



Law Council
OF AUSTRALIA

Business Law Section

Mr Ali Noroozi
Inspector-General of Taxation
Level 19
50 Bridge Street
SYDNEY NSW 2000
Via email: ali.noroozi@igt.gov.au

24 March 2014

Dear Mr Noroozi,

2014 work program

I am writing on behalf of the Taxation Committee of the Business Law Section of the Law Council of Australia (**Taxation Committee**). Thank you for allowing us the opportunity to meet with you and to provide input on your proposed 2014 work program.

Comments on 2014 work program

In respect of the proposed work program issues we make the following observations:

1. Taxpayer bill of rights

The Taxation Committee does not at this point support the concept of a taxpayer bill of rights. However, we support an inquiry into whether the Taxpayers' Charter has been adhered to. It may be an outcome of your review that some form of judicial review of ATO behaviour is appropriate.

We have suggested below two areas which we believe are worthy of consideration in this context, namely, the ATO's practices in regard to freedom of information ("FOI") requests and the ATO's adherence to model litigant principles. It may be that each of these issues is appropriate to consider either on its own or as part of a more general inquiry into ATO adherence to the Taxpayers' Charter. (In this connection, we observe that whilst the charter explicitly contains a taxpayer right styled as "Giving you access to information we hold about you", which specifically references the Freedom of Information Act, there is no such specific reference to model litigant behaviour).

2. The ATO's approach to test case litigation

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We support an inquiry into the ATO's approach to test case litigation program.

One area of concern is that of test case selection. Although the ATO has indicated that it will take financial capacity to pursue litigation into account, they say that they nevertheless may still approve funding for applicants who have capacity to fund their own case. Notwithstanding these public statements, it would anecdotally appear to be very rare for test case funding to be provided for wealthy or well-funded taxpayers even though the technical issue may be of general importance, but was one where the taxpayer would not otherwise wish to incur the cost of litigation. If such a bias was apparent it may skew the types of issues on which guidance is obtained through the test case program.

We also note that specific issues have been raised by our members in relation to the particular provisions of the standard funding deed which is used in test case matters; notably clauses 6.1.2 and 9.1.1(c) and (f) of the standard test case funding deed. These clauses empower the Commissioner to require the taxpayer to refund amounts received under the test case funding program in certain circumstances. An example is where the taxpayer seeks to bring the Test Case to an end or where the taxpayer takes certain other actions without the consent of the Commissioner. Our concern is whether the ATO uses these provisions in an affirmative manner, thereby influencing and interfering with the way that taxpayers run their cases.

3. **ATO's application of the general anti-avoidance rules (GAAR)**

Given the recent amendments to Part IVA we do not believe that a current review of the GAAR is appropriate. However, it may well be that once we have had the opportunity to have some experience of ATO auditor behaviour and the progress of matters through the courts under the new rules, such an inquiry will be worthwhile.

We have no specific comments to make on any of the other recommended program items.

Suggestions for inclusion in the 2014 work program

1. **The ATO's administration of FOI requests**

Notwithstanding that the Taxpayers' Charter contains an explicit "right" to taxpayers to information - the ATO in 2013 demonstrated that in its view the scope of FOI should be severely limited. The ATO's view is reflected in submissions it made on 9 January and 29 April 2013 to the review into the operation of the Freedom of Information Act 1982 chaired by Dr Allan Hawke. The broad thrust of these submissions was that the legislation should be amended to suspend taxpayer FOI rights during the audit or

enforcement phases of compliance action and that in any case there should be a 40 hour rule so that the ATO does not need to comply with an FOI request where it would take more than 40 hours to fulfil. Dr Hawke ultimately recommended in favour of the ATO's submissions (see Recommendation 39 of Dr Hawke's Report). Separately from the Hawke Committee the ATO has set out in Corporate Management Practice Statement PS CM 2013/02 (Information pro-disclosure), a voluntary system for providing information to taxpayers.

We believe that against this backdrop it would be instructive if the Office of the Inspector General of Taxation were to undertake a review of the past practices of the ATO in attending to FOI requests. Such a review may take into account matters such as the time taken, and the extent of compliance. Several of our members have indicated that there is an unwillingness on the part of the ATO to comply with FOI requests on a timely basis.

The freedom of information rules reach far beyond taxation - nevertheless we believe it is possible to frame an inquiry which specifically focuses on the ATO's administration of the rules. We believe this is appropriate particularly given that the ATO has submitted that they should be given special treatment under a reformed legislative regime.

2. **The ATO's adherence to model litigant behaviours**

The ATO is required to adhere to model litigant behaviours which are set out in the Legal Services Directions which are issued by the Office of Legal Service Coordination. These are a set of binding rules which issue from the Attorney General's Department.

We believe that it would be worthwhile for the Office of the Inspector General of Taxation to conduct a review into whether the model litigant behaviours are being adhered to. One recent example of an instance where perhaps these behaviours were not adhered to was highlighted in the Federal Court decision in *Blank v Commissioner of Taxation* [2014] FCA 87. In that case at paragraph 93 Edmonds J said "I do not propose to consider the second and third grounds because, in my view, they have no arguable merit". Members have brought to our attention other instances where, the ATO has instructed counsel to bring arguments before the court which counsel have advised have little or no prospect of success. This is just one instance of behaviours which we do not believe comply with those expected of a model litigant.

We have received comment from members that the ATO takes a "win at all costs" approach to tax litigation - rather than ensuring arguments are put to the court in order to promote the proper interpretation and administration of tax laws. We believe the ATO's approach to tax litigation should differ from that adopted in normal commercial litigation -

where adversarial parties are seeking to protect their commercial interests.

Suggestion for future consultation

Whilst it would not be appropriate at the moment, we believe that a review into the ATO's consultation practices may well be worthwhile at some point in the future. As you are aware, the Commissioner has radically revised the consultation framework. We believe that once the changed regime has been given the opportunity to settle down, then a review into whether the revised consultation framework is effective would be worthwhile. One of the key concerns which such a review may wish to address is whether, under the new framework, the ATO is less accountable to taxpayers over concerns they have with regard to the administration of the law.

Should you wish to discuss this further, please contact the Committee Chair, Mark Friezer, on (02) 9353 4227.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves
Chairman, Business Law Section