

Tax and Time travel Looking Back and Looking Forward - a Tax Administrators perspective

Plenary address accompanying conference paper¹:

Jan Farrell

*Time present and time past
Are both perhaps present in time future,
And time future contained in time past.²*

Tax administrators who have worked in the service for many years have usually experienced the joys of seeing initiatives work and also experienced the disappointment of seeing courageous ideas flounder,³ notwithstanding some truly valiant briefings to those that decide our policy and administrative settings.

The ultimate litmus test of whether those ideas worked well is whether they stood the test of time by serving government and the community as envisaged. Although sometimes, judged more harshly with the benefit of hindsight, as history recalls the attempt back in the mid-1980s of a decision to proceed with a sensible tax proposal for an Australia Card, where everyone had a unique identifier known to all government departments.⁴ As it turned out this was an idea that the community was not ready to embrace and tax file numbers won the day, but we may yet see a unique identifier applied for a wider social security purpose at a suitable time in the future. More recently in Australia we saw polarised divisions of opinion over the introduction of new measures for a mining resource rent tax and a carbon tax and the very idea of proposing new or increased taxes is enough to put politicians (all around the world) in hot water.⁵ The notion of formulary apportionment of global income to ensure countries received their fair share was also kicked around for a long time and is yet another concept that didn't find common appeal.

The strategic role of government revenue agencies is ultimately to provide a service to the public by effectively managing and shaping the Commonwealth tax and super systems, to

¹ The views expressed are a reflection of my experience working in many areas in the ATO, currently as Deputy Commissioner, Case Leader for the Public Groups and International business line and do not represent official views of the ATO.

² T S Eliot in the opening lines of *Four QUARTETS*.

³ Leigh Edmonds in the *Working for all Australians 1910-2010: A Brief History of the Australian Taxation Office*, ATO Canberra publication November 2010, p 167 provides a *Eulogy for a tax bill* story, where an ATO senior official recounts receiving a bereavement card from a first Parliamentary Counsel, after the death of 5 tax bills that did not make it into law, designed to assist states to collect "receipts taxes," that were never legislated.

⁴ The Australia Card was proposed in 1986 as a national identity card and responded to concerns about wide scale tax evasion, but did not gain popular public support amid concerns about privacy. The legislation to introduce the card had already been rejected twice in the hostile Senate and it provided the trigger for the double dissolution of both houses, which led to the 1987 election in July and a later decision of the new Government, was not to proceed with the Australia Card.

⁵ In an acceptance speech for the GOP nomination in New Orleans at the Republican National Convention in 1988, the then presidential candidate George H W Bush famously said "Read my lips; no new taxes". This apparent commitment to voters was broken in a budget agreement in 1990 when defence spending escalated and the national budget deficit rose so taxes were increased in some areas.

benefit all Australians - so it is a valued part of the community fabric.⁶ We must be seen to act in a consistent and impartial manner and be subjected to a balance of internal governance and external oversight to answer questions on our transparency and accountability for management of the tax system. I will touch on the care and attention which various bodies bestow on us, through various levels of oversight, later in this paper.

In terms of the ATO's primary function as Government's principal revenue collection agency the record stands for itself; back in 1975-76 then Commissioner Sir Edward Cain, C.B.E. reported net revenue collections of \$13.47billion⁷ whereas Commissioner Chris Jordan A.O. reported in the 2014-15 Annual Report total collections of \$336.8billion, which is an almost 25 fold increase, albeit on a narrower tax base, just ahead of nominal GDP growth over the same period which had a 20 fold increase.⁸ Staff numbers also steadily increased over time to administer a changed mix of taxes; from the 70s base of around 11,800 overall staff operating largely under state based Deputy Commissioners to around 21,300 nationally based staff, over more dispersed locations.

A blueprint for a modern tax administration to be efficient and effective suggests some desirable features including adequate (operational) autonomy and adequate resources together with a stable legal framework (for assessment collection and enforcement) so that a revenue body is accountable for its actions but also subject to control and assessment.⁹

From time to time the ATO has also been given various other roles outside traditional revenue collection and necessarily shifted its focus to augment welfare delivery or government initiatives; so at various times the Commissioner of the day also had other hats to wear as the Child Support Registrar, the Development Allowance Authority and (still is) the Australian Business Registrar.¹⁰ Many of these initiatives set new administrative challenges for the ATO and equally recognised the ATO as being capable of implementation of new functions which supported economic growth or collected payments on behalf of

⁶ This aligns to a vision to be a leading tax administration known for its contemporary service, expertise and integrity. Back in 1991/92 the then Commissioner T P Boucher's Annual report had the theme of working 'Towards a World Class Tax Administration', which remarked on new work underway to revitalise "Australian tax administration": Commissioner Overview at p3.

⁷ The 1975/76 Annual Report at p18 lists total revenue of \$13.47billion. The tax base at that time included Estate duty, Gift duty, Sales tax, as well as levies for tobacco, wool, stevedoring industry and fruit canning. The Health Insurance Levy had only just been introduced by *Income Tax Assessment Act 1976* at a basis rate of 2.5% for resident individuals so for the 1976/77 year three quarters of the basic rate applied 1.875%. The general company tax rate was 42.5%.

⁸ Nominal GDP in 1975-76 was \$83,150m and in 2014-15 it was \$1,609,992, amounting to almost a 20 fold increase. This assumes that taxation revenue is principally driven by movements in nominal income and at an aggregate level nominal GDP (I) is a proxy for national income.

⁹ European Commission "*Fiscal Blueprints- a path to a robust, modern and efficient tax administration*" European Communities 2007 for best practice international application. The OECD also surveyed similar features of tax administration in a 2015 report. Refer http://ec.europa.eu/taxation_customs/resources/documents/common/publications/info_docs/taxation/fiscal_blueprint_en.pdf

¹⁰ Under the *Child Support Act 1988* the Commissioner of Taxation became responsible for collection of child or spouse maintenance payments due under the Child Support Scheme until ten years later when it was sufficiently established to move out to the Department of Family and Community Services; responsibility for the Development Allowance Authority, established in 1992, was to the Commissioner (or his delegates) as a statutory office holder responsible for management of tax incentive allowances under the *Development Allowance Authority Act 1992* for concessions that were designed to improve international competitiveness through 'microeconomic reform' for genuine private sector investment with two incentive schemes being –the development allowance and the infrastructure borrowings tax offset scheme, however the initial incentives were terminated for new cases by the *Taxation Laws Amendment (Infrastructure Borrowings) Act 1997* as the concession gave rise to unintended consequences and cost estimates ('93-2003) grew from \$100m to \$1.5billion. Lastly the maintenance responsibility for the Australian Business Register accompanied the Australian Business Number single identifier that government introduced on 1 July 1999 as part of Government measures for a new tax system where some 2.8 million requests for registration were received in that tax year.

other agencies. Notwithstanding their eventual cessation or transition out of the agency, the effect was to place greater demands on our workforce, which has evolved and adapted to each challenge.

The institution of the ATO is now 105 years old¹¹ and I don't plan to look back that far, although as you might appreciate, our history presents the seeds of many present and no doubt, some future initiatives.

In our current environment individual taxpayers enjoy the benefit of prefilling/prepopulated electronic tax returns, including financial institutions' data, dividend data, employer information and other benefit information when lodging the prior down-loadable E-Tax module and the newer web-based myTax. We are part of myGov which now has 4.3 million linked clients as a single point of entry for government service. The ATO is moving to a future that has a digital interface platform, needing very little taxpayer effort to supply information or prepare documentation in many cases, especially for workers on a lower income.

The management of superannuation has generally maintained a prominent position for the ATO along with our partner agencies from the first appearance of superannuation funds in our tax law back in the early 1960s,¹² which then consisted of fairly rudimentary retirement vehicles. The more modern reforms have reacted to the aging population and associated welfare burden by bringing in the imposition of compulsory employer SGT and the current waves of employees' retirement savings through SMSF vehicles. The demands on government, to encourage people to self-fund for their retirement and to decrease reliance on the public purse, are not likely to wane into the near future. The massive amounts of funds both in the sovereign wealth fund, under investment by public and private superannuation funds is a significant investment¹³ that goes to the heart of ensuring prudent financial management and hence access to and assuring compliance of certain superannuation funds is another perennial matter for regulatory administrations.

I can recall a time in 2004 when I headed the individuals' business line and an officer advised me he had developed a 70+ step guide for any taxpayer who was in receipt of an eligible termination payment to calculate the concessional and full tax outcome- with all possible permutations covered. I asked him to have another go at more simplified instructions.

¹¹ The First Annual Report was by the Commissioner of Land Tax in 1912, relating to the operations of the Federal Land Tax Department in the first year of existence 1910/11 and provided to Parliament by the then Treasurer of the Commonwealth The Right Honorable(sic) Andrew Fisher. Of note, under the heading "Evasion of the Act", at p 11 it is stated that "It may be fairly stated that, so far as the investigations of the Department have yet disclosed, the cases of deliberate breach or evasion are few in number". Non lodgements, debt collection activity, objections and appeals all get coverage.

¹² See the majority judgment of Allsop and Stone JJ in *Cameron Brae*, 2007 ATC 4936, [2007] FCAFC 135 where the legislative history of superannuation (in the context of s 82AA) is recounted, noting the first appearance of superannuation as follows: "...the *Income Tax and Social Services Contribution Assessment Act 1961* (Cth) s 11 which inserted the first definition of "superannuation fund" into the Commonwealth tax legislation by inserting s 121B into the Tax Act; (and)... the *Income Tax Assessment Act 1965* (Cth) which introduced into s 6(1) of the Tax Act a definition of the phrase "superannuation benefits".

¹³ Australian Bureau of Statistics *Managed Funds, Australia* September 2015, reported that managed funds industry had \$2,590.6Billion under management.

1. Tax administration – Then and now

I commenced employment in the ATO in the somewhat myopic days of full assessment where we manually checked information supplied in detailed paper tax returns. The workloads consisted of high volume processing and technical scrutiny of claims against taxable income. We coded the returns using alpha codes for a limited range of adjustments and this was sent to data entry points which produced machine generated advice notes issuing to taxpayers with their notices of assessment. Apart from in the audit section, we had very limited personal contact with taxpayers either at assessment or review stage, unless it was our role to review assessing action after lodgement of an objection in order to settle claims based on a new opinion of the adequacy of evidence.

The lexicon we used last century included ATO buzz words like Chief Assessor directives, Canberra Income Tax Circular Memorandums (a form of internally binding ruling) and it was an age when tax enquiry counters distributed verbal tax advice. Once I recall many years ago assisting a taxpayer to tabulate his taxable income because as an author he could apply for the benefit of a lower marginal tax rate by using the averaging provisions like primary producers.

We used to work in large breezy open plan offices without air conditioning or partitions, with one group telephone for half the floor area and where the working day was tabulated by time clock (bundy) cards for each employee and where the rattly tea trolley heralded the morning and afternoon work breaks. There was no Capital Gains Tax, no Goods and Services Tax, no Fringe Benefits Tax, no comprehensive Thin Capitalisation rules and no Taxation of Financial Instruments or Consolidation regime, so the interaction problems we now experience in the tax legislation were limited. In fact, a lot of time was spent on defining and refining the basics of tax law like the ambit of income, deductions, rebates and concessions. Those were the days of targets to achieve daily output tallies with limited time for technical scrutiny and with machine like turnover of file stock of salary and wage, partnership, trust, and to a lesser extent company and superannuation returns.

Today the ATO is looking at the employee experience by focusing on capability improvements through knowledge sharing, updating workplace infrastructure to create an agile work environment with staff being provided with virtual desktop platforms to change the way we work. This will lead to a smarter and adaptable workforce. The pace of technology innovation has allowed government an enhanced ability to use technology to drive efficiencies, as we moved away from typing pools of dedicated people on typewriters to where we had a computer on every desk. Twenty five years ago our “aim” was that..” 30% of staff would have access to business tools to meet the needs of the office of the

future”.¹⁴ The present ATO Executive might well be able to trumpet that they have well surpassed that objective.

Our attitudes to administration have certainly evolved over time from the ATO – from early days of ‘protecting the revenue’, to a more efficient and effective operation that ensures taxpayers’ willing participation in the tax system through payment of the right amount of tax at the right time and thereby building community confidence.¹⁵

With the introduction of *The Freedom of Information Act 1982*, a greater environment of openness came to APS agencies and the ATO published many internal guidance notes to make them generally available as well as making other material gathered under its formal powers available on request. Interestingly, it was almost a decade earlier, in the mid-70s when the Commissioner’s Annual Report had its own version of release of (internal) information by publishing details of the people who had an ‘understatement of taxable income’ during the year, by including names, suburb of residential address (or town) of individuals and occupation/business of all companies and the amount of that understatement together with the amount penalty imposed, for the relevant years.¹⁶

If a sign of a mature tax system is the sophistication of its risk and collection mechanisms, then we can expect that both mechanisms will continue to feature on the improvement continuum into the future.

Risk detection mechanisms that we used at the turn of this century featured heavy reliance on data matching, with intel from both audits and provision of advice, as well as community contacts, research initiatives and a newly formed Analytics Project.¹⁷

Our risk systems were probably somewhat rudimentary in the 1980s just as foreign banks were given licences to operate in Australia. We had employed economists to look at the tax performance of various sub segments of large and medium companies operating in Australia and those that displayed signs of low or no profit margins came onto the ATO radar. Also of interest to the ATO were innovative financial instruments, the substance of which, were not well understood in the ATO at that time. An attempt to access information not freely made available to the ATO on particular financial arrangements was discussed in often sighted Court case, where the ATO auditors carried out an ‘unannounced visit’ on Citibank’s premises to seek information using the Commissioner’s general access power.¹⁸ The outcome resulted in the courts properly pointing out a need for due process in seeking broad access and allowing claims for LPP to be made.

¹⁴ Commissioner of Taxation Annual Report 1991/92 “Goal: Staff Finding the ATO a satisfying place to work: Business Tools Objective” at p138.

¹⁵ ATO Program Blue Print Summary 2015 <http://reinventing.ato.gov.au/program-blueprint-summary>

¹⁶ See Schedule 1 ‘Breaches and Evasions’ of 1974-75 and 1975-76 Annual Reports of the Commissioner of Taxation.

¹⁷ Annual Report of Commissioner of Taxation (Michael Carmody) 2002-03 at p70-71.

¹⁸ 89 ATC 4268.

The ATO does indeed acknowledge the right of taxpayers to make claims for legal professional privilege and also allows an opportunity to make a claim for the accountants' concession.¹⁹ Occasionally we have found that broad claims to exclude access to tranches of documents, on the basis of alleged privilege, are capable of stopping difficult audits in their tracks and we are at pains to make sure that such claims are asserted only where they properly apply. In the instructive words of Lord Justice Hamilton:

'Claiming privilege in an affidavit of documents is not like pronouncing a spell, which, once uttered, makes all the documents taboo'.²⁰

The advent of Self Assessment and Rulings

What sparked one of the most significant changes to tax administration was undoubtedly the introduction of the self assessment system in 1986-87.

A review was made of the traditional assessing work and it was found that changes were needed in the face of the-

- "costs associated to assess business and company returns";
- insufficient detection and treatment of general non compliance of tax obligations; and
- "lack of job satisfaction for staff".

In this new world where tax returns were no longer technically scrutinised by swathes of assessors, the ATO shifted emphasis to post assessment audit and "compliance improvement activities".²¹

The Self Assessment Priority Tasks Project of 1991 led to a new system of binding public rulings and binding private rulings along with new systems for penalty and interest, although the FOI changes led to earlier internal rulings issuing.²²

At the time the proposed improvements were made in conjunction with various stakeholder associations and it was heralded as a new age of consultation and openness by the ATO – which a former Commissioner referenced as the ATO putting "past enmities aside"- akin to the Berlin wall coming down (overseas) and through such co-operation, building .."a modern tax administration, world class."²³

¹⁹ In November 1989, the ATO granted a concession to clients of professional accounting advisors which allowed such advisors to withhold, in the absence of exceptional circumstances, certain documents from the ATO.

²⁰ In *Birmingham and Midland Motor Omnibus Company Limited v London and North Western Railway Company* [1913] 3 K.B. 850 at 859

²¹ Address by Michael D'Ascenzo (then Acting First Assistant Commissioner of Taxation) to the National Convention of the Taxation Institute of Australia on 9 May 1993 at p2.

²² A report on Aspects of Income Tax Self Assessment in August 2004 by Treasury further suggested improvements to the advice system, to make it more responsive including the option of deemed negative ruling for those older than 60 days, refrain from ruling on issues not directly raised in PBR applications to shorter periods of review.

²³ Ibid. Footnote 10 at p8, citing the (then) Commissioner's T.B. Boucher's statement to the Public Accounts Committee of 29 May 1992.

In fact the tax profession in that decade and since, have become very involved in consultation on many novel movements in tax legislation stemming from a raft of rewritten legislation coming out of the Tax Law Improvement project introducing the 1997 Act along with some new measures²⁴ and the mandatory Regulation Impact Statements came into being to estimate impacts of proposals affecting business.²⁵ In the 2000's, the integrity of the tax system was sought to be improved by a new Consolidations regime²⁶, etc. and the biggest change was the abolition of sales tax and the introduction of a Goods and Services Tax on 1 July 2000.

Consultation emerged as a key plank of Treasury, the Board of Tax and the ATO's *modus operandi*. Notwithstanding its undoubted benefits, the growth of various levels of consultation may have been slightly over enthusiastically adopted in the ATO.²⁷ A recent review of ATO industry, professional and community consultation committees under the ATO Reinvention banner noted the duplication and attendant resourcing issues and the decision was made to reduce them down from 68 to 8 and reduced the number of our internal committees from 45 to 22, with special-purpose and technical forums convened as required.²⁸

While core issues should invariably benefit from consultation, the future may not lie in Committee driven consultation but more interactive real time management and intelligence gathering where collective knowledge sharing takes place.

The ATO's Public Rulings guidance is another way of externally providing technical interpretation views and it came of age in the mid 1990's with an amalgamation into one program and notifications by way of the Commonwealth Gazette, together with a Panel of experts at the review and clearance stage to bring in commercial acumen. The initially untracked issuance of private binding rulings, issued by the ATO, matured considerably after implementation of quality standards and after being tested, many improvements followed from recommendations out of several big step reviews.²⁹ Guidance by way of providing ATO views continues to be a hallmark of our service and to assist voluntary compliance.

²⁴ The new *Income Tax Assessment 1997* was written to make the law more understandable and principle based. Also In the 1990s we saw *Taxation of Financial Arrangements* Consultation document (December 1993) followed by an Issues paper in 1996 etc. (until legislation emerged), Redrafting of the *Thin Capitalisation* provisions in TLAB (No 4) 1997, introducing *Controlled Foreign Companies* rules (1990) to tax foreign source income by Australian residents and extending Part IVA to include WHT avoidance (per s 177CA in the 1996-97 tax year).

²⁵ This followed the governments Regulation review and was part of, "More Time for Business" 24 March 1997 by the Hon. John Howard.

²⁶ Per various *New Business Tax System Bills* in 2002. Other highlights included the Simplified Tax System for small business; the Australian Business Number became our single business identifier; the PAYGI system replaced provisional tax, prescribed payments, company instalments and withholding tax; and let's not forget company headline tax rates plummeted from 36c to 34c in 2000-01 and then 30c for 2001-02.

²⁷ See the Report of The Commissioner of Taxation 2008-09- the three C's were embraced – consultation, collaboration and co-design.

²⁸ Geoff Leeper, Second Commissioner, People, Systems and Services, Address to the National Tax Practitioner Conference Sydney, Wednesday, 18 June 2014 said that "a considerable amount of time was invested in the old arrangements, with almost 1,500 external people participating in 230 meetings a year as part of 68 ongoing committees. This has been significantly reduced to eight stewardship committees plus project-like consultation for specific issues." See also similar comments from Chris Jordan, Commissioner of Taxation in his address to the ATAX 11th International Tax Administration Conference Sydney, 14 April 2014. Note the 2014-15 Annual report notes that 68 matters were consulted on and completed, and 53 matters were in progress.

²⁹ For example in 2001 by the ANAO, then an Auditor General Audit (Report No. 7) in 2004-05, in the *Report on Aspects of Self Assessment* in 2005-06 and by the more limited IGT review in 2007.

Tax Reform

It's fair to say that some attempts at making tax law less complex and more equitable or simpler are well documented and seem to have taken time to gestate.³⁰ The Aspery report completed in 1975 had a central objective of broadening the tax base and lowering taxes. Sounds like a familiar theme.

The tax reform package announced in September of 1985 by then Treasurer Keating introduced across the board cuts in marginal tax rates, new taxes on fringe benefits and capital gains and the taxation of income from foreign sources, with an allowance for foreign tax already paid. Cabinet decided that it was not the right time to introduce a consumption tax, because they were advised that a ... "yield from a tax on services and a major extension of the wholesale sales tax" would be insufficient to fund tax cuts to low income earners.³¹

When CGT was introduced from September 1985 on gains not previously taxed, it managed to generate revenue beyond Treasury expectations.³² A number of factors contributing to this included the growth in the global and Australian economies in that decade, the scope of the net as drafted and the lack of concessional rates. As part of the first interpretation CGT Cell we had a number of technical issues to determine and issued an early form of tax determination to provide quick answers to vexed issues.

The policy and non-policy initiatives stemming from the Tax Simplification taskforce in 1990, the Review of Business Taxation report in 1999 (John) Ralph Report of *A New Tax System Redesigned*-(ANTS) recommending a Goods and Services Tax (GST) and introduced the CGT 50% discount were big initiatives. The implementation of the GST and PAYG system meant an overhaul of ATO systems and procedures of tax administration as tax reform impacted on many jobs in the ATO.³³ The massive recruitment exercise to employ 4,000 new staff to deal with the additional workload in call centres and enquiry counters is legendary in the ATO and not likely to be seen on that scale again.

Since the handover of law design to Treasury, the ATO has contributed ideas and opinions especially around administrative workability of proposed new laws, courageously pointed out likely impediments or flaws and provided practical input on possible improvements to

³⁰ For example the 1959 Commonwealth Committee on Taxation, chaired by Sir George Ligertwood addressed tax avoidance reform but other recommendations were not picked up until the next major reform exercise in 1972 by Justice KW Aspery and the Taxation Review Committee.

³¹ Cabinet Decision No. 6513 - Tax reform. Secretary to Cabinet file note dated 12 August 1985: NAA: A13979, 6513-National Archives of Australia. Australian Government publication.

³² National Archives of Australia, Australian Government. There were no reliable "statistics available regarding the distributions of capital gains across income ranges in Australia" although information from Cabinet Decision No. 5629 from 12 May 1985 (at 402) suggests that early low estimates of revenue collections- were derived from Canadian capital gains data (by grade of income) by chart at p 405. These were later overshadowed by estimated collections of around \$300m in revenue over a 5 year period: NAA: A14039, 2865.

³³ There was also an 8 person 'New Tax System Advisory Board' established in July 1999 by the Treasurer to assist with effective implementation, to minimise transitional issues and to advise government about assistance to business and community sectors.

proposed law changes. Our corporate plan speaks of influencing policy and law design for more certain outcomes.³⁴

The more important 'root and branch' examination of the tax and transfer system (excluding GST and Superannuation) was conducted by the Henry Review in 2008-09 around the time of the global financial crisis and produced some enlightened ideas for a future tax system.

Outside the tax reform space large scale tax changes traditionally bring with them an increase in implementation challenges for tax administration and present opportunities for our expert workforce.

Remarkably though, with all the media concentration on companies tax obligations, the tax mix of where the Commonwealth derives its (direct) revenue has not changed significantly in 60 years. It has been observed that about 50% is from personal income tax collections and (in the last decade) around 20% in company income tax, however tax reforms do impact changes within tax bases.³⁵ Leaving aside indirect taxes, it's hard to see that the incidence and reliance on personal tax is likely to change much into the future as the world trend statistics show continuing stability with individual income tax and indirect tax as a steady source.³⁶

2. Structure and Modernisation of the ATO

Our brief history of the ATO records that one of the most significant decisions was to revitalise our computer capacity, integrate it into our activities for better compliance and service initiatives and to modernise the ATO.³⁷ Typing pools where we once took our hand written notes were closed and work processes were redesigned. To transition from a processing organisation to a service based organisation, we attended team building workshops run in-house by senior tax officers, with a range of visitor trainers from all walks of life that demonstrated a broad range of skills including ethics, tactics and HR management. This program, funded through the Public Services Commission, was a new style of manager training looking at the "psychological and sociological problems" that may be experienced with ATO staff, that wasn't necessarily found in any rule book produced at

³⁴ When the ATO sees weaknesses in the tax law it advises government and occasionally this process of advice and subsequent public announcement has not worked as well as intended, for example where a stockpile of proposed legislative improvements is not enacted.

³⁵ M. Stewart, A. Moore, P Whiteford and R Q Grafton "A Stocktake of the Tax System and Directions for Reform- 5 years after the Henry Review", February 2015, Tax and Transfer Policy Institute, Crawford School of Public policy paper, Australian National University at p 30 and Chart 3.4 *Composition of the Commonwealth tax system since 1950 (to 2012)*.

³⁶ 'Corporate tax revenues have been falling across OECD countries since the global economic crisis, putting greater pressure on individual taxpayers to ensure that governments meet financing requirements, according to new data from the OECD's annual Revenue Statistics publication. Average revenues from corporate incomes and gains fell from 3.6% to 2.8% of gross domestic product (GDP) over the 2007-14 period. Revenues from individual income tax grew from 8.8% to 8.9% and VAT revenues grew from 6.5% to 6.8% over the same period'. OECD report summary 2015.

³⁷ Edmonds, Leigh: *Working for all Australians 1910- 2010: A brief history of the Australian Taxation Office* ATO Canberra November 2010 at p196-206. The Modernisation Program is described in the Commissioner of Taxation Annual Report for 1993/94 at pp83-89, to have received in-principle approval from Government in 1987 to "improving our services to the community and meeting the challenges of our changing environment toward the year 2000."

the time.³⁸ In addition a core competency model was developed to match employee skill sets with ATO work types and the ATO supported a Bachelor of Taxation degree through the University of NSW (ATAX) for undergraduate degrees and from 1993 for post graduate courses.³⁹

In the 90's decade we became a new nationally run business organisation that took over from the old state run branch offices. I found myself as a national litigation appeals manager fielding calls on cases around the country, which was quite a learning curve.

Tax Law Services was set up in 1994 to provide technical leadership through the ATO to resolve complex technical matters in an environment where "all technical staff could perform at their optimum". It consisted of three arms being Legislative Services – whose primary role was policy advice and our window to government, Tax Counsel Network -which was a team of senior technical resources and a Practice Management & Development arm – which developed technological and support tools and professional development activities- all of which resulted from government's investment in the ATO's Compliance strategy in September 1992. The then ATO's Second Commissioner (of Law) saw that the National Tax Practice role was ..."interpreting, applying, mending and/or developing the law".⁴⁰

In terms of client engagement, the ATO unveiled a Compliance Pyramid that helped form the subject matter for many PhD thesis and research papers and provided a "valuable framework for compliance work" in the ATO.⁴¹ The ATO Compliance Model worked well to depict the levels of help and engagement warranted against levels of compliance behaviour. At the base of the pyramid where most taxpayers converged –mutual 'Trust and Cooperation' was observed, up through the middle of 'Passive' facilitation and 'Active' facilitation and up to the top pointy end of the pyramid where as small group of high risk taxpayers warrant 'Tougher Enforcement'.⁴²

Tracking Costs of Compliance

One of the ATO's current KPIs is the time-cost index for business and super funds to prepare and complete key tax forms.⁴³ The ATO started very limited qualitative work on the costs of compliance for small business back in 1991 by focussing on record keeping and reporting requirements with various trends identified from inadequate software availability to the burdens of sales tax. This was not unusual since the sales tax rules had developed from a single rate tax with limited exemptions (when introduced in the 1930) to a much larger suite

³⁸ The Managing in the Nineties Program (MIN) was heavy on practical training and experiential learning and "light on theory" and resonated well with many people who were rolled into the Program. Its aim was to have it rolled out to 17 offices 71st Report of The Commissioner of Taxation Annual Report 1991/92 p156.

³⁹ Our three major training programs were the Australian Taxation Studies Program (ATAX), the Taxation Officer Development (TOD) program e.g. TOD 1 competency based training for lowest graded officers was developed with the Public Sector Union) and CPD. ATAX began in 1991 and by 2002 had 582 graduates, largely from the ATO.

⁴⁰ Peter Simpson, then Second Commissioner as reported in our staff magazine Tax People 1994.

⁴¹ Michael D'Ascenzo, "Y2K relationships- the ATO and you post 2000", Taxation in Australia, Vol 34, No.8 February 2000, pages 421-430.

⁴² Ibid

⁴³ Treasury Portfolio Budget Statements 2015-16: Budget related paper No 116.at p203.

of assessment acts and exemptions.⁴⁴ Then in September and October 1995 research under the Compliance Improvement banner in conjunction with our Revenue Analysis branch conducted wider, but limited studies,⁴⁵ which revealed that the average time spent by businesses (surveyed) on tax activities per month was 18-23 hours⁴⁶ but the finding I most liked was that “on average, businesses consider that they would save 94 hours per annum if federal taxation were abolished, and if allowed ‘fair compensation’ for their compliance costs, would claim approximately \$3,000 (outliers excluded); and that “approximately half the respondents agreed that their requirements of the federal tax system improved the record keeping of their business.”

While the ATO keeps track of cost of compliance cost of various taxes and report on our views and survey work, academics have noted the added impact of social compliance costs.⁴⁷ We seek to work with tax agents, software providers and through improvements in accessing third party information, hence providing better tools to assist taxpayers, the future ‘help’ mechanisms are designed to reduce the impact of obligations to report.

Looking outwards over time, one of the next progressions for the ATO is to work on more sophisticated macro tax gap estimates which give an indication of the difference between the amount legally payable by a fully compliant taxpayer population, against actual collections for that population (for a particular tax).

3. Schemes that Frustrated the Best Tax Administrators

The ATO’s investigation of tax avoidance activities in the late 1970s early 1980s, grew well beyond its ability and the extent of taxpayer involvement took everyone by surprise, such that ATO resourcing barely kept pace with the monster.

The Annual reports of the Commissioner to Parliament recount the frustration of the Australian tax administration at trying to address and understand the ...“new and ingenious misuse of tax provisions” which was exacerbated by the use of “evasive tactics” to frustrate ATO investigative action and featured tactics of...“deliberately concealing the facts” and “making claims based on fictitious transactions”.⁴⁸

⁴⁴ The joint study with the Department of Industry, Technology and Commerce and researched by Dr Ian Wallshutzky, Associate Professor in Taxation, University of Newcastle, reviewed over 12 months, twelve small businesses both new and well established in Qld, Victoria and NSW.

⁴⁵ “Costs of Compliance: An interim Report,” from Chris Evans, Katherine Ritchie, Binh Tran-Nam and Michael Walpole 27 November 1995.

⁴⁶ This time on tax compliance activities had increased from the 12 hours average per month found from interviews of 123 participants in the 12 months between November 1991 and 1992 in a paper “A Case Study Exploration of Taxation Compliance Issues in Small Business” by Brian Gibson & Ian Wallshutzky, Department of Commerce University of Newcastle in a paper for a Tax Compliance Research Conference in Canberra in December 1993. This impact was assessed at that time as “either \$7,425 or \$16,335 depending on how opportunity cost was assessed.”

⁴⁷ Deadweight losses: Refer to the conference paper to the 9th International Tax Administration conference ATAX UNSW by Evans and Tran-Nam *Managing Tax System complexity: building Bridges through Prefilled Tax Returns*.

⁴⁸ 59th Report of the Commissioner of Taxation 1979-80: *Management, Organization (sic), Compliance and Personnel* at p4 and Tax Avoidance at p7.

It is still at times extremely difficult to get the full facts necessary to properly determine tax risks and to the extent that we have there exists asymmetric, information flows which inhibit parties from arriving at good decision making. It is important that we improve the extent of transparency around transactions that involve worldwide financial flows, related party dealings and the taxation implications of global arrangements.⁴⁹

A popular method of avoidance of taxation that proliferated from the 1970's was stripping companies of their assets (or pre-taxed profits) prior to their tax liabilities being paid. This was described as an "alarming tactic" because it was compounded by the attendant lack of provision in the company (bank) accounts for any (subsequent) tax payments that may be assessed and was regarded as tax evasion pure and simple.⁵⁰ In response, the Commonwealth Parliament passed a number of related Acts in 1982, the most important of which was the *Taxation (Unpaid Company Tax) Assessment Act* which sought to recover evaded taxes under the *Crimes (Taxation Offences) Act* 1980. The ATO ultimately issued many notices to former owners or vendor shareholders for recoupment of tax where it was thought they were bona fide owners/directors of companies, but some found their way into the 'bottom of the harbour' repository of the criminally inclined. The tax evasion was very bold, blatant and a serious threat to the equity and fairness of the tax system, such that it was given a retrospective application (to all schemes entered into or after "shortly before" they were uncovered as being "practised on a wide scale entered into on or after 1 January 1972") and the law excluded review as to the assessment of the recoupment tax under the *Administrative Decisions (Judicial Review) Act 1977*.⁵¹

Famously an opponent of that legislation was Senator Don Chipp who speaking against the bill in the Senate said:

*Good heavens; give politicians the chance to legislate retrospectively and we will open a Pandora's box. I find that quite frightening. On this occasion a Pandora's box is opened in the excuse of catching the filthy people who cheat on tax. It is done for a noble purpose, one might say, and I agree. But I have never been one to subscribe to the view that the end justifies the means. That sort of proposition leads one down a track which is fraught with disaster. That is the track that Adolf Hitler went down. It is the track that every tyrant in history has gone down; that is, to make illegal today something which was legal last year.*⁵²

Notwithstanding Senator Don Chipp's colourful remarks on the introduction of retrospective legislation,⁵³ it can be justified to ensure consistency of treatment to all participants (not the

⁴⁹ The Senate Enquiry Reference Committee -enquiry into corporate tax avoidance Interim Report of 2015, has made specific recommendations for Multinationals.

⁵⁰ Ibid

⁵¹ Taxation (Unpaid Company Tax) Assessment Bill 1982, Explanatory Memorandum –Part I. Treasurer Hon. John Howard.

⁵² See Senate Hansard, 19 November 1982 at 2592.

⁵³ Senate Standing Order 30 also addresses retrospective bills in the tax context, by stating that if they are not introduced within 6 months of announcement then the commencement date will be after introduction of legislation into Parliament- effectively when the bill is made public. Treasury reviewed this aspect in August 2004 in their "*Report on Aspects of Income Tax Self Assessment*" and concluded that

fewer late entrants). The era marked a change in the way we handled large tranches of work and our awareness of the extent of evasion practices. The retrospectivity issue will surely be a feature of legislative change and tax administration at some future juncture to account for transactions falling within the same class being treated consistently.⁵⁴

Our internal history records that by 1983 the ATO had successfully employed another 580 staff⁵⁵ to strengthen overall compliance activities and with the retirement of Chief Justice Barwick from the High Court the ATO was again successful in a tax avoidance case.⁵⁶ The waxing and waning of contentious issues in litigated tax cases will no doubt be another feature of a tax system where significant issues emerge to present uncertainty.

A fresh look at the avoidance and schemes

The High Court informed us in judgements on several test style cases which the ATO considered amounted to avoidance of tax under the former section 260, that the general anti-avoidance law didn't work because evidently the taxpayer had a choice of tax effective arrangements and the ATO was not permitted to reconstruct the arrangement to produce a different tax effect. The age of tax avoidance annihilation under section 260 was replaced by the age of Part IVA. The changed law allowed an objective view of a particular arrangement and its surrounding circumstances and included countering the then prominent dividend stripping schemes that purported to replace otherwise taxable profits into the hands of shareholders in a tax free form.

It wasn't until around 1997 that the ATO commenced work on what became known as mass marketed schemes after our awareness of how pervasive they had become and how innovative the arrangements. Many aggressive promoters had made fees from targeting ordinary Australians such as miners in Kalgoorlie, to claim large deductions for arrangements that created tax benefits. These included schemes related to afforestation, agriculture, franchises, employee benefit and films, where large tax refunds were promised for very little equity outlay and non recourse loans supposedly funded by future revenue flows. It was all too good to be true and quite uncommercial in nature and certainly ineffective under the tax law.⁵⁷

retrospective start dates are appropriate to correct an unintended consequence, to address a tax avoidance issue or to correct an undesirable behavioural change on a measure-by-measure basis.

⁵⁴ Note the Full Federal Court decision on 24 July 2014 in *IOOF Holdings Ltd* [2014] FCAFC 91, an appeal from a private ruling challenging whether it was entitled to deductions for rights to future income (RTFI) in respect to shares in Australian Wealth Management, where it was held that there was no "accrued right" to have the matter determined according to the law that existed before the Consolidation provisions were amended to remove the deduction for RTFI, in Tax Laws Amendment (2012 Measures No.2) Act 2012.

⁵⁵ Leigh Edmonds, *op cit*, pp172-173. See also the 59th Report of the Commissioner of Taxation 1979-80 where at p 4 the Public Service Board approved and addition of 400 staff to the staff ceiling for that year and 180 in the following year.

⁵⁶ High Court refused special leave to appeal against the Federal court case of *Leary v. C. of T.*

⁵⁷ The ATO applied the general anti avoidance provisions to many schemes, a Senate enquiry was conducted and the Ombudsman investigated the Budplan arrangements after investor complaints and for the benefit of 'affected investors, tax advisers and financial planners'. Refer to the publicly released reports of the Cth Ombudsman under s35A of Ombudsman Act 1976: "*The ATO and Budplan*" of June 1999; and "*ATO and Main Camp; Report into the investigation into the ATO's handling of claims for tax deductions by investors in*

By 30 June 2001 we had finalised our views on 176 investment schemes involving around 40,000 taxpayers caught up in one or more of the arrangements.⁵⁸ The administrative reaction to the issues was, once understood, to reduce the interest rate on debts, start a print advertising campaign with warnings, Fact Sheets and look at dispute resolution mechanisms. I was part of the widely held settlement panel that approved terms of settlement that were offered to individual investors on some arrangements to resolve disputes and such guidelines were posted on our website.

Had we been able to detect some early warning signs or had systematic intelligence signalling material changes to high risk refunds or instalment variation patterns, as they were occurring – then the acknowledged slow administrative responses to the extensive risks may have allowed real time assessments. Today's Smarter Data initiatives are designed to assist with risk pattern but back then we used Product Rulings, introduced in June 1998 to create an avenue to advise our views at the early stages of prospectus- based offerings to allow arrangers and prospective investors some certainty. Most of the litigation challenges by promoters to these arrangements found the ATO ultimately successful.⁵⁹

This dark era of aggressive tax planning led to the Commissioner releasing Taxpayer Alerts or early warnings about the administrative treatment of tax schemes that we had encountered and were likely to take action against. More comprehensively the ATO shifted its focus to promoters and to deter the behaviour and hence a decision had to be made between whether to bring in a taxpayer's notification system for participants in an (identified) tax scheme, or whether a targeted deterrent should be aimed at those promoting the arrangements. The latter was viewed as the more preferable and so in 2006 a penalty regime to deter the promotion of tax exploitation schemes proved to be a more effective approach, especially with the ability to seek voluntary undertakings from the promoter or court injunctions.⁶⁰ Our brochure *Don't Take the Bait* and fact sheets for investors Tax Planning- investigate before investing were produced to give simple tips to investors.

4. Our Presence on the International front

Today we marvel that wealth can be made rapidly by young entrepreneurs devising digital services to a mass audience. The scale of such value creation with global activities defies the traditional concepts of source and residence and creates new issues to solve. The new words to describe the attendant loss of country revenue by groups using global tax advantaged positions – can't be labelled under old nomenclature and so is coined as 'base erosion and profit shifting'. With much global attention, the Organisation for Economic Co-

mass-marketed tax effective schemes known as Main Camp". Recommendations were adopted by the ATO and some legislative measures were also introduced such as a limit on prepayments related to tax shelters.

⁵⁸ Commissioner of Taxation Annual Report of 2000-01 at p 49.

⁵⁹ For example the Budplan scheme cases of *Howland-Rose & Ors v CofT* 2002 ATC 420 where tax benefits were denied by the courts and denial of R&D expenses in the AAT case of *Brody & Ors v FCT* 2007 ATC 2493

⁶⁰ *Taxation Laws Amendments (2006 Measures No.1) Act 2006*.

operation and Development (OECD) has progressed its work on base erosion topics and has pursued the development of guiding principles aimed at achieving greater tax transparency and consensus measures that can be adopted by countries in their domestic laws. It is anticipated that with the implementation of improved avenues to exchange information between jurisdictions and proposed multilateral instruments to efficiently implement treaty changes without the need to renegotiate a myriad of bilateral treaties, we can augment international cooperation between countries to combat treaty shopping and other forms of treaty opportunism.⁶¹ There is inherent good sense in finding shared solutions for commonly encountered problems, in the world of tax.

Looking back to the 70's, the ATO used to have out posted representatives in London and in Washington DC⁶², at a stage when just nine double tax agreements had been negotiated. When I was posted to Washington DC in 2005-07 (with my family), to a collocated task force to assist with our overseas work there was more focus on collaborative work. During my posting, a small US based international task force shared expertise to review international 'tax shelter' cross border arrangements⁶³ through the lenses of primary drivers of bank secrecy jurisdiction concerns, tax law mismatches, financing arbitrage, use of structures, concessions offered, losses and the adequacy of the tax administration approaches to detect and deter the promotion of schemes. This was all executed in an environment which was strictly subject to our respective treaty exchange limitations.

At present we have one representative located at the OECD in Paris providing a full time representational role and contributing to international programs of work. More commonly, in the current age of communication, we are better placed to hold international conference calls with our overseas revenue colleagues. Conference calls are conducted between separate teams representing each country and with respective appointees performing the role of Competent Authority to ensure the treaty rules are observed and to organise information flows.

The development of joint participation with other revenue international revenue agencies was established through the quaintly named SGATAR, PATA, and CATAR groups.⁶⁴ In thinking back on our contribution to these forums I recall that they consisted of rewarding but rudimentary work with developing countries at one level, to the more sophisticated exchange of tax risk analysis practices from the more advanced economies.

Have things changed that much? Well to me finding consensus on cross border tax work requires diplomacy not unlike a well quoted description of what was required to achieve success in foreign diplomacy in days gone by, which goes... "There is nothing dramatic in the

⁶¹ BEPS Action Item 15 re a proposed OECD a multilateral instrument to basically assist with treaty amendments for the BEPs action items (by 31 December 2016).

⁶² Then called –'Counsellor (Taxation)' in Washington DC and an 'ATO Representative' in London.

⁶³ Refer explanation in Australian Government ATO Compliance Program 2010-11 at p27.

⁶⁴ Study Group on Asian Tax Administrations (SGATAR), Pacific Association of Tax Administrators and Inter American Centre of Tax Administrators (PATA) and Commonwealth Association of Tax Administrators (CATA).

success of a diplomatist... such victories... are made up of a series of microscopic advantages: of a judicious suggestion here, of an opportune civility there, of a wise concession at one moment and a far sighted persistence at another... (that) no blunder can shake.”⁶⁵

In the modern world, we have seen media headlines on leaked documents and obtained intelligence that revealed the extent of hidden global tax evasion and jurisdiction mismatches in tax laws. However, once the G20 Leaders acknowledged tax base erosion as a risk to their economies and gave tax a priority in their Communiques, the pace of work in the post BEPS environment was given an impetus that made sure outcomes on key action items would progress at an enormous pace, much more than we have ever experienced in our history.

Areas of growing interest

A) Profit shifting

On the same operative date as the new GAAR provisions of 27 May 1981 the then Treasurer also foreshadowed law to counter the practice known as transfer pricing, where parties to an international transaction do not deal with each other at arms' length and avoid Australian income tax– sounds like profit shifting.

Transfer pricing is an area of the law that always gives so much and in which we have been reliant on experts to guide us through the economics of arms' length pricing methodologies. The Courts and Tribunals have not always embraced the economic conclusions that either the ATO or the taxpayer relies upon, as advised by its experts.⁶⁶

Over 30 years later we have brought in more workable laws to deal with modern day transfer pricing of goods and services but the whole changing world of digital commerce will ensure that it will be a topic well into the future of the global world of tax administration.

The ability of companies to choose preferred jurisdictions in which to locate their value chain, outsource a function or adopt a risk has enabled some enterprises to shift profits and access significant worldwide reductions in effective incidence of tax. Future tax administrations however, although assisted by administrative safe harbours and interpretative guidance, will continue to track the complexities of international transactions to assess tax compliance risks, if disclosures are not comprehensive and reliable.

Anytime the GAAR provisions are extended, we see a flurry of interest as it is an area which traditionally brings in a fresh era in tax interpretation and comment from tax professionals. I expect the new multinational anti-avoidance law (MAAL) applying to tax benefits of

⁶⁵ Lord Salisbury, 19th century quote.

⁶⁶ Refer to Justice Downes of the AAT in *Roche Products v. FCT* [2008] AATA 639 declined to accept the experts view of certain “appropriate mark-ups” and “medians” in inter-quartile ranges and in the absence of (in his view) a rational basis for distinguishing profit margins between comparable and non comparable drugs, he determined a separate gross profit margin for prescription pharmaceuticals based on other evidence.

significant global entities from 1 January 2016, will be no different.⁶⁷ The new measure targets multinational entities that use artificial and contrived arrangements to avoid attribution of profits and so do not return a sufficient proportion of the profit from Australian sales. Dialogue with the ATO is encouraged by entities affected and it is expected that affected groups will restructure their business chains to conform and apply for ATO rulings, to be assured their operations do not breach these new laws.⁶⁸

The community has seen a greater level of transparency around who pays their fair share of tax and through advocacy groups and the media, will be more vocal in holding companies accountable if not.⁶⁹ The ATO like other administrations seeks to stay current by reviewing the tax impact of taxpayers' commercial and financial dealings so we can spot the trends, provide certainty in our views and assure the community we are fulfilling our role in signalling acceptable levels of tax to profits.⁷⁰ Notwithstanding these efforts the future will surely present its own challenges around tax administrations addressing global (non symmetrical) tax structuring and transparency and through greater international cooperation to keep pace with innovative arrangements.

B) High wealth Individuals

Another memorable watershed for the ATO was the establishment of the High Wealth Individuals Taskforce. In Australia in the 1995-96 tax year, the ATO trail blazed the segment by uncovering a small number of apparently wealthy family groups paying little or no personal tax through a web of associated trust and company structures and thereby allowing one or more individual members to access welfare. Because privately owned and wealthy groups operated some of Australia's largest and most successful businesses, we conducted an extensive compliance review to work out their effective tax rates due to the often complex financial and legal arrangements many had structured that obscured, for revenue authorities, detection of any tax avoidance or tax sheltering.

Some countries have more recently levied a greater burden for tax (or called for a tax surcharge) on their high net worth individuals or top end earners, noting the disproportionate distribution of income as the gulf widens between the top 1% and the rest. Aberrations like wealthy US hedge fund managers paying lower rates of capital taxes than ordinary people on their carried interest returns (i.e. being not treated as ordinary income) is one tax break for the elite.

⁶⁷ New laws in addition double tax penalties for larger companies in various situations, with application to income years commencing on or after 1 July 2015.

⁶⁸ Refer to ATO's Law Companion Guideline LCG 2015/2: Section 177DA of the *Income Tax Assessment Act 1936*: Schemes that limit a taxable presence in Australia.

⁶⁹ On 3 December 2015, the *Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015* passed the Australian Senate requiring annual financial statements disclosing levels of tax by entities.

⁷⁰ The recently published 1st annual Corporate Transparency Report involves a transparency population of 1,539 entities (1,042 corporates with annual turnover >\$250m) for the 2013-14 income year, issued by the ATO on 17 December 2015, is one way to inform public debate about tax policy into the corporate tax system. It is expected that the next release of taxation data for Australian-owned, resident companies around March 2016 will further assist the global push for transparency in the corporate tax system.

Tax evasion, avoidance and crime (abuse of offshore secrecy arrangements) was addressed through the establishment of Project Wickenby taskforce in 2006. This involved a partnership of eight agencies to address the use of secrecy jurisdictions by individuals to avoid tax.⁷¹ We have revisited this area with amnesty like approaches to encourage people to come forward and voluntarily disclose unreported taxable income and access reduced penalties. For example, the 2014 voluntary disclosure initiative known as Project DO IT which provides Australians with opportunities to declare undisclosed or incorrectly reported offshore financial activities, has seen 5,800 disclosures (as at 30 June 2015) lodged with the ATO, and is an example of newer approaches being adopted for the ATO to work together with the wider community and encourage international transparency in our dealings with the tax system.

In addition, Project DO IT assists with intelligence information on the range and scope of inappropriate offshore arrangements, including those who chose not to voluntarily disclose income and can be used to inform on risk and compliance approaches.

5. Community expectations

The Taxpayer's Charter marked a change for the ATO on commencement from 1 July 1997 as it applied to all taxpayers' interactions with the ATO and introduced a set of service standards against which our administrative responses would be measured.⁷² The genesis of the Charter followed a Joint Public Accounts committee recommendation in 1993 and was in line with initiatives of other tax jurisdictions in explicitly documenting expectations and commitments as to how revenue authorities will treat taxpayers and vice versa. The initiative also coincided with the Howard government's statement that Service Charters were to apply to all government agencies that provided services to the public "to create a more open and responsive service culture in the public sector".⁷³ The ATO made a number of commitments to maintain professional excellence and service standards which has been continuously maintained and benchmarked in governance reports against key performance measures. Its future shape will no doubt continue to be reviewed for some time, noting the Inspector General of Taxation has it on his work program.

It was in late December 1996 that the ATO began measuring general community perceptions of its performance from individual and business taxpayers who had contact with the ATO to obtain views on our professionalism in respect of areas covered by the

⁷¹ See ATO Compliance Program 2011-12 at pages 24-25. Partners include ACC, AFP, ASIC and Cth DPP, AUSTRAC and AGS.

⁷² The Joint Committee of Public Accounts recommended in their report number 326 of November 1993, that the ATO adopt a Taxpayers Charter to address a perceived imbalance of the Commissioner's wide powers for income tax collection against the rights of taxpayers.

⁷³ The Hon. John Howard MP, "More Time for Business," 24 March 1997, p.56.

Charter.⁷⁴ The outcome was generally positive on competence and integrity but work on ATO responsiveness and taxpayers rights continued.

Current surveys reveal positive feedback has been received from the community in respect of the ATO's "perception of fairness" surveys⁷⁵ with individuals tends to be good as well as the feedback on earlier resolution of tax disputes as alternatives to litigation. Technology has allowed feedback to be interactive online and an ATO presence on Facebook/Twitter/You Tube, unlike what has been able to be delivered in the past.⁷⁶ In addition the Small Business Assist web page provides real-time guidance and support from an ATO officer on particular topics and the Lets Talk Forum (discussion board) has interactive conversations with tax agents with topics like the 'digital by default initiative'. These avenues for positive engagement with the community, fosters that willing participation in ways we would not have envisaged in times past.

The ATO work covers both internal and external facing improvements.

One valuable key initiative is the Single Touch Payroll. Once fully developed, it is capable of assuring many employees that tax is being deducted or being remitted to the ATO on their behalf. In this new environment, payroll data can be sent to the ATO in real time. Then progressive payslip information is remitted to the ATO, rather than leaving it to the annual payment summary at the end of the tax year to be the point of reconciliation (for tax and super).

The technology initiatives of the future will also incorporate elements of what have been piloted today, such as 'voice biometrics'. This style of speech analytics leverages off the notion that every voice has unique physical and behavioural attributes; which include both (stable) tonal as well as (transient) environmental characteristics. A caller can voluntarily agree to allow their voice characteristics to be recorded to allow identification and retrieval of account details to assist with service queries.⁷⁷ Such initiatives along with the myGov's fast, simple access to online services will better shape the efficiency and effectiveness of our interactions with clients from the taxpayer population.

6. Scrutiny of the ATO and the role of those conducting ATO oversight Australian National Audit Office (ANAO), Inspector General of Taxation (IGT), Board of Taxation (BoT) and Parliamentary committees

⁷⁴ Independent consultants such as Millward Brown Australia contacted around 2,000 people randomly by telephone with core questions (from 1996) and then in December 2000 a six monthly Professionalism survey was conducted using 9 characteristics expecting >= 70% satisfaction.

⁷⁵ MillwardBrown consultancy.

⁷⁶ Facebook – ATO page posts educational notes for different taxpayer communities to increase awareness. For example deadlines to lodge returns, tips for small businesses – it allows the public to comment on the posts as well; You Tube – features videos on various tax and super topics including ranging from presentations by ATO officers on proposed legislative changes affecting foreign investors, through to basic educational videos on basic tax obligations targeting recent migrant community. LinkedIn – promotes visibility of ATO to local and global professional working community. You can follow the ATO on this site to receive continual latest updates/posts and also be connected to those that are working in the organisation.

⁷⁷ At January 2016, 1.4million people had voluntarily agreed to enrol to use this technology for their identification.

While the ATO has had its own (internal) audit committee since 1998/99, external scrutiny has taken place via various avenues including-

- **The ANAO**, a separate government agency, has regularly conducted efficiency audits of the ATO for many years around particular functions or programs of the ATO as well as aspects of tax administration.
- **The Inspector-General of Taxation (IGT)**, an independent reviewer, now incorporating tax complaint handling.⁷⁸ The appointment of an IGT took place along with proposals for a Board of Taxation, following the 2001 Federal election where the option was raised as a way to balance business advice from the ATO and Treasury and to complement the Commonwealth Ombudsman role with individual taxpayers.⁷⁹ The ATO provides assistance as required to the 11 member advisory BoT on tax system improvement measures or studies on tax matters undertaken by the BoT at the request of the Treasurer. The functions given by Parliament to the IGT broadly consists of conducting reviews, at his own initiative, of the range of ATO systems used to administer tax laws.⁸⁰

In the year just passed Commissioner Jordan reported in his Annual Report that four ANAO audits, five IGT reviews and one Commonwealth Ombudsman own-motion investigation were completed and that amongst other things *'our scrutineers were informed of our reinvention program, including plans to drive cultural change, our new Building Confidence web page and the introduction of voiceprint (a voice biometric authentication solution) to simplify client access to our phone services'*.

- **Parliamentary committees**

The Senate Economics Reference Committee (SERC) had from time to time conducted inquiries into the operations of the ATO that stemmed from media or community concerns. A recent example was the Senate referral of an enquiry into corporate tax avoidance of multinationals to the SERC, where some companies were called to provide evidence before the committee as was the Commissioner and his officers. The changing dynamics were the openness with which companies were asked and did provide information about tax performance and tax compliance that is usually not in the public domain. In a sense this gave greater insights into the real challenges of the ATO in reviewing the complex financial affairs of large global corporations and stresses on the tax framework.

In present times the House of Representatives Standing Committee on Tax and Revenue has the mandate to examine annual reports of agencies allocated to it by the Speaker of the

⁷⁸ ATO website notes that from 1 May 2015, the tax complaint handling role was transferred from the Commonwealth Ombudsman to the IGT as a way to enhance the systemic review role of the IGT and provide taxpayers with specialised and focused tax complaints handling for tax matters. The purpose of this move is to enhance the systematic and unique review role of the IGT.

⁷⁹ Josh Gordon article in the Age newspaper of 22 March 2003 titled *'Senator slams Labor for impeding tax reforms'*, stated that "Facing a serious tax administration backlash during the 2001 federal election campaign, the Government promised to install an inspector-general of tax with inquisitorial powers to access confidential Tax Office information....Senator Coonan said the Government had an election mandate to introduce the reforms, and would not back down."

⁸⁰ Inspector-General of Taxation Act 2003, sections 7 and 8. The IGT may be requested to carry out a review by the Commissioner of Tax, a Minister, a resolution of a committee or the House, but is not required to comply with the request.

House or a Minister.⁸¹ After conducting hearings where tax officials and key witnesses gave evidence,⁸² a report of the committee published its views, saying that–

...“ the innovative services instigated by the ATO to simplify tax returns, the agency’s move towards a contemporary service culture and its commitment to formally assess the Tax Gap. It details how the ATO is progressing with its Capability Action Plan and notes the publication of the agency’s Strategic Intent and Corporate Plan, setting out priorities for 2014-18. It concludes that, since February, the ATO has clarified its vision to become a leading tax administration known for contemporary service, and is steadily working towards this goal.”⁸³

The members of the Committee⁸⁴ will successively review later year ATO annual reports and we expect will continue to do so into the future with equally useful reports.

The future state is not expected to change with respect to external scrutiny and inquiries into the management and effectiveness of government agencies including the ATO being subjected to scrutiny, whatever the subject matter.

7. Tax Appeals and Dispute resolution

The (then) Special Tax Adviser in the office of the Ombudsman (Cth) was one of our first external case mediators for disputes,⁸⁵ but since that time we have moved to more available and trained in-house facilitation services to resolve disputes with the ATO and other formal and informal services as avenues for Alternate Dispute Resolution.

From our early times at the Taxation Boards of Review (now the Administrative Appeals Tribunal⁸⁶) where, as one of the young Appeals & Review officers dealing with a considerable back log of (mainly individual taxpayers) smaller tax cases,⁸⁷ we regularly appeared for the Commissioner before the members of the Boards. The attractiveness of a low \$2 appeal fee meant many people got their day at the Board and were self represented or accompanied by their tax agents, so we were presented with some truly novel arguments about the need for lavish entertainment expenses, or why a barrister should be allowed his personal home water rates because he read his legal briefs in the toilet and while relaxing in the pool; to the man who argued he should be allowed to depreciate his brain (for tax

⁸¹ Under Standing Order 215. The Committee commenced to act as a scrutineer of the ATO in February 2014, a responsibility previously held by Joint Committee of Public Accounts and Audit (JCPAA), to look into its previous year Annual Report to Parliament and assess its progress.

⁸² Witnesses at the second hearing included the Commissioner of Taxation and senior staff of the Australian Taxation Office; Inspector-General and Deputy Inspector-General of Taxation; Senior Tax Counsel of the Tax Institute; Senior Tax Adviser of the Institute of Public Accountants; Head of Tax Policy of the Institute of Chartered Accountants Australia and the CEO of the Council of Small Business Organisations of Australia.

⁸³ Review of 2013 Annual Report of the Australian Taxation Office, Second Report, House of Representatives Standing Committee on Tax and Revenue, October 2014, Chapter 1, at paragraph 1.4.

⁸⁴ For the 44th Parliament the Committee comprises of ten Members of the House of Representatives, with six members nominated by the Government and four nominated by the non-Government parties.

⁸⁵ A recommendation of the JCPA in the 1990s.

⁸⁶ On 1 July 1986 the Administrative Appeals Tribunal took over the tax jurisdiction of the taxation Boards of Review.

⁸⁷ Around 80,000 cases nationally of which 47,000 were cleared in the 1991/92 tax year. See Annual Report at p35.

deduction purposes), whereas the Commissioner argued in response that he should not be afforded a deduction for depreciation as his brain would have been fully depreciated.

This leads me onto litigation and memorable case law that is too numerous to give justice to in this paper and will invoke some dissent, but I'll say that some impacted us organisationally more than others. The ones that had a considerably wide impact related to individuals claims for work related expenses that we had considered private in nature such as stockings for flight attendants and sunglasses for outdoor workers to a student receiving youth allowance who was found to be allowed to deduct education expenses against that income,⁸⁸ however the Test Case Litigation Program gave rise to a useful avenue to fund clarification of contentious areas of the tax law.⁸⁹

Overall the ATO has a solid history of litigation and it reflects good decision making by our tax administration. In the tax avoidance realm we were relieved to have the "no nonsense" *Spotless* decision handed down which has stood the test of time as referenced in the recent Federal Court *Orica* decision,⁹⁰ whereas other cases where we did not succeed in applying the anti avoidance rules such as *Mills*,⁹¹ mark law clarification points in our strategic litigation program.

Actually, the more mundane topic of debt and deductibility of interest has given rise to some of the more interesting cases from the early days of whether something in the nature of interest was properly deductible or of a capital nature up to the most recent Chevron transfer pricing case on the arms' length price of interest on a loan between related parties,⁹² which is the first jurisprudence on that topic for a while. The OECD Base Erosion and Profit Shifting Report (BEPS) set out three other tax risks areas of where excessive interest deductions need to be countered being: debt dumping or debt loading in high tax countries; creation of intra group debt at rates in excess of third party debt; and the mismatch tax exempt income funded by intragroup debt; from which legislative change to address these issues in participating countries is a distinct possibility.⁹³ Law clarification necessarily means cases are lost and won by the ATO as we endeavour to interpret some novel and interesting aspects of the tax system.

It is difficult to predict what future courts may have to ponder although ... our pivot towards a greater readiness to engage in Alternate Dispute Resolution means that we can deal more

⁸⁸ High Court decision in *C of T v Anstis* [2010] HCA 40 re Youth allowance;

⁸⁹ The ATO Test Case Program received Ministerial approval for 1995/96 tax year and \$2million funding secured from the Department of Finance. In 2006-07 the IGT reviewed the administration of test case tax litigation and although found it to be soundly conducted recommended a number of changes to improve its operation.

⁹⁰ See 1999/2000 Commissioner's Annual Report at p80. Refer to *FCT v Spotless Services Ltd* (1996) 186 CLR 404 and *Orica Limited v Commissioner of Taxation* [2015] FCA 1399 See 1999/2000.

⁹¹ *Mills v CofT* [2012] HCA 51.

⁹² *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)* [2015] FCA 1092.

⁹³ BEPS Action 4 OECD publication 2015. The UK's HM Treasury, as part of its Budget 2015 announced "new business tax roadmap", released an Open consultation paper on 22 October 2015 to seek views on how best to respond to the OECD proposals for countries to counter these risks and to modernise interest deductibility rules. Australia's Thin Capitalisation rules introduced in 2001 where strengthened in 2014 to prevent erosion of the Australian tax base from debt loading by introducing a safe harbour for general entities (with debt deductions >\$2m) of 1.5:1 and a worldwide gearing amount and a safe harbour limit for banks along with a capital limit.

flexibly with inevitable disputation and ensure that the path to resolution of tax disputes will continue to be refined to practically give fair and equitable outcomes.⁹⁴

8. The Future Evolution of Tax- what can be predicted?

Overall direction setting suggests that we might see in the future that a strong, sustainable and balanced country growth will always be supported by a good tax system.

What the ATO expects to see happen in the near future includes the following:

1. An efficient approach to personal income tax reporting with minimal compliance costs.⁹⁵
2. Tax being a function of business profits not a separate global cost centre, so that tax follows the profits where they are made rather than being an orchestrated product.
3. Tax administrators understanding tax performance and perceived weaknesses in the tax and super systems through -
 - Creation of astute mechanisms for certainty to resolve disputes and advise on ATO interpretation of the various tax laws applicable to situations in an environment where the full facts are known and understood.
 - An advanced analytics program which is capable of organising our ever increasing warehouse of data⁹⁶ in such a way that we can find and use those key bits of information that will help us target our activities and programs in a more effective way to support operations including lodgment, debt, disputes, advice and assurance work.
 - The thirst for behavioral insights into patterns of compliance, risk and measurements of tax gaps should continue well into the future.
4. Having an inclusive program for streamlined and collaborative interactions with clients across government and internationally.
5. In an age where service provider companies can bounce personal information around their global data centres (subject to privacy or regulatory constraints), tax administrations should use financial transparency initiatives to employ ever

⁹⁴ House of Representatives Standing Committee on Tax and Revenue Report of March 2015 acknowledges that given different attitudes to tax and its complexity makes disputes 'inevitable' @p 1 and recommendations made.

⁹⁵ Digital advances will allow improvements in prefilling of individual income tax returns with employment, financial and shares details and access account details.

⁹⁶ The ATO holds and receives enormous amounts of data each year and it is growing at a rate of over 20%pa. In addition we receive over 600million transactions of data each year from third parties. Information flows will be enhanced- through Ccountry-by-country reporting, FACTA intergovernmental agreement, Common Reporting Standard, FIRB, mandatory disclosure and automated exchange of rulings.

increasing sophisticated automatic exchanges of information. A framework with other countries is proposed to be in place by 2017/2018, along with the 'minimum standards' implementation to:

- to create a leap forward from the existing network of bilateral treaties after consistent implementation in the BEPS action areas of prevention of treaty shopping, Country-by-Country Reporting, fighting harmful tax practices with the of a multilateral instrument capable of incorporating the tax treaty BEPs related concepts.⁹⁷
 - Modernisation of all relevant partner country tax rules. The degree to which each country is able to adopt the suggested BEPs measures usually depends on what carve-outs the businesses in that economy are willing to allow and the extent of administrative capability.
 - Check global trends and monitoring for double non taxation.
6. Capacity to build for new challenges and work towards fixing stresses on the administration through:
- Maintaining a Capable workforce.
 - Modernising international tax rules to support multilateral approaches around cross border harmful tax practices and transparency.
 - Working collaboratively with sectors of the community to improve the efficiency and experience of the tax and super systems.
7. Advanced risk systems capability of individual and Small Business sectors and a deeper understanding of large business to provide:
- Tax gap extended view.⁹⁸
 - Disputes Resolution mechanisms.

And

⁹⁷ The instrument was announced by the OECD as open for signature by all interested countries who want to assist with its implementation from 2016 (refer BEPS Final package of reports: Explanatory Statement 2015). This is BEPS Action item 15 and incorporating Actions 2, 6, 7 & 14. The existing global pool of around 3,600 bilateral double tax treaties have restrictions on how modern tax administrations can work together to improve their understanding of the dynamic of tax planning through transparency. The lesson was that we gain better momentum and ownership when moving in a responsive and coordinated way to new challenges to the integrity of our tax systems.

⁹⁸ Recommendation 5 of the JCPA Accounts & Audit Report 398 was for the ATO to provide a mechanism to calculate the tax gap to prevent overall efficiency and prevent GST fraud. In the Annual report for 2014-15 the ATO added a number of new tax gap estimates to our GST and luxury car tax gaps and plans to advise other tax gaps this tax year.

8. Continuing interest and scrutiny in public senate/parliamentary domain as to whether multinationals are paying their fair share of tax.

Conclusion

A blueprint for a modern tax administration to be efficient and effective suggests some desirable features including adequate (operational) autonomy and adequate resources together with a stable legal framework (for assessment collection and enforcement) so that a revenue body is accountable for its actions but also subject to control and assessment.⁹⁹

Assuming these features can apply, the resulting outcome is a very good standard of administration, service to the community and advice to government. The ATO, drawing on its long history, expects to continue to meet community expectations with whatever the future of administration of the tax and superannuation system holds.

⁹⁹. Refer to Footnote 9 and the following link:
http://ec.europa.eu/taxation_customs/resources/documents/common/publications/info_docs/taxation/fiscal_blueprint_en.pdf