



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

# SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON TAX AND REVENUE

## INQUIRY INTO THE COMMISSIONER OF TAXATION ANNUAL REPORT 2018-19

By the Inspector-General of Taxation and Taxation Ombudsman

May 2020



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

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8 May 2020

Mr Jason Falinski MP

Chair

House of Representatives Standing Committee on Tax and Revenue

Parliament House

Canberra ACT 2600

Dear Chair

**Re: Inquiry into the Commissioner of Taxation Annual Report 2018-19**

Thank you for the opportunity to contribute to the Committee's *Inquiry into the Commissioner of Taxation Annual Report 2018-19* (Inquiry). The Inspector-General of Taxation and Taxation Ombudsman (IGTO) believes that the tax system needs to be administered in a way that is fair, equitable and transparent. Our dual roles (as Taxation Ombudsman and Inspector-General of Taxation) allows us to investigate and report independently (both privately and publicly) and so provide greater transparency and confidence over areas of taxation administration to be improved.

Our submission is divided into seven main sections and draws upon information contained in the Commissioner of Taxation Annual Report 2018-19, our complaints handling data and other Reviews and observations. Where possible, we have referred to findings and observations made in prior reviews by our own office and also that of other agencies as well as the Committee itself.

We have provided upfront a consolidated list of the key recommendations that identify areas of inquiry the Committee may wish to pursue. These key recommendations are also reproduced at the start of the relevant section to which they relate. We have also highlighted, in the text of the submission, references to the Committee and these key recommendations.

We trust this submission is of assistance to the Committee. Please do not hesitate to contact me on [REDACTED] should you require any further information or background.

Kind regards,

A large black rectangular box redacting the signature of Karen Payne.

Karen Payne  
Inspector-General of Taxation and Taxation Ombudsman

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# KEY RECOMMENDATIONS

## Resourcing of the ATO

*The Committee may wish to consider:*

- a. whether additional and more granular reporting of the ATO workforce deployment - segmented by business area and job family overlay - would provide improved public transparency and insights on areas where ATO resources have been deployed for more improved accountability and to better inform those with oversight responsibilities, including the Australian Parliament and its Committees; and*
- b. whether the correlation or inverse correlation between ATO resourcing and performance in key areas identified in this submission is a basis to make further inquiry of the ATO.*

## Complaints

*The Committee may wish to:*

- a. clarify and explore the following with the ATO:*
  - i. Why it has not adopted the Australian and New Zealand Standard's definition of complaints;*
  - ii. Why it has not reported its reasons for departing from the Australian and New Zealand Standard;*
  - iii. Whether the ATO should adopt and report on complaints under the Australian and New Zealand Standard;*
- b. obtain clarity from the ATO on what records it expects staff to keep when they receive an initial expressions of dissatisfaction which is not escalated to a formal complaint, and what type of cases would be recorded as being an unresolved expression of dissatisfaction where no formal complaint was made.*
- c. consider the merits of additional complaints reporting in the ATO Annual Report, as follows:*
  - i. the number of feedback and compliments the ATO receives and the sentiment of the feedback;*
  - ii. a description of issues that are the subject of most complaint;*
  - iii. trends in complaint numbers, by issue, together with explanations for significant changes in numbers over the years;*
- d. examine the timeliness of the ATO's finalisation of complaints and the ATO's progress in implementing Recommendation 1 in the ANAO's performance audit on the Management of Complaints and Other Feedback;*
- e. consider whether greater reporting of the ATO's timeframes for finalising complaints, for example stratified by range of days taken, is warranted; and*

- f. examine whether the current reporting on performance against Taxpayers' Charter is sufficient and whether the ATO should also report on the outcome of its complaint investigations against breaches of the Taxpayers' Charter.*

## Advice and Guidance

*The Committee may wish to consider:*

- a. examining whether the ATO's current 'layered' approach in providing advice and guidance to taxpayers addresses the complex nature of tax and superannuation laws for taxpayers and reduces the tax gap;*
- b. making inquiries to determine if the concerns raised in the IGTO's Review into Improving the Self-Assessment System in relation to the content of guidance and time taken to complete rulings have been addressed;*
- c. seeking clarification as to the 'interpretative guidance products' referred to in Table 6.18 of the ATO's Annual Report. In particular, it may be of assistance for the Committee to understand the type of support and guidance communicated under this category and the quantity of each;*
- d. making inquiries to understand why there has been a decline in ATO Advice products being issued; and*
- e. making inquiries to understand why the ATO is taking longer to finalise its public rulings.*

## Timeliness of Objections

*The Committee may wish to consider:*

- a. the impacts of the removal of an objection service standard on the allocation and finalisation of objection matters;*
- b. making inquiries to understand why the ATO may have a backlog of objection cases and factors contributing to its performance in finalising objection cases;*
- c. those recommendations with which the ATO did not agree in the IGTO Review into the Underlying Causes and the Management of Objections to Tax Office Decisions. (2009), namely reviewing its performance standards and remission of GIC for the ATO's delayed progress of an objection; and*
- d. exploring if the increasing objection cases are genuine disputes and the extent to which objections are being used for purposes other than a dispute about an interpretation of the substantive tax laws (such as self-amendment of out of time returns) and the likely impact this has on resourcing and timeliness; and*
- e. exploring the extent to which pre-filing contributes to more objections or disputes with the ATO.*

## Compassionate Release of Super

*The Committee may wish to consider:*

- a. examining the manner in which the ATO communicates with taxpayers regarding compassionate release of superannuation — including broad communications, such as the ATO's guidance and website materials, as well as the ATO's tailored communications to individual applicants;*
- b. making inquiries to determine whether the ATO has allocated sufficient resources to administer requests for compassionate release given the projected increase in demand due to the COVID-19 pandemic;*
- c. seeking clarification on whether the ATO has made any legal interpretive decisions that are inconsistent with the previous interpretation by the Department of Human Services, and the effect of such inconsistencies on the success rate of taxpayer applications for compassionate release; and*
- d. comparing compassionate release data obtained from the ATO in relation to FY19 with historical figures from Services Australia (formerly the Department of Human Services) and, if there is a material discrepancy, seeking to understand the reasons for such discrepancy.*

## Tax Performance

*The Committee may wish to consider:*

- a. whether the current level of ATO tax performance reporting is appropriate and sufficiently transparent, given the significant amount of resourcing and funding allocated to the related activities and the Committee's previous review into tax gaps as part of its inquiry into the ATO's 2015-16 Annual Report;*
- b. understanding the reasons for the ATO's measures of the Individuals not in the business tax gap increasing and the proportion of overall tax assured decreasing;*
- c. exploring the ATO's tax performance methodologies in greater detail, including the scope of the summarised version of its methodologies in the Annual Report and the evolution of these methodologies over time;*
- d. seeking clarification on the reasons for the ATO's limited use of specific, quantitative performance targets to report on tax performance and the absence of previously quoted aspirational tax gap targets;*
- e. exploring the need to provide a more comprehensive breakdown of tax performance in the ATO's Annual Report, including the consolidation of already available tax performance data with particular emphasis on the Large corporate groups and Small business markets; and*
- f. assessing whether the ATO's reporting adequately addresses the current community perceptions on tax performance, especially the perceived tax compliance of the Large corporate groups and Small business segments.*

## Other Matters

*The Committee may wish to consider:*

- a. exploring the most recent results of the ATO's fairness research and how it proposes to continue measuring perceptions of fairness into the future; and*
- b. exploring the current and proposed ATO support available to tax practitioners during this period leading into Tax Time 2020.*

# 1. RESOURCING OF THE ATO

## KEY RECOMMENDATIONS

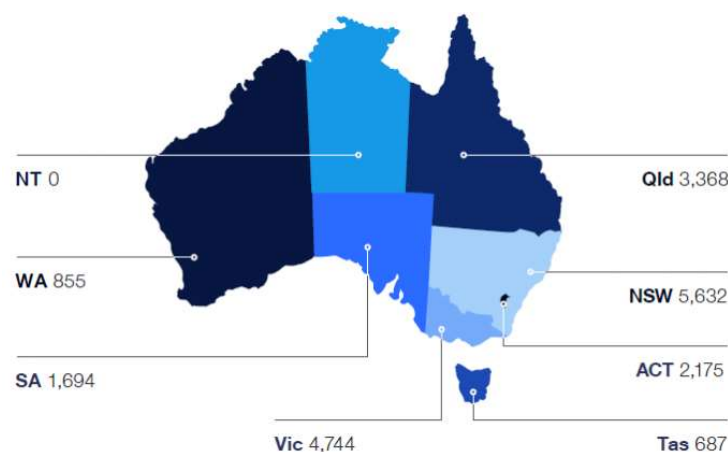
*The Committee may wish to consider:*

- a. *whether additional and more granular reporting of the ATO workforce deployment - segmented by business area and job family overlay - would provide improved public transparency and insights on areas where ATO resources have been deployed for more improved accountability and to better inform those with oversight responsibilities, including the Australian Parliament and its Committees; and*
- b. *whether the correlation or inverse correlation between ATO resourcing and performance in key areas identified in this submission is a basis to make further inquiry of the ATO.*

The Australian Taxation Office (ATO) is one of the largest employers within the Australian public service and one of the largest service delivery agencies of the Commonwealth of Australia. In FY19, the ATO reported that it had 19,157 employees (ongoing and non-going). These include employees currently working for the Tax Practitioners' Board and the Australian Charities and Not-for-Profits Commission.<sup>1</sup>

## DEPLOYMENT OF ATO STAFF

The ATO maintains a presence in all States and Territories around Australia, with the exception of the Northern Territory.<sup>2</sup>



Source: ATO

The majority of the ATO's workforce (71.7%) is located in New South Wales (29.4%), Victoria (24.8) and Queensland (17.6%).

<sup>1</sup> Commissioner of Taxation, *Annual Report 2018-19* (2019) p 79.

<sup>2</sup> Ibid, p 78.



The Annual Report sets out the different business areas and the number of employees within each business area.<sup>3</sup> These are set out in the Table below. Numbers reported in red are generally decreasing whereas numbers reported in green are increasing.

Business area	At 30 June 2017	At 30 June 2018	At 30 June 2019
ATO Corporate	656	420	519
ATO Executive	15	16	13
ATO Finance	527	593	569
ATO People	1,422	1120	1,086
Business Reporting and Registrations	236	196	186
Client Account Services	3,898	3,447	3,132
Client Engagement Group Strategy and Performance	na	202	90
Customer Service and Solutions	375	306	na
Debt	1,513	1,761	1,960
Design and Change Management	246	382	na
Enterprise Strategy and Design	na	na	212
Enterprise Solutions and Technology	1,858	1,896	1,848
Indirect Tax	1,315	1,217	1,028
Individuals	861	1,026	976
Intermediaries and Lodgement	594	512	123
Policy, Analysis and Legislation	147	159	183
Private Groups and High Wealth Individuals	2,019	2,135	1,944
Public Groups and International	1,378	1,506	1,449
Review and Dispute Resolution	670	660	650
Strategy and Support	na	na	339
Small Business	953	950	1,170
Smarter Data Program	702	599	520
Superannuation	813	778	712
Tax Counsel Network	237	232	208
<b>TOTAL</b>	<b>20,435</b>	<b>20,113</b>	<b>18,917</b>

Source: Commissioner of Taxation Annual Report 2018-19; Commissioner of Taxation Annual Report 2017-18.

<sup>3</sup> Above n 1, p 77.

The Table above presents a three year comparison of different business areas within the ATO and the change in their human resource levels across that period. It should be noted that certain business areas have been discontinued while others are more recently created so a complete three year comparison is not possible. At a whole of agency level, the most pronounced decrease in the ATO workforce occurred between FY18 and FY19, which saw a reduction of 1,196 personnel (or approximately 6%).

While there has been a reduction in the ATO workforce as a whole, not all areas within the ATO experienced a decline in human resources. Highlighted in red (IGTO emphasis) are those in which there has been a consistent decline in the level of resourcing. Highlighted in green (IGTO emphasis) are areas that have generally experienced an increase in their resourcing. These include the Debt business line, the ATO's Policy Analysis and Legislation business line, and Small Business line (which had a reduction of 3 people between FY17 and FY18 but increased to over 1000 in FY19). Other areas set out in the Table showed both increases and decreases across the three financial years.

The ATO's Annual Report also provides a breakdown of its workforce by functional responsibility (or job families).<sup>4</sup>

Job family	2018 %	2019 %
Accounting/finance	1.3	1.3
Administration	5.3	5.4
Analytics/intelligence	5.4	5.8
Communication/marketing	1.6	1.7
<b>Engagement, assurance and compliance</b>	<b>27.4</b>	<b>29.1</b>
Entry level programs	1.8	1.6
Governance and performance	4.1	4.5
Human resources management	3.0	3.3
Information and organisation professionals	1.8	1.8
Information technology	8.5	8.4
Law	8.7	8.6
Other agencies	0.9	0.9
Project management	3.1	3.0
Senior executive	1.9	1.7
<b>Service delivery</b>	<b>25.2</b>	<b>23.0</b>
<b>TOTAL</b>	<b>100</b>	<b>100</b>

Source: Commissioner of Taxation Annual Report 2018-19; Commissioner of Taxation Annual Report 2017-18.

More than half of the ATO's workforce is engaged in engagement, assurance and compliance work (typically, audits and reviews) and service delivery (debt collection, return processing and call centre). These two areas are highlighted in **bold blue** (IGTO emphasis).

<sup>4</sup> Above n 1, p 76.

However, the ATO's reporting does not currently provide detail on the breakdown of its business area resourcing into job families. For example, of the 1,960 officers in the Debt business line as at 30 June 2019, what proportions were engaged in debt collection work, communications, information technology...etc.

The Committee may wish to consider whether additional and more granular reporting of the ATO workforce segmented by business area and overlayed with job family would provide better insight on areas where ATO resources are deployed for improved transparency, accountability and oversight by Parliament and its Committees.

## IGTO'S OBSERVATIONS

It is clear from the annual report data over the past few years that the ATO workforce has reduced. While this issue is not unique to the ATO, the ATO's functions have also been expanded to include administration of areas such as Compassionate Release of Super (discussed later in this report). Without further information and transparency of the ATO resources deployed in this area, it is difficult to make informed comment on the impact of reducing numbers and increasing responsibilities.

### ATO performance areas potentially being affected by resourcing allocations

A more granular level of reporting by the ATO may provide greater transparency and insight on ATO resourcing for outcomes required – including whether the ATO is achieving outcomes efficiently and effectively. Sufficiency of resourcing for the ATO to deliver services to the community is an important consideration.

This submission has highlighted a number of areas where ATO resourcing allocations may be impeding efficient delivery of ATO services, leading to community dissatisfaction and complaints or concerns being raised, including with the IGTO in certain cases. In summary, these areas include:

- a decline in the proportion of complaints which are resolved and finalised by the ATO within 15 business days (rather than a longer negotiated deadline) – Part 2 of this submission;
- a decline in the level of public binding advice produced by the ATO and the timeliness for issuing such advice – Part 3 of this submission;
- a backlog of several thousand objections awaiting allocation and action, resulting in complaints about lack of timeliness and limited communication on progress of these objections being made to the IGTO – Part 4 of this submission; and
- the outcomes from the ATO's audit and assurance activities and the level of tax gap reported – Part 6 of this submission.

However, it should be noted that resourcing alone may not be a complete explanation for areas of community dissatisfaction and potential inefficient administration. For example while there has been a decrease in resourcing in the Superannuation business line, complaints relating to the timeliness of decisions on compassionate release of superannuation has been relatively low – Part 5 of this submission.

While resourcing is one factor to be considered, it may not be a complete answer to performance questions and areas of administration to be improved. However, examining the correlation or inverse correlation between resourcing levels and performance outcomes may provide a helpful starting point for further inquiry.

The Committee may wish to draw on complaints that the ATO has received as a source of dissatisfaction from the community. The IGTO complaints statistics have been set out in the IGTO Annual Report for the past few years. Year on year, the general themes of Debt Collection, Lodgement, Audit, Superannuation and ATO Communications have consistently ranked among the top five areas of complaint.

## Agility of the ATO workforce

Where there is a need for public sector workforces to be reduced and streamlined, it will be important for the ATO to be able to redeploy its officers to different areas within the ATO to meet the variety of needs that can arise. These redeployments will necessarily require the ATO to maintain a workforce that is agile and officers with capabilities and skillsets which are transferrable into different roles and functions.

In the past, the ATO has redeployed staff to assist in matters such as increased data matching programs, income tax refund integrity and to support the contact centres during times of high demand.

The current COVID-19 pandemic that is affecting the entire Australian population and business sector and the level of disruption is unprecedented. Demand for support from the Commonwealth government has been exceptional, with resources including public servants needing to be redeployed on a large scale.<sup>5</sup>

The Committee may wish to consider the agility of the ATO's workforce to be redeployed both to meet the demands of the agency (for example, in relation to areas such as debt collection or dispute resolution, as need arises) and in times of crisis, such as now.

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<sup>5</sup> *Prime Minister's Directive under sub-section 21(1) – 2020(1)*; See *Public Service Act 1999*, s 21(1).

## 2. COMPLAINTS

### KEY RECOMMENDATIONS

*The Committee may wish to:*

- a. clarify and explore the following with the ATO:*
  - i. Why it has not adopted the Australian and New Zealand Standard's definition of complaints;*
  - ii. Why it has not reported its reasons for departing from the Australian and New Zealand Standard;*
  - iii. Whether the ATO should adopt and report on complaints under the Australian and New Zealand Standard;*
- b. obtain clarity from the ATO on what records it expects staff to keep when they receive an initial expressions of dissatisfaction which is not escalated to a formal complaint, and what type of cases would be recorded as being an unresolved expression of dissatisfaction where no formal complaint was made.*
- c. consider the merits of additional complaints reporting in the ATO Annual Report, as follows:*
  - i. the number of feedback and compliments the ATO receives and the sentiment of the feedback;*
  - ii. a description of issues that are the subject of most complaint;*
  - iii. trends in complaint numbers, by issue, together with explanations for significant changes in numbers over the years;*
- d. examine the timeliness of the ATO's finalisation of complaints and the ATO's progress in implementing Recommendation 1 in the ANAO's performance audit on the Management of Complaints and Other Feedback;*
- e. consider whether greater reporting of the ATO's timeframes for finalising complaints, for example stratified by range of days taken, is warranted; and*
- f. examine whether the current reporting on performance against Taxpayers' Charter is sufficient and whether the ATO should also report on the outcome of its complaint investigations against breaches of the Taxpayers' Charter.*

### WHAT IS A COMPLAINT?

Complaints and effective complaints handling processes are essential to organisations and government agencies. They provide a mechanism to obtain feedback to improve service delivery and to gauge the community's satisfaction.

The ATO's Annual Report does not define what is considered to be a complaint for ATO reporting and measurement purposes. However, the ATO's definition of complaint was included in the Australian National Audit Office's (ANAO) performance audit on the ATO's *Management of Complaints and Other*

*Feedback* which was completed in 2014.<sup>6</sup> In that report, the ANAO noted that the ATO defined complaints, compliments, and feedback to be:<sup>7</sup>

*Complaints – An expression of dissatisfaction made to the ATO related to its services or products that requires an individual response to the complainant.*

*Feedback – Unsolicited criticism or comment made by an external source to the ATO about its services, products or processes.*

*Compliments – Compliments are unsolicited positive forms of feedback made by an external source to the ATO about its service or products.*

The Australian Standards AS/NZS 10002:2014 Guidelines for complaint management in organisations (the Standard) defines a complaint to be:<sup>8</sup>

*Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.*

This is in contrast to disputes and feedback which are defined in the Standard as follows:<sup>9</sup>

*Disputes - Unresolved complaints escalated internally or externally, or both.*

*Feedback - Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.*

The ATO's website provides the following information to the community in relation to lodging a complaint:

*Before deciding whether to lodge a complaint, here is some general information that may assist you. However, if you are still concerned about the issue:*

- *discuss it with an ATO officer who will aim to resolve your issue – see Enquiries*
- *try to sort it out with the tax officer you've been dealing with (or phone the number you've been given)*
- *if you're not satisfied, talk to that officer's manager*
- *if you're still not satisfied, consider making a formal complaint.*

### ***Lodging your complaint***

*To lodge your complaint:*

- *access the Complaints form*
- *phone 1800 199 010 8am–6pm, Monday to Friday (local time), except national public holidays*
- *phone the National Relay Service on 13 36 77 (if you have a hearing, speech or communication impairment)*
- *fax 1800 060 063*
- *write to*

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<sup>6</sup> Australian National Audit Office (ANAO), *Management of Complaints and Other Feedback Australian Taxation Office* (2014).

<sup>7</sup> Ibid, pp 29, 31.

<sup>8</sup> Joint Technical Committee QR-015, *Complaint Handling, Guidelines for complaint management in organizations* (2014).

<sup>9</sup> Ibid.

*Australian Taxation Office*

*PO Box 1271*

*ALBURY NSW 2640*

*If you have previously lodged a complaint and you are not satisfied with the way it is being handled, or with the outcome, you may request for your complaint to be escalated to a more senior officer. To escalate your complaint contact ATO Complaints on one of the methods listed above.<sup>10</sup>*

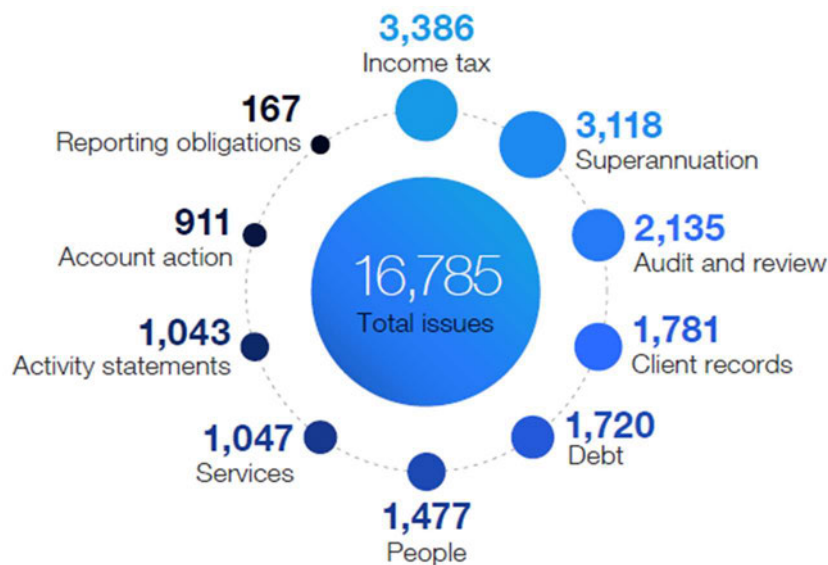
The information provided on the ATO's website about complaints appears to align more appropriately with a 'dispute' as defined in the Standard. The Standard is developed to provide best practice guidance to organisations and ensure consistencies in complaints management across organisations in Australia and New Zealand. If the Standard is not adopted, there may be risks that complaints as defined in the Standard are under-reported and comparisons of complaints handling service across agencies are made more difficult. This is explored further in the IGTO's observations below.

## THE ATO'S REPORTING OF COMPLAINTS

### Number of complaints received

The Annual Report noted that in FY19 there were 19,826 complaints received by the ATO including 1,391 complaints that were lodged via the IGTO.<sup>11</sup> The ATO commented that the number of complaints received was the lowest since 2009.<sup>12</sup>

The following breakdown of complaint issues is included in the Annual Report. It shows that income tax is the top complaint issue follow by superannuation and audit and review.



Source: ATO

The ATO noted that the categories of complaint issues have changed in FY19 and could not be compared to the previous year's annual report. Furthermore, the number of complaint issues differ to the number

<sup>10</sup> Australian Taxation Office (ATO), *Contact Us – Complaints* (6 April 2020) <<https://www.ato.gov.au/About-ATO/Contact-us/Complaints,-compliments-and-suggestions/Complaints/>>.

<sup>11</sup> Above n 1, pp 65, 68.

<sup>12</sup> Ibid, p II.



of complaints received. The reasons include complaint issues were not recorded in some cases, for example, the complaint was resolved during the first telephone call.<sup>13</sup>

### Timeliness of complaints finalisation

In relation to timeliness of resolution of complaints issues, the Annual Report also indicates that eighty-eight percent (88%) of complaints were resolved within 15 business days or within the date negotiated. This exceeded the ATO's performance benchmark - 85% of complaints cases to be resolved within 15 business days or another negotiated date.<sup>14</sup>

## IGTO'S OBSERVATIONS

The IGTO believes that transparent reporting of complaints service is important to facilitate informed decision making on the timeliness and effectiveness of the ATO's complaint handling process as well as to instil community's confidence that the ATO is responding to and addressing community concerns effectively.

Having regard to the information reported by the ATO in its Annual Report on complaints, there are a number of observations that the IGTO would like to make in relation to:

- the ATO's definition of complaints;
- the number of complaints reported;
- the timeliness of complaints finalisation; and
- the reporting of complaint issues.

These observations are outlined in more detail below.

### ATO's definition of complaints

The Standard was prepared by a joint committee consisting of government agencies, industry groups and ombudsman offices from Australia and New Zealand to provide guidance on complaints management to organisations.<sup>15</sup> The ATO was represented on this joint committee. Considering the ATO's definitions and the ATO's process for accepting lodgement of complaints, the ATO does not appear to have adopted the definitions set out in the Standard.

The ATO's process for accepting lodgement of complaints asks complainants to resolve their concerns with two ATO officers before lodging a formal complaint via a specified channel. Such a process is more akin to an internal escalation of an unresolved complaint and, according to the Standard, would be more accurately characterised as a 'dispute'.

Furthermore, when comparing the ATO's definitions against the Standard, a key difference between the two is the provision of a response. The ATO's consideration of a complaint is one where it requires a response from the ATO. It is not clear how this requirement is determined and whether the complainant or the ATO makes such a determination. In contrast, the Standard defined a complaint to include those where a response could be explicitly or implicitly expected or legally required. The expectation of receiving a response comes from the complainant and not the agency that is receiving the complaint.

Using the ATO's definition, there could be feedback received by the ATO where the complainant expresses dissatisfaction and has an expectation of receiving a response from the ATO. However, if the ATO determines that the feedback does not require a response to be provided to the complainant more than

<sup>13</sup> Above n 1, p 68.

<sup>14</sup> Ibid.

<sup>15</sup> Above n 8.



acknowledging their concerns, then it would not be classified by the ATO as a complaint. In contrast, such feedback would be considered as a complaint under the Standard.

While the Standard provides guidance only to organisations and is not legally enforceable, standards are developed to provide a best practice guide to organisations. The IGTO considers that adopting the Standard promotes consistency and credibility in the ATO's management of complaints. The Committee may wish to clarify and explore the following with the ATO:

- why it has not adopted the Australian and New Zealand Standard's definition of complaints;
- why it has not reported its reasons for departing from the standard;
- whether the ATO should adopt and report on complaints under the Australian and New Zealand Standard.

## Number of complaints received

The ATO's Annual Report noted a decline in the number of complaints received in FY19. This may indicate an improvement to its service delivery. However, a range of factors could affect the reporting of complaints received by the ATO.

These factors include:

- whether certain communications are properly classified as complaints (and not enquiries), feedback or compliments and suggestions; and
- whether complaints are only recorded as such when they are made through specific ATO channels.

The IGTO has received complaints where complainants have explained that they have complained to the ATO about their concerns before contacting the IGTO. However, when the IGTO commenced an investigation and enquired with the ATO, the ATO advised there has been no complaint recorded on its system. The IGTO has observed that the ATO considered the previous contact from the complainant to be an enquiry but the complainant was of the view that they have lodged a complaint with the ATO.

The IGTO has also observed that where complaints are lodged with the IGTO expressing dissatisfaction with the ATO's services but seek broader improvements to the ATO's systems and services rather than a resolution for the individual circumstances—for example, a tax agent expressing dissatisfaction with ineffective or inefficient processes which subject them to unrecoverable costs—the communication is more often treated by the ATO as feedback. This is so, even though the complainant had expressed a dissatisfaction and expected a response from the ATO on how the ATO will consider their suggestions and how the services will be improved.

The ATO's Annual Report does not include data on the number of feedback and compliments it has received. In the absence of such reporting and the different definition of complaint, it is difficult to draw accurate conclusions on community's satisfaction with the ATO's services.

The Committee may wish to consider the merits of reporting on the number of feedback and compliments the ATO receives and the sentiment of the feedback in its Annual Report.

Taxpayers and representatives may contact the ATO through a variety of channels and for different purposes. For example, taxpayers may contact the ATO call centre to understand their obligations, seek information relating to their tax affairs or contact their designated audit or objection officer to discuss an ongoing audit or objection. Representatives may contact the ATO to discuss their clients' tax affairs or their tax practices. They may also contact the ATO via the Tax Agent Portal or participate in discussion groups.

During contacts with the ATO, taxpayers and representatives may voice dissatisfaction about the ATO's services in the midst of their discussions about the primary purpose of their contact. However, their feedback may not be correctly recorded as complaints and therefore not included in the number of complaints reported in the Annual Report.

The Committee may wish to obtain clarity from the ATO on what records it expects staff to keep when they receive an initial expressions of dissatisfaction which is not escalated to a formal complaint, and what type of cases would be recorded as being an unresolved expression of dissatisfaction where no formal complaint was made.

## Timeliness of complaints finalisation

The ATO currently reports on the percentage of complaints that are finalised within 15 business days or the date negotiated. While it is positive that the ATO has exceeded its benchmark of resolving 85% of complaints within 15 business days or the date negotiated in FY19, comparison to previous years' report shows a decreasing trend in percentage of complaints resolved within 15 business days or the date negotiated. The following table shows the percentage of complaints resolved within 15 business days or the date negotiated in FY17, FY18 and FY19 years.

Percentage of complaints resolved within 15 business days or the date negotiated

	2016-17	2017-18	2018-19
Percentage	93% <sup>16</sup>	90% <sup>17</sup>	88%

Source: ATO

The Annual Report does not provide any explanation of or insight into the decrease in percentage of complaints resolved within 15 business days or the date negotiated. Similar to observations made in Section 1, the ATO does not report on the number of officers that are allocated to its complaints service. The numbers allocated impacts on the timeliness of complaints finalisation. It is difficult to conclude whether resources are appropriately allocated to investigate and resolve complaints.

Furthermore, there are no data or statistics to inform the range of the negotiated timeframes agreed nor the average timeframes actually taken to resolve complaints. This makes it difficult to ascertain the reasonableness of the negotiated timeframes and the efficiency of the ATO's complaint handling process.

The ANAO in its performance audit of the ATO's complaints management processes in 2014 made observations about the ATO's timeliness target. In particular, the ANAO observed that it is good practice to negotiate timeframes with complainants in cases where it may be warranted, for example to set realistic expectations about the timeframe to finalise a case due to the complexity of the matter. However, this should not preclude the ATO from reporting against its target of finalising a percentage of cases within 15 business days. The ANAO noted that, if it wished, the ATO could separately report the percentage of cases finalised within negotiated timeframes.<sup>18</sup>

The ANAO made the following recommendation to the ATO:<sup>19</sup>

### *Recommendation No.1*

*2.33 To improve transparency, the ANAO recommends that, in reporting performance against its published timeliness resolution target, the ATO reports on the percentage of complaints that were finalised within:*

*(a) the target timeframe (from 2013–14, 15 business days) without adjusting for extended timeframes that may be arranged with complainants; and*

<sup>16</sup> Above n 1, p 133.

<sup>17</sup> Ibid, p 158.

<sup>18</sup> Above n 6, p 49.

<sup>19</sup> Above n 6, p 50.

(b) any extended timeframes arranged with complainants separately.

The IGTO supports the ANAO's recommendation.

Despite agreeing to the above recommendation, the ATO continues to report on the percentage of complaints that were finalised within the target timeframe and negotiated timeframes together.

The Committee may wish to examine the timeliness of the ATO's finalisation of complaints and the ATO's progress in implementing the ANAO recommendation noted above. The Committee may also wish to consider whether greater reporting of the ATO's timeframes for finalising complaints, for example stratified by range of days taken, are warranted.

## Complaint issues

The Commonwealth Ombudsman's *Better Practice Guide to Complaint Handling*<sup>20</sup> encourages agencies to use complaint information to improve programs and services. It noted that complaints provide a rich source of information but that it is only possible if good records are kept and analysed regularly. Complaint issues should be recorded and reported.<sup>21</sup>

The complaint issues currently reported in the Annual Report do not represent all complaints that were received by the ATO.<sup>22</sup> In cases where the ATO did not record the complaint issue(s), it is not clear how the ATO is capturing and analysing data to identify irritants in its systems and processes. In the absence of capturing complaint issues in all cases, the ATO may miss the opportunity to identify trends and address them before they become bigger problems.

The Committee may wish to consider the merits of the ATO recording the issues of concern in all complaints made to the ATO.

The ATO noted in its Annual Report that categories of complaint issues have changed and could not be compared to previous years. It may be inevitable for categories to change, however the IGTO is of the view that complaint categories should remain consistent for a number of years to enable trend analysis and comparison between different years.

In December 2016, the IGTO completed a review into the *Taxpayers' Charter and Taxpayer Protections* to examine concerns raised in relation to the ATO's adherence to the Charter and its effectiveness as well as the limited avenues for enforcement of the Charter principles.<sup>23</sup>

In that review, the IGTO recommended the ATO improve its monitoring and reporting of performance against the Charter by matching complaint cases against the Charter principles and publicly reporting on its annual performance. The ATO agreed to this recommendation and explained that it will on an annual basis, report against themes, how they link to the Charter principles and what the ATO has done against these themes.<sup>24</sup>

The Committee, in its Inquiry into the 2016-17 Annual Report of the Australian Taxation Office, also noted the above IGTO's recommendation and observed that it has 'yet to be developed and reported on'.<sup>25</sup>

While the Annual Report identifies complaint issues according to the type of tax, taxpayer obligation or area of administration, it does not provide enough information to understand the different types of concerns that gave rise to complaint. Reporting the ATO's analysis on complaint themes would be helpful

<sup>20</sup> Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling* (2009).

<sup>21</sup> Ibid, p 27.

<sup>22</sup> See: Above n 1, p 68.

<sup>23</sup> Inspector-General of Taxation and Taxation Ombudsman (IGTO), *Review into Taxpayers' Charter and Taxpayer Protections* (2016).

<sup>24</sup> Ibid.

<sup>25</sup> House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, *Inquiry into the 2016-17 Annual Report of the Australian Taxation Office* (2019).

to understand the root causes of complaint as well as to better target training and guidance for ATO officers.

The Committee may wish to consider the merits of additional reporting on descriptions of issues that are the subject of most complaint and trends in complaint numbers, by issue, together with explanations for significant changes in numbers across years.

Reporting on the ATO's adherence to the Taxpayers' Charter in complaint cases would also provide a useful framework to understand causes of taxpayer concern. Such reporting could supplement the current reporting on the ATO's overall performance against the Taxpayers' Charter and increase transparency on ATO-taxpayer interactions.

Some taxpayers have also raised concerns about the ATO's handling of their complaint with the IGTO. In some cases, they raised concern that the ATO did not specifically address their complaint about breaches to the Taxpayers' Charter. They believe that the ATO should consider whether there were breaches to the Taxpayers' Charter and make a finding in the outcome of its complaint investigation. It is not clear whether the ATO makes such a finding in all of its complaint cases.

More than three years have passed since the IGTO's recommendation was made. While the ATO has made improvements by reporting on its overall performance against the Taxpayers' Charter, the ATO is yet to provide information in its Annual Report that aligns with the reporting it had agreed to in the IGTO's review.

The Committee may wish to examine whether the current reporting on performance against Taxpayers' Charter is sufficient and whether the ATO should also report on the outcome of its complaint investigations against breaches of the Taxpayers' Charter.

## 3. ADVICE AND GUIDANCE

### KEY RECOMMENDATIONS

*The Committee may wish to consider:*

- a. examining whether the ATO's current 'layered' approach in providing advice and guidance to taxpayers addresses the complex nature of tax and superannuation laws for taxpayers and reduces the tax gap;*
- b. making inquiries to determine if the concerns raised in the IGTG's Review into Improving the Self-Assessment System in relation to the content of guidance and time taken to complete rulings have been addressed;*
- c. seeking clarification as to the 'interpretative guidance products' referred to in Table 6.18 of the ATO's Annual Report. In particular, it may be of assistance for the Committee to understand the type of support and guidance communicated under this category and the quantity of each;*
- d. making inquiries to understand why there has been a decline in ATO Advice products being issued; and*
- e. making inquiries to understand why the ATO is taking longer to finalise its public rulings.*

### THE ROLE OF ADVICE AND GUIDANCE

#### ATO Views

The ATO views on the role of advice and guidance is set out in various documents and sites. According to the ATO, the key to administering an effective tax system is fostering a high level of willing participation.<sup>26</sup> As part of fostering willing participation, the ATO aims to build trust and confidence amongst taxpayers<sup>27</sup> and provide them 'with accurate, consistent and clear information to help [taxpayers] understand [their] rights and entitlements and meet [their] obligations'.<sup>28</sup>

In this respect, the ATO's Advice and Guidance products are key tools, as they aim to deliver consistent tax outcomes through communicating the ATO's views to be applied in administering the taxation and superannuation laws. Where such views are consistently applied, it can contribute to a perception of fairness and transparency amongst the community.

The ATO also uses Advice and Guidance products to deter non-compliance and alert the wider taxpayer community of the risks that will likely attract its interest as well its likely focus on emerging risks.<sup>29</sup>

<sup>26</sup> ATO, *ATO action to reduce the gap* (17 October 2019) <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/individuals-not-in-business-income-tax-gap/?page=5>>.

<sup>27</sup> Above n 12.

<sup>28</sup> ATO, *Taxpayers' Charter- helping you to get things right* (22 October 2018) <<https://www.ato.gov.au/About-ATO/Commitments-and-reporting/Taxpayers--Charter/Taxpayers--Charter---helping-you-to-get-things-right/>>.

<sup>29</sup> ATO, 'Episode 15- PAG: Making Complex Simple', *Tax invoice* (2019) <[https://www.ato.gov.au/media-centre/video-and-audio-files/ato-podcast---tax-invoice/?page=6#Episode\\_15\\_\\_\\_PAG\\_\\_Making\\_the\\_complex\\_simple](https://www.ato.gov.au/media-centre/video-and-audio-files/ato-podcast---tax-invoice/?page=6#Episode_15___PAG__Making_the_complex_simple)>.

In its FY19 Corporate Plan, the ATO identified proactive advice and guidance as a key strategic initiative.<sup>30</sup> In particular, the ATO made reference to the different products produced in FY19:

*We produced **proactive advice and guidance** on a range of issues, including the expansion of the taxable payments reporting system, changes to the small business tax rates and the tax treatment for compensation paid to individuals following the Royal Commission into banking misconduct.*<sup>31</sup>

In a speech by the former Second Commissioner, Andrew Mills, the ATO has noted that it is currently adopting a 'layered' approach in providing public advice and guidance, including 'web-based guidance, factsheets, rulings and more detailed explanations that users can access depending on their needs'.<sup>32</sup>

## Stakeholder Views

Regardless of the approach adopted, stakeholders have asserted that there needs to be a strong emphasis on ATO advice and guidance being 'both clear and useful'.<sup>33</sup>

Given the concerns raised by the IGTO previously and the concerns raised by some stakeholders within the tax system, the Committee may wish to examine the effectiveness of the ATO's current approach to advice and guidance in addressing the complex nature of the tax superannuation laws for taxpayers and reducing the tax gap.

## TYPES OF ADVICE AND GUIDANCE PRODUCTS PROVIDED BY THE ATO

### Advice Products

Advice products are generally in the form of a ruling that explains the taxpayer's obligations or entitlements under a provision of tax or superannuation law. A ruling is generally binding on the Commissioner and can be relied upon by the taxpayer for the purposes of calculating an assessment of tax. The ATO's Advice products provide 'the highest level of protection' if relied upon.<sup>34</sup> Generally, the ATO will not depart from the administratively binding advice provided unless:

- a) there have been legislative changes since the advice was given;
- b) a tribunal or court decision has affected [the ATO's] interpretation of the law since the advice was given; or
- c) the advice is no longer appropriate for other reasons.<sup>35</sup>

In instances where the ATO later finds out that the binding advice does not apply the law correctly and the taxpayer has followed the advice, the taxpayer is then protected from having to repay amounts of tax that would otherwise be payable, as well as any penalties and interest attributable to those amounts.<sup>36</sup>

<sup>30</sup> Andrew Mills, 'Tax in a changing world- change is the new black' (Conference Paper, Australasian Tax Teachers' Association 31st annual conference, 17 January 2019) <[https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-in-a-changing-world---change-is-the-new-black/?page=1#Prevention\\_of\\_disputes\\_story](https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-in-a-changing-world---change-is-the-new-black/?page=1#Prevention_of_disputes_story)>.

<sup>31</sup> Above n 1, p 15.

<sup>32</sup> Above n 30.

<sup>33</sup> The Tax Institute, *Review of ATO Public Advice and Guidance Products and Processes* (3 November 2014) <<https://tticdn.blob.core.windows.net/tti-securefiles/tiStory/TaxInstituteSubmission-ATOreviewofpublicadviceandguidance.pdf?sv=2015-04-05&sr=b&sp=r&se=2020-05-06T04%3A23%3A15Z&sig=n1FZIT2GpKgTa9yVEndPIUIOc0kffFANUX3160HrQDY%3D>>.

<sup>34</sup> *Tax Administration Act 1953* (Cth) sch 1 s 357-60.

<sup>35</sup> *Tax Administration Act 1953* (Cth) sch 1 ss 357-60, 357-75, 357-85.

<sup>36</sup> *Tax Administration Act 1953* (Cth) sch 1 s 357-60.

However, the ATO is not administratively bound by the advice provided if there are 'good and substantial reasons not to',<sup>37</sup> including in instances where the taxpayers rely on a ruling knowing it was not appropriate for their circumstances.

Taxpayers may also wish to stop relying on a ruling and act in a way that is not in accordance with the Commissioner's advice.<sup>38</sup> The taxpayer will not receive a penalty for the shortfall resulting from failing to follow a ruling but there are penalties for shortfalls resulting from a failure to take reasonable care or from taking a position about a large income tax item that is not reasonably arguable.<sup>39</sup> The different Advice products offered by the ATO include:

- Public rulings - these are published written rulings on the way in which the Commissioner considers relevant provision applies or would apply to:
  - (a) entities generally or a class of entities; or
  - (b) entities generally, or a class of entities, in relation to a class of schemes; or
  - (c) entities generally, or a class of entities, in relation to a particular scheme.<sup>40</sup>

These are issued as formal rulings grouped in different series.<sup>41</sup>

- Law companion rulings - express the Commissioner's view on how a recently enacted law applies to a class of taxpayers, or to taxpayers generally.<sup>42</sup>
- Private rulings - where the Commissioner may, on application, make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to a taxpayer based on a specific scheme.<sup>43</sup> Private rulings are binding only where the facts and circumstances are identical to those relied upon in the ruling.

Taxpayers may wish to object to a private ruling if they are unsatisfied with it.<sup>44</sup> De-identified versions of private rulings are published on the ATO's Public Rulings Register.

- Oral rulings - where the taxpayer may apply to the Commissioner for advice on the way in which the Commissioner considers a relevant provision applies would apply to the taxpayer in relation to a specified scheme.<sup>45</sup> Oral rulings are provided for less complex matters or issues not related to indirect tax.<sup>46</sup> The taxpayer's application and Commissioner's advice must be made orally.<sup>47</sup> The taxpayer will not receive a written recording of the advice.<sup>48</sup>

<sup>37</sup> *Tax Administration Act 1953* (Cth) sch 1 s 357-60.

<sup>38</sup> *Tax Administration Act 1953* (Cth) sch 1 s 357-65.

<sup>39</sup> *Tax Administration Act 1953* (Cth) sch 1 s 357-65.

<sup>40</sup> *Tax Administration Act 1953* (Cth) sch 1 s 358-5.

<sup>41</sup> We refer to the Committee to Taxation Ruling TR 2006/10: Public Rulings at [22] for a detailed list of the public rulings issued in the formal rulings series.

<sup>42</sup> ATO, *Taxation Ruling TR 2006/10: Public Rulings* (19 February 2018)

<<https://www.ato.gov.au/law/view/document?docid=txr/tr200610/nat/ato/00001>> at [23A].

<sup>43</sup> *Tax Administration Act 1953* (Cth) sch 1 s 359-5.

<sup>44</sup> *Tax Administration Act 1953* (Cth) sch 1 sub-s 359-60(1).

<sup>45</sup> *Tax Administration Act 1953* (Cth) sch 1 sub-s 360-5 (1).

<sup>46</sup> *Tax Administration Act 1953* (Cth) sch 1 s 360-5.

<sup>47</sup> *Tax Administration Act 1953* (Cth) sch 1 sub-ss 360-5 (2), (4).

<sup>48</sup> *Tax Administration Act 1953* (Cth) sch 1 sub-s 360-5 (5).



## Guidance products

### ATO Views

ATO Guidance products explain how the laws administered by the Commissioner apply generally but are not binding on the ATO.<sup>49</sup> In contrast to the protection offered by Advice products, taxpayers who rely upon written or oral guidance will be 'liable for the tax that would otherwise be payable under the law'.<sup>50</sup> However, the taxpayer will be protected against any false or misleading statement penalty that might arise.<sup>51</sup> Where the guidance is relied upon reasonably and in good faith, the interest on the tax shortfall will not apply<sup>52</sup> — i.e. ATO Guidance products aim to allow taxpayers to 'swim between the flags'.<sup>53</sup>

ATO Guidance products aim to allow taxpayers to receive broader law administration guidance across a 'spectrum of behaviours or arrangements'.<sup>54</sup> However, the ATO designs its guidance to provide general assistance only, as it is not intended to cover all possibilities for every taxpayer.<sup>55</sup> It can be provided privately, if requested.

The ATO has stated that such broader guidance will 'enable the ATO to communicate how it will sensibly apply its audit resources or provide practical compliance solutions where tax laws are uncertain in their application'.<sup>56</sup> The ATO's Guidance products include:

- Practical compliance guidelines (**PCG**) - provides broad law administration guidance, addressing the practical implications of tax laws and how the ATO assesses tax compliance risk across activities or arrangements in relation to a certain area of the law.<sup>57</sup>
- Oral guidance over the phone or in person at an ATO shopfront.
- Written guidance communicated on the ATO's website, media releases and speeches.
- Decision impact statements - advises the community of the ATO's view on the implications of adverse or significant court or tribunal decisions.<sup>58</sup>
- Taxpayer alerts (**TA**) - warns taxpayers of the ATO's concerns about new or emerging higher risk tax or superannuation arrangements or issues under the ATO's risk assessment.<sup>59</sup>
- ATO Interpretive Decisions (**ATO IDs**) - ATO IDs are not binding on the Commissioner. They set out the precedential ATO view that its Officers must apply in resolving interpretative issues.<sup>60</sup> ATO IDs are produced for internal purposes and are not intended to provide advice to taxpayers or serve as a ruling.

<sup>49</sup> Australian Taxation Office, *Law Administration Practice Statement PS LA 2008/3: Provision of advice and guidance by the ATO* (20 February 2014)

<<https://www.ato.gov.au/law/view/document?DocID=PSR/PS20083/NAT/ato/00001&PiT=99991231235958#P205>> at [206].

<sup>50</sup> Ibid at [214], [242].

<sup>51</sup> Ibid.

<sup>52</sup> Ibid at [215].

<sup>53</sup> Australian Taxation Office, *Practical Compliance Guidelines PCG 2016/1: Practical compliance guidelines: purpose, nature and role in ATO's public advice and guidance* (3 June 2016)

<<https://www.ato.gov.au/law/view/document?DocID=COG/PCG20161/NAT/ATO/00001&PiT=99991231235958>> at [5].

<sup>54</sup> Ibid.

<sup>55</sup> Above n 49, at [210].

<sup>56</sup> Above n 53, at [6].

<sup>57</sup> Ibid at [5] – [7].

<sup>58</sup> ATO, *Decision impact statements* (31 March 2017) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Litigation/Decision-impact-statements/>>.

<sup>59</sup> ATO, *Law Administration Practice Statement PS LA 2008/15: Taxpayer Alerts* (16 January 2019)

<<https://www.ato.gov.au/law/view/document?DocID=PSR/PS200815/NAT/ATO/00001&PiT=99991231235958>>.

<sup>60</sup> ATO, *Law Administration Practice Statement PS LA 2001/8: ATO Interpretative Decisions* (9 June 2016)

<<https://www.ato.gov.au/law/view/document?DocID=PSR/PS20018/NAT/ato/00001&PiT=99991231235958>>.



- Law administration practice statements - provides direction to ATO staff on approaches to take when applying the laws administered by the Commissioner.<sup>61</sup>
- Self-managed super fund Regulator's Bulletins - provides updates on new and emerging superannuation regulatory and income tax arrangements that pose potential compliance risks.<sup>62</sup>

## IGTO'S OBSERVATIONS

### Recent trends on ATO advice and guidance

The IGTO has not investigated whether the number of advice (binding) and guidance (non-binding) products has declined over time. However, others have observed a decline between 2009 and 2019.<sup>63</sup>

A breakdown of ATO-issued Advice and Guidance products are extracted from the ATO's FY17, FY18 and FY19 Annual Report<sup>64</sup> as follows:

Breakdown of ATO-issued Advice and Guidance products in FY17, FY18 and FY19			
	2016-17	2017-18	2018-19
<b>Advice products</b>			
Private rulings	7,300	6,459	5,285
Total public rulings (including significant addenda)	73	64	54
<b>Guidance products</b>			
Interpretative guidance products	45,000	55,048	51,584
Practical compliance guidelines (including significant updates- as per the ATO's 2019 Annual Report)	20	13	20
Taxpayer alerts	11	1	4
Decision impact statements	11	10	7
Synthesised texts of the Multilateral Instrument and Australian tax treaties	N/A	N/A	6
<b>Total</b>	<b>52,415</b>	<b>61,595</b>	<b>56,960</b>

Source: ATO's Annual Report

Based on these reported numbers, the IGTO notes that there has been a consistent decrease in the number of private and public rulings issued between the FY17 to FY19. The Committee may wish to inquire into the reasons for this decline with the ATO.

<sup>61</sup> ATO, *Law Administration Practice Statement PS LA 1998/1: Law Administration Practice Statements* (17 April 2018) <<https://www.ato.gov.au/law/view/document?DocID=PSR/PS19981/NAT/ato/00001&PiT=99991231235958>>.

<sup>62</sup> ATO, *Self-managed super fund Regulator's Bulletins* (4 February 2019) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-guidance-products/Self-managed-super-fund-Regulator-s-Bulletins/>>.

<sup>63</sup> Professor Richard Vann and Andrew Hirst, 'Rulings Update' (Conference Paper, 2020 Financial Services Taxation Conference, February 2020).

<sup>64</sup> Above n 1, pp 167, 182.

Reasons may include:

- decreasing demand for binding advice amongst the taxpayer community (and if so, why);
- the ATO's resourcing and willingness to issue such advice; and
- whether law clarification has been obtained in key areas by other means.

Conversely, Guidance products (including TAs and decision impact statements) have increased from FY18 to FY19 and, while interpretative guidance products declined over the same period, overall levels remain higher than they were in FY17. However, it is unclear what products are encompassed in the term 'interpretative guidance products'. The Committee may wish to seek clarification from the ATO regarding this matter.

The IGTO observes that growing concerns have been expressed amongst the taxpayer and tax practitioner community about the trend in decreasing binding advice and increasing non-binding guidance. That is, a concern that there is a move away from the ATO providing advice.<sup>65</sup> Recent research on the issue has observed reductions consistently across the different types of ATO Advice products offered.<sup>66</sup> Concerns have also been echoed by the Tax Institute, which highlighted that its members perceived a 'deliberate change in approach to guidance' with a focus on producing more Guidance products such as PCGs as opposed to binding rulings.<sup>67</sup> The ATO has stated their intention to use PCGs more frequently as it would 'allow companies to make informed decisions', allowing taxpayers to engage with the ATO at an earlier stage.<sup>68</sup>

However, the Tax Institute identified that PCGs (rather than rulings) have been used as if it were the ATO's binding legal interpretation of the law.<sup>69</sup> We refer the Committee to the Tax Institute's letter to the ATO's Deputy Chief Tax Counsel for specific examples of the ATO preference towards guidance materials.<sup>70</sup>

Another example of the ATO's preference to issue guidance products is through its emphasis on TAs. In 2017, CPA Australia identified an increase in TAs being issued, in comparison to rulings.<sup>71</sup> It has been noted that TAs act as time-expedient vehicle to 'raise red flags on issues that run across industries or particularly market segments'.<sup>72</sup> As TAs are issued quickly, they are general in nature and do not contain the clarity and analysis of the relevant tax law present in the ATO's rulings.<sup>73</sup> This can create additional compliance costs for the taxpayers, which will be discussed in further detail below.

## Increased uncertainty resulting from the ATO's changing approach to advice and guidance

Under Australia's self-assessment taxation system, taxpayers must self-assess how the tax laws apply to their circumstances. Taxpayers are exposed to additional primary tax, penalties and interest if the law is not applied correctly.<sup>74</sup> However, tax and superannuation laws are becoming increasingly complex.<sup>75</sup> The IGTO observes that this complexity arises for a variety of reasons. It is not just how the legislation is drafted

<sup>65</sup> The Tax Institute, *ATO Guidance* (14 November 2019) <<https://tticdn.blob.core.windows.net/tti-files/dmfile/tax-institute-submission---ato-guidance-.pdf>>.

<sup>66</sup> Above n 63.

<sup>67</sup> Above n 65, pp 4 - 5.

<sup>68</sup> Jeremy Hirschhorn, 'Future of tax administration' (Conference paper, PricewaterhouseCoopers Global Tax Symposium, 14 November 2019) <<https://www.ato.gov.au/Media-centre/Speeches/Other/Future-of-tax-administration/>>.

<sup>69</sup> Ibid, p 5.

<sup>70</sup> Ibid.

<sup>71</sup> Zilla Efrat, *ATO alerts vs rulings: is there a change in direction?* (24 October 2017) <<https://www.intheblack.com/articles/2017/10/24/ato-alerts-vs-rulings>>.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> IGTO, *Review into Improvement of Self-Assessment System* (2012) p 13.

<sup>75</sup> Ibid.

and designed, but also the way that legislation is interpreted and enforced by the administrator.<sup>76</sup> The system can result in the taxpayer being required to anticipate the ATO's views.

To foster the willing participation amongst the taxpayer community, the 'system relies on taxpayers having a good understanding of the tax laws' through the ATO playing an advisory role supporting taxpayers and providing certainty.<sup>77</sup> Minimising uncertainty for taxpayers is a 'critical role'<sup>78</sup> for the ATO and this commitment to 'helping [taxpayers] get things right'<sup>79</sup> is embedded in the ATO's Taxpayers' Charter. The ATO's role in reducing taxpayer uncertainty has been previously explored in a number of the IGTO's Reviews, including the Review into Improving the Self-Assessment System in 2012.

Accordingly, the Committee may wish to make inquiries to determine if the concerns raised in the IGTO's Review into Improving the Self-Assessment System in relation to the content of guidance and time taken to complete rulings have been addressed.

Having regard to the ATO's 'layered' approach to providing advice and guidance to taxpayers, the Tax Institute raised further concerns about the 'increasing reliance on guidance material on the ATO website and 'Let's Talk' web page.<sup>80</sup> This shifts the tax risk to the taxpayer population for two reasons – it results in the taxpayer's 'reduced understanding of the ATO's view of the law and a reduced capacity to bind the ATO to those of its view that were known'.<sup>81</sup> Based on this, the IGTO considers that this reduced understanding of the tax treatment adopted by the ATO is likely to result in increased uncertainty, as taxpayers will find it more difficult to ascertain how the tax laws apply to their affairs. Furthermore, less protections are offered as the Commissioner is not bound to assess the taxpayer consistent with how the advice applies.<sup>82</sup>

The IGTO observes that public rulings are 'an inexpensive way of obtaining certainty' for taxpayers (particularly those in the small business and individual taxpayer segments).<sup>83</sup> As identified by the IGTO previously, raising the public's awareness of significant compliance concerns as soon as the ATO is made aware of them helps taxpayers take action 'to minimise the risk of subsequent adverse ATO views'.<sup>84</sup>

To achieve this, the IGTO observes that there should be constant engagement between the ATO and taxpayer community, proactively seeking to identify any areas of uncertainty or compliance risks prior to drafting any Advice or Guidance products. The IGTO previously identified that an 'over-reliance on the community to identify significant compliance concerns forces the ATO to become reactive to developments, sometimes many years after the development has taken place'.<sup>85</sup> This may be due to the ATO not being aware or concerned with particular practices until it is perceived to be of sufficient risk to revenue.<sup>86</sup>

The IGTO notes that due to significant technical issues involved, the publishing of Advice products may require additional time. However, the IGTO observes that interim ATO guidance should be provided to 'provide prospective certainty during the periods in which significant technical issues are being resolved'.<sup>87</sup>

<sup>76</sup> Above n 74, p 123.

<sup>77</sup> Ibid, p 13.

<sup>78</sup> Ibid, p 20.

<sup>79</sup> Above n 28.

<sup>80</sup> Above n 65, p 4.

<sup>81</sup> Australia's Future Tax System (Ken Henry, chairperson), The Treasury (Cth), *Final Report*, (2009) Part 2 Vol 2 <[www.taxreview.treasury.gov.au](http://www.taxreview.treasury.gov.au)> at recommendation 112.

<sup>82</sup> We note that, as outlined in the ATO's Annual Report for 2018-19, the ATO's current rating for community confidence is 65/100.

<sup>83</sup> Above n 74, pp 18 and 27.

<sup>84</sup> IGTO, *Review into delayed or changed Australian Taxation Office views on significant issues* (2010) at [6.35].

<sup>85</sup> Above n 84 at [6.62].

<sup>86</sup> Ibid at [6.59].

<sup>87</sup> Ibid at [6.24].

An absence of this exposes the taxpayers to an increased risk of adverse ATO views, eroding taxpayer certainty and confidence in the ATO.

TAs, for example, allow the ATO to quickly communicate to taxpayers its concerns about certain arrangements amounting to tax avoidance.<sup>88</sup> The IGTO has previously observed that it is in the taxpayers' interest to be quickly alerted about the ATO's concerns.<sup>89</sup> However, concerns have been raised (from stakeholder submissions to the IGTO's 'U-Turn' Review<sup>90</sup> in 2010) regarding the drafting of TAs and the need to target TAs towards specific arrangements.

TAs not drafted with sufficient clarity create additional compliance costs for taxpayers because taxpayers then have to determine whether what is covered in the TA is in fact an issue for them.<sup>91</sup> Taxpayers then have to seek the services of tax professionals to mitigate this uncertainty. Applying for a private ruling may assist in providing certainty to the taxpayer but it comes at a cost to the taxpayer – and small business taxpayers are not as well-resourced as (say) the ATO and large businesses.<sup>92</sup> Taxpayers having the will and financial capacity to bear the additional costs receive certainty. This presents challenges for the ATO's commitment in the Taxpayers' Charter – to ensure the fair treatment of all taxpayers in providing consistent binding advice.

A taxpayer's ability to 'get things right' (who has limited financial resources) is likely eroded where there is a lack of transparency in understanding the ATO's tax position as administered, with follow-on impacts regarding taxpayers' perceptions of trust and confidence in the ATO. The IGTO observes that taking a proactive approach in identifying areas of uncertainty and compliance risks will further tailor the ATO's Advice and Guidance products in addressing the taxpayer's needs, encouraging compliance and potentially minimising risk to revenue.

## Timeliness

The Tax Institute also raised concerns about the content of the guidance and time taken for the ATO to complete rulings.<sup>93</sup> The ATO's *Advice under Development Program* is updated monthly and outlines the ATO's planned issue dates as well as details on the status of the rulings, including the reasons for any delays. However, it appears that the ATO is taking longer to finalise public rulings. The IGTO observes that the majority (56%) of public rulings in the 2019 financial year took more than seven months to finalise.

This contrasts to 58% of public rulings being finalised within six months in the 2018 financial year. We refer the Committee to the chart below containing figures extracted from the ATO's 2018 and 2019 Annual Reports.

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<sup>88</sup> Ibid at [6.30].

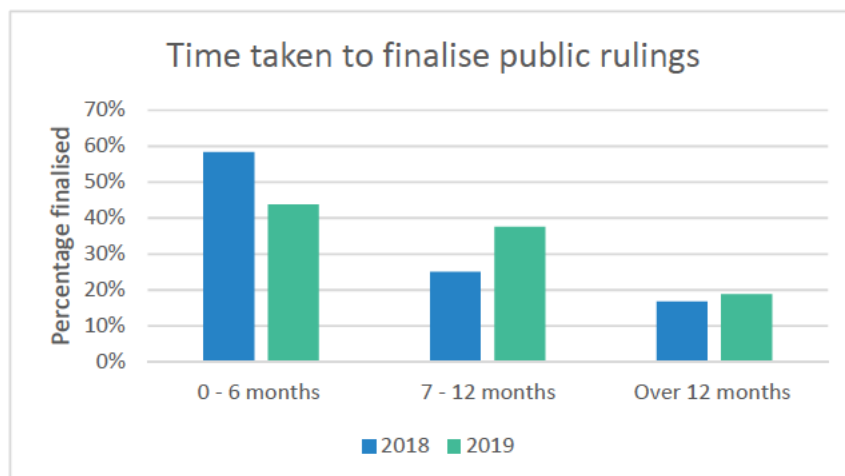
<sup>89</sup> Ibid.

<sup>90</sup> IGTO, *Review into delayed or changed Australian Taxation Office views on significant issues* (2010).

<sup>91</sup> Above n 71.

<sup>92</sup> Above n 74, p 27.

<sup>93</sup> Above n 65, p 5.



Source: ATO

The ATO's Public Advice and Guidance (PAG) Centre was established within the Tax Counsel Network (TCN) in October 2015, to coordinate and identify prior areas for public guidance.<sup>94</sup> The IGTO observes that an increase in the time taken to finalise public rulings may be due to the changes in resourcing within the TCN – the number of staff decreased by approximately 10% to 208 in the 2019 financial year.<sup>95</sup> The IGTO observes that the ATO previously reported a 2.1% decrease in employees in the TCN between 2017 and 2018.<sup>96</sup>

However, the IGTO notes that PAG is supplemented by PAG units in each business line of the ATO and the PAG staffing numbers in each business line is not clearly identified in the ATO's Annual Report. PAG also works with the Policy, Analysis and Legislation business line, which has experienced increasing staffing levels since 2017.<sup>97</sup> However, the IGTO has not investigated this issue and accordingly cannot confirm if reasons beyond resourcing or the complexity of subject matter have contributed to an increase in the time taken for the ATO to finalise public rulings. The Committee make wish to make inquiries to understand why the ATO is taking longer to finalise its public rulings.

Nevertheless, the IGTO observes that an increase in time taken to produce binding rulings creates further uncertainty amongst taxpayers because they are unable to access timely advice, instead relying on the ATO's guidance products (that is unless they incur the cost for the services of a tax professional). The IGTO observes that where there is a need for interim guidance due to the time taken to finalise ATO Advice products, consideration should be made in terms of the clarity of the guidance drafted and whether it addresses taxpayer concerns. Otherwise, this may in turn lead to an increase in objections lodged. However, this aspect needs to be explored in further detail.

<sup>94</sup> Andrew Mills, 'Tax Administration Continuum- the Law was Made for Man, not Man for the Law' (Speech, 30 August 2017) <<https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-Administration-Continuum---The-Law-was-Made-for-Man,-not-Man-for-the-Law/>>.

<sup>95</sup> Above n 1, p 77.

<sup>96</sup> Commissioner of Taxation, *Annual Report 2017-18* (2018) p 171.

<sup>97</sup> Ibid.

## 4. TIMELINESS OF OBJECTIONS

### KEY RECOMMENDATIONS

*The Committee may wish to consider:*

- a. *the impacts of the removal of an objection service standard on the allocation and finalisation of objection matters;*
- b. *making inquiries to understand why the ATO may have a backlog of objection cases and factors contributing to its performance in finalising objection cases;*
- c. *those recommendations with which the ATO did not agree in the IGT Review into the Underlying Causes and the Management of Objections to Tax Office Decisions. (2009), namely reviewing its performance standards and remission of GIC for the ATO's delayed progress of an objection; and*
- d. *exploring if the increasing objection cases are genuine disputes and the extent to which objections are being used for purposes other than a dispute about an interpretation of the substantive tax laws (such as self-amendment of out of time returns) and the likely impact this has on resourcing and timeliness; and*
- e. *exploring the extent to which pre-filing contributes to more objections or disputes with the ATO.*

### NUMBER OF OBJECTIONS

The taxpayer's right of review is one of the key pillars of the rule of law and tax system. The objections framework continues to be a vital part of tax administration as it enables a taxpayer to seek an internal review of an ATO decision. From a fairness point of view, the ATO needs to ensure an efficient, effective and timely objection process in order to minimise the adverse impact on taxpayers. The Annual Report indicates that there has been an increase in objection cases compared to prior years. The primary observation from the table below indicates that the number of objection cases increased in FY19 by approximately 1,926 cases when compared to FY18.<sup>98</sup>

Disputes arising from both the returns lodged and adjustments arising from audits appear to have been on a steady increase between the FY17 and FY19 financial years. This may explain, in part, the increase in the comparable number of objection cases.<sup>99</sup> The use of advanced analytics and automation may have led to increased review and audit activities for individuals. The ATO noted that the increase in objections can in part be attributed to taxpayers objecting to their own self-assessments<sup>100</sup> and may also be due in part to the operation of the rulings system in tax administration – refer Part 3 of this submission.

The ATO provides a table (shown below) on the level of disputation in the system for FY17, FY18 and FY19.

<sup>98</sup> Above n 1, p 168.

<sup>99</sup> Ibid.

<sup>100</sup> Above n 1, p 168.



**TABLE 6.5 Disputes, 2016–17 to 2018–19**

Cases	2016–17	2017–18	2018–19
Returns lodged	35,540,854	36,572,123	37,628,879
Adjustments arising from audits	253,000	361,107	530,508 <sup>(*)</sup>
Disputed cases resolved			
▪ objections <sup>(*)</sup>	24,490	24,350	26,276
▪ settlements	648	673	635
▪ litigations	437 <sup>(*)</sup>	326	314
▪ independent reviews	12	16	13

Source: Commissioner of Taxation, *Annual Report 2018-19* (2019) p 168

## SERVICE STANDARDS VS SERVICE COMMITMENTS FOR MANAGING OBJECTIONS

The ATO no longer sets service standards for processing and finalising objections. Previously, the ATO had set itself a service standard of 56 days, excluding any time awaiting information to be provided by the taxpayer, to finalise most objections. In recent years, the ATO has introduced ‘service commitments’. The ATO website states that service commitments provide ‘the level of performance you can expect when dealing with us under normal circumstances’.<sup>101</sup> The ATO also states on its website that service commitments help to set its performance targets, taking into account both historical performance and taxpayers expectations when using its services.

## IGTO OBSERVATIONS

In April 2009, the IGTO completed a review into the *underlying causes and the management of objections to Tax Office decisions*.<sup>102</sup> In that review, the IGTO recommended that the ATO work towards a revised performance standard (‘from 70 per cent in 56 days to 85 per cent in 28 days in line with other relevant Taxpayer’s Charter and Tax Office standards’) and will involve the ATO adopting a more differentiated approach with the aim of resolving the dispute in a timely and effective manner. The review also noted that stakeholders have indicated that the ATO needs to improve its administration in particular instances to minimise the potential for unnecessary delay and poor communication with the taxpayer and their representatives.<sup>103</sup>

The ATO response to the recommendation is that it is committed to reviewing performance standards to improve services to the community. However, it is not in a position to commit to standards specified in the recommendation and thus only agreed in part.<sup>104</sup>

In reviewing the ATO’s discontinuation of its ‘service standard’ and introduction of ‘service commitments’, it is noted that the ATO’s public reporting of its performance regarding objections is very limited. The ATO does not appear to report data relating to its service commitments for objections. For example, it is not clear what the average timeframe for issuing an objection decision is at present and whether there has been improvement in this regard. In the absence of a ‘service standard’ and related reporting, it is difficult to assess the timeliness of the ATO’s handling of objections.

<sup>101</sup> ATO, *Commitments and Reporting - Service Commitments* (6 April 2020) <<https://www.ato.gov.au/About-ATO/Commitments-and-reporting/Service-commitments/>>

<sup>102</sup> IGTO, *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions*. (2009)

<sup>103</sup> Ibid.

<sup>104</sup> Above n 102.

## IGTO complaints data on timeliness of objection allocation

The IGTO has received a number of complaints about the duration taken for the ATO to allocate, progress and finalise objections. In some cases, the time being taken to allocate an objection to an officer is longer than the previous finalisation service standard - being 56 days from the date that all information requested has been received.

For example, in a complaint case received by the IGTO concerning delay in the allocation of an objection, the ATO stated recently (March 2020) that it was unable to provide a timeframe as to when the taxpayer's objection would be allocated to an ATO officer for consideration, and suggested that the taxpayer continue to follow up with the ATO periodically to obtain an update. The ATO explained that this delay was due to a backlog of objection cases, including 6,300 objection cases that were in a queue (at the time) awaiting to be actioned.

## Timeliness of objection finalisation

In reviewing the ATO's management of objections cases, the IGTO observed that the process begins with a triage team classifying and allocating the objection cases to an appropriate project team. Once this happens, a notification is sent to the taxpayer acknowledging receipt of the objection (usually via SMS). After the notification is sent, the case is left unallocated until a profiler (within the project team) is available. During this time, the taxpayer receives little or no communication about the progress of its objection case. When a profiler then contacts a taxpayer it can be several weeks or months later. The profiler determines whether the objection is valid (i.e. in time, if the matter can be reviewed in line with taxpayer objection rights and whether sufficient information has been provided by the taxpayer). If there is insufficient information, the profiler will contact the taxpayer to request further information. Once the profiler is satisfied that the objection is valid and has sufficient information, it is then allocated to an objection officer to consider the taxpayer's arguments.

The IGTO notes that in many of the complaints it now receives regarding objection cases, taxpayers express concern that they have received little or no communication from the ATO about the progress of their objection. On this basis, it appears that the ATO reduced its communication and transparency in dealing with objection cases when it removed its service standard for such cases. As a result, it is likely that there would be opportunities to make improvements in this sphere that would allow a greater sense of clarity and confidence about the objection process for the benefit of all taxpayers, as well as a more efficient ATO allocation of its cases to reduce its backlog.

Given the importance of the objection function within the self-assessment system and the old adage that justice delayed is justice denied, the Committee may wish to consider the impacts of the removal of an objection service standard on the ATO's allocation and finalisation of objection matters.

For completeness, the IGTO notes that a key finding of the review into the *underlying causes and the management of objections to Tax Office decisions* is that the objections process is frequently used by taxpayers to seek an amendment to their self-assessed returns where they are out-of-time to do so under the current amendment provisions. The review recommended that the Government consider improving the objection process, and bring it in line with self-assessment, by confining objections to cases of genuine dispute between the ATO and taxpayers.<sup>105</sup>

Since that review there have been further developments in using objections to correct information that has been assessed because of the use of inaccurate pre-filled tax return information.

The Committee may wish consider inquiring with the ATO on the extent to which objections are being used for purposes other than a dispute about an interpretation of the substantive tax laws and the likely impact this has on resourcing and timeliness.

<sup>105</sup> Above n 102.



## 5. COMPASSIONATE RELEASE OF SUPER

### KEY RECOMMENDATIONS

*The Committee may wish to consider:*

- a. examining the manner in which the ATO communicates with taxpayers regarding compassionate release of superannuation — including broad communications, such as the ATO’s guidance and website materials, as well as the ATO’s tailored communications to individual applicants;*
- b. making inquiries to determine whether the ATO has allocated sufficient resources to administer requests for compassionate release given the projected increase in demand due to the COVID-19 pandemic;*
- c. seeking clarification on whether the ATO has made any legal interpretive decisions that are inconsistent with the previous interpretation by the Department of Human Services, and the effect of such inconsistencies on the success rate of taxpayer applications for compassionate release; and*
- d. comparing compassionate release data obtained from the ATO in relation to FY19 with historical figures from Services Australia (formerly the Department of Human Services) and, if there is a material discrepancy, seeking to understand the reasons for such discrepancy.*

### BACKGROUND

Retirement income for aging Australians primarily comprises voluntary and compulsory contributions to the superannuation system, supported by the age pension which functions as a safety net. The ATO plays a major role in protecting retirement savings within the superannuation system through the regulation of self-managed superannuation funds, the collection of Superannuation Guarantee Charge and helping Australians connect with their lost super.

On 1 July 2018, the administration of the early release of superannuation benefits on compassionate grounds was transferred from Services Australia (formerly the Department of Human Services) to the ATO.<sup>106</sup> This transfer occurred because the ATO is responsible for most individuals’ interactions with the superannuation system and because the ATO’s ongoing relationship with the superannuation industry could be leveraged to streamline the release process.<sup>107</sup>

The early release of superannuation benefits on compassionate grounds allows eligible applicants to access their retirement savings in times of need. The grounds for release are limited - meeting the costs for an applicant or their dependant for medical treatment or transport, home and vehicle modifications to cater for severe disability, funeral expenses, palliative care, and mortgage arrears to prevent foreclosure.

The criteria that applicants must satisfy, including the evidence that needs to be provided, in order for release to be granted are outlined in regulation 6.19A of the *Superannuation Industry (Supervision) Regulations 1994* (SISR). The regulation was not amended when the function was transferred from the

<sup>106</sup> *Treasury Laws Amendment (2018 Measures No. 1) Act 2018.*

<sup>107</sup> *Explanatory Memorandum to the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018.*

Services Australia to the ATO<sup>108</sup>. The criteria outlined in the regulation are specific in nature and do not confer any discretion on the regulator.

## The ATO's administration of the function

The ATO receives applications for compassionate release through an online form. Paper application forms are available for those who are unable to apply online. Due to the typically time sensitive nature of compassionate release applications, the ATO commits to a 14 day (28 days for postal applications) service standard to assess an individual's eligibility<sup>109</sup>.

For individuals whose applications had been rejected, the ATO offers the option to request an internal review of its decision. However, in situations where the initial application did not contain sufficient evidence to satisfy the criteria, the ATO encourages the individual to instead submit a new application with all of the required documentation, noting that a 'request for review generally won't be successful'.<sup>110</sup>

The ATO has not reported any figures associated with the administration of this function, such as the number of applications it has received and approved or the total amount released, in its FY19 Annual Report.

## IGTO OBSERVATIONS

### Lessons from tax complaint investigations

Since 1 July 2018, we have received 139 complaints in relation to ATO actions associated with compassionate release of superannuation. A significant portion of these complainants had sought assistance from the IGTO because they had trouble understanding why their applications had been rejected. As the criteria outlined in regulation 6.19A of the SISR is quite strict, individuals whose life circumstances would otherwise satisfy the criteria for release can sometimes be rejected on technicalities associated with timing or inadequate documentation. When this occurs, delays can result if the individual is not adequately informed about the nature of the deficiency in their application<sup>111</sup>.

As rejected applicants sometimes lodge further applications without understanding why their initial application had failed, further delays ensue, which can be detrimental and distressing due to the urgent nature of these applications. Such applicants are often only able to access their superannuation after intervention and assistance from the IGTO. Accordingly, the Committee may wish to examine the manner in which the ATO communicates to taxpayers in relation to the compassionate release of superannuation. This may include both broad communications, such as the ATO's guidance and website materials, as well as the ATO's tailored communications to individual applicants.

<sup>108</sup> Schedule 4 of the *Treasury Laws Amendment (2018 Measures No. 1) Act 2018* amends the *Retirement Savings Account Act 1997* and the *Superannuation Industry (Supervision) Act 1994*.

<sup>109</sup> ATO, *Early access on compassionate grounds – understanding your options* (20 March 2020) <[https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=8#How\\_to\\_apply](https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=8#How_to_apply)>.

<sup>110</sup> ATO, *Early access on compassionate grounds – if you don't agree with the decision we have made* (20 March 2020) [https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=9#If\\_you\\_don\\_t\\_agree\\_with\\_the\\_decision\\_we\\_have\\_made](https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=9#If_you_don_t_agree_with_the_decision_we_have_made)

<sup>111</sup> The ATO's standard finalisation letter for compassionate release of super does not specify why the application were rejected. Rather the letter explains that the reason why the application was unsuccessful 'could be because' of a number of reasons, which it then proceeds to list. The letter then encourages the applicant to phone the ATO so as to obtain a more detailed verbal explanation.

## A greater need to access super on compassionate grounds due to COVID-19

Of the complaints received by the IGTO, only a minute proportion relate to ATO delays in processing their applications. This suggests that the ATO has done well to process the applications it has received within the 14 day timeframe, which is an appropriate outcome in light of the urgent nature of these applications. Notwithstanding this, the IGTO considers that due to the stress that is placed on both the Australian health system as well as the Australian economy by the COVID-19 pandemic, there may be an increasing<sup>112</sup> number of Australians who meet the criteria for compassionate release. Accordingly, the Committee may wish to make inquiries to determine whether the ATO has allocated sufficient resources to this area to handle the projected increase in demand and to continue processing applications in a timely manner.

Due to the potentially greater need for Australians to access their superannuation on compassionate grounds during the difficult times presented by the COVID-19 pandemic, the IGTO believes that excessively narrow interpretations of the criteria in regulation 6.19A of the SISR should be avoided, if possible. One example of this is perhaps the ATO's interpretation of the word 'dependant'. According to the ATO's website<sup>113</sup>, a dependant is defined as a spouse, a child, or a person with whom you have an interdependent relationship<sup>114</sup>. The *Superannuation Industry (Supervision) Act 1994* on the other hand, states that the meaning of dependant 'includes' a spouse, a child, and a person with whom you have an interdependency relationship<sup>115</sup>. The legislative definition appears to be broader in the sense that it leaves open the possibility of including other types of dependants, such as the common law or dictionary definition of dependant. For example, the *CCH Macquarie Concise Dictionary of Modern Law* defines a dependant as a 'person substantially maintained or supported financially by another'. Accordingly, the legislative definition suggests that an applicant would be eligible to apply for compassionate early release to help an elderly parent who is substantially maintained by the applicant financially but does not live with them<sup>116</sup>.

Accordingly, the Committee may wish to seek clarification on whether the ATO has made any legal interpretive decisions that are inconsistent with how the regulation was interpreted by Services Australia, and the effect of such inconsistencies on the success rate of applications.

## Transparency through reporting

It should be noted that regulation 6.19A of the SISR was not altered when the administration of the function was transferred from Services Australia to the ATO. Accordingly, one would not expect significant deviation in the figures reported by the respective agencies in relation to applications approved and total amounts released.

<sup>112</sup> We may witness an increase in applications despite the newly introduced measure permitting those affected by COVID-19 to access up to \$20,000 of their superannuation. Some individuals may not meet the criteria for the new measure but do meet the criteria for compassionate release, for example, those seeking to access their superannuation to pay expenses for a dependant.

<sup>113</sup> ATO, *Early access on compassionate grounds – definition of a dependant* (20 March 2020)

<[https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=7#Definition\\_of\\_a\\_dependant](https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Early-access-on-compassionate-grounds/?page=7#Definition_of_a_dependant)>.

<sup>114</sup> An interdependency relationship is defined in s10A of the *Superannuation Industry (Supervision) Act 1994*. It is a close personal relationship between two people which meets all of the following conditions - the people live together, one or both provides financial support to the other and one or both provides domestic support and personal care to the other.

<sup>115</sup> *Superannuation Industry (Supervision) Act 1994*, s 10

<sup>116</sup> The elderly parent would not meet the ATO's definition as they are not a child, a spouse, or in an interdependency relationship with the applicant (because they do not live together).

When Services Australia administered these applications, it reported the following figures in its Annual Reports.<sup>117</sup>

Compassionate Release of Superannuation prior to 1 July 2018

Annual Report	Applications received	Applications approved (in part or in full)	Total amount approved for release	Average amount released per application
2017-18	39,662	24,073	\$343.9million	\$14,286
2016-17	37,105	21,258	\$290,037,520	\$13,644
2015-16	29,379	15,161	\$204,954,883	\$13,519
2014-15	19,367	14,261	\$183,772,297	\$12,886
2013-14	19,286	12,243	\$150,991,150	\$12,874
2012-13	18,024	11,510	\$145,517,285	\$12,643
2011-12	17,391	11,346	\$153,674,964	\$13,544
2010-11	15,795	10,141	\$122,975,798	\$12,127

Source: Services Australia

As the ATO has not publicly reported information akin to that of Services Australia as shown in the above table, a comparison of how the function has been administered by the respective agencies is not presently possible. In the IGTO's view, greater transparency of how the ATO is treating applications for early release of superannuation on compassionate grounds may prove valuable in the current environment to assure the community that they remain able to access vital funds during the difficult economic situation presented by the COVID-19 pandemic as well as at other times of distress and need.

Accordingly, the Committee may wish to consider obtaining data from the ATO in relation to FY19, compare this with historical figures from Services Australia (as set out above) and, if there is a material discrepancy, seek to understand the reasons for it.

<sup>117</sup> Extracted from Department of Human Services, Annual Reports 2010-11 to 2017-18.

## 6. TAX PERFORMANCE

### KEY RECOMMENDATIONS

*The Committee may wish to consider:*

- a. whether the current level of ATO tax performance reporting is appropriate and sufficiently transparent, given the significant amount of resourcing and funding allocated to the related activities and the Committee's previous review into tax gaps as part of its inquiry into the ATO's 2015-16 Annual Report;*
- b. understanding the reasons for the ATO's measures of the Individuals not in the business tax gap increasing and the proportion of overall tax assured decreasing;*
- c. exploring the ATO's tax performance methodologies in greater detail, including the scope of the summarised version of its methodologies in the Annual Report and the evolution of these methodologies over time;*
- d. seeking clarification on the reasons for the ATO's limited use of specific, quantitative performance targets to report on tax performance and the absence of previously quoted aspirational tax gap targets;*
- e. exploring the need to provide a more comprehensive breakdown of tax performance in the ATO's Annual Report, including the consolidation of already available tax performance data with particular emphasis on the Large corporate groups and Small business markets; and*
- f. assessing whether the ATO's reporting adequately addresses the current community perceptions on tax performance, especially the perceived tax compliance of the Large corporate groups and Small business segments.*

### THE REPORTING OF TAX PERFORMANCE

#### Compliance approach and performance measures

The ATO's approach to tax performance, which generally refers to its effectiveness in the collection of tax revenue, has evolved in recent years towards a more preventative and assurance-based approach.<sup>118</sup> This has incorporated the use of systemic performance measures, such as tax gap estimates and the level of tax assured, to evaluate and report on tax performance.<sup>119</sup>

Although audit and other corrective activities remain an integral part of its compliance approach, the ATO aims to improve tax performance through greater use of the aforementioned measures. Specifically, through its tax performance research program, the ATO has developed methodologies aimed at ensuring that such measures can be reported in a reliable, credible and sustainable manner.

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<sup>118</sup> Above n 1, p 11.

<sup>119</sup> Ibid, p 50.

## Tax gaps

Tax gap estimates the difference between the amount of tax revenue collected by the ATO and the amount it would have collected if all taxpayers were fully compliant.<sup>120</sup> In essence, tax gaps measure the level of tax non-performance.

The ATO has tax gap estimates in place for a range of its market segments, including large corporate groups, individuals, small businesses and more recently, the high wealth individuals market. Following the commencement of the Tax Avoidance Taskforce in 2016 and the \$1.679 billion in funding the taskforce has received since, the ATO has set out to reduce the tax gap of its large corporate market to 2% by the time of taskforce completion.<sup>121</sup>

## Tax assured

Tax assured, on the other hand, focuses on the concept of 'justified trust', a term originally coined by the Organisation for Economic Cooperation and Development (OECD).<sup>122</sup> Justified trust involves building community confidence that taxpayers are paying the correct amount of tax.<sup>123</sup> Unlike tax gaps, the measure of tax assured, by way of initiatives such as justified trust, refers to the amount of tax actually collected and the degree of confidence that this amount is correct, in order to provide a more complete and holistic picture of the overall health of Australia's tax system.

As part of the justified trust program established in 2016, the ATO undertakes specific engagements with the Top 100 and the next Top 1,000 public and multinational businesses in order to obtain assurance on the amount of tax paid, which is given an overall rating of high, medium or low.

## Tax performance in the Annual Report

The reporting of the ATO's tax performance falls under the *G1 Government* strategic objective of the Annual Report, which relates to building community confidence by reducing the tax gap and providing assurance across the tax and superannuation systems.<sup>124</sup> The ATO reports on tax performance by way of setting performance targets for its tax gap estimates and tax assured.

In the FY19 Annual Report, the ATO reports on the net tax gap estimates, both percentage and dollar value, from FY14 to FY19. However, it is noted in the Annual Report that most tax gap estimates are not available for the FY18 and FY19 years due to data lags.<sup>125</sup> Additionally, the ATO provides a reliability assessment for each estimate based on the advice of an expert panel.<sup>126</sup>

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<sup>120</sup> Above n 1, p 50.

<sup>121</sup> ATO, *Tax Avoidance Taskforce* (21 October 2019) <<https://www.ato.gov.au/general/Tax-avoidance-taskforce/>>.

<sup>122</sup> ATO, *Justified Trust* (24 October 2019) <<https://www.ato.gov.au/Business/Large-business/Justified-trust/>>.

<sup>123</sup> Ibid.

<sup>124</sup> Above n 1, p 11.

<sup>125</sup> Above n 1, p 51.

<sup>126</sup> Ibid.



For FY19, the ATO's tax gap performance target as identified in the Annual Report was to 'reduce the gap to a level as low as practicable given the nature and complexity of the law and the resources available'.<sup>127</sup> The latest tax gap figures for particular markets of interest is shown below.<sup>128</sup>

<i>Income tax market</i>	<i>Reliability assessment</i>	<i>2014-15</i>	<i>2015-16</i>	<i>2016-17</i>
<i>Large corporate groups</i>	High	5.0%	4.7%	4.0%
<i>Individuals not in business</i>	High	6.2%	6.4%	-
<i>Small business</i>	Medium	-	12.5%	-

Source: ATO

With regards to the reporting of tax assured, this indicator was under development during the 2018-19 year and therefore, no performance target was set. According to the 2018-19 Annual Report, the tax assured performance target for the 2019-20 year is to 'increase the proportion of the tax base where the ATO has justified trust to a level as high as practicable given the nature and complexity of the law and resources available'.<sup>129</sup>

The ATO reported its tax assured for the first time in the FY19 Annual Report, with an estimated total tax of 45.6% being assured for FY17, which is a decrease from the revised FY16 estimate of 47.4%.<sup>130</sup>

## IGTO OBSERVATIONS

### Significance of reporting on tax performance

It is understood that, due to the reliance on estimates, there are practical limitations in using the measures explained above to report on tax performance. Also, given the relative infancy of these performance measures and potential sensitivity concerns in publishing such information, there are some difficulties in reporting tax performance to the wider community in greater detail.

Notwithstanding the above, the IGTO recognises that the reporting of tax performance is critical in understanding how the ATO fulfils its role as the Government's principal revenue collection agency. In communicating its tax performance to stakeholders through the Annual Report, the ATO provides an insight into how it manages its tax performance activities and gives scope for improvement opportunities to be explored.

The IGTO has previously recommended the adoption of tax gaps in the *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, which noted the benefits of its use in several OECD countries and the potential opportunity costs that may arise.<sup>131</sup> This Committee has also previously reviewed the ATO's development of tax gaps in its inquiry into the *2015-16 Annual Report of*

<sup>127</sup> Ibid, p 26.

<sup>128</sup> Ibid, p 51.

<sup>129</sup> Ibid, p 28.

<sup>130</sup> Ibid, p 52.

<sup>131</sup> IGTO, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools* (2013) p 147.

the Australian Taxation Office and accordingly, the Committee may wish to follow up on the progress of the ATO's work and forward plans in this area now that the tax gaps have been published.<sup>132</sup>

The Committee may also wish to examine the correlation between resourcing and funding (contributing factors) and the tax performance results provided in the Annual Report. This would potentially aid in identifying aspects within the system that may or may not be working as optimally as they could. Furthermore, it would help to ensure that the ATO is transparent in the information it reports to the Australian community and accountable in its administration of the tax system.

Contributing factors that could be examined include:

- the \$1.679 billion in Tax Avoidance Taskforce funding;<sup>133</sup> and
- the 29.1% of the ATO's workforce responsible for engagement, assurance and compliance activities.<sup>134</sup>

The Committee may wish to consider whether the current level of ATO tax performance reporting is appropriate and sufficiently transparent, given the significant amount of resourcing and funding allocated to the related activities and the Committee's previous review into tax gaps as part of its inquiry into the *2015-16 Annual Report of the Australian Taxation Office*.

## Understanding the trends identified

Based on information reported in the FY19 Annual Report, it may be useful for the Committee to seek further insights into the trends in specific tax gaps from year to year, where applicable, and the reasons for any changes observed. In instances where the tax gap estimate has increased from the previous year, as is evident in the *Individuals not in business* segment,<sup>135</sup> such insights would assist to better inform the Committee on aspects of the ATO's performance in this segment.

Importantly, it would be interesting to note why there was a decrease in the estimate of total tax assured in FY17.<sup>136</sup> The Committee may wish to inquire as to whether there are any particular segments of the market, if any, that this decline can be attributed to and what actions the ATO are aiming to undertake in response to this decline.

The Committee may wish to consider understanding the reasons for the ATO's measures of the *Individuals not in the business* tax gap increasing and the proportion of overall tax assured decreasing.

## Methodologies used

Due to the limitations in using estimates to measure tax gaps and tax assured, as mentioned previously, the Committee may wish to further explore the methodologies that form the basis of these measures. Since there is information readily available on the ATO website about the current methodologies used,<sup>137</sup> it may be more appropriate that, for completeness, a summarised version of this information is provided in the Annual Report, together with descriptions of any changes made to the methodologies.

The Committee may also want to inquire how the ATO intends to update its methodologies over time to ensure they are as complete, accurate and transparent as possible. For example, this may include obtaining an insight into the methodologies of recently released tax gaps, such as the *High wealth* tax gap, and

<sup>132</sup> Above n 25, pp. 33-34 & 65.

<sup>133</sup> Above n 120.

<sup>134</sup> Above n 1, p 76.

<sup>135</sup> Ibid, p 51.

<sup>136</sup> Ibid, p 52.

<sup>137</sup> ATO, *How we measure tax gaps* (12 March 2020) <[https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Principles-and-approaches-to-measuring-gaps/?page=2#How\\_we\\_measure\\_tax\\_gaps](https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Principles-and-approaches-to-measuring-gaps/?page=2#How_we_measure_tax_gaps)>.



observing whether its methodologies have changed in comparison to prior tax gaps that have been published.

The Committee may wish to consider exploring the ATO's tax performance methodologies in greater detail, including the scope of the summarised version of its methodologies in the Annual Report and the evolution of these methodologies over time.

## Performance targets

The IGTO has observed that the ATO uses qualitative rather than quantitative yearly performance targets to measure the effectiveness of its tax gap and tax assured initiatives. Although this may be reasonable given that the measures are fairly recent and prone to a degree of uncertainty, the Committee may wish to investigate the reasons behind the non-specific performance targets in the Annual Report and understand the feasibility of using quantitative performance targets to report on these measures moving forward.

The IGTO also understands that the ATO has an aspirational goal to achieve tax compliance of 96% at lodgement and 98% after compliance activity, with tax gaps of 4% and 2% respectively, in the *Large corporate groups* market.<sup>138</sup> The ATO has publicly stated that it aims to achieve this by the end of the Tax Avoidance Taskforce, which is currently funded until FY23.

However, there is no mention of this target in the Annual Report and therefore, given the level of government funding the taskforce has received, the Committee may wish to make further inquiries of the ATO. Similarly, the Committee may also like to explore whether there are any aspirational targets for the estimate of tax assured for upcoming years.

The Committee may wish to consider seeking clarification on the reasons for the ATO's limited use of specific, quantitative performance targets to report on tax performance and the absence of previously quoted aspirational tax gap targets.

## Potential areas for further inquiry

Broadly speaking, the ATO only provides high level information on its tax gap and tax assured results in the Annual Report. Whilst this may be adequate in providing an overview of performance, the absence in the Annual Report of a more granular breakdown, or a reference to where that breakdown may be published, poses difficulties in being able to obtain valuable insights into the ATO's tax performance.

The ATO does publish some of this detailed data separately on its website. This includes the release of interim findings reports for its Top 100 and Top 1,000 programs, which provides a breakdown of the application of its justified trust methodology.<sup>139 140</sup> However, this information is not referenced or included in the Annual Report.

Accordingly, the Committee may wish to make further inquiries of the ATO on tax gap estimates and tax assured in greater detail, with a view to examining whether more information, including data which is already publicly available on the ATO website, should also be collated into a single repository for reference in the Annual Report as a more enduring record.

<sup>138</sup> Above n 68.

<sup>139</sup> ATO, *Top 1,000 Tax Performance Program* (25 November 2019)

<<https://www.ato.gov.au/Business/Large-business/Top-1,000-Tax-Performance-Program/>>.

<sup>140</sup> ATO, *Top 100 justified trust program* (25 November 2019)

<<https://www.ato.gov.au/Business/Large-business/Top-100-justified-trust-program/>>.

The IGTO suggests that the following information may be of benefit to the Committee:

<b>Tax gap estimates</b>	<ul style="list-style-type: none"> <li>the percentage contribution of specific industries in the <i>Large corporate groups</i> and <i>Small business</i> segments towards the estimated tax gap of that market;</li> <li>the yearly highlights of the Tax Avoidance Taskforce;<sup>141</sup></li> <li>the use of gross (at lodgement) and net (post-compliance activity) tax gap estimates to differentiate between the levels of voluntary and non-voluntary tax compliance; and</li> <li>the publishing of individual scores as part of the reliability assessment ratings for each tax gap estimate, including justification of the particular rating and/or score.<sup>142</sup></li> </ul>
<b>Tax assured</b>	<ul style="list-style-type: none"> <li>the estimate of total tax that can be assured in each market segment, such as <i>Large corporate groups</i> and <i>Small business</i>, and particular industries within those markets (only some information is currently available for the <i>Large corporate groups</i> market);<sup>143</sup></li> <li>the proportion of total tax assured specifically through the justified trust initiative, as opposed to other approaches such as obtaining third party data (which accounts for approximately 70% of total tax assured);<sup>144</sup> and</li> <li>the percentage of justified trust engagements where the overall assurance rating was less than high (69% for the Top 1,000 as at July 2019) and/or the tax reported was not assured.<sup>145</sup></li> </ul>

Source: ATO

In addition to the above, the Committee may wish to revisit matters it previously identified in the *Inquiry into Taxpayer Engagement with the Tax System*.<sup>146</sup> Specifically, the Committee may want to re-examine its previous concerns about the lack of data that exists on the exact size of the *Small business* tax gap and understand how the ATO is using this information to address the substantial level of unreported income in this market.<sup>147</sup> In the IGTO's submission to that inquiry, the IGTO noted that it would be useful to understand what component of the tax gap is in fact attributable to the cash economy and which components are due to other reasons.<sup>148</sup>

It has also been observed that the ATO has published an overall tax gap of 8% for the FY16, following the release of the FY19 Annual Report.<sup>149</sup> This is the first time that an overall annual estimate, which incorporates all tax types and markets, has been published. Accordingly, the Committee may wish to

<sup>141</sup> ATO, *Tax Avoidance Taskforce highlights 2018–19* (21 October 2019)

<<https://www.ato.gov.au/General/Tax-avoidance-taskforce/Tax-Avoidance-Taskforce-highlights-2018-19/>>.

<sup>142</sup> ATO, *Reliability Assessment* (12 March 2020) <<https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/tax-gap/principles-and-approaches-to-measuring-gaps/?anchor=Reliabilityassessment1#Reliabilityassessment1>>.

<sup>143</sup> ATO, *Interim Findings Report Top 100 Program (income tax) July 2019* (22 November 2019)

<[https://www.ato.gov.au/uploadedFiles/Content/LB\\_I/downloads/20191121\\_Top%20100%20Findings%20ReportPost\\_LBSG.pdf](https://www.ato.gov.au/uploadedFiles/Content/LB_I/downloads/20191121_Top%20100%20Findings%20ReportPost_LBSG.pdf)>.

<sup>144</sup> ATO, *Tax assured: gaining confidence the right amount of tax is reported* (17 October 2019) <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-research/Tax-assured---gaining-confidence-the-right-amount-of-tax-is-reported/#Whywemeasuretaxassured>>.

<sup>145</sup> Australian Taxation Office, *Findings Report Top 1,000 Tax Performance Program (income tax) March 2019* (30 July 2019)

<[https://www.ato.gov.au/uploadedFiles/Content/LB\\_I/downloads/Top\\_1000\\_Findings\\_Report.pdf](https://www.ato.gov.au/uploadedFiles/Content/LB_I/downloads/Top_1000_Findings_Report.pdf)>.

<sup>146</sup> House of Representatives Standing Committee on Tax and Revenue, Parliament of the Commonwealth of Australia, *Taxpayer Engagement with the Tax System* (2018) p 160.

<sup>147</sup> Ibid.

<sup>148</sup> IGTO, *Submission to the Inquiry into Taxpayer Engagement with the Tax System* (2017) p 12.

<sup>149</sup> ATO, *The performance of the tax system* (12 March 2020) <[https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Australian-tax-gaps-overview/?page=2#The\\_performance\\_of\\_the\\_tax\\_system](https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Australian-tax-gaps-overview/?page=2#The_performance_of_the_tax_system)>.

inquire into whether such summarised annual data, or more data relating to tax performance in general, will be provided in future Annual Reports as new information becomes available.

The Committee may wish to consider exploring the need to provide a more comprehensive breakdown of tax performance in the ATO's Annual Report, including the consolidation of already available tax performance data with particular emphasis on the *Large corporate groups* and *Small business* markets.

## Community confidence and perceptions

From a holistic perspective, the Committee may wish to consider whether the reporting of ATO's tax performance in the Annual Report sufficiently addresses the current community attitudes towards the tax compliance of large corporate organisations and more recently, small businesses. In particular, the tax gaps reported for these taxpayer markets would be of considerable interest to the wider Australian community in addressing perceptions of compliance and fairness.

It has been stated that only about 40% of Australians believe that large corporations pay the correct amount of tax and therefore, greater transparency in the reporting of tax performance would likely contribute to alleviating public scepticism.<sup>150</sup> As the ATO has introduced new community confidence ratings in the FY19 Annual Report, the Committee may wish to inquire into the impact the more recent tax performance measures have had, if any, in shifting community perceptions about administration of the tax system.

Since large corporate groups are considered, by many, to be a benchmark for tax compliance and influence the willingness of other markets to voluntarily comply, increasing the transparency in the reporting of such performance measures would only improve taxpayer compliance and overall confidence in the administration of the tax system.

In order to better understand the evolving tax compliance landscape, the Committee may like to explore whether further investigation or review, beyond the scope of this inquiry, into the reporting of the ATO's tax performance measures would be appropriate in the near future.

The Committee may wish to consider assessing whether the ATO's reporting adequately addresses the current community perceptions on tax performance, especially the perceived tax compliance of the *Large corporate groups* and *Small business* segments.

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<sup>150</sup> Chris Jordan, 'Now and when: Commissioner's address to the Tax Institute Tax Summit 2020' (The Tax Institute Tax Summit 12 March 2020) <<https://www.ato.gov.au/Media-centre/Speeches/Commissioner/Now-and-when--Commissioner-s-address-to-the-Tax-Institute-s-Tax-Summit-2020/>>.

## 7. OTHER MATTERS

### KEY RECOMMENDATIONS

*The Committee may wish to consider:*

- a. exploring the most recent results of the ATO's fairness research and how it proposes to continue measuring perceptions of fairness into the future; and*
- b. exploring the current and proposed ATO support available to tax practitioners during this period leading into Tax Time 2020.*

### INTRODUCTION

Two further issues may warrant examination by the Committee. Firstly, the issues of fairness and taxpayer engagement, are matters which the Committee has considered previously in an earlier inquiry into the Commissioner of Taxation's Annual Report<sup>151</sup> and as part of a standalone inquiry on taxpayer engagement with the tax system<sup>152</sup>.

The second issue relates to the ATO's services and support for tax practitioners which, as part of other inquiries, the Committee may have considered. It was also the subject of a specific IGTO review investigation in 2015.<sup>153</sup>

The IGTO has not set out these issues in the main body of the submission as they are not directly referable to the FY19 Annual Report, although they have been included in previous annual reports and, as noted above, have been raised previously in other relevant contexts.

Accordingly, the IGTO considers that there would be merit in the Committee considering these matters as part of its current inquiry.

### FAIRNESS AND TAXPAYER ENGAGEMENT

Earlier in this submission, we have made observations about IGTO recommendations for the ATO to improve its reporting in relation to the compliance with the Taxpayers' Charter. The IGTO notes that in a number of inquiries, the Committee itself, drawing from ATO materials and evidence given by the Commissioner of Taxation, has also recognised the importance of fairness as a driver for voluntary compliance within a self-assessment system.<sup>154</sup>

In its *Inquiry into Taxpayer Engagement with the Tax System*, the Committee recommended that:<sup>155</sup>

*In the interests of promoting fairness and taxpayer confidence in Australia's tax system, the Committee recommends that the ATO should work to develop a framework which clearly outlines the rights and obligations of both parties in the tax engagement process for adoption in the near future.*

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<sup>151</sup> Above n 25.

<sup>152</sup> Above n 146.

<sup>153</sup> IGTO, *The Australian Taxation Office's Services and Support for Tax Practitioners* (2015).

<sup>154</sup> Above n 146, p 58.

<sup>155</sup> Ibid, p 198.

*The process, involving the review of high level ATO mission statements, would be consistent with the ATO's principle-based approach to service delivery and support design of a Regulatory Philosophy document.*

The Committee may wish to consider the progress that the ATO has made in implementing the above recommendation.

Ancillary to considerations of fairness within the tax system, the IGTO notes that the FY19 Annual Report does not make any reference to the Perceptions of Fairness research that the ATO has undertaken in rolling waves for some years. The most recent mention of this research is contained in the ATO's FY18 annual report<sup>156</sup> although no details of the outcomes of that research were given. Moreover, searches of the ATO website did not yield any results.

It is not clear from the ATO's reporting whether the research has been discontinued or subsumed into other research projects. The Committee may wish to explore with the ATO the most recent results of its fairness research and how it proposes to continue measuring perceptions of fairness into the future more generally, but also more particularly in its Corporate Plan and Annual Reporting.

## SERVICES AND SUPPORT FOR TAX PRACTITIONERS

The Committee may wish to consider the ways in which the ATO continues to work with, and support, registered tax practitioners within the tax system. The IGTO continues to receive complaints from registered tax practitioners in areas relating to ATO systems and the more recent transition from AusKEY to MyGovID as the primary identifier for tax practitioner access to ATO systems.

While MyGovID is in its early days and there are some teething issues needing to be addressed, it may be worthwhile to explore how that system has been implemented, the nature of feedback that the ATO has received and how it plans to respond to this feedback.

Relevant to the current situation concerning the COVID-19 pandemic, much has been said about the level of support afforded to individuals and businesses affected by the pandemic and the restrictions imposed to curb its transmission. It is understandable that registered tax practitioners would be affected by COVID-19, both as business owners in their own right and also as trusted advisers for many, including individuals and small businesses. The nature of the ATO's support for practitioners during periods of crises is incredibly important.

The ATO recently announced support for tax practitioners by way of, *inter alia*, general automatic lodgement deferrals:<sup>157</sup>

*Lodgment and payment deferrals will be automatically applied to:*

- Company 2018–19 income tax returns due on 15 May 2020, which are now due by 5 June 2020
- SMSF 2018–19 annual returns due on 15 May 2020 and 5 June 2020, which are now due by 30 June 2020.

*2018–19 income tax returns for individuals, partnerships, and trusts can be lodged by the 5 June concessional due date, provided your clients pay any liability by this date.*

### **2019–20 Fringe Benefits Tax annual returns**

*The lodgment and payment due date for 2019–20 Fringe Benefits Tax (FBT) annual returns has been automatically deferred to 25 June 2020.*

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<sup>156</sup> Above n 96, p 204.

<sup>157</sup> ATO, *COVID-19 Support for Tax Professionals* (22 April 2020) <<https://www.ato.gov.au/General/COVID-19/Support-for-tax-professionals/>>.

While the automatic deferral is a positive development and one that will likely assist many registered tax practitioners, it is worthwhile noting that the automatic deferral was granted more recently and after some concerns had been raised and reported in the media. In late March, as COVID-19 restrictions were being implemented, it was reported that the ATO required registered tax practitioners to seek deferrals of lodgements on a case by case basis,<sup>158</sup> which led to concerns being raised by the Institute of Public Accountants about the increased stress and pressure on registered tax practitioners. At the time, the Commissioner of Taxation responded noting that the challenges faced by registered tax practitioners were 'diverse and complicated'<sup>159</sup> and a blanket response was not sufficient. The Commissioner reaffirmed the commitment of the ATO to work closely with registered tax practitioners and their clients to 'tailor our response to individual circumstances and ensure we are offering the best possible support for your situation.'<sup>160</sup>

There may be a number of reasons why the ATO delayed announcing an automatic lodgement deferral for tax practitioners, including that it was working through a number of different support options for tax practitioners or assessing the likely impact and scope of any such deferrals.

As registered tax practitioners are a key gatekeeper of the tax system that assists over 70% of individuals and more than 90% of businesses with their tax obligations, support for them during periods of crises and pandemic is vitally important to ensuring that compliance with tax obligations is managed.

Accordingly, the IGTO considers that support should be provided quickly where such issues are identified. The Committee may wish to explore with the ATO the current and any proposed support available to tax practitioners during this period leading into Tax Time 2020.

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<sup>158</sup> Jotham Lian, "ATO pressed to apply blanket lodgement deferrals," *Accountants Daily* (25 March 2020) <<https://www.accountantsdaily.com.au>>.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.



# APPENDIX A — GLOSSARY AND DEFINED TERMS

Abbreviation	Defined term
AAT	Administrative Appeals Tribunal
ADJR Act 1977	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFP	Australian Federal Police
AGIS	Australian Government Investigation Standards
ANAO	Australian National Audit Office
ANZOA	Australian and New Zealand Ombudsman Association
APH	Parliament of Australia
APPs	Australian Privacy Principles, as defined in Schedule 1 of the <i>Privacy Act 1988</i>
APS	Australian Public Service
ATO	Australian Taxation Office
ATO ID	Australian Taxation Office Interpretative Decisions
CDDA	Scheme for Compensation for Detriment caused by Defective Administration
Collectable debt	Tax debts which are not subject to objection or appeal or to some form of insolvency administration
Commissioner	Commissioner of Taxation
Complaint	<p>A complaint is defined AS/NZS 10002:2014 Guidelines for complaint management in organizations</p> <p><i>Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</i></p> <p><i>Disputes - Unresolved complaints escalated internally or externally, or both.</i></p> <p><i>Feedback - Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling</i></p>



Abbreviation	Defined term
	<i>of a complaint. Organizations may choose to manage such feedback as a complaint.</i>
Disclosures as part of a review and Investigation	these disclosures are protected because there is a Review and the disclosure of information assists in achieving a public purpose.
DPN	Director Penalty Notice
Entity	<p>an entity is defined in section 960-100 of the <i>Income Tax Assessment Act 1997</i> that is:</p> <ul style="list-style-type: none"> <li>an individual</li> <li>a body corporate</li> <li>a body politic</li> <li>a partnership</li> <li>any other unincorporated association or body of persons</li> <li>a trust</li> <li>a superannuation fund</li> </ul>
FOI	Freedom of Information
FOI Act 1982	<i>Freedom of Information Act 1982</i>
FY19	Financial Year ended 30 June 2019
FY20	Financial Year ended 30 June 2020
GIC	General interest charge
GIC	General Interest Charge
GST	Goods and Services Tax
IGIS	Inspector-General of Intelligence and Security
IGT Act 2003	<i>Inspector-General of Taxation Act 2003</i>
IGTO	Inspector-General of Taxation and Taxation Ombudsman. The acronym “IGTO” is used throughout the submission to denote both the “Inspector-General of Taxation”, as named in the enabling legislation, and “Inspector-General of Taxation and Taxation Ombudsman” as recently adopted due to recent calls for greater understanding and awareness of our complaints services function.

Abbreviation	Defined term
IRS	Internal Revenue Service
ITR	Income tax return
JCPAA	Joint Committee of Public Accounts and Audit
NTA	National Taxpayer Advocate
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
PAG	Public Advice and Guidance
PAYG	Pay As You Go
PCG	Practical Compliance Guidelines
PGPA Act 2013	<i>Public Governance, Performance and Accountability Act 2013</i>
PGPA Rule 2014	<i>Public Governance, Performance and Accountability Rule 2014</i>
PID Act 2013	<i>Public Interest Disclosure Act 2013</i>
SCTR	House of Representatives Standing Committee on Tax and Revenue
STP	Single Touch Payroll
TAA 1953	<i>Taxation Administration Act 1953</i>
Tax Official	<p>The term ‘tax official’ is defined in section 4 of the <i>IGT Act 2003</i> to mean:</p> <ul style="list-style-type: none"> <li>a. an ATO official; or</li> <li>b. a Board member of the Tax Practitioners Board; or</li> <li>c. an APS employee assisting the Tax Practitioners Board as described in section 60-80 of the <i>Tax Agent Services Act 2009</i> ; or</li> <li>d. a person engaged on behalf of the Commonwealth by another tax official (other than an ATO official) to provide services related to the administration of taxation laws; or</li> <li>e. a person who: <ul style="list-style-type: none"> <li>i. is a member of a body established for the sole purpose of assisting the Tax Practitioners Board in the administration of an aspect of taxation laws; and</li> </ul> </li> </ul>

Abbreviation	Defined term
	<p>ii. receives, or is entitled to receive, remuneration (but not merely allowances) from the Commonwealth in respect of his or her membership of the body.</p> <p>For the purpose of this submission, the term ‘tax official’ is also used to refer to a ‘taxation officer’ to whom subdivision 355-B of Schedule 1 to the TAA 1953 applies.</p>
TA	Taxpayer Alerts
Taxpayers’ Charter	Outlines the taxpayer’s rights and what they can expect from their interactions with the Australian Taxation Office.
TCN	Tax Counsel Network
TERC	Tax Evasion Referral Centre
TFN	Tax File Number
TIO	Telecommunications Industry Ombudsman
TPB	Tax Practitioners Board
Whistleblower complaints	A disclosure will generally qualify for whistleblower protection where it is made by an eligible whistleblower to an eligible recipient. These disclosures are typically defined by statute and the protections available are in part designed to encourage disclosures in a prescribed manner. See for example, the definition of eligible whistleblower in section 14ZZU of the <i>Taxation Administration Act, 1953</i> .