

COMMONWEALTH
OMBUDSMAN



**Submission by the
Commonwealth Ombudsman**

**HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON TAX AND
REVENUE**

**INQUIRY INTO THE EXTERNAL SCRUTINY OF THE
AUSTRALIAN TAXATION OFFICE**

Submission by the Commonwealth Ombudsman, Colin Neave

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INTRODUCTION AND SUMMARY

Responsibility for investigating complaints about the Australian Taxation Office (ATO) was transferred from the Commonwealth Ombudsman to the Inspector-General of Taxation in May 2015, officially ending the Taxation Ombudsman role.

The Commonwealth Ombudsman is no longer able to investigate new complaints about the ATO or the Tax Practitioners Board (TPB), except for complaints about Freedom of Information (FOI) or Public Interest Disclosure (PID).

Over the 20 years before that change my office worked proactively with the ATO to encourage it to improve its complaints handling process, learn from complaints and take active responsibility for resolving them. The ATO was receptive to our approach and adopted many of our suggestions, resulting in an enhanced experience for taxpayers in resolving matters.

This approach resulted in a steady decline of complaints to the Ombudsman about the ATO and in 2014-15, the final year, we received the lowest number of complaints since the commencement of the role in 1995.

It is my view that the removal of the Ombudsman's taxation jurisdiction has diminished the efficacy of oversight of the ATO and leaves the Parliament, the Government and the community without adequate assurance that the ATO's administration is sound.

BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Taxation Ombudsman role was established in 1995 to increase the focus on the investigation of complaints about the ATO. Over the 20 years of operation we finalised more than 40,000 complaints from taxpayers.

Major events or projects undertaken by the ATO that proved to be sources of complaints during this period related to:

- the ATO's handling of complaints about the settlement process for taxpayers involved in mass marketed investment schemes in 1998-99
- the introduction of the Goods and Services Tax (GST) in 2000-01
- the roll-out of the ATO's systems upgrade (referred to as the 'change program') in 2009-10 and the impact of delays on taxpayers

- the Project Wickenby joint taskforce and the ATO's handling of complaints from high profile taxpayers in 2012-13

The Commonwealth Ombudsman completed several Own Motion investigations during this period which led to significant change and service improvement including:

- an investigation into ATO complaint handling, published July 2003. This led to the creation of a whole-of-ATO complaints management system with over 66% of complaints resolved satisfactorily
- the ATO's administration of garnishee action, published April 2007. As a result the ATO improved its procedural advice and guidance to staff and introduced an internal review process for payment arrangement decisions
- re-raising of written off tax debt, published March 2009. The ATO improved its advice to taxpayers to avoid confusion over the debt re-raise process
- resolving Tax File Number compromise, published September 2010. The ATO changed its identification and response processes to improve outcomes for taxpayers

The Commonwealth Ombudsman is no longer able to investigate new complaints about the ATO or the Tax Practitioners Board (TPB), except for complaints about Freedom of Information (FOI) or the handling Public Interest Disclosures (PID).

We are however able to investigate complaints concerning the Inspector-General of Taxation's handling of complaints concerning the ATO and TPB.

RESPONSE TO TERMS OF REFERENCE

The terms of reference for the enquiry specify that the committee will inquire into the scrutiny arrangements that apply to the ATO with particular regard to:

- removing inefficiency and duplication
- reducing cost to government

The Committee has invited a submission from the Commonwealth Ombudsman into its inquiry and this submission reflects the Ombudsman's experience gained through:

- dealing with complaints about the ATO for twenty years, as well as our ongoing role for PID and FOI complaints.
- our contact and collaboration with the Australian National Audit Office (ANAO), and the IGT and to a lesser extent, the Office of the Australian Information Commissioner (OAIC)
- dealing with complaints about other agencies that include interaction with the ATO
- hosting whole-of-government complaints management workshops
- complaints about the IGT's handling of complaints about the ATO and TPB

Collaboration without capture

A recent publication describes the Ombudsman as 'a magistrate of persuasion'¹. Although there are many ways to 'persuade', the best sort of persuasion comes as a result of mutual respect: agencies' respect for the rigour, objectivity and independence with which ombudsmen conduct their activities; and respect by ombudsmen and their staff for the integrity and efforts of agencies to do the right thing.

My office continues to invest in strong relationships to achieve outcomes and effect change.

Building a relationship of trust at all levels with agencies and the community provides a platform for our views to be heard and also receive early warning about issues that agencies know will impact our work.

This requires us to negotiate the balance between being a trusted partner of agencies and maintaining appropriate independence. In a phrase: 'collaboration without capture'.

In my view, there is significant risk in creating an oversight body with responsibility for only one or two agencies. Such arrangements result either in a dysfunctional and antagonistic relationship between the oversight body and the agency, or in the oversight body being captured by the agency.

That relationship problem can, in my opinion, develop from the suggestion that a single agency complaint handler should have on its staff specialists in the business of the agency. This can lead to the complaint handler second guessing the agency's decisions, which should not be its role.

In addition the removal of an agency from the jurisdiction of a whole of government oversight body, particularly an agency of the significance of the ATO, diminishes the assurance the Ombudsman can provide about the efficient operation of the Australian Public Service. I should add that the Ombudsman is seen as part of the integrity group of agencies at the Commonwealth level.

It is counter-intuitive that in a time when governments expect public service agencies to resist siloed approaches and produce whole of government solutions, oversight of key agencies is allowed to fragment.

In making these comments I do not imply any wrongdoing on the part of the Inspector-General of Taxation or the ATO, but rather point out the practical problems created by the way ATO oversight is currently structured.

The result is that the removal of the Ombudsman's taxation jurisdiction has diminished the efficacy of oversight of the ATO and leaves the Parliament, the Government and the community without adequate assurance that the ATO's administration is sound.

Removing inefficiency and duplication

In its report on the ninth biannual hearing with the Commissioner of Taxation, the Joint Committee of Public Accounts and Audit (JCPAA) considered the respective responsibilities of the ATO's external scrutiny organisations (ANAO, IGT and the Commonwealth Ombudsman) and recommended that:

¹ International Framework of the Ombudsman Institution – Catalan Ombudsman, Spain

The Committee recommends that the external review agencies investigate and report on opportunities for more strategic planning and improved information sharing as they undertake to avoid duplication of their efforts and the ATO's resources.²

A Joint response from three agencies was accepted by the Committee and reported:

The recommendation has been actioned. The three external review agencies will meet collectively as part of the annual planning process to share information and consider more broadly the overall ATO review activity. This enhances the current bilateral consultative process in place. Within the boundaries of the respective legislative frameworks, consultation between the agencies on review activity will continue to be undertaken as appropriate.³

Since then collaboration has been effective and two clear examples are:

- **ANAO Performance Audits**

In 2014, the ANAO published its performance audit report titled Management of Complaints and Other Feedback⁴. We consulted extensively with the ANAO during the audit to provide information from our management of tax complaints. The audit referenced our publication *Better Practice Guide to Complaint Handling*⁵ as a complaint management standard

- **Transfer of tax complaint to IGT**

The transfer of tax complaints from my office to IGT was completed efficiently and effectively with no reported adverse consequences for complainants and minimal disruption for ATO resources

However, while consultation arrangements remain in place, the transfer of tax complaints to IGT has created consequences which have inadvertently created duplication of effort for the three agencies and that of the ATO's resources, for example:

- **Cross-agency complaints arising from the tax and transfers system and sharing of data**

My office receives complaints concerning the Department of Human Services (DHS) programs resulting from its collaborations with the ATO and the interdependence of its systems on up to date lodgement and tax assessment data.

Almost 40% of all complaints we received in 2014-15 concerned DHS and specifically Centrelink and the Child Support Agency. Some of the complaint issues which are relevant to ATO lodgement and assessment programs include:

- Non lodgement of a tax return by payee which affects the child support assessment for both parents.

Complainants (previously) told us that the ATO did not take adequate action following a call to its Tax Evasion Referral Centre, and that the ATO did not provide the complainant with information about what action the ATO took in response to the call. Callers often also complained about the actions of the Child Support Agency in pursuing the matter with the payer and report the perception

² Joint Committee of Public Accounts and Audit Report 426 Ninth biannual hearing with the Commissioner of Taxation. Recommendation No.4 paragraph 1.152

³ JCPAA Report 30 May 2012

⁴ ANAO Audit report No.19 2013-14. Performance Audit Management of Complaints and Other Feedback 12 Feb 2014

⁵ Better practice guide to complaint handling

http://www.ombudsman.gov.au/data/assets/pdf_file/0020/35615/Better-practice-guide-to-complaint-handling.pdf

that they are caught between the ATO and Child Support and are powerless to resolve the matter.

- Non lodgement by one parent affecting the Family Tax Benefit payment of the other, usually resulting in a debt.

A similar but less common complaint received by the Ombudsman relates to non-lodgement and Family Tax Benefit (FTB) recipients. Many families receive FTB as a fortnightly payment rather than as a single payment at the end of the year. The fortnightly payment is calculated according to their estimate of their taxable income for the financial year.

After a person lodges their tax return, Centrelink reconciles the FTB already paid (fortnightly) by comparing the person's income estimate with the ATO's assessment and either tops-up the payment or raises a debt for overpayment. If the person (and/or their partner) fails to lodge a tax return within two years of the end of the financial year, Centrelink raises a debt for the full amount of FTB paid for that financial year. Since 1 July 2013, this period has reduced to 1 year.

- Tax return intercept program errors where an amount outstanding is not collected or incorrectly withheld affecting child support payments.

Whilst there are obligations conferred on the ATO and DHS under legislation⁶ and a Memorandum of Understanding (MOU) establishes administrative arrangements between the agencies relating to the management and resolution of complaints, disputes still arise.

As it stands, complaints about the ATO's handling of such matters are made to IGT and DHS complaints are made to us. Where we identify that the error and resolution sits with the ATO it is more effective and efficient for us to utilise the cross-agency collaborative arrangements between the ATO and DHS to seek resolution, however the process can still be somewhat confusing for complainants as well as the agencies.

At the conclusion of an investigation, we can provide comment to DHS about its process and its interactions with the ATO, in line with our better practice guide to complaint handling. Under agreement with IGT we provide it with a summary of our comments which relate to the ATO's actions. We are not able to provide comments directly to the ATO or ensure consistency in the messaging between DHS and ATO.

- **Complain to IGT about tax and to the Ombudsman about PID and FOI**

We still receive a small number of complaints about the ATO, which we transfer to IGT however complaints about PID and FOI remain in our jurisdiction. Administrative arrangements are in place to facilitate the transfers/referral between agencies when complainants incorrectly approach either agency.

- **Complaints about IGT**

We can receive complaints about the IGT's handling of tax complaints as well as its handling of FOI and PID matters. This provides an interesting dilemma for my office concerning perceptions of independence due to collaborative arrangements.

In 2015-16 (to 29 February 2016), we have received 11 approaches from complainants dissatisfied with IGT's but we have determined that an investigation is not warranted. A summary of the complaints is detailed below

⁶ *Data-matching Program (Assistance and Tax) Act 1990*

Issue	No.	Action / decision
Contact issues	2	Provided alternate contact information
IGT Decision to refer matter back to the ATO	2	Refer back to IGT to lodge formal complaint
No formal complaint lodged	4	
IGT management of TPB complaint	2	Appropriate referral to review body
IGT Review of ATO CDDA decision	1	IGT response in line with CDDA guidelines
Total	11	

- **Whole-of-government complaint management**

We conduct biannual forums with government agencies within our jurisdiction including IGT, ATO and TPB however involving a scrutineer and its subject agencies adds an unnecessary level of complexity