Tax Law, Public Trust and Confidence in the Australian Tax System

By David W Marks KC and Matthew Paterson[1]

1 A Prolific Decision-Maker

1. The Australian Taxation Office (**ATO**) is one of the most prolific administrative decision-makers in Australia.

2. Not only is the revenue that it collects the lifeblood of the Australian Government, but its decisions on the manner in which tax laws are administered affect nearly every Australian. Tax is an instrument of policy, not just a means of funding it.[2]

3. Further, the ATO's systems must have the flexibility to deal with everybody – from the lowest income-earners, who may be socially or economically disadvantaged, to expensively advised, multi-billion dollar, multi-national corporations.

4. As such, public trust and confidence in the ATO's administration of tax law is a matter of national significance.[3] Inevitably, the ATO's performance and powers are a matter of

---

[1] David W Marks KC, Inns of Court, Brisbane; Matthew Paterson, Associate, Minter Ellison, Brisbane. Opinions expressed in this paper are personal to the authors, and do not reflect the views of Mr Paterson's employer.

[2] Tax is most plainly seen as an instrument of policy in schemes such as the Superannuation Guarantee Charge. Failure to pay minimum super contributions is not an offence. It simply leaves the employer open to tax, tax penalties, and interest. The tax and penalties are not deductible for income tax purposes (unlike most employer super contributions, which meet the minimum "requirements" of SGC).

[3] As a former Commissioner of Taxation said: "For Australia, the effectiveness and integrity of the ATO provided the country with a comparative advantage in the reliable collection of taxes with which to fund the policies and vision of respective governments; and in terms of helping to build trust and confidence in Australia's democracy." See D'Ascenzo, Modernising the Australian Taxation Office: Vision, people, systems and values", (2015) 13(1) *eJournal of Tax Research* 1-17.

comment and debate. Everyone has an engagement. Everyone has an interest in knowing they will be treated fairly and predictably.[4]

5. We propose to address three facets of the administration of tax laws in Australia, which pose issues for the public trust and confidence in the Australian tax system. We do not suggest, on the evidence to hand, that administrative systems have broken down. Indeed, it would be difficult to suggest this, given the statistics on one kind of decision-making process, discussed below. And a recent objective measure, of trust, rates the ATO very highly.[5] Rather, we see opportunities for enhancement of existing systems contributing to the integrity of the system.

6. First we address issues regarding availability of forward guidance from the ATO in its administration of tax laws. These include:

   (a) the private binding ruling regime, including current limitations leading to inflexibility of that regime; and

   (b) other pre-emptive engagement with the ATO: although the ATO encourages pre-emptive engagement by taxpayers concerning questions where there is doubt, there is a tension with the ongoing trend of depersonalisation of the ATO's public-facing engagement.

7. Secondly, the Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) has produced some interesting preliminary results of her analysis of the tax objection process showing what we characterise as "churning" of income tax decisions within ATO. This particularly affects objections filed against self-assessed income tax, where the taxpayer

---

4 Refer to the recently reissued "ATO Charter", formerly "Taxpayers' Charter", viewed on25 July 2023, at https://www.ato.gov.au/About-ATO/Commitments-and-reporting/ATO-Charter/Our-Charter/

5 A recent measure of public trust in the Commonwealth public sector rated ATO as the most trusted institution: "Trust in Australian public services: 2022 Annual Report", Department of Prime Minister & Cabinet, in "Supplementary Data Tables, published November 2022. Viewed on 25 July 2022 at: https://www.apsreform.gov.au/resources/reports/taps-2022/supplementary-material

is presumably filing on a more conservative basis, and then reliant on the objection regime to obtain what the taxpayer regards as the "correct" result, a lower amount of tax or some other more favourable result. This calls for greater examination, to clarify whether the churn is reduced by pre-lodgement engagement.

8. In this respect, the raw data so far sourced by the IGTO still invites dissection and analysis. It is remarkable that in the three financial years for which data was examined, objections against self-assessments, which were allowed in full:

   (a) greatly exceeded the number of such objections disallowed; and

   (b) in two of the three years – exceeded the number of objections allowed in full where the assessment had arisen from ATO compliance activity.

9. Such results give the outward appearance of possible scope for efficiency gains, current wasted costs both by the regulator and the taxpayer, and delayed resolution. This would be a particular issue if taxpayers had already availed themselves of available mechanisms for forward guidance, and been led through those existing mechanisms to file on a more conservative result, ultimately reversed.

10. Thirdly, the mechanism and structure for external reviews of ATO objection decisions remains at date of writing uncertain. The final shape of the replacement body for the Administrative Appeals Tribunal (**AAT**) has not been announced. The authors point to the desirability that any external review body have the expertise and mechanisms quickly and accurately to resolve tax disputes. By far the greater number of tax disputes are filed with the AAT, rather than the Federal Court of Australia.

11. We are conscious that tax disputes form a small subset of the overall work of the present AAT. The number of filed disputes each year is relatively small,[6] and the number proceeding to a contested hearing is much smaller still.[7] Nevertheless, for reasons that we cannot explain, this aspect of the present AAT's work is top of mind. A range of factors and pressures potentially impinge on the effectiveness of a successor body, in dealing with tax.

2 Private Binding Ruling Regime

12. Australian gradually moved to something resembling a "self-assessment" regime, for most classes of taxpayers, formally beginning in the 1986-87 year.[8]

13. We set the scene this way:

    (a) Taxpayers are now expected to self-assess in many cases, either in fact or in substance.[9]

    (b) There are substantial penalties for incorrectly returning income,[10] which are magnified by Australia's comparatively high income tax rates.[11]

---

6 Less than 2% of filings: Annual Report, Administrative Appeals Tribunal, 2021-2022, page 21, viewed 25 July 2023 at: https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2021-22-annual-report

7 We do not have disaggregated data, but about 6% of matters are disposed of by a decision other than a consent decision, over all matters filed, according to the 2021-2022 Annual Report, *op cit.,* page 22.

8 The history is recounted in Marks, "Proceeding in certainty: tax rulings", (2017) 89 AIAL Forum 91-101, pages 92-94.

9 Companies truly self-assess. Their returns are deemed to be assessments on lodgement: section 166A of the *Income Tax Assessment Act 1936* (Cth). For most individuals, returns are not deemed to have been assessed on lodgement, but are accepted with checks that are much short of a full assessing process.

10 Division 284 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

11 Comparisons are difficult, but the OECD places Australia in the highest 20% of company tax rates, after adjustments to get at an effective rate: OECD "Corporate Tax Statistics" (4ed), page 19, table of "Effective average tax rate: OECD, G20 and participating Inclusive Framework jurisdictions, 2021", viewed on 25 July 2023 at: www.oecd.org

(c) The ATO's sources of information have never been better, given the sweep of domestic and international automated reporting about everything from dividends to luxury car sales.[12]

(d) Where there is a transaction in progress, or a taxpayer desires to return income on a basis provided by the ATO, there is facility for the ATO to provide a private binding ruling (**PBR**).

14. This PBR facility was instituted as self-assessment was broadened in Australia and is meant to support self-assessment.

15. The law provides a way in which a PBR can be provided.[13]

16. The law also provides how you may object against a PBR,[14] and how someone dissatisfied with an objection decision may then either seek review in the AAT or appeal to the Federal Court of Australia.[15]

17. Thus far, this sounds like a rational system for a self-assessing taxpayer to gain certainty about how to lodge a return.

18. In practice, it has long been thought that the PBR ruling system does not work well for some more significant cases, however.[16]

19. Examples show the strengths and limitations, without having to get into some of the technical, tax details.

---

12 For a contemporary assessment of international responses of revenue offices to AI and the volume of data available: Strauss, Fawcett & Schutte, "An evaluation of the digital response of tax authorities to optimise tax administration within the digitalised economy", (2020) 18(2) *eJournal of Tax Research* 382-401.

13 Section 359-5(1) of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

14 Section 359-60.

15 Sections 14ZYB and 14ZZ of the *Taxation Administration Act 1953* (Cth).

16 Marks, "Caught in a bind" (1998) 33(1) *Taxation in Australia* 30-34.

2.1 Static versus dynamic

2.1.1 Dynamic

20. A transaction in progress is unsuited to the current private binding ruling process. This is despite a legislative mechanism allowing an application for a proposed transaction.

21. Initially, the PBR process allowed for no updating of the arrangement put to the Commissioner for ruling. This has been ameliorated in a small degree. During the ruling process, it is possible for the Commissioner to seek a valuation,[17] seek further information from the applicant or from others,[18] make assumptions,[19] and make a "related ruling" (presumably to deal with a situation where a ruling request dealt with a narrow point, but the ATO feels it would be misleading only to answer that narrow issue).[20]

22. Further, during the objection process the Commissioner may now consider new information, but can essentially restart the ruling process if the Commissioner considers that the additional information is such that the scheme to which the application related is materially different from the scheme to which the ruling relates.[21]

23. This effectively means that, on objection, and certainly on review or appeal, no further evidence is allowed.[22] The subject matter of the review or appeal is the objection decision, and the objection decision relates to a ruling on a set of facts put to the Commissioner.[23]

---

17 Section 359-40.
18 Sections 357-105, 357-115 and 357-120.
19 Section 357-110.
20 Section 359-45.
21 Section 359-65. The effect is that the objection is taken not to have been made, and the Commissioner must request the applicant to make an application for another private ruling, effectively restarting the process.
22 Indeed, it is doubtful that evidence, as such, is allowed on review or appeal. But see *A Taxpayer v Commissioner of Taxation* (2007) 97 ALD 501; 67 ATR 959, where a mining engineer explained aspects of the fixed scheme.
23 As noted, further information can be submitted on objection, but section 359-65 restricts how far that is permitted. On review or appeal, nothing further is admitted: *Commissioner of Taxation v McMahon* (1997) 79 FCR 127.

24. How then does one deal with a transaction actually in progress such as the purchase of the Loy Yang Power Station by Horizon Energy Partners in *Bellinz v Commissioner of Taxation*?[24]

25. Merkel J described some of the procedural aspects as follows:[25]

> *... [I]n the course of the proceeding the parties resolved certain complaints of the Lessor Partners as to alleged defects in the private ruling. Consequently agreement was reached as to:*
>
> - *the documents which comprised the factual information given to the Commissioner and upon which he based his ruling; and*
> - *the arrangement on which the ruling was sought.*
>
> *These matters are of importance. On a review of a private ruling, whether by the Administrative Appeals Tribunal or the court, the reviewing body is to review the opinion of the Commissioner in the ruling as to the way in which the relevant tax law applies to the "agreement" the subject of the ruling. In doing so, the reviewing body is to be limited to the facts identified by the Commissioner as constituting the arrangement and relied upon him by making his decision ... Accordingly, it was imperative that the arrangement the subject of the ruling and the facts on which the ruling was based be clearly identified.*

26. So, critically, the process in *Bellinz* had been so compressed that there was (initial) disagreement as to the very facts of the application for ruling.

27. This truly was a transaction in progress. Merkel J went on:[26]

> *However, one of the problems which arose was that the Lessor Partners from time to time sought to comply with objections raised by the Commissioner by making amendments, or agreeing to make amendments, to their transaction documents. As a consequence the documents recording the arrangements did not necessarily accord with the agreed description of the arrangement or the applicant's submissions as to the arrangements. <u>Whilst I have endeavoured to accommodate the discrepancies I would point out that the Court is not giving an advisory opinion on the basis of an arrangement that might be made</u>. ... Yet the agreement by the parties as to the arrangement on which the ruling was sought departs from the documentation. For example the documentation provides that the option to purchase is subject to the Equipment mortgage but*

---

24 The report of the trial decision by Merkel J is telling, and is reported in *Bellinz Pty Ltd v Commissioner of Taxation* (1998) 38 ATR 350; 98 ATC 4399. There was an appeal to the Full Court, reported as (1998) 84 FCR 154, but the appeal was dismissed. We will focus on the difficulties felt at trial, by the trial judge and by the parties.

25 98 ATC 4399, 4405.

26 Ibid, 4405-4406. (Underlining added)

> *the agreement states that the Equipment mortgage either permits or will be amended to permit legal title to be transferred upon the exercise of the option and payment of the limited recourse, rather than the full, loan under the mortgage. As pointed out above I have endeavoured to accommodate these matters as they do not affect the final outcome but they do emphasise the importance of the Commissioner stating the arrangement on which he has ruled (and any binding ruling, whether private or public) with clarity and precision in the ruling itself.*

28. So, for an arrangement still under negotiation, the process of application for a private ruling is less than ideal. And by the time you reach the objection, or further stages of a dispute, the arrangement should be firmly fixed. This does not accommodate continued commercial negotiation on material points.

2.1.2 Static

29. In contrast, an arrangement which is essentially static, where the facts may be known with some certainty (so far as those facts are relevant to the tax status), may well be suitable for a PBR application. Indeed, a static arrangement may need ongoing certainty, since any error, say in assumed tax treatment, may have devastating results if allowed to persist for some years.

30. An example of a static arrangement was *BERT Pty Ltd v Commissioner of Taxation*.[27]

31. The dispute before the AAT related to the Commissioner's ruling about whether a fund, set up to provide security for workers' entitlements (such as redundancy entitlements), fell within a given category of trust under the income tax laws.

32. This turned entirely on the construction of the trust deed, and of related tax provisions. An accurate answer was able to be given by the Tribunal, one that was later approved in unrelated litigation by another fund in the High Court of Australia.[28]

---

27 (2013) 95 ATR 457; 2013 ATC 10-332.

28 *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* (2016) 259 CLR 73, [12] fn 8.

2.2 Complex facts

33. Where the facts are complex - and whether the matter be static or dynamic - the matter may not be suitable for a PBR application. This is illustrated by *Aurizon Holdings Limited v Commissioner of Taxation*.[29]

34. The transaction was of economic significance. A State had restructured and privatised components of its railway. In the course of floatation and listing of part of the railway, and the State's sell-down of its interest, the taxpayer company received $4.4 billion from the State, which was called a "receivable".

35. The State Treasurer issued a direction that the consideration provided for transfer of the receivable from the State to the taxpayer was nil, and that the transfer of the receivable was to be designated as a contribution by the State "to be adjusted against the contributed equity" of the taxpayer.

36. At that point, the contributed equity of the taxpayer comprised 100 fully paid shares held by two Ministers of the State, the allotment of which had been recorded in the taxpayer's authorised capital account.

37. The directors of the taxpayer then minuted that they recognised the transfer of the receivable from the State as a contribution of equity in accordance with an Australian accounting standard interpretation that they nominated.

38. They directed that the transfer of the receivable be reflected in the company's accounting records.

39. The taxpayer gave effect to that resolution by creating a "Capital Distribution" account in the amount of $4.4 billion, to reflect the State contribution.

---

[29] 2022 ATC 20-824; 114 ATR 754.

40. Shortly after, the offer to the public of shares in the taxpayer was completed, and the taxpayer's shares were listed on the stock exchange.

41. It should be apparent that the stakes here were very large indeed, no matter what the technical tax question might then be. And the transactions, the directors' minutes, the accounting records and accounting standards would all need to be characterised.

42. Instead of pursuing an application for PBR, the taxpayer sought a declaration from the Federal Court of Australia in accordance with section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and section 21 of the *Federal Court of Australia Act 1976* (Cth).

43. The Commissioner resisted the application, including raising discretionary considerations. It is worthwhile paraphrasing Thawley J's summary of the Commissioner's submissions on this account:[30]

    (a) That there was an alternative and more appropriate remedy that was available to the taxpayer, an application for a PBR.

    (b) In the event that the taxpayer did not agree with the PBR issued by the Commissioner, it had a right to bring proceedings for review or appeal from the PBR (noting of course for completeness that an objection would need to be decided first).

    (c) An analogy was drawn with the discretionary limits on challenging an assessment. Specifically, the legislature had enacted a regime allowing challenges to an assessment, and the High Court of Australia had previously said that that legislated regime was the way in which an assessment should be challenged in future, absent good reason.[31] The analogy was thus drawn with the presence of a statutory regime allowing challenge to a PBR.

---

30 Ibid, from [104].

31 *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146.

44. Thawley J said:[32]

> *The object of the statutory regime for private binding rulings is to provide a way for taxpayers to find out the Commissioner's view about how certain laws administered by the Commissioner apply to the taxpayer so that the risks to the taxpayer of uncertainty when self-assessing or working out tax obligations or entitlements are reduced … the resulting ruling might be binding on the Commissioner in relation to the particular taxpayer (here, Aurizon), but not others (for example, Aurizon's shareholders) … The private ruling regime is a useful regime. It is not a regime which is particularly well suited to dealing efficiently with the present case. For one thing, it would have been, to say the least, difficult to identify with any certainty the relevant facts upon which the ruling would be made. As the course of these proceedings has shown, it was only shortly before the hearing that the parties were able to agree a number of relevant facts. Certain facts were only perceived to be relevant, and made the subject of evidence, during the course of the hearing. Secondly, any appeal would have been confined to the facts as put in the ruling application. If there had been a Part IVC appeal from a ruling, it is likely that the facts in the private binding ruling application would have been shown to be wrong in some respect with the result that the whole process would likely miscarry and need to start again. Thirdly, third parties (Aurizon's shareholders) have an interest in the issue being resolved in a way which binds the Commissioner and this is not achieved through a private binding ruling.*

45. It should be noted that the Commissioner disagrees with Thawley J in this respect, relevant to today:[33]

> *The Commissioner acknowledges that this was an unusual case. Nevertheless, the Commissioner considers that the private binding ruling process is capable of dealing with complicated factual circumstances.*

3 "Churning" of decision making - objections

46. The Inspector-General of Taxation and Taxation Ombudsman has published her interim report on "The Australian Taxation Office's Administration and Management of Objections".[34] This was Phase 1 of her investigation. At present, she has before her submissions on Phase 2 of this investigation, but no results have been published yet.

47. There is much to like about an investigation of this kind.

---

32 Ibid, [108], underlining added.
33 Decision impact statement on *Aurizon Holdings Limited v Commissioner of Taxation*, issued 25 August 2022.
34 October 2022.

(a) The investigation in its first phase was data-heavy.

(b) This drew out the fact that some data simply are not available. Other data are, in the ATO's own assessment, not well-maintained at present (due to manual systems). Even these findings are something on which ATO and the IGTO can reflect.

(c) As the first phase was restricted to data for three years – in fairness it may be that none of the figures leads to any statistically robust result. And we are seeing figures affected by the pandemic. Nevertheless, where an effect is strong enough, such as the "churning" effect mentioned below, it remains worthy of further consideration.

(d) The IGTO was not in a position to draw strong conclusions at the end of the first phase.

48. For Phase 2 of IGTO's investigation, there are five terms of reference. These focus on the actual objection process, but one feature highlighted in Phase 1 was that "more than 50% of objections received by the ATO in FY19-FY21 (excluding Covid-19 objections) are self-initiated", being "taxpayers objecting against their own self-assessment".[35]

49. Before we deal with those observations by IGTO, it is necessary to speak about the data. IGTO's report details the systems used within ATO to capture data about objections. ATO's enterprise case management system does contain a template for an officer to record some matters, but "the ATO has advised the IGTO that these field are not used for reporting as they are manually entered by officers and the ATO has low confidence in the integrity of the data and its reliability".[36]

50. Thus ATO "cautioned against the use of this data to draw conclusions". This has led IGTO to treat the data in a way that "minimises the risk of errors and outliers".[37]

---

35 Slide pack produced by IGTO to accompany the Interim Report, 10 October 2022, Slide 8.

36 IGTO, interim report, "The Australian Taxation Office's administration and management of objections, October 2022, paragraph 2.25".

37 Ibid, paragraph 2.25.

51. Turning then to an aspect of the data that is noteworthy, IGTO found:

    (a) more than 50% of objections are allowed in full (where they are valid objections);[38]

    (b) well over 50% of valid, self-initiated objections – objections coming out of a taxpayer's own self-assessed return - were allowed in full in the three financial years investigated;

    (c) in fact, of the three years in question, 60% was the lowest percentage allowed in full, of self-initiated assessments (being for the financial year ended 2021). There was also a small number of objections in each year allowed in part;[39]

    (d) more than half of the objections received by ATO in the three financial years were in the self-initiated class.[40]

52. Particular groups affected by the prevalence of objections to self-initiated assessments were the following:

    (a) Individuals.

    (b) Small businesses.

    (c) Privately owned and wealthy groups.

    (d) Public and multinational businesses.[41]

53. There were two groups where the trend was the opposite, being for super funds and not-for-profits. There, objections against assessments (or decisions) arising from ATO compliance action predominated.

---

38 IGTO Slide Pack, ibid, page 17.
39 Ibid, page 17.
40 Ibid, page 19.
41 IGTO, interim report, ibid, page 23, paragraph 2.18.

3.1 Possible reasons

3.1.1 Amendment of a return – lack of formal mechanism

54. There is no formal mechanism for the amendment of a return that has been filed, and the informal mechanisms for amendment of such returns apparently time out.[42] Informal information provided by people who have worked with tax agents indicates that ATO then direct the taxpayer's representative to the objection route, which is a formal, statutory mechanism for seeking a change to a tax assessment.

55. Since none of the data thus far gathered by IGTO directly addresses the reasons for that, let alone how prevalent that is, we are left to speculate.

56. However, it does indicate that one channel, which ought to be used for real disputes, may be utilised as of necessity for matters which are less controversial. The large number of objections being allowed against self-assessments indicates this is possibly occurring.

57. One feature of the Australian income tax system which can drive this is laws requiring a taxpayer to reconsider a past year's assessment, in light of facts occurring in the present year. Simple examples are:

    (a) The timing rule for a contract of sale of property, for capital gains tax purposes deems this CGT event to occur at the time of contract, but there is no CGT event until settlement. In other words, there is an artificial construct about time, but not about the actual occurrence of the CGT event. A contract entered into in May 2024, which is only due to settle in late December 2024 would lead an ordinary individual taxpayer, who has not applied for a lodgement extension, to file a return as if the CGT event had not occurred, by the gazetted time for lodgement, which is usually

---

42 A taxpayer seeks an amended assessment, say under section 170 of the *Income Tax Assessment Act 1936 (Cth)*, but faces limitations because of its time limits.

October 2024. That individual would then amend the 2023-2024 financial year assessment, after settlement.[43]

(b) Where there is loss carry back, or sale of an asset on the basis of some form of profit sharing with the vendor, similar results can occur.

58. At one level, if ATO is simply directing tax agents to the objection process, because of the absence of a better way of processing largely uncontroversial amendments to assessments, there is perhaps little harm. ATO as an institution no doubt can and has adapted to that kind of workflow, if it be true.

59. But if that workflow is significant, but unquantified, then the present absence of data reflecting that aspect of the workflow disguises other aspects of the noteworthy statistics about objections to self-initiated assessments.

60. For example, we do not know to what extent an objection has been filed against a self-assessment, in circumstances where the taxpayer has already availed themselves of more substantive engagement procedures facilitated by the ATO.[44]

3.2 Means of engagement pre-lodgement

61. A taxpayer may seek to obtain more certainty about how the taxpayer should lodge by seeking a private binding ruling, as discussed above. This is a statutory process.

62. But the majority of engagements between the ATO, on the one hand, and taxpayers and their representatives, on the other hand, is informal. It is done through exercise of the Commissioner's general powers of administration.[45]

---

43 Timing rule on CGT Event A1 is in section 104-10 of the *Income Tax Assessment Act 1997* (Cth).

44 Here, we put to one side a simple engagement about a necessary and uncontroversial amendment to an assessment of the kind discussed above, such as due to the CGT timing rule for sale contracts.

45 Separately, the IGTO has initiated an investigation of the exercise of the Commissioner's general powers of administration, which remains underway. This investigation was opened on 9 December 2021. Refer to the IGTO's website, viewed 26 July 2023.

63. Sometimes the ATO engages proactively. An overseas example of such engagement by a revenue authority involved a foreign revenue authority simply turning up at a client's new office in the foreign country. The officers were invited in for tea, and the taxpayer, and the Secretary of the foreign revenue authority, discussed how the taxpayer was expected to comply with the local tax law. Properly done, this is commendable and usually welcomed by business.

64. But in terms of the taxpayer initiating contact, the ATO has the usual obvious channels:

    (a) Telephone.

    (b) Internet – webpage and portals.

    (c) Facsimile and mail, which unfortunately persist out of necessity in relation to some forms of contact.

65. But there are other forms of contact which actually are given labels, and have known functions within the bureaucracy:

    (a) Sectoral programs such as the "Top 500" and "Next 5000" programmes, aimed at wealthy private groups. Here the ATO actively seeks engagement, looking for details so that the ATO understands the group, and attempts to establish a relationship so that there might by "justified trust". A similar program operates for the large business and international sector.[46]

    (b) Early engagement for advice – this is open to various taxpayer segments, and is intended to assist with complex transactions that a person is considering or has implemented.

    (c) The public ruling program and related documents such as practical compliance guidelines. These are available at the website, but deserve special mention since

---

[46] Refer to document "qc 70764", "Findings report Top 500 tax performance program – June 2022", 2 November 2022, obtained from ATO website on 26 July 2023.

some of these forms of "products" can actually operate as binding advice by the ATO.

66. The "early engagement" process may actually direct the taxpayer or its representative toward another channel, such as an application for a PBR, or to less formal advice which may not have binding effect but nevertheless is regarded as "administratively binding".

3.3 Churn

67. It is apparent, even from ATO's website, that ATO makes a very substantial effort to provide a measure of certainty to taxpayers. It remains remarkable that so many self-initiated objections – that is, against assessments which were not the result of audit activity by the ATO – are filed by the very taxpayer who signed the return as correct.

68. There is as yet an untold story here. Perhaps the data do not exist, and we will never know for sure.

69. But one thing does come out of the figures: churn.

70. Given the amount of effort that the ATO is putting into taxpayers attempting to get their returns correct, for the ATO to then have to consider objections filed by taxpayers in circumstances where the taxpayer probably knows that the return self-assesses excessively, is redolent of wasted effort.

71. The solution, if any, is difficult to see in the absence of hard data. The hard data is apparently not available. This is worth revisiting so that hard data can be produced, the causes of this "churn" further investigated, and some remedy applied to the most significant drivers.

3.4 Comparators

72. The IGTO's interim report gives raw figures for the flow of objections, in table 2.3:

Table 2.3: Objection Data and key ratios (Overall)

Objection Data		FY19	FY20	FY21
Stock on Hand (as advised by ATO) – 1 July	A	4,681	6,174	6,422
Objections Received	B	27,016	21,892	27,780
Total Objections (A+B)	**C**	**31,697**	**28,066**	**34,202**
Outcomes				
Decisions Issued	D	15,088	15,269	22,284
Withdrawn	E	4,538	4,060	3,969
Invalid/Other	F	6,650	2,961	3,624
Sub-Total – Finalised Objections (D+E+F)	**G**	**26,276**	**22,290**	**29,877**
Closing Balance (Calculated by IGTO) (C-G)	H	5,421	5,776	4,325
Stock on Hand (as advised by ATO) – 30 June	H1	6,174	6,422	4,658
Key Ratios				
Decisions Issued as % of Total Objections	D/C	47.60%	54.40%	65.15%
Withdrawn/Invalid as % of Total Objections	(E+F)/C	35.30%	25.02%	22.20%
Closing Balance as % of Total Objections	H/C	17.10%	20.58%	12.65%
Decisions Issued as % of Total Objections excluding invalid and withdrawn objections	D/(C-E-F)	73.57%	72.55%	83.75%
Closing Balance as % of Total Objections excluding invalid and withdrawn objections	H/(C-E-F)	26.43%	27.45%	16.25%

73. These data might be compared to those from over 40 years ago, which were included in the Administrative Review Council's 1983 Report, *Review of Taxation Decisions by Boards of Review*.[47] Table 1 to that Report provided:

[47] Administrative Review Council, *Report No. 17: Review of Taxation Decisions by Boards of Review* (1983).

TABLE 1: INCOME TAX OBJECTIONS AND APPEALS

Summary of Year Ending 30 June 1982

Assessments and Objections	
Returns lodged in respect of all years, taxable and non-taxable	8 602 000
Current assessments issued, taxable	6 048 449
Previous year's assessments issued, taxable	311 000
Total assessments issued	6 359 449
Objections on hand at 1 July 1981	73 627
Objections received during year	189 311
	262 938
Objections decided during year	182 284
Objections on hand at 30 June 1982	80 654
Requests for Reference and Appeals	
Requests for reference to Boards of Review	16 214
Requests for objection to be treated as appeal to Supreme Court	478
Total requests for references and appeals	16 692
Cases for reference to Boards (all taxes):	
— allowed by Commissioner	4 149
— settled	6 695
— withdrawn by taxpayer	4 473
	15 317
— transmitted to Boards during year	543
— cases awaiting transmission at 30 June 1982	25 569
Cases for appeal to Courts:	
— awaiting transmission at 30 June 1982	1 506
Action taken by Boards of Review (All Taxes)	
References outstanding at 1 July 1981	788
References transmitted during year	543
Total references	1 331
Manner in which dealt with:	
— allowed	20
— partly allowed	76
—disallowed	305
— withdrawn, allowed or settled prior to listing	107
— awaiting decision or part-heard	55
— awaiting hearing at 30 June 1982	768

Source: Australian Taxation Office

74. The Administrative Review Council (**ARC**) further observed that "Statistics on numbers of objections allowed or disallowed are not kept, but the ATO estimates that approximately 75% are either wholly allowed or allowed in part."[48]

48 Administrative Review Council, *Report No. 17: Review of Taxation Decisions by Boards of Review* (1983), [115].

75. The only thing that can explain the fact that, with a smaller taxpayer population in 1981, there were about 3 times as many objections being filed – is history.

76. This was a different era, when tax schemes were rife, the Commissioner had less access to data, and the ATO had not yet managed to reset community expectations about acceptable fiscal behaviour.

77. The Hon John Howard, as Treasurer, introduced a new and more effective anti-avoidance provision in 1981.[49] This in itself indicates that the times were very different, requiring an intervention.

4 Ensuring appropriate external review

4.1 Background to the current system of review

78. While the "churning" of income tax assessments on the one hand highlights inefficiencies in the current system of self-assessment, on the other hand it demonstrates that the ATO earnestly and seriously considers taxpayers' objections. This is a good thing. As frustrating as the system of self-assessment and objection can be, taxpayers can at least be confident that their concerns will be seriously listened to on an internal review.

79. Upon receiving their objection decisions, if they remain dissatisfied, taxpayers may seek review in either the AAT or in the Federal Court.[50] Where they seek review in the AAT, they may then seek review of those decisions by the Federal Court on questions of law.[51] Taxpayers therefore have, effectively, up to three levels of review of their initial assessments (plus appeals to the Full Court, and to the High Court by Special Leave).

---

49 Part IVA of the *Income Tax Assessment Act 1936* (Cth) introduced by Act No.110 of 1981.
50 *Taxation Administration Act 1953* (Cth) ("TAA"), s 14ZZ(1).
51 *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act"), s 44.

80. At trial, the taxpayer bears the onus of proving the assessment is excessive or otherwise incorrect.[52] This "purposely negates any possible suggestion that, by the making of an assessment, the Commissioner of Taxation … assumes an onus of proving that the recipient of that assessment is indebted to the Commonwealth in the amount of the liability thereby created."[53] The policy reasons underlying the imposition of the onus on the taxpayer are grounded in the asymmetry in the information available to the taxpayer on the one hand and the Commissioner on the other.[54]

4.2 Judicial vs merits review

81. Taxation law is notable in providing taxpayers with a preliminary level of merits review (the objection decision process), and with the subsequent option of seeking either judicial or tribunal merits review of those decisions. In circumstances where the AAT is now being abolished, before considering design features of any successor tribunal in the tax space, one must consider the anterior question of whether this regime of tiers of review should be maintained.

82. The availability of *judicial* review of taxation decisions is a Constitutional prerequisite for the validity of a law imposing a tax.[55] In *Deputy Commissioner of Taxation v Brown*, Dixon CJ observed (emphasis added):[56]

> *Although there is no judicial decision to that effect, it has, I think, been generally assumed that under the Constitution liability for tax cannot be imposed upon the subject without leaving open to him sone judicial process by which he may show that in truth he was not taxable or not taxable in the sum assessed, that is to say that an administrative assessment could not be*

---

52 TAA, ss 14ZZK, 14ZZO.
53 *Le v Commissioner of Taxation* (2021) 390 ALR 132; [2021] FCA 303 (Logan J), [4].
54 Ibid, [4].
55 *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146; 2008 ATC 20-039, [9]; *Ierna Beneficiary Pty Ltd v Commissioner of Taxation* [2023] FCA 725
56 *Deputy Commissioner of Taxation v Brown* (1958) 100 CLR 32, 40.

> *made absolutely conclusive upon him if no recourse to the judicial power were allowed.*

83. This position was reaffirmed by the High Court in *Commissioner of Taxation v Futuris Corp Ltd*.[57] There can thus be little doubt that the federal judiciary both can and should continue to play an important role in the review of taxation decisions.

84. But what, then, of merits review? To begin, it is necessary to understand the nature of an "appeal" to the Federal Court of Australia, directly from an objection decision.

85. The so-called appeal is a proceeding in original jurisdiction. The court proceeds by way of rehearing, and it has also been referred to a "proceeding de novo".[58]

86. The main drawback in such an appeal is that the court does not review, on the merits, certain states of mind that the Commissioner may form in the course of his administration. Rather, review of such formation of a state of mind is limited to traditional administrative law grounds.

87. Thus, it seems all questions of individual residency in Australia must be more usefully commenced in a tribunal affording merits review of such states of mind. For example, one limb of that statutory concept calls upon the Commissioner to consider if he be satisfied that a person has a usual place of abode outside Australia.[59]

88. In any case, there has long been a perceived need for a means for taxpayers to seek review of tax assessments without resort to the Courts. As early as 1921, the Royal Commissioners on Taxation referred to a "unanimity of opinion" regarding the need for "the appointment of a tribunal, other than a Court, to deal with the numerous cases under the Income Tax Act in which taxpayers dissent from the decisions of the Commissioner,

---

57 (2008) 237 CLR 146.

58 *Insomnia (No. 2) Pty Ltd v Commissioner of Taxation* (1986) 84 FLR 278, 287. This was a decision of a State Supreme Court, exercising a jurisdiction later conferred on the Federal Court.

59 *Commissioner of Taxation v Addy* (2020) 280 FCR 46. Reversed on other grounds, (2021) 273 CLR 613.

but for various reasons are unable or unwilling to assert what they believe to be their rights, in a superior Court."[60] Accordingly, they recommended "the introduction of 'an independent tribunal (with a simple and inexpensive procedure)' which would be 'more speedy in its methods' than the Courts."[61]

89. There was a false start. An early iteration of the administrative review of taxation decisions was struck down on the grounds that it vested the judicial power of the Commonwealth in an executive agency.[62] Parliament learned its lessons from this, and the Taxation Board of Review, which it subsequently implemented, successfully withstood a Constitutional challenge in the Privy Council.[63] In its reasons, the Privy Council emphasised the administrative nature of the Boards of Review:

> *The Board of Review appears to be in the nature of administrative machinery to which the taxpayer can resort at his option in order to have his contentions reconsidered. An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. … the Board of Review is not exercising judicial powers, but is merely in the same position as the Commissioner himself; namely, it is another administrative tribunal which is reviewing the determination of the Commissioner, who admittedly is not judicial, but executive.*[64]

90. As to the role of the Boards of Review (and now the AAT), Kitto J stated that the Board's "function is merely to do over again (within the limits of the taxpayer's objection) what the Commissioner did in making the assessment — not to give a decision affecting the taxpayer's legal situation, but to work out, as a step in administration, what it considers

---

60 *Royal Commission on Taxation* (First Report, 1921), [141].

61 Chapple, "Have the Administrative Appeals Tribunal and associated changes improved the resolution of taxation disputes?" (1991) 20 *Australian Tax Review* 245, 246, quoting Roach, "The Good, the Bad and the Ugly" (June 1989) *Australian Accountant*.

62 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422.

63 *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530; [1931] AC 275; [1931] ALR 1 (*"Shell*"),

64 *Shell* (1930) 44 CLR 530, 544-545.

that situation to be."[65] These conclusions have been subsequently applied to the AAT,[66] which replaced the Boards of Review following a report by the Administrative Review Council (**ARC**) in 1983.[67]

91. There are sound reasons for Parliament to maintain a system of merits review of taxation decisions.

92. First, as observed by the Royal Commissioners on Taxation, the "expense, delay and risk of proceedings in the superior Courts" may deter taxpayers from commencing judicial proceedings to vindicate their rights.[68] Nearly a century later, an academic study found that litigation costs had a significant chilling effect on the number of tax dispute cases brought.[69] Similarly, the Federal Court's 2021/22 Annual Report disclosed that more than one third of its taxation cases were more than 24 months old.[70]

93. Conversely, the AAT finalised 82% of all Small Business Taxation division matters, and 59% of all Taxation and Commercial division matters, within 12 months of filing in 2021/22.[71] It also had median times to finalise of 29 weeks and 39 weeks, respectively, for the two divisions.[72] The AAT's costs of litigation are also markedly lower, albeit not insignificant,[73] and may still "put external review out of the reach of most taxpayers and make it uneconomic and impractical for most cases."[74]

---

65 *Mobil Oil Australia Pty Ltd v Commissioner of Taxation (Cth)* (1963) 113 CLR 475, 502, quoted in *Saunders v Federal Commissioner of Taxation (Cth)* (1988) 15 ALD 353; 19 ATR 1289; 88 ATC 4349, ALD 358, ATR 1296, ATC 4355-4356; *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [2016] FCA 814, [32].

66 *Commissioner of Taxation v Apted* (2021) 284 FCR 93; [2021] FCAFC 45, [13]-[16] (Logan J).

67 Administrative Review Council (above n 47), given effect in 1986 in the *Boards of Review (Transfer of Jurisdiction) Act 1986* (Cth).

68 *Royal Commission on Taxation* (First Report, 1921), [143].

69 Tram-Nam and Walpole, "Effective access to independent tax dispute resolution in Australia: The tax lawyers' perspective" (2018) 47 *Australian Tax Review* 5, 12.

70 Federal Court of Australia, *Annual Report 2021-2022*, Table 3.1.

71 Administrative Appeals Tribunal, *Annual Report 2021-2022*, 28.

72 Ibid, 66.

73 Tran-Nam and Walpole, (above n 69), 15.

74 Chapple, "Income Tax Dispute Resolution: Can We Learn from Other Jurisdictions?" (1999) 2(5) *Journal of Australian Taxation* 312, 3.7.1.

94. It follows that a merits review system in a tribunal will tend to be more accessible than litigation in the Courts. This is borne out by the active case figures for 2021/22: in the Federal Court's original jurisdiction 174 tax cases were on foot at the end of the financial year, against 1,784 in the AAT's Small Business Taxation and Taxation and Commercial divisions.[75]

95. Secondly, and relatedly, the volume of decisions the Federal judiciary would otherwise face would far exceed its capacity to deal with them. In a 1993 paper, then-President of the AAT, O'Connor J stated that:[76]

> *The twin objectives of a system of external review of administrative decisions are accessible, speedy, economical and informal review and an adequate standard of justice in all cases. In high volume jurisdictions… a review system with complementary tiers has been regarded as the way to fulfil these objectives. The first tier operates as a filter, shielding the second tier from significant numbers of disputes, often involving the same basic issue requiring only the application of settled law to individual facts. The second tier formulates and develops principles to guide primary decision-makers and first-tier tribunals.*

96. Although her Honour was writing in the context of two tiers of external merits review (such as is currently in place in Social Security cases in the AAT), the principle of a primary tier of decision-making acting as a filter for subsequent tiers remains sound. In 2021/22, the AAT had fully ten times the number of active cases as the Federal Court.[77] Even assuming only a percentage of these were to be transferred to the Federal Court, there would still be a drastic increase in the Federal Court's workload. Such an increase would expose a higher proportion of taxpayers to increased delays and costs associated with judicial proceedings.

---

75 Federal Court of Australia, *Annual Report 2021-2022*, Table 3.1; Administrative Appeals Tribunal, *Annual Report 2021-2022*, 28.

76 O'Connor, "Effective Administrative Review: an Analysis of Two-tier Review" (1993) 1 *Australian Journal of Administrative Law* 4, 7.

77 Federal Court of Australia, *Annual Report 2021-2022*, Table 3.1; Administrative Appeals Tribunal, *Annual Report 2021-2022*, 28.

97. Thirdly, there may be an intangible, methodological, benefit in allowing for a review in a merits tribunal, rather than a Court. This sentiment was pithily expressed by the Privy Council in *Shell* at 544:

> *Their Lordships are of opinion that it is not impossible under the Australian Constitution for Parliament to provide that the fixing of assessments shall rest with an administrative offer, subject to review, if the taxpayer prefers, either by another administrative body, or by a Court strictly so called, or, to put it more briefly, to say to the taxpayer "If you want to have the assessment reviewed judicially, go to the Court; if you want to have it reviewed by business men, go to the Board of Review."*[78]

98. By referring to having a decision "reviewed by business men", the Privy Council recognised that, for many taxation cases, a pragmatic, commonsense approach will deliver a more appropriate outcome for a taxpayer than resort to judicial proceedings will. Put another way, the practical life experience of an administrative decision-maker may result in them being better-placed to understand the rationale and design of business arrangements of everyday taxpayers, though the observation may also reflect composition of panels of the tribunal at the time.

99. Fourthly, the role of a merits review tribunal is "to do over again (within the limits of the taxpayer's objection) what the Commissioner did in making the assessment".[79] Accordingly, it is not uncommon for taxpayers to commence proceedings in the AAT where a review on the merits of a decision (rather than its legality) is considered desirable. Logan J addressed a classic example of a situation where this would be beneficial to a taxpayer in *King v Commissioner of Taxation*, where his Honour observed that "unlike the Court, the Tribunal can decide on the merits and in place of the Commissioner whether

---

78 *Shell* (1930) 44 CLR 530, 544.

79 *Mobil Oil Australia Pty Ltd v Commissioner of Taxation (Cth)* (1963) 113 CLR 475, 502, quoted in *Saunders v Federal Commissioner of Taxation (Cth)* (1988) 15 ALD 353; 19 ATR 1289; 88 ATC 4349, ALD 358, ATR 1296, ATC 4355-4356; *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224 [2016] FCA 814, [32].

or not remission of penalty is warranted."[80] The ability to re-make such discretionary decisions is a strong reason favouring the retention of an administrative merits review body for taxation decisions – the absence of such a merits review option would leave a significant gap in taxpayers' abilities to have a tax dispute fully heard and determined on an external review.

4.3 Key design features

100. If external merits review, by a body other than a court, is to be retained, the next question is: how should it be designed?

101. Although much ink has been spilled over the decades on the design of external merits review generally, the taxation system has some unique features which warrant consideration. In its 1983 Report, the ARC discussed the need to balance the Australian public's interest in ensuring the flow of public revenue with "a community interest in the fair and proper administration of taxation law."[81] Further:

> *It is Council's view that the balance of interests achieved in the policies of taxation legislation must be kept in mind when reforms are being considered. So as not to give undue weight to one or other interest, it is necessary to keep distinct the separate strands of policy reflecting the various interests and to ask, in respect of a particular component of the taxation system, what interest it is intended to serve or promote. It is important that the community interest in the performance of the individual's social obligations is not seen as overshadowing the community interest which is reflected in the individual's right to review, or as impliedly cutting down its operation. Equally, it is important that that right of review not be so enlarged as to undermine the social function of taxation.*[82]

102. Despite this policy tension, the Report further distilled the basic elements of external merits review almost without reference to the taxation law. It listed them as including:

- "enhancement of administrative efficiency";

---

80 *King v Commissioner of Taxation* (2022) 177 ALD 275; [2022] FCA 935, [4].
81 Administrative Review Council (above n 47), [14]-[15].
82 Ibid, [17].

- "justice to the individual citizen seeking review";
- "minimisation of the burden upon taxpayers";
- "independence of the tribunal from the decision maker whose decision is being reviewed";
- the distinctive function of the tribunal as engaging in administrative merits review;
- fairness to the individual seeking review;
- ensuring equitable access to administrative review, both in terms of the decisions which may be reviewed, and the individuals who may seek review; and
- ensuring the tribunal's review is informed of the relevant facts and laws.[83]

103. These principles were pithily stated by then-AAT President O'Connor J, who described the "twin objectives of a system of external review of administrative decisions" as being "accessible, speedy, economical and informal review and an adequate standard of justice in all cases."[84]

104. More recently, Professor Creyke identified five essential elements of merits review tribunals:

(a) the ability to reach the correct and preferable decision in all the circumstances;

(b) the availability of specialised members and a diverse membership;

(c) flexibility of process;

(d) accessibility; and

(e) cost effectiveness.[85]

105. Against these generalised principles, one must also remember the technical and occasionally arcane nature of most tax laws – it is, after all, "one of the most complex and voluminous statutory schemes in Australian law".[86] Such complexity must be borne in

---

83 Ibid, [63]-[70].

84 O'Connor, (above n 76), 7.

85 Creyke, "Tribunals – 'Carving out the Philosophy of their Existence': The Challenge for the 21st Century" (2012) *AIAL Forum* 71. This framework was picked up in Attorney-General's Department: *Administrative Review Reform: Issues Paper* (April 2023), 18.

86 Gumley, "The Taxation Appeals System: An Administrative Law Perspective", ATAX Tax Administration Conference (1998).

mind in the design of any merits review tribunal which engages in tax law. For example, while the Queensland Civil and Administrative Tribunal requires that parties not be represented by lawyers except in special circumstances,[87] it has been observed that:

> *While self-representation is an important right, tax law is extremely complex so that it is very difficult for self-represented taxpayers to present their facts and evidence, let alone legal arguments, to members of the tribunal/court in a coherent and sensible fashion.*[88]

106. It is notable that lawyers may represent parties in State tax disputes in QCAT.[89]

107. It follows that, at least in respect of taxation law, it is important to ensure that legal or other representation is available to taxpayers as they traverse any merits review system.

108. Similarly, though, this emphasises the importance of adequate experience in taxation law on the part of decision-makers. Just as self-represented taxpayers may struggle appropriately to consider and make submissions, so too may underqualified tribunal members struggle properly to consider and apply some of the more arcane the tax laws.

109. Accordingly, any assessment of the efficiency of a merits review process for taxation matters must be coloured by an appreciation for the complexity of these matters. It may be that, rather than more streamlined processes, efficiency in taxation matters could be boosted by more robust intervention and decision-making. If the taxpayer is not in a position to guide the process, the decision-maker may have to.

4.4 Constitution of Membership

110. Perhaps the most important impact on the decision-making of a merits review body is its membership. Although at first this appears to be an almost prosaic observation, the emphasis placed by recent reviews of the AAT on its membership, including both the

---

87 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 43.
88 Tram-Nam and Walpole, (above n 69), 13.
89 Section 72 of the *Taxation Administration Act 2001 (Qd)*.

machinery of Member appointments and their qualifications more generally, cannot escape notice.

111. Indeed, reading the reports, one is often left with the impression that the key features of how merits review ought to operate are increasingly agreed upon. (For instance, there do not appear to be any calls for the rules of evidence strictly to apply to merits review bodies.) The critical question for our times is how to ensure that a merits review body has the right personnel in the right places effectively to execute within these processes.

112. In the taxation context, it is instructive to start consideration of this point with reference to the old Boards of Review. Interestingly, the Boards of Review were composed of three members, "one legal member, one accounting member, and one ex-departmental officer with experience in the taxation field".[90] That is, they were multi-Member tribunals with the experience to understand the law and practice of taxation disputes.

113. In its 1983 Review, the ARC compared this process to the AAT:

> *When constituted as a full Tribunal, the AAT adopts a similar membership format. Drawn from the pool of available members the most common combination is a senior member (an experienced legal practitioner) and two part-time members with expertise in the relevant area. A significant difference between the Boards and the AAT, however, is the range and variety of experience and expertise of AAT members. When coupled with the ability of the Tribunal to vary its constitution and to reconstitute itself in appropriate cases, this difference can lead to important advantages. Of particular note is the availability of Federal Court Judges as presidential members.*[91]

114. Subsequently, the ARC considered that, in light of the small sums in dispute in many matters, the flexibility of the AAT to constitute only one Member to a matter was a real benefit it held over the Boards of Review, which were limited to the rigid three-member structure.[92] This arrangement assumes, however, that:

---

90 Administrative Review Council (above n 47), [98].
91 Ibid, [99].
92 Ibid, [114], [151].

(a) a "subject matter expert" member will be accompanied by at least one who is legally trained; and

(b) the AAT will have the resources to be able to match each matter to the Member or Members who might be best-suited to determine it.

115. Although the AAT has recently been constituted by multi-Member tribunals, with legal and subject matter expertise,[93] this is far from the norm. Rather, the practice of constituting multi-Member tribunals has largely ceased.

116. One might be forgiven for assuming that this has been a recent development arising from budgetary pressures. Given the AAT's enormous caseload, a multi-Member tribunal might be seen as a luxury which can ill be afforded. However, it appears that multi-Member tribunals in the taxation jurisdiction were never as prevalent as the ARC's report suggested they might be. In its first full year after replacing the Boards of Review, the AAT conducted 818 substantive hearings in its taxation jurisdiction, of which 103 were conducted by multi-Member tribunals.[94] Although we have been unable to locate data on the recent prevalence of multi-Member tribunals on taxation matters, anecdotally their prevalence has decreased dramatically from the heights of 103 in 1986/87.

117. In his submission to the Senate's Legal and Constitutional Affairs References Committee's recent review into the AAT, Professor Weeks suggested that increasing the number of multi-Member tribunals could be an effective way of ensuring the sufficient degree of qualifications hear matters.[95]

---

93 See, eg, *Thomas and Secretary, Department of Defence* (2018) 74 AAR 379; [2018] AATA 604, where the Tribunal was constituted by Logan J, DP Hanger and SM Nikolic. While all three Members had military experience, Senior Member Nikolic, who was not legally trained, was formerly a Brigadier in the Australian Army.

94 Chapple (1991 above n 61), 249. In 1987/88, these figures were 1,348 and 89, respectively. In 1988/89, they were 923 and 41, respectively.

95 Weeks, Submission to the Legal and Constitutional Affairs References Committee, 4-5.

118. We agree, particularly in the taxation context. The complexities of the tax system, subject-matter, and laws favour the presence of legally-qualified Members, as was recognised by the ARC in 1983.[96] However, to restrict Membership to legally-qualified individuals would impose an unfortunate limitation on the range of experiences which can and should qualify a person for Membership. This is exemplified by the observation that many accountants are far more familiar with tax law than most lawyers, and have greater facility with numbers.

119. At a minimum, the addition of specialised accounting knowledge or other subject matter expertise could amplify the quality of the decision-making on a multi-Member tribunal. Further, it could have benefits even when those Members are not sitting together. Sitting on a multi-Member tribunal could lead to a sharing of experiences and cross-fertilisation of ideas which would improve the standard of each individual Member's decision-making.

120. Being able to draw on a membership body with a range of experiences is consistent with the benefit of having a decision being reviewed by "business men", identified by the Privy Council in *Shell*. That is, in circumstances where taxation appeals may touch on almost all of human experience (the AAT has in the last decade determined taxation matters concerning residency,[97] superannuation,[98] property development,[99] luxury cars,[100] and brothels,[101] to give some flavour of the variety of matters which arise), there is an innate benefit to being able to draw on a membership coming from different walks of life.

---

96 Administrative Review Council (above n 47), [99].
97 *Shord and Commissioner of Taxation* [2015] AATA 355.
98 *GDGR and Commissioner of Taxation* [2020] AATA 766.
99 *Earlmist Pty Ltd atf Earlmist Unit Trust and Commissioner of Taxation* [2023] AATA 978.
100 *Trustee for Star Enterprises Trust and Commissioner of Taxation* [2020] AATA 1656.
101 *HKYB and Commissioner of Taxation* [2018] AATA 4770.

121. For example, a member who has advised on major international transactions may be better-placed to understand an international transfer pricing arrangement than one who has not. Conversely, a member who has previously worked as an accountant for small businesses may be in a more advantageous position to understand and determine small business tax arrangements.

122. The proposition that accountants should be appointed to the AAT's taxation matters has found support in some potentially unexpected places. The Callinan Report, which generally favoured the appointment of lawyers only to the AAT, singled out the Taxation and Commercial division as a possible exception "to which competent accountants might be appointed".[102] This perspective was echoed by the NSW Bar Association's submission to the Senate Committee.[103] If adopted in concert with an increase in multi-Member tribunals, there is no reason that accountants would not be able to maintain an appropriate standard of decision-making in taxation cases. It bears observation that the benefits of viewpoint diversity and subject matter expertise described above apply to fields beyond accounting.

123. A further point made by the ARC emphasised the benefit in being able to appoint judicial Members to hear significant matters in the AAT.[104] After the transition of taxation matters to the AAT, this did prove to be a significant benefit, especially where taxpayers had concurrent AAT and Federal Court appeals. An example was given by Logan J in *King v Commissioner of Taxation*,[105] where his Honour observed that such arrangements:

> *... presented a convenience in circumstances like the present in that a taxation appeal might be determined by an exercise of judicial power and a remission of penalty review by an exercise of executive power but by the one person, on*

---

102 Callinan, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (2018), 9.
103 NSW Bar Association, *Submission to the Senate Legal and Constitutional Affairs References Committee*, 2-3.
104 Administrative Review Council (above n 47), [98].
105 (2022) 177 ALD 275; [2022] FCA 935, at [5].

> *the one occasion and, usually but not always, on one body of evidence. However, the practice did bring with it the possibility of a need for careful differentiation as between the basis for the exercise of judicial power and the basis for the exercise of administrative power, because the exercise of the latter, unlike the former, was not conditioned upon the tendering of admissible evidence, only material reasonably capable of engendering administrative satisfaction.*

124. This practice, too, has in recent years been diminished.[106]

125. The allocation of taxation matters with the same applicant in the Federal Court and AAT to the same judicial Member remains a considerable benefit of the retention of judicial Members of the AAT. It reduces the risk of inconsistent findings on the same facts, and avoids the unnecessary duplication of costs by both the taxpayer and the Commissioner. At least in the taxation context, this practice should be retained and continued to be used in appropriate cases.

126. The final point worth considering in respect of Membership is that, somewhat paradoxically, efficiency in decision-making may be improved by giving the Members more time to consider and make their decisions, not less. In its Interim Report, the Senate Legal and Constitutional Affairs References Committee referred to submissions which argued that the "increasing complexity of cases before the AAT, including tax cases" warranted greater resourcing of Members to reduce any backlogs in the system.[107] This is a well-made observation. When Members are overloaded with cases, they may not have the space or time in which to do the deep thinking and research which taxation matters often require. Putting aside its potential impacts on the *quality* of decision-making, an overloaded Membership is likely to take more time to make its decisions.

127. It follows from the above that, in determining the Membership of any merits review body, the following features should be emphasised:

---

106 *King v Commissioner of Taxation* (2022) 177 ALD 275; [2022] FCA 935, [6].

107 Senate, Senate Legal and Constitutional Affairs References Committee Interim report, [3.9].

(a) due to the complexities of taxation law and policy, decision-makers should have a requisite level of training and skill to be able to navigate the tax system;

(b) however, one of the strengths of a modern tribunal lies in its ability to draw on a diverse Membership, with Members who bring different life and professional experiences, including (but not necessarily limited to) accountants;

(c) holding multi-Member tribunals should be retained and expanded, to improve the overall quality of decision-making (especially where one of the Members is not legally qualified);

(d) similarly, the ability to have judicial Members sit simultaneously on related AAT and Federal Court proceedings should be retained; and

(e) ultimately, any merits review body must be sufficiently resourced to be able to properly carry out its functions. Due to the complexity of many tax disputes, the need for Members to have sufficient time to properly consider the matters assigned to them is critical to the interests of justice.

128. There is an exogenous factor affecting recruitment. The conduct rules of the legal profession prevent a former tribunal member appearing before the tribunal for two or five years.[108] This potential neutralises years of expertise once a member leaves a tribunal, and thus potentially discourages subject-matter experts from seeking appointment in the first place. (Federal law could presumably override these State-based conduct rules.)

---

108 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rule 101A(3) has reduced this to two years, but the equivalent Queensland rule remains five years: rule 95(n) of the *2011 Barristers' Rule* (Qld).

4.5 Other key features

4.5.1 Speed and efficiency of decision-making

129. In its Report, the ARC observed that, as at 30 June 1982, there was a delay in obtaining a hearing before the three Boards of Review of 18 months, 29 months and 9 months, respectively.[109] The ARC described these delays as giving rise for a "need for concern".[110] This should be compared to the numbers reported in the AAT's 2021/22 Annual Report, which showed that the AAT finalised 82% of all Small Business Taxation division matters, and 59% of all Taxation and Commercial division matters, within 12 months of filing in 2021/22,[111] with median times to finalise of 29 weeks and 39 weeks, respectively, for the two divisions.[112]

130. Thus, while delay in the AAT is not as excessive as was the case under the Boards of Review, it remains significant. In light of the penalties and interest applied in respect of disputed amounts, there is a particularly pressing issue in respect of the efficient resolution of taxation matters. Against this, however, we note that taxation matters are also often some of the more factually and legally complex matters dealt with by the AAT, so it is not unreasonable to expect that it will take longer to make decisions in its taxation jurisdiction than it would in some of its other jurisdictions. We also observe that the complexity of taxation matters is a strong reason for ensuring a right to be legally represented in external merits review proceedings, to ensure that proper submissions which assist the Tribunal can be made.

---

109 Administrative Review Council (above n 47), [117].
110 Ibid, [118].
111 Administrative Appeals Tribunal, *Annual Report 2021-2022*, 28.
112 Ibid, 66.

4.5.2 Effective pre-hearing dispute resolution procedures

131. In the early days after the transfer of the merits review function from the Boards of Review to the AAT, its alternative dispute resolution practices were considered to be some of the "most important facets of the Tribunal's procedure."[113]

132. It remains the case that the AAT's alternative dispute resolution practices are an important element of its procedure. Further, the presence of the logistical machinery (including, relevantly, conference registrars), in the AAT provides a compelling reason for not spinning off a separate taxation tribunal – the cost of losing and having to re-establish that institutional knowledge would be great.

4.5.3 Confidentiality

133. Generally, the AAT holds its hearings in public, unless it is satisfied that an order for non-publication or non-disclosure should be made under s 35 of the AAT Act. However, for appeals to the Tribunal, taxpayers have two additional rights:

(a) under s 14ZZE of the *TAA*, they may to request a private hearing in the AAT; and

(b) under s 14ZZJ of the *TAA*, the AAT's reasons must be framed so as not to be likely to enable the identification of the applicant.[114]

134. Although these rights do not extend to an express right to have the publication of evidence restricted, the Courts have held that:

> *Parliament has conferred an express right on parties to certain taxation matters before the Tribunal to have the hearing in private. It does not confer any express right for a party to have the publication of evidence before the Tribunal prohibited or restricted. On the other hand, having regard to the terms of s14ZZE, it would be a most unusual case where the Tribunal, if asked, did not give the directions that are contemplated by s35(2) in a proceeding to which s14ZZE applies. The Tribunal is empowered to give such directions for any reason, where it is satisfied that it is desirable to do so. Where a party*

---

113 Chapple (1991 above n 61), 249.

114 See also *VNBM and Commissioner of Taxation* (2021) 175 ALD 538; [2021] AATA 3579, [6].

> *exercised the right, under s14ZZE, to have a hearing in private, that would be a very cogent reason for the Tribunal to make an order under s35(2)(b).*[115]

135. Notably, this regime has been held not to automatically apply on appeal from the AAT to the Federal Court. In *Herald & Weekly times Ltd v Williams* (2003) 130 FCR 435, Merkel J held:[116]

> *…there is nothing in the Taxation Administration Act or the AAT Act which evidences a legislative intention that the privacy or confidentiality that might prevail when a matter is before the AAT should continue once a proceeding, which arises out of or relates to the matter in the AAT, is commenced in the court.*

136. This distinction in approach is derived from the administrative, as opposed to judicial, function adopted by the AAT.[117] By extending an automatic right to a private hearing to AAT proceedings, Parliament has implicitly accepted that being involved in tax litigation can adversely impact a taxpayer's reputation. While the *administrative* processes are ongoing, it has determined that a taxpayer should be entitled to a degree of privacy over their personal affairs and information. This regime should remain in place for any future merits review tribunals.

4.6 Multiple tiers of external merits review?

137. The IGTO Interim Report discloses that only a small proportion of objection decisions are then the subject of an external review:[118]

---

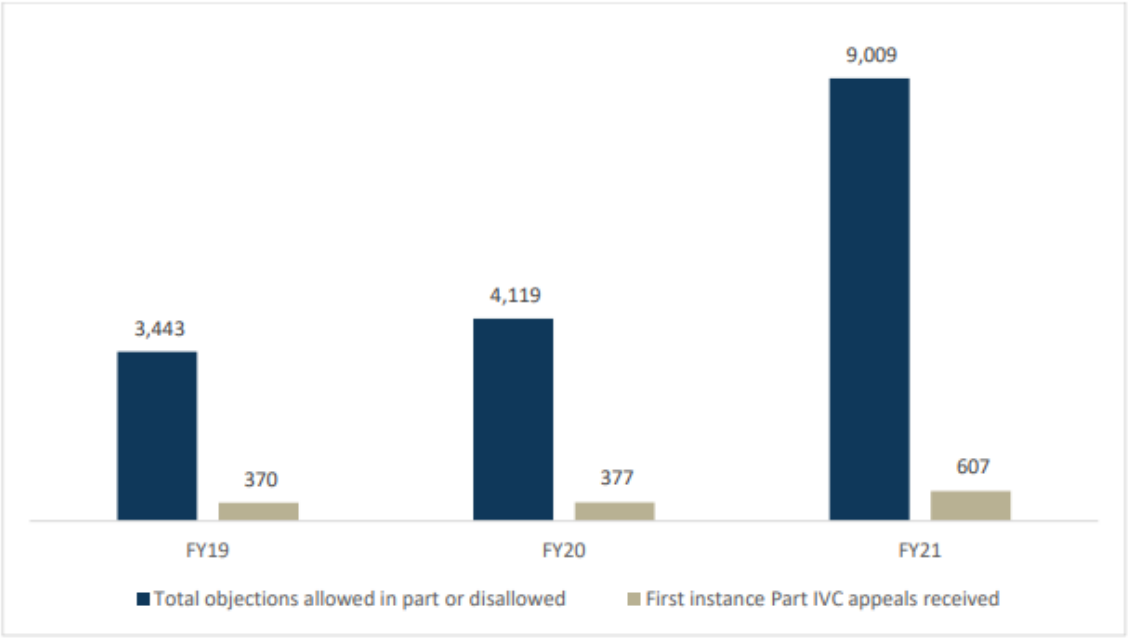
115 *Brown v Commissioner of Taxation* [2001] FCA 276. This distinction is significant, and one area for future reform may be to create a more general right to privacy under the TAA in external review of taxation cases, rather than relying upon an application under s 35 of the AAT Act.

116 *Herald & Weekly times Ltd v Williams* (2003) 130 FCR 435, [28].

117 Ibid.

118 IGTO, interim report, "The Australian Taxation Office's administration and management of objections, October 2022, [6.51].

Figure 6.55: Finalised objections vs Part IVC appeals commenced in the AAT or Federal Court



Note: The number of appeals/reviews includes some cases where there was no objection decision made (and the Tribunal has no jurisdiction to make a decision).

138. This is a notable discrepancy, and raises the question of whether there is scope for two tiers of external merits review in the taxation system. To answer this question, one must first consider why this discrepancy exists.

139. One potential answer is the cost of seeking review of an objection decision. A striking feature of the literature around the time the taxation merits review jurisdiction was transferred from the Boards of Review to the AAT is that its application fees were significant, compared to the notional fees charged by the Boards. Chapple observed that:

> *The Boards offered a cheap service for the taxpayer as the only unavoidable cost was the nominal $2 refundable fee. This left the system open to abuse from frivolous or tactical objections from taxpayers (who often withdrew just prior to the hearing) and was a contributing factor to delays in the system.*[119]

119 Chapple (1991, above n 61), 255-256.

140. Conversely, while appeals to the AAT were initially free, they were soon increased to $300, refundable in the event of a successful appeal.[120] Higher fees in the AAT were originally justified on the grounds that:

> *It is necessary to produce practical means of filtering out less important issues in full and brutal realization that if we seek perfect justice in every individual case, we may well be decisively compromising the quality of justice delivered by the tax system as a whole.*[121]

141. The filing fee is presently $581 in the AAT's Small Business Taxation division, and $1,082 in its Taxation and Commercial division, unless, relevantly, the amount of tax in dispute is less than $5,000, in which case the fee is $107.[122]

142. This would suggest that the fears of the AAT becoming swamped by low-level taxation review applications has abated, but not because of the increased application fee compared to the Boards of Review.

143. One possible explanation is the cost of running a proceeding in the AAT. While the cost of legal representation would likely far exceed the amount in dispute in a matter attracting the lower application fee, there is also a question of fatigue on the part of the taxpayer when faced with the daunting prospect of taking an appeal to the AAT as a layperson.

144. Another possible explanation is more prosaic: the ATO may have been correct in its objection decision.

145. In the circumstances, and on the basis of the data presently available, there does not appear to be the need for a two-tier external merits review system.

---

120 Ibid, 250.

121 Woellner, "An Analysis of the New Taxation Process" (1987) 4 *Australian Tax Forum*.

122 Administrative Appeals Tribunal, https://www.aat.gov.au/apply-for-a-review/taxation-and-commercial/taxation-and-commercial/fees.

5 Conclusion

146. The results of our survey of the Australian tax system are not as negative as one might have assumed at first blush. Particularly in light of the enormous volume and diversity of matters which it deals with, it is apparent that the ATO largely administers tax laws effectively and efficiently. However, we recommend that the following occur in order to ensure that the administration of the Australian tax system remains fit for purpose.

147. First, while the PBR regime should be maintained, it is important to recognise its limitations and investigate alternative mechanisms of providing forward guidance for transactions that are dynamic, or which have complex facts. In the cases of such transactions or arrangements, it may be important for the Commissioner and taxpayers alike to be more creative and open-minded in the ways in which they seek and provide guidance. We coped with non-binding letters of comfort before 1992, and this option remains open where a PBR is problematic.

148. Secondly, the IGTO's interim report shows the value of ensuring high-quality data are kept in respect of all aspects of the taxation administration system. Such data have the potential to give interesting and important insights into how the ATO administers the Australian taxation system, and what does and does not work.

149. One insight which appears from the data presently available is that a significant proportion of objection decisions set aside the assessment at least in whole or in part. We note that this pattern does not appear to arise from poor-quality decision-making by the ATO in making assessments. Rather, it often arises from taxpayers objecting to their own self-assessments, leading to "churn" and inefficiencies. Although more work is required to confirm these conclusions, consideration needs to be given to methods of providing better guidance before self-assessments are lodged in order to reduce this churn.

150. Thirdly, there are strong reasons for maintaining a single tier of external merits review of objection decisions in whatever system replaces the AAT. Key aspects of the current regime, including confidentiality for taxpayers, the right to legal representation, and alternative dispute resolution, should be maintained. Also, there are significant benefits in retaining a diverse membership of such a body, potentially including non-legal members such as accountants.

151. However, this should be balanced by an increase in resourcing for the body, including by providing for a greater number of multi-Member tribunals. Further, the practice of appointing Federal Court judges and making them available to the tribunal to hear and determine taxation cases should be re-invigorated and re-emphasised. At the time of the transfer to the AAT from the Boards of Review, it was seen as a significant benefit to shifting to the AAT. That remains the case.