



Australian Government
Inspector-General of Taxation
Taxation Ombudsman

Telephone: (02) 8239 2111
Facsimile: (02) 8239 2100

Level 6, 321 Kent Street
Sydney NSW 2000
GPO Box 551
Sydney NSW 2001

27 November 2019

Senator the Hon Slade Brockman
Chair
Senate Economics Legislation Committee
Parliament House
Canberra ACT 2600

Senator.Brockman@aph.gov.au
Economics.Sen@aph.gov.au

Dear Chair

Inquiry into the performance of the Inspector General of Taxation – Supplementary Submission

Please find the following additional submissions in relation to the Committee's Inquiry into the performance of the Inspector General of Taxation. These submissions expand on some themes raised during the oral hearings.

Legal Advice

Cross reference arrangements exist between the *Ombudsman Act 1976* and the *Inspector General of Taxation Act 2003 (IGT Act 2003)*. The cross reference drafting creates additional red-tape and ambiguity in seeking clarification on the operation of the *IGT Act 2003*. This includes:

1. Significant and sometimes challenging consultation is required before independent legal advice may be obtained by the IGTO regarding *Ombudsman Act 1976* provisions that interact with the *IGT Act*.
 - The legal services directions necessitate a four way consultation between both operating agencies (Commonwealth Ombudsman and IGTO) as well as the portfolio agencies (the Department of the Attorney-General and Treasury).
2. Ambiguity or dispute around individual portfolio agency and operating agency requirements and responsibilities regarding the need for advice.
 - An agency may have their own long established practices with differing perceptions regarding precedential advice needs;
 - An agency may not wish to rely upon the circumstances of another agency in establishing a precedential view;
 - Express or implied direction to seek administrative arrangements or 'work-around' where possible in preference to the impost and cost associated with legislative change;
 - Competing priorities in relation to the Government or portfolio legislative programs;

- Legislative reform that is in the interests of one agency is also made difficult since there must be identical requirements for the other agency; and
- A concern that there has been a 'failure' in the design of the law originally such that there may be a political backlash regarding major changes.

Further details are included in Annexure A attached.

Victimisation Protections

Although Victimisation protections are available under section 39 of the *IGT Act* where information is compelled under section 9 of the *Ombudsman Act 1976*, there are several practical problems which arise in accessing these protections:

- The protections exist within a 'Catch-22' arrangement – to have a reasonable belief, the Tax Ombudsman must be aware that a Tax Official has information and this requires disclosure by the Tax Official before the compulsory notice is issued which would otherwise provide the protections.
 - Before IGTO can compel information from a Tax Official it must have a reasonable belief that the Tax Official has the information and is in the possession of the relevant information;
 - It is an offence under section 36 of the *Ombudsman Act* [10 penalty units or \$2,100 or imprisonment for 3 months] to fail to comply [unless the person has a reasonable excuse];
- Any investigation by the IGTO of ATO actions (for example under section 7(1)(b) of the *IGT Act*) must be notified to the Commissioner of Taxation – refer section 8(1) of the *Ombudsman Act 1976*;
- The IGTO is not authorised to investigate actions in relation to employment – section 5(2)(d) of the *Ombudsman Act 1976*. However, employment matters are necessarily inter-related to administrative matters – being the role and duties of Tax Officials as public servants. Accordingly this exclusive one or the other approach can result in disputes about jurisdiction to investigate which would not arise where the authority was couched in relative terms. Where the requirement was instead - for example – IGTO is not authorised to investigate actions **to the extent they relate to employment matters**;
- There is no relevant definition of 'detriment' for these purposes – whereas detriment is defined exhaustively in whistle blower style legislation;

Accordingly, the protections against victimisation which appear to support disclosure and permit compulsory access to information on paper in fact provide weaker outcomes in practice and in reality.

Further references are set out in Annexure B attached.

* * * * *

We trust these further submissions are of assistance to the Committee. Please do not hesitate to contact me on [REDACTED] should you require any further information.

Yours faithfully



Karen Payne

Inspector-General of Taxation and Taxation Ombudsman

Annexure A – Legal Services Directions 2005 & 2017 and Treasury IGT Protocol

Cross reference arrangements exist between the *Ombudsman Act 1976* and the *Inspector General of Taxation Act 2003*. The cross reference drafting creates additional red-tape and ambiguity in seeking clarification on the operation of the *IGT Act 2003* through independent legal advice.

The Commonwealth Legal Services Directions provide a mandatory framework in this regard. In addition there is a formal Protocol between the Treasury and the IGT agencies that provides for commitments in relation to seeking or obtaining legal advice in this context. Both the Directions and the Protocol will be specifically addressed in more detail in the sections that follow.

Legal Services Directions – generally

A public service agency seeking legal advice is obliged to comply with the Legal Services Directions (Directions), which are empowered under section 55ZF of the *Judiciary Act 1903*.

The IGT has needed to consider the cross reference arrangements since 1 May 2015, including the specific Directions issued in 2005 and replaced in 2017. While the analysis below considers each Direction set separately, it is important to appreciate that differences are minimal with both having virtually the same requirements in this context.

Legal Services Directions – 2005

Relevantly, the Directions have a section addressing sharing advice within Government at section 10 and non-compliance reporting requirements at section 11, extracts of which are provided below:

10. Sharing of advice within Government

Consultation

10.1 If an FMA¹ agency (the requesting agency) wishes to obtain legal advice (whether from an in-house or external source) on the interpretation of legislation administered by another agency (the administering agency), the requesting agency is to provide the administering agency with:

- (a) a reasonable opportunity to consult on the proposal to seek advice
- (b) a copy of the request for advice
- (c) a reasonable opportunity to consult on the matter prior to the advice being finalised, including consultation with the requesting agency's legal services provider, as required by the administering agency, and
- (d) a copy of the advice.

[....]

10.8 Where an FMA agency receives legal advice that it considers is likely to be significant to other agencies, it is to take reasonable steps to make that advice available to those agencies.

Note 1 and 2 to section 10 provides further direction as follows:

¹ FMA Agency is a *Financial Management and Accountability Act* reference which is repealed and replaced by the PGPA Act.

NOTE 1. The purpose of paragraph 10 is to promote consultation between agencies on the interpretation of legislation with the aim of reaching, as far as possible, consistency in statutory interpretation across the Commonwealth. Agencies are not to act in a manner that may be inconsistent with or undermine Commonwealth policy in respect of a particular piece of legislation. Concerns about interpretation are to be raised with the administering agency so that it has the opportunity to consider whether the policy requires change, and agencies are to seek to minimise cost by first seeing if the administering agency has an answer to their question rather than commissioning fresh advice.

NOTE 2. The Administrative Arrangements Orders will not define 'administering agency' in all cases, but will provide the starting point. If a department and one of its portfolio agencies have agreed that consultation should be with the portfolio agency, [Office of the Legal Services Commissioner] OLSC is to be notified so that details of those consultation arrangements can be made available on the OLSC website. OLSC is also to be notified of consultation arrangements where departments share policy responsibility.

11.2 The Chief Executive of an FMA agency is responsible for giving to OLSC, within 60 days after the end of each financial year, a certificate setting out the extent to which the Chief Executive believes there has been compliance by the agency with the Directions. The certificate should:

- (a) give details of any apparent or possible breach of the Directions not previously reported to OLSC
- (b) give details of actions taken to address the causes of any breaches of the Directions during the financial year

Legal Services Directions – 2017

Relevantly, the Directions have a section addressing sharing advice within Government at section 10 and non-compliance reporting requirements at section 11, extracts of which are provided below:

10 Sharing of advice within Government

Consultation

10.1 If a non-corporate Commonwealth entity (the **requesting entity**) wishes to obtain legal advice (whether from an in-house or external source) on the interpretation of legislation administered by another non-corporate Commonwealth entity (the **administering entity**), the requesting entity is to provide the administering entity with:

- (a) a reasonable opportunity to consult on the proposal to seek advice
- (b) a copy of the request for advice
- (c) a reasonable opportunity to consult on the matter prior to the advice being finalised, including consultation with the requesting entity's legal services provider, as required by the administering entity, and
- (d) a copy of the advice.

Sharing of advice generally

10.8 If a non-corporate Commonwealth entity receives legal advice that it considers is likely to be significant to other Commonwealth agencies, it is to take reasonable steps to make that advice available to those agencies, subject to paragraph 10.4.

Note 1: The purpose of paragraph 10 is to promote consultation between Commonwealth agencies on the interpretation of legislation with the aim of reaching, as far as possible, consistency in statutory interpretation across the Commonwealth. Non-corporate Commonwealth entities are not to act in a manner that may be inconsistent with or undermine Commonwealth policy in respect of a particular piece of legislation. Concerns about interpretation are to be raised with the administering entity so that it has the opportunity to consider whether the policy requires change, and entities are to seek to minimise cost by first seeing if the administering entity has an answer to their question rather than commissioning fresh advice.

Note 2: To find out the non-corporate Commonwealth entity that administers particular legislation, see the Administrative Arrangements Orders.

11.2 The accountable authority of a non-corporate Commonwealth entity is responsible for giving to [Office of the Legal Services Commissioner] OLSC, within 60 days after the end of each financial year, a certificate setting out the extent to which the accountable authority believes there has been compliance by the entity with the Directions. The certificate should:

- (a) give details of any apparent or possible breach of the Directions not previously reported to OLSC
- (b) give details of actions taken to address the causes of any breaches of the Directions during the financial year

The Treasury and IGT Protocol – Legal advice arrangements

The Treasury and IGT have agency have a formal protocol² that issued on 30 March 2007 and outlines certain commitments or requirements. One requirement is for the IGT to consult with the Treasury on legal services as portfolio agency in the following terms:

“Consistent with the Legal Services Directions, Treasury has the portfolio responsibility, as necessary, to provide guidance to the Inspector-General on the operation of the *Inspector-General of Taxation Act 2003*. Where the Inspector-General wishes to obtain independent legal advice on the interpretation of that Act, the Inspector-General is to provide to Treasury...” (Thereafter the protocol cites the same requirements outlined at paragraphs (a) to (d) of section 10.1 from the legal services directions themselves as set out above in this annexure.)

The transfer of complaints handling of taxation administration matters from the Commonwealth Ombudsman to the IGT office presented a new form of powers, effective from 1 May 2015. The legislative design was cross referenced to the *Ombudsman Act 1976* for operation by virtue of specific provisions with the *Inspector-General of Taxation Act 2003*. Accordingly, the IGT office now had two separate Acts to consider when contemplating legal advice.

² * The protocol is published on the IGT website at <https://igt.gov.au/accountability-and-reporting/protocol-igt-treasury/>

Where the IGT agency wishes to obtain independent legal advice regarding the operation of provisions within the *Ombudsman Act 1976* that apply by virtue of the *IGT Act 2003*, the Commonwealth Ombudsman and the Treasury as portfolio agency need to be consulted. The Office of the Ombudsman would be expected to do likewise with its portfolio agency³. This consultation as noted is required pursuant to the legal services direction and hence the four way agency consultation process, where mutual agreement is necessary on the actual need to obtain the advice, and if that agreement is obtained, what firm/solicitor would be engaged to provide it and then which agency would pay for it.

In summary the required approach is strongly supportive of fulsome consultation and consistent interpretation and application of laws by agencies across government. Further should non-compliance arise by an agency the then accountable authority has a duty to notify and formally report of any potential or actual breaches in this regard to the OLSC. For a small agency such as the IGT that originally had only seven people with the addition of responsibility for taxation complaints handling, this was at that time and still remains to this day, a significant practical stumbling block to the obtaining of legal advice regarding provisions within the *Ombudsman Act*.

³ The Office of the Commonwealth Ombudsman was administered by the Prime Minister until 10 May 2018, when the Attorney-General commenced administering the Act.

Annexure B – Victimisation Protections

Further detailed explanation and legislative references is provided below.

The IGTO can compel information from a person (including a Tax Official) by issuing a section 9 notice under the *Ombudsman Act* (as it applies by virtue of the *IGT Act* section 15(f)).

The IGTO must have a reasonable belief that the Tax Official has the information and it is in the possession of the relevant Tax Official for the purpose of an investigation.

Importantly, such an investigation must be notified to the Commissioner before it may be conducted – refer section 8(1) of the *Ombudsman Act 1976*.

Where a Tax Official contacts the IGTO and provides information that it is protected information for the purposes of the *Taxation Administration Act 1953* (TAA), then the Tax Official will have breached their obligations of secrecy and confidentiality for the purposes of the TAA:

- The Tax Official's action is not within the exception provided by Schedule 1 section 355-65(2) Table 4 Item (5) of the TAA, as an investigation by the IGTO is required for that exception to apply,
- there will be a breach of the main provision at section 355-25 to keep that information protected.

The IGTO is then required pursuant to section 38 of the *IGT Act*, when forming an opinion before, during or after, conducting an investigation a person has engaged in misconduct who is or was a Tax Official and it is of sufficient weight to do so, must report that evidence to the Commissioner.

A breach of disclosure under the TAA regarding protected information requirements is a criminal offence carrying 2 years imprisonment. Accordingly, this will be misconduct as described.

Further, if an abovementioned section 9 notice is issued and the Tax Official does not disclose the relevant information, it remains an offence under section 36 of the *Ombudsman Act* (by virtue of the *IGT Act* section 15(j)). The sanction for such a breach is \$2,100 (10 penalty units at \$210 currently) or imprisonment for 3 months (or imprisonment for 6 months if relating to an 'investigation into a systemic issue' as modified by the *IGT Act* section 17(4)) for failure to comply unless the person has a reasonable excuse – where the note to section 36 of the *Ombudsman Act* itself advises that the defendant (being that Tax Official) bears an evidential burden in this regard by reference to the Criminal code subsection 13.3(3).