



**Australian Government**  
**Inspector-General of Taxation**

Investigation into matters reported by the  
Four Corners program about  
small business dealings with the  
Australian Taxation Office

A submission to the Secretary of the Treasury

Inspector-General of Taxation

April 2018



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# 1. INTRODUCTION

1.1 The Inspector-General of Taxation (IGT) welcomes the opportunity to assist the Secretary of the Treasury (Secretary) with his investigation, at the request of the Minister for Revenue and Financial Services, into matters reported on the Australian Broadcasting Corporation's Four Corners program, which aired on 9 April 2018, regarding small business dealings with the Australian Taxation Office (ATO).

1.2 This investigation is crucial given the important role of small businesses in Australia, making up 99 per cent of all businesses, and contributing \$380 billion to the economy.<sup>1</sup> As the Prime Minister has said:

When you stand with small business, you are backing the lifeblood of millions of Australian families right around the country, in every community and in every electorate, in our regions and our cities.<sup>2</sup>

1.3 The IGT has significant interactions with small business particularly through its complaint handling function with approximately 25 per cent of all complaints being received from small businesses. IGT reviews have also dealt with many tax issues that affect small business.

1.4 The IGT has already publicly stated that his office has not seen evidence of the ATO systematically targeting small businesses<sup>3</sup> although there are clearly matters that need to be addressed and improved.

1.5 It is well-established that the ATO is a large and powerful organisation<sup>4</sup> whose functions touch on almost every aspect of Australian life. As the IGT has noted in his 2016 submission to the House of Representatives Standing Committee on Tax and Revenue (SCTR):<sup>5</sup>

2.13 The ATO itself is in a unique position of being, by necessity, a monopoly service provider whose services permeate the fabric of Australian society. For example, the ATO is responsible for collecting approximately 80 per cent of total Government revenue across all levels which comprises \$340 billion in net revenue for the Federal Government and on behalf of the states. In addition to managing and collecting revenue, the ATO is also responsible for maintaining oversight of 880,000 employers, 780,000 trusts, 557,000 self-managed superannuation funds and working with 55,000 tax and business activity statement agents.

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<sup>1</sup> The Hon Malcolm Turnbull, *Business and Employment* <[www.pm.gov.au](http://www.pm.gov.au)>.

<sup>2</sup> *Ibid.*

<sup>3</sup> Ross Greenwood, 'ATO targeting small business, "This is a harrowing, horrible experience"', *2GB*, 10 April 2018 (Inspector-General of Taxation).

<sup>4</sup> Mark Leibler AC, 'Perspectives on Tax Administration' (Keynote Address to the 33rd National Convention Tax Institute of Australia, Cairns, 14 March 2018) <<https://www.abl.com.au/Insights-News/News/Leibler-letter-in-The-Age>>.

<sup>5</sup> Inspector-General of Taxation (IGT), *Inquiry into the External Scrutiny of the Australian Taxation Office: Submission to the House of Representatives Standing Committee on Tax and Revenue* (2016).

2.14 The ATO administers the tax affairs of some 12.8 million individual taxpayers and 2.9 million businesses, whose valuable financial information is also used by other Government bodies to determine eligibility to social support services, such as pensions and child support.

2.15 The data made publicly available by the ATO is also relied upon by commerce and seen as a trusted source. For example, the Australian Business Register (ABR) is amongst the top ten most used Australian Government websites as it is the only public source of accurate and reliable information on Australian Business Numbers. The ABR was accessed some 517 million times in 2014-15.

2.16 Moreover, the ATO administers a significant portion of the superannuation system, which impacts the Australian community's retirement savings, as well as administering excise systems, managing numerous grant schemes, collecting debt in relation to the Higher Education Loan Program and maintaining the Agricultural Land Register, to name a few.

2.17 In performing its variety of critical roles, the ATO holds one of the largest repositories of sometimes highly commercially sensitive information and data on businesses and individuals operating in Australia and elsewhere around the world. In 2014-15, the ATO reported receiving data on some 650 million transactions for data matching purposes. In this respect, it is receiving and managing such data from a range of sources including state-based public sector agencies, share registries, land titles offices and credit card companies. In addition, the ATO has also begun a program to collect and make use of biometric data for verification purposes, reporting having collected 750,000 voiceprints in 2014-15.

2.18 As one of the largest public service agencies with an operating budget of \$3.45 billion and over 20,000 employees, the ATO is also undertaking a "digital transformation", by moving away from paper-based interactions towards electronic interactions.

2.19 In the discharge of its duties, the primary one being the compulsory exaction of monies from taxpayers, the ATO is afforded significant powers including coercive information gathering and interrogation, restricting movements of individuals and garnishee notices, many of which are exercised without judicial oversight. In addition, it should be noted that operations of the ATO are directed by the Commissioner and three Second Commissioners all of whom are appointed for a fixed tenure of seven years, which falls outside of the election cycle.

1.6 Given the size of the ATO, the breadth and depth of its activities as well as the complexities of administering the tax and superannuation system, it is inevitable that mistakes will be made and/or the community, from time to time, would be dissatisfied with its decisions, actions or the manner in which it has dealt with them. The key issue is the manner in which mistakes or dissatisfaction are addressed and that the community is, and believes that it is, ultimately treated fairly and equitably on each occasion.



1.7 In the short timeframe provided, in this submission, the IGT has drawn on his past reviews as well as themes emerging from his complaints handling service to address the four specific areas identified by the Secretary, namely:

1. Information and views, including any relevant past findings of the IGT, about the ATO's administration of the tax laws for small businesses, including the ATO's approach to:

1.1. handling tax disputes, including the adequacy of its administrative arrangements for the separate assessment and review functions.

1.2. ensuring recovery actions are proportionate, including in its use of garnishee notices and other firmer recovery actions.

1.3. administering ABNs, including its approach to cancelling ABNs.

1.4. compensating for defective administration, including the timeliness and adequacy of compensation offers.

2. Information regarding small businesses' perceptions about the fairness of their dealings with the ATO.

3. Views as to whether any of the issues within the scope of this investigation will be adequately addressed by the ATO's recent or planned changes to organisational arrangements, administrative policies or procedures, or by otherwise implementing the past recommendations of the IGT or other external scrutineers.

4. Any other information the IGT considers relevant to this investigation.

1.8 A full copy of the Secretary's information request to the IGT, which contextualises the investigation following the recent media reporting, is provided in Appendix 1 to this submission.



## 2. INFORMATION AND VIEWS OF THE IGT

### HANDLING OF TAX DISPUTES

2.1 The IGT has previously examined the ATO's approach to resolving tax disputes through a number of different reviews including those into the management of Part IVC litigation,<sup>6</sup> objections,<sup>7</sup> settlement<sup>8</sup> and the ATO's use of alternative dispute resolution (ADR)<sup>9</sup>. Most recently, at the request of the SCTR, the IGT undertook a review into the ATO's management of tax disputes with a focus on large businesses and high wealth individuals although commentary was also provided about small businesses and individuals.<sup>10</sup> The SCTR issued its own report on the ATO's approach to tax disputes in respect of other market segments, including small businesses.<sup>11</sup>

2.2 A key consideration in the tax disputes review was 'whether a separate agency should manage ATO litigation, whether the ATO should have a separate appeals area, or if current arrangements should continue'.<sup>12</sup> The majority of the submissions received had called for a separate appeals area within the ATO whilst a small number preferred the establishment of a separate agency.<sup>13</sup> Whilst a separate agency represented the purest and most definitive form of independence from the ATO, the IGT noted that such an agency would not be without its challenges including additional costs for Government, be largely staffed with personnel transferred from the ATO, may potentially overlap with the functions of the Administrative Appeals Tribunal and hamper the development of effective feedback loops.<sup>14</sup>

2.3 Having regard to all the submissions as well as the IGT's research across a range of comparable international jurisdictions, the IGT concluded that a separate appeals area within the ATO was the best option for a number of reasons. These reasons included improving the actual and perceived independence of the objection function, safeguarding sustainable audit decisions, the centralised management of ADR and litigation, and providing a point of challenge for ATO precedential views.<sup>15</sup> The IGT also considered that such an area would yield two further improvements for taxpayers, particularly small businesses.

2.4 Firstly, it would enhance the availability and effectiveness of pre-assessment review processes. The IGT observed in the review that there were a range of processes which operated at different points during a dispute with the ATO. However, some of

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<sup>6</sup> IGT, *Review of Tax Office management of Part IVC litigation* (2006).

<sup>7</sup> IGT, *Review into the underlying causes and the management of objections to Tax Office decisions* (2009).

<sup>8</sup> IGT, *Review into aspects of the Tax Office's settlement of active compliance activities* (2009).

<sup>9</sup> IGT, *Review into the Australian Taxation Office's use of early and alternative dispute resolution* (2012).

<sup>10</sup> IGT, *The Management of Tax Disputes* (2015).

<sup>11</sup> House of Representatives Standing Committee on Tax and Revenue (SCTR), *Tax Disputes* (2015).

<sup>12</sup> SCTR, *Inquiry into tax disputes launched* (Media Alert, 6 June 2014).

<sup>13</sup> IGT, above n 10, p 67.

<sup>14</sup> *Ibid*, p 69.

<sup>15</sup> *Ibid*, pp 71-82.

these processes, such as the ATO's internal Independent Review, where the merits of the ATO's position is considered by a senior ATO officer unconnected with how that position was initially established, are only available to large taxpayers. The IGT believed that, as a matter of fairness and equity, all taxpayers should have access to such pre-assessment review mechanisms. In fact, it was noted that it is even more important for small business and individual taxpayers to have such access given their limited resources to progress disputes through more formal channels.<sup>16</sup>

2.5 Tax debt crystallises at the point that an assessment is issued following which the ATO can commence a range of recovery actions.<sup>17</sup> Therefore, while a taxpayer may challenge an assessment through the objection and litigation processes under Part IVC of the *Taxation Administration Act 1953*, these courses of action may impose significant costs which are exacerbated by collateral debt collection action, or the risk of it, by the ATO. Accordingly, pre-assessment reviews are an important safeguard, particularly for small businesses and individuals, against such recovery action taking place based on an incorrect assessment and the cost of challenging that assessment.

2.6 Secondly, a separate appeals area would provide oversight and accountability in the management of settlements. The IGT recognises that the ATO has, in recent years, engaged retired Federal Court judges to undertake *ex post facto* reviews of settlements with a view to provide both assurance and learnings for future activities rather than ensuring that the case being reviewed was settled appropriately. It is also necessary to appreciate that the numbers of settlements that have been reviewed to date have been very small,<sup>18</sup> the former judges themselves are commissioned by the ATO which may create a perceptions of bias and the reviews do not seek feedback from the taxpayers but rather operate with ATO material only.

2.7 Accordingly, the IGT made a recommendation to the Government to establish a separate Appeals area within the ATO, headed by a new and dedicated Second Commissioner, that would be responsible for pre-assessment reviews, objections, litigation and facilitating the use of ADR.<sup>19</sup> The SCTR made a similar recommendation in its Inquiry report.<sup>20</sup>

2.8 While the IGT's and the SCTR's recommendations were ultimately not implemented, it served as a catalyst for the ATO to administratively restructure itself to move the objection function from the Client Engagement (formerly Compliance) Group into the Law Design and Practice Group.<sup>21</sup> The restructure, together with certain initiatives of the ATO such as the broader rollout of the in-house facilitation service have yielded some benefits with dispute levels (as indicated by objection and litigation figures) decreasing in recent years.<sup>22</sup>

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<sup>16</sup> IGT, above n 10, p 72.

<sup>17</sup> *Taxation Administration Act 1953*, ss 14ZZM, 14ZZR.

<sup>18</sup> Commissioner of Taxation, *Annual Report 2016-17* (2017) p 68.

<sup>19</sup> IGT, above n 10, p 120.

<sup>20</sup> SCTR, above n 11, p 108.

<sup>21</sup> Australian Government, *Australian Government Response to House of Representatives Standing Committee on Tax and Revenue report: Tax disputes* (December 2015) p 14.

<sup>22</sup> Commissioner of Taxation, above n 18, pp 65-66.

2.9 While the above ATO initiatives are worthwhile and should be encouraged, given the ongoing levels of discontent, the IGT remains of the view that a separate Appeals area within the ATO would significantly enhance the ATO's approach to tax disputes as well as the public perception of it. A key function of such an area would be to conduct merits-based pre-assessment reviews which would be available to all taxpayers, including small businesses and individuals, based on pre-established criteria. The IGT appreciates that the ATO may require significant additional resources to provide the latter service to all taxpayers, however, such costs may now be worthy of consideration.

2.10 Additionally, consideration should be given to providing assistance or funding to vulnerable or unrepresented taxpayers who may need to challenge ATO decisions through the objection process or the court system. The Dispute Assist pilot<sup>23</sup> which the ATO conducted last financial year seems to indicate that it has also acknowledged that provision of such assistance is justified. However, taxpayers may be uncomfortable with such assistance being provided by the party with whom they have a disagreement, namely the ATO. Accordingly, the IGT is of the view that other programs, such as the Low Income Taxpayer Clinics (LITC) program<sup>24</sup> operating in the United States, should be considered.

2.11 The LITC 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 Internal Revenue Service (IRS);
- educating them about their rights and responsibilities as taxpayers; and
- advocating for issues that impact them.<sup>25</sup>

2.12 LITCs are independent from the IRS but receive some of their funding from the Taxpayer Advocate Service (the IGT counterpart in the United States) through a matching grant program.<sup>26</sup> The Taxpayer Advocate Service also oversees and administers the grant program. The grant must be matched by the clinic on a dollar-for-dollar basis.<sup>27</sup> Academic institutions and other non-profit organisations are among those which may qualify for such funding.<sup>28</sup>

## **PROPORTIONALITY OF DEBT RECOVERY ACTIONS**

2.13 The IGT understands that the ATO has stated that it had issued approximately 24,000 garnishee notices during the 2016-17 financial year. This is considerably lower than in previous years as depicted in Table 1.

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<sup>23</sup> Commissioner of Taxation, above n 18, pp 65-66.

<sup>24</sup> Taxpayer Advocate Service (TAS), *Low Income Taxpayer Clinics* <<https://taxpayeradvocate.irs.gov/about/litc>>.

<sup>25</sup> TAS, *Low income taxpayer clinic program report* (2015) p 4.

<sup>26</sup> *Internal Revenue Code* § 7526(a).

<sup>27</sup> *Internal Revenue Code* § 7526(c)(5).

<sup>28</sup> TAS, above n 25, pp 58-59.

2.14 Following recent concerns raised with the IGT about the use of garnishee notices, the IGT made preliminary enquiries with the ATO. In response, the ATO had explained that the decrease in the number of garnishee notices issued during the 2016-17 financial year compared with previous years was due to a range of factors including:

- the decrease in debt collection activities themselves due to the lead-up to an ATO system upgrade in November 2016;
- the failure of I.T. storage hardware in December 2016, which impaired payment and debt-related activities into February 2017; and
- the deferral of debt collection activities in April and May 2017 for those impacted by Tropical Cyclone Debbie in Queensland and northern New South Wales.

2.15 The IGT's 2015 *Debt Collection*<sup>29</sup> report contained the table below which shows ATO's numbers of garnishee notices issued across three financial years, 2011-12 to 2013-14, and their impact on the solvency of affected entities.

**Table 1: Garnishee notices issued and impact on solvency**

Business segment	2011-12	2012-13	2013-14	Total	Percentage
<b>Gov</b>	4	1	1	6	0.00%
Insolvent	0	0	0	0	0.00%
Solvent	4	1	1	6	100.00%
<b>INB</b>	6,485	13,878	8,965	29,328	14.15%
Insolvent	0	3	0	3	0.01%
Solvent	6,485	13,875	8,965	29,325	14.15%
<b>LGE</b>	25	41	59	125	0.06%
Insolvent	0	0	0	0	0.00%
Solvent	25	41	59	125	100.00%
<b>MIC</b>	37,198	65,281	58,222	160,701	77.55%
Insolvent	0	346	283	629	0.39%
Solvent	37,194	64,920	57,938	160,052	99.60%
Unknown	4	15	1	20	0.01%
<b>NFP</b>	132	151	85	368	0.18%
Insolvent	0	1	2	3	0.82%
Solvent	132	150	83	365	99.18%
<b>SME</b>	5,024	5,979	5,692	16,695	8.06%
Insolvent	0	79	67	146	0.87%
Solvent	5,024	5,893	5,621	16,538	99.06%
Unknown	0	7	4	11	0.01%
<b>Grand Total</b>	48,868	85,331	73,024	207,223	100.00%

Source: ATO as set out in IGT, *Debt Collection* (2015).

2.16 The table above shows that the majority of garnishee notices are issued to small business (SME) including micro businesses (MIC), totalling 86 per cent of all such notices issued over the three financial years, 2011-12 to 2013-14. The total number of

<sup>29</sup> IGT, *Debt Collection* (2015) pp 104-105.

garnishee notices issued to these taxpayer groups was 42,222, 71,260 and 63,914 in the 2011-12, 2012-13 and 2013-14 financial years respectively.

2.17 Indeed, the IGT had observed in the *Debt Collection* report that:

Garnishee notices are the most common form of firmer recovery action used by the ATO, with over 207,000 notices issuing between 2011-12 and 2013-14. Accordingly, it is vital that garnishee notices are issued correctly as they impact a significant number of taxpayers every year.<sup>30</sup>

2.18 The IGT had identified supervision as an important theme with respect to the ATO's firmer debt recovery activities, particularly as very junior staff were making significant debt-related decisions. For example, junior staff at the APS 2 level were authorised to issue garnishee notices for significant amounts (up to \$50,000). In addition to training that they may have received, the IGT was of the view that greater supervision of these officers' decisions was required including the need to seek approval from more senior officers before any notices are issued.<sup>31</sup> A broader recommendation was also made to:

- (a) improve Debt Business line team leader supervision of staff including requiring team leader approvals in appropriate cases;
- (b) align case allocation systems with the debt staff capability matrix once developed;
- (c) implement a network of advisory staff in the Debt Business Line to support escalation of issues, development of precedents and an effective database of debt decisions; and
- (d) improve the enforcement of recording details of debt cases on its systems to promote better management of particular lower risk cases.<sup>32</sup>

2.19 Although the ATO agreed to the above recommendation, their associated commentary suggests that their agreement was limited to pre-existing arrangements. As a result no improvement to supervision of junior staff who issue garnishee notices may have been made.

2.20 The IGT made a further recommendation aimed specifically at garnishee notices. It required:

- (a) developing improved processes to correct data mismatches between the ATO Integrated System and Receivables Management System;
- (b) encouraging financial institutions to challenge garnishee notices where they believe notices may have been issued to the incorrect bank account;

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<sup>30</sup> IGT, above n 29, p 101.

<sup>31</sup> Ibid, p 102.

<sup>32</sup> Ibid, p 131.

- (c) reviewing its officers' adherence to policy of making every effort to telephone taxpayers, particularly lower risk taxpayers; and
- (d) adopting a unified approach between debt and legal officers when issuing garnishee notices for all cases.<sup>33</sup>

2.21 The ATO had agreed to parts (a), (b) and (c) but disagreed to part (d).<sup>34</sup> The latter part of the above recommendation was important in minimising the risk of inconsistent approaches being taken where there is a lack of communication between the debt and legal areas.<sup>35</sup>

2.22 The IGT was also of the view that unnecessary costs and frustration of small business owners could be avoided by improving commercial awareness and credit risk assessment capability of ATO staff who make decisions regarding garnishee notices and payment arrangements as such staff were expected to consider the viability of the relevant businesses.<sup>36</sup> A recommendation was made for the ATO to improve the commercial awareness and understanding of such staff and to develop streamlined tools to improve their assessment of business viability in lower risk cases.<sup>37</sup> The ATO disagreed with developing such tools and although it agreed with expanding its training program, the level of this agreement is not clear.<sup>38</sup>

2.23 Furthermore, the IGT made an overarching structural recommendation which required the ATO to consider merging the Debt Business Line into the Client Engagement Group. The Debt Business Line is currently in the Service Delivery Group, however, the business line that would have issued the assessment and is well acquainted with the taxpayer in question lies in the Client Engagement Group. The co-location of these two functions within the one group, would facilitate a more efficient, better informed and coordinated ATO action.

2.24 The ATO disagreed with the above recommendation although it did undertake to consider the most appropriate structure as part of its Reinvention program.

2.25 Overall, the IGT made 19 recommendations, 16 of which the ATO had agreed to in full, in principle or in part. However, as mentioned above and in the report itself, the level of agreement was not clear in a number of respects.<sup>39</sup>

2.26 It should be noted that at the time of the above review, the ATO had acknowledged that its previous approach to debt collection was 'random and ad hoc'<sup>40</sup> and had begun developing a program of work to explore alternatives and improve its recovery action. These programs were at various stages of design, development and implementation during the review. As such, their effectiveness could not be

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<sup>33</sup> IGT, above n 29, p 103.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, p 102

<sup>36</sup> Ibid, pp 19, 83, 84.

<sup>37</sup> Ibid, pp 83-86.

<sup>38</sup> Ibid, p 86.

<sup>39</sup> Ibid, p x.

<sup>40</sup> Ibid, p 37.



comprehensively assessed. The IGT's recommendations focused on interim measures and improving the ATO's strategic focus, such as taking more frequent and proportionate debt recovery action to minimise the need to take firmer action later<sup>41</sup> as well as developing strategies to better assist small businesses to avoid falling into debt<sup>42</sup>.

2.27 The IGT has not conducted a major review into ATO's debt collection since the above review. However, debt collection issues have accounted for 31.4 per cent, 23.1 per cent, 21.9 per cent and 22.6 per cent of all complaints received by the IGT in the 2014-15,<sup>43</sup> 2015-16, 2016-17 financial years and the 2017-18 financial year to date, respectively. Of these debt-related complaints, concerns with garnishee actions and payment arrangements were amongst the top three most commonly raised. Across all years mentioned above, garnishee action accounted for 18.6 per cent, 14.9 per cent, 8.8 per cent and 11.2 per cent while payment arrangement issues accounted for 29.1 per cent, 21.9 per cent, 18.2 per cent and 18 per cent.

2.28 In respect of complaints raised with the IGT by taxpayers regarding payment arrangements, upon receiving information from both the taxpayer and the ATO, the IGT has generally been able to achieve desired outcomes for taxpayers in over 50 per cent of cases.

2.29 As the IGT proffered to the SCTR, it may now be timely to assess the ATO's implementation of the IGT recommendations from the *Debt Collection* review and their effectiveness in practice and, in particular, consider those recommendations with which the ATO did not agree or agreed with qualifications. Such a review may be necessary given that collectable tax debt is continuing to grow and tax debt related complaints have continued to form a large proportion of all complaints made to the IGT.<sup>44</sup>

2.30 In relation to the latest allegations of abuse of the ATO's garnishment powers as set out in the Four Corners program, an urgent, targeted and independent review is required to verify the allegations and, if proven, the extent of such abuse should be determined together with the appropriate remedial action. The IGT had already made preliminary enquires in this regard but has not taken any further action pending the outcome of the Secretary's investigation. There are significant concerns<sup>45</sup> and these are serious allegation made by an ATO officer who has provide some very damaging evidence to Four Corners including the so-called 'hour of power'. These allegations must be independently investigated and effectively addressed to regain the confidence and trust of the community which has been in decline following major ATO I.T.

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<sup>41</sup> IGT, above n 29, p 68.

<sup>42</sup> IGT, above n 29, pp 54-58.

<sup>43</sup> The IGT's complaints handling service commenced operation on 1 May 2015. Accordingly, the statistics for the 2014-15 year only include complaints received between 1 May 2015 and 30 June 2015.

<sup>44</sup> IGT, *Inquiry into the 2016-17 Annual Report of the Australian Taxation Office: A submission to the House of Representatives Standing Committee on Tax and Revenue* (February 2018).

<sup>45</sup> Adele Ferguson and Nassim Khadem, 'Coalition, Labor to probe ATO over 'scandalous' revelations,' *Sydney Morning Herald* (10 April 2018).

outages as well as Operation Elbrus and allegations of tax fraud that may be linked to abuse of position by a public official.<sup>46</sup>

## ADMINISTRATION OF AUSTRALIAN BUSINESS NUMBERS (ABN)

2.31 In 2016, the IGT undertook a review into the ATO's *employer obligations compliance activities*<sup>47</sup> (Employer Obligations review) a key focus of which was the uncertainty associated with the employee/contractor distinction which can lead to misclassification of workers with adverse impacts for all parties. During the review, some stakeholders had also raised concerns with 'unreasonable delays' in obtaining an Australian Business Number (ABN) and insufficient reasons provided for refusal. It was considered that whilst such delays and reasons may be indirectly related to whether a worker is a contractor or an employee, the eligibility for an ABN is based on whether an 'enterprise' is being undertaken. This was outside the scope of the review, however, the IGT noted it as an area for future review if concerns persisted.<sup>48</sup>

2.32 The IGT has been monitoring the concerns relating to administration of ABNs. For example, complaints relating to ABNs have been closely considered since the IGT assumed the tax complaints handling function. A summary of the IGT's ABN-related complaint data is provided in the table below. These complaints generally concern ABN registration or deregistration, inaccurate taxpayer details or information.

**Table 2: Numbers of complaints to the IGT raising ABN issues**

Description of issue	Total 1 May to 30 June 2015	Total 2016 Financial year	Total 2017 Financial year	Total 1 July 2017 to 16 April 2018	Grand Total
ABN registration/deregistration, taxpayer information/details	44	33	33	6	116
Total of all issues	274	2374	2638	2022	7308
ABN issues as a % of all issues	16.1%	1.4%	1.3%	0.3%	1.6%

Source: IGT

2.33 The above table indicates that ABN issues were proportionately more prevalent in period between 1 May 2015 and 30 June 2015. This result may be attributable to the ATO's 'Major Release 4' system upgrade which impacted ABN registrations amongst other things.<sup>49</sup> In subsequent financial years, ABN-related complaints dropped sharply to just over one per cent of all issues raised with the IGT.

2.34 In addition to complaints data, the IGT also monitored the situation through its other interactions with the tax profession as well as the broader community. Concerns began to re-emerge in the latter parts of 2017.<sup>50</sup> There were discussions about the IGT conducting a review into this area, however, it is understood that the Commissioner undertook to review the matter himself in the first instance. It is not

<sup>46</sup> Australian Federal Police, 'AFP smashes \$165 million tax fraud syndicate' (Media release, 18 May 2017).

<sup>47</sup> IGT, *Review into the Australian Taxation Office's employer obligations compliance activities* (2016).

<sup>48</sup> Ibid, p 22.

<sup>49</sup> Commissioner of Taxation, *Annual Report 2014-15* (2015) p 81.

<sup>50</sup> Miranda Brownlee, 'ATO cancels thousands of ABNs in non-lodgment blitz', *Accountants Daily* (29 November 2017) <[www.accountantsdaily.com.au](http://www.accountantsdaily.com.au)>; Robert Gottlieb, 'The tax office should collect tax, not attempt to engineer business', *The Australian* (7 December 2017) <[www.theaustralian.com.au](http://www.theaustralian.com.au)>.

clear whether such a review has been conducted or complete but there does not seem to be any public reporting of it.

2.35 More recently, in a presentation to the 13<sup>th</sup> International Conference on Tax Administration,<sup>51</sup> the IGT noted challenges which revenue authorities may increasingly face as a result of emerging technologies and platforms. To illustrate the challenges, that IGT discussed the case of Uber drivers compared with taxi drivers in the requirement to register for and pay Goods and Services Tax (GST). In this case, while the ATO issued its initial directive for Uber drivers to register for ABNs and to charge and pay GST, the position was not officially settled until February 2017. In the intervening period, many drivers registered and charged GST while others chose not to do so despite the ATO messaging.

2.36 Furthermore, once the position was settled by the Federal Court,<sup>52</sup> a number of drivers who had not registered for ABNs or charged GST found themselves in the position of potentially needing backdated registrations, lodgments and payments of GST shortfall. This would not be an easy feat for someone who did not otherwise operate a business or who merely worked as an Uber driver on an ad hoc basis.

2.37 Other examples include riders of delivery services such as Deliveroo and Foodora, who faced similar issues in relation to ATO delays or refusals to issue ABNs where there were concerns about whether the person was in fact carrying on an enterprise. They may not be carrying on an enterprise in the strict sense, however, when faced with mandatory requirements by platforms such as Deliveroo and Foodora to hold an ABN before they are able to commence work, the taxpayer is invidiously caught between two conflicting requirements in these instances.

2.38 Given the current concerns regarding the administration of ABNs, the ATO needs to complete and/or report the findings of its review, taking also into account the above challenges. Following the release of such findings, the IGT will consider whether he should conduct a further review.

## **COMPENSATION FOR DEFECTIVE ADMINISTRATION**

2.39 In 2016, the IGT examined the Scheme for Compensation for Detriment Caused by Defective Administration (CDDA Scheme) as part of the review into the *Taxpayers' Charter and Taxpayer Protections*.<sup>53</sup>

2.40 The IGT identified that the CDDA Scheme had been the subject of a range of prior reviews including those of the Administrative Review Council,<sup>54</sup> the

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<sup>51</sup> IGT, 'Ensuring appropriate revenue authority scrutiny in the age of the sharing economy' (Presentation to the 13<sup>th</sup> International Conference on Tax Administration, Sydney, 5 April 2018) <[www.igt.gov.au](http://www.igt.gov.au)>.

<sup>52</sup> *Uber B.V. v Commissioner of Taxation* [2017] FCA 110.

<sup>53</sup> IGT, *Taxpayers' Charter and Taxpayer Protections* (2016) pp 71-97.

<sup>54</sup> Administrative Review Council, *Federal Judicial Review in Australia* (2012).

Commonwealth Ombudsman,<sup>55</sup> the Auditor-General<sup>56</sup> and the Senate Legal and Constitutional Affairs References Committee<sup>57</sup>.

2.41 Notwithstanding the range of prior reviews, issues and concerns continued to percolate at the time of the IGT's review with the primary concerns being difficulties in obtaining compensation<sup>58</sup> as well as the low quantum of compensation where it was paid. These concerns together led some stakeholders to form the view that it was 'just a token scheme' and in place 'for the sake of having a compensation scheme'.<sup>59</sup> Statistics provided by the ATO showed that in each of the 2013-14, 2014-15 and 2015-16 financial years, the median compensation amount paid by the ATO was \$267, \$300 and \$484, respectively.

2.42 Although, in the above review, the IGT observed that the number of cases where compensation was paid and the quantum of awarded compensation were not necessarily accurate measures of the effectiveness of the CDDA Scheme, it is understandable that aggrieved taxpayers would view such low compensation offers as a lack of genuine attempt to indemnify them for the loss that they had suffered.

2.43 There are limited options for taxpayers who disagree with the ATO's compensation decision and seek review of it. The ATO offers internal review of CDDA Scheme decisions in limited circumstances although there are no statutory or administrative requirements to do so. There are presently no external review avenues for taxpayers in respect of CDDA Scheme decisions, save for judicial review pursuant to section 75 of the Constitution and section 39B(1) of the *Judiciary Act 1903*. It is noted, however, that judicial review would only operate to revert the decision to the ATO to be remade where the Court identifies a deficiency in the decision making process. It would not entitle the taxpayer to a ruling on whether or not there has been defective administration or the quantum of compensation to be paid.

2.44 In the above review, the IGT observed the importance of avenues for review of CDDA decisions and recommended that the ATO make internal review accessible to all taxpayers. In respect of external review, the IGT noted that that the scope of sections 75 and 39B(1) in respect of CDDA Scheme decisions remains largely untested and that the Department of Finance may wish to consider the issue more broadly. Given that the broad policy remit of the CDDA Scheme rested with the Department of Finance and that any changes to it would not necessarily apply on a whole-of-government basis, the IGT was constrained in the nature of recommendations that could be made in this regard.

2.45 Since the advent of the IGT complaints handling service, 151 complaint cases concerning CDDA as the primary, or one of a range of issues, have been received. In the main, many of these complaints relate to concerns that the ATO had not

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<sup>55</sup> Commonwealth Ombudsman, *Putting things right: compensating for defective administration* (2009); Commonwealth Ombudsman, *To compensate or not to compensate?* (1999).

<sup>56</sup> Australian National Audit Office (ANAO), *Compensation Payments and Debt Relief in Special Circumstances* (2003-04).

<sup>57</sup> The Senate, Legal and Constitutional Affairs References Committee, *Review of Government Compensation Payments* (December 2010).

<sup>58</sup> IGT, above n 53, pp 76 and 82.

<sup>59</sup> *Ibid*, p 82.

investigated or considered all relevant facts, the taxpayer's complaint and/or offered a compensatory payment which was insufficient to cover the loss.

2.46 Under the CDDA scheme, whether compensation is paid at all or how much is paid, is wholly at the discretion of the Commissioner. All the IGT can do is to verify whether all relevant matters have been considered in arriving at the compensation decision and that the guidance issued by the Department of Finance has been followed. Where it is found that the Commissioner has not done so in exercising his discretion, the IGT requests that he reconsider his decision taking into account all the relevant matters and guidance. As a result of the IGT findings, the initial quantum of compensation offered to the taxpayer has been increased in some cases although it has not always been increased to a level acceptable to the taxpayer.

2.47 The IGT is of the view that reform is required to the way the ATO compensates taxpayers who have suffered as a result of its defective administration. This may be achieved by devising a new scheme for tax purposes only or bolster the CDDA scheme more broadly. In regards to the latter, the Department of Finance should be approached to consider options for reforming the policy framework across whole of government, with an emphasis on making formal external review available. Regardless of whether that review function continues to be conducted by existing merits reviews forums, such as the Administrative Appeals Tribunal (AAT), or scrutineers such as the IGT, it is imperative that those bodies be adequately resourced to perform the necessary functions.

2.48 Given the complexities of the tax and superannuation systems, and that these systems affect almost the entire population, consideration should also be given to instituting a separate compensation regime for indemnifying taxpayers for losses they may sustain as a result of defective administration by the ATO. Such new regime must be either administered by an agency other than the ATO or at least include a right of review to an independent agency or body with the cost of exercising such right being kept to a minimum particularly for small businesses and individuals. Such an approach would not be novel as the Privacy Commissioner is presently empowered to make a declaration for 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'.<sup>60</sup> The *Privacy Act 1988* also makes provision for the Federal Court or the Federal Circuit Court to order the payment of compensation in relation to certain breaches.<sup>61</sup>

## **ROLE OF THE IGT**

2.49 The IGT was established as an independent statutory agency in 2003. Initially, the IGT sought to improve the administration of the tax system primarily by undertaking reviews into systemic tax administration issues and making recommendations for improvements to the Government and the ATO.

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<sup>60</sup> *Privacy Act 1988*, s 52(1)(b)(iii).

<sup>61</sup> *Privacy Act 1988*, s 25.

2.50 Since 1 May 2015, the IGT has become an ombudsman with respect to tax administration as he can now also assist the community to address their complaints about the administrative actions of ATO and the Tax Practitioner Board (TPB). Generally, administrative actions relate to the conduct of the ATO and the TPB in their interactions with the community, including the policies and procedures which guide these actions. For example, the IGT can assist to expedite the resolution of tax disputes and minimise unnecessary escalation. Indeed, in more than 50 per cent of complaint cases lodged with the IGT since June 2016, the IGT has been able to achieve complainants' preferred outcomes in full or in part. Where the law does not permit the desired outcomes, the IGT is at least able to assure taxpayer that the ATO or TPB had acted appropriately.

2.51 The IGT, however, is not empowered to make substantive tax decisions such as how much tax someone has been assessed to pay or whether they should be registered as a tax agent. Additionally, the outcomes of complaint investigations or review recommendations are not binding on the ATO or TPB. Such an approach is consistent with other ombudsmen services across Australia and overseas and is necessary to preserve the independence of ombudsmen, such as the IGT, from the subject of their scrutiny.

2.52 The above approach also minimises the degree of overlap with the functions of other bodies such as the AAT and the courts who are empowered to render binding decisions on the ATO and the TPB. The maintenance of this sound traditional role of the judiciary is important, however, the cost of litigation can be prohibitive, particularly for the most vulnerable.

2.53 The main issue is access to justice and the cost associated with it which can be prohibitive for many individuals and small businesses. Even to lodge an effective objection to an assessment requires a degree of knowledge and expertise which many individual and small business taxpayers do not possess and there are costs associated with seeking professional help. The costs of progressing the matter to the AAT or the Federal Court are significantly higher and likely to be out of the reach of these taxpayers.

2.54 Accordingly, the IGT believes that funding and/or assistance should be provided to taxpayers, in appropriate cases, to exercise their right to bring their matter before the AAT or the courts rather than making his findings binding on the ATO, as advocated by many parties. Appropriate cases may include those where the ATO has rejected the IGT findings on the matters in question.

2.55 An alternative which has been advocated by some parties is a specialised, low cost tax tribunal or court dedicated to small business matters. However, this approach may risk duplicating the function of existing forums and may create uneven access amongst the different categories of taxpayers. Furthermore, it does not address the issue of funding or assistance that many taxpayers would still require even in a more specialised, simpler process.

2.56 As mentioned earlier, although the ATO has considered assistance to vulnerable and unrepresented individuals through Dispute Assist, the IGT believes that a better solution would be to consider the US approach of using LITCs. In this

regard, the IGT can play a more expansive role by, for example, overseeing the LITC program and manage its funding similar to his US counterpart.

2.57 Other examples where the IGT may play a greater role, include being the independent safeguard with respect to specific matters such as the recently proposed Transparency of Business Tax Debts Measures. The IGT has encapsulated such a potential role as follows:

Taxpayers should be informed of their right and allowed time to lodge a complaint with the IGT as explained below. Where they do lodge a complaint with the IGT, the Bill's requirement to consult and the [Legislative Instrument] requirement to confirm should be appropriately amended to make it clear that the ATO should await the outcome of the IGT investigation and duly consider the IGT findings in deciding whether to proceed with the disclosure to [Credit Reporting Bureaus].<sup>62</sup>

2.58 Another service that the IGT could provide would be to have his staff act as independent facilitators in formal ADR processes such as mediations or conciliations to resolve disputes between the ATO and taxpayers. However, such a role would require additional and appropriately skilled staff.

2.59 In considering the IGT's powers and resources, due regard should be given to the positive feedback that has been received through client satisfaction surveys indicating a 78 per cent satisfaction rate with our services and staff.<sup>63</sup> However, the survey results have also highlighted that the majority of the Australian public remain unaware that there is an independent umpire, namely the IGT, who can assist them with their concerns about the administrative actions of the ATO and the TPB.<sup>64</sup> Furthermore, many taxpayers only become aware of the IGT after a protracted dispute with the ATO where significant losses may have already been incurred.

2.60 Accordingly, in the current year, the IGT has devoted resources to reaching out to the wider community through a number of initiatives such as a newsletter, IGoT News!, social media and presentations to suburban and regionally-based tax practitioner groups. These activities have been undertaken within the IGT's existing budget.

2.61 We have also actively been encouraging stakeholders, such as Parliamentarians, the Commonwealth Ombudsman and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to refer complaints they receive about the ATO or TPB to us. Over the period of three years, we have received 147 formal referrals from the Commonwealth Ombudsman and 7 from the ASBFEO.

2.62 A great deal more needs to be done to better inform the public about the services that the IGT can provide. The IGT welcomes broader measures on approaches that may overcome this lack of awareness and fosters wider appreciation of the role of his office amongst all taxpayers. One avenue would be for the ATO to more actively

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<sup>62</sup> IGT, *Submission on Transparency of Business Tax Debts Measures* (2018) p 5.

<sup>63</sup> IGT, *Annual Report 2016-17* (2017) p 12.

<sup>64</sup> *Ibid*, p 14.

raise awareness of the services of the IGT amongst taxpayers particularly the small business taxpayers with whom it regularly communicates. Moreover, an advertising campaign may be necessary which would require additional funding. It should also be noted that once the public has been adequately informed, the numbers of complaints to the IGT would increase and additional funding would be required to deal with the heightened workload.



### 3. SMALL BUSINESS PERCEPTIONS OF FAIRNESS

3.1 In a self-assessment tax system, revenue authorities, such as the ATO, cannot verify that every taxpayer has complied with their tax obligations and, accordingly they are very much reliant on voluntary compliance. A key driver in fostering voluntary compliance is the perception of fairness amongst taxpayers.<sup>65</sup> This has been noted by the Organisation for Economic Cooperation and Development:

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.<sup>66</sup>

3.2 Similarly, the US' National Taxpayer Advocate has said:

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'.<sup>67</sup>

3.3 The growing interest and research into taxpayer rights also illustrate the importance of treating taxpayers fairly and being seen to be doing so. The IGT has also been working extensively in this area with his international counterparts. Such work includes a 2016 comprehensive review into the *Taxpayers' Charter and Taxpayer Protections*.<sup>68</sup> In that review, the IGT's recommendations included ensuring that the Charter is at the forefront of the ATO's interactions with the community and its performance against the Charter's principles is appropriately measured and publicly reported.<sup>69</sup>

3.4 Perceptions of fairness in the tax system are important amongst all taxpayers. Compared to small businesses, large business taxpayers typically have complex tax affairs and ongoing relationships with the ATO in respect of their tax obligations. While many of them have raised concerns with the IGT, either directly or through their representatives, statistics from the IGT's complaint handling service show that they have generally not lodged formal complaints. There may be a number of reasons for this. Firstly, large businesses are concerned that the lodgment of formal complaints may damage their ongoing relationships with the ATO. Secondly, they are generally well-resourced and well-represented to be able to progress disputes through formal channels. However, they have also indicated that at times they do not challenge ATO decisions because of the financial costs and reputational damage.

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<sup>65</sup> IGT, above n 53.

<sup>66</sup> Organisation for Economic Co-operation and Development (OECD), *Principles of Good Tax Administration* (Practice Note GAP001, 2001) p 3.

<sup>67</sup> National Taxpayer Advocate (NTA), *2013 Annual Report to Congress – Volume One*, (2013) p 6.

<sup>68</sup> IGT, above n 53.

<sup>69</sup> *Ibid*, p 67.

3.5 Small businesses, however, have been more open to seeking assistance from the IGT, with our complaints handling statistics showing approximately 25 per cent of all complaints lodged are from small businesses, including tax practitioners who are raising concerns in relation to their businesses. While the IGT has not seen evidence to suggest systematic targeting of small businesses by the ATO, through his office's interaction with taxpayers and tax professionals in handling complaints or conducting reviews, the IGT has observed that many small businesses may believe that they are being unjustifiably targeted. Such perception may be at least partly due to the complexity of the system and misunderstanding about how tax law operates and is administered and unfortunately, in a small number of cases, more egregious errors or poor service from the ATO. For example, in the recently released IGT review into the administration of the Pay As You Go Instalments (PAYGI) system, an underlying cause of taxpayers' concerns was a lack of understanding as to how PAYGI regime operated.<sup>70</sup>

3.6 Furthermore, the IGT has received feedback that taxpayers feel they are 'guilty until proven innocent' when dealing with tax matters and that 'even when they win, they still lose' because of the time and costs involved in 'taking on the might of the ATO'. Examples cited in this respect include the onus of proof resting with the taxpayer to show that the ATO's assessment is incorrect or excessive<sup>71</sup> or the ATO's powers to commence debt recovery action while the underlying assessments are being challenged.<sup>72</sup>

3.7 A further area which has been raised with the IGT regarding unfairness is the ATO's use fraud or evasion (FOE) opinions based on which the ATO may examine and amend assessments outside of standard periods of review (typically 2 or 4 years). Significant compliance and evidentiary burdens may be imposed on taxpayers wishing to dispute such amended assessments because of the considerable time that may have elapsed since those assessments were initially made. Complaints and concerns raised with the IGT have claimed that the ATO's processes for forming FOE opinions are not sufficiently robust and may lead to unfair outcomes. The SCTR had previously made a number of recommendations to enhance the use of FOE opinions, including reversing of the onus of proof.<sup>73</sup> The use of FOE opinions had also been identified as a potential area of review by the IGT although it was held pending the outcome of the ATO's own internal review which was commenced as a result of issues identified during IGT complaints investigations.<sup>74</sup> The results of the ATO's review have still not been made public.

3.8 The above are not intended to be definitive observations as the IGT has not undertaken any comprehensive review into small business perceptions of fairness. The IGT notes, however, that the ATO does undertake a community perceptions survey and the SCTR had previously recommended to the ATO that it:

...report against its fairness measures—on the basis of taxpayer and tax agent

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<sup>70</sup> IGT, *Review into Aspects of the Pay As You Go Instalments System* (2018).

<sup>71</sup> *Taxation Administration Act 1953*, s 14ZZK

<sup>72</sup> *Taxation Administration Act 1953*, ss 14ZZM, 14ZZR.

<sup>73</sup> SCTR, above n 11, pp 35-36.

<sup>74</sup> IGT, *IGT Work Program 2017* (27 January 2017) <[www.igt.gov.au](http://www.igt.gov.au)>.

experience of the outcome; the process; the information provided; and interaction with staff—for specific business lines, including audit, advice and debt work, in its next Annual Report.<sup>75</sup>

3.9 To date, the ATO has only reported that it has developed an organisational fairness framework and implemented relevant strategies. Its most recent findings show that more than half of individuals surveyed believe that the ATO is fair and professional in administering the system.<sup>76</sup> No information is provided about perceptions amongst other taxpayer categories such as small business.

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<sup>75</sup> SCTR, *2016 Annual Report of the Australian Taxation Office* (March 2017) p 62.

<sup>76</sup> Commissioner of Taxation, above n 18, p 20



## 4. ADDRESSING ISSUES WITHIN SCOPE OF THE INVESTIGATION

4.1 The ATO has, for a number of years, been undertaking a reinvention program which is 'a broad transformational change program focused on achieving the [ATO's] vision of being a contemporary service oriented organisation.'<sup>77</sup> In 2017, the Australian National Audit Office (ANAO) undertook a review on the costs and benefits of the program.<sup>78</sup> The ANAO ultimately concluded that:

The ATO has sound systems and guidance for estimating and monitoring the costs, savings and benefits associated with Reinventing the ATO projects but the effectiveness of these processes has been compromised by low levels of conformance. As a result, the costs, savings and benefits from these projects cannot be calculated.<sup>79</sup>

4.2 While the ANAO believed that higher level of assurance on the measure of benefits flowing from the reinvention program could be achieved, they nonetheless observed that:

There was a general improvement across the ATO's corporate benefits categories from 2013-14 to 2015-16, particularly relating to the corporate impact areas of willing participation and revenue. Further, the ATO advised of a number of positive business changes, including improved employee engagement, as a result of the Reinventing the ATO program.<sup>80</sup>

4.3 The broad scope of the reinvention program, and the length of time that it has taken, may have created challenges for the ATO in demonstrating the benefits to the client experience for many taxpayers. Furthermore, it is difficult to keep the public and its own staff fully engaged and enthused about the program. A better approach may have been the adoption of shorter term goals that could be measured and reported to the public.

4.4 Nevertheless, there have been improvements, whether implemented under the umbrella of reinvention or other programs. As the IGT has already highlighted in this submission, these improvements included the transfer of the objection function away from the Client Engagement Group and into the Law Design and Policy Group to bolster the actual and perceived independence of the objection process. Moreover, the ATO has reported that the rollout of In-House Facilitation, which originated from an IGT recommendation,<sup>81</sup> has yielded significant benefits including a 'positive impact on the relationship between the ATO and taxpayer'<sup>82</sup> and, saving taxpayers, on

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<sup>77</sup> ANAO, *Costs and Benefits of the Reinventing the ATO program* (22 November 2017) p 7.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid, p 8.

<sup>81</sup> IGT, above n 9.

<sup>82</sup> Commissioner of Taxation, above n 18, p 65.

average, more than \$50,000.<sup>83</sup> In addition, the ATO has piloted ways in which to assist unrepresented and vulnerable taxpayers through its Dispute Assist program with plans to expand the program further this year, however, as noted earlier some taxpayers may be reticent to receive assistance from the organisation with whom they are in dispute.

4.5 While these improvements should be commended, some stakeholders do not believe that they have gone far enough and further consideration should be given to recommendations such as a formal and separate appeals area within the ATO as well as the merging of the Debt business line into the Client Engagement Group.

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

## 5. OTHER RELEVANT INFORMATION

5.1 It is important to acknowledge that the ATO has a challenging role. As a country, we rely on the ATO to collect most of the Government's revenue and appropriately administer socially valuable programs.

5.2 Parliament has entrusted that role with a range of strong powers – not just market power in a monopoly sense but statutory legal powers far beyond that of commercial or industry monopoly.<sup>84</sup> Many citizens have anxiety in relation to their dealings with the ATO due to the power asymmetry. People have to 'trust' these large institutions, government or commercial, to do the right thing but seek solace in safeguards such as regulation and scrutineering oversight.<sup>85</sup>

5.3 Oversight of the exercise of the above powers is particularly important<sup>86</sup> as there is no alternative to the monopoly at play. Accordingly, the public expects a particularly high standard of conduct in the exercise of those powers. As noted earlier, the perception of fairness, including how the revenue authority deals with taxpayers, is a key factor in fostering voluntary compliance, which is critical to the efficient and effective operation of Australia's self-assessment tax system.<sup>87</sup>

5.4 Notwithstanding recent events,<sup>88</sup> the ATO has generally been doing a good job of maintaining public trust in administering the tax system. In some cases it may make mistakes or errors. That is not to say that the mistakes, of themselves, erode taxpayers' trust. However, how the ATO responds to disaffected people can have a large impact on the general confidence of the system.

5.5 In the context of the ATO's management of concerns raised by small business owners, it is important to recognise that they may have already had an unwelcome experience, so further complication, or 'run-arounds', in accessing an effective resolution mechanism needs to be avoided and concerns promptly and efficiently addressed. The key to restoring the confidence of disaffected people is to provide a mechanism to quickly identify and address mistakes with minimal costs.

5.6 If taxpayers have complaints, there are bodies they can approach, such as the IGT, for an independent assessment and/or may choose to engage a professional tax practitioner or adviser to act on their behalf. In responding to administrative mistakes

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<sup>84</sup> Mark Leibler AC, above n 4.

<sup>85</sup> Alan Fels as quoted by Adele Ferguson, Nassim Khadem & Lesley Robinson, "'A mongrel bunch of bastards': The small businesses being crushed by the tax office", *Sydney Morning Herald*, 8 April 2018.

<sup>86</sup> SCTR, *External scrutiny of the Australian Taxation Office* (2016) p 31.

<sup>87</sup> 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, as cited in IGT, above n 53, pp 2-3; 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) as cited in IGT, above n 53, p 52.

<sup>88</sup> For example, major ATO IT outages, Operation Elbrus and allegations of tax fraud that may be linked to abuse of position by a public official as well as revelations in the Four Corners program.

in such circumstances, effective administrators should aim to address people's concerns on the basis of the facts and to do so with courtesy, compassion and objectivity. Remaining alive to the personal impact that administrative errors have on the lives and livelihoods of taxpayers is needed for a range of reasons, including the trust that it engenders from demonstrating respect for their well-being, conduct of business and choice of representation.

5.7 In the IGT's experience, confidence is best instilled where the ATO openly considers how it has contributed to specific matters that have gone wrong, as this helps more reasonable minds to make their own assessment of whether the ATO's resulting action will be effective in addressing any such problems in future. The key is to understand taxpayers in these situations better and improve the ability to independently verify the events giving rise to the concerns and provide assurances to further enhance confidence in the system and foster voluntary compliance.

5.8 Specifically with respect to the Four Corners program, serious concerns were expressed by small business owners and former ATO officers. Their concerns appear to have been unresolved and certain cases had stretched over many years. The program seemed to be a public outlet for their frustration. Many have commented that the ATO's initial responses were to, first, pre-emptively publicly negate the existence of a problem and discredit the people raising the concerns,<sup>89</sup> and then later, refine its message to acknowledge a problem, but diminish it.<sup>90</sup> Given the ATO's extensive use of media, such attempts have been perceived to be 'gaming' the media or being a 'fair weather friend' – they have not reflected well on the ATO as an institution and for some their negative views of the ATO have been confirmed.

5.9 In the IGT's view, the above media strategy does not only fall short of public expectations of institutions, such as the ATO, but recent events have demonstrated that it is becoming increasingly irrelevant in our modern society. Firstly, it is now easier for citizens to publicly respond to such strategies where the administrator's reaction does not accord with their personal experience. Secondly, improvements in technology have enabled people to evidence their experience and disprove the ATO's response as well as providing a means to connect with others having similar experiences and coordinate responses for broader impact. Continuing to adopt such strategies runs an increasing risk of eroding public confidence as information is brought to light that discredits the ATO's actions and how it chooses to treat disaffected taxpayers.

5.10 Take for example, the ATO's response to the IGT statement in the Four Corners program that 'perhaps in 5 per cent of the cases or so, an organisation that size may not get it right'. The ATO was well aware of the context of that statement, as it had been made 12 days earlier in the IGT's 28 March 2018 public hearing before the SCTR:

...in any large organisation you cannot guarantee everything will go according to plans or all procedures will be followed at all times. I would say, and this is not backed up by hard evidence, in 5% of cases there are, likely, things to go wrong. And

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<sup>89</sup> Evidence to the SCTR, Parliament of Australia, 28 March 2018, p 12 (Commissioner of Taxation).

<sup>90</sup> ATO, *ATO Executive statement on ABC/Fairfax coverage* (media statement, 10 April 2018)



that's why the government has officers like mine, to make sure we address that five percent.<sup>91</sup>

5.11 In response, the ATO referred to performance statistics and other reporting that compares all manner of actions with the total number of lodgements by all taxpayers. This response, at best, is unhelpful to those impacted and, at worst, misleading without considerable explanation. For example, the ATO is aware of the difficulties faced by tax practitioners regarding the continuing performance issues of the ATO's I.T. systems, including the considerable outages of its Storage Access Network (SAN) in December 2016 and February 2017 as well as the recurring performance issues with the roll out of its Practitioner Lodgement System. In fact, at the same time that the ATO was disputing the proportion of mistakes made, it was dealing with errors regarding its Small Business Superannuation Clearing House system which affected substantial numbers of transactions.

5.12 If it is considered desirable to accurately calculate the proportion of errors made, the numbers used should be comparable. If that error rate is calculated by reference to the total number of ATO interactions, then the tax profession community should also be engaged to offer their views on the problems they encounter, including those that they do not raise with the ATO but address through their own 'workarounds'. There will also be a need to consider whether an omission constitutes a 'mistake' as illustrated by the ATO's recent realisation that potentially over-claimed work-related expenses could be due to inaccuracies or errors with the ATO risk assessment processes.

5.13 In any event, the comment was illustrative and explicitly recognised that large organisations do and will continue to make mistakes or have errors, a matter which the Commissioner himself acknowledged at the same SCTR hearing.<sup>92</sup> The more important issue, in the IGT's view, is how these errors are addressed when they are raised to the ATO's attention.

5.14 The ATO needs to rethink its media strategy recognising that extensive use of media does have it downsides and when they do so they should genuinely address issues raised without diminishing them or singling out specific groups or organisation for rebuke.<sup>93</sup> The ATO must show its care and compassion for the public that it serves both in words and in actions if it is to maintain the confidence of taxpayers, which itself is the lynchpin for Australia's self-assessment tax system.

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<sup>91</sup> Evidence to the SCTR, Parliament of Australia, 28 March 2018, p 6 (Inspector-General of Taxation).

<sup>92</sup> Evidence to the SCTR, Parliament of Australia, 28 March 2018, p 14 (Commissioner of Taxation).

<sup>93</sup> Commissioner of Taxation, Commissioner's Address to the Tax Institute National Convention 2018 (15 March 2018) <[www.ato.gov.au](http://www.ato.gov.au)>; Evidence to the SCTR, Parliament of Australia, 28 March 2018, p 12 (Commissioner of Taxation).



## 6. CONCLUSION

6.1 The IGT believes that there are five areas which warrant prompt and serious consideration.

6.2 Firstly, compensation as an issue needs to be addressed and, in particular, the Secretary should consider options to bolster the CDDA Scheme or the establishment of a new and dedicated scheme for tax matters. In the former case, consideration should be given to avenues for external review of ATO decisions whereas in the latter the decision on compensation should be made independently of the ATO.

6.3 Secondly, tax disputes between the taxpayers and the ATO require improvement particularly for small businesses and individuals who lack the resources to challenge ATO decisions. Consideration should be given to the IGT and SCTR's recommendation for a separate appeals area, within the ATO, who amongst other things would conduct pre-assessment reviews. Assistance or funding should also be provided to vulnerable or unrepresented taxpayers who may need to challenge ATO decisions through the objection process or the court system. The IGT believes that the US experience in this area provides a possible model.

6.4 Thirdly, while the IGT acknowledges the call for him to be empowered to make binding decisions on the ATO, such an approach is not consistent with the role of ombudsmen in Australia or overseas. There are a number of identified areas where the IGT can play a greater role but the most important issue is raising awareness of the services that the IGT can provide and encourage taxpayers to contact his office as early as possible in their dispute with the ATO or TPB, so that adverse impacts, including unnecessary costs, on taxpayers may be minimised and their understanding of and confidence in the system enhanced.

6.5 Fourthly, trust and confidence needs to be restored in the ATO's approach to debt collection. In particular, allegations made during the Four Corners program, such as the so-called 'cash grabs' and 'hour of power', needs prompt independent investigation. If these allegations are found to be true, they should be expeditiously addressed and, if not, such notion should be dispelled.

6.6 Finally, the ATO must appreciate the power that it holds over the vast majority of citizens with whom it interacts and reconsider its strategy when concerns of the nature identified in the Four Corners program are raised. While it is undeniable that there have been many commendable ATO initiatives over the years, it needs to ensure that when approached with concerns, it considers them fully and genuinely and be seen to be doing so rather than be perceived to be diminishing the concerns and those who raise them.



# **APPENDIX 1 – SECRETARY’S INFORMATION REQUEST TO THE IGT**

## **INVESTIGATION INTO MATTERS REPORTED BY THE FOUR CORNERS PROGRAM ABOUT SMALL BUSINESS DEALINGS WITH THE AUSTRALIAN TAXATION OFFICE**

### **SCOPE OF INVESTIGATION**

The Minister for Revenue and Financial Services has asked the Secretary to the Treasury to investigate the ATO’s handling of cases and associated matters reported in the ABC Four Corners program on 9 April 2018 and other media related to that program.

The Secretary will investigate the administration of the taxation laws by the ATO as they are applied to small businesses and consider recommendations for improvements to the administration of those laws by the ATO. In doing so, the Secretary will consider the ATO’s administrative policies and procedures that relate to the issues reported in the Four Corners program and the extent to which these policies and procedures have been followed.

The Secretary will consider recommendations made in recent reviews undertaken by the ATO or its external scrutineers relevant to matters raised in the program, including the extent to which those recommendations have been implemented. The Inspector-General of Taxation and the Australian Small Business and Family Enterprise Ombudsman will provide input into the investigation.

The secrecy provisions of the tax laws that protect the confidentiality of taxpayer information mean the Secretary will not consider specific taxpayer cases, including those featured in the program. Taxpayers that have concerns about their own dealings with the ATO are encouraged to contact the ATO, the Inspector-General of Taxation and the Australian Small Business and Family Enterprise Ombudsman.

## **INFORMATION SOUGHT FROM THE INSPECTOR GENERAL OF TAXATION:**

The following information is sought by noon, 20 April 2018:

1. Information and views, including any relevant past findings of the IGT, about the ATO's administration of the tax laws for small businesses, including the ATO's approach to:
  - 1.1. handling tax disputes, including the adequacy of its administrative arrangements for the separate assessment and review functions.
  - 1.2. ensuring recovery actions are proportionate, including in its use of garnishee notices and other firmer recovery actions.
  - 1.3. administering ABNs, including its approach to cancelling ABNs.
  - 1.4. compensating for defective administration, including the timeliness and adequacy of compensation offers.
2. Information regarding small businesses' perceptions about the fairness of their dealings with the ATO.
3. Views as to whether any of the issues within the scope of this investigation will be adequately addressed by the ATO's recent or planned changes to organisational arrangements, administrative policies or procedures, or by otherwise implementing the past recommendations of the IGT or other external scrutineers.
4. Any other information the IGT considers relevant to this investigation.



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**Australian Government**  
**Inspector-General of Taxation**

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Sydney NSW 2001

2 May 2018

Mr John Fraser  
Secretary  
The Treasury  
Langton Crescent  
Parkes ACT 2600

Dear John,

**RESPONSE TO REQUEST FOR COMMENTS ON YOUR DRAFT REPORT**

Thank you for the opportunity to comment on the draft report of your investigation into *Small Business Dealings with the Australian Taxation Office* which was prompted by a request from the Minister for Revenue and Financial Services (Minister) following the ABC's Four Corners program on 9 April 2018.

We recognise that many of the points raised in the draft report are supported directly, or indirectly, by a range of the Inspector-General of Taxation's (IGT) review reports, complaints case studies, submissions to this investigation and public comments before Parliament or elsewhere.

We appreciate the tenor and approach of the draft report and consider the proposed action provided for within as a welcome first step, although the potential response of the media and affected stakeholders remains uncertain given the extent of reform or change that they may have anticipated.

We also appreciate the short timeframe that has been afforded to you to deliver the ultimate final report to the Minister and in the interests of enhancing the utility and completeness of that report, we make the following points for your consideration in short form.

**A separate Appeals area & dispute funding models for vulnerable taxpayers**

We note that the draft report has discussed the concerns regarding a perceived lack of independence in the Australian Taxation Office's (ATO) dispute resolution processes and mentioned the ATO's more recent administrative efforts to separate its audit and objection functions. We note further that the report recommends an expansion of pre-assessment reviews to all taxpayers, including small businesses, as well as the establishment of a panel of external experts to be involved in such reviews. However, there does not appear to be similar discussion of the separate Appeals area recommendations of the IGT and Standing Committee on Tax and Revenue flowing from our respective investigations into the management of tax disputes, in particular, the importance of the role of an independent Second Commissioner to lead the area.

The basis for considering such an approach was highlighted in those earlier reports as well as our submission to this current investigation. Given the nature of the concerns currently raised, for example those relating to ATO accountability and oversight, it may be worthy of further consideration together with a recommendation as to the approach.

The cost of disputation is another concern raised and, as noted in our submission and *Tax Disputes* report, the funding of a genuinely independent Appeals model is an important option that would overcome the problems that the most vulnerable taxpayers face in accessing justice and merits review as well as avoiding potential problems of overlap and cost inefficiencies. Moreover, funding models that assist the most vulnerable taxpayers to be able to progress disputes through the courts and tribunal, in a manner similar to the Low Income Taxpayer Clinics in the United States, also warrant consideration.

### **The IGT as the Taxation Ombudsman**

We are concerned with the accuracy of certain statements in the draft report regarding the options that taxpayers, including small businesses, have in resolving tax administration matters with assistance from the IGT, as the Taxation Ombudsman, and from other ombudsmen.<sup>1</sup> Such statements are likely to mislead all but experienced tax practitioners and, in particular, may present real risks to small business taxpayers who have complaints.

The basis for this view rests in the legislative framework which provides the IGT with Taxation Ombudsman powers<sup>2</sup> to investigate tax administration complaints issues, including those raised by aggrieved taxpayers, and to effectively prohibit other ombudsmen, such as the Commonwealth Ombudsman and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), from doing so.<sup>3</sup> The IGT's specialised complaints handling service<sup>4</sup> was designed to ensure that there is a single window through which all taxpayers especially the most vulnerable, including small businesses, may seek assistance to address concerns they may have with the administrative actions of the ATO or the Tax Practitioners Board.

Accordingly, the *Inspector-General of Taxation Act 2003* provides the IGT, as the Taxation Ombudsman, with very specific and extensive powers including the ability to receive protected taxpayer information from the ATO and to receive Tax File Numbers for the purpose of efficient management of tax administration complaints.<sup>5</sup> As a design feature, only the IGT can obtain all taxpayer information directly from ATO records. Furthermore, only the IGT has independent and direct access to the ATO I.T. systems to verify and assure taxpayers of what information the ATO has in that regard. Few agencies are vested with this level of trust and access. The IGT and ATO complaints management systems also have dedicated links to provide for direct systems transfer of information to improve efficiency and effectiveness. It is important to appreciate that such information is only available for the specific purpose intended, being complaints and reviews, and is not able to be shared with other ombudsmen.

In order to provide the complaints handling service and review function, all IGT staff are dedicated tax professionals who possess relevant tertiary and higher qualifications as well as professional accreditations and have extensive experience working within the tax and superannuation systems. For any another ombudsman to be held out or to otherwise represent, inadvertently or otherwise, that advice regarding tax administration matters may be provided to small business taxpayers also

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<sup>1</sup> For example at paragraph 4 on page 3 of the current report, it is stated that “an individual or small business that has a complaint or dispute with the ATO can seek assistance from the IGT or the ASBFEO” [Australian Small Business and Family Enterprise Ombudsman]. Other comments may mislead by overstating or otherwise giving an appearance of an overlapping of roles and responsibilities for taxpayers, including small businesses.

<sup>2</sup> *Inspector-General of Taxation Act 2003*, s 15.

<sup>3</sup> *Ombudsman Act 1976*, s 6D and *Australian Small Business and Family Enterprise Ombudsman Act 2015*, ss 16 and 69.

<sup>4</sup> Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014, p 31.

<sup>5</sup> *Inspector-General of Taxation Act 2003*, ss 15, 37B, 37C.



raises individual professional standards and capability concerns for the agency and individual officer concerned.

These IGT powers and specifically skilled personnel assist all taxpayers in seeking their desired outcomes, wherever possible in a timely manner, on tax administration complaints. Our performance statistics are outlined in our earlier submission.

Other agencies, such as the Commonwealth Ombudsman and ASBFEO, are required to transfer tax administration complaints to us<sup>6</sup> and we have actively ensured that appropriate processes are in place to receive such complaint transfers. As identified in our submission to you and since the inception of the IGT's complaints handling service in 2015, we have received 147 such transfers from the former and 7 from the latter. Since that submission we have received a further 8 transfers from ASBFEO.<sup>7</sup>

The IGT has also received 178 complaints since the Four Corners program went to air. The ASBFEO kindly provided us with a copy of their submission to your investigation which advises that they had received in excess of 100 requests for assistance from small businesses and their advisers following the Four Corners program. We have been actively seeking to assist ASBFEO in reconciling this number of requests with the 8 that have been transferred to us recently to ensure that any complaints were not lost in transit and we are awaiting their response. As noted by the draft report, the tax system is complex and challenging for the ATO and individuals and small businesses and a range of taxpayer matters are critically time sensitive such that any delay on transfers to the correct agencies can exacerbate already difficult circumstances and hamper efforts for early engagement and amicable resolution for affected taxpayers including small business.

### **The IGT's small business credentials and support**

The draft report has discussed, at some length, the role of the ATO in supporting individuals and small businesses and the various programs of work that had been, or are currently proposed to be, implemented to further this work.

However, the draft report does not presently provide a small business context regarding the important role and the functions of the IGT in the tax system to provide independent support, assistance and assurance in resolving their complaints and concerns with the ATO. We believe that the report would be enhanced by providing further details and context regarding the IGT's demonstrated activities and services to small business. For example, in our submission to the current investigation, it was noted that 25 per cent of our complaints are received from small businesses who give the IGT staff an approximate 80 per cent satisfaction or higher rating in survey responses<sup>8</sup> on our complaints handling service and we fully or partially achieve the desired outcomes in approximately 50 per cent of cases.

Furthermore, the IGT's review reports have examined a significant range small business tax administration issues, as referenced in footnote 1 of the draft report, and have made recommendations for ATO improvement. These IGT reports have the benefit of drawing on a significant amount of evidence, sourced from ATO systems and officers as well as taxpayer information, which are not accessible to other ombudsmen or scrutineers.

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<sup>6</sup> *Ombudsman Act 1976*, s 6D and *Australian Small Business and Family Enterprise Ombudsman Act 2015*, s 69.

<sup>7</sup> It should be noted that in respect of two of these cases, one had already been considered and closed by the IGT while another had separately approached the IGT prior to the ASBFEO referral.

<sup>8</sup> We typically have a high response rate to the survey of over 40 per cent.

Through our review reports, we have actively advocated for greater access to service and support for small businesses, including the expansion of pre-assessment reviews, assistance to avoid financial distress and the implementation of in-house facilitation (which originated from an IGT recommendation), now positively assisting taxpayers and resulting in significant cost savings.

Accordingly, we ask that these statements regarding roles and responsibilities of the IGT as the Taxation Ombudsman be contextualised in the Secretary's final report for the benefit of vulnerable taxpayers including small businesses needing complaint support.

### **‘Cash Grab’ or ‘Hour of Power’**

As noted in our submission, the IGT had made preliminary enquiries with the ATO regarding its use of garnishee notices and had foreshadowed the need for a further review into this area, although that has been held in abeyance pending the outcome of your investigation.

The draft report has considered the allegations of a ‘cash grab’ and ‘hour of power’ by an ATO officer as well as the ATO's representations on these matters. The ATO has made a number of contentions including that the Key Performance Indicators (KPIs) it employs are not intended to incentivise or drive particular conduct. The nature of behavioural responses to KPIs generally is a complex issue and one that warrants consideration of the ATO staff context in which they arise.

We believe, as the Secretary's draft report contends, that the extent and impact of these allegations and related issues are best assessed by way of independent review and we are ready to move forward and undertake this important review in seeking to restore community confidence in this regard.

### **Raising Awareness and Increasing visibility**

The IGT has a duty to serve all taxpayers and, as noted, has a focus on small businesses and individual taxpayers in doing so, which is evidenced by both our reviews and complaints handling service.

As acknowledged in our submission, however, there is a need to raise further awareness of the IGT to all Australians, including small businesses as amongst the most vulnerable. We have already commenced a program of work internally to realise this goal but we also recognise that greater awareness could be raised by, for example:

- having the ATO actively raise awareness of the IGT as the Taxation Ombudsman with small business through its various forums and engagement activities with the industry;
- supporting the IGT's inclusion on various public communications platforms, including conferences and forums; and
- additional funding for appropriate advertising and promotional campaigns.

We are also open to exploring opportunities with the ASBFEO to further raise awareness in this regard and mindful that any such promotion needs to emphasise the IGT's demonstrated role in assisting small businesses as a first port of call to reduce ‘run-arounds’ and minimise the risk of taxpayers ‘slipping through the cracks’.

**ATO acknowledgments and Channel 9 A *Current Affairs* program**

The draft report reproduces some of the ATO's acknowledgements and commitments regarding areas for improvement in its responses to issues and concerns. Such statements are a welcome first step and, if made public, may assist to allay public concern as they may moderate the ATO's current public messages which have been perceived by some to be more unyielding than contrite. For example, the recent ATO response to the Channel 9 A *Current Affairs* program aired last week appears to continue with a mixed message which may not assuage community concerns in the same way that the ATO responses to your investigation appear to have been directed.

On this issue, our submission made observation regarding the ATO's comments to the media and communications, including messaging that could reassure and would be accepting of feedback for improvement, as well as demonstrating contrition where adverse impacts or experiences have been voiced.

**Tax System design**

The draft report is necessarily constrained by its scope, both as instructed by the Minister and by secrecy provisions within the tax laws. However, it may be useful for the report to consider the broader design of the tax system and processes for dispute management setting out a considered visual flowchart noting the roles of the relevant parties within the system and the options for redress including tax administration complaints for small business.

**Proposed reviews**

The draft report identified a number of tax administration areas for review which the IGT may consider for further investigation as the IGT's current work program of reviews approaches finalisation.

We trust that the above has been helpful in in finalising your report to the Minister. If you would like us to elaborate on any of the matters raised herein, please do not hesitate to contact me.

Yours sincerely

A black rectangular redaction box covering the signature of Andrew McLoughlin.

Andrew McLoughlin  
Acting Inspector-General of Taxation