



## THE TAX INSTITUTE

26 November 2021

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Sir or Madam

### **The performance and integrity of Australia's administrative review system**

The Tax Institute welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee (**the Committee**) in relation to its inquiry titled *The performance and integrity of Australia's administrative review system* and the associated Terms of Reference (**the Inquiry**).

Terms of reference for the inquiry are broad and encompass many important aspects of Australia's administrative review system. We have focused our comments primarily on the operation of the Administrative Appeals Tribunal (**The AAT**), given the importance of the AAT in the resolution of tax disputes.

The AAT plays a crucial role in the review and administration of Australia's tax system. The AAT's review of decisions and outcomes allow applicants the opportunity to have adverse decisions reviewed by a trusted and wholly independent tribunal. This ensures that the authority given to administrative bodies is regulated and exercised in a consistent and lawful manner with the appropriate oversight. The AAT also acts as an important pathway for resolving disputes, significantly reducing the number of tax cases escalating to litigation in the court system.

As a result, it is imperative that the AAT is supported to ensure that it operates in an equitable and efficient manner. To achieve this, the AAT needs to be appropriately funded and resourced to handle cases in an impartial and expedient manner. Further, steps should be taken to increase transparency and accountability over AAT matters, while ensuring the AAT is a low cost and informal environment that encourages taxpayers seek a review of adverse decisions. We are also of the view that the Administrative Review Council (**ARC**) should be re-instated.

Our detailed response is contained in **Appendix A**

We would be pleased to continue to work with the Committee in relation to any updates or reforms emerging from the current review or with any future reviews of the administrative review process.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix B** for more about The Tax Institute.

If you would like to discuss any of the above, please contact Associate Tax Counsel, Abhishek Shekhawat, on 02 8223 0013.

Yours faithfully,

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

**Peter Godber**

President

## APPENDIX A

We have set out below detailed comments and observations for The Committee's consideration. Our comments broadly follow the order of the Terms of Reference in the Inquiry and is limited to matters concerning tax administration and policy.

### Operation of the AAT

#### *Resourcing and member selection*

As noted above, we are of the view that the AAT plays an important role in the administration and review of Australia's tax system. Without the AAT, the costs and procedural challenges of bringing matters before a court would likely deter taxpayers from seeking resolution of their disputes. Providing taxpayers with access to timely and cost effective independent review of ATO decisions plays an integral part in maintaining the communities overall confidence in the tax system.

The importance of the review for taxpayers can be seen in the number of cases before the AAT regarding taxation matters or in the Small Business Taxation Division from 2018 to 2021:

Period	Lodged		Finalised		On hand at year end	
	Taxation	Small Business	Taxation	Small Business	Taxation	Small Business
2018 - 2019 <sup>1</sup>	670	123	642	5	1,285	118
2019 - 2020 <sup>2</sup>	577	274	719	75	1,142	318
2021 - 2021 <sup>3</sup>	596	552	740	418	1,002	453

However, it should also be noted that in 2020-21, only 53% of taxation and commercial cases were finalised within 12 months.<sup>4</sup> This is down from 62% in the 2019-20 year.<sup>5</sup> Although the AAT has finalised over 90% of cases in the Small Business Division within 12 months,<sup>6</sup> it has been unable to meet its target of 75% of all cases across all divisions since 2017-18.<sup>7</sup>

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<sup>1</sup> AAT Caseload Report For the period 1 July 2018 to 30 June 2019. Available at <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2018-19.pdf>.

<sup>2</sup> AAT Caseload Report For the period 1 July 2019 to 30 June 2020. Available at <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2019-20.pdf>.

<sup>3</sup> AAT Caseload Report For the period 1 July 2020 to 30 June 2021. Available at <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2020-21.pdf>.

<sup>4</sup> AAT Annual Report 2020-21, Chapter 3 'Performance', Table 8 at page 31.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid, page 31

In our opinion, there are probably a number of factors contributing to delays in the AAT. These include the complexity of tax matters, a lack of preparation by taxpayers, the ATO's approach to debt collection and significant gaps between the hearing of matters and decision. With respect to complexity, we note that the Australian Taxation Office's (ATO) improved alternative dispute resolution (ADR) processes have been successful in resolving a higher number of cases before they are escalated to the AAT, especially those that are less complex. As a result, the cases going before the AAT are likely to be those that are higher in complexity or in which the parties positions are more entrenched. Cases of this nature require greater resources to resolve and manage. Insufficient resources with sufficient expertise in taxation and administrative law within the AAT are also likely to result in further delays for cases.

Another significant factor contributing to delay in the AAT is the lack of preparation by taxpayers, particularly where taxpayers are not represented by experienced professionals. It is common for taxpayers to be unaware of the evidence required to satisfy their onus in tax cases or fail to understand what a review entails. This can often result in a series of case conferences and extensions of time granted by the AAT to ensure taxpayers are provided with procedural fairness. The approach contrasts with that adopted in other jurisdictions, in which taxpayers are typically expected to have prepared their case in advance of litigation and the cases are case managed with much stricter timetables with the hurdles for obtaining adjournments much higher. The matter of *Parr and Commissioner of Taxation* [2021] AATA 2038 illustrates this issue.

Further, other than in high risk cases, we understand that the ATO will generally not seek to recover debts whilst a taxpayer is disputing the assessment giving rise to that debt through the AAT. This can create an incentive for taxpayers to purposely be slow in responding to AAT timetables and seek to delay the progress of the matter in an attempt to defer recovery of the debt. Current government proposals to further limit the ATO's ability to recover disputed debts may exacerbate this issue going forward if a greater number of taxpayers seek review in the AAT as a means of deferring payment of their debt.

To address the above factors, we consider that the AAT should have greater resourcing of members with expertise in tax to better address the large number of tax related cases on hand. Further, we consider that members should be selected through an independent process that has the goal of selecting a diverse range of members who are best suited for the role. This will allow the AAT to best resolve taxpayer disputes in a timely and efficient manner. Independently determined member appointments will also ensure that integrity and good standing of the AAT will be maintained or enhanced further.

We also consider that member tenure should be extended beyond the current standard. Extending member tenure will promote stability by ensuring cases are overseen and resolved by those that are best suited. It will also better facilitate an increased consistency and organisational memory in the decisions made by the AAT.

### *Reduction in case times*

Efficient and timely resolution of tax disputes is imperative for the operation of Australia's tax system, especially when delays and uncertainty can materially impact the livelihood of taxpayers. In addition to the figures regarding cases completed within 12 months noted above, feedback from our members indicates that the average period between a hearing and decision for a case in the AAT is over 400 days.<sup>8</sup> In 2020 there were at least 13 cases in which the reasons for decision were delivered more than one year after the case was originally heard and in some cases the delay was more than two years. The matter of *Commissioner of Taxation v Ross* [2021] FCA 766 is illustrative of the problem and the consequences, where it was a delay of two years and two months between the hearing and delivery of reasons for decision was found to result in a denial of procedural fairness.

We consider that changes should be adopted that reduce the duration taken for a matter to be resolved in the AAT. Ideally, the AAT would seek to adopt a universal standard that now applies to the Small Business Tribunal which requires reasons for decision to be provided within 28 days of the hearing.

We note that, in large part, this issue can potentially be addressed through greater funding and resourcing of AAT members. In addition to this, members should be given an appropriate amount of time to write their decisions. We understand that under the current formula or approach used, members are effectively given eight hours or one working day to write each decision. As noted above, tax cases before the AAT tend to be complex or cases where the parties have entrenched positions. We note that given the complexity, the ATO and well-resourced taxpayers will have likely spent days or weeks researching and analysing their positions. It is not feasible for the decisions for these cases to be written within a day. Further, limiting the timeframe as described could potentially deter highly qualified candidates from applying to be members.

Accordingly, we recommend that the existing formula or approach be reconsidered in light of the growing complexity of tax cases before the AAT. We consider that a significantly more realistic timeframe should be provided to members to write decisions on tax matters.

Further, we consider that steps should be taken to increase the transparency and accountability of matters before the AAT. Greater transparency of the AAT's performance should be made publicly available, including a greater sampling of statistics regarding case length beyond the metrics currently provided. Examples include statistics regarding the average wait until a case is heard, the average length of time between the hearing and the decision, and the average age of cases which have not yet been determined. Greater transparency will likely lead to the awareness of potential blockers before they become systemic issues.

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<sup>8</sup> Member feedback indicates that in a sample of 268 cases over the past 5 years, the average period of time between a hearing and decision is 412 days.

This could be combined with members being held accountable for unreasonable delays in making decisions. Noting the difficulties of the cases before members, and increasing workload, each case would likely need to be considered on its own merits. As a result, the appropriate mechanism for accountability may be the increased powers for Deputy Presidents to address unreasonable delays or potential non-performance. Increasing accountability will instil further confidence in the AAT and ensure that it is able to remain a trusted and efficient institution in the resolution of taxpayer disputes.

### *Small Business Taxation Division*

The Tax Institute also notes that although the Small Business Taxation Division has existed for less than 3 years, the figures noted above suggest its growing importance in allowing small businesses to have their tax disputes resolved in an effective way that is tailored to their situation. The Division's approach to case management,<sup>9</sup> provision of various ADR methods,<sup>10</sup> and commitment to deciding on matters within 28 days<sup>11</sup> has made the AAT a more viable and accessible avenue for small businesses.

The marked rise in matters before the Small Business Taxation Division between the 2018-19 to 2019-21 periods illustrates that this has been a previously overlooked part of the system that has greatly benefitted from the creation of a specific division. We are of the view that the Small Business Taxation Division should continue to receive the appropriate amount of support in order to ensure that the targeted taxpayers have a way to engage with the administrative review system that is best suited their needs and resourcing.

### *Visibility over case triage process*

The AAT uses case triaging processes to achieve a number of different outcomes. These include identifying cases for early intervention or ADR resolution,<sup>12</sup> managing caseloads, and identifying cases that do not require a hearing or are otherwise suitable for expedited decisions.<sup>13</sup> A special triaging process was also used to expedite AAT cases relating to COVID-19.<sup>14</sup> However, despite the wide use of case triaging, there is little available information about the triaging process, or the factors taken into consideration by the AAT's triaging team.

We consider that more information regarding the AAT's triaging process and factors considered be made publicly available. This will better allow applicants to ensure that they provide the relevant information to triaging officers, leading to a more efficient and effective triaging process.

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<sup>9</sup> See it, 'Guide to the Small Business Taxation Division'. Available at <https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/guide-to-the-small-business-taxation-division>.

<sup>10</sup> Practice Direction, 'Review of Small Business Taxation Decisions Practice Direction', clause 6.2. Available at <https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/review-of-small-business-taxation-decisions-practi>.

<sup>11</sup> Ibid, clause 8.1.

<sup>12</sup> AAT Annual Report 2020-21, page 102.

<sup>13</sup> Ibid, page 67.

<sup>14</sup> Practice Direction, 'COVID-19 Special Measures Practice Direction – Migration and Refugee Division' Clause 5. Available at <https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/COVID-19-Special-Measures-Practice-Direction-Migration-and-Refugee-Division.pdf>.

### *Ensuring low cost and procedurally simple environment*

The AAT was originally designed with the intention of creating a low cost and informal environment for individuals and businesses to seek resolution for adverse administrative decisions. However, over time the actual cost and procedural steps have resulted in matters that are before the AAT being equal in cost, formality and process as courts. In part, we consider this is caused by the AAT's practices concerning the relevant evidence taxpayers are required to produce and the requirement in virtually all cases to provide written witness statements.

We note that taxpayers have basic evidentiary requirements to substantiate their claims under the *Income Tax Assessment Act 1997* (Cth). The nature of the evidence required will depend on the wording of the relevant tax provisions. However, based on feedback from our members, matters brought to the AAT in practice often require taxpayers to produce evidence that is not required in the tax legislation, or in an alternate format to what is required. For example, feedback from our members indicates that there is an increasing reliance on witness statements, expert opinions and other written evidence for matters before the AAT. We note that these items of evidence can cost significant amounts to prepare, even for simpler cases, and are not required for all provisions in the taxation legislation.

We consider that the AAT should review its current processes and procedures, ensuring that they do not unnecessarily add unreasonable burdens on taxpayers and continue to promote a low cost and informal environment. A potential option to reduce the barriers to bringing a matter before the AAT include decreasing the reliance on written statements where not required at law, and instead allowing taxpayers greater opportunities to provide oral evidence, particularly in matters where the tax in dispute is low (e.g. under \$100,000) and the cost of preparing written statements is likely to act as a substantial barrier for taxpayers.

### **Re-establishment of the ARC**

The Tax Institute also supports the re-establishment of the ARC. Although the ARC was dissolved in 2015 in order to reduce the size of the public sector,<sup>15</sup> we believe that the current oversight hierarchy has been unable to replicate the important role played by the ARC.

We consider that the ARC ensures that Australia's administrative review system operates in a fair, efficient and expedient manner. The ARC provides important oversight over tribunals, judicial review, privative clauses, administrative discretions, and the adequacy of existing review mechanisms. This is increasingly important in an environment where government's discretionary powers are extending and new mechanisms for making administrative discretion are created. Further, the proactive abilities of the ARC is important in identifying potential issues and developing systematic measures to address them before they adversely impact taxpayers.

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<sup>15</sup> Parliament of Australia, Abolition of the Administrative Review Council. Available at [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201516/ARC](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/ARC).

## Other Considerations

### *Early resolution of matters*

The current drafting of the *Taxation Administration Act 1953* regarding the tax dispute resolution process does not provide sufficient opportunities to expedite and resolve important cases. Broadly, the steps in the current process require taxpayers to be subject to numerous review and objections processes before they are able to appeal to the AAT or more senior courts. It has been acknowledged that this process can take significant resources, and may not contribute the resolution of issues which establish or challenge precedential views.

The Australian Small Business and Family Enterprises Ombudsman (**ASBFEO**) has noted that the cost, time and stress associated with the internal review processes often means it is not viable for small businesses to seek a further review of their decision.<sup>16</sup> In our opinion, this statement also applies to taxpayers who are not small businesses as they are largely subject to the same internal review processes. Further, as noted by the Inspector-General of Taxation and Taxation Ombudsman (**IGTO**), objections may add an unnecessary delay for disputes with precedential value or concerning the ATO's view on the application of the law.<sup>17</sup> Objections in these instances are unlikely to result in a different outcome as the ATO processes require the ATO decision maker to apply the existing presidential views used to determine the original assessment.<sup>18</sup>

In our opinion, the framework for resolving cases with precedential value should be re-visited. These cases can take lengthy periods of time to resolve and can potentially adversely impact the lives of millions of taxpayers. Issues can have an even greater adverse impact when time is of the essence. Accordingly, we are of the view that consideration should be given to solutions that allow for the expedient resolution of matters with important precedential value. The IGTO has noted the public benefits and cost savings, to both taxpayers and the ATO, of expedited resolution processes.<sup>19</sup>

A potential solution is the provision of a right for taxpayers to elect a court or tribunal appeal prior to the current objections process. This would allow taxpayers to efficiently have their matters heard at a lower cost. We note that such an election process would need to be carefully considered and designed to ensure all endeavours are made to prevent unnecessary disputes making their way to court or the tribunal.

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<sup>16</sup> ASBFEO, 'ATO practices regarding small businesses'. Available at <https://www.asbfeo.gov.au/sites/default/files/documents/ASBFEO-ATO-final-report-to-Treasury.pdf>

<sup>17</sup> IGTO, 'A report on aspects of the ATO's administration of JobKeeper boosting cash flow payments for new businesses', (2020), page 48; IGTO, 'Review into the management of tax disputes', (2015), pages 47-48 and 50-52.

<sup>18</sup> IGTO, 'A report on aspects of the ATO's administration of JobKeeper boosting cash flow payments for new businesses', (2020), pages 46-47; ASBFEO, 'ATO practices regarding small businesses'. Available at <https://www.asbfeo.gov.au/sites/default/files/documents/ASBFEO-ATO-final-report-to-Treasury.pdf>

<sup>19</sup> IGTO, 'A report on aspects of the ATO's administration of JobKeeper boosting cash flow payments for new businesses', (2020), page 48.



Further, the AAT and ATO should be encouraged to identify new law and cases with important precedential value at an earlier stage in the dispute resolution process. These cases could then be expedited for hearing or, at the very least, provide the AAT to prepare and consider the relevant law before the matter is heard and shorten the time taken to make the decision. This would allow precedentially important cases proceed through the dispute process in a more efficient manner.

An alternate solution could be to establish an independent panel to make determinations on such matters, and for those determinations to hold an appropriate level of precedential value. We note that this would not replace the current dispute resolution process. Instead, we consider that applications under this process would need to have the appropriate level of importance or urgency to justify why they could not go through the usual pathways, or why it is of public interest to expedite it.

#### *Removing some appeal limitations*

Currently, private binding rulings (**PBRs**) issued by the ATO face some limitations when being appealed to the AAT by taxpayers. Appeals to at AAT can only be decided on the facts decided in the PBR. Noting the length of time taken for matter to proceed to the AAT after the ATO's internal review process, it is not uncommon for the taxpayer's circumstances to change. As a result, the underlying assumptions or expected facts need to be updated to reflect the reality of the taxpayer's circumstances and ensure the taxpayer receives appropriate guidance and protection.

However, taxpayers are unable to alter the facts of the PBR during the AAT hearing and are instead required to lodge a request for a new PBR. This requirement imposes significant costs and notably increases the time taken for taxpayers to receive correct binding advice. Accordingly, we consider that the AAT should be able to update the facts of a PBR during hearings. This will ensure that the PBR better reflect the taxpayer's actual circumstances while reducing the costs and allowing for a more expedient process.

## **APPENDIX B**

### **About The Tax Institute**

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.