



Community & Public Sector Union
Alistair Waters • Deputy National President

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House Standing Committee on Tax and Revenue
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Canberra ACT 2600

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Dear Committee Secretary

Inquiry into Tax Disputes

The PSU Group of the Community and Public Sector Union (CPSU) is an active and progressive union with approximately 55,000 members. The CPSU represents employees of the Australian Public Service (APS), the ACT Public Service, the Northern Territory Public Service, Telstra, the telecommunications sector, call centres, employment services and broadcasting.

The CPSU welcomes the opportunity to make a submission to the House Standing Committee on Tax and Revenue Inquiry into Tax Disputes.

The CPSU is the largest of the three unions representing staff in the ATO. Our members have raised a range of issues regarding tax disputes that are pertinent to the Inquiry, particularly about the efficiency and effectiveness of managing disputes. The issues are:

1. arrangements for and appropriate level of separation between the compliance, investigation, objection and litigation functions;
2. fair treatment and respect for taxpayers; and
3. inadequate resourcing of existing functions.

Arrangements for and appropriate level of separation between the compliance, investigation, objection and litigation functions

Separation of functions between different agencies

Prior to the 2013 federal election, the then Shadow Treasurer Joe Hockey raised concerns about fairness and impartiality during the resolution of tax disputes. He suggested that an option to better resolve tax disputes could be to "move the appeals section out of the ATO

*into a different agency, recognising that the audit function is different from an independent review.*¹

The House Inquiry's media release also stated that it would examine *'whether a separate agency should manage ATO litigation, whether the ATO should have a separate appeals area, or if current arrangements should continue.'*²

The CPSU does not support separating the functions of the ATO into different agencies. First, there would be a significant efficiency loss from establishing a new, smaller agency. Second, there are many issues relating to the deskilling of staff and loss of intelligence between agencies that would frustrate the ATO's current work in resolving disputes at an earlier point in the taxpayer relationship.

The CPSU is not alone in opposing any split of ATO functions into separate agencies. Clayton Utz tax partner Niv Tadmor has stated that *"tax administration will be more expensive and not as efficient if you break it up."*³

Members report that ATO is increasingly focused on trying to reduce the number and duration of disputes. The recently released 2014-18 ATO Corporate Plan states that *"where disputes do occur, our approach is to resolve disputes early, avoiding litigation where possible, with the aim of ensuring we treat taxpayers in similar situations fairly and consistently"*.⁴ For example, the ATO has sought to come to joint positions with taxpayers at the audit and review stages in order to prevent escalation to litigation. The litigation area is currently contributing, and has previously contributed, to the design of work processes that will resolve disputes at these earlier stages.

Moving the litigation function to a separate agency would remove the impetus for the litigation area to devote resources to preventing disputes from arising, as they would be essentially spending their own resources to assist another agency to reduce its costs.

A further issue involves the actual progress of cases which have entered the litigation phase. At present, the litigation officer and business line staff work together to resolve the case, with the business line officer contributing subject matter expertise in most instances. There is a reasonable level of informality around these roles but with separation into another agency an 'us and them' mentality is likely to develop where business line staff would seek to limit their involvement in litigation cases, even when they were better placed than the litigation officer to undertake particular tasks. One member stated that:

It would be harder for lawyers to do their job. It is already sometimes hard to get onto the contact officer within quick timeframes. That's when something is internal. If the functions are split, it will only get worse.

Separation would also make it harder to draw on existing corporate knowledge to resolve disputes. The current structure allows business lines to draw on those with the background knowledge of prior cases from other business lines to help settle disputes. Many ATO staff who are experienced in working with taxpayers are not working in formal dispute resolution

¹ Joe Hockey, Coalition Government's Approach on Tax, Speech to the Institute of Chartered Accountants, <https://www.liberal.org.au/latest-news/2012/11/23/joe-hockey-speech-coalition-governments-approach-tax>, 23 November 2012

² Standing Committee on Tax and Revenue, 'Inquiry into tax disputes launched', Media Alert, 6 June 2014

³ Nasseem Khadem, 'Will the ATO be split under the Coalition? Not if Chris Jordan keeps singing from the Abbott-Hockey song sheet', *BRW*, last updated 25 September 2013, http://www.brw.com.au/p/business/hockey_keeps_singing_chris_split_Rmo3etbCuw2SuiGvZ832ZM, (accessed 2 July 2014)

⁴ Australian Taxation Office, ATO Corporate Plan 2014-18, June 2014, pp.37, https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/js32219%20ATO%20Corporate%20Plan%202014_w.pdf, (accessed 9 July 2014)

areas. If moved to a different agency, there would be less capacity for these officers to contribute to the resolution of matters.

Transfer of audit objections

CPSU members have indicated that the Terms of Reference suggest one proposal to improve governance arrangements may be to group audit objections with appeals.

CPSU members have reservations about the potential grouping of audit objections with appeals. Members have informed us that only half of the objections workload is audit related. If audit objections and appeals are grouped together, this will remove flexibility from the interpretative advice capability. Any increases in different parts of the workload will not be able to be addressed by moving staff from the audit work type to the non-audit work type. The range of work able to be completed by individual staff over time, will be restricted.

The grouping of review and litigation work is not a new idea. Prior to 1994, litigation and objections were grouped within the same business line. The functions were then separated, following a recommendation from the Joint Committee of Public Accounts,⁵ and objections joined to private advice. It should be noted that the volume of audit source objections completed annually at that time was only a fraction of the current volume (perhaps one third), due to the large increase in automated audit activity that has occurred in the intervening period.

There are also implications for regional jobs if audit objections are co-located with existing appeals areas. For reasons of proximity to the relevant courts, litigation work is restricted to capital city locations. If only the more complex audit objection work was moved into the appeals area, it would restrict the variety and complexity of work available to officers in regional locations. This will not only affect the availability of highly skilled employment in regional communities and the local economy but may also affect how the ATO interacts with clients in regional areas.

Fair treatment and respect of taxpayers

In his 2012 speech on taxation, Joe Hockey raised concerns about the treatment of taxpayers during taxation disputes, stating that *"the perception that there may not have been a fair consideration of the matter needs to be addressed."*⁶

The CPSU notes that ATO already has policies in place to ensure that the disputes process is independent and fair and there has been no evidence to suggest otherwise. The Inspector-General of Taxation has previously examined these concerns about perceived lack of independence⁷ and found that in most of cases, there is an 'independent review' of decisions.⁸ An ATO employee who has been involved in an audit decision has no influence on the review process. The limited instances where the division has been blurred is in more complex and technical matters where greater assistance is needed to understand the facts and evidence and in order to make a decision.⁹

⁵ Joint Committee of Public Accounts, 'An Assessment of Tax: A Report on an Inquiry into the Australian Taxation Office', Australian Parliament, 1993, pp.xxxviii,

⁶ Joe Hockey, 'Coalition Government's Approach on Tax', *Speech to the Institute of Chartered Accountants*, 23 November 2012, <https://www.liberal.org.au/latest-news/2012/11/23/joe-hockey-speech-coalition-governments-approach-tax>, (accessed 3 July 2014)

⁷ Inspector-General of Taxation, 'Review into the underlying causes and the management of objections to Tax Office decisions', 15 April 2009, pp.10, http://www.igt.gov.au/content/reports/underlying_causes/underlying_causes.pdf, (accessed 3 July 2014)

⁸ *ibid*, pp.11

⁹ *ibid*

Even though audit and review areas may be part of the same business line, objection officers working in the interpretative advice capability view their work quite differently to auditors. Members advise that there is no pressure for objection officers to agree with officers simply because they are an officer in the same business line.

The ATO has already responded to perceptions about the fair consideration of objections by implementing a number of changes. For example, an Independent Review function has been rolled out by the ATO. The process is conducted by a senior adviser from Review and Dispute Resolution who has had no previous involvement in the audit. It provides an opportunity for an internal review on the technical merits of an audit and allows large business taxpayers the option of a second opinion. The reviewer makes a recommendation to the taxpayer and the audit team at the end of the review.¹⁰ The ATO has indicated that the feedback from taxpayers and their advisors is that this process is effective even though it is within the ATO.¹¹ A significant percentage of the reviews have varied the original decision in favour of the taxpayer.

The ATO is also increasingly using Alternative Dispute Resolution (ADR) to avoid unnecessary disputes. When disputes go to the Administrative Appeals Tribunal, very few disputes progress to hearing without going through some form of ADR. The aim is to reduce the number of issues that need to be resolved via formal hearing. The ATO is prioritising the building of its in-house facilitation capacity and supporting the use of ADR over the planning period.¹² The ATO also has engaged the Australian Centre for Justice Innovation to evaluate how effective ADR has been and is collecting information to see how it can be improved.¹³

The CPSU also notes that the inquiry does not mention the ATO's use of settlement arrangements in the Terms of Reference. While previously used for larger taxpayers, the ATO is seeking to make increased use of this form of dispute resolution at both audit and objection and has recently reviewed its settlement procedures to allow settlements in a wider range of matters. Settlement arrangements seek to avoid taking disputes to court and to come to some arrangement that is suitable to both the ATO and taxpayers.¹⁴

The use of these methods shows that the ATO is focused on early engagement of disputes to ensure that points of contention, which may lead to ongoing disputation, are identified and resolved, or narrowed, when and as they arise.

It should be noted that where the taxpayer and the ATO are in genuine disagreement regarding the operation of the law, the ATO funds test cases to clarify the law. This provides a fair result for the taxpayer involved and further guidance for taxpayers in similar situations.

All these changes mentioned show that previous concerns about fairness and impartiality are being addressed, and there is no reason to think that any future concerns would not be similarly addressed.

¹⁰ Australian Taxation Office, 'Submission to Productivity Commission Review: Access to Justice Arrangements Dispute Management in the Australian Taxation Office', pp.4, http://www.pc.gov.au/data/assets/pdf_file/0008/134486/sub150-access-justice.pdf, (accessed 2 July 2014)

¹¹ Chris Jordan, 'Reinventing the ATO', *Tax Institute of Australia 29th National Convention*, 27 March 2014, <https://www.ato.gov.au/Media-centre/Speeches/Commissioner/Commissioner-s-address-to-TIA>, (accessed 3 July 2014)

¹² Australian Taxation Office, ATO Corporate Plan 2014-18, pp.38

¹³ Australian Taxation Office, 'Evaluating alternative dispute resolution in tax disputes', last updated 21 June 2014, <https://www.ato.gov.au/Tax-professionals/Legal-practitioners/Litigation-and-case-law/Evaluating-alternative-dispute-resolution-in-taxation-disputes>, (accessed 3 July 2014)

¹⁴ Australian Taxation Office, ATO Corporate Plan 2014-18, pp.38

Inadequate Resourcing

ATO officers are proud of the work they do and feel pride in their professionalism. They carry out their work conscientiously and with respect towards taxpayers. They, however, report immense pressures to get the work done on time in the face of a growing workload.

Members have emphasised that staff working on objections and appeals need more support. Staff do not always get the resources required to ensure work is done on time and to a high standard. It is arguably the main reason sub-optimal decisions are made. Members say that the pressure to finalise cases 'prematurely' is more likely to lead to errors and poor decisions than other factors such as capability issues or poor procedures.

The failure to replace staff who leave the ATO is exacerbating this problem. The work of exiting team members is reallocated to others in the team, further increasing individual workloads.

One concerning example provided by a member was that litigation receives urgent applications from the debt business line after court dates have already been missed. This raises serious questions about adequate resourcing levels.

These pressures are likely to grow as the ATO will lose 3,000 employees by October 2014. These cuts are the result of the 2013-14 Budget and of the 2014-15 Budget cutting \$143m from the ATO's funding. It has forced the ATO to bring forward 1,600 job cuts.¹⁵ The ATO is responding by cutting back what it does. Already companies turning over up to \$5 billion a year will be allowed to use their own auditors to review issues raised by the ATO,¹⁶ creating risks of conflicts of interest and possibly leading to future problems.

The CPSU is happy to provide information to the Committee on the matters raised in this submission and supplementary information on other issues relevant to the Terms of Reference.

For further information please contact Dr Kristin van Barneveld, Director of Research via email [REDACTED] or [REDACTED].

Yours faithfully

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¹⁵ Andrew White and Adam Creighton, Tax audit effort to cut costs, *The Australian*, 24 June 2014, <http://www.theaustralian.com.au/business/tax-audit-effort-to-cut-costs/story-e6frg8zx-1226964256240#>, (accessed 3 July 2014)

¹⁶ *ibid*