

**Follow up Submission/Briefing Note to the
Senate Legal and Constitutional Affairs Committee Inquiry into the
Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017
21 June 2018**

Split the ATO into two Independent Authorities

Overview

When we provided evidence to the Committee on 14 June 2018, we were asked to provide a briefing on our call for the splitting of the ATO into two (2) separate authorities, namely:

- One authority to collect tax and undertake audits.
- A separate authority to manage taxpayers' objections, appeals and prosecutions.

Our experience with small business people is that the ATO abuses its powers. A primary reason is that the ATO is effectively police, prosecutor, judge, jury and financial jailer which is only answerable to itself.

Instead, the principles of good policing should apply to the ATO. That is, a collection and audit agency should be answerable to an independent prosecution authority just as police are answerable to the Department of Prosecutions. Such structural separation, as with policing, will lead to better tax administration, better targeted prosecution and increased perceptions and application of justice. The outcome sought is greater integrity in the tax administration system.

Background Information

- The essential structure of the ATO has not changed since its creation in 1936.
- In 2016-17, the ATO raised 253,000 audit debt notices, 24,490 objections were lodged, 456 cases were lodged with AAT/Federal Court. <https://www.ato.gov.au/About-ATO/Annual-report-2016-17/Part-2-Performance-report/2-1-Fostering-willing-participation/Resolving-disputes/>
- A debt raised by the ATO is immediately payable at law and enforceable.
- Best information is that the ATO issues 15,000 small business garnishees a year and bankrupts 37 small business people a week.

Reform Specifics

- A new, independent agency, perhaps called *Commonwealth Director of Tax Disputation*.
- Purpose to manage objections and appeals to ATO audits, including AAT or court actions.
- Funded from existing ATO budget.
- Build the new agency using best-known practices of elite Commonwealth agencies such as ACCC and CDPP under the control (most likely) of the Attorney-General's department.
- New legislation required to amend the *Taxation Administration Act 1953 (Cth)* ("TAA")
- Structure the new agency and restructure the ATO along the lines of the ACCC, for example, with separate 'boards' to whom the CEO is responsible. Existing, all-powerful ATO Commissioner model abolished.

Additional background

- SEA policy: SEA released an ATO Reform policy on 18 April 2018. Available here: <http://www.selfemployedaustralia.com.au/Downloads/Taxation/ATO-Reform-April-2018.pdf>
- Joe Hockey: As Shadow Treasurer he proposed splitting the ATO into two. National Press Club 22 May 2013: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2467809%22>
“...the Coalition stands ready to break up the tax office, so that its policeman functions are separate to its responsibility for administering the tax system.”
- University of New South Wales Law Journal: Article by John Bevacqua in 2015 evaluating a proposed splitting of the ATO: <http://www.austlii.edu.au/au/journals/UNSWLJ/2015/35.html>
“The analysis reveals that, prima facie, these mooted structural reforms are likely to generate long-term benefits in terms of greater ATO accountability and taxpayer fairness.”
- Inspector-General of Taxation: Report into the Management of Tax Disputes. January 2015. Recommended splitting functions, although internally in the ATO: <http://igt.gov.au/publications/reports-of-reviews/ato-management-of-tax-disputes-with-hwi/>
“...a lack of separation between the ATO’s original decision makers and its officers who review such decisions ...has given rise to a lack, or perceived lack, of independence”



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Small Business Tax Tribunal Proposal

Background

When we provided evidence to the Committee on 14 June 2018, the Committee asked for a follow-up, briefing on our call for the establishment of a low-cost, non-adversarial and non-legalistic Small Business Tax Tribunal.

We maintain that the existing Administrative Appeals Tribunal (AAT) processes are heavily adversarial, legalistic and so expensive that most small business people who are in dispute with the ATO cannot afford access to justice through the AAT.

Our proposal is modelled on the existing Migration Review Tribunal processes.

Principles of a Small Business Tax Tribunal

A low-cost, non-adversarial, independent, tax dispute-resolution procedure for small business people.

- 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.
- Hearings would be non-adversarial. Lawyers or accountants could not represent either the ATO or the small businessperson. However, because taxation law is complex, lawyers, accountants or tax agents may accompany the taxpayer as advisors. Advisors could only speak with Tribunal approval.
- The Tribunal would review the taxpayer's issue from the beginning.
- 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.
- In a decision favouring the taxpayer, the ATO could appeal to the Federal Court against the decision only on the basis of an error of law made by the Tribunal.
- If the Tribunal made a decision against the small businessperson, the person would retain the right to appeal to, say, the Federal Court.

The Inspector-General of Taxation is an office that could possibly have its powers extended to include those of a Small Business Tax Tribunal.