



Australian Government
Inspector-General of Taxation

Inquiry into the External Scrutiny of the Australian Taxation Office

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

Inspector-General of Taxation

April 2016

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1. INTRODUCTION

1.1 This is a supplementary submission of the Inspector-General of Taxation (IGT) to the House of Representatives Standing Committee on Tax and Revenue's (Committee) *Inquiry into the External Scrutiny of the Australian Taxation Office* (Inquiry). The IGT has previously provided the Committee with a submission that details the response to the Committee's terms of reference (the Primary Submission), and accordingly, will not reiterate the points made therein in this supplementary submission except where it is necessary to provide context.

1.2 The IGT has now had the benefit of considering the published submissions made to the Inquiry, including those of the Australian Taxation Office's (ATO) dated 11 March 2016 (ATO Submission)¹ as well as the transcript of the ATO's testimony provided to the Committee on 16 March 2016 (the Hearing).² It appears that there are misunderstandings as to how the system of scrutineering operates within Government and in particular with respect to the ATO.

1.3 By way of assisting the Committee in its Inquiry and to promote greater understanding of the Australian Government's system of scrutineering, the IGT believes that it would be helpful to clarify a number of misconceptions in the following key areas:

- the scrutineering arrangements;
- the IGT work program and review topic selection;
- report recommendations; and
- complaints handling.

1.4 These areas are discussed in turn followed by a general observation on the way forward, the need for clearer and more focused communications on processes and interactions between the ATO and its scrutineers as a means of improving awareness, efficiency and effectiveness.

¹ Australian Taxation Office (ATO), *ATO Submission into the external scrutiny of the Australian Taxation Office* (11 March 2016) <www.aph.gov.au>.

² Evidence to the House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, Canberra, 16 March 2016.

2. SCRUTINEERING ARRANGEMENTS

2.1. THE EFFECT OF RECENT LEGISLATIVE AMENDMENTS ON THE ATO'S SCRUTINEERING ARRANGEMENTS

Statement:

2.1 The ATO appears to hold the view that it has more scrutineers than other Government departments. The Primary Submission addresses this issue in detail. In addition, the ATO appears to misunderstand the role of the Commonwealth Ombudsman (the Ombudsman) following the amendments to the *Inspector-General of Taxation Act 2003* (IGT Act) and the *Ombudsman Act 1976* (the Ombudsman Act) that became effective from 1 May 2015 (May 2015 Amendments):

The one that stands out is the inspector-general. I am not aware of too many other cases—perhaps the Inspector-General of Intelligence and Security—where there are either agency- or activity-specific additional piece of external scrutiny. If my colleagues want to correct me, I am happy to be corrected. But I think ourselves and the Inspector-General of Intelligence and Security roles would probably be the two standout ones which would be different from the experience of most other departments and major agencies.³

We do still have some relationship with the Commonwealth Ombudsman beyond tax complaints, including that the ombudsman can make own motion investigations.⁴

Clarification:

2.2 As set out in the IGT's Primary Submission, following the May 2015 Amendments, the Ombudsman no longer has oversight of tax administration matters. Whilst the Ombudsman may conduct own motion reviews, these may not examine tax administration issues due to section 6D of the Ombudsman Act. The only matters the Ombudsman oversees in relation to the ATO, and for all other Government agencies, are those relating to the Public Interest Disclosure (PID) Scheme and Freedom of Information (FOI).⁵

2.3 It should be noted that the May 2015 Legislative Amendments incorporate the Ombudsman's powers and functions into the IGT Act.⁶ As a result, the IGT effectively performs a specialist ombudsman role. In some cases, complaints lodged with the IGT may concern the ATO and other agencies which fall under the Ombudsman's

³ Above n 2, p 4 (Geoff Leeper, Second Commissioner of Taxation).

⁴ Ibid.

⁵ *Ombudsman Act 1976*, s 6D.

⁶ *Inspector-General of Taxation Act 2003*, s 15.

jurisdiction (or vice versa i.e. where the Ombudsman receives a complaint which partially relates to the ATO). In those rare circumstances, the amended IGT Act provides for effective management of those matters through procedures for transfer and referral of complaints.⁷

2.2. THE ROLES AND ACTIVITIES OF THE ANAO AND THE IGT

Statement:

2.4 At the Hearing, the ATO's leadership expressed a view regarding the types of reviews conducted by the IGT and the Australian National Audit Office (ANAO) in the following manner:

...there is not an enormous difference between the [ANAO] performance audit and the type of review that the Inspector-General undertakes. They cover very much the same types of things in the same types of ways.⁸

Clarification:

2.5 As noted in the Primary Submission, the ATO is subject to the same external scrutineering arrangements as all other Commonwealth public service agencies. This includes the ANAO and the IGT, as a tax specialist ombudsman, who operate with different legislative functions. Any potential overlap by the ANAO and ombudsman functions is no different to that experienced by other Government departments.

2.6 It should be noted, however, that whilst on occasion an ANAO performance audit and an IGT review may appear to have a certain degree of 'things' in common, when considered in the context of their respective functions, this is not the case. This misunderstanding is discussed later in examining the ATO's cited examples of overlap.

2.7 The ATO also appears to have taken issue with the similarities in how the ANAO and IGT discharge their responsibilities in conducting audits or reviews. As a result of the ANAO and the IGT both adopting high standards for audit and review practice, it must be accepted that there may be certain processes or elements that are the same or at least similar.

2.8 In addition to the different legislative requirements, another area of distinction between ANAO performance audits and the IGT reviews is that, fundamentally, the agencies are 'answerable to different masters'.⁹ The ANAO's performance audits are primarily focused on efficiency of administration. The IGT's reviews are distinguishable as they primarily focus on 'improvement' with a broader perspective including principles of fairness. Accordingly, IGT reviews involve extensive external consultation to understand the experiences of taxpayers and their tax advisers. For example, the Law Council of Australia's submission to this Inquiry noted that:

⁷ *Ombudsman Act 1976*, para 6D(3)(a); *Inspector-General of Taxation Act 2003*, sub-ss 10(1) and 10(2).

⁸ Above n 2, p 12 (Andrew Mills, Second Commissioner of Taxation).

⁹ Above n 2, p 12 (the Hon Bronwyn Bishop).

The IGT's office, under its statutory obligations, has a closer alignment to taxpayers' interests and ensuring the improvements in the administration of the system benefit all parties. The office of the IGT has extensive contact with taxpayer groups, including the Committee, on various of their projects. The office approaches groups, including the Committee, at least annually in order that we can suggest topics for their work program. Together with the complaint handling function now with the IGT, the office of the IGT is very interactive with taxpayers and alive to their concerns. By contrast, the ANAO role is more aligned to Government and their concerns with efficiency and administration and the ANAO does not undertake the same consultation and have the same level of interaction with taxpayers and relevant representative bodies.¹⁰

2.9 It should be noted that IGT reviews may also contain recommendations to Government for policy change, which require legislative amendments, with respect to tax administrative matters. This is consistent with the IGT's specialist ombudsman function.

2.3. SCRUTINEERS' CONSULTATION ARRANGEMENTS

Statement:

2.10 At the Hearing (and not in its written submission), the ATO's leadership have made statements which indicate a misunderstanding of the degree of consultation between the IGT, Auditor-General and the Ombudsman. For example:

...I am not aware that the ANAO varies its planned audit activity on the tax office with regard to the program that is established by the inspector-general. I am not aware that they coordinate their programs of activity. I am happy to take that on notice and check. I think they are actually independently worked out, as it were.¹¹

Clarification:

2.11 The IGT's Primary Submission has sufficiently addressed this issue. Specifically, pursuant to a legislative requirement, the IGT had previously consulted with the Auditor-General and the Ombudsman in the development of his work program.¹² These consultation arrangements were further bolstered following a recommendation from the Joint Committee of Public Accounts and Audit (JCPAA) whereupon the three agencies entered a tri-partite agreement on consultation.¹³

¹⁰ Law Council of Australia, *Submission to the Inquiry into the External Scrutiny of the Australian Taxation Office* (11 March 2016), p 6.

¹¹ Above n 2, p 4 (Geoff Leeper, Second Commissioner of Taxation).

¹² *Inspector-General of Taxation 2003*, former sub-s 9(2) [now repealed].

¹³ Joint Committee of Public Accounts and Audit (JCPAA), *Report 426 Ninth Biannual Hearing with the Commissioner of Taxation* (2011) p 32; Inspector-General of Taxation (IGT), Commonwealth Ombudsman and Australian National Audit Office (ANAO), *Executive Minute on Joint Committee of Public Accounts and Audit Report 426 Ninth Biannual Hearing with the Commissioner of Taxation* (30 May 2012).

2.12 The agreement was more recently re-affirmed following the May 2015 Legislative Amendments. Examples of instances in which the IGT varied or delayed investigation of particular issues of concern after consultation with the ANAO and the Ombudsman were set out in the Primary Submission.¹⁴

2.4. VALUE OF IGT REVIEWS

Statements:

2.13 The ATO has made general statements questioning the value of the work of external scrutineers, including the IGT. In its written submission, the ATO has stated that:

Some reviews make recommendations that do not provide any real insight or added value. Observations made are already known and under active management in the organisation and all effort and time expended proves futile.¹⁵

and

...regardless of the relative merits of reviews, significant ATO resources are being drawn away.¹⁶

Clarification:

2.14 It is curious that the ATO leadership would focus purely on resourcing with complete disregard for the merits of scrutineers' reviews. First, the Commissioner has reassured the public on a number of occasions that the decrease in the ATO work force would not impact its services.¹⁷ Secondly, in such environments, robust oversight and scrutineering are even more critical especially when new significant projects, such as the 'reinvention', are being rolled out. There are examples of large-scale system failures during periods of significant change within the ATO.¹⁸

2.15 Turning to the merits of IGT reviews, the Primary Submission has set out the significant and enduring benefits of IGT reviews and public acknowledgments of those benefits by a number of stakeholders, including the ATO.

2.16 Furthermore, the IGT's work has provided a catalyst for expanding the ATO's thinking on issues by encouraging holistic problem identification and resolution. For example, the ATO's move towards a holistic dispute resolution approach resulted from a number of IGT's reviews, especially the Settlements and Objections reviews. In the latter, the ATO acknowledged:

¹⁴ IGT, *Submission to Inquiry into the External Scrutiny of the Australian Taxation Office* (11 March 2016) pp 38-39.

¹⁵ Above n 1, p 12.

¹⁶ Ibid, p 1.

¹⁷ See for example: Evidence to the Senate Economics Reference Committee on Corporate Tax Avoidance, Parliament of Australia, 8 April 2015, p 31 (Chris Jordan, Commissioner of Taxation).

¹⁸ IGT, *Review into the Australian Taxation Office's Change Program* (2011) p 97.

...the need to take a more 'whole of dispute' approach with an emphasis on moving dispute resolution closer to the point of the original decision. It has recognised that there was a tendency in the past to focus compartmentally on the particular stage of the progression of the case (audit stage, objection stage or litigation).¹⁹

2.17 IGT reviews have also provided independent assurance of major ATO changes and accelerated progress of that work:

...increasingly the ATO is appreciating that, in addition to being a scrutineer, my office can also play a role as an independent consultant. Such a shift more clearly recognises that my office is able to engage with external stakeholders and the ATO in an unbiased, candid and evidentiary-based dialogue to identify improvement opportunities...

For example, the Commissioner recently consulted with me on his proposal to implement an independent review function for certain tax disputes. Although this ATO proposal did not implement any particular IGT recommendations, it was informed by my submission to the October 2011 Tax Forum, recommendation 6.1 of the ADR review and recommendation 9.3 of the large business compliance review. I highlighted the risks as well as benefits of such a function and these were considered in the ATO's design.²⁰

2.18 The IGT's reviews have also been significant in enhancing the taxpayer and tax practitioner experience when interacting with the ATO on significant technical issues, particularly in the absence of binding advice. In this respect, the IGT's *review into delayed or changed ATO views on significant issues*²¹ (the so-called 'U-turns' view), which was undertaken at the direction of the then Assistant Treasurer, provides a good example. The review led to the ATO, amongst other things, developing a practice whereby it would not retrospectively apply changed technical views where taxpayers could show that they had acted in good faith on other ATO guidance or statements. The relevant ATO practice statement was more recently updated to imbue further improvements following a follow up review undertaken by the IGT.²²

2.19 The work of the IGT, including reviews, has assisted in shaping the public debate on structural change to Australia's tax administration.²³ It has also provided considerable assistance to the community by engaging, investigating and reporting on key areas of concern in tax administration. As the Committee stated in its *Tax Disputes* report:

The Committee would very much like to thank the IGT for the assistance he has provided the Committee during the inquiry. This includes his review of tax

¹⁹ IGT, *Review into the underlying causes and the management of objections to Tax Office decisions* (2009) p 8. See also: IGT, *Review into aspects of the Tax Office's settlement of active compliance activities* (2009).

²⁰ IGT, *Annual Report 2012-13* (2013), p 4-5.

²¹ IGT, *Review into the delayed or changed Australian Taxation Office views on significant issues* (2010).

²² IGT, *Follow up review into delayed or changed Australian Taxation Office views on significant issues* (2014).

²³ Above n 20, p 3.

disputes for large businesses and high wealth individuals, private briefings with the Committee, and the provision of evidence at the biannual hearings with the ATO. The IGT has also assisted the Committee through his work program over the past five years. Reports into objections (2009), compliance approaches to SMEs and high wealth individuals (2011), and the self-assessment system (2012) have given the Committee a solid foundation for its inquiry.

Finally, the Committee would like to acknowledge the impact that the IGT's report on Alternative Dispute Resolution (ADR) in 2012 has made on tax disputes generally. The Committee notes that the previous Commissioner of Taxation also requested that the IGT undertake the ADR review. Many of the recent reforms made by the ATO can be traced back to this report and the Committee understands that some of the IGT's suggestions, such as in-house facilitators at the ATO, have been very successful.²⁴

2.20 Similarly, external stakeholders such as the Law Council of Australia have also recognised the improvements generated by IGT reviews and the extensive community engagement undertaken by the IGT, as noted in its submission to the Inquiry:

We consider that our view (and the view of many others at the time) as supported by the Board of Taxation, has been vindicated by the good work of the IGT over its near 13 years of operation.

There has been a significant level of work done by the IGT's office in its time. It must be noted that the work has led to improvement in the administration of the tax system, including:

- ATO management of disputes with taxpayers
- ATO development of its views and changes of views
- ATO compliance practices affecting smaller and medium taxpayers as well as larger taxpayers.

In the last 12 months alone, of the IGT's reports recommending changes, the ATO has responded agreeing (in whole or in part) with 50 of the 58 recommendations made by the IGT. That is an indicator of the relevance and value of that scrutiny.²⁵

2.21 Moreover, the former and current Commissioners have acknowledged key improvements were implemented as a result of IGT recommendations. These were set out in the IGT's Primary Submission to this Inquiry as well the IGT's *Management of Tax Disputes* report.²⁶

2.22 In addition, many ATO officers, who have been engaged in IGT reviews, have reflected very positively on such experience and the outcomes of the reviews. Indeed a

²⁴ House of Representatives Standing Committee on Tax and Revenue, *Tax Disputes* (March 2015) p 2.

²⁵ Above n 10, pp 5 & 6.

²⁶ IGT, *The Management of Tax Disputes* (2015) pp 118 and 119.

fundamental part of each review is to obtain feedback from key ATO officers on improvements that may be realised in conducting future reviews.

2.23 It is unfortunate that the ATO's submission and testimony was narrowly directed to achieving a certain outcome without any regard to public or private acknowledgments of the benefits of scrutineering and particularly of IGT reviews.

2.24 A concerning new development appears to be the ATO's disagreement with IGT recommendations whilst progressing and implementing improvements which are materially similar. For example, in the *review into the ATO's services and support for tax practitioners*, the IGT recommended that the ATO 'develop a 'web chat' functionality that provides tax practitioners with helpful information.²⁷ Whilst the ATO disagreed with this recommendation, at a recent conference, the Commissioner noted a key improvement being:

Our newest service offering is Alex, a virtual assistant available on ato.gov.au 24/7 to help clients with their queries. Alex made her debut on ato.gov.au on 29 February 2016 and has already had almost 60,000 conversations.²⁸

2.25 In another example, the ATO also initially disagreed with the IGT's recommendation for delaying the retirement of its current Electronic Lodgment System (ELS).²⁹ Notwithstanding that disagreement, the ATO has now publicly indicated that it would delay the decommission date for ELS until at least 31 March 2017.³⁰

²⁷ IGT, *Review into the Australian Taxation Office's services and support for tax practitioners* (2015) pp 73 and 74.

²⁸ Commissioner of Taxation, 'Better Services and a better experience for Australians' (Speech delivered to the 12th International Conference on Tax Administration, 31 March 2016).

²⁹ Above n 27, p 70.

³⁰ ATO, 'Electronic Lodgment Service - tax agents' <www.ato.gov.au>.

3. WORK PROGRAM AND REVIEW TOPIC SELECTION

3.1. SCRUTINEERS' CONSULTATION ON THE WORK PROGRAM

Statement

3.1 At the Hearing, the ATO's leadership stated:

... I am not aware that the ANAO varies its planned audit activity on the tax office with regard to the program that is established by the inspector-general. I am not aware that they coordinate their programs of activity. I am happy to take that on notice and check. I think they are actually independently worked out, as it were.³¹

Clarification:

3.2 The above ATO comment, that there is no coordination of activities, is simply not correct. There is a formally agreed process for consultation which is also maintained in practice.

3.3 As set out in the Primary Submission, the consultation is extensive and was previously mandated by law and bolstered by commitments made to the JCPAA. Furthermore, where the ATO has previously provided information to one scrutineer, nothing precludes it from providing the same information to another scrutineer in order to minimise both time and costs.

3.2. TIMEFRAME OF WORK PROGRAMS

Statement:

3.4 The ATO's leadership has stated at the Hearing (but not in its written submission) that:

...it is not an annual program of review; it can be 18 months in the making, and sometimes reviews go over a much longer period than that. Certainly, if you also take into account the implementation of recommendations, the review process can go on for quite some time...we in the organisation are dynamic. We are moving all the time.³²

³¹ Above n 2, p 4 (Geoff Leeper, Second Commissioner of Taxation).

³² Ibid, p 13 (Jacqui Curtis, Chief Operating Officer).

Clarification:

3.5 The IGT program of review is not constrained in the manner suggested. Historically, it was a statutory requirement that the IGT develop a work program,³³ however, since the May 2015 Legislative Amendments, that requirement no longer exists.

3.6 As stated earlier, the IGT Act now incorporates the provisions of the Ombudsman Act and, accordingly, the IGT has the power and flexibility to conduct reviews at any time. The scope of those reviews similarly is very flexible across a wide spectrum from smaller targeted reviews to very broad or systemic-like reviews. Therefore, in future, the broader IGT review work would be quite different from the way the IGT has historically set his work program. As indicated in his Primary Submission (as well as in his annual report³⁴ and speeches³⁵), moving forward, the IGT is likely to undertake more targeted reviews in an expedited manner to address issues emerging from the handling of complaints.

3.7 The IGT's last work program was issued on 10 April 2014. Due to the IGT assisting the Committee in its *Inquiry on Tax Disputes* as well as needing to direct resources to develop a complaints handling function pursuant to the Government's policy decision, this work program has not yet been completed. However, the stakeholder concerns that gave rise to the selection of these two topics originally was strongly reaffirmed by the number and depth of stakeholder submissions lodged in response to the release of terms of reference for each review toward the end of last calendar year. In commencing the formal review process, the IGT meets with the relevant ATO senior management, including the relevant Second Commissioners, to discuss the range and nature of concerns raised by stakeholders in their submissions and also offer them an opportunity to provide initial comments.

3.8 The ATO's statement also appears to suggest that sometimes the implementation of a recommendation as part of the review process itself may go on for quite some time [and that this is not helpful] as the ATO is 'agile', 'dynamic' and 'moving all the time'.³⁶

3.9 As set out in the Primary Submission, the design and implementation of any recommendation from the IGT is a matter solely for the ATO. Furthermore, the IGT has in the past been routinely asked to provide advice on proposed implementation plans and we have readily assisted in this regard. There also needs to be acknowledgment that not all recommendations are the same and that whilst some recommendations may be quickly implemented, others may require further careful consideration as to how they may be incorporated into the ATO's existing work.

3.10 It is acknowledged that any large organisation needs to plan well beyond an annual cycle and has to be flexible and agile in responding to client needs, as well as changing environments. It should be noted, however, that the ATO's reinvention

³³ *Inspector-General of Taxation Act 2003*, former sub-s 8(2) [now superseded]

³⁴ IGT, *Annual Report 2014-15* (2015), p 13.

³⁵ IGT, 'The role of the Inspector-General of Taxation in Australia' (Speech delivered to the International Taxpayer Rights Conference, November 2015) p 4 <www.taxpayerrightsconference.gov.au>.

³⁶ Above n 2, p 13 (Jacqui Curtis, Chief Operating Officer).

program has been in progress for approximately three years and is continuing. As the ATO's leadership has stated, 'as much as 18,000 people can be agile we try to be agile.'³⁷

3.3. WORK PROGRAM DEVELOPMENT AND TOPIC SELECTION

Statement:

3.11 At the Hearing (but not in its written submission), the ATO's leadership has expressed doubt as to the veracity of checks and consultation undertaken by the IGT to determine the appropriateness of topics selected for review. Specifically, it noted:

What we are saying is that we do not think that there is enough transparency in how something moves from being a complaint to being the source of a systemic review, and we are not involved in that discussion. That is a matter for the Inspector-General.³⁸

...Chair, we would say on the record that the processes that led to the Inspector-General deciding to inquire into something are not transparent to us. That is why we are struggling to answer the question. The Inspector-General, quite appropriately, has his or her own powers to decide where to inquire into things, and they receive information, advice, complaints, feedback from people. We are not always privy to the information that has caused them to inquire into particular areas, which is why I guess we may appear to be struggling to answer this particular question. That is not a process that we are necessarily involved in, so we would not be able to assist you in determining how those things get onto the work program.³⁹

...part of the challenge here is the different approaches that the scrutineers use. With the ANAO, Mr Leeper has laid out their approach. With the Inspector-General of Taxation, it is a slightly different approach. We do not have the visibility, perhaps, as to the drivers behind why a particular area is reviewed. There is not as much communication and transparency around that... To start with, the inspector-general, unlike the ANAO, calls for submissions on areas that the public would like the inspector-general to inquire into. That is immediately going to give rise to people who have a complaint—an axe to grind about something. That is fine, because those things should be brought forward, don't get me wrong, but whether or not that represents a systemic and whole-of-ATO—and, for that matter, whole-of-government—approach to a particular issue is unclear to us, whereas we know the ANAO takes a more systemic whole-of-government and whole-of-ATO approach.⁴⁰

³⁷ Above n 2, p 13 (Geoff Leeper, Second Commissioner of Taxation).

³⁸ Ibid, p 12 (Geoff Leeper, Second Commissioner of Taxation).

³⁹ Ibid, pp 10-11 (Geoff Leeper, Second Commissioner of Taxation).

⁴⁰ Ibid, p 11 (Jacqui Curtis, Chief Operating Officer).

Clarification:

3.12 The IGT has previously provided the JCPAA with a briefing on how it develops his work program by using the 2012-13 work program, which was announced on 10 October 2012, as an example.⁴¹ A copy of that briefing is included as 'Appendix A' to this supplementary submission. This is a matter of public record and reflects the processes at the time as well as those used in developing the most recent work program announced in April 2014.

3.13 In that briefing, the IGT acknowledged the need to remove duplication and identify the issues of most concern. Specifically, he noted:

Flowing from the consultation process, the IGT received 107 submissions with a total of 248 issues being raised. There was significant duplication in the issues raised such that 87 discrete issues were identified.⁴²

3.14 A divergence between the issues raised with the IGT and those raised with the ATO would likely indicate the respective degree of openness and trust that stakeholders have in these two agencies. The ATO's consultations with representative organisations should surface much, if not, all, of the issues raised with the IGT. However, stakeholders may not be as open or frank with the ATO for a number of reasons, including fear of adversely affecting their relationship with the ATO or even retribution.

3.15 The IGT also seeks input from the ATO during the development of the work program.⁴³ Such consultation is seen as critical to ensuring that key issues of concern are identified as, being the administrator, the ATO is close to the issues that are emerging and in a good position to suggest those areas which warrant independent review. It is noteworthy that the IGT has accepted the ATO's suggestions on all occasions where it has identified such topics. These have resulted in two IGT reviews, being the *review into the ATO's use of early and alternative dispute resolution*⁴⁴ and the *review into aspects of the ATO's administration of private binding rulings*.⁴⁵

3.16 Moreover, prior to the formal public announcement of the work program, a final draft version of the document is presented to the ATO senior executives.

3.17 The IGT, in calling for public submissions, obtains real insight into concerns and issues. Of course as with any process of this nature, the IGT may also receive responses from individuals, who on one view, may 'have an axe to grind'.

3.18 As set out in Appendix A and IGT annual reports,⁴⁶ an extensive process is undertaken to consult broadly with stakeholders to ensure that reviews are not conducted on the basis of isolated representations made by a few taxpayers or tax

⁴¹ IGT, *Inspector-General of Taxation work program public consultation: a briefing for the joint committee of public accounts and audit* (6 December 2012) <www.igt.gov.au>.

⁴² *Ibid*, p 3.

⁴³ *Ibid*.

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

⁴⁵ IGT, *Review into aspects of the ATO's administration of private binding rulings* (2010).

⁴⁶ See for example: Above n 20, pp 10-11.

professionals. Issues may also be tested in a range of other means, including through various forums or otherwise in discussion with professionals and industry bodies whose membership broadly reflects the market segments, to gauge whether the topic issues are isolated or may have broader and more significant impacts.

3.19 The IGT also arranges meetings with the ATO towards the end of the process to enable the IGT to synthesise submissions from community stakeholders. At these meetings, the IGT provides some insight to the ATO senior executives with a snapshot of the issues which have been brought to the IGT's attention and to seek their direct feedback on topic areas for review.

3.20 Once the work program is settled and publicly announced, work begins on conducting each review. This work and the associated extensive consultation with the ATO is described in detail in sections that follow.

3.21 Given the comments at the Hearing, the ATO leadership do not appear to appreciate the above processes and those contained in Appendix A. Such comments possibly reflects the limited experience that the current ATO leadership team, or at least of those present at the hearing have in this area.

3.4. QUANTITY OF REVIEWS

Statement:

3.22 The ATO has indicated that, over the past five years since 1 July 2010, there have been too many reviews conducted by the IGT. Specifically, it has said that of the 51 reviews and audits, 43 per cent of these originated from the IGT.⁴⁷ The ATO's has alleged that the number of reviews represents an unnecessarily high volume which has diverted ATO resources from other work and priorities.⁴⁸

Clarification:

3.23 Since July 2010, the IGT has commenced 17 reviews. A timeline of these reviews is set out in 'Appendix B' to this supplementary submission. All but 6 of these reviews were commenced prior to 1 January 2013 when the current Commissioner was appointed. The IGT notes that there was a concentration of reviews commenced and completed in the 2012-13 and 2013-14 financial years. This was reflective of the issues which had emerged during consultation to develop the work program in 2012.

3.24 During the same period, 19 reviews were completed (four of which commenced prior to 1 July 2010). A timeline of completed reviews is also included but in Appendix C.

⁴⁷ Above n 1, p 5.

⁴⁸ Ibid, p 1.

3.25 In relation to the *review into the ATO's administration of valuation matters*,⁴⁹ the IGT notes that the review had been flagged in a work program announced in 2012 but due to resource constraints was not commenced until the end of 2013. To put into context the relative resourcing differential between the IGT and the ATO, up until August 2015, the entirety of the IGT's office had between 8 and 9 staff members which included the IGT himself, the Deputy IGT as well as an office and a corporate compliance manager. Effectively, there were only five IGT staff members at the coal-face of the reviews being undertaken. This represents 0.02 per cent of the staffing population of the ATO. Similar ratios could also be drawn between the IGT's approximate \$2 million budget at the time and the over \$3 billion budget of the ATO.

3.26 It is critical to note that stakeholders had been urging the IGT to undertake many more reviews. Given his resources, the IGT had developed a work program of reviews that would yield optimal benefits for as large a number of taxpayers as possible.

3.27 As mentioned earlier, the majority of the reviews in question had commenced prior to the current Commissioner taking up his role. Interestingly, shortly after assuming office, he identified such serious concerns and adverse community perceptions that an enterprise-wide program was required to 'reinvent' the ATO. Indeed after three years the 'reinvention' is continuing.

3.28 Moreover, the suggestion that the scrutineering function prevents ATO officers from doing their work ignores the low impact approach taken in IGT reviews. The IGT has actively, and continues to, encourage the ATO to collaborate with the IGT on reviews such as by providing pre-existing information and not to create documents or information afresh. However, the IGT has observed at times a reticence for ATO officers to depart from a risk averse approach which has translated to reverse workflows and unnecessary delays as the ATO works through multiple layers of approvals and sign offs before information is provided or creating documents where none existed previously.

3.29 To only list the number of IGT reviews and recommendation and assert that it is holding back the ATO from its core business, is a simplistic assessment aimed at achieving a particular outcome. By way of example, if the work of five IGT staff has such a significant impact on the ATO's operations, then, as indicated in the Primary Submission, there is a need for the ATO to better manage its own resources and work more collaboratively with external scrutineers.

3.30 Moreover, the work of scrutineers and the ATO's response to it is indeed part of the ATO's core business. Such work is mandated by law and executed through key independent statutory agencies, i.e. the ANAO and the Ombudsman including the IGT as taxation specialist ombudsman.

⁴⁹ IGT, *Review into the Australian Taxation Office's management of valuation matters* (2015).

3.5. TIMING OF REVIEWS

Statement:

3.31 The ATO in submission asserted that ‘there is insufficient time between reviews to provide different data sets or introduce, embed and measure improvements’.⁵⁰

Clarification:

3.32 The IGT has publicly demonstrated a willingness to allow time for ATO processes and procedures to be bedded down before consideration is given to possible review. Examples were provided in the Primary Submission, one of which was the ATO’s approach to technical decision making which was considered as a potential review topic in the 2012-13 work program. It was ultimately not selected as a review topic as the ATO itself was about to embark on an internal review into the area.

3.33 Examples in the current work program include the ATO’s consultation arrangements and the ATO’s approach to information gathering.⁵¹

3.6. REVIEWS ON SAME THEMES

Statement:

3.34 The ATO has made a number of assertions in its submission that reviews are ‘overlapping and repetitive’⁵² and that ‘duplication and overlap is evident across and within scrutiny work programs.’⁵³ Similar assertions were made at the Committee Hearing:

I am talking specifically here about ANAO reviews and reviews by the Inspector-General, where we have seen duplication in the issues been reviewed and, indeed, in some of the recommendations. My understanding is that we have to report on the progress we have made on those recommendations.⁵⁴

3.35 It also appears that ATO officials consider that alerting the IGT to previous reviews on the issues being examined goes unheard. For example:

... The people within the organisation who run the area that the review is focused on would liaise directly with the scrutineers. We also have four people who work in this area to coordinate the reviews. They would work directly with the scrutineering organisation, whether that be the ANAO or the IGT, and they would be briefing them from the very beginning about what our view is about the

⁵⁰ Above n 1, p 1.

⁵¹ IGT, ‘Work program 2012-13’ <www.igt.gov.au>; IGT, ‘Our work program’ <www.igt.gov.au>.

⁵² Above n 1, p 1.

⁵³ Above n 1, p 12.

⁵⁴ Above n 2, p 5 (Jacqui Curtis, Chief Operating Officer).

review that has been undertaken, previous reviews, previous recommendations and the progress that has been made against those. We certainly do try to get involved from the very beginning and put forward our view, but that does not necessarily get reflected in the scope of the review or how the review is undertaken.⁵⁵

Clarification:

3.36 The interconnectedness of the tax laws and tax administration often means that areas may not be reviewed and considered in isolation as this may not provide a holistic view of the ATO's processes in these matters.

3.37 Moreover, reviews on common themes arise when the ATO had not fully implemented previous recommendations or where there were changes in the underlying systems such that community concerns may continue to emerge:

It should be acknowledged that in certain cases, underlying systemic issues which have been the subject of IGT reviews, may re-emerge or appear to re-emerge. This may be due to a number of factors, including where the ATO has not fully implemented the recommendations or where the ATO has implemented the recommendation faithfully but the underlying systems, policies or law had subsequently changed. In such cases where the IGT considers that there would be broad community benefits in doing so, a new review may be undertaken.

An example of such action occurred following the completion of the IGT's Review into the Tax Office's Administration of Public Binding Advice which, amongst other things, sought to provide greater taxpayer clarity on the Commissioner of Taxation's (Commissioner) approach to general administrative practice (GAP). The stakeholder concerns regarding a particular aspect of that review, namely GAPs, continued to persist and ultimately lead to a direction from the then Assistant Treasurer that the IGT undertake a further review on changed or clarified ATO views – the so-called 'U-turns' review.

The follow up of the ATO's implementation of recommendations from the so-called 'U-turns' review will be published in a separate report. This is due to a large number of stakeholders who approached the IGT with ongoing concerns in this area during the course of the follow up review. Moreover, a legal challenge that had been launched in relation to the ATO's administration of so-called 'U-turns' and related administrative processes warranted a separate reporting of the follow up for that review.⁵⁶

3.38 As noted by the members of the Committee, a common reason for repeating a recommendation is that the ATO had not acted on it previously and the underlying causes of broader community concern remain.⁵⁷ In relation to the ATO's testimony that agreed recommendations are listed as part of the work program and routinely reported

⁵⁵ Above n 2, p 5 (Jacqui Curtis, Chief Operating Officer).

⁵⁶ IGT, *Follow up review into the Australian Taxation Office's implementation of agreed recommendations in five reports released between August 2009 and November 2010* (2014) pp 4-5.

⁵⁷ Above n 2, p 5 (the Hon Bronwyn Bishop).

on, this no longer seems to be the case. The ATO has not provided such information since it ceased to publicly report on its implementation of IGT recommendation as part of its website update.

3.7. AREAS OF ALLEGED DUPLICATION

3.39 At the Hearing and in its written submission, the ATO has identified a number of examples which it considers are illustrative of overlap and duplication in the work of external scrutineers. These include director penalty notices (DPNs), dispute handling, debt and superannuation.

3.40 As noted earlier, it must be accepted that a certain degree of what might be perceived to be overlap is necessary due to the inter-connectedness and inter-relationships between different areas of the ATO's administration. Moreover, when the ATO's cited examples are considered more closely, it is clear that the degree of alleged duplication is minimal in some cases and, in others, there are clear reasons why the reviews were undertaken. The cited examples are addressed in turn below.

3.7.1. Director Penalty Notices

Statement:

3.41 The ATO has asserted that the issue of DPNs has been 'examined' seven times over the past five years.⁵⁸ In support of this assertion, the ATO has listed four IGT reports and three ANAO reports:

- IGT: *Review into the ATO's administration of the superannuation guarantee charge (SGC review)*;⁵⁹
- ANAO: *The engagement of external debt collection agencies (EDCA report)*;⁶⁰
- ANAO: *Management of debt relief arrangements (Debt Relief report)*;⁶¹
- IGT: *Review into the ATO's administration of penalties (Penalties review)*;⁶²
- IGT: *Follow up review into the ATO's implementation of agreed recommendations in give reports released between August 2009 and November 2010 (Follow up review)*;⁶³

⁵⁸ Australian Taxation Office (ATO), *ATO Submission into the external scrutiny of the Australian Taxation Office* (11 March 2016) <www.aph.gov.au> appendix 4.

⁵⁹ IGT, *Review into the ATO's administration of the superannuation guarantee charge* (2010).

⁶⁰ ANAO, *The Engagement of External Debt Collection Agencies* (2012).

⁶¹ ANAO, *Management of Debt Relief Arrangements* (2013).

⁶² IGT, *Review into the ATO's administration of penalties* (2014).

⁶³ Above n 56.

- ANAO: *Promoting compliance with superannuation guarantee obligations (SGC compliance obligations review)*;⁶⁴ and
- IGT: *Debt Collection (Debt review)*.⁶⁵

Clarification:

3.42 The ATO's assertion is incorrect. The ATO appears to have only cursorily examined the above reports to determine whether the issue of DPNs was 'examined'. The correct position is that only two reviews, one IGT and one ANAO report, considered the ATO's administration of DPNs.

3.43 A closer consideration of the substance of the other three IGT reports reveal the extent of the consideration of DPNs was limited to the following:

- The SGC review made a single recommendation to Government to extend the DPN regime to cover SGC liabilities;⁶⁶
- The Follow Up review mentioned DPNs in an appendix to show that the Government had adopted the above IGT recommendation;⁶⁷ and
- The Penalties review only made a single mention of DPNs and this was part of a quote taken from the ATO's own practice statement by way of context.⁶⁸

3.44 Of the three reviews above, no recommendations were made to the ATO on DPNs and it is unlikely that any information relating to DPNs would have been requested from the ATO resulting in time or costs being incurred.

3.45 With respect to the ANAO reports which were identified by the ATO, the IGT's review of those documents indicates that in the EDCA report, the ANAO mentioned DPNs four times, all of which were by way of background and context rather than in-depth examination.⁶⁹ Similarly, the ANAO's Debt Relief report made three mentions of DPNs, also only by way of background and context.

3.46 The IGT's Debt review, by necessity, examined the ATO's administration of the DPN powers in part due to it being a critical part of the ATO's debt collection approach and the high volumes of such notices being issued. Similarly, it appears to the IGT that the consideration of DPNs in the ANAO's SGC compliance obligations review was also necessary due to the new DPN powers which were granted to the ATO.

⁶⁴ ANAO, *Promoting compliance with superannuation guarantee obligations* (2015).

⁶⁵ IGT, *Debt Collection* (2015).

⁶⁶ Above n 59, pp 92-93.

⁶⁷ Above n 56, p 93.

⁶⁸ Above n 62, p 48.

⁶⁹ Above n 60, pp 38 and 41.

3.7.2. Dispute Handling

Statement:

3.47 In Appendix 5 to its submission, the ATO has identified 13 reports allegedly dealing with different aspects of the dispute handling process.

Clarification:

3.48 The IGT has considered these reports and the following comments need to be made:

- two reviews identified by the ATO were follow up reviews in which no new issues were examined;⁷⁰
- two were part of the Committee's *Inquiry into Tax Disputes*;⁷¹
- there was no overlap between the reviews examining general interest charge,⁷² Part IVC,⁷³ objections⁷⁴ and settlements⁷⁵ as they were mutually exclusive due to the ATO's compartmentalisation of these functions to particular stages of a dispute;⁷⁶
- the revisiting of model litigant issues in the current review on the *Taxpayers' Charter and taxpayer protections* is warranted given the effluxion of ten years since the Part IVC review. Moreover, there have been recent changes to the Office of Legal Service Co-ordination's approach to compliance with the *Legal Service Directions 2005*;⁷⁷ and
- whilst there is some overlap between the IGT's penalties and settlements reviews as well as the Senate Economics Committee's report on Corporate Tax Avoidance, the IGT also notes that acknowledgment was also given for the ATO's earlier work and improvements in this regard. Recommendations were therefore made to further enhance these improvements.⁷⁸

⁷⁰ IGT, *Follow up review into the Australian Taxation Office's implementation of agreed recommendations included in the six reports prepared by the Inspector-General of Taxation between June 2006 and October 2008* (2011); Above n 20.

⁷¹ Above n 24.

⁷² IGT, *Review of the remission of the general interest charge for groups of taxpayers in dispute with the Tax Office* (2004).

⁷³ IGT, *Review of Tax Office management of Part IVC litigation* (2006).

⁷⁴ IGT, *Review into aspects of the Tax Office's settlement of active compliance activities* (2009).

⁷⁵ IGT, *Review into the underlying causes and the management of objections to Tax Office decisions* (2009).

⁷⁶ *Ibid*, p 8.

⁷⁷ Attorney-General's Department, *Legal Services Directions 2005 Compliance Framework* (2013) p 6.

⁷⁸ Above n 62, pp 34-36.

3.7.3. Debt and Superannuation

Statement:

3.49 Appendix 5 to the ATO's written submission has also identified issues of debt and superannuation as other areas of overlap.

Clarification:

3.50 With respect to superannuation guarantee obligations, the IGT notes that his review was completed in 2010 and, key policy recommendations, were adopted by the Government to grant the ATO new powers to manage compliance in this area.⁷⁹ As the ANAO's review was announced more than a year after these powers came into effect and completed in 2015, the IGT believes the reviews to be appropriate and the elapsed 5 years to be more than enough time for the ATO to have bedded down improvements.

3.51 In relation to Debt, the IGT notes that this area continues to be one of significant concern to the community. With the growing levels of collectable debt under the ATO's care, the impact of the global financial crisis as well as consistent and high proportions of taxpayer complaints (it is consistently amongst the top two areas of complaint by taxpayers lodged with the Commonwealth Ombudsman previously and now with the IGT). Given these ongoing concerns, it is expected that the area would be heavily scrutinised. Moreover, in the conduct of the IGT's Debt review, clear reference and acknowledgement is made to the earlier work of the ANAO where relevant.⁸⁰

3.8. EVIDENCE USED IN IGT REVIEWS

Statement:

3.52 The ATO's written submission has suggested that some reviews 'rely on questionable sources of information and immaterial evidence'.⁸¹

Clarification:

3.53 There are numerous opportunities throughout the IGT review process for the ATO to engage with the IGT. A diagrammatic representation of this process together with the points of engagement is included in Appendix D.

3.54 Prior to the commencement of the review, the IGT issues terms of reference which includes detailed background discussion of the issues as well as submission guidelines which ask focused and targeted questions to garner evidence of both

⁷⁹ *Tax Laws Amendment (2012 Measures No 2) Act 2012*; ANAO, *Audit Work Program* (July 2014) p 116; ANAO, *Audit Work Program* (July 2013) p 124.

⁸⁰ See for example: Above n 65, pp 138-139.

⁸¹ Above n 1, p 1.

positive and negative experiences from stakeholders. As noted earlier, ATO senior management are provided an opportunity to comment on these materials.

3.55 Once a review commences, the IGT again consults extensively with the ATO senior executives and their teams at different points throughout the process.

3.56 A formal opening meeting for the review is called following the close of submissions. The meeting is attended by the IGT, Deputy IGT, the IGT review team as well as the relevant Second Commissioners and other senior executive officers of the ATO. At that meeting, the IGT provides details to the ATO regarding the numbers of submissions received, the broad category of stakeholders from whom submissions have been received as well as a detailed breakdown of the issues raised for consideration. This meeting also allows the ATO Second Commissioners and senior executives with an opportunity to provide initial comment on the issues raised.

3.57 Following that meeting, workshops are convened between the IGT and ATO review teams, both of which are headed by Senior Executive Service (SES) Band 1 officers, being an ATO Assistant Commissioner and the IGT General Manager. The workshops enable the IGT review team to engage directly with the ATO on the specific hypotheses being tested during the review. The workshops provide the ATO with an opportunity to clarify IGT information requests, provide details of any work or projects currently under way on these matters and to discuss any other matters relevant to the review.

3.58 During the workshop the IGT provides the ATO with a 2-3 page list of review hypotheses. We seek to use pre-existing information from the ATO in relation to these hypotheses wherever possible and actively consult with relevant ATO personnel to identify the most effective and efficient means of testing these concerns to minimise time and cost impacts for all involved. The impact on ATO resources is also minimised by IGT staff accessing certain systems directly under a secure arrangement.

3.59 In addition to the workshop, the IGT review team engages on at least a weekly basis with the ATO review team. Such engagement facilitates discussion about the information that has been provided and the progress of the review to address any issues or blockers such as instances of the ATO not providing the requested information. It also identifies for the ATO team the potential issues which are emerging, possible IGT observations and conclusions and whether there is a need for escalation of the matter to senior executive staff.

3.60 In many reviews, the IGT also convenes working groups consisting of private sector tax professionals, tax academics and ATO senior executive staff to further explore issues, find common ground and identify solutions. All parties have found such forums useful as external stakeholders have the opportunity to communicate their views and ATO senior officers may test those concerns directly in a non-adversarial forum.

3.61 Following the conclusion of the above processes, a 'preliminary draft report' is prepared. The preliminary draft report sets out the stakeholder concerns, the current

state of play (including any current ATO projects) together with the IGT's observations and supporting evidence as well as proposed recommendations for improvement.

3.62 The preliminary draft report is then provided to the ATO. The ATO is afforded an opportunity to provide comments specifically on the factual accuracy of the report as well as the proposed recommendations within a four week timeframe. The ATO comments are then discussed at a meeting of the IGT and ATO teams which include senior management.

3.63 The ATO's comments are taken into consideration in developing a final draft which is provided to the ATO for further comment and formal response to the recommendations. During this time, the IGT and Deputy IGT also meet with the ATO's Second Commissioners and other SES staff to discuss any outstanding issues before the report is finalised and made available for publication.

3.64 It is also worthwhile noting that at any other time, whether as part of the review process or otherwise, the ATO is encouraged to contact the IGT to discuss issues of emerging concern or other areas of interest which would assist both the IGT and the ATO in the progress of the review.

3.65 Given the above processes and significant sharing of information between the two agencies during a review, it is difficult to understand and regrettable that the ATO would make such a bold generalised statement posited as 'fact'.

4. REPORT RECOMMENDATIONS

4.1. VALUE OF RECOMMENDATIONS

Statement:

4.1 Statements made in the ATO's written submission appear to indicate a misunderstanding of the basis for IGT recommendations and, more fundamentally, his reviews. In its written submission, the ATO has asserted that some recommendations 'do not provide any real insight or added value'⁸² but did not elaborate further.

4.2 Moreover, at the Hearing, the ATO's leadership stated:

We find that many of the recommendations that are made add little value. I would like to explain that. Some of these are administrative in nature and have very little impact on improving the client experience. ... Some of them – and I can give you some examples – are very costly and do not actually impact on the experience for the client or shift the experience.⁸³

4.3 Curiously, despite suggesting that the recommendations were of little value, the ATO almost immediately after indicated that they 'were in fact in the process of implementing them'⁸⁴ or alleging that the ATO had been working independently on the very same improvements at the time they agreed with the recommendations.⁸⁵

Clarification:

4.4 The comments demonstrate a misunderstanding of the function of scrutineers as they apply to the ATO. The recommendations are administrative in nature because the IGT, like the Ombudsman and the ANAO, are confined by their respective legislation to only examine administrative matters. We are all precluded from considering substantive tax policy or merits-related matters as these are the domain of the Parliament (with advice from Treasury and the Board of Taxation), the Administrative Appeals Tribunal and the judiciary, respectively.

4.5 The ATO also appears to indicate that recommendations should only be made if the ATO has not commenced any work to address the concern raised by the end of the review. Such an approach would render any review by any scrutineer superfluous as at the moment any issue is raised by a scrutineer, the ATO could commence action to address it and therefore obviate the need for a recommendation.

⁸² Above n 1, p 1.

⁸³ Above n 2, p 14 (Jacqui Curtis, Chief Operating Officer).

⁸⁴ Ibid, p 16 (Geoff Leeper, Second Commissioner of Taxation).

⁸⁵ Ibid.

4.6 First, whilst the ATO's responsiveness to address the concerns of taxpayers or tax professionals is welcomed, it is arguable whether such responsiveness is only triggered by the spotlight shone on them by the IGT through his extensive consultations with the community. As the former IGT noted:

It has become apparent to me that when the Commissioner becomes aware of my intention to undertake a formal review, the Tax Office begins to focus internally on that area. When formal reviews do eventuate and outcomes are reported, it therefore comes as no surprise that many of the issues encountered often are in the course of being internally examined. Where improvement is required, steps are often underway to move in that direction. I see this responsiveness as very positive. Combined with frank and open liaison during the progress of a review (which both Offices have promoted), it creates an environment of 'no surprises' and often leads to improvements being implemented earlier than they might have been.⁸⁶

4.7 Secondly if the approach suggested by the ATO was to be adopted, it would most likely lead to community outrage as there would be little transparency or independent review of the issues causing concern and how they would be addressed if they are addressed at all.

4.8 Thirdly, our reviews provide an assurance of the ATO's commitment to address the underlying issues causing concern. If solutions to issues of concern are not captured in recommendations, it would be difficult to track the ATO's progress in resolving these issues. As one Committee member noted in relation to an issue concerning the recovery of superannuation from companies that had been struck off:

It was brought up at a public hearing: 'Oh, yes, we will look into that. We will do it.' Six months later they came back: 'Where is the answer?' 'Oh, we haven't done it.' You bet we asked the question again and got into it again. I can cite many examples, along those lines, over that time.⁸⁷

4.9 Recommendations reflect the ATO's commitment to action. The IGT has publicly stated, for example in his annual reports, that the ATO's actions to address community concerns identified by IGT are signs of a responsive organisation.⁸⁸ Unfortunately, the ATO's view seems to differ – recommendations are seen by the ATO as adversely reflecting on the organisation.

4.10 Lastly, the IGT accepts that the tax landscape, including its administration, is constantly changing. The IGT seeks to deliver recommendations which provide the broadest improvements for all taxpayers, especially those who may not be sufficiently resourced or equipped to challenge the ATO and its actions. In this respect, the IGT recognises that on rare occasions, changes within the ATO, the law or other aspects of administration may lead to a previous IGT recommendation no longer being applicable. In such instances, the IGT welcomes discussion on how the changing landscape has impacted the implementation of agreed recommendations.

⁸⁶ IGT, *Annual Report 2004-05* (2005), p 2.

⁸⁷ Above n 2, p 11 (the Hon Bronwyn Bishop).

⁸⁸ Above n 86.

4.2. QUANTITY OF RECOMMENDATIONS

Statement:

4.11 The ATO has stated in its written submission that of the 51 reviews and audits, over the past five years since 1 July 2010, 43 per cent of these originated from the IGT and contained 80 per cent of the 366 recommendations.⁸⁹ It has inferred that this is too much for the ATO to manage.

In our submission you will see that the recommendations made, particularly by the Inspector-General of Taxation, far exceed recommendations made by organisations like the ANAO or parliamentary committees. ... What this is doing is actually taking resources away from the mainstream outcomes of the organisation, which are about making it easier for people to do their tax affairs.⁹⁰

Clarification:

4.12 A question must be asked whether it is appropriate for the ATO to have previously agreed to implement recommendations and now express remorse about that agreement. Whilst the IGT and the ATO may not necessarily agree on all points, robust engagement and communications are necessary to ensuring that recommendations and responses are able to withstand public scrutiny.

4.13 Similarly, where the ATO believes that implementation would be too costly or impractical, the ATO has disagreed with IGT recommendations. For example, in the IGT's Penalties review, the ATO responded to one recommendation noting:

The ATO does not agree to report this information on a business line basis. This is because work types and market segments managed within each of the business lines continue to change over time and may continue to do so, resulting in limited usefulness for the development of trend data and comparative analysis.

The ATO does not propose to undertake a program of work for additional reporting. The ATO notes the significant staff costs involved in keying further data in addition to the limited system deployment capacity to deliver all of the items noted in the report.⁹¹

4.14 In some cases, the ATO may consider that the IGT's recommendation would be useful but due to resource or other constraints, or that further ATO internal consideration is needed. In such cases, the ATO has 'agreed in principle' with the recommendation. For example, in response to a recommendation that the ATO 'increase its workforce ability to handle complex tax practitioner enquiries, including those requiring whole of tax practice understanding'⁹² the ATO stated:

⁸⁹ Above n 1, p 5.

⁹⁰ Above n 2, p 5 (Jacqui Curtis, Chief Operating Officer).

⁹¹ Above n 62, p 60.

⁹² Above n 27, p 88.

In relation to 4.4 (c) - Agree in principle

There would need to be further analysis in relation to the specifics of the work type and associated capability gaps.

4.15 The IGT acknowledges that in the past, some IGT reviews have made recommendations with a generally higher degree of specificity, which has resulted overall in a higher number of recommendations. This was reflective of the historical interactions between the ATO and the IGT in which it was observed that where recommendations were made more broadly, the ATO's implementation tended to be ad hoc, unfocused and the ATO presenting other unrelated work it had undertaken to be evidence of implementation. Such an approach led to substantial disagreement during IGT follow up reviews.

4.16 Over time, this has changed as the IGT worked with the previous Commissioner and Second Commissioners to implement processes whereby the ATO's Audit Committee took an active role in overseeing the implementation of agreed recommendations.

4.17 The IGT expects that with a more cooperative relationship with the ATO and a commitment to more fulsome engagement between the two offices that recommendations need not be prescriptive nor numerous. However, the IGT would note that in maintaining the independence of the office, there must be acknowledgment that, at times, the two offices may disagree.

4.3. ATO COMMENTS AND FEEDBACK ON RECOMMENDATIONS

Statement:

4.18 At the Hearing, the ATO's leadership raised the degree of communication and dialogue between the ATO and the IGT on the draft reports and recommendations and then made assertions that the IGT has ignored ATO commentary or feedback on the report and the recommendations:

Can I just add one thing to what Mr Leeper said, going to your point, Chair, about communication. There have been occasions in the past where we have been given drafts of reports and recommendations and so on, and have sat down and tried to point out where modifications and improvements could be made to those which suffer the kinds of flaws that you have referred to. In some cases, that has been ignored and the final report comes out anyway. I just want to make sure that the committee does not go away with the impression that we do not try to engage on that basis already, at least to some extent.⁹³

...

With great respect to the Inspector-General, we would say that the ANAO scrutiny is much more effective because there is more dialogue and two-way

⁹³ Above n 2, p 16 (Andrew Mills, Second Commissioner of Taxation).

conversation. We have not had that lived experience in recent times with the Inspector-General, as Mr Mills has pointed out. That is something we will take some responsibility for working on as well, but our objective here is to make sure that scrutiny improves the performance of the office and provides assurance back to bodies such as this committee and the parliament. That is where we are coming from.⁹⁴

Clarification:

4.19 Any inference that the IGT ‘ignores’ the ATO’s position or disagreement is incorrect. As noted earlier, there is significant communication and discussion throughout the review process so that both offices have a common understanding of the issues being examined and solutions or recommendations are robustly tested.

4.20 The ATO has ample opportunity discuss recommendations with the IGT and his staff in person and why those recommendations will or will not work, may or may not be costly to implement or why the cost may outweigh the benefits. We also offer the ATO opportunity to provide evidence which would cause us to change our view on these issues. Indeed, as a result of such discussions, we have been persuaded to reconsider some recommendations and at times changes were made to ensure that improvements would be delivered to taxpayers and tax professionals on a more timely basis.

4.21 Furthermore, the reasons for any ATO disagreement are captured in the report. This fulfils our responsibility to the public to transparently demonstrate how we have considered the ATO's point of view on the issue.

4.22 One of the challenges the IGT faces is to ensure that the ATO’s middle management keep the relevant Second Commissioners informed of issues that emerge during the review and provide them with opportunity to give early input on issues so that they can be given appropriate consideration. We recognise that in a large organisation it takes time to consider a change as remedial action may have unintended ramifications elsewhere. Raising issues early for consideration ensures that such potential impacts can be fully considered and explained transparently. Unfortunately, however, we have not been able to secure the input or involvement of senior ATO officials at key stages of reviews. This is a recent occurrence and has caused delay in completion of reviews.

4.23 Our observations, findings and recommendations would not be publicly defensible if not rigorously tested. If the public or tax professionals identify matters and we do not consider them in formulating our recommendations, their confidence in our ability to discharge our duties would be significantly diminished. For this reason, we welcome and expect robust discussions with the ATO based on evidence and reason, not merely an amplification of a particular position, to enhance the review process and our reports. This is what Parliament, and indeed, the public would expect both agencies to do.

⁹⁴ Above n 2, p 16 (Geoff Leeper, Second Commissioner of Taxation).

4.24 The IGT appreciates that the ATO may not always agree with his recommendations. Where such disagreement is professionally managed and the reasons for disagreement are made public then that is an appropriate outcome. Indeed, given the same facts and applicable law, judges in the highest courts are known to disagree on occasions. If scrutineers always agreed with the agencies that they are scrutinising, perceptions of lack independence or ineffectiveness would be inevitable.

4.4. THE ADVISORY ROLE OF EXTERNAL SCRUTINEERS

Statement:

4.25 At the Hearing, the ATO's leadership asserted that there has been an expectation for it to agree with IGT recommendations:

...there has been an expectation that we would agree to a great majority. In the five years since July 2010, there have been 293 separate inspector-general recommendations and we have agreed to 234 of those – that is 80 per cent.⁹⁵

Clarification:

4.26 It is unclear to the IGT why the ATO considers that there has been an expectation for it to agree with IGT recommendations. As the IGT has set out in the Primary Submission, the IGT has no powers to compel the ATO to agree with, or undertake any action in relation to, a recommendation with which it disagrees. If the ATO genuinely believes that there is such an expectation, it is one which has been internally generated within the ATO.

4.27 As noted earlier, the IGT expects that where the ATO disagrees with an IGT recommendation, such a disagreement should be raised and discussed to explore whether common ground can be found. However, ultimately, the decision of whether to agree with a recommendation rests with the ATO.

4.28 It should also be noted that despite the expectation or compulsion that the ATO seems to feel, it has disagreed with some IGT recommendations in the past. An example has been already provided above in the penalties review. Other such examples can be found in almost every other review including the ADR, the Tax Practitioners and the Debt reviews.⁹⁶

⁹⁵ Above n 2, p 14 (Geoff Leeper, Second Commissioner of Taxation)

⁹⁶ Above n 44, pp 104-105; Above n 65, pp 119 and 126; Above n 27, pp 73 and 74.

5. COMPLAINTS HANDLING

5.1. COMPLAINT STATISTICS

Statement:

5.1 In its written submission, the ATO states:

Since 1 May 2015, and as at 29 February 2016, the IGT has received 880 complaints about the ATO.⁹⁷

and

Between 1 May 2015 and 29th February 2016, the IGT has referred 880 complaints to the ATO.⁹⁸

5.2 At the Hearing, the ATO's leadership reiterated:

Our own systems and processes capture about 25,000 complaints a year which we deal with. The Inspector-General, at the current time, I think has logged about 800 or so complaints for this financial year. So we stand in the front position and try to deal with these things in any event, and people who are unhappy then go through to the next level.⁹⁹

Clarification:

5.3 These statements are incorrect. The IGT is unclear how the ATO arrived at its 880 complaints figure.

5.4 Between 1 May 2015 and 29 February 2016, the IGT received 1,739 complaints about the ATO. However, as the IGT noted in his Primary Submission, a significant proportion (35 per cent) of these cases are actioned and resolved by the IGT's tax specialist staff without the need for referral or interaction with the ATO. Accordingly, 1,137 of these cases were referred to the ATO.

5.5 Of the cases referred to the ATO, approximately 50 per cent had not approached the ATO's own complaint handling team in the first instance. In such cases, the IGT receives the complaints, captures and analyses the issues of concern with relevant supporting material but provides such information to the ATO to directly resolve the matter with the taxpayer if the taxpayer agrees to such a process. In the

⁹⁷ Above n 1, p 10.

⁹⁸ Above n 1, p 19.

⁹⁹ Above n 2, p 9 (Geoff Leeper, Second Commissioner of Taxation).

ATO's own words, the IGT is seeking to foster 'a direct relationship between the ATO and clients [complainants] (rather than third party intervention)'.¹⁰⁰

5.6 It should be noted that in the above cases where the complainant is encouraged to resolve the issue directly with the ATO in the first instance, the role of the IGT is just as important as in other cases where the IGT is fully engaged throughout the complaint cycle. Firstly, the IGT team distils and analyses the issues of concern and provides them to the ATO with supporting information, saving both the ATO and complainant considerable time and costs. Secondly, the IGT tracks all complaints, including these cases, so that should the complainant remain unsatisfied with the ATO handling of it and require IGT intervention, the IGT can step in with minimal delay or costs.

5.7 Accordingly, the ATO should include the type of complaints described above in its IGT-related statistics if it has not already done so.

5.8 There are a number of other matters that should be raised in relation to the complaint statistics presented by the ATO. First, it is curious that despite quoting the number of IGT referrals in the 2015-16 financial year, the ATO has only chosen to quote prior year figures of its own complaints rather than figures to date.

5.9 Secondly, using only the numbers of lodgments as a denominator for the relative proportion of complaints can potentially be misleading. During the IGT's *review into the Change Program*, the IGT noted the wide-spread community perceptions of large scale systemic failures which led the then Assistant Treasurer to direct the IGT to conduct a review into the issues. In this case, of a total of 33.15 million lodgments, 40,403 complaints were raised with the ATO, i.e. the complaints were 0.12 per cent of total lodgments. Whilst this is a small percentage, 40,403 complaints does represent a large number of affected and unsatisfied taxpayers and was appropriately deemed to be a large-scale issue.

5.10 Finally, the ATO does not appear to appreciate that many taxpayers may feel aggrieved by ATO actions but do not necessarily raise complaints. The reasons for these are manifold and may reflect cultural or personal values, concerns about possible ATO reprisal or a lack of understanding of the relevant channels through which such complaints may be made. The numbers of complaints received is not necessarily a true reflection of the level of community dissatisfaction with the ATO.

5.2. COMPLAINTS HANDLING PROCESS

Statement:

5.11 The ATO's submission infers that the ATO had to change its complaint handling system because the IGT was referring too many complaints to the ATO.¹⁰¹ At the Hearing, the ATO's leadership also inferred that the larger than expected complaints numbers are due to the IGT:

¹⁰⁰ Above n 1, p 4.

¹⁰¹ *Ibid*, p 19.

To go to your first point, when the complaints function moved from the ombudsman to the inspector-general last May, the experience when it was with the ombudsman would have been exactly the same.

...That experience probably has not changed. I would note that the numbers of complaints being received by the inspector-general are higher than we had seen with the ombudsman. That would be my first point.¹⁰²

Clarification:

5.12 The new complaint handling process was implemented before the IGT referred any complaints to the ATO. As noted in the Primary Submission, the transfer of the complaints handling function afforded the ATO and the IGT an opportunity to reconsider and redesign the complaint handling process to minimise costs for both agencies as well as taxpayers and their representatives.¹⁰³

5.13 Furthermore, this process was presented to the Commissioners on 20 April 2015 in which the IGT explained the reasons for its design and the inter-agency corporation in the design process. In light of the substantial increase in complaints that the ATO has received direct from taxpayers and their advisers in the 2015-16 financial year, the ATO has benefited from this new process.

5.14 While it is true that the IGT has referred more complaints than the Ombudsman did in the previous year, we understand that the ATO has also received significantly more complaints directly from the public than it did in the previous year. The Commissioner would be aware of the exact numbers from his internal briefings, details of which are not yet publicly disclosed.

¹⁰² Above n 2, p 4 (Geoff Leeper, Second Commissioner of Taxation).

¹⁰³ Above n 14, page 25.

6. THE WAY FORWARD

6.1 The ATO's public comments, its written submission and statements at the Hearing reveal that there appears to be a misunderstanding of the Australian Governmental scrutineering system and the role of the IGT, particularly since the May 2015 Legislative Amendments. Furthermore, there needs to be better engagement and improved dialogue between the two agencies which would, in turn, also facilitate a better understanding of scrutineering and the role of the IGT.

6.2 As set out in the Primary Submission and earlier in this Supplementary Submission, there are multiple opportunities throughout the IGT's review and complaints handling processes for the ATO to engage with the IGT to discuss relevant issues and potential solutions. Furthermore, the IGT has always welcomed ATO briefings on upcoming events and initiatives, potential outages or any other issues with respect to which the IGT can assist the ATO manage community expectations and any adverse impacts. At an operational level, the IGT believes this is functioning effectively with IGT review and complaints officers engaging effectively and efficiently with their ATO counterparts as outlined in the Primary Submission.

6.3 The IGT believes that at a higher level, the ATO and IGT senior executives need to engage periodically to discuss strategic developments, emerging issues and opportunities for improvement in both agencies. Historically, such engagement was scheduled and took place periodically as key commitments for the leadership of both agencies. However, more recently, it has been a challenge to engage the Commissioner and Second Commissioners in dialogue of this kind.

6.4 The IGT believes that full and frank discussion on a periodic basis between the IGT and the ATO leadership would provide a structured forum through which concerns may be raised and addressed promptly. It would be useful to formalise such an arrangement in a similar manner to the agreement reached by the ANAO, Ombudsman and the IGT following the JCPAA recommendation noted earlier.

APPENDIX A – IGT BRIEFING TO THE JCPAA



Australian Government
Inspector-General of Taxation

Inspector-General of Taxation Work program public consultation

**A brief for the Joint Committee of Public Accounts
and Audit**

6 December 2012

BACKGROUND

1.1 In its recent report of the annual hearing with the Commissioner of Taxation, the Joint Committee of Public Accounts and Audit (JCPAA) expressed an interest in understanding the public consultation process undertaken by the Inspector-General of Taxation (IGT) to develop his work program. Specifically, paragraph 5.13 of that report states:¹

The Committee is interested in the conduct of the Inspector-General's public consultation process in preparing his work program, and would appreciate a brief review of the process and the comments of the Inspector-General on the value of the process.

1.2 The role of the IGT was created to improve the administration of the tax laws for the benefit of all taxpayers by identifying systemic issues in the administration of the tax laws and providing independent advice to government for improvements in this regard.² To support the realisation of these aims, approximately every eighteen months, the IGT undertakes an extensive public consultation process to identify and prioritise those systemic tax administration issues of concern to the community with a view to formulating his work program.

1.3 As outlined in the IGT's 2010-11 Annual Report:³

Broad consultation with the community ensures that the resources of the IGT focus on tax administration issues of greatest concern and that investigation of such issues are strongly supported by the community. The selected review topics typically involve issues of concern to differing stakeholders. However, collectively, the work program canvasses issues of concern for the whole community including, individuals, businesses, tax practitioners and their representative bodies as well as Government and its agencies.

WORK PROGRAM PROCESS

1.4 It should be noted that whilst there is a formal public consultation period, the IGT continually receives potential review topics from stakeholders in the day-to-day operations of his office. Such feedback is catalogued and considered during the formal public consultation period.

1.5 To illustrate how the IGT conducts his work program public consultation, set out below is an account of how the current work program was developed and ultimately announced on 10 October 2012.

¹ Joint Committee of Public Accounts and Audit, Parliament of Australia, *Report 434: Annual Public Hearing with the Commissioner of Taxation – 2012* (2012) p 43.

² See, sections 3, 6 and 7 of the *Inspector-General of Taxation Act 2003*.

³ Inspector-General of Taxation, *Annual Report 2010-11*, p 6.

Media release, advertisement and call for submission

1.6 The IGT formally commenced his most recent consultation to develop the work program on 13 August 2012 by issuing a media release calling for submissions⁴ as well as directly calling for submissions from a number of professional bodies, industry associations, law and accounting firms, taxpayers and other stakeholders.

1.7 The media release invited the community to raise any areas of concern which they felt should be the subject of review by the IGT. Furthermore, the media release requested commentary on the suitability of eleven identified issues for IGT review. These eleven issues were distilled from matters raised by stakeholders with the IGT since the announcement of the last work program as well as matters which had emerged in earlier IGT reviews and which potentially qualified as review topics in their own right.

1.8 Significant media interest was generated with a number of newspapers and other publications reporting on the consultation process. In addition, the IGT was invited to participate in radio and television interviews⁵ to discuss the IGT work program, the purpose of the associated consultation process and how members of the community could contribute.

1.9 The IGT also advertised his call for submissions to the development of the work program in a total of five national and state newspapers across the country.⁶ The advertisements were designed to bring the IGT's work program consultation and invitation for submissions to individual and business taxpayers as well other stakeholders who may not be familiar with the function and work of the IGT.

Input from the taxpayers and their representatives

1.10 As a result of the media coverage, advertisements and direct call for submission, the IGT received input from a range of individual and business taxpayers and their representatives who raised concerns relating to their dealings with the Australian Taxation Office (ATO) across a number of areas.

1.11 In addition, the IGT hosted three stakeholder meetings (one in Melbourne and two in Sydney) with professional bodies and industry associations who through their membership are aware of systemic tax administration issues.

1.12 The IGT also met with a number of stakeholders individually both at their request and as initiated by the IGT. These stakeholders included those who were unable to attend the above meetings and accounting and legal tax practitioners.

1.13 Furthermore, a number of taxpayers approached the IGT separately for meetings or phone conferences to outline their concerns. All of these requests were accepted and the issues that emerged were catalogued and considered in line with other submissions received.

⁴ Inspector-General of Taxation, 'New IGT Work Program – Call for Submissions' (Media Release, 13 August 2012).

⁵ 2GB radio, ABC radio's AM program and ABC 24 television.

⁶ The Age, the Australian, the Australian Financial Review, the West Australian and the Courier Mail.

Input from Government, Government Agencies and Parliament

1.14 The IGT met separately with the Assistant Treasurer, senior Treasury officials and the Second Commissioners of Taxation to provide them with an opportunity to raise issues which the IGT should consider for review.

1.15 The IGT also sought input from the JCPAA including at the JCPAA's annual hearing with the Commissioner of Taxation on 14 September 2012.⁷ It should be noted that the *Inspector-General of Taxation Act 2003* (IGT Act) specifically allows a Committee of either House of Parliament, including Joint Committees, to request the IGT to conduct a review.⁸

1.16 Lastly, in line with an earlier recommendation of the JCPAA⁹ and a requirement of the IGT Act,¹⁰ the IGT met with the Auditor-General and the Commonwealth Ombudsman to discuss the issues emerging from the work program consultation and those matters likely to be selected for review. A key consideration in this consultation was the need to avoid duplication of efforts and to foster closer collaboration in areas of mutual interest.

Submissions, issues raised and IGT consideration

1.17 Flowing from the consultation process, the IGT received 107 submissions with a total of 248 issues being raised. There was significant duplication in the issues raised such that 87 discrete issues were identified.

1.18 Forty-six point eight (46.8) per cent of the 248 issues were raised by individual taxpayers whilst 13.3 per cent were raised by tax practitioners (legal and accounting), 9.7 per cent were raised by business taxpayers, 29.4 per cent were raised by professional and industry associations, and 0.8 per cent were raised anonymously.

1.19 In considering which issues to review in his forward work program, the IGT had regard to both the quantity of submissions raising a particular issue as well as the nature and impact of the systemic issue raised. In doing so, the IGT aimed to set a program of work which, as a whole, would optimise the benefits to a broad range of taxpayers.

1.20 On 10 October 2012, the IGT announced his forward work program setting out the reviews selected. The seven reviews selected fell within the top ten topics raised during the public consultations.

1.21 Overall, the consultation process enabled the IGT to identify and prioritise the issues of community concern with tax administration and gain insight into their impact on taxpayers.

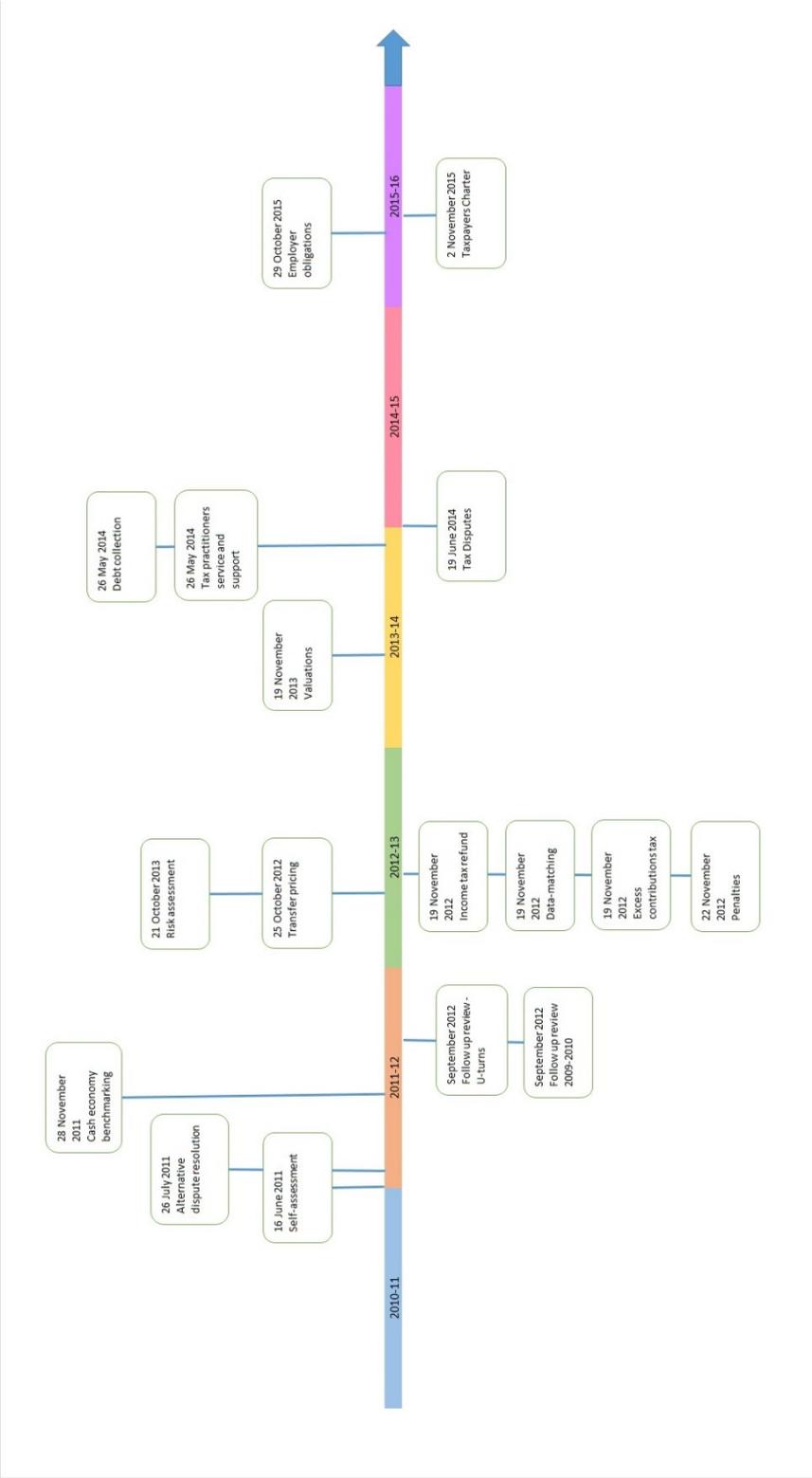
⁷ Joint Committee of Public Accounts and Audit, Parliament of Australia, *Annual Public Hearing with Commissioner of Taxation*, Canberra, 14 September 2012, p 6 (Ali Noroozi, Inspector-General of Taxation).

⁸ See, subsection 8(3) of the IGT Act.

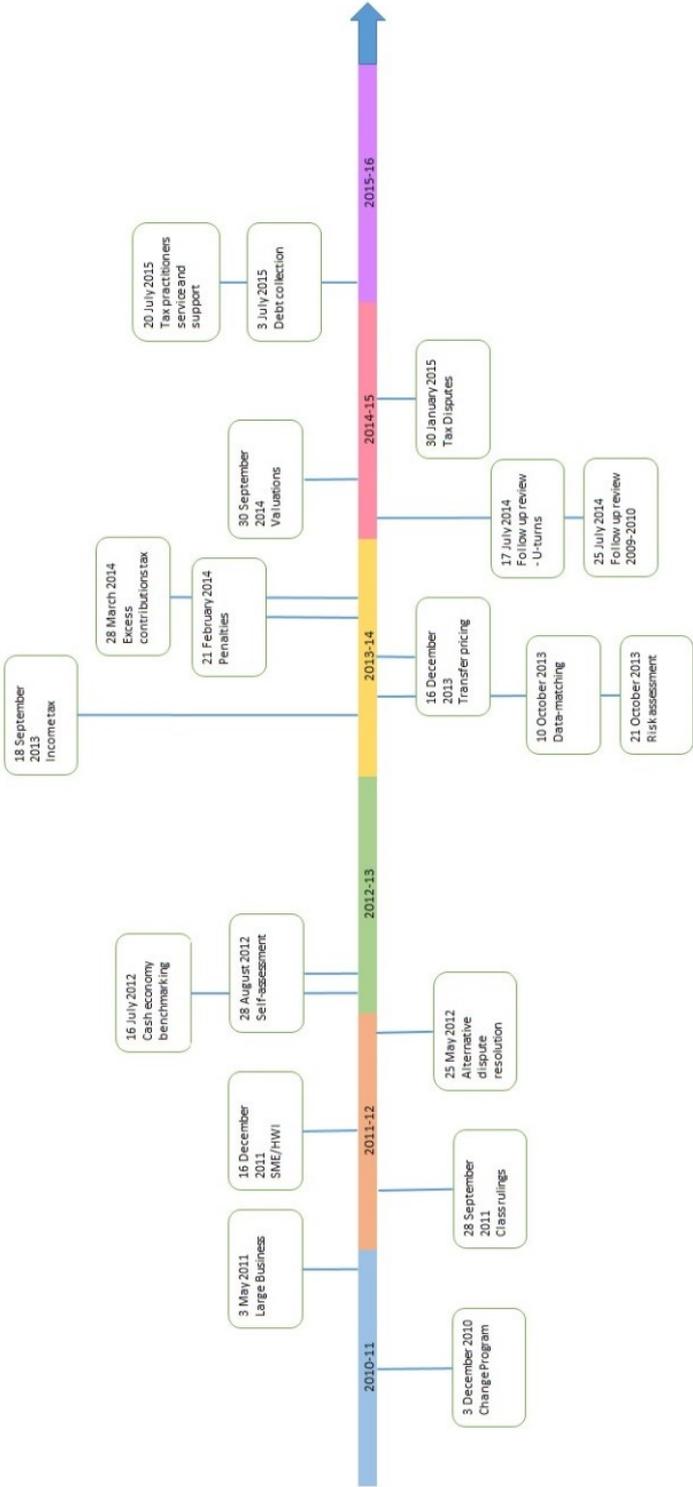
⁹ Joint Committee of Public Accounts and Audit, Parliament of Australia, *Report 426: Ninth Annual Public Hearing with the Commissioner of Taxation* (2011) p 32.

¹⁰ See, subsection 9(2) of the IGT Act.

APPENDIX B – TIMELINE OF REVIEWS COMMENCED 1 JULY 2010 TO PRESENT



APPENDIX C – TIMELINE OF COMPLETED REPORTS 1 JULY 2010 TO PRESENT



APPENDIX D – IGT REVIEW PROCESS AND ENGAGEMENT WITH THE ATO

