



## **Observatory for the Protection of Taxpayers' Rights**

Below you will find a questionnaire filled in by or with the contribution of the National Reporter of Australia, Dr. John Bevacqua, a representative of the Academia.

This questionnaire comprises the National Reporter assessment on the level of compliance of the minimum standards and best practices on the practical protection of taxpayers' rights identified by Prof. Dr. Pistone and Prof. Dr. Philip Baker at the 2015 IFA Congress on "*The Practical Protection of Taxpayers' Rights*". This report was filled in considering the following parameters:

1. It contains information on those issues in which there were movements towards or away from the level of compliance of the relevant standard/best practice in Australia between 2015 and 2017.
2. It is indicated, by the use of a checkmark (☑) whether there were movements towards or away from of the level of compliance of the relevant standard/best practice in Australia between 2015 and 2017.

It contains a summarized account on facts (legislation enacted, administrative rulings, circulars, case law, tax administration practices) that serves as grounds for each particular assessment of the level of compliance of a given minimum standard / best practice, in a non-judgmental way.

**Country: Australia**

Minimum Standard	Best Practice	Shift towards	Shift away	Development
<b>1. Identifying taxpayers, issuing tax returns and communicating with taxpayers</b>				
Implement safeguards to prevent impersonation when issuing unique identification numbers				
The system of taxpayer identification should take account of religious sensitivities				
Impose obligations of confidentiality on third parties with respect to information gathered by them for tax purposes	Where tax is withheld by third parties, the taxpayer should be excluded from liability if the third party fails to pay over the tax			
Where pre-populated returns are used, these should be sent to taxpayers to correct errors				
Provide a right of access for taxpayers to personal information held about them, and a right to apply to correct inaccuracies	Publish guidance on taxpayers' rights to access information and correct inaccuracies			
Where communication with taxpayers is in electronic form, institute systems to prevent impersonation or interception		☑		From 22 February 2018 the ATO (as an entity covered by the Australian Privacy Principles (APPs) will have clear obligations to report eligible data breaches). This will require all reasonable steps to be taken to ensure an assessment is completed within 30 days. If an eligible data breach is confirmed, as soon as practicable they must provide a statement to each of the individuals whose data was breached or who are at risk, including details of the breach and recommendations of the steps individuals should take. A copy of the statement must also be provided to the Office of the Australian Information Commissioner.
Where a system of “cooperative compliance” operates, ensure it is available on a non-discriminatory and voluntary basis				
Provide assistance for those who face difficulties in meeting compliance obligations, including those with disabilities, those located in remote				

areas, and those unable or unwilling to use electronic forms of communication				
<b>2. The issue of tax assessment</b>				
	Establish a constructive dialogue between taxpayers and revenue authorities to ensure a fair assessment of taxes based on equality of arms			
<b>Minimum Standard</b>	<b>Best Practice</b>	<b>Shift towards</b>	<b>Shift away</b>	<b>Development</b>
<b>2. The issue of tax assessment (cont)</b>				
	Use e-filing to speed up assessments and correction of errors, particularly systematic errors			
<b>3. Confidentiality</b>				
Provide a specific legal guarantee for confidentiality, with sanctions for officials who make unauthorised disclosures (and ensure sanctions are enforced)	Encrypt information held by a tax authority about taxpayers to the highest level attainable			
Restrict access to data to those officials authorised to consult it. For encrypted data, use digital access codes	Ensure an effective fire-wall to prevent unauthorised access to data held by revenue authorities			
Audit data access periodically to identify cases of unauthorised access				
Introduce administrative measures emphasising confidentiality to tax officials	Appoint data protection/privacy officers at senior level and local tax offices			
If a breach of confidentiality occurs, investigate fully with an appropriate level of seniority by independent persons (e.g. judges)				In 2017 there was a high profile breach of confidentiality and code of conduct breaches by senior officials including a Deputy Commissioner of Taxation, Michael Cranston, who revealed confidential audit information to his son whose affairs were subject to audit. In response, the Inspector-General of Taxation Ali Noroozi has announced his terms of reference for the review into the ATO. See Terms of Reference for Review into ATO Fraud Control Management <a href="#">here</a> .
Introduce an offence for tax officials covering up unauthorised disclosure of confidential information				
Provide remedies for taxpayers who			<input checked="" type="checkbox"/>	See comment below re 2015 case of <i>FCT v Donoghue</i> – for discussion of the

are victims of unauthorised disclosure of confidential information				developments in this case and similar recent cases, see - R Woellner & J Bevacqua, 'The ATO, Conscious Maladministration and Stolen Information' (2017) 46 <i>Australian Tax Review</i> 26.
Exceptions to the general rule of confidentiality should be explicitly stated in the law, narrowly drafted and interpreted				
If "naming and shaming" is employed, ensure adequate safeguards (e.g. judicial authorisation after proceedings involving the taxpayer)	Require judicial authorisation before any disclosure of confidential information by revenue authorities			
No disclosure of confidential taxpayer information to politicians, or where it might be used for political purposes	Parliamentary supervision of revenue authorities should involve independent officials, subject to confidentiality obligations, examining specific taxpayer data, and then reporting to Parliament			

Minimum Standard	Best Practice	Shift towards	Shift away	Development
<b>3. Confidentiality (cont).</b>				
Freedom of information legislation may allow a taxpayer to access information about himself. However, access to information by third parties should be subject to stringent safeguards: only if an independent tribunal concludes that the public interest in disclosure outweighs the right of confidentiality, and only after a hearing where the taxpayer has an opportunity to be heard				
If published, tax rulings should be anonymised and details that might identify the taxpayer removed	Anonymise all tax judgments and remove details that might identify the taxpayer			
Legal professional privilege should apply to tax advice	Privilege from disclosure should apply to all tax advisors (not just lawyers) who supply similar advice to lawyers. Information imparted in circumstances of confidentiality may be privileged from disclosure		<input checked="" type="checkbox"/>	<i>Federal Commissioner of Taxation v Donoghue</i> [2015] FCAFC 183 – Federal Court of Appeal held that s 166 of the Income Tax Assessment Act 1936 imposes an overriding <i>duty</i> on the Commissioner to use whatever information he has in his possession to make an assessment. This is a significant point, because it means that the protection of legal professional privilege may be lost whenever the ATO receives volunteered information from third parties and uses that information to issue assessments even where – it would seem – the ATO knows that the information has been unlawfully provided by that third party.
Where tax authorities enter premises				

which may contain privileged material, arrangements should be made (e.g. an independent lawyer) to protect that privilege				
<b>4. Normal audits.</b>				
<p>Audits should respect the following principles:</p> <p>(1) Proportionality</p> <p>(2) <i>Ne bis in idem</i> (prohibition on double jeopardy)</p> <p>(3) <i>Audi alteram partem</i> (right to be heard before any decision is taken)</p> <p>(4) <i>Nemo tenetur se detegere</i> (principle against self-incrimination).</p> <p>Tax notices issued in violation of these principles should be null and void</p>				<p>Senate Standing Committee on Tax and Revenue recommended in 2015 that taxpayers charged with tax fraud or tax evasion should be granted the presumption of innocence in court.</p> <p>At the moment, a taxpayer accused of tax evasion is deemed guilty and must prove their innocence. The Standing Committee on Tax and Revenue has recommended that change after hearing that the Tax Office often goes on "fishing expeditions" and uses its extraordinary powers to gather information that it then uses against the taxpayer. See full report – <a href="#">Full Report</a></p>
In application of proportionality, tax authorities may only request for information that is strictly needed, not otherwise available, and must impose least burdensome impact on taxpayers				

Minimum Standard	Best Practice	Shift towards	Shift away	Development
<b>4. Normal audits (cont).</b>				
	In application of <i>ne bis in idem</i> the taxpayer should only receive one audit per taxable period, except when facts that become known after the audit was completed			
In application of <i>audi alteram partem</i> , taxpayers should have the right to attend all relevant meetings with tax authorities (assisted by advisors), the right to provide factual information, and to present their views before decisions of the tax authorities become final				
In application of <i>nemo tenetur</i> , the right to remain silent should be respected in tax audits.				

	Tax audits should follow a pattern that is set out in published guidelines			
	A manual of good practice in tax audits should be established at the global level			
	Taxpayers should be entitled to request the start of a tax audit (to obtain finality)			
Where tax authorities have resolved to start an audit, they should inform the taxpayer	Where tax authorities have resolved to start an audit, they should hold an initial meeting with the taxpayer in which they spell out the aims and procedure, together with timescale and targets. They should then disclose any additional evidence in their possession to the taxpayer			
Taxpayers should be informed of information gathering from third parties				
	Reasonable time limits should be fixed for the conduct of audits			
Technical assistance (including representation) should be available at all stages of the audit by experts selected by the taxpayer				
<b>Minimum Standard</b>	<b>Best Practice</b>	<b>Shift towards</b>	<b>Shift away</b>	<b>Development</b>
<b>4. Normal audits (cont).</b>				
The completion of a tax audit should be accurately reflected in a document, notified in its full text to the taxpayer	The drafting of the final audit report should involve participation by the taxpayer, with the opportunity to correct inaccuracies of facts and to express the taxpayer's view			
	Following an audit, a report should be prepared even if the audit does not result in additional tax or refund			
<b>5. More intensive audits.</b>				
	More intensive audits should be limited to the extent strictly necessary to ensure an effective reaction to non-compliance			
If there is point in an audit when it becomes foreseeable that the taxpayer may be liable for a penalty or criminal				

charge, from that time the taxpayer should have stronger protection of his right to silence, and statements from the taxpayer should not be used in the audit procedure				
Entering premises or interception of communications should be authorised by the judiciary				
Authorisation within the revenue authorities should only be in cases of urgency, and subsequently reported to the judiciary for <i>ex post</i> ratification				
Inspection of the taxpayer's home should require authorisation by the judiciary and only be given in exceptional cases.	Where tax authorities intend to search the taxpayer's premises, the taxpayer should be informed and have an opportunity to appear before the judicial authority, subject to exception where there is evidence of danger that documents will be removed or destroyed			
	Access to bank information should require judicial authorisation			
	Authorisation by the judiciary should be necessary for interception of telephone communications and monitoring of internet access. Specialised offices within the judiciary should be established to supervise these actions			
<b>Minimum Standard</b>	<b>Best Practice</b>	<b>Shift towards</b>	<b>Shift away</b>	<b>Development</b>
<b>5. More intensive audits (cont).</b>				
Seizure of documents should be subject to a requirement to give reasons why seizure is indispensable, and to fix the time when documents will be returned; seizure should be limited in time				
	If data are held on a computer hard drive, then a backup should be made in the presence of the taxpayer's advisors and the original left with the taxpayer			
Where invasive techniques are applied, they should be limited in time to avoid disproportionate impact on taxpayers				
<b>6. Review and appeals.</b>				

	E-filing of requests for internal review to ensure the effective and speedy handling of the review process			
The right of appeal should not depend upon prior exhaustion of administrative reviews				In his report into Management of Tax Disputes (January 2015) the Inspector General of Taxation recommended that an Appeals Group be established within the Australian Taxation Office. The Appeals Group would be a centralised, dedicated and separate internal group within the ATO to manage tax disputes independently for all taxpayers, including conducting pre-assessment reviews, objections and litigation processes and employing ADR as necessary. See full report here: <a href="https://cdn.tspace.gov.au/uploads/sites/16/2015/04/management_tax_disputes.pdf">https://cdn.tspace.gov.au/uploads/sites/16/2015/04/management_tax_disputes.pdf</a>
	Reviews and appeals should not exceed two years			
<i>Audi alteram partem</i> should apply in administrative reviews and judicial appeals				In his December 2016 Report into Taxpayer Rights and Remedies, the Inspector-General of Taxation considered the Australian Tax Office level of compliance with Australian "Model Litigant Obligation" (MLO) which sets out standards of conduct for all Commonwealth agencies when conducting litigation. In relation to the MLO, the IGT has recommended, amongst other things, that the ATO work with the ATO Complaints Unit to enhance its investigation of allegations of MLO breaches to address perceptions of bias and lack of independence. <a href="#">Report Here</a> .
Where tax must be paid in whole or in part before an appeal, there must be an effective mechanism for providing interim suspension of payment	An appeal should not require prior payment of tax in all cases			
	The state should bear some or all of the costs of an appeal, whatever the outcome			
Legal assistance should be provided for those taxpayers who cannot afford it				
Taxpayers should have the right to request the exclusion of the public from a tax appeal hearing				
Tax judgments should be published				

Minimum Standard	Best Practice	Shift towards	Shift away	Development
<b>7. Criminal and administrative sanctions.</b>				
Proportionality and <i>ne bis in idem</i>				



should apply to tax penalties				
	Where administrative and criminal sanctions may both apply, only one procedure and one sanction should be applied			
	Voluntary disclosure should lead to reduction of penalties			
Sanctions should not be increased simply to encourage taxpayers to make voluntary disclosures				
<b>8. Enforcement of taxes.</b>				
Collection of taxes should never deprive taxpayers of their minimum necessary for living				
	Authorisation by the judiciary should be required before seizing assets or bank accounts			
Taxpayers should have the right to request delayed payment of arrears				
	Bankruptcy of taxpayers should be avoided, by partial remission of the debt or structured plans for deferred payment			
Temporary suspension of tax enforcement should follow natural disasters				
<b>9. Cross-border procedures.</b>				
The requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer unless it has a reasoned request from the requesting state that the taxpayer should not be informed on grounds that it would prejudice the investigation	The taxpayer should be informed that a cross-border request for information is to be made			In December 2016 the Inspector-General of Taxation in his review of Taxpayer Rights and Remedies - <a href="#">Report Here</a> - examined the ATO's approach to exchange of taxpayer information with foreign revenue authorities. The Report concluded that while the ATO's procedures in this regard align with international practices and appeared reasonable, there was minimal public information on which taxpayers and tax practitioners could rely. Accordingly, the IGT recommended that the ATO provide additional public guidance on the ATO's approach, particularly with respect to data security, notification to taxpayers where their information is being exchanged with other revenue authorities and opportunities for them to consider that information.

Minimum Standard	Best Practice	Shift towards	Shift away	Development
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## 9. Cross-border procedures (cont).

	Where a cross-border request for information is made, the requested state should also be asked to supply information that assists the taxpayer			
	Provisions should be included in tax treaties setting specific conditions for exchange of information			
If information is sought from third parties, judicial authorisation should be necessary				
	The taxpayer should be given access to information received by the requesting state			
	Information should not be supplied in response to a request where the originating cause was the acquisition of stolen or illegally obtained information  A requesting state should provide confirmation of confidentiality to the requested state			
A state should not be entitled to receive information if it is unable to provide independent, verifiable evidence that it observe high standards of data protection				
	For automatic exchange of financial information, the taxpayer should be notified of the proposed exchange in sufficient time to exercise data protection rights			
	Taxpayers should have a right to request initiation of mutual agreement procedure			
Taxpayers should have a right to participate in mutual agreement procedure by being heard and being informed as to progress of the procedure				

## 10. Legislation.

Retrospective tax legislation should only be permitted in limited circumstances which are spelt out in detail	Retrospective tax legislation should ideally be banned completely		<input checked="" type="checkbox"/>	Retroactivity continues to be the norm. For example, on 9 May 2017, the Government announced it will negate the use of foreign trusts and partnerships in corporate structures to circumvent the multinational anti-avoidance law. This measure will apply retroactively from 1 January 2016, which is when the multinational anti-avoidance law originally came into effect.
	Public consultation should precede the making of tax policy and tax law			

Minimum Standard	Best Practice	Shift towards	Shift away	Development
<b>11. Revenue practice and guidance.</b>				
Taxpayers should be entitled to access all relevant legal material, comprising legislation, administrative regulations, rulings, manuals and other guidance				
Where legal material is available primarily on the internet, arrangements should be made to provide it to those who do not have access to the internet				
Binding rulings should only be published in an anonymised form				
Where a taxpayer relies upon published guidance of a revenue authority which subsequently proves to be inaccurate, changes should apply only prospectively				
<b>12. Institutional framework for protecting taxpayers' rights.</b>				
Adoption of a charter or statement of taxpayers' rights should be a minimum standard	A separate statement of taxpayers' rights under audit should be provided to taxpayers who are audited			<p>In December 2016 the Inspector-General of Taxation released a report on Taxpayer rights and remedies - <a href="#">Report Here</a> . The Report recommended that before any further enforceable remedies are considered, there are administrative measures which the ATO could implement to realise significant improvements. Such improvements include ensuring that the Taxpayers' Charter is at the forefront of the ATO's interactions with the community and its performance against the Charter principles is appropriately measured and publicly reported.</p> <p>A recommendation was also made for the ATO to undertake consultation with a view to updating the Australian Taxpayers' Charter to record improvements in taxpayer rights and addressing other relevant matters such as the role of, and the ATO's interaction with, tax practitioners and the increasing use of digital interactions.</p> <p>The IGT raised the possibility of further review, noting (in the Executive Summary of the Report) – "Overall, the IGT has made four recommendations with which the ATO has either agreed in full, in part or in principle. However the ATO's level of agreement and their accompanying commentary create a level of uncertainty as to how and to what extent the recommendations would be implemented. Accordingly, to the extent that stakeholder concerns persist, the IGT may undertake a follow-up review to</p>

				<p>assess the effectiveness of resulting ATO actions and, if necessary, make recommendations for government to consider mandatory reporting of the ATO's compliance with the Charter and additional enforceable remedies.”</p> <p>The Report also considered taxpayer access to compensation where they have suffered a loss or detriment as a result of unreasonable ATO action. The focus was on the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme), a discretionary Commonwealth scheme through which agencies are able to pay compensation in circumstances where there is no legal requirement to do so. The Report recommended that the ATO raise awareness of the availability of the CDDA Scheme as well as to ensure that taxpayers are able to access internal review of decisions where there are sufficient grounds warranting reconsideration.</p>
	<p>A taxpayer advocate or ombudsman should be established to scrutinise the operations of the tax authority, handle specific complaints, and intervene in appropriate cases. Best practice is the establishment of a separate office within the tax authority but independent from normal operations of that authority</p>	<input checked="" type="checkbox"/>		<p>From May 1, 2015, the Inspector General of Taxation assumed responsibility from the Commonwealth Ombudsman for investigating tax complaints.</p>
	<p>The organisational structure for the protection of taxpayers' rights should operate at local level as well as nationally</p>			