



**Australian Government**  

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**Inspector-General of Taxation**

**ISSUES PAPER NUMBER 4**

**ATO LAW ENFORCEMENT AND GOVERNANCE**



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### **ATO LAW ENFORCEMENT AND GOVERNANCE**

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## ISSUES PAPER NUMBER 4

### ATO LAW ENFORCEMENT AND GOVERNANCE

#### OVERVIEW

- 1 This paper covers concerns raised with the Inspector-General of Taxation about the ATO's systems for enforcement of the tax laws. This includes systems for auditing taxpayers, imposing penalties, collecting tax debts and determining which cases will proceed to court action.
- 2 This paper includes concerns about the ATO's internal structure and governance, with a special emphasis on a perceived need to focus ATO systems away from a revenue focus to a law administration perspective.
- 3 This paper also includes concerns raised with the Inspector-General about the ATO's approach to aggressive tax planning.

#### Part IVA and aggressive tax planning

- 4 Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) provides for the Commissioner of Taxation to amend assessments to cancel tax benefits obtained by people who enter into schemes for the sole or dominant purpose of obtaining a tax benefit. The Commissioner may amend assessments under Part IVA within six years of a tax debt falling due under those assessments.
- 5 Part IVA was introduced prior to self-assessment; the six year review period equated to the then prevailing statutory review period for the Commissioner to amend the ATO's assessment of a taxpayer's affairs if the taxpayer had not made a full and true disclosure of material facts. The six year review period in Part IVA now provides the ATO with an additional two years over and above the statutory timeframe for reviewing assessments.

6 In recent years the Commissioner has relied on Part IVA extensively, including where the taxpayers disclosed their participation in schemes in successive tax returns but the ATO would be 'out of time' to disallow claims for tax benefits under the general four year statutory timeframe for amending assessments.

7 Reliance on Part IVA intensifies the impact of aspects of tax administration that have already been nominated for review. In particular, the impact of the General Interest Charge (GIC) and penalties is greater when such charges are applied retrospectively over several years.

8 It is important that all parties understand that the Inspector-General of Taxation cannot direct the Commissioner of Taxation in his administration of the tax laws and, in particular, cannot overturn past ATO actions — including settlement offers. The Inspector-General's only directive power in relation to the Commissioner is for the disclosure of information under section 15 of the *Inspector-General of Taxation Act 2003*.

9 The above warning has particular relevance for taxpayers who invested in Mass Marketed Tax Effective Investments (MMTEIs) and those taxpayers affected by the ATO's approach to Employee Benefit Arrangements (EBAs).

10 The purpose of the following potential reviews of MMTEIs, EBAs and R&D syndicates, would be to learn lessons about tax administration in general, and the administration of tax avoidance provisions in particular, to improve tax administration systems for the future.

11 The Auditor-General is currently reviewing the ATO's aggressive tax planning program with a report scheduled to be tabled in the Autumn 2004 Parliamentary sittings. The following reviews relating to Part IVA may be considered 'on hold' pending the Auditor-General's report. The reviews would be reconsidered after the Auditor-General has reported and the ATO has responded to any recommendations.

### **Mass marketed tax effective investments**

12 In the 1990s many individual and business taxpayers invested in what have become known as MMTEIs. The ATO investigated many of these investment products from 1987 onwards.

## ATO enforcement and governance

13 On 12 June 1998, the Commissioner of Taxation announced his intention to write to participants in MMTEIs, advising that the ATO had concluded that the tax deductions claimed by taxpayers were not allowable and that they would be asked to pay back-taxes, interest and appropriate penalties.

14 The Commissioner issued amended assessments to around 60,000 individual taxpayers with retrospective tax bills that far exceeded the original direct tax benefits received by investors, reflecting the application of interest and penalties, in amounts of tens of thousands of dollars per taxpayer.

15 In view of previous reviews conducted by the Ombudsman and the Senate, any further review into this issue could focus on one specific aspect of the MMTEI experience, namely why it was necessary for the Commissioner to rely on the six-year amended assessment period under Part IVA of the ITAA 1936 to issue amended assessments to some participants in MMTEIs. The review could examine why the ATO was unable to finalise assessments in the four year general review period.

16 Many of the contentious issues that came to light in MMTEIs are the subjects of other potential reviews outlined in this report. In particular, the following potential systemic reviews could draw on taxpayer experience with MMTEIs:

- General Interest Charge;
- Time taken by the ATO to amend assessments;
- Test litigation;
- Settling out-of-court;
- Notice of Assessment; and
- A new class of rulings for individual taxpayers.

## Research and development syndicates

17 Since the late 1980s, the Australian Government has been encouraging innovation by allowing tax concessions for expenditure on research and development (R&D). In July 1996, the Government tightened eligibility criteria for R&D tax concessions and closed off R&D syndicate participation in tax concessions, following evidence that some taxpayers had exploited the syndicate provisions to obtain tax concessions for expenditure that did not represent genuine R&D. Around 240 syndicates had been registered before the syndicate provisions were closed off.

18 Since a report by the Auditor-General in 1993-94,<sup>1</sup> the Commissioner of Taxation has been examining tax concessions claimed by investors in R&D syndicates, relying on Part IVA of the ITAA 1936 and/or specific R&D anti-avoidance provisions. This has caused concern amongst syndicate investors.

19 The fundamental concern is the retrospectivity of the ATO's actions and a perception that the ATO is really trying to wind up syndicates that were legitimately registered prior to the change in the law, rather than to ensure syndicates operate in accordance with the law. Subsidiary concerns include:

- Delays in audits of up to a decade after the investment is made, relying on extended time periods for review under section 170 (10A) of the ITAA 1936;
- Revaluations of core technology in current market circumstances (rather than the market conditions applying at the time investments were made in R&D) resulting in anti-avoidance provisions being invoked; and
- Application of penalties and the General Interest Charge to tax concessions now in dispute.

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<sup>1</sup> Australian National Audit Office, Administration of the 150 per cent Taxation Incentive for Industry Research and Development, Audit Report No. 12 of 1993-94.



## ATO enforcement and governance

20 A review into this matter could examine what systems the ATO had in place prior to July 1996 for ensuring effective administration of the tax concessions for syndicated R&D, including systems for the provision of private rulings to syndicates. Any such review could examine why it has been necessary to rely on Part IVA and other anti-avoidance provisions, with their extended statutory timeframes for amending assessments, for participants in R&D syndicates, given the extensive disclosure required to be made by taxpayers at the outset.

21 Other concerns raised in relation to R&D syndicates are the subject of specific potential reviews outlined in this report. Of particular relevance are the review topics on the ATO's rulings systems foreshadowed in Issues Paper Number 3.

## Employee benefit arrangements

22 A key focus of the ATO's aggressive tax planning program is on Employee Benefit Arrangements (EBAs) — including Employee Benefit Trusts, Controlling Interest Superannuation Funds, and Employee Share or Incentives Schemes.

23 EBAs can provide benefits to both employer and employee by minimising various tax liabilities, including company tax, fringe benefits tax, income tax and superannuation surcharge. EBAs arose in the late 1990s.

24 On 14 March 2003, the Commissioner announced that the ATO would be disallowing deductions for investments in EBAs and would be applying various penalty and interest treatments to tax debts incurred.

25 EBA investors who are now facing significant tax debts are concerned that there is no effective right of review of the Commissioner's decisions on EBAs other than to challenge an amended assessment in the Federal Court — an expensive option beyond the reach of many EBA participants.

26 Any review into this matter could examine why it has been necessary to apply the extended six year review period under Part IVA to EBAs notwithstanding the ATO was aware of the existence of EBAs in the 1990s.

27 Many other tax administration issues have been raised in relation to the ATO's handling of EBAs. These are the subject of potential reviews foreshadowed elsewhere in this series of Issues Papers. In particular, the following potential reviews could draw on taxpayer experience with EBAs:

- General Interest Charge;
- Time taken by the ATO to amend assessments;
- Settling out-of-court;
- Private Binding Rulings and Part IVA;
- Potential conflict between rulings and case law; and
- Taxpayers' Charter and tax planners.

### **Taxpayers' Charter and tax planners**

28 The Ombudsman's report into mass marketed investment products found significant breaches of the Taxpayer's Charter in the ATO's handling of MMTEI investors. The Ombudsman was of the view that:

*Irrespective of the numbers of participants involved, the principles of fairness and accountability remain paramount. This includes requiring the ATO to explain fully the basis of its decisions. This lack of explanation to the individual participants, in the Ombudsman's opinion, amounts to a breach of the Taxpayers' Charter.<sup>2</sup>*

29 Concerns have been raised about ATO observance of the Taxpayers' Charter for participants in EBAs, including in relation to the following matters:

- Whether EBA participants were entitled to be 'heard' prior to the Commissioner making a public commitment to disallow all deductions in EBAs;
- Whether the ATO applied a blanket policy to EBA participants without analysing the application of the law to individuals' circumstances and considering the individual merits of each case;

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<sup>2</sup> Commonwealth Ombudsman: *Report of the investigation into the ATO's handling of claims for tax deductions by investors in a mass marketed tax effective scheme know as Main Camp*, January 2001, p. 19.

## ATO enforcement and governance

- Why EBA investors were not treated in the same way as taxpayers involved in MMTEIs, particularly in relation to remission of interest and penalties; and
- How the Commissioner applied the Essenbourne case on EBAs in determining his enforcement approach.

30 The Taxpayers' Charter commits the Commissioner:

*To make fair and equitable decisions in accordance with the law. This includes acting consistently, treating [each taxpayer] as an individual, listening to [each taxpayer] and taking all relevant circumstances into account.<sup>3</sup>*

31 There have also been concerns about the extent of the Commissioner's adherence to the Model Litigant Directions, issued by the Attorney-General under the *Judiciary Act 1903*, when dealing with taxpayers in the aggressive tax planning program.

32 A review into this issue could examine what systems are in place to ensure that taxpayers examined as part of the aggressive tax-planning program are afforded their rights under ATO policy guidelines and the law.

33 Such a review could examine what systems have been implemented in the aggressive tax planning area to implement the ATO's response to the findings of the Ombudsman that MMTEI participants were not treated in accordance with the Taxpayers' Charter.

## Imposing penalties equitably

### Reviewing the ATO's administration of penalties

34 The penalty regime that applies to all tax laws administered by the Commissioner of Taxation is defined in Schedule 1 of the TAA 1953. The penalty regime consists of three distinctive components: penalties relating to statements and schemes, penalties for failure to lodge returns and other documents on time, and penalties for failing to meet other taxation obligations.

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<sup>3</sup> Taxpayers' Charter (current as at 22 September 2003), p.3.

35 Tax practitioners and industry representatives have expressed concern at the ATO's attitude to the administration of some of these penalty arrangements, in that the ATO automatically applies penalties in a 'speeding infringement' or 'bulk' fashion without asking questions, including where the ATO may have contributed to the taxpayer's failure to meet his or her obligations.

36 The ATO's approach to the administration of penalties is highlighted in the ATO Receivables Policy and ATO Compliance Model, which states that:

*The individual circumstances of a taxpayer contribute to his or her underlying attitudes to compliance and to the subsequent behaviour. Accordingly, the Tax Office's strategies, including its approach to the imposition of penalties, are designed to improve that behaviour and in the long term, the underlying attitude to compliance.<sup>4</sup>*

37 Any review into this issue could examine the ATO's administrative systems for the application of penalties, including reviewing the ATO Receivables Policy and ATO Compliance Model.

## Exercising statutory discretions to help taxpayers

### Administration of the hardship provisions

38 Under Division 340 of the TAA 1953, the Commissioner of Taxation has the power to release an individual (or a trustee of the estate of a deceased person) from a tax liability, if the Commissioner is satisfied that in paying the liability the taxpayer would experience serious hardship. Liabilities to which this division applies include: fringe benefits tax, Medicare levy, Medicare levy surcharge, Pay as You Go (PAYG) instalments, administrative penalties and the General Interest Charge.

39 The inclusion of Division 340 is a recent amendment to the TAA 1953.<sup>5</sup> The key changes flowing from the new provisions are that consideration of hardship claims has now moved exclusively to the ATO, with rights of review to the Administrative Appeals Tribunal, and that, for the first time, it is possible to make a hardship application for PAYG instalment debts.

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<sup>4</sup> ATO, *Receivables Policy*, Penalties Relating to Receivables Activities, 91.3.2.

<sup>5</sup> *Taxation Laws Amendment Act (No. 6) 2003*.

## ATO enforcement and governance

40 There is concern that some tax officials in the ATO do not recognise the rights of taxpayers to apply for hardship relief and will not assist in lodgement of an application. There is a perception in the private sector that hardship applications are mostly rejected.

41 However, the Commissioner of Taxation advised that 1600 hardship applications were considered in the 2002-03 financial year, and that 49 per cent of applicants were granted full or partial release from their tax debts.<sup>6</sup>

42 The introduction of Running Balance Accounts is seen as having compounded the difficulty of making a hardship claim because it obscures the historical pattern of tax payments. So, for example, if small businesses manage to resume tax payments after falling into debt, these tax payments are posted against the earliest debts, perhaps altering the mix of debt (amongst income tax debts for which hardship relief *can* be claimed and GST debts for which hardship relief *cannot* be claimed). Yet the small business may remain in debt, perhaps with no prospect of being able to 'catch up'.

43 A review into this issue could examine the systems now, and previously, in place to deal with applications under the hardship provisions in the tax laws.

## Family trust elections

44 Sections 272-80 of the ITAA 1936 allow a trustee to make an election (the 'family trust election') that a trust they govern is a family trust for taxation purposes. If a trust tax return is not required, the trustee must give the election to the Commissioner of Taxation before the end of two months after the end of the specified income year in which taxpayers want the election to apply.

45 Tax practitioners regard the consequences of missing the lodgement date (that is, forfeiture of any benefits that would flow from the family trust) as being a disproportionate penalty.

46 However, the ATO advises that the Commissioner has acceded to all (thirteen) written requests it has received for an extension to lodge the election.<sup>7</sup>

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6 Commissioner of Taxation, letter to the Inspector-General of Taxation of 27 October 2003.

47 A review into this issue could examine the administrative arrangements surrounding the making of a family trust election, in particular the Commissioner's right to specify an alternative date for these elections under section 272-80(2)(b)(ii) of the ITAA 1936.

### **ATO approved forms**

48 There are provisions in the taxation legislation that require taxpayers to provide information 'in a form approved by the Commissioner'.

49 For example, Section 284-225(2) of Schedule 1 to TAA 1953 provides for penalties to be reduced for a shortfall amount of tax if the taxpayer voluntarily tells the Commissioner about the shortfall 'in the approved form' in a certain time.

50 Section 388-50 of Schedule 1 to the TAA 1953 provides that 'approved form' means a form approved in writing by the Commissioner that contains all the information the Commissioner requires and is lodged in the manner the Commissioner requires.

51 However, it is claimed there is no approved form for voluntary disclosure of shortfalls to reduce shortfall penalties. It is further claimed that there are other 'approved forms' mentioned in the tax legislation where the Commissioner has not made any determination in writing as to the requirements for lodgement, such as the valuation of unlisted shares under an employee share scheme.

52 The Commissioner of Taxation advised that:

*The fact that a particular form has not been approved for making voluntary disclosures does not prevent such disclosures being made and does not prevent taxpayers from benefiting from reduced penalties. An application in writing setting out the relevant details is accepted. There is no need for the application to specifically use the words 'voluntary disclosure'.*

## ATO enforcement and governance

53 Should this issue be selected for review, such a review could start with a stocktake of the 'approved form' provisions in tax administration laws, to determine whether lodgement requirements are clear to taxpayers from proforma returns or other written advice provided by the ATO.

## Audit systems

### Small business audits

54 The Taxpayers' Charter and associated documentation set out the standards of conduct that taxpayers are entitled to expect if they are selected for audit.

55 However, concerns have been raised with the Inspector-General of Taxation about the audit process.

56 If this issue is selected for review, it may be appropriate to focus on audits of small business taxpayers, with the possibility of similar reviews being conducted for other groups of taxpayers in the future. Such a review would first examine the ATO's methodology for audit selection and consider whether it would be appropriate for this methodology to be made more widely known to reassure taxpayers that they are being treated fairly.

57 The Inspector-General of Taxation could examine the ATO's own surveys of auditees to determine whether complaints to the Inspector-General are representative views, as well as directly seeking the views of small businesses who have been audited. Finally, any review could examine what complaints and appeal mechanisms are in place if an auditee is concerned about the behaviour of a tax auditor.

### The administrative cost to business of a tax audit

58 ATO audits can result in significant administrative costs, as well as financial damage for business taxpayers, especially if the audit becomes known to financiers or trading partners.

59 A review into this issue could examine the ATO's strategies for minimising damage to businesses in tax audits, as well as the ATO's policy for compensating businesses for any undue administrative costs, loss or damage arising from an audit.

60 Such a review could proceed by seeking access to all claims that have been made to the ATO for compensation arising from ATO audits over the last five years, together with information on the outcomes of those claims. As with all reviews, the Inspector-General of Taxation could invite submissions from business taxpayers who have been subject to tax audits.

### **ATO information requests**

61 Businesses are required to report large amounts of information to the ATO in addition to the information required in tax returns. This includes responses to section 264 notices, surveys, risk reviews and audits.

62 There is concern about a growing reporting burden and associated compliance costs, particularly in the context of taxpayers already bearing the risks associated with self-assessment. There is frustration that information requests appear not to be well coordinated within the ATO, with the result that businesses can receive multiple requests for information, and that requests sometimes reflect a lack of understanding of how an industry operates.

63 It is claimed that the ATO's unlimited ability to demand information from taxpayers at no cost to the ATO but at high cost to businesses leads to excessive demands for information.

64 A review into this issue could examine the ATO's policies for issuing statutory requests for information.

### **ATO audits of Self-Managed Superannuation Funds**

65 Under the *Superannuation Industry (Supervision) Act 1993*, funds with fewer than five members are known as self-managed superannuation funds and are regulated by the ATO. Other funds are regulated by the Australian Prudential Regulation Authority (APRA).

66 There is concern that the ATO has adopted more prescriptive approaches to the audit of investment strategies of funds than APRA. This is claimed to discriminate against self managed superannuation funds in their level of discretion over investment strategies.



67 A review into this issue could seek advice from the ATO and APRA on their strategies for tailoring their regulatory approaches to their different client groups.

## Debt collection systems

### ATO's small business debt collection practices

68 ATO debt collection practices are of critical concern to small businesses. Around 2.5 million micro-businesses in Australia with an annual turnover of less than \$2 million each account for around 10 per cent of Commonwealth revenue but 60 per cent of the overdue debt collected by the ATO.<sup>8</sup>

69 The Auditor-General has reviewed the ATO's debt collection administration in the past, most recently in 1999, finding that the ATO had been successful in reducing debt 'written off' and also increasing the value of debt finalised, notwithstanding that, as the Australian National Audit Office (ANAO) noted:

*... the ATO considers broader social issues and believes that a \$ expended to \$ collected equation, which applies in a commercial environment, should not be the sole consideration for the ATO.*<sup>9</sup>

70 There is a perception amongst some small business taxpayers and tax practitioners that the ATO's policy is that, if a business taxpayer cannot demonstrate an ability to pay tax debts within a year, then the ATO 'winds the business up' (that is, initiates bankruptcy proceedings).

71 The ATO has advised that this is not the case. At 3 October 2003 the ATO had in place 84,187 tax debt repayment arrangements to the value of \$1.109 billion, including 14,538 repayment arrangements to the value of \$323 million that relate to tax debts over 12 months old, and these figures include small businesses.<sup>10</sup>

72 There are related concerns that the ATO ignores the hardship provisions in section 265 of the ITAA 1936 for small businesses in debt, as well as

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8 ATO, *Compliance Program 2003-04*, p.12.

9 Australian National Audit Office, *The Management of Debt Collection: Australian Taxation Office, Audit Report No. 23 of 1999-2000, Summary*.

10 Commissioner of Taxation, letter to the Inspector-General of 14 October 2003.

declining to use the discretionary provisions for the remission of the GIC in section 8AAG of the TAA 1953.

73 If the ATO is too aggressive in collecting debt from small businesses, there is a possibility that other creditors of small businesses, as well as employees and the community, may suffer. Small business taxpayers struggling to pay tax debts may, in some cases, be competing in the market against businesses that evade all their tax obligations.

74 A review into this matter could examine the fairness of the ATO's small business debt collection program, with a particular focus on the processes and practices of 'winding up' small businesses. The review will examine if the ATO's repayment arrangements assist small businesses to get out of debt.

## ATO litigation management systems

### Examining the ATO's tax litigation practices

75 The ATO has published its official policies in relation to prosecutions and settlements. The ATO, as an agency of the Commonwealth, is also bound by the Attorney-General's Model Litigant directions.

76 There is concern amongst taxpayers and tax practitioners that these policies are not effectively implemented because responsibility for instituting litigation is devolved to relatively low levels within business lines and regional offices.

77 A review into this issue could examine whether the ATO's litigation policies are providing effective and transparent guidance to tax officials and to taxpayers on the cases that should be taken to Court. Such a review could also examine the governance arrangements in place to ensure that litigation is only commenced in accordance with these policies.

78 It would be possible for the Inspector-General of Taxation to examine the mechanisms available within the ATO for taxpayers against whom proceedings are instituted to seek further consideration of their circumstances.

## Test litigation

79 Access to test litigation funding to challenge an ATO position is critical for individuals and small businesses that could not be expected otherwise to afford the high costs associated with Court proceedings. This is especially so where the ATO position has broad impact.

80 The ATO has published its policy on test litigation. This policy is administered through the Litigation Panel in the ATO which includes prominent lawyers and tax advisers who are independent of the ATO.

81 Submissions were received from investors in MMTEIs alleging they were not treated fairly in terms of access to test litigation funding. There is particular concern that the ATO has only tested its position on MMTEIs to an extremely limited extent in the Courts and that the significant case law on MMTEIs has been established by privately funded actions.

82 The Inspector-General of Taxation would not review particular decisions of the Litigation Panel, but could consult with members of the Litigation Panel to determine the systems through which the ATO adopts advice and recommendations from the Panel.

83 Any review into this issue could examine how the ATO's test litigation policy applies to aggressive tax planning arrangements.

84 The Inspector-General could also review the procedures the Litigation Panel has in place to fulfil its Charter role 'to provide a contact point for public feedback about Tax Office involvement in litigation and dispute resolution'.<sup>11</sup> A review into this topic could also examine the ATO's response to the Senate Economics Committee recommendation that the Litigation Panel should publish reasons for its recommendations.<sup>12</sup>

## Settling out-of-court

85 The ATO's aggressive tax planning area has been and is responsible for dealing with tens of thousands of taxpayers who have invested in tax effective investment products, including MMTEIs, EBAs and other arrangements.

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11 Commissioner's Media Release 97/11 of 22 April 1997, 'New Tax Office Litigation Panel'.

12 Senate Economics Committee, *Final Report of the Inquiry into Mass-Marketed Tax Effective Schemes and Investor Protection*, February 2002, p. 41.

86 Common themes raised by taxpayers who have dealt with the aggressive tax planning area in the ATO is that taxpayers feel as though they are being aggregated into 'scheme' categories, branded as tax cheats, and denied an opportunity to communicate their individual tax circumstances. Some taxpayers report being left with little option but to accept a mass settlement offer to avoid ever-accumulating interest and penalties. Some taxpayers have expressed concern about the lack of substantial case law underpinning the ATO's position and, in the case of mass marketed investment schemes, relevant cases were pending in the Courts at the time investors were required to sign deeds of settlement.

87 Once a settlement offer has been accepted, there are claimed to be continuing problems with the ATO's revised amended assessments, such as the failure of the ATO to subtract interest and penalties. Such errors are believed to result from settlements being handled by several different areas in the ATO.

88 Any review into this issue could start by examining the experience of 'settling' with the ATO from the perspective of investors who sought to accept the Commissioner's settlement offer of 14 February 2002 to participants in MMTEIs. Such a review could analyse the equity implications of mass settlement offers, with particular emphasis on the mechanisms available to individual taxpayers to seek a review of their specific circumstances.

### ATO structure and governance

89 The ATO's Corporate Governance Framework is set out in Corporate Practice Management Statement PS CM 2003/03 (G) as read in conjunction with PS CM 2003/01. Corporate Practice Statements must be followed by ATO staff.

90 ATO governance arrangements are consistent with the Australian Standard AS8000-2003, *Good Governance Principles*, and with the Auditor-General's guide to public sector governance.<sup>13</sup>

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13 Australian National Audit Office, *Better Practice Guide — Public Sector Governance*, July 2003.

## **Revenue collection and law enforcement**

91 There is a general concern amongst some taxpayers and their advisers that the ATO's top priority is to meet revenue estimates, not to administer the tax laws equitably and efficiently.

92 There was strong support for the Tax Counsel Network (TCN) in the ATO and a desire to see the TCN better resourced and more active in promoting the legal perspective within the ATO.

93 The Inspector-General of Taxation could examine the ATO's law administration systems, including the training given to tax officers to assist them to understand and apply the ATO's law enforcement role, and the effectiveness of the TCN.

94 Such a review could also examine the systems that the ATO has in place for estimating revenue, analysing emerging revenue patterns and feeding this information back into compliance and operational areas of the ATO.

## **Taxpayer Alerts**

95 The ATO is increasingly using communication products such as 'Taxpayer Alerts' and statements by the Commissioner to draw attention to tax arrangements that may not be legitimate. It is constructive for taxpayers to receive early warnings of investment products that may ultimately lead them into financial loss or damage, should the ATO disallow the tax benefits associated with those products, and it is important for the ATO to maintain the ability to warn taxpayers of its enforcement intentions.

96 However, the ATO's effective ability to make public statements, if not managed carefully, has the potential to harm businesses operating within the law.

97 There are concerns that the ATO has, in the past, issued negative public statements on investment products or arrangements prior to issuing rulings on those investment products. This has the effect of a business sustaining severe damage in the marketplace but, at the same time, being denied the opportunity to challenge any ATO ruling through statutory review channels.

A review into this matter could examine what risk management systems are in place in relation to 'Taxpayer Alerts' and similar communication products, to ensure that the Commonwealth is not exposed to damages claims from businesses operating within the tax laws.

### **ATO governance systems**

98 For several years, business groups have been calling for the Government to strengthen governance systems for the ATO and this issue has also been raised with the Inspector-General of Taxation.

99 Particular concerns raised about ATO governance systems include:

- the bureaucratic structure of the ATO and a perceived lack of focus on statutory role and objectives;
- the need for strategic staffing and training programs;
- the need for strategic business planning in the ATO, including an information technology systems strategy;
- the need for progressive reporting on achievements against the ATO's strategic business plan;
- benchmarking of ATO systems' performance against international standards for revenue collection and program delivery; and
- the need for clear lines of accountability for tax policy and tax administration, (to ameliorate the current situation of everyone blaming everyone else when a problem arises in administration of new tax laws).

100 On 14 November 2002 the Government announced that Mr John Uhrig AC would undertake a review into the corporate governance of Commonwealth statutory authorities and office holders. The ATO is included in the agencies covered by this review. An expected outcome of the review is the development of a broad template of governance principles. It is also noted that the Government, in 2002, formally transferred the tax legislative function from the ATO to Treasury to reinforce the ATO's tax administration responsibility.

## ATO enforcement and governance

101 Any review into this issue would examine the systems adopted by the ATO to implement any recommendations flowing from the Uhrig review. Such a review would not commence until the ATO had been given sufficient time to consider, and implement, the outcomes of the Uhrig review.

### **ATO internal communication systems**

102 A message that recurs in consultation with tax agents is that there is a disconnect in the ATO between the line areas with whom agents deal and the National Office Executive in the ATO.

103 Manifestations of this disconnect were advised to include the following:

- Decisions taken by senior management are not adequately implemented by junior management.
- Junior management does not have sufficient authority to make commonsense decisions, but can only act in accordance with practice statements.
- There are no effective channels for information about systems problems to go up from line areas to senior management, so junior tax officers have to cope with systems they know are dysfunctional.
- When problems are raised by tax agents at a high level, directions for change come down from the top but the systems do not get any better because the people coming up with the 'solutions' don't understand the 'problems'.

104 A review by the Inspector-General of Taxation could examine the ATO's internal communication systems, particularly as they relate to solving systemic problems manifesting at the 'coalface'.

### **ATO communication with taxpayers**

105 The ATO's move into the electronic environment has resulted in most taxpayers and their advisers being denied the opportunity to establish effective personal working relationships with tax officers in their particular area of interest, instead being referred to ATO call centres or shopfronts and, if that proves unhelpful, the ATO complaints call centre.

106 Taxpayer groups and agents would like to see the least qualified tax officers taken off client contact responsibilities and replaced by tax officers who are well trained, have worked in the tax field on which they are advising, and who have appropriate delegations to give advice and make simple decisions (rather than just reading from practice statements distributed by National Office).

107 The tax professions would also like to see ATO senior executives represented on industry technical committees trying to sort out specific problems in tax administration, not just on high level forums such as the National Tax Liaison Group.

108 A review into this issue could examine options for getting ATO expertise and authority out to the public through client interface systems.

### **ATO networking with business groups**

109 There was high praise for the regular forums that the ATO conducts on a regular basis with business groups and tax practitioners.

110 However, there is concern from business groups and tax professions outside Sydney and Melbourne about their level of access to senior representatives of the ATO, in a broad consultation context.

111 A review into this issue could examine options for extending the ATO's networking and consultation systems into other capital cities and regional areas. Such a review would not be examining the location of ATO offices or shopfronts but, rather, would examine the extent to which the ATO has established programs of visiting different regions on a regular basis to consult with taxpayer groups and tax advisers.



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