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ATO

'A mongrel bunch of bastards': The small businesses being crushed by the tax office

Mark Freeman's bright business idea earned him a government grant. But the tax office disagreed and hit him with a huge bill. Seven years and \$750,000 later, he is still fighting for justice.

By Adele Ferguson, Nassim Khadem & Lesley Robinson

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“In dealing with the ATO, I’ve never come across such a mongrel bunch of bastards in my entire life.”

Mark Freeman’s troubles with the Australian Taxation Office began in mid-2011 with an audit of Blackwater Treatment Systems, a company he set up to develop technology that would turn waste into reusable water.

The company had won research and development grants from the government’s innovation arm, it was working in collaboration with the University of NSW and had third-party support from Standards Australia.

But the ATO decided the company wasn’t eligible for the grants and tax offsets and hit Freeman with a \$250,000 tax bill.

“It was like a horror story,” he tells a joint *Age/Sydney Morning Herald/Four Corners* investigation into the ATO.

“I was stunned. We hadn’t generated that type of income to even be owing that type of audit debt,” he says. “But on closer review of the assessment, it was obvious that the [tax] auditor had left out critical paperwork.”

It is a fight that has cost the 62-year-old personally and financially.

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He alleges he has been subjected to “defective administration, predetermined outcomes, fabricated debts, denial of procedural fairness and targeted malice”. He says he has been bullied, misled and had his reputation and credit rating trashed.

When he took on the ATO he had no idea that it would consume his life for the past seven years. His office, in a house he rents in Ulladulla on the NSW south coast, is jam-packed with files and boxes of meticulous paperwork that he has amassed to help clear his name, a fight he estimates has cost him \$750,000.



Mark Freeman says he has spent \$750,000 fighting the ATO. *Photo: Wayne Taylor*

A target on your back

The fight has also taken a toll on Freeman's personal life.

“Having to deal with an agency the size of the ATO, with the resources that they have, goes past the stage of explaining how difficult it’s been on us. It’s been difficult on my wife. It’s been difficult on the family. And for something that we didn’t do anything wrong, not a thing wrong.”

Freeman set up Blackwater in 2006 with a small inheritance and his savings. It came from his passion to save the ocean. “Coming from a surfing background, I had a natural objection to ocean outfalls,” he says. “After looking at the facts of the ocean outfall, I realised our best opposition was to develop an alternative reuse for the wastewater.”

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And he did.

The aim for the treatment system – which looks like a portable box – is to have it installed in every Australian home to recycle waste into reusable water. A prototype is set up at Ulladulla Sewage Treatment Plant, but Freeman’s battle with the tax office has set it back a few years due to lack of funding. “This is the first on-site system designed for reuse for the domestic market. The prototype in itself is hopefully setting new guidelines for reuse, national guidelines. We’ve taken a centralised sewage treatment plant and miniaturised it into this prototype.”

Freeman is one of a number of legitimate companies eligible for research and development grants that the tax office has crushed.



Graeme Halperin tells clients to avoid grants. *Photo: Eddie Jim*

Barrister Graeme Halperin, who has been practising tax law for 30 years, says he tells his clients not to apply for research and development grants. “It’s effectively putting a target on your back,” he says. “I would basically tell clients not to bother engaging in R&D in this country, notwithstanding the government talks up its commitment to R&D in this country.”

He believes the ATO is getting worse. “They are much tougher on their position on penalties,” he says. “Where originally you might have ended up with a 5 or 10 per cent penalty, and then it rose to 25 per cent for lack of reasonable care, typically these days I will see penalties of 50 per cent, 75 per cent, 90 per cent, where effectively the primary tax bill has been doubled.”



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The ATO’s deputy commissioner of small business, Deborah Jenkins, rejects negative comment and says the tax office doesn’t have an image problem. “I don’t think the ATO has an image problem ... People talk to me very, very positively about the work that they’re doing with the ATO. I work very closely with a number of small businesses in the community, industry associations, and they are very positive about the changes they’ve seen within the ATO. I think they all accept that we are going to make mistakes, but the mark of us is going to be how we deal with those mistakes and how we learn from those mistakes.”

The joint *Age/Sydney Morning Herald/Four Corners* investigation has uncovered a litany of questionable business practices at the ATO including abuse of power, bullying, intimidation and mistakes. It spoke to many small businesses and individuals, but most didn’t want to speak publicly for fear of

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retribution. Some roll over, even if they are in the right.

The investigation found that the tax office doesn't always play fair and is breaching the community's trust.

ATO

'How could they do this?': the tax office call that sent Kathryn broke

Freeman is living proof. He says his treatment by the ATO was a breach of trust.



ATO Commissioner Chris Jordan. *Photo: Wayne Taylor*

The era of trust

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Since Chris Jordan joined the ATO as Commissioner in 2013, the organisation has been on a transformation drive but, with a staff of 20,000, the message is struggling to get through.

In a recent speech to a national conference of tax agents in Cairns, Jordan set out his mission to build trust and confidence in the ATO. "I do understand the need for balance

mission to build trust and confidence in the ATO. I do understand the need for balance, pragmatism, respect and empathy for taxpayers and their representatives at the same time as being able to hold the nation's interest uppermost in this position as Commissioner of Taxation," he said.

But trust is being broken and as Allan Fels, the former head of competition watchdog the Australian Competition and Consumer Commission, warns, "This is an era when institutions must be trusted".

The ATO is reeling over trust issues after its star deputy commissioner, Michael Cranston, dragged the office into a scandal last year when he was charged with abuse of office after a police investigation into an alleged \$144 million scam led by Cranston's son, Adam Cranston.

Michael Cranston, who resigned after the scandal broke, is accused of inappropriately accessing confidential ATO information on his son's behalf.

The matter triggered an investigation by the Inspector-General of Taxation, a key oversight body of the ATO, into whether internal ATO practices and procedures can properly identify internal fraud. A report and recommendations will be released in June.

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'I'm angry at them'

It took years before the ATO conceded its mistakes in slugging Mark Freeman with a crushing tax bill.

In a media interview last year, Jordan described the Cranston affair as an “isolated incident”. He conceded it had led to questions about the tax office’s integrity.

“As the leader of the ATO with great momentum in its transformation; as the commissioner building trust and confidence in the ATO with the community and stakeholders; as a reformist trying to bring perspective and sensible risk management to bureaucracy; and as a colleague who had great respect and fondness for Michael Cranston, it was one of the most difficult things I’ve dealt with in my career,” he said.



ATO deputy commissioner of small business Deborah Jenkins. *Photo: Wolter Peeters*

Despite this, Jordan and Jenkins don't believe the ATO needs more oversight, something Fels and many others dispute. "There's no better way to achieve trust than having proper mechanisms and oversight," Fels says. "The ATO has virtually untrammelled power that must be balanced by a strong, well-resourced independent mechanism or there will be abuse."

Small Business Ombudsman Kate Carnell believes the powers of the Inspector-General of Taxation should be looked at.

"Not much point in having an independent entity if it doesn't have the powers or the capacity or the size to actually deal with the issues that we're talking about," she says.

"Not really having capacity to deliver on some of these recommendations can be a real problem. If you're going to have an independent entity, it's got to have teeth, and it's got to have size."



Small Business Ombudsman Kate Carnell says garnishees are a 'step too far'. *Photo: Louis Douvis*

Taking on the tax office

Mark Freeman took on the ATO but most don't. He was accused of ripping off the ATO and slapped with a tax bill and penalties. He objected, but that didn't stop the ATO issuing him with a garnishee notice in May 2014 to the tune of \$165,000. A garnishee is a notice issued by the tax office to a taxpayer's bank demanding it hand over a certain percentage of money in the bank account.

The ATO wrote to his bank saying, "Blackwater Treatment Systems owes money to us and may hold an account with you. A notice is enclosed that requires you to deduct amounts from any accounts held and send this money to us."

It hit Freeman between the eyes. “Straight away there goes our rating with the bank,” he says. “Obviously, it’s quite a financial blow to the company and a massive blow to the company’s credibility. Any business that receives a garnishee order is always going to be thought to be a bad payer.”

Someone rang him from the tax office and threatened to destroy his company if he didn’t pay the debt. “All I could say was basically, ‘Do your very best.’”

Each week 37 companies are either wound up or issued a bankruptcy notice by the ATO.

ATO deputy commissioner of small business Deborah Jenkins says it is a “very, very small number”.

She says that if someone has a problem, they should call the ATO.

She says each year the ATO issues about 24,000 garnishee notices, 14,000 of which relate to small businesses.

Carnell describes garnishees as “a step too far” as they can destroy a business. “When the ATO takes action it can do a range of things: it can issue statutory notices, it can put in a director’s penalty notice, it can run with garnishees, it can wind a business up. All of them are pretty ordinary, but garnishees, they seem to be a step too far, for me.”

She says the issue is for the ATO to get the balance right between getting the debt that is owed back and the impact of its actions. “They changed a lot, they’re doing a lot of good stuff, but getting compliance, and their small business, and their consumer engagement area better balanced is something that’s going to take a lot more work.”

Garnishee n. Third party legally notified to surrender money to a debtor; v. to attach a debt by garnishment

Lowball compensation

Each year the tax office receives 25,000 complaints from taxpayers. The independent oversight agency, the Inspector-General of Taxation gets more than 2200 complaints a year. Most relate to debt collection.

In its latest annual report, the ATO reveals that more than 24,000 taxpayers challenged the tax office on debts they were alleged to owe but disputed. But most roll over before it gets to lodging an objection.

Kate Carnell's office also keeps busy with complaints. She says of all the complaints her office receives, the one considered most difficult to deal with and that involves the most red tape is the ATO.

But she says that since Tax Commissioner Chris Jordan took the top job there has been a "stronger" focus on small businesses and trying to make life easier for them.

The great problem is how disputes are handled when the ATO makes a mistake. There have been calls for change. Carnell describes the process as slow and opaque, and the compensation as too low.

According to its financial report for 2016-2017, the ATO paid just over \$800,000 in compensation, equivalent to a median payout of \$500 per person.

“I think if the ATO makes a mistake, they’ve got to compensate properly and in a timely fashion. No point two years down the track for a small business that has now gone broke,” she says.

She also believes the compensation area needs a clean set of eyes looking at it. “For the ATO to determine what compensation they should get seems a bit ... maybe not totally a level playing field.”

Jenkins says there are two ways of dealing with compensation, the compensation scheme or the court system for larger taxpayers. “There's those two options available to people. We've worked with people as they go through that compensation scheme.”

Freeman can relate to lowball compensation offers.

On November 23, 2015, the ATO admitted it made errors and wiped the debt it said he owed. He received a letter from the Minister for Small Business Kelly O'Dwyer's office saying, “The Commissioner of Taxation has advised that errors identified during the audit process have been dealt with following your objection application.” It says, “The Commissioner apologises for any stress or inconvenience these errors have caused.”

In October 2016, the ATO offered Freeman \$1500 in compensation. He appealed and six months later it was bumped up to \$11,500, still well below his costs.

Freeman has asked for a third review. If that fails, he will consider legal action – if he can afford it.

“In the beginning, people would say, ‘Pay them. You’ll never win.’ But we did win. We beat them on the debt, and they offered us compensation. We were in the right and we were entitled to compensation. We need a collection agency to pay for services. We certainly don’t need an agency that’s wasting time on people who’ve done nothing wrong and just want to have a go.”