



Submission by the
Commonwealth Ombudsman

JOINT COMMITTEE OF PUBLIC
ACCOUNTS AND AUDIT

ANNUAL HEARING WITH
COMMISSIONER OF TAXATION

Submission by the
Acting Commonwealth Ombudsman,
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INTRODUCTION AND SUMMARY

The purpose of this submission is to provide a report to the Committee on the nature of tax related complaints made to the Ombudsman's office. It also provides an account of some of the broader conversations that this office has had with the Australian Tax Office (ATO) over the past 12 months which have resulted in the improvement of tax administration.

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
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

COMPLAINTS TO THE OMBUDSMAN ABOUT THE ATO

In 2011-12 we received 2,717 complaints about the ATO, the highest number of complaints we have received in 10 years and a 4.7% increase on the previous year. In 2011-12 complaints about the ATO accounted for 12% of complaints received by the office. This increase in complaints was not reflected in the ATO's own complaint numbers, which fell by 20%.

The most common ATO complaints received were about:

- income tax refund delay
- other processing issues
- debt recovery actions
- time taken in the investigation of unpaid superannuation entitlements owed to employees
- audit actions by the ATO, most often in relation to goods and services tax matters
- superannuation excess contributions tax imposed
- delays in processing Australian Business Number (ABN) applications.

Since 1 July 2011, we have continued to be proactive in providing feedback at the conclusion of investigations in order to draw particular matters to the ATO's attention.

For example, we commented on cases where the ATO's actions had not followed its policy and administrative guidelines. We also made suggestions to the ATO about administrative processes which warranted further consideration or enhancement. In other cases we acknowledged the efforts made by the ATO to provide remedies to problems identified through our investigations.

During the year, with the ATO's co-operation, we commenced a 'one last chance' referral process. We use this process when a person complains to us about a matter that has been considered and finalised by the ATO, but we assess that the issue is one that could easily be resolved by the ATO.

Under this arrangement we refer complaints to the ATO for action within 14 days, identifying the possible remedies. The ATO then reports back to us on what actions it took to resolve the complaint directly with the taxpayer. We then consider whether further action by this office is warranted. This process has proved to be effective where remedies can be provided in a few administrative steps without requiring an investigation. The ATO has demonstrated its capacity to satisfactorily resolve the large majority of referred complaints, without requiring further investigation by our office. Examples of the types of remedies provided by the ATO include:

- sending forms or statements of account
- providing better explanations for its decisions and tax-related matters
- processing payments.

As the ATO demonstrated the capacity to satisfactorily resolve the large majority of these cases, we invited it to initiate its own review of complaints where the ATO considered the issues could be addressed. The ATO agreed to a trial. It is noteworthy that the ATO is co-operating in such a manner and it is a credit to its willingness to address complaints. We continue to emphasise that the ATO should learn from these complaints, and apply the lesson to improve its resolution practices and broader administration.

We have noted a high level of complainants (in the order of 50%) coming directly to the Ombudsman without the complainant first attempting to address their complaint with the ATO. In these circumstances, the ATO accepts and actions a transfer of a complaint from this office. This removes the need for the complainant to contact and repeat the complaint to the ATO. However, we intend to investigate whether the number of people coming directly to us is proportional to the complaints about other agencies and to determine what factors may be driving this behaviour. The ATO has agreed to assist in this review in the course of its complaints re-engineering project.

We continue to encourage the ATO to adopt and implement the recommendations identified in its complaints re-engineering project. In particular:

- building its analytical capability
- making better use of intelligence from complaints in policy, service design and implementation
- making executive officers accountable for the resolving root-cause of complaints
- undertaking more first contact resolution.

MATTERS OF INTEREST

Income Tax Refund Integrity program 2011

A significant number of complaints we received this year related to an increase in activity in the ATO's income tax return integrity (ITRI) checking. For the past three years the ATO has used computer system generated models to identify and stop for further checking income tax returns which display certain indicators.

In 2011 the ATO stopped substantially more returns than it had capacity to process. This resulted in significant delays to taxpayers receiving their anticipated refund. The average completion time for these cases was five months, with 30% taking between six and nine months to conclude. These delays led to a large number of complaints to both the ATO and this office. Once we became aware of the situation we advised taxpayers and tax agents that the delays arising from the backlogs were known, and that it might take the ATO some time to finalise the processing of their tax return. We held regular meetings with the ATO to provide feedback and seek information based on the complaints that were coming to us, to obtain updates on the ATO's progress in addressing the backlog and to bring its attention to matters that may require priority.

The ATO states that the program resulted in it amending 75% of the returns stopped, which amounted to the protection of revenue estimated at \$200 million. We acknowledge the purpose and apparent success of the ITRI program. However, we also note the consequences for taxpayers who were affected by the delays. We provided feedback to the ATO on:

- the need for better communication where the ATO identifies an issue that will impact on taxpayers, for example, the need to notify taxpayers and tax agents of expected delays in the processing of tax returns
- unreasonable delay — lengthy delays were experienced by many taxpayers. We sought an explanation as to why it was necessary to review each of the returns stopped
- the need to provide clearer explanations and reasons in correspondence when adjustments are made to a taxpayer's return.

The ATO conducted a substantial review of its 2011 ITRI program, and has taken into account our feedback in making adjustments to the 2012 ITRI program. We anticipate that these changes will deliver a much improved program and avoid the issues we noticed in 2011.

Departure Prohibition Orders

Between March and June 2011 we received four complaints relating to the ATO's exercise of its power to issue a Departure Prohibition Order (DPO) which prohibits a person who owes a tax debt from leaving Australia. As a result of our investigations into the complaints about DPOs the ATO has improved its administrative processes for DPOs, including:

- providing reasons to taxpayers for why a DPO was issued
- providing information on rights of review and appeal in the ATO's letters to affected taxpayers
- reducing further the number of officers able to issue a DPO and introducing a requirement to seek senior executive level endorsement

- directing decision makers to consider the currency and accuracy of the information they rely on
- reviewing its use of its DPO power at least yearly, and ensuring that all staff delegated to approve and/or issue a DPO undertake refresher training
- assigning a new decision maker when a taxpayer requests a review and imposing a five day timeframe for those reviews to take place
- undertaking to revise the guidance to officers relating to the issuance of a Departure Authorisation Certificate (DAC).

While four complaints is not on its own a significant number, over the past few years the ATO has on average issued 20 DPOs per year (not all of the complaints related to a single year). Furthermore the impact of a DPO on an individual can be significant. The ATO acknowledges this fact and accepts the importance of careful administration in these circumstances.

Information about Education Tax Refund

We investigated a number of complainants from taxpayers about the Education Tax Refund (ETR). In these cases, complainants advised that they had acted upon the ATO's information about their ETR entitlement based on information in the 2009 TaxPack which stated at page 69:

“On the day you or your partner incurred the expense in respect of the child, were you eligible to receive FTB Part A [Family Tax Benefit Part A] for that child. If you are not sure whether you were eligible to receive FTB Part A for that child, contact the Family Assistance Office.”

Some taxpayers who were not in receipt of, and/or may not have claimed the Family Tax Benefit Part A (FTB Part A) payment, understood this to mean that if they determined that they were 'eligible' to receive FTB Part A if they had applied to the Family Assistance Office (FAO). They may have then elected not to apply. However, approval of their claim by the FAO was required by the legislation, but not explicitly explained in the ATO information at the time.

The ATO conducted a data matching audit in 2011 and compared FAO records of FTB Part A recipients with ATO records of those who claimed ETR in 2009. In January and February 2011 those not paid FTB Part A were asked to provide evidence of their entitlement to the ETR. At this time these taxpayers were within time to make their claims for FTB Part A. Some complainants who did not contact the FAO prior to July 2011 were then told by the FAO that they were not entitled to FTB Part A because they were out of time. Consequently they were not entitled to ETR, resulting in a debt to the ATO for the ETR they had received.

It was our concern that the ATO advice was unclear and did not provide sufficient references to adequately inform the taxpayer and avoid incorrect claims (under self-assessment). The ATO's response was that the original information was not wrong. The ATO advised that it material had informed taxpayers that they might need to check their eligibility with the FAO. They noted at the time they commenced the audit there was still opportunity for taxpayers to lodge a valid claim with FAO for FTB Part A.

The ATO advised that it suspended the audit program in April 2011 in response to tax agents' concerns that there was confusion about ETR eligibility. In response to this the ATO sought internal legal advice which confirmed that to be eligible for ETR, a taxpayer must have lodged an FTB Part A claim form and had that claim approved by the FAO. The ATO did not continue with the remainder of the audit program, with the exception of a small group.

The ATO subsequently amended the information on its website in December 2011.

...you were entitled to receive FTB Part A for the child, which means you must have lodged a claim for family tax benefit (FTB) Part A for the child and had your claim approved by the Family Assistance Office (FAO).

In response to our inquiry about whether the complainants were owed some remedy, the ATO indicated that there were limited remedies available under the law and none were warranted in the circumstances. The ATO submitted that there were no provisions in the taxation laws to allow claims for the ETR when the taxpayers had not had their claims for the FTB Part A approved by the FAO. The ATO indicated that it considered taxpayers had sufficient opportunity to make inquiries in relation to their eligibility, or to redress their situation, and that this has been set out in the correspondence issued.

The ETR was replaced in the 2012 Federal Budget with the Schoolkids Bonus, administered by the Department of Human Services.

Superannuation Excess Contributions Tax

We have continued to receive a consistent level of complaints in the past year about the ATO's decisions to not grant a Commissioner's discretion to disregard or reallocate to another financial year any excess superannuation contributions. The discretion is determined against a set of criteria that must be met to establish that 'special circumstances' apply in a taxpayer's particular case.

The impact of an ECT assessment when caused by inadvertent exceeding of the limits can be quite detrimental to a taxpayer, particularly where it is raised at their time of retirement. In complaints to our office ECT debts have ranged from \$2,000 to over \$56,000 and in many instances have occurred even under professional advice. Complainants have felt harshly penalised in these circumstances and have argued that the ATO should exercise this discretion to lessen the impact of this tax.

In our discussions the ATO emphasised that 'special circumstances' are those that are not ordinary or usual. The ATO argued that it needs to administer the provisions and that it exercises the decision with appropriate oversight and quality assurance. The ATO stated that it aims to make people aware of the limits so that they do not inadvertently exceed them, particularly those at risk, and it has recently revised its online material.

On occasion, at our request, the ATO has been willing to review cases relating to the exercise of discretion in ECT matters. We accept that the ATO's role in these cases is to administer the law and many of the complaints are perhaps often better described as concerning the policy of ECT.

Since November 2010 taxpayers have been able to seek review of these decisions through the Administrative Appeals Tribunal. Provisions were also introduced in July 2012 which enable a taxpayer with an ECT liability of up to \$10,000 from 2011-

12 onwards to seek a once-only refund without penalty (but taxed at their marginal tax rate).

Other matters

Tax File Number compromise

We are aware that the Committee has had an ongoing interest in Tax File Number (TFN) compromise cases. We can report that we have received very few complaints related to this issue. Those that we have received have not been subject to any delay by the ATO, but were nonetheless addressed promptly when we brought the matters to the ATO's attention.

Project Wickenby

We concluded an own motion investigation into certain aspects of the administration of the joint-agency taskforce, Project Wickenby. We decided not to release the report publicly. The agencies (it was not limited to the ATO) agreed with the recommendations. Our recommendations in relation to the ATO were that:

- in consultation with Australian Crime Commission (ACC), it develop guidance to officers who might become ACC members of staff or handle ACC material in the course of their duties
- review and improve its guidance on what officers should consider as factors in determining acceptable security for the granting of a Departure Authorisation Certificate.

Communication and use of plain language

We have continued to provide feedback to the ATO in relation to its letters and communication.

The 'one last chance' complaint program often picks up cases where 'better explanation' is the necessary remedy. This might include explanation of the ATO's decision, its obligations or limitations and those of the taxpayer. The ATO should use these cases to improve its communication products. We do note that it can be the case that a complainant describes their misunderstanding differently to this office than they might to the ATO. We continue to encourage the ATO's awareness of the benefits of providing as clear and straightforward information to taxpayers as possible.

In one example we provided the ATO with two of its own letters sent to taxpayers advising them of its refusal to accept a repayment plan for a debt. In both cases the letters stated only that the repayment offer was refused because it was 'not acceptable'. The letter did not offer further reasons for the refusal or to consider further repayment offers, only insisted on full payment. These letters led to complaints to our office.

The letters were found to have been issued by an area of the ATO which handled a limited number and scope of debt matters. As a result of our referral, the ATO revised its standard template letters, including providing officers with examples of reasons for refusal to be used, and developed 'payment plan refusal guidelines'.

ATO briefings

The ATO willingly facilitates and responds readily to requests from this office for background briefings and discussions on any emergent issues. It also initiates these briefings where new programs or changes in practices might result in complaints to the Ombudsman.