



Australian Government
Inspector-General of Taxation

Review into the Taxpayers' Charter and Taxpayer Protections

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December 2016



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EXECUTIVE SUMMARY

The Inspector-General of Taxation's (IGT) review into the *Taxpayers' Charter* (Charter) and taxpayer protections was undertaken to examine concerns raised in relation to the Australian Taxation Office's (ATO) adherence to the Charter, its currency and effectiveness. Specifically, stakeholders consider that there are limited avenues for enforcement of the Charter principles, diminishing its effectiveness in affording protection to taxpayers.

As part of the review, the IGT compared the Australian approach with those partner jurisdictions, such as the United States of America, the United Kingdom, Canada and New Zealand. Additionally, a significant body of academic and other research was considered, including those of the Organisation for Economic Cooperation and Development, the International Bureau of Fiscal Documentation and professional bodies (including the Asia-Oceania Tax Consultants' Association, Society of Trust and Estate Practitioners and Confederation Fiscale Europeene) that collectively represented more than half a million tax practitioners worldwide. Moreover, the IGT also commissioned the University of New South Wales to research and report on existing taxpayer rights in Australia and, from that research, drew observations regarding the difficulties taxpayers may face in seeking to enforce their rights.

The IGT has acknowledged the calls from certain stakeholders for the enactment of additional legislative rights or for the Charter, or a similar document, to be enshrined in legislation. However, the IGT's research of the legislative regimes of comparable jurisdictions indicated that none of these jurisdictions had a comprehensive legislated charter or taxpayer bill of rights and Australia compared favourably in terms of legislative protections. Moreover, the IGT noted that whilst legislated rights would provide the highest degree of protection, it is unlikely to be of significant assistance to taxpayers who are unable to enforce such rights due to the costs associated with doing so.

Having regard to the above, the IGT has formed the view that, before any further enforceable remedies are considered, there are administrative measures which the ATO could implement to realise significant improvements. Such improvements include ensuring that the Charter is at the forefront of the ATO's interactions with the community and its performance against the Charter principles is appropriately measured and publicly reported. Such public reporting is the key to promoting the ATO's adherence to the Charter as transparency and accountability better inform the community of an agency's performance. It can be likened to IGT reviews of the ATO's administration. Whilst the IGT and the Commissioner cannot direct each other to take any particular course of action, public scrutiny requires appropriate IGT recommendations and ATO responses.

The ATO is seeking to embed a better client experience in all its interactions with the community through its reinvention program. To the extent that such improvements are realised, the IGT believes they should be captured in an enduring document, such as the Charter. Accordingly, a recommendation has also been made for the ATO to undertake consultation with a view to updating the Charter with any such improvements as well as addressing other relevant matters such as the role of, and the ATO's interaction with, tax practitioners and the increasing use of digital interactions.

In response to other concerns raised by stakeholders, the IGT has also examined two other areas relevant to taxpayer protection. The first area is taxpayer access to compensation where they have suffered a loss or detriment as a result of unreasonable ATO action. The focus was on the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme), a discretionary Commonwealth scheme through which agencies are able to pay compensation in circumstances where there is no legal requirement to do so. The second is the Model Litigant Obligation (MLO) which sets out standards of conduct for all Commonwealth agencies when conducting litigation.

The IGT has made recommendations to improve the ATO's administrative approach to these areas to the extent possible, noting that responsibility for the policy framework rests with Department of Finance and the Attorney-General's Department, respectively. In respect of the CDDA Scheme, the IGT has recommended that the ATO raise awareness of the availability of the scheme as well as to ensure that taxpayers are able to access internal review of decisions where there are sufficient grounds warranting reconsideration. As a related issue, the IGT has also recommended that the ATO ensure its staff are supported in providing effective apologies in appropriate circumstances. In relation to the MLO, the IGT has recommended, amongst other things, that the ATO work with the ATO Complaints Unit to enhance its investigation of allegations of MLO breaches to address perceptions of bias and lack of independence.

The IGT has also examined an emerging area of concern for stakeholders in relation to the ATO's exchange of taxpayer information with foreign revenue authorities. While the ATO's procedures in this regard align with international practices and appeared reasonable, there was minimal public information on which taxpayers and tax practitioners could rely. Accordingly, the IGT has made a recommendation for increased public guidance on the ATO's approach in this regard, particularly with respect to data security, notification to taxpayers where their information is being exchanged with other revenue authorities and opportunities for them to consider that information.

Overall, the IGT has made four recommendations with which the ATO has either agreed in full, in part or in principle. However the ATO's level of agreement and their accompanying commentary create a level of uncertainty as to how and to what extent the recommendations would be implemented. Accordingly, to the extent that stakeholder concerns persist, the IGT may undertake a follow-up review to assess the effectiveness of resulting ATO actions and, if necessary, make recommendations for government to consider mandatory reporting of the ATO's compliance with the Charter and additional enforceable remedies.

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

The IGT recommends that the ATO:

- (a) promote and educate taxpayers and tax practitioners about the Charter and in particular draw their attention to its principles at the outset of interactions which are likely to generate dispute or disagreement, such as reviews, audits, objections and litigation;*
- (b) treat allegations of any breaches transparently and address them independently of the substantive issues;*
- (c) enhance staff awareness and understanding of their obligations under the Charter through more practical training and guidance;*
- (d) improve its monitoring and reporting of the Charter by matching complaints cases against the Charter principles and publicly reporting on its annual performance; and*
- (e) consult with stakeholders on updating the Charter and in particular consider the following:*
 - i) the need to include any higher standards set by the 'Reinvention Program';*
 - ii) its application to digital interactions, tax practitioners when acting as agents or in their personal capacities and the interaction between taxpayers and any external service providers engaged by the ATO;*
 - iii) the impact of any recent law changes or evolution in tax administration and whether any additional or existing 'rights' should be incorporated;*
 - iv) the need for a clear statement that Charter 'rights' are not contingent on taxpayers discharging their 'obligations'; and*
 - v) the most effective way of presenting the Charter, such as a single page summary of all 'rights' and 'obligations' with links to further information.*

RECOMMENDATION 2

The IGT recommends that the ATO:

- (a) improve the currency of its website to provide more up-to-date public information about its administration of the CDDA Scheme, including its decision-making and review procedures to enhance public confidence;*
- (b) ensure that internal review for CDDA decisions is available where taxpayers are able to provide new information or grounds which warrant the decision being reconsidered by a new and independent decision maker; and*
- (c) ensure that staff are supported in providing an apology, where appropriate, and how to do so effectively.*

RECOMMENDATION 3

The IGT recommends that the ATO:

- (a) improve its public communication and guidance on the nature of the MLO and the limitations including that only the Attorney-General may enforce the rules;*
- (b) improve its investigation process for alleged MLO breaches by:*
 - i) informing taxpayers at the outset how the allegations will be investigated;*
 - ii) developing strategies to improve, actual and perceived, independence and impartiality of the process and in doing so consider enhancing the capability of the ATO Complaints Unit to undertake such investigations; and*
- (c) in consultation with the OLSC, identify opportunities to enhance its public reporting on allegations of MLO breaches, including the outcome of investigations and any remedial action taken, on an annual basis.*

RECOMMENDATION 4

The IGT recommends that the ATO centrally publish information on all aspects of EOI including:

- (a) its guidelines for requesting and responding to EOI;*
- (b) safeguards for protecting taxpayer information;*
- (c) avenues through which taxpayers may raise concerns; and*
- (d) when taxpayers would be informed of an EOI request being made in relation to their affairs and, where appropriate, have an opportunity to review the information obtained.*

CHAPTER 1—INTRODUCTION

CONDUCT OF THE REVIEW

1.1 The Inspector-General of Taxation (IGT) conducted this review in response to stakeholders' concerns¹ regarding the adequacy of the Australian Taxation Office's (ATO) *Taxpayers' Charter* (the Charter), compensation schemes and adherence to the Model Litigant Obligation (MLO) in ensuring that taxpayers are afforded procedural fairness and appropriate outcomes. These concerns were raised during consultation on the current work program and have been acknowledged in a number of previous IGT reviews² as well as the IGT Annual Report 2012-13.³

1.2 It should be noted that this review was delayed due to the tax complaints function being transferred to the IGT from the Commonwealth Ombudsman (Ombudsman). The transfer took effect on 1 May 2015 and work on this review did not commence in earnest until after this function was developed and operating smoothly.

1.3 This report is produced pursuant to paragraph 7(1)(f) of the *Inspector-General of Taxation Act 2003* (IGT Act 2003).

1.4 The IGT invited and received many submissions to this review.⁴ The IGT also met with a number of taxpayers, tax practitioners and their representative bodies as well as academics, senior staff in other government departments and members of the judiciary to gain a better understanding of the issues and areas requiring improvement. The concerns may be broken down into the following themes:

- inadequate taxpayer protection provided in the Charter including the lack of enforceability of the rights contained within it, processes to ensure adherence to it, reporting of any breaches as well as education and communication on its nature and purpose;
- limited avenues of redress where taxpayers' rights are breached, particularly in relation to the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme), the lack of independence and transparency in the ATO's associated administration and decision-making processes, the absence of any internal and external review for such decisions and limited public information on these matters;
- insufficient ATO processes to ensure compliance with the MLO, processes for investigating and publicly reporting any breaches, internal and public guidance as well as the inability of affected parties to take action to enforce compliance with the MLO; and

1 This review was commenced pursuant to paragraph 7(1)(d) of the *Inspector-General of Taxation Act 2003*.

2 Inspector-General of Taxation (IGT), *Review into the Australian Taxation Office's Change Program* (2010); IGT, *Report into the Australian Taxation Office's large business risk review and audit policies, procedures and practices* (2011); IGT, *Review into improving the self assessment system* (2012); IGT, *The Management of Tax Disputes* (2015).

3 IGT, *Annual Report 2012-13* (2013) p 7.

4 Terms of reference are reproduced in Appendix 1 of this report.

- lack of information regarding protection of taxpayers' rights in the cross-border context, specifically whether taxpayers would be informed if their information is provided to another revenue agency, how they can rectify any inaccuracies in the information exchanged, whether the scope of information requests is appropriate and how the confidentiality of their information is maintained following an information exchange.

1.5 As part of this review, the IGT engaged Dr Kalmen Datt and Professor Michael Walpole of the University of New South Wales (UNSW) to research and identify existing legislative and common law rights available to taxpayers in Australia. Their report is set out in Appendix 2.

1.6 In addition, the IGT has also worked progressively with ATO senior management to distil potential areas for examination and to agree on specific improvements. This work has been informed by IGT review team discussions with ATO staff in the ATO Corporate and ATO General Counsel units as well as those from the Review and Dispute Resolution (RDR) and Public Groups and International (PGI) business lines (BSLs). The IGT review team also examined case records on the ATO's case management system, Siebel, to better understand taxpayer concerns in this area and analysed ATO statistics which related to ATO performance and its impact on the above issues.

1.7 The Commissioner of Taxation (Commissioner) was provided with an opportunity to make submissions on any implied or actual criticisms in this report.⁵

THE IMPORTANCE OF TAXPAYER RIGHTS AND PROTECTIONS IN A SELF-ASSESSMENT TAX SYSTEM

1.8 This review represents an important step in improving the administration of the tax system in Australia. It builds upon ideas which have percolated in the international sphere for some years and focuses not only on taxpayer rights and protections in isolation, but the important role that such rights and protections play in encouraging voluntary compliance.

1.9 The efficient administration of a self-assessment tax system relies upon the majority of taxpayers voluntarily complying with their tax obligations. This is so as revenue authorities are not resourced to verify compliance of such obligations in respect of each taxpayer.

1.10 The threat of compliance action and any associated penalties and sanctions may be influential in deterring non-compliant behaviour for certain classes of taxpayers and to redress any imbalance between those taxpayers who voluntarily comply and those who do not.⁶ However, research has indicated that the perception of fairness, including how the revenue authority deals with taxpayers, is a key factor in fostering voluntary compliance. It is presented as the interplay between trust and power:

5 In accordance with sub-section 8(5) of the *Ombudsman Act 1976* which has effect by virtue of section 15 of the *Inspector-General of Taxation Act 2003*.

6 IGT, *Review into the Australian Taxation Office's administration of penalties* (2014) pp 2-3.

... trust in tax authorities was the strongest predictor of voluntary tax compliance, whereas power attributed to the authorities predicted enforced tax compliance. Furthermore, enforced compliance was negatively related to trust. It seems trust induces voluntary tax compliance, and reduces the feeling that one is forced to pay taxes ...

... our emphasis of the importance of trust should be no means be misinterpreted as a naïve approach... we propose that taxpayers should be treated fairly, according to their behavior: committed taxpayers should be supported by the authorities, whereas persistent tax evaders should be prosecuted with the full rigor of the law.⁷

1.11 The Organisation for Economic Co-operation and Development (OECD) has also observed:

The ways by which revenue authorities interact with taxpayers and employees impact on the public perception of the tax system and the degree of voluntary compliance. Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.⁸

1.12 The view that voluntary compliance is directly affected by perceptions of fair tax administration is echoed in comparable jurisdictions, such as the United States of America (USA).⁹ The ATO seems to be of a similar view with its recent focus on better understanding taxpayers' perceptions of fair treatment:¹⁰

We are deeply interested in fairness because we understand that, in the tax system, if people have a misperception of how the system operates, if they think it operates unfairly, that is a no-no in tax administration. That gets people thinking, 'Well, if it's unfair, I don't want to participate in it'.¹¹

1.13 Beyond the strong links to voluntary compliance, it has also been stated that taxpayer rights are fundamental human rights:

... human rights principles have an application at the level of the implementation, collection, enforcement and dispute procedures embedded in a tax regime. As tax regimes have become more complex and pervasive, jurisdictions have enlarged the powers of tax collectors, so exacerbating the risk of infringing upon the fundamental rights of their citizens. Here the rights at issue are not founded so much in morality or distributive justice but rather as to a fair treatment by the bureaucracy.¹²

7 Stephan Muehlbacher, Erich Kirchler and Herbert Schwarzenberger, 'Voluntary versus enforced tax compliance: empirical evidence for the 'slippery slope' framework' (2011) 32 *European Journal of Law and Economics* 89-97, p 95.

8 Organisation for Economic Co-operation and Development (OECD), *Principles of Good Tax Administration* (Practice Note GAP001, 2001), p 3.

9 National Taxpayer Advocate (NTA), *2013 Annual Report to Congress – Volume One*, (2013) p 6.

10 Australian Taxation Office (ATO), *Perceptions of Fairness in Disputes* (12 October 2015) <www.ato.gov.au>.

11 House of Representatives Standing Committee on Tax and Revenue, *Tax Disputes* (March 2015) p 16.

12 Justin Dabner, 'Resolving Australian tax controversies: does the tax jurisprudence under the European Convention on Human Rights suggest a better way?' (2016) *Australian Tax Forum* 213, p 215.

1.14 Similar sentiments have also been echoed by the National Taxpayer Advocate (NTA) in the USA:

At their core, taxpayer rights are human rights. They are about our inherent humanity. Particularly when an organization is large, as is the IRS [Internal Revenue Service], and has power, as does the IRS, these rights serve as a bulwark against the organization's tendency to arrange things in ways that are convenient for itself, but actually dehumanize us. Taxpayer rights, then, help ensure that taxpayers are treated in a humane manner.¹³

1.15 In summary, taxpayers are entitled to fair treatment by tax authorities and their perception that their rights are protected and respected is key in fostering voluntary compliance.

DIFFERENTIATING BETWEEN TAXPAYER RIGHTS, PROTECTIONS AND EXPECTATIONS

1.16 In the conduct of this review, the IGT has noted that terminology in this area may, at times, be used interchangeably. These terms include taxpayer rights, taxpayer protections and expectations. It is important to differentiate between these terms and arrive at a common understanding of the concepts and principles which underpin them.

Taxpayer rights

1.17 There is no universally accepted definition of 'taxpayer rights', however, a 'right' itself commonly refers to something which may be enforced at law directly by the affected person either as a result of positive action on the taxpayer's part (for example, appeal a decision) or passive action (for example, by claiming legal professional privilege to not answer questions or provide documents).

1.18 The tax law contains a number of well-recognised and well-utilised rights. Examples of such rights include the taxpayer's right to seek formal internal and external review of audit decisions.¹⁴ Other legislation, such as the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Freedom of Information Act 1982* (FOI Act), also confer rights on taxpayers, for example in relation to receiving reasons for certain administrative decisions¹⁵ and the right to access and correct information held about them by government bodies.¹⁶

1.19 In addition to rights which may be conferred in statute, rights may also be available to taxpayers at common law. For example, all taxpayers have a right to claim legal professional privilege over information or documents provided to their legal representative for the purposes of seeking legal advice.¹⁷

13 Nina E Olson, 'A Brave New World: The Taxpayer Experience in a Post-Sequester IRS Environment,' 139 *Tax Notes* 1189 (2013).

14 *Taxation Administration Act 1953*, Pt IVC.

15 *Administrative Decisions (Judicial Review) Act 1977*, s 13.

16 *Freedom of Information Act 1982*, Pt III.

17 *Baker v Campbell* (1983) 153 CLR 52.

Taxpayer protections

1.20 Taxpayer protections may refer to those areas of the law which allow another party to act on behalf of the aggrieved taxpayer, or be relied upon by the taxpayer as a shield against ATO action, thereby effectively ‘protecting’ them from actions which may violate their rights. An example of such a protection is the superannuation guarantee charge provisions which effectively require the ATO to protect taxpayers against unpaid superannuation.¹⁸ The ATO achieves this through a combination of audit activities and enforcement action to recover unpaid superannuation.

1.21 Another example of such protection is the MLO (which will be discussed later in this report).¹⁹ The MLO exists essentially to protect the taxpayer against inappropriate conduct by the Commonwealth in litigation and seeks to re-balance the limited resources and experience of a taxpayer against those of the Commonwealth.²⁰

Taxpayer expectations

1.22 Expectations are often reflected in administrative, rather than legal, documents or materials. They usually contain statements regarding standards of service and what taxpayers can reasonably expect of the revenue authority and vice versa. The Charter and its associated publications are examples of a set of taxpayer expectations. This is despite the fact that the Charter itself uses the terms ‘rights’ and ‘obligations’ and some of the principles reflected in the Charter are based on legislative requirements. Similarly, the ATO’s Practice Statements, which are publicly issued, are administrative documents that set out processes which ATO officers are expected to follow in respect of certain matters or activities.

1.23 It is important to note that these documents do not confer on the taxpayer any legally enforceable rights.²¹ Rather, where the taxpayer is of the view that principles or expectations set out in the Charter or a Practice Statement have been violated, they may lodge a complaint with the ATO for investigation or, alternatively, with the IGT. Where an investigation identifies a potential breach, remedial action may be taken. However, these remedial actions do not take away from the Commissioner’s responsibility to properly assess and collect tax due and payable, nor do they release the taxpayer from such obligations to comply with the tax laws.

1.24 The IGT notes that whilst administrative documents do not give rise to any enforceable rights, in some jurisdictions such as the United Kingdom (UK), the legal doctrine of ‘legitimate expectation’ has provided a potential avenue of redress for affected taxpayers. This is discussed further in the next chapter.

18 *Superannuation Guarantee (Administration) Act 1992*, s 49.

19 Attorney-General’s Department, *Legal Services Directions 2005*; *Judiciary Act 1903*, s 55ZG.

20 Productivity Commission, *Access to Justice Arrangements Report No. 72* (September 2014) pp 430-431.

21 *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119.

TAXPAYER OBLIGATIONS AND RESPONSIBILITIES

1.25 In the same manner that taxpayer rights, taxpayer protections and expectations may be interchangeably used, the terms 'obligations' and 'responsibilities' may also be used interchangeably to describe government-mandated behaviours in relation to their tax affairs. These behaviours are legally enforceable or are required to be undertaken for moral reasons.²² They can be differentiated from expected behaviours which are not based in law but to which the parties are expected to adhere based on social norms.

1.26 In the tax administration context, obligations generally refer to a set of behavioural norms that are 'so fundamental to the successful operation of taxation systems that they are legal requirements in many, if not most, countries'²³. The basic taxpayer obligations are: to be honest; to provide accurate information and documents on time through lodgments and reporting; to maintain appropriate records; and to pay any liabilities on time. By way of example, taxpayers in Australia are obliged to lodge their tax returns by their respective due dates²⁴ and to pay their taxes as and when they fall due.²⁵

1.27 Conversely, whilst the ATO has indicated that it expects taxpayers to be cooperative in their interactions,²⁶ there is no legal obligation for the taxpayer to do so. However, the ATO is armed with a number of legislative powers to compel taxpayers to act in a particular way in defined circumstances (such as providing information)²⁷ where they do not do so cooperatively.

TERMINOLOGY USED IN THIS REPORT

1.28 In this report, the IGT will seek to distinguish between rights and expectations in the following ways:

- where the rights are legally enforceable, the IGT will use the term 'enforceable rights'; and
- where they are not legally enforceable, the IGT will refer to them as 'administrative rights' or 'expectations'.

1.29 In certain documents examined by the IGT, such as the Charter documents in Australia and in other jurisdictions, the IGT will reflect the terminology used in those documents but will contain these in inverted commas to distinguish them from other usage. For example, the Australian Charter refers to 'rights' and 'obligations'.

22 Macmillan Dictionary definition of 'obligation'.

23 OECD, *Taxpayers' Rights and Obligations* (Practice Note GAP002), p 3.

24 *Income Tax Assessment Act 1936*, s 161.

25 *Income Tax Assessment Act 1997*, s 5.

26 ATO, *Taxpayers' charter - what you need to know* (5 January 2016) <www.ato.gov.au>.

27 *Taxation Administration Act 1953*, Sch 1, Div 353.

STRUCTURE OF THE REPORT

1.30 Before turning to address stakeholders' concerns, it is useful to first consider the historical development and current status of taxpayer rights and protections in Australia, including by way of comparison with other jurisdictions. This discussion is set out in Chapter 2.

1.31 Chapter 3 discusses stakeholders' concerns in relation to the current framework for taxpayer rights and protections in Australia.

1.32 Chapter 4 considers the existing compensation regimes as well as other avenues of redress where taxpayers consider that their rights and protections have been transgressed.

1.33 Chapter 5 explores the ATO's obligations under the *Legal Services Directions 2005* (LSD 2005) and, specifically, the MLO.

1.34 Chapter 6 examines an emerging area of concern in relation to the protection of taxpayers' rights where information is exchanged across borders.

CHAPTER 2—TAXPAYER RIGHTS IN AUSTRALIA AND INTERNATIONAL COMPARISONS

HISTORICAL CONSIDERATION OF TAXPAYER RIGHTS AND PROTECTIONS IN AUSTRALIA

2.1 Prior to 1986, the Australian tax system operated on the basis of full assessment, whereby taxpayers provided the ATO with all relevant information so that the ATO could apply the law and assess their tax liabilities. Under that system, the taxpayer's primary responsibility was to make a full disclosure of all relevant information to the ATO.²⁸

2.2 From the 1986-87 financial year, the system moved towards self-assessment in which taxpayers assume responsibility for their tax affairs and determine their own tax liabilities.²⁹ The self-assessment system effectively relieved the ATO from examining the affairs of all taxpayers in the process of issuing an assessment. Under self-assessment, the ATO continues to issue an assessment to taxpayers, however, tax returns are generally taken at face value and may be subject to post-assessment audit and other verification processes.³⁰

2.3 The introduction of self-assessment fundamentally altered the balance of power and responsibilities between taxpayers and the ATO. Under the new system, an incorrect application of the law results in taxpayers being exposed to additional primary tax, penalties and interest charges. At the same time, it also brought about a number of law changes which sought to re-balance these responsibilities, by allowing the ATO to amend not only for errors of calculation or mistakes of facts but also for mistakes of law. A rulings system was also introduced in 1992 which was intended to make it easier for taxpayers to comply with their tax obligations³¹ and to protect taxpayers against additional primary tax, penalties and interest where they relied upon and acted in accordance with binding advice issued by the ATO.³²

The Joint Committee of Public Accounts inquiry

2.4 In 1993, the Joint Committee of Public Accounts (JCPA), as part of its wide-ranging examination of the administration of the tax system, considered the role and responsibilities of taxpayers in the self-assessment system.³³ Against the backdrop of the newly implemented self-assessment system, the JCPA identified a need to better re-balance the rights of taxpayers against their relatively new responsibilities:

28 The Treasury (Cth), *Report on Aspects of Income Tax Self Assessment* (2014) p 2.

29 Ibid.

30 Ibid.

31 Above n 28, pp 2-3.

32 *Taxation Administration Act 1953*, Sch 1, Sub-Div 357-B.

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

The Income Tax Assessment Act 1936 (the Act) establishes amongst its numerous provisions obligations and duties in respect of tax. When taken together with the Taxation Administration Act 1953 and the Income Tax Regulations, this body of law imposes an extensive framework of legal responsibilities on taxpayers. The Australian Taxation Office (ATO) administers this body of law and in so doing utilises given provisions to enforce the obligations of the law upon the taxpayer. The question arises, 'Where is the corresponding statement of taxpayer rights?'

In reality no formal statement of the rights of taxpayers currently exists. Although protection is afforded by the principles of equity and justice established by the common law, the review and objection rights provided by relevant acts and a number of administrative mechanisms for supervising the actions of the ATO, taxpayers have no single written statement of rights. This is despite the fact that the ATO investigatory powers are far more extensive and less well supervised than any criminal law enforcement agency.³⁴

2.5 The above taken together with submissions that had been made to the JCPA and following comparisons with the *Citizen's Charter* in the UK and the USA's Taxpayer Advocate Service (TAS) led the JCPA to determine that:

Taxpayers, like every citizen, should be entitled to be fully informed of their rights and obligations according to law. In the Committee's opinion the ATO, as the body established to administer the taxation laws, was obliged to clearly, concisely, accurately and consistently advise taxpayers of their duties and rights. Such publicity should neither be restrained nor restricted to circumstances in which taxpayers were required to confront the ATO. Information concerning a taxpayer's rights and the standards of conduct expected of the ATO readily available for all taxpayers and specifically cast for taxpayers who are required to interact with the ATO. Taxpayer agents and representatives should similarly be entitled to a given level of service.³⁵

2.6 Accordingly, the JCPA recommended the establishment of a Taxpayers' Charter.³⁶ It should be noted that the JCPA had initially contemplated that such a charter would set out taxpayers' common law rights as well as standards of service that they could expect from the ATO.³⁷ This charter was to include statements in respect of taxpayers' rights to legal and commercial advice; due process, timely, accurate and confidential advice, independent review, access to administrative and judicial review, information, privacy, the presumption of innocence and individual consideration and treatment.³⁸

2.7 In addition to the establishment of the Charter, the JCPA also saw a need for the establishment of a dedicated Taxation Ombudsman, for the purpose of providing a remedy to administrative impropriety or inefficiency which impacted upon taxpayers.³⁹ Taxpayers who considered that they had been treated unfairly by the ATO, or whose rights at law had been violated, would be able to approach the Taxation

34 Ibid, p 307.

35 Ibid, p 311.

36 Ibid, p 314.

37 Ibid, p 312.

38 Ibid, pp 311-312.

39 Ibid, p 314.

Ombudsman. In 1995, legislation was enacted to give effect to this JCPA recommendation.⁴⁰ Whilst initially there was a specific Taxation Ombudsman role within the Ombudsman office, gradually this function was subsumed into the broader work of the Ombudsman.

2.8 Currently, the IGT is effectively the Taxation Ombudsman with the Ombudsman no longer having a role with respect to tax administration. This transfer of function has happened over time as the role of the IGT has evolved.

Office of the Inspector-General of Taxation

2.9 The IGT was established in 2003 as an independent statutory office to review systemic tax administration issues and to report to government with recommendations for improving tax administration.⁴¹

2.10 Since its inception, the IGT has been conducting systemic reviews covering a broad range of tax administration matters. To date it has conducted 44 reviews covering such areas as the self-assessment system,⁴² the ATO's compliance risk assessment tools⁴³ and also tax disputes.⁴⁴

2.11 In the 2014 Federal Budget, a policy decision was made to extend the role of the IGT by transferring the tax complaints handling service from the Ombudsman to the IGT and expanding its scrutineering function to include the Tax Practitioners Board (TPB). This decision, which took effect from 1 May 2015, means that the IGT now operates as a tax specialist ombudsman.⁴⁵

2.12 In the context of taxpayer rights and protections, the IGT, as an independent agency, assists taxpayers in several ways. First, the IGT facilitates discussion between taxpayers and the ATO or TPB to address or resolve matters in dispute. Secondly, the IGT makes determinations which are persuasive but not binding on the ATO or TPB. It should be noted that the IGT is not empowered to consider the merits of ATO decisions as this is the jurisdiction of the Administrative Appeals Tribunal (AAT) and the courts.

CURRENT STATUS OF TAXPAYER RIGHTS AND PROTECTIONS IN AUSTRALIA

2.13 In December 2015, the IGT undertook an assessment of the status of taxpayer rights in Australia at the request of the International Bureau of Fiscal Documentation (IBFD). The assessment examined Australia's performance against a range of criteria

40 *Ombudsman Act 1976*, sub-s 4(3) [now repealed].

41 *Inspector-General of Taxation Act 2003*, sub-s 7(1) [now superseded]; IGT, *Submission to the House of Representatives Standing Committee on Tax and Revenue, Inquiry into the External Scrutiny of the Australian Taxation Office* (2016) p 21 <www.igt.gov.au>.

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

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

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

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

published by International Fiscal Association which included both enforceable and unenforceable rights.⁴⁶ A copy of this document is provided in Appendix 3.

2.14 The IGT also engaged Dr Kalmen Datt and Professor Michael Walpole of the UNSW, as part of this review, to independently research and identify all enforceable rights available in Australia. Their report is set out in Appendix 2 with the key enforceable rights being reproduced below:

Table 1: Existing taxpayer rights and protections in Australia

Taxpayer right	Source
Challenge (most) assessments, determinations, notices and decisions	Part IVC of the <i>Taxation Administration Act 1953</i> (TAA 1953)
Challenge the issue or failure to issue a private ruling	Part IVC of the TAA 1953
Challenge an assessment for an administrative penalty	Section 298-30, Sch 1 to the TAA 1953
Apply to remit a penalty; challenge a refusal to remit a penalty	Section 298-20, Sch 1 to the TAA 1953
Protection from interest charges if non-binding advice is relied on in good faith	Section 9 of the TAA 1953
Appeal an AAT or Federal Court decision	Part IVC of the TAA 1953
Request a referral on a question of law to the full bench of the Federal Court	Section 44 of the <i>Administrative Appeals Tribunal Act 1975</i>
Request an amendment of their income tax return	Section 170 of the <i>Income Tax Assessment Act 1936</i>
Obtain an assessment if no assessment is issued 6 months after a return is submitted	Section 155-30, Sch 1 to the TAA 1953
Request an assessment of an indirect tax	Section 105-20, Sch 1 to the TAA 1953
Request a variation or revocation of a departure prohibition order (DPO)	Section 14T of the TAA 1953
Request a departure authorisation certificate where a DPO has been issued	Section 14U of the TAA 1953
Challenge the issue of a DPO	Section 14V of the TAA 1953
Challenge a garnishee notice	ADJR Act 1977 or <i>Judiciary Act 1903</i> (Judiciary Act)
Apply for a stay of execution on the grounds of serious hardship in respect to a debt owing under an assessment	Sections 14ZZM and 14ZZR of the TAA 1953
Review a demand for a security deposit	ADJR Act 1977 or Judiciary Act or the Constitution
Obtain reasons for a decision	<i>Administrative Decisions (Judicial Review) Act 1977</i>
Obtain a refund for excess tax withheld	Schedule 1 to the TAA 1953
Obtain a tax receipt for an income year	Section 70-5, Sch 1 to the TAA 1953
Object to an excess concessional contribution determination	Section 97-10, Sch 1 to the TAA 1953
Finality of assessment (Commissioner may not amend an assessment after the period for review has elapsed)	Section 155-40 to 155-60, Sch 1 to the TAA 1953
Obtain interest on overpayments and prepayments	<i>Taxation (Interest on Overpayments and Early Payments) Act 1983</i>
Access government-held documents	<i>Freedom of Information Act 1982</i>

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

Table 1: Existing taxpayer rights and protections in Australia (continued)

Taxpayer right	Source
Complain to the Information Commissioner or IGT for a breach of the privacy principles	<i>Privacy Act 1988</i>
Lodge a complaint to the IGT (other than on assessments)	<i>Inspector-General of Taxation Act 2003</i>
Apply for compensation under the CDDA Scheme	Section 61 of the Constitution and the <i>Public Governance, Performance and Accountability Act 2013</i>
Claim legal professional privilege when responding to requests for information and documents under sections 353-10 and 353-15, Sch 1 to the TAA 1953	Common law
Comply with a notice issued under sections 353-10 and 353-15, Sch 1 to the TAA 1953 only to the extent they are able to do so	Common law
Obtain procedurally fair treatment from the ATO	Common law
Claim damages for pure economic loss due to wrongful ATO conduct	Common law

2.15 The above table shows that the majority of the enforceable rights relate to the ability to seek reasons for ATO decisions and to challenge certain decisions through the objection and appeal processes pursuant to Part IVC of the *Taxation Administration Act 1953* (TAA 1953). Other enforceable rights include those relating to the issue of refunds and the right to having interest paid on overpayments. The common law rights include those relating to claims for legal professional privilege, procedural fairness and damages for pure economic loss due to wrongful ATO conduct.

2.16 Interestingly, the research has identified a ‘right’ to seek compensation for defective administration which is based on a provision of the Constitution as well as the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) notwithstanding that the decision to pay compensation is purely discretionary and not enforceable externally. This issue is discussed further in Chapter 4.

2.17 Whilst the research from the UNSW has identified a range of enforceable rights available to taxpayers under the current framework, it is important to note that there are various practical impediments for taxpayers seeking to enforce these rights. These are discussed further below.

Legislative rights

2.18 Whilst it is evident that taxpayers have a number of enforceable rights of review and appeal, many taxpayers are restricted or reticent in availing themselves of these rights in practice due to factors such as cost, the formality of enforcing such rights and the chance of success.⁴⁷ Taxpayers are also cognisant of the impact such actions may have on their ongoing relationship with the ATO.

2.19 Furthermore, when challenging an ATO decision under the current legislative framework, taxpayers are faced with the onus of proving that the ATO’s decision is

⁴⁷ Binh Tran-Nam and Michael Walpole, ‘Access to justice: How costs influence dispute resolution choices’ (2012) 22(3) *Journal of Judicial Administration*, p 27.

incorrect or excessive.⁴⁸ The JCPA had considered this issue in its 1993 report and identified that the burden of proof is an example of the imbalance of powers between the ATO and taxpayers:

*No better example of the powers of the ATO and the inferior standing of taxpayers is provided than by the requirement under the Act that taxpayers should satisfy the burden of proving their cases.*⁴⁹

Common law rights

2.20 Fundamental common law rights and avenues for relief that are available to taxpayers include the presumption of innocence, privilege against self-incrimination, the right to claim legal professional privilege and the right to claim damages for pure economic loss as a result of negligence.⁵⁰ It should be noted that common law rights may be challenged or abrogated through legislation or, in certain circumstances, court decisions.⁵¹

2.21 Whilst these rights are available to taxpayers, Australian case law has shown that it is often difficult for taxpayers to successfully enforce their common law rights in practice.⁵² For example, the comments in *Harris v Deputy Commissioner of Taxation*, indicates the limited prospects of success in any claim against the Commissioner on the grounds of negligence:

*There is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.*⁵³

2.22 Similarly, in *Lucas v O'Reilly*, the Court found that the Commissioner's duties were owed exclusively to the Crown rather than the taxpayer and, as such, any action against the Commissioner for breach of statutory duty would inevitably fail:

*If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show not only that the duty which is alleged to have been or to be about to be broken is a duty owed to him but also that the statute creating the duty confers upon him a right of action in respect of any breach.*⁵⁴

2.23 Moreover, whilst the common law right to legal professional privilege may be claimed by taxpayers with respect to certain protected communications, the scope of this right has potentially been diminished by recent court decisions.⁵⁵ In addition, rights such as the privilege against self-incrimination are also abrogated by the ATO's exercise of a statutory power, such as its compulsory information gathering powers.⁵⁶

48 *Taxation Administration Act 1953*, ss 14ZZK and 14ZZO; University of New South Wales (UNSW), *Report to the Inspector-General of Taxation on Taxpayer Rights* (April 2016) p 27.

49 Above n 33, p 307.

50 UNSW, *Report to the Inspector-General of Taxation on Taxpayer Rights* (April 2016).

51 *Commissioner of Taxation v Donoghue* [2015] FCAFC 183.

52 John Bevacqua, 'Redressing the imbalance - challenging the effectiveness of the Australian Taxpayers' Charter' (2013) 28 *Australian Tax Forum* 377, p 392.

53 *Harris v Deputy Commissioner of Taxation* (2001) 47 ATR 408.

54 *Lucas v O'Reilly* (1979) 36 FLR 102.

55 *Commissioner of Taxation v Donoghue* [2015] FCAFC 183.

56 *Stergis & Ors v Federal Commissioner of Taxation & Anor* 89 ATC 4442.

Pre-assessment rights and protections

2.24 The research undertaken by the UNSW shows that the majority of enforceable rights generally only become available after an ATO decision has been made or an assessment has been issued. In effect, taxpayers have very few enforceable rights in interactions with the ATO prior to the issue of an assessment (pre-assessment).

2.25 Whilst some enforceable rights may exist for taxpayers in pre-assessment interactions with the ATO, such as challenging the scope of an ATO information request,⁵⁷ most other pre-assessment protections arise pursuant to ATO public and private rulings which are legally binding as well as principles set out in the Charter, practice statements and other guidance products which are not legally enforceable.⁵⁸

2.26 The IGT had previously examined the role of practice statements in the administration of the tax system⁵⁹ and the courts have been clear on their legal status.⁶⁰ The Charter also plays a critical role in the pre-assessment sphere, being the only document which sets out a standard of conduct and expectation for taxpayers and the ATO. Before turning to discuss stakeholders' concerns regarding the Charter, it is necessary to understand its evolution since its inception in the late 1990s. Moreover, it is instructive to consider the approach adopted by other jurisdictions in this area to identify learning and improvement opportunities.

HISTORY AND DEVELOPMENT OF THE TAXPAYERS' CHARTER

2.27 The Charter was introduced in July 1997 as a document for taxpayers and tax practitioners who deal with the ATO on tax, superannuation, excise and the other laws that it administers. The Charter is designed to assist taxpayers and tax practitioners to understand their 'rights' and 'obligations'.⁶¹ It also sets out steps which taxpayers and tax practitioners may take where they are dissatisfied with the conduct of the ATO and its officers.

2.28 Since its introduction, the Charter has undergone a number of reviews. Table 2 below sets out its evolution, the internal and external reviews it has undergone and subsequent revisions made to it.

Table 2: Development and evolution of the Taxpayers' Charter

1993	The process of introducing a Taxpayers' Charter in Australia began with JCPA's report in 1993, which recommended that the Government consider the establishment of a Charter. ⁶²
1994 - 1997	The ATO consulted extensively with staff, the general public, business and community groups, tax practitioners and other government agencies during the process of developing the Charter. ⁶³

57 See for example: *Australia and New Zealand Banking Group v Konza* [2012] FCAFC 127.

58 *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119.

59 IGT, *Follow up review into delayed or changed ATO views on significant issues* (2014).

60 *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119.

61 Above n 26.

62 Above n 33, p 314.

63 Commissioner of Taxation, *Annual Report 2002-03* (2003) p 102.

Table 2: Development and evolution of the Taxpayers' Charter (continued)

July 1997	The Charter, together with its supporting explanatory booklets, was formally launched in July 1997. ⁶⁴ The Charter at this time comprised a set of 18 publications, including Taxpayers' charter – in detail (A4 booklet) and Taxpayers' charter – what you need to know (summary leaflet). ⁶⁵
2001 - 2003	<p>The first major internal review of the Charter was conducted in the 2001-02 financial year and involved both community and staff input.⁶⁶ The community's preference at this time was for a concise, simple format.</p> <p>Following the review of the Charter and taking into account the findings of the research, a revised version of the Charter was released in November 2003.⁶⁷ The Charter principles remained essentially unchanged. However, the Charter's design and content was updated based on the community's preference. A number of changes were made, including:</p> <ul style="list-style-type: none"> • <i>Taxpayers' charter – what you need to know</i> (A5 version) became the main publication for taxpayers; • <i>Taxpayers' charter – in detail</i> was retained; • six of the explanatory booklets were withdrawn and the remainder (12) were updated; and • Charter information on the ATO's website was made easier to locate and follow.
2004-05	<p>The Australian National Audit Office (ANAO) undertook a performance audit of the Charter in the 2004-05 financial year.⁶⁸ The ANAO's report concluded that overall the ATO was managing its responsibilities under the Charter, however, the ATO was yet to effectively monitor and report on its performance against the Charter principles.⁶⁹</p> <p>The ANAO made a total of nine recommendations to improve the ATO's management of its responsibilities under the Charter. The ATO agreed with all of the recommendations, noting that many were consistent with its own internal review and were already being developed or implemented.⁷⁰</p>
2005-06	<p>The ATO conducted a second internal review of the Charter in the 2005-06 financial year.⁷¹ This review involved feedback from the community with respect to how well the ATO was 'living the Charter'.⁷² The feedback at this time was that the ATO's strengths were in treating taxpayers fairly and with respect, as well as the clarity of the ATO's verbal communication.</p> <p>However, it was identified that further improvements were required with respect to the ATO's accountability, handling of complex queries and written communication. In response to the review findings, the ATO undertook a major review of its written correspondence.</p>
January 2007	<p>Following the ATO's second review of the Charter, a revised set of Charter publications was released in 2007. A number of changes were made, including:</p> <ul style="list-style-type: none"> • <i>Taxpayers' charter – in detail</i> was renamed to <i>Taxpayers' charter – expanded version</i>; • the ATO removed publication of its service standards in the <i>Charter</i> explanatory booklets and instead published them on the ATO's website; and • the ATO updated the <i>Charter</i> to remove duplicated content and make them easier to follow.

64 ATO communication to the IGT, 15 January 2016.

65 Ibid.

66 Ibid.

67 Commissioner of Taxation, *Annual Report 2003-04* (2004) pp 100–101.

68 Australian National Audit Office (ANAO), *Taxpayers' Charter: Australian Taxation Office* (2004-05).

69 Ibid, p 21.

70 Commissioner of Taxation, *Annual Report 2004-05* (2005) p 105.

71 Commissioner of Taxation, *Annual Report 2005-06* (2006) p 42.

72 Ibid, p 44.

Table 2: Development and evolution of the Taxpayers' Charter (continued)

2007-08	The ANAO undertook a follow-up audit of the Charter in the 2007-08 financial year. ⁷³ The audit assessed the ATO's implementation of the nine recommendations from the ANAO's 2004-05 audit in 2004-05. The ANAO's report concluded that the ATO had progressed well in implementing its recommendations and made four recommendations for further improvement, including improving complaints reporting and trend analysis and implementing procedures to align future training programs with the Charter principles. ⁷⁴
2008-09	The Charter was transitioned into a 'business as usual' model whereby the ATO aspired to a model of 'living the Charter' rather than specifically promoting it as something separate from its ordinary activities. ⁷⁵
2010	Following a third internal review of the content of the Charter which took into account legislative and procedural changes, as well as input from ATO staff, a revised version of the Charter was released in July 2010. ⁷⁶ The revised Charter contained a number of changes, including: <ul style="list-style-type: none"> • the Charter principles remained consistent with the 2007 version, however the document presented was smaller and more concise; and • the ATO removed the <i>Taxpayers' charter – expanded version</i> from the suite of Charter documents, and retired two of the explanatory booklets, <i>Who can help with your tax affairs</i> and <i>If you're not satisfied</i>, thereby reducing the number of explanatory booklets from nine to seven.⁷⁷ <p>Note: It is unclear to the IGT as to when and why the ATO further reduced the suite of Charter documents from 12 in the early 2000s to 9 in the current year.</p>
2014	The ATO withdrew the <i>Taxpayers' charter – respecting your privacy and confidentiality</i> explanatory booklet in March 2014 following the publication of the <i>ATO Privacy Policy</i> . This reduced the number of Charter explanatory booklets from seven to six. ⁷⁸

Source: ATO

2.29 The Charter currently comprises an overarching document, *Taxpayers' charter – what you need to know*,⁷⁹ together with six supporting and explanatory documents. These are:⁸⁰

- Taxpayers' charter - treating you fairly and reasonably
- Taxpayers' charter - treating you as being honest
- Taxpayers' charter - accessing information under the Freedom of Information Act
- Taxpayers' charter - fair use of our access and information gathering powers
- Taxpayers' charter - helping you to get things right
- Taxpayers' charter - if you're subject to review or audit

73 ANAO, *Taxpayers' Charter: Follow-up Audit (2007-08)*.

74 Ibid, p 14.

75 Above n 64.

76 ATO, 'Taxpayers' Charter 2010' (internal ATO document, 12 March 2014).

77 Ibid.

78 Ibid.

79 ATO, *Taxpayers' charter* (22 January 2013) <www.ato.gov.au>.

80 Ibid.

2.30 The Charter is the primary vehicle through which the ATO defines the relationship that it seeks to establish and maintain with the community, being one based on mutual trust and respect and to promote and maintain taxpayer voluntary compliance. For example, by being fair, open and accountable in its dealings with taxpayers and ensuring taxpayers are made aware of their 'rights' and 'obligations'.⁸¹

2.31 The ATO has publicly acknowledged that the way it treats taxpayers is a major factor in influencing the compliance behaviour of taxpayers. It understands that failure on its part to adhere to the Charter principles may lead to disengagement and future non-compliance.⁸²

INTERNATIONAL COMPARISONS

2.32 The IGT had previously examined aspects of taxpayer rights in the *Management of Tax Disputes* review.⁸³ In that review, the IGT considered the dispute management and resolution approaches of a number of other jurisdictions including the USA, the UK, Canada, New Zealand and Ireland.⁸⁴ In each of those jurisdictions, the IGT observed that taxpayer rights to challenge and dispute the decisions of the revenue authorities were largely consistent, albeit with their own particular nuances. These rights generally involved avenues of internal and external review, as well as avenues to progress matters to tribunals and courts of law.⁸⁵

2.33 Set out below are discussions of other aspects of enforceable and administrative taxpayer rights in a number of jurisdictions, namely: the USA, the UK, Canada and New Zealand. The IGT also examines aspects of the approaches adopted by Mexico and Chile to highlight their uniqueness.

United States of America

Taxpayer Bill of Rights

2.34 The USA's Internal Revenue Service (IRS) is subject to a Taxpayer Bill of Rights which is set out in the Internal Revenue Code (IRC).⁸⁶ These rights developed through a number of iterations and amendments to the IRC.

2.35 The first manifestation of a specific Taxpayer Bill of Rights was legislated in 1988 and has become known as 'TBOR 1'. These changes included over 20 provisions titled 'Taxpayer Rights and Protections', including providing taxpayers

81 ATO, 'Guiding principles and models' in *Developing Effective Compliance Strategies* (13 January 2015) <www.ato.gov.au>.

82 Ibid.

83 Above n 44.

84 Ibid, pp 26-38.

85 Ibid.

86 *Internal Revenue Code* (USA), §7803 (a) (3).

with rights of administrative appeal in relation to the collection of revenue and litigation opportunities.⁸⁷

2.36 The Taxpayer Bill of Rights was updated in 1996 (TBOR 2) with incremental improvements. Notably, this update also established the role of the Taxpayer Advocate.⁸⁸

2.37 In 1998, further legislative amendments were made to taxpayer rights provisions and became known as 'TBOR 3'.⁸⁹ These amendments modified the organisational structure of the IRS by, amongst other things, increasing the independence of the appeals function and creating the position of the NTA to head up the Taxpayer Advocate Service (which effectively replaced the Taxpayer Advocate role that been created in 1996). The amendments also expanded the authority of the TAS, Taxpayer Assistance Orders which may be issued by the NTA and mandated that each state have at least one Local Taxpayer Advocate who reported to the NTA.

2.38 More recently, on the basis of its research into the awareness of taxpayer rights, the NTA concluded that there was greater need to inform and educate taxpayers of the rights and protections available to them.⁹⁰

2.39 On 10 June 2014, the IRS consolidated the Taxpayer Bill of Rights into a single document to assist taxpayers to better identify and understand their rights. The document sets out each of the ten rights together with a brief explanation and associated fact sheets.⁹¹ The NTA website provides further advice on each of the ten 'rights' available to taxpayers by explaining what each right means for the taxpayer, how the IRS seeks to meet its obligation under the right and the relevant legislative provisions on which the taxpayer may rely.⁹²

2.40 On 18 December 2015 further amendments were made to the IRC which required that 'in discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights ...'.⁹³ These amendments included the insertion of the ten principles of the Taxpayer Bill of Rights into the IRC.

Right to sue for damages

2.41 In addition to the 'rights' which are set out in the Taxpayer Bill of Rights, there are a range of statutory causes of action which are available to taxpayers in the USA. Notably, these statutory causes of action provide an option for taxpayers to seek civil damages for:

87 Dianne Mehany, Scott Michel, and Christopher Rizek, 'United States' in International Fiscal Association 2015 Basel Congress, *Cahiers de droit fiscal international Vol 100b - The practical protection of taxpayers fundamental rights* (2015) 873, p 875.

88 Taxpayer Advocate Service (TAS), 'Our history', <www.taxpayeradvocate.irs.gov>.

89 *Internal Revenue Service Restructuring and Reform Act of 1998* (USA).

90 NTA, 'Volume 1: Most Serious Problems #1' in 2013 *Annual Report to Congress* (2013).

91 Internal Revenue Service (IRS), *Taxpayer Bill of Rights* (13 June 2016) <www.irs.gov>.

92 NTA, 'Taxpayer rights' (undated) <www.taxpayeradvocate.irs.gov>.

93 *Internal Revenue Code* (USA), §7803 (a)(3); *Consolidated Appropriations Act 2016*, s 401.

- unauthorised inspection or disclosure of taxpayer returns or return information;⁹⁴
- failure to release a lien;⁹⁵
- certain unauthorised collection action;⁹⁶ and
- unauthorised enticement of information disclosure.⁹⁷

2.42 The IGT understands that whilst these provisions have been available to taxpayers for some years, they have not been widely utilised by taxpayers. Specifically, in her annual reports to Congress over the past three years, the NTA has not listed any of these areas in the ten most litigated issues section.⁹⁸

Taxpayer Advocate Service (TAS)

2.43 As mentioned above, the TAS, headed by the NTA, was established in 1998 and at least one Local Taxpayer Advocate who reports to the NTA is located in each state.

2.44 The objective of the TAS is to ensure that every taxpayer is treated fairly, and that they know and understand their 'rights' as a taxpayer.⁹⁹ Additionally, taxpayers who meet certain requirements may be assisted by being assigned an advocate who can assist in the matter free of charge until it is resolved.¹⁰⁰

2.45 The TAS may provide advocate services to a taxpayer in a number of circumstances including where the taxpayer cannot resolve the issue directly with the IRS and the problem is causing them financial difficulties or if the taxpayer is facing an immediate threat of adverse action and the IRS has not responded to them directly.¹⁰¹

2.46 Under § 7811 of the IRC, a taxpayer may apply to the NTA to issue a Taxpayer Assistance Order (TAO) where the NTA determines the taxpayer is suffering, or is about to suffer, a significant hardship due to the manner in which the internal revenue laws are being administered.¹⁰²

94 *Internal Revenue Code (USA)*, §7431.

95 *Internal Revenue Code (USA)*, §7432.

96 *Internal Revenue Code (USA)*, §7433-7433A.

97 *Internal Revenue Code (USA)*, §7435.

98 NTA, *2015 Annual Report to Congress – Volume 1* (2015) pp 426-527; NTA, *2014 Annual Report to Congress – Volume 1* (2014) pp 423-520; NTA, *2013 Annual Report to Congress – Volume 1* (2013) pp 322-408.

99 TAS, *Who we are* (undated) <www.taxpayeradvocate.irs.gov>.

100 *Ibid.*

101 TAS, *Contact us* (undated) <taxpayeradvocate.irs.gov>. See also, IRS, *Internal Revenue Manual*, Part 13, Chapter 1, Section 7. – Taxpayer Advocate Service Case Criteria <www.irs.gov>; TAS, *Learn more about eligibility* (undated) <www.taxpayeradvocate.irs.gov>.

102 *Internal Revenue Code (USA)*, Title 26, § 7811.

2.47 The terms of a TAO may require the IRS to:

- release a levy;¹⁰³ or
- cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer pursuant to:
 - collection;¹⁰⁴
 - bankruptcy and receiverships;¹⁰⁵
 - discovery of liability and enforcement of title;¹⁰⁶ or
 - any other provision of the internal revenue laws specifically described by the NTA in the TAO.¹⁰⁷

2.48 A TAO may be appropriate where the IRS does not agree with the TAS on the proper resolution of specific case issues.¹⁰⁸ The IRS will generally comply with these orders unless they are appealed and subsequently modified or rescinded by the NTA, the Commissioner or Deputy Commissioner.¹⁰⁹ 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 NTA.¹¹⁰ In her annual report, the NTA sets out the use of TAO's and whether the IRS complied with them.¹¹¹

2.49 The TAS also examines and reports problems which impact on multiple taxpayers or represent a systemic problem in tax administration.¹¹² Such problems may be identified from patterns in taxpayer issues or raised by taxpayers through the Systemic Advocacy Management System.¹¹³ The TAS may also receive intelligence on areas requiring improvement through the Taxpayer Advocacy Panel, a Federal Advisory Committee established in 2002 comprising volunteers from the community.¹¹⁴

2.50 In her annual report, the NTA identifies at least 20 of the most serious problems facing taxpayers and may offer recommendations to resolve the problem. One such problem identified led to the adoption of the Taxpayer Bill of Rights in 2014.

103 Code of Federal Regulations (USA), Title 26, Chapter I, Subchapter F, Part 31, §301.7811-1 (b).

104 Code of Federal Regulations (USA), Title 26, Chapter I, Subchapter F, Part 31, §301.7811-1 (b). See also Chapter 64 of the *Internal Revenue Code* (USA).

105 Code of Federal Regulations (USA), Title 26, Chapter I, Subchapter F, Part 31, §301.7811-1 (b). See also Sub-chapter B of Chapter 70 of the *Internal Revenue Code* (USA).

106 Code of Federal Regulations (USA), Title 26, Chapter I, Subchapter F, Part 31, §301.7811-1 (b). See also Chapter 78 *Internal Revenue Code* (USA).

107 Code of Federal Regulations (USA), Title 26, Chapter I, Subchapter F, Part 31, §301.7811-1 (b).

108 IRS, 'Taxpayer Assistance Order (TAO) Process' in IRS Manual, Part 13.1.20.2 <www.irs.gov>.

109 Code of Federal Regulations (USA), Title 26, Chapter I, Subchapter F, Part 31, §301.7811-1 (b).

110 Code of Federal Regulations (USA), Title 26, Chapter I, Subchapter F, Part 31, §301.7811-1 (b).

111 NTA, *2015 Annual Report to Congress* (2015) pp 555-556.

112 TAS, *Who we are* (undated) <www.taxpayeradvocate.irs.gov>.

113 IRS, *System Advocacy Management System (SAMS)* (20 May 2016) <www.irs.gov>

114 Taxpayer Advocacy Panel, *What we do* (undated) <www.improveirs.org>.

2.51 The NTA has also proposed a 'report card' to measure the IRS's performance relating to taxpayer rights. In the preface to her 2014 and 2015 annual reports, the NTA sets out a *Taxpayer Rights Assessment* which contains performance measures and data organised against the ten taxpayer 'rights'. However, this assessment is still a 'work in progress' and is expected to grow and evolve over time as more data becomes available.¹¹⁵

Low income tax clinics

2.52 One service made available to certain taxpayers in the USA is the Low Income Taxpayer Clinic Program. This program aims to ensure the fairness and integrity of the tax system for low income taxpayers (and non-English speaking taxpayers) through:

- pro bono representation on their behalf in tax disputes with the IRS;
- educating them about their rights and responsibilities as taxpayers; and
- advocating for issues that impact them.¹¹⁶

2.53 Low income clinics are independent from the IRS but receive some of their funding from the IRS through a matching grant program.¹¹⁷ The TAS oversees and administers the grant program for the IRS. The grant must be matched by the clinic on a dollar-for-dollar basis.¹¹⁸ Academic institutions and other non-profit organisations are among those which may qualify for such funding.¹¹⁹

United Kingdom

Your Charter

2.54 The UK government has a history of adopting charters to provide the community with a comprehensive guide of what to expect in the delivery of public services. The first such charter which specifically concerned taxpayer interactions with revenue authorities was published by the Board of Inland Revenue in 1986. It was superseded by a revised version in 1991 in line with broader government policies at the time.¹²⁰ Following the merger of the Board of Inland Revenue and Her Majesty's (HM) Customs & Excise into HM Revenue & Customs (HMRC), a new publication titled *Your Charter* was adopted in 2009.

2.55 *Your Charter* sets out what individuals and businesses dealing with HMRC can expect from the department, as well as what it expects from them in return. Recently in

115 TAS, *2014 Annual Report to Congress* (2014), p xv; TAS, *2015 Annual Report to Congress* (2015), p xvii.

116 TAS, *Low income taxpayer clinic program report* (December 2015) p 4.

117 *Internal Revenue Code* section 7526(a).

118 *Internal Revenue Code* section 7526(c)(5).

119 TAS, *Low Income Tax Clinics* (2015) pp 58-59.

120 International Fiscal Association 2015 Basel Congress, *Cahiers de droit fiscal international Vol 100b – The practical protection of taxpayers fundamental rights* (2015), p 868.

January 2016, HMRC ‘refreshed’ *Your Charter* to be shorter, setting out ‘rights’ and ‘obligations’ in a simple and concise way.¹²¹

2.56 HMRC has also sought to strengthen its charter governance by creating a sub-committee of its Board, namely: the Charter Committee. The Charter Committee is chaired by a HMRC non-executive director whilst the majority of the other members are external to HMRC.¹²² The HMRC has also appointed nine senior staff members as Charter Champions to assist the Charter Committee in its oversight work.

2.57 The Charter Champions also promote *Your Charter* within the organisation and ensure its principles are considered in developing HMRC processes and policy design. A number of Charter Advocates have also been recruited by Charter Champions to ensure adherence to *Your Charter* principles by HMRC staff. It should be noted that these roles are relatively new and are still evolving.

Reporting on the Charter

2.58 Although the ‘rights’ and ‘obligations’ outlined in *Your Charter* are not legislated into UK law, it is explicitly supported by legislation. Namely, not only is the HMRC required to prepare a charter, which includes standards of behaviours to which HMRC aspires when exercising its powers, but it is also legislatively required to review the charter regularly and report at least once a year on its adherence to the charter.¹²³

2.59 The HMRC’s customer survey measures how it performed against each right listed in *Your Charter*.¹²⁴ Each year HMRC present a series of set questions to individuals, small and medium businesses and agents and measures their responses in percentage terms to see how the department is performing.

2.60 The HMRC has made progress to enhance *Your Charter* through comments and suggestions from taxpayers. The enhanced charter will link the rights and obligations to specific areas of its work to enable taxpayers to more clearly appreciate how it is delivering on its promises and commitments. As noted above, they have also created a new HMRC Board sub-committee to enable them to show stakeholders how they are an accountable and transparent department.

2.61 It has been noted that HMRC has increased its focus on *Your Charter* with 30 references being made to *Your Charter* in the 2015-16 annual report compared with three such references in the previous year.¹²⁵

121 HM Revenue & Customs (HMRC), *Your Charter Annual Report: April 2015 to March 2016* (14 July 2016) p 7.

122 HMRC, *Our Governance* <www.gov.uk>.

123 *Commissioners of Revenue and Customs Act 2005 (UK)*, s 16A, as inserted by *Finance Act 2009 (UK)*, s 92.

124 HMRC, *Your Charter Annual Report: April 2014 to March 2015* (2015).

125 Ian Young, ‘Charter Annual Report 2015-16’ <www.ion.icaew.com/TaxFaculty/post/Charter-Annual-Report-2015-16>.

The Adjudicator's Office and Parliamentary and Health Service Ombudsman

2.62 The Adjudicator's Office was established in 1993 and currently provides an independent tier of complaint handling for HMRC, the Valuation Office Agency and the Insolvency Service. The Adjudicator is able to look at complaints about mistakes, unreasonable delay, poor and misleading advice, inappropriate staff behaviour and the use of discretion.¹²⁶

2.63 The Adjudicator cannot look at matters of government or departmental policy, complaints where there is a specific right to determination by any court, tribunal or other body with specific jurisdiction over the matter or complaints about an ongoing investigation or enquiry.¹²⁷ The Adjudicator also cannot ask a department to suspend any action, such as pursuing a debt or calculating interest.¹²⁸

2.64 The Adjudicator generally refers complaints to the originating departments to handle internally in the first instance. Where a complaint is considered ready for investigation and accepted, the Adjudicator's Office appears to seek resolution first by mediation between the parties.¹²⁹ Where such mediation is inappropriate, the Adjudicator will review the case in detail to set out views and make recommendations. Where the Adjudicator upholds any aspect of a complaint, a detailed letter is prepared for the senior manager responsible along with a request to be notified in writing after the corrective action has been taken.¹³⁰

2.65 Where a complaint is upheld, the Adjudicator may make recommendations which can include for the HMRC to issue an apology and/or pay costs to the taxpayer.¹³¹ Notably, the Adjudicator may also recommend that a monetary sum be paid in recognition of the poor level of service the taxpayer received as well as costs.¹³²

2.66 Where customers remain dissatisfied with the outcome of their complaint after investigations by HMRC and the Adjudicator, they may raise their concerns with their local Member of Parliament to refer to the Parliamentary Ombudsman.¹³³

2.67 The Parliamentary Ombudsman's role is to investigate complaints that individuals have been treated unfairly or have received poor service from government departments. However, the Parliamentary Ombudsman has observed that, as the Adjudicator's Office already acts as a 'second tier' to handle complaints about HMRC, many issues raised in complaints are resolved prior to reaching the Parliamentary Ombudsman.¹³⁴

126 The Adjudicator's Office, *How we work* <www.adjudicatorsoffice.gov.uk>.

127 Ibid.

128 The Adjudicator's Office, *Annual Report 2015*, p 6.

129 Ibid, pp 8-9.

130 Ibid, p 6.

131 Ibid, p 6.

132 Ibid, p 12.

133 *Parliamentary Commissioner Act 1967* (UK).

134 Parliamentary and Health Service Ombudsman, *Complaints about UK government departments and agencies, and some UK public organisations 2014-15* (2015) p 26.

European Union law and human rights

2.68 Taxpayer rights in the UK have also been influenced by broader developments of human rights. The main source of human rights law in the UK is the *Human Rights Act 1998 (UK)*, which incorporates the European Convention of Human Rights (Convention) into UK law.¹³⁵ It enables taxpayers, who contend that their rights under the Convention have been contravened, to seek remedies in UK courts with ultimate rights of appeal being available in the European Court of Human Rights (ECHR)¹³⁶.

2.69 The particular rights within the Convention that have been held to have an impact on tax matters include:¹³⁷

- Article 1 of Protocol 1, the right to peaceful enjoyment of possessions and protection of property;
- Article 6, the right to a fair and public trial within a reasonable time;¹³⁸
- Article 8, the right to respect for private and family life; and
- Article 14, prohibition of discrimination in the enjoyment of ECHR rights.

2.70 As a European Union (EU) member state, the UK is also required to comply with EU law and the rights contained in the Charter of Fundamental Rights in so far as it is within the scope of EU law.¹³⁹ Where an EU member state acts in a way that contravenes EU law, the act can be set aside by the Court of Justice of the European Union (CJEU).¹⁴⁰ The CJEU can be used by taxpayers if they feel their rights under EU law have been infringed.

2.71 Academic research on the area suggests that whilst the UK Charter may not provide legislative protection, the overlay of European human rights law, and avenues of redress through the ECHR, provides an additional layer of taxpayer protection that is not available in Australia.¹⁴¹

2.72 During the course of this review, a referendum was held in the UK to determine whether it would continue to be a member state of the EU.¹⁴² The referendum resulted in a 52 per cent vote for the UK to leave the EU. At present, it is unclear how the anticipated UK's exit from the EU may impact the jurisdiction of the CJEU and ECHR vis-à-vis UK tax law.

135 HMRC, *AH 1051 – European Law and Human Rights: European Union Law* <www.hmrc.gov.uk>.

136 *Human Rights Act 1988 (UK)* s 7; See also Ministry of Justice, *Making Sense of Human Rights* (2006) p 12.

137 HMRC, *REC1006 – Customer contact – HMRC work areas affected by the HRA* <www.hmrc.gov.uk>.

138 Article 6 does not apply to public law disputes and the ECHR has held that tax is public law.

139 *HM Government, Rights and obligations of European Union membership* (April 2016).

140 *Ibid.*

141 *Above n 52*, p 395.

142 *European Union Referendum Act 2015*.

Doctrine of legitimate expectations

2.73 In addition to *Your Charter* adopted by the HMRC, commentators have pointed to developments in the UK common law that have provided an additional source of taxpayer rights.¹⁴³ Namely, the administrative law doctrine of substantive legitimate expectations.

2.74 In the UK, the principles of legitimate expectations in tax matters are well established. The principles of legitimate expectation were considered in some detail recently in *R (oao Hely-Hutchinson) v HMRC*.¹⁴⁴ In that case, the taxpayer had relied upon published guidance issued by the HMRC in 2003 to make claims for deductions which had arisen between 1999 and 2002 (inclusive). The HMRC had opened a number of enquiries into such claims, including those of the taxpayer, and these remained opened until at least 2009 when the HRMC revised and reversed the guidance it had previously published on the deductibility of these amounts. As a result of the changed HMRC position, the taxpayer's claims were denied.¹⁴⁵

2.75 The taxpayer lodged an appeal, asserting that he had a legitimate expectation to claim those losses and to be treated in accordance with the 2003 guidance. He also argued that the HMRC's refusal to recognise his capital loss claim was a breach of the principle that the Commissioners should treat taxpayers fairly and consistently.¹⁴⁶

2.76 The HMRC's central contention was that its duty was to collect the correct amount of tax.¹⁴⁷ However, it was held that HMRC's responsibility for the collection and management of tax 'embedded the obligation to treat taxpayers fairly'.¹⁴⁸ In this case, four particular factors of unfairness were identified. The first factor was comparative unfairness, being that some taxpayers had a legitimate expectation arising out of the 2003 guidance and obtained a benefit, whilst others did not.¹⁴⁹ The second factor of unfairness was that the 2009 revised guidance had retrospective effect.¹⁵⁰ The third factor was the situation had arisen because of a mistake made by the HMRC in 2003¹⁵¹ and the fourth factor was that HMRC took six years to recognise and resolve its mistake.¹⁵²

2.77 The court held that legitimate expectation on the part of the taxpayer had been established and that HMRC had failed to consider all aspects of unfairness claimed by the taxpayer.¹⁵³ The case was remitted to HMRC to make a fresh decision, taking into account all aspects of unfairness. This case is the first tax case where 'a judicial review

143 Above n 141, p 394.

144 *R (oao Hely-Hutchinson) v HMRC* [2015] EWHC 3261.

145 *Ibid*, at [23].

146 *Ibid*, at [28].

147 *Ibid*, at [30] and [43].

148 *Ibid*, at [43].

149 *Ibid*, at [50]-[53] and [71].

150 *Ibid*, at [54]-[56] and [72].

151 *Ibid*, at [57]-[62] and [73].

152 *Ibid*, at [63] and [74].

153 *Ibid*, at [77].

application based on legitimate expectations has succeeded in the absence of any finding of detrimental reliance.¹⁵⁴

2.78 In addition to reaffirming the role of substantive legitimate expectations in the UK, the case also demonstrated that:

It is not necessary that the claimant relied on the guidance to his detriment: conspicuous unfairness may also result from the unequal treatment of different taxpayers, and from retrospective withdrawal of guidance in relation to past transactions or claims. HMRC does not have a 'trump card' that its guidance was wrong and that it has an obligation to collect the correct amount of tax.¹⁵⁵

2.79 The above position appears markedly different to that in Australia as confirmed by the decision of the Full Federal Court in *Macquarie Bank*¹⁵⁶. In that case, the Federal Court effectively confirmed that guidance issued by the ATO cannot bind the Commissioner to act otherwise than in accordance with the tax law.

Canada

Taxpayer Bill of Rights

2.80 In 1985, the then Minister of National Revenue introduced a publication titled the *Declaration of Taxpayer Rights* (Declaration). This formulation of rights did not have the force of the law itself, although its principles were sourced from the Canadian Charter of Rights and Freedoms,¹⁵⁷ statute and common law.¹⁵⁸ The Declaration was not enacted into law and has since been superseded by the Taxpayer Bill of Rights.

2.81 On 28 May 2007, Canada adopted a Taxpayer Bill of Rights to increase the accountability of the Canada Revenue Agency (CRA) to taxpayers and enhance the level of awareness among taxpayers about their rights and avenues of redress when dealing with the CRA. It sets out 16 taxpayer 'rights' as well as a five-part Commitment to Small Business.¹⁵⁹ The Taxpayer Bill of Rights contains both legislated rights and non-legislated service rights. Some of these rights are derived from existing legislation including the *Income Tax Act*, the *Official Languages Act* and the *Privacy Act*.

Office of the Taxpayers' Ombudsman

2.82 The Office of the Taxpayers' Ombudsman was established in 2007. The Ombudsman reports directly to the Minister of National Revenue. The mandate of the

154 Mark Whitehouse and Peter Halford, 'Hely-Hutchison, legitimate expectation and judicial review,' *Tax Journal* (2 December 2015) <www.taxjournal.com>.

155 Ibid.

156 *Macquarie Bank v Commissioner of Taxation* [2013] FCAFC 119.

157 Part I of the *Constitution Act 1982*, being schedule B to the *Canada Act 1982 (UK) 1982*, c 11.

158 Jinyan Li, 'Taxpayers' Rights in Canada' (1997) 7(1) *Revenue Law Journal* 83, p 85.

159 Canada Revenue Authority, *Taxpayer Bill of Rights* (December 2013) <www.cra-arc.gc.au>.

Ombudsman is to 'assist, advise and inform the Minister about any matter relating to services provided to a taxpayer by the [CRA]'.¹⁶⁰

2.83 The Ombudsman's duties include reviewing and addressing complaints about the service provided by the CRA and allegations of breaches of the eight service rights contained in the Taxpayer Bill of Rights. This can arise in circumstances such as undue delay, misleading information, complaints of staff behaviour or misunderstandings which potentially result from mistakes by the CRA.¹⁶¹ The Ombudsman does not review complaints relating to tax policy or legislation or matters that are before the courts.¹⁶²

2.84 The outcome of such reviews may result in the Ombudsman making recommendations to the CRA or the Minister, which may provide remedial relief in the form of giving further information, correcting a misunderstanding or omission, or offering an apology. The Ombudsman may also make recommendations aimed at helping the CRA to improve its policies and procedures to better serve taxpayers. However, the Ombudsman cannot make a binding directive to the CRA to take a particular course of action.¹⁶³

2.85 The Ombudsman has a role to raise awareness or conduct outreach programs to promote the service rights defined in the Taxpayer Bill of Rights. For example, the Ombudsman has published a Digest of Taxpayer Service Rights to enable taxpayers to better understand their 'rights' to service and fairness when dealing with the CRA.¹⁶⁴

2.86 The Ombudsman also reviews systemic and emerging issues related to service matters. One such example related to concerns about taxpayers' reluctance to lodge complaints against the CRA. Consequently, the right to lodge a complaint or seek a review without fear of reprisal was added to the Taxpayer Bill of Rights in June 2013, to reassure taxpayers of the integrity of the complaint process.¹⁶⁵ The CRA has also designated a separate form for reprisal complaints.¹⁶⁶ These complaints are reviewed by its Internal Affairs and Fraud Control Division,¹⁶⁷ which directly reports to the Commissioner. The Ombudsman does not have oversight of reprisal complaints.

2.87 The ability for a taxpayer to seek a review by a taxpayer ombudsman in the Canadian Taxpayer Bill of Rights is consistent with the IBFD best practice in terms of a framework for protecting taxpayer rights.¹⁶⁸

160 Order in Council P.C. 2007-828, Schedule 1, s 4.(1).

161 Office of the Taxpayers Ombudsman website, 'Complaints we review', <www.oto-boc.gc.ca>.

162 Ibid.

163 Ibid.

164 Ibid.

165 Salvatore Mirandola and Sergio Privato, 'Canada' in International Fiscal Association 2015 Basel Congress, *Cahiers de droit fiscal international Vol 100b – The practical protection of taxpayers fundamental rights* (2015) 215, p 236.

166 Form RC459, Reprisal Complaint.

167 CRA, *Reprisal Complaints* <www.cra-arc.gc.ca>.

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

Tort of ‘negligent investigation’

2.88 Although the Canadian Taxpayer Bill of Rights does not itself provide specific relief or justiciable redress, developments in Canadian case law have raised the possibility of redress under the tort of negligence.¹⁶⁹ Generally, Canadian courts have shown reluctance to impose a duty of care on CRA officials when dealing with taxpayers, despite the Taxpayer Bill of Rights. However, more recent developments have provided indication that the CRA and its officers may be held liable for negligent actions in some circumstances.

2.89 In *Leroux v Canada Revenue Agency*¹⁷⁰, the Supreme Court of British Columbia found that there was sufficient nexus between the CRA auditors and taxpayer being audited such that the taxpayer was owed a duty of care.¹⁷¹ In this case, the taxpayer’s extensive dealings with the CRA through numerous objection processes meant that the CRA officials involved would have reasonably contemplated that carelessness may be likely to cause damage to the taxpayer. Furthermore, the Court found that amongst the allegations, the imposition of penalties indeed breached the standard of care owed by the CRA official to the taxpayer.¹⁷² However, due to other factors, the Court determined the breach of standard of care by the CRA and its officers did not cause the injury claimed by the taxpayer.¹⁷³ The IGT understands that the taxpayer had initially sought to appeal the decision of the Supreme Court of British Columbia, but that appeal had been abandoned.

2.90 Two further cases on the issues have been decided in Canada. In *Grenon v Canada Revenue Agency*¹⁷⁴, the Court of Queen’s Bench of Alberta declined to follow the decision in *Leroux* on the issue of duty of care.¹⁷⁵ The Court in *Grenon* questioned the approach adopted in *Leroux* and concluded that, absent exceptional circumstances, there was not a sufficient degree of proximity in the relationship between the taxpayers and the CRA such that the latter would owe a duty of care to the former.¹⁷⁶ The decision in *Grenon* is currently the subject of a pending appeal in the Alberta Court of Appeal.

2.91 In *Canada v Scheuer*,¹⁷⁷ the Federal Court of Appeal determined that:

... there is no category of recognized cases that supports the plaintiffs’ assertion that the Canada Revenue Agency and Canada owed a duty of care to all Canadians when issuing tax shelter numbers or a duty to warn all Canadians that participation in a given tax shelter may lead to the denial of the income tax deductions (the charitable tax credits in this case) allegedly available as a result of such participation. The performance of

169 John Bevacqua, ‘Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments’ (2013) 61(4) *Canadian Tax Journal* 893.

170 *Leroux v Canada Revenue Agency* 2014 BCSC 720.

171 *Ibid.*, at [271]–[309].

172 *Ibid.*, at [339]–[355].

173 *Ibid.*, at [372]–[399].

174 *Grenon v Canada Revenue Agency* 2016 ABQB 260.

175 *Ibid.*, at [82].

176 *Ibid.*

177 *Canada v Scheuer* 2016 FCA 7.

*statutory duties generally does not, in and of themselves, give rise to private law duties of care.*¹⁷⁸

2.92 However, the Court in *Scheuer* did leave open the possibility that 'liability may attach if public officials act in a manner inconsistent with proper and valid exercise of their statutory duties, in bad faith or in some other improper fashion.'¹⁷⁹

New Zealand

Inland Revenue's Charter

2.93 The Inland Revenue's Charter was first published in March 2001 and outlines the New Zealand Inland Revenue Department's (IRD) commitments to, and standards of service for, taxpayers.¹⁸⁰ It was adopted in response to recommendations made by the Finance and Expenditure Committee in 1999,¹⁸¹ following an inquiry which found that public confidence in tax administration had been eroded.¹⁸²

2.94 The Inland Revenue's Charter is noticeably different to other jurisdictions, in that the Charter appears to be targeted at the IRD itself, not the taxpayer unlike those of Australia and the UK which are outward-facing community documents.

2.95 As a result of this difference in approach, the Inland Revenue's Charter does not set out taxpayer obligations¹⁸³ and generally does not use 'rights' terminology. Instead, it sets out its service commitments. However, the content of the commitments made within the Inland Revenue's Charter are similar in substance to comparable taxpayer charters or documents in other jurisdictions some of which are discussed above.

2.96 The Inland Revenue's Charter also clearly sets out the avenue through which taxpayers can make a complaint to the IRD about the service they have received with a commitment to deal with complaints promptly, fairly and fully. It also sets out that complaints can be escalated to the Ombudsman.

2.97 The IRD is currently undertaking a review of its Charter to ensure that it reflects the department's move towards being a more customer focused and intelligence-led organisation. The IRD expects that this current review will provide an opportunity to engage with its 'customers' on the shape, direction and expectations of the Charter as well as identifying new approaches of reporting on the department's performance against it.

178 Ibid, at [30].

179 Ibid, at [46].

180 Inland Revenue Department (IRD), *Inland Revenue's Charter* <www.ird.govt.nz>.

181 Finance and Expenditure Committee, *Report of the inquiry into the powers and operations of the Inland Revenue Department* (1999).

182 Controller and Auditor-General (NZ), *Inland Revenue Department: Performance of Taxpayer Audit* (July 2003), pp 9-10.

183 It should be noted that taxpayers' primary obligations are set out in legislation under section 15B of the *Tax Administration Act 1994* (NZ).

Reporting on the Charter

2.98 When it first implemented its Charter, the IRD reported its performance on the Charter as part of its annual report. The extent of reporting on the Charter included quantitative measures, such as numbers of complaints received and resolved, and qualitative gauges, such as highlighting where new and existing initiatives aligned with commitments under its Charter.¹⁸⁴ The IRD does not currently report publicly on its Charter performance and has ceased to include such information in its annual reports.

2.99 Whilst the IRD no longer publishes its performance against the Charter in its annual reports, it reports internally on such performance on a quarterly basis.¹⁸⁵ Information contained in complaints is directly measured against IRD customer satisfaction survey results that reference the Charter principles, such as:

- we will be easy to deal with, prompt, courteous, and professional;
- we will provide you with reliable and correct advice and information about your entitlements and obligations;
- we will be well-trained and competent; and
- we will treat all information about you as private and confidential.¹⁸⁶

2.100 This information contained in the above quarterly reports is useful in guiding the IRD's approach to handling complaints and improving staff performance against the Charter principles.

2.101 In 2015, the IRD engaged an independent consultancy firm to carry out a staff attitudinal survey for the purpose of improving IRD performance in customer service and complaints management.¹⁸⁷ The objectives of this survey were to provide insights into staff views on areas including customer service, leadership and commitment to complaints, policies, procedures and processes, complaints handling and complaints as a source of improvement.¹⁸⁸ The survey results included candid responses from IRD staff and have helped the IRD understand staff attitudes towards complaints. These results are expected to assist in driving positive attitudes from IRD staff and in moving the IRD towards a customer-centric approach.¹⁸⁹

Other jurisdictions

2.102 In addition to the above jurisdictions, the IGT also examined the taxpayer rights and protection frameworks of a number of other countries. Whilst these are not

184 For example: Inland Revenue Department (NZ), *Annual Report 2001-2002*, pp 59-63.

185 IRD, *Inland Revenue Charter and Customer Satisfaction* (1 January to 31 March 2011).

186 Ibid.

187 IRD, *Complaints Management Assessment: Stage 1* (November 2015).

188 Ibid.

189 IGT meeting with the IRD, 19 May 2016.

intended to be used as direct comparisons with Australia due to the different socio-political and legal environments within which they operate, they do offer useful insights.

Mexico

2.103 The protection and defence of taxpayer rights in Mexico is the responsibility of the *Procuraduría de la Defensa del Contribuyente* (PRODECON). The PRODECON is independent of the Mexican revenue authority and provides 'non-judicial review over the decisions, actions or resolutions of any government agency or public organism which collects taxes or any other kind of duties (social security contributions, customs duties, fees for public services).'¹⁹⁰

2.104 In discharging its responsibilities, the PRODECON may provide free advice and counselling to taxpayers as well as advocating on their behalf in legal action against the revenue authority.¹⁹¹ Additionally, the PRODECON may, of its own volition, act as a public defender in ordinary and constitutional courts where it considers that a particular legal provision would violate fundamental taxpayers' rights.¹⁹²

2.105 In addition, the PRODECON may also make recommendations for law change to taxes and customs, investigate systemic tax issues and make recommendations for improvement and also act as a mediator in a newly implemented alternative dispute resolution mechanism called Conclusive Agreements between auditors and taxpayers.¹⁹³ The latter provides a mechanism whereby audit disputes are resolved by way of a binding agreement which cannot be later altered, varied or legally challenged either by the taxpayer or the revenue authority.¹⁹⁴

2.106 Finally, the PRODECON also performs an Ombudsman role to receive complaints from taxpayers regarding actions which they consider violate their rights. The PRODECON will make enquiries of the relevant tax office in question which has 72 hours to justify their actions.¹⁹⁵ Where the action is verified, the PRODECON may make a non-binding public recommendation for improvement.¹⁹⁶ Whilst the revenue authority is not obliged to accept the recommendation, where it is not accepted, the PRODECON has the right to publicly name the relevant official to prevent the relevant conduct from recurring.¹⁹⁷

Chile

2.107 The Chilean Tax Code has a legislated list of taxpayers' rights. The IGT

190 Diana Bernal, 'The role of PRODECON in the protection of taxpayers' rights', p 2 <www.taxpayerrightsconference.com>.

191 Ibid, p 3.

192 Ibid, p 4.

193 Ibid, p 3.

194 Ibid, p 13.

195 Ibid, p 6.

196 Ibid, pp 6-7.

197 Ibid, p 7.

understands that the list essentially consolidates a range of rights which had previously existed through other Chilean legislation as well as its Constitution.¹⁹⁸

2.108 By operation of Law No 20.420 which was unanimously approved by the Chilean Senate in December 2009, the Chilean Tax Code sets out the consolidated list of ten taxpayers' rights and a number of requirements which are directed at the revenue authority.¹⁹⁹

2.109 Whilst the rights set out in the Chilean Tax Code are not of themselves unique to those in many other jurisdictions, Chile is the only jurisdiction examined by the IGT in which taxpayers' rights were legislated. Moreover, the Chilean Tax Code also states that these rights are actionable through the Chilean Tax and Customs Courts where they are violated by acts or omissions of the revenue authority.²⁰⁰

THE MODEL TAXPAYER CHARTER

2.110 Interest in taxpayer rights and responsibilities and the role of charters and similar documents has extended beyond the realm of revenue authorities. The role of taxpayer rights in enhancing the fairness of the tax system was explored recently in a collaborative project by the Asia Oceania Tax Consultants' Association (AOTCA), Confederation Fiscale Europeenne (CFE) and Society of Trust and Estate Practitioners (STEP). Collectively, the membership of these organisations represents some 500,000 tax advisors in 80 countries.²⁰¹

2.111 The project identified 86 specific provisions of taxpayer rights which were derived from a survey questionnaire posed to members of AOTCA, CFE and STEP in 41 countries. Australia was one such country with participating organisations being CPA Australia and the Tax Institute of Australia.²⁰²

2.112 The aggregate response to the survey questionnaire for each jurisdiction is summarised in the study and indicates that in Australia 64 of the 86 provisions already exist to varying degrees. Notably, the survey reported positively on the clarity of legislation,²⁰³ preventing interest or penalties to be imposed if it is not reasonably possible for a taxpayer to comply with legislation²⁰⁴ and making the policy intent clear in legislation.²⁰⁵ The survey results did not find that these aspects were followed in the USA, UK, Canada and New Zealand.

198 Enrique Rojas, 'CIAT News - Chile', *Inter-American Centre for Tax Administrations* <www.ciat.org>.

199 Ministerio de Hacienda, Modifica El Código Tributario Para Explicitar Derechos De Los Contribuyentes (19 February 2010) <www.leychile.cl>.

200 Ibid.

201 Asia Oceania Tax Consultants' Association (AOTCA), Confederation Fiscale Europeenne (CFE) and Society of Trust and Estate Practitioners (STEP), *Towards Greater Fairness in Taxation: A Model Taxpayer Charter* (March 2016) <www.taxpayercharter.com>.

202 Model Taxpayer Charter, *Origin of Our Study*, <www.taxpayercharter.com>.

203 Model Taxpayer Charter, Art 17(1).

204 Ibid, Art 17(2).

205 Ibid, Art 17(6).

2.113 The survey also identified potential shortcomings in Australia such as allowing tax refunds to be offset against other debt, not reversing the onus of proof on tax avoidance and penalty matters and the enactment of retrospective legislation.

2.114 Based on the result of the survey as well as other research, AOTCA, CFE and STEP published the Model Taxpayer Charter. The Model Taxpayer Charter was designed with a view to be easily adopted by revenue authorities or incorporated into domestic law. An important factor in the Model Taxpayer Charter was its direct balancing of the rights and responsibilities of taxpayers:

*... recognising and enshrining taxpayer rights in legislation will contribute substantially to both the perception and reality of fairness and integrity in the tax system. Placing statements of taxpayer responsibilities in an overarching document reinforces the proposition that while holding rights, taxpayers must also shoulder responsibilities and do so in good faith.*²⁰⁶

2.115 The Model Taxpayer Charter research noted that the majority of countries which have adopted charters have done so by way of practice statement rather than in a legally binding document.²⁰⁷ Importantly, and notwithstanding the majority approach in this area, the researchers argue that as a matter of best practice 'the Taxpayer Charter should have legal force to the extent possible, in order for it to be fully effective.'²⁰⁸

2.116 They also advocate in favour of empowering taxpayers to enforce their rights under taxpayers' charters generally, noting that 'laws which are not capable of enforcement have no real effect'.²⁰⁹ However, the Model Taxpayer Charter does not propose a framework for enforcement as it considered that enforcement will depend on the legal traditions of the jurisdiction:²¹⁰

*Since these legal traditions vary considerably across the world, it would be wrong to advocate a particular approach as being suitable in all circumstances. We note, that the office of a Taxpayer Ombudsman (or Taxpayer Advocate) could be the appropriate forum for enforcement of Taxpayer Rights in the first instance (i.e. informed resolution rather than court action) if given the authority to do so.*²¹¹

2.117 The main difference between the Australian Charter and Model Taxpayer Charter as proposed is that the former mainly provides expectations rather than enforceable rights. However, it must be noted that some of the Charter principles are based on legislative requirements and are enforceable. A comparison of the Charter principles against those set out in the Model Taxpayer Charter is set out in Table 3.

206 Above n 201.

207 Ibid.

208 Ibid.

209 Ibid.

210 Ibid.

211 Ibid.

Table 3: A comparison of the Australian Charter and the Model Taxpayer Charter

Australia – Taxpayers’ Charter	Model Taxpayers Charter
Rights	
Treat you fairly and reasonably	The Tax system shall be designed and administered fairly, honestly and with integrity, according to the law, without bias or preference.
Treat you as being honest unless you act otherwise	The Tax system will be designed and administered to provide as far possible certainty, clarity and finality in one's Tax affairs.
Offer you professional service and assistance	The Tax system will be designed and administered fairly and cost effectively taking into account the attainment of its purposes.
Accept you can be represented by a person of your choice and get advice	In cases of disputes as to Tax liability an independent, objective, speedy and cost effective appeal process. Disputes as to actions of the Tax Authority will be followed up without fear of reprisal under independent oversight.
Respect your privacy	Taxpayers who face difficulties in carrying out their responsibilities as Taxpayers will be given appropriate assistance by the Tax Administration.
Keep the information we hold about you confidential	A Taxpayer's affairs and records will be kept confidential and private except in the case of public hearings in litigation or criminal prosecutions.
Give you access to information we hold about you	A Taxpayer is required to pay no more than the amount of Tax based on Tax laws.
Help you to get things right	A Taxpayer may be represented by a person of the Taxpayer's choosing.
Explain the decisions we make about you	Enforcement action including audits, collections, reassessment, penalties and prosecutions will be proportionate to the circumstances.
Respect your right to a review	In the absence of any evidence to the contrary to be presumed honest.
Respect your right to make a complaint	
Make it easier for you to comply	
Be accountable	
Obligations/Responsibilities	
Be truthful	Be truthful in all Tax matters including legally required disclosures.
Keep the required records	Provide information on a timely basis as and when reasonably required.
Take reasonable care	Be cooperative in dealings with the Tax Administration, filing Tax returns and information reporting, the conduct of an audit, and payment of Taxes.
Lodge by the due date	Pay Tax on time without deduction or offset subject to the right to appeal.
Pay by the due date	Comply with Tax responsibilities and seek assistance if necessary.

Table 3: A comparison of the Australian Charter and the Model Taxpayer Charter (continued)

Australia – Taxpayers' Charter	Model Taxpayers Charter
Obligations/Responsibilities	
Be cooperative	Maintain accurate financial records and supporting information for such period as may be reasonably required.
	Exercise an appropriate degree of care and diligence in taxation matters.
	Be held accountable for the correctness and completeness of the information supplied to the Tax Administration whether or not another person has been engaged to prepare, assemble and/or submit the information on your behalf.
	Treat Tax Officers with courtesy and respect, noting that abuse of Tax Officers in performance of their duties is never acceptable.
	Ensure that all legitimate cross border compliance requirements are met.

2.118 An examination of the rights set out in the Model Taxpayers Charter revealed four rights which do not explicitly appear in the Australian Charter. These are the rights to:

- certainty, clarity and finality;
- a cost effective and independent, objective and speedy appeals process;
- pay no more tax than is required by the tax laws; and
- a proportionality requirement in the conduct of audits, debt collection, reassessment, prosecution and penalties.

2.119 The IGT notes that whilst the above rights do not explicitly appear on the face of the Australian Charter, some may be found in varying degrees in other publications or legislation. For example, 'access to an independent appeal process' arguably exist through the Part IVC reviews and appeals.²¹²

²¹² *Taxation Administration Act 1953, Pt IVC.*

CHAPTER 3—STAKEHOLDER CONCERNS WITH THE TAXPAYERS' CHARTER

SUMMARY OF STAKEHOLDER CONCERNS

3.1 Stakeholders generally support the principles underpinning the Charter, noting that it is important for taxpayers to both understand their rights and have access to these when interacting with the ATO. The concerns raised include:

- the lack of education or promotion of the Charter and the lack of clarity about its intended purpose and audience;
- the nature of the 'rights' conferred by the Charter, including their level of enforceability – the questions that arise include whether they are contingent on taxpayers discharging their obligations under the Charter and whether there is protection for those taxpayers whose actions or positions are ultimately found to be justified but who have incurred disproportionate time and costs in challenging ATO actions;
- the consistency of ATO officer compliance with the Charter and whether shortcomings are sufficiently addressed when brought to the ATO's attention as well as how the ATO ensures its officers are complying with the Charter principles; and
- whether the Charter reflects the current environment in tax administration, such as increased tax practitioner interactions, digital interactions (for example, myGov, data matching and pre-filled information) and use of external service providers.

CHARTER PURPOSE, AUDIENCE AND EDUCATION

Stakeholder concerns

Purpose and audience

3.2 Stakeholders have expressed some confusion regarding the nature and purpose of the Charter, noting that it appears to define the ATO's duty of care to the public, yet the view shared by the courts and the ATO is that it does not:

... There is no identified duty of care specified as being owed by the defendants to the plaintiff. Such a duty is not established by reference to proclamations such as the Taxpayers Charter which express aims of treating citizens from whom tax is to be levied, fairly and reasonably...²¹³

213 *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550.

3.3 The conflicting perceptions regarding the status of the Charter between taxpayers and the ATO have given rise to a lack of stakeholder confidence in the Charter itself. In particular, it has been noted that on the one hand, the ATO has delivered a document purporting to set out 'taxpayers' rights' whilst, on the other hand, argued in litigation specifically against the conferral of any rights under the very same document. Similar analogies have been drawn between the ATO's approach to the Charter and its arguments against the standing and enforceability of other guidance, such as practice statements.²¹⁴

3.4 Stakeholders have also observed different levels of relevance and reliance on the Charter depending on the market segment of the taxpayer. In particular, the consensus amongst submissions received was that the Charter is of more significance to smaller or more vulnerable taxpayers for whom the cost of tax litigation is disproportionately large, especially those who do not have professional representation as a 'fall back for when things go wrong'.

3.5 The feedback in submissions from larger and more well-resourced taxpayers and their representatives has been that there is an awareness of the Charter but that it was limited or has no utility. This is due to the one-on-one relationships that can be, and in many cases are, fostered between those taxpayers, their representatives and the ATO. Moreover, it was contended that in larger tax disputes the issues tended to relate more to technical and substantive tax issues rather than procedural matters, such that objection and litigation were more appropriate avenues for resolution.

3.6 A growing concern amongst tax practitioners is that the Charter does not make reference to their role other than by accepting that taxpayers can be represented by a person of their choice.²¹⁵ Submissions to this review have commented that the requirements imposed on tax practitioners have become unreasonable, for example the 85 per cent lodgment rule. In this respect, it has been noted that if such impositions can be made on tax practitioners, who are inherently acting for taxpayers, then they should be given the same treatment under the Charter that a taxpayer receives. Submissions to the IGT have suggested that the Charter should recognise the role of tax practitioners or that there should be a separate Tax Practitioners' Charter for when things go wrong between the ATO and tax practitioners.

Education and promotion

3.7 Stakeholders have commented that taxpayers who do not regularly interact with the ATO or self-represented have no easy way of knowing their rights in dealing with the ATO, as details of the Charter are not brought to their attention in interactions with the ATO and are not easily located on the ATO's website. Specifically, some stakeholders have observed that the Charter only appears in the footer of the ATO website which gives rise to the perception that the ATO does not place much importance on it.

214 *Macquarie Bank Ltd v Commissioner of Taxation* [2013] FCAFC 119; *Macquarie Bank Ltd v Commissioner of Taxation* [2013] FCA 887.

215 ATO, *Your rights* (5 January 2016) <www.ato.gov.au>.

3.8 It has been raised in submissions that there is a lack of education and promotion about the availability of the Charter to both taxpayers and tax practitioners. In this regard, stakeholders have commented that greater education about the aims and principles of the Charter was necessary to increase overall community awareness.

Relevant Materials

Purpose and audience

3.9 The ATO has stated that the Charter is its client service charter and is for everyone who deals with the ATO on tax, superannuation, excise and the other laws it administers.²¹⁶ It was referred to by the previous Commissioner as one of the ATO's three 'communication pillars' aimed at maintaining and improving community confidence in its administration.²¹⁷ The ATO has also committed to following the Charter in all its dealings with taxpayers and their representatives.²¹⁸

3.10 However, the ATO has advised the IGT that sole reliance upon the Charter itself to define its commitment to the community does not adequately capture its current client service ethic, cultural shift and the importance of the 'client experience',²¹⁹ all of which are part of its 'Reinvention Program'.²²⁰ The ATO believes that its stated expectation of the experience taxpayers and other stakeholders should have in their interactions goes well beyond the stated rights within the Charter.²²¹

3.11 In focusing on the 'client experience', the ATO has advised the IGT its cultural shift in behaviours have been driven by an intention to:²²²

- make it as easy as possible for taxpayers to get things right;
- understand and consider taxpayers' circumstances and offer a fair and differentiated service;
- treat all people with respect and dignity;
- build trusted relationships;
- be pragmatic and fair in its decision making;
- give the right answers, at the right time and in the right way; and
- use its skills and expertise to assist taxpayers to do the right thing.

3.12 Accordingly, whilst it remains committed to the Charter and acknowledges that the Charter has a role to play, the ATO has stated to the IGT that its approach to

216 ATO, *Your rights and obligations* (5 January 2016) <www.ato.gov.au>.

217 Michael D'Ascenzo, 'Letter to Auditor-General in Response to Charter Audit' (27 May 2008).

218 Above n 26.

219 ATO, Communication to the IGT, 15 September 2016.

220 ATO, 'Program Blueprint' (19 August 2016) <www.ato.gov.au>.

221 Above n 219.

222 Ibid.

administering the tax system seeks to build a relationship with taxpayers and their representatives based on mutual trust and respect rather than affording rights.²²³

Education and promotion

3.13 The Charter principles are set out in the main booklet *Taxpayers' charter – what you need to know* which is accessible from the ATO's website. The publication is available in a range of different languages.²²⁴

3.14 The ATO has acknowledged that:

*The Charter sits at the heart of the client and staff experience. It details the expectations of both the taxpayer and our staff. By making the Charter more accessible and visible to staff and taxpayers alike, we will continue to shape a better experience for all.*²²⁵

3.15 Beyond making the Charter available on its website, the ATO has not provided the IGT with any other materials setting out how it seeks to raise awareness and educate the community about the Charter.

IGT observations

Purpose and audience

3.16 Taxpayers' charters or bills of rights are fundamental documents used by revenue authorities across the globe to set out taxpayer rights or expectations as well as their obligations. They provide a clear basis against which taxpayers and their representatives may anchor their expectations as well as playing a key role in fostering community confidence and voluntary compliance.

3.17 Consistent with international norms, the ATO has recognised the value of the Charter and has committed to following its principles in all of its dealings with the community.²²⁶ In recent years, the ATO has also embarked on its overarching 'Reinvention Program'²²⁷ which aims to shift its focus to client experience in all its interactions with the community. The ATO also believes that 'Reinvention' goes beyond the Charter principles. To the extent that this is the case, the IGT believes that the Charter should be updated to reflect the higher standards of the 'Reinvention Program'. The ATO cannot remain in a perpetual state of 'Reinvention' and such higher standards should be captured in an enduring and fundamental document such as the Charter.

3.18 In addition to the Charter, the ATO has also issued a number of other documents which cover similar territory although they are specifically aimed at certain market segments, namely, the large business and international and high wealth

223 Ibid.

224 Above n 216.

225 ATO, 'Taxpayers' charter – Questions and answers', p 2 (internal ATO material).

226 Above n 26; ATO, *Annual Report 2015-16* (2016) p 14.

227 Above n 220.

individual market segments.²²⁸ These additional more targeted documents provide an opportunity for the ATO to deliver a more tailored message to different group of taxpayers. However, they may also lead to perceptions of preferential treatment for different classes of taxpayers i.e. large businesses and high wealth individuals.

3.19 The IGT notes that, to an extent, Canada has sought to specifically address small business in its Taxpayer Bill of Rights. A commitment is given to small business in the form of five principles:

- The CRA is committed to administering the tax system in a way that minimizes the costs of compliance for small businesses;
- The CRA is committed to working with all governments to streamline service, minimize cost, and reduce the compliance burden;
- The CRA is committed to providing service offerings that meet the needs of small businesses;
- The CRA is committed to conducting outreach activities that help small businesses comply with the legislation we administer; and
- The CRA is committed to explaining how we conduct our business with small businesses.

3.20 Whilst Australia does not have a similarly expressed commitment to small business in its Charter, it is arguable that such a commitment exists and has been implemented in a number of other ways, including through legislation that provides for small business concessions²²⁹ and a specific small business assistance webpage.²³⁰ The ATO could highlight this through a clearer statement together with appropriate links to resources and assistance options to small business and less well-resourced taxpayers acknowledging and addressing the challenges that these taxpayers face.

3.21 In other market segments, such as tax practitioners, the multitude of documents have understandably created a degree of uncertainty regarding whether the Charter is intended to apply to them and, if so, whether in a representative capacity or directly to them as participants within the tax system.

3.22 The Charter itself states that *'it is for everyone who deals with us on tax, superannuation, excise and the other laws' administered by the ATO.*²³¹ However, in the light of various documents, such a statement may not be sufficiently apparent to all stakeholders who have interactions with the ATO.

3.23 Having regard to the broad spectrum of ATO interactions and stakeholders, the IGT believes that the ATO should consider only having one generalist document or if tailored ones are required in addition to it or in its stead, no class of taxpayer should

228 ATO, *Large Business and Tax Compliance* (2014); ATO, *Tax Compliance for Small to Medium Enterprises and Wealthy Individuals* (2012).

229 ATO, 'Small business entity concessions' <www.ato.gov.au>.

230 ATO, 'Small Business Assist' <www.sba.ato.gov.au>

231 Above n 216.

be excluded from such a tailored approach. In either case, the IGT considers that there would be benefits in the ATO clearly setting out the intended purpose and audience for the Charter, or other similar documents, and clarifying the extent to which these documents apply to its staff, taxpayers, tax practitioners and external service providers.

Education and promotion

3.24 The education and promotion of taxpayers' rights has been highlighted in guidance provided by various international bodies, including the OECD,²³² the International Monetary Fund (IMF)²³³ and the European Commission.²³⁴ In particular, the European Commission's set of Fiscal Blueprints emphasised the need for tax administrators to 'define and publicise taxpayers' rights and obligations so that taxpayers have confidence in the fairness and equity of the tax system but are also aware of the implication of non-compliance.'²³⁵

3.25 In this respect, the ATO's education approach is critical in ensuring that both taxpayers and tax officers are cognisant of their rights and obligations under the Charter and to have regard to them in all their interactions with each other. The IGT's research indicated that beyond the website references to the Charter documents, there was little mention of it elsewhere. By way of example, the ATO's annual reports over the past three years mentioned the 'Taxpayers' Charter' only once in each report and only in the context of requiring the ATO's external contractors to adhere to the Charter.²³⁶ It is also worthwhile noting that the ATO's intranet, a primary source of information for ATO staff, does not actively promote the Charter either. Instead, searches for the Charter lead to pages about the APS Values and hyperlinks to the Charter are inactive. Relevant ATO staff training and guidance will be explored later in this chapter.

3.26 The IGT is aware that similar challenges have been faced in the UK with HMRC having only mentioned *Your Charter* a handful of times in 2014-15.²³⁷ However, it has been noted that in the most recent annual report, HMRC has consciously turned its focus to acknowledging *Your Charter* and its role with 30 mentions of the document being made in the *2015-16 Annual Report*.²³⁸ As noted earlier, HMRC is now required to report its performance against the *Your Charter* principles annually.

3.27 The ATO has advised the IGT that it is seeking to move from directly promoting the Charter to 'living' the Charter with the goal of embedding the relevant principles into its 'business as usual' processes. Whilst this approach should be

232 OECD, 'Tax Administration 2015: Comparative information on OECD and other advanced and emerging economies' (2015) p 284-285.

233 International Monetary Fund, 'Manual on Fiscal Transparency' (2007), p 32.

234 European Commission, *Fiscal Blueprints - A path to a robust, modern and efficient tax administration* (2007) pp 47, 63.

235 Ibid, p 47.

236 See for example: Commissioner of Taxation, *Annual Report 2014-15* (2015), p 116; Commissioner of Taxation, *Annual Report 2013-14* (2014), p 126; Commissioner of Taxation, *Annual Report 2012-13* (2013), p 115.

237 Institute of Chartered Accountants of England and Wales, 'Charter Annual Report 2015-16' <<http://www.ion.icaew.com/TaxFaculty/post/Charter-Annual-Report-2015-16>>.

238 Ibid.

commended, cases brought to the IGT's attention suggest that these goals have not been fully realised. The IGT considers that express communication of the Charter remains important as a means of ensuring taxpayers are made aware of it, particularly when things go wrong between themselves and the ATO.

3.28 As the ATO has previously indicated that the Charter is one of its three pillars of communication to instil confidence in the community, the IGT considers that the Charter needs to be at the forefront of all interactions between the ATO and the taxpayer. There are a number of avenues available which could assist the ATO in this regard.

3.29 Firstly, the ATO could make the Charter more visible on its website. At present, the ATO's website only includes links to the Charter at the footer of the website. Greater visibility of the Charter on the ATO's website would assist to highlight it as a key document for taxpayers to better understand their 'rights' and 'obligations' and generate greater accountability for ATO officers in adhering to its principles.

3.30 Secondly, the ATO could examine options to add messaging to its main call centre lines or through myGov as the two major channels of taxpayer interaction. These measures should have minimal impact on ATO resources.

3.31 Thirdly, the ATO could consider adding statements and references regarding the Charter to documents which are frequently issued to taxpayers, especially small business or individual taxpayers. For example, the IGT notes that no references to the Charter or taxpayers' rights or the ability to lodge a complaint are contained on notices of assessment and there is scope to explore its use as a vehicle to inform and educate.

3.32 Fourthly, ensuring that the Charter is made available to taxpayers and their representatives at the outset of interactions which are likely to generate dispute or disagreement, such as reviews, audits, objections and litigation. This may be done through standardised statements in the relevant correspondence with links or references to more detailed material from the ATO's website.

3.33 Fifthly, the ATO could use its existing consultation forums and committees as a means of promoting and seeking feedback on the Charter from its external stakeholders. Through such discussions, the ATO may be able to reiterate its commitment and reach a wider audience through professional and industry association delegates who would be able to disseminate the ATO's messaging through their newsletters or other publications.

3.34 Finally, the ATO could use its social media platforms as a means of more broadly raising awareness of the Charter and the processes by which complaints or concerns may be raised, investigated and resolved. Such channels provide a cheap and easy alternative compared to standard modes of correspondence. At least one community member has queried why the ATO does not 'tweet' about the Charter with appropriate links. Currently, there is limited mention of the Charter on the ATO's social media platforms.

ENFORCEABILITY, ADEQUACY, CURRENCY AND COMPLIANCE WITH THE CHARTER

Stakeholder concerns

Enforceability of the Charter

3.35 Stakeholders have observed that while the Charter has helped to improve the relationship between taxpayers and the ATO, it has done little to redress the balance of power between the ATO and taxpayers, or articulate the legal rights of taxpayers and the avenues of redress when these rights are violated. The main concern arising in these submissions has been the lack of legal force behind the Charter which results in taxpayers having no substantive legal redress where ATO officers fail to follow it. Without a legislative basis, stakeholders are concerned that the Charter remains a purely ATO administered document which may be changed, set aside or not enforced with little or no warning or justification, particularly given that the Courts, and indeed the ATO on occasions, have highlighted its non-binding nature.

3.36 To illustrate the above, some stakeholders have conveyed experiences where ATO officers have been selective in applying Charter principles. In particular, they are more likely to respect rights rooted in legislation such as accepting that taxpayers can be represented and respecting the right to a review, whilst not rigorously adhering to or entirely disregarding expectations, such as conducting audits with minimal cost and inconvenience to the taxpayer or treating the taxpayer as being honest.

3.37 Some stakeholders have particularly raised the limited protections afforded to taxpayers whose actions or positions are ultimately found to be justified but who expend disproportionate time and costs to challenge ATO actions. In this regard, they note that penalties are imposed on taxpayers who make errors but there are no consequences for the ATO when it makes an incorrect assessment or decision.

3.38 As noted earlier, AOTCA, STEP and CFE have found that the lack of enforceability of the Charter principles has also resulted in it being largely ignored by taxpayers, tax advisers and the revenue authorities themselves.²³⁹ Developments in the UK on the doctrine of legitimate expectations may provide some options for the enforcement of administrative statements without the need for legislation. However, such an approach is likely to be of limited utility in Australia given the approach that the courts have adopted in relation to this doctrine thus far.

3.39 In line with the above research, some stakeholders have suggested that for the Charter to remain relevant and effective, it needs to be a legally binding document that will hold the ATO to account. These stakeholders argue in favour of the adoption of a legally binding charter or a bill of rights. Specifically, it has been suggested to the IGT that:

239 Above n 201.

- Australia should follow the USA's approach of bringing all rights related to tax together into a Taxpayer Bill of Rights and ensure that each right, to the extent possible, is supported by a legal right in the *Income Tax Assessment Act 1997* (ITAA 1997) or the TAA 1953; or
- the Charter should receive legislative backing, for example by including its provisions within the framework of the TAA 1953, to provide better protection against prospective breaches of taxpayer rights.

3.40 In contrast, some stakeholders have noted the potential risk of some litigants seeking to use legally enforceable rights as a means of delaying or frustrating the ATO's administration of the tax system. In response to these concerns, other stakeholders have asserted that the courts are already well-placed to deal with such issues expeditiously, including dismissing the claim, making orders for adverse costs and making vexatious litigant declarations.

3.41 Other arguments against enforceability of the Charter principles have suggested that it would do little, if anything, to make remedies more accessible for those who need it most. The most vulnerable taxpayers are just as unlikely to be able to fund a court case to enforce their rights under the Charter as they are to appeal a substantive tax decision.

3.42 Another issue that has divided stakeholders is whether or not the Charter principles should only be applicable to taxpayers that discharge their 'obligations' to the revenue authority. Some stakeholders are of the view that the interaction between the taxpayer and the ATO is a 'two-way street', with taxpayers being responsible for ensuring they are honest and cooperative. In contrast, some stakeholders consider that many of the rights articulated in the Charter are fundamental, such as the rights to representation, and must be available and respected regardless of whether the taxpayer has met their obligations.

3.43 Anecdotally, some stakeholders have indicated that in their experience, the ATO will depart from the Charter and its standard processes when fraud or evasion is suspected or when a covert audit is being undertaken. Whilst there is recognition that a departure from standard practice may be justified in these circumstances, greater clarity in this regard has been found to be lacking. It has also been suggested that in such cases, the ATO should be required to seek the approval of an independent panel.

3.44 The inter-mingling of expectations and enforceable rights in the Charter has also attracted some criticism. As stated earlier, most of the 'rights' stated in the Charter are in reality expectations but there are a number, such as the right to confidentiality, contained in statute and therefore enforceable. The concern is that the inclusion of enforceable rights within an otherwise administrative document, without any reference to its legislative basis, may potentially lead to the diminution of those rights. These concerns were raised as early as prior to the introduction of the Charter in 1997:

A range of stakeholders expressed concern that the rights and obligations in the Taxpayers' Charter were expressed in the form of a service charter and this formulation would undermine the operation of existing legal rights. First, informal articulation of legal rights would water down taxpayers' knowledge and understanding of the extent of

*their rights at law. Second, listing unenforceable rights was felt to be potentially meaningless.*²⁴⁰

Adequacy

3.45 Stakeholders have also commented on the inadequacy of the rights and protections that are currently afforded to taxpayers more broadly. In particular, it has been noted that existing common law rights, such as the right to claim damages against the Commissioner under the tort of negligence or breach of statutory duty are, in practice, non-existent and no reference to them is made in the Charter.

3.46 In this respect, submissions made to the IGT have also highlighted certain enforceable rights which appear to exist in other jurisdictions, but which do not seem to be present in Australia. One such example is the USA's 'Right to Finality', where taxpayers have the right to know the maximum amount of time they have to challenge the IRS's position as well as the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt. The recognition of a tort of negligent investigation in Canada, and the right to sue for damages for certain unauthorised IRS tax collection activities in the USA were also identified as key differences between Australia and comparable jurisdictions.

3.47 It should be noted that not all submissions made to the IGT sought additional enforceable rights for taxpayers. Some stakeholders believe that there are presently sufficient taxpayer rights in Australia. However, they consider that these rights are often not exercised due to the high evidentiary threshold and costs associated with taking legal action. These stakeholders consider that rather than creating more enforceable rights, action should be taken to make the existing rights more readily accessible and to assist low income and vulnerable taxpayers. In this regard the IGT's attention was drawn to the low income taxpayer clinics in the USA that provide assistance to taxpayers through free or low cost advice and advocacy services.

Compliance with the Charter

3.48 There is a lack of confidence amongst taxpayers and tax practitioners that compliance with the Charter is adequately being monitored and allegations of breaches appropriately investigated or addressed. The experience relayed by stakeholders is varied with some noting that allegations of breaches of the Charter are investigated and escalated over a lengthy period of time whilst others note that no action is taken or redress provided as a result of Charter related complaints.

3.49 Stakeholders have observed that the ATO is not required to report on breaches of the Charter. They consider that more robust measurement and reporting are required in this regard to gain a better understanding of the scope of alleged problems with the operation of the Charter. Such reporting mechanisms would give taxpayers

240 The debate is described and analysed in Duncan Bentley, 'A Taxpayers' Charter: Opportunity or Token Gesture?' (1995) 12 *Australian Tax Forum* 1; Duncan Bentley, 'Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules' (1996) 25 *Australian Tax Review* 97; and Duncan Bentley, 'The Taxpayers' Charter: More than a Mission Statement' (1996) 4 *Taxation in Australia - Red Edition* 259.

evidence that the ATO 'walks the talk' rather than just trusting that it complies with the Charter.

3.50 Two main suggestions were made in submissions to the IGT:

- that an independent function within the ATO be established to undertake an annual quality review of Charter compliance and publicly disclose its findings in the ATO's annual reports; or
- that Australia introduces a legislative reporting requirement, similar to the UK's *Your Charter* annual reports, which would require the ATO to set out the extent to which it is meeting its Charter commitments and the extent to which taxpayers and tax practitioners believe the ATO is doing so.

3.51 Whilst a number of stakeholders favour the introduction of an annual report covering the ATO's delivery against the Charter, they consider that such reporting would only be meaningful if it is overseen by, or the responsibility of, a body external to the ATO.

ATO guidance and training

3.52 Stakeholders have also raised concerns that there appears to be a lack of training and guidance for ATO staff on the application of the Charter in their day-to-day work. These stakeholders have also observed that the extent of ATO officer training on the Charter is a 20-30 minute discussion on commencement of employment, with no mandatory refresher training following that initial introduction. Stakeholders have also noted that the ATO has not set out how it applies the Charter principles in practice for both its staff and taxpayers alike.

3.53 Furthermore, some stakeholders have observed that if the ATO is seeking to effect an attitudinal or cultural change, then increased influence and direction from the ATO's most senior executives for staff to have regard to and comply with the Charter principles is required. Stakeholders have suggested that, at present, such high level direction is lacking.

Currency of the Charter

3.54 Stakeholders have questioned the currency of the Charter which is seen as not keeping pace with developments in tax administration both domestically and internationally as well as the evolution of the ATO itself.

3.55 Since the introduction of the Charter, the nature of interactions between taxpayers and the ATO has changed. The role of tax practitioners has grown significantly such that the vast majority of individual taxpayers and businesses now rely on tax practitioners to manage their compliance. Beyond recognition that taxpayers may be represented, the Charter says little else on what 'rights' and protections are afforded to both taxpayers and tax practitioners in this context.

3.56 Similarly, the ATO's increased use of external service providers, e.g. external debt collectors, and digital interactions, such as myGov and pre-filled information,

have reduced the degree of interactions that taxpayers have with officers of the ATO. This has in turn created uncertainty regarding the level of service they can expect to receive and the degree to which they would be protected where errors are made in digital interactions.

3.57 Examples cited of the Charter not keeping pace with legislative change include the recent amendments which limit the circumstances and timeframes where the Commissioner may retain Goods and Services Tax (GST) refunds.²⁴¹

Relevant materials

Enforceability of the Charter

3.58 The ATO has asserted that the Charter 'provides a further layer of protection and accountability to that afforded by law because it details how the ATO applies the law and delivers services and also because of the commitment to follow the charter in everything it does.'²⁴² The Courts, however, have been reluctant to identify any duty of care which may be owed by the ATO to affected taxpayers where the Charter principles are breached by ATO officers:²⁴³

Even if there was a departure from some standard specified in such a document, it could not vest a private right to recover tort damages in a person affected by the departure. In recent times the determination of the existence of a duty of care has been directed to be established by recognition of novel areas of duty on an incremental or case by case basis.²⁴⁴

3.59 The ATO has also suggested that the Charter is one source of taxpayer 'rights' and protections within a sufficiently comprehensive system of checks and balances on the ATO's administration of the tax systems which it notes comprises:²⁴⁵

- 31 legislative protections;
- 17 regulations;
- 53 whole of government requirements, including mandatory and guidance material; and
- 64 key ATO standards

3.60 However, many of the 'rights' and protections contained in the above documents, such as whole of government requirements and ATO standards, are not enforceable at law.

241 *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112; *Taxation Administration Act 1953*, s 8AAZLGA; ATO, *Exercise of Commissioner's discretion to retain a refund*, PSLA 2012/6, 9 July 2015.

242 ATO, 'ATO Response to the Model Taxpayer Charter', (Briefing Paper December 2013), p 2.

243 *Ibid.*

244 *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550.

245 ATO, 'Library of Taxpayer Rights and Protections' (February 2016), pp 12-13.

3.61 In his 2012-13 annual report, the IGT identified the Charter as a possible area for investigation, noting a theme in certain jurisdictions of moving towards a taxpayer bill of rights:

*A current theme that is gaining momentum in a number of jurisdictions is a bill of rights for taxpayers. The issue before us is whether the current Taxpayers' Charter, which is an ATO administrative document, is sufficient or whether we should seek a legislative bill of rights with enforceable remedies.*²⁴⁶

3.62 Following the publication of that IGT annual report, the ATO undertook an internal review of the form and content of the Charter, and considered the potential need for change. The ATO concluded that it:

*... is not seeing any evidence that suggests the current Charter needs to be strengthened to a bill of rights model.*²⁴⁷

3.63 The ATO has also advised that the question of whether Australia should have an administrative or legislated charter of taxpayers' rights was considered when the Charter was first developed.²⁴⁸ The ATO believes that it was rejected at that time due to direct language and formal presentation of service standards and expectations being considered to be preferable to the creation of enforceable rights.²⁴⁹ Similar sentiments were more recently expressed in respect of the HMRC Charter, with some commentators noting that the embedding of Charter principles within the tax legislation may reduce the level of accessibility due to many taxpayers being unable or unwilling to scrutinise the minutiae of tax legislation.²⁵⁰

3.64 On the ancillary issue of whether the 'rights' under the Charter are only available where taxpayers meet their 'obligations', the IGT has been unable to identify any relevant public material which sets out the ATO's views on this point.

3.65 Other research on the issue has suggested a need to balance the 'rights' afforded to taxpayers and the 'obligations' imposed upon them. For example, the OECD has observed that there are certain basic rights and obligations present in all tax systems and 'without this balance of taxpayers' rights and obligations taxation systems could not function effectively and efficiently'.²⁵¹

3.66 The importance of striking the right balance between taxpayer rights and responsibilities was also noted by AOTCA, CFE and STEP in the development of the Model Taxpayer Charter:

... taxpayer rights are responsibilities of the tax administration and taxpayer responsibilities are rights of the tax administration. This mirror image of rights and

246 IGT, *Annual Report 2012-13* (2013), p 7.

247 ATO, 'Briefing for the Commissioner and Second Commissioner - Taxpayers' Charter', (Briefing Paper, February 2014), p 1.

248 Above n 242, p 3.

249 Ibid, pp 3-4.

250 See for example: Ian Young, 'Protecting Taxpayers Rights,' *Taxline* (November 2015) p 10.

251 Above n 23, p 3.

*responsibilities, laid out and acted upon in a balanced and constructive way, should enhance the relationships between all stakeholders.*²⁵²

3.67 Similarly, the USA's NTA has also observed:

*... the tax system will work best if we provide transparency, not only about taxpayer rights but also about taxpayer responsibilities. The National Taxpayer Advocate views the relationship between the government and its taxpayers as a social contract of sorts – the U.S. government requires its tax collector to treat taxpayers with courtesy and respect and asks taxpayers to cooperate with the tax collector. In recognition of this two-way relationship, we recommend the Taxpayer Bill of Rights also contain a section outlining taxpayer responsibilities.*²⁵³

Adequacy

3.68 The UNSW's research and the research undertaken in developing the Model Taxpayer Charter shows that taxpayers in Australia have a number of other enforceable rights either in legislation or at common law. However, many of these rights largely relate to challenging ATO assessments or decisions. In this respect the research also identifies some room for improvement when compared to other comparable jurisdictions. Such research as well as submissions to the IGT have highlighted three areas where improvements may be required in the Australian context:

- burden of proof;
- legitimate expectations; and
- certainty and finality.

Burden of proof

3.69 In Australia, the burden of proof in tax matters typically rests on taxpayers. However, in some other jurisdictions, such as the USA, the burden of proof is reversed in certain circumstances, such as where the taxpayer presents credible evidence on a factual issue relating to the assessment of liability.²⁵⁴ As noted above, the issue was identified as early as 1993 by the JCPA.²⁵⁵

3.70 Similar concerns have also been raised in previous IGT reviews. In his *Review into improving the self-assessment system*, the IGT highlighted stakeholder concerns that the operation of the burden of proof has the potential to lead ATO officers to make decisions which are not sufficiently supported by facts and evidence.²⁵⁶ The IGT had also previously made recommendations to reverse the onus of proof for no reasonable arguable position penalties, which was agreed in principle by the then Government.²⁵⁷

252 Taxpayer Charter, *Objectives of a Model Taxpayer Charter*, <www.taxpayercharter.com> last accessed 24 May 2016.

253 NTA, *2013 Annual Report to Congress – Volume One*, p 6.

254 *Internal Revenue Code (USA)*, Title XIV, Rule 142.

255 Above n 33, p 307.

256 IGT, *Review into the Australian Taxation Office's administration of penalties* (February 2014), p 42.

257 Above n 42, p 115.

3.71 The House of Representatives Standing Committee on Tax and Revenue (SCTR) has also considered the issue as part of its *Inquiry into Tax Disputes*. The SCTR was particularly concerned with cases where the ATO forms a view that the taxpayer has engaged in fraud or evasion and extends its compliance activities beyond the period in which the taxpayer is required to maintain records thereby making rebuttal of the ATO's opinion very difficult. The SCTR, therefore, made a recommendation to Government that in such circumstances the burden of proof should be reversed such that the ATO had to make a case for fraud and evasion.²⁵⁸

Legitimate expectations

3.72 The doctrine of 'legitimate expectations' has been raised with the IGT as a point of distinction between the current state of the law in Australia when compared with some other jurisdictions, such as the UK. As noted in Chapter 2, the law appears to be proceeding in the UK in a manner which delivers substantive outcomes to taxpayers who have relied upon the publication of HMRC in good faith.

3.73 In contrast, the Australian legal position is reticent to recognise the same degree of protection. As the research from the UNSW points out, the phrase legitimate expectation 'no longer finds favour with the High Court.'²⁵⁹ The position in Australia appears to be that legitimate expectation would only go so far as to afford the taxpayer procedural fairness where such has been denied. However, the law is clear that the right to procedural fairness does not give rise to substantive rights.²⁶⁰

Certainty and finality

3.74 The USA's 'Right to Finality' has been described by some stakeholders as a potential gap in Australia. The 'right' is described as:

*Taxpayers have the right to know the maximum amount of time they have to challenge the IRS's position as well as the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt. Taxpayers have the right to know when the IRS has finished an audit.*²⁶¹

3.75 To an extent, it is arguable that such a right presently exists in the Australian tax law with the imposition of statutory periods of review and amendment. One specific element of the right to finality which does not appear to exist in Australia is set out in § 6502 of the IRC and has been described as follows:

*The IRS generally has ten years from the assessment date to collect unpaid taxes from you. However, there are a number of circumstances where the ten year collection period may be suspended, such as during the period when the IRS cannot collect, for example, bankruptcy or a collection due process proceeding, or an offer in compromise is pending.*²⁶²

258 Above n 11, p 36.

259 Above n 50, p 70.

260 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 [148].

261 IRS, *Your Rights as a Taxpayer*, (December 2014) <www.irs.gov>.

262 TAS, *The Right to Finality* (undated) <www.taxpayeradvocate.irs.gov>.

3.76 By limiting the time in which the IRS can collect debt in legislation, taxpayers in the USA are provided with assurance against later recovery actions when documentary evidence may no longer have been kept making it harder for the taxpayer to properly dispute or challenge the revenue authority's claims for debt. This approach differs to that in Australia, where the statute of limitations (usually six years) does not apply to the recovery of tax debts where an assessment has been raised within the appropriate timeframe.²⁶³

Compliance with the Charter

3.77 The ATO has publicly acknowledged the important role of the Charter principles in positively influencing the compliance behaviour of taxpayers as well as the consequences of it not adhering to the principles:

*... if we fail to adhere to all of the charter principles, particularly as we apply our strategies, we may damage taxpayers' trust in us and this may lead to disengagement and future non-compliance - precisely the opposite outcome to the one we are seeking.*²⁶⁴

3.78 Academic research on the issue has led to similar conclusions, notably:

... when people perceive the Tax Office adhering to the Charter, they also hold the view that the Tax Office can be trusted to meet its obligations to all Australians. Furthermore, those who perceive the Tax Office adhering to the Charter see the Tax Office as having legitimacy ...²⁶⁵

3.79 At a broad level, the ATO uses public surveys such as its Single Corporate Perception Survey²⁶⁶ (SCPS) and Perceptions of Fairness in Disputes Survey²⁶⁷ (PFDS) to seek community feedback on its performance against certain Charter principles including fairness, professionalism, accountability and integrity. The surveys do not specifically make reference to the Charter²⁶⁸ and not all Charter principles are directly tested. The results of these surveys tend to suggest that the ATO was positive in relation to certain principles but not others. For example, the SCPS found that participants considered that the ATO acted with integrity but at the same time observed there was 'a downward trend across the year in perceptions of the ATO being fair and professional.'²⁶⁹ The PFDS yielded similar results, though more moderate, with about half of the participants agreeing that the dispute process was fair and a decline in the perception that the ATO decision was fair.²⁷⁰

263 See for example: *Limitation Act 1969*, s 10 (NSW); *Limitation of Actions Act 1958*, s 32 (Victoria).

264 ATO, *Guiding principles and models* (13 January 2015) <www.ato.gov.au>.

265 Valerie Braithwaite and Monika Reinhart, 'The Taxpayers' Charter - Does the Australian Taxation Office Comply and Who Benefits?' (Working Paper No 1, Centre for Tax System Integrity, Australian National University, 2000).

266 Millward Brown, *ATO Single Corporate Perception Survey 2014-15* (2015).

267 Millward Brown, *Perceptions of Fairness in Disputes* (2015).

268 Ibid.

269 Above n 266, p 3.

270 Millward Brown, *Perceptions of Fairness in Disputes Wave 3* (2015).

3.80 In the past, the ATO has also commissioned reports specifically on the Charter. The last of these was conducted in 2005.²⁷¹

3.81 Internally, a primary form of assurance that ATO staff are adhering to their obligations under the Charter, amongst other obligations, is through quarterly Conformance Statements which are completed by the BSLs. An example of such a Conformance Statement indicates that Charter breaches are 'collected through complaints processes and are recorded on Siebel [ATO's case management system]'.²⁷² These statements, however, are completed on an exceptions basis which assumes that there has been compliance unless a matter is raised to indicate otherwise.²⁷³ Furthermore, not all Charter principles are captured.

3.82 Set out below are the initial set of statistics, provided to the IGT based on keyword searches within Siebel, which yielded very low results:

Table 4: Initial ATO statistics of Charter breaches

Financial Year	Complaint outcomes				Total
	Upheld	Not upheld	Partially upheld	Outcome not recorded	
2012-13	14	11	2	2	29
2013-14	9	8	1	1	19
2014-15	24	45	1	12	85*

Source: ATO.

Note: In the 2014-15 year, 2 complaints were recorded as having been withdrawn and 1 case with an undefined outcome.

3.83 Given the above low numbers and the likelihood of many complaints at least touching Charter principles, the IGT sought clarification. In response, the ATO provided a broader set of figures taken from an operational process whereby ATO complaints officers, including those in call centres, are required to identify breaches of certain Charter commitments. Under this process all complaints which are fully or partially upheld, that is, the ATO agreed in full or in part with the taxpayer's allegation, are recorded against one 'Charter commitment not met'.²⁷⁴ The statistics of this operational data, for the 2012-13, 2013-14 and 2014-15 financial years, are set out in Table 5.

271 TNS Social Research, *Review of the Taxpayers' Charter 2005* (2006).

272 ATO communication to the IGT, 25 February 2016.

273 ATO communication to the IGT, 23 December 2015.

274 ATO communication to the IGT, 6 May 2016.

Table 5: Follow up ATO complaints statistics

Charter Commitment Not Met	Complaint Outcomes						Total
	Complaint Withdrawn	Escalated to ATO Review	Not Upheld	Partially Upheld	Upheld	Not recorded as possible charter breach	
2012-13 Financial Year							
Access to our Services	N/A	N/A	N/A	95	699		794
Access to their Information	N/A	N/A	N/A	13	91		104
Correct Action Taken	N/A	N/A	N/A	98	2049		2147
Courteous and Respectful	N/A	N/A	N/A	21	117		138
Decisions Explained Clearly	N/A	N/A	N/A	5	64		69
Fair and Reasonable	N/A	N/A	N/A	10	87		97
Information and Advice	N/A	N/A	N/A	108	574		682
Plain and Clear Language	N/A	N/A	N/A	4	20		24
Privacy and/or Confidentiality	N/A	N/A	N/A	1	27		28
Relevant Circumstances Considered	N/A	N/A	N/A	5	28		33
Review Rights Respected	N/A	N/A	N/A		15		15
Timely Response	N/A	N/A	N/A	200	11580		11780
Complaints not recorded as possible charter breach	N/A	N/A	N/A	N/A	N/A		1789
Charter not required to be recorded (that is, withdrawn, not upheld)							8731
TOTAL	327	23	8381	560	15351	1789	26431
2013-14 Financial Year							
Access to our Services	N/A	N/A	N/A	107	434		541
Access to their Information	N/A	N/A	N/A	14	88		102
Correct Action Taken	N/A	N/A	N/A	139	1986		2125
Courteous and Respectful	N/A	N/A	N/A	18	116		134
Decisions Explained Clearly	N/A	N/A	N/A	11	50		61
Fair and Reasonable	N/A	N/A	N/A	23	107		130

Information and Advice	N/A	N/A	N/A	131	582		713
Plain and Clear Language	N/A	N/A	N/A	4	9		13
Privacy and/or Confidentiality	N/A	N/A	N/A	2	16		18
Relevant Circumstances Considered	N/A	N/A	N/A	4	25		29
Review Rights Respected	N/A	N/A	N/A	3	11		14
Timely Response	N/A	N/A	N/A	159	9564		9723
Complaints not recorded as possible charter breach	N/A	N/A	N/A	N/A	N/A		1403
Charter not required to be recorded (that is, withdrawn, not upheld)							8923
TOTAL	342	14	8567	615	12988	1403	23929
2014-15 Financial Year							
Access to our Services	N/A	N/A	N/A	43	778		821
Access to their Information	N/A	N/A	N/A	16	237		253
Correct Action Taken	N/A	N/A	N/A	97	2033		2140
Courteous and Respectful	N/A	N/A	N/A	14	144		158
Decisions Explained Clearly	N/A	N/A	N/A	12	80		82
Fair and Reasonable	N/A	N/A	N/A	6	60		66
Information and Advice	N/A	N/A	N/A	97	603		700
Plain and Clear Language	N/A	N/A	N/A	3	13		16
Privacy and/or Confidentiality	N/A	N/A	N/A		18		18
Relevant Circumstances Considered	N/A	N/A	N/A	4	41		45
Review Rights Respected	N/A	N/A	N/A	1	5		6
Timely Response	N/A	N/A	N/A	91	8609		8700
Complaints not recorded as possible charter breach	N/A	N/A	N/A	N/A	N/A		2798
Charter not required to be recorded (that is, withdrawn, not upheld)							8841
TOTAL	374	20	8447	384	12621	2798	24644

Source: ATO

3.84 The above statistics in Table 5 differ markedly from those initially provided in Table 4. Table 5 suggests that in the last three years in over 50 per cent of complaints cases, a Charter principle may have been breached. However, this is misleading as a significant proportion of the captured breaches are not Charter related. For example, across all years, the 'Timeliness' measure, which is a service standard, accounts for the vast majority of these cases - 74 per cent in 2012-13, 71.4 per cent in 2013-14 and 66.8 per cent in 2014-15. This high proportion is likely due to complaints relating to delayed refunds and income tax return processing rather than breaching of a Charter principle.

3.85 The ATO has indicated that the above data, whilst referring to some Charter principles, is not used for Charter reporting. Rather, it is a real-time source of intelligence from complaints to enable early identification of potential systemic issues which may require remedial action.

3.86 The ATO has also advised that there is a low level of confidence in the Table 5 data. First, staff may not fully understand the nature of the commitments that they are selecting, particularly where the issues relate to more nuanced principles such as fairness and reasonableness. Secondly, ATO officers have to select one commitment for each complaint and, in more complex cases, there may be multiple issues and/or Charter principles in dispute. Lastly, not all Charter principles are available to select such that breaches of some principles may not be captured.

3.87 The ATO does not appear to have any other statistical data that directly measures its performance against the Charter principles. Given the differences in the two sets of data provided to the IGT and their respective limitations, it is not possible to accurately determine the extent of non-compliance with the Charter principles.

3.88 Following extensive discussions between the IGT and the ATO, the ATO has advised that whilst it does not directly and specifically measure against each and every Charter principle, indirect measurements are obtained through the abovementioned surveys and other corporate measures. These are reported in publications such as the ATO's annual report, its Reinvention blueprint, the corporate plan, its website and internal executive and conformance reports.²⁷⁵ The ATO has provided the IGT with a table which illustrates how the Charter principles are aligned with its corporate measurement and reporting. This table is set out below.

Table 6: Taxpayers' Charter alignment to ATO corporate measures and reporting

Charter element	Corporate measure	Reported in
Treat you fairly and reasonably	Perceptions of fairness in disputes	Annual report (annually, external) Executive report (quarterly, internal)
Treat you as being honest unless you act otherwise	Contemporary and tailored service is an established approach to how we engage based on risk	Reinventing the ATO program blue print and corporate plan

²⁷⁵ ATO communication to the IGT, 27 October 2016 (Taxpayers' Charter alignment to corporate measurement and reporting).

Table 6: Taxpayers' Charter alignment to ATO corporate measures and reporting (continued)

Charter element	Corporate measure	Reported in
Offer you professional service and assistance	Community satisfaction with ATO performance	Annual report (annually, external) Executive report (quarterly, internal)
	People surveyed agreed that the ATO is respectful and courteous	Our commitments to service (monthly, external) Annual report (annually, external)
	Quality performance measures (customer service), including professionalism, have been met	Our commitments to service (monthly, external) Annual report (annually, external)
Accept you can be represented by a person of your choice and get advice	It is well established taxpayers can be represented by an agent of their choice. This is through a range of services including the Tax Practitioners Lodgment Service (TPALS).	
Respect your privacy	Privacy and confidentiality form part of our conformance reporting framework	Conformance reporting (monthly)
Keep the information we hold about you confidential		
Give you access to information we hold about you	People surveyed agreed that the ATO provides information sufficient to meet their needs	Our commitments to service (monthly, external) Annual report (annually, external)
	People surveyed agreed that the ATO lets them know of status or delays	Our commitments to service (monthly, external) Annual report (annually, external)
	If we are unable to finalise your individual electronic tax return within 30 calendar days of receipt we will inform you	Our commitments to service (monthly, external) Annual report (annually, external)
	Number of lost and ATO held superannuation accounts	Annual report (annually, external) Executive report (quarterly, internal)
	Value of lost and ATO-held superannuation accounts	Annual report (annually, external) Executive report (quarterly, internal)
Help you to get things right	People surveyed agree the ATO makes it easy to access services and information	Annual report (annually, external) Executive report (quarterly, internal) Our commitments to service (monthly, external)
	People surveyed agreed that the ATO provides information sufficient to meet their needs	Our commitments to service (monthly, external) Annual report (annually, external)
	People surveyed agreed that the ATO informs them of what they need to do	Our commitments to service (monthly, external) Annual report (annually, external)
	Quality performance measures (accuracy) have been met	Our commitments to service (monthly, external) Annual report (annually, external)
	People surveyed agreed that the ATO is knowledgeable in dealing with me	Our commitments to service (monthly, external) Annual report (annually, external)
	Number of interpretative guidance products, objections and rulings provided	Annual report (annually, external) Executive report (quarterly, internal)

Table 6: Taxpayers' Charter alignment to ATO corporate measures and reporting (continued)

Charter element	Corporate measure	Reported in
Help you to get things right (continued)	Effectiveness of public advice issued	Annual report (annually, external) Executive report (quarterly, internal)
Explain the decisions we make about you	People surveyed agreed that the ATO lets them know of status or delays	Our commitments to service (monthly, external) Annual report (annually, external)
	If we are unable to finalise your individual electronic tax return within 30 calendar days of receipt we will inform you	Our commitments to service (monthly, external) Annual report (annually, external)
	Private rulings – if we find that your request raises particularly complex matters that will take more than 28 calendar days to resolve after receiving all the necessary information, we will aim to contact you within 14 calendar days to negotiate a due date	Our commitments to service (monthly, external) Annual report (annually, external)
Respect your right to a review	Proportion of objections which result in litigation	Annual report (annually, external) Executive report (quarterly, internal)
Respect your right to make a complaint	Percentage of complaints received resolved in 15 business days	Our commitments to service (monthly, external) Annual report (annually, external)
Make it easier for you to comply	People surveyed agree the ATO makes it easy to access services and information	Annual report (annually, external) Executive report (quarterly, internal) Our commitments to service (monthly, external)
	Reduction in the unintended administrative costs to business of complying with government regulation	Annual report (annually, external) Executive report (quarterly, internal)
	People surveyed agreed that the ATO was easy to do business with	Our commitments to service (monthly, external) Annual report (annually, external)
	People surveyed agreed that the ATO informs them of what they need to do	Our commitments to service (monthly, external) Annual report (annually, external)
Be accountable	Reporting on specific legislation	Annual report (annual, external)
	An outline of structures and processes in place for the entity to implement principles and objectives of corporate governance	Annual report (annual, external)

Source: ATO

ATO guidance and training

3.89 Training on the Charter is mandatory for all new staff in the ATO and is required to be completed within three months of commencement. Compliance with the requirement to complete the course is monitored by the individual officer's manager.²⁷⁶

3.90 There is also a suite of guidance material that is available to assist ATO officers in understanding and applying the principles set out under the Charter, including, but not limited to, the following Chief Executive Instructions (CEI):

- Information Disclosure CEI 2014/07/03;
- Managing Complaints and Compliments CEI 2014/06/02;
- Privacy and Taxpayer Confidentiality CEI 2014/06/06;
- Respecting Clients' Right of Review CEI 2014/06/04;
- Employee Identification CEI 2014/06/03; and
- Records Management CEI 2014/01/01.

3.91 All ATO staff are required to comply with CEIs. Each of the CEIs has a set of questions and answers or video to compliment the instructions and assist staff to better understand and apply them.

3.92 In addition to the above, the IGT's research through the ATO's online internal learning and development system identified some courses which included discussion on the nature of the Charter and its interactions with ATO compliance strategies, client service and decision making.²⁷⁷ These courses tended to discuss the Charter as part of a broader training topic, such as the conduct of audits, rather than on its own.

3.93 In order to gauge the level of awareness that staff had in relation to their responsibilities under the Charter, amongst other things, the ATO conducted a staff survey in 2014 that included the question: 'Are you aware of the key messages and your responsibility in relation to Taxpayers' Charter, complaints and compliments? (Y/N)'. The ATO advised that of the 1,396 participants, 95.7 per cent of respondents indicated that they were aware of the Charter.²⁷⁸ There did not appear to be any further follow up questions on the issue to determine the degree to which the respondents understood their responsibilities in that regard.

Currency of the Charter

3.94 The ATO has recognised that 'in today's rapidly changing global environment it needs to do more if it is to keep pace with technology and the evolving expectations to deliver the level of service that the community demands.'²⁷⁹ This includes keeping

²⁷⁶ Above n 274.

²⁷⁷ ATO, *Compliance Strategies for taxpayers*; ATO, *Client service: Introduction*; ATO, *Decision-Making in the ATO*.

²⁷⁸ Above n 64.

²⁷⁹ Above n 242, p 4.

the Charter relevant and contemporary. The ATO has also acknowledged that any process of updating the Charter will necessarily consider whether it should include additional items which will require a significant level of consideration and consultation with key stakeholders, including government, the community and the tax profession.²⁸⁰

3.95 As noted earlier in Table 2, the ATO most recently reviewed the content of the Charter in 2010. That review took into account legislative and procedural changes, as well as input from ATO staff and a revised version of the Charter was released in July 2010.²⁸¹ Whilst that review did not result in any of the Charter principles being changed, it did update the presentation of the Charter into a smaller and more concise document, reducing the number of explanatory booklets from nine to seven.²⁸² A further explanatory booklet, *Taxpayers' charter – respecting your privacy and confidentiality*, was withdrawn in 2014 following the publication of the ATO's *Privacy Policy*.

3.96 In 2013 and 2015, the ATO also commenced preliminary work to consider further reviews of the Charter. However, those initiatives were not officially considered or endorsed by the ATO executive and therefore did not proceed.²⁸³

3.97 During discussions with the IGT, the ATO has also advised that the Charter formed part of the considerations in the ATO's Reinvention Program and how it would interact with initiatives to improve ATO relationships with tax practitioners as well as its digital transformation. However, the ATO has advised that whilst there are ongoing internal discussions amongst ATO stakeholders, it has not yet formalised a view as to the Charter's role in the reinvention program.²⁸⁴

IGT observations

Enforceability of the Charter

3.98 Submissions made to this IGT review, the research leading to the Model Taxpayer Charter as well as the examination of comparable jurisdictions seem to suggest that some improvements may be required in terms of taxpayer rights in Australia.

3.99 Whilst the status of taxpayer rights in Australia compares favourably with a broader range of countries, as set out in Appendix 3,²⁸⁵ and the Charter principles are largely aligned with comparable jurisdictions, it has been noted that taxpayers in those jurisdictions have access to additional layers of protection. For example, in the USA there are a series of statutory causes of action for damages as a result of certain inappropriate IRS action, there are common law remedies, such as the doctrine of legitimate expectation, in the UK as well as the overlay of EU law and the oversight of

280 Ibid.

281 Above n 76.

282 Ibid.

283 Above n 242, p 4; ATO, 'Review of Taxpayers' charter', (Executive summary, 9 September 2015), p 1.

284 IGT meeting with the ATO, 11 May 2016.

285 See also: International Fiscal Association 2015 Basel Congress, *Cahiers de droit fiscal international Vol 100b – The practical protection of taxpayers fundamental rights* (2015).

the CJEU and ECHR and, in Canada, common law seems to be expanding the tort of negligence to apply to certain actions of the CRA.

3.100 Whilst the IGT recognises that some changes are needed in the Australian context and that a legislated charter may provide the highest level of taxpayers' protection and improve perceptions of fairness, there are a number of challenges with such an approach.

3.101 First, converting the existing Charter principles into legally enforceable rights is unlikely to address fundamental issues of access to justice and redress for the majority of affected taxpayers. As was noted earlier, stakeholders tended to agree that the Charter was a vehicle predominantly relied upon by individual and small business taxpayers, many of whom are unrepresented and unlikely to have the resources to pursue legal action to enforce their rights. Even those taxpayers with sufficient funds are likely to litigate the underlying substantive issue before taking action for lack of fair treatment or breach of Charter principles.

3.102 Secondly, the IGT has not been able to identify any comparable jurisdictions where a comprehensive set of taxpayer rights has been legislated including remedies for any breach. The IGT notes that the USA appears to be the most advanced in this space, having incorporated the principles of its Taxpayer Bill of Rights into the IRC. However, the IGT notes that the legislative mandate in the USA currently only requires the Commissioner of the IRS to ensure that his or her staff are aware of, and adhere to, the Taxpayer Bill of Rights. Admittedly elsewhere in the relevant US legislation there are more enforceable rights than in Australia, however, their application is limited. Similarly, the legislative provisions in the UK in relation to *Your Charter* currently only require the HMRC to monitor and annually report on its performance against *Your Charter*.

3.103 Thirdly, the creation of new legislation to embody taxpayer rights may give rise to unintended consequences such as frustrating the proper administration of the tax system. Whilst it may not be impossible to exclude or minimise such unintended consequences, it does present a significant challenge.

3.104 Fourthly, the ATO's current monitoring of its compliance with the Charter is inadequate in measuring instances of breach of Charter principles. As a result, it is not possible to accurately determine the extent of non-compliance which would be helpful in formulating an appropriately tailored solution. It should also be noted that appropriate monitoring and public reporting may be at least part of the solution, in their own right. They can be as effective a deterrent as enforceable remedies, particularly where taxpayers are unlikely to seek relief in court, albeit lacking the entrenched nature of legislation.

3.105 Having regard to the above, the IGT is of the view that before considering enshrining a comprehensive set of taxpayer rights in legislation, it would be prudent to take other remedial actions (discussed below) and allow them some time to take effect. If such actions do not yield the desired outcome, legislative action may become necessary in the long term. All of these remedial actions, which are described in some detail below, can be implemented by the ATO without the need for legislative mandate. However, if the ATO does not agree to do so or does not implement them

appropriately, legislative provisions such as those currently in force in the USA or the UK may become necessary in the short term.

Commitment to the Charter

3.106 It is imperative that the ATO is not only fully committed to the Charter principles but that it is seen to be so in all its interactions with taxpayers and tax practitioners. Instances where the ATO is seen to be challenging these very principles,²⁸⁶ as rare as they may be, undermine such commitment and its standing as a fair administrator in the eyes of the community.

3.107 The IGT acknowledges that when a taxpayer seeks to take legal action to enforce the Charter, the ATO must present the legally correct position which is that the Charter confers no rights and cannot be legally enforced. However, the ATO's arguments along these lines are viewed as an attempt to resile from its commitments. Where this continues to occur, legislatively mandated provisions will be more keenly sought and the situation may become unworkable in the long term. The IGT considers that the ATO should make use of alternative dispute resolution to address matters relating to the Charter to the extent possible. In doing so, the ATO would limit the instances in which it finds itself in the invidious position of having to advance a legal argument which diminishes its standing in the eyes of the community.

3.108 In standing behind the Charter, the ATO must also treat allegations of non-adherence seriously. The IGT considers that they should be treated with the same gravity as transgressions of the law. In fact, as the Charter is a formal direction of the Commissioner to his staff, any non-compliance with its principles is arguably a breach of the Australian Public Service Code of Conduct.

3.109 Concerns relating to breaches of the Charter should be examined on their own merits, as the ATO does with substantive or technical tax issues. Whilst the two may sometimes be aligned, a taxpayer who has obtained the outcome they seek may nonetheless hold valid complaints and concerns regarding the conduct of the ATO leading up to that outcome. By addressing the two issues independently, the ATO demonstrates that the conduct of staff is equally as important as the application of the law.

3.110 It should also be noted that dealing with Charter-related issues separately from the underlying substantive tax issues and reporting on how they are resolved has the added advantage of tempering taxpayer expectations. It would minimise instances in which taxpayers lodge a complaint believing that where it is upheld, it would result in a substantive tax outcome, such as an assessment being withdrawn or a debt being written off.

Education and support for ATO staff

3.111 The ATO could do more to educate and support its staff to ensure that they adhere to Charter principles in their day-to-day interactions with taxpayers.

²⁸⁶ *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550; *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119.

3.112 At present, there is limited guidance and support for ATO staff seeking to apply the Charter other than the materials contained in CEIs. Whilst the CEIs provide some guidance to staff on how to comply with certain Charter principles, such as 'respect your privacy', 'keeping information confidential' and 'respect your right to a review', they are of limited practical assistance and do not canvass all of the 'rights' which appear in the Charter.

3.113 In addition to the CEIs, the ATO's online training platform provides some courses which touch on the Charter principles. The IGT notes that each of these courses considers the Charter in the context of other actions or activities undertaken by the ATO. Moreover, they do not form a mandatory part of the ATO officer's learning and development and, as self-paced modules, they do not appear to contain any specific post-completion assessments.

3.114 There does not appear to be any other periodic refresher courses or other initiatives to ensure that ATO staff remain engaged on Charter issues. The IGT notes that there is some precedent for such refresher courses with training on topics such as security, privacy and fraud being rolled out and made mandatory for all staff to complete on a periodic basis.²⁸⁷

3.115 As noted earlier, the ATO is seeking to transition the Charter into business-as-usual process, with ATO staff expected to be 'living the Charter'. Whilst this is an aspirational goal, the IGT considers that such an approach would only be effective where ATO staff are consistently made aware of the relevant principles and support is made available to them in discharging their responsibilities. Such an approach would be similar to the mandatory and periodic fraud prevention training that the ATO implements to ensure that staff knowledge and awareness of the principles required for compliance are current and up-to-date. The ATO could use the intelligence gathered from Charter-related complaints, as discussed earlier, to develop and target training and refresher courses to focus on areas of the Charter which are causing the most complaint or concern.

3.116 The IGT also believes that improved access and guidance on the ATO's intranet would assist staff to quickly and easily locate resources. As noted earlier, a current search of the ATO's intranet for Charter-related guidance yielded only pages relating to the APS Values with the relevant link to the Charter being inactive.

3.117 The ATO could also draw upon the work and experiences of HMRC in promoting its relatively new *Your Charter* and the roles of Charter Champions and Charter Advocates as a source of advice and input on adherence to the Charter.

Monitoring, investigating and reporting on breaches of the Charter

3.118 It is clear from the earlier discussion that there is currently no direct and comprehensive measurement of the ATO's compliance with the Charter although it does undertake a number of other assessments which may be indicative of its performance against certain Charter principles.

²⁸⁷ ATO, 'Mandatory training in the ATO', 2 June 2016 (internal ATO document).

3.119 Comprehensive measurement of ATO's performance against the Charter is critical in reinforcing its role, determining the extent of breaches and devising an appropriate solution. Measuring every breach arising out of the many interactions the ATO has with the community may be impractical, however, appropriate monitoring of its complaint handling function may hold the key.

3.120 The simplest way to gauge the ATO's compliance with the Charter, at a base level, would be to use its complaints function to match the complaints received against the Charter principles. This would be a more accurate measure of the level of adherence to the Charter principles. It would also assist in pinpointing specific areas for improvement by identifying aspects of the ATO's service delivery that are causing taxpayers the most concern. Where allegations of breach are upheld, the discrepancy between what had occurred and the actions that ought to have been taken could be used as a basis for further training and guidance of its staff. Where allegations are not upheld, the ATO could consider whether the Charter principles have been appropriately communicated and understood by the community at large and if any remedial action is necessary.

3.121 The measurement of ATO's compliance with the Charter through the complaints function could also be used to augment its current reporting. For example, the accuracy of the Conformance Statements could be compared with the number of Charter breaches alleged in complaints cases. Similarly, complaints data could also be used to confirm the outcomes of the ATO's surveys. Such comparisons may assist in explaining some of the seemingly contradictory survey results, for example, why respondents seem to believe the dispute resolution process was fair but that the outcome was not.

3.122 The above measurement and analysis should be publicly reported, similar to the approach adopted in the UK. In doing so, the ATO would achieve a number of objectives. First, it would address the lack of information currently available on the ATO's process for dealing with Charter-related complaints. Secondly, it demonstrates publicly the weight and significance that the ATO places upon the Charter and its commitments made to the community. Thirdly, it communicates to staff that their performance against the Charter is of the utmost importance.

Updating the Charter

3.123 It is clear from the foregoing discussion, and as the ATO itself has acknowledged, that the Charter is in need of an update to reflect the changing nature of interactions between taxpayers, tax practitioners and the ATO. In doing so, the ATO needs address a number of issues including:

- the service that taxpayers can expect to receive where the ATO engages external service providers, and taxpayers rights and remedies where that service falls short;
- the level of protection that is afforded to taxpayers engaging in digital interactions;
- any rights of tax practitioners and the extent to which they should be differentiated when they act as an agent or in their personal capacities;

- recent law changes, such as those mentioned earlier in respect of GST refunds; and
- whether any new 'rights', or existing 'rights' (such as the 'right' to seek a review from the IGT) which are not listed in the current Charter, need to be incorporated having regard to the change and evolution in tax administration and the ATO/taxpayer relationship in more recent years.

3.124 The IGT believes that there would be significant benefits in the ATO drawing on the work and insight of comparable jurisdictions as well as those of the Model Taxpayer Charter as part of this work. Moreover, it is important that the ATO consults widely with a range of stakeholders to ensure that any refreshed Charter reflects their concerns and addresses any potential gaps.

3.125 As part of its update, the ATO should also consider how best to present the new Charter. The current presentation of the Charter has a number of limitations as highlighted earlier. A single page summary, as is done in the USA, would be particularly helpful for individuals, small businesses and unrepresented taxpayers more generally, enabling them to quickly form an appreciation of their rights and obligations. Such a document could also provide appropriate links or references to the basis of the 'rights' and the course of action for redress. For example, it should make it clear whether the 'right' is at common law, in legislation or is merely an administrative 'right' or expectation. In the case of the latter, the reader should be directed to the complaint making mechanism within the ATO and/or the IGT, whilst in the other two instances, they should be informed that court action is an option in appropriate cases. Such an approach presents a useful summary but also makes more information easily available for those who require it as well as addressing the dangers of intermingling enforceable rights with mere expectations as outlined above.

Whether rights are contingent on meeting obligations

3.126 The IGT recognises that including 'rights' and 'obligations' in the same document suggests that they are interdependent and may give the community the impression that rights are only afforded to taxpayers to the extent that their responsibilities are fulfilled. The Charter, as it stands, and other publicly available documents do not make clear the ATO's position on this matter.

3.127 As a fundamental principle, the IGT is of the view that rights should be afforded to all taxpayers who participate in the tax system, not just those who are compliant. To draw an analogy with criminal law, those who are accused of having committed criminal offences are afforded a range of inalienable rights such as those of representation, fair hearing and efficient administration of justice.

3.128 The IGT has not found any support in other research to suggest otherwise. The research of the OECD, Model Taxpayer Charter and the comments of the NTA supported the need to balance taxpayer 'rights' and 'obligations' but none indicated that 'rights' should be withheld where the taxpayer did not, or is perceived to have not, complied with their 'obligations'.

3.129 The IGT believes that the ATO should clearly state its position as to whether the 'rights' contained in the Charter are available to all taxpayer in all circumstances. Where the ATO needs to depart from such a position, it should clearly explain and justify such a course of action.

Adequacy

3.130 The question of whether there are sufficient taxpayer rights in Australia, and whether the 'right' in the Charter should be expanded, is not simple or straightforward.

3.131 The research undertaken by the UNSW suggests that there are a range of other rights available to taxpayers but there are difficulties associated with exercising these rights in a practical sense. It is also evident that common law developments and legal regimes in other jurisdictions may offer taxpayer rights which may not be available in Australia. However, it is not clear to the IGT whether the improvement would result in tangible benefits to taxpayers.

3.132 For example, the IGT agrees that taxpayers should have a degree of finality in their dealings with the ATO and whilst the Charter does not specifically stipulate this right to finality (as in the USA's Taxpayer Bill of Rights), statutory review and amendment periods provide a degree of certainty in their interactions.²⁸⁸

3.133 In respect of the limitation periods for debt recovery in the USA, it has become clear that the nature of the right is subject to some exceptions. The IGT understands that this statute of limitation only requires that the IRS collect the debt by a levy, or the filing of a levy or initiating proceedings in court before the expiry of ten years.²⁸⁹ In her 2015 annual report, the USA's NTA conducted a study of IRS collection of debt and the debt cycle which found that a majority of debt is collected well before the ten year statutory period anyway. The total debt amount halves within the first two years and halves again over the next two years.²⁹⁰ At the same time, there is also evidence of some extreme cases where debts as old as 30 years have been recognised by US tax courts and determined to be recoverable by the IRS.²⁹¹

3.134 Similarly, the doctrine of legitimate expectation has seemingly evolved in a manner which has afforded UK taxpayers a broader avenue for redress against the revenue authority. The IGT notes that this development has only recently emerged and has not been found in other jurisdictions considered in this review. It should be noted that all such cases brought before the UK courts may not succeed. As the doctrine is a creature of common law, whether it flourishes in the UK or finds favour within Australian law remains to be seen. In any event, to the extent that the ATO strictly honours its Charter commitment as stipulated above, taxpayers will have little need to rely on this doctrine.

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

289 *Internal Revenue Code (USA)*, § 6502(a).

290 NTA, *2015 Annual Report to Congress, Volume 2 'IRS Collectability Curve'*, p 39.

291 *Beeler v Commissioner of Internal Revenue*, T. C. Memo. 2013-130.

3.135 The IGT continues to maintain an interest in areas of the law which can be improved in terms of taxpayer rights. One such area has been the onus of the burden of proof. As set out above, the issue has been identified on a number of occasions and in a number of different contexts. The IGT had previously made a recommendation to the Government in this regard as has the SCTR. Ultimately, the decision of whether the burden of proof should be reversed, and in what circumstances, remains a matter for the Government. The IGT acknowledges the ongoing concerns in this area and should these concerns manifest broadly amongst the complaints received or submissions made, the IGT may revisit the matter specifically in a more targeted manner.

RECOMMENDATION 1

The IGT recommends that the ATO:

- (a) promote and educate taxpayers and tax practitioners about the Charter and in particular draw their attention to its principles at the outset of interactions which are likely to generate dispute or disagreement, such as reviews, audits, objections and litigation;*
- (b) treat allegations of any breaches transparently and address them independently of the substantive issues;*
- (c) enhance staff awareness and understanding of their obligations under the Charter through more practical training and guidance;*
- (d) improve its monitoring and reporting of the Charter by matching complaints cases against the Charter principles and publicly reporting on its annual performance; and*
- (e) consult with stakeholders on updating the Charter and in particular consider the following:*
 - i) the need to include any higher standards set by the 'Reinvention Program';*
 - ii) its application to digital interactions, tax practitioners when acting as agents or in their personal capacities and the interaction between taxpayers and any external service providers engaged by the ATO;*
 - iii) the impact of any recent law changes or evolution in tax administration and whether any additional or existing 'rights' should be incorporated;*
 - iv) the need for a clear statement that Charter 'rights' are not contingent on taxpayers discharging their 'obligations'; and*
 - v) the most effective way of presenting the Charter, such as a single page summary of all 'rights' and 'obligations' with links to further information.*

ATO response

- (a) **Partially agree.** Our approach is to provide clients with information about their relevant rights and obligations when we interact with them, and in the information we make publicly available – what they need to know, when they need to know it.

We will improve visibility of the Taxpayers' Charter principles to clients at the outset of interactions that are likely to generate dispute or disagreement.

- (b) **Partially agree.** The ATO currently treats allegations of any breaches through the ATO's complaints process. This process provides taxpayers and their representatives with an independent, separate avenue to raise a complaint about breaches of the Taxpayers' Charter.

We will make our treatment of allegations of breaches more transparent in the appropriate circumstances.

- (c) **Partially agree.** Mandatory induction training to all staff includes information about the Charter. There are also other ATO training packages to assist staff in applying the Charter depending on the type of interaction or situation: for example; in decision making, in client service, in explaining decisions or applying penalties.

Most of the rights and obligations outlined in the Charter are at the heart of the ATO's Vision, Mission, Values statement, the Corporate Plan and the Reinvention program blueprint, especially the five guiding principles we are using to drive our transformation:

1. easy to get things right
2. tailored experience
3. excellent service
4. fair and respectful treatment
5. service delivered in the most effective way

The ATO will explore ways to further enhance staff awareness and understanding to ensure staff are, and continue to be, aware of their obligations under the Charter, and also how they are to apply ('live') the Charter in their business as usual interactions and activities.

- (d) **Agree in principle.** The ATO currently uses complaints data in real time to ensure we understand the current issues and impacts on the client experience. We use this data to prioritise our activities and focus areas.

A number of charter principles are also reflected in our corporate measures and reported in our annual report.

In order to improve our monitoring and reporting of the Charter, we will:

- on an annual basis, report against themes, how they link to the Charter principles and what we have done against these;
- include questions in our client experience surveys with the results to be reported on an annual basis
- streamline and improve the data collected through the complaints process.

- (e) **Agree.** The ATO considers the Charter is robust and comprehensive. Our aim is to achieve mutual trust and respect in our relationships with all those who deal with us.

We will undertake consultation with stakeholders, taking into account the considerations raised in paragraphs i) to v), in order to examine if there is a need to update the Charter given the transformation underway in relation to culture and services. Where required following consultation, we will update the Charter to ensure it remains contemporary and reflects what our clients and all stakeholders can expect when dealing with us.

CHAPTER 4—COMPENSATION AND OTHER AVENUES OF REDRESS

4.1 Where taxpayers believe that their ‘rights’ have been transgressed, they may seek avenues of redress to rebalance what they may perceive to be an injustice to them or restore them to the position they were in prior to the transgression.

4.2 There are a range of options which the ATO may use to restore the taxpayer’s confidence in the administration. Some of these may involve providing taxpayers with additional time to comply, informally reviewing decisions or updating policies and procedures that are found to give rise to unintended outcomes. It is not possible to examine the effectiveness of each and every possible form of redress as these will necessarily vary from case-to-case.

4.3 In this Chapter, the IGT will examine the concerns raised by stakeholders, and the ATO’s approach to, three specific forms of redress, namely:

- the scheme for compensation for detriment caused by defective administration (CDDA Scheme);
- compensation for legal liability; and
- apologies.

4.4 Whilst concerns were identified with each of the above forms of redress, the greatest degree of concern appeared to be focused on the ATO’s administration of the CDDA Scheme. As such, before turning to discussing the other areas of redress, this Chapter will examine the CDDA Scheme and the associated stakeholder concerns in some detail.

THE CDDA SCHEME

4.5 The CDDA Scheme was established in 1995 as an administrative remedy and allows Commonwealth agencies to provide compensation where there is no legal right of redress but a moral obligation to do so.²⁹² The CDDA Scheme is intended to restore a person to the position they would have been in had a Commonwealth agency’s defective administration not occurred.²⁹³ All claims are considered on their own merits and principles of procedural fairness apply in the CDDA decision-making process.²⁹⁴

4.6 The administrative framework for the CDDA Scheme is the responsibility of the Department of Finance. However, CDDA decisions are the responsibility of the relevant Portfolio Minister.²⁹⁵ In effect, however, the Ministers authorise their portfolio

292 *Resource Management Guide 409 Scheme for Compensation for Detriment caused by Defective Administration* (RMG 409), para [1]; Department of Finance and Deregulation, Submission to the Administrative Review Council, *Judicial Review in Australia* (July 2011).

293 RMG 409, para [68].

294 *Ibid*, paras [38]-[39].

295 *Ibid*, para [7].

agencies to make the decisions on their behalf.²⁹⁶ Portfolio agencies are provided with discretion in the application of the Scheme, subject to certain specific requirements set out in *Resource Management Guide 409 Scheme for Compensation for Detriment caused by Defective Administration* (RMG 409).

4.7 In addition to having discretion over the application of the CDDA Scheme, agencies also have discretion over whether payment of compensation is appropriate and the quantum of any such compensation. There is also no automatic right of review of decisions under the CDDA Scheme. Taxpayers who are dissatisfied with a CDDA decision may request an internal review of the decision with the agency concerned. However, there is no statutory or administrative requirement for there to be an internal review process and it is at the discretion of agencies whether to offer internal review and, if so, how such a process would operate.²⁹⁷

4.8 Beyond an internal review, a CDDA decision may be reviewable by the Ombudsman or, in the case of claims concerning the ATO or the TPB, the IGT. A CDDA decision may also be reviewable under section 75 of the Constitution or section 39B of the *Judiciary Act 1903* (Judiciary Act). These provisions provide a remedy for affected taxpayers where officers of the Commonwealth have failed to perform legally enforceable duties or acted in a way which is unlawful or exceeds their powers. Where a Court makes such a finding, the remedies would generally be confined to remitting the matter back to the original decision-maker to remake the decision in line with relevant procedural directions. It is important to note that these provisions would not entitle a taxpayer to a specific substantive outcome (for example, an order that the agency pay a certain amount of compensation).

4.9 There have been a number of reviews which have examined or referred to the CDDA Scheme, namely those of the Administrative Review Council (ARC), the Senate References Committee, the Ombudsman, the IGT and the Australian National Audit Office (ANAO).

Prior reviews

ARC review

4.10 The ARC's 2012 review, *Federal Judicial Review in Australia*, amongst other things, considered whether there was a need for decisions under the CDDA Scheme to be reviewable under the ADJR Act.²⁹⁸

4.11 The extension of ADJR Act review to decisions made under the CDDA Scheme was opposed on the basis that the flexibility and efficiency in decision making could be lost if too much weight is placed on the judicial review of decisions.²⁹⁹ It was noted that applications for review of CDDA decisions had been made under the ADJR

²⁹⁶ Ibid, paras [8]-[9].

²⁹⁷ Ibid, para [87].

²⁹⁸ Administrative Review Council, *Federal Judicial Review in Australia* (September 2012).

²⁹⁹ Submission by the Department of Finance and Deregulation to the Administrative Review Council's inquiry into judicial review in Australia (July 2011).

Act on at least two occasions and were unsuccessful because CDDA decisions were not made ‘under an enactment’ and therefore not reviewable under the ADJR Act.³⁰⁰

4.12 Ultimately, the ARC did not make any recommendations which would extend the ambit of the ADJR Act to cover decisions under the CDDA Scheme. However, it observed that decisions made under the CDDA Scheme would continue to be reviewable in the Federal Court under sections 75 of the Constitution and 39B of the Judiciary Act.³⁰¹

Senate review

4.13 In 2010, a Senate References Committee review was undertaken in respect of a range of government compensation schemes, including the CDDA Scheme.³⁰² Submissions to that review identified a number of limitations and associated issues with the CDDA Scheme. The Ombudsman at the time noted that the scheme did not then apply to entities governed by the *Commonwealth Authorities and Companies Act 1997* (CAC Act) and was not applicable in instances where the defective administration arose as a result of actions by contracted non-government entities.³⁰³

4.14 The review committee made one recommendation in respect of extending the CDDA scheme, in appropriate circumstances, to cover CAC agencies and third party service providers.³⁰⁴ The IGT notes that, whilst the issue has not been entirely addressed, with the introduction of the PGPA Act, the *Financial Management and Accountability Act 1997* and the CAC Act have now been consolidated and the CDDA Scheme has been applied to both corporate and non-corporate Commonwealth entities.³⁰⁵ However, it remains unclear whether the CDDA Scheme extends to the actions of third party service providers contracted by Commonwealth agencies.

4.15 Concerns were also raised in respect of other aspects of the CDDA Scheme, including the narrow definition of ‘detriment’ and the high threshold for proving economic loss.³⁰⁶ These concerns were also raised by submissions to this IGT review and will be discussed later in this Chapter.

IGT reviews

4.16 The IGT’s 2010 review of the *Change Program* highlighted concerns from the tax practitioner community about the ATO’s basis for and process to obtain compensation.³⁰⁷ The ATO had considered a number of CDDA claims from practitioners for losses incurred as a result of the ATO’s actions in implementing the

300 Ibid, p 9.

301 Above n 298, p 88.

302 The Senate, Legal and Constitutional Affairs References Committee, *Review of Government Compensation Payments*, December 2010.

303 Ibid, pp 49-51.

304 Ibid, p 53.

305 Above n 293, p 2.

306 Above n 302.

307 IGT, *Review into the ATO’s Change Program* (December 2010).

Change Program. However, the ATO declined to provide compensation at that time on the basis that there had been no defective administration.

4.17 The IGT observed that the ATO's compensation decisions had failed to acknowledge that although the ATO had published a list of known issues with the new system, it did not do so in a manner that helped taxpayers and tax practitioners minimise risk and unnecessary costs. As a result, the IGT made the following two recommendations to the ATO:

Recommendation 5

For the purpose of minimising risks arising in future large, complex ICT projects, the IGT recommends that the ATO consider for future projects, whether it should have guidelines in place early in the development of the project to assess and process claims for compensation by members of the community for substantial detrimental impacts imposed.³⁰⁸

Recommendation 6

For the purpose of addressing tax practitioners' concerns with the basis for, and process to obtain compensation, the IGT recommends that the ATO work with the tax practitioner community to robustly and openly consider its position on compensation claims under the CDDA Scheme and the process by which such claims should be made.³⁰⁹

4.18 In response, the ATO agreed with Recommendation 5. However, it disagreed with Recommendation 6 as it was of the view that compensation claims are considered on their merits and the CDDA Scheme does not operate on the basis which involves consultation about findings of defective administration.³¹⁰

Commonwealth Ombudsman reviews

4.19 In 2009, the Ombudsman undertook an own motion review of three Commonwealth agencies' administration of the CDDA Scheme, including the ATO.³¹¹ The Ombudsman concluded that, overall, these agencies had well-developed systems in place to handle CDDA claims.³¹² However, a major theme emerging from the report was that:

... while there is general acceptance by agencies of the CDDA Scheme, there is still a reluctance by agencies to admit error and to approve worthy claims. More can be done within agencies to facilitate greater acceptance of the scheme, its principles and purpose.³¹³

4.20 The Ombudsman also identified actions that the agencies should take to improve their administration of the scheme, including:

308 Ibid, p 107.

309 Ibid, pp 109-110.

310 Ibid, pp 109-110.

311 Commonwealth Ombudsman, *Putting things right: compensating for defective administration* (August 2009).

312 Ibid, p 32.

313 Ibid, p 32.

- providing greater visibility of the scheme so that the public knows they can ask to be compensated for government error;
- providing staff with greater guidance and instructional material, including illustrative case studies;
- using information technology to improve case monitoring, provide support for better decision making and capture feedback; and
- establishing an inter-departmental advisory or review panel to deal with disputed or exceptional CDDA claims.³¹⁴

4.21 An earlier Ombudsman review of the CDDA Scheme, in 1999, had also resulted in several recommendations. These included clarification of the CDDA guidelines, by the Department of Finance, to ensure that if the Ombudsman and the agency concerned agree that there has been detriment caused by defective administration, there is sufficient basis for compensation.³¹⁵ The development of Finance Circular 2001/01 was, in part, a response to this recommendation.³¹⁶

ANAO review

4.22 In 2003-04, the ANAO conducted a cross-portfolio performance audit on the processes applied by agencies to manage claims for compensation and debt relief.³¹⁷ The audit also assessed the Department of Finance's role of providing policy advice and its management of the compensation arrangements. The ATO was not included in this audit.

4.23 The ANAO concluded that whilst the management of compensation claims was generally in accordance with the relevant legislative requirements and administrative guidelines, there was room for improvement with respect to the overall coordination of the arrangements and processing of claims.³¹⁸ The ANAO made 11 recommendations, of which four were directed at the Department of Finance and seven were directed at the agencies receiving claims for compensation. The recommendations to agencies included developing and documenting procedures for processing claims and determining appropriate performance time indicators.³¹⁹ Agency responses to the ANAO's recommendation to develop comprehensive written procedures for processing compensation claims varied, however, most agreed with this recommendation and indicated that work would be undertaken to review and refine existing procedures.³²⁰

4.24 It is noted that, of the above reviews, only the 2009 Ombudsman review directly examined the ATO's administration of the CDDA Scheme. The other reviews

314 Ibid, pp 32-35.

315 Commonwealth Ombudsman, *To compensate or not to compensate?* (September 1999) p 12.

316 ANAO, *Compensation Payments and Debt Relief in Special Circumstances* (2003-04) p 56.

317 Ibid.

318 Ibid, p 17.

319 Ibid, pp 19-21.

320 Ibid, pp 79-80.

were either broader in scope, considered the CDDA Scheme in the context of other matters or did not review the ATO's administration.

Summary of stakeholder concerns

4.25 Notwithstanding the above reviews and actions taken in response to their findings, the difficulty in obtaining compensation under the CDDA Scheme was one of the primary concerns raised by stakeholders in their submissions to this review. In particular, stakeholders expressed concerns about:

- the level of awareness and accessibility of the CDDA Scheme in providing redress to taxpayers;
- the ATO's management of CDDA claims and its decision-making process, including the independence of decision makers; and
- the internal and external review avenues for CDDA decisions.

4.26 Each of these concerns is discussed below.

Awareness and accessibility of the CDDA Scheme

Stakeholder concerns

4.27 Stakeholders have raised some concerns that there is limited public education and guidance available about the CDDA Scheme. They have asserted that many taxpayers do not know that the CDDA Scheme exists or how to seek compensation. This claim seems to be supported by the relatively low number of CDDA applications made to the ATO.

4.28 The Ombudsman, in his 2009 review, also identified similar concerns regarding the need to raise awareness of the CDDA Scheme and recommended that all agencies:

... review their publicly available information to ensure that information about the CDDA Scheme, including the Ombudsman's role in review of decisions, is accessible on agency internet sites, and referred to in service charters, correspondence relating to decisions, and on fact sheets and similar material relating to complaints, review of decisions and appeals.³²¹

4.29 Even where taxpayers are aware of the scheme, submissions made to the IGT have expressed concern about the threshold criteria for compensation under the CDDA Scheme as a barrier to access. In particular, stakeholders have noted that the threshold for demonstrating 'defective administration' is too high and that the guidelines for what can and cannot be compensated are prohibitively narrow.

4.30 It has been further asserted that the time and cost of preparing CDDA claims is disproportionate to any benefits particularly for taxpayers in the individual and

321 Above n 311, p 34.

small business markets. These stakeholders consider that compensation should be available to the most vulnerable taxpayers in an efficient, timely and low cost manner.

4.31 In cases where taxpayers have succeeded in meeting the threshold criteria, submissions made to the IGT have observed that the CDDA Scheme does not adequately address productivity loss, opportunity costs (particularly for tax practitioners) or psychological injury (for example, stress and depression). It has been suggested that taxpayers should be able to seek financial compensation for time expended and emotional stress, with one submission expressing the concern as follows:

... in our experience, one of the key causes of financial loss in relation to pursuing the ATO for failure to uphold the Taxpayers Charter is the time and effort which has to be given up or diverted from other endeavours in order to undertake a time-consuming pursuit of redress from the ATO. In the context of a small business, for instance, this is time taken away from running the business, including generating sales. It is not unreasonable to expect that taxpayers should be able to seek financial compensation for the time spent in clearing up a mess largely created by the ATO. Similarly, the emotional stress involved in dealing with ATO compliance activity can be severe. Where it turns out that that ATO activity was not justified, the taxpayer should have redress to compensation.

4.32 Similarly, some stakeholders have indicated that the CDDA Scheme does not adequately compensate for losses arising from major ATO changes in process or information technology (IT). Tax practitioners, in particular, are keen to see a better compensation mechanism put in place to support tax practitioners inadvertently impacted by systems modernisation, such as the upgrades required as a result of the government's digital-by-default initiatives. Concerns have also been raised by tax practitioners regarding the limitations to the CDDA Scheme in compensating for losses incurred as a direct result of Tax Agent Portal performance and system errors.

Relevant materials

4.33 In relation to publicly available information, the ATO's website contains general information about how the ATO assesses a claim for compensation, the losses for which compensation can be considered, the losses that generally cannot be claimed, options for review of compensation decisions and its service standards for processing claims. The website also provides assistance to taxpayers and tax practitioners through its dedicated toll-free compensation phone line and dedicated compensation email inbox.

4.34 In addition, taxpayers and tax practitioners are made aware of the ATO's compensation schemes through the Charter, which acknowledges that taxpayers may in some circumstances be entitled to compensation.³²²

4.35 Following the Ombudsman's 2009 review, the ATO had undertaken some action to improve the public guidance on the CDDA Scheme, including by engaging with the Charter team to discuss updates to relevant sections of the Charter as well as

322 Above n 26.

reviewing the relevant ATO webpages to ensure that the information presented accorded with the recommendation.

4.36 Turning to issues of accessibility, the threshold requirement for compensation requires taxpayers to show that the actions of the agency amount to 'defective administration'. 'Defective administration' is defined in RMG 409 in the following terms:

- a) *a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the claimant's circumstances; or*
- b) *an unreasonable failure to institute appropriate administrative procedures to cover a claimant's circumstances; or*
- c) *giving advice to (or for) a claimant that was, in all circumstances, incorrect or ambiguous; or*
- d) *an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official's power and knowledge to give (or was reasonably capable of being obtained by the official to give).³²³*

4.37 RMG 409 also provides the following guidance on unreasonableness:

An unreasonable lapse or failure is one where the actions of the official(s) involved are considered to be contrary to the standards of diligence that the entity expects to be applied by reasonable officers acting in the same circumstances with the same powers and access to resources.

4.38 RMG 409 indicates that compensation can be approved for financial and non-financial detriment under the CDDA Scheme. Detriment is considered to be the amount of quantifiable financial loss, including opportunity costs, that was suffered as a direct result of the defective administration despite the taxpayer taking reasonable steps to minimise the loss.³²⁴ Non-financial loss claims may relate to personal injury (including psychiatric injury), emotional distress or damage to reputation. However, compensation is not payable solely for grief or anxiety, hurt, humiliation, embarrassment, disappointment, stress or frustration, that is unrelated to the personal injury, irrespective of the intensity of the emotion.

4.39 The ATO's public guidance on what may be claimed under the CDDA Scheme states that compensation can be considered under the CDDA Scheme for financial losses that have a direct connection to the actions of the ATO that give rise to 'defective administration' such as professional fees, interest for delay or bank and other administrative fees.³²⁵ However, the ATO also notes that claims for certain types of losses generally cannot be considered including those relating to personal time spent, stress, anxiety or other forms of emotional distress, delayed refunds where statutory interest has been paid and costs of compliance.³²⁶

323 Above n 293, para [16].

324 Ibid, para [54].

325 ATO, 'Applying for compensation' (5 May 2015) <www.ato.gov.au>.

326 Ibid.

IGT observations

4.40 The website and the Charter are the primary sources of ATO public information on the CDDA Scheme. The Charter information presently asks taxpayers to contact the ATO's toll-free information line or alternatively to search 'Compensation' on the ATO's website.³²⁷

4.41 Early in the review process, the IGT observed that the above website information (at least as it appeared in the PDF version of the Charter) seemed to be out of date. Test searches of 'Compensation' yielded several results but none of the first page results related to the CDDA Scheme. The ATO website at the time appeared to require 'CDDA' and 'defective administration' to be entered before directing them to the 'Applying for Compensation' page which contains the relevant CDDA details. The IGT raised concerns with the ATO that such restrictive search terms require the taxpayer to at least be aware of the existence of the CDDA Scheme before finding the relevant information on the ATO's website.

4.42 Moreover, the IGT also noted that the ATO's website also referred taxpayers to the superseded Finance Circular 2009/09 on Discretionary Compensation and Waiver of Debt Mechanisms³²⁸ rather than the current guidance on CDDA matters, being RMG 409.

4.43 The IGT notes that during the course of the review, the ATO took some steps in this regard such as replacing the old Finance Circular 2009/09 with the update-to-date RMG 409 and the ATO's website being more responsive to the search term 'compensation claim'. Having regard to the above, the IGT considers that it is important for the ATO to ensure that its website is kept up-to-date to better inform taxpayers of their rights in respect of the CDDA Scheme, more responsive to flexible search terms and links to the most current guidance material.

4.44 In addition to the above improvements to the ATO's website, the implementation of recommendations in the previous chapter, in relation to the education and promotion of the Charter, should significantly assist in raising awareness of the CDDA. The updated Charter should include references to the availability of compensation in certain cases with links where further information would be available including the requisite information on the CDDA Scheme.

4.45 In relation to claiming compensation, a key requirement is for taxpayers to demonstrate that the actions of the ATO gave rise to 'defective administration'. It would appear that 'defective administration' requires a higher degree of misconduct than mere mistake but not so high as to reach the levels of 'conscious maladministration' (that is, an intention to cause harm or loss).³²⁹ It is not an easily understood concept, particularly for taxpayers who do not often interact with the tax system. By contrast, in other jurisdictions such as the UK, a higher degree of misconduct is not required to be demonstrated in their redress and consolatory

³²⁷ ATO, *Taxpayers' Charter – What you need to know*, p 11.

³²⁸ Department of Finance and Deregulation, *Finance Circular 2009/09 Discretionary Compensation and Waiver of Debt Mechanisms* [Archived] <<http://www.finance.gov.au/archive/archive-of-publications/finance-circulars>>.

³²⁹ *Federal Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

payment regimes.³³⁰ However, this may be due to these regimes being more closely aligned with *ex gratia* payments than compensation. Indeed, the UK guidance specifically states that such payments are not to be referred to as 'compensation'.³³¹

4.46 RMG 409 has provided a definition for 'defective administration' as well as a broader statement by way of guidance, both of which have been set out above. The guidance, in effect, asks the ATO (as the assessing agency) to determine whether the action giving rise to the compensation claim was an 'unreasonable lapse' having regard to the standards of diligence expected of a reasonable officer acting in the same circumstances. Measurements of standards of reasonableness can be problematic, especially given the range of interactions between the ATO and taxpayers. Moreover, it can give rise to markedly different perspectives between the ATO officers charged with making the assessment and the taxpayer who has been affected.

4.47 There is limited public information through the ATO's website, or elsewhere, which provides a more detailed definition or illustration of the concept in practice. Therefore, an effective yardstick is not available to taxpayers or tax practitioners and they effectively have to lodge an application to find out whether the 'defective administration' standard has been met. It should be noted that the ATO may provide guidance in this regard through its assistance phone line or via a dedicated email inbox. The IGT understands that more tailored guidance, including the likelihood of compensation being payable, is available through these channels.

4.48 Whilst the ATO's approach to providing more tailored information to taxpayers is welcomed, the IGT considers that there are opportunities for the ATO to provide greater clarity on the types of losses that are compensable under the scheme and those that are not. Such guidance is likely to assist both taxpayers to better assess the likelihood of success and minimise workflows for the ATO.

4.49 One area in which further guidance could be given is compensation for non-economic loss. Non-economic loss may include matters such as stress or anxiety, depression or productivity losses as a result of ATO interactions. As noted above, the ATO's website indicates that claims for personal time expended, stress or other emotional distress as well as costs associated with audits, objections and appeals are generally not compensable.³³² However, it is understandable that taxpayers and tax practitioners may view this to be at odds with RMG 409 which indicates that compensation may be approved for non-economic losses:

63. *Non-economic loss claims may relate to personal injury (including psychiatric injury), emotional distress or damage to reputation.*

64. *Compensation for personal injury loss would be generally limited to the types of personal injury compensable in legal practice and principle. Entities must look to legal principle and practice when determining an appropriate amount to quantify the claimant's loss.*

330 HMRC, 'TPM14151 - Redress and consolatory payments: When do we make redress and consolatory payments?' <<http://webarchive.nationalarchives.gov.uk>>.

331 Ibid.

332 ATO, 'Applying for compensation' <www.ato.gov.au>.

65. *Compensation under the CDDA Scheme is not payable solely for grief or anxiety, hurt, humiliation, embarrassment, disappointment, stress or frustration that is unrelated to a personal injury which is being compensated under the CDDA Scheme, no matter how intense the emotion may be.*³³³

4.50 Whilst non-economic loss can have an impact on taxpayers, it can also affect tax practitioners whose day-to-day work is impacted by ATO system outages or other actions, such as the Tax Agents' Portal being down, preventing tax practitioners from completing their lodgment work. The IGT has been informed that tax practitioners have met with significant difficulty in seeking compensation for losses of this kind.

4.51 As noted earlier, the IGT had discussed such options in the review into the *Change Program* where large scale IT upgrades undertaken by the ATO had resulted in significant delays in the processing of tax returns leading to dissatisfaction for both taxpayers and tax practitioners.

4.52 The IGT remains of the view that, where the ATO undertakes large scale projects, such as those relating to significant IT upgrades, it should as a matter of risk assessment and good governance, particularly in the light of the requirements under the PGPA Act, consider catering for potential outages and teething issues which may lead to unintended delays and outcomes. In doing so, the ATO could consider a range of contingencies including setting aside appropriate portions of the budget to account for potential compensatory payments as well as other measures such as expedited processes for investigation, escalation and communication with those affected. A similar approach may be necessary where existing systems suffer frequent failures over a significant period of time and effective remedial action which adequately deals with the issues cannot be taken in a reasonable timeframe.

4.53 The ATO has advised the IGT that a separate budget allocation for specific projects is not necessary as General Counsel currently has a centrally managed budget allocation for compensation purposes. It has also asserted that there have been no identified instances where budgetary constraints have resulted in compensation not being paid.

Management of the CDDA Scheme and decision-making processes

Stakeholder concerns

4.54 The manner in which the CDDA Scheme is administered has given rise to perceptions of bias and lack of independence. This perception stems from having the ATO form its own opinion as to whether its actions amount to defective administration and deciding the appropriate quantum of compensation for taxpayers. There is a strong view that having the ATO review and decide on the outcome of matters that it has purportedly mismanaged is lacking in basic procedural fairness.

4.55 Submissions to this review have emphasised the need for enhanced independence in the administration and management of the CDDA Scheme. Some

333 Above n 293, para [65].

submissions have suggested that independence could be achieved by delegating the administration and management of the scheme, insofar as the ATO is concerned, to an independent body, such as the IGT, so that compensation claims are subject to independent consideration at the outset. Whilst stakeholders recognise that the CDDA Scheme applies across government, they consider the ATO to be distinct from other government agencies. As one stakeholder has noted:

The ATO is distinguishable from and unique when compared to other governmental authorities who too administer the CDDA Scheme. The ATO's reach stretches across the whole of the Australian community, and involves the whole of the Australian community. This is quite different from other governmental authorities that deal with a section of our community.

4.56 In this respect, submissions have commented that an overhaul of the entire scheme would not be required as the IGT could absorb the responsibility of administering the CDDA Scheme, given that its role already involves complaints handling and reviewing ATO activity.

4.57 The concerns regarding the ATO being responsible for making its own decisions about compensation are exacerbated by the perception that it is often reluctant to admit error, resulting in a tendency for the assessment of claims to be skewed towards denying compensation claims and safeguarding ATO funds. Concerns have been raised that offers of compensation by the ATO are nominal, often form less than the cost of submitting the claim for compensation and do not restore taxpayers to their original position as intended by the scheme. Stakeholders have also argued that the total compensation payout in a given year would be less than the total losses incurred by a single applicant.

4.58 Some stakeholders have viewed the limited numbers of CDDA claims approved and low quantum of CDDA Scheme payments as an indication that it is 'just a token scheme' and in place 'for the sake of having a compensation scheme'. Submissions to the IGT note that in the 2014-15 financial year, the ATO paid, in full or in part, only 37.5 per cent of the claims processed during the year and of the 201 claims finalised in that year, the median payment was \$484.³³⁴ On the issue of quantum, a small number of submissions have alleged that the ATO applies an arbitrary cap to the amount of compensation that would be payable where RMG 409 clearly states that no cap is applicable although it does require agencies to have regard to legal practice and principle when determining the quantum of compensation for non-financial loss.³³⁵

4.59 It has been identified that the concerns regarding the ATO's decision-making processes may be better managed through improved communications on CDDA Scheme decisions. Stakeholders have observed that, while not widespread, the ATO's reasoning on compensation decisions does not always properly address the taxpayer's application for compensation under the CDDA Scheme. Examples cited by stakeholders include instances where the ATO's compensation decision letter did not set out the facts applicable to the claim or explain how the CDDA criteria were applied

334 Commissioner of Taxation, *Annual Report 2014-15* (2015) p 114.

335 Above n 293, para 55.

to the facts of that claim. For these reasons, stakeholders have questioned whether CDDA claims are assessed by the ATO and considered on their merits.

4.60 Two ancillary issues have also been raised in this area. First, it has been alleged that, at times, the ATO's decision-making process may be overly legalistic where the CDDA Scheme is directed more at moral obligations. Secondly, stakeholders have also commented on the ATO's failure to meet its service standards in respect of some CDDA claims.

Relevant materials

CDDA administration and decision-making process

4.61 Applications under the CDDA Scheme are received and managed by the General Counsel section within the ATO.³³⁶ General Counsel officers at the APS 5 level and above are authorised to make compensation decisions up to specified monetary levels.³³⁷ The ATO has advised the IGT that it is guided in its decision-making by RMG 409 and an internal CDDA Manual that was developed and made available to ATO staff in September 2016. There is a SharePoint site through which ATO staff can access a range of templates, draft deeds, decision-making authorisations and approaches to seeking background information from the relevant business lines.

4.62 The Ombudsman had previously recommended, in his 2009 review, that agencies consolidate all material on handling CDDA claims into a single coherent document.³³⁸ Whilst, the ATO had previously indicated that it considered general guidance to be unnecessary given the small size of the team handling CDDA claims,³³⁹ its CDDA Manual and materials on the SharePoint website appear to align with the Ombudsman's recommendation.

4.63 In discussions with ATO General Counsel, the IGT has been advised that the process for receiving and assessing a CDDA claim is as follows:³⁴⁰

- Claims are received and allocated to a case officer in General Counsel who is required to acknowledge receipt of the claim within five days. The ATO relies upon RMG 409 in its assessment of the claim. RMG 409 does not impose a requirement that documentary or incontrovertible evidence be provided as essential to substantiate the claim, however, there must be sufficient evidence or information to enable the officer to form an opinion regarding whether there has been 'defective administration' and to substantiate the loss. In doing so, the ATO officer may seek input from the relevant BSL.

336 Department of Finance, *CDDA Scheme* (31 March 2016) <www.finance.gov.au>.

337 Assistant Treasurer, 'ATO Business: Authorisations for the Scheme for Compensation for Detriment Caused by Defective Administration (the CDDA Scheme)' (3 August 2012).

338 Above n 311, p 15.

339 ATO, *Progress report on implementation of Ombudsman's CDDA recommendations* (internal ATO document).

340 IGT meeting with the ATO, 24 May 2016.

- Where defective administration is found to have caused detriment, there is no limit to the amount of compensation to be paid under the CDDA Scheme. The ATO has advised the IGT that this process involves reviewing the entirety of the claim to determine what losses have reasonably been caused by the defective administration. It may involve a mathematical process, discretionary judgment or legal practice and principles depending on the nature of defective administration and the loss. For example, in a finding of an unreasonable delay, the compensable amount will be determined as lost interest, calculated from the point in time when the defective administration occurred. Where the loss relates to professional fees, General Counsel will assess the work undertaken by the claimant's advisers to determine the extent to which the 'defective administration' caused unnecessary cost to be incurred.
- Generally, a decision template is prepared by the relevant officers which records the background and facts of the case, communications with the taxpayer, applicable ATO policies which support the reasoning for the decision, as well as details of the 'defective administration' and the losses incurred. The template is approved by an executive level officer within General Counsel and a draft decision letter may be prepared based on the information in the template.
- Where the facts of the claim are straightforward and not contentious, a decision may be made without a draft decision letter being provided to the claimant. Such an approach may be appropriate where it is apparent that there is no new or further information that can be provided by the claimant.
- For complex matters, the ATO has advised that it is common practice to prepare a draft decision and provide the claimant the opportunity to comment on the draft to address any potential gaps in relevant facts or context. Such letters are reviewed and approved by an executive level officer before issuing. This practice is to ensure the claimant is afforded procedural fairness and to identify all relevant considerations or address any potential misunderstandings before the decision is finalised. If additional information has been provided by the claimant in response to the draft position, any new or relevant information is addressed before coming to a final decision on the CDDA claim.
- A letter is issued to the taxpayer setting out the ATO's decision. Typically, the letter will set out the background of the case, the ATO's understanding of the claim, general information about the CDDA Scheme, the reasons for the decision and the claimant's review rights.³⁴¹
- If a decision is made that compensation should be paid under the CDDA Scheme, this will be approved by an ATO officer at the EL2 classification with managerial responsibility for monetary claims or an executive level officer in General Counsel with CDDA experience. A Deed of Settlement

341 ATO, 'Decision letter template' (Internal ATO document).

is usually required to be executed between the taxpayer and the ATO for payments of compensation in excess of \$2,000.00.³⁴²

4.64 The ATO has advised that where there are learnings arising from a CDDA claim, General Counsel may provide feedback to the relevant BSL, notwithstanding that no formal process which mandates this feedback being given. Due to the relatively low number of compensation claims against the ATO under the CDDA Scheme, such feedback occurs in an ad-hoc manner. The executive level officers in General Counsel, through the process of allocating and approving CDDA claims or through more general discussions, are positioned to identify potential trends of CDDA claims for feedback.³⁴³ Similarly, these officers are expected to have sufficient visibility of claims made under the CDDA Scheme to identify classes of similar claims and facilitate a streamlined approach to addressing affected claims.

4.65 In respect of the ancillary issue that at times the ATO's approach could be overly legalistic, the Ombudsman's 2009 report had noted the risks of such perceptions where decision-making for CDDA rested with the legal areas of the ATO. The Ombudsman emphasised the need to be clear that whilst the analytical skills and experience of legally-trained staff could be drawn upon, a legal perspective should not be only one applied to CDDA decisions.³⁴⁴

Quantum of CDDA payments

4.66 The ATO publishes compensation statistics in its annual report each year. These statistics include the number of claims received and finalised in a given year, the total claims paid in full and in part, the total claims unpaid, the median payment, and the number and type of claims on hand at 30 June of that financial year.³⁴⁵

4.67 The ATO's CDDA statistics over three financial years between 2012-13 to 2014-15 (inclusive) are set out in Table 7.

Table 7: CDDA statistics

Financial year ended	Median payment	Total claims paid	Total paid (in full or part)	Total unpaid
30 June 2013	\$267	147 (43%)	\$363,617	\$609,586
30 June 2014	\$300	79 (43%)	\$841,754	\$395,696,793
30 June 2015	\$484	77 (37.5%)	\$738,402	\$200,730,465

Source: ATO

4.68 The ATO's statistics show that across the three financial years, the median amount of CDDA payments increased from \$267 to \$300 to \$484. Over the same period, the data indicates the number of claims paid decreased by almost 50 per cent. It is interesting to note that even though the total claims paid decreased between 2012-13 and 2013-14, the number of claims paid as a proportion of total claims remained the same.

342 ATO, 'Short form CDDA Decision Letter Deed' (Internal ATO document).

343 Above n 340.

344 Above n 311, p 25.

345 Above n 334.

4.69 There seems to be a significant increase in total compensation paid between 2012-13 (\$363,617) and 2013-14 (\$841,754). Whilst there was a decrease between 2013-14 and 2014-15 (\$738,402), this figure is still substantially higher than the figure for the 2012-13 financial year.

Service standards

4.70 The ATO website states that compensation claims will be acknowledged within three business days of receipt and processed within 56 days. However, the website information also acknowledges that some claims may take longer to investigate and consider due to their complexity. In such cases, the ATO states that it will contact the claimant to negotiate an extended reply date. In addition, the ATO states that it aims to contact the claimant within seven business days of receiving a claim if further information is required to make a decision.³⁴⁶

4.71 The ATO publicly reports on its performance against its service standards for processing CDDA claims in its annual reports.³⁴⁷ These are set out in Table 8 below.

Table 8: Completion timeframes for CDDA claims

Financial year	Acknowledged within three days (%)	Processed within 56 days (%)	Processed within the negotiated timeframe (%)	Average days taken to finalise a claim
30 June 2013	91.3	73.9	61.2	110.7 days
30 June 2014	96.0	72.1	67.5	108.5 days
30 June 2015	93*	76.4	78.7	77 days

Source: ATO

*acknowledged within five days

4.72 The ATO's reported statistics show that, in the majority of cases, it meets its service standard for acknowledging CDDA applications with all years reporting more than 90 per cent compliance. It is noted that in the *Annual Report 2014-15*, the ATO reported that it aimed to acknowledge all CDDA claims within 10 business days. The ATO reported that 97 per cent of claims were acknowledged within 10 business days and 93 per cent within five business days.³⁴⁸ For the 2016-17 financial year onwards, the ATO has revised its service standard for acknowledging CDDA applications to seven business days.³⁴⁹

4.73 The data also shows that the average number of days to respond to finalise a CDDA application has also reduced quite significantly from 110.7 and 108.5 days in 2012-13 and 2013-14 to 77 days in 2014-15. At the same time, the ATO has also improved the percentage of cases which it is able to finalise within the original 56 day service standard or within a renegotiated timeframe.

³⁴⁶ Above n 332.

³⁴⁷ Commissioner of Taxation, *Annual Report 2012-13* (2013) p 112; Commissioner of Taxation, *Annual Report 2013-14* (2014) p 123; Commissioner of Taxation, *Annual Report 2014-15* (2015) p 113.

³⁴⁸ Commissioner of Taxation, *Annual Report 2014-15* (2015) p 113.

³⁴⁹ Above n 332.

4.74 Notwithstanding the above improvements, the data still indicates that only approximately three-quarters of cases are finalised within the original service standard and, with the exception of the 2014-15 financial year, a smaller proportion of cases is finalised within renegotiated timeframes.

IGT observations

CDDA administration and decision-making process

4.75 The IGT acknowledges the perceptions of bias and lack of independence which arise in relation to the ATO bearing responsibility for assessing CDDA claims. However, this approach is consistent with the design of the CDDA Scheme whereby each agency is responsible for establishing processes and procedures to consider CDDA claims regarding its own conduct. It is beyond the remit of the IGT's jurisdiction to make recommendations regarding the design of the CDDA Scheme itself, as that is the responsibility of the Department of Finance. Nevertheless, it is important to explore the concerns, consider the alternatives and explain the reasoning behind the design of the current CDDA scheme.

4.76 Stakeholders have suggested that having an independent agency, such as the IGT, make CDDA determinations at the outset would enhance perceptions of independence of the CDDA Scheme. Determination by an independent body may address the concerns about bias and lack of independence but such a change would be a significant policy shift affecting the provision of services provided by the entire public service. The CDDA Scheme was designed as a purely discretionary measure to allow agencies to make decisions purely on moral grounds taking into account its own actions and the circumstances of the taxpayer. The involvement of an independent body would lack the element of introspection contemplated with the process beginning to transform from one based on moral and ethical grounds to a legalistic one already available through the court systems.

4.77 The IGT considers that, before considering far-reaching measures such as that mentioned above, more appropriate measures could be taken to improve confidence in the ATO's administration of the CDDA Scheme. For example, and in line with the recommendation made by the Ombudsman in 2009,³⁵⁰ the ATO could provide more public information regarding how CDDA claims are managed and, in particular, the processes in place to maintain independence between General Counsel and other areas of the ATO in respect of the CDDA Scheme. It could also assist to minimise any perceptions that the ATO is adopting an overly legalistic approach by highlighting how the ATO's processes give effect to the moral basis of the CDDA Scheme.

4.78 In response to the Ombudsman's recommendation, the ATO had previously indicated that due to the small size of the team, general guidance was unnecessary as training had been provided through team leader emails, model responses, oral feedback and staff mentoring. Whilst the IGT considers that feedback and mentoring are important, the absence of publicly available formal guidance to staff is problematic from a succession planning point of view and it can lead to diminishing public

350 Above n 311, p 34.

confidence. The IGT believes, therefore, that the ATO should reconsider its stance on developing general information about its CDDA decision making processes and making it publicly available. Reference to such information would be particularly useful in ATO responses to taxpayers to assure them of the robustness of the process.

4.79 In relation to concerns in respect of the appropriateness of the ATO's responses, the IGT has considered a number of complaint cases on CDDA matters and notes that, in most of them, the ATO's decision letters largely provide a suitable explanation for the decision reached and at times may be very detailed due to the nature and complexity of the claims themselves. However, the IGT is also aware of some instances where ATO decision letters do not adequately provide reasons for the rejection of claims. A good example observed by the IGT through a complaint related to a CDDA claim from a tax practitioner in respect of Tax Agent Portal downtime which the tax practitioner alleged resulted in losses for his business. Amongst other things, the tax practitioner felt that the ATO had not fully addressed his claim and that the response appeared to be a standard rejection letter for matters arising from Tax Agent Portal failures. In this case, the IGT was of the view that the response letter could have addressed the concerns in more detail and assure the tax practitioner that the impact on him and his business had been adequately considered.

Quantum of CDDA payments

4.80 The IGT notes the concerns regarding low or inadequate levels of compensation payments by the ATO under the scheme and the perceptions that have arisen as a result. In this regard, the IGT compared the ATO with the Department of Human Services (DHS) and the Australian Securities and Investments Commission (ASIC).

4.81 In the 2013-14 financial year, the DHS reported that it made 1,730 payments totalling \$5,356,686 under the CDDA Scheme. By way of comparison, during the same period the ATO made 79 payments totalling \$841,754. Whilst the statistics published by the DHS indicate that it made more CDDA payments in that financial year resulting in a higher total quantum, the ATO's average payment per claim exceeds those of the DHS. Based on the above figures, the average amount paid per claim by the DHS was \$3,096 whilst the average amount paid by the ATO in the same year was \$10,655.

4.82 When compared with ASIC, the IGT notes that the ATO pays out many more claims and a higher total quantum. Between the 2011-12 and 2014-15 financial years (inclusive), ASIC reported two payments under the CDDA Scheme, one in 2012 (\$2,590) and one in 2015 (\$6,655).³⁵¹

4.83 The IGT has identified some of these figures as examples only. Given the differences between the functions of government agencies, the degree of interaction with the public and the legislative functions that apply to each, it is not possible to draw any meaningful conclusions as to whether the quantum of compensation paid by the ATO is appropriate when compared to other government agencies.

351 Australian Securities and Investments Commission (ASIC), *Annual Report 2014-15* (2015), p 169; ASIC, *Annual Report 2012-13* (2013), p 138.

4.84 Determining the appropriate level of compensation under the CDDA Scheme is not a straight forward matter and perhaps it is inappropriate to make any attempt at doing so. Neither the Ombudsman's 2009 report nor the information available to the IGT in the current review definitively indicates whether the ATO has made adequate payments. Moreover, whilst costs associated with compliance with government laws and regulation should be kept to a minimum, such costs cannot be eliminated particularly in the self-assessment environment in which our tax system operates. Even where additional costs arise as a result of ATO compliance activities, such as audits, these costs may not be unreasonable or excessive such that compensation would be warranted. In more blatant or egregious cases the evidence would more readily support such a finding however, where the issues are more nuanced, it would be difficult to determine if compensation should be paid and definitively quantify the amount. This may assist to explain why the ATO has paid fewer claims but larger amounts of compensation on average when compared against some other government agencies.

4.85 Ultimately, the IGT considers that the quantity and quantum of claims paid are not the best indicators of effectiveness of the CDDA Scheme. Such measures can give rise to perverse outcomes, or a perception of perverse outcomes, where ATO officers feel compelled to either reject or allow claims to meet arbitrary internal budgetary measures.

4.86 The key is to develop robust systems for the management of the CDDA Scheme which demonstrates its effectiveness through transparency particularly of its decision-making and review processes and level of independence amongst officers whose conduct is the subject of the compensation claim, officers handling the compensation claim and officers who may be requested to conduct a review of the compensation decision (see below regarding reviews of decisions).

Service standards

4.87 Concerns regarding the service standards applied by the ATO to manage CDDA claims are not new and were previously raised in the Ombudsman's 2009 review (which resulted in a recommendation being made to address the issue) as well as the Senate review in 2010.³⁵²

4.88 As noted earlier, the ATO's statistics indicate that it finalises approximately 75 per cent of the CDDA claims it receives within the 56-day service standard. The IGT also recognises that the average time taken to finalise a claim has improved from 2012-13 to 2014-15.

4.89 However, the ATO's statistics show that where the ATO has renegotiated a timeframe, which is likely to occur in cases which have long histories or are otherwise complex, the proportion of cases which are completed within this renegotiated timeframe are generally not as high. The IGT is of the view that where a new timeframe has been negotiated, that timeframe should be respected in all but

352 Above n 311; The Senate, Legal and Constitutional Affairs Committee, *Review of Government Compensation Payments* (December 2010) p 52.

exceptional cases where a new finalisation date should be agreed with the taxpayer or their representative and the reasons for such further extension be made clear.

4.90 Whilst concerns regarding the time taken to process a CDDA claim are not widespread and did not feature prominently in submissions to this review, they have been previously raised in other contexts. The IGT believes that the ATO should monitor its own performance against the published service standards to consider whether the resources currently available to handling CDDA claims are adequate to meet these service commitments and, if not, what more could be done to improve its administration.

Internal and external review of CDDA decisions

Stakeholder concerns

4.91 Stakeholders have raised concerns about the lack of effective internal review options for CDDA decisions. Several stakeholders have observed that whilst internal review of decisions under the CDDA Scheme is available to taxpayers, it is only offered in limited circumstances where taxpayers can provide new information in support of their claim. Due to the discretionary nature of internal reviews and lack of publicly available information, there is a perception that the ATO does not seem to be bound by any guiding principles.

4.92 Similarly, stakeholders have noted that there is no option for CDDA decisions to be externally reviewed. Some have suggested the establishment of an independent review and appeals function within the ATO, such that CDDA decisions can be independently scrutinised. Others have suggested the establishment of a formal external review mechanism, such as through the IGT, that allows the reviewer to change the decision.

Relevant materials

Internal review

4.93 The ATO's stated policy is to offer an internal review only where new information can be provided in support of a claim:

Internal review of compensation decisions is offered in limited circumstances where claimants can provide new information. There is no statutory or administrative requirement for this. Rather, it is an informal mechanism intended to provide a convenient means of double-checking the merits of original decisions.³⁵³

4.94 In practice, when a review request is received by the ATO, the original decision maker may be consulted to determine whether new information has been provided due to their familiarity with the history of the case. If it is determined that the taxpayer has provided new information, the matter will be allocated to a new decision

353 Above n 332.

maker for review (usually at the same level or above). Any review is based on the same considerations set out in RMG 409.³⁵⁴

4.95 The ATO does not currently report on internal reviews separately from original CDDA cases. In response to the IGT's request for statistics of internal reviews of CDDA decisions, the ATO advised that of the 33 CDDA cases it had on hand in April 2016, two were internal review cases.³⁵⁵

External review

4.96 There are limited options for external review of CDDA decisions. As noted above, one avenue of review rests with the Ombudsman and, since 1 May 2015, with the IGT for matters concerning the ATO and the TPB.³⁵⁶ RMG 409 sets out the parameters of the reviews by the Ombudsman or the IGT:

90. Entities should be aware that the decisions made under the CDDA Scheme are reviewable by the Commonwealth Ombudsman, either following a complaint from a claimant or as an own-motion investigation.

91. An entity must consider any proposal or recommendation made by the Ombudsman but is not bound by it. The Ombudsman has no power to overturn or vary an entity's decision. Entities should be aware that the Ombudsman may exercise powers to bring the matter to the attention of the accountable authority of the respective entity, the portfolio minister, the Prime Minister and the Parliament.³⁵⁷

4.97 In the CDDA cases which have been considered by the IGT following the transfer of the complaints function on 1 May 2015, the IGT has examined the ATO's decision making approach and the ultimate responses issued to taxpayers. In doing so, the IGT has specifically considered whether the ATO had taken into account all relevant matters raised by the taxpayer and, to the extent that it had not, requested that the ATO reconsider the matter. Moreover, the IGT has sought to assist taxpayers by providing further details on the parameters and limitations of the CDDA Scheme and provided advice on what further information may need to be presented to the ATO for it to reconsider the matter.

4.98 In addition to approaching the IGT, taxpayers who are dissatisfied with the ATO's decision may also seek judicial review. As RMG 409 states:

As CDDA Scheme decisions are not made under an enactment or law, decisions are not amenable to judicial review under the Administrative Decisions (Judicial Review) Act 1977. However, they may be subject to judicial review under section 75 of the Constitution or section 39B(1) of the Judiciary Act 1903.³⁵⁸

4.99 Notwithstanding the availability of the judicial avenues for external review, the IGT notes that there have been few instances in which a taxpayer has sought to

354 ATO communication to the IGT, 11 April 2016.

355 ATO communication to the IGT, 20 April 2016.

356 Above n 293, paras [90]-[91].

357 Ibid.

358 Above n 293, para [92].

challenge a CDDA decision (from any Commonwealth agency) pursuant to these provisions.³⁵⁹ As a result, the scope of application of these provisions to the CDDA Scheme remains unclear although it is likely that the scope would be narrow.

IGT observations

Internal reviews

4.100 At the outset, the IGT notes that the ATO's present approach to internal review of CDDA decisions is in accordance with the wide discretion afforded to agencies by RMG 409. However, it gives rise to perceptions of bias and lack of independence which is an inevitable consequence of the involvement of the original decision maker, even if that involvement is minimal.

4.101 To minimise the perceptions of bias and to achieve a degree of finality to the matter, the IGT believes that as a matter of best practice, a more formalised review process is necessary where claimants may request that the original decision be reviewed by a more senior officer not involved in the original decision. Such reviews should not be solely dependent on the provision of new information as there are circumstances in which the taxpayer may raise new grounds or contentions that would warrant an independent reconsideration of the decision. As an alternative, and given the low numbers of internal review requests, the ATO may also wish to consider establishing an internal panel of senior staff to consider the merits of more contentious or complex CDDA decisions.

4.102 In relation to a separate and independent review function within the ATO specifically for CDDA decisions, it should be noted that the IGT and the SCTR have previously recommended that the Government, through legislative change, establish a separate appeals function to review broader ATO decisions.³⁶⁰ However, the Government has indicated that such an approach is not warranted at this stage.³⁶¹

External review

4.103 As mentioned above, through the complaints handling process, the IGT already reviews the ATO's CDDA decisions by verifying whether all relevant matters have been considered amongst other things. The IGT cannot request that the ATO change its decision but can ask the ATO to reconsider its position by, for example, taking any additional factors into account.

4.104 It should be noted that, with respect to matters that are at the discretion of the Commissioner, the courts can do no more than direct him to reconsider his position by

359 In *Croker v Minister for the Department of Finance and Deregulation* [2013] FCA 429, the Federal Court of Australia considered an application brought under section 39B of the *Judiciary Act 1903* which sought an order to compel the Department of Finance and Deregulation to make a decision to pay compensation under the CDDA Scheme or an act of grace payment or an *ex gratia* payment. The case therefore did not consider the parameters of section 39B of *Judiciary Act 1903* as an external review channel for CDDA decisions.

360 Above n 44, p 120; Above n 11, p 94.

361 Australian Government, *Australian Government Response to the House of Representatives Standing Committee on Tax and Revenue Report: Tax Disputes* (2015) p 5.

taking into account relevant matters, that may have not have been considered appropriately. This is consistent with the IGT powers, albeit that the court can direct the Commissioner whereas the IGT can only make a request. Having said that, the IGT request is persuasive and, to date, no such request has been refused outright.

4.105 In relation to additional external review mechanism, the IGT believes that existing avenues for judicial review under section 75 of the Constitution and section 39B of the Judiciary Act should be considered and the scope of their application to the CDDA Scheme clarified.

4.106 The IGT understands that as part of an upcoming review of RMG 409, the Department of Finance will consult with Commonwealth agencies on potential improvements which may be made. It is likely that the scope and application of the abovementioned sections 75 and 39B would also be re-examined. The IGT believes that such a consultation process would be a valuable opportunity for the ATO to engage with the Department of Finance, and other relevant Commonwealth stakeholders, to consider how best to test and clarify these matters to obtain greater judicial certainty.

COMPENSATION FOR LEGAL LIABILITY

Stakeholder concerns

4.107 In submissions to the IGT, concerns were raised in relation to the very high threshold and limited prospects of success for taxpayers seeking to bring compensation claims against the Commissioner under legal liability. In particular, it was noted that the threshold for establishing negligence by an ATO officer and misfeasance in public office should be lowered as it was presently unreachable for taxpayers.

4.108 Stakeholders have also noted that the costs involved in pursuing legal claims for compensation against the Commissioner are a deterrent for many taxpayers. They argue that there needs to be non-court processes for small claims as the costs associated with court-based processes would exceed any amount received. By way of example, it was noted that the cost of commencing litigation in the Magistrates Court in Queensland for a two day trial would cost between \$70,000 and \$80,000.

4.109 Submissions have also noted the lack of guidance on how a claim for compensation for legal liability will be assessed by the ATO and the circumstances in which compensation might be paid.

Relevant materials

4.110 The research undertaken by UNSW as well as other academics has been clear that there are only limited options for taxpayers seeking compensation from the Commissioner on the basis of legal liability. Claims against the Commissioner for tortious liability under negligence, breach of statutory duty or misfeasance in public office are likely to fail.³⁶² The research also identified a possibility of taxpayers

³⁶² Above n 50, p 99. See also: John Bevacqua, *Taxpayer rights to compensation for tax office mistakes*, CCH and ATTA Doctoral series No3, CCH Australia Ltd.

successfully mounting a claim against the Commissioner for personal injury or property damage caused by ATO employees. However, even in the unlikely event the taxpayer could demonstrate that the injury or damage was caused by the ATO officer, they would also need to show that the ATO officer acted within the course and scope of their employment with the ATO before the Commissioner becomes liable.³⁶³

4.111 All claims in relation to legal liability must be dealt with in accordance with the LSD 2005.³⁶⁴ The LSD 2005 requires that claims against the Commonwealth are to be handled in accordance with legal principle and practice and there must be, as a minimum, a meaningful prospect of liability being established before a matter can be considered. Under the LSD 2005, the ATO cannot settle claims simply because it is cheaper to settle than to defend a claim.

4.112 The ATO has advised that the majority of claims received for compensation under legal liability relate to internal employment issues.³⁶⁵ The ATO has advised that whilst it receives a number of claims based on legal liability outside of internal employment disputes, many of these claims do not in fact have a basis in legal liability and therefore need to be assessed in other ways. Where the converse occurs, for example a CDDA claim is lodged with legal liability elements, the ATO officer will discuss this with the claimant.

IGT observations

4.113 As noted earlier, there have been few attempts to pursue compensation from the Commissioner on the grounds of legal liability.³⁶⁶ In cases where allegations of negligence or breach of statutory duty have been judicially considered, no taxpayer has succeeded in recovering compensation from the Commissioner. In particular, judicial comments in cases such as *Harris v Deputy Commissioner of Taxation*³⁶⁷ and *Lucas v O'Reilly*³⁶⁸ indicate the limited prospect of success.

4.114 The evidentiary burden for proving legal liability is high as the above cases have demonstrated and as the research from the UNSW has borne out. A taxpayer seeking compensation or damages for the actions of the ATO faces significant hurdles in convincing a court that some form of redress is warranted. Whilst the IGT acknowledges the difficulties associated with this avenue, reducing the standards of proof or the thresholds to make out these actions are a matter for the courts and not within the IGT's remit.

4.115 Whilst an alternative may be for the Government to legislate a specific cause of action, such as those rights under the *Privacy Act 1988* (Privacy Act), the IGT considers that such a course of action would require significant evidence and support as it entails complex legal consideration. The evidence received by the IGT in this

363 Above n 50, p 99.

364 Legal Services Directions 2005, Appendix C – Handling monetary claims.

365 IGT meeting with ATO General Counsel, 24 May 2016.

366 John Bevacqua, 'Australian business taxpayer rights to compensation for loss caused by tax official wrongs – a call for legislative clarification' (2012) 10(2) *eJournal of Tax Research* 229.

367 *Harris v Deputy Commissioner of Taxation* (2001) 47 ATR 408.

368 *Lucas v O'Reilly* (1979) 36 FLR 102.

review does not presently demonstrate a need for the Government to consider such drastic action. Indeed, as discussed above, introducing new causes of action is unlikely to address current issues facing taxpayers with limited resources to pursue redress of this kind through the court system. It may also unnecessarily create further confusion and costs for both taxpayers and the ATO. The IGT considers that the improvements recommended in Chapter 3 are key to practical improvement in this area.

APOLOGY

Stakeholder concerns

4.116 In submissions to the IGT, some stakeholders have noted that often taxpayers' grievances with the ATO relate to how they have been treated by ATO officers rather than about a specific dispute. In many instances, all taxpayers are seeking from the ATO is an apology.

4.117 However, stakeholders have expressed the view that an apology from the ATO can be very difficult to obtain, or when received is not directed at the issues which have caused the taxpayer distress, as it can be seen as an admission of fault giving rise to liability.

Relevant materials

4.118 The ATO recognises the role an apology has in helping to restore its relationship with taxpayers. On whether to provide an apology, the ATO's policy for staff is that:

We should fix our mistakes as quickly as possible and apologise to the client. An apology can go a long way towards fostering or repairing our relationship with the taxpayer. An apology is not an admission of liability or an agreement to pay compensation.³⁶⁹

4.119 Moreover, the ATO's policy is that if a Charter commitment has not been met, an apology must be provided.³⁷⁰ The above instructions are reiterated through a number of resources on the ATO's internal SharePoint in relation to complaints management.³⁷¹

IGT observations

4.120 The benefits of an apology have previously been examined by the NSW Ombudsman,³⁷² which identified that a prompt and sincere apology will often avoid the escalation of a dispute and the significant time, cost and resources that are often involved, as well as help to build trust and restore a damaged relationship.³⁷³

369 ATO, 'Respecting Clients' Rights or Review - Questions and Answers' (Internal ATO document, 23 May 2016).

370 ATO, *Managing Complaints and Compliments Policy*, CEI 2014/06/02 (Internal ATO document, 31 March 2016), p 3.

371 See for example: ATO, 'Writing for Complaints' (SharePoint); ATO, 'Reference Guide - Complaint Owner BSL managed' (SharePoint); ATO.

372 NSW Ombudsman, *Apologies - A practical guide - 2nd Edition* (March 2009).

373 *Ibid*, p 5.

4.121 The IGT notes that in its 2013-14 report *Management of Complaints and Other Feedback*, the ANAO had identified areas in which the ATO could further improve. One such area was in relation to providing apologies to complainants where the ATO is at fault or where one would help to improve the taxpayers' experience.³⁷⁴

4.122 Whilst the IGT acknowledges that the ATO has issued high level instructions to its staff regarding the issue of apologies, complaints received by the IGT suggest that in some cases, there can be barriers to obtaining an apology from the ATO. In one such complaint, whilst the ATO Complaints Unit had apologised, the taxpayer expressed concern that the apology did not adequately address the ATO officers' conduct during the audit process. Furthermore, the apology was not provided by the auditors or BSL in which his complaint originated as they believed the actions taken were correct. The taxpayer has since sought a more fulsome apology from the ATO.

4.123 The IGT considers it critical that ATO officers are able to determine when an apology would be appropriate and how to provide that apology effectively. Importantly, ATO officers need to recognise that whilst they may have adhered to existing processes, such adherence may have given rise to unintended consequences, adversely impacting the taxpayer and that an apology is the appropriate course of action. The distinction between apologising for the action and apologising for the impact does not appear to be well understood. As the NSW Ombudsman has observed:

*Even if a full apology may not be justified or warranted, a sincere expression of sympathy, sorrow or regret for the suffering of others may still be the right thing to do.*³⁷⁵

4.124 The IGT believes that discrepancies between the high level instructions issued by the ATO and the conduct of staff in practice may be addressed by more comprehensive training and support.

RECOMMENDATION 2

The IGT recommends that the ATO:

- (a) improve the currency of its website to provide more up-to-date public information about its administration of the CDDA Scheme, including its decision-making and review procedures to enhance public confidence;*
- (b) ensure that internal review for CDDA decisions is available where taxpayers are able to provide new information or grounds which warrant the decision being reconsidered by a new and independent decision maker; and*
- (c) ensure that staff are supported in providing an apology, where appropriate, and how to do so effectively.*

374 ANAO, *Management of Complaints and Other Feedback* – Australian Taxation Office (2014) p 74.

375 Above n 372, p ii.

ATO response

- (a) **Agree in principle.** The ATO acknowledges the importance of having an up-to-date and current website. We will continue to monitor the information and update as required. The ATO notes that updates have been made since the start of the review.
- (b) **Agree in principle.** We note this is our current process and we will update our website to reflect this.
- (c) **Agree in principle.** The ATO has existing procedures to guide staff when offering an apology.

As we move forward with our cultural changes and reinvention journey, we will improve guidance and training to further support staff on how to effectively provide an apology.

CHAPTER 5—MODEL LITIGANT OBLIGATION

5.1 As Australia’s principal revenue collection agency, the ATO has considerable powers and resources at its disposal which give rise to advantages over the vast majority of taxpayers. This is particularly evident in the case of litigation, given that the ATO has access to specialist knowledge and is more experienced and better resourced than the majority of taxpayers, particularly small businesses and individuals.

5.2 This recognition of the significant disparity in power and resources between the Crown and other litigants provided the genesis for what would ultimately become the MLO.

5.3 This Chapter will first describe the MLO and the prior reviews which have examined them before turning to stakeholder concerns and the ATO’s processes for monitoring, evaluating and reporting on compliance.

WHAT IS THE MLO?

5.4 Recognition of the Commonwealth’s obligation to behave as a model litigant occurred at the highest judicial levels in the early 20th century, reflected by the often-quoted remarks of Chief Justice Griffith in the High Court:

*I am sometimes inclined to think that in some parts – not all – of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.*³⁷⁶

5.5 Similar sentiments have been expressed by other members of the judiciary, as an elaboration of the views initially set out by Griffith CJ. For example, in *Sebel Products Ltd v Commissioners of Customs and Excise*, Vaisey J noted:

*... the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control.*³⁷⁷

5.6 Similarly, King CJ stated in *Kenny v South Australia*:

*The Court and the Attorney-General, to whom the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct of and disposal of litigation. It is extremely important that the Crown Solicitor’s Office set an example to the private legal profession as to conscientious compliance with the procedures designed to minimise cost and delay.*³⁷⁸

³⁷⁶ *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133, per Griffith CJ.

³⁷⁷ *Sebel Products Ltd v Commissioners of Customs and Excise* (1949) 1 Ch 409, per Vaisey J at 413.

³⁷⁸ *Kenny v South Australia* (1987) 46 SASR 268, per King CJ at 273.

5.7 Over time such judicial observations on the standards required of Commonwealth litigants were developed and consolidated into the MLO which are presently contained in Appendix B to the LSD 2005, as issued by the Attorney-General's Department pursuant to section 55ZF of the Judiciary Act.³⁷⁹

5.8 An important feature of the MLO is that it does not confer any enforceable rights or remedies on taxpayers. The MLO is only enforceable by, or on the application of, the Attorney-General³⁸⁰ who may also impose sanctions for non-compliance.³⁸¹ Furthermore, non-compliance with the MLO cannot be raised in proceedings except by, or on behalf of, the Commonwealth.³⁸²

5.9 The ATO has indicated in discussions with the IGT that it is not aware of any cases where the Attorney-General's Department has sought to enforce or impose sanctions on the ATO for non-compliance with the MLO.³⁸³ Moreover, there does not appear to be any instances of sanctions or other enforcement action which have been applied to an agency for non-compliance with the MLO.

5.10 The position that the MLO does not give rise to any enforceability or action by the taxpayer has been confirmed to be legally correct by the Federal Court in cases where taxpayers have unsuccessfully sought to enforce the MLO against the ATO. Such a case is the decision of *Caporale v Deputy Commissioner of Taxation*, in which the Federal Court stated:

*... no private rights are conferred by Appendix B 'The Commonwealth's obligation to act as a model litigant' ...*³⁸⁴

and

*The terms of these provisions indicate an intention that the Directions are a means of control by the Attorney-General of Commonwealth legal work. In my opinion they are not designed to create obligations owed by the persons or bodies referred to in s 55ZG to others, especially other litigants.*³⁸⁵

5.11 The Office of Legal Services Coordination (OLSC) within the Attorney-General's Department administers the MLO and provides guidance notes and educational functions to agencies to help them comply with the MLO.³⁸⁶ Allegations of breaches may be brought to the attention of the OLSC by way of agencies self-reporting or through complaints made directly to the OLSC.³⁸⁷

5.12 The OLSC has released a Compliance Framework which sets out its compliance approach and responsibilities as well as the responsibilities of agencies and legal service providers under the LSD 2005, including the obligation to act as a model

379 *Judiciary Act 1903*, s 55ZF.

380 *Judiciary Act 1903*, subsection 55ZG(2).

381 *Legal Services Directions 2005*, para [14.1].

382 *Judiciary Act 1903*, subsection 55ZG(3).

383 IGT meeting with the ATO, 30 March 2016.

384 *Caporale v Deputy Commissioner of Taxation* [2013] FCA 427 at [39].

385 *Ibid*, at [44].

386 Attorney-General's Department, 'Legal Services Directions and guidance notes' <www.ag.gov.au>.

387 Office of Legal Services Coordination (OLSC), 'Guidance Note 3' (undated) <www.ag.gov.au>.

litigant.³⁸⁸ It emphasises greater agency responsibility for understanding the MLO and ensuring compliance through self-identification and self-investigation of alleged breaches, with the OLSC's role being to receive alleged breach notifications from agencies.³⁸⁹ Prior to the release of this framework in 2013, all investigations of alleged MLO breaches were undertaken by the OLSC.

PRIOR REVIEWS OF THE MLO

5.13 The MLO itself has been the subject of, or considered, in a number of reviews, including by:

- the Productivity Commission;
- the SCTR; and
- the IGT.

5.14 These are briefly discussed below.

Productivity Commission

5.15 In June 2013, the Productivity Commission was tasked with undertaking a broad-based review on access to justice arrangements in Australia's civil justice system.³⁹⁰ As part of its inquiry, the Productivity Commission examined the effectiveness of the MLO, as well as those of a number of different States, and their application in litigation at all levels of government.

5.16 The Productivity Commissioner received submissions and considered a range of options to improve compliance with the MLO. Such options included enshrining the requirements in legislation, establishing an independent agency to investigate complaints, improving the role of the courts in responding to breaches of the MLO or allowing private parties to enforce the MLO.³⁹¹

5.17 Ultimately, the Productivity Commission concluded:

The Commission's view is that model litigant obligations should apply to all levels of government as well as their legal representatives. To be effective in regulating governments' litigation behaviour, each jurisdiction should introduce a best practice complaints framework. Ombudsmen are 'ready-made', independent bodies that could receive and review complaints, report to the relevant department and refer appropriate matters to legal profession regulators where a lawyer's professional conduct is an issue.³⁹²

388 OLSC, 'Legal Services Directions 2005 – Compliance Framework' (undated) <www.ag.gov.au>.

389 Ibid, paras [7] and [30].

390 Productivity Commission, *Access to Justice Arrangements Report No. 72* (September 2014) pp iv–vi.

391 Ibid, pp 436 - 440.

392 Ibid, p 440 (Recommendation 12.3).

5.18 In addition, the Productivity Commission also recommended:

RECOMMENDATION 12.3

The Australian, State and Territory governments (including local governments) and their agencies and legal representatives should be subject to model litigant obligations.

- *Compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsmen for parties who consider model litigant obligations have not been met.*
- *State and Territory Governments should provide appropriate assistance for local governments to develop programs to meet these obligations.³⁹³*

5.19 The Government's response to this recommendation highlighted its view that enforcement of the obligations was a matter for the Attorney-General:

*While Commonwealth officers owe obligations to the Commonwealth under the Directions, the Directions are not intended to provide a remedy, cause of action or any personal rights in addition to those already available through administrative or judicial review. This was confirmed in *Caporale v Deputy Commissioner of Taxation* [2013] FCA 427.*

The question of compliance with the Directions, including the Model Litigant Obligations, is a matter between the Attorney-General and the relevant Commonwealth agency or Department. Any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth.

Where an individual is unhappy with the handling of their complaint by an agency, they may seek a review by the Commonwealth Ombudsman.³⁹⁴

House of Representatives Standing Committee on Tax and Revenue

5.20 The SCTR recently released a report on *Tax Disputes* in 2015,³⁹⁵ which included a discussion about the MLO as it applies to the ATO. The SCTR identified from submissions to the inquiry that there are concerns that the ATO does not always comply with the MLO. It considered that this perception may, at least in part, be due to taxpayers expecting that the ATO will make concessions or litigate in a benevolent manner despite it having no obligation to do so.³⁹⁶

5.21 The SCTR concluded that the ATO should better manage expectations and engage with taxpayers before litigation. The following two recommendations were made to the ATO in respect of the MLO:

393 Ibid, pp 54 and 442 (Recommendation 12.3).

394 Attorney-General's Department, 'Response to the Productivity Commission's report into access to justice arrangements' (29 April 2016) p 4 <www.ag.gov.au>.

395 Above n 11.

396 Ibid, p 47.

Recommendation 9

*The Committee recommends the Australian Taxation Office better engage with taxpayers prior to litigation so that they are aware of what the model litigant rules require, and do not require, of the Australian Taxation Office.*³⁹⁷

Recommendation 10

*The Committee recommends the Australian Taxation Office approach the Australian Government Solicitor to determine if they can provide advice and assistance to the Australian Taxation Office in terms of best practice in complying with the model litigant rules.*³⁹⁸

5.22 In response, the ATO has indicated that it commenced discussion with the Attorney-General's Department in relation to both these recommendations.³⁹⁹

Inspector-General of Taxation

5.23 In a number of previous reviews, the IGT has referred to the ATO's obligation to act as a model litigant, namely:

- *The Management of Tax Disputes* (the Tax Disputes review);
- *Review into the Australian Taxation Office's use of early and alternative dispute resolution* (the ADR review); and
- *Review of Tax Office management of Part IVC litigation* (the Part IVC Litigation review).

5.24 Relevant aspects of these reviews are discussed below.

The Tax Disputes review

5.25 This review was conducted in 2015 to assist the SCTR in the abovementioned *Tax Disputes* inquiry. The review examined the governance framework for the resolution of tax disputes in Australia which includes a number of legislative and administrative mechanisms designed to ensure early and efficient dispute resolution, including the MLO. The IGT noted stakeholder concerns about the MLO, namely that it lacks enforceability and that there appears to be a disconnect between the Government's intended purpose for the MLO and the community's understanding and expectations of it.⁴⁰⁰

5.26 The IGT acknowledged in that review that the issue of enforceability of the MLO is a matter which warrants consideration in conjunction with other government

397 Above n 11, p 47.

398 Ibid, p 48.

399 Above n 361, p 11.

400 Above n 44, p 109.

agencies and departments, including the OLSC and the Attorney-General's Department. The IGT proposed to explore these issues in more detail in this review.⁴⁰¹

The ADR review

5.27 This review was commenced in 2011 in response to concerns that the ATO utilises ADR sparingly and, as a consequence, forgoes opportunities to resolve disputes efficiently without the need for litigation.⁴⁰² In examining the issues raised in that review, the IGT noted that the MLO requires the ATO to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration to ADR processes before initiating legal proceedings.

5.28 The IGT's recommendations included bringing early engagement and ADR to the forefront of ATO dispute resolution approaches by treating all disputes as suitable for ADR, except where genuine disputes as to law arise and where there is public interest in having the matter judicially determined.⁴⁰³

The Part IVC Litigation review

5.29 This review was concluded in 2006 and examined the ATO's approach to litigation. A key finding by the IGT was the strong community perception that the ATO's approach and conduct was not consistent with the MLO.⁴⁰⁴ The IGT formulated a range of recommendations directed at improving the ATO's compliance approach to litigation, including that:

- the ATO, should issue a formal public statement on its approach to tax litigation. As part of this statement, the ATO should make taxpayers aware of the MLO at the outset of litigation and that the OLSC is responsible for administering the guidelines, including considering any alleged breaches of the MLO; and
- the ATO should develop practical guidelines for staff on the application of the MLO.⁴⁰⁵

5.30 Whilst reference was made to the MLO in previous IGT reviews, these reviews did not specifically examine the ATO's processes to monitor, evaluate and report on its compliance with the MLO. Furthermore, it should be noted that some of these reviews have aged and since they were published, new processes and guidance, such as the OLSC's release of the Compliance Framework in 2013 regarding agency compliance with the MLO, have been issued which may have changed the way in which the ATO approaches its obligation.

401 Ibid, pp 109-110.

402 IGT, *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution* (May 2012) p 111.

403 Ibid, p vi.

404 IGT, *Review of Tax Office management of Part IVC litigation* (April 2006) p 67.

405 Ibid.

SUMMARY OF STAKEHOLDER CONCERNS

5.31 Stakeholders recognise that the MLO seeks to guide appropriate, honest and fair handling of claims and litigation by the Commonwealth. However, concerns have been raised regarding:

- enforcement of the MLO as well as the role of government and the courts in responding to alleged breaches;
- ATO assurance that its officers are complying with the MLO, including the adequacy of the ATO's systems and processes used to monitor and report on compliance with the MLO;
- management and resolution of MLO complaints; and
- education and guidance on the purpose and intent of the MLO.

5.32 It should be noted that many of the concerns raised in this review, such as those relating to compliance with the MLO and the adequacy of the current enforcement arrangements, were also identified in the Productivity Commission's report.⁴⁰⁶

ENFORCEABILITY OF THE MLO

Stakeholder concerns

5.33 Concerns have been raised in submissions about the nature and design of the MLO, particularly in respect of the effectiveness of the current enforcement framework. Moreover, submissions made to the IGT have noted that, even in relation to identified breaches of the MLO in litigation, the courts are unable to comment or impose sanctions.

5.34 Whilst the OLSC provides a channel through which stakeholders may raise concerns regarding agencies' compliance with the rules, submissions to the IGT have expressed concern that, where complaints of breach are made against the ATO, there seems to be no action taken to enforce the MLO. It has been noted that whilst the Attorney-General may impose sanctions for non-compliance with the MLO, the frequency and nature of any sanctions imposed is unclear.⁴⁰⁷

5.35 Some submissions made to the IGT suggest that there may be a lack of understanding by the community regarding the general purpose and intent of the MLO. In particular, some stakeholders have observed that taxpayers may not be fully aware that the obligation is one which is owed to the Commonwealth rather than to the community at large and that breaches of the MLO do not lead to substantive tax outcomes.

⁴⁰⁶ Above n 390, p 440.

⁴⁰⁷ Ibid, p 439.

Relevant materials

5.36 It is well established that the MLO does not confer any rights of enforcement upon taxpayers or tax practitioners who believe that the Commonwealth has transgressed the MLO. The issue of enforcement and the range of stakeholder concerns in this regard have been well-reflected in the Productivity Commission's report.⁴⁰⁸

5.37 By way of general information on the MLO, the ATO's website states:

*The ATO as a model litigant – its officers, solicitors and counsel – is required to act with complete propriety, fairly and in accordance with the highest professional standards in handling claims and litigation. This also requires that the ATO not start legal proceedings unless it is satisfied that litigation is the most suitable method to resolve a dispute.*⁴⁰⁹

5.38 The ATO's practice statement on the conduct of litigation, PSLA 2009/9, makes similar statements.⁴¹⁰

5.39 There is limited information on the ATO's website about how taxpayers may raise concerns regarding the ATO's adherence to the MLO. Some information is accessible through Dispute Resolution Instruction Bulletin 2013/10 (DR IB 2013/10), an internal document, which is made available on the ATO legal database. Furthermore, at the commencement of litigation, the ATO has directed its staff to notify taxpayers and their representatives of the MLO, including a 'notice to comply' with the obligations.⁴¹¹ Relevantly, that notice provides an address to which complaints on breaches of the MLO may be raised.⁴¹²

5.40 The enforcement of the MLO is the sole remit of the Attorney-General and his or her department. The ATO has, therefore, not provided any relevant materials on the enforceability of the MLO.

IGT observations

5.41 The IGT acknowledges the concerns raised by stakeholders on the lack of enforceability of the MLO. However, it should be noted that whilst the MLO itself is not enforceable by taxpayers, many of the MLO principles can also be found in other legislation and court rules which are enforceable and can give rise to sanctions by the courts where a breach is found. For example, paragraph 2(d) of the MLO, which requires the Commonwealth to endeavour to avoid or limit the scope of legal proceedings by giving consideration to ADR, has direct parallels to the requirements imposed on litigants in the *Civil Dispute Resolution Act 2011*. The latter requires parties

408 Ibid, pp 433-436.

409 ATO, *Litigation – our policies* <www.ato.gov.au>.

410 ATO, *Conduct of Litigant and Engagement of ATO Dispute Resolution*, PSLA 2009/9, 19 December 2013, paras [13].

411 ATO, *Obligation to act as a model litigant*, DR IB 2013/10, paras [9] and [10].

412 Ibid, para [22].

to take genuine steps to resolve a dispute prior to commencing litigation in the Federal Court.⁴¹³ Failure to do so may result in adverse costs being imposed by the Court.⁴¹⁴

5.42 Another example is the requirement for the Commonwealth to deal with claims promptly and not cause unnecessary delay in the handling of claims and litigation.⁴¹⁵ This is broadly consistent with the requirements in the *Federal Court Act 1976* for litigants to act in a manner that facilitates the just resolution of disputes as quickly, inexpensively and efficiently as possible.⁴¹⁶ Failure to discharge this obligation may give rise to sanctions being imposed personally on the parties or their lawyers.⁴¹⁷

5.43 It should also be noted that the MLO imposes a standard of conduct which is similar, if not identical, to the ethical and professional obligations of lawyers through their professional associations.⁴¹⁸ Such associations also provide channels for complaint resolution against practitioners who may have transgressed the relevant code of conduct or ethics requirements.⁴¹⁹

5.44 Having regard to the above, taxpayers can already seek enforcement of a number of rights that are similar or equivalent to those in the MLO. Nevertheless, some stakeholders have argued that due to the complexities within the tax system and the significant powers of the Commissioner, the ATO should be held to a higher standard and that the MLO should be enforceable by the court either of its own volition or on the application of taxpayers. Similar suggestions were also made, in a more general sense, to the Productivity Commission's inquiry.⁴²⁰

5.45 The IGT notes that it is not within his remit to make any recommendations to the Attorney-General or the Attorney-General's Department regarding the operation and enforceability of the MLO. However, it is also not necessary for the IGT to make any recommendation in this regard as the Productivity Commission has already done so. In response to that recommendation, the Government had said:

*The question of compliance with the Directions, including the Model Litigant Obligations, is a matter between the Attorney-General and the relevant Commonwealth agency or Department. Any other approach could give rise to technical arguments and result in additional costs and Page 5 of 7 Relevant Recommendation number/s Commonwealth Response delay in litigation involving the Commonwealth.*⁴²¹

5.46 Based upon the submissions received as well as matters which have been brought to the IGT's attention through complaints, it would appear that education on the purpose and enforceability of the MLO is required to manage taxpayer expectation. Whilst the ATO has some information on its website and through PSLA 2009/9, neither sources of information make it clear that the obligation is owed to the

413 *Civil Dispute Resolution Act 2011*, ss 4, 6, 7.

414 *Civil Dispute Resolution Act 2011*, sub-s 10(2) and s 12.

415 Appendix B of the Legal Service Directions 2005, paragraph 2(a).

416 *Federal Court Act 1976*, ss 37M and 37N.

417 *Modra v State of Victoria* [2012] FCA 240.

418 See for example: Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW).

419 See for example: The Law Society of New South Wales, *Complaints and discipline* (undated) <www.lawsociety.com.au>.

420 Above n 390.

421 Above n 394.

Commonwealth and only enforceable by the Attorney-General, the corollary being that there are no enforcement rights available to the taxpayer. Where this is not made clear in public communications, some taxpayers and tax practitioners may unwittingly assume that the ATO's non-compliance with the MLO leads to substantive tax outcomes (for example, litigation being dismissed).

INVESTIGATING ALLEGATIONS OF MLO BREACHES

Stakeholder concerns

5.47 In submissions to the IGT, stakeholders also raised concerns about a lack of clarity as to how allegations of MLO breaches are dealt with by the ATO, leading to a lack of confidence as to whether they are appropriately investigated. In examples raised with the IGT, it has been suggested that where complaints are raised concerning breaches of the MLO, the ATO tends to focus on the substantive tax issues in dispute rather than examining whether the conduct which is the subject of the complaint has breached any aspect of the MLO.

5.48 Stakeholders also raised concern that allegations of breaches of the MLO were referred by the ATO complaints section to the very area (and sometimes officers) whose actions were the subject of the complaint. Those officers were then tasked with assessing their own conduct and responding to the taxpayer directly, thereby raising issues of bias and lack of independence.

Relevant materials

5.49 The ATO's approach to litigation is set out in the practice statement, PS LA 2009/09 which, amongst other things, provides guidance to ATO officers about the obligation to act as a model litigant. Additional guidance on dealing with MLO concerns is available to ATO staff through DR IB 2013/10 as well as OLSC's Guidance Note 3.

5.50 Whilst the OLSC generally administers the LSD 2005, its Guidance Note 3 on compliance with the MLO confirms that it does not resolve complaints regarding breaches:

If you are a party to a claim and/or litigation involving the Commonwealth and you want to make an allegation of non-compliance, you should contact the agency directly and particularise your concerns relating to their compliance with the Directions. OLSC does not resolve complaints from members of the public about agency compliance. If you contact OLSC, you will be advised to forward your complaint to the relevant agency. That agency will notify OLSC of your concerns in accordance with the Compliance Framework.⁴²²

5.51 The IGT has not been able to find any publicly available information regarding how complaints about the MLO are handled by the ATO. Whilst the DR IB 2013/10 provides general information on how complaints about the MLO are received

422 Attorney-General's Department, *Compliance with the Legal Services Directions 2005* (July 2015) para [29].

and considered by RDR staff, it does not clearly set out the processes to be followed. The ATO has advised that such complaints are managed by the RDR BSL and the processes adopted are as follows:⁴²³

- MLO issues are received through a number of different channels, including through self-identification or complaints. When MLO issues are received or identified, they are allocated to an RDR investigator who has not previously had active involvement in the matter. There are currently 18 trained RDR investigators at the EL1 or EL2 levels. In some sensitive cases, issues may be allocated to investigators outside RDR such as ATO General Counsel.
- The investigators assess complaints and complete Agency Notification Reports (ANR) which include assessments of the MLO allegations. ANRs are reviewed and approved by the RDR Assistant Commissioner, or his or her authorised EL2 officers, before being reported to OLSC. Where the report has been reviewed and authorised by the EL2 officer, a copy is provided to the Assistant Commissioner.
- During the course of the investigation, the investigator notifies the officer who is the subject of the MLO allegation and communicates the findings and outcome of the investigation. The investigator is also required to keep the taxpayer informed throughout the process, including seeking information or clarification, communicating the outcome of the investigation and providing them with an opportunity to respond.
- A spreadsheet of all allegations of breaches of the MLO, together with outcomes, is maintained for internal monitoring and reporting purposes.

5.52 The ATO has also advised that work is underway with the complaints support team to improve scripting to enable more accurate identification of RDR complaints in order to reduce complaint handling time and improve the client experience.⁴²⁴

5.53 The above processes reflect the approach taken by the ATO where concerns about the MLO are raised as specific complaints. However, the ATO has advised the IGT that, generally, MLO allegations are raised in the course of active litigation, either in Court or as part of the taxpayer's submissions. Where such allegations are received, the ATO is cognisant of the need to maintain a degree of independence in its investigation whilst also adhering to professional codes of conduct for communication between solicitors in litigation. The ATO has indicated that it is open to exploring strategies through which it may more effectively discharge its obligation to independently and impartially investigate MLO allegations in such circumstances.

IGT observations

5.54 There is clearly a perception of bias where allegations of MLO breaches are being referred to the BSL to which the complaint relates – namely, RDR. The IGT had

⁴²³ IGT discussion with the ATO, 14 July 2016.

⁴²⁴ ATO, 'RDR Executive Submission: RDR – Complaints Resolution' (11 March 2016).

previously identified the risk of such perceptions in the context of objections being considered within the same BSLs that issued the audit decision.⁴²⁵ Flowing from those observations, the IGT, as well as the SCTR⁴²⁶, recommended legislative change to create a separate appeals area, within the ATO led by a newly appointed Second Commissioner, to deal with objections amongst other things. In the meantime, the ATO transferred the objection function out of the then Compliance Group and into the Law Design and Practice Group. As a result, the Government was of the view that the course of action recommended by the IGT and the SCTR was not warranted at that time.

5.55 In the current case, the IGT considers that the ATO needs to be more mindful of the perceptions of bias and address the risk of actual and perceived conflicts of interest by closely considering its current processes.

5.56 The stated process for receiving, considering and responding to allegations of potential breaches of the MLO is contained in DR IB 2013/10 which is publicly available through the ATO's Legal Database.⁴²⁷ However, unless taxpayers are aware of the document, it would be difficult for them to locate it on the database.

5.57 Even where taxpayers are able to access this document, the instructions do not clearly set out the responsibilities of the relevant officers within the ATO. For example, whilst the first step of the consideration process is for the relevant ATO officer to discuss the matter with their manager or team leader, the instructions then go on to say that the Dispute Resolution section will consider the circumstances and prepare a report for the Assistant Commissioner.⁴²⁸

5.58 DR IB 2013/10 is unclear as to whom within the Dispute Resolution section would be responsible for considering the circumstances and preparing the report, and which Assistant Commissioner would consider the matter. Furthermore, the instructions do not seem to contemplate whether these officers should be independent of the matter or the officer who is subject of the complaint.

5.59 Moreover, whilst DR IB 2013/10 indicates that the taxpayer will be 'kept informed of the progress and outcome of the review,' it not clear whether further input will be sought from the taxpayer and their representatives before the ATO's report and determination are finalised even though the ATO's own internal processes, as communicated to the IGT, contemplate such actions.

5.60 Given that the numbers of alleged breaches are low, the IGT considers that, at this stage, the ATO should focus on improving community confidence by enhancing the independence and transparency of its processes to investigate allegations of MLO breaches. The IGT acknowledges the challenges in doing so where MLO concerns are raised during active litigation. However, these challenges may be addressed through implementation of such strategies as:

425 Above n 44.

426 Above n 11.

427 ATO, 'Legal Database' <law.ato.gov.au>.

428 Above n 411, paras [17] and [18].

- ensuring that the ATO's intended process is either publicly available and communicated to the taxpayer upon receipt of the allegation or complaint, including how the ATO will manage issues of independence;
- providing the ATO Complaints function with sufficient expertise to undertake MLO investigations and working closely with them to investigate MLO issues in an independent and impartial manner; and
- where it is necessary to engage the RDR BSL, doing so in line with a communication protocol which maintains the independence, both actual and perceived, of the ATO Complaints function.

COMPLIANCE AND REPORTING

Stakeholder concerns

5.61 Submissions suggest that in the experience of some stakeholders, ATO officers have acted in ways that are inconsistent with the MLO as they believe that there is little or no sanction for such conduct. For example, in one case it was contended that the ATO had raised new arguments after the taxpayer had filed evidence in respect of a particular matter. This would effectively preclude the taxpayer from adequately addressing the issue and having to seek further directions from the court which delayed resolution of the matter. In this case, it was alleged that the ATO had opportunity to raise these arguments through a number of preliminary stages but failed to do so. Other allegations made in submissions include practitioners observing cases where the ATO had relied on pure technicalities.

5.62 Stakeholders have also observed that the ATO is not required to report on its compliance with the MLO other than simply to report alleged breaches. Some stakeholders are of the view that purely reporting on potential breaches is inadequate and that the ATO should be required to demonstrate its compliance with the MLO more generally. In addition, stakeholders consider it imperative that alleged breaches are appropriately recorded, including the outcomes of any investigation or enforcement action, to maintain the integrity of the system.

Relevant materials

5.63 The ATO monitors its compliance with the MLO through requirements for internal self-identification and reporting.⁴²⁹ All staff from within the RDR BSL, who manage litigation matters, are required to complete an online assurance questionnaire on an ongoing basis in relation to aspects of their work.⁴³⁰ Amongst other things, the questionnaire asks:

- *Have you complied with the obligations under the Legal Services Directions 2005?*

⁴²⁹ ATO, 'Legal Services Directions 2005, Compliance Certificate Checklist 2014-15'.

⁴³⁰ ATO, 'Attachment 1 - Assurance questionnaire' (undated).

- *Please describe reasons for the failure.*
- *What remedial action has been taken in respect of the failure?*
- *Has anything occurred on any case that is potentially reportable to OLSC?*
 - *What court was this case in?*
 - *Please describe the potentially reportable instance.*⁴³¹

5.64 The ATO has advised the IGT that the online assurance questionnaire responses provided by RDR staff are consolidated in a report that is generated at the end of each month. This consolidated report seeks to identify the level of compliance by staff as well as any instances of non-compliance with the MLO.⁴³² Furthermore, the questionnaire also seeks to remind staff of their obligations under the LSD 2005.

5.65 It should be noted that external legal service providers engaged by the ATO are not required to provide the ATO with assurance of their compliance in the same manner as RDR staff i.e. completing the online questionnaire. However, they are all members of the Legal Services Multi-Use List (LSMUL) which is administered by the Attorney-General's Department. Those seeking to be part of the LSMUL must demonstrate:

*... their understanding of and capacity to meet the requirements of the Legal Services Directions. This should include arrangements to ensure that the requirements relevant to the performance of legal services in the public sector environment are met.*⁴³³

5.66 Clause 8 of the LSMUL deed between the Attorney-General's Department and the legal service providers requires that they comply with the LSD 2005 and the MLO and, moreover, identify and advise the agency (for example, the ATO) of any significant issues which may need to be reported to OLSC in this regard. Non-compliance with any aspect of this clause may lead to the work being withdrawn or the legal service provider not being paid.⁴³⁴

5.67 In relation to external reporting of MLO issues, the ATO has advised the IGT that it has recently implemented a new centralised complaints area within the RDR BSL. This area is responsible for receiving and managing all RDR complaints (including those relating to the MLO) as well as monitoring and reporting of those complaints. Its functions include reviewing and allocating RDR complaints, following up on the progress of complaints to ensure service standards are being met, providing training and procedural support to officers managing complaints, and liaising with the wider ATO complaint coordinators.⁴³⁵ As this area has been recently established and is still settling the relevant functions and procedures,⁴³⁶ the IGT has not had an opportunity to review its effectiveness.

431 Ibid.

432 IGT discussions with the ATO, 14 July 2016.

433 Attorney-General's Department, 'Legal Services Multi-Use List and Service Providers' <www.ag.gov.au>.

434 Attorney-General's Department, 'Legal Services Multi-Use List Deed' <www.ag.gov.au>.

435 ATO communication to the IGT, April 2016.

436 ATO, 'RDR Executive Submission: RDR – Complaints Resolution' (11 March 2016).

5.68 Where the ATO identifies an allegation or instance of non-compliance, it is required to report to the OLSC as soon as practicable about any possible or apparent breaches of the MLO. This is normally done by completing an agency notification form.⁴³⁷ After each financial year, the Commissioner must also provide a certificate of compliance to the OLSC setting out the extent to which he believes the ATO has complied with the LSD 2005 and the MLO.⁴³⁸

5.69 In addition to providing its reports to OLSC, the ATO has also previously reported publicly on its non-compliance with the MLO, including in its annual reports for certain years,⁴³⁹ in publications on its litigation work⁴⁴⁰ and on its website.⁴⁴¹ However, the IGT notes that no such reporting appeared in its annual report or website for the 2014-15 financial year.

5.70 At the IGT's request, the ATO has provided details on the numbers of allegations it has investigated and the outcomes of those investigations over four financial years between 2011-12 and 2014-15 (inclusive). These statistics are set out in Table 9 below.⁴⁴²

Table 9: Numbers of alleged breaches of the Legal Services Directions, including the MLO and outcomes of those investigations

	2011-12	2012-13	2013-14	2014-15
New allegations received and reported	N/A	15	17	18
Investigations finalised	15	29	23	16
Alleged breaches dismissed	10	27	20	8
Confirmed breaches	5	2	3	8

Source: ATO

5.71 The statistics provided by the ATO indicate that only a relatively small number of allegations of breach are received each year (15 in 2012-13, 17 in 2013-14 and 18 in 2014-15). Of these allegations, 7 per cent and 13 per cent were confirmed as actual breaches in 2012-13 and 2013-14 respectively. In 2011-12 and 2014-15, however, the proportion of confirmed breaches is higher, being 33 per cent and 50 per cent, respectively.

5.72 Whilst the statistics for 2014-15 indicate a significant jump in confirmed cases from the previous years, due to the low numbers of finalised cases in each year, it is difficult to draw meaningful trends from the data that is, 50 per cent represents only eight instances in which the ATO had confirmed that its officers breached the MLO.

5.73 The OLSC also publishes statistical data on breaches of the LSD 2005 as reported by all agencies on its website. Table 10 below sets out these consolidated statistics.

437 Above n 387, para [16].

438 Ibid, para [19].

439 Commissioner of Taxation, *Annual Report 2010-11* (2011) p 107; Commissioner of Taxation, *Annual Report 2011-12* (2012) p 95; Commissioner of Taxation, *Annual Report 2013-14* (2014) p 75.

440 ATO, 'Your Case Matters - 3rd ed' (March 2013) <www.ato.gov.au>, pp 34-35.

441 ATO, 'Litigation - our costs' (19 May 2014) <www.ato.gov.au>.

442 ATO, 'Legal Services Directions 2005, Compliance Certificate Checklist' for 2013-2015.

Table 10: Breaches of the Legal Services Directions, including the MLO

Year	Matters carried forward	New matters	Examined and found non-compliant	Examined and found compliant
2011-12	16	94	42	18
2012-13	50	93	14	33
2013-14	10	67	5	30
2014-15	42	90	30	77

Source: Attorney-General's Department

5.74 Table 10 above shows that the OLSC recorded 30 substantiated instances of non-compliance with the LSD 2005 in the 2014-15 financial year. The OLSC website indicates that of the 30 non-compliant matters, 16 related to non-compliance with the MLO.⁴⁴³ When read together with the ATO's own statistics, the IGT notes that half of these instances of MLO non-compliance in 2014-15 were attributable to the ATO.

5.75 It is important to understand that these statistics may be affected by a number of factors. First, the ATO, by the very nature of its jurisdiction and remit, is one of the most frequent litigants in the civil justice system which gives rise to more cases being pursued through federal and state courts. Secondly, it may be reflective of the quality of the ATO's self-reporting of breaches that gives rise to a higher proportion of reported cases than other agencies. Thirdly, the numbers alone do not disclose the nature of the breach itself. Whilst there may be a higher proportion of breaches, the nature of these breaches may be administrative in nature and not impinge on the substantive aspects of the litigation itself.

5.76 The ATO has indicated that it takes its obligations under the LSD 2005 seriously and is proactive in initiating reports of potential breaches to OLSC. The ATO believes that this may explain the higher rates of self-reporting of potential breaches and the relatively small number of determined breaches.⁴⁴⁴

IGT observations

5.77 In relation to improving ATO officers' adherence to the MLO, the IGT is of the view that the improvement sought above to the way alleged breaches are investigated should also result in an increased level of compliance.

5.78 Turning to public reporting of allegations of non-compliance, the current statistics indicate that only a small number of alleged breaches are reported annually by the ATO, and only a fraction of these are confirmed to be actual breaches after investigation.⁴⁴⁵ Against the backdrop of many thousands of cases in which the ATO litigates (either as plaintiff or defendant) annually, the statistics tend to indicate that the ATO is generally complying with its obligations under the MLO.

5.79 There are IGT complaint cases in which potential breaches of the MLO may have taken place, indicating there are matters that should have been investigated that were neither reported as alleged breaches nor investigated. By way of example, in

443 OLSC, 'Compliance and reporting' (undated) <www.ag.gov.au>.

444 Above n 440, p 35.

445 Commissioner of Taxation, *Annual Report 2013-14* (2014), p 75.

one case, the ATO had adversely assessed the taxpayer on the basis of third party information but did not disclose that information to the taxpayer. In the AAT, the ATO was directed to provide the third party information to the taxpayer following which the ATO effectively conceded the matter. The taxpayer has since sought compensation from the ATO for the time and costs associated with the unnecessary litigation. The IGT is also aware of another matter in which the ATO sought to resile from agreed settlement at ADR, forcing the taxpayer to institute legal proceedings to compel the ATO to honour its agreement.

5.80 Whilst the above cases may not be conclusive, they do indicate that the ATO's system for monitoring, reporting and investigating MLO breaches could be more closely scrutinised and bolstered.

5.81 In this respect, stakeholders have suggested that having an external agency, such as the IGT, monitor and report on alleged ATO breaches of the MLO would provide an appropriate degree of independence and validation. Whilst the IGT considers that such an approach could be useful in enhancing taxpayer confidence, the IGT's monitoring of the ATO's compliance would only be possible to the extent that the IGT is made aware of alleged breaches either through the complaints handling function or by reports from the ATO. Therefore, there seems to be little utility in transferring the function to the IGT as the outcome is unlikely to be any different.

5.82 The IGT is of the view that a better course of action would be to seek improvements to the ATO's own monitoring and reporting processes. First, whilst the ATO has established processes to monitor officer compliance with the MLO, for example through the mandatory completion of assurance questionnaires, these processes are largely dependent on officer self-reporting. In discussions with the IGT, the ATO advised that such self-reporting is not independently validated by senior staff within the ATO.⁴⁴⁶ Such validation could take the form of sample testing or conducted in a similar manner to monitoring compliance with Charter principles, as described in Chapter 3.

5.83 Secondly, the ATO should report more consistently and comprehensively on its non-compliance with the MLO and, in particular, it should publicly report, in redacted and summary form, the outcome of any investigation and the remedial action taken by the ATO.

5.84 As one of the largest litigants in the Commonwealth, the IGT believes that there is scope for the ATO to actively develop best practice approaches to both monitoring and reporting of alleged MLO breaches. In doing so, the ATO should consult with the OLSC to ensure that proposed processes to be implemented align with OLSC's Compliance Framework and whole-of-government imperatives.

446 IGT discussion with the ATO, 14 July 2016.

RECOMMENDATION 3

The IGT recommends that the ATO:

- (a) improve its public communication and guidance on the nature of the MLO and the limitations including that only the Attorney-General may enforce the rules;*
- (b) improve its investigation process for alleged MLO breaches by:*
 - i) informing taxpayers at the outset how the allegations will be investigated;*
 - ii) developing strategies to improve, actual and perceived, independence and impartiality of the process and in doing so consider enhancing the capability of the ATO Complaints Unit to undertake such investigations; and*
- (c) in consultation with the OLSC, identify opportunities to enhance its public reporting on allegations of MLO breaches, including the outcome of investigations and any remedial action taken, on an annual basis.*

ATO response

(a) and (b) Agree in part.

The ATO will ensure that taxpayers are advised of our approach to investigating alleged MLO breaches in any initial response to a complaint. We will also review current arrangements for investigation of potential MLO breaches to determine how best to deal with model litigant matters when concerns are raised about appropriate levels of independence and impartiality, including consideration of the role of the ATO Complaints Unit.

(c) Disagree.

The OLSC retains the oversight of the MLO legislation and compliance framework for the whole of the Commonwealth. The ATO will only make changes to our public reporting on model litigant matters consistent with advice and approval from the OLSC.

CHAPTER 6—CROSS-BORDER INFORMATION EXCHANGES

6.1 It is broadly recognised that cross-border exchange of information (EOI) is vital for enhancing global tax transparency and cooperation in the interest of maintaining the overall integrity of the tax system:

International banking has become commonplace and it is no longer extraordinary for taxpayers to reside in one country, hold assets in another and have them managed from a third location. ... But regardless of why taxpayers situate their assets beyond the boundaries of their own residence country, the result is that tax administrations around the world face more and greater challenges to the proper enforcement of their tax laws than ever before. To meet these challenges, tax authorities must increasingly rely on international co-operation based on the implementation of international standards of transparency and effective exchange of information.⁴⁴⁷

6.2 Australia maintains a network of international tax treaties, tax conventions and tax information exchange agreements (TIEAs) with over 100 jurisdictions worldwide.⁴⁴⁸ This work involves sharing data, intelligence and joint compliance action and is aimed at, amongst other things, combating profit shifting and cross-border tax avoidance. Such agreements may be bilateral agreements between two countries or multilateral conventions to which several countries may be party. Generally, bilateral agreements under which tax information may be exchanged are based on models developed by the OECD. Of particular note is the *Model Tax Convention on Income and on Capital* (MTCIC),⁴⁴⁹ where article 26 provides for EOI, as well as the *Model Agreement on Exchange of Information on Tax Matters* (MAEITM).⁴⁵⁰

6.3 The above agreements canvass a range of different types of EOI, namely: specific, spontaneous and automatic.⁴⁵¹ Specific EOI (also known as EOI on request) is the most common type of exchange and involves one treaty partner making a request, or responding to a request from, another treaty partner.⁴⁵²

6.4 Spontaneous EOI involves the provision of information that has not been specifically requested but was uncovered during an investigation and which may be of interest to another treaty partner. There is no obligation for treaty partners to act upon these spontaneous exchanges. It is intended to assist in building positive international relations with other tax authorities and help combat international tax avoidance.⁴⁵³

6.5 Automatic EOI involves the automatic exchange of data on various types of investment income such as interest, dividend and trust distributions. When such

447 OECD, *Tax Co-operation 2009: Towards a Level Playing Field* (2009), p 9.

448 Commissioner of Taxation, *Annual Report 2014-15* (2015) p 19.

449 OECD, *Model Tax Convention on Income and on Capital* (2014) Article 26.

450 OECD, *Model Agreement on Exchange of Information on Tax Matters* (2002).

451 ATO, 'PGH international bulletin - exchange of information (EOI) with overseas jurisdictions' (6 April 2016) Internal ATO document.

452 Ibid.

453 Ibid.

information is received by the ATO, it is uploaded onto the ATO's systems and used for data matching compliance activities.⁴⁵⁴

6.6 During the 2014-15 financial year, the ATO has reported that it took part in a total of 514 EOIs – this includes all three types of EOI. Of these, 281 were outgoing exchanges in which the ATO provided information to other revenue authorities, whilst 233 were incoming exchanges where the ATO received information from other revenue authorities.⁴⁵⁵ These EOIs resulted in total tax liabilities being raised by the ATO in the vicinity of \$255 million over the same period.⁴⁵⁶

6.7 In addition to Australia's various tax treaties and tax agreements, there is a range of other international tax transparency measures and initiatives which may also facilitate information exchange, including the OECD Common Reporting Standard (CRS)⁴⁵⁷, the Australia and USA inter-governmental agreement to implement the *Foreign Account Tax Compliance Act* (FATCA)⁴⁵⁸ and the Joint International Tax Shelter Information Centre (JITSIC) network.⁴⁵⁹ These measures reflect the increasing commitment by the Australian Government and the ATO to exchange information with other jurisdictions to combat tax avoidance. For example, the CRS and FATCA form part of the new international standard for identifying instances of undeclared offshore income through the automatic exchange of tax information.

COUNTRY-BY-COUNTRY REPORTING

6.8 A more recent development in cross-border information exchange is country-by-country (CbC) reporting. CbC reporting is contemplated within Action 13 of the OECD's 2013 *Action Plan on Base Erosion and Profit Shifting*.⁴⁶⁰ In October 2015, the OECD released its final report on Action 13⁴⁶¹ which concluded that a 'standardised approach' to transfer pricing documentation is required such that revenue authorities will have 'relevant and reliable information to perform an efficient and robust transfer pricing risk assessment analysis'.⁴⁶² Under this approach, multinational enterprises would be required to provide three tiers of transfer pricing documentation:

- (i) a master file containing standardised information relevant for all MNE group members;
 - (ii) a local file referring specifically to material transactions of the local taxpayer;
- and

454 Ibid.

455 Commissioner of Taxation, *Annual Report 2014-15* (2015) p 19; Commissioner of Taxation, *Annual Report 2015-16* (2016) p 139.

456 Commissioner of Taxation, *Annual Report 2014-15* (2015) p 19.

457 Common Reporting Standard for the automatic exchange of information will take effect in Australia on 1 July 2017 and is intended to improve the ability of tax authorities to detect and address tax evasion through the exchange of financial account information to other tax jurisdictions.

458 The agreement was signed on 28 April 2014, with Australia's obligations under FATCA outlined in legislation in Division 396 of the *Taxation Administration Act 1953*. The ATO has issued *Foreign Account Tax Compliance Act – detailed guidance material* on its website, www.ato.gov.au.

459 The JITSIC network focuses specifically on tackling cross-border tax avoidance and evasion.

460 OECD, *Action Plan on Base Erosion and Profit Shifting* (2013), p 23.

461 OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final report* (2015).

462 Ibid, p 14.

(iii) a Country-by-Country Report containing certain information relating to the global allocation of the MNE's income and taxes paid together with certain indicators of the location of economic activity within the MNE group.⁴⁶³

6.9 The exchange of CbC reports between revenue authorities occurs automatically.⁴⁶⁴

6.10 Domestically, Australia has begun implementing CbC reporting through enacting subdivision 815-E⁴⁶⁵ of the *Income Tax Assessment Act 1997* which requires a 'significant global entity' to provide transfer pricing documentation, including the CbC reports, within 12 months after the end of the period to which it relates.⁴⁶⁶ To assist taxpayers with the new CbC reporting requirements, the ATO has also issued Law Companion Guide LCG 2015/3.⁴⁶⁷

6.11 The implementation of CbC reporting is still in its infancy and the ATO is still bedding down its processes in line with guidance from the OECD and in consultation with relevant stakeholders. Should issues or concerns arise in the future in relation to the ATO's implementation or administration of CbC reporting, the IGT may seek to examine the relevant issues in a more targeted review. It should be noted that the IGT more generally reviewed the ATO's management of transfer pricing relatively recently.⁴⁶⁸

STAKEHOLDER CONCERNS

6.12 Stakeholders acknowledge the key role that information exchange plays, both domestically and across borders, in the ATO's effective administration of the tax system. However, they have raised some concerns in relation to the processes adopted by the ATO in this regard.

6.13 Firstly, stakeholders consider that there is a lack of clarity on the circumstances in which the ATO may engage in EOI processes with other jurisdictions. In particular, they would like to know the levels of authorisation required to ensure that ATO officers have exhausted all other options of obtaining the required information before resorting to EOI. They would also like to be assured EOI is appropriately used. Anecdotally, some stakeholders have expressed concerns that, at times, the ATO has sought information which is arguably beyond the parameters of the relevant international treaties or agreements.

6.14 Secondly, stakeholders have queried how the ATO assures itself that information received under an EOI is used only for the purposes for which it was sought and not any other ancillary actions. Similarly, stakeholders wish to be informed of mechanisms by which the ATO assures itself that the information it provides to other jurisdictions would not be used for a collateral or improper purpose.

463 Ibid.

464 Ibid, p 23.

465 *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015*.

466 *Income Tax Assessment Act 1997*, section 815-355.

467 ATO, Law Companion Guide LCG 2015/3 *Subdivision 815-E of the Income Tax Assessment Act 1997: Country-by-country reporting* (17 December 2015).

468 IGT, *Review into the Australian Taxation Office's management of transfer pricing matters* (December 2013).

6.15 Thirdly, stakeholders have raised concerns that the current EOI processes between Australia and its treaty partners do not explicitly include requirements for the relevant taxpayer or their representatives to be informed. Such notification may facilitate earlier engagement, may provide alternative domestic sources for the required information or limit the scope of the EOI. They are also of the view that being informed about EOI should be a fundamental procedural right of all taxpayers. In their view, where taxpayers are unaware that information has been exchanged, there is no opportunity for them to consider the information, correct any identified inaccuracies or properly contextualise the information before it is applied in the tax assessment process.

6.16 In addition to the above concerns, it has also been noted that where taxpayers are not notified of an EOI request, they are unable to challenge its scope or validity. An example of such a case was brought to the IGT's attention. In that case, Australia issued an EOI request to Jersey which was served to a lawyer requesting disclosure of certain information in relation to a taxpayer. At the same time, the notice precluded the lawyer from disclosing or discussing the notice with anyone connected to the taxpayer as the investigation concerned instances of suspected fraud.⁴⁶⁹ Whilst the Court ultimately acknowledged the need for secrecy in some respects, it also observed the broad scope of the prohibition of disclosure which it considered could not validly stand.⁴⁷⁰ In its view, an absurd circumstance had resulted where the person who was served with the notice was arguably even precluded from notifying himself⁴⁷¹ and effectively prevented the taxpayer from challenging the disputed notice.⁴⁷²

6.17 Whilst the above case is not indicative of all EOIs, it highlights some of the concerns raised by stakeholders.

RELEVANT MATERIALS

Scope and use of the information

6.18 Australia's tax treaties stipulate that the authority to exchange information between revenue authorities rests with each jurisdiction's competent authority (CA). Australia's CA is the Commissioner or his authorised representative. For practical purposes, this role is generally delegated to Assistant Commissioners and EL2 staff with international responsibilities.⁴⁷³ The EOI Unit within the PGI BSL assists the CA or his representatives, being responsible for receiving, assessing and managing incoming and outgoing cross-border information exchange requests.⁴⁷⁴

6.19 The ATO has advised that BSL officers (requesting officers), who wish to make an EOI request, are required to satisfy the EOI Unit and the CA that all alternative avenues of accessing the information have been pursued before an EOI

469 *Temple v The Office of the Comptroller of Taxes* [2014] JRC 244.

470 *Ibid*, at [27] - [28].

471 *Ibid*, at [27] - [28].

472 *Ibid*, at [8].

473 ATO, 'Competent Authority - an overview' (Internal ATO document, undated).

474 *Ibid*; ATO communication to the IGT, 16 December 2015.

request is made.⁴⁷⁵ The only exception to the above requirement is where obtaining the information through domestic channels is ‘disproportionately difficult’,⁴⁷⁶ in which case it would be assessed by the CA on a case-by-case basis.

6.20 When making a request for an EOI, the requesting officer prepares an EOI template that is specific to the jurisdiction from which the information is being sought. A separate EOI template is required for each jurisdiction as these templates are designed to ensure that the request for information complies with the relevant tax treaty or agreement that Australia has with that jurisdiction.⁴⁷⁷ The requesting officer works with the BSL Gatekeeper, who acts as liaison between the BSLs and EOI Unit,⁴⁷⁸ in finalising the EOI template to ensure that it is in accordance with the EOI Unit’s requirements. The EOI request is provided to the CA for approval before being sent to the overseas jurisdiction. A diagram of the ATO’s processes for requesting and responding to an EOI is provided in Appendix 4.

6.21 There is also some guidance that has been issued specifically in relation to information exchange in the context of indirect tax, in particular GST. This guidance largely reinforces the process described above.⁴⁷⁹

6.22 The ATO has advised that there is currently no public information which sets out the above processes through which EOI requests and responses are managed and the roles of the various ATO officers within the processes.

6.23 In respect of the appropriate use of information which has been received by the ATO, some guidance is available under Article 8 of the OECD’s MAEITM:

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.⁴⁸⁰

475 ATO, ‘Exchange of Information Questions’ (Internal ATO document, undated); ATO, ‘EOI Internal referral’ (Internal ATO document, 9 June 2016).

476 OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review Report – Combined Phase 1 and Phase 2 Report – Australia* (2013) p 71, see Article 7 of TIEAs with Antigua and Barbuda; Dominica; and Jersey; ATO Communication (18 December 2015).

477 ATO, ‘EOI Internal referral’ (Internal ATO document, 9 June 2016).

478 ATO, ‘Competent Authority – Roles and Responsibilities’ (Internal ATO document, undated); ATO communication to the IGT, 16 December 2015.

479 ATO, PSLA 2007/13 *Exchange of Information with foreign revenue authorities in relation to goods and services tax, under international tax agreements*; ATO, PSLA 2007/14 *Gathering and use of information from foreign agencies or sources in relation to goods and services tax, wine tax and luxury car tax administration*.

480 OECD, *Agreement on Exchange of Information on Tax Matters*, Article 8.

6.24 Article 26 of the MTCIC provides a similar provision in respect of appropriate information use.⁴⁸¹

6.25 In giving effect to the confidentiality and secrecy requirements of information that has been obtained through an EOI, the EOI Unit attaches a cover sheet to all information received from the relevant treaty partner before forwarding that information on to the requesting area.⁴⁸² This cover sheet includes a prominent alert to staff that the information has been obtained under a treaty and, accordingly, the use and handling of the information is subject to limitations. Notably, ATO staff are not to pass or copy information without prior consent from the EOI Unit. Where the information is scanned and archived on the ATO's systems, it is done with the cover sheet attached.

6.26 In certain circumstances, the scope of information that is provided to a treaty partner may be expanded beyond the initial request. The ATO is able to provide additional information which has not been specifically requested by the counterpart CA even where a new request has not been received. This information may be provided by the ATO as long as it satisfies the requirements of the relevant treaty or agreement under which information was initially sought.⁴⁸³ Alternatively, the information may be provided to other jurisdictions as a spontaneous EOI.⁴⁸⁴

6.27 The ATO has also adopted practical steps to minimise the risk of inappropriate use, such as providing training to the BSL through making a range of learning modules available. Furthermore, the ATO's internal fraud prevention and control section is tasked with detecting instances of unauthorised access. Such unauthorised accesses are investigated and sanctions may be imposed such as jail terms of up to two years.⁴⁸⁵

Safeguarding taxpayer information

6.28 As part of Australia's tax treaty negotiation process, which is conducted by the Treasury on behalf of the Commonwealth,⁴⁸⁶ it must satisfy itself, amongst other things, that partner jurisdictions will be able to maintain the privacy, secrecy and confidentiality of the information exchanged with them.⁴⁸⁷ Such assurances may be provided in a number of ways, including by the revenue authorities exchanging detailed processes to allow each other to assess the appropriateness of the safeguards or delegates being sent to inspect safeguarding mechanisms to gain a better appreciation.⁴⁸⁸

6.29 The ATO does not generally publicise the details of such negotiations as they may contain information which is sensitive to the protection of the data itself and publication may inadvertently reveal areas which may be exploited.

481 OECD, *Model Tax Convention on Income and on Capital*, Article 26, p 40.

482 Above n 476, p 90.

483 ATO, 'Exchange of Information Questions' (Internal ATO document, undated).

484 Ibid.

485 *Taxation Administration Act 1953*, sch 1, s 355-25.

486 Above n 476.

487 ATO communication to the IGT, 18 December 2015.

488 Ibid.

6.30 In addition to the above, the parties may rely on international checks and assurance processes. For example, the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD Global Forum) has established a two-phase peer review assessment process for the verification of security processes of member jurisdictions. Phase 1 examines the legal and regulatory framework and is conducted by way of a questionnaire.⁴⁸⁹ Phase 2 examines the implementation of this framework in practice⁴⁹⁰ and may require an onsite visit by the OECD assessment team.⁴⁹¹ Member jurisdictions are also required to detail mechanisms for monitoring, detecting and reporting breaches as part of the peer review process.⁴⁹²

6.31 Of the 46 jurisdictions⁴⁹³ with which Australia has a tax treaty, the majority have been assessed by the OECD Global Forum to be currently compliant or largely compliant with both Phase 1 and Phase 2. Two jurisdictions, Indonesia and Turkey have undergone Phase 2 assessment and have been assessed to be partially compliant whilst Romania and Switzerland have completed Phase 1 assessment and are deemed ready for Phase 2 assessment. Five other jurisdictions - Fiji, Kiribati, Papua New Guinea, Sri Lanka and Vietnam - have not yet been assessed by the OECD Global Forum.⁴⁹⁴

6.32 Of Australia's 35 TIEA partner jurisdictions,⁴⁹⁵ six remain at the Phase 1 assessment stage with three - Guatemala, Liberia and Vanuatu - deemed not yet ready to proceed to a Phase 2 assessment.⁴⁹⁶ It should be noted that TIEA partner jurisdictions generally only provide information to, rather than receive information from, Australia under the relevant agreement.

6.33 In respect of Australia, the OECD found it to be compliant at both Phase 1 and Phase 2, observing that:

Each of the DTAs and TIEAs concluded by Australia meet the standards for confidentiality including the limitations on disclosure of information received, and use of the information exchanged, which are reflected in Article 26(2) of the OECD Model Double Taxation Convention and Article 8 of the OECD Model TIEA respectively. These confidentiality requirements are supported by confidentiality provisions in Australian domestic law which include significant sanctions for any breach of confidentiality. Further, in respect of the DTAs, the confidentiality articles in those agreements form part of Australian domestic law as the agreements are scheduled to the ITAA 1953. Finally, there are additional secrecy obligations imposed on public servants in respect of

489 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer review of the implementation of the international standards for transparency and exchange of information for tax purposes*, p 2.

490 OECD, *About the Global Forum* (undated) <www.oecd.org>.

491 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *2016 Methodology for Peer Reviews and Non-Member Reviews*, p 8.

492 Above n 476; See also CRS Annex 4 - Questionnaire on Confidentiality and Data Safeguards Questionnaire (17 December 2015).

493 The Treasury, *Australian Tax Treaties: Income Tax Treaties* <www.treasury.gov.au>; Note: The Treasury's website does not include East Timor, which is listed in Appendix 3 of the ATO *Privacy Policy*.

494 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Phase 1 and Phase 2 Reviews* (14 March 2016).

495 The Treasury, *Tax Information Exchange Agreements* <www.treasury.gov.au>.

496 Global Forum, *Phase 1 and Phase 2 Reviews* (14 March 2016).

*information obtained in the course of employment duties pursuant to the Public Service Act 1999.*⁴⁹⁷

6.34 The OECD also outlines the ATO's application of the 'need to know' criteria for access to information, stating that information is received only through appropriately authorised officers and delegates of the EOI Unit, the Transfer Pricing Practice or the few delegate members of the JITSIC network.⁴⁹⁸

6.35 In relation to information provided to revenue agencies of other jurisdictions under an EOI, the ATO has implemented processes whereby taxpayers may raise concerns about breaches of their privacy by these other jurisdictions.⁴⁹⁹ In the first instance, a taxpayer may lodge a complaint with the ATO Complaints Unit. If the taxpayer is dissatisfied with the ATO's response to the complaint, they may escalate the matter to the Privacy Commissioner for consideration and a determination as to the breach. The Privacy Commissioner may recommend remedial action to the ATO or for payment of compensation. The Privacy Commissioner's determination is reviewable in the AAT.⁵⁰⁰ The AAT's decision may be appealed to the Federal Court of Australia on questions of law.⁵⁰¹

6.36 Where taxpayers are concerned that there has been a breach of the secrecy and confidentiality requirements, the taxpayer may also approach the ATO's Complaints Unit. Where it is found that the information has been mishandled or misused, sanctions may be imposed against the officer or officers involved.⁵⁰² Remedies that may be provided to the taxpayer include compensatory payments or apologies. If the complaint relates to suspicion of misuse of information held offshore, the ATO may also initiate processes to make enquiries of their treaty partners regarding the relevant access.

6.37 The ATO has advised that taxpayers may also approach the ATO on privacy and confidentiality concerns through a number of other channels which are specific to the information exchange. For example, the ATO's webpage on the CRS provides a dedicated email address for taxpayers to raise questions or concerns. Where the relevant team is unable to address those concerns, it is referred to the relevant area of the ATO for action.

6.38 It is worthwhile noting that there have been some recent positive developments in relation to the safeguarding of taxpayer information under an EOI. An example of this is found in the revised Australia-Germany DTA⁵⁰³ which seeks to set out clear parameters on the liability of the receiving country where taxpayers suffer unlawful damage as a result of the EOI.⁵⁰⁴ The same DTA also requires the supplying

497 Above n 476, p 68.

498 Ibid, p 69.

499 ATO communication to the IGT, 9 February 2016.

500 *Privacy Act 1988*, s 96.

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

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

503 On 1 September 2016, legislation to give force of law to the new treaty was introduced into Parliament by the Minister for Revenue and Financial Services and the Minister for Finance. See: The Hon Kelly O'Dwyer MP and Senator the Hon Matthias Cormann, 'New Australia-Germany Double Taxation Agreement Introduced into Parliament' (Media Release, 1 September 2016).

504 Australia-Germany DTA, Article 30(e).

country to ‘exercise vigilance’ as to the accuracy of the information supplied as well as ensuring that the information is foreseeably relevant and proportional to the purpose for which it is supplied.⁵⁰⁵ Furthermore, it states that on request, the receiving country notifies the supplying country about the use of the supplied information and the results achieved.⁵⁰⁶

Notification and correction of information

6.39 In some jurisdictions, domestic law or procedures may require that notification of an EOI be given to the taxpayer that is the subject of the request.⁵⁰⁷ There is currently no domestic law in Australia which imposes such a requirement on the ATO and, as a result, it is under no obligation to notify taxpayers of an EOI in relation to their affairs.⁵⁰⁸ It should be noted, however, that the ATO is required to notify taxpayers where their personal information is being collected from third parties domestically.⁵⁰⁹

6.40 Internationally, it has been recognised that such notification procedures may be important to prevent mistakes, such as addressing any mismatches in identity⁵¹⁰ and may also facilitate voluntary co-operation directly between the taxpayer and the jurisdiction requesting the information.⁵¹¹ Exceptions to these procedures have been envisaged to facilitate ‘effective exchange of information’⁵¹²:

... notification rules should permit exceptions from prior notification (notably, in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction) and time-specific post-exchange notification (for example, when such notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction).⁵¹³

6.41 A 2014 report published by the global law firm Dentons, which compared 15 jurisdictions in Europe and North America, indicated that the majority of jurisdictions which were surveyed do not provide taxpayers with any notification when their information is sent to a revenue agency in another jurisdiction. The exceptions to this were France and Kazakhstan. In addition, the survey noted that, of the jurisdictions surveyed, only Germany, Spain and Switzerland notified the target taxpayer when a request for an EOI had been received in relation to their affairs.⁵¹⁴

505 Australia-Germany DTA Article 30(b).

506 Australia-Germany DTA Article 30(c).

507 See for example, OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer Review Report – Combined Phase 1 and Phase 2 Report – Germany* (2013), pp 59-61.

508 Above n 476, p 54 at para [201].

509 *Privacy Act 1988*, Australian Privacy Principle 5.

510 OECD, *Commentaries on the Articles of the Model Tax Convention* (2010) ‘Commentary on Article 26’, p 404, at para [14.1].

511 OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Exchange of Information on Request Handbook for Peer Reviews 2016-2020* (2016) p 158, para [14.1].

512 *Ibid*, p 22.

513 *Ibid*, p 22-23.

514 Dentons, *Cross-border exchange of information procedures: What to expect*, (2014), pp 4-5.

6.42 Australia's tax treaties do not require taxpayers to be informed prior to an EOI.⁵¹⁵ There are also no guidelines or policies that allow taxpayers to review the information to be exchanged with another jurisdiction.⁵¹⁶ However, the ATO has advised the IGT that, except in instances of covert or urgent investigations, taxpayers would likely become aware of any planned EOI requests through discussions and engagement with BSL audit teams. Moreover, taxpayers who have concerns about data accuracy are able to raise them through existing channels, such as those set out earlier, for ATO investigation.

6.43 Whilst taxpayers are not informed specifically of EOIs, they are made generally aware of this possibility through such publications as the ATO's *Privacy Policy*⁵¹⁷ and the *Our Approach to Information Gathering* booklet.⁵¹⁸

6.44 Furthermore, there is some evidence to suggest that an officer making an EOI request needs to consider whether the taxpayer should be informed. The relevant EOI template, which they must complete as mentioned above, includes a section on whether the taxpayer should be notified. Many of the EOI templates offer the following suggested wording for use where there is a request to not notify the taxpayer:

*It is requested that the taxpayer not be notified as the case involves possible fraudulent activities and notification would prejudice the investigation.*⁵¹⁹

6.45 The wording can be altered to suit the needs and circumstances of the requesting officer. The template and guidance do not make it clear in what circumstances this wording would be appropriate or would need to be otherwise modified. The IGT understands that such modifications would occur through discussions between the requesting officer, the BSL Gatekeeper and the EOI Unit before the request is finalised. Some EOI templates adopt a different approach by requiring the requesting officer to positively consider whether the taxpayer should be informed⁵²⁰ and where the taxpayer is not to be informed, the requesting officer is required to provide supporting reasons for that decision.⁵²¹

6.46 The ATO has advised the IGT that work is currently underway to consolidate the existing EOI templates into a single document to simplify the EOI process.

IGT OBSERVATIONS

6.47 The processes currently employed by the ATO in relation to EOIs, their appropriate use and the safeguarding of taxpayer information, as outlined above,

515 ATO communication to the IGT, 18 December 2015. Note: Under the revised treaty between Australia and Germany, a person who is the subject of an EOI request has a right to apply to be informed of the information supplied and how that information will be used.

516 ATO communication to the IGT, 18 December 2015.

517 ATO, *Australian Taxation Office Privacy Policy* (21 January 2016) <www.ato.gov.au>.

518 ATO, *Our approach to information gathering* (22 December 2015) <www.ato.gov.au>.

519 See for example, EOI templates for Romania, Russia, San Marino, Saint Kitts & Nevis, Saint Lucia, Samoa, Singapore, Slovak Republic, South Africa, South Korea, Spain, Sri Lanka.

520 See for example, Jersey TIEA request instructions guide, p 3.

521 See for example EOI template for Jersey.

appear to be sound. The stakeholders' concerns seem to stem from a lack of awareness of these processes.

6.48 As the ATO has acknowledged, whilst there is general information available on the different aspects of EOI, there is currently no publicly available guidance which comprehensively sets out the process for dealing with EOI requests and responses, including the roles of the various ATO officers, the safeguards for protecting taxpayer information and the avenues through which concerns may be raised. Ideally, such guidance should be set out in a practice statement to ensure that staff adhere to the relevant processes and taxpayers have a standard against which to hold them to account where those processes are not followed. However, in the present case, publication on the ATO's website, with supporting hyperlinks leading to greater details for those taxpayers or practitioners who require them may be more appropriate. Such an approach would enable the ATO to quickly update the information as international standards and practices in this area evolve. Nevertheless, there is an expectation that ATO staff would follow it and taxpayers may rely on it in good faith.

6.49 In respect of notification, the IGT acknowledges that there is no legal requirement for the ATO to notify taxpayers of an EOI in relation to their affairs, nor is there a right for Australian taxpayers to review information before it is exchanged. However, the IGT notes that the ATO's guidance on information gathering tends to support a cooperative approach, with the taxpayer generally being approached and informed before third party sources are considered.⁵²² There are some exceptions to this approach which include instances where there may be a risk of prejudicing the investigation or where the taxpayer is the subject of a covert audit. The IGT believes that a similar approach could be applied to EOIs.

6.50 As a general principle, the IGT is of the view that the ATO should inform taxpayers when considering EOIs and even give them an opportunity to provide the required information themselves. Naturally, exceptions to this general approach are required such as in cases of serious fraud or evasion or where there is an appreciable risk of asset dissipation.

6.51 Where the taxpayer is notified prior to the information being requested or during preliminary audit discussions, it would promote greater transparency and engagement between the parties. For example, the taxpayer may be able to provide domestically-held information which would address the ATO's enquiries but which had not previously been provided due to misunderstanding the nature of the ATO's information requests. In such circumstances, there are opportunities for the ATO to minimise the time and costs associated with requesting information from foreign jurisdictions. It may also prevent unnecessary escalation of disputes and litigation.

6.52 In the exceptional circumstances mentioned above, there is a risk in disclosing information requests at such an early stage in the engagement. In higher risk and more sensitive matters, this may lead to taxpayers taking actions or adopting positions which could unduly frustrate any subsequent investigation. In these cases, the taxpayer should not be informed until the completion of the audit and issuance of

522 ATO, *Our Approach to information gathering* (22 December 2015) <www.ato.gov.au>.

assessment at which time the ATO is able to take protective recovery action such as freezing orders, garnishee notices and departure prohibition orders.

6.53 Once taxpayers are made aware of the EOI, they must be given an opportunity to review, correct or appropriately contextualise any relevant information obtained.

6.54 Ultimately, the point at which taxpayers are informed of the EOI and are afforded an opportunity to review the information obtained depends on a range of factors. The inherent risks associated with the investigation and the need to protect the revenue need to be balanced against the taxpayer's right to understand and answer the case against them.

6.55 In relation to responding to EOI requests from other jurisdictions, the ATO has to abide by its treaty obligations. As set out above, there seems to be robust processes whereby the ATO assures itself that any taxpayer information provided to other jurisdictions would be protected once it leaves Australia. Other issues, such as review rights, arising between the taxpayer and the revenue agency in the other jurisdiction, should be addressed as a matter of domestic law in that jurisdiction in the absence of international norms.

RECOMMENDATION 4

The IGT recommends that the ATO centrally publish information on all aspects of EOI including:

- (a) its guidelines for requesting and responding to EOI;*
- (b) safeguards for protecting taxpayer information;*
- (c) avenues through which taxpayers may raise concerns; and*
- (d) when taxpayers would be informed of an EOI request being made in relation to their affairs and, where appropriate, have an opportunity to review the information obtained.*

ATO response

Agree

The ATO has a long standing commitment to being transparent about our dealings with taxpayers. Using contemporary channels, we can maintain up-to-date guidance to help taxpayers understand when and why we exchange information with other tax jurisdictions and what it might mean for them. Contemporary channels also provide taxpayers the ability to click through to get more detailed information or make contact with an ATO staff member to assist them in understanding exchange of information.

APPENDIX 1—TERMS OF REFERENCE

BACKGROUND

The self-assessment system relies on taxpayers having trust and confidence in the fairness of the tax system. As the Organisation for Economic Cooperation and Development (OECD) has observed, taxpayers ‘who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.’⁵²³

In Australia, the *Taxpayers’ Charter* (Charter) sets out what taxpayers can expect when interacting with the Australian Taxation Office (ATO). The Charter does so by stating taxpayers’ rights and obligations as well as actions they may take if they are not satisfied.⁵²⁴ As a direct response to a recommendation made by the Joint Committee of Public Accounts, the Charter was introduced in 1997 to redress ‘the balance of authority between the ATO and the taxpayer’⁵²⁵, given the ATO’s considerable powers and resources particularly when compared to those of small and medium enterprises and individual taxpayers.

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

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

In support of calls for reform, stakeholders have identified current international developments which indicate an emerging trend towards a formalisation of taxpayer protections. For example, the United States of America’s (USA) Internal Revenue Service (IRS) has adopted a Taxpayer Bill of Rights, which sets out various rights including ‘the right to a fair and just tax system’.⁵²⁶ The United Kingdom’s HM Revenue & Customs’ taxpayers’ charter, *Your Charter*, while modelled on the Australian Charter, has been given statutory force by way of a legislative provision

523 Organisation for Economic Cooperation and Development, *Principles of Good Tax Administration* (Practice Note AP001, 2001) p 3.

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

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

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

which requires its regular review.⁵²⁷ Other jurisdictions such as Chile⁵²⁸ have taken similar actions and comparable developments are also taking place in the European Union⁵²⁹. By contrast, in Canada, developing case law suggests an expansion of the tort of negligence to impose a duty of care on the Canada Revenue Agency and its officers to taxpayers in the conduct of compliance activities.⁵³⁰

It should be noted that some of the principles that have been enshrined into law in the above jurisdictions, already have statutory force in Australia. These include the rights to external review of assessments, access to ATO-held documents and reasons for its decisions.⁵³¹

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

Other courses of action open to taxpayers include lodging complaints with the IGT who can investigate and seek to ensure that they have been afforded procedural fairness in relation to the handling of their matter by the ATO. Ultimately, action may also be taken in courts where the common law rights of taxpayers have been breached.⁵³²

Taxpayers may also seek compensation from the ATO for losses on grounds of legal liability. Applications for the payment of compensation on moral grounds may be made primarily through the *Scheme for Compensation for Detriment caused by Defective Administration* (CDDA Scheme), a scheme applying to all Government departments including the ATO.⁵³³

Stakeholders have expressed concern with the adequacy of the CDDA Scheme as a means of protecting taxpayers and providing redress. Specifically, stakeholders have expressed concern with the lack of transparency and independence as the ATO itself is the decision-maker with respect to both the occurrence of defective administration and any amount of compensation applicable. Furthermore, there are limited rights of internal review and limited rights to seek external review of such decisions.⁵³⁴ The ATO reported figures show that the number of successful compensation claims has

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

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

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

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

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

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

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

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

decreased, namely from 162 in 2011–12 to 79 in 2013–14, while the total amount of compensation paid has increased, from \$773,857 in 2011–12 to \$841,754 in 2013–14.⁵³⁵

Whilst there is strong support for a robust and transparent mechanism through which taxpayers may be compensated for losses flowing from breaches of their rights or protections by the ATO, such mechanisms need to consider the potential litigious environment that may be created, resulting in delays and related costs as well as the impact on Government revenue. In this respect, the USA experience may be instructive where the number of taxpayer cases to recover damages caused by IRS officer actions⁵³⁶ has declined from an initial spike when legislation providing such a right was introduced.⁵³⁷

Stakeholders have also raised concern with the ATO's adherence to the model litigant rules set out in the *Legal Services Directions 2005* as well as the self-regulating and self-reporting nature of those obligations.⁵³⁸ Stakeholders question whether alleged breaches of the rules by the ATO are being addressed particularly where self-represented taxpayers are involved. The IGT notes that the model litigant rules also extend beyond the operation of the ATO and apply to all Commonwealth agencies. The Productivity Commission has more recently examined issues affecting the adequacy and enforceability of these rules.⁵³⁹

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

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

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

536 § 7433 of the Internal Revenue Code of 1986 (IRC) allows taxpayers to seek civil damages for certain unauthorised collection actions. However, it is subject to a number of restrictions including penalties for frivolous claims.

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

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

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

TERMS OF REFERENCE

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

The framework for taxpayer protections

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

Compensation and other avenues for redress

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

Model litigant rules

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

Cross-border information exchanges

12. *The basis and extent to which the ATO presently engages in cross-border information exchanges and its impact on Australian taxpayers.*

13. *Whether there should be clearly defined rights and remedies for taxpayers with respect to information exchanges – particularly the extent to which they should be kept informed and afforded opportunities to review and correct any inaccuracies.*
14. *The effectiveness of the ATO's systems and processes to maintain the confidentiality of information exchanges.*

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

SUBMISSION GUIDELINES

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

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

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

YOUR EXPERIENCES

- Q1. If you have had experience with the ATO in pursuing your rights under the *Taxpayers' Charter*, existing compensation schemes or the model litigant rules, provide a detailed account of your experience, including:
- (a) a timeline of key events, including a description of the actions taken by the ATO and any impact the actions had on you;
 - (b) how you sought to avail yourself of the protections and how the ATO assisted you;
 - (c) if you expressed concerns to the ATO, how did you voice these concerns for example, did you lodge a complaint;
 - (d) the ATO's response to any concerns you expressed and any follow up action taken by the ATO;
 - (e) your views on whether the ATO's response and action were appropriate and commensurate with the circumstances;
 - (f) if you also took action in the Administrative Appeals Tribunal or the courts, whether such action obtained a satisfactory resolution; and
 - (g) if you also raised a complaint with the Commonwealth Ombudsman or IGT, did this action assist you in obtaining a resolution?

- Q2. If your information has been requested from, or shared with, foreign revenue authorities, provide an account of your experience, including whether you were advised before the information was shared, afforded an opportunity to correct any inaccuracies and assured that your confidentiality would be respected?

THE FRAMEWORK FOR TAXPAYER PROTECTIONS

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

COMPENSATION AND OTHER AVENUES FOR REDRESS

- Q9. What is your understanding of the operation of existing compensation schemes, including the CDDA Scheme, in relation to the ATO? Do you believe that the ATO's processes for managing compensation scheme applications adequately provide redress for loss or damage? If so, provide reasons. If not, how can the ATO's management of compensation scheme applications be improved? Should a more specific scheme for taxation and superannuation administrative compensation be considered?
- Q10. Could the ATO's application of the current guidance on compensation schemes be improved to provide greater assistance to ATO officers and the public alike? If so, what aspects could be improved and how?

COMPENSATION AND OTHER AVENUES FOR REDRESS (CONTINUED)

- Q11. Should the ATO's compensation decisions be subject to internal or external review? If not, why not? If so, explain your views including who would be best placed to undertake such review.
- Q12. Provide comments on the adequacy of other existing avenues for redress.

MODEL LITIGANT RULES

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

CROSS-BORDER INFORMATION EXCHANGES

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

OTHER ISSUES

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

LODGEMENT

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

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

Email to: tctp@igt.gov.au

CONFIDENTIALITY

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

**Report to the Inspector-General of
Taxation on Taxpayer Rights**

Prepared by Dr Kalmen Datt

April 2016

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1. Introduction

The Inspector-General of Taxation (IGT) is conducting a review under section 8(1) of the *Inspector-General of Taxation Act 2003* (IGT Act) of the rights a taxpayer has when dealing with the Australian Taxation Office (ATO)¹. In terms of that review the IGT has requested the School of Taxation and Business Law (incorporating ATAX) at the University of New South Wales, Australia (UNSW) to research the tax laws² and common law with a view to identifying for the IGT the rights that are currently available to taxpayers.

This report to the IGT is limited in a number of respects and is based on some fundamental understandings and assumptions. The first relevant assumption is the meaning of a ‘right’ that has been identified for the purposes of the research. For these purposes a ‘right’ is a right that is actionable in that it may be enforced in courts. In the process of this research project we have also identified a category of positions that taxpayers may find themselves in that we have termed ‘presumptions’. A ‘presumption’ is not enforceable in this way but describes a situation in which a taxpayer may believe that they will be treated in a particular way or afforded a particular indulgence that is weaker than a right but which they and the Australian community might regard as fair in the circumstances.

It should be noted that aside from the discussion of ‘presumptions’ above, before considering statutory entitlements to judicial review there is a brief reference to the concept referred as a ‘legitimate expectation’ and whether any act or omission by the Commissioner could give rise to a legitimate expectation and the consequences that may flow from a failure to meet such an expectation. In this part of the report, reference is made to the *Public Governance, Performance and Accountability Act 2013* (PGPA) and the *Public Service Act 1999* (PSA).

Subject to this, the first limitation is that the report does not consider those statutes that afford taxpayers certain entitlements such as tax offsets or deductions or the ability to choose some or other method of calculating income or a deduction. The second limitation is that the report does not consider all cases where the Commissioner is granted discretion to alleviate the

¹ References to the ATO or Commissioner of Taxation (the Commissioner) are used interchangeably throughout unless the context suggests otherwise.

² These are the laws administered by the Commissioner including Fringe Benefits Tax (FBT); Goods and Services Tax (GST), Superannuation and Income Tax.

effects of the tax laws either partially or in whole.³ Neither of these establishes rights of taxpayers as envisaged by the IGT.

Thirdly there are various statutes that the Commissioner administers or which may impact on how he deals with a taxpayer. Most of these statutes do not grant taxpayers any rights in their capacity as taxpayer and are not referred to further. Examples of such statutes include the *Income Tax Assessment Act 1997*; *Fringe Benefits Tax Act 1986*; *Fringe Benefits Tax Assessment Act 1986*; and *Crimes (Taxation Offences) Act 1980*. Some of the tax laws impose criminal sanctions on taxpayers. Other than to furnish a brief over view of the nature of the criminal process these are not considered although Appendix A describes the offences and penalties that can be imposed under the *Taxation Administration Act 1953* (TAA).

A fourth limitation is that the report does not directly consider any customs or excise laws or rights that may arise from the administration of these imposts. Finally, as the issues covered in this report including (but not limited to): common law rights of taxpayers, estoppel, the *Administrative Appeals (Judicial Review) Act 1977*, *Judiciary Act 1903*, the TAA are topics of significant length and complexity, and on which there are vast bodies of case law, this report can of necessity only deal with them succinctly as it is impossible to cover all aspects or all of the cases on any one aspect in this report.⁴ The report reviews some of the leading cases that have bearing on the matters considered. This approach best meets the purposes of the report and provides a sound and adequate basis for evaluation.

The report is based on sundry sources. In support of some of its conclusions, reference is from time to time made to extracts from cases. Where the extract is clear in communicating the concept sought to be conveyed, no further comment is made in relation to it.

The section headed 'Collection and recovery of tax-related liabilities and other amounts' contains references to the *Corporations Act 2001* and insolvency issues albeit under the general heading of the TAA.

This report deals separately with each of the tax laws which may grant taxpayers' rights in response to any act or omission by the Commissioner and then turns to the common-law and

³ Examples include the discretion of the Commissioner to remit all or part of a penalty imposed or not to collect all or part of a tax debt.

⁴ See for example John Bevacqua, Taxpayer rights to compensation for tax office mistakes, CCH and ATTA Doctoral series No3, *CCH Australia Ltd* (Bevacqua); Duncan Bentley, A Model of taxpayers rights as a guide to best practice in tax administration, Thesis presented for the degree of PhD at Bond University.

other statutes. The order in which these matters are considered appears from the table of contents to this report. A summary of the rights of taxpayers and the section numbers in which they are considered appear from the table immediately after this section. Even though something is described as a right in the table below, no comment is passed on a taxpayer's prospects of success in launching proceedings to enforce such rights. Such comments appear in the body of this report.

Table of Taxpayer Rights and Presumptions

Right	Effect/Consequences	Legal Basis	Discussion in Report
Defend criminal charges arising from a breach of the tax laws. As part of this right the accused is generally entitled to the presumption of innocence.	To defend criminal proceedings.	Common law. Section 2A TAA incorporates Chapter 2 of the <i>Criminal Code</i> to all offences under the TAA.	Section 2.
Challenge (most) assessments, determinations, notices and decisions made by the Commissioner of Taxation.	Challenge via the Administrative Appeals Tribunal (AAT) and/or Federal Courts. Incorporated within this right are a number of ancillary rights. An example is the ability of a taxpayer to approach the Administrative Appeals Tribunal for relief if the taxpayer has noted an objection to an assessment out of time and the Commissioner has not agreed to accept it as being in time.	Part IVC TAA.	Section 3.1.
Taxpayers may seek an amendment of their income tax return.	To ensure an assessment is issued on the correct information.	Section 170 <i>Income Tax Assessment Act</i> 1936.	Section 3.1

Individual taxpayers are entitled to represent themselves in any proceedings before any court or tribunal.	Individual taxpayer's representation in challenges to acts or omissions of the Commissioner.	Common-law.	Section 3.1.
Challenge the issue/failure to issue a private ruling by the Commissioner of Taxation.	Challenge via the AAT or Federal Court the ruling or failure to provide a ruling.	Part IVC TAA.	Section 3.2.
Appeal an AAT or Federal Court decision.	To overturn the decision of the tribunal or court of first instance.	Part IVC TAA.	Section 3.3.
Request a referral on a question of law to the full bench of the Federal Court.	Obtain ruling on question of law before AAT determines matter.	Section 44 <i>Administrative Appeals Tribunal Act 1975.</i>	Section 3.4.
Request a variation or revocation of a departure prohibition order (DPO).	Variation or revocation of such orders.	Section 14T TAA.	Section 3.5.
Where a DPO has been issued request a departure authorisation certificate.	To permit the taxpayer to leave Australia for a limited time.	Section 14U TAA.	Section 3.5.
Challenge the issue of a departure prohibition order.	Challenge via the Federal Court or State Supreme Courts.	Section 14V TAA.	Section 3.5.
A taxpayer who had withholding payments deducted from amounts due to it is entitled to credits by the Commissioner for the sums withheld irrespective of whether the paying entity has	Credits on liability for tax.	Schedule One to the TAA- section 18-15.	Section 3.6.

accounted to the Commissioner for these monies.			
If more than a taxpayer's assessed tax liability has been withheld the Commissioner must refund the excess.	To ensure correct tax collected.	Schedule One to the TAA.	Section 3.6.
If the fact of the overpayment is discovered early the taxpayer may obtain a refund from the entity that withheld the amount.	Obtain refund for excess withholding payment withheld.	Schedule One to the TAA- sections 18-(65-80).	Section 3.6.
The Commissioner must provide taxpayers with a tax receipt for an income year.	To enable taxpayers to know how tax assessed to that taxpayer for the income year is notionally used to finance different categories of Commonwealth government expenditure.	Section 70-5 TAA.	Section 3.7.
Object to an excess concessional contribution determination under Part IVC.	Overtake such a determination either in whole or in part.	Section 97-10 TAA.	Section 3.8.
Elect to pay an excess concessional contribution determination from a superannuation interest.	Payment of an excess concessional contribution determination.	Section 96-5(1) TAA.	Section 3.8.
Request an assessment of an indirect tax.	Obtain assessment to enable challenge.	Section 105-20 TAA.	Section 3.9.
Demand an assessment if no assessment is issued 6 months after return submitted.	Obtain an assessment.	Section 155-30 TAA.	Section 3.10.

The Commissioner may not amend an assessment after the period for review as elapsed.	Finality of assessment.	Section 155-40 to 155-60. TAA.	Section 3.10.
A taxpayer may extend the time period for review if requested by the Commissioner.	To afford Commissioner further time to assess taxpayer.	Section 155-35 TAA.	Section 3.10.
A garnishee notice may be challenged under the <i>Administrative Decisions (Judicial Review) Act 1977</i> (AD(JR)A) or <i>Judiciary Act 1903</i> (JA) or Constitution.	Set aside garnishee.	Various statutes mentioned in first column.	Section 3.11.
The Commissioner may recover a debt owing under an assessment notwithstanding proceedings in AAT or Federal Court are in progress. A taxpayer may apply for a stay of execution on grounds of serious hardship.	Stay execution.	Sections 14 ZZM and 14 ZZR TAA.	Sections 3.1 and 3.11.
Discharge from bankruptcy (subject to an exception relating to secured debts) operates to release a taxpayer from all debts.	Release from debts.	Section 153 <i>Bankruptcy Act</i> 1966.	Section 3.11.
If bankruptcy deprives a taxpayer the right to challenge an assessment a stay of those proceedings may be granted.	Stay of bankruptcy proceedings.	Common-law.	Section 3.11.
Right to review a demand for a security deposit under AD(JR)A or JA or	Set aside requirement for security.	Various statutes mentioned in	Section 3.12.

Constitution.		first column.	
Challenge an assessment for an administrative penalty under Part IVC.	Set aside penalty.	Section 298-30 TAA.	Section 3.13.
Apply to remit a penalty.	Reduce penalty either in whole or in part.	Section 298-20 TAA.	Section 3.13.
Challenge a refusal to remit either in whole or in part a penalty if amount payable after refusal is \$360 (2 penalty units) or greater.	Challenge refusal to remit penalty.	Section 298-20 TAA.	Section 3.13.
On an inspection under section 353-15 TAA ATO officers may not remove original documents.	ATO officers may only make copies of documents.	Section 353-15 TAA.	Section 3.14.
The individual entering on premises under section 353-15 on behalf of the Commissioner must produce proof of authority on request.	Must have authority to enter on premises.	Section 353-15 TAA.	Section 3.14.
Taxpayers have the right to claim legal professional privilege when responding to requests for information or documents by the Commissioner under sections 353-10 and 353-15 TAA.	Right to claim legal professional privilege.	Common-law.	Section 3.14.
The exercise of powers under sections 353-10 and 353-15 are subject to review under the AD(JR)A or JA or Constitution.	Conduct of Commissioner subject to judicial review.	AD(JR)A; JA and Constitution.	Section 3.14.
Notices to give evidence under	To ensure party giving	Section 353-10	Section 3.14.

section 353-10 must specify the entity against which information is sought, give a reasonable time and place for the giving of evidence and the notice must specify the nature of the evidence sought with clarity.	evidence knows what's required.	TAA and common-law.	
A taxpayer is obliged to comply with a notice under section 353-(10-15) only to the extent they are able to do so.	Comply with notices.	Common-law.	Section 3.14.
Where information is held offshore and a taxpayer does not comply with a notice under section 264A ITAA 36, the information contained in such documents may not be used in challenge proceedings, other than with the consent of the Commissioner, unless this prohibition would result in an incontestable tax.	May not have an incontestable tax.	Section 264A (13) ITAA 36.	Section 3.14.
Personal taxpayer information, including tax file numbers are secret and may only be disclosed by the ATO in limited circumstances.	Right of taxpayers to have affairs kept confidential.	Division 355 TAA, <i>Privacy Act 1988</i> .	Section 3.15 and section 6.
Rulings whether public, private or oral are binding on the Commissioner and if taxpayers bring themselves within their terms taxpayers	Taxpayers can arrange tax affairs in terms of rulings.	Divisions 357 to 360 TAA.	Section 3.16.

are entitled to be assessed as provided by such ruling.			
Taxpayers are not obliged to accept the terms of a ruling and may apply their own interpretation of the law if they are of the view that the Commissioner's view is incorrect.	Taxpayers can elect whether to accept a ruling as correct.	Divisions 357 to 360 TAA.	Section 3.16.
Time periods are specified as to when the Commissioner may amend an assessment.	To bring finality to assessment process.	Section 170 <i>Income Tax Assessment Act</i> 1936.	Section 4.
Taxpayers are entitled to interest on certain over and pre-paid amounts and to be compensated for a payment made under a mistake of fact or law.	To ensure taxpayers are compensated for the use of their money by ATO.	<i>Taxation (Interest on Overpayments and Early Payments) Act</i> 1983.	Section 5 and 14.
Taxpayers have the right to access government documents.	To ensure knowledge of how government and its departments operate.	<i>Freedom of Information Act</i> 1982 (FOI).	Section 6.
Taxpayers can request a notation or amendment on information held by the Commissioner which they believe to be incomplete or incorrect.	To ensure correct information is held.	Section 48 FOI.	Section 6.
If a request for information has been refused other than by the principal officer of the agency or the responsible Minister, the taxpayer may apply in writing	Request an internal review of a refusal to furnish information.	Section 54 and 54B FOI.	Section 6.

for an internal review of that decision.			
If refusal to grant access to information or on internal review the decision is affirmed a taxpayer may request an Information Commissioner Review (ICR).	To ensure review of decision.	Section 54 FOI.	Section 6.
During an ICR a taxpayer may request the Information Commissioner to hold a hearing.	To obtain a ruling on access to information.	Section 55B FOI.	Section 6.
Taxpayer can appeal a decision of the Information Commissioner to the Federal Court on question of law or take it on review to the AAT. The AAT decision may be appealed on a question of law.	Appeal review finding.	Sections 56, 57 FOI.	Section 6.
If the ATO breach the privacy principles a taxpayer may complain to the Information Commissioner or Inspector-General of Taxation (IGT).	Remedies for breach of privacy principles under <i>Privacy Act 1988</i> .	Section 36 <i>Privacy Act 1988</i> .	Section 7.
Taxpayer can commence proceedings in Federal Court to enforce a determination of Information Commissioner.	Enforce determination.	Section 55A <i>Privacy Act 1988</i> .	Section 7.
Taxpayers may lodge complaint about treatment by ATO other than on assessments to IGT.	Ensure treated as required by tax laws.	<i>Inspector-General of Taxation Act 2003</i> .	Section 8.
If a taxpayer follows in good	Remedies for following	Section 361-5	Section 9.2.

faith non-binding advice the taxpayer is not liable to pay the general interest or the shortfall interest charges.	non-binding advice.	TAA.	
A taxpayer is entitled to be treated procedurally fairly in all dealings with the Commissioner.	To obtain procedurally fair treatment from ATO.	Common-law.	Section 9.2.
Object (subject to exceptions set out in the <i>Administrative Decisions (Judicial Review) Act</i>) to administrative decisions made ‘under an enactment.’	A statutory route by which to challenge qualifying decisions made by the administrator via an application to the Federal Court or Federal Magistrates’ Court.	<i>Administrative Decisions (Judicial Review) Act</i> AD(JR)A).	Section 9.3.
Right to obtain reasons for a decision.	To understand the basis and grounds of a decision.	Section 13 AD(JR)A.	Section 9.3.7.
Challenge constitutional validity of a tax law.	To set aside an invalid tax law.	Common-law read with sections 51, 53 and 55 of the Constitution.	Section 9.4.1.
Right to apply to High Court for relief against Commissioner for wrongful conduct.	Review of conduct of Commissioner.	Section 75 of the Constitution.	Section 9.4.2.
Right to apply to Federal Court for wrongful conduct of Commissioner.	Review of conduct of Commissioner.	Section 39B <i>Judiciary Act</i> 1903.	Section 9.5.
Right to know that any discretion exercised by Commissioner will be exercised in the same manner	To ensure certainty of conduct of Commissioner.	Common-law.	Section 10.1.

for all taxpayers with identical characteristics.			
Taxpayers are entitled to reasons for the manner in which discretion is exercised by the Commissioner.	To know the basis for the exercise of a discretion.	Common-law.	Section 10.1.
ATO staff need to ensure they do not act in such a way that causes damage to a taxpayer's person or property whilst administering the tax laws.	To grant a claim to a taxpayer where ATO staff, in the actual or ostensible pursuit of the ATO's interests cause physical damage to a taxpayer's property or person.	Common-law.	Section 10.3.
Taxpayers have the right to seek compensation under the Scheme for Compensation for Detriment caused by Defective Administration.	Compensation for defective administration.	Executive power of the Commonwealth under section 61 of the Constitution and the <i>Public Governance, Performance and Accountability Act 2013</i> .	Section 10.4.1
Taxpayers have the right to claim damages for pure economic loss.	To ensure taxpayers are compensated for loss due to wrongful acts by the ATO.	Common-law.	Section 10.4.2
Taxpayers have right to apply for summary judgment in the Federal court.	To shorten proceedings.	Section 31(A) <i>Federal Court of Australia Act</i>	Section 11.1.

		1976; Federal Court Rule 26.01.	
If a Mareva order is granted against a taxpayer he/she is entitled to an undertaking from the Commissioner as to damages.	To prevent abuse of process.	Common-law.	Section 11.7.
A taxpayer is entitled to accept that the Commissioner will comply with any agreement concluded between the parties.	Prevent breaches of agreements.	Common-law.	Section 12.
If Commissioner enters into an agreement with a taxpayer and that agreement is made an order of court the Commissioner cannot act contrary to that agreement unless the judgment is set aside.	To prevent unconscionable conduct by Commissioner.	Common-law.	Section 13.
If a judgment is granted on an issue between the Commissioner and a taxpayer, the taxpayer can rely on the principle of res judicata in relation to those issues determined by the court.	To prevent multiple cases on the same issues.	Common-law.	Section 13.
The common law protects taxpayer litigants where the State is a party.	To ensure the Commissioner does not take unfair advantage of limited resources of taxpayers.	Common-law.	Section 16.
Presumptions by Taxpayers			

Under certain circumstances an administrative penalty may be reduced by between 20 and 100% if certain criteria are met.	Reduce administrative penalties.	Divisions 284-298 TAA.	Section 3.13.
Taxpayers will be treated in terms of the taxpayer's charter and other forms of non-binding advice.	To be treated fairly.	Common-law.	Section 9.2.
The Commissioner will act in such a way so as to recognise a taxpayer's human rights.	To ensure taxpayer is treated fairly.	<i>Australian Human Rights Commission Act</i> 1986 and common-law.	Section 15.
Taxpayers have a presumption they will be treated in terms of the model litigant rules.	To be treated fairly when litigating against the ATO.	Section 55ZF of JA read with Appendix B to Legal Services Directions 2005 - F2006L00320, [2].	Section 16.

2. Criminal Offences⁵

Part 3 of the TAA prescribes certain criminal offences⁶ arising from breaches of the tax laws. Taxpayers have the right to defend themselves against any criminal charges brought against them.

A principle of criminal law is that a person is innocent until proven guilty. Lacey refers to this as the jewel in the crown of criminal law doctrine.⁷ The presumption of innocence is almost universally recognised. The criminal trial is usually an adversarial proceeding brought by the Crown against the accused. The Crown must prove its case. A defendant cannot be compelled to give evidence in defence of a plea of not guilty. The prosecution must prove the guilt of the accused by evidence other than the compulsory answers or assistance of the accused. The onus of proving guilt is generally on the Crown and does not shift to the accused.⁸

The onus on the Crown is generally to prove beyond a reasonable doubt⁹ (the criminal standard) that all the elements of the offence are present. Normally a criminal offence requires both the commission of the crime together with a mental element. The *Criminal Code Act 1995 (Cth)* (*Criminal Code*) refers to the criminal act and necessary intent to commit a crime as the physical and mental elements of a crime.¹⁰ Chapter 2 of the *Criminal Code* applies to all offences against the TAA: section 2A. A number of taxation offences, however, are either strict or absolute liability offences where the Crown does not have to prove the fault element of an offence.¹¹

⁵ This section, with some minor variations, is an extract from Kalmen Datt, *A critical evaluation of how aspects of the tax system in Australia are administered and their impact on corporations and directors*, (Australian Tax Research Foundation) Research Study 49, 2015.

⁶ Appendix A sets out these various offences and the penalties that may be imposed. This appendix is an extract from Kalmen Datt *ibid*.

⁷ Nicola Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (Oxford University Press, (2004) 21.

⁸ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 [17], [30] (McHugh J).

⁹ 'Proof beyond reasonable doubt is a very high standard to meet. This test per Kos J in *R v Rowley and Skinner (No 2)* (2012) 25 NZTC ¶20-133 is the following:

I must be sure the accused is guilty. If I have an honest and reasonable uncertainty left in my mind about the guilt of the accused on a count, after thorough and impartial consideration given to all the evidence, I must enter a verdict of not guilty on that count.

¹⁰ In serious cases of tax evasion, general Commonwealth fraud and money laundering offences are brought pursuant to the *Criminal Code*.

¹¹ With absolute liability, there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact is unavailable. With strict liability, there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact is available: sections 6.1–6.2 of the *Criminal Code*.

With some offences the legislature has reversed the onus of proof, effectively deeming guilt unless the accused shows on a balance of probabilities¹² that he/she is not guilty of the offence. An example is section 8Y TAA which inter alia provides that if a corporation commits a tax offence a director of that corporation is deemed to have committed that offence simply by virtue of the office that person holds. It is difficult to discharge this onus. The courts have variously said that it is difficult to prove a negative,¹³ that it is notoriously difficult to prove a negative¹⁴ and that the forensic difficulty of proving a negative is well known.¹⁵ That the onus can be discharged on a balance of probabilities (the civil standard) makes no difference to this basic fact.

In addition to the offences mentioned in Appendix A, sections 8WA to 8WC deal with offences relating to the use of tax file numbers, while section 8X refers to unauthorised access to taxation records.

Some of the offences in Appendix A are Prescribed Taxation Offences (PTOs). These offences do not carry the possibility of a prison term on conviction. All taxation offences committed by a corporation are PTOs.¹⁶ In a prosecution for a PTO, the court may award costs against any party.¹⁷

A prosecution for a taxation offence¹⁸ may be commenced at any time.¹⁹ A successful prosecution does not relieve the taxpayer of the liability to pay any tax, duty or charge that would otherwise be payable.²⁰ A claim for a civil penalty under the TAA is not the prosecution of a taxation offence.²¹

¹² In *Bai v FCT* [2015] FCA 973 [31] Rares J described this test as follows:

There is a substantive difference in requiring the exclusion of a possibility and the conventional civil onus of proof of establishing a matter on the balance of probabilities. It is one thing not to be satisfied about a matter because, weighing all the evidence, the decision-maker is not persuaded that it is more likely than not that a fact existed or did not exist, and quite another thing to require the proof of that matter by excluding all other possibilities. The latter is akin to applying the criminal onus of proof beyond reasonable doubt.

¹³ *Vaughan v The King* (1938) 61 CLR 8.

¹⁴ *Cassell v The Queen* (2000) 201 CLR 189 [66].

¹⁵ *A v NSW* (2007) 233 ALR 584 [60].

¹⁶ Section 8A.

¹⁷ Section 8ZN.

¹⁸ A 'taxation offence' means an offence against a taxation law, or an offence against s 6 of the Crimes Act or sections 11.1, 11.4 or 11.5 of the *Criminal Code*, being an offence that relates to an offence against a taxation law: section 8A.

¹⁹ Section 8ZB.

²⁰ Section 8ZH.

²¹ *Christis v DFC of T* 2011 ATC ¶20–285 [14].

If a taxpayer is liable to pay by way of penalty an amount under a taxation law because of an act or omission of that taxpayer and a prosecution is instituted against that person for a taxation offence constituted by the act or omission; then (whether or not the prosecution is withdrawn) the person is not liable to pay that penalty. Any such amount paid, or applied by the Commissioner, in total or partial discharge of that liability is to be refunded, or applied by the Commissioner in total or partial discharge of another tax liability of the taxpayer.²²

If found guilty of any offence, in addition to any sentence that might be imposed, the operation of sections 19B or 21B *Crimes Act* 1914 (*Crimes Act*) or the *Proceeds of Crime Act* 2002 (*Proceeds Act*) may come into effect.²³ A brief discussion of these provisions follows.²⁴

Section 19B allows a court to discharge a person charged with a federal offence²⁵ without proceeding to conviction, or to dismiss the charge under certain circumstances even though the offence is proved.²⁶ These orders can be made conditional on the accused giving reparation or restitution or paying compensation in respect of the offence. For example, a court could discharge an accused, but make the discharge conditional on the outstanding tax of the taxpayer being paid if such non-payment were part of the offence.

Under section 21B, if a person is convicted of a federal offence or an order is made under section 19B, that person can be ordered to make reparation to the Commonwealth or to a public authority under the Commonwealth²⁷ in respect of any loss suffered or any expense incurred by reason of the offence.²⁸ If a reparation order is made, it has the effect of a civil judgment in favour of the Commonwealth or that public authority, and is enforceable in all respects as a final judgment. This enables a court to order a taxpayer to pay to the Commonwealth any tax shortfall occasioned by the offence.

²² Section 8 ZE.

²³ The predecessor of the *Proceeds Act* is the *Proceeds of Crime Act* 1987 (Cth). The earlier Act was a conviction-based statute that required proof on the criminal standard. Although still on the statute book, it is only operative in relation to matters that commenced before January 2003.

²⁴ For an overview of how these statutes operate see, Denis Barlin and Michael Bennet, 'Directors Duties—The Tax Perspective' (Paper delivered at the Law Society of New South Wales Young Lawyers' CLE, Sydney, 2011).

²⁵ A federal offence is an offence against the law of the Commonwealth: *Crimes Act* section 16.

²⁶ In *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 (7 September 2001), an order under section 19B was made on charges of failing to submit income tax returns in time.

²⁷ A public authority under the Commonwealth includes the ATO: *Crimes Act* section 3.

²⁸ The court can also make awards in favour of any person, by way of money payment or otherwise, in respect of any loss suffered as a result of the offence: *Crimes Act* section 21B.

A reparation order is discretionary and forms part of the sentencing process. The loss for which reparation is made may not be difficult to prove. It is sufficient to show that the state has been deprived of money that it would have been paid had it not been for the commission of the offence.²⁹

The *Proceeds Act* has four types of recovery orders: forfeiture, automatic forfeiture, pecuniary penalty and literary proceeds. Forfeiture and automatic forfeiture orders are used to recover assets that are the proceeds of or were used in a crime. Pecuniary penalty orders are awarded against entities for the benefits derived from crime, and literary proceeds orders are used to recover any profits made through the commercial exploitation of criminal activity. The standard of proof is on a balance of probabilities. The *Proceeds Act* also provides for an order, described as an unexplained wealth order, requiring a person to pay an amount of their total wealth, calculated by reference to that which they have been unable to prove is not derived from committing the offence in question (again, a reverse onus).³⁰

For the *Proceeds Act* to apply, the offence alleged to have been committed must be either indictable or serious. Serious offences are those offences that are an indictable offence, punishable by imprisonment for three or more years, and that involve: unlawful conduct by a person that causes, or is intended to cause, a benefit to the value of at least \$10,000 for that person or another person; or unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least \$10,000. An indictable offence is one that may be dealt with on indictment, even if it may also be dealt with as a summary offence in some circumstances.³¹

The courts have applied the forfeiture measures under the *Proceeds of Crime Act 1987* (Cth) to taxation and corporate law offences.³² It seems likely that the courts will make similar forfeiture orders under the current *Proceeds Act*. The ATO is aware of its rights under both the *Crimes Act* and the *Proceeds Act*.³³ It is extremely difficult for an accused to be successful if a claim under the *Proceeds Act* is made against it.

²⁹ *Hookham v The Queen* (1994) 181 CLR 450 [7].

³⁰ *Proceeds Act* Part 2–6.

³¹ *Ibid* section 338.

³² Examples of how forfeiture measures were applied under this Act include: *Studman v DPP (Cth)* [2007] NSWCA 285; *DPP (Cth) v Dawson* [2006] WADC 55; *R v Gaitanis* [1998] VSCA 57; *Beard v The Queen* [2003] WASCA 262.

³³ ATO, *Fraudulently Altered or Created Income Tax Returns or Activity Statements*, PSLA 2008/11 (26 June 2008).

Finally, before leaving the topic of tax crimes it should be noted the Commissioner does not have the power to issue a search warrant (see section 3.14 below for discussion of the Commissioner's information gathering powers). Where the issue of a search warrant is necessary, the Commissioner can request the assistance of the Australian Federal Police. An ATO officer or other person may accompany and assist the police in the execution of the warrant.³⁴

The foregoing reflects the fact that taxpayers have the right to defend themselves in the event of criminal charges being laid due to an alleged breach of the tax laws. In defending themselves defendants are generally entitled to accept the prosecution must prove guilt by evidence other than the compulsory answers or assistance of the accused. Individual taxpayers may represent themselves in all courts and tribunals but it is advisable that legal representation be obtained.

This report now considers non-criminal provisions of the various tax laws that afford taxpayer's rights.

³⁴ Section 3G *Crimes Act* 1904; *Kennedy v Baker* [2004] FCA 562.

3. *Taxation Administration Act 1953 (TAA)*³⁵

3.1 Objection Decisions

Part IVC TAA deals with objections by taxpayers to assessments, decisions and determinations made by the Commissioner and objections to the content of or failure to make a private ruling. This section first considers assessments, decisions and determinations, and then turns to the question of private rulings. This report only considers those provisions that may afford taxpayers some rights.

Taxpayers dissatisfied³⁶ with an assessment, determination, notice or decision may object to it.³⁷ Such an objection is known as a ‘taxation objection’.³⁸ Various parts of the tax laws make provision for challenges under Part IVC. No such parts are specifically itemised in this report or the table appended thereto. If the legislation does not provide for a challenge under Part IVC³⁹ then some other remedy must be sought such as under the *Administrative Appeals (Judicial Review) Act 1977 (AD(JR)A)* reviewed in section 9.3 below.

There are time periods specified in the TAA for a taxpayer to notify the Commissioner of the challenge and the grounds for the challenge: section 14ZW. These provisions are complex and care must be taken to ensure one complies with the prescribed time limits. These limits are generally either 4 years or 2 years or 60 days depending on the nature of the taxation objection.

If a taxpayer notes its objection outside the time limits it may request the Commissioner to accept the objection as having been lodged in time. If the Commissioner declines to do so the taxpayer has the right to approach the Administrative Appeals Tribunal (AAT) to extend these periods.⁴⁰ In order to be successful the taxpayer should inter alia give an explanation for the delay and show that it has an arguable case on the merits of the objection.⁴¹ A taxpayer does not have to show that it will ultimately be successful in the proceedings before the AAT or Federal Court. There is no onus imposed on taxpayers in these applications but

³⁵ All references in this section are to the TAA.

³⁶ *CTC Resources NL v. Federal Commissioner of Taxation* (1994) 48 FCR 397 *CTC* discusses what is meant by dissatisfied.

³⁷ Section 14ZL (1).

³⁸ Section 14ZL (2).

³⁹ Examples of where Part IVC either applies or does not apply appears from CCH on line tax library [¶972-540] *Application of Pt IVC to taxation objections*.

⁴⁰ Section 14 ZX.

⁴¹ PS LA 2003/7 Taxation objections — late lodgement. The leading case on this is *Brown v FC of T* 99 ATC 4516; [1999] FCA 563.

the court must be satisfied that extending the time limits is the correct decision. Taxpayers are often successful in these types of applications.

Once the objection has been lodged and is either in time or deemed to be in time the Commissioner is obliged to give a decision as to whether he accepts or rejects the taxation objection either in part or in whole. This decision is referred to as an objection decision.⁴² When formulating the objection decision, the Commissioner is not limited to the taxpayer's grounds of objection. The Commissioner may consider any matters relevant to arrive at the correct tax position. If the Commissioner does not make a decision within the time periods specified in the legislation a taxpayer may cause a notice to be served on the Commissioner to make the objection decision within a period of 60 days.⁴³ If the Commissioner still fails to make a decision he is deemed to have rejected the objection in its entirety.⁴⁴ A taxpayer may withdraw its taxation objection at any time before the 60 day notice period has expired if the Commissioner has not responded.⁴⁵

Once the objection decision has been made the taxpayer has the right to approach either the Federal Court or AAT to adjudicate on its objection. Before proceedings are commenced both the AAT and the Courts usually require the parties to have first sought resolution of their disputes directly with the Tax Office. This may involve one or both of the following:

- attempts to resolve the dispute before the taxpayer makes a formal objection; or
- attempts to resolve the dispute after the taxpayer makes a formal objection.

If these attempts are unsuccessful and if the objection decision is a reviewable objection decision, the taxpayer may apply to the AAT for review of the decision or appeal to the Federal Court.⁴⁶ All objection decisions are reviewable objection decisions unless it is an ineligible income tax remission decision.⁴⁷ If the objection decision is not a reviewable objection decision then the taxpayer may only proceed in the Federal Court: section 14ZZ. In all cases where an objection decision is challenged:

⁴² Section 14 ZY.

⁴³ Section 14 ZYA.

⁴⁴ Ibid.

⁴⁵ *FCT v McGrouther* [2015] FCAFC 34.

⁴⁶ Section 14 ZZ.

⁴⁷ Section 14 ZQ. An ineligible income tax remission decision is defined in section 14 ZS.

- the taxpayer (the party who commences the proceedings) is referred to as the applicant and the Commissioner as the respondent; and
- the applicant (taxpayer) has the burden of proving, if the taxation decision concerned is an assessment, that the assessment is excessive or otherwise incorrect and what the assessment should have been, or in any other case-that the taxation decision should not have been made or should have been made differently.⁴⁸

In *Dalco*⁴⁹ the court discussed the term ‘excessive’ and found it refers to the amount of the assessment and not to any unauthorised step in the process of its calculation.

The onus referred to in the second bullet point above is a fundamental issue for taxpayers.⁵⁰ The Commissioner does not have to prove anything. It is the taxpayer that must prove its case on a balance of probabilities. There are provisions in the tax laws that provide, subject to a Part IVC challenge, that once an assessment is made they are deemed to be correct and any defect in process in making that assessment is irrelevant.⁵¹ Regardless of the type of assessment (default, ordinary or amended) the onus is on the taxpayer. The taxpayer carries this burden throughout any appeals from the AAT or Federal Court even if the appeals are initiated by the Commissioner.⁵²

Time periods are prescribed as to how soon after an objection decision is received before proceedings must be commenced. Where a challenge to an assessment is made the time period is 60 days for both the AAT and Federal Court.⁵³ If proceedings are commenced after the 60 day period the AAT has power to extend these periods.⁵⁴ Essentially the same criteria for a late notice of objection must be placed before the tribunal to enable it to make a decision. The Federal Court does not have power to extend this 60-day period.

Generally, it is only the taxpayer who has the right to make application to the AAT or Federal Court against an objection decision. Any other person ‘whose interests are affected by the decision’ being reviewed may apply in writing to the Tribunal to be made a party to the

⁴⁸ Section 14 ZZK and section 14 ZZO.

⁴⁹ *FCT v Dalco* (1990) 168 CLR 614.

⁵⁰ For an example of a case where the taxpayer did not discharge this onus see *Rigoli v Commissioner of Taxation* [2016] FCAFC 38.

⁵¹ Section 350-10; Section 175 *Income Tax Assessment Act* 1936 (ITAA 36).

⁵² *FCT v Mantle Traders Pty Ltd* (1980) 11 ATR 348.

⁵³ Section 14 ZZC read with section 29 *Administrative Appeals Tribunal Act* 1975 (AATA) for proceedings in the AAT. For proceedings in the Federal Court see section 14ZZN.

⁵⁴ Section 29 (7) and (8) AATA.

proceedings.⁵⁵ The Tribunal has discretion whether to allow the relevant person to become a party to the proceedings but it can only do so if it is satisfied that the applicant consents to that happening.⁵⁶ If the Tribunal decides that the interests of the person applying to be a party are affected by the decision being reviewed then its decision is final. However, if the Tribunal decides that the interests of that person are not so affected then that person may appeal to the Federal Court. This appeal is different to the right of appeal from the Tribunal to the Federal Court on an objection decision in that such appeal is limited to a question of law, whereas this appeal right is not so limited.

Both the AAT and Federal Court have their own rules once an objection decision comes before them for adjudication.⁵⁷

With challenges to objection decisions taxpayers should note:

- the grounds of objection relied on should be clearly set out;
- the AAT and Federal Court have the power to refer both the taxpayer and Commissioner to undertake some alternative dispute resolution (ADR) process before the matter comes before it as a hearing;⁵⁸
- before the parties can proceed in the Federal Court they must comply with the *Civil Disputes Resolution Act 2011* (CDRA). Section 4 CDRA requires the applicant (taxpayer) to demonstrate they have taken genuine steps to resolve the matter, and if they have not, they must specify reasons why not. In return, the respondent (Commissioner) who is given a copy of a genuine steps statement filed by the applicant, must state whether they agree with it or not;
- the proceedings in the AAT are less formal than in the Federal Court;
- the AAT cannot make an adverse cost order against the unsuccessful party whereas the Federal Court usually does;
- if an amended assessment is in dispute a taxpayer may challenge only that part of the assessment to which the amendment refers;⁵⁹

⁵⁵ See *Re Control Investment Pty Ltd* (1980) 3 ALD 74 for discussion of what is meant by ‘whose interests are affected by the decision.’

⁵⁶ Section 14 ZZD.

⁵⁷ See for example sections 14ZZA to 14 ZZJ of the TAA read with the provisions of the AATA for proceedings in the AAT. For proceedings in the Federal Court see *Federal Court of Australia Act 1976* and *The Federal Court Rules 2011*.

⁵⁸ The ADR options utilised at the AAT are: conferences, conciliation, mediation, case appraisal and neutral evaluation.

⁵⁹ Section 14 ZV.

- if a dispute proceeds to the AAT or Federal Court or even on appeal from an adverse finding by a tribunal or court of first instance the liability for the tax debt created by the disputed assessment is not suspended;⁶⁰
- notwithstanding the foregoing a court has the power to stay execution on that debt.⁶¹ This power is exercised sparingly.⁶² The AAT does not have this power.⁶³ Some personal hardship arising from execution has to be shown by the taxpayer (discussed in section 3.11 below). The practice of the Commissioner is generally to require payment of half the disputed amount unless he believes it expedient to require payment of the full amount pending the decision on the objection decision. If there is a finding in favour of the taxpayer by the AAT or Federal Court on the challenge the Commissioner will refund the monies paid together with interest;⁶⁴
- the AAT is not bound by the rules which govern the admissibility of evidence whereas the Federal Court is so bound; and
- the AAT is empowered to make a full administrative review of the objection decision, and in doing so may exercise afresh the powers and discretions of the Commissioner⁶⁵ but only for the purposes of making the decision under review. They do not include any powers and discretions which may be vested in the decision maker for some other purpose.⁶⁶

If after the process has commenced and with the leave of the tribunal or court hearing the matter a taxpayer may apply to amend its grounds of objection even if they require consideration of matters not considered by the Commissioner when first making an assessment.⁶⁷ The right to amend is not absolute and the court has discretion to refuse such an application. The closer to the trial the application is made the less likely the prospects of success.⁶⁸

⁶⁰ Section 14 ZZM and section 14 ZZR.

⁶¹ *DFC of T v Australian Machinery & Investment Co Pty Ltd* (1945) 8 ATD 133.

⁶² *Snow v DFC of T* 87 ATC 4078.

⁶³ Section 14ZZB TAA read with section 41 AATA; *Coshott and Commissioner of Taxation* [2013] AATA 822.

⁶⁴ PS LA 2011/4 Recovering disputed debts. See also section 5 below dealing with the *Taxation (Interest on Overpayments and Early Payments) Act* 1983.

⁶⁵ *FCT v Jackson* 90 ATC 4990, 5000.

⁶⁶ *Fletcher & Ors v FCT* 88 ATC 4834, 4845.

⁶⁷ Sections 14 ZZK and ZZO. *Lighthouse Philatelics Pty Ltd v. Federal Commissioner of Taxation* 91 ATC 4942.

⁶⁸ See for example *Gilder v FCT* 91 ATC 5062; *Lambert v FCT* 2013 ATC ¶10-322.

The Federal Court does not have the power to permit a taxpayer to amend its grounds of objection when the matter comes before it on appeal from the AAT. Section 44(1) AATA provides that an appeal from the AAT to the Federal Court must be on a question of law only.

In *Liedig*⁶⁹ Justice Hill considered the ability of the Federal Court, sitting as a court of appeal from an AAT decision, to amend a taxpayer's grounds of objection and stated:

At the outset of the proceedings before me counsel for Mr Liedig applied, by way of motion, for orders that Mr Liedig be permitted now to amend his notices of objection to permit him to argue that the amounts in question were allowable deductions under s. 51(1) of the Act. However, counsel rightly conceded that this Court had no power to permit such an amendment. Because the objection decisions were made after 1 March 1992, the provisions of Part IVC of the *Taxation Administration Act 1975* (Cth) ("the Administration Act") were applicable rather than the provisions of s. 190(a) of the Act. Section 14ZZO of the Administration Act confers power on the Court to extend the grounds of objection in an appeal brought directly to it, just as s. 14ZZK of the same Act gives that power to the Tribunal in respect of an objection decision referred to it. But nowhere in the Act is the Court given the power to extend grounds of objection where an application for review has been made to the Tribunal. The Court's jurisdiction, where the matter has been referred to the Tribunal, is limited to that conferred upon it by s. 44 of the *Administrative Appeals Tribunal Act*, namely, to determining a question of law. Although the Court is empowered by s. 44(4) to make such orders as it thinks appropriate by reason of its decision on that question of law, and the Court has the powers referred to in s. 44(5) of that Act, those powers do not extend to exercising discretions conferred upon the Tribunal by statute and upon the Tribunal alone.

Counsel for Mr Liedig therefore sought to take a different tack. He sought, and was granted, leave to amend the notice of appeal to raise a ground that the Tribunal erred in law in not granting an extension of the grounds of the taxpayer's objection on the basis that it was bound so to do on its own initiative or at least bound to raise the matter and subject to permitting the Commissioner to be heard upon it, to extend the grounds of objection...

⁶⁹ *Liedig v FCT* 94 ATC 4269, 4271-4272.

For the taxpayer to succeed in the present case it would be necessary to show that there was some legal obligation imposed upon the Tribunal, on its own motion, to raise the question of extending the grounds of objection. With respect there is no such obligation. There is conferred upon the Tribunal a power to extend grounds of objection but no obligation is imposed upon it to do so of its own volition. In these circumstances the failure of the Tribunal to consider whether to extend the grounds of objection in circumstances where neither the taxpayer nor the Commissioner has requested it so to do and where the Commissioner has been given no right to advance any argument to the contrary could not involve the Tribunal in having erred in law. This being the case, the amended ground of appeal must fail.

The effect of the foregoing decision is that:

- a court sitting as a court of appeal from an AAT decision does not have the power to amend a taxpayer's grounds of objection; and
- the AAT does not have the power on its own volition to vary a taxpayer's grounds of objection.

The position may not be as clear where there is an appeal from a single judge sitting as a court of first instance. Here appeals are not limited to questions of law. On appeal from a single judge it seems a court will not permit an amendment of the grounds of objection on appeal. Even though an appeal court has the power to allow new evidence this discretion would be exercised very rarely. This discretion does not seem to extend to effectively changing the basis of a challenge to an assessment on appeal.

The position described above as to the rights of a taxpayer to amend its grounds of objection is the same where the Commissioner seeks to amend the basis on which a taxpayer is sought to be held liable. As noted by Kitto J 'No conduct on the part of the commissioner could operate as an estoppel against the operation of the Act.'⁷⁰ Thus in a tribunal or court of first instance the Commissioner could amend the basis on which it was contended a taxpayer was liable to tax. However, if the Commissioner has exercised his discretion in a particular way it seems he would not be permitted to seek to exercise that discretion differently even in a court of first instance. There can be only one conclusion when exercising discretion.

⁷⁰ *Federal Commissioner of Taxation v Wade* [1951] HCA 66 [7].

On appeal the Commissioner would not be permitted to change the grounds of assessment. In *Dismin* the Federal Court on appeal unanimously held that:

Consistently with the authorities to which we have referred, we are of the view that the Commissioner should not now be allowed to argue, for the first time on appeal, a basis for assessment not argued at first instance and a basis, had it been argued at first instance, which would have called for consideration by the appellant whether to lead evidence not called having regard to the manner in which the case was run below.⁷¹

If a taxpayer determines that an error has been made in its return it is not obliged to proceed by way of litigation to challenge an assessment made on the incorrect information.

Section 170(5) ITAA 36 provides:

The Commissioner may amend an assessment even though the limited amendment period has ended if, before the end of that period, the taxpayer applies for an amendment in the approved form. The Commissioner may amend the assessment to give effect to the decision on the application.

A taxpayer can request the Commissioner to amend an assessment if information contained in their return is incorrect.⁷² They do so by seeking to amend the information furnished with their return or other documents lodged with their return.

Such an amendment results in a notice of amended assessment, showing the new amount payable or refundable. If the amendment increases the tax payable the ATO would presumably treat it as a voluntary disclosure of unpaid tax. This means the ATO are likely to apply concessional treatment to any penalties that accrue (see section 3.13 below). A taxpayer may seek to amend a return for a particular income year more than once although the time limits in which the Commissioner may amend an assessment under section 170 ITAA 36 limits this right.

Even where there is an objection by a taxpayer the Commissioner may accept in whole or in part the contentions of the taxpayer either because of attempts by the parties to resolve the dispute between them or because the Commissioner accepts in whole or in part the taxpayer's contentions. If the Commissioner accepts the objection in its entirety that would presumably

⁷¹ *Dismin Investments Pty Ltd v Federal Commissioner of Taxation* [2001] FCA 690 [36].

⁷² See for example *Case 5/2001* [2001] AATA 831.

be the end of the matter. If acceptance is only in part then the taxpayer must determine whether or not to proceed on the amount still in dispute by way of Part IVC.

The effect of the foregoing is that, subject to the limitation on the powers of the Commissioner to amend an assessment in terms of the tax laws, a taxpayer may request an amendment to the information supplied to the Commissioner in connection with their return on multiple occasions.

Once the proceedings have been launched in the AAT or Federal Court both parties are entitled to know precisely what case they have to meet. The AAT⁷³ and Federal Court have power to order the Commissioner to furnish additional information or documents to facilitate the taxpayer understanding what case it has to meet.

If an individual taxpayer institutes a challenge under Part IVC or commences proceedings in any court for other forms of relief they are entitled to represent themselves. They obviously may have representation if they wish and generally it is advisable that they do so. The representation in the AAT, unlike the Federal Court, need not be by a legal representative.⁷⁴ If the taxpayer is a company they are obliged to obtain legal representation in the Federal Court unless leave of that court is granted for the taxpayer to be represented by an officer of that company.⁷⁵

In both the AAT and Federal Court a hearing will be held. Each party will have their chance to lead evidence and call witnesses. Generally, proceedings before the AAT or any court are public.

Both the AAT and Federal Court must furnish reasons when handing down a decision.

The AAT is obliged to give reasons for any decision made by it either orally or in writing.⁷⁶ Where its decision is not in writing a taxpayer may request the Tribunal to give a statement in writing of the reasons for its decision, and the Tribunal shall, within 28 days after receiving the request, give such a statement.⁷⁷ Such reasons must include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based. Section 43 (5AA) AATA then continues that when handing down a copy of its

⁷³ See for example sections 37 and 38 AATA.

⁷⁴ Section 32(1) AATA.

⁷⁵ Rule 4.01 *Federal Court Rules* 2011.

⁷⁶ Section 43(2) AATA.

⁷⁷ Section 43(2A) AATA.

decision the Tribunal must inter alia advise the party to whom the decision is handed of that party's right to appeal to a court on a question of law.

What is meant by 'reasons' was explained in *Telstra*⁷⁸ as follows:

In summary, the Court will not be concerned with looseness in the language of a tribunal nor with unhappy phrasing of a tribunal's thoughts. Further, the Court will not construe the reasons for the decision under review "minutely and finely with an eye keenly attuned to the perception of error".

Additional principles specifically relevant to review of reasons provided by the Tribunal include that:

- There is no requirement for the Tribunal to refer to every piece of evidence and every contention that may be advanced.
- There is no requirement that the reasons of the Tribunal provide an unarguable logical progression to a conclusion: (references omitted)

As French J explained in *Secretary, Department of Employment and Workplace Relations v Homewood* [2006] FCA 779; 91 ALD 103 at [40]:

... the Tribunal will have discharged its duty under s 43 if its reasons disclose its findings of fact, the evidence on which they were based and the logical process by which it moved from those findings to the result in the case.

*Yusuf*⁷⁹ considered what is understood by the phrase 'material question of fact' (the legislation considered was not the AATA but the principles enunciated are of application). The majority in the High Court said:

It was said that "material" in the expression "material questions of fact" must mean "objectively material". Even if that were right, it would by no means follow that the Tribunal was bound to set out findings that it did not make... All that s 430(1)(c) obliges the Tribunal to do is set out its findings on those questions of fact which *it* considered to be material to the decision which it made and to the reasons *it* had for reaching that decision. ..It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that

⁷⁸ *Telstra Corporation Limited v Hunter* [2016] FCA 318 [73-75].

⁷⁹ *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 per McHugh, Gummow and Hayne JJ [68-69].

conclusion... The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review by the Federal Court under Pt 8 of the Act, or by this Court in proceedings brought under s 75(v) of the Constitution.

A full bench of the Federal Court in *Kent Osborne*⁸⁰ noted the following about the reference in section 43 AATA to the ‘reasons’ being either oral or in writing:

The nature of the distinction intended between reasons given orally and reasons given in writing is not absolutely clear... In my opinion, reasons are given in writing within the meaning of s.43(2) if and when they are issued by the Tribunal in written form, whether or not they have been delivered orally in the first place. Of course, if very informal reasons are delivered orally, and a request is then made under sub-s.43(2A), the Tribunal will be unlikely to comply with sub-s.(2B) unless more elaborate, written reasons are then produced. ..Where there are (as is usual in the Tribunal) no pleadings or other documents formally defining the questions which the parties desire to have decided, sub-s.(2B) does not necessarily and always require discussion of every point which might have been raised before the Tribunal, whether or not it has been argued.

Section 66B (1) AATA provides that:

The Tribunal may, by any means it considers appropriate, publish its decisions and the reasons for them.

The AAT thus has discretion as to the means by which it publishes its reasons thereby effectively making them accessible to all who wish to see what was stated in the judgment.

It is open to the Federal Court to give oral reasons for judgment immediately prior to pronouncing its judgment at the end of the hearing. The more usual course is for the court to reserve its judgment at the end of the hearing, pronouncing judgment (with written reasons) at a later time.

Unlike the AAT, there is no mechanism whereby the Federal Court can be requested to provide written reasons for its judgment. However, the Full Court of the Federal Court has held that ‘in all cases it is important that parties to litigation are able to understand the

⁸⁰ *Re Commissioner of Taxation v Kent Osborne* [1990] FCA 362.

reasons why the Court arrived at its decision.’⁸¹ The High Court described the normal practice of courts as follows:

The decision in that case that the failure to give reasons was an error in law may have broken new ground, but there was nothing new in saying that judges are under an obligation to give reasons where that is necessary to enable the matter to be properly considered on appeal. It has long been the traditional practice of judges to express the reasons for their conclusions by finding the facts and expounding the law (see *Deakin v Webb* (1904) 1 CLR 585 at 604–5 and *Jacobs v London County Council* [1950] AC 361 at 369) and there have been many cases (some of which are collected in *De Iacovo v Lacanale* [1957] VR 553 at 558–9) in which it has been held that it is the duty of a judge or magistrate to state his reasons.⁸²

Justice Monahan in *De Iacovo*⁸³ stated:

In Broom’s *Constitutional Law* (1st ed., 1866), at pp. 152-3, the learned author observes: “A public statement of the reasons for a judgment is due to the suitors and to the community at large--is essential to the establishment of fixed intelligible rules and for the development of law as a science...A judgment once delivered becomes the property of the profession and of the public; it ought not, therefore, to be subsequently moulded in accordance with the vacillating opinions of the judge who first pronounced it.” In my view this statement has general application to all persons exercising judicial functions. From time to time appellate courts have pointed out the difficulties which result from the fact that reasons have not been given for judicial pronouncements...Such a statement is desirable for the information of the parties, and in order to afford assistance to the Court of Appeal in the event of there being an appeal... In *Robinson v Robinson*, [1898] P 153, and again in *Cobb v Cobb*, [1900] P 145, it was stated that when making orders of this kind, from which an appeal lies to other courts, it is the duty of the magistrate, not only to cause a note to be made of the evidence, and of his decision, but to give the reasons for his decision and to cause a note to be made of his reasons...Elaborate judgments are not required, but the reasons which lead the magistrate to make his order must be explicitly stated.

⁸¹ *Bourke v Beneficial Finance Corp Ltd* (1993) 47 FCR 264

⁸² *Public Service Board of NSW v Osmond* [1986] HCA 7; (1986) 159 CLR 656 per Gibbs CJ [10].

⁸³ *De Iacovo v Lacanale* [1957] VR 553, 566-557.

The effect of the foregoing is that it is a principle that proceedings and all evidence and information before the AAT and court be made public and that the decision and reasons for the decision be published. The AAT (as does the Federal Court considered below) does, have power (particularly where confidentiality of parties or evidence is important) to:

- determine that a hearing be held in private or prescribe who may be present at a hearing;
- give directions prohibiting or restricting the publication or other disclosure of information that may reveal the identity of or concerning any witness or party to the proceedings or any party related or associated with any party to the proceedings; and
- give directions prohibiting or restricting the publication or other disclosure of information that relates to the proceedings; or evidence or information about evidence; or information lodged or given to the AAT.⁸⁴

The *Federal Court of Australia Act 1976* (FCA) has similar provisions. It can make suppression or non-publication orders provided the court takes into account the fact that a primary objective of the administration of justice is to safeguard the public interest in open justice.⁸⁵ To this end it can make similar orders to those of the AAT set out above.⁸⁶ The Court may make such orders on its own initiative or on the application of a party to the proceeding concerned; or any other person considered by the Court to have a sufficient interest in the making of the order.⁸⁷ These orders can be made at any time and may be made subject to such exceptions and conditions as the Court thinks fit and specifies in the order.⁸⁸ These orders may be interim orders or for such period as the court deems appropriate.⁸⁹ Failure to comply with such an order is an offence.⁹⁰

This report now turns to challenges to private rulings.

3.2 Challenges to Private Rulings

Taxpayers can object to private rulings provided the Commissioner has not already made an assessment in respect of the matters raised in the ruling or the ruling refers to withholding tax

⁸⁴ Section 35 AATA.

⁸⁵ Section 37AE FCA.

⁸⁶ Section 37 AF FCA.

⁸⁷ Section 37 AH (1) FCA.

⁸⁸ Section 37 AH (3-4) FCA.

⁸⁹ Section 37 AI FCA; Section 37 AJ FCA.

⁹⁰ Section 37 AL FCA.

that has become payable.⁹¹ (Rulings are discussed in section 3.16 below). As is the case with other challenges under Part IVC time limits are prescribed as to when a taxpayer must challenge a private ruling.⁹²

There are two forms of challenge associated with a private ruling:

- The Commissioner failing to furnish a ruling after notice is given to do so; and
- A ruling is given and the taxpayer does not agree with its conclusion.

In the former case once a taxpayer has requested a private ruling and 60 days have elapsed from the date of the request,⁹³ and the Commissioner has not declined to make a ruling nor has he issued a ruling, the taxpayer can put the Commissioner on notice to make a ruling.⁹⁴ If the Commissioner still has not made the ruling or declined to do so within 30 days of the notice the taxpayer may object under Part IVC. In such a case the taxpayer must lodge a draft private ruling with their objection.⁹⁵

Where a ruling has been made and the taxpayer is dissatisfied with it, the ruling is deemed to be a taxation decision making it capable of challenge under Part IVC.⁹⁶

A taxpayer may not note an objection against an issue raised in a ruling and again on an assessment based on that ruling unless the grounds relied upon in the later challenge could not have been raised in the original objection.⁹⁷

A taxpayer may withdraw a request for a ruling at any time before the ruling is made.⁹⁸

In carrying out a review of a private ruling issued by the Commissioner the Federal Court has held that:

In reviewing the Commissioner's opinion on the application of the law to the specified scheme, the only material to which the court can have regard is the ruling and documents identified in the description of the scheme which were either provided

⁹¹ Section 359-60 (3).

⁹² Section 14 ZW.

⁹³ This 60-day period can be extended under certain circumstances. Section 359-50; Section 357-120.

⁹⁴ Section 359-50.

⁹⁵ Section 359-50.

⁹⁶ Section 359-60.

⁹⁷ Section 14 ZVA.

⁹⁸ Section 359-10.

by the applicant or were used by the Commissioner: *Bellinz v FCT* [1998] FCA 615; (1998) 84 FCR 154 at 160; [1998] FCA 615; 39 ATR 198 at 204; 98 ATC 4634 at 4639; [1998] FCA 615; 155 ALR 220 at 226. The court is confined by the scheme description in the ruling, which remains constant throughout any appellate process.⁹⁹

And

In describing an arrangement, the Commissioner is entitled to incorporate by reference a description found in a document. That is not a licence for the Tribunal, on review, itself to examine those documents to the end of making a finding of fact which is at variance with or not found in the Commissioner's description of the facts of an arrangement for the purposes of the ruling. Nor can the Tribunal draw inferences of fact which are at variance with or not found in the description the Commissioner has given of the arrangement.¹⁰⁰

3.3 Appeals from AAT and Federal Court as Courts of First Instance

An unsuccessful party in the AAT has the right to appeal to the Federal Court against the decision provided it is on a question of law.¹⁰¹ This appeal must be noted within 28 days¹⁰² after the judgment against which the party wishes to appeal has been handed down. If the taxpayer is late in noting this appeal the Federal Court can extend the time periods.¹⁰³ If unsuccessful in the Federal Court and the appeal from the AAT was heard by a single judge a taxpayer has the right to appeal against that decision to the full bench (3 judges) of the Federal Court. If the original appeal was heard by three judges then in such instance the unsuccessful party may appeal to the High Court but only if leave has been granted by that court to do so.

An appeal from a decision of a judge at first instance is to the full bench of the Federal Court and is not limited to a question of law.

⁹⁹ *Rosgoe Pty Ltd v Commissioner of Taxation* [2015] FCA 1231 [16].

¹⁰⁰ *Ibid* [20].

¹⁰¹ Section 44 (1) AATA. It is often not easy to determine if an issue is a question of law or fact.

¹⁰² Section 44 AATA.

¹⁰³ Rule 33.13 *Federal Court Rules* 2011.

3.4 Referral to a Full Bench of the Federal Court from AAT

Pursuant to section 45 AATA, the Tribunal may, of its own motion, or at the request of a party, refer a question of law arising in a proceeding before the Tribunal to the Federal Court for decision. Subsection 45(2A) AATA states the matter is to be heard in the Full Court of the Federal Court. The Full Court exercises its appellate jurisdiction, because it is hearing a matter referred to it by a lower court or tribunal. This procedure of referring a question of law to the Full Federal Court can be very useful where there are important questions of law which come before the Tribunal. The procedure provides a ‘fast track’ method of obtaining a decision of significant precedential value on the particular question of law. When such an issue is referred to the Federal Court the proceedings are stayed in the AAT until the Federal Court has delivered its decision on the point of law. The matter is then referred back to the AAT which must determine the case based on the legal findings of the Federal Court

3.5 Departure Prohibition Orders

Under certain circumstances, the Commissioner can issue without prior notice, and also physically enforce, a departure prohibition order (DPO). A DPO prevents a person who is subject to a tax liability leaving the country: Section 14S. The penalty for breaching a DPO is a maximum fine of \$8,500, one year’s imprisonment or both: Section 14R. Where a departure prohibition order is made the Commissioner must cause the person to be informed of the order.

Where a departure prohibition order is in force the Commissioner may of his own volition or on application revoke or vary the DPO provided certain criteria are met.¹⁰⁴ The Commissioner must give notice to all persons who received notice of the DPO that it is revoked or varied.

The Commissioner may where a DPO has been issued on application by the taxpayer issue a departure authorisation certificate permitting the taxpayer to leave Australia for a limited time provided certain criteria set out in section 14U are met.

A person aggrieved by the making of a DPO may appeal to the Federal Court or the Supreme Court of a State or Territory against the making of the DPO.¹⁰⁵ This appeal is not an appeal under Part IVC of the TAA. Applications may be made to the Tribunal for review of

¹⁰⁴ Section 14 T.

¹⁰⁵ Section 14 V.

decisions of the Commissioner under sections 14T (revocation or variation of a DPO) or 14U (issue of a departure authorisation certificate).¹⁰⁶

The onus of proof that the DPO is invalid generally rests with the tax debtor. But given the potentially oppressive and serious consequences of a DPO, the Courts have also found that the Tax Office has to demonstrate that recoverability of the tax liability will be adversely affected by the departure of the taxpayer.¹⁰⁷

This report now turns to Schedule 1 of the TAA.

3.6 PAYG

The PAYG system has 2 components: PAYG withholding and PAYG instalments. The latter affords no taxpayer rights and is not considered.

Under the PAYG withholding system amounts are deducted from particular kinds of payments or transactions. The entity that withholds these monies is obliged to pay the amount to the Commissioner.¹⁰⁸ These withheld amounts are credited against any tax that might be payable in respect of assessable income derived by an individual. A summary of the items covered by this regime appear in the table to section 10-5 (1). Examples include payments of salary, payments to directors of companies and unused leave payments. An entity may enter into a voluntary agreement with an individual to withhold tax even though the rules do not make provision for this provided it is under an arrangement which, in whole or in part, involves the performance of work or services (whether or not by the individual).¹⁰⁹ These rules do not apply to exempt income, or income that is otherwise not assessable.¹¹⁰

The amount required to be withheld from a payment is to be worked out under the withholding schedules made under section 15-25. However, if the regulations prescribe how the amount is to be worked out, then it is to be worked out under the regulations.¹¹¹

An entity that withholds an amount is discharged from all liability to pay or account for that amount to any entity other than the Commissioner.¹¹² A failure to withhold an amount

¹⁰⁶ Section 14 Y.

¹⁰⁷ *Troughton v Deputy Commissioner of Taxation* [2008] FCA 18.

¹⁰⁸ Section 6-5 (2).

¹⁰⁹ Section 12-55.

¹¹⁰ Section 6-5 (3).

¹¹¹ Section 15-10.

¹¹² Section 16-20.

required by Division 12 is a strict liability offence.¹¹³ In the alternative to criminal proceedings the Commissioner may elect to impose an administrative penalty.¹¹⁴

If more than a taxpayer's assessed tax liability has been deducted as a withholding payment the Commissioner is obliged to refund that excess. If the fact of the overpayment is discovered early the taxpayer may obtain a refund from the entity that withheld the amount.¹¹⁵

Within 14 days after the end of a financial year, the payer must give a payment summary (and a copy of it) to the party from whom monies were withheld during the year. This summary must cover inter alia each of the withholding payments made, except one covered by a previous payment summary given by the payer to the recipient under section 16-160.¹¹⁶

The effect of section 18-15(1) is that the taxpayer who had withholding payments deducted from amounts due to it is entitled to credits by the Commissioner for the sums withheld irrespective of whether the paying entity has accounted to the Commissioner for these monies. Note that for the taxpayer to be successful in claiming these credits, they must discharge the onus of proving that the amounts were in fact deducted. Where the withholding is represented by journal entries this may not be sufficient to discharge this onus. There has to have been a legitimate process of withholding undertaken by the payer.¹¹⁷

Section 20 -80 sets out those provisions in the PAYG rules that may be challenged under Part IVC.

3.7 Tax Receipts

The Commissioner must provide taxpayers with a tax receipt for an income year if they are an individual and the total tax assessed to that taxpayer for the income year is \$100 or more (or such other amount as determined by the Commissioner from time to time).¹¹⁸ The tax receipt must include information inter alia about how the total tax assessed to that taxpayer for the income year is notionally used to finance different categories of Commonwealth government expenditure.

¹¹³ Section 16-(20-25).

¹¹⁴ Section 16-30.

¹¹⁵ Section 18-65-18-80.

¹¹⁶ Section 16-155.

¹¹⁷ *Cassanti v Commissioner of Taxation* [2010] FCA 641.

¹¹⁸ Section 70-5.

3.8 Release of Excess Concessional Contributions

Excess concessional contributions are included in assessable income. If a taxpayer has excess concessional contributions for a financial year, the Commissioner must make a written determination stating the amount of those excess concessional contributions; and the amount (if any) of the excess concessional contributions charge the taxpayer is liable to pay for the corresponding income year.¹¹⁹ A taxpayer may object to such a determination under Part IVC.¹²⁰

The Commissioner will also forward an election form together with the determination. If the taxpayer receives an excess concessional contributions determination or an amended contribution determination for a financial year, the taxpayer may elect to release from their superannuation interest (usually their fund) an amount not exceeding 85% of the excess concessional contributions stated in the determination by giving the Commissioner notice of that intention.¹²¹

If the Commissioner advises the taxpayer that the provider did not pay the Commissioner the contribution the taxpayer may make another election and choose another superannuation interest from which the withdrawal is to be made. Released concessional contributions are paid to the Commissioner. The election is not mandatory but once made cannot be revoked. The taxpayer gets a credit for the released amount. Surplus credits are refunded to the taxpayer.

3.9 Administration of Indirect Taxes

A taxpayer may request the Commissioner at any time to make an assessment of an indirect tax.¹²² The amount payable does not depend on and is not in any way affected by, the making of such an assessment. Failure to issue an assessment after a request has been made does not affect the validity of the assessment.¹²³ A decision involving an assessment may be challenged under Part IVC.¹²⁴

¹¹⁹ Section 97-5.

¹²⁰ Section 97-10.

¹²¹ Section 96-5(1).

¹²² Section 105-10.

¹²³ Section 105-20.

¹²⁴ Section 105-45.

A request to the Commissioner to treat a document as a tax invoice for the purposes of attributing a credit to a tax period is taken to be a notification of the taxpayer's entitlement to such credit.¹²⁵

Section 105-65 (1) deals with restrictions on GST refunds. As this does not give any rights to taxpayers it is not considered although a relevant decision may be challenged under Part IVC.¹²⁶

A taxpayer may challenge under Part IVC certain GST decisions referred to in the table in section 110-50(2).

Division 111 gives taxpayers the right to object under Part IVC against decisions disallowing the whole or part of a claim for a wine tax credit. These decisions are specified in the table to section 111-50(2).

Division 112 gives taxpayers the right to object under Part IVC against fuel tax decisions. These decisions are specified in the table to section 112-50(2).

3.10 Assessments

If 6 months have elapsed from the day on which a return for an assessable amount is given to the Commissioner and no assessment has been issued the taxpayer may give the Commissioner 30 days' notice to so issue an assessment. If the Commissioner still fails to do so the taxpayer may object, in the manner set out in Part IVC to the Commissioner's failure to make the assessment.¹²⁷ This does not apply if the assessable amount is the Division 293 tax payable in relation to an income year in relation to that taxpayer's taxable contributions for the income year. Division 293 reduces the concessional tax treatment of certain superannuation contributions made for very high income individuals: section 293-1.

The Commissioner may amend an assessment of an assessable amount within the period of review for the assessment.¹²⁸ A taxpayer may voluntarily extend the review period if requested to do so by the Commissioner or the Commissioner may apply to the Federal Court to extend these time periods.¹²⁹ The Commissioner cannot, subject to certain exceptions noted

¹²⁵ Section 105-55 (2A).

¹²⁶ Section 105-65 (4).

¹²⁷ Section 155-30.

¹²⁸ Section 155-35(1).

¹²⁹ Section 155-35(4).

in sections 155-40 to 155-60 further amend an amended assessment of an assessable amount if the period of review for the assessment has ended.¹³⁰ Two examples of these exceptions are that the Commissioner can always amend: to give effect to a decision on a review or appeal; or if the Commissioner is of the opinion there has been fraud or evasion.

3.11 Collection and Recovery of Tax-Related Liabilities and Other Amounts

As was noted in section 3.1 above irrespective of whether a challenge to an assessment is noted the Commissioner can enforce payment of the debt arising from an assessment. If payment is made and the taxpayer is successful in its challenge the Commissioner must refund the amount overpaid with interest.

The Commissioner has various means of enforcing his right to payment in relation to a tax related liability. A tax related liability is defined in section 255-1 (1) as a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). These methods include execution of a judgment debt, winding up or bankruptcy proceedings.

There are special rules when the entity that is liable is a liquidator, receiver, an agent winding up a business for a foreign resident principal or the trustee/administrator of a deceased estate.¹³¹ These are not considered here as the relevant provisions do not afford taxpayers any rights.

Under section 260-5 the Commissioner may cause a notice described as a garnishee notice to be issued to a third party who is indebted to a taxpayer whereby the third party is required to pay to the Commissioner the amount owing to the taxpayer. This obligation is limited to the amount owing to the taxpayer by the third party or the tax debt whichever is the smaller. If such payment is made, the liability of the taxpayer is reduced accordingly.¹³² Under section 260-15 an amount that the third party pays to the Commissioner is taken to have been authorised by the debtor; and any other person who is entitled to all or a part of the amount; and the third party is indemnified for the payment.

¹³⁰ Section 155-65.

¹³¹ Subdivisions 255 D –E.

¹³² Generally on garnishee notices see *Clyne v DFC of T* 81 ATC 4429.

A garnishee notice may not be challenged under Part IVC.¹³³ Such decisions are, however, capable of challenge under the AD(JR)A.

Macquarie Health Corp Ltd v Commissioner of Taxation 2000 ATC 4015 held that a garnishee notice requiring monies to be paid to the Commissioner created a statutory charge on the debt in favour of the Commissioner, even if the debt was not then due and payable. This charge remains valid even if the taxpayer is wound up before the due date of such debt. A garnishee on the debtor of a company served after a winding up order is granted is invalid.¹³⁴

In *Zumtar*¹³⁵ the Commissioner had applied for and was granted a Mareva order (considered in section 11.7 below). Subsequent to this the Commissioner caused a garnishee to be served on a debtor of the taxpayer. The taxpayer argued that the garnishee was a breach of the Mareva injunction as this constituted dealing by the taxpayer with assets that had been enjoined. The court said:

In my opinion, it would be an absurdity if the making of an order restraining an individual from disposing of or charging, diminishing or dealing in any way with his assets had the effect of nullifying a s218 notice served upon a person holding moneys which may ultimately be due to the individual against whom the order was made (section 218 was the predecessor to section 260-50).

A few points arise with garnishee notices:

- a garnishee may not be issued to a debtor of a company in liquidation.¹³⁶
- state limitation Acts have no application to federal tax debts notwithstanding section 64 *Judiciary Act* 2003 which provides that:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.¹³⁷

¹³³ *Rossi v FCT* [2015] AATA 601.

¹³⁴ *Bruton Holdings Pty Ltd (in liq) v FC of T & Anor* [2009] HCA 32.

¹³⁵ *DFCT v Zumtar* 93 ATC 451.

¹³⁶ *Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation* [2009] HCA 32 (26 August 2009).

¹³⁷ *DFCT v Moorebank Pty Ltd* (1988) 165 CLR 55 (1988) 165 CLR 55.

Notwithstanding the right of the Commissioner to enforce payment of an amount assessed, if a taxpayer can show payment would cause serious hardship, a court has the power to stay execution.

In *Akers*¹³⁸ Nathan J noted that if payment of tax caused serious hardship this was a basis for a court to exercise its discretion to stay the enforcement of a tax liability pending a determination of a Part IVC challenge to an assessment but:

- the obligation to pay tax does not of itself impose an extreme personal hardship; and
- the possibility that the taxpayer may be bankrupted is not of itself an extreme personal hardship.¹³⁹

The foregoing views were accepted by the Queensland Court of Appeal in *Denlay*¹⁴⁰ but the Court unanimously held serious hardship would ensue if execution were to proceed and the loss of the taxpayer's property would have the effect of precluding the taxpayer from prosecuting their appeals against the Commissioner's assessment. The judgment continued:

It is preposterous to contend that the loss of the respondents' entire estate, and with it any chance of demonstrating that the basis for the assessments was wrong so that they should not have lost their property, could not be a hardship rightly called extreme. It is not easy to imagine a greater hardship in this context. Certainly the primary judge cannot be criticised for so regarding it.¹⁴¹

A word of caution should be noted. Although in the circumstances of *Denlay* a stay was granted the court looks at all the circumstances in reaching a decision. A delay in seeking a stay and challenging an assessment may be destructive of an application to appeal. As was noted in *Denlay*:¹⁴²

The decision in *Ho* cannot, I think, be criticised. The fact that Ho had not sought to challenge the assessments in the two and a half years since they were issued was itself enough to refuse a stay. It was not really a case in which bankruptcy would deprive

¹³⁸ *DFCT v Akers* 89 ATC 4725.

¹³⁹ *Ibid* 4727.

¹⁴⁰ *Deputy Commissioner of Taxation v Denlay & Anor* [2010] QCA 217 [39-41].

¹⁴¹ *Ibid* [50].

¹⁴² *Ibid* [32].

the taxpayer of his right of challenge. The taxpayer had never sought to exercise that right. The remarks relied upon are, therefore, obiter dicta.

Notwithstanding the full bench decision in *Denlay* granting a stay, the Commissioner sought to issue a garnishee notice to a debtor of the taxpayer in apparent conflict with that order. An application was made under the AD(JR)A to set aside the garnishee notice.¹⁴³ The application was successful.

Inability to pay is not a basis for a stay of execution even if there is an arguable case on the merits. Even if execution takes place and bankruptcy will follow may not be a basis for a stay. But if execution would effectively preclude the taxpayer from challenging an assessment this may, depending on the facts, give grounds for a stay on the basis of personal hardship.

In considering the Commissioner's right to claim payment of an amount assessed sight should not be lost of the case where the taxpayer is declared bankrupt. Discharge from bankruptcy:

- operates to release the taxpayer from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally; but
- does not affect the right of a secured creditor, or any person claiming through or under that creditor, to realize or otherwise deal with its security if the creditor does not prove the secured debt in insolvency.¹⁴⁴

If a statutory demand is received by a company, the operation of the demand may be stayed if there is a genuine dispute about liability. It is not a dispute as envisaged by the *Corporations Act 2001* if the debt is a tax debt and a challenge has been made under Part IVC as the liability has to be paid notwithstanding such challenge.¹⁴⁵

*Mossimo*¹⁴⁶ was a case where a statutory demand under the *Corporations Act 2001* was sought to be set aside by 7 companies. The basis of this application was there was genuine dispute as the company/ies had offsetting claims against the Commissioner. In delivering

¹⁴³ *Denlay v FCT* 2013 ATC ¶20-382.32.

¹⁴⁴ Section 153 (1) and (3) *Bankruptcy Act* 1966.

¹⁴⁵ *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41.

¹⁴⁶ *Mossimo Systems International Pty Ltd v Deputy Commissioner of Taxation* [2010] NSWSC 1430.

judgment the court held that by virtue of the provisions of section 175 ITAA 36 and 350-10 TAA which create a conclusive liability in favour of the Commissioner (subject to challenges under Part IVC) when issuing an assessment it was not open to the taxpayers to argue that there was no debt owing.

With bankruptcy proceedings it would seem similar criteria for a postponement of the bankruptcy proceedings may operate as was the case with *Denlay*. In *Ahern* an application was made to stay bankruptcy proceedings pending an appeal against assessment made by the Commissioner. This was refused by the court of first instance. The Federal Court on appeal in considering the matter noted that:¹⁴⁷

It is well established that an appellate court will rarely interfere with a trial judge's exercise of discretion upon an application for adjournment. However, the refusal to grant an adjournment may in some cases prevent the party seeking it from presenting his case or defence and in some circumstances this may result in injustice of such kind or magnitude as to warrant interference on appeal.

The court upheld the appeal noting that:

These cases rest on the broad principle that before a person can be made bankrupt the court must be satisfied that the debt on which the petitioning creditor relies is due by the debtor and that if any genuine dispute exists as to the liability of the debtor to the petitioning creditor it ought to be investigated before he is made bankrupt. Bankruptcy is not mere *inter partes* litigation. It involves change of status and has quasi-penal consequences.¹⁴⁸

The court then set aside the bankruptcy order and granted the postponement.

3.12 Security Deposits

Since 1 July 2010 the Commissioner has been able to require a taxpayer to give security for the payment of an existing or a future tax related liability under division 255-D of Schedule 1 TAA. Section 255-100(1) enables the Commissioner to require a security deposit if he has reason to believe that:

¹⁴⁷ *Ahern v DFC of T (QLD)* (1987) 76 ALR 137, 146.

¹⁴⁸ *Ahern v DFC of T (QLD)* (1987) 76 ALR 137, 148.

1. the taxpayer is establishing or carrying on an enterprise in Australia; and
2. the taxpayer intends to carry on that enterprise for a limited time only; or
3. the Commissioner reasonably believes that the requirement is otherwise appropriate having regard to all relevant circumstances.

The Federal Court¹⁴⁹ considered the ambit of this power and said:

It is to be observed that s 255-100(1)(a) refers both to the circumstance of a person or entity “establishing” an enterprise and a person or entity “carrying on” an enterprise. The juxtaposition of the words “establishing” and “carrying on” in s 255-100(1)(a) shows that Parliament intended that the power to issue a notice is enlivened in circumstances, even before the person or entity had commenced carrying on the proposed enterprise, and was no further advanced in that endeavour than engaging in the process of establishing the enterprise. Because the concept of “establishing” an enterprise embraces preliminary activities that do not have the trading connotations associated with “carrying on” a business, it is apparent that the power to issue a notice may be enlivened well before the circumstance contended for by the applicant in this case, namely, the sale of one or more of the subdivided lots.

The taxpayer in the above case also argued that the power to require security was outside the powers envisage under the Constitution and was invalid (see section 9.4.1 below). The court rejected this argument.

The Commissioner is required by section 255-105(2) to give notice of his requirement which, amongst other things, is to include an explanation of why he requires the security, the amount of the security, the means by which the security is to be provided, when it is to be provided and how the decision may be reviewed. That review is an internal review. There is no provision conferring jurisdiction on the AAT to consider the matter. The decision of the Commissioner could be reviewed by the Federal Court on technical grounds under the AD(JR)A.

3.13 Administrative Penalties under Division 284

Division 284 sets out the circumstances in which administrative penalties apply for various breaches of the tax laws. It also sets out how to calculate the quantum of such penalties.

¹⁴⁹ *Keris Pty Ltd (Trustee) v Deputy Commissioner of Taxation* [2015] FCA 1381 [27].

A taxpayer is not liable to an administrative penalty for a statement that is false or misleading in a material particular if the taxpayer or its agent took reasonable care¹⁵⁰ in connection with the making of the statement.¹⁵¹ A taxpayer is also not liable if a registered tax agent makes a statement that is false or misleading in the circumstances set out in section 284-75 (6).

The Commissioner must make an assessment of the amount of an administrative penalty under Division 284. An entity that is dissatisfied with such an assessment made about the entity may object to it in the manner set out in Part IVC.¹⁵²

The base penalty amount is reduced by 20% if: the Commissioner tells the taxpayer that an examination is to be made of the taxpayer's affairs relating to a taxation law for a relevant period; and the taxpayer then voluntarily tells the Commissioner about the shortfall which can reasonably be estimated to have saved the Commissioner a significant amount of time or significant resources in the examination.¹⁵³

The base penalty amount for a shortfall amount or scheme shortfall amount, or part of it, is reduced by 80% if the shortfall amount is \$1,000 or more; or reduced to nil if it is less than \$1,000 if the following criteria are met;

- where the taxpayer voluntarily tells the Commissioner, in the approved form, about the shortfall amount before the day the Commissioner tells the taxpayer that an examination is to be made of the taxpayer's affairs; or
- where the taxpayer tells the Commissioner about the shortfall on or before the day specified by the Commissioner in a public statement requesting entities to make a voluntary disclosure by a particular day about a scheme or transaction that applies to that taxpayer's affairs.¹⁵⁴

The Commissioner may remit all or a part of a penalty. If the Commissioner refuses, on application, to remit all or part of a penalty; and the amount of penalty payable after the

¹⁵⁰ Reasonable care was described in these terms by Finn J in *R & D Holdings Pty Ltd v DFCT* [2006] FCA 981 [182]:

I would add that encompassed in what constitutes reasonable care in this context is the need for the taxpayer, or its advisers who are reasonably relied upon, positively to advert to the applicability of the law in question to the taxpayer's circumstances and actually to form a reasoned view on the matter.

¹⁵¹ Section 284-75(5).

¹⁵² Section 298-30.

¹⁵³ Section 284-220.

¹⁵⁴ Section 284-225. The terms 'shortfall amount' and or 'scheme shortfall amount' are defined by sections 284-80 and 284-150 respectively. Base penalty amount is defined in section 284-160.

refusal is more than 2 penalty units (\$360.00); the taxpayer may object to the decision in the manner set out in Part IVC.¹⁵⁵

3.14 Powers of the Commissioner to Obtain Information and Evidence

Sections 353-10 and 353-15 only became effective 1 July 2015. Prior to this, sections 263 and 264 of the ITAA 36 contained much the same detail. Paragraph 2.26 of the Explanatory Memorandum to the *Treasury Legislation Amendment (Repeal Day) Bill 2014*, explicitly states that although the sections have been moved into the TAA and been re-phrased, there has been no change in definition, policy or meaning of sections 263 and 264 of the ITAA 36.

Notwithstanding the foregoing the new provisions appear to go further than did the former sections 263 and 264 ITAA 36. For example section 353-10 (1) (a-c) operate ‘for the purpose of the administration or operation of a taxation law’ whereas section 264 (1)(b) operated only in relation to matters ‘concerning a taxpayer’s or any other person’s income or assessment.’ This may mean that in using the powers granted under section 353-10 as opposed to the former section 264(1)(b) the ambit of the enquiry may be broader. Further section 353-15 (1)(d) is a new provision that reads that the Commissioner ‘may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.’

The Commissioner’s powers under sections 353-10 and 353-15 are sometimes seen as being draconian, and so potentially oppressive. Reflecting this, there have been a significant number of cases concerning the Commissioner’s use of these powers. Collectively those cases have confirmed the wide reach of these sections.

Under section 353-15 the Commissioner or an individual authorised by the Commissioner may enter and remain on any land, premises or place; and is entitled to full and free access to any documents, goods or other property; and may inspect, examine, make copies of, or take extracts from, any documents; and may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and take samples.¹⁵⁶

The occupier/taxpayer has the following rights:

¹⁵⁵ Section 298-20.

¹⁵⁶ Section 353-15.

- should the Commissioner wish to take copies of documents for further consideration or use, the taxpayer is entitled to retain the originals whilst the Commissioner is limited to taking copies of those documents.
- the taxpayer is entitled to demand from the Commissioner’s representatives that they produce proof of authority;
- the taxpayer is entitled to claim legal professional privilege (LPP)¹⁵⁷ in relation to one or more documents the Commissioner may wish to copy and/or examine. The taxpayer must be given an opportunity of claiming this privilege;¹⁵⁸
- a taxpayer has the right to challenge the issue of such a notice under the AD(JR)A or *Judiciary Act* 1903 or Constitution.¹⁵⁹ The Commissioner cannot make copies of all documents in the taxpayer’s possession (documents include information stored electronically) without first making some reasonable attempt to ensure the documents copied are relevant to the enquiry by the ATO¹⁶⁰ and
- a taxpayer is required to comply with a notice under section 353-(10) only to the extent they are able to do so.

The common law privilege against self-incrimination is not available to the taxpayer.¹⁶¹

The right to claim LPP is important when the Commissioner seeks to exercise powers under either section 353-10 or 353-15. Reference is made in this and other sections of this report to *Commissioner of Taxation v Donoghue*.¹⁶² This is an important and far reaching decision. What this judgment appears to stand for is that:

- if the Commissioner comes into possession of a taxpayer’s legally privileged documents or documents subject to a right of confidentiality from a third party then irrespective of the basis on which the third party obtained these documents the Commissioner must have regard to these documents in determining a taxpayer’s assessable income. The exception appears to be when the Commissioner obtains

¹⁵⁷ LPP is only available where the ‘dominant purpose’ of a confidential communication from the legal advisor to a client involves either:

- legal advice about some matter, or
- pending or anticipated litigation.

¹⁵⁸ *Commissioner of Taxation & Ors v Citibank Ltd* (1989) 20 FCR 403; 89 ATC 4268; *Daniels Corp International Pty Ltd v ACCC* (2002) HCA 49.

¹⁵⁹ For a discussion on injunctions see *Cardile v Led Builders Pty Ltd* [1999] HCA 18.

¹⁶⁰ *JMA Accounting Pty Ltd v Michael Carmody, Commissioner of Taxation* [2004] FCAFC 274.

¹⁶¹ *Stergis & Ors v Federal Commissioner of Taxation & Anor* 89 ATC 4442.

¹⁶² *Commissioner of Taxation v Donoghue* [2015] FCAFC 183 [71-77].

these documents directly from the taxpayer under the powers granted to him under sections 353-10 and 353-15 TAA.

- if an ATO employee unlawfully comes into possession of such documents and hands them to an investigating officer who is not a party to the wrongful conduct such documents must be taken into account in determining a taxpayer's assessable income.
- the provisions of section 166 ITAA 36 take primacy over claims (other than as set out in the first bullet point above) to claims for privilege or confidentiality. Section 166 reads as follows:

From the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:

- a. the amount of the taxable income (or that there is no taxable income) of any taxpayer; and
- b. the amount of the tax payable thereon (or that no tax is payable); and
- c. the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).

Under section 353-10 the Commissioner may by notice in writing require a taxpayer to do all or any of the following: to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a taxation law; to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law; to produce to the Commissioner any documents in their custody or under their control for the purpose of the administration or operation of a taxation law.

Taxpayers should note the following in relation to section 353-10:

- for it to be valid the notice must specify the person(s) about whom information is being sought;¹⁶³
- the notice must specify a reasonable time and place when the evidence is to be given;
- the notice must specify with sufficient clarity the kind of information or evidence which is being sought (oral, documents, under oath or affirmation etc.);¹⁶⁴

¹⁶³ *ANZ and New Zealand Banking Group Ltd and Ors v DFC of T* 2001 ATC 4140.

- the documents being sought by the Commissioner have to be in existence;¹⁶⁵ and
- in *Hua Wang Bank Berhad*, the Federal Court upheld the validity of a section 264(1)(b) (predecessor to section 353-10) notice which required production of documents where (it was argued that) production would breach the (criminal) laws of another country. However, the Federal Court observed that an Australian court must act cautiously where there is a possible intrusion on the sovereignty of a foreign nation.¹⁶⁶

A liquidator must comply with a s353-10 notice.¹⁶⁷

The practical reach of sub sections 353-(10-15) is limited where the information being sought is held partly or exclusively outside Australia. Section 264A ITAA 36 therefore complements these sections by empowering the Commissioner to issue an ‘offshore information notice’ to a person subject to Australian income tax. The information sought under section 264A ITAA 36 can only relate to the assessment of the taxpayer unlike under sections 353-(10-15) which can refer to persons other than the person on whom the notice is served. It is not an offence to fail to provide information under section 264A ITAA 36 whereas a breach of either section 353-10 or 353-15 is an offence. A failure to provide the documents requested under a section 264A ITAA 36 notice makes those documents, in some circumstances, inadmissible in any future challenge to an assessment by the Commissioner other than with the consent of the Commissioner.¹⁶⁸ However section 264A (13) ITAA 36 provides:

In spite of anything in this section, the Commissioner must give consent under subsection (10) in any case where a refusal would have the effect, for the purposes of the Constitution, of making any tax or penalty incontestable. In *MacCormick*, the majority stated that the legislature could not determine conclusively for itself its power to enact legislation by putting beyond examination compliance with the constitutional limits upon that power.¹⁶⁹

¹⁶⁴ *Federal Commissioner of Taxation v Smorgon* [1976] HCA 53; (1976) 134 CLR 475.

¹⁶⁵ *Perron Investments Pty Ltd & Ors v Deputy Federal Commissioner of Taxation* (1989) 90 ALR 1.

¹⁶⁶ *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28; *Australia and New Zealand Banking Group Limited v Konza* [2012] FCAFC 127.

¹⁶⁷ For a case where the liquidator did not do so and was held personally liable for costs see *FCT v Warner (No 2)* [2015] FCA 1281.

¹⁶⁸ Section 264A (10).

¹⁶⁹ *MacCormick v. Federal Commissioner of Taxation* (1984) 158 CLR 622.

The reason for the foregoing provision is that a law which imposes an incontestable tax is constitutionally invalid and can be set aside by the High Court (see discussion on the Constitution in section 9 below).

3.15 Secrecy Provisions

Information about the tax affairs of taxpayers including their tax file numbers is protected information and cannot be disclosed unless specifically authorised under a statute. The objects of Division 355 TAA are to: protect the confidentiality of taxpayers' affairs by imposing strict obligations on taxation officers (and others who acquire protected tax information); to encourage taxpayers to provide correct information to the Commissioner; and to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes.¹⁷⁰ Protected information is defined as information that was disclosed or obtained under or for the purposes of a taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained; relates to the affairs of an entity; and identifies, or is reasonably capable of being used to identify, the entity.¹⁷¹ Subdivision 355 B (section 355-50 to 355-75) sets out the circumstances where a taxation officer may make such disclosures and to whom. Possibly the most common is where this information is made available to a court in proceedings where the Commissioner and taxpayer are parties.

Subdivision 355 C (sections 355-150 to 355-210) sets out the limited circumstances in which a non-taxation officer may make such disclosures.

The disclosure of protected tax information that has been unlawfully acquired is prohibited and may not be disclosed other than in very limited circumstances: Subdivision 355D. Again from a taxpayer perspective the most important exception would appear to be where that entity's actions are required or permitted by a taxation law or reasonably necessary in order to comply with an obligation imposed by a taxation law; or if the record was made for or the information was disclosed to a taxation officer; and for a purpose connected with administering a taxation law.

¹⁷⁰ Section 355-10.

¹⁷¹ Section 355-40.

3.16 Rulings

Public rulings apply to entities generally or a class of entities; in relation to a particular scheme. Rulings must be published and stated to be a public ruling.¹⁷² Section 357-55 specifies the taxes to which a ruling may relate.

A public ruling binds the Commissioner from the time it is published, or from such earlier or later time as is specified in the ruling. The Commissioner withdraws a public ruling, either wholly or in part, by publishing notice of the withdrawal in the *Gazette*. The withdrawal is effective from the time specified in the notice which cannot be retrospective. Where a public ruling is withdrawn, that ruling continues to apply to schemes¹⁷³ to which it applied that had begun to be carried out before the withdrawal took place, but does not apply to schemes that begin to be carried out after the withdrawal.¹⁷⁴ A taxpayer relies on the ruling by acting (or omitting to act) in accordance with the ruling.¹⁷⁵

A taxpayer may rely on the ruling at any time unless prevented from doing so by a time limit imposed by a taxation law. It is not necessary to do so at the first opportunity.¹⁷⁶ Taxpayers are not obliged to rely on a ruling and may apply their own interpretation of the law.¹⁷⁷ However if the public ruling is applicable to their circumstances and they have not followed it, the ATO may amend their assessment in accordance with the ATO view expressed in that ruling. If the taxpayer disagrees it may challenge the assessment under Part IVC.

The Commissioner may, on application, make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to the taxpayer in relation to a specified scheme. This is a private ruling.¹⁷⁸

The essential difference between a private ruling and a public ruling is that a private ruling deals with a specific course of action by a particular taxpayer, whereas a public ruling is provided for the information of taxpayers generally, or a class of taxpayers.

¹⁷² Section 358-5.

¹⁷³ A scheme is defined in section 995 *Income Tax Assessment Act 1997* as meaning:

- (a) any arrangement; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

¹⁷⁴ Section 358-20.

¹⁷⁵ Section 357-60(1).

¹⁷⁶ Section 357-60(2).

¹⁷⁷ Section 357-65.

¹⁷⁸ Section 358-5.

Oral rulings constitute the third type of advice available to taxpayers that is legally binding on the Commissioner. Oral rulings are legally binding in much the same way as are private rulings. They are available only to individual taxpayers with simple tax affairs. Under section 360-5 to be eligible for an oral ruling:

- the advice sought cannot be in relation to a business matter
- the advice must not be complex, and
- the matter sought to be ruled upon must not be one that is already being, or has been, considered by the Commissioner for that taxpayer.

All rulings are statutorily binding on the Commissioner and taxpayers can expect that if they bring themselves within the ambit of a ruling they are entitled to be assessed on its terms.

The Commissioner has created a new form of document which either in whole or in part may be described a public ruling. These documents are referred to as Law Companion Guideline's (LCGs).

LCGs are issued either in whole or in part as public rulings. Those portions of a LCG that are a public ruling are binding on the Commissioner. A LCG is an expression of how the Commissioner believes a newly enacted law will apply to taxpayers and his interpretation of that law. The Commissioner makes at least one and possibly two contentious propositions in his publication explaining how a LCG will operate.¹⁷⁹

First he says that taxpayers may only rely on a LCG if they rely on it in good faith. Examples are then given as to what the Commissioner means by 'rely on a LCG in good faith'. This would appear to conflict with the section 357-60 TAA which provides that a ruling binds the Commissioner (whether or not you are aware of the ruling) if the ruling applies to you; and you rely on the ruling by acting (or omitting to act) in accordance with the ruling. Nothing is said in the section about acting in good faith. How a court will approach the Commissioner's qualification is unclear but prima facie unless the legislation is amended this qualification may not be accepted.

¹⁷⁹ ATO LCG 2015/D1 Law Companion Guidelines: purpose, nature and role in ATO's public advice and guidance (updated 10 March 2016).

The Commissioner states that because a LCG is operative from the time an enactment comes into force it is not informed by real world experiences. Then in a second possible contentious statement the Commissioner continues:

Where a statement in a Guideline is later found to be incorrect, that part of the Guideline may be withdrawn or amended. Where the change is less favourable to taxpayers, this would usually be done with prospective effect only.¹⁸⁰

The foregoing suggests (it is put no higher than this) that in certain circumstances a LCG may be amended retrospectively. The Commissioner refers to paragraph 43 of TR 2006/10¹⁸¹ in support of the above. This paragraph reads:

Where a public ruling does not specify the time at which it ceases to apply, the ruling will apply until it is withdrawn.

There is nothing contentious about the statement in the ruling but the ruling does not deal with the possibility of a retrospective amendment or withdrawal. The possibility of a retrospective withdrawal or amendment of the part of a LCG which is a ruling appears to be in conflict with section 358-20 (2) TAA which states that a public ruling may not be withdrawn retrospectively irrespective of whether the change is or is not favourable to taxpayers.

Practical Compliance Guidelines are not considered as the Commissioner accepts they are for internal ATO use only.¹⁸²

¹⁸⁰ Ibid paragraph 40.

¹⁸¹ ATO, TR 2006/10: Public Rulings in support of the proposition that that a guideline may be withdrawn or amended (updated 6 October 2006).

¹⁸² PCG 2016/D1, Practical compliance guidelines: purpose, nature and role in AT)'s public advice and guidance (16 March 2016).

4. *Income Tax Assessment Act 1936 (ITAA 36)*

Section 162 provides that:

A person must, if required by the Commissioner, whether before or after the end of the year of income, give the Commissioner, within the time required and in the approved form:

- a. a return or a further or fuller return for a year of income or a specified period, whether or not the person has given the Commissioner a return for the same period; or
- b. any information, statement or document about the person's financial affairs

This power can be used separately from or in conjunction with sections 353-10 and 353-15 TAA.

Reference has previously been made to section 166 in section 3.14 above.

Section 170 and the regulations published under the ITAA 36 specify the time period when and the circumstances under which the Commissioner may amend an assessment. An amended assessment issued outside these periods can be successfully challenged under Part IVC.

Section 202F refers to a range of decisions that may be taken on review to the AAT. Note these are not challenges under Part IVC TAA.

Section 264A was considered in section 3.14 above.

5. Taxation (Interest on Overpayments and Early Payments) Act 1983

Under the above legislation taxpayers are entitled to interest on various amounts paid more than 14 days prior to the day when the liability for which payment is made becomes due and payable. These items include income tax, shortfall interest or general interest charges.¹⁸³ Interest is not payable on PAYG or PAYG instalments. However where amounts deducted such as PAYG (on which interest is not payable) are greater than the amount assessed, interest is payable on the excess.¹⁸⁴ If there is an overpayment as a result of a decision of the Commissioner upon an objection; or a decision of the Tribunal in relation to an objection; or a decision of a court in relation to an objection, interest is payable.¹⁸⁵

Generally with individual taxpayers interest is for the period calculated from the beginning of the 30th day after the day on which the person furnishes the return of income until the end of the day on which the notice of assessment is issued.¹⁸⁶

There are a range of other pre or overpayments on which interest is payable by the Commissioner. These are specific provisions in the above Act that refer to overpayments under the following statutes:

- *Superannuation Contributions Tax (Assessment and Collection) Act 1997;*
- *Termination Payments Tax (Assessment and Collection) Act 1997;* and
- *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997*

There are also specific provisions relating to running balance accounts.¹⁸⁷

¹⁸³ Section 8A and section 12A *Taxation (Interest on Overpayments and Early Payments) Act 1983*.

¹⁸⁴ *Ibid* section 8E.

¹⁸⁵ *Ibid* sections 9-11.

¹⁸⁶ *Ibid* section 8F (1).

¹⁸⁷ *Ibid* sections 12AA to 12 AF.

6. *Freedom of Information Act 1982 (FOI)*

The purpose of the *Freedom of Information Act 1982* is to give members of the public a legally enforceable right of access to government documents that are not exempt from disclosure: section 11. Requests for such information must be made in writing.¹⁸⁸ Documents covered by the secrecy provisions of the TAA are exempt from disclosure.¹⁸⁹

If information is supplied to a taxpayer that is in the possession of the Commissioner and the taxpayer believes it is incomplete, incorrect, out of date or misleading; and that has been used, is being used or is available for use by the agency or Minister for an administrative purpose; the taxpayer may apply to the agency or Minister for: an amendment; or an annotation; of the record kept of that information.¹⁹⁰

If a request for information has been refused other than by the principal officer of the agency or the responsible Minister, the entity may apply in writing for an internal review of that decision.¹⁹¹

If there has been a refusal to grant access or on internal review the decision is affirmed a party may apply in writing for an Information Commissioner Review (ICR).¹⁹² Such an application may be withdrawn at any time.¹⁹³ At any time during an ICR a review party may request the Information Commissioner¹⁹⁴ to hold a hearing.¹⁹⁵ The onus is not on the review applicant.¹⁹⁶ A review party may appeal to the Federal Court on a question of law, from a decision of the Information Commissioner.¹⁹⁷ Time periods are specified for all these processes but they may be extended on application.

A decision of the Information Commissioner may also be taken on review to the AAT.¹⁹⁸ This is not a challenge under Part IVC. The AAT decision may be appealed to the Federal

¹⁸⁸ Section 15 FOI.

¹⁸⁹ Section 38 read with Schedule 3 FOI. *Federal Commissioner of Taxation v. Swiss Aluminium Australia Limited & Ors* 86 ATC 4200. Documents subject to legal professional privilege are also exempt: section 40 FOI.

¹⁹⁰ Section 48 FOI.

¹⁹¹ Sections 54; 54B FOI.

¹⁹² Sections 54M; 54N FOI.

¹⁹³ Section 54R FOI.

¹⁹⁴ This official is appointed under the *Australian Information Commissioner Act 2010*.

¹⁹⁵ Section 55B FOI.

¹⁹⁶ Section 55D FOI.

¹⁹⁷ Section 56 FOI.

¹⁹⁸ Section 57A FOI; *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623.

Court on a question of law. Taxpayers have reasonable prospects of success in these matters.¹⁹⁹

¹⁹⁹ *Murtagh v FC of T* 84 ATC 4516; *Re Walker & Ors and FC of T* 95 ATC 2001; *Re Saunders and FC of T*, 88 ATC 2067.

7. *Privacy Act 1988 (Privacy Act)*

Schedule one to the *Privacy Act* sets out the Australian Privacy Principles. By the very nature of the functions performed by the ATO some of these principles would not apply to the Commissioner. The principles binding the Commissioner include: not collecting sensitive information unless the collection of the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities (Principle 3 (4) (d)). Principle 6 is important and inter alia provides:

If an APP [Australian Privacy Principles] entity (the ATO is such an entity) holds personal information about an individual that was collected for a particular purpose (the *primary purpose*), the entity must not use or disclose the information for another purpose (the *secondary purpose*) unless... the individual has consented to the use or disclosure of the information; or ...the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or ...the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

Information about tax file numbers is also personal to a taxpayer and may not be made publically available.²⁰⁰

If a taxpayer believes there has been a breach of the privacy principles he may complain to the Information Commissioner or IGT.²⁰¹ If the complaint is upheld the Information Commissioner can make one or more of a range of orders.²⁰² These orders include:

- the agency has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct; and
- make a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint.

Such determinations are not binding²⁰³ but the Information Commissioner must state any findings of fact relied upon in making such determination. However a complainant or the

²⁰⁰ Section 17 *Privacy Act*. See also Division 355 TAA.

²⁰¹ Section 36 *Privacy Act*. The *Inspector-General of Taxation Act 2003* is considered in section 8 below.

²⁰² Section 52 *Privacy Act*.

Information Commissioner may commence proceedings in the Federal Court or the Federal Circuit Court of Australia to enforce a determination: section 55A(1). Section 55A(5) provides that the court is to deal by way of a hearing de novo with the question whether the person or entity in relation to which the determination applies has engaged in conduct that constitutes an interference with the privacy of an individual. If the court is satisfied that an interference with privacy has occurred, it may make such orders (including a declaration of rights) as it thinks fit: section 55 A(2).

²⁰³ Section 52(1B) FOI.

8. Inspector-General of Taxation Act 2003

Prior to the coming into effect of the *Tax and Superannuation Laws Amendment (2014 Measures No 7) Act 2015* the powers of the IGT were limited to examining systemic problems with systems established by the ATO to administer the tax laws. The IGT may now in addition investigate individual taxpayer complaints. This is achieved through transferring the investigative and complaint handling powers and functions of the Ombudsman to the IGT so far as they relate to taxation law matters.

The legislation referred to above wholly transfers all of the investigative and complaint handling powers and functions of the Ombudsman insofar as they relate to matters of administration under a taxation law by a tax official from the Ombudsman to the IGT. The amendments merge those powers and functions with the Inspector-General's existing powers and functions of conducting systemic reviews. This power is extensive and offers taxpayers a non-litigious way of obtaining redress for wrongs committed against them. The right of investigation of the IGT does not extend to challenges to assessments.

The IGT may not compel the ATO to act in a manner found to be necessary but the IGT furnishes an annual report to Parliament where issues such as this would be brought to the attention of Parliament and the general public. Failure on the part of the ATO to act on a recommendation effectively results in the ATO being 'named and shamed' as all refusals are reported to Parliament when the IGT makes a report to that body. This is a powerful incentive for the ATO to acquiesce in an IGT recommendation.

9. Other Legislation

9.1 General

The ATO is accountable to Parliament, which has special offices that oversee the ATO,²⁰⁴ and is subject to the scrutiny of the courts inter alia through the *Judiciary Act* 1903 (Cth), the Constitution and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). No penalties are imposed on the ATO if they issue an incorrect assessment other than a possible costs order if successfully challenged in the Federal Court.

Before considering the various statutes that give taxpayers the right to seek judicial review it is necessary to consider whether any act (particularly any statement made either orally or in writing) on the part of the Commissioner which is not binding on him would entitle the taxpayer to some relief. This is considered next.

9.2 Legitimate Expectations

If a taxpayer, in good faith, relies on: advice (other than a ruling) given to the taxpayer or its tax agent; or a statement in a publication approved in writing by the Commissioner and the statement or publication, is labelled as non-binding (if not stated to be a ruling and has no other legislative authority it constitutes non-binding advice) the taxpayer is not liable to pay the general interest or the shortfall interest charges.²⁰⁵ This does not prevent the Commissioner from issuing an assessment that reflects what he considers to be a correct application of the tax laws which may be inconsistent with such non-binding advice. The status of non-binding advice was authoritatively stated by the full bench of the Federal Court in *Macquarie Bank*.²⁰⁶ In this case the taxpayer sought declaratory relief (see section 11.2 below) that the Commissioner had not acted in terms of a practice statement that had been issued by him. The court unanimously held:

The power of the general administration of tax legislation given to the Commissioner, by provisions like s 8 of the 1936 Act, s 356-5 of schedule 1 of the 1953 Act and s 44 of the Financial Management and Accountability Act 1997 (Cth) ('1997 Act'), does not permit the Commissioner to dispense with the operation of the law. *The power of general administration in such provisions is not a discretion to modify, or which*

²⁰⁴ Examples include the Inspector-General of Taxation and the Australian National Audit Office.

²⁰⁵ Section 361-5 TAA.

²⁰⁶ *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119. See also *Stewart v The Deputy Commissioner of Taxation* [2010] FCA 402 [9, 10].

*modifies, the liability to tax imposed by the statute...*the practice statement could not fetter the Commissioner's duty of assessment or re-assessment where the law operated to impose liability nor could it fetter the lawful process of making an assessment to that end...any failure by the Commissioner to comply with his view in the practice statement will not alter the taxpayer's liability upon an assessment or the Commissioner's duty to assess upon the correct view of the law...*Whatever the sanction may be for the Commissioner not complying with the practice statement, it is not to relieve the taxpayer of the liability correctly imposed by the Act...*(Emphasis added).

The court made it clear that non-binding documents cannot impede the obligations of the Commissioner to assess in terms of the tax laws. They are published under the Commissioner's powers of general administration of the tax laws under section 8 ITAA 36 or equivalent legislation and have no binding legal effect. The Commissioner is obliged to assess in terms of the tax laws and non-binding advice cannot impact on that obligation.

The issue that arises in circumstances such as this is whether taxpayers have any rights against the Commissioner when he acts contrary to published non-binding advice.

It is in this context that the High Court in *Haoucher* considered the concept of 'legitimate expectations.' As will be seen below this phrase no longer finds favour with the High Court. It prefers to speak of a person's right to be treated procedurally fairly when dealing with regulators such as the ATO. This report will use both phrases interchangeably. Deane J noted that 'the word "legitimate" is prone to carry with it a suggestion of entitlement to the substance of the expectation whereas the true entitlement is to the observance of procedural fairness before the substance of the expectation is denied.'²⁰⁷ McHugh J noted that:

A legitimate expectation that a person will obtain or continue to enjoy a benefit or privilege must be distinguished, however, from a mere hope that he or she will obtain or continue to enjoy a benefit or privilege. *A hope that a statutory power will be exercised so as to confer a benefit or privilege does not give rise to a legitimate expectation sufficient to attract the rules of natural justice: South Australia v. O'Shea [1987] HCA 39; (1987) 163 CLR 378, at p 402. To attract the operation of the rules of procedural fairness, there must be some undertaking or course of conduct acquiesced*

²⁰⁷ *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] HCA 22; (1990) 169 CLR 648 [2].

*in by the decision-maker or something about the nature of the benefit or privilege which suggests that, in the absence of some special or unusual circumstance, the person concerned will obtain or continue to enjoy a benefit or privilege (Emphasis added).*²⁰⁸

Accordingly the requirements of procedural fairness may not require that ‘each person affected be accorded an effective opportunity of being personally heard before a decision is made but nonetheless requires that the decision-maker be, and appear to be, personally unbiased.’²⁰⁹ This right to procedural fairness does not give rise to substantive rights.²¹⁰

The High Court has recently had an opportunity of revisiting the concept of ‘legitimate expectations’ in *WZARH*.²¹¹ Kiefel, Bell and Keane JJ stated:

The use of the concept of “legitimate expectation” as the criterion of an entitlement to procedural fairness in administrative law has been described in this Court as “apt to mislead” “unsatisfactory” and “superfluous and confusing”...

More recently, in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*, Gummow, Hayne, Crennan and Bell JJ referred to the discussion of the concept by four members of the Court in *Lam*, and said that:

“the phrase ‘legitimate expectation’ when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded.”...

The “legitimate expectation” of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness. It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions. Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the

²⁰⁸ *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] HCA 22; (1990) 169 CLR 648 [16].

²⁰⁹ *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] HCA 22; (1990) 169 CLR 648 [2].

²¹⁰ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 [148].

²¹¹ *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 [28-30].

decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made (Emphasis added).

Gaegler and Gordon JJ in *WZARH* stated:

The concern of procedural fairness, which here operates as a condition of the exercise of a statutory power, is with procedures rather than with outcomes. It follows that a failure on the part of an assessor or reviewer to give the opportunity to be heard which a reasonable assessor or reviewer ought fairly to give in the totality of the circumstances constitutes, without more, a denial of procedural fairness in breach of the implied condition which governs the exercise of the Minister's statutory powers of consideration.²¹²

If the Commissioner changes his view contained in non-binding advice he should give notice of this to all taxpayers. It seems he need not communicate with each taxpayer separately. Even if there were a taxpayer directly impacted by this change the general notification should suffice. What constitutes procedural fairness depends on all the circumstances of the case including the statutory basis for the administrative decision. This was highlighted in the Federal Court in *Macquarie Bank* sitting as a court of first instance (accepted by the full bench on appeal) where the following was said:

There is some analogy here with the instructions (termed “Guidelines”) which successive Ministers for Immigration have issued to their officers, as to classes of cases that are to be brought to the Minister’s attention for the possible exercise of one of the non-compellable ministerial discretions under the *Migration Act 1958* (Cth). This Court has repeatedly refused to entertain attempts to enforce those instructions by seeking orders against the officers based on alleged non-compliance with them...The matter must be considered in the appropriate statutory context. *That context relevantly includes the comprehensive review and appeal mechanisms in Part IVC. The present case does not have anything comparable to the special features of Plaintiff M61 just mentioned.* In particular, a decision of the kind contemplated in PS LA 2011/27 may affect whether the ATO takes “compliance action” but does not

²¹² Ibid [55-57].

have a necessary or direct relationship with any particular exercise of statutory power (Emphasis added).²¹³

The fact that there are contained in Part IVC TAA challenge rights to assessments suggests that the possibility of judicial review due to a lack of procedural fairness is unlikely to be successful where an assessment or a step leading to an assessment is in issue. Further support is found in the judgment of Justice Robertson who held that:

There is specific authority for the proposition that a challenge under s 39B of the *Judiciary Act* to an assessment is not maintainable on the ground of mere denial of procedural fairness (references omitted).²¹⁴

In *Chemical Trustee*, the Court noted that ‘the effect of sections 175 and 177 is to preclude judicial review of assessment decisions in proceedings under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth) for error of law, failure to take into account mandatory relevant considerations and breaches of procedural fairness.’²¹⁵

The position may be different where a challenge under Part IVC is not available. In this case, if a court finds, having reviewed all the circumstances, that there was a lack of procedural fairness in the manner in which the Commissioner has acted towards a taxpayer the Commissioner’s decision could be set aside with an order that he reconsider the matter. This appears from the judgment of Justice Perram in *Stewart* where the following was said:

The only remedy available for a breach of the rules of procedural fairness would be an order setting aside the Commissioner’s decision to depart from the concession with a concomitant order to reconsider his decision to do so: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 21 [66]-[67] per McHugh and Gummow JJ, 48 [148] per Callinan J; *Rush v Commissioner of Police* [2006] FCA 12; (2006) 150 FCR 165 at 186-187 [82] per Finn J.²¹⁶

The relief available to a taxpayer not because there was some ‘expectation’ on the part of the taxpayer that the Commissioner would act in a particular way but rather one or more of the grounds for judicial review had been made out.

²¹³ *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887 [85-86].

²¹⁴ *Pratten v Commissioner of Taxation* [2015] FCA 1357 [23].

²¹⁵ *Deputy Commissioner of Taxation v Chemical Trustee Ltd* [2010] FCA 1297 [49].

²¹⁶ *Stewart v The Deputy Commissioner of Taxation* [2011] FCA 336 [13].

The decision of the Court of Sessions in Scotland in *Al Fayed* raises an important issue when considering legitimate expectations of taxpayers.²¹⁷ In this case the revenue authorities in Scotland had entered into a forward tax agreement with the petitioners in 1997 under which the petitioners agreed to pay specified annual sums in respect of specified future years of assessment. The Revenue agreed to accept those sums in lieu of any income tax and capital gains tax to which the petitioners might otherwise have been liable. This agreement was ultra vires the powers of the Revenue and was cancelled by the Revenue. The taxpayers sought to contend that they had a legitimate expectation that the Revenue would abide by the agreement. The court unanimously said:

We have already reached the conclusion that, as the 1997 Agreement was ultra vires, the respondents did not have any discretion to continue to abide by the Agreement once they knew that it was ultra vires. A decision taken at that stage to continue to be bound by the Agreement for the remainder of its contractual duration would, in our opinion, have been outwith the powers of the respondents. *However, under our domestic law a legitimate expectation can only arise on the basis of a lawful promise, representation or practice. There can be no legitimate expectation that a public body will continue to implement an agreement when it has no power to do so.* In our opinion, the petitioners could not have had a legitimate expectation that the respondents would have adopted a course of action which was outwith their powers, and continued to maintain a contract which was unlawful. *While the petitioners may well have had an expectation, it was not, in the particular circumstances of this case and according to our common law, a legitimate expectation.* Accordingly, we consider that the petitioners' case based on a breach of legitimate expectation must fail. We should add that, if the petitioners did have a legitimate expectation that the respondents would abide by the terms of the 1997 Agreement until its stipulated expiry date, we are satisfied, for the reasons which we have already set out, that the respondents' decision to bring the Agreement to an end in June 2000 was not unfair and was not an abuse of power (Emphasis added).²¹⁸

²¹⁷ *Al Fayed and others v Advocate General for Scotland (representing the Inland Revenue Commissioners)* [2004] STC 1703.

²¹⁸ *Ibid* [119].

If the act of the Commissioner in respect of which it is said the legitimate expectation arises is outside his powers no legitimate expectation can arise. Even though *Al Fayed* is a Scottish case it is submitted an Australian court would come to a similar conclusion.

Having regard to the provisions of the tax laws and the inferences of legislative intent that can be drawn from these laws²¹⁹ coupled with the judgment in *Macquarie Bank* it would appear that other than for rulings or other legislative determinations made by the Commissioner, publications by the ATO of non-binding advice have no practical utility when considering proceedings against the Commissioner when the act complained of is a step in making an assessment or the issue of an assessment itself. Even if a legitimate expectation is found to be present it seems the Commissioner can discharge his obligations in one of a number of ways. These are: by publicising the fact that he will not act in terms of the non-binding advice; or by ensuring there are no perceptions of bias on his part; or giving the taxpayer an opportunity of putting its case as to why the Commissioner should abide by his previous statement and giving such submissions proper consideration.

There are two statutes that may possibly impact on the foregoing. They are the *Public Governance, Performance and Accountability Act 2013* (PGPA) and the *Public Service Act 1999* (PSA). In his 2014-15 Annual Report the Commissioner acknowledged he is bound by the PGPA and all government employees are governed by the PSA. In all the cases referred to in this section the PGPA was not cited as it only became operative on 1 July 2013. Section 5 of the PGPA states its objects are inter alia:

- (a) to establish a coherent system of governance and accountability across Commonwealth entities...
- (c) to require the Commonwealth and Commonwealth entities:
 - (i) *to meet high standards of governance, performance and accountability; and*
 - (ii) to provide meaningful information to the Parliament and the public; ... (Emphasis added).

²¹⁹ *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475 per Kitto J [13].

In terms of the PGPA officials of a Government entity must perform their tasks in good faith and with reasonable care and diligence: section 25. An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose: section 26. The PSA (section 13 (1-2)) provides all government employees must behave honestly and with integrity, act with care and diligence and not provide false or misleading information in response to a request for information that is made for official purposes. Section 13(4) of the PSA provides that ‘An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws.’ The full bench of the Federal Court in *Denlay* had occasion to deal with this latter subsection of the PSA and stated with reference to the decision in *Futuris*²²⁰ that:²²¹

Their (the majority judgment in *Futuris*) views are concerned with making the point that an assessment which is the result of bad faith towards a taxpayer is not an assessment worthy of that description in the ITAA 1936. It may be accepted that such a purported assessment would be contrary to s 13(4) of the *Public Service Act*. But the reasons of the majority of the High Court in *Futuris* do not support the notion that an assessment, made in good faith on the basis of information believed to be accurate, may be vitiated by reason of a breach of s 13(4) of the *Public Service Act* in the course of obtaining that information.

The Federal Court in *Leaver*²²² amplified the foregoing by stating:

In all respects what the pleading lacks is the fundamental element required to establish a pleading of bad faith, namely, the material facts said to constitute the consciousness or awareness or knowledge of wrongdoing. Neither bad faith nor conscious wrongdoing is established by knowledge, awareness or consciousness of acts, facts or circumstances which the person concerned does not believe to be wrongful. Facts, acts or circumstances may be wrongful and that wrongfulness may result in such other remedies as may be available in respect of that wrongdoing, but wrongdoing does not establish bad faith of the kind contemplated in *Futuris* or *Denlay*.

²²⁰ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

²²¹ *Denlay v Commissioner of Taxation* [2011] FCAFC 63 [80].

²²² *Deputy Commissioner of Taxation v Leaver* [2015] FCA 1454 [9].

It may be arguable that in issuing these non-binding documents the Commissioner is acting under the specific legislative provisions noted above and that he creates a legitimate expectation of future conduct in the mind of a taxpayer. It seems the PGPA and PSA do not afford taxpayer's any rights such as to convert non-binding advice into substantive rights on the part of taxpayers. As was noted in *Broadbeach* 'The notion that the Commissioner can, absent specific statutory authority, 'qualify' the operation of a federal statute is a hopeless contention, bereft of support and having no place in proceedings responsibly drawn.'²²³

Notwithstanding the views expressed above there have been dicta that suggest that non-binding publications by the Commissioner may give rise to a legitimate expectation. An example is *One.Tel*²²⁴ where Burchett J had this to say:

It seems to me that the formality and detail with which the Guidelines are framed and the nature of their subject matter point strongly in favour of the view that they give rise to a legitimate expectation that the Commissioner will conduct himself in the manner he has so carefully set out...The more difficult question is whether there is a legitimate expectation, of the kind held to arise in *Haoucher*,...But here, too, I think the formality and particularity of the Guidelines, together with the Commissioner's own care to set out in them the justification supporting each aspect of them, require the conclusion that they do give rise to such a legitimate expectation...I do not think that natural justice makes the same demand here as it did in *Haoucher*...*a person may be entitled to less than full particulars of the facts and views which may be considered sufficient to deny his expectation* (Emphasis added).

In *obiter dicta* Goldberg J in *Deloitte Touche*²²⁵ said:

A key issue in the proceeding is the relevance of the guidelines in the manual and whether they were complied with by the respondent. It is important to understand the significance of the guidelines for they do not have the status of a legislative enactment but are rather the creation of the Commissioner and the Australian Taxation Office. It is submitted by the respondent that they do not constitute a source of rights. In my opinion, the manner in which they have been promulgated and their contents make it clear that they are, at the least, a relevant consideration to which the respondent and

²²³ *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41.

²²⁴ *One.Tel Ltd v Deputy Commissioner of Taxation* [2000] FCA 270 [42].

²²⁵ *Deloitte Touche Tohmatsu & Ors v DFCT* 98 ATC 5192, 5207.

officers of the Australian Taxation Office must have regard and at the most (without deciding the issue) they are matters which create a legitimate expectation in taxpayers and their professional accounting advisors that they will be complied with according to their terms.

If the views expressed in *One.Tel* and *Deloitte Touche* are correct (particularly where an assessment is not in issue) the publication of non-binding documents possibly does give rise to a legitimate expectation on the part of taxpayers. It seems, however, that the obligation to act procedurally fairly may not be difficult to meet. As noted previously it seems that all that is required to ensure procedural fairness is that the Commissioner must ensure there are no perceptions of bias or give notice that he will depart from the content of the document in issue or give the taxpayer impacted an opportunity of putting its case and giving that case proper consideration. The judgment in *May* could possibly limit this right. The court said

There may well be good reasons of public policy why, as between public officials and persons directly affected by the exercise of a power, such persons should as a rule be notified of decisions exercising that power. But if such an obligation is to be imposed, notwithstanding the obvious practical difficulties it could entail, it is one for parliament, not for the courts, to prescribe. It has not done so to date. Rather our system of judicial review contemplates the very contingency that a person aggrieved by a decision may not receive official notice of it and may only ascertain that it has been made at some later date: see e.g. ADJR Act, s 11(4) and (5); and see *Worthley v Australian Securities Commission* (1993) 11 ACLC 610; (1993) 42 FCR 578.

Fourthly, given the circumscribed scope of the requirements of procedural fairness, we consider that no proper basis exists for calling into question the observations made by judges of this Court in *Sixth Ravini Pty Ltd v FC of T*, in *Allen, Allen & Hemsley v DFC of T*, and in *Minosea Pty Ltd v ASC*, above, that the obligation of procedural fairness does not apply to a decision to issue a notice under s 264(1) or equivalent statutory provisions.²²⁶

It seems if a legitimate expectation does arise then very little may be required of the Commissioner to ensure taxpayers are treated procedurally fairly.

²²⁶ *May v DFCT* 99 ATC 4587 [36-37].

In any event the Commissioner currently puts a caveat at the beginning of some non-binding documents that they are for example only for the use of ATO staff.

There are two types of non-binding documents that require special mention. These documents afford taxpayers some limited form of LPP. They are what are known as the ‘accountant’s concession’ and the ‘corporate board concession.’ These documents and the rights afforded to taxpayers under them are not steps in issuing an assessment (see for example section 9.3.3.1 below).

9.2.1 Accountants’ Concession²²⁷

This is an ‘administrative’ concession granted by the Commissioner, which applies to taxpayer documents prepared by external professional accounting advisors who are independent of the taxpayer. It takes the form of a qualified LPP. Although the ATO has access powers to request documents, there are a certain class of documents which the Commissioner recognises should not be accessed unless there are exceptional circumstances. This is intended to give taxpayers the confidence to communicate frankly with their accounting advisors in discussing their tax affairs.

The accountants’ concession classifies taxpayer documents into three categories:

- source
- restricted source, and
- non-source documents.

Source documents are not covered by the accountants’ concession. They include documents recording details about transactions and arrangements. Examples include ledgers, balance sheets and tax working papers.

According to the ATO, restricted source and non-source documents will only be accessed by the Tax Office in exceptional circumstances. These categories of documents include documents which discuss sensitive issues associated with source documents or documents

²²⁷ This can be accessed at <<https://www.ato.gov.au/general/gen/guidelines-to-accessing-professional-accounting-advisors--papers/#>> .

which provide opinions on an item contained in the client’s tax return, or advice provided, but not acted upon by the taxpayer.

Exceptional circumstances include:

- taxpayer with a history of serious non-compliance or a history of taking aggressive tax positions;
- the anti-avoidance provision may apply;
- reasonable suspicion of tax evasion, fraud, offences under the TAA or any other illegal activity; and
- likelihood of source documents being destroyed or lost.

Justice Perram considered the accountant’s concession, in one of the series of *Stewart*²²⁸ cases and stated:

The concession is not, and could not be, a rule of law. It is plain that no other party apart from the Commissioner is affected by it. In particular, it was not, and it could not have been, suggested that the material seized by the ACC under warrant was immune from production under that warrant for the concession in no way bound the ACC (Emphasis added).

And

Whilst it is true the concession has been held to engender a legitimate expectation that it will be applied so that unnotified departure from it will involve a breach of the rules of procedural fairness (One.Tel Ltd v Commissioner of Taxation [2000] FCA 270; (2000) 101 FCR 548 at 567-568 [42] per Burchett J) in no universe of discourse does it operate so as to prevent the Commissioner from discharging his public obligations under the Act which may well include using the documents seized from Mr Stewart . In effect, the applicants’ argument must rise as high as an assertion that the concession could operate to qualify the operation of the Act itself. Indeed, the applicants do allege that s 8 of the Act, which vests administration of the Act in the Commissioner, “has been qualified by” the concession (see paragraph 3 of the statement of claim).

²²⁸ *Stewart v The Deputy Commissioner of Taxation* [2010] FCA 402 [5-6] and [9-10].

This argument is contrary to axiomatic principles of Australian law. Under that system, Parliament makes the law and the Executive, of which the Commissioner is a part, administers it. *The notion that the Commissioner can, absent specific statutory authority, “qualify” the operation of a federal statute is a hopeless contention, bereft of support and having no place in proceedings responsibly drawn* (Emphasis added).

The accountant’s concession does not apply if the Commissioner obtains documents whether they are restricted or non-source documents from a third party.²²⁹

9.2.2 Corporate Board Concession

The ‘corporate advice on tax compliance risk’ (‘corporate board concession’) is another administrative concession the Commissioner has granted taxpayers. Documents may be protected from access by the ATO if the information within the document is created:

- by advisors (in-house or external);
- for the sole purpose of providing advice or opinion to a corporate board relating to a major transaction, arrangement, corporate system or process; or
- in relation to the likelihood and impact of tax compliance risk, likely view held by the Tax Office or to manage the tax compliance risk.²³⁰

Even if the taxpayer claims the corporate board concession, the ATO can lift the concession in similar exceptional circumstances as apply to the accountant’s concession above.

The report now turns to the AD(JR)A.

9.3 *Administrative Decisions (Judicial Review) Act 1977 (AD(JR)A)*

The broad policy intent of the AD(JR)A is to provide a ‘simple’ path for judicial review of disputes over Commonwealth administrative decisions. This includes taxpayers’ disputes with the Tax Office.

Where an application has been made for a judicial review under the AD(JR)A, section 15(1) states that this:

²²⁹ *Stewart v The Deputy Commissioner of Taxation* [2011] FCA 336.

²³⁰ PS LA 2004/14 ATO access to advice for a corporate board on tax compliance risk.

does not affect the operation of the decision or prevent the taking of action to implement the decision but:

- a. the Court or a Judge may, by order, on such conditions (if any) as it or he or she thinks fit, suspend the operation of the decision; and
- b. the Court or a Judge may order, on such conditions (if any) as it or he or she thinks fit, a stay of all or any proceedings under the decision.

There are a number of criteria that must be met before a claim under the AD(JR)A will be successful. These are considered below.

9.3.1 The Applicant must be a ‘Person Aggrieved’

Section 3 (4) AD(JR)A defines what is meant by an ‘aggrieved person’. Essentially it is a person whose interests are adversely affected by the decision; or a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.

This threshold requirement is a low one. Generally, the courts have taken a wide interpretation of the term ‘person aggrieved.’

9.3.2 The Application must be made in time

The taxpayer generally has 28 days after the day that the document containing the decision is provided, to apply for judicial review in accordance with section 11 AD(JR)A but the court has discretion to extend the time period.

9.3.3 There must be a ‘Decision’ ‘Conduct’ or ‘Failure’ Within Scope of the AD(JR)A

To fall within the ambit of the AD(JR)A a decision must be of an administrative character and made under an enactment: section 3.

The ‘two bars’ of this requirement entail the interpretation by the Courts of what constitutes, first, ‘a decision of an administrative character’ and, second, ‘a decision made under an enactment’. Each is considered below.

9.3.3.1 A Decision of an Administrative Character

Since *Australian Broadcasting*²³¹ it is clear that the decision must be substantive rather than only procedural in character. It cannot involve just a step in the course of reasoning toward an ultimate decision.

ATO decisions that have been found to be of an administrative character include decisions to:

- exercise section 353-15 TAA access powers;
- issue a section 353-10 TAA notice;
- institute court recovery action for unpaid tax; and
- prosecute persons under various offence provisions.

Tax Office determinations made under Part IVA ITAA 36 (the general anti-avoidance rule) and interim Tax Office audit reports have been found to form part of the process of making an assessment, and so are not reviewable under the AD(JR)A.²³² Expressions of opinion are not amenable to review under the AD(JR)A.²³³

9.3.3.2 A Decision Made under an Enactment

The term enactment mostly covers Commonwealth Acts and Ordinances, by-laws and instruments made thereunder.

A decision will only have been made under an enactment if it has been made under the authority of a particular provision in the relevant legislation. In considering whether or not this has been the case, the Courts look to the immediate or proximate source of power rather than to an ultimate source residing in the Federal legislation.

Sections 8 of the ITAA 36 (and similar provisions in other tax laws) are problematic. It provides that the Commissioner shall have the general administration of the Act. The view today is that acting under these provisions is not a decision under an enactment.²³⁴

²³¹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321

²³² *Meredith v FC of T & Ors* 2002 ATC 4730.

²³³ *Pegasus Leasing Ltd v FCT* 91 ATC 4972.

²³⁴ *Knuckey v FC of T* 97 ATC 4911; *PFTF Stock Pty Ltd v Deputy Commissioner of Taxation* [2010] FCA 557.

9.3.4 The Decision Must Not Be ‘Excluded’ from the Scope of the AD(JR)A

Certain decisions which otherwise would be reviewable are expressly excluded from review. These exclusions are contained in Schedule 1 to the AD(JR)A. Those concerning tax include:

- e. Decisions making or forming part of the process of making, or leading up to the making of assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending or refusing to amend, assessments or calculations of tax, charge or duty, under any of the *Income Tax Assessment Act* 1997, *ITAA* 36 and TAA, but only so far as the decisions are made under Part 2-35, 3-10 or 4-1 in Schedule 1 to that Act; and
 - ga. decisions under section 14ZY TAA disallowing objections to assessments or calculations of tax, charge or duty; and
 - gaa. decisions of the Commissioner of Taxation under Subdivision 268-B or section 268-35 TAA.

To overcome this hurdle the taxpayer must prove the decision is ‘so far removed from the assessment process that it does not, in the relevant sense, lead up to the making of an assessment.’²³⁵

9.3.5 The Applicant Must Establish One of the ‘Grounds for Relief’ Set Out in the AD(JR)A

The grounds of review outlined in sections 5 and 6 of the AD(JR)A are primarily the same. These include:

- (a) a breach of the rules of natural justice;
- (b) procedures that were required by law ... were not observed;
- (c) [the decision-maker] ... did not have the jurisdiction to make the decision
- (d) the decision was not authorized by the enactment in pursuance of which it was purported to be made;

²³⁵ *Intervest Corporation Pty Ltd v Commissioner of Taxation* (1984) 3 FCR 591.

- (e) [the decision-making involved] ... an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(Subsection 5(2) identifies the following situations where there will be such an improper exercise of the power:

- taking an irrelevant consideration into account in the exercise of a power
 - failing to take a relevant consideration into account in the exercise of a power;
 - an exercise of a power for a purpose other than a purpose for which the power is conferred;
 - an exercise of a discretionary power in bad faith;
 - an exercise of a personal discretionary power at the direction or behest of another person;
 - an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
 - an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power (Commonly referred to as the *Wednesbury* principle-see section 9.6 below);
 - an exercise of a power in such a way that the result of the exercise of the power is uncertain, and
 - any other exercise of a power in a way that constitutes abuse of the power.)
- (f) the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) the decision was induced or affected by fraud;
- (h) there was no evidence or other material to justify the making of the decision;
- (j) the decision was otherwise contrary to law.

Section 7 AD(JR)A refers to a situation where the decision maker has a duty to make a decision, but has failed to make the decision. If there is no prescribed period in which the decision maker has to make the decision, then there is a ground of relief for unreasonable delay in making the decision. If there is a prescribed period in which the decision maker has

to make the decision, and it has expired, then there is a ground of relief for failing to make a decision within the prescribed period.

9.3.6 The Exercise of the Court’s Discretion to Grant Relief

If the applicant has satisfied the previous five requirements the courts have considerable discretion as to whether or not to grant the relief. If the taxpayer has some other form of relief available the court would probably exercise its discretion against the taxpayer except in exceptional circumstances.²³⁶ As to the form of relief available to a taxpayer the High Court in *Park Oh Ho*²³⁷ noted that:

In that regard, it is relevant to mention that both declaratory and injunctive orders, as distinct from an order for damages, can readily be seen as appropriate remedies of judicial “review” of administrative decisions and actions.

The foregoing would suggest damages are not appropriate orders when administrative actions are reviewed.

9.3.7 The Right to Reasons for a Decision

Section 13 AD(JR)A is a crucial provision to enable applicants (taxpayers) to seek reasons from a decision maker for any decision. These reasons can be fundamental in determining whether to proceed for example under the AD(JR)A or Part IVC or to take no further action. Specifically, subsection 13(1) provides:

Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Circuit Court under section 5 in relation to the decision may ... request ... a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

Key points to observe from subsection 13(1) are the following:

- the person seeking the reasons must be ‘a person who is aggrieved by a decision.’

²³⁶ See for example *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

²³⁷ *Park Oh Ho v Minister for Immigration & Ethnic Affairs* [1989] HCA 54; (1989) 167 CLR 637.

- a person can request a statement of reasons separate and independently from an application for judicial review. But the person must be ‘entitled’ as per the legislative steps outlined above.

For section 13 to apply a “decision” has to have been made.

9.3.7.1 Requests

The taxpayer must request a statement of reasons. The form and content of the request is not prescribed other than that it must be in writing and it seems the request should be made within 28 days of the decision.²³⁸ Although there is no legislative time limit to request a statement of reasons, section 13(5)(a) allows the decision maker to refuse to provide a statement of reasons if the request is not made within 28 days.

Under section 13(5)(b), where the decision was not provided in writing, the request for a statement of reasons has to be made within a ‘reasonable time after the decision was made.’ Subsection 13(6) specifies that the Courts have to decide what constitutes ‘reasonable’ when the parties cannot agree on this matter.

If the decision maker refuses to provide a statement of reasons because the request was not made within 28 days or within a reasonable time, the decision maker must respond within 14 days from receipt of the request. That response must advise of the refusal and provide reasons for refusing: section 13(5).

9.3.7.2 Responses

Once an entitled person has made their request the decision-maker then has to do one of the following:

- provide the statement within 28 days: section 13(2);

(The statement should make intelligible the true basis of the decision and not camouflage it.)²³⁹

- under subsection 13(7) if the Federal Court is of the opinion the statement does not contain adequate particulars of findings on material questions of fact, an adequate

²³⁸ *Ansett Transport Industries (Operations) Pty Ltd v Wraith* [1983] FCA 179.

²³⁹ *ARM Constructions Pty Ltd v DCT (NSW)* (1986) 17 ATR 459.

reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the court may order the person who furnished the statement to furnish to the taxpayer who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons; or

- under section 13(3), within 28 days either:
 - (i) advise the applicant/taxpayer that they do not believe they are an entitled person, or
 - (ii) seek a court order determining that the applicant is not entitled to a statement.

(Note: in the case of (i), above under subsection 13(4A) the applicant can seek a court order declaring that they are entitled to a statement.)²⁴⁰

Taxpayers should note that section 13(11)(c) excludes any decisions listed in Schedule 2. Relevant to taxation matters are decisions relating to: the administration of criminal justice (item e), decisions to initiate court proceedings to recover unpaid tax and penalties arising under the ITAA 36²⁴¹ (item f) and enforcement of judgments or recovery of money by the Commonwealth (item m).

Section 13(8) states regulations can declare certain decisions or classes of decisions not to be decisions for section 13 purposes. Currently there are no such decisions listed under the *Administrative Decisions (Judicial Review) Regulations 1985*.

Having examined the AD(JR)A it is now time to examine the alternative legislative routes to seek judicial review of a taxation decision. These are:

- a review by the High Court, under section 75 of the Constitution; and
- a review by the Federal Court under section 39B of the *Judiciary Act 1903* (JA).

Claims under the AD(JR)A or JA or Constitution can be in the alternative.

²⁴⁰ Generally see *Re Ansett Transport Industries (Operations) Pty Ltd and Another v Kenneth F Wraith and Others* [1983] FCA 179.

²⁴¹ *Mostyn v DCT* 86 ATC 4930.

9.4 The Constitution²⁴²

9.4.1 Challenging Validity of Tax Laws

Sections 51 (ii), 53 and 55 are important provisions in the Constitution which prescribe Parliaments powers to make laws in relation to taxation. If Parliament enacts laws in breach of the empowering provisions they may be capable of being set aside by the High Court. Section 51(ii) is probably the more important provision and provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) ...
- (ii) taxation; but so as not to discriminate between States or parts of States.

The challenge, if ultimately successful, would bring a matter to a conclusion without having to deal with the merits of an assessment.

Factors the courts take into account in such a challenge are set out below.

First regard must be had to the implied grant of legislative power inherent in the fact that the heads of power appear in a Constitution.²⁴³ It does not matter if a law falls within the ‘core’ of a grant of power under section 51, or within the incidental scope of the power, there is but a single grant. The basic test for validity is whether a sufficient connection has been shown between the law in question and the subject matter of the head of power.

Second whilst the title to an Act, its preamble and statement of objects may sometimes be usefully referred to in aid of a task of constitutional characterisation, they may not usurp the function of the courts. Neither the title nor preamble nor any statutory statement of an Act’s objects can cure constitutional invalidity where the court finds such invalidity to exist. Neither the economic consequences of a statute nor the motive behind its enactment is determinative of its character. The problem in every case is to ascertain from the terms of the law impugned its true nature and character.²⁴⁴

²⁴² *Commonwealth of Australia Constitution Act* (1900).

²⁴³ The general principles, unless otherwise stated, are adapted from the judgment of Kirby J in *Leask v Commonwealth of Australia* 35 ATR 91.

²⁴⁴ *Fairfax v FC of T* [1965] HCA 64; (1965) 114 CLR 1[13].

A tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is negligible.²⁴⁵

Next, tax laws may be unjust or cause harm but provided they meet the constraints prescribed in the Constitution there is no limit to the power of Parliament to enact such laws.

Finally, if taxation is merely secondary to some other objective this does not disqualify a charge from being a tax.²⁴⁶

Accordingly, if Parliament follows the criteria prescribed in the Constitution its power to enact legislation with respect to taxation is unfettered. The purpose or motive of the legislature in passing the enactment is irrelevant. If the statute is one with respect to taxation, it does not matter if the imposition of the tax is inadvertent.

Challenges against legislation as being invalid often turn on whether an exaction is or is not a tax. The High Court has set out what is a tax.²⁴⁷ Although success is rare there have been cases where tax legislation has been found to be unconstitutional.²⁴⁸

This report now turns to the power of the High Court to review acts of the Commissioner.

9.4.2 Section 75 of the Constitution

Under section 75 of the Constitution, the High Court has original jurisdiction in relation to matters where:

- the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party: section 75(iii)
- a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: section 75(v).

These possible remedies are usually only considered by the High Court when, given the circumstances, all other available remedies have been exhausted.

²⁴⁵ Ibid per Kitto J.

²⁴⁶ *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

²⁴⁷ *Matthews v The Chicory Marketing Board (Vic)* (1938) 60 CLR 263 read with *Air Caledonie International and others v Commonwealth of Australia* (1988) 82 ALR 385. Gaudron and Hayne JJ in *Luton v Lessels* [2002] HCA 13 [60] said 'Imposing a financial burden on one group in society for the benefit of another group in society will often constitute a tax.'

²⁴⁸ *Air Caledonie International and others v Commonwealth of Australia* (1988) 82 ALR 385.

Since *Futuris*²⁴⁹ challenges to an assessment can only be made under the Constitution or *Judiciary Act* 1903 (JA) in circumstances where:

- the assessment is provisional or tentative (and even here it is arguable that a taxpayer may be limited to a challenge under Part IVC of the TAA), or
- there has been:
 - conscious maladministration; or
 - deliberate failure to comply with the provisions of the Act; or
 - fraud, bribery or other improper purpose; or
 - misfeasance in public office.²⁵⁰

It is difficult to be successful in cases where there are allegations of the kind that would justify a claim on the grounds set out above. As was noted in *Futuris*:²⁵¹

Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld. Remarks by Hill, Dowsett and Hely JJ in *Kordan Pty Ltd v Federal Commissioner of Taxation* are in point. Their Honours said:

‘The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed, one would hope that this was and would continue to be the case. As Hill J said in *San Remo Macaroni Company Pty Ltd v FCT* it would be a rare case where a taxpayer will succeed in showing that an assessment has in the relevant sense been made in bad faith and should for that reason be set aside.’

The aforesaid was applied and explained by the full bench of the Federal Court in *Denlay* in the following terms:²⁵²

²⁴⁹ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

²⁵⁰ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32. John Bevacqua describes misfeasance as a tort that permits an individual to recover for the loss or damage suffered consequent upon administrative action taken by the holder of public office, if the officer acted maliciously or knew that the action was beyond power and was likely to harm the plaintiff.

²⁵¹ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 [60].

Those observations highlight that their Honours were concerned, in their reference to conscious maladministration, with bad faith in the exercise of the decision-making power under challenge and the need for proof of an allegation of bad faith against the Commissioner or his officers. Their Honours were concerned with actual bad faith, not with some form of “constructive” bad faith established by unwitting involvement in an offence...The observations of the majority in *Futuris* do not support the proposition that any breach of the law by officers of the Commissioner in the course of processes anterior to, or even in the course of, making an assessment, suffices to establish conscious maladministration which is apt to vitiate the assessment. Conscious maladministration, as explained in *Futuris*, involves actual bad faith on the part of the Commissioner or his officers.

9.5 Section 39B of the *Judiciary Act 1903* (JA)

The power of judicial review under section 75 of the Constitution has been given to the Federal Court via section 39B of the JA. The Federal Court’s jurisdiction complements that of the High Court. However, unlike section 75 of the Constitution, section 39B is not ‘constitutionally entrenched’ and so it can be amended or repealed.

Since the decision in *Futuris*²⁵³ the JA may only be used to challenge an assessment in the limited circumstances as described in the previous section.

The grounds of review under the JA or Constitution can be the same as for claims under the AD(JR)A but are not limited to such grounds. The prerogative writs (mandamus, certiorari, prohibition and injunction) discussed in sections 11.3 to 11.6 of this report are examples of the type of relief that may be sought in these types of cases.

9.6 General Comment on Judicial Review

Often the relief where there has been a failure to act procedurally fairly falls under one or more of the AD(JR)A or JA or Constitution.

For example, in *Stewart* the Australian Crime Commission had obtained documents created by the taxpayer’s accountants under a search warrant and had made them available to the Commissioner. The case was concerned with the access the Commissioner had to these

²⁵² *Denlay v Commissioner of Taxation* [2011] FCAFC 63 [76-78].

²⁵³ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 [66].

documents. It was inter alia contended such access was a breach of the accountant's concession (see section 9.2.1 above). The court noted:

But if the Commissioner puts in place decision-making procedures which give the impression that such confidences will be observed then it will generally be procedurally unfair for him to proceed on some other basis without first hearing from the affected person. In such a case, the decision maker's breach of the requirements of procedural fairness will take the exercise of power outside the statutory grant in s 8 of the *Income Tax Assessment Act 1936* (or s 1.7 of the *Income Tax Assessment Act 1997* or s 3A of the *Taxation Administration Act 1953*). In each of those cases there will be an excess of jurisdiction which this Court can remedy under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).²⁵⁴

The taxpayer in *Stewart* also argued that the Commissioner's decision to access these documents was so unreasonable that that no reasonable decision maker could have arrived at it. This is commonly referred to as the *Wednesbury* principle. The High Court explained this principle in *SZMDS*.²⁵⁵

In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. *A court should be slow, although not unwilling, to interfere in an appropriate case.*

²⁵⁴ *Stewart v The Deputy Commissioner of Taxation* [2011] FCA 336 [29].

²⁵⁵ *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16.

What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. *If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.*²⁵⁶ (Emphasis added).

The *Wednesbury* principle is encapsulated in section 5(e) AD(JR)A as one of the grounds for judicial review of an administrative action.

The report now considers whether taxpayers have any rights against the Commissioner under the common-law.

²⁵⁶ Ibid [130-131] per Crennan and Bell JJ.

10. Common Law

There are a range of rights available to entities under the common law. The issue that arises here is whether they extend to taxpayers in their capacity as such. These rights will be considered under different heads.

10.1 Discretions

In *Pickering*²⁵⁷ Cooper J held that:

The respondent when asked to exercise the discretion in favour of the second, third, fourth and fifth applicants was under a legal duty to them to act fairly. In *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, Lord Scarman said (at 651):-

“... I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.”

Dowsett J dealing with the identical issue noted that²⁵⁸:

Different discretions usually involve different considerations. The principle identified by Cooper J appears to be that a discretion should be exercised consistently. It does not follow that different discretions must be exercised so as to produce outcomes which are the same. Further, there is no evidence that the respondent was ever asked to exercise any such discretion or that he declined to do so.

From the foregoing it seems clear that the Commissioner cannot exercise the same discretion differently between persons having identical tax characteristics.

It seems that where the Commissioner exercises discretion a taxpayer is entitled to reasons for the manner in which the discretion was exercised. As Barwick CJ noted:²⁵⁹

²⁵⁷ *Pickering & Ors v FCT* 97 ATC 4893, 4900.

²⁵⁸ *Pickering v Deputy Commissioner of Taxation* [1998] FCA 16905.

²⁵⁹ *Giris Pty Ltd v FC of T* 69 ATC 4015; *Kolotex Hosiery (Aust) Pty Ltd v FC of T* 75 ATC 4028 [6].

However, in my opinion, the Commissioner is under a duty in each case to form an opinion and the taxpayer is entitled to be informed of it, and upon the taxpayer's request, the Commissioner should inform the taxpayer of the facts he has taken into account in reaching his conclusion.

There is nothing exceptional about this and there are legislative provisions that are to similar effect. See for example section 13 AD(JR)A and sections 37 and 38 AATA.

10.2 Can the Commissioner be Prevented from Issuing an Assessment Even if it is Incorrect?

*Lucas*²⁶⁰ was a case where a taxpayer sought to prevent the Commissioner issuing an assessment. It was alleged by the taxpayer that the cause of action relied upon was the right of the plaintiff to prevent the Commissioner from exercising a statutory power when he had no authority to do so. It was said that the Commissioner had no authority or power to assess the plaintiff to additional tax in the manner which it was feared he would attempt to do. Young CJ held that

- to the extent that any duty is owed by the Commissioner that duty is owed not to taxpayers but the Crown; and
- the Commissioner cannot be restrained from issuing an assessment that is incorrect.

Doubt on the validity of *Lucas* was raised in *Biga Nominees*.²⁶¹ *Biga Nominees* was a case where the respondent sought declaratory relief that a certain vehicle was exempt from sales tax under legislation passed in the 1930's. The Commissioner argued inter alia that the taxpayer had no standing to approach the court for relief as the Commissioner owed a duty only to the Crown. This legislation did not have provisions equivalent to Part IVC TAA and an assessment could not be challenged in *Biga Nominees*. The court found in favour of the taxpayer. This case is distinguishable as under the current legislation Part IVC is the only way (subject to some minor exceptions) an assessment can be challenged.

Gyles J had occasion²⁶² to revert to this issue in *Young*²⁶² where the Commissioner had indicated he would no longer allow deductions for certain types of transactions. The taxpayer

²⁶⁰ *Lucas v. O'Reilly* 79 ATC 4081.

²⁶¹ *Federal Commissioner of Taxation v Biga Nominees Pty. Ltd* 88 ATC 4270.

²⁶² *Young v FCT* 2000 ATC 4133 [19-20].

sought declaratory relief that the Commissioner was to assess as he had done in the past. The learned judge said:

The mere fact that the act which it is alleged would be a breach of the law will not take place until a future time does not necessarily establish that a question as to the lawfulness of the act is hypothetical. Whether this is so or not will be influenced by the effect that such an act would have. In the present case, all that is to be done is that an assessment will be issued. There is no other action which will have any directly adverse effect upon the applicant such as would normally be found *quia timet* relief...

This is particularly true where the act in question, assessment, cannot, for relevant purposes, be challenged otherwise than in accordance with Pt IVC of the Taxation Administration Act 1953 (Cth) by reason of the operation of s 175 and s 177 of the Act (references deleted). Whilst, as Dawson J pointed out in Oil Basins Ltd (supra), the sections do not in terms relate to the period anterior to assessment, it would, in my opinion, be anomalous to permit issues which could not be agitated after assessment to be agitated before assessment, when it is only the assessment which gives effect to the unlawfulness so far as the applicant is concerned. (Emphasis added).

The Commissioner cannot be prevented from issuing an assessment even if incorrect. Part IVC TAA provides the remedy if an assessment is incorrect.

The report now turns to the vexed question whether the Commissioner owes taxpayers a duty of care.

10.3 Is a Duty of Care Owed to Taxpayers?

If a duty of care is owed by the Commissioner to a taxpayer then, in the event of breach of that duty, an action for damages or possible other relief may lie against the Commissioner. This section seeks to determine whether such a duty is owed.

In *Crimmins*²⁶³ McHugh J set out 6 questions the answers to which, in the learned judge's opinion, would indicate whether an entity such as the ATO would owe taxpayers a duty of care in their capacity as taxpayer. The questions were:

²⁶³ *Crimmins v Stevedoring Committee* [1999] HCA [93].

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
5. Would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? If yes, then there is no duty.
6. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g., the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.

Each of these questions and their answers suggests the ATO would not owe such a duty.

Hayne J in *Crimmins* noted:²⁶⁴

Put at its most general and abstract level, the fundamental reason for not imposing a duty in negligence in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private or individual focus. To impose a private law duty will (or at least will often) distort that focus. This kind of distinction might be said to find reflection in the dichotomy that has been drawn between the operational and the policy decisions or functions of public bodies. And a quasi-legislative function can be seen as lying at or near the centre of policy functions

²⁶⁴ Ibid [292].

if policy and operational functions are to be distinguished. But as more recent authority suggests, that distinction may not always be useful and I do not need to apply it in deciding the present matter (Emphasis added).

In *Crimmins* Gaudron J noted that a factor to be considered when seeking to determine if a duty of care is owed is to determine ‘whether the powers and functions conferred on the Authority are compatible with the existence of that duty.’²⁶⁵

The foregoing suggests the Commissioner does not owe such a duty to taxpayers in the performance of his duties in administering the tax laws. *Bevacqua* appears to be of the same view where he notes that:

There is the policy question of statutory intent and statutory context. In tax, this translates to a concern with assessing whether and to what extent a tortious duty of care to taxpayers is compatible with the public duties and powers of the Commissioner set out in tax and tax administration legislation. It is the judicial approach to determining this public policy issue which has provided an apparent extended scope of immunity from tortious suit for the Commissioner of Taxation.²⁶⁶

Finally on the issue that the Commissioner owes taxpayers a duty of care such as to found a claim in tort was considered in *Harris*²⁶⁷ where Grove J said:

I deal first with negligence. There is no identified duty of care specified as being owed by the defendants to the plaintiff. Such a duty is not established by reference to proclamations such as the Taxpayers Charter which express aims of treating citizens from whom tax is to be levied, fairly and reasonably. Even if there was a departure from some standard specified in such a document, it could not vest a private right to recover tort damages in a person affected by the departure. In recent times the determination of the existence of a duty of care has been directed to be established by recognition of novel areas of duty on an incremental or case by case basis: *Perre v Apand Pty Limited* [1999] HCA 36; 1999 198 CLR 180; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 1999 200 CLR 1. There is no basis

²⁶⁵ *Ibid* [18].

²⁶⁶ *Bevacqua* gives detailed consideration to claims for negligence against the Commissioner. John Bevacqua, Taxpayer rights to compensation for tax office mistakes, CCH and ATTA Doctoral series No3, *CCH Australia Ltd*.

²⁶⁷ *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550.

upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act. The pleading does not suggest that the steps taken were outside of the scope of the Act. There is no identified act or omission which could give rise to an entitlement of the plaintiff to damages against any intended defendant.

The document misconceives the basis upon which damages may be payable to one who suffers loss as a result of an alleged breach of statutory duty. An action for breach of statutory duty is not available to all persons suffering special damage consequent upon a breach of public duty. What must be shown is that the duty was owed to the injured party at least in the sense that the duty was created for the benefit of a class of person less extensive than the general public of which the injured party was a member. To state this is not to imply that there can be discerned any asserted breach for which damages would be available to a member of a definable class. I have already commented that much of the verbiage in the pleading adverts to alleged procedural unfairness for which tort damages are not an available remedy. There is nothing in this pleading, whether referring to statute or regulation, which could vest a cause of action for damages in the plaintiff.²⁶⁸

Bevacqua's views on the policy questions to be considered in connection with the issues of statutory intent and statutory context reinforce the views expressed in this report that the Commissioner does not owe taxpayers a duty of care. Bevacqua is of the view that these questions translate to a concern with assessing whether and to what extent a tortious duty of care to taxpayers is compatible with the public duties and powers of the Commissioner set out in tax and tax administration legislation. It is the judicial approach to determining this public policy issue which has provided an apparent extended scope of immunity from tortious suit for the Commissioner of Taxation.²⁶⁹

The foregoing suggests that it is very difficult to find any duty of care that the ATO might owe to taxpayers in performing its functions in administering the tax laws. Further the recent decisions which appear to give the ATO and its administration of the tax laws primacy

²⁶⁸ *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550 [12, 13].

²⁶⁹ See for example *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550.

reinforce this view.²⁷⁰ To the extent such a duty exists it will be very difficult for a taxpayer to be successful in any claim against the ATO.

A related issue is whether the Commissioner can be held vicariously liable for the acts or omissions of ATO staff that cause physical or property damage to a taxpayer in circumstances where the Commissioner or more properly ATO staff go outside the ambit of the powers granted to them, such as in enforcing rights under section 353-10 TAA. This is considered next.

With claims other than for pure economic loss (considered in section 10.4 below) Gummow and Hayne JJ in *Lepore*²⁷¹ note, after an extensive review of the law relating to vicarious liability:

For present purposes, it is enough to conclude that when an employer is alleged to be vicariously liable for the intentional tort of an employee, recovery against the employer on that basis should not be extended beyond the two kinds of case identified by Dixon J in *Deatons*: first, where the conduct of which complaint is made was done in the intended pursuit of the employer's interests or in the intended performance of the contract of employment or, secondly, where the conduct of which complaint is made was done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having.

If claims for personal injury or damage to property were made arising from the administration of the tax laws it is possible the ATO staff member may have acted outside the purpose for which the servant was employed. If, in the unlikely event an ATO staff member acted in such a way that caused damage (and acting within the course and scope of their employment with the ATO) the Commissioner would be liable.

Further in *Futuris* the majority noted that:²⁷²

The issue here is whether, upon its proper construction, s 175 of the Act brings within the jurisdiction of the Commissioner when making assessments a deliberate failure to comply with the provisions of the Act. A public officer who knowingly

²⁷⁰ See for example *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41, *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 [60].

²⁷¹ *New South Wales v Lepore* [2003] HCA 4 [239].

²⁷² *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 [55].

acts in excess of that officer's power may commit the tort of misfeasance in public office in accordance with the principles outlined earlier in these reasons. Members of the Australian Public Service are enjoined by the Public Service Act (s 13) to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest. These considerations point decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms.

The foregoing reflects the view that the provisions of the tax laws providing for the conclusive nature of assessments do not preclude claims for misfeasance in public office (a deliberate failure to administer the law according to its terms). This is subject to what was stated by the majority in *Mengel*²⁷³ who noted that:

So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, *he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability* (Emphasis added).

It seems if a claim for misfeasance in public office were instituted, only the tax officer concerned would be liable. If the ATO accepts some form of liability or indemnifies the member of staff that is a different issue.²⁷⁴

The report now turns to claims for pure economic loss.

10.4 Pure Economic Loss

This part first considers the Scheme for Compensation for Detriment caused by Defective Administration and then looks to claims for pure economic loss.

²⁷³ *Northern Territory v Mengel* [1995] HCA 65 [60].

²⁷⁴ See for example *Young and Commissioner of Taxation* [2008] AATA 155 [2].

10.4.1 Scheme for Compensation for Detriment Caused by Defective Administration

The Commissioner accepts that where a claim under the Scheme for Compensation for Detriment caused by Defective Administration arises it could be as a consequence of a legal liability (for example, negligence).²⁷⁵ Such claims arise inter alia as a consequence of the executive power of the Commonwealth under section 61 of the Constitution and the PGPA. If a claim is made under the Scheme for Compensation for Detriment caused by Defective Administration, the relevant Minister and possibly the Commissioner, in their absolute discretion, may make an award in favour of a taxpayer if that taxpayer has suffered detriment as a result of defective administration. The prospects of success are slim in these circumstances.

This section now reviews claims for pure economic loss.

10.4.2 Claims for Pure Economic Loss

McHugh J describes pure economic loss in the following terms:

Where a defendant knows or ought reasonably to know that its conduct is likely to cause harm to the person or tangible property of the plaintiff unless it takes reasonable care to avoid that harm, the law will prima facie impose a duty on the defendant to take reasonable care to avoid the harm. Where the person or tangible property of the plaintiff is likely to be harmed by the conduct of the defendant, the common law has usually treated knowledge or reasonable foresight of harm as enough to impose a duty of care on the defendant. Where a person suffers pure economic loss, however, the law has not been so willing to impose a duty of care on the defendant. By pure economic loss, I mean loss which is not the result of injury to person or tangible property.²⁷⁶

The manner in which the tax legislation has been drafted and interpreted by the courts suggests that few claims, if any, for monetary compensation as a consequence of pure economic loss would be entertained. There are various reasons for this such as the need to

²⁷⁵ Applying for Compensation < <https://www.ato.gov.au/Forms/Applying-for-compensation/> > (Last modified 5 May 2015).

²⁷⁶ *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180 [73].

avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class.²⁷⁷

It seems that to the extent conduct of the Commissioner or any staff of the ATO acting in their capacity as such gives rise to a claim in tort it will usually be for pure economic loss and then generally for negligent misstatement such as might occur when the Commissioner issues non-binding statements and a taxpayer relies on them. A majority of the High Court in *San Sebastian*²⁷⁸ had this to say about claims of this nature:

There is a special problem in defining the circumstances in which a duty of care arises in the context of statements. One facet of this problem is that it is more difficult to apply the standard of reasonable foreseeability to the consequences which flow from the making of a statement, than it is to apply that standard to the consequences which flow from acts. This is because damage flows, not immediately from the defendant's act in making the statement, but from the plaintiff's reliance on the statement and his action or inaction which produces consequential loss. A second facet of the problem arises from the propensity of negligent statements to generate loss which is purely economic. The recovery of economic loss has traditionally excited an apprehension that it will give rise to indeterminate liability. And there is also an apprehension that the application of the standard of reasonable foreseeability may allow recovery of economic loss of such magnitude and in such circumstances as to provoke doubts about the justice of imposing liability for it on the defendant.

Claims in tort against the Commissioner for damage to person or property or for pure economic loss seem unlikely to succeed.

The report now discusses the various court processes and similar stratagems that may be of assistance to taxpayers.

²⁷⁷ *Bryan v Maloney* (1995) 182 CLR 609, 618.

²⁷⁸ *San Sebastian Pty Ltd v Minister* [1986] HCA 68 [15].

11. Court Processes

There are a number of processes initiated by the courts which may be of use to taxpayers. Before considering specific aspects, it may be apposite to cite what the majority of the High Court had to say on the ability of the courts to utilise new processes and procedures to meet the exigencies of cases.

The course which the proceedings followed in the Federal Court can only be understood against the background of the unavoidable complexity, costs and delays which would attend the judicial resolution of the appellants' individual claims by separate and individual proceedings. Only then will the desire of the parties (and of the Federal Court itself) to find an efficient way to proffer for judicial decision any justiciable issues common to the many claims before that Court be appreciated. The Constitution does not require this Court to adopt a view of the judicial power which would unduly restrict innovative procedures and flexible remedies made available in the courts to resolve new and complex problems in modern litigation. Within applicable constitutional restraints the procedures of the courts should be allowed to adapt to the necessities of the time. Otherwise the inevitable consequence will be that courts become irrelevant to, or effectively unavailable for, the determination of the disputes of parties such as those now before this Court. That cannot be the purpose and meaning of the Australian Constitution in providing for the Judicature as a branch of the government of the nation.²⁷⁹

This report now considers various court processes. These processes do not constitute rights in themselves (unless otherwise stated) but merely means by which a taxpayer may enforce those rights they have.

11.1 Summary Judgment

A party may apply for summary judgment in the Federal Court (not the AAT) where in that party's opinion it believes the other side has no reasonable prospect of success or no reasonable cause of action or defence is disclosed.²⁸⁰ Such an application may also be made in respect of part of a claim or defence. If an order is made dismissing part of the proceeding, the proceeding may be continued for that part of the proceeding not disposed of by the order.

²⁷⁹ *Bass v Permanent Trustee Co Ltd* [1999] HCA 9 [71].

²⁸⁰ Section 31(A) *Federal Court of Australia Act 1976*; Federal Court Rule 26.01.

In *Spencer*²⁸¹ French CJ and Gummow J dealing with summary judgment said:

Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this Court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success.

Collier J in *Hii* noted that ‘As has been repeatedly observed in cases dealing with summary judgment, the Court ought not lightly make an order for summary judgment.’²⁸²

It is difficult to obtain orders of this type particularly in tax proceedings although the remedy is available. Summary judgment was sought in *McDonald's*.²⁸³ Gyles J considering an application for summary judgment by the taxpayer against the Commissioner said:

[S]ection 14ZZO of the Administration Act provides that the applicant has the burden of proving that the declaration should not have been made or should have been made differently. *An application for summary judgment by a party which bears the burden of proof can be properly described as ambitious, particularly where the proceeding is at an early stage – no evidence has been filed, there has been no discovery, no subpoenas have been issued and where there are no formal pleadings. It must also be borne in mind that the Commissioner has no first-hand knowledge of the underlying facts and circumstances* (Emphasis added).

It seems it would be difficult for a taxpayer to obtain summary judgment against the Commissioner when an assessment is being challenged. An application for summary judgment by the Commissioner was successful in *Roberts*.²⁸⁴

²⁸¹ *Spencer v Commonwealth of Australia* [2010] HCA 28 [28].

²⁸² *Hii v Commissioner of Taxation* [2015] FCA 375 [44].

²⁸³ *McDonald's Australia Ltd v Commissioner of Taxation* [2008] FCA 37.

²⁸⁴ *Roberts v Deputy Commissioner of Taxation* [2013] FCA 1108.

11.2 Declaratory Relief

In order to obtain such relief a party must show various things described by Lockhart J delivering the judgment of the full court in *Aussie Airlines*²⁸⁵ as follows:

- the proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies: *Re Judiciary Act 1903 and Navigation Act 1912* (1921) 29 CLR 257. The answer to the question must produce some real consequences for the parties.
- the applicant for declaratory relief will not have sufficient status if relief is ‘claimed in relation to circumstances that [have] not occurred and might never happen’ or if the court's declaration will produce no foreseeable consequences for the parties (references omitted).
- the party seeking declaratory relief must have a real interest to raise it;
- generally there must be a proper contradictor.

The relief is discretionary.²⁸⁶

Declaratory relief in tax cases is dependent on whether an assessment has or has not been issued. Thus in *Platypus Leasing*²⁸⁷ after an assessment was handed up to the court it dismissed the application for relief. The courts have held that once an assessment has been issued it is precluded from dealing with issues related to such assessments except (subject to limited exceptions) under Part IVC TAA.²⁸⁸

As relief is discretionary, if other relief is available to the taxpayer there is a risk the application will not be granted.

A taxpayer cannot test whether an assessment is valid by means of this process.²⁸⁹

²⁸⁵ *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663 at 670-671.

²⁸⁶ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

²⁸⁷ *Platypus Leasing Inc v Commissioner of Taxation* (2005) 61 ATR 239.

²⁸⁸ *Platypus Leasing Inc & v Commissioner of Taxation* [2005] NSWCA 399.

²⁸⁹ *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 27; (1981) 147 CLR 360.

The applicant for declaratory relief has the burden of proof. This applies equally to the Commissioner if he seeks declaratory relief.

11.3 Mandamus

Where a legal duty is imposed on a public official who refuses to perform that duty an order of mandamus may be granted compelling performance of that duty provided it cannot be enforced by any other adequate legal remedy. A court may order a public officer to exercise a discretionary power but will not direct how that power is to be discharged.

The High Court unanimously held in *Ozone Theatres*²⁹⁰ that in relation to all the prerogative writs (mandamus, certiorari, prohibition and injunction):

The writ...is not a writ of right nor is it issued as of course. There are well recognized grounds upon which the court may, in its discretion, withhold the remedy.

For example, the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld. The question whether there are any grounds for refusing the remedy will be discussed after the question of the jurisdiction of the Court of Conciliation and Arbitration has been considered.

These prerogative writs can be sought separately or in conjunction with each other.

11.4 Certiorari

Certiorari is an order setting aside a decision. If a decision has been made unlawfully an order for *certiorari* may be sought.

²⁹⁰ *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 [6-7].

11.5 Prohibition

This order precludes a party from doing something illegal or continuing with unlawful conduct.

11.6 Injunction

An injunction can prevent or require certain action.

The court is able to grant one or more of these prerogative writs in the same order. As the High Court noted:

The power to grant declaratory and injunctive relief in addition to the power to quash or set aside (with effect from a specified date) an impugned decision is clear. It is to allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of in a way which will achieve what is ‘necessary to do justice between the parties’²⁹¹

The following section is also a form of court process but is not available to taxpayers. Only the Commissioner may avail himself of this form of relief.

11.7 Mareva Injunction

The Commissioner can seek a ‘Mareva injunction’ from a Court to prevent a taxpayer or a related-party dissipating or transferring assets beyond the reach of the Commissioner. The courts accept that, in some cases, a Mareva injunction may be ordered before a tax debt is payable. A Mareva injunction can also impose travel restrictions on a taxpayer. A breach of a Mareva injunction constitutes a contempt of court, and can result in imprisonment.

To obtain a Mareva injunction, five elements must be established:

1. a *prima facie* cause of action;
2. full disclosure is made to the court;
3. there must be assets available, though these need not ever have been in Australia;
4. there is a real risk of dissipation of the assets; and

²⁹¹ *Park Oh Ho v Minister for Immigration & Ethnic Affairs* [1989] HCA 54; (1989) 167 CLR 637 [11].

5. an undertaking is given as to damages.²⁹²

A Mareva order is not there just for the asking. In *Rosenthal*²⁹³ O'Bryan J said:

There must be demonstrated a real danger that the defendant intends to remove assets from the jurisdiction or dispose of assets within the jurisdiction to defeat the plaintiff. One might suppose that the first-named defendant is most apprehensive about the outcome of this litigation. The amount claimed with additional tax is a vast sum. However, the Mareva procedure was not designed to freeze a defendant's assets to make a plaintiff's claim fruitful. There must be evidence to show that the risk to the assets has materialised or will probably materialise.

The High Court has noted that:

In Australia, for many years, *Mareva* orders have been made in aid of the exercise of the specific remedies provided for execution against judgment debtors. Such orders are not interlocutory as they may operate after the recovery of final judgment, yet they are impermanent in the sense that they preserve assets and assist and protect the use of methods of execution and do not substitute for them. In respect of their operation after, as well as before, the making of orders for final relief, the *Mareva* order should, in general, be supported by an undertaking as to damages.²⁹⁴

A Mareva injunction can be issued in conjunction with a garnishee order.²⁹⁵

Although there are a number of jurisdictional facts that must be present for the grant of a Mareva injunction the Commissioner does from time to time apply for such orders and they are generally granted. A recent example is the *Regent Pacific* decision in the Federal Court.²⁹⁶

This report now turns to consider the various forms of estoppel and whether their application affords a taxpayer any rights.

²⁹² See for example *Mareva Compania Naviera SA v International Bulkcarriers SA* (1975) 2 Lloyd's Rep 509; (1980) 1 All ER 213.

²⁹³ *Deputy Federal Commissioner of Taxation v. Rosenthal & Ors* 85 ATC 4031.

²⁹⁴ *Cardile v Led Builders Pty Ltd* [1999] HCA 18.

²⁹⁵ *DFC of T v Zumtar* 93 ATC 4351.

²⁹⁶ *Commissioner of Taxation v Regent Pacific Group Limited* [2013] FCA 36.

12. Estoppel

Rich J has described estoppel in the following terms:

In *Greenwood v. Martins Bank Ltd*, Lord Tomlin said:-

The essential factors giving rise to an estoppel are I think:- (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (3) Detriment to such person as a consequence of the act or omission.

Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.²⁹⁷

There are various forms of estoppel such as being estoppel by judgment (also known as *res judicata*) (considered in the next section), issue estoppel which is an extension of the *res judicata* principle, estoppel by deed and estoppel by representation being estoppel by word or conduct (the most common). Where a judgment has been given, issue estoppel arises not only in respect of the right and cause of action claimed and put in suit (*res judicata*), but also in respect of every issue of fact or law alleged or denied in the proceedings, the existence of which was a matter necessarily decided in the proceedings.²⁹⁸ Estoppel by deed was described in *Case 2/2014*²⁹⁹ as follows:

Estoppel by deed refers to the principle that a party to a deed is prevented from disputing any distinct allegation of fact which he or she made in it. Relevantly, it is a rule of evidence based on the principle that an unambiguous statement in a deed must be taken as binding between the parties and therefore not allowing any contradictory proof. An important qualification, however, is that the statement of fact must be precise and unambiguous and, in this regard, it is not enough to draw inferences from the deed.

²⁹⁷ *Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507 [4].

²⁹⁸ CCH tax library [¶81-125].

²⁹⁹ *Case 2/2014*, 2014 ¶ATC 1-064 [57].

Estoppel by deed should not impact on the Commissioner in performing his tasks in administering the tax laws but if he enters into an agreement and both parties act upon the agreement he cannot be seen to deny its terms and not act accordingly.³⁰⁰ Such a claim could be based on estoppel or simply under the law of contract.

In so far as the Commissioner is obliged to determine the liability to tax and issue an assessment to taxpayers Kitto J noted that ‘No conduct on the part of the commissioner could operate as an estoppel against the operation of the Act.’³⁰¹ Estoppel by representation does not operate against the Commissioner in these circumstances. In *AGC Hill* J stated this principle succinctly when he said:

The last question merely reflects the reasons why there is no room for the doctrine of estoppel operating to preclude the Commissioner of Taxation from pursuing his statutory duty to assess tax in accordance with law. The *Income Tax Assessment Act* imposes obligations upon the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart. In my view the doctrine of estoppel cannot be invoked by a taxpayer so as to prevent the Commissioner assessing pursuant to his duty so to do.³⁰²

No statement or publication (other than rulings) can operate to prevent the Commissioner from assessing according to law.

The Commissioner on the other hand could raise estoppel against a taxpayer but would have to make it clear at the outset that he intends to do so.³⁰³

³⁰⁰ *Queensland Trustees Ltd v Fowles* [1910] HCA 51; (1910) 12 CLR 111.

³⁰¹ *Federal Commissioner of Taxation v Wade* [1951] HCA 66; (1951) 84 CLR 105 [7].

³⁰² *AGC (Investments) Ltd v FC of T* 91 ATC 4180, 4195.

³⁰³ *Saffron v FCT* 91 ATC 4501.

13. Res Judicata

Justice Dixon described this estoppel in the following manner:

A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.

Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. *In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived.* But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J. in *R. v. Inhabitants of the Township of Hartington Middle Quarter*, the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

In the phraseology of Lord *Shaw*, ‘a fact fundamental to the decision arrived at’ in the former proceedings and ‘the legal quality of the fact’ must be taken as finally and

conclusively established (*Hoystead v. Commissioner of Taxation*). But *matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion*. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation (Emphasis added).³⁰⁴

Notwithstanding the foregoing in it was held that the determination of an issue in one income year is not determinative of the identical issue in a different income year.³⁰⁵

An important decision from a taxpayer perspective is the decision in the High Court in *Chamberlain*.³⁰⁶ In this case the Commissioner sued for certain monies owed by virtue of an assessment. The matter was settled and the settlement made an order of court. The Commissioner then sued again for additional monies he contended were owed for the same income year in respect of which an order of court had been made. The majority (the court was unanimous as to the outcome) held:

To determine whether or not the appellant's argument should succeed, it is necessary to identify the cause of action upon which the respondent relied in the first proceeding. There can be no doubt that the respondent sued for a debt due to the Crown by the appellant in respect of income tax assessments and additional tax for late payment for the years in question. Equally, there is no doubt that in the second proceeding the respondent sued for a debt due to the Crown in respect of the same assessments and the same additional tax for late payment. Whether one focuses on the facts supporting a right to judgment or on the right impugned or on the substance of the action, the conclusion is inevitable that the cause of action relied upon by the respondent in the second proceeding is that upon which he had earlier relied. The additional credit reflecting the amount paid by the appellant after judgment was entered in the earlier proceeding was not part of the cause of action; it was simply an amount paid in respect of that cause of action.³⁰⁷

³⁰⁴ *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464.

³⁰⁵ *Orica Ltd & Anor v FC of T* 2001 ATC 4039; *Spassked Pty Ltd v FC of T* 2007 ATC 5406.

³⁰⁶ *Chamberlain v Deputy Federal Commissioner of Taxation* [1988] HCA 21; (1988) 164 CLR 502.

³⁰⁷ *Ibid* [14].

The court then continued:

It may well be true that, as the respondent submitted, estoppel by representation affords no answer to a claim in exercise of a statutory power or duty or a right conferred in the public interest: see *Maritime Electric Co. v. General Dairies, Ltd.* (1937) AC 610, at pp 619-621. And it may well be that no conduct on the part of the Commissioner can operate as an estoppel against the operation of the Act: *Federal Commissioner of Taxation v. Wade* [1951] HCA 66; (1951) 84 CLR 105, at p 117. It is equally true that the Commissioner is not bound by a determination made in respect of an assessment for one year, so far as other years are concerned: *Caffoor v. Income Tax Commissioner* (1961) AC 584, at pp 598-601. Likewise, there can be no issue estoppel against the operation of a statute which creates public rights and duties or which enacts imperative provisions: *Bradshaw v. M'Mullan* (1920) 2 Ir R 412, at pp 425-426; *Griffiths v. Davies* (1943) KB 618; *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* (1964) AC 993, at pp 1015-1017.

All this may be accepted for the purposes of the present appeal but it has little to do with the question at issue. This is not a situation in which all that is involved is the conduct of the respondent or indeed the operation of an Act which imposes liability for income tax and provides the means by which that tax may be assessed and recovered. *The point of the present appeal is that the respondent brought an action against the appellant and recovered judgment against him. He obtained a judgment of the court in which the cause of action upon which he relied merged, thereby destroying its independent existence so long as that judgment stood. And, so long as that judgment stands, it is not competent for the respondent to bring further proceedings in respect of the same cause of action.* It is no answer to say that the court might, if appropriate, stay the second action as an abuse of process. The impediment goes deeper than that; *res judicata* may sustain a plea of abuse of process but in that case the appropriate remedy is to strike out the later action: *Greenhalgh v. Mallard* (1947) 2 All ER 255, at p 257; *Dallal v. Bank Mellat* (1986) QB 441, at pp 451-454. *So long as the respondent chooses, as he does, to take no step to set aside the judgment and to raise no issue in the second action as to the circumstances in which that judgment was obtained, he must accept the consequences of res judicata.* There is nothing in the Act or arising from the position of the respondent as a public officer that precludes the operation of that doctrine. The matter is not one for the

discretion of the Court; by operation of law the cause of action relied upon by the respondent has ceased to exist (Emphasis added).³⁰⁸

If a judgment is granted for tax owed in respect of one income year it seems the Commissioner cannot then seek to claim additional sums contended to be owed in respect of tax in the same income year unless the first judgment is set aside.

The issues of the various bases for estoppel seem to be of little value to taxpayers although depending on the facts estoppel may be used as a shield against a claim by the Commissioner.

³⁰⁸ Ibid [20-21].

14. Unjust Enrichment

A claim:

for an amount paid under fundamental mistake of fact should now be recognized as lying not in implied contract but in restitution or unjust enrichment...In other words, receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment.³⁰⁹

The High Court has also recognised a mistake of law giving rise to such a claim.³¹⁰

The Federal Court has held (obiter) that no claim for unjust enrichment arises for taxes overpaid because they were inconsistent with the statutory scheme.³¹¹ The reasons for this conclusion were:

- the taxpayer's entitlement to a restitutionary remedy does not arise on payment of the tax incorrectly demanded (as it would under the general law), but only when the assessment is set aside.
- section 172 of the *Assessment Act* imposes a duty on the Commissioner to refund tax overpaid in certain circumstances — that is, where by reason of an amendment of an assessment, the taxpayer's liability to tax is reduced. This language suggests an intention to provide an exclusive remedy for the recovery of overpaid tax, within the framework of the objection and appeals process.
- if the taxpayer can recover tax incorrectly assessed under principles of unjust enrichment before the assessment is amended, s 172(1) is rendered nugatory. If, on the other hand, the taxpayer can only claim a remedy founded on unjust enrichment once the assessment is amended, the general law remedy has been curtailed by the statutory scheme to the point where it is unrecognisable.
- if a taxpayer can rely on restitutionary remedies, the statutory limitations on the recovery of interest might be circumvented by more generous provision for interest under the general law.

³⁰⁹ *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17; (1988) 164 CLR 662 [11].

³¹⁰ *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48.

³¹¹ *Lamesa Holdings BV v FCT* 99 ATC 4545 [106].

This issue once again came up for consideration in a case concerning sales tax where the court said:

In any event, I consider that the Interest Act constitutes a code for the recovery of interest on overpaid sales tax. It would be curious if the legislature, in circumstances such as those presently under consideration, intended to restrict the right to recover interest under the Interest Act, as it has in Part III of the Interest Act, yet intended to allow an unrestricted right, derived from the general law, to remain available at the same time.³¹²

The Federal Court had occasion to consider this issue once again in *State Bank*.³¹³ Sales tax was overpaid and the Commissioner agreed to refund the overpayment but declined to pay interest on the overpayment. The *Taxation (Interest on Overpayments and Early Payments) Act* 1983 did not apply to this overpayment. The court said:

This notion is reflected in a passage in the judgment of Deane J in *Pavey & Mathews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257 in which he said the concept of unjust enrichment "constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case". At a later stage of his reasons, Deane J related this conceptual approach to the determination of the quantum of compensation. He said at 263:

"What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted."

The court awarded interest in favour of the taxpayer.

³¹² *Qantas Airways Ltd v FCT* 2001 ATC 4760 [78].

³¹³ *State bank of New South Wales v FCT* 95 ATC 4734.

Unjust enrichment arose in another case involving stamp duty where the Commissioner acknowledged tax has been overpaid but declined to refund the overpayment. The Commissioner contended that she (the Commissioner) had discretion to decline to refund because the relevant statute provided that:

Where the [Commissioner] finds in any case that duty has been overpaid, whether before or after the commencement of the *Stamps Act* 1978 he may refund to the company, person or firm of persons which or who paid the duty the amount of duty found to be overpaid.³¹⁴

The majority (Brennan J with whom Toohey and McHugh JJ concurred) held (the remaining judges delivered separate concurring judgments):

The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter. It may be that, if Royal recovers the overpayments it made, the policy holders will be entitled themselves to claim a refund from Royal of so much of the overpayments made by Royal to the Commissioner as represents the amount paid to Royal by the policy holder. However that may be, no defence of “passing on” is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys.³¹⁵

The *Royal Insurance* case had unusual facts to justify a finding of unjust enrichment.

It seems today, in the vast majority of cases a claim for unjust enrichment would fail. However, depending on the facts there is a slight possibility that a taxpayer may be successful.

³¹⁴ *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 [12].

³¹⁵ *Ibid* [19].

15. Human Rights

The *Human Rights (Parliamentary Scrutiny) Act* 2011 creates a committee of Parliament to examine all legislation to see if it is compatible with human rights and to report their findings to the Parliament. Human Rights are defined broadly in this legislation but do not appear to impact on any tax legislation that has passed through Parliament. The European Court has set aside some tax legislation due to breaches of enshrined rights such as those to property but this is of little precedential value in Australia.³¹⁶

Australian domestic law provides that where there is a ratified treaty it only has effect when incorporated into domestic law.³¹⁷ Thus for any treaty to be enforceable in Australia legislation would have to be passed that provides that the treaty terms are part of the laws of Australia. This has been done in limited circumstances. For example, the International Covenant on Civil and Political Rights is enforceable in Australia but the Universal Declaration of Human Rights does not appear to have been incorporated into legislation.

The tax laws do not impact on any treaties that have been incorporated into Australian law. This statement does not take account of double tax treaties, Division 815 *Income Tax Assessment Act* 1997 (dealing with transfer pricing issues) nor any agreements or legislation that may be passed in relation to the various reports on base erosion profit shifting (usually referred to as BEPS) by the OECD.

The *Australian Human Rights Commission Act* 1986 (HRC) has a schedule incorporating the International Covenant on Civil and Political Rights into Australian law. If a taxpayer contends he or she has been discriminated against in terms which bring that taxpayer within the ambit of the HRC then the Human Rights Commission may investigate the complaint. The Human Rights Commissioner cannot make binding determinations.

³¹⁶ See for example *Tax Law Design and Drafting*, (Ed) Victor Thuronyi, international Monetary Fund 1996 <<https://books.google.com.au/books?id=ab4Q9tktrX0C&pg=PA33&lpg=PA33&dq=human+rights+and+tax+law&source=bl&ots=eq4seuQJtc&sig=FAkt9mHS1QsRR9KLciWyzwFvp5c&hl=en&sa=X&ved=0ahUKEwiyj9jF4e7KAhUFUZQKHV8kBbw4ChDoAQhBMAI#v=onepage&q=human%20rights%20and%20tax%20law&f=false>>.

³¹⁷ Kathrin Bain and Richard Krever, Australia, in *Tax Rules in Non Tax Agreements*, (ed.) Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer and Alfred Storck (IBFD 2012).

*Re Burrowes*³¹⁸ is a case where human rights were an issue. In response to an application for sequestration by the Commissioner due to the non-payment of taxes properly assessed, the taxpayer argued:

- he had paid in the form of shovels; and
- in any event he was not bound by the tax laws of Australia as it involved a violation of his right to conscientiously object against paying tax which was used by the Australian Government to finance military activities and the nuclear arms race. He relied on Article 18 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;
- it was a violation of his legal duty under international law. Obedience to superior orders was no defence to a breach of that law as established at the Nuremburg War Trials;
- the tax was used for nuclear weapons which were illegal pursuant to international treaties to which Australia was a signatory; and
- the non-payment of tax would help prevent the imminent peril of a nuclear holocaust. This was justified by the law of necessity

The court held that:

1. Income tax regulation 58 requires taxpayers to pay income tax by cash, banknotes or cheques. In other words, in the ordinary form of legal tender for debts. Accordingly, the tax debt had not been paid.
2. The Australian system of democratic government assumes that an elected Parliament passes laws which have force in Australia. The rule of law requires that those laws be enforced and does not give individuals the choice of disobeying them because they happen to offend an individual's conscience, however sincere and rational those beliefs may be. Although the International Covenant on Civil and Political Rights appears as a Schedule to the Human Rights and Equal Opportunity Commission Act, it is not part of the domestic law of Australia in the sense of creating legal rights and obligations in Australian courts. It does not provide a legal basis which allows Australian taxpayers at their individual option to withhold any part of the tax which is otherwise payable.

³¹⁸ *Re Burrowes; Ex parte DFCT 91 ATC 5021.*

3. The events of the Nuremburg War Trials are not applicable to the taxpayer's obligations under the Assessment Act. There can be no suggestion that the payment of tax assessed under Australian law involves the breach of international law.
4. Australia's obligations under international treaties are a matter of international relations between nations and do not form part of the Australian domestic law.
5. The defence of necessity relates to a charge of a criminal offence only and does not extend to enable taxpayers to opt out of their obligations because they disagree with the use to which the Government may use tax moneys.

In *Ellenbogen*³¹⁹ there was a claim that the tax laws were racially discriminatory but the claim was dismissed. The head note to the judgment reads:

The court found there was no evidence in this case of a breach of the Racial Discrimination Act. The Commissioner's decision was not made on the basis of the national or ethnic origin of the taxpayer. Neither sec. 51 nor any other provision of the Income Tax Assessment Act deprives a person of any particular race, colour or national or ethnic origin of a right, or limits their enjoyment of a right, enjoyed by persons of any other race, colour or national or ethnic origin.

In addition to the legislation cited above there are further enactments that have reference to human rights. These are:

- *Age Discrimination Act 2004*;
- *Disability Discrimination Act 1992*;
- *Sex Discrimination Act 1984*; and
- *Electronic Transactions Act 1999*.

Having regard to the self-assessment system adopted in Australia and the manner in which the tax laws are administered it is unlikely that there could be a breach of any one of these statutes against a taxpayer in their capacity as taxpayer.

It would seem human rights do not afford taxpayers any rights in their capacity as taxpayers.

³¹⁹ *Ellenbogen v Federal Commissioner of Taxation* 88 ATC 2012.

16. Model Litigant Rules

Pursuant to section 55ZF of the JA the Attorney-General may issue directions that are to apply generally to Commonwealth legal work; or that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter. Under section 55ZF a direction has been issued that inter alia requires the ATO to act as a model litigant in proceedings before the courts and other tribunals. The model litigant rules require that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency.

However, section 55 ZG (2-3) provides that:

2. Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General.
3. The issue of non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.

This would seem to suggest a taxpayer litigant cannot avail itself of the direction issued under section 55ZF.

This was affirmed in *Croker*³²⁰ where the court held that:

It was not necessary for his Honour to explore this issue further because compliance with the directions was not enforceable by Mr Croker and could not be raised in any proceeding other than by or on behalf of the Commonwealth.

However in *Caporale*³²¹ the court noted:

It is important to note the limited field of operation of ss 55ZG(2) and (3). I accept the submission on behalf of the respondent as follows:

To the extent that the common law has recognised any principles that govern or regulate the conduct of bodies politic or other public bodies involved in litigation (as to which see *Melbourne Steamship Co. Ltd v Moorehead* [1912] HCA 69; (1912) 15

³²⁰ *Croker v Commonwealth of Australia* [2011] FCAFC 25 [19].

³²¹ *Caporale v Deputy Commissioner of Taxation* [2013] FCA 427 [51].

CLR 333 at 342; *Scott v Handley* [1999] FCA 404; (1999) 58 ALD 373 at [43]- [44]), ss 55ZG(2) and (3) say nothing about who may seek to agitate, rely upon or enforce obligations said to arise under such principles forming part of the common law.

The sole effect of ss 55ZG(2) and (3) is in relation to obligations that arise under Legal Services Directions made under s 55ZF of the *Judiciary Act*.

*Caporale*³²² suggests the common law protects litigants where the State is a party. The state must treat its subjects fairly and not seek to take unfair advantage of a litigant either because of some error on the part of that litigant or the state. The effect of the foregoing is effectively a common-law reiteration of the model litigant rules. This is exemplified in the following extract from *Scott*:³²³

The second respondent is, as we have noted, an officer of the Commonwealth. As such he properly is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect - and where there has been a lapse therefrom, to exact - from the Commonwealth and from its officers and agencies. The spirit of this “model litigant” responsibility, now long enshrined in a policy document of the Commonwealth, is perhaps best captured in the observations of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* [1912] HCA 69; (1912) 15 CLR 333 at 342:

“I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.”

Insistence upon that standard is a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government (References omitted)...

As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for

³²² Ibid.

³²³ *Scott v Handley* [1999] FCA 404 [43-46].

example, spoken positively of a public body's obligation of “*conscientious compliance with the procedures designed to minimise cost and delay*”: *Kenny's case*, above, at 273; and of assisting “*the court to arrive at the proper and just result*”: *P & C Cantarella Pty Ltd v Egg Marketing Board*, above, at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure: *Yong's case*, above, at 166; of not unfairly impairing the other party's capacity to defend itself: *Saxon's case*, above, at 268; and of not taking advantage of its own default: *SCI Operations Pty Ltd*, above, at 368.

In the present instance the second respondent... has fallen considerably short of the standard properly to be expected of the Commonwealth.

LVR was a tax case where the AAT effectively copied the Commissioner's written submissions in handing down its decision on a challenge. The matter went on appeal on grounds unrelated to this. This problem was ascertained by virtue of the court of appeal reading the transcript of the proceedings with a view to preparing for the hearing of the appeal. The full bench of the Federal Court had this to say about the ATO acting as a model litigant:

Being a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards. This obligation may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations: see notes 2 and 3 to clause 2 of Appendix B to the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* (Cth)). That statutory instrument reflects an expectation the courts in our system of justice have of the executive government and its emanations...Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. *And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar...In our opinion, counsel representing the executive government must pay scrupulous attention to what the discharge of that obligation requires, especially*

where legal representatives who are independent of the agency are not involved in the litigation (Emphasis added).³²⁴

The appeal was upheld inter alia on the grounds raised by the court itself and referred back to the tribunal to reconsider its decision.

A case where a taxpayer was successful in raising the obligation to act as a model litigant is *Comaz*.³²⁵ In this case a crucial witness was not called by an unrepresented applicant. Neither the tribunal nor the Commissioner made the taxpayer aware of the rule in *Jones v Dunkel*³²⁶ that an adverse inference could be drawn in such circumstances. The court on appeal from the AAT said:

One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding.³²⁷

The court continued:

The failure of the Tribunal to even attempt to clarify or explain the manner in which an inference may be drawn, and indeed was drawn, in regard to the failure to call Mr Alderuccio resulted in a breach of procedural fairness of a most serious kind. As I have indicated, any notion that such a defect could have been cured by counsel for the Commissioner merely raising the issue in closing submissions without any further steps being taken, such as advising Ms Hirst of the possibility of re-opening Comaz's case to recall Mr Alderuccio, sorely misses the point. In many ways, the fact that the point was raised in closing submissions, and accepted by the Tribunal in its reasons, only serves to highlight how important the issue was to the conduct of the trial in a

³²⁴ *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 [42].

³²⁵ *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* [2015] VSC 294.

³²⁶ *Jones v Dunkel* [1959] HCA 8.

³²⁷ *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* [2015] VSC 294 [2].

manner which provided procedural fairness...The course followed also raises some concern in relation to the conduct of the Commissioner as a model litigant.³²⁸

*Denlay*³²⁹ has been referred to earlier. The taxpayer sought to set aside a garnishee order issued notwithstanding a stay of proceedings in an earlier decision. The court implicitly regarded this as a breach of the obligation to act as a model litigant stating:

Even so, I am not prepared, in respect of a statement of reasons which makes no reference to a Supreme Court judgment which expressly took into account the prospect that not to grant a stay might render nugatory the then extant taxation appeals, to infer that the decision-maker took this same prospect into account. Instead, what I infer from the absence of reference is that the Commissioner did not take the potential impact on the taxation appeals into account.

I reach that conclusion without regard to the fact that the Denlays did later become bankrupt and that this did result in the dismissal of the taxation appeals without completion of the hearing. What the Commissioner did or did not take into account must be judged by the circumstances prevailing at the time when the decisions under review were made and by reference to the reasons which the decision-maker gave, not by the wisdom of hindsight.

That conclusion does not carry with it the further conclusion that the Commissioner deliberately set out to hamstring the Denlays' ability to complete the prosecution of their taxation appeals. Such a finding ought not to lightly be made, even in a civil proceeding. Such a decision would not just be invalid but might also evidence a grave contempt of court. In this instance, the decisions are grounded in ignorance, not malice. That the Commissioner chose, voluntarily, to disclose his reasons for making the decisions reinforces why the further conclusion is not open.³³⁰

The last paragraph of the above extract is cited as a further example of the reluctance of the courts to find the Commissioner has acted illegally.

Unfortunately for taxpayers the breach of the obligation to act as a model litigant would generally occur during the course of proceedings and possibly even only become apparent as

³²⁸ Ibid [54].

³²⁹ Above n 252.

³³⁰ *Denlay v Commissioner of Taxation* [2013] FCA 307 [76-78].

was the case in *Comaz* in closing argument or even later: See *LVR*. An appeal if there was some breach of natural justice could be successful depending on the prejudice suffered by the taxpayer.

It seems these rules are of assistance to taxpayers but the breach would have to impact significantly on taxpayer litigant rights. It is probably of most value when the taxpayer is unrepresented in the AAT or Federal Court. A legal representative would presumably be aware of these obligations and ensure the Commissioner complied with them. If the AAT made an interlocutory order which would impact the outcome of the hearing in breach of this obligation it is possible applications under the AD(JR)A or JA or Constitution may be possible in limited circumstances.³³¹

³³¹ D Pearce, *Administrative Appeals Tribunal*, 2015 (4th Ed) LexisNexis Australia, 413-415.

17. Conclusion

This report on taxpayer rights under the tax laws has evidenced that there are a few rights available to taxpayers against the Commissioner both under statute and the common-law. These include rights vested in taxpayers under such tax laws as the TAA, AD(JR)A, JA or Constitution. The onus on taxpayers to succeed in many of these cases may often prove difficult to discharge.

Important common law rights such the right to claim LPP have, to some extent, been negated by cases such as *Donoghue*. It seems LPP can only be claimed as a right where there is a provision in a statute that compels production of documents such as section 353-15 TAA. However, if these confidential documents have come into the possession of a third party (the means by which the third party came into possession of these documents appear to be irrelevant) and that party hands these documents to the Commissioner he is entitled and in terms of *Donoghue*, obliged to have regard to these documents in determining the amount by which the taxpayer is to be assessed.

Possibly the best avenue for challenging the Commissioner, other than in court proceedings, would be to note a complaint with the IGT. However, the IGT cannot investigate or look into matters dealing with an assessment. An example given under section 7 (the powers of the IGT) of the *Inspector-General of Taxation Act 2003* is where a taxpayer seeks compensation under an administrative scheme because of action by a tax official during the course of an audit that caused the taxpayer detriment. The Inspector-General can investigate the action that caused the detriment, and any action by a tax official under the scheme.

Appendix A: Offences and Penalties under TAA

Section No.	Obligation/Offence	Strict or Absolute Liability	Penalty for Individual	Penalty for Corporation
8C	A person refuses or fails to furnish an approved form or any information to the Commissioner.	Absolute.	First offence: 20 penalty units. ³³² Second offence: 40 penalty units. Subsequent offences: 50 penalty units or imprisonment for a period not exceeding 12 months, or both.	First offence: 20 penalty units. Second offence: 40 penalty units. Subsequent offences: 250 penalty units.
8D	A person when attending before the Commissioner refuses or fails to answer a question, or to produce a book, paper, record or other document.	Strict.	As for section 8C.	As for section 8C.
8G	N/A	N/A.	If convicted of an offence against section 8C or 8D, the court may, in addition to imposing a penalty, order the person to comply with the requirement within a specified time or at a specified place and time.	As for individual.
8H	Failure to comply with a court order made under section 8G.	Strict.	50 penalty units or imprisonment not exceeding 12 months or both.	250 penalty units.
8HA	If convicted of an offence under section 8C, 8D or 8H and the court is satisfied that the purpose of the offending was to facilitate the avoidance of a tax liability of the convicted person or another person. ³³³	N/A.	In addition to any sentence, a court may order the convicted person to pay twice the amount of tax avoided, or if convicted on two or more occasions, three times that amount.	As for an individual.
8K	A person makes a false or misleading statement.	Absolute.	First offence: 20 penalty units. Second and further offences: 40 penalty units.	As for an individual.
8L	Any accounts, accounting	Absolute.	As for section 8K.	As for

³³² A penalty unit is \$170: *Crimes Act* s 4AA.

³³³ Avoidance in this context means more than a breach of the GAAR: *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23; *Federal Commissioner of Taxation v Westgarth* (1950) 81 CLR 396.

	records or other records do not correctly record and explain the matters, transactions, acts or operations to which they relate.			section 8K.
8N	Recklessly making false or misleading statements to a taxation officer.	N/A.	First offence: 30 penalty units. Subsequent offences: 50 penalty units or imprisonment for a period not exceeding 12 months, or both.	First offence: 30 penalty units. Subsequent offences: 250 penalty units.
8Q	Recklessly presenting accounts and records that do not correctly record and explain the matters, transactions, acts or operations to which they relate.	Strict.	As for section 8N.	As for section 8N.
8T	Records that do not correctly record and explain the matters, transactions, acts or operations to which they relate; or that are (whether in whole or in part) illegible, indecipherable, incapable of identification or are used with the intention to deceive, mislead or obstruct the Commissioner.	N/A.	First offence: 50 penalty units or imprisonment for a period not exceeding 12 months, or both. Subsequent offences: 100 penalty units or imprisonment for a period not exceeding two years, or both.	First offence: 250 penalty units. Subsequent offences: 500 penalty units.
8U	Conduct that results in or facilitates the falsification or concealment of the identity of, or the address or location of a place of residence or business of the person or another person, with any of the intentions specified in section 8T.	N/A.	As for section 8T.	As for section 8T.
8W (1)	If convicted of an offence under sections 8K, 8L, 8N or 8Q and the court is satisfied that the proper amount of a tax liability of the convicted person or another person exceeds the amount that would have	N/A.	In addition to any sentence, a court may order the convicted person to pay to the Commissioner an amount not exceeding three times the amount of the excess where the	As for an individual.

	been the amount of the tax liability if it were assessed or determined on the basis that the statements were not false or misleading, or the relevant accounts or records were correct.		person has been convicted two or more times for a breach of sections 8N or 8Q TAA, and in any other case, twice the amount.	
8W(2)	Where a person is convicted of an offence against section 8T or 8U and the court is satisfied that the purpose of, or one of the purposes of, the conduct was to facilitate the avoidance of an amount of a tax liability of the convicted person or another person.	N/A.	In addition to any sentence, a court may order the convicted person to pay to the Commissioner an amount not exceeding three times the amount of the excess if previously convicted of such an offence, or in any other case, double that amount.	As for an individual.

APPENDIX 3—IBFD REPORT



Australian Government
Inspector-General of Taxation

The protection of taxpayer rights in Australia

Report for the International Bureau of Fiscal
Documentation

DECEMBER 2015

FOREWORD

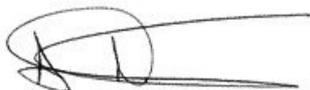
I am pleased to present this report, on the status of taxpayer rights in Australia, which was undertaken at the request of the International Bureau of Fiscal Documentation (IBFD).

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

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

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

December 2015



Ali Noroozi
Inspector-General of Taxation

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

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

Taxpayer identification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Third party confidentiality

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

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

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

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

Taxpayers' right to access and correct personal information

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

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

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

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

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

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

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

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

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

¹⁸ *Privacy Act 1988*, Sch 1, Part 5.

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

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

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

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

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

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

¹⁹ *Privacy Act 1988*, Sch 1, s 12.2.

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

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

²² The myTax functionality is discussed further in section 2.

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

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

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

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

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

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

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

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

Cooperative compliance

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

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

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

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

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

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

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

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

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

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

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

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

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

Assisting taxpayers

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

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

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

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

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

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

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

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

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

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

2. THE ISSUE OF TAX ASSESSMENTS

Dialogue between taxpayers and the Australian Taxation Office

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

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

Use of e-filing

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

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

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

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

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

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

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

⁴⁵ *Ibid*, p 21.

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

3. CONFIDENTIALITY

Legal sanctions for breaches of confidentiality

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

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

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

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

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

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

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

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

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

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

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

Breaches of confidentiality and remedies for victims

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

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

Exceptions to confidentiality and third party access to information

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

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

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

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

⁵³ *Privacy Act 1988*, ss 40A and 52.

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

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

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

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

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

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

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

Taxpayer anonymity

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

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

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

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

⁵⁹ *Parliamentary Privileges Act 1987*.

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

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

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

Legal professional privilege and confidential tax advice

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

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

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

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

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

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

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

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

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

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

4. NORMAL AUDITS

Proportionality

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

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

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

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

Double jeopardy

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

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

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

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

⁷² *Ibid*, pp 58–61.

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

Right to be heard

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

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

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

Principle against self-incrimination and the right to remain silent

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

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

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

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

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

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

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

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

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

Published guidelines to audit

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

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

Initiation of audit

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

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

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

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

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

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

Third party information

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

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

Timeframes of audits

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

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

Technical assistance to taxpayers

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

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

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

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

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

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

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

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

Completion of audit

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

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

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

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

5. MORE INTENSIVE AUDITS

Use of more intensive audits

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

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

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

Taxpayers' right to silence

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

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

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

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

⁹¹ *Taxation Administration Act 1953*, Part IVA.

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

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

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

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

Interception of communications

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

Timeframes of invasive techniques

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

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

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

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

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

6. REVIEW AND APPEALS

Internal review

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁵ *Ibid*, pp 105–107.

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

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

External right of appeal

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

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

Timeframe of reviews and appeals

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

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

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

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

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

¹⁰⁷ *Taxation Administration Act 1953*, Div 4.

¹⁰⁸ *Taxation Administration Act 1953*, Div 5.

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

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

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

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

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

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

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

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

Payment of taxes during appeal

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

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

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

Legal assistance

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

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

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

¹¹⁶ *Ibid*, para [4.2].

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

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

¹¹⁹ Administrative Appeals Tribunal Regulation 2015, Reg 22.

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

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

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

Hearings and tax judgments

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

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

¹²¹ Federal Court Rules 2011, Rule 40.02.

¹²² Federal Court Rules 2011, Sch 3.

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

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

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

7. CRIMINAL AND ADMINISTRATIVE SANCTIONS

Tax penalties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Voluntary disclosures

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

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

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

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

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

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

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

¹³⁴ *Crimes Act 1914*, s 21B.

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

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

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

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

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

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

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

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

8. ENFORCEMENT OF TAX

Payment arrangements

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

Extensions of time, remission of interest and serious hardship

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

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

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

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

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

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

¹⁴³ *Ibid.*

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

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

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

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

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

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

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

Seizing assets

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

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

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

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

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

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

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

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

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

¹⁵⁴ *Ibid*, Annexure E.

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

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

Bankruptcy

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

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

Natural disasters

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

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

¹⁵⁸ *Ibid*, pp 50–59.

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

9. CROSS-BORDER PROCEDURES

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

Double Tax Agreements

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

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

Tax Information Exchange Agreements

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

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

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

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

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

¹⁶⁴ *Ibid.*

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

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters

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

Joint International Tax Shelter Information and Collaboration Network

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

Judicial authorisation

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

Stolen or illegally obtained information

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

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

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

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

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

Mutual Agreement Procedures (MAPs)

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

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

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

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

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

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

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

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

10. LEGISLATION

Retrospective tax legislation

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

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

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

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

Public consultation

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

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

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

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

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

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

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

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

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

¹⁸⁰ Ibid, pp 127-130.

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

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

11. REVENUE AUTHORITY PRACTICE AND GUIDANCE

Taxpayer access to legal materials and rulings

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

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

Retrospective application of revenue authority guidance

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

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

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

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

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

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

12. INSTITUTIONAL FRAMEWORK FOR PROTECTING TAXPAYERS' RIGHTS

Taxpayers' Charter

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

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

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

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

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

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

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

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

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

Scrutiny of the Australian Taxation Office

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

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

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

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

Since its inception, the IGT has been conducting reviews into systemic tax administration issues with recommendations for improvements being made to Government in relation to policy matters or to the ATO on administrative issues. Reports of these reviews are made public¹⁹² and they cover a broad range of topics that are relevant to all taxpayers from the very large businesses to micro businesses and individuals. The IGT has completed 42 reviews to date with two currently in progress.¹⁹³

Generally, the IGT undertakes a review on his own motion based on stakeholder feedback and complaints received. Moreover, the Minister may request or direct the IGT to undertake a systemic review on particular areas or issues. Requests may also be made by the Commissioner, the TPB, by resolution of either or both Houses of Parliament or by resolution of a Committee of either or both Houses of Parliament.¹⁹⁴

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

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

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

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

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

The IGT commenced handling complaints about the ATO and TPB since 1 May 2015. The investigation of single taxpayer complaints was previously the responsibility of the Commonwealth Ombudsman who handles complaints about federal government agencies more generally. The Government decision to transfer this function to the IGT was aimed at enhancing “the systematic review role of the Inspector-General of Taxation and provide taxpayers with more specialised and focused complaint handling for tax matters.”¹⁹⁵

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

In dealing with complaints, the IGT, firstly, distils the key issues from the information provided by the complainant. The IGT then engages with the relevant ATO officers to further narrow the issues and engages with both parties to seek resolution. The IGT cannot direct the Commissioner to take any particular action in respect of a taxpayer nor is resolution possible in every case. However, the IGT seeks to ensure that every complainant is afforded procedural fairness in the handling of their matter.

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

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

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

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

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

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

Organisational structure for the protection of taxpayers' rights

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

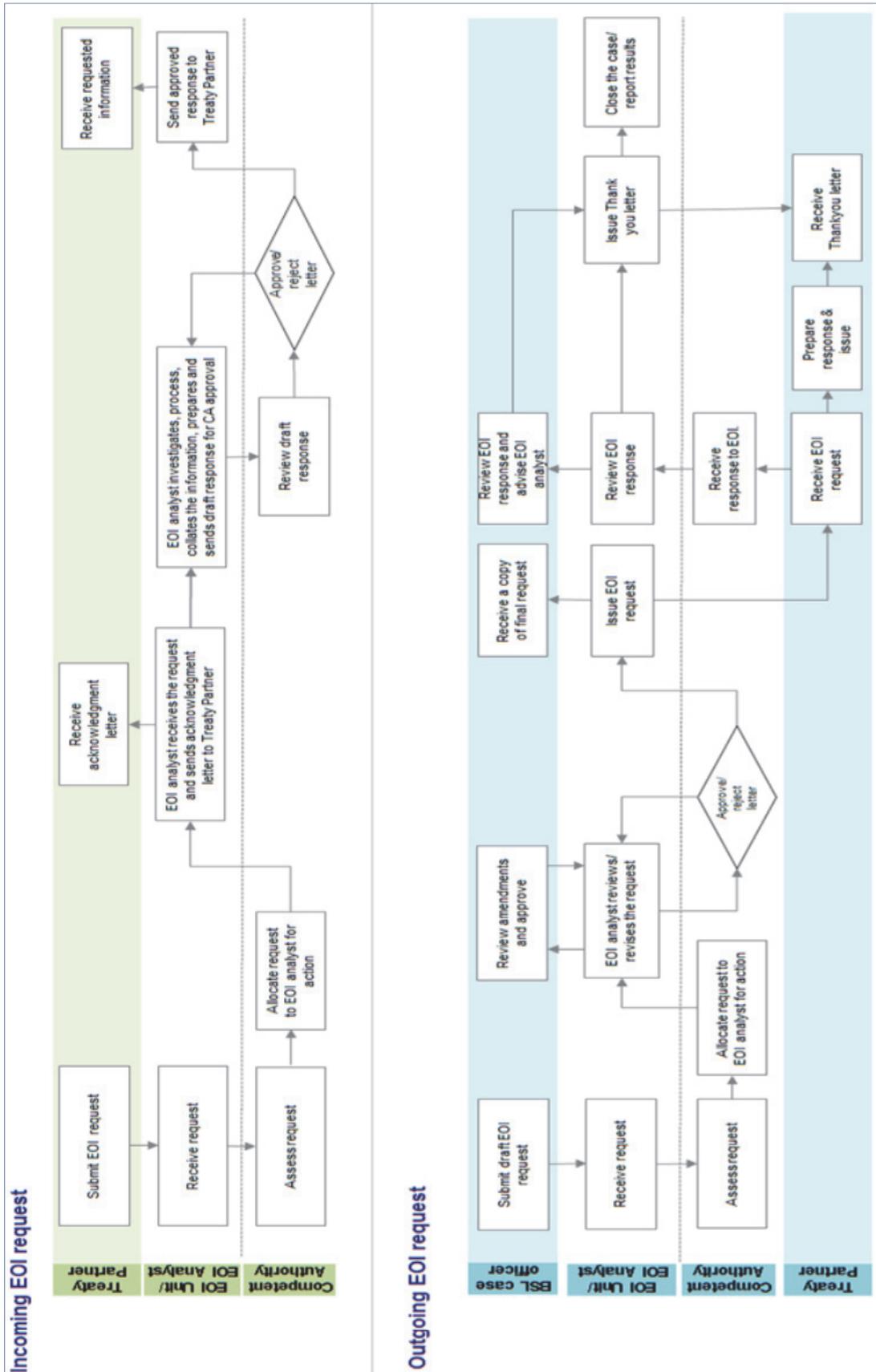
Where taxpayers have made a complaint to the ATO and they disagree with the outcome of that complaint, the complaint may be escalated to a separate ATO Complaint and Escalation Review Unit for an independent review. Although this unit operates in specific locations, it is available to taxpayers nationally.

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

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

¹⁹⁷ *Public Service Act 1999*, s 13.

APPENDIX 4—INCOMING AND OUTGOING EOI PROCESSES



APPENDIX 5—ATO RESPONSE



Australian Government
Australian Taxation Office

Second Commissioner of Taxation

Mr Ali Noroozi
Inspector-General of Taxation
GPO Box 551
SYDNEY ACT 2001

Dear Ali

Review into the Taxpayers' Charter and taxpayer protections

Thank you for the opportunity to comment on the final draft of your report on the review into the Taxpayers' Charter and taxpayer protections.

Our detailed response to all your recommendations is attached at Annexure 1.

The ATO recognises the Taxpayers' Charter as an important foundation for working with individual taxpayers and the broader community. In the past few years the ATO has developed even richer concepts above and beyond those in the Charter. These concepts include 'client experience' and 'willing participation' in the tax and super systems. Both concepts, 'client experience' and 'willing participation' are about a different approach and mindset in the ATO – one of service, one of working with the community, one of help and support, one of respect. The ATO now judges itself against these measures rather than things like complaints about the Charter. We know from our research that the vast majority of our interactions with taxpayers are positive and professional, that taxpayers acknowledge that we act with integrity and treat them with respect.

We have noted within our response that we are already undertaking work through our Reinvention program, which relates to a number of the recommendations. We believe that this report has concentrated on a limited, albeit important, part of the tax system. It should be noted that this needs to be understood in the context of how we are currently performing, the continuing transformation we are undergoing and the current client experience. We acknowledge that the Charter is an important statement of rights and obligations. We feel that to define our commitment to clients and the Australian community solely within the boundaries of the Charter document understates the significance of our client service ethic and cultural shift.

We note that the report recognises that the ATO is focussed on the importance of the client experience and the health of the tax and superannuation system. When dealing with us, our clients and stakeholders can expect to have an experience that not only includes the taxpayer rights in the Charter document but goes well beyond them. At the core of our organisational goals and strategies is a client focus which places the client at the centre of everything that we do as set out in our Corporate Plan and Reinvention program blueprint.

Other areas that illustrate where Charter principles are embedded into ATO business and where 'living the Charter' has surpassed being merely 'aspirational' include our:

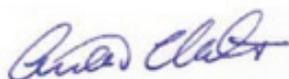
- Strategic intent
- Vision, Mission, Values statement
- ATO Annual report.

You acknowledge in the report some of our efforts in putting the client first as evidenced by our improvements made to response times to finalise CDDA applications, the low number of breaches of the Model Litigant Obligations and how the overall status of taxpayer rights in Australia compare favourably with a broad range of countries. We will build on these observations and other areas identified through this review to shape our future work and continue to improve the client experience.

Finally, I would like to acknowledge the efforts of all involved in undertaking this review.

If you require further information on our response, please contact Deb Unsworth

Yours sincerely



Andrew Mills
Second Commissioner
Australian Taxation Office

Date: 7 December 2016

[To minimise space, the annexure to the ATO's response has not been reproduced here, but has been inserted into the text of this report underneath each of the recommendations to which that text relates.]

ABBREVIATED FORMS

AAT	Administrative Appeals Tribunal
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
ADR	alternative dispute resolution
ANAO	Australian National Audit Office
ANR	Agency Notification Report
AOTCA	Asia Oceania Tax Consultants' Association
APS	Australian Public Service
ARC	Administrative Review Council
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BSL	ATO business line
CA	competent authority
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CbC report	Country-by-Country report
CDDA Scheme	Scheme for Compensation for Detriment caused by Defective Administration
CEI	Chief Executive Instructions
CFE	Confederation Fiscale Europeenne
CJEU	Court of Justice of the European Union
Commissioner	Commissioner of Taxation
Convention	European Convention of Human Rights
CRA	Canada Revenue Agency
CRS	Common Reporting Standard
DHS	Department of Human Services
DPO	Departure Prevention Order
DR IB 2013/10	Dispute Resolution Instruction Bulletin 2013/10
DTA	double taxation agreement
ECHR	European Court of Human Rights
EL2	Executive Level 2
EOI	exchange of information
EU	European Union
FATCA	<i>Foreign Account Tax Compliance Act</i>
FOI Act	<i>Freedom of Information Act 1982</i>
GST	Goods and Services Tax
HMRC	HM Revenue & Customs
IBFD	International Bureau of Fiscal Documentation
ICT	information and communications technology

ABBREVIATED FORMS (CONTINUED)

IGT	Inspector-General of Taxation
IMF	International Monetary Fund
IRC	<i>Internal Revenue Code 1988 (USA)</i>
IRD	New Zealand Inland Revenue Department
IRS	Internal Revenue Service
IT	information technology
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
JCPA	Joint Committee of Public Accounts
JITSIC	Joint International Tax Shelter Information Centre
LSD 2005	Legal Services Directions 2005
LSMUL	Legal Services Multi-Use List
MAEITM	Model Agreement on Exchange of Information on Tax Matters
MLO	Model Litigant Obligations
MNE	multinational entity
MTCIC	Model Tax Convention on Income and on Capital
NSW Ombudsman	New South Wales Ombudsman
NTA	National Taxpayer Advocate
OECD	The Organisation for Economic Co-operation and Development
OECD Global Forum	The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes
OLSC	Office of Legal Services Coordination
PFDS	Perceptions of Fairness in Disputes Survey
PGI	Public Groups and International
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
Privacy Act	<i>Privacy Act 1988</i>
PRODECON	Procuraduría de la Defensa del Contribuyente
PSLA	Law administration practice statement
RDR	Review and Dispute Resolution
RMG 409	Resource Management Guide 409: Scheme for Compensation for Detriment caused by Defective Administration
SCPS	ATO Single Corporate Perception Survey
SCTR	House of Representatives Standing Committee on Tax and Revenue
STEP	Society of Trust and Estate Practitioners
TAA	<i>Taxation Administration Act 1953</i>
TAO	Taxpayer Assistance Order
TAS	Taxpayer Advocate Service
TBOR	taxpayer bill of rights
TIEAs	tax information exchange agreements

ABBREVIATED FORMS (CONTINUED)

TPB	Tax Practitioners Board
UK	United Kingdom
UNSW	University of New South Wales
USA	United States of America