

**Submission to the  
Senate Legal and Constitutional Affairs Committee  
Inquiry into the  
Judiciary Amendment (Commonwealth Model Litigant Obligations)  
Bill 2017**

May 2018

“...Departures from model litigant behaviour can, in particular circumstances, constitute professional misconduct, a contempt of court or an attempt, contrary to s 43 of the Crimes Act 1914 (Cth), to pervert the course of justice.”

Justice Logan of the Federal Court

“... the existence of a mentality, maintained by too many ATO officers for too long, that taxpayers on the whole are cheats and liars and anything the ATO does to bring them to account can be justified...”

Retired Federal Court Judge Richard Edmonds SC

## 1. Our support for the Bill

The key clause in the Bill allows for a court to put a stay on proceedings if a Commonwealth entity has failed to comply with its model litigant obligations.

The clause reads:

**55ZGA Model litigant obligations: stay of proceedings**

(2) On the application of the applicant, the court may, if in the opinion of the court it is desirable to do so, by order, stay the proceeding or a part of the proceeding, for the period, and subject to any conditions, the court considers appropriate.

Self-Employed Australia strongly supports the Bill.

We do so entirely on the basis of our experiences with the Australian Taxation Office (ATO) in its treatment or, as we allege, mistreatment of self-employed small business people.

We have no experiences with other Commonwealth entities. However, as a matter of principle, the Commonwealth's Model Litigant Obligations require enforcement 'teeth'.

In this submission an important caveat applies. The model litigant obligations are legally quite technical. Our observations, conclusion and comments should be taken as the observations, experiences and perceptions of the layperson. That is, we apply the 'pub test.' Lawyers would no doubt apply more refined legal understandings.

With that caveat our observation is that, currently, the ATO only comply with the obligations if they choose to. Mechanisms for enforcement of the obligations are, from a practical perspective, effectively non-existent.

If the Bill were enacted into law, it would contribute to addressing the massive power imbalance that exists between the Commonwealth, particularly the ATO and ordinary Australians who may find themselves in litigation with the Commonwealth.

In our experience, the Australian Taxation Office almost routinely breaches its model litigant obligations in relation to small business people. Indeed, it is reasonable to suggest that the ATO has an unofficial 'playbook' in which it 'stretches out' procedural and litigation processes to maximise its massive power advantage so as to exhaust and bully small business people into submission.

In relation to the ATO, this Bill would go some distance in requiring the ATO to adhere to normal principles of justice.

## **2. The limitations of the Bill**

Model litigant obligations by their nature apply only to ‘litigation.’ We understand that limitation. But this raises two issues being (a) the behaviour of the ATO in their internal review processes before litigation and (b) whether the Administrative Appeals Tribunal is technically ‘litigation.’

### ATO internal review process:

Much of our commentary and conclusions on the ATO breaching of model litigant obligations is based on our experiences assisting people to go through the ATO internal review processes. Those processes in our experience quite normally breach model litigant principles. We are aware that that is not within the scope of this Bill or this Senate specific inquiry. However we believe our observations are entirely relevant because how the ATO behaves in its internal review processes flows through and is replicated when litigation occurs.

### Recommendation regarding AAT

The Administrative Appeals Tribunal is the normal ‘first port of call’ for an independent review of the ATO’s actions against a small businessperson. Whilst the AAT is not a ‘court’ in the sense that the Federal Court is but for the small businessperson the AAT is a process of ‘litigation.’ We believe it important that model litigant obligations be applied at the AAT level as well as at the level of the Federal Court. We recommend the words ‘or Tribunal’ be inserted into the Bill as follows:

(2) On the application of the applicant, the court or tribunal may, if in the opinion of the court or tribunal it is desirable to do so, by order, stay the proceeding or a part of the proceeding, for the period, and subject to any conditions, the court or tribunal considers appropriate. and any other places in the Bill to ensure consistency.

## **3. Background to this submission**

Self-Employed Australia is a not-for-profit advocacy group for the rights of self-employed people in Australia. Formed in 2000, we rely on membership subscriptions and the work of volunteers to conduct our advocacy. Details of ‘who we are’ are on our website at <http://www.selfemployedaustralia.com.au/About/who-or-what-is-ica>

For some 15 years we have been on ATO small business consultative committees. We know and have dealt with many ATO officers from middle to high executive levels. We have always appreciated the open engagement afforded to us by ATO officers.

We have been a persistent submitter to inquiries into the ATO—including the Board of Taxation, the Inspector-General of Taxation and the Commonwealth Parliamentary Tax and Revenue Committee.

This submission draws on a (to date) non-public submission to the Inspector-General of Taxation’s *Review into the ATO’s Fraud Control Management* (7 August 2017). We are happy to now have this submission made public. It is attached as an appendix if this assists the Senate Committee’s Inquiry.

The reason for including this long and detailed submission is that in order to understand the ATO’s approach to litigation it is necessary to grasp the minutiae of

the ATO's behaviour, both in the lead-up to litigation and during legal proceedings themselves. The appendix document studies in detail one case—the Rod Douglass case—and draws lessons and conclusions from it. The appendix document also includes summaries of three other cases, the details of which all reinforce the lessons and observations drawn from Rod Douglass's case.

In addition, we were heavily involved in the *Four Corners* exposé 'Mongrel Bunch of Bastards' <http://www.abc.net.au/4corners/mongrel-bunch-of-bastards/9635026> which aired on the ABC on 9 April 2018. We know the details of each of the stories covered in that program. Further, we have studied a number of legal judgments arising from litigation between the ATO and small business people. Moreover, many more cases have been brought to our attention since the airing of the *Four Corners* program.

This submission summarises the conclusions we have reached based on our observations and studies. There is a pattern of behaviour by the ATO that we believe cannot be ignored.

#### **4. Understanding the ATO's attitude to Self-Employed Australia**

It would be reasonable to say that the current 'official' attitude of the ATO towards us is one of annoyance coupled with a denial of the claims we make about the treatment of small business people by the ATO.

Acting Commissioner of the ATO, Mr Geoff Leeper, said of us in his opening submission to the House of Representatives Standing Committee on Tax and Revenue on 16 March 2016:

"I note with concern the reported comments by the head of the Independent Contractors Association [Self-Employed Australia] today criticising the ATO for purportedly making improper allegations of fraud against small business."

On 28 March 2018, the Commissioner of Taxation spent most of his opening address [http://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/fa451abc-f68e-497a-aaaa-1941e5df2909/toc\\_pdf/Standing%20Committee%20on%20Tax%20and%20Revenue\\_2018\\_03\\_28\\_6030.pdf;fileType=application%2Fpdf#search=%22committees/commrep/fa451abc-f68e-497a-aaaa-1941e5df2909/0000%22](http://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/fa451abc-f68e-497a-aaaa-1941e5df2909/toc_pdf/Standing%20Committee%20on%20Tax%20and%20Revenue_2018_03_28_6030.pdf;fileType=application%2Fpdf#search=%22committees/commrep/fa451abc-f68e-497a-aaaa-1941e5df2909/0000%22)

to the same committee taking issue with the 'self-serving comments' by a 'particular organisation.' The Commissioner started his remarks by saying:

"I do want to address some derogatory and self-serving comments that have been made about the ATO and its officers by a particular organisation. Now, whilst these sensational and misleading comments are only generated from one source, they are making their way to parliament and into the media."

We strongly suspect the reference to 'a particular organisation' is to Self-Employed Australia

Most recently on 30 May 2018 Mr Jordan was more specific in a Senate Estimates hearing where media reports stated,

"Mr Jordan also took issue with comments by the head of Self Employed Australia, who told the program that the treatment dished out to some business owners was akin to being "cooked slowly, until you are roasted and you are dead".

"These are such ridiculous allegations that it beggars belief that the ABC would present them as somehow the result of an investigation," Mr Jordan said. "People at the ATO do not get up in the morning thinking who can I destroy

today or boil to death."

## **5. Does the ATO comply with model litigant obligation? Our view.**

Our comments are confined to the ATO's treatment of self-employed, small business people. Our experience is that in relation to self-employed people the ATO:

- Is not a model litigant, but rather the opposite.
- Uses its superior resources to bully, intimidate and coerce small business people into paying amounts of tax that can be legally suspect or not legal at all.
- Conducts internal 'independent' reviews of taxpayers' alleged tax liabilities where the processes are not independent or seen to be independent.

In relation to ATO processes and systems as applicable to small business people, they are:

- Opaque and confusing. The systems amount to a 'dark tunnel' of procedural and legal complexity into which self-employed people are drawn.
- Applied in such a way as to achieve ATO predetermined outcomes against self-employed people.

In summary

- Our experience and observations are that, as a collective, the ATO engages in institutionalized coercion and bullying of self-employed people to the point that the ATO's activities amount to a gross abuse of power.

It is important to note that such breaches of model litigant principles by the ATO begin right at the beginning when the ATO audits an individual and proceed through the internal ATO appeals processes. This escalates into the legal strategies that the ATO applies in tribunal and court proceedings creating breaches of model litigant obligations

## **6. Does the ATO comply with model litigant obligation? Judicial Comments**

It is not only Self-Employed Australia that has made comment about the ATO's model litigant behaviour. Some members of the judiciary have done so as well.

### Justice Logan

In an October 2017 ruling, all three judges of the Federal Court declared in the Shord case (*Shord v Commissioner of Taxation* [2017] FCAFC 167) that the

"...denial of procedural fairness to Mr Shord ... is patent."

Justice Logan, in observing that the ATO had ample capacity and opportunity to prevent the denial of procedural fairness said:

"...Departures from model litigant behaviour can, in particular circumstances, constitute professional misconduct, a contempt of court or an attempt, contrary to s 43 of the *Crimes Act 1914* (Cth), to pervert the course of justice."

This is a strong observation by the Justice who excused the ATO's behaviour saying that the

“...lack of a ready concession (by the ATO) of the jurisdictional error was just the result of a lack of understanding (by the ATO)...”

#### Richard Edmonds SC

Recently retired Federal Court Judge [Richard Edmonds](#) has also spoken out. Edmonds is highly respected as one of Australia’s most knowledgeable tax jurists, with 50 years’ experience in tax law. In a letter to the *Australian Financial Review* (April 2018) the retired judge said:

“I have never known ... the ATO to apologise to a taxpayer where a court finds that the ATO wrongly assessed ... in the collection process.”

“... the ATO has even taken the position, pending appeal, that it is not bound by decisions of a single judge adverse to the commissioner...”

He referred to:

“... the existence of a mentality, maintained by too many ATO officers for too long, that taxpayers on the whole are cheats and liars and anything the ATO does to bring them to account can be justified...”

### **7. ATO performance against the specifics of the model litigant obligations.**

#### **Our view**

The ATO’s model litigant obligations are contained in the ‘Legal Services Directions 2017 Appendix B—The Commonwealth’s obligation to act as a model litigant’ (An edited and shortened version appears below with our comments including some examples on the ATO’s compliance or lack of it.)

*2 . The obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency by:*

#### SEA comment

- ‘Fairness’ does not seem to be a word in the ATO’s lexicon when it is intent on pursuing a small businessperson who is defending himself or herself against a debt claimed by the ATO.
- (Example 1) In the Rod Douglass case, Rod declared all his income yet the ATO said that Rod committed fraud or evasion on basis that he had (a) not sought professional advice when completing his tax return (b) could not cite a legal judgment referred to in a 2006 ATO Practice Statement where the legal judgment reference had some years later been removed from the ATO Practice Statement.
- (Example 2) In a report on the Rod Douglass case, the Inspector-General of Taxation said “We also note that neither the PSLA or Guidelines (relating to fraud opinions) imposes an obligation on the part of the ATO to provide an opportunity for taxpayers to comment.” Rod was not offered the opportunity to comment.

**(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation**

SEA Comment

- The ATO drags out the handling of claims where ever this suits its purposes. The ATO will respond slowly to requests for information yet will apply short and often unreasonable timelines when demanding information from small business people.

*(b) paying legitimate claims without litigation,*

SEA comment

- When it comes to the ATO's paying compensation for ATO wrongdoing, even wrongdoing admitted by the ATO, the ATO runs a process of re-victimising the small businessperson who has suffered at the hands of the ATO. That is, the ATO drags out processes, relies on technicalities to reject or diminish claims and offers levels of compensation that are insultingly low and inadequate.
- (Examples) This has occurred with both Helen Petaia and Mark Freeman profiled in the Four Corners show.

*(c) acting consistently in the handling of claims and litigation*

SEA comment

- The consistency that we observe from the ATO is a determination to push the ATO's position hard and to leverage every bit of its legal and financial power to crush the small business person.

*(d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible,*

SEA comment

- Our experience is that where a small businessperson seeks to defend his or her position, the ATO seeks to maximize the scope of legal proceedings to maximize cost to the small businessperson.
- (Example) In the Rod Douglass case, the process began in July 2015 with an ATO determination that Rod had committed fraud or evasion. It finished in the Federal Court in November 2016 after some 16 months with the ATO admitting it had made a mistake and the Court ordering that:  
"The respondent (Commissioner of Taxation) undertakes to issue a letter ... that, on the facts presently known to the respondent, the opinion as to fraud or evasion was incorrectly formed and, on that basis, is withdrawn. Federal Court of Australia No: NSD1700/2016

*(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum,*

SEA comment

- All observations we have is that the ATO seeks to maximize the cost of litigation to the small business persons.

*(f) not taking advantage of a claimant who lacks the resources to litigate*

SEA comment

- It almost seems that the ATO litigation 'playbook' is designed to intimidate and exhaust the small businessperson of resources so that small businesspeople are not able to defend themselves.

**(g) *not relying on technical defences***

**SEA comment**

- The ATO plays a hard, legal and technical game whereby if it can obtain a technical advantage in the litigation process over the small businessperson, it will exploit that technical advantage.
- (Example) In the Rod Douglass case, the assessment of the ‘results test’ under the Personal Service Income tax law requires evidence of ‘custom and practice’. The ATO’s decision on the results test ignored custom and practice. In the AAT proceedings, the ATO refused to give evidence about custom and practice and under FOI requests responded that ‘no such documents exist’.

**(h) *not undertaking and pursuing appeals unless ...***

**SEA comment**

- We reference Richard Edmonds SC. “... the ATO has even taken the position, pending appeal, that it is not bound by decisions of a single judge adverse to the commissioner...” We concur. That is, the ATO will appeal at every opportunity. Again, it is a process of exhausting the small businessperson of resources.

**(i) *apologising where the Commonwealth ...***

**SEA comment**

- Again, we reference Richard Edmonds SC. “I have never known ... the ATO to apologise to a taxpayer where a court finds that the ATO wrongly assessed ... in the collection process.” We concur. If the ATO loses a case, an apology is usually not forthcoming. Although there was a rare instance in the Helen Petaia case where an apology was issued before litigation, Helen was and is still being put through ‘hell’ by the ATO on the issue of compensation.

**8. High wealth individuals and the ‘big end of town’.**

Our comments above in no way reflect on how the ATO treats high wealth individuals and large businesses. In fact the suggestion is that wealthy people and large businesses enjoy a quite reasoned relationship with the ATO.

This is perhaps best explained by high profile and respected tax lawyer Mr Mark Leibler who gave an insightful speech to the 33<sup>rd</sup> National Convention of the Tax Institute of Australia in March of this year.

Mr Leibler explained that

- The ATO’s workings are opaque. He said;  
“And much of that interaction is bound up in negotiating the all-too-often opaque workings of the Australian Tax Office...”
- He has worked closely with the last four tax Commissioners and so knows the ATO intimately. He said;  
“..I’ve had the privilege of working particularly closely with four Commissioners, including the incumbent.”
- He has close dealings with ATO officers at all levels in the organization. He said  
“I have noticed a shift in attitudes on the part of tax officers I deal with at all levels of the Tax Office.” “It is refreshing to see tax officers initiating contact



with tax advisers...”

- He has achieved good outcomes for his clients and friends. He said;  
“And most important for me, it (*Project Do It*) gave clients and friends with  
fraught histories greater peace of mind.”

Mr Leibler noted that there is no evidence of the ATO abusing its powers. He says;  
“It is a testament to the integrity of the office of the Commissioner that there are  
no reported cases in which this power has been abused...”

We take Mr Leibler’s comments as a person of considerable knowledge of the ATO.  
And for high wealth individuals and large businesses quality working relationships  
with the ATO is a good thing.

The position of Self Employed Australia is that we would like to see that ‘good thing’  
being equally applicable to self-employed small business people and individuals. We  
see the implementation of the *Judiciary Amendment (Commonwealth Model Litigant  
Obligations) Bill 2017* as a positive move in that direction and reiterate our support  
for the Bill.