

Tax collection, recovery and enforcement issues for insolvent entities'

Introduction

Australia has abolished all statutory tax priorities. Accordingly, the current position is that no priority is given to tax claims in insolvency. Such claims are unsecured debts owed to the Commonwealth which may be recovered as a civil debt by the Commissioner or Deputy Commissioner, like other such debts, in any court of competent jurisdiction.

While the Commissioner suffers the disadvantage of being an unsecured, involuntary creditor, there are nevertheless important advantages the Commissioner enjoys over other unsecured creditors. Having responsibility for the administration of taxation laws provides the Commissioner with extensive powers for assessment of tax liability, and collection of the tax due and owing arising from a valid assessment. The collection and recovery of unpaid tax-related liabilities and other related amounts is covered by a common set of rules in Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (TAA).

In addition to this legislative scheme, the Australian Taxation Office (ATO) has provided administrative guidance as to the operation of the legislation by way of Law Administration Practice Statement (PS LA) documents, which prescribe the ATO's view on the operation of the legislative provisions. The manner in which the ATO engages with taxpayer's in the administration of the legislative scheme can be as important as the content of the legislation itself.¹ In the context of a corporate tax debtor approaching insolvency or that is insolvent, the efficacy with which the ATO collects tax debts can significantly impact on a number of stakeholders, including the tax debtor, general creditors and competitors of the tax debtor as well as more broadly impact upon Australia's voluntary tax compliance regime, government policy and the provision of services for Australians.

This paper will describe the ATO's debt collection framework, including the number of debt collection strategies that the ATO has developed. The paper will then discuss where a corporate tax debtor that is approaching insolvency or that is insolvent is likely to fall within the ATO's debt collection framework. Further, consideration will be given as to whether the ATO's administrative practices are achieving the recognised tax policy criteria of fiscal adequacy, efficiency, equity and simplicity. This analysis will highlight areas of weakness within the current ATO's debt collection framework and the international experience will be drawn upon to discuss possibilities for future action.

The scope of this paper is limited to tax debt management in the context of the tax collection and recovery processes of the ATO when dealing with definite and undisputed debt. This chapter does not consider the ATO's approach in relation to dealing with disputed debt. Further, this paper does not consider comprehensively the ATO's enforcement tools or third party liabilities.

¹ Productivity Commission Research Report, *Regulator Engagement with Small Business*, September 2013, 86.

Background

The global financial crisis (GFC) had a considerable impact on the Australian economy resulting in decreases in net revenue in 2008–09 and 2009–10, and coupled with this, a further increase in the level of collectable debt.² Post the GFC, the Australian economy is still experiencing economic uncertainty due to the volatility of global financial markets.³ The ATO's most recent annual report shows tax debt increased 10 per cent from \$17.7 billion in 2012-13 to \$19.5 billion in the last financial year.⁴ This was despite collections attributable to ATO debt collection actions increasing by 4.8% compared to the previous financial year.⁵ Small businesses account for over 60% of total collectable debt with small-to-medium enterprises accounting for almost the total amount of collectable debt.⁶ Accordingly, small business is a specific area of focus of the ATO.⁷ In this environment the ATO is carefully managing its approach to debt collection to contain debt levels at acceptable limits.⁸

In the international context, it has been estimated that the Organisation for Economic Co-operation and Development (OECD) governments alone were owed around two thirds of a trillion US dollars in undisputed tax debts at the end of 2013.⁹ Accordingly, in both the Australian and international context, the management of tax debt is a major concern for revenue authorities.

There are two inquiries that were recently undertaken in Australia which concern issues relating to the ATO's debt management problems. Following community consultation, on 10 April 2014, the Inspector-General of Taxation (IGT), announced his new work program for improving tax administration in Australia.¹⁰ During the consultation process there were significant concerns raised with the ATO's approach to debt collection. Major sources of dissatisfaction included delayed recovery action, disproportionate action when debts are pursued and the use of external debt collectors.¹¹ Many of these concerns were also raised in the IGT's earlier review into the Tax Office's Small Business Debt Collection Practices.¹² Complaints to the Commonwealth Ombudsman relating to debt collection accounted for 23% of all complaints received by him in 2013, and attracted significant media attention.¹³ The IGT's review examined these stakeholder concerns and it also considered broader ATO debt collection functions including the use of administrative and legislative instruments such as garnishee notices and director penalty notices, its approach to the debtor and the debtor's creditors during insolvency action, the re-raising of 'written-off' debts, debt relief decisions and payment arrangements.¹⁴ The second inquiry into tax disputes was referred to by the Minister for Finance and Acting Assistant Treasurer, Senator the Hon Mathias Cormann, and

² Commissioner of Taxation, *Annual Report 2008–09*, p47, 53 and Commissioner of Taxation, *Annual Report 2009–10*, 37, 50.

³ Commissioner of Taxation, *Annual Report 2013-14*, 14.

⁴ Commissioner of Taxation, *Annual Report 2013-14*, 50.

⁵ Commissioner of Taxation, *Annual Report 2013-14*, 49.

⁶ *Ibid*: The Auditor General, *Audit Report No.42 2006–07 Performance Audit*, Australian Taxation Office, *The ATO's Administration of Debt Collection—Micro-business*, 35; Construction is the largest industry component of the small business collectable debt. Construction entities comprise 11.3% of the small business population and owe 23.1% of the total small business collectable debt. The top five industries of small business collectable debt are construction, professional, scientific and technical services, financial and insurance services, rental, hiring and real estate services and accommodation and food services.

⁷ Commissioner of Taxation, *Annual Report 2013-14*, 49.

⁸ Australian National Audit Office, *Audit Work Program*, July 2012, Section 2, Australian Taxation Office.

⁹ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) Executive Summary.

¹⁰ Inspector General of Taxation, *New IGT Work Program*, 20 April 2014.

¹¹ Inspector General of Taxation, *Annual Report 2013-14*, 6.

¹² Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Report to the Minister for Revenue and the Assistant Treasurer, 12 April 2005, 13-14.

¹³ Inspector General of Taxation, *Annual Report 2013-14*, 6

¹⁴ *Ibid*.

adopted by the Standing Committee on Tax and Revenue on 4 June 2014. The Committee inquired into and reported on disputes between taxpayers and the ATO, with particular regard to collecting revenues due.¹⁵

Tax Debtor Engagement with the ATO Pre-insolvency

The Legislative Framework

One category of compliance action undertaken by the ATO is that of debt collection. A debt will arise when “a tax, duty or charge becomes due and payable, that is, deemed by law to be due to the Commonwealth and payable to the Commissioner”.¹⁶ Section 47 of the *Financial Management and Accountability Act 1997 (Cth)* governs the management and collection of taxation debts. That section states that a Chief Executive Officer (CEO) must pursue each debt for which the CEO is responsible unless, the debt has been written off as authorised by an Act; or the CEO is satisfied that the debt is not lawfully recoverable; or the CEO considers that the recovery of the debt is not economical.¹⁷ Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953 (Cth)* (TAA) provides a collective set of rules for the collection and recovery of taxation debts and other related amounts.

The ATO's Position

In addition to this legislative scheme, the ATO has provided administrative guidance as to the operation of the legislation by way of PS LA documents, which prescribe the ATO's view on the operation of the statutory scheme. Further the ATO's debt management strategies are underpinned by the ATO's Compliance Model, Enterprise Risk Management Framework and Debt Management Framework.

ATO Policies

The primary ATO PS LA documents which concern the administration and enforcement of tax debts include:

- PS LA 2011/6 – Risk and risk management in the ATO;
- PS LA 2011/14 – General debt collection powers and principles;
- PS LA 2011/16 – Insolvency – collection, recovery and enforcement issues for entities under external administration; and
- PS LA 2011/18 – Enforcement measures used for the collection and recovery of tax related liabilities and other amounts.

The ATO's PS LA's set out in more detail the ATO's approach to debt collection and lodgement matters. PS LA 2011/14 provides that the ATO expects tax debtors to pay their debts as and when they fall due for payment because the ATO: ¹⁸

“is not a lending institution or credit provider; expects tax debtors to organise their affairs to ensure payment of tax debts on time, and to give their tax debts equal priority with other debts.”

PS LA 2011/6 provides that “all taxpayers will be treated professionally, equitably and fairly”; taxpayers can expect each case to be considered on its merits; and “taxpayers can expect the ATO to apply the most severe measures and sanctions in response to the highest level of risk in accordance with [its] compliance model”.¹⁹

¹⁵ Parliament of Australia, *Inquiry into Tax Disputes*, Terms of Reference; The Parliament of the Commonwealth of Australia, Tax disputes, House of Representatives Standing Committee on Tax and Revenue, March 2015 Canberra.

¹⁶ Australian National Audit Office, *Management of Debt Relief Arrangements*, Australian Taxation Office, The Auditor General Audit Report No.52 2012–13, 24.

¹⁷ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices - Summary of submissions and evidence*, 12 April 2005, 47.

¹⁸ ATO, PS LA 2011/14: *General debt collection powers and principles*.

¹⁹ PS LA 2011/6, para 37.

The private sector has criticised the ATO's policies and practices on the basis that:²⁰

- they do not appropriately balance the competing interests the major stakeholders including the debtor, other creditors and the ATO;
- they do not sufficiently consider the underlying viability of small businesses;
- the policies were developed without sufficient consultation with the business sector;
- there is poor awareness of the policies;
- there is a lack of certainty and transparency as to the ATO's processes and timeframes for collection of debt; and
- they do not uniformly apply the relevant policies, resulting in inequities and unfair or disproportionate debt collection responses in individual cases.²¹

In contrast to the private sector views, the Taxation Ombudsman has commented that, from his observation, the "ATO receivables policy" (now PSLA's) would appear adequate to address any issues around small business tax debt collection.²² For example, the Taxation Ombudsman comments that the ATO's policies sets out comprehensive guidelines for negotiating payment arrangements, remission of interest and penalties, and for legal recovery action, including the use of garnishees, bankruptcy and liquidation.²³

The ATO's Compliance Model

The ATO's Compliance Program prescribes the ATO's "compliance responsibilities, strategies and actions", including securing payment compliance as well as highlighting areas of perceived compliance risks and its strategies targeted at addressing those risks.²⁴ The compliance model was first officially publicised by the ATO in its large business and compliance publication in 2000 and was implemented in the early 2000s.²⁵

The Compliance Program is underpinned by the 'enforcement pyramid' of the ATO's Compliance Model.²⁶ Essentially, those taxpayers that are persistently non-compliant are situated at the top of the pyramid, while those taxpayers who are generally compliant are situated toward the bottom of the pyramid. Taxpayers situated at the top of the pyramid are subjected to the ATO's more severe sanctions while those situated at the bottom of the pyramid are encouraged to engage in 'cooperative compliance' with the ATO.²⁷

The model combines 'responsive regulation' and 'motivational posturing theories'.²⁸ 'Responsive regulation' is a theory that describes and prescribes how a regulator can use enforcement strategies to facilitate compliance.²⁹ It proposes that in order to achieve this objective, that enforcement action should not be used solely as a deterrent or solely as a cooperative

²⁰ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices - Summary of submissions and evidence*, 12 April 2005, 51.

²¹ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Report to the Minister for Revenue and the Assistant Treasurer, 12 April 2005, 10.

²² Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices - Summary of submissions and evidence*, 12 April 2005, 51.

²³ *Ibid.*

²⁴ Inspector General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, A report to the Assistant Treasurer, October 2013, 16, 106.

²⁵ Robert Whait, 'Developing risk management strategies in tax administration: the evolution of the Australian Tax Office's compliance model' (2012) 10(2) *eJournal of Tax Research* 437, 438.

²⁶ Inspector General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, A report to the Assistant Treasurer, October 2013, 16

²⁷ Commonwealth Ombudsman, *Australian Taxation Office Administration of Garnishee Action*, Report No.1/2007, April 2007, 3.

²⁸ Robert Whait, 'Developing risk management strategies in tax administration: the evolution of the Australian Tax Office's compliance model' (2012) 10(2) *eJournal of Tax Research* 437, 438-452.

²⁹ *Ibid.*

measure. 'Motivational posturing' theory is based upon the premise that regulatees (i.e. taxpayers) place social distance between themselves and the regulator (i.e. ATO), so as to protect themselves from negative appraisal by the regulator.³⁰ Together, the models advocate that compliance can be made easier through improved customer service and education in addition to the traditional deterrence strategies.

The ATO adopts strategies such as using behavioural economics principles when drafting its debt letters and scripting, targeting education and communication and developing online tools to improve the level of customer service and education to positively influence voluntary compliance.³¹ Over recent years, the ATO's use of tailored correspondence using behavioural economics toward the tax debtor's perceived risk profile is one strategy that has contributed to increases in the amount of debt collected and improvements in the efficiency and effectiveness of debt collection. For example, as a result of a successful trial in 2013, the ATO phased out a payment reminder letter and replaced it with a revised version based on behavioural insights. Over a 30 day period, this resulted in a 5.1% increase in payments in full for activity statement debts and a 3.4% increase in payments in full for income tax debts.³² Additionally, behavioural insights helped the ATO refine a debt collection warning letter prompting taxpayers to take immediate action to address their debt resulting in a 12.6% increase in payments in full for activity statement debts, and a 12.1% increase in payments in full for income tax debts.³³ One commentator argues that it is only after education and persuasion fail that the sanctioning of non-complying individuals should occur, as relying upon a deterrent based strategy as a starting point is likely to lead to a defensive response from the taxpayer resulting in increasing mistrust and disengagement between the taxpayer and ATO.³⁴

The 'BISEP' (business, industry, sociological, economic, and psychological (i.e. 'BISEP')) model was also developed to sit alongside the compliance pyramid to allow the ATO to consider the qualitative factors of the taxpayer when determining its response to non-compliance.³⁵ The compliance model has been described by some commentators as a significant shift from the traditional regulatory approach of the ATO which was focussed on recovery and enforcement actions.³⁶

Enterprise Risk Management Framework

One of the considerable challenges for the ATO is ensure that its debt collection practices operate efficiently so that resources are channelled into those areas that present the greatest compliance risk whilst ensuring that its policies and practises are equitable and deliver uniform responses.³⁷ In order to achieve this objective, the ATO utilises an Enterprise Risk Management Framework (ERMF) to make assessments and manage all 'enterprise risks'.³⁸ 'Corporate Management Practice Statement PS CM 2003/02 Risk and issues management provides that the aim of the ERMF is to ensure:

³⁰ Ibid.

³¹ Organisation for Economic Co-operation and Development, Working Smarter in Tax Debt Management (OECD Publishing, 2014) 44; ATO, *GST Administration Annual Performance Report 2013-14, Managing Debt: ATO, Online Services* <https://www.ato.gov.au/general/online-services/use-online-services/business/> Last modified: 1 July 2014, Accessed March 2015.

³² Commissioner of Taxation, *Annual Report 2013-14*, 51.

³³ Ibid.

³⁴ Duncan Bentley, "Problem Resolution: Does the ATO Approach Really Work?" [1996] 6 *Revenue Law Journal* 17.

³⁵ Robert Whait, 'Developing risk management strategies in tax administration: the evolution of the Australian Tax Office's compliance model' (2012) 10(2) *eJournal of Tax Research* 437, 438.

³⁶ Valarie Braithwaite, 'A New Approach to Tax Compliance' (Ashgate Publishing Ltd, Aldershot, UK, 2003) 1

³⁷ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Report to the Minister for Revenue and the Assistant Treasurer, 12 April 2005, 10.

³⁸ Inspector General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, A report to the Assistant Treasurer, October 2013, 6.

"A consistent, effective and integrated approach to the overall management of risks and issues at all levels to enable the ATO to achieve its outcome, deliver on government commitments and meet legislative obligations."³⁹

The Australian Government Productivity Commission Report on Regulator Engagement with Small Business stated that *"using a risk based approach to guide compliance and enforcement resources is likely to result in the greatest gains for the community in regulatory areas where businesses present diverse risks, such as in the area of... taxation"*.⁴⁰ Similarly, in an international context, guidance from the OECD Committee on Fiscal Affairs has also advocated that revenue authorities adopt a risk management approach.⁴¹

In 2011, the ATO replaced the former 'risk engine' which relied upon a relatively simple approach where cases were primarily prioritised on the basis of the age and size of debts with a contemporary integrated risk-based approach.⁴² This new approach was developed and implemented as part of the 'Debt Right Now' (DRN) program.⁴³ The key innovations from this project included an integrated end-to-end platform that takes a whole-of-ATO approach to debt collection, the development of contemporary, evidence-based risk assessment models and a risk-based decision-making framework.⁴⁴ The models incorporate a large number of variables, including the filing and payment history of taxpayers. The principal analytical risk models are propensity to pay (P2P) and capacity to pay (C2P). The P2P predicts the probability of the taxpayer paying all outstanding liabilities in full within a certain time interval and the C2P predicts the financial capacity of the taxpayer to pay their debt against likelihood of insolvency in the next 12 months. The analysis of these two risk models are combined to create a risk score.⁴⁵ Based on the Australian ATO's risk differentiation framework, 86 per cent of small-to-medium enterprises (SMEs) are classified as low risk taxpayers and therefore receive less attention from the ATO, 11 per cent are categorised as a medium risk and 3 per cent as higher risk.⁴⁶ The application of this form of 'advanced analytics' makes it possible for the ATO to use the rich data that it collects about each taxpayer to determine when to intervene and the best form of intervention, thereby eliminating the cost of ineffective interventions and decreasing levels of collectable debt.⁴⁷ While the DRN program has improved debt collection effectiveness and efficiency, the improvement has not been enough to reduce levels of collectable debt.⁴⁸ In that regard, there remains a focus of the ATO to continue to further develop their models to better target their debt collection strategies. For example, the ATO is working with a major Australian university on the development of predictive models that will combine with the existing models to form a more advanced risk framework.⁴⁹

While the ERMF is clearly an integral part of the ATO's debt collection process, the private sector has criticised the risk methodology which is employed by the ATO, commenting that *"it would be helpful to better understand the way in which that*

³⁹ Australian Taxation Office, *Risk and issues management*, PS CM 2003/02, 22 May 2013.

⁴⁰ Australian Government Productivity Commission, *Regulator Engagement with Small Business*, Productivity Commission Research Report, September 2013, 106.

⁴¹ Centre for Tax Policy and Administration, Organisation for Economic Co-operation and Development, *General Administrative Principles - GAP003 Risk Management* (2001), para 10.

⁴² Inspector General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, A report to the Assistant Treasurer, October 2013, 108.

⁴³ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 31.

⁴⁴ Thomas Ryan, Assistant Commissioner, Debt for the Australian Taxation Office, Public Sector Efficiency Conference, *Case Study: The Debt Right Now (DRN) project*, Brisbane, October 2012.

⁴⁵ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 31.

⁴⁶ Productivity Commission Research Report, *Regulator Engagement with Small Business*, September 2013, p98.

⁴⁷ On 18 May 2011, the ATO commenced the 'Debt Right Now' (DRN) pilot for SGC debt collection. Due to the success of the pilot, it has become a part of the ATO's 'business as usual' process for SGC debt collection. Inspector General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, A report to the Assistant Treasurer, October 2013, p111.

⁴⁸ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 31.

⁴⁹ *Ibid.*

risk methodology actually works in order to help clarify some of the seemingly odd choices which the ATO sometimes makes about who to pursue and how to pursue."⁵⁰

Debt Management Framework

The ATO has in place a debt management framework that is based on three elements which are early collections, firmer action and strategic recovery.⁵¹ The first element of the ATO's framework for managing debt focuses on early intervention as aged debt is more difficult and more expensive to follow-up.⁵² Early intervention is considered necessary in helping businesses to resolve their debts as when further tax debts are accumulated the likelihood of the tax debt remaining outstanding over 12 months and becoming bad or doubtful almost triples.⁵³ Some practitioners are of the view that intervention by the ATO is too tardy, resulting in failed businesses that continue to trade to the detriment of all creditors.⁵⁴ The Australian Restructuring Insolvency and Turnaround Association (ARITA) comments that one of its members saw as an extreme (but exceptional) 11 repayment arrangements entered into with a tax debtor prior to any firmer action being taken by the ATO.⁵⁵ This can also extend to the ATO agreeing to excessive court adjournments of winding up or creditors petitions over a long period.⁵⁶ Similar concerns were expressed in the Inspector General of Taxation, Review into the Tax Office's Small Business Debt Collection Practices.⁵⁷

The second element of the ATO's framework focuses on firmer action. The ATO states that its general position on debt collection is that *"it gives people the opportunity to work with the ATO to clear their tax debts before it takes firmer or legal action that is difficult and costly for all involved"*.⁵⁸ In its 2012-13 Annual Report, the ATO stated *"we took firmer action to recover debts where taxpayers were unwilling to work with us, continually defaulted on agreed arrangements, or did not have the capacity to pay and failed to take steps to resolve their situation."*⁵⁹ The ATO states that firmer action may include garnishee notices, director penalty notices, statutory demands, using court processes such as bankruptcy or wind-up proceedings, issuing a writ/warrant of execution authorising the seizure and sale of your property to pay a judgment debt plus costs and in rare circumstances requiring the debtor to pay a bond or provide security in respect of any tax-related liability that the ATO thinks may be at risk of not being paid.⁶⁰

The third element of the ATO's framework is concerned with identifying instances where there is greater risk of a debt not being recovered. For example, a business may be considered not to be viable in the longer term or where 'phoenix' activity

⁵⁰ Taxpayers Austratia Inc., *Submission to the Inspector General of Taxation, Review into the Australian Taxation Office's Approach to Debt Collection*, 17 July 2014, 3.

⁵¹ Australian National Audit Office, The Auditor General Audit Report No.54 2011-12 Performance Audit, *The Engagement of External Debt Collection Agencies*, Australian Taxation Office, 14.

⁵² Australian National Audit Office, The Auditor General Audit Report No.54 2011-12 Performance Audit, *The Engagement of External Debt Collection Agencies*, Australian Taxation Office, 16. Aged debt is defined by the ATO as debt outstanding for more than two years.

⁵³ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Report to the Minister for Revenue and the Assistant Treasurer, 12 April 2005, 19.

⁵⁴ Institute of Chartered Accountants submission, Inspector-General of Taxation (IGT) Work Program 2014 and beyond, 4 April 2014; Michael Murray, *Arita's views on the ATO*, Apr 28, 2014; Inspector General of Taxation, *Review into the Australian Taxation Office's approach to debt collection*, Terms of reference & submission guidelines, 26 May 2014.

⁵⁵ Australian Restructuring Insolvency and Turnaround Association, *Submission to the Inspector General of Taxation, Review into the Australian Taxation Office's Approach to Debt Collection*, 18 July 2014, Appendix.

⁵⁶ *Ibid.*

⁵⁷ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Report to the Minister for Revenue and the Assistant Treasurer, 12 April 2005, 4, 80, 91.

⁵⁸ Australian National Audit Office, The Auditor General Audit Report No.54 2011-12 Performance Audit, *The Engagement of External Debt Collection Agencies*, Australian Taxation Office, 38.

⁵⁹ Commissioner of Taxation, *Annual Report 2012-13*, 46.

⁶⁰ Australian National Audit Office, The Auditor General Audit Report No.54 2011-12 Performance Audit, *The Engagement of External Debt Collection Agencies*, Australian Taxation Office, 38; Australian Taxation Office, *Firmer action approach to debt collection*, <http://www.ato.gov.au/Individuals/Payments-and-refunds/In-detail/Having-difficulty-paying-on-time/Firmer-action-approach-to-debt-collection/>, Last modified: 08 Mar 2013, Accessed May 2014.

is involved.⁶¹ In these instances, the ATO may take strategic recovery action, including initiating bankruptcy or business wind-up proceedings.⁶²

ATO Engagement with Small Business⁶³

The small business sector is notoriously difficult to engage with, making it more challenging for the ATO to effectively communicate with them compared with larger businesses.⁶⁴ There are a number of factors that influence the small business sector's compliance with tax payment obligations and these factors are more pronounced in businesses that have an outstanding tax debt. These factors include:

- difficulties with cash flow management (short-term and long-term);⁶⁵
- inability to recognise the importance of tax obligations and to comply with them in a timely and accurate manner;⁶⁶
- persistent and deliberate culture of avoidance of tax obligations, particularly as high competition increases;
- high frequency of cash transactions;⁶⁷
- number of small businesses deems auditing difficult and ATO enforcement action is often met with public criticism;⁶⁸
- limited access to finance;
- dealing with big business;
- competition with non-compliant businesses and the regulatory burden on small businesses;⁶⁹
- poor-record keeping;
- intertwining of business and personal affairs;
- fluctuating profitability and a constant need for working capital to maintain viability;⁷⁰ and
- inadequate knowledge of tax law.⁷¹

The Council of Small Business Australia stated, in its response to the Productivity Commission's Study into regulator engagement with small business:⁷²

"The ATO is a prime example of an agency who engages with industry. The ATO has various consultative forums where they actively seek information and advice ... They consult with industry at all levels and they get the difference between big and small business."

⁶¹ Australian Taxation Office, Firmer action approach to debt collection, <http://www.ato.gov.au/Individuals/Payments-and-refunds/In-detail/Having-difficulty-paying-on-time/Firmer-action-approach-to-debt-collection/>, Last modified: 08 Mar 2013, Accessed May 2014.

⁶² Australian National Audit Office, The Auditor General Audit Report No.54 2011–12 Performance Audit, *The Engagement of External Debt Collection Agencies*, Australian Taxation Office, 13.

⁶³ The ATO defines micro businesses as those businesses with an annual turnover below \$2 million. They employ one in five Australian workers and account for more than a quarter of tax revenue collected, including approximately \$14 billion in PAYG withholding tax for their employees. There are approximately 2.8 million micro businesses in this market segment. ATO, Compliance Program 2012-13, Microenterprises. SME taxpayers are those entities with an annual turnover between \$2 million and \$250 million. This particular market segment comprises a diverse group of businesses such as closely held private groups, foreign owned multinational corporations, charities, sole traders and partnerships: Australian Taxation Office, Tax compliance for small-to-medium enterprises and wealthy individuals, <https://www.ato.gov.au/General/Wealthy-individuals/In-detail/Compliance-information/Tax-compliance-for-small-to-medium-enterprises-and-wealthy-individuals/> Last modified: 20 Mar 2015, Accessed March 2015.

⁶⁴ Ibid, 146.

⁶⁵ Australian National Audit Office, The Auditor General Audit Report No.42 2006–07 Performance Audit, The ATO's Administration of Debt Collection—Micro-business, 19.

⁶⁶ Eliza Ahmed and Valerie Braithwaite, 'Understanding small business taxpayers: issues of deterrence, tax morale, fairness and work practice' (2005) 23(5) *International Small Business Journal* 539.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Summary of submissions and evidence, 12 April 2005, 119.

⁷⁰ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Report to the Minister for Revenue and the Assistant Treasurer, 12 April 2005, 10.

⁷¹ Margaret Mc Kerchar, 'Understanding small business taxpayers: Their sources of information and level of knowledge of taxation' (1995) 12 *Australian Tax Forum*, 25-41; Coleman, C. & Lynne Freeman, 'Cultural foundations of taxpayer attitudes to voluntary compliance' 13 *Australian Tax Forum* 311-336.

⁷² Commissioner of Taxation, *Annual Report 2012-13*, 21.

The IGT also observes that there are significant differences between the large business market and the SME market and as such this will require different ATO approaches.⁷³

In a recent Government review, advisors of small business have expressed that small business is vital to the economy, and that the Government needs small business to be profitable, growing and employing people. In particular, the submission provided that the advisors would emphasise *"that the ATO has an important part to play in creating an economic environment where businesses can prosper and that the ATO should avoid making small businesses insolvent and causing additional burdens of unemployment and reliance on government benefits"*.⁷⁴

The ATO has introduced a number of initiatives aimed at achieving greater engagement with small business during the debt collection activities. For example, in May 2014 the ATO began trialling email payment reminders for taxpayers with a payment arrangement for their tax debt and in response to taxpayers' feedback, the ATO are now developing an SMS payment reminder service. The ATO has implemented a number of self-help tools designed to make entering into a payment arrangement as easy as possible. For example, business taxpayers can enter into a payment arrangement using automated telephone services for debts up to \$25,000.⁷⁵ An online service should be available for businesses and activity statement debts and superannuation debts in the near future.⁷⁶ These services are complemented by other digital tools, including a payment arrangement calculator and a payment plan estimator mobile app.⁷⁷

The ATO has a number of initiatives in place aimed at improving the small business taxpayers' online experience. For example, Small Business Assist was launched in July 2013⁷⁸ and a Tax Time app for small business in late 2013.⁷⁹ These tools offer functionality for determining SGC eligibility, performing SCG, tax withheld and FTX credit calculations and include checklists, employee/contractor tools and a payment plan estimator.⁸⁰ 'Tax tips for Australian business' is available on the ATO website and includes suggestions as to how business owners can better manage their business to avoid debt, as well as encouraging them to contact the ATO if they are having difficulty meeting their tax obligations.⁸¹ Further, the ATO is planning to introduce a small business 'newsroom' which will allow subscribers to tailor the information they receive from the ATO and the mode in which they receive it. Subscribers will have be able to receive tax and superannuation news and alerts, watch short video clips, add tax dates to their calendars to create reminders and share articles with each other. Another measure is 'click to chat' which is currently in the pilot stage and will allow small business owners to have a real-time, online conversation with an ATO customer service officer, who will be able to provide guidance on particular topics and additional information to the taxpayer.⁸² Additional engagement with small business occurs via social media and promotional campaigns to help taxpayers meet their tax obligations and in one-on-one assistance visits.⁸³

⁷³ Inspector General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, A report to the Assistant Treasurer, October 2013, p117.

⁷⁴ *Ibid.*

⁷⁵ ATO, Managing Your Tax Debt, <https://www.ato.gov.au/printfriendly.aspx?url=/general/managing-your-tax-debt/> Last Modified January 2015 Last Accessed May 2015.

⁷⁶ *Ibid.*

⁷⁷ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 41

⁷⁸ Commissioner of Taxation, *Annual Report 2012-13*, 23, 25.

⁷⁹ Commissioner of Taxation, *Annual Report 2012-13*, 26.

⁸⁰ ATO, 'ATO IT strategy' (July 2014)

⁸¹ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 46

⁸² *Ibid.*

⁸³ Michael D'Ascenzo, *Promoting tax excellence – an essential ingredient for a prosperous community*, speech at The Curtin University Taxation Seminar, 30 October 2012.

While these are positive reports and initiatives in relation to the ATO's engagement with the small business sector, a number of industry groups have been very critical of the ATO's approach to small business debt collection.⁸⁴ Industry comments that there has been a "noticeable firming in the ATO's approach to debt collection" which stands in contrast to the flexibility that was offered by the ATO immediately post the GFC.⁸⁵ This firmer approach is perceived to be unjustified as in many sectors business confidence and sustainability has remained unchanged since 2008.⁸⁶

Another major area of concern to small business includes the use of third party debt collectors. Submissions made to the IGT as part of the ATO's recent Review into the Australian Taxation Office's Approach to Debt Collection reveal that the private sector is of the view that the ATO should not outsource its debt collection function to third party debt collectors. Further, stakeholders who are not adverse to the use of third party debt collectors are still critical of the policies, procedures and practices that they employ.⁸⁷ The grounds for this criticism include that third party debt collectors are inefficient, that they pose security and privacy risks that they are using out of date data resulting in poor communication.⁸⁸

Assessment of Business Viability

Where a business is experiencing cash flow problems the ATO is typically the last creditor to be paid and the business may be signalling potential insolvency. The assessment of viability and financial risk plays an important role in determining a taxpayer's ability to address their tax debt and comply with their ongoing tax obligations. A recent Productivity Commission Report recommended that governments should not seek to support small businesses that are no longer sustainable over the long term.⁸⁹

The IGT's report into the ATO's Small Business Debt Collection Practices published in 2005 makes a number of references in relation to the lack of ATO concern in relation to assessing the viability of a business prior to taking legal action against a tax debtor. The reports states that the ATO is of the view that "a business's viability is not a matter they (Senior Tax Officials) can accurately determine, nor should they", that "the ATO is concerned with the risk of non-payment of tax debts, not businesses' viability"⁹⁰ and "that it (the ATO) is neither in the business of assessing a small business's viability nor does it have the resources to encourage all non-compliant businesses to seek advice."⁹¹ This attitude of the ATO is contrary to the views expressed by the IGT in that Report that he would have concerns if the ATO took action which would cause otherwise viable businesses to go into liquidation simply because of short-term cash flow problems or if the ATO implemented reactive measures to recover the outstanding collectable debt amounts within short time frames without considering the implications for the business sector.⁹² Similar views have been expressed by the Auditor General.⁹³

⁸⁴ Australian Restructuring Insolvency and Turnaround Association, *Submission to the Inspector General of Taxation, Review into the Australian Taxation Office's Approach to Debt Collection*, 18 July 2014; Institute of Chartered Accountants submission, *Inspector-General of Taxation Work Program 2014 and beyond*, 4 April 2014; Taxpayers Austratia Inc., *Submission to the Inspector General of Taxation, Review into the Australian Taxation Office's Approach to Debt Collection*, 17 July 2014, 3.

⁸⁵ Taxpayers Austratia Inc., *Submission to the Inspector General of Taxation, Review into the Australian Taxation Office's Approach to Debt Collection*, 17 July 2014, 4.

⁸⁶ Jason Clout, Tax bills surge as ATO tracks SME payments, *Financial Review*, 14 Aug 2013; Other recent media reports state "The federal government is cracking down on business and using the ATO as a weapon to claw back revenue to help plug the federal budget deficit" Adele Ferguson, Taxman wields axe on small business, *Sydney Morning Herald*, Business Day, August 9 2013 and "The ATO has worked closely with the small business sector in the past to deal with the implications of the global financial crisis. But....it started to tighten a few years ago. "It is a little bit tighter again this year", Jason Clout, Tax bills surge as ATO tracks SME payments, *Financial Review*, 14 Aug 2013.

⁸⁷ Taxpayers Austratia Inc., *Submission to the Inspector General of Taxation, Review into the Australian Taxation Office's Approach to Debt Collection*, 17 July 2014, 4.

⁸⁸ *Ibid*, 5.

⁸⁹ Productivity Commission Research Report, *Regulator Engagement with Small Business*, September 2013, 95.

⁹⁰ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Summary of submissions and evidence, 12 April 2005, 53.

⁹¹ *Ibid*, 79.

⁹² Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Report to the Minister for Revenue and the Assistant Treasurer, 12 April 2005, 19.

⁹³ The Auditor General Audit Report No.42 2006-07 Performance Audit, *The ATO's Administration of Debt Collection—Micro-business*, Australian Taxation Office, 50.

The ATO's attitude to the assessment of business viability appears to have changed more recently. The ATO has developed a Business Viability Assessment Tool (BVAT) for small and medium enterprises which the ATO uses together with other information about taxpayers' individual circumstances to distinguish between viable businesses that may be undergoing short term financial difficulties, and businesses that may not be viable.⁹⁴ The BVAT is only used when firmer action is anticipated for those taxpayers that present the greatest risk and generally when a repayment plan is requested.⁹⁵ This tool is also available to taxpayers online and it is currently being further developed. While there have been positive reports from the ATO in relation to the use of this tool, stakeholders have questioned the ATO's reliance on the BVAT in determining debt recovery and assistance strategies.⁹⁶ The ATO has also developed an independent viability assessment (IVA) process for large publically listed companies.

In 2010–11 the ATO also piloted the use of professional firms to conduct independent business viability assessments for businesses with complex financial arrangements and significant outstanding debt.⁹⁷ The ATO's Independent Viability Assessment program mirrors a similar program run by United Kingdom's HM Revenue and Customs where taxpayers with debts of more than 1 million undergo a financial review by an external practitioner.⁹⁸ The initial ATO pilot demonstrated that an independent viability assessment can be beneficial.⁹⁹ However, as this initiative is at pilot stage, it is uncertain as to whether it will be implemented in the future.¹⁰⁰

This change of attitude toward the assessment of business viability has not been reflected in the ATO's PS LAs. With the exception of garnishee notices, the ATO's PS LAs do not provide any reference in relation to the ATO taking into account the viability of the business as a factor prior to determining the appropriate action to be taken against a tax debtor.¹⁰¹ Accordingly, the Commissioner can commence winding-up proceedings against a tax debtor without considering the business' long term viability.

Where does a company that is approaching insolvency fall within the Compliance Model, ERMF and DMF?

Within the Compliance Model, ERMF and DMF, a corporate taxpayer that is approaching insolvency is likely to be experiencing financial difficulties and as such will have outstanding tax liabilities with the ATO. The corporate debtor will have considered the debt relief options available. The ATO comments that "*We offer help to viable businesses having trouble meeting their tax payment obligations due to such short-term difficulties.*"¹⁰² This help includes flexible payment arrangements that align with cash flow and remission of general interest charge (GIC) where appropriate.¹⁰³ At 30 June 2013, there were around 32,000 general interest charge-free payment arrangements in place to the value of almost \$700 million.¹⁰⁴ While the ATO offers these payment arrangements, submissions made to the IGT by the Institute of Chartered Accountants (ICA) in relation to the IGT Work Program for 2014 comment that their members have noticed increasing strain

⁹⁴ Australian Taxation Office, Regional Tax Practitioner Working Groups, South East QLD, Minutes, March 2013; Australian Taxation Office, Commissioner's Small Business Consultative Group, Minutes, 24 October 2012.

⁹⁵ Australian Taxation Office, Regional Tax Practitioner Working Groups, Victoria, Minutes, March 2013.

⁹⁶ Michael Murray, *Arita's views on the ATO*, Apr 28, 2014.

⁹⁷ Commissioner of Taxation, *Annual Report 2010-11*, 84.

⁹⁸ Australian Taxation Office, Small Business Partnership Minutes, 29 November 2012.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Australian Taxation Office, PS LA 2011/18, para 102.

¹⁰² Australian Taxation Office, *Help for small businesses experiencing short-term financial difficulties*, <https://www.ato.gov.au/General/Managing-your-tax-debt/In-detail/Overview/Help-with-paying/Help-for-small-businesses-experiencing-short-term-financial-difficulties/>, Last Accessed May 2014.

¹⁰³ *Ibid.*

¹⁰⁴ Commissioner of Taxation, *Annual Report 2012-13*, p12.

faced by some of their clients in the current economic environment as a result of the ATO's debt collection activities.¹⁰⁵ The ICA's submission comments that *"There is a view that the ATO has been deploying a strong-arm approach to collecting tax debts. For example, by imposing a more stringent requirement such as a 50% up-front payment, rather than settle for a payment arrangement."*¹⁰⁶

Another debt relief option includes entering into a compromise in which the ATO accepts an amount less than the primary tax outstanding in full settlement of an undisputed debt in circumstances where a taxpayer does not have the capacity to pay a debt in full. However, taxpayers' representative bodies and tax practitioners raise the concern that the ATO's compromise policy is not commercial and has little or no regard for the ongoing viability or circumstances of a business. The ATO recognises the inflexibility of its compromise policy commenting that *"corporate debtors would probably seek an arrangement with creditors under Part 5.3A of the Corporations Act 2001 or go into liquidation, rather than agree to an ATO compromise."*¹⁰⁷ The final debt relief option available is a release from tax-related liabilities on the grounds that the taxpayer will suffer serious hardship if they are required to satisfy the liability. However, this option is not available to corporate tax debtors.¹⁰⁸

Accordingly, once these limited and quite inflexible debt relief options have been exhausted, the corporate tax debtor approaching insolvency is likely to be categorised by the ATO as a persistent non-compliant taxpayer, possibly with a poor lodgement and payment history that may include having defaulted on a number of payment arrangements. A viability assessment may or may not have been conducted by the ATO. A corporate taxpayer with this profile is likely to be categorised as high risk and therefore firmer action either has been initiated by the ATO, or will be initiated by the ATO pre-insolvency. The most commonly initiated ATO actions that fall within the firmer action artillery include issuing garnishee notices, statutory demands, director penalty notices and winding-up notices.¹⁰⁹

The Commissioner's Position and the Tax Policy Criteria

Consideration will now be given as to whether the ATO's administrative practices are achieving the recognised tax policy criteria of fiscal adequacy, efficiency, equity and simplicity. This analysis will highlight areas of weakness within the current ATO's debt collection framework and will then draw upon the international experience to discuss possibilities for future action.

Fiscal Adequacy

In the context of tax administration and debt collection, the ATO is most concerned about mitigating the risk to the revenue of non-compliance and more broadly, carefully managing its approach to debt collection to contain debt levels at acceptable limits. Delays in collection can affect the level and timeliness of resources available to the government, and on a macro-economic level those delays could add to the level of government borrowing and public debt interest, thereby impacting on the fiscal adequacy criterion.¹¹⁰ In order to achieve the fiscal adequacy criterion in the context of tax administration, a few themes have emerged in this paper. These themes include the importance of early intervention, the assessment of business

¹⁰⁵ Institute of Chartered Accountants submission, Inspector-General of Taxation Work Program 2014 and beyond, 4 April 2014.

¹⁰⁶ Ibid.

¹⁰⁷ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Summary of submissions and evidence, 12 April 2005, 101.

¹⁰⁸ Division 340 of Schedule 1 to the TAA; Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Summary of submissions and evidence, 12 April 2005, 111.

¹⁰⁹ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices*, Summary of submissions and evidence, 12 April 2005, 89; Price Water House Coopers, *2013 Insolvency Review – Overarching Report, August 2013*, Commissioned by the Australian Taxation Office, 5-6; ATO, PS LA 2011/16 Insolvency - collection, recovery and enforcement issues for entities under external administration, para 3.

¹¹⁰ Irish Tax Reports, *Collection of Tax Debts*, The Collector-General outlines Revenue's approach (2008).

viability, tax debtor engagement with the ATO and of striking the right balance of 'flexible delivery' while fostering a positive compliance culture when administering the tax law.

Early intervention by the ATO is imperative if the fiscal adequacy criterion is to be achieved. The research suggests that penalties and interest can be very effective in preventing and managing debt within the first few weeks after a late payment, however once this period lapses and debt continues to accumulate, penalties and interest become less effective unless they are coupled with some effective form of intervention.¹¹¹ Aged debt is also more difficult and more expensive to follow-up.¹¹² Insolvency practitioners observe that without early intervention which will allow a business to take quick action to make it more profitable, the business will likely default in repayments and incur increasing debt to the point of an unsustainable amount, leading to insolvency.¹¹³ Accordingly, it is sound administrative practice to include early intervention as one of the key objectives within the ATO's debt management framework. While the framework includes early intervention as a key objective, the private sector has criticised the ATO for being tardy in its debt collection practices and from a practical perspective, there appears to be considerable room for improvement by the ATO in order to be able to achieve this objective. In that regard, there is scope for the ATO to implement a number of additional techniques which target early intervention such as preventative strategies. Many of these techniques are currently being implemented in a number of jurisdictions and include dynamic risk clustering, the use of predictive data models, preventative interventions, preventative communication and preventative dialogue. As well as achieving increased success rates, prevention strategies have resulted in a change of attitude by the public at large and revenue bodies are now seen as more trustworthy.¹¹⁴

Dynamic risk clustering is a technique used by the Canada Revenue Agency (CRA) which relies upon sophisticated predictive data models to establish a risk score for each tax debtor based on individual taxpayer behaviour. The models can predict whether an outstanding debt will be paid, identify accounts that will 'self-resolve' and the probability that a debt instalment arrangement will be complied with, enabling each debt to be directed to the most appropriate debt management strategy.¹¹⁵ Classifying each tax debt in this manner results in some cases being subjected to action before a liability becomes due and therefore reduces the rate of debt occurrence.

New Zealand has an early intervention strategy 'Prevent, Assist, Recover & Enforce' (PARE) for minimising tax debt. This strategy has evolved from 'Debt 2010', a 10 year Debt Collection funding programme which has enabled new focus on early engagement such as preventative type messaging and interventions and "lighter touch" assistance interventions to customers to achieve compliance.¹¹⁶ During recent years, additional techniques aimed at early intervention have been introduced including "Just Pay" now letters, 40 to 75 day letters, outbound texting (SMS) and enforcement rounds (garnishee/deduction notices).¹¹⁷

¹¹¹ Elisabeth Poppelwell, Gail Kelly and Xin Wang, 'Intervening to reduce risk: identifying sanction thresholds among SME tax debtors' (2012) 10(2) *eJournal of Tax Research* 425.

¹¹² Aged debt is defined by the ATO as debt outstanding for more than two years. Australian National Audit Office, *The Auditor General Audit Report No.54 2011-12 Performance Audit, The Engagement of External Debt Collection Agencies*, Australian Taxation Office, 16; Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 30

¹¹³ Inspector General of Taxation, *Review into the Tax Office's Small Business Debt Collection Practices - Summary of submissions and evidence* 12 April 2005, 79.

¹¹⁴ *Ibid.*, 29.

¹¹⁵ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 28

¹¹⁶ *Ibid.*, 37.

¹¹⁷ *Ibid.*

“Preventive communication” and “preventive dialogue” is the priority strategy in Sweden. The Swedish Tax Agency (STA) is pro-active in contacting several debtors, by telephone or other means, at the point of a debt arising and offers them information on how to comply with their tax debts.¹¹⁸ Another success factor is the introduction of the “payment thinking” within the STA which involves the STA making a strategic decision in relation to a tax debtor at an early stage.¹¹⁹

The ATO is becoming increasingly aware of the importance of assessing a business’ long term viability at an early stage, however it is not a mandatory part of the ATO’s debt collection activities. One possible reform in this area is to revise the ATO’s administrative practices so that when a corporate debtor signals cash flow difficulties then pre-emptive action could include a mandatory assessment of business viability at the early intervention stage within the ATO’s Debt Management Framework, rather than making the assessment at a later stage prior to the initiation of legal action, or failing to make any assessment of the business’s viability at all. Such a mandatory process would enhance the risk assessment that is currently being undertaken, allowing the ATO to determine its response to the tax debtor. For example, if an assessment is made that the business is viable in the long-term, then an action plan can be developed to assist the business to meet its outstanding tax obligations.¹²⁰ However, if the business is considered to be unviable in the long-term then the ATO can take appropriate action to mitigate its losses by preventing the business continuing its poor compliance record and escalating its debt.

In order to achieve the fiscal adequacy criterion, the ATO must ensure that tax debtor’s remain engaged in the tax administration process. If the ATO adopts an ‘us and them’ mentality to regulating businesses, it is highly likely that this will result in unsatisfactory engagement strategies and an inappropriately compliance focused regulatory culture, leading to poor regulatory outcomes.¹²¹ Further, if risk management results in an automatic sanction, then the tax system is not being regulated in the way that responsive regulation intended because such compliance measures would not be taking into account the circumstances of the taxpayer, which is a key element that underpins the compliance model.¹²² Alternatively, if the ATO adopts an approach that fosters flexible delivery with an awareness and understanding of the factors that impact on small business, this is more likely to lead to better regulatory outcomes.¹²³

Taxpayer engagement could also be promoted if the ATO adopts more flexible debt relief mechanisms. For example, in the United States of America (USA), the Fresh Start Initiative was introduced in 2012 and expanded in 2014.¹²⁴ This initiative was introduced primarily to help individuals and small businesses meet their tax obligations by offering more flexible terms to its Offer in Compromise (OIC) program.¹²⁵ In general, an OIC is an agreement between a taxpayer and the Internal Revenue Service (IRS) that settles the taxpayer’s tax liabilities for less than the full amount owed. The IRS generally approves an OIC after other payment options have been explored and when the amount offered represents the most it can expect to collect within a reasonable period of time.¹²⁶ To apply, the taxpayer (amongst other requirements) must be up to

¹¹⁸ Ibid, 38.

¹¹⁹ Ibid.

¹²⁰ Inspector General of Taxation, Review into the Tax Office’s Small Business Debt Collection Practices , Summary of submissions and evidence, 12 April 2005, 68.

¹²¹ Ibid, 65.

¹²² Robert Whait, ‘Developing risk management strategies in tax administration: the evolution of the Australian Tax Office’s compliance model’ (2012) 10(2) *eJournal of Tax Research* 456.

¹²³ Inspector General of Taxation, Review into the Tax Office’s Small Business Debt Collection Practices , Summary of submissions and evidence, 12 April 2005, 93.

¹²⁴ Internal Revenue Service Advisory Council, 2014 Public Report, November 2014, 73-87; IRS, Struggling with Paying Your Taxes? Let IRS Help You Get a Fresh Start <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Struggling-with-Paying-Your-Taxes-Let-IRS-Help-You-Get-a-Fresh-Start> Last Modified September 2014 Last Accessed March 2015.

¹²⁵ Internal Revenue Service Advisory Council, 2014 Public Report, November 2014, 73-87.

¹²⁶ Ibid.

date with all of their filing requirements and not involved in bankruptcy proceedings.¹²⁷ This initiative has enabled some of the most financially distressed taxpayers to clear up their tax problems expediently. In mid-2004, the ATO introduced the Small Business Debt Assistance Initiative which was a similar initiative to the USA Fresh Start Initiative and the ATO considered this initiative to be a “productive” initiative.¹²⁸ The re-introduction of such an initiative is likely to encourage greater engagement with tax debtors, thereby increasing compliant taxpayer behaviour and assist in reducing current levels of ATO aged debt.

While flexible delivery options are necessary to keep the tax debtor engaged with the ATO, this must be balanced with the ATO taking an approach that is too flexible. If the ATO is perceived to be too flexible in the delivery of its regulation this can adversely affect the fiscal adequacy criterion. In that regard, there is a considerable amount of academic literature which has found that high tax morale, perceived fairness of the tax system, trust in the tax authority and strong social norms, are all important drivers for compliance.¹²⁹ A recent OECD report notes that fairness and trust are important drivers for compliance and comments that “*it is not only important what a revenue body does; it is also important how the revenue body does it*”.¹³⁰ Accordingly, when a taxpayer perceives that others are not paying their fair share, that taxpayer is likely to question why they should pay.¹³¹ Similarly, when a taxpayer withholds tax payments to improve their cash flow and thereby secure an unfair competitive advantage, this can ‘push’ other businesses to do the same.¹³² Consequently, effective tax administration must involve reducing debt while maintaining the integrity of the tax system.

Equity

While it is clear that administrative equity was one of the drivers of the introduction of the ATO's compliance model, this paper has highlighted that many stakeholder concerns stem from the lack of administrative equity in tax administration. For example, concerns that the ATO's administration practices result in inequities as they fail to sufficiently consider the underlying viability of small businesses and that debt collection practices do not uniformly apply the relevant policies and do not deliver fair or proportionate debt collection responses in individual cases.

The SME market has a large population and the ATO does not have the resources required to take into account many of the qualitative factors of the tax debtor that the compliance model was based upon. An understanding of the small business debtor's context requires the ATO to know the tax debtor's business related economic and financial indicators as well as the tax debtor's demographics. This would involve considering the client focus of the business such as business to business or business to customer, the sector or type of business and the major factors affecting the industry in which the business is operating and the extent to which trends might highlight issues relevant to the taxpayer's ongoing viability and competitive position, the known assets and liabilities of the tax debtor, movements of accounts and solvency indicators, the age and location of the business and external events (such as restrictive policies by financial institutions).¹³³ This assessment is critical for the ATO to be able to assess small business debtors who “*want to comply but are unable to do so in the short-*

¹²⁷ Ibid.

¹²⁸ The Auditor General Audit Report No.42 2006–07 Performance Audit, *The ATO's Administration of Debt Collection—Micro-business*, Australian Taxation Office, 54-55.

¹²⁹ Eva Hofmann, Erik Hoelzl, and Erich Kirchler, Preconditions of Voluntary Tax Compliance Knowledge and Evaluation of Taxation, Norms, Fairness, and Motivation to Cooperate (2008) 216(4) *Journal of Psychology* 209–217.

¹³⁰ OECD, ‘Understanding and influencing taxpayers’ compliance behaviour’, Forum on Tax Administration: Small/Medium (SME) Compliance Subgroup, 30.

¹³¹ Eva Hofmann, Erik Hoelzl, and Erich Kirchler, Preconditions of Voluntary Tax Compliance Knowledge and Evaluation of Taxation, Norms, Fairness, and Motivation to Cooperate (2008) 216(4) *Journal of Psychology* 209–217.

¹³² Valarie Braithwaite and Michael Wenzel, *Integrating explanations of tax evasion and Avoidance*, The Cambridge Handbook of Psychology and Economic Behaviour, (Cambridge: Cambridge University Press, 2008) 304-331; Valarie Braithwaite, *Taxing Democracy* (Ashgate Publishing Ltd., 2002).

¹³³ Ibid, 31.

term; debtors who are incapable of complying (probably ever); and those debtors who are unwilling to comply".¹³⁴ This assessment is required for the ATO to apply the most appropriate treatment to each type of compliance behaviour, thereby balancing the interests of all stakeholders. Such an administrative process is also consistent with the OECD's recommendation that the tax debt collection function needs to be able to choose from a "rich suite of interventions, ranging from soft measures, designed to prevent people from falling into debt in the first place, through to tough enforcement measures."¹³⁵

While the ATO has introduced advanced risk analysis in combination with behavioural insights to assist in the risk assessment, the considerable stakeholder concerns indicate that the ATO is failing to capture a considerable amount of this qualitative information about the tax debtor when making its assessment, leading to poor regulatory interventions and outcomes. Accordingly, one method of being able to address these stakeholder concerns is to develop tools or processes which are focused upon capturing the qualitative factors of the tax debtor. While the compliance model was developed to facilitate administrative equity, it is also a risk management tool developed to help improve administrative efficiency. Encapsulating all of this qualitative information of a tax debtor comes at a cost to administrative efficiency. In that regard, just as the traditional economic concepts of equity and efficiency are in conflict administrative efficiency may also conflict with the administrative equity. Accordingly, the ATO must monitor these two competing criteria as if achieving efficiency in tax administration is prioritised over achieving equity, the community may perceive the system of tax administration to be unfair which will adversely impact upon the voluntary compliance regime and undermine the integrity of the tax system.

Looking at the concept of equity more broadly, stakeholders have also criticised the ATO for not appropriately balancing the competing interests of the major stakeholders involved in a corporate insolvency including the debtor, other creditors and the ATO. In this regard, the ATO has been criticised for being too flexible in its debt collection practices. If the ATO is too flexible in its intervention, then other creditors of the debtor's business may perceive that business to be viable on the basis that the ATO is agreeing to payment arrangements. The ATO has better information available about the debtor's financial condition than general business creditors. For example, the ATO has access to information concerning the tax debtor's behaviour such as lodgement performance, income information and tax payments, personal details and financial information and details of the ATO's interactions, including compliance activities in relation to that tax debtor's debt management. Armed with this information, the Commissioner is able to detect debtor default immediately, predict the likelihood of further debtor default and make a more accurate assessment of insolvency risk. Allowing tax debts to accumulate under those circumstances can unfairly disadvantage other unsecured creditors (and in some instances, secured creditors) who go on trading with the debtor not knowing that there is a tax default. In order to address this current failing of the ATO, policies focused upon early intervention by the ATO and early assessment of business viability before such flexible arrangements are entered into is of paramount importance to the protection of general business creditors and the community. From a public interest perspective and to maintain the integrity of the tax system, it is important for the ATO to be able to assess a business that is viable but is experiencing short-difficulties to businesses that are no longer sustainable over the long term as early as possible within the debt collection framework.

¹³⁴ The Auditor General Audit Report No.42 2006–07 Performance Audit, *The ATO's Administration of Debt Collection—Micro-business*, Australian Taxation Office, p42.

¹³⁵ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 15.

Efficiency

In order to channel the ATO's resources into those areas that present the greatest compliance risk, the ATO utilises an ERMF to make assessments and manage all 'enterprise risks'.¹³⁶ This chapter has considered how administrative efficiency has improved as a result of the ATO implementing an approach that focuses on the debtor instead of the debt and makes use of modern techniques such as advanced analytics and behavioural sciences to understand the drivers of tax debtor behaviour. These modern techniques make it possible to "*more effectively prioritise debts, to better allocate resources and to achieve greater consistency*".¹³⁷ The ATO can continue to gain greater efficiency in its debt collection function by implementing a number of additional techniques which target early intervention. The preventative strategies that are currently employed in other jurisdictions were discussed in relation to the fiscal adequacy criterion. An additional strategy could be to introduce strategies that achieve greater integrated compliance. Further, more research must be conducted to determine the effectiveness of third party debt collectors as there is little evidence to date which shows that the ATO's external debt collection agencies create efficiencies in tax administration. These additional strategies are discussed below.

Ingrained within the Australian tax system is a culture which is dependent on the reporting of transactions after they have occurred by taxpayers themselves. This means that reporting for tax purposes happens after the event, once taxable income has been calculated. In that regard, reporting can take place many months after a transaction has been completed. Accordingly, the Australian tax system fails to integrate tax compliance as a natural part of taxpayers' business process. A recent OECD report emphasised the importance of integrated compliance to efficient tax administration. The report stated:

*"The more tax administrations succeed in making taxpayers pay as they earn, the smaller the debt book will be. Tax administrators need to make tax payment part of the normal system of doing business and as close to the event creating the liability as possible, in order to eliminate or reduce the risk of non or late payment."*¹³⁸

*...Tax compliance by design in debt management means that taxes should be levied as close to real time preferably based on lead indicators instead of lag indicators, such as income and tax declarations that are prepared in arrears and submitted annually."*¹³⁹

In order for the ATO to achieve greater administrative efficiency legislation must be enacted which integrates compliance into the taxpayer's business in the manner described above. One possibility for achieving integrated compliance is by making greater use of third party withholding and reporting. Third party withholding and reporting refers to a mandatory requirement on prescribed third parties (e.g. businesses, financial institutions, and government agencies) to withhold an amount of tax from payments of income to taxpayers and report payments of income (and other tax-related transactions) and payee details (generally with a taxpayer identifying number) to the revenue body. The implication of third party reporting and withholding are that tax debts never accrue in the first place. Instead, as soon as a transaction is undertaken, the payer of the source of income remits tax to the tax authority, with the net amount paid to the taxpayer. Published research findings of the Swedish STA, United Kingdom HMRC and the United States IRS clearly indicate that there are significant

¹³⁶ Inspector General of Taxation, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools*, A report to the Assistant Treasurer, October 2013, p6.

¹³⁷ Michael Hallsworth et al., *The Behaviorist As Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance*, 2014 NBER Working Paper Series, NBER, Cambridge.

¹³⁸ Organisation for Economic Co-operation and Development, *Working Smarter in Tax Debt Management* (OECD Publishing, 2014) 18.

¹³⁹ *Ibid*, 74.

compliance-related benefits from the use of withholding.¹⁴⁰ Furthermore, the timely remittance of amounts withheld by payers to the revenue body ensures a consistent revenue stream to Government accounts, thereby providing fiscal adequacy and budgetary gains.¹⁴¹

In comparison with the tax systems of most OECD countries, Australia's income tax system makes relatively limited use of both withholding and reporting mechanisms.¹⁴² For example, in the UK, all bank interest is paid to taxpayers with a component of income tax already deducted. The same applies to dividends. Payments of wages and salaries are made to employees net of tax and with a sophisticated system of PAYE coding, the amount which is withheld is extremely accurate and equates almost precisely to the amount of tax due.¹⁴³ Withholding and mandatory reporting arrangements are also used to varying degrees in many countries for payments made by businesses to certain categories of self-employed/contractors/small medium enterprises, rents, royalties and patents, and sales of shares and real property.¹⁴⁴

Two initiatives that have been introduced by the ATO to integrate tax compliance include Standard Business Reporting (SBR) and Single Touch Payroll. The ATO is moving towards SBR and contemporaneous data collection as key driver in the way in which it interacts with business taxpayers. SBR allows taxpayers to lodge forms directly from their business accounting or payroll software. The ATO believes that SBR offers greater efficiency, accuracy and certainty to the taxpayer.¹⁴⁵ Single Touch Payroll will be available from July 2016.¹⁴⁶ Under this electronic payroll system, employers will be required to electronically report payroll and super information to the ATO when employees are paid, using Standard Business Reporting-enabled software.¹⁴⁷ As employers will be required to remit PAYG withholding and the SG using their software at the same time that employees are paid then this will achieve greater integrated compliance. The development of new technology and new strategies creates more opportunities for integrated compliance resulting in taxpayers paying taxes in real-time, paying directly as they earn and paying per transaction they make. These two initiatives may be the catalyst needed to stimulate greater innovation in this area. For example, one further possibility is that the Goods and Services Tax could be collected at point of sale through the banking system.¹⁴⁸ Such a system would ensure that levels of tax debt are minimised resulting in efficiency savings as a result of the revenue authority not having to maintain such an intensive focus on debt collection.

There is little evidence to indicate that the ATO's use of external debt collection agencies (EDCAs) is efficient. In 2012, Australian National Audit Office conducted an audit to assess the effectiveness of the ATO's administration of external debt collection arrangements.¹⁴⁹ The results of the audit were generally positive and it was concluded that "*the agencies provide*

¹⁴⁰ OECD, Tax Administration 2013 Comparative Information on OECD and other Advanced and Emerging Economies, (OECD Publishing, 2013) 289.

¹⁴¹ Ibid.

¹⁴² Ibid, 296-297.

¹⁴³ Ibid, 290, 293, 296-297.

¹⁴⁴ Ibid, 274.

¹⁴⁵ ATO, Standard Business Reporting, <https://www.ato.gov.au/General/Wealthy-individuals/In-detail/Compliance-information/Tax-compliance-for-small-to-medium-enterprises-and-wealthy-individuals/> Last modified: July 2014, Accessed March 2015.

¹⁴⁶ ATO, Single Touch Payroll discussion paper, Consultation process <https://www.ato.gov.au/General/Consultation/What-we-are-consulting-about/Papers-for-comment/Single-Touch-Payroll-discussion-paper/> Last Accessed March 2015. Chartered Accountants, Single Touch Payroll Discussion Paper, 12 March 2015; ATO, Single Touch Payroll discussion paper, Consultation process <https://www.ato.gov.au/General/Consultation/What-we-are-consulting-about/Papers-for-comment/Single-Touch-Payroll-discussion-paper/> Last Accessed March 2015.

¹⁴⁷ Ibid.

¹⁴⁸ OECD, *Tax Compliance by Design: Achieving Improved SME Tax Compliance by Adopting a System Perspective*, (OECD Publishing, 2014) 58.

¹⁴⁹ Australian National Audit Office, The Auditor General Audit Report No.54 2011-12 Performance Audit The Engagement of External Debt Collection Agencies Australian Taxation Office (2012).

the ATO with a flexible mechanism to action a workload that would otherwise remain unactioned".¹⁵⁰ The audit found that in approximately 50 per cent of the referred cases, EDCAs achieve either payment in full, or negotiate payment arrangements with taxpayers.¹⁵¹ The report also stated that the EDCAs "have collected a significant amount of debt, generating very few taxpayer complaints and there have been no known breaches in the security of taxpayers' data."¹⁵² Clearly, since the time of publication of that report, tax debtor sentiment has changed considerably with the Inspector General of Taxation commenting that a "major source of dissatisfaction for stakeholders was the ATO's use of EDCAs."¹⁵³

The audit report recommended that:¹⁵⁴

"The ATO could more effectively analyse and evaluate the costs of the program, and consider efficiencies that could be achieved, including the targeting of debt cases for referral. Such an analysis would also assist the ATO in more clearly outlining the ATO's future use of the outsourcing arrangement. In undertaking this work, it may be useful for the ATO to consider the different experiences of revenue and taxation offices internationally, including the United Kingdom, the United States of America, and Canada."

In the international context, experiences of outsourcing tax debt to private parties vary among revenue bodies. While Australia has experienced some success with the use of third party debt collectors, some countries tried outsourcing debt for several years and then eventually concluded it was uneconomic to do so and now deal with these debts through their own debt collection department. For example, in the USA, the IRS introduced a Private Debt Collection Program which continued for nearly three years before the IRS ended it. There are a number of studies that found that the IRS was more effective than the external debt collection agencies in collecting tax debts.¹⁵⁵ Accordingly, it is evident that when a revenue authority outsources its debt collection function, that this will not automatically result in efficiency gains and that continued monitoring and evaluation of the EDCA is imperative. At this stage it appears as though the ATO will continue to outsource part of its debt collection function to EDCAs. However, there are likely to be changes to the way in which EDCA's engage with tax debtors as a result of the new "Debt Collection Guidelines: For Collectors and Creditors" which were released jointly by the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission on 8 July 2014 (Guidelines). The ATO will need to ensure that appropriate policies and procedures are in place to ensure compliance with the Guidelines by EDCAs. Failure to comply with these Guidelines may result in considerable penalties for the ATO, including fines of up to \$1,700,000 per offence.¹⁵⁶

Simplicity

This paper has discussed a number of strategies that the ATO has introduced to streamline and simplify processes for the business taxpayer. These include service driven strategies that are aimed at improving communication and the online customer service experience and tools that allow for easy payment, support viable businesses and reduce costs for taxpayers.

¹⁵⁰ Ibid, 16.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Inspector General of Taxation, *Review into the Australian Taxation Office's approach to debt collection*, Terms of reference & submission guidelines, 26 May 2014.

¹⁵⁴ Australian National Audit Office, *The Auditor General Audit Report No.54 2011–12 Performance Audit The Engagement of External Debt Collection Agencies* Australian Taxation Office (2012) 109.

¹⁵⁵ Electronic Tax Administration Advisory Committee Annual Report to Congress, *Innovating to Meet the Challenge: The IRS Private Debt Collection Program – A Comparison of Private Sector and IRS Collections While Working Private Collection Agency Inventory*, Section 6 (2013); IRS, *IRS Private Debt Collection, IRS Cost Effectiveness Study* (2009); United States Government Accountability Office, *Report to the Ranking Member, Committee on Finance, U.S. Senate, Tax Debt Collection, IRS Could Improve Future Studies by Establishing Appropriate Guidance*, September 2010.

¹⁵⁶ S12GBA(3) *Australian Securities and Investments Commission Act 2001 (Cth)*.

There it is likely that there will be considerable investment in developing online resources to further improve ATO online service delivery.¹⁵⁷ The private sector has submitted that an improved online service could build upon the current tax portal by introducing tailored tools for each taxpayer, rather than providing generic information.¹⁵⁸ The Institute of Chartered Accountants have submitted that such tools might include personalised tax payment calendars, payment reminders and offers of ATO assistance to small business taxpayers, particularly during the establishment phase of a business.¹⁵⁹ Further, the online portal must be better equipped for external service providers such as the business' accountant who should be privy to the information the ATO provides their clients, including real-time information access and 'warnings signals'. This information would assist these professionals who are likely to have a better understanding of their client's business and personal circumstances, to intervene in their client's affairs at an early stage, which may involve assisting their client to develop a business plan or to negotiate a debt relief option with the ATO.¹⁶⁰

In the United States, a number of recommendations were made to the IRS by the Electronic Tax Administration Advisory Committee in its June 2014 Annual Report to Congress. The Report made the following comment in relation to the online experience that the IRS should be aiming towards:¹⁶¹

"Largescale financial institutions and retailers, as well as many other industry sectors, provide customers with a comprehensive, personalized online experience to manage their accounts, make transactions, and interact without ever visiting an office or store. Technology also enables online providers to tailor the customer experience to the customer's profile, buying habits and prior interests – all of which provide a highly engaging, effective service delivery model."

...To achieve high taxpayer adoption and satisfaction, ETAAC believes that the IRS should provide taxpayers with a comprehensive, customized online experience – at the same standard expected of today's retailers and financial service providers."

This recommendation translates well into the experience that the ATO should be aiming to provide its 'customers'. Further, if the online experience is vastly improved, it is likely that this will also result in increased tax debtor engagement, greater efficiencies and increased voluntary compliance.

Conclusion

This paper has considered the ATO's debt collection framework and strategies and has given particular attention to the position of a tax debtor that is approaching insolvency within that framework. In the context of a tax debtor that is approaching insolvency, it is evident that the manner in which the ATO administers the tax law plays has the potential to impact upon a number of stakeholders. An analysis of the recognised tax policy criteria within the Corporate Insolvency Taxation Framework has provided useful insights in relation to where weaknesses in the ATO's debt collection administrative function lie. In that regard, containing debt levels at reasonable levels is a major concern of the ATO and

¹⁵⁷ Geoff Leeper, Second Commissioner, People, Systems and Services, Tax administration transformation: Reinventing the ATO, Address to the National Tax Practitioner Conference Sydney, Wednesday, 18 June 2014 (Delivered by First Assistant Commissioner Steve Hamilton on behalf of Second Commissioner Geoff Leeper) <https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-administration-transformation--Reinventing-the-ATO/> Last Accessed March 2015; ATO, ATO capability action plan update September 2014 <https://www.ato.gov.au/printfriendly.aspx?url=/About-ATO/Access-accountability-and-reporting/In-detail/APSC-Capability-Review/ATO-capability-action-plan-update-September-2014/> Last Accessed May 2015.

¹⁵⁸ Institute of Chartered Accountants, Submission to IGT Review into the Australian Taxation Office's approach to debt collection, 24 July 2014, 5.

¹⁵⁹ Ibid, 6.

¹⁶⁰ Ibid, 5.

¹⁶¹ Electronic Tax Administration Advisory Committee, Annual Report to Congress, June 2014, 25.

strategies aimed at reducing levels of collectable debt, particularly those aimed at early intervention, are one area for future action.

While the use of behavioral insights and advanced analytics is creating greater efficiencies in tax administration, stakeholder concerns indicate that a considerable amount of qualitative information relating to a tax debtor is not being captured by the ATO's current technology, leading to inequities and inconsistencies in the treatment of tax debtors. Without significant technological advancements, the only way in which this information can be captured is for additional resources to be employed at significant additional cost to the ATO, which compromises the efficiency criterion. Accordingly, trade-offs must be made between administrative efficiency and administrative equity and the correct balance must be struck between these competing criteria to ensure that the community perceives tax administration to be fair. In practical terms, given the limited resources that the ATO has at its disposal, maintaining this balance is a challenge for the ATO. The ATO, like most other OECD revenue authorities, has invested in developing new technologies that will be able to capture more of the qualitative characteristics of a tax debtor when performing risk assessments and determining which debt collection strategy to take. The development of this new technology coupled with the implementation of new strategies, some of which have been mused on in this paper are likely to create greater opportunities for the ATO to be able to achieve a better balance between these two competing objectives of tax law as well as to create further efficiencies through better integrated tax compliance.