

Appendix A

1. Summary

We believe that the ATO has an important role in Australian Government and society to assess and collect revenue. It is therefore rightfully accorded significant powers and autonomy in the exercise of its role. In this regard, the ATO has been granted greater and greater powers over time in order to ensure it can effectively assess and collect revenue from sophisticated businesses and the community at large.

The granting of unfettered powers also poses a risk to the community if the exercise of those powers is not properly monitored and checked. In light of the substantial powers and resources at the disposal of the ATO, it is essential that an appropriate level of scrutiny and oversight is placed on the ATO to ensure that those powers are being used in an effective and fair manner, and that no maladministration takes place. This would ensure that the public and business community continue to support and have justified trust in ATO and the best possible revenue outcomes are achieved.

It is our view that the current review functions including the various parliamentary committees and the roles of the Inspector General of Taxation (IGOT) and the Auditor General and his Australian National Audit Office (ANAO) reflect an appropriate level of oversight.

We consider that prior proposals for a board to oversee the role of the Commissioner have merit but do not appear to be within the terms of reference of this enquiry.

2. Role of the ATO – current and future

The *Public Governance, Performance and Accountability Rule 2014* (Cth) imposes a duty upon the Commissioner to collect monies legally owed to the Government that have arisen from the operation of the Acts that the Commissioner governs.

The responsibilities of the ATO as outlined in the Commissioner of Taxation's 2014-2015 Annual Report include¹:

- ▶ Collecting revenue
- ▶ Administering the goods and services tax (GST) on behalf of the Australian states and territories
- ▶ Governing a range of programs which result in transfers and benefits back to the community
- ▶ Administering major aspects of Australia's superannuation system
- ▶ Custodianship of the Australian Business Register

In this regard, the ATO's role is to 'effectively manage and shape the tax and superannuation systems that support and fund services for Australians'².

The ATO also has a continuing responsibility for the administration of Australia's tax law, and its longstanding functions have enabled it to assist Treasury with the development of tax policy and the design of the law in Australia, strengthening the links between policy development, tax law design and implementation through integrated tax design resulting in better alignment between government policy and the operation of the tax system.³

The role of the ATO is increasing with, for example, responsibility for the Multinational Anti-Avoidance Law, greater interaction with the Foreign Investment Review Board and potential greater functions in compliance concerning Research and Development concessions. The governance must be considered in light of the evolving, changing and growing role of the ATO. The Governance matrix is we believe appropriate and certainly does not reflect an excessive level of review.

¹ Commissioner's Annual Report 2014-2015

² Commissioner's Annual Report 2014-2015

³ PS LA 2013/4 The ATO role in tax law design

3. Revenue collection

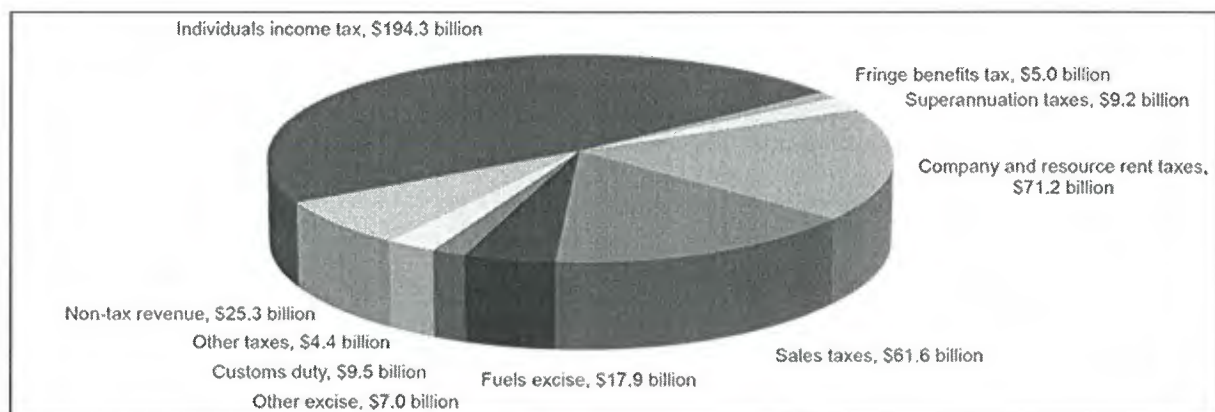
The ATO is Australia’s core revenue collection organization, funding the Government’s provision of public goods and services for the Australian community. According to the Commissioner of Taxation’s 2014-2015 Annual Report (“**Annual Report**”), revenue collection amounts were comprised of the following:

<i>Source of revenue collections</i>	<i>Amount (billion)</i>
Gross tax	\$432.3
Refunds	(\$95.5)
Net tax	\$336.8

<i>Major items of net tax</i>	<i>Amount (billion)</i>
Net individuals	\$177.9
Net companies	\$67.0
Net GST	\$54.6
Net excise	\$23.7

The Annual Report further outlines the ATO operating budget of \$3.45 billion and 21,251 employees.

According to the 2015-2016 Federal Budget, revenue is expected to be \$405.4 billion (an increase of 5.5 per cent on estimated revenue in the 2015 financial year). Revenue is expected to come from the following sources:



Sources: Australian Government Budget website:- <http://www.budget.gov.au/2015-16/content/overview/html/overview-29.htm>

As can be seen from this chart the Commissioner is responsible for the collection of the vast majority of this revenue.

4. Evolution of the ATO

The ATO has adapted to the changing landscape of taxpayers, business and technology through the ATO initiative ‘*Reinventing the ATO*’ which proposes six formal programs of change, including focus on digital infrastructure; tailored services based on profile, history and circumstances; smarter use of data; working with partners; workforce capability and culture; governance and evaluation.⁴

The ATO indicated in the Annual Report that these programs are interdependent, and are focused on the delivery of program outcomes in an integrated approach. Examples of technological advancements

⁴ Commissioner’s Annual Report 2014-2015

that the ATO has introduced and continued to maintain from prior years have included *myTax*, *myGov*, and the ATO App which have all contributed to easier accessibility for a vast range of users to input their tax information and ensure higher rates of lodgement and tax collection.

This demonstrates that the ATO continues to develop and change in response to its environment and is driven to improve the efficiency and effectiveness in which it carries out its obligations.

The ATO also heavily collaborates with state and territory revenue offices to share tools, intelligence, data and information on emerging issues. The Annual Report notes that in 2014-2015, collaborative exchange of data and information in the forums held throughout the year resulted in over \$250 million in revenue generated by state and territory revenue offices. This amount is comprised of \$175 million attributable to payroll tax, \$79 million attributable to land tax and \$1 million attributable to duties.

Collaborating with various offices across the board informally regulates the actions of each office and ensures a more consistent approach to various transactions and services across the board. Based on the above, it is clear that the ATO has a significant role in both Federal and State based revenue collection.

The Committee would be aware that various prior tax reform proposals have suggested combining some state and Federal compliance activities with a greater co-ordination role for the ATO. Again, we highlight that the ATO is not a static organisation with diminishing role and powers – so the governance needs to reflect the changing role and responsibilities of the ATO and its interactions with taxpayers.

5. The recovery powers of the Commissioner

In light of the Commissioner's role to recover revenue and the importance of that role, the Commissioner has wide ranging powers to facilitate such revenue collection.

In particular, the Commissioner has the following information gathering powers:

- ▶ To give notice to request any information (section 353-10(1)(a)) of Schedule 1 to the *Tax Administration Act 1953* ("**TAA 1953**");
- ▶ To give notice to request the taxpayer attend and give evidence before the Commissioner (section 353-10(1)(b) of the TAA 1953);
- ▶ To give notice to request the taxpayer produce to the Commission any documents in their custody or under their control (section 353-10(1)(c) of the TAA 1953).
- ▶ To give notice to the taxpayer to obtain information about rights or interests in property (section 354-5(1) of the TAA 1953);
- ▶ Under section 353-15 of the TAA 1953, the Commissioner has authority to access land, premises or places, and is entitled to full and free access at all reasonable times to any documents, good, or other property for the purposes of a taxation law;
- ▶ To issue offshore information notice for income tax information or documents under section 264A of the *Income Tax Assessment Act 1936* ("**ITAA 1936**").

Failure to comply with the above requirements can lead to administrative penalties, criminal sanctions and potential restrictions on the use of evidence by the taxpayer in the event that the taxpayer appeals an assessment in Court.

The ATO also has a number of powers, over and above those available to ordinary creditors, to compel payment of tax liabilities. These powers include:

- ▶ Under Part IVA of the ITAA 1936, specifically section 14S, the Commissioner is able to issue departure prohibition orders which prevents the tax debtor from leaving the country – regardless of whether the tax debtor intends to return to Australia;

- ▶ While the departure prohibition order does not guarantee payment of outstanding tax liabilities, the prevention of the taxpayer from leaving the country enables the ATO to pursue recovery alternatives against the tax debtor and/or their assets to secure payment or receive acceptable security;
- ▶ A garnishee notice may be issued to a third party holding money for or on behalf of the tax debtor necessitating payment to the Commissioner to satisfy the tax liability;
- ▶ The ATO can also take steps to liquidate a company or bankrupting an individual.⁵

There are also a range of administrative penalties available for the Commissioner to impose on taxpayers who are non-compliant or misreport their income or assessments. The applicable penalty can now reach 100% of the tax liability, which applies in addition to the tax payable.

We recognise that the wide ranging powers of the Commissioner are essential to the proper assessment and collection of revenue. However, while these powers aim to regulate taxpayers and increase confidence and trust in the Australian tax system, they can simultaneously have damaging effects upon the Australian businesses and residents. Examples of this include

- ▶ The extensive powers of the ATO can have disruptive consequences upon business activity and investment decisions.
- ▶ The cost of complying with the ATO's extensive powers for information gathering can be financially damaging to taxpayers, particularly small business enterprises and individuals who generally have less cash flow and resources to respond to often far-reaching and exhaustive requests.
- ▶ The effect of garnishee notices can have detrimental effects on a business' cash flows as it redirects the cash that the business expects to receive and had planned to use for other funding.
- ▶ The use of Departure Prohibition Orders as a negotiation tool to put undue pressure on taxpayers.

We refer to the *Commissioner's Annual Report 2014-2015*, which shows that the ATO's debt management strategies have been a consistent cause of complaint for taxpayers, making up a total of 2,241 of total top complaints.⁶

We note that small business taxpayers without the help of sophisticated tax advice are more impacted by onerous ATO action. For example, the Sydney Morning Herald published an article on 25 November 2014 highlighting that small business taxpayers have 'been intimidated, made bankrupt and some have suffered mental breakdowns and contemplated suicide'⁷ after protracted disputes with the ATO. Small businesses often do not have the cash flows or resources to deal with the ATO and disputes can lead to potential insolvency of the business or bankruptcy for the individual taxpayer, regardless of the merits of their position.

6. New powers of the ATO

In recent years, the ATO has, from reforms initiated by governments, through its own initiative and from recommendations made by review bodies including the IGOT, formulated new powers to oversee various business structures and transactions and improved the way in which its internal governance models operate.

Recent and future changes include:

Foreign Investment Review Board ("FIRB")

The ATO has been granted a new role alongside FIRB regarding foreign investments. Following the Treasurer's announcement on 22 February 2016, there will be more stringent conditions placed on

⁵ PS LA 2011/4: *General debt collection powers and principles*

⁶ Commissioner's Annual Report 2014-2015

⁷ <http://www.smh.com.au/business/parliamentary-inquiry-told-of-atos-unequal-treatment-of-small-business-20141124-11slto.html>

transactions that are subject to FIRB approval in order to ensure foreign taxpayers comply with Australian taxation laws.

Applicants will have to comply with “ATO directions to provide information in relation to the investment and advise the ATO if investors enter into any transactions with non-resident to which transfer pricing or anti avoidance measures of Australian tax law may potentially apply”.⁸ There are also powers for the ATO to impose additional conditions where a significant tax risk is identified, and breaching such conditions could force the ATO to proceed with prosecution, fines or divestment of the asset.

Lack of judicious use of this power has the potential to impose significant obligations on taxpayers, delay transactions and may impact on Australia’s attractiveness as a location for foreign investment. In light of this, the use of this power clearly needs to be subject to significant oversight.

Transfer pricing reconstruction power

Under the recently enacted Subdivisions 815-B and 815-C of the *Income Tax Assessment Act 1997*, the ATO is able to notionally reconstruct a taxpayer’s entire transaction and change the taxing outcome if the conditions were different to that had the transaction been between independent parties dealing at arm’s length.

This has the potential to be highly contentious due to the inherently subjective nature of the potential reconstructions. Consequently, the tax paid by the taxpayer could be higher than initially paid as well as subject the time consuming and complex dispute to regarding the application of the provisions. This again imposes a cost to business and may impact on Australia’s attractiveness as a location for foreign investment.

Multinational Anti-Avoidance Law

The Multinational anti-avoidance law (“MAAL”) came in to effect from 1 January 2016 to prevent schemes where entities are gaining a tax benefit by avoiding attributing income to an Australian permanent establishment. This new law carries extremely large penalties for large taxpayers if their existing structures fall foul of the newly enacted law.

7. Checks and balances

We understand the importance of the ATO being granted a number of powers and autonomy to duly carry out its responsibilities.

However, as with every major government agency, appropriate checks and balances are required to oversee the processes. This has long term benefits such as ensuring accountability, greater impartiality in dealing with taxpayers, and continuing efficiency gains.

Currently, the ATO is scrutinised through the following external measures:

- ▶ The Australian National Audit Office (“**ANAO**”)
- ▶ The Inspector-General of Taxation (“**IGOT**”)
- ▶ Office of the Australian Information Commissioner
- ▶ Senate Estimates Committee
- ▶ House of Representatives Standing Committee on Tax and Revenue
- ▶ Courts and Tribunals

Australian National Audit Office

The Auditor-General heading the ANAO is an independent officer of Parliament and provides an independent assessment of the ATO, auditing its efficiency and effectiveness in administration and

⁸ Media release - <http://sjm.ministers.treasury.gov.au/media-release/010-2016/>

accountability, as well as providing assurance of the ATO's financial reports (for convenience we refer to the ANAO role in this submission as "efficiency and effectiveness").

This latter oversight is important to ensure that the financial reports give a true and fair view of the financial position of the ATO and builds further trust and confidence in the system amongst members of the public.

ANAO can also investigate specific taxpayer complaints or look at the broader ATO engagement with taxpayers to ensure that the ATO continues to operate in accordance with the law. However, as a practical matter, we consider that this type of inquiry is seldom carried out by ANAO.

Inspector-General of Taxation

The IGOT is an independent statutory office established by the Inspector-General of Taxation Act 2003, in addition to the pre-existing ANAO role, with the functions of the IGOT:

- "(a) to review:
 - (i) systems established by the Australian Taxation Office to administer the tax laws, including systems for dealing or communicating with the public generally, or with particular people or organisations, in relation to the administration of the tax laws; and
 - (ii) systems established by tax laws, but only to the extent that the systems deal with administrative matters; and
- (b) to report on those reviews, setting out:
 - (i) the subject and outcome of the review; and
 - (ii) any recommendations that the Inspector-General thinks appropriate concerning how the system reviewed could be improved."

Administrative matters includes, for these purposes, the process for assessing, collecting, paying or recovering amounts under a tax law, or the enforcement of a tax law.

So the IGOT seeks to develop recommendations for the administration of tax laws, reduce inefficiencies in the tax system and reflect and assist to rectify areas of concern to all stakeholders in the tax system.

Recent changes to improve the scrutiny and accountability of the ATO and all players involved have seen the tax complaint handling role transferred from the Commonwealth Ombudsman to the IGOT to improve the systemic review role of the IGOT and offer taxpayers' specialised handling for tax matters.

The IGOT is one of the important mechanisms for scrutiny of the ATO and essentially provides a useful forum for taxpayers. It was specifically established for the public's dealings with the ATO, in particular allowing the public to voice their concerns regarding the ATO's interactions and the policy and procedures followed by representatives of the ATO which guide such interactions. Part of the role is providing reviews and reports and making recommendations to the ATO and Government on issues identified.

The IGOT oversight of the ATO administration in the sense of ATO interaction with taxpayers is much greater than that by the ANAO. That supervision or governance gap was precisely the reason why the IGOT role was established.

During the 2015 financial year, the Assistant Treasurer released five reports by the Inspector-General of Taxation, all with recommendations from the IGOT for the ATO. The most recent report by the IGOT concerned whether the ATO has implemented agreed recommendations is based on reports released between August 2009 and November 2010.⁹

The report found that the agreed recommendations in the reports considered have been implemented by the ATO and have encouraged ATO action toward the realisation of intended improvements. Out of the reports reviewed for the period, 55 recommendations directed to the ATO in whole or in part, the

⁹ <http://igt.gov.au/files/2014/12/follow-up-5-reports-2009-2010-20150527.pdf>

Commissioner responded to 52 of these. Of these 52 recommendations, the ATO has implemented 46 of these recommendations, and has taken action consistent with the agreed principle essential to two of the recommendations, as well as making developments in administrative practices and approaches.

Given the significant role that the IGOT has in the scrutiny of the ATO and the contribution it has to its advancement and development, we believe that there would be significant impact on the effectiveness and efficiency of the tax system if IGOT was to be removed. The IGOT recommendations as indicated above are generally accepted by the ATO and in our view are designed to improve the operation and fairness of the ATO's administration of the tax laws.

In addition given the IGOT overseas the ombudsman function which is one of the key ways individuals can have concerns raise about the administration of taxation laws, its removal and the loss of the specialist skills which exist in this area would significantly reduce the ability of general community to have concerns reviewed and examined.

Office of the Australian Information Commissioner

The Office of the Australian Information Commissioner ("**OAIC**") is an independent statutory agency established a part of the Federal Freedom of Information laws to advise agencies such as the ATO on information and policy management practice, protect the privacy of individuals with personal information provided to such agencies and uphold and promote the freedom of information principles.

The OAIC carries out various activities in these areas, such as monitoring statutory compliance, merit reviews of freedom of information decisions and providing advice to government agencies to educate and promote awareness on responsible information handling. Members of the public can apply under Freedom of Information legislation for the ATO to publish certain documents which acts as a safeguard and check on ATO integrity. However, given that this must be initiated by a taxpayer and is not an ongoing automatic check, further safeguards and scrutiny measures are necessary.

Senate Estimates Committee and House of Representatives Standing Committee on Tax and Revenue

Senate Estimates hearings and House of Representatives Standing Committee on Tax and Revenue hearings provide the opportunity for senators and Members to scrutinise how executive government, and therefore how the ATO is spending taxpayers' money and collecting the governments revenue. Senators and Members are able to focus on how this money was allocated and expended as well as analyse future spending plans. This provides a check and balance on the powers of the ATO as Parliament is able to ensure that monies are being allocated to the approved areas of expenditure.

There appears to have been a significant increase in parliamentary oversight of and appearances by the ATO and its senior officers recently. This is understandable given the significant focus on taxation revenues and their adequacy given the changing economic circumstances and globalisation. But those parliamentary appearances by the ATO senior officers do not substitute for the scrutiny by the ANAO or IGOT.

We observe that the Committee might wish to consider how parliamentary processes might best build on the work done by the ANAO and IGOT, in the interests of efficient operations on the ATO and all stakeholders. We note to this end the Committee enlisted the assistance of IGOT in its review of Tax Disputes and acknowledged in its report the valuable contributions that the IGOT's work provided to the committee in formulating its report.

Courts and Tribunals

Within the legal system, the Courts and tribunals are able to provide additional scrutiny of ATO processes and determinations. In particular, applicants who disagree with findings of the ATO have the

option of appealing to the Administrative Appeals Tribunal (“AAT”) or the Federal Court of Australia for an independent review of the decisions.

The AAT is an independent body which allows the applicant to seek review of decisions made by the ATO for their tax affairs. The proceedings are less formal than initiating court proceedings and therefore less costly than attending court and the applicant is able to self-represent. The AAT has the jurisdiction to exercise most of the Commissioner’s powers and discretions thereby allowing the adjudicator to reconsider the decision and confirm, vary or set it aside.

The Federal Court of Australia allows taxpayers to appeal directly to the Court on a decision of the taxpayer’s objection, or to appeal on the decisions of the AAT on the basis of a question of law. This provides the applicant with a more formal proceeding however there are greater costs involved for the applicant to seek this review than other review processes available.

While Courts play an important role in curbing excessive use of ATO powers, Courts alone are insufficient to aid in thoroughly scrutinising ATO processes and decisions. One reason for this is the difficulty in proving maladministration as is highlighted in the case of *The Commissioner of Taxation v Donoghue* [2015] FCAFC 183, where, in suspicious circumstances, the ATO had received documents subject to legal professional privilege and used them as the basis of a tax assessment yet, on appeal to the Full Federal Court, this did not amount to maladministration.

Practical effect of IGOT on dispute resolution

An IGOT report to the Assistant Treasurer released in May 2012 on the ‘ATO’s use of early and Alternative Dispute Resolution’ found that despite the ATO’s commitment to enhancing the ADR framework and resolving disputes at an earlier point in time, there was still a reluctance in practice for ATO officers to engage with taxpayers to resolve tax disputes.¹⁰

The finding showed that ATO officers instead preferred taxpayers to challenge their decisions through formal methods, such as Courts and Tribunals. The report noted that there was a lack of understanding of alternative dispute resolution techniques among officers at various levels with the ATO, as well as reluctance to depart from established procedures and policies in applicable cases. These factors, combined with the lack of senior officer involvement until later in the dealings with the taxpayer contributed to forgone opportunities for the ATO and taxpayers to address issues in a time and cost effective method without resorting to litigation.

Since the issuance of the report, the ATO has reviewed the recommendations and the Commissioner has announced improvements to the dispute resolution process such as implementing an Independent Review process and further changes to encourage alternative dispute resolution. We applaud that action of the ATO. The ATO noted that they have accepted 20 of the 22 recommendations from the IGOT report either fully in principle or in part¹¹ which demonstrates the practical results that the IGOT scrutiny process achieves in assisting the ATO to improve its administrative and dispute resolution processes.

We highlight for the Committee that the ADR processes and dispute resolution processes continue to evolve on the part of the ATO and taxpayers. This again highlights for the Committee that the ATO administration and interaction with taxpayers are not a steady-state unchanging environment, and the changes require appropriate governance and supervision.

8. Australia’s Future Tax system Review (Henry Review) supported supervision

The Australia’s Future Tax System Review chaired by former Treasury Secretary Dr Ken Henry (Henry Review) considered in detail as part of its review of the tax system supervision and governance of the ATO in its deliberation and its 2010 report.

¹⁰ <http://igt.gov.au/files/2014/11/alternative-dispute-resolution.pdf>

¹¹ <https://www.ato.gov.au/printfriendly.aspx?url=/About-ATO/Access,-accountability-and-reporting/In-detail/Inspector-General-of-Taxation/Review-into-the-ATO-s-use-of-ADR/>

Its recommendations included the following recommendations:

- **Recommendation 115:** A board should be established to advise the Commissioner of Taxation on the general organisation and management of the ATO. The board would not be a decision-making body and would have no role in interpreting the tax laws or examining individual taxpayer issues. The government would appoint members to the board.
- **Recommendation 116:** The government should clarify that the role of the Inspector-General of Taxation is to examine systemic tax administration issues that affect businesses.
- **Recommendation 117:** The government should ensure that sufficient resources are devoted to the functions of the Inspector-General of Taxation, the Australian National Audit Office and the Commonwealth Ombudsman, recognising their importance in maintaining a fair and efficient tax system.
- **Recommendation 118:** The Joint Committee of Public Accounts and Audit should examine reports of the Inspector-General of Taxation and the Commonwealth Ombudsman, and monitor the ATO's implementation of the recommendations in those reports.

Recommendations 115-118 are directly relevant to this inquiry and confirm the Henry Review did not consider, in its extensive analysis, there was excessive supervision of the ATO. In fact as indicated above it recommended further supervision.

We agree that these recommendations remain relevant. We believe that there may be opportunities to maximise efficiencies of the scrutiny processes, but consider these recommendations support the maintenance of the current level of supervision,

9. Conclusion

Based on the above, having regard to the ATO's major role in the government, the taxpayer community and society and the substantial powers and autonomy it has, the current level of oversight and scrutiny of the ATO is necessary and appropriate to ensure that the administration of the tax system continues to be fair and effective. We believe each body performs a different function and such functions collectively provide an appropriate level of review. To remove any of these functions would reflect poor governance.

We would also support an increased level of oversight through a Board function overseeing the operation of the ATO and the Commissioner.