

## Submission to the Standing Committee on Tax and Revenue – Inquiry into the Annual Report of the Australian Taxation Office 2018-19

I am a tax advisor with 30 years' experience, specializing in the resolution of tax disputes between taxpayers and the Commissioner of Taxation. I am a former Senior Assistant Commissioner at the ATO, and a former Tax Partner at both PriceWaterhouseCoopers and Deloitte. I now run a specialized tax consulting practice with a focus on ATO audits, investigations, and disputes. I make this submission in my personal capacity.

I am raising an important issue that I believe goes to the heart of this Inquiry, as stated in your media release dated 5 August 2020 *"Are We Getting a Fair Go from the ATO?"*:

*"The Committee has a strong interest in taxpayer engagement with the tax system and ensuring that people with low tax literacy or vulnerable taxpayers **are not unfairly treated in a complex system of self-assessment.**"*

The issue I am raising in this submission is that of 'Fraud and Evasion'. Fraud and Evasion can be a very serious matter in the tax system. It has become a more problematic issue for the ATO and taxpayers since the introduction of the self-assessment system of taxation in the 1980s<sup>1</sup>. Issues relating to fraud and evasion have been raised frequently with this committee. The problems still exist but can be mostly remedied with a change in the way the ATO manages cases involving suspected fraud or evasion, and also with legislative change.

### Summary of issues

Despite countless papers, submissions, complaints and pleas from the tax profession over many years, the ATO's administration of cases that involve fraud or evasion remains to be less transparent, consultative and fair than cases involving tax avoidance (a less serious behavior)<sup>2</sup>.

This paper recommends changes that the ATO should adopt in its management of cases of fraud and evasion that would put those cases on an even footing with cases involving tax avoidance, making it much fairer for affected taxpayers.

This paper also recommends that the statutory time frame for cases involving fraud or evasion be reduced from an unlimited amount of time to ten years after the issue of an assessment by the ATO.<sup>3</sup> This recommendation is for government to consider.

### Discussion of issues relating to fraud and evasion

"Fraud or evasion" is not defined in Australia's tax legislation. The term appears in section 170 of the *Income Tax Assessment Act 1936* and opens the door to an unlimited time for amendment, regardless of the taxing provisions concerned. Item 5 at section 170(1) simply provides:

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<sup>1</sup> It became more problematic because taxpayers were no longer required to provide full information to lodge a tax return, and therefore held and retained less information than they previously had. More recently, the move to increased digitization has meant that enhances the risk that taxpayers will not have complete and fully documented tax records later on.

<sup>2</sup> It is widely accepted that tax avoidance is less serious than tax fraud or tax evasion.

<sup>3</sup> This would require an amendment to section 170 of the *Income Tax Assessment Act 1936*.

*The Commissioner may amend an assessment at any time if he or she is of the opinion there has been fraud or evasion.*

We must look at common law for a definition. The concept the concept of “fraud” is common law fraud where a taxpayer makes a statement either knowing it is false or not believing it is true, or with reckless indifference as to its truth or falsity. “Evasion” involves a blameworthy act or omission on the part of the taxpayer. From my experience and from a review of cases that are appealed to the AAT and Federal Court, tax evasion is more commonly detected than tax fraud. An obvious example of tax evasion is undeclared cash economy income. A taxpayer is liable for fraud or evasion if it is committed by his or her tax agent, even if the taxpayer is unaware of the tax agent’s conduct<sup>4</sup>.

The OECD defines the term **tax evasion** as ‘illegal arrangements where liability to tax is hidden or ignored’. This contrasts with **tax avoidance**, which is described as an ‘arrangement of a taxpayer’s affairs that is intended to reduce his liability and that although the arrangement could be strictly legal, it is usually in contradiction with the intent of the law it purports to follow’. Hence, tax evasion is illegal, while tax avoidance (strictly speaking) is legal<sup>5</sup>.

Where he considers it appropriate to do so, the Commissioner (or more typically, one of his many delegated officers) can make a determination that a taxpayer has been guilty of **fraud or evasion**<sup>6</sup>. The result of such a determination is that the Commissioner is then permitted to amend the taxpayer’s old tax returns that he was otherwise out of time to amend under normal circumstances, as far back in time as the Commissioner thinks it appropriate to do so. I have seen this be as far back as 20 years or more.

The ATO describes the policy behind this issue as:

*“The self-assessment system of taxation relies upon taxpayers self-assessing their own liability through the lodgement of taxation returns and formal assessment. Under section 170 of the Income Tax Assessment Act 1936, a limited period of two years (or four years for taxpayers with more complex affairs) generally applies for the Commissioner to amend assessments; providing certainty and finality. However, by way of exception, the Commissioner has an unlimited amendment period to amend income tax assessments when he is of the opinion there has been **fraud or evasion**. This power embodies a longstanding principle that people who engage in calculated behaviour to evade tax should remain permanently at risk.”<sup>7</sup>*

It is true that some cases of fraud or evasion relate to deliberate attempts to evade tax, such as not declaring amounts that are clearly income of the taxpayer and then trying to cover it up. Those cases are a serious threat to the tax system and should be dealt with in a firm manner. But at the other end of the evasion spectrum are where taxpayers had a reason for not including amounts in their tax returns that the Commissioner subsequently considers were income<sup>8</sup> (sometimes on the advice of their tax advisors) or included deductions in their tax returns that the Commissioner later considers were not properly allowable.

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<sup>4</sup> *Kajewski v FCT* (2003) 52 ATR 455.

<sup>5</sup> These definitions were quoted in paragraph 5.4 in the Report of this committee titled *“Taxpayer Engagement with the Tax System”*, dated August 2018.

<sup>6</sup> Currently, these determinations can be made by either an Executive Level 2 or an SES officer (refer to paragraph 6 of the ATO’s Practice Statement Law Administration ATO PS LA 2008/6 Fraud and Evasion). As at 30 June 2020, there were 1,539 ATO officers at these levels (refer to Table 4.4 of the ATO’s Annual Report for 2019-2020).

<sup>7</sup> Refer to the ATO response 1 (a) in the section titled “Answers to Questions on Notice – Perceptions of fairness in complaints” in this Committee’s Report on the 2016 Annual Report of the Australian Taxation Office, March 2017.

<sup>8</sup> This can include amounts that are “deemed” as income by the ITAA even though no payment or amount of cash or readily identifiable value was received by the taxpayer.

Other cases at this end of the spectrum are where taxpayers make mistakes and the Commissioner argues they should have known better, or where it is debatable as to whether a taxpayer was a resident of Australia or not during the relevant income year. Sometimes this is not obvious.

When a finding of Fraud or Evasion has been made by the ATO, it is then up to the taxpayer to challenge that finding, and to disprove each of the tax issues that the Commissioner has amended in each tax return. The taxpayer needs to disprove the finding of fraud or evasion associated with each item of income or deduction in dispute in each year's tax return.

This can be a very challenging task that is very unfair to the taxpayer, particularly when the tax year ended many years prior and documentary and other evidence has not been kept and is very difficult to locate. The burden of proof in these cases always sits with the taxpayer<sup>9</sup>.

It is also difficult because there is no way to challenge the fraud or evasion finding on its own. The ATO does not provide any avenue through which taxpayers can argue their case prior to a fraud or evasion determination being made. The ATO's internal process for these cases is neither fair nor transparent to the taxpayer. The internal guidance for these cases is contained in its Fraud or Evasion Practice note—***Practice Statement Law Administration ATO PS LA 2008/6 Fraud and Evasion***.

As soon as an ATO auditor considers that fraud or evasion occurs, they prepare a submission to an internal panel of ATO officers from the ATO's compliance area.<sup>10</sup> That panel meets shortly after to hear from the auditor. There is no thorough testing of evidence, nor is there any defence raised by the taxpayer. Taxpayers are neither informed of the panel hearing nor invited to make a submission or attend the panel. In many cases the taxpayer (or even their advisors) is not even aware that they can be subsequently provided with the minutes of the panel. Following the panel meeting, the ATO audit team proceeds with making the fraud or evasion determination and then advises the taxpayer after that process is finished. This is typically a shock to such taxpayers.

There is no avenue available to submit and argue the evasion defence before assessments are issued. Taxpayers have to face paying those assessments before they can have their objections and appeals heard<sup>11</sup>. That ATO has also confirmed to this committee that it does not seek external advice on these cases:

*"The ATO does not generally seek external advice in making determinations on such matters. The ATO generally relies on its in-house resources, including internal technical panels."*<sup>12</sup>

Furthermore, Australian Courts have consistently said that a taxpayer must go through the formal objection and appeal processes relating to the individual tax issues (the income and deductions in dispute) in order to have the fraud and evasion arguments heard.<sup>13</sup> That means that even though the audit assessments are totally dependent on there being a determination of fraud or evasion, there is no avenue to have that

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<sup>9</sup> Recommendations about shifting the burden of proof from the taxpayer to the Commissioner in these types of cases has been made in other submissions to this enquiry, and to previous inquiries of this Committee. This submission does not deal with these matters further.

<sup>10</sup> The ATO's internal guidelines on fraud and evasion encourage auditors to escalate matters as early as possible.

<sup>11</sup> There is an ATO policy under which taxpayers can apply to pay only half of the tax in dispute at the time of assessment if they are proceeding that they are proceeding with an objection and/or appeal. It is entirely up to the ATO debt collection officers as to whether to accept that application.

<sup>12</sup> Refer to the ATO answer 1 (b) in the section titled "Answers to Questions on Notice – Perceptions of fairness in complaints" in this Committee's Report on the 2016 Annual Report of the Australian Taxation Office, March 2017.

<sup>13</sup> For example: *LDGL and Commissioner of Taxation* (Taxation) [2017] AATA 2779 (21 December 2017); *Binetter v Commissioner of Taxation* [2016] FCAFC 163; *Bai v Federal Commissioner Taxation* [2015] FCA 973;

matter dealt with early and separately to the appeal on the actual tax issues (the income and deductions). This makes the whole appeal process more complex and costly than it should be.

This is in stark contrast to the ATO's approach to tax avoidance cases – which is a less serious tax minimization behavior than fraud or evasion. In cases where ATO audit teams allege that tax avoidance has occurred, the ATO has a thorough and transparent process including an independent panel (which has external members from the tax profession) that is chaired by a very senior ATO Law officer<sup>14</sup>. The taxpayer facing the avoidance allegations is invited to make a submission and attend (including with representation) the ATO Tax Avoidance panel and is then provided with written minutes and advice from the panel. It is not uncommon that a case can be reheard, or further evidence be provided to the Panel in order to clarify and potentially remove the tax avoidance determination from an audit case.

Remarkably, the same independent and open panel process does not exist for the more serious fraud or evasion cases.

### There is a long history of problems with Fraud and Evasion cases

The problems with fraud and evasion cases continue to exist despite problems and issues having been raised with the ATO, in court appeals and at public tax seminars for decades. Issues have also been raised directly with this Committee on numerous occasions in the past, including in the following instances:

#### Concerns raised during the 44<sup>th</sup> Parliament

**2015** – The Committee conducted a review called “*Tax Disputes*” and made recommendations about fraud and evasion cases to both the ATO and the Government:

- The Committee's recommendations to the ATO were (i) that findings of fraud or evasion should only be made by an officer from the Senior Executive Service<sup>15</sup>, (ii) that such allegations only be made against taxpayers when evidence of fraud or evasion clearly exists<sup>16</sup>, and (iii) that allegations of fraud or evasion are addressed as soon as practicable in an audit or review<sup>17, 18</sup>
- Regretfully, only the third of these recommendations was subsequently adopted, to the detriment of taxpayers.
- The same report also recommended that the Government introduce legislation to place the burden of proof on the ATO in relation to allegations of fraud and evasion because of the difficulties a taxpayer faces to prove innocence from such allegations. The Government did not support the recommendation because it had been led to believe that the Commissioner “was already committed to a range of administrative remedies to address this issue” and it would “encourage sham behavior by taxpayers”.<sup>19</sup> It was not explained how shifting the burden of proof would encourage sham behaviours.

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<sup>14</sup> The Panel is chaired by one of the ATO's Deputy Chief Tax Counsel Officers, of which there are currently four (according to page 10 of the ATO's 2019-20 Annual Report).

<sup>15</sup> The ATO has not adopted this recommendation.

<sup>16</sup> Taxpayers facing these allegations are not able to make submissions or appear at the panel meeting that decides their fate.

<sup>17</sup> The ATO adopted this recommendation by amending its Fraud and Evasion Practice Statement to encourage auditors to make such determinations as soon as practicable.

<sup>18</sup> Refer to Recommendations 4, 5 and 6 of the House of Representatives Standing Committee Report on “Tax Disputes”.

<sup>19</sup> Refer to the Government's response dated December 2015 to the House of Representatives Standing Committee Report on “Tax Disputes” - Recommendation 7

**2016** – The Committee conducted a review called “*External Scrutiny of the ATO*” and again considered complaints raised about fraud and evasion:

- In the section titled ‘ATO Culture and reinvention’<sup>20</sup> the Committee considered concerns and complaints made during the inquiry, including those relating to the ATO approach to fraud and evasion cases, where assertions of a denial of procedural fairness were made (amongst other complaints).
- The Committee noted that the ATO offered to independently review any cases specifically provided to it.
- The Committee also noted that the fraud and evasion issues had been raised in the past (in the Committee’s inquiry into *Tax Disputes*) and that the ATO undertook to examine the recommendations that had been made.
- The Committee reiterated its earlier comments in support of mediation and early engagement by the ATO.

### Concerns raised during the 45th Parliament

**2017** - The Committee conducted a performance review of the “*2016 Annual Report of the Australian Taxation Office*” and again considered issues about fairness and about fraud and evasion. During the Committee’s review there were concerns raised about the unfairness and lack of an independent process which can elicit a response from the ATO in review of its decisions or administrative processes, including where there were allegations of fraud or deliberate tax evasion. Specific issues had been raised by The Australian Taxpayer’s Alliance, tax agents and the Inspector General of Taxation. However, the Committee did not make any recommendations specific to fraud or evasion issues in that Report.

In 2017, the ATO revised its internal Practice Statement that deals with Fraud and Evasion. Some improvements were made because of the consultation process that occurred at the time.<sup>21</sup>

**2018** – The Committee conducted a review titled “*Taxpayer Engagement with the Tax System*” and issued its Report in August 2018. The report considered issues relating to exchanging information with other tax authorities in other countries, and with AUSTRAC, relating to serious tax evasion. The report also considered how behavioral analysis and data analytics could be a strategy that the ATO can use to identify and deal with tax evasion in the cash economy. Those matters, whilst important, are not relevant to this submission.

**2019** - The Committee conducted a very detailed performance review of the “*2017 Annual Report of the Australian Taxation Office – Fairness, functions and frameworks – performance review*” and again considered issues directly relating to Determinations of fraud or evasion in the section titled “*Fair Practice and review*”.<sup>22</sup>

As part of the review, the Committee took evidence from numerous tax agents, taxpayers and the Inspector General of Taxation that raised complaints about unfair treatment by the ATO in cases involving allegations of bias, the presumption of guilt and findings of evasion.

That Report made the following statement under the heading of “Fairness in auditing”<sup>23</sup>:

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<sup>20</sup> Page 51 of the Final Report dated May 2016.

<sup>21</sup> The author of this submission was an external member of the ATO’s Dispute Resolution Working Group (representing the Institute of Chartered Accountants of Australia and New Zealand), the consultative committee for ATO dispute resolution issues. The amendments to the ATO’s Practice Statement were discussed with the Working Group, but several of the Working Groups’ recommendations were not adopted by the ATO.

<sup>22</sup> Commencing on page 89 of the Report.

<sup>23</sup> Page 67 of the Report.

*The audit process can be a prolonged and stressful period, between two and four years for complex cases, and longer should the Commissioner make a determination of tax fraud or evasion, in which case there is no limit. It has been suggested in evidence that ATO staff are **not objective in their assessments of fraud or evasion**, and that ATO demands for documentation are excessive and unreasonable, with penalties issued in default of willingness to engage, despite evidence to the contrary.*

And the Report made the following statement under the heading of “Presumption of guilt”<sup>24</sup>:

*Section 170 (1) of the Income Assessment Act 1936 provides the Commissioner with powers to determine on fraud or evasion. A principal concern in evidence to the Committee was the perception that the ATO operates on the presumption of guilt, **with a conviction of fraud or evasion a necessary corollary irrespective of the taxpayer’s active attempts to engage with the process.***

The Report also made the following statement in the section titled “Fair practice and the law”<sup>25</sup>:

*As set out in Chapter 3, submitters have identified the following problems which impaired their tax engagement experience, and ultimately their trust and confidence in fair treatment from the ATO:*

- *‘Guilty, until proven innocent’—that the ATO’s auditing process and opinions were seemingly geared for revenue collection at any cost—the ATO interpretation of law would change, **and a verdict ‘of fraud and evasion’ would be made**, and irrespective of evidence of past and present ‘engagement’ with the process.*

The Report considered the law and policy surrounding fraud and evasion in the section titled “Determinations of fraud or evasion”<sup>26</sup>. Importantly, the Committee recognised the following unfair attributes of the ATO’s approach to evasion cases<sup>27</sup>:

*“It would appear, then, that the current law is not adequately protecting the rights of taxpayers under self-assessment in a digitised lodgement environment. Instead, as indicated by accounts recorded in the preceding chapter, **taxpayers are now routinely required to provide historical documentation beyond the statutory period of five years in very tight timeframes to prove they are not guilty of evasion.***

*In this regard, the Committee notes that the ATO has relatively recently established the National Fraud or Evasion Advisory Panel to assist tax office staff to adjudicate on the material evidence of evasion. This body was formed in response to **concerns that in forming an opinion of fraud and evasion the taxpayer’s position is literally unchallengeable if the records required beyond the statutory period are not obtainable.***

*Under an opinion of fraud or evasion a taxpayer can’t appeal to the AAT on the basis of the untrue opinion per se but must only contest the substantive facts in forming the liability of a lengthy retrospective assessment. This potentially puts an innocent taxpayer in a very unfair position, suggesting a need for both refinements to the review and decision-making processes and the clarity of the law.”*

The report contained the following recommendations relating to fraud or evasion:

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<sup>24</sup> Pages 67-68 of the Report.

<sup>25</sup> Paragraph 4.8 on pages 88-89 of the Report.

<sup>26</sup> Pages 117 – 121 of the Report.

<sup>27</sup> Paragraphs 4.15, 4.16 and 4.17 of the Report.

*Recommendation 7 - The Committee recommends that **the ATO review the case law and practice notes governing the Commissioner's discretion on fraud or evasion to ensure that fairness is preserved under the self-assessment system**, and that the basis of the Commissioner's determinations are both clear and accountable to the taxpayer.*

*Recommendation 8 - The Committee further recommends that the **ATO should publish in its annual report the number of taxpayers by taxpayer segment who are deemed to have engaged in fraud or evasion as a figure and as a percentage of the total audited, and how many of these receive additional penalties.***

*Recommendation 22 - The Committee also recommends the ATO should conduct a review of its communications material in hard copy and on its website to ensure that it is communicating taxpayers' rights and obligations clearly, simply and meaningfully, including by:*

- *refining and updating guidance on determination of fraud or evasion so that taxpayers are fully cognisant of their mutual obligations and commitments under the law;*
- *articulating ATO commitments to fairness during the audit and objections process, with further investment in-house training for audit staff to raise standards; and*
- *ensuring performance benchmarks for fairness are clearly articulated in the Taxpayers' Charter and corporate documents, and measured in the Annual Report.*

As a result of these recommendations, the ATO reviewed its Practice Statement relating to how its officers should deal with Fraud and Evasion cases. Despite some minor improvements in process, including that all cases should be referred to an ATO internal technical panel for consideration, the ATO has not implemented the main recommendations that tax practitioners have been asking for – a Fraud and Evasion Panel with external members, chaired by a suitably qualified senior ATO officer, and to which taxpayers are invited to make submissions and appear to plead their case. All of these features are available to taxpayers facing the less serious allegation of *tax avoidance*.

### **Concerns raised during the current Parliament**

**2020** – the current review into the ATO's 2018-19 Annual Report by the Committee is the only review since the current term of parliament commenced<sup>28</sup>. I am aware that at least one other submission to this Committee for this current review has addressed problems with Fraud and Evasion<sup>29</sup>.

### **Current ATO administration of fraud and evasion cases**

The author notes that neither the ATO's Annual Report for the 2018-19 year, published in October 2019 or the ATO's Annual Report for the 2019-20 year, published in October 2020, included any data or statistics revealing how many taxpayers had been deemed to have engaged in fraud and evasion.<sup>30</sup>

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<sup>28</sup> The ATO's Annual Report for the 2018 income year was not reviewed by the committee. The ATO did not appear before any House Committees in 2019-20 (according to page 79 of the ATO Annual Report for 2019-20).

<sup>29</sup> The other submission that addresses Evasion (with a recommendation about reversing the burden of proof) was proposed by Richard Bobb of Encountr Tax Advisory. I have not been able to access that submission. Jotham Liam wrote about it on 10 December 2020 in "Accountant's Daily".  
<https://www.accountantsdaily.com.au/tax-compliance/15158-reform-taxpayer-s-burden-of-proof-government-told>

<sup>30</sup> Despite this being a recommendation made by this Committee in 2019.

Despite the continuing requests and recommendations to the ATO to improve the administration of Fraud and Evasion cases, significant problems still exist today:

- Findings of Fraud or Evasion are continuing to be made by ATO officers below the Senior Executive Service
- Findings of Fraud or Evasion are being made in cases where the facts have not yet been obtained and analyzed – the findings are being made based on the audit hypotheses<sup>31</sup>
- Taxpayers are not given advance notice that the ATO is considering making a finding of Fraud or Evasion
- Taxpayers are not invited to make submissions or attend the internal ATO Panel meetings where their issues are being discussed and decided. This allows ATO auditors to make allegations to the internal committee that are unproven and to which the taxpayer has no ability to reply. The ATO Panel members have no way of knowing what to believe.
- Taxpayers are not routinely provided with copies of the minutes or advice from the internal ATO Panel<sup>32</sup>
- The ATO does not have Alternate Dispute Resolution processes available to taxpayers to address Fraud or Evasion findings. This means that taxpayers typically can only challenge a fraud or evasion finding after an assessment has been amended/issued. This means that the taxpayer must pay at least half of the amount of tax alleged by the Commissioner
- Taxpayers bear the full burden of proof to disprove findings of Fraud or Evasion, and the AAT and courts have consistently denied taxpayer the ability to challenge fraud and evasion findings separate to the underlying income/deduction issues, despite the fraud and evasion findings being the gateway for the Commissioner to amend prior year tax assessments.

The above circumstances are in stark contrast to the ATO's administration of tax avoidance cases<sup>33</sup>, where there is a Panel chaired by a Deputy Chief Tax Counsel and with external members from the tax profession and to which taxpayers are invited to make submissions and to attend to present their case. The outcomes of Panel meetings are provided to taxpayers at the same time they are provided to the ATO audit team.

### Problems still exist with cases involving allegations of fraud and evasion

However, the following significant problems still exist:

1. Fraud and Evasion Findings/Determinations are not required to be made by Senior Executives of the ATO, despite the seriousness of making such a finding.
2. The ATO has an internal technical Panel to discuss cases where Fraud and Evasion findings are being considered. However, this Panel is made up solely of ATO Officers (unlike the ATO's Anti-Avoidance Panel which has external members) and is not chaired by a senior officer from the Law and Dispute Resolution area of the ATO. This Panel does not test the veracity of evidence that the audit team should obtain to support the cases.
3. The ATO internal Practice Statement does not adequately deal with the law surrounding Fraud and Evasion and encourages ATO offices to make Fraud and Evasion findings very early in the audit process. This has led to several cases where the ATO audit team has made a determination of Evasion before it has obtained and adequately considered the facts of the case.

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<sup>31</sup> I am advising taxpayers with cases where this has occurred.

<sup>32</sup> Taxpayers have the right to this information under FOI laws – but these processes can take months to produce documents.

<sup>33</sup> As mentioned previously, tax avoidance is less serious than tax fraud or tax evasion.



4. ATO auditors will often make a submission and presentation to the ATO internal Panel without advising the taxpayer that is doing so.
5. Taxpayers are not invited or permitted to make submissions to, or to attend Panel meetings.
6. The Panel does not have the benefit of hearing anything from the taxpayer, and therefore typically agrees with the recommendation from the audit team.
7. ATO auditors do not provide copies of the Evasion submission, or advice from the ATO internal Panel, to the taxpayer as a matter of course. It often needs to be obtained through *Freedom of Information* processes, which take weeks or months to be processed.
8. The ATO processes relating to fraud and evasion are significantly less robust and fair to taxpayers than processes for tax avoidance, despite tax avoidance being relatively less serious.
9. Once a Determination of fraud or evasion has been made, it is extremely difficult to have it overturned within the ATO. In the worst cases, ATO officers can use that Determination as a bargaining chip in settlement negotiations. The ATO's typical response is that it is up to the Federal Court to consider the facts of the case and to consider fraud and evasion appeals<sup>34</sup>.

## Recommendations

I strongly recommend the following change be made, particularly for cases where it is debatable whether the Commissioners view of whether an item should be included in assessable income, or allowable as a deduction, is correct:

### For the ATO:

- Determinations of fraud and evasion should only be made by Senior Executive Officers of the ATO.<sup>35</sup> This would ensure that adequate seniority is brought to the decision-making process.
- The ATO Panel that consider fraud and evasion cases be chaired by an Officer at the Deputy Commissioner level or higher (the same as ATO Tax Avoidance Panel).
- The Panel should include external members (the same way that the ATO's Tax Avoidance Panel does). This would bring independent scrutiny and analysis to the process and should result in filtering out cases that are not reasonably arguable to have been fraud or evasion. It would also bring greater confidence that the process has some independent representation and is therefore fairer to taxpayers.
- Taxpayers that are having Fraud or Evasion findings about them being considered by the ATO are advised of that, are invited to make a submission, are provided with a copy of the ATO's submission and are invited to attend the Panel meeting where their case is being considered (the same as ATO Tax Avoidance Panels). This is a fundamental issue of fairness to the taxpayer. It is untenable that the current process can continue without at least a written submission from the taxpayer.
- The ATO's Practice Statement on Dispute Resolution be revised to specifically allow for Fraud and Evasion cases to be considered under a Dispute Resolution process PRIOR to the issue of amended assessments. There is no valid reason to leave disputes about fraud and evasion findings to the objection stage or AAT and Federal Court appeals after assessments have been issued/amended.

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<sup>34</sup> I am not suggesting that the AAT or Federal Court is wrong to adopt this approach. They follow the law spelt out in legislation and in precedential case law.

<sup>35</sup> According to the 2019-20 Annual Report of the ATO, there were 223 Senior Executive Officers on 30 June 2020.

### For Parliament:

Amend the tax law<sup>36</sup> to reduce the applicable amendment period in Fraud and Evasion cases **to 10 years** (rather than the current unlimited time for amendment). This would still allow ample period of time for the Commissioner to investigate and recover unpaid taxes but would put a time limit on how far back such investigations can go. This amendment would be very straightforward to draft. It is not a technical issue, just one of policy.

### Conclusion

If the above recommendations are not accepted, administration of the tax system where tax evasion is alleged by the ATO will continue to be skewed unreasonably in favour of the Commissioner. It is very likely that taxpayers will continue to be subject to findings of evasion where they have not had the opportunity to argue their case, and as a result be faced with expensive, exhausting, and often soul-destroying defence processes through the AAT and Federal Court. It is also very likely that issues relating to the unfairness of fraud and evasion cases will continue to be raised by tax professionals, including to this Committee.

I would be happy to address the Inquiry Committee in person to discuss the matters raised in this submission.

Regards

Ashley King

Managing Partner

TaxResolve

January 2021

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<sup>36</sup> Section 170 of the *Income Tax Assessment Act 1936*.