



Australian Government  
Inspector-General of Taxation  
Taxation Ombudsman

# Submission to the Exposure Draft:

*Treasury Laws Amendment (Measures for a later sitting)  
Bill 2022: Taxation of military superannuation benefits*

By the Inspector-General of Taxation

5 August 2022

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# Introduction

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) welcomes the opportunity to make a submission on the *Treasury Laws Amendment (Measures For A Later Sitting) Bill 2022: Taxation Of Military Superannuation Benefits (the draft Bill)*.

The IGTO is an independent, Commonwealth statutory agency that investigates taxation administration systems and laws, as well as the actions and decisions made by Tax Officials – of the Australian Taxation Office (**ATO**) or the Tax Practitioners Board. The IGTO seeks to assure the community that public administration of the tax system is fair, equitable, and transparent, consistent with community expectations.

The community's perception of the fairness of the tax administration system is an important factor and influence in determining voluntary compliance by taxpayers and tax practitioners alike – which ultimately determines the efficiency and effectiveness of the tax administration system itself. The Australian community expects and benefits from a tax system that is administered consistently, reliably, honestly and fairly, as this improves integrity and people are more willing to engage with the tax system where they trust in its integrity.

The IGTO also undertakes tax investigations for the purpose of providing independent advice and assurance to Government on the taxation administration laws and systems. The IGTO is not empowered to investigate or advise on tax policy matters but does have a statutory function and purpose to advise on improvements in the administration of taxations laws.

The IGTO is in the process of finalising its investigations into 35 disputes that were made by affected veterans about the ATO's administration of the taxation system following the Full Federal Court decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (**Douglas**).

The final investigation reports have not been delivered to the complainants as at the time of writing. IGTO has a statutory obligation<sup>1</sup> to provide the ATO with an opportunity to comment on any draft investigation report. The original deadline for the ATO response was 9 August 2022. The ATO is expected to provide their comments on the final investigation reports on or before 23 August 2022. Accordingly, our final reports will be delivered shortly after this. As this date is after the due date for submissions on the draft Bill, there may be some further or late submissions from affected veterans.

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<sup>1</sup> Refer s8 of the *Ombudsman Act 1976* as applied by s15 of the *Inspector-General of Taxation Act 2003*.

We do not intend to make a submission or comment on the original policy intent or the proposed revisions as set out in the draft Bill. However, we wish to share some of our experiences and insights investigating disputes for affected veterans and which may impact the measures to be included in the draft Bill. In summary:

- There is significant added complexity for the Fund Trustee, Commonwealth Super Corporation (**CSC**), to calculate withholding on an on-going fortnightly basis where there is a legislative requirement to calculate the relevant components at the time of each payment.
- The ATO would be reliant on CSC to obtain the data necessary to calculate the proposed tax offset.
- There is additional complexity for CSC if the impact of the proposed tax offset at year-end is to be reflected in the withholding rate throughout the year.
- There are practical difficulties and costs associated with making significant systems changes to include the impact of the tax offset in fortnightly withholding.
- Veterans would have uncertainty of their after-tax pension amount on a fortnightly basis.
- Amendments as far back as 2007-08 may not be practically achievable due to record keeping requirements and the availability of CSC data.
- There are non-tax implications of the proposed tax offset that warrant consideration.

We would also welcome the opportunity to discuss and expand on this submission, should Treasury consider it helpful, and encourage the Treasury to contact [REDACTED]

Kind regards,

[REDACTED]  
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# A legislative requirement for superannuation lump sum calculations to be made at the time of each payment can contribute to administrative complexity, compliance costs and uncertainty for veterans' after-tax pension amounts after the *Douglas* decision

The financial or economic significance of the matters raised in *Douglas* are that the concessional tax treatment for invalidity benefits would generally be greater for "superannuation lump sums" than they would be for "superannuation income stream benefits".<sup>2</sup> This is because section 307-145 of the *Income Tax Assessment Act 1997 (ITAA 1997)* provides an additional tax free component for "superannuation lump sums".<sup>3</sup> There are various data points required to calculate the additional tax free component, including 'Days to retirement', 'last retirement day', 'Service days' and 'service period'.

Some of the significant compliance and administrative implications of the *Douglas* decision in recognising fortnightly pension payments as 'lump sum payments' are to significantly increase the number and complexity of the calculations for affected benefits.

This is because, unlike superannuation income stream benefits, the concessional tax treatment of a superannuation lump sum must be calculated as at the time the payment is made. As the value of some of the data points in this calculation may be different with each fortnightly benefit payment, depending on the veterans' individual circumstances, the amount of tax payable may be different for every such 'lump sum' payment.

The impact of performing such calculations on an on-going fortnightly basis (rather than once-off or once only at the start of the financial year) is discussed in further detail in the sections below.

Another key difficulty that is not addressed by the draft Bill is the legislative requirement to calculate the relevant tax free and superannuation interest components for **each** "superannuation lump sum" at the time of each payment (rather than say once at the start of each financial year or at the start of any change in pension circumstances or on some other regular interval basis). We refer to this as the proportioning rule, which is discussed in more detail below.

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<sup>2</sup> Refer paragraph 6 of the joint judgement of Justices Griffiths, Davies and Thawley *Commissioner of Taxation v Douglas* [2020] FCAFC 220.

<sup>3</sup> *Income Tax Assessment Act 1997 (ITAA 1997)* s 307-145.

## How the proportioning rule operates

A key cause of many administrative difficulties arising from *Douglas* is the proportioning rule contained in section 307-125 of the ITAA 1997. The proportioning rule was introduced as part of superannuation reforms in 2007 to ensure that superannuation benefits were ‘taxed’ as paid out in proportion to the tax free and taxable components of the underlying interests. This is particularly relevant for benefits paid before an individual reaches age 60, as most benefits paid thereafter are tax free.<sup>4</sup> Without this rule, there is a risk that benefits may be preferentially paid out of tax free components to minimise tax.

The proportioning rule operates differently depending on whether the benefit is paid as a lump sum versus an income stream. In summary:

- the proportion of an *income stream* that is made up of a tax free component remains fixed for all payments;<sup>5</sup> and
- the proportion of a *lump sum* that is made up of a tax free component is calculated just before the amount is paid.<sup>6</sup>

The calculation of the tax free component provides that the underlying superannuation interest is reduced by amounts previously paid out.<sup>7</sup> When coupled with the proportioning rule, this means that the tax free component of lump sums will progressively **reduce over time** and therefore lump sums will be taxed progressively more until the tax free component is exhausted.

Whilst the draft Bill is aimed at ensuring that no veteran faces worse tax outcomes because of the *Douglas* decision via a non-refundable tax offset, the effect of the draft Bill is that the tax free component and taxable component need to be recalculated for each historical payment with the tax free component being reduced after each payment.

## Administrative discretion can simplify the proportioning rule but there is no certainty this will occur as an ongoing feature

The legislation allows the Commissioner to determine alternative methods for determining the components of a superannuation benefit for the proportioning rule, by way of legislative instrument.<sup>8</sup> This effectively provides the Commissioner with an administrative discretion, where appropriate, to depart from the strict requirements of the proportioning rule.<sup>9</sup> This would include modification to accommodate the circumstances arising following the decision in *Douglas*.

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<sup>4</sup> ATO, *How tax applies to your super*, last updated 24 June 2021, <[www.ato.gov.au](http://www.ato.gov.au)>

<sup>5</sup> ITAA 1997 s 307-125(3)(a).

<sup>6</sup> ITAA 1997 s 307-125(3)(b).

<sup>7</sup> ITAA 1997 s 307-210(2).

<sup>8</sup> ITAA 1997 s 307-125(5).

<sup>9</sup> Treasury, Explanatory Memorandum, *The Tax Laws Amendment (Simplified Superannuation) Bill 2006 (this Bill) and supporting Bills*, 2006 [2.138].

To date, the Commissioner has issued 2 such legislative instruments to remedy some of the consequences following the decision in *Douglas* by essentially keeping the proportioning rule static (consistent with the rules that apply to superannuation income streams).<sup>10</sup> However there is no legislative certainty that this approach will continue as it is, as a matter of legislation, left to the discretion of the Commissioner.

As observed in our complaint investigations, the Commissioner has issued such instruments for a 1-year duration previously. However, considerable anxiety and uncertainty regarding forward tax positions had built up towards the end of the life of each instrument due to the ambiguity surrounding the ATO's continuing commitment to issue further instruments.

The latest instrument applies to payments made from 1 July 2022 to 30 June 2023 and we have observed that anxiety and uncertainty has begun to build again — for example, it has been suggested that the ATO may not intend to continue this administrative approach beyond 30 June 2023 without an express public statement of support, as was the case for the instrument applying to payments made in 2021–22.

Also, in the absence of an express statement, there is also some doubt about whether it was intended (as a matter of deliberate design and policy) for the Commissioner to rectify this issue via repeated exercise of his discretion or whether the administrative costs that result from the proportioning rule's operation in the circumstances was considered a trade-off for other aims.

## Practical difficulties in calculating lump sums

As the draft Bill does not address the difficulties of calculating the proportioning rule for each fortnightly payment, there are concerns that it cannot be complied with by the CSC or administered by the ATO and that veterans will remain in an uncertain after-tax position.

As part of our complaint investigations, the IGTO engaged with the CSC to understand the impact of the *Douglas* decision on its fund-administration operations.

We understand a material impact in this regard is that its information systems are not currently designed to calculate fortnightly lump sum payments to be compliant with the proportioning rule. There are concerns that such a system may not be practically achievable at all due to the variety of scenarios and factors that change the amount of a veteran's payment and the numerous different permutations of calculations required. These include indexation, moving between pension classes, birthdays, preservation and retirement ages and becoming entitled to the disability superannuation benefit. Additionally, any such information system changes may not be implemented at short notice (even if achievable).

A manual calculation would impose significant compliance costs and delay on CSC. Historically, CSC had 340 veterans with private rulings prescribing that their pensions may be taxed as lump sums. Its systems could not process these payments and so they needed to be calculated manually. The *Douglas* decision now results in this treatment affecting more than 12,000 individuals. Furthermore, we observed that the

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<sup>10</sup> ATO, Legislative instrument, [MS 2021/1](#), 25 June 2021; ATO, Legislative instrument, [LI 2022/1](#), 9 December 2021.

ATO itself took longer than it anticipated to process cases as part of its streamlined amendment process due to a range of issues. We understand a manual solution is not viable in these circumstances.

## ATO reliant on CSC data to calculate the tax offset, shifting compliance costs unfairly to CSC

The structure of the proposed non-refundable tax offset requires 2 calculations of an individual's basic income tax liability; first with the invalidity pension treated as a superannuation lump sum and then second as an income stream. This is required to determine whether the individual is worse off as a result of the *Douglas* decision – that is, because their payments are to be taxed as a lump sum – and if so, neutralise that effect via the tax offset.

The various data points required to calculate the additional tax free component for a lump sum – including 'Days to retirement', 'last retirement day', 'Service days' and 'service period' – are not held by the ATO. The ATO would need to obtain this data from CSC to calculate the tax offset. While the CSC has been able to comply with ATO information requests to give effect to the ATO's remediation strategies following *Douglas*, we observed that this has come at a compliance cost to CSC.

## Including the impact of the tax offset in fortnightly withholding shifts administration unfairly to CSC

The press release accompanying the draft Bill states:<sup>11</sup>

*This will reverse higher end of year tax liabilities that would have occurred for some of these veterans and enable the ATO and CSC to include the impact of the new offset in determining fortnightly tax withholding, in order to address higher withholding that has occurred due to the Douglas decision. [emphasis added]*

It is unclear whether the obligation to perform these calculations is imposed on the ATO, the CSC or both. Incorporating the tax offset into the withholding calculation would require CSC to go beyond providing data to the ATO and effectively require CSC to perform the offset calculation fortnightly – arguably, performing the role of administrator. This would create an anomalous arrangement, as all other PAYG Withholders are required to withhold at a rate, or apply formula, that has already been calculated by the ATO. It is also worth noting that PAYG withholding is not intended to be a final tax but a progress payment – that is, an interim tax collection mechanism.

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<sup>11</sup> Stephen Jones, [Exposure draft legislation: Taxation of military superannuation benefits](#), (media release, 25 July 2022).



## Practicalities and costs of making significant systems changes to include the impact of the tax offset in fortnightly withholding

A threshold question is the capability of the CSC systems to perform the multiple calculations required under the draft Bill in order to include the impact of the new offset in determining fortnightly tax withholding. We would expect that CSC could expand on this.

In the IGTO's experience, information systems changes usually require more time and resources to appropriately mitigate risks than is often anticipated at the commencement of such projects. The IGTO made similar observations in its *Review in the ATO's Change Program* when discussing complex systems that the ATO implemented. These changes effectively cost three times the initial budget, delivered one-third of the key business objectives and gave rise to unforeseen risks that had substantial financial impact on thousands of individual taxpayers and required considerable remedial action.<sup>12</sup> Whilst changes to CSC systems may not approach the same scale as that involved in the ATO's Change Program, the lessons learnt underscore the fact that the level of investment and time required to sufficiently mitigate risks in upgrading or migrating core legacy systems cannot be underestimated and must be robustly considered.

## Lump sums create variability and uncertainty for veterans' fortnightly after-tax pension amounts

The variables involved in calculating the withholding for lump sums paid fortnightly – in particular the proportioning rule – make it difficult for veterans to know what their after-tax pension payment will be on a fortnightly basis. This is because:

- the data points used in the calculation itself are subject to change (fortnightly); and
- factoring the variables into the withholding calculation<sup>13</sup> adds complexity for the CSC and does not produce precise results at the individual level.

Both of these factors are described above. However, it is important to note the potential effects of this compliance and administration on the veterans themselves:

- Veterans cannot easily know what their after-tax pension amount will be over time, making it difficult to budget or plan their personal finances.
- Inaccurate withholding may cause veterans to have a tax bill at year-end which they have not accounted for and may struggle to pay.

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<sup>12</sup> IGTO, *Review in the ATO's Change Program*, (2011).

<sup>13</sup> ATO, [Pay as you go withholding for military superannuation payments](#), 14 July 2022.

- Conversely, where there is over-withholding, a refund position at year-end is unhelpful where the veteran is relying on pension payments to make ends meet (i.e. they could have used those funds sooner and not at year-end).

Veterans can lodge a further PAYG withholding variation<sup>14</sup> to better align with their individual tax position. Lodging these annually requires time and effort for veterans to request, for the ATO to process and the CSC to implement. More importantly, veterans may miscalculate their withholding for one of the many reasons discussed above (e.g. indexation, moving between pension classes, becoming entitled to the disability superannuation benefit) and face the prospect of being penalised for an excessive variation if they are inaccurate.<sup>15</sup>

The effect of this uncertainty is something that was raised in veterans' complaints to the IGTO. It is important to consider that the veterans affected by the decision in *Douglas* represent a cohort of vulnerable taxpayers. Due to the nature of the benefits received by these affected veterans, many are likely to suffer from mental health issues linked to their service history, such as depression, anxiety and post-traumatic stress disorder, and have been deemed incapable of civil employment to varying degrees.

## **Each lump sum payment requires a payment summary – that is potentially 26 payment summaries in each financial year**

The law requires payers to issue a payment summary within 14 days of making a superannuation lump sum payment.<sup>16</sup> Accordingly, the CSC must issue payment summaries each time a payment is made, which is generally fortnightly. The Commissioner has an administrative discretion to provide an exemption<sup>17</sup> from this requirement and has exercised that exemption for CSC to date.

The IGTO has not heard any suggestion that the Commissioner would withdraw or cease to renew this administrative discretion. However, there is also no certainty that this will not occur, including by inadvertent ATO oversight. If the Commissioner's discretion were not renewed, veterans would have to review 26 payments each financial year when complying with their tax affairs. There would also be a compliance cost for CSC, which may not be able to comply with the requirement in any case due to the calculation difficulties described above. The IGTO would expect these matters would be considered in any Regulatory Impact Statement.

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<sup>14</sup> *Taxation Administration Act 1953* (TAA 1953) s 15-15.

<sup>15</sup> TAA 1953 s 16-25.

<sup>16</sup> TAA 1953, sch 1 s 16-165.

<sup>17</sup> TAA 1953, sch 1 s 16-180.

## Amendments as far back as 2007-08 may not be practically achievable

The draft Bill is to apply in relation to income years starting on or after 1 July 2007. This is because the *Douglas* decision had retrospective impact on approximately 12,000 affected veterans' prior year income tax liabilities spanning back to the 2007–08 income year. Some individuals will have a reduced tax liability, while others would pay more tax as a result of the decision.

To reflect the decision, income tax amendments for those previous years would be required. Under normal circumstances, taxpayers can only amend tax returns that are within their period of review<sup>18</sup> (generally the previous 2 financial years) unless they lodge an objection and the Commissioner exercises his discretion to accept the objection out of time.<sup>19</sup>

In response to the *Douglas* decision, the ATO implemented a streamlined amendment process whereby it obtained data directly from CSC (rather than from veterans via lodged objections) and used this to process amendments for veterans who opted into the process. Due to limitations in the quality and availability of the CSC data, however, the ATO could only amend income years from 2010-11 onward under the streamlined amendment process.

Veterans seeking amendments for periods prior to 2010-11 needed to lodge an out of time objection with the ATO and provide the necessary information to the ATO, based on their personal records to prove what their tax liability should be.<sup>20</sup>

As individuals are generally required to keep tax records for 5 years from the date they lodge their tax return,<sup>21</sup> it is likely that many affected veterans would not have all relevant tax records dating back to 2007-08. Such individuals would therefore be reliant on the data that they (or the ATO) can obtain from the CSC or the Department of Veterans' Affairs (**DVA**). Accordingly, it is unclear that impacted veterans will practically be able to lodge a successful objection and may be disadvantaged in this respect.

Individuals would also still technically be reliant on the Commissioner exercising his administrative discretion to accept their out of time objection application.

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<sup>18</sup> *Taxation Administration Act 1953* (TAA 1953), s 14ZW.

ATO, [Time limits on tax return amendments](#), 16 June 2022.

<sup>19</sup> TAA 1953 s 14ZX(3).

<sup>20</sup> ATO, [Treatment of military invalidity benefits following Full Federal Court decision](#), 27 July 2022.

<sup>21</sup> *ITAA 1936* s 262A(4).

## Non-tax implications of the proposed tax offset – consequential implications

While not necessarily the remit of the IGTO, it is important to comment on potential non-tax (consequential) implications of *Douglas* and the draft Bill for other Commonwealth benefits and obligations. These other benefits often rely on Adjusted Taxable Income (**ATI**)<sup>22</sup> when determining eligibility or calculating the amount of a benefit/obligation. ATI is the sum of Taxable Income<sup>23</sup> and various other amounts, meaning it is equal to or greater than Taxable Income.

Simplistically, income tax payable is calculated based on Taxable Income assessed at the relevant marginal rate of tax, which is then reduced by any Tax Offset – that is (Taxable Income x Tax Rate) – Tax Offsets.<sup>24</sup> The effect of this is that a tax offset does not reduce Taxable Income, it reduces income tax payable.

The *Douglas* decision to tax benefits as lump sums affects the Taxable Income of affected veterans – both positively and negatively. This change affects the ATI calculation for affected veterans and therefore potentially affects any Commonwealth benefit and obligation that relies on the ATI calculation. Examples of this include Child Support Payments and Family Tax Benefits.

By contrast, the tax offset in the draft Bill does not affect the ATI calculation. Veterans who are worse off as a result of the *Douglas* decision may have their income tax payable reduced by the offset (notwithstanding the practical difficulties discussed above), however, the adverse impact on their non-tax benefits may not be addressed as their ATI (as affected by the *Douglas* decision) would not be adjusted.

While the IGTO has not sought to quantify the effect of this outcome, there is reason to believe that it could be substantial for some affected veterans if the impact on non-tax benefits resembles that observed for tax payable. Some of the veterans who approached the IGTO were expecting substantial refunds as a result of amendments dating back to 2007-08. Many veterans received refunds in excess of \$60,000 due to their reduced Taxable Income following *Douglas*. On the understanding that this draft Bill is focused on the tax outcome for affected veterans and that non-tax outcomes will be considered later, it would be prudent to keep in mind the specific tax administrative provisions that affect non-tax entitlements for affected veterans and obtain a holistic understanding of the overall financial impact that *Douglas* has had on affected veterans – i.e. in terms of tax outcome, ongoing taxing impacts (e.g. PAYG W) as well as and entitlement to benefits, as they affect veterans' financial position both at year-end and on an ongoing basis throughout the year.

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<sup>22</sup> TAA 1953 s 45-330(1).

<sup>23</sup> ITAA 1997 s 4-15(1). Taxable Income = Assessable Income – Deductions.

<sup>24</sup> ITAA 1997 s 4-10(3).

## Appendix — Glossary and defined terms

| Abbreviation   | Defined term  |
|----------------|---|
| ATI            | Adjusted Taxable Income   |
| ATO            | Australian Taxation Office  |
| Commissioner   | Commissioner of Taxation  |
| Complaint      | <p>A complaint is defined AS/NZS 10002:2022 Guidelines for complaint management in organizations</p> <p><i>Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</i></p> <p><i>Disputes - Unresolved complaints escalated internally or externally, or both.</i></p> <p><i>Feedback - Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.</i></p> |
| CSC            | <p>Commonwealth Super Corporation</p> <p>CSC is the Fund Trustee for the <i>Military Superannuation and Benefits Scheme</i> and the <i>Defence Force Retirement and Death Benefits Scheme</i> that are the subject of the exposure draft.</p>   |
| DVA            | Department of Veterans' Affairs   |
| Douglas        | <i>Commissioner of Taxation v Douglas</i> [2020] FCAFC 220  |
| the draft Bill | <i>Treasury Laws Amendment (Measures For A Later Sitting) Bill 2022: Taxation Of Military Superannuation Benefits</i>   |
| entity         | <p>an entity is defined in section 960-100 of the <i>Income Tax Assessment Act 1997</i> that is:</p> <ul style="list-style-type: none"> <li>an individual</li> <li>a body corporate</li> <li>a body politic</li> <li>a partnership</li> <li>any other unincorporated association or body of persons</li> <li>a trust</li> <li>a superannuation fund</li> </ul>  |
| IGT Act 2003   | <i>Inspector-General of Taxation Act 2003</i>   |
| IGTO           | Inspector-General of Taxation and Taxation Ombudsman. The acronym "IGTO" is used throughout the submission to denote both the "Inspector-General of Taxation", as named in the enabling legislation, and "Inspector-General of Taxation and Taxation Ombudsman" as recently adopted due to recent calls for greater understanding and awareness of our complaints services function.  |

## Appendix — Glossary and defined terms

|              |   |
|--------------|---|
| ITR          | Income tax return   |
| ITAA         | <i>Income Tax Assessment Act 1997</i>   |
| PAYG         | Pay As You Go   |
| TAA 1953     | <i>Taxation Administration Act 1953</i>   |
| Tax Official | <p>The term 'tax official' is defined in section 4 of the IGT Act 2003 to mean:</p> <ul style="list-style-type: none"> <li>(a) an ATO official; or</li> <li>(b) a Board member of the Tax Practitioners Board; or</li> <li>(c) an APS employee assisting the Tax Practitioners Board as described in section 60-80 of the <i>Tax Agent Services Act 2009</i>; or</li> <li>(d) a person engaged on behalf of the Commonwealth by another tax official (other than an ATO official) to provide services related to the administration of taxation laws; or</li> <li>(e) a person who: <ul style="list-style-type: none"> <li>(i) is a member of a body established for the sole purpose of assisting the Tax Practitioners Board in the administration of an aspect of taxation laws; and</li> <li>(ii) receives, or is entitled to receive, remuneration (but not merely allowances) from the Commonwealth in respect of his or her membership of the body.</li> </ul> </li> </ul> <p>For the purpose of this submission, the term 'tax official' is also used to refer to a 'taxation officer' to whom subdivision 355-B of Schedule 1 to the TAA 1953 applies.</p> |