

# Australian Institute of Administrative Law

## The Australian Taxation Office: One Agency - Two Watchdogs

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### Introduction

In the office's most recent annual report (2001-02) the then Commonwealth Ombudsman recorded his support for the strengthening of independent scrutiny of the Australian Taxation Office's (ATO) administration and noted his intention to work closely with the proposed new agency.

I take this opportunity to congratulate David Vos again on his appointment and to confirm our intention to work closely with him and his new agency. Now that the position of Inspector-General of Taxation has been established and David Vos appointed, we in Ombudsman's office have the opportunity to restate our role.

As the flyer to today's session suggests, it is a question of two watchdogs. [It is also about the old and the new watchdog] It is my intention today to provide an outline of the Taxation Ombudsman's role and how it might relate to that of the Inspector-General of Taxation.

I should make it clear from the outset that I am not the Taxation Ombudsman. That responsibility belongs to Professor John McMillan, who, as Commonwealth Ombudsman, is also the Taxation Ombudsman. Incidentally, the Commonwealth Ombudsman is in addition the Defence Force Ombudsman and, by arrangement with the ACT Government, the ACT Ombudsman too. Further, following a recent announcement by the Minister for Communications, the Commonwealth Ombudsman will be the Postal Industry Ombudsman, if all goes to plan.

As the Special Tax Adviser in the Ombudsman's office I head the tax team, which deals with complaints made to the Taxation Ombudsman about the Australian Taxation Office. The Special Tax Adviser position was established in the office in 1995.

I turn now to give some background about the Ombudsman's role in relation to taxation administration. This background provides an insight into the present arrangements for accountability in relation to the ATO.

## Background

The Commonwealth Ombudsman was established in 1977 under the Ombudsman Act 1976. The then Attorney-General described the Ombudsman's role as investigating complaints about the administrative action of officials and government departments, statutory authorities and other official bodies.

The Attorney-General also made the point that the Commonwealth Ombudsman would complement the Administrative Appeals Tribunal (AAT). The AAT had commenced a on 1 July 1976 to hear appeals against decisions of Ministers and officials in specific cases.<sup>1</sup>

The legislation to establish the AAT and the Commonwealth Ombudsman had its origins in the Commonwealth Administrative Review Committee of the 1970s. So it was that, together with the AAT and the Administrative Decisions (Judicial Review) legislation, or (AD(JR)), the Ombudsman was part of the administrative reform package that transformed the relationship between members of the public and officials in the performance of their administrative functions<sup>2</sup>.

For the purpose of investigating complaints about administrative actions of officials and agencies, the Ombudsman has the power to question officials and other persons and to inspect documents and premises. If after an investigation the Ombudsman is of the opinion that there has been administrative error, he or she reports accordingly to the Department or agency concerned and to the responsible Minister. Section 15 of the Ombudsman Acts set out the elements of what might broadly be called defective administration, ie action that is: contrary to law; unreasonable; unjust; oppressive; improperly discriminatory; or in all the circumstances wrong.

In reporting to the Department or agency and the responsible Minister, the Ombudsman will usually make recommendations for remedial action. If the Ombudsman's recommendations are not accepted or other remedial action not taken, the Ombudsman can inform the Prime Minister and make a report to the Parliament.

In the early years of the Ombudsman's office, the ATO was just another agency among the broad range of federal departments and prescribed authorities<sup>3</sup>, administrative actions of which the Ombudsman could investigate.

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<sup>1</sup> Hansard, The Senate, 7 September 1976, p. 397.

<sup>2</sup> Commonwealth Ombudsman, First Annual Report 1977-98 the Parliament of the Commonwealth of Australia, Canberra, 1979, p. 4.

<sup>3</sup> The Ombudsman's functions extend to all Commonwealth departments other than the Parliamentary Departments. Commonwealth agencies are also brought within jurisdiction as prescribed authorities. Commonwealth Ombudsman, First Annual Report 1977-98, op cit, pp. 23-24.

In 1993, the Joint Committee of Public Accounts produced a report entitled "An Assessment of Tax: A Report of an Inquiry into the Australian Taxation Office." The Committee concluded that there was an imbalance between taxpayers and the ATO in relation to their formal rights and obligations<sup>4</sup> and recommended inter alia that:

- the Government consider establishing a Taxpayers' charter;
- a statutory position of Commonwealth Taxation Ombudsman be created within the current Commonwealth Ombudsman's Office;
- resources be provided to the Commonwealth Taxation Ombudsman to allow the Ombudsman to adequately investigate all complaints; and
- the role of the Problem Resolution Units in the ATO be changed so that the staff of those units work directly to the Commonwealth Taxation Ombudsman.<sup>5</sup>

As a result of these recommendations, the Commonwealth Ombudsman was brought into a special relationship with the ATO as distinct from other agencies. By a special relationship I mean that the Ombudsman has an identified role in relation to the ATO. In 1995, the Ombudsman Act was amended to enable the Commonwealth Ombudsman, if he or she so chooses, to be called the Taxation Ombudsman.<sup>6</sup> The purpose of this provision was to establish a Taxation Ombudsman within the office of the Commonwealth Ombudsman. This measure and the allocation of additional resources to the Ombudsman for review of ATO action were directed at improving equity in the taxation system.<sup>7</sup>

## Role of the Taxation Ombudsman

In more recent years, the Taxation Ombudsman, through the Special Tax Adviser and the tax team, has worked in the context of significant changes to the tax system. With that change has come growing complexity. For instance, although a self-assessment taxation system has applied in Australia since 1987 there continues to be a lack of understanding about how the system works and the added responsibility placed on taxpayers. The extent of this lack of knowledge is made clear in many of the complaints we receive.

Another significant change to the tax system was of course the introduction in 2000 of the new tax system. The implementation of that system brought the Australian community into contact with the ATO over a short period of time in an unprecedented manner. Predictably, the introduction of a large and new system like the GST did not occur without the ATO making some errors. In fact, the 2000-01 financial year proved to be a record year for tax complaints. Some 3354 complaints were received and represented a 61% increase on the previous year.

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<sup>4</sup> Joint Committee of Public Accounts, Report 326 An Assessment of Tax, November 1993, p. xxii.

<sup>5</sup> Ibid, see pp. 314 & 317.

<sup>6</sup> See sub-section 4(3) of the Ombudsman Act, which was added by the *Taxation Laws Amendment Act (No. 1) 1995*.

<sup>7</sup> Hansard, The Senate, Monday, 27 February 1995, p. 958.

With the new tax system, the Taxation Ombudsman played the important role of ensuring that citizens' problems could be dealt with efficiently and effectively. Many of the complaints reflected issues such as initial confusion, difficulty in getting access to information, and delays in processing applications and refunds.<sup>8</sup>

Currently, complaints show that taxpayers are generally more familiar with the concepts, forms and reporting requirements of the tax system. (However, in 2002-03, about 20% of the complaints finalised by the Ombudsman stemmed primarily from ATO interaction with taxpayers in relation to the new tax system). As a consequence, and also as a result of the declining numbers of complaints received about the ATO's actions concerning mass-marketed schemes, complaint numbers generally have returned to the pre new tax system levels. In 2002-03, the Taxation Ombudsman received just under 2000 complaints.

## The Taxation Ombudsman's Own Motion Power

The Ombudsman can conduct own motion investigations. Usually these investigations involve matters, which may indicate underlying systemic or major service delivery issues. Under the own motion power, the Ombudsman can initiate an investigation on an administrative issue even though no complaint has been received.

Part of the Ombudsman's role is to ensure the accountability of government administration and to this end the Taxation Ombudsman can report direct to the Parliament.

In recent years, the Taxation Ombudsman has conducted several own motion investigations. Three such investigations were about mass marketed schemes; one was about the Budplan scheme, the other about the Main Camp scheme and the third was about film schemes. The effort put into the investigation of these systemic matters was considerable. Our 2000-01 annual report records that the proportion of effort, which the Tax Team devoted that year to own motion investigations and individual complaint handling, was 50/50.<sup>9</sup>

In the two years since then, the focus has returned to individual complaint handling. The one own motion report completed during that time has supported that focus. In June 2003, the Taxation Ombudsman released the report of his own motion investigation into the ATO's complaint handling.

The Ombudsman expects agencies to have adequate internal measures and mechanisms in place for handling complaints about their actions, decisions and programs. People who experience a problem or difficulty should generally first contact the agency concerned. Accordingly, the Ombudsman must have full confidence that the agency's complaint-handling system is responsive and can deal effectively with complaints.

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<sup>8</sup> Commonwealth Ombudsman Annual Report, 2000-01, p. 30.

<sup>9</sup> Commonwealth Ombudsman, Annual Report, 2001-02, p. 21.

Our report into ATO complaint handling provides an overview and assessment of the processes within the ATO, and makes several broad recommendations for improvement to the complaint-handling process. Among the key recommendations were that the ATO move to a single ATO-wide complaint-handling system as soon as practicable, and welcomed the ATO's current activities to achieve that aim. Incidentally, the Commissioner of Taxation agreed to all recommendations.

The ATO has more intrusive powers than almost any other government agency. In 2001-02, the ATO received a considerable increase in funding for increased compliance activity. With these factors in mind, and consistent with a Senate Scrutiny of Bills Committee recommendation, we have commenced an own motion investigation into the ATO's use of entry and search powers.

(I note that the Administrative Review Council is undertaking at present an inquiry into coercive powers.)

## ATO Complaints

No outline of the Taxation Ombudsman role would be complete without reference to ATO Complaints. In December 1996, the Australian National Audit Office, in a report on client service in the ATO, recommended that the ATO implement an effective complaint-handling service.

The ATO responded by developing a Taxpayers' Charter, as recommended by the 1993 Joint Committee of Public Accounts, and by establishing a Problem Resolution Service (or PRS). The Taxpayers' Charter sets out taxpayers' rights and obligations and a statement outlining the service that taxpayers should reasonably expect from the ATO.<sup>10</sup> A revised Taxpayers' Charter is to be released soon.

The PRS was set up as an approachable and helpful internal complaint handling service, operating independently from the ATO's main business areas. In 2001, the PRS changed its name to ATO Complaints.<sup>11</sup>

ATO Complaints plays an important strategic role in overseeing the ATO complaint processes, and in providing an impartial internal review mechanism for complaints.

The 1993 Joint Committee of Public Accounts considered the arrangements that preceded the Problem Resolution Service. At that time, Problem Resolution Units (PRU) existed in each ATO branch office. The staff of PRUs had the role of acting on behalf of taxpayers concerning administrative problems where taxpayers had no formal avenues of review or redress.

Interestingly, the Joint Committee recommended that PRUs and the role of the Commonwealth Taxation Ombudsman be fully integrated. It was envisaged that the

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<sup>10</sup> Commonwealth and Taxation Ombudsman, Own Motion Investigation into Australian Taxation Office Complaint handling, July 2003, p. 3.

<sup>11</sup> Ibid.

Ombudsman would select PRU staff on the recommendation of the Commissioner of Taxation. Hence the Ombudsman would investigate complaints using PRU officers to make the inquiries. The idea was to link internal administrative review with external independence.

Although the recommendation was not implemented, the present cooperative relationship that exists between the Ombudsman's Tax Team and ATO Complaints enables the complaints about tax administration that are referred between the two agencies to be handled effectively and responsively. In this sense, the essence of the earlier recommendation is being achieved.

## The Impact of the Establishment of the Inspector-General of Taxation

The establishment of the Inspector-General of Taxation gives us the opportunity to restate the distinctive role that the Taxation Ombudsman plays in the taxation system.

The Taxation Ombudsman continues to be the only agency external to the ATO that can handle individual complaints about tax administration and resolve individual disputes. Hence, the obvious proposition is that the Taxation Ombudsman will focus primarily on individual complaints leaving the Inspector-General to conduct reviews of systemic issues.

The Ombudsman's Tax Team approaches the work of investigating and resolving complaints about tax administration from the perspective of administrative law rather than as tax law specialists. This statement should not be seen as discounting our knowledge of tax law. Rather our focus is on examining tax administration issues through the perspective of the Ombudsman Act.

The Taxation Ombudsman examines issues brought before him according to the standards set out in his legislation. Hence, any suggestion in a particular matter that the ATO's action appears contrary to law, unreasonable, unjust, oppressive or improperly discriminatory soon gets our attention. Equally, in the Taxation Ombudsman's opinion when the provision of an enactment or practice when applied by the ATO produces an outcome that is unreasonable or unjust etc or when an ATO action was based on a mistake of law or fact or when in the all the circumstances the ATO's action was wrong, the Taxation Ombudsman can take the matter up.

In working with the ATO, the Taxation Ombudsman has the advantage of his investigative experience in administrative matters over the breadth of the federal bureaucracy, and indeed, the advantage of the corporate knowledge held in an office that has existed for over 25 years.

It is to be noted, however, that the Taxation Ombudsman's power to conduct own motion investigations remains. Clearly, there is some potential for overlap here. However, by appropriate liaison between both agencies each will be able to complement

the work of the other and cooperate closely and consistently with our respective legislation.

We envisage that we would do fewer ATO-specific own motion investigations in future. These investigations would seem to fall more logically in the Inspector-General of Taxation's area of responsibility. However, the Ombudsman often undertakes own motion investigations into matters of more general administration such as FOI, record keeping, compensation and oral advice that cover many agencies. The ATO is a significant part of the federal bureaucracy and as such would naturally be included in such studies.

The establishment of the Inspector-General of Taxation will also allow the Taxation Ombudsman to refocus on achieving systemic remedies that arise from investigation of individual complaints. Some individual complaints indicate the presence of broader problems, which can be redressed by the relatively efficient and informal processes of an Ombudsman inquiry. Let me give an example.

## Complaint

We received a complaint from an investor in ACT residential property that she had experienced great difficulty in convincing an ATO auditor that certain costs were tax deductible. The ATO auditor was based outside the ACT and was apparently unaware that stamp duty paid on the transfer of ACT property is a deductible expense where the property is to be used for rental investment.

## Investigation

Our investigation disclosed that tax treatment of rental properties in the ACT was different from those of the States because of the nature of property title in the ACT. The auditor had not taken this into account. On examining the relevant ATO publication, we suggested that the section dealing with deductible rental expenses could be clarified to cover the rules concerning ACT properties. We also suggested that all auditors be made aware of the special issues concerning crown leases.

## Outcome

Together with a remedy for the individual complainant, the ATO agreed to make changes to its publication on rental properties, to update the audit guidelines, and to clarify the tax situation relating to grant or transfer of crown leases. The updated ATO publication Rental Properties 2001 – 2002 was recently released and the amended Rental Audit Guidelines should be available to staff shortly.

This sort of approach would keep the Taxation's Ombudsman's main focus on individual complaints and systemic remedies.

## What issues is the Taxation Ombudsman likely to address in future

So what is the future direction for the Taxation Ombudsman in a taxation system that is complex and where the ATO continues to be given responsibility for administering programs that are not directly related to revenue collection, eg superannuation guarantee, the baby bonus and the family tax benefit?

The answer can only be given in general terms as the Ombudsman responds to the concerns of the community, as raised with him.

One issue for the future relates to the revised Taxpayers' Charter. The Charter sets out principles and guidelines that ensure the level of service and the kind of relationship that the ATO seeks to have with taxpayers. When the revised version of the Charter becomes available we will monitor the extent to which the ATO applies its principles and standards as another means of assessing the appropriateness and reasonableness of ATO actions.

Another issue is the Commissioner of Taxation's recently announced program of delivering easier, cheaper and more personalised services. This program has a clear focus on service delivery to individual taxpayers and relates well to the Taxation Ombudsman's focus on the concerns of individuals.

The above issues exemplify the Taxation Ombudsman's role in using individual complaint investigations to address on the one hand the concerns of individual taxpayers and on the other hand to provide the ATO, the community and the Government with feedback and assurances about the effectiveness of ATO program delivery.

The Ombudsman will continue to provide the only impartial and informal avenues for taxpayers to raise their concerns about the administration of the tax system. The Taxation Ombudsman's 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 – serves the interests of both the individual taxpayer and the tax system. This work remains of vital importance - negotiating practical solution to tax problems.