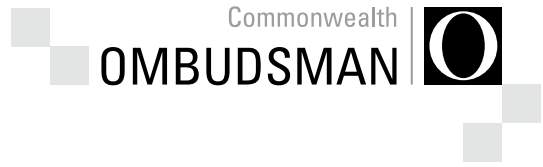


taxation ombudsman activities 2007





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CONTACTING THE COMMONWEALTH AND TAXATION OMBUDSMAN

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introduction

The Commonwealth Ombudsman has been investigating complaints about the administrative actions and decisions of the Australian Taxation Office (ATO) since July 1977. In 1995 the *Ombudsman Act 1976* was amended to give the Ombudsman the additional title of Taxation Ombudsman. The amendments were made in response to recommendations of the Joint Committee of Public Accounts (JCPA) to give a special focus to the office's handling of complaints about the ATO. The Committee's recommendations recognised the imbalance that exists between the powers of the ATO and the rights of taxpayers.

The Taxation Ombudsman is the only external complaint-handling agency for taxpayers with complaints about the ATO. A Senior Assistant Ombudsman and a specialist Tax Team assist me in fulfilling my role as Taxation Ombudsman.

We have been publishing the *Taxation Ombudsman Activities* report since 2002. The report provides a valuable opportunity to highlight the issues that have been raised during the year in taxation complaints. In the year ending 31 December 2007, the majority of complaints were about debt collection activities, non-payment of superannuation guarantee, taxpayer information, the imposition of penalties, and lodgement and processing. Case studies arising from these complaints are provided throughout the report.

A special theme of this year's activities report is thirty years of taxation complaint handling by the Commonwealth and Taxation Ombudsman. The thirtieth anniversary of the Commonwealth Ombudsman was celebrated in 2007.



Prof. John McMillan, Taxation Ombudsman

A strong message that arises from this historical perspective on complaint handling is that complaints often spring from major program or administrative changes occurring within an agency. Complaints provide valuable information about the impact of government program changes on members of the public, and the unanticipated problems that can arise. Those complaints have enabled both the ATO and the Commonwealth Ombudsman to improve the service they provide to the public.

Prof. John McMillan
Commonwealth and Taxation Ombudsman

1 overview

In 2007, the Ombudsman's office received 1,248 complaints about the ATO, compared with 1,415 in 2006. This continues the trend of the last few years of a slight decrease in ATO complaint numbers, as shown in Figure 1. We finalised 1,312 complaints. Of those complaints, we investigated around 10% and transferred around 31% to the ATO as part of a new assisted transfer process.

The complaints received in 2007 covered a range of ATO activities and products, including:

- lodgement and processing of tax forms (around 25% of complaints)
- superannuation (16%)
- debt collection (14%)
- taxpayer information (6%)
- imposition of penalties (5%)
- audit activities (5%)
- access to enquiry phones (2%).

We recorded administrative deficiency in relation to six complaints:

- audit activities
- lodgement and processing of forms
- superannuation (three complaints)
- freedom of information.

The Ombudsman's Tax Team continues to monitor complaints to identify emerging complaint trends that may warrant more active intervention by our office.

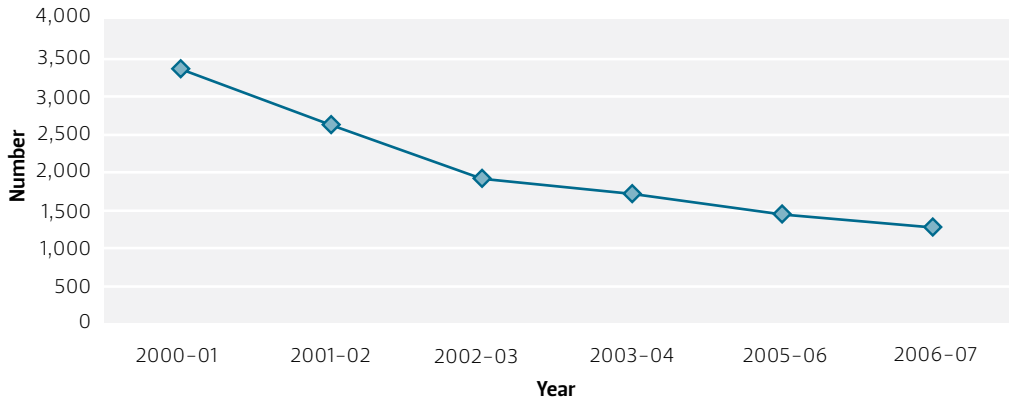
For example, given the relatively high number of debt collection and superannuation

complaints we received, our work program included a focus on aspects of administration of debt collection and superannuation guarantee. In April 2007 we published a report about the administration of garnishee action for debt collection, and throughout 2007 we received regular briefings from the ATO on superannuation guarantee. A report on the administration of superannuation guarantee will be finalised in 2008.

Our 2007 work program also included reviews of some aspects of the ATO's correspondence and audit activities in relation to work-related expenses. We found no significant areas of concern in these aspects of tax administration.

In late 2007, we made changes in the internal administrative processes of the Ombudsman's office including moving the handling of tax complaints to the Canberra office. We hope to see greater consistency and more efficient handling of complaints as a result of this initiative.

We also formally implemented the assisted transfer of complaints from our office to the ATO. Our approach to resolving complaints is to encourage complainants to seek to resolve their complaints with the agency before contacting the Ombudsman. For tax complaints we assist complainants by offering to transfer their complaint directly to ATO Complaints—the ATO's internal complaint-handling unit. We advise complainants to come back to us if they are not satisfied with the outcome provided by ATO Complaints. In 2007 we transferred 274 complaints to the ATO.

FIGURE 1: AUSTRALIAN TAXATION OFFICE COMPLAINT TREND, 2000-01 TO 2006-07

2 thirty years of taxation complaints

There were two significant anniversaries in 2007: the thirtieth anniversary of the office of the Commonwealth Ombudsman and 10 years since the introduction of the Taxpayers' Charter.

We can look back over thirty years from a position of great achievement. The relationship between the Ombudsman's office and the ATO has been a positive and cooperative one. The Taxpayers' Charter itself represents a remarkable turnaround in the relationship between the ATO and the public during this period.

Challenges remain and undoubtedly new issues will continue to emerge in the area of taxation administration. Nevertheless the story of the last thirty years, despite its twists and turns, is a productive one.

In his keynote address on *Accountability of government* at the Above Board Accountability Forum, Prof. McMillan noted:

Administrative law is in part an error or fault driven culture. It makes officials accountable by asking whether they have done something wrong, such as made the wrong decision, acted unlawfully, or misused their authority.¹

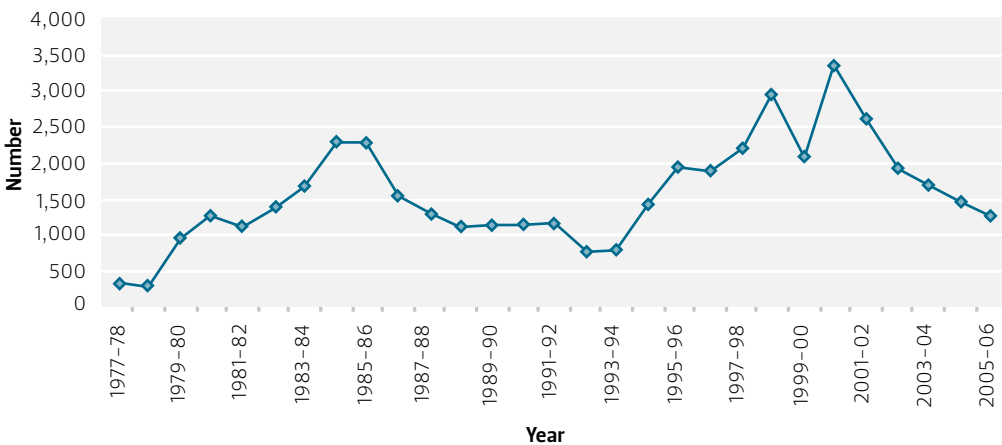
In reviewing the interaction between the Ombudsman's office and the ATO we need to keep in mind that the relationship is borne of the culture of administrative law. In a paradoxical fashion, success is celebrated in the discovery of defect. This being the case, this review will cover concerns, complaints, and recommendations alongside the remedies and collaborative work of the two offices.

The ATO has consistently responded positively to concerns raised by, and complaints referred by, the Ombudsman. This thirty-year period clearly demonstrates the benefits of the ATO's preparedness to embrace problems as a means to better its administrative systems.

In such a brief review, the narrative aims only to capture the flavour of the times. A timeline of legislative and other innovations is included to supplement the text.

Figure 2 illustrates the changing level of complaints we have received over this thirty-year period. The discussion in the following sections identifies the main drivers behind the fluctuating numbers of complaints.

FIGURE 2: AUSTRALIAN TAXATION OFFICE COMPLAINT TRENDS, 1977-78 TO 2006-07



70 timeline for the seventies

- 1975** *Administrative Appeals Act 1975*
- 1976** *Ombudsman Act 1976*
- 1977** Prof. J E Richardson appointed as first Ombudsman; office opens 1 July

Ombudsman receives 333 tax complaints

Administrative Decisions (Judicial Review) Act 1977 (commences operation 1 October 1980)
- 1978** Ombudsman receives 283 tax complaints
- 1979** Ombudsman receives 957 tax complaints



Prof. Jack Richardson, AO, Commonwealth Ombudsman from March 1977 to September 1985

A FOUNDATION FOR CHANGE

In his first annual report in 1978, the Ombudsman, Prof. Jack Richardson, observed:

It is immediately obvious that an unbroken era of federal decision making shielded from public scrutiny beginning in 1901 has ended. Protective mechanisms operating within the Australian Public Service from its inception, making public accountability unnecessary, will wither as the officers performing tasks of executive government are expected to be answerable to the public just as on many occasions members of the public are expected to answer to the administration. Government should become far less privileged.²

The Ombudsman was referring to a suite of legislation introduced in the 1970s, which heralded 'radical innovations' in public administration. The legislation included:

- *Ombudsman Act 1976*—establishing an Ombudsman's office that commenced on 1 July 1977
- *Administrative Appeals Tribunal Act 1975*—establishing the Administrative Appeals Tribunal and the Administrative Review Council
- *Administrative Decisions (Judicial Review) Act 1977*—establishing a new system of judicial review.

The enactment of the Freedom of Information Act in 1982 completed these reforms.

The Ombudsman anticipated that the new administrative law reforms would create problems requiring 'considerable effort and adjustment for their absorption into the Australian Public Service'.³

This adjustment was more challenging at the time for the ATO, which was dealing with problems of tax avoidance and tax evasion that dominated its concerns in the mid 1970s and early 1980s. The legislative, judicial and administrative weaknesses exposed by tax evasion schemes required far-reaching changes.

THE TAXATION ENVIRONMENT

The beginning of the 1970s was a period of great change and reform for the Commonwealth Taxation Office.⁴ Over the previous two decades a great many structural and administrative changes had been introduced with the shift to a uniform, national system of income taxation, beginning in the 1940s. Computer technology was in its infancy, but the introduction of automatic data processing systems signalled new levels of efficiency. A process of decentralisation of taxation administration had begun. ATO state offices had become capable of processing returns of taxpayers across Australia and head office was re-organised with a focus on national policy and research issues.

Public perception of tax administration in the 1970s was coloured by issues arising from tax avoidance schemes that emerged in the late 1960s and proliferated in the 1970s. They were marketed, principally by members of the legal and accounting professions, as a means to take advantage of taxation minimisation options.

Taxation planners exploited structural gaps in the taxation laws, taking advantage of a literal phase in interpretation of taxation laws by the High Court. Tax avoidance was initially perceived as a legal pursuit carried out in accordance with tax codes. As the number and complexity of the schemes increased, the distinction between legitimate tax minimisation and tax evasion became blurred.⁵ It was clear that some forms of tax avoidance were illegal. Before long the more blatant, so-called 'bottom of the harbour' frauds emerged.⁶

The Taxation Commissioner was not successful⁷ in reigning in the schemes that produced a massive loss in tax revenue. As a consequence, the administrative and political stress facing the Commissioner at the end of the decade was considerable.⁸ Administrative functioning and staff resources were heavily strained, as was the relationship between the Commonwealth Taxation Office and the community.

THE WORK OF THE OMBUDSMAN

The Commonwealth Ombudsman's office opened in Canberra on 1 July 1977 with five staff. This increased to 32 staff with offices in Sydney, Melbourne and Perth by the end of the first financial year.

The Commonwealth Taxation Office was one of a broad range of federal departments and prescribed authorities whose administrative actions could be investigated by the Ombudsman.

Complaints made to the Ombudsman about the Commonwealth Taxation Office increased steadily between 1977 and 1980 and covered a range of administrative issues. A good working relationship between the Ombudsman and Commonwealth Taxation Office developed; the Commonwealth Taxation Office was responsive to issues raised by investigations and receptive to resolving problems with practical remedies.⁹

The impact of taxation minimisation schemes had not yet peaked in terms of complaints. However, anger and confusion about the Commissioner's stance on schemes was evident in some of the complaints received from investors. An example from the Ombudsman's third annual report was a letter from a complainant who had, in effect, accused the Tax Commissioner of acting *in terrorem*. The complainant had written:

My real complaint is that the Commissioner, in assessing the penalties, has knowingly acted improperly; has issued the relevant assessments knowing that he lacks jurisdiction to do so; has acted for the sole purpose of intimidating taxpayers; has acted with a view to bringing improper pressure upon taxpayers to forego past participation and future participation in activities which are perfectly legal but at the same time designed to minimise the impact of taxation.¹⁰

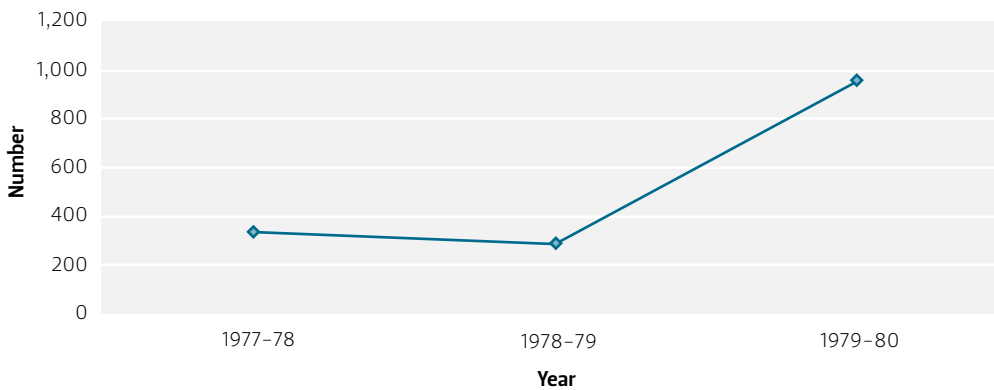
The Ombudsman concluded the Commissioner had not acted in bad faith and observed that the delays in the review procedures were frustrating to the Commonwealth Taxation Office as well as to taxpayers.

A particular challenge facing the Ombudsman's office at that time was to clarify the role it would play in investigating complaints on a contentious issue. Impartiality was vital in reconciling the statutory responsibility of the

Ombudsman to investigate complaints from taxpayers involved in tax avoidance schemes, with the acknowledgement of the government's view that such schemes undermined the basic equity of the taxation system.


Over the period, the public responded with increased numbers of approaches to the Ombudsman, as shown in Figure 3.

FIGURE 3: AUSTRALIAN TAXATION OFFICE COMPLAINT TRENDS, 1977-78 TO 1979-80

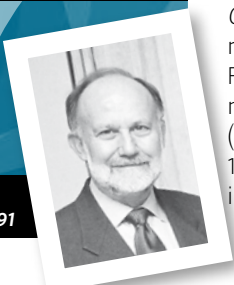


30 timeline for the eighties

- 1980** Ombudsman receives 1,265 tax complaints
Crimes (Taxation Offences) Act 1980
- 1982** *Taxation (Unpaid Company Tax) Act 1982*
Freedom of Information Act 1982
Commonwealth Taxation Office renamed the Australian Taxation Office
- 1984** Ombudsman receives 2,294 tax complaints
- 1985** ATO establishes National Tax Liaison Group as part of its community consultation initiative
- 1986** ATO establishes Tax Payer Service Group to provide additional information and assistance to taxpayers
Taxation Boards of Review subsumed into Administrative Appeals Tribunal
Mr Geoffrey Kolts, OBE QC appointed Ombudsman
Taxation self assessment introduced
- 1987** ATO introduces problem resolution units as an internal administrative dispute resolution mechanism
Child Support Agency opened
- 1988** Prof. Dennis Pearce appointed Ombudsman
Privacy Act 1988
- 1989** Taxation Electronic Lodgement Service launched
Ombudsman receives 1,128 tax complaints



Mr Geoffrey Kolts, OBE, QC, Commonwealth Ombudsman from July 1986 to October 1987



Prof. Dennis Pearce, Commonwealth Ombudsman from February 1988 to January 1991

CHANGE TAKES HOLD

The Ombudsman commented in his first annual report that:

Undoubtedly, in the light of experience, some of it being rapidly gained through the operations of the Ombudsman's Office, adjustments to reforms will prove to be desirable.¹¹

This prediction was played out in the 1980s. Despite early doubt and misgivings about administrative law reform, there was growing acceptance by senior officials of the benefits of external scrutiny.¹² The decade also brought further reform and reconstruction in the area of taxation.

By the end of the decade, the strong working relationship between the Australian Taxation Office (ATO) and the Ombudsman was evident. The Ombudsman noted 'a desire in the ATO to develop a more flexible and client-oriented tax administration'.¹³ The introduction of problem resolution units by the ATO in late 1987 demonstrated a new approach to complaint handling and analysis.

THE TAXATION ENVIRONMENT

Throughout the 1980s, the ATO pursued a decentralisation and modernisation program. Issues of tax avoidance and evasion continued to dominate in the early years. Legislative activity intensified to address the problems.

Between 1978 and 1983 at least 34 separate Acts were passed by Parliament amending substantive provisions of the *Income Tax Assessment Act 1936*. The *Crimes (Taxation Offences) Act 1980* elevated tax evasion to a serious crime and the *Taxation (Unpaid Company Tax) Act 1982* paved the way for the retrospective recovery of taxes evaded.¹⁴ Following the Costigan Royal Commission,¹⁵ a newly created Director of Public Prosecutions (DPP) incorporated a Major Fraud Division in 1984 and the ATO worked directly with the DPP in the preparation of cases.¹⁶

The legislative changes were successful in curbing tax avoidance and evasion schemes, and the ATO implemented new approaches to customer service. Nevertheless, the problems lingered, and the number of assessments and backlog of objections and appeals remained high. In 1983–84 there were 1,000 assessors processing individual returns and about 1,200 assessors processing partnerships, trust, companies and superannuation funds—all up around 9.3 million income tax returns. Assessors handling salary and wage returns were on quotas of up to 400 returns a day.¹⁷

In 1986 a system of self-assessment was introduced. Amendments to the Income Tax Assessment Act relieved the ATO of the obligation to examine returns prior to the issue of an assessment.

While the obligations on the taxpayer were unchanged in terms of the information required for lodgement, the repercussions of self-assessment were to be far-reaching. In practical terms, the ATO was able to more effectively deploy its resources to the areas of audit and services to support taxpayer compliance.

Taxpayers and tax agents responded with objections to what was perceived as an unfair shift in rights and responsibilities.¹⁸ In an Australian Institute of Criminology report in 1993, Ivan Potas commented about voluntary compliance through self-assessment:

*... this means that despite the quantity, complexity, and vagueness of the law, taxpayers are obliged to pay the correct amount of tax or be penalised under the Act.*¹⁹

The strategies that were found to be effective in resolving tension between the ATO and the community ushered in a period of significant cultural change within the ATO. Over the following decade, the objectives of 'support and enforcement'²⁰ developed into that of 'mutual responsibility' and 'community involvement'.²¹ The new approach was more promising for encouraging compliance and improving the tax system.

THE WORK OF THE OMBUDSMAN

By 1980 the Ombudsman was receiving an increasing volume of complaints from taxpayers involved in taxation schemes. The number of complaints peaked in 1984 (2,294 complaints). In 1985 the Ombudsman received more complaints about the ATO than any other agency.

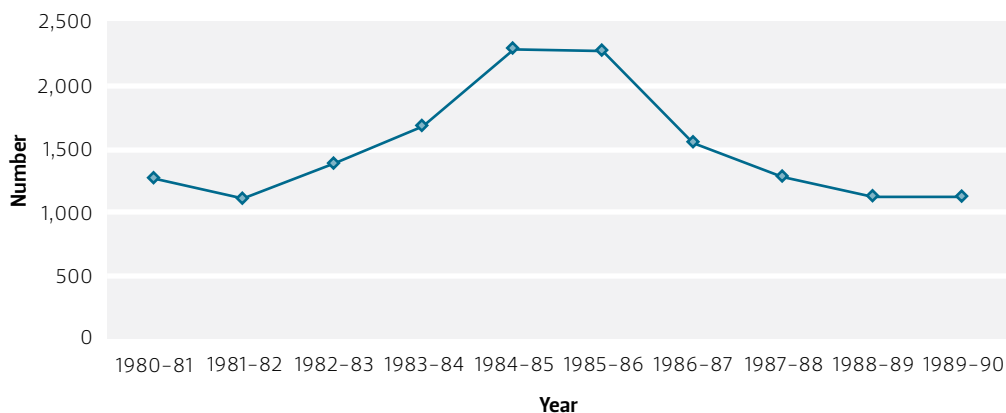
The Ombudsman, Prof. Jack Richardson, took up the special challenge for the Ombudsman's office posed by the large number of complaints. In an address to the State Convention of the New South Wales Division of the Taxation Institute of Australia in 1984, the Ombudsman noted the inability of the ATO to deal with the number of disputes.²²

The issue of staff resources was acknowledged, as was the inefficiency and duplication of effort if complainants put their matters before several bodies. Nevertheless, the Ombudsman found the delays unreasonable and determined to take the unusual step of dealing with some cases within his office despite their suitability for determination by the Board of Review or the Courts.²³

'In my opinion,' the Ombudsman wrote to the Commissioner 'the possibility of taxpayers having to suffer even more extensive delays in having objections heard by a Board of Review constitutes special reasons justifying the investigation of the action or the investigation further'.²⁴ His concern was that many taxpayers with a genuine dispute were being forced to remain in a position of uncertainty about the tax implications of their plans for some years.

Providing certainty to taxpayers was later recognised by the ATO as a key component in achieving effective taxpayer compliance.

As can be seen from Figure 4, the introduction of self-assessment in 1986 was associated with an initial decrease in the number of complaints. Formerly, complaints had been principally about returns and most returns were no longer queried by the ATO. Complaints about audit processes increased, as did those relating to the complexity of the taxation laws.

FIGURE 4: AUSTRALIAN TAXATION OFFICE COMPLAINT TRENDS, 1980–81 TO 1989–90

Costs or financial disadvantage suffered by a taxpayer due to defective administration emerged more prominently in Ombudsman investigations. Claims of this kind fell outside the statutory framework for review by boards and courts. Their role was essentially limited to objections, references and appeals against assessment matters.

The ATO was initially reluctant to accept the idea of compensation for defective administrative decisions. The *Taxation (Interest on Overpayments) Act 1983* introduced, for the first time, the concept of payment of compensatory interest in cases where a taxpayer had successfully challenged an assessment. This legislation was important in changing the ATO's attitude to compensation.

The ATO then worked with the Ombudsman's office in agreeing to principles relating to the payment of compensation for actions not covered by the *Taxation (Interest on Overpayments) Act*. This was a landmark development: the fundamental principle of compensation in the case of defective administration was thereby established.²⁵

Over several years, the Ombudsman had been

critical of the reluctance of successive Ministers for Finance to approve act of grace payments to persons having suffered loss as a result of defective administration. The Ombudsman pointed to an 'increasing disregard for the recommendations of the Ombudsman'.²⁶ Ombudsman Prof. Dennis Pearce pursued the issue with the Prime Minister.

In 1988 a system was trialled to devolve authority to agency heads for the approval of act of grace payments up to \$50,000 in cases of defective administration, where the Ombudsman recommended the compensation payment. In these cases the Ombudsman would obtain the views of the Department of Finance and provide those, with his recommendations, to the agency concerned.

It would still be some years before the introduction of the more comprehensive Compensation for Detriment caused by Defective Administration scheme.²⁷ Authority to approve act of grace payments remained with the Minister for Finance.

90 timeline for the nineties

- 1990** Ombudsman receives 1,152 tax complaints
- 1991** Mr Alan Cameron, AM appointed Ombudsman
- 1992** Taxation electronic lodgement program expanded
Taxation Laws Amendment (Self Assessment) Act 1992
ATO introduces System of Private and Public Rulings
- 1993** Ms Philippa Smith, AM appointed Ombudsman
Joint Committee of Public Accounts Report 326, *An Assessment of Tax*
Access to Justice Advisory Committee, *Access to Justice: an Action Plan*
- 1995** Taxation Ombudsman established
Deputy Ombudsman appointed to ATO Fraud Committee
- 1997** Taxpayers Charter launched
Financial Management and Accountability Act 1997
Small Taxation Claims Tribunal commenced within Administrative Appeals Tribunal
- 1998** Mr Ron McLeod, AM appointed Ombudsman
Ombudsman receives 2,955 tax complaints
ATO launches *A New Tax Office for a New Tax System*, to assist taxpayers to meet their obligations under the self assessment system
- 1999** Review of Business Taxation Report, *A Tax System Redesigned*, Mr John Ralph, AO, Chairman of Review

Mr Alan Cameron, AM, Commonwealth Ombudsman from April 1991 to December 1992



Ms Philippa Smith, AM, Commonwealth Ombudsman from May 1993 to January 1998



DEALING WITH COMPLEXITY

Administrative law was well established in government agencies by the 1990s, with a growing consensus of support for its core objectives of executive accountability, better decision making and administrative justice.²⁸

The community voice was made stronger through the availability of complaint and appeal processes, external scrutiny of agencies, and the expectation of transparency, accountability and freedom of information.

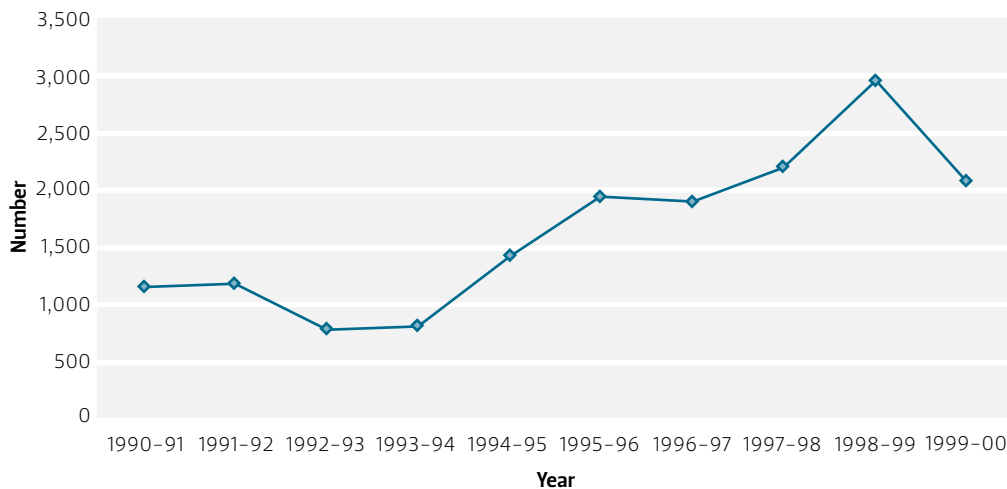
It followed that the relationship between agencies and the community became a focus for the development of best practices strategies, and the ATO was notably proactive in this.

One theme that dominated the period was the increasing volume and complexity of the taxation laws. This had consequences for taxpayers because of self-assessment. The Joint Committee of Public Accounts (JCPA) took up the issue in its assessment of the taxation office in 1993. The Committee recommended a charter of taxpayer rights and a taxation ombudsman.

Another dominant theme in the 1990s was the ATO action against mass marketed schemes. This theme is taken up in the feature page on page 15.

THE TAXATION ENVIRONMENT

The move to self-assessment placed greater responsibility on taxpayers to comply with increasingly complex legislation, or face penalties if they got it wrong. As one commentator observed, 'Complexity and compliance are unhappy bedfellows'.²⁹ The growing complexity in the system provided an opportunity for tax avoidance. Schemes continued to be marketed by taxation advisers, and public uncertainty remained over which forms of tax minimisation were acceptable. An increased dependence on tax advisers by taxpayers complicated the issues.

FIGURE 5: AUSTRALIAN TAXATION OFFICE COMPLAINT TRENDS, 1990–91 TO 1999–00

One ATO response was a system of rulings on the interpretation of laws in particular taxation circumstances. Public rulings were binding on the Commissioner, and private rulings for individuals were binding on the Commissioner if correctly followed by the taxpayer to whom the ruling was issued.

Other procedures were reviewed, including the period in which a taxpayer could object to an assessment (extended from 60 days to four years), and the regime of automatically imposed penalties (replaced with a system of discretionary penalties). Interest charges were introduced for late payments and for debit amendments issued as a result of underpayment of tax. The changes implicitly acknowledged the difficulties taxpayers faced with self-assessment and the likelihood of inadvertent errors or honest mistakes.³⁰

A modernisation program continued in the ATO with an extensive overhaul of its information technology infrastructure. A major organisational restructure saw the development of market-based business lines headed by Deputy Commissioners with a national overview. As part of its move to assist taxpayers, Tax Pack was produced in 1990, following on from the introduction of the electronic lodgement service for tax returns introduced in 1989.

The JCPA 1993 report, *An Assessment of Tax*, set the stage for further reform. In particular, the government took up the JCPA's

recommendation to draw up a taxpayers' charter in consultation with taxpayers' representatives and professional bodies, community groups and relevant government bodies such as the Ombudsman and the Privacy Commissioner.³¹

The ATO launched the Taxpayers' Charter on 1 July 1997, supported by an internal complaints handling system, the Problem Resolution Service. The Taxpayers' Charter remains a noteworthy development in public law and government administration. (The Ombudsman's speech given at the 10th anniversary celebration of the Taxpayers' Charter is at Appendix 1.)

The introduction of the Charter brought with it a need for both attitudinal and operational changes within the ATO, 'bringing the Charter to life was no small challenge'.³² The Charter principles called for fairness and reasonableness for those taxpayers who willingly complied with their tax obligations and a presumption that taxpayers were honest unless there was evidence to the contrary. As these principles also underpinned the operation of self-assessment, the Charter was a lynchpin for the mutual responsibility between the ATO and the taxpaying community.

In conjunction with the Charter, the ATO developed a Compliance Model that drew on the work of the Cash Economy Task Force reports of 1997 and 1998. The Compliance

Model set out a sophisticated approach to both detection and management of non-compliance designed to better recognise the economic, psychological and sociological factors that affect taxpayers' decisions about the actions they take to meet their tax obligations.³³ The model provided a hierarchy of intervention strategies matched to taxpayer response, allowing resources to be targeted progressively towards more serious levels of non-compliance. A Centre for Tax System Integrity was established at the Australian National University, in partnership with the ATO, to monitor and evaluate the implementation and effectiveness of the model over a six-year period.

THE WORK OF THE OMBUDSMAN

The 1990s was a busy time for the Ombudsman in handling tax complaints and investigations. This is reflected in the steady increase in complaints over the decade, the publication of an increased number of reports relating to tax administration (see Table 1), and the creation of the role of Taxation Ombudsman in 1995.

The JCPA report of 1993 recommended to government the creation of a Taxation Ombudsman within the Ombudsman's current jurisdiction. In 1995, the Ombudsman Act was amended to give the Ombudsman this additional role. A team of four was established, headed by a Special Tax Adviser.

The specialist team addressed the increasingly complex issues giving rise to complaints about taxation. The need for the team was clearly demonstrated by a dramatic increase in approaches within the first few months of the specialist team's operation (as seen in Figure 5). The specialist tax team also allowed the Ombudsman to focus more attention on systemic issues that might underpin individual complaints.

The ATO's debt collection practices caused a consistently large number of complaints in the early 1990s. Some of the issues raised were inconsistency and rigidity of decision making, whether and how guidelines were used by staff, the tenor of ATO correspondence about debts, and the responsibility given to junior ATO staff

in making recovery decisions. Complaints to the Ombudsman indicated that individual circumstances were not taken sufficiently into account, and there appeared to be discrepancies in ATO debt collection activities between smaller and larger debtors.

An Ombudsman own motion investigation into the ATO's debt collection processes completed in 1998 made several recommendations, which were accepted and acted on by the Commissioner.

With the introduction and expansion of taxation self-assessment, audit activity by the ATO increased, as did complaints about audit processes. One Ombudsman investigation revealed that taxpayers were offered concessional treatment in settlement arrangements if they agreed to forego all objection and review rights, including the right to approach the Ombudsman. The Commissioner agreed to change the practice in relation to the right to approach the Ombudsman.

The complexity of the tax law was not necessarily addressed by the provision of a guide such as Tax Pack. For example, item 5 of the 1993 Tax Pack dealing with the calculation of eligible termination payments consisted of four pages of instructions and in some cases up to 70 calculations in order to satisfy the requirement of the law. After allegations of errors and omissions in the 1995 Tax Pack, the Ombudsman undertook an investigation that found the allegations were overstated but gave sufficient cause for this office to monitor the 1996 Tax Pack and the associated audit processes.

The Taxpayers' Charter established an agency standard for ATO officers and a reference point for external complainants. This inevitably strengthened the customer service approach employed by the ATO. The increased effectiveness of the Problem Resolution Service meant that the ATO, rather than the Ombudsman, handled an increased proportion of taxation complaints. The Ombudsman referred a majority of complaints to the ATO for resolution in the first instance. This remains current practice.

TABLE 1: OMBUDSMAN'S OWN MOTION REPORTS RELATING TO TAX ADMINISTRATION COMPLAINTS

1985	<ul style="list-style-type: none"> • Incorrect advice given by the ATO • Unreasonable delay on the part of the ATO to requests made by complainant's accountant
1992	<ul style="list-style-type: none"> • Delays in processing interest payments on overpaid tax
1995	<ul style="list-style-type: none"> • The ATO's failure to issue a public ruling on Fringe Benefits Tax treatment of entertainment. • Allegations of errors and omissions in the 1995 version of the Tax Pack
1996	<ul style="list-style-type: none"> • The ATO's use of information gathering powers
1997	<ul style="list-style-type: none"> • Clients Beware—issues relating to oral advice*
1999	<ul style="list-style-type: none"> • The ATO and Budplan • A Good Practice Guide for Effective Complaint Handling* • Needs to know—administration of the <i>Freedom of Information Act 1982</i> in Commonwealth agencies* • To compensate or not to compensate? Commonwealth arrangements for providing financial redress for maladministration*
2000	<ul style="list-style-type: none"> • Group certificates—failure to issue group certificates within statutory time limits (report not made available for public access)
2001	<ul style="list-style-type: none"> • Fraud and prevention control investigators (report not made available for public access) • The ATO and Main Camp—tax effective planning scheme • The ATO and film schemes
2003	<ul style="list-style-type: none"> • Own motion into ATO complaint handling
2004	<ul style="list-style-type: none"> • Refusal [by the Tax Agents' Board of NSW] to provide reasons for decisions not to pursue complaints about tax agents • Use of access powers by the ATO
2006	<ul style="list-style-type: none"> • Administration of superannuation co-contribution scheme • Scrutinising government—administration of the <i>Freedom of Information Act 1982</i> in Australian Government agencies*
2007	<ul style="list-style-type: none"> • ATO: administration of garnishee action • Lessons for public administration: Ombudsman's investigation of referred immigration cases*
<p>* These reports were relevant to Australian Government agencies and public administration generally.</p>	

mass marketed tax schemes, the ATO actions and a rise in taxpayer complaints and anger

FEATURE

In 1998 the ATO began issuing amended tax assessments to tens of thousands of investors in mass marketed schemes. Applying the general deduction and the anti tax avoidance provisions in Part IVA of the Income Tax Assessment Act, the ATO required the investors to pay back taxes, interest and penalties.

Investors were angered by the legitimacy of the Commissioner's actions. They were upset because of what they saw as an unjust delay by the Commissioner in taking action on schemes that had been in operation for several years. A report by Kristina Murphy for the Australian National University Centre for Tax System Integrity (CTSI) found that investors in the schemes felt the ATO had been procedurally unjust by not giving sufficient warning to investors. Many had reinvested the tax deductions they received from scheme investments in further schemes, believing the ATO would have let them know if the plans were not acceptable. They felt the ATO had been negligent in its advice. Investors also believed the Commissioner had not considered the motives for investors entering the schemes and had not been empathic in considering the financial burden they suddenly faced.

Much of this anger occurred because investors were unaware of the extensive interaction between the ATO and promoters and advisers who represented investors. The CTSI report highlighted the trust and reliance taxpayers invested in the advice of their tax agents and financial advisers. The risk for investors compared to promoters of the schemes was often unbalanced. Promoters stood to gain financially from marketing schemes, while investors bore the brunt of penalties if the schemes were found to be illegal by the Commissioner.

A number of 'fighting funds' were established for investors who resisted the ATO's demands for repayment. However, there were concerns that legal firms who promoted the tax schemes were often also running these cases against the ATO. This level of potentially conflicted involvement added to the protracted time period for the resolution of claims against the amended assessments. The public nature of the disputes was unhelpful in some ways. The term 'tax cheat' was coined in the media but popularly attributed to the attitude of the Commissioner towards investors.³⁴ The Commissioner noted that the picture the media portrayed of its harsh treatment of taxpayers was one sided, as the ATO was constrained by secrecy provisions in putting forward balancing information.

In 1998 the ATO introduced a Product Ruling system, guidelines advising investors of settlement options, and a taxation ruling setting out the ATO's views on investment schemes.

the first decade of the new millennium



timeline for the new millennium

- 2000** Ombudsman receives 3,354 tax complaints
Board of Taxation established
Report of an internal review of the systems and procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office, Tom Sherman
A New Tax System, Goods and Services Tax and Pay as you Go
Report of the Senate Economics References Committee Inquiry into the Operation of the Taxation Office
- 2001** Final report of the Senate Economics References Committee Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection
- 2003** Inspector General of Taxation commences
Prof. John McMillan appointed Ombudsman
- 2004** Report of the Treasury on Aspects of Income Tax Self Assessment
- 2006** Promoter penalty laws came into effect
Joint Committee Public Accounts and Audit inquiry into aspects of tax administration
Ombudsman receives 1,523 tax complaints
- 2007** Thirty year anniversary of the Commonwealth Ombudsman
Ten year anniversary of the Taxpayers' Charter

Mr Ron McLeod, AM, Commonwealth Ombudsman from February 1998 to February 2003



Prof. John McMillan Commonwealth Ombudsman from March 2003 to present



ADDRESSING COMMUNITY CONCERN

The new millennium brought not only a new tax system but also another wave of scrutiny of ATO administrative activity—especially in relation to the ATO's response to mass marketed tax minimisation schemes (now referred to as aggressive tax planning). In a report for the ATO, Tom Sherman described the situation in the year 2000 as 'an environment of media scrutiny and public opinion increasingly unforgiving of error in public administration'.³⁵

The tax system was placed under considerable pressure by the re-emergence of aggressive tax planning schemes in the nineties and the introduction of the new tax system. This environment of growing complexity, together with the ATO's response to aggressive tax planning, saw tax complaints to the Ombudsman reach a record high of 3,354 in 2000.

The ATO responded positively to the growing community concern about the lack of certainty in the increasingly complex system by introducing several systems to assist taxpayers in meeting their obligations under self-assessment.

The ATO had taken a comprehensive approach to the introduction of self-assessment in 1986, and its work with the Australian National University Centre for Tax System Integrity provided a background for understanding taxpayer behaviour. As the decade unfolded, the strength of this was highlighted. In particular, emphasis was given to the principles of the Taxpayers' Charter, external and internal review, the development of internal complaint handling and need for the ATO to rebuild a positive relationship with the taxpaying community.

THE TAXATION ENVIRONMENT

The decade began with the introduction of the New Taxation System. Major changes to the taxation system included the introduction of the Goods and Services Tax to replace Wholesale Sales Tax, a Pay As You Go system in place of Pay As You Earn and the Provisional Tax systems, and the abolition of Prescribed Payments. The administration of these reforms involved significant additional workload and organisational change for the ATO.

There was an intense media focus on the ATO's action against mass marketed schemes and on problems related to the private ruling system. While many allegations made in the media were subsequently found to be without substance, it became clear that public confidence in the integrity and professionalism of the ATO was at stake.

When the Commissioner issued amended assessments to many investors in mass marketed schemes, the full implications of self-assessment were made clear. Despite the complexity of the law and the reliance of taxpayers on professional advice, responsibility for tax return information and any penalties incurred for incorrect information remained with the individual taxpayer.

The fact that a taxpayer could receive a refund on a tax return did not mean that the ATO had necessarily approved the reasons on which any claims for deductions were based. Rather, the self-assessment system meant that taxpayer returns were generally accepted without actual assessment in the first instance. The Commissioner was allowed up to six years to investigate and amend assessment notices where the tax avoidance provisions of the law applied.

The Senate Economic References Committee Inquiry took up these issues and in 2002 published its Final Report into mass marketed tax effective schemes and investor protection. Among other things, the Committee examined the 'highly competitive entrepreneurial promoter market'. New schemes continued to be developed but were tailored to the high wealth end of the market. This led the Committee to recommend the ATO be 'given

powers to apply to the courts for injunctive relief to stop investments in abusive arrangements contrary to the law'. Such powers would help to prevent the recurrence of another 'outbreak' of mass marketing of tax avoidance schemes. (This legislation was enacted in 2006.)

The ATO responded with a regional program providing face-to-face officer communication for taxpayers in regional areas and the development of ATO help lines. Each taxpayer with a scheme related debt was given a case manager. A settlement offer was made in 2002 based on remission of penalties and interest on each scheme related debt, and a two-year general interest charge free period in which to repay a debt. At the end of the settlement offer period in June 2002, 87% of investors agreed to settle.³⁶

The Senate Committee also commented on a debate about the professional responsibility of tax agents. The view on one side of the debate was that tax agents had a responsibility to actively support the integrity of the tax system by reporting to the ATO, schemes which might undermine the tax system. The competing view was that the principal responsibility of professional tax agents was to their clients in providing advice on the most effective lawful means to minimise tax payable. The Committee rested on the point that tax advisers were responsible for a correct interpretation of the law and that any morality in taking up the advice remained with the taxpayer seeking it.

Although public sentiment was inflamed during this period, the restoration of a sound relationship between the ATO and the community may have been assisted by the Commissioner's comprehensive approach to the self-assessment program. The Commissioner had an established commitment to the concept of mutual responsibility between the ATO and the taxpayer on the issue of taxpayer compliance. The Taxpayers' Charter spelt out the responsibilities of ATO staff and the community.³⁷ This was supplemented by the Compliance Model, which underpinned the compliance strategies of the ATO.

The increasing use of product rulings was providing more certainty to investors who invested in plans implemented according to a ruling. In 2006, new legislation was implemented which allowed the ATO to approach the Federal Court to impose monetary penalties where a tax exploitation scheme was not implemented in accordance with a product ruling. The new legislation also meant that promoters could not pass on all the risks to investors.

The ATO also worked towards building a better service and a more constructive relationship with tax agents. This was implemented through the Tax Practitioner Service Improvement Program and the introduction of a Tax Agent Integrity Unit.

A Listening to the Community Program, and Community Perception Surveys for feedback about ATO performance and taxpayer needs, commenced in 2002. In response to the increased costs of compliance, the Commissioner introduced in 2004 the Easier, Cheaper and More Personalised program, now known as the Change Program. This program includes the introduction of tax agent and business portals, an improved telephone response capability and the aim for an integrated information technology environment.

In 2004, the Treasury released a report on Aspects of Income Tax Self Assessment. The

report contained recommendations aimed at improving taxpayer certainty by improving the framework for ATO advice, reducing exposure to the risk of increased liabilities, and mitigating the penalties and interest charges when taxpayers who act in good faith make errors.

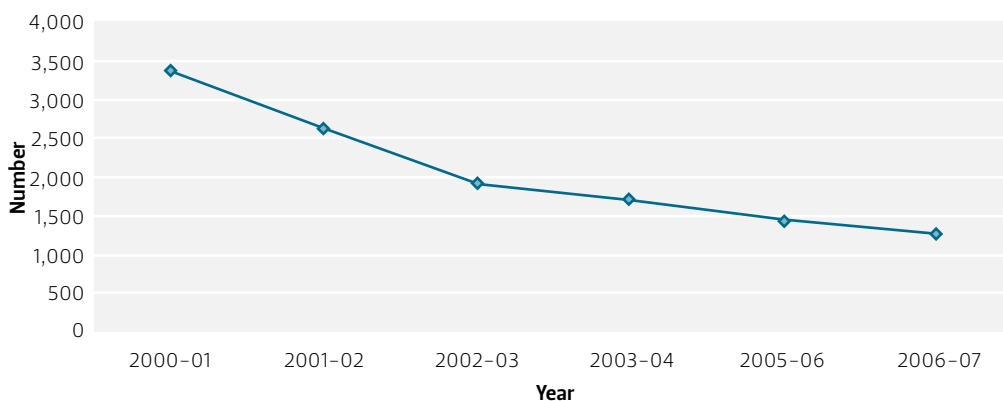
Ideologically, the ATO set its targets beyond those envisaged in the early days of administrative law reform. In a speech to the 2007 National Administrative Law Forum, the Commissioner described the public sector as having moved into:

... a new era in which the expectations are even higher than they were in the new dawn of the 1970s and 1980s. Having embraced administrative law standards, the public sector now requires an 'ethical compass'. Officers need to embed ethical and professional values into their day-to-day interactions with the public in order to be efficient and effective.³⁸

THE WORK OF THE OMBUDSMAN

Complaints about the taxation office were at record high levels in the 2000–01 year. Complaints reflected the main activities of the ATO, issues arising in the new tax system and the ATO's response to mass marketed tax schemes. The backdrop was now one of taxation self-assessment and a public more accustomed to avenues of appeal.

FIGURE 6: AUSTRALIAN TAXATION OFFICE COMPLAINT TRENDS, 2000–01 TO 2006–07



In his 2000–01 annual report, the Ombudsman noted:

*With intense public debate about the ATO's actions in relation to aggressive tax planning and an equally intense scrutiny of its performance in relation to the introduction of the new tax system, it is my view that there has been no other time where the Charter principles ... have been more tested. Nor do I believe there has been another time in the history of my office where we have been under so much pressure to consider the reasonableness or fairness of a Commonwealth agency's administration.*³⁹

Sounds from the 1970s echo in this statement. Complainants' issues were similar—delay, uncertainty, and suspicion of unfairness and unlawfulness on the ATO's part.

The Ombudsman undertook three own motion investigations into the aggressive tax planning schemes. The first of these reports, on the Budplan scheme, was submitted to the Senate Committee in 2000 for its inquiry into the operation of the ATO. The Ombudsman concluded in the report that the Commissioner's interpretation of the law and subsequent actions in amending assessments were not retrospective, unjust or oppressive. The Ombudsman noted that it was a matter for the courts to determine the interpretation of the law.

The Ombudsman's investigation highlighted the lack of understanding on the part of taxpayers of the operations of the self-assessment system and their obligations under it. The role of tax agents in promoting schemes was also raised with the Senate Committee. That, coupled with their approach of testing inconsistencies in ATO decision making, agents could be disposed to push the boundaries on questionable claims.

The Senate Committee heard some criticism of the Ombudsman by those involved in schemes over what they saw as the Ombudsman's endorsement of the Commissioner's stance. The Committee noted the highly constructive role played by the Special Tax Adviser in the Budplan matters. The Ombudsman's intercession, the Committee noted, enabled

taxpayers to have their voices heard at senior levels in the ATO, and the Ombudsman was instrumental in brokering an agreement between the ATO and Budplan representatives to run a test case in the courts. The Committee also noted the importance of a 'strong, well resourced and independent Ombudsman as a counterweight to the ATO's powers'.

The Ombudsman made recommendations to the Commissioner in several areas to improve the handling and resolution of disputed assessments, including 20 recommendations to strengthen public support for self-assessment. This could be done by the ATO adopting enhanced promoter and participant profiling, implementing proactive measures to prevent further problems, providing fuller information about decisions, and testing its information packages prior to release.

In light of the attention on taxation administration in the early part of the decade, the government established an Office of Inspector-General of Taxation in 2003, adding another 'watchdog' in the taxation environment. The Inspector-General's role includes the review of systemic tax administration issues and the providing of reports to government, including recommendations for improving tax administration. The Inspector-General of Taxation does not deal with individual taxpayer matters. The Taxation Ombudsman continues to be the only agency external to the ATO that handles individual complaints about tax administration.

The Ombudsman worked with the ATO in the development of its complaint-handling systems. An interim report of the Ombudsman's own motion investigation into ATO complaint handling was released in 1999 and the final report in July 2003. The reports made recommendations to assist the ATO in implementing best practice relationship management for complaint handling and embedding the principles of quality complaint management. The recommendations were embraced by the ATO in the development of ATO Complaints.

ATO Complaints now plays an important strategic role in overseeing complaint

processes and providing an impartial internal review mechanism for complainants.⁴⁰ The Ombudsman's office considers the ATO's management of complaints is an excellent model and one from which other agencies can learn. The operation of ATO Complaints may be a contributing factor in the decrease in number of complaints to the Ombudsman about the ATO in this decade (see Figure 6).

By 2007, the Taxpayers' Charter had been in operation for 10 years. Complainants and professional bodies call upon its principles in their assessments and expectations of the ATO. The Charter is a worthwhile development in public law and government administration in Australia.⁴¹ The value of external scrutiny is made more effective by well-built internal standards and systems capable of dealing positively with feedback.

AFTER THIRTY YEARS—THE ROAD AHEAD

*The road ahead is always a continuation of the road just travelled. We can better understand where we are going and what we can expect, by looking back at where we started and what we saw along the way.*⁴²

The growth and effectiveness of the Ombudsman's office over the last thirty years has achieved an important social trend: people now know they have a right to complain.⁴³

As an independent, external, complaint agency, the Ombudsman will continue to provide an impartial and informal avenue for taxpayers to raise their concerns about the administration of the tax system.



Prof. John McMillan, Commonwealth and Taxation Ombudsman, speaking at the ATO's 10th anniversary celebration of its Taxpayers' Charter

taxation ombudsman complaints in 2007

The number of complaints received by the Ombudsman has remained steady over the last few years. This, combined with the outcomes from our investigations, indicates that tax administration is fundamentally sound. There are, nevertheless, a number of areas where taxpayers continue to experience problems.

Generally, the areas where we see the most complaints are where people are required to pay tax or are waiting to receive refunds or other monies owed to them. The underlying causes of complaint in these areas appear to be taxpayer misunderstanding of the ATO processes, real or perceived delay by the ATO⁴⁴ and unclear or misunderstood information from the ATO to the taxpayer.

REFERRALS AND EXPLANATIONS

Many complaints to the Ombudsman are resolved without the need for investigation. Taxpayers sometimes just need assistance to navigate through the complexities of the tax system. We also encourage people to seek to resolve complaints with the ATO before approaching us. This is the basis of our assisted transfer process that we formally implemented this year.

The case studies in this section provide some insight into the types of complaints we received this year and how we resolved them. Most often a complaint is resolved simply by providing a more complete explanation or the ATO taking more timely action.

breaking the impasse

CASE STUDY

Ms A complained about the ATO and the Department of Health and Ageing failing to provide her with appropriate information about the tax offset for net medical expenses over \$1,500. Ms A was required to lodge a tax return for her deceased mother before probate could occur. Her mother had incurred medical expenses of around \$4,500 for residential respite care and Ms A was seeking to claim these expenses as part of the offset. She was advised by the ATO that the Department of Health and Ageing's classification of the respite care as 'high care' was not acceptable.

When Ms A approached us she was frustrated at being sent between government agencies and left with a situation that she had been unable to resolve. As a result of our investigation, the ATO acknowledged that it had provided Ms A with incomplete information and acknowledged that respite care was recognised for the purposes of the offset. The ATO provided Ms A with a written explanation and an apology.

circuit breaker

CASE STUDY

Ms B complained about the ATO's delay in transferring her superannuation from the Superannuation Holding Accounts Reserve to her nominated superannuation fund. When we investigated, we found that misunderstanding and confusion between the ATO and Ms B seemed to have caused the problem. We were able to explain to Ms B what had happened and what she needed to do to transfer her money from her old superannuation account to her new superannuation account.

SUPERANNUATION

Each year, the Ombudsman receives a variety of complaints about the administration of superannuation. In 2007, complaints about superannuation were our second most common complaint topic (16%). Many of these complaints (around 45%) relate to the non-payment of superannuation guarantee contributions by employers. Common issues with the non-payment of superannuation are the length of time the ATO takes to recover unpaid employer superannuation contributions and the amount of information provided to complainants.

A change to the *Superannuation Guarantee (Administration) Act 1992* (the Super Guarantee Act) in April 2007 has opened up the flow of information to complainants while having regard to the relevant privacy issues. The ATO now discloses information to

complainants relating to the steps that the ATO has taken to investigate a complaint and the action taken to recover any unpaid superannuation monies. We anticipate the additional information the ATO is now providing will assist in the management of complaints and will reduce the numbers of complaints.

In addition to the changes to the Super Guarantee Act, the 2006–07 Federal Budget provided the ATO with an additional \$19.2 million over four years to enhance the ATO's responsiveness to superannuation guarantee compliance issues.

Throughout 2007 we received regular briefings from the ATO on the implementation of these changes. We will be publishing our report on the ATO's administration of superannuation guarantee in 2008.

better explanation

CASE STUDY

Mrs C complained to us about paying GST on her new car and the lack of response from the ATO about her query. Mrs C has a disability that allowed her to purchase a car without paying the GST. However, both Mr C and Mrs C purchased the car, meaning the eligibility no longer applied. We were able to explain this to Mrs C and to advise her that she could seek a private ruling on the matter from the ATO.

action expedited

CASE STUDY

Ms D complained to us about the delay in receiving her income tax refund. She had contacted the ATO after two weeks to find out how much longer it would take, and was told that she had entered the incorrect bank account details in her return and her refund had been deposited in another person's bank account.

Ms D contacted the ATO a number of times thereafter and had been told her refund would be with her soon. When she still had not received her refund two months later, Ms D contacted us. We contacted the ATO and were advised that there had been some delay in contacting the bank to retrieve Ms D's refund. Ms D received her refund two weeks after we contacted the ATO.

better explanation for refund delay

CASE STUDY

Ms E was anxious to obtain her tax refund and complained to us after being frustrated with the response from the ATO. When we contacted the ATO, they advised us that Ms E's refund would be issued in two weeks and they would provide her with a written explanation for the delay. Ms E was happy with this outcome.

DEBT COLLECTION

In 2007 complaints about aspects of debt collection activity made up around 14% of our complaints. The most common debt collection issues were:

- payment arrangements
- waiver or write-off of debt
- bankruptcy or other legal action
- receiving a final notice requiring payment of a tax debt.

As with any complaint to the Ombudsman, the Ombudsman Act requires us to consider if it is appropriate to investigate a complaint. For a

significant proportion of complaints about debt collection (around 86%), it was not appropriate for us to investigate. This was for a range of reasons—for example, the issue was before a court or tribunal, or would have been more effectively dealt with through existing objection mechanisms in the ATO.

For those cases we did investigate in 2007, we did not find that the ATO had been deficient in its administration. The most common outcome of our investigations was the provision of a better explanation and an objective view that the case had not been handled inappropriately. Overall, our investigation of complaints about

delay in collecting unpaid superannuation

CASE STUDY

Ms F complained to the Ombudsman about the ATO's apparent lack of progress in the recovery of the superannuation owed to her by her former employer. Ms F had been chasing her unpaid superannuation contributions with the ATO for two years but had not received information about the progress of her case.

As a result of our investigation, the ATO contacted Ms F to update her records, which allowed it to provide her with information under the amended disclosure provisions in the legislation. The information provided to Ms F explained the complexity of the specific issues in relation to her situation, that the ATO had been working towards a resolution and was at the time in negotiations with her former employer to obtain payment.

final case review

CASE STUDY

Mr H complained to our office when the ATO disallowed his objection to a personal tax debt and also refused his application for release from payment on serious hardship grounds. Mr H's debt of \$69,000 arose after his original return was amended as a result of an audit that disallowed deductions he had claimed. Mr H had been receiving unemployment benefits for the last two years, but had some personal assets and before that had operated his own business ventures.

In our investigation we considered the ATO's processing of Mr H's objection. Our investigation revealed that the ATO had provided a comprehensive and clear statement of reasons for its decision not to allow Mr H's objection, appropriately taking into account information provided to it and the provisions of the *Tax Administration Act 1953*. Based on the facts, the decision made by the ATO was a reasonable one to make and an earlier settlement offer involving a \$20,000 discount on Mr H's tax debt also appeared reasonable. The ATO also advised of the evidence they had regarding Mr H's assets. The reason for refusing the hardship application based on Mr H's financial situation also appeared reasonable.

Even though we were not able to provide Mr H with the remedy he sought, our consideration of the issue appeared to assist him to accept the situation and to look for a way to best clear his debt. When we told Mr H about our conclusion that the ATO appeared to have acted reasonably, he indicated he would contact the ATO to see if he could still access the settlement offer and use the proceeds from his assets towards paying his debt.

debt collection by the ATO indicated it was generally being handled appropriately.

We published a report on ATO administration of garnishee action in April 2007. Our report disclosed no major concerns or significant systemic problems in ATO administration of garnishee action. However, the report made some suggestions for reviewing the operation of garnishee action, including:

- development of a Practice Statement for garnishee action
- documentation of reasons for taking garnishee action
- consideration of the adequacy of reasons provided to debtors and guidance and procedures to ensure garnishee action does not affect a taxpayer's ability to pursue an appeal
- options for improving statistical and complaint records.

The ATO welcomed the report and indicated that it would take our suggestions into account in a better practice review of administration of garnishee actions they were undertaking. Our report on garnishee action is available on our

website at www.ombudsman.gov.au under 'Publications'.

As debt collection activity by the ATO remains a significant area of complaint, our 2008 work program is likely to include other projects connected with debt collection.

TAXPAYER INFORMATION

In 2007 we received almost 50% fewer complaints about taxpayer information than in 2006. This decrease may be attributable to the work the ATO has been doing over the last few years as part of their correspondence improvement process.

Of the taxpayer information complaints we did receive in 2007, the majority of these (86%) were either resolved at point of contact or transferred directly to ATO Complaints using our new assisted transfer process. Complaints about taxpayer information and advice included:

- concern about correspondence and advices sent to taxpayers
- tax file number information
- personal contact details held by the ATO.

getting information from the right source

CASE STUDY

Ms J, a backpacker returning to her home country after a working holiday in Australia, lodged her income tax return. Ms J thought she would receive a refund of all the taxes she paid while working in Australia. Ms J was a non-resident of Australia and had been told by friends that she did not need to pay taxes while working in Australia.

Ms J's notice of assessment advised her that she owed tax. Unfortunately, Ms J subsequently lost this notice of assessment as well as other correspondence from the ATO. She did not contact the ATO again because friends assured her that the information was incorrect.

Ms J used our website to make an online complaint. Ms J queried the amount of tax she was being asked to pay and also told us about the missing paperwork. She wanted to find out if she was required to pay Australian taxes and how she could pay the taxes from overseas. Ms J wanted to return to Australia at a later date and did not want to jeopardise this.

We confirmed with the ATO that Ms J's debt was correct. The ATO advised us it is a common misconception in the community that people on working visas are not required to pay tax.

We provided Ms J with information about her obligations and how she could apply for an arrangement to pay her debt with the ATO. Ms J subsequently paid the debt and was happy in the knowledge that when she returned to Australia she knew and understood her tax obligations.

As the case study *Getting information from the right source* demonstrates, it is often difficult for the ATO to always provide the right information at the right time and to combat widespread misinformation or misunderstanding within some sections of the community.

Our work program for 2008–09 is likely to focus on aspects of the ATO’s communication with taxpayers and our outreach program will focus on encouraging taxpayers to manage their relationship with the ATO by providing them with some practical advice.

LODGEMENT AND PROCESSING

Around a quarter of our complaints are about the lodgement and processing of tax forms. Around 59% of these complaints relate to the

lodgement and processing of income tax returns. However, in 2007 we only investigated a small percentage (around 8%) of these complaints. The majority of complainants had not complained to the ATO so, with their permission, we transferred their complaint directly to ATO Complaints for resolution.

Complaints about lodgement and processing included:

- delays in receiving a refund
- the ATO exercising its discretion to retain tax credits to offset against tax debts
- taxpayers not understanding the basis of their assessment
- enforcing lodgement, particularly where other payments such as child support are dependent on the lodgement of an income tax return.

explaining assessment and payment arrangements

CASE STUDY

After he received his notice of assessment, Mr K wanted to reach an agreement with the ATO to pay by instalments, but he had not sent the ATO the appropriate forms. Mr K complained to us about the way in which his requests for information about his assessment and repayment options were handled by the ATO. Mr K said the information provided by the ATO contained errors and conflicted with other information they had provided.

When we investigated the matter, it appeared there had been some confusion around the information provided to Mr K and what terms of any payment arrangement were acceptable to the ATO. We were able to clarify for Mr K the information previously provided by the ATO.

clarifying information

CASE STUDY

Mr L lodged multiple returns, including years covering Mr L’s retirement from his employer. Mr L had expected that some of his retirement payout would be taxed at a concessional rate as an eligible termination payment. Contrary to Mr L’s expectations, the ATO issued him with a debt assessment. He did not understand the basis for the assessment, and although he complained to the ATO, Mr L was not satisfied with the outcome.

After investigating the complaint, we advised Mr L that the ATO had letters from his former employer that indicated a particular payment from them to Mr L was not an eligible termination payment but was back-pay and subject to ordinary tax rates. As a result of our explanation, Mr L better understood the basis for his assessment.

assurance that action was being taken

CASE STUDY

Ms M complained to us about the ATO's failure to pursue her former partner for non-lodgement of tax returns. Ms M complained that as a result she had received no child support payments from the Child Support Agency. Although secrecy provisions in taxation legislation prevented us from telling Ms M about the actions the ATO was taking to obtain her former partner's returns, we were able to assure her that appropriate action was being taken. We were able to tell her that it could be a lengthy process and that the non-payment of her child support was not due to inactivity by the ATO.

the taxation ombudsman in the framework of tax administration

As well as handling complaints about the ATO, the Taxation Ombudsman also monitors and comments on tax issues and aspects of tax administration. Other agencies such as the Australian National Audit Office (ANAO) and the Inspector-General of Taxation have similar functions with the common aim of improving tax administration.

AUSTRALIAN NATIONAL AUDIT OFFICE

Each year we liaise with the ANAO regarding its forward work program and may also discuss with them particular performance audits they are conducting. We work to avoid any unnecessary overlap or duplication, but also acknowledge that we each approach our work from different perspectives.

INSPECTOR-GENERAL OF TAXATION

The focus of the Inspector-General of Taxation is to review systemic tax administration issues for government from the perspective of the taxpayers' advocate. This advocacy role complements our own role as an impartial reviewer of tax administration wholly independent of government, with both offices concerned to ensure improvements to tax administration for the benefit of all taxpayers.

The Inspector-General consults with the Taxation Ombudsman about his forward work program and on his specific reviews. Again, the objective is to avoid any unnecessary

duplication, and to share our experiences and perspectives.

We also closely follow the work of the Inspector-General analysing his reports to note areas he has identified for improvement. We keep these in mind when following developments in tax administration and examining complaint trends.

TAX AGENTS' BOARDS

The specific role of Taxation Ombudsman is limited to handling complaints about the ATO. However, in our broader role as Commonwealth Ombudsman, we handle complaints about the Tax Agents' Boards (TABs) under the Commonwealth Ombudsman's jurisdiction, and recognise the Boards as playing an important role in the framework of tax administration. We received 12 complaints about the TABs during 2007.

We provided a submission to the Treasury on the Exposure Draft Tax Agents Service Bill, Related Regulations and Explanatory Material in August 2007. We consider it to be critical that tax administrators support a culture of community voluntary tax compliance, a key aspect of the current tax system. The proposed new tax agents' regulatory scheme should increase community confidence in the tax professionals upon whom taxpayers and the ATO increasingly rely.

5 challenges in complaint handling

The complexity of the tax environment means that we are always likely to need effective review and complaint-handling mechanisms to assist individuals who consider they have been wronged in some way by the ATO.

We encourage tax complainants to contact ATO Complaints before making a complaint to the Ombudsman. As mentioned earlier in the report, we have implemented an assisted transfer process to facilitate this.

The effectiveness of the ATO's complaint-handling system means that each year, although we are receiving fewer complaints, the complaints we do receive are often more complex and involve heightened levels of grievance. Therefore, a key challenge for our office is to continue to improve our own complaint-handling performance, in particular around complex and difficult complaints. This section discusses factors relevant to improving our own tax complaint handling.

NEW WORK ARRANGEMENTS

In 2007 we reviewed our decentralised approach to tax complaint handling. As a result of this review, all tax complaints are now handled in our Canberra office. This will allow us to build a better understanding of the underlying causes of complaints about tax administration. It will also assist us in building and maintaining a team in Canberra with specialist knowledge and understanding of tax administration.

LIAISON WITH THE ATO

We continue to work with the ATO on improving complaint handling generally, to ensure that our respective complaint systems work effectively, and complement each other. We have regular liaison meetings with ATO Complaints where we discuss issues such as work practice and patterns of complaints.

To ensure our understanding of the ATO environment is maintained, we seek out topic-specific briefings from the ATO. During the year, the ATO provided us with briefings on the following tax matters:

- implementation of the ATO's change program
- the small business assistance program
- administration of the superannuation guarantee.

We continue to be involved in more strategic roles within the ATO, with a Senior Assistant Ombudsman sitting on the ATO Integrity Advisory Committee and the Indigenous Tax Advisory Forum.

In 2008, we look forward to continuing the work of the last few years with a renewed focus on our program of external projects reviewing aspects of tax administration. We will finalise our review on the administration of aspects of the superannuation guarantee and examine the re-raising of debt by the ATO.

As part of our process of ensuring our complaint-handling systems complement each other, we will begin working with the ATO on aligning our classifications of complaints. This will enable better identification and analysis of any systemic issues that may be arising.

Our forward work program for 2008–09, outlining our proposed areas of investigation,

will be finalised mid-June. This work program will be available to the ATO, the ANAO, peak professional bodies and the Inspector-General of Taxation.

The 2008 program for liaison and consultation will continue to include our ongoing relationship with the ATO, and maintaining our relationships with the ANAO and the Inspector-General of Taxation. We will however, expand our consultation and liaison with peak taxation bodies in 2008. We hope the wider consultation with peak bodies will provide a valuable perspective for us in identifying, investigating and analysing systemic problems in tax administration.

ombudsman's address to 10th anniversary of ATO taxpayers' charter

Celebrating 10 years of the Taxpayers' Charter—Prof. John McMillan (address at an ATO function in August 2007 to mark the 10th anniversary of the Taxpayers' Charter)

It is a pleasure to speak at a function to celebrate the 10th anniversary of the Taxpayers' Charter. I confess that I am in anniversary mood this year, as this year is also the thirtieth anniversary of the Commonwealth Ombudsman's office. As many here will appreciate, the older you get, the more you enjoy other people's birthdays.

The 10th anniversary of the Taxpayers' Charter holds special interest to the Ombudsman's office, since we were there at conception, we were there at the birth, and we have been there during adolescence. With all the wisdom of a thirty year old, we can observe what a fine young progeny the Taxpayers' Charter has grown to become!

To digress with a personal reflection, the Taxpayers' and other charters have caused me to become a convert to charterism. Like many others here, I received my legal training and experience in the pre-charter days. We were taught about the importance in a legal system of having hard-edged remedies, which can be enforced by courts. Nothing less would satisfy the rule of law and the separation of powers.

We were taught—and believed—that integrity within the executive branch could only come through external review to combat the evil tendencies that lurk within the executive branch. Nowhere is this better captured than in the generic standards of administrative law that define impermissible executive conduct—abuse of power, apprehended bias, unreasonableness, improper purpose, lack of proportionality. The message was clear.

When the idea of government service charters gained popularity in the 1990s, myself and many others were suspicious. Another smoke and mirrors trick from the executive branch, we thought, to distract attention from their

obligation to be externally accountable. Charter language—'ownership', 'stakeholder', 'values', 'customer service' and 'cultural change'—served only to heighten our suspicion.

It is a fitting metaphor for today to say that we all have to grow up sometime, and this is an appropriate occasion to mark the maturing of the service charter phenomenon in Australia. The agencies in which we work all now have a service charter, we all believe in them, and we have all seen that charters can stimulate improvements in integrity and service delivery in our own organisations.

Prominent in this chapter has been the Taxpayers' Charter. It was one of the first, it is the most comprehensive, it has a high public profile in Australia, and it has been reviewed and refined a few times in the last decade.

Let me say a few words about why I changed my view about the importance of charters. Firstly, charters—or, at least, effective charters—are treated as important documents by managers and staff within their own agencies. The charter is a public commitment by the agency as to the principles and service standards it will observe. They are written within the agency, and formally adopted and sponsored by the agency leaders. Charters are written in language that can be understood by all staff in the agency. The charters cut through the complexity of the legislation and programs administered by the agency.

The same cannot be said of many other public law standards and principles that apply to agencies. Court and tribunal rulings, for example, are undeniably important in defining principles of administrative conduct, but they are not easily accessible to most people in government. I know myself that I think more about whether my conduct and that of my office is meeting our charter commitments than about whether the office has digested the latest High Court or Full Federal Court ruling on administrative law.

Good behaviour, whether at a personal or a corporate level, is more a reflection of how we choose to behave than how others tell us to behave. Charters are necessary for that reason, to build integrity and a public service orientation from the inside.

A second reason why charters are important is that they provide a positive definition of the principles of good administrative conduct and service delivery. By contrast, the external controls on agencies are mostly error or fault driven, and focus on whether an official has done something wrong—acted unlawfully, failed to accord natural justice, made a defective decision, or engaged in unreasonable delay.

That focus on error is important in defining the minimum standards of acceptable administrative conduct. But there must be a matching focus in affirmative language of what is good administrative behaviour. Charters tell officials how to behave responsibly, for example, to take timely administrative action, to be helpful, to provide an explanation or reasons for any decision, and to treat each case individually.

Thirdly, charters are accessible to the public. They tell the public what to expect, and where to complain when things go wrong. I have been struck in my time as Ombudsman by how often people do consult agency service charters when framing their complaint against an agency—including against the Ombudsman's office! There is a powerful message in any complaint alleging that an agency has broken its own charter commitment. In fact, there is a dual message—one is that the agency's conduct falls short of its published standards of good administrative conduct, the other is that the agency has breached its own promise or commitment ... 'You promised to respond within 14 days and you haven't' ... 'You promised to apologise if you made a mistake, and you're refusing to do so'.

That second message is often the more powerful message, and can be more compelling than messages framed in different

terms. Complaints to my office commonly state that an agency has breached natural justice, has acted unlawfully, or has interfered with someone's human rights. There is usually some elasticity in allegations of that kind, and they become part of the mix of issues involved in investigating a complaint. By contrast, a complaint that an agency has breached a specific commitment made in a service charter can have greater impact by directing attention to a clear-cut issue and prompting an agency to remedy the breach.

The Ombudsman's office pays close attention to whether agencies are in breach of their charter commitments. For example, in the taxation context, we drew attention in own motion reports on the Budplan and Main Camp mass marketed tax minimisation schemes⁴⁵ to whether there was compliance with charter standards on matters such as timeliness in issuing private rulings, and providing an explanation of decisions individually to scheme participants

Finally, on the back of every effective service charter there is now built a robust complaint handling and feedback mechanism, which is integrated with program monitoring, evaluation and development in the agency. A charter is meant to create a dynamic relationship between the agency and the public. Errors, misunderstandings and unintended consequences always occur in program administration, and an agency must be open to receiving and building on the opinions and practical experience of members of the public. This was a major focus of two own motion reports by the Commonwealth Ombudsman's office on complaint handling in the ATO.⁴⁶

In closing, I congratulate the ATO on 10 productive years in developing the Taxpayers' Charter. It is a worthwhile development in public law and government administration in Australia. It is something that the ATO can rightly celebrate on this 10th anniversary.

glossary

ANAO	Australian National Audit Office
ATO	Australian Taxation Office
CTSI	Centre for Tax System Integrity
DoFA	Department of Finance and Administration
DPP	Director of Public Prosecutions
CDDA	Compensation for Detriment caused by Defective Administration
GIC	General Interest Charge
GST	Goods and Services Tax
IGT	Inspector-General of Taxation
JCPA	Joint Committee of Public Accounts, 1915 to 1997
JCPAA	Joint Committee of Public Accounts and Audit, 1998 onwards
TAB	Tax Agent's Board

- 1 Prof. J McMillan, Commonwealth Ombudsman (2007) *Accountability of government*, Keynote address at the Above Board Accountability Forum.
- 2 Commonwealth Ombudsman First Annual Report 1978.
- 3 *Ibid.*
- 4 Joint Committee for Public Accounts (1993) Report 326 *An Assessment of Tax*.
- 5 Ivan Potas (1993) *Thinking about Tax Avoidance*, Australian Institute of Criminology.
- 6 'Bottom of the harbour' tax evasion referred to a practice of stripping a company's records so that it was unable to pay its debts. The records were unrecoverable just as if they had been thrown to the bottom of the harbour.
- 7 P N Grabosky (1989) in *Wayward Governance: illegality and its control in the public sector*, Australian Institute of Criminology, (Australian studies in law, crime and justice series).
- 8 Joint Committee for Public Accounts (1993) Report 326 *An Assessment of Tax*.
- 9 Commonwealth Ombudsman Third Annual Report 1979–80.
- 10 *Ibid.*
- 11 Commonwealth Ombudsman First Annual Report 1978.
- 12 Michael D'Ascenzo, Commissioner, ATO, (2007) *Effectiveness of Administrative Law in the Australian Public Service*, paper presented to National Administrative Law Forum, 14–15 June 2007.
- 13 Commonwealth Ombudsman and Defence Force Ombudsman Annual Report 1986–87.
- 14 Ivan Potas *op cit*.
- 15 Royal Commission on the Activities of the Federated Ship, Painters and Dockers Union, (1984) *Final Report* (F C Costigan).
- 16 P N Grabosky *op cit*.
- 17 Michael D'Ascenzo (Acting First Assistant Commissioner of Taxation) (1993) *Self Assessment: the ATO perspective*, address to the National Convention of the Taxation Institute, 9 May 1993.
- 18 Michael D'Ascenzo (1991) AC (SA) *Self-assessment: priority tasks*, address to joint seminar of ATO/Institute of Chartered Accountants and Society of CPAs (ACT Division).
- 19 Ivan Potas *op cit*.
- 20 Michael D'Ascenzo (Acting First Assistant Commissioner of Taxation) (1993) *Self Assessment: the ATO perspective*, address to the National Convention of the Taxation Institute, 9 May 1993.
- 21 Michael Carmody, Commissioner of Taxation (2000) *Tax Reform: the lessons for tax administration in Australia*, paper presented to American Chamber of Commerce in Sydney 2 May 2000.
- 22 Commonwealth Ombudsman and Defence Force Ombudsman Annual Report 1984–85 Appendix C.
- 23 *Ibid.*
- 24 *Ibid.*
- 25 Commonwealth Ombudsman and Defence Force Ombudsman Annual Report 1987–88.
- 26 *Ibid.*
- 27 The Compensation for Detriment caused by Defective administration scheme was introduced in 1995. Department of Finance Circular 2006/05 sets out the current mechanisms for compensation.
- 28 Robin Creyke and John McMillan (2002) *Executive Perceptions of Administrative Law: An Empirical Study*, Australian Journal of Administrative Law, Volume 9 (4).
- 29 Ivan Potas *op cit*.
- 30 Ivan Potas *op cit*.

- 31 The Taxpayers' Charter was launched on 1 July 1997 together with the Problem Resolution Service.
- 32 V Braithwaite (2005) *A New Approach to Tax Compliance* in *Taxing Democracy*, Ashgate.
- 33 *Ibid.*
- 34 Kristina Murphy (2002) *Procedural justice and the Australian Taxation Office: A study of scheme investors*, Working Paper No 35, The Australian National University Australian Taxation Office Centre for Tax System Integrity.
- 35 Tom Sherman (2000), *Internal review of the systems and procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office*.
- 36 Kristina Murphy *ibid.*
- 37 Simon James, Kristina Murphy, and Monika Reinhart *The Taxpayers' Charter: A Case Study in Tax Administration*, School of Business, University of Exeter, UK.
- 38 Michael D'Ascenzo, Commissioner, ATO, (2007) *Effectiveness of Administrative Law in the Australian Public Service*, paper presented to National Administrative Law Forum, 14–15 June 2007.
- 39 Commonwealth and Defence Force Ombudsman Annual Report 2000–01.
- 40 Philip Moss, Special Tax Adviser, (2003) *The Australian Taxation Office: One Agency—Two Watchdogs*, paper presented to the Australian Institute of Administrative Law.
- 41 *Ibid.*
- 42 Prof. John McMillan, Commonwealth Ombudsman, (2006) *What can we as ombudsmen expect in the future?* Address to the International Financial Ombudsman Conference.
- 43 *Ibid.*
- 44 In the case of income tax refunds, there appears to be a strong expectation by our complainants that every electronic refund will issue within two weeks even though the ATO's published service standard for this in 2006–07 was 96%, in 2007–08 the published standard is 82%. The standard for paper returns in 2006–07 was 92% within 42 days.
- 45 Commonwealth Ombudsman, *The ATO and Budplan*, June 1999; and Commonwealth Ombudsman, *The ATO and Main Camp*, January 2001.
- 46 Commonwealth Ombudsman, *Own motion investigation into ATO complaint handling*, July 2003.

