



Law Council  
OF AUSTRALIA

*Business Law Section*

The Inspector-General of Taxation  
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By email: [tctp@igt.gov.au](mailto:tctp@igt.gov.au)

18 December 2015

Dear Mr Noroozi

### **Review into the Taxpayers' Charter and taxpayer protections**

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (**BLS**) welcomes the opportunity to make a submission to the Inspector General of Taxation in relation to the above review. The BLS draws on the experiences of members in academia, members in private practice acting solely or mainly for taxpayers, and also members who act for both taxpayers and the ATO including members of the Bar.

### **Summary**

2. There are a broad range of views amongst individual members in respect of these issues. Nevertheless, the BLS submits that:
  - a) The Taxpayer's Charter should be redrawn so that it properly distinguishes between the "rights" and "obligations" of taxpayers and the ATO respectively, and the ATO's service charter. The conflation of those matters in the current Charter leads to confusion about what "rights" and "obligations" are enforceable and what are mere "expectations".
  - b) The focus on redress for defective administration should be on making compensation available to the most vulnerable taxpayers in an efficient, timely, and low cost manner.
  - c) The current mechanisms for compensating the few people who suffer loss or damage as a result of inappropriate ATO actions are adequate, provided that they are properly administered. The BLS suggests that administration may be improved (and be seen to be improved) if the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) was administered by a third party, such as the Inspector General of Taxation, and the ATO gave an undertaking to abide by the Inspector General's recommendations.
  - d) Related to the last point, in most circumstances the appropriate remedy for failure of a party to conduct litigation appropriately is an order for costs. That obviates the need for any specific remedy for breach of "model litigant" obligations. If the conduct occurs in the course of proceedings in the Administrative Appeals Tribunal, which is a "no cost jurisdiction", the proper course should be to consider whether relief is available under the CDDA Scheme. Creating legal rights enforceable through the courts only encourages

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more litigation, and discourages vulnerable taxpayers - who should be the focus of the scheme – from pursuing rights of compensation.

- e) The BLS considers that the ATO should act in a manner that is consistent with its obligations to administer the Australian tax system, including exchanging information with foreign jurisdictions as appropriate, but that in doing so there should be guidelines for ATO officers concerning the circumstances in which it is appropriate to share information.

### **Detailed response to questions in Submissions Guidelines**

3. By way of elaboration, below are the responses of the BLS to the questions posed in the Submission Guidelines.

#### ***Q1 and Q2: Your experience***

4. The BLS represents a large number of members. It is not within the scope of this submission to outline each of their experiences. Individual members with experiences to share with the Inspector General will make individual submissions.

#### ***Q3: Do you believe that the current Taxpayer's Charter sufficiently sets out your rights and obligations when dealing with the ATO? If not, what improvements should be made? Provide reasons for your views.***

5. The Taxpayers' Charter sets out rights and obligations that are legally enforceable, and the ATO's non-legally enforceable obligations under its service charter. The failure to distinguish between enforceable and non-enforceable obligations leads to confusion amongst taxpayers, and concerns about redress when non-enforceable obligations are allegedly breached, which breeds cynicism towards the Taxpayers' Charter and distrust in the ATO as its author.
6. The BLS strongly believes that maintenance of trust in the ATO as administrator of the tax system is vitally important to the effective administration of the tax law. For that reason, the BLS submits that the Taxpayers' Charter should be redrawn to clearly identify those rights and obligations that are legally enforceable, those rights and obligations that are not legally enforceable but better described as "expectations", and what steps can be taken by taxpayers to complain in respect of breaches of those obligations (for example, lodge a complaint with the Inspector General).

#### ***Q4: Do you believe that the right balance has been struck between such protections and the ATO's ability to effectively administer the taxation law? Explain your views.***

7. The BLS considers that the answer to this question is a "qualified yes".
8. The protections afforded by a properly administered CDDA Scheme to the most vulnerable taxpayers – being taxpayers who do not have the means to meet the cost of pursuing legal remedies for defective administration – strike the right balance. The concern is to ensure that, through the Taxpayers' Charter, these taxpayers are informed of what rights and obligations are legally enforceable, what rights and obligations are not, and what remedies are available in circumstances of defective administration.
9. Enshrining in legislation the rights and obligations in the Taxpayers Charter and making them legally enforceable in many cases does little, if anything, to make redress available to the most vulnerable taxpayers who can least afford to pursue often costly legal proceedings. It could

encourage large well-funded taxpayers who are least in need of protection to strategically litigate to seek redress as part of related disputes with the ATO.

10. The BLS does acknowledge that there are strong arguments in favour of enshrining the rights in legislation.<sup>1</sup> Nevertheless, on balance, the BLS considers that the proper administration of the current regime will strike the proper balance and achieve the desired objectives in a more efficient and cost-effective manner. From a practical perspective, it must also be acknowledged that legislating taxpayer rights that may be exploited (or perceived to be open to exploitation) by large taxpayers is unlikely to be a legislative priority for the Government, and in any event it is questionable whether legislation would be enacted in a form that achieved the desired outcomes.

**Q5: Do you believe that the rights in the Taxpayers' Charter are effectively enforced? If so, provide examples. If not, what further enforceability mechanisms should be available and what impact would these changes have?**

11. The BLS considers that the ATO has taken appropriate steps to implement practices and procedures that give effect in almost all cases to the rights and obligations in the Taxpayers Charter.
12. In relation to the small number of cases of defective administration, for the reasons outlined above, effective and independent administration of the CDDA Scheme would ensure meritorious cases are both properly considered, and perceived to be properly considered.

**Q6: What is your understanding of the existing avenues of redress afforded for breaches of the Taxpayers' Charter? Do you believe that the existing mechanisms are adequate? If so, provide examples. If not, how could they be improved?**

13. Please see above.

**Q7: Do you believe the ATO has appropriate guidance to assist its officers to comply with the Taxpayers' Charter? Explain your views.**

14. Yes. In an organisation the size of the ATO, having regard to its role and responsibilities for administering a large volume of complex law, it is inevitable that there will be cases that could and should have been handled better. Nevertheless, it does not appear that there are systemic issues in relation to compliance with the Taxpayer's Charter. It should also be noted that, similarly to the Model Litigant obligation, some complaints that are made misconceive the nature of the rights and obligations referred to in the Taxpayers' Charter, and some are otherwise found not to be meritorious.

**Q8: Do you believe that current ATO systems adequately identify, investigate, address and report allegations of breaches of the Taxpayers' Charter? If not, how could they be improved? Explain your reasons.**

15. The BLS considers that the identification, investigation, addressing and reporting of alleged breaches would be improved by, firstly, the Taxpayers' Charter properly identifying what rights and obligations are legally enforceable and what are not and, secondly, the ATO taking

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<sup>1</sup> Both sides of the argument are discussed in D Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (2007 Kluwer Law International).

reasonable steps to ensure that taxpayers are informed of their right to complain to the Inspector General in circumstances where they do not consider that their grievance has been adequately addressed by the ATO.

**Q9: What is your understanding of the operation of existing compensation schemes, including the CDDA Scheme, in relation to the ATO? Do you believe that the ATO's processes for managing compensation scheme applications adequately provide redress for loss or damage? If so, provide reasons. If not, how can the ATO's management of compensation scheme applications be improved? Should a more specific scheme for taxation and superannuation administrative compensation be considered?**

16. The BLS is aware that the CDAA Scheme is discretionary and permissive, and imposes no obligation on the decision-maker to make a compensatory payment where the Department of Finance gives advice recommending a payment. Anecdotal evidence suggests that the ATO is perceived to be reluctant to make compensatory payments under the scheme. Whether that perception is accurate or not, it has the potential to undermine both the ATO's reputation for fair and objective administration of the tax law, and for vulnerable taxpayers who are most in need of the assistance that the scheme can provide being dissuaded from applying for compensation. For that reason, the BLS supports a recommendation that the administration of the scheme insofar as the ATO is concerned is delegated to an independent party and that the ATO agrees to be bound by the recommendation of that party, rather than retaining any effective discretion to refuse payment once recommended. By reason that the Inspector General already has a complaints handling role, and is independent of the ATO, it makes sense for the Inspector General to have administrative responsibility for these matters.

**Q10. Could the ATO's application of the current guidance on compensation schemes be improved to provide greater assistance to ATO officers and the public alike? If so, what aspects could be improved and how?**

17. As referred to above, the redrawn Taxpayers' Charter should clearly state in what circumstances taxpayers' have a right to seek redress from the CDDA scheme, how to seek that redress, and make it clear that the scheme is intended to be "low or nil" cost.

**Q11. Should the ATO's compensation decisions be subject to internal or external review? If not, why not? If so, explain your views including who would be best placed to undertake such review.**

18. Yes. See above.

**Q12. Provide comments on the adequacy of other existing avenues for redress.**

19. See above.

**Q13. Do you believe the ATO's current systems adequately identify, investigate, address and report alleged breaches of the model litigant rules? Provide reasons for your views.**

**Q14. Do you believe there is room to improve the identification, investigation, reporting and addressing of alleged breaches of the rules by the ATO? If so, what aspects could be improved and what benefit would they provide?**

**Q15. Which agency or body, whether the ATO or otherwise, is best placed to monitor and enforce the ATO's compliance with the rules? Provide your reasons.**

20. See paragraph 2.4 above.

**Q16. Provide comments on the transparency of the ATO's processes for cross-border information exchanges.**

**Q17. Do you believe the rights of taxpayers to confidentiality and due process are sufficiently protected by the ATO in the case of cross-border information exchanges? Explain your views.**

**Q18. In what circumstances should the ATO allow taxpayers to review and correct information or otherwise challenge an exchange of information request? Are there circumstances where this would not be appropriate? Explain your views.**

21. The increasing commitment by the Australian Government and its agencies to transfer information to other jurisdictions raises significant concerns that have not been addressed. Questions arise as to what the limits are to confidentiality in a range of circumstances and it is submitted that these should be addressed explicitly before information is either made public or exchanged between different jurisdictions. The issues include:

- f) The use of taxpayer information for “naming and shaming” and the right of redress where this is found to be inappropriate and causes damage or harm to a taxpayer;
- g) Clarity on levels of authorisation and the reasons required before confidential information is released to third parties;
- h) Clarity on when a taxpayer should be informed when information is being released either domestically or cross-jurisdictionally and any rights of review;
- i) Clarity on the scope and extent of information that can be exchanged with other jurisdictions and the assessment of equivalent protection to Australia before such information is exchanged;
- j) Rights of redress where information provided cross-jurisdictionally causes damage or harm to a taxpayer; and
- k) Rights of redress where information provided to the ATO is subject to cyber-crime that causes damage or harm to a taxpayer.

Should you have require any further information on any of these matters, in the first instance please contact the Committee Chair, Adrian Varrasso, on 03-8608 2483 or via email: [adrian.varrasso@minterellison.com](mailto:adrian.varrasso@minterellison.com).

Yours sincerely



**Rebecca Maslen-Stannage, Acting Chairman**  
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