



Australian Government  
Inspector-General of Taxation  
Taxation Ombudsman

# Submission to the Attorney-General's Department

Commonwealth Integrity Commission Consultation Draft

By the Inspector-General of Taxation

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# Executive Summary

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) welcomes the opportunity to provide comments and submissions to the Attorney-General's Department's (AGD) as part of the consultation on the Commonwealth Integrity Commission, namely, exposure drafts of:

- the Commonwealth Integrity Commission Bill 2020 (CIC Bill); and
- the Integrity and Anti-Corruption Legislation Amendment (CIC Establishment and Other Measures) Bill 2020 (IALA Bill).

We support the introduction of the CIC and expect that it will play a significant role in enhancing Australia's integrity arrangements and building trust and confidence in the Australian community.

It is pleasing to observe the extensive level of consultation being undertaken in establishing the CIC and the supporting legislative framework – to ensure the model works appropriately and as intended. Administrative issues arising from poor law design and unintended or unexpected outcomes can undermine the perceived effectiveness of the new agency and confidence in the Government's commitment to combat corruption.

We trust these observations and submissions are of assistance.

A brief introduction to the Inspector-General of Taxation and Taxation Ombudsman (IGTO) – being both the office holder and the agency – is set out in the Introduction, which follows.

The Inspector-General is named in the CIC Bill as a Commonwealth Integrity Office Holder and, together with her officers, the IGTO agency is named as a Commonwealth Integrity Agency.

Our submission does not make (or intend to make) comment on the appropriateness of the policy reforms set out in the CIC Bill and the IALA Bill. Rather, we have confined our comments to practical implementation issues which may arise in areas of tax administration for the AGD's consideration to ensure that the objects of the CIC are realised and the system operates effectively and efficiently. Our submission canvasses a range of issues (in Parts), which are set out below in summary form.

## **Part A - The envisaged role of the CIC and its interaction with the PID Scheme**

In its current form, the CIC Bill creates potential administrative implementation risks for the effective and efficient operation of the referral mechanisms designed to provide the CIC with key information to commence investigations into 'corruption issues'. More specifically, the term 'corruption' used to establish whether a person 'engages in corrupt conduct' pursuant to paragraph 17(1)(c) is not free from ambiguity and may be a source of confusion as to the necessary elements required to demonstrate 'corrupt' conduct in the context of law enforcement agencies.

To address these risks, the IGTO recommends that the AGD consider whether a definition of 'corruption' should be introduced for the purposes of paragraph 17(1)(c) to ensure agencies' compliance with their notification and referral obligations under the Bill. The AGD should also consider providing further

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explanatory materials prior to the commencement of operation of the CIC Bill so that partner agencies, such as our own, clearly understand the type and nature of conduct needing to be investigated and referred. The IGTO notes that the bifurcation and distinction between the Australian Taxation Office (**ATO**) which is defined as a law enforcement agency, and the Tax Practitioners Board (**TPB**), which is a public sector agency under the CIC Bill creates some practical implementation complications. This is because the TPB currently operates out of ATO premises, is funded by the ATO through budget allocations and staffed by ATO officers.

The IGTO believes that aligning the TPB's treatment under the CIC Bill with the treatment of the ATO will simplify implementation and investigation matters.

The IGTO notes further that sufficient funding will be required to produce the relevant educational materials and training for agencies.

The introduction of the CIC also raises some uncertainty with respect to the PID Scheme and the complexities arising from the interaction between the two regimes. The IGTO recommends that the AGD consult on, and clarify, the intended interaction between the CIC regime and the PID Scheme prior to the enactment of the CIC legislation, including on the following matters:

- how integrity agencies may lawfully refer matters to the CIC in circumstances where the PID Scheme secrecy requirements prohibit disclosure of any information relating to the PID, or which may lead to the identification of the person who made the PID;
- how integrity agencies and regulated entities may continue to meet the relevant deadlines set out under the PID Scheme where there is a 'stop action' requirement after referral of a matter to the CIC; and
- how any CIC investigation will run concurrently with an existing PID investigation without inadvertently interfering with the other.

The IGTO also recommends for simplicity and ease of compliance that the treatment for the ATO and TPB is aligned (so that both are treated as a law enforcement agency under the CIC regime), that is, unless and until the TPB is made operationally independent of the ATO.

### **Part B - Reasonable Suspicion and resourcing**

The CIC Bill imposes a significant number of new responsibilities and obligations on the Inspector-General and the IGTO. These include new obligations as a Commonwealth Integrity Office Holder and Commonwealth Integrity Agency, in addition to obligations we would hold as a regulated entity. Many of these responsibilities and obligations are predicated upon the concept of a 'reasonable suspicion' having been formed as to the existence of corrupt conduct. However, there is no definition of 'reasonable suspicion', which may lead to inconsistent or unintended outcomes. The IGTO also notes that, by its nature, corruption necessarily entails both a *mens rea* (guilty mind) and an *actus reus* (guilty act). The former may be difficult to ascertain without in depth investigation and may therefore deter agencies from making referrals to the CIC where that element cannot be ascertained to the relevant threshold standard.

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Furthermore, having regard to the range of new responsibilities and obligations, steps should be taken to ensure that the Inspector-General and the IGTO (and other integrity agencies interacting with the CIC) have the resourcing capability to carry out our responsibilities in the manner that is contemplated by the legislation. If no resourcing allowances are made, consideration should be given to developing shared resourcing and capability mechanisms such as surge capacity and secondment arrangements. In the absence of these, we may be constrained in our ability to discharge our obligations under the CIC Bill.

The IGTO recommends that:

- further clarification be provided on the definition of ‘reasonable suspicion’ and in particular that ‘reasonable suspicion’ need only be formed in respect of the conduct that has occurred and not the mental state of any potential perpetrators; and
- the AGD consult with stakeholders on mechanisms to address potential under-resourcing of integrity agencies’ capability to discharge obligations under the CIC regime, including development of surge capacity pools, temporary movement registers and resource sharing or secondment arrangements.

### **Part C - Information sharing, compulsory information gathering and protections**

The approach adopted in the CIC Bill is to exclude tax secret information (clause 38) from any referrals made to the CIC. This may create difficulties associated with extricating tax secret information from other information that may also be subject of their own secrecy provisions - for example, section 37 of the IGT Act 2003. Furthermore, given the significant size and complexity of the tax and superannuation systems, any referrals made to the CIC without relevant tax information may hamper, rather than assist, the CIC to undertake its investigations.

Matters are further complicated where the compulsory information gathering powers are used (clause 90), which may place officers in the invidious position of either breaching secrecy provisions of their agency, or failing to comply with a notice of the CIC – both of which carry terms of imprisonment.

The IGTO recommends that consideration be given to whether, in its current form, further legislative change is needed to address existing secrecy obligations to enable agencies to refer cogent and probative information to the CIC to assist in its investigations.

### **Part D - Concurrent Investigations and obligations of secrecy**

In its current form, the CIC Bill differentiates between regulated entities referring matters to the CIC and Integrity Agencies referring matters. In the former case, the regulated entity is required to ‘stop action’ once a referral has been made to the CIC. The PID interactions noted above may be relevant here. In the case of an Integrity Agency, such as the IGTO referring a matter relating to an agency under its jurisdiction (such as the ATO), no ‘stop action’ is applied.

We recognise there are competing considerations to be balanced here because:

- Imposing a ‘stop action’ would effectively hamper the ability of the IGTO to effectively assist taxpayers who have come to us for assistance in dealing with their tax affairs; whilst

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- no 'stop action' runs the risk that continuing investigations may alert potential perpetrators to the possibility of their corruption being discovered leading to destruction or fabrication of records.

In the circumstances, we believe that a balance would be best struck by allowing agencies to engage with the CIC either before, or at the time of, any referrals to be made to discuss any competing interests and the need (if any) for a 'stop action' to apply.

The IGTO recommends that consideration be given to:

- augmenting the proposed legislation to enable agencies to engage with the CIC either before, or at the time of, any referrals to be made to determine whether a 'stop action' needs to apply in respect of the particular case; and
- providing clarification on how Integrity Agencies can best manage the expectations of their clients while adhering to secrecy obligations imposed by the CIC regime after a matter is referred to the CIC.

### **Part E - Harmonisation and cross-agency information sharing**

There are limitations on the authority of the cohort of integrity agencies to share information regarding concerns and allegations. This may lead to different Integrity Agencies duplicating resources and efforts to consider the same issue. It may also lead to situations of inconsistent opinions on 'reasonable suspicion' - where, some agencies consider materials in isolation and do not conclude there is a reasonable suspicion of corruption, whereas other agencies do. Furthermore, the inability to share information across agencies may create opportunities for unreasonable complainants (a common experience across ombudsmen offices) to 'forum-shop' their complaints and effectively circumvent vexatious complainant determinations.

We believe that, subject to current legislative restrictions on information sharing being addressed, that the establishment of a cohort of integrity agency representatives to share information and intelligence in relation to specific allegations of corruption and how to best tackle the issue. Further support may be provided through a standing forum of representatives from these agencies to discuss broader, more systemic issues in relation to potential corruption and how these may be addressed.

The IGTO recommends that consideration should be given to:

- the benefits of enabling the cohort of Integrity Agencies to share information to minimise the risk of duplication of resources and effort; and
- clarifying the scope and communication of vexatious complainant declarations to enable agencies to take appropriate action in updating their systems and invoking processes to minimise the risk of unreasonable complainants circumventing the declaration.

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We would be happy to provide further explanation or insight into any of the comments in this submission by engaging directly with officers of the AGD. Please feel free to contact me on [REDACTED] or [REDACTED] or via email ([REDACTED]) if you require any further information or clarification in relation to this submission.



Karen Payne  
Inspector-General of Taxation and Taxation Ombudsman



# Introduction

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) welcomes the opportunity to provide comment and submissions to the AGD on the exposure drafts of CIC Bill and IALA Bill.

The IGTO considers that it is critical that allegations of corruption are quickly identified and appropriately investigated to ensure that community's confidence in government institutions is maintained.

This submission does not make (or intend to make) comment on the appropriateness of the policy reforms set out in the CIC Bill and the IALA Bill. Rather, we have confined our comments to practical implementation issues which may arise in areas of tax administration for the AGD's consideration to ensure that the objects of the CIC are realised and the system operates effectively and efficiently.

## About the Inspector-General of Taxation and Taxation Ombudsman

The IGTO is created and governed by the *Inspector-General of Taxation Act 2003*. The IGTO is both:

- an independent Commonwealth statutory officer appointed by the Governor-General under the IGT Act 2003; and
- an independent Commonwealth statutory agency which is composed of Commonwealth public servants - officers who are employed under the *Public Service Act 1999*.

In this submission, the acronym *IGTO* will be used to denote the statutory agency while the term *Inspector-General* will be used when referring specifically to the statutory office holder.

The IGTO investigates taxation administration systems and laws, as well as the actions and decisions made by Tax Officials - of the Australian Taxation Office (**ATO**) or the Tax Practitioners Board (**TPB**).

The IGTO seeks 'to assure and ensure that there is fair, equitable, and transparent administration of the tax and superannuation system consistent with community expectations.'<sup>1</sup> We also undertake tax investigations for the purposes of providing independent advice and assurance to Government on the taxation administration laws and systems. The IGTO is not empowered to investigate or advise on tax policy matters.

Annually, the IGTO receives more than 2,000 complaints about the administrative actions of the ATO and the TPB and this figure has increased by 29% across the previous five financial years.<sup>2</sup> These complaints will, from time to time, raise concerns or allegations regarding corruption or corrupt conduct of Tax Officials. A key-word search of our case management system returned 114 cases (between May 2015 and December 2020) where the words 'corrupt' or 'corruption' were used by the complainants in the description of their complaints.

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<sup>1</sup> Inspector-General of Taxation and Taxation Ombudsman (IGTO), *Corporate Plan 2021 – 2024* (2020) p 5  
<<http://igt.gov.au/accountability-and-reporting/>>.

<sup>2</sup> IGTO, *Annual Report 2019-20* (2020) p 11.

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Amongst other things, the CIC Bill names the Inspector-General as a Commonwealth Integrity Office Holder<sup>3</sup> and, together with her officers, the IGTO is named in the CIC Bill as a Commonwealth Integrity Agency<sup>4</sup>. Accordingly, we consider that the effective and efficient operation of the Commonwealth Integrity Commission (CIC) and its legislative framework is essential to the health and confidence in the tax and superannuation systems and trust in government as a whole.

Our submission seeks to discuss and provide views and recommendations on areas we believe would assist to achieve the intended outcomes of CIC, as we understand them. Some brief introductory comments about our understanding of the current context of the amendments is set out below for completeness.

## Impacts of Corruption in Australia

Australia is perceived to be a country with relatively low levels of corruption as demonstrated by Transparency International's Corruption Perceptions Index. In the 2019 global survey, Australia ranked 12<sup>th</sup> with a score of 77/100 (0 being highly corrupt and 100 being not corrupt) improving on its previous 13<sup>th</sup> rank with the same score in 2018.<sup>5</sup>

The impacts of corruption are insidious and are known to include:<sup>6</sup>

- the distortion of market and the fair provision of services, skewed competition and the inhibiting business growth;
- threats to sustainable economic growth regionally and internationally, undermining financial integrity;
- obstacles for social development and poverty reduction;
- damaging Australia's international business reputation, credibility and public trust in government;
- reduced effectiveness of government programs with lost resources;
- distortion of decision making processes for public officials;
- unauthorised disclosure of information;
- hindering or compromise of national security and law enforcement efforts; and
- enabling organised crime.

## Impacts of Corruption on the Tax and Superannuation Systems

The impact of corruption can also flow through to and erode the health of the tax and superannuation systems in Australia. This is because administration of these systems generally relies on taxpayers' self-assessment and voluntary compliance of their obligations, which in turn depends on public confidence in

<sup>3</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clause 20(1).

<sup>4</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clause 20(2).

<sup>5</sup> Transparency International, *Corruption Perceptions Index 2020* <<https://www.transparency.org/en/cpi>>.

<sup>6</sup> Australian Public Service Commission, *Induction - Fraud Awareness* <<https://apslearn.apsc.gov.au/>>.

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the bodies charged with administering the relevant laws. Actual or perceived corruption in the administration of the tax and superannuation systems can erode taxpayer confidence and engagement – leading to increased need for compliance activities and increased costs for all parties (taxpayers, tax practitioners and regulatory agencies which oversee the system) and decreases revenue collection. The ATO has noted:

*An organisational culture that promotes awareness of fraud and corruption risks and supports those who report suspected fraud and corruption is key to maintaining integrity in the ATO. The ATO acknowledges that a lack of integrity in these areas jeopardises the internal and external confidence in the ATO.<sup>7</sup>*

In 2018, the IGTO conducted a broad review investigation into the ATO's Fraud Control Management,<sup>8</sup> which was precipitated by the events connected with Operation Elbrus and the allegations of tax fraud and abuse of position by a public official, as they were alleged at that time. The investigation sought to restore community confidence through the provision of independent assurance of the ATO's integrity in its administration of the tax and superannuation systems. In that report, the IGTO observed:

*Those trusted with regulatory power are expected to exercise that power effectively and ethically. Public confidence is lost when institutions are ineffective in fulfilling their public role or fail to address unethical staff conduct. As a result, an institution loses its legitimacy and power to engender voluntary compliance with the laws that it regulates.<sup>9</sup>*

That investigation also considered the ATO's prevention, detection and response measures for both internal and external risks of fraud and corruption, including those relating to its significant information holdings and payment systems which facilitate funding in excess of \$420 billion for the federal and state governments as well as its governance of discretionary decision-making powers with financial impact.

## Structure of this Submission

Our submission is divided into five sections, covering:

- A. The envisaged role of the Commonwealth Integrity Commission (CIC) and its interactions with the Public Interest Disclosure (PID) Scheme;
- B. Reasonable suspicion, the obligations on Integrity Agencies and resourcing;
- C. Information sharing, compulsory information gathering and protections;
- D. Concurrent investigations and obligations of secrecy; and
- E. Harmonisation of approaches across government and cross-agency information sharing.

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<sup>7</sup> Australian Taxation Office (ATO), *ATO Fraud and Corruption Plan 2019-20* (26 February 2020)

<<https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/ATO-Fraud-and-Corruption-Control-Plan-2019-20/>>.

<sup>8</sup> IGTO, *Review into the Australian Taxation Office's Fraud Control Management* (2018) <[www.igt.gov.au](http://www.igt.gov.au)>.

<sup>9</sup> Ibid, p 9.

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Where appropriate, we have made recommendations for the Attorney-General's Department's (AGD) consideration as it progresses the consultation draft to finalisation.

All legislative references in this document refer to proposed provisions in the CIC Bill, unless otherwise stated.

# A. The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

## The envisaged role of the CIC

A.1.1. The CIC's purpose is to "detect, deter and investigate suspected corruption and to work with agencies to build their resilience to corruption and their capability to deal with corrupt misconduct".<sup>10</sup> Its proposed investigatory powers will also be greater than a Royal Commission and extend beyond conducting formal hearings and summoning witnesses. For example, the CIC will be able to exercise search warrants, arrest individuals and confiscate passports. It is therefore unsurprising that the CIC's role has been compared to that of a police officer.<sup>11</sup>

A.1.2. The primary investigatory function of the CIC will also have an ancillary effect of raising awareness about corruption issues and bringing these issues into the light. The maxim that 'sunlight is the best disinfectant' implies that increased transparency and stronger detection measures are critical in dealing with corruption. The overt power of anti-corruption bodies and to an extent, the media, is bringing what is done in the dark, out into the open.

A.1.3. Beyond its investigatory role, the CIC will also partner with other anti-corruption bodies, integrity agencies and entities under its jurisdiction to deliver education on best practice and ensure the adequacy of implemented corruption prevention measures. There are also opportunities for the CIC to assist with harmonising best practice across jurisdictions and Commonwealth entities.

## Implementation risks with the proposed CIC referral mechanisms

A.1.4. We consider there are some practical risks with the current multi-agency approach against corruption and the heavy reliance placed on referral mechanisms:

- There is a risk that the start of investigations may be delayed and/or multiple referrals of the same matter may be made to the CIC, where agencies are uncertain about the type of conduct that will amount to 'corruption' under this Bill and the thresholds for referral to the CIC.
- Where alleged conduct spans different areas of government administration and jurisdictions, there is a risk of the inconsistent reporting and referral of 'corruption issues' to the CIC by agencies seeking to appropriately discharge its responsibilities and obligations under the Bill.

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<sup>10</sup> Attorney-General's Department, *Commonwealth Integrity Commission Fact Sheet* (2020)

<[https://www.ag.gov.au/sites/default/files/2020-11/Commonwealth Integrity Commission Fact Sheet.pdf](https://www.ag.gov.au/sites/default/files/2020-11/Commonwealth%20Integrity%20Commission%20Fact%20Sheet.pdf)>.

<sup>11</sup> Law Council of Australia, *Submission to the Commonwealth Integrity Commission Proposed Reforms* (2019)

<<https://www.ag.gov.au/sites/default/files/2020-05/Law-council-of-australia.pdf>>.

## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

- There is a risk that informants may form the perception that their complaints or tip-offs are falling between the cracks or into a limbo state particularly where there is a subsequent lack of communication or action cannot be seen to have been taken. Integrity agencies and the CIC may seek to provide assurance to informants under clauses 75(4), 81(5), 87 and 182 of the Bill about the progress and outcome of investigations but does not explicitly include a decision to take no further action.
- A diversion of resources for the CIC and integrity agencies can arise from ineffective training and procedures for managing persistent complainants. Determined individuals with experience making repeated complaints can seek to avoid or frustrate vexatious complainant declarations through behaviours such as ‘forum shopping’ and ‘drip feeding’ information.
- There are potential inefficiencies that may arise with the double handling of information as well as practical challenges in ascertaining the appropriate agency to investigate a particular matter. The interactions between the IGTO and CIC along with the relevant obligations are discussed further in Part B of this submission.
- With respect to public access to the CIC, there is a risk of misunderstanding and confusion between the proposed CIC divisions from the public’s point of view. This is particularly so as members of the public cannot approach the CIC’s public sector integrity division directly and must instead raise their concerns through other agencies, such as the IGTO, who bear obligations to investigate and refer relevant matters to the CIC.

A.1.5. With the referral model proposed in the establishment of the CIC, open dialogue with the relevant agencies supported by appropriate protocols and statutory agreements is of the utmost importance to ensure the appropriate filtering of corruption issues. It is anticipated that the CIC will have the opportunity to refine the corruption issues it expects to receive from agencies through its determinations under clause 290 and through its agreements under clause 27 with its regulated entities and integrity agencies.

### ‘Corruption’ in paragraph 17(1)(c) needs to be further defined

A.1.6. The CIC Bill includes a definition of ‘engages in corrupt conduct’ – refer clause 17 – which in turn relies upon:

- (1) **Staff members of law enforcement agencies** – a concept of conduct that amounts to *corruption*, but which remains undefined (refer clause 17(1)(c));
- (2) **Staff members of public sector agencies** – conduct that constitutes abuse of office, perversion of justice or a listed offence (refer clause 18).

A.1.7. Clause 16(3) also clarifies that the identity of the person does not need to be known for an allegation to amount to a ‘corruption issue’, broadening the scope for the types of allegations that would trigger notification and disclosure obligations to the CIC (e.g. clauses 37 and 38).

A.1.8. Where there is conduct that does not fall within the definition of corrupt conduct for the purposes of the CIC bill, this matter will be referred to the appropriate agency to consider for further

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action under the relevant codes of conduct. Accordingly it is important to understand for these purposes what is meant by corruption.

### Applying the definition of corruption to staff members of law enforcement agencies (ATO)

A.1.9. In the absence of a definition of corruption found in clause 17(1)(c), the ‘ordinary’ meaning of corruption will apply.

A.1.10. Corruption carries different meaning across different contexts and corrupt conduct can take many different forms. Accordingly, there are difficulties in agreeing to the scope of what is corruption and establishing a bright-line test to determine whether certain conduct is considered corrupt (or not).

A.1.11. The term ‘corruption’ has various meanings used in other statutory contexts in Australia and there is no uniform definition adopted at a Commonwealth or State level. The lack of harmonisation in and of itself may be problematic in applying the CIC Bill.

A.1.12. Some criticisms on the definition from Transparency International in relation to Australia is that the definitions adopted are “variable, inconsistent or missing legal definitions of official corruption”<sup>12</sup>. Transparency International has said of Australia:

*Legal definitions of corruption need to be overhauled by Australian and State parliaments, to make them simpler, nationally consistent, and more comprehensive for present-day contexts – not only for investigation and prosecution purposes, but prevention and resilience-building.*<sup>13</sup>

A.1.13. Australian Standard AS 8001-2008 Fraud and Corruption Control also provides the following definition encompassing both internal and external forms of corruption:

*Dishonest activity in which a director, executive, manager, employee or contractor of an entity acts contrary to the interests of the entity and abuses his/her position of trust in order to achieve some personal gain or advantage for him or herself or for another person or entity. The concept of ‘corruption’ within this standard can also involve corrupt conduct by the entity, or a person purporting to act on behalf of and in the interests of the entity, in order to secure some form of improper advantage for the entity either directly or indirectly.*<sup>14</sup>

A.1.14. Arguably, this definition imports both a *mens rea*<sup>15</sup> (the guilty mind) and an *actus reus*<sup>16</sup> (the guilty act) requirement. The definition in this standard may be a useful starting point where this is the intended requirements to establish a reasonable suspicion of ‘corruption’. However, the IGTO notes

<sup>12</sup> Transparency International, *Anti-Corruption Agencies in Australia* (2016) <<https://transparency.org.au/wp-content/uploads/2019/10/PP3-Anti-Corruption-Agencies-Transparency-International-Australia-Jan-2016.pdf>>.

<sup>13</sup> Ibid.

<sup>14</sup> SAI Global, *AS 8001-2008 Fraud and Corruption Control* (2018) para 1.7.4.

<sup>15</sup> The intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.

<sup>16</sup> The act or omission that comprise the physical elements of a crime as required by a statute. The *actus reus* includes only voluntary bodily movements, particularly one which society has an interest in preventing.

## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

that forming a reasonable suspicion about intention (as opposed to action) may prove a difficult threshold or standard to meet.

A.1.15. In Australia, the state corruption bodies in their investigatory role utilise various definitions of corruption and misconduct:

- New South Wales - Independent Commission Against Corruption (ICAC);
  - Section 8 - General nature of corrupt conduct [Independent Commission Against Corruption Act 1988 No 35 - NSW Legislation](#)
- Victoria - Independent Broad-Based Anti-Corruption Commission (IBAC);
  - Section 4 - Corrupt conduct [Independent Broad-based Anti-corruption Commission Act 2011 \(legislation.vic.gov.au\)](#)
- Queensland - Corruption and Crime Commission (CCC);
  - Division 2 – Corrupt conduct [View - Queensland Legislation - Queensland Government](#)
- South Australia - Independent Commissioner Against Corruption (ICAC);
  - Section 5 – Corruption, misconduct and maladministration [Independent Commissioner Against Corruption Act 2012 \(legislation.sa.gov.au\)](#)
- Western Australia - Corruption and Crime Commission (CCC); and
  - No definition of corruption with focus instead on “misconduct” Section 4 – Term used: misconduct [Western Australian Legislation - Corruption, Crime and Misconduct Act 2003](#)
- Tasmania – Integrity Commission (IC).
  - No definition of corruption with focus instead on “misconduct” Section 4 – Interpretation [View - Tasmanian Legislation Online](#)

A.1.16. In the APS context corruption has been defined as ‘the abuse of a public position for private gain’ or ‘the dishonest or biased exercise of a Commonwealth public official’s functions’.<sup>17</sup> Division 142 of the *Criminal Code Act 1995* further details the offences relating to bribery, corrupting benefits and abuse of public office.

A.1.17. The range of definitions and conduct which may fall under the definition of ‘corruption’ still in use by state anti-corruption bodies may give rise to uncertainty and confusion which can result in circumstances of either over- or under-compliance.

A.1.18. In these cases, the CIC may receive an unnecessarily high number of unwarranted referrals or otherwise not receive referrals which are in genuine need of further investigation.

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<sup>17</sup> Senate Select Committee on a National Integrity Commission, *Report* (2017) p 7.



## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

### Applying the definition of corruption to staff members of public sector agencies (TPB)

A.1.19. The bifurcated approach to define ‘engages in corrupt conduct’ in clause 17 has been explained as necessary due to law enforcement agencies requiring greater oversight given the higher risk they present. The narrower definition of corruption in place for public sector agencies does not include a catch-all but instead relies on listed offences at clause 18.

A.1.20. The IGTO notes that as raised by submissions to the AGD’s 2018 consultation on the proposed CIC reforms, the separation of CIC into the two divisions would necessarily result in ADF and DHS (now Services Australia) falling under the “lower risk tier” public sector division despite the large sums involved in Defence procurement and the highly sensitive information managed in healthcare, respectively.<sup>18</sup> The TPB is another entity that would fall within the public sector division, despite the significant provision of resourcing provided to the TPB by the ATO (within the law enforcement division). The TPB, under legislation and regulations,<sup>19</sup> receives its funding and staffing support from the ATO,<sup>20</sup> and its offices are co-located in ATO office sites.<sup>21</sup> For the purposes of the *Public Governance, Performance and Accountability Act 2013*, the Commissioner of Taxation is the Accountable Authority of the TPB.<sup>22</sup>

A.1.21. The separate treatment of the ATO and TPB with the bifurcation of the CIC may also present some administrative difficulties for the IGTO. In addition to the administrative and operational arrangements noted between the ATO and the TPB, in the IGTO’s experience, complaints about the TPB are sometimes intertwined with the ATO and where a corruption issue is raised about both agencies in the same matter, there is currently little guidance available as to how these are managed. For example, if a tax agent alleges corruption by certain TPB officers deregistering and ATO officers removing their tax agent access to systems, under the proposed arrangements they would only be able to approach the CIC directly regarding the ATO, with the TPB element being diverted to the CIC’s public sector division via an IGTO referral. There is a risk with such bifurcation that referrals and decisions to investigate a matter would be based on incomplete information through the operation of the two divisions.

A.1.22. In these cases, the CIC may receive an unnecessarily high number of unwarranted referrals or otherwise not receive referrals which are in genuine need of further investigation. The IGTO believes that the matter *could* be remedied if the TPB were also included within the remit of the Law Enforcement Division of the CIC so long as its current administrative and operational arrangements are

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<sup>18</sup> See for example submissions of the Law Council of Australia and New South Wales Ombudsman to the Commonwealth Commission Proposed Reforms consultation in 2018: [Commonwealth Integrity Commission | Attorney-General's Department \(ag.gov.au\)](https://www.ag.gov.au/Commonwealth-Integrity-Commission-Attorney-Generals-Department).

<sup>19</sup> Tax Agent Services Regulations, Reg 11.

<sup>20</sup> *Tax Agent Services Act 2009*, s 60-80.

<sup>21</sup> Treasury, *Independent Review of the Tax Practitioners Board* (2019) pp 23 – 27.

<sup>22</sup> Commissioner of Taxation, *Annual Report 2019-20* (2020) p 1. By way of completeness, we note that the administrative and operational arrangements of the Australian Charities and Not-for-Profits Commission (ACNC) are similar to those of the TPB. However, as the ACNC is not within our jurisdiction, we are unable to provide further comment on the implications this might have on the work of the CIC.

## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

maintained. In this regard, it is worthwhile noting that in 2019, the Treasury completed its *Independent Review of the Tax Practitioners Board* which, amongst other things, recommended that:

*...the TPB should become a separate agency and receive its own specific appropriation from the Government rather than as an allocated proportion of a broader ATO budget (which will require accompanying law changes).<sup>23</sup>*

A.1.23. The Government's response to the Treasury review supported this recommendation in principle, noting that 'after the TPB Charging Arrangements Review has concluded, the Government will take steps to increase the TPB's financial independence from the ATO.'<sup>24</sup> Accordingly, should the TPB be financially and operationally separated from the ATO, any alignment with the ATO within the CIC framework (as proposed by the IGTO) may then need to be reconsidered.

A.1.24. If the inclusion of the TPB within the Law Enforcement Division's jurisdiction is not feasible, the IGTO recommends that further explanatory materials be made available prior to the commencement of operation of the CIC so that partner agencies, such as our own, are clear on the type and nature of conduct needing to be investigated and referred in respect of public sector agencies and law enforcement agencies, particularly in circumstances where there may be cross-action or overlaps. That is, where the bifurcation does not practically operate as a bright line.

A.1.25. It is understood that not all allegations or referrals of suspected corruption would be investigated by the CIC, rather only those that from the information before the CIC suggests serious criminal conduct. There is a risk that this may incentivise complainants to frame issues of misconduct and non-compliance with a code of conduct as more serious or systemic corruption.

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<sup>23</sup> Above n 21, Recommendation 3.1, p 25.

<sup>24</sup> Australian Government, *Government Response to the Review of the Tax Practitioners Board 2019* (2020) p 7.

## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

**Recommendation to the AGD**

*The IGTO recommends that the AGD consider:*

- *whether a definition of ‘corruption’ should be introduced for the purpose of paragraph 17(1)(c) to ensure compliance and that this is especially important and necessary where non-compliance creates a relevant offence for the IGTO and the Inspector-General; and*
- *providing further explanatory materials prior to the commencement of operation of the CIC Bill so that partner agencies, such as our own, clearly understand the type and nature of conduct needing to be investigated and referred.*
- *Remove the ATO/TPB bifurcation by including TPB in the same category as the ATO – that is, as a law enforcement category, or otherwise providing further explanatory materials*

*The IGTO also notes that sufficient funding will be required to produce educational materials and provide ongoing practical agency education/training, with special attention to the type of conduct that would be considered as corrupt under this Bill, including the required elements of that conduct and examples.*

## Clarification of interactions between the CIC and the Public Interest Disclosure Scheme is required

### Uncovering corruption through whistleblowing

A.1.26. The Public Interest Disclosure (PID) scheme offers protections to current or former public servant whistleblowers against reprisals where they raise their suspicions of Commonwealth public sector wrongdoing in accordance with the PID Act 2013. The PID Scheme supports the reporting and investigation of serious misconduct including corruption, perverting the course of justice and abuse of public trust. It has been noted that, “[p]rotection of people who make genuine disclosures about improper conduct in the public sector is critical for an effective integrity and anti-corruption system.”<sup>25</sup>

A.1.27. The importance of whistleblowers providing first-hand experiences of serious misconduct can be seen through the valuable intelligence gathered and subsequent publicised investigations. In the tax context, there have also been private sector whistleblowers, such as Heinrich Kieber whose disclosures initiated Project Wickenby, and anonymous data leaks, such as the Panama and Paradise Papers that were linked to extensive worldwide tax evasion and corruption. The protection of whistleblowers has

<sup>25</sup> Independent Broad-based Anti-corruption Commission, *What is a public interest disclosure?* <[https://www.ibac.vic.gov.au/docs/default-source/education-resources/fact-sheet-what-is-a-public-interest-disclosure.pdf?sfvrsn=42207775\\_10](https://www.ibac.vic.gov.au/docs/default-source/education-resources/fact-sheet-what-is-a-public-interest-disclosure.pdf?sfvrsn=42207775_10)>.

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been subject of recent media attention and has resulted in calls made for the establishment of a whistleblower protection commissioner.<sup>26</sup>

### Uncertainty regarding how the CIC will investigate corruption issues that are also the subject of a PID

A.1.28. The *Review of the Public Interest Disclosure Act 2013* (Moss Review) noted two challenges affecting the effective operation of the framework were the complexity of the PID Act's interaction with other procedures for investigating wrongdoing and disclosable conduct being too broad.<sup>27</sup>

A.1.29. There is a risk that the IGTO's referral requirements under the CIC Bill will not work effectively or efficiently as they intersect with the PID and tax administration investigation regimes, as those regimes apply to the IGTO. The referral of information pertaining to tax administration investigation, is further explored in Part C below. These risks may be exacerbated if the CIC is not prescribed as an investigative agency and uncertainty arises as to the mechanism that should apply. This is due to the strict secrecy and confidentiality provisions in the PID Act<sup>28</sup> that, subject to certain narrow exceptions, preclude the disclosure of any information relating to the PID or any information that could identify the person who made the PID.

A.1.30. The secrecy and confidentiality provisions (and related offences) within the PID Act may be a source of difficulty with understanding how to effectively investigate serious misconduct and corruption issues. In the IGTO's experience, PID investigators have been prevented from merely disclosing the fact that a disclosure had been made resulting in a duplication of effort with the commencement of overlapping investigations and risking unhelpful interference in those investigations. Consultation with the Commonwealth Ombudsman and the Inspector-General of Intelligence and Service as key oversight bodies for the PID Act at this juncture would be critical.

A.1.31. If the interaction between the CIC processes and PID Scheme is not clearly established, it may have an unintended chilling effect on the disclosure of corruption issues for fear of transgressing PID secrecy requirements. Individuals who are turned away and directed elsewhere may perceive themselves being given the "run-around" and other agencies who are unable to accept the complaints and referring them elsewhere being viewed as complicit in the allegations.

A.1.32. We understand that there may be further consideration given to the interactions of the CIC and PID Scheme in light of the Government's recent response to the Moss Report which was issued on 16 December 2020. In that response, the Government agreed in principle to consider whether, amongst others, the IGTO and the CIC should be prescribed as investigative agencies for the purposes

<sup>26</sup> See for example: Yee-Fui Ng, *As the government drags its heels, a better model for a federal integrity commission has emerged* <<https://theconversation.com/as-the-government-drags-its-heels-a-better-model-for-a-federal-integrity-commission-has-emerged-148796>>; Australian Federal Integrity Commission Bill 2020.

<sup>27</sup> Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (2016) <<https://www.ag.gov.au/sites/default/files/2020-06/Moss%20Review.PDF>>.

<sup>28</sup> *Public Interest Disclosure Act 2013*, ss 20, 21, 23, 44, 57, 65.

## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

of the PID Act. The Government in its response has briefly described the CIC's role with respect to the PID Act.

A.1.33. The CIC will include a public sector integrity division and law enforcement integrity division, ensuring targeted attention to corruption and fraud across the entirety of the public sector, including criminal conduct and serious corruption that would otherwise be subject to the PID Act.

## Uncertainty regarding how the IGTO as a regulated entity will investigate and refer corruption issues that are also the subject of a PID

A.1.34. Currently, the IGTO can only receive internal disclosures under the PID Act from public officers who are employed, or were previously employed, by the IGTO. ATO or TPB employees seeking to make a PID about their own agencies are advised to report these internally and to seek advice from the Commonwealth Ombudsman.

A.1.35. Where the PID points to possible corrupt conduct by IGTO officers, the Inspector-General would be prohibited from disclosing to the CIC that a PID had been made on the issue and constrained in the information that it could provide to the CIC where that information could lead to discovering the identity of the officer who made the PID. It is not clear what information the Inspector-General could provide to the CIC in these circumstances to enable the CIC to investigate the potentially corrupt conduct.

A.1.36. Where a PID is made about an IGTO corruption issue, as a regulated entity, and the matter is referred to the CIC, any internal PID investigation would be stopped by clause 38(2)(b). Where permission is not provided by the Integrity Commissioner to continue action on the PID while the matter is under CIC consideration or it is refused under clause 38(5), this will impact the 90-day time limit to complete a PID investigation unless consent is obtained from the discloser or with agreement from the Commonwealth Ombudsman. However, if the CIC requires that the IGTO not communicate details of any CIC investigations (as will be discussed later in this submission), seeking that consent or agreement to extend the timeframe may prove problematic.

## Uncertainty how the IGTO as an integrity agency will investigate and refer corruption issues that are also subject of a PID

A.1.37. The IGTO in limited circumstances may also receive external disclosures under the PID Act from employees of the ATO or the TPB in the event they are dissatisfied with how their agencies have dealt with the PID investigation.<sup>29</sup> Although the name of the IGTO would suggest similar PID functions to the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, individuals (genuine whistleblowers) who disclose matters to the IGTO have limited protections under section 39 of the IGT Act when compared to the protections that could be afforded under the PID Act. This is because the IGTO is not currently an investigative agency for PID purposes. Recommendation 2 of the Moss Review included making the IGTO an investigative agency. In December 2020, the Government

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<sup>29</sup> *Public Interest Disclosure Act 2013*, s 26(1) Item 2.

## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

agreed to this recommendation in principle.<sup>30</sup> This was echoed in recommendation 13 of the Senate Economics Legislation Committee's report into the *Performance of the Inspector-General of Taxation*.<sup>31</sup>

A.1.38. If the IGTO is made an investigative agency for the purposes of the PID Act, clarification of the interaction of PID functions with the CIC would be needed. That is, the manner, in which a PID investigation involving a corruption issue would proceed (if at all) once the CIC has been notified. It is noted that an IGTO PID investigation would only be effective if appropriate additional resourcing was provided with technology systems set up and relevant legislative powers.

A.1.39. The IGTO experience is that many individuals seeking the extensive protections offered by the PID Act also raise personal employment-related grievances and these are intertwined with the tax administration issue or misconduct they have observed in the ATO. The Moss Review confirmed this is a common experience for agencies considering disclosures under the PID Act. In December 2020, the Government agreed to the Moss Review's recommendation to exclude conduct solely related to personal employment-related grievances unless relating to a systemic issue.<sup>32</sup>

A.1.40. Respectfully, the IGTO submits that identifying conduct which is solely related to employment matters can be difficult or at least 'grey' and it may be preferable to exclude such conduct to the extent that it relates to such employment matters, to ensure any ambiguities do not prevent intended investigations.

A.1.41. Further complicating the matter, the IGTO (like the Commonwealth Ombudsman) is specifically precluded from investigating actions taken in relation to the employment of ATO or TPB staff<sup>33</sup> and it is unclear whether the IGTO is authorised to make enquiries to determine if it is an issue of that nature. Similarly, it is unclear whether the IGTO officers assessing whether a matter is a corruption issue and if the relevant thresholds of "reasonable suspicion" have been met are empowered to make preliminary enquiries – especially given this express exclusion.

A.1.42. It is also noted that the use of formal information gathering powers<sup>34</sup> are required to be published in our Annual Report and may alert the ATO to the discloser's identity particularly where they have raised the matter internally without success (as is often the case). This may also deter individuals seeking to raise corruption issues with the IGTO.

A.1.43. It is also unclear to the IGTO whether agencies will be expected to develop internal reporting mechanisms for corruption issues separately or whether this can be aligned with PID reporting.

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<sup>30</sup> Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM* (2020) p 6 <<https://www.ag.gov.au/system/files/2020-12/government-response-to-the-review-of-the-public-interest-disclosure-act-2013.pdf>>.

<sup>31</sup> Senate Economics Legislation Committee, *Inquiry into the Performance of the Inspector-General of Taxation* (2020) p 66.

<sup>32</sup> Above n 30, p 7.

<sup>33</sup> *Ombudsman Act 1976*, para 5(2)(d)

<sup>34</sup> *Ombudsman Act 1976*, s 9 by virtue of the *Inspector-General of Taxation Act 2003*, s 15.

## The envisaged role of the CIC and its interactions with the Public Interest Disclosure Scheme

**Recommendation to the AGD**

*The IGTO recommends that the AGD consult on, and clarify, the intended interaction between the CIC regime and the PID Scheme prior to the enactment of the CIC legislation, including on the following matters:*

- *how integrity agencies may lawfully refer matters to the CIC in circumstances where the PID Scheme secrecy requirements prohibit disclosure of any information relating to the PID, or which may lead to the identification of the person who made the PID;*
- *how integrity agencies and regulated entities may continue to meet the relevant deadlines set out under the PID Scheme where there is a 'stop action' requirement after referral of a matter to the CIC; and*
- *how any CIC investigation will run concurrently with an existing PID investigation without inadvertently interfering with the other.*

*The consultation may need to consider the CIC and PID interactions in circumstances where the CIC is ultimately prescribed as an investigative agency for PID purposes and in circumstances where it is not.*

## B. Reasonable suspicion, obligations on Integrity Agencies and Resourcing

B.1.1. The following part deals with the need to clarify the meaning of “reasonable suspicion” and the practical implications that are likely to arise as a result of adopting that standard. Whereas the IGTO receives numerous complaints that allude to, or make allegations of, corrupt conduct, in a typical case, a considered view on whether the corrupt conduct is likely to have occurred cannot be reached unless an investigation is carried out. The IGTO will only typically have the power to carry out such an investigation if the conduct relates to the ATO (which is a law enforcement agency) or the TPB. It is not presently clear, on the face of the draft legislation, how the “reasonable suspicion” standard should be understood and applied in those circumstances.

### The scope of what constitutes a ‘reasonable suspicion’ should be clarified

B.1.2. In order to allow the Inspector-General (i.e. the office holder) and the IGTO (i.e. the agency) to understand and carry out the functions and obligations that are contemplated in the draft legislation, the meaning of “reasonable suspicion” should be clarified. The clarification should include the matters to which the Inspector-General must have regard in determining whether a reasonable suspicion has been formed. Consideration of these matters, and the application of the threshold test for corrupt conduct, generally, must fall within the scope of the IGTO’s statutory powers to investigate tax administration issues and the actions of tax officials. Providing this clarity will ensure that investigatory and referral obligations are fulfilled and that corruption issues are investigated by the most appropriate investigatory agency.

B.1.3. The draft legislation contemplates that, in certain circumstances, the Inspector-General *must* or *may* notify to the Integrity Commissioner of corruption issues relating to the IGTO or another entity. Specifically, in her capacity as the head of a regulated entity, the Inspector-General must notify the Integrity Commissioner of a corruption issue relating to the IGTO (clause 37). In her capacity as a Commonwealth integrity office holder, the Inspector-General may notify the Integrity Commissioner of an allegation or information that raises a corruption issue relating to another person or entity specified in the legislation (clause 46).

B.1.4. A notification made in either capacity may pertain to a public sector corruption issue, as that term is defined in clause 5. Indeed, this will typically be the case with regards to any notification made by the Inspector-General in relation to the IGTO under clause 37, as the IGTO is a public sector agency within the meaning prescribed in clause 8. It may also be the case with regards to a notification made in relation to another entity. (NB: It will not be the case in relation to referrals of corruption issues relating to the ATO, which is a law enforcement agency as specified in clause 7.)

B.1.5. The draft legislation stipulates that the Inspector-General must not notify a public sector corruption issue to the Integrity Commissioner, in either capacity, unless she *reasonably suspects* that



## Reasonable suspicion, obligations on Integrity Agencies and Resourcing

the offence to which the corruption issue relates has been, or is being, committed (clauses 37(2) and 46(2)).

B.1.6. The matters to which the Inspector-General (or other entity head or Commonwealth office holder) must have regard in forming a reasonable suspicion about the commission of an offence to which a public sector corruption issue relates may be the subject of a determination made pursuant to clause 290(1).

B.1.7. The use of the “reasonable suspicion” standard as a threshold for notification should be understood in light of the fact that staff members of public sector agencies will only be taken to have engaged in corrupt conduct (for the purposes of the CIC legislation) if, *inter alia*, the conduct constituted a listed offence (clause 17(2)). We assume it is on this basis that a threshold has been adopted that is typically used in relation to the investigation of criminal offences; for example, in determining whether search and detain powers should be exercised in the absence of a warrant on the basis of a reasonable suspicion that a criminal offence has been committed (see, for example, s 21 of the *Law Enforcement (Powers and Responsibilities) Act 2002*).

B.1.8. The IGTO stresses the importance of providing sufficient guidance, in the text of the legislation or in a clause 290 determination, as to how the “reasonable suspicion” test must be applied in the context of this legislation, bearing in mind the nature of the corruption issues are likely to arise, and how they are likely to arise, in the context of the IGTO’s activities. This is essential for the purposes of ensuring that:

- the Inspector-General is not so constrained in her capacity to notify the Integrity Commissioner of public sector corruption issues that the legislation does not achieve its stated objectives;
- the approach to determine whether there is a reasonable suspicion is not arbitrary or based on subjective considerations; and
- a lack of clarity as to what constitutes a “reasonable suspicion” does not result in the Inspector-General or any other person inadvertently failing to satisfy their statutory obligations, including under s. 37 of the IGT Act 2003.

B.1.9. Some guidance may be drawn from how the Courts have interpreted the meaning of “reasonable suspicion” in other contexts. In the case of *R v Rondo* [2001] NSWCCA 540, for example, which is a leading case on the meaning of “reasonable suspicion,” the NSW Court of Appeal considered the meaning of the expression in the context of (former) s. 357E of the *Crimes Act 1900*, which concerned the power of a police officer to stop, search and detain a person if he or she held certain suspicions on reasonable grounds. In his judgment, Smart AJ (with whom, on this point, Spigelman CJ and Simpson J agreed), referred to a number of earlier authorities dealing with the expressions “suspect” and “reasonably suspects” and stated that the following propositions emerge (at [53]):

*“(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s.357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.*

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*(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.*

*(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.”*

B.1.10. It is a fundamental principle of statutory interpretation that words and expressions must be interpreted in the context of the Act in which they appear. With that in mind, the extent to which the meaning of “reasonable suspicion” in the draft legislation should, or can, be understood with reference to the principles elucidated in *R v Rondo* is not clear. Certainly, the circumstances in which the test will be applied by the Inspector General will be, in many ways, distinct from the scenarios to which s. 357E was directed.

B.1.11. Consequently, the IGTO submits that clear and definitive guidance should be provided to explain how the test should be understood in the context of the draft legislation. If it is intended that the principles such as those outlined in *R v Rondo* will apply, those principles should be reflected in the guidance as appropriate and tailored to the circumstances in which the test is likely to be applied by entity heads and Commonwealth integrity office holders.

B.1.12. We submit that the guidance should address the following practical considerations:

- The IGTO deals with complainants on a frequent basis (as do certain other Commonwealth integrity agencies). It is not unusual for allegations of corruption to be made to the IGTO where it is one of a number of possible explanations for tax official actions, based on the information known by the informant. Whilst an IGTO officer may form an impressionistic view of the credibility of the complainant, or the veracity of the complaint, often it is not possible to adopt a considered view of these matters until an investigation has been carried out and further facts are discovered and verified. Unless and until an investigation is carried out, the IGTO position may be appropriately independently neutral.
- Neither the draft legislation nor the IGTO’s governing Acts<sup>35</sup> specifically empowers the Inspector-General to request or require information or documents that might assist with determining whether there are grounds to reasonably suspect that an offence has been committed. Unless that power is afforded under some other legislation (such as the IGT Act, which is unlikely to be the case unless the matter relates to the ATO or the TPB and a formal investigation is commenced by the IGTO), the Inspector-General might not be empowered to ask the questions necessary to form a view with respect to an allegation, irrespective of the severity or significance of the issue that is raised.

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<sup>35</sup> The *Inspector-General of Taxation Act 2003* and the *Ombudsman Act 1976*.

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- Even in circumstances where the Inspector-General does have a reasonable suspicion in relation to the commission of an offence, the Integrity Commissioner will not investigate the corruption issue unless he or she also has a reasonable suspicion that the offence has been, or will be committed. In those circumstances, and in circumstances where the Integrity Commissioner has broader powers to obtain information and documents to assist with the enquiry, he or she may be better placed to determine whether the threshold is met.

B.1.13. In other jurisdictions, such as Victoria, we note that the Independent Broad-based Anti-Corruption Commission, has published guidance on ‘reasonable suspicion’ on its website.<sup>36</sup> This may be one channel for the CIC to pursue. If it is intended that the meaning of “reasonable suspicion” will be explained in clause 290(1)(a) determination, the IGTO submits that the determination should be made upon commencement of the draft legislation (if enacted), and consideration should be given to the content of such a determination as part of this consultation process. This is because, the effectiveness and reach of the draft legislation, insofar as it relates to public sector corruption issues, is, in many ways, dependent on how that threshold will be applied in practice. Moreover, entity heads and Commonwealth office holders are well placed to consult with respect to the content and comprehensiveness of the determination and whether it addresses the issues that are likely to be encountered in practice.

B.1.14. As we observed in Part A, by its definition, criminal offences and ‘corruption’ import both an intent or knowledge of criminal acts as well as the criminal actions themselves. While the latter may more readily identified and thus form the basis of a ‘reasonable suspicion’, the criminal intent or knowledge of a person does not lend itself to such easy observations absent an in depth and comprehensive investigation which many agencies, including our own, are not empowered or resourced to undertake. We do not believe that the CIC regime intends to create such responsibilities, and therefore recommend that reasonable suspicion of the corrupt conduct having taken place should be sufficient for referral to the CIC, who may then undertake further and more comprehensive investigations.

#### **Recommendation to the AGD**

*The IGTO recommends that the AGD:*

- *provide greater clarification on the definition of ‘reasonable suspicion’ and the matters to which an Integrity Officer Holder and Integrity Agency must or may have regard when forming that suspicion or view; and*
- *clarify that entity heads and Commonwealth integrity office holders need not form a ‘reasonable suspicion’ of the mens rea (or guilty mind) before making a referral to the CIC.*

<sup>36</sup> Independent Broad-based Anti-Corruption Commission, *Information for Principal Officers*  
<<https://www.ibac.vic.gov.au/reporting-corruption/notifications/information-for-principal-officers>>.

## Integrity agencies should be adequately resourced to discharge the new and additional responsibilities in the CIC Bill

B.1.15. The draft legislation, in its current form, contemplates that the Inspector-General (ie. the office holder) and the IGTO (ie. the agency) will participate in the corruption investigation and inquiry framework in various capacities. These capacities include:

- i. the Inspector-General as head of a regulated entity (clause 8);
- ii. the IGTO as a regulated entity (clause 6);
- iii. IGTO employees as staff members of a regulated entity (clause 12);
- iv. the Inspector-General as a Commonwealth integrity office holder (clause 20(1));
- v. the IGTO as a Commonwealth integrity agency (clause 20(2));
- vi. the Inspector-General as the head of a home entity (clause 52(1)); and
- vii. the IGTO as a home entity (clause 52(1)).

B.1.16. Additionally, the Inspector-General and the IGTO may be required to be involved, or may choose to be involved, in various processes outlined in the draft legislation which apply to persons and/or agencies, generally.

B.1.17. Annexure A to this submission sets out our understanding of the various roles the Inspector-General and IGTO will adopt under the CIC Bill in its current form, and the various processes that may be mandated, or made available, including (but not limited to);

- entry into agreements with the Integrity Commissioner as to how corruption issues are to be dealt with;
- the referral of corruption issues to the Integrity Commissioner;
- the investigation of corruption issues referred to the IGTO by the Integrity Commissioner, including under the management or oversight of the Integrity Commissioner, which may require the nomination of an agency contact, interim or periodic reports to be prepared, final reports to be prepared and numerous parties to be kept informed of the progress of the investigation;
- the joint investigation of corruption issues with the Integrity Commissioner in the manner prescribed by the legislation;
- the provision of information and documents with reference to the limitations on information sharing that arise from tax secrecy provisions and other secrecy/confidentiality provisions;
- the requirement to give evidence or respond to summonses issued to the Inspector-General, the IGTO or an IGTO employee in the course of a hearing, including with legal representation where appropriate; and
- the potential necessity of obtaining appropriate legal advice in relation to secrecy and confidentiality constraints, human resource issues and other matters that may arise when carrying out obligations under the legislation.

## Reasonable suspicion, obligations on Integrity Agencies and Resourcing

B.1.18. The IGTO welcomes the opportunity to make meaningful contributions to the identification and investigation of corruption issues in the manner contemplated by the draft legislation. As an investigative body with systems in place to investigate the actions and conduct of ATO and TPB officers, the IGTO is particularly well placed to assist if and when corruption issues arise in relation to the ATO and the TPB.

B.1.19. However, the responsibilities that will or may arise under the legislation are numerous and varied, and there is a real risk that these will have a significant resourcing impact for the IGTO. In circumstances where the IGTO is a micro-agency with fewer than 30 employees, it may take little more than the referral of a single investigation or joint investigation to compromise the IGTO's capacity to carry out its day-to-day functions under the IGT Act.

B.1.20. Moreover, the IGTO has, for some time, publicly advised that we have been required to make difficult decisions regarding our service standards for the resolution of complaints and the number of broader reviews that may be conducted, which is due to increased awareness and demand for IGTO services and the absence of additional resources. Such constraints have also been acknowledged by the Senate Economics Legislation Committee in its June 2020 report, *Inquiry into the Performance of the Inspector-General of Taxation*<sup>37</sup>. These constraints are the subject of recommendations by the Committee and are awaiting Government's response.

B.1.21. In the light of these considerations, it is essential that steps are taken to ensure that the Inspector-General and the IGTO have the resourcing capability to carry out our responsibilities in the manner that is contemplated by the CIC Bill and IALA Bill. This will allow the Inspector-General and the IGTO to assist, to the best of our ability, in achieving the objectives of the legislation.

B.1.22. Alternatively, if no resourcing allowances are made, it will be necessary to have some mechanism whereby the Inspector-General and the IGTO can be excluded from otherwise mandated processes, if resourcing constraints impede our involvement. Where there is already some discretion in the legislation as to whether a corruption issue will be referred to the IGTO (for example, in s. 49(2) where the Integrity Commissioner must form a view that the IGTO has appropriate capabilities to investigate an issue), it must be made clear that resourcing constraints are a relevant consideration.

#### **Recommendation to the AGD**

*If no additional resources are provided, the IGTO recommends that the AGD consult with stakeholders on the development of mechanisms to address potential under-resourcing issues as a result of the additional and increased responsibilities for Integrity Agencies under the CIC regime. These mechanisms may include, for example:*

- *Centralised surge capacity pools;*
- *Temporary movement registers; and*
- *Streamlined resource sharing and secondment arrangements.*

<sup>37</sup> Above n 31, Recommendation 1, p 28.

## C. Information sharing, compulsory information gathering and protections

C.1.1. The IGTO currently collects, holds and uses a range of information for the purposes of carrying out and discharging our statutory functions. Firstly, we currently maintain a database of tax complaints which includes the name and contact details for the complainant (where provided), the tax administration issues and the outcomes of our investigations. We also hold information in relation to our broader reviews including submissions lodged by stakeholders and information provided by the ATO or the TPB. Secondly, our office also holds personal (and potentially sensitive) information in relation to IGTO personnel for employment and management purposes.

C.1.2. This part of the submission discusses our concerns regarding the risks associated with information sharing provisions contained within the CIC Bill and in particular the lack of current protections that may otherwise be made available for individual IGTO officers in making a referral to the CIC.

### Referrals by the IGTO to the CIC may inadvertently give rise to an offence where it involves protected information or documents, or those subject to tax secrecy provisions

#### Tax secret information

C.1.3. In making a referral to the CIC, clause 38 does not authorise the IGTO to disclose information that is protected by the tax secrecy provisions. The taxation secrecy provisions are set out in Division 355 of Schedule 1 to the *Taxation Administration Act 1953*. Barring specific exceptions,<sup>38</sup> a breach of these provisions may attract a penalty of up to 2 years imprisonment.<sup>39</sup>

C.1.4. Information that is subject to the tax secrecy provisions includes those obtained under or for a purpose under a taxation law, relating to the affairs of an entity and which identifies or is reasonably capable of identifying an entity.<sup>40</sup>

C.1.5. A significant proportion of the IGTO's records – mostly related to our complaints handling function – is information pertaining to specific taxpayers and their taxation affairs, falling squarely within the ambit of the tax secrecy provisions. However, it is also separately and independently subject to IGTO tax secrecy provisions.

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<sup>38</sup> See for example, *Taxation Administration Act 1953*, Sch 1, s 355-50.

<sup>39</sup> *Taxation Administration Act 1953*, Sch 1, s 355-25.

<sup>40</sup> *Taxation Administration Act 1953*, Sch 1, s 355-30(1).

## Protected Information and Protected Documents

C.1.6. It is not clear whether clauses 47(1) and 47(4) of the CIC Bill would be sufficient to overcome the strict requirements which bind the Inspector-General and all IGTO officers.

C.1.7. The IGT Act 2003 contains a specific secrecy provision specific to information and documents obtained in the course of IGTO duties. Section 37 of the IGT Act 2003 (the IGTO secrecy provision) states that protected information includes information that is 'disclosed to, or obtained by' a person to whom the section applies and similarly that protected documents include those 'obtained or made by' a person to whom the section applies.

C.1.8. Pursuant to section 37 of the IGT Act 2003<sup>41</sup>, an IGTO officer may commit an offence and be imprisoned for up to 2 years for disclosing any protected information or document, as defined.

C.1.9. The IGTO routinely obtains information that is protected by both the tax secrecy and IGTO secrecy provisions:

- Information that is provided to us by complainants under section 37 of the IGT Act 2003; and
- Information provided to us or that we obtain from the ATO or the TPB as part of our investigations is also often also protected by the tax secrecy provisions.

C.1.10. It is arguable that certain information within the IGTO's possession would retain its protected status under both legislative regimes – that is, IGTO and tax secrecy provisions.

C.1.11. We note that no consequential amendments have been proposed for the IGT Act 2003 to provide any carve outs or exceptions to the strict secrecy provisions to which we are bound. Accordingly, we would find it difficult to make any referrals to the CIC without a significant risk of committing an offence – that is:

- a. disclosing protected information or documents under our Act and otherwise; and/or
- b. ensuring that no information subject to tax secrecy was provided.

## The distinction between tax secret information and other protected information may place IGTO officers in a position where they breach secrecy requirements where mandatory information gathering powers are used

C.1.12. It is not straightforward to extricate information and documents which would otherwise be protected by a 'tax secrecy provision' and those which are subject only to the IGTO's secrecy obligations. Furthermore, any process to extricate tax secret information from IGTO protected information would be time-consuming and resourcing-intensive.

C.1.13. When considered alongside the compulsory information gathering powers afforded to the CIC in Part 8 of the CIC Bill, the situation becomes even more difficult. Clause 90 empowers the CIC to issue

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<sup>41</sup> *Inspector-General of Taxation Act 2003*, s 37.



## Information sharing, compulsory information gathering and protections

a notice for the production of documents or information with a consequence of 2 years imprisonment for non-compliance (clause 95).

C.1.14. Although an IGTO officer would not be excused from providing information that is protected by section 37 of the IGT Act 2003, they may be excused from providing information that is protected by the taxation secrecy provisions (clause 97(6)(e)(i)). As previously stated, the nature of the IGTO investigatory role is to obtain information that is usually protected by both types of secrecy provisions and impracticable to distinguish quickly. Arguably, all information in the IGTO's possession could be the subject of a formal notice from the CIC.

C.1.15. As a practical matter, if an IGTO officer was served with such a notice, they would be placed in the invidious position of either risking a breach of the taxation secrecy provisions or failing to comply with a notice of the Integrity Commissioner. That is, IGTO personnel would be committing an offence, either:

- (1) because they provide information to the CIC in response to a notice and the information provided contains tax secret information; or
- (2) because they fail to provide information to the CIC in breach of the notice.

## The requirement to refer all information and documents may deter referrals being made to the CIC unless further legislative amendments are made to prevent an offence being committed by IGTO personnel

C.1.16. Clauses 46(1) and (2) provides that where a Commonwealth integrity office holder becomes aware of an allegation that raises a corruption, they *may* notify the Integrity Commissioner in writing. In doing so, clause 47(1) is enlivened stating that after the referral is made, the Commonwealth integrity office holder *must* give to the Integrity Commissioner 'all information and documents that (a) relate to the issue; and (b) are in the possession, or under the control, of the office holder.'

C.1.17. The requirements in clause 47(1) to provide all information and documents to the Integrity Commissioner are at odds with section 37 of the IGT Act 2003 which requires that protected information and documents only be used and disclosed for the purposes of discharging functions under the IGT Act. Without further amendment to align these two provisions, there would be significant risk to the Inspector-General and officers of the IGTO in making any referrals to the CIC. Accordingly, and in view of the discretion afforded in clause 46, it is likely that a conservative approach will be adopted and no referrals will be made to the CIC without clear legislative protection against penalties for potential breaches of our secrecy obligations.



## Lack of information in tax referrals may hamper the ability of the CIC to effectively identify and investigate corrupt conduct

C.1.18. By its nature, corrupt conduct and, particularly complex corrupt conduct, is difficult to detect. Within a system as large and complex and as the Tax and Superannuation systems, the ability to quickly and easily identify key areas of concern may be a challenge for those who do not often work in this area. Corrupt conduct within Tax and Superannuation matters usually manifests through inappropriate access and disclosure, inappropriate actions or decisions, or inappropriate exercise of discretion. The IGTO office is composed of officers with prior tax experience, both in the private sector and from within the ATO itself which, which affords us with unique insight into tax technical matters and the machinations of ATO internal policies, processes and systems.

C.1.19. In our experience, if the CIC does not receive sufficient information to enable its investigators to pinpoint specific cases or individuals for investigation, the effectiveness of the CIC investigative processes could be compromised. In its present form, the CIC Bill would not permit us to share any tax information obtained as part of our investigations with the CIC and, arguably, any information that we hold on our systems in relation to an investigation.

C.1.20. We have set out a hypothetical example to illustrate these difficulties, both for our office and for the CIC receiving the information.

### Hypothetical example

C.1.21. During a complaint investigation, the IGTO receives information alleging that a tax official may be utilising their position to provide favourable tax outcomes in private binding rulings that are inconsistent with the ATO's authoritative view of the law and are provided in return for a price paid by the taxpayer.

C.1.22. The information provided by an informant to the IGTO may be protected only by section 37 of the IGT Act 2003 and, if so, clause 47(1), may authorise its disclosure in a referral to the CIC. However, in the IGTO's experience, informant-provided information by itself would rarely be probative and is commonly found to be incomplete or inaccurate. Notwithstanding this, the information provides useful lines of enquiry which enables the IGTO to obtain information with high probative value from the ATO's records. This latter information, however, is usually protected by the taxation secrecy provisions, and therefore unable to be included in any referral to the CIC.

C.1.23. The importance of ready and fulsome access to information held by the ATO for effective discharge of the IGTO's dual statutory functions was considered by the Senate Economics Legislation

## Information sharing, compulsory information gathering and protections

Committee (SELC) in its recent *Inquiry into the Performance of the Inspector-General of Taxation*.<sup>42</sup> In its final report, the SELC recommended that:

*...the Australian Government review the IGTO's current access to the ATO and Tax Practitioners Board's systems, data, and records and considers improving access, where necessary, to further enable it to perform its legislative functions.*<sup>43</sup>

C.1.24. The Government has not yet issued its response to the SELC's Inquiry.

### **Recommendation to the AGD**

*The IGTO recommends that the AGD consider whether further legislative amendments are necessary to realise the objectives of the CIC regime – especially where the matters under investigation involve the tax and superannuation systems, including whether the:*

- *provisions of the CIC Bill and IALA Bill are sufficient to enable the IGTO to refer matters to the CIC without committing an offence – that is, contravening existing secrecy regimes, such as section 37 of the IGT Act 2003; and*
- *information that is referred to the CIC by the IGTO (absent any tax secret information) would provide sufficient insight to enable a fulsome investigation by the CIC.*

## Human Resource and Personnel Information Sharing

C.1.25. As highlighted previously, our office also possesses personnel information in relation to our staff members. Through the course of her duties, the Inspector-General may be made aware of potentially fraudulent or corrupt conduct of one of her staff members that may give rise to corrupt conduct or reasonable suspicion to satisfy a referral to the CIC. In relation to making the referral to the CIC as per section 37 of the proposed legislation, the Inspector-General would need to provide the CIC with specific information to potentially act on the referral. In this situation, the proposed legislation is unclear as to whether the Inspector-General is also required to give her staff member that is the subject of the referral, an opportunity to respond to the allegations of corruption prior to the referral.

C.1.26. The concern is that without a clear a process for the head of agency to follow or utilise, the current proposed bill leaves certain elements of the referral process in question, which in turn creates uncertainty for the head of the agency when undertaking the referral to the CIC and may create unnecessary employer-employee disputes. For a small agency such as ours, employee-employer disputes of this kind could be deleterious to the efficient operation of our agency and overall staff morale. For those currently working in a high stress complaints handling capacity, such impacts would reduce productivity and adversely affect outcomes for taxpayers who depend on our service. It may be that other Integrity Agencies, such as the Australian Public Service Commission, would be better placed to provide input on the employer-employee implications of the CIC Bill.

<sup>42</sup> Above n 31.

<sup>43</sup> Ibid, Recommendation 3, p 28.

## Information sharing, compulsory information gathering and protections

**Recommendation to the AGD**

*The IGTO recommends that the AGD consult with the Australian Public Service Commission to provide further guidance on best practice processes that regulated entities should adopt when contemplating referring matters to the CIC in relation to their own officers. In particular, consideration should be given to any notification or opportunity for the employee to make submission prior to the referral being made.*

## D. Concurrent investigations and obligations of secrecy

### It is uncertain how the 'stop action' requirement applies where the IGTO refers to the CIC a corruption issue that relates to another agency

D.1.1. Clause 46 provides that the IGTO may notify the Integrity Commissioner of a corruption issue that relates to another agency, such as the ATO. In doing so, it appears the IGTO may continue any related investigation that may be on foot.

D.1.2. By contrast, clause 37 provides that the Inspector-General is required to notify the Integrity Commissioner of a corruption issue that relates to our agency (the IGTO), unless certain exceptions apply. Following the notification, the IGTO must 'stop' our agency from 'taking any other action relating to the issue'<sup>44</sup> until the Integrity Commissioner grants permission to take the action or decides to deal with the issue in a prescribed manner<sup>45</sup> ('stop action' requirement). Similarly, if the Commissioner of Taxation notifies a corruption issue in relation to the ATO to the Integrity Commissioner, then a 'stop action' would be in force.

D.1.3. Due to the different approach in the 'stop action' requirement, we are uncertain how this requirement applies where the IGTO refers to the CIC a corruption issue that relates to the ATO, and the Commissioner of Taxation also notifies the CIC of the same corruption issue.

D.1.4. If the IGTO receives a complaint about the ATO's tax administration actions and alleged corruption relating to the ATO, and the Inspector-General notifies the Integrity Commissioner of the corruption issue, two possible outcomes may eventuate:

- (1) Firstly, the IGTO may continue with our complaint investigation as the current drafting of the CIC Bill, if read strictly, does not apply a 'stop action' where an Integrity Agency refers a matter to the CIC in relation to another agency. There is a risk that the IGTO's investigation may cause a concerned ATO officer to take action to cover up any corrupt conduct.
- (2) Secondly, a 'stop action' is in force (as if the Commissioner of Taxation had made the referral to the CIC) in order to protect the documents and information from being destroyed prior to the CIC being able to commence its investigation. It is not clear whether, based on the current drafting of the CIC Bill, the IGTO may be required to stop our complaint investigation into the ATO's tax administration actions raised by the complainant, until we are granted permission

<sup>44</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clause 38(2)(b).

<sup>45</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clause 38(4)(b)(i)-(iii). The Integrity Commissioner may also direct the IGTO to 'not to take action' in relation to the corruption issue that relates to our agency pursuant to clauses 61(9) and 64(7).

## Concurrent investigations and obligations of secrecy

by the Integrity Commissioner to resume the action. An IGTO complaint investigation may be delayed if the 'stop action' applies.

D.1.5. We have explained those concerns in further details below and provided a hypothetical example for illustration purposes.

## Potential adverse impact on corruption investigation if a 'stop action' does not apply to both the referring agency and the agency to which the referral relates

D.1.6. Where a 'stop action' does not apply, a continuation of the IGTO investigation may run the risk of relevant persons or areas being made aware of the possible identification of corrupt conduct and therefore leading to the destruction or fabrication of relevant information or documents.

D.1.7. Most of the IGTO's complaint investigations are in relation to the administrative actions of the ATO. Where the IGTO decides to investigate a complaint and requires access to the ATO's systems and records, the IGTO must first issue an investigation notice to the Commissioner and the Commissioner must authorise ATO officers to provide the information to the IGTO<sup>46</sup>. The investigation notice summarises, amongst other things, the complainant's concerns about the ATO's actions. This may create an opportunity for a concerned ATO officer to alter records or fabricate evidence.

D.1.8. Furthermore, during an IGTO investigation, the IGTO officer will raise questions which may require an ATO Complaint Resolver to coordinate with relevant ATO business units for responses. This will create further opportunities for the concerned ATO officer to be alerted to a potential CIC referral and act to cover up their actions.

D.1.9. In cases where the Inspector General has information about corrupt conduct before issuing the investigation notice to the Commissioner, access to the investigation notice is limited to a small number of identified ATO officers. However, if the ATO officer who has engaged in corrupt conduct was alerted to the allegations, they may have an opportunity to act and cover up their actions.

## Hypothetical example

D.1.10. A complainant approaches the IGTO with several tax related concerns including that the processing of her income tax return has been unduly and inappropriately delayed. She informs the IGTO that the refunds were required as a matter of urgency owing to her imminent eviction from her home.

D.1.11. There is no suggestion of corrupt conduct and there are no other factors which would reasonably cause the Inspector General to suspect a corrupt conduct has occurred. As a result, the IGTO, as per our standard processes, issues an unredacted investigation notice to the Commissioner.

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<sup>46</sup> *Ombudsman Act 1976*, ss 7A and 8 (by virtue of section 15 of the *Inspector-General of Taxation Act 2003*). The IGTO is empowered under section 9 of the *Ombudsman Act 1976* (by virtue of section 15 of the *Inspector-General of Taxation Act 2003*) to obtain information and documents via formal compulsory disclosure processes; however, the IGTO considers this power to be used only as a last resort.

## Concurrent investigations and obligations of secrecy

The complaint is allocated to an ATO officer in the relevant area, who is the one trying to remain undetected.

### **Scenario 1 – ATO officer taking action before an IGTO officer accessing ATO systems and records**

D.1.12. In this scenario, the ATO officer has removed the case notes or obscure them before an IGTO officer has an opportunity to access the ATO systems. This has prevented the IGTO from obtaining information which could point to the existence of corrupt conduct. As a result, the Inspector General does not refer the matter to the CIC.

### **Scenario 2 – ATO officer taking action after an IGTO officer accessing ATO systems and records**

D.1.13. In this scenario, the ATO officer has not had an opportunity to remove or obscure the case notes before an IGTO officer accessing the ATO systems. As part of the IGTO's investigations, it is identified that the refund had been selected for integrity verification. However, in the course of reviewing case notes relevant to the investigation, the IGTO becomes aware of irregularities that suggest there has been a significant departure from usual procedures for deciding which refunds are selected for verification and that this decision and which has been made by the same ATO officer occurred on more than one occasion in relation to this taxpayer. The matter is referred to the CIC under clause 46.

D.1.14. The ATO officer is concerned of a potential CIC notification by the IGTO. This officer proceeds to obscure and alter the case notes subsequent to the IGTO investigation to frustrate CIC's corruption investigation.

## The IGTO's complaint investigation may be delayed if the 'stop action' requirement applies

D.1.15. Where a 'stop action' is in force, the IGTO would be required to stop any investigations including any tax administration complaint investigations which may delay providing an outcome (sometimes time-sensitive outcome) to the taxpayers.

D.1.16. The IGTO's services to taxpayers provide assurance and ensure accountability that the administration by the ATO and TPB is consistent and improves community confidence in a fair and efficient tax and superannuation system for all Australians. Taxpayers come to us for an independent investigation of their complaints, including where there has been an erosion of trust in institutions. Where there are unnecessary delays with our complaint investigation, there is a risk that community's trust and confidence in the tax and superannuation system would be eroded. The adage that 'justice delayed is justice denied' is apt in the present circumstances.

## Hypothetical example

D.1.17. Take the earlier example where a complainant approaches the IGTO with several tax related concerns including that the processing of her income tax return has been unduly and inappropriately delayed. In this scenario, the complainant has provided additional information which enables the

## Concurrent investigations and obligations of secrecy

Inspector General tends to suggest the existence of corrupt conduct. The Inspector General refers the matter to the CIC under clause 46.

D.1.18. In the absence of a 'stop action' requirement, the IGTO would issue a redacted investigation notice and directly contacts the ATO's Fraud Prevention and Internal Investigations unit to ensure the subject matter of the investigation is only known by that area. However, if a 'stop action' is in force, the IGTO's investigation will be delayed until such time as the CIC finalises its investigation or otherwise authorises the IGTO to proceed. In this case, the taxpayer whose sole concern is to obtain her refund to pay rent would be adversely impacted:

- first by the delay of the refund being issued; and
- second by the delay of the IGTO finalising its investigations to have her refund issued.

## **There is a need to strike an appropriate balance between preserving the integrity of any CIC investigation processes while allowing agencies to continue their BAU**

D.1.19. Having regard to the matters discussed earlier in this part, and the different hypothetical examples and scenarios, it is clear that steps need to be taken to preserve the integrity of information and processes in any CIC investigation. At the same time, each agency has its own statutory remit and stakeholders who rely on those agencies to discharge their statutory duties. A balance must be carefully struck between the two potentially competing interests.

D.1.20. In our view, a 'hard and fast' rule in relation to a 'stop action' (or the absence of one) when a referral is made would not effectively strike the right balance. Rather, we believe that the legislation should be augmented to allow regulated entities and integrity agencies to engage with the CIC on whether a 'stop action' should apply in the circumstances. Such engagement should ideally occur before, or at the very least contemporaneously with, the referral made to the CIC. This would enable both the CIC and the referring agency to discuss any concerns that actions taken may frustrate the later work of the CIC.

## **Consideration should be given to whether records of the IGTO investigation are useful to the CIC and therefore should be provided (in full) to the Integrity Commissioner**

D.1.21. In part C of this submission, we have outlined the difficulties with the IGTO sharing information and documentation with the CIC whilst also ensuring that we adhere to the secrecy requirements under the IGT Act 2003.

D.1.22. We note that a continuation of the IGTO investigation may run the risk of relevant persons or areas being made aware of the possible identification of corrupt conduct and therefore leading to the destruction or fabrication of relevant information or documents. This may happen at any time during and after an IGTO investigation.

## Concurrent investigations and obligations of secrecy

D.1.23. If records are altered or destroyed after an IGTO investigation, we believe the IGTO's investigation file would be valuable to the CIC as it records relevant situations prior to records being manipulated. However, if investigation records held by the IGTO cannot be shared with the CIC, it could be difficult for the CIC to detect any changes that were made by concerned officers, which could frustrate the CIC's investigation into the corruption issue.

D.1.24. The IGTO recommends that the AGD consider whether it would be useful for the CIC's investigation if records of the IGTO's complaint investigations could be provided to the CIC. If so, conflicts between the compulsory information gathering requirements under the CIC Bill and the tax secrecy requirements in IGT Act 2003, as outlined in Part C of this submission, should be addressed.

### **Recommendation to the AGD**

*The IGTO recommends that the AGD:*

- *consider augmenting the existing legislative provisions in relation to 'stop action' to allow referring agencies to engage with the CIC on whether a 'stop action will be applied. Such engagement should occur before, or contemporaneously with, any referrals being made to the CIC; and*
- *If a 'stop action' does not apply, whether there would be utility in empowering Integrity Agencies to refer all materials gathered as part of the investigation (to date) to the CIC.*

## **Non-disclosure obligations - a broad prohibition from disclosure of information or documentation relating to a corruption issue may adversely impact the IGTO's ability to undertake complaint investigations into tax administration issues**

D.1.25. A further constraint to the effective discharge of the IGTO's statutory obligations may arise in relation to the obligations of secrecy surrounding corruption investigations by the CIC. The CIC Bill contains a number of provisions which prohibit the disclosure of certain information relating to a corruption investigation or inquiry undertaken by the CIC.

D.1.26. The Integrity Commissioner can issue a notice<sup>47</sup> or summons<sup>48</sup> to require the Inspector-General or IGTO officers to give information or evidence or produce documentation relevant to a corruption investigation or inquiry. The notice/summons may include a notation to prohibit the

<sup>47</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clause 90.

<sup>48</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clause 100.



## Concurrent investigations and obligations of secrecy

disclosure of information about the notice/summons or any official matter connected with the notice/summons.<sup>49</sup>

D.1.27. If an IGTO officer receives such a notice or summons, the IGTO officer may commit an offence<sup>50</sup> if they disclose the existence of, or any information about the notice/summons or any official matter connected with the notice/summons whilst the notation is still active, and the disclosure is not otherwise permitted under the terms of the notation/summons. Penalty for this offence is two-years imprisonment or 120 penalty units, or both.

D.1.28. The IGTO appreciates the need to maintain strict confidentiality regarding corruption matters that are being investigated or which are subject to enquiry by the CIC. We are concerned, however, that a broad prohibition from disclosure may adversely impact the IGTO's ability to undertake complaint investigations into tax administration issues. We may also be required to make changes to our systems and processes (e.g. remove the case from our system or impose different system access rights to case officers) to ensure compliance with the non-disclosure requirement.

D.1.29. As part of the IGTO's complaint investigations, it is necessary for us to discuss information relating to the complaint with the complainant and the relevant agency (i.e. the ATO and TPB). The information and related documentation may be the subject of the CIC's notice or summons, or they may be connected with the information or documentation contained in this notice or summons. If we are not allowed to discuss those details, we would not be able to progress our complaint investigation.

D.1.30. As noted earlier, where there are unnecessary delays with our complaint investigation, there is a risk that community's trust and confidence in the tax and superannuation system would be eroded. Furthermore, in the IGTO's experience, complainants who are dissatisfied with the progress of complaint investigations will commonly seek to obtain information why and/or take action in an attempt to expedite activities. Such steps would likely include prompting internal review processes and, in the case of corruption allegations, referral to external parties who scrutinise the work of the IGTO, such as Parliamentarians, in an attempt to expose the issue publicly.

D.1.31. Conversely, if we progress the complaint investigation and discuss those details, the IGTO would commit an offence and could personally be subject to penalties.

D.1.32. In balancing the need to maintain confidentiality of CIC activities and promptly investigate tax administration concerns from the Australian community, we suggest that, in so far as possible, mechanisms are established by the CIC to allow agencies like the IGTO to continue to serve the community whilst minimising any potential to compromise the confidentiality of a CIC inquiry. This may include providing a prospective recipient of the notice / summons an opportunity to make suggestion or comment regarding the notation to be included in the notice / summons. This should allow the recipient to bring to the attention of the CIC any adverse impacts that the notation may have on their agency.

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<sup>49</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clauses 93 and 108.

<sup>50</sup> Commonwealth Integrity Commission Bill 2020 Exposure Draft, clauses 94 and 109.

## Concurrent investigations and obligations of secrecy

## Hypothetical Example

D.1.33. For illustrative purposes, take the earlier example in which the IGTO has referred the issues arising during a complaint investigation to the CIC which is not subject to a 'stop action'. In this example, the CIC is investigating the conduct referred and issues a notice to the IGTO requiring production of information and documents. That notice includes a notation to prohibit the IGTO from disclosing information about the notice and any official matter connected with the notice.

D.1.34. The notice may prevent the IGTO discussing the complaint raised by the complainant. If the notation is broad enough, the IGTO may also be prohibited from discussing the ATO's handling of the complainant's matter. As a result of this, the IGTO would not be able to progress the complaint at all and the IGTO may be constrained from even explaining to the complainant why their matter has been delayed.

D.1.35. The complainant is dissatisfied with the IGTO's perceived lack of action. They contact the media and their local Member of Parliament to expose the issue publicly, which alerts concerned ATO officials of potential enquiry or investigation into their conducts.

**Recommendation to the AGD**

*The IGTO recommends that the AGD provide guidance on how Integrity Agencies can balance on the one hand the need to maintain confidentiality about referrals to the CIC and on the other to manage expectations of complainants who have raised concerns needing to be investigated. This includes navigating the relevant offence requirements under separate legislation and requirements.*

## E. Harmonisation of approaches and cross-agency information sharing

### The scope of vexatious complainant declarations needs to be considered to minimise the risk of collateral complaints to circumvent the declaration

E.1.1. It is a common experience among ombudsman and ombudsman-like offices that a small cohort of complainants exhibit unreasonable conduct that can consume a significant amount of organisational resources.<sup>51</sup> The conduct may exhibit in a number of ways including unreasonable behaviour, unreasonable arguments, unreasonable lack of cooperation, unreasonable demands and unreasonable persistence.<sup>52</sup> Where such complainants are determined to obtain an outcome that is unsupported by the evidence, they typically attempt to keep the complaint 'alive' by seeking re-investigation on the basis that the original investigation was defective or seeking a new investigation of different, but directly-related and non-material, issues.

E.1.2. The CIC Bill provides that the Integrity Commissioner may declare a complainant vexatious (clause 67) either on his or her own initiative, or on application by the head of a regulated entity or Minister, or an Integrity Office holder (clause 67(2)). Amongst other things, the intended effect of the declaration is to enable heads of regulated entities, Commonwealth integrity office holders or the Minister, to refuse to consider the allegation or information provided unless the Integrity Commissioner has provided written permission to raise those allegations (clause 69(2)).

E.1.3. The current drafting of the CIC Bill does not make clear whether the declaration is intended to apply narrowly, only in respect of specific allegations and specific regulated entities and integrity office holders or broadly to a class of regulated entities and integrity office holders and/or agencies.

E.1.4. If the terms of the declaration are limited to the allegation that was previously raised, then it is open to the complainant to use another issue to collaterally raise the same concerns.

### Hypothetical example

E.1.5. A complainant lodged a complaint with the IGTO that alleges an ATO officer engaged in corrupt conduct and that conduct adversely affected their interest. After investigation, the IGTO determines that no referrals will be made to the CIC. The complainant is dissatisfied and engages in behaviour that is unreasonable, including persistence and abusive behaviour towards IGTO officers. The IGTO applies to the Integrity Commissioner for a vexatious complainant declaration. The CIC grants a declaration, however, it is limited to the allegations of corruption that were raised with the IGTO. The

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<sup>51</sup> NSW Ombudsman, *Managing Unreasonable Complainant Conduct Practice Manual* (2<sup>nd</sup> Ed) (May 2012) p iii.

<sup>52</sup> *Ibid*, p 14.

## Harmonisation of approaches and cross-agency information sharing

complainant seeks internal IGTO review of the initial investigation and lodges fresh complaints regarding the ATO's failure to prevent the alleged officer conduct.

E.1.6. Furthermore, if the terms of CIC declarations are only limited to the agency which sought the declaration (in the case of the IGTO, this may also include the ATO as the subject of the allegation), it would not be surprising if the complainant were to then seek to approach other regulated entities or integrity office holders to seek to re-enliven the issue – for example, by approaching the Commonwealth Ombudsman, the Australian Public Service Commission, the Australian Information Commissioner (AIC), the Australian Federal Police and responsible Ministers. In relation to vexatious complainants, this has also been a common experience in our complainants handling service.

E.1.7. We expect that vexatious complainant declarations would be published as formal determinations, in the same manner that the AIC publishes her decisions in relation to vexatious applicants.<sup>53</sup> However, unlike the AIC declarations which limit the ability of a prospective FOI applicant to seek access from an agency, or certain agencies, the Integrity Commissioner declarations may need to operate more broadly.

E.1.8. We suggest that, in addition to publication of the declarations, a process is established whereby the CIC informs regulated entities and Commonwealth integrity office holders of the declaration being made so that each can take appropriate steps to update case management systems to guard against such complainants using different agency processes as a means of circumventing the declaration.

### **Recommendation to the AGD**

*The IGTO recommends that the AGD consider whether:*

- *vexatious complainant declarations will be limited to specific agencies or will apply across the cohort of Integrity Agencies; and*
- *there would be utility in establishing a mechanism to inform all relevant agencies about the vexatious declaration component so that each agency can take appropriate action to update their systems and processes to manage the risk of collateral complaints being lodged.*

## Limitations on information sharing across agencies may lead to unnecessary duplication of effort and referrals to the CIC

E.1.9. The CIC Bill sets out a range of obligations and responsibilities for Commonwealth integrity officers which were discussed earlier in this submission. Each Commonwealth integrity officer operates

<sup>53</sup> Office of the Australian Information Commissioner, *Vexatious applicant declarations* <<https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions/vexatious-applicant-declarations/?start=8>>.

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within their own jurisdiction, subject to specific pieces of legislation and (often) secrecy provisions. There are limitations about information sharing between integrity officers which may lead to a situation of duplicated effort and referral to the CIC.

E.1.10. It is not uncommon for complainants to approach a large number of different agencies about the same issue. In a recent, ongoing matter with our office, the complainant has copied over 100 recipients to his email correspondence. These recipients include those from agencies such as the ATO, the AFP, the Fair Work Commission, Department of Home Affairs and a range of state-based government agencies. In this case, it was evident on the face of email correspondence that other agencies had been made aware of the complainant's concerns. In some cases, we have no knowledge of whether a complainant has raised their concerns with other agencies.

E.1.11. Upon receipt of the complaint, each of the recipient agencies is likely to consider the approach in accordance with their own processes. There are some clear benefits to this approach:

- allowing each agency to determine their own process as it may ensure that potentially corrupt conduct does not fall through the net because it does not fit one agency's definition or process;
- drawing upon the breadth of experience and expertise of each of the recipient agencies, it is possible that each may identify different aspects of the conduct that may be of concern within their specific jurisdictions and specialisations; and
- minimising the risk of 'group think' where integrity office holders or integrity agencies are persuaded one way of another through committee discussion of the issues that have been raised.

E.1.12. However, and notwithstanding the potential benefits of having each agency consider the concerns raised on their own merits, there are potential downsides:

- each integrity agency would be required to commit their own resources and personnel to consider and investigate the issue and, if there is sufficient evidence to form a reasonable suspicion, referring the matter to the CIC; and
- the CIC receiving multiple referrals from integrity agencies on the same issue and, absent a process whereby referrals containing materially similar allegations are group together, the CIC itself might be a position of duplicating effort and resources to consider those referrals.

E.1.13. Furthermore, the inability to share information across agencies might, in fact, result in an under-referral of matters to the CIC. This is so as, in many cases, corrupt conduct involves a number of suspicious activities across different areas. One agency may not have access to the information needed to verify the allegations so that reasonable suspicions may be formed. More complex forms of corruption may not be able to be identified from an isolated action and may remain invisible unless viewed by a number of relevant government agencies collectively, so as to make visible the series of relevant actions, with full knowledge of relevant end-to-end Government processes and with the awareness of the broader range of methods that external corrupting influences may employ to enrol Government officers. In this respect, consideration needs to be given to whether or not existing secrecy

## Harmonisation of approaches and cross-agency information sharing

provisions could be tailored to improve the effective sharing of information across the cohort of integrity agencies to enable efficient consideration of potential corruption issues to refer to the CIC.

E.1.14. There are some precedents for cross-agency collaboration and information sharing to combat external fraud and serious financial crimes within the tax space, namely the Serious Financial Crime Taskforce (SFCT), 'an ATO-led joint-agency taskforce established on 1 July 2015. It brings together the knowledge, resources and experience of relevant law enforcement and regulatory agencies to identify and address the most serious and complex forms of financial crime.'<sup>54</sup>

E.1.15. We are not aware of any similar arrangements to address fraud and corruption either within the public sector or in law enforcement agencies. We recognise that this is not likely to be an issue that could be easily addressed and may require some legislative change for the reasons identified earlier in this submission.

E.1.16. We recognise that much of the detail will be developed in the implementation and we understand that broader consideration needs to be given to whether the CIC Bill, as currently drafted, is likely to achieve its intended objectives and outcomes as well as marshalling the Government's collective resources to improve efforts to detect more problematic corruption.

E.1.17. A balance needs to be carefully struck between on the one hand not hampering the effective work of each integrity office holder to ensure that genuine allegations of corrupt conduct are fully considered and referred (where appropriate) while on the other minimising the resource impacts of such work, particularly on small agencies.

E.1.18. Certain aspects of this issue may be addressed through administrative arrangements between the CIC and integrity agencies. For example, if the information sharing restrictions can be addressed, it may be worthwhile considering establishing a cohort of integrity agency representatives to consider and share intelligence on corruption issues raised or alleged. This could be facilitated by the CIC on an as-needs basis when similar referrals are made by different integrity agencies, to bring representatives from those agencies together to consider the specific allegations and the intelligence that may be shared amongst the cohort to enable the CIC to most efficiently and effectively discharge its obligations.

E.1.19. Furthermore, there may also be benefits in the CIC convening a standing forum of integrity agency representatives which focuses on broader corruption issues to which they may be alerted within their respective jurisdictions and discuss best practices on how to handle and refer such matters. This forum would be differentiated from the one contemplated above in that it will consider broad, systemic issues rather than the detail of particular allegations.

E.1.20. Much of this detail will necessarily flow from the implementation following the enactment of CIC legislation. Where it is possible to include aspects of this either in the legislation, or any subsequent regulations, it would help to bolster the CIC regime and reinforce for integrity agencies the roles they will play within the new regime, alongside their own statutory obligations.

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<sup>54</sup> ATO, *Serious Financial Crime Taskforce* (14 January 2021) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Serious-Financial-Crime-Taskforce/>>.

Harmonisation of approaches and cross-agency information sharing

***Recommendation to the AGD***

*The IGTO recommends that the AGD consider whether there would be benefits in enabling agencies to share information and intelligence about potential corruption issues to minimise the need for duplication of resources and effort in considering those issues.*

# **Annexure A — Our understanding of responsibilities of the Inspector-General, IGTO Agency and IGTO Employees under the CIC regime in its current form**

Due to its size, Annexure A is included as a separate document. It should be treated as a part of this submission.



# Glossary and defined terms

Abbreviation	Defined term
AAT	Administrative Appeals Tribunal
ADJR Act 1977	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFP	Australian Federal Police
AGIS	Australian Government Investigation Standards
ANAO	Australian National Audit Office
ANZOA	Australian and New Zealand Ombudsman Association
APH	Parliament of Australia
APPs	Australian Privacy Principles, as defined in Schedule 1 of the <i>Privacy Act 1988</i>
APS	Australian Public Service
ATO	Australian Taxation Office
CDDA	Scheme for Compensation for Detriment caused by Defective Administration
Commissioner	Commissioner of Taxation
Complaint	<p>A complaint is defined AS/NZS 10002:2014 Guidelines for complaint management in organizations</p> <p><i>Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</i></p> <p><i>Disputes - Unresolved complaints escalated internally or externally, or both.</i></p> <p><i>Feedback - Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.</i></p>
Disclosures as part of a review and Investigation	these disclosures are protected because there is a Review and the disclosure of information assists in achieving a public purpose.
DPN	Director Penalty Notice
entity	<p>an entity is defined in section 960-100 of the <i>Income Tax Assessment Act 1997</i> that is:</p> <ul style="list-style-type: none"> <li>an individual</li> <li>a body corporate</li> <li>a body politic</li> <li>a partnership</li> <li>any other unincorporated association or body of persons</li> <li>a trust</li> <li>a superannuation fund</li> </ul>
FOI	Freedom of Information

## Glossary and defined terms

FOI Act 1982	<i>Freedom of Information Act 1982</i>
FY19	Financial Year ended 30 June 2019
FY20	Financial Year ended 30 June 2020
GST	Goods and Services Tax
IGIS	Inspector-General of Intelligence and Security
IGT Act 2003	<i>Inspector-General of Taxation Act 2003</i>
IGTO	Inspector-General of Taxation and Taxation Ombudsman. The acronym “IGTO” is used throughout the submission to denote both the “Inspector-General of Taxation”, as named in the enabling legislation, and “Inspector-General of Taxation and Taxation Ombudsman” as recently adopted due to recent calls for greater understanding and awareness of our complaints services function.
IRS	Internal Revenue Service
ITR	Income tax return
JCPAA	Joint Committee of Public Accounts and Audit
NTA	National Taxpayer Advocate
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
PAYG	Pay As You Go
PGPA Act 2013	<i>Public Governance, Performance and Accountability Act 2013</i>
PGPA Rule 2014	<i>Public Governance, Performance and Accountability Rule 2014</i>
PID Act 2013	<i>Public Interest Disclosure Act 2013</i>
SCTR	House of Representatives Standing Committee on Tax and Revenue
STP	Single Touch Payroll
TAA 1953	<i>Taxation Administration Act 1953</i>
Tax Official	<p>The term ‘tax official’ is defined in section 4 of the IGT Act 2003 to mean:</p> <ul style="list-style-type: none"> <li>(a) an ATO official; or</li> <li>(b) a Board member of the Tax Practitioners Board; or</li> <li>(c) an APS employee assisting the Tax Practitioners Board as described in section 60-80 of the <i>Tax Agent Services Act 2009</i>; or</li> <li>(d) a person engaged on behalf of the Commonwealth by another tax official (other than an ATO official) to provide services related to the administration of taxation laws; or</li> <li>(e) a person who: <ul style="list-style-type: none"> <li>(i) is a member of a body established for the sole purpose of assisting the Tax Practitioners Board in the administration of an aspect of taxation laws; and</li> <li>(ii) receives, or is entitled to receive, remuneration (but not merely allowances) from the Commonwealth in respect of his or her membership of the body.</li> </ul> </li> </ul> <p>For the purpose of this submission, the term ‘tax official’ is also used to refer to a ‘taxation officer’ to whom subdivision 355-B of Schedule 1 to the TAA 1953 applies.</p>
TERC	Tax Evasion Referral Centre

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TFN	Tax File Number
TIO	Telecommunications Industry Ombudsman
TPB	Tax Practitioners Board
Whistleblower complaints	A disclosure will generally qualify for whistleblower protection where it is made by an eligible whistleblower to an eligible recipient. These disclosures are typically defined by statute and the protections available are in part designed to encourage disclosures in a prescribed manner. See for example, the definition of eligible whistleblower in section 14ZZU of the <i>Taxation Administration Act, 1953</i> .

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