

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

31 May – 2 June 2011

Question No: BET 92

Topic: ATO – AFR article of 26 May 2011

Hansard Page: Written

Senator Bushby asked:

1. Has ATO read the article by Hannah Low in the AFR of 26 May 2011, page 7 entitled ‘QC alleges deals for tax evaders’?

The article reports that ‘In an unrelated case this week, lawyers for DPP told the court the ATO had failed to disclose documents of “principal” importance to the case. The information came to light after the DPP interviewed an ATO auditor, but the ATO had not yet handed it over even though the DPP might have a “duty of disclosure” to deliver the new documents lawyers said’.

2. Is this particular report correct?
3. Why hasn’t the ATO handed over the documents?
4. When will ATO provide the materials to DPP?
5. Has ATO provided the AFR with a response to this article?
6. What can ATO do to ensure that the DPP embarks on cases in compliance with its obligations as a model litigator, but also has full knowledge of salient material to ensure that it is sufficiently informed to ensure that its actions bring to the court all available material evidence?
7. Would the ATO agree that the current model litigant rules are too loose and do not impose a serious burden on agencies, with no apparent sanctions for poor behaviour – if so is it time that they were enshrined in statute and become justiciable?

Answer:

1. Yes, the ATO is aware of the Australian Financial Review article written by Hannah Low.
2. The article does not specify which case is being referred to. However, the ATO believes Ms Low is referring to the case involving Dr Graham Kelly, his son Mr David Kelly and his accountant Mr Ray Osborne as that case was before the Downing Centre Local Court on 24 May 2011. This case is ongoing before the courts.

The article incorrectly asserts that lawyers for the Commonwealth Director of Public Prosecutions told the Court that the ATO had failed to disclose documents of “principal” importance to the case. In fact, when the matter was before the Court on 24 May 2011

the Prosecutor indicated to the court, that as a result of a conference with one of the ATO witnesses in the case, there was material with the ATO which potentially involved issues of disclosure by the prosecution. The Prosecutor further indicated that as those issues remained unresolved and were unlikely to be resolved by the next court date (20 June 2011), an adjournment was required.

The potential relevance of material held by the ATO only became apparent after conferences between prosecuting counsel and an ATO witness in preparation for the hearing which was listed on 20 June 2011.

The Commonwealth Director of Public Prosecutions Statement on Prosecution Disclosure imposes an ongoing duty of disclosure on the Commonwealth Director of Public Prosecutions in the conduct of criminal matters. This requires the Commonwealth Director of Public Prosecutions to inform defendants of the existence of disclosable material.

Disclosable material is material that has been gathered in the course of the investigation, but which is not included in the brief of evidence. It is not restricted to admissible evidence. It includes all material which may:

- be relevant to the credibility or reliability of a prosecution witness
- be relevant to the charge against the defendant and which either points away from the defendant having committed the offence, or might reasonably be expected to assist the defendant in advancing a defence. or
- be adverse to the credit or credibility of the defendant.

The ATO consistently works with the Commonwealth Director of Public Prosecutions to comply with the Commonwealth Director of Public Prosecutions Statement on Prosecution Disclosure, as it has done in this case.

On 5 July 2011, at a mention hearing in the Downing Centre Local Court the Crown Prosecutor indicated to the Court that the Commonwealth Director of Public Prosecutions has determined to discontinue the prosecution of Dr Graham Kelly due to his ill health. The Prosecutor stated that the decision was not made on the basis of the strength of the Crown case against Dr Kelly. Accordingly the charges were withdrawn and dismissed. The committals against the other two co-accused, Mr David Kelly and Mr Ray Osborne, were confirmed for the 12 December 2011.

3. Refer to the answer to Question 2.
4. Refer to the answer to Question 2. In addition, it should be noted that the ATO is working with the Commonwealth Director of Public Prosecutions to identify all disclosable material with a view to disclosing this to the defence well before the next listed court date of 12 December 2011.
5. The ATO's Media Unit was not approached by Hannah Low of the Australian Financial Review in relation to this story. As a matter of protocol, the ATO does not comment on matters before the court.

6. The ATO works cooperatively with the Commonwealth Director of Public Prosecutions in respect to matters referred to the Commonwealth Director of Public Prosecutions for prosecution involving tax charges. The ATO refers matters for possible prosecution to the Commonwealth Director of Public Prosecutions in accordance with the prosecution policy of the Commonwealth, the ATO Prosecution Policy and a memorandum of understanding between the two agencies (available at www.ato.gov.au).

As stated in the memorandum of understanding, an assessment of what material is relevant and how best it should be handled will involve consideration and input from both agencies. The ATO provides the Commonwealth Director of Public Prosecutions with evidence that supports a prosecution case and any additional information or materials available which is 'disclosable material' as required by law and described in the Commonwealth Director of Public Prosecutions Statement on Prosecution Disclosure (see answer to Question 2).

7. The Attorney-General is responsible for the administration of the Legal Service Directions 2005, which contain the model litigant obligations.

The ATO's approach to act as a model litigant is set out in ATO Practice Statement Law Administration 2009/9 (PS LA 2009/9) which provides direction to ATO officers regarding the conduct of litigation.

As part of the management of litigation cases, senior ATO officers review the cases' outcomes and, where relevant, take this into account in determining future ATO procedures and practices.

The ATO's performance as a model litigant is covered each year in the Commissioner of Taxation's Annual Report.