



Australian Government

Inspector-General of Taxation

Taxation Ombudsman

SUBMISSION TO THE SENATE
ECONOMICS LEGISLATION
COMMITTEE

INQUIRY INTO THE PERFORMANCE OF
THE INSPECTOR-GENERAL OF
TAXATION

By the Inspector-General of Taxation and Taxation Ombudsman

30 August 2019

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30 August 2019

Senator the Hon Slade Brockman
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Dear Chair

INQUIRY INTO THE PERFORMANCE OF THE INSPECTOR-GENERAL OF TAXATION

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) welcomes the inquiry by the Senate Economics Legislation Committee (Committee) into the performance of the Inspector-General of Taxation. The precise terms of reference are set out below:

TERMS OF REFERENCE

The Committee will inquire into performance of the Inspector-General of Taxation with particular reference to:

- a. whether the accountability framework the IGT operates within needs to be amended or strengthened;
- b. how the IGT conducts its investigations into the Australian Taxation Office (ATO);
- c. what safeguards exist to ensure the independence of the IGT;
- d. the complaints management policies and practices of the IGT;
- e. the protections afforded to whistle-blowers who disclose information to the IGT; and
- f. any related matters.

THE IMPORTANCE OF THE INQUIRY

Importantly, this inquiry is an opportunity to review and confirm that the legislative framework and accountability framework for the IGTO is fit-for purpose and consistent with community expectations. It is also an opportunity to identify areas for improving service to the community.

In addition, the inquiry provides an opportunity to clarify and explain the protections that are (and are not) available to those disclosing information to the Inspector-General of Taxation and Taxation Ombudsman (IGTO), the role of the IGTO in the taxation administration system and the review and investigation processes and powers in respect of both complaints and reviews undertaken by the IGTO.

The accountability, impartiality, independence and integrity of the IGTO are important to ensure the effectiveness of the services our office provides to the community and government directly. The legislative framework, protections and processes are important influences in this regard. The IGTO welcomes the opportunity to provide greater insight into how the IGTO's investigations and complaints service operates to improve the administration of taxation laws and how the operation of IGTO's legislative framework, protections and processes are aligned with community expectations.

The IGTO welcomes the opportunity to make this submission and to share some observations, insights and recommendations on measures that may improve the performance of the IGTO, for the consideration of the Committee.

Yours Sincerely

Karen Payne
Inspector General of Taxation and Taxation Ombudsman

30 August 2019

INTRODUCTION, BACKGROUND & HISTORY

INTRODUCTION

The Inspector-General of Taxation and Taxation Ombudsman (IGTO¹) was created in 2003 as an independent statutory office to provide independent advice to government on the resolution of systemic tax administration issues of concern to taxpayers. The objects of the IGTO's enabling legislation were to review and report on such issues and improve the administration of the tax laws for the benefit of all taxpayers.²

The legislative framework provided reporting obligations and powers consistent with this role. For example, the relevant Treasury Minister could require the IGTO to include a review on its work program.³ Further historical details are provided below.

That role was expanded twelve years later, in 2015, to include the Tax Practitioners Board (TPB) within jurisdiction as well as to transfer some of the Commonwealth Ombudsman's tax complaints function. This provided a capability to quickly address taxpayer concerns on a case-by-case basis. The IGTO now effectively performs a dual role of:

- **Taxation Ombudsman** with respect to tax complaints — investigations are conducted, and recommendation made, in private, which is consistent with taxpayers' rights to privacy and secrecy in respect of their tax affairs;⁴ and
- **Inspector-General of Taxation** with respect to review of systemic and other tax issues — investigations are conducted, and recommendations made, publicly, which is consistent with the public interest in systemic issues and assurance regarding their recommended treatment.

These investigations may be own-initiated, directed by the Minister or requested by the Minister, the Parliament, the ATO or TPB.

Some important features of the 2015 amendments and related issues include:

- There was only a transfer of partial jurisdiction from the Commonwealth Ombudsman to investigate administrative tax complaints. The IGTO's pre-existing powers were repealed and replaced with powers directly aligned with existing Commonwealth Ombudsman powers, and reflecting the expanded role of Taxation Ombudsman.

¹ 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.

² *Inspector-General of Taxation Act 2003 (IGT Act 2003)*, s 3 as made 14 April 2003 (repealed).

³ *IGT Act 2003*, s 8(2) as made 14 April 2003 (repealed).

⁴ Australian Privacy Principles under the *Privacy Act 1988*; *Taxation Administration Act 1953 (TAA 1953)* sch 1 Div 355.

- The Commonwealth Ombudsman retained the power to investigate taxation complaints made under the *Public Interest Disclosure Act 2013* (PID Act 2013). That is, ‘whistleblower’ style complaints made by taxation officers (as public servants) — complaints for which appropriate whistleblower protections are provided by Part 2, Division 1 of the PID Act 2013. Importantly, access to these protections for whistleblowing complaints requires the process under the PID Act 2013 to be followed.
- The Commonwealth Ombudsman and Inspector-General of Intelligence and Security have jurisdiction for the PID Act 2013.
- The legislative amendments in 2015 altered the circumstances in which protections would be available to those making a disclosure to the IGTO.
- The IGTO received an increased level of funding (from approximately \$2.6 million per annum) to \$6.5 million per annum to build and maintain staffing and front facing systems to support and fulfil the tax complaints function.
- No employees were transferred from the Commonwealth Ombudsman to the IGTO as a consequence of the transfer of taxation complaints, but an additional 20 employees were recruited between 2015 and 2018.

Some further details on the history of the IGTO are set out below.

EFFECTIVENESS OF THE IGTO

The accountability, impartiality, independence and integrity of the IGTO are important to ensure the effectiveness of services our office provides to the community and government directly. Further details are provided in Sections A – F below. In summary though:

Accountability

The IGTO as an agency has accountability for its complaints investigations and reviews to:

- the complainant – the taxpayer or tax practitioner;
- the Commonwealth Ombudsman;
- the Minister;
- the Parliament;
- the Australian Taxation Office (ATO);
- the TPB; and
- the community.

A more detailed analysis is provided in Section A.

Impartiality

IGTO investigations, whether as part of a review or complaint, are necessarily impartial. This is primarily achieved after hearing from interested parties through to an impartial examination of the contemporaneous notes, files and correspondence. Further details are set out in Sections B and D below.

Independence

There are many safeguards to support the IGTO's independence – refer Section C below.

The historical resourcing and funding of the IGTO is set out in Appendix A.

The Inspector-General is an agency within the Treasury portfolio. The Commonwealth Ombudsman is an agency within the Attorney General's portfolio.

Conversely, the Auditor General and Australian National Audit Office as independent officers and agency are within the Prime Minister & Cabinet's portfolio and also report directly to Parliament.

Administrative Tribunals and Courts are within the Attorney General's portfolio.

Integrity

The legislative framework and operating practices and policies of the IGTO are important for the integrity of the IGTO. Details of the legislative framework and operating practices and policies of the IGTO are included in each of the sections noted below for the information of the Committee. The confidentiality of taxpayer information and submissions is important to the IGTO's reputation and integrity.

Confidential submissions remain at all times confidential. These themes and the protections which underpin them are explored in Section E below.

HISTORY OF THE IGTO

IGTO's initial role and legislative framework

Creation

The creation of the IGTO followed taxpayer concerns about aspects of tax administration such as delays in processing, the provision of inconsistent advice and the lack of certainty surrounding taxation obligations.⁵ It was intended that the IGTO would "strengthen the advice given to government in respect

⁵ The Hon. Helen Coonan, Minister for Revenue and Assistant Treasurer, 'A New Tax Advocate' (Media Release, C62/02, 29 May 2002).

of matters of tax administration”⁶. A “key function ... [was] to advocate the concerns of taxpayers to the Treasury Ministers to enable fast resolution of any systemic problems in the tax system...”⁷

The proposal for the IGTO received strong support from the community, business taxpayers and the tax advisory professions and the establishment of the office⁸ was considered to be “a valuable addition to the taxation governance framework, complementing the existing functions of the Board of Taxation, the Commonwealth Ombudsman and the Auditor-General”.⁹

Statutory office

The enabling legislation established the IGTO as an independent statutory office to be appointed by the Governor-General for a term of up to five (5) years. The IGTO could only be terminated on specified grounds.¹⁰ The IGTO could directly employ Australian Public Service officers and delegate its powers to them.¹¹

Initial objects

The objects of the IGTO’s enabling legislation were to:¹²

- a. improve the administration of the tax laws for the benefit of all taxpayers; and
- b. provide independent advice to the government on the administration of the tax laws; and
- c. identify systemic issues in the administration of the tax laws.

Other intended aims for the IGTO, such as “to act as an advocate for all taxpayers ... and provide an avenue for more effective conflict resolution”,¹³ was observed by the Senate Economics Legislation Committee as not necessarily being fulfilled by the objects statement in the enabling legislation.¹⁴ However, as the IGTO’s key function was “to advocate the concerns of taxpayers to the Treasury

⁶ ‘The Howard Government Putting Australia’s Interest First: Election 2001’ as cited in Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 3.

⁷ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 49.

⁸ The Board of Taxation, *Inspector-General of Taxation: a Report to the Minister for Revenue and Assistant Treasurer* (2002).

⁹ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 29.

¹⁰ *IGT Act 2003*, ss 28 and 35 as made 14 April 2003 (repealed).

¹¹ *IGT Act 2003*, ss 36 and 42 as made 14 April 2003 (repealed).

¹² *IGT Act 2003*, s 3 as made 14 April 2003 (repealed).

¹³ ‘The Howard Government Putting Australia’s Interest First: Election 2001’ as cited in Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 3.

¹⁴ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) pp 5–6.

Ministers to enable fast resolution of any systemic problems in the tax system”, the IGTO was to report to the Treasury Ministers.¹⁵ Accordingly, the IGTO was placed within the Treasury portfolio.

Initial functions

The functions of the IGTO were to:¹⁶

- review systems established by the tax laws and the ATO; and
- report to the Minister on those reviews, setting out the subject and outcome of the review as well as any recommendations for improvement the IGTO thought appropriate.

Initial reviews

Reviews were confined to concerns of an “administration” matter - which was defined to exclude “rules imposing or creating an obligation to pay an amount under a tax law, or rules dealing with the quantification of such an amount.”¹⁷

Initial powers

The IGTO was provided with strong information gathering powers to obtain any information relevant to a review underway or in contemplation.¹⁸ For ATO officers making disclosure to the IGTO, they were authorised to provide information to the IGTO upon request and could be compelled to provide information pursuant to a formal notice.¹⁹

Apart from the power to compel disclosure of information, the IGTO had no power to direct the Commissioner of Taxation (Commissioner) or ATO employees. On this point, the Senate Economics Legislation Committee reported in 2003 that:

“The Committee has no desire to see the power of the Inspector-General increased to the extent that he or she can direct the Commissioner of Taxation to follow a recommendation. It believes that the investigative process itself coupled with the ability of the Inspector-General to report publicly on the administration of taxation laws is sufficient incentive for the Commissioner of Taxation to take appropriate action if required...”²⁰

¹⁵ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 49.

¹⁶ *IGT Act 2003*, s 7(1) as made 14 April 2003 (repealed).

¹⁷ *IGT Act 2003*, s 7(2) as made 14 April 2003 (repealed).

¹⁸ *IGT Act 2003*, ss 12–15 as made 14 April 2003 (repealed).

¹⁹ *IGT Act 2003*, ss 14–15 as made 14 April 2003 (repealed).

²⁰ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 14.

The House of Representatives Standing Committee on Tax and Revenue (SCTR) has also recently reported that the former IGTO did not support a power to direct the Commissioner as “...the IGT’s independence is tied to his inability to make binding decisions”.²¹

Initial reporting requirements

After completion of a review, the IGTO was required to transmit the report to the Minister setting out the subject and outcome of the review as well as any recommendations thought appropriate to improve the system.²² The IGTO could not publicly release reports directly or independently.

Interaction with Commonwealth Ombudsman and Auditor-General

At that time, the IGTO did not investigate complaints concerning individual taxpayer cases. The Commonwealth Ombudsman retained that role. Also, the focus of the IGTO as a source of advice to Government differentiated IGTO from the Auditor-General and the Commonwealth Ombudsman which had “a relationship separately and equally with Parliament, the Executive and members of the public, individually and collectively.”²³ To minimise the potential for functional overlap between the agencies, the IGTO was also required to consult with the Commonwealth Ombudsman and Auditor-General.²⁴ Accordingly, the Commonwealth Ombudsman and Auditor-General fall within the Attorney General’s and Prime Minister & Cabinet’s portfolios, respectively.

Initial Resourcing

Annual appropriations for the IGTO are separately identified and allocated as part of the Federal Budget process. The IGTO was initially allocated approximately \$2 million in annual appropriations. This provided for one office located in Sydney and staffed by seven officers, including the statutory position of the IGTO.

2015 – Expanded IGTO role and revised legislative framework

In 2014, bipartisan support was received to expand the scope of the IGTO’s role into two areas. The TPB was included within the IGTO’s jurisdiction and the Commonwealth Ombudsman’s tax complaint handling function was transferred to the IGTO.²⁵

²¹ House of Representatives Standing Committee on Tax and Revenue (SCTR) Parliament of Australia, *2017 Annual Report of the Australian Taxation Office* (2019) Canberra, pp 186–7.

²² *IGT Act 2003*, s 10 as made 14 April 2003 (repealed).

²³ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 16.

²⁴ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) pp 15–17.

²⁵ Australian Government, *Budget Paper No. 2, Part 2: Expense Measures* (May 2014).

This expanded role provided the IGTO with a tax complaints investigation function and the means to review systemic issues, including those which may be evidenced in complaints. The rationale for the transfer was set out in the Explanatory Memorandum to the 2015 amendments:

“Issues surrounding taxation laws can be complex and specialised. This complexity is compounded as the administration of the taxation laws is scrutinised by both the Inspector-General and the Ombudsman. By concentrating expertise about taxation administration issues, taxpayers are provided with a dedicated body to investigate and handle complaints about all taxation matters.”²⁶

The complaints transfer also served the additional important benefit of enabling the IGT to see trends in systemic tax administration concerns and to self initiate systemic investigation in a timely fashion.²⁷

In 2015, legislation to transfer the tax complaint service function to the IGTO was enacted.

Revised functions

Pursuant to the amended legislation, the IGTO’s functions were to investigate:²⁸

- complaints made by entities who were subject to actions taken by tax officials which related to administrative matters under a taxation law;
- other actions taken by tax officials relating to administrative matters under a taxation law;
- systems established by the ATO or TPB to administer taxation laws; and
- systems established by taxation laws, but only to the extent that the systems deal with administrative matters.

Revised powers

The amending legislation also replaced the IGTO’s review, information gathering and reporting powers²⁹ with those of the Commonwealth Ombudsman – albeit limited in application to tax administration matters. This was effected by repealing the pre-existing powers and incorporating into the *Inspector-General of Taxation Act 2003 (IGT Act 2003)* a new section 15, which identified the provisions in the *Ombudsman Act 1976* that applied (were imported by reference) in relation to the IGTO with some modifications.

The IGTO was not provided with the Commonwealth Ombudsman’s powers to receive and investigate Public Interest Disclosures.

²⁶ Explanatory Memorandum, House of Representatives, Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014.

²⁷ SCTR, Parliament of Australia, *2017 Annual Report of the Australian Taxation Office* (2019) para [6.104].

²⁸ *IGT Act 2003*, s 7.

²⁹ *IGT Act 2003*, ss 7–27 as made 14 April 2003 (repealed).

In effect the new powers apply to both an investigation of a tax complaint and an investigation of a systemic issue. The amendments made two key changes concerning the IGTO's information gathering powers:

- the powers could not be used for the purpose of determining whether to conduct an investigation, as a specific 'preliminary inquiries' power (section 7A) applied instead; and
- the Commissioner's approval was now needed for ATO officers to make an authorised disclosure in response to an IGTO request.³⁰

The IGTO could require ATO officers to provide information on threat of sanction, pursuant to a written notice. Like some ombudsmen functions (e.g. Overseas Student Ombudsman) the IGTO is required to publicly report each time it issued such a notice and the details of the relevant circumstances.³¹

Legislative provisions were also enacted with the aim to mitigate potential overlap between the IGTO and Commonwealth Ombudsman by facilitating a transfer of matters from one to the other.³²

Revised remedies

The amendments required the IGTO to report to the Commissioner (or TPB) where the IGTO forms an opinion (and makes a recommendation) at the conclusion of an investigation that, in the relation to the relevant action:³³

- it should be referred for further consideration;
- its effects should be rectified, mitigated or altered;
- if a decision, it should be cancelled or varied;
- the relevant rule of law, provision of an enactment or practice on which the action was based should be altered;
- reasons should have been given; or
- any other thing should be done.

The IGTO may also inform the Minister and Parliament where the Commissioner has not taken adequate or appropriate action in response to any recommendation.³⁴

The IGTO may also make a written report to the Minister regarding recommendations to make improvements to taxation laws – setting out the reasons for those recommendations. The Minister must cause a copy to be publicly released³⁵ within 25 sitting days of the House of Representatives.

³⁰ *Ombudsman Act 1976*, ss 7A and 8(2A).

³¹ *Ombudsman Act 1976*, s 9; *IGT Act 2003*, s 41(2).

³² *Ombudsman Act 1976*, s 6D; *IGT Act 2003*, s 10.

³³ *Ombudsman Act 1976*, s 15.

³⁴ *Ombudsman Act 1976*, ss 16 and 17.

³⁵ *IGT Act 2003*, s 18.

Objects

The objects of the *IGT Act 2003* were also changed to:

- a. improve the administration of taxation laws for the benefit of all taxpayers, tax practitioners and other entities; and*
- b. provide independent advice to the government on the administration of taxation laws; and*
- c. investigate complaints by taxpayers, tax practitioners or other entities about the administration of taxation laws; and*
- d. investigate administrative action taken under taxation laws, including systemic issues, that affect taxpayers, tax practitioners or other entities.*

Identifying priorities for review

Prior to 2015, public consultation was the primary means of identifying and prioritising topics for review in developing review work programs. With the addition of the tax complaints function in 2015, changes were also made to how the IGTO identifies and prioritises issues for improvement. The IGTO now captures and considers themes emerging from complaint cases, international trends, discussions in stakeholder forums and other sources throughout the year to identify tax administration issues of greatest community concern and opportunity for improvement.

Accordingly, the themes emerging from tax complaints are a material source for identifying topics for reviews. For examples see, the GST Refunds Review, the Review into aspects of PAYG instalments system as well as the taxation evasion referrals centre (TERC) own initiative investigation which was incorporated into the Review into the ATO's Fraud Management, which reflect this trend.³⁶

TAX SPECIALIST ORGANISATIONS AND OMBUDSMEN

The IGTO is one of a number of independent tax specialist bodies in the world that deal with tax administration issues. The most recent public information from the OECD, identifies 10 countries with specific independent bodies, dealing solely with tax-related complaints from citizens and business arising from actions or inactions of the revenue body. With few exceptions, all of these bodies may report on systemic issues identified from such complaints. Some of these bodies cannot deal with matters of government policy or matters which can be considered on appeal by independent judicial or tribunal bodies—for example, the UK's Adjudicators Office and Canada's Taxpayers Ombudsman.³⁷ Some may compel the revenue authority to take action in certain circumstances—for example, the US Taxpayer Advocate Service.³⁸

³⁶ See the IGTO's website <www.igt.gov.au>, for review announcements and reviews reports.

³⁷ Organisation for Economic Co-operation and Development (OECD), *Tax Administration 2013: Comparative information on OECD and other advanced and emerging economies* (2013) pp 46-50.

³⁸ Internal Revenue Service, *Internal Revenue Manual*, § 13. 2. 1. 6.

Ombudsmen generally

The IGTO's role as taxation ombudsman also requires consideration in the context of the role of ombudsmen generally. The Australian and New Zealand Ombudsman Association (ANZOA) considers that ombudsmen are distinguished from other complaint mechanisms by six essential criteria: independence; jurisdiction; powers; accessibility; procedural fairness; and accountability.³⁹

Ombudsmen schemes generally provide a free service for complainants to resolve disputes without the complex and intimidating procedures and processes involved in the judicial system or need for legal representation. They may deal with a broader scope of issues than just the assertion of legal rights and take a proportionate and cost-effective approach in doing so. They help prevent smaller disputes from becoming larger ones and assist complainants to restore the balance of power in dealing with larger organisations. They also have capacity to investigate issues affecting multiple complaints and work with the relevant organisations to assist in resolving systemic issues.⁴⁰ Importantly, while the naming convention is important, it is the function and role of a given body of office that determines whether a particular organisation is an Ombudsman office in nature and the Taxation Ombudsman meets these ANZOA membership requirements.

The recent *Review of the financial system external dispute resolution and compliance framework* observed that:⁴¹

“There is general consensus among stakeholders that ombudsman [sic] services are effective dispute resolution mechanism which promotes access to justice and decreases the burden on the judicial system. While there are clear benefits to ombudsman [sic] schemes, low awareness amongst consumers may prevent them from fully utilising these services”.

The IGTO provides additional background in Sections A – F, which follow.

Consistent with the terms of reference for this Inquiry, we also submit various recommendations and observations for the consideration of the Committee.

³⁹ Australian and New Zealand Ombudsman Association 2010, 'Essential criteria for describing a body as an ombudsman' (February 2010) <www.anzoa.com.au>.

⁴⁰ Productivity Commission, *Access to Justice Arrangements Inquiry Report* (2014) pp 315–7.

⁴¹ Professor Ian Ramsay, Julie Abramson and Alan Kirkland, *Review of the financial system external dispute resolution and complaints framework* (2017) p 31.

SUMMARY OF OBSERVATIONS AND RECOMMENDATIONS

IGTO makes the following observations and recommendations for the consideration of the Committee and to enhance the performance of the IGTO:

RECOMMENDATION OR OBSERVATION	PARAGRAPH REFERENCE FOR ADDITIONAL COMMENTARY
Recommendations	
Recommendation 1 - Strengthen the protections available to all those who disclose information to the IGTO – including as part of a complaint or review investigation. This should include protections from statutory, administrative, and professional conduct sanctions and ensure protection from reprisal where information is provided to the IGTO in good faith.	E5 – E11 E14 E27 – E28
These protections should ideally be commensurate with the statutory obligation to conduct investigations.	
Recommendation 2 - Remove the statutory requirement for the Commissioner of Taxation or Chair of the Tax Practitioners Board to approve the IGTO's access to and right to receive information. This is currently a condition under the <i>IGT Act 2003</i> for Tax Officials to secure protection against a relevant offence (for example under the ITAA and TAA). This will clarify that Tax Officials are free to share information with IGTO for the purposes of its reviews and allow the IGTO to engage without fear of personal consequence for ATO officers concerned. This would also be more consistent with the exclusion for protected information ⁴² .	C56–C60 E26
Recommendation 3 - Strengthen the protections for Tax Officials who disclose information to the IGTO as part of an investigation – including making such protections available to former Tax Official and aligning the protections with those protections available under the PID Act 2013.	E9, E13, E16 - E22

⁴² As set out in Item 5 of Table of section 355-65 of schedule 1 to the TAA 1953.

RECOMMENDATION OR OBSERVATION	PARAGRAPH REFERENCE FOR ADDITIONAL COMMENTARY
<p>Recommendation 4 - Improve the IGTO's right to access ATO and TPB records, data and systems, as of right. This could be achieved by amending the existing exclusion in section 355-65 Item 5 of Table 4 of Schedule 1 of the TAA. In this way, and importantly consistent with the current tax debt disclosure reforms, Tax Officials would have a statutory protection against prosecution or reprisal for disclosing information to the IGTO where it is specifically and expressly excluded and where Recommendation 2 is implemented.</p>	C19 - C21, C61–67 D63 – D67
<p>Recommendation 5- Clarify the rights of Tax Officials interviewed as part of an IGTO investigation. That is, expressly provide that Tax Officials may choose to be interviewed with or without an attending Tax Official or person of their choice (including a lawyer or Tax Official of their choice).</p>	E32
<p>Recommendation 6 - Improve the governance arrangements (including documentation and process) for the IGTO's investigation of a complaint. This should ensure that non-binding recommendations made by the IGTO in respect of a complaint must be formally responded to within a specified time frame and where the recommendation is not accepted, reasons are provided. Where the IGTO does not believe the reasons provide reasonable grounds, this refusal and reasons for the refusal are reportable to Parliament (via the Annual Report or other mechanisms). This could be achieved by introducing a Taxpayer Assistance Order mechanism for formal communications between the IGTO and ATO or TPB.</p>	C80–C97 D61, D85 – D95
<p>Recommendation 7 - Clarify the statutory scope for IGTO Reviews as they relate to taxation administration matters and importantly clarify that this includes administration matters relating to quantification and collection of taxation – such as penalties.</p>	B45 – B50 D62

RECOMMENDATION OR OBSERVATION	PARAGRAPH REFERENCE FOR ADDITIONAL COMMENTARY
<p>Recommendation 8 - Introduce express drafting in the <i>IGT Act 2003</i> consistent with the existing powers, rather than simply referring back to the <i>Ombudsman Act 1976</i> and redefining terms. This would facilitate legislative amendments specific to the IGTO (without consequence for the Commonwealth Ombudsman) – including recommendations made in this submission. This would not only clarify the legislative powers and functions of the IGTO but provide operational clarity.</p>	<p>B45 – B50 E12 – E15</p>
<p>Recommendation 9 – Introduce more formal arrangements between the IGTO and Australian Tax Clinics to facilitate a seamless delivery of service to the community. This would also provide an efficient and effective means to improve the geographic reach of the IGTO – including for the purposes of receiving complaints in time zones and locations outside Sydney.</p>	<p>D75 D84</p>
<p>Recommendation 10 – The IGTO should be empowered to award an amount of compensation or reasonable costs to complainants where the IGTO investigation finds that ATO or TPB action has caused loss or damage or where they have failed to take reasonable action leading to loss or damage.</p>	<p>F2 – F12</p>
<p>Recommendation 11 – The IGTO should have a formal role to independently advise the Minister as part of the tax law design process where the relevant tax law impacts on taxation administration matters affecting the community. This statutory power does not currently exist. However, the proposal would be an extension of IGTO's existing powers to recommend legislative reform to the Minister as part of an investigation. In this way, the relevant Minister is apprised of any potentially adverse or beneficial impact that may be inherent in a package of legislation to be introduced to Parliament. Before the legislation is introduced to Parliament, the Minister may have an opportunity to consider issues which are raised by the IGTO on behalf of the community.</p>	<p>F13 – F17</p>
<p>Recommendation 12 – The IGTO should be adequately resourced to provide ongoing effective assistance to Australian taxpayers to meet increased demands for assistance. An equivalent recommendation was made by the House of Representatives Standing Committee on Tax and Revenue in a recent report <i>2016-17 Annual Report of the Australian Taxation Office</i>. Refer recommendation 35, which is that the IGTO “should also be</p>	<p>C68–73 D83 – D84 F16</p>

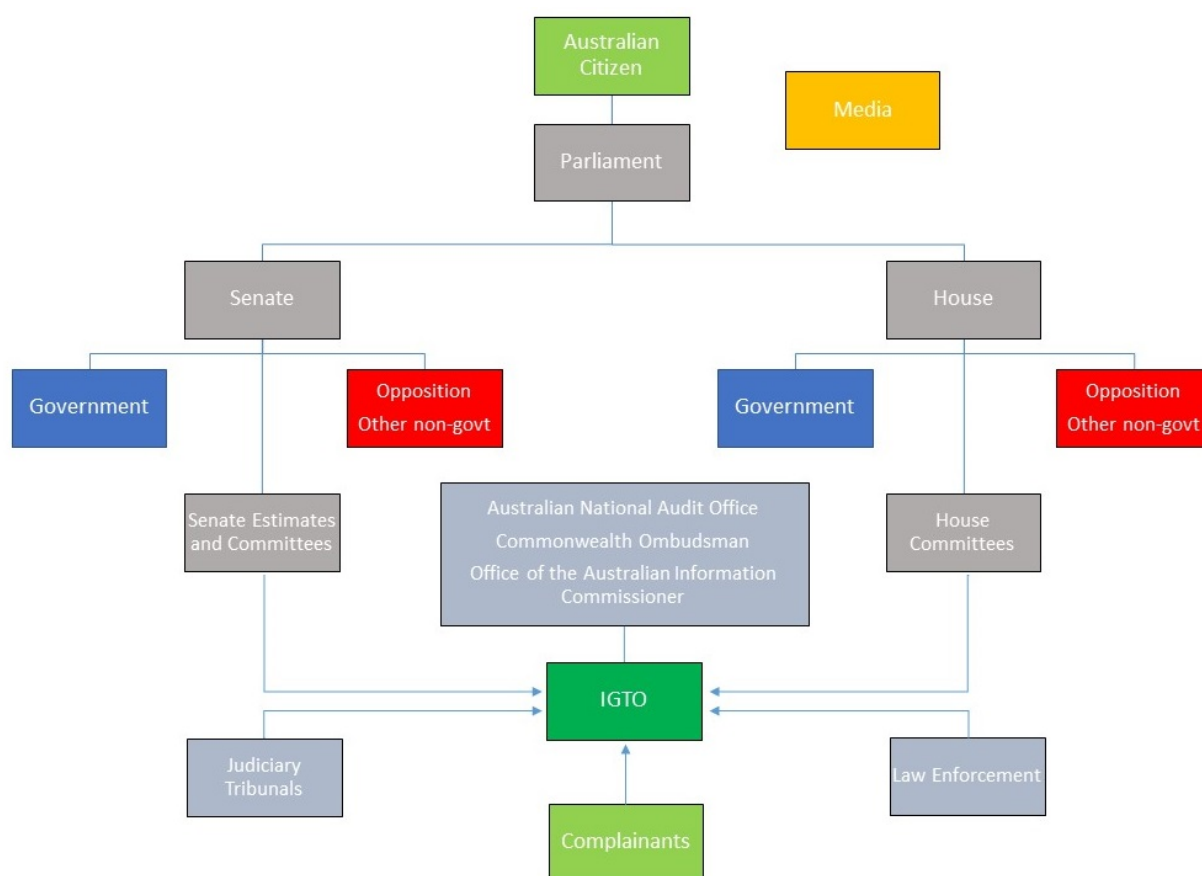
RECOMMENDATION OR OBSERVATION	PARAGRAPH REFERENCE FOR ADDITIONAL COMMENTARY
adequately resourced to provide ongoing effective assistance to Australian taxpayers as the promotion of the function demands greater volumes of assistance.”	
Recommendation 13 – improve the model for inter-agency collaboration to permit joint investigations – for example between the IGTO, Australian National Audit Office (ANAO) and Commonwealth Ombudsman agencies. This would streamline the investigation process and permit sharing of information and expertise in appropriate circumstances. For example, the ANAO has particular expertise in information technology and systems, which the IGTO does not. Refer also Observation 1.	D77 – D82
Observations	
Observation 1 – Consider what IGTO resources are necessary in the near future to undertake and interrogate automated digital systems and processes for taxation administration.	B55 – B59
Observation 2 – Consider whether the IGTO’s powers are appropriate for its statutory role and purposes – including the power to make non-binding decisions. This is related to considerations arising at Recommendation 6.	D77–82, D84
Observation 3 – The Committee consider whether more formalised, integrated and cooperative liaison arrangements as between the Taxation Ombudsman and AAT (and other support mechanisms – such as Tax Clinics) are appropriate. This would provide more holistic management of taxpayer complaints and dispute resolution. Importantly, this would deliver a faster and more cost effective support service for the more vulnerable individuals and unrepresented small business.	C79 – C97

A. WHETHER THE ACCOUNTABILITY FRAMEWORK THE IGTO OPERATES WITHIN NEEDS TO BE AMENDED OR STRENGTHENED

INTRODUCTION

A.1. An overview of the IGTO's Accountability Framework is set out below:

Figure 1 – Overview of IGTO Accountability Framework



Source: The original diagram from the IGTO's submission to the House of Representatives Standing Committee on Tax and Revenue's Inquiry into the External Scrutiny of the ATO (March 2016) was updated to recognise the role of complainants and the media in the IGTO's accountability framework.

- A.2. A number of relevant documents are also available on the IGTO website including:
- The Corporate Plan for 2020 – 2023 and prior years;
 - The Annual Report for FY19 and prior years; and
 - IGTO Policies and Procedures
- A.3. The IGTO is currently transitioning its website from Treasury to a third party provider. Accordingly, the IGTO notes that its website and the accessibility of reports and materials on the website will be improved in the new host environment. This is expected to complete by the end of October 2019.
- A.4. The above Figure represents the main elements of the accountability framework in the form of 'vertical' and 'horizontal' accountability.

VERTICAL ACCOUNTABILITY

- A.5. Accountability flows vertically, that is, top down from the Australian community who elect member representatives in Parliament to form the Parliament to make legislation and provide direct scrutineering over the IGTO agency's performance and all other government agencies and functions against those laws. This vertical accountability also flows bottom up from members of the community (complainants) seeking scrutineering services from the IGTO in the form of complaints and reviews in relation to the ATO and TPB as outlined in the Corporate Plan and ultimately tested and reflected in complainant satisfaction levels as a measure of performance delivery against that legislation.
- A.6. The Parliament undertakes this legislation accountability framework through Committees (in the form of inquiries, including appearances) along with the related public transparency, annual reports review, portfolio budget statement analysis, as well as other formal processes.

Legislative framework for accountability – Overview

Inspector-General of Taxation Act 2003 (IGT Act 2003)

- A.7. The Parliament has provided the IGTO's governing legislation in the form of the *IGT Act 2003*, which also incorporates sections of the *Ombudsman Act 1976*⁴³ as outlined in the introduction of this report. The Governor-General has power to appoint and terminate the IGTO.⁴⁴ Specific legislative accountabilities are set out within the IGTO's annual reporting requirements, namely:⁴⁵
- the number of complaints received;
 - the number of investigations into complaints that were started and completed;

⁴³ By virtue of section 15 of the *IGT Act 2003*.

⁴⁴ *IGT Act 2003*, ss 28 and 35.

⁴⁵ *IGT Act 2003*, s 41(2).

- the number of investigations into systemic issues that were started and completed; and
- the number of times a formal notice has been issued to a person to provide information and documents along with the circumstances giving rise to this action⁴⁶.

Public Governance, Performance and Accountability Act 2013 (the PGPA Act) and Public Governance, Performance and Accountability Rule 2014 (the PGPA Rule 2014)

A.8. The Parliament has also provided a range of obligations for all agencies imposed under the PGPA Act, including publishing a corporate plan (which is also given to the responsible Minister and the Finance Minister⁴⁷). Agencies must include in their corporate plan, amongst other things:⁴⁸

- the agency's planned performance, such as, details of the methodology, data and information that it will use to measure and assess its performance;
- the capability of the agency, including the plans and strategies it will implement to achieve its purposes; and
- the agency's risk oversight and management systems.

A.9. Agencies are also required to prepare and give an annual report to the agency's responsible Minister for the financial year, which is subsequently presented to Parliament.⁴⁹ As part of their annual report, agencies are required to report on their performance over the relevant financial year through the agency's annual performance statements and financial statements.⁵⁰ The performance statement is intended to demonstrate how the agency performed in relation to its purpose(s) and program(s) and, where possible, indicate the agency's effectiveness in achieving its planned or intended results.⁵¹ The agency's purpose(s) is outlined in its corporate plan and the Portfolio Budget Statements.⁵²

Administrative Decisions (Judicial Review) Act 1977 (ADJR Act 1977).

A.10. An IGTO complaint investigation decision may be subject to judicial review under the ADJR Act 1977, if the complainant applies for a review with the Federal Court or the Federal Circuit Court. The IGTO advises complainants of this right following an investigation. At that time they are also advised of their right to seek a reconsideration or internal review of the original decision.

Other legislation

A.11. The IGTO and other agencies are subject to the broad range of applicable legislation, such as the *Public Service Act 1999* and the *Fair Work Act 2009*.

⁴⁶ *Ombudsman Act 1976*, s 9 (by virtue of section 15 of the *IGT Act 2003*).

⁴⁷ *Public Governance, Performance and Accountability Act 2013* (PGPA Act 2013), s 35.

⁴⁸ *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule 2014), s 16E.

⁴⁹ PGPA Act 2013, s 46.

⁵⁰ PGPA Act 2013, s 17AD(c).

⁵¹ Department of Finance, *Resource Management Guide No. 135: Annual reports for non-corporate Commonwealth entities* (2019) para [39].

⁵² Department of Finance, *Resource Management Guide No. 135: Annual reports for non-corporate Commonwealth entities* (2019) para [43].

Parliamentary Committees

- A.12. The committee arrangements are an important feature of the legislation making and related scrutiny of government functions, through hearing, inquiry and related public transparency.
- A.13. The Senate has committees the IGTO may be called upon to contribute toward regarding its scrutineering of other agencies, particularly the ATO given its size and importance to the smooth functioning of government and the collection of revenue to fund the community services provided.
- A.14. A resolution of a Committee of either or both Houses of the Parliament may also request the IGTO to conduct an investigation, however, the IGTO is not required to comply with such requests.⁵³

House of Representative Standing Committee on Tax and Revenue (SCTR).

- A.15. The House of Representatives Standing Committee on Tax and Revenue (SCTR) is appointed under Standing Order 215.
- A.16. The role of the SCTR may involve inquiring into and reporting on any matter referred by either the House of Parliament or a Minister. This may include any pre-legislation proposal, bill, motion, petition, vote or expenditure, other financial matter, report or document.⁵⁴ In 2016, the IGTO was the subject of a significant and specific inquiry by the SCTR into the external scrutiny of the ATO. The outcome of this inquiry will be discussed later in this submission.

Senate Committees

- A.17. The Senate has committees that the IGTO has assisted or attend upon, include:
- Senate Economics Legislation Committee – purpose is to deal with bills referred by the Senate, the Estimates process and oversee the performance of departments, including their annual reports.⁵⁵ The Estimates process’ purpose is to scrutinise, twice each year, the performance of the executive branch of government and the use of the public resources with which they have been entrusted.⁵⁶
 - Economics References Committee – purpose is to deal with all other matters referred by the Senate.⁵⁷

The Joint Committee of Public Accounts and Audit (JCPAA)

- A.18. By way of background, the IGTO appeared before the JCPAA committee, until the SCTR was established to oversee this function.

⁵³ *IGT Act 2003*, s 8(3).

⁵⁴ Parliament of Australia (APH), ‘Standing Committee on Tax and Revenue, Roles of the Committee’ (undated) <www.aph.gov.au>.

⁵⁵ APH, ‘Senate Standing Committees on Economics, Roles of the Committee’ (undated) <www.aph.gov.au>.

⁵⁶ APH, No. 5 - Consideration of Estimates by the Senate’s Legislation Committees’ (July 2019) <www.aph.gov.au>.

⁵⁷ APH, ‘Senate Standing Committees on Economics, Roles of the Committee’ (undated) <www.aph.gov.au>.

Government and Minister

- A.19. The IGTO is an independent statutory appointment with a direct reporting relationship to the Minister. The only direct power the Minister has with respect to the IGTO is to direct⁵⁸ the IGTO to conduct an investigation into systems established by the ATO or TPB, to administer taxation laws, as well as systems established by taxation laws, but only to the extent that the systems deal with administrative matters.⁵⁹
- A.20. Where the Minister directs a review be conducted, details must be included in the annual report⁶⁰.
- A.21. The Minister, or a resolution of either or both Houses of the Parliament, may also request the IGTO to conduct an investigation. However, the IGTO is not required to comply with such requests.⁶¹

Australian citizens and complainants

- A.22. As noted the Australian citizen community and its individual members as complainants, while not having direct legislative or scrutineering responsibility, are the vital overarching source for the accountability framework in an overall sense as well as through direct service delivery performance satisfaction.

Community expectations

- A.23. Changing community expectations regarding the timeframes to respond to and resolve complaints can have an impact on the IGTO's performance.
- A.24. Over the past 10 years, complainants' expectations regarding response times to their complaints have changed substantially. While it might of been acceptable to await 28 days when using traditional means of complaints, such as letters and telephone, recent studies indicate that clients expect a same day response for a reply to an email or voicemail and one to two weeks for a reply to a letter.⁶² Studies regarding complaints raised on social media platforms indicate that complaints are expected to be responded to within 3–6 hours, generally with shorter timeframes of 1–3 hours on specific social media platforms, such as Twitter. However, this timeframe may extend where complainants' preferred outcomes are met.⁶³ Unmet expectations may prompt use of social media to voice dissatisfaction and advocacy of change.

⁵⁸ *IGT Act 2003*, s 8(2).

⁵⁹ *IGT Act 2003*, s 7(1)(c) and (d).

⁶⁰ *IGT Act 2003*, s 41(1).

⁶¹ *IGT Act 2003*, s 8(3).

⁶² Canadian research referred to in NSW Ombudsman, *Applying the commitments to effective complaint handling – guidance for agencies*, p7.

⁶³ Yijiang Liu, Yinghong Wan and Xian Su, 'Identifying individual expectations in service recovery through natural language processing and machine learning' (2019) 131 *Expert Systems and Applications* 288 <www.sciencedirect.com>.

- A.25. These expectations present challenges for investigations where public interest is important, especially where unfettered access to material information, sometimes contemporaneous records to understand the sequence of events in detail, is needed. However, an undue focus on timeliness can come at the expense of an outcome.

HORIZONTAL ACCOUNTABILITY

- A.26. Across government, specific scrutineer agencies have oversight (including the IGTO) in considering performance against the Parliament's legislation. The primary agency in this regard is the Australian National Audit Office (ANAO) through its audit functions. In addition, there are specific oversight responsibilities undertaken by the Office of the Australian Information Commissioner (OAIC) and the Commonwealth Ombudsman.

Australian National Audit Office (ANAO)

- A.27. The role of the ANAO is to support accountability and transparency in the Australian Government sector through independent reporting to the Parliament. The ANAO delivers its purpose under the Auditor-General's mandate in accordance with the *Auditor-General Act 1997*, the PGPA Act 2013 and the *Public Service Act 1999*⁶⁴ along with a range of other legislation and regulations.

Office of the Australian Information Commissioner (OAIC)

- A.28. The OAIC is the independent national regulator for privacy and freedom of information.⁶⁵ The OAIC has oversight functions in relation to the *Privacy Act 1988* and the *Freedom of Information Act 1982* (FOI Act 1982). Individuals may lodge a privacy complaint with the OAIC about the IGTO if their personal information has been mishandled. Similarly, individuals may seek an Information Commissioner review of the IGTO's decisions regarding requests under the FOI Act.

Privacy Act 1988

- A.29. The IGTO must comply with the Australian Privacy Principles (APPs) contained in the *Privacy Act 1988* regarding collecting, holding or use or disclose of personal information, and individuals access and correction thereof.⁶⁶ The IGTO's Privacy Policy⁶⁷ outlines how personal information is managed.
- A.30. The IGTO is empowered to deal with tax file numbers (TFN) for complaint investigations⁶⁸. The OAIC also has the power to apply sanction or penalty upon the IGTO for breaches pursuant to the *Privacy Act 1988* (Privacy Act), as the Australian Information Commissioner has responsibility

⁶⁴ Australian National Audit Office (ANAO), 'The Australian National Audit Office' (28 June 2019) <www.anao.gov.au>.

⁶⁵ Office of the Australian Information Commissioner (OAIC) (undated) <www.oaic.gov.au>.

⁶⁶ *Privacy Act 1988*.

⁶⁷ IGTO, 'Privacy Policy' (undated) <www.igt.gov.au>.

⁶⁸ *IGT Act 2003*, Div 2.

for a number of monitoring, advice and assessment related functions regarding the handling of TFNs.⁶⁹

Freedom of Information Act 1982

- A.31. Individuals have the right to request access to documents from government agencies, such as the IGTO, under the FOI Act 1982. This is for the purposes of increasing scrutiny, discussion, comment and review of the Government's activities.⁷⁰
- A.32. The IGTO's Privacy Policy⁷¹ explains how individuals may lodge an FOI request to the IGTO.

Commonwealth Ombudsman

- A.33. The role of the Commonwealth Ombudsman is to consider and investigate complaints under the *Ombudsman Act 1976*.
- A.34. The IGTO has sole responsibility for investigating Taxation Ombudsman matters.⁷² However, the Commonwealth Ombudsman may also conduct an investigation into the IGTO and the conduct of its officers in carrying out those investigations. The Commonwealth Ombudsman also has general oversight regarding the PID Act 2013.

Public Interest Disclosure Act 2013 (PID Act 2013)

- A.35. Like all other government agencies, the IGTO is only responsible for investigating internal PIDs made within our own agency. The Commonwealth Ombudsman is the responsible agency for general oversight about the process or advice and reporting of a PID and related investigations undertaken by an agency internally.
- A.36. As noted, the affected agencies themselves are the primary party to deal with internal PIDs.
- A.37. Importantly, this responsibility was not included in the transfer of the tax complaints function to the IGTO in 2015 as it is expressly retained by the Commonwealth Ombudsman.⁷³

⁶⁹ Tax file numbers (TFNs) are unique numbers issued by the Australian Taxation Office (ATO) to identify individuals, corporations and others who lodge income tax returns with the ATO. While individuals cannot be required to provide their TFN, there may be consequences if they do not. For example, if individuals do not quote their TFN to employers and financial institutions then they may have tax deducted from their income or interest payments at the highest marginal rate. Quotation of TFNs is also a condition of receipt of most Australian Government assistance payments.

⁷⁰ *Freedom of Information Act 1982* (FOI Act 1982), s 3(2)(b).

⁷¹ IGTO, 'Privacy Policy' (undated) <www.igt.gov.au>.

⁷² *Ombudsman Act 1976*, s 6D(1).

⁷³ *Ombudsman Act 1976*, s 8D(2)(c)(i).

Other obligations – law enforcement

- A.38. Agencies, including the IGTO, must refer all instances of potential serious or complex fraud offences to the Australian Federal Police (AFP) in accordance with the Australian Government Investigation Standards (AGIS) and AFP referral process.⁷⁴

EXTERNAL INFLUENCES

- A.39. The media also acts as a form of check and balance to supplement the formal accountability measures outlined above. The media's intersection with the community means that they may have influence on the manner in which services and associated expectations regarding the adequacy of policy are viewed or appreciated. Further, the *Treasury Whistleblowers Amendment (Enhancing Whistleblower Protections) Act 2019* expressly provides for the disclosures to be made to journalists once certain requirements are satisfied.⁷⁵ While the media does not exist as a formal part of the accountability system, it does have significant indirect social influence.

ACCOUNTABILITY IN PRACTICE

House of Representatives Standing Committee on Tax and Revenue (SCTR).

- A.40. The SCTR's *Inquiry into the External Scrutiny of the Australian Taxation Office* was announced on Wednesday 3 February 2016. The inquiry received 30 submissions from a broad range of stakeholders. As the IGTO is a key scrutineer of the ATO through both the Inspector-General function and Taxation Ombudsman complaints service for taxpayers, the inquiry had particular importance.

"The Committee supported the view that external scrutiny is an investment in the tax system and that the benefits of the scrutiny accrue more widely than the ATO. The Parliament, Australian businesses and individuals also benefit. The costs of external scrutiny also need to be kept in perspective relative to the size of the ATO and its importance to the economy."⁷⁶

- A.41. Further, the inquiry confirmed that the quality of IGTO work had improved ATO operations, and generated strong support amongst stakeholders (as evidenced by the weight and nature of submissions). It also provided 'a good return on investment for Australia' which 'flows directly to the ATO, and indirectly to Government, the Parliament, and Australian businesses and individuals'⁷⁷.
- A.42. The SCTR made four (4) recommendations, which were to be actioned by the IGTO in collaboration with other agencies. The Government also provided a written response in March

⁷⁴ IGTO, *Review into the Australian Taxation Office's Fraud Control Management* (2018) para [2.27].

⁷⁵ The *Treasury Whistleblowers Amendment (Enhancing Whistleblower Protections) Act 2019* adds section 1317AAD to the *Corporations Act 2001*, which outlines these circumstances.

⁷⁶ SCTR, Parliament of Australia, *External Scrutiny of the Australian Taxation Office* (2016) p xvii.

⁷⁷ SCTR, Parliament of Australia, *External Scrutiny of the Australian Taxation Office* (2016) p 31.

2017 and agreed with these recommendations, noting that; “the Australian National Audit Office (ANAO), Inspector-General of Taxation (IGT) and Australian Taxation Office (ATO) have already commenced activities to strengthen the working relationship between the agencies”. The recommendations and the IGTO’s implementation were as follows:

TABLE 1 – HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON TAX AND REVENUE - RECOMMENDATIONS

Recommendation	IGTO implementation action
Recommendation 1	
To increase transparency, the Committee recommends that the Auditor-General, Commonwealth Ombudsman, and Inspector-General of Taxation examine ways to increase the profile of their co-ordination activities—potentially through their websites, annual reports, and consultations undertaken for work programs.	<p>The IGTO has examined and increased transparency regarding the profile of our coordination activities. We have done this in several ways.</p> <p>Our annual reports provide an overview of agency relationship arrangements consultations and contact in this regard.</p> <p>Our website is currently in transition and is being redesigned to make cross referrals to many agencies involved in the tax administration system.</p> <p>Our offices also continue to consult directly regarding review or audit work program setting. The IGTO has met with each of the Auditor-General and Commonwealth Ombudsman since commencing on 6 May 2019. The relevant Deputy officers also have on going liaison in this regard between their respective offices.</p>
Recommendation 2	
To increase transparency, the Committee recommends that the Auditor-General, Commonwealth Ombudsman, and Inspector-General of Taxation improve the explanation in their reports of why each review was conducted and how the review fits in with past and other current reviews.	The IGTO Review Reports are publicly released and include within the relevant background section consideration of other relevant scrutineer reviews or audit reports. This includes an explanation that outline the reasons for and the scoping of those prior reviews or audits and how they fit within the context of current IGTO review being undertaken.
Recommendation 3	
The Committee recommends that the Australian Taxation Office and the Inspector-General of Taxation	The IGTO has formal operational guidelines in place with the ATO for both our Review and Complaints management processes. These provide for clear

Recommendation	IGTO implementation action
redouble their efforts to improve communication before, during and after reviews.	communication requirements regarding our processes and required actions in the conduct of complaints and reviews, for the benefit and support of taxpayer complainants and the community through more prompt resolution of complaints and improvements for taxation administration more broadly. The guidelines also include pre and post complaints and review investigation aspects.
Recommendation 4	
The Inspector-General of Taxation examine opportunities to conduct targeted reviews based on complaints and emerging issues in tax administration, and work with the Australian Taxation Office to develop a mutually efficient system for such reviews.	The IGTO's complaints data and analysis is a key source of information for our review work programming that is more targeted in nature. Some recent examples of reviews undertaken from this source include: GST Refunds Review, Review into Aspects of the Pay As You Go Instalments System and Tax Evasion Referral Centre (TERC) review which was incorporated into the Review into the ATO's Fraud Control Management. The data also provided insight to the Review into the ATO's use of Garnishee Notices.

Reporting accountabilities

- A.43. Specific legislative reporting accountabilities to Parliament are set out in section 41 of the *IGT Act 2003*, namely:⁷⁸
- the number of complaints received;
 - the number of investigations into complaints that were started and completed;
 - the number of investigations into systemic issues that were started and completed; and
 - the number of times a formal notice has been issued to a person to provide information and documents along with the circumstances giving rise to this action⁷⁹.
- A.44. The Committee should consider if any additional reporting obligations should be included in the IGTO statutory framework.

⁷⁸ *IGT Act 2003*, s 41(2).

⁷⁹ *Ombudsman Act 1976*, s 9 (by virtue of section 15 of the *IGT Act 2003*).

CONCLUSIONS

- A.45. Importantly, the general legislative accountability framework under which the IGTO operates is consistent with those of other government agencies. That is, the same checks and balances are applied consistently to all government agencies despite differences in size, resources and function.
- A.46. The IGTO's performance under the accountability and legislative framework will be discussed in further detail in sections B – E of this submission.
- A.47. The IGTO considers these frameworks to be generally robust and fit for purpose. We do consider there are some elements of our legislative and accountability framework which may benefit from further consideration by this Committee. This is especially the case where this may affect the IGTO's future performance and ability to meet community expectations.

B. HOW THE IGTO CONDUCTS ITS INVESTIGATIONS INTO THE AUSTRALIAN TAXATION OFFICE (ATO)

INTRODUCTION

- B.1. The IGTO has applied this specific term of reference to the conduct of the IGTO's broader or systemic reviews. The Taxation Ombudsman role regarding investigation of individual taxpayer complaints is addressed separately in Section D.
- B.2. The conduct of review investigations has been a cornerstone of the work of the IGTO since its inception in 2003 and continues to be an area of significant work and resource allocation.
- B.3. Reviews may be initiated by the IGTO's own motion (usually following consultation with stakeholders to develop a work program or, more recently, from intelligence and data gathered in complaint investigations), at the direction or request of the Minister, a request by Parliamentary Committees or a request by the Commissioner.⁸⁰
- B.4. To date, the IGTO has completed 49 reviews. A summary of the categories of reviews commenced or initiated is set out in Table 2 below.

TABLE 2: REVIEWS COMMENCED BY THE IGTO

REASON FOR REVIEW	NUMBER COMPLETED
IGTO own initiative	41
Direction or request by the Minister	3
Request by Parliamentary Committees	2
Request by the Commissioner	3
Total	49

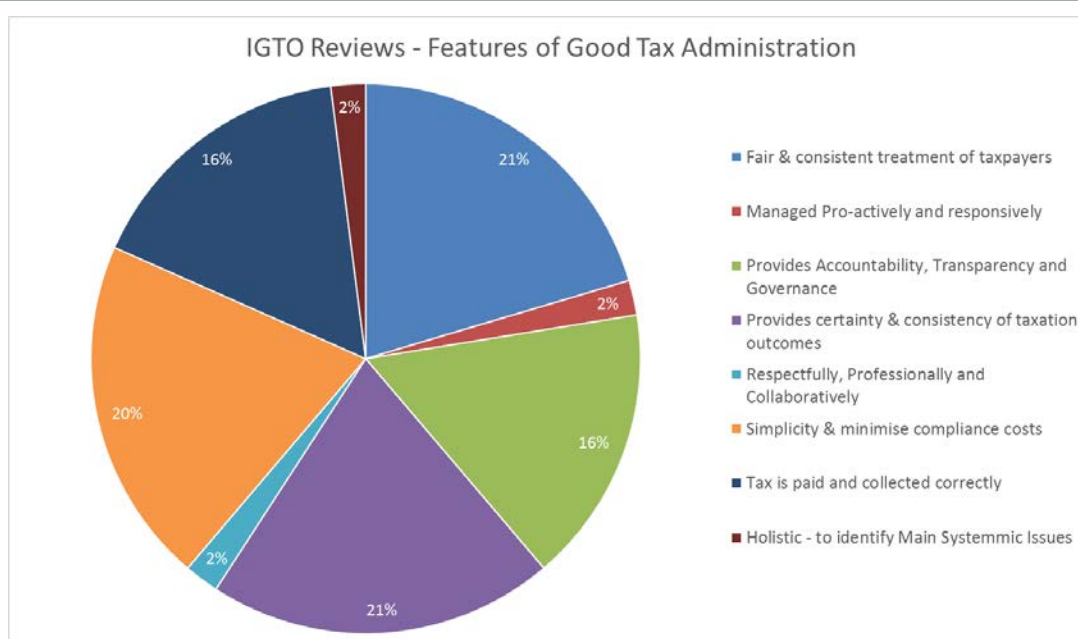
- B.5. A complete list of our reviews is included in Appendix B. Each review has examined one or more of the elements of the taxation administration system.
- B.6. We are developing (through community consultation) a framework of the principles of good tax administration⁸¹ (refer Appendix C). The initial draft identifies the following features:
- fair and consistent treatment of taxpayers;
 - issues are managed pro-actively and responsively;
 - provision of accountability, transparency and governance;

⁸⁰ *IGT Act 2003*, s 8(3).

⁸¹ The draft principled framework has been prepared for the purposes of community consultation.

- provision of certainty and consistency of taxation outcomes;
 - dealing respectfully, professionally and collaboratively;
 - systems are simple and minimise costs; and
 - tax is paid and collected correctly.
- B.7. Some reviews have also been holistic only, aimed at identifying main systemic issues within the tax system that may warrant further consideration.
- B.8. Figure 2 below shows the distribution of IGTO reviews (to date) across one or more of the above principles included in our draft framework.

Figure 2: IGTO reviews and areas of good tax administration considered



- B.9. IGTO reviews have yielded significant benefits for taxpayers and the tax system as a whole. Some examples of such improvements include:
- the ATO's implementation of an in-house facilitation system⁸² to provide taxpayers with an opportunity to resolve less complex disputes. The ATO has noted that each successful in-house facilitation has saved taxpayers, on average, more than \$50,000⁸³;
 - legislative change to enable taxpayers who have made excess superannuation contributions to have the excess amounts refunded, rather than taxed (in some cases at up to 93%);⁸⁴ and

⁸² IGTO, *Review into the ATO's use of early and alternative dispute resolution* (2012) p 44.

⁸³ Commissioner of Taxation, *Annual Report 2016-17* (2017) p 65.

⁸⁴ IGTO, *Review into the Australian Taxation Office's compliance approach to individual taxpayers – superannuation excess contributions tax* (2014); The Hon. Mathias Cormann, Minister for Finance, 'Superannuation excess contributions tax' (Media Release, MC39/14, 13 May 2014).

- extending the director penalty notice (DPN) regime to recover unpaid superannuation guarantee entitlements on behalf of employees.⁸⁵
- B.10. The remainder of this part will consider the IGTO's legislative framework for review investigations and practical approaches to the conduct of review investigations, together with the IGTO's observations and recommendations for improvement.

LEGISLATIVE FRAMEWORK FOR CONDUCTING INVESTIGATIONS

- B.11. The IGTO is empowered to undertake review investigations pursuant to paragraphs 7(1)(b) to (d) of the *IGT Act 2003*. These provisions state:

7 Functions of the Inspector-General

(1) The functions of the Inspector-General are as follows:

...

(b) to investigate other action that:

(i) is taken by a tax official; and

(ii) relates to administrative matters under a taxation law;

(c) to investigate systems established by the Australian Taxation Office, or Tax Practitioners Board, to administer taxation laws, including systems for dealing or communicating:

(i) with the public generally; or

(ii) with particular people or organisations;

in relation to administrative matters under those laws;

(d) to investigate systems established by taxation laws, but only to the extent that the systems deal with administrative matters;

...

(f) to report on those investigations.

- B.12. Sub-section 7(2) of the *IGT Act 2003* prohibits the IGTO from investigating:
- rules imposing or creating an obligation to pay an amount under a taxation law;⁸⁶ and
 - rules dealing with the quantification of such an amount.⁸⁷

⁸⁵ IGTO, *Review into the ATO's administration of the Superannuation Guarantee Charge* (2009) p 93.

⁸⁶ *IGT Act 2003*, s 7(2)(a).

⁸⁷ *IGT Act 2003*, s 7(2)(b).

- B.13. Paragraph 18(1)(b) of the *IGT Act 2003* states that the IGTO may make a report to the Minister ‘setting out any recommendations for how that taxation law might be improved.’
- B.14. Furthermore, by virtue of section 15 of the *IGT Act 2003*, a number of provisions from the *Ombudsman Act 1976* are imported and applicable. The powers and remedies are effectively harmonised with those of the Commonwealth Ombudsman. Accordingly, the IGTO may:
- a. exercise formal information gathering powers⁸⁸ with associated protections⁸⁹;
 - b. refer questions to the Administrative Appeals Tribunal as well as the powers of the Federal Court of Australia⁹⁰;
 - c. examine witnesses and enter the premises of the agency subject of an investigation⁹¹; and
 - d. grant a certificate of unreasonable delay in exercising a power⁹².
- B.15. In addition, the IGTO may find (in relation to decisions or actions taken by the ATO or TPB) that:
- a. *a decision, recommendation, act or omission should be referred to the ATO, TPB or other appropriate authority for further consideration;*
 - b. *some particular action could be, and should be, taken to rectify, mitigate or alter the effects of, a decision, recommendation, act or omission;*
 - c. *a decision should be cancelled or varied;*
 - d. *a rule of law, provision of an enactment or practice on which a decision, recommendation, act or omission to which this section applies was based should be altered;*
 - e. *reasons should have been, but were not, given for a decision to which this section applies; or*
 - f. *any other thing should be done in relation to a decision, recommendation, act or omission to which this section applies;*
- B.16. The Commonwealth Ombudsman is required to report these findings to the authority concerned – the ATO or TPB.
- B.17. The IGTO does not propose to comment on every applicable legislative provision in this submission but will comment on a number of themes from the current legislative framework that warrant further discussion and consideration by the Committee.

⁸⁸ *Ombudsman Act 1976*, s 9.

⁸⁹ *Ombudsman Act 1976*, s 37; *IGT Act 2003*, s 39.

⁹⁰ *Ombudsman Act 1976*, ss 10A, 11 and 11A.

⁹¹ *Ombudsman Act 1976*, ss 13 and 14.

⁹² *Ombudsman Act 1976*, s 10.

THE CONDUCT OF REVIEW INVESTIGATIONS IN PRACTICE

- B.18. In 2016, the SCTR undertook an inquiry into the *External Scrutiny of the Australian Taxation Office*. As part of the IGTO's submission to that review, we provided the SCTR with a broad overview of the conduct of review investigations and the interactions that we had with the ATO and other stakeholders up to the time of the review. The SCTR presented a diagram of that process in its report.⁹³ This diagram is reproduced in Appendix D.
- B.19. While each review will have its own nuances that will require some tailoring, the overall process of the IGTO's conduct of review investigations into the ATO remain constant. The IGTO review investigation processes largely align with the ANAO's performance audit process.⁹⁴
- B.20. A broad summary of the main steps in the review process are provided below. More detailed information on each of these steps are set out in the Operational Guidelines which were adopted by the office of the IGTO and the ATO in May 2019 and which are provided in Appendix I.

Step 1 – Set the scope and Terms of Reference for the review

Preliminary enquiries

- B.21. A key source of intelligence on potential broader issues warranting IGTO review investigation is the complaints handling service. Through analysis of the number and nature of complaints received, the IGTO may consider launching a review. However, reviews are resource-intensive projects and so it may be necessary to make preliminary enquiries before committing resources to a review.
- B.22. These enquiries have generally been effected through briefings or direct information requests from ATO senior officers. This assists the IGTO to understand potential issues within particular subject areas and the scale of impact on taxpayers.

EXAMPLE

The IGTO has more recently received a number of complaints from small business taxpayers about the impact that Single Touch Payroll (STP) is having on them. As the extension of the STP regime to small business is still in its infancy, the IGTO does not consider that an immediate commitment of resources to a full review is warranted. However, to better understand the work that the ATO is undertaking to extend the STP regime, the assistance it is offering small business taxpayers and the potential impacts, the IGTO has requested and the ATO has provided a briefing on these matters.

- B.23. The preliminary enquiry process is also effected by the interrogation of IGTO complaints data and consulting with external stakeholders.

⁹³ SCTR, *External Scrutiny of the Australian Taxation Office* (2016) p 40; IGTO, Submission 23 to SCTR, *Inquiry into the External Scrutiny of the Australian Taxation Office* (March 2016) p 45.

⁹⁴ ANAO, *A Guide to Conducting Performance Audits* (2017).

Terms of reference

- B.24. Once a decision is made to launch a review, it is commenced by the development and publication of terms of reference (TORs). The IGTO prepares an initial draft of the TORs and seeks comment on these TORs from external stakeholders and the ATO. Following publication, the IGTO usually allows a period of four to six weeks to receive submissions.
- B.25. Once submissions have closed and the IGTO has undertaken initial analysis of the concerns that have been raised, an opening meeting with the ATO senior executive is set to share with them the concerns that have been raised, identify key personnel from both offices to manage the review and any other arrangements particular to the review topic.

Step 2 - Evidence gathering and analysis

- B.26. The bulk of the review investigation concerns the gathering and analysis of evidence to either confirm or dispel hypotheses raised in complaints or submissions to the review. Although information may be provided by stakeholders in relation to their experience, the bulk of evidence is gathered from the ATO, its systems and officers.
- B.27. During this period, the IGTO review team and the SES officers overseeing the review for both the IGTO and the ATO, establish regular meetings to discuss progress of the review, additional information requests and to discuss issues as they emerge so that they may be expeditiously addressed.

Information access

- B.28. For the purposes of the *IGT Act 2003*, the IGTO has broad power to 'obtain information from such persons, and make such inquiries, as he or she thinks fit'⁹⁵ and may issue formal notice to obtain relevant documents or information.⁹⁶ Access to ATO information has generally been achieved without the need for the IGTO to issue formal notices to either the Commissioner or other ATO officers.
- B.29. Notwithstanding that there is a right to access ATO information and IGTO officers have direct access to a range of ATO systems for that purpose, it has generally been necessary to engage with the ATO to request information and access the necessary information and systems. This is consistent with the conduct of other agencies undertaking investigations of this kind, including the ANAO.⁹⁷
- B.30. There are a number of reasons that necessitate engagement of the ATO to access information.
 - a. Firstly, the sheer volume of information and data held by the ATO would make it impossible for any person to be able to review and consider without direction from ATO officers who deal with the data and information on a business-as-usual basis.

⁹⁵ *Ombudsman Act 1976*, s 8(3) (by virtue of section 15 of the *IGT Act 2003*).

⁹⁶ *Ombudsman Act 1976*, s 9 (by virtue of section 15 of the *IGT Act 2003*).

⁹⁷ ANAO, *A Guide to Conducting Performance Audits* (2017).

- b. Secondly, the making of a request for information assists to limit the risk of potentially personal and sensitive data being inappropriately accessed, or perceived (by the ATO) to be inappropriately accessed.
- c. Finally, as some issues considered by the IGTO involve examination of the history of events or evolution of particular policies and practices, not all information is readily available online or available at all. Accordingly, through discussions and requests made to the ATO, other contemporaneous materials may be identified that would assist the IGTO investigation.

Step 3 - Interview and examination of ATO officers

- B.31. The IGTO may, if necessary, require ATO officers to give evidence under oath or affirmation for the purposes of a review investigation. Direct evidence is a useful source of information but has IGTO typically seeks access to more reliable forms of evidence. This includes contemporaneous records. Also, the ATO has generally been willing to provide the IGTO with access to its officers and subject-matter experts for the purposes of identifying sources of evidence and understanding more complex areas of the tax administration.

EXAMPLE

As part of the IGTO's review into the ATO's use of *Data Matching*, the IGTO requested and were afforded an opportunity to meet with experts in that area who developed models and other automated processes to cleanse and validate the data before it was applied to match against taxpayers' income tax returns.

- B.32. Notwithstanding the IGTO's right to access ATO systems and officers, the ATO does not routinely broadcast that the IGTO has commenced a review and that ATO officers are encouraged to assist the IGTO in their review and investigation.
- B.33. In certain reviews, however, it has been necessary to adopt different processes due to the nature or subject matter of that review. Two examples are provided below in relation to the IGTO's review into the ATO's *Fraud Control Management*⁹⁸ and its use of *Garnishee Notices*⁹⁹.

Example - Fraud Control Management

- B.34. The review into the ATO's Fraud Control Management was initiated in response to a request from the Senate Economics References Committee following issues emerging from the Australian Federal Police's Operation Elbrus.
- B.35. Due to the nature of the concerns in this area as well as their links to a former senior ATO official, the review was treated highly sensitively and input was sought from both current and former ATO officers. In respect of current ATO officers, a specific invitation and endorsement of

⁹⁸ IGTO, *Review into the Australian Taxation Office's Fraud Control Management* (2018).

⁹⁹ IGTO, *Review into the Australian Taxation Office's use of Garnishee Notices* (2019).

approaches to the IGTO was issued by the Commissioner to all ATO staff via the ATO's internal newsletter, *ATO News Hub*, as set out below.

EXAMPLE

The closing date for submissions for the review into the ATO's fraud control management has been extended.

The Inspector-General has extended the closing date for submissions for the review into the ATO's fraud control management until Friday 4 August 2017.

Guidelines for making submissions can be found [here](#).

As a tax officer you should be aware that privacy and confidentiality laws still apply to any submissions you may choose to make. You can disclose information, including taxpayer information (but not tax file numbers¹⁰⁰) to the Inspector-General of Taxation if that information is relevant and useful:

- under the Inspector-General of Taxation Act 2003
- for the purposes of the Terms of Reference of the Inquiry.

Staff should also be mindful that unauthorised access to taxpayer records is prohibited under the *Taxation Administration Act 1953*, and penalties for unauthorised access are severe.

Staff should take care to transmit information to the Inspector-General of Taxation by post, or by the secure email system known as FedLink, which secures emails between @ato.gov.au and @igt.gov.au email addresses.

If you are unsure about any of your obligations as a tax officer, you should contact the [ATO External Scrutineers Gateway mailbox](#).

- B.36. The IGTO has also invited and received approaches from former ATO officers and ATO officers on an anonymous basis in relation to reviews undertaken.

Example - Garnishee Notices Review

- B.37. The *Garnishee Notices* review sought to address certain allegations made by current and former ATO staff in the ABC's Four Corners program. As part of that review, 'the IGTO requested that a specific invitation be provided by the Commissioner to ATO staff to provide assurance that they could independently provide assistance or information to the IGTO review and do so by directly contacting a specific independent IGTO officer whose contact details were provided. This also provided ATO staff with an opportunity to make disclosure anonymously where there may have

¹⁰⁰ Importantly, IGTO staff are empowered and entrusted to obtain taxpayer complainant TFNs pursuant to Division 2 of the *IGT Act 2003* to assist them resolve their complaints. This power is not required in a broad systemic or own motion review investigation context as these do not relate to specific individual complaints as such.

been concerns with being personally identified in the review process.’¹⁰¹ An example of one such email is provided below.

EXAMPLE

[Adelaide staff]

As you would know, representatives from the office of the Inspector-General of Taxation are visiting our office tomorrow to discuss our garnishee approach with some staff.

If you would like to discuss your experiences around garnishees with the IGT, you are welcome to do so by arranging a time with [ATO Assistant Commissioner] (from Debt’s Relationship and Stakeholder Management branch) on [Mobile Number]. As is usual protocol, an ATO representative (in this case, [ATO Assistant Commissioner]) will accompany staff for these sessions.

Should you wish to speak with the IGT anonymously, feel free to contact [IGTO General Manager] on [Mobile Number] to arrange a mutually convenient meeting time.

Regards

- B.38. The IGTO visited four ATO sites and at each site, held group sessions with all relevant ATO staff who wished to attend. Additionally, time was allotted for ATO staff to speak directly with the IGTO review representatives outside of those sessions and the IGTO General Manager’s email was also provided to all staff at the relevant sites for the purposes of making anonymous contact if they wished.
- B.39. The IGTO notes that some ATO staff took the opportunity to use the option to anonymously contact the IGTO General Manager to discuss their experiences. No ATO representative was present during these discussions. Officers who attended the on-site sessions also did not raise concerns about having an ATO representative with them.

Step 4 - Reporting and implementation of agreed recommendations

Preliminary draft report

- B.40. The IGTO’s initial findings and recommendations, together with supporting evidence, are reduced into a preliminary draft report which is shared with the ATO for comment. This is to provide the ATO with an opportunity to comment on any implied or expressed criticism and is required by law¹⁰². It also allows further evidence or information to be provided to the IGTO to consider.

¹⁰¹ IGTO, *Review into the Australian Taxation Office’s use of Garnishee Notices* (2019) pp 2–3.

¹⁰² *Ombudsman Act 1976*, s 8(5).

Final report

- B.41. The IGTO considers any additional information and finalises the report which is provided to the ATO for its formal response before being either publicly released or transmitted to the Minister. If a report is transmitted to the Minister, the Minister is required to publicly release the report within 25 sitting days of the House of Representatives.¹⁰³

Implementation of agreed recommendations

- B.42. Consistent with other ombudsmen, the IGTO cannot compel the Commissioner to undertake any specific actions (or refrain from taking any actions, as the case may be). Historically, the ATO has agreed with the vast majority of the IGTO's recommendations. The IGTO is empowered to notify the Minister in writing if the IGTO is of the opinion that action that is 'adequate and appropriate in the circumstances is not taken with respect to the matters and recommendations included in a report to [the ATO] within a reasonable time after the [IGTO] furnished the report to the [ATO]'.¹⁰⁴
- B.43. In relation to agreed recommendations, the ATO provides the IGTO with proposed implementation plans and requests the IGTO feedback. Feedback from the IGTO is given on the assumption that the actions and deliverables are carried out as described in the implementation plans. This assists to reduce the potential for disagreement, (regarding the capacity of the ATO's implementation plans to address recommendations) should the IGTO later conduct a follow up review on implementation.
- B.44. Ultimately, implementation is a matter for the ATO and is overseen by its internal audit area which reports to the ATO Audit and Risk Committee. As an additional oversight, the IGTO may undertake a (post implementation or new) review if concerns or issues persist through complaints and other feedback the IGTO receives from taxpayers and their representatives.

EXAMPLE

The IGTO had completed a broad review into the ATO's Debt Collection practices in 2015. However, notwithstanding that the ATO was implementing a range of recommendations from that review, it was clear that there were ongoing concerns in particular areas, such as the ATO's use of garnishee notices, leading to complaints with the IGTO as well as media attention which resulted in the ABC Four Corners segment.

¹⁰³ *IGT Act 2003*, s 18(2).

¹⁰⁴ *Ombudsman Act 1976*, s 16 (by virtue of section 15 of the *IGT Act 2003*).

OBSERVATIONS AND RECOMMENDATIONS

Internal inconsistency and/or overlap in the legislative framework

- B.45. The legislative framework states that IGTO **should** investigate administrative matters and tax administration rules **but not** those imposing or creating an obligation to pay an amount under a taxation law.
- B.46. The jurisdiction within which the IGTO operates could be better clarified in the *IGT Act 2003* – not simply by way of importation of *Ombudsman Act 1976* provisions.
- B.47. This would also provide an opportunity to clarify that the IGTO is to investigate ‘administrative matters’ or ‘tax administration’ or ‘the administration of the tax system’ – including administration that is connected to the tax collection administration processes.
- B.48. The IGTO notes that tax administration at its core is concerned with the collection of tax. However the exclusion currently included in subsection 7(2) of the *IGT Act 2003* suggests that ‘rules imposing or creating an obligation to pay an amount under a taxation law’ and ‘the quantification of such an amount’ are expressly excluded. This exclusion is internally inconsistent and can create unnecessary confusion.
- B.49. Fundamentally, ‘tax administration’ as a concept is used to distinguish matters of tax policy, i.e. activities or entities to be taxed and the manner for calculating that tax liability. This separation between tax administration and tax policy is expressly stated in subsection 7(1) of the *IGT Act 2003*. It provides that the IGTO shall investigate ... *but only to the extent that the systems deal with administrative matters*. It is curious as the *Ombudsman Act 1976* design approach did not have such a restriction imposed over the history of its operation, particularly given when one considers that taxation complaints and own motion reviews were so managed under that Act by the Commonwealth Ombudsman prior to the changes in 2015.
- B.50. The additional exclusion in subsection 7(2) of the *IGT Act 2003* is an unnecessary formulation that can result in confusion, as noted in the examples listed below.

EXAMPLE

In the context of penalties under a taxation law, the IGTO may refrain from investigating the law imposing the penalty and the respective amounts, but through examination of the ATO’s administration of these provisions, the IGTO may identify policies or processes that lead to excessive or incorrect penalty amounts being imposed. The IGTO’s investigation may result in these policies and processes being refined, which would have a flow on effect to the amount of penalties imposed.

- B.51. The IGTO has an express statutory power to recommend¹⁰⁵ that a rule of law, provision of an enactment, act or omission should be altered where the rule, provision or practice may be unreasonable, unjust, oppressive or improperly discriminatory. Accordingly, even where the administration of the tax laws is arguably aligned with the legislation, but perhaps not its intention, the IGTO has powers to investigate and make recommendations. This would apply especially where the disconnect is generating high levels of concern within the tax system and diminishing overall confidence. In these cases, the IGTO has drawn upon the ATO's data and client experience to report how the administration of the legislation is creating an impression of unfairness or unjustness within the system.

EXAMPLE

The superannuation excess contribution tax regime created a significant amount of dissatisfaction from taxpayers who, through inadvertence or misunderstanding contributed more superannuation than was permitted under the law and, as a result, had those excess sums taxed at punitive amounts. While the Commissioner had a discretion to treat excess amounts as having been made in another year and, therefore, no tax was payable, the strict rules around the exercise of the discretion caused further dissatisfaction. The IGTO report into ATO administration of Excess Contributions Tax noted these outcomes. Without addressing the amount of tax that needed to be paid, the IGTO recommended to the Government that consideration could be given to allowing the taxpayers to withdraw the excess with minimal penalty. In the May 2014 Federal Budget, the Government accepted the recommendation, announcing legislation to enable taxpayers with excess non-concessional contributions to withdraw those contributions and not incur the ECT. The adoption of this recommendation has virtually eradicated complaints and concerns in this area, saving significant time and costs on the part of the ATO and taxpayers in dealing with these disputes.¹⁰⁶

- B.52. The IGTO submits that the current provisions concerning the IGTO's jurisdiction raise ambiguity as to IGTO powers and this may serve to unduly inhibit the community's understanding of the potential scope of IGTO investigations and limit their value.

¹⁰⁵ Refer to section 15 of the *Ombudsman Act 1976*.

¹⁰⁶ The Hon. Mathias Cormann, Minister for Finance, 'Superannuation excess contributions tax' (Media Release, MC39/14, 13 May 2014).

RECOMMENDATION

The IGTO recommends that the Committee consider:

- whether the drafting in the *IGT Act 2003* should be clarified – including by incorporating express drafting provisions and not simply by way of importation of *Ombudsman Act 1976* provisions; and
- whether section 7 of the *IGT Act 2003* should be reframed to remove any ambiguity that tax collection is a matter of tax administration.

Reviews and investigations generally

B.53. The IGTO considers that broadly, at a practical level, the conduct of review investigations is operating effectively – given the existing legislative framework. However, for the reasons noted in sections C, D, E and F of this submission, the IGTO believes that there are some areas for improvement. These areas of improvement are considered in detail in later sections but broadly include:

- the IGTO has limited access to ATO data. This can impact on the timeliness of our investigations (both reviews and complaints). It can also impact on our ability to independently verify and provide actual assurance on the effective operation of the tax administration laws – refer Recommendations in Section C.
- the IGTO has limited access to ATO information systems. This can impact on our ability to obtain data, verify data and analyse data – all of which impact on the quality of our service - refer Recommendations in Section C.
- the IGTO has indirect access to ATO officers and the information and explanations that they can provide. This can impact on the quality of our reviews and recommendations.

- B.54. The issues of delay in the ATO providing the IGTO with information were previously raised in the IGTO's submission to the SCTR review into the external scrutiny of the ATO.¹⁰⁷ The experience varies from review to review. In the *Garnishee review*, for example, information was provided between 3-43 business days after request. In other reviews, such as the IGTO's review into the *Taxpayers' Charter and Taxpayer Protections*, a piece of requested information on the number of complaints received by the ATO about breaches of the Taxpayers' Charter took fifty-two business days for the initial information to be provided. When the information was interrogated by the IGTO, a further thirty-eight business days elapsed before the ATO provided fresh data that had not been previously provided to the IGTO in response to the original request. In some instances, information is not provided to the IGTO at all due to it not being able to be found despite being referenced internally by the ATO.¹⁰⁸

Meeting community expectations as the tax system evolves - Future skills and challenges

- B.55. The IGTO will need to adapt to the changing administrative landscape and the increasing use of automation and artificial intelligence. This will affect the manner and approach of IGTO investigations.
- B.56. It is well-accepted that the future of tax will be digital, with decreasing reliance on paper and manual processes. The market is already seeing much of this increased digitisation and automation, both within the ATO and elsewhere in the tax system as noted in the IGTO's *Future of the Tax Profession*¹⁰⁹ review.
- B.57. A challenge that is presented from the scrutineer's perspective is the changing nature of review and assurance. Whereas IGTO reviews have historically examined written policies and processes, and how these translated into ATO officer actions, it is likely that over the next five to ten years, investigation and assurance by the IGTO will need to consider whether the automated systems are operating as intended and returning outcomes that are consistent with tax laws and community expectations. One emerging area for scrutiny focus is the use of machine-learning decision-making algorithms, particularly the challenges that the administration faces in meeting community expectations regarding tailored due process and fairness (see for example, the Federal Court of Appeal's consideration of ATO's automated letters and the Commonwealth Ombudsman's investigation of Centrelink's on-line compliance program, also known as 'robodebt'¹¹⁰).

¹⁰⁷ IGTO, *Inquiry into the External Scrutiny of the Australian Taxation Office: A submission to the House of Representatives Standing Committee on Tax and Revenue* (2016) p 40; IGTO, *Inquiry into the External Scrutiny of the Australian Taxation Office: Supplementary submission to the House of Representatives Standing Committee on Tax and Revenue* (2016) p 16.

¹⁰⁸ IGTO, *Review into the ATO's management of transfer pricing matters* (2014) pp 25-26.

¹⁰⁹ IGTO, *The Future of the Tax Profession* (2018).

¹¹⁰ See, for example, *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79 and Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System, Implementation report* (April 2019).

- B.58. Such issues necessarily will involve IGTO officers who not only understand underlying tax law requirements but also have a working knowledge of digital systems and their operation, automation, SQL coding and the implementation of artificial intelligence, amongst other things that may emerge.
- B.59. The IGTO considers that, at present, the expert resources of the IGTO team to investigate and provide assurance on the ATO's policies and processes are appropriate. However, augmentation of the IGTO capability and expertise will be necessary in the future. This may include upskilling of the current IGTO team or ensuring sufficient resources for the IGTO to draw in those expert 'digital and technology skills as needed for particular investigations.

OBSERVATION

The IGTO welcomes the Committee's views on the IGTO resources necessary to undertake investigations involving the interrogation of automated digital system processes.

C. WHAT SAFEGUARDS EXIST TO ENSURE THE INDEPENDENCE OF THE IGTO

- C.1. The IGTO recognises that the integrity and independence of scrutineers is critical in discharging its obligations impartially in the manner envisioned by Parliament and in line with community expectations. Impartiality is also a core value of the Public Service and the IGTO. There are a number of safeguards protecting the independence of the IGTO in the conduct of its investigations, the reporting of those investigations and the making of recommendations. These safeguards are enshrined in legislation and operationally embedded within internal controls.

GOVERNANCE & STRUCTURAL SEPARATION

Accountability assures independence

- C.2. External scrutiny of our performance and accountability contributes to the independence of the IGTO. As outlined in section A, the IGTO's accountability framework includes accountability to the Australian community, including through Parliament, the ANAO, the OAIC and the Commonwealth Ombudsman.

Independent statutory appointment remuneration and objects in legislation

- C.3. The *IGT Act 2003* establishes the IGTO as a statutory authority which is separate from the bodies it is tasked to investigate. As set out in section A, the IGTO is neither an advocate for any particular taxpayer or any government agency, as its object is to improve tax administration through investigation of complaints, conducting reviews, public reporting and independent advice to Government and its relevant entities.¹¹¹
- C.4. The IGTO's appointment is made by the Governor-General based on a nomination by Cabinet – and the recommendation of the relevant Minister, the Treasurer. The appointment is for a fixed term with the salary set by the remuneration tribunal.
- C.5. This model is more independent than some comparable jurisdictions. For example, the National Taxpayer Advocate (NTA), who is the scrutineer for the United States (US) Inland Revenue Service (IRS), is appointed by the Secretary of the Treasury after consultation with the Commissioner of the IRS and the Congressional Oversight Board. The NTA also reports directly to the Commissioner¹¹² and can have their remuneration set by the Secretary of the Treasury.¹¹³

¹¹¹ *IGT Act 2003*, s 3.

¹¹² *Internal Revenue Code 1986*, § 7803(c)(1)(B).

¹¹³ *United States Code*, Title 5, § 5382.

Separate funding and premises – especially from the ATO and TPB

- C.6. The funding of the IGTO is provided as a separately identified allocation in the Australian Government Budget Process, which seeks Parliament's authority through the relevant appropriation acts. The amount of funding is not dependent on the ATO or TPB.
- C.7. The IGTO has one national office which services the entire country. Our premises are stand alone and are not shared with any other government agency. Importantly, the premises of the IGTO are separate from the ATO and TPB.

Annual corporate plan and reporting

- C.8. The IGTO corporate plan and Annual Report is prepared by the IGTO as an independent agency. These documents are published and tabled in Parliament and can be located on the IGTO's website.

Separate legislation and complaint systems

- C.9. The *IGT Act 2003* establishes the IGTO as an agency with functions which are separate from the ATO, TPB and Commonwealth Ombudsman. There are also clear and defined jurisdictional boundaries which allow a complaint to be transferred between relevant agencies, including the IGTO, Commonwealth Ombudsman and Information Commissioner. This facilitates consideration of a complainant's concerns by the most appropriate agency. For example:
- The Commonwealth Ombudsman is required to transfer complaints regarding tax administration actions to the IGTO.¹¹⁴ Conversely, the IGTO is required to transfer complaints or aspects of complaints that are not about tax administration to the Commonwealth Ombudsman.¹¹⁵
 - The Commonwealth Ombudsman also has a role to review issues raised by complainants regarding the conduct of the IGTO's investigation. Such investigations are limited to conduct concerns only and do not encompass tax administration concerns.
- C.10. These arrangements establish the IGTO, effectively, as a single port of call for all matters of tax administration involving the ATO or TPB.

Separate communication and technology systems

- C.11. IGTO information, communication and technology (ICT) systems, including our case management system, which collates files about complaints and call recordings, is held on a separately located system within the Department of Treasury's ICT network. These systems have strong safeguards and are independent from the ATO and TPB's systems. The IGTO systems cannot be accessed by the ATO or TPB. As a result, information is kept confidential from other agencies, including the ATO and TPB.

¹¹⁴ *Ombudsman Act 1976*, s 6D(4)(b).

¹¹⁵ *IGT Act 2003*, s 10(1).

- C.12. In addition to that above, we also have a separate system which provides access to some information stored on the ATO's systems for the purposes of conducting investigations.

Audit and risk committee

- C.13. The IGTO has an audit and risk committee with an independent chair and members. It examines our risk framework and strategies for managing key risks, including those which may impact on the IGTO's independence. For example, two key risks which are subject to the audit and risk committee's purview are:
- failure to efficiently deliver a complaint handling service that enhances the taxpayer experience; and
 - failure to provide timely, accurate and high quality reports or reviews to government with sound recommendations.

Independent appointment of own staff and conflicts of interest register/policy

- C.14. The *IGT Act 2003* also empowers the IGTO to independently employ its own staff directly. All such staff are employed as APS employees and are required to observe the relevant APS rules, including the statutory Code of Conduct.
- C.15. As investigations require a deep knowledge of tax administration systems, the IGTO employs dedicated tax professionals who have extensive experience working within the tax and superannuation systems. Such staff are required to possess relevant tertiary and professional qualifications.
- C.16. Due to these requirements, the majority of IGTO staff have experience working at the ATO. The IGTO has an induction program to imbue the cultural attributed required for independent investigation.
- C.17. The potential for conflicts of interest, whether apparent, perceived or otherwise, is addressed through our conflicts of interest policies and procedures. Requirements include, the potential for such conflicts to be registered and reported to a manager. Where it is established that an apparent or perceived conflict of interest does exist, the case is reassigned and restrictions are put into effect to prevent the conflicted officer from accessing case information.
- C.18. The conflicts of interest register records instances of reported action or perceived conflicts of interest and is maintained by senior staff.

LEGISLATIVE POWERS AND REMEDIES

Compulsory information gathering powers/access

- C.19. The IGTO has powers to request and require information, including the power to require tax officials to give evidence under oath or affirmation. There are criminal penalties, including imprisonment, for tax officials who do not provide documents when required.¹¹⁶ These powers allow the IGTO to obtain relevant information and documents in addition to any oral evidence. As a result, these powers allow the IGTO to form independent views on matters under investigation that are based on corroborative and contemporaneous records of events.
- C.20. The IGTO has direct access to some ATO ICT systems for investigation purposes. The IGTO also has the ability to receive protected taxpayer information from the ATO and to receive TFNs for the purpose of efficient management of tax administration complaint investigations.¹¹⁷ For example:
- Such documents may include ATO communications with clients (such as letters, emails and file notes of telephone calls), internal ATO reports (such as audit reports, position papers and submissions) and call recordings.
 - IGTO complaint investigators can independently and directly access information in the ATO's customer relationship management system up to and including a 'classified' level. Our team members are very capable in this regard, however, given the complexity and vast range of ATO systems assistance may be required at times to navigate through this network labyrinth.
 - If an IGTO officer requires information maintained on an ATO system which it does not already have access to, the IGTO needs to make a request to the ATO that access be granted to that officer. The IGTO's requirement for requesting access to the ATO's systems arises due to the number of systems the ATO operates and the need for all those using the ATO's systems, including IGTO officers, to have valid reasons documented why access is being sought. This process of requesting access is to ensure unauthorized access is prevented. For some systems, the IGTO may not be provided direct access and are provided information from an ATO officer that has such access. This is the case for information which has a higher security classification or that obtained by the ATO from other law enforcement agencies. More detail is provided further below.
 - The risk of the ATO not providing systems access when requested by the IGTO is negated by the fact that the IGTO may choose to exercise its formal coercive information gathering powers to obtain information at any time (i.e. when information requests are either not provided or not responded to in a reasonable timeframe).
- C.21. The IGTO can also seek documentation from the ATO or TPB outside of an IGTO investigation to facilitate better understanding of issues. However, this may not include protected information

¹¹⁶ *Ombudsman Act 1976*, s 36(1) (by virtue of section 15 of the *IGT Act 2003*) modified by section 17(4) of the *IGT Act 2003* to be 6 months imprisonment.

¹¹⁷ *IGT Act 2003*, ss 15, 37B and 37C.

until an IGTO investigation has commenced. These constraints are discussed in more detail below.

TRANSPARENCY MEASURES

C.22. Public reporting is an important safeguard to assure independence.

Public and transparent reporting processes

- C.23. When the IGTO finalises a review, it is reported publicly on IGTO's website¹¹⁸. If a review does not contain recommendations to Government, the IGTO is not required to provide the report to the Minister before publication. In the event that a report does contain recommendations to government for consideration regarding a change to taxation administration law, it is issued to the Minister, which as a consequence thereafter must be made public within a set timeframe.¹¹⁹
- C.24. Complaint investigations relate to individual taxpayers and are conducted privately¹²⁰ with our views provided directly to the complainant¹²¹. These responses are not sent to the ATO, unless consented to by the taxpayer which is often provided as it assists in resolving their matter more expeditiously. Importantly, the taxpayer may choose to release our responses publicly.
- C.25. Concerns have been raised previously in relation to the IGTO function — that without a public reporting requirement, the independence of the IGTO would be diminished.¹²² These views maintain that for the IGTO function to be principled and effective as a means of identifying and remedying systemic problems in the administration of the tax system, the reporting process must be open and transparent.¹²³
- C.26. The IGTO is of the view that decisions that are subject of public scrutiny are more likely to be accepted as independent and such public and transparent reporting encourages evidenced based decision-making.

¹¹⁸ The IGTO, pursuant to sections 15, 16 and 17 of the *Ombudsman Act 1976* by operation of section 15(i) of the *IGT Act 2003* and also section 18 of that same Act, do not require public release of reports, however, the IGTO office has a practice of doing so.

¹¹⁹ Currently 25 sitting days in the House of Representatives – see section 18 of the *IGT Act 2003*.

¹²⁰ *Ombudsman Act 1976*, s 8(2) (by virtue of section 15 of the *IGT Act 2003*). Further other legislative requirements also need to be considered regarding confidentiality and privacy such as the *Privacy Act 1988*.

¹²¹ *Ombudsman Act 1976*, s 12 (4) (by virtue of section 15 of the *IGT Act 2003*).

¹²² Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 19.

¹²³ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) pp 33 and 38.

Operational guidelines should be publicly available

- C.27. To safeguard against the risk that the IGTO's independence could be compromised in investigating complaints about the ATO, the roles and responsibilities of IGTO and the ATO officers are clearly set out in the IGT-ATO operational guidelines for complaints, as agreed on by both agencies – refer Appendix I.
- C.28. These operational instructions include the following safeguards:
- The IGTO case officer sets out the terms of a complaint investigation, which is confirmed with the complainant and reviewed by a IGTO manager, prior to the ATO being notified of the complaint.
 - The IGTO is responsible for finalising complaints and keeps investigations open for as long as the complainant's concerns have not been appropriately addressed by the ATO.
 - Each agency keeps its own contemporaneous records of meetings and outcomes where complaints are discussed.
 - The IGTO will provide a copy of the IGTO's finalisation letter, which is sent to the complainant, if the complainant provides consent to do so.
- C.29. The IGTO's complaint investigation work with the ATO ensures complaints progress efficiently and promotes disclosure of relevant information and communication during all stages of the complaint investigation. This contributes to a common understanding of the respective positions and issues and ensures issues are quickly and appropriately addressed.

Public consultations with the community

- C.30. The development and publication of the IGTO's work program of reviews provides transparent reasons for why topics were short-listed for review.
- C.31. During the development of work programs, the IGTO has historically provided any stakeholder, other agencies and members of the public and professional bodies with an opportunity to raise areas of concern for IGTO review. Such a process was designed, in part, to address concerns that the IGTO may otherwise be unduly influenced by well-resourced stakeholders.¹²⁴
- C.32. Following identification and preliminary scoping, the IGTO publicly announces potential review topics and describes the issues that could be examined as part of the 'Work Program' which is published on the IGTO website.¹²⁵

¹²⁴ Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) Senate Standing Committee on Economics, *Inspector-General of Taxation Bill 2002*, pp 31 and 40.

¹²⁵ IGTO, 'Work Program 2017' (2017) <www.igt.gov.au>.

- C.33. The announcement also makes it clear which topics were requested by other government agencies—see for example, the 2017 work program announcement which identified the ATO’s request for reviews into the ‘Future of the Tax Profession’ and ‘Influencing Willing Participation in the Tax and Superannuation Systems’.¹²⁶

Terms of reference release

- C.34. After announcing the commencement of a review, the IGT publishes terms of reference, which invite submissions from the public and private practice, whilst also providing clarity on the scope of the review. Such transparency is necessary, as it provides comfort upfront, regarding what the IGT is intending to review to reduce perceptions that investigations may be directed by the ATO or TPB.

DISCRETION AS TO METHOD OF INVESTIGATION

- C.35. Another safeguard for the IGT’s independence is the discretion provided in commencing and conducting investigations.

Review is at the discretion of the IGT

- C.36. The IGT is empowered develop its own work program and decide which reviews it commences. The IGT may conduct reviews on her own initiative¹²⁷ or if requested to do so by the Minister, Parliament, the Commissioner or Chair of the TPB.¹²⁸ However, the IGT is only obligated to conduct a review if directed to do so by the Minister¹²⁹ and can decline a request from other from other government agencies.¹³⁰
- C.37. Importantly, the IGT is not restricted from conducting a review as an own motion investigation. In fact, the majority of reviews have been commenced on the IGT’s own motion (refer Table 1).

Working co-operatively with other scrutineers

- C.38. The major scrutineer agencies in relation to the ATO and TPB, being the Auditor General, IGT and Commonwealth Ombudsman (on non-tax administration matters) engage in consultation – to minimise the risk of duplication from multiple scrutineers.¹³¹ Importantly, such consultation arrangement is undertaken in a manner that supports rather than impinge on the independence of any of the statutory officeholders involved.¹³²

¹²⁶ IGT, ‘Work Program 2017’ (2017) <www.igt.gov.au>.

¹²⁷ IGT Act, s 8(1).

¹²⁸ IGT Act, s 8(3).

¹²⁹ IGT Act, s 8(2).

¹³⁰ IGT Act, s 8(3).

¹³¹ See Recommendation 1 of SCTR, *Inquiry into the external scrutiny of the ATO* (2016).

¹³² See, for example, Australian Government’s response to Recommendation 12 in Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 50.

Ministerial independence

- C.39. The IGTO is empowered to conduct reviews on its own initiative and has discretion in prioritising work. Such a discretion was initially envisaged to address concerns that the Minister's power to direct the IGTO to investigate particular issues had the potential to monopolise the limited resources of the office and therefore operate as a constraint on the IGTO's independence.¹³³

Discretion with scope of review

- C.40. When a decision is made to commence a review, the IGTO begins developing Terms of Reference (TORs) which set the scope of issues that could be examined in the review. The TORs are developed following a consultation process with stakeholders and other government agencies. Importantly, as an independent scrutineer, the TORs are ultimately the responsibility of the IGTO.

IGTO may decline complaints, discontinue or refer to another agency

- C.41. In common with other ombudsmen offices, the IGTO has a discretion to decline to investigate complaints or discontinue investigating a complaint in certain circumstances. For example, where the complaint is frivolous or vexatious or was not made in good faith, or where a review of the matter would be more appropriate by another agency or body, such as the OAIC.¹³⁴ This allows the IGTO to focus its complaint investigations service on those complaints that have been made in good faith and would most benefit the public.

IGTO must review legitimate complaints

- C.42. The IGTO's legislation provides only limited discretion to decline to investigate certain complaints.¹³⁵ However, where a complaint does not fall within the prescribed category, the IGTO cannot decline to investigate. This strengthens our impartiality and independence, since we are obligated to investigate ALL taxpayer concerns.
- C.43. The statutory obligation can also place constraints on our resourcing capacity to investigate concerns in an efficient and timely manner – which will be addressed in more detail below.

Conduct complaint investigations in private

- C.44. Whilst the legislation does not preclude the IGTO from conducting investigations in private, practical difficulties do arise if a taxpayer does not consent to their concerns being disclosed to the applicable agency.

¹³³ See, for example, Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) pp 39-40 and para [3.25]; See also, the Australian Government's response to Recommendation 8 in Senate Economics Legislation Committee, Parliament of Australia, *Inspector-General of Taxation Bill 2002* (2002) p 48.

¹³⁴ *IGT Act 2003*, s 9.

¹³⁵ *IGT Act 2003*, s 9.

- C.45. The IGTO is restricted from making any adverse comments in a report, unless the relevant affected party is provided with an opportunity to comment.¹³⁶ Specifically, the IGTO shall not make comments about an investigation that is critical of an agency or person in a report unless they have had the opportunity to make submissions on the issues. This approach ensures due process or procedural fairness is extended to all parties, which is a corner stone principle that underpins the independence and impartiality of the ombudsman function. Such an approach also ensures investigations are more effective or productive, as the IGTO is able to test its understanding of the information and considered all relevant information in making comments be it adverse or confirmatory.

DEDICATED AND ADEQUATE RESOURCES TO CONDUCT INVESTIGATIONS

Tax specialists with people skills

- C.46. The IGTO only employs tax specialist staff to conduct complaint investigations and broader review work. Mandatory requirements in recruitment processes include having tertiary qualifications in law, accounting or finance and candidates must have prior tax related experience. Such qualifications and experience differentiates us from other ombudsmen and community agencies. Such an approach accords with the skills initially envisaged for IGTO staff. For example, the Board of Taxation observed in its report on the IGT in 2002 that submissions considered the IGT “should have a strong understanding of taxpayer issues concerning tax administration, a capacity to pursue those issues with the ATO and the Government, and experience in both the public and private sector.”¹³⁷

Separate training

- C.47. The IGTO conducts both regular and specific learning and development initiatives for its staff, which are conducted separately from the ATO and TPB. This includes orientation and technical training to maintain the relevant skills for complaint handling and the conduct of reviews. The IGTO does engage directly with the ATO for briefings on specific tax administrative issues, where emerging risks are identified and the IGTO requires greater clarity on the scope or ATO plans to address problems that may be anticipated.

¹³⁶ See for example, subsection 8(5) of the *Ombudsman Act 1976*.

¹³⁷ The Board of Taxation, *Inspector-General of Taxation: A report to the Minister for Revenue and Assistant Treasurer* (2002) p 34.

Professional and People skills

- C.48. Our staff are trained to be multi-skilled - that is, in both technical skills and people skills. In particular, strong inter-personal skills are required in IGTO investigations to develop and maintain the trust of all relevant parties and that investigations are being conducted impartially and independently. This is especially the case where judgment is expected to be utilized when engaging with parties on potentially sensitive concerns.
- C.49. As an Ombudsman we are not empowered to direct the ATO or TPB to adopt a particular outcomes. Our non-technical skills include areas such as behavioural psychology, problem solving, and persuasion techniques to better draw parties towards a common understanding of the facts and a resolution that is fair and reasonable.
- C.50. Our office also undertakes quality assurance measures regarding our office complaints management and also review processes, which includes reviewing case files and telephone calls with taxpayers to ensure that IGTO officers are not only acting impartially but are also seen to be doing so.

POTENTIAL CONSTRAINTS TO OUR INDEPENDENCE

Governance

Oversight by the same minister as the ATO and TPB

- C.51. The IGTO, ATO and TPB report under the same portfolio - the Treasury. This may contribute to a perception of diminished independence.¹³⁸ For example, in the government review of Australia's Future Tax System (chaired by Dr Henry)¹³⁹, it was observed that having the tax complaints handling function in the Treasury portfolio raised a question of a perceived reduction of the tax ombudsman's independence.¹⁴⁰ Moreover, written responses to Parliamentary committees by the IGTO require a response to be submitted through the Treasury, as part of a portfolio response. This too could affect perceptions of 'independence'.
- C.52. It is noted that the subject matter of tax administration is clearly best aligned with the Treasury portfolio.¹⁴¹ For example, Treasury makes recommendations for taxation administration law reform to Government and Treasury is responsible for policy advice to Government – typically supplemented by the ATO's views on such recommendations.
- C.53. By comparison, however, the Commonwealth Ombudsman has oversight over a number of agencies across multiple portfolios and reports under the Attorney-General's portfolio. From this portfolio the Commonwealth Ombudsman has promoted improvements to government

¹³⁸ Australian Government, *Australian Government Organisations Register* <www.directory.gov.au>.

¹³⁹ The Treasury, *Australia's Future Tax System* (2009).

¹⁴⁰ The Treasury, *Australia's Future Tax System* (2009) p 667.

¹⁴¹ Commonwealth of Australia, *Administrative Arrangements Order*, 29 May 2019.

administration in other portfolios — see for example, the Commonwealth Ombudsman's *Better practice to complaint handling*.¹⁴²

- C.54. The Auditor-General also performs an important oversight role and is like-wise placed within a portfolio which reduces perceptions regarding independence, i.e. Prime Minister and Cabinet.¹⁴³
- C.55. The Committee may wish to consider whether the portfolio responsibility for the oversight and scrutineering function of the ATO and TPB sufficiently accords with the community's expectation regarding the IGTO's independence.¹⁴⁴

Access to information and officers

Access to ATO Information - Commissioner must first be informed and then authorise information to be released to the IGTO

- C.56. The IGTO is empowered to obtain information and documents via formal compulsory disclosure processes – including when a request for information has not been satisfied¹⁴⁵.
- C.57. However, 'voluntary' requests for information require the Commissioner to firstly be notified of the investigation and for the Commissioner to authorise that the information can be provided by ATO officers.¹⁴⁶ A voluntary approach is preferred, but this presents difficulties based on the current drafting.
- C.58. This requirement can place practical and perceived constraints on our independence. This includes constraints on:
- actual independence on our reviews as the information made available to us is constrained by the timeliness of the authorisation; and
 - perceptions of independence, as it is arguable that an independent scrutineer would not require authorisation from the Commissioner.
- C.59. As noted formal compulsory information gathering powers may be used. However, all uses must be reported in our annual report¹⁴⁷. The requirement is not universal for ombudsmen office functions. The analogue it was drawn from was the Overseas Students Ombudsman reporting requirements, and does not apply generally to other Ombudsman roles under that Act¹⁴⁸. The IGTO interprets this power to be one of last resort. Were the compulsory power to be used as a

¹⁴² Commonwealth Ombudsman, *Better practice to complaint handling* (2009).

¹⁴³ Commonwealth of Australia, *Administrative Arrangements Order*, 29 May 2019.

¹⁴⁴ The former IGTO has recommended a shift toward a more independent portfolio oversight structure away from the Department of Treasury, given the nature of potential or perceived conflicts of interest — Ali Noroozi, 'IGT Valedictory Speech' (Speech delivered at the IGT valedictory event, Melbourne, 4 October 2018) <www.igt.gov.au>.

¹⁴⁵ *Ombudsman Act 1976*, s 9 (by virtue of section 15 of the *IGT Act 2003*).

¹⁴⁶ *Ombudsman Act 1976*, ss 7A and 8 (by virtue of section 15 of the *IGT Act 2003*).

¹⁴⁷ *IGT Act 2003*, s 41(2)(d).

¹⁴⁸ Explanatory Memorandum, House of Representatives, Tax and Superannuation Law Amendment (2014 Measures No.7) Bill 2014, p 48, para 2.67; *Ombudsman Act 1976*, s 19ZS.

standard or routine feature of conducting investigations, potential adverse inferences or perceptions may arise. In addition, using the compulsory power for all information gathering requirements could impose particularly onerous arrangements due to the need to publicly report all such instances.¹⁴⁹

- C.60. The IGTO would welcome the Committee's views on these arrangements and whether they are consistent with community expectations of independence.

Constraints in accessing non-case management systems and TPB systems

- C.61. As explained above, prior to accessing ATO systems, the IGTO is first required to notify the Commissioner (or Chair of the TPB) of the action and issue an investigation notice. Under the existing inter-agency arrangements, the IGTO may access lower level security classified information on the ATO's ordinary case management system (Siebel) and accounts processing system (ICP) in such circumstances.
- C.62. Depending on the nature of the concerns raised, there may be a need to access information outside of these systems—for example, information from the data warehouse or information with a higher level of security classification. In these instances, the IGTO must request ATO permission to access such systems, prior to use. In some instances, access may be declined and information provided to the IGTO by ATO officers on a data field by data field basis. Such processes often result in delays in progressing reviews and complaint investigations.
- C.63. It should also be noted that the IGTO currently does not have direct access to TPB systems and is also reliant on the TPB providing the relevant information during reviews and complaints investigations.
- C.64. The above may result in a perception of diminished IGTO independence – since the applicable agency must either approve access or provide the information. Such perceptions are particularly difficult to address where taxpayers raise concerns regarding the IGTO's ability to independently verify that records have not be altered or that all relevant records have been made available.
- C.65. Whilst, there is a need to ensure that the access controls for sensitive information are proportionate to the security risks, the IGTO considers that such risks could be addressed by other means than requiring data field by data field requests to be made. Also, such controls could provide direct access to all ATO systems in appropriate cases and without the need to seek permission. This would not only improve the perception of independence but also reduce delays in conducting reviews and investigating complaints.
- C.66. The IGTO also considers that direct access to TPB systems is appropriate. Such action would assist in alleviating concerns from taxpayers and tax practitioners that IGTO has not conducted a sufficiently independent verification of the TPB's activities during the course of our investigation.
- C.67. The IGTO would welcome the Committee's views on these arrangements and whether they are consistent with community expectations of independence.

¹⁴⁹ *Ombudsman Act 1976*, ss 8 and 9.

Dedicated and adequate resources to conduct investigations

Resourcing

- C.68. The effectiveness of the scrutiny of the ATO is dependent to some extent on the resources and other responsibilities of the institution.¹⁵⁰
- C.69. An ongoing challenge for this office has been our ability to manage our resources efficiently so that we can maintain a reasonable level of review work whilst also maintaining high standards in the handling of complaints.¹⁵¹ Such challenges exist, in part, due to our limited control over the number of complaints we receive and the timing of receipt. Complaint numbers have been increasing over the previous four years and as the community's awareness of our office increases, this trend is expected to continue.
- C.70. With increasing complaint numbers, and in the absence of additional resources, difficult decisions will need to be made to create efficiencies in the manner in which IGTO work is conducted. These decisions may affect service standards and the amount of work that may be conducted, with impact on perceptions of IGTO independence. For example, efficiencies may require greater reliance on streamlined processes which may increase risks regarding direct verification and investigation of issues.
- C.71. The IGTO is monitoring this trend in complaint numbers and has proposed enhanced public reporting of the same – refer our latest Corporate Plan for 2020 and beyond. Ultimately, any appropriation decision is matter for Government and in light of other competing budget priorities.
- C.72. The IGTO also has similar corporate compliance requirements as other larger departments (e.g. ATO) which places difficulties on completing our core work.
- C.73. It should be noted that the SCTR's has recently recommended that the IGTO should be adequately resourced to provide ongoing effective assistance to taxpayers as the promotion of our complaint handling service demands greater volumes of assistance.¹⁵²

Ex-ATO staff

- C.74. As a result of our technical skills requirements, the pool for potential IGTO recruitment is likely to come from the ATO. Whilst applications are received from the broader tax profession, they are fewer in volume. This may be due to public service requirements and market differences regarding terms and conditions or competitiveness of salary as between the private sector and public service.

¹⁵⁰ The Treasury, *Australia's Future Tax System* (2009) p 663.

¹⁵¹ IGTO, *Annual Report 2017–18* (2018) p 16.

¹⁵² See Recommendation 35 in SCTR, Parliament of Australia, *2017 Annual Report of the Australian Taxation Office* (2019). Canberra 2017 Annual Report of the Australian Taxation Office – Fairness, functions and frameworks – performance review

- C.75. Given that the majority of current IGTO staff have prior experience working at the ATO, the IGTO recognizes that this may contribute to a perception of diminished independence. Conversely, those who chose to work for IGTO have a strong alignment with the purpose and objectives of the IGTO.
- C.76. As discussed above, the IGTO also utilizes its conflict of interest register and operational guidelines to manage any perception risk concerning the independence of our staff.

No Post employment restrictions

- C.77. The statutory appointment of the IGTO is made for a maximum period of five years.¹⁵³ However, there are no limitations or restrictions on what private sector employment opportunities may be pursued by that appointee when their statutory term expires.
- C.78. The Committee may wish to consider whether the independence of the statutory position and its office would be strengthened by placing certain restrictions on activities that may be undertaken at the end of the statutory term. It may be appropriate to review the appropriate length of the maximum period, superannuation or pension terms and other remuneration conditions where additional restrictions are deemed appropriate and consistent with an independent statutory term.

OBSERVATIONS AND RECOMMENDATIONS

- C.79. IGTO makes the following observations on the importance of independence for the role of IGTO – as a matter of public record and for completeness.

IGTO may make non-binding recommendations only

- C.80. The power of the IGTO is best summarised as a recommendation power. That is, the IGTO in conducting reviews and investigations – whether of individual complaints or systemic taxation issues – does not have any powers to direct or require action. This is consistent with the legislative framework for the Commonwealth Ombudsman.
- C.81. Unlike other review and appeal bodies, however, the Commonwealth Ombudsman does not have authority to change a decision, although it can recommend to the agency that the decision be cancelled or varied. The Commonwealth Ombudsman's recommendation is not confined to rectifying legal errors; it can take into account correct or preferable decision making, ethical standards and principles of good administration.¹⁵⁴
- C.82. Some have argued, however, that the IGTO's position in tax fairness investigations should be legally binding.¹⁵⁵

¹⁵³ IGT Act 2003, s 28.

¹⁵⁴ Administrative Review Council, *Decision making: Accountability Better Practice Guide 5* (2007) p 9.

¹⁵⁵ Australian Small Business and Family Enterprises Ombudsman (ASBFEO), Submission 23 to SCTR, *2017 Annual Report of the Australian Taxation Office*, 8 October 2018, p 2 (2019) Canberra.

- C.83. Although decisions made by IGTO in tax disputes regarding taxpayer complaints are not binding on the ATO, recommendations could be ‘persuasive’ if the tax administrator perceives ‘a need to change’ on particular matters. As ombudsmen provide an impartial review process that affords procedural fairness to all parties, it is desirable that decisions be non-binding but transparent. The IGTO is therefore a fairness sounding board, not a fairness arbiter.
- C.84. Even if not initially accepted, experience shows many communications have been subsequently taken on board and implemented.¹⁵⁶ Thus response from highlights that it may not be necessary for more coercive powers to achieve improvements to the tax system.
- C.85. The IGTO also notes that views about our independence can be linked to our inability to make binding decisions. These views suggest that it is necessary to preserve the independence of ombudsmen, such as the IGTO, from the subject of their scrutiny¹⁵⁷ which is an approach that is consistent with other ombudsmen services across Australia and overseas.
- C.86. Although the scrutineering arrangements with respect to the ATO are comparable to those scrutinising revenue agencies in most OECD countries, tax scrutineers in some overseas (OECD) jurisdictions have additional powers which include compelling or directing the revenue agency to take a particular action or granting relief to taxpayers.¹⁵⁸
- C.87. Similarly, some non-OECD jurisdictions, such as Mexico, also have additional powers. For example, the *Procuraduría de la Defensa del Contribuyente* (PRODECON) which is Mexico’s equivalent taxpayers’ ombudsman is able to act on behalf of taxpayers in certain cases and as a public defender of taxpayers’ rights in ordinary and constitutional court actions.¹⁵⁹
- C.88. In summary there is argument that supports the current ombudsman design approach such that the IGTO need not and indeed should not have the power to make binding recommendations. As review recommendations and related reports are made public, and the applicable agency exposes itself to its own risk of not agreeing or implementing agreed recommendations that support improved tax administration.
- C.89. The Committee may wish to consider the pros and cons for different frameworks. The IGTO provides some initial comments below.

¹⁵⁶ See for example, SCTR, Parliament of Australia, *2017 Annual Report of the Australian Taxation Office* (2019) pp 118–119.)

¹⁵⁷ SCTR, Parliament of Australia, *2017 Annual Report of the Australian Taxation Office* (2019). .,

¹⁵⁸ IGTO, Submission 23 submission to SCTR, *Inquiry into the External Scrutiny of the Australian Taxation Office* (March 2016) scrutineer inquiry p 15.

¹⁵⁹ IGTO, Submission 23 to SCTR, *Inquiry into the External Scrutiny of the Australian Taxation Office* (March 2016) p 15. IGT submission to House of Representatives Standing Committee on Tax and Revenue, *External scrutiny of the Australian Taxation Office*, scrutineer inquiry p 15.

IGTO independence is important to facilitate common understanding

- C.90. The investigation of complaints and reviews benefits taxpayers by facilitating a common understanding of facts or issues which are the subject of a dispute. This provides assistance and clarity to both taxpayers and the government agency subject to the complaint by working with both parties.

We do not have any real or perceived conflicts-of-interest

- C.91. The Tax Ombudsman function provides procedural fairness, transparency and accountability. It also assists to empower taxpayers, not as decision maker, but as an independent third party to help make sense of what has occurred and options moving forward.
- C.92. If further powers were given to compel the ATO or TPB to take action, it could result in a conflict of interest if we are asked to review a decision we were involved in making.

No overlap with AAT/Court

- C.93. Any consideration to grant the IGTO additional power should take into account the role of the AAT and the Courts in reviewing tax administration decisions. If the IGTO is granted powers to review the merits of ATO decisions and make binding orders, there may be a duplication of roles and uncertainty of the administrative review process.
- C.94. The IGTO is also able to resolve non-legal issues. Ordinarily, ombudsmen do not determine disputes on the law alone—they also consider good industry practice and what is just, fair and reasonable, as well as whether the matter was within the service providers reasonable control.¹⁶⁰ They are also able to do so in less costly manner. Such a role differentiates the IGTO from bodies such as the AAT.

A “productive relationship” can be perceived as compromising on outcomes

- C.95. It is important for the IGTO and the ATO to have a productive, professional, efficient and effective working relationship—the ATO must be persuaded that recommended change is both desirable and practicable. Furthermore, during the scrutiny inquiry, the committee observed that communication between the IGTO and ATO could be improved before, during and after its reviews. Recommendation was made for both agencies to “redouble their efforts to improve communication”.¹⁶¹
- C.96. However, such arrangements may give rise to perceptions that the IGTO will not be frank and fearless in investigating the ATO and in issuing recommendations. Such perceptions are addressed by setting IGTO investigation processes in operational guidelines and instructions.¹⁶²

¹⁶⁰ Productivity Commission, *Access to Justice Arrangements Inquiry Report* (2014) p 317 quoting ANZO Submission.

¹⁶¹ SCTR, Parliament of Australia, *2017 Annual Report of the Australian Taxation Office* (2019) pages pp 37-42, recommendation 3.

¹⁶² See Appendix I – *Operational Guidelines*.

- C.97. It has been said that where an agency is subject to an ombudsman review, the agency should adopt a helpful, rather than defensive, role. In many cases the review or complaint will prompt the agency to examine its decision to see whether it is the correct or preferable decision and has been made properly.¹⁶³ Such productive working relationships should not be perceived as independence being comprised, although it can be seen this way.

¹⁶³ Administrative Review Council, *Decision making: Accountability Better Practice Guide 5* (2007) p 6.

D. THE COMPLAINTS MANAGEMENT POLICIES AND PRACTICES OF THE IGTO

LEGISLATIVE REQUIREMENTS – OVERVIEW

- D.1. The IGTO has a core function to investigate action that is the subject of a complaint¹⁶⁴. A discretion not to investigate complaints is only available where IGTO considers that:¹⁶⁵
- a. the complaint is frivolous or vexatious or was not made in good faith; or
 - b. the complainant does not have a sufficient interest in the subject matter of the complaint; or
 - c. an investigation, or further investigation, of the action is not warranted having regard to all the circumstances; or
 - d. the complainant has not yet raised the complaint with the Commissioner or the TPB (as applicable); or
 - e. the action came to the complainant's knowledge more than 12 months before the complaint was made; or
 - f. the complainant has not exercised a right to cause the action to which the complaint relates to be reviewed by a court or by a tribunal constituted by or under a law of the Commonwealth.
- D.2. Since assuming responsibility for the investigation of taxpayer complaints in 2015, IGTO has rarely exercised a discretion not to investigate a complaint.

POLICIES, PROCEDURES AND PRACTICES RE COMPLAINTS MANAGEMENT – OVERVIEW

Overview

- D.3. The IGTO has established complaints management policies and procedures documents which set out our approach to complaints management. Our key policy documents are:
- The IGTO-ATO Complaints Handling Operational Guidelines and accompanying Operational Instructions; and
 - Internal procedural documents, including the IGTO's Complaints Work Practices Manual and Unreasonable Conduct Management Policy.

¹⁶⁴ *IGT Act 2003*, s 7(1)(a).

¹⁶⁵ *IGT Act 2003*, s 9.

What is a complaint?

- D.4. A complaint is defined in the Australian Standards AS/NZS 10002:2014 Guidelines for complaint management in organizations as follows:¹⁶⁶

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.

- D.5. This is in contrast to:

Disputes - Unresolved complaints escalated internally or externally, or both.

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.

- D.6. These definitions are adopted for the purposes of this submission.

THE OPERATION OF COMPLAINTS MANAGEMENT IN PRACTICE

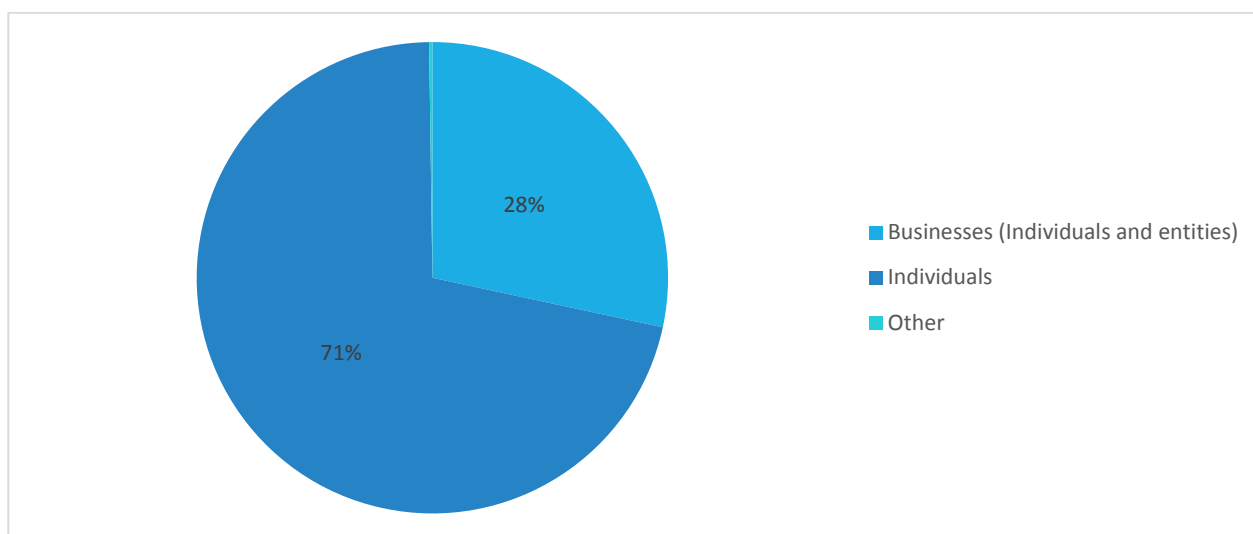
- D.7. The IGT0 provides a free, independent and impartial complaints service to all taxpayers, whether directly or through their representatives. As our services are free, they are practically of most value to the most vulnerable.
- D.8. For many taxpayers, particularly more vulnerable individuals, our office is viewed as a final avenue of recourse. In a large number of cases, the taxpayers have already made attempts to resolve their matter directly with the ATO or TPB, however, the agency has not been able to resolve their matter or they remain dissatisfied with the conduct of the agency's investigation.

Who are lodging complaints with the IGT0

- D.9. Since May 2015 approximately 28 per cent of complaints have been lodged by businesses, which are overwhelmingly small businesses. The remaining 72 per cent are mostly individuals.

¹⁶⁶ Joint Technical Committee QR-015, Complaint Handling, *Guidelines for complaint management in organizations* (2014).

Figure 3 –Proportion of Complainants that are businesses



D.10. The large majority of complaints are lodged with the IGTO without representation. For example, 23 per cent of complaints for businesses are lodged by a representative, compared to 13 per cent for individuals. Further, only 43 per cent of the representatives for individuals are tax practitioners, accountants or lawyers, with the remaining individuals being represented by family members or friends. Further details are provided in Table 3 and Figures 4 and 5 below.

TABLE 3 – TYPES OF COMPLAINANTS AND REPRESENTATION [CASES RECEIVED]

	2017-18	2018-19
Individuals		
Self-represented	1376	1661
Represented	222	247
Businesses (Individuals and entities)		
Self-represented	535	490
Represented	182	153
Anonymous		
Self-represented	86	154
Represented	3	3
Other		
Self-represented	8	4
Total	2412	2712

Figure 4 – Representatives lodging complaints on behalf of the complainant

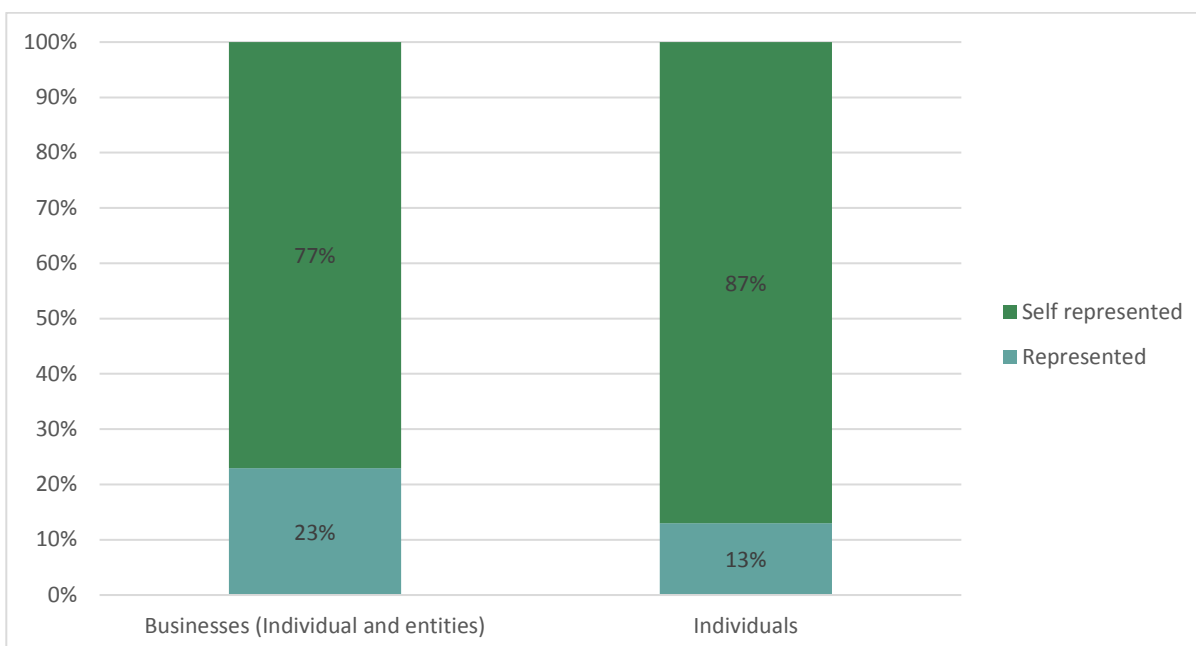
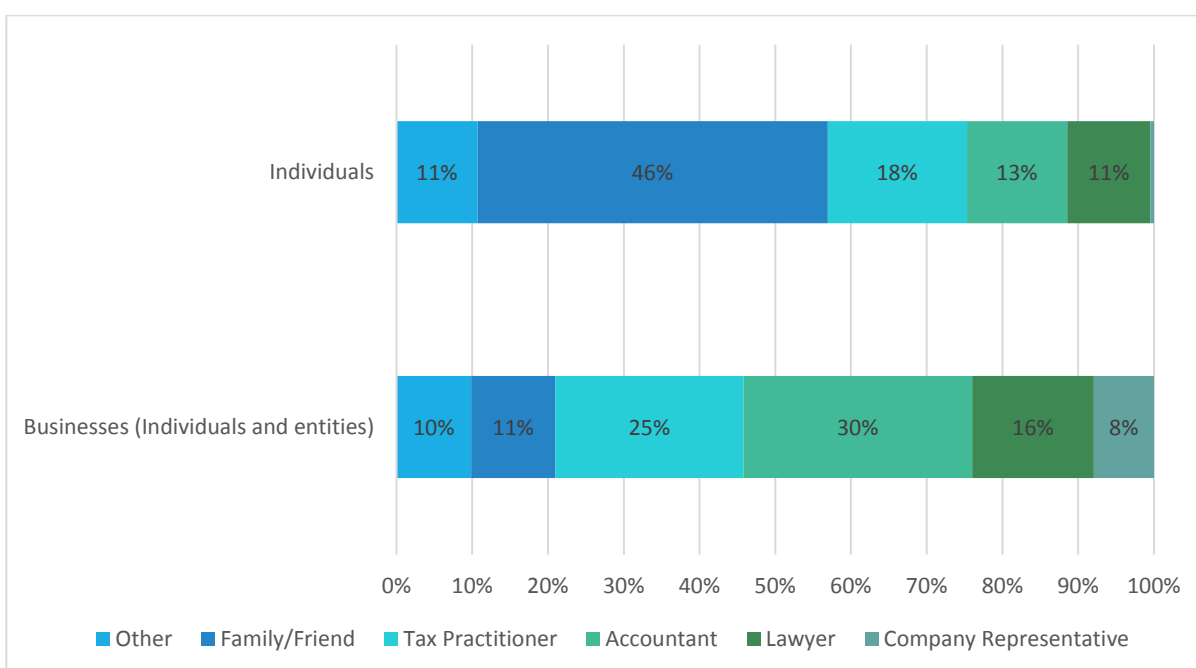


Figure 5 – Representatives relationship to the complainant



Why people complaint to the IGT0

D.11. Investigating complaints provides our office with unique and valuable insights into the administrative practices of the ATO and TPB and their service delivery. In approaching our office, taxpayers and tax practitioners often raise concerns about:

- not understanding the agency's communications or actions and the options that may be available to them;
- the impacts of delays by the agency in completing an administrative action, for example, the delay in processing a form or return or in completing a compliance activity. These delays can cause significant financial, economic and health impacts on taxpayers and tax practitioners; and
- the multiple interactions that are required to resolve an issue or complaint and the difficulties in navigating a number of areas within the agency and the tax system more broadly.

D.12. Since July 2017, the top five complaints registered by the IGT0 account for 65 per cent of all issues, with debt collection being the most significant issue raised.

TABLE 4 – MAIN REASONS PEOPLE COMPLAIN TO THE IGT0

Examples	% of total issues
Debt collection	24%
How has the ATO calculated this debt and why is it using my refund to pay it?	
Why has the ATO issued me a Director Penalty Notice and garnished funds from my bank account?	
The ATO won't accept my payment arrangement offer and wants to bankrupt me	
Lodgement and processing	13%
The ATO won't process my amendment	
Why does the ATO say I'm not eligible for a tax offset?	
I can't lodge my tax return electronically	
Payments to the taxpayer	12%
The ATO hasn't paid me my tax refund	
Why isn't the ATO making my employer pay me super?	
Audit and Review	8%
The ATO has not properly considered my evidence and circumstances in its audit	
I don't understand the ATO's decision	
Communications	7%
The ATO never sent me that notice	
The call centre gave me the wrong information	
Total	64%

- D.13. We provide examples of other issues raised to illustrate the range of complaints that we deal with. These are included in the remaining 36 per cent of issues.

TABLE 5 – OTHER REASONS PEOPLE COMPLAIN TO THE IGTO

ATO is unfairly litigating or prosecuting me	ATO not investigating my tax evasion referral
The ATO won't consider my circumstances and remit my penalties and interest	ATO's compensation decision is unfair
ATO not registering or deregistering my business	I'm concerned about the ATO's rulings and advice
I'm having issues with the objections and disputes processes	The TPB has decided I've breached the code of conduct without conducting a proper investigation
The ATO's handling of my complaint was poor	The TPB is not taking action against unregistered tax agents

- D.14. The IGTO also collects TFNs from complainants to make the process of navigating ATO systems easier and to ensure we correctly identify the relevant taxpayer's records in ATO systems.
- D.15. Our complaints management practices are designed to enable our team to efficiently and effectively investigate the complaints we receive from the community, including ensuring the independence of our investigation and decision making processes. There are five key stages in our complaints management process, which are briefly summarised below.

OVERVIEW OF THE COMPLAINTS MANAGERMENTS PROCESSES

Stage 1: Receipt and acknowledgement of complaints

- D.16. We receive complaints from the community through a number of channels - but primarily through our website form and dedicated telephone line. Complaints are also referred to our office by other government agencies, including the Commonwealth Ombudsman, the Australian Small Business and Family Enterprise Ombudsman and Parliamentarians.

TABLE 6 – NUMBER OF REFERRALS FROM OTHER AGENCIES IN FY19

Commonwealth Ombudsman	32
Australian Small Business and Family Enterprise Ombudsman	8
Tax Clinics	Under development
ATO and TPB ¹⁶⁷	239

- D.17. The large majority of complaints we receive relate to the ATO and are lodged by individual and small business taxpayers.

¹⁶⁷ The number of referrals received from the ATO and TPB is based on the number of complainants who found the IGTO from the agency for which they are complaining about.

- D.18. A taxpayer may wish to raise a complaint but remain anonymous to the ATO or TPB. In such circumstances, we notify the taxpayer that the resolution options may be limited as the scope of any investigation may be restricted to general processes and may not examine that taxpayer's particular experience with that process.
- D.19. All complaints received by our office are registered on our case management system, together with any supporting information or documentation. Importantly, all complaints received from taxpayers and tax practitioners are treated as confidential and will not be raised with the ATO or TPB unless express consent is provided.
- D.20. Complaints are allocated to a dedicated complaint investigator who typically manages the complaint from receipt through to finalisation. Our team of complaint investigators consists of experienced tax specialists who are able to engage meaningfully with taxpayers as well as ATO and TPB officers to identify and discuss the key tax administration issues and potential options to resolve the matter.
- D.21. We aim to provide a high degree of assurance that complaints will be received and allocated promptly to a dedicated complaints investigator. We seek to acknowledge all complaints received within 2 business days and provide direct telephone contact details of the investigator managing the complaint.

Stage 2: Assessment and categorisation of complaints

- D.22. Before proceeding with a complaint, we make initial contact with the taxpayer or tax practitioner to better understand their experiences, concerns and preferred outcomes. The specific action taken in each complaint depends on the nature of the issues and outcomes sought.
- D.23. The categories of approaches to our office range from simple enquiries that can be resolved without investigation through to formal investigations. We categorise complaints on a scale from 'Category 0' to 'Category 5' to indicate the complexity and resources needed for the resolution of the complaint. Category 0 to 2 cases are resolved without involving the ATO or TPB and include cases in which assurance and better explanations were provided to taxpayers or tax practitioners. Category 3 to 5 cases require the ATO and TPB's involvement and are raised as formal complaint investigations.
- D.24. The decision to formally investigate a complaint can be made for a number of reasons, including where there is a need to gain access to agency records, to provide independent assurances to taxpayers about the actions of the agency or where a specific outcome sought by the taxpayer requires an investigation.

Stage 3: Investigation of complaints

- D.25. Where a decision to investigate a complaint is made, we provide official notification to the ATO or TPB by way of an investigation notice. This notice sets out the complainant's concerns and preferred outcomes as well as the IGTO's 'areas of focus' for the investigation, which includes our analysis of the key administrative issues that need to be addressed as well as potential options for resolution.
- D.26. Within three to five business days after sending an investigation notice, an initial meeting called an 'Early Assessment Meeting' is scheduled. This meeting is a 15 minute discussion to:
- discuss the IGTO's areas of focus set out in the investigation notice;
 - provide an opportunity for the ATO or TPB to provide additional facts or issues from their review of the complaint issues;
 - identify and seek information from the ATO or TPB that is relevant to the issues examined in the complaint investigation; and
 - agree on actions to be taken, by whom and the relevant timeframes.
- D.27. The initial meeting is a valuable aspect of our complaints management practice as it seeks to:
- expedite the investigation process by allowing IGTO and ATO or TPB officers to reach a common understanding of the issues and potential options for resolution at the outset and to facilitate early agreement on the actions required to progress or resolve the complaint; and
 - ensure IGTO and ATO/TPB accountability by identifying the relevant officers in both agencies who are responsible for the ongoing management of the complaint, including the actions to be taken and the associated timeframes.
- D.28. As a matter of practice, the discussions and meetings we hold with the ATO or TPB during a complaint investigation do not generally involve the taxpayer or tax practitioner. This approach encourages open and frank dialogue with the agency about the concerns and options for resolution. Following any of our meetings with agencies, we seek to contact the taxpayer or tax practitioner to discuss the agency's response and any agreed actions to be taken.
- D.29. Where it is identified that further investigation is required to resolve a complaint, we schedule follow up meetings before our response is formalised and communicated to the taxpayer or tax practitioner.
- D.30. If, during a complaint investigation, we consider that an adverse view may be formed about the ATO or TPB's actions or we suggest a change in ATO or TPB processes or administrative actions, we provide the relevant agency with a written 'preliminary view'. This provides the ATO and TPB with the opportunity to consider our view and correct any factual errors as well as provide comments on any adverse opinions. We then independently consider the agency's response before formalising our view and communicating the outcome of our investigation to the taxpayer.

Stage 4: Finalisation of complaints

- D.31. Following our investigation into the complaint, we contact the complainant to discuss:
- the proposed outcome of the complaint and the remedy or resolution that we consider appropriate;
 - the reasons for our decision with details of the specific actions taken in our investigation; and
 - any further material or information the complainant considers relevant.
- D.32. We also issue a detailed complaint investigation decision letter at the conclusion of our investigation. This letter outlines the relevant ATO or TPB materials that we have received and relied upon in forming our decision as well as the IGTO's views - details of our decision and the steps taken in our investigation process. The complainant is also advised of the options for review available to them, such as an internal review or reconsideration of our decision.
- D.33. An important feature of our decision letters is that we clearly separate the ATO or TPB's information from our own views and investigation process to highlight the independence of our agencies and our investigation process. The impact of our final decisions is not derived from binding, coercive or determinative powers but from the evidence-based rigour, objectivity and independence with which we conduct our activities. Our views are also based on community expectations – including of fairness and service.

Stage 5: Recording and monitoring of business improvements and complaint themes and issues

- D.34. During the course of a complaint investigation, we may identify broader improvement opportunities with respect to the ATO or TPB's practices. Examples of such improvement opportunities include changes to ATO or TPB's policies, products, procedures, systems, training, communications and website content. Such improvement opportunities, if agreed to by the relevant agency, are formally registered on our case management system as an 'Agreed Business Improvement' and are actively monitored. We also report publicly on our agreed business improvements in our Annual Reports.
- D.35. In addition, we are increasingly leveraging the insights from our complaint investigations to improve the broader tax administration system on a more real time basis by separately registering complaints that raise broader issues. Such complaints are used to inform our program of broader reviews or targeted investigations called 'own initiative' investigations.
- D.36. Our office also meets weekly with the ATO to monitor the operation of our complaints management process and identify opportunities to improve that process. We also meet with the TPB on an as needs basis. We use these meetings to discuss common complaint themes and broader issues which arise from complaint cases. Such meetings allow both agencies to better assist and manage complaints as well as improve the overall taxpayer experience and confidence in the tax system.
- D.37. In the spirit of improving tax administration, we also request briefings from the ATO on tax matters which arise from or affect complaints that we receive. Examples may include scenarios

that may generate complaints and enquiries from the community, such as changes to internal ATO procedures, or information on the ATO's implementation of new initiatives for each year's 'Tax Time'.

OBSERVATIONS

- D.38. As an independent scrutineering agency composed of a dedicated team of tax specialists, we are well placed to help taxpayers and tax practitioners address their individual complaints about the ATO or TPB. Our deep knowledge of the business, processes and laws of the ATO and TPB enable us to quickly and fairly resolve complaints and identify systemic issues.
- D.39. Our complaints management service complements our systemic issue review function as systemic tax issues commonly arise from a large number of individual tax issues. In the same way, systemic issues may lead to individual tax issues for many taxpayers. The work our office undertakes in investigating individual tax complaints and in also conducting targeted or broader systemic reviews provides us with unique insights into our broader tax administration system.
- D.40. Our performance as an Ombudsman agency rests on our ability to provide an effective, efficient, independent and transparent complaints management service to the community.

Effectiveness

- D.41. We assess the effectiveness of our performance through a number of channels, including:
- the number of complaints we receive and resolve each year;
 - the outcomes that we achieve for complainants as a result of our investigations; and
 - the feedback we receive directly from complainants during the course of our investigation and through our quarterly satisfaction surveys.
- D.42. In the 2018-19 financial year, we received a total of 2,712 complaints and resolved 2,827 complaints. Table 7 below provides a breakdown of the numbers of complaints we received and resolved by agency.

TABLE 7: NUMBERS OF COMPLAINTS RECEIVED AND RESOLVED

AGENCY	COMPLAINTS RECEIVED			COMPLAINTS RESOLVED
	CARRIED FORWARD FROM 2017-18	RECEIVED IN 2018-19	TOTAL HANDLED IN 2018-19	TOTAL RESOLVED IN 2018-19
ATO	279	2469	2748	2576
TPB	8	88	96	92
Other	9	155	164	159
Total	296	2712	3008	2827

Remedies and Outcomes

D.43. Our investigations achieved the following outcomes and remedies for taxpayers and tax practitioners during the period from July 2017 and August 2019:¹⁶⁸

TABLE 8: REMEDIES AND OUTCOMES ACHIEVED FOR COMPLAINANTS

Where <i>no investigation</i> was required to resolve the complaint		Where <i>an investigation</i> was required to resolve the complaint	
WE ASSISTED BY:	NO.	WE ASSISTED BY:	NO.
Providing information to address concerns	1556	Providing a better explanation or additional information about what had occurred	1398
Helping people direct their concerns to the appropriate agency	118	Providing independent assurance	469
Providing feedback to the ATO or TPB	101	Asking the ATO or TPB to reconsider the matter	273
Providing a better explanation of what had occurred	100	Expediting resolution of the matter	266
		Obtaining an apology for the complainant	210
		Having the ATO or TPB change its substantive position (e.g. application of the law)	107
		Providing feedback to the agency	105

D.44. In line with our commitment to provide high quality and tailored services to the community, we conduct quarterly independent surveys to evaluate the performance of our complaints management service. We use these surveys as a key performance indicator of complainant satisfaction and to assess the effectiveness of our current practices.

D.45. The feedback from our complaint feedback surveys show that 65% of surveyed taxpayers in FY19 reported that they were satisfied with the IGTO's services and 82% were satisfied with the overall professionalism of our complaints management team. Such results are positive in light of the fact that 0% of complainants were satisfied with the ATO's actions when they approached the IGTO for assistance (a complaint, by definition, is an expression of dissatisfaction). These survey results are encouraging as they indicate that, whilst a proportion of taxpayers were not satisfied with the outcome of their complaint (44%), there were less taxpayers that were dissatisfied with our complaints handling service (29%) and the professionalism of our staff (8%). Further details are set out in Table 9 below.

¹⁶⁸ A single complaint case may have several remedies and outcomes.

TABLE 9 – COMPLAINTS SERVICE SURVEY RESULTS

VIEWS OF IGTO'S COMPLAINTS HANDLING SERVICE	PROPORTION SATISFIED	PROPORTION DISSATISFIED	PROPORTION NEITHER SATISFIED OR DISSATISFIED
Overall satisfaction with the IGTO's complaints handling service	65%	29%	6%
Overall satisfaction with the outcome of the complaint	45%	44%	11%
Professionalism of IGTO staff	82%	8%	10%

D.46. The survey results show that complainants have generally been satisfied with our service and are willing to use our service again. Refer to Appendix J for more details.

D.47. In addition, we have established an automated telephone survey response platform to obtain real-time feedback from complainants whose concerns were resolved over the telephone. This feedback relates to cases where no investigation was required to resolve the complaint. A total of 489 complainants were invited to participate in the survey. Of those who participated:

- 91.5% of respondents gave our service a rating of 4/5 or 5/5; and
- 94.9% of respondents indicated that they would use our service again.

D.48. We also receive feedback directly from complainants during the course of an investigation. Listed below are some examples of feedback received directly from taxpayers and tax practitioners in FY19:

"I truly appreciate all your efforts in helping me resolve this matter which has dragged out for 5 months and has given me a lot of stress and anxiety. I wish I had known more about this service provided by IGT."

"I thank you for your quick and diligent and conscientious and extremely effective resolution of this matter. Hopefully the ATO learn from dealing with you in the way they should be attending to their administrative function including when they get it wrong."

"...[IGTO officer] was able to resolve my issues after I personally tried to resolve the issue with ATO complaints who procrastinated for nearly three months. [IGTO officer] was able to resolve my issues within 3 business days."

"As you can see [from] my rating of the service provided by IGT I was very impressed by both the courteous and respectful attitude of the individual I was dealing with, [IGT officer]. The ATO did not follow their published guidelines and through influence of IGT the situation was remedied."

"[IGTO officer] acted promptly each time I have complaint against the abuse of power by the ATO. Without IGT's support our objections lodged last December would have been"

delayed for years as done with the ATO's audits started in July 2014. More power to the IGT is needed to enforce its findings."

- D.49. The above feedback indicates that the IGTO delivers a high degree of comfort and assurance to the community that their matters have been appropriately considered and investigated. It highlights the important role of the IGTO in assisting and supporting taxpayers and tax practitioners to navigate the tax system and resolve their matters with the ATO or TPB.
- D.50. The feedback we receive also alerts us to the aspects of our service that do not meet community expectations or the areas in which our services can be improved, such as the responsiveness and timeliness of our complaint investigations, the level of public awareness of our office and services and the lack of powers to compel the ATO or TPB to take a particular action. Examples of such feedback are set out below.

"The IGT seems limited in its ability (or jurisdiction) to change ATO policy. This has a domino effect with respect to how the end result may arise."

"I believe that your powers be extended from investigating ATO's abuse of power to enforcing your finding and making those ATO employees accountable for their actions..."

"If a recommendation is made to the ATO by the IGT ATO should be made to comply, the process seems like a toothless tiger."

"Promote your service so that others can report issues and improvements can be made to the operations of the tax office."

"The IGT is not easy to find or widely known about. Perhaps a media campaign or even a link to your website in a prominent position on the ATO website would help to address this?"

- D.51. All feedback received is analysed by senior management to assess and track our performance and to identify service improvements. The feedback is also shared with the broader complaints management team to highlight the areas of our complaints management service that meet community expectations and to facilitate discussion on how our current practices could be further improved.

Complaint case studies

- D.52. Examples of complaints that we handled in FY19 and how we have assisted taxpayers that have approached us are set out in the case studies below.

CASE STUDY 1

A single mother of two children and legal guardian of her aging father was concerned with the ATO offsetting her Centrelink Family Assistance (CFA) payment of approximately \$8,000 towards a debt of \$23,000. She did not receive the \$8,000 CFA payment, but instead had a debt of approximately \$15,000 remaining after the offset. She was relying on the \$8,000 Centrelink payment to support her family, as she was unemployed at the time due to undertaking full time care responsibilities for her children and her father.

Through the IGTO complaint process, the ATO agreed to refund the \$8,000 offset from Centrelink, by recognising that it was not appropriate to pursue debt collection given her circumstances at the time.

CASE STUDY 2

A small business owner was experiencing difficulties trying to resolve their company's debt with the ATO. The ATO had raised superannuation guarantee charge assessments and issued a director penalty notice (DPN) despite the director's insistence that payments towards the debt had already been made.

The IGTO investigated the allocation of payments in the ATO's systems, and provided independent assurance that her payments were made to the proper accounts, according to the ATO's policies and procedures. As a result of our investigation of the complaint, the ATO reviewed the issue of the DPN and confirmed that it had accepted the director's defence. Accordingly, the ATO withdrew the notice.

CASE STUDY 3

The taxpayer was in an uncommon Employee Share Scheme (ESS) which had resulted in an overpayment of tax. The ATO's systems were unable to process a tax refund for that overpayment. The ATO suggested that the taxpayer lodge an amendment to the 2018 income tax return (ITR). The taxpayer subsequently lodged the amendment which resulted in an incorrect tax debt of approximately \$60,000.

The taxpayer contacted our office and an investigation was commenced. As a result of our investigation, the ATO correctly amended the taxpayer's ITR and a tax refund of approximately \$130,000 was issued.

CASE STUDY 4

An elderly person who spoke English as a second language lodged a complaint with the IGTO in relation to the lack of help he was receiving from the ATO after dealing with a suspicious online tax agent service. The taxpayer had contacted the ATO to withdraw his authorisation for the agent to lodge income tax returns on his behalf due to his concerns about the agent's conduct. However, despite contacting the ATO, the income tax return lodgements were processed and the refund was issued to the agent.

As a result of the IGTO's investigation, the ATO acknowledged that different actions should have been taken to prevent processing of the lodgements and stop the refunds from issuing to the agent. The ATO agreed to assist the taxpayer to re-lodge his affected tax returns and to process the refunds.

CASE STUDY 5

A small business was concerned that the ATO's audit decision may have been based on an inappropriate assumption. The IGTO independently examined the ATO's audit process and determined that the relevant procedures outlined a decision making process that did not align with the approach adopted by the courts.

The ATO agreed with the IGTO, explaining that it was updating its procedures and provided a draft of the new procedures to the IGTO for review. We worked directly with senior ATO officers to provide feedback on how the administration of taxation laws in this regard could be improved.

Efficiency

D.53. The time it takes to investigate a complaint varies according to the nature and complexity of the issues and outcomes sought. Simple complaints take less time than complex complaints. Table 10 below shows the average days taken to resolve a complaint by category in FY19.

TABLE 10 – AVERAGE BUSINESS DAYS TO RESOLVE COMPLAINTS BY CATEGORY

CATEGORY	AVERAGE BUSINESS DAYS	NUMBER OF COMPLAINTS RESOLVED
Category 0	11	303
Category 1	6	928
Category 2	9	95
Category 3	17	1372
Category 4	71	106
Category 5	189	23

- D.54. The above table shows that the average timeframes to investigate and resolve Category 4 and 5 complaints are considerably longer than Category 0 to 3 cases. This is due to the complex nature of the issues and outcomes sought in such complaints. For example, Category 5 complaint investigations are complex investigations which require a substantial amount of IGTO resources and senior management involvement. Such complaints are likely to involve complaints:
- with potentially sensitive issues or broader ramifications on the community;
 - which involve complex legal or legislative issues;
 - with unresolved issues spanning over many years where the matter is significant and an appropriate outcome cannot be negotiated without escalation to appropriately senior IGTO and ATO/TPB officers; and
 - involving improper behaviour of agency officials or other possible disciplinary matters.
- D.55. To investigate a complaint it is necessary for our complaints team to obtain an understanding of relevant legislation and agency processes or systems. This often requires multiple discussions and meetings with the agency to understand the intricacies of their processes and systems. This process may also require the involvement of senior management from all relevant agencies. Such requirements impact on the time it takes us to resolve complex complaints.
- D.56. Another factor that impacts on the timeliness of our complaint investigations relates to our available resources. Complaint investigations are routinely undertaken by a team of 17 dedicated tax complaint investigators, overseen by 3 dedicated complaints managers and 2 technical managers. Collectively, our complaint investigators manage over 2,500 complaints nationally each year. In order to manage the increasing number of complaints we receive from the community, some of our complaint investigations are prolonged in order to manage the intake and flow of all complaints received.
- D.57. Notwithstanding these challenges, our office seeks to actively monitor and assess the timeliness of our complaint investigations and the impact those timeframes have on taxpayers. In January 2019, we established a Complex Complaints Unit (CCU) to assist with the timely resolution of complex and sensitive complaints and to enhance the technical capability across our complaints management team. We also rolled out a new active case management report which seeks to inform senior management, on a weekly basis, of all open complaints that are meeting our internal timing expectations, those cases that fall outside these expectations but are being actively managed and those cases that require additional support. Since the establishment of this new CCU and reporting, we have seen a positive reduction in the cases on hand and overall improved complaint timeframes.

Independence

- D.58. We ensure our independence in relation to the management of complaints through our established policies and practices.

- D.59. An important feature of our current practices is our ability to initiate an investigation and to make independent recommendations to the ATO/TPB during or following a complaint investigation to rectify an issue or improve administrative processes.
- D.60. In the course of investigating a complaint, we may form a view that the actions of the ATO or TPB were not fair or reasonable in the circumstances having regard to all relevant information available. In such cases, we communicate our views to the agency and may make recommendations that an appropriate remedial action be taken (such as the issuing of an apology, change in procedure or reconsideration of a decision). Our recommendations, while non-binding in nature, are persuasive and are generally accepted by the ATO or TPB. In situations where the ATO or TPB does not agree with our independent view or recommendation, we clearly communicate this to the taxpayer along with the agency's response.
- D.61. The non-binding nature of our powers is an area of concern raised by some taxpayers following a complaint investigation. The feedback we have received directly from the community is that, for our office to be truly independent and effective, we would require powers that can compel the ATO and TPB to take a particular action or change a decision. Note, however, that such a power may also operate to reduce independence (see Section C). In this respect, we note that where action that is in our opinion adequate or appropriate in the circumstances is not taken by the relevant agency, we may make a written report to the Minister.¹⁶⁹
- D.62. Another area of concern for taxpayers is the IGTO's inability to investigate the merits of the ATO or TPB's decisions, as this is reserved for the tribunals and courts. Currently, there is some confusion as to our jurisdiction and ability to investigate complaints matters that relate to the application of legislation imposing tax liabilities or the quantification of those liabilities. The current wording of our legislation states that our functions do not include investigating 'rules imposing or creating an obligation to pay an amount under a taxation law' and 'rules dealing with the quantification of such an amount'. To provide greater clarity and certainty to the community regarding our jurisdiction, there may be benefit in clarifying this and removing any ambiguity.

Access to agency systems

- D.63. Another important feature of our current practices is that we have direct access to some core ATO systems (via ATO provided terminals) to assist with our complaint investigations. Such access allows us to independently verify ATO records and materials which enables us to provide assurances to taxpayers and tax practitioners in relation to the administrative actions of the ATO. It also assists to enhance community confidence in our investigation process, as the decisions and outcomes that flow from our investigations are based on our independent review of contemporaneous ATO records and not simply a reliance and acceptance of representations from ATO officers.

¹⁶⁹ *Ombudsman Act 1976*, s.16(1) of the *Ombudsman Act 1976* which operates by virtue of s.15 of the *Inspector-General of Taxation Act 2003*.

- D.64. Similar access to TPB systems is currently not available to the IGT0. However, our practices require our team to take all reasonable steps to request and verify all TPB records that are relevant to the concerns. From our discussions with the TPB, we understand that they are undergoing a process of redesigning their complaints management system and processes. In this respect, we will seek to discuss with them the practicalities of obtaining direct access to their systems for the purpose of undertaking our complaint investigations.
- D.65. We recognise that for our investigations to be credible, we must have timely access to agency information that is relevant, accurate and complete. Currently, and as discussed above, we receive direct, but limited, access to core ATO systems and no direct access to TPB systems. Without access to all data systems, there is a degree of reliance on the agencies to provide our office with information. Such reliance could potentially compromise the perceived independence of our office in the eyes of the community.
- D.66. Furthermore, in our experience, there are situations where it may be appropriate for our office to undertake an investigation covertly due to the sensitive nature of the issues or persons raising the complaint, or where the taxpayer wishes to remain anonymous and does not consent to our office disclosing their identity to the ATO or TPB. Where anonymous complaints are accepted, there are limitations in relation to our ability to undertake a proper investigation into such complaints. These include:
- the inability to discuss specific details of the taxpayer's concerns with the ATO to obtain their side of the story and to acquire a holistic understanding of the events relating to the matter;
 - the inability to discuss our views with the ATO and persuade the ATO to consider any appropriate remedial actions that may flow from such views. In this respect, we are required to afford the ATO or TPB with an opportunity to review and comment on any IGT0 view or opinion that is critical of their actions (either expressly or impliedly)¹⁷⁰; and
 - the amount of resources that would need to be expended to trawl through ATO systems to identify relevant ATO documents and records, and to understand ATO actions and decisions.
- D.67. The Committee should consider if our independence, purpose and objective would be improved or require unfettered access to all relevant agency resources and systems. Such unfettered access would greatly assist the efficiency and effectiveness of our current practices. Notwithstanding the benefits of such access, we also recognise that additional resources may need to be allocated towards skilling our complaints management team on the relevant systems.

Transparency and accountability

- D.68. For each complaint, our procedures are based on principles of due process and fairness. This includes giving both the agency and the complainant opportunities to be heard and to respond to each party's perspective and our perspective.

¹⁷⁰ *Ombudsman Act 1976*, s 8(5) (by virtue of section 15 of the *IGT Act 2003*).

- D.69. To ensure transparency, we provide complainants with our acknowledgement and closure information in writing and seek to draft these documents so that they read independently as a stand-alone document.
- D.70. We report publicly in relation to our performance on complaints management to Parliament in our Annual Reports. We recognise that there is scope for our office to enhance our public reporting to the community to better inform them of our complaints management services and our performance in that regard.
- D.71. Where our investigation of a complaint identifies a systemic or significant issue, we have the power under section 35A of the *Ombudsman Act 1976* to issue a press release or to report on the issues on our website or via other means. This power increases the transparency of the outcomes of our complaint investigations and enables us to alert the public to issues which have the potential to affect a significant number of taxpayers or to cause appreciable damage or inconvenience to taxpayers.
- D.72. Examples of the types of issues that may be considered for publication include:
- a pattern of ATO conduct or recurring instances of ATO conduct – for example, persistent delay in meeting a statutory timeframe, poor complaint handling or defective notification letters;
 - a deficiency in individual cases that is likely to be repeated in other cases – for example, an erroneous interpretation of legislation, wrong advice in an ATO procedure or errors which reflect poor training; or
 - tax policy that is very difficult for taxpayers to understand or comply with or the ATO to administer without errors.
- D.73. The publication option is in addition to other remedies discussed above (providing a preliminary view to the agency if we consider the agency should take further action, requesting a broader briefing from the agency or conducting an own initiative investigation).
- D.74. We are precluded from disclosing the identity of taxpayers “unless it is fair and reasonable in all the circumstances to do so”¹⁷¹.

Accessibility and awareness

- D.75. As we operate out of a single office, we have found that our services are not always accessible to taxpayers located in certain regions. For example, our ability to communicate with taxpayers via telephone may be restricted where the taxpayer is in a different time zone. Furthermore, where taxpayers are only available outside of our core business hours of 8:30 AM to 5:06 PM AEST, the period available for telephone contact is limited. Whilst we seek to contact taxpayers outside of our core business hours where necessary, our single office location may at times present challenges to providing an effective service to the community.

¹⁷¹ *Ombudsman Act 1976*, s 35A(3)(b).

- D.76. A current strategic priority of our office is to increase awareness and accessibility of our free complaints management services to all Australians, in particular the more vulnerable taxpayers within our community. We are actively reaching out to the wider community through our social media platforms, such as Facebook, and our online communications via our website and e-Newsletter.

Multi-agency issues and consultations

- D.77. There are occasions where taxpayers raise concerns with our office that relate to the administrative actions of the ATO as well as another Government agency. For example, where complaints are received about a tax matter that may also concern Higher Education Loan Payment (HELP) or child support matters. In such cases, we are only empowered to assist taxpayers with the tax administrative aspects of their concerns. In such cases, we investigate the tax issue and encourage taxpayers to engage with the Department of Education or the Department of Human Services on the non-tax matters. In line with our commitment to providing a tailored and personalised service, we seek to assist taxpayers to the extent that we may by referring taxpayers to the appropriate agency in the event that we are unable to assist further.
- D.78. We recognise from our interactions with taxpayers that the process of engaging with more than one Government agency is time consuming and can be a real source of frustration and anxiety for the individuals concerned. In particular, we recognise the difficulties that taxpayers in such circumstances face in having to navigate a number of areas within multiple agencies.
- D.79. We consider that our office and other Government agencies may be better equipped to assist taxpayers who lodge complaints raising multi-agency issues if they had an understanding of how the actions of one agency may affect the actions of the other. Such assistance may be achieved through cross-agency collaboration, training or secondment opportunities.
- D.80. Our ability to collaborate with other Government agencies may also be extended to areas outside of our complaint management work. For example, we could conduct reviews in collaboration with the Board of Taxation.
- D.81. Working with the ANAO would also improve our skills on ATO internal procedures and critiquing those procedures. We expect this will yield significant benefits for complaints that require us to gain knowledge of new ATO data systems.
- D.82. Currently, there is no formal mechanism or arrangement for the conduct of joint investigations or information sharing between other Government agencies – for example, with the Commonwealth Ombudsman or the ANAO.

OBSERVATIONS AND RECOMMENDATIONS

- D.83. IGTO recognises that our current framework for complaints management presents some challenges which may prevent our office from providing an optimal complaints management service to the community.
- D.84. The Committee may wish to consider whether:
- the IGTO has sufficient powers to perform our function effectively in undertaking independent investigations into individual tax complaints, including covert investigations;
 - the IGTO is sufficiently resourced (in terms of geographic presence and human resources) to efficiently and effectively service the entire Australian community in relation to their individual tax matters; and
 - it would be consistent with community expectations, in the context of our complaints management framework, for the IGTO to require and receive unfettered access to agency resources and systems.

Improved process and transparency for any failure to follow IGTO recommendations or Taxpayer Assistance Orders

- D.85. To improve community confidence in the effectiveness of our office as an oversight agency of the ATO and TPB, the IGTO powers of recommendation could be enhanced so that there is improved mandatory reporting of any agency's refusal and/or reasons for not following an IGTO recommendation. This would be consistent with our review functions. Additionally, the process could ensure that decisions are effectively more determinative rather than just recommendatory.
- D.86. Currently, where the IGTO is not satisfied that the agency has taken adequate and appropriate steps to implement a complaint investigation recommendation by the IGTO, the IGTO can report the inaction to the Minister and ultimately the Parliament.¹⁷²
- D.87. The procedures could be improved without altering the legal status of IGTO recommendations. For example, IGTO could be empowered to issue a formal order to the Commissioner or Chair of the TPB – much like the USA Taxpayer Assistance Orders. Such an order could direct (rather than recommend) the ATO or TPB to:
- take a particular action, cease a particular action or refrain from taking a particular action; or
 - reconsider, or expedite consideration of, a taxpayer's specific tax or complaint matter.
- D.88. This approach, similar to the approach currently taken in the USA, would allow the IGTO to report directly to the Minister and/or to Parliament either through the Annual Report or otherwise where the agency has not followed an Assistance Order of the IGTO.

¹⁷² *Ombudsman Act 1976*, s 16 (by virtue of section 15 of the *IGT Act 2003*).

- D.89. This would be procedurally a clearer process and provide improved transparency and better documentation of the process and agency responses to recommendations or determinations.
- D.90. A brief outline of the USA system is provided below for completeness.

Outline of USA Taxpayer Assistance Orders

- D.91. The National Taxpayer Advocate has the authority to issue a Taxpayer Assistance Order to the Internal Revenue Service (IRS) when it has determined that the taxpayer is suffering, or is about to suffer, a significant hardship due to the manner in which the IRS is administering the internal revenue laws¹⁷³.
- D.92. The terms of the Taxpayer Assistance Order essentially directs the IRS to take a particular action within a specified period of time—for example, to:
- release a levy; or
 - cease any action, take any action as permitted by law, or refrain from taking any action relating to tax collection, bankruptcy and receiverships, or any other provision of the internal revenue laws specifically described in the order.
- D.93. The IRS will generally comply with these orders unless they are appealed and subsequently modified or rescinded by the National Taxpayer Advocate, the Commissioner or Deputy Commissioner. Where the order is modified or rescinded by the Commissioner or the Deputy Commissioner, a written explanation of the modification or rescission must be provided to the National Taxpayer Advocate. The National Taxpayer Advocate then sets out the use of Taxpayer Assistance Order and whether the IRS has complied with them in her annual report to Congress.
- D.94. If adopted in Australia, the nature of the order could be broadened to include circumstances not limited to cases involving serious hardship. For example, the Order could require the ATO or TPB to formally respond in writing to the IGTO within a specified time – to enhance accountability and transparency.
- D.95. The IGTO could similarly be required to report in its Annual Report details of the number of orders that have issued to the ATO or TPB and those that have been complied with. Such an approach would assist to improve agency accountability, provide greater transparency of IGTO complaint investigation findings and outcomes and promote community confidence in the oversight of the tax administration system.

¹⁷³ Internal Revenue Code 1986, § 7811.

E. THE PROTECTIONS AFFORDED TO WHISTLEBLOWERS WHO DISCLOSE INFORMATION TO THE IGT

LEGISLATIVE FRAMEWORK – OVERVIEW OF PROTECTIONS

The PID Act 2013

- E.1. The Commonwealth Ombudsman and Inspector-General of Intelligence and Security have joint jurisdiction to investigate complaints made under the *Public Interest Disclosure Act 2013* (PID Act 2013) – including ‘whistle-blower’ style complaints made by taxation officers (as public servants).
- E.2. There was a review of the PID Act 2013 in 2016 by Mr Philip Moss AM (*Review of the Public Interest Disclosure Act 2013 – An independent statutory review conducted by Mr Philip Moss AM*). This review appears to be comprehensive and is arguably relevant to the matters under consideration by this Committee. An extract of the Moss Review recommendations is included in Appendix G.
- E.3. Importantly, the PID Act 2013 provides the following protections (refer Appendix F for details) for public servants making whistle-blower style disclosures of information:
- Immunity from liability – the individual is not subject to civil, criminal or administrative liability including disciplinary action for making a disclosure under PID;
 - No contractual or other remedy may be enforced and no contractual right exercised for making a disclosure under PID;
 - There is absolute privilege in defamation cases;
 - There is protection from termination of a contract including for breach of contract; and
 - There are remedies for reprisal or detriment which include compensation, injunction, apology or other orders or reinstatement.
- E.4. These protections are not replicated under *the IGT Act 2003* – neither for ATO officers, TPB officers, individual taxpayers, business taxpayers nor tax practitioners.

The IGT Act 2003

- E.5. The *IGT Act 2003* was amended in 2015 to incorporate various provisions from the *Commonwealth Ombudsman Act 1976* – refer section 15 of the IGT Act 2003.
- E.6. These amendments also altered the circumstances in which protections are available to those making a disclosure to the IGT.

E.7. The legal protections available under the *IGT Act 2003* vary and depend on the circumstances in which there is a disclosure of information to IGTO. These protections mirror the protections under the *Ombudsman Act 1976* for disclosures made to the Commonwealth Ombudsman (outside of the PID regime).

E.8. For example:

[Where you disclose information voluntarily – for example, as part of a complaint](#)

- You are protected from civil action, provided you disclose information in good faith.

[Where you disclose information in response to an investigation or review that has been commenced by the IGTO](#)

- The IGTO will announce publicly when an investigation or review is to commence to trigger these protections.
- Additional protections are provided but only where the information is lawfully obtained. These include:
 - any documents provided are inadmissible as evidence;
 - there is no liability to statutory penalties;
 - the disclosure is authorised under the *Privacy Act 1988*; and
 - Legal Professional Privilege is unaffected by the disclosure.
- These protections are also available for officers of the ATO but only where the Commissioner has authorised the officer to give the information.
 - There is no prescribed form for this authorisation – including whether the Commissioner’s notice is to be provided internally or externally.
 - Although it will usually be emailed internally at the commencement of an IGTO review or investigation, this is not ordinarily copied to the IGTO and accordingly the IGTO is unaware of the terms of the authorisation to provide information that is encouraged by ATO officers (internally).
 - Authorisation is unlikely to be available to ex-ATO officers – those who have already ceased employment with the ATO – where the authorisation is internally made.

[Where an ATO officer discloses information as part of a preliminary inquiry by the IGTO](#)

- Where there is an arrangement with the Commissioner (or Chair of the TPB), then protections may be available for ATO officers referred to in an arrangement with the Commissioner (or Chair of the TPB) for the purposes of determining whether to investigate action or not;
- Protections are available in this circumstance only for ATO officers that are within the class of officers authorised under the arrangement with the Commissioner (or Chair of the TPB).

Where you disclose information in response to a Notice issued by the IGTO requiring compulsorily disclosure

- Additional protections are available where the information is compelled. These include:
 - any documents provided are inadmissible as evidence;
 - there is no liability to statutory penalties;
 - the disclosure is authorised under the *Privacy Act 1988*; and
 - Legal Professional Privilege is unaffected by the disclosure.
- In this instance, ATO officers are protected because they are **required** to disclose.
- The IGTO will likely issue a compulsory Notice to disclose or produce only where it can identify the relevant ATO officer and then only to ensure protections are available to the recipient or to secure timely access to information. IGTO has rarely issued compulsory notices.

Overview of protections under the IGT Act 2003

E.9. The following is an overview of the legislative protections available under the *IGT Act 2003* as amended:

TABLE 11: PROTECTIONS UNDER THE *IGT ACT 2003* TO DISCLOSERS - CURRENTLY

DISCLOSURE IS MADE	TAXPAYER	ATO OFFICER OR TPB OFFICER	TAX PRACTITIONER
Voluntarily	Protection from civil action only - Note 1	Protection from civil action only - Notes 1 and 2	Protection from civil action only - Notes 1 and 2
Preliminary to an investigation or Review ¹⁷⁴	Documents are inadmissible No liability to statutory penalties Authorised disclosure under the Privacy Act 1988 – Note 3 No loss of Legal Professional Privilege	Documents are inadmissible No liability to statutory penalties Authorised disclosure under the Privacy Act 1988 – Note 3 No loss of Legal Professional Privilege	Documents are inadmissible No liability to statutory penalties Authorised disclosure under the Privacy Act 1988 – Note 3 No loss of Legal Professional Privilege

¹⁷⁴ *Ombudsman Act 1976*, s 9.

DISCLOSURE IS MADE	TAXPAYER	ATO OFFICER OR TPB OFFICER	TAX PRACTITIONER
In response to a Review ¹⁷⁵	Yes, if the information is lawfully obtained – Note 5 Documents are inadmissible No liability to statutory penalties Authorised disclosure under the Privacy Act 1988 Legal Professional Privilege is unaffected	Yes, if the Commissioner has authorised the officer to give the information - Notes 1, 2, 3 and 4 Documents are inadmissible No liability to statutory penalties Authorised disclosure under the Privacy Act 1988 Legal Professional Privilege is unaffected	Yes, if the information was lawfully obtained but confidentiality and professional ethical obligations may apply Documents are inadmissible No liability to statutory penalties Authorised disclosure under the Privacy Act 1988 Legal Professional Privilege is unaffected
Compulsorily	Yes, if Notice is served in writing	Yes, if Notice is served in writing	Yes, if Notice is served in writing

Notes

- Section 37 of the *Ombudsman Act 1976*. Protection from **civil action** (in respect of loss, damage or injury of any kind suffered by another person) is provided for the following acts done in good faith:
 - making a complaint to the IGTO;
 - making a statement or providing a document or information for the purposes of the IGT Act 2003
- These protections do not fully override statutory, professional and ethical obligations of confidentiality & secrecy – which carry criminal and statutory penalty sanctions for breach or professional sanctions. That is, there are no personal protections from statutory or criminal penalties for voluntary disclosure. See for example, Division 355 of the *Taxation Administration Act 1953*.
- Authorised disclosure under the *Privacy Act 1988* Schedule 1, Clause 2.1(g) – the use or disclosure is required or authorised by or under law.
- The protections are not available without commencement of an *investigation* and only if the Commissioner has authorised the officer to provide the information (section 8(2A)(b)(iii) of the *Ombudsman Act 1976*), unless disclosure is made in response to an IGTO preliminary inquiry and in accordance **with an arrangement with the Commissioner of Taxation** under section 7A of the *Ombudsman Act 1976*.
- Section 8 protections include: Documents are inadmissible, No liability to statutory penalties and Legal Professional Privilege is unaffected.

Summary of Protections for ATO officers

- Importantly, ATO officers receive no personal protection for statutory or criminal penalties without commencement of an investigation (and then only if the Commissioner has authorised the officer to give the information to the IGTO).
- Where the inquiry is preliminary, protections are available for ATO officers which form part of an arrangement with the Commissioner under section 7A of the *Ombudsman Act 1976*.

IGT Act 2003 as originally enacted

- Section 14 of the *IGT Act 2003* as originally enacted stated that the IGT may request the Commissioner to provide information. Alternatively there was a power (refer section 15, repealed) to compel the production of information or documents. This arrangement is arguably more transparent. It does however also rely upon the Commissioner to instruct ATO officers to

¹⁷⁵ *Ombudsman Act 1976*, s 8(2B)–(2E).

provide information to the IGTO. It would be preferable if the IGTO could issue a Notice to Produce – that is, requiring information to be provided directly to the IGTO (directly through internal ATO communication channels).

- E.11. The following is an overview of the legislative protections available under the *IGT Act 2003* as originally enacted by way of comparison:

TABLE 12: PROTECTIONS UNDER THE *IGT ACT 2003* AS ORIGINALLY ENACTED

DISCLOSURE IS MADE	TAXPAYER	ATO OFFICER OR TPB OFFICER	TAX PRACTITIONER
Voluntarily (Note 1)	Not Applicable	Not Applicable	Not Applicable
In response to a Review (reviews were systemic only - pre-complaints service - but could include for purposes of deciding whether a review should be conducted)	Good Faith disclosure (see Note 2) (as part of a submission, or at request of or as required by IGT) is not admissible in criminal proceedings (Note 3) not liable to civil proceedings, no loss of legal professional privilege	Good Faith disclosure (see Note 2) (as part of a submission, or at request of or as required by IGT) is not admissible in criminal proceedings (Note 3) not liable to civil proceedings, no loss of legal professional privilege	Good Faith disclosure (see Note 2) (as part of a submission, or at request of or as required by IGT) is not admissible in criminal proceedings (Note 3) not liable to civil proceedings, no loss of legal professional privilege
Compulsorily	Same as above	Same as Above	Same as Above

Notes

- 1 There was no Ombudsman function originally or previously and accordingly no protections for purely voluntary disclosures.
- 2 See Division 3 of IGT Act 2003
- 3 That is, other than subsection 15(6) of the *Ombudsman Act 1976* and sections 137.1, 137.2 or 149.1 of the *Criminal Code 1995*.

OBSERVATIONS AND RECOMMENDATIONS

Legislative Inconsistencies create ambiguity

- E.12. Section 355-65(5) Table 4 Item 5 of Schedule 1 of the TAA 1953 provides a specific exception from the taxation offence¹⁷⁶ that occurs for making an unauthorised disclosure. The exclusion applies where a Taxation Officer discloses to the IGTO for the purposes of investigating or reporting under or otherwise administering:
- a. the *Inspector General of Taxation Act 2003*; or
 - b. Provisions of the *Commonwealth Ombudsman Act 1976* to the extent that they are applied by the *Inspector General of Taxation Act 2003*.

¹⁷⁶ Refer to section 355-25 of schedule 1 to the TAA 1953.

- E.13. However, as noted above, the protections available under the *IGT Act 2003* for Taxation Officers require (consistent with the Commonwealth Ombudsman regime) that the Commissioner has authorised the officer to give the information or the officer is within the class of officers nominated under an arrangement with the Commissioner where there is a preliminary inquiry.
- E.14. The importation of the Commonwealth Ombudsman provisions creates an inconsistency between the laws and raises ambiguity for Taxation Officers wishing to comply with their statutory obligations of secrecy and confidentiality.
- E.15. This should ideally be clarified, consistent with our submission and comments at paragraphs B.45 – B.52.

Notification to ATO officers

- E.16. The authorisation required by the Commissioner before IGTO protections are available to ATO officers is not prescribed – neither as to time nor form. This may discourage active participation by ATO officers and ex-ATO officers (who may never receive an authorisation, especially where they are sent internally only) and not mandatorily in respect of every IGTO review.

Ex ATO officers

- E.17. The authorisation by the Commissioner to ATO officers appears not to contemplate ex-ATO officers. That is, ex-ATO officers are never protected. This appears to be a gap in the potential disclosures that may be made to the IGTO.

Protections are critical to encourage participation in an IGTO review

- E.18. The legislative protections and considerations of privacy and confidentiality may not be of primary importance to a taxpayer that is a natural person taxpayer in their decision to make a voluntary disclosure as part of a complaint to the IGTO. However, the protection and confidentiality considerations become significantly more relevant for ATO officers, TPB officers and tax practitioners – owing to other overriding professional, ethical and statutory obligations of confidentiality and privacy restrictions that prevent the disclosure of information. Business taxpayers are also more likely to consider reprisal, repercussion and reputational consequences and accordingly taxpayer protections will be a significant consideration in their decision to disclose.
- E.19. As a general observation, the statutory protections available to those disclosing information should be consistent with and support the policy objective of the disclosure regime. A mismatch will result in under-disclosure and community expectations being unmet.

IGT has no power to investigate a complaint or provide protections to a complainant consistent with the PID Act 2013

- E.20. Although the Tax Ombudsman has power to investigate taxation complaints referred from the Commonwealth Ombudsman under paragraph 6D(4)(b) of the *Ombudsman Act 1976*, there is no jurisdiction to investigate complaints made pursuant to the PID Act 2013.

- E.21. Accordingly, the IGTO is unable to investigate Whistleblower style complaints where it cannot offer protections to those disclosing. The recommendations of the Moss Review are relevant in this regard and can be found in summary in Appendix G.
- E.22. Further sub-section 6D(6) of the *Ombudsman Act 1976* provides that a complaint transferred from the Commonwealth Ombudsman to the IGTO is taken to be a complaint made to the IGTO under the IGT Act 2003. Accordingly it would appear to secure the protections available under the *IGT Act 2003* only.

Private investigations should remain private, even where the discloser has chosen to make a public statement

- E.23. Where a complaint is made privately and is to be investigated on a private basis, the requirement to observe and continue to observe privacy and confidentiality of taxpayer information remains in place indefinitely for the IGTO. Although taxpayers, ATO officers or tax practitioners may choose to make public statements, this does not relieve the IGTO of its privacy obligations.
- E.24. This imbalance in disclosure arrangements can result in an agency being criticised for the manner in which a matter has been investigated without a right of reply – that is, where the investigation is essentially private but the discussion has progressed to a public discussion.
- E.25. This is not unique to the IGTO and applies equally to PIDs and other Ombudsman disclosures. However, in the interest of encouraging private disclosures, it is important that the information remains private –unless for example the discloser has a right to release the agency from its confidentiality obligation (say in writing).

ATO officers only protected if an investigation has commenced or is contemplated and then only then with the Commissioner's approval

- E.26. For protections other than civil protections to be available, a public review or investigation must be commenced by the IGTO. The need to progress to a public investigation before statutory and other protections are available can create confusion as to the private versus public nature of the review and create blurred distinctions between the Taxation Ombudsman and Inspector-General functions. This could be more usefully clarified in the legislative framework.

Clarify Disclosures to be encouraged

- E.27. The protections available under the legislative framework should implicitly make clear whether voluntary disclosures to the IGTO are encouraged from:
- Individuals taxpayers
 - Small business taxpayers
 - Large business taxpayers
 - Tax practitioners
 - ATO officers

- Tax Agents, or all
 - All of the above
- E.28. Where the Committee recommends that voluntary disclosure to the IGTO should be facilitated and encouraged in these circumstances, then additional and strengthening of protections for disclosers, protection against reprisal and compensation provisions should be introduced – consistent (at least for public servants such as ATO officers) with the protections available under the PID Act 2013. These include protections such as:
- Immunity from liability – the individual is not subject to civil, criminal or administrative liability including disciplinary action for making a disclosure;
 - No contractual or other remedy may be enforced and no contractual right exercised;
 - Absolute privilege in defamation cases;
 - Protection from termination of a contract including for a breach of contract; and
 - Remedies for any reprisal or detriment arising from disclosure - including compensation, injunction, apology or other orders or reinstatement.

Improve IGTO direct access, improve transparency and strengthen protections

- E.29. The pre-requisite that permission from the Commissioner to disclose information before protections are available to ATO officers should be removed. ATO officers should be protected automatically once the investigation or review has commenced or is in contemplation and the disclosure by the ATO officers may form part of that consideration.
- E.30. It would for example, be preferable if the IGTO could issue a Notice requiring information to be provided directly to the IGTO (for example, through internal ATO communication channels). Part of that Notice would remind ATO officers of the protections that are available and in doing so, encourage ATO officers wishing to provide IGTO with information (including anonymously) in relation to matters under investigation.
- E.31. As noted above, this would require that the protections that are available once a review has commenced or is in contemplation are strengthened as currently they do not adequately address existing statutory, professional and ethical obligations.

Provide choice for ATO officers

- E.32. The legislation should expressly state that an ATO officer may choose to provide information or evidence to the IGTO with or without the presence of another ATO officer or person of their choice (including a lawyer or ATO officer of their choice).

THE PRACTICAL IMPLICATIONS OF THE OPERATION OF PROTECTIONS

Commissioner's authorisation

E.33. The IGTO has not historically received a copy of the authorisation notice sent to ATO officers. In May 2019 (before the commencement of the incoming IGTO), review and complaints handling guidelines were settled between the IGTO and ATO, which provide:¹⁷⁷

IGTO case officers may seek information from any ATO officer (including external contractors) that is relevant to the issues examined in the complaint investigation. ATO officers may provide information in response to such requests without breaching the tax law secrecy provisions or privacy law. Legal professional privilege is also maintained where information is provided to the IGTO.

IGTO case officers aim to obtain relevant information without the need to invoke the compulsory information gathering powers. ATO staff seek to provide information in such investigations cooperatively and voluntarily.

Voluntary disclosure

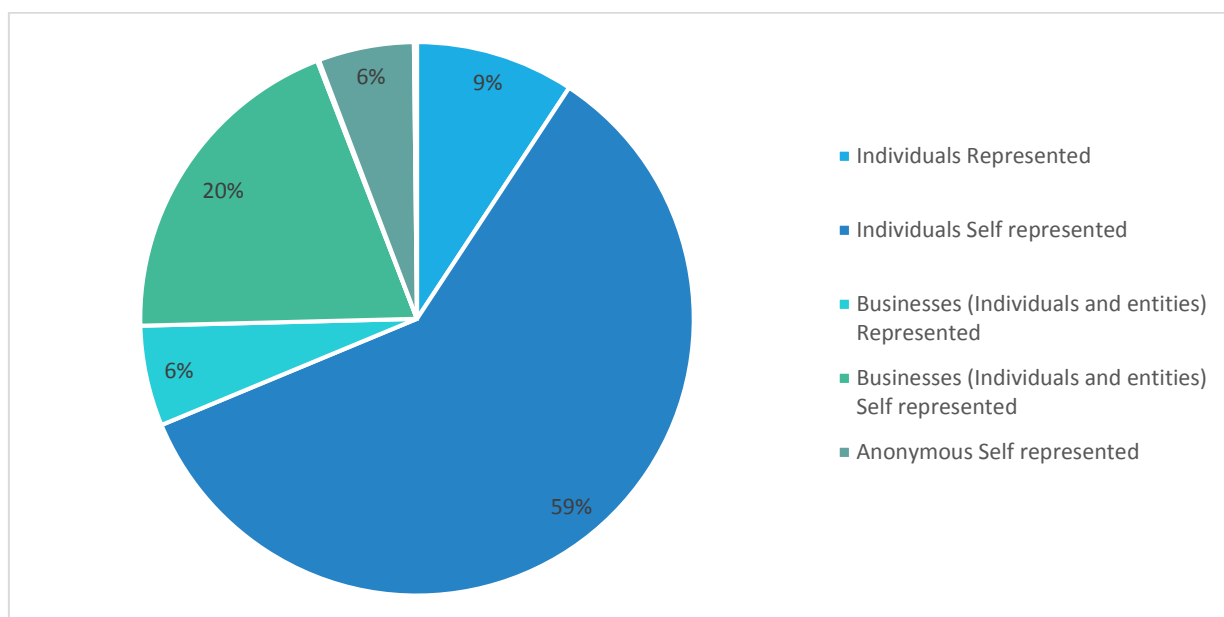
E.34. Our complainant statistics in FY 19 suggest that the following taxpayers and tax practitioners are lodging complaints with IGTO:

TABLE 13 – OVERVIEW OF COMPLAINANT STATISTICS (CASES CLOSED) IN FY19

STAKEHOLDERS	NO.	%
Individuals	1943	68.73%
Represented	262	9.27%
Self-represented	1681	59.46%
Businesses (Individuals and entities)	359	25.40%
Represented	166	5.87%
Self-represented	552	19.53%
Anonymous	161	5.70%
Represented	3	0.11%
Self-represented	158	5.59%
Other	5	0.18%
Self-represented	5	0.18%
Total	2827	100.00%

¹⁷⁷ IGTO, 'IGTO-ATO Complaints Handling Guidelines', 2019.

Figure 6 – Complainant Statistics (cases closed) in FY19

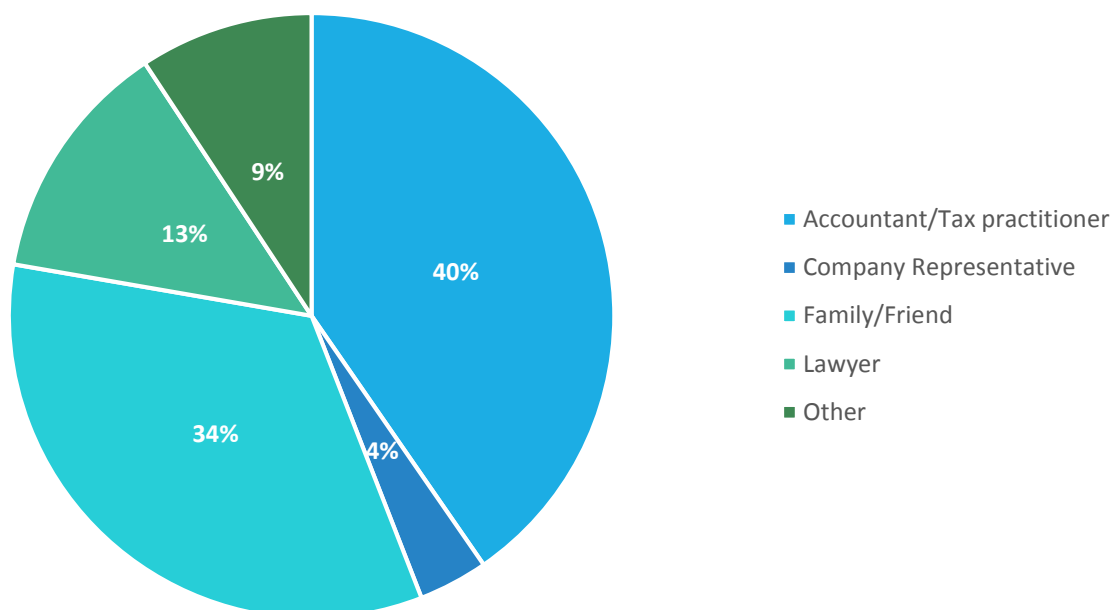


E.35. Where a complaint was made by a representative in FY19, the representatives included:

TABLE 14 – OVERVIEW OF REPRESENTED COMPLAINANTS (CASES CLOSED) IN FY19

REPRESENTATIVE	NO.	%
Accountant/Tax practitioner	174	40.37%
Company Representative	16	3.71%
Family/Friend	145	33.64%
Lawyer	56	12.99%
Other	40	9.28%
Grand Total	431	100.00%

Figure 7: Overview of Represented Complainants (cases closed) in FY19



- E.36. The IGTO accepts that there is a need to improve the community's awareness of our existence and the services we provide.
- E.37. The nature of the statutory protections available may (in part) explain the composition of complainants to date.

Disclosure as part of a complaint

- E.38. The number of complaints that took longer than 180 calendar days to finalise – that is, from the date the agency was issued with an investigation notice – were 22 ATO cases and 1 TPB case.
- E.39. The last ten reviews commenced and their elapsed time are as follows:

TABLE 15: OVERVIEW OF TIME TAKEN TO COMPLETE LAST 10 REVIEWS

REVIEW	DATE ANNOUNCED	DATE AVAILABLE	TIME LAPSED
Review into the ATO's use of Garnishee Notices	16/05/2018	13/03/2019	10 months
Review into the ATO's Fraud Control Management	28/06/2017	22/10/2018	16 months
The Future of the Tax Profession	6/06/2017	3/04/2019	22 months
GST Refunds	5/04/2017	16/08/2018	16 months
Review into Aspects of the Pay As You Go Instalments System	29/03/2017	23/01/2018	10 months
Review into the Taxpayers' Charter and taxpayer protections	2/11/2015	12/12/2016	13 months

Review into the ATO's employer obligations compliance activities	29/10/2015	24/05/2017	19 months
The management of tax disputes	19/06/2014	27/02/2015	8 months
The Australian Taxation Office's services and support for tax practitioners	26/05/2014	20/06/2015	13 months
Debt collection	26/05/2014	14/07/2015	14 months

Source: IGT website - reports of reviews and media release

Disclosure as part of a review

- E.40. Notwithstanding the legislative framework requires either an arrangement or approval from the Commissioner, the experience to date has been that even though such approval may have been given, the ATO does not routinely notify ATO officers. There is also no obligation on the ATO to do so.
- E.41. The IGTO is only aware of two reviews where an internal notice was sent to ATO officers – refer paragraph B.35 and B.37. Details of the notices provided are as follows:

TABLE 16: ATO APPROVAL FOR ATO OFFICERS TO PROVIDE INFORMATION AS PART OF A REVIEW

REVIEW	DATE REVIEW COMMENCED	DATE ATO OFFICERS NOTIFIED
REVIEW INTO THE ATO'S FRAUD CONTROL MANAGEMENT	28 JUNE 2017	28 JULY 2017
REVIEW INTO THE ATO'S USE OF GARNISHEE NOTICES	16 MAY 2018	26 - 28 JUNE 2018 (A)

(A) No general authorisation was issued, only email invitations to debt staff in Melbourne, Adelaide, Parramatta and Penrith ATO sites.

Compulsory Notices issued

- E.42. Although the IGTO can compel ATO officers to provide information, this is a power that has been rarely used – generally to provide clarity that the protections are available.

F. ANY RELATED MATTERS

COMPENSATION AND AWARDS FOR DAMAGES

- F.1. The IGTO should be empowered to award an amount of compensation or reasonable costs to complainants where the IGTO investigation finds that ATO or TPB action has caused loss or damage or where they have failed to take reasonable action leading to loss or damage.

The CDDA Scheme

- F.2. The issue of compensation has been raised with the IGTO in a number of reviews¹⁷⁸, complaints and in the media¹⁷⁹. The main scheme under which taxpayers may seek compensation from the ATO is the Commonwealth Scheme for Compensation caused by Defective Administration (CDDA Scheme). Awards of compensation under the CDDA Scheme are purely discretionary and made by the ATO in accordance with the Department of Finance's Resource Management Guide 409.¹⁸⁰ The CDDA Scheme makes clear that the IGTO (like the Commonwealth Ombudsman) is not empowered to overturn or vary the ATO's decision¹⁸¹.
- F.3. The CDDA Scheme is a common source of complaint from taxpayers who approach the IGTO. These complaints have focused on the discretionary nature of the CDDA Scheme, the fact that decision-making power rests with the agency that is subject of the compensation claim and limited avenues for substantive external review.
- F.4. Taxpayers have typically approached the IGTO to seek assistance with the following complaints in relation to compensation:
- whether they may be entitled to compensation and advice on avenues that may be available to them;
 - relevant contact details and advice on how to seek compensation and the type of evidence that may be required;
 - the ATO's management of claims they have lodged under the CDDA Scheme; and
 - seeking a review by the IGTO of the ATO's CDDA Scheme decision, including determinations as whether compensation is payable and the quantum of said payments.

¹⁷⁸ IGTO, *Review into the Australian Taxation Office's Change Program* (2011) p 63; IGTO, *Review into the Taxpayers' Charter and Taxpayer Protections* (2016) chapter 4; IGTO, *The Future of the Tax Profession* (2018) p 62.

¹⁷⁹ See for example: Tom McIlroy, 'Accountants demand compo for ATO outages,' *Australian Financial Review* (online) 16 July 2019.

¹⁸⁰ Department of Finance, *Resource Management Guide 409: Scheme for Compensation for Detriment caused by Defective Administration* (May 2017).

¹⁸¹ Department of Finance, *Resource Management Guide 409: Scheme for Compensation for Detriment caused by Defective Administration* (May 2017) p 15.

- F.5. While the IGTO is able to assist taxpayers with information and general advice, as well as to provide an independent review of ATO decisions to provide assurance that all relevant information has been appropriately considered and taxpayers have been afforded sufficient opportunity to provide input, there are limits on how far the IGTO can go.
- F.6. There is currently a review by the Department of Finance, led by Mr Robert Cornall, focusing on the in relation to the Australian Taxation Office (ATO) and small businesses¹⁸² and, as such, the IGTO does not consider that it would be prudent make further commentary on the CDDA Scheme until that review is publicly released.

Empowering the IGTO to award compensation outside of the CDDA Scheme

- F.7. Separate to the CDDA Scheme, there would be benefit in the Committee considering the merits of empowering the IGTO to award compensation or reimbursement of taxpayers' reasonable costs in certain circumstances.
- F.8. Such an approach would not be novel and already exists in a number of complaints investigation regimes, both within the public and private sectors¹⁸³. A good analogue at the Federal public service level can be found within the *Privacy Act 1988* which empowers the Australian Information Commissioner (Information Commissioner) to make determinations that the complainant is entitled to a specified amount of compensation for loss or damage, as well as reasonable costs incurred in the making of the complaint.¹⁸⁴ Determinations of the Information Commissioner are binding on Commonwealth agencies and where the determination includes an amount of compensation or reimbursement of expenses, those amounts are recoverable by the complainant as a debt due by the agency or the Commonwealth.¹⁸⁵ While the *Privacy Act 1988* does not set a limit, a review of the Information Commissioner's published decisions show that compensation of up to \$20,000 has been awarded.¹⁸⁶
- F.9. While the IGTO does not foresee that compensation or reimbursement of costs would be awarded as a regular feature of our complaints handling service, we have come across some issues in which the exercise of such a power would have been appropriate.

¹⁸² Department of Finance, 'Review of the CDDA Scheme in relation to the Australian Taxation Office and Small Business' (22 March 2019) <www.finance.gov.au>.

¹⁸³ Telecommunications Industry Ombudsman, *Consumer guide to compensation for financial loss* (undated).

¹⁸⁴ *Privacy Act 1988*, ss 51(1)(b)(iii), 52(1A)(d) and 52(3).

¹⁸⁵ *Privacy Act 1988*, s 60.

¹⁸⁶ OAIC, 'Privacy Determinations', <www.oaic.gov.au>.

EXAMPLE

The ATO issued a taxpayer with an assessment following completion of an audit. The taxpayer believed that the ATO did not consider all relevant information she submitted to them. She lodged an objection, which was ultimately unsuccessful.

The taxpayer lodged a complaint with the IGTO. Following an investigation, the IGTO formed the view that the ATO had not considered all relevant information and recommended that the ATO do so. The ATO agreed to consider the information, but ultimately did not change its view on the assessment.

The taxpayer challenged her assessment in the Administrative Appeals Tribunal (AAT) and the ATO defended the AAT proceedings. But before the matter proceeded to hearing before a Member of the AAT, the ATO conceded that its assessment was excessive based on a review of the information the taxpayer had previously provided. The ATO agreed to make the relevant amendments. While the taxpayer ultimately achieved the outcome she was seeking, she had incurred expenses that were not recoverable by her as the AAT is a 'no cost' jurisdiction.

- F.10. In the above example, a suggestion may be made for the taxpayer to seek compensation or reimbursement by way of the CDDA Scheme. However, the ATO would be well within its rights to argue that it was open to the auditors and objection officers to consider and reach a different view to the taxpayer on the evidence she had submitted. Furthermore, that in defending the actions in the AAT, the ATO arguably did not act contrary to any law or in a manner so unreasonable as to give rise to compensation.
- F.11. An express power for the IGTO to consider and make determinations on compensation and/or reimbursement of reasonable costs in circumstances where existing compensation schemes, such as the CDDA Scheme, would not or could not be invoked by the taxpayer would be beneficial.
- F.12. In considering whether there would be merit in creating such a power, the Committee may also wish to consider the conditions or circumstances of that power being exercised including:
- when compensation or reimbursement may be payable and the types of compensable loss (e.g., economic and/or economic);
 - the standard of proof required from the taxpayer seeking compensation or reimbursement;
 - monetary limits for compensation;
 - rights of submissions and hearing from all parties involved; and
 - rights of external review and appeal, where necessary.

RECOMMENDATION

The IGTO recommends that the Committee consider whether the IGTO should be empowered, following an investigation, to make a determination requiring the ATO or the TPB to pay the complainant an amount of compensation or reimbursement of reasonable costs.

IGTO'S ROLE IN CONSULTATIONS ON THE TAX LAW DESIGN PROCESS

- F.13. The IGTO has power to make recommendations to the Minister after completing an investigation on how the taxation law might be improved¹⁸⁷. There is no express function for the IGTO to advise or suggest improvements to the law in the tax law design phase.
- F.14. There would be merit in consulting with the IGTO on the expected or likely impacts that the administration of proposed new tax laws would have on taxpayers, the ATO and the tax system overall – given the unique role of the IGTO in the tax administration system.
- At present, while the IGTO is made aware of certain consultations in relation to new tax measures, the IGTO is not specifically consulted to provide input on how the proposed laws would be administered by the ATO and any impacts this may have on taxpayers or other stakeholders within the tax system.
 - The IGTO may be requested by Parliamentary Committees to advise or provide submission on proposed new laws and their administration – refer for example, the IGTO's submission to the Senate Economics Legislation Committee on the Disclosure of Business Tax Debts.
 - While the IGTO is aware of exposure drafts released by the Department of Treasury and legislation which is referred to Senate Committees for inquiry, it is not presently possible, having regard to the IGTO's resources and legislative functions, to lodge submissions in respect of the administration of new tax measures (except on an ad hoc basis and as requested).
- F.15. The IGTO submits that there is merit in consulting the IGTO as part of the tax law design process. The IGTO could be consulted on new tax measures and specifically invited to comment on areas of the tax administration (from the community's perspective) — if any — that may need to be considered in the tax law design process.
- F.16. IGTO resources would need to be increased to allow for the creation of a dedicated team to monitor and respond to new tax measures from the perspective of good tax administration.
- F.17. The IGTO considers that this suggestion and process would not be novel. There are existing consultation processes involving the Department of Treasury, the ATO and external stakeholders

¹⁸⁷ Refer to section 18 of the *IGT Act 2003*.

during the tax law design process. The IGTO believes that its contribution would enable tax law designers to consider potential tax administration risks or impacts on taxpayers before enactment which would reduce the risk of adverse impacts.

RECOMMENDATION

The IGTO recommends that the Committee consider whether:

- a. the IGTO should be consulted on tax administration risks (on behalf of the community) of new tax laws as they are designed;
- b. the IGTO is sufficiently resourced to monitor and respond to any new tax administration measures by way of submissions; and
- c. there would be benefits in the IGTO being formally consulted during the tax law design process to advise (for example, the Parliament of Parliamentary Committees on the administration of those proposed measures and any potential for adverse impacts on taxpayers.

APPENDIX A – RESOURCING & FUNDING

Currently, the IGTO maintains one office in Sydney. The IGTO's historical annual appropriations and staffing levels as at 30 June are presented in Table 17 below.

TABLE 17 – APPROPRIATIONS AND RESOURCING

FINANCIAL YEAR	DEPARTMENTAL APPROPRIATION	NO. OF EMPLOYEES (AS AT 30 JUNE), INCL IGTO
2019-20	6.455*	N/A
2018-19	6.451	32
2017-18	6.475	29
2016-17	6.565	27
2015-16	6.503	24
2014-15	2.788	8
2013-14	2.626	9
2012-13	2.622	9
2011-12	2.686	7
2010-11	2.134	7
2009-10	2.179	7
2008-09	2.167	7
2007-08	2.178	7
2006-07	2.170	7
2005-06	2.149	7
2004-05	2.178	6
2003-04	2.012	7

Source: IGTO Annual Reports

APPENDIX B – LIST OF IGTO REVIEW REPORTS AND ORIGIN AS AT 30 JUNE 2019

All reviews were commenced on the IGTO's own initiative unless shaded:

KEY			
41	IGTO Own Initiated Reviews	3	Ministerial requests
3	Commissioner of Taxation requests	2	Parliamentary or Committee requests

TITLE OF REVIEW	DATE OF REPORT
The Future of the Tax Profession	3 April 2019
Review into the ATO's use of Garnishee Notices	13 March 2019
Review into the ATO's Fraud Control Management	22 October 2018
GST Refunds	16 August 2018
Review into Aspects of the Pay As You Go Instalments System	23 January 2018
Review into the ATO's employer obligations compliance activities	24 May 2017
Review into the Taxpayers' Charter and taxpayer protections	12 December 2016
The Australian Taxation Office's services and support for tax practitioners	20 July 2015
Debt collection	14 July 2015
The management of tax disputes	27 February 2015
Review into the ATO's administration of valuation matters	19 January 2015
Follow up review into the Australian Taxation Office's implementation of agreed recommendations in five reports released between August 2009 and November 2010	14 November 2014
Follow up review into delayed or changed Australian Taxation Office views on significant issues	14 November 2014
Review into the ATO's administration of penalties	8 July 2014
Review into the Australian Taxation Office's management of transfer pricing matters	2 June 2014
Review into the Australian Taxation Office's compliance approach to individual taxpayers – superannuation excess contributions tax	13 May 2014
Review into the Australian Taxation Office's compliance approach to individual taxpayers – income tax refund integrity program	21 February 2014
Review into the Australian Taxation Office's compliance approach to individual taxpayers – use of data matching	21 February 2014
Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools	21 February 2014
Review into improving the self assessment system	13 February 2013

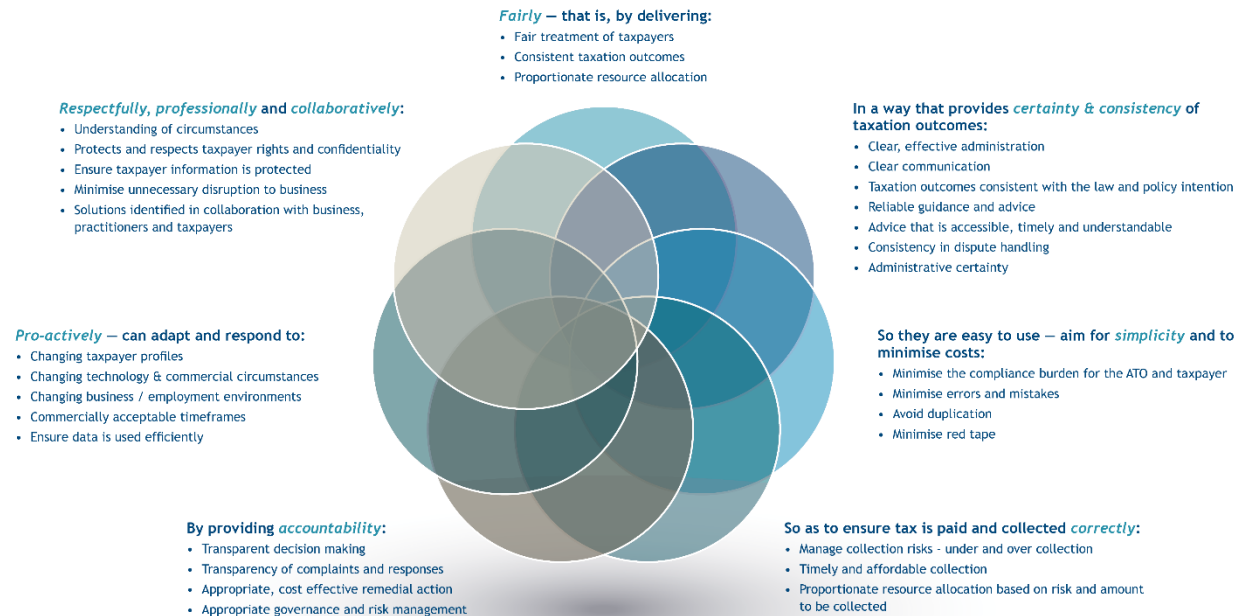
TITLE OF REVIEW	DATE OF REPORT
Review into the Australian Taxation Office's use of early and alternative dispute resolution	31 July 2012
Review into the ATO's compliance approaches to small and medium enterprises with annual turnovers between \$100 million and \$250 million and high wealth individuals	24 April 2012
Review into the Australian Taxation Office's use of benchmarking to target the cash economy	4 April 2012
Review into the Australian Taxation Office's administration of class rulings	14 March 2012
Report into the Australian Taxation Office's large business risk review and audit policies, procedures and practices	7 September 2011
Review into the ATO's change program	5 May 2011
Follow up review into the Australian Taxation Office's implementation of agreed recommendations included in the six reports prepared by the Inspector-General of Taxation between June 2006 and October 2008	21 March 2011
Review into the ATO's administration of the Superannuation Guarantee charge	24 November 2010
Review of aspects of the Australian Taxation Office's administration of private binding rulings	24 November 2010
Review into delayed or changed Australian Taxation Office views on significant issues	17 March 2010
Review into aspects of the Tax Office's settlement of active compliance activities	1 December 2009
Review into the non-lodgement of individual income tax returns	16 October 2009
Review into the underlying causes and the management of objections to Tax Office decisions	11 August 2009
Review into the Tax Office's administration of public binding advice	7 August 2009
Report on improvements to tax administration arising from the Inspector-General's case study reviews of the Tax Office's management of major, complex issues	29 October 2008
Review of the Tax Office's administration of GST audits for large taxpayers	11 June 2008
Follow up review into the Tax Office's implementation of agreed recommendations included in the six reports prepared by the Inspector General of Taxation between August 2003 and June 2006	5 March 2008
Review of the potential revenue bias in private binding rulings involving large complex matters	25 February 2008
Review of Tax Office management of complex issues — Case study on research and development syndicates	16 August 2007
Review of Tax Office management of complex issues — Case study on living-away-from-home allowances	10 May 2007
Review of Tax Office management of complex issues — Case study on service entity arrangements	24 April 2007
Review of Tax Office management of Part IVC litigation	7 August 2006
Review into Tax Office audit timeframes	28 September 2005

TITLE OF REVIEW	DATE OF REPORT
Review into the Tax Office's administration of penalties and interest arising from active compliance activities	28 September 2005
Review into the Tax Office's small business debt collection practices – Summary of submissions and evidence	24 May 2005
Review of Tax Office administration of GST refunds resulting from the lodgement of credit BASs	24 May 2005
Review into the Tax Office's small business debt collection practices	24 May 2005
Review of the remission of the general interest charge for groups of taxpayers in dispute with the Tax Office	18 November 2004
Report identifying of the main systemic tax administration issues and concerns facing taxpayers	9 February 2004

APPENDIX C – DRAFT FRAMEWORK OF THE COMMUNITY’S EXPECTATIONS OF GOOD TAX ADMINISTRATION

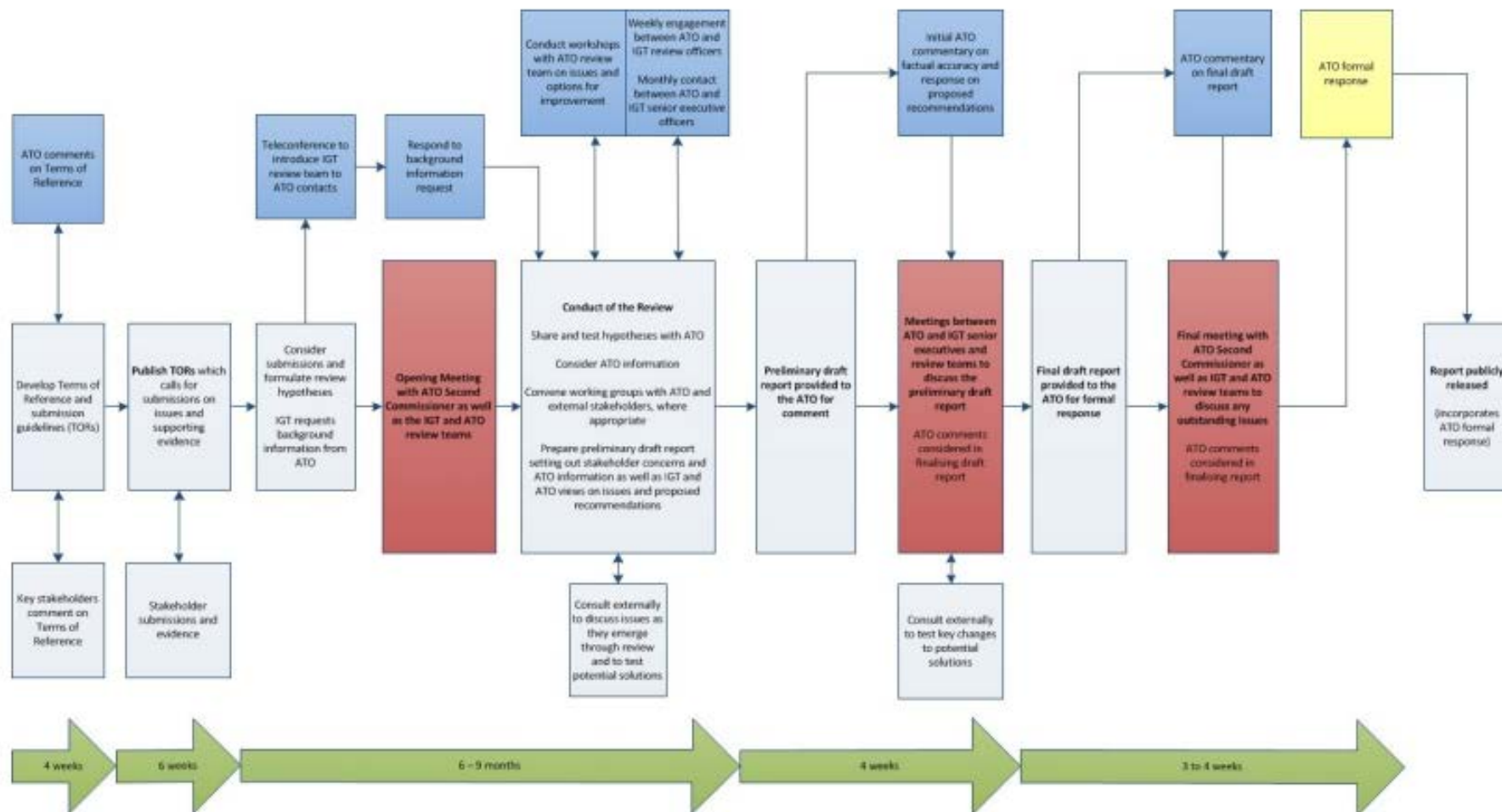
Features of good tax administration

The community expects the tax administration laws to be administered:



APPENDIX D – IGT REVIEW PROCESS AND ENGAGEMENT WITH THE ATO

Figure 8 - Extract from the IGTO submission to the House of Representatives Standing Committee on Tax and Revenue



APPENDIX E – TAXATION ADMINISTRATION LAWS FOR IGTO OVERSIGHT

The IGTO may investigate administrative actions under the following taxation laws and their associated regulations, which confer powers or functions on the Commissioner.

- *A New Tax System (Australian Business Number) Act 1999*
- *A New Tax System (Goods and Services Tax) Act 1999*
- *A New Tax System (Luxury Car Tax) Act 1999*
- *A New Tax System (Wine Equalisation Tax) Act 1999*
- *Commonwealth Places Windfall Tax (Collection) Act 1998*
- *Excise Act 1901*
- *Excise Tariff Act 1921*
- *Foreign Acquisitions and Takeovers Act 1975*
- *Fringe Benefits Tax Assessment Act 1986*
- *Fuel Tax Act 2006*
- *Higher Education Support Act 2003*
- *Income Tax Assessment Act 1936*
- *Income Tax Assessment Act 1997*
- *International Tax Agreements Act 1953*
- *Petroleum Excise (Prices) Act 1987*
- *Petroleum Resource Rent Tax Assessment Act 1987*
- *Product Grants and Benefits Administration Act 2000*
- *Product Stewardship (Oil) Act 2000*
- *Register of Foreign Ownership of Water or Agricultural Land Act 2015*
- *Small Superannuation Accounts Act 1995*
- *Superannuation Contributions Tax (Assessment and Collection) Act 1997*
- *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997*
- *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*

- *Superannuation Guarantee (Administration) Act 1992*
- *Superannuation Industry (Supervision) Act 1993*
- *Superannuation (Self-managed Superannuation Funds) Taxation Act 1987*
- *Superannuation (Unclaimed Money and Lost Members) Act 1999*
- *Taxation Administration Act 1953*
- *Taxation (Interest on Overpayments and Early Payments) Act 1983*
- *Trust Recoupment Tax Assessment Act 1985*

The IGTO may also investigate administrative actions of the TPB under the *Tax Agent Services Act 2009* and regulations made under that Act.

APPENDIX F – RELEVANT EXTRACTS FROM THE PID ACT 2013

The following is an extract from the PID Act 2013 in relation to the protections made available to public servants disclosing information.

10 - Protection of disclosers

(1) If an individual makes a public interest disclosure:

(a) the individual is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the public interest disclosure; and

(b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the individual on the basis of the public interest disclosure.

(2) Without limiting subsection (1):

(a) the individual has absolute privilege in proceedings for defamation in respect of the public interest disclosure; and

(b) a contract to which the individual is a party must not be terminated on the basis that the public interest disclosure constitutes a breach of the contract.

11 - Liability for false or misleading statements etc. unaffected

(1) Section 10 does not apply to civil, criminal or administrative liability (including disciplinary action) for knowingly making a statement that is false or misleading.

(2) Without limiting subsection (1) of this section, section 10 does not apply to liability for an offence against section 137.1, 137.2, 144.1 or 145.1 of the Criminal Code.

12 - Protection from reprisals

*(1) A person (the **first person**) takes a reprisal against another person (the **second person**) if:*

(a) the first person causes (by act or omission) any detriment to the second person; and

(b) when the act or omission occurs, the first person believes or suspects that the second person or any other person made, may have made or proposes to make a public interest disclosure; and

(c) that belief or suspicion is the reason, or part of the reason, for the act or omission.

*(2) **Detriment** includes any disadvantage, including (without limitation) any of the following:*

- (a) dismissal of an employee;*
 - (b) injury of an employee in his or her employment;*
 - (c) alteration of an employee's position to his or her detriment;*
 - (d) discrimination between an employee and other employees of the same employer.*
- (3) Despite subsection (1), a person does not take a reprisal against another person to the extent that the person takes administrative action that is reasonable to protect the other person from detriment.*

14 - Compensation

- (1) If the Federal Court or Federal Circuit Court is satisfied, on the application of a person (the **applicant**), that another person (the **respondent**) took or threatened to take, or is taking or threatening to take, a reprisal against the applicant, the Court may:*
- (a) in any case—make an order requiring the respondent to compensate the applicant for loss, damage or injury as a result of the reprisal or threat; or*
 - (b) if the Court is satisfied that the respondent took or threatened to take, or is taking or threatening to take, the reprisal in connection with the respondent's position as an employee:*
 - (i) make an order requiring the respondent to compensate the applicant for a part of loss, damage or injury as a result of the reprisal or threat, and make another order requiring the respondent's employer to compensate the applicant for a part of loss, damage or injury as a result of the reprisal or threat; or*
 - (ii) make an order requiring the respondent and the respondent's employer jointly to compensate the applicant for loss, damage or injury as a result of the reprisal or threat; or*
 - (iii) make an order requiring the respondent's employer to compensate the applicant for loss, damage or injury as a result of the reprisal or threat.*
- (2) The Federal Court or Federal Circuit Court must not make an order under paragraph (1)(b) if the respondent's employer establishes that it took reasonable precautions, and exercised due diligence, to avoid the reprisal or threat.*
- (3) If the Federal Court or Federal Circuit Court makes an order under subparagraph (1)(b)(ii), the respondent and the respondent's employer are jointly and severally liable to pay the compensation concerned.*

APPENDIX G – OVERVIEW OF THE MOSS REVIEW OF THE PID ACT 2013

The following is an extract from the Independent Statutory Review of the *Public Interest Disclosure Act 2013* which was conducted by Mr Phillip Moss AM (15 July 2016)

Terms of reference

The Government has requested Mr Philip Moss AM review and report on the effectiveness and operation of the *Public Interest Disclosure Act 2013*.

This Review will give effect to section 82A of the Public Interest Disclosure Act which requires a review of the operation of the Act to be undertaken two years after it has commenced. This Review is an opportunity to gather information and views on whether the Act is operating as intended and whether it could be improved.

The Review should consider:

1. the impact of the Act on individuals seeking to make disclosures in accordance with its provisions;
2. the impact of the Act on agencies, including any administrative burdens imposed by investigation and reporting obligations in the Act;
3. the breadth of disclosable conduct covered by the Act, including whether disclosures about personal employment-related grievances should receive protection under the Act; and
4. the interaction between the Act and other procedures for investigating wrongdoing, including Code of Conduct procedures under the *Public Service Act 1999* and the Commonwealth's fraud control framework.

The Review should be informed by public submissions.

The Review report must be provided to the Minister Assisting the Prime Minister for the Public Service by 15 July 2016.

LIST OF RECOMMENDATIONS

PART 1: STRONGER OVERSIGHT

Recommendation 1. That the PID Act be reviewed every three to five years to enable its operation to be assessed and regard to be given to new research and developments in similar state and territory legislation.

Recommendation 2. That the Australian Public Service Commissioner, the Merit Protection Commissioner, the Integrity Commissioner, the Parliamentary Services Commissioner, the Parliamentary Services Merit Protection Commissioner, and the Inspector-General of Taxation be prescribed as investigative agencies to simplify the PID Act's interaction with other investigative and complaint schemes and to strengthen the investigative capacity under the PID Act.

Recommendation 3. That the PID Act be amended to require a Principal Officer to provide the Commonwealth Ombudsman or the IGIS with a copy of the investigation report within a reasonable period of time.

Recommendation 4. That the Commonwealth Ombudsman share information about the handling of or response to a PID with relevant investigative agencies.

PART 2: A STRONGER FOCUS ON SIGNIFICANT WRONGDOING

Recommendation 5. That the definition of 'disclosable conduct' in the PID Act be amended to exclude conduct solely related to personal employment-related grievances, unless the Authorised Officer considers that it relates to systemic wrongdoing. Other existing legislative frameworks are better adapted to dealing with and resolving personal employment-related grievances.

Recommendation 6. If Recommendation 5 is adopted, that the PID Act be amended to include reprisal within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.

Recommendation 7. That disclosable conduct which constitutes 'disciplinary action' be amended to include only conduct which the Authorised Officer considers would, if proven, be reasonable grounds for termination or dismissal.

Recommendation 8. That the external and emergency disclosure provisions be considered in a future review of the PID Act, when further evidence about how they are being used is available.

Recommendation 9. That the PID Act be amended to include situations when an Authorised Officer failed to allocate an internal PID, or a supervisor failed to report information they received about disclosable conduct to an Authorised Officer, as grounds for external disclosure.

PART 3: SIMPLER LEGISLATIVE PROCEDURES

Recommendation 10. That the procedural requirements of the PID Act be amended in order to adopt a principles-based approach to regulation.

Recommendation 11. That the effectiveness of the principles-based approach to regulation be evaluated periodically to assess the experience of individuals, agencies and investigative agencies.

Recommendation 12. That the PID Act be amended to include statutory recognition of guidance material provided by the Commonwealth Ombudsman, similar to the recognition of guidance material in section 93A of the *Freedom of Information Act 1982*.

Recommendation 13. That the Commonwealth Ombudsman and the IGIS be appropriately resourced to enable them to monitor and scrutinise compliance with the PID Act by agencies within their remit.

PART 4: BALANCE BETWEEN TRANSPARENCY, CONFIDENTIALITY AND PROCEDURAL FAIRNESS

Recommendation 14. That the PID Act be amended to include a discretion for the Principal Officer or Authorised Officers of an agency to allocate a PID, or delegate a PID investigation, to the agency's portfolio department with the consent of that department.

Recommendation 15. That the PID Act be amended to recognise the Principal Officer's obligation to provide procedural fairness to a person against whom wrongdoing is alleged before making adverse findings about that person.

Recommendation 16. That the secrecy offences relating to the use or disclosure of information about a PID (protected information) be repealed as these offences unnecessarily limit agencies' ability to respond to alleged wrongdoing.

Recommendation 17. If Recommendation 16 is accepted, that the PID Act be amended to clarify that existing secrecy offences, such as those in the *Crimes Act 1914*, the *Australian Security and Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*, continue to apply to the disclosure or use of information, unless it is a public interest disclosure under section 26 of the PID Act, for the purposes of the PID Act, or to perform a function or exercise a power of the PID Act.

Recommendation 18. That the PID Act be amended to simplify the offence about use or disclosure of identifying information by including within its exemptions: explicit reference to the protections for good faith actions or omissions by a public official exercising powers or performing functions under the PID Act (as in section 78); lawyers or other trusted professionals who disclose the information to provide professional advice or assistance to a discloser or potential discloser (as in section 67); and other existing exemptions.

Recommendation 19. That the PID Act be amended to recognise implied consent as an exemption to the secrecy offence relating to identifying information.

PART 5: MAKE IT EASIER FOR PEOPLE TO GET ADVICE AND HELP

Recommendation 20. That the PID Act be amended to include a positive obligation upon a Principal Officer to support disclosers and witnesses involved in the PID process, in the same way they already have an obligation to protect disclosers from detriment.

Recommendation 21. That the obligation on public officials to assist a Principal Officer in conducting a PID investigation should be broadened to include assisting an agency or public official to perform a function or role under the PID Act.

Recommendation 22. That the PID Act be amended to include a positive obligation on Principal Officers to provide ongoing training and education to public officials who belong to their agency about integrity and accountability, incorporating the PID Act's protections and mechanisms to report concerns. This training should become more rigorous as a public official takes on supervisory role or is promoted.

Recommendation 23. That the PID Act be amended to include an obligation for supervisors who receive information from a public official about disclosable conduct to explain their existing obligation to report that information to an Authorised Officer.

Recommendation 24. That the PID Act be amended to permit disclosures of security classified information (other than intelligence information) to a lawyer for the purpose of seeking legal advice about a public interest disclosure, without requiring the lawyer to hold the requisite security clearance.

Recommendation 25. That the PID Act be amended to protect disclosures for the purpose of seeking professional advice about using the PID Act.

PART 6: CLARIFY THE COVERAGE OF THE LEGISLATION

Recommendation 26. That the PID Act be amended to clarify that its provisions do not apply to reports about alleged wrongdoing by Senators, Members and their staff, or allegations made by them.

Recommendation 27. That consideration be given to extending the application of the PID Act to members of Parliament or their staff if an independent body with the power to scrutinise their conduct is created.

Recommendation 28. That a witness receives the same protections from reprisal, civil, criminal and administrative liability as a discloser. These protections should not affect a witness' liability for their own conduct and should apply regardless of whether the formal investigation of a PID had commenced when the witness provided information.

Recommendation 29. That the definition of 'agency' in the PID Act be replaced with the *Public Governance, Performance and Accountability Act 2013* term 'entity' while retaining treatment of intelligence and security agencies as entities separate from their portfolio department.

Recommendation 30. That the definition of 'contracted service provider' be amended to ensure that grant recipients are not subject to the PID Act.

PART 7: SIMPLER INTERACTIONS WITH OTHER INVESTIGATORY REGIMES

Recommendation 31. That the PID Act be amended to provide a discretion not to investigate disclosable conduct under that legislation if it would be more appropriately investigated under another legislative or administrative regime.

Recommendation 32. If Recommendations 5 and 31 are adopted, that section 53(5) of the PID Act be repealed since it will be redundant.

Recommendation 33. That section 56(2) of the PID Act be amended to exclude from the mandatory obligation to notify police of evidence of an offence punishable by at least 2 years situations when the conduct relates to a corruption issue which has been notified to the Integrity Commissioner under section 19 of the *Law Enforcement Integrity Commissioner Act 2006*.

RECOMMENDATIONS IN SUMMARY

- a. To strengthen the **Commonwealth Ombudsman’ and the IGIS’ ability to scrutinise and monitor decisions of agencies about PIDs** by strengthening the transparency of agency decision-making. The Commonwealth Ombudsman could then share this information with any relevant investigative agency to scrutinise and monitor the handling of PIDs within their remit and to inform their use of their own investigative or review powers. This role would require additional resourcing.
- b. To create **more investigative agencies under the PID Act**, including the Australian Public Service Commissioner and the Merit Protection Commissioner (as well as their roles in relation to the parliamentary departments), the Inspector-General of Taxation, and the Integrity Commissioner.
- c. To strengthen the PID Act’s **focus on significant wrongdoing** like fraud, serious misconduct, and corrupt conduct in order to achieve the integrity and accountability aims. To this purpose, personal employment-related grievances would be excluded from the PID Act, unless they relate to systemic issues or reprisal, and ‘disciplinary conduct’ would be defined as termination or dismissal. Such issues are better investigated or resolved through other existing dispute resolution processes.
- d. To include in the **grounds for external disclosure** situations where an Authorised Officer has failed to allocate a disclosure, or a supervisor has failed to report information received from a public official about disclosable conduct to an Authorised Officer.
- e. To redraft procedural aspects of the PID Act using a **‘principles-based’ approach**. The PID Act has prescriptive procedural requirements which undermine the development of a ‘pro-disclosure’ culture. Reducing prescriptive compliance can help foster culture change and strengthen the consistency and fairness of decisions. The Commonwealth Ombudsman and the IGIS, with their enforceable powers, then can lead conversations with agency decision-makers about continuous improvement and the policy intent of the PID Act.
- f. To insert an explicit requirement for **procedural fairness**.
- g. Secrecy obligations not to use or disclose **identifying information** remain criminal offences. Offences not to use or disclose **protected information** would be repealed.
- h. Retain the current **definition and treatment of intelligence information**. The Review concludes that the IGIS’s oversight role is sufficient to ensure the integrity and accountability of the intelligence and security agencies.
- i. To **provide better support for disclosers, or potential disclosers, by enabling them to get help and advice** from lawyers, and other professional support services such as unions, Employee Assistance Programmes, and professional associations, as well as include a proactive obligation on

Principal Officers and any public official with a supervisory role to support disclosers and other public officials within their agency in performing a function or role under the PID Act.

- j. To **provide witnesses with the same protections as disclosers** from detriment, civil, criminal and administrative liability.

APPENDIX H - CONFIDENTIALITY AND SECRECY PROVISIONS

Unlike privacy laws, taxation confidentiality provisions protect information about all taxpayers, whether they are individuals or other kinds of taxpayer entities, such as:

- a body corporate
- a body politic
- a partnership
- any other unincorporated association or body of persons
- a trust
- a superannuation fund
- an approved deposit fund.

Protected information is defined to mean information disclosed or obtained under or for the purposes of a taxation law (other than the *Tax Agent Services Act 2009*), which relates to the affairs of an entity (including but not limited to the entity's tax affairs), and which identifies, or is reasonably capable of being used to identify, that entity.

THE *TAXATION ADMINISTRATION ACT 1953*

The following extracts from the *Taxation Administration Act 1953* (TAA 1953) relate to taxpayer secrecy and confidentiality.

355-1 What this Division is about

The disclosure of information about the tax affairs of a particular entity is prohibited, except in certain specified circumstances.

Those exceptions are designed having regard to the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity's privacy.

SECTION 355-25 OFFENCE — DISCLOSURE OF PROTECTED INFORMATION BY TAXATION OFFICERS

355-25(1) An entity commits an offence if:

*(a) the entity is or was a *taxation officer; and*

(b) the entity:

(i) makes a record of information; or

(ii) discloses information to another entity (other than the entity to whom the information relates or an entity covered by subsection (2)) or to a court or tribunal; and

*(c) the information is *protected information; and*

(d) the information was acquired by the first-mentioned entity as a taxation officer.

Penalty: Imprisonment for 2 years.

*355-25(2) An entity (the covered entity) is covered by this subsection in relation to *protected information that relates to another entity (the primary entity) if:*

*(a) the covered entity is the primary entity's *registered tax agent or BAS agent; or*

*(b) the covered entity is a *legal practitioner representing the primary entity in relation to the primary entity's affairs relating to one or more *taxation laws; or*

(ba) the covered entity is a public officer (within the meaning of section 252 or 252A of the Income Tax Assessment Act 1936) of the primary entity; or

*(c) the primary entity is an *incapacitated entity and the covered entity is a *representative of the incapacitated entity; or*

*(d) the covered entity is the primary entity's *legal personal representative; or*

(e) the covered entity is the primary entity's guardian where the primary entity is a minor or suffers from mental incapacity; or

*(f) the covered entity and the primary entity are members of the same *consolidated group or *MEC group; or*

*(g) the covered entity is a representative of the primary entity who has been nominated by the primary entity in the *approved form to act on that entity's behalf with respect to protected information.*

SECTION 355-30 MEANING OF PROTECTED INFORMATION AND TAXATION OFFICER

355-30(1) Protected information means information that:

*(a) was disclosed or obtained under or for the purposes of a law that was a *taxation law (other than the Tax Agent Services Act 2009) when the information was disclosed or obtained; and*

(b) relates to the affairs of an entity; and

(c) identifies, or is reasonably capable of being used to identify, the entity.

Note: Tax file numbers do not constitute protected information because they are not, by themselves, reasonably capable of being used to identify an entity. For offences relating to tax file numbers, see Subdivision BA of Division 2 of Part III.

355-30(2) Taxation officer means:

*(a) the Commissioner or a *Second Commissioner; or*

(b) an individual appointed or engaged under the Public Service Act 1999 and performing duties in the Australian Taxation Office.

Note: This Division applies to certain other entities as if they were taxation officers: see section 355-15.

The disclosure of protected information by taxation officers is an offence except as authorized under Subdivision 355-B.

THE *TAX AGENT SERVICES ACT 2009* — CODE OF PROFESSIONAL CONDUCT

The following extracts from the *Tax Agent Service Act 2009* relate to tax agent duties of confidentiality as part of their professional conduct requirements.

Section 30-10 The Code of Professional Conduct

Honesty and integrity

1 - You must act honestly and with integrity

Independence

4 - You must act lawfully in the best interests of your client

Confidentiality

6 - Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

PRIVACY ACT 1988

A taxpayers' right to privacy is set out in the following key pieces of legislation:

- The *Privacy Act 1988*, which contains provisions designed to safeguard personal information about living individuals. The *Privacy Act 1988* requires agencies to comply with the APPs set out in that Act.
- the Australian Government Agencies Privacy Code, which requires agencies to put in place practices, procedures and systems to ensure agencies comply with the APPs and the *Privacy Act 1988*

OFFICE OF THE AUSTRALIAN INFORMATION COMMISSIONER

Under the *Privacy Act 1988*, the Australian Information Commissioner has a number of monitoring, advice and assessment related functions regarding the handling of TFNs.¹⁸⁸

Privacy (Tax File Number) Rule 2015 (TFN Rule 2015)

The *Privacy (Tax File Number) Rule 2015* (TFN Rule 2015) issued under s 17 of the *Privacy Act 1988* regulates the collection, storage, use, disclosure, security and disposal of **individuals'** TFN information. The TFN Rule 2015 only applies to the TFN information of **individuals** and does not apply to TFN information about other legal entities such as corporations, partnerships, superannuation funds and trusts.

The TFN Rule 2015 is legally binding. A breach of the TFN Rule 2015 is an interference with privacy under the *Privacy Act 1988*. Individuals who consider that their TFN information has been mishandled may make a complaint to the OAIC.

Taxation legislation

The obligations relating to the handling of TFNs under the TFN Rule 2015 are in addition to responsibilities under other laws, including:

- the APPs,
- the TAA 1953, including offences for the unauthorised use, disclosure, collection, or requests for TFNs,
- Part VA of the *Income Tax Assessment Act 1936*, which contains provisions related to the handling of TFNs,
- Part 25A of the *Superannuation Industry (Supervision) Act 1993* and Part 11 of the *Retirement Savings Accounts Act 1997*, which provide for the collection of TFNs by the trustees of superannuation funds and retirement savings account providers,
- the *Data-matching Program (Assistance and Tax) Act 1990* which provides for, and regulates, the matching of records between the ATO and assistance agencies (ie DHS, DSS, DET and DVA) that use the TFN in a data-matching process, and
- The *IGT Act 2003* Division 2 – Powers relating to TFN. The division entrusts and empowers IGTO staff to request and receive TFN details from complainants and to provide and receive the same from the ATO for the purpose of individual complaint investigations.

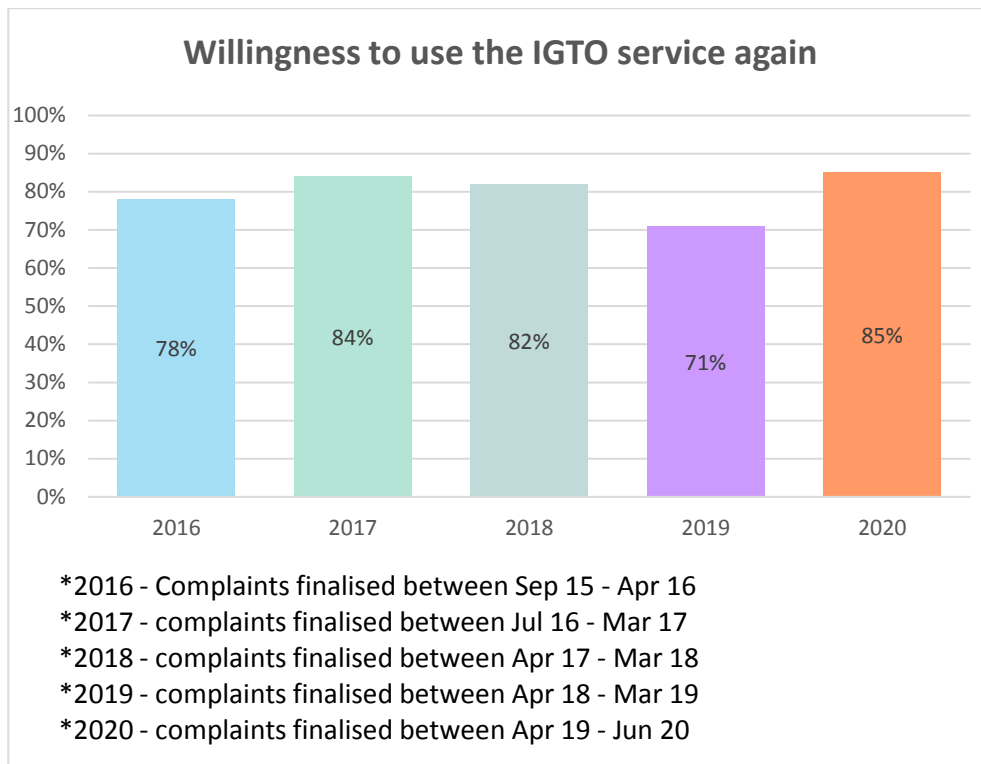
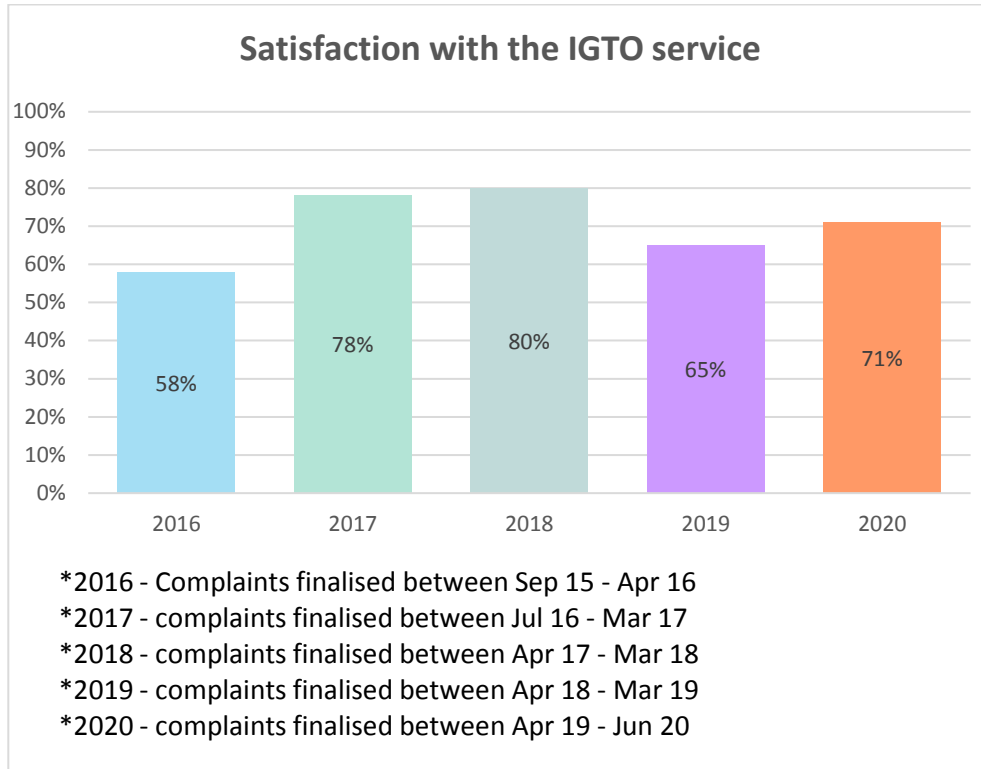
¹⁸⁸ Tax file numbers are unique numbers issued by the Australian Taxation Office (ATO) to identify individuals, corporations and others who lodge income tax returns with the ATO. While individuals can't be required to provide their TFN, there may be consequences if they don't. For example, if individuals don't quote their TFN to employers and financial institutions then they may have tax deducted from their income or interest payments at the highest marginal rate. Quotation of TFNs is also a condition of receipt of most Australian Government assistance payments.

APPENDIX I – OPERATIONAL GUIDELINES

The IGTO-ATO operational guidelines for reviews and complaints handling are currently not publicly available. We are in discussions with the ATO to obtain their agreement to make these guidelines available on our website. In the interim, we will provide a copy of the operational guidelines in a separate confidential submission to the Committee.

APPENDIX J – EXTERNAL FEEDBACK SURVEY RESULTS

Where an investigation was required to resolve the complaint



APPENDIX K – 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>

Abbreviation	Defined term
	<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>
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"> ▪ an individual ▪ a body corporate ▪ a body politic ▪ a partnership ▪ any other unincorporated association or body of persons ▪ a trust ▪ a superannuation fund
FOI	Freedom of Information
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

Abbreviation	Defined term
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 <i>IGT Act 2003</i> to mean:</p> <ul style="list-style-type: none"> (a) an ATO official; or (b) a Board member of the Tax Practitioners Board; or (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

Abbreviation	Defined term
	<p>(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</p> <p>(e) a person who:</p> <p>(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</p> <p>(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.</p> <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
TFN	Tax File Number
TIO	Telecommunications Industry Ombudsman
TPB	Tax Practitioners Board
Whistleblower complaints	<p>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>.</p>