

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE
MANAGEMENT AND ASSURANCE OF INTEGRITY BY CONSULTING
SERVICES (CONSULTING SERVICES)
ANSWERS TO QUESTIONS ON NOTICE

Agency: Australian Taxation Office
Topic: Christmas Phone Call
Senator: Deborah O'Neill

Question:

Senator O'NEILL: I will finish with this. The timeline that you provided according to the key sets out critical engagements with the ATO and the TPB. I would like to table some copies publicly available on the TPB's FOI disclosure log. This is request No. 242223. It is two letters. I can give them to the secretariat. One is from the ATO commissioner Chris Jordan dated 21 September. The response from Mr Klug is dated 20 January 2022. They have attracted some discussion this morning. Both of these letters are included in the timeline provided—

CHAIR: I will confirm that the committee is happy to table them. They are public documents.

Senator O'NEILL: Both of these letters are included in the timeline provided by the ATO. Mr Klug's 20 January letter actually references a Christmas eve 2021 phone call between him and Mr Jordan that is actually not on the timeline. Do you want to look at the timeline? We take it to Christmas eve 2021. You should find that there is no documentation of that matter in this timeline. We go from 1 October 2021 through to 20 January 2022. What was the phone call between Mr Klug and Commissioner Jordan about?

Mr Hirschhorn: I was not part of that phone call. I would have to take that on notice.

Senator O'NEILL: Were you responsible for the delivery of a very extensive timeline. Did you oversee the timeline that the committee has received?

Mr Hirschhorn: Yes. I was the member of the executive that signed off this timeline.

Senator O'NEILL: Why was this phone call not included? Was it unknown to you at that point in time?

Mr Hirschhorn: I will say that the only thing with the timeline is that it is a pretty long timeline as it is.

Senator O'NEILL: It is a very comprehensive timeline.

Mr Hirschhorn: We've tried to be very transparent and comprehensive.

Senator O'NEILL: Yes. That is why I am really interested in why this significant phone call between the commissioner of taxation and the head of the TPB, at a period of time when there was considerable tension between the two entities, was not documented in the timeline.

Mr Hirschhorn: Again, I will take it on notice. Our general approach to the timeline was to really focus on what we thought were the key interactions and those where there was documentary evidence.

Senator O'NEILL: Chair, with indulgence, I think it would be pretty unusual for the ATO to be conducting business on Christmas eve. Do you agree that the timing of this phone call suggested that it was a serious conversation? It is certainly documented in this letter from Mr Klug.

Mr Hirschhorn: I can't give any context to that call. It could well be—again, probably this is speculation—that they were calling each other up to wish each other a happy Christmas and then it went on to professional matters. I am just not sure. I would have to take it on notice.

Senator O'NEILL: I hope that the Christmas salutations were happily shared. I don't know that is why it would be recorded in a letter from Mr Klug. Certainly, if I were writing a letter

to a professional colleague, I wouldn't be mentioning the fact that we had a nice chat about Christmas. I can't really take that seriously. I assume that was a throwaway line.

Mr Hirschhorn: Again, I will take it on notice and see what I can give.

Answer:

It is standard practice for agency heads to speak directly from time to time on a range of matters where their agencies have a close working relationship.

The call on 24 December 2021 (the call) was about the former Government's proposed structural changes to the TPB (announced 25 March 2022¹), and the outcome of the TPB's review into the conduct of their investigation into PwC and Peter Collins.

The ATO's timeline is comprehensive, not exhaustive. The key elements of the call were included in the letter from the Chair of the TPB to the Commissioner of Taxation on 20 January 2022. The letter was referred to in both the ATO's and the TPB's timeline.

Due to their schedules, the Commissioner of Tax and the Chair of the Tax Practitioners Board had missed each other's previous phone calls before finally connecting on Christmas eve.

¹ <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/greater-independence-tax-practitioners-board>

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Agency: Australian Taxation Office
Topic: Confidential agreements prior year elements
Member: Senator Richard Colbeck

Question:

Mr Hirschhorn: Yes. I would say in general terms, yes.

CHAIR: In general terms. Okay. How many confidential agreements were registered out of those 44? I'm not asking you to name who the individuals are because I know that is an issue. I want to know how many were confidential.

Mr Hirschhorn: I would have to take that on notice in terms of the prior year elements and the future year elements. On the future year elements, we've reached agreement with 44 companies. On the prior year elements, I would have to take that on notice.

CHAIR: Is it possible to get a calculation of the difference between your initial assessment of what tax was owed and what the settlements were?

Mr Hirschhorn: Yes. Indeed, every year we publish this information on an aggregated basis in our annual report by market segment.

CHAIR: Is it possible to do it with respect to these 44 cases, though?

Mr Hirschhorn: Senator, I think we should be able to do that.

Answer:

Our engagement with multinational groups as part of the Tax Avoidance Taskforce, together with the successful implementation of the Multinational Anti- Avoidance Law (MAAL), resulted in 44 multinational enterprises restructuring to return their Australian sourced sales in Australia. Our final estimate of the impact of the implementation of MAAL (done for the 2018-19 income tax year) showed these taxpayers were collectively booking more than \$8 billion in additional sales in Australia and paying more than \$100 million each year in additional income tax and net GST of approximately \$80 million.

Whilst the Australian Taxation Office (ATO) engaged with all 44 taxpayers, a settlement was not required in all cases. In total there were settlements with 23 taxpayers. Not all settlements involved the settlement of a disputed amount. Settlements were used in two circumstances.

Firstly, most settlements locked in the agreed form for a MAAL compliant structure. As some taxpayers were unable to have a MAAL compliant structure in place by the 1 January 2016 MAAL commencement date, the settlements were used to lock in the form and timeframes for restructures as well as the tax outcomes for that period. Tax outcomes agreed under the settlements ensured that the right amount of tax was paid even though the restructure was not completed by the 1 January 2016 MAAL commencement date.

Secondly, in 11 cases the settlement included resolution of an income tax dispute, typically a pre-existing audit or a MAAL review. Only 7 of these settlements involved the ATO moving

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from its original starting position to an agreed settlement outcome for one or more years. These settlements typically included disputed years prior to 1 January 2016.

For completeness, we note that the small number of taxpayers that implemented a foreign partnership structure as set out in Taxpayer Alert 2016/11 were required to restructure their affairs and agree tax outcomes as though a MAAL compliant structure had been in place since 1 January 2016. The ATO ensured that no benefit was obtained. Or put another way, the ATO ensured that there was no tax leakage through the use of the foreign partnership scheme.

The total variance for the 11 settlements represents an overall compromise of 20%. The total variance of 20% can be compared against the 5-year average variance for settlements with public and multinational businesses more generally which is 42%.

The breakdown of the income tax variances for the 11 cases are set out below:

Item	ATO position \$m	Settled position \$m	Variance \$m	Variance %
Primary Tax	549.5	490.7	58.8	11%
Interest	31.3	27.6	3.8	12%
Penalties	90.8	18.6	72.1	79%
Total	671.6	536.9	134.7	20%

Note: Totals may differ from the sum of components due to rounding.

Significant settlements are subject to external scrutiny through the Independent Assurance of Settlements (IAS) process. Under this program a former judge reviews the ATO's largest and most significant settlements to determine whether they are fair and reasonable for the Australian community.

Of the 11 settlements 4 were referred to the IAS program. The first referral was to ensure the ATO approach was sound, creating a precedent for other cases. The other three were referred as they met the materiality criteria for automatic referral to the IAS program. All four settlements were found to be fair and reasonable. These 4 settlements represented over 98% of the "total settled position" across the 11 settlements.

Some taxpayers have publicly disclosed their settlements with the ATO, including Google, Facebook and Microsoft.

For further information in relation to settlements with public and multinational businesses, see <https://www.ato.gov.au/Business/Large-business/In-detail/Findings-report-Public-and-multinational-business-settlements>

Refer to response to Question on Notice 'Settlement Discount' for further information in relation to settlement variances.

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Agency: Australian Taxation Office

Topic: Legal Reports

Member: Senator Deborah O'Neill

Question:

Senator O'NEILL: Can I indicate a possible quick response, if possible, with regard to the reports? There is a line of questioning that I put to the TPB around the reports from PwC, King & Wood Mallesons, Allens and Linklaters and the Switkowski report. Have you received any of those? If you have had any interactions, could you explain them in the way the TPB did this morning?

Answer:

On Monday 25 September 2023, PwC advised the ATO that it would provide the full independent review conducted by Dr Ziggy Switkowski, as well as the detailed management response and action plan on the coming Wednesday (27 September 2023).

PwC provided the ATO with copies of the following reports at 12.48pm on 27 September 2023, ahead of their public release at 1pm on the same day:

- Review of Governance, Culture and Accountability at PwC Australia
- PwC Australia's Commitments to Change
- Review of Tax Confidentiality Breaches and Related Questions

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Agency: Australian Taxation Office
Topic: Settlement Discount
Senator: Deborah O'Neill

Question:

Senator O'NEILL: But in this matter—I have limited time—where the 44 companies were involved, there was a high-level engagement that involved an assessment of how much should be paid. That was negotiated into a settlement which had two parts—the payment of prior contested earnings, so there's a tax reconciliation from the previous year, and a series of commitments going forward. That was negotiated. How much of a discount did people receive to go to settlement?

Mr Hirschhorn: I will make a comment here. Each year, we produce an annual report of our settlement statistics, which talks about the original tax and the tax ultimately paid. What we see from those statistics over time is that the settlement discount for large business, if anything, is a bit less than the settlement discount for other groups of taxpayers.

Senator O'NEILL: What is the number, Mr Hirschhorn?

Mr Hirschhorn: Of course, it varies over time. I will take the exact number on notice. It is about 40 per cent, I think. It is 35 to 40 per cent for large business and 40 to 45 per cent for other groups. That is the general discount in that sort of situation. The multinational anti-avoidance law was different because it was actually requiring companies to actively restructure their affairs. This is why it was a more intense interaction. Ordinarily, we're coming in after the event.

Answer:

Data in relation to settlements is included in the Annual Report each year.

The following table shows the variance for settlements with public and multinational businesses for the past 5 years.

Income Year	Variance
2022-2023	44%
2021-2022	45%
2020-2021	30%
2019-2020	36%
2018-2019	45%

The 5-year average variance for settlements with public and multinational businesses is 42%. This is consistent with the 5-year average variance for all other settlements of 43%.

For further details about settlements with public and multinational businesses, including links to previous Annual Reports, please refer to ATO's answers to questions on notice provided to the inquiry into Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry (Settlements, question 22).

Refer to the Settlements Findings Report for further detail about settlements with public and multinational businesses during the 2022-23 financial year, including why we settle and safeguards and controls found at <https://www.ato.gov.au/Business/Large-business/In-detail/Findings-report-Public-and-multinational-business-settlements/>