

Senate Estimates Hansard

1. Full *Hansard* transcript of Economics Legislation Committee (Estimates) session held on 27 October 2021:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F25211%2F0005;query=Id%3A%22committees%2Festimate%2F25211%2F0000%22>

2. Highlighted extracts of the session involving Senator Abetz and Commissioner Jordan

CHAIR: Thank you very much, Commissioner, and congratulations to all the staff at the ATO; they've performed magnificently during this difficult time.

Senator ABETZ: Welcome, ATO. Commissioner, I've got some documents here that I'll have great difficulty in providing to you. I have three sets: one for the minister and possibly others at the table. I refer you to a statement you made to Senate estimates on 30 May 2018 in response to the 'Mongrel Bunch of Bastards' *Four Corners* program, where you said that the allegation that the ATO 'slowly boil people until they are roasted to death' was 'ludicrous and absurd'. Do you recall saying that?

Mr Jordan : Yes.

Senator ABETZ: I have a document, which, regrettably, I can't give to you, from MinterEllison. It's an interview with Ross Burns. In that we are told, on page 8: 'RB, Ross Burns, 29 August, 27 meeting on what was agreed. Lots of SES there, including Grahame Tanna, assistant commissioner in charge of in-house legal. One time we had four deputy commissioners, and they agreed this strategy of piling on pressure should be continued. One of them used the expression "burn them". I would prefer a roast meal to a burnt meal.' Whilst there was some slightly different language being employed, can I ask: were you aware of that comment, and, now having been made aware of that comment, if you weren't so aware, what is your view of that which you told the Senate some two or three years ago?

Mr Jordan : I'm not aware of that comment. It would be highly unusual. I'm astounded that you are raising this in this situation. It is a one-off individual taxpayer situation. You've got to realise that there are people who have a pathological desire not to pay tax. They will go to all sorts of lengths to pursue their issue. You are raising a one-off issue that is quite outrageous, frankly, about burning and boiling or whatever. If you have an issue that you want to share with us, we will take that on board. We will look at that issue and respond to you and to the Senate. I have no idea what you're talking about, and I think it's just so misleading to raise extreme examples that do not reflect the millions and millions of lodgements and transactions that happen with absolutely no complaint or issue. We've modernised our systems. People don't even touch us; it's all through their software. I talk to small business and they're like: 'I don't know what's going on. I just do it all, and it all happens.'

Senator ABETZ: Mr Jordan—

Mr Jordan : No, listen to me. If you want to raise something about MinterEllison which we can follow up, or if you can provide us with that information, I am very happy to do so—but, really.

CHAIR: Senator Abetz, if you can give me some indulgence, I'm going to get some advice from the secretary to the committee with respect to the tabling process of a document of this nature.

Senator ABETZ: I'm just happy to have it supplied.

CHAIR: So you're not proposing to table the document?

Senator ABETZ: Not at this stage; it was just to provide the witnesses with the source documents from which I was seeking to quote.

CHAIR: The point has been made to me that, in the usual course, we'd need to provide the document to the witnesses so they could actually—

Senator ABETZ: And that is why I had copies ready to go, not realising that Mr Jordan was coming in remotely.

CHAIR: I understand.

Senator ABETZ: That clearly puts him at a disadvantage, which I'm willing to accept.

CHAIR: Thank you, Senator Abetz.

Mr Jordan : It is so inappropriate to raise individual tax matters that I have no knowledge of, no background on and cannot comment on in any way in this forum. You clearly have that detail. I do not.

CHAIR: Thank you, Commissioner Jordan. The minister would like to say something.

Senator Birmingham: I still haven't seen the documents. I have heard you quote the law firm whose documents they are, Senator Abetz. It's not clear to me from what you've said to date whether the documents identify the particulars of the tax matter that I assume they pertain to and the individuals in relation to that tax matter. Obviously if they do then there are a number of points that I imagine the chair would want to clarify in terms of whether it's accepted as a tabled document. If you are simply proposing that it is best for Commissioner Jordan and the ATO to see it then it may be best, by and large, for us to transmit that out of the estimates session to Commissioner Jordan and facilitate you being able to have that discussion with the commissioner or his deputies, as appropriate, to work through the issues.

Senator ABETZ: Minister, that's a very reasonable approach. It's a pity Mr Jordan's not here. That's no criticism at all. But the commissioner did say on the public record that any such assertion as 'roasted to death' was ludicrous and absurd—in other words, a flat-out denial—and we now have documentation which talks about burning them. I accept Mr Jordan's approach, if it needs to be taken for the record, that the vast bulk of people in the ATO do a fantastic job, such as in the police force. But every now and then we do get a bad egg, and we cannot overcome the bad egg by referring to the 99 per cent of good people in the police force and similarly with the ATO. The concern I have, Commissioner, is that your response—quite an agitated response—to this merely suggests that you are not willing to accept that there might be an issue where you do need to deal with this sort of a culture or behaviour by certain individuals. I would have hoped the reaction would be: 'I am horrified by this.' Tell me the details and we will weed it out.' Unfortunately—

Mr Jordan : I think I did say that. I have no idea who you are talking about. If you or a taxpayer want to send the information to me, I will undertake to investigate that matter, because it

doesn't sound right. That is not part of the culture. I don't know how long ago this was supposed to be and I don't know what the surrounding circumstances of the taxpayer are—

Senator ABETZ: 7 August 2019.

Mr Jordan : but I have found that taxpayers are good at putting one side of the story to people like you, and we know a different story. If you are authorised to act on behalf of this taxpayer, please send that through to me. If you are not, please ask the taxpayer to send that information and I will deal with it. I will undertake to investigate and to see what that actually is.

Senator ABETZ: Thank you for that. I accept what you are doing with this answer. But this is one case that I have: some time ago, on the public record, you described this sort of terminology as ludicrous and—

Mr Jordan : Well, it is. It's ludicrous.

Senator ABETZ: and absurd. Yet there is now a document suggesting 'roasting' and 'burn them'. So, instead of saying it's ludicrous, with great respect, shouldn't the answer be, 'This is very concerning'?

Mr Jordan : I just said that.

Senator ABETZ: If a case is very concerning, it's not ludicrous, is it? You cannot have it both ways, Mr Jordan.

Mr Jordan : I will investigate that. If you are authorised to send that to me, we will look at that. That is absolutely unacceptable and I want to know whether it's true.

Senator ABETZ: Thank you, Mr Jordan. That is what I wanted to hear at the very outset—that this is unacceptable, rather than terminology such as 'ludicrous', 'absurd' et cetera. So thank you for that, and you might think that I might have some authorisation given that I've got the document in front of me and was willing to make it available to you, but I will make it available to you through other channels.

CHAIR: Thank you, Senator Abetz. And thank you, Commissioner. I understand you didn't have the documents in front of you, so you were at a disadvantage.

Senator Duniam: And, for complete clarity, Senator Abetz simply quoted from those documents; they haven't actually been tabled for the committee, and he will transmit them to the ATO by other means.

Senator ABETZ: Yes.

CHAIR: That's an important confirmation for *Hansard*. The documents have not been tabled. Senator Cox, I understand you have some questions.

View the session on YouTube here (10 minutes):

<https://www.youtube.com/watch?v=UvONh4EjRMs>

3. Highlighted extracts of the session involving Senator Small and the ATO

Senator SMALL: Good afternoon, folks. I am aware of the ATO's practice statements on alternative dispute resolution. **Have there been any situations where the ATO has refused to participate in ADR with the taxpayer, even where the taxpayer has requested ADR?** I am anticipating you will cite taxpayer privacy. Can you give me the exact parameters where the ATO could refuse ADR and still be compliant with its own practice statements?

Ms Fish : Thank you for that question. I don't have that practice statement in front of me, so I would have to go back and revisit it. In general, ADR is one of the mechanisms we have available to engage with taxpayers who are willing to engage with us through that process to resolve their matters amicably and in a way that is satisfactory to both parties. It is something that we are very active in promoting. Our reviewing dispute resolution area within law design and practice really has a focus on resolving disputes early and preventing disputes by feeding back insights into the client engagement group when they are doing their work. Our alternative dispute resolution is a real focus of our RDR area. I don't have the practice statement in front of me, but we really are focused on ensuring that we will engage with taxpayers who are engaged with us to resolve the matters as amicably as we can.

Mr Jordan : I might say that **not every case is necessarily suitable for ADR.**

Senator SMALL: That is exactly what I am asking you to articulate, where those circumstances apply. **Commissioner, if you could give me absolute clarity on where ADR would not be appropriate,** that would be very helpful.

Mr Jordan : One example is where there is entrenched evasion or obstruction of tax investigations. For complex, long-standing difficult situations with people who dispute everything, who don't pay tax when it is due and take legal proceedings against every point, there is not much point going through an ADR. If you have a particular taxpayer who you are making representations on, we would, again, be happy or glad to hear that and to provide back to you our view, if we did not do ADR, why it was. Typically, it is the high end of evasion, the obstruction of investigations and being highly litigious at every point. Why would you do an ADR with someone like that?

Senator SMALL: Indeed. For absolute clarity, **where you form a view about a particular taxpayer, are you effectively saying to me that would preclude ADR** from being pursued by the taxpayer, because that is effectively what your evidence just then reflects to me.

Mr Jordan : No, not if that view is formed over a 10-year-plus period of consistent evasion, avoidance, obstruction and legal points all the time. We have ADR for all sorts of people who may be a bit confused or a bit uncertain. **If you have entrenched avoiders, ADR won't help.** If you are willing to provide the taxpayer—

Senator SMALL: **Where a taxpayer in that particular circumstance approached the ATO with a view to engaging in good faith ADR to de-escalate for the parties, are you saying that would not be appropriate?**

Mr Jordan : No, I am not saying that at all. I am saying the history of matters, the attitude of the taxpayer and their history of non-payment and non-compliance will go to whether an ADR facility is appropriate or worthwhile or whether a more legalistic approach, which is generally the way they tend to go, would be more appropriate. But if you want to provide the detailed of a taxpayer, we will certainly have a look at that. You may wish to add to that.

Senator SMALL: No, thank you. That is very helpful. Effectively, I just need to understand the policy implications of the case before the High Court. I am referring to the Commissioner of Taxation v Carter. **Discretionary trusts** are used by so many people in Australia, small-business people, family businesses, farmers—you name it—and when I asked some questions at estimates, frankly, the answer didn't really give me a lot of clarity around what the effect would be. **Is the effect of success at the High Court for the ATO such that a distribution made to an unknowing and nonconsenting beneficiary not dis-claimable post June 30, notwithstanding that that particular beneficiary didn't receive any actual money?**

Ms Fish : I know that you raised these questions last time. As I talked about last time we met, the issue in the High Court is not about the legal effectiveness of the disclaimer; the issue in the High Court is about the tax consequences of a legally valid disclaimer. What the commissioner is seeking through the High Court proceedings is clarity and certainty about how the tax law operates in those circumstances. We see late disclaimers of trust entitlements are increasingly prevalent in high-wealth family groups. This represents a risk to the commissioner recovering tax that is properly payable, where disclaimers happen very late, after review periods are finished. Bringing this case will provide certainty and clarity, both for the community and for the commissioner, as to how the tax law operates when there is a legally valid disclaimer.

Senator SMALL: I also asked some questions around that exact point—whether consultation with Treasury et cetera occurred. My question is: could we have achieved an equivalent outcome for the **ATO without going to the High Court on a particular matter and in fact sought to legislate for certainty for all Australian taxpayers?**

Ms Fish : A change to the law or a change to policy really is a question for Treasury. What we do from the tax office's perspective is interpret and apply the law and seek clarity from the courts, where we need that clarity, as to how the current law operates. We would seek to do that—

Senator SMALL: **That's inconsistent with, 'We're seeing that this is a risk to tax revenue.' They're not necessarily consistent statements,** if I could put that to you.

Ms Fish : Whether or not the law is changed is a matter for Treasury. Whether it requires to be changed depends on the current interpretation of the law as it exists, and that is what we're testing in these proceedings.

Mr Jordan : But also what we need to ensure is that income derived through business activities, whether it passed through one or multiple trusts, ultimately should be taxed at either the trustee or the beneficiary. It's profit. Interposing many trusts, disclaiming present entitlement—all sorts of things happen to try to divert us from our attention to ensure that everyone, for the benefit of the community, pays the right amount of tax. Again, if you would like to name—either now or privately—the people that you're concerned about, we will take that on board.

Senator SMALL: The point on this is: it's actually not about a particular taxpayer; it's about the tax implications for literally millions of Australians who use this. **If I set up a discretionary trust and make a distribution to you that you don't know about**—and I'm talking about you in your personal capacity here—if I make a distribution to you for tax purposes, and you can't disclaim that post 30, when you discover it, notwithstanding **that you haven't received any money, I would suggest that poses a very serious problem in our tax system.**

Mr Jordan : That's **not the facts of the case you're talking about.**

Senator SMALL: Ms Fish, on notice I would really like to fully understand—and, if you don't want to do it on notice and want to give me a briefing, I'm happy with that. I guess what I am gravely concerned about is the implications of success in this case for every user of a discretionary trust structure within the Australian tax landscape.

Mr Jordan : I'm disinclined to take it on notice, because it relates to one case that's in the judiciary system—let that run.

Senator SMALL: But millions of taxpayers use discretionary trusts, as you would know better than I do.

Mr Jordan : And they don't disclaim their entitlements in the way that has been done in this case.

Senator SMALL: The chief law officer just said that it is increasingly used within the tax system, so I'm getting very conflicting pictures here.

Mr Jordan : There are many family trusts that run many businesses, farms and everything else, and they work as naturally as they are supposed to. The trustee distributes the money; the beneficiary puts it in their account. It's extraordinarily unusual for a beneficiary to get money from someone they didn't know about. Would you do that? Would you give money to someone you don't know about?

Senator SMALL: We're talking about the distribution of a tax—

Mr Jordan : No, you wouldn't. I wouldn't either. So it is a very, very unusual situation. It's before the court, and let's leave it at that. We can do something with you separately, but we're not going to take it on notice.

View the session on YouTube here (11 minutes):

<https://www.youtube.com/watch?v=OPK1JpH6OVg&t=2s>