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## **Inquiry into the 2015-16 Annual Report of the Australian Taxation Office**

### **Submission of the Australian Taxpayers' Alliance**

#### **Executive Summary**

1. The Australian Taxpayers' Alliance (ATA) welcomes the decision by the Australian Government to review the 2015-16 Annual Report of the Australian Taxation Office and expresses thanks for the opportunity to present the following submission to the Tax and Revenue Committee.
2. The ATA is a grassroots, free-market advocacy group, consisting of over 25,000 members. The ATA stands for the principles of efficient and effective enforcement of taxation regulations, responsibility and fairness for individual taxpayers and a tax system that has the confidence of the Australian public in its execution and the related government departments.
3. The ATA commends the ATO for implementing KPI targets to address perceptions of fairness.
4. The ATA submits that recent measures don't go far enough to ensure overall outcomes of fairness for taxpayers. It recommends continual accountability for the backlog of public draft rulings, repealing the "one chance" policy and shifting the burden of proof to ensure that taxpayers are innocent before proven guilty.

#### **Backlog of draft public rulings**

5. A recurring concern of the ATO is the persistent backlog of draft public rulings. It is noted that this results in uncertainty for taxpayers and tax professionals. Mr. Andrews Mills from the ATO state that there were 16 draft public rulings that were yet to be finalized with some even dating back decades.<sup>1</sup>
6. The ATA recognises the new approach in dealing with draft rulings that engages in consultations on the issue before drafting a ruling with an aim to streamline the finalisation of the rulings.<sup>2</sup> Although they have been in limbo status due to 'issues and tensions that arose, and clear differences of opinion', taxpayers and tax practitioners find that the draft rulings bring uncertainty about the legal position and how the ATO will rule in certain situations.<sup>3</sup> The clarity and consistency for the taxpayer is necessary and a specific timeline ought to be given to the ATO to provide certainty regarding the finalisation and clearing of the backlog of draft public rulings.<sup>4</sup>

<sup>1</sup> Mr Andrew Mills, Committee Hansard, Canberra, Wednesday 24 February 2016, p. 15.

<sup>2</sup> Mr Andrew Mills, Committee Hansard, Canberra, Wednesday 24 February 2016, p. 15.

<sup>3</sup> Mr Andrew Mills, Committee Hansard, Canberra, Wednesday 24 February 2016, p. 15.

<sup>4</sup> Inquiry into the 2015 – 2015 Australian Taxation Report

7. The Annual Report for 2011 – 2012 stated that there were 92 public rulings and determinations.<sup>5</sup> While the Annual Report for 2012 – 2013 stated that the ATO issued 69 Public Rulings and Determinations.<sup>6</sup> In 2014 – 2015, there were 64 public rulings with only 81% of them on time.<sup>7</sup> However in the 2015 – 2016 year there is not one mention of any statistics regarding the 2015 – 2016 year.<sup>8</sup> The ATA submits that the ATO should be held to a higher standard of excellence in ensuring that public rulings are being released so that tax practitioners and taxpayers are able to access timely information that would be relevant for them as they engage with the services from the ATO. The ATA would also question why there are no statistics mentioned for the 2015-2016 year regarding the backlog of public rulings.

### **Indicators of the perceptions of fairness in disputes by taxpayers and other performance information**

8. The ATA supports the use of key performance indicators for the perception of fairness in tax disputes and encourages further research into a variety of measurable indicators of taxpayer perceptions of fairness when dealing with the ATO. The ATO should be commended for producing an important measure of performance and perception of fairness with taxpayers, and as new issues emerge, the flexibility to introduce new indicators.
9. The ATA echoes the sentiment by First Assistant Commissioner, Ms. Suzanne Sinclair, who stated that perception of fairness should ‘definitely’ be considered as a KPI and affirms the view that the perception of fairness ought to be formalised as a key performance indicator as it instils public confidence in the dispute resolution process.<sup>9</sup> The consistent use of these indicators ensures that trends may be identified in order to promote long term solutions for any potential structural or inherent blind spots in the dispute resolution process.
10. The initial research by the ATO for a sample of 231 disputes finalized between 1 July and 30 September 2014 analysed whether the overall disputes process was fair through a survey which measured whether taxpayers, strongly agreed, agreed, were neutral, disagreed or strongly disagreed that the process was fair.<sup>10</sup> This found that on average 50% agreed that the system was unfair and even if the outcome fully supported the taxpayer, only 64% agreed or strongly agreed that there was fairness in the process.<sup>11</sup> This is a startling figure that will provide potential disincentives for taxpayers to participate in the system.
11. The ATA submits that the ATO should continue to use the perception of fairness as a KPI and that the ATO should expand the survey to include a wider range of data which goes beyond whether the taxpayer agrees that there was fairness in the procedure. Other data which may be useful for the ATO in order to improve its perception of fairness is to gather data on particular phases within the procedural process as it would allow for the specific identification of the various bottlenecks which are causing the perception of fairness to be relatively low.

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<sup>5</sup> [https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/Annual\\_Report\\_2011-12/n0995-10-2012\\_js23899\\_w.pdf](https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/Annual_Report_2011-12/n0995-10-2012_js23899_w.pdf)

<sup>6</sup> [https://www.ato.gov.au/uploadedFiles/Content/CR/Annual\\_Reports/Annual\\_Report\\_2012-13/Downloads/complete.pdf](https://www.ato.gov.au/uploadedFiles/Content/CR/Annual_Reports/Annual_Report_2012-13/Downloads/complete.pdf)

<sup>7</sup> [https://annualreport.ato.gov.au/sites/g/files/net376/f/Annual-Report-2014-15/sites/g/files/net376/f/AR\\_14-15\\_Vol1\\_n0995\\_js34758\\_w.pdf](https://annualreport.ato.gov.au/sites/g/files/net376/f/Annual-Report-2014-15/sites/g/files/net376/f/AR_14-15_Vol1_n0995_js34758_w.pdf)

<sup>8</sup> [https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO\\_AR\\_15-16\\_Vol1-Full.pdf](https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO_AR_15-16_Vol1-Full.pdf)

<sup>9</sup> Ms Sinclair, ATO, Transcript of Evidence, Canberra, Wednesday 18 March 2015, p. 9.

<sup>10</sup> ATO, Submission 2, pp. 15-16

<sup>11</sup> ATO, Submission 2, pp. 15-16

12. The ATA submits that the Committee report tabled on 26 March 2015 that recommended the ATO develop a measurable KPI for the perception of fairness in tax disputes by taxpayers ought to be followed up on to ensure the success of the past use of indicators is maintained in the long term.<sup>12</sup>
13. The inclusion by the ATO of “Fairness – perception of fairness in disputes” as a performance measure of integrity in the *ATO Corporate Plan 2015 – 2019* is a welcomed initiative.<sup>13</sup> With a target of 60% overall perception of fairness in dispute to be achieved over a 12 month period to 30 June 2016.<sup>14</sup> The ATA submits that a target of 75% should be set by 2019.
14. The ATA recognizes that there are lower perceptions of fairness by the taxpayer when a decision favours the ATO. A plan should be set in place to improve this and uphold the public confidence in the dispute resolution process. Realistic expectations for taxpayers need to be met while also ensuring that there are transparency and the rationale is explained so taxpayers can understand why a decision was not ruled in their favour. The confidence of the public in the ATO to handle their dispute with fairness throughout the procedure is essential. Additionally, taxpayers may feel out of place when raising their dispute with a government body such as the ATO and be overwhelmed by the process, the subsequent jargon and handling of their objection.
15. In the 2015 – 2016 Annual Report, there is mention of a survey that showed “there was a significant increase in the proportion of people who, having disputed an ATO decision, agreed that was fair” – further stats are required to show this ‘significant increase’.<sup>15</sup> The Report found that the result for the perception of fairness in disputes that only 55% of taxpayers who finalised a dispute perceived the process to be fair which is well short of the 60% target above.<sup>16</sup> The ATA submits that the ATO be kept accountable as to the factors why they have failed to reach their 60% target and what steps they will take to ensure that this goal is reached.

### **Proposed changes to penalties for small business and individuals**

16. Additionally, there are concerns about the proposed changes regarding the penalties for certain small business and individual clients.<sup>17</sup> These changes would introduce new rules that would lead to higher areas of uncertainty and in a system where taxpayers are already skeptical in dealing with the ATO, this would not be conducive towards the engagement between taxpayers and the ATO. An example of this is the one chance policy where there is a failure to lodge penalties on time, though potential issues may arise that despite the well-intentioned proposed changes, the pragmatics of the application may lead to greater cost and more time wasted by taxpayers, negating an positive effect.<sup>18</sup>
17. The parameters for this proposal would mean that small business and individuals who do not engage in behavior that demonstrates recklessness or dishonesty would receive one chance, resulting in an explanation of the error and how to ensure it is correct in the future. After this one chance has been given, penalties for failure to lodge on time would apply. The ATA submits there are possible effects of the proposed changes that need to be considered and potential balances to ensure that the

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<sup>12</sup> House Standing Committee on Tax and Revenue, Tax disputes, March 2015, p. 17.

<sup>13</sup> ATO, Submission 2.2, p. 21.

<sup>14</sup> ATO, Submission 2.2, p. 21.

<sup>15</sup> [https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO\\_AR\\_15-16\\_Vol1-Full.pdf](https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO_AR_15-16_Vol1-Full.pdf)

<sup>16</sup> [https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO\\_AR\\_15-16\\_Vol1-Full.pdf](https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO_AR_15-16_Vol1-Full.pdf)

<sup>17</sup> <http://www.smhtaxlawyers.net.au/blogs/posts/Consultation-paper-September-2016-Proposed-changes-to-penalties-for-small-business-and-individuals-109>

<sup>18</sup> <http://www.smhtaxlawyers.net.au/blogs/posts/Consultation-paper-September-2016-Proposed-changes-to-penalties-for-small-business-and-individuals-109>

ATO does not utilise these changes for any ulterior motives.<sup>19</sup> A situation may arise where this one chance policy could be circumvented for reckless or dishonest behavior by taxpayers at the 50% penalty rate which would not have occurred prior to this change.<sup>20</sup> Therefore, the ATA submits that the proposed changes are to be approached with caution and that further checks and balances are required to ensure that taxpayers will benefit from these proposals.

## **Burden of proof**

18. When a taxpayer interacts with the ATO and raises an issue through the dispute resolution processes, the current culture at the ATO suggests that taxpayers are considered guilty until they are proven to be innocent. This was highlighted in March 2015, when the House of Representatives Standing Committee of Tax and Revenue heard numerous stories from taxpayers about the consequences of ATO maladministration which place a significant strain on taxpayers, who are clearly a relatively minor actor that pales in comparison to the ATO.<sup>21</sup> Although there was a recommendation that the ATO should bear the legal burden of proving any allegation by the taxpayer, this recommendation was rejected by the government.<sup>22</sup> This must be reconsidered to ensure that taxpayers are not being taxed merely because of an allegation of fraud and evasion. Clearly there are concerns of the potential by the ATO to take advantage of taxpayers, given their position and size.
19. An example of the potential danger is echoed by those who have experienced such as legal battles such as tax lawyer David Hughes and the reality that there are “so many people just running scared against the ATO”.<sup>23</sup> When unchallenged, the ATO benefits from the presupposition of the current burden of proof while having the backing of the funding by the Australian Government. As seen in Gary Kurzer’s experience, the ATO and the defective administration can lead to disastrous consequences for taxpayers, such as the loss of assets and an incredibly bureaucratic process that makes it difficult to recover money.
20. The ATO must shift the burden of proof to ensure that taxpayers are not disadvantaged by a presumption of guilt. Taxpayers must be given a presumption of innocence resulting in the ATO having to face the burden of establishing guilt rather than taxpayers being assumed to be guilty and having to prove that they are innocent. The ATA submits greater scrutiny is also required in the dispute resolution process to ensure that cases like Kurzer’s are prevented.
21. The ATA submits that shifting the burden of proof is particularly pertinent considering recently disclosed cases such as Douglass before Federal Court.<sup>24</sup> The case demonstrates why ATO officials must seek approval from the Federal Court before going beyond two to four year term limits.

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<sup>19</sup> <http://www.smhtaxlawyers.net.au/blogs/posts/Consultation-paper-September-2016-Proposed-changes-to-penalties-for-small-business-and-individuals-109>

<sup>20</sup> <http://www.smhtaxlawyers.net.au/blogs/posts/Consultation-paper-September-2016-Proposed-changes-to-penalties-for-small-business-and-individuals-109>

<sup>21</sup> <http://www.smhtaxlawyers.net.au/blogs/posts/Taxpayers-Still-Guilty-Until-Proven-Innocent-104>

<sup>22</sup> <http://www.smhtaxlawyers.net.au/blogs/posts/Taxpayers-Still-Guilty-Until-Proven-Innocent-104>

<sup>23</sup> <http://www.abc.net.au/news/2012-11-01/'draconian'-ato-accused-of-bullying-taxpayers/4344720>

<sup>24</sup> Gottlieb, Robert. Chris Jordan’s last shot at righting a wayward ATO

<http://www.theaustralian.com.au/business/opinion/robert-gottlieb/chris-jordans-last-shot-at-righting-a-wayward-ato/news-story/39035b0d176111c58b61f7083d6b68ea>

## Conclusion

22. It is submitted that the ATO has made some improvements in the perceptions of fairness but must do more to ensure overall outcomes in fairness for taxpayers are achieved.
23. The ATA recommends continued usage of KPI targets to address perceptions of fairness, continual accountability for the backlog of public draft rulings, repealing the “one chance” policy and shifting the burden of proof to ensure that taxpayers are innocent before proven guilty.

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