Australian Government
Australian Taxation Office

Australian Taxation Office Submission

Response to public submission - Inquiry into Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

June 2018

Contents

Introduction

1. We refer to your letter of 7 June 2018 attaching a submission received from Self-Employed Australia (SEA) in relation to the Committee's Inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 (JACMLO Bill). You have invited a reply to adverse comments made about the Australian Taxation Office (ATO) and its officers in the submission, in accordance with Senate resolutions in relation to parliamentary privilege.

2. We note that the Committee is inquiring into JACMLO Bill, which would enact legally enforceable obligations in respect of the Commonwealth Model Litigant Obligations (MLOs). The MLOs are an Appendix to the Legal Services Directions, which govern how the Commonwealth and its agencies should conduct litigation.

3. The ATO rejects the adverse comments and allegations made in the submission. They have no basis.

ATO response to SEA submission regarding the Shord and Douglass litigation

4. The ATO responses to comments in the SEA submission regarding the Shord and Douglass litigation are as follows.

SEA comment 1, page 5:

5. The SEA submission sets out the following quotation:

Justice Logan:

In an October 2017 ruling, all three judges of the Federal Court declared in the Shord case (Shord v Commissioner of Taxation [2017] FCAFC 167) that the "…denial of procedural fairness to Mr Shord … is patent."

Justice Logan, in observing that the ATO had ample capacity and opportunity to prevent the denial of procedural fairness said:

"…Departures from model litigant behaviour can, in particular circumstances, constitute professional misconduct, a contempt of court or an attempt, contrary to s 43 of the Crimes Act 1914 (Cth), to pervert the course of justice." This is a strong observation by the Justice who excused the ATO's behaviour saying that the "…lack of a ready concession (by the ATO) of the jurisdictional error was just the result of a lack of understanding (by the ATO)…"

ATO Response:

6. In the same case, White and Siopis JJ "**expressly disassociated**" themselves from Logan J's comments, stating:

   "In our view, **no criticism can be made of the conduct of counsel for the Commissioner or the solicitors who acted for the Commissioner**. To the contrary, in our view, **counsel for the Commissioner acted with propriety in both advancing the interests of her client as a model litigant, and in discharging her duty to the Court**. The same is the case in respect of the solicitors who acted for the Commissioner. We **expressly disassociate ourselves from the observations of Logan J which may be construed as asserting a contrary position**." [Emphasis added].

7. Further, in the costs proceedings (judgement delivered on 22 February 2018 in WAD 332 of 2016) Siopis and White JJ again at [23] disassociated themselves with the comments of Logan J in the principal judgment:

   "Further, we would observe that our principle judgement at [100], **we disassociated ourselves from the criticisms which Logan J made of the Commissioner's conduct and that of his legal representative. We continue to disassociate ourselves from Logan J's criticisms of the Commissioner's conduct and that of his legal representatives** which he has repeated in his reasons for judgement in this costs judgement." [Emphasis added].

8. In the costs proceedings, Siopis Longan and White JJ made orders that each party pay their own costs.

SEA comment 2, page 6:

9. *(Example 1) In the Rod Douglass case, Rod declared all his income yet the ATO said that Rod committed fraud or evasion on basis that he had (a) not sought professional advice when completing his tax return (b) could not cite a legal judgment referred to in a 2006 ATO Practice Statement where the legal judgment reference had some years later been removed from the ATO Practice Statement.*

10. *(Example 2) In a report on the Rod Douglass case, the Inspector-General of Taxation said "We also note that neither the PSLA or Guidelines (relating to fraud opinions) imposes an obligation on the part of the ATO to provide an opportunity for taxpayers to comment." Rod was not offered the opportunity to comment.*

ATO Response:

11. A review by the Inspector-General of Taxation (IGT) in 2016 found no substantive failings in the way in which this audit was conducted.

12. The IGT made some recommendations for process improvements for engaging with taxpayers who are in dispute with the ATO and for taxpayers who may be subject to a finding of evasion. These process improvements have since been implemented by the ATO's Fraud or Evasion Working Group.

13. The Fraud or Evasion Working Group was formed in late 2016 and reviewed 408 cases from the previous 3 income years that included a fraud or evasion opinion (being all such opinions), out of a total of 13.8 million audits or reviews. The 408 cases represent less than 0.003% of all cases subject to audit or review. The review did not identify any systemic issues in the ATO's making of fraud or evasion findings in those cases.

14. In addition the ATO has made the following improvements to the processes in relation to findings of fraud or evasion:

- established a National Fraud or Evasion Advisory Panel to which all cases considering fraud or evasion will be referred for guidance
- updated Practice Statement PSLA 2008/6 (Fraud or Evasion)
- updated our internal guidance material - this was done in consultation with the Tax Institute and the Law Council of Australia.

SEA comment 3, page 7:

15. *(Example) In the* Rod *Douglass case, the process began in July 2015 with an ATO determination that Rod had committed fraud or evasion. It finished in the Federal Court in November 2016 after some 16 months with the ATO admitting it had made a mistake and the Court ordering that:*

16. *"The respondent (Commissioner of Taxation) undertakes to issue a letter …that, on the facts* presently *known to the respondent, the opinion as to fraud or evasion was incorrectly formed and, on that basis, is withdrawn. Federal Court of Australia No: NSD1700/2016.*

ATO Response:

17. The ATO withdrew its position that Mr Douglass had committed evasion by not including the full amount of income derived in his personal income tax return. This decision was taken after considering advice from Counsel as to the strength of that opinion. Subsequently, the Court was advised that the evasion opinion was incorrectly formed and would be withdrawn.

18. The information provided by the taxpayer and meetings with the taxpayer's representative did not provide the impetus for that decision.

19. While the proceedings brought by Mr Douglass in the Federal Court were misconceived (proceedings should have been brought under Part IVC and not under s39B of the Judiciary Act), rather than continuing with these proceedings, we considered that the better course was simply to withdraw the evasion opinion and amend the assessments.

SEA Comment 4, page 8:

20. *(Example) In the Rod Douglass case, the assessment of the 'results test' under the Personal Service Income tax law requires evidence of 'custom and practice'. The ATO's decision on the results test ignored custom and practice. In the AAT proceedings, the ATO refused to give evidence about custom and practice and under FOI requests responded that 'no such documents exist'.*

ATO Response:

21. The Commissioner did not refuse to give evidence.

22. During the Administrative Appeals Tribunal (AAT) proceedings Mr Douglass had sought to compel the Commissioner to provide to the Tribunal any documents held by him concerning the following matters:

    *(a) whether there was a relevant custom or practice in the matters identified in the three paragraphs in s 87.18(4) of the Income Tax Assessment Act 1997 (Cth) (the **ITA Act**); and*

    (b) if there was such a custom or practice, what it was.

23. The application was refused by the AAT on 12 May 2017. The AAT's reasons for rejecting the application under s 37(2) may be summarised as follows:

    - Although s 37(2) provides a safeguard against a decision maker who does not lodge all relevant documents as required by s 37(1), the applicant had failed to identify particular documents or a particular class of documents which may be relevant to the AAT's review of the objection decision.
    - The statutory provision required the Tribunal to be satisfied on the basis of the matters advanced by the applicant that there are particular documents or documents in a particular class of documents that may be relevant. Section 37(2) was not a general discovery provision nor did it provide a basis for a fishing expedition, citing *Kennedy v Administrative Appeals Tribunal* [2008] FCAFC 124; 168 FCR 566 (***Kennedy***).

- The AAT accepted that it was sufficient that the documents "may be relevant" in the sense that they may shed light on the issues that will be reviewed in the substantive proceedings, but s 37(2) operates by reference to particular documents or to a particular class of documents.

ATO general comments on conduct as a model litigant

24. Conducting ourselves as a 'model litigant' is both a mandatory requirement for Commonwealth agencies and a natural extension of the ATO's dispute resolution approaches.

25. Being a model litigant requires the ATO to act with complete propriety, fairness, and in accordance with the highest professional standards in handling claims and litigation brought by or against it.

26. Incidences of alleged model litigant breaches by the ATO is very small, and the number of confirmed findings against the ATO even smaller. In 2016-17 the Commissioner of Taxation was a party to over 5,000 legal proceedings including 456 tax or administrative law appeals. Fourteen breaches of the model litigant obligation were investigated and finalised, with two confirmed findings of model litigant breaches by the ATO. In both cases these were procedural issues and were not systemic in nature.

ATO comments on Alternative Dispute Resolution (ADR)

27. The ATO is committed to avoiding litigation. To this end we offer a number of alternative dispute resolution services tailored to the small business market and the nature and complexity of their disputes, including our:

- free In-House Facilitation service where a trained ATO facilitator, who has no prior knowledge or involvement in the case, facilitates discussions between the ATO and taxpayer to help both parties find a solution
- free Dispute Assist service where an independent disputes guide provides support and assistance through the dispute process.

28. These services are designed to guide small business owners through the disputes process, in particular those affected by significant personal circumstances in their lives.

29. From 1 July 2018 the ATO will commence a pilot of its Independent Review process for small business. The pilot, based on the processes and procedures in place for taxpayers in the large market, will run for 12 months, commencing from 1 July 2018. The pilot will assess the feasibility of extending Independent Review to small business taxpayers (those with income or turnover of less than $10 million) who have had income tax audits undertaken by the ATO's Small Business line.

Conclusion

30. The ATO takes compliance with the MLO's very seriously, always endeavours to uphold them, and thoroughly investigates alleged breaches, and makes reports the Office of Legal Services Directions as required.

31. We would like to reiterate that no review, scrutineer or credible source has ever found a pattern of abuse towards small business owners by the ATO.

32. The ATO is committed to supporting small businesses to meet their obligations; and working with them upfront and early, to get things right from the beginning, and to avoid the need for litigation of disputes.