



Australian Government
Inspector-General of Taxation

The Role of Inspector-General of Taxation in Australia

A presentation to the International
Conference on Taxpayer Rights

WASHINGTON DC, USA
NOVEMBER 2015

CONTENTS

1.	INTRODUCTION	1
2.	HISTORY	2
3.	OVERVIEW OF THE EXPANDED ROLE AND FUNCTIONS OF THE IGT.....	2
3.1	Complaint handling	3
3.2	Systemic reviews	5
4.	PREVIOUS IGT SYSTEMIC REVIEWS.....	6
4.1	The Management of Tax Disputes	6
4.2	Debt Collection	7
4.3	ATO services and support for tax practitioners.....	8
4.4	ATO management of transfer pricing matters.....	9
4.5	ATO administration of penalties	10
5.	UPCOMING IGT REVIEWS	11
	APPENDIX – TERMS OF REFERENCE FOR UPCOMING IGT REVIEWS	12

1. INTRODUCTION

Revenue authorities are, by necessity, in the very unique position of being monopoly service providers to the community. Moreover, taxpayers do not benefit directly from the taxes that these authorities collect from them. The benefit is indirect and takes the form of provision of infrastructure and services such as healthcare and education.

There is also a perception of an information imbalance in that revenue authorities have or are able to collect a great deal about taxpayers who often feel there is a lack of transparency in the way the collected information is processed and used in compliance activities.

It is clear that there is a fundamental asymmetry in the relationship between revenue authorities and the taxpayer community that if left unchecked, can lead to public dissatisfaction, erosion of confidence in the tax system, decreasing levels of voluntary compliance and ultimately loss of revenue.

Given the unique position of revenue authorities, the above asymmetry can only be addressed through effective governance and scrutineering functions. Effective scrutineering functions have to be appropriately structured and resourced otherwise they cannot fulfil public expectations of holding to account large and well-resourced revenue authorities.

The ultimate 'owner' of the tax system is the community and parliament may be viewed as its board of directors. Parliament, often through its committees, seeks to hold the revenue authority accountable for the administration of the tax system. This is very valuable, however, it has limitations in terms of the capacity to deeply analyse and question the revenue authority.

Reviews of tax administration require the examination of significant amounts of information, including case files, correspondence and internal communications as well as meeting with relevant officers of the revenue authority. The parliamentary review processes are not designed for that level of scrutiny and are often reliant upon information provided by the revenue authority which may not always present the whole story or be perceived to suffer from a degree of inherent bias.

Taxpayers are also frequently reluctant or unwilling to raise their concerns with aspects of tax administration directly with the revenue authority or parliamentary committees. There appears to be a fear of retribution against taxpayers who publicly criticise the conduct or approaches of the revenue authorities.

Therefore, to effectively scrutinise the administration of the tax system by revenue authorities, the work of parliamentary committees needs to be augmented by other activities. These activities may be conducted by a taxpayer advocate group within the revenue authority (such as the National Taxpayer Advocate in the USA), as part of a broader scrutineering function of other government agencies (for example, ombudsman or national audit office type agencies), by a dedicated and specialised tax scrutineer agency (such as the Inspector-General of Taxation (IGT) in Australia), or by any combination of such agencies. This presentation explores the evolution and current structure of the tax scrutineering function in Australia.

2. HISTORY

Pursuant to the *Inspector-General of Taxation Act 2003* (IGT Act), the IGT was established as an independent statutory officeholder to review systemic tax administration matters and make recommendations for improvement. These recommendations must be publicly reported and may be made to Government in relation to policy matters or to the Australian Taxation Office (ATO) on administrative issues.

Until recently, the investigation of single taxpayer complaints was the responsibility of the Commonwealth Ombudsman who handles complaints about federal government agencies more generally.

In the 2014 Federal Budget, the Government announced its decision to transfer the tax complaint handling function from the Commonwealth Ombudsman to the IGT.¹ The Budget announcement further expanded the IGT's scrutineering function to include the Tax Practitioners Board (TPB),² an independent statutory agency responsible for the registration and regulation of tax practitioners³ in accordance with the *Tax Agent Services Act 2009*.

The above Government decision took effect from 1 May 2015 and was aimed at enhancing "the systematic review role of the Inspector-General of Taxation and provide taxpayers with more specialised and focused complaint handling for tax matters."⁴ The Government decision was well received by stakeholders and welcomed by the IGT. The IGT had publicly advocated the creation of a single port-of-call for concerns with tax administration matters for some time to improve outcomes for taxpayers and the system more generally.

It should be noted that the Australian National Audit Office remains responsible for financial statement and performance audits of the ATO.

3. OVERVIEW OF THE EXPANDED ROLE AND FUNCTIONS OF THE IGT

Notwithstanding the significant expansion of the IGT's role over the past year, the overall aim of the IGT remains to "improve the administration of taxation laws for the benefit of all taxpayers, tax practitioners and other entities."⁵

The effectiveness of the IGT as a scrutineer stems from the actual and perceived independence of the office. The office of IGT is an independent Government agency which is wholly separate from both the ATO and the TPB. This is bolstered by its extensive and comprehensive systemic review reports which are well-respected and have been influential in shaping the Australian tax administration landscape.

¹ Australian Government, *Budget Measures Budget Paper No 2 2014-15* (May 2014) p 217.

² Ibid.

³ Tax practitioners is a collective term to describe tax agents, business activity statement (BAS) agents and tax financial advisers.

⁴ Above n 1.

⁵ *Inspector-General of Taxation Act 2003*, s 3.

The structural separation of the IGT, its proven track record as well as its specialised focus and expertise has led to a high degree of trust and confidence from private sector stakeholders. There is, therefore, a greater willingness for them to candidly raise issues of concern and assist the IGT in improving tax administration.

The IGT recognises that the present structure of the Australian tax scrutineering function differs from that in some other countries, such as the United States (US), where the National Taxpayer Advocate is within the Internal Revenue Service and provides reports to Congress. The differences in this structure reflect the respective socio-political environment of the two countries. For example, members of the US Executive Branch are not part of the Legislature whereas in Australia, the Executive are members of the House of Representatives or the Senate in the Westminster tradition.

The role of the IGT has been likened to a 'safety valve' which provides transparency, accountability, confidence and integrity. In this respect, its role fosters trust and voluntary compliance by allowing issues to be ventilated and discussed by relevant decision makers so that concerns or issues may be appropriately addressed.

Effective scrutineering functions have to be appropriately resourced to hold to account large and well-resourced revenue authorities. It is instructive to note that concerns regarding the funding of relevant scrutineering functions as they relate to the ATO were previously considered by the Treasury in its *Australia Future Tax System Review*.⁶

To ensure that both streams, i.e. single complaints and systemic issues, are effectively resourced, the IGT was allocated additional funding, as part of the 2014-15 Budget Measures, to recruit additional specialist staff and implement a new Information and Communication Technology platform.

Further discussion on the two main streams of the IGT's function is set out below.

3.1 COMPLAINT HANDLING

The transfer of the complaint handling function into the office of the IGT this year has enhanced the overall tax scrutineering capability and has facilitated a more co-ordinated approach, minimising duplication and overall costs. The benefits of the complaint handling and systemic review functions being consolidated within the IGT may be summarised as follows:

- a single port-of-call for considering taxpayers' administration issues and simplifying and improving access;
- a more holistic understanding of taxpayer issues arising in relation to their dealings with the tax system;
- prompt systemic issues identification that emerges from handling a significant number of similar complaints;
- reduction of overlap between the current scrutineer agencies;

⁶ Treasury, *Australia's Future Tax System* (December 2009) p 663.

- stronger trust with internal and external stakeholders through effective and reciprocated consultation;
- better understanding of the subject matter and the tax environment;
- a specialist technical skills base, attracting specialist staff more effectively from a career perspective;
- minimised scrutineer resource allocation concerns as only the ATO is being scrutinised and not a broad range of government entities;
- economies of scale and scope in centralising the separate scrutineer functions; and
- greater synergistic benefits for the ATO in only having a single tax administration scrutineer agency.

As stated earlier, the IGT complaint handling function commenced on 1 May of this year. In the first six months of operations ending on 31 October 2015, we have received approximately 1,200 complaints of which 1,076 have been processed and finalised with the remainder in progress. Of the finalised cases, the vast majority were closed within 14 days with the remainder taking longer because of complexity of the issues or lengthy case histories.

Complaints may be received by the IGT through a number of channels. These include a smartform on our website, a dedicated telephone line, by mail, facsimile or through referrals from other government agencies including the ATO or the TPB themselves. On occasions, individuals may also make complaints to parliamentarians whom we have encouraged to direct such complainants to the IGT office.

In dealing with complaints, the IGT, firstly, distils the key issues from the information provided by the complainant. The IGT then engages with the relevant ATO officers to further narrow the issues and engages with both parties to seek resolution. Whilst resolution is not possible in every case, we seek to ensure that every complainant is afforded procedural fairness in the handling of their matter.

Although, the IGT cannot direct the Commissioner of Taxation (Commissioner) to take any particular action in respect of a taxpayer, the engagement of the IGT with complainants and the ATO has been beneficial in identifying key issues and options for resolution. It is early days but the effectiveness of such a strategy is evident in the high numbers of case closures, the short timeframes within which these are achieved and substantial positive feedback already received.

We have been recruiting and training specialist staff to achieve an effective and efficient complaint handling service which enhances the taxpayers' experience. Further fine-tuning of our internal system and processes as well as interactions with the ATO and TPB are being sought.

Once the complaint handling service is operating at optimal levels, we will be closer to realising our goal of gaining real-time insight into emerging issues and moving quickly to address problems before they escalate into major causes of taxpayer discontent. This could mean that in future, we may undertake more targeted reviews in an expedited manner to address particular areas where significant complaints have been received. We will also continue to consult with the community and conduct broader systemic reviews as required.

3.2 SYSTEMIC REVIEWS

As set out above, since its inception, the IGT has been conducting reviews into systemic tax administration issues covering a broad range of topics that are relevant to all taxpayers from the very large businesses to micro businesses and individuals. The IGT has completed 42 reviews to date with another two recently commencing.

Generally, the IGT undertakes a review on his own motion based on stakeholder feedback and complaints received. Moreover, the Minister may request or direct the IGT to undertake a systemic review on particular areas or issues. Requests may also be made by the Commissioner, the TPB, by resolution of either or both Houses of Parliament or by resolution of a Committee of either or both Houses of Parliament.⁷

In conducting systemic reviews, the IGT has been effectively engaging with the community by inviting submission and consulting with taxpayers, tax professionals and their representative bodies. Input from these stakeholders has been continually increasing as they become aware of the confidential nature of their dealing with the IGT as well as the fact that their issues are being heard and actioned through collaborative and robust engagement with the ATO.

The IGT review reports generally start by setting out the current status and stakeholder concerns. There are also comparisons made with the work and practices of revenue authorities in other jurisdictions as well as further independent research drawing on submissions made to the review. This naturally leads to recommendations for improvements which may be made to the ATO or the Government.

Neither the ATO nor the Government are compelled to accept IGT recommendations. However, the IGT review reports are made publicly available and include the ATO's response to each recommendation. It is noteworthy that the vast majority of the IGT's recommendations to the ATO have been accepted and implemented. Even where recommendations are not initially accepted, experience has shown that they may be subsequently taken on board and implemented. The Government has also implemented a number of the IGT's key recommendations.

The IGT maintains an active working relationship with the ATO and the Treasury on tax administration and related policy issues. Protocols are in place to guide interactions between the three agencies.

Furthermore, the IGT has strong powers of access to ATO information and personnel. The IGT may compel parties to provide any document and give evidence necessary for a review. This ensures that matters can be rigorously pursued and resolved.

The IGT may release his own reports. Only reports with policy recommendation for Government are required to be provided to the Minister for consideration. The Minister must ensure such IGT review reports are publicly released within 25 Parliamentary sitting days.⁸

Whilst, in the current year, a high degree of focus and resources have been directed to ensuring a seamless transition of complaint handling, the IGT has continued his work on systemic reviews. Two announced reviews have been completed, a review at the request of the House of

⁷ *Inspector-General of Taxation Act 2003*, s 8.

⁸ *Inspector-General of Taxation Act 2003*, s 18.

Representatives Standing Committee on Tax and Revenue was also completed and, as noted above, two new reviews have been recently launched.

4. PREVIOUS IGT SYSTEMIC REVIEWS

The IGT has undertaken reviews to examine a range of issues including the ATO's compliance approach to large businesses,⁹ small to medium enterprises (SMEs)¹⁰ and individual taxpayers¹¹. We have also examined key areas of tax administration including, improvements to the self-assessment system¹², the ATO's use of risk assessment tools¹³ and the ATO's use of alternative dispute resolution (ADR)¹⁴. The latter review provided a framework for the ATO's cultural shift towards greater taxpayer engagement to resolve disputes earlier and in a less costly manner.

Set out below are brief summaries of more recently completed IGT reviews. The full text of all published IGT reviews is available on the IGT website at www.igt.gov.au. The IGT also maintains a Twitter account (www.twitter.com/insp_gen_tax) through which the IGT announces new and upcoming work and reviews.

4.1 THE MANAGEMENT OF TAX DISPUTES

The *tax disputes review*¹⁵ arose from a request from the House of Representatives Standing Committee on Tax and Revenue (the Committee) to whom an Inquiry into Tax Disputes (the Inquiry) had been referred by the Acting Assistant Treasurer. The IGT was asked to focus on the large business and high wealth individual (HWI) themes of the Inquiry. One of the major issues to be considered by the Inquiry was whether a separate agency or a separate appeals area within the ATO should manage disputes or whether current arrangements should continue.

The tax disputes review drew on previous IGT reviews, submissions to the review and additional research and analysis including comparisons with the revenue authorities of the US, Canada, the United Kingdom, New Zealand and Ireland.

The review found that the underlying cause of many concerns raised in submissions appeared to be a lack of separation between the ATO's original decision makers and those officers who reviewed such decisions at the request of taxpayers. This had given rise to a lack, or perceived lack, of independence, leading taxpayers to believe that their cases were not reconsidered afresh and that they had been denied a fair hearing until reaching the Administrative Appeals Tribunal

⁹ IGT, *Report into the Australian Taxation Office's large business risk review and audit policies, procedures and practices* (2011).

¹⁰ IGT, *Review into the ATO's compliance approaches to small and medium enterprises with annual turnovers between \$100 million and \$250 million and high wealth individuals* (2012).

¹¹ IGT, *Review into the Australian Taxation Office's compliance approach to individual taxpayers – use of data matching* (2014); IGT, *Review into the Australian Taxation Office's compliance approach to individual taxpayers – income tax refund integrity programme* (2014); IGT, *Review into the Australian Taxation Office's compliance approach to individual taxpayers – superannuation excess contributions tax* (2014).

¹² IGT, *Review into improving the self-assessment system* (2013).

¹³ IGT, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools* (2014).

¹⁴ IGT, *Review into the Australian Taxation Office's use of early and alternative dispute resolution* (2012).

¹⁵ IGT, *The Management of Tax Disputes* (2015).

(AAT) or the Federal Court of Australia. Such views were supported by ATO statistics – for example during 2013–14, 85 per cent of taxpayer disputes were resolved without hearing once they reached the AAT.

Following earlier IGT reviews, the ATO had embarked on a programme of work to improve its compliance and dispute resolution approaches, particularly in relation to large businesses and HWIs. However, there was still a need for further improvements that could be sustainable and result in a more efficient, effective and transparent process being available to all taxpayers, particularly individuals and small businesses. Such improvements would also provide taxpayers with more confidence that they would be treated fairly and equitably.

The IGT's recommendation in this review was to create a separate and dedicated Appeals Group, led by a new Second Commissioner, to embed the improvements within the ATO structure and provide a framework that would be less dependent on the views and ideals of the ATO leadership of the day. The new Appeals Group would manage and resolve tax disputes for all taxpayers including the conduct of pre-assessment reviews, objections and litigation, as well as championing the use of ADR throughout the dispute cycle. The separation from both the ATO's compliance and legal advisory functions would also facilitate a fresh and impartial review of the taxpayer's case by empowering officers of the new area to resolve disputes through the most appropriate means, taking into consideration the individual circumstances of the taxpayer, their case and assessment of the ATO's precedential view. Additionally, the new area would ensure that settlements were appropriately scrutinised and in the best interests of the community.

In making the recommendation, the IGT sought to achieve the highest level of independence whilst retaining the dispute management function within the ATO. In this regard, the need for the Appeals Group to be headed by a new Second Commissioner was paramount, as such roles are statutorily appointed and their tenure and remuneration is pre-determined by the Government and the Remuneration Tribunal respectively and not the head of the relevant agency. Such an arrangement accords with comparable overseas jurisdictions and the views of the International Monetary Fund.

It is pleasing to see that the ATO has taken some steps towards implementing the recommendation by transferring all objection and dispute work from its compliance function to its legal advisory function. The creation of the Appeals Group as recommended in this review will require legislative change.

4.2 DEBT COLLECTION

The *Debt Collection*¹⁶ review was prompted by concerns raised by individuals, small businesses, tax and insolvency practitioners as well as their representative bodies. Broadly, these concerns related to the ATO's ability to recover tax debts effectively whilst ensuring that its actions were proportionate to circumstances of the affected taxpayers. The continual growth in collectable tax debt over the last decade to more than \$20 billion in 2013-14 and its potential impact on government services were also important considerations in undertaking this review.

During the review, the ATO acknowledged that its previous approach to debt collection could be improved as it involved a linear process for debt recovery which generally relied upon a series of escalated actions. Prior to the commencement of this review, the ATO had begun developing a programme of work to explore alternatives and improve its recovery action.

¹⁶ IGT, *Debt Collection* (2015).

Given that the ATO's new programme of work would take some time to be fully implemented and bear fruit, the IGT made a number of recommendations as interim measures. One of these measures proposed a focus on the main debt holdings which are owed by individuals and micro businesses. These two taxpayer segments account for approximately 60 per cent (\$12.3 billion) of total collectable tax debt. Related recommendations were also made to identify underlying causes of cash flow and payment difficulties for these taxpayers and to develop preventative strategies. Another interim measure proposed that the ATO take more frequent and proportionate debt recovery action to minimise the necessity to take firmer action at a later time.

The ATO's new overarching strategic focus is to design actions that reduce overall debt holdings by using taxpayer behavioural analysis to prevent debts arising and, where they do arise, taking the most effective recovery action at the most appropriate time. This was consistent with recommendations made in previous IGT reviews where the use of behavioural analysis was a common theme. The IGT continues to endorse such an approach.

The IGT also identified a need to ensure ATO officers have the appropriate level of expertise and experience to handle taxpayer cases and fulfil procedural requirements. The ATO has a framework for officer decision authorisations and also provides training and support for various aspects of debt recovery. The decisions of officers, who are considered 'proficient', are not scrutinised in the majority of low risk debt cases. Given the sustained and substantial level of individual taxpayer complaints, the IGT considered that there is a need for greater top-down supervision and recommendations were made accordingly.

Overall, the IGT made 19 recommendations to 16 of which the ATO has agreed, agreed in principle or agreed in part. The ATO has disagreed with 2 recommendations and considered that 1 recommendation was a matter for Government. One of the disagreed recommendations required the ATO to merge its Debt Business Line into the Compliance Group although the ATO has indicated it would consider such a merger as part of its broader cultural and structural change.

4.3 ATO SERVICES AND SUPPORT FOR TAX PRACTITIONERS

There is a high degree of taxpayer reliance on the services provided by tax practitioners in Australia. They assist approximately 70 per cent of individual and 90 per cent of business taxpayers to comply with their tax obligations. Tax practitioners are also an invaluable source of knowledge and practical experience which may be drawn upon to develop more effective and efficient tax laws and administrative practice. Accordingly, maintaining a positive relationship between the ATO and tax practitioners is critical to the functioning of the self assessment system.

The review into the ATO's services and support for tax practitioners was undertaken in response to concerns raised by the latter and their representative bodies in relation to access and adequacy of ATO support and services and the resulting strained relationship between tax practitioners and the ATO.

A key underlying cause of the strain on the ATO-tax practitioner relationship has been the reliability and functionality of the ATO Portals – gateways through which tax practitioners can use a range of ATO services. The ATO Portals have been described as an indispensable tool of trade and 'the most useful tools that the ATO has ever provided'. However, in recent years, their unreliability has been a major source of tax practitioner concern and frustration as they believe it has resulted in productivity loss, missed deadlines, irrecoverable costs as well as damage to their reputation and relationship with their clients.

The ATO has acknowledged the concerns with the ATO Portals and believes that it will address the majority of tax practitioner concerns in the long term by migrating to a 'more functional software platform and flexible online system.' However, such a migration causes further uneasiness for tax practitioners because of their previous experience with the ATO's deployment of new technology. In this regard, the IGT took comfort from the ATO's approach to maintaining the current ATO Portals and operating them in parallel with the new system.

At the closing stages of this review, the ATO advised that it estimated the migration to occur within the next two years. During this time, the ATO would not seek to implement key improvements sought by tax practitioners to the current ATO Portals but will limit enhancements to maintenance and stability assurance. Therefore, it is likely that some of the tax practitioner concerns and frustration may persist in the short term.

Another source of concern for tax practitioners has been the accuracy of ATO information and ATO communications which they believe has, in some instances, generated unnecessary follow up work and costs for them. The IGT recommended improved communication by user-testing standardised correspondence to ensure that the tone and content are effective in generating the intended behavioural response and minimising unnecessary contact.

Tax practitioners had also raised concerns with the delays and quality of support provided on the ATO's website and telephone services. In this regard, the IGT recommended improved ATO telephone services by maintaining shorter wait times, having technically proficient staff to answer calls, simplifying the proof of identity processes and improving the ATO's website by taking into account tax practitioners' needs.

Overall the IGT made eight recommendations, with which the ATO has agreed fully or partially.

4.4 ATO MANAGEMENT OF TRANSFER PRICING MATTERS

This review was prompted by concerns, from taxpayers, tax professionals and their representative bodies, with the unnecessary costs and protracted timeframes involved in the ATO transfer pricing compliance activities, lack of ATO communication on important issues, inadequate public advice and guidance and ineffective use of consultative forums. The key underlying theme was insufficient ATO capability to deal with transfer pricing matters.

Internationally, there were also government and community concerns regarding risks to revenue arising from transfer pricing, base erosion and profit shifting as evidenced in the OECD and G20 forums. This was also an important consideration in undertaking this review.

The review found that key causes of the concerns were inadequate succession planning and resource management. Experienced specialist officers had left the ATO's transfer pricing area and their knowledge was not effectively disseminated across the organisation. Another significant cause was the complex interactions between the ATO's internal functions and a lack of clarity with respect to the decision-making process.

A suite of recommendations were made to develop sufficient organisational capability to address transfer pricing risks, including giving priority to measures that target the highest risks to tax revenue. A number of recommendations were also made to optimise the use of current ATO resources while further capability was being developed. In this regard, the ATO agreed to match the scope and scale of transfer pricing compliance activities with the available specialist capability. In addition, it also agreed to limit the use of wide-ranging enquiries to identify emerging risks and give priority to project-based compliance activities that target the highest revenue risks.

In addition to responding to ATO enquiries, taxpayers' transfer pricing tax obligations, such as documenting the evidence for arm's length pricing outcomes, impose substantial costs. These costs have a regressive effect, particularly for SMEs. As a result, the ATO agreed to a number of recommendations which are aimed at reducing the compliance burden for SME taxpayers including the increased use of safe harbours for lower value and more common transactions.

The review also focused on the administration of the Advanced Pricing Arrangement (APA) programme which provides opportunities to reduce overall compliance costs by reaching a common understanding of views through a cooperative process. The IGT observed that the use of APAs for more complex arrangements was critical to maintaining taxpayer and broader perceptions of the utility of the programme and therefore identified a need for greater ATO transparency on the reasons for 'audit-like' approaches in APA processes and the circumstances which would justify a transition to an audit. It was also noted that such APAs are expected to provide valuable intelligence on emerging business practices and issues. In this respect, the ATO agreed to promote the use of the APA programme, provide the criteria for the withdrawal from APA negotiations and improve communications with taxpayers on issues of concern. However, the ATO has not agreed to certain suggested improvements with respect to APAs including better resourcing and a 'stage and gate' process.

Overall, there are 18 recommendations, 17 of which the ATO has agreed with in whole, part or principle.

4.5 ATO ADMINISTRATION OF PENALTIES

Concerns with the ATO's administration of penalties had been persistently raised with my office over a number of years. In some previous reviews, particularly the self-assessment review, the IGT made recommendations in this regard. However, due to the level of concern and its ongoing nature, the penalties review was undertaken to more broadly examine the issues being raised.

The report found that approximately 25 per cent of total penalties raised were later reduced due to unsustainable penalty decisions. Accordingly, the IGT made recommendations for the ATO to improve its penalty decision-making capability (through such means as further development of officers), the clarity and practicality of guidance material as well as its processes for identifying, collecting and analysing penalty information. In relation to taxpayer perceptions that penalties may be used as leverage to influence primary tax disputes, the IGT made a number of other recommendations including only requiring taxpayers to pay penalties after primary tax disputes have been settled and that discussions on potential penalties be delayed until after position papers have been issued.

The IGT also encouraged the Government to consider reviewing the penalty regime to promote greater voluntary compliance, and in particular to address issues such as a lack of sufficient differentiation between a range of taxpayer behaviours and the inability of taxpayers to be compensated for time-value of money paid for unsustainable penalties. As a result, the Government announced its intention to consider these issues once the Tax White Paper process has been finalised.

5. UPCOMING IGT REVIEWS

As mentioned earlier, the IGT recently launched two new reviews, namely the *review of the ATO's employer obligations compliance activities* and the *review into the Taxpayers' Charter and taxpayer protections*. The latter review is of particular relevance to this conference and will examine the adequacy of existing taxpayer rights including compensation to taxpayers where they have suffered loss or damage caused by ATO actions. The full text of the terms of reference for this review is reproduced in the Appendix.



Australian Government

Inspector-General of Taxation

Review into the Taxpayers' Charter and taxpayer protections

**Terms of reference &
submission guidelines**

2 November 2015

BACKGROUND

The self-assessment system relies on taxpayers having trust and confidence in the fairness of the tax system. As the Organisation for Economic Cooperation and Development (OECD) has observed, taxpayers 'who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.'¹

In Australia, the *Taxpayers' Charter* (Charter) sets out what taxpayers can expect when interacting with the Australian Taxation Office (ATO). The Charter does so by stating taxpayers' rights and obligations as well as actions they may take if they are not satisfied.² As a direct response to a recommendation made by the Joint Committee of Public Accounts, the Charter was introduced in 1997 to redress 'the balance of authority between the ATO and the taxpayer'³, given the ATO's considerable powers and resources particularly when compared to those of small and medium enterprises and individual taxpayers.

During consultation on the Inspector-General of Taxation's (IGT) current work program and in previous reviews, stakeholders have expressed general support for the Charter. However, they have also raised concerns with the ATO's adherence to it and its effectiveness. Specifically, stakeholders have noted that there are limited avenues for enforcement of the Charter principles, diminishing their effectiveness in affording protection to taxpayers. Stakeholders have, therefore, called for the Charter to be reviewed and updated to reflect the changes to tax administration and community expectations.

Whilst it is important to appropriately protect taxpayers' rights in their interactions with the ATO and provide avenues for redress, the ATO's ability to discharge its administrative duties efficiently and effectively needs to also be considered. For example, the impact of potentially vexatious litigation, aimed at inappropriately delaying or unreasonably obstructing the ATO in the conduct of its duties, should be minimised.

In support of calls for reform, stakeholders have identified current international developments which indicate an emerging trend towards a formalisation of taxpayer protections. For example, the United States of America's (USA) Internal Revenue Service (IRS) has adopted a Taxpayer Bill of Rights, which sets out various rights including 'the right to a fair and just tax system'.⁴ The United Kingdom's HM Revenue & Customs' taxpayers' charter, *Your Charter*, while modelled on the Australian Charter, has been given statutory force by way of a legislative provision which requires its regular review.⁵ Other jurisdictions such as Chile⁶ have taken similar actions and comparable developments are also taking place in the European Union⁷. By contrast, in Canada, developing case law suggests an

¹ Organisation for Economic Cooperation and Development, *Principles of Good Tax Administration* (Practice Note GAP001, 2001) p 3.

² Australian Taxation Office (ATO), *Taxpayers' Charter – what you need to know* (1 May 2015) <www.ato.gov.au>.

³ Joint Committee of Public Accounts, Parliament of Australia, *Report No. 326 An Assessment of Tax, A Report on an Inquiry into the Australian Taxation Office* (1993) p 308.

⁴ Internal Revenue Service, *Taxpayer Bill of Rights* (5 October 2015) <www.irs.gov>.

⁵ HM Revenue and Customs, *Your Charter* (26 February 2013) <www.gov.uk>.

⁶ Article 8 bis of the *Chilean Tax Code*.

⁷ European Commission, 'A European Taxpayer's Code' (Consultation paper, TAXUD.D.2.002 (2013) 276169, 2013).

expansion of the tort of negligence to impose a duty of care on the Canada Revenue Agency and its officers to taxpayers in the conduct of compliance activities.⁸

It should be noted that some of the principles that have been enshrined into law in the above jurisdictions, already have statutory force in Australia. These include the rights to external review of assessments, access to ATO-held documents and reasons for its decisions.⁹

In addition to the statutory protections presently existing in Australia, taxpayers have a number of different administrative avenues to report and have potential breaches investigated and addressed. In the first instance, complaints may be made directly to the ATO for internal review processes and the ATO may take action to address any breach by, for example, re-assigning the case to another officer or having more senior officers review actions of their staff. The ATO also has a range of dispute resolution strategies available to resolve issues as early as possible and assist in encouraging voluntary compliance.

Other courses of action open to taxpayers include lodging complaints with the IGT who can investigate and seek to ensure that they have been afforded procedural fairness in relation to the handling of their matter by the ATO. Ultimately, action may also be taken in courts where the common law rights of taxpayers have been breached.¹⁰

Taxpayers may also seek compensation from the ATO for losses on grounds of legal liability. Applications for the payment of compensation on moral grounds may be made primarily through the *Scheme for Compensation for Detriment caused by Defective Administration* (CDDA Scheme), a scheme applying to all Government departments including the ATO.¹¹

Stakeholders have expressed concern with the adequacy of the CDDA Scheme as a means of protecting taxpayers and providing redress. Specifically, stakeholders have expressed concern with the lack of transparency and independence as the ATO itself is the decision-maker with respect to both the occurrence of defective administration and any amount of compensation applicable. Furthermore, there are limited rights of internal review and limited rights to seek external review of such decisions.¹² The ATO reported figures show that the number of successful compensation claims has decreased, namely from 162 in 2011–12 to 79 in 2013–14, while the total amount of compensation paid has increased, from \$773,857 in 2011–12 to \$841,754 in 2013–14.¹³

Whilst there is strong support for a robust and transparent mechanism through which taxpayers may be compensated for losses flowing from breaches of their rights or protections by the ATO, such mechanisms need to consider the potential litigious environment that may be created, resulting in delays and related costs as well as the impact on Government revenue. In this respect, the USA experience may be instructive where the number of

⁸ *Leroux v. Canada Revenue Agency*, 2014 BCSC 720. The decision is currently the subject of appeal.

⁹ Part IVC of the *Taxation Administration Act 1953*; s 11 of the *Freedom of Information Act 1982*; s 28 of the *Administrative Appeals Tribunal Act 1975* and s 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

¹⁰ *Donoghue v Commissioner of Taxation* [2015] FCA 235.

¹¹ ATO, *Applying for compensation* (5 May 2015) <www.ato.gov.au>; Department of Finance, *Discretionary financial assistance* (15 June 2015) <www.finance.gov.au>.

¹² CDDA Scheme decisions may be subject to judicial review under section 75 of the Constitution or section 39B of the *Judiciary Act 1903*.

¹³ Commissioner of Taxation, *Annual Report 2013-14* (2014) p 124; Commissioner of Taxation, *Annual Report 2011-12* (2012) p 172.

taxpayer cases to recover damages caused by IRS officer actions¹⁴ has declined from an initial spike when legislation providing such a right was introduced.¹⁵

Stakeholders have also raised concern with the ATO's adherence to the model litigant rules set out in the *Legal Services Directions 2005* as well as the self-regulating and self-reporting nature of those obligations.¹⁶ Stakeholders question whether alleged breaches of the rules by the ATO are being addressed particularly where self-represented taxpayers are involved. The IGT notes that the model litigant rules also extend beyond the operation of the ATO and apply to all Commonwealth agencies. The Productivity Commission has more recently examined issues affecting the adequacy and enforceability of these rules.¹⁷

An emerging issue which the IGT may also examine in this review relates to the potential increase in cross-border information exchanges and sharing of intelligence between revenue authorities, particularly in light of recent OECD and multilateral measures to address base erosion and profit shifting. There are concerns with the accuracy and security of such information, the extent to which taxpayers should be kept informed as well as an appropriate appeals framework. Privacy is a particular issue with taxpayers wanting assurances that their confidential information is protected given the large amount of data that may be shared and the associated cyber security risks.

The IGT will conduct this review pursuant to subsection 8(1) of the *Inspector-General of Taxation Act 2003* (IGT Act). The review will consider the Charter and other taxpayers' protections and determine whether they are adequate or improvements are required. The following terms of reference and guidelines are provided to assist with the preparation of submissions to the review.

TERMS OF REFERENCE

The IGT will identify the opportunities to improve taxpayer protections and avenues for redress, with a focus on:

The framework for taxpayer protections

1. *The adequacy and clarity of the Taxpayers' Charter in protecting taxpayers' rights and in setting out their obligations.*
2. *The ATO's guidance and support to its staff in complying with the Taxpayers' Charter as well as guidance to the community as to their rights and obligations under the Charter.*
3. *The effectiveness of the ATO's systems and processes to identify, investigate, address and report allegations of breaches of the Taxpayers' Charter.*
4. *The requirement for further taxpayer protections and the need to guard against effective administration being impeded due to factors such as inappropriate litigation, delay and costs.*

¹⁴ § 7433 of the *Internal Revenue Code of 1986* (IRC) allows taxpayers to seek civil damages for certain unauthorised collection actions. However, it is subject to a number of restrictions including penalties for frivolous claims.

¹⁵ In 2007, § 7433 of the IRC appeared as one of the top ten 'most litigated issues' but had fallen out of the top ten in 2014. See National Taxpayer Advocate, *2014 Annual Report to Congress* (2014); National Taxpayer Advocate, *2007 Annual Report to Congress* (2007).

¹⁶ Inspector-General of Taxation, *The Management of Tax Disputes* (January 2015) pp 109-110.

¹⁷ Productivity Commission, *Access to Justice Arrangements* (2014) pp 429-442.

Compensation and other avenues for redress

5. *The adequacy of existing avenues for compensation in providing redress for loss or damage, including opportunity costs, as a result of inappropriate ATO actions.*
6. *The ATO's processes for making compensation decisions, including the consistency of decisions made and the effectiveness of any internal review mechanisms.*
7. *The available external review mechanisms for compensation decisions.*
8. *Guidance material for both ATO officers and the public in relation to availability and application processes for compensation.*

Model litigant rules

9. *The effectiveness of the ATO's systems and processes to identify, investigate, address and report allegations of breaches of the model litigant rules.*
10. *The effectiveness of any external channels to enforce or review ATO duties and obligations under the model litigant rules.*
11. *The ATO's guidance and support to its staff, and external service providers acting for the Commissioner, in complying with the model litigant rules and information to assist the public to understand the nature and purpose of these rules.*

Cross-border information exchanges

12. *The basis and extent to which the ATO presently engages in cross-border information exchanges and its impact on Australian taxpayers.*
13. *Whether there should be clearly defined rights and remedies for taxpayers with respect to information exchanges – particularly the extent to which they should be kept informed and afforded opportunities to review and correct any inaccuracies.*
14. *The effectiveness of the ATO's systems and processes to maintain the confidentiality of information exchanges.*

The IGT may also examine other relevant concerns raised or potential improvements identified during the course of this review.

SUBMISSION GUIDELINES

We envisage that your submission will set out your experiences and views on the rights and protections afforded to taxpayers and related avenues for redress.

It is important to provide a detailed account of your experiences having regard to the terms of reference. A timeline of events outlining your key experiences with the ATO would also be helpful. In addition to your views on potential improvements, we are seeking examples of ATO approaches that have contributed to positive outcomes.

The following questions are designed to assist you in your submission.

Your experiences

- Q1. If you have had experience with the ATO in pursuing your rights under the *Taxpayers' Charter*, existing compensation schemes or the model litigant rules, provide a detailed account of your experience, including:
- a. a timeline of key events, including a description of the actions taken by the ATO and any impact the actions had on you;
 - b. how you sought to avail yourself of the protections and how the ATO assisted you;
 - c. if you expressed concerns to the ATO, how did you voice these concerns for example, did you lodge a complaint;
 - d. the ATO's response to any concerns you expressed and any follow up action taken by the ATO;
 - e. your views on whether the ATO's response and action were appropriate and commensurate with the circumstances;
 - f. if you also took action in the Administrative Appeals Tribunal or the courts, whether such action obtained a satisfactory resolution; and
 - g. if you also raised a complaint with the Commonwealth Ombudsman or IGT, did this action assist you in obtaining a resolution?
- Q2. If your information has been requested from, or shared with, foreign revenue authorities, provide an account of your experience, including whether you were advised before the information was shared, afforded an opportunity to correct any inaccuracies and assured that your confidentiality would be respected?

The framework for taxpayer protections

- Q3. Do you believe that the current *Taxpayers' Charter* sufficiently sets out your rights and obligations when dealing with the ATO? If not, what improvements should be made? Provide reasons for your views.
- Q4. Do you believe the right balance has been struck between such protections and the ATO's ability to effectively administer the taxation law? Explain your views.
- Q5. Do you believe that the rights contained in the *Taxpayers' Charter* are effectively enforced? If so, provide examples. If not, what further enforceability mechanisms should be available and what impacts would these changes have?
- Q6. What is your understanding of the existing avenues of redress afforded for breaches of the *Taxpayers' Charter*? Do you believe that the existing mechanisms are adequate? If so, provide examples. If not, how could they be improved?
- Q7. Do you believe the ATO has appropriate guidance to assist its officers to comply with the *Taxpayers' Charter*? Explain your views.
- Q8. Do you believe that current ATO systems adequately identify, investigate, address and report allegations of breaches of the *Taxpayers' Charter*? If not, how could they be improved? Explain your reasons.

Compensation and other avenues for redress

- Q9. What is your understanding of the operation of existing compensation schemes, including the CDDA Scheme, in relation to the ATO? Do you believe that the ATO's processes for managing compensation scheme applications adequately provide redress for loss or damage? If so, provide reasons. If not, how can the ATO's management of compensation scheme applications be improved? Should a more specific scheme for taxation and superannuation administrative compensation be considered?
- Q10. Could the ATO's application of the current guidance on compensation schemes be improved to provide greater assistance to ATO officers and the public alike? If so, what aspects could be improved and how?
- Q11. Should the ATO's compensation decisions be subject to internal or external review? If not, why not? If so, explain your views including who would be best placed to undertake such review.
- Q12. Provide comments on the adequacy of other existing avenues for redress.

Model litigant rules

- Q13. Do you believe the ATO's current systems adequately identify, investigate, address and report alleged breaches of the model litigant rules? Provide reasons for your views.
- Q14. Do you believe there is room to improve the identification, investigation, reporting and addressing of alleged breaches of the rules by the ATO? If so, what aspects could be improved and what benefit would they provide?
- Q15. Which agency or body, whether the ATO or otherwise, is best placed to monitor and enforce the ATO's compliance with the rules? Provide your reasons.

Cross-border information exchanges

- Q16. Provide comments on the transparency of the ATO's processes for cross-border information exchanges.
- Q17. Do you believe the rights of taxpayers to confidentiality and due process are sufficiently protected by the ATO in the case of cross-border information exchanges? Explain your views.
- Q18. In what circumstances should the ATO allow taxpayers to review and correct information or otherwise challenge an exchange of information request? Are there circumstances where this would not be appropriate? Explain your views.

Other issues

- Q19. Are there any other areas on which you would like to make a submission? For example, you may wish to cite international experiences or comparisons which you believe would lead to improvements.

LODGEMENT

The closing date for submissions is 18 December 2015. Submissions can be sent by:

Post to: Inspector-General of Taxation
 GPO Box 551
 SYDNEY NSW 2001

Email to: tctp@igt.gov.au

CONFIDENTIALITY

Submissions provided to the IGT are maintained in strict confidence (unless you specify otherwise). This means that the identity of the taxpayer, the identity of the adviser and any information contained in such submissions will not be made available to any other person, including the ATO. Section 37 of the IGT Act safeguards the confidentiality and secrecy of such information provided to the IGT – for example, the IGT cannot disclose the information as a result of a Freedom of Information (FOI) request, or as a result of a court order generally. Furthermore, if such information is the subject of client legal privilege (also referred to as legal professional privilege), disclosing that information to the IGT will **not** result in a waiver of that privilege.