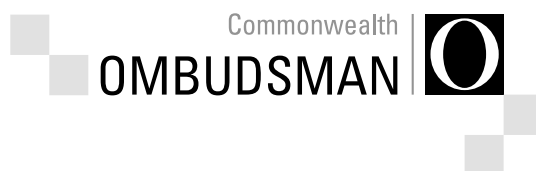


taxation ombudsman

activities 2003–2004





taxation ombudsman activities 2003–2004

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introduction



Painting by Guy Vaughn Gilmour, *Friday's Creek Road*, 1981–92, provided by Artbank.

Commonwealth Ombudsman, Prof. John McMillan, and Philip Moss, Special Tax Adviser.

This was my first full year in office as Taxation Ombudsman, having been appointed in March 2003. This report covers the Taxation Ombudsman's activities during the twelve-months ending 30 June 2004. It provides a more detailed account than set out in the Commonwealth Ombudsman 2003–04 Annual Report, which covers my office's full range of activities across all jurisdictions. Because most Australians are taxpayers there is a particular interest in the Ombudsman's role concerning the Australian Taxation Office (ATO).

Sub-section 4(3) of the *Ombudsman Act 1976*, enables the Commonwealth Ombudsman to be called the Taxation Ombudsman when dealing with complaints about the ATO.

The 1993 recommendation by the Joint Committee on Public Accounts to establish the specialist Taxation Ombudsman position within the Ombudsman's Office stemmed from its perception that a fundamental imbalance existed between the powers of the ATO and the rights of taxpayers. The Joint Committee regarded the establishment of a Taxation Ombudsman function as a key mechanism in correcting that imbalance. Since mid-1995 when the specialist tax team commenced operation, we have received over 20,000 complaints.

The 2003–04 financial year was the first year of operation for the Inspector-General of Taxation (IGT) whose focus is on tax systems review. The Taxation

Ombudsman continues to be the only external complaint-handling agency for taxpayers with complaints about the ATO. We will also continue to identify systemic issues and remedies that flow from individual complaints and to conduct own motion investigations. To avoid any duplication in our work, we maintain regular liaison with the IGT.

The Taxation Ombudsman provides an independent and informal avenue for taxpayers to raise their individual concerns. We follow a practical approach to complaint handling—identifying issues, setting the complaint on the path to resolution, and explaining the process to the taxpayer in a clear and open way. The objective of the office, to achieve practical solutions to tax problems, remains vitally important.

In a majority of cases we investigated during 2003–04, we were able to achieve a remedy. Remedies included expedited action, clarification or explanation about the basis for a decision, correction of errors, a refund or other financial remedy, or an apology. In some cases, the remedy

also involved a change to practice or procedure, or agreement by the ATO to review the relevant practice or procedure.

As Taxation Ombudsman, I was assisted by a tax team led by the Special Tax Adviser, Mr Philip Moss. The Tax Team consists of six investigation officers and a part-time consultant. Other staff members, located in our State offices, also provide assistance by investigating less complex complaints and by acting as referral points.

The Commonwealth Ombudsman 2003–04 Annual Report is available on our website site at www.ombudsman.gov.au. For the first time, our annual report has been adapted as an online publication with improved usability and accessibility in line with government standards.

Prof. John McMillan
Commonwealth and Taxation Ombudsman

overview

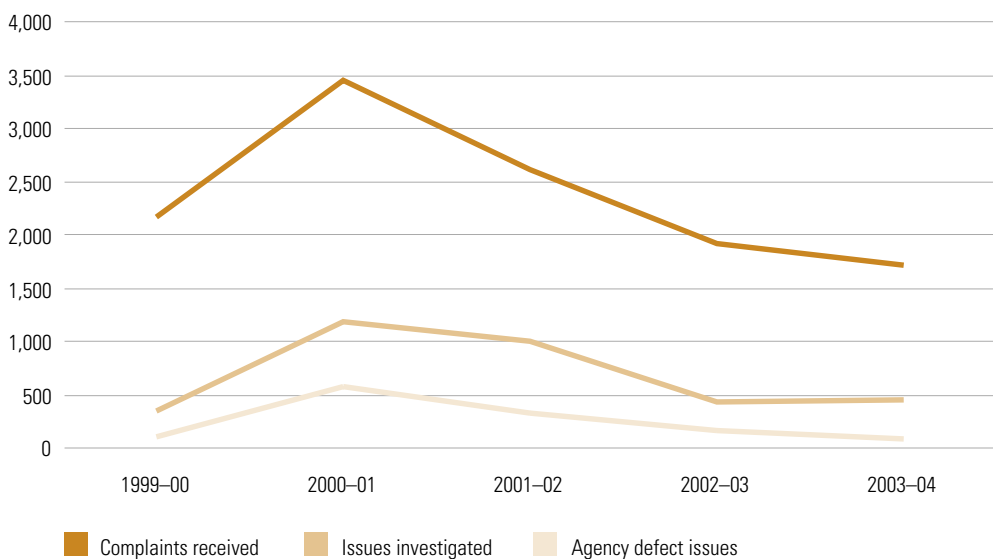
The Australian Taxation Office (ATO) is primarily responsible for administering taxation legislation and collecting Commonwealth revenue. Under the self-assessment system of taxation which we have in Australia—that is, where the taxpayer is responsible for the accuracy of his or her own taxation assessment—the ATO has increasingly taken on the role of providing accurate and timely information to taxpayers (and tax agents) to enable them to comply with the law. The ATO also administers some other non-taxation legislation, such as the *Superannuation Guarantee Charge Act 1992*.

In 2003–04, the Ombudsman received 1,711 complaints about the ATO, compared with 1,909 last year (see figure below). There has been a steady reduction in the number of complaints about the ATO since 2000–01, due primarily to

the declining number of complaints relating to mass-marketed schemes and the bedding down of the new tax system. The office finalised 1,904 individual complaint issues of which 24% were investigated; error or deficiency by the ATO was found in 17% of the cases investigated.

Complaints were received about a wide range of issues. Some of the more prominent complaint issues are covered in this report and are looked at in the chapters on 'How the Taxation Ombudsman helped people', 'Providing advice and reasons', 'Promoting good taxation administration', and 'Cooperation with other agencies'. Issues include active compliance and debt recovery, 'competitive edge' issues, tax relief, the impact of changing demographics, compensation issues, GST issues, mass-marketed schemes and superannuation surcharge.

FIGURE Australian Taxation Office complaint trends, 1999–2004



how the taxation ombudsman helped people

The complaints received by the Ombudsman range in complexity. Many are about the smaller irritations that people experience in their dealings with government, while others relate to dissatisfaction with how complex legislation has been applied in an individual instance, or question the essential principles of a substantial government program.

The work of the Ombudsman is mostly known through the investigations undertaken by the office. Some investigations culminate in a formal finding of defective administration against a government agency. Many other investigations that span a great deal of time and investigative work conclude that there was no agency error. In either case, there can be demonstrable public benefit—correcting defective administration in one instance and, in the other, allaying any such concern by an independent and objective examination of a grievance against government.

Investigative work, although the most prominent role of the Ombudsman, is just one aspect of how the Ombudsman helps people in their dealings with government. This chapter provides a fuller picture of the work of the Ombudsman by looking at the different ways in which the office handles complaints and inquiries it receives.

HANDLING COMPLAINTS FROM MEMBERS OF PARLIAMENT

Members of Parliament (MPs) in Australia, in discharging their constituency role, perform a function similar to the Ombudsman of taking up the grievances of their constituents directly with government agencies. This is a major function of the electorate offices of many MPs. Even so, many MPs find that the Ombudsman's office can be a useful supplement or alternative to their own constituency work. Sometimes we are better placed because of our resources, experience and information-gathering powers to investigate an issue brought initially to an MP's attention.

'... many MPs find that the Ombudsman's office can be a useful supplement or alternative to their own constituency work.'

During the year, we received a number of complaints about the ATO from MPs on behalf of their constituents. In most cases, we were able to resolve the matter or at least clarify the actions of the agency through an investigation. On several occasions during the year we met with MPs to discuss the issues. For example, the Special Tax Adviser and another staff member met with an MP

CASE STUDY clarification

A Member of Parliament complained about the ATO's imposition of General Interest Charge (GIC) on a constituent who had previously been led to believe by ATO staff that no such charge would apply.

The day after we made inquiries about this complaint, the ATO contacted the constituent, clarified the situation, apologised for any inconvenience, and arranged to have the GIC remitted. The ATO then undertook subsequent follow up action to confirm that the remitted GIC was properly credited to the constituent's bank account.

who had been approached by taxpayers involved in employee benefit arrangements. As we had already dealt with many similar matters, we were able to clarify a range of related issues for the MP.

In some cases, we were able to achieve a quick and effective remedy after seeking comments from the ATO, as illustrated in the *Clarification* case study.

COMPLAINTS FROM OVERSEAS RESIDENTS

During the year, we dealt with 19 complaints from overseas residents. As a proportion of all overseas complaints received by the Ombudsman's office, this was second only to immigration matters. If the complainant was concerned about the taxation of foreign income, we usually suggested that the complainant seek a private ruling from the ATO to clarify their particular situation. If the complaint was in essence about the tax law itself and relevant international agreements, we advised the complainant that there was little scope for the Ombudsman's office to assist. In other cases where we were able to respond differently, the complaints stemmed from difficulties the complainants were experiencing in resolving disputes or in trying to sort out their tax affairs which related to income earned during periods of residence in Australia.

In one case, an overseas resident approached us because he was experiencing a problem with lodging his tax return for income he had received during his time as a student living in Australia. A relative who was an Australian resident was attempting to assist but both were experiencing difficulty in finding out how to go about lodging the return. Following inquiries, the ATO advised us of the range of options open to people resident overseas. We were able to advise the complainant that the ATO offered to grant an extension of time for lodging his tax return and that a contact officer would be appointed to assist the complainant's relative should any further problems arise in the lodgment process.

In another case, an elderly widow who had left Australia to reside permanently overseas, wrote to the Ombudsman after having tried for three years to resolve with her bank and the ATO an issue relating to withholding tax. The ATO had earlier

explained that the situation would be sorted out when she complied with her obligation to lodge tax returns. She had done so but was still concerned that the assessment notices demonstrated that she was in fact owed a refund. Our inquiries revealed that she was entitled to a refund of \$608. The ATO agreed to complete the necessary amendments to her income tax returns; she was thereafter free of the obligation to continue lodging returns in Australia.

PROVIDING AN INDEPENDENT ASSESSMENT

An essential component of the Ombudsman's commitment to the values of independence, impartiality and professionalism is that the office should listen to both sides of a complaint or disagreement. The first step ordinarily taken after a complaint is received is to elicit an agency's response to what a complainant has said, and then to give the complainant a further opportunity to comment. Sometimes the Ombudsman's office is the only body that has been independent of the dispute and has heard both sides. The office is not an advocate for either party.

In several areas of the office's jurisdiction relating to tax complaints, we perform a role of providing an independent assessment where secrecy and privacy considerations preclude disclosure by the ATO about the tax affairs of third parties. We can provide that independent assessment even though we are similarly unable to pass on information to the complainant. One such area relates to the ATO's actions concerning investigation and recovery activity connected with unpaid superannuation guarantee payments. The relevant legislation prevents the ATO from disclosing to an employee the particulars of any action that the ATO has taken with respect to the employer, although the ATO is authorised to provide information to the Ombudsman. It is inappropriate for us to pass on information that is otherwise protected; however, we do seek to satisfy ourselves that action by the ATO is consistent with its guidelines and processes, and to notify the complainant accordingly.

Another area relates to reports of tax evasion where a complainant is concerned that the ATO has failed to take action in response to a report

made by the complainant. In such cases, we make inquiries to check that the matter has been properly logged, prioritised, and investigated where appropriate. We are unable to advise the complainant what, if any action, is being taken but we do seek to satisfy ourselves that the matter has been or is being appropriately handled by the ATO. This independent assurance can be important to complainants.

WORKING RELATIONSHIPS

During the year, we continued to develop our good working relationship with the ATO. Through meetings, briefings and the development of referral

processes, we were able to facilitate effectively with the ATO the resolution of many tax complaints.

We met regularly with the ATO to discuss issues raised by complaints, such as a complaint about the ATO's handling of test and lead case litigation. In looking at that complaint, we noted that in litigation involving large numbers of taxpayers, a third party, not necessarily party to the litigation, may be involved in representation, funding and management of the individual taxpayers' cases. The ATO accepted that, where arrangements had been reached with third parties concerning litigation involving individual taxpayers, it was important to keep the individual taxpayers informed

CASE STUDY **prompt action**

Mrs D complained to the Ombudsman that the ATO had written to her frail, elderly parents stating that their deceased son's superannuation provider had advised that an eligible termination payment had been paid to him in the year he died, some seven years earlier. The letter implied that the amount would be taxable and requested to know the son's tax file number (TFN), otherwise the highest marginal tax rate would be charged.

Mrs D was concerned that her parents were distressed, shocked and threatened at the prospect of having to pay a debt that should have been finalised when their son's estate was settled. She stated that the ATO letter arrived three days before the seventh anniversary of her brother's death and her parents were just coming to terms with their grief. Mrs D also found it difficult to accept that the ATO would not have had a record of her brother's TFN. When she rang the ATO Superannuation Infoline, she was told 'these things happen'.

We identified the issues arising from the complaint and requested a response from the ATO. The ATO acted promptly in response to our inquiries, and provided the following advice.

- The notice was issued because the information about the termination payment had only just been provided to the ATO by the deceased brother's superannuation fund. The documentation from the fund had his name incorrectly spelled, and therefore it did not match up with the ATO's records, hence the need to confirm the TFN.
- An explanation was provided to Mrs D and she was told that on review no monies were owed. A written apology was also issued.
- The ATO Superannuation Infoline staff member was counselled and all contact centre staff were made aware of the problem with determinations issued for benefits paid by the particular superannuation company to deceased estates, and about the need to deal with such matters sensitively.
- Other cases were identified from the same fund where interim assessments were sent to estates. Action was taken to contact the families and issue a letter of apology and/or explanation.
- Procedures were put in place to prevent a recurrence of this in future when other funds report previous year payments.

of significant developments relating to that litigation. In the particular case raised, the ATO acknowledged that this had not been done, and indicated that it would be open to providing realistic compensation by settling with the individual taxpayer concerned.

‘... our good working relationship with the ATO ... enabled us to facilitate effectively the resolution of many tax complaints.’

In many of the complaints we referred to the ATO for comment, the ATO acted quickly to resolve the individual complaint and took the initiative to pursue related issues. The *Prompt action* case study provides a relevant example.

The ATO briefed Ombudsman staff about a range of activities, including the compliance and debt recovery areas, and alerted us where it became aware of incidents that might generate complaints. In each such case brought to our attention, the ATO initiated steps to mitigate the risk of complaints and provided specific high-level briefings to the Special Tax Adviser and Tax Team staff. This provided us with up-to-date information, enabling our staff to respond effectively to these complaints.

We also contributed to the ATO’s consideration of integrity issues through the Special Tax Adviser’s attendance at the ATO’s Integrity Advisory Committee.

We further refined arrangements between the ATO and ourselves to assist in:

- improving response times to ensure that we can shorten the time required to resolve complaints
- referring complainants directly to the appropriate person at the ATO to ensure complaints are dealt with efficiently.

ATO COMPLAINT HANDLING

The Ombudsman’s 2002–03 annual report advised that the Commissioner of Taxation had accepted all of the recommendations in our report, *Own Motion Investigation into ATO Complaint Handling*. During 2003–04, we worked with the ATO on implementing these recommendations, particularly towards the ATO developing a single ATO-wide complaint-handling and recording system. The new system is to be in place by late November 2004, and should dramatically improve the ATO’s ability to track and manage complaints. It should also result in some flow-on effects on the complaints we currently refer to the ATO, as well as on our own investigations.

‘... we developed a protocol to facilitate more efficient referral of complaints to the ATO’s internal complaint-handling unit.’

During the year, we developed a protocol to facilitate more efficient referral of complaints to the ATO’s internal complaint-handling unit, ATO Complaints. We refer written complaints and some oral complaints to the ATO with the agreement of a complainant who has not previously contacted the ATO. This avoids the need for the complainant who has first contacted our office to repeat the details of their complaint to the ATO. ATO Complaints or the relevant business line will then seek to resolve the matter and advise the complainant directly of the outcome and any remedy. Generally we only have further contact from complainants who continue to be dissatisfied with the process or the outcome of their complaint. We have received positive feedback from complainants about the effectiveness of the referral process. For example, a tax agent wrote to us on behalf of a client, complaining about an ATO decision not to remit the General Interest Charge on a tax debt. Following the transfer of his complaint directly to ATO Complaints, the complainant wrote to advise that the ATO acted promptly and courteously in response to the complaint and had granted a financial remedy that was entirely to his client’s satisfaction.

providing advice and reasons

The issues on which taxpayers turn to the ATO for advice can be matters of great importance in how they structure their lives and finances. They can also be complex issues, on which people rely heavily for correct advice. The accuracy or quality of agency advice—oral advice particularly—is a recurring theme in many of the complaints received by the Ombudsman's office. The provision of oral advice to taxpayers is a significant part of the daily work of ATO officers.

ORAL ADVICE PROVIDED TO TAXPAYERS

In a submission to the Department of Treasury Review of Aspects of Income Tax Self Assessment in May 2004, the Ombudsman provided the perspective of the office on a number of issues, including those relating to the ATO's provision of advice to taxpayers.

Although ATO advice is generally accessible, in our view the complexity of tax law in its application to an individual taxpayer's affairs presents significant difficulties. Our submission noted that the ATO must balance the need to provide clear and understandable advice with the obligation to provide legally correct advice in all circumstances. This is often very dependent on the information provided by the taxpayer to the ATO, which is not always sufficient for the ATO to provide legally correct advice.

In certain circumstances, particularly where a taxpayer is seeking oral advice about the application of the tax law to their own affairs, it may be more appropriate for the ATO to advise the taxpayer of other means or sources of obtaining relevant advice rather than providing oral advice. Options include seeking advice from general ATO publications, through the tax ruling system or through a professional tax adviser. The tax treatment of Eligible Termination Payments (ETPs) is one area where complexity of the law

complicates the ATO's task of giving oral advice, particularly when many taxpayers will only ever have to deal with an ETP once in their lifetime.

TaxPack and its supplements provide a comprehensive starting point for most individual taxpayers. Generally, if TaxPack cannot meet a taxpayer's need for advice, it can be assumed that their affairs are sufficiently complicated to warrant seeking more personalised advice (either through a tax professional or via the tax ruling system). We provide feedback each year to the ATO on TaxPack, as well as providing suggestions that arise from the investigation of specific complaints. This year we identified an ambiguity in the TaxPack text, relating to travel claims, which the ATO agreed to address in future editions.

Following the Ombudsman's 2003 report into ATO complaint handling, the Commissioner of Taxation's commitment to the 'one plus one' policy was welcomed. That is, where a tax officer cannot resolve a taxpayer's inquiry in the first instance, rather than simply passing them on to someone else, the tax officer makes contact with other tax officers on behalf of the complainant to identify a person who can respond to the inquiry. Such a policy should instil in tax officers a sense of individual and collective commitment to effective service delivery. This approach has been absorbed into the current ATO Change Program (based on the ideals of providing an 'easier, cheaper and more personalised' service to taxpayers).

Problems stemming from incorrect or inconsistent advice provided by the ATO can generally be managed in the following ways:

- a complaint can be made to the ATO or to the Ombudsman's office
- the ATO can enter into a reasonable payment arrangement for payment of an outstanding primary tax debt

- the Commissioner of Taxation has discretionary powers to remit penalties and the General Interest Charge
- compensation can be paid under the scheme for Compensation for Detriment caused by Defective Administration to a taxpayer who has suffered financial detriment (for example, compliance costs, the cost of alternative advice and the cost of litigation) after acting on inconsistent or incorrect ATO advice.

‘...we revisit this issue regularly with agencies and oral advice continues to be a major issue for this office.’

Taxpayers may have difficulty in establishing that the ATO has given incorrect or inconsistent advice, due to the general tendency of the ATO not to record certain types of advice—especially oral advice. The Ombudsman’s 1997 report, *Oral Advice—Clients Beware*, outlined the minimum practical level for recording oral advice. Since that time, we have not conducted a comprehensive examination of the provision and recording of oral advice by Australian Government agencies. However, we revisit this issue regularly with agencies and oral advice continues to be a major issue for this office. The Ombudsman is currently considering a new own motion investigation into the provision of oral advice across all agencies, which would include the ATO as one of the key advice-giving agencies.

FAILURE TO ADVISE TAXPAYERS OF REVIEW RIGHTS

The ATO undertakes in the Taxpayers’ Charter to advise taxpayers of their review rights, and in particular to explain the different review processes which apply to ATO decisions and the limitations of those processes. Generally, the ATO includes such advice in its notification to a taxpayer about a particular decision. Several complaints we dealt with during the year highlighted that the ATO was not always aware of the existence of a review right and as a consequence had not fully informed the taxpayer of that right. Once these cases were drawn to the ATO’s attention, appropriate steps were taken to rectify the situation.

In one case, a company complained that the ATO had unfairly declined to reclassify it from ‘Large Withholder’ status. When we sought to establish whether the complainant had a right to seek review under taxation legislation, we were initially advised that no review right existed. We asked the ATO to reconsider that advice, following which the ATO advised that a review right did exist. The ATO accepted that it had failed properly to notify the company of a formal review right and undertook to treat the company’s most recent letter as a formal objection and to also give the company the opportunity to submit supplementary information to support the objection. As well as taking appropriate remedial steps to rectify the deficiency for the individual complainant, the ATO also undertook to take steps to amend procedures to ensure that relevant staff are aware of when a review right is applicable and that they advise clients appropriately.

In another case we dealt with during the year, a company that had sought to adopt a substituted accounting period (that is, an annual accounting period ending in December rather than in June) had wished to pursue a review of the ATO’s adverse decision and related private ruling. The ATO had indicated that a review was not possible. The complainant approached the Ombudsman’s office, and while we could not criticise the ATO’s reasoning in rejecting the company’s request, we were concerned that the company had been under the misapprehension that all alternative review avenues were closed.

We found that although the complainant company had no formal objection or review rights under taxation legislation, the company did have a right to seek review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). Consistent with its undertakings in the Taxpayers’ Charter, the ATO agreed that it should have advised the company of that review right. To remedy the situation, the ATO agreed to reconsider its decision outside the formal review processes in the light of further material provided by the company. The ATO also advised us that if the reconsideration was unfavourable to the company the ATO would provide advice about the company’s right to seek review under the ADJR Act.

ADVICE ABOUT NON-TAX DEBTS

During 2003–04, we examined the issue of how the ATO handles requests by taxpayers for information about debts they may have with other Australian Government departments or agencies. We had received a number of complaints about the ATO refusing to disclose to taxpayers the source of non-ATO debts, which in some cases had been repaid through automatic offsets deducted from expected tax refunds. In some instances, the complainants had been unaware of the debts or had wished to query them, but were unable to do so because of the ATO's refusal to disclose the source of the debt.

In response to our inquiries, the ATO advised that it was endeavouring to adjust its information technology systems to provide taxpayers with full details of all automatic offset occurrences, though this adjustment may take some time. In the mean-

time, where an offset has occurred, taxpayers can contact the ATO to obtain the exact details of the offset. Staff in call centres have now been advised that they can disclose such details to the taxpayer or their agent. In the case of offsets linked to Child Support Agency debts or Centrelink garnishees, the details can only be provided to the taxpayer personally.

PROVIDING REASONS

It is a fundamental principle of good public administration that reasons for an administrative decision should be provided to anyone aggrieved by the decision. Members of the public are more likely to have confidence in how and why government decisions are made if a satisfactory written explanation is provided. In a publication of the Administrative Review Council, *Commentary on the Practical Guidelines for Preparing Statements of*

CASE STUDY providing a statement of reasons

Ms C complained about the refusal by the Tax Agents' Board of New South Wales to provide reasons for its decision not to pursue a complaint made to it about the conduct of a tax agent.

After investigation, the Ombudsman was satisfied that the decision by the Board not to take action against the tax agent could not be criticised as being unreasonable in the circumstances. The Ombudsman did not consider that the behaviour alleged against the tax agent by the complainant would, in itself, amount to the serious misconduct which might lead to cancellation or suspension of registration and the related loss of livelihood for the tax agent.

The Ombudsman accepted that the Board was not in breach of any legal obligation in declining to provide a statement of reasons. However, on other grounds the Ombudsman disagreed with the Board's approach of not providing reasons. It was pointed out to the Board that it is now widely accepted in the public sector that a decision-maker should at least attempt to give an explanation that will satisfy a complainant.

While accepting that the Board has very limited resources and works under considerable time and workload pressure, the Ombudsman considered that it was incumbent on the Board to recognise the importance of reasoned decision-making in its dealings with members of the public and to be prepared to provide a sensible explanation of its decision-making process on request. What will suffice as an explanation may vary markedly according to the circumstances of the particular case, including the nature of the decision being made.

In the course of the investigation, the Board prepared a draft letter to the complainant that, in the Ombudsman's view, contained adequate reasons. The Board confirmed that the letter had been sent and that the Board has changed its policy. The Board now provides all complainants with a general explanation of its processes and, where applicable, specifies reasons on request.

Reasons (2002), the Council set out fundamental interests that are advanced by reasoned decision making and transparency in decision making. Providing clear and concise reasons for decisions is an essential part of the system of government accountability.

Many public-sector bodies have made an agency commitment to reasoned decision making, to supplement whatever legal obligations may apply. The Taxpayers' Charter is an example, giving an undertaking that the ATO will provide a clear explanation of decisions except in very limited circumstances (for example, if explaining a decision would involve a breach of another person's privacy). This ATO commitment reflects

best practice that is now widely adopted by other government agencies.

The Ombudsman Act reflects the same theme. Section 15(1)(c)(ii) of the Act provides that the Ombudsman can form an opinion that a person should have been furnished with reasons for a decision about exercising, or refusing to exercise, a discretionary power in a particular matter.

Many of the complaints received by the Ombudsman's office each year relate to instances where there was scope for better explanation of decisions by agencies. This is illustrated in the *Providing a statement of reasons* case study, which relates to a Section 15 investigation of the Tax Agents' Board of New South Wales.

promoting good taxation administration

The chief function of the Ombudsman is to investigate individual complaints received from members of the public, and to find a remedy in appropriate cases. Another key objective of the office is to foster good public administration within Australian Government agencies. The particular concern is to ensure that the principles and practices of public administration are sensitive, responsive and adaptive to the interests of members of the public. The Ombudsman's perspective on these issues is gleaned from the individual complaints that are received and investigated by the office. The issues identified by the Ombudsman are taken up in suggestions and recommendations to agencies, in own motion investigations conducted by the office, and in submissions to government and parliamentary inquiries.

This section provides a selection of the issues dealt with by the Taxation Ombudsman in 2003–04. An underlying theme is that the function of the Taxation Ombudsman is well-adapted to building a bridge between correcting individual problems and shaping systemic remedies that can result in an overall improvement to taxation administration.

OWN MOTION INVESTIGATION— ATO COERCIVE POWERS

The Ombudsman continued an own motion investigation, mentioned in last year's annual report, into a selected aspect of ATO's use of its entry and search powers. The investigation was in response to a recommendation by the Senate Standing Committee for the Scrutiny of Bills that the Commonwealth Ombudsman undertake a regular, random 'sample audit' of the ATO's use of these powers.

An initial audit of the ATO's use of access powers conducted during 2003–04 examined a sample of high-profile cases from the serious

non-compliance and aggressive tax planning areas of ATO operations. The audit did not bring to notice any significant difficulty with the ATO's use of these powers. Consistent with the Standing Committee's recommendation that the Ombudsman conduct ongoing monitoring, a further own motion investigation will be conducted in 2004–05.

ACTIVE COMPLIANCE AND DEBT RECOVERY

In 2003–04, there was a decrease in the number of audit and debt recovery complaints coming to the Ombudsman, from 575 in 2002–03 to 457. This decrease was unexpected, given that the ATO increased its focus on compliance; the decrease suggests that the ATO has improved its handling of audit and debt collection matters. Our investigation of cases found no evidence of improper or over-zealous action by tax officers. We were able to assist taxpayers by expediting completion of audits and advising people on their options about ATO recovery action against a tax debt.

'Our work in this area will continue to provide important assurance to taxpayers, the ATO, and the community more generally.'

The Commissioner of Taxation advised that the ATO would continue actively to pursue outstanding tax debts. This may see an increase in the number of bankruptcies and insolvencies. Although we appreciate the Commissioner's obligations to the community as a whole to ensure that tax properly due and payable is collected, we are mindful of the human element involved. We can intervene where we consider the effects of ATO recovery action to be unjust or oppressive. The use of legal action, including bankruptcy or insolvency, to recover an outstanding tax debt is not itself unreasonable, unjust or oppressive.

As the *Inappropriate garnishee action* case study shows, it is always important for the ATO to take the personal circumstances of the taxpayers into account. Our work in this area will continue to provide important assurance to taxpayers, the ATO, and the community more generally.

INCOME TAX RETURN PROCESSING

Many complaints received during the year related in some way to income tax returns or to the processing of those returns. A broad range of

matters was raised, from complaints about delays in processing returns and refusal to allow late lodgment through to unnecessary correspondence. Generally, these complaints were not difficult to resolve and a simple preliminary inquiry frequently got the matter back on track. In other cases, further investigation was necessary before the matter could be resolved. The following three case studies, *Incorrect advice*, *Unnecessary correspondence* and *Deferral of income tax return*, provide examples of ATO action taken as a result of our preliminary inquiries.

CASE STUDY inappropriate garnishee action

In September 2003, the ATO garnisheed over \$75,000 from the sale of a business partly owned by Mr and Mrs Q, an elderly retired couple. The purpose of the garnishee was to recover an unpaid tax debt arising from a Director Penalty Notice (DPN) against Mrs Q. Fourteen months earlier, the Supreme Court of Queensland had ordered that an application for summary judgment on the debt be dismissed and that the matter be adjourned to the District Court to determine if Mrs Q had a defence to the DPN. There had been no contact between the ATO, the courts and Mrs Q between the handing down of the decision in July 2002 and the issue of the garnishee notices.

Although our investigation confirmed that, notwithstanding the decision in the Supreme Court of Queensland, the ATO had the legal authority to garnishee, we raised a number of concerns and issues with the ATO. We questioned why there had been no contact with either Mrs Q or the District Court following the Supreme Court decision, and suggested this might amount to a breach of the Commonwealth's Model Litigant Policy. We also questioned whether the issue of the garnishee notices had taken into account Mrs Q's circumstances, and suggested the ATO consider its actions against its own Receivables Policy. This Policy sets out the circumstances that should be considered before issuing a garnishee.

After reconsideration, the ATO agreed that it had not adhered to the Taxpayers' Charter and the Model Litigant Policy in its recovery action against Mrs Q. The ATO agreed to repay the amount garnisheed (plus interest) and to refrain from any further recovery against Mrs Q, unless a change in her circumstances makes future recovery appropriate.

CASE STUDY incorrect advice

Ms P complained that the ATO had wrongly reissued a letter concerning an incorrect TFN to Comsuper two years after the letter was originally issued, and as a consequence Comsuper deducted tax at a higher rate from two pension payments. Ms P was adamant that she had sorted out the TFN problem two years earlier after she had received the initial letter from the ATO.

Following our inquiries, the ATO accepted that there was an error in Ms P's case, in that the 2001 letter was wrongly reissued by the ATO to Comsuper in 2003.

The ATO took steps to correct its information and to process Ms P's tax return as a high priority so that the incorrect deductions could be refunded. The ATO also undertook to contact Ms P to discuss the priority processing of her return and to make an ATO resolving officer who was familiar with the case available to discuss any further concerns Ms P might have about the matter.

CASE STUDY unnecessary correspondence

Ms D, the manager of a number of body corporates, complained about unnecessary correspondence from the ATO. She had received over 150 letters notifying the due dates for lodgment and payment of tax returns for the body corporates she managed. Ms D considered that the despatch of a separate letter in a separate envelope for each body corporate was extremely wasteful of ATO resources, particularly given that notification was unnecessary as the relevant tax returns had all been lodged.

Given that Ms D had also raised the matter with the ATO, we considered that an investigation would be an unwarranted duplication of effort. However, we made a preliminary inquiry of the ATO, which advised that Ms D had been contacted. For legal and privacy reasons the ATO is required to send separate letters to each body corporate. Noting Ms D's concern that correspondence could be reduced if the ATO first waited to see if tax returns were lodged and payment made by the entity, the ATO advised Ms D that segmented issuing of letters was not within the current capacity of the ATO's computer system. The ATO hopes to implement enhancements to the system to allow this, possibly for the next financial year.

On the basis of our preliminary inquiries, we were satisfied that the ATO had dealt appropriately with the complaint and that steps were already being taken to reduce the issuing of unnecessary correspondence.

CASE STUDY deferral of income tax return

Ms B contacted the Ombudsman about the ATO's refusal to grant her request to defer lodging her tax return. Ms B stated that she relied on a partnership income, the details of which would not be available from an accounting firm until mid-next financial year. The ATO refused the initial request to defer lodgment on the ground that Ms B's circumstances were not exceptional and failed to meet the threshold for granting a deferment.

As Ms B did not speak English very well, and may not have been able to communicate her situation to the ATO effectively, we obtained Ms B's consent to act directly with her son on her behalf. The ATO informed us that Ms B's position was covered by an internal practice note that had not been applied in her case. The note directed staff to exercise discretion to grant a deferral in favour of a taxpayer to lodge a tax return where the taxpayer relied on partnership income or on an association that already had a deferral.

The ATO issued written advice to Ms B that she would be granted a deferment to lodge her tax return until March 2004.

COMPLIANCE—'COMPETITIVE EDGE' ISSUES

ATO compliance activity during the year led to some complaints raising 'competitive edge' issues. The concern is that not all taxpayers in the same industry are being targeted by the ATO. For example, we received a complaint from a tax agent concerned about audit of his clients and about the subsequent tax adjustments. The audit in question was based on random selection and related to the taxation of incentives that some greeting card suppliers give to newsagencies and other similar businesses. The agent considered that the ATO attention given to his clients was unfair and that failure to enforce against others in the industry, where he alleged similar practices were widespread, put his clients at a competitive disadvantage.

The ATO was able to satisfy us that, at the time of the audits, there was no basis for it to broaden its review to the industry as a whole. Following our inquiries and as a result of the information provided by the complainant, the ATO decided to focus specifically on incentives from greeting card suppliers to newsagencies and other similar businesses, including rebates and non-cash benefits relating to quantity purchases.

GST rulings have also been a source of complaints about 'competitive edge' issues. This year we received two complaints about the application of GST from companies that conduct title searches. The complainants were concerned that GST was being applied selectively in the information broking industry and was not being applied to some companies that performed a slightly different though competitive function. They also complained the ATO would not advise them of any steps it might be taking on the compliance front.

On the basis of our inquiries, we were satisfied that the ATO consulted the information broking industry, was seeking to apply the law with proper regard to the particular facts of relevant transactions, and was taking appropriate steps to educate the industry and to ensure compliance. We noted that the ATO is required to comply with stringent secrecy provisions as well as privacy legislation, and

concluded that there was no basis for us to be critical of the ATO for declining to provide details to the complainants about specific compliance activities.

TAX RELIEF

In September 2003, an important change was made to the way in which taxpayers can seek relief from their tax debts on the grounds of serious hardship. The Taxation Relief Board was abolished and replaced by a system that allows taxpayers to seek relief by submitting a simple application to the ATO. The reforms also created a right to object to the ATO's decisions on relief, with a flow-on right of review by the Small Taxation Claims Tribunal. The Ombudsman expects that the reforms will promote good tax administration through streamlining the process of seeking relief, with gains in both timeliness and accountability.

'These reforms should streamline the process of seeking relief, with gains in both timeliness and accountability.'

THE IMPACT OF CHANGING DEMOGRAPHICS IN AUSTRALIA

There was much policy debate during the year about the impact of changing demographics in Australia and, in particular, the 'ageing' of the population. A number of cases we received highlighted an administrative issue that will be an increasing challenge for the ATO in response to this demographic change.

For example, in one case, a complaint from an elderly self-funded retired couple stemmed from their confusion about the reasons for the wife's inclusion in the Pay As You Go (PAYG) instalment system. Despite a number of telephone conversations with ATO staff, the couple apparently did not understand the new system. As a result of our inquiries the ATO wrote to the taxpayer advising how the PAYG instalment system applied

in specific circumstances, explaining in simple terms the criteria for annual PAYG instalments, and clarifying what notices had been sent to her. The ATO also invited the taxpayer to telephone a specified contact officer if she required any further clarification.

Another case involved a small manufacturer suffering from early-onset dementia and the difficulties his wife faced in attempting to meet the tax obligations of the business after several years of neglect, while at the same time caring for her rapidly deteriorating husband. In the first instance, and after some initial resistance from the ATO, we were able to assist in having an ATO case officer appointed to negotiate an appropriate repayment arrangement and to provide an ongoing point of contact. We were approached subsequently, as a result of the taxpayer's failure to meet the agreed repayment arrangements and the subsequent breakdown in relations between the taxpayer and the ATO. Although we advised the taxpayer that, in the circumstances, we did not believe we could criticise the ATO, we were sympathetic to the taxpayer's predicament and eager to see the ATO doing as much as it reasonably could to help the taxpayer through this difficult situation.

The growing administrative challenge for the ATO arises from the convergence of a number of factors, including:

- the ageing population and the likely increase in age-related illnesses
- an increasing emphasis on fully or partially self-funded retirement
- the current complexity of the tax system
- the nature of the self-assessment regime.

After we raised the general issue, the ATO advised that it was conscious of the demographic changes, having already identified seniors as a population segment requiring increasing support. The ATO is

moving to adopt a range of products, services and strategies to target and assist that section of the community. The ATO accepted that more could be done to assist taxpayers affected by complications associated with age and infirmity. The ATO undertook to explore additional steps that might be taken to better assist these clients, particularly through more immediate case management.

GST ISSUES

In this fourth year of operation of the new tax system, taxpayers generally have a better understanding of the way the GST operates. During 2003–04, we received 107 complaints about GST issues. Several of these complaints stemmed from events in the transitional and introductory periods for the GST. One case highlighted the initial uncertainty relating to the application of GST in the taxi industry, but also the ATO's preparedness to find a practical solution to a difficult problem. In this case, the complainant, a minibus business operator, was cooperative and anxious to adopt the correct procedure and was dependent on ATO advice, which was delayed because of the complexity of the issues (as illustrated in the *Practical solution* case study).

'One case highlighted ... the ATO's preparedness to find a practical solution for a difficult problem.'

We received a complaint from a tax professional concerned that the unrequested cancellation of his client's GST registration might be indicative of a systemic problem. We clarified how the error had occurred and were satisfied that the error was not indicative of any widespread problem (see *Error in GST deregistration* case study).

CASE STUDY practical solution

Mr P (a solicitor) complained to our office on behalf of his client, the owner of a minibus service, about the ATO's decision to seek payment of GST amounts for the period 1 July 2000 to 31 March 2001. Mr P complained that during this period there was uncertainty about the application of GST in the taxi industry and that his client had inadvertently implemented an incorrect method of GST collection through putting the onus on drivers to pass GST onto the ATO. Mr P accepted that the ATO was correct in its technical view that his client, rather than the drivers, was liable to pay GST but believed that the outcome was unjust.

We sought comments from the ATO, particularly relating to Mr P's assertion that the ATO was in effect collecting the necessary GST twice, from both the minibus drivers and the owner of the minibus service. We also sought comments on Mr P's assertion that the ATO did not keep his client fully informed about progress or the ultimate decision on the issue. According to Mr P, his client was disadvantaged by these delays because he lost the opportunity to identify and locate drivers so that he could sort out the situation.

Our review of the ATO's case notes indicated that the ATO accepted that its handling of the matter could have been better and that Mr P's client was at all times co-operative and anxious to adopt the correct procedure and was dependent on ATO advice. In the course of our investigation, the ATO decided that it would move quickly to resolve the matter and decided not to pursue the \$20,000 debt.

Mr P and his client were satisfied with the proposed settlement of the matter and the restoration of a good relationship with the ATO. In the circumstances, we decided not to pursue our investigation.

CASE STUDY error in GST deregistration

We received a complaint from Mr S, a tax professional, that his client's GST registration had been cancelled. The ATO explained that the error occurred when another taxpayer applied for cancellation of his GST registration, but inadvertently quoted the ABN of Mr S's client instead of his own. The automated processes for deregistration check only the ABN and not the business name. The manual checking process set up to cover certain risk categories was not triggered in this case.

We were assured by the ATO that this type of error is rare. Around 6,000 to 7,000 applications for cancellation of registration are processed each week and the ATO believes that the total number of errors in processing these cancellations would be in the vicinity of two per month.

Given the large number of transactions, we accepted that full manual checking is impracticable and not warranted given the low error rate. We were satisfied that this case was not indicative of any systemic problem.

The ATO accepted that an error occurred in this case and understood the inconvenience caused to both Mr S and his client. We passed on an ATO apology to Mr S.

The ATO's heightened focus on compliance and recovery action led to several complaints that the ATO was unreasonably interpreting the GST legislation. We decided not to investigate these complaints because the complainants could challenge the ATO's view through the objection and review process. We did, however, make inquiries in one case that raised an interesting issue about the application of s 39 of the *Taxation Administration Act 1953*; see the *When is a donation a consideration* case study.

During 2003–04, we received 22 complaints about delays in processing of GST refunds. We decided not to investigate 15 of these complaints,

usually because the complainant had not first approached ATO Complaints and therefore not given the ATO an opportunity to first respond to the complainant's concerns. From the complaints we received, the apparent reasons for delay were in three main categories: an audit was underway; the ATO had made data entry or other errors; or the taxpayer had made errors in information provided. Some complainants also asserted that they had been given conflicting information by different officers about the causes of delay or the date of processing. We found error or deficiency by the ATO in three of the seven complaints we investigated.

CASE STUDY when is a donation a consideration

Mr N complained that the ATO was seeking to recover GST on supplies he had made in his restaurant. Mr N asserted that the supplies of food by his restaurant were not subject to GST because he did not run it with any reasonable expectation of profit or gain and hence he was not running an enterprise as defined in the GST legislation. He said that he had obtained an ABN but had registered for GST in error. Customers to Mr N's restaurant put a donation into a bucket, paying whatever they can afford. Any surplus money for the day (after paying rent and outgoings) is split between the volunteer staff.

On the basis of preliminary inquiries, we were satisfied that, on the information available to it, the ATO's view that the supplies made by Mr N were subject to GST was reasonably arguable. We considered that the most appropriate way for Mr N to challenge the ATO view was through the objection and review process. This would allow the nature of the operation of the entity to be examined and the ATO's interpretation of the law to be tested. We pointed out that as Mr N was registered for GST he was required to submit activity statements.

A particular concern raised by Mr N was that if he lodged activity statements he would prejudice his rights to recover GST because of the application of s 39 of the *Taxation Administration Act 1953*. This section requires the supplier to reimburse customers for any GST incorrectly included. Mr N argued that even if he was ultimately successful in the objection and review process, s 39 would operate to preclude a refund because he would not be able to track down customers or their respective donations for the purpose of repaying directly to them any GST found to be wrongly imposed by the ATO. We were aware of an ATO GST technical advice stating that where a taxpayer remits GST and the ATO later holds that the client has not made any taxable supply, the ATO can exercise discretion to allow a refund of GST to the taxpayer. The refund is applicable if, among other things, the taxpayer can demonstrate that he has absorbed the cost of the amount incorrectly included as GST in the price and has not passed it on to the consumer.

We advised Mr N that if he paid GST and subsequently succeeded in his dispute about whether GST was properly applicable and the ATO then declined to exercise its discretion in his favour to refund the GST, he was welcome to come back to us. We would then consider whether the ATO properly exercised its discretion in Mr N's case.

MASS MARKETED SCHEMES

We continued to receive complaints arising out of the ATO's handling of mass-marketed schemes (114 in 2003–04 compared to 112 in the previous year).

The largest single category of complaints came from those taxpayers deemed ineligible for the full concessionary settlement opportunity offered for most mass-marketed scheme investors by the Commissioner of Taxation in February 2002. The ATO put in place a review process for these taxpayers and informed them of their right to further review by the Ombudsman's office.

We investigated all of the 'ineligibility' complaints we received. Although we did not find any reason to criticise the ATO's decision in any of these cases, our earlier investigations encouraged the ATO to make improvements in the quality and content of its decision letters.

We were also able to assist some taxpayers who had already settled. For example, one of our investigations disclosed errors in the ATO's statement of account. Our intervention resulted in an ATO apology for the taxpayer and a concession on the starting time for his repayments.

SETTLEMENT—DELAYS AND OTHER DIFFICULTIES

During the year, we received complaints where taxpayers were involved in disputes with the ATO about its settlement process. Generally, where the ATO is following its settlement guidelines and there is no apparent undue delay on the part of the ATO, there is little scope for our office to become involved. However, some cases raised general issues about aspects of the ATO's settlement practice and application of the guidelines and we are exploring those issues with the ATO.

We were able to achieve a remedy for two complainants in relation to the ATO's settlement process. One complainant approached our office concerned about a 13-month delay by the ATO in resolving a legal dispute. Following inquiries, we met with the ATO Solicitor to discuss the ATO's handling of the dispute. While the ATO was able to show that not all the delay was caused by the ATO, it did accept responsibility for some delay, at least in

the early stages of the matter. The complaint was resolved when the ATO and the complainant agreed to settle the dispute. The settlement amount incorporated an interest component in recognition of some initial delay by the ATO in actioning the matter. In the other case, the ATO agreed to reduce a penalty from \$6,087 to \$30 in recognition that the higher penalty had not been raised as an issue during the settlement process but had only been imposed following that process.

COMPENSATION ISSUES

This year we have seen further evidence of the ATO's shift towards a more pragmatic and efficient approach to the handling of compensation claims. Following our intervention in one such case, the ATO met with the claimant and her agent and was able to substantially settle, in less than an afternoon, a dispute that had been running for several months. We were also able to provide the complainant with some assurances about the process.

Sometimes, intervention by the Ombudsman's office can assist people who otherwise have little chance of mounting a successful claim for compensation. In one complaint investigated this year, where the ATO had already recommended to the relevant Minister that the compensation claim be rejected, our investigation identified a number of areas of possible agency error or deficiency. However, we also formed the view that it would be difficult for the claimant to establish financial detriment. In response to our discussions, and in recognition that the matter had not been as well handled as it might have been, the ATO stated that it would be prepared to negotiate with the claimant on the basis of a fair and reasonable settlement of the claim.

BABY BONUS

During 2003–04, we identified an issue relating to payment of the so-called 'baby bonus'—a first child tax refund scheme. We found that claimants who made mistakes in their selection of a base year were not being allowed to change that selection. The ATO advised us that there is no discretion within the legislation to allow for alteration or correction of mistakes relating to a

claim or selection. We pursued a number of cases where the ATO would not allow correction of what appeared to us to be genuine errors in election of a base year.

After further consideration the ATO agreed that it would allow amendment in all cases where the choice made by the claimants was not correctly reflected in their returns. The ATO considered that in such cases the change sought by the claimants were not revocations but merely correctly reflected their intention. In those circumstances, the ATO was satisfied that the legislation did not preclude the processing of the changes. The ATO also agreed to review the situation relating to other claimants who might seek to revoke their initial base year election where it did not reflect the claimant's intention.

SUPERANNUATION SURCHARGE

In 2002–03, the Ombudsman reported on a case where the ATO had initially disallowed an objection against a decision to impose the superannuation surcharge. Superannuation contributions had been made by the taxpayer through salary sacrifice, but the employer had failed to remit the amounts to the relevant superannuation fund until the following financial year. The ATO believed that it had no discretion to vary the surchargeable amount.

We put to the ATO that the legislation appeared to allow the Commissioner of Taxation to vary the surcharge in certain circumstances and we suggested that this was a case where the taxpayer had paid contributions, even though they had not reached the relevant fund. On considering the case, the ATO agreed to amend its records so as to 'validate the intent' of the complainant's contributions and to issue amended surcharge assessments for each of the years in question.

During 2003–04, we received a similar complaint where an employer had forwarded contributions to a fund prior to the end of the 2000–01 financial year but they were not credited to the relevant account until the following financial year. The fund reported the contributions to the ATO as applying to 2001–02 and declined to amend the member contribution statements. When the taxpayer's agent complained to the ATO he was advised that the ATO had no discretionary power to amend the

surcharge assessments unless the fund amended its member contribution statements. As the fund declined to amend its statements, the agent approached our office.

'We suggested that the ATO review its procedures to ensure consistent treatment of such cases.'

We contacted the ATO, drawing attention to the previous similar complaint and asked that the new case be reconsidered in that light. The ATO accepted that it was the employer's intention to make contributions in respect of the 2000–01 financial year and agreed to amend its records to reflect the employer's intent. The ATO advised us that a credit assessment would be issued in due course, subject to the next quarterly surcharge assessment process leading to a reversal of the earlier assessment.

Given the initial reliance in both cases on the lack of any discretion in the legislation to amend a record of contribution, but the preparedness after our intervention to make a 'validation of intent' alteration, we suggested that the ATO review its procedures to ensure consistent treatment of such cases.

FORMER ATO OFFICERS

We finalised a complaint from a former ATO officer now working in the private sector about the ATO's conduct of an audit. Our investigation was concluded without reaching any views on that issue, as the audit was finalised in the course of our investigation and the complainant was happy for us to cease investigation at that stage. However, an issue raised by the complaint concerned how the ATO deals with former ATO officers working as private tax professionals. The complainant expressed concern to us about a possible conflict of interest where current ATO officers may be investigating the actions of former colleagues or the clients of former colleagues. The complainant suggested that perhaps such investigations should be undertaken by internal investigators or special teams with restricted access.

Given that a large number of private tax professionals may be former ATO officers, there may be practical limitations to the approach suggested by the complainant. Without reaching any views about the matter in our investigation, we alerted the ATO to the potential systemic issue raised by the complainant. The ATO subsequently provided a briefing to us on how it addresses conflict of interest matters in general and how the ATO treats ex-ATO officers specifically.

We were satisfied that the ATO's policies and procedures for restricted access, its procedures for investigation or audit case selection, and its conflict of interest guidelines, provide sufficient checks and balances to cover situations where ex-ATO officers are subject to audit or investigation.

FREEDOM OF INFORMATION APPLICATIONS

We received 21 complaints about the ATO's handling of freedom of information (FOI) applications. Some of these complaints related to the ongoing issue of the waiver of FOI rights on settlement of a tax dispute. We again raised with the ATO our view that FOI is an important public right and that the exemption provisions of the *Freedom of Information Act 1982* should be the only basis on which an agency can seek to prevent citizens from obtaining access to Australian Government records. The ATO has now agreed to seek the views of the Attorney-General's Department on the stance it has taken.

One FOI complaint we investigated during the year highlighted that it is not always possible for an agency to initially identify all documents relevant to an FOI request. The ATO in this instance had provided further documents to the applicant following an internal review and then again after investigation by the Ombudsman. Our investigation found that the existence of the further documents only became apparent in the context of continuing inquiries. In these circumstances, given the technical nature of the documents requested and the relative obscurity of the procedure to which they related, we were reluctant to criticise the ATO. We did, however, negotiate a waiver of the fees for the internal review request and a review of

FOI procedures to ensure that, in future, the ATO's FOI officers received appropriate technical advice relating to requests about technical processes.

RECORD KEEPING

A number of complaints we dealt with during the year raised issues about the ATO's record keeping. If an agency is called on to explain or justify its actions, the written record will be the key to doing so. An investigation by the Ombudsman's office will often focus heavily on scrutinising the written record. Inadequacies in the record trail are therefore a matter of special concern to this office.

One particular case raised issues about the secure storage of tax returns. While our investigation revealed some deficiency, as outlined in the *Missing tax return* case study, there was no evidence of any systemic problem.

Another case we dealt with this year highlighted the importance of keeping records of meetings. As a matter of good administrative practice, a relatively detailed record should be kept of any significant meeting between an agency and an individual. Ideally, the record should be agreed between the parties to avoid any future dispute about precisely what was said and agreed.

'A relatively detailed record should be kept of any significant meeting between an agency and an individual.'

The point was illustrated in this case, in which millions of dollars of tax were potentially riding on the outcome. Our investigation did not uncover sufficient evidence to challenge the ATO's account of the meeting—the most plausible explanation was at best a misunderstanding on the part of the complainant—but we were able to impress upon the agency that the importance of the meeting should have been reflected in the way it was minuted. If nothing else, it would then be easier to deal with any future complaint. Our advice was well taken.

CASE STUDY missing tax return

Mr B, aged in his 80s, represented himself in an Administrative Appeals Tribunal (AAT) court case in which questions of income were at issue with the Department of Veterans' Affairs (DVA). Mr B said that while he was in the witness box, a copy of his 1998 income tax return was produced. This took him by surprise and he could not explain the income in question. He asserted that because of his confusion and consequent inability to explain the situation, the AAT accepted that Mr B was discredited and found against him. After the AAT hearing, Mr B checked his personal papers at home and found his handwritten copy of the return he had submitted to the ATO. He discovered that the copy produced in the AAT did not match the copy he had made and he believed that a page of the tax return had not been included in the material faxed to DVA by the ATO.

Mr B accepted that he should pursue the matter with the AAT or Federal Court and sought a copy of his tax return from the ATO to assist in his appeal. In response to his FOI request, Mr B received a copy of the computerised version of his return. As this version did not substantiate his assertion that a page had been omitted in the faxing process from the ATO to DVA, Mr B wrote to the ATO again requesting a copy of his original tax return. Mr B subsequently complained to our office about the ATO's delay in responding to his request.

From our inquiries, we established that the ATO had conducted extensive searches but was unable to locate the original tax return. The document had apparently been removed from a storage bundle by an unknown officer and copied. The copy was passed to another officer who passed that copy to DVA (by hand not by fax). Mr B was satisfied that the copy of his tax return handed to DVA was in fact a complete copy and he was content to pursue separately through the Federal Court issues relating to the allegedly adverse impact on him of the incomplete version being produced in the AAT.

In the course of the ATO's inquiries about Mr B's complaint, a letter was sent to Mr B advising that his original tax return was no longer available because the document had been destroyed. Although we could not establish that the letter was issued with the intention of misleading Mr B, we suggested that the ATO issue an apology and some clarification to him. Unfortunately, there seemed to be some uncertainty about which area of the ATO should take responsibility for preparing a letter to Mr B and we needed to escalate the matter to a senior level in the ATO. We also sought comments from the ATO on possible systemic deficiencies relating to matters such as storage security, access arrangements and recording retrieval activities.

On the basis of the ATO's response to our further inquiries, we concluded that there was an error by the ATO in misfiling the original tax return (which has still not been located) and that the ATO had issued a letter wrongly suggesting the return in question had been destroyed. We considered the ATO's written assurance that there had not been a breach of confidentiality, and the clarification and apologies provided to Mr B to be appropriate remedies.

We were satisfied that this was an isolated case and was not indicative of any systemic problems in the ATO's record-handling procedures.

cooperation with other agencies

AUSTRALIAN NATIONAL AUDIT OFFICE

The Ombudsman's office provided information to the Australian National Audit Office (ANAO) on several occasions during the year on a range of scoping studies and reviews the ANAO was conducting. One example concerned the ANAO's inquiries into aspects of the superannuation surcharge.

INSPECTOR GENERAL OF TAXATION

The 2003–04 financial year was the first year of operation for the Inspector-General of Taxation (IGT), whose focus is on tax systems review. The Taxation Ombudsman continues to be the only external complaint-handling agency for taxpayers with complaints about the ATO. We will also continue to identify systemic issues and remedies that flow from individual complaints and to conduct our own motion investigations.

The IGT consulted with the Ombudsman during the development of his work program and provided the opportunity to comment on reviews. The Ombudsman made submissions to the IGT relating to a review of the ATO's remission of General Interest Charge for groups of taxpayers in dispute with the ATO and a review of ATO's small business debt collection practices. To avoid any duplication in our work, we will maintain regular liaison with the IGT.

DEPARTMENT OF THE TREASURY

Drawing from our complaint experience, the Ombudsman's office made a submission in response to a discussion paper issued by the Department of the Treasury on the Review of Aspects of Income Tax Self Assessment. The self-assessment system is now an established feature of the income taxation system, but contains some elements of concern. The responsibility placed on individual

taxpayers to complete all transactions necessary for assessing their liability to taxation will lead to occasional and possibly acrimonious disagreement between them and the ATO as to how properly that responsibility has been discharged.

'The self-assessment system is now an established feature of the income taxation system, but contains some elements of concern.'

The thrust of our submission to the Treasury Review was that there is a corresponding duty on the ATO to manage the self-assessment system in a manner that is responsive to the problems and uncertainties sometimes faced by taxpayers. We drew attention to the importance of the discretionary powers exercisable by the ATO in managing the problems that can arise in a self-assessment system. These include discretionary powers to relax penalties and to approve arrangements for payment of unpaid tax. We also noted the improvements in administrative practice initiated by the ATO in recent years, which reflect a more developed understanding by the ATO of its role in administering a self-assessment system. These include a more active program by the ATO to make information available about arrangements considered to involve tax avoidance, the product ruling system, and ATO rulings and advice.

INTERNATIONAL COOPERATION

Over the past three years, there has been a steady increase in the Ombudsman's international program, with study tours by senior-level delegations visiting our office from China, Indonesia, Japan, Mauritius, Thailand and the United Kingdom; representatives from other countries also visited the office.

In April 2004, the Ombudsman's Special Tax Adviser, Mr Philip Moss, presented a keynote address at the ATAX 6th International Conference on Tax Administration. Entitled 'Towards Community Ownership of the Tax System: the Taxation Ombudsman's perspective', the address looked at the role given to the Taxation Ombudsman and made some international comparisons. The conference allowed the exchange of ideas and practice in the global tax community and, in particular, highlighted the challenges of globalising tax systems. In the course of preparing the paper, contact was made with a range of equivalent overseas agencies, including the Office of the Ombudsmen of New Zealand, the Monitoring Office of South African Revenue Service, the UK

Office of the Adjudicator, and the USA Office of the National Taxpayer Advocate.

In May 2004, an 11-member delegation from China's Ministry of Agriculture, visited our Canberra office to discuss issues relating to supervision of corruption in the public service. The Special Tax Adviser (who is also the Senior Assistant Ombudsman responsible for law enforcement) attended the discussions to provide his perspective on the issues raised.

In June 2004, the office hosted a delegation from the Japan National Conference of Tax to discuss the role of the Taxation Ombudsman and the nature and handling of complaints about taxation matters.

glossary of acronyms

AAT	Administrative Appeals Tribunal
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
ANAO	Australian National Audit Office
ATO	Australian Taxation Office
DPN	Director Penalty Notice
DVA	Department of Veterans' Affairs
ETP	Eligible Termination Payment
FOI	Freedom of Information
GIC	General Interest Charge
GST	Goods and Services Tax
IGT	Inspector-General of Taxation
MP	Member of Parliament
PAYG	Pay As You Go
TFN	Tax File Number

