

**Submission in response to the draft *Practice Direction and Guide* setting out the
procedures for the conduct of the Small Business Tax Tribunal**

21 February 2019

1. Preamble

In a [speech to the Australian Chamber of Commerce and Industry](#) on 28 November 2018, the Prime Minister announced the establishment of a Small Business Taxation Division within the AAT designed to “...ensure a level playing field for small business”.

On 12 February 2019 [the Assistant Treasurer announced](#) that the Small Business Tax Tribunal would begin operating on 1 March 2019.

The Assistant Treasurer’s announcement stated that

The general rule is that these hearings in the AAT will be without lawyers. Where the ATO engages external legal counsel in the AAT and the small business does not have legal representation, the ATO will cover the cost of providing the small business with equivalent legal representation.

The announcement included links to two Administrative Appeals Tribunal draft documents, namely:

- [Practice Direction](#)
- [Guide](#)

These two AAT documents detail how the Small Business Tax Tribunal (SBT) will operate.

This submission comments on the Guide and Practice Direction in terms of the extent to which the proposed operation of the SBT will fulfil the policy intention of the government to “...ensure a level playing field for small business”.

2. Summary

The operation of the SBT, as currently proposed, will effectively neuter the government’s policy intent of ensuring a level playing field for small business. It will turn the SBT into a sham giving the SBT the appearance of providing a level playing field, whereas in fact it will ensure the reverse—namely, the power dominance of the ATO over small business people.

There are two items of detail that will lead to the neutering of the government’s policy intent:

1. The use of lawyers by the ATO.
2. The ability of the ATO undertake enforcement while the SBT is considering a matter.

There is also one item that should be included that will assist the achievement of a ‘level playing field’, namely:

3. The use of the Inspector-General of Taxation to provide reports to the SBT on individual cases.

This submission proposes rewordings of the Guide/Practice Direction to fix these two problems and ensure the government’s policy intent of a ‘level playing field’ is achieved. The last three sections of this submission provide rationales for the proposed rewordings..

3. Legal representation gives ATO dominance

The draft Guide reads:

The Commissioner *may* engage an external legal service provider to act for the ATO in the SBT Division... If the Commissioner decides to engage external legal services, they *may* also decide to meet the costs of legal representation for small businesses with no legal representation up to an amount equal to that expended by the Commissioner on its external legal services. [Emphasis added.]

Note the word ‘may’ (emphasized twice) effectively gives the ATO unrestrained power to use lawyers itself and to give total discretion to the ATO as to whether small business can have equal access to lawyers at ATO expense. Further, it enables the ATO to use *internal* lawyers without any suggestion of covering the costs that small business would need to secure equal legal representation. Both of these effectively neuter the policy intent of the SBT to create measures of equality in power between the ATO and small business (the PM’s “level playing field”).

This section of the draft Guide directly undercuts and contradicts the Assistant Treasurer’s announcement (quoted above) that

... these hearings in the AAT will be without lawyers. Where the ATO engages external legal counsel in the AAT and the small business does not have legal representation, the ATO will cover the cost of providing the small business with equivalent legal representation.

The AAT Guide should instead read:

In most cases, other than test cases for example, legal representatives are not to act for either the ATO or the small business. For the Commissioner this includes internal and external legal representatives. If legal argument on the interpretation or application of tax law requires consideration, such argument must be put to the SBT in written submissions. If the ATO seeks to put such written submissions, the ATO must fund the small business for legal opinion up to an amount equal to that expended by the Commissioner on its internal and external legal services.

4. Ongoing ATO enforcement

The draft Guide reads:

The Commissioner may still implement a decision while the review is being decided (*for example, by commencing recovery of a debt*). While the Commissioner may agree to suspend implementation of its decision until the review is decided, the AAT cannot require the Commissioner to do so. [Emphasis added]

The effect of this is to give the Commissioner the power to strip a small business of its funds and resources, even to cause bankruptcy, before a debt has been considered or confirmed before the SBT. This puts the small business in a position of powerlessness in relation to the ATO. It effectively neuters the policy intent of the SBT to create measures of equality in power—that is, a ‘level playing field’ between the ATO and small business.

The AAT guide should instead read:

Where the Commissioner may seek to implement a decision while the review is being decided (for example, by commencing recovery of a debt) the Commissioner must apply to the SBT for leave to implement a decision and cannot implement without AAT authority.

(For the legal technically minded this should also read – “TAAs14ZZB will be modified to remove reference to AAT Act s27,28,41”)

5. Use of the Inspector-General of Taxation

We recommend and urge that the resources of the Inspector-General of Taxation (IGT) be made available to the SBT and the small business person to aid the objective of a “level playing field”.

The Guide/Practice Direction should have wording inserted to the effect that

The small business person may request that the Inspector-General of Taxation prepare a report on the small business person’s tax dispute and that the SBT must include the IGT report in its consideration of the dispute.

6. Rationale—Legal representation

The public policy need for the SBT is to remove, as far as is feasible, legal complexity in small business tax disputes and to focus instead on commercial truths. The need is to resolve the bulk of disputes with maximum efficiency, thus allowing small businesses to obtain speedy resolution so that they can move on with their business and that the ATO can move on to further auditing and enforcement of other matters.

The significant bulk of small business tax disputes are to do with matters of fact. Examples include: Is a deposit into a taxpayer’s account income or a transfer between accounts or loan repayment and therefore not income? Or is a claimed expense actually a tax-deductible expense? On matters of fact both the small business person and the ATO audit officer (for example) should be well capable of presenting facts to the SBT to support their positions. Legal representatives are not necessary in such circumstances and are arguably even a hinderance to the common-sense identification of commercial truth.

In matters where interpretation of tax law is required, it is reasonable to expect (within the ambit of the SBT policy intent) that both the ATO and the small business put their positions in written submissions to the SBT. Examples include: Is income generated overseas taxable in Australia? Or is a small business person a Personal Services Business? In such cases the legal arguments regarding interpretation of tax law can be complex. In the pursuit of fairness, where the ATO is putting legal arguments, the small business should be funded by the ATO in equal measure to the ATO’s cost of internal and external legal advice.

The issue of legal representation is integral to the public perception of the integrity and fairness of the tax administration system and hence influences voluntary compliance with the tax system. Long-standing allegations and complaints against the ATO have been that it manipulates the interpretation of legislation and case law, utilising its superior resources to tie small business up in legal process and technicality to the point that it exhausts the resources of small business. Hence the ATO ‘wins’ through bureaucratic and process intimidation rather than a focus on the facts. Such public perception of ATO bureaucratic and

legal ‘bullying’ damages the integrity of the tax collection system and threatens tax revenue. The creation of the SBT is intended to overcome this perception.

If either the ATO or the small business person consider that a decision of the SBT on legislative interpretation is wrong, both parties retain their rights to appeal in the normal way.

7. Rationale—ongoing enforcement

This issue of reasonable enforcement is integral to the public perception of the integrity and fairness of the tax administration system and hence influences voluntary compliance with the tax system.

Allegations and complaints against the ATO have been that it enforces its decision of an owed debt whether the debt subsequently proves valid or not. The use of this power by the ATO against small business has the effect of intimidating small business into compliance and/or exhausting the small business of the resources it needs to argue its case. Hence the ATO ‘wins’ through bureaucratic intimidation rather than a focus on the facts. This results in public perceptions of ATO bureaucratic and legal ‘bullying’, thus damaging the integrity of the tax collection system and threatening tax revenue. The creation of the SBT is intended to overcome this perception.

The SBT is intended to create a process where efficient and relatively swift consideration of the facts of a small business tax dispute can occur and be decided. Given the timelines expected for an SBT consideration and decision, the suspension of enforcement under normal circumstances will contribute to public perceptions of the fairness of the system and support the integrity of the tax collection system.

However, it is also recognised that there may be circumstances where the ATO has concerns that a small business may seek to avoid a debt, for example by stripping an entity of its assets/cash. In such circumstances the ATO should be able to make application (urgent, if necessary) to the SBT for enforcement to occur while the SBT process is under way.

8. Rationale – Use of the Inspector-General of Taxation’s expertise

The Inspector General of Taxation (IGT) has demonstrated a high capacity to investigate individual tax disputes by identifying and reporting on the facts. The IGT is able to do this because it has direct access to the ATO’s systems and can independently interrogate the circumstances and ATO records of individual cases. Further, the IGT is staffed with people of significant tax knowledge, mostly from the ATO itself. The IGT’s reports are of high quality but are significantly underutilised in aiding settlement of small business tax disputes.

Small businesses can already request the IGT to investigate and report on their case. This should be extended to ensure that IGT reports can be submitted to the SBT and considered by the SBT as independent analysis of individual disputes thereby aiding the SBT in its deliberations.