litigant who may be challenged to comply with the court or tribunal processes. However, the Commonwealth also finds itself engaged with extremely well resourced litigants, such as litigants from the banking or finance sector, who may seek to take every technical point that they can construct. In both of these situations the Commonwealth is under the model litigant obligation—a higher obligation than the ethical duties of lawyers generally—but in both of these circumstances the Commonwealth also needs to appropriately defend the interests of the Commonwealth, which are ultimately the interests of taxpayers and of the community. The manner in which the Commonwealth does so is likely to vary, however, depending on the nature of the proceedings.

In this context I note that in 2015-16 our department recorded a total of 75 reports of actual or alleged noncompliance with the directions. Forty-nine of these related to the model litigant obligation, with 11 identified as actual incidents of noncompliance. The 2016-17 figures will be published shortly—and I acknowledge that they should have been published by now. But we note that these statistics remain low in comparison to the Commonwealth's involvement in litigation.

More information about agency compliance is contained in our submission, but I do take this opportunity to make three observations. First, in each instance of noncompliance the department was satisfied with the agency's assessment and remedial actions proposed or undertaken by the agencies. Second, within the volume of litigation these figures represent a very low number of noncompliance. Third, many of the complaints of perceived noncompliance do not, in fact, stand up when investigated. People might be unhappy with an outcome, but that

does not mean that the Commonwealth has acted improperly. Indeed, the complainant may be unhappy with the outcome of their case because the Commonwealth, in fact, acted properly to protect the public interest with respect to that case.

The longstanding nature of the model litigant obligation reflects the Commonwealth's role to serve the public and to promote the administration of justice. Given its executive role, the Commonwealth's actions have the ability to affect both individuals and groups or classes of people. It's imperative that the Commonwealth conducts itself in a manner that assists the court and supports access to justice.

The obligation expressed in the directions is broad and wide ranging. This allows the Commonwealth to apply a principles-based approach to compliance rather than approaching the obligation as a restricted technical exercise. This reflects the need for the Commonwealth to be able to engage fairly in the unique circumstances of each individual case. It enables the Commonwealth to balance the impact of our approach to litigation on an individual against the broader public interests and the proper administration of justice.

It is also essential that the obligation is not codified in a way that would limit the Commonwealth's ability to respond appropriately to claims and litigation. As it stands, the obligation does not prevent the Commonwealth from acting firmly and properly to protect its interests and the public interest. It does not preclude the Commonwealth from taking legitimate steps to pursue, test or defend claims. The obligation is not intended to provide a separate remedy, cause of action or any personal rights beyond those that are already available.

The department considers that the model litigant obligation currently strikes the right balance in protecting the interests of individual litigants, the broader public interest and the administration of justice. The department takes a very active role in administering the directions and works closely with agencies across the Commonwealth to support their compliance with the obligations. The department has a number of mechanisms supporting this approach, which include: direct engagement with the agencies during significant litigation; education to agencies, either on a targeted basis or broadly across the Commonwealth; and coordination of platforms to support individual agencies to seek guidance on complex issues that they are working with—for example, through our General Counsel Working Group and the Australian Government Legal Network.

It will not necessarily be evident to a party that the department has become involved and that, as a result, the Commonwealth has altered its actual planned handling of a legal issue. This does not mean that there was, in fact, noncompliance in the first place either. The department may become involved through an agency itself raising an issue with the department to seek guidance, and often does so. But the important thing for us is that the department does actively engage with the other departments and agencies in administering the directions and does not simply wait passively until a matter has concluded and then review its handling.

As indicated previously, the rate of alleged noncompliance by the Commonwealth is relatively small compared to the tens of thousands of matters on foot each year. Where litigants do wish to raise concerns about the Commonwealth's conduct or approach, a number of mechanisms are already available to them. For example, individuals should raise their concerns directly with the agency and seek internal review; they can lodge a complaint with the Commonwealth Ombudsman; or they can seek relief through administrative review in appropriate cases. The court is also able to oversee the Commonwealth's actions in court by using their inherent jurisdiction and civil and procedure laws to ensure that litigation is conducted in a proper way. For example, the courts have imposed cost orders or made adverse comment from the bench in order to impose higher litigation standards on the Commonwealth. So it is certainly not the case that there is a gap or that the Commonwealth is in some way not subject to the supervision of courts and tribunals in how it conducts itself in litigation and merits review.

I would like to note that a common theme from a number of the submissions and some of the testimony we've heard today is the applicability of the model litigant obligation in administrative decision-making. The model litigant obligation does not extend to agencies making administrative decisions. This is consistent with common law expectations. It remains appropriate that administrative decisions are generally subject to external merits review and judicial review. Once a matter is subject to such a review, the obligation will apply to the conduct of the Commonwealth agency if they are involved in the proceedings. The model litigant obligation in the directions is not the only means by which the Commonwealth seeks to ensure appropriate decision-making. Outside of the litigation, the availability of merits review assists to ensure that correct and preferable decisions are made. In addition, judicial review ensures that administrative decision-making powers are lawfully exercised.

Given the avenues for redress already available and our views of the current compliance by Commonwealth litigants with their obligations, the department considers that there is no evidence to support the need for the additional measures that the bill proposes. Instead, it would give rise to real practical difficulties in the conduct of litigation. We'd be pleased to take questions.

CHAIR: Thanks very much for that opening statement. I suspect the answer's no to this, but do you keep any sorts of records or statistics across all Commonwealth government agencies and departments—I think you said there were 159 or something—on people who've said, 'We've got a good claim but we simply cannot afford to continue on these proceedings that we've started, or that someone's started, because of the cost of the interlocutory proceedings.' Are there any statistics to show if—

Mr Gifford: If they approached us saying that they thought there was some concern about conduct in terms of model litigant obligation, then certainly we have those statistics and we maintain those. But if, indeed, it was a case where effectively they weren't commencing litigation for whatever reason—

CHAIR: No, I mean the one's that have commenced litigation—you do have statistics on that?

Mr Gifford: Certainly in terms of anything that relates to model litigant obligation—I think we were talking about the statistics being around about 63 for the last financial year. The next financial year's statistics will be released shortly, but they're not too much higher than the 63 released previously.

CHAIR: I was making the point before about major commercial firms with teams of QCs who take every opportunity—because that's what they're paid to do—to make sure that every time limit to respond to something is the narrowest, shortest-possible time to put pressure on the other side. If you've got two international law firms and QCs against each other, that's perhaps fair game. But if you've got the Commonwealth with all of its resources against an ordinary litigant with a small-town country lawyer, sometimes these things come to the stage where they say, 'Just pay the $50,000 in tax and don't worry about it,' because to litigate it with all the tricks of the trade and all the interlocutory proceedings is going to cost you much more than $50,000. I'm just wondering if you have any statistics about people who have made you aware that they've dropped out of a case across the Commonwealth jurisdictions because—

Mr Gifford: Not on that particular point. One thing I'd probably like to take the opportunity to explain is how we actually approach our compliance work, because I think there's been some criticism today that effectively either we're asleep at the wheel or we don't actually do the compliance job at all.

CHAIR: Or don't care, because the Commonwealth—

Mr Gifford: And I will say, for the purpose of *Hansard*, that I categorically reject that. We have an investment across the Commonwealth's litigation, so we engage very early and quite often throughout the process with different agencies. To give you some core examples about where we engage with different departments and different agencies, it will include, for instance, the engagement of counsel. Where you're talking about how many counsel are engaged, for instance, if you're talking about seeking approval for engaging counsel over the cost of $5,000 then you need the Attorney's approval to do so. We'll be part of that conversation to say, 'What do you need this particular counsel for, how many counsel and what's the particular purpose?' Part of that conversation is: 'Have you got the right, and only the right, amount of resources devoted to this particular exercise?' It's not just that we wait until the other end of the exercise, where there's a complaint about a potential breach of the model litigant obligation but that we're very much involved at the outset of litigation as well.

Senator PRATT: In paragraph 15 of the submission, you state the department:

… promotes awareness of the Directions and works with agencies to address systemic issues where they are identified.

What systemic issues have previously been identified by the department?

Mr Gifford: I might give a bit of a description of exactly how we engage, and then I'll ask my colleague, Ms Whitaker, to talk to any particular systemic issues that have arisen. The way we engage, as I said, is to be quite proactive with our agencies. There are a number of forums where we have these discussions. One that is particularly pertinent is our General Counsel Working Group, where we bring together the Commonwealth's key litigators. It's a forum where effectively we're sharing expertise and opinions about the way the current litigation is unfolding. It's also the forum in which we discuss any adverse commentary that is coming from the judiciary in terms of the conduct of that litigation. That then gives us the ability to have some bilateral conversations with the relevant agencies to see whether or not there are any particular concerns. The other way in which, of course, we engage with them is that once a complaint is made it will be referred to the relevant agency. As you heard Tax say this afternoon, Tax will investigate that, or any relevant Commonwealth entity. They'll let the applicant know what the outcome of that particular review is and they'll also let us know, and we'll engage further to see whether that was appropriate for the particular circumstances. Ms Whitaker, I'm not sure if you want to talk to any particular systemic issues which have arisen?

Ms Whitaker: Essentially, I'd like to talk a little bit about our compliance framework and how we assist agencies. When we're looking at and reviewing the notifications as they're coming through, what we're looking at doing is supporting agencies to ensure that they're engaging with their model litigant obligations. A systemic issue

will be identified if, for example, we think that they're not engaging with their obligations. Or if a court has made adverse comment about them not providing documents and they're not finding that to be a model litigant breach then that might identify that to be a systemic issue, because they're not taking into account their obligation to assist the court. A systemic issue might be identified because the same issue is arising from the same agency across multiple complainants or because there is one issue that's arising that they're just not engaging with.

Senator PRATT: They're generic examples that you've given us. Do you have specific examples from agencies where you have identified such issues?

Mr Gifford: I think the full answer to that question is no. We're not particularly concerned that there are, at this present time, systemic issues. From our visibility of the case load and our visibility of the complaints and the way they're responded to, we're not seeing anything from any particular agency where there is a repeat concern about particular types of behaviour.

Senator PRATT: So you're arguing that you're looking for systemic issues but you haven't found any.

Mr Gifford: We continue to look but, at this stage, there is nothing where I'd say there is a systemic concern in relation to the conduct of the agencies.

Senator PRATT: In the example you give where someone, for example, hasn't met their obligation in the provision of documents, investigation of that issue would have seen it to be a one-off example rather than systemic—is that what you're arguing?

Ms Whitaker: It depends on how the agency engaged with that allegation. If the allegation came from the court and the agency identified and notified that under their obligations under the directions and they found that they were compliant, we might raise with them that they weren't necessarily engaging with the court's criticism of them and assisting the court in that process.

Senator PRATT: When complaints that are made are important to the case that is before the court, is action taken to get the Commonwealth to act as a model litigant while proceedings are underway, or are proceedings properly paused so that the playing field is levelled?

Ms Whitaker: That is depends on the timing of the notification. If the notification is made while proceedings are on foot and engaged with and particularly if it goes to a matter that might be of substance to the proceedings, then we would work with the agencies as much as possible to deal with that in real time.

Senator PRATT: Is it part of the model litigant obligation to do that?

Ms Whitaker: I believe that is a part of our compliance framework and how we prioritise the notifications that we receive.

Senator PRATT: Is it possible to get a copy of the compliance framework, in addition to the model litigant?

Ms Whitaker: It is available on the website but I also have a copy here, if you would like it.

Senator PRATT: That is fine. I am sure we can grab a copy off the website. The 49 notifications all appeared to be one-off incidents rather than systemic issues. Do you mean that the technical defences were that those undertaking the legal work were unaware of their obligation not to rely on a technical defence?

Mr Gifford: Going back to Ms Whitaker's point, it depends on how the agency engages with it. It is not systemic to the point that any remedial action is undertaken. If, for instance, it is about the claiming of a technical defence where it wasn't appropriate and if education is a response to that, then that usually addresses it from becoming a systemic issue rather than just being a particular issue for either the individual officer or the particular case.

Senator PRATT: The 11 out of the 49 would be of that character.

Mr Gifford: That is correct.

Senator LEYONHJELM: You have mentioned that there are 150 agencies, tens of thousands of actions and many varied litigants, yet, out of all that, there were only 49 complaints on compliance notifications and 11 of those identified as incidents of actual noncompliance. It seems to be a remarkably small amount. Is the Commonwealth that virtuous?

Mr Gifford: No, Senator. I must admit that I was wrestling with this question myself on the way up on the plane. No, we are not laying claim to being that virtuous at all. The one thing I wanted to put in context was the fact that the complaints are realistically just the tip of the iceberg in terms of our compliance work. Because we are engaging so early and so often with agencies in their conduct of litigation—and I gave an example earlier about some of the forums—it means that we can be engaged throughout their decision-making process, including suggesting to them that they might want to think about how they are proposing to conduct the litigation. So I

would say to you that our compliance work includes prevention of further complaints and that the statistics then are not necessarily representative of the totality of where amendments might be needed for the conduct of the agencies.

Senator LEYONHJELM: All of the incidents or notifications and then the actual non-compliance incidents that you record are all self-reported by the agencies. So, the agencies have to actually fess up to these before they come to your attention, don't they?

Mr Gifford: No, that is not the case either. We can be directly approached and we are directly approached by the other parties to the litigation. When that is the case we refer them to the agency involved, such as the ATO. The ATO's evidence this afternoon was that they will conduct an investigation. They will tell us their response to that and give the response to the other party. If we are not satisfied with that, we continue to engage further until such time as we think it has been satisfactorily resolved.

Senator LEYONHJELM: In the period 2015-16, how many the 49 notifications which you refer to in your submission came from agencies and how many were external to agencies?

Mr Gifford: It might just take a little time to find that information for you, Senator.

Ms Whitaker: We do have it.

Senator LEYONHJELM: You probably heard some of the earlier witnesses suggest, and you refer to it yourself, that you guys don't do anything about compliance or noncompliance, as the case may be, and the suggestion is that the model litigant rules are there but that it is okay to not conform to them in a particular case. That was the assertion by a number of witnesses we heard today. You said in your opening statement that there are occasions when the Commonwealth needs to deal firmly with the litigant. By implication, I took that to mean that it might mean not behaving in a manner envisaged by the guidelines.

Mr Gifford: If that was the inference that I left, that wasn't my intention. I would firmly suggest that they are just defending appropriately the principle at stake in the matter.

Senator LEYONHJELM: We heard this morning of a case where the ATO had undertaken a raid on a taxpayer, seized their documents. Those documents included details of the loan agreement. The accusation was that the taxpayer hadn't paid money. The taxpayer argued that the money received was a loan. The taxpayer was asked to prove that the money was a loan, not taxable income, and the documents required to prove that were held by the ATO, and the ATO would not release them. The reason the tax office didn't release them was because it said it would be too onerous to find them, I think—or words to that effect.

If this model litigant bill became law, it would strike me that had the model litigant rules been applied, there would be a possibility that the taxpayer could go to the court and say, 'I have a disability here in establishing that this is a loan. The ATO has my documents and won't release them.' The court could then, at its discretion, say, 'All right, we will either order the ATO to deliver up the documents or we will suspend this action. We will basically say no judgement is to occur until the ATO has the time and resources to release those documents.' In the event of that particular case, it did go to court but that's not as desirable as having headed it off before it got to court. I would imagine that case never even came onto your 49 or whatever year it was that you're counting there. So how many more of those sorts of situations have to arise before we say, 'You may be handling 90 per cent well, you may be heading them off well but isn't 10 per cent enough?'

Mr Gifford: There are so many things for me to say there if I can unpack that. But if I could perhaps start with the 10 per cent. I think 10 per cent is a dangerous extrapolation. I have not yet seen any evidence that would substantiate that figure of 10 per cent. Putting that to one side, the scenario you are talking about, I am not familiar with it to be able to comment on it in detail. But if I can take it as a hypothetical, in that scenario, the current situation would be such that the individual who was aggrieved by that particular conduct could and should actually raise that with the Office of Legal Services Coordination and that would then kick in the complaint mechanism whereby we would directly and in real-time to the best of our endeavours raise that with the relevant agency—in this particular instance, tax—and we would seek to make sure that that was remedied in terms of being consistent with the model litigant operations, which, as you describe it would actually include handing over the pertinent information for the purposes of that case.

At the same time, at the moment, that person would also be able to seek that redress from the court, and that was a point that I heard tax making earlier in their previous evidence. I'm not sure what we would be adding from the proposed bill which they can't currently seek in terms of court enforcement because that particular information sounds, in this hypothetical situation, very pertinent to the conduct of that case. A court would see it as such.

Even taking your point that you would like to avoid the conduct of the litigation to the extent that it's possible, a court would certainly dismiss the case if it were necessary and give appropriate costs orders to the individual. So

there are mechanisms that are already available to the complainant in a case such as that, including our compliance and our framework.

Senator LEYONHJELM: The ATO made the same point, that there are existing rules. But they're common-law rules, they're not the same as the guidelines. The guidelines go further than the common-law rules, if I understand it—I'm very much a bush lawyer in this area.

The argument you're making, and which, essentially, the ATO made, is that the common law provides sufficient safeguards and that it doesn't require these additional options for a plaintiff to say to the court, 'I'm being treated unfairly.' And yet we hear the complaints that some people are indeed being treated unfairly.

Mr Gifford: To me, there is a concern there in terms of them not availing themselves of the existing framework. Perhaps there is some consideration there for us to give in making sure that the recourse for complaints is available, but, certainly, the mechanisms are there to address that type of conduct.

Perhaps I could flip the example around as well, to explore what the proposed bill would potentially open up. I think that a lot of the testimony you've heard today is from people who are taking the perspective that the aggrieved litigant is necessarily always in the right or pure of motive. That's not the case.

Senator LEYONHJELM: I don't know that I'd agree with that, but, anyway, I'll take it for the moment.

Mr Gifford: Okay, but could you follow me with this for a second? The fear for us is that, effectively, you're opening up another mechanism whereby you can stay proceedings. You can ask the Ombudsman to investigate a particular issue, by which you can—

Senator LEYONHJELM: You can ask the court for those things. The court will be no more or less inclined to do it than it is now, based on common-law principles.

Mr Gifford: But I think if you're opening up another avenue for the Ombudsman to investigate, the court would very likely defer until such time as the investigation by the Ombudsman is complete.

Senator LEYONHJELM: That may be, yes.

Mr Gifford: If we think about that in context where there is litigation on foot and where delay is of an advantage to a complainant—for instance, immigration or extradition spring to mind—then there is an incentive there for that person to raise model litigant obligations so as to build some additional time into the process. That's not really the incentive that I think would be consistent with government policy in terms of the quick resolution of litigation.

Senator LEYONHJELM: A small point, too: there has not been any serious suggestion that this should apply to administrative decisions. It was the AAT where the suggestion was made. I wouldn't regard that as an administrative decision; it was a tribunal context. The discussion earlier today was whether or not this bill, if it became law, should apply not just to courts but also to the AAT's processes in being able to bring to the attention of the commissioner a complaint about failure to follow the model litigant rules. But it wasn't about administrative decisions per se.

Ms Whitaker: Excuse me, Senator, you asked for those statistics about the origins of the 49 complaints that we received in the 2015-16 financial year. Of the 49 complaints, six were reported to the Office of Legal Service Coordination by the individual, one was reported by a law firm and 42 by the agencies.

Senator LEYONHJELM: Thank you.

CHAIR: In litigation between the Commonwealth and a citizen, is the citizen made aware, consciously, of the model litigant rules?

Mr Gifford: I'm not sure if that's a standard practice, but we might just take that on notice to confirm whether or not that's the case.

CHAIR: Great, if you would. And under the bill, as you interpret the bill, what status would the Ombudsman's investigations hold before a court?

Mr Gifford: I think that's an excellent question, and actually one that we hold ourselves. We're not quite sure about the way those two processes would interact potentially. We see the potential there for a matter to be raised with a court and referred off to the Ombudsman for investigation. But then it also remains within the court's jurisdiction, as we understand it, to make a decision without waiting for the Ombudsman's outcome. Alternatively, they might actually await a report from the Ombudsman. There is a potential there for the Ombudsman to conclude that it either is or isn't a breach of the model litigant obligation and for a court to conclude otherwise. How those two can be reconciled is actually a little unclear for us.

CHAIR: One of the witnesses who was a one-time judge indicated that judges—federal court judges, particularly—didn't want to get involved; they wanted to concentrate on the substantive issue there and didn't want to be diverted into a side issue of whether the model litigant rules were being followed or not; hence, the evidence, as I interpret it, was that the courts would be happy for someone else to look at whether the model litigant rules had been followed in this instance and, hence, a suggestion for the Ombudsman. Do you have any comment on that?

Mr Gifford: I think that's a fair observation—that the court would rely, then, on the jurisdiction of the Ombudsman to have a look at that complaint. For us, that then feeds into the concern about the potential delays that come from that, and I think one of the questions that the Ombudsman may wish to address is on the resourcing implications it would have for the Ombudsman as an agency as well.

CHAIR: We're hearing from the Ombudsman later, and I suspect resourcing would be an issue.

Ms Whitaker: Could I just add to that point? In the previous evidence, you discussed the types of model litigant breaches that might be relevant to the court procedures and the conduct of litigation, and causing a delay is a breach of the model litigant obligation, and what the bill is seeking to do is to expand the types of circumstances in which the court can do this. As our submission indicates, those other types of model litigant obligations are more appropriately, and can be, investigated by the Ombudsman or the particular oversight body of the agency, such as the Inspector-General of Taxation, that being the oversight body for the ATO.

CHAIR: You have mentioned the issue that the bill, as drafted, talks about a stay of proceedings, and I think 60 days is mentioned. One of the suggestions given to this committee—by the Queensland Law Society, I might say—was that that should be amended to say that, rather than staying the proceedings, the court will make such orders as it deems appropriate in the circumstances, which may be a stay, but which may be an order: 'Get that document here by tomorrow,' or something like that. Would that allay some of your concerns on the delay aspect?

Mr Gifford: Not necessarily, because, to be honest, it reinforces our view that, effectively, that power is already available to the court in terms of the management of any of the litigation in front of it and it can include time frames in terms of when documents must be discovered. It has got hands-on powers in terms of directions for the conduct of the litigation. So, while that would be a tempering of the stay element of this particular bill, it's not a new power for the court; the court already has that power.

CHAIR: I appreciate your comments. Particularly in this committee, we've had a bit to do with the AAT and migration reviews, on which I have a certain position, and I can't help but think that, in those instances, the Commonwealth is required to follow model litigant rules, whereas, very often, the lawyers for the other side don't have any obligation to follow any sorts of rules, let alone model litigant rules. So I understand the point you're making there, and I guess it's horses for courses, which you are talking about. Of course, we've heard from a lot of small businesses on dealing with the tax department, and it's a nightmare out there in the real world. Senator Pratt.

Senator PRATT: Your submission says that, of the 49 notifications, they were for the '15-'16 financial year. Have you got the figures for the '16-'17 financial year?

Mr Gifford: We do have the figures. Unfortunately, I can't release them, to the extent that we haven't actually advised the Attorney about those figures. I would acknowledge that effectively it's very late in the piece for those figures not to have been released, and that is actually down to the competing priorities within the department. We do anticipate that they will be released very soon.

CHAIR: Take it on notice.

Mr Gifford: By all means.

Senator PRATT: Do you know if they differ substantially? They don't affect your statements—

Mr Gifford: No, they don't affect my statements.

Senator PRATT: that there are no systemic issues?

Mr Gifford: They are very consistent. Whereas I think we were talking about figures of '15-'16, looking at 75 total complaints, I think we're still on a figure of less than 100 for the '16-'17 year.

Senator PRATT: I'm not sure about our reporting time line, but is it possible for you to give us that information before the reporting date for our inquiry?

Mr Gifford: We can certainly seek the Attorney's approval for that.

Senator PRATT: Do those notifications include notifications from the Ombudsman? What's your overlap in terms of how you resolve that?

Ms Whitaker: Can I take that on notice please? I don't know how often the Ombudsman actually comes to us as a part of that process. I'd like to double-check that, if you don't mind.

Senator PRATT: Okay. We've had some conversation that there are 49 and you wouldn't expect that there are necessarily other examples. In terms of whether you are systematically collecting that information, you're not sure if the Ombudsman is one of those sources?

Ms Whitaker: I would expect that the Ombudsman would advise us if they were investigating a breach of the model litigant obligation. I expect that we would know prior to that being referred to the Ombudsman through an agency self-identified notification to us. But I just need to double-check that.

Senator PRATT: Thank you.

Senator LEYONHJELM: I'd like to take up another aspect of your objections to the bill. You argue that it goes well beyond the Productivity Commission. I'm struggling to see how it does that. Could you explain that to the committee please?

Ms Whitaker: 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.

Senator LEYONHJELM: Let me read to you the Productivity Commission's relevant recommendation. Recommendation 12.3 states:

> 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.

In what way does the bill exceed that recommendation?

Mr Gifford: I draw your attention to paragraph 32 of our submission, where we tried to address this point. We were trying to articulate there that the Productivity Commission's recommendation focuses on an avenue of complaint to the relevant ombudsman. Effectively this bill builds in a complaint and arbitration mechanism for the court to consider that. That goes beyond what was proposed in the recommendation you just read out from the Productivity Commission report of 2014.

Senator LEYONHJELM: No, I don't think that's correct. The recommendation of the Productivity Commission says:

- Compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsmen—

It says 'including'. It doesn't say it's the only avenue, nor is it mutually exclusive of other options. The bill actually says that, in order to take it to a court, you first have to complain to the Ombudsman but the court can consider it and the Ombudsman can consider it—the assumption being that courts are grown-ups and quite capable of making their own decisions about these things. There will certainly be situations where the court might say, 'We'll wait for what the Ombudsman says.' That may slow things down, which is the point the ATO made, but it also may facilitate the progress of the case. Or in other cases the court might say: 'No, we're not going to wait. This seems to me to be a legitimate complaint in terms of not complying with the model litigant rules. I will, therefore, make an order or do something.' It's up to the court what they do, of course, so there's nothing prescriptive about how the court should respond to a complaint like that. Courts can make up their own minds, and I would imagine that in many cases a court would say: 'No, we're not interested. The case will continue.' So I don't see how the bill exceeds what the Productivity Commission has recommended.

Mr Gifford: That's perhaps the point on which we'll differ. If we were looking at that recommendation and looking to implement that recommendation, we would be limiting it to looking at a role for the Ombudsman. The court interaction, I think, brings in a different layer. You're right: it's not necessarily inconsistent with the recommendation of the PC report. In any event, our broader concern is that it doesn't necessarily add to anything that the court can't already do, and potentially it adds complexity and delay in terms of the conduct of litigation.

Senator LEYONHJELM: Yes, we had that discussion with the ATO—it doesn't add to anything that the court can't already do. You're quite right: the court has its powers. But the reasons for doing anything are currently common law reasons. The guidelines go beyond the common law. What they would do is give the court additional reasons to exercise its existing powers, or an additional basis on which to exercise its existing powers. It doesn't change the court's powers; it expands the opportunity for them to use them beyond the common law limitations. Essentially what you're saying, I think, is, 'No, the common law is sufficient'—if that's what you're arguing.

Mr Gifford: We would argue that, to the extent that anything is raised before the court which goes to the substance of the way that the litigation is being conducted, the court has sufficient inherent jurisdiction to deal with it. To the extent that it's outside of the way the conduct is being managed for the purposes of the current dispute—and it goes to something about the conduct of the Commonwealth, which does not substantively impact on the litigation—then the current framework, in terms of a complaint to the Office of Legal Services Coordination and engagement with the relevant agency, is sufficient to address that.

Senator LEYONHJELM: I think you're saying what I said, with the additional bit about the complaint to the Office of Legal Services Coordination. I wonder whether anybody other than you guys knows that exists. Anyway, I hear your point.

Ms Whitaker: In terms of the enforceability of the model litigant obligation, the directions require that all Commonwealth agencies and legal service providers comply with the model litigant obligation, and it is enforceable by the Attorney-General. He has the powers to issue sanctions and directions where necessary. One of the reasons we're so engaged throughout the litigation process is to ensure that we're able to assist agencies to understand their obligations before we require any kind of elevation of the issues.

Senator LEYONHJELM: All right. I'm finished with my questions, thank you, Senator Macdonald.

CHAIR: Thank you very much for coming along today. We do appreciate your assistance. I think we have asked for some answers on notice, and if you could get them back as soon as possible we'd appreciate that.

WALSH, Mr Rodney Lee, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman

MANTHORPE, Mr Michael, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

WANDMAKER, Ms Kate, Principal Lawyer, Office of the Commonwealth Ombudsman

Evidence was taken via teleconference—

[15:19]

CHAIR: Welcome, Mr Manthorpe. We have your submission, which we've numbered as submission No. 4. Do you want to make a short opening statement, after which we will ask you some questions? If you don't have an opening statement we'll just get straight into the questions.

Mr Manthorpe: I have Kate Wandmaker and Rodney Walsh with me to help with any technical matters that I might get tripped up on. I also wanted to apologise that I wasn't able to get up there in person to appear before you, but I hope we can assist over the phone in any event.

CHAIR: Thank you very much. We understand it's not always easy to move around and follow Senate committees. Mr Manthorpe, I will start with an obvious question: were this bill to become law, do you have any appreciation of what additional time or cost that may involve you in, and what additional resources, if any, you might need to discharge the obligation?

Mr Manthorpe: I think it's very hard to know how much, if any, additional resources would be needed. I know that we called out in our submission that additional resources would likely be needed, but it is one of those 'how long is a piece of string' sorts of questions. My colleagues and I have been listening in to some of the testimony that's been going on through today, and we've also had a look at some of the relevant submissions. On one line of argument, there aren't very many complaints about this thing to either us or to the Office of Legal Services Coordination. Agencies take this all very seriously, so there probably wouldn't be very many complaints or very many matters where the model litigant provisions are called in and the question would arise. If that were the case, then the amount of resources I'd need to help deal with it would be pretty small.

On the other hand, there's another line of argument that says that Commonwealth agencies routinely and almost systematically ride roughshod over the model litigant provisions. If that turned into a caseload of what, typically, would be very complex complaints, and that made it's way to me in a form envisaged by the bill, and I then had a responsibility to report to the courts in some way about my thinking about each of those complaints, that could be quite an onerous task requiring quite a lot of resources. I'm sorry—that's a terribly bureaucratic answer, which amounts to: I don't know, but it would depend on how many cases came along.

CHAIR: That's an understandable answer, I guess. Mr Manthorpe, on your staff do you have a team of lawyers, and how many of them are lawyers who have had experience in litigation in one form or another in the past?

Mr Manthorpe: I do have quite a few lawyers. We employ quite a number of admin-law type people, who often work in various parts of the Commonwealth in legal areas and the like. I couldn't give you a number for that off the top of my head, but it would be quite a large number. I'm not short of lawyers, I don't think. I think only a minority of them would have deep experience in litigation, so I may need to beef up my capability there, which, if this bill came to pass, I would look to do.

CHAIR: It's a long time since I practised law, but I would imagine working out whether the model litigant obligations had been followed wouldn't be a terribly complex and time-consuming investigation. I might be wrong.

Mr Manthorpe: It could be. We don't get a lot of complaints that pertain to it, but the small number I've seen in the time that I've been here—I'm talking about a few; I'm not talking about a large number—have tended to be quite longstanding, hotly-contested matters that have extended over a period of time between an individual and some entity in the Commonwealth. Although on their face the model litigant provisions are a reasonably plain English document about limiting the scope of legal proceedings where possible and so on and so forth, in any given case the set of facts that give rise to the Commonwealth taking one view and the other person in the litigation taking another view might require quite a lot of digging into the history of the case, digging into the case law and digging into the policy underpinnings of what it is that the relevant department or agency is arguing versus the individual and so on. So it could actually be quite a complicated task and then, in the end, a matter of judgement about whether what the entity did was a fair thing.

CHAIR: You have read the draft bill—the bill that has been presented to the Senate.

Mr Manthorpe: Yes.

CHAIR: Would you need to establish right and wrong beyond reasonable doubt or on the balance of probabilities? What standard of proof do you need? If I'm the civilian litigant, if I could call it that, and I allege that my opponent, which is an agency of the Commonwealth, has breached the model litigation rules, would I have to convince you on the balance of probabilities? What standard of proof do you use?

Mr Manthorpe: I think it would probably be a balance of possibilities sort of test. But, of course—and I think we point this out in our submission—what then arises is: what might the court do with whatever it is that we conclude? So a question about the operation of the bill that occurs to us is that, even if I or my staff go through a process of assessing the merits of whether or not someone has breached the model litigant provisions and we come to a view on the balance of probabilities that a Commonwealth agency either has or hasn't, the court might actually come to a different view. A feature of ombudsman arrangements right across the work of the Commonwealth Ombudsman and, indeed, other ombudsmen that exist around the country and elsewhere is that typically we don't make binding decisions. We make recommendations to others about what might be done. So there is a possibility that in this matter we might come to a balance of probabilities view that a Commonwealth agency breached the provisions, but the court might come to a different view. So I would query where that would get us, if I can put it that way.

CHAIR: Fair enough. Senator Pratt, do you have some questions for the Ombudsman?

Senator PRATT: Yes, I do. I am going to ask you about the volume of current complaints you have about this issue currently.

Mr Manthorpe: Very few is the short answer, but—and I know this isn't terribly helpful—I've got very poor data on it. We don't classify complaints against this question of the model litigant provisions. We classify complaints more about what they are about, what agency they are about—that sort of thing. So I can tell you that there are thousands of complaints about Centrelink or hundreds of complaints about Home Affairs or what have you, but I am unable to give you a precise figure on this.

In preparation for today, I have asked my folks what sorts of numbers we see, and we think it might be in the order of three, four or five a year. It is a very small number. Often where the matter of the model litigant provisions arises is in a wider context of a complaint about a substantive issue between the Commonwealth and somebody else. So we are also looking at whether we can help solve the substantive issue in our conversation with the complainant and the relevant agency, and sometimes the model litigant provision arises in that context. It is a very small number. I wouldn't suggest that is proof that, therefore, the model litigant provisions are always upheld. I can't say that. All I can say is that we get a very small number of complaints.

Senator PRATT: Have you identified instances where a breach of model litigant behaviour has taken place in other complaints? Is it up to the complainant to identify that, or do you sometimes come across this behaviour in the context of other complaints that are also made?

Mr Manthorpe: I'm not aware that we have, but I'm happy to take that on notice. It's something that would be very hard to get from our datasets, but I've got some very experienced complaint handlers in the office and I'd be happy to talk to them and try to get a readout on how often they see the issue arising, even if it isn't the subject of a complaint, as you put it. I suspect it does arise from time to time, but it's certainly not in any way a dominant feature of our work.

Senator PRATT: The Attorney-General's Department reports the notifications that it has had. There were 49 notifications, 11 of which were identified as actual incidents, in the 2015-16 financial year. Do you report your complaints to the Attorney-General's Department? Is there a complete set of statistics around this issue anywhere?

Mr Manthorpe: There isn't it our end. We would on occasions refer complaints to the Office of Legal Services Coordination. If someone came to us with a complaint that is solely about the model litigant provisions, our first port of call would probably be to say, 'Have you taken this up with the Office of Legal Services Coordination because they do have a role in this space?' We might do that on a few occasions. I just caught the end of the previous conversation you were having with the AGD. If I heard it correctly, they indicated that they thought that they might sometimes get referrals from us. I'd agree with that—they would from time to time. I'm sorry, I just don't have good data on it.

Senator PRATT: In terms of the agencies that you deal with and in terms of people having procedural fairness with how they are treated—for example, the ATO—you wouldn't see a breach of model litigant behaviour as being a key component when people might be treated unfairly by an agency as a systemic part of those problems in fairness? This area would have a reasonable level of oversight compared to other areas, would it not?

Mr Manthorpe: Yes. First of all, on the issue of the tax office, by and large, I don't have jurisdiction of the tax office—

Senator PRATT: No, that's right.

Mr Manthorpe: because of the existence of the Inspector-General of Taxation. Let's take another example. The Department of Human Services and Centrelink generate a large number of cases. Sometimes we may well take an interest in whether there is procedural fairness in the way in which someone is dealt with, and that is an issue that comes up quite a bit, but not necessarily in the context of litigation. A topical example might be the so-called robo-debt matter that we looked at with DHS last year and that comes up from time to time. It's an example of where we're looking at questions like: is it fair and is it reasonable for Centrelink to raise debts in relation to particular individuals given the particular data that they've got at their disposal and how they go about that? We might look quite deeply—and in that case did look quite deeply—at the fairness and the appropriateness of how Centrelink went about administering that program, but that was short of looking at the model litigant provisions because the matter wasn't being litigated. It was still in the realm of clients engaging with a government agency and us taking an interest in complaints about that.

Senator PRATT: Thank you.

Senator LEYONHJELM: One of the provisions in the bill is that a complainant in relation to the Commonwealth's behaviour in a litigation matter has to complain to the Ombudsman prior to raising the matter in a court and that gives the Ombudsman 60 days in which to respond before it can be raised in the court. What can you do in 60 days? Is that too short or too long—irrelevant? What do you think?

Mr Manthorpe: I think it depends on the complexity of the matter. There might be some occasions where 60 days is plenty, where the matter in dispute—or the process matter in dispute, if you will, as distinct from the subject matter of the proceeding—might actually be quite a simple thing, where we can come to a view, on the basis of the rapid collection of a couple of pieces of evidence from either side, that the provisions have been breached or have not. But, in other cases, as I was trying to explain to Senator Macdonald a few minutes ago, I think actually getting to the bottom of whether the model litigant provisions have been breached or not will be quite an onerous thing. Bear in mind: we'd be coming to each matter completely cold—impartially, but completely cold. Some matters might have literally years of toing and froing between lawyers and barristers for either side, about not just the content of the matter but also the process by which the matter should be advanced. And we must assess all of the information and evidence. Then we would want to be procedurally fair in the way we go about it, so we would, I envisage, want to consult with both sides of the argument and say, 'Look, we're inclined to this view or this assessment; what say you?' So, by the time we go through that kind of process, 60 days may well not be enough. By way of an analogy, we have a role a little bit like this with respect to the FOI Act in the ACT jurisdiction, interestingly enough, in our capacity as the ACT Ombudsman, where we are required to review decisions by entities about whether or not to release something under FOI, and one party says, 'You should release it,' and the other party says, 'We shouldn't release it.' Again, sometimes it can be quite quick; at other times, by the time we go through a process of understanding what each side is saying, forming a view, giving people an opportunity to comment on that preliminary view and then making a decision, a time frame like 60 days just isn't enough. So, again, it is sort of an 'It depends on the situation' answer.

Senator LEYONHJELM: I was thinking you'd probably say that!

Mr Manthorpe: You're kind of getting a theme! I'm sorry. I know I sound terribly bureaucratic. But each of these things will be different.

Senator LEYONHJELM: No, no; that's fine. Your submission suggests the bill could remove an existing power of the court to consider model litigant obligations. I would contend that it doesn't do that—certainly not explicitly. But that argument I don't quite follow. Wouldn't it be odd for a court to read a bill that was clearly motivated to improve compliance with model litigant obligations as a reason to reduce compliance with model litigant obligations?

Mr Manthorpe: I think what we were trying to say—and perhaps we said it imperfectly—was that, depending on how the scheme worked, it might be, in effect, giving to us a power that the court, in effect, already has. On the other hand, if it were the case that the way the scheme worked was that we would assess the matter and form a recommendation, then the court's powers would not be reduced. I think the way we crafted that paragraph was really reflective of the fact that we're not quite sure how it would actually be applied in practice.

Senator LEYONHJELM: You also suggest the possibility that the Ombudsman and the court might come to different conclusions.

Mr Manthorpe: Yes.

Senator LEYONHJELM: I'm interested to know: why does that matter? What difference does it make if that is the case? In any event, suppose a court were proceeding to consider a matter which had also come to your attention as a complaint; if you knew the court was proceeding, wouldn't you let it go and leave it to the court?

Mr Manthorpe: Setting aside the bill for a moment—as things currently stand, if someone came to complain to us about the model litigant provisions and we knew that they were also prosecuting the model litigant matter in the court, we would not involve ourselves. Our submission makes it clear that there are a couple of provisions in the Ombudsman Act that go to this question of the interface between the Ombudsman, which is not a judicial function, and the courts. If a matter is already before the court, we won't typically go anywhere near it.

In the case envisaged in the bill, getting to your question about 'what does it matter if we form a different view to the court' I think it only matters to the extent that it potentially chews up a chunk of time and a chunk of resources on the part of ourselves, the court, the solicitors and lawyers for each side and so on—but to what end? We might spend 60 days, 90 days or some amount of time forming a view and putting that view to the courts, and the court takes a different view. Meanwhile, some amount of time has been consumed and quite a few resources have been consumed. 'Where has that really got anyone,' I suppose, is the question.

CHAIR: Thanks very much, Mr Manthorpe. You must spend half of your time appearing before Senate committees!

Mr Manthorpe: It's a pleasure and a privilege on every occasion.

CHAIR: Thank you very much for your assistance today and for that of your team with you. We do very much appreciate that.

Mr Manthorpe: No problem.

CHAIR: With that, I'll declare these hearings of the committee adjourned until a date to be fixed. I thank Hansard and the secretariat for their ongoing excellent work in what they do in assisting the committee.

Committee adjourned at 15:41