

Submission to the Senate Economics Legislation Committee inquiry into
the performance of the Inspector-General of Taxation

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Introduction

- 1 This submission on the performance of the Inspector-General of Taxation (IGT) is based on my experience of as a former employee of the Australian Taxation Office (ATO). As an ATO officer I made submissions to the IGT, including ‘whistle-blower’ disclosures about alleged ATO misconduct in response to a Section 9 Notice issued by the IGT.
- 2 Many of the facts relating to my disclosures and the consequences of making them are on the public, as well as parliamentary record¹, and will not be repeated in this submission. However, I am willing to provide any additional information or documents that the Committee believes will assist the Inquiry.
- 3 If it assists the Committee in its inquiry into the IGT, I grant permission to the Committee and to the IGT to discuss any matter raised in this submission or related to my case.
- 4 The submission is organised into key points (as dot points) under relevant Terms of Reference.

¹ Senate Official Hansard, No. 10, 2017, 5 September 2017, pages 160-162, Australian Taxation Office, Senator Whish-Wilson, Accessed at: https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/7b64dad2-40a4-477c-ad6b-ac738f3ca1b6/toc_pdf/Senate_2017_09_05_5459_Official.pdf;fileType=application%2Fpdf

Term of Reference (a) - *whether the accountability framework the IGT operates within needs to be amended or strengthened.*

- An accountability mechanism for IGT investigations is required
- 5 In my experience, there is an accountability gap in relation to the IGT. When I developed serious concerns about how the IGT was managing my case, I tried a range of avenues for accountability, including Parliamentary scrutiny, Treasury scrutiny, review by the Commonwealth Ombudsman, media scrutiny, and Freedom of Information. Attempts at accountability were resisted by the IGT. Parliamentary enquiry was resisted on the basis of confidentiality, as was media scrutiny. I believe the confidentiality of my case should rest with me, not with the IGT. The Treasurer declined to assist on the basis that the IGT had conducted an investigation. The Ombudsman referred me back to the IGT.
- 6 When I made an FOI application to the IGT, inappropriate FOI exemptions were used to refuse release of large volumes of information about how my case was handled. Most of the attachments to this submission were initially refused release, then released in reconsideration after the Information Commissioner decided to conduct a review of the IGT's FOI decision. The resistance to release information sets a poor example by the IGT, an agency that has frequently lauded its dedication to transparency.

Term of Reference (b) - *how the IGT conducts its investigations into the Australian Taxation Office (ATO), and*

Term of Reference (e) - *the protections afforded to whistle-blowers who disclose information to the IGT*

- IGT must exercise its legislative powers responsibly and professionally
- 7 In October 2014 I made a disclosure to the IGT about suspected misconduct at the ATO. The IGT advised me at that time that the disclosure warrants investigation, however an investigation will not occur because the IGT was unable to offer me protection from ATO reprisals. The IGT advised they may be able to offer protections from reprisals around March 2015. I was disappointed by the response.
- 8 In January 2015 I made a further submission to the IGT. In the cover letter I enquired about the progress of protection from reprisals.
- 9 On 4 May 2015 the IGT contacted me by telephone to advise that the long-awaited changes to the IGT Act had occurred (on 1 May 2015), and that the IGT would now be able to progress my matter, and invited me to re-submit my disclosures online to conform with the IGT's current 'complaint' handling process. I made the online submission with the following proviso, "I do not wish for any action to be taken in relation to the complaint until I have an opportunity to discuss with the IGT the protections available to me from actions by the ATO".
- 10 In subsequent calls in May 2015 the IGT advised that protections from reprisals can be covered by the PID Act, but that the PID regime is administered by the Commonwealth Ombudsman (OCO) and not the IGT. I explicitly rejected the proposition that I would make a disclosure to one agency, but rely on protections from a different agency. I also rejected the notion of OCO protections because these were not the 'new' protections which prompted the IGT to contact me on 4 May 2015. The IGT advised that the new protections available to me are contained in Section 39 of the IGT Act, and that to be relevant these protections require a trigger, which is the issue of a Section 9 Notice. I advised that having the protections in Section 39 of the IGT Act was a condition for me to proceed

with the matter. The IGT offered to issue me with a Notice, and did so on 18 May 2015. In relation to the Notice, the IGT advised me that while I am free to discuss the Notice with anyone I wish, The IGT will treat the Notice with absolute confidentiality and will not discuss the Notice with anyone, including the ATO.

- 11 Shortly after starting to collect evidence in response to the Notice, I was removed from the workplace by ATO security and my employment was terminated. In justifying the termination, the ATO used information from the IGT obtained in discussions that occurred without my consent or knowledge (see Attachment RS01).
- 12 I initially asked, and then pleaded with the IGT to enliven the protections previously discussed. However, once I was removed from the ATO workplace, the IGT resisted any use of Section 39 of their Act, and advised that the termination matter was an 'employment related' issue and therefore outside the IGT's remit.
- 13 In summary, the IGT contacted me in May 2015 to offer whistle-blower protections. However, in June 2015 the IGT advised they did not believe those protections were relevant to me. In my experience as described in this submission, the IGT did not manage my disclosures or use the IGT's legislative powers in a manner expected from a professional oversight agency that purports to have whistle-blower handling capabilities. On 19 April 2016 the IGT appeared before the House of Representatives Inquiry into the External Scrutiny of the ATO. Then-Assistant Treasurer Kelly O'Dwyer asked the IGT if the current scrutiny situation is sufficient to both encourage ATO whistle-blowers to make disclosures and to protect them when they do. The IGT, referring to the Section 9 Notice arrangements, replied, "We do have the ability to require them to provide certain information, and by requiring to provide that information, they do have the necessary protection". This response in no way accurately describes the IGT's experience with the first (and possibly only) Section 9 Notice issued to an ATO employee.
- 14 It is confounding that an oversight agency offers an *employee* protection from reprisals for making a disclosure regarding their *employer*, but later states it can't apply those protections to *employment* related reprisals. When I asked the IGT what form they envisaged the reprisals would take, if not employment related, the IGT replied that they were not expecting me to advise the ATO about the Notice and therefore did not anticipate any reprisals. The way in which the IGT exercised its legislative powers in relation to me has resulted in devastating consequences that continue to affect me and my family today. Throughout what became a catastrophe for me, I received no protection, help or support whatsoever from the IGT. To the contrary, IGT support in this matter has been provided to the ATO, as illustrated in this submission.
 - IGT requires professional investigative capabilities
- 15 Under FOI laws I eventually obtained the only written 'assessment' by the IGT (as Attachment RS02) of my disclosure of July 2015. I believe an experienced investigator would regard this report as not meeting professional or community expectations. In addition to accuracy and quality issues, the IGT assessment is hostile towards me for unknown reasons, starting with the IGT's title, "Affidavit *purportedly* in response to" Notice. My affidavit clearly stated that it was in response to the Notice.
- 16 Point number 4 in the assessment appears to address "Para 26" of my affidavit. However, the IGT comment "need to obtain the Office Minute", is difficult to understand because the Office Minute, a document central to the allegations in my disclosure, was provided to the IGT. That document showed that, as described by the IGT comments in this section, the ATO procedure I reported was "motivated by revenue and the process would disregard taxpayer rights".
- 17 Point number 18 in the assessment refers to "Para 74" of my affidavit, where I disclosed to the IGT that an auditor receiving 5 GST refunds to check is expected to escalate at least 1 of those refunds to an audit of the taxpayer. However, rather than considering the 1 taxpayer that endures an audit

because the auditor is meeting a performance target, the IGT's brief comment, "this view could also be said to encourage profiling which avoids targeting taxpayers with low risks", is more sympathetic to the ATO view, which is that the disadvantage to the taxpayer that happened to be the 'worst' of the 5 on a particular day, is balanced by the advantage of the other 4 cases being passed over as having less risk. It's a comment that only makes sense if the priority is revenue collection rather than protecting taxpayers' rights. The formal ATO position is that you will be audited only if a risk of non-compliance is identified, not if your risk happens to be comparatively more than 4 other random taxpayers. This part of the disclosure addressed historical ATO denials that individual performance targets exist, and the IGT comment reflects disinterest in the matter.

- 18 Particularly given the high price I paid to provide the information to the IGT, together with the seriousness of the allegations, it is difficult to understand the IGT assessment's apparent hostility and disinterest as reflected in many of the superficial and dismissive 'Notes' in the assessment. I believe the public would expect the IGT to put in place a higher standard of investigative capability.
- 19 All the IGT comments in the assessment were initially refused release by the IGT under FOI using an unsuitable exemption.
 - IGT requires unbiased approach to investigations
- 20 I eventually obtained under FOI the comments made by the IGT in relation to a speech made in the Senate about my matter (as Attachment RS03). The comments again reflect the IGT's bias in favour of the ATO. For example, the IGT consider my termination by the ATO was justified, and apparently "blind Freddy" could see that the full bench FWC decision to overturn my reinstatement, was the "better decision".
- 21 There is a consistent deference to the ATO view and underplaying of the seriousness of allegations against the ATO. For example, next to the mention of "suspending taxpayer rights while applying extraordinary ATO powers without the required evidence", the IGT notes "Only 200 cases". I provided the IGT with evidence showing that by November 2012 the ATO had processed at least 2,410 cases (the ATO would admit to) in Operations Whip, Onion, Feline, Cohort and Zodiac.
- 22 I provided the IGT with evidence that in thousands of cases tax refunds had been cancelled unilaterally by the ATO without advising the taxpayer, as required, of the reason and of the action taken. It was a 'shoot first, ask questions later', or cancel first, verify later approach in a frenzy to meet revenue collection targets. The IGT comments that these, apparently only 200 cases, were "only those who didn't chase up ATO". The IGT appears to support the ATO view that taxpayer rights can be suspended by the ATO to meet revenue collection targets.
 - IGT cannot appear to support ATO to discredit a whistle-blower
- 23 Two days after the Senate speech about my matter, the ATO contact the IGT, documented in an IGT file note titled "ATO statement on Shamir case – file note of phone call", dated 7 September 2017 1:27 pm. At the time of this submission, the IGT continues to refuse to release this document, stating its release will have a "strong, adverse effect on the relationship and function of both agencies".
- 24 Later that day, the ATO released a media statement in response to the speech which still appears on the ATO web site. The "Statement on Shamir matter"² aims to discredit me and the allegations I raised.
- 25 The statement includes the following assurance: "All other claims and complaints made by Mr Shamir have been considered, investigated and found to lack substance and Mr Shamir has been

² Statement on Shamir Matter, ATO media release, 7 September 2017, Accessed at: <https://www.ato.gov.au/Media-centre/Media-releases/Statement-on-Shamir-matter/>

advised of the outcomes. Importantly, this has included a review by the Inspector-General of Taxation who has not raised any concerns with the ATO as a result.”

- 26 In explaining to the Information Commissioner why the document “ATO statement on Shamir case – file note of phone call” should not be released, the IGT states:
- “The IGTO is a small statutory agency that carries a significant national responsibility... the IGTO has been afforded extensive powers to obtain information... However, given the size and resources of our agency, it is not practicable to adopt a formal approach in every instance... we have fostered strong information sharing relationships with the agencies we scrutinise and are able to have frank and open discussions as well as receive fulsome information expeditiously... The document reflects the process of informing the views of both agencies in a manner conducive to the health of the relationship of independence between the IGTO and the ATO.”
- 27 The timing infers the ATO consulted with the IGT when making the media release. The wording of the statement, and the IGT’s non-response to the statement, suggest the IGT agrees with the ATO statement that the IGT has no concerns about any aspect of the matters I raised.
- 28 If the IGT appears to be working hand-in-glove with the ATO to discredit a whistle-blower, then the IGT is unlikely to receive many more disclosures from ATO employees.
- 29 The ATO media statement is still in the public domain, searchable by any potential employer.
- IGT report into whistle-blower disclosures relies heavily on ATO materials and ATO view
- 30 Given the antagonism shown towards me in the IGT’s FOI documents, it isn’t surprising that I was not advised when the IGT published a report that covered some of the allegations I raised. A journalist alerted me to the IGT’s report “GST Refunds”, dated March 2018 and publicly released August 2018, where buried on page 55 is an orphan section with no recommendations, titled “Management of Identity Fraud” (included as Attachment RS04).
- 31 The IGT’s report is self-evidently based heavily on the “ATO materials”. For example, the report underplays the magnitude of the breach by repeating the inference that it only affected 200 cases, or in this report described as “200 trusts” (see “200 cases” also under paragraphs 19 to 20).
- 32 Despite the IGT’s efforts to word the report in a manner that clears the ATO of any wrongdoing, the report does substantiate that taxpayer rights were suspended by the ATO in the manner and context I described in my disclosures. The IGT’s description of the use of procedures that go well beyond the ATO’s legislated powers, and that were endorsed by the Senior Executive, is that these were “far from desirable”.
- 33 The IGT credits the ATO for fixing the problem. “More importantly”, the report states, “the ATO appears to have addressed the above concerns”.
- 34 There is no mention in the report of a whistle-blower, the Section 9 Notice under which the information for the ‘investigation’ was obtained, or any of the consequences that followed.
- 35 The IGT was well aware from the evidence I provided that when I first raised the allegations internally with the ATO, I was told there was nothing wrong with the operations in question, because the operations had been endorsed by the Senior Executive. It was only when I raised the matter again with the endorsing executive officer directly that I obtained an admission that the procedures were “inappropriate”. The fact that my job was abolished 3 months later is also on the public record. However, from the IGT’s view it is a simple matter of the ATO having fixed the problem themselves.
- 36 An individual in these circumstances who can illustrate that an IGT investigation or action has detrimentally impacted them must be provided with support to obtain justice and compensation. As the IGT is a government agency, it is the government that should provide that support.

Term of Reference (c) - *what safeguards exist to ensure the independence of the IGT*

- IGT gives ATO prospective assurance that sensitive information will not be released publicly
- 37 One of the allegations in my 2015 submission to the IGT was that a taxpayer in the ‘large entity’ sector (turnover more than \$250M/annum) did not lodge an income tax return in Australia for over a decade, and had not been pursued by the ATO.
- 38 Under FOI laws I eventually obtained a letter from the IGT to ATO (as Attachment RS05), dated 13 November 2017, making what is self-evidently the first enquiry to the ATO about the non-lodgement matter, disappointingly more than two years after receiving my submission.
- 39 What concerned me about the letter in addition to the timing is the prospective assurance given at the end of the letter that, whatever the outcome of the enquiry, the IGT will resist any public scrutiny of the matter, including by the informant, because the IGT understand the “privacy issues surrounding disclosure of such information”.
- 40 The IGT further assures the ATO that if pressed for a response, it would be “limited to providing assurance... that the ATO has followed its processes in determining whether relevant action would be taken”. If pressed, the IGT will only provide assurance that the ATO has done the right thing because “the ATO has followed its processes”.
- 41 The assurance is given not just in relation to my case, but to all “TERC cases”. TERC (Tax Evasion Referral Centre) is the ATO’s database of all whistle-blower disclosures and tipoffs regarding tax evasion.
- 42 If this is a prospective agreement that information that is potentially damaging or embarrassing, will be kept away from public scrutiny by the IGT, and that the IGT will give the ATO the public tick of approval that the ATO has “followed its processes”, then this sets a dangerous precedent in the relationship between an oversight agency and the oversighted. Agreeing to keep information of public interest secret is arguably a form of capture of an oversight agency.
- 43 Safeguards, such as effective, independent oversight of the IGT, are required to ensure that the IGT is not at risk of capture or compromise of public expectations of independence.

[END]