

Submission to House Tax and Revenue Committee request for comments on the administration of the taxation system.

9 October 2018

Self-Employed Australia responds to the Committee's request, issued in a media release by the Committee on 26 September 2018, for comments on the administration of the tax system.

We note the Committee's observation in the media release that:

“...in April 2018, news reports on the ATO treatment of tax debt among several small and medium businesses, and its media response, brought out further criticism (of the ATO) ...”

Our response to the Committee's request focuses primarily on the ATO's treatment of small business people but is not limited solely to that issue.

Attached to this submission are three appendices providing supporting evidence and referred to below.

1. Summary of criticisms

In summary, we are highly critical of the Australian Taxation Office in the way it administers tax—particularly the raising and enforcement of alleged tax debts. The media and other criticism levelled against the ATO since the airing of the *Four Corners* program 'Mongrel Bunch of Bastards' on 9 April 2018 is justified on the facts and evidence. In this submission we present just some of that evidence.

In our view, based on our experience and collection of hard facts, the ATO:

- fails properly to audit individuals who dodge tax, resulting in significant revenue loss;
- but instead
- focuses claims of tax debt against small business people who are open, transparent and truthful about their tax affairs.

The ATO also:

- creates false claims of tax debts based on erroneous application of the law
- falsifies documents to support its claims of tax debt against individuals (we have clear evidence of this);

- when caught out creating false claims of tax debt and as a result withdraws its claims, nonetheless persecutes its victims by putting them through a compensation claims process that can only be described as a ‘sham’, and further
- gives special treatment to select individuals (mostly high-wealth people) resulting in a loss of tax revenue on a large scale.

In addition, we submit that the ATO:

- Issues misleading publications and guidance.
- Misleads Members of Parliament.
- Attacks its critics rather than dealing with the substance of their criticisms.
- Is coercive and threatening in its behaviour towards individuals.
- Pursues cases that have no merit.

2. How the ATO handles criticism

The ATO’s response to criticism is essentially the same as the

- Banks, when they were first criticised for their abuse of customers.
- Churches, when they were first accused of harbouring and protecting sexual predators.

The ATO’s response is what is too frequently seen in recent times from large, powerful organisations when they are exposed. They simply deny, deny, deny! They turn against and blame their victims and accusers. They put the power and reputation of the organisation above truth and the ethical service they are supposed to deliver to the community.

3. The judiciary

Some of our criticisms are reflected in comments from some significant jurists who have had experience with the ATO.

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.”

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...”

It is highly unusual for anyone in the judiciary to make these sorts of comments.

4. Structural reform of the ATO is urgently required

The ATO has effectively become an unregulated police force, creating its own laws and misrepresenting the law. It has adopted an approach whereby it determines that taxpayers are guilty and then forces them to settle their alleged ‘debt’ in the knowledge that most small business taxpayers have no real alternative as they do not have the means—financial and emotional—to defend themselves.

We submit that the ATO must be structurally reformed to ensure that the principles and practices of justice apply to all Australians in the administration of tax law. It is necessary that the secrecy surrounding the ATO’s practices be lifted and that transparency and accountability prevail. (Note: This does not mean removing the secrecy relating to individuals’ tax affairs).

It is important for the integrity of the tax administration system that the checks and balances applying under good policing principles and practices elsewhere in the community also apply to the ATO.

Specifically, we submit that the ATO should be split into two:

- One arm responsible for the collection of tax and auditing (The ATO).
- Another entirely independent arm, responsible for prosecutions and managing appeals and complaints by taxpayers (The Department of Tax Prosecutions).

Further

- That a separate, dedicated Small Business Tax Tribunal be created.

Until such structural reform occurs, the ATO’s powers should not be expanded. For example, the current rush to push through legislation under the Black Economy Task Force agenda should be halted pending ATO reform. Under current circumstances, expansion of the ATO’s powers will only lead to more abuse of ordinary taxpayers by the ATO.

5. Evidence

Self-Employed Australia has accumulated considerable evidence on the performance and practices of the ATO. We have at all times been public and transparent in documenting the evidence and sharing it with the ATO.

In this submission we present evidence supporting our specific criticisms by way of a series of Appendices.

They are as follows

Appendix A: Case Study: Rod Douglass

To understand the processes and practices of the ATO it's necessary to 'live through' the way the ATO drags out cases to the point that it exhausts people into acquiescing with its claims. The Rod Douglass case has been going on for more than three years. The case study herein tracks in considerable detail some 18 months of that three years. By providing this level of detail we believe some understanding of the ATO's processes from the taxpayer's perspective can be achieved.

There are several lessons to be learned from the Rod Douglass case study.

ATO abuses its powers in falsely alleging fraud

The ATO makes false allegations of fraud and/or evasion which, on any sensible assessment, are unsustainable. In fact, the basis upon which the ATO makes assessments of fraud is almost fraudulent itself. The ATO makes a fraud allegation for the purposes of raising a debt. In Rod's case the ATO did not withdraw its fraud assessment until it was challenged in the Federal Court.

ATO website statements cannot be relied upon

Rod acted on a very clear statement by ATO Commissioner Carmody in 2005 to organise his tax affairs. The ATO accepted Rod's tax returns for some ten years but then it changed its position from the Carmody statement and sought to retrospectively collect some \$440,000 in back tax and imposed penalties. This sort of behaviour by the ATO means that no-one can be sure that they are completing their tax returns correctly. The tax system, as administered by the ATO, cannot be trusted.

ATO exhausts people into submission

The process of dealing with the ATO is exhausting and beyond the resources of most people. This reflects major inefficiencies and dysfunction in the ATO but we surmise that it is also a deliberate strategy adopted by the ATO. The ATO knows that few small business people have the resources to defend themselves against ATO claims. The ATO wins by default—regardless of the facts or truth of any given situation.

ATO internal review processes are a scam

The ATO's internal review processes are neither independent nor genuine. Their review processes are for the most part targeted to convincing the taxpayer that they cannot win against the ATO.

The powers of the IGT are inadequate to prevent ATO abuse

The Inspector-General of Taxation does a great job in its review processes. But it is not able to provide an interpretation of the law, cannot direct the ATO to a conclusion and the ATO has a tendency to not act on the IGT's reports.

ATO manipulates information to support its view. Truth is not an ATO priority

The ATO removes documents and information from its website that would prove the truth and support the position of the taxpayer.

ATO thwarts the intent of Parliament

The use of fraud or evasion opinions by the ATO is effectively a process by which the ATO thwarts one of Parliament's clear intentions—namely, to bring certainty to taxpayers dealings with the ATO.

Appendix B: ATO false statements to Parliament

It should be expected that statements that the ATO makes to Parliament can be totally relied on to be factual in every respect. Particularly before Parliamentary Committees and in its prepared statements to Parliament the alleged facts, as stated by the ATO, should be accurate. But our experience is that this is not the case.

Our experience and observation is that the ATO cannot be relied upon to be factual in its statements and evidence to Parliament.

In the attached Appendix we give five examples where the ATO has not been factual. In each example the ATO was responding to criticism. The ATO's non-factual responses had the effect of deflecting the criticism in such a manner that the parties who had made the criticism were belittled, maligned and had their reputations tarnished by the ATO.

It is legitimate to ask if that was that the intent of the ATO. Certainly the ATO has vast resources at its disposal and it would be inexcusable if the ATO made statements before Parliament that had not been factually checked. Or is it that when faced with criticism the ATO chooses to mislead Parliament? This is a legitimate question.

But the issue of the ATO's honesty goes further. If the ATO is prepared to be dishonest before Parliament when faced with criticism, can any of its statements be relied upon to be factual? What proportion of the ATO's vast outpouring of information is fact and what is distortion? Can actual claims of debt owed to the ATO be relied upon to be factual, for example?

For individuals, particularly small business people in dispute with the ATO, can the ATO be relied upon to deal with individuals in a factual and truthful manner?

In short, the entire integrity and reliability of the tax administration system is under question when Parliament and the public cannot rely on the ATO to be truthful.

Appendix C: Is the ATO corrupt?

Over many years in all of our experiences, and analysis, reports and submissions on, the ATO we have never had cause to consider individuals within the ATO to be corrupt. In fact, all the individuals with whom we have dealt in the ATO have in our view acted with integrity. We consider the processes, procedures and administration of tax law by the ATO to be dysfunctional and even administratively 'corrupt', but we do not believe that individual tax officers are corrupt.

However, the disclosures of May 2017 concerning Operation Elbrus and revelations of alleged tax fraud have raised concern across the community and are reflected in the House Tax and Revenue Committee's media release seeking submissions.

Further, a speech in March 2018 by prominent and respected tax lawyer Mr Mark Leibler caused us to look more closely. We were alerted to the 2014 tax amnesty *Project Do It* that delivered breathtaking advantage to high-wealth individuals. We compared this to the harsh, oppressive and bullying treatment we have witnessed towards small business people by the ATO. We conducted research and have produced a report that we submit as an Appendix.

Our summary to the report states

Project Do It could be viewed as arguably the greatest tax scandal in Australia's history. It was initiated and organised by the Australian Taxation Office.

Project Do It gave massive tax advantages to Australian high-wealth individuals who had hidden money in secret overseas (mostly Swiss) bank accounts. They were tax evaders. These people were about to be caught when the ATO stepped in to 'protect' them under the *Project Do It* tax amnesty.

The loss of tax revenue was likely in the order of \$2.2 billion, maybe more.

The top ATO tax official who organised *Project Do It*, Deputy-Commissioner Michael Cranston, is now facing charges in an unrelated alleged \$160 million tax fraud involving his son.

Our report calls for the highest level of independent investigation into the ATO to determine whether the ATO operates within the law and whether the ATO suffers from systemic internal corruption. *Project Do It* is the starting point for that investigation.

6. Our past submissions

For additional reference and information if required, listed below are details of submissions we have made on the ATO and its behaviour since 2015.

2018

- Treasury review of the Draft Treasury Laws Amendment (Black Economy Taskforce Measures No. 2) Bill 2018: Removing tax deductibility of non-compliant payments (August 2018)
<https://www.selfemployedaustralia.com.au/Downloads/Taxation/SEA-submission-Black-Economy-Taskforce-ATO-Powers-0818.pdf>
- Senate Legal and Constitutional Affairs Committee Inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (May 2018) <https://www.selfemployedaustralia.com.au/Downloads/Taxation/SEA-Submission-May2018-model-litigation.pdf>
- Treasury review of the Treasury Laws Amendment (Tax 3 Transparency) Bill 2018: Transparency of Taxation Debts (February 2018)
<https://www.selfemployedaustralia.com.au/Downloads/Taxation/SEA-Submission-Treasury-Tax-3-Transparency-Bill-February-2018.pdf>

2017

- Submission to the Inspector-General of Taxation's Review into the ATO's Fraud Control Management (August 2017) (Note: We have not made this submission public to this point as we were in discussions with the ATO on its content)

2016

- The Commonwealth Parliamentary Tax and Revenue Committee: Review into ATO Scrutiny <http://www.selfemployedaustralia.com.au/Downloads/Taxation/ICA-Submission-to-Parliamentary-Tax-Office-Review-March-2016.pdf>

2015

- The Board of Taxation: Review into ATO treatment of small business people <http://www.selfemployedaustralia.com.au/Current-Issues/Taxation/digging-out-the-ato-board-of-taxation-review-recommendations>
- The Inspector-General of Taxation: Review of ATO Employer Obligations Audits <http://www.selfemployedaustralia.com.au/Downloads/Taxation/Submission-ICA-IGT-Review-Dec-2015.pdf>

7 Additional reference

Since the airing of the *Four Corners* program 'Mongrel Bunch of Bastards', the following reports are significant for the Committee's considerations:

- The ATO's own surveys have demonstrated that the ATO is 'unfair.' <https://www.selfemployedaustralia.com.au/Current-Issues/Taxation/atos-own-report-reveals-its-unfairness>
- The *Australian Small Business and Family Enterprise Ombudsman* has found that "In the tax system, there is a fundamental denial of access to justice for small business..." <https://www.selfemployedaustralia.com.au/Downloads/Taxation/ASBFEO-report-July-2018.pdf>
- The Inspector-General of Taxation found a range of significant problems with the ATO in its report following its investigation into matters reported by the *Four Corners* program about small business dealings with the Australian Taxation Office <https://www.selfemployedaustralia.com.au/Downloads/Taxation/IGT-Submission-Treasury-April-2018.pdf>