

Inspector-General of Taxation
A Report to the Minister for Revenue and
Assistant Treasurer

The Board of Taxation

July 2002

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EXECUTIVE SUMMARY

There is strong support among business taxpayers, the tax advising professions and the community for the establishment of an Inspector-General of Taxation ('Inspector-General'). While primarily an adviser to government, the Inspector-General would represent the interests of taxpayers generally to the Government and the Australian Taxation Office ('ATO') with a view to improving the administration of the tax system from the perspective of taxpayers.

An Inspector-General would focus on system issues in tax administration, providing both an 'early warning' role for emerging issues, and a review role in relation to past issues. It will be important for the Inspector-General to be clearly distinguished from both the Ombudsman and Auditor-General.

Combining the Ombudsman's complaint handling role with the role envisaged for the Inspector-General may prejudice the proper discharge of the complaint handling role, especially if that would result in taxpayers being reluctant to raise their individual complaints. The Board of Taxation ('the Board') therefore favours the establishment of the Inspector-General outside the Ombudsman's office, with the Ombudsman retaining its existing function.

The Inspector-General will need to access individual taxpayer records to build case studies demonstrating the impact administrative systems have for individual taxpayers, but this should be subject to rigorous procedural requirements designed to protect the privacy of individual taxpayers.

In order to build and maintain the confidence of taxpayers in the new office, it will be necessary to establish accountability arrangements that allow the Inspector-General to be both perceived and actually independent of the ATO.

The procedures for appointing and removing the Inspector-General should be similar to those applying to statutory offices such as the commissioners of the Competition and Consumer Commission. This would involve appointment by the Governor-General and removal by the Governor-General only on the grounds of misbehaviour or mental or physical incapacity. The selection of the inaugural office holder will be crucial to establishing the reputation and integrity of the office. The inaugural Inspector-General would most likely be appointed from the private sector, but would also ideally have substantial experience in tax administration.

Subject to any Ministerial direction, the Inspector-General should be able to establish the office's own work program priorities. The Inspector-General would focus on the efficiency and effectiveness of existing tax systems, and would need to avoid becoming involved in the

establishment of new systems. The Inspector-General would liaise with the Ombudsman and the Auditor-General in setting programs and priorities, and would not be a member of the Board of Taxation.

Recommendations

Recommendation 1

The legislation establishing the Inspector-General of Taxation should include a clause stating that the object of the legislation is to improve the way in which the Australian Taxation Office administers the Australian taxation system from the perspective of taxpayers.

Recommendation 2

In achieving this objective, the functions of the Inspector-General of Taxation should be broadly defined to include providing advice to the Government, reviewing the systems used by the Australian Taxation Office to administer the tax system, and making recommendations to the Government about how these systems could be improved.

Recommendation 3

The Inspector-General of Taxation should be established outside the Ombudsman's office, with the Ombudsman retaining its existing functions.

Recommendation 4

The efficiency and effectiveness of the new office should be reviewed within five years of the appointment of the first Inspector-General of Taxation.

Recommendation 5

The Inspector-General of Taxation should have a right of access to individual taxpayer information held by the Australian Taxation Office, but only to the extent necessary to carry out its functions, and should be under an obligation comparable to that of the Ombudsman to maintain the confidentiality of any such information.

Recommendation 6

The Inspector-General of Taxation should be appointed by the Governor-General.

Recommendation 7

The Governor-General should be able to remove the Inspector-General of Taxation from office only for misbehaviour or physical or mental incapacity.

Recommendation 8

The Inspector-General of Taxation should be able to undertake work on both an ‘own motion’ basis and in response to a direction given by a Minister. The legislation should not prescribe how the Inspector-General of Taxation’s work priorities would be established.

Recommendation 9

The Inspector-General of Taxation should be required to report annually to the Parliament. The legislation should require that the annual report outline the matters on which advice has been provided to the Minister, and list the formal reports given to the Minister, in the reporting period.

Recommendation 10

The Inspector-General should be able to publish reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about where these systems could be improved (but not advice to the Government), but only after giving the Minister a reasonable opportunity to comment. A person whose interests would be adversely affected by the publication should be given a reasonable opportunity to comment, and to have their comments included in the publication. The Inspector-General should not be liable to be sued for an act done in good faith in exercise of any power conferred by the legislation, including the power to publish.

Recommendation 11

The Ombudsman’s role in reviewing administrative action taken by the Australian Taxation Office, both in response to a complaint and on an ‘own motion’ basis, should not be affected by the establishment of the Inspector-General of Taxation.

Recommendation 12

The Inspector-General of Taxation should be obliged to consult with the Ombudsman and the Auditor-General in establishing a work program and priorities.

Recommendation 13

The Government should appoint as the inaugural Inspector-General of Taxation someone who:

- (a) has a strong capacity to understand both commercial and public sector issues in tax administration;
- (b) is committed to community consultation and building constructive relationships with stakeholders; and
- (c) has earned the trust of both government and external stakeholders.

Recommendation 14

The establishment of the Inspector-General of Taxation should not affect the functions of the Board of Taxation.

Recommendation 15

The Inspector-General of Taxation should not be an ex-officio member of the Board of Taxation.

1. INTRODUCTION

1. On 29 May 2002, the Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan, published the Government's Consultation Paper on *The Inspector-General of Taxation in the Taxation System* ('the Paper'). At the same time, the Minister asked the Board to gather and consider the views of business taxpayers, the tax advising professions and the community on the Paper, and to make its own recommendations to her by 19 July 2002.
2. This report provides the Board's response to the Minister's request.
3. The Commissioner of Taxation assisted the Board in its deliberations on this report, but did not participate in the Board's decisions in this report. While also assisting in the Board's deliberations, the other *ex officio* members of the Board did not participate in the Board's decision on recommendation 10.
4. In general terms, the Government has asked the Board for advice on how its proposal to establish an Inspector-General might best be implemented, without reviewing the need for the new office.
5. The Board divided its task into three discrete elements.
6. First, the Board gathered the views of business, taxpayers, the tax advising professions and the community on the Paper. This work is discussed in Part 3 of this report.
7. Second, the Board considered the views gathered by it and developed its own recommendations on the proposal advanced in the Paper. The Board discusses its recommendations in Part 4 of this report.
8. Third, the Board considered whether the establishment of an Inspector-General would have any implications for its own mission statement, charter and operations. The Board discusses this issue at Part 5 of this report.

The Consultation Paper

The Government's policy intent

9. The Government has indicated in the Paper that it proposes to establish an Inspector-General to strengthen the advice it receives on tax administration. The Minister's introduction to the Paper outlines the benefits sought to be achieved through the establishment of the Inspector-General:

The Government's ongoing objective is to ensure that the taxation system is fair and efficient, and operates to achieve its various policy roles without undue intrusion into the way individuals and businesses conduct their affairs. Where taxpayers feel that their tax affairs have not been dealt with fairly, there is a need for appropriate mechanisms to resolve those concerns within a reasonable time frame. ...

At present, a number of mechanisms have the aim of ensuring that taxpayers are treated fairly and in accordance with the law. ...

... the Government considers that there is scope to improve the existing taxation arrangements to better ensure that the tax system operates fairly for taxpayers.

The Inspector-General will not replace the existing points of review but rather will fill gaps that currently exist and help guide further improvements to them. The objective is to enable the Commissioner [of Taxation] to continue to independently administer the tax laws, by strengthening the framework for reviewing systemic issues arising from tax administration. It is also a means of improving the way the Commissioner interacts with, and is perceived to interact with, taxpayers.

10. The Paper comes after the Government's election commitment in *Securing Australia's Prosperity — The Coalition's Economic Policy*:

As a separate and distinct initiative, in a third term, the Coalition will strengthen the advice given to government in respect to matters of tax administration and process through the creation of a senior office, the Inspector General of Taxation. This position will report to the Parliament through the Treasurer and will provide a new source of independent advice. The role will act as an advocate for all taxpayers, including Australian business, and provide an avenue for more effective conflict resolution than currently exists.

11. The Paper contemplates that, in providing advice to Government, the Inspector-General would have both an 'early warning' and a 'review' role.

12. The early warning role would oblige the Inspector-General to advise the Government on matters that may become of major systemic concern with tax administration.

13. The review role would require the Inspector-General to prepare reports reviewing the systems used by the ATO to administer the tax system, and to make recommendations to the ATO and the Government about how these systems could be improved. The Paper identifies the following examples of ATO systems that could be reviewed by an Inspector-General: the self assessment system, the system for processing tax returns and other information, the rulings system, the audit system, penalties and interest, and systems for handling complaints and formal objections and appeals.

14. The Paper mentions that the Government anticipates that the effective discharge of these roles would improve confidence among taxpayers that the tax system is being administered fairly and efficiently, without undue intrusion into the way individuals and businesses conduct their affairs. It expects that this would improve relations between taxpayers and the ATO.

Review of governance arrangements for statutory authorities and office holders

15. The Board has noted that in *Securing Australia's Prosperity — The Coalition's Economic Policy* the Government also indicated that it 'will focus in the [current] term ... on improving the structures and the governance practices of all its Statutory Authorities and Office Holders, with particular emphasis on those that impact upon the business community'. The Government has indicated that this process of reform will be undertaken on a whole of government basis, will involve expertise outside the public sector, and will report directly to the Prime Minister.

16. The Board has been mindful of the need to ensure that it does not pre-empt the foreshadowed broader reform of governance arrangements for statutory authorities and office holders, particularly in relation to the ATO and the Commissioner of Taxation. It notes, however, that its task will necessarily involve consideration of the governance arrangements that should apply to the Inspector-General.

Implementing the policy intent

17. The Paper canvasses the following three operational structures for establishing an Inspector-General:

- (a) Option 1: The Government's preferred option would establish the Inspector-General as a statutory office under its own enabling Act.
- (b) Option 2: As for Option 1, except transfer to the Inspector-General all the Ombudsman's functions and powers concerning tax matters.
- (c) Option 3: Establish the Inspector-General within the Ombudsman's office, possibly as a specific purpose Deputy Ombudsman.

18. The Paper also raises a number of specific issues that the Government will need to address in establishing an Inspector-General. In general terms, these relate to the Inspector-General's functions and powers, accountability arrangements, relationships with other 'points of review' in the tax system (most notably the Commonwealth Ombudsman and the Board) and the characteristics of the inaugural appointee. A summary of the Paper is at Attachment A.

19. The Board has summarised the views it received on these issues in Part 3 of this report. Parts 4 and 5 set out in more detail the views put in submissions, together with the Board's

recommendations and reasons. The next Part of this report outlines what the Board did in response to the Minister's request.

2. COMMUNITY CONSULTATION AND EVALUATION

The Board's processes

20. The Board appointed one of its members, Associate Professor Alison McClelland, to have day-to-day carriage of its work on this project. In particular, Associate Professor McClelland oversaw the Board's consultations and consideration of the Paper. This appointment was consistent with the Board's recommendation in its report on *Government Consultation with the Community on the Development of Taxation Legislation* that there should be clear accountabilities for consultation processes.

21. To facilitate community input, the Board prepared a Consultation Plan setting out how it proposed to gather views on the Paper. The Consultation Plan was published on the Board's internet site. The Chairman of the Board issued a media release outlining the Board's role in relation to the Paper and mentioning the availability of the Paper. The Consultation Plan was also advertised in daily newspapers throughout Australia. A copy of the Plan is at Attachment B.

22. Associate Professor Alison McClelland convened meetings with external stakeholders in Melbourne and Canberra on 7 June 2002, and in Sydney 12 June 2002. A list of the organisations represented at these meetings is at Attachment H. The principal aim of these meetings was to assist external stakeholders and the Board to identify and discuss the issues raised by the Paper. A record of the discussion at these meetings is at Attachment H.

23. The Board received 34 submissions on the Paper from the individuals and organisations listed at Attachment C. Submissions received by the Board (apart from those received in-confidence) were published on its website and are included in Attachment I of this report.

24. The Board discussed the proposal to establish an Inspector-General at a number of meetings and teleconferences.

Other input

25. To assist it in forming its own views on the Paper, the Board also commissioned Professor John McMillan, Alumni Chair in Administrative Law at the Australian National University, to advise it on the administrative law and practice implications of establishing an Inspector-General. Professor McMillan's advice contrasted the Government's proposal with the existing arrangements for the review of tax administration, focussing on the efficiency,

effectiveness and accountability of the proposed arrangement. A copy of Professor McMillan's advice is at Attachment D.

26. Associate Professor Alison McClelland also discussed the Paper with the Commonwealth Ombudsman, Mr Ron McLeod, and with Mr Peter White, Executive Director, Performance Audit Services, Australian National Audit Office.

3. VIEWS FROM CONSULTATIONS — SUMMARY

27. A majority of submissions received by the Board were in favour of the Government's proposal to establish a separate office of Inspector-General. Of the 34 submissions received, only two expressed reservations about the establishment of the Inspector-General. Mr Haggstrom, a former Special Tax Adviser to the Commonwealth Ombudsman, suggested that the role envisaged for the Inspector-General could be undertaken by a better resourced Ombudsman. The National Institute of Accountants 'remains to be convinced that there is a gap that the [Inspector-General] needs to fill'.
28. A minority of submissions, including from CPA Australia, suggested that the Inspector-General should assume responsibility for the handling of individual complaints that are currently dealt with by the Ombudsman.
29. Relative to the Government's preferred option, the main issues raised in submissions related to the Inspector-General's role and reporting framework. Submissions were strongly of the view that the Inspector-General should act mainly, or solely, as an advocate of taxpayers' interests. A corollary, most argue, is that the operations of the Inspector-General must be transparent, and that the Inspector-General must be accountable to taxpayers. In particular, there is a very strong view that:
- (a) the Inspector-General should report at least annually to Parliament; and that the annual report should include, as a minimum, details of issues that have been brought to the Inspector-General's attention together with a brief explanation of any action taken on the issue and reasons why no action has been taken (where relevant); and
 - (b) all reports of the Inspector-General should be published unless there are exceptional circumstances.
30. Subject to the above reporting requirements, some submissions (for example, the Business Coalition for Tax Reform) acknowledged that the Inspector-General might also need to maintain a confidential advisory relationship with the Minister on tax administration matters.
31. The potential for some duplication or overlaps to occur between the Inspector-General and other offices such as that of the Ombudsman was identified in a number of submissions. A key recommendation of many of these submissions was the need for appropriate liaison and communication between the Inspector-General and these other offices to ensure that this issue is appropriately managed and maximum efficiency obtained.
32. A number of submissions suggested that there be a mechanism included in the framework under which the Inspector-General is established to ensure that where a

particular issue is examined, and recommendations made, the Inspector-General be able to obtain a formal reply or response from the Commissioner of Taxation or the Government.

33. It was suggested in a number of submissions that it is important that the Inspector-General be able to consider broader tax policy and law design issues where necessary if the office is to be effective in addressing tax administration issues. Some submissions went on to point out that such an approach is consistent with the integrated tax design process proposed by the Review of Business Taxation in which the development of tax policy and tax legislation are also influenced by tax administration issues.

34. Most submissions considered that it was vital for the Inspector-General to have the power to examine systemic issues of tax administration and that the primary focus of responsibilities should be in this area. There was also a clear view that the Inspector-General should have broad investigative powers and access to information to carry out the role and that sufficient resources should be made available to enable the office's functions to be carried out effectively. The view expressed in many submissions was that the level of funding proposed by the Government for the Inspector-General was inadequate.

35. Submissions took the view that the most suitable candidate for the position of Inspector-General would have significant private sector tax experience with some knowledge of the tax administration from a public sector perspective being an advantage.

36. In other respects, submissions were broadly supportive of the preferred options or approaches outlined by the Government in its paper. As might be expected, views expressed in written submissions were consistent with those expressed in the course of focus group meetings convened by the Board.

37. More detailed comments on particular issues raised by submissions are included in the next Part of this report.

4. ASSESSMENT OF THE ISSUES

Inspector-General of Taxation: objects and functions

The Consultation Paper

38. The Paper indicates that the Inspector-General would be 'established to strengthen the advice given to government in respect of tax administration and process. [The Inspector-General would have] a focus on possible improvements to the operation of the system, particularly from the perspective of taxpayer compliance.'

39. As mentioned at paragraphs 11 to 13, the Inspector-General would provide advice, reports and recommendations to the Government on the way the ATO administers the tax system. The Inspector-General would seek to act as a catalyst for discussion and change within the ATO before the matter has had a significant impact on taxpayers.

40. The Minister has indicated that '[t]he Inspector-General will not replace existing points of review but rather will fill gaps that currently exist and help guide further improvements to them'. The existing points of review include the Ombudsman and the Auditor-General.

41. The Government intends that the Inspector-General should assist it in its stewardship of the tax system on behalf of the community. The Inspector-General would be established in response to calls by taxpayers for the Government to establish a source of advice on tax administration issues that is independent of the ATO and the Treasury Department. The new office would raise with the ATO tax administration issues that are likely to be of concern to taxpayers generally. In this sense, the Inspector-General would act as an advocate for taxpayers generally, and provide an avenue for conflict resolution between taxpayers generally and the ATO.

42. The key difference between the Inspector-General and both the Ombudsman and the Auditor-General is that while the Inspector-General would report to the Minister, the Ombudsman and the Auditor-General report through the Parliament to the public at large. The service provided by the Inspector-General to the executive arm of government would be akin to that provided by the internal auditor of a large corporation, while the services provided to the Ombudsman and the Auditor-General are more in the nature of an external auditor. While each office would review systemic issues in tax administration, the different accountability arrangements would provide the distinguishing characteristics for each office.

Submissions

43. Submissions were overwhelmingly in favour of the establishment of the Inspector-General as an additional point of review in the system.

44. However, submissions generally saw the Inspector-General as having a strong emphasis on acting as an advocate for taxpayers, rather than as an adviser to Government. The Business Coalition for Tax Reform suggested that '[t]he objectives of the Inspector General [should be] to improve the administration of tax in Australia from the perspective of taxpayers and to ensure the administration of taxation continuously strives for excellence in efficiency, fairness, accountability and transparency'.

45. Some submissions suggested that there has been a shift in the Government's emphasis. For example, the Institute of Chartered Accountants in Australia commented that:

... the PM and the Treasurer at the [election] painted the picture of the [Inspector-General] as a watchdog protecting the community interests, a 'champion for business', whereas now we see that the position has been described as more of a 'new independent adviser to Government on the tax administration system', and in carrying out those duties 'would be expected to consult the community'.

There seems to have been somewhat of a shift from the initial rationale for the position, from an advocate for change for business, to that of another intermediary between the community, the ATO and the Government.

46. A strong view from submissions was that the role of the Inspector-General must be clearly articulated by the Government. Ernst & Young commented:

It is not entirely clear from the consultation paper what the fundamental role of the Inspector-General is, or whose interests the Inspector-General should represent when performing that role.

The consultation paper proposes that the role of the Inspector-General of Taxation is to strengthen the advice to government on matters of tax administration and process. This conveys the impression that the primary role of the Inspector-General of Taxation is to provide advice on issues raised by Treasury Ministers.

At the same time, however, the consultation paper also envisages that the Inspector-General of Taxation would also be able to investigate concerns raised by taxpayers and groups of taxpayers that are due to actual or potential systemic issues confronting the tax administration system.

We believe it is essential to clarify the fundamental role of the Inspector-General of Taxation and whose interests the Inspector-General is intended to represent when performing that role.

47. The Business Coalition for Tax Reform, CPA Australia, and Deloitte Touche Tohmatsu each proposed that the enabling legislation should include an objects clause. The Business Coalition for Tax Reform mentioned that ‘it is particularly important that the objectives of the [Inspector-General] are explicitly stated to avoid the danger that the [Inspector-General] will be seen as the panacea to all the ills of the taxpaying community’.

48. Submissions supported the Inspector-General having broad powers to review systemic issues in the tax system. In common with a number of submissions, the International Bank and Securities Association of Australia noted that ‘it will be necessary for the Inspectorate to consider tax design and policy issues to the extent that deficiencies in these areas are reflected in the administration problems’ (see also Savings Factory, Deloitte Touche Tohmatsu, Corporate Tax Association, Taxation Institute of Australia, Australian Institute of Company Directors, Business Coalition for Tax Reform, KPMG, CPA Australia and Ernst & Young).

49. The Institute of Chartered Accountants in Australia noted that the role of the Inspector-General would most likely develop over time, and be shaped by the incumbent. The Business Coalition for Tax Reform considered that the Inspector-General’s role should extend to reviewing ‘cultures and behaviours in the administration of taxation rather than purely issues of administrative systems’.

50. Some submissions agreed with a suggestion made in the Paper that the Inspector-General could also be asked to provide advice when the Government considers new tax policy measures that are likely to have significant implications for taxpayer compliance (see KPMG and the Institute of Chartered Accountants in Australia). This was seen to be broadly consistent with the principles of integrated tax design (see CPA Australia).

51. A different view was put by the Australian Chamber of Commerce and Industry:

The tax systems that the Inspector-General should be examining should include all aspects of the tax system including policy, legislation and tax administration.

Where the Board is working on a potential new tax measure the Inspector-General should be familiar with it but should not be an active participant in the development of the tax system. Involving the body that is to check that the tax system is functioning appropriately in establishing the tax system may lead to a perception of, or actually be a, conflict of interest.

The Inspector General should be able to give advice freely to bodies examining current flaws in the tax system or that are envisaged in a prospective measure

but should not be on any panel taking decisions on the new tax measure, and must only be a contributor.

Were the Inspector General to be an active decision maker in developing a new tax policy or system then this role may compromise the Inspector General's impartiality and objectivity. In addition, active involvement will implicate the Inspector General in the new tax arrangements and thus reduce the perception that the Inspector General can be turned to for relief of failings of the new tax arrangements. ...

The Inspector General will not be able to perform as a monitoring body of the tax system if actively involved in developing the tax system and thus should not be involved in the establishment of new tax policy.

52. A number of submissions suggested that the Inspector-General should have a broad jurisdiction extending to every legislative function or power conferred on the ATO, and not merely to income tax (see Australian Institute of Company Directors, Business Coalition for Tax Reform, Corporate Tax Association, the Institute of Chartered Accountants in Australia and the Taxation Institute of Australia). On this view, the Inspector-General should, for example, be able to review the manner in which the ATO administers legislation concerning income tax, fringe benefits tax, goods and services tax and other indirect taxes, wine equalisation tax and other excises, and superannuation.

Summary of submissions

There is a range of views about the role an Inspector-General of Taxation would be expected to fulfil. While some see the role as an adviser to government, a majority of submissions saw the role primarily as an advocate for taxpayers. There was also support for the legislation establishing the Inspector-General of Taxation including an object clause clarifying the purpose of creating the Inspector-General of Taxation.

The Board's conclusions

53. The Board considers that, to be effective, the Inspector-General will need to add value to the tax system in a way that is clearly distinguishable from the functions performed by the Ombudsman, the Auditor-General and the Board. The relationship between the Inspector-General and the Board is discussed in Part 5 of this report.

54. The Ombudsman's principal role is to address complaints made by individuals. The Ombudsman also has a discretion to conduct 'own motion' investigations, including into systemic issues concerning tax administration. The Auditor-General undertakes performance audits examining the economy, efficiency and administrative effectiveness of the ATO's administration of the tax system. The principal client of both the Ombudsman

and the Auditor-General is the Parliament, and through it the public at large. Both report directly to the Parliament.

55. In contrast, the Inspector-General would be an adviser to government in the interests of taxpayers. The effective discharge of the role will require the Inspector-General to be frank and open with taxpayers, particularly in relation to the development of its work program and priorities and reporting on its outcomes.

56. The Board considers that the Inspector-General should focus on improving the ATO's existing business. While the Inspector-General may sometimes identify the underlying policy as a source of compliance problems for taxpayers, and recommend that the policy be reconsidered, it would not be appropriate for the Inspector-General to review the policy. A review of existing policy should be undertaken using existing policy process, including those involving the Treasury Department and, if appropriate, the Board.

57. While there are arguments in favour of the Inspector-General participating in the development of legislation and administrative systems arising from policy initiatives, the Board believes this would not be appropriate. The Board's mission statement requires it 'to contribute a business and broader community to improving the design of taxation laws and their operation'. There would be unnecessary duplication in requiring both the Inspector-General and the Board to bring a taxpayer perspective to policy initiatives, and also potentially confusion among taxpayers about the roles undertaken by the two bodies. It may also be difficult for the Inspector-General to objectively review systems that the office has played a role in establishing. It is also largely for these reasons that the Board also recommends that the Inspector-General should not be a member of the Board (see recommendation 15).

58. The Board agrees with submissions that an object clause would be an important step in communicating to taxpayers the role that the Government expects the Inspector-General to fulfil. An object clause would also assist in establishing a clear public perception of the different functions to be performed by the Inspector-General, Ombudsman, Auditor-General and the Board. The Board also agrees that the Inspector-General's functions should be broadly defined to providing 'early warning advice' and 'systemic review' of all aspects of the ATO's business related to tax administration.

Recommendation 1

The legislation establishing the Inspector-General of Taxation should include a clause stating that the object of the legislation is to improve the way in which the Australian Taxation Office administers the Australian taxation system from the perspective of taxpayers.

Recommendation 2

In achieving this objective, the functions of the Inspector-General of Taxation should be broadly defined to include providing advice to the Government, reviewing the systems used by the Australian Taxation Office to administer the tax system, and making recommendations to the Government about how these systems could be improved.

Operational structure

The Consultation Paper

59. The Paper canvasses the following three operational structures for establishing an Inspector-General:

- (a) Option 1: The Government's preferred option would establish the Inspector-General as a statutory office under its own enabling Act.
- (b) Option 2: As for Option 1, except transfer to the Inspector-General all the Ombudsman's functions and powers concerning tax matters.
- (c) Option 3: Establish the Inspector-General within the Ombudsman's office, possibly as a specific purpose Deputy Ombudsman.

The case for Option 1

60. The arguments made in favour of establishing the Inspector-General as a separate statutory office, with the Ombudsman retaining its existing function, (that is, Option 1) include that:

- (a) the Ombudsman and the Inspector-General would each be separately accountable for discharging a discrete function;
- (b) it would provide transparency for the resources provided to each agency;
- (c) it would provide clarity in the role assigned to each agency; and
- (d) it would provide an opportunity for each agency to establish a clear public perception about its role.

The case for Options 2 and 3

61. The arguments made in favour of placing in the one office both the Ombudsman's complaint handling function and the Inspector-General's function (that is, Options 2 and 3) are that:

- (a) this would give the office a more complete understanding of the issues faced by taxpayers in their dealings with the tax system;

- (b) there would be a single agency from which taxpayers could seek assistance on tax administration issues;
- (c) there would be no potential for overlap between the roles of the Inspector-General and the Ombudsman;
- (d) there would be economies of scale in amalgamating the two functions in the one office, particularly in relation to corporate overheads; and
- (e) the Ombudsman's existing staff and other resources would provide an immediate pool of expertise upon which the Inspector-General could draw.

The case against Option 2

62. The arguments made against transferring the Ombudsman's complaint handling function to the Inspector-General (that is, Option 2) are that:

- (a) the carve out of tax matters from the Ombudsman's role may lead to confusion about the Ombudsman's role in addressing administrative complaints against Government agencies;
- (b) the Inspector-General's role as an adviser on tax system issues may be overwhelmed by the volume of individual complaints; and
- (c) transferring the complaint handling function to an Inspector-General within the Treasury portfolio may result in a perceived loss of independence in reviewing taxpayer complaints.

The case against Option 3

63. The arguments made against placing the Inspector-General within the Ombudsman's office (that is, Option 3) are that:

- (a) it would be more difficult to establish a public perception that there has been a change;
- (b) it would involve, within the one office, the Inspector-General reporting to the Treasury Ministers on tax administration system issues and the Ombudsman reporting to the Parliament as at present;
- (c) resources intended for the Inspector-General role may be diverted to addressing individual taxpayer complaints; and
- (d) taxpayers may see the Inspector-General role, particularly in relation to reporting to the Government, as reducing the Ombudsman's independence from Government.

Submissions

64. Option 1 was supported by the Business Coalition for Tax Reform, the Business Council of Australia, the Australian Chamber of Commerce and Industry, the Corporate Tax Association, the International Banks and Securities Association of Australia, the Institute of Chartered Accountants in Australia, the Taxation Institute of Australia, the Australian Institute of Company Directors, Deloitte Touche Tohmatsu and Mr/Ms K Taylor.

65. After commenting on some of the disadvantages of Option 1 mentioned above, the National Institute of Accountants suggested that:

These possible problems may be better overcome by combining the office of the [Inspector-General with the Special Tax Adviser to the Ombudsman by having the Inspector-General takeover (sic) the role of Special Tax Adviser independent of the Ombudsman or as part of the office of the Ombudsman. ... The [National Institute of Accountants] is concerned that these options were not properly discussed, as they have considerable merit and warrant further consideration.

66. Ernst & Young favoured the establishment of the Inspector-General as a specialist Taxation Ombudsman (that is, Option 2), having both the systems review role proposed for the Inspector-General and the complaint handling role currently held by the Ombudsman. CPA Australia, KPMG, Phillips Fox, Resolution Holdings Pty Ltd, Mr Shiel and Mr Verick also made submissions supporting Option 2, with CPA Australia commenting that:

While there are a number of advantages in the [Inspector-General] being independent, this raises a number of disadvantages especially regarding the potential for duplication, overlap of functions between the two bodies and potential lack of accountability in this arrangement.

We would particularly emphasise the importance of avoiding the potential for confusion, duplication and overlap which would inevitably arise if the Ombudsman retained his existing 'own motion' powers to investigate wider tax administration issues in addition to his responsibility to investigate individual complaints.

[Undertaking both systemic examination and individual complaints functions would assist] in providing a basis for direct understanding of the experience of taxpayers with the tax administration process.

67. KPMG put to the Board in support of Option 2 that:

... arguments used for not merging the Offices do not stack-up to any rigorous review. ...

We suggest that any purported confusion could be easily overcome by a limited marketing campaign, including explanations in the TaxPack. The merger of the

Ombudsman's function is unlikely to result in any significant consternation amongst taxpayers. ...

As it is proposed that the [Inspector-General] be established as a statutory authority within the Treasury portfolio, with independence from the Department of Treasury and the ATO, the argument that moving the Ombudsman's tax function under the Treasury portfolio will erode the independence of that function is tenuous at best. ...

Provided the Ombudsman's tax related staff and budget are transferred to the [Inspector-General's] office, and the new office receives an adequate budget for its responsibilities of investigating significant systemic issues, there should be no reason that the [Inspector-General] should be under-resourced, unless the budget allocation for the [Inspector-General's] investigation of systemic issues is inadequate.

We consider that there should be economies of scale created by the merger of the two functions, and hence real savings to taxpayers may result.

68. On the other hand, Mr Peter Haggstrom, a former Special Tax Adviser to the Ombudsman, suggested that a better resourced Ombudsman could take on the Inspector-General role (that is, Option 3).
69. A number of submissions considered whether merging the two roles in the Ombudsman's Office would affect its capacity to undertake the complaint handling role. CPA Australia, while supporting Option 2, indicated that:

... [t]he possibility of there being a perceived loss of independence in reviewing taxpayer complaints needs to be addressed by ensuring that the IGT is clearly independent of other government agencies such as the ATO and the Treasury and has a reporting responsibility to Parliament in line with that of the Ombudsman.

70. Ernst & Young considered that Option 3 would mean that:

... some taxpayers might be reluctant to bring their complaints to the Inspector-General if they perceive the additional role will create a closer relationship between the Ombudsman and the Government. That is, there is a risk that taxpayers will see this as a reduction in the independence of the Ombudsman.

Summary of submissions

There is strong support among submissions for establishing the Inspector-General of Taxation as a separate office, with some support for giving the Inspector-General of Taxation the Ombudsman's tax functions. There is little support for placing the Inspector-General of Taxation within the Ombudsman's office. There are concerns that placing the two functions within the one office would compromise the effectiveness of the complaint handling function.

The Board's conclusion

71. The Board considers that the weight of argument supports establishing the Inspector-General as a separate stand-alone office without disturbing the Ombudsman's existing functions in relation to tax administration.
72. There are arguments in favour of combining the functions of the Inspector-General and the tax business of the Ombudsman in the one office — either as a new office or within the Ombudsman's office. There may be economies of scale in combining the two roles in the one office, particularly in relation to corporate overheads and the broadening and deepening of corporate knowledge. It might also obviate concerns raised about the potential for duplication of effort and public confusion about roles, should the functions be located in different offices. The ATO could also be expected to incur additional administrative expenses were it required to deal with both the Inspector-General and the Ombudsman. Similarly, the Inspector-General and the Ombudsman would incur expenses in liaising with one another that would not be required were their functions undertaken by a single agency. It may also be possible to quarantine within the one office the resources intended for systemic review and complaints handling.
73. The Board has weighed these factors against two related considerations counting in favour of placing the functions in separate offices.
74. First, the Board has noted at paragraphs 38 to 42 that the Inspector-General would be an adviser to Government, while the Ombudsman reports to the Parliament. In describing the functions held by the two offices at paragraph 42, it has compared them to an internal and external auditor. The Board considers that it would not be appropriate to combine these two functions, with their different accountability arrangements, within the one office.
75. At this stage in the development of the Inspector-General, the Board considers that the risk to the effective performance of the complaint handling function implicit in Options 2 and 3 tilts the balance in favour of establishing the Inspector-General as a separate statutory office, with the Ombudsman retaining its existing functions, at least initially.
76. Professor McMillan notes in his advice to the Board that:

The distinguishing function which the Inspector-General is expected to perform is that of being an adviser to government. There are, of course, many statutory bodies that have a public reputation for fierce independence of government, but there are equally many that are perceived as being more compliant and responsive to government thinking. It would be a special challenge for an Inspector-General to carve out a unique role, as successfully as bodies such as the Ombudsman have already managed to do.

77. The effective discharge of the complaint handling role requires that individual taxpayers have the utmost confidence that the Ombudsman will deal with their complaint impartially, on its merits, and, if necessary, with confidentiality. A lack of confidence in these matters would undermine the Ombudsman's complaint handling role, as taxpayers would not bring their complaints to the office.

78. The Board considers that placing an advisory role with the Ombudsman's office, as proposed by Option 3, would involve a risk of a loss of public confidence in the impartiality of the Ombudsman. It would involve a reorientation of the Ombudsman's role that should not be undertaken without further public discussion. In particular, any such discussion would impact upon the Ombudsman's broader role in reviewing administrative action taken throughout Commonwealth agencies, and not just in relation to tax matters. Any public discussion should be undertaken in this broader context, and is clearly outside the scope of the proposal to establish an Inspector-General.

79. Moving the Ombudsman's complaint handling role to the Inspector-General, as proposed by Option 2, carries a similar risk to the level of community confidence in the handling of individual complaints concerning tax administration, and also changes the accountability arrangements, because the Ombudsman is accountable to Parliament.

80. The Board considers that it would not be appropriate to risk the community's confidence in the handling of individual complaints about tax administration by co-locating that function with an internal audit function clearly oriented towards providing advice to the Government in the same area. In summary, the Board agrees with the Taxation Institute of Australia that:

... the [Inspector-General] has no track record. It would be a pity to compromise the current status and integrity of the Ombudsman's role with an untested [Inspector-General's] role, regardless of which one 'subsumed' the other in a combined role. Perhaps once the [Inspector-General] is fully established, and has proved its worth, the issue of combining these roles might be re-considered?

Recommendation 3

The Inspector-General of Taxation should be established outside the Ombudsman's office, with the Ombudsman retaining its existing functions.

A review in five years

81. Professor McMillan noted in his advice to the Board that, compared to the Ombudsman, the Inspector-General is an 'untested idea and an untried model' in the Australian system of administrative review:

It is important to recognise nevertheless that there is no tradition or established base from which the Inspector-General can draw experience, nor any similar model in Australia to guide the development of the office. The power and influence of established models is well-illustrated by the experience of the Ombudsman. The concept of an Ombudsman's office is now reasonably well-settled in Australia. ... The model of the ombudsman is now enduring and successful. It is probably the least controversial feature of the Australian administrative law system, with a high degree of public recognition and government acceptability ... There is no similar tradition or experience from which the Inspector-General can draw. It is an untested idea and an untried model. With the variety of functions it is expected to perform, it runs the risk that it is expected to be all things to all people — a body that is meant to shadow the role of every existing agency, including the Commissioner, the Board, the Ombudsman, and parliamentary committees. It could, in one guise, be expected to be a kind of roving royal commission, responding especially 'to large scale community concerns on a particular matter'.

82. The Board recommended in its report on Government Consultation with the Community on the Development of Taxation Legislation that resources should be allocated to assessing new legislation to ensure that it is having its desired effect and to find out whether it can be improved. The Board also considers that there would be merit in examining ways to assessing performance and providing support to the Inspector-General, but this issue might be more appropriately addressed in the broader review of the governance arrangements for statutory authorities mentioned at paragraphs 15 and 16.

Recommendation 4

The efficiency and effectiveness of the new office should be reviewed within five years of the appointment of the first Inspector-General of Taxation.

The specific issues

83. The Consultation Paper identifies a number of more specific issues that will need to be addressed in establishing the Inspector-General.

Access to confidential information

The Consultation Paper

84. The Paper proposed that the Inspector-General would have information access powers based on those of the Ombudsman. The Inspector-General would be able to gain confidential access to information from taxpayers and the right to seek and receive information directly from the ATO on tax administration matters. However, individual taxpayer information would not be disclosed to Ministers or included in reports.

Submissions

85. Submissions were generally supportive of conferring on the Inspector-General a right of access to information held by the ATO about individual taxpayers as proposed by the Government, subject to a requirement to maintain the confidentiality of taxpayer information (see Australian Chamber of Commerce and Industry, Australian Institute of Company Directors, Business Coalition for Tax Reform, Corporate Tax Association, CPA Australia, the Taxation Institute of Australia, Deloitte Touche Tohmatsu, KPMG and Mr/Ms Taylor).

Summary of submissions

Submissions were generally supportive of conferring on the Inspector-General a right of access to information held by the ATO about individual taxpayers as proposed by the Government, subject to a requirement to maintain the confidentiality of taxpayer information.

The Board's conclusions

86. The Board agrees that the effective discharge of its functions would make it necessary for the Inspector-General to have access to individual taxpayer records. Access to individual taxpayer records may be required to confirm whether a particular problem exists, and to establish the extent of the problem. The Inspector-General may need to access individual taxpayer records to develop case studies about how an issue might affect individual taxpayers.

87. As is the case with the Ombudsman, the Inspector-General should be obliged to maintain the confidentiality of taxpayer information, with access to individual taxpayer information being subject to strong 'need-to-know' and security requirements. In particular,

the legislation should expressly preclude the Inspector-General from passing individual taxpayer information obtained from the ATO to the Minister or third parties.

Recommendation 5

The Inspector-General of Taxation should have a right of access to individual taxpayer information held by the Australian Taxation Office, but only to the extent necessary to carry out its functions, and should be under an obligation comparable to that of the Ombudsman to maintain the confidentiality of any such information.

Accountability arrangements

The Consultation Paper

88. The Paper notes that the grounds for removal of a statutory appointee typically include misbehaviour, physical or mental incapacity and bankruptcy. It notes that the grounds for removing an Inspector-General might also include poor performance in the position, provided the dismissal process is fair.

89. The Paper noted that the Inspector-General would give priority to addressing administrative issues that would have a positive impact on the largest groups of taxpayers.

90. The paper proposes that the Minister should be able to direct the Inspector-General to undertake an investigation into a specific matter. It also contemplates that the Inspector-General should be able to undertake 'own motion' inquiries into tax administration based on requests, or following the receipt of information, from the Commissioner of Taxation, Parliamentary Committees, taxpayers and the Board.

91. The Paper proposes that the Inspector-General would report annually to Parliament through the Treasury Ministers. The Inspector-General would also appear as necessary before Parliamentary Committees. It notes that the Treasury Ministers may also decide to table other reports prepared by the Inspector-General.

Submissions

92. Submissions suggest that the Inspector-General's role as an advocate for taxpayers requires a measure of independence from the executive arm of government.

93. The Business Coalition for Tax Reform suggested that the Inspector-General should be appointed for a fixed term of five years, and that the appointment be terminated early 'only for reasons set out clearly in the enabling legislation'. The Australian Institute of Company Directors favoured setting a fixed term.

94. Submissions were not in favour of the legislation setting out criteria for deciding the Inspector-General's work priorities. The International Banks and Securities Association of Australia was critical of the proposal that the priorities of the Inspector-General should be decided having regard to how many taxpayers were affected. It noted that 'small groups of taxpayers may never have their concerns dealt with by the Inspector-General given the likely demands on its limited resources, even though these groups may be important participants in the economy'.

95. Submissions were very strongly in favour of all advice and reports prepared by the Inspector-General being made public, with the majority of these preferring direct reporting to Parliament, with specified and limited exceptions (Mr/Ms Taylor, the Institute of Chartered Accountants in Australia, the Corporate Tax Association, Deloitte Touche Tohmatsu, the Business Coalition for Tax Reform, the Taxation Institute of Australia, KPMG, the Australian Institute of Company Directors, CPA Australia, Ernst & Young, Australian Chamber of Commerce and Industry, Phillips Fox).

96. The Business Coalition for Tax Reform, the Australian Chamber of Commerce and Industry and the Australian Institute of Company Directors suggested that the Inspector-General should be required to include in its annual report a summary of the matters brought to its attention and a list of all reports prepared.

97. CPA Australia commented that:

[t]he independence of the [Inspector-General] in dealing with systemic issues is just as important as it is for the handling of individual complaints.

It is important that the reporting framework includes a mechanism to elicit a formal reply by the Government or the Commissioner of Taxation depending on the circumstances.

98. The Business Coalition for Tax Reform considered that:

... except in very rare circumstances, the IGOT's reports should be made public ... [and] there should be clear and explicit criteria for not publishing reports.

A perception of conflict of interest would arise if the Minister responsible to the Parliament for the administration of tax could influence the reporting of the [Inspector-General] in this way [by selectively publishing the reports].

99. The Australian Chamber of Commerce and Industry favoured reporting to the Minister. It also noted that:

... unless there is an exceptional circumstance the report should also be made public. The [annual] report tabled in Parliament should be a detailed report of the issues lodged with the [Inspector-General]. Matters that have been addressed and the outcomes of these matters should also be furnished.

Should a report not be made public specific reasons should be given, and criteria for the withholding of reports, such as containing specific taxpayer information, should be established.

100. Phillips Fox considered that:

... it will be important for the Government that the [Inspector-General's] operations are characterised as not only transparent but also undeniably expert, responsive and professionally even-handed.

Summary of submissions

Submissions favoured the appointment of the Inspector-General of Taxation for a fixed term, with the appointment being liable to termination only for the reasons specified in the legislation. Submissions are very strongly in favour of the public being made aware of the activities of the Inspector-General of Taxation, with a capacity to report direct to the Parliament both annually and on an ongoing basis.

The Board's conclusions

Appointment and removal processes

101. The Board has noted that there are a variety of arrangements for the appointment, suspension and removal of the holders of a statutory office, providing various levels of security of tenure.

102. The almost universal practice is for statutory officers to be appointed by the Governor-General, and the Board considers that this would also be appropriate for the Inspector-General.

103. Some statutory officers may only be removed following an address from each House of the Parliament in the same session (for example, the Ombudsman, the Auditor-General and the Commissioner of Taxation). However, the holders of statutory offices are generally liable to be removed only for misbehaviour or mental or physical incapacity (for example, members of the Australian Competition and Consumer Commission). Very few statutory officers hold office at the pleasure of the relevant Minister (for example, the Commonwealth representative on the Criminology Research Council) or are liable to have their appointment terminated for poor performance (for example, a non-executive director of the Special Broadcasting Service). The Secretary of a Commonwealth Department (other than the Secretary of the Prime Minister's Department) may only be dismissed by the Prime Minister following receipt of a report from the Secretary of the Prime Minister's Department.

104. The Board considers that the Inspector-General should be liable to removal by the Governor-General only for misbehaviour or mental or physical incapacity. This in turn

implies that the Inspector-General should be established as a statutory office, and not as an Executive Agency under section 66 of the *Public Service Act 1999*.

Recommendation 6

The Inspector-General of Taxation should be appointed by the Governor-General.

Recommendation 7

The Governor-General should be able to remove the Inspector-General of Taxation from office only for misbehaviour or physical or mental incapacity.

Minister's power of direction

105. The Board supports the Minister being able to direct the Inspector-General to undertake particular inquiries. As a matter of practice, the Board anticipates that the Inspector-General would ordinarily give the highest priority to any request made by the Minister to investigate a matter, and that the direction giving power would rarely be used.

106. Nevertheless, unless appropriately restricted, the power to give directions could be perceived as potentially undermining the confidentiality of individual taxpayer information. It could lead to a perception, for example, that it might be used to require the Inspector-General to investigate the affairs of individual taxpayers. The power of direction should therefore be defined to rule out this possibility.

107. The Board agrees with submissions that the enabling legislation should not provide criteria for establishing priorities in the Inspector-General's work program. The Board nevertheless anticipates that the Inspector-General would establish the office's work program and priorities following consultations with taxpayers and having regard to directions given by the Minister. The legislation should provide that the Inspector-General's annual report must set out the work program and priorities that have been pursued during the reporting period. The Board has also recommended that the Inspector-General should be obliged to consult with the Ombudsman and the Auditor-General in establishing a work program and priorities (see recommendation 12).

108. The Board considers that, as an adviser to Government, the Inspector-General should report directly to the relevant Minister. Whether the Inspector-General's advice to the Minister should be published is a separate question.

Recommendation 8

The Inspector-General of Taxation should be able to undertake work on both an 'own motion' basis and in response to a direction given by a Minister. The legislation should not prescribe how the Inspector-General of Taxation's work priorities would be established.

Publication of advice

109. The Board has noted that submissions were very strongly in favour of the Inspector-General having an independent power to publish advice given to the Minister. Submissions suggested that a capacity to publish advice would strengthen the independence of the Inspector-General from both the ATO and the government. They also suggested that it would enhance the accountability of the Inspector-General towards taxpayers by making it easier to assess the Inspector-General's effectiveness as an advocate for taxpayers.

110. The Board has also noted the proposal at Part 4.1 of the Paper that arrangements might be established to transfer to the Inspector-General the Ombudsman's existing capacity to review the systems used by the ATO to administer the tax system.

111. The Government has indicated that its policy intent is to establish the Inspector-General as an adviser to government on the way in which the ATO administers the Australian taxation system. The Government has also indicated that the Inspector-General would be expected to provide advice from the perspective of taxpayers, and in this sense, would be an advocate for taxpayers.

112. The Board has therefore considered whether an independent capacity to publish reports is consistent with the policy intent to establish the Inspector-General as an adviser to government. The Board has considered a number of other arguments concerning the publication of advice provided by the Inspector-General.

113. First, the Board has considered whether any existing legislation allows an advisory body to publish its advice. The Board has noted that the Inspector-General of Intelligence and Security has a role similar to that proposed for the Inspector-General of Taxation, but has no independent capacity to publish its advice to the government. On the other hand, the Corporations and Markets Advisory Committee may publish advice or recommendations that it has given to the Minister on the policy, operation or administration of the corporations legislation (including law reform in relation to the corporations legislation) (see sections 148 and 155 of the *Australian Securities and Investments Commission Act 2001*).

114. Second, the effective discharge of the advisory function would require the Inspector-General to have a high degree of awareness and responsiveness to emerging issues within tax administration systems, with immediate discussions with the ATO and reporting to the Minister. The advice provided by the Inspector-General on matters that may become

of major systemic concern with tax administration is unlikely to be undertaken through long-term and formal processes that lend themselves to formal reporting processes.

115. Third, publishing advice given by the Inspector-General as a matter of course would most likely shift the balance of the Inspector-General's role towards being an advocate for taxpayers rather than an adviser to the Government as intended by the Government. The Board has discussed at paragraphs 53 to 58 the importance of ensuring clarity in the role of the Inspector-General. Reporting to the government would assist in building the public's perception of the Inspector-General as an adviser to government.

116. Fourth, the effective discharge of the advisory function would require a close, confidential and non-adversarial relationship between the Inspector-General and the Government that may be prejudiced by conferring on the Inspector-General an independent power to publish its advice to Government. A capacity to publish advice may undermine the office's role and value as an adviser to government.

117. Fifth, taxpayers may be more likely to bring their criticisms of the ATO's administration of the tax system to an Inspector-General who has a reputation for having a close, confidential and non-adversarial relationship with the Minister. A reputation of this kind would enhance the Inspector-General's effectiveness in advocating change on behalf of taxpayers.

118. Sixth, the author of advice that will be published ordinarily carries an obligation to provide natural justice to those who may be affected by the advice, particularly where the advice will be tabled in the Parliament and protected by Parliamentary privilege. For example, section 19 of the *Auditor-General Act 1997* obliges the Auditor-General to give the relevant agency 28 days to comment on a draft of a performance audit concerning the agency. A requirement of this kind would limit the effectiveness of the Inspector-General's advice to the Minister, particularly where urgent action is required.

119. Seventh, in Australia, the courts and the Parliament have long recognised a need to preserve the confidentiality of advice provided to Ministers, largely to ensure that the advice is candid. Similar considerations will apply to advice provided by the Inspector-General to the Minister.

120. For these reasons, the Board does not favour requiring the publication of all advice provided by the Inspector-General, as suggested by some submissions. However, the legislation should require the Inspector-General's annual report to outline the matters about which advice has been provided to the Minister in the relevant year, which would be broadly consistent with the requirement in section 31 of the *Inspector-General of Intelligence and Security Act 1986*.

121. The Board agrees with submissions that reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about how these systems could be improved, should be published as a matter

of course, with due regard, for example, to the need to protect the public interest in maintaining the integrity of the tax system, but considers that this should not be required by the legislation.

122. The critical question is whether the decision to publish those reports should lie with the Inspector-General or the Minister. The answer to this question involves a judgment about the place that the Inspector-General should occupy in the arrangements for reviewing the ATO's administration of the tax system.

123. At one end of the spectrum, the Parliament has already legislated to establish both an Auditor-General and an Ombudsman with independent powers to set their own work program and priorities, and to cause reports to be tabled directly in the Parliament without Ministerial intervention.

124. At the other end of the spectrum, the Government receives advice from the ATO and the Treasury Department about the way the ATO administers the Australian tax system. This advice is generally not published, except in accordance with the *Freedom of Information Act 1982*.

125. The Board has noted that the Minister for Revenue and Assistant Treasurer proposed in her introduction to the Paper that '[t]he Inspector-General will not replace existing points of review...'. The Board considers that the Inspector-General should give a priority to providing advice to the Minister, with responsibility for reports and recommendations lying generally with the Ombudsman and the Auditor-General. The Board would be concerned if establishing the Inspector-General were to come at the expense of the resources available to, and the functions undertaken by, the Auditor-General and the Ombudsman. In this context, the Board has recommended that the Ombudsman should retain its existing functions despite the establishment of the Inspector-General (see recommendation 3). The Board would welcome an assurance from the Government that the establishment of the Inspector-General would not result in a loss of resources or functions for either the Auditor-General or the Ombudsman.

126. Against this background, the Board has considered three broad options:

- (a) That the legislation should allow the Inspector-General to publish advice to the government, reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about how these systems could be improved.
- (b) That the legislation should allow the Inspector-General to publish reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about how these systems could be improved (but not advice to the Government), but only after giving the Minister a reasonable opportunity to comment on the report or recommendations before publication.

- (c) That the legislation should not allow the Inspector-General to publish advice, reports of reviews or recommendations given to the Minister.

127. Option (a) would put the office close to the point currently occupied by the Ombudsman. The Inspector-General would be able to publish advice, reports and recommendations undertaken pursuant to both the office's 'early warning' and 'review' roles mentioned in paragraphs 11 to 13.

128. Option (c) places the Inspector-General close to the point occupied by the Treasury Department, though the Inspector-General would have additional security concerning tenure of office (see recommendation 7) and access to confidential taxpayer information (see recommendation 5).

129. Option (b) provides a midpoint, designed to ensure that the Inspector-General would exercise the office's power to publish on a fully-informed basis after consulting with the Minister. However, unlike the Ombudsman, the Inspector-General would not be able to publish advice provided pursuant to the 'early warning' role mentioned in paragraphs 11 and 12.

130. The Board understands that the Government's policy intent is to position the Inspector-General as an adviser to Government, and that some may see this as having implications for the relationship that should exist between the Inspector-General and the Minister. However, the Board has also had regard to both the arguments put by submissions, and particularly to the strength and universality with which those views are held.

131. After careful consideration, the Board has concluded that, after consulting with the Minister, the Inspector-General should be able to publish reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about where these systems could be improved (but not advice to the Government). The publication of advice to the Government would prejudice the Inspector-General's ability to discharge its 'early warning' role.

132. The Inspector-General should be obliged, in deciding whether to publish reports and recommendations, to have regard to the public interest in maintaining the integrity of the tax system. The power to publish reports and recommendations should also be subject to a requirement to provide natural justice to anyone whose interests may be adversely affected by the publication of the report (for example, an officer of the ATO). In particular, they should be given a reasonable opportunity to comment on a draft report, and the Inspector-General should be obliged to incorporate those comments into the published report.

133. In common with the Ombudsman, the Inspector-General of Taxation should not be liable to be sued for an act done in good faith in exercise of any power conferred by the legislation, including the publication of reports and recommendations.

Recommendation 9

The Inspector-General of Taxation should be required to report annually to the Parliament. The legislation should require that the annual report outline the matters on which advice has been provided to the Minister, and list the formal reports given to the Minister, in the reporting period.

Recommendation 10

The Inspector-General should be able to publish reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about where these systems could be improved (but not advice to the Government), but only after giving the Minister a reasonable opportunity to comment. A person whose interests would be adversely affected by the publication should be given a reasonable opportunity to comment, and to have their comments included in the publication. The Inspector-General should not be liable to be sued for an act done in good faith in exercise of any power conferred by the legislation, including the power to publish.

Relationship with the Ombudsman and the Auditor-General

The Consultation Paper

134. The Paper suggests that it may be necessary to put in place arrangements designed to ensure that there is no duplication in the matters under investigation by the Inspector-General and the Ombudsman. The Paper contemplates that the Ombudsman might be required to notify the Inspector-General when the Ombudsman considers that an aspect of tax administration raises issues that might be more appropriately dealt with by the Inspector-General. It notes that this might involve the Ombudsman making a formal request to transfer the matter to the Inspector-General, with the Inspector-General being required either to accept the investigation or to allow the Ombudsman to continue to deal with the matter.

135. The Paper also contemplates that the Ombudsman might be required to formally advise the Inspector-General what 'own motion' investigations the Ombudsman proposes with respect to tax administration.

Submissions

136. The Business Coalition for Tax Reform suggested that 'the independence of the Ombudsman's office should not be restricted in, for example, the possible initiation of 'own motion investigations''.

137. Phillips Fox commented:

I don't believe the liaison arrangements ... are workable in practice and look to me to be a prescription for 'border skirmishing' and duplication / waste of resources, including the potential for unseemly posturing in the media.

138. There was some support for encouraging the Ombudsman and the Inspector-General to find administrative savings and efficiencies through the sharing of corporate overheads, particularly office facilities.

Summary of submissions

Submissions did not support restricting the Ombudsman's power to review administrative action either in response to complaints or on an 'own motion' basis.

The Board's conclusions

139. While not mentioned in the Paper, concerns about avoiding duplication of effort must also be present in relation to performance audits undertaken by the Auditor-General and formal reviews proposed to be undertaken by the Inspector-General.

140. The Ombudsman and the Auditor-General currently liaise with one another informally in establishing work programs and priorities in relation to the ATO, as both currently review the systems used by the ATO to administer the tax system, and make recommendations to the Government about where these systems could be improved. The work undertaken by the Ombudsman and the Auditor-General concerning systemic issues in tax administration is discussed in Attachment E.

141. The Paper does not suggest that the Ombudsman would be unable to review administrative action taken by the Inspector-General. Accordingly, were a matter to be transferred to the Inspector-General, as proposed by the Paper, it would be open to the Ombudsman to review the manner in which the Inspector-General examined the matter. This could have the undesirable result of the Ombudsman re-opening issues examined by the Inspector-General.

142. If the Government were to proceed with a referral procedure of the kind mentioned in the Paper, it would be necessary to consider whether a decision by the Inspector-General to undertake an investigation or to refer a matter back to the Ombudsman should be subject to review under in the Administrative Appeals Tribunal or under the *Administrative Decisions (Judicial Review) Act 1977*.

143. The *Ombudsman Act 1976* allows the Ombudsman to transfer a complaint to another agency when a complaint could be more conveniently or effectively dealt with by that agency. The relevant agencies perform a complaint handling function akin to the

Ombudsman, under either the *Privacy Act 1988*, *Telecommunications Act 1997*, *Employment Services Act 1994*, *Broadcasting Services Act 1992* or the *Public Service Act 1999*; and it is a pre-condition to the transfer of the complaint that the complainant could have instead complained to the relevant agency under the relevant Act.

144. However, the Board considers that the different functions assigned to the Inspector-General and the Ombudsman do not readily lend themselves to the transfer of investigations from the Ombudsman to the Inspector-General. Nor do their functions fit well with obliging the Ombudsman to advise the Inspector-General of any ‘own motion’ investigations that the Ombudsman proposes to undertake in relation to tax administration.

145. These arguments are similar to those that caused the Board to recommend in favour of establishing the Inspector-General as a separate statutory office, with the Ombudsman retaining its existing functions.

146. As mentioned at paragraph 42, while each office would review systemic issues in tax administration, they would bring a different orientation to the task. It would not be appropriate to require the Ombudsman, with a capacity to report to the public at large through the Parliament, to stop looking into a matter because the Inspector-General, an adviser to the Government, was also looking into the same issue.

147. Deloitte Touche Tomhatsu proposed that there should be a statutory obligation on the Inspector-General to consult with the Ombudsman and the Auditor-General in developing a work program and priorities. The Board notes the Director-General of Intelligence and Security is required to consult with the Auditor-General in establishing its priorities. The Board considers that the legislation establishing the Inspector-General should require the Inspector-General to consult with the Ombudsman and the Auditor-General in developing its work program and priorities.

148. The establishment of the Inspector-General may also result in a slight reorientation of the Ombudsman’s function in relation to tax administration. Rather than working directly with the ATO on improving administrative action, the Ombudsman may chose to work indirectly through the Inspector-General, by making recommendations on how the Inspector-General might improve its performance in reviewing systemic issues in tax administration. Whether the Ombudsman would wish to take up this option should be a matter for the Ombudsman.

Recommendation 11

The Ombudsman’s role in reviewing administrative action taken by the Australian Taxation Office, both in response to a complaint and on an ‘own motion’ basis, should not be affected by the establishment of the Inspector-General of Taxation.

Recommendation 12

The Inspector-General of Taxation should be obliged to consult with the Ombudsman and the Auditor-General in establishing a work program and priorities.

Characteristics of the inaugural appointee

The Consultation Paper

149. The Paper suggested that '[t]he person appointed to undertake the role of the Inspector-General would be expected to have an excellent technical knowledge of the taxation system and administrative practices more generally. The person appointed will also need to have a very good first hand appreciation of business practices and government processes. The person appointed would also need to be able to maintain an independent view of the tax administration system.'

Submissions

150. Submissions generally suggested that the Inspector-General should be able to bring a strongly independent business perspective to the office.

151. The Institute of Chartered Accountants in Australia said that the Inspector-General:

... needs to be an instrument of change, and the type of person that will not accept the leisurely rate that issues are currently progressed as a result of representations directly to the [Australian Taxation Office] from the professional and industry bodies. The position should carry the authority to ensure that, should progress on a project be unsatisfactory, or the [Inspector-General] is being stonewalled on a matter, a report to the Minister is an appropriate step, or a press release explaining why the issue cannot be resolved.

152. The Business Coalition for Tax Reform suggested that the Inspector-General will need to have access to first rate expertise in relation to technical and administrative aspects of the tax system.

153. The Corporate Tax Association considers that the Inspector-General would have:

[d]irect empathy and understanding of practical taxpayer experience with the tax system. ... it is considered unlikely that a career public servant or former politician would possess those necessary qualities.

Summary of submissions

Submissions considered that the Inspector-General of Taxation should have a strong understanding of taxpayer issues concerning tax administration, a capacity to pursue those issues with the Australian Taxation Office and the Government, and experience in both the public and private sector.

The Board's conclusions

154. The Board agrees that it is unlikely that the inaugural appointee would be found within the public service. It considers that appointees should have experience in both the public and private sector.

Recommendation 13

The Government should appoint as the inaugural Inspector-General of Taxation someone who:

- (a) has a strong capacity to understand both commercial and public sector issues in tax administration;
- (b) is committed to community consultation and building constructive relationships with stakeholders; and
- (c) has earned the trust of both government and external stakeholders.

5. THE BOARD AND THE INSPECTOR-GENERAL

155. The Board acknowledges that it has an interest in the proposal to establish an Inspector-General, given the possible impact of the new office on the Board's role.

156. The Board's Mission Statement requires the Board to contribute a business and community perspective to improving the design of tax laws and their operation. Its functions include providing advice to the Treasurer on improvements to the general integrity and functioning of the tax system. This clearly contemplates that the Board could become involved in tax administration.

157. The proposal to establish an Inspector-General raises the following issues for the Board:

- (a) How will the Board's functions be affected by the establishment of the Inspector-General?
- (b) Should the Board's Charter be amended to accommodate the establishment of the Inspector-General?
- (c) Should the Inspector-General be an ex-officio member of the Board? Assuming that the Inspector-General is not an ex-officio member, how should the Board develop a working relationship with the Inspector-General?

The Board's functions

The Consultation Paper

158. The Paper notes that the functions proposed for the Inspector-General might interface with the functions currently held by the Board, as follows:

- (a) The Inspector-General could be asked to provide advice when the Government considers new tax policy measures that are likely to have significant implications for taxpayer compliance. The Board's functions include facilitating community input to assist in ensuring the 'effectiveness' of legislative outcomes.
- (b) The Board would need to engage the Inspector-General (and vice versa) on any reviews of the effectiveness of tax legislation.

159. The Paper also mentions that where recommendations made by the Inspector-General require consideration of policy changes, existing policy advising processes would be put in train, including those provided by the Treasury Department and the Board.

Summary of submissions

No submissions were received on this issue.

The Board's conclusions

160. The Board's mission statement and functions contemplate a role for the Board in reviewing the administration of the tax system. However, the establishment of the Inspector-General implies that the Board would become involved in tax administration issues only if it believed that it could offer an additional, useful perspective on a particular matter.

161. The Board's functions include contributing a business and broader community perspective to improving the general integrity and functioning of the tax system. Once established, the Inspector-General would itself become a key component in the tax system. The Board considers that this may require the Board to provide advice to the Treasury Ministers on the efficiency and effectiveness of the Inspector-General.

Recommendation 14

The establishment of the Inspector-General of Taxation should not affect the functions of the Board of Taxation.

Inspector-General a member of the Board?

The Consultation Paper

162. The Consultation Paper asks whether the Inspector-General should develop a working relationship with the Board without becoming an ex-officio member.

163. The Paper proposes that the Inspector-General would not be a member of the Board because:

- (a) the Board and the Inspector-General have different roles in the tax system: unlike the Board, the Inspector-General will not be focussing on tax policy advice; and
- (b) there could be a perceived conflict of interest in appointing both the Commissioner of Taxation and the Inspector-General to the same Board.

164. The Paper notes that that the Board and the Inspector-General will need to develop a strong working relationship so that matters of common interest about the tax system can be pursued.

Summary of submissions

165. Submissions revealed mixed views on whether the Inspector-General should be a member of the Board. Those in favour of including the Inspector-General on the Board included CPA Australia and KPMG. The opposing position was taken by the Business Coalition for Tax Reform, the Taxation Institute of Australia, the International Banks and Securities Association of Australia, Ernst & Young, Phillips Fox and Mr/Ms Taylor.

Summary of submissions

Submissions revealed mixed views on whether the Inspector-General of Taxation should be a member of the Board, though the preponderance of opinion was that the Inspector-General of Taxation should not be a member of the Board.

The Board's conclusions

166. The Board notes that appointing the Inspector-General to the Board would tilt the balance of representation on the Board further towards the Government members.

167. The Board has recommended that the functions of the Inspector-General should not include providing advice to the Government on the design of laws to implement policy initiatives. There would be unnecessary duplication in both the Inspector-General and the Board bringing a taxpayer perspective to policy initiatives, and also potentially confusion among taxpayers about the roles undertaken by the two bodies. Also, participation in the policy development might make it difficult for the Inspector-General to objectively review that same policy later. For similar reasons, the policy orientation of the Board suggests that the Inspector-General should not be a member of the Board.

168. The Board agrees that it would not be appropriate for the Inspector-General to be a member of the Board. Rather, the better approach would be for the Board formally to meet with the Inspector-General regularly to discuss matters of mutual interest and work priorities, and to otherwise liaise with the office, principally through the Board's Secretariat, on an as needed basis.

Recommendation 15

The Inspector-General of Taxation should not be an ex-officio member of the Board of Taxation.

The Board's Charter

169. The Paper notes that establishing the Inspector-General will require consideration of 'whether the broad charter of the Board needs to be recast to remove any potential overlaps in respective roles'.

170. The Board considers that its present Charter accommodates the prospective working arrangements between the Board and Inspector-General contemplated at paragraphs 166 to 168, without any material amendments. At most, the Government may wish to amend the Charter to recognise the Inspector-General's role and responsibility within the Board's Mission Statement, as follows:

Recognising the Government's responsibility for determining taxation policy, and the statutory roles of the Commissioner of Taxation and the Inspector-General of Taxation, to contribute a business and broader community perspective to improving the design of taxation laws and their operation.

ATTACHMENT A: A SUMMARY OF THE CONSULTATION PAPER

The Government's policy intent

Senator Coonan's introduction to the Consultation Paper includes the following passage:

'The Government's ongoing objective is to ensure that the taxation system is fair and efficient, and operates to achieve its various policy roles without undue intrusion into the way individuals and businesses conduct their affairs. Where taxpayers feel that their tax affairs have not been dealt with fairly, there is a need for appropriate mechanisms to resolve those concerns within a reasonable time frame. ...

At present, a number of mechanisms have the aim of ensuring that taxpayers are treated fairly and in accordance with the law. ...

... the Government considers that there is scope to improve the existing taxation arrangements to better ensure that the tax system operates fairly for taxpayers.

The Inspector-General will not replace the existing points of review but rather will fill gaps that currently exist and help guide further improvements to them. The objective is to enable the Commissioner [of Taxation] to continue to independently administer the tax laws, by strengthening the framework for reviewing systemic issues arising from tax administration. It is also a means of improving the way the Commissioner interacts with, and is perceived to interact with, taxpayers.'

The broad options

The Paper outlines the following three options for establishing an Inspector-General of Taxation.

- Option 1: The Government's preferred option would establish the Inspector-General as a statutory office under its own enabling Act.
 - The Inspector-General would be an independent adviser to Government on the administration of the tax system.
 - The Ombudsman would continue to have responsibility for individual taxpayer complaints, but would advise the Inspector-General of any systemic tax

administration issues that the office identifies, with a view to the transfer of those issues to the Inspector-General.

- Option 2: As for Option 1, except transfer to the Inspector-General all the Ombudsman's functions and powers concerning tax matters.
- Option 3: Establish the Inspector-General within the Ombudsman's office, possibly as a specific purpose Deputy Ombudsman.

The preferred option in more detail

The Inspector-General's functions and powers

The Inspector-General would provide advice to the Minister on the fairness and efficiency of the administration of the taxation system as it applies to taxpayers.

- The Inspector-General would have no power to direct the Commissioner of Taxation in any matter, consistent with the Government's election commitment on establishing the office.
- The Inspector-General would also be independent of both the Department of the Treasury and the Australian Taxation Office.

The objective would be to find ways to help the Commissioner of Taxation and the Government improve the operation of the tax administration system, particularly its interface with taxpayers.

- The Minister could also ask the Inspector-General for advice on tax policy initiatives that are likely to have significant implications for taxpayer compliance.
 - The ATO's role in providing advice on these issues would not change.

The Inspector-General would develop a work program that gives priority to addressing tax administration system issues that will have a positive impact on the largest group of taxpayers.

The Inspector-General would raise with the Commissioner issues that might be resolved through changes in administrative practices.

- Some issues might also be raised earlier with the Minister depending on the scale of the issue and the timeframe for implementing a solution.
- The Inspector-General would also involve the Minister where the issue might require changes in policy and legislation.

The Inspector-General would be able to initiate an investigation on an 'own motion' basis, upon receipt of a request from the Minister, or upon referral from the Ombudsman.

The Inspector-General would have information access powers similar to those held by the Ombudsman.

- The Inspector-General would therefore have access to confidential taxpayer information held by the ATO to the extent necessary to perform the office's duties.
 - This would include the right to require the ATO to provide documents and answer questions, and the right to enter any ATO premises in order to inspect and copy documents.

Who might be appointed as Inspector-General

The Paper notes that the Inspector-General would have an excellent technical knowledge of the taxation system and administrative practices, as well as business practices and government processes. At the same time, the person would also need to be able to maintain an independent view of the taxation system.

Accountability arrangements

The Inspector-General of Taxation would be established as a statutory office within the Treasury Portfolio.

The Inspector-General would be appointed for a fixed term.

The appointment could be terminated for prescribed reasons (typically, misbehaviour, physical or mental incapacity and bankruptcy), but might also include poor performance in the position, provided the procedure for dismissal is fair.

The Inspector-General would give the Treasury Ministers an annual report, and other reports from time to time, on investigations proposed or completed, the processes pursued and the outcomes.

The Treasury Ministers would table the annual report in the Parliament, and other reports would be tabled at their discretion.

Relationship with the Ombudsman

The Paper notes that it would be necessary to ensure that there is no duplication between the Inspector-General and the Ombudsman (for example, when the Ombudsman encounters an issue relating more to how the administration system operates than to the 'fairness' of the process in a particular case).

It notes that it may not be practicable to define in the legislation what systemic issues should be addressed by the Inspector-General, and that in practice this would probably be resolved by agreement between the offices.

The Ombudsman might be required (either by legislation or a protocol between the offices) to notify the Inspector-General when the Ombudsman considers that an aspect of tax administration raises issues that might be more appropriately addressed by the Inspector-General.

The notice could take the form of a formal request to transfer the matter to the Inspector-General, who would be required to respond by declining or accepting responsibility for the matter.

The Ombudsman might also be required (either by legislation or a protocol between the offices) to formally notify the Inspector-General whenever the Ombudsman proposes to undertake an 'own motion' investigation on tax administration (that is, an investigation not based on a taxpayer complaint).

The Paper notes that the two offices would also need to develop guidelines about transfer of information between them.

The Ombudsman would be able to investigate administrative action undertaken by the Inspector-General, either in response to a complaint or on an 'own motion' basis.

The Inspector-General and the Board of Taxation

The Inspector-General would not be a member of the Board of Taxation, because:

- 'there could be a perceived conflict of interest in having both the Commissioner of Taxation and the Inspector-General as members of the same Board' (page 24); and
- the Board and the Inspector-General would have distinct roles, with the Board focussing on policy advice and the Inspector-General on tax administration systems.

Moreover, the Board would not be able to direct the Inspector-General to investigate a matter, but would be able to draw matters to the Inspector-General's attention.

However, the Paper notes that it would be necessary for the Board and the Inspector-General to develop a strong working relationship, and that it may be necessary to 'give consideration to whether the broad charter of the Board of Taxation needs to be recast to remove any potential overlaps in respective roles' (page 24).

ATTACHMENT B: BOARD OF TAXATION CONSULTATION PLAN

This Consultation Plan outlines how the Board of Taxation proposes to fulfil a request by the Minister for Revenue and Assistant Treasurer, Senator the Hon. Helen Coonan, for it to gather and present to her the views of business, taxpayers, the tax advising professions and the community on the proposals raised in the Government's Consultation Paper on the Inspector General of Taxation. Senator Coonan has also asked the Board to make recommendations to her on the proposals in the Consultation Paper.

You can obtain a copy of Senator Coonan's media release and the Government's Consultation Paper from www.treasury.gov.au or www.taxboard.gov.au, or by telephoning (02) 6263 4366.

Consultation processes

Ms Alison McClelland, a member of the Board of Taxation, will have general oversight of the Board's consultations on the Consultation Paper.

The Board will issue a media release summarising the consultation arrangements proposed in this Plan, inviting members of the public to participate in its consultations, and advising that a copy of this Consultation Plan may be obtained from www.taxboard.gov.au, by email from inspectorgeneral@taxboard.gov.au, or by telephoning Ms Jodi Wood on (02) 6263 4366.

The Board will also:

- (a) publicise the consultations through its web site;
- (b) call for comments on the Consultation Paper in advertisements placed in a daily newspaper circulating throughout each State and Territory;
- (c) write to a number of individuals and organisations who have expressed an interest in the proposal, or whom the Board considers may have an interest in the proposal, to advise them that the Consultation Paper is available for public comment;
- (d) invite the Ombudsman and the Australian National Audit Office to comment on the Consultation Paper (Ms McClelland will also invite the Ombudsman and the Australian National Audit Office to meet with her to discuss the Consultation Paper.);

- (e) ask the Australian Taxation Office if Ms McClelland, or a member of the Board's Secretariat, may seek comments on the Consultations Paper from participants in its industry liaison groups that meet during the consultation period; and
- (f) ask the Australian Taxation Office to publicise the consultations through its networks with tax practitioners.

Comments on the Consultation Paper may be sent to the Board by 25 June 2002 to:

The Inspector General Project
The Board of Taxation
c/- the Treasury
Langton Crescent
PARKES ACT 2600

or: inspectorgeneral@taxboard.gov.au

Senator Coonan has asked the Board to report to her by 19 July 2002.

The Board will make a copy of every submission available on its web site, www.taxboard.gov.au, unless the submission is confidential. The public release of submissions will also be governed by the *Freedom of Information Act 1974*.

To facilitate the preparation of submissions, the Board will invite representative stakeholders, groups or organisations to meetings early in the consultation period to discuss the Consultation Paper. It will invite the Treasury Department to participate in the meetings, to provide any further information stakeholders may require to better inform themselves on the issues raised by the Consultation Paper. Expressions of interest in participating in these consultations should be made to inspectorgeneral@taxboard.gov.au or to Ms Jodi Wood on (02) 6263 4366. The location and timing of the meetings will be determined in the light of interest expressed.

The Board may also hold a further round of consultations shortly after 25 June 2002, the closing date for submissions, to assist it in framing its own recommendations and in synthesising the comments made on the Consultation Paper. Participants in these consultations would principally be drawn from those who have given the Board substantive comments on the Consultation Paper.

The Board's report to Senator Coonan will include its own recommendations on the Consultation Paper, a synthesis of comments it receives on the Consultation Paper, and a copy of those comments. The Board notes that it has an interest in the proposal to establish an Inspector-General of Taxation given the possible impact of the proposal on the Board's role. The report will identify those issues separately.

For further information about this Consultation Plan, contact Mr Robert Patch: telephone (02) 6263 4339, or by email to inspectorgeneral@taxboard.gov.au.

ATTACHMENT C: LIST OF THOSE WHO HAVE MADE SUBMISSIONS

Australian Chamber of Commerce & Industry (ACCI)
Australian Institute of Company Directors (AICD)
Administrative Review Council (ARC)
Blissenden M
Brown R
Business Coalition for Tax Reform (BCTR)
Business Council of Australia (BCA)
Corporate Tax Association (CTA)
Council of Small Business Organisation of Australia Ltd (COSBOA)
CPA Australia
Deloitte Touche Tohmatsu
Ernst & Young
Fahy M
Financial Planning Association of Australia Limited (FPA)
Haggstrom P
Hastie G
Henzell LA
Institute of Chartered Accountants in Australia (ICAA)
International Banks and Securities Organisation of Australia (IBSA)
KPMG
Law Council of Australia
Law Institute of Victoria
Martyn S
National Institute of Accountants (NIA)
Phillips Fox
Resolution Holdings
Rosenblum R
Savings Factory
Sheil H
Taxation Institute of Australia (TIA)
Taylor G
Taylor K
Verick A
Wincott J

ATTACHMENT D: ADVICE BY PROFESSOR McMILLAN



THE AUSTRALIAN NATIONAL UNIVERSITY

FACULTY OF LAW
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20 June 2002

Mr Murray Edwards
Secretary
Board of Taxation

The Proposal for an Inspector-General of Taxation

I have been asked to comment, from an administrative law perspective, on the Consultation Paper issued by the Minister for Revenue and Assistant Treasurer, entitled *The Inspector-General of Taxation in the Taxation System*. I have been asked in particular to contrast the proposal with the existing arrangements for administrative review of taxation administration, drawing attention to the efficiency, effectiveness and accountability of the proposed new arrangement.

The current system of administrative law review of taxation administration rests on a few elements – judicial review of decisions by the Federal Court, merit review of decisions by the Small Taxation Claims Tribunal (a division of the Administrative Appeals Tribunal), investigation of defective administration by the Commonwealth Ombudsman, investigation of discriminatory administration by the Human Rights and Equal Opportunity Commission, internal review of complaints by the Complaints Resolution Service in the ATO, and the taxation objection system. The proposal for an Inspector-General does not directly touch the existing arrangements apart from the Ombudsman, and it is that element of the system on which I shall focus. I will do so in three ways, by discussing:

- the differences between the role and powers of the Inspector-General and the Ombudsman;
- the advantages that might be gained by establishing an Inspector-General; and
- the drawbacks, so far as the role and powers of the Ombudsman are concerned, that might arise from having an Inspector-General.

Contrasting the role and powers of the Inspector-General and the Ombudsman

There are similarities between the Ombudsman and the Inspector-General. Both agencies would have a role in investigating problems in taxation administration and making proposals for change. Both could exercise ‘royal commission’ powers in doing so, such as the coercive powers to demand access to premises, papers and people. Both conclude their investigation by providing a report and recommendation to government, with no power to overturn administrative action or to substitute a new decision.

There are a number of important differences. There is firstly a different emphasis in the conception of the function of both offices. The Inspector-General is described as a body that investigates tax administration issues but also as ‘a new independent adviser to Government on the tax administration system’. The Ombudsman does give advice to government in the reports that conclude the

Ombudsman's investigations, but that is not the focus or characterisation of the Ombudsman's role. It is rather to undertake independent investigation of whether there has been defective administration. Presentation of reports to government is a necessary product of that function, but does not itself provide the occasion or the focus of the investigation.

This difference in function is reflected in other differences in the way the role of both offices is to be discharged. The Inspector-General undertakes investigation at his or her own motion, on referral from Treasury Ministers, or at the request of the Commissioner of Taxation, parliamentary committees, and taxpayers. The Ombudsman by and large investigates complaints made by members of the public; the Ombudsman's own motion power of investigation is usually exercised as a consequence of the insights gained by the Ombudsman in investigating individual complaints.

Both offices would investigate the same range of taxation administration issues and whether the system is operating fairly and efficiently from the perspective of taxpayers. However, the Inspector-General is expected to focus on issues of a systemic nature: that is, upon issues that affect taxpayers generally, rather than upon whether there has been defective administration in relation to a particular taxpayer. That will remain the province of the Ombudsman. Presumably time will tell whether the Ombudsman would take less of a role and have less interest in investigating and reporting upon systemic issues in taxation administration.

Compatibly with the Inspector-General's advisory role and concern with systemic issues, the Inspector-General is expected to consult more widely, in and outside government. That option is open to the Ombudsman, but the office has customarily drawn from within and relied upon its own judgment in the discharge of its investigatory function.

The different focus of both offices is reflected also in the way in which investigative findings and recommendations are to be reported. There is no occasion, of course, for the Inspector-General to prepare a report to an individual taxpayer, since the Inspector-General does not have the function of investigating their complaints. The Inspector-General will report to Parliament annually, but is likely to report to Ministers, the Commissioner and the Board of Taxation as occasion requires: it is possible that that reporting function would become merged with ongoing consultation between those bodies. I note that the Consultation Paper describes the purpose of the recommendations of the Inspector-General as being to 'help the Commissioner of Taxation and the Government improve the operation of the tax administration system'.

Because of the Ombudsman's case investigation methodology, the preparation of a report on the findings and recommendations of the Ombudsman on each individual complaint or own motion investigation is an important characteristic of the office. This is highlighted in the *Ombudsman Act 1976* (Cth) in Part II Div 2 ('Reports'), which lists the different kinds of reports the Ombudsman can make and the criteria for making a report. The Ombudsman, unlike the Inspector-General, can make a special report to the Parliament. In practice this channel does not have great practical importance, since the Ombudsman has only ever made two special reports to Parliament (in 1985 and 1986). It is, nevertheless, an important symbol of the character of the office, of its complaint and reporting function, and of the independent ground the Ombudsman occupies in the system of government, having a relationship separately and equally with Parliament, the Executive and members of the public, individually and collectively.

The Consultation Paper specifically addresses the comparison between the Inspector-General and the Ombudsman 'as partners in reviewing different dimensions of tax administration'. The Paper notes that while they would work alongside each other, the Inspector-General's role 'would not infringe upon the existing role of the Ombudsman'. The two examples that are given are the contrast between individual complaints and systemic issues, and between 'the fairness of the process or judgements in a particular case' (the province of the Ombudsman) and 'how the administration system operates' (the Inspector-General's concern).

I rather think that the Paper understates the similarity and cross-overs in the investigation role that each would play. Indeed, I think there is a subtle acknowledgment of this point in the further comments that are made in the Paper about the need for an administrative protocol dealing specifically with notification of investigations by one office to the other, transfer of matters, formal determination of inter-jurisdictional difficulties, and information-sharing. It is possible that these matters can be resolved amicably and efficiently between both offices. But it is equally possible to envisage a different working relationship riven by tension and disagreement. Here it needs to be borne in mind that both will be established as independent statutory officers with a duty of sorts owed to members of the public who have raised concerns about the administration of the tax system.

Nor can it be overlooked that, over the last decade, the Ombudsman has given steadily more emphasis to the own motion function of investigating systemic defects in government administration. Oftentimes those investigations have related to Commonwealth administration generally (such as the investigations and reports on freedom of information administration, payment of compensation, complaint handling procedures, and oral advice). But some of the investigations have related to administration in a particular area, such as administration within the Child Support Agency. Some of the examples given in Section 4.2 of the Consultation Paper of systemic issues that the Inspector-General might investigate are likewise matters that are commonly explored in Ombudsman investigations (such as the clarity of information provided to taxpayers, public consultation mechanisms, calculation of penalties and interest, complaint handling, public notification of appeal rights, compliance with service charter obligations, procedures for oral and written advice, and compliance strategies). Finally, too, as the Consultation Paper notes, the office of the Commonwealth Ombudsman currently has a specialist tax team, and the Ombudsman can adopt the title of Taxation Ombudsman.

Advantages to be gained by establishing an Inspector-General

A strong Government motivation lying behind the proposal for an Inspector-General is that taxation administration uniquely demands a specialist office to review systemic issues arising from taxation administration. The taxation system directly affects 12 million individuals and businesses, and provides a revenue base for government generally. A great deal therefore rests on the integrity of the system as a matter of fact, and on public perception that it is a fair and efficient system. An Inspector-General would form part of the web of control and accountability that secures those objectives. The creation of an Inspector-General will, furthermore, signify a government commitment to fulfilling the objectives outlined in the Consultation Paper – ‘improve the responsiveness of the Australian tax system to legitimate concerns of taxpayers’; ‘make the tax administration system more receptive and attuned to the needs of taxpayers’.

It is possible that the merit in the proposal for an Inspector-General hinges on that argument, yet it is hard to measure the significance or weight that should be attached to it. Those are not by nature the kind of considerations that can be proved or rejected empirically. They are, moreover, objectives that are capable of being met in other ways, including through existing mechanisms such as the Ombudsman and parliamentary processes. Yet, public perception and government commitment can be all important, and I do not therefore discount the significance that should be attached to the very fact of this proposal as a government initiative and election commitment. It is, however, for others to judge what weight to attach to this point.

In concrete terms, there is little that one can point to in this proposal that distinguishes it intrinsically or emphatically from the Ombudsman. It is possible that a specialist investigator more so than a generalist investigator will develop ‘high level expertise’, but that is probably more a function of whether the generalist investigator is resourced adequately to perform such a role. An Inspector-General, more so than an Ombudsman, could develop a specialist role of being ‘an additional, independent source of advice’ to government, but that does not explain why such a role has to be located either in a new office, or in an office that arguably draws part of its function away from an existing office such as the Ombudsman. The Inspector-General will ‘undertake investigations into significant systems issues’ after developing a prioritised work program, but that is not substantially

different to the Ombudsman's role, subject again perhaps to the resources the Ombudsman is able to commit to that task. The qualifications of the Inspector-General are likely to be different to those of the Ombudsman, and be a person having 'an excellent technical knowledge of the taxation system'; yet, the importance of that prior experience is at risk of being overstated when it comes to investigating matters of administration and bringing an objective and independent focus to the responsibilities owed by government to the community. Lastly, it is probable that the Inspector-General would develop a much closer working relationship with the Commissioner of Taxation and the Treasury Ministers, but that could equally be perceived from the outside as a weakness rather than a strength.

The Consultation Paper draws a comparison between the proposed Inspector-General of Taxation and the Inspector-General of Intelligence and Security. My view is that the analogy is not altogether appropriate, for two reasons. The latter office is focused uniquely on specialist national security and intelligence issues which, though arising in other areas of government, are not the mainstay of government administration generally. There is much greater commonality between the administration of tax and other laws relating to welfare benefits, grant administration, superannuation, immigration processing and the like. Secondly, the size of the function is qualitatively different too: the creation of the Inspector-General of Intelligence and Security carved out but a small potential area of operation from the jurisdiction of the Ombudsman, but the creation of the Inspector-General of Taxation is a measurably greater disturbance to existing arrangements.

The other comparisons dealt with in the Consultation Paper are with arrangements in other countries. Here it is interesting to note that in countries that have an Ombudsman (such as the United Kingdom, Canada and New Zealand) there is no comparable office on an independent statutory basis to the proposed Inspector-General. Administrative law at the federal level in the United States is distinguished by the fact that there is no Ombudsman such as there is in Australia. To the extent that an Ombudsman-type function is discharged at the federal level in the US, it tends to be by a few specialist offices, such as the Office of Management and Budget, and the Treasury Inspector-General for Tax Administration.

Drawbacks from establishing an Inspector-General

Overlapping function of Inspector-General and Ombudsman: The Consultation Paper at Appendix B already provides a very good summary of the possible drawbacks of having two independent offices with an overlapping function. It is sufficient to note these without explaining them further. They are: taxpayer confusion arising from excising taxation matters from the function of the Ombudsman; a perceived loss of independence in locating the new function in the Treasury portfolio; a loss of efficiencies of scale from having two separate offices; a bifurcation of the knowledge and expertise gained by both offices; and administrative difficulties arising from the overlap in function of both offices.

Impact on the framework of Commonwealth administrative law: It is appropriate to say a few words about the development of the Commonwealth administrative law system, and how the proposal for an Inspector-General fits in. The present administrative law system can mostly be traced to the proposals made in 1971 by the Commonwealth Administrative Review Committee (the Kerr Committee). The model of administrative law envisaged by that Committee was that a person could seek review of Commonwealth administrative action, via judicial review in a court, merit review in an administrative tribunal, or investigation of defective administration through the Ombudsman. It was envisaged that there would be a principal, central review agency for each function, later established as the Federal Court, the Administrative Appeals Tribunal and the Commonwealth Ombudsman. The Committee was not opposed to the creation of specialist review agencies, though there was a presumption against proliferation of review bodies.

The development of Commonwealth administrative law in the intervening three decades has been heavily influenced by that presumption against proliferation. Specialist review bodies have occasionally been created, usually because of the specialist nature of the activity under review or a

perceived difference in the role of the new body (such as the Inspector-General of Intelligence and Security, or the Telecommunications Ombudsman). Often, too, the role of the specialist review bodies has been integrated with the role of the principal review bodies: thus, for example, the Commonwealth Ombudsman is also the Defence Force Ombudsman; the Small Taxation Claims Tribunal is a division of the Administrative Appeals Tribunal; and appeals lie from the Veterans' Review Board and the Social Security Appeals Tribunal to the Administrative Appeals Tribunal.

The concern to avoid proliferation is evident in other ways too. For some years, for example, the Government has been anxious to create an Administrative Review Tribunal into which the functions of most of the existing administrative tribunals would be merged. The system for review of migration decisions has been the subject of persistent complaint and controversy, in part because of its gradual removal from the main administrative law framework.

The proposal to create an Inspector-General needs to be evaluated in light of that history and development of administrative law in Australia. The presumption against proliferation does not, of course, provide a conclusive answer to the new proposal, and the Inspector-General is meant to have more than an administrative law investigation function. Nevertheless, the proposal runs the risk of fracturing a model of administrative law and government accountability that has served Australia well. It would be possible that review of taxation administration would be better served by the creation of a specialist Inspector-General, but at the expense of the review system overall. It would be regrettable for that reason if the current proposal was viewed in isolation.

Isolating taxation administration from administrative law review: The subtle benefits of an integrated review system need also to be considered. There is a general expectation in the community and in review bodies that common standards of public administration and legal understanding will be observed throughout the government administration. Thus, for example, the way in which penalties are imposed, grievances are handled, decisions are explained and rights are publicised, is expected to conform to basic standards and to fulfil uniform objectives. The Ombudsman plays a key role in ensuring that that happens. It is possible that taxation administration specifically, and public administration generally, would be the poorer from a separation of the two areas.

It is at this point too that the interrelationship between individual glitches and systemic problems becomes critical. Many systemic problems are the accumulation of individual difficulties, sometimes of the same kind, but sometimes different. There is a great risk that if the investigation of the two is separated, an understanding of the full dimension of the problem will be lacking. The wisdom that an investigator can bring to the task is also a product of their experience from working at both levels, of focusing on the detail and how it affects people specifically, and of standing back from the problem and forming a broader picture of whether the problem is as real as it seems close-up and of the viability of one remedy as against another.

Atypical role of the Inspector-General: Another difficulty that I foresee for an Inspector-General derives from the mixture of roles the office will be expected to discharge. The Consultation Paper variously refers to the office as being an 'active adviser to Government', a body that provides 'help [to] the Commissioner of Taxation and the Government', a body to 'provide advice when the Government considers new tax policy measures', a body with a 'strong working relationship with the Board of Taxation', a body to 'strengthen the advice given to government', 'an advocate for all taxpayers', and a body to 'research and conduct consultations with the community and business'.

It is possible that the Inspector-General could uniquely carve out a role that meets all those expectations. There are no fixed models of how government functions are to be discharged. It is important to recognise nevertheless that there is no tradition or established base from which the Inspector-General can draw experience, nor any similar model in Australia to guide the development of the office. The power and influence of established models is well-illustrated by the experience of the Ombudsman. The concept of an Ombudsman's office is now reasonably well-settled in Australia. Whenever a new body is created – a banking ombudsman, a health complaints ombudsman, a telecommunications ombudsman – there is an existing body of

experience and wisdom that can be brought to bear in evaluating the new proposal and providing guidance for future development. The model of the ombudsman is now enduring and successful. It is probably the least controversial feature of the Australian administrative law system, with a high degree of public recognition and government acceptability, still performing much the same function as it did when created 25 years ago.

There is no similar tradition or experience from which the Inspector-General can draw. It is an untested idea and an untried model. With the variety of functions it is expected to perform, it runs the risk that it is expected to be all things to all people – a body that is meant to shadow the role of every existing agency, including the Commissioner, the Board, the Ombudsman, and parliamentary committees. It could, in one guise, be expected to be a kind of roving royal commission, responding especially ‘to large scale community concerns on a particular matter’.

Some comparisons can be drawn with other bodies or proposals with a combined function. The original proposal by the Kerr Committee for an Ombudsman was for a General Counsel for Grievances, that would investigate complaints but also be an advocate on behalf of complainants. That idea was dropped early, and it is generally been thought that the Australian concept of the Ombudsman has benefited as a result. There is also the model that applies in the human rights and anti-discrimination area. The Human Rights and Equal Opportunity Commission, and the sex, race and disability discrimination commissioners, have often performed a combined role, of investigating complaints, conducting public inquiries, providing advice to government on legislative proposals, conducting public education, and being an advocate generally for the improvement of standards of government administration. It is probably fair to say that those bodies have often encountered controversy that other administrative law bodies have managed to navigate around. One has to take account of the special sensitivity to which human rights and discrimination issues give rise, but even so the more controversial and chequered history of those bodies provides a reason to be cautious in developing another different model.

Public understanding of an Inspector-General’s role: Finally, the Inspector-General would face a special challenge in developing a reputation in the public eye for independence and objectivity. The Ombudsman was able to meet that challenge, partly because of the public recognition of the concept of an Ombudsman, but partly too as a result of the Ombudsman’s regular interaction with members of the public in handling complaints. The Ombudsman is able to impart that aura of independence and objectivity to all the functions the Ombudsman discharges, even those (such as systemic investigations) that do not involve the same measure of public contact. It is not envisaged that the Inspector-General will have that regular interaction with the public, and yet the Inspector-General is expected to have the same reputation with the public. The distinguishing function which the Inspector-General is expected to perform is that of being an adviser to government. There are, of course, many statutory bodies that have a public reputation for fierce independence from government, but there are equally many that are perceived as being more compliant and responsive to government thinking. It would be a special challenge for an Inspector-General to carve out a unique role, as successfully as bodies such as the Ombudsman have already managed to do.

John McMillan
Alumni Professor of Administrative Law
Australian National University
20 June 2002

ATTACHMENT E: THE COMMONWEALTH OMBUDSMAN AND THE ANAO

This attachment outlines the existing role of the Commonwealth Ombudsman and the Australian National Audit Office (ANAO) in reviewing systemic issues in taxation administration.

The Commonwealth Ombudsman

The Commonwealth Ombudsman's principal function is to investigate administrative action by Commonwealth agencies. Investigations may be undertaken either in response to a complaint, or on the Ombudsman's own motion.

In addition to investigating individual complaints, the Ombudsman also commits resources to systemic investigations. About 20% of the Ombudsman's resources are applied to systemic investigations, though in 2000-01 in the tax area the split between complaints and systemic work was closer to 50/50. The Ombudsman's work on systemic issues is based on the office's power under the *Ombudsman's Act 1976* to investigate on an 'own motion' basis any action that relates to a matter of administration by a Commonwealth agency.

The Ombudsman must give a report to an agency about any inappropriate administrative action by the agency, and may also make recommendations to the agency. The Ombudsman may require the agency to indicate what action it proposes to take in response to the report. A copy of the report must be given to the relevant Minister. If the Ombudsman is not satisfied with the agency's response to the report, the Ombudsman:

- (a) may advise the Prime Minister of this; and
- (b) may present to the Parliament a copy of the report and any response provided by the agency.

The Ombudsman must give an annual report to the Minister for presentation to the Parliament, and may at any time give the Minister other reports for presentation to the Parliament. The Ombudsman may also publish a statement about any matter the office has investigated.

The Ombudsman encourages investigation officers to identify systemic issues as they arise in the course of investigating individual complaints. The Ombudsman has indicated that the investigation of systemic issues is one of the office's most important functions. The Ombudsman considers that by investigating and resolving systemic issues the office is able to make a far more effective contribution to the overall health of the tax system.

The Ombudsman provides quarterly reports to the ATO on complaint trends, with some analysis of the complaints. This is intended to assist the ATO to better understand the issues giving rise to the complaints and to take earlier remedial action on systemic matters.

The Ombudsman has published the following reports raising systemic issues in the ATO's administration of taxation legislation:

- (a) ATO & Main Camp — Investigation into the ATO's handling of tax deduction claims by investors in Main Camp: January 2001;
- (b) Balancing the Risks: An investigation into the role of agencies in providing adequate information to customers in a complex income support system: September 1999; and
- (c) The ATO and the Budplan Scheme: June 1999.

In 2000-01, the Ombudsman published reports on investigations into mass marketed film and agricultural schemes critical of the ATO. In 2001-02, the Ombudsman also commenced investigations into *Delays in the Budplan Test Case Program* and *the ATO's Complaint Handling System*.

The Ombudsman also maintains a systemic issues register. The register currently identifies 30 systemic issues in the tax area. These issues cover a range of taxation administration such as mass marketed schemes, debt collection, HECS debt, service delivery to remote areas, Superannuation Guarantee, and the Tax Agents Board.

In addition to these 'major' systemic investigations, in the normal course of handling individual complaints generally (including taxation-related) the Ombudsman's office regularly identifies many 'minor' systemic deficiencies which it brings to the notice of agencies. These may involve the need to change a practice, a procedure, a description in a manual, the wording on a form etc. While these changes may be small, the Ombudsman considers that their cumulative impact on improving the efficiency and accuracy of administrative practice are not insignificant, particularly where they apply to a large customer base such as that in the taxation systems,

There was unanimous agreement at the three consultation sessions that the Ombudsman has insufficient resources to properly discharge the office's complaint handling function, and that it would not be practicable for the Ombudsman to undertake systems reviews of the kind contemplated for the Inspector-General within the office's existing resources.

The Australian National Audit Office

The Board also notes that the Australian National Audit Office ('ANAO') may undertake performance audits evaluating the economy, efficiency and administrative effectiveness of the ATO. Issues that may be examined include those related to the governance of the ATO, risk

management and other control structures, resource use, information systems performance measures, reporting and monitoring systems, probity and legal compliance.

As at 1 July 2001, the ANAO had performance audits in progress concerning implementation of the GST and the administration of the collection of excise (petroleum). On 17 July 2001, the ANAO presented to the Parliament a report on the *Australian Taxation Office's Administration of Taxation Rulings*. The ANAO has also identified the following topics for potential audit work: GST fraud prevention and control, tax agent liaison arrangements, management of non-resident's withholding tax, administration of tobacco excise, use of investment and income returns in taxation administration and the management of aggressive tax planning.

ATTACHMENT F: MEMBERS, CHARTER OF THE BOARD OF TAXATION AND CONFLICT OF INTEREST DECLARATION

Members

The members of the Board of Taxation are:

Chairman

Richard F E (Dick) Warburton

Members

John Bronger

Tony D'Aloisio

John Harvey

Brett Heading

Chris Jordan

Alison McClelland

Ex officio members

Michael Carmody (Commissioner of Taxation)

Ken Henry (Secretary to the Department of the Treasury)

Hilary Penfold QC (First Parliamentary Counsel)

Secretariat

Members of the Board's Secretariat who contributed to preparing this report were, Mr Murray Edwards (Secretary), Mr Robert Patch, Mr Phil Bignell, and Ms Jodi Wood.

Charter

Mission

Recognising the Government's responsibility for determining taxation policy, and the statutory role of the Commissioner of Taxation, to contribute a business and broader community perspective to improving the design of taxation laws and their operation.

Membership

The Board of Taxation will consist of up to ten members.

Up to seven members of the Board will be appointed, for a term of two years, on the basis of their personal capacity. It is expected that these members will be appointed from within the business and wider community having regard to their ability to contribute at the highest level to the development of the tax system. The Chairman will be appointed from among these members of the Board. Members may be reappointed for a further term.

The Secretary of the Department of the Treasury, the Commissioner of Taxation and the First Parliamentary Counsel will also be members of the Board. Each may be represented by a delegate.

Function

The Board will provide advice to the Treasurer on:

- (a) the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspect of tax design;
- (b) improvements to the general integrity and functioning of the taxation system;
- (c) research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and
- (d) other taxation matters referred to the Board by the Treasurer.

Relationship to other Boards and Bodies

From time to time the Government or the Treasurer may establish other boards or bodies with set terms of reference to advise on particular aspects of the tax law. The Treasurer will advise the Board on a case by case basis of its responsibilities, if any, in respect of issues covered by other boards and bodies.

Report

The Chairman of the Board will report to the Treasurer, at least annually, on the operation of the Board during the year.

Secretariat

The Board will be supported by a secretariat provided by the Treasury, but may engage private sector consultants to assist it with its tasks.

Other

Members will meet regularly during the year as determined by the Board's work program and priorities.

Non-government members will receive daily sitting fees and allowances to cover travelling and other expenses, at rates in accordance with Remuneration Tribunal determinations for part-time public offices.

The Government will determine an annual budget allocation for the Board.

Conflict of Interest Declaration

All members of the Board are taxpayers in various capacities. Some members of the Board derive income from director's fees, company dividends, trust distributions or as a member of a partnership.

The Board's practice is to require members who have a material personal interest in a matter before the Board to disclose the interest to the Board and to absent themselves from the Board's discussion of the matter, including the making of a decision, unless otherwise determined by the Chairman (or if the Chairman has the interest, the other members of the Board).

The Board does not regard a member as having a material personal interest in a matter of tax policy that is before the Board merely because the member's personal interest may, in common with other taxpayers or members of the public, be affected by that tax policy or by any relevant Board recommendations.

ATTACHMENT G: LIST OF CONSULTANCIES

Sherry Pullen Business Consulting, to facilitate consultations held in Melbourne and Canberra on 7 June 2002 and in Sydney on 12 June 2002.

Professor John McMillan, Alumni Chair in Administrative Law at the Australian National University, to advise the Board on the administrative law and practice implications of establishing an Inspector-General of Taxation

ATTACHMENT H: CONSULTATION SESSIONS HELD ON 7 AND 10 JUNE 2002

Organisations represented

Administrative Review Council
Allens Arthur Robinson
Australian Business Limited
Australian Chamber of Commerce and Industry
Australian Institute of Company Directors
Business Council of Australia
Centre for Tax System Integrity, Australian National University
Council of Small Business Organisations of Australia Ltd
CPA Australia
Deloitte Touche Tohmatsu
Ernst & Young
Financial Planning Association of Australia Limited
Freehills
Institute of Chartered Accountants in Australia
KPMG
Law Institute of Victoria
Law Society of New South Wales
Law Society of the Australian Capital Territory
Mallesons Stephens Jaques
National Farmers' Federation
National Institute of Accountants
Taxpayers Australia
The Savings Factory Ltd

Record of discussions

Introduction

This Appendix seeks to summarise around a number of themes, and without attribution, the issues raised at the consultation session held by the Board on 6 and 10 June 2002 in Melbourne, Canberra and Sydney.

In this record the abbreviations IGoT refers to Inspector-General of Taxation and BoT refers to Board of Taxation.

Discussion at Melbourne: 9 am, 7 June 2002

What is the problem?

The Government needs to identify the problem the IGoT is intended to remedy. It is not clear why the Government wants to establish an Inspector-General of Taxation.

An adequately funded and independent Board of Taxation could do the tasks proposed for the IGoT.

Is the IGoT a kneejerk response to mass marketed schemes in an election context? The IGoT will stop issues like this coming to the Minister's office.

Is the problem that the Government can't get the advice on tax administration it is looking for?

Treasury/ATO appear to speak with one voice. The Treasury focuses on policy advice, while ATO focuses on tax administration. The result is that Treasury does not appear to review the ATO's advice on tax administration issues.

Is the problem that the ATO/Treasury do not give sufficiently pro-business advice on tax issues? Is the IGoT a response to poor advice to date by the ATO / Treasury? There is a lack of accountability in the ATO. ATO had ultimate authority in, for example, mass marketed schemes and BAS.

The Ombudsman

There is a perception that the Ombudsman is not doing everything that the office could be doing to review tax system administration, despite having the power to do so.

The disappointment with the Ombudsman arises from the office's lack of resources. The ANAO seems to have taken over the Ombudsman's role in looking at tax administration systems. Establishing the IGoT could be seen as punishing the Ombudsman.

The IGoT's role

The Consultation Paper is not clear on what the IGoT's role would be.

Some participants expressed disappointment that the role is too narrow. Could consider the IGoT having a role in more directly overseeing the ATO.

It will be important for the IGoT to focus on systemic issues, and leave individual complaints to the Ombudsman.

It is not clear how detailed the IGoT's reports will be. The IGoT should have a broad and detailed role, extending to considering the roles and accountability of individual ATO officers.

The Government should consider the US model, that combines the individual complaint handling and systemic review in the one body.(for example, by looking at its Strategic Plan for 2000-2005).

The IGoT should have powers similar to those of the Ombudsman.

It will be important for the IGoT to be able to use the ATO's resources (for example, to locate and copy papers, or to explain how the system works.). There is a risk that the information provided will be not helpful, and require additional resources to understand.

The IGoT should be able to make recommendations to the ATO, with an obligation on the ATO to provide reasons where it decides not to adopt the recommendation.

The IGoT could review the ATO's regulation of tax professionals.

Accountability of the IGoT

A fundamental point is whether the IGoT reports to Parliament or the Minister. This goes to the actual and perceived independence of the position. If the IGoT reports to the Treasury Ministers, then this will undermine public confidence in the office. The US IGoT reports to Congress and not the Executive.

It will be difficult for the IGoT to achieve transparency if the relationship with the Minister is too close.

This is not an issue about giving the Minister a right to direct the IGoT. However, a power to give directions will increase the risk that resources will be redirected from other functions. The Minister should be required to provide additional resources to fund the work flowing from the direction. The Government is considering separately the governance arrangements for statutory authorities.

Length of the appointment goes to the independence of the Office. There were different views about whether the term should be 4 — 5 years, or 7 years. Need to balance security of tenure against reintegration into private sector following completing of term.

The issues identified in the Consultation Paper could keep the IGoT busy for years, on the budget being made available to it.

The IGoT's work program should be published. This would allow public comment and responsiveness.

Adequate funding is integral to public confidence in the IGoT. Establishing the IGoT should result in an increase in the resources reviewing tax administration systems, and better accountability to Parliament. However, every agency is at risk of having its resources reduced by the Government.

The only safeguards are independence and a right to report to Parliament.

The IGoT and the Ombudsman

It will be difficult for the IGoT to review systemic issues without also being able to consider individual complaints. The IGoT will need to be able to look at individual complaints, but not necessarily action them. It will also be difficult to determine the borderline between individual complaints and systemic issues. It will be difficult to have seamless arrangements between the IGoT, ATO, Ombudsman and BoT. There is a risk that the IGoT will result in fragmented arrangements, with confusion about what each office is responsible for, and demarcation questions and different outcomes from the two offices.

One option would be to establish the IGoT within the Ombudsman's Office, with sharing of facilities and experience. On this option, a key issue would be to prevent resources going to individual complaints. Pragmatic funding issues need to be taken into account, in order to address the concern that individual complaints will soak up resource. A key benefit of putting the Offices together is that it would allow reporting to Parliament.

It would be difficult to have an independent person in the Ombudsman's Office, because the person would report to the Ombudsman.

Is there a case for giving the IGoT responsibility for individual complaints?

If both functions are in the one office, how do you ensure that the resources are appropriately allocated to systemic and individual issues. This can be resolved by adequately resourcing the IGoT.

A benefit of having one body is that there would only be one body to complain to.

The IGoT and the BoT

What will be the roles of the IGoT and the BoT? The starting point is that the BoT would look at policy questions, and the IGoT at tax administration systems.

There may be policy issues concerning the tax administration system (for example, should we have self assessment, what rights of review should be available?)

The BoT has no power. Could the role of the BoT be limited to rate and base issues?

The IGoT should be on the BoT.

Appointment of the IGoT

The IGoT will need to be somebody whose feet are firmly planted on the ground. It will be very important for the IGoT to have independence and breadth of mind, and not necessarily be a tax professional. The successful appointee needs to have both private sector and ATO experience. The inaugural appointee should not be from the ATO. The IGoT should be able to second staff from the private sector and other Government agencies.

Discussion at Canberra: 2 pm, 7 June 2002

What is the problem?

There is a need for a seamless process in tax administration. Taxpayers need to be able to comply with and understand the tax law and their obligations.

There is a need to improve the way the ATO interacts with taxpayers. At present, there is a communication gap between the ATO and taxpayers.

There is a need for somebody to whom small business can take their complaints about the ATO. The IGoT will need to look at the self assessment system.

The tax system is in serious trouble. There is a clear public perception that elements of the community do not pay their tax, particularly those who are wealthy and have access to better tax advice. At the same time, the ATO is perceived to be putting resources into increasing compliance for ordinary people who cannot afford sophisticated tax advice.

The ATO appears to be unable to enforce the law against large corporates and High Wealth Individuals. One possible deliverable is that the IGoT might reduce the grey areas of the tax law.

The Ombudsman

The IGoT is a move away from the Ombudsman. The Ombudsman is viewed as a ‘toothless tiger’, so nobody goes to office. There is a perception that the Ombudsman is not sufficiently an advocate for taxpayers. There is potential to lift the Ombudsman’s service standards.

The IGoT’s Role

The IGoT may increase the perception about the fairness of tax administration.

The IGoT should have a role in enforcing the ATO’s taxpayer charter.

A priority in setting up the IGoT will be to publicise its role. The IGoT will become a lightning rod for taxpayer frustrations about the tax system.

The average citizen is concerned that to complain to the ATO will result in the ATO ‘biting them on the bum’. While this is an issue, not clear how creating an IGoT would fix it.

The IGoT should represent taxpayer concerns to the ATO and the Government.

Accountability of the IGoT

It will be important for the IGoT to be independent.

Need to avoid the IGoT becoming another organ of the ATO/Treasury. There is currently little scope for the taxpaying community to influence the Ombudsman’s priorities. There is no reporting back to the community. The IGoT will need to establish a public register of issues that are on its agenda, and priority that is being accorded to them.

There was agreement that the IGoT’s work program needs to be transparent.

The IGoT will result in three underfunded bodies (that is, BoT, IGoT and Ombudsman), with none of them doing the job they were created to do.

The IGoT needs to be independent — not affected by elections and change of government. The IGoT needs to be able to report to the public and the Parliament.

There is a risk that the IGoT will become the ‘fall guy’ when things go wrong, so that accountability for ensuring good tax administration will shift away from the ATO.

IGoT and the Ombudsman

Need to make clear the role between the Ombudsman and the IGoT.

It is not clear what value the IGoT would add. The IGoT will increase the opportunities for game playing by sophisticated taxpayers, who will play the IGoT, Ombudsman and ATO off against one another. There will be a need for clear dialogue between the IGoT, ATO and

Ombudsman. The IGoT may help in breaking down the communication barriers between the ATO and Treasury.

May be difficult for the IGoT or Ombudsman to determine whether an issue is systemic and which agency is looking after it.

Some considered that effective informal relationship between the IGoT and Ombudsman would be sufficient, while others saw a need for a more formal protocol.

The IGoT and the BoT

The IGoT will focus on current issues, while the BoT will look to the future. The IGoT will be able to raise issues with the ATO. Currently, there may be an issue, but nowhere to raise it.

The IGoT should not be on the BoT.

Problem with the BoT is that it is constrained by a lack of resources that prevents it from looking at systemic issues.

Appointment of the IGoT

The IGoT needs to have a good understanding of how the ATO works and how it might be improved.

The IGoT needs to be somebody who understands the tax law, with a range of coal-face tax experiences. The appointee will need to be knowledgeable about tax, have a capacity to implement, and be a good communicator.

Discussion at Sydney: 10 am, 12 June 2002

The IGoT's role

It is not clear whether the IGoT is there for Ministers or taxpayers.

The IGoT should be an advocate for taxpayers in relation to the efficiency, fairness and simplicity of the tax system. Not an advocate for particular taxpayers, but for taxpayers in general.

The legislation should include an objects clause that says the IGoT provides advice from a taxpayer perspective, as opposed to a tax administration perspective.

The IGoT will not be able to solve problems in tax administration, because the tax law and administration is too complex.

The IGoT should not be concerned with whether the tax law is unfair. This is a matter of policy. The question should be whether the law is being administered as was originally

intended. However, it is frequently difficult to ascertain whether the current administration is within the original design parameters.

Some aspect of tax administration are undertaken by agencies other than the ATO (for example, Centrelink). The IGoT needs to be able to review all aspects of tax administration, not just that undertaken by the ATO.

The IGoT will not have sufficient resources to become involved in policy development, and the new systems required by policy changes. Rather, the IGoT should review systems that are already in place. For example, the IGoT should not be looking at forms as they are developed. This will make it difficult for the IGoT to later criticise the forms when they are found to be defective.

It is difficult to distinguish between policy and administration. Separately examining policy and administration will inevitably lead to problems 'down the track'. Policy and administration are mutually influencing components of the Integrated Tax Design System. Separating policy and administration runs in the opposite direction to Integrated Tax Design. There are only sufficient resources to manage an Integrated Tax Design System, and not enough to have an adequate review arrangement over the top of it. Should make sure the system has mechanisms that are self correcting, such as systematic and ongoing review process of tax law and administration.

The IGoT needs to take on the role of an agitator. The IGoT should be able to give early advice to Ministers on matters that may become a problem. The IGoT would provide day-to-day advice to the Minister, so as to create a dialogue between the ATO and the Minister leading to the resolution of issues.

The IGoT will have an advising role to Ministers, a reporting role to Parliament, and an advocacy role to taxpayers. The IGoT's role is to advise Ministers that there is (or may be) an issue. The Government is accountable for addressing the issue.

The IGoT could have a role in examining the ATO's synthetic legislation. Synthetic legislation is typically vague and uncertain, and not supported by the courts.

The Ombudsman

The Ombudsman generally becomes involved after the problem has become serious and warrants a formal report to the Minister.

Current review processes (for example, Ombudsman, AAT, and judicial review) are too slow and after the fact to be effective problem solvers. The Ombudsman makes formal recommendations and reports to agencies, Government and the Parliament. The Ombudsman does not have an advisory role in relation to the Minister.

There is a conflict between the Ombudsman's impartiality and being able to provide confidential advice to Ministers. However, the transparency of advice to Ministers in New Zealand doesn't seem to cause problems there.

There will be too many agencies. It will be important to make sure that the agencies work together seamlessly.

The Ombudsman has insufficient resources to do the job asked of the office.

The IGoT and the BoT

It is difficult to clearly define and distinguish the role of the IGoT and the Board of Taxation.

The Board should have an ongoing role of monitoring the effectiveness of legislation.

Accountability of the IGoT

The proposed \$2 million budget is too small.

There must be transparency in the IGoT's work program, priorities and advice. It will be critical for the IGoT to be independent of the ATO. The IGoT must be able to report directly to the Parliament.

The IGOT should be able to report to Parliament as required, and, if necessary, more frequently than annually. There should be a requirement that these reports be put to the ATO or other agency responsible for the area reported upon and their response included in the report tabled in the Parliament.

The IGOT's advice to the Government should as a general rule be published in a summary form in reports to the Parliament. This is to ensure transparency to ensure stakeholders are kept informed of the IGOT's work and to address concerns that the IGOT may be compromised in its advice because of a conflict between its role in advising the Government and in reporting to the Parliament.

It will be necessary to have a memorandum of understanding between the IGoT and the ATO about their respective roles.

Appointment of the IGoT

The IGoT should be located in a major city so that the office can empower itself with information through networks.

The IGoT should have a strong background in both the private and public sector, though the inaugural appointee's most recent experience should be with the private sector.

The advice given by the Treasury/ATO tends to be sceptical of complaints about tax policy and administration, and suggests that complaints are driven by self-interest. The IGoT needs to be able to bring a more objective perspective.

The IGoT will need to be a credible advocate for taxpayers, with strong leadership skills.

The consensus was that the IGoT's staff should have a mix of private and public sector expertise, though it was suggested by some that the IGoT's staff should be drawn exclusively from the private sector

