

Submission to the Draft
Treasury Laws Amendment (Tax 3 Transparency) Bill 2018:
Transparency of taxation debts
9 February 2018

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The ATO's "...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. (see item 5 below)

1. Overview

On 11 January 2018, the Minister for Revenue and Financial Services, the Hon. Kelly O'Dwyer MP, released exposure draft legislation that will authorise the Australian Taxation Office (ATO) to disclose small business tax debts to credit reporting bureaus.

Self-Employed Australia responds to the invitation to make submissions to the *Treasury Laws Amendment (Tax 3 Transparency) Bill 2018: Transparency of taxation debts*.

2. Summary

Self Employed Australia opposes the Bill and calls for it to be withdrawn.

The Bill is not promoting a transparency issue. Rather, it is a grab for additional powers by the ATO for use against small business people.

2.1 Our reasons for opposing the Bill are as follows:

- a) The ATO already has draconian powers that far exceed those of any police force in Australia or arguably any other government instrumentality.
- b) The ATO already has the power to raid a person's home without a warrant, allege a debt, demand payment of an alleged debt, garnishee a person's bank account to force settlement of an alleged debt, sell a person's house and bankrupt a person before the person has a chance to 'disprove' the debt.

- c) Our opinion, based on solid evidence, leads us to allege that the ATO abuses those powers in order to bully and harass small business people into paying alleged tax debts that are often false or poorly supported by the evidence. The ATO's abuses of its powers are such that they routinely destroy the business, personal lives and often the mental health of small business people.
- d) The ATO is not subject to any effective oversight other than to bodies that 'review' and make 'recommendations' on ATO behaviour, but which have no power to sanction ATO abuses or order abuses to stop.
- e) If Parliament were to give the ATO additional power to report small business people's alleged tax debts to credit rating agencies, it would further extend the ATO's ability to bully, harass and destroy small business people. This is unacceptable. There is no justification for this extension of the ATO's powers.

2.2 Conclusion and submission

The Bill should be withdrawn until such time as the ATO has imposed upon it effective, proper and independent oversight to stop it abusing its powers and begins to operate in an ethical, moral and legal manner toward small business people.

2.3 Our evidence

In this submission we

- a) Give an overview, with some detail, of the ATO's draconian powers, powers that most people would be surprised to discover.
- b) Provide links to earlier submissions by Self-Employed Australia that provide some evidence of the abuse of power by the ATO.
- c) Provide *to Treasury only*, a copy of a (to date) confidential submission providing a detailed case study of the ATO's abuse of power.
- d) Discuss the inadequate and weak oversight of the ATO's abuse of power as it relates to small business realities.
- e) Discuss one proposal for oversight of the ATO raised in the Bill—somewhat as a 'thought bubble' but lacking in any fine detail.

3. The ATO's existing (draconian) powers

3.1. Powers that arguably exceed those of any police force in Australia

The ATO has the power enter someone's premises at any time without a warrant and to seize documents of its choosing. This power is derived from Section 263-264 of the *Income Tax Assessment Act 1936* (now contained in Schedule One of the *Tax Administration Act*.)

Police, by comparison, must obtain from a Court an approval (warrant) for a search. This is an important oversight of police activities designed to protect justice and limit the abuse of power by police. Such oversight makes for better police forces by improving public confidence in policing. The ATO has no such oversight.

3.22. Taxpayers are guilty until they prove their innocence

The ATO has the following power:

- Where the ATO raises an assessment against a person (for example, for extra tax) the ATO's action and people's appeal rights is a Part 4C application. Part 4C is a statutory regime of appeal under the *Tax*

Administration Act 1953. The issuing of an assessment by the ATO is the issuing at law of a debt. It is not a ‘claim’ of a debt. Rather, at law, it is an actual debt that the person must pay. The person must ‘un-prove’ the debt. The ATO does not have to ‘prove’ the debt.

- To appeal (un-prove the debt) people must go through the following procedure:
 - (a) They must object under the ATO’s internal processes.
 - (b) When/where the ATO decides against someone, that person must take their case either to the Administrative Appeals Tribunal or the Federal Court. In the Court or Tribunal the person must demonstrate that the tax burden is excessive—that is, the person must prove what amount of tax is actually owed.

For small business people these powers of the ATO put them in a highly vulnerable position. The processes of defence are not easily or cheaply accessed by a small businessperson. Defence requires access to highly specialized tax lawyers and accountants at enormous cost. The process itself creates abuse, stripping people of their normal rights at law and creating oppression. The ATO knows this and, we allege, exploits this huge power to abuse small business people.

3.3. The ATO can (and often does) require people to pay an assessed/alleged tax debt ‘up-front’ before the person can appeal

Once the ATO has issued an assessment stating that a person owes additional tax, the ATO has a policy of “pay now, dispute later”. The ATO’s authority for this lies in Section 350-10 Schedule One of the *Tax Administration Act 1953*. This section effectively states that any Assessment by the ATO is conclusive evidence of the truth.

The steps the ATO can employ to force payment are:

- a) It issues the assessment as ‘proof’ that a person owes money.
- b) The ATO goes to the Magistrates Court for a Summary Judgment against the person. There is no trial and the judgment is basically automatic for the ATO.
- c) The ATO issues a garnishee notice against a person’s bank accounts requiring the bank to immediately pay the ATO without the person’s authority.
- d) Where it is deemed necessary, the ATO applies to bankrupt the person.

The ATO can and does do the above quickly.

The only way to stop this process from occurring is to apply to the Courts for a ‘Stay’ order. There have only been three or four of these issued in the past 20 years.

The implications of the above for small business people is that even if a tax debt is disputed, the ATO can force the payment, sell a person’s assets (house, etc.) perhaps even bankrupt a person before the person even launches an appeal. Such action obviously puts a person in the position of being incapable of conducting and paying for his or her defence.

3.4. The ATO forms an ‘opinion’ of fraud and you are guilty

Under the Tax Act the ATO can only go back two years in reviewing an individual’s tax return. This is intended to give people some certainty and some protection from the ATO and to ensure that the ATO operates efficiently in checking and reassessing peoples’ tax.

However, if the ATO ‘forms an opinion’ that a person has conducted ‘fraud or evasion’, then it can investigate as far back as it likes. The ATO has this power under Section 170 of the *Income Tax Assessment Act 1936*. In ‘forming an opinion’ the ATO does not have to prove anything. The ATO can and does act on its opinions of fraud or evasion without going to a court to prove such ‘opinions’ are correct. And the allegation of fraud is effectively an allegation of criminal behaviour against someone. It is serious.

Most people would likely think that such ‘opinions’ of fraud and evasion would be brought against people who had falsely declared their income. But the ATO regularly ‘forms an opinion of fraud’ against people who have declared all their income. The ‘evidence’ the ATO has used for fraud or evasion ‘opinions’ has included instances where people have:

- Completed their tax return without seeking professional advice
- Completed their tax return using professional advice.
- Filled out their tax return based on advice from the ATO’s website.
- Been unable to cite a legal case that had appeared on the ATO’s website and upon which the person had based their tax return. Subsequent investigations proved that the legal case reference had been removed from the ATO’s website.

The reason the ATO uses fraud and evasion ‘opinions’ extensively is because

- a) The ATO can turn a small tax debt based on a two year review period into a big tax debt over many years. For example, a \$40,000 tax debt can be turned into \$400,000. This makes the ATO audit process revenue-‘juicy’ and worthwhile.
- b) The ATO does not have to be efficient. By forming ‘opinions’ of fraud or evasion the ATO can ignore the discipline of the two-year limitation.

3.5. ATO charges penalties of up to 90% of the tax debt

By the ATO charging penalties, people can wind up with an alleged debt that is greater than the actual tax a person owes the ATO. The penalty regime is as follows:

- 25% for ‘failure of reasonable care’;
- 50% for ‘recklessness’;
- 75% for ‘intentional disregard’;
- 90% for doing something twice or obstructing the Commissioner

The ATO imposes these penalties based on its ‘opinion’ of a person’s behaviour and there is no identifiable set of standards for each term that might readily be understood by the public. For example, what is the difference in terms of someone’s behaviour between ‘failing to take reasonable care’ and being ‘reckless’? Yet massive increases in debt are imposed on people.

3.6. Nothing on the ATO's website is law

Most people would think that if they follow what the ATO says on its own website, then they would have complied with tax law. Most people would be shocked to discover that this is not the case.

In fact, nothing on the ATO's website is tax law. The ATO's website is a collection of statements of the ATO's *view or opinion* of tax law. And if the ATO changes its view or opinion over time, what someone one day thought was correct, can another day turn out to be wrong (in the opinion of the ATO).

The ATO says that its 'formal rulings' are 'binding on the ATO'. But it turns out that rulings are not law. Rulings are simply the ATO's volunteering to say what it will 'bind' itself to. And rulings can and do change.

3.7. Summary of the ATO's powers

The powers described above mean that the ATO is effectively police investigator, prosecutor, judge, jury and financial jailer—all in one.

The constraints on the ATO's power are minimal, complex to access, require high technical knowledge of ATO processes and tax law and are massively expensive to apply. The situation gives the ATO a huge capacity to abuse its powers and it does so on a systematic basis. This is the opinion and view of Self-Employed Australia, based on our extensive experience in dealing with the ATO when attempting to assist small business people.

4. Evidence of ATO abuse toward small business people

Self-Employed Australia has been active for many years in discovering, researching collating and reporting on the poor behaviour of the ATO towards small business people. Our case studies and evidence have been documented in submissions to official enquiries. The three links below are to those submissions which are included as part of this submission.

- 1) [ICA Submission to Parliamentary Tax Office Review of ATO Scrutiny](#) [March 2016]
- 2) [ICA Submission to Inspector-General of Taxation](#) [December 2015]
- 3) [ICA Submission to Board of Taxation Review](#) [2014]

In addition, in August 2017 Self-Employed Australia made a confidential *Submission to the Inspector-General of Taxation Review into the ATO's Fraud Control Management* in which we detailed case study evidence of ATO's abuse of power toward small business people. In our view, we alleged that the ATO's abuse amounts to fraud by the ATO against small business people.

(*That submission is included as an appendix to this submission as a confidential document.)

5. Existing ATO oversight

Existing oversight of the ATO's powers and behaviour effectively only consists of review powers by

- The Inspector-General of Taxation (IGT).
- The Parliamentary Standing Committee on Tax and Revenue.

These bodies have the power to review the ATO's systems and overall performance, but can only make recommendations. They have no power to enforce anything.

The IGT has the power to investigate individual cases and (again) make recommendations, but has no power to enforce anything.

If a small businessperson objects to a debt alleged by the ATO, the only appeal is to the ATO's internal processes and if those fail, the small business person can appeal to the Administrative Appeals Tribunal or to the Federal Court. Both the Tribunal and Court processes are hugely time-consuming, require specialised, legal and accounting experts to conduct the cases and are hugely expensive to conduct. Most small business people are unable to afford such a defence. Further, as explained above, the ATO can enforce payment of an alleged debt, sell a person's home and bankrupt them before they can conduct a defence. The outcome for small business people is that justice is denied because justice simply cannot be accessed.

But, even when a small businessperson manages to conduct a defence, the behaviour of the ATO is occasionally revealed. This was tellingly exposed in October 2017 in a case involving small businessperson Michael Shord when defending himself against the ATO. Justice Logan commented on the ATO's treatment of Michael Shord as follows:

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

and

The ATO's "...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."

(Full Federal Court judgment of 26 October 2017 (*Shord v Commissioner of Taxation [2016] FCA 761*. File number WAD 332 of 2016).)

6. A 'thought bubble' on oversight

In February 2017, Self-Employed Australia announced our policy objective for the establishment of a low cost, non-adversarial, independent, tax dispute-resolution procedure for small business people. Our proposal is modelled on the current Immigration Tribunal as follows:

- Tribunal independent from the ATO, made up of tax and legal specialists.
- Tribunal determination would be required before a matter could go to the courts (AAT or Federal).
- A small business applicant would pay a modest fee (say, \$1,600) for a hearing.
- Lawyers could not represent either the ATO or the small businessperson in any hearings.

- The Tribunal would review the ATO's allegations against the small businessperson with a view to a correct application of tax law.
- The small businessperson could present his or her case.
- The Tribunal would make a decision binding on the ATO.
- If the Tribunal made a decision in favour of the small businessperson, the person would receive a rebate (of say, \$800) on their lodgement fee.
- If the Tribunal made a decision against the small businessperson, the person would retain the right to appeal to a court.

We view the office of the Inspector-General of Taxation as a body that could probably have its powers extended to include those of a Small Business Tax Tribunal.

This *Treasury Laws Amendment (Tax 3 Transparency) Bill 2018: Transparency of taxation debts* contains a provision to allow the Inspector-General of Taxation to have involvement in the process of releasing alleged small business tax debt information to credit rating agencies. The provision in the Bill states:

355-72 Exception—disclosure to credit reporting bureaus

(1) (e) (i) ...the Inspector-General has been consulted on the disclosure;

That is, before the ATO can release information to credit rating agencies, the ATO must 'consult' with the IGT. This could appear to be the government's moving in a direction of improved oversight of the ATO. Conceptually, we would support this provision. But, what does 'consult' mean? It could be a phone call to the IGT saying 'this is what we, the ATO, are going to do' or it could be a full process of review.

Given our 'opinion', experiences of and allegation that the ATO abuses its powers in dealing with small business people, we hold the view that the ATO would not act in good faith and would abuse the requirement to 'consult' with the IGT.

We strongly oppose the Bill for the reasons stated above. But if the Bill were to proceed, the ATO should be required to:

- Consult with the IGT.
- Present a full brief and facts on the case to the IGT.
- Fully cooperate with the IGT in the IGT's independent inquiries into the ATO's actions and decisions on the case.
- Comply with any decisions of the IGT in relation to the case.

And these requirements should be specifically detailed in the Bill/Act so that the ATO is required to comply.