



Australian Government
Inspector-General of Taxation

Inquiry into the External Scrutiny of the Australian Taxation Office

**A submission to the House of Representatives
Standing Committee on Tax and Revenue**

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March 2016

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EXECUTIVE SUMMARY

The IGT welcomes the opportunity to make submission to the House of Representatives Standing Committee on Tax and Revenue (the Committee) to assist in its *Inquiry into the External Scrutiny of the Australian Taxation Office (ATO)*.

As the Committee has previously found, an examination of the Australian Government scrutiny landscape shows that the ATO is not subject to any more scrutiny than the vast majority of public sector agencies, which are generally scrutinised by Parliament and its committees, the Australian National Audit Office and the Commonwealth Ombudsman (Ombudsman). The Committee has noted that the level of scrutiny was appropriate, given the importance of the ATO's role. It is 'too big to fail' and appropriate levels of governance and independent scrutiny must be available to guard against system failures whilst also ensuring that due processes are followed and taxpayers are afforded procedural fairness.

Whilst the Inspector-General of Taxation (IGT) supports the removal of duplication, inefficiencies and unnecessary costs, any major policy change to reduce external scrutineer functions needs to be informed by a comprehensive analysis that weighs costs against the benefits and risks to arrive at the net benefit. A cursory look at the ATO's key risks, including systemic and serious system failures (such as those giving rise to the establishment of the IGT) demonstrates the need to exercise extreme care in relation to any change to external scrutineering arrangements.

In respect of the IGT, specifically, the Government's recent policy decision to transfer the Ombudsman's tax complaint handling function to the IGT has already created significant efficiencies and minimised duplication. It has provided a single-port-of-call for investigating and reviewing taxation and superannuation administrative matters. The IGT is now essentially performing the functions of a tax specialist ombudsman in respect of the ATO and the Tax Practitioners Board, streamlining the number of agencies with oversight of the ATO on tax administration matters. The specialist nature of the IGT office has, for example, resulted in over 35 per cent of complaints being resolved without needing ATO intervention and, when the ATO's input is required, the majority of the remaining matters have been resolved with 15 business days.

The Government's decision has also consolidated the complementary functions of complaints handling and broader reviews. These two aspects of the IGT's core work go hand-in-hand. The former provides real-time insight into emerging issues which, together with the latter, enables the IGT to move quickly to address problems before they escalate into major causes of taxpayer discontent or serious system failures. Moving forward, the IGT may undertake more targeted reviews in an expedited manner to address particular areas where significant complaints have been received.

The IGT believes that there are opportunities for the ATO to further manage its interactions with external scrutineers, including the IGT, to realise greater efficiencies and cost reductions. Such opportunities include improved engagement and collaboration based on full, frank and expeditious information sharing.

1. INTRODUCTION

1.1 The Inspector-General of Taxation (IGT) welcomes the opportunity to make a submission to the Standing Committee on Tax and Revenue's (the Committee) *Inquiry into the External Scrutiny of the Australian Taxation Office* (Inquiry). As the IGT's core function is aimed at delivering improvements to the administration of the tax system, we believe that the Committee's Inquiry presents a valuable opportunity to assess those aspects of the system that are working well and areas which can be improved.

1.2 In making this submission, the IGT would like to thank the Committee, Parliament more generally, the Government and its agencies, the broad range of taxpayers, the tax profession and their collective representative bodies for their assistance in our common goal of achieving an effective, fair and efficient administration of the tax and superannuation system. The IGT has a proud history of consulting extensively with stakeholders in undertaking reviews to advise the Australian Taxation Office (ATO) and Government on solutions for improvement. In the past this was primarily achieved by calling for submissions to his work program. The range of concerns raised by these stakeholder groups was always considerable and my office sought to apply its limited resources to those areas the reviews of which were likely to deliver the greatest overall benefit for all Australians.

1.3 The IGT role has been expanded by the recent Government policy decision to transfer the complaint handling function from the Commonwealth Ombudsman to the IGT. A single port-of-call for investigating and reviewing taxation and superannuation administrative matters has therefore been created. Effectively this means that the IGT now fulfils the Ombudsman function in relation to these matters. It acts as a dedicated specialist ombudsman providing a complaints handling service as well as conducting broader reviews. The former provides real-time insight into emerging issues and together with the review function enables the IGT to move quickly to address problems before they escalate into major causes of taxpayer discontent or system failures. Therefore, moving forward the IGT may undertake more targeted reviews in an expedited manner to address particular areas where significant complaints have been received.

1.4 The Inquiry's specific terms of reference, are:

- removing inefficiency and duplication;
- reducing cost to Government; and
- the 'earned autonomy principle' set out in Stage 2 of the Public Management Reform Agenda.¹

¹ House of Representatives Standing Committee on Tax and Revenue, *Inquiry into the External Scrutiny of the Australian Taxation Office Terms of Reference* (3 February 2016) <www.aph.gov.au>.

1.5 In order to faithfully address the above three terms of reference it is important that they be considered in the appropriate context.

1.6 Part 2 provides an overview of the Australian Government's scrutineering arrangements. It is a strong and well established foundation structure that applies across Government and its agencies. Accordingly any proposed policy changes in this area need to be considered very carefully as they have much wider ramifications.

1.7 The benefits of scrutineering both as part of the broader Government system and specifically in relation to the tax system and by extension taxpayers and the ATO are also outlined. This is to facilitate a fulsome understanding of the 'net benefits' through a more critical and appropriate analysis of all the 'costs', 'risks' and benefits.

1.8 A comparative analysis of the ATO with other Government agencies then follows together with a comparative analysis of relevant overseas jurisdictions.

1.9 Part 3 outlines the specialist role of the IGT together with the significant improvements and benefits which the work of his office has delivered.

1.10 Given the interrelationship between reducing costs and removing inefficiencies and duplications, Part 4 addresses these two terms of reference together.

1.11 Part 5 considers the final term of reference regarding 'earned autonomy'.

2. AUSTRALIAN GOVERNMENT SCRUTINY ARRANGEMENT— AN OVERVIEW

2.1 Australia's democratic system of Government is predicated on the principles and traditions of the Westminster System, in which the Government is responsible to Parliament, and robust checks and balances exist on the actions of Government and its agents (the Government's administration), including those dealing with tax policy and tax administration matters.

2.2 At its highest levels, the two houses of Parliament, whose members are elected and representative of the Australian people, hold the Government to account. The Senate (sometimes referred to as a house of review) also acts as an 'effective check' on the Government's administration by performing a function:

...to probe and check the administration of the laws, to keep itself and the public informed, and to insist on ministerial accountability for the government's administration.²

2.3 The make-up and representation of the Senate, as it differs from the House of Representatives (the House) is important in this regard:

The proportional representation system of voting used to elect senators makes it easier for independents and the candidates of the smaller parties to be elected. In recent decades this has meant that the government party usually does not have a majority of votes in the Senate and the non-government senators are able to use their combined voting power to reject or amend government legislation. The Senate's large and active committee system also enables senators to inquire into policy issues in depth and to scrutinise the way laws and policies are administered by ministers and public servants.³

2.4 In both the House and in the Senate, the Opposition has a recognised and fundamental role in holding the Government to account on its actions and providing a counterbalancing view on issues of contention. It has been noted in Australia that:

The Opposition is considered to be essential for the proper working of Australia's democratic system of government and it is an essential component of the structure of the House.

and

The House depends on an effective Opposition to carry out its functions in respect of government accountability. Government members can usually be expected to support the Government with their votes and may not be inclined (at least in public) to be too

² Odgers' *Australian Senate Practice*, Thirteenth Edition, Chapter 1, <www.aph.gov.au>.

³ Parliament of Australia, 'About the Senate' <www.aph.gov.au>.

critical of the Government's actions or legislation. Opposition Members can be expected to criticise and to offer alternative views. The rules and procedures of the House enable the Opposition to perform this role.⁴

2.5 At all levels of government in Australia, independent voices are heard, debated and considered to ensure that decisions made are in the best interests of the Australian community. The investment of time and monies in these integrity structures and functions ensure that power is exercised appropriately and only in the best interests of the Australian people.

2.6 The same principles of integrity are applicable to all agencies and departments of Government to assure the Australian public that government revenue, funded by taxpayers, is used appropriately and services delivered are in accordance with Government policy and general community expectations. In the words of Woodrow Wilson, President of the United States, 1913-21, whose views were considered important in developing Australia's Constitution:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinise these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.⁵

2.7 To assist Parliament and the Australian public, every federal government agency regardless of its size and resources is subject to oversight by the Australian National Audit Office (ANAO), the Office of the Australian Information Commissioner (OAIC) and the Commonwealth Ombudsman (Ombudsman) or a specialist body performing ombudsman functions.

2.8 The role of the ANAO:

...is to provide the Parliament with an independent assessment of selected areas of public administration, and assurance about public sector financial reporting, administration, and accountability. [It does] this primarily by conducting performance audits, financial statement audits, and assurance reviews.⁶

2.9 The OAIC develops and issues whole-of-government information policy, as well as administering the review, complaint and oversight functions conferred by the *Freedom of Information Act 1982* and *Privacy Act 1988*.⁷

⁴ Parliament of Australia, *Infosheet 19: The House, Government and Opposition* <www.aph.gov.au>, pp 1-2.

⁵ Congressional Government, 1885, reprinted Meridian Books, 1956, p. 193 as quoted in above n 2.

⁶ Australian National Audit Office, 'About Us' <<http://www.anao.gov.au/About-Us>>.

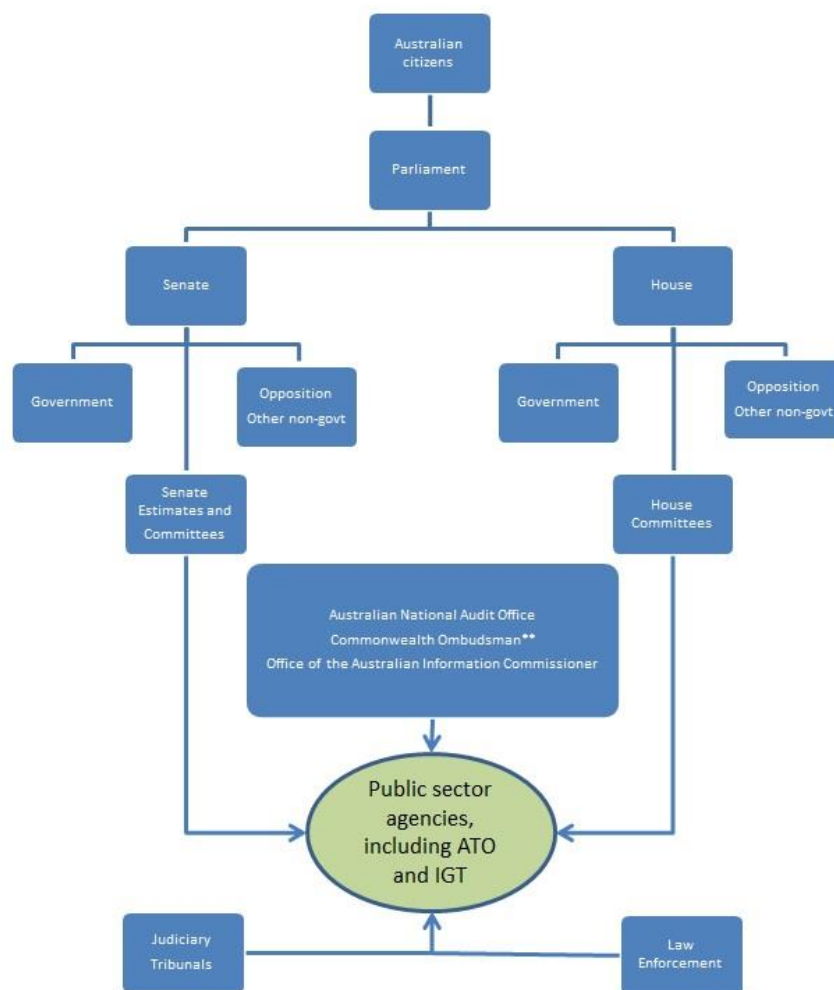
⁷ Office of the Australian Information Commissioner, 'About the OAIC' <<https://www.oaic.gov.au/about-us/>>.

2.10 The role of the Ombudsman is to:

...consider and investigate complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department/agency or *prescribed* private sector organisation, including Australia Post, Centrelink, Child Support (DHS), and Department of Immigration and Border Protection.⁸

2.11 A diagrammatic representation is provided below.

Figure 1: Governance arrangements for all public sector agencies



Note: As public service agencies, the ANAO, OAIC and the Commonwealth Ombudsman are accountable to, and scrutinised by Parliament and its committees as well as by each other. ** A small number of agencies have specialist scrutineers who effectively perform the Ombudsman's function in respect of that agency only. The IGT is one such scrutineer and essentially performs the Ombudsman's role as a specialist in respect of the ATO and the Tax Practitioners Board.

2.12 Each of the above oversight functions are applicable to the broad range of public sector agencies including the ATO.

⁸ Commonwealth Ombudsman, 'What we do' < <http://www.ombudsman.gov.au/about/what-we-do>>.

2.13 The ATO itself is in a unique position of being, by necessity, a monopoly service provider whose services permeate the fabric of Australian society. For example, the ATO is responsible for collecting approximately 80 per cent of total Government revenue across all levels⁹ which comprises \$340 billion in net revenue for the Federal Government and on behalf of the states.¹⁰ In addition to managing and collecting revenue, the ATO is also responsible for maintaining oversight of 880,000 employers, 780,000 trusts, 557,000 self-managed superannuation funds and working with 55,000 tax and business activity statement agents.

2.14 The ATO administers the tax affairs of some 12.8 million individual taxpayers and 2.9 million businesses,¹¹ whose valuable financial information is also used by other Government bodies to determine eligibility to social support services, such as pensions and child support.

2.15 The data made publicly available by the ATO is also relied upon by commerce and seen as a trusted source. For example, the Australian Business Register (ABR) is amongst the top ten most used Australian Government websites as it is the only public source of accurate and reliable information on Australian Business Numbers. The ABR was accessed some 517 million times in 2014-15.¹²

2.16 Moreover, the ATO administers a significant portion of the superannuation system, which impacts the Australian community's retirement savings, as well as administering excise systems, managing numerous grant schemes, collecting debt in relation to the Higher Education Loan Program and maintaining the Agricultural Land Register, to name a few.

2.17 In performing its variety of critical roles, the ATO holds one of the largest repositories of sometimes highly commercially sensitive information and data on businesses and individuals operating in Australia and elsewhere around the world. In 2014-15, the ATO reported receiving data on some 650 million transactions for data matching purposes.¹³ In this respect, it is receiving and managing such data from a range of sources including state-based public sector agencies, share registries, land titles offices and credit card companies. In addition, the ATO has also begun a program to collect and make use of biometric data for verification purposes, reporting having collected 750,000 voiceprints in 2014-15.¹⁴

2.18 As one of the largest public service agencies with an operating budget of \$3.45 billion¹⁵ and over 20,000 employees,¹⁶ the ATO is also undertaking a "digital transformation", by moving away from paper-based interactions towards electronic interactions.

⁹ Australian Bureau of Statistics, 'Taxation Revenue Key Figures' (21 December 2015) <<http://www.abs.gov.au>>.

¹⁰ Commissioner of Taxation, *Annual Report 2014-15* (2015) p 21.

¹¹ *Ibid*, p 8.

¹² *Ibid*, p 21.

¹³ *Ibid*, p 45.

¹⁴ *Ibid*, p 10.

¹⁵ *Ibid*, p iv.

¹⁶ *Ibid*, p 85.

2.19 In the discharge of its duties, the primary one being the compulsory exaction of monies from taxpayers, the ATO is afforded significant powers including coercive information gathering and interrogation,¹⁷ restricting movements of individuals¹⁸ and garnishee notices,¹⁹ many of which are exercised without judicial oversight. In addition, it should be noted that operations of the ATO are directed by the Commissioner and three Second Commissioners all of whom are appointed for a fixed tenure of seven years, which falls outside of the election cycle.²⁰

2.20 Moreover, through the system of responsible government, the Commissioners are responsible to the Parliament through the relevant Minister, the Assistant Treasurer. Unlike other departmental arrangements, however, Ministers are precluded from testing the basis for the Commissioners' positions where strict secrecy provisions prevent taxpayer related information from being disclosed. Prior to 2003, the independent verification of such positions encountered significant difficulties due to this secrecy veil.²¹

2.21 Given the magnitude of the ATO's operations and the important role it plays in Australia, it is clear that there is a significant risk that must be appropriately managed through robust governance arrangements, including independent and effective external scrutineering functions. Such arrangements are critical to the health of the Australian tax system, and indeed the Australian community generally, as a means of guarding against large-scale systemic failure that could have long-lasting effects.

2.1 BENEFITS OF INDEPENDENT EXTERNAL SCRUTINY – TAX ISSUES

2.22 Australia's tax system is centred on the principles of self-assessment and voluntary compliance. It is not practical for the ATO to return to a system of full assessment, nor is it feasible having regard to the costs and resources that would be involved. As will be discussed below, the system depends on Australians having confidence that the system is operating with the highest levels of integrity and fairness. Within this system, independent scrutineering should be viewed as an investment to guard against large-scale systemic failures and irreparable loss of confidence in the system.

2.23 The functions of the external scrutineers, generally, deliver a range of different benefits for the Government, the Australian community and for the ATO itself. These benefits include:

¹⁷ *Taxation Administration Act 1953*, sch 1, div 353.

¹⁸ *Taxation Administration Act 1953*, Part IVA.

¹⁹ *Taxation Administration Act 1953*, sch 1, div 260.

²⁰ *Taxation Administration Act 1953*, ss 4-5.

²¹ See for example: Senate Standing Committee on Economics, *Operation of the Australian Taxation Office* (March 2000); Senate Standing Committee on Economics, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection* (February 2002).

- (a) ensuring that the tax system is operating effectively and equitably, redressing the asymmetric power imbalance between the ATO and taxpayers;
- (b) building community confidence in the ATO as a fair administrator and enhancing voluntary compliance;
- (c) advising the Parliament and Government more generally;
- (d) providing benefits and savings for the ATO; and
- (e) reducing unnecessary compliance costs for taxpayers and the broader economy.

2.1.1 Ensuring the tax system operates effectively and equitably, and redressing asymmetric power imbalances

2.24 By necessity, the ATO possesses significant resources and powers in administering the tax laws and other legislation under its purview. Such resources and power significantly outweigh those of taxpayers²² such that challenging the ATO or questioning its actions may prove daunting, difficult or impossible particularly for small business and individual taxpayers. Independent external scrutineers seek to ensure that procedural fairness is afforded in all disputes between taxpayers and the ATO and that appropriate outcomes are achieved.

2.25 In some cases, a taxpayer who may not often interact with the ATO, may find that navigating and reaching the right areas to discuss issues of concern may be a task in itself. In such cases, the scrutineer involvement may only need to extend as far as assisting taxpayers and tax practitioners to better engage with the most appropriate ATO officers to cast a fresh set of eyes on the matter. In other cases, through more in-depth understanding and experience of the processes of the ATO, their procedures, the relevant laws and the facts of the dispute at hand, external scrutineers may act as a circuit-breaker to facilitate or mediate the discussions of competing views on the issue and identify possible solutions.

2.26 Furthermore, where there are a number of different issues requiring input from multiple public sector agencies, experienced scrutineers with a clear understanding of the workings of the public sector are able to refer taxpayers and practitioners to the agencies best placed to assist with their matter.

2.27 In dealing with specific complaints or in consultation with taxpayers, tax professionals or their representative bodies, external scrutineers may also identify broader issues which require broad-based reviews. External scrutineers undertake such reviews to identify the root cause of the issues giving rise to community concerns and, through discussions with community stakeholders as well as the ATO, make recommendations which seek to minimise the risk of it recurring.

²² Binh Tran-Nam and Michael Walpole, 'Access to tax justice: How costs influence dispute resolution choices' (2012) 22 JJA 3, p 4.

2.1.2 Self-assessment, confidence in the system and voluntary compliance

2.28 Australia's move to a self-assessment tax system abandoned administrative assessment procedures on efficiency grounds, in favour of a more targeted approach which verifies information contained in tax returns.²³ However, without taxpayers' voluntary compliance with obligations, these efficiency gains would not be realised. Such voluntary compliance is not without cost. It is dependent on strong trust and security and independent external scrutiny is an investment towards these outcomes. As the IGT has previously said:

Independence engenders trust in dealings. Independence liberates my office from unavoidable organisational or stakeholder behavioural bias or inertia that may otherwise arise. Independence also provides for candour in communication and rigor in the consideration of issues.²⁴

2.29 There has also been significant research on the interaction between voluntary compliance, confidence and perceptions of fairness and reasonableness in the tax system. Specifically, the research finds that:

Whereas enforced compliance depends on (perceived) power of authorities to prosecute tax evaders, voluntary compliance is based on a trustful relationship towards authorities.²⁵

2.30 In a self-assessment tax system, taxpayers' perception of fairness and reasonableness has a direct impact on the trust and confidence they have in the administrator and the system itself. Where taxpayers perceive the system to be unfair or unreasonable, taxpayers are less willing to comply with their obligations.²⁶ Fairness, in this regard, is often described by principles of justice and when these principles are believed to operate ineffectively, they undermine confidence in the system or the organisation.²⁷

2.31 The ATO is also conscious of the need to ensure that public perceptions of it as a fair administrator are robust as a means of encouraging voluntary compliance. For example, recent news media reports suggest that in 2014-15, the ATO expended significant sums of money to assess and improve its public perception in the eyes of the Australian community.²⁸

2.32 Notwithstanding the ATO's efforts to deliver a fair and transparent service, given the large scale of its operations and the complexity of the system, some mistakes

²³ Errn Chen Loo, Margaret McKerchar & Ann Hansford, 'An International Comparative Analysis of Self Assessment: What Lessons Are There for Tax Administrators' (2005) *Australian Tax Forum* 669, at 671.

²⁴ Inspector-General of Taxation (IGT), *Annual Report 2009-10* (2010) p 10.

²⁵ Stephan Muehlbacher and Erich Kirchler, 'Tax Compliance by Trust and Power of Authorities' (2010) 24(4) *International Economic Journal* 607-610.

²⁶ Grant Richardson, 'An Exploratory Cross-Cultural Study of Tax Fairness Perceptions and Tax Compliance Behavior in Australia and Hong Kong' (2005) 31(1) *The International Tax Journal* 11-24.

²⁷ Michelle Maiese, 'Principles of Justice and Fairness' (2013) <www.beyondintractability.org>.

²⁸ Nassim Khadem, 'ATO's research, media \$8m bill', *Sydney Morning Herald* (16 February 2016) p 8.

and disputes are inevitable.²⁹ The existence of independent external scrutineers, such as the IGT, provides comfort and confidence for taxpayers and practitioners that where such mistakes or disputes cannot be addressed directly with the ATO, the matter can be escalated to an external agency for an objective investigation of the issues.

2.1.3 Advising Parliament and Government

2.33 The ultimate owners of the tax system are the Australian public and the ATO is accountable to Parliament as representatives of the Australian people. However, Parliament is often engaged in a number of different functions including setting laws and public policy and is therefore not able to devote all of its time and resources to monitor and oversee the ATO.

2.34 Given the complexity of the tax system,³⁰ specialist tax scrutineers provide vital support to Parliament in its oversight of the ATO. Through their more detailed investigation of the ATO and real-time assistance to taxpayers, they provide valuable insight to Members of Parliament who may not be subject matter experts. Such insight may be with respect to particular ATO operations, areas of concern and opportunities for improvement. This critical role of scrutineers has been recognised by the Joint Committee of Public Accounts and Audit (JCPAA):

The committee intends to use the published work of the external review bodies, their in-depth knowledge of the workings of the ATO and their collected experiences of dealing with ordinary tax payers to help the committee raise relevant issues and assess the performance of the ATO.³¹

2.35 The ongoing involvement of the external scrutineers in the work of the Committee is also a testament to their work in assisting the Committee in its considerations of the ATO's performance and service delivery.³²

2.1.4 Benefits and savings for the ATO

2.36 The work of external scrutineers can also assist the ATO to realise significant cost savings.

2.37 Through the review and investigation processes undertaken by external scrutineers, inquiries may be made about systems and processes which, without a third

²⁹ Australian Taxation Office (ATO), 'ATO response to tax enquiry report' (26 March 2015) <<https://www.ato.gov.au>>; ATO, 'GST Voluntary Compliance Program – Research Phase 5' (2015) <<https://www.ato.gov.au>>.

³⁰ Evidence to House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, 24 February 2016, p 5 (Chris Jordan, Commissioner of Taxation); Commissioner of Taxation, 'Reinventing the ATO – building trust in Australia's tax administration' Speech at the ATAX 11th International Tax Administration Conference (14 April 2014); Commissioner of Taxation, 'Reinventing the ATO' Speech to the Tax Institute's 30th national convention (19 March 2015).

³¹ Joint Committee of Public Accounts and Audit (JCPAA), 'When too much scrutiny is never enough' (Media Alert, 22 September 2011).

³² See for example: Evidence to House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, 18 March 2015; Evidence to House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, 16 September 2015; Evidence to House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, 24 February 2016.

party perspective, may continue to progress with blind spots that an agency itself may be unable to detect. The identification of these areas, ongoing discussions and information sharing between the ATO and its scrutineers as well as the resulting recommendations assist the ATO to bring about improvements which may not have otherwise been realised.

2.38 In some cases, such improvements require legislative change and external scrutineers assist the ATO to highlight to Government legislative concerns that give rise to administrative costs. Addressing these issues at their root cause brings about significant benefits and cost savings.

2.1.5 Reducing unnecessary compliance costs for taxpayers

2.39 The administration of the tax and superannuation system imposes costs upon taxpayers and other stakeholders in the pursuit of their activities – be they profit or not-for-profit entities or even retirees. A certain level of compliance costs are expected to be borne by citizens.

2.40 However, when these costs are disproportionate or unnecessary, as the IGT has pointed out in a number of his reviews, they are a ‘burden that imposes a dead weight cost on taxpayers and the economy’.³³ Where costs of this nature arise there are potential implications for the self-assessment system itself given the heavy reliance upon voluntary compliance.

2.2 EXTERNAL SCRUTINY OF THE ATO

2.41 The Commissioner has previously argued that the ATO is subject to an extensive, and possibly unnecessary, level of scrutineering.³⁴ To support these contentions the Commissioner provided, in a supplementary submission to the Committee’s Inquiry into the Commissioner’s 2013-14 Annual Report, a diagrammatic representation of the external ATO governance arrangements existing at the time.³⁵ The diagram identified the following such arrangements:

- Annual Report
- Australian National Audit Office
- Commonwealth Ombudsman
- Consultation arrangements

³³ Inspector-General of Taxation (IGT), *Review into aspects of the Australian Taxation Office’s use of compliance risk assessment tools* (2014) p 81; IGT, *Report into the Australian Taxation Office’s large business risk review and audit policies, procedures and practices* (2011) p 31.

³⁴ Commissioner of Taxation, ‘Deregulation – balancing our service delivery and regulatory roles in a real time environment’ Speech delivered to Council of Small Business of Australia 12th National Small Business Summit 2014 (8 August 2014) <www.ato.gov.au>.

³⁵ House of Representatives Standing Committee on Tax and Revenue, *2013 Annual Report of the Australian Taxation Office First Report* (March 2014) p 42.

- House of Representatives Standing Committee on Tax and Revenue
- Inspector-General of Taxation
- Integrity Adviser
- Joint Committee of Public Accounts and Audit
- Office of the Australian Information Commissioner
- Senate Estimates

2.42 The diagram fails to properly contextualise the Australian Government system of scrutiny across all agencies as outlined above. Importantly, the key point to note is one that the Committee has well made recently. Simply put, the Commissioner is subject to the same scrutiny arrangements as other agencies. The Commissioner's diagram is now specifically addressed to explain why this is the case.

2.43 Firstly, the annual reporting requirements and oversight by the ANAO, Ombudsman, OAIC, the Committee, JCPAA and Senate Estimates are those which apply to the vast majority of public sector agencies and departments. Even small Commonwealth agencies may be subject to the full gamut of such scrutiny.

2.44 Secondly, the Commissioner has included two self-originated arrangements that are completely under his control. The first such arrangement is the Commissioner's own consultation arrangements. This is curious as they are not scrutineering functions. Their overarching purpose is to assist the ATO develop its products, particularly its guidance material, by garnering feedback from key stakeholders before they are issued in final form. It is also noteworthy that in recent years, the ATO has significantly rationalised its consultation arrangement from sixty-eight forums to eight,³⁶ with a number of additional specialist forums being established as needed.³⁷ As these arrangements are not legislatively mandated, they are entirely within the control of the ATO and may be changed or reduced. Members of these forums have no power to request information or direct any action or outcome.

2.45 The other self-originated arrangement is the ATO's own Integrity Adviser. The role was created by the Commissioner to provide him with advice on the ATO's ethical and legal obligations in respect of fraud prevention and control, its integrity framework and certificate of assurance processes.³⁸ As with the consultation arrangements, there is no legislative requirement for the ATO to appoint an Integrity Adviser and, if so appointed, the responsibilities and accountability of such a role are set and maintained contractually by the ATO and not independent. In any event, the

³⁶ Evidence to the Joint Committee on Public Accounts and Audit, Parliament of Australia, 26 June 2013, p 2 (Chris Jordan, Commissioner of Taxation)

³⁷ ATO, 'Consultation Groups' <<https://www.ato.gov.au>>.

³⁸ Commissioner of Taxation, *Annual Report 2010-11* (2011) p 20, Commissioner of Taxation, *Annual Report 2011-12* (2012) p 118, Commissioner of Taxation, *Annual Report 2012-13* (2013) p 79, Commissioner of Taxation, *Annual Report 2013-14* (2014) p 94.

role seems to no longer exist as no mention of it has been made in the ATO's most recent annual report³⁹ or anywhere on its website.

2.46 Thirdly, the transfer of the Commonwealth Ombudsman's tax complaints handling function into the IGT office (discussed in more detail in Part 3 of this submission) has effectively removed the Ombudsman as an oversight body of the ATO on tax matters.⁴⁰ With this consolidation, the ATO, as well as taxpayers, now have only one agency dealing with taxpayer complaints and systemic tax administration issues. Moreover, the transfer of the complaints handling function is providing real-time insight into emerging issues and an opportunity to address problems before they escalate into major causes of taxpayer discontent. This could mean that in future, the IGT may undertake shorter and more targeted reviews in an expedited manner to address particular areas where significant complaints have been received.

2.47 Fourthly, the Commissioner's diagram has characterised the formation of this Committee as an increase in scrutiny to the historical arrangements by also including the JCPAA.⁴¹ However, the JCPAA has not required the ATO to attend any meetings or issued any reports in relation to the operation of the ATO since this Committee's formation. It is also important to appreciate that Parliament is sovereign as the ultimate governing body in Australia, and accordingly, whatever scrutiny arrangement it believes to be appropriate at any given time must be respected.

2.48 More generally, although the Commissioner has adversely commented on the high level of scrutiny, he has at the same time accepted the wisdom in ensuring key issues are scrutinised by experienced specialists. For example, he has recently appointed a former Federal Court judge to provide assurance on the appropriateness of settlements entered into by the ATO and to provide advice on the design of a new settlement process.

2.49 Finally, it is important to appreciate that whilst there are a number of bodies that have a role in overseeing the ATO, no scrutineer, including the Parliamentary committees and Senate Estimates, can compel the Commissioner or the ATO to undertake any action or implement any changes to which they disagree.⁴² Only the judiciary can compel a different action or decision by the Commissioner and this only occurs where it is found that a decision or action was not in accordance with the law. This is important as it necessarily preserves the statutory independence of the Commissioner over the administration of the tax laws and of the ATO.⁴³

2.50 Importantly, the Commissioner or the ATO accepts the vast majority of recommendations made by the Government's independent scrutineers. The IGT

³⁹ Above n 10.

⁴⁰ The Commonwealth Ombudsman's roles in relation to the ATO are now to consider complaints about the ATO's handling of freedom of information applications and to oversee the ATO's implementation of the Commonwealth Public Information Disclosure Scheme.

⁴¹ Commissioner of Taxation, 'Reinventing the ATO - building trust in Australia's tax administration' Speech to the ATAX 11th International Tax Administration Conference (14 April 2014).

⁴² JCPAA, *Report 426 Ninth Biannual Hearing with the Commissioner of Taxation* (2011) p 29.

⁴³ Michael Bersten, 'Independence and Accountability of the Commissioner of Taxation' (2002) 12 Revenue LJ 5-39.

appreciates that there can be professional differences of opinion that can arise in relation to recommendations, therefore where the ATO expresses disagreement, their reasons and explanations,⁴⁴ are made public in reports provided to the Government to enhance transparency of the review process. Even in those limited cases where the ATO has initially disagreed with a recommendation, these have in a number of cases been adopted and implemented by the ATO⁴⁵ or other bodies⁴⁶ at a later time.

2.51 The ATO's actions, in this respect, tend to reflect the high value that the ATO places on external scrutineers' insights into the system and improvements that could be made by acting on such insights.

2.3 INTERNATIONAL COMPARISON

2.52 The features of the Australian external scrutineering tax landscape are not unique. Recent information published by the Organisation for Economic Cooperation and Development (OECD) indicates that all countries surveyed had either an independent and dedicated body to handle tax administration-related complaints or dealt with these complaints through ombudsmen offices.⁴⁷

2.53 When compared with key partner jurisdictions, such as the United States (US) and United Kingdom (UK), it is clear that Australia's external scrutineering arrangements are on par with those that have been implemented in those jurisdictions. Specifically, it is noted that the US's Internal Revenue Service (IRS) is subject to scrutiny and review by the Taxpayer Advocate Service⁴⁸ (which operates similarly to the IGT), the Taxpayer Advocacy Panel,⁴⁹ the Treasury Inspector General for Tax Administration⁵⁰ and a number of Congressional sub-committees.⁵¹

2.54 Similarly, the UK Her Majesty's Revenue and Customs (HMRC) is overseen by the Adjudicator's Office,⁵² the Parliamentary and Health Service Ombudsman⁵³ and Parliamentary committees of the House of Lords and House of Commons.⁵⁴

⁴⁴ *Inspector-General of Taxation Act 2003*, s 15; *Ombudsman Act 1976*, sub-s 8(5); *Auditor-General Act 1997*, s 19.

⁴⁵ IGT, *The Management of Tax Disputes* (2015) pp 118-119.

⁴⁶ See for example: *Australia's future tax system: Report to the Treasurer* (the Henry Report) recommendation 114; JCPAA, *Report 410 Tax Administration* (2008) recommendation 9.

⁴⁷ Organisation for Economic Cooperation and Development (OECD), *Tax Administration: Comparative Series 2015* (2015) p 48.

⁴⁸ Taxpayer Advocate Service <<https://www.irs.gov/Advocate>>.

⁴⁹ Taxpayer Advocacy Panel <<http://www.improveirs.org/>>.

⁵⁰ Treasury Inspector General for Tax Administration <<https://www.treasury.gov/tigta/>>.

⁵¹ United States Senate Committee on Finance

<<http://www.finance.senate.gov/about/subcommittees#taxation>>; United States House of Representatives, Committee on Ways and Means <<http://waysandmeans.house.gov/subcommittee/oversight/>>.

⁵² Adjudicator's Office <<http://www.adjudicatorsoffice.gov.uk/>>.

⁵³ Parliamentary and Health Service Ombudsman <<http://www.ombudsman.org.uk/>>.

⁵⁴ United Kingdom Parliament, Lords Select Committee, Economic Affairs Committee <<http://www.parliament.uk/business/committees/committees-a-z/lords-select/economic-affairs-committee/>>; United Kingdom Parliament, Commons Select Committee, Finance Committee <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/finance-committee/>>.

2.55 In addition to the above, the IRS and HMRC are subject to audits and reviews by the Government Accountability Office⁵⁵ and the National Audit Office,⁵⁶ respectively. These offices have roles similar to that of the ANAO.

2.56 Furthermore, a number of key OECD jurisdictions also have oversight or advisory boards as an additional form of governance for the revenue authority. Such jurisdictions include the US,⁵⁷ the UK⁵⁸ and Canada.⁵⁹ The IGT had previously recommended the establishment of a management board for the ATO as one option to improve its governance.⁶⁰

2.57 It is interesting to note that notwithstanding the oversight of HMRC in the UK, the House of Lords in a 2013 report recommended further Parliamentary oversight of the organisation to ensure that it was taking appropriate action in relation to corporate tax avoidance.⁶¹

2.58 Having regard to the above, it is clear that, in Australia, the scrutineering arrangements with respect to the ATO are comparable to those of revenue agencies in most OECD countries. However, when compared to some OECD jurisdictions, tax scrutineers in those jurisdictions have additional powers which include compelling or directing the revenue agency to take a particular action or granting relief to taxpayers.⁶²

2.59 Similarly, some non-OECD jurisdictions, such as Mexico, also have additional powers. For example, the *Procuraduría de la Defensa del Contribuyente* (PRODECON) which is Mexico's equivalent taxpayers' ombudsman is able to act on behalf of taxpayers in certain cases and as a public defender of taxpayers' rights in ordinary and constitutional court actions.⁶³ More recent legislative amendments have also empowered the PRODECON to facilitate, monitor and mediate the 'Conclusive Agreements' process, which if activated, halts the action of the revenue authority and seeks to deliver a binding settlement which cannot be judicially challenged.⁶⁴

2.4 PRIOR COMMENTS ON THE EXTERNAL SCRUTINY OF THE ATO

2.60 The level of scrutiny of the ATO has previously been the subject of some public comment including reports of parliamentary committees and by the former and current Commissioners.

⁵⁵ United States Government Accountability Office <<http://www.gao.gov>>.

⁵⁶ National Audit Office <<https://www.nao.org.uk/>>.

⁵⁷ The Internal Revenue Service (IRS) Board which was established by the *IRS Restructuring and Reform Act of 1998* <<https://www.treasury.gov/irsob/Pages/default.aspx>>.

⁵⁸ Her Majesty's Revenue and Customs Board <<https://www.gov.uk/government/organisations/hm-revenue-customs/groups/hmrc-board>>.

⁵⁹ Canada Revenue Agency, Board of Management <<http://www.cra-arc.gc.ca/board/>>.

⁶⁰ IGT, *Tax Forum – next steps for Australia* (September 2011) pp 14-15.

⁶¹ House of Lords Economic Affairs Committee, *Tackling corporate tax avoidance in a global economy: is a new approach needed?* (2013) <<http://www.publications.parliament.uk/>>.

⁶² Internal Revenue Service, *Internal Revenue Manual*, section 13.2.1.6 <https://www.irs.gov/irm/part13/irm_13-002-001.html>.

⁶³ Paper presented by Diana Bernal Ladrón de Guevara, Procuradora de la Defensa del Contribuyente (Mexico), at the International Conference on Taxpayer Rights, Washington, D.C., November, 2015, p 4.

⁶⁴ Above n 63, p 13.

2.61 In November 2011, the JCPAA noted:

The Committee feels that the level of scrutiny of the ATO provided by the Auditor-General, the Inspector-General of Taxation, and the Ombudsman is of high quality and should provide the public with confidence in the robustness of their tax system.⁶⁵

2.62 In 2012, the ATO also acknowledged the value in collaborating with its external scrutineers. Specifically, the former Commissioner noted:

An important part of sustaining community and government confidence in our administration of the tax and superannuation systems is that we have professional and cooperative relationships with our scrutineers and with representatives of a broad spectrum of the community stakeholders whom we serve. We listen constructively to the issues they raise and the suggestions they make to improve the administration and effective operation of Australia's tax and superannuation systems.

and

... I would also like to acknowledge the contribution made by this committee and our scrutineers to good tax and super administration.⁶⁶

2.63 In July 2013, the Australian Public Service Commission (APSC), in its Capability Review of the ATO, noted that the ATO 'is in the fortunate position of receiving extensive external scrutiny.'⁶⁷

2.64 In February 2014, the Commissioner also raised the issue with the Committee in written submission and at a public hearing on the 2013 Annual Report of the ATO.

While you are in front of us, I just want to make a comment—perhaps to temper enthusiasm for more reports! You can see the document that we provided, but we are in an environment of reducing resources. We had 14 scrutineer reports last year: there were the six from the inspector-general, double-sided printing, and two of which are not yet released. But there are six reports there. There are seven Australian National Audit Office reports on performance audits and those sort of things—I do not know how big they would be. There is the one 'own motion' from the ombudsman—and I am pleased to hear that it is all agencies now, it is not just us, which I had not appreciated until you made that! So we have to balance the resources and issues here. I know that it is an important role of oversight for us, and I am not in any way saying that we should not have that. But maybe we could just balance it some time? As I said, that is just the inspector-general reports over the last 12 months: 14 reports in total.⁶⁸

⁶⁵ Above n 42 p 32.

⁶⁶ Evidence to the Joint Committee of Public Accounts and Audit, Parliament of Australia, 14 September 2012 pp 1 and 3 (Michael D'Ascenzo, Commissioner of Taxation).

⁶⁷ Australian Public Service Commission, *Capability Review Australian Taxation Office* (July 2013) p 13.

⁶⁸ Evidence to the House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, 28 February 2014, p 32 (Chris Jordan, Commissioner of Taxation).

2.65 In response to submissions and comments made by the Commissioner, the Committee itself remarked in March 2014:

At the hearing, the ATO commented that it is scrutinised extensively. The Committee would note, however, that much of this scrutiny is similar to other agencies. For example, almost all agencies are subject to the Auditor-General and the Ombudsman and appear before Senate Estimates. The fact that these agencies often focus more on the ATO reflects the importance of the ATO's role.

The main difference between most agencies and the ATO is that it has its own Inspector-General. In this respect, it is similar to the intelligence and security agencies, and defence agencies, which also have an Inspector-General. Once again, this reflects their importance.⁶⁹

2.66 The Committee's comments above remain true today, perhaps even more so. Since the time the above remarks were made by the Committee, the tax complaint handling function has been transferred to the IGT from the Ombudsman. Accordingly, the IGT is now a tax specialist Ombudsman with the same powers of the Ombudsman with respect to the ATO and Tax Practitioners Board (TPB).⁷⁰ As such, and as will be discussed later in this submission, with this recent change as well as ongoing consultation between the external scrutineers of the ATO, there is even less chance of any overlap amongst the work of these scrutineers.

2.67 Notwithstanding the Committee's comments, the Commissioner has continued to publicly comment on the level of external scrutineering including by reference to the ATO's own self-appointed arrangements in a number of different forums:

If you think about what's involved in all that 'regulation of the regulator', all that scrutiny; the number of people and hours it takes to research, write, review and respond to these committees and reports – you have to wonder, is that really cost effective for the benefit we might receive? Is the time (and therefore money) invested in creating these briefings and reports, reflective of the government's push for efficiency improvements and reductions in red tape, and does it make things better for everybody?

Interestingly, this level of scrutiny and oversight hasn't resulted in a perfect tax administration and it didn't prevent loss of confidence in the ATO.⁷¹

2.68 These comments from the Commissioner appear at odds with those he had made a year earlier in which he positively acknowledged the benefits of implementing a number of recommendations made in IGT reviews.⁷²

⁶⁹ House of Representatives Standing Committee on Tax and Revenue, *2013 Annual Report of the Australian Taxation Office* (2014) p 32.

⁷⁰ Joint Committee of Public Accounts, *Report 326 An Assessment of Tax* (1993) pp 314 & 317.

⁷¹ Commissioner of Taxation, 'Deregulation – balancing our service delivery and regulatory roles in a real time environment' Speech delivered to Council of Small Business of Australia 12th National Small Business Summit 2014 (8 August 2014).

2.69 Given the Commissioner's continued focus publicly on the nature of the Australian Government scrutiny structure and related scrutineers, the IGT believes that it is appropriate to address some aspects of the comments made by the Commissioner.

2.70 The Commissioner's public comments continue to focus very narrowly on the resources and cost-effectiveness for the ATO in managing the inquiries of external scrutineers. As noted earlier, limiting an examination of costs to that expended by the ATO is a simplistic one-sided equation. It is an unbalanced assessment that excludes the benefits, savings and risks on the other side of the equation.

2.71 Importantly, a comprehensive analysis that seeks to weigh costs against the benefits and risks to arrive at the net benefit is not a simple one. However, even a cursory look at the ATO's key risks, including systemic and catastrophic system failures (such as that giving rise to the establishment of the IGT⁷³) demonstrates the need to exercise extreme care in relation to scrutineering arrangements. Issues regarding benefits, savings and costs are discussed in more detail at Part 4.

2.72 It is of concern that the Commissioner's comments do not seek to explain the function of an external independent scrutineer. This process enhances confidence in Government agency deliberations as the transparency allows the public to assure itself that areas for improvement are properly understood and genuine steps are being taken to realise those improvements.

2.73 The IGT is not aware of any scrutineer whose recommendations purport to achieve a 'perfect administration' be it taxation or otherwise. Although a laudable aspiration, it is unrealistic, particularly given the dynamic nature of the tax laws and changing social, political, technological and commercial environments.

2.74 Furthermore, the Commissioner's statement that the 'level of scrutiny and oversight... didn't prevent loss of confidence in the ATO' can only be reconciled by accepting that the loss of confidence in the ATO would have been much greater had it not been for the current level of scrutiny. This outcome is evidenced by the fact that the IGT's work program has been developed solely from the complaints and concerns that stakeholders have raised directly with the IGT in their submissions.

2.75 It is regrettable that the Commissioner has considered it necessary to make such comments publicly without first approaching the external scrutineers to raise his concerns. These continued public proposals for policy change, divorced from the context and broader implications, only serve to undermine the very confidence in the administration of the tax and superannuation systems that external scrutineering, at all levels, seeks to establish and maintain. This is especially so given the significant

⁷² Commissioner of Taxation, 'Tax, the way ahead' Speech delivered to the Tax Institute 28th Annual Convention (14 March 2013) <www.ato.gov.au>.

⁷³ Commonwealth, *Parliamentary Debates*, Senate, 15 May 2002, p 1579.

differences in resources between the ATO and its scrutineers, which in the past has been described as David and Goliath.⁷⁴

2.76 These comments explicitly and unfairly criticise the function and value delivered by the external scrutineers without offering evidence or providing these respective agencies with a proper opportunity to comment, contextualise or respond.

2.77 Critically, an external scrutineer would not, and indeed could not, make such public comment about the ATO without first affording the Commissioner an opportunity to comment. Such a requirement is fundamental to fair and transparent interactions and built into the legislation governing the scrutineering functions.⁷⁵

2.78 As an improvement opportunity for the future, the Commissioner should be subject to the same legislative requirement as external scrutineers — that is, he must provide an opportunity for them to comment on any proposed documents or presentations which contain implied or expressed criticisms of them or their functions.

⁷⁴ Australian Institute of Company Directors, 'David vs the Taxation Goliath' Company Director Magazine (1 October 2003) <<http://www.companydirectors.com.au>>.

⁷⁵ *Inspector-General of Taxation Act 2003*, s 15; *Ombudsman Act 1976*, sub-s 8(5); *Auditor-General Act 1997*, s 19.

3. THE ROLE AND FUNCTIONS OF THE IGT

3.1 ESTABLISHMENT OF THE IGT

3.1 The IGT was established pursuant to *Inspector-General of Taxation Act 2003* (IGT Act 2003) as an independent statutory officeholder to review systemic tax administration matters and make recommendations for improvement.

3.2 The IGT office was created in the wake of mass-marketed schemes entered into in the 1990s. There was also a history of such schemes prior to this time. Such schemes were often sophisticatedly marketed such that large numbers of investors bought in and were unaware of the intricate mechanics of those schemes, or the ATO's concerns and positions in that regard.⁷⁶ The limited availability of public information on the ATO's concerns and its subsequent crackdown of these schemes left many investors in the precarious position of owing significant amounts of tax whilst the promoters were effectively unpunished.

3.3 Whilst the ATO ultimately reached settlement in these matters,⁷⁷ concerns of the impact on the system and diminished confidence on the tax administration led the Howard Government to commit to the creation of the IGT 'to identify systemic problems in tax administration, such as mass marketed schemes, and deal with those problems as they emerge'.⁷⁸ The Government at the time sought input from the Board of Taxation, of which the current Commissioner was then a member, on the establishment of the IGT, and the Board responded positively.⁷⁹

3.4 Parliamentary Committees have noted that the IGT office should 'impose new rigour, new standards, [and] continuous improvement' on the ATO whilst also providing a degree of scrutiny and oversight to assure Parliament and the public that ATO actions and decisions are properly made and justifiable.⁸⁰

3.5 The establishment of the IGT office has received strong Parliamentary support over the years as well as receiving recognition for the value it adds to the system. For example, both Coalition and Labor Governments have directed the IGT to undertake particular reviews⁸¹ as, under the IGT Act 2003, the Minister may request or direct the IGT to undertake a systemic review on particular areas or issues. Requests may also be made by the Commissioner, the TPB, by resolution of either or both Houses of

⁷⁶ ATO, 'Mass Marketed Investment Schemes' (2012) <www.ato.gov.au>.

⁷⁷ Ibid.

⁷⁸ Above n 73.

⁷⁹ Board of Taxation, *Inspector-General of Taxation* (2002).

⁸⁰ JCPAA, Parliament of Australia, 9 November 2006, p 22.

⁸¹ For example: Inspector-General of Taxation, *Review into the ATO's Change Program* (2011); Above n 45.

Parliament or by resolution of a Committee of either or both Houses of Parliament.⁸² Indeed, Commissioners⁸³ and the relevant Parliamentary Committees have done so.⁸⁴

3.6 The Rudd Government initially considered options to amalgamate the IGT office with other agencies. However, following consultation with stakeholders, it ultimately decided to maintain the office as a separate agency. The then Assistant Treasurer, the Hon Chris Bowen MP, stated:

The Inspector-General of Taxation plays an important role in ensuring high standards of tax administration for Australian taxpayers. The best way to ensure the Inspector-general's work is not hampered in any way is to retain the Inspector-General's status as a separate stand alone body.⁸⁵

3.7 When the current Government was in opposition, the then Shadow Treasurer, the Hon Joe Hockey MP, reaffirmed the confidence that the Government had in the IGT office, noting:

I am referring to the Board of Taxation and the Inspector-General of Taxation.

Each institution commands wide respect for the work they perform and independent advice given to government.

...

The Henry Review also recorded the Inspector-General of Taxation's great work despite limited resources of an annual budget of only \$2.2 million a year and a staff of only seven.

The professional bodies, including the Institute, voiced their concerns, arguing that the Inspector-General's independence should not be compromised.

These two institutions have proved to be a counter-weight to what can be an inwardly focused, Canberra centric view of the world.⁸⁶

3.8 In addition to the public expressions of support, the current Government's ongoing confidence in the IGT is reflected in its 2014 Federal Budget where it announced its decision to transfer the tax complaints handling function from the Commonwealth Ombudsman to the IGT⁸⁷ to enhance 'the systematic review role of the Inspector-General of Taxation and provide taxpayers with more specialised and

⁸² *Inspector-General of Taxation Act 2003*, sub-s 8(3).

⁸³ Examples of such reviews include: IGT, *Review into the ATO's use of early and alternative dispute resolution* (2012) and IGT, *Review of aspects of the Australian Taxation Office's administration of private binding rulings* (2010).

⁸⁴ Above n 45.

⁸⁵ Chris Bowen MP, 'Inspector-General of Taxation to be retained as a stand alone office' (Media Release 22, 9 April 2008).

⁸⁶ Joe Hockey MP, 'Address to the Institute of Chartered Accountants' (23 November 2012) <<http://www.joehockey.com/media/speeches/details.aspx?s=109>>.

⁸⁷ Australian Government, *Budget 2014-15 Budget Paper No 2* (13 May 2014) p 217.

focused complaint handling for tax matters.’⁸⁸ The Budget announcement further expanded the IGT’s scrutineering function to include the TPB.

3.9 Accordingly, the IGT Act 2003 was amended to provide the IGT with the same powers of investigation and reporting as the Ombudsman by incorporating those provisions from the *Ombudsman Act 1976*. As a result, the IGT now operates as a specialist Ombudsman with respect to the ATO and TPB. This Government decision took effect from 1 May 2015 and empowered the IGT to assist taxpayers and tax professionals resolve their issues with the ATO and TPB. As the then Assistant Treasurer stated:

...the transfer would concentrate scarce tax expertise in a single agency, enabling more efficient use of that expertise and improved customer focus. The change will also simplify the scrutiny landscape.⁸⁹

3.10 The transfer of the function was also supported by other members of Parliament who noted the widely-held support for the IGT office,⁹⁰ the efficiency benefits of the consolidation⁹¹ and who characterised the transfer as an ‘important step forward’.⁹² As noted by one member of Parliament in his speech on the issue:

The role of external scrutiny is to provide independent assurance that ATO services are well managed and fit for purpose and that public money is being used properly. The current external scrutiny systems for the Australian Taxation Office include the Commonwealth Ombudsman, the Inspector-General of Taxation, the Auditor-General, the Board of Taxation, the Administrative Appeals Tribunal, the courts and the parliament. So in no way is this a dilution of anyone’s right to make a complaint; there are many vehicles for that. This is just about trying to streamline the complaints department so that customers of the Australian Taxation Office are able to get quicker and accurate resolution of their issues. The transfer of tax complaints to the Inspector-General of Taxation will also enable earlier flagging of emerging issues that require more general review, and this ensures better customer outcomes for both individual complaints and the government.⁹³

3.11 This decision was also well received by stakeholders. The IGT had publicly advocated the creation of a single port-of-call for concerns with tax administration matters for some time to improve outcomes for taxpayers and the system more generally. As the IGT said at a recent hearing before the Committee:

⁸⁸ Above n 87.

⁸⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 February 2015, p 1253 (Josh Frydenberg MP).

⁹⁰ Ibid, pp 1237-1238 (Scott Buchholz MP).

⁹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2014, pp 14246-14247 (Steven Ciobo MP); Commonwealth, *Parliamentary Debates*, Senate, 3 March 2015, p 1025 (Senator Nigel Scullion); Commonwealth, *Parliamentary Debates*, Senate, 2 March 2015, p 847 (Senator Marise Payne); Above n 89, p 1241 (Graham Perrett MP).

⁹² Above n 89, p 1244 (Tony Smith MP).

⁹³ Ibid, pp 1237-1238 (Scott Buchholz MP).

We work hard with the ATO and the Tax Practitioners Board to ensure tax complaints are resolved promptly, such that extended time frames only occur in more complex cases. We are committed to a process of continual improvement for the taxpayer and tax practitioner experience, whilst at the same time aiming to provide efficiencies for the ATO and the Tax Practitioners Board. We are pleased to report that the IGT has continued to receive substantial positive feedback from complainants. We are facilitating greater real-time interaction for people who are experiencing difficulties with the administration of the tax and superannuation systems. While there is a broad range of complaint issues, the main issues relate to ATO's debt collection, lodgement, processing and audits.⁹⁴

3.12 The IGT's comments are elaborated further below together with further details of functions and benefits arising from the IGT's single complaints handling and broader review work.

3.2 SINGLE TAXPAYER COMPLAINTS

3.13 The transfer of the complaints handling function to the IGT in 2015 has enhanced the agency's overall tax scrutineering capability and facilitated a more co-ordinated approach, minimising duplication and overall costs. The benefits of consolidating the complaints handling and systemic review functions within the IGT may be summarised as follows:

- reduction of overlap between the scrutineer agencies and realising economies of scale and scope in centralising the separate scrutineer function;
- greater synergistic benefits for the ATO in only having a single tax administration scrutineer agency;
- minimised scrutineer resource allocation concerns as only the ATO is being scrutinised and not a broad range of Government entities;
- a single port-of-call for considering taxpayers' administration issues and simplifying and improving access;
- a more holistic understanding of taxpayer issues arising in relation to their dealings with the tax system;
- a specialist technical skills base, attracting specialist staff more effectively from a career perspective;
- better understanding of the subject matter and the tax environment;
- stronger trust with internal and external stakeholders through effective and reciprocated consultation; and

⁹⁴ Evidence to the House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, 24 February 2016 p 2 (Ali Noroozi, Inspector-General of Taxation).

- prompt systemic issues identification that emerges from handling a significant number of similar complaints.

3.2.1 Improvements in IGT/ATO complaints handling process

3.14 The transfer of the complaints handling function afforded both the IGT and the ATO an opportunity to consider and redesign a complaints handling process which minimised costs for both agencies as well as for taxpayers and their representatives.

3.15 The redesigned complaints process improved both the interaction between the ATO and the IGT, as well as provided a singular channel of access for taxpayers and their representatives to reduce cost and minimise duplication. The key features of the process giving rise to these improvements are briefly set out below.

3.16 Firstly, the IGT aims to provide a high degree of assurance that complaints have been received and will be managed by the relevant officer. This is done through acknowledging all complaints received within a 24 to 48 hour window⁹⁵ and providing direct telephone contact details of the officer managing the case. Moreover, messages left on the IGT complaints voicemail are returned on the next business day with IGT officers assisting taxpayers to take the details of their complaints and, again, providing direct contact details so that taxpayers are able to follow up on enquiries being managed by the IGT.

3.17 Secondly, all complaints received by the IGT are captured together with any supporting documentation, synthesised and analysed for resolution. This minimises the resource impacts on the ATO whilst also reducing the need for the taxpayer to provide the same material multiple times particularly where the taxpayer re-approaches the IGT.

3.18 Thirdly, the taxpayer or tax practitioner is provided with an option to have the matter addressed directly by the ATO where the complainants have not availed themselves of the ATO's own complaints resolution processes. If this option is undertaken, the complaint is referred to the ATO Complaint section in form of a Complaint Investigation Notice (CIN) from the IGT. Such complainants are informed that if they remain unsatisfied with the ATO's handling of their matter, they can re-approach the IGT.

3.19 Fourthly, the IGT formally tracks all complaints including those which are referred to the ATO. This provides independent assurance to taxpayers and tax practitioners that their matters have been registered and will be dealt with by an identifiable officer who is accountable for the management of their complaint.

3.20 Fifthly, pursuant to the amended IGT Act 2003, the IGT is empowered to ask taxpayers to provide their Tax File Numbers (TFN) when lodging complaints,⁹⁶ which was not previously available to the Ombudsman. The ability to request and provide

⁹⁵ IGT, 'Frequently asked questions' <<http://igt.gov.au/making-a-complaint/complaint-faqs/>>.

⁹⁶ *Inspector-General of Taxation Act 2003*, s 37B.

TFNs enhances the ability of the ATO to quickly identify taxpayers on their systems to correctly pinpoint issues and identify options to resolve the matter.

3.21 Sixthly, as the IGT Complaints and Review team is composed of tax specialist staff, we are able to engage meaningfully with taxpayers and ATO officers to identify the key issues for attention and highlight opportunities for resolution. This also manifests itself through the IGT areas of focus on the CIN which sets out the key questions and, at the outset, issues needing to be addressed by the ATO. The latter has helped the IGT and the ATO to focus discussions, minimise the work needing to be undertaken by ATO officers and ensuring that issues critical to the resolution of the matter from the taxpayer's perspective are addressed.

3.22 Seventhly, the IGT and the ATO instituted 'Early Assessment Meetings' or 'EAMs' which are 15 minute discussions held within three to five business days after an investigation notice has been referred to the ATO. The purpose of the EAM is to narrow the areas of focus in the CIN, provide an opportunity for the ATO to surface additional facts or issues from their own review of the matter and to agree on actions to be taken, by whom and the relevant timeframes. The EAM seeks to ensure that only necessary inquiry and investigation aimed at resolving the matter are undertaken to minimise unnecessary actions, duplication of work and related costs for the ATO. Such a process has significantly reduced the average timeframes for complaints cases with approximately 85 per cent of matters being resolved or finalised within 15 business days.

3.23 Eighthly, through ongoing discussions between the IGT and the ATO, common areas of complaints are identified. Examples of such areas include delays in issuing Australian Business Numbers or delayed refund issues. These areas of complaint are generally capable of streamlined resolution processes. In such cases, the IGT and the ATO have developed pre-agreed processes against which these matters are handled effectively and efficiently and it is only in exceptional cases that the IGT has had to intervene further.

3.24 Ninthly, in more complex cases, the IGT engages directly with ATO senior management to provide 'early warning' of emerging risks and opportunity to address cases with sensitive issues through an escalation process that seeks to promptly explore options for resolution.

3.25 Finally, the IGT and the ATO continue to engage on a weekly basis in discussions and feedback on how each agency can improve their side of the process to deliver optimal outcomes to the community while minimising costs. The discussions have served as informal opportunities for continuous improvement, increased efficiencies and more effective outcomes for taxpayers and tax practitioners.

3.2.2 Impact and outcomes of IGT complaints handling function

3.26 At its core, the IGT complaints handling function acts as an intermediary to promote procedural fairness, transparency and accountability by assisting taxpayers to direct their enquiries or challenges, at first instance, to the most appropriate areas of the ATO. In doing so, the IGT is not exercising decision making power of the kind conferred on the Commissioner but, rather, the IGT is facilitating discussions between

taxpayers who have issues or complaints and the most appropriate officers within the ATO to address or resolve the matters.

3.27 The IGT is an advocate for the fair administration of the tax and superannuation system.⁹⁷ Importantly, the IGT's role in maintaining confidence in the administrative processes is most valuable when taxpayers raise concerns that the ATO has acted unfairly in pre-assessment or prior to formal litigation action being taken. In this respect, the IGT engages closely with the complainant and the ATO to ensure that the taxpayers and the ATO's rights on substantive issues, which are more properly the ambit of the courts, are respected.

3.28 The feedback received directly from taxpayers and tax practitioners indicates that often, the IGT, as an independent third party, delivers a high degree of comfort that their matters were appropriately considered and actioned where they may have otherwise been delayed or remain unresolved in some cases. Examples of such feedback are set out below:

- Thank you very much, ATO said there was nothing that they could do but she gave them a push. Thank you very much again for your help.
- Your willingness to listen and your advice and professionalism was very much appreciated at the time. We are now confident that our complaint will at least proceed to the next level and have a chance to be addressed by the relevant body.
- The original complaint, made at a time when our client had no access to an interpreter, had as its subject the refusal of the ATO to engage ... and in particular to have the Commissioner participate in in-house facilitation. IGT's involvement brought the facilitation about.
- I am very grateful for the way you helped me and the instant action that followed.
- I congratulate your office on its procedures and approach, and thank you for your involvement, which unfortunately was necessary to resolve what was though really a minor issue for ATO, would have required me to ignore its assessment, and I did not want to do that.
- I cannot thank you enough for your time and effort. I have been contacted by the ATO, and the issue has been resolved... I am so very pleased that I have found favour in the eyes of the ATO and that is all thanks to you.
- I would like to offer my sincere thanks and appreciation for the customer service offered by [IGT officer] whom handled the above complaint. [IGT officer] was an extremely friendly, concerned, caring and professional operator who upheld the high standards of customer service. Her responses were accurate, articulate and extremely rapid. I believe [IGT officer] should be congratulated on her

⁹⁷ It should be noted that the IGT does not resolve substantive tax matters nor does the IGT represent taxpayers in respect of audits, objections or any subsequent litigation action.

outstanding commitment to the Inspector Generals Taxation Department [sic] and her customers. [IGT officer is the type of operator you would wish to encounter in all government offices and her operating procedure should be exemplary practice to all.

- Thank you for being so generous with your time to go through in full detail all the issues you are following through on my behalf and evidently on behalf of other concerned professionals. Your attention to detail is brilliant and I thank you. You are making a real difference and it is great and reassuring to have such a dedicated individual in such an important and influential job!

3.29 The feedback above, which is a reflective sample of those received by way of return email or correspondence, highlights the important role of the IGT in assisting taxpayers and tax practitioners to navigate through the ATO which, for many taxpayers, may seem like a daunting and fruitless task given the size and impersonal interactions.

3.30 Similar feedback was recently provided to the Committee with a key stakeholder noting that generally better outcomes have been produced as a result of a fresh set of eyes looking at the dispute.⁹⁸ Similarly, the Committee through one of its members has also related an instance in which his constituent was positively assisted by the IGT:

It was a GST return, a figure of around \$230,000. The case was settled 12 months ago but he spent 14 months dealing with just about every ATO office in every capital city in Australia, dealing with different people over that period of time. He presented all the evidence to me. I asked Mr Noroozi to comment on this as well. I contacted Mr Noroozi's department and within 12 days his cheque – the GST that was owed to him – was returned to him.

...

I would like to comment in regards to why would Mr Noroozi's department take 12 days to get the cheque when as an individual he could not get it done in 14 months?⁹⁹

3.31 The IGT's role in assisting taxpayers and tax practitioners in this way is particularly important as Australia does not have a taxpayer advocate service like the US and there is limited opportunity for free independent advice or assistance in engaging with the ATO on disputes or other complaints.

3.32 This IGT function is critical for Australia's most vulnerable taxpayers who may require assistance with simple matters but have trouble, for a range of reasons, accessing the services delivered by the ATO.

3.33 In some long-running dispute cases between taxpayers and the ATO (many of which had arisen a number of years before the complaints handling function was

⁹⁸ Evidence to the House of Representatives Standing Committee on Tax and Revenue, 10 February 2016, pp 13-14.

⁹⁹ Ibid, p 8.

transferred to the IGT), the IGT has been able to engage with both the taxpayer and the ATO to identify opportunities to bring those matters to finality. In such matters, the IGT has persuaded both parties to accept a number of different approaches including the use of external mediators.

3.34 In addition to the above, a significant part of the IGT's handling of single taxpayer complaints relates to providing independent assurance to taxpayers and their representatives that the ATO has undertaken appropriate action, even in instances where the ATO is bound by strict secrecy and confidentiality requirements not to disclose any information. Such instances include where taxpayers complain that they were not given any information despite having approached the ATO regarding possible instances of potential fraud and evasion perpetrated by other taxpayers or employers not paying their employees' superannuation.

3.35 In such cases, the IGT assists the ATO by providing an independent third party assurance to the taxpayer that whilst the ATO is unable to disclose the specific details of its actions, it has nonetheless received the taxpayer's complaint and properly actioned it in accordance with existing policies and procedures. In the majority of instances, such assurance is sufficient for the taxpayer who is then able to appreciate the limitations of the ATO's ability to disclose further information.

3.36 Similarly, through the IGT's complaints referrals, the ATO Complaints section has identified certain work processes which could be improved through better contact and communication to manage expectations. For example, where a taxpayer raises complaints regarding human resources, those complaints are forwarded by the ATO Complaints to the ATO People section, without notification to the taxpayer. This transfer process and the absence of contact by either section of the ATO led to a complaint being lodged with the IGT. Through discussions with the IGT, the ATO agreed to update its processes to ensure that where transfers are made between different areas of the ATO, appropriate notification is given so that taxpayers were able to follow up their enquiries.

3.37 Finally, in some instances, the role of the IGT has involved keeping taxpayers well-informed and managing their expectations when the ATO is experiencing difficulties as well as assisting both parties where possible. For example, in 2015 the ATO implemented a new complaints re-routing system which was designed to ensure that complaints were directed to those officers who were best placed to manage them. However, a number of teething issues resulted in cases being incorrectly diverted which caused delays in response times to taxpayers. In managing taxpayer complaints on these matters, the IGT kept the relevant taxpayers well-informed and provided the ATO with early notice for remedial action to be taken so that those taxpayers did not escalate matters further.

3.38 The IGT complaints handing role has become even more critical due to the increase in the number of complaints received by the IGT when compared to those that were received by the Ombudsman in prior years. We also understand that with respect to complaints made directly to the ATO, the number that it has received in the 2015-16 financial year to date has been significantly higher than for the same periods in the 2013-14 and 2014-15 financial years.

3.3 BROADER REVIEWS

3.39 From its inception, the IGT has conducted reviews into broader or systemic tax administration issues covering a wide range of topics that are relevant to all taxpayers from the very large businesses to micro businesses and individuals, as well as tax practitioners. Through extensive consultation with stakeholders, research and analysis, these reviews have significantly shaped the tax administration landscape for the benefit of all Australians.

3.40 Over the last thirteen years, since its inception, the IGT has completed 42 reviews with two others currently in progress, namely, the review into the ATO's employer obligations compliance activities and the review into the Taxpayers' Charter and taxpayer protections.

3.3.1 Impact and improvements of IGT systemic reviews

3.41 Many of the recent positive changes to the administration of the tax system in Australia have their genesis in IGT reviews as well as other related IGT activities.¹⁰⁰ They have, collectively, generated a significant number of improvements within the ATO to enhance transparency, fairness and certainty for taxpayers¹⁰¹ and delivered practical benefits and cost savings for both the ATO and taxpayers.

3.42 It is useful to consider select examples of IGT reviews and the benefits that they have delivered in relation to a wide range of situations.

3.43 The IGT's *review into the ATO's use of early and alternative dispute resolution* (ADR Review), which was undertaken at the request of the former Commissioner, examined the ATO's approach to resolving disputes throughout its compliance process. The report made a number of significant recommendations which were later adopted and implemented across the ATO. One such recommendation was making available an in-house facilitation process to resolve smaller, less complex disputes.¹⁰² The ATO's Annual Report has stated that in 2014-15, 53 such facilitations were reported which, in conjunction with other ADR activities, led to participants providing feedback of 'considerable savings of time and money.'¹⁰³ The current Commissioner has also publicly acknowledged the value of this review:

Last year we asked the Inspector General of Taxation to look at our approach to alternative and early dispute resolution. He made a number of recommendations, many of which we have included in our first Dispute Management Plan. The ATO was the first Commonwealth agency to release a Dispute Management Plan, which along with our supporting Disputes Policy is our guide to early and better dispute resolution. This shift recognises the benefits and commits us to actively pursue timely, cost effective dispute resolution.

¹⁰⁰ IGT, *Tax Forum – next steps for Australia – A submission to the Tax Forum* (2011).

¹⁰¹ See for example: IGT, *Annual Report 2011-12* (2012) pp 7-8; IGT, *Annual Report 2006-07* (2007) pp 6-7.

¹⁰² IGT, *Review into the Australian Taxation Office's use of early and alternative dispute resolution* (2012) p 44.

¹⁰³ Above n 10, p 61.

One of the recommendations by the Inspector General, which I believe will be of particular interest to Tax Institute members, was for the ATO to pilot the use of specially trained ATO facilitation officers to conduct and process smaller, less complex disputes.¹⁰⁴

3.44 The IGT's *Management of Tax Disputes* review,¹⁰⁵ which was conducted at the request of the Committee, identified a range of concerns but focused on the governance arrangements within the ATO and made a single integrated recommendation to ensure that disputes were more independently considered and addressed. The recommendation was designed to deliver the highest degree of independence whilst ensuring that the dispute or appeal function remained within the ATO.¹⁰⁶ This review as well as the aforementioned ADR review provided a catalyst for the ATO to undertake its own internal changes by moving the objections from the compliance group to the law group as a means of providing greater transparency and independence of decision making.

3.45 The IGT's *Review into the Change Program* was conducted at the direction of the then Assistant Treasurer to address the community's concerns.¹⁰⁷ The key impact or focus of this review was to inform the public about events that had adversely affected them. The Change Program was an enterprise-wide upgrading of the ATO's Information and Communication Technology platform whose troubled implementation history gave rise to increased costs and significant delays for both taxpayers and the ATO. The review acted as a 'safety valve' which diffused much of the tension and disquiet within the tax practitioner community, as well as affected taxpayers, by clearly and transparently presenting the facts and issues which had given rise to the concerns and dissatisfactions. Moreover, the ATO's commitment to address those concerns through agreement with the IGT's recommendations further re-assured the community. The report also assisted the Government by providing necessary third party assurance of the ATO's intended processes moving forward to minimise further adverse impact on taxpayers.

3.46 The IGT review into the *ATO's management of transfer pricing matters* explored another topical issue which continues to be of concern to the community. The review was undertaken at a time when the global community expressed concern with the erosion of sovereign revenues and revenue authorities' ability to address the potential for large corporations to avoid their tax obligations by shifting profits offshore, including through intra-group trading known as 'transfer pricing'. The review examined the ATO's management of transfer pricing matters and made a suite of recommendations aimed at developing sufficient organisational capability to address the risks and give priority to measures posing the highest risks to protect Australia's tax revenue.

3.47 Recommendations were also made to improve the ATO's project management of compliance activities to reduce costs for both the taxpayers and the ATO. The work

¹⁰⁴ Above n 72.

¹⁰⁵ The review was conducted to assist the Committee in its *Inquiry into Tax Disputes*.

¹⁰⁶ Above n 45, p 120.

¹⁰⁷ Above n 81.

that the ATO had already undertaken in this area was also acknowledged and set out in detail in the IGT's resulting review report, providing assurance to the Government and the community that the ATO was aware of the improvement opportunities and work was being undertaken to address the risks.

3.48 In addition to delivering improvements to the taxpayer and the ATO as well as providing assurance to the Government and the public with respect to the administration of the tax system, IGT reports may be directly beneficial to the ATO in terms of resourcing and cost savings. Some of these areas have been indicated above, including the implementation of in-house facilitation following the ADR Review. A similar initiative was implemented in the form of the 'Independent Review' process for large businesses which followed a recommendation in the IGT's large business review.¹⁰⁸ The current Commissioner has positively acknowledged the IGT's recommendation in this regard.¹⁰⁹

3.49 Similarly cost savings were derived by the ATO as a result of the IGT's *review into the ATO's use of benchmarking to target the cash economy*.¹¹⁰ In that review, stakeholders had raised concerns that the ATO's use of industry benchmarks to identify small business taxpayers for compliance activity had yielded low strike rates with unnecessary high costs imposed on both the taxpayer and the ATO.

3.50 Following the implementation of the IGT recommendations from that review, the ATO reported that the strike rates of compliance activities based on benchmarking had increased from 24 per cent to 50 per cent,¹¹¹ effectively doubling the outcomes of more than 400 'full-time equivalent' staff that the ATO had allocated to benchmarking compliance work.¹¹² The significant increase in strike rates indicated that fewer taxpayers were being incorrectly targeted, thereby reducing their compliance costs as well. For the ATO, the recommendations enabled it to better apply its resources to those taxpayers with a higher risk of non-compliance, thereby increasing the chances of tax recovery whilst reducing the ATO's administrative costs.

3.51 The IGT's reviews have also effected significant changes in relation to individual taxpayers and small business. One such example is the IGT's review into the ATO's administration of the superannuation excess contributions tax.¹¹³ Individual taxpayers considered the tax to be unfair and, in effect, a very harsh penalty. Much of that perception of unfairness was directed at the ATO who was bound by strict legislation to apply the high rates of tax on those contributions and unable to exercise sufficient discretion to address the dissatisfaction of a large number of taxpayers. This led to ongoing complaints with the ATO, the Commonwealth Ombudsman and members of Parliament, as well as disquiet in the media and superannuation and tax industry publications.

¹⁰⁸ Above n 33, p 149.

¹⁰⁹ Above n 72.

¹¹⁰ IGT, *Review into the Australian Taxation Office's use of benchmarking to target the cash economy* (2012).

¹¹¹ ATO, 'Commissioner and Minister Senate estimates briefing – October 2012 Cash Economy – Benchmarking, data matching and e-marketing' (CCH Parliament, Political Alert, 23 January 2013) p 1.

¹¹² ATO communication to the IGT.

¹¹³ IGT, *Review into the Australian Taxation Office's compliance approach to individual taxpayers – superannuation excess contributions tax* (2014).

3.52 The IGT highlighted that the short-comings and harsh impact on individual taxpayers was due to the legislation itself rather than the administration of it and recommended a law change. The Government accepted the IGT's recommendation and amended the legislation to provide taxpayers with an option to withdraw excess contributions without incurring the tax.¹¹⁴ The measure was seen to be fairer and more reasonable¹¹⁵ and, anecdotally, has resulted in fewer complaints being raised in this regard.

3.53 The IGT's systemic reviews have also assisted the ATO to identify structural and capability issues which may prevent it from meeting its administrative obligations in the future.

3.54 For example, in the review of the ATO's compliance approach to small-to-medium enterprises (SME) and high wealth individuals (HWI), the IGT highlighted inadequate technical capability and support for ATO officers to deal with the often highly complex nature of compliance work in relation to larger SMEs and HWIs.¹¹⁶ As a result of that report, 'the ATO [gave] significant attention to structures that should support the development and maintenance of staff capability' within those areas.¹¹⁷

3.55 Overall, as the above examples demonstrate, IGT reviews have collectively delivered significant improvements and reshaped the Australian tax landscape. They have also operated as a safety valve for the administration of the system, enabling the community's concerns to be ventilated, discussed, analysed and where necessary remedial action has been recommended which in the vast majority of cases has been implemented. This process has fostered increase confidence in the system and no doubt enhanced voluntary compliance.

3.3.2 Conduct of broader reviews

3.56 The conduct of broader reviews continues to be important for the IGT. With the recent changes to the IGT Act 2003 and the specialist ombudsman role of the IGT, the goal going forward is to gain real-time insight into emerging issues and moving quickly to address problems before they escalate into major system failures or causes of taxpayer discontent. This may mean that in future, more targeted reviews are undertaken in an expedited manner to address particular areas where significant complaints have been received.

3.57 Previously, the IGT consulted widely with all stakeholders including the Government and its agencies, particularly the ATO, as well as taxpayers, tax professionals and their representative bodies to identify the issues of most concern to the tax system. As part of this process, the IGT also consulted with the ANAO and the Ombudsman to ensure that there was no overlap in the work program of these

¹¹⁴ Senator the Hon Matthias Cormann, 'Superannuation excess contributions tax' (Media Release, 13 May 2014).

¹¹⁵ Trish Power, 'Excess contributions: Happy ending to a super horror story' *Superguide* (3 February 2016) <www.superguide.com.au>.

¹¹⁶ IGT, *Review into the ATO's compliance approaches to small and medium enterprises with annual turnovers between \$100 million and \$250 million and high wealth individuals* (2012) pp 1-2.

¹¹⁷ IGT, *Annual Report 2011-12* (2012) p 7.

agencies as far as the ATO was concerned. Where another agency announces or considers a review that may have a degree of overlap with a proposed IGT review, that review may be deferred to take advantage of other agency outputs or insights and maximise resource efficiencies.

3.58 The IGT has periodically refreshed or set a new work program to ensure it remained focussed on the community's main concerns as well as those high-risk operational or strategic issues to ensure that the value of any IGT review is maximised. It should be noted that the IGT has not necessarily undertaken full-scale reviews of all topics that are brought to his attention. Due to the need to manage resources, focus was given to those issues the reviews of which were likely to generate the highest degrees of benefit to the Australian community as a whole.

3.59 The identification of potential issues, even where they do not lead to a particular review being conducted, has on occasions led the ATO to undertake action of its own volition to address the matter. For example, as early as 2005, the IGT identified concerns with the ATO's tax technical decision making and providing taxpayer access to experts. Similar concerns were identified in subsequent reviews though not specifically examined. However, in line with these concerns 'the ATO embarked on a number of initiatives to deliver more effective and efficient use of tax technical resources through earlier engagement of tax technical expertise.'¹¹⁸

3.60 Notwithstanding the recent changes to the IGT Act 2003 and the specialist Ombudsman role of the IGT, the IGT will continue to consult widely with the community to identify issues of concerns. However, the subjects of his broader reviews are likely to be increasingly guided by the complaints handling function.

3.61 In conducting broader reviews, the IGT engages with the community again by inviting submission and consulting with taxpayers, tax professionals and their representative bodies. Input from these stakeholders has continually increased as they become aware of the confidential nature of their dealing with the IGT as well as the fact that their issues are being heard and actioned through collaborative and robust engagement with the ATO.

3.62 Following the receipt of submissions, issues are distilled and communicated to the ATO. Relevant pre-existing information is requested from the ATO, followed by an initial workshop with relevant ATO officers to further narrow the issues of enquiry and pinpoint additional relevant documentary evidence. Such a process also gives ATO officers an opportunity to better understand the concerns that stakeholders have raised with the IGT with minimal resourcing impact.

3.63 Reviews are conducted in a manner which minimises the risk of surprise and unnecessary workloads for the IGT and ATO. There is significant reliance on ATO officers having a sound knowledge of relevant ATO policies, processes and practices and proactively raising relevant information which narrows issues under review. To minimise unnecessary work for both the IGT and ATO, ATO officers are asked to discuss with IGT staff all information requests before time and effort is directed at preparing responses. This ensures a common understanding of the expectations and

¹¹⁸ Above n 117, p 8.

provides opportunities to explore alternative material that advances inquiries where it would be able to be more quickly provided.

3.64 Views and evidence are shared with the ATO and other interested parties to reach a mutual understanding of issues which serves to better inform practical and evidence based outcomes. ATO officers involved in the review are encouraged to provide their perspectives, particularly where they may have reason to provide alternative views, ideas or opportunities for improvement. By taking this overall approach and encouraging a two-way dialogue with the ATO, the IGT seeks to ensure that recommendations for improvement are tested and transparently address valid concerns.

3.65 The IGT review reports themselves generally sets out how the ATO currently handles the issues in question and highlights the relevant stakeholder concerns. There are also comparisons made with the work and practices of revenue authorities in other jurisdictions as well as further independent research drawing on submissions made to the review. Relevant ATO policies, procedures and practices are also set out as well as any competing views on the issues.

3.66 The report sets out the IGT's observations on the concerns raised as well as practical options for improvement. This is followed by recommendations for improvement made to the ATO or, on occasion, to the Government, depending on whether the recommended changes are within the scope of the ATO's power or legislative change is required. In this respect, the IGT maintains an active working relationship with the Treasury as well as the ATO on tax administration and related policy issues. Protocols are in place to guide interactions between the three agencies.¹¹⁹

3.67 As noted above, whilst the IGT may express views and findings as part of the review process as well as make recommendations for improvement, his role has always been purely advisory. The IGT does not have the power to compel the Commissioner to accept any recommendations or implement any changes with which he disagrees.

3.68 Moreover, even where the Commissioner agrees with the IGT recommendations, he retains autonomy over how they should be implemented. The IGT considers that this is entirely appropriate as the ATO is in the best position to implement the recommendations most efficiently as part of the broader deployment of its resources. However, in many instances, the ATO will seek the IGT's input on proposed implementation plans to assure itself and its audit committee that the intent of the recommendation has been addressed.

3.69 As IGT reports must be made public, the recommendations have to withstand public scrutiny as would the corresponding ATO responses. The risk of adverse public opinion on the scrutineer can be much more severe than on the entity being scrutinised.

¹¹⁹ *Protocol between the IGT and the ATO; Protocol between the IGT and Treasury* <www.igt.gov.au>.

3.70 It is noteworthy that the vast majority of the IGT's recommendations to the ATO have been accepted and implemented. Even where recommendations are not initially accepted, experience has shown that they may be subsequently taken on board and implemented.¹²⁰

¹²⁰ See for example: Above n 45, pp 118 and 119.

4. REMOVING INEFFICIENCY, DUPLICATION AND COSTS

4.1 The IGT supports the removal of inefficiency and duplication in any administrative process. It is a key consideration in all IGT reviews and other work of the IGT office.

4.2 In discharging his statutory function, the IGT is required to ensure that budget funding is appropriately applied and costs are minimised in a manner that delivers maximum benefit for the Government and the Australian community. This requirement is set out in the *Public Governance, Performance and Accountability Act 2013* (PGPA Act 2013).¹²¹

4.3 The Government's policy decision to transfer the tax complaints handling function, discussed earlier, has increased efficiency and streamlined the work of the agencies who oversee the ATO's approach to tax administration.

4.4 The Australian Governmental scrutiny arrangement has a strong foundation and is designed to ensure there are no gaps and minimal overlaps. The oversight and scrutiny of the ATO is consistent with this approach with each of the agencies, the ANAO, Ombudsman and IGT, performing different functions and providing assurance to Parliament and the Australian community on different aspects of the ATO's operations. The risks associated with gaps and overlaps can be very significant and very different. These risk issues are discussed further in Part 5.

4.5 The Commissioner has and continues to refer to external scrutiny, a key component of robust governance arrangements, as 'red tape' to fit into a narrower debate.¹²² It is worthwhile noting that Commissioner's audit requests and other actions and decisions, as they impact on taxpayers, are often characterised as 'red tape' but that does not take away from their need or importance.¹²³ Appropriate levels of governance and external scrutiny, exist throughout the Government and the public sector to act as a safety valve, minimise the risk of major system failures and provide transparency and accountability.

4.6 The IGT believes that a major policy change to reduce or remove external scrutineer functions needs to be considered at a whole-of-government level if at all. This is necessary as the current scrutineering arrangements for the vast majority of public service agencies have the same foundation across all of Government.

4.7 The primary scrutineers for public service agencies are the ANAO and the Ombudsman. Similarly, the ATO's primary scrutineers are the ANAO and the IGT

¹²¹ *Public Governance, Performance and Accountability Act 2013*, s 15.

¹²² Commissioner of Taxation, 'Deregulation – balancing our service delivery and regulatory roles in a real time environment' Speech delivered to Council of Small Business of Australia 12th National Small Business Summit 2014 (8 August 2014); Evidence to the House of Representatives Standing Committee on Tax and Revenue, 24 February 2016, p 1 (Chris Jordan, Commissioner of Taxation)

¹²³ See for example: Andrew Sadauskas, 'Uber hits out at red tape nightmare as ATO rules Uber drivers are small business owners and have to charge GST', *SmartCompany* (20 May 2015).

which effectively performs a specialist Ombudsman role with the recent legislative changes. Therefore any reduction in the level or scope of oversight these scrutineers have in relation to the ATO would need to be carefully considered as it would be inconsistent with the level of oversight or scrutiny to which other public service agencies are subjected.

4.8 It should also be noted that comparable private sector organisations that handle significant funds and employ considerable numbers of personnel also have a broad range of governance and external oversight. This will be discussed in more detail in the next part of this submission.

4.1 CONSULTATION TO AVOID DUPLICATION

4.9 The IGT maintains strong consultative arrangements with the Ombudsman and the ANAO. This relationship was built upon a legislative requirement for the IGT to consult with both the Ombudsman and the ANAO in the development of his work program.¹²⁴ For example, the IGT's consultations with both the ANAO and the Ombudsman in the development of his 2011-12 work program avoided potential duplication as set out below:

A major area of concern raised with the IGT was Project Wickenby (which involves a number of member agencies). The IGT consulted with the Australian National Audit Office (ANAO) and the Commonwealth Ombudsman on this matter. The ANAO recently announced a cross agency review into Project Wickenby, the objectives of which are available on the ANAO website. The Ombudsman is also considering a cross agency review into Project Wickenby.

The ANAO and the Ombudsman have much broader jurisdiction to investigate matters across various agencies, whilst the IGT is limited to those relating to the ATO. Accordingly, these agencies are better placed to conduct a review of this kind. The IGT will await the results of the ANAO review as well as a decision from the Ombudsman before considering whether the IGT should also conduct a review into the area. Should the Ombudsman conduct a review into Project Wickenby, the IGT would be pleased to provide appropriate assistance as required.¹²⁵

4.10 Those consultation arrangements were further enhanced following a recommendation of the JCPAA that:

...the external review agencies investigate and report on opportunities for more strategic planning and improved information sharing as they undertake their reviews to avoid duplication of their efforts and the Australian Taxation Office's resources.¹²⁶

4.11 In line with the JCPAA's recommendation, the IGT, the Ombudsman and the ANAO signed an agreement 'to meet collectively as part of their annual planning

¹²⁴ *Inspector-General of Taxation Act 2003*, sub-s 9(2) [Repealed].

¹²⁵ IGT, *Review into the Australian Taxation Office's use of early and alternative dispute resolution* (2012); IGT, 'New IGT Work Program for 2011-2012' (2011) <<http://igt.gov.au>>.

¹²⁶ JCPAA, *Report 426 Ninth Biannual Hearing with the Commissioner of Taxation* (2011) p 32.

processes to share information and consider more broadly the overall ATO review activity'.¹²⁷

4.12 The three agencies continue to maintain a close ongoing working relationship to maximise efficiencies and benefit from each other's work and experience. In this respect, the three agencies have reflected on the changes in the IGT Act 2003 and the *Ombudsman Act 1976* and have recently recommitted to collaborating to minimise any potential overlap.

4.13 It should be noted that, the IGT also works closely with the Ombudsman to ensure that complaints about the ATO are received, transferred and actioned seamlessly.

4.14 In addition to the above, the IGT also consults with the Treasury and the ATO on proposed areas for review. For example, as a result of such consultations, the IGT has previously taken on board suggestions by the ATO to review certain areas of concern, as was the case with the IGT review into Private Binding Rulings¹²⁸ as well as the ADR Review mentioned earlier, or not conduct a review where the ATO had advised that it was undertaking its own internal review and improvements.¹²⁹ Similarly, the IGT has also conducted reviews based partly or wholly on suggestions from the Treasury. Such examples include the IGT reviews into improvements to the self-assessment system and the ATO's management of transfer pricing matters discussed earlier.¹³⁰ The latter assisted Treasury in providing advice to the Government and resulted in legislative changes to improve certainty for taxpayers.¹³¹

4.2 IMPROVING PROJECT MANAGEMENT TO REDUCE COSTS

4.15 In the conduct of both systemic reviews and single complaints, the IGT has observed that the choices made by the ATO in engaging on these matters may be giving rise to higher costs for the ATO. In that respect, the IGT considers a number of the observations set out below as opportunities to work with the IGT, and indeed other scrutineers, to enhance the method of engagement to realise efficiencies and enhance the effectiveness of the interactions.

4.2.1 Broader reviews

4.16 Firstly, due to the ATO's large-scale operations, knowledge and expertise are centralised and, as a result, large projects such as IGT reviews are managed or involve numerous internal ATO stakeholders. The IGT has observed that this approach often results in a large number of people attending meetings, phone conferences and other discussions with many merely observing the discussions rather than having direct

¹²⁷ IGT, Commonwealth Ombudsman and ANAO, *Executive Minute on Joint Committee of Public Accounts and Audit Report 426 Ninth Biannual Hearing with the Commissioner of Taxation* (30 May 2012).

¹²⁸ IGT, *Review of aspects of the Australian Taxation Office's administration of private binding rulings* (2010).

¹²⁹ See for example: IGT, 'New IGT Work Program for 2011-2012' (4 April 2011) <<http://igt.gov.au>>.

¹³⁰ IGT, *Review into Improving the Self Assessment System* (2013); IGT, *Review into the Australian Taxation Office's management of transfer pricing matters* (2014).

¹³¹ *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*.

input on the issues or specific areas of inquiry. The IGT believes that the ATO could examine its approach in this regard as a way to minimise its time and cost commitment.

4.17 Secondly, the IGT has consistently encouraged more effective and open dialogue between the two agencies on broader reviews to avoid the risk of unnecessary work or duplication. However, we are still made aware of instances where the ATO's uncertainty in responding to IGT enquiries have led to lengthy internal discussions and a number of different officers being involved. The IGT believes that more direct and frequent engagement between ATO and IGT contact officers should provide the necessary clarity without the ATO expending unnecessary time internally discussing how best to deal with IGT requests.

4.18 Thirdly, the ATO has on occasion undertaken its own parallel reviews to that of the IGT's as a means of 'fixing' identified issues before the IGT is able to properly examine, consider and make recommendations. In doing so, the ATO is expending costs unnecessarily where those resources could have been better utilised by working with the IGT to arrive at optimal outcomes. These parallel reviews also do not benefit from candid, external and independent perspectives to assess the impact of its resulting actions which may lead to a situation where the ATO essentially has to re-do or fix its intended improvements following IGT consideration.

4.19 Fourthly, the ATO often feels the need to justify or contextualise the information requested by the IGT before it is provided. This is arguably unhelpful and creates additional work for the ATO as well as unnecessary delay in the provision of that information to the IGT.

4.20 Finally, the IGT has also experienced instances of uncertainty by some ATO officers in delivering information to the IGT which has led to unnecessary delay and inconsistent information being provided. It would be helpful if information was provided expeditiously without hesitation and where there is inconsistency that the matter is promptly escalated to more senior officers for transparent resolution.

4.21 Moreover, where the ATO has strongly-held views about particular projects or areas of improvement, significant effort, time and resources may be applied debating the need for improvement before it is ultimately accepted. Similar views were highlighted in the APSC's Capability Review of the ATO in which it noted:

Some scrutineers and members of consultative forums advised that the ATO can be dismissive of feedback, particularly where it conflicts with a strongly entrenched view that the ATO holds about its own performance or client expectations.¹³²

4.22 Such was the case during the aforementioned review of the Change Program. Given the limited time and resources available to the IGT at the time, and the need to put another review on hold, the IGT provided the ATO with a draft report based upon existing information provided by the ATO as well as information from ATO's own contractors. However, discussions on the draft report with the ATO saw significant disagreement on IGT conclusions and recommendations albeit that there was

¹³² Above n 67, p 31.

agreement with the material facts. Large numbers of ATO senior officers were brought into meetings to argue their point of view and more time devoted by both offices to arrive at agreed positions which ultimately were not materially different to those in the draft report.

4.23 The above scenarios may be indicative of a risk adverse approach to reviews, such as those undertaken by the IGT, which in turn can give rise to increased time and costs for both agencies as well as creating unnecessary tension in the relationship.

4.24 The IGT believes that through better project management, commitment to engage and openly share information and views, the ATO and IGT could better streamline the review process to reduce the risk of duplication and inefficiencies, thereby minimising the impact on costs and resources. To this end, and given the recent changes to the IGT Act 2003 and its core functions, both agencies are looking to refresh the IGT-ATO Protocol that had previously guided the conduct of systemic reviews.

4.2.2 Single complaints

4.25 As noted earlier, the transfer of the tax complaints handling function to the IGT has yielded significant efficiency gains for the ATO by having tax specialist IGT staff receive, consider, synthesise and refer complaints to the ATO with succinct areas of focus in the CIN.

4.26 Moreover, over 35 per cent of all complaints received by the IGT are managed internally without the need for referral to or intervention by the ATO and approximately another 50 per cent are resolved with minimal IGT-ATO interaction.

4.27 In addition to the above, the IGT has observed that there are further opportunities for improving efficiencies and avoiding unnecessary work. These relate to a number of areas of ATO/IGT interactions in relation to complaint handling.

4.28 Firstly, as with the management of broader reviews, there have been instances where the ATO appears to adopt an unnecessarily defensive approach by having significant numbers of people present to discuss a single case. By way of example, a recent case was discussed by telephone conference involving two IGT officers and twelve ATO officers. Whilst the IGT considers it is important for key officers to attend such discussions to ensure that matters are appropriately addressed, the attendance of twelve people for the ATO to discuss a single case appears excessive with many people in attendance not having responsibility for the issues in contention or not contributing to the discussion.

4.29 Secondly, whilst the ATO often has large contingents of officers attending discussions on larger more complex cases, there appears to be a reticence on the part of the ATO to involve senior decision makers within the ATO despite the ATO Second Commissioners indicating to the IGT that they would prefer early warning where a complaint is likely to escalate into a major issue. The IGT believes that where the ATO is willing to engage senior staff early in complex matters, this would reduce the need

for detailed internal briefings and referrals and enable prompt decisions to be made and followed by action to resolve the matter expeditiously.

4.30 Thirdly, there have been instances in which the management of complaints has been drawn out unnecessarily due to lack of information or clarity of the information initially provided by the ATO. In one example, the case concerned allegations that the ATO had not appropriately followed audit procedures in respect of communications with the taxpayer. The case was delayed for some weeks due to the business line not being upfront with the ATO's own complaints section as to the nature of the audit that had been conducted leading to the provision of incorrect procedures and information to the IGT.

4.31 Fourthly, in some cases the ATO business line's actions in ongoing investigations have taken the complainant, the IGT and ATO complaint officers by surprise. This failure of proactive and adequate internal ATO communication has, in such cases, led to significant escalation and expansion of complaints which may have been avoided if the information was proactively provided to the IGT so that expectations could be managed at first instance.

4.32 Finally, the resolution of complaints are generally most efficient where, at the outset, both the IGT and the ATO have a clear understanding of the areas of focus and issues that need to be addressed in order to bring a matter to finality. To this end, IGT officers work hard to clearly identify these areas of focus in the CIN which are provided to the ATO. On occasions, we have noticed that ATO officers have attended discussions with the IGT having not considered, or been provided with, the notice and therefore discussion was not sufficiently directed at addressing the issues of concern. Ongoing feedback has been provided to the ATO in this regard to ensure that such occurrences are minimised and the resolution of these cases are not unnecessarily delayed.

4.33 As set out earlier in this submission, to ensure the seamless transition of services delivered to the taxpayer in relation to complaints handling, the IGT and the ATO have collaborated to identify and streamline areas of frequent complaint to ensure a consistent and quick response is possible. The continued use of such pre-agreed processes assists to minimise the need for unnecessary duplication and effort by the ATO.

5. EARNED AUTONOMY

5.1 The concept of ‘earned autonomy’ (or ‘differential regulation’ as it may now be known)¹³³ was previously implemented in the English National Health System in 2000.¹³⁴

5.2 Based upon the information available to the IGT, at a Commonwealth level, the earned autonomy model is intended to apply to financial oversight and regulation of Commonwealth entities as part of Stage 2 of the Public Management Reform Agenda. It has been noted:

One of the common complaints about the current framework requirements concerns the one-size-fits-all approach to the imposition of obligations on agencies. This approach is not sustainable and can impose unnecessary requirements on entities. A more nuanced and proportionate approach to risk could contribute to more effective monitoring and oversight arrangements. The aim would be to improve accountability and performance through managing risk not through increasing control.¹³⁵

5.3 As a result of concerns regarding the ‘one size fits all approach’ the PGPA Act 2013:

...provides the framework for a more risk-based approach in regulation and policy setting, to contribute to more effective governance, monitoring and oversight arrangements. It does this in two ways. The first is to provide Accountable Authorities (entity heads) with greater autonomy, and indeed a requirement, to establish and maintain appropriate systems of internal control within their entities, taking into account entity risk. The second is to allow the Finance Minister to apply some PGPA Act requirements differentially.

The aim of both statutory mechanisms is to improve accountability and performance through considered and appropriate risk management practices at the entity level, rather than through centrally imposed detailed controls and oversight requirements.¹³⁶

5.4 It is axiomatic that an appropriate level of oversight for any public sector agency is required. However, a differential regulation approach could see regulatory

¹³³ Department of Finance ‘Differential Regulation’ <<http://www.pmra.finance.gov.au/differential-regulation/>>.

¹³⁴ OECD, *OECD Reviews of Health Care Quality: Australia Raising Standards* (2015) p 201; Russell Mannion, Maria Goddard and Angela Bate, ‘Aligning incentives and motivations in health care: the case of earned autonomy’ (2007) 23(4) *Financial Accountability and Management* 401 – 420.

¹³⁵ Department of Finance, ‘Earned Autonomy’ <<http://www.pmra.finance.gov.au/position-paper/earned-autonomy/>>.

¹³⁶ Department of Finance, ‘Differential Regulation’ <<http://www.pmra.finance.gov.au/differential-regulation/>>.

and oversight requirements being raised or lowered based on a number of different factors including:¹³⁷

- the risk profile of the entity;
- the Government's preferred approaches to achieving efficiency, agility and Australian Public Service transformation;
- particular policy objectives of the Government; and
- necessary standards of accountability to responsible ministers, the Parliament and the public, including the legislative requirements and the information needed to inform ministerial, Government, and Parliamentary decisions and enable discharge of oversight responsibilities.

5.5 The development of this 'differential regulation' or 'earned autonomy' approach is in its early stages. However, some commentators have cautioned against losing sight of the importance of accountability by reducing disclosures under the concept of 'earned autonomy'¹³⁸ whilst others expressed uncertainty as to the requirements or specifics of how the earned autonomy model would operate. They noted that further comment could not be provided until these aspects were clarified.¹³⁹

5.6 As the matter falls under the remit of the Department of Finance, they would be best placed to advise the Committee on the relevant issues.

5.7 However, the IGT believes that it would be useful for the Committee to consider the full range of benefits and risks outlined at paragraphs 2.70 to 2.71 of this submission, that are missing from the Commissioner's public commentary. In addition the Committee may wish to also consider the range of oversight to which Australia's largest financial institutions are subjected. It would provide a useful analogy when the specific risks, size, power and resources of the ATO are considered together with the amount of revenue that it manages. In this regard, the 'too big to fail' theory often applied in relation to financial institutions could apply to the ATO given its importance to the Australian economy and its monopoly nature.

5.8 The 'too big to fail' theory posits that certain institutions are so deeply interconnected with the fabric of society that governments will implicitly (or explicitly, in some cases) guarantee their support in the face of potential failure.¹⁴⁰ Such an approach may create a moral hazard in which the institution adopts increasingly higher risk and inefficient positions.¹⁴¹

¹³⁷ Above n 136.

¹³⁸ Sue Newberry, 'Public sector accountability and earned autonomy: accountability lost?' Allan Barton Memorial Lecture (16 October 2013).

¹³⁹ Australian Council of Social Service, Submission to Commonwealth Financial Accountability Review (February 2013); Chartered Secretaries Australia, Submission to Financial Accountability Review (19 February 2013).

¹⁴⁰ Commonwealth of Australia, *Financial System Inquiry Final Report* (2014) p 49.

¹⁴¹ *Ibid.*

5.9 In considering the range of oversight and governance arrangements of financial institutions in Australia, a cursory examination indicates that the nature of oversight and scrutiny is broad and includes:

- the Australian Securities and Investments Commission;
- the Australian Prudential Regulation Authority;
- the Reserve Bank of Australia;
- the Australian Securities Exchange;
- the Foreign Investment Review Board;
- the Treasury;
- the Australian Competition and Consumer Commission;
- state-based Fair Trading offices;
- Parliamentary committees;¹⁴²
- Annual General Meetings;
- annual reporting requirements;
- board of directors (often largely independent and non-executive);¹⁴³
- audit committees;¹⁴⁴ and
- external auditors.

5.10 In addition, where these institutions operate or seek to operate in other jurisdictions, they are also subject to oversight of the relevant regulatory bodies in those jurisdictions.

¹⁴² See for example: Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Impairment of Customer Loans* <<http://www.aph.gov.au>>.

¹⁴³ See for example: Commonwealth Bank of Australia, 'Corporate Governance' <<https://www.commbank.com.au/about-us/shareholders/corporate-profile/corporate-governance.html#six>>; Westpac, 'Board of Directors' <<http://www.westpac.com.au/about-westpac/westpac-group/board-of-directors/>>; ANZ, 'Board of Directors' <<https://www.shareholder.anz.com/our-company/board-of-directors>>.

¹⁴⁴ See for example: Commonwealth Bank of Australia, 'Board Audit Committee Charter' <https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/corporate-profile/Audit_Committee_Charter_Adopted_December_2013_with_Calendar.pdf>; Westpac, 'Board Audit Committee Charter' <<https://www.westpac.com.au/docs/pdf/aw/BoardAuditCommitteeCharter.pdf>>; NAB, 'Principal Board Audit Committee Charter' <<https://www.nab.com.au/content/dam/nabrw/About-Us/principal-board-audit-committee-charter.pdf>>; ANZ, 'ANZ Audit Committee Charter' <<https://anz.com.au/resources/c/8/c803de004d2bd84a85789d69785e67b9/Audit-Committee-Charter-May2013.pdf?MOD=AJPERES>>.

5.11 It is interesting to note that even with the vast resources and extensive oversight, both statutory and otherwise, financial institutions still acknowledge that there will be instances where complaints will arise and the need for independent complaints resolution options outside of the institutions themselves. In this latter respect, financial institutions have collectively established and agreed to have complaints externally addressed by the Financial Ombudsman Service.¹⁴⁵

5.12 Importantly, the ATO also extensively audits these institutions and indeed all other large corporate entities. In fact, all large entities with revenues of over \$5 billion are under comprehensive review every year¹⁴⁶ irrespective of how compliant they may have been in the past or the present. As the current Commissioner notes 'they can be very cooperative and very compliant' but they are just too large to fail.¹⁴⁷

5.13 It is perhaps appropriate to reflect on the adage 'what's good for the goose is good for the gander' in this case. Any diminution of the external scrutiny of the ATO would give rise to allegations of double standards, a lack in transparency and accountability, particularly given that the ATO handles funds which are many folds over \$5 billion and is able to exercise extensive and often costly investigative powers when scrutinising the affairs of taxpayers. It should be recalled that the Commissioner himself has stated that the ATO handles gross collections of \$432.3 billion and refund payouts of \$95.5 billion.¹⁴⁸

5.14 The IGT notes that the concept of 'earned autonomy' aims to develop a model that 'will see a targeted and risk-based approach taken to financial framework regulation.'¹⁴⁹ In contrast, the role of external scrutineering such as that performed by the IGT is to ensure that, in its administration of the tax system, the ATO and its officers are acting in accordance with accepted standards of fairness, natural justice and due process.

5.15 In summary, there must be effective and independent oversight to ensure that the ATO is administering the tax and superannuation systems and other responsibilities effectively and efficiently. The integrity of the Australian Government scrutiny arrangements must be maintained through an independent process for all Australians to raise concerns where the ATO's actions, policies or practices lead to adverse outcomes or impacts.

¹⁴⁵ Financial Ombudsman Service, 'What we do' <<https://www.fos.org.au/about-us/what-we-do/>>.

¹⁴⁶ Commonwealth, Senate Economics Legislation Committee, 10 February 2016, p 51

¹⁴⁷ Ibid, p 50.

¹⁴⁸ Above n 10, pp 21 and 24.

¹⁴⁹ Explanatory Memorandum to the Public Governance, Performance and Accountability Bill 2013, para [57].