

# **Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017**

Submission to Senate Legal and Constitutional  
Affairs Committee

**March 2018**



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).



## Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Senate Standing Committees on Legal and Constitutional Affairs' current inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (Bill).
2. We support this Bill, and suggest further reforms for the Committee's consideration, relating to increasing flexibility under model litigant obligations and expanding the entities that are subject to model litigant obligations.

## Support for the Bill

3. In 2013, the Productivity Commission recommended that governments, their agencies and legal representatives should be subject to model litigant obligations that are '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'.<sup>2</sup> This Bill would implement this recommendation.
4. There is a clear need for greater oversight of government agencies' implementation of model litigant obligations. ALA members have found that, in relation to Comcare for example, model litigant obligations are rarely implemented. Recently we have seen examples of an increasingly aggressive approach to retrieve compensation paid out previously, on receipt of 'fresh evidence' following a liability review. Comcare has employed what has been described as 'bullying tactics' in demanding people pay back money that they had previously received as a part of their workers compensation claims. These tactics are causing some injured workers to forgo appeals, and potentially compensation that they are entitled to, as the prospect of disputing Comcare's decision at the Administrative Appeals Tribunal (AAT) is too frightening.<sup>3</sup>

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<sup>2</sup> Productivity Commission, *Access to Justice Arrangements: Inquiry Report, Overview*, 2014, Recommendation 12.3.

<sup>3</sup> See, for example, Sally Whyte, 'Comcare overpayment letters are a bullying tactic lawyers say', *Canberra Times*, 6 February 2018, <http://www.canberratimes.com.au/act-news/comcare-overpayment-letters-are-a-bullying-tactic-lawyer-says-20180204-h0toiy.html>.

5. These repayment letters can be financially and emotionally devastating for injured workers. One worker, Danielle Small, was sent a debt letter and could have been liable to pay Comcare \$550,000 if she had not been successful in her AAT appeal. Ms Small described the heavy toll the appeal took on her, including legal fees, saying that she went 'into a very dark place' as a result of the demand for repayment.<sup>4</sup>
6. Comcare has described their new approach to claims as 'fairer and more robust'.<sup>5</sup> In the view of the ALA, however, these are the actions that might be expected an aggressive and highly defensive litigant, not one adhering to the model litigant obligations found in the Legal Services Direction 2017.
7. With regard to the oversight offered by the Ombudsman, it will be important that this is available in real time, while the misconduct is occurring, rather than simply a mechanism to complain after the case is over. By then it will be too late for the model litigant obligations to have any genuine prospect of altering the conduct of the Commonwealth party to a dispute.

## Recommendations for further reform: Allowing for greater flexibility in model litigant obligations

8. ALA members regularly make claims against or engage in litigation with Commonwealth entities and their agents (collectively, Commonwealth entities) or licenced self-insurers (licensees). In relation to workers compensation, for example, our members bring claims against Comcare, as outlined above, and licensees under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act).
9. Even though model litigant policies are designed to, *inter alia*, ensure dispute resolution is undertaken promptly and without unnecessary delay, at times Commonwealth entities are the most cumbersome respondents. This is because of the strict administrative requirements that these respondents must meet, meaning claimants too often face lengthy delays and disproportionately vigorous defences.

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<sup>4</sup> Ibid.

<sup>5</sup> 'Comcare outperforms without legislative change', in email *Workers Compensation Report 1148*, received by Rod Hodgson, ALA Queensland Director, from Premium Subscription News, 27 February 2018.

10. At times, these clients have found the process of making a claim against a self-insurer licensee to be simpler and more straightforward. As well as the aggressive tactics outlined above, claims made against Comcare can be overly administrative. Self-insurers on the other hand appear to have greater flexibility in how they respond to claims. This has meant that in some circumstances clients have been offered compensation without the self-insurer accepting liability (commercial settlements). Such circumstances might arise, for example, where establishing liability might be complex, and it is simpler and fairer to avoid the question and pay compensation.
11. For example, a claim was recently made against Comcare for a pair of exercise shoes. Such shoes had been provided as a part of the injured worker's rehabilitation on numerous occasions in the past. This subsequent request was refused, however, on the basis that it did not fit within the relevant criteria. The claimant appealed the decision numerous times, with the AAT affirming the refusal.<sup>6</sup> The money that was expended on disputing this claim, in terms of staff hours and retaining counsel, was much greater than the shoes themselves would have cost. Members report that, due to the flexibility that licensees have to make commercial settlements, similar claims could be resolved with the provision of compensation without an admission of liability. This results in inconsistencies and unfairness.
12. In his 2013 review of the SRC Act, Peter Hanks QC noted the apparently unintended consequences arising from Appendix C of the Legal Services Directions 2017. This Appendix prevents government entities from making commercial settlements.<sup>7</sup> Hanks explained that this at times acted as 'a barrier to the resolution of claims'.<sup>8</sup> To this end, he recommended that '[p]roviding a mechanism by which disputes can be resolved without an admission of liability would assist both Comcare (defending decisions it has made as a determining authority) and employees'.<sup>9</sup> The ALA supports this recommendation.

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<sup>6</sup> *Chalfont and Comcare (Compensation)* [2016] AATA 1081 (23 December 2016).

<sup>7</sup> '[S]ettlement is not to be effected merely because of the cost of defending what is clearly a spurious claim': Legal Services Directions 2017, Appendix C, [2].

<sup>8</sup> Peter Hanks QC, *Safety, Rehabilitation and Compensation Act Review: Report – February 2013*, [9.117].

<sup>9</sup> *Ibid*; Recommendation 9.11.

## Further reform: Expanding model litigant obligations to corporations working as Commonwealth entities

13. In his 2013 review Hanks QC further recommended that licensees under that Act also be subjected to model litigant obligations, which he suggested could be done most simply when negotiating contracts with them.<sup>10</sup> The ALA believes this approach could ensure consistency in the provision of government services, whether provided by a government agency, contractor or licensee.

## Recommendations

14. The ALA makes the following recommendations:

- a. The Bill should be passed;
- b. Oversight by the Ombudsman should be available in real time, offering the prospect of enforcing model litigant obligations while the dispute is still ongoing;
- c. The Legal Services Directions 2017 should be amended to facilitate commercial settlements where it is in the interests of fairness and justice to allow them; and
- d. Model litigant obligations should be expanded to include corporations conducting work as agents or similar for Commonwealth entities.

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<sup>10</sup> Ibid, [9.119].