



THE TAX INSTITUTE

THE MARK OF EXPERTISE

15 December 2015

Mr Ali Noroozi
Inspector-General of Taxation
GPO Box 551
SYDNEY NSW 2000

By email: tctp@igt.gov.au

Dear Mr Naroozi

Review into the Taxpayers' Charter and taxpayer protections

The Tax Institute welcomes the opportunity to make a submission to you in relation to the Review into the Taxpayers' Charter and taxpayer protections (**Review**).

Deficiencies with the Charter

Unenforceability

The Taxpayers' Charter (**Charter**), which is published by the ATO, explains the rights and obligations of taxpayers dealing with the ATO, rather than giving rise to standalone remedies.

The Charter does not have any legal status as a stand-alone document and is not enforceable. Tax practitioners would find the Charter more useful if it imposed enforceable obligations upon ATO officers and gave taxpayers rights and remedies (administrative and other) in respect of failures of ATO officers to comply with its terms. Accordingly, the Charter should be enshrined in statute.

Tax practitioners only rely on the Charter as a last resort once all other options have been exhausted, rather than as the starting point for an inquiry as to a taxpayer's enforceable rights and obligations. Whilst we appreciate that ATO officers generally endeavour to uphold the Charter, it would be of more use to those outside the ATO if it stated the consequences arising when ATO officers breach or fail to apply it and what a taxpayer can do in those circumstances.

We refer you to *Towards Greater Fairness in Taxation: A Model Taxpayer Charter* by Michael Cadesky, Ian Hayes and David Russell for STEP, CFE and AOTCA (2015) (**Model Taxpayer Charter**) which recognised enforceability as one of the shortcomings of taxpayer charters, which can result in such a charter being largely ignored by taxpayers, tax advisers and the tax administration.¹

¹ <http://www.taxpayercharter.com/page.asp?id=12>

Interaction with other documents

Taxpayers without good representation have no easy mechanism of knowing their rights in a dispute with the Commissioner. Good representation usually involves retaining legal counsel which can be a very expensive exercise. The ATO guidance and rules in relation to rights in a dispute are in various places on the ATO website and not easy to find or, if found, to pursue. Members have noted that, in their experience, some ATO officers also do not know what is in the Charter.

The Charter purports to refer to other ATO publications with further guidance. However it should be reviewed to ensure consistency with those other ATO publications, for example *Our Approach to Information Gathering* (which replaced the *Information Gathering and Access Manual* in November 2013). A member raised an issue where these two publications have been inconsistent in their guidance on a taxpayer's ability to obtain transcripts of interviews conducted under section 264 of the *Income Tax Assessment Act 1936* (Cth). This may be a result of different ATO publications that deal with the same issue being updated at different times.

In another example, the Charter provides information as to when the ATO will notify a taxpayer of a third party information request.² It sets out situations where the ATO would not normally tell the taxpayer concerned before contacting third parties for information. This includes "where we decide access without notice is appropriate". Such information is quite high level and members have asked whether more detail can be provided by the ATO as to their procedures.

The guidance should explain when the ATO will decide to request information from third parties in relation to a taxpayer and how the ATO will factor in the business risks to the taxpayer in making the decision to exercise their information gathering powers in this way. The guidance should also cover the amount of notice a taxpayer can generally expect in relation to the exercise of the power. There need to be parameters around the exercise of the power. Wherever possible, particularly where the taxpayer is just under routine review, we would like to see them being advised if a third party is being contacted. If the ATO does not consider the matter to be a routine review, that should also be disclosed to the taxpayer concerned.

Model Taxpayer Charter

Consolidating rights in one place

The text of the Model Taxpayer Charter can be found online.³ A number of rights dealt with in the Model Taxpayer Charter already exist in Australia but those rights are not necessarily contained in our Charter. Consolidating all taxpayer rights in the Charter would help to increase the recognition and accessibility of the rights that taxpayers already have.

The Charter to some extent already acts as a reference point for what remedies may be available to taxpayers elsewhere (such as through appeals under the *Taxation*

² https://www.ato.gov.au/About-ATO/About-us/In-detail/Taxpayers--charter/Taxpayers--charter---fair-use-of-our-access-and-information-gathering-powers/?page=3#Telling_you_when_we_ask_for_third_party_information

³ <http://www.taxpayercharter.com/charter.asp?id=16>

Administration Act 1953 (Cth), access to information under the *Freedom of Information Act 1982* (Cth) and protection of taxpayer information under privacy legislation and secrecy provisions). Having those remedies in the standalone Charter would make the document easier to use, and minimise the likelihood of inconsistency described above where the Charter and the documents it refers to are updated at different times.

The process of consolidating the rights in the Charter will also highlight any gaps with the rights applying to taxpayers in Australia when compared against the Model Taxpayer Charter. Global consistency of taxpayer rights and obligations will become increasingly important as cooperation and exchange of information between tax administrations across the world increases. In the context of cross-border information exchanges, consistent rights as to confidentiality, due process and taxpayer rights to review and correct or challenge an information request will be important.

Model litigant rules

Members have expressed concerns about the enforceability of the model litigant rules set out in the *Legal Services Directions 2005*. Although the ATO will largely respect those obligations, only the Commonwealth can enforce them. It may also be highly subjective as to whether the particular behaviour constitutes a breach of those rules. For example, a taxpayer may allege that the Commissioner has pursued an appeal without reasonable prospects for success, or has required the taxpayer to prove a matter that the taxpayer claims that the Commonwealth 'knows' to be true, but it may be difficult for the taxpayer to prove those allegations.

Members have also expressed concerns that the ATO itself does not necessarily adhere to the model litigant rules in practice, particularly in relation to using its substantial resources in raising and relying on technical defences or otherwise taking advantage of claimants who lack the resources to litigate legitimate claims. There needs to be a consistent reinforcement by the Commissioner that all officers continue to act in accordance with the Commonwealth's obligation to act as a model litigant.

Maladministration claims

Members have echoed the concern noted in the Terms of Reference in relation to the Review regarding the lack of transparency and independence of the Scheme for Compensation for Detriment caused by Defective Administration (**CDDA Scheme**). The perceived lack of independence stems from the ATO assessing the claims and the absence of any formal rights of internal or external review. For example, a member who took action to recover under the CDDA Scheme complained that the organisation in charge of determining the claim was patently biased against the claimant. The claim was time-consuming and eventually settled for 50% of the amount claimed, given the costs of pursuing the claim.

As the above example demonstrates, it is expensive to pursue the ATO for maladministration. In relation to compensation claims, the dollar value of what can be expected from a successful claim is unknown. Costs of pursuing a claim are prohibitive due to the complexity of the CDDA Scheme. In another example relating to the same member, where the taxpayer wanted to pursue the compensation claim following a successful AAT case, the member did not want to be engaged in a compensation claim

as it would be prohibitively time-consuming and the client may not ultimately recover a significant amount net of professional fees.

Taxpayers may now be able to complain to your office regarding the handling of compensation claims by the ATO, though that is not yet well understood. Further broader consultation would be required before modifying this scheme, given that the CDDA is a Commonwealth wide scheme under the Public Governance, Performance and Accountability Act 2013. Any substantive changes (such as the introduction of formal rights of review with respect to the exercise of the discretion to award compensation) would presumably have to be made in respect of the whole scheme and not just in respect of the ATO's administration of the tax law.

There is no reason why a prescribed scheme for dealing with claims arising from the defective administration cannot be developed so that taxpayers can assess the merits of whether or not to make such a claim and the maximum prescribed amount available as compensation.

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If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Arthur Athanasiou', with a horizontal line extending to the right.

Arthur Athanasiou
Vice President