



Australian Government
Inspector-General of Taxation

The protection of taxpayer rights in Australia

Report for the International Bureau of Fiscal
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FOREWORD

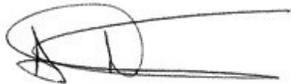
I am pleased to present this report, on the status of taxpayer rights in Australia, which was undertaken at the request of the International Bureau of Fiscal Documentation (IBFD).

The protection of taxpayer rights is fundamental to maintaining taxpayer trust and confidence, which is in turn essential for effective tax administration, particularly in the context of a self-assessment system.

The structure of this report is aligned with the summary of taxpayer protections published in *Cahiers de droit fiscal international Vol 100b – The practical protection of taxpayers fundamental rights*.¹ Accordingly, this report describes taxpayer rights and protections across a broad range of interactions between taxpayers and the Australian revenue authority, the Australian Taxation Office (ATO).

I would like to offer my thanks to the ATO and to Helen Symon QC for their contributions to this report.

December 2015

A handwritten signature in black ink, appearing to be 'Ali Noroozi', written over a horizontal line.

Ali Noroozi
Inspector-General of Taxation

¹ International Fiscal Association 2015 Basel Congress, *Cahiers de droit fiscal international Vol 100b – The practical protection of taxpayers fundamental rights* (2015), pp 74–82.

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1. IDENTIFYING TAXPAYERS, ISSUING TAX RETURNS AND COMMUNICATING WITH TAXPAYERS²

Taxpayer identification

The Australian Taxation Office (ATO) issues unique tax file numbers (TFNs) to taxpayers upon application.³ Safeguards have been established in ATO procedures to verify the identity of the applicant before the TFN is issued including proof of identity requirements such as presenting passports and birth certificates.⁴

In addition to safeguards, there are legislative sanctions where TFNs are requested or used for an unauthorised purpose. It is an offence under the tax laws for any person to require or record a TFN unless they are authorised to do so.⁵ Such authorised use includes third parties who are required to withhold taxes on behalf of taxpayers.⁶

The *Privacy Act 1988* (Privacy Act) also regulates the use of TFNs and provides oversight and compliance powers to the Office of the Australian Information Commissioner (OAIC) regarding how the ATO manages TFN information in its use of data matching compliance activities.⁷ The OAIC powers include investigating complaints into breaches of privacy and confidentiality.⁸

Although the OAIC is separate from the ATO, it was announced that from 1 January 2015, the various functions of the OAIC, including those under the Privacy Act and the *Freedom of Information Act 1982* (FOI Act) would be subsumed into existing government departments. However, at the time of the writing of this report, the OAIC continues to operate in respect of its privacy and freedom of information (FOI) functions, albeit in a scaled back manner.⁹

Business entities may apply for an Australian Business Number (ABN) which appears on the Australian Business Register (ABR). The ATO is the custodian of the ABR. ABNs act as an identifier for businesses and are used for taxation and other business purposes. ABNs are publicly available to determine the eligibility of businesses for collecting and remitting the Goods and Services Tax (GST) to the ATO.

² In the Australian context, the issuing of tax returns and tax assessments is closely related due to the lodged return being the assessment. Accordingly, there may be a degree of overlap between section 1 and section 2.

³ *Income Tax Assessment Act 1936*, Part VA.

⁴ Australian Taxation Office (ATO), *Acceptable proof of identity documents* (5 November 2015) <www.ato.gov.au>.

⁵ *Taxation Administration Act 1953*, ss 8WA and 8WB.

⁶ *Taxation Administration Act 1953*, ss 8WA and 8WB; *Income Tax Assessment Act 1936*, s 202.

⁷ *Data-Matching Program (Assistance and Tax) Act 1990*.

⁸ Office of the Australian Information Commissioners (OAIC), *Guidelines on Data Matching in Australian Government Administration* (2014).

⁹ OAIC, *Annual Report 2014–15*, pp 4–5.

The ATO's system of taxpayer identification does not expressly take into account religious sensitivities. However, Australian law provides for the freedom of religious expression and a complaints mechanism to investigate any Government action which may be inconsistent with such rights.¹⁰

Third party confidentiality

It is an offence for a third party to record or disclose protected information.¹¹ Taxpayer confidentiality is discussed in greater detail in section 3.

Where tax is required to be withheld by a third party on behalf of a taxpayer,¹² the third party is required to provide payment summaries to the taxpayer and to the ATO detailing income earned and tax withheld.¹³ This allows taxpayers to claim tax credits equal to the amount of tax withheld on their behalf when they lodge their tax returns.¹⁴

Where the third party fails to pay the tax withheld to the ATO, provided that the taxpayer and the ATO have been given consistent information regarding the amount of the tax credit, the taxpayer will not be held liable for the withheld amounts. Where amounts are withheld and reported but not paid to the ATO, the ATO will collect the withholding amounts from the withholder through its debt collection activities.¹⁵ An administrative penalty will not arise, however, an interest charge will apply. Where the withholder is a company, the ATO is empowered to make the director of the company personally liable for some withholding debts.¹⁶

Failure by the withholder to withhold tax on behalf of the taxpayer does not protect the taxpayer from the liability of paying that tax. In order to deter such behaviour, the withholder may be subject to penalties equal to the amount of tax which should have been withheld. Failure to withhold may also make the third party liable for a criminal offence.¹⁷

Taxpayers' right to access and correct personal information

The Privacy Act sets out the Australian Privacy Principles (APPs) that provide rights of access to, and correction of, personal information held by agencies such as the ATO.¹⁸ Taxpayer access to personal information under the APPs may be limited where a refusal to

¹⁰ *Australian Constitution*, s 116; *Australian Human Rights Commission Act 1986*, Part II, Div 4.

¹¹ *Taxation Administration Act 1953*, Sch 1, s 355-155.

¹² *Taxation Administration Act 1953*, Sch 1, Part 2-1.

¹³ *Taxation Administration Act 1953*, Sch 1, s 16-155.

¹⁴ *Taxation Administration Act 1953*, Sch 1, s 18-15.

¹⁵ ATO, *Remission of penalty for failure to withhold as required by Division 12 of Schedule 1 to the Taxation Administration Act*, PS LA 2007/22, (2007), para [20].

¹⁶ *Taxation Administration Act 1953*, Sch 1, s 269-10.

¹⁷ *Taxation Administration Act 1953*, Sch 1, s 16-25.

¹⁸ *Privacy Act 1988*, Sch 1, Part 5.

provide such information is authorised by the FOI Act or by another Act, such as the *Tax Administration Act 1953* (TAA 1953).¹⁹

The ATO is providing taxpayers with increased electronic access to their records as part of the whole-of-government digital transformation agenda.²⁰ Such electronic access is provided through “myGov”, a single entry point enabling taxpayers to access online services and receive information from various government departments, including the ATO. Online access to tax records is provided primarily for income tax but there is also some limited scope for taxpayers to access information and services relating to their GST and superannuation affairs.²¹

Access to ATO services is managed through an opt-in link from the myGov account. The services provided include the online lodgement of income tax returns through “myTax”.²² Access to ATO services from myGov requires a separate identification procedure. The security protocols surrounding electronic communications are managed through the myGov platform and must comply with the Federal Government’s requirements for electronic communications security.

As part of the increased direct electronic interactions with taxpayers, the ATO assists taxpayers in the electronic lodgement of their income tax returns by using pre-filled information. This information has been matched to taxpayers from third party sources such as employers and financial institutions.²³ The pre-filled return is presented to the taxpayer for confirmation prior to lodgement. Deductions may be inputted directly online by taxpayers. They are also able to request assistance from the ATO to correct any errors in pre-filled information.²⁴

The ATO also uses third party information to undertake data matching audits of lodged tax returns. Where the ATO proposes to adjust taxpayers’ returns on the basis of such information, the ATO practice is to provide taxpayers with an opportunity to address any inaccuracy before the ATO finalises its decision. For certain data matching activities, the ATO has instituted manual intervention processes to verify any data before it is used.²⁵

The FOI Act provides a general right of access to records held by government agencies, such as the ATO.²⁶ This also provides taxpayers with access to records about themselves provided

¹⁹ *Privacy Act 1988*, Sch 1, s 12.2.

²⁰ For more details about the ATO’s specific initiatives please refer to the *Reinventing the ATO* program.

²¹ The ATO is also responsible for administering aspects of the superannuation system in Australia.

²² The myTax functionality is discussed further in section 2.

²³ Inspector General of Taxation (IGT), *Review into the Australian Taxation Office’s compliance approach to individual taxpayers – use of data matching (Data matching review)* (2013) pp 8–11.

²⁴ ATO, *Pre-filling your online return* (30 June 2015) <www.ato.gov.au>.

²⁵ IGT, *Data matching review*, above n 23, p 20.

²⁶ *Freedom of Information Act 1982*, s 11.

they are able to show proof of record ownership. In the event that the information is inaccurate or contains errors, taxpayers may request corrections.²⁷

Some records are exempt from access, for example, where there is a risk to national security or public safety, information has been obtained in confidence or documents pertain to commercially sensitive information.²⁸

It should also be noted that in limited circumstances third parties may be able to access ATO information.²⁹

The ATO has released guidance which sets out the rights of taxpayers to access information under the FOI laws and how they may make such information requests.³⁰ The ATO is required to maintain an FOI disclosure log which lists information that has been released in response to a FOI request, subject to some exceptions.

Cooperative compliance

The ATO's general design of its compliance approach is to match the intensity of assurance and verification activities with taxpayers' transparency, complexity of their affairs and their compliance behaviours and attitudes. For example, those who provide all relevant information to the ATO and are considered to be willing to comply are less likely to be subjected to intensive compliance processes.³¹ To assist in determining the level of risk posed, the ATO uses a risk differentiation framework (RDF). The RDF is discussed further in section 4.

The ATO presently engages in a number of different compliance approaches which may be classified as 'cooperative compliance'. Such approaches include, for example, Annual Compliance Arrangements (ACAs) where an ATO officer is appointed as an ongoing relationship contact with the taxpayer throughout the year to review and provide input on proposed transactions and indicate the potential tax treatment.

Other examples of cooperative compliance approaches include activities such as Advance Pricing Arrangements (APAs) to determine the treatment of specific transfer pricing transactions.³² The Inspector-General of Taxation (IGT) (a scrutineer of the ATO, described in more detail in section 12) has encouraged the use of APAs as a flexible and cheaper process for taxpayers to obtain certainty.³³ The ATO has recently undertaken an extensive

²⁷ *Freedom of Information Act 1982*, Part V.

²⁸ *Freedom of Information Act 1982*, Part IV.

²⁹ Third party access to information is discussed in more detail in section 3 of this report.

³⁰ ATO, *Taxpayers' charter - accessing information under the Freedom of Information Act* (2010).

³¹ ATO, *Compliance Program 2012-13* (2012), pp 1-3; ATO, *Our approach to compliance*, (29 October 2015) <www.ato.gov.au>.

³² ATO, *Advance Pricing Arrangements*, PS LA 2015/4 (2015).

³³ IGT, *Review into the Australian Taxation Office's management of transfer pricing matters* (2013), pp 161-166.

review of the APA program and the process has been modified to increase the emphasis on the cooperative nature of the arrangement.³⁴

Large businesses, which have a major role in the Australian economy and have not entered into an ACA with the ATO, may be engaged in a pre-lodgment compliance review (PCR) for their income tax affairs. PCRs may take place anytime between the commencement of the tax period under review up to the time of lodgement. The intent is to assure the correct tax outcomes are reached by identifying and managing material tax risks through early, tailored and transparent engagement. The ATO uses the PCR discussions and outcomes to analyse the lodged return and address outstanding issues as necessary.³⁵

It is noted that the above mentioned compliance approaches tend to be available only to the largest taxpayers due to the complexity of their arrangements, risk consequences and associated cost. More broadly, the ATO seeks to foster “voluntary compliance” which aspires for a cooperative relationship with taxpayers with compliance action being taken in proportion with the previously mentioned level of risk.³⁶

Assisting taxpayers

The ATO’s move towards online lodgement and communication necessitates a corresponding move away from paper publications. However, the IGT has recommended that the ATO should continue to support taxpayers who are unable to lodge electronically and provide these taxpayers with certainty while minimising additional compliance costs.³⁷

The ATO has services available to taxpayers who genuinely experience difficulty or are unable to interact electronically. This includes providing specific online links, paper based forms or, on rare occasions, print-outs of relevant website materials on behalf of those who do not have electronic access.³⁸

The ATO also provides other services, for example the “Tax Help” program where volunteers from the community offer assistance in lodging returns free of charge to eligible low income taxpayers.³⁹ The ATO also provides specific support to indigenous taxpayers, including a specific phone service.⁴⁰

³⁴ ATO, PS LA 2015/4, above n 32, sections 3–5.

³⁵ ATO, *Engaging early with you* (9 October 2015) <www.ato.gov.au>; ATO, *Large business and tax compliance* (20 May 2015) <www.ato.gov.au>.

³⁶ ATO, *Compliance Model*, (27 April 2015) <www.ato.gov.au>.

³⁷ IGT, *Review into improving the self assessment system (Self assessment review)* (2012), pp 47–51.

³⁸ ATO, *Communication with the IGT*, 2015.

³⁹ ATO, *Tax Help program* (30 June 2015) <www.ato.gov.au>.

⁴⁰ ATO, *ATO Indigenous Helpline and other phone services* (21 March 2014) <www.ato.gov.au>.

2. THE ISSUE OF TAX ASSESSMENTS

Dialogue between taxpayers and the Australian Taxation Office

The ATO continues to foster engagement with taxpayers on a more informal basis in line with previous recommendations by the IGT.⁴¹ To build confidence with taxpayers, the ATO has committed to consultation and early engagement. For example, allowing privately owned and wealthy groups to engage with the ATO to obtain certainty about a transaction or arrangement⁴² and the previously discussed PCRs available to larger businesses.⁴³

As mentioned earlier, the ATO's data matching compliance activities have given rise to certain concerns that the adjustment of tax assessments may be premature. The IGT has recommended that the clarity of communication with taxpayers may be improved by actively contacting taxpayers to verify details before an adjustment is processed.⁴⁴

Use of e-filing

As previously discussed, the ATO is moving increasingly towards electronic communication and lodgement of tax returns in line with the whole-of-government's digital transformation. Income tax returns lodged through the ATO's electronic platforms of myTax or its predecessor are usually processed within 12 business days, whereas paper based returns may take up to 56 days.

Furthermore, the use of electronic lodgement combined with pre-filled information allows taxpayers to quickly and easily identify potential errors in this information and correct them prior to lodgement.⁴⁵

The ATO also uses information obtained from third parties to undertake pre-assessment checks of lodged returns to determine the likely accuracy of electronically lodged returns and address any discrepancy prior to the return being finalised. These risk based checks can give rise to extended delays in some instances.⁴⁶

⁴¹ IGT, *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution* (2012) (ADR review), pp 33–36.

⁴² ATO, *Excellent working relationships* (2 June 2015), <www.ato.gov.au>.

⁴³ ATO, *Engaging early with you*, (9 October 2015) <www.ato.gov.au>.

⁴⁴ IGT, *Data matching review*, above n 23.

⁴⁵ *Ibid*, p 21.

⁴⁶ IGT, *Review into the Australian Taxation Office's compliance approach to individual taxpayers – income tax refund integrity program* (2013), p 8.

3. CONFIDENTIALITY

Legal sanctions for breaches of confidentiality

The taxation legislation does not provide for an explicit guarantee of confidentiality. However, severe sanctions can be imposed for breaches of confidentiality and secrecy. Under Division 355 of Schedule 1 of the TAA 1953, it is an offence for a current or former taxation officer to disclose protected information and that officer is liable for up to 2 years of imprisonment. The division also sets out explicit exceptions to these offences, such as allowing the disclosure of such information in the course of carrying out the officers' duties.⁴⁷

Although the TAA 1953 does not include a specific offence for taxation officers concealing unauthorised disclosure of protected information, criminal liability is generally extended to persons who are complicit by way of aiding, abetting, counselling or procuring the commission of an offence.⁴⁸

Regulation of access to data, identifying unauthorised access and administrative arrangements

It is also an offence for a person to access information or records in the possession of the Commissioner of Taxation unless they are providing administrative access to taxpayers of their own records, acting under the FOI Act, in accordance with court or tribunal rules or in the course of exercising powers or performing functions under or in relation to a taxation law.⁴⁹

The ATO recognises unauthorised access to taxpayer records is a significant risk.⁵⁰ Access to ATO systems is monitored through its internal fraud prevention and control procedures. This includes generation of "exceptions reports", where unauthorised access is suspected or identified, and seeking clarification from relevant business areas or officers regarding the nature and need for the access.

ATO officers are required to only access information on a "need-to-know" basis. All taxation officer access to confidential information requires a security clearance, including police and criminal history checks. Access to information which is of higher levels of sensitivity or protection requires higher levels of clearance from the Australian Government Security Vetting Agency.

⁴⁷ *Taxation Administration Act 1953*, Sch 1, ss 355-45 and 355-50.

⁴⁸ *Criminal Code Act 1995*, The Schedule, s 11.2.

⁴⁹ *Taxation Administration Act 1953*, s 8XA.

⁵⁰ Commissioner of Taxation, *Annual Report 2014-15* (2015), Vol 1, p 80.

All new taxation officers are also required to complete fraud and ethics awareness training which emphasises confidentiality and appropriate access to information. These training modules are required to be refreshed periodically.

Breaches of confidentiality and remedies for victims

Internally, the ATO's Fraud Prevention and Control unit may investigate allegations of inappropriate access and breach of confidentiality. As previously discussed, disclosure of protected information by a taxation officer is an offence and carries severe penalties.⁵¹ These investigations can be referred for prosecution where appropriate. In the Commissioner of Taxation's *Annual Report 2014-15*, the ATO reported that 257 new allegations of fraud, serious misconduct and other activity were investigated in that period. Of these, 27 cases were substantiated in investigation.⁵²

Prosecution of these offences does not provide taxpayers with a direct remedy for breaches of confidentiality. However, where a breach of privacy is suspected, taxpayers may approach the Privacy Commissioner to make a complaint. The Privacy Commissioner is empowered to consider and resolve privacy complaints which may include a determination for compensation to be payable where appropriate.⁵³ The ATO may also proactively advise the Privacy Commissioner in appropriate circumstances but there is no mandatory reporting requirement of all breaches.⁵⁴

Exceptions to confidentiality and third party access to information

Under the tax law secrecy provisions, disclosure may be made to specific entities or for specific purposes if it falls under an exception. Such exemptions include circumstances where the relevant information would otherwise be publicly available⁵⁵ or it is for government and law enforcement purposes.⁵⁶

In accordance with the provisions discussed above, the ATO does not generally publish or discuss confidential taxpayer information. This includes "naming and shaming" deterrence strategies. However, under tax transparency laws, the ATO is required to make public tax return information for corporate entities with income in excess of \$100m other than certain Australian private corporate entities, including the information about income and tax payable.⁵⁷ These disclosures are made by operation of legislation and do not require judicial authorisation.

⁵¹ *Taxation Administration Act 1953*, Sch 1, s 355-25.

⁵² Commissioner of Taxation, *2014-15 Annual Report*, above n 50, Vol 1, p 94.

⁵³ *Privacy Act 1988*, ss 40A and 52.

⁵⁴ OAIC, *Data breach notification guide: A guide to handling personal information security breaches*, (August 2014), p 4 and 38.

⁵⁵ *Taxation Administration Act 1953*, Sch 1, s 355-45 and s 355-170.

⁵⁶ *Taxation Administration Act 1953*, Sch 1, s 355-65 and s 355-70.

⁵⁷ *Taxation Administration Act 1953*, s 3C and s 3E. Note that amendments passed by the Australian Parliament on 3 December 2015 will, subject to Royal Assent being granted, extend this obligation to include reporting for Australian-owned private companies with total income of \$200 million or more.

Similarly, the ATO does not disclose taxpayer information for political purposes under general secrecy requirements. Where public commentary is critical of the ATO which it considers to be untrue and undermines public confidence in taxation administration, the ATO has responded publicly during Parliamentary hearings to correct the record.⁵⁸ Evidence given at Parliamentary hearings is privileged.⁵⁹

In addition to providing a taxpayer with access to their own records, as noted before, the FOI Act may also provide access to third parties to records held by the ATO. However, these avenues are limited to where the information does not fall under a public interest conditional exemption.⁶⁰ In determining whether private, personal or business information is released to a third party, the party to whom the information relates must be afforded the opportunity to make submissions about whether or not it is in the public interest to release the information to the third party.

Under current arrangements, the OAI may conduct merit reviews of decisions made under the FOI Act. Once proposed changes, mentioned earlier, have been fully implemented, these reviews will be conducted by the Commonwealth Ombudsman. The investigation of allegations of non-compliance has moved to the Commonwealth Ombudsman, as an initial step. Taxpayers also have the right to external review of such decisions with the Administrative Appeals Tribunal (AAT).

Taxpayer anonymity

The ATO may provide tax advice to taxpayers, upon their request, in the form of private rulings. Private rulings are binding on the ATO with respect to the requesting taxpayer only, even when the advice is incorrect. The ATO publishes private rulings on its *Register of Private Binding Rulings* (PBR Register), however, the ATO anonymises such advice prior to publication. The ATO also provides and publishes public rulings which are generally binding on the ATO. They do not disclose any identifying details about specific taxpayers, as these rulings apply to a class of taxpayers or certain tax arrangements.

External to the ATO, the courts are forums of public record in Australia and, accordingly, tax judgments are generally issued without removing the taxpayers' details. However, in some circumstances taxpayers may request that hearings be conducted in the judge's chambers⁶¹ or to have the court closed during the hearing so that members of the media/public are unable to observe the proceedings.⁶²

In the AAT, taxpayers may ask their case to be reported anonymously. In these cases, decisions are issued without identifying the taxpayer.

⁵⁸ For example: Evidence to Senate Economics Legislation Committee (proof), Parliament of Australia, Canberra, 21 October 2015, pp 41–43, (Mr Chris Jordan, Commissioner of Taxation).

⁵⁹ *Parliamentary Privileges Act 1987*.

⁶⁰ *Freedom of Information Act 1982*, s 27A.

⁶¹ *Federal Court of Australia Act 1976*, s 17.

⁶² *Federal Court of Australia Act 1976*, s 17(4).

Legal professional privilege and confidential tax advice

At common law,⁶³ legal professional privilege (LPP) protects confidential discussions between legal practitioners and their clients.⁶⁴ In relation to tax advice, general LPP principles may apply to communications between taxpayers and their legal advisors to the extent that the dominant purpose of those communications is to obtain legal advice or for the purposes of actual or anticipated litigation.

LPP does not extend to communications with all tax advisors. However, as an administrative concession, the ATO accepts that certain documents between taxpayers and their professional accounting advisors should, aside from exceptional circumstances, be treated as confidential. Generally, claims for confidentiality under this “accountants’ concession” will be observed by the ATO.⁶⁵

For corporate taxpayers, a further administrative concession may be available for advice provided to the corporate board which considers tax compliance risks and their impact.⁶⁶ This concession is intended to encourage full and frank discussions of tax risks by the boards.

The ATO will generally observe LPP or administrative concessions claimed by taxpayers when exercising its formal information gathering powers in accessing documents or when entering a taxpayer’s premises. The ATO has also published guidance to this effect.⁶⁷ The ATO’s information gathering powers are discussed further in section 4. The IGT has observed that there is potential for ATO auditors of large taxpayers to receive greater technical and specialist guidance around the application of privilege and administrative concessions, in particular in the use of formal information gathering powers.⁶⁸

⁶³ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.

⁶⁴ Note that Division 1 of Part 3.10 of the *Evidence Act 1995* also provides a similar protection in the form of client legal privilege for adducing evidence in court.

⁶⁵ ATO, *Guidelines to accessing professional accounting advisors’ papers*, (30 June 2010) <www.ato.gov.au>.

⁶⁶ ATO, *Access to corporate board advice on tax compliance risk*, PS LA 2004/14, (2014).

⁶⁷ ATO, *Our approach to information gathering*, (23 June 2015) <www.ato.gov.au>.

⁶⁸ IGT, *Review into the Australian Taxation Office’s large business risk review and audit policies, procedures and practices (Large business risk review)* (2011), pp 93–95 and 103–110.

4. NORMAL AUDITS

Proportionality

The ATO takes a risk-based approach in identifying and focusing its compliance activities. Compliance risks can be generally categorised into obligations of registration, lodgement, payment and reporting. Under the ATO's Compliance Model, taxpayers' attitude towards compliance and the factors which influence their behaviour guides the ATO's approach to them. To make the best use of its resources, the ATO applies more intense compliance activity to higher risk arrangements and to higher risk taxpayers.⁶⁹ The main risk assessment tool that the ATO uses for this purpose is the RDF which assesses the likelihood and consequence of the risk posed by either the entity or transaction.

In a 2013 report, the IGT reported that, at the time, the RDF did not provide for substantial differentiation between behavioural and inherent risk factors. For example, a taxpayer may face higher levels of compliance activity due to the nature of the industry in which they operate rather than specific behaviours of that taxpayer.⁷⁰ However, it was recognised that the RDF was a relatively new tool which would be subject to continual improvement and refinement. Refinement of the RDF has continued with the ATO's recent focus on a more detailed consideration of consequence and providing a differentiated client experience depending on the likelihood ratings of the taxpayers involved.

Before an audit is initiated, the scope of the audit is generally determined through the case selection and risk identification processes. Thereafter, the scope of the audit may only be extended with the approval of the team leader and any change should be communicated to the taxpayer.⁷¹

Facts and evidence is gathered in all cases and templates are used to assist decision making. For more complex cases, a facts and evidence worksheet is used to assist auditors formulate and develop technical positions and to document their decision making process. The IGT has supported the increased use of this worksheet to facilitate a stronger understanding of issues, assist in narrowing the scope of information requests⁷² and thereby reduce the compliance burden on the taxpayer.

Double jeopardy

Generally, a taxpayer who has been reviewed or audited for a given period may be subject to subsequent audits for different issues within the same reporting period. The ATO may

⁶⁹ ATO, *Compliance Model*, above n 36.

⁷⁰ IGT, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, (2013), pp 82–85.

⁷¹ IGT, *Review into the ATO's compliance approach to small and medium enterprises with annual turnovers between \$100 million and \$250 million and high wealth individuals (SME and HWI audits review)*, (2011), p 50, Recommendation 3.1.

⁷² *Ibid*, pp 58–61.

decide to revisit the same issue for the same period in rare circumstances such as where new material or evidence warrants the audit to be conducted again.

Right to be heard

The ATO generally observes the right of taxpayers to be heard during compliance activities as a matter of good and fair decision-making. This may occur in a number of ways, such as:

- taxpayers being invited to provide information or additional evidence to address ATO areas of concern;
- the ATO confirming its understanding of taxpayer materials or positions and seeking comment on the same; and
- taxpayers being invited to provide comments on position papers or interim audit decisions.

Following recommendations from the IGT, the ATO has further committed to making greater use of informal information sharing early in compliance activities to enable taxpayers and their representatives to understand the nature of the ATO's concerns and to address any issues with the information relied on by the ATO.⁷³

Principle against self-incrimination and the right to remain silent

Whilst it is not a specific right for taxpayers to remain silent during audit activities, to avoid incriminating themselves, taxpayers may choose not to engage with the ATO. However, in such circumstances, the ATO may progress the audit and make adjustments to the taxpayer's returns based on third party or other information.⁷⁴ An example of this is the ATO's use of industry benchmarks as such a basis in relation to small business taxpayers operating in the cash economy who may be underreporting their income.⁷⁵

Importantly, the ATO has broad formal information gathering powers. These powers may be exercised to gather information from taxpayers or third parties for the administration or operation of a tax law. Failure to comply with a notice under these powers carries the possibility of criminal prosecution.⁷⁶ However, the use of these powers is not unlimited. As previously discussed, the ATO observes the confidentiality afforded by LPP⁷⁷ and administrative concessions.⁷⁸

⁷³ IGT, *ADR review*, above n 41, pp 33–36.

⁷⁴ IGT, *Data matching review*, above n 23.

⁷⁵ IGT, *Review into the Australian Taxation Office's use of benchmarking to target the cash economy* (2012).

⁷⁶ *Taxation Administration Act 1953*, s 8C.

⁷⁷ ATO, *Legal professional privilege* (23 June 2015), <www.ato.gov.au>.

⁷⁸ ATO, *Guidelines to accessing professional accounting advisors' papers*, above n 65; ATO, PS LA 2004/14, above n 66.

From 1 July 2015, the ATO's information gathering powers have been consolidated into Division 353 of Schedule 1 of the TAA 1953.⁷⁹ General guidance on the ATO's approach to information gathering is set out in the ATO publication entitled *Our approach to information gathering*.⁸⁰

Published guidelines to audit

The ATO has published internal audit manuals for its officers. However, there is no universal manual to guide audit processes, with tailored guidance existing across different business lines to cater for the various taxpayer segments.

The ATO has also published a booklet which addresses what taxpayers can expect when they are subjected to an audit.⁸¹ For example, the booklet informs taxpayers that they have the opportunity to give the ATO their views on any relevant issues, such as proposed adjustments, and that the ATO should clearly communicate its understanding of the facts as soon as practicable.

Initiation of audit

Audits are generally commenced with the issue of an audit letter which sets out areas of inquiry, contact details of the audit officer or team and the relevant team leaders. An audit plan may also be attached to provide more detailed information regarding the proposed audit. In certain circumstances, the ATO may initiate an audit covertly without notifying the taxpayer, which is discussed further in section 5.

Taxpayers are not able to initiate audits to obtain certainty. However, in 2015, the ATO piloted a program for some taxpayers with simple affairs to be issued a "certainty letter".⁸² For these taxpayers, the ATO was satisfied that future audit or review will not be required, provided there is no indication of fraud or evasion. These taxpayers will still need to maintain their tax records in accordance with existing document retention requirements.

⁷⁹ *Taxation Administration Act 1953*, Sch 1, s 353-10 and s 353-15.

⁸⁰ ATO, *Our approach to information gathering*, above n 67.

⁸¹ ATO, *Taxpayers' Charter – if you're subject to review or audit*, (2013). The Taxpayers' Charter is more broadly discussed in Section 12.

⁸² ATO, *Certainty letter* (24 September 2015) <www.ato.gov.au>.

Third party information

Where the ATO requests or receives information from third parties, taxpayers are generally not made aware of such requests unless the ATO uses it in its compliance activities. The nature and source of certain information may not be provided due to legitimate requests by the provider for confidentiality such as in case of a whistle-blower, whose identity should be protected, or where disclosure of the provider's identity may otherwise jeopardise his or her safety.

Where the ATO seeks to make use of third party information in compliance activities, generally, principles of natural justice require the ATO to inform the taxpayer of the nature of the information, provide access to that information and allow them an opportunity to verify its accuracy. Examples include the ATO's use of third party data to pre-fill tax returns or other data matching compliance activities.⁸³ Although notification of data matching may not be provided to each affected taxpayer, the ATO publishes protocols for each of its data matching programs pursuant to the *Guidelines on Data Matching in Australian Government Administration*.⁸⁴

Timeframes of audits

As mentioned earlier, at the outset of an audit, the taxpayer is provided with a commencement letter which sets out an audit plan with the expected timeframe for completion. The ATO has stated that, in the case of large business taxpayers, audits will generally be concluded within two years.⁸⁵ Generally, audit timeframes vary depending on the complexity of the case and the approach taken. These can range from 40 days for a streamlined review of a transaction to 540 days for a large complex audit.⁸⁶

The use of cycle times is used by ATO management to monitor the timeliness of reviews and audits across various taxpayer market segments. The IGT has observed that aspirational cycle times may impact on the decision-making and behaviours involved in conducting an audit.⁸⁷ In order to ensure that unnecessary compliance burdens on taxpayers are minimised, the IGT has commented that for audits of small and medium enterprises, the effectiveness of cycle times should be routinely monitored and, when appropriate, extensions of the cycle time of the audit may be allowed with appropriate communication to the taxpayer.⁸⁸

Technical assistance to taxpayers

Taxpayers may engage the assistance of tax agents, solicitors, barristers or other experts in managing the audit and dealing with the ATO. Australia has one of the highest rates of tax

⁸³ IGT, *Data matching review*, above n 23.

⁸⁴ OAIC, *Guidelines on Data Matching*, above n 8.

⁸⁵ ATO, *Large business and tax compliance*, above n 35.

⁸⁶ ATO intranet, PG&I Siebel case product cycle times.

⁸⁷ IGT, *SME and HWI audits review*, above n 71, p 70; IGT, 'Large business risk review', above n 68.

⁸⁸ IGT, *SME and HWI audits review*, above n 71, Recommendation 4.3.

agent usage amongst Organisation for Economic Co-operation and Development (OECD) countries with approximately 70 per cent of individual taxpayers and 90 per cent of small businesses using their services when engaging with the ATO.⁸⁹ The cost of utilising tax agent services for the lodgement of income tax returns and related professional service is a deductible expense.⁹⁰

Completion of audit

Upon completion of the audit, the ATO will generally issue a finalisation letter to the taxpayer which sets out the ATO's position, the reasons for its decision(s) and details of any proposed adjustments. The finalisation letter should be issued to the taxpayer regardless of whether or not adjustments are proposed or made.

In some audits, the ATO issues a draft decision or position paper to provide taxpayers with the opportunity to comment prior to the position being finalised.

⁸⁹ IGT, *The Australian Taxation Office's services and support for tax practitioners* (2015), p 3.

⁹⁰ It should be noted that tax practitioners providing such a service for a fee must be registered in accordance with the *Tax Agent Services Act 2009*.

5. MORE INTENSIVE AUDITS

Use of more intensive audits

Consistent with the Compliance Model described earlier, the ATO pays particular attention to tax avoidance schemes and conducts compliance activities accordingly. The ATO also investigates the promotion of tax exploitation schemes under a civil penalty regime⁹¹ as well as investigating tax crime.

Where the ATO suspects there may be a risk of dissipation of assets which would frustrate audit outcomes, the ATO may undertake audits covertly, without notice or communication with the taxpayer. Such audits typically rely upon third party information and the taxpayer is only notified after the audit decision has been made. It is open for the taxpayer to challenge the audit decision in objection or through appeal processes.

The ATO also conducts compliance activities covertly in conjunction with other government agencies to target serious non-compliance, phoenix activity and organised crime.

Taxpayers' right to silence

As previously discussed, taxpayers may choose not to engage in audit or other compliance activities, however, they risk adjustments being made on the basis of other information and the imposition of potentially higher penalties. Where formal information gathering powers are used, non-compliance may result in criminal prosecution.⁹²

Entering taxpayers' premises, seizure of documents and access to bank information

The ATO has strong statutory information gathering powers for the purpose of audits. The exercise of these powers is an administrative decision and does not require judicial authorisation. This includes the ATO's use of these powers to access a taxpayer's premises and make copies of documents or obtain information from banks or other third parties.⁹³ Criminal sanctions may apply where there is non-compliance with the information gathering powers.⁹⁴

The ATO's information gathering powers allow it to access and copy relevant electronic information. Seizing computers is not permitted unless by consent or where a warrant is executed in relation to possible criminal activity.

⁹¹ *Taxation Administration Act 1953*, Part IVA.

⁹² *Taxation Administration Act 1953*, s 8C.

⁹³ *Australia and New Zealand Banking Group Ltd v Konza* [2012] 2012 FCA 196; *Australia and New Zealand Banking Group Ltd v Konza* [2012] FCAFC 127.

⁹⁴ *Taxation Administration Act 1953*, s 8C.

The ATO may also access taxpayer premises in conjunction with other government agencies as part of a government task force. For example, “Project Wickenby” was established in 2006 as a cross-agency task force to target international tax evasion and involved a number of agencies including the Australian Transaction Reports and Analysis Centre, the Australian Federal Police as well as the ATO.⁹⁵ Such task forces may have expanded powers, through specific legislation. For example, in relation to Project Wickenby, a specific exception was enacted to allow the disclosure of protected information for law enforcement and related purposes.⁹⁶

Interception of communications

The ATO may be able to access intercepted communications where a warrant has been obtained.⁹⁷ This access is limited to stored or historical communications. In a recent report of the Joint Committee on Law Enforcement, it has been recommended the ATO also be given access to real-time intercepted communications;⁹⁸ however, legislative change would be needed to give effect to this recommendation.

Timeframes of invasive techniques

The current formal information gathering powers do not impose timeframe restrictions on when the Commissioner may exercise those powers and the extent of the information which may be sought.

⁹⁵ ATO, *Project Wickenby*, (10 September 2014) <www.ato.gov.au>.

⁹⁶ *Taxation Administration Act 1953*, Sch 1, s 355-70.

⁹⁷ *Telecommunications (Interception and Access) Act 1979*, s 110.

⁹⁸ Senate Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Financial Related Crime* (7 September 2015), para [3.7]-[3.10] and [3.34].

6. REVIEW AND APPEALS

Internal review

The ATO provides for informal and formal avenues of internal review of its decisions. Where the ATO has adjusted a taxpayer's return as a result of a data matching audit, the taxpayer may dispute the adjustment by contacting the data matching audit area and seeking internal review of the decision. If the reviewing officer is satisfied with the information provided, the adjustment may be reversed in part or in full without requiring a formal review.

Taxpayers with turnover exceeding \$250 million may request informal reviews of audit decisions through processes such as "Independent Review".⁹⁹ The ATO also offers an in-house facilitation service.¹⁰⁰ This involves a trained facilitator who has had no involvement in the matter previously facilitating a discussion between the ATO and the taxpayer. This may result in resolution of all or part of the dispute.¹⁰¹ Taxpayers may request these forms of internal review by emailing the relevant areas within the ATO.

Taxpayers may also seek mediation with the ATO with the assistance of an external Alternative Dispute Resolution practitioner. Mediation can be voluntarily initiated at any time.¹⁰²

A taxpayer may formally dispute a decision, such as an amendment resulting from audit or certain penalties, by lodging an objection as legislated in Part IVC of the TAA 1953. Electronic lodgement of objections is limited to businesses and tax practitioners on behalf their taxpayer clients.¹⁰³

Until recently, most objections were considered within the same Compliance business line that undertook the audit, but in a separate business team from the audit team. This gave rise to stakeholder concerns of a lack of independence of such decisions.¹⁰⁴ In July 2013, the ATO separated its objection function for large business taxpayers to a law area completely separate from the accountability of the audit areas. Since 1 July 2015, this separation applies to all objections.

The IGT's Alternative Dispute Resolution¹⁰⁵ and Tax Disputes¹⁰⁶ reviews have contributed to the shaping of the above current practices of the ATO; these include the ATO's adoption of

⁹⁹ ATO, *Independent review of the Statement of Audit Position for entities with turnover greater than \$250m*, (3 December 2014) <www.ato.gov.au>.

¹⁰⁰ IGT, *ADR review*, above n 41, pp 44–45.

¹⁰¹ ATO, *In-house facilitation*, (19 November 2015) <www.ato.gov.au>.

¹⁰² ATO, *ATO plain English guide to alternative dispute resolution* (1 June 2015) <www.ato.gov.au>.

¹⁰³ ATO, *How to object to a decision*, (26 November 2015) <www.ato.gov.au>.

¹⁰⁴ IGT, *ADR review*, above n 41, pp 99–107.

¹⁰⁵ *Ibid*, pp 105–107.

¹⁰⁶ IGT, *The management of tax disputes* (2015), pp 115–120.

IGT recommendations to establish the in-house facilitator and independent review functions as well as increase the level of independence between the original decision makers and those managing the objections process.

External right of appeal

Where the taxpayer is dissatisfied with the objection decision, or a part thereof, they may seek a merits review of the decision in the AAT¹⁰⁷ or appeal to the Federal Court of Australia.¹⁰⁸ Appeals from the AAT to the Federal Court are also possible in limited circumstances.¹⁰⁹ In proceedings in the AAT and the Federal Court, the taxpayer has the onus of establishing that the ATO's assessment was excessive, requiring evidence to substantiate the alternative.

In hearings before the AAT and the Federal Court, the taxpayer has a right to be represented and to have sufficient opportunity to present their case in accordance with principles of natural justice.

Timeframe of reviews and appeals

In the case of an income tax assessment which has been adjusted by the ATO, the objection must be lodged by the later of:

- 60 days since the amended assessment; or
- prior to expiry of period of review of the original assessment.¹¹⁰

The period of review applicable to a majority of individuals and small business is 2 years from the date of assessment. There are exceptions to this, such as a 4 year period of review where income from trusts is involved. If a taxpayer wishes to object outside of these timeframes, they may ask the ATO for an extension of time to consider their objection in writing.¹¹¹ This can be lodged simultaneously with the objection.

The ATO has provided a service commitment to finalise 70 per cent of objections within 56 calendar days of all required information being lodged.¹¹²

After lodging an objection, if the Commissioner has not made a decision within 60 days, a taxpayer may give the Commissioner a notice in writing requesting the Commissioner to make a decision. If one is not made within 60 days, the Commissioner is taken to have made a decision to disallow the objection.¹¹³

¹⁰⁷ *Taxation Administration Act 1953*, Div 4.

¹⁰⁸ *Taxation Administration Act 1953*, Div 5.

¹⁰⁹ *Administrative Appeals Tribunal Act 1975*, s 44.

¹¹⁰ *Income Tax Assessment Act 1936*, s 170.

¹¹¹ *Taxation Administration Act 1953*, s 14ZX; ATO, *How to treat a request to lodge a late objection*, PS LA 2003/7 (2003).

¹¹² ATO, *Current year performance*, (24 November 2015) <www.ato.gov.au>.

¹¹³ *Taxation Administration Act 1953*, s 14ZYA.

To appeal an objection decision in the AAT or the Federal Court, the taxpayer must lodge their application or appeal within 60 days after notice of the decision is served.¹¹⁴

The AAT aims to finalise 75 per cent of applications in its Taxation Appeals Division within 12 months of the application being lodged.

The Federal Court aims to improve the determination of tax disputes in a timely manner. Generally, the Court aspires to complete 85% of cases within 18 months of filing. The Federal Court has also released a practice note specific to its tax list to promote a consistent and efficient approach to tax disputes.¹¹⁵ Measures introduced to expedite tax proceedings include the use of a pro forma questionnaire to better identify areas of disputation as well as imposing timeframes for filing and serving documents.¹¹⁶

Payment of taxes during appeal

The Commissioner of Taxation is empowered to pursue debt recovery action whilst an appeal is on foot.¹¹⁷ However, the ATO has indicated that debt recovery action is generally not pursued in respect of disputed debts unless the ATO forms an opinion that there would be a risk to revenue if recovery action was not commenced. In such instances, the ATO may exercise its discretion to defer recovery if the taxpayer:

- enters into an acceptable payment arrangement;
- offers security for the debt;
- enters into an arrangement whereby 50 per cent of the disputed debt is paid pending the outcome of the appeal; or
- enters into an agreement which combines the above.

Debt recovery action by the ATO is more generally discussed below in section 8.

Legal assistance

The AAT is a no-costs jurisdiction and taxpayers are not required to pay the costs even when they are unsuccessful. A lower application fee also applies for certain tax disputes, including disputes involving a tax liability of less than \$5,000 or some decisions relating to release of debt on grounds of hardship.¹¹⁸ Furthermore, some taxpayers can apply for a waiver of the filing fee.¹¹⁹

¹¹⁴ *Taxation Administration Act 1953*, ss 14ZZC and 14ZZN.

¹¹⁵ Federal Court of Australia, *Practice Note TAX 1*, (1 August 2011) <www.fedcourt.gov.au>.

¹¹⁶ *Ibid*, para [4.2].

¹¹⁷ *Taxation Administration Act 1953*, ss 14ZZM and 14ZZR.

¹¹⁸ Administrative Appeals Tribunal Regulation 2015, Reg 20(2).

¹¹⁹ Administrative Appeals Tribunal Regulation 2015, Reg 22.

Similarly, the Federal Court has mechanisms which may exempt parties from paying filing fees in certain circumstances.¹²⁰ However, unlike the AAT, the unsuccessful party in the Federal Court may be ordered to pay the costs of the other party.¹²¹ The amount of costs which can be awarded must accord with the Court's rules.¹²²

In both forums, the taxpayer would be required to pay the fees associated with any professional advice or representation during proceedings.

The ATO may also provide funding in limited cases for example where it would be in the public interest to obtain judicial clarification in an uncertain area of tax law. In these cases, the taxpayer may apply to the ATO for test case litigation funding or, alternatively, the ATO may offer it directly. Such funding would ordinarily cover the costs of professional representation and may also include agreements by the ATO not to seek any adverse costs orders should the taxpayer be unsuccessful.¹²³

Hearings and tax judgments

Generally, as matters of public record, tax judgments are published in support of principles of open justice.¹²⁴ However, the Court is empowered to make orders for the suppression or non-publication of judgments or certain information.¹²⁵

¹²⁰ Federal Court and Federal Circuit Court Regulation 2012, Div 2.3.

¹²¹ Federal Court Rules 2011, Rule 40.02.

¹²² Federal Court Rules 2011, Sch 3.

¹²³ ATO, *Test case litigation*, (29 January 2015) <www.ato.gov.au>.

¹²⁴ *Federal Court of Australia Act 1976*, s 37AE.

¹²⁵ *Federal Court of Australia Act 1976*, s 37AF.

7. CRIMINAL AND ADMINISTRATIVE SANCTIONS

Tax penalties

Administrative penalties are imposed on taxpayers to deter non-compliant behaviour in meeting their various tax obligations such as the requirement to register, lodge, report or make prompt payment. The ATO may exercise its discretion to weigh relevant facts and remit penalties where appropriate, in whole or in part.¹²⁶ Depending on the type of penalty, the base amount imposed may depend on factors prescribed in legislation such as how late the required document has been lodged or the ATO's assessment of the taxpayers' conduct.

Where penalties are applied to shortfall amounts as a result of a false or misleading statement by the taxpayer, the base penalty may be 25, 50 or 75 per cent of the shortfall amount, depending on the level of care or intention attributed to the taxpayer. The base penalty amount may be reduced where the taxpayer has applied the law in accordance with advice or guidance provided by the ATO.

There may be circumstances which increase or decrease the amount of base penalty. An additional 20 per cent to the penalty may apply where:

- the taxpayer prevented or obstructed the ATO from finding out about the shortfall amount or the false or misleading statement; or
- the taxpayer became aware of the shortfall amount or the false or misleading nature of a statement after the statement was made and did not tell the ATO about it within a reasonable time.¹²⁷

A taxpayer is not liable to a false or misleading statement penalty where, although they made an error, they took reasonable care.¹²⁸ In practice, this decision may be made when the ATO considers remission of a penalty. Taxpayers who make a genuine attempt to report correctly will generally not be penalised.¹²⁹

It is generally expected that the taxpayer would not be penalised twice for the same transgression in respect of the same tax lodgement period. However, similar transgressions

¹²⁶ *Taxation Administration Act 1953*, Sch 1, s 298-20.

¹²⁷ IGT, *Review into the ATO's administration of penalties (Penalties review)* (2014), pp 13–14; *Taxation Administration Act 1953*, Sch 1, s 284-220(1).

¹²⁸ *Taxation Administration Act 1953*, Sch 1, s 284-75(5). Also, under subsection 284-75(6) the taxpayer is not liable when a tax practitioner makes a false or misleading statement on their behalf provided the statement was not made intentionally or recklessly and the taxpayer provided the tax agent with all relevant information.

¹²⁹ ATO, *Administration of penalties for making false or misleading statements that result in shortfall amounts*, PS LA 2012/5 (2012), para [156]–[157].

which are found to be repeated across different periods may result in an increase of the base penalty by 20 per cent.¹³⁰

The base penalty amount may be decreased where the taxpayer makes a voluntary disclosure, which is discussed below.

In a recent review, the IGT has considered whether the current penalty regime adequately fosters voluntary compliance. In particular, he has recommended consideration be given to further stratification of the penalties regime to ensure that there is sufficient differentiation between types of taxpayer behaviour and consistent treatment of taxpayers in similar circumstances.¹³¹

The ATO is currently working on a project to explore how it can create a penalty and incentives framework that influences future compliance behaviour. Consideration is being given to possible penalty and interest ideas that will strengthen the quality and fairness of the ATO's administrative penalty decision making.

Where criminal prosecution for a taxation offence under the TAA 1953 is instituted, any administrative penalty associated to the same course of conduct is no longer payable.¹³² Furthermore, the Court is prevented from making a civil penalty if the entity has been convicted of offences constituted by the same conduct.¹³³

In cases of fraud, the ATO can either seek to recover the unpaid tax through the assessment process or seek reparation orders in court proceedings.¹³⁴

Voluntary disclosures

Typically, voluntary disclosures made by taxpayers in seeking an amended assessment may result in significant reductions to the level of penalties and interest which may be otherwise imposed.¹³⁵ Where the taxpayer voluntarily discloses a tax shortfall with sufficient information for the ATO to determine the shortfall amount, the base penalty amount may be reduced by 80 per cent. The penalty may be reduced to nil if the shortfall amount is small.

In certain instances, such as "Project DO IT", the ATO has adopted a more lenient approach to penalties as an incentive for the voluntary disclosures.¹³⁶

As previously discussed, the base penalty for a false or misleading statement may be increased where the taxpayer becomes aware of a shortfall or a false or misleading statement and does not inform the Commissioner or another entity.¹³⁷ Furthermore, where the ATO

¹³⁰ *Taxation Administration Act 1953*, Sch 1, s 284-220(2).

¹³¹ IGT, *Penalties review*, above n 127, pp 38-41.

¹³² *Taxation Administration Act 1953*, s 8ZE.

¹³³ *Taxation Administration Act 1953*, Sch 1, s 298-90.

¹³⁴ *Crimes Act 1914*, s 21B.

¹³⁵ *Taxation Administration Act 1953*, Sch 1, s 284-225.

¹³⁶ ATO, *Targeting tax crime: Project DO IT – October 2014*, (30 October 2014) <www.ato.gov.au>.

¹³⁷ *Taxation Administration Act 1953*, Sch 1, s 284-220(1).

uses its formal information gathering powers, non-compliance by the taxpayer carries the possibility of significant sanctions.

The IGT has observed that the ATO could better engender taxpayer behavioural change by utilising alternative approaches to penalties.¹³⁸ For example, the ATO may be able to better influence taxpayer behaviour where the deterrent effect of penalties is coupled by educational efforts, carefully tailored persuasive communication or rewards.¹³⁹ The ATO has confirmed that it is developing and applying new procedures and approaches to affect behavioural change in taxpayers.

¹³⁸ IGT, *Penalties review*, above n 127, Recommendation 2.1(b).

¹³⁹ See IGT, *Penalties Review*, above n 127, p 6 which refers to:

Franklin Zimring, *Perspectives on Deterrence* (1971); Franklin Zimring and Gordon Hawkins, 'Deterrence: the Legal Threat in Crime Control' (1973) 3(5) *Contemporary Sociology* 454; Ann Witte and Diane Woodbury, 'The Effect of Tax Laws and Tax Administration on Tax Compliance' (Working Paper, 1983); Richard Schwartz and Sonya Orleans, 'On Legal Sanctions' (1967) 34 *The University of Chicago Law Review* 274.

8. ENFORCEMENT OF TAX

Payment arrangements

The ATO has shown a willingness to accept payment of debts by instalments through entering into such arrangements with taxpayers where immediate full payment is not possible.¹⁴⁰ However, interest will generally continue to accrue on the amount of debt outstanding notwithstanding the existence of such an arrangement. The IGT has observed that use of payment arrangements may be improved with the increased commercial awareness of staff and refinement of tools to assist in determining the viability and capacity of a taxpayer to fulfil an acceptable payment arrangement.¹⁴¹

Extensions of time, remission of interest and serious hardship

The Commissioner may agree to defer debt recovery action in some circumstances.¹⁴² Generally, demands for payment will not be deferred unless the taxpayer can demonstrate circumstances which are beyond their control and that they have attempted to mitigate those circumstances. Consideration will also be given to the taxpayer's capacity to make full payment of debt at a later time and that other ongoing tax liabilities will be duly paid.¹⁴³

While the General Interest Charge (GIC) is imposed by the tax laws, and is regarded as part of a debt owed, the ATO may also consider taxpayer applications to reduce or remit the amount of GIC. The ATO has recognised that, following research into behavioural attitudes of debtors and analytics projects, remission of interest may assist in avoiding a "tipping point" where the imposition of interest makes the debt unmanageable and sanctions cease have an impact in recovering the debt.¹⁴⁴ The IGT has encouraged this approach to improve taxpayer engagement as part of a strategy to encourage prompt payment of debts.¹⁴⁵ The ATO is, however, mindful that any remission needs to be consistent with the policy intent of the GIC regime and that taxpayers who pay on time do not perceive that those taxpayers who do not pay on time are receiving an unfair financial advantage through the remission of GIC.¹⁴⁶

The current tax legislation empowers the Commissioner to release individual taxpayers from some debts owing on grounds of "serious financial hardship".¹⁴⁷ Whilst serious financial hardship is not defined in legislation, the ATO's guidance on the issue suggests that such hardship may be demonstrated where taxpayers can show that the provision of

¹⁴⁰ *Taxation Administration Act 1953*, Sch 1, s 255-15.

¹⁴¹ IGT, *Debt collection* (2015), pp 79-86, Recommendation 3.1.

¹⁴² *Taxation Administration Act 1953*, Sch 1, s 255-10; ATO, *General debt collection powers and principles*, PS LA 2011/14 (2011), Annexure A.

¹⁴³ *Ibid.*

¹⁴⁴ IGT, *Debt collection*, above n 141, pp 64-66.

¹⁴⁵ *Ibid.*, p 94, Recommendation 3.3.

¹⁴⁶ ATO, *Remission of General Interest Charge*, PS LA 2011/12 (2011), section 4.

¹⁴⁷ *Taxation Administration Act 1953*, Sch 1, Div 340.

food, accommodation, clothing, medical treatment, education and other basic necessities would be affected by the payment of the debt.¹⁴⁸ It should also be noted that establishing serious financial hardship does not necessarily result in relief from the debt. For example, where a taxpayer owes liabilities to other creditors as well, the ATO may not release the debt as doing so would not remove the hardship on the taxpayer.

The IGT has commented that consultation with other government agencies may be beneficial to more accurately identify cases of serious financial hardship and develop appropriate tools for this purpose.¹⁴⁹

As a final avenue of recourse, taxpayers may also apply directly to the Department of Finance for a waiver of any debts owing to the Commonwealth.¹⁵⁰

Seizing assets

The ATO has the power to seize funds in taxpayer bank accounts or intercept monies owing by third parties to taxpayers through the use of garnishee notices.¹⁵¹ A decision to issue such a notice does not require judicial authorisation. In its guidance on the use of garnishee notices, the ATO has indicated that it would not generally issue garnishee notices for the totality of funds held in bank accounts¹⁵² or in circumstances where it is aware that the taxpayer's sole source of income is from government pensions.¹⁵³

The ATO has also published guidance regarding its use of warrants of execution to seize taxpayer assets in enforcing court judgments for unpaid tax debts.¹⁵⁴ After the ATO has obtained judgment in respect of a tax debt, it may request the court to issue a warrant of seizure to authorise a sheriff or bailiff of the court to seize and, if necessary, auction the property of the debtor taxpayer. The proceeds of the seizure may be used to satisfy the judgement debt owed by the taxpayer to the ATO. However, the ATO's guidance also indicates that it may be preferable to commence insolvency proceedings in certain cases where other creditors are involved.

The ATO may also seek a freezing order, also known as a "Mareva injunction", from a court to prevent a taxpayer from accessing and dealing with their money or assets.¹⁵⁵ A freezing order may be sought where there is an unacceptable risk that the taxpayer will dissipate their assets so that the anticipated judgement debts will remain unpaid.¹⁵⁶

¹⁴⁸ ATO, *Debt relief*, PS LA 2011/17 (2011), para [23]-[25].

¹⁴⁹ IGT, *Debt collection*, above n 141, p 90, Recommendation 3.2.

¹⁵⁰ Department of Finance, *Waiver of debt mechanism* (16 June 2015) <www.finance.gov.au>.

¹⁵¹ *Taxation Administration Act 1953*, Sch 1, Div 260.

¹⁵² IGT, *Debt collection*, above n 141, p20.

¹⁵³ ATO, *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts*, PS LA 2011/18 (2011), para [111].

¹⁵⁴ *Ibid*, Annexure E.

¹⁵⁵ *Mareva Compania Naviera SA v International Bulkcarriers SA [the Mareva]* [1975] 2 Lloyd's Rep 509.

¹⁵⁶ IGT, *Debt collection*, above n 141, pp 22-23; ATO, PS LA 2011/18, above n 153, Annexure F.

Bankruptcy

Taxpayers are permitted a certain period of time upon receiving relevant bankruptcy and insolvency notices to engage with the ATO to address the debt, before proceedings for bankruptcy or winding up of companies commences.¹⁵⁷ This is in addition to the powers to defer debt recovery, entering into payment arrangements, provide release or accept a compromised amount.

The ATO does not generally have a policy of avoiding bankruptcy action where it considers that such action may be necessary. However, the IGT has observed that, in its Debt Strategy 2014-18, the ATO has undertaken to reduce outstanding taxes by focusing on the prevention of unresolved debt from arising. This focus departs from previous debt management strategies where steps to collect debt were generally taken after the debt became overdue.¹⁵⁸ This is consistent with the previously mentioned behavioural and attitudinal research undertaken by the ATO to identify areas where earlier engagement can be improved.

Natural disasters

The ATO recognises the need to help taxpayers in the event of natural disasters. In these circumstances, affected taxpayers may be provided with more time to meet their lodgement and payment obligations, have penalties or interest waived or have refunds expedited.¹⁵⁹ To better identify taxpayers in need of assistance following a major natural disaster, the ATO circulates alerts and establishes indicators on the accounts of those who may be affected for frontline staff to assist accordingly.

¹⁵⁷ IGT, *Debt collection*, above n 141, p 28. For example, agreements under Part IX and Part X of the *Bankruptcy Act 1966*.

¹⁵⁸ *Ibid*, pp 50-59.

¹⁵⁹ ATO, *People affected by natural disasters*, (5 July 2013) <www.ato.gov.au>.

9. CROSS-BORDER PROCEDURES

Australia interacts with various foreign revenue agencies to improve tax transparency and combat tax avoidance at the international level. It is party to tax agreements with over 100 jurisdictions, which includes sharing data, intelligence and approaches to compliance.¹⁶⁰ Set out below are descriptions of these interactions. The IGT is presently considering aspects of these interactions, namely information exchange, as part of the review into taxpayer protections.¹⁶¹

Double Tax Agreements

Australia, through the Department of the Treasury (the Treasury), negotiates double taxation agreements or double tax conventions with foreign jurisdictions for the right to taxation in cross-border economic activity to protect taxpayers from double-taxation of earnings.¹⁶² These agreements also include provisions for the exchange of taxpayer information between jurisdictions and periodic bulk information exchange, known as automatic exchange of information.¹⁶³ Information exchange provisions typically impose similar requirements of confidentiality and secrecy as if the information was obtained domestically. The automatic exchange of information may be made electronically or physically and may be protected by an encryption algorithm.¹⁶⁴

Double taxation agreements or conventions also provide taxpayers with avenues of dispute resolution by mutual agreement procedures (MAPs), which is discussed further below.

Tax Information Exchange Agreements

Australia is also party to taxation information exchange agreements (TIEAs) with non-OECD participating partner countries to exchange information for the administration and enforcement of their respective domestic tax laws, both criminal and civil. Information may only be provided when requested by the other jurisdiction. TIEA partners must have legal and administrative frameworks in place to support their commitment to exchange information. The information exchanged must be about a specific taxpayer currently under investigation.¹⁶⁵

¹⁶⁰ Commissioner of Taxation, 'Annual report 2014–15', above n 52.

¹⁶¹ IGT, *Review into the Taxpayers' Charter and taxpayer protections: Terms of reference & submission guidelines* (2 November 2015) <www.igt.gov.au>.

¹⁶² ATO, *What are tax treaties?* (13 August 2014) <www.ato.gov.au>.

¹⁶³ Australian National Audit Office, *The Management and Use of Double Taxation Agreement Information Collected through Automatic Exchange – Audit Report* (2010).

¹⁶⁴ *Ibid.*

¹⁶⁵ ATO, *Tax information exchange agreements – overview* (13 August 2014) <www.ato.gov.au>.

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention)¹⁶⁶ is the most recent addition to Australia's international tax information sharing arrangements. Australia is one of 91 signatories to the Convention. The Convention covers a wide range of assistance between parties, including exchange of information and assistance in recovery and service of documents. The large number of signatories to the Convention has significantly expanded Australia's ability to exchange information and collect, or assist in the collection of, tax globally.

Joint International Tax Shelter Information and Collaboration Network

The Joint International Tax Shelter Information and Collaboration (JITSIC) network focusses specifically on cross border tax avoidance and working together across various collaborative projects and compliance initiatives. JITSIC is open to all OECD Forum on Tax Administration members on a voluntary basis. At the start of 2014, the network had a membership of nine countries. Now, over 30 member jurisdictions have made a commitment to the network to improve exchange of information, cross border collaboration and multilateral actions. The ATO reports that information exchanged between JITSIC revenue authorities is increasing, indicating a greater role for JITSIC in cross-border compliance activity.¹⁶⁷

Judicial authorisation

As set out above, the ATO's formal information gathering powers allow it to obtain information from third parties without judicial authorisation.¹⁶⁸ However, these powers may be subject to challenge in the Federal Court. In addition, cross-border information received through the channels discussed above may be accessed without the need for judicial approval.

Stolen or illegally obtained information

The use of alleged stolen or illegal information in the conduct of compliance activities and whether assessments rendered using such information is tainted by maladministration has been considered by the Federal Court in two related cases.¹⁶⁹ In those cases, the Court found that the Commissioner was able to rely on the information provided and that the assessments issued were not tainted by maladministration.

¹⁶⁶ Organisation for Economic Co-operation and Development (OECD), *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (2011).

¹⁶⁷ ATO, *About JITSIC* (18 February 2009) <www.ato.gov.au>.

¹⁶⁸ *Taxation Administration Act 1953*, Sch 1, ss 353-10 and 353-15.

¹⁶⁹ *Kevin Denlay v Commissioner of Taxation* [2010] FCA 1434; *Mirja Denlay v Commissioner of Taxation* [2010] FCA 1435.

Mutual Agreement Procedures (MAPs)

All of Australia's double taxation agreements include a provision which enables taxpayers to seek assistance to initiate a MAP for the resolution of double taxation disputes.¹⁷⁰ The ATO invites taxpayers wishing to take such action to approach it directly.¹⁷¹

The MAP process is generally initiated by the presentation of the case by the taxpayer to the competent authority of the taxpayer's country of residence, who then considers whether the request is accepted and scheduled for action. The second stage concerns the dealings between the two countries, with the country of the original request acting as a 'defender' of the claim.¹⁷²

Pursuant to the 2013 G20/OECD Base Erosion and Profit Shifting (BEPS) Action Plan,¹⁷³ the OECD recently released the final report on "Action 14 – Making Dispute Resolution Mechanisms More Effective"¹⁷⁴ which discusses a minimum standard and best practice to be adopted in MAPs. The ATO is reviewing and updating internal and external guidance to clearly articulate Australia's position and reflect global best practice.

¹⁷⁰ ATO, *Income tax: international transfer pricing transfer pricing and profit reallocation adjustments, relief from double taxation and the Mutual Agreement Procedure*, 'TR 2000/16' (2000), para [4.1].

¹⁷¹ ATO, *Large business and tax compliance publication*, above n 35.

¹⁷² IGT, *Transfer pricing review*, above n 33, para [1.222].

¹⁷³ OECD, *Action Plan on Base Erosion and Profit Shifting* (2013).

¹⁷⁴ OECD, *Making Dispute Resolution Mechanisms More Effective – Action 14: 2015 Final Report* (2015).

10. LEGISLATION

Retrospective tax legislation

Australia generally does not enact tax legislation with retrospective impact, but has done so historically in limited circumstances. For example, in 2010 and 2012 legislation was introduced which affected rights to future income assets held within a number of companies which were part of a consolidated group for tax purposes. The application of these rules had retrospective effect, with different rules applying depending on when an entity joined the consolidated group.¹⁷⁵

Retrospective legislation may be subject to scrutiny in the Senate and limits may apply to the retrospectivity of some taxation bills.¹⁷⁶ Importantly, Government announcements of intended law change can take many years to be enacted, which can give rise to challenges.¹⁷⁷

Where intended legislation with retroactive impact has been enacted, the ATO must administer the law as it stands until the new law comes into effect. In its administration of such laws, the ATO's guidance acknowledges that where taxpayers have relied on private rulings issued under the previous law, it would not seek to disturb those rulings.¹⁷⁸ In this way, the Commissioner would be bound to assess taxpayers' liabilities in accordance with those rulings.

Discussion of the retrospective or delayed interpretations of tax law by the ATO and protections available to taxpayers in these circumstances is discussed below in section 11.

Public consultation

The Australian Government adopts a consultative approach to improving the development of tax legislation, with the potentially rare exception of those laws directed at addressing the integrity of tax system. It relies on the expertise and experience of private sector practitioners and representative bodies to inform policy development. In addition, the Government has also established the Board of Taxation which comprises private sector tax experts as well as senior executives from the public service to advise on a range of tax policy matters.¹⁷⁹

A tri-partite approach is taken in law design consisting of the ATO, the Treasury and private sector experts. The IGT has previously supported such an approach and has made

¹⁷⁵ *Tax Laws Amendment (2010 Measures No 1) Act 2010; Tax Laws Amendment (2012 Measures No 2) Act 2012*. See also *IOOF Holdings Ltd v Federal Commissioner of Taxation* [2014] FCAFC 91.

¹⁷⁶ The Senate, Parliament of Australia, *Standing Orders and other orders of the Senate*, Continuing Order C40, p139.

¹⁷⁷ Tax Design Review Panel, *Better Tax Design and Implementation* (2008).

¹⁷⁸ IGT, *Review into delayed or changed Australian Taxation Office views on significant issues ("U-turns" review)* (2010), p 13.

¹⁷⁹ IGT, *Self assessment review*, above n 37, pp 123–126.

recommendations in this regard.¹⁸⁰ The ATO has defined its role in tax law design as to provide advice to the Treasury on the administrative and interpretive aspects of the proposed laws.¹⁸¹

Furthermore, the Tax Issues Entry System (TIES) is an initiative managed jointly by the ATO and the Treasury which provides the public the opportunity to participate in the care and maintenance of tax laws. This includes technical or drafting defects in the tax law as well as anomalies which may result in unintended outcomes.¹⁸²

¹⁸⁰ Ibid, pp 127–130.

¹⁸¹ ATO, *The ATO's role in tax law design and expressing ATO views as part of the law design process*, PS LA 2013/4 (2013).

¹⁸² The Treasury, *Making the tax system work better for everyone* (2015) <www.ties.gov.au>.

11. REVENUE AUTHORITY PRACTICE AND GUIDANCE

Taxpayer access to legal materials and rulings

The ATO maintains a database (ATOlaw) that is made available to the public through its website.¹⁸³ The database includes tax-related legal materials as well as rulings and other guidance. Private binding rulings are also made available through the ATO website in a redacted form to protect the anonymity of the original taxpayer requesting it.

In addition, publicly available legal materials including case law and legislation are accessible through free online services such as www.austlii.edu.au and www.comlaw.gov.au. The latter is a government service which provides up-to-date versions of enacted legislation and regulations as well as bills, explanatory memoranda and other associated documentation.

Retrospective application of revenue authority guidance

Where taxpayers rely on private rulings, they are protected against changes in the law or the ATO's administration of those laws, as set out above. However, where there is no such ruling and the taxpayer has relied on other forms of guidance or where it is believed that the ATO has acquiesced to the practice, there may be a lower degree of protection. It is possible that taxpayers who adopt a practice in accordance with such guidance may find themselves subject to changes in tax liability, where the ATO subsequently changes its approach. However, in some circumstances there may be protection from penalties and interest where the taxpayer can establish reasonable care was taken. In other circumstances, where the ATO considers that the taxpayer has taken reasonable care and the position adopted constitutes a reasonably arguable position, protections may be available.

In 2010, the IGT examined the impact on taxpayers where the ATO changes or delays its views on significant issues (so-called 'U-turns').¹⁸⁴ Following that review, the ATO issued a practice statement which set out its approach in such circumstances and a process whereby it would determine whether any changed views would be applied prospectively only, in particular by considering whether previous publications and conduct could reasonably provide an alternate interpretation of the law.¹⁸⁵ The IGT undertook a further review in 2014 to reconsider the matter and made further recommendations for the ATO to ensure the practice statement and other guidance materials are consistently followed.¹⁸⁶

¹⁸³ ATO, *ATOlaw*, (2015) <www.ato.gov.au>.

¹⁸⁴ IGT, *"U-turns" review*, above n 178.

¹⁸⁵ ATO, *Determining whether the ATO's views of the law should be applied prospectively only*, PS LA 2011/27 (2011).

¹⁸⁶ IGT, *Follow up review into delayed or changed Australian Taxation Office views on significant issues* (2014), Recommendations 2.1 and 2.2.

12. INSTITUTIONAL FRAMEWORK FOR PROTECTING TAXPAYERS' RIGHTS

Taxpayers' Charter

In 1997, the ATO published Taxpayers' Charter which sets out the level of service that taxpayers can expect from the ATO as well as their obligations. This followed a recommendation of the Joint Committee of Parliamentary Accounts as a means to address concerns of an imbalance of power between taxpayers and the ATO, namely for the ATO to "clearly, concisely, accurately and consistently advise taxpayers of their duties and rights".¹⁸⁷ The Charter was revised and republished in 2003 and again in 2007.

Whilst the Charter refers to "rights" and "obligations", it is more accurately described as a set of mutual expectations between the ATO and the taxpayer. The Charter itself is made up of a number of different documents to address different interactions between taxpayers and the ATO, such as that during audits.¹⁸⁸ It predominantly recognises that taxpayers can expect ATO to:¹⁸⁹

1. Treat you fairly and reasonably
2. Treat you as being honest unless you act otherwise
3. Offer you professional service and assistance
4. Accept that you can be represented by a person of your choice and get advice
5. Respect your privacy
6. Keep the information we hold about you confidential
7. Give you access to information we hold about you
8. Help you get things right
9. Explain the decisions we make about you
10. Respect your right to a review
11. Respect your right to make a complaint
12. Make it easier for you to comply
13. Be accountable

In addition, taxpayers have a range of other statutory and common law rights which may include matters such as privacy, FOI, LPP and natural justice.

At the time of writing this report, the IGT is currently reviewing the Taxpayers' Charter and the framework of taxpayers' protections, including taxpayer access to compensation and the protection of taxpayer information in light of developments in cross-border information exchange.¹⁹⁰

¹⁸⁷ Parliamentary Joint Committee of Public Accounts, Parliament of Australia, *An assessment of tax: Report 326*, para [13.16].

¹⁸⁸ ATO, *Taxpayers' Charter – if you're subject of review or audit*, above n 81.

¹⁸⁹ ATO, *Taxpayers' Charter – What you need to know* (2010).

¹⁹⁰ IGT, *Taxpayer protections review*, above n 161.

Scrutiny of the Australian Taxation Office

In its administration of taxation and superannuation systems, the ATO is subject to external scrutiny by:

- the IGT, an independent scrutineer agency specific to the ATO and the Tax Practitioners Board (TPB);
- other government agencies who have a scrutineering role with respect to specific functions of a range of public service agencies; and
- Parliament.

The IGT has been established pursuant to the *Inspector-General of Taxation Act 2003* as an independent specialist scrutineer for the tax administration system. It is staffed with experienced taxation specialists and investigates all matters with the aim of achieving procedural fairness and improving the tax system. It is a separate statutory agency, distinct from the ATO, and interacts directly with the responsible Minister. Such structural separation provides for an increased level of independence and public confidence.

Broadly the IGT has two main roles, namely the conduct of systemic reviews into tax administration matters and the handling of complaints about the ATO and the TPB¹⁹¹.

Since its inception, the IGT has been conducting reviews into systemic tax administration issues with recommendations for improvements being made to Government in relation to policy matters or to the ATO on administrative issues. Reports of these reviews are made public¹⁹² and they cover 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 two currently in progress.¹⁹³

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.¹⁹⁴

In conducting reviews, the IGT invites submissions from the public and interested parties, including taxpayers and industry representative bodies. The IGT is empowered to access the ATO's internal systems, request information and to interview current and former officers to identify and investigate areas for improvement. Discussions with the ATO and interested stakeholders are also held in the process of formulating recommendations for improvement.

¹⁹¹ The TPB is an independent statutory agency responsible for the registration and regulation of tax practitioners in accordance with the *Tax Agent Services Act 2009*.

¹⁹² *Inspector-General of Taxation Act 2003*, s 18.

¹⁹³ IGT, *Review into the ATO's employer obligations compliance activities: Terms of reference & submission guidelines* (29 October 2015) <www.igt.gov.au>; IGT, *Taxpayer protections review*, above n 161.

¹⁹⁴ *Inspector-General of Taxation Act 2003*, s 8.

The IGT commenced handling complaints about the ATO and TPB since 1 May 2015. The investigation of single taxpayer complaints was previously the responsibility of the Commonwealth Ombudsman who handles complaints about federal government agencies more generally. The Government decision to transfer this function to the IGT 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.”¹⁹⁵

The IGT is now a single port of call of taxpayer and tax practitioner complaints or concerns.

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. The IGT cannot direct the Commissioner to take any particular action in respect of a taxpayer nor is resolution possible in every case. However, the IGT seeks to ensure that every complainant is afforded procedural fairness in the handling of their matter.

Through the complaint handling service, the IGT expects to gain real-time insight into emerging issues and move quickly to address problems before they escalate into major causes of taxpayer discontent. This may mean that in future, the IGT undertakes more targeted reviews in an expedited manner to address particular areas where significant complaints have been received.

In relation to the scrutiny of the ATO by other government agencies, the Auditor-General, supported by the Australian National Audit Office (ANAO), conducts performance and financial reporting assessment of the ATO, as well as other public sector entities, to identify broad areas to improve public administration. Since 2006, the ANAO has completed 45 reviews with four currently in progress – two directly on the ATO and two cross-agency audits that include the ATO.

The Commonwealth Ombudsman still retains some limited scrutineering function with respect to the ATO. This includes addressing specific areas such as FOI complaints.

As with other public agencies, the ATO is also subject to Parliamentary scrutiny in the form of annual reporting, periodic hearings and other requests for information and assistance. This includes hearings and inquiries from the House of Representatives Standing Committee on Tax and Revenue.¹⁹⁶

¹⁹⁵ Australian Government, *Budget Measures Budget Paper No 2 2014-15*, (May 2014), p 217.

¹⁹⁶ House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, *Tax Disputes* (26 March 2015).

Organisational structure for the protection of taxpayers' rights

In accordance with principles set out in the Australian Public Service Code of Conduct and Values,¹⁹⁷ all ATO employees are responsible for being alert to potential breaches of taxpayer protections or the Taxpayers' Charter and to report these where appropriate.

Where taxpayers have made a complaint to the ATO and they disagree with the outcome of that complaint, the complaint may be escalated to a separate ATO Complaint and Escalation Review Unit for an independent review. Although this unit operates in specific locations, it is available to taxpayers nationally.

The scrutineering functions, such as the IGT, whilst operating predominantly from a single location, provide a range of channels which enable taxpayers throughout Australia to access their services.

In addition, the AAT and the Federal Court are Federal forums which also have registries that operate in all Australian states and territories.

¹⁹⁷ *Public Service Act 1999*, s 13.