

# eJournal of Tax Research

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# eJournal of Tax Research

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## **eJournal of Tax Research**

### **PUBLISHER**

The School of Accounting, Auditing & Taxation is part of the UNSW Business School at UNSW Sydney. The tax group in our school brings together a team of expert academic staff with backgrounds in law, tax and economics. At the School of Accounting, Auditing & Taxation, we're working towards building excellence in the tax profession, looking at tax from both a theoretical and practical perspective.

### **EDITORS' NOTE**

The *eJournal of Tax Research* is a refereed journal that publishes original, scholarly works on all aspects of taxation. It aims to promote timely dissemination of research and public discussion of tax-related issues, from both theoretical and practical perspectives. It provides a channel for academics, researchers, practitioners, administrators, judges and policy makers to enhance their understanding and knowledge of taxation. The journal emphasises the interdisciplinary nature of taxation.

### **SUBMISSION OF ORIGINAL MATERIAL**

Submission of original contributions on any topic of tax interest is welcomed, and should be sent as an email attachment (Microsoft Word format) to the Production Editor at <ejtr@unsw.edu.au>. Submission of a manuscript is taken to imply that it is an unpublished work and has not already been submitted for publication elsewhere. Potential authors are requested to follow the "Notes to Authors", which is available from the journal's website.

### **WEBPAGE**

Current and past issues of the *eJournal of Tax Research* are available via the journal's website: <https://www.unsw.edu.au/business/our-research/research-environment/ejournal-tax-research>.

# Editorial

## **Special issue: 15th International Conference on Tax Administration**

It is a privilege for us to write this foreword to this special issue of the *eJournal of Tax Research* that features a number of papers that were originally presented at the 15th International Tax Administration Conference hosted by UNSW Sydney. The theme of the 2023 Conference was: *Tax Administration: Evolution or Revolution*, with the presentations (and associated papers) at the Conference addressing a range of issues, incorporating aspects of the following:<sup>1</sup>

- innovative initiatives in service delivery (including digital and data use, tap and go, AI, algorithms);
- *developments encouraging sustainable compliance in tax risk areas as diverse as the hidden economy; crypto currency and other digital assets and adoption of a range of tools; including the rise of tax transparency to aid compliance;*
- *opportunities and challenges that shape the tax system from new technologies including data policy, ethical data exploitation, cyber security and progress in the regulation of the relatively new data platforms;*
- administering sustainability (or ESG) initiatives in the tax system including effectiveness of service and administrative techniques to attain compliance;
- *developments in globalisation of revenue administration (e.g., mutual cooperation on tax risks and data exchange and exploitation); and*
- *tax dispute resolution and developing new approaches to protect the vulnerable.*

The first article is an updated version of the keynote address delivered by Professor James Alm to the Conference. Entitled 'Tax compliance, technology, trust, and inequality in a post-pandemic world', Professor Alm argues that changes in technology will improve the ability of governments to improve tax compliance, but concurrently will open up new avenues for evading (and avoiding) taxes. Overall, the impact of these developments on compliance, in Alm's view, is uncertain, but the impact of technological change and COVID-19 are expected to increase inequality unless governments can counter these trends.

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<sup>1</sup> See further: <https://www.unsw.edu.au/business/our-schools/accounting-auditing-taxation/news-events/15th-international-atax-tax-administration-conference>. Those areas set out in italics are closely explored in the featured articles.

Each of the remaining articles in this special issue focuses principally on a significant issue in a specific jurisdiction (or in one article an analysis involving a group of closely-related countries), frequently undertaken utilising a case study methodology. The subjects traversed in the articles include the need to protect vulnerable groups through wider use of tax clinics in Australia; two closely related papers that explore crypto currency issues facing tax practitioners in Australia and tax practitioners' views of the Tax Practitioners Board (TPB) review recommendations; value added tax (VAT) issues in the Gulf nations, the low success rates of the Indian Income Tax Department (IITD) with tax disputes in India, globalisation and digitalisation issues faced by New Zealand's tax administration (Inland Revenue), and growing concerns over the blurring of the separation of powers with the tax administration in Sweden.

Associate Professor Kayis-Kumar and co-authors explore the role of pro bono tax clinics within the social impact ecosystem with a focus on the experiences of women in financial distress who are otherwise unable to access professional tax advice. Using a grounded theory approach, the authors reveal numerous concerning findings, which strongly suggest that the relationship between tax problems, financial stress and economic abuse merits further exploration. The authors believe that tax clinics will continue to play a major role to improve the situation for women in financial distress.

Dr Morton and co-authors examine how tax practitioners are responding to clients participating in the crypto-economy, with a particular focus on the *Tax Agent Services Act 2009* (Cth) Code of Professional Conduct. Through employing both interview and survey methodologies, these instruments identify practitioners' perspectives on issues as diverse as the appropriateness of current regulation and guidance, the implications for practitioners' skills and competencies, applying the law, acting lawfully, and ascertaining clients' affairs. The study is very timely given the Board of Taxation's review into digital assets and transactions.

The article by Associate Professor Devos and co-authors is closely related to that of Morton and co-authors and gathers the views and insights of 20 Australian tax practitioners via semi-structured interviews, as to their acceptance or otherwise of the recommendations of an independent review of the TPB and *Tax Agent Services Act 2009* (Cth). Their analysis sees a number of themes emerge which complicate perceptions, and, in the authors' view, warrant further investigation. The findings from this study may potentially break new ground in determining whether the TPB Review's recommendations will achieve their objectives.

Associate Professor Abdellatif and Professor Tran-Nam assess the VAT compliance burden in Gulf Cooperation Council (GCC) countries. The authors express concern that all four (of the six GCC nations) that currently have a VAT do not possess a mature tax system, lack a well-defined tax culture and tax morale, and their tax administrations are not sufficiently developed. The authors make a number of policy recommendations to improve VAT compliance and administration in GCC countries.

Dr Mohan's article provides insights into why the IITD has a low success rate in litigation. Through using a grounded theory approach, Mohan demonstrates that Indian bureaucratic culture is the major cause of this low rate, specifically because of poor accountability, ineffective performance management, and a trust deficit. This analysis, which forms part of Mohan's PhD dissertation, provides insights into how the Indian tax administration may be reformed.

Professor Sawyer, within the context of globalisation and the G20/OECD's response to Base Erosion and Profit Shifting (BEPS) activities, uses New Zealand as a case study to examine and reflect upon how these policy developments are impacting revenue authorities. Related to these developments is digitalisation, which has served as the principal tool by which New Zealand's Inland Revenue has navigated the challenges it faces. Sawyer comments that while New Zealand is a 'strong supporter' of the work of the G20/OECD, it is not a leader. Furthermore, he identifies that the country continues to face its fair share of administrative challenges, including the ongoing impact of COVID fiscal reforms on tax administrations.

In the last article, Professor Lind uses Sweden as a case study to examine the blurring of the separation of powers through the phenomenon of tax administrations moving from acting within the Executive branch towards encroaching into the ambit of the Legislative branch. Lind's study incorporates both legal and political perspectives, providing evidence that the signs of this encroachment prior to COVID-19 has grown to the extent where the tax administration has moved well beyond its 'traditional' role of acting within the Executive branch to extending its reach into the Legislative branch.

The articles in this issue of the *eJournal of Tax Research* explore many of the themes set out above and have been written by experts in their fields. We commend them to the readers.

Ken Devos and Adrian Sawyer

Guest Editors

We appreciate the fine work of the guest editors for this special issue and their support for the *eJournal of Tax Research*. As co-editors, we wish to inform our readers that the review process for each of the articles in which the guest editors were involved in authoring was handled by us.

### **Vale Timothy David Russell (1969 to 2023)**

The *Journal* is sad to note the premature passing of Tim Russell, who died on 24 September 2023 in Sydney. He was aged 53. Tim graduated from UNSW Sydney in 1992 with a combined law and accounting degree, followed by a very successful finance and banking career in Europe. He returned to Australia in 2010 and embarked on a Master of Taxation degree at UNSW, which he completed in 2012. His performance in the MTax was outstanding: all of his grades were high distinctions and in one subject he achieved an astonishing 100%. Subsequently he decided to take his legal knowledge further, and successfully practised as a barrister, specialising in tax law. He maintained his academic connections through publication of many seminal journal contributions, as an adjunct lecturer at UNSW and as a co-author with Emeritus Professor Chris Evans of the *Australian Capital Gains Tax Handbook*. Tim's skills as a communicator, his deep legal insights, his capacity for analysis of the law, and his sheer decency as a colleague will not easily be forgotten by all who knew him.

**Call for Papers: Special Issue of the *eJournal of Tax Research* in Honour of Professor John Taylor**

Emeritus Professor John Taylor was an outstanding tax scholar, teacher, mentor, colleague and leader. Among other things he was the Head of the School of Taxation and Business Law (from 2009 to 2016), co-editor of the *eJournal of Tax Research* (from 2013 to 2021) and a recipient of the Australasian Tax Teachers Association's Hill Medal in 2019. His premature passing in January 2023 was a tremendous loss to the community of tax academics around the world. The *Journal* plans to publish a special issue in 2024 to honour John's many contributions to tax law. This special issue will be edited by Emeritus Professor Chris Evans and Professor Binh Tran-Nam, two of John's long-time colleagues. Submitted papers are expected to focus on John's areas of research interest, which include, but are not limited to, taxation of business entities, international taxation, double tax treaties, tax history and capital gains taxation. Contributions by John's former students, colleagues and co-authors are particularly welcome. Please send your submissions in correct template of the *Journal* to Chris Evans (cc.evans@unsw.edu.au) with a copy to Binh Tran-Nam (b.tran-nam@unsw.edu.au) by 31 December 2023.

The Special Issue will be published in 2024.

Youngdeok Lim and Yan Xu

# Tax compliance, technology, trust, and inequality in a post-pandemic world

James Alm\*

## *Abstract*

Ensuring compliance with the tax laws is an enduring challenge for all governments, and government strategies are constantly evolving as circumstances change. Recently, countries around the world have experienced some major shocks, shocks that are already affecting tax compliance and the policies that governments utilise to maintain compliance. In this article I examine the effects of two especially important shocks – technological shocks and SARS-CoV-2 (COVID-19) pandemic shocks – on tax compliance in the years ahead. I argue first that many of these changes in technology will improve the ability of governments to improve tax compliance, mainly by increasing the flow of information to governments, while at the same time opening up new avenues by which some individuals and some firms can evade (and avoid) taxes. I then argue that the pandemic and the associated policies enacted by governments will affect compliance in uncertain ways, in large part because of the conflicting effects of the pandemic and government policies on trust in government. At this point it is unclear which of these trends will dominate, so that the effects of technology and the pandemic on the overall level of tax compliance in a post-pandemic world are uncertain. Even so, I believe that the distributional effects of these shocks are more predictable. Indeed, I argue that these two shocks – especially the technological shocks – seem virtually certain to increase economic inequality, regardless of their actual impacts on the level of tax compliance. The challenge facing governments is devising policies to counter these trends.

**Keywords:** tax compliance, technology, digitalisation, trust, inequality, technology

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## 1. INTRODUCTION

A ‘good’ tax system is one that achieves the goals of equity, efficiency, and adequacy. Tax evasion – when individuals and firms do not pay their legally due tax liabilities in a timely manner – compromises all of these goals. Governments therefore devote many resources in an attempt to combat tax evasion and to improve tax compliance, even while individuals and firms devote many resources to minimising their tax liabilities. However, both the methods by which governments enforce the tax laws and the methods by which individuals and firms evade their taxes change over time, as the environment in which governments, individuals and firms operate changes.

Indeed, several recent major shocks have changed the tax compliance environment in significant, even momentous, ways, and these shocks are already affecting tax compliance and the policies that governments utilise to maintain compliance. In this article I examine the effects of two especially important shocks – technological shocks and SARS-CoV-2 (COVID-19) pandemic shocks – on tax compliance in the years ahead. Focusing first on technology, I argue that many of these changes in technology will improve the ability of governments to improve tax compliance, mainly by increasing the flow of information to governments, while at the same time opening up new avenues by which some individuals and some firms can evade (and avoid) taxes. Focusing next on the pandemic, I then argue that the pandemic and the associated policies enacted by governments will affect compliance in uncertain ways, in large part because of the conflicting effects of the pandemic and government policies on trust in government. At this point it is unclear which of these trends will dominate, so that the effects of technology and the pandemic on the overall level of tax compliance in a post-pandemic world are uncertain. Even so, I believe that the distributional effects of these shocks are more predictable. Indeed, I argue that these two shocks – and especially the technology shocks – seem virtually certain to increase economic inequality, regardless of their actual impact on the level of tax compliance. The challenge facing governments is devising policies to counter these trends.

In the next section I discuss technological changes and the likely effects of these changes on tax compliance. I then discuss the pandemic shock, government policies to deal with the shock, and the resulting effects on tax compliance due largely to the ways in which trust in government has been affected, now and in the future. I conclude with an analysis of the impact of these twin shocks on income inequality and with suggestions for policies to address these effects.

It should be noted at the start that measuring tax compliance – and its mirror image tax evasion – is enormously challenging, for obvious reasons. After all, individuals have strong incentives to conceal their tax evasion, as well as other activities that reduce their tax payments like money laundering and tax avoidance, given financial and other penalties that may be imposed. Even so, research has been increasingly creative in finding data to examine these activities using naturally occurring field data, controlled field experiments and laboratory experiments. Due to space restrictions, I do not discuss the measurement issues in this article.<sup>1</sup>

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<sup>1</sup> See Alm (2012, 2019), Slemrod (2019), and especially Slemrod and Weber (2012) for recent surveys of the many different approaches to, and difficulties in, measurement. For earlier and still useful discussions of the tax compliance literature, see Cowell (1990) and Andreoni, Erard and Feinstein (1998).

## 2. TECHNOLOGICAL INNOVATIONS AND TAX COMPLIANCE

### 2.1 Emerging new technologies<sup>2</sup>

The basic issue in tax administration has always been *getting information* on taxpayers and their activities, and for much of history tax administrations did not have full, complete, and timely information. Even during much of the 20th century information has been limited, due to several factors. Many transactions were in cash, so that there was no ‘paper trail’ that could be used to verify the accuracy of any reports. Many types of transactions were not reported via third-party information, so again there was no paper trail of transactions. Many types of income were also not subject to source withholding, which also decreased the flow of information to the tax authorities. Many types of tax shelters were shrouded in secrecy. Many individuals (and firms) hid income and assets in offshore accounts (e.g., tax havens). Many multinational enterprises were able to shift profits to low-tax jurisdictions via transfer prices that were largely hidden and, even when reported, could not be independently verified.

Overall, these factors generated several main strategies for tax evasion during much of the 20th century. Individuals (and firms) would fail to report all cash receipts and cash expenses on their tax returns; indeed, many individuals would simply fail to file a tax return. Individuals would use sophisticated tax shelters that were in principle legal forms of tax avoidance but that in practice shaded heavily into illegal forms of tax evasion. Individuals would move income and wealth into hidden offshore accounts, thereby evading any taxes on the hidden income and wealth, and firms would shift profits to lower tax jurisdictions via various strategies, including the manipulation of transfer prices.<sup>3</sup> The end result was predictable: tax evasion (along with money laundering and tax avoidance) existed, persisted, and flourished in almost all countries around the world, largely because tax administrations did not have the information necessary to prevent these practices.<sup>4</sup>

However, technological changes have dramatically and fundamentally affected the flow of information to tax administrations. These changes are of course more concentrated in developed countries, but they are also emerging even in developing countries, given especially the efforts of international organisations like the International Monetary Fund and the World Bank, individual country organisations (e.g., US Agency for International Development, Swedish International Development Cooperation Agency, Italian Development Cooperation Programme), and non-profit institutions like the Bill and Melinda Gates Foundation and the Aspen Institute.

Almost all of the technological changes start with ‘digitisation’, or the transformation of information storage into digital formats (e.g., a series of binary numbers) for use by

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<sup>2</sup> For a more detailed discussion of many of these technological developments, focusing especially on their legal aspects, see Alm et al. (2020).

<sup>3</sup> More accurately, the ability of firms to shift profits to low tax jurisdictions (including tax havens) is a form of legal tax avoidance via ‘aggressive tax planning’ (ATP), one that complies with the letter but abuses the spirit of the law.

<sup>4</sup> ‘Money laundering’ is the process of disguising the unlawful source of criminally derived proceeds to make them appear legal, proceeds derived from such sources as illegal arms sales, smuggling, activities of organised crime (e.g., drug trafficking and prostitution), embezzlement, insider trading, bribery, extortion and blackmail, computer fraud schemes, corruption (e.g., ‘petty’ and ‘grand’), and the like. See Unger and van der Linde (2013) for a discussion of money laundering strategies and of government policies to combat their use.

computers. Computers have opened the doors to a range of methods, all of which affect the flow of information to tax administrations, via:

- information retrieval and storage;
- information transmission;
- information analysis.

Indeed, with the integration of digitisation into almost all aspects of everyday life, often termed ‘digitalisation’, there have been numerous additional technological innovations, creating what has referred to as the ‘Third Industrial Revolution’ or the ‘Fourth Industrial Revolution’.<sup>5</sup>

Specifically, briefly, and not exhaustively, these technological innovations driven largely by digitalisation include the increasing use of or growth in:

- electronic ‘cash’;
- electronic commerce;
- blockchain technology;
- global supply chains;
- peer-to-peer (P2P) networks;
- ‘monopolisation’ via technology;
- ‘apps’ and the disclosure of personal information;
- biometrics;
- ‘big data’;
- ‘deep learning’ (including artificial intelligence (AI) and ChatGPT).

Each of these developments emerges in large part from digitalisation.<sup>6</sup>

In short, digitalisation offers the potential – for government but also for private organisations – to generate better information (e.g., more information, more timely information, and more precise information), better analysis of this information (e.g., more powerful and more predictive statistical methods), and better designed systems and policies all based on this information and its analysis. Digitalisation also offers the potential for abuse of this information.

Technological changes via digitalisation therefore open up new frontiers for government to detect tax evasion, while also presenting to private agents new opportunities for evasion. How will these technological changes affect both the ability of government to collect taxes and of private agents to cheat on their taxes?

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<sup>5</sup> See Gupta et al. (2017) for a detailed discussion of digitalisation and its effects on government finances.

<sup>6</sup> Gordon (2016) and Ooi and Goh (2022). Again, see Alm et al. (2020) for a detailed discussion of these technological developments.

## 2.2 Toward more tax compliance

From the standpoint of government and its tax administration, it seems clear that these technological changes have the potential to vastly improve the ability of government to collect taxes, mainly by increasing the ability of government to track and then to analyse transactions that leave some kind of electronic trail. For example, the decreasing use of cash and the increasing use of digital currencies allow the government to track increasing numbers of transactions because digital currencies create an electronic paper trail that government can use to trace and verify many dimensions of taxpayers' reporting decisions. Further, these innovations increase the ability of government to retrieve information (e.g., the 'Panama Papers' large-scale leak of tax information in 2016); to transmit this information across jurisdictional borders via linked cross-agency governmental databases, linked international databases and transparency agreements; and to analyse this information (often with AI algorithms). Finally, these innovations allow government to expand greatly the use of tax administration improvements like electronic filing, third-party information returns, and presumptive taxes; to track transactions via peer-to-peer (P2P) networks and even perhaps blockchains and supply chains; and to monitor workers in large enterprises subject to third-party information and source withholding systems. All of these innovations allow government to reduce the ability of individuals and firms to evade or to avoid their tax obligations.

Increasingly, then, certain forms of tax evasion (along with tax avoidance and money laundering) will become much more difficult for individuals and firms. In particular, compliance will almost certainly increase for individuals with income mainly from wages, interest, dividends, and even (realised) capital gains because all of these forms of income will be subject to electronic verification, monitoring, and scrutiny. Put differently, individuals who engage in transactions that leave an electronic trail and who are subject to source withholding and/or third-party information reporting will find it virtually impossible to evade or avoid their taxes or to engage in money laundering. These taxpayers represent the vast bulk of taxpayers in all countries around the world.

## 2.3 Toward less tax compliance

Of course, these same technological innovations for information retrieval, transmission, and analysis are not confined to the government, but are also available to individuals and firms. This means that the ability of private agents to hide their income and assets from government tax administrations is enhanced by the ways in which technology makes for easier profit shifting via transfer pricing, the locating of intangible assets in low-tax jurisdictions, intra-group debt shifting, treaty shopping, corporate inversions, and tax deferral. Technology also makes it easier for individuals and firms to utilise global supply chains both for locating income in tax havens and for engaging in tax evasion via money laundering. Blockchains also are seen as making money laundering easier, although it is increasingly believed that the supposed anonymity of blockchains may be overstated. Finally, the growing use of P2P transactions, many of which involve 'independent contractors' and the 'informal sector', may in fact make it easier for participants to hide these transactions from the tax authorities, given the relatively small financial size of these taxpayers together with the absence of an electronic trail for many of the P2P transactions.

Again, all of these activities are abetted by the same technologies for information retrieval, transmission, and analysis that are available to government agencies. As a result, it seems likely that certain forms of tax evasion, tax avoidance and money

laundering will actually become easier and more prevalent. Almost certainly, these activities will become easier for multinational enterprises, high-income individuals and independent contractors.

## 2.4 Summary and implications

Which of these trends – those toward more compliance versus those toward less compliance – will dominate? It is of course impossible to predict these trends. Even so, I believe that a strong case can be made that the dominant technological trend will be toward the ability of government to access better information, to conduct better analysis of this information, and to design better systems and policies, all of which will improve its ability to enforce the tax laws. However, this prediction depends upon two crucial conditions being met.

First, government agencies *within each country* must be given the resources to access, analyse and utilise this information, in order to stay ahead of those individuals wishing to cheat on their taxes. Second, government agencies *across countries* must establish the necessary policy coordination and information exchanges to utilise these new technologies, again in order to stay ahead of those individuals who intend to evade. So my conclusion is that tax compliance will tend to increase in the future – as long as government tax agency funding is adequate and as long as international policy coordination is achieved. It is certainly possible that both conditions will be met.

Even so, one cannot be too sanguine here, if recent history is any guide. For example, consider funding of the US Internal Revenue Service (IRS). According to IRS data, since 2010, IRS funding has fallen in real terms by over 20%, audit rates have fallen well below 1%, audit staff has shrunk by 25%, revenues from audits have fallen from USD 23 billion to USD 14 billion, and the IRS ‘Global High Wealth Industry Group’ has been effectively eliminated. Clearly, all of these actions reduce the ability of the IRS to utilise new technologies. Organisation for Economic Co-operation and Development (OECD) data suggest that the US experience is not an isolated one.

Similarly, there have been several international initiatives to combat profit shifting, aggressive tax practices, and money laundering, including the US Foreign Account Tax Compliance Act (FATCA),<sup>7</sup> the Financial Action Tax Force on Money Laundering (FATF),<sup>8</sup> the OECD ‘Common Reporting Standard’ (CRS) framework along with the associated United Nations Global Compact ‘Ten Global Principles’,<sup>9</sup> and the G20 and OECD Base Erosion and Profit Shifting (BEPS) framework based in large part on the FATCA model.<sup>10</sup> All of these initiatives advance various recommendations designed to improve international policy coordination, to increase transparency and reporting, and to establish clear sanctions. However, to date achieving concrete action has been elusive and uneven, largely because countries seem unwilling to cede autonomy on tax affairs to any international organisation. For example, 12 European Union countries recently

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<sup>7</sup> See IRS, ‘Foreign Account Tax Compliance Act (FATCA)’, <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca>.

<sup>8</sup> See FATF, <https://www.fatf-gafi.org/>.

<sup>9</sup> See OECD, ‘Automatic Exchange Portal’, <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>; United Nations Global Compact, ‘The Ten Principles of the UN Global Compact’, <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

<sup>10</sup> OECD, <http://www.oecd.org/tax/beps/>.

blocked a law that would have forced multinational enterprises to reveal their profits and their taxes in each of the 27 EU Member States.

Indeed, there are plausible reasons for the failure of these efforts to improve reporting, based largely on political considerations. For example, the US IRS has a long history of allegations of abuse, in which individuals in power have been accused of using the IRS and its investigative tools to target opposition individuals or groups. In the face of these allegations, it is common among elected officials of both parties to call for the reform of the IRS, even its abolition, and any politician advocating for increased (or even stable) levels of IRS funding faces significant political opposition. In fact, the USD 80 billion increase in IRS funding from the passage of the Inflation Reduction Act of 2022 was reduced by USD 20 billion in the just completed deficit reduction negotiations in May 2023. Similarly, there are major political challenges in any efforts to coordinate joint international efforts to share information, to establish common reporting standards, to distribute enforcement-generated revenues, and the like, given the conflicting interests of the many political actors who are involved, both within and across countries. More broadly, recent research on tax policies in countries has demonstrated that the choice of many structural dimensions of tax systems, including enforcement features, is quite sensitive to political considerations.<sup>11</sup> It is hardly surprising that calls for increased tax administration funding and/or increased international coordination often go unheeded, given the inherently political dimensions of these calls for action.

### 3. THE PANDEMIC, TRUST AND TAX COMPLIANCE

#### 3.1 Government policies in the pandemic

Since the beginning of the SARS-CoV-2 pandemic in early 2020, governments around the world have enacted a range of extensive – and expensive – measures in an attempt to protect their citizens' health, both physical and economic. Among other policies, governments have imposed lockdowns, required masks, limited personal interactions (indoors and outdoors), closed schools and businesses, and developed vaccines on an expedited basis, all designed to reduce the spread of the COVID-19 virus and to vaccinate their citizens against the virus, thereby improving the *physical* health of individuals.

Governments have also instituted many economic policies aimed mainly at providing various forms of *economic* relief to their citizens and businesses. According to the OECD, these include such policies as: increased business cost subsidies / non-repayable grants and loans / tax credits; tax filing extensions / tax payment deferrals / tax waivers; extended tax refunds; claim back of preliminary tax payments; enhanced business loss offset provisions; wage subsidies; short-term work schedules; accelerated and bonus depreciation provisions; tax incentives for research and development; corporate income tax rate reductions; value added tax (VAT) tax rate reductions; reduced taxes on specific sectors (e.g., tourism, construction, finance); reduced business financing costs; direct cash transfers to households; enhanced or extended unemployment benefits for individuals; enhanced individual eligibility for sick-pay, tax refunds, special tax deductions, tax exemptions, and waivers for social security contributions; enhanced individual tax refunds; special tax deductions, tax exemptions, tax credits and tax waivers for individuals; and tax waivers and tax credits for specific consumption items.

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<sup>11</sup> See especially Kenny and Winer (2006) and Robinson and Slemrod (2012).

As classified by the OECD, these policies fall into four main areas that depend on their main objective: policies to support firms' liquidity (e.g., tax deferrals and waivers), policies to support employment (e.g., wage subsidies), policies to support business investment (e.g., enhanced tax incentives, reduced business tax rates, expanded depreciation allowances), and policies to support household consumption (e.g., direct cash transfers to households, unemployment benefits).<sup>12</sup>

The amounts that governments have spent on economic relief programs have been staggering. Consider the United States as only one example. Since the start of the pandemic in early 2020, the US federal government has enacted nearly USD 6 trillion in relief programs, including: the Coronavirus Preparedness and Response Supplemental Appropriations Act (March 2020, USD 8 billion); the Families First Coronavirus Response Act (March 2020, USD 192 billion); the Coronavirus Aid, Relief, and Economic Security (CARES) Act (March 2020, USD 2.2 trillion); the Paycheck Protection Program and Health Care Enhancement Act (April 2020, USD 483 billion); the Consolidated Appropriations Act (December 2020, USD 868 billion); the American Rescue Plan Act (March 2021, USD 1.9 trillion); and the Infrastructure Investment and Jobs Act (November 2021, USD 1.2 trillion). The US experience is not an isolated one.

These policies have often proved controversial. The lockdowns, masks, social distancing, and closures have been seen by many as infringements on their personal freedoms. The economic policies have been questioned on their cost and on their effectiveness.

The success of these many policies has varied considerably across countries, in both the physical and economic health dimensions. This varied success has in turn had dramatic effects on peoples' perceptions of their government, especially on their trust in government and so on their willingness to obey the many government mandates generated by the pandemic. One important and related aspect of government mandates is tax compliance. Individuals are required by law to pay their legally due taxes, and yet many individuals do not obey these requirements.

### 3.2 The effects – and the perceptions – of government pandemic policies

What will be the effects of the pandemic and the associated government policies on post-pandemic tax evasion, especially via the effects of government policies on citizen trust in the government? It is this general question that I examine in this section. I do this by looking at three related but more specific questions. First, how will these many policies be perceived by citizens in the countries in which they have been enacted? Second, how will these perceptions affect citizens' trust in their government? Third, how will changes in trust – positive or negative – affect tax compliance? Put differently, why does trust matter for tax compliance?<sup>13</sup>

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<sup>12</sup> See OECD, 'Tax administration responses to COVID-19: Measures taken to support taxpayers', <http://www.oecd.org/coronavirus/policy-responses/tax-administration-responses-to-covid-19-measures-taken-to-support-taxpayers-adc84188/> (update 21 April 2020). For a detailed discussion of these policies, especially tax-related policies, see Alm et al. (2020).

<sup>13</sup> Note that there are various definitions of 'trust'. The definition that is the starting point here is for 'social trust', often referred to as 'generalised trust' or 'moralistic trust'. This is trust in others – strangers, or people within your society with whom you have little personal familiarity. It is a belief in the honesty, integrity and reliability of others. It is a belief that others share your fundamental values, that they will abide by

It is straightforward if not especially informative to answer the first two questions. If policies are seen as effective (ineffective) by most citizens, then citizens' trust in government will clearly increase (decrease). Because country experiences differ widely, perceptions of success or failure also vary widely across countries, with correspondingly wide differences in the effects of trust in government.

As only one example, continue with the case of the United States; the experiences of other countries vary quite widely. As noted earlier, the magnitude of the various economic measures was enormous, with nearly USD 6 trillion in various relief programs enacted since early 2020. The health measures were equally momentous, even intrusive – lockdowns, mask mandates, restrictions on personal interactions and travel, school and business closings, and vaccine development via Operation Warp Speed – all designed to help protect and immunise US citizens against the virus. There were some initial successes on the economic and health fronts, especially given the magnitudes of government economic relief measures.

However, it is widely perceived that the United States subsequently missed many opportunities to protect its citizens, especially on the health front. Specifically, the US federal government: did not develop rapid testing or contact tracing; did not cover the cost of testing; did not provide or develop high-quality masks; did not send consistent messages on the utility of masks and other mitigation strategies; did not clearly articulate the urgency of the pandemic; did not always suggest scientifically-supported treatments; did not coordinate state and local government strategies; did not collect useful or reliable data; and the like. The outcome of these many failures was expected and tragic: the US experienced higher 'excess deaths' than many (though not all) countries, despite the levels of income, wealth, and technology in the US relative to many other countries. The US experience was similar to several other developed countries like Belgium, the Netherlands, Italy, Sweden, France, Canada and Denmark; other developed countries like New Zealand, Australia and Japan had considerably lower rates of excess deaths.<sup>14</sup>

These many failures of US government pandemic policies almost certainly have contributed to a perception of many citizens of an ineffective government response to

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recognised and shared social norms, that they should be treated by you as you would wish to be treated by them. It is a 'faith in people', a belief in the 'Golden Rule', a belief that people can be trusted to 'do the right thing'. Aside from social trust, one can also think about trust in specific institutions, such as government, the courts, the media, and the like. The basic notion of trust for these institutions mirrors the notion of social trust: it is the belief that these institutions can ultimately be trusted to 'do the right thing'. Especially important for my purposes here is trust in government, or 'political trust'. See the OECD (2017) for a useful summary of these definitions and the methods for the measurement of trust; the OECD website also provides links to its many studies of trust, along with its estimates of trust, available at <https://www.oecd.org/gov/trust-in-government.htm>.

<sup>14</sup> For example, see the various estimates of excess mortality from the US Centers for Disease Control and Prevention (<https://www.cdc.gov/nchs/covid19/mortality-overview.htm>); *The Economist* ('The pandemic's true death toll', <https://www.economist.com/graphic-detail/coronavirus-excess-deaths-estimates>); *Our World in Data* (C Giattino et al., 'Excess mortality during the Coronavirus pandemic (COVID-19)', <https://ourworldindata.org/excess-mortality-covid>); the World Health Organization (<https://www.who.int/data/sets/global-excess-deaths-associated-with-covid-19-modelled-estimates>), and from *The Lancet* (COVID-19 Excess Mortality Collaborators, 'Estimating excess mortality due to the COVID-19 pandemic: a systematic analysis of COVID-19-related mortality, 2020–21' (2022), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)02796-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)02796-3/fulltext)), among many estimates.



the COVID-19 pandemic, followed by a loss of trust in government. In fact, trust in government in the US has declined since the start of the pandemic, continuing its overall downward trend since the 1950s.<sup>15</sup> It is difficult to determine whether the recent downward trend is due entirely to US government pandemic policies or to other external events like the increasingly partisan political environment in the US, the impeachments of then-President Donald Trump in 2019 and 2021, the US elections of 2020, or to other events. Regardless of the exact cause, it is clear that there has been a decline in trust in government in the US in recent years. Again, the US experience is not an isolated one. Even so, many other countries have governments whose pandemic response was widely perceived as effective.

### 3.3 The effects of trust on tax compliance

Now why should we care about trust? One crucial reason is because trust is a major factor in shaping the effectiveness of public policies: people who do not trust government will not obey government policies that require them to behave in specific ways.<sup>16</sup> This reasoning suggests another reason: when people do not obey government laws, regulations and directives, government policies cannot achieve their goals.

But why does trust have these effects? There are two strands of research that help us understand some of the reasons for these effects of trust: the *tax compliance* literature and the more recent *pandemic* literature. Both strands demonstrate the central role of trust on individual behaviour. Specifically, both strands demonstrate that trust – and especially trust in government – is a major factor in shaping the effectiveness of public policies. When trust in government is weak, many government policies cannot achieve their goals because people simply do not follow the government’s various mandates.<sup>17</sup>

In the *tax compliance* arena, there are several distinct if overlapping frameworks that consider the effects of trust. Here is a brief sampler – there are other examples.

In one framework, Benno Torgler, Jorge Martinez-Vazquez, and I have argued that government policies toward tax compliance need to incorporate different approaches, or *paradigms* (Alm & Martinez-Vazquez, 2003; Alm & Torgler, 2011). One is the traditional *Enforcement* paradigm, where taxpayers are viewed and treated as potential criminals, and the emphasis is on repression of illegal behaviour through frequent audits and stiff penalties. A second and newer approach is the *Service* paradigm, which views the tax administration as a facilitator and as a provider of services to taxpayer-citizens, and the emphasis is on making it easier for people to pay their taxes via simplification, education and assistance. Of most relevance is an emerging *Trust* paradigm, whose premise is that individuals are more likely to respond either to enforcement or to services if they believe that other individuals and, especially, the government are honest; that is, ‘trust’ in others and in the authorities can have a positive impact on compliance

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<sup>15</sup> See the estimates of trust in government provided by the Pew Research Center, ‘Public trust in government: 1958-2023’ (19 September 2023), available at <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/>.

<sup>16</sup> Note that there is a large (and fairly recent) empirical literature that attempts to show the many economic effects of trust, on such outcomes as: trade, financial development, productivity, institutional performance, personal happiness, educational attainment, preferences for redistribution, fertility, political participation, voting behaviour, crime, savings, and the like; see Guiso, Sapienza and Zingales (2006) for discussions of much of this literature. One of the most investigated outcomes is economic growth; see Algan and Cahuc (2013) for a survey of this literature.

<sup>17</sup> For a detailed discussion of the role of trust in public policies, see Alm (2022).

behaviour. The World Bank has recently developed a framework ('Innovations in Tax Compliance') that is largely the same, in which the paradigms are renamed to *Enforcement, Facilitation and Trust* (Prichard et al., 2019).

In a related but more formalised and developed framework, Erich Kirchler and his many collaborators have developed and tested the *slippery slope* framework, in which they argue that it is the interaction climate between taxpayers and authorities that shapes the willingness to cooperate, as based on 'trust' and 'power' (Kirchler, Hoelzl & Wahl, 2008). In a synergistic and cooperative climate, characterised by high trust in authorities who act with high legitimisation and professionalism, taxpayers are willing to cooperate voluntarily. In an antagonistic climate, characterised by low trust, poor legitimisation and questionable professionalism, taxpayers refuse to cooperate, unless compliance with the law is enforced via power. Thus, taxpayer compliance depends both on the *power* of the authority and on the *trust* in the authority, with both dimensions moderating each other and determining the level of compliance. An authority with a high level of power (determined by frequent and effective audits and heavy penalties) achieves enforced tax compliance; an authority with a low level of power cannot generate a similar level of compliance. Of note, an authority that elicits strong trust from citizens (determined by fair procedures, favourable attitudes towards the government, and social norms that define compliance as the expected and prevalent behaviour) achieves voluntary compliance; an authority that does not generate trust from its citizens is unable to achieve voluntary compliance. Once again, the effectiveness of government policies depends intimately on trust in government.

Still another similar framework has been developed by Lars Feld and Bruno Frey. They argue that there is a *psychological contract* between taxpayers and the government, a contract that implies responsibilities for both parties. They conclude that citizens are willing to honestly declare income as long as the political process is perceived to be fair and legitimate; when the political process is seen as unfair and illegitimate, citizens are more likely to cheat on their taxes. In their framework, honest taxpayers must believe that they will not be exploited by tax cheaters, which requires that major violations for tax evasion must be enforced by the government. However, even honest taxpayers may make mistakes, so that minor offences should be subject to minor fines. Indeed, the imposition of heavy penalties on (largely) honest taxpayers may crowd out their intrinsic motivation to pay their taxes; that is, deterrence can actually backfire (Feld & Frey, 2007).

There is in fact much emerging evidence using different methods – evidence that is not always ironclad but more than suggestive – that supports all of these frameworks and so that also supports the central role of trust.

Some evidence comes from my own work on compliance, including especially my work using laboratory experiments conducted with many collaborators.<sup>18</sup> One of our basic findings demonstrates that the social and institutional environment in which individuals live affects compliance, in ways that go well beyond any effects via purely financial incentives. In particular, there is strong evidence that there is a social norm of compliance, in which one's compliance behaviour depends upon various factors that

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<sup>18</sup> See Alm (2019) for a comprehensive survey of the tax compliance literature, including detailed citations to the relevant literature. For a meta-analysis of laboratory experiments on tax compliance, see Alm and Malézieux (2021).

reflect the many aspects of one's environment, including trust in others. Further, these social norms are affected by the institutions that individuals face and by individuals' attitudes toward these institutions – such as trust in government. For example, individuals who do not exhibit trust in government tend to comply less, and trust in institutions affects the viability of government policies by affecting how individuals respond to government policies: when trust in government is greater, enforcement is more effective in deterring non-compliance, and service policies are also more effective in getting individuals to pay their taxes.

A related finding from my experimental work is that individual participation in the choice of institutions – the *process* as distinct from the *outcome* – has real effects, again independent of financial considerations driven by tax, audit and fine rates. Subjects in laboratory experiments pay more when they choose the use of their taxes by voting than when the identical use is imposed upon them, their compliance is greater when the vote indicates a clear group consensus, and their compliance is significantly and dramatically lowered by the imposition without taxpayer choice of any program (especially an unpopular one). Additional experiments demonstrate how different forms of communication between the tax authorities and the taxpayers can increase the social norm of compliance. Once again, trust affects behaviour, this time trust in the process.

There is also much experimental evidence for the *slippery slope* framework.<sup>19</sup> Of special relevance here is recent work using data from multiple experimental studies conducted across 44 nations in five continents with nearly 15,000 subjects (Batrancea et al., 2019). They find that the trust in authorities and the power of authorities each separately increases tax compliance, across societies that differ enormously in economic, sociodemographic, political and cultural backgrounds. They also show that trust and power foster compliance through different channels: trusted authorities register the highest voluntary compliance, while powerful authorities register the highest enforced compliance. Overall, compliance is higher (lower) when both power and trust are high (low), with power and trust interacting in a complicated dance. Indeed, there is evidence that some power is necessary to maintain trust and to signal to the compliant that the government will protect them from free-riders. However, power can also backfire and crowd-out trust – audits by their very nature signal distrust, and there is evidence from other work that audits can be counterproductive if those who are audited turn out to be honest.

There is finally empirical evidence to support the *psychological contract* theory. For example, Feld and Frey (2002) use data on Swiss cantons, and they find that the more strongly are political participation rights developed, the more important is this psychological contract between taxpayers and the government, and the higher is tax morale – and tax compliance.

There is also supportive evidence consistent with all of these approaches that is just now emerging from field experiments on tax compliance. The World Bank, sometimes in partnership with other international organisations, has undertaken a range of innovative field experiments that test different strategies for improving tax compliance. The most relevant field experiments here are those that attempt to increase trust in government as a compliance strategy. Importantly, almost all of these trust experiments occur at the

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<sup>19</sup> For example, see Wahl, Kastlunger and Kircher (2010), Muehlbacher, Kirchler and Schwarzenberger (2011) and Lisi (2012).

local government level in developing countries, in Asia (e.g., Pakistan), Latin America (e.g., Argentina, Brazil, Colombia, Costa Rica, Guatemala, Mexico, Peru, Uruguay), and Africa (e.g., Ethiopia, Ghana, Kenya, Liberia, Malawi, Rwanda, Sierra Leone, South Africa, Tanzania, Uganda). These field experiments examine strategies like:

- improving transparency and accountability in local government decisions by providing information to participants about local government behaviour;
- providing information to participants about the compliance behaviour of their neighbours;
- linking taxes with local services by informing participants about the use of their taxes or allowing participants to determine the use of their taxes;
- sending different types of messages to participants about government policies (e.g., enforcement messages, information messages, social norm messages);
- providing educational services to participants to make it easier to pay taxes.

The results vary significantly by type of strategy, but they all rely at least in large part on providing more and better information to individuals. A common result is that these strategies often improve individuals' trust in their neighbours and in their local government, at least when this information is viewed by individuals as reliable – or trustworthy – and, through this trust channel, they also improve tax compliance. Once again, changing trust changes behaviour in systematic and predictable ways.<sup>20</sup>

Will these results scale and generalise beyond tax compliance? The *pandemic* itself has presented an unprecedented opportunity to examine via natural experiments the effects of social trust on individual behaviour, well beyond the tax compliance literature. There are many just emerging studies that demonstrate that many of the effects of government policies during the pandemic have been intimately affected by citizen trust in government. For example, there is strong and consistent evidence that individuals have been far more likely to obey mask mandates, to stay at home and to get vaccinated, when they live in areas with greater levels of social and political trust (as well as greater levels of social capital), with evidence coming from a varied set of countries, including Austria, Brazil, Denmark, Germany, Italy, the Netherlands, Sweden, Switzerland, United Kingdom, and the US (admittedly with some confounding results). In short, government policies designed to reduce the spread of the coronavirus worked when people trusted government – and they did not work when people did not trust government.<sup>21</sup>

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<sup>20</sup> Information on this work can be found online at International Centre for Tax and Development, 'Innovations in Tax Compliance: Building Trust, Navigating Politics, and Tailoring Reform', <https://www.ictd.ac/theme/tax-administration-and-compliance/> and World Bank, 'Innovations in tax compliance' (17 February 2022), <https://www.worldbank.org/en/topic/macroeconomics/brief/innovations-in-tax-compliance>.

<sup>21</sup> This research is expanding quite quickly. Much of it is still in working papers. For example, see the VoxEU webpage on COVID-19 research, available at <https://voxeu.org/pages/covid-19-page>, and see also the CESifo webpage for all of their many studies, available at <https://www.cesifo.org/en/cesifo/publications>. Some studies are now being published in academic journals; for an especially timely and important of these published papers, see the recent (and ongoing) special issues of the *Journal of Public Economics*, available at <https://www.sciencedirect.com/journal/journal-of-public-economics/special-issue/10JWB645FT5>.

In many ways, this evidence suggests that government policy is an expression of values. When government articulates policies that are counter to peoples' values, their trust in government necessarily and inevitably declines.

### 3.4 Summary and implications

There are many reasons for believing that many government policies work best – and may only work at all – in changing behavioural responses when people trust government. The recent COVID-19 studies may be the most vivid illustration of this result.

All of these considerations suggest that the pandemic has had pervasive effects on trust in government, both positive and negative, depending on the country. Countries that protected their citizens against the COVID-19 virus and the resulting income insecurity have seen an increase in trust in government, countries like Australia, Japan and New Zealand. Countries that did a poor job in physical and economic health protection of their citizens – as with the US and many other countries – have likely seen a decline in trust in government. In both cases, we can expect to see the resulting effects of changes in trust on tax compliance. Whether these effects will be large or persistent remains to be seen, but there is little question that such effects will emerge.<sup>22</sup>

## 4. IMPLICATIONS FOR INEQUALITY

The combined effects of technology and the pandemic on tax compliance are of course uncertain. Compliance may increase or decrease from technological changes depending on whether government within a country is given the resources to implement the new technologies and also on whether governments across countries are able to achieve effective policy coordination. Compliance may also increase or decrease from the pandemic and the resulting government policy responses depending on whether government responds effectively or ineffectively and so on whether trust in government increases or decreases. The results will necessarily be varied and country-specific.

Overall, then, it is difficult to know whether tax compliance in any country will rise or fall in the post-pandemic years ahead. However, regardless of the exact effect on the magnitude of tax compliance, I believe that it is hard to avoid the conclusion that tax evasion will remain an important problem across all countries. Importantly, I also believe that it is hard to avoid the conclusion that the forms of tax evasion that will

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<sup>22</sup> Recent work by Schneider (2022) provides estimates of the size of the so-called 'shadow economy' for 36 OECD and European countries during the initial years of the pandemic (2020 and 2021), with projections to 2022. Note that these estimates are driven entirely by macroeconomic factors (e.g., recession, shutdowns). Note also that the shadow economy is different than, even if related to, tax evasion. See also recent work by Alm and Barreto (2023), who analyse an endogenous growth model that incorporates the impacts of various shocks: an initial pandemic shock, the response of government to the pandemic via a policies shock, and the resulting trust shock that stems from a shock to tax morale as individuals perceive an effective/ineffective government response. They then use this model to simulate the short and long run dynamic effects of the various shocks, using real data from 11 representative economies that typify developed and developing countries as well as countries whose governments implemented policies that either increased or decreased trust in government. Their simulation results both illustrate and quantify the short and long term effects of these shocks on tax compliance, showing the significant impacts on tax compliance via the effects of the pandemic and government responses on trust.

remain will worsen inequality, largely due to the lasting effects of technological changes.<sup>23</sup>

Now there are many causes of inequality, most are well beyond technology and the pandemic, and most are largely unrelated to tax compliance. Government tax and transfer policies are certainly one proximate determinant of inequality. However, there are many other – and likely many other more important – determinants, including: unionisation of labour markets, market power of firms, government regulatory policies, minimum wages, education programs, monetary policies (e.g., interest rate policies), institutions (including histories of discrimination, sexism and racism), and the like. How will the tax evasion that remains with us likely affect inequality?

Perhaps surprisingly, there has been relatively little work on the distributional effects of tax evasion, at least until recently. Early work by Alm, Bahl and Murray (1991) for a developing country (Jamaica) indicated that income tax evasion was concentrated in higher income classes, especially through non-filing of tax returns by professionals and small business owners; that is, taxes as a proportion of ‘true’ or ‘comprehensive’ income fell significantly as comprehensive income rose, transforming an income tax that appeared on paper to be a progressive tax into a highly regressive tax. Johns and Slemrod (2010) examined administrative data for a developed country (the US), and they also found that the proportion of misreported income relative to ‘true’ income was significantly higher for higher income individuals. In both analyses, tax evasion was found to be absolutely and proportionately greater as income increased. There is now recent and emerging evidence for other countries that suggests a similar result, as discussed in detail later.

Technological changes seem likely to reinforce these patterns. As I argued earlier, digitalisation seems likely to make tax evasion increasingly difficult for those individuals who engage in transactions that leave an electronic trail and who are subject to source withholding and third-party information reporting. These individuals will find it virtually impossible to cheat on their taxes, and these individuals represent the vast bulk of all taxpayers, in developing and in developed countries.

In contrast, digitalisation seems likely to make tax evasion increasingly easy for multinational companies (via profit shifting), for high-income individuals (via tax havens and money laundering), and for independent contractors who operate in the P2P economy (via lack of third-party reporting, especially on expenses). The actual distributional effects of these likely patterns of tax evasion are not entirely clear. The distributional effects of tax havens and money laundering will accrue largely to higher income individuals. However, the distributional effects for multinational enterprises and for independent contractors are subject to some debate. There is in fact much evidence of the extent of tax shifting by multinational enterprises.<sup>24</sup> Given that ownership of multinational enterprises is heavily concentrated in higher income classes, it seems

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<sup>23</sup> Note that some preliminary evidence for the US from the US Census Bureau (2022) shows that inequality increased in the initial period immediately following the pandemic in early 2020 due largely to the economic contraction. Inequality then decreased due to government economic relief programs, and inequality increased again following the phase-out of the relief programs and the uneven economic recovery. Possible long run effects include the impact of school closures on educational attainment and the impact of changing work patterns from the pandemic (e.g., working from home). The magnitude of these long run effects remains unknown at present.

<sup>24</sup> See Zucman (2013, 2015), Clausing (2016, 2020) and Tørslov, Wier and Zucman (2023).

likely that the gains from profit shifting will accrue largely to higher income individuals. Even so, the distributional effects of profit shifting depend on the incidence of the corporate income tax, about which there is little consensus, especially in a global economy.<sup>25</sup> The gains from tax evasion by independent contractors operating in the P2P economy will increase the income of lower income individuals; however, the magnitudes of these gains are unknown at present, and regardless these gains seem likely to be quite small in the aggregate.

On balance, then, it seems plausible, and even likely, that it will be people mainly at the very top and at the very bottom of the income distribution who will reap the benefits of technology and its effects on tax evasion, with the gains at the top almost certainly far exceeding the gains at the bottom. Indeed, the political power of these higher income individuals also makes it likely that they will disproportionately benefit from any technological changes.

Recent and emerging evidence largely confirms these speculations. Alstadsæter, Johannesen and Zucman (2018) use macroeconomic data published by the Bank for International Settlements to allocate the estimates of Zucman (2013, 2015) of global offshore financial wealth (or 8% of world household financial wealth) to each country, in order to estimate the amount of household wealth owned by each country in offshore tax havens. They find that the global estimate of offshore wealth hides much heterogeneity in individual country offshore wealth. Their estimates indicate that European countries own about one-sixth of world offshore wealth, and individual countries like Russia, Gulf countries, and Latin American countries also own considerable amounts of offshore wealth. Importantly, Alstadsæter, Johannesen and Zucman (2018) find that the ownership of offshore wealth is heavily concentrated at the very top of the wealth distribution, and accounting for offshore wealth dramatically increases the wealth share of the top 0.01%, especially in Scandinavian countries, the United Kingdom, Spain and France.

In related work, Alstadsæter, Johannesen and Zucman (2019) use data leaked from HSBC Switzerland (the ‘Swiss leaks’), from the now-defunct Panama firm of Mossack Fonseca (the ‘Panama Papers’), and from various tax amnesties enacted after the financial crisis of 2008-2009 to examine more directly tax evasion of the very rich. At the time of the Swiss leaks in 2007, HSBC Switzerland was a major player in offshore banking, managing assets that represented 5% of all foreign wealth in Swiss banks. The leaked data include the complete internal records for 2007 of over 30,000 HSBC Switzerland clients, many of whom were evading taxes. Alstadsæter, Johannesen and Zucman (2019) use these specialised data to link this information to micro-level administrative data for Scandinavian countries (Denmark, Norway and Sweden), in order to estimate the amount of income that individuals in these countries evaded via offshore banking. They find striking and high levels of tax evasion by the very rich: the 0.01% richest households evade nearly 25% of their taxes, a level of tax evasion that far exceeds the usual estimates (roughly 5% tax of taxes) generated from random tax audits. Although not directly related to distributional issues, the evidence from Johannesen and co-authors (2020) is also consistent with the concentration of offshore wealth in the higher – and the very much higher – income classes.

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<sup>25</sup> For a comprehensive review and assessment of the literature on the incidence of the corporate income tax, see Auerbach (2006).

Just released results by Boning and co-authors (2023) provide supporting evidence. Using micro-level IRS administrative data for US taxpayers over the years 2010-2014, they find that an additional \$1 spent auditing taxpayers above the 90th income percentile yields more than \$12 in additional revenues, while audits of below-median income taxpayers yield only \$5. Overall, their evidence is consistent with higher income taxpayers cheating more in absolute and relative terms than lower income taxpayers.<sup>26</sup>

There are of course critical and unresolved concerns about whether these estimates, generated using restrictive assumptions using specialised data sets for specific countries, will apply more broadly.<sup>27</sup> Even so, this evidence is consistent with the conclusion that the distributional effects of tax havens and money laundering will accrue largely to higher income classes. More broadly, the existing evidence is also largely consistent with the conclusion that technological advances will make it easier for the very rich to evade their taxes, even while also making it easier for participants in the P2P economy to evade their taxes. The challenge for researchers is to find new data and new methods that can quantify these effects well beyond the scope of existing studies.

All of this suggests that technology will make evasion increasingly difficult for most taxpayers, but that technology will also make evasion increasingly viable for high income taxpayers. Regardless of the overall impacts both of technology and of the pandemic on the level of tax compliance, I conclude that inequality is virtually certain to increase in the post-pandemic years ahead.

However, these are speculations only. One challenge will be to find data that quantify these effects. A more fundamental challenge will be to devise policies that prevent, or at least mitigate, the effects of technology on the incomes of the already very wealthy. Such policies are currently much debated. On the tax administrative dimension, these policies likely include such obvious steps as maintaining (and increasing) tax agency funding, improving international policy coordination and information exchange, expanding third-party information reporting to include all major margins of behaviour, reforming taxation of the P2P economy, attacking money laundering and tax havens, imposing a national or even an international wealth tax, imposing a tax on unrealised capital gains, establishing a global minimum corporate income tax, and perhaps even changing the practice of international taxation, as is currently under discussion.<sup>28</sup> On the broader fiscal front, increasing government transfers and other social welfare expenditures are obvious policies. On the even wider economic front, policies that encourage unionisation, break up monopolies, raise minimum wages, improve education, and extend reparations to affected minorities have been suggested, despite their uncertain effects on inequality. All of these policies are feasible. None are assured.

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<sup>26</sup> In related work, see also Saez and Zucman (2019), DeBacker et al. (2020) and Guyton et al. (2021).

<sup>27</sup> For example, see Blouin and Robinson (2020) for a detailed critique of some these estimates.

<sup>28</sup> For example, see recent work by Saez and Zucman (2019) on a global wealth tax, Clausing, Saez and Zucman (2021) on a global minimum corporate income tax, and Avi-Yonah and Clausing (2019), Mason (2020) and Devereux et al. (2021) on comprehensive reform of international taxation.



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# Identifying and supporting financially vulnerable women experiencing economic abuse: a grounded theory approach

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## *Abstract*

This study extends the literature by exploring the role of pro bono tax clinics within the social impact ecosystem with a focus on the experiences of women in financial distress who are otherwise unable to access professional tax advice. Using clinic data derived from a pro bono tax advisory clinic, this article finds that 58 per cent of financially vulnerable women seeking pro bono tax services have experienced domestic and family violence (DFV), confirming again the link between financial stress and economic abuse. Yet only 3 per cent of these women were receiving domestic and family violence-related support, highlighting the hidden nature of economic abuse within DFV and underscoring the potential for financial services to document the tactics and effects of economic abuse.

Overall, the findings suggest that the relationship between tax problems, financial stress and economic abuse merits further exploration, so that large-scale initiatives can be designed to support women experiencing economic abuse as part of DFV. Further, this article establishes the important role of tax clinics, as a site of research and knowledge and also of support, intervention, engagement and assistance for victim-survivors of DFV.

**Keywords:** tax, tax clinics, domestic and family violence (DFV), coercive control, economic abuse, financial abuse, structural justice, reduce inequalities

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## 1. INTRODUCTION

Governments and policy-makers are increasingly aware of the need to provide legislative and regulatory protections for women experiencing coercive control, culminating in the recent release of the National Principles to Address Coercive Control in Family and Domestic Violence on 22 September 2023.<sup>1</sup> Similarly, from July 2024 coercive control will be a criminal offence in New South Wales when a person uses abusive behaviours towards a current or former intimate partner with the intention to coerce or control.<sup>2</sup> However, the tax system is notably absent from the policy development and resulting law design, presenting a potential gap in addressing coercive control comprehensively. Similarly, as noted by Apps, there is an almost complete absence of reference to the impacts on women in Australia's longstanding tax reform debate.<sup>3</sup> Further, there is a dearth of literature exploring the impacts of the tax and transfer system on financially vulnerable cohorts.

This article explores and bridges these disparate areas. Specifically, it explores whether and, if so, how the operation and design of the tax system (and, in particular, the operation of tax clinics) can be used as a mechanism to identify and support financially vulnerable women experiencing economic abuse.

Kayis-Kumar and co-authors highlight the importance of conceptualising tax clinics as a platform for grassroots academic research with the overarching purpose of attaining tax justice by identifying systemic injustices and advocating for tax reform.<sup>4</sup> They propose tracking client outcomes across the short, medium and long term through the Tax Clinics Program Logic model,<sup>5</sup> which further presents a useful framework for scaffolding further research focused on attaining tax justice.

Accordingly, the overarching research question presented by this study is:

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<sup>1</sup> Australian Government, Attorney-General's Department, 'Coercive Control', available at: [https://www.ag.gov.au/families-and-marriage/families/family-violence/coercive-control#:~:text=The%20Australian%20Government%20recognises%20coercive,Violen%20\(the%20National%20Principles](https://www.ag.gov.au/families-and-marriage/families/family-violence/coercive-control#:~:text=The%20Australian%20Government%20recognises%20coercive,Violen%20(the%20National%20Principles) (accessed 23 November 2023).

<sup>2</sup> In November 2022, the New South Wales Parliament passed the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW). This Act was passed following the New South Wales Joint Select Committee on Coercive Control recommending a criminal offence of coercive control, and after detailed and public consultation on an exposure draft Bill. The Act makes coercive control in current and former intimate partner relationships a criminal offence. The offence has not commenced yet – and will likely commence in June 2024. The Act also provides a definition of 'domestic abuse' for the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The definition will commence in February 2024. See further, New South Wales Government, 'Coercive Control: Know the Signs of Abuse', available at: <https://www.nsw.gov.au/family-and-relationships/coercive-control/the-law> (accessed 23 November 2023).

<sup>3</sup> Patricia Apps, 'Gender Equity in the Tax-Transfer System for Fiscal Sustainability' in Miranda Stewart (ed), *Tax, Social Policy and Gender: Rethinking Equality and Efficiency* (ANU Press, 2017) 69.

<sup>4</sup> A Kayis-Kumar, J Noone, F Martin and M Walpole, 'Pro Bono Tax Clinics: An International Comparison and Framework for Evidence-based Evaluation' (2020) 49(2) *Australian Tax Review* 110 ('Pro Bono Tax Clinics').

<sup>5</sup> Ann Kayis-Kumar and Jack Noone, 'Measuring the Social Impact of University-Based Pro Bono Tax Clinics: Co-Creating a Framework for Evidence-Based Evaluation', *Austaxpolicy: Tax and Transfer Policy Blog* (Article, 3 October 2019), <https://www.austaxpolicy.com/measuring-the-social-impact-of-university-based-pro-bono-tax-clinics-co-creating-a-framework-for-evidence-based-evaluation/> (accessed 16 June 2023). The authors acknowledge the contribution of academics across all ten universities involved in the National Tax Clinic pilot, in particular: Donovan Castelyn, Michelle Cull, Brett Freudenberg, Sunita Jogarajan, Van Le, Gordon Mackenzie, Annette Morgan, Connie Vitale, Sonali Walpole, Michael Walpole and Rob Whait.

**RQ:** *Can tax clinics complement the existing social impact ecosystem by identifying and supporting women experiencing domestic and family violence? If so, how?*

Relevantly, this article examines the relationship between tax problems, economic abuse and economic hardship. Evidence confirms that financial stress and economic hardship for women is significantly associated with economic abuse.<sup>6</sup> This type of abuse is increasingly recognised as a strategy of the coercive control perpetrated as part of domestic and family violence (DFV). DFV '[i]ncludes any behaviour, in an intimate or family relationship, which is violent, threatening, coercive or controlling, causing a person to live in fear. The behaviour is usually part of a pattern of controlling or coercive behaviour'.<sup>7</sup>

A recent review of the available literature confirms that women experiencing economic abuse may not know they are being subjected to economic abuse or may not recognise their experiences constitute DFV.<sup>8</sup> They may see this type of abuse as less serious than other forms of abuse such as physical and sexual abuse and are less likely to seek assistance from specialist DFV support services unless other forms of DFV are also occurring. This latter finding is salient and highlights the opportunity for a range of non-DFV specialist service providers and in particular, those involved in providing financial services, to assist in the identification and response to economic abuse perpetrated as part of DFV.

Economic abuse (also known as financial abuse) is now recognised as a form of DFV and forms part of a pattern of coercive control of one partner or family member over another.<sup>9</sup> It is a gendered problem predominantly experienced by women,<sup>10</sup> but the extent of perpetration remains largely under-estimated.

Economic abuse is particularly problematic given the economic aftermath of the Covid-19 pandemic, putting into focus the urgent need to support financially vulnerable women experiencing economic abuse. However, identifying and supporting abuse victims as well as preventing the incidence of economic abuse is a significant challenge.<sup>11</sup>

The purpose of this research is to assess the suitability of a free tax clinic to identify those who have experienced DFV and refer them appropriately. This article also discusses potential mechanisms for working with these women, noting the safety risks to be overcome through this process.<sup>12</sup> Established in 2019 following a successful prototype initiated by Curtin University the year prior, Australia's National Tax Clinic Program has the overall purpose of helping low-income taxpayers and small businesses

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<sup>6</sup> Gendered Violence Research Network (Jan Breckenridge, Co-Convenor), *Understanding Economic and Financial Abuse in Intimate Partner Relationships* (October 2020).

<sup>7</sup> *Ibid* 4, quoting New South Wales Government, *It Stops Here: Standing Together to End Domestic and Family Violence in NSW* (Report, 2014) 7.

<sup>8</sup> Gendered Violence Research Network, above n 6, 11-12. Relevantly, economic abuse occurs in nearly all cases of DFV.

<sup>9</sup> *Ibid* 8-10.

<sup>10</sup> The authors recognise that DFV may also be experienced by men and people with diverse gender identities. However, this article has a specific focus on women given that the overwhelming majority of DFV victim-survivors are women.

<sup>11</sup> Gendered Violence Research Network, above n 6, 9-11.

<sup>12</sup> *Ibid* 31.

that are unable to afford professional advice and representation.<sup>13</sup> Importantly, while the grant administrator is the Australian Taxation Office (ATO), these clinics operate independently of the ATO and act in a complementary manner to the existing range of services that the ATO offers to unrepresented taxpayers, including small businesses.<sup>14</sup> This has given the founders of each clinic the flexibility to adapt their clinics to their respective communities and work in partnership with each other.

The Clinic presents one such model for pro bono tax advice. Offering state-wide, year-round tax and accounting advisory services, the Clinic specifically targets vulnerable taxpayers in genuine financial distress. In order to maintain the integrity of the client base, the Clinic works directly with financial counsellors, crisis support services, community centres, homeless services and pro bono legal clinics to identify and support people with otherwise unmet tax and accounting needs.

This article proceeds as follows. First, section 1.1 explores the definitions of economic abuse and DFV. Second, section 1.2 identifies some of the most recent statistics to understand the extent of the problem and who is experiencing it. Third, section 1.3 discusses why economic abuse affects women's financial (in)security and creates financial stress and the challenge this presents for those looking to support those experiencing economic abuse. Section 1.4 highlights the complexities surrounding economic abuse and introduces the Clinic program as a means of supporting socially and financially disadvantaged women with their tax affairs. The remainder of this article presents in section 2 an overview of the Australian tax and legal landscape, with an emphasis on identifying unmet needs and identifying – and bridging – gaps between tax problems, economic abuse, and economic hardship. Section 3 outlines the research design, details the clinic setting and presents both the qualitative and quantitative components of this study. Section 4 outlines the results of the study, and section 5 presents the conclusion.

## 1.1 Defining economic abuse

There is an emerging international literature with various definitions and measures of economic abuse.<sup>15</sup> Economic abuse refers to '[a] pattern of control, exploitation or sabotage of money, finances and economic resources which affects an individual's capacity to acquire, use and maintain economic resources and threatening their economic security and self-sufficiency'.<sup>16</sup> Economic abuse commonly occurs alongside other forms of DFV, including physical, sexual, psychological and emotional abuse, as well as threats, intimidation and controlling behaviours.<sup>17</sup> A recent evidence review conducted by Breckenridge et al identified common tactics used to perpetrate economic abuse, including the control of money within a relationship, failing to contribute to household expenses, appropriating one partner's income or assets, making one partner

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<sup>13</sup> For a detailed overview of the introduction of the National Tax Clinics Program, see Kayis-Kumar et al, 'Pro Bono Tax Clinics', above n 4.

<sup>14</sup> Hon Stuart Robert (Assistant Treasurer), Address to the Australasian Tax Teachers Association 31st Annual Conference (16 January 2019), <https://ministers.treasury.gov.au/ministers/stuart-robert-2018/speeches/address-australasian-tax-teachers-association-31st-annual>.

<sup>15</sup> Judy L Postmus, Gretchen L Hoge, Jan Breckenridge, Nicola Sharp-Jeffs and Donna Chung, 'Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review' (2020) 21(2) *Trauma, Violence, and Abuse* 261, 265-277.

<sup>16</sup> Gendered Violence Research Network, above n 6, 4.

<sup>17</sup> *Ibid* 28.



liable for joint debt and employment sabotage.<sup>18</sup> However, it is of note that the review did not identify the incidence of tax problems as a potential symptom of DFV or economic abuse perpetration.

Indeed, this is the first article in the Australian literature to conceptualise tax problems as a potential symptom for DFV or economic abuse perpetration.

Similarly to the economic abuse and tax literatures remaining disconnected to date, tax laws have also not conceptualised economic abuse as grounds for potential relief from tax debts.<sup>19</sup> This is despite precedent in the US, which has had in place ‘innocent spouse relief’ since 1971, which provides relief for spouses who may be jointly liable for tax debts, with the Internal Revenue Service recognising that survivors of economic abuse may deserve relief from tax debts since legislative reform of the provisions in 1998.<sup>20</sup> This is the subject of further research by the authors, as it presents an opportunity for law reform in Australia. A brief outline is presented in section 2.2 below.

For completeness, Australian States and Territories have begun to recognise economic abuse as part of DFV within relevant legislation.<sup>21</sup> However, Tasmania is the only Australian jurisdiction which explicitly criminalises economic abuse,<sup>22</sup> with New South Wales likely to both criminalise coercive control and implement a legislative definition of ‘domestic abuse’ by July 2024.<sup>23</sup> While economic abuse is defined differently in each jurisdiction, it ultimately recognises the fundamental underpinning of economic abuse as part of coercive control.

## 1.2 Prevalence, indicators and consequences of economic abuse

It is not possible to accurately report the prevalence of economic abuse in Australian households as it is largely underreported.<sup>24</sup> However, research suggests that economic

<sup>18</sup> Ibid 22.

<sup>19</sup> See, for example, Evgenia Bourova, Ian Ramsay and Paul Ali, ‘Limitations of Australia’s Legal Hardship Protections for Women with Debt Problems Caused by Economic Abuse’ (2019) 42(4) *University of New South Wales Law Journal* 1146. This article finds that in the absence of provisions for severing liability for joint debt, the legal hardship protections have limited capacity to assist victims of economic abuse.

<sup>20</sup> See, for example, the *Internal Revenue Service Restructuring and Reform Act of 1998*, PL 105-206, 112 Stat 685 (US), which substantially revised the situations when spouses or ex-spouses can be relieved of a joint tax liability and provides three different categories for relief: s 6015(b) traditional innocent spouse relief, which was modelled on relief that had been provided since 1971; s 6015(c) allocation of liability for taxpayers divorced, legally separated or living apart for more than twelve months, and s 6015(f) equitable relief, which provides that the Internal Revenue Service (IRS) may weigh a taxpayer’s individual circumstances when deciding whether to grant relief. Equitable relief was a major expansion of the law, allowing for potential relief for not only those who understate their tax liability but also those who underpay. Taken together, these provisions are generally known in the US as ‘spousal relief’ or ‘innocent spouse relief’: Christine S Speidel and Audrey Patten, *A Practitioner’s Guide to Innocent Spouse Relief: Proven Strategies for Winning Section 6015 Tax Cases* (American Bar Association, 3<sup>rd</sup> ed, 2022) 1. It has been noted that, since 1988, ‘the IRS has received tens of thousands of innocent spouse relief requests annually. The National Taxpayer Advocate has consistently reported that innocent spouse claims are among the most serious problems faced by taxpayers, and innocent spouse relief has been one of the 10 most-litigated tax issues in the past decade’: Wei-Chih Chiang, Rachana Kalelkar and Xiaobo Dong, ‘New Rules for Innocent Spouse Equitable Relief’, *Journal of Accountancy* (1 May 2014).

<sup>21</sup> See, *Domestic and Family Violence Act 2007* (NT) s 5; *Domestic and Family Violence Protection Act 2012* (Qld) s 10; *Family Violence Act 2016* (ACT) s 8; *Family Violence Protection Act 2008* (Vic) s 5.

<sup>22</sup> *Family Violence Act 2004* (Tas) s 8.

<sup>23</sup> See *Crimes Legislation Amendment (Coercive Control) Act 2022*, above n 2; *Crimes (Domestic and Personal Violence) Act 2007*, above n 2.

<sup>24</sup> Gendered Violence Research Network, above n 6, 9-11.

abuse is likely to be a problem for at least 50 per cent of women who have experienced abusive relationships.<sup>25</sup> Further, Australian Bureau of Statistics (ABS) data suggest that approximately 16 per cent of women and 7 per cent of men have experienced some form of economic abuse.<sup>26</sup>

Further, there is no ‘stereotypical’ target of economic abuse: it can affect men or women (though more often the latter) irrespective of wealth and social class.<sup>27</sup> However, the ABS Personal Safety Survey demonstrates that women are most likely to be the victims in intimate partnerships and may not realise they are experiencing abuse given the gendered financial management that is typical of these relationships.<sup>28</sup> The literature simultaneously identifies that economic abuse clusters around certain social categories: men and women between 40 and 49 years of age are most at risk, as are individuals with a disability or long-term health condition.<sup>29</sup> It is important to note that older people and people with a disability may experience financial abuse outside the context of an intimate partner or family relationship, so not all experiences of financial abuse are DFV related.<sup>30</sup>

Economic abuse is associated with lower levels of financial wellbeing – that is, a person’s capacity to meet their expenses, be in control of their finances and feel financially secure.<sup>31</sup> For example, Kutin, Russell and Reid<sup>32</sup> found that women experiencing financial stress, as indicated by cashflow problems across nine areas, were significantly more likely to report abuse than those reporting limited stress. These results remained significant even after controlling for factors such as household income, labour force status and education.<sup>33</sup> One important study by Sharp highlights the direction of the relationship between economic abuse and financial wellbeing.<sup>34</sup> This study showed, for example, that before female participants had entered an abusive relationship, 20 per cent were in rent arrears.<sup>35</sup> This increased to 33 per cent while they were in a relationship with their abuser.<sup>36</sup> Similar results were found for having savings

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<sup>25</sup> Nicola Sharp, ‘What’s Yours Is Mine’: The Different Forms of Economic Abuse and its Impact on Women and Children Experiencing Domestic Violence’ (Research Report, Refuge, 2008) 35 citing Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

<sup>26</sup> The Australian Bureau of Statistics (ABS) interviewed 17,050 women and men in Australia in 2012 about their experiences of violence in the community and in their homes. For the first time, data included items that measured economic abuse, but these were hidden in the emotional abuse statistics: ABS, *Personal Safety, Australia, 2012* (Catalogue No 4906.0, 11 December 2013) (*‘Personal Safety, 2012’*); ABS, *Australian Social Trends, 2014* (Catalogue No 4102.0, 27 June 2014).

<sup>27</sup> Gendered Violence Research Network, above n 6, 10 citing Jozica Kutin, Roslyn Russell and Mike Reid, ‘Economic Abuse Between Intimate Partners in Australia: Prevalence, Health Status, Disability and Financial Stress’ (2017) 41(3) *Australian and New Zealand Journal of Public Health* 269.

<sup>28</sup> ABS, *Personal Safety, 2012*, above n 26.

<sup>29</sup> Kutin et al, above n 27, 270, 273.

<sup>30</sup> Gendered Violence Research Network, above n 6, 39; Kutin et al, above n 27, 271.

<sup>31</sup> Fanny Salignac, Myra Hamilton, Jack Noone, Axelle Marjolin and Kristy Muir, ‘Conceptualizing Financial Wellbeing: An Ecological Life-Course Approach’ (2020) 21(5) *Journal of Happiness Studies* 1581, 1590-1591.

<sup>32</sup> Kutin et al, above n 27, 272-273.

<sup>33</sup> Ibid. See, eg, Tanya Corrie and Magdalena McGuire, *Economic Abuse: Searching for Solutions* (Good Shepherd Youth and Family Service and Kildonan UnitingCare, 2013) 32-34.

<sup>34</sup> Sharp, above n 25, 38-40.

<sup>35</sup> Ibid 38.

<sup>36</sup> Ibid.

(37 per cent reduced to 20 per cent); having a loan, credit card or overdraft (12 per cent to 39 per cent); and having other forms of debt (8 per cent to 41 per cent).<sup>37</sup>

The links between economic abuse and psychological distress are also well documented. For example, US data has shown that ‘mothers who experienced economic abuse were 1.9 times more likely to exhibit depression symptomatology than mothers who had not’.<sup>38</sup> Similar results were found in Queensland,<sup>39</sup> in a Philippines population study<sup>40</sup> and in India.<sup>41</sup>

Finally, the literature indicates that the potential consequences are exacerbated for certain social groups. For instance, women from lower and working class backgrounds are more likely to use refuges or get by without food.<sup>42</sup> Likewise, women who are financially insecure may feel unable to leave an abusive relationship or may feel they must return to their violent partner.<sup>43</sup> It is also likely that economic abuse will continue after the relationship has ended, albeit with slightly different tactics. Accordingly, ‘policy [and practice] responses need to be sensitive and tailored to differing degrees of vulnerability’.<sup>44</sup>

### 1.3 Complexities surrounding economic abuse

Economic abuse is a complex social problem for many interrelated reasons, the full extent of which cannot be covered here.<sup>45</sup> However, an important issue is that those experiencing financial abuse may not recognise abuse. This is because there are a multitude of tactics that perpetrators can use, ranging from changing a personal identification number, to making a partner liable for joint debt, to sabotaging their education or work commitments.<sup>46</sup> Likewise, traditional gender roles, where males control the household finances, can mask (and facilitate) abuse.<sup>47</sup> Economic abuse is

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<sup>37</sup> Ibid.

<sup>38</sup> Judy L Postmus, Chien-Chung Huang and Amanda Mathisen-Stylianou, ‘The Impact of Physical and Economic Abuse on Maternal Mental Health and Parenting’ (2012) 34(9) *Children and Youth Services Review* 1922, 1927.

<sup>39</sup> Heather Nancarrow, Stewart Lockie and Sanjay Sharma, *Intimate Partner Abuse of Women in the Bowen Basin and Mackay Region of Central Queensland* (Australian Institute of Criminology, 2008) 5. See also Amanda M Stylianou, ‘Economic Abuse Experiences and Depressive Symptoms Among Victims of Intimate Partner Violence’ (2018) 33(6) *Journal of Family Violence* 381.

<sup>40</sup> Diddy Antai, Ayo Oke, Patrick Braithwaite and Gerald Bryan Lopez, ‘The Effect of Economic, Physical, and Psychological Abuse on Mental Health: A Population-Based Study of Women in the Philippines’ [2014] *International Journal of Family Medicine* 852317, 6.

<sup>41</sup> Suman Kanougiya, Nayreen Daruwalla, Lu Gram, Apoorwa Deepak Gupta, Muthusamy Sivakami and David Osrin, ‘Economic Abuse and its Associations with Symptoms of Common Mental Disorders Among Women in a Cross-Sectional Survey in Informal Settlements in Mumbai, India’ (2021) 21 *BMC Public Health* 842, 6-11. See also Amanda M Stylianou, ‘Economic Abuse Within Intimate Partner Violence: A Review of the Literature’ (2018) 33(1) *Violence and Victims* 3, 9.

<sup>42</sup> Whitney Bartlett and Rachel Busbridge, ‘Preventing the Financial Abuse of Women in Australia: Can Intersectionality Help?’, *ABC Religion and Ethics* (online, 10 September 2019), <https://www.abc.net.au/religion/iintersectionality-and-the-financial-abuse-of-women/11497004> (accessed 23 November 2023).

<sup>43</sup> ABS, *Personal Safety, Australia, 2016* (8 November 2017) (‘*Personal Safety, 2016*’).

<sup>44</sup> Bartlett and Busbridge, above n 42. For completeness, a comprehensive analysis is contained in Gendered Violence Research Network, above n 6.

<sup>45</sup> See generally Gendered Violence Research Network, above n 6, 26-40.

<sup>46</sup> Sharp, above n 25, 19-32; Gendered Violence Research Network, above n 6, 18-19.

<sup>47</sup> Sharp, above n 25, 37-38; Gendered Violence Research Network, above n 6, 26-27.

also an insidious form of abuse; the abusers' tactics may slowly increase over time, going unnoticed.<sup>48</sup>

As economic abuse is often hidden with wide-ranging tactics, it is also difficult to measure. Breckenridge et al argued that the lack of clear and consistent definition has hampered measurement activity.<sup>49</sup> The measurement issue partly arises because it is not appropriate to ask direct questions about economic abuse and because it is difficult to create a scale that captures these many tactics.<sup>50</sup> There are also ethical issues associated with measuring economic abuse as it may inadvertently place the person experiencing abuse in greater harm. This leads to a third area of complexity – safety for those experiencing abuse.

In many instances it is very difficult for those affected by economic abuse to come forward. This is partly because of the identification issue, but also because they may fear the safety ramifications of coming forward or may not have the financial means to leave the relationship.<sup>51</sup> Additionally, those experiencing economic abuse are likely to experience financial hardship and high levels of psychological distress.<sup>52</sup>

These and other complexities of economic abuse mean that any intervention [or service] assisting individuals must be cognisant of safety and economic hardship issues.<sup>53</sup> Potential targets of economic abuse may benefit from actions being taken by financial institutions and financial services.<sup>54</sup> This includes the early identification of abuse, appropriate hardship programs for those leaving abusive relationships and training to identify risk factors for abuse and the financial hardship that often follows.<sup>55</sup> Financial services may also benefit from establishing specific family violence teams to minimise the impact of economic abuse on individuals.<sup>56</sup> In order to provide appropriate referrals and tailored solutions for individuals affected by economic abuse, financial institutions should also be linked to other DFV services within the community.<sup>57</sup> These actions exemplify the interdisciplinary and integrated response being advocated for within the legal needs literature, which canvasses the need to address the wide-ranging legal problems experienced by targets of abuse.<sup>58</sup> The UNSW Tax and Business Advisory Clinic (Clinic) is one such example of an interdisciplinary financial service.

## 2. IDENTIFYING AND ADDRESSING UNMET NEEDS

In general, individuals will not only face a wide range of additional family, criminal or civil law problems, but their severity will be compounded due to circumstances of

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<sup>48</sup> Sharp, above n 25, 20; Bartlett and Busbridge, above n 42.

<sup>49</sup> Gendered Violence Research Network, above n 6, 11-21.

<sup>50</sup> Ibid 16.

<sup>51</sup> Ibid 9, 10, 23; Natasha Cortis and Jane Bullen, *Domestic Violence and Women's Economic Security: Building Australia's Capacity for Prevention and Redress* (Australia's National Research Organisation for Women's Safety, 2016) 11, 48, 56-58.

<sup>52</sup> See above section 1.2.

<sup>53</sup> Gendered Violence Research Network, above n 6, 48-50.

<sup>54</sup> Ibid 48-50.

<sup>55</sup> Ibid.

<sup>56</sup> Owen Camilleri, Tanya Corrie and Shorna Moore, *Restoring Financial Safety: Legal Responses to Economic Abuse* (Good Shepherd Australia New Zealand and Wyndham Legal Service, 2015).

<sup>57</sup> Kathy Landvogt, *Collaborating for Outcomes: Networks in the Financial Support Service System* (Good Shepherd Youth and Family Service, 2014) 108.

<sup>58</sup> Christine Coumarelos, 'Quantifying the Legal and Broader Life Impacts of Domestic and Family Violence' (Law and Justice Foundation Paper No 32, June 2019) 23-29.

DFV.<sup>59</sup> Recent research conducted by the Law and Justice Foundation substantiates the relationship between DFV victimisation and a heightened experience of legal problems.<sup>60</sup> Accordingly, the Law and Justice Foundation promotes a ‘collaborative or joined-up approach’.<sup>61</sup> An example of this is the partnership between health and legal services, primarily targeting victims of physical or sexual violence.<sup>62</sup> This partnership was recommended by the Victorian Royal Commission into Family Violence, which also warned against a ‘siloing’<sup>63</sup> of services that could create greater difficulty for women.<sup>64</sup> Other partnerships are concerned with housing,<sup>65</sup> criminal justice and child protection.<sup>66</sup> The literature also supports the collaboration of legal and financial advisers for individuals experiencing economic abuse.<sup>67</sup>

Despite the extensive body of research that exists, many areas remain unexplored.<sup>68</sup> Relevantly for this article, Australia’s tax needs literature is currently in its infancy. While this is typically the case for other comparable jurisdictions, the United States present a notable exception given the availability of ‘innocent spouse relief’ provisions. These provisions present useful comparison as an example of how a revenue authority or tax regime can respond to DFV and, in particular, economic abuse. These issues present the focus of this section 2.

## 2.1 Unmet tax and accounting needs in Australia

The Australian tax system presents significant problems for financially and socially disadvantaged people, especially those who experience economic abuse.<sup>69</sup> Prior research has found that over one-third of financially vulnerable people per year have a

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 25.

<sup>62</sup> Ronli Sifris, Kate Seear and Genevieve Grant, ‘Gender, Health and the Law: Opportunities and Challenges for Reform’ (2016) 25(1) *Griffith Law Review* 1, 3-4; S Forell and M Nagy, *Health Justice Partnership as a Response to Domestic and Family Violence* (Health Justice Australia, May 2021) 11-14. See also Jan Breckenridge, Susan Rees, Kylie Valentine and Samantha Murray, *Meta-Evaluation of Existing Interagency Partnerships, Collaboration, Coordination and/or Integrated Interventions and Service Responses to Violence Against Women: Key Findings and Future Directions* (Australia’s National Research Organisation for Women’s Safety, 2016) (‘*Meta-Evaluation of Existing Interagency Partnerships*’).

<sup>63</sup> Sifris et al, above n 62, 3 citing *Royal Commission into Family Violence* (Full Report, 2016).

<sup>64</sup> Sifris et al, above n 62, 3-4, discussing *Royal Commission into Family Violence* (Full Report, 2016).

<sup>65</sup> Kylie Valentine and Jan Breckenridge, ‘Responses to Family and Domestic Violence: Supporting Women?’ (2016) 25(1) *Griffith Law Review* 30, 34-37.

<sup>66</sup> Breckenridge et al, *Meta-Evaluation of Existing Interagency Partnerships*, above n 62, 18-21.

<sup>67</sup> Evelyn Rose, Charlotte Mertens and Jennifer Balint, *Addressing Family Violence: Contemporary Best Practice and Community Legal Centres, Final Report* (University of Melbourne in collaboration with the Federation of Community Legal Centres, July 2018) 98-103; see also, Evelyn Rose, Charlotte Mertens and Jennifer Balint, ‘Structural Problems Demand Structural Solutions: Addressing Domestic and Family Violence’ (2023) *Violence Against Women*, 7 June advance online.

<sup>68</sup> Lynette M Renner and Carolyn Copps Hartley, ‘Psychological Well-Being Among Women Who Experienced Intimate Partner Violence and Received Civil Legal Services’ (2021) 36(7-8) *Journal of Interpersonal Violence* 3688, 3705.

<sup>69</sup> ‘Tax Symposium: Critical Junctures/Critical Perspectives – A Call for New Voices in Tax Reform’, *Monash University Centre for Commercial Law and Regulatory Studies* (Web Page, 2021), <https://www.monash.edu/law/research/excellence/clars/news-events/critical-juncturescritical-perspectives-a-call-for-new-voices-in-tax-reform> (accessed 23 November 2023); ‘Let’s Talk About Tax’, *SLS 2021 Annual Conference* (Web Page, 2021), <https://virtual.oxfordabstracts.com/#/event/public/2020/submission/319> (accessed 31 August 2021).

tax problem for which they are unable to access independent professional tax advice.<sup>70</sup> This means that around 36,000-48,000 financially vulnerable people seen by financial counsellors each year are unable to access independent professional tax advice (being 30.1-40.6 per cent of the 120,000 clients with in-person appointments per year).<sup>71</sup> Importantly, this is an underestimate of the total unmet need across Australia as the calculation is limited by the segment of the population that is aware of financial counsellors and can obtain their assistance. Not everyone who needs a financial counsellor will know that financial counsellors can help them. This means that between 745,000-1,004,000 financially vulnerable people are unable to access professional independent tax advice (with 9.9 per cent of women and 8.3 per cent of men across Australia experiencing severe or high financial stress).<sup>72</sup>

Of significant concern is that this figure is likely to grow, with ever-increasing shocks to the Australian economy (ranging from natural disasters, the cost of living and housing affordability crises, to the economic aftermath of Covid-19) putting further financial pressure on those already vulnerable.

This is particularly problematic given the existing design of Australia's tax and transfer system. Notably, in order to obtain income support payments, including Family Tax Benefit,<sup>73</sup> individuals are required to lodge an income tax return.<sup>74</sup> The Henry Review had anticipated that this requirement creates administrative complexity and increases compliance burdens. Further – and more troublingly – women report the weaponisation of the tax and transfer system as a mechanism to perpetuate coercive control both during and after escaping abusive relationships,<sup>75</sup> with methods include non-lodgement of tax returns, the diversion of Family Tax Benefit, the non-disclosure of income, and maliciously generating Family Tax Benefit debts. Notably, Cook and co-authors identify that abusive ex-partners often minimise their taxable incomes or avoid lodging

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<sup>70</sup> Ann Kayis-Kumar, Jack Noone, Youngdeok Lim, Michael Walpole and Gordon Mackenzie, 'Tax Accounting for Financial Wellbeing: Quantifying the Unmet Need for Pro Bono Tax Advice' (2022) 51(3) *Australian Tax Review* 228 ('Tax Accounting for Financial Wellbeing').

<sup>71</sup> Financial Counselling Australia, 'A Survey: The Unmet Need for Financial Counselling' (December 2018), <https://www.financialcounsellingaustralia.org.au/docs/a-survey-the-unmet-need-for-financial-counselling> (accessed 23 November 2023).

<sup>72</sup> National Australia Bank and Centre for Social Impact (UNSW), *Financial Security and the Influence of Economic Resources: Financial Resilience in Australia 2018* (2018) 41.

<sup>73</sup> Australian Government, 'Guides to Social Policy Law – Family Assistance Guide' (6 November 2023) 6.4.3 (Requirement to Lodge an Income Tax Return), available at: <https://guides.dss.gov.au/family-assistance-guide/6/4/3> (accessed 4 December 2023).

<sup>74</sup> While beyond the scope of this article, notable recommendations for reform include those contained in the Henry Review; specifically, Recommendation 2 which would 'improve the relationship between the tax and transfer systems: allied with a tax exemption for transfer payments, more people would be in only one system at any given time': Australia's Future Tax System Review Panel (Dr Ken Henry, chair), *Australia's Future Tax System: Report to the Treasurer* (December 2009) pt 2, vol 1, 22-23 ('Henry Review'), available at: [https://treasury.gov.au/sites/default/files/2019-10/afts\\_final\\_report\\_part\\_2\\_vol\\_1\\_consolidated.pdf](https://treasury.gov.au/sites/default/files/2019-10/afts_final_report_part_2_vol_1_consolidated.pdf).

<sup>75</sup> See, for example, Australian Law Reform Commission, 'Family Violence and Commonwealth Laws: Child Support and Family Assistance' (Issues Paper IP 38, March 2011), available at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/IP-38-whole-document.pdf>; Dina Bowman and Seuwandi Wickramasinghe, *Trampolines, Not Traps: Enabling Economic Security for Single Mothers and Their Children* (Brotherhood of St Laurence, 2020), available at: <https://nla.gov.au/nla.obj-2904137381/view>; Kay Cook, Adrienne Byrt, Rachel Burgin, Terese Edwards, Ashlea Coen and Georgina Dimopoulos, *Financial Abuse: The Weaponisation of Child Support in Australia* (Swinburne University of Technology and the National Council of Single Mothers and their Children, 2023), available at: <https://doi.org/10.26185/72dy-m137>.

tax returns in order to lower their child support liabilities, or threaten not to lodge a tax return if their former spouses did not do what they wanted.<sup>76</sup> Cook et al find that separated mothers endure lasting impacts to their financial security, emotional and mental wellbeing, food security, and housing safety through child support-facilitated economic abuse, sometimes long after separation.<sup>77</sup>

These issues are exacerbated by women generally having lower tax literacy levels.<sup>78</sup> As noted in advocacy efforts including by the North Queensland Women's Legal Service, there is also widespread system abuse including of the interaction between the ATO and Services Australia, inadvertently supported by organisational processes and privacy legislation.<sup>79</sup> For example, government departments assume that couples share control of finances, and therefore make decisions to take childcare rebate overpayments from the mother's tax refund.

This is problematic and further compounded by the absence of tax relief on grounds of economic abuse – in both Australian law and those of other comparable jurisdictions. The United States presents a notable exception. Its 'innocent spouse relief' provisions present a useful example of how a revenue authority and tax regime can respond to DFV and, in particular, economic abuse. This is explored in the following section 2.2.

## 2.2 Alternative regulatory responses to economic abuse

It is important at the outset to contextualise that the US innocent spouse relief provisions apply because of joint liability in a jointly filed 'married' tax return. There is no joint assessment nor joint filing in Australia. Rather, joint and several liability for taxes in Australia may arise in some situations including debts in bankruptcy<sup>80</sup> and corporate directorships,<sup>81</sup> and the ATO issuance of director penalty notices.<sup>82</sup>

Nonetheless, it is instructive to compare the experience of comparable jurisdictions to explore alternative approaches to bridging the gap between tax problems, economic abuse, and economic hardship. Accordingly, the remainder of this section outlines the role of tax clinics in advocacy, the resultant innocent spouse relief provisions, and lessons learnt that may be instructive for Australian policy-makers.

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<sup>76</sup> Cook et al, above n 75.

<sup>77</sup> Ibid.

<sup>78</sup> Toni Chardon, Brett Freudenberg and Mark Brimble, 'Tax Literacy in Australia: Not Knowing Your Deduction from Your Offset' (2016) 31(2) *Australian Tax Forum* 321, 359.

<sup>79</sup> The North Queensland Women's Legal Service, Submission to the Women's Safety and Justice Taskforce (April 2021), available at: [https://www.womenstaskforce.qld.gov.au/\\_data/assets/pdf\\_file/0004/691339/wsjs-submission-north-queensland-women-s-legal-service-nqwls.pdf](https://www.womenstaskforce.qld.gov.au/_data/assets/pdf_file/0004/691339/wsjs-submission-north-queensland-women-s-legal-service-nqwls.pdf).

<sup>80</sup> See *Commissioner of Taxation v Tomaras* (2018) 265 CLR 434.

<sup>81</sup> Vivien Chen, 'Hidden Risks of Economic Abuse through Company Directorships' (2024) 47(1) *University of New South Wales Law Journal*, forthcoming, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4515673](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4515673).

<sup>82</sup> See further Australian Taxation Office, 'Director Penalties' (last updated 6 May 2022), available at: <https://www.ato.gov.au/business/engaging-a-worker/in-detail/director-penalty-regime/>.

### 2.2.1 *The role of tax clinics in advocacy efforts*

As observed by Kayis-Kumar et al, the US is the only other comparable jurisdiction which has employed a tax clinic program with as extensive reach as the Australian system.<sup>83</sup>

First introduced in 1970, the US Low Income Tax Clinics program was part of an academic movement to equip students with skills training, as well as a broader social movement in providing legal services to vulnerable taxpayers.<sup>84</sup> With growing criticism around graduates lacking sufficient practical skills, and an increasing push for protection of vulnerable taxpayers, it was natural for conversations around the development of the legal skills training and legal aid movements to converge.<sup>85</sup>

Legal scholars such as one of the co-authors of this article emphasise the role played by clinics in addressing the national crisis in relation to access to justice and observe that tax clinics have enabled ‘greater access to legal representation in tax controversies than in many other essential civil matters’.<sup>86</sup>

The US experience also highlights how clinics have played a significant role in advocacy and law reform. For example, as Fogg has discussed, a number of US tax clinicians distinguished themselves by advocating and writing on issues that related to vulnerable taxpayers, issues that typically received less attention from the greater number of other academics and practitioners.<sup>87</sup>

In addition to US tax clinicians providing a general focus on vulnerable taxpayers, some US tax clinicians have highlighted the particular problems that relate to joint and several liability and the opportunity for taxpayers to qualify for innocent spouse relief.<sup>88</sup> First introduced in 1971, the US innocent spouse relief provisions afforded relief for spouses who faced oppressive tax burdens.<sup>89</sup> The work of US clinicians was instrumental in bringing about change to provisions in the wake of 1988 legislation.<sup>90</sup>

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<sup>83</sup> For an international comparative analysis of the pro bono tax clinic experiences of Australia, United States, United Kingdom and Canada, see Kayis-Kumar et al, ‘Pro Bono Tax Clinics’, above n 4, 116-122.

<sup>84</sup> ‘Tax Clinics, as we know them today, began in the 1970s as part of an academic movement to provide skills training to students and as part of the broader social movement to provide free or very low cost legal services to the poor. Law schools were looking for platforms through which to teach practical skills to students because of growing criticism that their graduates entered the profession with inadequate practical skills. Communities and the legal profession were looking for ways to protect the most vulnerable members of society from processes over which they could exert little control’: Keith Fogg, ‘Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics’ (2013) 67(1) *The Tax Lawyer* 3, 5 (footnotes omitted).

<sup>85</sup> *Ibid.*

<sup>86</sup> Leslie Book, ‘Academic Clinics: Benefitting Students, Taxpayers, and the Tax System’ (2015) 68(3) *The Tax Lawyer* 449, 453; ‘Federal Tax Clinic Practicum’, *Hofstra Law* (Web Page, 2016), <https://law.hofstra.edu/clinics/federaltaxclinicpracitum/> (accessed 9 January 2020).

<sup>87</sup> Fogg, above n 84, at 32-37.

<sup>88</sup> *Ibid* 32-33 (discussing the role that tax clinicians have played in litigating and publicising the innocent spouse provisions).

<sup>89</sup> As described by Congressman Boggs when urging its consideration, this legislation was intended to ‘provide relief in compelling situations ... in connection with the imposition upon innocent spouses of large liabilities for taxes and penalties attributable to income omitted from a joint return by the other spouse’: Thomas Hale Boggs, Sr, 116 *Congressional Record* 43350 (1970), House of Representatives.

<sup>90</sup> Fogg, above n 84, 34-37, discussing how after the 1998 legislation, tax clinician Bob Nadler was an early contributor to scholarship on the provisions and tax clinician Carlton Smith’s advocacy contributed to the change in law allowing for requests for equitable relief to be made beyond two years from the first IRS



Relevantly, in the context of economic abuse and hardship, it is instructive to examine the US innocent spouse relief provisions. In the US, there are three avenues for obtaining innocent spouse relief. Traditional innocent spouse relief requires that the spouse requesting relief did not know or have reason to know that there was an understatement of tax and in considering the facts and circumstances it would be inequitable to hold the requesting spouse liable for the understatement of tax.<sup>91</sup> Second, for an understatement of tax, relief is available when a requesting spouse is divorced, widowed, legally separated or apart from the non-requesting spouse for one year from the date of a request for relief.<sup>92</sup> Finally, under equitable relief, the IRS can grant relief when a taxpayer is unable to qualify for the first two forms of relief if in its view it would be inequitable to continue to hold the spouse liable.<sup>93</sup> This last path is available both for understatements of tax and underpayments of tax, while the first two paths are only available with respect to tax liabilities flowing from IRS determinations that a taxpayer has understated their true tax liability.

The IRS, in administering the innocent spouse provisions, has adopted guidelines for its employees.<sup>94</sup> In the first and third paths for relief, that is traditional innocent spouse relief and equitable relief, economic hardship and financial abuse are important factors that the IRS evaluates in determining the equity of whether to grant relief. While a detailed discussion of the eligibility criteria is beyond the scope of this article, a requesting spouse's knowledge, or reason to know, of a tax liability can be a disqualifying factor for traditional relief and an important factor in the IRS's evaluation of a request for equitable relief.

Below is a brief discussion concerning how the IRS has prioritised issues of economic abuse and financial hardship in its determinations regarding eligibility for innocent spouse relief, especially with respect to equitable relief.

### 2.2.2 *Innocent spouse relief and defining economic abuse*

Revenue Procedure 2013-24 § 4.01(7)(d) states, 'if a requesting spouse establishes that he or she was the victim of abuse prior to the time the return was filed, and that, as a result of the prior abuse, the requesting spouse was not able to challenge the treatment of any items on the [tax] return, or was not able to question the payment of any balance due reported on the [tax] return, for fear of the nonrequesting spouse's retaliation, the Service will consider granting equitable relief...'.<sup>95</sup>

Abuse here is defined as including '*physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate the requesting spouse, or to undermine the requesting spouse's ability to reason independently and be able to do what is required under the tax laws*'.<sup>96</sup> Even if the requesting spouse knew or had reason to know (the knowledge factor) about the erroneous tax liability understatements or

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collection activity. In the US, tax clinicians continue to be at the forefront of issues of the innocent spouse provisions. For example, Professors Christine Speidel and Audrey Patten, tax clinicians at the Villanova Law School and Harvard Law School, have recently written the sixth edition of a detailed book on the provisions, *A Practitioner's Guide to Innocent Spouse Relief*, above n 20.

<sup>91</sup> Internal Revenue Code (IRC) § 6015(b).

<sup>92</sup> Ibid § 6015(c). The tax must also be attributable to erroneous items of the non-requesting spouse.

<sup>93</sup> Ibid § 6015(f).

<sup>94</sup> IRS, Revenue Procedure 2013-34 ('Revenue Procedure 2013-34').

<sup>95</sup> Ibid § 4.01(7)(d).

<sup>96</sup> Ibid § 4.03(2)(c)(iv) (emphasis added).

deficiencies, the abuse or financial control in terms of household finances and access to financial information could weigh in favour of relief.<sup>97</sup>

### 2.2.3 *Innocent spouse relief and economic hardship*

The economic hardship factor is satisfied when a failure to grant relief from joint and several liability, would ‘cause the requesting spouse to be unable to pay reasonable basic living expenses’.<sup>98</sup> According to § 4.03(2)(b) of the Revenue Procedure, hardship would be suffered if (1) the requesting spouse’s income is less than 250 per cent of the federal poverty guidelines,<sup>99</sup> and (2) the requesting spouse does not have assets from which they can make payments towards the tax liabilities and still meet reasonable basic living expenses.<sup>100</sup> If this test is not met, additional factors are considered such as taxpayer’s age, earning potential, amount reasonably necessary for food, clothing, housing, medical expenses and transportation, total available assets and the cost of living in the geographical area in which the taxpayer lives.<sup>101</sup>

The Australian regime presents a notable contrast. Academics such as Fisher<sup>102</sup> and Villios<sup>103</sup> have observed that while the threshold test turns on the criterion of ‘serious hardship’, the legislation remains silent on the issue, providing no definition or criteria as to what may constitute serious hardship. Similarly, the Explanatory Memorandum accompanying the Taxation Laws Amendment Bill (No. 6) 2003 (Cth) contains no interpretive guidance.<sup>104</sup> Thus, the meaning of serious hardship is interpreted by reference to judicial considerations and administrative guidance – and has been described by O’Rourke et al as outdated and in urgent need of reform.<sup>105</sup>

### 2.2.4 *Lessons learnt from the US experience*

In determining whether equity favours granting relief, the US tax system provides for a multi-factored consideration. The determination is context specific; abuse and hardship are important variables that the IRS must weigh when a taxpayer requests relief. While a requesting spouse’s knowledge of a tax liability is a barrier to relief, it can be mitigated in the presence of abuse, inappropriate financial control or financial hardship.

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<sup>97</sup> Ibid § 4.03(3)(c)(i)(A).

<sup>98</sup> Ibid § 4.03(2)(b).

<sup>99</sup> 42 USC §9902(2).

<sup>100</sup> *Contreras v Commissioner*, TC Memo. 2019-12, 16-17 (US Tax Court, 2019) (‘*Contreras*’).

<sup>101</sup> IRS, Revenue Procedure 2013-34, above n 94, § 4.02(2).

<sup>102</sup> Rodney Fisher, ‘Tensions in Tax Decision-Making: The Decision to Not Collect Tax’ (2012) 27(4) *Australian Tax Forum* 885; Rodney Fisher and Cynthia Coleman, ‘The Hardship Discretion – Building Bridges with the Community’ (2010) 8(2) *eJournal of Tax Research* 162.

<sup>103</sup> Sylvia Villios, ‘Tax Collection, Recovery and Enforcement Issues for Insolvent Entities’ (2016) 31(3) *Australian Tax Forum* 425.

<sup>104</sup> Rather, the Explanatory Memorandum highlights a twofold objective of this amendment: ‘... to streamline the procedures under which an individual taxpayer can be released from a tax liability where payment would entail serious hardship. Consistent with contemporary review practices, the amendments will also introduce a new right to have tax relief decisions reviewed internally under the ATO objections process, and externally by the AAT sitting as the Small Taxation Claims Tribunal’; Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 6) 2003, 5.

<sup>105</sup> See further Kevin O’Rourke, Ann Kayis-Kumar and Michael Walpole, ‘Serious Hardship Relief: In Need of a Serious Rethink?’ (2021) 43(1) *Sydney Law Review* 1; see also ATO, ‘Debt Relief, Waiver and Non-Pursuit’, Practice Statement Law Administration PS LA 2011/17, <https://www.ato.gov.au/law/view/document?docid=PSR/PS201117/NAT/ATO/00001> (‘PS LA 2011/17’).

For example, the US tax system recognises that inappropriate financial control may negate knowledge and thus explicitly recognises a spectrum of abusive conduct that may justify relief from a tax debt.<sup>106</sup> In addition, a recent analysis of relevant US tax cases by Fogg indicates that while the Tax Court still places significant negative weight on a requesting spouse's knowledge of a tax liability, the presence of economic hardship can be the determinant in deciding whether to grant equitable relief. Notably, Fogg observes that when knowledge of the tax was a negative factor, but other positive factors are present, 'the taxpayer always wins if one of the positive factors is also financial hardship'.<sup>107</sup>

In contrast, the Australian legislative landscape affords no specific avenues for relief of tax debts on grounds of economic abuse, and very limited grounds for relief of tax debts on grounds of economic hardship.<sup>108</sup> Indeed, the existing provisions have most recently been described as 'outdated and in urgent need of reform'.<sup>109</sup>

It remains underexplored in the Australian context whether affording relief from tax debts on grounds of economic abuse and economic hardship would have the potential to improve client outcomes and financial wellbeing, and improve long-term trajectories of financially vulnerable taxpayers.<sup>110</sup> Accordingly, this is the subject of further research by the authors.

### 3. RESEARCH DESIGN

#### 3.1 Research framework, methodological approach and research method

A grounded theory strategy was selected as the most appropriate methodological approach for this research. McKerchar and co-authors<sup>111</sup> note that in grounded theory, the theory derived by the researcher is 'grounded' in the views and observations of the interviewees in the study. This process involves using multiple stages of data collection and data coding and the ongoing refinement of information and theories derived. Grounded theories, because they are drawn from data, are likely to offer insight, enhance understanding and provide a meaningful guide to action.<sup>112</sup> Further, the research findings and recommendations arising from the use of grounded theory can contribute

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<sup>106</sup> In *Contreras*, above n 100, 28-29, for example, the Tax Court was unable to conclude that the requesting spouse met her burden of proof in establishing alleged physical or emotional abuse, but was able to negate knowledge by proving her ex-spouse exercised inappropriate financial control, including requiring her to ask permission to purchase household items and preventing her from reviewing tax returns.

<sup>107</sup> Keith Fogg, 'Is Economic Hardship the Antidote for Knowledge in an Innocent Spouse Case?', *Procedurally Taxing* (Blog Post, 24 August 2021), <https://www.taxnotes.com/procedurally-taxing/economic-hardship-antidote-knowledge-innocent-spouse-case/2021/08/24/7h77w?pt=1>.

Conversely, Fogg noted that when knowledge was a negative taxpayer factor, the presence of multiple positive factors in the taxpayer's favour, combined with an absence of hardship, resulted in taxpayer losses.

<sup>108</sup> For a detailed analysis of Australia's legislative background, case law history and specific recommendations to modernise Australia's serious hardship relief provisions, see O'Rourke et al, above n 105.

<sup>109</sup> *Ibid* 1.

<sup>110</sup> For a range of short-, medium- and long-term outcomes, see: Kayis-Kumar et al, 'Pro Bono Tax Clinics', above n 4.

<sup>111</sup> Margaret McKerchar, Helen Hodgson and Michael Walpole, 'Understanding Australian Small Businesses and the Drivers of Compliance Costs: A Grounded Theory Approach' (2009) 24(1) *Australian Tax Forum* 151.

<sup>112</sup> *Ibid*.

to policy or knowledge development and service provision and can reform thinking to initiate change in the substantive area of inquiry.<sup>113</sup>

Given the Clinic setting and procedures (detailed in section 3.2), the research method adopted is in-depth interviews and observations. These interviews contain both quantitative and qualitative questions, thereby drawing on the strengths of both type of data analysis.

Specifically, the qualitative questions provide access to deeper understandings of people's lives and experiences, whereby the interviewers (namely, the clinic supervisors and students) have the freedom to ask follow-up questions, to digress, to tease out issues and underlying concerns. As a result, each interview becomes a unique and challenging experience. The quantitative questions are coded into the client dataset and include a combination of yes/no questions, Likert scales, and various screening scales (including the Kessler 6 and the Scale of Economic Abuse 2).

Together, the quantitative and qualitative components complement and inform each other, thereby providing a deeper understanding of client experiences.

## 3.2 Clinic setting and procedures

### 3.2.1 Clinic setting

The Clinic provides its clients, all of whom are financially disadvantaged, with a pro bono tax agent service to get their tax affairs back on track. This can increase their levels of financial control, which is associated with financial security in the short and long term.<sup>114</sup> As a result of targeting this cohort, clients are often dealing with the financial implications of mental health issues, financial abuse, natural disasters, gambling addictions, substance abuse, an inability to afford food and medical care, and the risks of financial despair leading to self-harm.

To date, the vast bulk of the Clinic's work has involved debt management and tax compliance including filing long-term overdue income tax returns and Business Activity Statements, with most clients' backlog spanning nearly a decade.<sup>115</sup>

### 3.2.2 Clinic procedures

Following initial screening based on strict eligibility criteria<sup>116</sup> or direct 'warm referrals' from a social impact ecosystem partner organisation, prospective clients are invited to make a client appointment. Client appointments are subsequently made on a bookings-only basis to ensure that matters can be triaged by degree of need. Clients are given their choice of appointment date and time, their preferred mode of meeting (in person,

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<sup>113</sup> Ylona Chun Tie, Melanie Birks and Karen Francis, 'Grounded Theory Research: A Design Framework for Novice Researchers' (2019) 7 *Sage Open Medicine* 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6318722/>.

<sup>114</sup> Jack H Noone, Christine Stephens and Fiona Alpass, 'The Process of Retirement Planning Scale (PRePS): Development and Validation' (2010) 22(3) *Psychological Assessment* 520, 520.

<sup>115</sup> UNSW Tax and Business Advisory Clinic, *Annual Report 2022*, <https://www.unsw.edu.au/content/dam/pdfs/events/business-school/2023-02-documents/2023-02-documents-UNSW-Tax-and-Business%20Advisory-Clinic-2022-Annual-Report.pdf>.

<sup>116</sup> See 'Get Free Tax Advice and Business Coaching', *School of Accounting, Auditing and Taxation, UNSW Business School* (Web Page), <https://www.unsw.edu.au/business/our-schools/accounting-auditing-taxation/about-us/unsw-clinic/free-tax-advice-business-coaching>.

telephone or online), and asked whether they would like the involvement of a support person and/or interpreter.

As a teaching clinic, the client is typically first interviewed by a student under the supervision of a professional tax agent. This comprises the in-depth interview (comprising both a Client Consent Form and a Client Advice Form) and subsequent observations used in this research. The duration and frequency of client interaction varies depending on the complexity of the case, with most clients requiring an additional two follow-up appointments and on average approximately 17 hours to finalise their matters.<sup>117</sup>

The Client Advice Form provides a mechanism to confirm eligibility and determine whether the client consents to their data being used for secondary research purposes. The verbal consent is twofold; first, it obtains consent from the client to their personal information being used for secondary research purposes, subject to such information being de-identified, and evidence of human ethics approval being provided.<sup>118</sup> Second, it determines whether the client consents to being contacted by the Clinic to complete a voluntary Client Satisfaction Survey following completion of their matter.

The Clinic's screening form also collects data on the referring organisation, what other services are being utilised by each client, and if a client would like to be referred to a DFV service. However, clients are only offered a referral to a DFV provider if the screening tool puts them at risk for DFV. Risk is categorised as answering sometimes, often or very often to any of the screening questions. The wording is:

*Thank you so much for sharing your experience with us. Your answers suggest possible coercive control, which can often take the form of financial control within intimate partner relationships. We partner with specialist services that can help. Would you like us to connect you with one of our partner services?*

It is important to note that given the likelihood of interviewers being directly exposed to confronting subject matter, an integral part of the Clinic's internal onboarding procedure involves both mental health awareness and domestic violence awareness training. These training sessions are conducted before any new Clinic team member has exposure to client casework, and are led by external providers.<sup>119</sup>

### 3.3 Qualitative component

The period of the study is from September 2019 to May 2023. The in-depth interviews and client observations conducted over this time were with a team of five accountants as clinic supervisors and 53 university students enrolled or volunteering at the Clinic. Facilitating the provision of advice from accountants was important given the ethical prerogative of supporting those with otherwise unmet needs for professional tax advice by providing them with said professional tax advice.

Tax clinic clients typically present with mental health and similar problems which make it difficult for them to handle their own affairs unaided and make it difficult for them to

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<sup>117</sup> UNSW Tax and Business Advisory Clinic, above n 115.

<sup>118</sup> The current research was approved by the human ethics committee of the researchers' university.

<sup>119</sup> Relevantly, Women's Legal Service NSW has generously conducted all of the Clinic's domestic violence awareness training sessions.

understand what is required of them.<sup>120</sup> In such situations, independent, free and confidential advice is key to the resolution of the taxpayer's problem.<sup>121</sup> Further, tax clinic clients have comorbid issues and need to be referred on to other support services (including DFV support services). However, there is a research gap on whether these referral pathways are effective. This presents the subject of further research by the authors.

The literature on domestic and family violence demonstrates that those affected may have complex needs – particularly those clients who have experienced economic abuse. As such, this research critically examines: (1) the Clinic processes; (2) the client characteristics, and, (3) the tax issues that clients present with, to assess the Clinic's capacity to deal with that complexity.

The overarching research question presented by this study is:

**RQ<sub>1</sub>:** *Can tax clinics complement the existing social impact ecosystem by identifying and supporting women experiencing domestic and family violence? If so, how?*

The following sub-questions are designed to guide the analysis of the above RQ<sub>1</sub>.

### 3.3.1 *Clinic processes to identify clients experiencing domestic and family violence*

Some clients may not clearly identify the violence and abuse they suffer as domestic and family violence and others may feel shame or that it is not safe to disclose their experiences. Therefore, more sophisticated measures need to be used in the screening process to ensure the Clinic provides a safe and appropriately targeted service to address these clients' needs. These new measures focus on known abusive behaviours (including those known to constitute economic and financial abuse) rather than overtly asking if people have been abused or not. However, more sophisticated measures mean there would be a typically longer interview with clients and to date, there is little or no data demonstrating the efficacy of such measures.

Therefore, the research questions are:

**RQ<sub>1.1</sub>:** *Are there variations in detecting DFV depending on whether clients are asked direct questions vs indirect screening questions? Are these women current seeking support from DFV services?*

### 3.3.2 *Clinic processes to support clients experiencing domestic and family violence*

The literature stresses the importance of being able to provide appropriate and targeted referrals to relevant services to support those experiencing DFV financially, psychologically and practically. This evidence suggests the need for effective relationships between the Clinic and DFV specialist, mental health, financial counselling, legal and housing services. The way in which clients are referred to the

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<sup>120</sup> See, eg, Van Le and Tina Hoyer, '2019 National Tax Clinic Project: James Cook University Tax Clinic' (2020) 22(2) *Journal of Australian Taxation* 162, 162-173; Donovan Castelyn, Stephanie Bruce and Annette Morgan, '2019 National Tax Clinic Project: Curtin University – Curtin Tax Clinic' (2020) 22(2) *Journal of Australian Taxation* 1, 1-26.

<sup>121</sup> Kayis-Kumar et al, 'Tax Accounting for Financial Wellbeing', above n 70.

Clinic provides an early indication of the Clinic network's strength and opportunities for growth in interprofessional relationships within the social impact ecosystem.<sup>122</sup>

However, it is challenging to track and determine whether these cross-referral pathways are effective. Accordingly, this presents the subject of further research by the authors. So, the following sub-question is limited to exploring the tax-specific supports provided to clients.

The research questions are:

**RQ<sub>1.2</sub>:** *Which service providers refer clients to the Clinic? How do clients feel about the support they have received from the Clinic?*

### 3.3.3 Characteristics of clients experiencing domestic and family violence

There is no one population group who experience violence and abuse. It is therefore important to assess whether the Clinic client base demonstrates the same diversity, excepting that the participants are all women in economic hardship by design. If analysis identifies a lack of diversity on other characteristics, the Clinic may need to change its processes to attract more diverse female clients. The Clinic's client base also provides an opportunity to explore which, if any, characteristics are associated with the incidence of DFV.

The research question is:

**RQ<sub>1.3</sub>:** *What are the characteristics of clients experiencing DFV?*

### 3.3.4 Tax problems faced by clients experiencing domestic and family violence

As observed in the above section 2, the research on the relationships between tax and DFV is in its infancy. But those experiencing DFV are more likely to have experience financial and economic abuse, which could include tax-related issues. Likewise, issues around 'shared debt' are known to exist in the literature and may come up in a tax context. The nature of clients' tax issues is important to establish because it may affect the provisioning of services. If clients commonly present with specific tax issues, then more training and support could be provided to clinic staff in those areas. At this point, the specific tax issues of those experiencing DFV are unknown.

The question is therefore:

**RQ<sub>1.4</sub>:** *What tax issues do clients experiencing DFV present with?*

Answering this question will provide insights into the Clinic's capacity to identify and support those experiencing domestic and family violence.

## 3.4 Quantitative component

The Federal government's 2018 Australian Institute of Health and Welfare report establishes six specific population groups as being most at risk of DFV; namely, Aboriginal and Torres Strait Islander women; young women; pregnant women; women with disabilities; women experiencing financial hardships; and women and men who

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<sup>122</sup> Ann Kayis-Kumar, Gordon Mackenzie and Michael Walpole, 'Interprofessional Collaborative Practice in Pro Bono Tax Clinics: A Case Study Approach' (2020) 22(2) *Journal of Australian Taxation* 49.

experienced abuse or witnessed domestic violence as children.<sup>123</sup> However, it is important to emphasise that there is no ‘typical’ target of economic abuse. Rather, it can affect men or women (though more often the latter) irrespective of wealth and social class.<sup>124</sup>

This study adopts quantitative data analysis in the form of descriptive statistics to explore whether specific population groups are at risk of DFV. Utilising a logit regression model with the dependent variable being DFV and various indicators as independent variables, the logit regression model is as follows:

$$DFV = f(\text{client characteristics, tax-related variables, and socio-economic status})$$

where:

Dependent variable:

*DFV* is equal to 1 if respondent experience of DFV is ‘Yes’ and is zero otherwise.

Independent variables:

Clients’ characteristics

- *Age* is the number of years after the year of birth.
- *Country of Birth* is equal to 1 if country of birth is ‘Australia’ and is zero otherwise.
- *Indigenous* is equal to 1 if Indigenous is ‘Yes’ and is zero otherwise.
- *Mental Illness* is equal to 1 if respondents write ‘Yes’ for an item of Mental Illness and is zero otherwise.
- *Physical Disability* is equal to 1 if respondents write ‘Yes’ for an item of Physical Disability and is zero otherwise.
- *Small business owner* is equal to 1 if respondents write ‘Yes’ for an item of Small business owner and is zero otherwise.
- *Centrelink benefit* is equal to 1 if respondent receives any benefit including Jobseeker, parenting payment, disability support pension from Centrelink and is zero otherwise.
- *Contact type – referral* is equal to 1 if the Clinic received the referral as contact type and is zero otherwise (eg, online query, phone etc).

Tax-related variables

*Type of Tax Issue – Debt* is equal to zero if Type of Tax Issue is ‘Debt’ and is 1 otherwise.

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<sup>123</sup> Australian Institute of Health and Welfare, *Australia’s Health 2018* (Australia’s Health Series No. 16, 2018) 70-115, available at: <https://www.aihw.gov.au/getmedia/7c42913d-295f-4bc9-9c24-4e44eff4a04a/aihw-aus-221.pdf>.

<sup>124</sup> Gendered Violence Research Network, above n 6, 10 citing Kutin et al, above n 27.



*Lodge own tax return* is equal to 1 if respondent lodged own tax return and zero otherwise.

#### Community-level Socio-Economic Status

- *IRSAD* is the Index of Relative Socio-Economic Advantage and Disadvantage as per postcode through one of the Socio-Economic Indexes for Areas (Census, 2016).

## 4. RESULTS

The following sections 4.1 and 4.2 detail the results of both the qualitative and quantitative analysis, respectively.

### 4.1 Qualitative analysis

#### 4.1.1 *Clinic processes to identify clients experiencing domestic and family violence*

The research questions for this sub-section are:

***RQ<sub>1.1</sub>***: *Are there variations in detecting DFV depending on whether clients are asked direct questions vs indirect screening questions? Are these women current seeking support from DFV services?*

It is well-established that women experiencing DFV have significantly poorer general health, physical function and mental health.<sup>125</sup> Accordingly, the authors consider whether respondents have access to both mental health-related and DFV-related support services. Among respondents who self-report experiencing DFV, 50 per cent have received mental health-related support services. In contrast, only 3 per cent of this cohort has received DFV-related support services. This suggests a substantial unmet need for specialist DFV support services among this cohort. This highlights just how difficult it is to identify and support this cohort, which heightens the need for novel intervention strategies, including the use of pro bono tax clinics as a mechanism to identify and support women experiencing DFV.

#### 4.1.2 *Clinic processes to support clients experiencing domestic and family violence*

The research questions for this sub-section are:

***RQ<sub>1.2</sub>***: *Which service providers refer clients to the Clinic? How do clients feel about the support they have received from the Clinic?*

In line with the expectations of the researchers, most Clinic clients were referred by, and already obtain support from, service providers in the social impact ecosystem. These include financial counsellors, crisis support services, community centres, homeless services and pro bono legal clinics.

Regarding the second element of this ***RQ<sub>1.2</sub>***, two key themes emerged from the follow-up interviews conducted upon completion of client matters. Specifically, when asked ‘How did you feel before you came to the Tax Clinic? How do you feel now?’, all

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<sup>125</sup> Australian Institute of Health and Welfare, above n 123, 68.

responses can be grouped under one of two themes; either (1) relief from financial and psychological stress, and/or (2) empowerment.

Select examples of client feedback under these two themes include:

*Thank you so much ... just got out of Family Court now and this is such a relief! I really don't think people understand the magnitude of offering this assistance to people in hardship and situations where financial abuse is a factor. I can't explain what a weight has been lifted by having these completed – something I should be capable of figuring out myself but at this time in my life simply unable to cope with! Thank you again so much, it really has made a difference to my life and my children's lives [Client #19053];*

*Reduced my stress about tax, I couldn't do it alone. I needed help, was too overwhelming [Client #20046];*

*Before I contacted the Tax Clinic I felt like the world was spinning in the wrong direction and my anxiety was through the roof. After they helped me I'm so thankful and grateful [Client #20055];*

*Stressed, confused, hopeless. After tax clinic assistance relief, out of blindness about the problem I had [Client #20078];*

*I had severe financial stress and couldn't discuss finances with close family. I am now less stressed about managing money and being tax ready [Client #22001];*

*Before coming to the tax clinic, I was really afraid of what would happen once I finally did my tax returns. Now I am actually considering doing an accounting course so I can too help other sole traders who struggle with this stuff. Liz has helped me so much, and I have realised that tax is a language that I not only can understand but may also be able to learn and pass on [Client #22018].*

#### 4.1.3 Characteristics of clients experiencing domestic and family violence

The research question is:

**RQ<sub>1.3</sub>:** *What are the characteristics of clients experiencing DFV?*

Most (that is, 58 per cent) Clinic clients self-reported that they have experienced DFV. In contrast, the latest figures on the prevalence of domestic violence and economic abuse are 27 per cent and 16 per cent, respectively.<sup>126</sup> As such, Clinic observations demonstrate that financially vulnerable women presenting with tax problems are substantially more likely than the general population to be experiencing DFV.

This again highlights and amplifies the need to support this cohort. Existing research has also clearly demonstrated that financial services have an important role to play in supporting individuals affected by economic abuse. This may be achieved through training for staff so that they can identify abuse, financial hardship programs and

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<sup>126</sup> ABS, *Personal Safety, Australia, 2021-22 Financial Year* (15 March 2023), <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release> ('*Personal Safety, 2021-22*').

referrals to external support services to ensure that individuals receive tailored responses which meet their needs.

#### 4.1.4 *Tax problems faced by clients experiencing domestic and family violence*

The research question is:

***RQ1.4:*** *What tax issues do clients experiencing DFV present with?*

As detailed in the Client Advice Forms and subsequent client observations, all tax issues related to either overdue returns and/or debt discussions. This is broadly consistent with the existing literature, which finds that for the vast majority of financially vulnerable taxpayers, their unmet tax needs are in relation to requiring professional assistance with lodging tax returns and handling tax debt.<sup>127</sup>

The median number of outstanding income tax returns and BAS returns amongst the cohort of female clinic clients experiencing DFV was 3 years of income tax returns and 9 quarters of BAS returns, respectively. Given this client profile includes outstanding BAS returns, these clients are operating businesses (predominantly as sole traders or are merely ABN holders, which by default puts them in the ‘business’ category). This disqualified these clients from the ATO’s Tax Help program,<sup>128</sup> which highlights the critical role and importance of clinics providing tax advice for complex matters involving taxpayers in economic hardship. This is punctuated by the observations in the literature that women who are financially insecure may feel unable to leave an abusive relationship or may feel they must return to their violent partner.<sup>129</sup>

## 4.2 Quantitative analysis

A total of 112 women participated in the study from September 2019 to May 2023, with a final sample of 71 who responded to the question relating to DFV. This DFV variable provides enough variation for additional univariate and multivariate analyses.

### 4.2.1 *Clinic processes to support clients experiencing domestic and family violence*

The second and third columns in Table 1 show that of those using a service, general counselling and mental health counselling were popular for both those who were or were not experiencing DFV. This is not surprising given that this is where most of the Clinics referrals came from. Also, 23-32 per cent of our clients were also using mental health services. However, 12-15 per cent of clients did not answer the questions on existing services received.

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<sup>127</sup> Kayis-Kumar et al, ‘Tax Accounting for Financial Wellbeing’, above n 70.

<sup>128</sup> ‘ATO Tax Help Program: Eligibility for Tax Help’, *Australian Taxation Office* (Web Page, 9 March 2023), <https://www.ato.gov.au/Individuals/Your-tax-return/Help-and-support-to-lodge-your-tax-return/Tax-Help-program/#EligibilityforTaxHelp>.

<sup>129</sup> ABS, *Personal Safety, 2016*, above n 43.

**Table 1: Proportion of Clients Using Support Services According to Their Self-Reported Experience of DFV**

|                            | Total sample |            | Reports being affected by DFV |            | Does not report being affected by DFV |            |
|----------------------------|--------------|------------|-------------------------------|------------|---------------------------------------|------------|
|                            | N            | Percentage | N                             | Percentage | N                                     | Percentage |
| Financial services         | 16           | 0.23       | 8                             | 0.20       | 8                                     | 0.27       |
| Gambling services          | 4            | 0.06       | 1                             | 0.02       | 3                                     | 0.10       |
| Disability services        | 4            | 0.06       | 3                             | 0.07       | 1                                     | 0.03       |
| Mental health services     | 20           | 0.28       | 13                            | 0.32       | 7                                     | 0.23       |
| Housing services           | 3            | 0.04       | 3                             | 0.07       | 0                                     | 0.00       |
| Employment services        | 2            | 0.03       | 1                             | 0.02       | 1                                     | 0.03       |
| Legal services             | 7            | 0.10       | 6                             | 0.15       | 1                                     | 0.03       |
| General counselling        | 18           | 0.25       | 12                            | 0.29       | 6                                     | 0.20       |
| Domestic violence services | 2            | 0.03       | 2                             | 0.05       | 0                                     | 0.00       |
| Not answered               | 11           | 0.15       | 5                             | 0.12       | 6                                     | 0.20       |

Notes: Double selections are allowed in the question.

#### 4.2.2 Characteristics of clients experiencing domestic and family violence

Table 2 shows the descriptive statistics of the variables used in the study. When asked, ‘Have you ever been affected by family or domestic violence?’, 58 per cent of respondents self-reported experiencing DFV. This figure is above the general population levels of 27 per cent (or 2.7 million) women experiencing DFV.<sup>130</sup> The clinical observations demonstrate that financially vulnerable women presenting with tax problems at the Clinic are substantially more likely than the general population to be experiencing DFV.

Clients experiencing DFV ranged in age from 24 to 82 years (M=71, SD=11.74). The majority (61 per cent) were born in Australia, and 11 per cent self-identified as Indigenous. Nearly two-thirds (70 per cent) self-reported experiencing mental health issues and 27 per cent self-reported experiencing physical disability. Sixty-eight per cent of clients were small business owners and 78 per cent received Centrelink benefits. Fourteen per cent were engaged in tax debt discussions with the ATO and 71 per cent of clients were referred to the Clinic from the social impact ecosystem.

<sup>130</sup> ‘Of women, 27% (2.7 million) have experienced violence or emotional/economic abuse by a cohabiting partner’: ABS, *Personal Safety, 2021-22*, above n 126.

**Table 2: Descriptive Statistics**

|                                | <b>Obs</b> | <b>Mean</b> | <b>Std.Dev</b> | <b>Min</b> | <b>Max</b> |
|--------------------------------|------------|-------------|----------------|------------|------------|
| DFV                            | 71         | 0.58        | 0.50           | 0          | 1          |
| Age                            | 71         | 52.03       | 11.74          | 24         | 83         |
| Country of Birth               | 71         | 0.61        | 0.49           | 0          | 1          |
| Indigenous                     | 71         | 0.11        | 0.32           | 0          | 1          |
| Mental Illness                 | 70         | 0.70        | 0.46           | 0          | 1          |
| Physical Disability            | 70         | 0.27        | 0.45           | 0          | 1          |
| Ever been small business owner | 63         | 0.68        | 0.47           | 0          | 1          |
| Centrelink Benefit             | 67         | 0.78        | 0.42           | 0          | 1          |
| Contact Type – Referral        | 71         | 0.51        | 0.50           | 0          | 1          |
| Type of Tax Issue - Debt       | 57         | 0.14        | 0.35           | 0          | 1          |
| Lodge Own Tax Return           | 52         | 0.44        | 0.50           | 0          | 1          |
| IRSAD                          | 68         | 1025.88     | 98.17          | 817        | 1171       |
| SEA2                           | 23         | 16.57       | 16.66          | 0          | 52         |

Notes: DFV is equal to 1 if respondent experience of DFV is ‘Yes’ and is zero otherwise. Age is the number of years after the year of birth. Country of Birth is equal to 1 if country of birth is ‘Australia’ and is zero otherwise. Indigenous is equal to 1 if Indigenous is ‘Yes’ and is zero otherwise. Mental Illness is equal to 1 if respondents write ‘Yes’ for an item of Mental Illness and is zero otherwise. Physical Disability is equal to 1 if respondents write ‘Yes’ for an item of Physical Disability and is zero otherwise. Ever having been a small business owner is equal to 1 if respondents write ‘Yes’ for an item of Ever been small business owner and is zero otherwise. Centrelink benefit is equal to 1 if respondent receives any benefit including Jobseeker, parenting payment, disability support pension from Centrelink and is zero otherwise. Type of Tax Issue – Debt is equal to zero if Type of Tax Issue is ‘Debt’ and is 1 otherwise. Lodge own tax return is equal to 1 if respondent lodged own tax return and zero otherwise. Contact type – referral is equal to 1 if UNSW Tax and Business Advisory Clinic receives referral as contact type and is zero otherwise (eg, online query, phone etc). IRSAD is the Index of Relative Socio-Economic Advantage and Disadvantage as per postcode through one of the Socio-Economic Indexes for Areas (Census, 2016).

Only 23 of the 71 participants provided responses to the Scale of Economic Abuse 2 (SEA2).<sup>131</sup> However, all participants who screened positively for experiencing economic abuse according to the SEA2 also self-reported experiencing DFV. The authors find that there is a strong positive and significant Pearson correlation coefficient ( $r=0.692$ ,  $p\text{-value}=0.000$ ) between women who screen positively under the SEA2 and

<sup>131</sup> Adrienne E Adams, Megan R Greeson, Angela K Littwin and McKenzie Javorika, ‘The Revised Scale of Economic Abuse (SEA2): Development and Initial Psychometric Testing of an Updated Measure of Economic Abuse in Intimate Relationships’ (2020) 10(3) *Psychology of Violence* 268.

those who also self-reported experiencing DFV. This finding is consistent with existing literature.<sup>132</sup>

**Table 3: Comparisons of Number of Clients Screening for DFV (N=23)**

|                                    | Reports being affected by DFV | Reports not being affected by DFV |
|------------------------------------|-------------------------------|-----------------------------------|
| SEA2 < median (Lower risk of DFV)  | 3                             | 8                                 |
| SEA2 ≥ median (higher risk of DFV) | 12                            | 0                                 |

The higher the SEA2 variable, the more reports being affected by DFV, which suggests that both variables capture similar constructs. However, with only 23 observations screening specifically for the SEA2 out of a total of 71 respondents, it is more statistically sound to focus on the DFV variable as the key variable in this article.<sup>133</sup>

#### 4.2.3 Tax problems faced by clients experiencing domestic and family violence

Clients presented with a variety of different tax issues at different stages of the tax lifecycle as shown in Table 4. For 41 clients identified as experiencing DFV, objection and debt issues are the important type of tax issue.

**Table 4: Tax Issues Presented by Reference to Stage of Tax Lifecycle**

|                          | Reports being affected by DFV | Percentage | Does not report being affected by DFV | Percentage |
|--------------------------|-------------------------------|------------|---------------------------------------|------------|
| N                        | 41                            | Percentage | 30                                    | Percentage |
| <b>Issue arising</b>     |                               |            |                                       |            |
| Disputing ATO Assessment | 2                             | 0.05       | 2                                     | 0.07       |
| Lodgement                | 6                             | 0.15       | 4                                     | 0.13       |
| Debt                     | 7                             | 0.17       | 4                                     | 0.13       |
| Technical questions      | 7                             | 0.17       | 6                                     | 0.20       |
| General questions        | 16                            | 0.39       | 12                                    | 0.40       |
| Not answered             | 7                             | 0.17       | 4                                     | 0.13       |

Notes: Double selections are allowed in the question.

#### 4.2.4 Univariate analysis

The t-test results in Table 5 show a significant difference between women who are experiencing DFV (who are in turn more likely to be experiencing mental illness)

<sup>132</sup> Sharp, above n 25, 35.

<sup>133</sup> Adams et al, above n 131.

compared to women who are not experiencing DFV. This presents at a 5 per cent significance level, and is consistent with the extensive literature on the adverse mental health impacts of experiencing DFV.<sup>134</sup>

**Table 5: Univariate Analysis**

| <b>DFV=1</b>                   | <b>Obs</b> | <b>Mean</b> | <b>Std.Dev</b> | <b>Min</b> | <b>Max</b> | <b>Difference in means</b> |
|--------------------------------|------------|-------------|----------------|------------|------------|----------------------------|
| Age                            | 41         | 50.63       | 9.23           | 30         | 74         | t = -1.17                  |
| Country of Birth               | 41         | 0.56        | 0.5            | 0          | 1          | t = -0.89                  |
| Indigenous                     | 41         | 0.12        | 0.33           | 0          | 1          | t = 0.28                   |
| Mental Illness                 | 40         | 0.8         | 0.41           | 0          | 1          | <b>t = 2.14</b>            |
| Physical Disability            | 40         | 0.3         | 0.46           | 0          | 1          | t = 0.61                   |
| Small business owner           | 37         | 0.57        | 0.5            | 0          | 1          | <b>t = -2.40</b>           |
| Centrelink Benefit             | 39         | 0.79        | 0.41           | 0          | 1          | t = 0.42                   |
| Contact Type - Referral        | 41         | 0.59        | 0.5            | 0          | 1          | t = 1.54                   |
| Type of Tax Issue – Debt       | 31         | 0.19        | 0.4            | 0          | 1          | t = 1.25                   |
| Lodge Own Tax Return           | 29         | 0.41        | 0.5            | 0          | 1          | t = -0.45                  |
| IRSAD                          | 40         | 1026.65     | 101.43         | 817        | 1171       | t = 0.07                   |
| SEA                            | 15         | 24.8        | 15.04          | 0          | 52         | <b>t = 4.39</b>            |
| <b>DFV=0</b>                   | <b>Obs</b> | <b>Mean</b> | <b>Std.Dev</b> | <b>Min</b> | <b>Max</b> |                            |
| Age                            | 30         | 53.93       | 14.44          | 24         | 83         |                            |
| Country of Birth               | 30         | 0.67        | 0.48           | 0          | 1          |                            |
| Indigenous                     | 30         | 0.10        | 0.31           | 0          | 1          |                            |
| Mental Illness                 | 30         | 0.57        | 0.50           | 0          | 1          |                            |
| Physical Disability            | 30         | 0.23        | 0.43           | 0          | 1          |                            |
| Ever been small business owner | 26         | 0.85        | 0.37           | 0          | 1          |                            |
| Centrelink Benefit             | 28         | 0.75        | 0.44           | 0          | 1          |                            |
| Contact Type - Referral        | 30         | 0.40        | 0.50           | 0          | 1          |                            |
| Type of Tax Issue - Debt       | 26         | 0.08        | 0.27           | 0          | 1          |                            |
| Lodge Own Tax Return           | 23         | 0.48        | 0.51           | 0          | 1          |                            |
| IRSAD                          | 28         | 1024.79     | 95.15          | 819        | 1163       |                            |
| SEA                            | 8          | 1.13        | 1.46           | 0          | 4          |                            |

Notes: T-statistics show two-sample t test results with equal variances between the two groups.

Unreported Pearson correlations for the variables show that there is a significant positive correlation between DFV and mental illness, and a negative correlation

<sup>134</sup> See, for example, Ciara Smyth, Patricia Cullen, Jan Breckenridge, Natasha Cortis and kylie valentine, 'COVID-19 Lockdowns, Intimate Partner Violence and Coercive Control' (2021) 56(3) *Australian Journal of Social Issues* 359.

between DFV and being a small business owner. The correlation coefficients are less than 0.7 for all variables, which indicates no presence of multicollinearity for multivariate regression models.

#### 4.2.5 Multivariate regression results

Table 6 shows the multivariate regression results after controlling for other factors that affect DFV. It finds that LR chi-square statistics for the logit regression model are significant (at 1 per cent significance) which indicates good model fit. Further, the Pseudo R2 for the model is 0.599 which further supports our statistical inferences. Notably, this article finds that Age, Indigenous, Mental Illness, Physical disability, Centrelink Benefit and Type of tax issue – Debt are significant variables associated with the incidence of DFV at 5 per cent and 10 per cent significance.

**Table 6: Multivariate Regression Results**

|                          | Model 1 (Dependent variable=DFV and logit regression) |       | Model 2 (Dependent variable=SEA2 and OLS regression) |              |
|--------------------------|---|-------|--|--------------|
|                          | Coefficient   | Z-    | Coefficient  | t-statistics |
| Age                      | -0.46**   | -2.18 | -1.52*   | -2.7         |
| Country of Birth         | -0.02   | -0.01 | -11.66   | -1.32        |
| Indigenous               | 6.58**  | 1.97  | 27.56  | 1.77         |
| Mental Illness           | 8.82**  | 2.07  | -2.06  | -0.2         |
| Physical Disability      | 5.00*   | 1.66  | 31.31*   | 3.02         |
| Ever been small business | -2.27   | -1.35 | -22.49**   | -4.11        |
| Centrelink Benefit       | -8.03*  | -1.69 | -27.00*  | -2.78        |
| Contact Type - Referral  | 1.19  | 0.99  | 7.78   | 1.04         |
| Type of Tax Issue - Debt | 8.14*   | 1.91  | 10.54  | 0.9          |
| Lodge Own Tax Return     | 0.44  | 0.29  | -25.76   | -1.77        |
| IRSAD                    | -0.01   | -0.98 | 0.14   | 1.59         |
| Constant                 | 31.97   | 1.95  | -13.64   | -0.16        |
| Number of obs            | 45  |       | 15   |              |
| LR chi                   | 37.08***  |       |  |              |
| Pseudo R2                | 0.599   |       |  |              |
| F statistics             |   |       | 5.2*   |              |
| Adj R-squared            |   |       |  | 0.767        |

Note: \*/\*\*/\*\* represent significance levels of 0.10, 0.05, and 0.01 (two-tailed), respectively.

This article finds that clients are more likely to report DFV when they are Indigenous, experiencing mental health problems, physical disability and have tax debts (as opposed



to tax issues related to disputes, lodgements, or general questions). This finding is in line with prior empirical research of the authors.<sup>135</sup>

It is instructive to cross-reference the common variables correlated with both DFV and SEA2. Specifically, these are: Age, Physical Disability, Centrelink benefits. This highlights the importance of prioritising these cohorts in the provision of pro bono tax advisory services given they are likely to be particularly at-risk.

## 5. RECOMMENDATIONS AND CONCLUSION

This article is the first in the Australian literature to conceptualise tax problems as a potential symptom for DFV or economic abuse perpetration. It extends the existing literature by exploring the role of pro bono tax clinics within the social impact ecosystem with a focus on the experiences of women in financial distress who are otherwise unable to access professional tax advice.

Four recommendations for reform arise from this analysis, and are primarily focused on improving tax-related services and addressing gender-related issues in the tax and transfer system. These recommendations are:

### **Recommendation 1: Increased tax literacy targeted at women**

Given the need to increase public awareness in relation to coercive control, empower women by raising awareness around the use (and abuse) of the tax system in public awareness campaigns. At an ATO level, establish targeted educational programs in partnership with educational institutions and community organisations to offer workshops, seminars, and online resources tailored to women's specific needs and circumstances.

### **Recommendation 2: Increased scale of support services to address unmet tax and accounting needs**

Given the likelihood of widespread need, there is an urgent need to expand access to free tax clinics for victim-survivors of economic abuse, with a particular emphasis on marginalised cohorts. This is most effectively achieved in partnership with the community sector. Priority should be given to those with the most dire financial situations; specifically, single parents, low-income earners, and women with disabilities.

### **Recommendation 3: Relationship between ATO/Services Australia to prevent perpetration of abuse via tax and transfer system**

Reports of systems abuse are particularly problematic, and can be addressed by strengthening collaboration and two-way information sharing between the ATO and Services Australia to prevent abuse of the tax and transfer system by perpetrators. This will likely require the implementation of comprehensive data-sharing agreements, carefully balancing the needs of protecting individuals' privacy and data security with the public policy imperative of maintaining the integrity of the system.

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<sup>135</sup> Kayis-Kumar et al, 'Tax Accounting for Financial Wellbeing', above n 70.

**Recommendation 4: Implementation of regulatory and legislative solutions inspired by US innocent spouse relief**

Assess the feasibility and appropriateness of introducing US-inspired ‘innocent spouse relief’ provisions in the Australian context. While not directly transferable, it is instructive to learn from the experiences of the United States system and adapt this framework to the Australian context. This likely complements the Australian government’s efforts to implement coercive control legislation.

Overall, this article establishes the important role of tax clinics, as a site of research and knowledge and also of support, intervention, engagement and assistance for victim-survivors of DFV. It provides compelling data that tax clinics may be able to screen for and detect DFV among financially vulnerable clients. Further, this article finds that pro bono tax clinics have an important role to play as a screening point, referral partner and tax service provider for women who are experiencing economic abuse and economic hardship. It further finds that over half (that is, 58 per cent) of the Clinic’s female clients self-reported experiencing DFV and economic abuse. This is over double the general population levels. Those who did report DFV showed substantive variation in their personal characteristics, which is in line with the DFV literature. The participants presented with a variety of tax issues, but predominantly lodgements and tax debt issues. This is also in line with existing literature.

This article further finds that there is a substantial unmet need for specialist DFV support services among this cohort, with only 3 per cent of clients receiving DFV-related support despite the study period spanning from September 2019 to May 2023. It highlights just how difficult it is to identify and support financially vulnerable women experiencing DFV, and offers a novel intervention strategy; namely, the use of pro bono tax clinics as a mechanism to identify women experiencing DFV and subsequently to refer them to specialist DFV support services they might not be aware of and would otherwise not access. This is the subject of ongoing research by the authors. It may also be beneficial to consider the extent to which the women either know they are experiencing financial abuse or can identify the tactics of financial abuse arising from gendered financial management in their relationship.

It is evident that pro bono tax clinics are well positioned to be safe places to collect pre- and post-data for interventions designed to assist those experiencing DFV. It is anticipated that the number of affected women visiting the clinic will increase as the National Tax Clinics Program expands over time.

Ultimately, it is hoped that these and subsequent findings might present the catalyst for a large-scale roll-out of DFV screening and the identification of economic abuse and its commensurate tactics across pro bono tax clinics assisting financially vulnerable people.

# The crypto-economy and tax practitioner competencies: an Australian exploratory study

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## *Abstract*

This study examines how tax practitioners are responding to clients participating in the crypto-economy, with a particular focus on the *Tax Agent Services Act 2009* (Cth) Code of Professional Conduct. Employing both interview and survey methodologies, the study investigates crypto-economic activities undertaken by clients and gathers practitioner perspectives on several issues. These include current regulation and guidance as well as the implications for practitioner skills and competencies, applying the law, acting lawfully, and ascertaining client's affairs. The findings have key implications for tax reform, particularly relevant given the Board of Taxation's review into digital assets and transactions.

**Keywords:** blockchain, crypto-economy, cryptoassets, tax practitioners, TASA, code of professional conduct, competency, knowledge, Australian Taxation Office, tax compliance, web guidance

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## 1. INTRODUCTION

As the world progresses towards increased digitalisation, there is a need to continually reflect on the lag between digital transformation and complex regulations (Inspector-General of Taxation (IGT), 2018), whilst also ensuring the continued maintenance of taxpayer rights, equity, and fairness (Bentley, 2019) within the context of public accounting and advisory services. Schmitz and Leoni (2019) explicitly called for the need to examine the level of technological understanding and skill sets needed by practitioners to serve clients who make use of blockchain technology. This study is one such response.

We agree that there is a fundamental need to better understand how practitioners are responding to this digital technology, what issues practitioners and clients are facing, and how this is impacting on the behavioural and social outcomes between these parties. This ultimately leads us to question the implications for the necessary skills and roles in professional practice in a digital economy, stemming from the codes of professional conduct, such as the *Tax Agent Services Act 2009* (Cth) (TASA 2009) Code of Professional Conduct (TASA Code). Such connectedness between emerging technology and ethics is a key issue within the accounting and auditing profession (see, for example, Nguyen et al., 2023; International Ethics Standards Board for Accountants (IESBA), 2022).

For the tax profession specifically, the Australian Treasury (2023) noted that over 1 million Australian taxpayers were expected to lodge their 2022 income tax returns with crypto-related activities. This followed the Senate Select Committee on Australia as a Technology and Financial Centre (previously known as the Senate Select Committee on Financial Technology and Regulatory Technology) Final Report (2021) (Bragg Report) reporting that close to 25% of Australian taxpayers have either held or hold cryptoassets. Whilst a 'crypto winter' has led to significant declines in market capitalisation since 2022, there remains a need to ensure regulatory frameworks are fit for purpose in a digitalised economy. As Australian Treasury (2023, p. 6) describes:

To capitalise on ... opportunities and ensure consumer and business trust and confidence in the crypto ecosystem, regulation is required. This includes both clarifying where existing regulation applies, as well as ensuring that any additional regulation is appropriately robust, fit-for-purpose, and can keep pace with the rapidly evolving ecosystem.

Despite the increase in activities within the crypto-economy, the lag between digital transformation and regulation (IGT, 2018) may extend to regulations and skills required for professional accountants to discharge services and act in the public interest (Schmitz & Leoni, 2019) – this includes taxation professionals. There are calls for better blockchain literacy in the industry so the links between the digital blockchain technology and regulatory-advisory practices are more widely understood, along with both the challenges and efficiencies that blockchain can bring (Tech London Advocates & The Law Society, 2020).

This is an exploratory study designed to provide insights into the challenges and impacts on the technological skills required by tax practitioners when providing blockchain-related advisory services to clients. Initially, a set of semi-structured interviews were carried out to examine the state of play across a cohort of Australian accounting and tax practitioners. This was to garner a foundational understanding of the blockchain space

generally and provide insight into not only the variety of activities becoming pervasive across the participants client base, but also to gain a foundational understanding of the issues and actions such professionals were taking. Through the semi-structured interviews, a set of propositions were established which formed the basis of a survey instrument to assess more broadly the key activities, challenges and issues developing with respect to blockchain technology. The survey targeted Australian tax practitioners specifically.

As such, this study fosters a greater understanding of the skills and knowledge requirements of tax practitioners, which are not well articulated in the academic or professional literature (Schmitz & Leoni, 2019) with respect to the TASA Code (Devos & Kenny, 2017). In doing so, this study addresses concerns associated with blockchain-related literacy in the field by identifying the educational needs (both technical and theoretical) of accounting and taxation practitioners in the business and advisory services industry.

The remainder of this article is structured as follows. First, this study presents a brief overview of the Australian tax regulatory context with respect to the crypto-economy. Then, in section 3 the TASA Code and relevant code items are introduced and discussed before leading into the research design in section 4. Section 4 outlines the interview and survey methods employed and then section 5 presents the findings and discussion thereof, breaking down the analysis into: the crypto-economy and client activities (section 5.1); regulation and guidance: fit for purpose? (section 5.2); perspectives with respect to tax practitioner skill and competencies (section 5.3); perspectives with respect to tax practitioners applying the law (section 5.4), and perspectives with respect to tax practitioners acting lawfully and ascertaining client's affairs (section 5.5). Section 6 concludes.

## 2. BACKGROUND TO TAXING THE CRYPTO-ECONOMY IN AUSTRALIA

Whilst the Australian legal system has developed over many decades and significant sources of tax law are derived from case law and legislation, for taxpayers and tax practitioners to interpret the tax consequences for crypto-economic activities, the Australian Taxation Office (ATO) plays a significant role. Whilst there is no bespoke taxing regime for crypto activities, there have been minor targeted amendments to existing tax laws. These have largely focused on (1) removing double taxation in certain circumstances for the goods and services tax (GST), and (2) ensuring that cryptoassets will not fall within the foreign currency regime.<sup>1</sup> Otherwise, taxpayers and tax practitioners are expected to interpret existing tax principles and so look for ATO guidance to understand the administrator's interpretation.

Depending on the format of the ATO guidance, there can be varied levels of protection in relying on such guidance. For example, tax determinations provide legally binding<sup>2</sup> advice for taxpayers and offer protection across underpaid tax, penalties, and interest. General ATO guidance such as website material does not offer protection from underpaid tax (ATO, 2022). In contrast, unless it is the applicant who is relying on a private binding ruling (PBR),<sup>3</sup> those who review published PBRs (edited versions of

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<sup>1</sup> Both amending the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

<sup>2</sup> Legally binding on the ATO.

<sup>3</sup> Comparable to tax determinations, PBRs are legally binding advice that protect against underpaid tax, penalties and interest (ATO, 2022).

PBRs) have no protection whatsoever. Although Australia was one of the earliest jurisdictions to introduce formal guidance for crypto activities (PwC, 2021), the fast pace at which crypto activities are evolving means that numerous aspects of the more complex crypto-economy do not have formal (i.e., neither legally binding nor protective) tax guidance or the process is not yet enacted (see listing in PwC, 2021; 2022).

Unlike traditional investment activities, cryptoasset transactions are treated as barter transactions, requiring a frequent conversion of value to Australian dollars (fiat currency) leading to potential unintended gains or losses as values fluctuate. As Morton and Curran (2022b, p. 5) summarise:

Instead of the traditional barter context, transactions are made on a contemporary digital, distributed technology platform (blockchain). The increasing popularity and familiarity of transacting with cryptocurrencies by Australians, raises issues not only for the declaration of income earning activities and consequential tax obligations, but also their use as a means of payment.

Although debated within the sector, cryptoassets are considered a form of property within the scope of the CGT regime<sup>4</sup> and not considered to be foreign currency.<sup>5</sup> For non-business taxpayers, cryptoassets will often be held on capital account with the CGT regime applying.

The decision in *Seribu Pty Ltd and Commissioner of Taxation (Taxation)* [2020] AATA 1840, 111 ATR 882 (*Seribu*) reinforced the stance that bitcoin was not a foreign currency. However, El Salvador's decision in 2021, and that of other countries, to recognise bitcoin as legal tender creates renewed concern that bitcoin may fall within the foreign currency regime for tax purposes (Morton & Curran, 2022a). Despite the government's position that foreign jurisdictional activity would not alter the characterisation of bitcoin, legislation was introduced in late 2022 to return to the status quo: reaffirming the 2014 position (Chalmers & Jones, 2022). The legislation explicitly altered the definition of foreign currency within the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) by way of amending the definition of digital currencies within the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) as well as enabling further restrictions by way of including the power to make regulations to make further exclusions. Importantly, the amendment allows for centralised government-issued digital currencies to continue to fall within the foreign currency regime, therefore

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<sup>4</sup> *Income Tax Assessment Act 1997* (Cth) s 108-5(1)(a) (ITAA 1997). See also ATO, 'Income tax: is bitcoin a CGT asset for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997?', Taxation Determination TD 2014/26, [7].

<sup>5</sup> See ATO, 'Income tax: is bitcoin a "foreign currency" for the purposes of Division 775 of the Income Tax Assessment Act 1997?', Taxation Determination TD 2014/25. The mere fact that cryptoassets can be treated as equivalent to money or transacted with at a higher frequency than share investments, creates complexities in tax compliance. For example, where taxpayers donate cryptoassets rather than money and seek a deduction under Division 30, there is a need to assess factors such as length of time the assets have been held for, whether the assets were purchased or acquired in some other way as well as the value of the assets. Depending on the circumstances, the taxpayer may be denied a deduction, may be able to claim based on the lesser of purchase price or market value or require an ATO valuation (see Morton & Curran, 2021).

recognising a particular use of the technology for governments. The *Treasury Laws Amendment (2022 Measures No. 4) Act 2023* (Cth) was enacted in June 2023.

In contrast, for business taxpayers who hold cryptoassets for the purpose or sale in exchange in the ordinary course of business, those cryptoassets will be treated as trading stock.<sup>6</sup> However, not all business taxpayers will hold cryptoassets as trading stock: some may simply accept cryptoassets as a payment for goods and services (ATO, 2020). As per well-established principles, the value of property paid is taken in lieu of fiat currencies.

For those business taxpayers registered for GST, since an amendment to the definition of digital currency under section 195-1 of the GST Act in 2017, cryptoassets such as bitcoin, Ether and Litecoin are not subject to GST and hold an equivalence to money. In this instance, no additional GST consequences arise (or double taxation) occurs through using digital currency for the sale or purchase of goods and services. GST in these instances applies to the goods or services. Where the taxpayer is in the business of buying and selling digital currency, the transactions are treated as financial supplies. However, non-fungible tokens, stablecoins and initial coin offerings are not considered to be digital currency (ATO, 2023). As a result, such supplies can be either taxable, input taxed, or GST-free (ATO, 2023).<sup>7</sup>

Moreover, where an employer provides cryptoassets, such as bitcoin, to employees, only when it is part of a valid/effective salary sacrifice arrangement, the cryptoassets will be treated as a property fringe benefit (ATO, 2020).<sup>8</sup> Following ordinary principles therefore, consequential impacts occur with respect to relative liabilities for withholding and superannuation obligations, including whether the cryptoassets are included in the determination of ordinary times earnings (OTE) (Cameron, 2020; Bevacqua et al., 2022).

With continual advancements in the blockchain economy, the execution of complex smart contracts enables more complex property ownership, credentialing and governance. For example, traditional financial products are seeing their decentralised equivalents emerge (decentralised finance, 'DeFi'), and opportunities for 'liquidity providers' and 'yield farming' arising through a multitude of platforms. Similarly, decentralised autonomous organisations (DAOs) create new forms of decentralised entities and governance structures.<sup>9</sup> DAOs raise significant issues for legal, tax, and

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<sup>6</sup> ITAA 1997, s 118-25, sets aside the CGT provisions where the trading stock provisions apply. See ATO, 'Income tax: is bitcoin trading stock for the purposes of subsection 70-10(1) of the Income Tax Assessment Act 1997?', Taxation Determination TD 2014/27, [14].

<sup>7</sup> According to the ATO (2023), the supply of a stablecoin will be input taxed (unless GST-free), the supply of an NFT will be taxable (unless GST-free), the supply of an initial coin offering where a security or derivative, will be input taxed (unless GST-free) and the supply of an initial coin offering where it gives a right or entitlement to goods or services, will be taxable (unless GST-free). Note the issues around GST-free generally relate to the normal GST rules that sales to non-residents are GST-free rather than input taxed, which can be difficult to ascertain for the crypto-economy given the pseudo-anonymous nature of participants (ATO, 2018a).

<sup>8</sup> See also ATO, 'Fringe benefits tax: is the provision of bitcoin by an employer to an employee in respect of their employment a fringe benefit for the purposes of subsection 136(1) of the Fringe Benefits Tax Assessment Act 1986?', Taxation Determination TD 2014/28.

<sup>9</sup> Although there are numerous definitions of DAOs (Tse, 2020; Sims, 2019; Hassan and de Filippi, 2021), the Bragg Report describes DAOs as '... a new category of organisation that operates on decentralised blockchain infrastructure, whose operations are pre-determined in open source code and enforced through smart contracts': Senate Select Committee on Australia as a Technology and Financial Centre (2021, p. 75,

moral obligations (see for example, Tse, 2020; Sims, 2019; Hassan & De Filippi, 2021). The resulting tax implications raise further uncertainty and challenges for taxpayers and tax practitioners (see for example Pirovich, 2022). The Bragg Report (2021) highlights that the most common position is that DAOs are partnerships, which in turn raises issues for the infinite number of participants (therefore partners) that could not only be personally liable for the organisation's debts but also have moral culpability for the actions of such decentralised infrastructure.

Overall, the ATO has made it abundantly clear that it is concerned with the lack of compliance when it comes to the disclosure of crypto activities by taxpayers in their tax returns. Since 2019, the ATO has had cryptoassets within the data-matching program. The ATO (2019a) describes putting crypto activities under the 'microscope' as part of their data-matching program, writing to 100,000 taxpayers regarding their tax compliance on the matter. Their efforts have focused on gathering data from exchanges and the taxpayer.

Whilst also working closely with the Australian Transaction Reports and Analysis Centre (AUSTRAC) as well as the Australian Securities and Investment Commission (ASIC), the ATO has already broadened its data-matching program to include crypto activities from the 2014-15 income year (ATO, 2021; 2019b). The ATO obtains relevant data from designated service providers (DSPs) and matches that against taxpayer records (ATO, 2021). Numerous third party cryptoasset 'tax calculators' have been released to the market to assist both taxpayers and tax practitioners meet their compliance requirements (Bevacqua et al., 2022).<sup>10</sup>

A key narrative derived from the Bragg Report (2021) is the recognition of the benefits of robust policy reform in respect of digital assets to aid in consumer protection and the promotion of investment as well as market competition. The Report highlighted the worldwide challenges in establishing appropriate regulatory frameworks, whilst balancing dynamism and competitiveness to ensure Australia's place for digital business. It is also noteworthy that there is a broader narrative within international tax jurisdictions over the push towards global taxation regimes for a digitalised economy, including the introduction of taxing rights and a global minimum tax as part of the OECD/G20 BEPS two-pillar solution<sup>11</sup> (Bragg Report, 2021; see also, OECD, 2021; Bevacqua et al., 2022).

The Bragg Report (2021) tabled several recommendations for the government's consideration. Of particular relevance is Recommendation 6, recommending that the CGT regime be amended so that CGT events are only triggered when they 'genuinely result in a clearly definable capital gain or loss' in relation to digital asset transactions. This has been considered by many as lacking specificity – particularly what would be considered 'genuine' and 'clearly definable' (Morton, 2021). Whilst the government acknowledged the challenges with tax compliance, this recommendation was only *noted* (Australian Treasury, 2021). Instead, the Board of Taxation (BoT) was tasked with a broader review of the taxation of digital assets and transactions. At the time of writing,

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citing RMIT academics' submission [Allen, Berg, Davidson, Lane, MacDonald, Morton and Potts], Submission 67, p. 13).

<sup>10</sup> E.g., third parties include but are not limited to Cryptotaxcalculator.io/au and Koinly.io/au.

<sup>11</sup> Note that these particular issues are beyond the scope of this article.



Treasury is awaiting the final report from the BoT, which is now due to be released in February 2024.

Given the dearth of literature on blockchain relating to tax practitioners, there are calls to examine technological understandings and skill sets related to emerging blockchain technology (Schmitz & Leoni, 2019; Kend & Nguyen, 2020). This project responds to those calls as a second phase of research. We seek to better understand how tax practitioners are responding to this digital technology when providing blockchain-related tax advisory services to clients, particularly in being able to comply with codes of professional conduct such as the TASA Code.

### 3. TASA CODE OF PROFESSIONAL CONDUCT

There are extant concerns that emerging technologies can impact adherence to professional codes of ethics (see for example Nguyen et al., 2023; IESBA, 2022). Specific to Australian tax practitioners, since the introduction of the TASA Code, tax and Business Activity Statement (BAS) agents are required to comply with the key principles around (1) honesty and integrity, (2) independence, (3) confidentiality, (4) competence, and (5) other responsibilities: section 30-10 of TASA 2009. Within these key principles, there are 14 Code Items. The rationale underlying the TASA Code is to enhance tax practitioners' ethics and behaviour (Devos & Kenny, 2017). Both the public and client base expects a high level of service and attention to detail from tax practitioners (Devos & Kenny, 2017). If a practitioner breaches the TASA Code, penalties and sanctions may be imposed, such as the tax practitioner's registration being terminated (see for example Tax Practitioners Board (TPB), 2021a). Our study, therefore, focuses on how the following five key principles of the TASA Code are impacted by blockchain-related activities.

#### 3.1 Code Item 4: You must act lawfully in the best interest of your client

As part of the principle of independence, practitioners are required to follow Code Item 4.<sup>12</sup> The duty is comparable to that of a fiduciary duty; however, the relationship between the practitioner and client is not a fiduciary one (TPB, 2021a). The scope of a practitioner to act in the best interest is limited by the terms and circumstances of the engagement,<sup>13</sup> but is not wholly contractual (TPB, 2021a). In reflecting on relevant judicial decisions, the TPB (2021a, p. 13) summarises numerous characteristics as potentially relevant in determining the scope of the practitioner's duty, including whether there is a 'dependency or vulnerability on the part of the client that causes them to rely on the registered tax practitioner for the taxation services...'

As such, practitioners ought not be influenced by personal and other interests and are obliged not to promote personal interests nor personally profit without authorisation and accounting to the client (TPB, 2021a). Moreover, tax practitioners are only required to act in the best interest of the client to the extent that they act consistently with the law (TPB, 2021a; Explanatory Memorandum to the Tax Agent Services Bill 2008, p. 54). The Explanatory Memorandum to the Tax Agent Services Bill 2008 goes on to exemplify the balance between the client's best interests and contravening the law, in that whilst it may be perceived as being in the best interest to reduce a client's taxable

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<sup>12</sup> TASA 2009, s 30-10(4).

<sup>13</sup> E.g., via 'letter of engagement, report, advice or other communication' (TPB, 2021a, p. 14).

income, the tax practitioner cannot do so if it means claiming something that is not an allowable deduction (see Example 3.5 of the Explanatory Memorandum to the Tax Agent Services Bill 2008, p. 54).<sup>14</sup> The role of a tax practitioner is a critical element in a system of voluntary compliance (Marshall, Armstrong & Smith, 1998). Tax practitioners have a duty to both their clients and government to ensure accurate tax filing and administration of the law (Erard, 1993).

### **3.2 Code Item 7: You must ensure that a tax agent service provided on your behalf is provided competently**

The TPB (2021a) refers to competence, with respect to registered tax practitioners, as involving someone who is capable, fitting, suitable or sufficient to provide a tax agent service. Ultimately it requires someone with the skill, ability, and knowledge to be able to perform those services in a professional manner. The TPB (2021a) goes on to canvas the important principles which highlight the competence characteristic. These principles include the failure of a tax agent to comply with their own tax obligations, committing certain offences (including tax evasion) under the tax law, failing to complete and submit annual returns or even committing multiple less serious offences, which can all point to an agent not being a fit and proper person (TPB, 2021a).

An important aspect of competence for tax agents is that they must also operate within their level of expertise. In this regard, the Explanatory Memorandum to the Tax Agent Services Bill 2008 (para 140) indicates that if the work required of the tax agent is beyond their expertise, they should seek that expert advice or assistance or refer the work. (e.g., obtain a legal opinion). Whilst skill and knowledge can be gained through private study and research, the tax practitioner must be able to satisfy the TPB that they are competent to give the relevant advice (the Explanatory Memorandum to the Tax Agent Services Bill 2008, para 140).

There have also been numerous cases before the courts where the relevant principles of competence have been established and confirmed (TPBa, 2021). One important issue to reflect upon is the self-assessment nature of income tax compliance. With the purported accuracy of tax returns coming under question through the ATO audit process, for tax agents it is critical that they make sufficient enquiries to ascertain the taxpayer's affairs to confirm the correct application of the law at first instance.<sup>15</sup>

### **3.3 Code Item 8: You must maintain knowledge and skills relevant to the tax agent services you provide**

Section 30-10(8) of the TASA 2009 encompasses a very broad perspective and can be interpreted in a variety of ways:

The TPB is of the opinion that it requires tax practitioners to maintain 'continuing awareness, understanding and up to date knowledge of relevant, technical, legal and business developments' in their area of practice, to act diligently in accordance with applicable technical and professional standards,

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<sup>14</sup> This can be further illustrated in the case of *Burnett and Tax Practitioners Board* [2014] AATA 687; 99 ATR 456 (see Woellner, 2021, p. 480).

<sup>15</sup> See *Burnett and Tax Practitioners Board* [2014] AATA 687.

maintain knowledge and skills and an appropriate level, and exercise reasonable care in providing their tax services (Woellner, 2021, p. 485).<sup>16</sup>

Certainly, the challenge in running a practice and at the same time having to constantly update and maintain tax knowledge and skills makes it difficult for many practitioners. This is where the practitioner needs to be aware of their capacity and only provide services that they can confidently deliver. The obligation to stay up to date only applies to the tax area in which they are providing services. The availability and sophistication of modern technology assists practitioners (Woellner, 2021) in this regard; however, the onus is still upon them to adapt and change as required.

An example of the failure to stay up to date was illustrated in the case of *Comino and Tax Agents' Board of New South Wales* [2009] AATA 766, 77 ATR 595 (*Comino*). The tax agent had been convicted under section 8C of the *Taxation Administration Act 1953* (Cth) of serious taxation offences, for failure to lodge personal income tax returns and quarterly business activity statements. Handley DP and Creyke SM noted ([2009] AATA 766, [34], quoted in TPB, 2021a):

Mr Comino acknowledged that he had experienced problems with the introduction of the GST and that this had been a factor in the late lodgement of business activity statements. Given the importance of tax agents keeping up to date with the relevant law in order to fulfil their responsibilities in properly advising clients, Mr Comino's acknowledgement, while a frank admission, does not give the Tribunal confidence in his ability to keep abreast of the changes in the law, especially since the problems with business activity statements occurred in 2006/2007, and the introduction of GST occurred in 2000.

It is noted that the TPB Explanatory Paper indicates that where there have been major changes in law which do occur from time to time, that further training and continued professional education hours will be required.

### 3.4 Code Item 9: You must take reasonable care in ascertaining a client's state of affairs

Code Item 9 requires the tax practitioner to take reasonable care in ascertaining a client's state of affairs: sub-section 30-10(9) of the TASA 2009. This duty appears to reflect the common law duty, with an additional range of statutory consequences (TPB, 2019). Without a set formula to establish reasonable care, the TPB (2019) states that the starting point in this duty is to exercise professional judgment, utilising the practitioner's knowledge, skills, and experience.

This is a difficult proposition for tax practitioners as the concept and scope of 'reasonable care' is not readily amenable to precise or inflexible prescription.<sup>17</sup> Further the TPB (2019, para 8) guidance speaks of the standard of 'reasonable care' as that generally required of a registered agent who is a 'competent and reasonable person, possessing the knowledge, skills, qualifications, and experience that a registered agent

<sup>16</sup> The TPB also provides the rationale for the requirement that agents undertake prescribed continuing professional education (CPE) annually.

<sup>17</sup> See *Birdseye v TPB* [2021] AATA 1011 as cited in Woellner (2021, p. 487).

is expected to have, in the circumstances'. A key question is, how far should a tax agent go in gathering and confirming the taxpayer's information being true and correct?

The TPB (2019, para 17) provides the following answer, suggesting:

Code item 9 does not require registered agents to 'audit', examine or review books and records or other source documents to independently verify the accuracy of information supplied by their clients. However, there may be circumstances (see paragraphs 13 to 16) where a registered agent may not automatically discharge their responsibility in particular cases by simply accepting what they have been told by their clients.

They must make a reasonable enquiry which would be expected of them in their professional capacity.

This notion is further supported (as set out in TPB, 2019, para 9) by APES 110 Code of Ethics for Professional Accountants and APES 220 Taxation Services, where the Accounting Professional and Ethical Standards Board (APESB) indicated that professional competence and due care is fundamental and that:

This principle requires a member 'to maintain professional knowledge and skill at a level required to ensure that a client or employer receives competent professional services ... and act diligently in accordance with applicable technical and professional standards'. This requires, among other things, the exercise of sound judgment in applying professional knowledge and skill in the performance of such a service (TPB, 2019, para 9, citing APES 110, sections 100.5 and 130; APES 220, paras 3.11 to 3.17).

There have also been several cases which have demonstrated the consequences of tax practitioners failing to take reasonable care. In the case of *Su and Tax Practitioners Board* [2014] AATA 644, 2014 ATC 376, lodging tax returns based on fraudulent instructions without verifying client information was a clear case of lack of reasonable care. In further cases including *Logic Accountants and Tax Professionals Pty Ltd and Tax Practitioners Board* [2021] AATA 676, *Norman and Tax Practitioners Board* [2021] AATA 848 (*Norman*) and *Yvonne Anderson and Associates Pty Ltd and Tax Practitioners Board* [2020] AATA 4022, which involved taxpayers claiming work-related expenses, it was also evident that the tax practitioner had failed to take adequate professional care (Woellner, 2021). Failing to ask for substantiation of the claims made and a lack of time on behalf of the practitioner were just excuses and rejected by the AAT (see *Norman*) (Woellner, 2021).

### 3.5 Code Item 10: You must take reasonable care to ensure that taxation laws are applied correctly

Finally, Code Item 10 states that 'you must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client'.<sup>18</sup> Like Code Item 9, Code Item 10 does not extend the common law

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<sup>18</sup> TASA 2009, s 30-10(10).

duty where a tax practitioner provides advice; instead it establishes an additional range of possible statutory consequences under the TASA 2009 (TPB, 2017, para 5).<sup>19</sup>

An important aspect of this Code item is that it requires registered agents to take 'reasonable care' to ensure the correct interpretation and application of the law. Therefore, incorrect interpretations and/or applications of the law may not necessarily amount to a breach of the TASA Code (TPB, 2017, para 11). It is not possible for a tax practitioner to necessarily be able to ascertain the correct application of the law in every circumstance due to the volume and complexity and this is recognised. However, the TPB (2017) notes that if the tax practitioner applied the taxation laws incorrectly to the circumstances of a client and did not take reasonable care to determine the correct taxation treatment in the circumstances, this will likely be considered a breach of the TASA Code (see TPB, 2017, para 12).

In this particular case, the terms of the engagement letter under which the tax practitioner is operating are critical (Woellner, 2021). The level and scope of the advice needs to be clearly communicated at the outset. This would be evidenced in all communications including emails and telephone calls (TPB, 2017, paras 14-16). It also requires a practitioner to exercise a professional approach which typically involves not only referring to relevant legislation, cases and rulings but also seeking an opinion or legal advice where the situation is beyond their level of expertise (TPB, 2021a; Woellner, 2021).

#### **4. RESEARCH METHOD**

This exploratory study provides insights into the technological skills required by tax practitioners when providing blockchain-related advisory services to clients. This study applies a mixed-method approach (Carpenter et al., 1994), including semi-structured interviews to explore the state of play for practitioners (Phase 1), followed by a survey methodology to reaffirm interview themes developed (Phase 2).

##### **4.1 Semi-structured interviews**

In Phase 1 of this study, we conducted semi-structured interviews with 12 accounting and taxation practitioners to gain in-depth insights into the issues faced in the field broadly. Following Qu and Dumay (2011) and Richards and Morton (2020), the interview methodology allowed for interpretations and perceptions to be obtained that can be unique and sometimes incommunicable due to the social world of interviewees.

Interview participants were identified through their roles as Australian accounting and tax practitioners working in Australian advisory service firms. We used professional networks of the researchers to identify participants. Interviews were conducted and recorded in Microsoft Teams between August 2021 and October 2021. The same researcher led all interviews to ensure consistency (Devos et al., 2023b). Interviewees were provided with the interview guide and consent forms ahead of time. Interviewees were given the opportunity to review their de-identified transcription. Interviewees received no reward for participation.

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<sup>19</sup> See TPB (2017, paras 18-20) for more information on the consequences for failing to comply with Code Item 10.

We interviewed 12 participants with 75% and 25% of interviewees being male and female respectively and the majority aged between 40-49. We note that there is a high representation from Victoria, as well as a low representation of female participants (25%). The latter is comparable to prior research (see for example Devos & Kenny, 2017; Devos et al., 2023a) and more generally the TPB Annual Report statistics on the tax profession (TPB, 2021b), although noting Phase 1 interviewees represent not only the tax profession itself, but the broader business sector. Table 1 summarises interviewee participants.

**Table 1: Interview Participant Overview**

| <b>Interview Number</b> | <b>Duration (HH:MM:SS)</b> | <b>Age Range</b> | <b>Gender</b> | <b>Role*</b> | <b>Affiliation</b> | <b>Location</b> |
|-------------------------|----------------------------|------------------|---------------|--------------|--------------------|-----------------|
| 1                       | 00:32:22                   | 40-49            | Female        | Partner      | CAANZ              | VIC             |
| 2                       | 00:32:04                   | 40-49            | Male          | Practitioner | CPA                | VIC             |
| 3                       | 00:51:15                   | 40-49            | Male          | Consultant   | Other              | VIC             |
| 4                       | 00:17:38                   | 60-69            | Male          | Practitioner | Multiple           | VIC             |
| 5                       | 00:39:30                   | 40-49            | Male          | Practitioner | Multiple           | VIC             |
| 6                       | 00:21:35                   | 60-69            | Male          | Practitioner | IPA                | VIC             |
| 7                       | 00:56:03                   | 40-49            | Male          | Practitioner | CAANZ              | QLD             |
| 8                       | 00:35:48                   | 30-39            | Male          | Manager      | Other              | NSW             |
| 9                       | 00:26:11                   | 18-29            | Male          | Manager      | Other              | VIC             |
| 10                      | 01:15:57                   | 50-59            | Female        | Practitioner | Multiple           | VIC             |
| 11                      | 00:34:20                   | 30-39            | Male          | Practitioner | CAANZ              | VIC             |
| 12                      | 00:23:31                   | 30-39            | Female        | Practitioner | Multiple           | WA              |

\*Generic roles have been used, such as ‘Partner’ and ‘Manager’.

The interviews focused on open-ended questions covering (i) the practitioner’s role; (ii) the blockchain-related activities being undertaken; (iii) regulation, and (iv) the technical skills and knowledge required. Interview data were then coded and analysed. From this, a set of propositions were established forming the basis of the online survey instrument to further explore themes across crypto-economic activities and the role of tax practitioners pursuant to the key TASA Code items (as outlined in section 3).

## 4.2 Survey instrument

Phase 2 of this study involved the use of a survey instrument to tax practitioners across Australia to examine and test the findings (Nardi, 2018; Devos & Kenny, 2017; Devos et al., 2023a) illuminated from Phase 1 of this project. In addition to demographic information with respect to the tax practitioners, information with respect to clients’ blockchain-related activities and the level of agreement that the current regulatory framework is fit for purpose, a set of propositions were developed covering themes across the TASA Code (practitioner skills and competencies, applying the law and acting lawfully and ascertaining client's affairs): see Appendix A. These propositions were tested using 5-point Likert scaling (strongly agree to strongly disagree). Tax practitioners also had the opportunity to comment at each stage of the survey, leading to both quantitative and qualitative data collection.

The electronic survey was distributed to Australian tax practitioners of at least 18 years of age, who have had at least one client who has undertaken activities in the crypto-economy. In doing so, we use a form of purposive sampling, where the recruitment of participants reflects the knowledge about the area of investigation.

Prior research shows that response rates can be low (Devos & Kenny, 2017; Attwell & Sawyer, 2001; Marshall et al., 2006; Gupta, 2015). Due to the emerging nature of blockchain technology, unknown statistics on tax practitioners with clients that undertake blockchain-related activities, as well as the continued impacts of the Covid-19 pandemic on response rates (as seen in Devos et al., 2023a) we anticipated a lower response rate compared with prior research involving tax practitioners. In response, we ensured an expansive dissemination program to recruit sufficient participants to meet a minimum viable threshold.

Dissemination of the survey instrument included the researchers' professional networks, including direct email to existing contacts held by researchers, via LinkedIn posts and Twitter tweets etc.; professional body e-newsletters and/or emails, at their discretion; and publicly listed tax practitioner emails, obtained from online yellow pages and tax practitioner websites.

The survey was open for an extended period, between July 2022 and November 2022. A total of 281 responses were received. On reviewing survey data, 52 responses were eliminated due to:

- (i) not progressing, previewing the survey only (n = 3);
- (ii) not meeting the requirements of the survey, established via the screening questions (n = 16), and
- (iii) insufficient progress (less than 10% complete) or duration (less than 120 seconds) (n = 33).

The final sample size forming the basis of the analysis is therefore 229: Table 2. Of the final sample, missing data ranged from 1-59, resulting in observation-sizes per question ranging between 170 to 228.

**Table 2: Survey Sample and Elimination Spread**

| Name of variables    | Elimination reasons | Number of dropped records | Sample size |
|----------------------|---------------------|---------------------------|-------------|
| Survey total         |                     |                           | 281         |
| Distribution channel | Preview             | 3                         | 278         |
| Screening questions  | 18 & agents         | 2+14                      | 262         |
| Progress & duration  | < 10% or < 120s     | 33                        | <b>229</b>  |
| Total                |                     | 52                        | <b>229</b>  |

Of the practitioners surveyed, most practitioners are aged between 30 and 60 years (76%), with slightly higher representation being male (58%) compared to female (41%). The majority are in New South Wales (40%), followed by Victoria (20%) and Queensland (18%): Table 3 in Appendix D. With respect to their time spent on tax-related matters, more than half of participants (54%) spend 75-99% of their time on tax-

related issues. Whilst participants are frequently associated with numerous professional associations, the most frequent associations were Chartered Accountants Australia and New Zealand (CAANZ) (cited 104 times), CPA Australia (cited 82 times) and The Tax Institute (TTI) (cited 43 times).

Moreover, the majority (49%) have 11-25 years of tax experience. The majority are also either sole practitioners or from small firms of two to five partners (74%). For the clientele tax practitioners attend to, whilst it is not entirely realistic to silo practitioners' client bases into a single category, most participants responded that their main clientele were SMEs (70%), followed by employed persons (16%) and self-employed persons (8%).

### 4.3 Limitations

The sample of tax practitioners was not totally representative of the wider practitioner population which makes it difficult to extrapolate the results. Given the focus is on those practitioners with clients who have participated in the crypto-economy, purposive sampling inherently restricts generalisability. In addition, a limitation of self-reports is the possibility of non-response bias and in this case the issue of socially desirable response bias of the tax practitioners (Devos & Kenny 2017). Inaccurate and incomplete responses impact the results as does the problem of honesty and misinterpretation of questions (Roberts, 1998). Nevertheless, to address the presence of non-response bias the survey responses along with the interview data allowed for meaningful analysis which provided some assistance in improving the validity of the overall findings.

Furthermore, the technology and related activities are both evolving at a significant pace and subject to volatility (bear, bull market shifts), and therefore we recognise that the timing of interviews and survey dissemination respectively may have a limiting effect on the broader generalisability.

More generally, this research focuses on tax practitioners. As such, whilst there is an increasing number of taxpayers lodging their tax returns using myTax (e.g., see Harb, Morton & Narayanan, 2023), they are beyond the scope of this study.

## 5. FINDINGS AND DISCUSSION

### 5.1 The crypto-economy and client activities

We acknowledge from the outset that the level of participation and awareness differs between practitioners with respect to clients' crypto-related activities. Both interviews and surveys reveal a diversity in practice. As such, in contemplating the technological understanding and skill sets needed by practitioners to service client who make use of blockchain technology (Schmitz & Leoni, 2019), we inherently recognise a continuum from the crypto-economy having limited to no impact on practitioners and/or their clients to those who are at the forefront of servicing crypto-focused clients. This is similarly impacted by the level of complexity and/or frequency of those crypto activities. Thus, consideration of terms and circumstances of engagement are critical (TPB, 2021a) as well as the generalisability of these findings.

For interviewees, 2021 appeared to be a turning point, with a 'wave' of crypto activity becoming evident for tax practitioners. The stereotypical 'crypto-client' is predominantly the younger demographic – mainly those in their 20s, often male and



often more likely to take risks.<sup>20</sup> Whilst their activities can be lucrative – where the client knows what they are doing – many practitioners describe client activity as ‘dabbling’, equivalent to gambling:<sup>21</sup>

...But this last tax season, yeah, I'd probably say 20% of my returns, people are dabbling. And they're not dabbling big bucks, right? ... you can hear the frustration in my voice. They're doing like \$10 trades... And to me, they're buying it like a Tatts lotto ticket, but that's just my interpretation, which makes it very frustrating for me as a practitioner to say, ‘Do you know each one of these is a separate CGT event and different taxing point for you?’. [Interviewee]

Whilst there are opportunities in the space, it is not necessarily a ‘gold rush’ for all participants within the crypto-economy and substantial concern exists over the lack of regulation and uncertainty. There is incredible uncertainty stemming from risks, volatility, regulation, market immaturity and scams. Moreover, the pace at which the crypto-economy is moving is high – comparable to when the internet came along.<sup>22</sup>

Whilst it is considered to have potential, the space is described as noisy, full of superlatives and vested interests:

... [O]bviously people are very tied to the specific assets that they invest in. And if there's negative things to be said about some of those assets, again, they can be quite aggressive or really forceful on things. And similar if they have a specific asset that they are a massive fan of. So I see this particularly in the Bitcoin space, they then really talk down the other assets that actually are providing potentially real world utility, strong business backing, strong real world value to their customer base and doing that through the decentralisation of a token, but will be considered, by certain people, as you'll hear the terms like ‘shit coins’ thrown around all the time. And it's often used because I'm trying to push a token that I'm heavily invested in or that I believe in, and I don't want all these others coming through. [Interviewee]

The crypto-economy as a result is aiding the deeper analysis of activity and investment – beyond that of traditional or conventional financial activities; however, to be able to do so requires adequate technical skills and education. As one interviewee described reflecting on the exposure to original tax issues being faced, ‘*sometimes you don't know what you don't know*’ [Interviewee]. Another summed it up as:

...[F]irstly, understanding the practical regime within which you're operating, what is blockchain, how does it operate? Secondly, applying the tax law to an area that is unknown. And thirdly having a system to track... [Interviewee]

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<sup>20</sup> This raises an important consideration of the taxpayers who seek the assistance of tax practitioners or in contrast self-lodge via myTax, the frequency for the latter of which is increasing (see Harb et al., 2023). Whilst over 1 million taxpayers are expected to be lodging tax returns with crypto activities in 2022 (Australian Treasury, 2023), what proportion will do so via a tax agent?

<sup>21</sup> This is consistent with recent UK research that indicates that whilst the crypto-economy is becoming increasingly mainstream, it is most bought for gambling purposes: Financial Conduct Authority (2021) cited in Australian Treasury (2023).

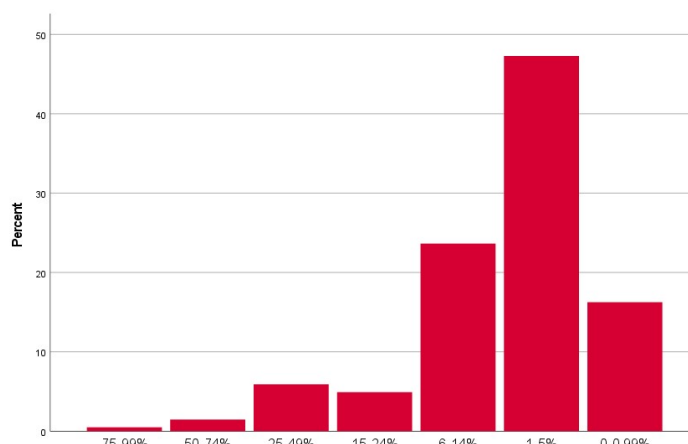
<sup>22</sup> A similar position was noted by Australian Treasury (2023); see studies by Iansiti and Lakhani (2017) and De Filippi and Wright (2018).

Taxation issues span a variety of issues, including novel issues, the complexity in understanding what the product attributes are and understanding the scope of engagement (and when a lawyer is needed, when to ‘lose’ clients, or not to engage).

### 5.1.1 *The impact of the crypto-economy on tax practitioners*

Surveyed tax practitioners indicated most often that they are spending 1-5% of their tax-related work time on blockchain-related matters (47%), followed by 6-14%: Figure 1. Whilst this indicates for most tax practitioners that crypto clients represent the minority of workload, this is not unexpected. For example, if we take the statistic that 25% of Australians hold or have held cryptoassets (Bragg Report, 2021 or Australian Treasury, 2023 data on expected number of impacted tax returns), this will not be dispersed equally across all tax practitioners due to a multitude of demographic factors, as well as recent ATO data<sup>23</sup> on the dispersion of taxpayers lodging by way of tax agents (64%), self-lodging via myTax (36%) and paper-based returns (0.6%) for the 2021 tax year (see for example Harb et al., 2023).

**Fig. 1: Percentage of Tax-Related Work Time Spent on Blockchain-Related Activities**



Note: 26 participants did not disclose. Percentages are based on those who responded to this question.

Similarly, surveyed tax practitioners have indicated that their clients are spending 1-5% of their taxable income (33%) – or more broadly that the majority are spending up to 14% of their taxable income (65%) – on blockchain-related activities: shaded rows in Table 4.

<sup>23</sup> Available at: <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Taxation-statistics/Taxation-statistics-2020-21/?anchor=IndividualsStatistics#IndividualsStatistics>.

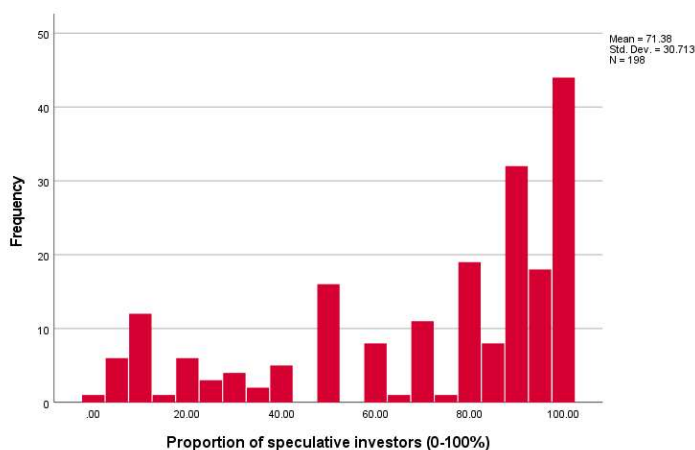
**Table 4: Proportion of Taxable Income Clients Are Spending on Blockchain-Related Activities**

| Average Proportion              | N          | %            | Cumulative % |
|---------------------------------|------------|--------------|--------------|
| 100%                            | 1          | .5           | .5           |
| 50-74%                          | 2          | 1.0          | 1.5          |
| 25-49%                          | 7          | 3.5          | 5.0          |
| 15-24%                          | 19         | 9.5          | 14.5         |
| 6-14%                           | 40         | 20.0         | 34.5         |
| 1-5%                            | 66         | 33.0         | 67.5         |
| 0-0.99%                         | 23         | 11.5         | 79.0         |
| Prefer not to say/I am not sure | 42         | 21.0         | 100.0        |
| <b>Total</b>                    | <b>200</b> | <b>100.0</b> |              |

Note: 29 participants did not disclose. Percentages are based on those who responded to this question.

We also note that whilst most surveyed tax practitioners describe their main client base as SMEs, tax practitioners have indicated that 71% of their clients would be described as speculative investors (median = 85%): Figure 2. This somewhat reinforces the nature of client activities outlined in section 5.1 (see also Financial Conduct Authority, 2021; Australian Treasury, 2023). However, for many, despite the speculative nature, we posit that the proportion is somewhat comparable to the superannuation guarantee contribution rate (10.50% for 2023), thus it cannot be considered necessarily trivial. The label of speculation or gambling should not be construed as trivial.

**Fig. 2: Proportion of Clients Characterised as Speculative**



Note: 31 participants did not disclose.

The five most common blockchain-related activities practitioners reported their clients to be undertaking were concerned with: (1) cryptoasset investment and/or trading, followed by (2) moving cryptoassets between wallets and /or exchanges; these were most notable in the findings, followed by (3) crypto staking; (4) crypto as trading stock and (5) airdrops: Figure 3 in Appendix D (see also Table A2 in Appendix B).

Consistent with this was the five most common tax issues arising from client activities being: (1) whether the activity falls within ordinary income or CGT provisions; (2) cryptoasset trading (capital account); (3) record keeping; (4) cost base valuation, and (5) cryptoasset trading (revenue account) and investor or trader characterisation: Figure 4 in Appendix D (see also Table A3 in Appendix C).

As can be seen, there are inherent overlaps across common categories of tax issues. We see strong foundations with respect to the capital-revenue distinction (do the CGT provision apply?), followed by specific sub-issues therein (for capital characterisation: determining Australian dollar cost base, gains, discounting, etc.; for revenue characterisations: issues around employee benefits) and with overarching concerns over appropriate record keeping and substantiation, as well as managing client engagement.

As will be elucidated in the subsequent sections, tax practitioners are finding the compliance work particularly time consuming without the commensurate benefit. In setting the scene for findings set out next, it is important to note that not all clients are considered to fully understand the activities they pursue within the crypto-economy. Combined with problematic tracking and record keeping, tax practitioners are therefore being placed in a challenging position to ensure tax compliance requirements are met, including with respect to the professional conduct.

Assistance from third party applications and exchanges does not resolve in full the challenges practitioners and taxpayers face. Critically, whilst blockchain technology is described as an open, transparent ledger technology, for the purposes of tax compliance, a gap remains. For practitioners to attempt to 'close the gap', a significant compliance burden on both practitioners and taxpayers is experienced. There is a challenge with respect to time and value, the reliability and availability of information, the capacity for clients to provide adequate information and to meet substantiation requirements.

## 5.2 Regulation and guidance: fit for purpose?

In engaging with practitioners, we are finding there is a genuine concern that current tax laws and current guidance are not fit for purpose for the digital economy. This is negatively impacting not only taxpayers but tax practitioners.

Interviewees indicated that existing tax law is '*inadequate*', '*lacking*', '*unclear*', '*murky*', and '*emerging*'. Similarly, interviewees also viewed ATO guidance as '*inadequate*', '*too broad*', '*not timely*', '*too simplistic*', '*not definitive*', '*not responsive*', '*quite negative*'. Moreover, according to some interviewees, the ATO lacks appropriate communication and the prefill data is not sufficiently accurate. These perceptions extend to the guidance that PBRs can offer, due to the concern over the level

of redacted fact patterns. This is despite the acknowledgement that PBRs are specific to applicants only and do not yield protection nor precedential value.<sup>24</sup>

For basic activities, interviewees indicated that the current regulatory framework is workable. However, as the complexity increases, the law begins to stretch. There is a significant cost-benefit issue playing out. This creates a high level of uncertainty, as one interviewee summed up on the point of PBRs:

...[T]here's so much of the fact patterns being redacted that we can't even make any reasonable decisions on that even. So where does that leave us with providing advice to our clients, which is ultimately what we're talking about here? What are we doing with giving advice to our clients in these spaces? Because there is so much uncertainty. So then what do we do? We go for a PBR for everyone. [Interviewee]

Practitioners are seeking all forms of guidance to support their understanding and provision of advice to clients in this space.

The consequences of a slow moving, conservative government includes the potential for Australians to be missing out (opportunity cost, economic activity going elsewhere), and impact on reputation and credibility of market, security, and trust. Such perspectives reflect current observations by Treasury (2023). However, cautiousness is vital – otherwise there is a fundamental risk of enacting problematic or rushed solutions. Reflecting on Bentley (2019) we need to ensure taxpayer rights, equity and fairness are maintained. A part of this is technological neutrality and understanding the extent of ‘novel’ within the crypto-economy. There is lag between digital transformation and complex regulation (IGT, 2018) for a reason.

Similarly, we find that of the surveyed tax practitioners, the majority found that neither the existing tax law (legislation, precedent) (63.5% disagree/strongly disagree), current ATO guidance (56.2% disagree/strongly disagree) nor prefilling data (72.4% disagree/strongly disagree) are fit for purpose with respect to crypto-related activities: Figure 5 and Table 5 in Appendix D.

Record and data capturing are a fundamental challenge to tax practitioners. Tax compliance becomes particularly onerous when the clients do not necessarily understand the consequences of their activities, nor are prepared to pay for the time it takes to make sense of these. The timing of the ‘crypto winter’ meant that many indicate higher levels of losses are either being experienced or anticipated to be experienced through 2023.

Whilst for more simple activities there may be less problems with tax compliance, most surveyed tax practitioners have an issue with the current state of affairs. There is a real concern of non-compliance, whether intentional or unintentional:

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<sup>24</sup> Note it is acknowledged that PBRs can only be relied on by the applicant it relates to and not by tax practitioners or taxpayers: See ATO, ‘Publication of edited versions of written binding advice’, Law Administration Practice Statement PS LA 2008/4. However, with the publication of PBRs, as reflected in this project, tax practitioners can view these to gain insights on particular issues with the awareness that versions do not reflect changes in law or changes in the way the Commissioner applies the law (ATO, 2018b). The ATO is clear that they cannot be relied upon as precedent or used to determine how the ATO applies the law with no protection and contents not binding on the Commissioner (ATO, 2018b).

Coordinating accurate tax data without using a specific software AND having someone knowledgeable to review the data is next to impossible. We have picked up significant errors by other accountants attempting to prepare this information manually. Accounting for crypto NFT businesses holding as trading stock and with high volume of trades/transactions from NFT secondary sales is very difficult and time consuming! [Surveyed Tax Practitioner]

One avenue of improved certainty and guidance is with respect to increasing the prefilling data with respect to crypto-related activities. When it comes to prefilling data, it is important to clarify that there is merely a statement to confirm ‘*your client has some cryptocurrency transactions*’ [Surveyed Tax Practitioner]. If prefilling data was more detailed, that would assist tax practitioners in ensuring complete records are being provided and therefore more effective tax compliance. This is particularly the case where clients are reported to have denied disposals have occurred or where they ‘forget’ to provide information until queried:<sup>25</sup>

[The] ATO provide absolutely no details in prefilling data. Many taxpayers engage in crypto trading as a kind of sport or gambling activity – trying to convert transactions – if there are any records – into capital gains or losses in \$A is in many cases a practical impossibility. [Surveyed Tax Practitioner]

More generally, concern was raised that ATO data collection is too narrow, focusing mainly on exchanges. Sufficiently broad ATO data collection, third party calculators and exchange reports are considered an important component of tax administration, particularly where tax practitioner fees are creating key challenges. In this respect, regulatory requirements could focus on standardising reporting:

Based on the onerous reporting requirements one would have expected better transaction tracking to be pushed directly from the ATO, giving taxpayers an effective and endorsed way of providing data is important to effective tax administration. [Surveyed Tax Practitioner]

The time taken to review and calculate the CGT liabilities associated with blockchain activities is extensive. Our clients do not understand the complexities and as a result, do not appreciate the fee we raise for our time. A common ground arrangement is for them to use a crypto tax calculator, and provide the reports to us to review and assist with the calculations. [Surveyed Tax Practitioner]

There was also recognition of the challenges in any prefill or report displaying the correct information: ‘*collection of everything would be way too cumbersome*’ [Surveyed Tax Practitioner]; ‘*Prefilling data is pointless and creates a question to work out a tax income which 90% is a loss and is prohibitively expensive to work out*’ [Surveyed Tax Practitioner].

Along with data collection and reporting, tax practitioners indicated that there needs to be guidance that is both clear and practical. The broad guidance lacks practical, specific examples to aid in the compliance process, which can be complex and cumbersome. Guidance for particular regulatory contexts is not well developed, such as guidance specific to self-managed superannuation funds (SMSFs) and what investments are

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<sup>25</sup> Issues around clients providing adequate information are considered further in section 5.5.

permitted. Fundamental to this is the complexity in the crypto-economy, which ‘*ATO information is only just starting to recognise...*’ [Surveyed Tax Practitioner].<sup>26</sup>

Very little practical examples are floating around to confirm the ATO guidance is correct at law. Current ATO guidance doesn't dive into specifics of the various activities and broadly just applies CGT principles and doesn't really expand on the income side. [Surveyed Tax Practitioner]

However, there is concern that web guidance, which is more readily updated, does not have the same standing as formal ATO guidance such as tax determinations. Moreover, the alignment between tax determinations, web guidance and PBRs was raised:

For example, PBRs that state NFTs are like Bitcoin therefore the Bitcoin guidance applies shows their lack of interest in flexing their interpretations to make things work. [Surveyed Tax Practitioner]

The ATO needs to expand the definition of a hobby in my opinion. [Surveyed Tax Practitioner]

There is a clear dichotomy, in that sufficient time is really needed for appropriate reform; however there is urgent need now for compliance solutions and or transitional support. Thus, there is a clear delineation between the burden from an administrative perspective and tax reform perspective:

While the existing regulation and guidance is incredibly limited, I would also prefer regulators to move slower and more informed in order to achieve broad, well-considered and reasonable legislation instead of rushed and uninformed bad legislation. [Surveyed Tax Practitioner]

We reflect here on the notion presented by Flanagan and Clarke (2007) that rules and regulation can provide necessary but not sufficient conditions for practice. For practitioners to interpret rules effectively, they are obliged to develop both sound ethical judgment and technical skills (Cheffers & Pakaluk, 2005). Reluctance combined with the need to revert to superiors has been noted (Leung & Cooper, 1995). What is observed with respect to the crypto-economy is the consideration of the tax profession as a holistic system<sup>27</sup> – bringing together technological advancements and key stakeholders to enable an effective system to achieve the required outcomes of the tax system.

We now outline findings with respect to tax practitioner skills and competencies.

### 5.3 Perspectives with respect to tax practitioner skills and competencies

In engaging with tax practitioners via electronic survey, we tested a set of propositions based on interview data findings with respect to the impact of blockchain-related client activities and tax practitioner skills and competencies: Figure 6 and Table 6 in Appendix D.

Related to our findings with respect to the ATO guidance being fit for purpose, we find that the lack of blockchain-related guidance is making it difficult for tax practitioners to

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<sup>26</sup> This is despite Australia's standing with respect to guidance being issued: see section 2 of this article.

<sup>27</sup> Similar considerations are noted regarding the TASA Code in Devos et al. (2023a; 2023b).

comply with the TASA Code (67.8% agree/strongly agree). With this in mind, we reflect upon the distinct sets of knowledge and/or skills between taxation and blockchain technology among tax practitioners and clients. Most surveyed practitioners agree that there can be a knowledge and/or skills imbalance, in that clients may be experts in blockchain and practitioners in taxation, however the two can be difficult to reconcile (75.8% agree/strongly agree). However, from the qualitative comments we received and discussed, a strong theme is that tax practitioners recognise that clients delving into the crypto-economy are not necessarily experts in blockchain nor understand the ramifications of their activities therein. There is a strong theme, therefore, that when it comes to tax compliance – non-compliance may not be intentional.

Flowing from this we find that substantial agreeance over the balance needed in understanding blockchain technology and/or blockchain terminology, whilst being able to communicate tax technical to clients (88.7% agree/strongly agree). Reflective of this was the concern that often the tax practitioner may be the last ‘to know’ in respect to educating the client and being reactive – as opposed to proactive. This fundamentally goes to the role of the tax practitioner with respect to the crypto-economy.

Key knowledge in blockchain technology and how it works is generally seen as a necessary for tax practitioners to be able to apply tax principles (71.6% agree/strongly agree). This proposition was particularly strong for the age group 30-39 (80.5% agree/strongly agree). Tax practitioners mostly agree that they do not necessarily have adequate skills and/or knowledge in blockchain technology (78.5% agree/strongly agree). Independent investigation and ‘hands-on’ experience in blockchain technology was found to be valuable for professional judgment and being confident in applying the tax law correctly (76.4% agree/strongly agree). This is critical in that practitioners also find it to be challenging to upskill in blockchain and taxation (76.9% agree/strongly agree). Opportunities for hands-on experience therefore may assist in the necessary skills development.

Inherently, crypto-economic activity can be described as a niche area with respect to compliance. Despite this, however, we present evidence that without adequate experience and understanding of this space, there is a genuine risk to tax compliance.<sup>28</sup>

When tax practitioners don't have experience with crypto they are ignorant to the tax complications and calculate CGT based on proportion of AUD value withdrawn opposed to calculating CGT on each trade as it relates to the AUD value at the time of the trade. [Surveyed Tax Practitioner]

Very niche industry that has dragged into many unsophisticated investors where both the practitioner and the client don't understand what they are doing. [Surveyed Tax Practitioner]

In my experience the lack of knowledge in tax practitioners is a problem. They don't understand the complexities involved so just take the information at face value without research or ensuring all underlying data has been captured. [Surveyed Tax Practitioner]

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<sup>28</sup> Therefore, reinforcing the call by Schmitz and Leoni (2019) with respect to examining the skill sets required by practitioners and the relevance of government resources examining the crypto-economy (Treasury, Board of Taxation).



These perspectives echo the Explanatory Memorandum to the Tax Agent Services Bill 2008 in that tax practitioners must operate within their level of expertise. If the work required is beyond this, they should seek expert advice, or at a minimum gain that skill and knowledge through private study and research. This returns to the issues of the terms and circumstances of the engagement (TPB, 2021a). Whilst Woellner (2021) highlights the availability and sophistication of modern technology in assisting practitioners, for the crypto-economy the technology is the central focus thus creating the challenges to ensure awareness and understanding, challenging the notions of relevant technical, legal, and business developments.

Moreover, we reflect on Handley DP and Creyke SM in *Comino*<sup>29</sup> on the issue of the introduction of the GST system, the importance of keeping up to date and fulfilling responsibilities is critical. Without such up to date knowledge, there is a lack of confidence in the tax practitioner's ability. Inherently, any new change or novel development that relates to a tax practitioner's services can require further training and continued professional development.

We do however note that whilst we see strong agreeance, it is recognised that not all practitioners perceive crypto activities as problematic from a tax compliance point of view. Perspectives can range from '*monumental*' to '*simple*' (albeit time consuming): '*Principles may be fine for 1 or 2 trades; not scores of trades*'.

This may be reflective of the variety and volume of crypto activities being undertaken and therefore presented to practitioners; however one school of thought presented is that practitioner time being spent on crypto-economic activities may play a role:

Blockchain Technology and Taxation knowledge aren't difficult to reconcile where the accountant has a strong knowledge of the technology and the applications; as with any client relationship it's about the ability to relate to the client on their level. [Surveyed Tax Practitioner]

One respondent noted that knowledge of the crypto-economy gives an advisor an *edge* but is not *necessary*. Moreover, reflective of other grey areas of tax law, it is about taking a reasonably arguable position:

It is likely that, like other investment options, knowledge of how the underlying technology works can be helpful and provides an edge when advising but is not necessary for the bulk of the tax work involved. [Surveyed Tax Practitioner]

... [A] lack of guidance doesn't mean I can't advise what I think the correct position is – if ultimately a different view is taken by the ATO or courts I just need to be able to show that the position taken was not unreasonable. [Surveyed Tax Practitioner]

To some, it is understanding the '*lingo*' of the crypto-economy.

Despite this, the strong findings support the notion that the impact of the crypto-economy with respect to tax practitioner skills and competencies is a genuine concern. Like all areas of the tax profession, there is a constant need to update knowledge; however the challenge in appropriate training and education opportunities on this area

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<sup>29</sup> See section 3.3 of this article.

is noted. The profession is calling for training and guidance and is raising the concern that for the crypto-economy, there are significant shortfalls. This is particularly the case given the vast array of activities emerging – *‘it is a whole field of knowledge in itself’* – which evolve and change at a fast pace:

I have been immersing myself to gain knowledge due to clients developing a DAO but each seminar I attend seems to be the same people saying the same things as no real answers from Aust govt. [Surveyed Tax Practitioner]

One area of concern persistently raised relate to SMSFs. It is therefore not surprising we are seeing a small cohort of practitioners dedicating their practices to the crypto-economy – to gain that ‘edge’. This reflects a contrast between those arguably more proactive or embedded within the crypto-economy and with those awaiting guidance from key stakeholders (i.e., reactive to professional bodies, CPD providers, ATO etc.):<sup>30</sup>

If practitioners want to practice in this area of tax, they need to want to educate and do professional learning in this area. Very easy to do, just need to want to do it. [Surveyed Tax Practitioner]

As part of this, practitioners rely on professional networks for support and guidance. This is particularly pertinent when there is general agreeance over the benefit of practical, hands-on experience, such as practitioners describing that *‘in order to understand it, I had to open a trade account myself’* or *‘Crypto is a nightmare for tax practitioners who have not participated in it themselves’*. However, this is a controversial space.

We also reflect on the newness for tax practitioners in engaging clients in this space. Accuracy or issue can often only be deciphered through audits, penalties, and the courts (see for example, TPB 2021a as detailed in section 3.2 of this article). Perspectives here are self-reported and thus are inherently limited by response bias. Part of this is the uncertainty practitioners may feel on the future unknowns regarding audit of crypto clients. Fundamentally, this interrelates to the role of the ATO in administering the law and clarity around guidance.

Reiterating findings presented in the previous section are calls for simplifying compliance, as well as the provision of practical guidance. As one practitioner noted, *‘it is also hard to find a balance between reconciling crypto transactions correctly for client and keeping the cost low for the client’* [Surveyed Tax Practitioner]. Compliance is prohibitive due the time necessary. Reflective of the unsophisticated investors active in this space, client activities have been described as otherwise simple.

The concern that arises from this, is the risk of superficiality. Some strong opinions are noted here:

From my experience with colleagues – there is a large knowledge gap. Many have no ideas of crypto asset treatments. I am concerned for those who only do the basic reading of what the ATO has put out there and don't delve into the

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<sup>30</sup> This is somewhat unsurprising given Leung and Cooper (1995) on the reluctance of accountants to resolve ethical issues and referring to superiors for consultation. Here, the effectiveness is perceived as ethical judgment combined with technical skills (see Cheffers & Pakaluk, 2005) – the latter the most challenging aspect and in need of confirmation. For those more knowledgeable, the greater competencies and skills enable ethical decision-making despite the uncertainties in the interpretation of the law.

transactions. Relying on client's downloaded csv files is definitely not sufficient! [Surveyed Tax Practitioner]

For anyone but the most basic blockchain investor (i.e., has used a centralised exchange only) most tax practitioners will not have the sufficient industry understanding of the various mechanics of blockchain tools, strategies and transactions to adequately advise clients in this space. [Surveyed Tax Practitioner]

We now present findings with respect to tax practitioners applying the law.

#### 5.4 Perspectives with respect to tax practitioners applying the law

In engaging with tax practitioners via an electronic survey, we tested a set of propositions based on interview data findings with respect to the impact of blockchain-related client activities and tax practitioner applying the law: Figure 7 and Table 7 in Appendix D.

Consistent with findings with respect to having the knowledge and skills required to comply with the TASA Code, the lack of blockchain-related guidance makes it difficult for tax practitioners to comply with the law (72.3% agree/strongly agree). Whilst we find that there is an indication that basic activities are not so problematic, transactions on blockchain are creating unique tax issues that tax practitioners have not necessarily been exposed to before (80.1% agree/strongly agree).

Critically, taking reasonable care to ensure that taxation laws are applied correctly requires more than using the summary crypto-currency reports, they cannot replace professional judgment (80.1% agree/strongly agree).

Moreover, as the findings in section 5.2 indicate, applying tax law principles to blockchain-related activities is more about learning how the ATO interprets the application of tax law rather than the law itself (72.8% agree/strongly disagree). This is a particularly pertinent finding, especially when most tax practitioners agree that the broad nature of income tax law means it is more about how you learn to apply it rather than the law not being fit for purpose (67.4% agree/strongly agree). From a tax policy / tax reform perspective, these findings in conjunction with the issues presented in section 5.2 on data gathering and the role of the ATO are critical for policy-makers. Importantly, the ATO's interpretation of the law in its rulings and guidelines is not the law itself. There is a clear need for practitioners to have resolution to the administration of the law – law reform itself can and ought to take the necessary time.

It is important to recognise that whilst there is a strong feeling that much of the activities can be characterised as gambling or speculative, tax practitioners are split on whether client activities result in paying a lot of tax (50% agree/strongly agree, whilst 29.4% are in the middle). These findings raise the concern over the administrative burden in complying and the corresponding benefit to the taxpayer (paying appropriately for the complex compliance) when the tax revenues do not necessarily reflect the relative complexity of complying. We however note the timing of this survey coincides with the 'crypto winter', therefore an increased likelihood of loss realisation across this compliance cycle.

Contrasting perspectives indicate that, on the one hand if you have the information to apply the law, it can be simple – however on the other hand – no one really knows to

what extent the treatment applied is correct. The lack of certainty for tax compliance requirements is problematic. Tax practitioners raised the issue that there needs to be support now to manage the existing uncertainties and unknowns to mitigate stress and unnecessary tax debts.<sup>31</sup> As the TPB (2021a) and Woellner (2021) note, exercising professional approaches includes referring to relevant legislation, case law, and tax rulings, as well as seeking legal advice or opinions where the facts and circumstances go beyond the tax practitioners' level of expertise. For the latter, understanding when the practitioner cannot engage is critical.

Despite the ATO being one of the earliest jurisdictions to introduce formal guidance for crypto activities (PwC, 2021), as indicated through these findings there is an issue of practical guidance and practical examples. This too requires consistency across avenues of guidance and other published materials to help minimise 'wasted' – and unbillable – time:

In an ideal world, understanding the reasons behind any tax law would mean that someone would be able to apply the principle in any relevant situation, but in practice the ATO's private rulings may set conflicting precedents between the application of the law and the ATO's own theoretical tax rules. Actual cases involving blockchain / crypto that have gone through the court system / the ATO's private rulings are probably still very few in number as the technology is a recent development, so precedents that outline a clear legal view may be hard to come by. However in the meantime, it may be of benefit to everyone involved to have clear theoretical rules and guidelines, which are accompanied by clearly written examples showing slightly different scenarios and their different outcomes. [Surveyed Tax Practitioner]

Tax practitioners in this respect appreciate the role of the ATO in its interpretation of current legislation; however, more could be done to aid in clarifying guidance – and for the guidance to cover a variety of activities, including issues around substantiation:

The sheer level of trades – in non-SA – makes the ATO guidelines far removed from the reality of tax return preparation. As tax agents, we do our best with what's available to us, but I feel that's often very approximate; what self-preparers are declaring would most likely bear little resemblance to reality. [Surveyed Tax Practitioner]

Through these findings, we see a reiteration of the problem around quality of data being made available and the pace for which the crypto-economy is moving. Tax practitioners are similarly wary that even the Board of Taxation's review of digital assets and transactions could easily become outdated by the time it is released (now expected in February 2024).

The third party reports are one avenue to resolve some of the issues with respect to complexity in this space – clarifying or creating certainty in what from the perspective of the tax practitioner in performing their services amounts to taking reasonable care:

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<sup>31</sup> Thus, reinforces perspectives that to interpret the rules effectively requires practitioners to develop sound ethical judgment combined with technical skills – practitioners are learning what a 'reasonable' person would do (Cheffers & Pakaluk, 2005) – here, novel circumstances are being presented within the crypto-economy.

Because it is all on-chain... the future for the profession is using software tools to calculate and report transactions – The accountant should then just code the transactions appropriately... [Surveyed Tax Practitioner]

The capacity to ensure compliance with respect to clients in this space is also described as reliant on third party software, with some indicating they require their crypto clients to use software. Otherwise, it is *'too hard to track manually'* [Surveyed Tax Practitioner] and *'...if you analyse every transaction you would die before it was completed'* [Surveyed Tax Practitioner].

A critical element in applying the law is that reasonable care is taken (TPB, 2019). Where an 'incorrect' interpretation or application occurs, this does not necessarily amount to a failure to take reasonable care (TPB, 2019). Given the current uncertainties, there are unknowns regarding whether interpretations and application of law for crypto activity may ultimately be 'incorrect'. With time, it is expected that the audit process by the ATO will create lessons learned as what amounts to the 'correct' interpretation of the law (in the eyes of the administrator) or via the courts.

Fundamental to these challenges is the need to ensure that the terms and conditions of engagement are clearly articulated between the client and the tax practitioner (see TPB, 2021a; Woellner, 2021). Moreover, the evidence of such is equally critical (TPB, 2019).

We now present the findings with respect to tax practitioners acting lawfully and ascertaining client's affairs.

## 5.5 Perspectives with respect to tax practitioners acting lawfully and ascertaining client's affairs

In engaging with tax practitioners via electronic survey, we tested a set of propositions based on interview data findings with respect to the impact of blockchain-related client activities and tax practitioner acting lawfully and ascertaining client's affairs: Figure 8 and Table 8 in Appendix D.

Unsurprisingly given the previously presented findings, documentation gathering is increasingly important to ensure a reasonably arguable position for client's blockchain-related activities (93.7% agree/strongly agree) and the ATO could improve the quality of data matched prefill information (85.8% agree/strongly agree). On this point, the ATO is well positioned with respect to encouraging tax compliance, as tax practitioners perceive the risks of the ATO data matching program as encouraging compliance for those blockchain-related activities (81% agree/strongly agree).

The majority see the ATO letters to clients (via tax practitioners) as prompting conversations and compliance (66.5% agree/strongly agree). However, it is important to note that despite one of the key benefits of blockchain technology being transparency, it can be difficult to ensure clients are providing appropriate information with respect to their on-chain activities (88.7% agree/strongly agree). This goes to earlier findings with respect to what data is being captured and matched by the ATO and the breadth of activities occurring on chain.

Reflecting this quasi-transparency, tax practitioners tend to agree that if the client was motivated not to declare crypto-related income, they can deliberately evade both the tax system and tax practitioners' attempts to understand the client's blockchain-related activities (62% agree/strongly agree whilst 21% are in the middle). The more varied

responses here may be linked to the distinction identified with respect to non-compliance stemming from intentional or unintentional factors. Whilst clients can be unwilling to provide evidence on their blockchain-related activities (60.3% agree/strongly agree whilst 22.7% are in the middle), a mixed position was held that clients can be unwilling to lodge tax returns once their tax position arising from their blockchain-related activities is ascertained (45.2% agree / strongly agree whilst 29.4% are in the middle).

As the TPB (2019) notes, establishment of the client's state of affairs begins with taking reasonable care – professional judgment, knowledge, skills and expertise. Issues with respect to competencies have been considered already. Findings highlight the need to reflect upon the perspectives of the tax practitioner and the perspectives of the client. In this regard, as already highlighted, there is substantial uncertainty over the client's understanding of the technology and relevance to tax compliance:

While some clients are trying to avoid any liability (thinking crypto is untraceable), more don't provide the information as they don't understand the system or think because they have lost their money that it's not relevant.  
[Surveyed Tax Practitioner]

Thus, consideration of any potential non-compliance being intentional or unintentional and what this indicates for the current regulatory context is critical. This reflects not only what the ATO can do in its administration with limited resources, but also the extent of taxpayers' activities within the crypto-economy. The engagement with the client, as well as their understandings and motivations are critical:

...ATO use data provided to them, they don't make data so don't lay data quality at their feet. Remove 'crypto' from the concept of evading income. A motivated client will do this regardless. The same goes for motivation to provide evidence.  
[Surveyed Tax Practitioner]

The problem is just how much can happen without a client's active involvement – e.g., if you'd just held onto bitcoin but forgotten you had it, you'd have been involved and received so many airdrops – most clients are not techy so it is not that they would be actively evading – they just wouldn't know that they have a copy of coins on the ETHW chain, or this or that other chain because of the hard fork or consensus split... [Surveyed Tax Practitioner]

For tax practitioners, there is a fundamental trust in the client providing all necessary information – this is not necessarily different for crypto from any other aspect of the tax compliance system. The question arises as to how far should a tax practitioner go in gathering and confirming the taxpayer's information as being true and correct? (See section 3.4 of this article.) What amounts to a reasonable enquiry that would be expected of the tax practitioner in their professional capacity? What level of knowledge and understanding of the technology is necessary to ascertain this?

The problem is that the novel activities that can occur – with technology described as transparent – are yet to be fully realised. A distinction though needs to be carefully considered between ignorance and ignoring the law:

Many clients don't understand the transactions so are unsure of what is required to be given to the tax agent. There are also some who were misled into believing

their crypto trading was anonymous and no one would know about it. [Surveyed Tax Practitioner]

On this perspective, we reiterate the duties of the practitioner extending beyond the client to the greater community and therefore the law (Explanatory Memorandum to the Tax Agent Services Bill 2008). We reiterate the concern over the extent to which the client is dependent on the tax practitioner for lawful guidance (TPB, 2021a). The practical reality that crypto clients are described as younger raises a key concern over the next generations of taxpayers and their engagement with and experience of the tax system.<sup>32</sup> A critical element of the voluntary tax compliance system is the tax practitioner (Marshal et al., 1998; see also Erard, 1993).

Rather than clients seeking to mislead or be unwilling to provide information to practitioners, challenges in the ascertaining of client affairs can include: (i) non-existent or inadequate reporting for substantiation; (ii) difficulties in collating information from multiple sources (e.g., exchanges, wallets, protocols), or (iii) lack of ability to continue to access transactional information. Or more simply, following confusion, these activities get put into the ‘*too hard basket*’ and therefore ignored. The ATO needs to note why tax practitioners can be overwhelmed and this is likely to vary dependent on market dynamics:

Most clients made a loss for 2022, so I don't personally believe a fear of extra tax payable motivates them withholding information this year, it is just the sheer complexity and (even enormous volume of low-value transactions), and even perhaps embarrassment of their true losses that seem to leave us without reliable, usable, verifiable data from the client. [Surveyed Tax Practitioner]

Moreover, third party software aggregators will not necessarily get it right. There is a fundamental need for practitioners to use judgment and be alert to the possibility of increasing margins of error:

Crypto tax software are not able to give accurate results when several exchanges/wallets are used, with transfers between them. In fact some of the reports I have seen have over-reported or under-reported the profits/losses in a massive way – they don't even pass the common sense test. They may be able to handle cases where users stick to the one exchange and have simpler transactions, but not complex cases. Crypto reporting really needs to step up to handle the complexity of this space and for heavy users. [Surveyed Tax Practitioner]

Thus, the combination of uncertainty from both perspectives creates ‘*tricky conversations*’. In contrast with share trading activities, there can be a sense of no real value being added:

In general they don't have the records, or can't understand their records, rather than recklessness. Can be a two-edged sword where sometimes you don't want to ask as it makes your job harder for a fee sensitive client with no real value add for either in the relationship. [Surveyed Tax Practitioner]

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<sup>32</sup> Noting that this project does not capture those taxpayers self-lodging via myTax (see Harb et al., 2023).

However, many tax practitioners indicate most clients are willing to provide the requisite information – once conversations are held: *‘clients rarely remember to disclose their blockchain activities unless directly asked’* [Surveyed Tax Practitioner]. Disclosure often occurs following the examination of the prefill report. This creates challenges in managing workflows,<sup>33</sup> as can backlogs from increased workloads, with practitioners *‘trying to fit in their reports in an already fully booked diary’* [Surveyed Tax Practitioner], as well as delays as clients *‘tend to disappear for weeks before providing’* [Surveyed Tax Practitioner].

For some clients, they are described as treating it like a lotto ticket and *‘their reluctance to comply with the law comes after the fact because it’s too hard/time consuming for them to find the information we request’* [Surveyed Tax Practitioner]. For others, they want to remain under the radar. Whether it is a lack of understanding, or unwillingness to disclose and recognise the cost of compliance, there is a fundamental challenge to the tax compliance function:

Clients generally do not understand what they are doing. We had one client that said [they] had no sales (i.e., [they] did not draw money out of the account) but when we looked at [their] Crypto reports, [they] had more than 70 sales let alone purchases. It took hours to work out and they are not willing to pay for that. [Surveyed Tax Practitioner]<sup>34</sup>

Those that choose to do the wrong thing – irrespective of whether this is specific to crypto activities – will continue to do so. Those under-reporting crypto activities are likely to do so making use of the current lack of scope covered by the ATO data collection activities.<sup>35</sup> It is important to recognise that if the taxpayer is evading their obligations, it is not the tax practitioner that is at fault.

Finally, we briefly examine the potential demographic factors at play within the survey results.

## 5.6 Demographic considerations

With respect to the regulation and guidance being fit for purpose, we find that overall surveyed tax practitioners aged between 60 to 69 tend to have a stronger opinion (average of all perspective at 78% disagree/strongly disagree) that the current regulation and guidance is not fit for the purpose with respect to blockchain-related activities. However, with respect to experience, we do not observe variation based on the years of tax experience. This suggests that perceptions may be an age – rather than experience – related variation. Although we also find that overall, the less time practitioners spent on the tax-related matter (25-49% of their working time spent on tax-related matter), the more they tend to view that the current regulation and guidance is not fit for the purpose (average of all perspective at 93% disagree/strongly disagree). On this basis, we query whether there is an element of knowledge and skill development with the level of activity. The more practice in the space, the more familiar and comfortable the practitioner becomes in applying existing tax law principles. However, this appears to

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<sup>33</sup> Recall Devos and Kenny (2017) highlight the expectation of a high level of service and attention to detail, by both the public and client base.

<sup>34</sup> Gender of client removed from quotation.

<sup>35</sup> For example, the extent to which exchanges are reporting as well as the extent to which activities within the crypto-economy are beyond exchanges.



be a temporal consideration rather than overarching years of experience consideration. We should reflect on the inherent pace at which the technology is evolving.

Other potential variation stems from gender and the area of practice. We find that overall, female practitioners tend to have a stronger view that regulation and guidance is not fit for purpose compared to male practitioners. We also find those practitioners who identify SMSFs as their main clientele category tend to have a stronger opinion that the regulation and guidance is not fit for the purpose compared with those who identify other type of clients. This could relate to the specific regulatory context SMSFs face.

With respect to perspectives on practitioner skills and competencies, when we examine more closely the demographic factors across the surveyed sample, we find, that overall surveyed female tax practitioners have a stronger opinion (strongly agree) on all propositions with respect to tax practitioner skills and competencies (see Table 6 in Appendix D). With respect to perspectives on practitioner skills and competencies, other possible factors that may impact this include having SMSFs and SMEs as core clientele and firms with two to five partners.

With respect to applying the law and gender, female practitioners were observed to have a higher percentage (average of all perspectives 78%) of agree/strongly agree compared to male (average of all perspectives 67%) except for the proposition that the broad nature of income tax law means it is more about how you learn to apply it rather than the law not being fit for purpose. On this proposition, the perspectives were reasonably similar between male and female practitioners.

With respect to acting lawfully and ascertaining client affairs, we note that the age group 18 to 29 years appears to have the strongest, most consistent level of agreeance (average of 80% agree/strongly agree) while the average of all other age groups is 70%. We observe generally that all of the age groups are most agreeable with respect to the proposition that documentation gathering is increasingly important to ensure a reasonably arguable position for client's blockchain-related activities (average of 95% agree/strongly agree).

Finally, we again observe preliminary findings with respect to gender in that female practitioners expressed a higher percentage of agree/strongly agreed (average 75.8%) on all perspectives with respect to acting lawfully than male (average 67%), except for the proposition that where the client was motivated not to declare crypto-related income, they can deliberately evade both the tax system and tax practitioners' attempts to understand the client's blockchain-related activities.

Our findings suggest that practitioner demographics may play a role in perceptions with respect to the crypto-economy and the Australian tax system. We suggest that further research is warranted to examine age and gender factors that may influence perceptions of the tax system. Moreover, further research within the SMSF space is warranted to examine the regulatory challenges this cohort faces with tax (and superannuation) compliance.

## 6. CONCLUSION

This study presents findings exploring the response of tax practitioners to clients participating in the crypto-economy with a particular focus on the TASA Code. Overall, in collating tax practitioner perspectives, we reaffirm a majority position that there is a

lack of clear, specific guidance with respect to the broad activities being carried out by clients within the crypto-economy. This is despite Australia generally being reported as having strong guidance to support the tax compliance function.

The perspectives in this project suggest that the current guidance available is making tax compliance challenging for tax practitioners (and taxpayers). Whilst practitioners are required to learn how to apply existing tax laws to evolving activities, practitioners often lack knowledge and skills in blockchain. From the perspective of tax practitioners surveyed, this presents a risk to tax practitioners' compliance with the TASA Code. However, this can vary between tax practitioners, depending on the level and complexity of crypto activities being undertaken by clients. With this comes a fundamental need to reflect on the terms and circumstances of engagement (see for example TPB, 2021a) as well as the shifting demographics of taxpayers.

There can be a knowledge and/or skills imbalance, in that clients may be experts in blockchain and practitioners in taxation. These can be difficult to reconcile. However, this assumes that clients are sufficiently knowledgeable of blockchain technology and their activities. Tax practitioners have the difficulty in making sense of client activities, often only becoming evident once the question is asked or the prefill report viewed. These challenges increase when the clients may not necessarily be forthright. These situations can create difficult decisions for tax practitioners. However, to some extent intentional and unintentional non-compliance is nothing new.

As some tax practitioners are embracing this emerging space, they may be proactive and act as change agents. However, some tax practitioners are hesitant and awaiting profession-level response. As there is an increasing demand, there develops a need for competencies. Tax practitioners need to be cognisant of the skills and expertise required and whether they ought to engage and what that means for the future capacity to meet the needs for an increasingly digitalised society.

The crypto-economy is creating a need for bespoke expertise and skills. These can be challenging for formal educators to meet the needs of eager tax practitioners. The challenge relates to adaptivity, responsiveness, and in-depth learning. It is necessary to have sufficient practical guidance and hands-on experience to allow tax practitioners to gain an appropriate appreciation of the vast array of activities being undertaken and the extent to which these can be captured by current reporting mechanisms. Moreover, the ATO's proactivity is similarly required as it can be about understanding how the ATO interprets the law not just the law itself, particularly when formal tax regulation lags.

Whilst this research is not completely representative of the broader tax profession, the tax practitioner perspectives present important empirical findings for the taxation of the crypto-economy and related regulatory frameworks in operation. Future evidence-based research ought to consider the taxation implications in respect of demographic traits of both the tax practitioner and taxpayer in order to gain further understandings of variation in perceptions. For example, this research suggests there may be an age – or generational – factor from a tax practitioner perspective; however the more frequent the practice, the more familiar and comfortable practitioners become with the work. Given the emerging nature of this speciality, tax practitioners are yet to gain learnings from ATO audit activity. This warrants further consideration. Given the problems around disclosure by clients considered, there is further consideration of the implications of the challenges participants face in the crypto-economy on tax morale and therefore tax compliance for a digital generation of taxpayers.

This study fosters a greater understanding of how tax practitioners are responding to the crypto-economy, particularly in being able to comply with codes of professional conduct such as the TASA Code. These findings have key implications for regulators in managing the administration of the tax system as well as considerations towards tax reform and the voluntary nature of the tax compliance system. For Australian tax practitioners, this is particularly relevant given the Board of Taxation's review into digital assets and transactions and following the Bragg Report (2021).

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## APPENDIX A

**Table A1: Proposition Set**

| <b>With respect to tax practitioner skills and competencies</b>  |
|--|
| <ul style="list-style-type: none"> <li>• Key knowledge in blockchain technology and how it works is necessary for tax practitioners to be able to apply tax principles.</li> <li>• Tax practitioners do not necessarily have adequate skills and/or knowledge in blockchain technology.</li> <li>• It can be challenging for tax practitioners to upskill in blockchain and taxation.</li> <li>• Independent investigation and hands-on experience in blockchain technology is valuable to be able to use professional judgement and be confident in applying the tax law correctly.</li> <li>• There is a balance in needing to understand blockchain technology and/or blockchain terminology, whilst being able to communicate tax technical to clients.</li> <li>• There can be a knowledge and/or skills imbalance, in that clients may be experts in blockchain and practitioners in taxation, however the two can be difficult to reconcile.</li> <li>• The lack of blockchain-related guidance makes it difficult for tax practitioners to comply with the TASA code of professional conduct.</li> </ul> |
| <b>With respect to applying the law</b>  |
| <ul style="list-style-type: none"> <li>• Transactions on blockchain are creating unique tax issues that tax practitioners have not necessarily been exposed to before.</li> <li>• The broad nature of income tax law means it is more about how you learn to apply it rather than the law not being fit for purpose.</li> <li>• Applying tax law principles to blockchain-related activities is more about learning how the ATO interprets the application of tax law rather than the law itself.</li> <li>• Client's declaring blockchain-related activities typically do not result in the client paying a lot of tax.</li> <li>• Taking reasonable care to ensure that taxation laws are applied correctly requires more than using the summary crypto-currency reports, they cannot replace professional judgement.</li> <li>• The lack of blockchain-related guidance makes it difficult for tax practitioners to comply with the law.</li> </ul>   |
| <b>With respect to acting lawfully and ascertaining client's affairs</b>   |
| <ul style="list-style-type: none"> <li>• ATO Letters to clients (via tax practitioners) prompts communication with tax practitioners and subsequent compliance.</li> <li>• The ATO could improve the quality of data matched prefill information.</li> <li>• The risk of the ATO data matching program with respect to blockchain activities encourage compliance.</li> <li>• Documentation gathering is increasingly important to ensure a reasonably arguable position for client's blockchain-related activities.</li> <li>• Clients can be unwilling to lodge tax returns once their tax position arising from their blockchain-related activities is ascertained.</li> <li>• If the client was motivated not to declare crypto-related income, they can deliberately evade both the tax system and tax practitioners attempts to understand the client's blockchain-related activities.</li> </ul>  |

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- Despite the transparency of blockchain-related activities, it can be difficult to ensure clients are providing appropriate information with respect to their on-chain activities.
  - Clients can be unwilling to provide evidence on their blockchain-related activities.
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## APPENDIX B

**Table A2: Common Blockchain-Related Activities that Clients Undertake**

| <b>Rank</b> | <b>Common blockchain activities</b>                  | <b>N</b>   | <b>%</b>     | <b>%<br/>Cases<br/>(n=202)</b> |
|-------------|--|------------|--------------|--------------------------------|
| 1           | Cryptoasset investment and/or trading                | 194        | 25.2         | 96.0                           |
| 2           | Moving cryptoassets between wallets and/or exchanges | 145        | 18.9         | 71.8                           |
| 3           | Crypto staking                                       | 84         | 10.9         | 41.6                           |
| 4           | Crypto as trading stock                              | 71         | 9.2          | 35.1                           |
| 5           | Airdrops   | 66         | 8.6          | 32.7                           |
| 6           | NFTs   | 48         | 6.2          | 23.8                           |
| 7           | Crypto mining  | 36         | 4.7          | 17.8                           |
| 8           | Chain Splits/forks                                   | 25         | 3.3          | 12.4                           |
| 9           | DeFi (derivatives and liquidity pools)               | 21         | 2.7          | 10.4                           |
| 10          | Cryptoasset bridging and/or wrapping                 | 15         | 2.0          | 7.4                            |
| 11          | Crypto as remuneration                               | 12         | 1.6          | 5.9                            |
| 12          | DeFi (lending, flash loans etc)                      | 11         | 1.4          | 5.4                            |
| 13          | DAOs   | 11         | 1.4          | 5.4                            |
| 14          | Donating crypto                                      | 9          | 1.2          | 4.5                            |
| 15          | Play to earn (P2E), or ‘GameFi’                      | 6          | 0.8          | 3.0                            |
| 16          | Trading bots   | 6          | 0.8          | 3.0                            |
| 17          | Crypto as governance                                 | 2          | 0.3          | 1.0                            |
| 18          | Cryptoassets as digital twins                        | 1          | 0.1          | 0.5                            |
|             | Other  | 6          | 0.8          | 3.0                            |
|             | <b>Total</b>   | <b>769</b> | <b>100.0</b> | <b>380.7</b>                   |

Note: 27 participants did not disclose. Percentages are based on those who responded to this question.



## APPENDIX C

**Table A3: Common Tax Issues that Arise from Client's Blockchain-Related Activities**

| <b>Rank</b> | <b>Common Tax Issue</b>   | <b>N</b>   | <b>%</b>     | <b>%<br/>Cases<br/>(n=200)</b> |
|-------------|---|------------|--------------|--------------------------------|
| 1           | Whether activity falls within ordinary income or CGT provisions | 138        | 14.5         | 69.0                           |
| 2           | Cryptoasset trading (capital account)                           | 128        | 13.5         | 64.0                           |
| 3           | Record keeping  | 123        | 12.9         | 61.5                           |
| 4           | Cost base valuation   | 113        | 11.9         | 56.5                           |
| =5          | Cryptoasset trading (revenue account)                           | 100        | 10.5         | 50.0                           |
| =5          | Investor or trader?   | 100        | 10.5         | 50.0                           |
| 7           | CGT Discounting   | 48         | 5.0          | 24.0                           |
| 8           | Lost or stolen crypto   | 44         | 4.6          | 22.0                           |
| 9           | Special asset class and treatment (personal use)                | 43         | 4.5          | 21.5                           |
| 10          | FIFO  | 35         | 3.7          | 17.5                           |
| 11          | Crypto and GST  | 24         | 2.5          | 12.0                           |
| 12          | International tax issues  | 14         | 1.5          | 7.0                            |
| 13          | Special asset class and treatment (collectables)                | 9          | 0.9          | 4.5                            |
| 14          | Crypto and super and/or PAYG                                    | 8          | 0.8          | 4.0                            |
| 15          | Crypto and FBT  | 6          | 0.6          | 3.0                            |
| 16          | Crypto and withholding taxes and/or royalties                   | 6          | 0.6          | 3.0                            |
|             | Other   | 12         | 1.3          | 6.0                            |
|             | <b>Total</b>  | <b>951</b> | <b>100.0</b> | <b>475.5</b>                   |

Note: 29 participants did not disclose. Percentages are based on those who responded to this question.

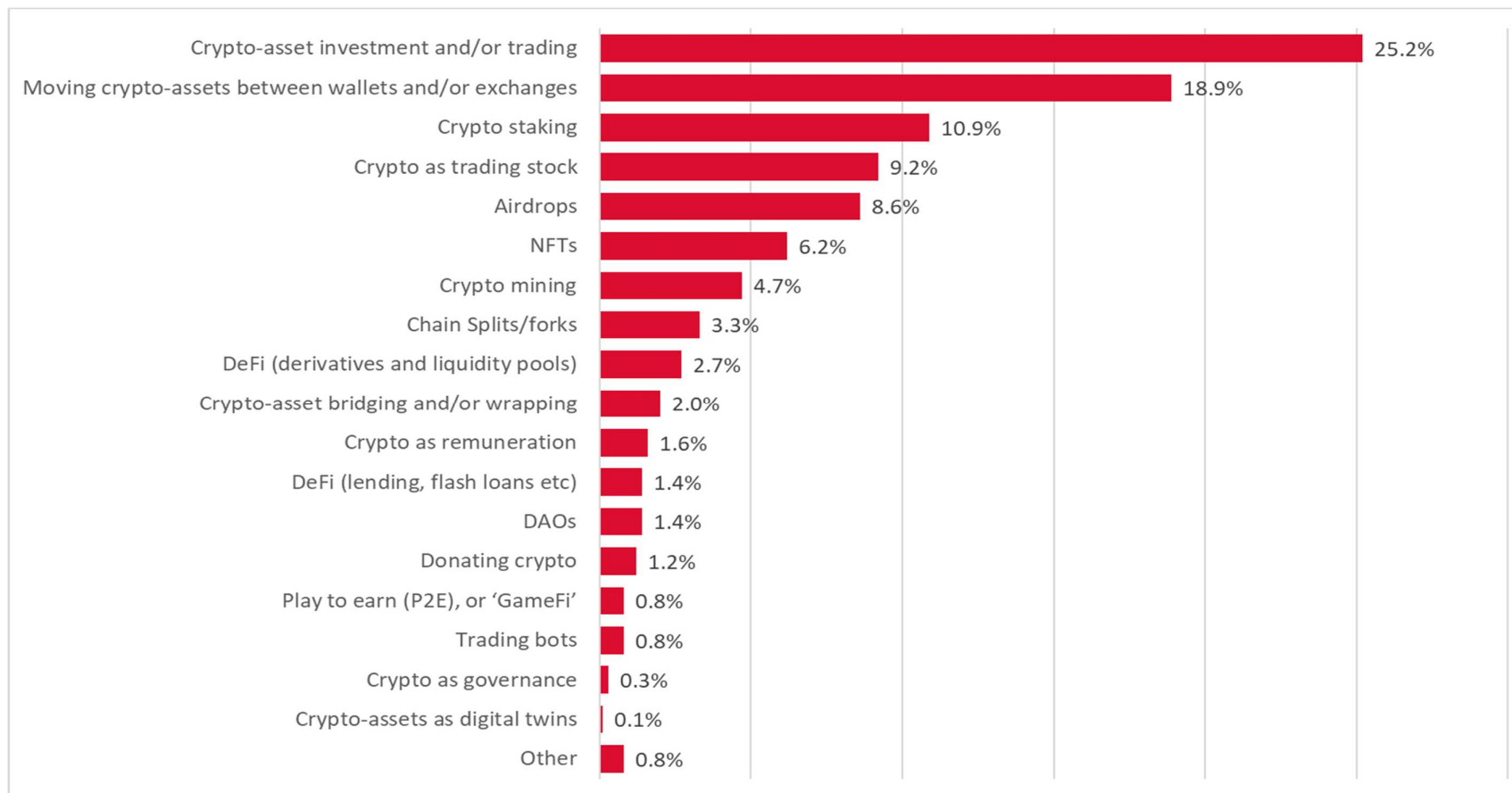
**APPENDIX D**

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**Table 3: Survey Participant Demographics**

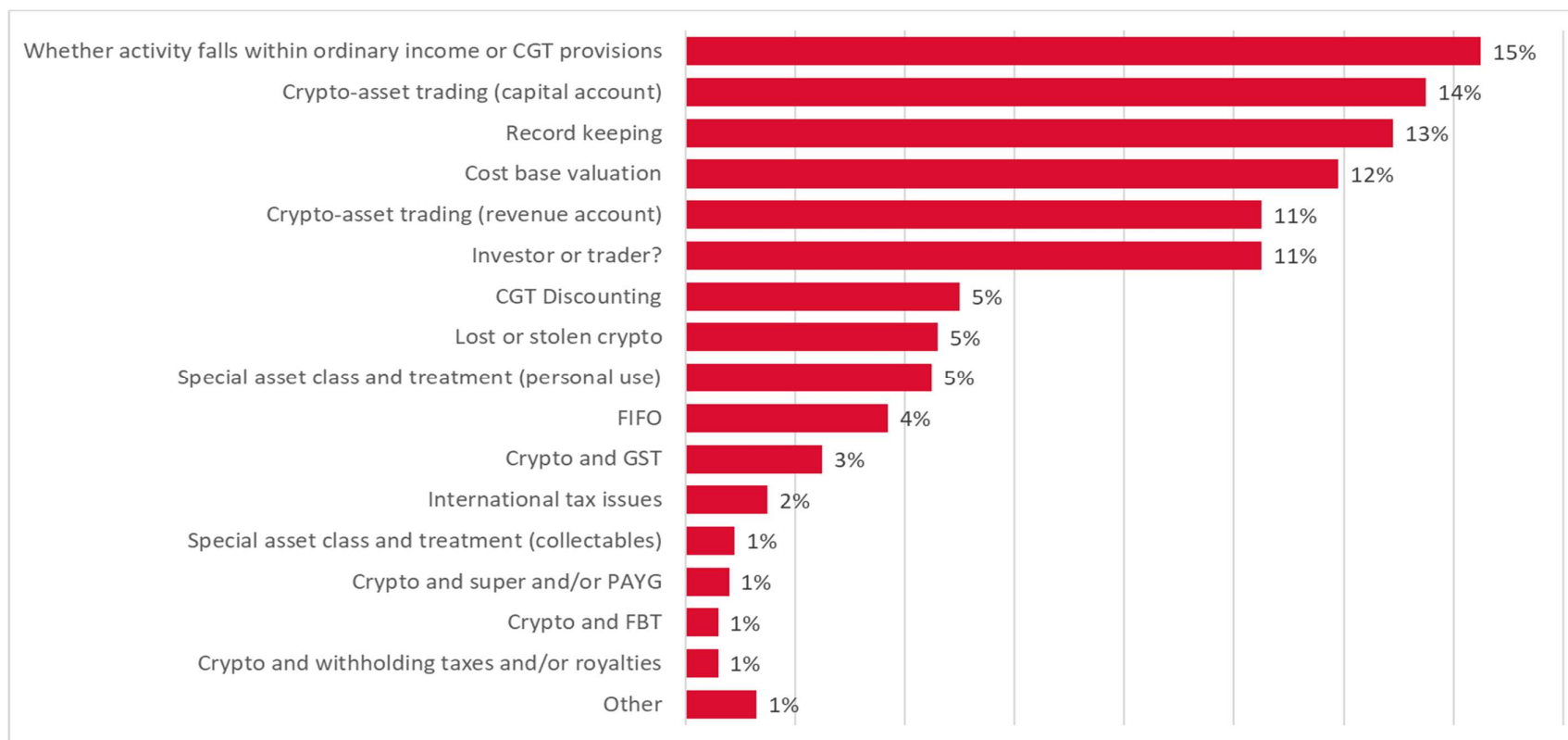
| Description   | N          | %           | Description  | N          | %            |
|---|------------|-------------|--|------------|--------------|
| <b>Age</b>  |            |             | <b>Office you currently work in</b>                            |            |              |
| 18-29   | 28         | 12.2        | Sole practitioner  | 80         | 34.9         |
| 30-39   | 54         | 23.6        | 2-5 partners   | 89         | 38.9         |
| 40-49   | 61         | 26.6        | 6 or more partners   | 14         | 6.1          |
| 50-59   | 57         | 24.9        | Directors  | 24         | 10.5         |
| 60-69   | 23         | 10.0        | Management role  | 6          | 2.6          |
| > 70  | 3          | 1.3         | Tax consultant/agent   | 14         | 6.1          |
| <b>Total</b>  | <b>226</b> | <b>98.7</b> | Other  | 2          | 0.9          |
| <i>Missing</i>  | 3          | 1.3         | <b>Total</b>   | <b>229</b> | <b>100.0</b> |
| <b>Gender</b>   |            |             | <b>Percentage of working time spend on tax-related matters</b> |            |              |
| Male  | 130        | 56.8        | 0-24%  | 1          | 0.4          |
| Female  | 92         | 40.2        | 25-49%   | 6          | 2.6          |
| Prefer not to say                                       | 3          | 1.3         | 50-74%   | 60         | 26.2         |
| <b>Total</b>  | <b>225</b> | <b>98.3</b> | 75-99%   | 124        | 54.1         |
| <i>Missing</i>  | 4          | 1.7         | 100%   | 38         | 16.6         |
|   |            |             | <b>Total</b>   | <b>229</b> | <b>100.0</b> |
| <b>State or territory</b>                               |            |             | <b>Year of experience working in Taxation</b>                  |            |              |
| VIC   | 46         | 20.1        | 0-5 years  | 27         | 11.8         |
| NSW   | 92         | 40.2        | 6-10 years   | 37         | 16.2         |
| ACT   | 2          | 0.9         | 11-15 years  | 43         | 18.8         |
| QLD   | 41         | 17.9        | 16-20 years  | 35         | 15.3         |
| WA  | 28         | 12.2        | 21-25 years  | 36         | 15.7         |
| TAS   | 1          | 0.4         | 26-30 years  | 13         | 5.7          |
| SA  | 16         | 7.0         | 31-35 years  | 19         | 8.3          |
| Other   | 2          | 0.9         | 36 years or more   | 19         | 8.3          |
| <b>Total</b>  | <b>228</b> | <b>99.6</b> | <b>Total</b>   | <b>229</b> | <b>100.0</b> |
| <i>Missing</i>  | 1          | 0.4         |  |            |              |
| <b>Professional association(s)</b>                      |            |             | <b>Client categories</b>                                       |            |              |
| CPA Australia (CPA)                                     | 82         | 35.8        | Employed persons   | 36         | 15.7         |
| Chartered Accountants Australia and New Zealand (CAANZ) | 104        | 45.4        | Self-employed persons  | 18         | 7.9          |
| The Tax Institute (TTI)                                 | 43         | 18.8        | Small medium business (SME)                                    | 161        | 70.3         |
| The Institute of Public Accountants (IPA)               | 31         | 13.5        | Large business   | 5          | 2.2          |
| National Tax and Accountants Association (NTAA)         | 31         | 13.5        | Other  | 4          | 1.7          |
| Tax & Super Australia                                   | 14         | 6.1         | Self-managed super fund (SMSF)                                 | 5          | 2.2          |
| SMSF Association  | 7          | 3.1         | <b>Total</b>   | <b>229</b> | <b>100.0</b> |
| Other   | 10         | 4.4         |  |            |              |
| Not a member of a professional association              | 12         | 5.2         |  |            |              |

**Fig. 3: Common Blockchain-Related Activities that Clients Undertake**



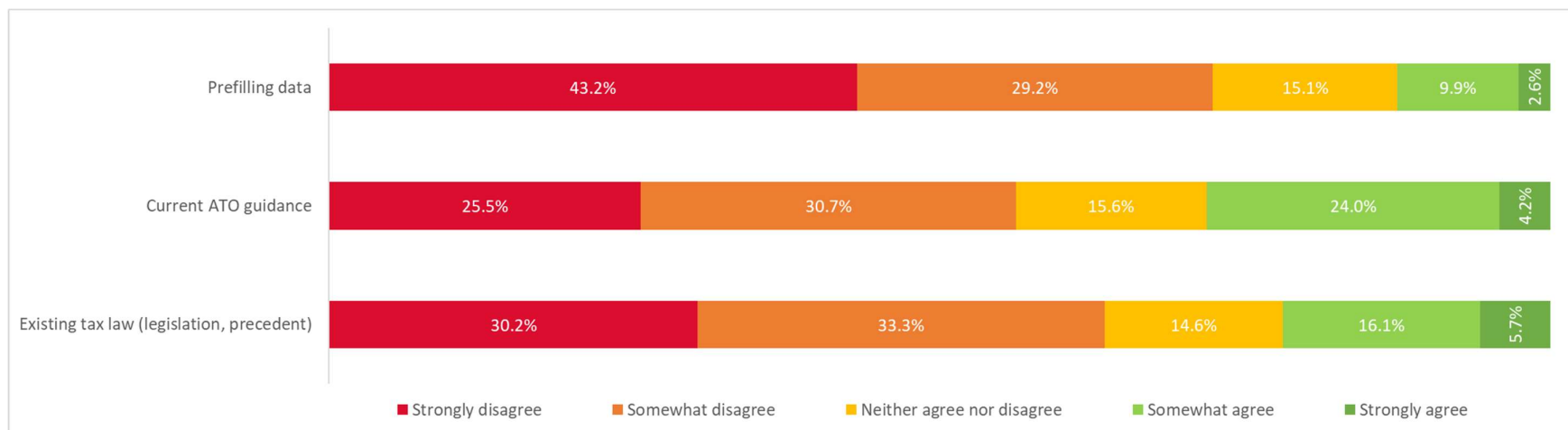
Note: 'Other' includes for example operating exchanges/wallets, NFT horse racing, Initial Coin Offerings (ICOs), and one practitioner who indicated 'money laundering' as the common blockchain activity. Note that inherent overlaps are present across categories.

**Fig. 4: Common Tax Issues that Arise from Client’s Blockchain-Related Activities**



Note: The ‘Other’ category includes issues with respect to: *Calculations*: calculating gains, conversion to \$A; *Classifications and interpretations*: classification for TOFA, Div. 6C and CFC purposes, personal use asset exemption, collectables, staking rewards as taxable income based on market value of the time token rewards were issued; *Report Data*: interpreting statements, client disclosure issues, lack of data on reports; *Client/practitioner*: tax management/planning/optimisation, clients being overwhelmed and not wanting to deal with the tax return; *Legality*: crypto trading to money launder; *Other*: incidental amounts.

**Fig. 5: Perspectives with Respect to Regulation and Guidance: Levels of Agreeance as to Regulation and Guidance Being Fit for Purpose**

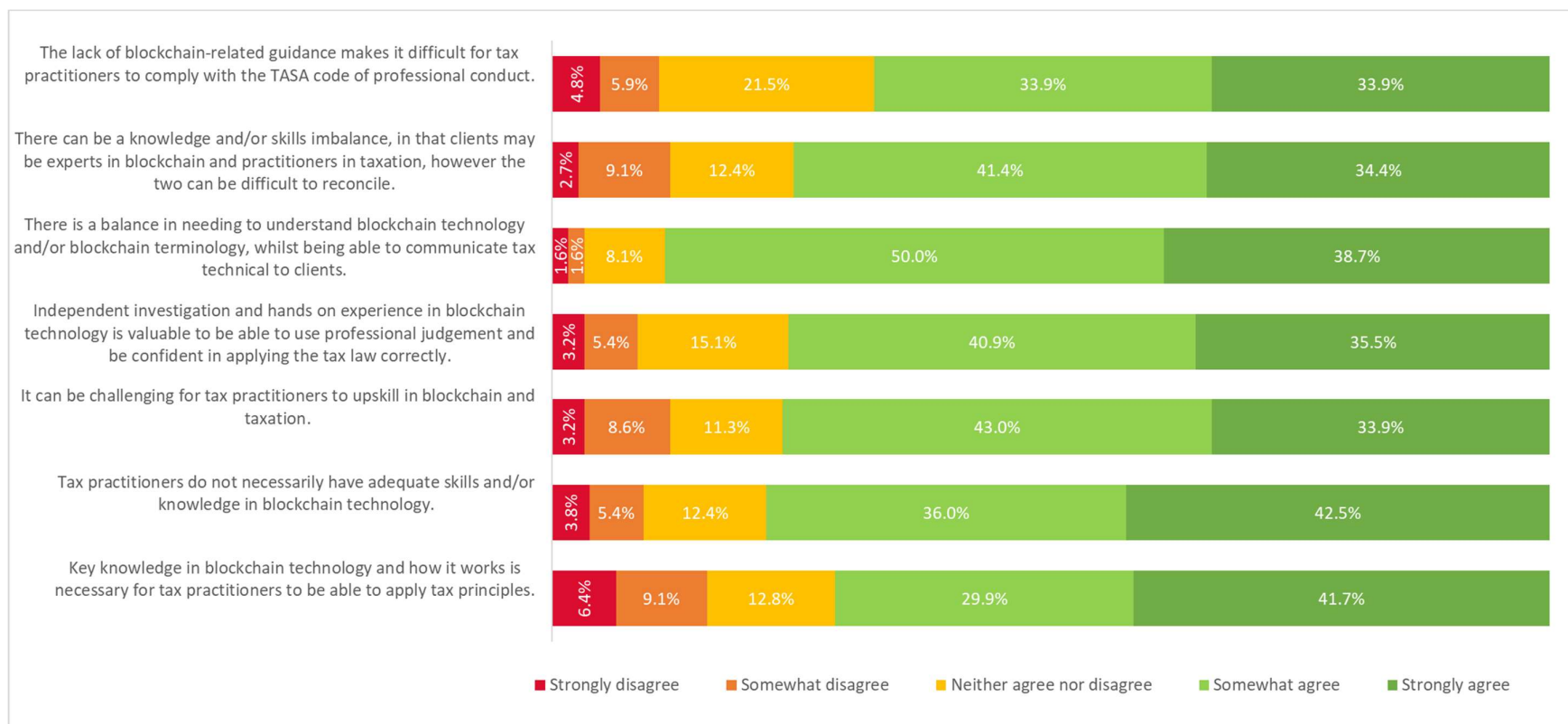


**Table 5: Perspectives with Respect to Regulation and Guidance: Levels of Agreeance as to Regulation and Guidance Being Fit for Purpose**

| Regulation & guidance                     | N   | Mean* | SD   | Min | Max | Majority Position                                       |
|---|-----|-------|------|-----|-----|---|
| Prefilling data                           | 192 | 1.99  | 1.10 | 1   | 5   | <b>Disagree</b> prefilling data is fit for purpose      |
| Current ATO guidance                      | 192 | 2.51  | 1.22 | 1   | 5   | <b>Disagree</b> current ATO guidance is fit for purpose |
| Existing tax law (legislation, precedent) | 192 | 2.34  | 1.23 | 1   | 5   | <b>Disagree</b> existing tax law is fit for purpose     |

\*Likert scale ranging from 1 meaning strongly disagree to 5 meaning strongly agree.

**Fig. 6: Perspectives with Respect to Tax Practitioner Skills and Competencies: Levels of Agreeance**



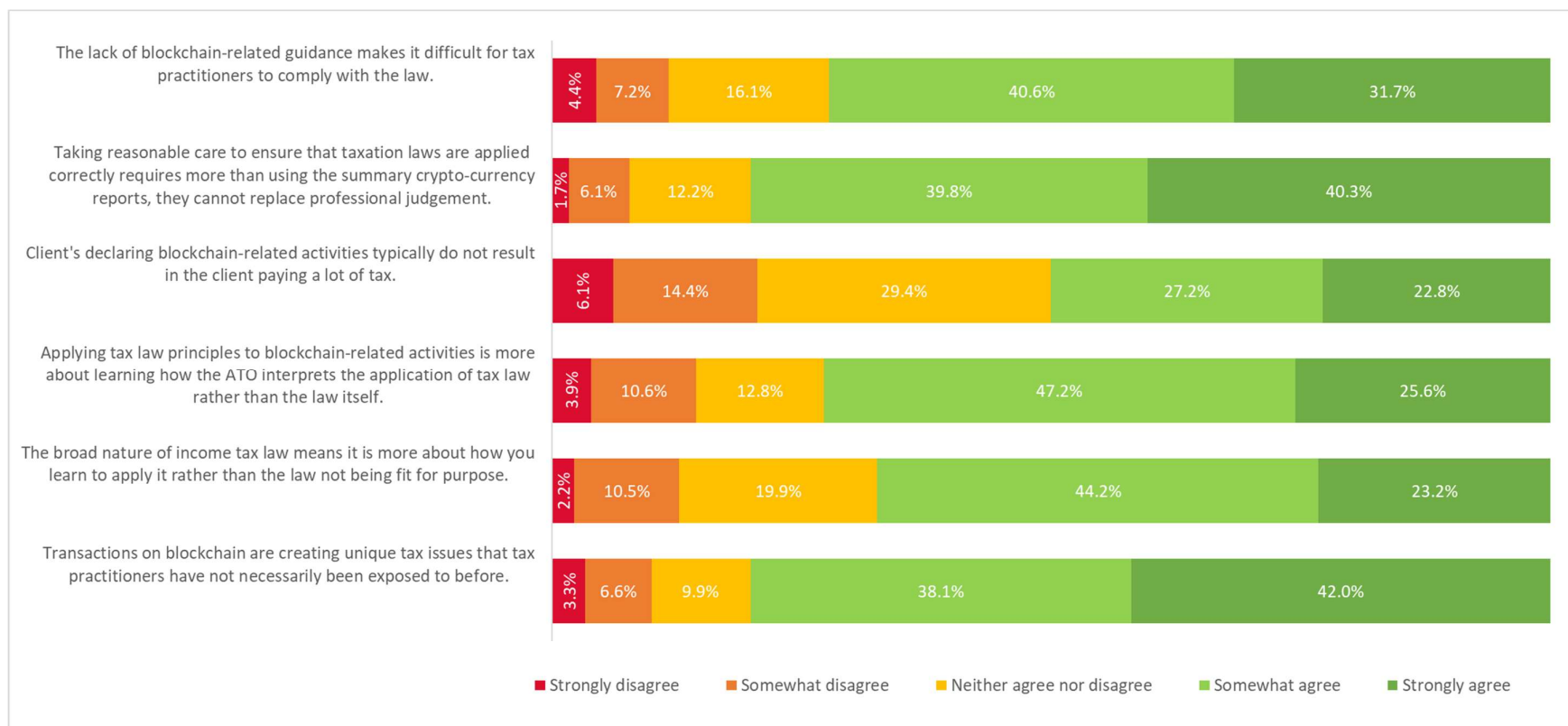
**Table 6: Perspectives with Respect to Tax Practitioner Skills and Competencies: Levels of Agreeance**

| <b>Tax practitioner skills and competencies</b>  | <b>N</b> | <b>Mean<br/>*</b> | <b>SD</b> | <b>Min</b> | <b>Max</b> | <b>Majority<br/>Position</b> |
|--|----------|-------------------|-----------|------------|------------|------------------------------|
| The lack of blockchain-related guidance makes it difficult for tax practitioners to comply with the TASA code of professional conduct  | 186      | 3.86              | 1.10      | 1          | 5          | <b>Agree</b>                 |
| There can be a knowledge and/or skills imbalance, in that clients may be experts in blockchain and practitioners in taxation, however the two can be difficult to reconcile        | 186      | 3.96              | 1.04      | 1          | 5          | <b>Agree</b>                 |
| There is a balance in needing to understand blockchain technology and/or blockchain terminology, whilst being able to communicate tax technical to clients                         | 186      | 4.23              | 0.79      | 1          | 5          | <b>Agree</b>                 |
| Independent investigation and hands-on experience in blockchain technology is valuable to be able to use professional judgement and be confident in applying the tax law correctly | 186      | 4.00              | 1.01      | 1          | 5          | <b>Agree</b>                 |
| It can be challenging for tax practitioners to upskill in blockchain and taxation  | 186      | 3.96              | 1.04      | 1          | 5          | <b>Agree</b>                 |
| Tax practitioners do not necessarily have adequate skills and/or knowledge in blockchain technology  | 186      | 4.08              | 1.05      | 1          | 5          | <b>Agree</b>                 |
| Key knowledge in blockchain technology and how it works is necessary for tax practitioners to be able to apply tax principles  | 187      | 3.91              | 1.22      | 1          | 5          | <b>Agree</b>                 |

\*Likert scale ranging from 1 meaning strongly disagree to 5 meaning strongly agree.



**Fig. 7: Perspectives with Respect to Applying the Law: Levels of Agreeance**

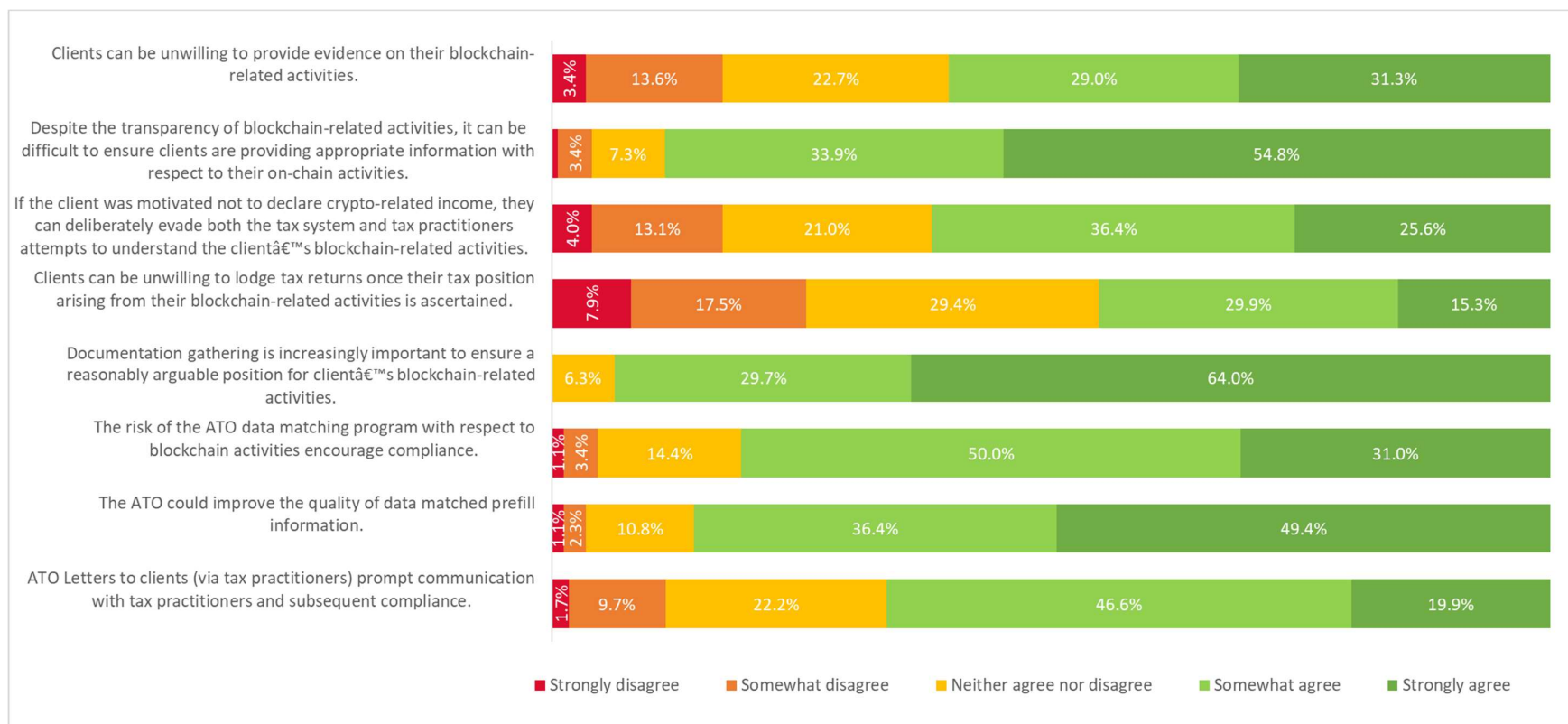


**Table 7: Perspectives with Respect to Applying the Law: Levels of Agreeance**

| <b>Applying the law</b>  | <b>N</b> | <b>Mean</b><br><b>*</b> | <b>SD</b> | <b>Min</b> | <b>Max</b> | <b>Majority Position</b> |
|--|----------|-------------------------|-----------|------------|------------|--------------------------|
| The lack of blockchain-related guidance makes it difficult for tax practitioners to comply with the law  | 180      | 3.88                    | 1.08      | 1          | 5          | <b>Agree</b>             |
| Taking reasonable care to ensure that taxation laws are applied correctly requires more than using the summary crypto-currency reports, they cannot replace professional judgement | 181      | 4.11                    | 0.95      | 1          | 5          | <b>Agree</b>             |
| Client's declaring blockchain-related activities typically do not result in the client paying a lot of tax   | 180      | 3.46                    | 1.17      | 1          | 5          | <b>Neutral → Agree</b>   |
| Applying tax law principles to blockchain-related activities is more about learning how the ATO interprets the application of tax law rather than the law itself                   | 180      | 3.80                    | 1.06      | 1          | 5          | <b>Agree</b>             |
| The broad nature of income tax law means it is more about how you learn to apply it rather than the law not being fit for purpose  | 181      | 3.76                    | 1.00      | 1          | 5          | <b>Agree</b>             |
| Transactions on blockchain are creating unique tax issues that tax practitioners have not necessarily been exposed to before   | 181      | 4.09                    | 1.04      | 1          | 5          | <b>Agree</b>             |

\*Likert scale ranging from 1 meaning strongly disagree to 5 meaning strongly agree.

**Fig. 8: Perspectives with Respect to Acting Lawfully and Ascertaining Client’s Affairs: Levels of Agreeance**



**Table 8: Perspectives with Respect to Acting Lawfully and Ascertaining Client's Affairs: Levels of Agreeance**

| <b>Tax practitioner skills and competencies</b>   | <b>N</b> | <b>Mean<br/>*</b> | <b>SD</b> | <b>Min</b> | <b>Max</b> | <b>Majority<br/>Position</b> |
|---|----------|-------------------|-----------|------------|------------|------------------------------|
| Clients can be unwilling to provide evidence on their blockchain-related activities   | 176      | 3.71              | 1.15      | 1          | 5          | <b>Agree</b>                 |
| Despite the transparency of blockchain-related activities, it can be difficult to ensure clients are providing appropriate information with respect to their on-chain activities                          | 177      | 4.39              | 0.81      | 1          | 5          | <b>Agree</b>                 |
| If the client was motivated not to declare crypto-related income, they can deliberately evade both the tax system and tax practitioners attempts to understand the client's blockchain-related activities | 176      | 3.66              | 1.11      | 1          | 5          | <b>Agree</b>                 |
| Clients can be unwilling to lodge tax returns once their tax position arising from their blockchain-related activities is ascertained   | 177      | 3.27              | 1.16      | 1          | 5          | <b>Neutral → Agree</b>       |
| Documentation gathering is increasingly important to ensure a reasonably arguable position for client's blockchain-related activities   | 175      | 4.58              | 0.61      | 3          | 5          | <b>Agree</b>                 |
| The risk of the ATO data matching program with respect to blockchain activities encourage compliance  | 174      | 4.06              | 0.83      | 1          | 5          | <b>Agree</b>                 |
| The ATO could improve the quality of data matched prefill information   | 176      | 4.31              | 0.84      | 1          | 5          | <b>Agree</b>                 |
| ATO Letters to clients (via tax practitioners) prompt communication with tax practitioners and subsequent compliance  | 176      | 3.73              | 0.95      | 1          | 5          | <b>Agree</b>                 |

\*Likert scale ranging from 1 meaning strongly disagree to 5 meaning strongly agree.

# The tax profession's response to the recent review of the TPB, the TASA 2009 Code of Professional Conduct, investigations, and related sanctions

Ken Devos,\* Elizabeth Morton,\*\* Mike Curran\*\*\* and Chris Wallis\*\*\*\*

## *Abstract*

A much anticipated review of the Tax Practitioners Board (TPB) and *Tax Agent Services Act 2009* (Cth) was released by the Australian Treasury in October 2019 detailing 28 recommendations with regard to the operation and function of the TPB. The government responded to those recommendations supporting 20 in part, full or principle, while rejecting eight. This study gathers the views and insights of 20 Australian tax practitioners via semi-structured interviews, as to their acceptance or otherwise of the recommendations. Interview data provides evidence surrounding the Code of Professional Conduct, investigations, sanctions and safe harbour recommendations. We find that whilst in many cases practitioners both agreed and disagreed with particular recommendations, preliminary or indicative themes emerged which complicated perceptions and warrant further investigation. These preliminary or indicative themes have the potential to impact perceptions and agreement with the TPB recommendations and raise questions as to whether recommendations will ultimately achieve their objectives. Practically, the findings of this study feed into the tax policy debate, by providing insights and information to the Tax Practitioner Governance and Standards Forum and Professional Standards Council. This study answers a call for further research into tax practitioners' attitudes and behaviour and adds to the limited existing empirical literature in this space. Importantly, the research findings have the capacity to potentially break new ground in determining whether the review's recommendations will achieve their objectives.

**Keywords:** tax profession, investigations, sanctions, code of conduct, safe harbour, Tax Practitioners Board, Tax Agent Services Act 2009, Tax Practitioners Governance and Standards Forum, tax policy

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## 1. INTRODUCTION

The *Tax Agent Services Act 2009* (Cth) (TASA 2009) was designed to regulate the operation and behaviour of registered tax practitioners, Business Activity Statement (BAS) agents and previously tax (financial) advisers. Since the enactment of the TASA 2009, few amendments have been made regarding registration, the Code of Professional Conduct (Code), the civil penalty regime and the Tax Practitioners Board (TPB), which make up the essence of the legislation. Despite previous attempts to address inefficiencies under the legislation and improve the overall operation of the TPB governing body, the TASA 2009 and Code therein have largely remained the same. There has also been opposition and resistance levied at the Code and its application to both individuals and organisations.<sup>1</sup> Given this background, the recent external review of the TPB (the Review) was overdue and has been well received, resulting in over 90 submissions from interested parties and key stakeholders alike.<sup>2</sup>

Given the wide-ranging review of the TPB and TASA 2009 legislation, this study is timely in that it provides some much-needed empirical evidence from tax practitioners themselves as to the merits of the TPB recommendations and how they will impact upon tax practitioners' businesses and livelihoods. Previous studies, including Marshall, Armstrong and Smith (1998),<sup>3</sup> Devos and Kenny (2017),<sup>4</sup> and more recently Devos, Morton, Curran and Wallis (2023),<sup>5</sup> have provided empirical evidence with regard to tax practitioners' attitudes and beliefs. Significantly, this study is well positioned to build on this prior work.

This study gathers the views and insights of 20 tax practitioners, as to their level of acceptance of selected proposed recommendations with respect to the Code, investigations, sanctions, and safe harbour. The findings are relevant to the tax policy debate, including the work of the Tax Practitioner Governance and Standards Forum (TPGSF), as well as the Professional Standards Council (PSC) and government as to whether the said recommendations are fit for purpose. After interviewing 20 tax practitioners, the authors are of the view that the said recommendations are generally fit for purpose; however some important caveats have been raised that warrant consideration. The evidence herein indicates that there is a clear, logical, and convincing case that these recommendations will potentially become law in the near future. This includes exposure draft legislation on several of the Review's recommendations: Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review and more recently, the Treasury Laws Amendment (Measures for Consultation) Bill 2023 along with the Tax Agent Services Amendment (Register Information) Regulations 2023 (a discussion of which is beyond the scope of this article).

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<sup>1</sup> Rex L Marshall, Robert W Armstrong and Malcolm Smith, 'The Ethical Environment of Tax Practitioners: Western Australian Evidence' (1998) 17(12) *Journal of Business Ethics* 1265.

<sup>2</sup> Australian Treasury, *Review of the Tax Practitioners Board: Discussion Paper* (July 2019); Australian Treasury, *Independent Review of the Tax Practitioners Board: Final Report* (31 October 2019) ('The Review'). The Review was led by former Board of Taxation member and Deputy Chair Mr Keith James.

<sup>3</sup> Marshall et al, above n 1.

<sup>4</sup> Ken Devos and Paul Kenny, 'An Assessment of the Code of Professional Conduct under the TASA 2009 – Six Years On' (2017) 32(3) *Australian Tax Forum* 629.

<sup>5</sup> Ken Devos, Elizabeth Morton, Michael Curran and Chris Wallis, 'Tax Practitioner Perspectives on Selected 2019 TPB Review Recommendations' (2023) 38(1) *Australian Tax Forum* 151.

The article is structured as follows. Following the introduction, in section 2 we outline the background to the Code, investigations, penalties, sanctions, and safe harbours with respect to the Review and government response. This is followed by section 3 which briefly outlines the relevant literature, before section 4 outlines the research design. Therein, we outline the research objective and questions derived from the prior literature (in particular, Devos and co-authors, 2023, referred to above). Section 5 provides a discussion and analysis of the in-depth tax practitioner perspectives while section 6 summarises and concludes.

## **2. BACKGROUND**

### **2.1 The key recommendations**

This section provides a brief background to the key recommendations which are the focus of this study, as summarised in Table 1 (see Appendix). These recommendations relate to the Code regulating tax practitioners' operation and behaviour, the investigative powers of the TPB which assists in ensuring tax practitioner compliance with the Code and thirdly, the penalties and sanctions for non-compliance and any safe harbour protections that may be available.

### **2.2 The TASA Code of Conduct**

The Code has now been in place for some 13 years amidst recent technological change (digital environment). Also, the activities and behaviour of some tax practitioners have been difficult to deal with and address effectively under the Code. For the Code to be able to deal with these challenges in real time requires legislative intervention. As such, the key recommendation (Recommendation 5.1) with regard to this issue was that the relevant Minister be given the legislative power to be able to supplement the Code to address emerging and existing behaviour.<sup>6</sup> The rationale was that a dynamic Code would assist the TPB 'scope out' possible behaviour and practices that were undesirable and streamline and standardise the Code where possible.<sup>7</sup>

There has been opposition by key stakeholders to this recommendation including the Australian accounting professional bodies (Chartered Accountants Australia and New Zealand and CPA Australia), who strongly believe the Code should remain in the Act as it now stands (Discussion Paper, Chartered Accountants Australia and New Zealand and CPA Australia). The professional bodies believe that the Code is principle-based and that making changes would make it too prescriptive.

Other concerns this recommendation raises include the level of government control and the independence of the TPB. The need to collaborate and consult with key stakeholders, regulators and professional bodies is an important function of the TPB and this recommendation of ministerial power may endanger that. It also raises the issue of whether the relevant Minister has the required expertise to make the Code changes or whether the Minister could possibly be subject to political pressures or Australian Taxation Office (ATO) influence which may result in biased decisions. In this regard it is critical for the Minister to be independent of the TPB so as to ensure confidence amongst practitioners. If tax practitioners are going to have faith in the legitimacy of

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<sup>6</sup> Australian Treasury, The Review, above n 2.

<sup>7</sup> Devos et al, above n 5.

ministerial power being granted to supplement the Code, they need to be convinced this will actually be the case.

The Australian Treasury has supported Recommendation 5.1 with the caveat that any proposed changes would first be considered by the newly established TPGSF, as an independent body which could oversee the process.<sup>8</sup> Note that Recommendation 5.1 is one of the subjects of published draft legislation.<sup>9</sup> The Exposure Draft Explanatory Materials confirm that the Minister can specify additional obligations that registered tax and BAS agents must comply with, including with respect to (i) subjects that are already referred to in the Code, and (ii) new subjects relating to *personal* and *professional*<sup>10</sup> conduct.<sup>11</sup>

The Exposure Draft Explanatory Materials go on explaining some limitations to the power. First, the ministerial power does *not* include the ability to reduce existing obligations and secondly where conflict occurs between the Code and the ministerial power, the conflicting provisions have no effect – thus providing some scope for checks and balances in reference to the notion of ‘supplement’.<sup>12</sup>

The Exposure Draft Explanatory Materials also reiterate the importance of consultation:

The legislative instrument process also ensures appropriate consultation with key stakeholders and parliamentary oversight, while also creating a proactive regime where emerging changes to behaviours and practise can be promptly adapted to by the regulator (para 1.75).

Note that the proposed amendment does not explicitly codify this consultation,<sup>13</sup> nor does the overarching process of legislative instrument.

### 2.3 Investigations

The TPB Review had indicated that changes needed to be made to improve the investigative powers of the TPB. Specifically, the Review recommended (Recommendation 6.2) that:

- a) investigations could commence and/or continue once a registered tax practitioner either has their registration terminated, chosen not to re-register, or is seeking to surrender their registration;
- b) the limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation be removed;
- c) the six-month timeframe to conduct investigations be removed.

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<sup>8</sup> Australian Treasury, *Government Response to the Review of the Tax Practitioners Board 2019* (November 2020) (‘Government Response’).

<sup>9</sup> See Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review, Exposure Draft Bill (18 November 2022), <https://treasury.gov.au/consultation/c2022-338098>.

<sup>10</sup> Note the proposed legislation does not use the phrase ‘personal’; it refers to professional and ethical.

<sup>11</sup> See Explanatory Memorandum to the Exposure Draft Bill, above n 9, para 1.72.

<sup>12</sup> See *ibid*, para 1.73.

<sup>13</sup> The proposed amendment is via new sub-sections 30-10(16), 30-12(1) and 30-12(2) within the *Tax Agent Services Act 2009* (Cth) (‘TASA 2009’).



With regard to (a), currently the TASA 2009 requires the TPB to institute a formal investigation to impose a sanction for a breach of the Code. While this requirement arguably draws out the time involved and hinders efficiency, common law procedural fairness/natural justice principles need to be adhered to. Further with regard to (b), similar procedural fairness issues are raised to enable tax practitioners to be able to prepare and defend their case against any potential investigation. On the other hand, the recommendation does have the potential to address an integrity issue, where higher risk tax practitioners are able to circumvent the investigation process and avoid disciplinary action by voluntarily deregistering before a formal investigation commences.<sup>14</sup>

While acknowledging that there is a need to support legislation that enhances the integrity of the tax system, such as Recommendation 6.2, some concerns have been raised that the recommendations may be too broad. In particular, the Institute of Financial Professionals Australia (IFPA)<sup>15</sup> has indicated that the proposed amendments with respect to investigations may unintentionally draw in tax advisers and their clients who neither have the intention nor opportunity to engage in the egregious activities that prompted the recommendation.<sup>16</sup> This will ultimately lead to increasing compliance costs, financial risk and regulatory scrutiny for them.<sup>17</sup> Whilst the IFPA's concern to ensure the legislative changes do not unfairly impact honest tax practitioners is valid, for those practitioners who do the right thing these safeguards should not cause any fear or unnecessarily heavy burdens.

Recommendation (c) to remove the six-month time frame for a formal investigation can arguably create problems. It is possible that the open time frame could lead to lengthy and inefficient investigations. However, the decision to extend would also be a reviewable decision. Currently, the TASA 2009 only allows a one-off extension due to matters that are outside the TPB's control. As an alternative, the TPB has indicated that formal information gathering powers under the TASA 2009 could be amended such that they are not triggered by the commencement of a formal investigation.<sup>18</sup>

Overall the professional bodies have supported the recommendation in principle. The government supports the Review's recommendation in part, agreeing with Recommendation 6.2 (a) and intends to amend the law to enact this change. However, with regard to (b) and (c), the government has indicated it would consult further to investigate the implications of such a change.<sup>19</sup>

It is important to note that the investigation powers of the TPB are wide and contained in Division 60-E of the TASA 2009. It could be noted that this power is augmented by sections 8C and 8D of the *Taxation Administration Act 1953* (Cth) (TAA 1953). Section 8C is an absolute liability provision and section 8D is a strict liability provision.<sup>20</sup> This limits the defences available. If a person does not produce documents or answer questions and so forth, then they could be subject to the penalties set out in section 8E.<sup>21</sup>

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<sup>14</sup> Devos et al, above n 5.

<sup>15</sup> Institute of Financial Professionals Australia, 'Exposure Draft Bills: Response to PwC Tax Leaks' *Daily Update* (21 September 2023).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Australian Treasury, *The Review*, above n 2; Devos et al, above n 5.

<sup>19</sup> Australian Treasury, *Government Response*, above n 8. See also Devos et al, above n 5.

<sup>20</sup> See *Criminal Code Act 1995* (Cth) sch 1, ss 6.1 and 6.2.

<sup>21</sup> *Taxation Administration Act 1953* (Cth) s 8E ('TAA 1953').

It should also be noted that in some circumstances the penalties include imprisonment for up to 12 months.

## 2.4 Penalties, sanctions and safe harbours

While the Review had indicated that the majority of tax practitioners do the right thing and act within the law, there was nevertheless a small minority of 'egregious' tax practitioners who choose to operate outside the law. These practitioners contribute to the high error rate in tax returns (78 per cent amongst agents) and undermine the integrity of the tax system thereby contributing to the tax gap through their reckless behaviour and intentional disregard for the law.<sup>22</sup>

In order to deal with this inappropriate behaviour, the Review indicated that there was a limited range in the severity of sanctions available to the TPB. For instance, the TPB had little choice in applying low level sanctions such as a written caution or further education or a high-level sanction, such as suspension or termination of registration and civil penalties. Broad support was received in the submissions for the TPB to have more flexibility when finding or determining a breach has occurred and consequently six additional sanction tools were made available to cover a broad range of misconduct.<sup>23</sup> The issues of maintaining procedural fairness and providing the correct level of regulation are still paramount and it is important that the increased sanctions do not jeopardise the power and independence of the TPB. The following range of sanctions were introduced in (Recommendation 6.1):

- infringement notices;
- enforceable undertakings;
- quality assurance audits;
- interim suspensions;
- permanent disbarment, and
- external intervention.

In addition to the range of penalties on offer to the TPB, to act as a deterrent to those tax practitioners who continue to operate outside the law, the Review recommended (Recommendation 6.3) that a register of identified unregistered practitioners would provide further transparency to both prospective employers and clients, and should be implemented.<sup>24</sup> As the compliance literature indicates that public naming and shaming can be effective<sup>25</sup> and improve public trust, determining exactly what details of unregistered practitioners are provided and how long it remains published requires careful consideration given that people's livelihoods are at stake.

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<sup>22</sup> Australian Treasury, The Review, above n 2.

<sup>23</sup> Devos et al, above n 5.

<sup>24</sup> Ibid.

<sup>25</sup> John Braithwaite and Peter Drahos, 'Zero Tolerance, Naming and Shaming: Is There a Case for it with Crimes of the Powerful?' (2002) 35(3) *The Australian and New Zealand Journal of Criminology* 269.

Prior studies have also indicated that reputational damage can be quite detrimental and can severely impact the practitioner's ability to operate in the future.<sup>26</sup> In this regard, the register needs to balance the need for public information against safeguarding the tax profession. Information regarding those practitioners who have breached their obligations needs to be present for sufficient time to also allow for rehabilitation and continued future operation, where continuation of practice is appropriate.

Along with the proposed amendment in respect to Recommendation 5.1 outlined above, the draft legislation proposes the introduction of 'Disqualified Entities' provisions in a new Division 45 of the TASA 2009. These would require that a registered tax or BAS agent give notice to the TPB if they are employing or using the services of a disqualified entity to provide tax agent services on behalf of the agent without the Board's approval. Furthermore, the disqualified entity would be required to give notice to the tax or BAS agent when seeking to provide or are providing tax agent services on behalf of the agent.<sup>27</sup>

Where the tax agents had 'knowingly' made false or misleading statements in the preparation of tax returns and demonstrated intentional disregard with respect to the tax law, the Review recommended further penalties (Recommendation 6.4). This was premised on the taxpayer acting in good faith and complying with their obligations under the law, but where this was found not to be the case, it was suggested that some apportionment of the penalty be applied to both parties according to their respective behaviour.<sup>28</sup>

To add to the current safe harbour protections afforded under the TAA 1953 which establishes the administrative penalty regime, the Review recommended (Recommendation 6.5) similar protections to cover instances of recklessness and intentional disregard with the trade-off being the imposition of penalties on high-risk tax intermediaries that break the tax law.<sup>29</sup> Consequently, as the penalty could be applicable to whoever was at fault this could be difficult to establish in practice. The basis on which to apportion the penalty could become problematic and the relevance of a safe harbour may be questionable given that taxpayers will still have the right to take legal action to recover costs against the tax practitioner. Note, however, that pursuing a remedy against the practitioner can be long and costly, in terms of both economic and psychological costs.

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<sup>26</sup> Devos and Kenny, above n 4.

<sup>27</sup> The definition of a disqualified entity in the proposed s 45-5 of the draft Bill is very wide. Broadly speaking it is defined, amongst other things, to include an entity that is not a registered tax or BAS agent and, within the last 5 years has committed a serious offence, committed a serious taxation offence, had its registration terminated or suspended, been convicted of an offence involving fraud or dishonesty or is an undischarged bankrupt. The term 'serious taxation offence' is defined in s 90-1 of the TASA 2009, above n 13. However, the term 'serious offence' is not defined in the TASA 2009. Nonetheless, s 3-5 provides that if a term is not defined in the TASA 2009, then it will take on the meaning of the definition contained s 995-1 of the *Income Tax Assessment 1997* (Cth) ('ITAA 1997'). Here it is given the meaning outlined in s 355-70 in Sch 1 of the TAA 1953, above n 21. Section 355-70(10) defines a serious offence as an offence against an Australian law that is punishable by a term of imprisonment exceeding 12 months. By comparison, this is a wider than the definition of a serious offence in s 23WA of the *Crimes Act 1914* (Cth), which stipulates that a serious offence is one that is punishable by a maximum penalty of imprisonment for life or 5 years or more.

<sup>28</sup> Australian Treasury, The Review, above n 2.

<sup>29</sup> Ibid.

### 3. LITERATURE REVIEW

This section provides a brief review of some of the main research studies conducted over the last 30 years regarding tax practitioner ethics, the Code, investigations, penalties, sanctions, and safe harbour provisions.

Part 3, Division 30 of the TASA 2009 incorporates the Code. Specifically, it comprises the key attributes of tax practitioners, including *honesty* and *integrity*, *independence*, *confidentiality*, *competence* and *other responsibilities*.<sup>30</sup> In investigating *integrity*, tax practitioners' judgments have been found to be impacted, making them either less or more likely to choose a favourable tax outcome.<sup>31</sup> When it comes to the attribute of *independence*, tax practitioners have also found themselves to be conflicted between the needs of the client and their loyalty to the tax system.<sup>32</sup> Independence has also been found to be a problem in that tax practitioners do not always *realise* they have a potential conflict of interest between allegiance to their client and to the revenue authority.<sup>33</sup>

The attribute of *confidentiality* needs to be observed in any communications between tax practitioner and client, noting that while documents may not be subject to *legal professional privilege*, an administrative/statutory protection can be extended to tax advice provided by accountants.<sup>34</sup> Professional *competence* requires tax practitioners to be qualified and to stay up to date to satisfy the various needs of the public.<sup>35</sup> *Other responsibilities* of the accountant also include, among others, responding to requests and directions from the TPB in a timely manner. These and other aspects relating to the Code are explored throughout this study.

The TPB may decide to investigate tax practitioners if initial enquiries suggest they should. They have the power to do so pursuant to section 60-95 of the TASA 2009. It is noted that the TPB may also investigate without having made any enquiries or received any complaints. The investigations could arise due to a number of actions. These include registration applications, breach of the Code, as a result of making false or misleading statements, advising or supplying services when unregistered, and other types of misconduct. Currently, an investigation involves an 8-step process which affords the tax practitioner natural justice and appeal rights.<sup>36</sup> Since 2010 a significant body of Administrative Appeals Tribunal (AAT) decisions have developed in this area.<sup>37</sup>

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<sup>30</sup> TASA 2009, above n 21, s 30-10.

<sup>31</sup> Darius Fatemi, John Hasseldine and Peggy Hite, 'The Influence of Ethical Codes of Conduct on Professionalism in Tax Practice' (2020) 164(1) *Journal of Business Ethics* 133.

<sup>32</sup> Brian Erard, 'Taxation with Representation: An Analysis of the Role of Tax Practitioners in Tax Compliance' (1993) 52(2) *Journal of Public Economics* 163; Michael Walpole, 'Ethics and Integrity in Tax Administration', UNSW Law Research Paper No 2009-33 (2009).

<sup>33</sup> Gordon Cooper, 'The New Regulatory Regime for Tax Practitioners' (Paper Presented at the Tax Institute Tasmanian State Convention, 17-18 October 2008) 16-22.

<sup>34</sup> Devos and Kenny, above n 4.

<sup>35</sup> Julie H Collins, Valerie C Milliron and Daniel R Toy, 'Factors Associated with Household Demand for Tax Preparers' (1990) 12(1) *Journal of the American Taxation Association* 9.

<sup>36</sup> See 'Investigations', *Tax Practitioners Board* (Web Page, last modified 10 October 2022), [www.tpb.gov.au/investigations](http://www.tpb.gov.au/investigations).

<sup>37</sup> For example, see *Middlebrook and Tax Practitioners Board* [2020] AATA 3698; *Ridden and Tax Practitioners Board* [2020] AATA 422; *Re Li and Tax Practitioners Board* (2014) 141 ALD 201; *Re Tung and Tax Practitioners Board* (2012) 90 ATR 480; *Rent to Own (Aust) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689; *Re Allen J Middlebrook & Associates Pty Ltd and Tax Practitioners' Board* [2010] AAT 622.

Limited studies have been carried out on investigations per se, but the Review largely supports the recommendation to commence or continue an investigation for tax practitioners that have chosen not to reregister. The TPB also indicated that formal investigations could be curtailed as long as procedural fairness requirements are met.<sup>38</sup> It is important to note that the TPB is not bound by the rules of evidence and is able to exercise a discretion as to this procedure.<sup>39</sup> Previous case law has provided some guidance as to what is acceptable in exercising this discretion in regard to the rules of evidence.<sup>40</sup>

However, while tax practitioners are made aware of an investigation by the TPB under section 60-95(2) of the TASA 2009, they 'might not be aware of a note in section 60-125 which lists out outcomes of investigations'.<sup>41</sup> As Arthur Athanasiou indicates, section 60-95 'mandates that the TPB act transparently by giving notice to a tax agent beforehand', meaning it can 'potentially act with impunity by stealthily investigating the fitness and propriety of a tax agent, forming a decision and then unilaterally terminating a tax agent's registration'.<sup>42</sup> Consequently, it is imperative that tax practitioners take a proactive approach and be transparent with the TPB and see whether matters can be resolved before the TPB commences an investigation.<sup>43</sup> Practitioners should be aware that the issue of investigating high-risk tax practitioner behaviour remains high on the agenda with the Board Conduct Committee (BCC) investigating large numbers in 2022.<sup>44</sup>

The Final Report recommendations do raise some potential issues when it comes to investigations, for example, the requirement of the TPB having to conduct a formal investigation before it could apply sanctions under section 30-15 of TASA 2009, despite

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<sup>38</sup> Australian Treasury, The Review, above n 2.

<sup>39</sup> This is subject to the requirement to observe procedural fairness: see, eg, Tax Practitioners Board, 'Tax Practitioner Service Charter', item (4), <https://www.tpb.gov.au/tax-practitioner-service-charter>, as cited in Robin Woellner, 'TASA and the Life-Cycle of a Tax Practitioner – Current Law and Proposed Reform' (2021) 36(3) *Australian Tax Forum* 443, 448.

<sup>40</sup> As Brennan J (quoted by Member Grigg in *Norman v TPB* [2021] AATA 848, [67]-[68]) observed in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492: 'To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force' and subsequently (quoting Evatt J in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256), that the fact that the Tribunal is not bound by the formal rules of evidence (see now s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth)) 'does not mean that all rules of evidence may be ignored as of no account'. See also, eg, *Baini v Federal Commissioner of Taxation* [2012] AATA 440, [117]-[129] (Forgie DP). In practice the TPB generally applies the evidentiary rules: cf *Knox v FCT* [2011] AATA 906, [22]-[58] (Forgie DP); Hon Justice Garry Downes, 'Practice, Procedure and Evidence in the Administrative Appeals Tribunal' (Paper Presented at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011) 1-5, <https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/practice-procedure-and-evidence-in-the-administrat>, cited in Woellner, above n 39, 448, n 42.

<sup>41</sup> Jotham Lian, 'Practitioners Cautioned over TPB "Stealthy" Investigation Tactic' *Accountants Daily* (28 February 2020) (citing Arthur Athanasiou), <https://www.accountantsdaily.com.au/business/14080-practitioners-cautioned-over-tpb-stealthy-investigation-tactic>.

<sup>42</sup> *Ibid* quoting Arthur Athanasiou.

<sup>43</sup> Amber Agustin, 'Tips for Managing Disciplinary Matters with the TPB' *Clayton Utz Insights* (1 May 2017), <https://www.claytonutz.com/insights/2017/may/tips-for-managing-disciplinary-matters-with-the-tpb>.

<sup>44</sup> See the Tax Practitioners Board, above n 36.

the TPB already holding adequate information on which to base those sanctions.<sup>45</sup> This is counter-productive and can potentially lead to a waste of valuable resources given that there is no need for the investigation. This leads to the issue of sanctions themselves.

A much broader body of literature<sup>46</sup> has emerged over the last 30 years with regard to the impact of sanctions upon tax practitioner behaviour.<sup>47</sup> In particular, the subtle balance between penalties per se and their enforcement has been a common theme. For example, it was found that perceptions of tax laws and the penalties thereon were stronger than perceptions of enforcement activities and the probability of detection by the ATO.<sup>48</sup> In contrast, other studies have found that penalties without the possibility of detection reduces their effectiveness and that both elements are required to influence compliance attitudes.<sup>49</sup> Having clear penalties that were also enforced has also been found to be effective where practitioners are more conservative in their decision-making.<sup>50</sup> In attempting to temper tax practitioner aggressiveness and behaviour that potentially exploits the tax law, further studies have confirmed that strong penalties are important, in that where penalty fines were low, tax practitioner compliance was also low.<sup>51</sup>

However, as a slight variation to this, other studies have found that increased penalties had little influence on curbing tax practitioner aggressiveness where issues were ambiguous.<sup>52</sup> Consequently, the greyness and complexity of Australian tax law provides many opportunities for non-compliance. Supporting this contention were the results of Erard's study, which in this case found that an American CPA member would take any tax position as long as there was a realistic possibility of it being sustained, either administratively or judicially, if challenged.<sup>53</sup>

One resolution to the issue of tax law complexity and ambiguity would be to simplify the tax law. However, this is easier said than done. Numerous attempts have been made to simplify and streamline the tax law over the years with limited success.<sup>54</sup> Therefore, given the inherent nature and complexity of Australian tax law, it is suggested that penalties per se should be complemented with greater awareness and education of tax

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<sup>45</sup> Woellner, above n 39; Robin Woellner, 'Updating the Tax Agents Services Act 2009' *Austaxpolicy: Tax and Transfer Policy Blog* (Online, 23 September 2022), <https://www.austaxpolicy.com/updates-the-tax-agents-services-act-2009/>.

<sup>46</sup> For a more in-depth survey of the relevant literature please refer to Devos et al, above n 5.

<sup>47</sup> *Ibid.*

<sup>48</sup> Rex Marshall, Malcolm Smith and Robert Armstrong, 'The Impact of Audit Risk, Materiality and Severity on Ethical Decision Making: An Analysis of the Perceptions of Tax Agents in Australia' (2006) 21(5) *Managerial Auditing Journal* 497.

<sup>49</sup> Michael L Roberts, 'Tax Accountants' Judgment/Decision-Making Research: A Review and Synthesis' (1998) 20(1) *Journal of the American Taxation Association* 78.

<sup>50</sup> Philip M J Reckers, Debra L Sanders and Robert W Wyndelts, 'An Empirical Investigation of Factors Influencing Tax Practitioner Compliance' (1991) 13(2) *Journal of the American Taxation Association* 30.

<sup>51</sup> S G Nienaber, 'Factors That Could Influence the Ethical Behaviour of Tax Professionals' (2010) 18(1) *Meditari Accountancy Research* 33.

<sup>52</sup> Andrew D Cuccia, Karl Hackenbrack and Mark W Nelson, 'The Ability of Professional Standards to Mitigate Aggressive Reporting' (1995) 70(2) *The Accounting Review* 227.

<sup>53</sup> Erard, above n 32.

<sup>54</sup> See generally the Review of Business Taxation (John Ralph, chair), *A Tax System Redesigned: More Certain, Equitable and Durable* (1999) (Ralph Review) and Australia's Future Tax System Review Panel (Dr Ken Henry, chair), *Australia's Future Tax System: Report to the Treasurer* (December 2009) (Henry Review) where many recommendations were either not feasible or adopted.

practitioners.<sup>55</sup> Ultimately it is balancing both enforcement and education/training of the practitioners by the TPB that will potentially deliver the best results regarding compliance with the Code.<sup>56</sup>

It should also be noted that in creating adequate deterrents for undesirable tax practitioner behaviour, the literature has been quite strong on the impact of reputational damage.<sup>57</sup> In this regard, naming and shaming tax practitioners in the public register can be quite contentious. While having the desired effect of acting as a general deterrent, this must also be weighed against the potential damage that could be caused to a tax practitioner's livelihood.<sup>58</sup> The contents of the register and how long certain information remains in the register then becomes critical and the discretion would be with the TPB.

The establishment of safe harbour for taxpayers in cases of where the tax practitioner had intentional disregard of the tax law was also an issue explored in this study. Building on the work of Devos and co-authors (2023),<sup>59</sup> the focus was on the extension of the protections afforded in section 286-75(1A) of Schedule 1 of the TAA 1953 regarding recklessness and intentional disregard for the law.<sup>60</sup> In particular, the findings of the Review indicated the imposition of the penalty for intentional disregard and raised the contentious issue of apportioning the penalty between the two parties according to their respective behaviour.<sup>61</sup> Also, in the case of fraud and evasion, it was recommended that the onus of proof be on the ATO instead of the taxpayer.<sup>62</sup>

Clearly, this topic of the Review was going to generate strong debate with regard to expanding safe harbour protections to cover instances of recklessness and intentional disregard, with the trade-off being the imposition of penalties on high-risk tax intermediaries that break the tax law.<sup>63</sup> It should also be noted that submissions to the Review indicated a lack of awareness of the safe harbour protections amongst tax practitioners generally, and that the ATO should do more to ensure the protections are

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<sup>55</sup> Scott A Yetmar and Kenneth K Eastman, 'Tax Practitioners' Ethical Sensitivity: A Model and Empirical Examination' (2000) 26(4) *Journal of Business Ethics* 271.

<sup>56</sup> Devos and Kenny, above n 4.

<sup>57</sup> Yuka Sakurai and Valerie Braithwaite, 'Taxpayers' Perceptions of Practitioners: Finding One Who is Effective and Does the Right Thing?' (2003) 46(3) *Journal of Business Ethics* 375; Cuccia et al, above n 52; Braithwaite and Drahos, above n 25.

<sup>58</sup> For example, Peter-John Collins and PwC's reputation has been impacted in recent times due to breaches to the Code. In particular, Peter-John Collins was deregistered for a period of two years following their failure to comply with the Code, including with respect to acting honestly and with integrity, as well as having adequate arrangements for managing conflicts of interest: Tax Practitioners Board, 'Peter-John Collins', <https://www.tpb.gov.au/tax-practitioner/tax-agent/39805002>. PwC was similarly found to have breached the Code regarding adequate arrangements in place to manage conflicts of interest: Tax Practitioners Board, 'PriceWaterhouseCoopers', <https://www.tpb.gov.au/tax-practitioner/tax-agent/16226000>. See also Neil Chenoweth and Edmund Tadros, 'PwC Leaks Scandal Widens' *Australian Financial Review* (Online, 16 February 2023), <https://www.afr.com/companies/financial-services/pwc-leaks-scandal-widens-20230215-p5ckv> (also reporting that at a Senate estimates hearing TPB's Michael O'Neill addressed the activities of between 20 and 30 PwC staff and their involvement in the sharing of confidential information).

<sup>59</sup> Devos et al, above n 5.

<sup>60</sup> Australian Treasury, *The Review*, above n 2.

<sup>61</sup> Devos et al, above n 5.

<sup>62</sup> Lois Maskiell, 'Accounting Groups Back Calls for Taxpayer Bill of Rights to Better Protect SMEs' *SmartCompany* (Web Page, 27 October 2021), <https://www.smartcompany.com.au/business-advice/politics/accounting-groups-taxpayer-bill-rights/>.

<sup>63</sup> Devos et al, above n 5.

published.<sup>64</sup> This finding was also consistent with the findings of Devos and Kenny (2017)<sup>65</sup> concerning potential education deficiencies amongst some tax practitioners.

## 4. RESEARCH DESIGN

### 4.1 Research objective

The objective of this project is to investigate Australian tax practitioners' perceptions of the recent recommendations made concerning the Code, investigations, sanctions, and safe harbours. We extend upon the work by Devos and co-authors (2023), which examines overall perceptions to the TPB recommendations examined in this study.<sup>66</sup> They found that whilst in many cases survey participants agree (disagree), preliminary or indicative themes emerged which complicated perceptions and warrant further investigation.

Consequently, this study extends their work by gaining an in-depth understanding of tax practitioner perceptions. As Australian tax practitioners act on behalf of a substantial proportion of Australian individual taxpayers (approximately 75 per cent), they have an enormous capacity to influence taxpayer compliance, which has always been a challenge for the ATO. Understanding the attitude and behaviour of tax practitioners who act on behalf of taxpayers is a key to improving compliance outcomes. This study provides an opportunity to investigate further the attitude and behaviour of tax practitioners in terms of the Code, investigations, sanctions, and safe harbours, thereby directly addressing this challenge.

There is an overarching concern that although the majority of tax practitioners conduct themselves appropriately, some engage in high-risk behaviour, such as money laundering activities, which impacts on the profession and demands further investigation.<sup>67</sup> This is relevant to the profession, community regulators (PSC), policy-setters and the government generally. The government has been clear with the injection of increased funding in the recent October 2022 Federal Budget for the TPB<sup>68</sup> to up-scale compliance activity with regard to detecting and addressing egregious tax practitioner behaviour.

### 4.2 Research questions

#### 4.2.1 *With respect to supplementing the Code*

Extant research by Devos and co-authors (2023) referred to above suggests that on balance tax practitioners are supportive of Recommendation 5.1; however this research has indicated several issues including (i) caveats with respect to the degree of agreement with the Recommendation, (ii) concern over government control and independence, and (iii) concern over the lack of expertise and political bias.<sup>69</sup>

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<sup>64</sup> Australian Treasury, *The Review*, above n 2, 72.

<sup>65</sup> Devos and Kenny, above n 4.

<sup>66</sup> Devos et al, above n 5.

<sup>67</sup> Australian Treasury, *The Review*, above n 2.

<sup>68</sup> Australian Treasury, *Budget Paper No 2: Budget Measures October 2022-23* (25 October 2022) 20. The government will provide AUD 30.4 million to the Tax Practitioners Board (TPB) to increase compliance investigations into high-risk tax practitioners and unregistered preparers over four years from 1 July 2023.

<sup>69</sup> Devos et al, above n 5.



This project therefore examines the recommendation relating to the Code and seeks to gain in-depth insights into the indicative themes found therein:

**RQ<sub>1.1</sub>:** *Why do Australian tax practitioners agree or disagree with Recommendation 5.1?*

**RQ<sub>1.2</sub>:** *To what extent, if any, are Australian tax practitioners concerned about the level of government control and independence that Recommendation 5.1 suggests?*

**RQ<sub>1.3</sub>:** *To what extent, if any, are Australian tax practitioners concerned about the proposed Minister having a lack of expertise to make changes to the TASA Code of Professional Conduct?*

**RQ<sub>1.4</sub>:** *To what extent, if any, are Australian tax practitioners concerned that the proposed Minister may be subject to political pressure or ATO influence which could lead to biased decisions?*

#### 4.2.2 *With respect to investigations*

Extant research by Devos and co-authors (2023) suggests that whilst tax practitioners on balance agree with Recommendation 6.2 (a) regarding investigating tax practitioners no longer registered, on balance tax practitioners disagree with Recommendations 6.2 (b) and (c), which relate to formal information gathering and the six-month time frame. With respect to each component of Recommendation 6.2, the research results raised several aspects that may underpin these findings.<sup>70</sup>

This project therefore examines the recommendation relating to investigations and seeks to gain in-depth insights into the indicative themes found therein:

**RQ<sub>2.1</sub>:** *Why do Australian tax practitioners agree or disagree with Recommendation 6.2?*

**RQ<sub>2.2</sub>:** *To what extent, if any, do Australian tax practitioners believe that investigating de-registered tax practitioners, as proposed by Recommendation 6.2 (a), is a valuable and good use of government resources?*

**RQ<sub>2.3</sub>:** *To what extent, if any, are Australian tax practitioners concerned about the impact of investigating de-registered tax practitioners, as proposed by Recommendation 6.2 (a), on the principles of natural justice and procedural fairness?*

**RQ<sub>2.4</sub>:** *To what extent, if any, do Australian tax practitioners believe that tax practitioners, as proposed by Recommendation 6.2 (b), have a right to know they are being investigated?*

**RQ<sub>2.5</sub>:** *To what extent, if any, are Australian tax practitioners concerned about the impact of removing the six-month timeframe, as proposed by Recommendation 6.2 (c), on the effectiveness and efficiency of investigations?*

#### 4.2.3 *With respect to penalties and sanctions*

Extant research by Devos and co-authors (2023) referred to above suggests that tax practitioners on balance agree with Recommendations 6.1, 6.3 and 6.4. These

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<sup>70</sup> Ibid.

recommendations relate to increasing the number and type of sanctions, increasing the level of detail on the public TPB register concerning tax practitioner sanctions, and the introduction of an administrative penalty regime with respect to intentional disregard. Whilst the research finds on balance agreement with the recommendation, several issues or concerns have been indicated.<sup>71</sup>

This project therefore examines the recommendation relating to penalties and sanctions and seeks to gain in-depth insights into the indicative factors that may impact tax practitioner perceptions found therein:

**RQ<sub>3.1</sub>:** *Why do Australian tax practitioners agree or disagree with Recommendation 6.1, 6.3 and 6.4?*

**RQ<sub>3.2</sub>:** *To what extent, if any, do Australian tax practitioners believe that sufficient penalties are needed to curb undesirable behaviour?*

**RQ<sub>3.3</sub>:** *To what extent, if any, do Australian tax practitioners believe that the proposed sanctions, as proposed by Recommendation 6.1, offer balance between regulation and procedural fairness?*

**RQ<sub>3.4</sub>:** *To what extent, if any, are Australian tax practitioners concerned about the impact of increasing sanctions, as proposed by Recommendation 6.1, on the power and independence of the TPB?*

**RQ<sub>3.5</sub>:** *To what extent, if any, do Australian tax practitioners believe that the proposed publication of further detail in the TBP Register, as proposed by Recommendation 6.3, will improve transparency and public trust?*

**RQ<sub>3.6</sub>:** *To what extent, if any, do Australian tax practitioners believe that the proposed administrative penalty regime, as proposed by Recommendation 6.4, will be effective in dealing with high-level misconduct?*

**RQ<sub>3.7</sub>:** *To what extent, if any, do Australian tax practitioners believe that an appropriate avenue of appeal is required with regard to the proposed administrative penalty regime, as proposed by Recommendation 6.4?*

#### 4.2.4 *With respect to safe harbour*

Extant research by Devos and co-authors (2023) referred to above suggests that whilst tax practitioners on balance agree with Recommendations 6.5, this research has indicated several issues that may complicate tax practitioner perceptions. These relate to (i) caveats with respect to the agreement with the Recommendation, (ii) consideration of both the agent and the client, and (iii) concern over whether safe harbour is relevant.<sup>72</sup>

This project therefore examines the recommendation relating to the proposed safe harbour for instances where the tax agent has demonstrated recklessness or intentional disregard and seeks to gain in-depth insights into the indicative factors that may impact tax practitioner perceptions found therein:

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

*RQ4.1: Why do Australian tax practitioners agree or disagree with Recommendation 6.5?*

*RQ4.2: To what extent, if any, do Australian tax practitioners believe that it is important to identify whether the taxpayer is at fault in addition to the tax practitioner?*

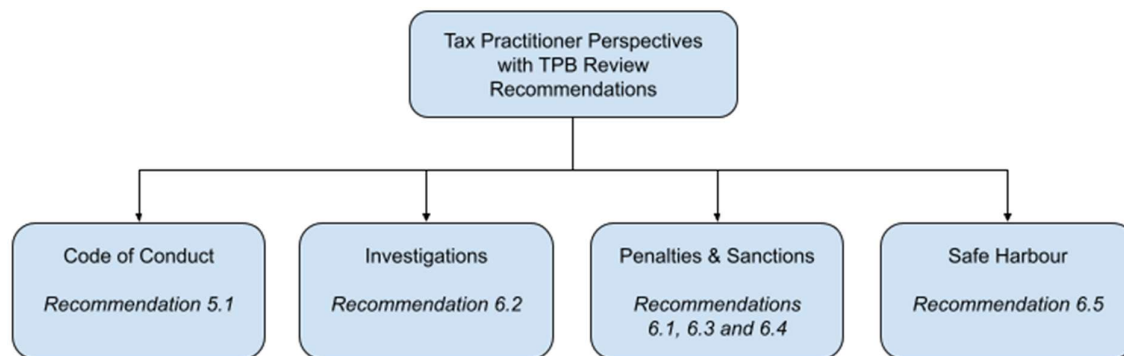
*RQ4.3: To what extent, if any, do Australian tax practitioners believe that the imposition and apportionment of penalty between the taxpayer and tax practitioner is appropriate?*

*RQ4.4: To what extent, if any, do Australian tax practitioners believe that the proposed safe harbour regime, as proposed by Recommendation 6.5, is relevant given taxpayers can take legal action to recover costs?*

### 4.3 Research method

The project employs a qualitative methodology consisting of semi-structured interviews of Australian tax practitioners. Interview methodology allows for in-depth perceptions not capturable via quantitative research methods and follows on from findings established by Devos and co-authors (2023) which indicate several issues and/or concerns that may impact perceptions and agreement with the TPB recommendations.<sup>73</sup> The semi-structured interviews revolve around the four substantive areas set out in the research question sets above, as well as an establishment of basic demographic data: Figure 1.

**Fig. 1: Interview Framework**



### 4.4 Data collection

Interviewees were identified through their status as an Australian tax practitioner, whether operating as a sole practitioner, employee, partner, or director of or within a firm/office. The recruitment process and interview schedule ran between June and September 2022. Recruitment occurred via email invitation, with support from a

<sup>73</sup> Ibid.

selection of professional bodies as well as the researchers' professional networks. Invitations to participate were promoted through the following set of recruitment avenues:

- 1) Tax Practitioners Board weekly newsletter, '*eNews*', promoted in the June 2022 issue (no. 66).
- 2) The Tax Institute email invitations to various state councils, engagement committees and local tax clubs at the Institute's discretion, from June 2022.
- 3) CPA Australia email invitations to various committees and tax discussion groups at their discretion, from June 2022.
- 4) Professional Networks of chief researchers (including email and LinkedIn), between June and August 2022.

All interviewees were provided with the interview question guide and participant information and consent form (PICF) ahead of the scheduled interview. Following the interview, interviewees were given the opportunity to review the transcription and make any necessary adjustments. For their time and participation in the project, interviewees were given an AUD 50 e-voucher.

Interviews were conducted online through Microsoft Teams between June and September 2022. In all, 20 interviews running between 32 minutes to 1 hour and 19 minutes were conducted. All interviews were carried out by the two chief investigators of the project, with the same chief investigator leading lines of questioning to aid reliability of findings. In this way, whilst we acknowledge subjectivity in all qualitative research, including interviewer/interviewee and response biases, interviews were conducted as consistently as practicable.<sup>74</sup>

Interviews were recorded for transcription purposes with the consent of each interviewee. Transcripts were de-identified. Interviewees are labelled as 'Practitioner 1' through to 'Practitioner 20'. Table 2 provides an overview of interviewee spread.

**Table 2: Interviewee Spread**

| <b>Practitioner</b> | <b>Duration<br/>(HH:MM:SS)</b> | <b>Gender</b> | <b>Age Range</b> | <b>Location</b> |
|---------------------|--------------------------------|---------------|------------------|-----------------|
| 1                   | 01:08:46                       | Male          | 40-49            | NSW             |
| 2                   | 00:41:09                       | Male          | 60-69            | NSW             |
| 3                   | 00:39:15                       | Male          | 40-49            | VIC             |
| 4                   | 00:38:24                       | Male          | 40-49            | VIC             |
| 5                   | 01:19:22                       | Male          | 60-69            | NSW             |
| 6                   | 00:52:32                       | Male          | 30-39            | QLD             |
| 7                   | 01:06:32                       | Female        | 40-49            | QLD             |

<sup>74</sup> The study followed a procedure that allowed for systematic analysis of the data through repetition. The systematic approach of framework analysis allowed for constant comparative analysis of each interview against previously collected interviews. The fact that tax practitioners themselves provided this information and had industry-specific knowledge of the subject matter also provided a degree of reliability to the data collected albeit there may have been some inherit bias.

|    |          |        |       |     |
|----|----------|--------|-------|-----|
| 8  | 00:51:19 | Female | 50-59 | VIC |
| 9  | 00:44:44 | Male   | 50-59 | NSW |
| 10 | 00:44:33 | Male   | 40-49 | QLD |
| 11 | 01:07:57 | Female | 50-59 | VIC |
| 12 | 00:40:29 | Female | 40-49 | VIC |
| 13 | 01:08:18 | Male   | 50-59 | VIC |
| 14 | 00:32:02 | Male   | 40-49 | QLD |
| 15 | 00:47:38 | Female | 40-49 | VIC |
| 16 | 00:48:04 | Male   | 50-59 | WA  |
| 17 | 00:47:02 | Male   | 70-79 | VIC |
| 18 | 00:53:12 | Male   | 50-59 | VIC |
| 19 | 00:50:55 | Male   | 50-59 | NSW |
| 20 | 00:37:47 | Male   | 50-59 | VIC |

Of the tax practitioners interviewed, the majority were male (75 per cent male, 25 per cent female), which is comparable to related prior research.<sup>75</sup> Half of the practitioners were from Victoria, whilst similar representation between New South Wales (25 per cent) and Queensland (20 per cent) is noted. As such, there was a higher representation from Victoria compared to the TPB statistics.<sup>76</sup> The majority of practitioners interviewed were between 40 and 59 years of age (80 per cent), spread equally between 40-49 and 50-59 year cohorts. While it is acknowledged that the limitation of the sample size meant that the results were not totally representative of the wider tax practitioner cohort this was expected and is accepted in conducting qualitative research.

Following each interview, the two investigators debriefed on the key themes emerging and saturation. Transcripts were summarised and assembled, allowing for principal themes to become apparent, including relevant relationships between themes and emerging categories. These interim summaries form the basis of regular discussion and testing between the chief researchers. A third researcher then coded and analysed the qualitative data to form an independent examination. This enabled the research team to explore, develop and test themes and propositions in a holistic and systematic manner before finalising the findings of the study. This included triangulation with the TPB Review findings, the government's response, and the existing literature.<sup>77</sup>

## 5. IN-DEPTH PRACTITIONER PERSPECTIVES

The following sections outline the research findings with respect to each area of examination: (i) supplementing the Code; (ii) with respect to investigations; (iii) penalties and sanctions, and (iv) safe harbour.

<sup>75</sup> Devos et al, above n 5; Devos and Kenny, above n 4.

<sup>76</sup> Ibid. The TPB Annual Report reports a spread of 34 per cent New South Wales and 27 per cent Victoria.

<sup>77</sup> This methodology improved the reliability and validity of the findings. Throughout the process, researchers also compared interview notes with the recorded transcriptions and non-verbal clues for discrepancies. No discrepancies were discovered in this process, which aided in validation of perceptions.

## 5.1 With respect to supplementing the Code

We find mixed support for Recommendation 5.1 and re-affirm the inherent factors playing a part in tax practitioner perspectives. In principle, there is support for increasing the agility, timeliness, and responsiveness of the Code. Since the Code's introduction in 2009 – over 13 years ago – we have seen a rapidly changing environment, both in terms of technology, globalisation and more recently the Covid-19 pandemic. There is a clear recognition that reform, including increased powers, can enable responsiveness within a contemporary environment. Ministerial power can provide more timely responses than the formal legislative processes.

Although the TPB may be well placed to act, there is some concern that it may be restricted in its capacity to take action. As one interviewee describes, the TPB '*is a bit like a toothless tiger*'. Reform that both increases the powers of the TPB and also strengthens the Code can be welcomed to prevent further wrongdoings. One of the core issues we face is the timeliness – responding to issues *before* they cause significant further harm; whilst there are numerous anecdotes of egregious behaviour being caught – the concern being the harm done in the meantime.

As noted with the current PwC scandal<sup>78</sup> both the ATO and TPB have responded swiftly with increased resources being devoted to tackle breaches of the Code. As will be explored throughout the four areas examined, there is a real benefit in creating a holistic toolkit for the TPB to respond to the needs of the profession.

There is also generally a sense of faith in the system – both in terms of the tax profession as a community and with respect to the relevant Minister carrying out their duty with integrity and accountability. There is generally a perception that the power entrusted in the Minister would not be abused. Whilst it is not unusual for a Minister to have such powers, it was felt that it is unusual for these to be abused.<sup>79</sup> Where questions are raised, proper process would (or should) follow to investigate and ensure integrity is maintained.

You do need to be able to deal with emerging behaviours or behaviours that haven't been envisaged. But at the same time ... [having] one person who has the ability to do that, there has to be some sort of subsequent oversight.

Proper process seeks to have appropriate checks and balances. On this basis, the power could complement the proper functioning of the profession; as one interviewee described, '*providing also that the Prime Minister doesn't take on additional ministerial responsibilities*'.

However, reform, including the introduction of ministerial powers, needs to be appropriate. Clear concern over the danger in power was observed. Appropriateness

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<sup>78</sup> Hon Jim Chalmers (Treasurer), Hon Katy Gallagher (Minister for Women, Minister for Finance and Minister for the Public Service), Hon Mark Dreyfus (Attorney-General) and Hon Stephen Jones (Assistant Treasurer and Minister for Financial Services), 'Government Taking Decisive Action in Response to PwC Tax Leaks Scandal' (Joint Media Release, 6 August 2023), <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/government-taking-decisive-action-response-pwc-tax-leaks>.

<sup>79</sup> Interviewees noted several instances, including tennis player Novak Djokovic, that went to the Federal Court which affirmed that the Minister had correctly exercised his power, and the more unusual instance of the former Prime Minister having been secretly appointed to five ministries. Whilst neither have been found to be unlawful, they raised public concern and/or scrutiny.

here is in terms of the reform's objectives relative to existing processes, as well as in terms of the role and function of key stakeholders within the greater ecosystem. Reform, however, also needs to balance the impact on stakeholders, including tax practitioners. As will be explored throughout the four areas examined, the recommendations fundamentally interrelate with the livelihood and wellbeing of tax practitioners, their teams, their clients (ie, taxpayers), and their respective families. In this instance, power affecting livelihoods is being placed in one person's (the Minister's) hands.

Proper processes already exist. Questions were raised over the concept of 'supplementing' the Code and the practical need for quicker responsiveness in contrast to the existing process, including engagement with the profession. For example, the Code being principles-based, as indicated by the professional bodies,<sup>80</sup> enables implicitly the agility to address emerging issues and corresponding TPB guidance assists in the interpretation thereof. Concern was raised over whether ministerial power could lead to the erosion of proper process. Moreover, questions arose as what situation would require such a response. For example:

In what circumstance would it be way too slow to be changed and just give one person the power to do that without it going through the proper authorities? ... What would be the urgency for something like that? ... I can't think of a situation where there would be such...

The complex web of regulatory frameworks was also raised. It is critical to appreciate and understand the relationship between the professional/regulatory bodies (as well as the courts and the Australian Federal Police) and the greater ecosystem in which the profession operates. Concern was raised over the potential for unnecessary overlaps and increasing complexities, or even so far as the potential to be perceived as interfering. This raises the fundamental question over where the role and function of the TPB starts and stops, and therefore, what are the actual gaps that ought to be filled, compared with the perceived gaps that arise due to other factors (eg, resourcing constraints, regulatory lag)?

We need to be sure we truly need this additional layer and whether real change will ensue. Part of this is also turning our minds to those that are doing the right and wrong thing; notions of red tape and cost impositions for those doing the right thing in comparison to whether those doing the wrong thing continue to simply ignore their responsibilities.

For example, the question arises as to why the Minister should be brought in, when the TPB has been established, a body that has fundamental standing within the profession. Moreover, it is arguably more about how the TPB interprets and issues guidance for practitioners. As one Practitioner notes:

...[T]here's a stronger argument in my view on getting the guidance put down as legislative instruments, which a lot of them aren't in the process for. That's quite convoluted. So, if it was me, I'd be focusing on the guidance and giving that legislative power and a more streamlined way rather than having you know

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<sup>80</sup> Chartered Accountants Australia and New Zealand and CPA Australia, 'Review of the Tax Practitioners Board – Discussion Paper' (Joint Submission, 6 September 2019) 'Appendix A – Chapter 6', <https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/media/submissions/taxation/tax-practitioner-board-review-joint-submission.pdf>.

this as a safety net thing. All else fails, Minister changes the law, which I don't think is a good way of doing things from a structural point of view.

Where ministerial powers are sought, there needs to be further deliberations underpinning the introduction of those proposed powers. For example, the explicit definition of the powers is important, when the powers can be utilised (eg, practice or behaviour of a particular level of severity), whether the measures implemented would be temporary or permanent, whether they would be reserved as emergency powers. This fundamentally goes to the heart of the question – what it truly means to be 'supplementary' to the Code – and ensuring that the enactment of reform aligns with this objective. Whilst it can be interpreted as an additional power over and above those already vested in the TPB, the Review did not specifically define the term.

Powers should not be unfettered nor opaque. Concern over the bypassing of industry consultation was raised in this regard. The administration of the powers needs to include a rigorous process to demonstrate integrity in the reform. This covers adequate communication, transparency, and consultation processes: *'There is no real risk as long as there's conversation'*.

A key issue identified was the decision-making process itself. Not only should the process to reach a decision be sufficiently articulated, but also the basis for the ultimate decisions made by the relevant Minister. Proper reporting of decisions overall is found to be a critical element of proper process. Transparency and accountability are fundamental components of the system.

This relates to the potential for increased uncertainty for practitioners with (i) the potential for increased frequency of changes and lack of clarity, and (ii) the lack of continuity with Ministers changing as the political landscape evolves. Inherently change is ever present.

... [I]f you go back to 2009 and come to 2022, the number of ministers that have been in that role is a lot. So, there's a lack of continuity and without being disrespectful to the ministers, not all of them have the level of knowledge that you would need to make an informed decision. So, I think as a matter of legal principle, I don't think it's a sound one...

Linked to this are questions over expertise and bias, and the way in which political interference can impact procedural fairness and independence. The majority of interviewees had concern over political influence and pressure.

There are also the issues of independence and power of politics, evident in the three-year election cycle. These create confounding variables for the TPB.

...[T]he relevant minister would normally be more in the space of constraining whatever the ATO is trying to do rather than encourage it... [a] recent example of that was when the ATO released their new draft ruling on Section 100A and it was quite aggressive and very different... the Assistant Treasurer came straight out with the press release saying, 'oh, if we get back in, we'll fix this legislation'.

To what extent ought the Code be dependent on who is in government and who is the Minister, in contrast with who is in the ATO and who is on the TPB? Yet, the notion of



'who' is comparable to what drives the impetus for reform – the rapidly changing environment.

Yet, the Minister may in reality be more constrained. The framing of political influence is inherently considered as a negative. Here, we find perspectives on the alternative. The public facing role is likely to mean more scrutiny – making it more challenging to go against the profession:

... I don't find in my 26 years in public practice that Ministers are generally wanting to pick a fight with the tax profession... I expect this is a power that they would probably use very sparingly, if ever.

This can be linked to issues of expertise. Whilst Ministers may not have strong experience, it is the connection with the tax profession that ought to overcome this limitation: *'Most ministers have little experience and hopefully rely on the recommendations of TPB and the Profession'*. Simply put, the relevant Minister has the capacity to obtain expert advice. As such, whilst this power may defer decision-making to the relevant Minister, through appropriate consultation, it ought not result in siloed decisions.

The implications of these findings raise three main issues: (i) there is no certainty that Ministers will undertake such processes; (ii) pressures from stakeholders/lobbyists may drive decision-making, and (iii) lobbying can be private or public. However, this may not necessarily lead to negative outcomes for the profession. We have seen in recent times the positive outcomes of lobbying by stakeholders with respect to section 100A of the *Income Tax Assessment Act 1936* (Cth) and the resulting impact of amending the draft ruling ahead of the release of Taxation Ruling TR 2022/4, 'Income Tax: Section 100A Reimbursement Agreements' (8 December 2022). Lobbying can come from all directions – practitioners, TPB, ATO and so forth:

...[T]he Minister, if that's the person who has this responsibility, will we coping it from both ends... people who represent various stakeholders, will, you know, seek to have the ear of the Minister. If that means that the whole process should be more transparent with, you know, any lobbying being made public as opposed to private lobbying, then you know that framework can be put in place ... making the whole process more transparent to avoid the sense that [they are] being leaned on by stakeholders or political pressures being applied to, you know, influence [their] decision-making.

The key is open and transparent dialogue for this process, whilst also acknowledging that consultation may not always result in real change or real outcomes. Checks and balances are not just for the system, but to protect processes for the making of neutral decisions and avoid opaqueness:

...[C]onsultation doesn't always result in real change being made. I think it very much depends on the participants in the consultation and the extent to which they want to take feedback on board – and so sometimes you see really good processes run where you know consultation is quite valuable and is listened to – but in other cases it is (and if someone's already set on their view) ... to tick the box. So ... I think in many instances it would help, but not always.

In further reflection on notions of independence, the TPB is seen as an extension of the ATO. Staffing interdependencies exist. As such, independence between the two can be

merely a perception at most. Whilst this can be interpreted in a number of ways, the key issue that arises is the connectedness of the TPB with practitioners. While the culture of the ATO will inherently be prevalent in the Board, there is concern over how this ultimately translates: not only in the influence on the TPB or the relevant Minister, but also in a lack of awareness or experience of pressures that arise in private practice:

...[I]f the board is consisting of ATO officers and only ATO officers, how are they able to understand and sympathise with the pressure from a private practitioner? From this perspective, the Review's Recommendation to establish a Forum (TPGSF) should assist in these issues, being well placed to consider further profession representation. Issues of power and independence are considered further in later subsections.

Table 3 (see Appendix) breaks down the findings based upon the level of agreement or concern with each element of Recommendation 5.1 and the research questions set.

## 5.2 With respect to investigations

The majority support for Recommendation 6.2 is re-affirmed, with some mixed results and strong caveats present throughout, consistent with Devos and co-authors' (2023) preliminary themes.<sup>81</sup> There is a desire to improve standards within the profession, particularly in respect to networks of bad culture – '*weed out the cowboys*'. Practitioners believe that it is important for the TPB to have the power to investigate; although, there is a real concern over the lack of resourcing of the TPB in carrying out investigations efficiently and effectively, but also the impact on livelihoods, wellbeing, and safety.

Specifically, the majority were supportive of the first Recommendation 6.2(a) for commencing an investigation once a tax practitioner has their registration terminated or where they don't seek reregistration. This finding is also consistent with the submissions of the TPB, professional bodies and the ATO, and was supported by the government in its response. The investigation was viewed as appropriate and in line with what other professional bodies would also do for their members.

The practitioners argue that the review is giving extra power to the TPB not just to educate, but to enforce and police the Code. Consequently, it ought to increase the standard of the profession:

[I]t seems to be that the Review is kind of nudging it [the TPB] more towards being a bit of an enforcer and a policer rather than just an educator – and, you know, ... I'm OK with that because I have seen, and I see all the time, the quality of some of the – some of my colleagues in the tax industry, and let me tell you, they're not all high-quality practitioners and there's some very, very poor behaviours out there – and to the point where it's frustrated me a lot in recent years, some of the clients and the work that I've picked up or been asked to get involved with – and I've just looked at it and just wondered what the person was thinking – and firstly and secondly, how on earth can they do this work with a straight face? Because it's just it's just really to a low standard – and so I think this would help improve standards.

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<sup>81</sup> Devos et al, above n 5.

The consequence of breaching the Code must follow the tax practitioners regardless of their registration status. This in turn can help in maintaining the integrity of the tax system and the tax profession and upholding the principles of the Code.

However, concerning the issue of investigating *all* subsequent deregistrations, the findings were more qualified. A strong caveat was raised that the decision to investigate must be justified and necessary given the potential disruption it may cause a tax practitioner's practice and livelihood:

You can't have an authority or regulator making arbitrary decisions...[I]f they're [the TPB] going to essentially severely impact somebody's livelihood, they better have a damn good reason for doing it. And they better be able to explain it... and that also gives a court or a tribunal, something to scrutinise if their decision's objected to.

Appropriate, transparent, respectful processes are a core element of procedural justice and will differ based on the category of wrongdoing. Some argue that early intervention would be preferable to Recommendation 6.2. While it is very important to stop rogue tax practitioners from bringing the profession into disrepute, the practitioners believe that it will be more beneficial for the TPB to influence the rogue tax practitioners to behave within the principles of the Code instead of 'wasting' government resources (and tax practitioners' time) on investigating these rogue practitioners after being deregistered, arguably described as a re-registration issue. The TPB ought to work with the tax practitioner and help them to improve their practice behaviour. Aligned with this is the need for early engagement rather than chasing tail-end practitioners.

Mixed findings transpired where the tax practitioners were asked about the importance of having valid grounds and reasons for deregistration. While in most cases tax practitioners would provide those grounds/reasons there are always some who choose to manipulate the situation, may destroy evidence, or use the de-registration as a loophole for avoiding consequences. Interviewees were mindful of doing the right thing. For example:

It's better to be conservative than end up in an ATO audit because I've lived and breathed a few of those and they're not fun. There has to be sufficient evidence and there has to be the ability to have a right of reply, I think. If it's serious and it's a serious complaint that maybe there's a temporary suspension or something like that, I don't know.

Most interviewees indicated that investigating deregistered tax practitioners was valuable and a good use of resources, providing the misconduct was serious and the TPB had done its due diligence on the matter beforehand. However, it is acknowledged that the spectrum of low-level – high-level wrongdoing is something that can be more readily established in hindsight. Issues of early engagement and hindsight highlight the need for proactivity. This will be further examined with respect to penalties and sanctions.

Moreover, while it is important to pursue tax practitioners who breached the Code regardless of their registration status, not only should the TPB first take into consideration the seriousness of the offence but also the overlapping authorities (such as the Australian Federal Police). In some situations, those alternative authorities may

be the more relevant authority to act – and therefore result in criminal penalties applying, for example:

...[E]ven if the Tax Practitioners Board was potentially aware someone was conducting themselves in a criminal manner, they would typically refer to the federal police anyway, and then they would conduct those surveillance activities. So I don't think it's the role of the Tax Practitioners Board.

The results of this study also indicate strong support with some caveats for Recommendation 6.2(b) of removing the limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation. The element of surprise and flexibility in conducting the investigation was also noted:

... I am aware that there are certain practitioners out there who if they had become aware that there was going to be an investigation into them, might do certain things they might seek to hide evidence, they might seek to cancel the registration and you know distance themselves and might do any number of things, and that could frustrate an actual investigation – and so, I think it's important that the TPB have powers to at least get to a certain point in their investigation without necessarily having to notify the practitioner if there's a concern that they might interfere.

On the other hand, an important caveat raised was that inadequate resources may hinder the TPB in performing investigations more generally:

[It's] quite difficult for the TPB. One I don't think they got the resources to do that properly... when they do have a case and go to Court, it's really got to be watertight and I know from what's happened with various chairs over the last few years, they do make sure that the case is solid that they've got all the facts and then, and only then will they take it further – and sometimes they got an inkling of what's happening they that they might have 30% of the facts or 40, but they can't go any further and that becomes a problem too.

This issue may be addressed to some degree with the additional funding the TPB is to receive to carry out their compliance work, as indicated in the October 2022 Federal Budget.<sup>82</sup>

However, it is noted that lengthy delays mean that there are increasing risks of further victims of egregious behaviour. After all, this is about protecting clients (taxpayers) – tax practitioners are meant to be trusted advisers. Where a practitioner is egregious in their behaviour, this can be seen as a mass betrayal: '*[A] mass betrayal from a person that was meant to be a trusted advisor*'.

Here we point to the distinction of tax practitioners being professionals in the first instance – not criminals – thus regulation should reflect this. However, bad actors lead to harm that may be criminal in nature. There is a necessary balance between timely action, procedural fairness, and accountability. This requires strategic resourcing, linking together due process and effective timeframes.

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<sup>82</sup> Australian Treasury, *Budget Paper No 2: Budget Measures October 2022-23*, above n 68.

A strong majority was found in favour of tax practitioners having a right to know they were being investigated with the ideal of open and transparent communications between the TPB and tax practitioners. A strong majority were also of the belief that tax practitioners had the right to prepare and defend their case, particularly with regard to protecting evidence. Whilst technological advancements make it harder to tamper with evidence, it is not impossible; there is also the recurring issue of seriousness of the purported offence. Here, the level of seriousness ought to determine whether it is appropriate to lose their right to be notified. In this respect it is the taxpayer's right to protection that outweighs the tax practitioner's right to be notified.

Related to this was evidence of tax practitioner concerns with regard to jeopardising the principles of natural justice and procedural fairness with unknown investigations. The entitlement to the presumption of innocence must be maintained. The practitioners argue that the checks and balances are most likely embedded within the first stage of the investigation, which can be linked to the above issues of resourcing.

However, it is also noted that the findings for Recommendation 6.2(b) contrast with the findings of Devos and co-authors' (2023) study where caveats were raised with regard to criminality and the nature of unknown investigations.<sup>83</sup> The government has also not supported Recommendation 6.2(b), suggesting that further consultation is required with regard to its systemic implications.<sup>84</sup>

Finally, this study found strong support for Recommendation 6.2(c) regarding removal of the six-month time frame to conduct investigations; however there were strong caveats:

...I think it's appropriate to be removed. Why? Because six months is such a short period of time in the context of what I we do. And remember, we have of course a preparation phase and assessment phase, and then of course in tax land for our small business clients, we have a two-year amendment period and for our larger clients are four-year amendment period, well six months is such a short period of time that the assessments and like wouldn't have even been had.

Practitioners believe that giving a longer timeframe is not necessarily considered to be a 'witch hunt' as the TPB must gather relevant information to make an informed decision. However, it was clear that the time it takes depends on the complexity of the case. Whilst an open time frame may not endanger procedural justice, setting a timeframe was seen to be important to avoid unnecessarily lengthy investigations. Investigations should be dealt with as swiftly as possible and be transparent. In most cases, practitioners believe one year is a sufficient timeframe. The timeframes should take into account the implications resulting from stress, anxiety, and workloads.

Importantly, the TPB needs to be held accountable for the time taken to undertake an investigation. Some qualifications to this general response were also received, including the suggestion of a more flexible approach:

I think the six-month rule should remain. So, that's six-month rule is not steadfast. It can be extended in circumstances where the practitioners caused delay, unnecessary delay – but I think by having the six-month rule there, it

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<sup>83</sup> Australian Treasury, The Review, above n 2.

<sup>84</sup> Ibid.

really forces the investigation to be carried on expeditiously and I would go one step further and say that this type of time limit should be imposed in respect of tax reviews and tax audits – and you know, if we're talking about complex cases, then you know, a complex tax audit, might, you know, put a 12 month time limit.

Some, however, found six months to be too long. Overall, the majority were strongly in favour of the investigation being both efficient and frequent. As such, the majority recommended that clear timeframes were still warranted for investigations so that those who deliberately delayed and were hiding information would be found out. Tax practitioners should not be able to stonewall investigations.

However, it is noted that the findings for Recommendation 6.2(c) contrast with the findings of Devos and co-authors' (2023) study where strong opposition was found particularly with investigations being efficient and adequate.<sup>85</sup> The government has also not supported Recommendation 6.2(c), suggesting that further consultation is required with regard to its systemic implications.<sup>86</sup>

Table 4 (see Appendix) breaks down the findings based upon the level of agreement or concern with for each element of Recommendation 6.2 and the research questions set.

### 5.3 With respect to penalties and sanctions

We find that whilst there were mixed results and many caveats to the issues raised when it came to the expansion of penalties and sanctions and the flow-on implications, we find a strong majority of interviewees are supportive of the recommendations. A broader toolkit of consequences offers the potential for better standards for the profession.

The practitioner is in a position of trust, both from the perspective of the government and the client (taxpayer). An effective system needs to be able to respond with genuine, timely penalties and sanctions and sufficient enforcement.<sup>87</sup> Without trust within the system, it will be hard for the TPB to control rogue behaviour:

...[T]here's no reservations. I'll tell you why the whole system is based on trust... the only way you can maintain trust is if there's genuine sanctions. Otherwise, you should just wind the whole system up... Forget about self-assessment...

Without a trusted system, rogue practitioners will continue to harm.

Expanding penalties can create an opportunity for efficiency and ensure tailoring the punishment to the crime, ie, again, coming down to the severity of wrongdoing:

... 100% in favour of this one ... they [the TPB] don't need to, you know, use a sledgehammer to deal with something that maybe doesn't warrant.

This finding is consistent with the TPB submissions received where it was expressed that the TPB be given more flexibility when it came to dealing with a broad range of tax

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<sup>85</sup> Devos et al, above n 5.

<sup>86</sup> Australian Treasury, *The Review*, above n 2.

<sup>87</sup> The probability of detection was even more important than the penalty which is consistent with extant literature: Roberts, above n 49, 78.

practitioner misconduct. Our findings are also consistent with Devos and co-authors (2023).<sup>88</sup>

The government *noted* Recommendation 6.1, indicating further consultation is warranted. Our findings justify this position given some of caveats that have been raised. One of those caveats is that the focus should be on greater education, not necessarily increased sanctions, which prior evidence supports.<sup>89</sup> Similar to issues around investigations, an ideal is proactivity and early engagement rather than reactive punishment: ‘... [the TPB should] encourage and educate tax practitioners to remain in the position’. Therefore, there is a framing of whether penalties and sanctions are focusing on the symptoms and not the cause; moreover, the overarching lifecycle being explored within this project, from the practitioner building skills and knowledge, servicing the community, to a particular allegation/investigation process, the outcome, aftermath and so on. Key challenges and key relationships throughout this lifecycle will be dynamic. We reflect here on the objective of protecting the community which is not necessarily about punitive action.

It is recognised, however, that those who are egregious will be likely to continue to act in undesirable ways. Many interviewees did not see penalties as being likely to curb undesirable behaviour. Bad actors will continue to be bad actors:

To be quite honest, if they're really undesirable, I don't think they'd care less. They'll just do it. But if people are kind of on the edge and they're not really that bad but they're just pushing the system; it might bring those people back in the line, but you know, like anyone, if you're a crook, you're a crook. It doesn't matter you know you can put them in jail or out of jail, they go and do it again. And I think really bad ones couldn't care less.

Irrespective of whether the tax practitioner is struck off – loopholes can be found to continue practising. Egregious practitioners will find alternative vehicles to practise. An example is where the egregious practitioner relies on other practitioners to continue to operate, resulting in an environment of problematic culture and pressure:

...[T]here's been cases where a lot of people have got around this by getting someone else to run their practice and they still manipulate the practice from a distance sort of thing – and that's one thing I'd like to see that if they're disbarred, they shouldn't be involved in practising, you know for that period because I think it's just wherever they're working is probably, then put them [staff] under pressure and I know people that have done it, they've had their staff member take on the registration of the practice and they then sit in the practice and still work the same way and it shouldn't be...

We pause, however, with respect to the causes of undesirable behaviour and whether education or sanctions are likely to influence tax practitioner behaviour. Interviewees reflected on the extent to which undesirable behaviour can stem from intentional and unintentional causes, the latter a matter of deficits in education and experience, or otherwise a lack of reasonable care:

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<sup>88</sup> Devos et al, above n 5.

<sup>89</sup> Devos and Kenny, above n 4.

... one is where it's just, you know, not taking care, not being sufficiently educated and probably the one I see most is particularly with accountants, is acting in matters and for clients that you're just not experienced or qualified to do – and so some of that is malicious and some isn't... the practitioner is the one in that scenario who should put their hand up and say I'm out of my depth, you need to move on and they don't because they're conflicted. They're, in my opinion, they're in complete breach already.

Moreover, the conflict of interest raises issues here.<sup>90</sup> Particularly for smaller practitioners, they may be particularly reliant on particular clients – 'golden geese' – over time, leading to a problematic reliance and therefore conflict:

There's a lot of smaller practitioners, especially, out there who might have a one or two clients who are just their golden goose and they get a lot of revenue out of these clients, and they might have started with them when they were small and the clients just grown and grown and grown, and now they'd be much more suited to a bigger firm perhaps, or a firm with more skills. But for whatever reason that you know loyalty or the fact that the client is simply unaware, they've hung in there, I see this all the time... and the practitioner is the one in that scenario who should put their hand up and say I'm out of my depth. You need to move on, and they don't because they're conflicted.

Despite this, interviewees did not see questions of effectiveness as stopping reform. The TPB needs to be more creative and have sufficient capabilities to investigate. Inherently, this links to a persistent theme across the perspectives: funding.

Thus, a conundrum – or perhaps a spectrum – arises. The perceptions largely presented indicate: (i) those egregious tax practitioners are unlikely to be swayed by increasing sanctions or penalties; (ii) those that ought to benefit from early intervention and education to drive improving standards of practice, and (iii) those somewhere in between that may trend towards responding to either/or sanctions and educational approaches.<sup>91</sup> The objective of reform is about the community, it is not punitive but protective. Practitioners serve the community. This in itself creates a conflict between the client and the community.<sup>92</sup>

It ultimately depends on how the reform is implemented.

Some strong opposition to Recommendation 6.1 was identified, which suggested an alternative to the increased sanctions was by way of a court order and making the order an enforceable undertaking. Concern was also raised regarding the impact of interim suspensions to livelihoods and the risk to ruining the practitioner's business.

We can similarly reflect on past reforms that interviewees considered positive and offer lessons to future reform:

I think it's a very good idea and I think this change is similar to a change that we saw a couple of years ago in the superannuation industry in that the tax

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<sup>90</sup> As identified in Cooper, above n 33 and Walpole, above n 32.

<sup>91</sup> The literature supports the notion that tax practitioners are no different here to taxpayers in that they will improve compliance with a combination of education and penalty: Devos and Kenny, above n 4, 629.

<sup>92</sup> See for example Cooper, above n 33, 16.



office was very unlikely to make a super[annuation] fund non-compliant and that was one of the very few things that they could do to a fund. They couldn't have a penalty, that there weren't a lot of minor penalties or options to give and that appears to be a similar situation that the Tax Practitioners Board has at the moment with tax practitioners. So, I think it would be very good to have a larger range of options available to the Tax Practitioners Board.

Proper process and procedural fairness are found to be an important aspect, including access to support and guidance, the right of appeal. However, this is not necessarily absent from the existing system, and some questions arose as to whether the overall system should change:

I would hope that the due process still takes place, just because you have a series of different sanctions and for different levels of court culpability, and hopefully that would not mean that they bypass due process.

The majority of interviewees indicated that increased sanctions would not jeopardise the power and independence of the TPB; however perceptions of independence were reiterated, with respect to supplementing the Code. The implications of the interconnectedness between the TPB and ATO, extending considerations presented earlier, create hesitation by practitioners:

[A] lot of the staff have moved across and they go backwards, and forwards and it happens in public service everywhere that people go across... but ... people say, well, are they different from the tax office?

Similarly, perceived conflicts of interest arose again over the reach of power and revenue collection:

I think so long as there was some ability for that decision to be reviewed by a genuine third party, and if that is the AAT, then I guess that's up to the AAT because you know, you wouldn't want them ...overstepping their power in [respect of] ... revenue collection.

A strong majority were supportive of Recommendation 6.3, regarding publishing more detailed reasons for tax practitioner sanctions and terminations in a publicly available TPB register. Overall, the findings suggest that there is a role for 'naming and shaming' although there was also acknowledgment of what reputational damage could occur as a result.<sup>93</sup> This relies on members of the public being aware of the register.

Here we reflect on the notions of rehabilitation and spent convictions, borrowing from criminal law:

I would like it to be there for a long period of time, and even if an agent, remains and is of good standing. I would like to know, as a user of that service that I have the ability to access those details and understand what my tax agent has done in the past ... it's not to say the person cannot become a better advisor or better tax agent they can – but I think it's in the public interest to have that information out there...

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<sup>93</sup> See also Braithwaite and Drahos, above n 25; Sakurai and Braithwaite, above n 57, 375.

Such an approach provides transparency as well as enabling informed decisions to be made by the community, thus improving public trust. Moreover, it goes together with education – for all stakeholders.

So, for me and I think anyone in the profession having a bit more detail around why the decision was made and what decision gave rise to the different level of sanction that would assist the tax practitioner in understanding what others are doing wrong – and because sometimes you know, I hope that in my advice I've never breached those lines and I'm confident that I'm not, but it's still useful knowing.

However, it is important to recognise the need to balance privacy and consumer rights. For example, the appropriateness of disclosing certain information may be challenged. A point that was also raised, was in relation to publication, that information should not be published until all avenues of appeal had been exhausted:

... [I]f there are criminal charges against the tax practitioner it would not be appropriate to disclose those or provide more disclosure in relation to those on a register when they wouldn't be open to the general public. I think that would be quite unfair to that tax practitioner, yes, but some limited information on the TPP register, such as cancelled registration, suspended registration until a particular date or something like that, I think would be good as it would allow the consumers to make a more informed decision.

Caution is also raised with respect to the potential damage the disclosures could do. There is equally a balance between recognising harm and having 'done the time'. The idea of 'naming and shaming' is seen to be a significant risk to the livelihoods of practitioners.<sup>94</sup>

...[Y]ou might be suspended for six months, you might get a caution and it's dealt with... you don't want to have a black mark on someone when they've done the time. So that's the balance...

There is also a need to consider the contemporaneous narratives permanently available following publication. Whilst the TPB can publish official reasons, whether permanently or temporarily, there is a contrasting and less controllable narrative that will live on through the court of public opinion. The ability for parties to undertake 'Google reviews' can skew reasoning and impact named practitioners. This may not, however, be seen as too problematic – a fact of a digitalised economy – an information economy:

...[I]t's like a Google review, OK? Someone going to review a restaurant and give it two stars? And if you're thinking of going to that restaurant, you might want to go – hang on – why did you give it two stars? I'll make up my own mind – and then you look at the reason and you might actually not have a problem with whatever the issue was – and you go, you know what? I'm OK with that. I'm a very strong believer in transparency. I think government decisions and executive decisions need to be made as clear as possible with as much reasonable information communicated as possible so that the public can make better decisions and be better informed – and I think simply saying, oh,

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<sup>94</sup> See also Braithwaite and Drahos, above n 25.

someone got banned – I mean that just gives you nothing. Then you're going – and I've done this myself – then you're going to Google to try and find something in the media as to why this particular person got sanctioned or struck off, and you would rather have the official reason for that than the court of public opinion.

There is a delicate balance given the personal reach of 'naming and shaming' in this context (in contrast to 'naming and shaming' a company or business). A more personal impact therefore results.

Whilst there may be decisions or rulings for behaviour that progressed through the courts – where the tax practitioner challenges decisions of the TPB – clients may not have the capacity or willingness to locate, peruse and understand complex reasonings. Some mixed perspectives were put forward on whether the public should be expected to 'dig' through court decisions and the role of the courts in publishing decisions (in contrast with the distinct role of the TPB register). However, this implies the taxpayer is searching the register to begin with. Since 2010 a body of case law has begun to develop in the area.<sup>95</sup>

Reputation also extends more inwardly, with registers being flagged as a tool for assessing possible future employees:<sup>96</sup>

...[W]e would probably check the register to make sure that there are no, you know black marks against him at the end of the day, it becomes reputational for a firm, if you take on somebody that he is on that list and it becomes public knowledge, then it's potentially quite damaging to a brand, so, yeah...

The issue was raised again with respect to the level of misconduct guiding the disclosures, for example comparing the multi-million dollar frauds, with not lodging a tax return on time. We again reflect on issues of intention vs ignorance and the need for a nuanced approach. However, just like the problem of '*a doctor not knowing how to treat a cold*', practitioners must have adequate knowledge of the law.

Embedded within these issues are the permanent-temporary perspectives of published information, education and previously flagged notions of rehabilitation and spent convictions. Interviewees suggested time limits to having practitioner information disclosed on the registers. There is an expectation that practitioners should be able to learn from their mistakes:

I think that I'm a believer in, you know, we all make mistakes and we all should be able to learn from our mistakes and move on in life. I'm a strong believer in that and – so I don't believe that they should be up there forever – but less than forever, maybe just for the period of time that there's a suspension exists. Seems reasonable off the top of my head.

The caveat, however, is that interviewees felt that given the digital world we operate in, the impact will follow practitioners for life, irrespective of the period of publication.

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<sup>95</sup> See section 3 of this article.

<sup>96</sup> As flagged in section 2.4 of this article, draft legislation on new disqualified entity rules have been released. This will be further discussed in section 6 of this article.

This somewhat qualified support differs slightly to the TPB submissions received, where it was expressed that the greater transparency was required for both prospective employers and clients in warning them against unscrupulous tax agents; although the TPB Review conceded that the register needed to be supplemented with accurate information identifying these agents. The study's results are also not as strong as the findings by Devos and co-authors (2023) regarding penalties, although reputational damage was earmarked as a concern.<sup>97</sup> On the other hand, it could also be viewed as an effective deterrent as indicated in the literature.<sup>98</sup> Similarly, the government noted Recommendation 6.3 and believes further consultation is warranted.

Finally, this study produced mixed results with regard to Recommendation 6.4 and the introduction of an administrative penalty regime which imposed penalties on tax practitioners who demonstrate an intentional disregard of the tax laws. Approximately half of the practitioners were in support of an administrative penalty regime to particularly address the egregious tax agent. In essence, there was strong support to hold egregious practitioners to account; again, forming part of the TPB's toolkit.

However, clear challenges were considered around establishing sufficient evidence to prove intentional disregard and similarly raising the question as to whether the tax practitioners should be terminated instead if proven. Whilst the challenge of establishing sufficient evidence and proof relates to the complexity of the law, it was equally noted that there is a good body of law from which to draw upon to develop appropriate frameworks:

... [I]t's a tough one, but there is a lot of case law in the tax sphere around penalties and penalty remissions for, you know, reasonable care and intentional disregard, all those sorts of things that could be drawn upon to come up with a framework when you would find this or when you would find that. So, look, I think it's OK. I think it should be a tool that the TPB has in their toolkit. Yes, I think it can be challenging to figure out what is intentional disregard versus something else, but that's why we have so many cases on it is because it is hard to for people, to people, have different opinions on it. So, you got to go to court to figure it out.

Inherently connected to issues of independence and overlapping regulatory frameworks, one suggestion offered was for the TPB to be the body to deal with reviewing tax promoters, thereby removing 'unnecessary' duplication (ATO and TPB) over the affairs of tax agents:

...[T]he exercise of administrative discretion, you know, is usually at the AAT now think probably requires a change in the law to, you know, allow a review of administrative discretion... why don't we get the TPB to be the body that deals with the, you know, review of tax promoters? Because tax promoters usually are tax agents anyway. You wouldn't expect a mum and dad to be a tax promoter, so why don't we get civil penalty applications that are made to the federal court? They have penalties imposed upon tax promoters for the marketing of tax exploitation schemes would within the purview of the TPB and make it the sole body rather than having two separate bodies, you know,

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<sup>97</sup> Devos et al, above n 5.

<sup>98</sup> Braithwaite and Drahos, above n 25.

involved in the regulation of tax agent activity... [T]his idea that you've got the tax office and the TPB both reviewing the affairs of tax agents, I think is just, you know an unnecessary duplication. Yeah, so, the two side issues are the tax promoter penalty provisions and the disqualification of directors and the comparison of how that regime works with regard to the possibility of applying the same principles to the disqualification of tax practitioners.

More broadly, the question is whether the role and function of the TPB should broaden and become more independent from the ATO.

Overall, this somewhat qualified support is consistent with the TPB submissions received where it was acknowledged that there was sensitivity surrounding this issue. The study's results are also consistent with the findings of Devos and co-authors (2023) with regard to the caveats around the clarification and proof of intentional disregard and the procedures and independence of the regime.<sup>99</sup> The government has also noted Recommendation 6.4 and believes further consultation is warranted.

Table 5 (see Appendix) breaks down the findings based upon the level of agreement or concern with for each element of Recommendations 6.1, 6.3 and 6.4, and the research questions set.

#### 5.4 With respect to safe harbour

There was strong support in principle shown for Recommendation 6.5 for extending safe harbour protections to instances where the tax agent had demonstrated recklessness or intentional disregard with respect to the law. There is a need for appropriate protection for clients relying on – ie, trusting – tax practitioners. The Code must always prevail and be robust:

So, I think that a Safe Harbour mechanism is critical to ensure that you know if a tax agent has made an error, or failed, or overlooked the lodgement of something, or done something erroneously, it shouldn't be the taxpayer that is penalised for that situation...

If the tax practitioner has done the wrong thing, then safe harbour ensures no one suffers – the aggrieved party can take steps to protect themselves. In some cases, it will be fairly straightforward – however not always:

[The] Commissioner, let's say, gives the taxpayer free pass because they're the aggrieved party and he often does that and says, well, you know, you trusted this tax agent and he let you down or he or she let you down. Then nobody suffered – nobody. There's no consequence to anyone because there's no regime at the moment to penalise the agent – and I think we are missing that – and I think we should have it. I wouldn't want to be necessarily the one making the call as to who's going to pay what penalty. It's a tough one, but I can tell you from experience, it's going to be easy in some cases. In other cases, it can be very, very hard.

The more challenging cases reflect challenges in respect to discretion and judgment, as law is complex by volume and also practically complex. Interviewees suggest that more

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<sup>99</sup> Devos et al, above n 5.

guidance is needed in this space for safe harbour to be effective. It is difficult to apply in practice. Part of the issue is the prescriptive nature of safe harbour leading to a 'tick box exercise'. This can create an unintended consequence of protecting parties without stopping the misconduct. Safe harbour protections are therefore a consequence of a flawed system, where the system cannot be trusted to weed out all bad actors. They represent another form of reactive checks and balances. The stronger the system, the less likely the need for safe harbours:

...Safe Harbour is fine. It has to be written properly. It has to be done in a way that people still get assurance and comfort – but you know, if it's been artificially or contrived that you don't actually get the – you know, protection so that you know says it has.

The critical issue with the Recommendation is identifying where the taxpayer is at fault in addition to the tax practitioner. If clients are truly innocent, where the intentional disregard or recklessness can be clearly attributed to the tax practitioner, safe harbour is considered appropriate. However, concern arises where clients give tacit approval to the actions of the practitioner:

... [T]hey often are well aware of what's going on and give tacit approval – but if the client is truly innocent of the recklessness or intentional disregard, and that can be clearly attributed to the agent, then I'm OK with the client having a Safe Harbour...

In establishing fault, the Recommendation recognised the potential to apportion penalties. We find mixed results with respect to this element. The appropriateness and practicality to do so where the taxpayer is not fault-free is a complex matter. Many caveats were raised by the interviewees, including the resulting legal action ensuing between the client and the practitioner to recover monies lost. This would create a blame game between parties:

I think if we started to go down a level of apportionment, we could, you know, be around for another five years trying to argue about percentages. So, I don't think apportionment really works. It would just be too messy – and practically if there was some apportionment to be done, the tax agent would then get legal advice and attempt to recover some...

The conflict of interest is also noted in that the Recommendation goes against normal principles of law between the client and practitioner acting on their behalf and potentially jeopardises their very relationship:

...[Without Safe Harbour] then taxpayers are effectively liable for what the things that the tax agent does, but having said that pretty much in most cases, principal is generally liable for actions of their agent in most areas of law – and this is an issue, and if there's an issue with the agent acting contrary to the interests of the principal, then the principal has to take action against the agent.

There was also some strong opposition to the Recommendation which noted that this course of action was highly unusual amongst tax administrations worldwide – and a 'game changer':

...[T]hat would be a game changer. I don't think there are any tax jurisdictions around the world that sort of apportion penalties. Penalties are ordinarily imposed upon taxpayers.

As already flagged, the broader regulatory framework, including the role of the courts is relevant and raises opportunities for efficiency from a client perspective. Taxpayers are able to take legal action to cover costs, sue for negligence, or make a claim on the tax agent's insurance, although it was noted that this action is very costly for taxpayers.<sup>100</sup> Court action was considered to be less likely. It was suggested that most action is settled outside of court:

It's difficult to sue a professional. I mean, a lot of taxpayers won't have the financial capability to commence legal action against their tax advisors or agents. I mean, you look at your average person who you know and the cost of starting a court action is enormous as time.

Lastly, timeliness for client outcomes and wellbeing were also identified as important considerations. Safe harbour can be perceived as a facility to circumvent stress. A client having suffered harm by the practitioner is likely to be incredibly stressed and the court processes can be lengthy and expensive.

Overall, this qualified support for Recommendation 6.5 is consistent with the TPB submissions received where it was acknowledged that there was some opposition surrounding this issue. The study's results are also consistent with the findings of Devos and co-authors (2023) with regard to the caveats around the necessity of safe harbours and how they would work in practice.<sup>101</sup> The government has also noted Recommendation 6.5 and has not endorsed it in the absence of a new administrative penalty regime.

Table 6 (see Appendix) breaks down the findings based upon the level of agreement or concern with for each element of Recommendation 6.5 and the research questions set.

## 6. SUMMARY AND CONCLUSION

This study gathered the views and insights of 20 Australian tax practitioners, as to their level of (dis)agreement with the selected recommendations in respect to the Code, investigations, penalties and sanctions, and safe harbour provisions. Table 7 summarises the majority positions identified in this research. However, as detailed in section 5, there are strong, complex narratives at play. Across all recommendations, whilst there may be majority perspectives of the interviewed cohort, these perspectives are complicated by nuances of a contemporary Australian context. Table 7 cannot be considered without appreciating the in-depth and valuable insights detailed in section 5.

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<sup>100</sup> Note that there is no right of appeal for safe harbour. It is an administrative decision by the Commissioner with the only redress being to challenge the Commissioner's administrative action in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This is generally seen as an expensive exercise and beyond the financial resources of most clients, as reflected upon by interviewees.

<sup>101</sup> Devos et al, above n 5.

**Table 7: Summary of Majority Positions by Practitioners**

| <b>Research Question</b>   | <b>Majority Position</b> |
|--|--------------------------|
| <b>With Respect to Supplementing the Code</b>  |                          |
| <i>RQ<sub>1.1</sub></i> Overarching agreement (dis-agreement) with Recommendation 5.1  | Agree-Partial<br>Agree   |
| <i>RQ<sub>1.2</sub></i> Concern about the level of government control and independence   | Concerned                |
| <i>RQ<sub>1.3</sub></i> Concern about the Ministers' lack of expertise   | Concerned                |
| <i>RQ<sub>1.4</sub></i> Concern about the Ministers being subject to political pressure or ATO influence leading to biased decisions   | Concerned                |
| <b>With Respect to Investigations</b>  |                          |
| <i>RQ<sub>2.1</sub></i> Overarching agreement (dis-agreement) with Recommendation 6.2  | Agree                    |
| <i>RQ<sub>2.2</sub></i> Investigating de-registered tax practitioners is a valuable / good use of resources (re Recommendation 6.2 (a))                                      | Agree-Partial<br>Agree   |
| <i>RQ<sub>2.3</sub></i> Concern investigating de-registered tax practitioners will impact on principles of natural justice / procedural fairness (re Recommendation 6.2 (a)) | Concerned                |
| <i>RQ<sub>2.4</sub></i> Tax practitioners have a right to know they are being investigated (re Recommendation 6.2 (b))   | Mixed                    |
| <i>RQ<sub>2.5</sub></i> Concern that removing the six-month timeframe will impact the effectiveness and efficiency of investigations (re Recommendation 6.2 (c))             | Concerned                |
| <b>With Respect to Penalties and Sanctions</b>   |                          |
| <i>RQ<sub>3.1</sub></i> Overarching agreement (dis-agreement) with Recommendation 6.1, 6.3 and 6.4   | Agree                    |
| <i>RQ<sub>3.2</sub></i> Sufficient penalties are needed to curb undesirable behaviour  | Disagree                 |
| <i>RQ<sub>3.3</sub></i> The proposed sanctions offer balance between regulation and procedural fairness (re Recommendation 6.1)  | Agree                    |
| <i>RQ<sub>3.4</sub></i> Concern increasing sanctions will impact power and independence of the TPB (re Recommendation 6.1)   | Not Concerned            |
| <i>RQ<sub>3.5</sub></i> Proposed publication of further detail in the TPB register will improve transparency and public trust (re Recommendation 6.3)                        | Not Concerned            |
| <i>RQ<sub>3.6</sub></i> Proposed administrative penalty regime will be effective in dealing with high-level of misconduct (re Recommendation 6.4)                            | Agree                    |
| <i>RQ<sub>3.7</sub></i> Appropriate avenues of appeal are required regarding the proposed administrative penalty regime (re Recommendation 6.4)                              | Agree                    |
| <b>With Respect to Safe Harbour</b>  |                          |
| <i>RQ<sub>4.1</sub></i> Overarching agreement (dis-agreement) with Recommendation 6.5  | Agree                    |
| <i>RQ<sub>4.2</sub></i> It is important to identify whether the taxpayer is at fault in addition to the tax practitioner   | Agree-Partial<br>Agree   |
| <i>RQ<sub>4.3</sub></i> The imposition and apportionment of penalty between the taxpayer and tax practitioner is appropriate   | Mixed-Partial<br>Agree   |
| <i>RQ<sub>4.4</sub></i> The proposed safe harbour regime is relevant given legal action can be taken to recover costs  | Agree                    |

Overall, there are complex and intertwining factors influencing practitioners' perceptions regarding Recommendation 5.1. Like the study by Devos and co-authors



(2023),<sup>102</sup> it is considered important that the Minister's powers be used judiciously and not in a knee-jerk fashion. Similarly, the inclusion of safeguards – proper process – has been revealed in this project, particularly around notions of open communication. Here, we expanded perspectives on the issues surrounding consultation and the role of lobbying and how these connect to issues of power, independence, and balance.

Interviewees explored issues surrounding the expertise and bias of Ministers identified by Devos and co-authors (2023)<sup>103</sup> and the way in which open dialogue can improve or add to these concerns. Overall, these interact with issues of perceived independence. Whilst Devos and co-authors (2023)<sup>104</sup> did not reveal concern of the principles-based Code becoming too prescriptive as was identified in the Review, in-depth examination of the perceptions in this study confirmed this aspect of concern.

Overall, the Review already:

- reinforced the critical need for collaborating with key stakeholders;
- referred to safeguards and parliamentary oversight.

The government has already:

- established the TPGSF to enable appropriate collaboration and consultation;
- announced an increase in funding allocation in the October 2022 Federal Budget;<sup>105</sup>
- published legislation on several of the Review's recommendations, including Recommendations 5.1, 6.2(c) and 6.3.<sup>106</sup>

On the latter point, the release of the legislation occurred following the completion of interviews. As noted in section 2.2 of this article, the initial proposal to provide the Minister with this power would include the need for the Minister to consult with the TPGSF before making any changes – thus checks and balances. This process has not been included in the legislation. Thus, the question arises as to whether the profession would feel more at ease if the proper processes surrounding collaborations and safeguards were to be embedded in law. However, what constitutes proper process itself needs to be founded in collaboration. Here, the TPGSF is the appropriate starting point. The TPGSF ought to consider whether Ministers should be required to undertake a minimum level of public consultation before decisions can be made.

Concern over the scope and limits of ministerial power can be somewhat resolved through the legislative amendments. The profession can reinforce their perspectives through this process, including concerns over complexity and overlapping roles and functions across regulatory frameworks. The amendments do not limit powers in terms

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Federal Treasury, *Budget Paper No 2: Budget Measures October 2022-23*, above n 68.

<sup>106</sup> See Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review, above n 9. See also at the time of writing *Treasury Laws Amendment (2023 Measures No 1) Act 2023* (Cth) and Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023.

of temporary or permanent outcomes, nor are they proposed to be reserved as emergency powers.

Given the perspectives presented, we conclude that the TPGSF should consider the alternative or additional approach of a *TPB-guidance focus* or the TPB having the power to supplement the Code. The amendments will add additional layers of complexity, and the profession is clear on to the notion of 'fixing what we have'. One example proffered was to have the guidance documents put down as legislative instruments. This offers a meaningful connection between the profession, TPB and Minister with respect to the necessary expertise and understandings underpinning future legislation. TPB guidance is seen as a critical piece of the puzzle and can resolve many of the issues presented by practitioners, including clarity over the various roles and functions across regulators (including with respect to professional bodies as well as regulators and the courts<sup>107</sup>).

We also reflect on the need for decision-making processes to be formalised and transparent. Our findings suggest that decisions made (or considered) by the relevant Minister, including their basis, ought to be reported and monitored. The TPGSF will have a continuing role here, ensuring the Code does not become unwieldy or untenable, but to also help ensure the Code retains its principles-based approach. No prior evidence or argument had been put forward within TPB submissions opposing Recommendation 6.2 from the professional bodies. In turn, the government indicated support in part, with an intention to amend the law to enact Recommendation 6.2 (a), whereas the government indicated it would consult further on Recommendations 6.2 (b) and (c). Devos and co-authors (2023) similarly found contrasting perspectives.<sup>108</sup>

Fundamental to investigations is the issue of funding, education/awareness and wellbeing. The TPB needs to ensure appropriate resources are maintained to complete the investigations it starts. As previously noted with respect to supplementing the Code, the Federal Budget has increased funding allocations in this space which ought to begin to address the concerns raised.

More generally, we find that clarity on the extent to which the level of investigations can occur without the knowledge of the practitioner is needed. In this regard, practitioners expect appropriate, transparent, and respectful processes that are appropriately resourced; however they understand that what this translates into can differ between cases. We reiterate the broad powers of the TPB to investigate and the significant implications, including limits to defence and penalties therein, as outlined in section 2.4 of this article. This is of particular concern given the contrasting positions of interviewees depending on whether the problem is a result of inexperience/lack of knowledge compared with more egregious actors. As noted previously, at the time of writing the government had also published exposure draft legislation<sup>109</sup> with regard to

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<sup>107</sup> It is also pertinent to note that since the completion of interviews, the Federal government announced plans to abolish the AAT and replace it with a new appeal body: 'A New Federal Administrative Review Body' *Administrative Appeals Tribunal* (Online), <https://www.aat.gov.au/about-the-aat/a-new-federal-administrative-review-body>. Thus, whilst tax agents that are struck off by the TPB can appeal to the AAT, there will be a functional change to this process in due course.

<sup>108</sup> Devos et al, above n 5.

<sup>109</sup> Treasury Laws Amendment (Measures for Consultation) Bill 2023: Tax Practitioners Board, Exposure Draft Legislation, Sch 1, Pt 2. See also the Exposure Draft Explanatory Materials, Treasury Laws Amendment (Taxation and Other Measures No 1) Bill 2023, ch 1 'Government Response to the Review of the Tax Practitioners Board – Tranche 2'.

investigations where the period of consultation appeared to be quite short. Further discussion of the proposed legislation is outside the scope of this article, but it should definitely be the subject of further research.

When it comes to penalties and sanctions, as identified, the Review considered there to be a problematic gap in the severity of sanctions. Recommendations 6.1, 6.3 and 6.4 were largely agreed with, although there were general perceptions that those egregious tax practitioners will not be swayed by increasing consequences. Instead, early engagement programs for low-level misconduct to catch tax practitioners before they become problematic were viewed favourably. Similarly, recurring themes with respect to benefits of guidance enabling practical resources to educate stakeholders are seen throughout this project. The TPB cannot underestimate the value of disseminating practical insights and lessons learned from real life occurrences. This includes with respect to providing a framework and clear guidance that breaks down the characterisation of intentional disregard and recklessness. An overarching issue is the self-assessment system itself. Inadequate funding for tax audits and resources for the TPB will exacerbate the problem. This was somewhat addressed by the October 2022 Federal Budget allocation.<sup>110</sup>

Whilst contrasting perspectives were offered with respect to the public register, the majority position was positive. These findings on naming and shaming will be further tested by the proposed legislation that imposes new legal obligations on registered tax agents and BAS agents, as outlined in section 2.4 of this article, particularly where interviewees indicated the various uses of register information, in addition to the loopholes flagged in getting around deregistration. It is therefore critical to fully appreciate the scope for which registers can be utilised. With the public scrutiny over PwC and a former partner,<sup>111</sup> which occurred following the completion of interviews for this project, our findings around conflict of interest as well as ethical culture are particularly noteworthy.

The proposed introduction of the disqualified entity provisions may require tax and BAS agents to undertake police checks on both new and existing staff. It can be seen that the wide and complex definition of a disqualified entity<sup>112</sup> will introduce new legal complexities and obligations both in managing existing staff and recruiting new staff. Given the findings presented, we see further need to explore the TPB register, including details of length of time and level of misconduct. At the time of writing, further exposure draft legislation had also been released with regard to information on the register.<sup>113</sup>

Finally, to date, it does not appear we have strong policy recommendations capturing issues with respect to implicit conflicts of interest. This issue warrants further attention,

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<sup>110</sup> See Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review, above n 9.

<sup>111</sup> See n 58, above.

<sup>112</sup> An entity is a disqualified entity if, among other things, the entity is subject to sanctions under TASA 2009 or has been convicted of certain offences – see Recommendation 4.6.

<sup>113</sup> Treasury Laws Amendment (Measures for Consultation) Bill 2023: Tax Practitioners Board, above n 110, Sch 1, Pt 1. See also the Exposure Draft Explanatory Materials, Treasury Laws Amendment (Taxation and Other Measures No 1) Bill 2023, above n 110, ch 1, 'Government Response to the Review of the Tax Practitioners Board – Tranche 2'. See Recommendation 8.1. Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023.

again an item that could be encompassed within the newly formed TPGSF. This study highlights inherently the benefits of the TPGSF.

With respect to Recommendation 6.5 on safe harbour, there was overarching support, but a strong caveat with how to operationalise it. Critically, the government merely noted this recommendation. Without a new administrative penalty regime, it would not endorse it.<sup>114</sup> This study indicates further work is needed to understand comprehensively the issues with respect to safe harbour, including with respect to guidance, identifying and evidencing fault, principle/prescription approaches and so forth, the problem being that the Review's scope did not extend to consider taxpayer conduct, which was a key element of the issues found in Devos and co-authors' (2023) study.<sup>115</sup> Contemplating fault and apportionment between tax practitioners and their clients require a broader scope of consideration.

Finally, we pause on the need to consider issues of wellbeing and harm across the various stakeholders within the profession. Harm can take on many forms and can arise from actions and inactions. Reform should seek to balance a multitude of conflicting factors within a self-assessment system.

This study offers timely evidence of Australian tax practitioners' perspectives as to the merits of the selected TPB recommendations and how they will impact upon their businesses and livelihoods. What we have observed are strong themes around continuing to develop a holistic system and toolkit for the TPB and the tax practitioner community. What cannot be diminished is consideration of the various interconnected stakeholders, their livelihoods and wellbeing. Moreover, a strong consultative approach, and proactivity are key factors.

These findings offer critical insights relevant to the tax policy debate, including the work of the newly-established TPGSF, as well as the PSC and government more generally. Even though the interview sample size of 20 tax practitioners is limiting in being able to extrapolate the results to the wider tax practitioner population, this study indicates that there is fertile ground for further empirical research into tax practitioner attitudes and behaviours concerning the remaining TPB recommendations. As this study focused on six Recommendations, of which two appear in draft legislation and one has already become law to date, there is scope for further work to inform policy and improve revenue and compliance outcomes. In this regard it is imperative that further academic research be supported and continued in order to generate a more comprehensive picture of the tax practitioner landscape.

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<sup>114</sup> See also Devos et al, above n 5.

<sup>115</sup> Ibid.

## APPENDIX

Table 1: TPB Recommendations and Government Response

| Recommendation – October 2019 |  | Government Response – November 2020   |
|-------------------------------|--|---|
| 5.1                           | The Review recommends that the relevant Minister be given a legislative instrument power to be able to supplement the Code of Professional Conduct to address emerging or existing behaviours and practices. The legislative instrument process would also ensure appropriate consultation with key stakeholders and parliamentary oversight.  | The government supports the recommendation. There are clear benefits in having processes in place to ensure the Code of Professional Conduct remains contemporary. Any proposed changes to the Code will be considered first by the Tax Practitioner Governance and Standards Forum proposed as part of Recommendation 3.3.       |
| 6.1                           | The Review recommends that the Board's sanctions powers need to be increased, including introducing the following sanctions into the <i>Tax Agent Services Act 2009</i> , which could be applied to registered and unregistered practitioners: <ul style="list-style-type: none"> <li>a. Infringement notices</li> <li>b. enforceable undertakings</li> <li>c. quality assurance audits</li> <li>d. interim suspensions</li> <li>e. permanent disbarment</li> <li>f. external intervention.</li> </ul>                             | The government notes the recommendation. While there are a number of sanctions already available to the TPB, the review identified a gap between existing low-level sanctions and higher-level sanctions. Treasury will consult with stakeholders on the appropriateness of providing new sanction powers to the TPB.             |
| 6.2                           | The Review recommends that: <ul style="list-style-type: none"> <li>a. Investigations are able to commence and/or continue once a registered tax practitioner either has their registration terminated, chooses not to re-register, or is seeking to surrender their registration.</li> <li>b. The limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation be removed.</li> <li>c. The six-month timeframe to conduct an investigation be removed.</li> </ul> | The government supports the recommendation in part. The government agrees with (a) and will amend the law to enact this change. The government will consult further on (b) and (c) to investigate the systemic implications of changing the current limitation on TPB formal information gathering and investigation time limits. |

|     |  |  |
|-----|--|--|
| 6.3 | The Review recommends that the <i>Tax Agent Services Regulations 2009</i> be amended to enable the TPB to publish more detailed reasons for tax practitioner sanctions, including terminations, on the TPB Register (which is publicly available). See also Recommendation 8.1.                        | The government notes the recommendation. The government notes that there should be transparency for the community to make informed decisions regarding their use of tax services and will consult on the scope of information to be included on the TPB register and how long the information should remain on the TPB register. |
| 6.4 | The Review recommends that an administrative penalty regime, administered by the ATO, be introduced to impose penalties on tax practitioners who demonstrate an intentional disregard of the taxation laws in making, or being involved in making, a statement to the Commissioner of Taxation.        | The government notes the recommendation. Any additional powers provided to the TPB (as per Recommendation 6.1) should be given time to be considered in operation before considering the need to introduce ATO administered administrative penalties for tax practitioners.  |
| 6.5 | The Review recommends the safe harbour protection as it applies both to false or misleading statement penalties and failure to lodge penalties, be extended to cover instances where the tax agent or BAS agent has demonstrated recklessness or intentional disregard with respect to a taxation law. | The government notes the recommendation. In the absence of a new administrative penalty regime administered by the ATO (recommendation 6.4), a response to this recommendation is not required.  |


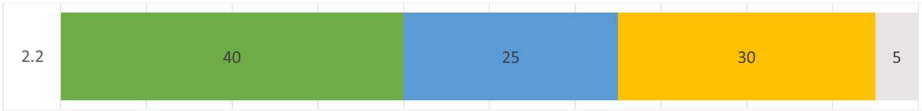
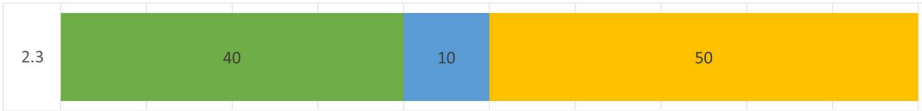
Source: Australian Treasury, The Review, above n 2, 12-13; Australian Treasury, Government Response, above n 8, 16-19.

**Table 3: With Respect to Supplementing the Code with Ministerial Powers**

| Research Question Set   | Interviewee Spread (Percentages)   | Key Themes |            |                        |    |                                     |    |                         |    |   |
|---|--|------------|------------|------------------------|----|-------------------------------------|----|-------------------------|----|---|
| <p><b>RQ<sub>1.1</sub></b><br/>Overarching agreement (dis-agreement) with Recommendation 5.1</p>  | <p>1.1</p> <table border="1"> <tr> <th>Category</th> <th>Percentage</th> </tr> <tr> <td>Agreement / No Concern</td> <td>45</td> </tr> <tr> <td>Partial Agreement / Partial Concern</td> <td>10</td> </tr> <tr> <td>Dis-agreement / Concern</td> <td>45</td> </tr> </table> | Category   | Percentage | Agreement / No Concern | 45 | Partial Agreement / Partial Concern | 10 | Dis-agreement / Concern | 45 | <p>Judiciary process, legislative process, decision-making process, bad behaviour, natural justice, technological advancement, stakeholders</p> |
| Category  | Percentage   |            |            |                        |    |                                     |    |                         |    |   |
| Agreement / No Concern  | 45   |            |            |                        |    |                                     |    |                         |    |   |
| Partial Agreement / Partial Concern   | 10   |            |            |                        |    |                                     |    |                         |    |   |
| Dis-agreement / Concern   | 45   |            |            |                        |    |                                     |    |                         |    |   |
| <p><b>RQ<sub>1.2</sub></b><br/>Concern about the level of government control and independence</p>   | <p>1.2</p> <table border="1"> <tr> <th>Category</th> <th>Percentage</th> </tr> <tr> <td>Agreement / No Concern</td> <td>35</td> </tr> <tr> <td>Partial Agreement / Partial Concern</td> <td>15</td> </tr> <tr> <td>Dis-agreement / Concern</td> <td>50</td> </tr> </table> | Category   | Percentage | Agreement / No Concern | 35 | Partial Agreement / Partial Concern | 15 | Dis-agreement / Concern | 50 | <p>Decision-making process, judicial process, stakeholders, natural justice, procedural fairness, bad behaviour</p>                             |
| Category  | Percentage   |            |            |                        |    |                                     |    |                         |    |   |
| Agreement / No Concern  | 35   |            |            |                        |    |                                     |    |                         |    |   |
| Partial Agreement / Partial Concern   | 15   |            |            |                        |    |                                     |    |                         |    |   |
| Dis-agreement / Concern   | 50   |            |            |                        |    |                                     |    |                         |    |   |
| <p><b>RQ<sub>1.3</sub></b><br/>Concern about the Ministers' lack of expertise</p>   | <p>1.3</p> <table border="1"> <tr> <th>Category</th> <th>Percentage</th> </tr> <tr> <td>Agreement / No Concern</td> <td>35</td> </tr> <tr> <td>Partial Agreement / Partial Concern</td> <td>5</td> </tr> <tr> <td>Dis-agreement / Concern</td> <td>60</td> </tr> </table>  | Category   | Percentage | Agreement / No Concern | 35 | Partial Agreement / Partial Concern | 5  | Dis-agreement / Concern | 60 | <p>Level of independence/political interference, decision-making process, judicial process</p>  |
| Category  | Percentage   |            |            |                        |    |                                     |    |                         |    |   |
| Agreement / No Concern  | 35   |            |            |                        |    |                                     |    |                         |    |   |
| Partial Agreement / Partial Concern   | 5  |            |            |                        |    |                                     |    |                         |    |   |
| Dis-agreement / Concern   | 60   |            |            |                        |    |                                     |    |                         |    |   |
| <p><b>RQ<sub>1.4</sub></b><br/>Concern about the Ministers being subject to political pressure or ATO influence leading to biased decisions</p> | <p>1.4</p> <table border="1"> <tr> <th>Category</th> <th>Percentage</th> </tr> <tr> <td>Agreement / No Concern</td> <td>20</td> </tr> <tr> <td>Partial Agreement / Partial Concern</td> <td>15</td> </tr> <tr> <td>Dis-agreement / Concern</td> <td>65</td> </tr> </table> | Category   | Percentage | Agreement / No Concern | 20 | Partial Agreement / Partial Concern | 15 | Dis-agreement / Concern | 65 | <p>Legislative process, level of independence/political interference</p>  |
| Category  | Percentage   |            |            |                        |    |                                     |    |                         |    |   |
| Agreement / No Concern  | 20   |            |            |                        |    |                                     |    |                         |    |   |
| Partial Agreement / Partial Concern   | 15   |            |            |                        |    |                                     |    |                         |    |   |
| Dis-agreement / Concern   | 65   |            |            |                        |    |                                     |    |                         |    |   |

Percentage Agreement / No Concern   
  Percentage Partial Agreement / Partial Concern   
  Percentage Dis-agreement / Concern   
  No Clear Position Provided

**Table 4: With Respect to Investigations**

| Research Question Set  | Interviewee Spread (Percentages)  | Key Themes   |
|--|---|--|
| <p><b>RQ<sub>2.1</sub></b><br/>                     Overarching agreement (dis-agreement) with Recommendation 6.2</p>  |  <p>A horizontal stacked bar chart for RQ2.1. The bar is divided into three segments: a green segment on the left representing 70%, a blue segment in the middle representing 10%, and a yellow segment on the right representing 20%. The number '2.1' is written in the left margin, and the percentages '70', '10', and '20' are written inside their respective segments.</p>                                 | <p>TPB power, Decision-making process, code principles, judicial process, natural justice, procedural fairness, investigation power, stakeholders, grounds for investigation, sanctions, registration status</p> |
| <p><b>RQ<sub>2.2</sub></b><br/>                     Investigating de-registered tax practitioners is a valuable / good use of resources (re Recommendation 6.2 (a))</p>                                      |  <p>A horizontal stacked bar chart for RQ2.2. The bar is divided into four segments: a green segment on the left representing 40%, a blue segment representing 25%, a yellow segment representing 30%, and a small grey segment on the far right representing 5%. The number '2.2' is written in the left margin, and the percentages '40', '25', '30', and '5' are written inside their respective segments.</p> | <p>TPB power, Decision-making process, code principles, judicial process, natural justice, procedural fairness, investigation power, regulation process</p>  |
| <p><b>RQ<sub>2.3</sub></b><br/>                     Concern investigating de-registered tax practitioners will impact on principles of natural justice / procedural fairness (re Recommendation 6.2 (a))</p> |  <p>A horizontal stacked bar chart for RQ2.3. The bar is divided into three segments: a green segment on the left representing 40%, a blue segment representing 10%, and a yellow segment on the right representing 50%. The number '2.3' is written in the left margin, and the percentages '40', '10', and '50' are written inside their respective segments.</p>   | <p>Code principles, judicial process, procedural fairness, investigation process, stakeholders, cost-benefit approach, sanctions</p>   |



**RQ2.4**

Tax practitioners have a right to know they are being investigated (re Recommendation 6.2 (b))



Code principles, judicial process, investigation power, tampering with evidence, tax system, technological advancement, investigation process, stakeholders, sanctions

**RQ2.5**

Concern that removing the six-month timeframe will impact the effectiveness and efficiency of investigations (re Recommendation 6.2 (c))



Investigation process, procedural fairness, natural justice, taxation law, the complexity of the issue, the severity of the offence, timeframe



**Table 5: With Respect to Penalties and Sanctions**

| Research Question Set   | Interviewee Spread (Percentages) | Key Themes  |
|---|----------------------------------|---|
| <p><b>RQ<sub>3.1</sub></b><br/>                     Overarching agreement (dis-agreement) with Recommendation 6.1, 6.3 and 6.4</p>                              | <p>3.1 80 10 10</p>              | Trust, system, the principles of the Code, sanctions, professional bodies, procedural fairness, uncertainty   |
| <p><b>RQ<sub>3.2</sub></b><br/>                     Sufficient penalties are needed to curb undesirable behaviour</p>   | <p>3.2 35 15 50</p>              | Judicial process, sanctions, registration status, rogue behaviour, severity of the penalty, procedural fairness, fraud technique, the principals of the Code, parliamentary process, tax practitioners' profession, safe harbour, consequences, carless |
| <p><b>RQ<sub>3.3</sub></b><br/>                     The proposed sanctions offer balance between regulation and procedural fairness (re Recommendation 6.1)</p> | <p>3.3 60 10 15 15</p>           | Sanctions, procedural fairness  |
| <p><b>RQ<sub>3.4</sub></b><br/>                     Concern increasing sanctions will impact power and independence of the TPB (re Recommendation 6.1)</p>      | <p>3.4 65 5 20 10</p>            | Independence issues, power  |

**RQ3.5**

Proposed publication of further detail in the TPB register will improve transparency and public trust (re Recommendation 6.3)



Registration status, the severity of the penalty, procedural fairness, judicial process, the principles of the Code, the nuance of the register, protective approach, consumer protection, balance, length of time, the content of the register

**RQ3.6**

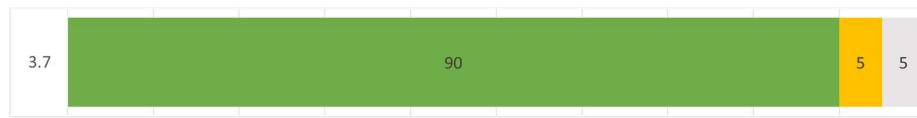
Proposed administrative penalty regime will be effective in dealing with high-level of misconduct (re Recommendation 6.4)



Duty of care, information gathering process, proportionate the penalty, the principles of the Code, confidentiality, the onus of proof, affected party, judicial process

**RQ3.7**

Appropriate avenues of appeal are required regarding the proposed administrative penalty regime (re Recommendation 6.4)



Appeal process, judicial process



**Table 6: With Respect to Safe Harbour**

| Research Question Set  | Interviewee Spread (Percentages) | Key Themes  |
|--|----------------------------------|---|
| <p><b>RQ<sub>4.1</sub></b><br/>                     Overarching agreement (dis-agreement) with Recommendation 6.5</p>  | <p>4.1 65 15 15 5</p>            | Duty of care, penalty, protection, innocence, legal process   |
| <p><b>RQ<sub>4.2</sub></b><br/>                     It is important to identify whether the taxpayer is at fault in addition to the tax practitioner</p>   | <p>4.2 50 25 25</p>              | Onus of proof, tough situation  |
| <p><b>RQ<sub>4.3</sub></b><br/>                     The imposition and apportionment of penalty between the taxpayer and tax practitioner is appropriate</p>   | <p>4.3 35 5 45 15</p>            | Apportionment of penalty, the complexity of the system, duty of care, level of expertise, judicial process, innocence, penalty regime |
| <p><b>RQ<sub>4.4</sub></b><br/>                     The proposed safe harbour regime is relevant given legal action can be taken to recover costs</p>  | <p>4.4 70 5 5 20</p>             | Legal path  |
| <p> <span style="display: inline-block; width: 15px; height: 15px; background-color: #4CAF50; border: 1px solid black; margin-right: 5px;"></span> Percentage Agreement                             <span style="display: inline-block; width: 15px; height: 15px; background-color: #2196F3; border: 1px solid black; margin-left: 20px; margin-right: 5px;"></span> Percentage Partial Agreement                             <span style="display: inline-block; width: 15px; height: 15px; background-color: #FFC107; border: 1px solid black; margin-left: 20px; margin-right: 5px;"></span> Percentage Dis-agreement                             <span style="display: inline-block; width: 15px; height: 15px; background-color: #E0E0E0; border: 1px solid black; margin-left: 20px;"></span> No Clear Position Provided                         </p> |                                  |   |

# Assessing value added tax compliance burden in Gulf Cooperation Council countries

Mahmoud Abdellatif\* and Binh Tran-Nam\*\*

## ***Abstract***

In 2017, the Gulf Cooperation Council (GCC) member countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates (UAE)) ratified the Unified Value Added Tax (VAT) Agreement, which set out the general principles for imposing VAT and mandated each GCC member state to introduce a VAT by January 2018. Four GCC countries have so far introduced VAT, namely, Saudi Arabia, UAE, Bahrain and Oman. None of these countries possess a mature tax system. In fact, they also lack a well-defined tax culture and tax morale, and their tax administrations are not yet well developed. Thus, the introduction of VAT could give rise to a serious issue regarding VAT compliance burden. In this context, this article aims (i) to examine the new VAT in the four GCC countries, and (ii) to compare qualitatively the likely VAT compliance burden among these four countries, and relative to other VAT-imposing countries, specifically member countries of the Forum on Tax Administration (FTA). We adopt the VAT Diagnostic Tool approach, which has been developed by an Australia-based research team and applied successfully to assess VAT compliance burden in FTA countries. The findings of the article suggests that while the four GCC countries belong to the medium VAT compliance burden group, they compare very favourably with FTA countries. More specifically, they perform above the FTA average in minimising compliance burden that arises from VAT policy complexity and administration complexity, but below FTA average in terms of revenue capabilities in meeting taxpayer service and compliance needs. A small number of policy recommendations are proposed with a view to maintaining or improving the good performance of GCC countries in terms of VAT complexity. They include: (i) formal recognition of the importance of tax system simplicity; (ii) use of VAT Diagnostic Tool Factors/indicators in guiding the design or simplification of VAT policy and administration; (iii) restraint from making VAT policy and administration changes without supporting evidence, and (iv) capacity building in tax administration.

**Keywords:** tax compliance burden, VAT Diagnostic Tool, GCC countries, FTA countries

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## 1. INTRODUCTION AND CONTEXT

In Gulf Cooperation Council (GCC) countries, the bulk of government revenue is derived from the hydrocarbon sector, making government revenue dependent mainly on one revenue source. The dominance of hydrocarbon revenues decreases the significance of developing and implementing tax policy and also diminishes the functional role of taxation in GCC countries. Furthermore, a tax-paying culture is absent among citizens and residents of GCC countries. Such a situation might be acceptable if the international oil price was consistently and indefinitely high, which would result in budget surpluses in those resource-rich countries. However, oil prices are often vulnerable to sharp fluctuation over time. For example, after more than a decade of low oil prices during the 1990s, oil prices had significantly increased to high levels during the period 2003-14 before declining again since the last quarter of 2014. Such a decline in oil prices has a significant impact on the government revenue in all GCC countries. To mitigate the impact of oil price fluctuations, GCC governments accordingly started to reform their tax policies and consequently tax systems. This has been manifested in ratifying the GCC Unified Value Added Tax (VAT) Agreement in 2017, which set out the general principles for imposing VAT and mandated each GCC member state to introduce a VAT by January 2018. Four countries have so far introduced a VAT, namely, Saudi Arabia, UAE, Bahrain and Oman.

Introducing a new tax in an immature tax system without well-defined tax culture/morale and developed tax administration could give rise to a serious issue regarding VAT compliance burden (Delghan, Abdellatif & Gomaa Abdel-Salam, 2021). In this context, this article aims to examine the new VAT in the four GCC countries, and to compare qualitatively the likely VAT compliance burden in these four GCC countries with those in the Forum on Tax Administration (FTA) member countries.<sup>1</sup> In addition, specific recommendations to mitigate the VAT compliance burden in all GCC countries will also be provided.

To achieve the above aims, the mixed research method of the VAT Diagnostic Tool is employed. The Diagnostic Tool approach was developed by an Australia-based research team and has recently been applied by various tax researchers to assess the relative compliance burden of VAT and corporate income tax in a number of countries (Highfield, Evans & Walpole, 2019; Evans et al., 2020; Zu, Evans & Krever, 2020; Brown & Sadiq, 2023).

The remainder of this article is organised as follows. Section 2 briefly discusses the development of VAT in Saudi Arabia, UAE, Bahrain and Oman in order to prepare the ground for the discussions that follow. Section 3 presents a brief literature review on measures of tax compliance burden, focusing on the composite index approach, which includes the VAT Diagnostic Tool as an example. Section 4 presents the research methodology and data collection, describing how the VAT Diagnostic Tool can be implemented in a step-by-step procedure. The results from the survey are then discussed and analysed in section 5. Some specific recommendations for mitigating VAT compliance burden in GCC countries are also proposed. The final section provides some concluding remarks.

## 2. VALUE ADDED TAX IN GULF COOPERATION COUNCIL COUNTRIES

The tax systems in developed and developing countries typically consist of direct and indirect taxes. The major direct taxes are individual income tax and corporate income

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<sup>1</sup> The FTA, created in 2002, brings together Commissioners from over 50 advanced and emerging tax administrations from across the globe, including all Organisation for Economic Co-operation and Development (OECD) and G20 member countries.

tax, whereas the main indirect tax is VAT, alternatively known as Goods and Services Tax (GST). Those taxes represent the major components of the tax mix and the main sources of tax revenue. Nevertheless, the situation in GCC countries is different from that in other countries as the major source of GCC government revenue is derived from the hydrocarbon sector, while the contribution of tax revenue to government revenue remains low. For example, recent International Monetary Fund (IMF) reports indicate that the tax to Gross Domestic Product (GDP) ratios in Oman (IMF, 2022a), Qatar (IMF, 2022b), Saudi Arabia (IMF, 2022c) and UAE (IMF, 2022d) in 2021 were 6.5%, 3.2%, 14.2% and 14.9%, respectively. The bulk of tax revenue is derived from corporate income tax on oil and gas companies, and the recently introduced VAT.

The dependence on oil and gas revenue, accompanied by the low contribution of tax revenue to total government revenue, makes government revenue in GCC countries vulnerable to fluctuations in oil and gas prices (Abdellatif, Eid & Tran-Nam, 2017). As a result, the IMF had been advising GCC countries to find ways to diversify government revenue through restructuring their tax mix. Accordingly, GCC countries commenced tax reform through the introduction of a broad-based consumption tax, resulting in the GCC Unified VAT Agreement in 2017. The following sections provide a brief description of VAT in each of the four GCC countries under study.

## 2.1 Unified VAT framework for GCC countries

In May 2017, the GCC countries ratified the Unified VAT Agreement, which set out the general principles for introducing VAT in each member state. These principles include the following:

- the use of the destination principle for taxing goods and services;
- a list of goods and services taxable under VAT;
- VAT registration thresholds, equal to SAR 375,000 (approximately AUD 147,450 according to the average June 2023 exchange rate);
- A VAT standard rate of 5% in all member states;
- zero-rating applicable on exports;
- taxing imports at the first entry country;
- special VAT rules for a number of sectors such as the financial sector, education services, and health care; and
- the treatment of intra-trade between GCC countries.

These principles should be reflected in the VAT legislation of each member state and the legislation should come into force by 1 January 2018. Nevertheless, VAT was introduced in only four countries. Saudi Arabia and UAE enacted their VAT laws on 1 January 2018, while Oman and Bahrain enacted their VAT laws in April 2021 and January 2022, respectively.

## 2.2 VAT legislation in GCC countries

The VAT in Saudi Arabia was enacted by *Law No. 113* in January 2018. The VAT standard rate was 5% which increased to 15% from July 2021 onward. The registration threshold is SAR 375,000 and voluntary registration is allowable for businesses with an annual turnover below the threshold.

The VAT legislation in the UAE is the *Federal Decree Law No. 8 of 2017* enacted on 1 January 2018. The VAT registration threshold is AED 375,000 (equivalent to SAR

375,000 at the time) and the VAT standard rate is also 5%. The executive regulation provides more details with regard to the scope of taxable goods and services. Also, it provides further details with regard to a taxpayer's obligations.

In Oman, VAT was introduced by *Law No. 121 of 2020* which became effective on 16 April 2021. The VAT registration threshold is OMR 38,500 (equivalent to SAR 375,000 at the time) and businesses with an annual turnover below the threshold may opt to register voluntarily. The VAT standard rate is 5%.

In Bahrain, VAT has been introduced by *Law No. 48 of 2018* which entered into force on 1 January 2022. The VAT standard rate is 10%, and the registration threshold is BHD 37,500 (equivalent to SAR 375,000 at the time) according to Article 33 of the executive regulation.

It is obvious that the four countries followed the Unified GCC VAT Agreement regarding the registration threshold. Nevertheless, there are two important deviations from the Agreement. These are: (1) only two countries (Saudi Arabia and UAE) implemented VAT by the proposed date of by 1 January 2018, and (2) only two countries (UAE and Oman) implemented and continue to impose VAT at the standard rate of 5%.

### 2.3 The main features of VAT in GCC countries

The VAT legislation of each country provides specific treatment for a number of goods and services in accordance with the Unified GCC VAT Agreement. These items include, for example, exports, basic foods, and oil and gas. Special treatment is also provided to a number of services, namely, financial services, housing, education and health services. These measures are summarised in Table 1.

**Table 1: Main Features of VAT in GCC Countries, 2022**

| VAT treatment                  | Saudi Arabia                        | UAE                  | Bahrain                  | Oman                  |
|--------------------------------|-------------------------------------|----------------------|--------------------------|-----------------------|
| Export of goods and services   | Zero-rated                          | Zero-rated           | Zero-rated               | Zero-rated            |
| Education                      | Zero-rated/<br>taxed (non-citizens) | Zero-rated*          | Zero-rated               | Exempt                |
| Health                         | Zero-rated                          | Zero-rated           | Zero-rated               | Exempt/<br>Zero-rated |
| Financial services             | Exempt                              | Exempt               | Exempt                   | Exempt                |
| Governmental bodies            | Refund mechanism                    | Recovery mechanism   | Taxed/Recovery mechanism | Recovery mechanism    |
| Basic food commodities         | Taxed                               | Taxed                | Zero-rated*              | Zero-rated*           |
| Crude oil, gas and derivatives | Taxed                               | Zero-rated/<br>Taxed | Zero-rated               | Zero-rated            |

Source: Relevant legal provisions in GCC countries.

\* Some education and basic food commodities are only exempted, not zero-rated.



It is apparent that all GCC countries zero rate exports and exempt financial services, which aligns with the Unified VAT Agreement. Health care services are zero-rated in Saudi Arabia, UAE and Bahrain, but they are subject to specific conditions in Oman so that health care may be exempted or zero-rated in that country. Similarly, basic foods are taxed in both Saudi Arabia and the UAE, but are zero-rated in both Bahrain and Oman. These differences in tax treatment of merit services and necessity goods reflect the different tax policies implemented by each country, despite their ratification of the Agreement.

#### **2.4 Taxable period and tax return**

Taxable period refers to the period for which the taxable business is required to report to the tax authority on its VAT obligation. The length of the taxable period indicates the frequency for filing tax return (Schenk, Thuronyi & Cui, 2015, p. 237). An important aspect for managing VAT compliance is the frequency of filing the VAT return. Article 60 of the Unified VAT Agreement provides the freedom to each member country to determine the taxable period. In this context, Saudi Arabia's VAT legislation provides different filing periods depending on the annual turnover of businesses. In this case, if the taxable business's annual turnover exceeds SAR 40.0 million, it is required to file a tax return monthly in accordance with Article 58 of the executive regulations of VAT law. If annual turnover is SAR 40.0 million or less, a taxable business is required to file the tax return quarterly. The tax return must be filed within one month from the ending date of the taxable period in accordance with Article 62 of the executive regulation.

As stated in Article 62 of the executive regulation of the UAE's VAT law, the taxable period is three months (quarterly) regardless of the taxable business's annual turnover. A taxable business is required to file a tax return within 28 days from the end of the taxable period. A similar taxable period is implemented in Oman, as the taxable period is three months (quarterly), and a taxable business is required to file a tax return within 30 days of the ending date of the taxable period in accordance with Article 72 of the executive regulation.

Bahrain's VAT law uses two taxable periods in a similar way to Saudi Arabia's approach. Taxable businesses with an annual turnover exceeding BHD 3.0 million are required to file a tax return monthly. If annual turnover equals BHD 3.0 million or less, a taxable business is required to file a tax return quarterly in accordance with Article 48 of the executive regulation. A taxable business is obliged to file a tax within one month from the ending date of the taxable period in accordance with Article 49 of the executive regulation.

### **3. BRIEF LITERATURE REVIEW ON MEASURES OF TAX COMPLIANCE BURDEN**

Tax complexity, however defined, is an inevitable feature of any modern tax system. Tax complexity give rises to non-trivial tax operating costs,<sup>2</sup> which can be defined as the sum of compliance costs (borne by taxpayers) and tax administration costs (borne by the government). The simplicity criterion of good tax policy calls for tax operating costs to be minimised in raising any given amount of tax revenue. The present review focuses on tax compliance costs because such costs are not only more interesting conceptually than tax administration costs but also represent the bulk of tax operating costs (Evans, 2008, p. 447).

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<sup>2</sup> Tax operating costs are often known as tax administration costs in the US; see, for example, Stiglitz (2000, p. 464).

Since tax complexity is multi-dimensional and can be captured in different ways, many different tax complexity indicators have been proposed in the literature. They include, for example, number of taxes, number of pages or words of tax legislation, number of tax reliefs/concessions, extent of use of tax advisers, level of tax litigation, etc. Broadly speaking, these alternative approaches to measuring tax complexity can be classified into three categories: legal complexity, effective complexity and composite complexity index. Since the various measures of legal and effective complexity have been well discussed elsewhere (see, for example, Sandford, Godwin & Hardwick, 1989; Evans, 2008; Tran-Nam & Evans, 2014, p. 350), the remainder of this section focuses on the composite indexes of tax complexity.

### 3.1 Measures of legal tax complexity

Legal tax complexity refers to the difficulty with which a particular tax law can be read, interpreted and applied in various hypothetical or actual situations (Tran-Nam, 1999, p. 508). This definition can be broadened to include tax administrative requirements. A variety of measures of the extended notion of legal complexity have been proposed and implemented in the literature on tax complexity. They include:

- tax law readability (for example, Tan & Tower, 1992; Richardson & Smith, 2002);
- number of lines in the state income tax forms; number of pages in the instruction booklets (Slemrod, 2005);
- number of state tax expenditures in the US (Weinstein, 2014);
- the World Economic Forum (WEF)'s Tax Complexity Score (Schwab, Porter & Lopez-Claros, 2006) based on a survey of business executive perceptions;
- perceptions of business tax law complexity based on survey studies of tax advisers, tax educators and tax administrators (see, for example, O'Neil, Samelson & Harkness, 1997; Davies, Carpenter & Iverson, 2001; Burton et al., 2021)

Measures of legal complexity are dimensionless and generally not appropriate for international comparison.

### 3.2 Measures of effective tax complexity

Effective complexity from the taxpayer perspective refers to the time and effort (value of resources) expended by taxpayers and third parties as they come into interaction with the tax system (Tran-Nam, 1999, p. 508). The best-known measure of effective tax complexity by far is tax compliance costs, universally defined as those costs incurred by taxpayers or third parties in satisfying the requirements of the tax system (Sandford et al., 1989, pp. 3 and 10). The method for estimating tax compliance costs is based on either the Sandford approach or one of its variants (Sandford et al., 1989) or the European Union's Standard Cost Model, also known as the Dutch Model (Ramboll Management Consulting, The Evaluation Partnership and Europe Economic Research for the European Commission, 2013, pp. 23-26). Under both methods, tax compliance costs can be estimated as the inner product of a vector of relevant quantities (such as number of hours per year spent by internal accountants to keep businesses' tax records) and a vector of corresponding prices (such as average wage rate of internal accountants) where data on the quantity vector is typically obtained from a large-scale survey of taxpayers and the data on the price vector from the same survey or other external

sources. It is widely acknowledged that there are several conceptual and measurement problems in estimating tax compliance costs.

Estimated tax compliance costs derived from empirical studies can be expressed either in dollar terms (for example, average VAT compliance costs per VAT payer; aggregate VAT compliance costs for all VAT payers) or relative terms (for example, as a percentage of business turnover of the corresponding tax revenue). In addition to tax compliance costs, there are also much simpler measures of effective tax complexity. Examples of these naïve measures include:

- percentage of firms identifying tax administration as a major constraint derived from World Bank's Enterprise Surveys (World Bank, 2023).
- the now defunct World Bank and PricewaterhouseCoopers (PwC) Paying Taxes data, for example, time taken to prepare, file and pay taxes (hours/year) (PwC & World Bank, 2019).
- the European Association Comenius (EACO) World Tax Index which included hours needed for paying taxes per year (Kotlán & Machová, 2012).

### 3.3 Measures of composite tax complexity

The third method for measuring tax complexity is the tax compliance burden index approach. Before proceeding further, it may be helpful to discuss the subtle difference between tax compliance costs and compliance burden although these two terms have been used more or less interchangeably in the literature. As discussed previously, tax compliance costs represent the attempt to monetise the opportunity costs of a taxpayer's compliance. Tax compliance burden, by contrast, is somewhat broader, multidimensional and more qualitative. It is not a single numerical estimate of all costs, but a vector of many qualitative and quantitative factors. It may include factors that do not fit easily into the tax compliance cost quantification framework such as the psychological stresses experienced by individuals or small business owners in dealing with their tax affairs.

Tax compliance burden indexes (sometimes known as tax diagnostic tools) assess tax complexity in terms of a set of related variables (often referred to as factors and, within each factor, there can be many indicators) that together capture the complexity of the tax law or system under study. These factors and indicators are mainly related to legal and administrative complexity and tend to be qualitative although selected elements of effective complexity can also be incorporated into the indexes.<sup>3</sup> This kind of approach in summarising a vast amount of information in a tax law or national tax system for the purposes of international or intertemporal comparison has become increasingly popular in recent times.

The construction of tax compliance burden indexes is based on the composite indicator methodology, which has a longstanding tradition in the literature.<sup>4</sup> A composite indicator shows how a group of related variables (factors and indicators) varies with respect to geographical location, time or both. The use of different factors and indicators in composite indicator construction gives rise to two key problems: (i) weighting (how weights are assigned to each factor or indicator), and (ii) aggregation (how weighted

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<sup>3</sup> For example, the Office of Tax Simplification (OTS) Complexity Index contains 'number of taxpayers' and 'aggregated compliance burden for a taxpayer and HMRC' as indicators; see OTS (2017). These indicators are clearly measures of effective complexity.

<sup>4</sup> Composite indicators are related to index numbers which date back to the 18th century; see also Diewert and Nakamura (1993) and OECD (2008).

factors and indicators are combined to arrive at the values of the index). For a discussion on methodological issues relating to the construction of a composite tax complexity index, interested readers are referred Tran-Nam and Evans (2014).

There are currently three main types of composite tax compliance burden index, namely, the OTS Complexity Index, Global Multinational Corporation (MNC) Tax Complexity Index and VAT Diagnostic Tool. The OTS Complexity Index, first published by the OTS in 2012, appears to be the earliest example of composite index of tax compliance burden (OTS, 2017). It went through several iterations and ceased to be updated after 2015. The OTS Complexity Index has two sub-indexes: Underlying complexity and Impact of complexity. While the OTS Complexity Index was designed for the UK tax legislation, it has subsequently been applied to many other countries such as Portugal (Borrego, Lopes & Ferreira, 2016), and Australia, New Zealand and Turkey (Budak & James, 2016).

The Tax Complexity Index arose from the Global MNC Tax Complexity Project by Ludwig Maximilian University of Munich and Paderborn University, Germany.<sup>5</sup> The index measures the complexity of a country's corporate income tax system as faced by multinational corporations where the scope of the Project is worldwide with a special focus on OECD countries. Its composition is based on two factors: tax code complexity (with 15 indicators) and tax framework complexity (with five indicators). The index is an arithmetic mean of all 20 indicators with equal weights. Since each indicator is measured within the unit interval (where 0 stands for no complexity and 1 for maximum complexity), the overall value of the index also lies between 0 and 1. The data for the index has been derived from a survey of consultants of international tax services firms, conducted every two years from 2016. The Project website currently shows the results of the surveys in 2016, 2018, 2020 and 2022.

The VAT Diagnostic Tool was initiated by the OECD in 2012 and subsequently developed by tax academics at UNSW Sydney and other international universities. The study was conducted in two stages: a pilot study of 13 countries carried out in 2017 (Highfield et al., 2019) and a full study of 47 FTA countries conducted with KPMG International's collaboration commencing in mid-2018 (Evans et al., 2020). While the Tool is based on the composite index approach, its intention is diagnosis rather than ranking countries in terms of their GST/VAT compliance burden. This is because the ranking of tax performance of countries is fraught with difficulties, not least the political pressure that inevitably emanates from any ranking methodology, as illustrated by the recent discontinuation of the World Bank's Doing Business Report (World Bank, 2021). Instead, the Tool seeks to diagnose variations in aspects of the compliance burden in different countries, highlighting those factors or indicators that contribute to that burden and thereby enabling countries to identify the means by which that burden can be mitigated. The detailed implementation of the Tool will be further discussed in the next section.

#### 4. RESEARCH METHODOLOGY AND DATA COLLECTION

This section is concerned with the research approach of the article. It first briefly explains the overall research design of the present study. It then describes how the VAT Diagnostic Tool can be applied in a step-by-step fashion. Finally, primary data collection from a questionnaire-based survey is discussed.

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<sup>5</sup> Global MNC Tax Complexity Project, 'Tax complexity index', <https://www.taxcomplexity.org/info/> (accessed 27 November 2023).

## 4.1 Overview of research design

The research design of any tax study involves three separate but related elements: research framework, research method and data collection. The research framework of the present article is positivist because the study rests on the fundamental postulation that VAT compliance burden is causally related to a number of variables (or determinants), which are to be identified in the next section. To achieve the research aim, the article employs the VAT Diagnostic Tool, which is an increasingly popular method for examining the comparative VAT burden of a group of countries. The tool is consistent with the mixed-methods approach that combines elements of quantitative and qualitative research to address the research issues under study. Further, the study utilises both primary and secondary data where primary data is collected from a questionnaire-based survey and secondary data is derived from a previous study (Evans et al., 2020).

## 4.2 The VAT Diagnostic Tool

The VAT Diagnostic Tool was chosen for a number of reasons. First, the Tool was specifically designed for assessing the VAT compliance burden, which matches the principal aim of this article. Secondly, the Tool is easily replicable to other countries or a different year of study. Thirdly, and most importantly, the Tool is ‘fit for purpose’ as a robust instrument capable of measuring and evaluating the VAT compliance burden across the 47 FTA countries, and of identifying the key drivers of that burden (Tran-Nam et al., 2021). The factors/indicators, weighting, aggregation and rescaling of the VAT Diagnostic Tool are discussed below in turn.

### 4.2.1 *The VAT Diagnostic Tool’s factors and indicators*

The VAT Diagnostic Tool identifies four key factors affecting compliance burden:

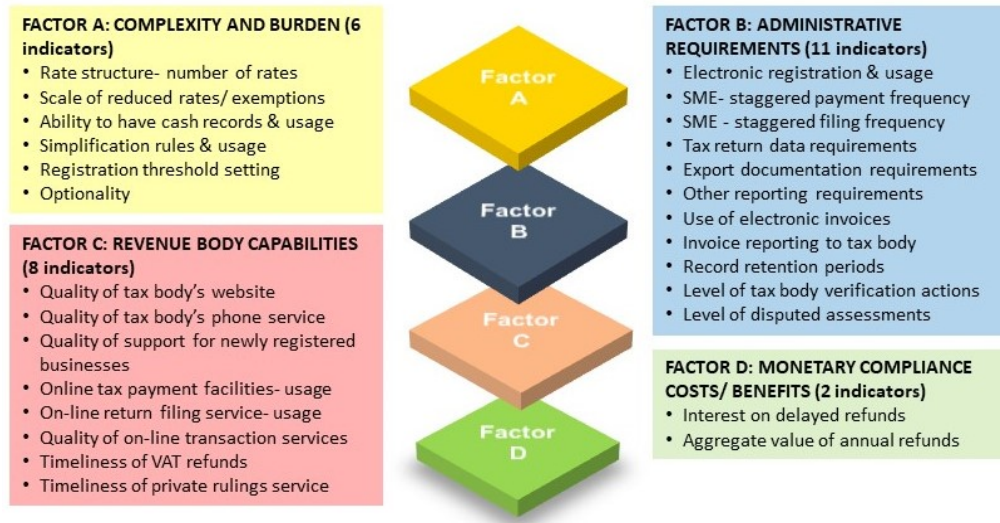
Factor A – Tax law complexity and burden resulting from core elements of VAT policy;

Factor B – Number and frequency of administrative requirements to comply;

Factor C – Revenue body capabilities in meeting taxpayers’ services and compliance needs;

Factor D – Monetary costs/benefits associated with the act of complying.

Each factor contains a number of indicators. As illustrated in Figure 1, there are 27 indicators in total. Each indicator has a variable range of responses. The full list of indicators with their ranges of responses and corresponding score is provided in Appendix 1.

**Fig. 1: VAT Diagnostic Tool's Factors and Indicators**

Source: Evans et al. (2020, p. 85).

Each indicator was justified by reference to a strategic policy or administrative objective aimed at minimising the VAT compliance burden. A higher score for an indicator means a higher compliance burden. For example, under Factor A, a plausible objective is 'The tax has a simple rate structure'. Corresponding to this objective is the indicator 'The VAT rate structure' with four categories: no reduced rate applies (other than a 'zero rate' for exports) (score = 1), one reduced rate applies (score = 2), two reduced rates apply (score = 3), and three or more reduced rates apply (score = 4) where reduced rates include 'zero-rated' goods and services, exclusive of exports. Another example, under Factor B, is the objective 'Technology is used to reduce the burden of VAT registration'. The corresponding indicator is 'Electronic VAT registration' with four categories: businesses can register electronically and over 50% use this method (score = 1); businesses can register electronically and 25-50% use this method (score = 2); businesses can register electronically and less than 25% use this method (score = 3), and businesses required to register must file applications on paper (score = 4).

#### 4.2.2 Weighting

A (normalised) weighting scheme for a composite index having  $n$  factors is a set of  $n$  positive numbers  $w_i$  ( $i = 1, 2, \dots, n$ ) whose sum equals unity.<sup>6</sup> In the case of the VAT Diagnostic Tool, the weights reflect the relative importance of the four factors (A, B, C and D) in determining the VAT compliance burden. Weights can have a significant effect on the overall composite index, so weighting is often considered as the most contentious aspect of composite index construction. There are many statistical techniques for assigning weights (OECD, 2008, pp. 89-102), but these methods are largely not applicable to diagnostic tools. In practice, there exist two alternative

<sup>6</sup> Mathematically speaking,  $w_i$  represents the partial effect of the  $i$ -th factor on the composite index, holding all other factors constant.

weighting schemes that are available to researchers: equal weighting and expert weighting.<sup>7</sup>

Equal weighting means all factors and indicators are worth the same to the summary index. It does not imply there are ‘no weights’ but typically reflects insufficient knowledge about the causal relationship or a lack of agreement on the alternative. Expert weighting refers to a weighting scheme that is derived from the opinion of experts who are familiar with the field being studied. Those experts can be qualified, independent persons participating in the study or external to it. The main advantage of expert weighting is its transparent and straightforward nature (OECD, 2008, p. 96).

A mixed approach to assigning weights was adopted in this study. Within each factor, all indicators were equally weighted. Between the factors, an expert weighting scheme was obtained from the eight respondents from various continents (Australia, Canada, Croatia, Indonesia, Malaysia, New Zealand, South Africa and Vietnam) in the pilot study in 2017 (Highfield et al., 2019, p. 627). The weights were derived from a two-round Delphi exercise.<sup>8</sup> In the first round, all participating tax researchers, informed by their own experience and research, were invited to independently suggest a weighting scheme for Factors A, B, C and D. In the second round, those eight researchers who took part in the first round were shown all proposed weighting schemes. At this stage, participating researchers had the option of maintaining or revising their initial suggestions.

In the end, the weights provided by the eight participants pointed to a reasonable degree of consistency. A geometric mean of the proposed weights was computed for each factor. This was because geometric mean is less affected by fluctuations in values of the components, and it lies between the arithmetic mean and the median. Since the sum of the geometric mean weights was not equal to 100%, the chosen weights were normalised, yielding 0.2899, 0.3430, 0.2629 and 0.1043 for Factors A, B, C and D, respectively.

#### 4.2.3 Aggregation and rescaling

The summary value of the VAT Diagnostic Tool can be derived as a weighted arithmetic or weighted geometric mean of the factors and indicators. The main advantage of arithmetic mean is that it is simple, intuitively straightforward and easy to interpret. The use of geometric mean has other advantages, especially when the study is conducted over time, as it always satisfies some axioms of index numbers (Tran-Nam & Evans, 2014, pp. 341 and 355). In this study, we opt for simplicity and use arithmetic mean although geometric mean can also be utilised for the purpose of robustness checking, if it is desired.

In symbolic form, the summary value of the Diagnostic Tool can be expressed as:

$$DT = w_A X_A + w_B X_B + w_C X_C + w_D X_D = 0.2899X_A + 0.3430X_B + 0.2629X_C + 0.1043X_D \quad (1)$$

where  $DT$  is the arithmetic mean value of the diagnostic tool and  $X_i$  ( $i = A, B, C$  and  $D$ ) is the total score of all indicators within the  $i$ -th factor (to be calculated from primary data).

From the questionnaire in Appendix 1, it can be established that min A = 6, min B = 11, min C = 8, min D = 2, max A = 26, max B = 38, max C = 30 and max D = 9.

<sup>7</sup> There is a third theoretical possibility, namely, user weighting. This can only be derived from a large-scale survey of VAT payers, which is practically impossible for an international diagnostic tool study.

<sup>8</sup> For a tax-related explanation of the Delphi approach, see Guglyuvatyy and Stoianoff (2015).

Applying formula (1), the theoretical minimum and maximum values of  $DT$  are  $DT_{\min} = 7.8236$  and  $DT_{\max} = 29.3949$ , respectively.  $DT$  is thus a decimal number varying between 7.8236 and 29.3949 inclusively. Since such a value cannot be easily interpreted by users of the Tool, it is helpful to convert  $DT$  into an index ( $DTI$ ) that varies from 1 to 10 where 1 and 10 represent VAT systems with a theoretically lowest and highest compliance burden, respectively. This can be achieved by the use of the following linear transformation:

$$DTI = 1 + 9(DT - 7.8236) / (29.3949 - 7.8236) = -2.3194 + 0.4243DT \quad (2)$$

It can be seen that when  $DT = DT_{\min} = 7.8236$ ,  $DTI = 1$  and when  $DT = DT_{\max} = 29.3949$ ,  $DTI = 10$ , as expected. The advantages of  $DTI$  are that they can be easily interpreted, and they can be used as an objective basis for classifying countries into various groups with respect to VAT compliance burden. Based on an empirical study of the 47 FTA countries (Evans et al. 2020, p. 87), a possible classification is given in Table 2.

**Table 2: Range of  $DTI$  Values and VAT Compliance Burden Classification**

| Range of $DTI$ values | VAT compliance burden classification |
|-----------------------|--------------------------------------|
| Less than 3           | Very low                             |
| 3 to less than 4      | Low                                  |
| 4 to less than 5      | Medium                               |
| 5 to less than 6      | High                                 |
| More than 6           | Very high                            |

Source: Evans et al. (2020, p. 87).

### 4.3 Primary data collection

The primary data for this study was obtained by means of a questionnaire-based survey. The full questionnaire, provided in Appendix 1, captured four factors, 27 indicators and their corresponding ranges of scores. The questionnaire was intended to provide relevant data on VAT of the surveyed countries for the calendar year 2022. In January 2023, we asked tax professionals from Deloitte offices in the four GCC countries (Saudi Arabia, UAE, Oman and Bahrain) to complete the questionnaire. The survey instrument was completed by the end of January 2023, reflecting the development of VAT in the four countries up to the end of 2022. The respondents answered the survey questions based on their expertise and the relevant publicly available materials. They also liaised, to the extent practicable, with relevant local tax authorities. There were a few questions in the questionnaire (for example, Factor D, Indicator 2) that required estimations by the participating tax professionals. The primary data from the completed questionnaire was then combined with comparable, secondary data from a previous study on FTA countries (Evans et al., 2020) for comparative analysis. The full dataset is available from the authors upon request.

## 5. RESULTS AND DISCUSSIONS

As noted in section 3, the VAT Diagnostic Tool primarily seeks to highlight those factors or indicators that contribute to VAT compliance burden, and therefore enables countries under study to identify the areas in which that burden can be mitigated.



Accordingly, we start with an examination of each of the four factors that constitute the *DT*.

### 5.1 Factor A: tax law complexity

Factor A corresponds to the perceived degree of complexity and compliance burden resulting from core elements of the VAT policy. The data relating to the six indicators within Factor A for the four GCC countries is summarised in Table 3.

**Table 3: Factor A Indicators, GCC Countries, 2022**

| Compliance burden indicators   | Range | Saudi Arabia score | UAE score | Bahrain score | Oman score |
|--|-------|--------------------|-----------|---------------|------------|
| The VAT rate structure   | 1–4   | 2                  | 2         | 2             | 2          |
| The scale (that is, revenue impact) of reduced rates and exemptions                    | 1–4   | 2                  | 2         | 2             | 2          |
| The use of cash records by specified small businesses to calculate the VAT liabilities | 1–4   | 2                  | 4         | 4             | 4          |
| Use of rules for prescribed industries that simplify calculations of VAT liabilities   | 1–4   | 4                  | 4         | 4             | 4          |
| VAT registration requirements  | 1–8   | 1                  | 3         | 1             | 1          |
| Optionality (that is, the availability of optional regimes to small businesses)        | 1–4   | 2                  | 2         | 2             | 1          |
| <b>Unweighted total score</b>  | 6–28  | 13                 | 17        | 15            | 14         |
| <b>GCC's average of unweighted total scores</b>  | 14.75 |                    |           |               |            |
| <b>FTA's average of unweighted total scores</b>  | 19.15 |                    |           |               |            |

Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

Since the VAT laws of the GCC countries are derived from the Unified VAT Agreement, it is reasonable to expect that the compliance burden arising from the core VAT policy would be largely similar amongst Saudi Arabia, UAE, Bahrain and Oman. This is borne out by the data in Table 3 which exhibits a very narrow range of values for each Factor A indicator. Overall, Saudi Arabia is the least burdensome (with a total score of 13) and UAE the most burdensome (total score of 17) in terms of VAT policy complexity. More specifically, Saudi Arabia is doing well with respect to the use of cash records by small business, while UAE is doing poorly in terms of VAT registration requirements.

The arithmetic mean value of Factor A total score for the GCC countries is 14.75. This average for 2022 compares favourably with both the theoretical values (ranging from 6 to 28 with an average of 17) and the FTA average of 19.15 in 2017, bearing in mind the five-year gap between the two data sets. The lower GCC's VAT policy complexity relative to that of the FTA on a country-by-country basis is illustrated in Figure 2 (see Appendix 2). In the combined sample of 51 countries (four GCC countries and 47 FTA countries), Saudi Arabia and UAE ranked 6th and 18th, respectively. The fact that the GCC is doing much better than the FTA in terms of Factor A is not overly surprising. It has been shown that VAT complexity tends to rise as the VAT system becomes more

mature (see Evans et al., 2020, p. 92). Since GCC countries are newcomers to VAT, it is therefore entirely plausible to expect their compliance burdens resulting from Factor A to be lower in comparison with those in FTA countries.

## 5.2 Factor B: number and frequency of administrative requirements to comply

Factor B is associated with the compliance burden arising from VAT administration requirements. The data relating to the 11 indicators within Factor B for the four GCC countries is summarised in Table 4.

**Table 4: Factor B Indicators, GCC Countries, 2022**

| Compliance burden indicators                               | Range | Saudi Arabia score | UAE score | Bahrain score | Oman score |
|--|-------|--------------------|-----------|---------------|------------|
| Electronic VAT registration                                | 1–4   | 1                  | 1         | 1             | 1          |
| Staggered VAT payments for small businesses                | 1–3   | 1                  | 1         | 1             | 3          |
| Staggered return filing periods                            | 1–3   | 1                  | 1         | 1             | 1          |
| Information requirements of typical VAT return form        | 1–4   | 2                  | 2         | 2             | 2          |
| Documentation requirements for exported goods and services | 1–4   | 1                  | 1         | 1             | 1          |
| Other reporting requirements in addition to the VAT return | 1–4   | 1                  | 1         | 1             | 1          |
| Use of electronic VAT invoices between businesses          | 1–4   | 1                  | 4         | 4             | 4          |
| Invoice reporting requirements to revenue body             | 1–3   | 1                  | 1         | 1             | 2          |
| Record retention periods                                   | 1–3   | 3                  | 3         | 3             | 3          |
| Number of VAT verification actions                         | 1–3   | 3                  | 3         | 3             | 2          |
| Level of disputed VAT assessments                          | 1–3   | 3                  | 3         | 3             | 2          |
| <b>Unweighted total score range</b>                        | 11–38 | 18                 | 21        | 21            | 22         |
| <b>GCC's average of unweighted total scores</b>            | 20.50 |                    |           |               |            |
| <b>FTA's average of unweighted total scores</b>            | 21.26 |                    |           |               |            |

Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

As in the case of Factor A, there are narrow ranges of values for most indicators within Factor B. Again, Saudi Arabia is the least burdensome (with a total score of 18) and Oman the most burdensome (total score of 22) in terms of VAT administration complexity. Saudi Arabia is doing particularly well with respect to the use of electronic invoices between businesses, while Oman is doing poorly in terms of staggered VAT payments for small businesses.

The arithmetic mean of the Factor B total score for the GCC countries is 20.50, which still compares well with both the theoretical values (ranging from 11 to 38 with an average of 24.5) and the FTA average of 21.26. This means that GCC countries are

doing better than FTA countries in terms of Factor B although the gap here is much narrower than that for Factor A. The lower GCC's VAT administration complexity relative to that of the FTA on a country-by-country basis is illustrated in Figure 3 (see Appendix 2). Saudi Arabia ranked 11th out of 51 countries, and both Bahrain and UAE were positioned better than the FTA average, where Oman is the only GCC country that ranked below the FTA average. As has been argued previously, it remains to be seen whether GCC countries can continue to maintain the above average performance in VAT administration complexity relative to the FTA countries as the GCC VAT systems become more mature over time.

### 5.3 Factor C: revenue body capabilities in meeting taxpayers' service and compliance needs

Factor C is concerned with indicators that provide an insight into how well each country's tax administration agency assists taxable businesses complying with their VAT obligations and thus reducing their compliance burdens. Table 5 presents the GCC countries' scores of eight indicators relating to the nature and quality of specific services of their tax administration agencies.

**Table 5: Factor C Indicators, GCC Countries, 2022**

| <b>Compliance burden indicators</b>                       | <b>Range</b> | <b>Saudi Arabia score</b> | <b>UAE score</b> | <b>Bahrain score</b> | <b>Oman score</b> |
|---|--------------|---------------------------|------------------|----------------------|-------------------|
| The revenue body's website                                | 1–3          | 2                         | 2                | 2                    | 2                 |
| The revenue body's phone enquiry service                  | 1–4          | 2                         | 2                | 2                    | 2                 |
| Support for newly registered businesses                   | 1–4          | 2                         | 2                | 2                    | 2                 |
| The revenue body's online tax payment facilities          | 1–4          | 1                         | 1                | 1                    | 1                 |
| The revenue body's VAT online return filing service       | 1–4          | 1                         | 1                | 1                    | 1                 |
| Quality of the revenue body's online transaction services | 1–4          | 3                         | 2                | 2                    | 3                 |
| The revenue body's refunding of excess VAT payments       | 1–4          | 4                         | 4                | 4                    | 4                 |
| The revenue body's private rulings service                | 1–3          | 3                         | 3                | 3                    | 3                 |
| <b>Unweighted total score range</b>                       | <b>8–30</b>  | <b>18</b>                 | <b>17</b>        | <b>17</b>            | <b>18</b>         |
| <b>GCC's average of unweighted total scores</b>           | <b>17.5</b>  |                           |                  |                      |                   |
| <b>FTA's average of unweighted total scores</b>           | <b>16.04</b> |                           |                  |                      |                   |

Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

As with Factors A and B, there are hardly any differences in Factor C indicators among GCC countries. In fact, the only variation that occurs is concerned with Indicator 6 (quality of the revenue body's online transaction services among the GCC countries). Overall, UAE and Bahrain (with a total score of 17 each) are performing only marginally better than Saudi Arabia and Oman (with a total score of 18 each).

Unlike Factors A and B, the VAT compliance burden associated with the revenue body capabilities in GCC countries (with an average total score of 17.5) is somewhat higher than that in the FTA countries (with an average total score of 16.04). The relatively

poorer performance of GCC countries in terms of Factor C seems to arise from Indicators 7 (refund of excessive VAT payments) and 8 (VAT private ruling service) where all GCC countries exhibit the most burdensome scores of 4 and 3, respectively. Figure 4 (see Appendix 2) illustrates the ranking of GCC and FTA countries with respect to Factor D on a country-by-country basis. Both UAE and Bahrain were located below the FTA average while Saudi Arabia and Oman ranked in the group of 12 countries with the highest VAT compliance burden arising from revenue body capabilities.

The relatively poorer performance of GCC countries in terms of Factor D is not at all surprising. It can be reasonably expected that the revenue body capabilities in meeting taxpayers' service and compliance needs to improve over time. As discussed in the introductory section of the article, tax administration in GCC countries is still in its infancy. For example, the Federal Tax Authority in UAE was established in 2016 by *Law No. 13 of 2016* and, in Bahrain, the National Bureau of Revenue commenced operation in 2018 by *Law No. 5 of 2018*. Thus, it seems plausible to expect the GCC revenue bodies to catch up with FTA countries in providing supportive services that would assist VAT payers for coping with their compliance burdens.

#### 5.4 Factor D: monetary costs/benefits associated with the act of complying

Factor D consists of two indicators that investigate aspects of the monetary costs and benefits involved in complying with VAT laws. Table 6 presents the primary and secondary data relating to Factor D for GCC and FTA countries, respectively.

**Table 6: Factor D Indicators, GCC Countries, 2022**

| Compliance burden indicators                    | Range | Saudi Arabia score | UAE score | Bahrain score | Oman score |
|---|-------|--------------------|-----------|---------------|------------|
| The payment of interest on delayed refunds      | 1–4   | 4                  | 4         | 4             | 4          |
| Aggregate value of annual VAT refunds           | 1–9   | 1                  | 1         | 1             | 1          |
| <b>Unweighted total score</b>                   | 2–5   | 5                  | 5         | 5             | 5          |
| <b>GCC's average of unweighted total scores</b> | 5.0   |                    |           |               |            |
| <b>FTA's average of unweighted total scores</b> | 5.8   |                    |           |               |            |

Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

All GCC countries scored the same for both indicators within Factor D. The scores for the first indicator reflect the current issues related to VAT refunds and interest payments on late VAT refunds in GCC countries. These issues are positively correlated with Factor C on revenue body capabilities discussed above. The scores for the second indicator were estimated by survey respondents. Overall and on average, GCC countries are slightly ahead of FTA countries in terms of Factor D. As illustrated in Figure 5 (see Appendix 2), Bahrain, Oman, Saudi Arabia and UAE lay just ahead of the FTA overall average.

## 5.5 Overall results

The above discussions indicate that, in comparison with the FTA's VAT systems, the GCC's VAT systems are, on average, less burdensome to comply with in terms of VAT policy and administration complexity, but more burdensome in terms of revenue capabilities. Further, both FTA and GCC VAT systems perform more or less the same in relation to monetary costs and benefits associated with complying with VAT laws. While the ultimate aim of the VAT Diagnostic Tool is not country ranking, it is nevertheless helpful from the big picture perspective to compute the *DT* and *DTI* values of the four GCC country under study for the purposes of comparative analysis. Using equations (1) and (2) and information provided in Tables 3 to 6, these values are as follows.

**Table 7: VAT Compliance Burdens in GCC Countries, 2022**

|                     | <b>Factor A</b> | <b>Factor B</b> | <b>Factor C</b> | <b>Factor D</b> | <b><i>DT</i></b> | <b><i>DTI</i></b> |
|---------------------|-----------------|-----------------|-----------------|-----------------|------------------|-------------------|
| <b>Saudi Arabia</b> | 13              | 18              | 18              | 5               | 15.20            | 4.08              |
| <b>UAE</b>          | 17              | 21              | 17              | 5               | 17.12            | 4.88              |
| <b>Bahrain</b>      | 15              | 21              | 17              | 5               | 16.54            | 4.64              |
| <b>Oman</b>         | 14              | 22              | 18              | 5               | 16.86            | 4.77              |

Sources: Authors' calculations and Tables 3 to 6.

Table 7 indicates that GCC countries belong to the group with medium VAT tax compliance burden (*DTI* values range from 4 to less than 5). As expected from the previous examination of the four factors, Saudi Arabia currently has the lowest VAT compliance burden within the GCC. It is followed by Bahrain and Oman, while UAE has the highest VAT compliance burden.

Keeping Table 7 in mind and applying equations (1) and (2) to the FTA data available from Evans et al. (2020), it is possible to obtain a ranking of VAT compliance burden in GCC and FTA countries. The results are summarised in Table 8. Note that there is a trivial variation in the FTA country rankings between Table 8 and Evans et al. (2020) due to the use of different methods of aggregation (arithmetic mean in the present article and geometric mean in Evans et al., 2020).

**Table 8: VAT Compliance Burden Grouping, FTA and GCC Countries\***

| VAT Compliance Burden Grouping based on <i>DTI</i> | Countries   |
|--|---|
| Very low (less than 3)                             | Singapore   |
| Low (3 to less than 4)                             | Costa Rica, New Zealand, Australia, South Africa, Denmark, Norway   |
| Medium (4 to less than 5)                          | Saudi Arabia, Japan, Sweden, Canada, Ireland, Estonia, Russian Federation, Bahrain, Lithuania, Oman, Slovenia, Netherlands, Chile, Germany, UAE, Indonesia, Iceland, Switzerland, Austria |
| High (5 to less than 6)                            | Peru, Korea, Finland, Latvia, China, UK, India, Portugal, Czech Republic, Israel, Italy, Argentina, Poland, Slovakia, Kenya, Colombia, Spain  |
| Very high (6 or more)                              | Hungary, Mexico, Greece, France, Brazil, Luxembourg, Turkey, Belgium  |

Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

\* The GCC survey pertained to the 2022 tax year while the FTA survey related to the 2017 fiscal year.

While belonging to the medium group of VAT compliance burden countries, all GCC countries ranked well above the average of the combined set of countries. For example, Saudi Arabia ranked 8th overall in the combined set of 51 countries. Even UAE, identified as the most VAT compliance burdensome country within the GCC, was respectably located at the 21st position overall. It suggests that GCC businesses face a relatively lower VAT compliance burden than their counterparts in FTA jurisdictions. This is encouraging for GCC countries from the VAT simplicity perspective, although it is not yet clear how the GCC's good performance to date can be maintained over future years. This also naturally leads to the question of policy implications of the study, which will be considered in the next section.

## 5.6 Policy recommendations

The above analysis reveals that Saudi Arabia, UAE, Bahrain and Oman have made a good start in their tax expansion especially with respect to the criterion of VAT simplicity. However, over the years, changes in VAT policy and administration adding to complexity may take place. In addition, some significant challenges may also lie ahead, for example, the potential increase in the number of VAT payers or pressures to change the VAT legislation. To maintain or improve the current rankings of GCC countries in terms of VAT compliance burden, the following policy recommendations are proposed.

First, at the broad tax policy level, there should be a conscious recognition of the importance of VAT simplicity by tax authorities in designing or amending VAT policy and legislation. VAT is known for its high compliance burden imposed on business taxpayers, so governmental efforts need to be made in keeping VAT compliance burden as small as practicable.

Secondly, the VAT Diagnostic Tool is a robust and proven instrument. It should be formally utilised by Kuwait and Qatar as a check list in designing their VAT policy and administration. It can also be used by Saudi Arabia, UAE, Bahrain and Oman for VAT simplification in the future. Specific areas that may require attention include the use of cash records by small business and VAT registration requirements (Factor A); the use of electronic invoices between businesses and staggered VAT payments for small businesses (Factor B); VAT refund (Factor C) and interest payment on delayed VAT refund (Factor D).

Thirdly, it is well known that frequent changes in tax law constitute a significant source of tax complexity. As a tax system becomes more mature, some vested interest or lobbying groups may emerge. Thus, the GCC governments should resist pressures from such groups for changing their VAT policy/legislation or administration. Changes to VAT policy and administration should be infrequent and founded in evidence-based analyses or arguments, keeping the Factors/indicators of the VAT Diagnostic Tool in mind.

Fourthly and finally, tax administration in GCC countries is still in its infancy. Developing modern, state-of-the-art practices and building staff capacities are critically important in delivering comprehensive taxpayer services and promoting VAT morale and compliance. In this regard, it is very beneficial for the revenue bodies to make efforts in building trust with taxpayers and thus developing a cooperative tax culture.

## 6. SUMMARY CONCLUSIONS

The article has provided a systematic assessment of the VAT compliance burden in four GCC countries using the VAT Diagnostic Tool approach. The study is motivated by the concern for a potentially high level of VAT compliance burden that may arise as a result of tax expansion reform in GCC countries. As discussed in the literature review, there are three categories of alternative measures of tax complexity, namely, measures of legal complexity, measures of effective complexity (for example, tax compliance costs) and composite complexity index (for example, diagnostic tools). The VAT Diagnostic Tool is chosen because it matches the aim of the study, it is a robust instrument capable of identifying the key drivers of VAT compliance burden, it has been successfully applied to the 47 FTA countries, and it is easily replicable to other countries.

To provide the background for the study, a brief review of the key features of the VAT laws in Saudi Arabia, UAE, Bahrain and Oman was presented. Subsequently, the article offered a transparent, step-by-step process (factors, indicators, weights, aggregation and rescaling) for implementing the VAT Diagnostic Tool in practice. The study utilised two sources of data: primary data collected from a questionnaire-based survey involving the four GCC countries, and secondary data available from a previous study involving the 47 FTA countries.

An examination of the primary data demonstrates that, within the GCC, Saudi Arabia performs the best in terms of Factor A (VAT policy complexity) and Factor B (VAT administration complexity). There is little country variation in terms of Factor C (revenue body capabilities), and no country variation with respect to Factor D (monetary benefits associated with the act of complying). Overall, Saudi Arabia is shown to have the lowest VAT compliance burden in the GCC. It is followed by

Bahrain and Oman, whereas the UAE currently has the highest VAT compliance burden in the region.

An investigation of the combined dataset reveals that, on average, the GCC countries are doing better than the FTA countries in terms of Factors A and B. However, they are doing slightly worse than the FTA countries in terms of Factor C while there is no material difference between the two groups of countries in terms of Factor D. These findings are considered to be plausible in view of the facts that VAT systems in GCC are immature and their tax administrations are not yet fully developed. Overall, the GCC countries belong to the medium group of VAT compliance burden. However, they compared very favourably with FTA countries in overall ranking. Saudi Arabia and UAE ranked 8th and 21st, respectively, in the combined set of 51 countries.

While the GCC countries have started their VAT reform well in terms of tax system complexity, many challenges still lie ahead. In order to maintain or improve their relatively good performance over time, some policy recommendations have been proposed. These include: (i) consciously recognising the importance of keeping VAT payers' burden compliance as small as possible; (ii) formally using the VAT Diagnostic Tool Factors/indicators as a guide for designing and simplifying VAT policy and legislation; (iii) resisting pressures from potential vested interest groups and lobbyists to make changes to VAT policy and administration, and (iv) developing the capabilities of revenue bodies and paying attention to human resource development in particular.

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**APPENDIX 1: VAT DIAGNOSTIC TOOL QUESTIONNAIRE**

(Record a single score for each indicator as it relates to the country's VAT for the 2022 year)

**A. Tax Law Complexity and Burden Resulting from Core Elements of VAT Policy**

| Compliance burden indicators   | Relevant score   |
|--|--|
| <p><b>The VAT rate structure:</b></p> <ol style="list-style-type: none"> <li>1. No reduced rates apply.</li> <li>2. One reduced rate applies.</li> <li>3. Two reduced rates apply.</li> <li>4. Three or more reduced rates apply.</li> </ol> <p>NB: Reduced rates include 'zero-rated' goods and services, exclusive of exports.</p>   | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4 |
| <p><b>The scale (i.e., revenue impact) of reduced rates and exemptions:</b></p> <ol style="list-style-type: none"> <li>1. The revenue impact of reduced rates and exemptions is nil or low (i.e., &lt; 10% of the estimated VAT base).</li> <li>2. The revenue impact of reduced rates and exemptions is medium (i.e., 10–19% of the estimated VAT base).</li> <li>3. The revenue impact of reduced rates and exemptions is high (i.e., 20–29% of the estimated VAT base).</li> <li>4. The revenue impact of reduced rates and exemptions is very high (i.e., 30% or more of the estimated VAT base).</li> </ol> <p>NB: Reduced rates include 'zero-rated' goods and services, exclusive of exports.</p>                               | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4 |
| <p><b>Use of cash records by specified small businesses (*) to calculate VAT liabilities:</b></p> <ol style="list-style-type: none"> <li>1. 50% or more of small businesses required to pay VAT use the "cash basis of accounting" for calculating VAT liabilities.</li> <li>2. Between 25–49% of small businesses required to pay VAT use the "cash basis of accounting" for calculating VAT liabilities.</li> <li>3. Less than 25% of small businesses required to pay VAT use the "cash basis of accounting" for calculating VAT liabilities.</li> <li>4. Use of the "cash basis of accounting" is generally not permitted.</li> </ol> <p>(*) Guidance for interpreting the term 'small businesses' is at the end of this form.</p> | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4 |
| <p><b>Use of rules for prescribed industries that simplify calculations of VAT liabilities:</b></p> <ol style="list-style-type: none"> <li>1. Over 50% of VAT taxpayers use simplified rules that are available for taxpayers in prescribed industries to calculate their VAT liabilities</li> <li>2. Between 25–50% of VAT taxpayers use simplified rules that are available for taxpayers in prescribed industries to calculate their VAT liabilities.</li> <li>3. Less than 25% of VAT taxpayers use simplified rules that are available for taxpayers in prescribed industries to calculate their VAT liabilities.</li> <li>4. There are no simplified rules for taxpayers in any prescribed industries.</li> </ol>                | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4 |
| <p><b>VAT registration:</b></p> <ol style="list-style-type: none"> <li>1. Less than 30% of the business taxpayer population is registered for VAT purposes.</li> <li>2. 30–39% of the business taxpayer population is registered for VAT purposes.</li> <li>3. 40–49% of the business taxpayer population is registered for VAT purposes.</li> <li>4. 50–59% of the business taxpayer population is registered for VAT purposes.</li> <li>5. 60–69% of the business taxpayer population is registered for VAT purposes.</li> </ol>   | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4 |

|   |                            |
|---|----------------------------|
| 6. 70–79% of the business taxpayer population is registered for VAT purposes.                 | <input type="checkbox"/> 5 |
| 7. 80–89% of the business taxpayer population is registered for VAT purposes.                 | <input type="checkbox"/> 6 |
| 8. 90% or more of the business taxpayer population is registered for VAT purposes             | <input type="checkbox"/> 6 |
| <b>Optionality (i.e., the availability of optional regimes to small businesses) (*):</b>      | <input type="checkbox"/> 1 |
| 1. There are no optional regimes generally available to small businesses.                     | <input type="checkbox"/> 2 |
| 2. There is only one optional regime generally available to small businesses.                 | <input type="checkbox"/> 3 |
| 3. There are two optional regimes generally available to small businesses.                    | <input type="checkbox"/> 4 |
| 4. There are three or more optional regimes generally available to small businesses.          | <input type="checkbox"/> 4 |
| (*) Guidance for assessing the rating for this indicator is provided at the end of this form. |                            |
| <b>COMMENTS</b> (if you wish to elaborate on any responses/ratings please do so in this part) |                            |

### B. Number and Frequency of Administrative Requirements to Comply

| Compliance burden indicators   | Relevant score             |
|--|----------------------------|
| <b>Electronic VAT registration:</b>  | <input type="checkbox"/> 1 |
| 1. Businesses can register electronically: 50% or more use this method   | <input type="checkbox"/> 2 |
| 2. Businesses can register electronically: 25-49% use this method  | <input type="checkbox"/> 3 |
| 3. Businesses can register electronically: < 25% use this method   | <input type="checkbox"/> 4 |
| 4. Businesses required to register must file applications on paper and/or attend a tax office in person.   | <input type="checkbox"/> 4 |
| <b>Staggered VAT payment periods for small businesses:</b>   | <input type="checkbox"/> 1 |
| 1. Small businesses generally need only pay their VAT liabilities quarterly or less frequently.  | <input type="checkbox"/> 2 |
| 2. Small businesses generally need only pay their VAT liabilities bi-monthly.  | <input type="checkbox"/> 3 |
| 3. Most small businesses are generally required to pay VAT liabilities monthly.  | <input type="checkbox"/> 3 |
| <b>Staggered return filing periods for small businesses:</b>   | <input type="checkbox"/> 1 |
| 1. Small businesses generally need only file VAT returns quarterly or less frequently.   | <input type="checkbox"/> 2 |
| 2. Small businesses generally need only file VAT returns bi-monthly.   | <input type="checkbox"/> 3 |
| 3. Most small businesses are generally required to file VAT returns monthly.   | <input type="checkbox"/> 3 |
| <b>Information requirements of a typical VAT return</b>  | <input type="checkbox"/> 1 |
| 1. Tax returns require minimal data to be provided, with less than 10 boxes or fields (other than fortaxpayer identification) typically to be completed. | <input type="checkbox"/> 2 |
| 2. Tax returns require a moderate amount of data, with 11-20 boxes or fields typically to be completed.  | <input type="checkbox"/> 3 |
| 3. Tax returns require a significant amount of data to be provided, with 21-30 boxes or fields typically to be completed.                                | <input type="checkbox"/> 4 |
| 4. Tax returns require a very large amount of data, with over 30 boxes or fields typically to be completed.  | <input type="checkbox"/> 4 |

| Compliance burden indicators  | Relevant score   |
|---|--|
| <p><b>Documentation requirements for exported goods and services</b></p> <ol style="list-style-type: none"> <li>1. There are no additional documentation requirements in respect of exported goods and services to be provided to the tax authorities as part of return filing obligations.</li> <li>2. There are additional documentation requirements in respect of exported goods and services to be provided to the tax authorities as part of return filing obligations that impact less than 10% of registered taxpayers.</li> <li>3. There are additional documentation requirements in respect of exported goods and services to be provided to the tax authorities as part of return filing obligations that impact between 10-19% of registered taxpayers.</li> <li>4. There are additional documentation requirements in respect of exported goods and services to be provided to the tax authorities as part of return filing obligations that impact 20% or more of registered taxpayers.</li> </ol> | <input type="checkbox"/><br><input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4 |
| <p><b>Other reporting requirements (in addition to the VAT return (e.g., statistical data))</b></p> <ol style="list-style-type: none"> <li>1. There are no reporting requirements additional to the periodic VAT return</li> <li>2. There are reporting requirements in addition to the periodic VAT return — completed on an annual basis.</li> <li>3. There are reporting requirements in addition to the periodic VAT return — completed every 4-6 months.</li> <li>4. There are reporting requirements in addition to the periodic VAT return — completed at least every 3 months or more frequently.</li> </ol>  | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4                             |
| <p><b>The use of electronic invoices between businesses</b></p> <ol style="list-style-type: none"> <li>1. Legislation permits use of e-invoicing between businesses and 50% or more of invoices are estimated to be prepared in this way.</li> <li>2. Legislation permits use of e-invoicing between businesses and 25 to 49% of invoices are estimated to be prepared in this way.</li> <li>3. Legislation permits use of e-invoicing between businesses and less than 25% of invoices are estimated to be prepared in this way.</li> <li>4. Legislation does not permit use of e-invoicing between businesses.</li> </ol>   | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4                             |
| <p><b>Provision of copies of VAT invoices to the revenue body</b></p> <ol style="list-style-type: none"> <li>1. Except for specific requests (e.g., re audits), copies of invoices do not need to be provided to the revenue body as a general rule.</li> <li>2. Less than 50% of businesses are required to supply invoices to the revenue body.</li> <li>3. 50% or more of businesses are required to supply invoices to the revenue body.</li> </ol>   | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3   |
| <p><b>Record retention periods:</b></p> <ol style="list-style-type: none"> <li>1. Records must be retained by taxpayers for up to 4 years.</li> <li>2. Records must be retained by taxpayers for between 4 and 8 years.</li> <li>3. Records must be retained by taxpayers for 8 years or more.</li> </ol>   | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3   |
| <p><b>The number of VAT verification actions (*):</b></p> <ol style="list-style-type: none"> <li>1. The overall number of VAT verifications actions each year is generally less than 5% of the registered VAT payer population.</li> </ol>  | <input type="checkbox"/> 1<br><input type="checkbox"/> 2   |

|  |  |
|--|--|
| <p>2. The overall number of VAT verification actions each year is generally between 5-10% of the registered VAT payer population.</p> <p>3. The overall number of VAT verification actions each year is generally over 10% of the registered VAT payer population.</p> <p>(*) “Verification actions” include all types of actions taken by revenue bodies to verify taxpayers’ reported liabilities (e.g., document verification requests, audits, investigations, and written and phone inquiries).</p> | <input type="checkbox"/> 3   |
| <p><b>The level of disputed VAT assessments</b></p> <p>1. The no. of VAT assessments disputed each year is &lt; 5% of the no. of VAT verifications</p> <p>2. The no. of VAT assessments disputed each year is 5-10% of the no. of VAT verifications.</p> <p>3. The no. VAT assessments disputed each year is over 10% of the no. of VAT verifications.</p>   | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3 |
| <p><b>COMMENTS</b> (if you wish to elaborate on any responses/ratings please do so in this part)</p>   |  |

### C. Revenue Body Capabilities in Meeting Taxpayers’ Service and Compliance Needs

| Compliance Burden Indicators  | Relevant score   |
|---|--|
| <p><b>The revenue body’s website (*)</b></p> <p>1. The revenue body’s website has a very comprehensive range of VAT information on taxpayers’ VAT obligations.</p> <p>2. The revenue body’s website has reasonably comprehensive range of information on taxpayers’ VAT obligations.</p> <p>3. The revenue body’s website offers very little or no information on taxpayers’ VAT obligations.</p> <p>(*) Guidance for assessing the rating for this indicator is provided at the end of this form.</p>  | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3                               |
| <p><b>The revenue body’s phone enquiry services (*)</b></p> <p>1. The revenue body provides a dedicated phone enquiry service — phone response times and the standard of advice and service are generally of a high standard.</p> <p>2. The revenue body provides a dedicated phone enquiry service — phone response times and the standard of advice and service are generally of a reasonable standard</p> <p>3. The revenue body provides a dedicated phone enquiry service — phone response times and the standard of advice and service are generally of an unsatisfactory standard.</p> <p>4. The revenue body does not provide a dedicated call centre enquiry service.</p> <p>(*) Guidance for assessing the rating for this indicator is provided at the end of this form.</p> | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4 |
| <p><b>Support for newly registered businesses (*)</b></p> <p>1. The revenue body’s range of VAT-related services targeted at newly registered businesses are of a high standard.</p>  | <input type="checkbox"/> 1<br><input type="checkbox"/> 2   |

|   |                            |
|---|----------------------------|
| 2. The revenue body's range of VAT-related services targeted at newly registered businesses are of areasonable standard.                                  | <input type="checkbox"/> 3 |
| 3. The revenue body's range of VAT-related services targeted at newly registered businesses are of a poor standard.                                       | <input type="checkbox"/> 4 |
| 4. The revenue body does not provide any unique VAT-related services dealing with VAT targeted at newly registered businesses.                            |                            |
| (*) Guidance for assessing the rating for this indicator is provided at the end of this form.   |                            |
| <b>The revenue body's online VAT payment facilities:</b>  | <input type="checkbox"/> 1 |
| 1. 75% or more of VAT payments received from taxpayers are made using online (i.e., Internet-based) payment facilities.                                   | <input type="checkbox"/> 2 |
| 2. Between 50-74% of VAT payments received from taxpayers are made using online (i.e., Internet-based) payment facilities.                                | <input type="checkbox"/> 3 |
| 3. Between 25-49% of VAT payments received from taxpayers are made using online (i.e., Internet-based) payment facilities.                                | <input type="checkbox"/> 4 |
| 4. Less than 25% of VAT payments received from taxpayers are made using online (i.e., Internet-based) payment facilities, or there is no such capability. |                            |
| <b>The revenue body's online VAT return filing service</b>  | <input type="checkbox"/> 1 |
| 1. 75% or more of taxpayers use online filing facilities for submitting returns.  | <input type="checkbox"/> 2 |
| 2. Between 50-74% of taxpayers use online filing facilities for submitting returns.   | <input type="checkbox"/> 3 |
| 3. Between 25-49% of taxpayers use online filing facilities for submitting returns.   | <input type="checkbox"/> 4 |
| 4. Less than 25% of taxpayers use online filing facilities for submitting returns <u>or</u> there is no such service                                      |                            |
| <b>Quality of the revenue body's online transaction services (e.g., return filing) (*)</b>  | <input type="checkbox"/> 1 |
| 1. The revenue body's online transaction services are of a very high standard   | <input type="checkbox"/> 2 |
| 2. The revenue body's online transaction services are of a high standard  | <input type="checkbox"/> 3 |
| 3. The revenue body's online transaction services are of a medium standard  | <input type="checkbox"/> 4 |
| 4. The revenue body's online transaction services are of a low standard   |                            |
| (*) Guidance for assessing the rating for this indicator is provided at the end of this form.   |                            |
| <b>The revenue body's refunding of excess VAT payments:</b>   | <input type="checkbox"/> 1 |
| 1. 90% of refund claims are paid with 1 month of receipt.   | <input type="checkbox"/> 2 |
| 2. 90% of refund claims are paid within 2 months of receipt.  | <input type="checkbox"/> 3 |
| 3. 90% of refund claims are paid within 3 months of receipt.  | <input type="checkbox"/> 4 |
| 4. More than 3 months are required to pay 90% of refund claims.   |                            |
| <b>The revenue body's private rulings service:</b>  | <input type="checkbox"/> 1 |
| 1. Rulings are generally provided within one month of being requested.  | <input type="checkbox"/> 2 |
| 2. Rulings are generally provided within two months of being requested.   | <input type="checkbox"/> 3 |
| 3. Rulings generally take longer than two months to be provided.  |                            |
| <b>COMMENTS</b> ((if you wish to elaborate on any responses/ratings please do so in this part)  |                            |

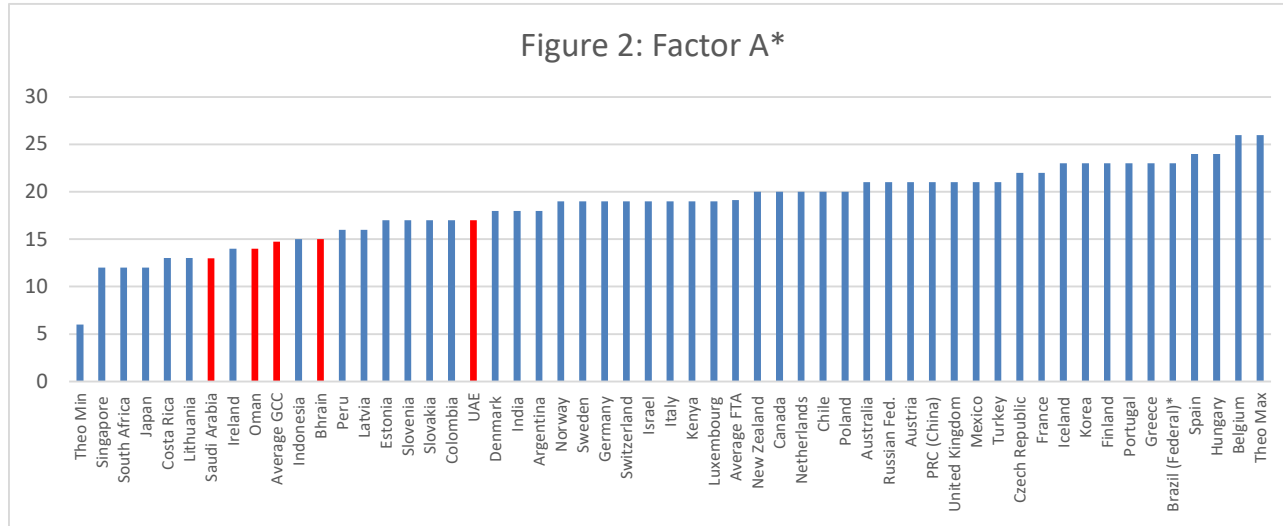
**D. Monetary Costs/Benefits Associated with the Act of Complying**

| Compliance Burden Indicators  | Relevant score   |
|---|--|
| <p><b>The payment of interest on delayed refunds:</b></p> <ol style="list-style-type: none"> <li>1. Interest is paid on excess VAT credits unpaid after one month or more.</li> <li>2. Interest is paid on excess VAT credits after two months or more.</li> <li>3. Interest is only paid on excess VAT credits after three months or more</li> <li>4. Interest is <u>not</u> generally paid on excess VAT credits.</li> </ol>  | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4                               |
| <p><b>The aggregate value of annual VAT refunds:</b></p> <ol style="list-style-type: none"> <li>1. The value of VAT refunds annually is less than 10% of annual gross VAT collections.</li> <li>2. The value of VAT refunds annually is between 10-19% of annual gross VAT</li> <li>3. The value of VAT refunds annually is between 20-29% of annual gross VAT</li> <li>4. The value of VAT refunds annually is between 30-39% of annual gross VAT</li> <li>5. The value of VAT refunds annually is 40% or more of annual gross VAT collections.</li> </ol> | <input type="checkbox"/> 1<br><input type="checkbox"/> 2<br><input type="checkbox"/> 3<br><input type="checkbox"/> 4<br><input type="checkbox"/> 5 |
| <p><b>COMMENTS</b> (if you wish to elaborate on any responses/ratings please do so in this part)</p>  |  |



**APPENDIX 2: FIGURES 2-5**

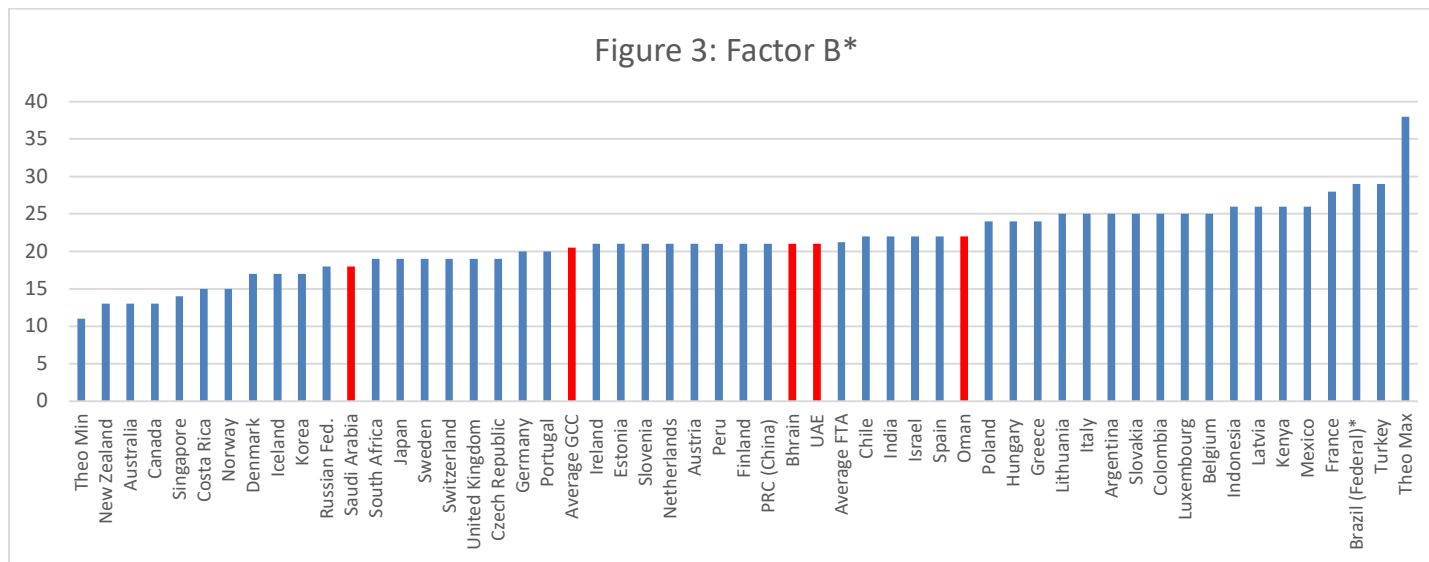
**Fig. 2: Factor A**



Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

\* The GCC survey pertained to the 2022 tax year while the FTA survey related to the 2017 fiscal year.

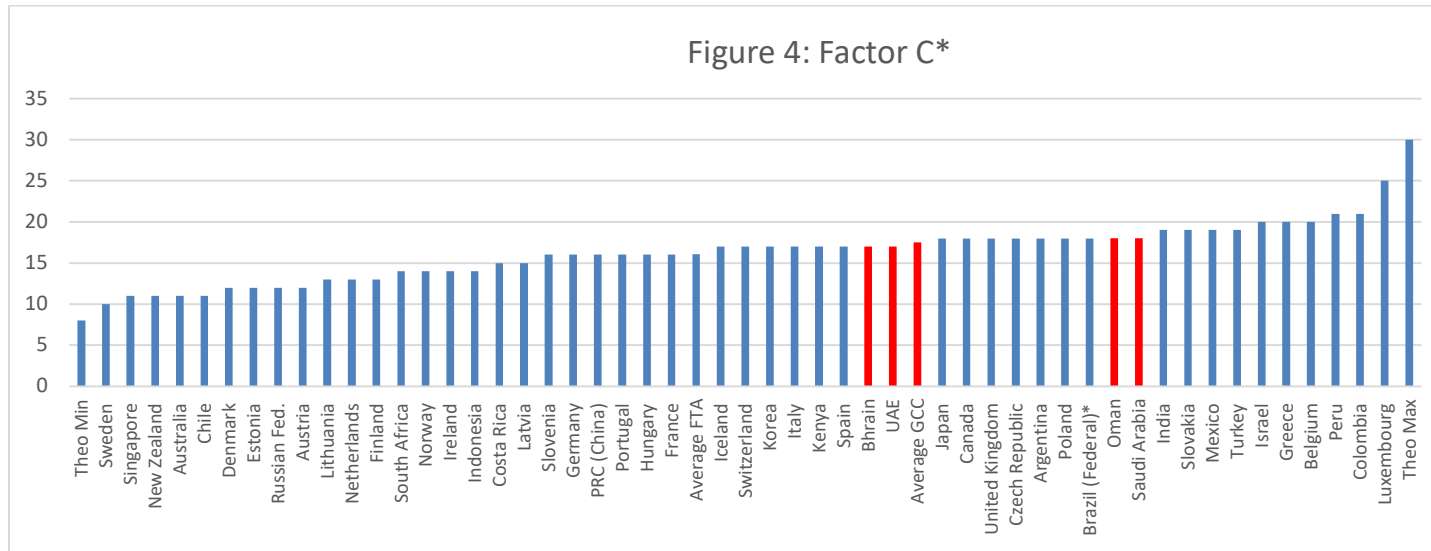
**Fig. 3: Factor B**



Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

\* The GCC survey pertained to the 2022 tax year while the FTA survey related to the 2017 fiscal year.

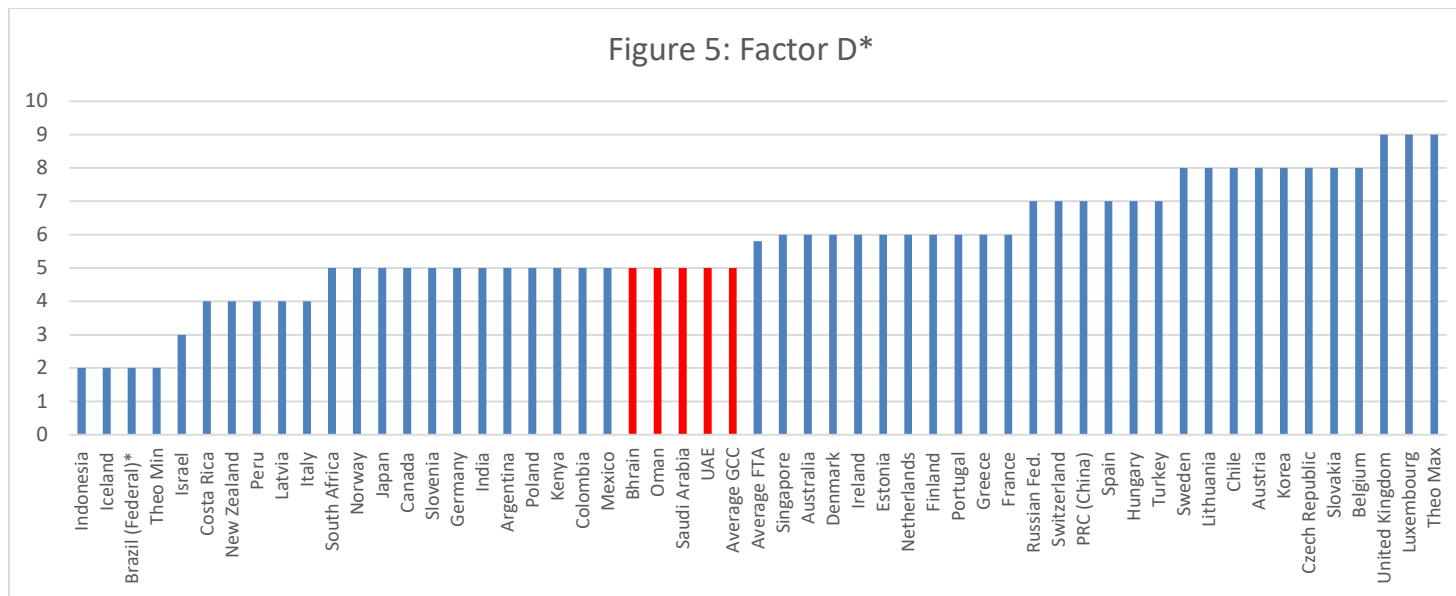
**Fig. 4: Factor C**



Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

\* The GCC survey pertained to the 2022 tax year while the FTA survey related to the 2017 fiscal year.

**Fig. 5: Factor D**



Sources: Authors' calculations based on primary data collected and secondary data from Evans et al. (2020).

\* The GCC survey pertained to the 2022 tax year while the FTA survey related to the 2017 fiscal year.

# Insights into the low success rate of the Indian Income Tax Department in litigation: a grounded theory approach

S A Mohan\*

## ***Abstract***

The Economic Survey of India of 2017-18 and OECD data show that the Indian Income Tax Department (ITD) loses more than two-thirds of the income tax appeals litigated before the Income Tax Appellate Tribunal (ITAT), the High Courts, and the Supreme Court in India. However, reasons for the ITD's subpar performance, which may adversely impact revenue collection and the ability of the government to fund public services, are unknown. This study applies grounded theory methodology to case law, interview, and survey data to develop a theoretical model to explain the ITD's low success rate in income tax litigation.

The study shows that Indian bureaucratic culture, which is characterised by poor accountability, ineffective performance management, and a trust deficit, contributes to the ITD's low success rate in income tax litigation before the ITAT and the courts. Inadequate accountability and ineffective performance management in turn contribute to the poor quality of income tax assessments and the ITD filing meritless or frivolous appeals. Factors that lead to such sub-standard quality of income tax assessments and ITD filed appeals include revenue targets imposed on income tax officials by the ITD, inadequate supervision of tax officials with regard to their assessment of tax, and tax officials disregarding precedent in the process of making assessments and filing appeals. The inferior quality of income tax assessments and ITD filed appeals consequently results in the low success rate of the ITD in tax litigation. In addition, poor accountability and ineffective performance management perpetuate inadequate representation of the ITD before the appellate fora, adding to the ITD's losses in litigation.

Further, trust deficit, which underlies Indian bureaucratic culture, fosters a mindset of tax officials that reflects prejudice against taxpayers and a fear of audit and investigation. Trust deficit also leads to officials abdicating their responsibility to make objective decisions in favour of taxpayers. This trust deficit therefore adds to the poor quality of tax assessments and appeals filed by the ITD, further compounding the ITD's losses in income tax litigation.

By explaining reasons for the low success rate of the ITD in income tax litigation as well as the poor quality of income tax assessments made and income tax appeals filed by the ITD, the theory of Indian bureaucratic culture provides insights for reforming Indian tax administration. Further, the use of grounded theory methodology to develop a theory based on multiple sources of empirical evidence is a unique contribution to the field of taxation and to the literature on tax administration, especially, the literature on Indian tax administration.

**Keywords:** tax administration, bureaucratic culture, tax litigation, accountability, performance management, trust, taxation

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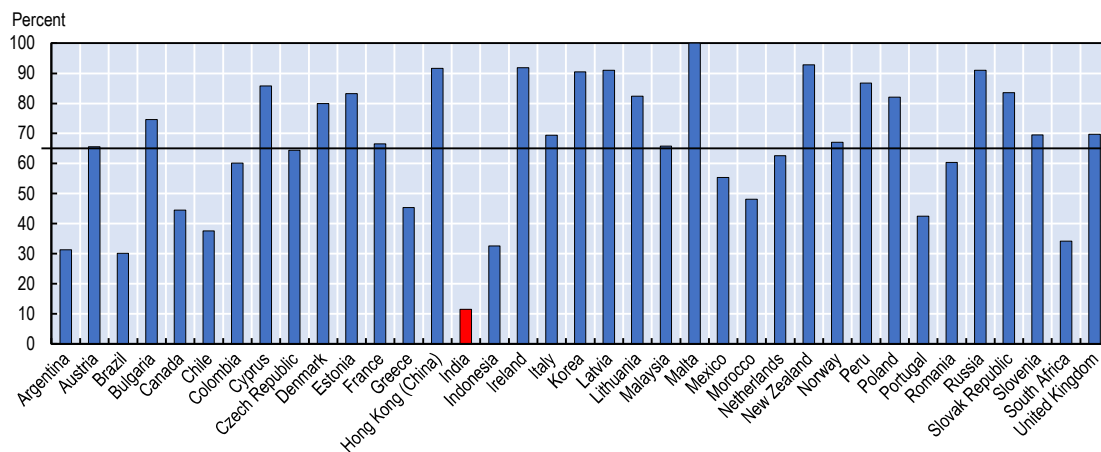
\* PhD graduate, Victoria University of Wellington. This article was presented (online) at the 34th ATTA Conference, Brisbane, 19-20 January 2023, and at the 15th International ATAX Tax Administration Conference, Sydney, 4-5 April 2023, and is largely based on the author's now published doctoral thesis (Mohan, 2023). The author dedicates this article to his PhD supervisors, Lisa Marriott and Jonathan Barrett, in gratitude for their guidance, time, and support, and is much obliged to an anonymous referee for their comments on an earlier version of this article. The author is solely responsible for any errors in this article.

## 1. INTRODUCTION

In India, the first level of appeal for taxpayers against the Income Tax Department (ITD) lies before the Commissioner of Income Tax (Appeals) (CIT(A)), a quasi-judicial authority who is a senior ITD official. The second stage of appeal for taxpayers, against the CIT(A)'s orders, is before the Income Tax Appellate Tribunal (ITAT), which is independent of the ITD and is the first level of appeal for the ITD against the orders of the CIT(A). Decisions of the ITAT may be appealed to the jurisdictional High Court, whose orders can further be appealed to the Supreme Court of India, which is the highest court of the land.

Research shows that less than 15% of the tax appeals in India were decided in favour of the Indian tax administration in 2014-15 (Deloitte Touche Tohmatsu India, 2020; Organisation for Economic Co-operation and Development (OECD), 2017). This success rate was the lowest among tax administrations of 37 emerging and advanced economies (Deloitte Touche Tohmatsu India, 2020; OECD, 2017), as shown in Figure 1. In addition, the Indian Economic Survey of 2017-18 reveals that more than two-thirds of the direct tax appeals before the ITAT, the High Courts, and the Supreme Court of India were decided against the ITD (Ministry of Finance, India, 2018). Of all direct tax appeals (including those filed by the ITD and the taxpayers), the ITD won around 27% of the appeals before the ITAT, only 13% before the High Courts, and 27% of the appeals before the Supreme Court (Ministry of Finance, 2018, p. 138). Further, the success rate of the ITD in direct tax appeals filed by the ITD is also less than 50%. Data compiled for the four-year period between 2011-12 and 2014-15 show that, of all the direct tax appeals filed by the ITD, the ITD loses the majority of such tax appeals, 'about 53 percent before the ITAT', 'about 61 percent before High Courts', and 'about 51 percent before the Supreme Court' (Deloitte Touche Tohmatsu India, 2020, p. 12).

**Fig. 1: Percentage of Appeals Resolved in Favour of Tax Administrations, 2014-15**



Source: OECD (2017)

The low success rate of the ITD in income tax litigation raises the question of why the ITD fares poorly. Given the implication of the low success rate of the ITD for tax collection and, possibly, economic development, this question is important to answer. This article seeks to answer this question based on the author's analysis of case law, interview data, and survey data.

The article begins with a review of the literature on tax administration and litigation in India and describes the methodology used to conduct the research undertaken for this article. The article then lays out reasons for the low success rate of the ITD in income tax litigation and concludes with a discussion of the theoretical model built to explain this low success rate.

## 2. LITERATURE REVIEW

Tax administration is a key determinant of the performance of not only the tax system but also tax policy. Bird (2014, p. 271) echoed this sentiment by asserting that 'tax administration is tax policy' (quoting Casanegra de Jantscher, 1990, p. 179) and contending that '[t]he best tax policy in the world is worth little if it cannot be implemented effectively' (2014, p. 269). Tax administration is of even greater importance in developing countries such as India as ineffective tax administration impedes the collection of tax revenue (for funding public services) and the implementation of growth friendly policies (Gordon, 2010, p. 9).

Researchers have commented that the literature on tax administration is not adequate. For instance, Alley and Bentley (2008, pp. 124, 132) have asserted that 'research into tax administration is not comprehensive', and Hasseldine (2011, p. 372) concluded that there is 'a dearth of scholarly literature' on best practices in tax administration. More recently, Shome (2016, pp. 2-4) advocated for more research into tax administration, especially in India. Despite the Indian tax administration losing more than two-thirds of the appeals in the ITAT and the courts, there is little research on tax administration and litigation in India.

Below is an overview of the literature on tax administration and litigation in India.

### 2.1 Tax administration in India

A review of the literature on tax administration in India helps set the context for the research question discussed in this article. Based on comprehensive research into Indian tax administration, Mookherjee (1998, p. 105) cautioned that motivating tax officials to 'collect revenues more aggressively' may lead to the harassment of taxpayers. Gordon (2010, p. 5) agrees and adds that '[w]hen tax officials are given incentives simply to collect more revenue, it is not surprising that they do so even beyond what the statutes would allow'. For instance, Das-Gupta (2006, p. 25) contends that unreasonable tax assessments are made by Indian tax officials just to meet their revenue targets (see also Rao, 2015, p. 30). Noting the tendency of income tax officials to 'frame high-pitched and unreasonable assessment orders', Butani (2016, p. 439) agrees that income tax assessment in India is 'often guided by revenue-collection targets'. Butani (2016, p. 444) concludes that 'targets-linked performance evaluation and incentives' have resulted in income tax officials 'making arbitrary/irrational demands' at times. This is all the more likely when targets are set 'with no mechanism to revise the targets with the change in the performance of [the] economy' (Butani, 2016, p. 445). Butani (2016, p. 439) also raises other concerns about the quality of tax assessments, noting, for

example, that often, 'key legal and interpretative issues are not adequately dealt with'. The literature therefore suggests multiple reasons for the poor quality of tax assessments in India.

Other administrative issues reported by the literature include low taxpayer compliance and high compliance costs in India. Compliance costs in India have been estimated to be 'extraordinarily high by international standards' (Chattopadhyay & Das-Gupta, 2002, p. v). In a survey of 45 Indian companies, respondents identified 'lack of accountability and transparency in tax administration matters', litigation, administrative delays, and 'non-transparent, ambiguous terminology of tax laws' as important factors contributing to high corporate compliance costs (Das-Gupta, 2006, p. 25). Survey respondents also cited 'unhelpful attitude' of the tax officials as a contributing factor (Das-Gupta, 2006, p. 25).

The 'poor state of tax administration' is proposed to be 'a major reason for low compliance and high compliance cost[s]' in India (Rao, 2005, p. 1009). Literature suggests that improving administration may increase voluntary compliance (Sharma & Singh, 2018, p. 11; Singh & Sharma, 2010, p. 147; Kumar, Nagar & Samanta, 2007, p. 110). Kumar and co-authors (2007, p. 109) add that poor compliance is due to 'the perceived inequity of the tax system, complexity of tax laws, lack of fairness of the penalty system, and weak taxpayer education programmes'. Addressing these issues may reduce compliance costs and improve voluntary compliance.

In this regard, Jain (2016, p. 723) notes that while 'the promotion of voluntary compliance' is the stated goal of the ITD, 'there is a basic absence of trust in the taxpayer', as well as 'inadequate emphasis' on the 'creation of a tax friendly culture' and the provision of 'comprehensive and reliable guidance on compliance to taxpayers'. This may be due to the 'adversarial attitude of the tax administration towards taxpayers', who are viewed by many tax officials as 'tax evaders' (Rao, 2015, p. 30). Jain (2016, p. 723) adds that the Indian tax administration is 'by and large perceived to be unfriendly towards the taxpayer'. For instance, in a survey of chartered accountants of a province in India, the majority of the respondents perceived the Indian income tax authorities as 'enforcers' and not 'facilitators' and viewed the ITD as not being 'taxpayer-friendly' (Rani & Arora, 2011, pp. 49-50). Jain (2016, p. 723) explains that while the 'vision and strategy documents' of the ITD espouse 'lofty ideals', the experience of taxpayers on the ground is 'at wide variance with these ideals and shows a gulf between what is professed and actual practice' within the ITD.

Literature on Indian tax administration thus reveals concerns about the effectiveness of tax administration in India as well as low compliance rates and high compliance costs in India. Literature also describes an administration that favours enforcement over enabling taxpayer compliance. The next section describes the literature on tax litigation in India.

## 2.2 Tax litigation in India

A recent Economic Survey of India (for 2017-18) notes that delays and pendency of economic cases in the courts, the tribunals, and the income tax department are high and mounting, with the pendency adversely impacting the economy in the form of delayed projects, high legal costs, disputed tax revenues, and declining investment (Ministry of Finance, 2018, p. 132). Such delays and pendency of cases may arise from an increase in the judiciary's workload, for example, due to greater use of injunctions and stays, and



from the Indian income tax officials favouring litigation despite the ITD's high rate of failure to prevail in cases at every stage of the tax appeal process (Ministry of Finance, 2018, p. 132).

With respect to the appeals filed by the ITD, an OECD paper notes that, 'following a decision by the commissioner in the taxpayer's favour, too many cases with limited merit are brought by the Tax Department before the Courts' (Joumard, Thomas & Morgavi, 2017, p. 30). The paper suggests that the possibility of 'imposition of sanctions against assessing officers who are considered by the Comptroller and Auditor General to have under-assessed [tax] incentivises a defensive approach towards [tax] assessments' (Joumard et al., 2017, p. 31). Also, such a conservative approach may lead to cases without merit being appealed (Joumard et al., 2017, p. 31). In this context, Butani (2016, p. 445) notes that the fear of audit and the prospect of 'being subjected to critical evaluation pushes [Indian] tax officials into a "fault-finding" mode'.

Another OECD paper describes other factors that contribute to an environment of overly conservative assessments, which in turn result in a significant number of tax disputes and litigation (Thomas et al., 2017, p. 42). Examples of such factors include limited staffing, limited audit expertise in some areas, unclear guidelines, fear of corruption accusations, and unreasonable audit revenue targets (Thomas et al., 2017, p. 42). These factors are likely to incentivise tax officials to take an overly defensive approach (Thomas et al., 2017, p. 42).

In this regard, Das-Gupta (2006, p. 23) suggests, based on anecdotal evidence, that Indian income tax officials file appeals against taxpayers notwithstanding the department's low success rate in tax litigation to 'avoid sanctions for lack of due diligence' in not filing an appeal. For example, to avoid adverse comments during an external audit by the Comptroller and Auditor General of India, income tax officials are likely to pass the buck by filing an appeal even if the officials believe that an appeal is not warranted (Das-Gupta, 2006, p. 23).

Based on the results of a survey of 45 Indian companies, Das-Gupta (2006, p. 25) concludes that litigation is a recurrent administrative 'hotspot' for taxpayers in India. Thomas and co-authors (2017, p. 43) propose that the factor most responsible for fostering 'an environment of excessive disputes' in India is the 'imposition of audit revenue targets on assessing officers'. They argue that the low success rate of the ITD in appeals to the CIT(A) suggests that revenue targets are 'excessive' and lead to 'unreasonable [tax] assessments' (Thomas et al., 2017, p. 43). Further, Butani (2016, p. 439) notes that there is 'no qualitative assessment' of taxpayer disputes by income tax officials, leading to 'protracted litigation'.

Literature on tax litigation in India therefore paints a picture of an environment of excessive and unnecessary litigation, which is at least in part driven by tax assessments of a poor quality. Such assessments may result from, for example, unreasonable revenue targets imposed on tax officials and their fear of audit and inquiry and corruption allegations. This article discusses factors that contribute to the ITD's low success rate in litigation, including reasons behind income tax officials making assessments of a poor quality and filing appeals without merit.

The next section explains the methodology followed in the research described herein.

### **3. RESEARCH METHODOLOGY**

#### **3.1 Methodology**

The research discussed in this article follows the grounded theory methodology. Grounded theory is ‘the discovery of theory from data systematically obtained from social research’ (Glaser & Strauss, 1999, p. 2). Such theory is ‘derived’ from research data and is ‘illustrated by characteristic examples’ of the data (Glaser & Strauss, 1999, p. 5). ‘Generating a theory from data means that most hypotheses and concepts not only come from the data but are systematically worked out in relation to the data during the course of the research’ (Glaser & Strauss, 1999, p. 6). This often takes place in an iterative manner.

Grounded theory is built upon two key concepts – constant comparison and theoretical sampling (Suddaby, 2006, p. 634). Constant comparison involves simultaneous collection and analysis of data, while theoretical sampling enables decisions about data collection based on the theory that is being developed (Suddaby, 2006, p. 634). These steps are performed iteratively. Constant comparison is used to replicate facts based on comparative evidence and establish the generality of each fact (Glaser & Strauss, 1999, pp. 23-24). By generating the properties of conceptual categories that emerge from the data, comparison of facts can increase the generality and the explanatory power of such categories (Glaser & Strauss, 1999, p. 24). Generalisations help broaden the grounded theory and enhance the theory’s explanatory and predictive power (Glaser & Strauss, 1999, p. 24).

Classical Grounded Theory, which is the version of grounded theory described above, recommends substantive and theoretical coding (Evans, 2013, p. 40) in conjunction with the comparative analysis and theoretical sampling strategies to analyse data. Substantive coding precedes theoretical coding (Evans, 2013, p. 40) as substantive coding involves coding of raw data. In this research, substantive coding has been performed using descriptive coding to analyse the data and build the categories. Theoretical coding was then undertaken using selective coding to identify concepts underlying the developed theory. This identification was facilitated by themes developed from comparison of the categories with the core category.

#### **3.2 Methods**

Grounded theory permits the use of various types of data collection methods, including qualitative methods and quantitative methods, to generate theory. For example, quantitative methods can supplement qualitative ones. Although the research presented in this article relies primarily on the qualitative methods of case law review and interviews, a survey has also been deployed to corroborate some of the themes. Glaser and Strauss (1999, pp. 75, 104, 18) propose that document reviews, interviews, and surveys are all acceptable methods for use with grounded theory methodology to build a substantive theory from the data.

Glaser and Strauss (1999, p. 163) add that documentary materials may be ‘as potentially valuable for generating theory’ as ‘observations and interviews’. In this research, case law provided insights into legal principles that are commonly relied upon by the courts for deciding against the ITD. Moreover, while not random, the sample of cases reviewed for this article is biased only by the income tax assessment years selected for review (2010-20 for Supreme Court cases and 2015-20 for High Court cases). The historical

depth of case law reviewed for the research discussed in this article is greater than that of the interview data.

In addition to the review of case law, former ITD officials were interviewed to obtain the perspectives of income tax officials *vis-à-vis* the research question. Chartered accountants and tax lawyers were interviewed to understand the views of taxpayer representatives. Also, former ITAT members and judges were interviewed to obtain the opinions of adjudicators.

The author conducted semi-structured interviews (Qu & Dumay, 2011, p. 246) of 34 tax professionals between December 2020 and April 2021. The interviewees were identified using purposive, convenience, and snowball sampling techniques. Of these 34 research participants, six are former income tax officials, two are former income tax officials who served and retired as ITAT adjudicators, seven are chartered accountants or lawyers who served on the ITAT or in the judiciary as adjudicators, and 19 are lawyers or chartered accountants with no prior experience of having served as adjudicators in income tax cases. Below is a legend corresponding to the codes used to refer to the interviewees in this article.

**Table 1: Legend of Abbreviations Used to Refer to the Different Backgrounds of Interviewees**

|    | <b>Abbreviation</b> | <b>Description of Interviewee Background</b>               |
|----|---------------------|--|
| 1. | <b>J</b>            | Judge of High Court or Supreme Court                       |
| 2. | <b>T</b>            | Former Income Tax Official                                 |
| 3. | <b>A</b>            | Chartered Accountant                                       |
| 4. | <b>L</b>            | Tax Lawyer   |
| 5. | <b>IT</b>           | Retired ITAT Adjudicator and Former Income Tax Official    |
| 6. | <b>IA</b>           | Former ITAT Adjudicator and Chartered Accountant           |
| 7. | <b>IL</b>           | Retired ITAT Adjudicator and Lawyer                        |
| 8. | <b>TP</b>           | Tax Practitioner with Legal and Accountancy Qualifications |

After reviewing the case law and analysing the interview data, an anonymous online survey of chartered accountants, income tax lawyers, and former income tax officials was undertaken. Potential respondents were identified using purposive and convenience sampling. The questionnaire was designed and administered online through Qualtrics and resulted in 123 valid survey responses. The survey data was thereafter analysed using SPSS software.

The section below discusses themes related to the low success rate of the ITD that emerged from the analysis of case law as well as that of interview and online survey data.

#### **4. LOW SUCCESS RATE OF THE ITD**

A review of case law, interview data, and survey results reveals reasons for the low success rate of the ITD in tax litigation. Key reasons include the poor quality of income

tax assessments and appeals, poor accountability of tax officials, inadequate representation of the ITD in the appellate fora, inadequate supervision of tax officials, their disregard of precedent, revenue targets imposed on officials, the prejudiced mindset of officials, their fear of audit and inquiry, and their abdication of responsibility. A discussion of these reasons follows.

#### 4.1 Poor quality of assessments

Case law refers to the poor quality of income tax assessments made by assessing officers, i.e., officials who assess tax within the ITD (Mohan, 2021, pp. 22-27). Interviewees agree that the quality of many of the income tax assessments is poor. In addition, the results of the survey of tax professionals undertaken for this research show that 49% of the respondents to the survey believe that income tax officials make correct assessment of tax sometimes and 18% believe that officials make correct assessments rarely or never.

Interviewees propose that the poor quality of income tax assessments made by assessing officers results in the low success rate of the ITD in litigation (Interview T5; Interview IL1; Interview IA2; Interview TP2; Interview A3). Reasons behind inadequate assessments include poor examination of accounts by officers (Interview A5) or officers not properly applying the law, rules, or procedures (Interview IL2). Interviewees, including those who previously served as the CIT(A) (Interview T5; Interview T2) or as retired ITAT adjudicators (Interview IA2; Interview IL1; Interview IL2), agree that an assessment that is inadequately supported by facts or in law is difficult to defend in the ITAT or the courts.

Another reason for the poor quality of tax assessments is not investigating thoroughly or not drafting the income tax assessment orders properly (Interview T5). For example, tax practitioners contend that, in some cases, the assessment of tax is made in a hurry before assessments become time-barred by the operation of law (Interview A2; Interview A7; Interview IA1). When assessing officers do not have enough time to make a thorough assessment, they err on the side of making additions, even those not substantiated by evidence, to avoid missing out on potential tax collection, likely resulting in high-pitched tax assessments (Interview IT2; Interview T3). High-pitched tax assessments are unreasonable assessments that make unsustainable tax demands (Interview A3). Even where an officer investigates properly, they may not reference correctly incriminating materials unearthed in the investigation in the assessment order, a deficiency that cannot usually be overcome in the ITAT and the courts, which do not permit new evidence (Interview T5; Interview IA2).

Poor-quality tax assessments may also result from inadequate training and insufficient knowledge (Interview IA2), especially in complex areas of taxation such as international taxation and transfer pricing (Interview A3). Despite officers being trained for more than a year prior to their posting (Interview T6; Interview T1; Interview T2; Interview T3), some suggest that more training is required as assessing officers may not have prior experience in taxation, accounting, and law (Interview A5; Interview T5; Interview IT1; Interview IA1).

Other interviewees dispute that lack of training is a major cause of poor assessments (Interview T4; Interview T1; Interview T6). Some propose instead that poor accountability, the mindset of assessing officers (Interview L7; Interview A1), or insufficient supervision (Interview T2; Interview T6) are more likely reasons for the

poor quality of assessments and the resulting low success rate of the ITD. For instance, while supervision of assessing officers and their tax assessments is provided for in the ITD's processes (Interview T5), as discussed in detail below, this supervision is inadequate (Interview T5; Interview IT1; Interview T6).

Incorrect tax assessments are typically appealed by taxpayers. When taxpayers prevail in such appeals, the ITD is said to routinely file appeals against orders in favour of taxpayers.

#### 4.2 Poor quality of appeals

Case law shows examples of tax appeals without merit filed by income tax officials (Mohan, 2021, pp. 25, 29-30). In addition, interviewees suggest that the poor quality of appeals filed by income tax officials contributes to the low success rate of the ITD in tax litigation in many cases. According to a former income tax official, in some cases, appeals are filed based on 'one string of evidence' or just based on suspicion (Interview T5). Also, a retired ITAT adjudicator said that 'at least 50 percent of the appeals filed' by the ITD are 'without merit' as officials 'file appeals against the CIT[(A)]'s order ... indiscriminately' (Interview IA2). Regarding indiscriminate filing of appeals by income tax officials, a retired High Court judge added that a reason for the poor success rate of the ITD in the High Courts is officials filing infructuous appeals that do not raise a substantial question of law (Interview J2).<sup>1</sup> Meritless appeals therefore do not withstand the scrutiny of the higher appellate fora.

In addition, many income tax officials file appeals mechanically because of the belief that filing appeals does not cost the ITD much (Interview T2). This contributes to the ITD filing twice or thrice the number of appeals filed by taxpayers (Interview T2; Interview A6). The large number of meritless appeals filed by the ITD impacts its success rate in litigation.

#### 4.3 Poor accountability

The substandard quality of tax assessments and appeals filed by the ITD can result from poor accountability. For instance, assessing officers and their superiors are purportedly not held accountable for the poor quality of assessments (Interview T5). Moreover, assessing officers who make high-pitched tax assessments are not penalised within the ITD because the ITD feels that assessing officers who make such assessments protect the ITD's interests by being overzealous, colloquially referred to as being 'revenue-minded' (Interview IT2).

Most of the interviewees, including many retired ITAT adjudicator interviewees and some former income tax official interviewees, believe that there is little to no accountability of assessing officers within the ITD for making incorrect assessments or those of a poor quality (Interview L1; Interview A2; Interview A3; Interview TP2; Interview TP3; Interview L3; Interview TP4; Interview L4; Interview L5; Interview L7; Interview IT1; Interview IL1; Interview IA1; Interview IT2; Interview T5). Further, the results of the survey of tax professionals show that around two-thirds of the respondents

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<sup>1</sup> The higher judiciary adjudicates only substantial questions of law, not ordinary questions of law, in tax cases.

do not believe that officials face consequences for making incorrect assessments or for filing meritless or frivolous appeals.

With respect to appeals, tax practitioners, retired ITAT adjudicators, and former ITD officials note that while tax officials may be held accountable for not filing an appeal where it is due, there appears to be no accountability when income tax officials file appeals without merit (Interview L5; Interview IA1; Interview TP3; Interview IL1; Interview IL2; Interview L7; Interview T5). For example, a senior tax lawyer (Interview L7) said that there is ‘zero accountability’ within the ITD for its officials filing meritless or frivolous appeals. Such meritless and frivolous appeals are invariably lost by the ITD before the ITAT and the courts. Poor accountability thus contributes to the low success rate of the ITD in appellate litigation.

#### 4.4 Inadequate supervision

Poor accountability can be fostered by inadequate supervision. Supervision of assessing officers and their assessments exists on paper as the ITD vests the Additional Commissioner of Income Tax, to whom the assessing officers report, with the authority to monitor and verify income tax assessments (Interview T5). However, most former income tax official interviewees believe that this monitoring, verification, guidance, and supervision is often missing (Interview T5; Interview IT1; Interview T6; Interview T1; Interview T4). A retired member of the Central Board of Direct Taxes (CBDT), which oversees the ITD, said that the department does not have ‘a formal program or even a service culture’ of senior officials mentoring assessing officers and is ‘an individualistic department’ (Interview T6).

Another retired member of the CBDT added that, ‘though the [Income Tax] Department is now over 100 years old, the culture of close monitoring of ... assessments hasn’t happened’ (Interview T5). The retired CBDT member suggested that a review mechanism is needed, not to punish erring assessing officers, but to train them and monitor them closely (Interview T5). The former senior income tax official added that in the absence of proper training and monitoring, erring assessing officers may end up wasting taxpayers’ time and the government’s time by making assessments of a poor quality (Interview T5).

Reasons for inadequate supervision include the reluctance of assessing officers to be supervised, under the guise of their being quasi-judicial authorities, despite supervision being required by the department rules (Interview T5; Interview T6). Some assessing officers are said to have in the past attributed ulterior motives to supervision, for example, by filing anonymous complaints against their supervising officials (Interview T5). This is said to have led to supervising authorities taking a step back to avoid the questions and allegations that come with supervision (Interview T5; Interview IT1). A former income tax official remarked that supervising income tax officials ‘now are afraid of ... [their] subordinates’ (Interview IT1). A senior tax lawyer concluded, in the context of income tax assessments prepared by assessing officers, that there appears to be no quality control within the ITD (Interview TP3).

#### 4.5 Revenue targets

In addition to poor accountability and inadequate supervision, the imposition of revenue targets on income tax officials also contributes to the poor quality of assessments. Many interviewees believe that the influence of revenue targets on income tax assessments

made by assessing officers is a key factor that impacts the quality of the assessments made (Interview IT1; Interview A1; Interview TP1; Interview A3; Interview IA1; Interview TP4; Interview T3; Interview L4; Interview J1; Interview J2; Interview J3; Interview IL1; Interview A8; Interview IL2). Revenue targets seek to hold assessing officers accountable and may be used as a metric during performance evaluation (Interview L6). However, the imposition of revenue targets appears to have unintended or undesired consequences at times.

For example, targets may lead to ‘high-pitched assessments’ (Interview A5), and result in orders without adequate foundation (Interview TP2). A senior tax lawyer remarked that, in some cases, tax assessments are reopened, or unreasonable positions are taken, by assessing officers just to meet targets (Interview L7). Other practitioners add that the revenue targets ‘thrust’ upon assessing officers result in high-pitched assessments as meeting the target becomes ‘more important’ than ‘fair collection’ of tax (Interview TP1; Interview A1).

Interviewees also note that assessing officers sometimes acknowledge the pressure from superiors within the ITD to collect revenue and even ask taxpayers to seek relief in the appellate fora, for example, in the ITAT, instead (Interview TP1; Interview TP3). As a senior tax accountant (Interview A3) remarked, high-pitched assessments contribute to the ITD’s low success rate in tax litigation as assessments that make unsustainable tax demands are generally overturned by the ITAT and the courts. Interviewees thus conclude that revenue targets contribute to the low success rate of the ITD in litigation (Interview L7; Interview J2).

#### 4.6 Disregard of precedent

Another factor that contributes to the poor quality of both income tax assessments and ITD filed appeals is the disregard of precedent by income tax officials. Case law offers several examples of income tax assessments made or appeals filed by income tax officials that disregard judicial precedent (Mohan, 2021, pp. 24-25). Referring to an instance of disregard of precedent by income tax officials, the High Court of Bombay said that ‘the least that is expected of the Officers of the State is to apply the law equally to all and not be over zealous in seeking to collect the revenue ignoring the statutory provisions as well as the binding decisions of ... [the] Court’.<sup>2</sup> Many interviewees confirm the practice of assessing officers disregarding binding precedent while making tax assessments or filing tax appeals (Interview L7; Interview A2; Interview L4). Moreover, income tax officials have in some cases disregarded binding precedent of not only the jurisdictional High Court but also that of the Supreme Court, the highest court (Interview L7). Some interviewees suggest that revenue targets put pressure on assessing officers to disregard precedent (Interview L4; Interview L7). However, as shown by case law, assessments made by disregarding judicial precedent, for example, to meet revenue targets, do not withstand appellate scrutiny (Interview TP3).

Disregard of precedent also contributes to the poor quality of appeals (Interview A3; Interview T2; Interview IL1; Interview IL2). When income tax officials seek to re-litigate issues covered by binding jurisdictional High Court precedent or Supreme Court precedent (Interview T2; Interview IL1), the ITD eventually loses such cases during

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<sup>2</sup> *Milestone Real Estate Fund v Assistant Commissioner of Income Tax, Circle 25(3), Mumbai* [2019] 105 taxmann.com 292 (High Court of Bombay, India) (26 March 2019).

appeal. In one case, the High Court of Bombay stated that it was ‘pained to record ... [the] most unreasonable attitude on the part of the Advocate for the Revenue of seeking to reargue settled concluded issues, without having obtained any stay from the Apex Court’.<sup>3</sup>

Data therefore suggests that the reluctance of income tax officials to follow judicial precedent contributes to the poor quality of both income tax assessments and ITD appeals, which in turn results in the ITD losing the corresponding appeals before the appellate fora.

#### 4.7 Prejudiced mindset

In addition to the above factors, the mindset of income tax officials contributes to the poor quality of assessments. Case law shows examples of the prejudiced mindset of income tax officials against taxpayers (Mohan, 2021, pp. 27-28). In one case, the High Court of Bombay said that the behaviour of the income tax officials in that case was ‘high handed and manifestly unfair towards the [taxpayer] ... [and was] in defiance of settled law’.<sup>4</sup> This prejudiced mindset of income tax officials was referred to by many of the interviewees as well. Also, more than three-quarters of the survey respondents believe that income tax officials are biased in favour of the ITD when making assessments or filing appeals. Further, most survey respondents believe that officials are not fair to taxpayers while assessing tax.

Interviewees propose that the prejudiced mindset of officials contributes to the low success rate of the ITD in litigation. For example, assessing officers tend to interpret the law to avoid giving a benefit or relief to taxpayers under some pretext or the other (Interview A1; Interview L7), even when that benefit or relief is explicitly provided to taxpayers by the *Income Tax Act, 1961*. This leads to the underlying assessment being overturned on appeal.

Interviewees also note that the mindset of prejudice against taxpayers (Interview L1; Interview L2) and resulting trust deficit (Interview A1) contribute to income tax officials viewing taxpayers unfavourably (Interview A7) or with suspicion (Interview A5). A former senior income tax official and retired member of the CBDT said that, among officials, ‘there is considerable suspicion that most taxpayers are evading or avoiding payment of tax’ and added that this bias often ‘persists’ with the officials throughout their career (Interview T5).

Assessments driven by prejudice, for example, based on suspicion or with unfairness, do not usually withstand appellate scrutiny (Interview T5; Interview A5; Interview A1), adding to the low success rate of the ITD in litigation before the ITAT and the courts.

#### 4.8 Fear of audit and inquiry

In addition, the mindset of fear of audit and inquiry influences assessing officers to make unnecessary additions in tax assessments to avoid being questioned by their superiors for not making enough additions in an assessment (Interview TP4). Referring to

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<sup>3</sup> *Principal Commissioner of Income-tax, Central-1 v JWC Logistics Park (P.) Ltd* [2018] 100 taxmann.com 355 (High Court of Bombay, India) (11 April 2018).

<sup>4</sup> *Milestone Real Estate Fund*, above n 2 (imposing costs on ITD officials (payable to the taxpayer) ‘for the unnecessary harassment’ that the taxpayer had to undergo ‘at the hands of the Revenue’).



discussions with some assessing officers, a senior lawyer interviewee (Interview TP4) explained that assessing officers are questioned for not making an addition but not probed for making an unsustainable addition that is bound to be deleted upon appeal. Further, the fear of a vigilance investigation by the ITD, when assessing officers do not make additions in an important case, influences assessing officers to make unjustifiable and arbitrary additions in such cases to avoid a vigilance investigation in the future (Interview J2; Interview J1). This fearful mindset of assessing officers (Interview A4) often leads to indefensible additions (Interview A5) in tax assessments that are ultimately set aside by the appellate fora, adding to the ITD's losses.

Interviewees add that the ITD is known to retaliate against assessing officers who accept even legitimate deductions sought by taxpayers, by auditing and investigating such officers (Interview TP3). This leads to officers erring on the side of the ITD (Interview T6) to be safe. This despite the Supreme Court's mandate that if there are two views possible, then the assessing officer should take the view that favours the taxpayers, not the tax department. Instead, 'it's easier [for officers] not to take a decision or [to] take a decision in favour of the department, even if it is wrong' as that would spare the assessing officers of 'a witch-hunt' for not making an addition, even one that is indefensible on appeal (Interview A5). The ITD tends to ultimately lose appeals in which the underlying assessment erred in the ITD's favour.

The fear of audit and inquiry by the ITD may also influence an income tax official's decision to file an appeal. To avoid the risk of being questioned or even accused for not filing an appeal, income tax officials routinely file appeals regardless of their merit (Interview J1; Interview TP3; Interview L7; Interview IL1), leading to the ITD losing many such appeals. The fear of audit and inquiry therefore contributes to the ITD's low success rate in litigation.

#### **4.9 Abdication of responsibility**

A further aspect of the mindset of income tax officials is their tendency to abdicate responsibility by playing it safe and passing the buck. For example, assessing officers play it safe by not taking an objective view on a point of law that is under litigation (Interview A2) or by making unnecessary additions and asking taxpayers to get relief from the CIT(A) or the ITAT (Interview A7). Assessing officers thus prefer to let someone else decide by 'handing off [their] responsibility' to be fair to taxpayers to the appellate fora instead (Interview L4).

Assessing officers also abdicate responsibility to avoid being questioned by their superiors within the ITD for not making an addition or for not making enough additions in an assessment (Interview TP4). A former income tax official and retired member of the CBDT (Interview T6) and a retired income tax official (Interview T1) claim that at least 50% of the tax officials play it safe (Interview A3). As noted in the previous section, officials file an appeal to 'play [it] safe' (Interview T6), especially in cases involving a large tax demand (Interview IT1), to avoid retaliation, for example, an investigation, by the ITD.

A retired Chief Commissioner added that 'very few' officials 'are bold enough to take independent decisions and take responsibility' for not filing an appeal (Interview T1). Another retired Chief Commissioner explained that many income tax officials incorrectly 'think that they need not take any decision, it is someone else who will have to take a decision, and that should be the High Court or the Supreme Court' (Interview

T2). This ‘tendency to pass the buck’ (Interview IA1) by not assessing the merit of an appeal leads to the mechanical filing of appeals (Interview A6) lacking merit (Interview L4; Interview L5).

A retired Chief Commissioner of Income Tax disagrees with this approach, explaining that most of the ITD’s appeals may be ‘infructuous’, partly due to income tax officials taking such a mechanical approach (Interview T2). A retired ITAT adjudicator concurred (Interview IA2). The result is that the ITD loses such meritless appeals before the ITAT and the courts.

#### **4.10 Inadequate representation**

Another reason that adds to the ITD’s low success rate is inadequate representation. Interviewees propose that the poor quality of representation of the ITD during litigation further contributes to the ITD’s low success rate in at least some cases (Interview T5; Interview TP2; Interview IA1; Interview T2; Interview IA2; Interview J2; Interview IL1; Interview L6). For example, the ITD is represented by its own officials before the ITAT. A tax practitioner said that due to ‘poor representation by the [tax] department, the results at [the] ITAT are more favourable’ to taxpayers than to the tax department (Interview A3).

One reason for poor representation may be inadequate training of officials to prepare and present a good case before the ITAT (Interview T5). Another reason may be inadequate preparation or poor presentation of the case by the official representing the ITD before the ITAT (Interview IA2; Interview J2). In some cases, even where the tax official is capable, they may not get the necessary information or support (for example, case information or files) well in advance from the ITD to make a strong case (Interview T5; Interview IA2; Interview J2). Yet another reason for the ITD’s poor representation in the ITAT is the perception that being deputed to represent the ITD before the ITAT is a ‘punishment posting’ (Interview T1; Interview IA1; Interview TP3; Interview IA2; Interview L6). This results in ‘disinterested’ representation by officials deputed to that role (Interview J2; Interview IL1; Interview T2).

Also, retired income tax officials and former ITAT adjudicators claim that the ITD’s standing counsel, i.e., lawyers hired by the ITD to represent the ITD before the High Courts and the Supreme Court, are often ineffective as well, leading to even cases in favour of the ITD sometimes being lost (Interview T5; Interview T2; Interview J2; Interview T4). Thus, poor representation of the ITD in appeals is a contributing factor to its low success rate.

The next section illustrates the development of a theoretical model from this analysis.

### **5. THEORETICAL MODEL**

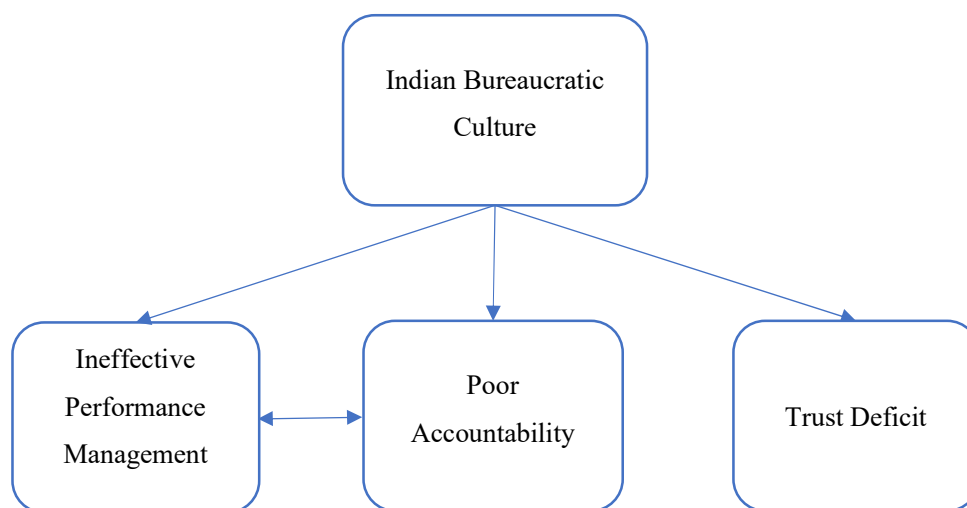
This section describes the theory developed from the themes in the preceding section to explain the low success rate of the ITD in tax litigation before the ITAT and the courts.

The themes related to the low success rate of the ITD in income tax litigation demonstrate that commissions and omissions by income tax officials contribute to the poor performance of the ITD in litigation. Data also indicate that the culture within the ITD (and the larger Indian bureaucracy) influences these commissions and omissions. The proposed theoretical model therefore presents the characteristics of Indian

bureaucratic culture that motivate the themes related to the low success rate of the ITD in income tax litigation.

The theoretical model proposes that Indian bureaucratic culture is characterised by inadequate performance management, poor accountability, and trust deficit, as shown in Figure 2. This section explains these concepts using the themes developed from the analysis of case law, interview, and survey data, thus providing empirical support to the model.

**Fig. 2: Theoretical Model for Explaining the Low Success Rate of the ITD in Tax Litigation**



### 5.1 Ineffective performance management

Performance management in this article refers to the monitoring and evaluation of the actions of Indian government officials. Indian bureaucratic culture is beset by ineffective performance measurement, which adversely impacts the delivery of public services. The problem of ineffective performance measurement within the Indian government has been discussed in the literature (Panda, 2021, p. 10; Kashikar, 2004, p. 554). For example, a report published by the National Commission to Review the Working of the Constitution (appointed by the Government of India) in 2002 proposed ‘drastic reform’ to the methods of performance evaluation within the government (National Commission to Review the Working of the Constitution, India (Justice M N Venkatachaliah, chair), 2002, Ch. 6, para. 6.7.5). The Commission found that ‘neither the quantity nor the quality of output of individuals and collective units’ was being ‘properly measured’ (National Commission to Review the Working of the Constitution, 2002, Ch. 6, para. 6.7.5). The Commission added that ‘the good, the bad and the indifferent’ government officials are treated alike and that only the seniority of the

officials determined their advancement in the government (National Commission to Review the Working of the Constitution, 2002, Ch. 6, para. 6.7.5).

Performance management is an established mechanism for monitoring and reviewing the performance of both individuals and organisations (Rao, 2016, pp. 9, 24, 89, 100; Bourne & Bourne, 2011, pp. 8, 62, 99, 103-104). As performance management seeks to facilitate 'good performance' (Rao, 2016, pp. 2-3, 5, 77; Bourne & Bourne, 2011, pp. 1-3, 9, 12), the absence of effective performance management can contribute to sub-optimal performance.

In income tax administration, inadequate performance of income tax officials can lead to sub-standard representation of the ITD before the ITAT and the courts, as revealed by interview data. Other manifestations of inadequate performance, shown by case law and interview data, are incorrect assessments of tax and the filing of meritless appeals against taxpayers. In addition, the Comptroller and Auditor General of India's reports (2022, p. 43; 2021, p. 27) refer to 'significant deficiencies in the performance of the Assessing Officers'. The reports give examples of the types of errors made by income tax officials in incorrect tax assessments and suggest the absence of proper monitoring and evaluation within the ITD.

As mentioned earlier in this section, effective performance management requires monitoring of the actions of government officials. Proper monitoring of the performance of these officials requires the institution of systems and processes to identify any lapses in their performance as well as any deviations in their actions, through commission or omission, from those authorised by law. Ineffective performance management can therefore be evidenced by inadequate controls within the government for detecting erroneous actions of officials. In the context of income tax administration, the Comptroller and Auditor General of India's reports (2022, p. 43; 2021, p. 27), for example, raise concerns about the 'weaknesses in the internal controls in the ITD' and imply that these weaknesses lead to incorrect assessments of tax.

More specifically, themes developed from the analysis of case law and interview data illustrate such weaknesses within the ITD. For example, violations of the principles of natural justice by income tax officials suggest ineffective systems and processes for identifying and preventing these violations, especially those arising from not providing notice to taxpayers or not providing taxpayers with an opportunity to be heard before finalising the tax assessment.

Inadequate supervision is another reason for wrong assessments passing through unchecked. This can be due to the absence of a strong culture of monitoring and mentoring within the Indian bureaucracy, as shown by interview data. A reason for the culture of monitoring and mentoring assessing officers within the ITD being weak may be the reluctance of these officers to be supervised, as suggested by the history of anonymous complaints made against senior income tax officials who had endeavoured to supervise.

Performance management also requires proper review of the effectiveness of the actions of government officials for the purposes of providing feedback and taking corrective steps. Inadequate or improper evaluation of the actions of government officials can result in mistakes being repeated, as noted by the Comptroller and Auditor General of India's reports (2022, p. 43; 2021, p. 27) in the context of assessment of tax within the ITD, for instance. Specifically, improperly incentivising income tax officials or

inadequately disincentivising them can lead to incorrect assessments of income tax and the filing of meritless tax appeals.

For example, as discussed previously, literature supports the view that incentivising officials to collect taxes may result in their collecting more tax than is authorised by law (Gordon, 2010, p. 5). This may also lead to the harassment of taxpayers (Mookherjee, 1998, p. 105) as unreasonable revenue targets do not reflect the state of the economy and may not be revised to correspond to changes in economic circumstances (Butani, 2016, p. 445). Interview data shows this to be the case within the ITD. Revenue targets put pressure on income tax officials to make unreasonable additions or deny taxpayers legitimate deductions as well as file income tax appeals without merit against decisions in favour of taxpayers. There is support in the literature for this impact of revenue targets on tax officials (Butani, 2016, pp. 439, 444; Thomas et al., 2017, p. 42). Literature also suggests that the performance of income tax assessing officers is determined by the ITD largely based on their meeting revenue targets and that overturning of an assessing officer's assessments upon appeal (an indicator of the quality of the assessments) has 'no bearing on the assessing officer's performance measurement' (Thomas et al., 2017, p. 43). Interview data validates this view.

In addition, inadequately disincentivising income tax officials, for instance, for disregarding precedent, as shown by case law and interview data, or for abdicating their responsibility to be objective and fair, as shown by interview data, contributes to the entrenchment of the abdication of responsibility and disregard of precedent by income tax officials. Moreover, data shows that, apart from the absence of disincentives to discourage income tax officials from disregarding precedent and abdicating responsibility, improper incentives in the form of unreasonable revenue targets encourage tax officials to disregard judicial precedent, at times, even that of the Supreme Court, and abdicate their responsibility.

Measuring the performance of income tax officials based on the assessed income tax (or revenue targets met based on the assessed income tax) and not based on the quality of income tax assessments made or appeals filed or revenue ultimately collected at the end of the appellate process, inadequate supervision, and a weak bureaucratic culture of mentoring junior officials together contribute to ineffective performance management within the ITD.<sup>5</sup>

Ineffective performance management, which is a well-documented problem that affects Indian bureaucracy, therefore impacts the ITD as well. Specifically, ineffective performance management contributes to the low success rate of the ITD in income tax litigation by adding to the incorrect assessments made and meritless appeals filed by income tax officials as well as the inadequate representation of the ITD before the ITAT and the courts. Indian bureaucratic culture thus contributes to the low success rate of the ITD.

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<sup>5</sup> While the CBDT revised the performance review process of assessing officers in 2015 to measure the quality of income tax assessments (for example, by considering whether the assessments have been upheld on appeal) (Butani, 2016, p. 443), the impact of these revisions is not apparent from interview data. This could be due to the long duration of the appellate cycle making the benefits of some of these revisions hard to see yet.

## 5.2 Poor accountability

Accountability here refers to government officials having to answer for their actions. Poor accountability within the government reflects the inability or the unwillingness of the government to make its officials answerable for their failure to discharge duties in accordance with the law. Poor accountability in Indian bureaucracy, including the dearth of 'public accountability', has been discussed in the literature (Chakraborty, 2011, pp. 103, 110; Kumar, Sahay & Ranjan, 2011, p. 24; Baqai, 2008, p. 25; Sharma, 2007, pp. 104-106). For example, Panda (2021, p. 2) remarks that accountability is an issue that the Indian government has been grappling with for more than 70 years (since independence) and proposes (2021, p. 9) that officials be made accountable to address the 'power asymmetry and imbalance between the state and the citizens'. In addition, Kashikar (2004, pp. 549, 553) discusses the 'erosion of accountability' in Indian bureaucracy and the perception that officials are not accountable.

Analysis of the data collected for this research also suggests poor accountability in Indian bureaucracy. For instance, survey data shows widespread belief that income tax assessing officers, CIT(A) officials, ITAT adjudicating members, and High Court judges do not face consequences for making incorrect assessments and passing incorrect orders, inconsistent decisions, and inconsistent judgments respectively. Also, the discussion of interview and survey data demonstrates that income tax officials do not face consequences for filing meritless or even frivolous appeals. These results suggest that inadequate accountability may be a systemic problem in Indian bureaucracy, as reported by the literature.

With reference to the ITD, Butani (2016, p. 442) claims that the 'accountability' of income tax officials is 'undefined'. Further, the results of a survey of Indian firms suggested a lack of accountability within the Indian tax department (Das-Gupta, 2006, p. 25). In addition, literature also refers to the challenge of introducing accountability in the public sector in India, including, within the Indian tax administration (Bagchi, 1993, p. 1644). Inadequate accountability within the Indian government has therefore been recognised in the literature.

Poor accountability not only contributes to the sub-optimal performance of Indian officials but also entrenches ineffective performance management in government. The discussion below illustrates the impact of poor accountability in the context of the ITD.

Poor accountability of income tax officials can perpetuate incorrect assessments of income tax by assessing officers or the filing of meritless appeals by income tax officials. This postulation is supported by the interview data. Further, survey data shows a correlation between the accuracy of income tax assessments and consequences tax officials face for making incorrect assessments. When officials are not held accountable for making incorrect assessments or filing meritless appeals, the quality of the assessments and appeals may not improve. For example, the Comptroller and Auditor General of India's reports (2022, p. 43; 2021, p. 27) raise concerns regarding the quality of assessments year after year, with recurring references to some issues. These include errors in the calculation of income tax, 'application of incorrect rates of tax', and 'mistakes in [the] levy of interest' (Comptroller and Auditor General of India, 2022, p. 43; Comptroller and Auditor General of India, 2021, p. 27). The reports suggest ineffective performance management within the ITD as a reason for recurring errors and recommend that erring officials be held responsible (Comptroller and Auditor General of India, 2022, p. 43; Comptroller and Auditor General of India, 2021, p. 27).

This culture of poor accountability of Indian government officials to the public, which is alluded to in the literature, most likely arises from officials being accountable to politicians they report to and not to the public they are meant to serve. The data collected for this research shows that while income tax officials may be punished for wrongly acting against the ITD's interest, they are not penalised for incorrectly acting to the detriment of taxpayers. For example, income tax officials are not reprimanded for recklessly making additions of income tax in assessments or for passing unnecessarily harsh orders against the taxpayers.

As the above discussion suggests, ineffective performance management and poor accountability are interrelated, as shown in Figure 2. For example, ineffective performance management can foster poor accountability when officials are not questioned for inadequate performance or improper actions. This appears to be the situation within the ITD, where the accountability of the officials is 'undefined' (Butani, 2016, p. 442). Not holding the officials accountable may entrench ineffective performance management and create a vicious cycle.

Therefore, poor accountability within the Indian bureaucracy, as discussed in this section, leads to income tax assessments and ITD filed income tax appeals of a poor quality as well as the inadequate representation of the ITD before the ITAT and the courts. Indian bureaucratic culture therefore contributes in another way to the low success rate of the ITD.

### 5.3 Trust deficit

Trust in this context refers to the confidence of the public in the actions and conduct of Indian government officials and the confidence of officials in their respective departments. Trust deficit is part of Indian bureaucratic culture, as evidenced by the following discussion of the literature. This trust deficit can be between government officials and the public or even between officials and their departments and can impact the way in which officials treat the public and deliver services as well as the manner in which officials discharge their duties.

Trust deficit can also lead to government officials being perceived as being prejudiced and acting based on their prejudices, and not pursuant to the facts and the law. In addition, trust deficit can result in officials abdicating their responsibility to be objective and fair.

Literature shows that Indians do not appear to trust their government officials (Panda, 2021, p. 6). This trust deficit may be due to the 'colonial mindset' and the 'legacy of civil service' (Baqai, 2008, p. 24) that make government officials accountable to their political masters and not to the public (Masum, 2018, pp. 441-442; Kashikar, 2004, p. 549). Indian bureaucrats are also perceived as being 'elite, exclusionist, rule-wielding, power-hungry, corrupt, non-accountable, conservative, yes-men and subservient' (Kashikar, 2004, p. 549).

More specifically, income tax officials are perceived to be prejudiced and adversarial, not fair and reasonable. For example, Indian taxpayers believe that they are treated by income tax officials 'harshly' and that officials enforce punitive tax provisions 'ruthlessly' (Singh & Sharma, 2010, p. 137). The interview data supports this view, while the survey data demonstrates that assessing officers are not considered to be fair in their assessment of tax. Survey data however shows that ITAT adjudicating members

and High Court judges are perceived to be fair, suggesting that perceptions of unfairness, at least in the context of income tax assessments and income tax litigation, are particularly directed towards income tax officials. Income tax officials are also considered to be biased towards the ITD (as shown by interview and survey data), instead of being impartial during their assessment of income tax and the filing of appeals against appellate decisions in favour of taxpayers. Due to this perception of income tax officials, there is a trust deficit between taxpayers and the officials.

Moreover, the analysis of survey data reveals a correlation between perceptions regarding the quality of income tax assessments and perceptions about the fairness of income tax officials. Fairness inspires trust (Walsh, 2012, p. 455) and unfairness of income tax officials can lead to a trust deficit between income tax officials and taxpayers. Trust deficit may therefore also influence perceptions regarding the quality of income tax assessments.

In addition, income tax officials in India do not appear to trust taxpayers either. For example, literature describes the ‘adversarial attitude of the tax administration towards taxpayers’, who are said to be viewed by many tax officials as ‘tax evaders’ (Rao, 2015, p. 30), and suggests that ‘there is a basic absence of trust in the taxpayer’ (Jain, 2016, p. 723). Interview data provides evidence that income tax officials treat taxpayers with suspicion, supporting the inference from the literature that officials are prejudiced against taxpayers.

Trust deficit can also develop between income tax officials and the ITD. Income tax officials do not trust the ITD owing to their fear of retaliation by the ITD. Interview data provides such evidence of intimidation or investigation of income tax officials for corruption. This evidence is in line with similar data from the literature (Thomas et al., 2017, p. 42). The fear of investigation by the ITD can lead to officials abdicating their responsibility to be objective and fair and instead playing it safe and passing the buck by erring in favour of the ITD to avoid being questioned. For instance, income tax officials may file meritless appeals to avoid being questioned by the ITD (Joumard et al., 2017, p. 31; Butani, 2016, p. 445).

Trust deficit between income tax officials and the ITD can thus lead to officials making unnecessary additions or denying legitimate deductions in income tax assessments, or officials filing income tax appeals without merit against decisions in favour of taxpayers, resulting in the proliferation of disputes and litigation (Thomas et al., 2017, p. 42). Income tax assessments and ITD filed appeals informed by trust deficit between the officials and taxpayers or between the officials and the ITD do not withstand scrutiny by the ITAT and the courts. Therefore, Indian bureaucratic culture, through trust deficit, again contributes to the low success rate of the ITD in income tax litigation before the ITAT as well as the courts.

To improve the success rate of the ITD in tax litigation, bureaucratic culture within the ITD needs to be transformed to one characterised by effective performance measurement, accountability, and informed trust between officials and taxpayers and officials and the ITD. While the Taxpayers’ Charter, adopted by the CBDT (which oversees the ITD) under section 119A of the *Income Tax Act* and unveiled by the Prime Minister of India in 2020 (Income Tax Department, 2020), is a step in the right direction, the success of the Taxpayers’ Charter depends on its implementation by the CBDT and its enforceability by taxpayers. The Charter (Income Tax Department, 2020) has the potential to institute accountability, improve performance management within the ITD,



and build trust between the ITD and taxpayers. However, the CBDT is yet to issue guidelines to facilitate the Charter's implementation.

## 6. IMPACT OF TECHNOLOGY

The impact of the Indian bureaucratic culture has been alleviated to some extent by the adoption of technology by the CBDT. For example, electronic processing of income tax returns by the Centralised Processing Centre and automated selection of income tax returns (in many cases) for scrutiny by the Computer-Assisted Scrutiny Selection system limit the number of taxpayers who need to interact with income tax officials (Interview T1; Interview A2; Interview L6). Also, electronic processing enables many taxpayers to receive refunds fairly quickly (Interview T1). However, the taxpayers whose returns have been selected for scrutiny and those whose refunds are delayed by income tax officials continue to be affected by the Indian bureaucratic culture. Therefore, while technology has reduced the number of taxpayers impacted by the Indian bureaucratic culture, it has not eased the impact of this culture on taxpayers who interact with income tax officials either electronically or in person.

In August 2020, the Indian government introduced the Faceless Assessment Scheme, under which assessments are conducted electronically without taxpayers having to visit the ITD (Ministry of Finance, 2020). Tax assessments under the Faceless Assessment Scheme seek to eliminate the human interface between the taxpayers and the income tax officials (Directorate of Income Tax, 2021). As the interviews conducted for this research took place between December 2020 and April 2021, prior to faceless assessments becoming common (after mid-2021), further research is required to evaluate the effectiveness of this scheme.

## 7. CONCLUSION

The theoretical model described in this article explains the low success rate of the ITD in income tax litigation. This model suggests that Indian bureaucratic culture suffers from poor accountability and ineffective performance management. In the context of the ITD, these characteristics contribute to the poor quality of income tax assessments made and appeals filed by income tax officials. For example, the inclination of income tax officials to abdicate their responsibility by playing it safe and passing the buck, tax officials disregarding judicial precedent, and inadequate representation of the ITD before the ITAT and the courts reflect poor accountability and ineffective performance management in the ITD. Improper revenue targets are another sign of ineffective performance management within the ITD.

In addition, income tax officials are perceived to be prejudiced against taxpayers and partial towards the ITD and as not always following income tax rules and procedures. The prejudiced and biased mindset of these officials leads to a trust deficit between the officials and taxpayers. There is also a trust deficit between income tax officials and the ITD due to the latter retaliating against the former for making legitimate assessments that benefit taxpayers or for not filing appeals, even those without merit, against taxpayers. This fear of retaliation by the ITD may lead to income tax officials abdicating their responsibility to be objective and fair. The trust deficit in both cases contributes to income tax assessments of a poor quality and the ITD filing appeals with limited merit or even those without any merit.

The theory proposed by this article and factors informing the development of the theoretical model can enable the CBDT to undertake reforms within the ITD to instil accountability, improve performance management, and foster trust within the ITD. For example, insights from this article can enable the CBDT to develop appropriate rules and procedures to guide income tax officials in adhering to the Taxpayers' Charter and empower taxpayers to enforce the Taxpayers' Charter when officials fall short of the Charter's promise.

## 8. LIMITATIONS

The limitations of this research include those typically associated with qualitative research. First, the theory of Indian bureaucratic culture proposed in this article is based on research corresponding to the ITD and needs to be tested in the context of other Indian government departments to examine the generalisability of the theory more broadly. Next, the sampling used to select interviewees and survey respondents is not random, which further limits the generalisability of the research findings, and therefore that of the proposed theory. Third, although multiple sources of data have been referred to in this research to corroborate the research findings, some of the results are based only on interview data. Further, the theory is more likely to apply to jurisdictions that are culturally similar to India and perform poorly in the context of assessing income tax and defending the assessments in the appellate fora.

## 9. FUTURE RESEARCH

As this research studied the direct tax administration system in India, specifically, the income tax system, researching similar issues in the indirect tax system can help improve the predictive power of the theory of Indian bureaucratic culture. The indirect tax administration in India also suffers from a low success rate in litigation (Ministry of Finance, 2018, p. 138).

Future research can also investigate the impact of the Taxpayers' Charter (launched in August 2020) on accountability, performance management, and trust building within the ITD. At the time of this writing, the CBDT was yet to publish guidelines to enforce the Charter, nor had the CBDT published any data related to the impact of the Charter on tax administration.

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# Globalisation and tax administration – a New Zealand perspective

Adrian Sawyer\*

## ***Abstract***

The work of the G20 and OECD in relation to Base Erosion and Profit Shifting (BEPS) 1.0, and more recently with BEPS 2.0, has shown unprecedented levels of cooperation between revenue authorities globally. While the work to date has increased the sharing of information and improved cooperation on cross-border investigations, it has also led to enhancements (some currently at the policy refinement stage) that expand the tax base (such as new taxing rights for jurisdictions where value has been added), and buttress existing core tax concepts (such as residence and source). This article, taking the form of a case study, examines and reflects upon how these policy developments are impacting revenue authorities, with a focus on New Zealand. It traverses the administrative direction and political influences over the last six to eight years, within the wider context of Inland Revenue's Business Transformation project (BT) that was completed in 2022. Digitalisation has been critical to the way Inland Revenue has navigated the challenges it faces, many of which are common to tax administrations globally. In general terms, New Zealand is a 'strong supporter' of the work of the G20/OECD with respect to BEPS but would not be considered to be a leader. Being a small jurisdiction, New Zealand is less impacted by BEPS issues, but nevertheless it faces its fair share of administrative challenges, including the ongoing impact of COVID fiscal reforms on tax administrations.

**Keywords:** BEPS, digitalisation, globalisation, New Zealand, OECD, tax administration

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## 1. INTRODUCTION

Much has been made concerning the unprecedented levels of cooperation between jurisdictions and their revenue administrations in responding to the challenges of base erosion and profit shifting (BEPS). While the early lead was taken by the G20 nations, finding ways to respond to the challenges was assigned to the Organisation for Economic Co-operation and Development (OECD). Over the last decade or so the world has seen an extensive array of policy proposals, reports, public debates and announcements, as reflected in BEPS 1.0 and BEPS 2.0 (the latter ongoing as at the time of writing). A key player in the process has been the tax administrations of the OECD member countries along with those that form the wider 140-plus member OECD/G20 Inclusive Framework on BEPS.<sup>1</sup> Representatives have been involved in discussions (in person and virtually) that have led to proposals requiring debate and decisions concerning future ratification by Inclusive Framework members.

Running alongside these developments is the impact of globalisation. From a New Zealand perspective, former New Zealand Minister of Revenue Peter Dunne described globalisation as follows:<sup>2</sup>

I see globalisation as meaning an increase in international trade, the flow of goods and services between countries; international capital flows; and the movement of people (especially those with skills) across national borders.

Thus, while globalisation extends beyond economic issues to include societal and other (non-financial) impacts, this article will principally limit its focus to the economic impacts of globalisation as it impacts tax administrations, with particular consideration on the impact of digitalisation. In a tax context, digitalisation includes the following:<sup>3</sup>

Tax digitalisation then, as we define it, is not just converting paper forms into PDFs to upload on a government website. True digitalisation has to be revolutionary, considering not only how taxpayers complete their filings, but what is taxed, and how the authority can leverage powerful data pipelines to complete and audit taxes without a filing being made.

Globalisation is a major issue in that it signifies a far-reaching intensification of relations between countries and between the individuals that inhabit them. Avi-Yonah<sup>4</sup> reflects on the advent of globalisation as it emerged in the 1980s and then digitalisation from the 1990s, and how these have impacted upon the international tax regime. What has emerged is a new economic digital divide with a varied impact on nations and tax administrations. To be clear, digitalisation and globalisation work closely together, and while it is possible that an economy may be highly digitalised but not globalised, this is unlikely today. The opposite, however, is possible, as there may be globalised economies that are not highly digitalised due possibly to internal resource constraints. Furthermore, it is the author's view that while digitalisation is a process that facilitates

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<sup>1</sup> See further OECD, 'Members of the OECD/G20 Inclusive Framework on BEPS' (updated 15 November 2023), <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>.

<sup>2</sup> Hon Peter Dunne, 'Globalisation and Its Impact on National Revenue' (Speech to the Globalisation and Public Policy Conference, 11 August 2010).

<sup>3</sup> Institute of Chartered Accountants in England and Wales (ICAEW), *Digitalisation of Tax: International Perspectives* (ICAEW, 2019) 2.

<sup>4</sup> Reuven Avi-Yonah, 'International Taxation, Globalization, and the Economic Digital Divide' (2023) 26(1) *Journal of International Economic Law* 101.

greater globalisation, it is not a necessary condition given that globalisation existed before digitalisation was prevalent across the world.

At this point, in order to provide a greater focus on the direction of this article, it is useful to set out the research question to be addressed, namely: *How have globalisation and digitalisation impacted tax administration in New Zealand?*

It is acknowledged that the article provides a largely descriptive synopsis of research in the field of globalisation and digitalisation with a focus on New Zealand. Its principal contribution is to contextualise what has been occurring in New Zealand, an under-researched jurisdiction, within global developments. Exploratory case study research not only provides insights that emerge within the case at hand, but offers perspectives that may be relevant to other jurisdictions and to the global literatures on globalisation and digitalisation within a tax administration context.

As will be discussed further in section 2 of the article, this article, after first exploring globalisation and digitalisation from a global perspective, utilises an exploratory single country case study to evaluate how New Zealand's tax administration has responded to the impact of globalisation and digitalisation, taking a tax policy lens. The remainder of this article is organised as follows. Section 2 provides the rationale for taking an exploratory case study approach, and outlines the application of a policy lens. It also sets out the research question for this study. Section 3 contains the discussion and analysis of globalisation with a focus on the impact of BEPS generally, and then more specifically the New Zealand tax administration's response, and then the impact arising from globalisation and digitalisation. This is followed by further discussion incorporating the author's reflections on the preceding analysis, including a tentative assessment of what the future may hold for New Zealand in section 4. Section 5 concludes the article, and sets out its limitations and suggestions for future research.

## 2. LITERATURE AND METHODOLOGY

In providing some meaningful analysis of the impact of globalisation on tax administration, one needs to adopt an approach that balances the demands of taking a high-level assessment with sufficient detail to ascertain the impact within one or more jurisdictions. This article takes an exploratory case study approach focusing on one jurisdiction, New Zealand, for which the author is familiar. In adopting a sole case study approach, the design and analysis considerations are of significant importance, along with the description of events or the scenario(s) under review.<sup>5</sup> The need for a case study frequently arises out of the desire to understand complex social phenomena. It enables the researcher to investigate and review in a holistic and meaningful way the various characteristics of real-life events. However, while the article contains a single country case study, it has wider ramifications for other jurisdictions, such as Australia, where other researchers may compare experiences and lessons between the two jurisdictions concerning how their respective tax administrations have responded to globalisation and digitalisation.

In terms of other potential research methods, apart from undertaking a comparative case study (as opposed to sole case study) approach, interviews or focus groups could be

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<sup>5</sup> Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sage Publications, 6<sup>th</sup> ed, 2017).



conducted to explore the perspectives and views of influential individuals and/or representatives of directly affected groups. As such this article undertakes comprehensive document analysis using a policy lens. This involves working through policy material, legislation, guidance material, academic and other commentaries, which relate to globalisation and digitalisation globally and within a single jurisdiction (New Zealand). Instead of focusing on the impact of globalisation on tax administration through a policy lens, an empirical analytical approach could also be employed, such as by analysing tax revenue information and projections, to explore financial data and other relevant statistics. The major issue here is gaining access to this (limited) data.

From a theoretical perspective, a standard approach to understanding the role of major actors in tax policy is that of institutionalism or more specifically Institutional Theory. Institutional Theory considers the processes by which structures, including schemes, rules, norms and routines, become established as authoritative guidelines for social and economic behaviour. For example, prior research has used Institutional Theory as the theoretical framework to explain the development and application of various major disciplines or activities, such as accounting, and of particular relevance to this article, taxation. Scott states that institutions ‘comprise regulative, normative, and cultural-cognitive elements that, together with associated activities and resources, provide stability and meaning to social life’.<sup>6</sup> The three elements coexist within institutional settings with varying degrees of influence. The regulative structures control and constrain behaviour by providing a written (or in some instances unwritten) framework for what must be done, which is typically in the form of laws, rules and structures, along with monitoring to ensure adherence to the rules. The normative aspects of institutions represent obligations and binding expectations based on norms, values and roles that influence the behaviour. It also involves goals and objectives, and how to achieve them. The cultural-cognitive elements involve social contexts, traditions, cultures, and also individual and subjective interpretations and assumptions.

In the context of this research, taxation is viewed as a social and political activity within itself (in addition to the economic impact), with the intention being to understand the economic, institutional, political and social environment of taxation policy and administration.<sup>7</sup> How has this been utilised in a taxation context in the literature? McKerchar,<sup>8</sup> writing with an accounting, law and taxation audience in mind, describes Institutional Theory as a variant of Critical Theory. This article does not seek to debate this point but notes that the analysis within the article takes a critical focus within the context of Institutional Theory.

In a tax or fiscal context, Marriott and Holmes provide an excellent analysis of Institutional Theory and how it can be applied to understanding tax policy for retirement savings.<sup>9</sup> In particular they comment on two variants of the theory, namely Old

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<sup>6</sup> See W Richard Scott, *Institutions and Organizations: Ideas, Interests, and Identities* (Sage Publications, 4<sup>th</sup> ed, 2014) 56.

<sup>7</sup> Aspects of the discussion in this section of the article draw upon themes present in the work of Ceray Aldemir and Tuğba Uçma Uysal, ‘Public Accounting Reform from Institutional Theory Perspectives: Case of Turkey’ in Soner Gokten (ed), *Accounting and Corporate Reporting – Today and Tomorrow* (IntechOpen, 2017) 277.

<sup>8</sup> Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters/Lawbook Company, 2010).

<sup>9</sup> Lisa Marriott, and Kevin Holmes, ‘Exploring the Application of Institutional Theory to Tax Policy for Retirement Savings in New Zealand and Australia’ (2006) 24(2) *Law in Context* 78.

Institutionalism and New Institutionalism (and their subcategories). This theoretical approach is separate to the particular choice of theoretical analyses or principles that may be employed to analyse tax policy choices. An evaluation, when based on analysis of documents and actions taken, is necessarily limited compared to utilising more extensive in-depth methodological analysis, such as interviews and behavioural analysis.

Marriott, in her published dissertation, demonstrates how a comprehensive application of Institutional Theory can be used to explain the politics behind retirement savings through a comparative case study of Australia and New Zealand.<sup>10</sup> Marriott's work is historically focused, whereas this study seeks to take a more contemporary and potentially forward focused approach, and as such it aligns more closely with New Institutionalism. This 'split' in Institutional Theory recognises the evolution of thought as more researchers apply and test the original theory and seek to refine it to be more relevant to their analysis. For example, this may depend upon whether the focus is on historical developments (Old Institutionalism usually being more relevant) or on more contemporary events (where New Institutionalism is better suited).

In the context of this article, the major institutions involved are the G20/OECD, and more generally, the Inclusive Framework (along with its constituent members, represented in most instances by revenue authority personnel). In this regard, while no single country or jurisdiction has the 'authority' of an institution, the United States is the most significant jurisdiction in terms of its influence on global tax policy development.

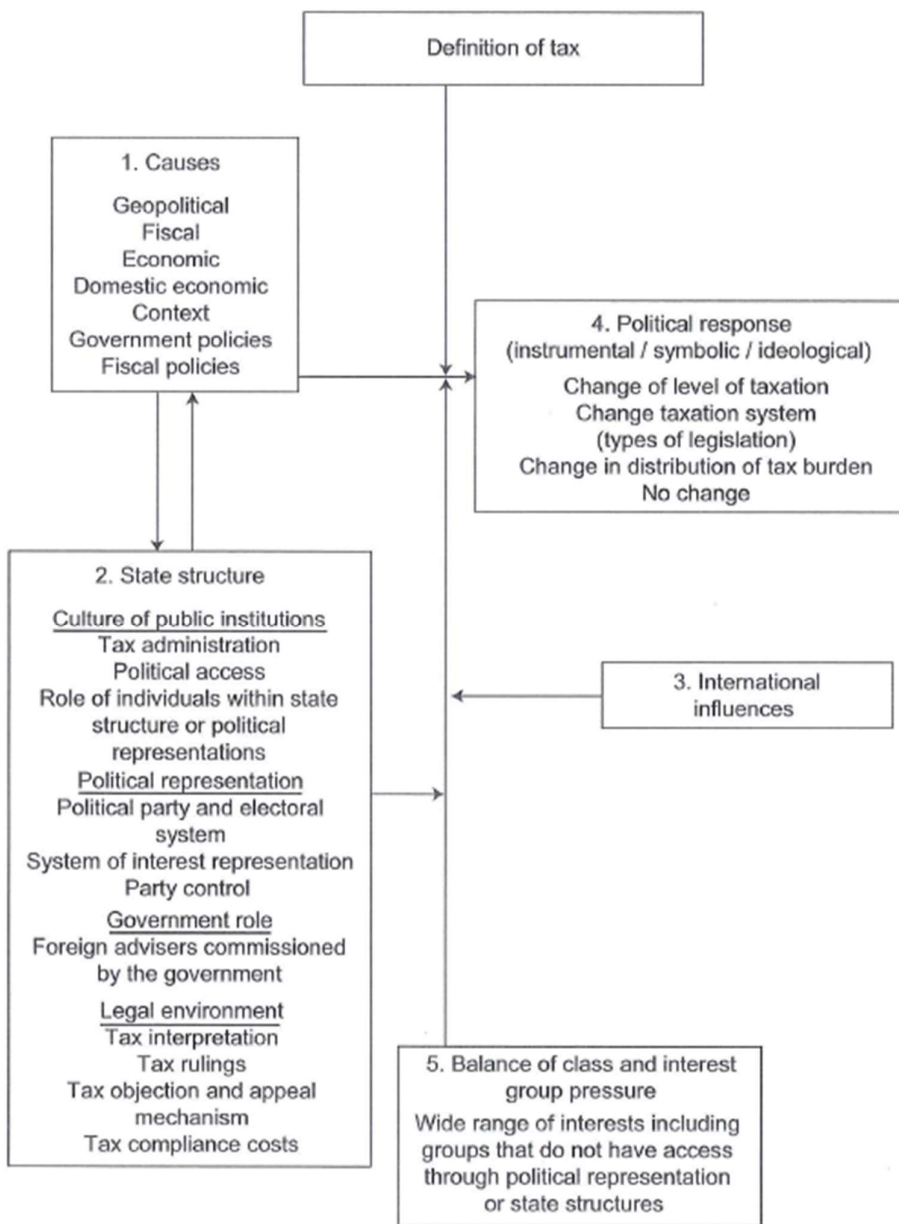
Focusing more specifically on tax policy and administration, the contribution of Heij<sup>11</sup> is particularly useful in that this includes the roles and linkages of the major actors, such as the states, globalisation, political responses and other influences. This model is set out in Figure 1.

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<sup>10</sup> Lisa Marriott, *The Politics of Retirement Savings Taxation: A Trans-Tasman Comparison* (CCH Australia and Australasian Tax Teachers Association, 2010).

<sup>11</sup> Gitte Heij, 'Theoretical Framework for Applied Research on Tax Policies' in Lynne Oats (ed), *Taxation: A Fieldwork Research Handbook*, (Routledge, 2012) ch 23.

**Fig. 1: Revised Model for Research**



Source: Gitte Heij, 'Theoretical Framework for Applied Research on Tax Policies' in Lynne Oats (ed), *Taxation: A Fieldwork Research Handbook* (Routledge, 2012) 202.

In the context of this article, rather than focusing on the definition of tax, the focus is on BEPS issues. For box 1, all of the content is relevant to the analysis in this article, with box 2 drawing attention to the situation in New Zealand as the case study jurisdiction of interest. The international influences for box 3 here are predominantly globalisation and digitalisation (couched principally within the context of BEPS), with the content of box 4, using a tax policy lens, focusing on the impact on tax administration. Box 5 will have a minor role for the purposes of this article other than acknowledge that there are New Zealand domestic groups that will seek to exert pressure on the changes in tax administration.

Before undertaking the ‘impact’ analysis, it remains important to set out once again the research question that this study seeks to answer. Specifically, the research question to be answered is:

**RQ:** *How have globalisation and digitalisation impacted tax administration in New Zealand?*

### 3. THE IMPACT OF BEPS 1.0 AND 2.0 – GLOBAL AND NEW ZEALAND PERSPECTIVES

#### 3.1 A global overview

It is useful to briefly review what is meant by BEPS in the context of this article, taking a global perspective, before focusing on New Zealand as the jurisdiction of interest. Following this discussion, the article will look at the issues facing tax administrations, especially as a result of increased digitalisation, from a general perspective and then move the focus to how this has influenced and impacted upon New Zealand. Much has been written about BEPS elsewhere and it is not the intention of this article to go into any detail in this regard.<sup>12</sup> However, some background context is necessary.

The G20 nations engaged the OECD in the early 2010s to make recommendations for combating international tax base erosion and profit shifting (BEPS) activities from a global perspective. This reflected a growing view that multinational enterprises’ (MNEs’) behaviour was focused on locating profits in low-tax jurisdictions and contributing little by way of tax in proportion to their global pre-tax profits. Most jurisdictions concluded that this type of tax behaviour by MNEs was endemic. Furthermore, this behaviour (often labelled as ‘tax avoidance’) was not viewed as relating to selected sectors of the global economy or to individual enterprises. By definition it is not constrained by jurisdictional boundaries. The OECD, with the establishment of the Inclusive Framework (along with its members), released draft reports in September 2013 with 15 action plans to address BEPS. By October 2015, 15 Actions in 13 final reports were released. This has become known as BEPS 1.0. Overall,

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<sup>12</sup> See for example, Sergio André Rocha and Allison Christians (eds), *Tax Sovereignty in the BEPS Era* (Kluwer Law International, 2017); Sam Sim and Mei-June Soo (eds), *Asian Voices: BEPS and Beyond* (IBFD Publications, 2017); Michael Lang, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringer (eds), *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (Kluwer Law International, 2018); Werner Haslehner, Georg Kofler, Katerina Pantazatou and Alexander Rust (eds), *Tax and the Digital Economy: Challenges and Proposals for Reform* (Kluwer Law International, 2019); Allison Christians and Laurens van Apeldoorn, *Tax Cooperation in an Unjust World* (Oxford University Press 2021); Craig Elliffe, *Taxing the Digital Economy: Theory, Policy and Practice* (Cambridge University Press, 2021); Andreas Perdelwitz and Alessandro Turina (eds), *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative* (IBFD Publications, 2021).

the intention was to prevent double taxation; prevent no or low taxation by shifting of profits, and to ensure fair share of tax revenues.

A notable absence in BEPS 1.0 was any detailed proposals to deal with Action 1 – the digital economy. Addressing the tax challenges arising from digitalisation is a key policy issue today and is likely to be one for some years to come. BEPS 2.0 (focusing on addressing the issues of the digital economy), is arguably the greatest single phenomenon to shape tax activities/behaviours and the responses of tax administrations to all of the BEPS actions. The work remains ongoing but potentially it is close to finalisation. Several other actions have had a major influence, including the four minimum standards (Actions 5, 6, 13 and 14), along with Actions 8-10 focusing on transfer pricing issues, Action 11 (the data gathering processes) and Action 15 with the development of the multilateral instrument (MLI).<sup>13</sup>

Overall, the espoused intention behind the OECD's approach is to equip governments (that choose to take up the tools) with the domestic and international instruments needed to tackle cross-border tax avoidance. This is designed to 'ensure' that profits are taxed where economic activities generating the profits are performed and where value is created. Concurrently, it is intended that the tools will give businesses greater certainty by reducing disputes over the application of international tax rules and standardising compliance requirements. The OECD is also taking a role in monitoring of jurisdictions' implementation as Inclusive Framework members, including the use of peer reviews.

However, the process is only as effective as the level of agreement between nations, along with domestic uptake through ratification and amendments to domestic legislation by member jurisdictions, and commitments that lead to action to give effect to the tools. Throughout the process each jurisdiction needs to ascertain the degree to which it is willing to adjust its level of sovereignty over taxation policy, in order to not only improve its own interests, but the wider collective interests of other Inclusive Framework members.

### 3.2 The OECD as the key institutional player

With the underlying theoretical framework for this article adopting Institutional Theory, it is important to consider how the OECD has such a major influencing role and what might be its future – might it be the future international tax organisation? In considering this question, Tychmańska<sup>14</sup> provides a comprehensive overview of the history and major developments in the life of the OECD. She observes that the OECD's approach regarding dealing with international tax issues has evolved from a preference to implement defensive measures on behalf of its members towards the non-OECD Member States that contributed to the tax base erosion. Over time it realised that this approach is not the most appropriate for addressing the problems faced by international taxation, and that developing countries' voices need to be heard, and so it began to engage in dialogue with developing non-OECD Member States. This has led to many initiatives to cooperate with the non-OECD Member States and provide assistance to some developing countries that lack technical capacity. The Inclusive Framework is an example of this change in approach.

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<sup>13</sup> For further details on the OECD's actions, see generally <https://www.oecd.org/tax/beps/about/>.

<sup>14</sup> Aleksandra Tychmańska, 'The OECD as the Future International Tax Organization: An Inevitable Course of Events?' (2021) 49(8-9) *Intertax* 614.

Furthermore, Tychmańska observes, the OECD continues to rely on soft power consensus mechanisms, although with BEPS 1.0, approaches such as the MLI show that agreements of binding character may be established. This is reflective of the OECD launching a number of multilateral projects creating the platforms for cooperation with non-OECD Member States. However, the OECD is still adapting its approach to international tax policy. Going forward, the current author expects to see the OECD become an informal global/international tax organisation using soft power mechanisms (especially in the absence of any specifically created world tax organisation<sup>15</sup>). In this sense, the OECD is a major institutional actor in the framework as set out in Figure 1.

More on point with respect to BEPS 2.0, Plekhanova<sup>16</sup> argues, using a case study approach (using the social dimension of fairness as a focus), in the context of the OECD's BEPS Action 1 narrative (as seen through the Inclusive Framework), that the OECD's narrative is inconsistent with the various states' narratives and as such is unjustified. In particular, she argues that it lacks fidelity (story integrity) and is only weakly persuasive, at least where the fairness argument is concerned. However, of particular relevance to this article is her conclusion that these flaws may not affect the OECD's legitimacy as a standard-setter and consensus facilitator. However, they may undermine the legitimacy of the OECD standards that are founded on fairness arguments, especially if those standards affect the distribution of the benefits and costs of tax cooperation.

Plekhanova supports this by asserting that the normative legitimacy of the OECD (its claim to a right to rule, or legally sanctioned legitimacy) is weak because, like most intergovernmental organisations, the OECD lacks coercive power (it can be persuasive at most). Furthermore, in the case of the non-OECD members of the Inclusive Framework, there is nothing akin to normative legitimacy since the Inclusive Framework is not premised on any binding agreement (notwithstanding that the OECD is a formally established body). She further applies a framework that:<sup>17</sup>

... recognizes the distinction between normative and sociological legitimacy, and views the legitimacy of institutions as a complex phenomenon that can be legally sanctioned (a regulative pillar), morally governed (a normative pillar), and/or comprehensible, recognizable, and culturally supported (a cultural-cognitive pillar). In other words, *the legitimacy of institutions can rest on the rule of law, a shared moral or social norm, and a shared belief, if the rule of law is grounded in both shared norms and beliefs that underlie those norms.*

Thus, in order to legitimise its governance in the eyes of all Inclusive Framework members (or at a minimum to secure their agreement to adopt the standards developed during the BEPS project), the OECD needs 'its strategic narratives to resonate with the values of a more diverse audience than the OECD group membership'.<sup>18</sup> This is essential for the OECD to have a realistic chance to secure widespread cooperation. A

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<sup>15</sup> See for example, Adrian Sawyer, *Developing a World Tax Organisation: The Way Forward* (Fiscal Publications, 2009).

<sup>16</sup> Victoria Plekhanova, 'The Legitimizing Effects of the OECD's Fairness-Based Narratives' (2022) 70(4) *Canadian Tax Journal* 785.

<sup>17</sup> *Ibid* 789 (footnote references removed, emphasis added).

<sup>18</sup> *Ibid* 809.

question to ponder is if the OECD had not assumed the role that it has, what organisation might have filled the void (for example, the United Nations)?

BEPS 2.0 is a pivotal phase in the OECD's evolution and ongoing impact on international taxation. It creates 'winners' and 'losers' amongst jurisdictions, which may not facilitate widespread cooperation by those that believe they are worse off. It has a significant impact on tax sovereignty and tax competition. As Harpaz concludes:<sup>19</sup>

This Article examined the OECD's proposed rules to address the tax challenges of digitalization and profit-shifting. It argued that the *two-pillar solution resulted from a political compromise that undermines tax sovereignty and overlooks the role of developing countries*. Reducing profit-shifting is an important duty. MNEs should be required to pay their fair share of taxes and report profits where they are earned. However, the OECD BEPS Project largely ignored broader institutional issues in the international tax framework. Taxes on MNEs will increase – mostly under Pillar Two – yet traditional tax norms, including profit allocation principles, have not been meaningfully reconsidered.

The OECD inherently represents the interests of the world's developed economies and has historically disregarded the interests of developing ones. While the OECD dominates global tax policy, it continuously neglects the effects of its agenda on non-members who are excluded from the essential stages of policy design and diplomatic negotiation. Thus, this Article proposed ways to *promote inclusivity in international tax policymaking. It recommended expanding voting rights for non-members within the OECD. Furthermore, it supported a newly created intergovernmental process within the United Nations that should focus on revisiting the traditional norms and promoting the distinct interests of developing countries*.

Hearson and co-authors<sup>20</sup> provide an insightful analysis of how the Inclusive Framework operates. The authors set out to reconceptualise what is meant by 'regulatory capacity', arguing that nation states can overcome limited market power or influence through using socio-technical resources, namely expertise and professional networks. In studying the Inclusive Framework, they focus on how the 140-plus members participated in negotiations through analysing attendance data and interviews with dozens of participants. A key emphasis was the extent and sources of developing countries' influence. They conclude that socio-technical resources allow individuals from lower income (developing) countries to achieve limited yet significant successes, thereby to use the parlance 'punching above their weight in global governance'.

Elliffe asserts in his 2022 article that the proposed changes to the international tax regime (through BEPS and the 2020s compromise) are fundamental and brave in the

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<sup>19</sup> Assaf Harpaz, 'International Tax Reform: Who Gets a Seat at the Table?' (2023) 44(4) *University of Pennsylvania Journal of International Law* 1007, 1063 (emphasis added).

<sup>20</sup> Martin Hearson, Rasmus Corlin Christensen and Tovony Randriamanalina, 'Developing Influence: The Power of "the Rest" in Global Tax Governance' (2023) 30(3) *Review of International Political Economy* 841.

sense that, on balance, they represent positive changes to the international tax regime.<sup>21</sup> Elliffe also observes that:<sup>22</sup>

It is vital to continue to examine whether the Inclusive Framework is genuinely ‘inclusive’. If it is, then all of the 2020s Compromise is being facilitated by the increasingly multilateral processes of the institutions, instruments, and interpretation of tax law (soft and hard), that is, consensus international tax law. *The future of international tax will have increasing focus on the three elements discussed, more effective source taxation, multilateralism and cooperation. If it is not inclusive, then we can expect that the future of international tax will be very uncertain.*

Noonan and Plekhanova conclude their analysis of the compliance challenges that BEPS 2.0 faces for successful implementation as follows:<sup>23</sup>

The likely impact of the [Two Pillar Solution] on state (and taxpayer) behaviour cannot be determined from within the four walls of the BEPS documentation. *State interests, institutions, legitimacy and capacity are likely to impact the implementation of the TPS.* The decisions of states will affect and be affected by those of others. The international law and international relations literatures have explored the circumstances in which international rules have more or less compliance pull.

*If fully implemented, the TPS would represent a new and potentially significant enhancement of the OECD’s public authority in the area of international tax and would increase the influence of major jurisdictions over domestic tax systems simultaneously throughout the world. Putting aside the substantive merits of the TPS, the increased influence of the developed countries over the tax policy of the world raises legitimacy concerns.* These concerns are attenuated by the challenges inherent in the global implementation of the TPS. Agreed international dispute settlement seems likely to have limited impact outside of the Amount A rules, where the proposed dispute settlement mechanism may be seen as undermining tax sovereignty too much. Despite its presentation as a package, the TPS appears to be held together loosely. The obstacles to full implementation of the TPS in major countries, in particular the US, may mean the TPS will lead an uncertain life.

Building upon the earlier discussion in this article, Li introduces her paper in a provocative manner stating:<sup>24</sup>

With much pomp and ceremony, it was announced that member jurisdictions of the G20/OECD BEPS Inclusive Framework ‘agreed to a two-pillar solution to address the tax challenges from the digitalization of the economy’ (the ‘Two-Pillar Agreement’). *This agreement has been hailed by some as ‘historic’,*

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<sup>21</sup> Craig Elliffe, ‘The Brave (and Uncertain) New World of International Taxation under the 2020s Compromise’ (2022) 14(2) *World Tax Journal* 237.

<sup>22</sup> *Ibid* 260 (emphasis added).

<sup>23</sup> Chris Noonan and Victoria Plekhanova, ‘Compliance Challenges of the BEPS Two-Pillar Solution’ [2022] (5) *British Tax Review* 512, 548-549 (emphasis added).

<sup>24</sup> Jinyan Li, ‘The Global Tax Agreement: Some Truths and Legal Realities’ (Osgoode Hall Law School of York University Working Paper, 2022) 1 (emphasis added; footnotes omitted).



*'momentous', 'revolutionary', but criticized by others as 'harmful to developing countries', cartelistic power grabbing by a few powerful countries, or neocolonialism. So, is the agreement a cause for celebration or the opposite? What is the chance of the Agreement become real law?*

Through Li's exposition of a number of 'truths' and 'legal realities' about the two-pillar solution, the challenges and 'hype' surrounding BEPS 2.0 are laid bare. Li's conclusion brings the challenges into stark reality:<sup>25</sup>

For anyone interested in international taxation, the current moment is really exciting because we are witnessing a multilateral, open process attempted to transform a century-old regime. *The outcomes of this process are not yet clear or certain because the fundamentals that shaped the existing system remain more or less unchanged in the past 100 years: each state is fiscally responsible and accountable to its citizens in its own ways and there is no international government that has the power to impose taxes.* Taxing rights are directly translated into revenues to pay for public spending on hospitals, social welfare and national defence, among others. Because Pillar One and Pillar Two distribute taxing rights among jurisdictions and such distribution is, by definition, a zero-sum game, they produce winners and losers among states. *Reaching a genuine and legally enforceable global agreement requires participating states to feel that they all win something. Finding a way for each of the 140 jurisdictions to feel that they are a 'winner' may be akin to chasing a rainbow.*

With these challenges it is important to explore and discuss the impact of globalisation more closely in the context of how it has shaped digitalisation.

### 3.3 The impact of digitalisation

Digitalisation has become in many respects an enabler for tax administrations in terms of their interactions with taxpayers and tax practitioners, while also facilitating many of the challenges that are the focus of BEPS 2.0. Strauss and co-authors<sup>26</sup> evaluate the digital response of tax authorities in a number of jurisdictions, including New Zealand, to optimise tax administration within the wider digitalised economy. They observe that the legislative and policy responses to the digitalisation of the economy establish a legal right for governments via their tax authorities to collect taxes; what is of utmost importance is an optimised tax administration system to administer this legal right. The authors find discrepancies in the level of response and the level of sophistication of tax administration systems implemented among tax authorities globally to address this new digital world. None of the participating tax authorities' tax administration systems reflect an optimised tax administration system, as defined, within the digitalised economy. In order to move forward a standard set of elements to undertake a global assessment, a set of minimum digital maturity standards and an international consensus on what is an 'optimised' tax administration system are needed.

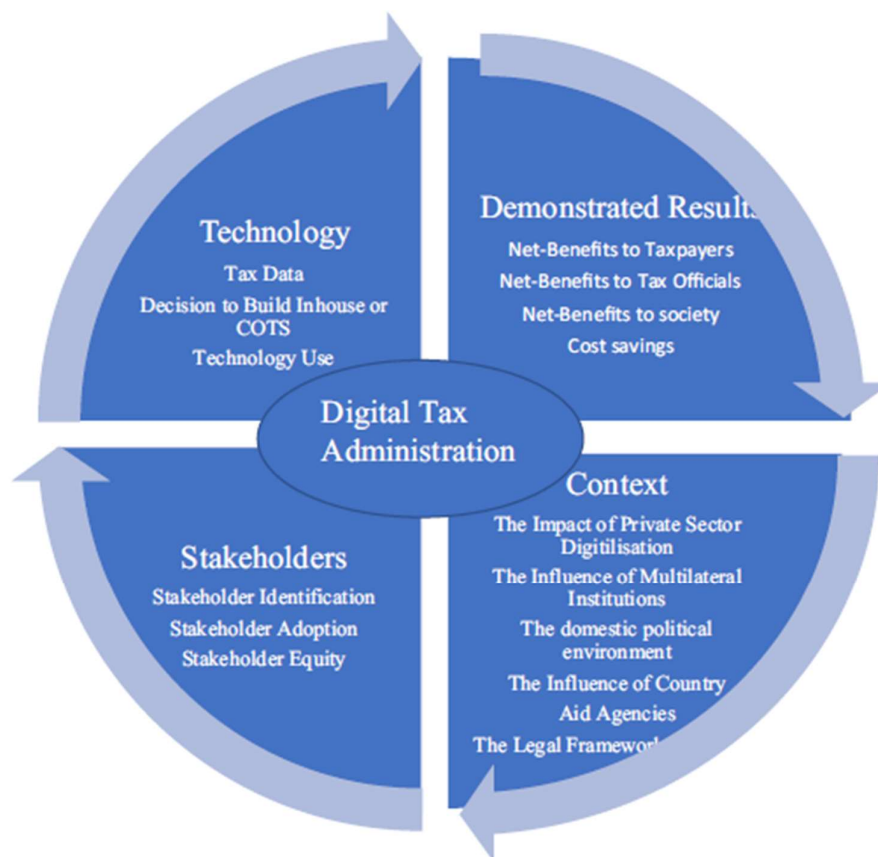
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<sup>25</sup> Ibid 14-15 (emphasis added).

<sup>26</sup> Helena Strauss, Tyson Fawcett and Danie 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.

Bassey and co-authors<sup>27</sup> undertake a systematic review of around 100 publications across several literatures, including digital taxation, taxation, and information systems (IS), from which they develop a comprehensive conceptual framework to improve the success of digital services in tax administration. The authors identify 15 themes around four categories; see Figure 2.<sup>28</sup>

**Fig. 2: Digital Tax Administration Conceptual Framework**



Source: Edidiong Bassey, Emer Mulligan and Adegboyega Ojo, 'A Conceptual Framework for Digital Tax Administration – A Systematic Review' (2022) 39(4) *Government Information Quarterly* 101754, Fig. 10.

<sup>27</sup> Edidiong Bassey, Emer Mulligan and Adegboyega Ojo, 'A Conceptual Framework for Digital Tax Administration – A Systematic Review' (2022) 39(4) *Government Information Quarterly* 101754.

<sup>28</sup> *Ibid* 10-11.

The linkages to the framework for this research are captured within Figure 2, especially with respect to the stakeholders and overall context. The authors conclude:<sup>29</sup>

Overall, the conceptual framework is described as an ecosystem, which intends to suggest *thinking of each theme and category as part of a wider whole, in which each theme is interdependent*. Furthermore, the arrows in the conceptual framework reflect that *digital services in tax administration is constantly changing and that changes in one part of the framework due to new laws or technological development in a particular country context will have spillover effects on other parts of the framework*. The study is one of the first to develop a conceptual framework to integrate themes in designing effective digital services in tax administrations. ...

Various proposals for addressing the concerns of digital tax administrations and the impact of digitalisation have been suggested beyond those of the G20/OECD, such as a digital data tax (DDT) to create a significant source of tax revenues for market jurisdictions (utilising existing tax theory and principles), that is overseen by a new global internet tax agency.<sup>30</sup> Proposals beyond those being put forward by the G20/OECD are beyond the scope of this article.

The preceding analysis sets the scene for exploring the impact of globalisation (including digitalisation) on tax administration in a New Zealand context.

### 3.4 A New Zealand perspective

New Zealand, as a long-term member of the OECD from the early 1970s, has been a dedicated supporter of the OECD's work, and sought to work for the greater good where it may not stand to gain significantly as a nation. New Zealand is well known for having an efficient and robust tax system. In some respects, it is a world leader in tax policy and reform (such as with its generic tax policy process – GTPP).<sup>31</sup> However, in other areas, including when it comes to international tax, New Zealand usually prefers to be a follower rather than a leader or early adopter. Under successive governments during the last 20 to 25 years, New Zealand has supported the work of the OECD, ensuring that it is – in all material respects – compliant with OECD recommendations and guidance. New Zealand has also succumbed to the pressure of much larger nations, such as the

<sup>29</sup> Ibid 13 (emphasis added).

<sup>30</sup> See for example, Cristian Óliver Lucas-Mas and Raúl Félix Junquera-Varela, *Tax Theory Applied to the Digital Economy: A Proposal for a Digital Data Tax and a Global Internet Tax Agency* (World Bank Group, 2021).

<sup>31</sup> See for example, Adrian Sawyer, 'Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation – Some Recent Developments' (1996) 2(1) *New Zealand Journal of Taxation Law and Policy* 17; Michael Dirkis and Brett Bondfield, 'At the Extremes of a "Good Tax Policy Process": A Case Study Contrasting the Role Accorded to Consultation in Tax Policy Development in Australia and New Zealand' (2005) 11(2) *New Zealand Journal of Taxation Law and Policy* 250; Peter Vial, 'The Generic Tax Policy Process: A "Jewel in Our Policy Formation Crown"?' (2012) 25(2) *New Zealand Universities Law Review* 318; Adrian Sawyer, 'Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of "Law and Politics"' (2013) 28(2) *Australian Tax Forum* 401; Adrian Sawyer, 'Tax Policy Without Consultation: Is New Zealand on a "Slippery Slope"?' (2022) 37(4) *Australian Tax Forum* 481 ('Tax Policy Without Consultation'); Adrian Sawyer, 'Navigating Challenging Times: A New Zealand Perspective' (2023) 29(4) *New Zealand Journal of Taxation Law and Policy* 341. See also Inland Revenue, 'Tax and Social Policy Engagement Framework' (August 2019).

United States, through enacting legislation to give effect to the Foreign Account Tax Compliance Act (FATCA).<sup>32</sup>

As this author and McGill observe:<sup>33</sup>

New Zealand has actively engaged with the G20/OECD BEPS program. *New Zealand's approach to BEPS generally is to work with the OECD (unsurprising given it is a member) to ensure that its international tax rules provide a robust way of taxing MNEs.* This needs to be balanced against ensuring that NZ remains a good place to base an exporting business, as well as to encourage inward investment given that NZ is a net capital importer.

Overall, New Zealand has also worked to ensure that the reforms needed to the domestic tax system to incorporate the BEPS 1.0 program were progressed through the domestic ratification process. BEPS 2.0 remains a 'work in progress'. That said, New Zealand was not initially overly concerned about the BEPS initiatives proposed by the G20/OECD as officials took the view New Zealand's international tax regime was robust and the jurisdiction would not be one targeted by MNEs for abusive tax practices.

A major component to New Zealand's domestic response to BEPS 1.0 was to enact the *Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018* to prevent MNEs from using:

- artificially high interest rates on loans from related parties to shift profits out of New Zealand (new interest limitation rules);
- artificial arrangements to avoid having a taxable presence (a permanent establishment – PE) in New Zealand (proposals go beyond BEPS requirements);
- related party transactions (transfer pricing payments) to shift profits into their offshore group members in a manner that does not reflect the actual economic activities undertaken in New Zealand and offshore (New Zealand adopted the OECD's Transfer Pricing Guidelines);<sup>34</sup>
- hybrid and branch mismatches that exploit differences between countries' tax rules to achieve an advantageous tax position (correcting current deficiencies); and

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<sup>32</sup> New Zealand signalled it would enter into an agreement in October 2012 with an agreement signed in June 2014 and in force in July 2014; see <https://www.taxpolicy.ird.govt.nz/tax-treaties/united-states-america>.

<sup>33</sup> Adrian Sawyer and Richard McGill, 'The Adoption of BEPS in New Zealand' in Kerrie Sadiq, Adrian Sawyer and Bronwyn McCredie (eds), *Tax Design and Administration in a Post-BEPS Era: A Study of Key Reform Measures in 18 Jurisdictions* (Fiscal Publications, 2019) 211, 212 (emphasis added).

<sup>34</sup> Note that Michael Kobetsky argues that in this new post-BEPS 2.0 environment, the OECD needs to illuminate the status of the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* by including a clear statement in the associated Commentary on the intrinsic character of the OECD Guidelines and expressly identifying which parts of the OECD Guidelines form part of the Commentary; see Michael Kobetsky, 'The Status of the OECD Transfer Pricing Guidelines in the Post-BEPS Dynamic' (2020) 3(2) *International Tax Studies*.

- certain tactics to hinder an Inland Revenue investigation, such as withholding relevant information that is held by an offshore group member, which would be penalised.

Under BEPS Action 5 New Zealand agreed to disclose a wide variety of binding rulings, and it is also committed to binding arbitration. New Zealand ratified the MLI (Action 15) on 14 May 2018. New Zealand remains open to taking unilateral action through a digital services tax (DST)<sup>35</sup> should it not be satisfied with the OECD's progress or the final BEPS 2.0 outcome. Walker<sup>36</sup> reviews the DST proposal, setting out his concerns over its intended scope and lack of supporting evidence for the need for a DST. Importantly, he emphasises the risks that such unilateral action will reduce overall levels of cooperation. As time passes, it seems more likely that the DST proposal will progress further, although this ultimately depends significantly on the effectiveness of BEPS 2.0.<sup>37</sup>

In terms of an early assessment of a core aspect of BEPS 1.0, namely the country-by-country reporting (CbCR) under Action 13, this author and Sadiq<sup>38</sup> adopted a cross-country comparative case study analysis involving Australia and New Zealand that have implemented CbCR. Utilising a series of semi-structured interviews with key tax professionals, along with revenue officials, they are able to ascertain the views of the profession and their MNE clients on the new CbCR requirements. Specifically, the tax practitioner interviewees were candid in their responses, and provided insights that could not be ascertained from reviewing documentation. What is particularly evident in their comments are significant challenges in implementing CbCR for their clients, along with their role in supporting their clients. They saw minimal benefits to them and their clients, although the revenue officials unsurprisingly had a different view!

Gupta<sup>39</sup> explores, in the context of a wide array of transparency obligations under BEPS 1.0, New Zealand's tax administration's response to exchange of information (EOI) requests under double tax agreements (DTAs), implementation of the BEPS program (specifically Actions 5 and 13), new standards on automatic EOI, and critically assesses the provision of beneficial ownership information to tax authorities for the global exchange to treaty partners. She also recommends, from a revenue authority perspective, adoption of enhanced technology to facilitate the gathering of such information.

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<sup>35</sup> See Inland Revenue, *Options for Taxing the Digital Economy: A Government Discussion Document* (June 2019) <https://www.beehive.govt.nz/sites/default/files/2019-06/20190604-dd-digital-economy.pdf>.

<sup>36</sup> Ben Walker, 'Analysing New Zealand's Digital Services Tax Proposal' (2019) 21(2) *Journal of Australian Taxation* 86.

<sup>37</sup> The current New Zealand government introduced a Digital Services Tax Bill (based on a proposal released in 2019) on 31 August 2023, due to its frustration over the slow progress under BEPS 2.0. See further <https://www.beehive.govt.nz/release/government-enable-digital-services-tax-multinationals-2025>.

<sup>38</sup> Adrian Sawyer and Kerrie Sadiq, 'Country-by-Country Tax Reporting: A Critical Analysis of Enhanced Regulatory Requirements for Multinational Corporations' (2019) 36(7) *Company and Securities Law Journal* 570.

<sup>39</sup> Ranjana Gupta, 'Global Tax Transparency and Developments in the Exchange of Information Standards: A New Zealand Perspective' (2021) 36(1) *Australian Tax Forum* 1.

An important observation is made by KPMG concerning BEPS 2.0 with respect to New Zealand:<sup>40</sup>

*New Zealand's commitment to BEPS 2.0 is a sign that it accepts the OECD arguments around the greater global good. This means the complexity created for some businesses and the potential restrictions on our tax policy choices is considered to be worth it. Similar to New Zealand's embracing of the BEPS 1.0 measures, there is the desire to be a good global citizen and play our part in the expectation that a multilateral approach will be of greatest benefit.*

In terms of BEPS 2.0, it has been determined that if a critical mass of countries adopt the BEPS 2.0 two-pillar approach, then New Zealand will also formally adopt it. This is premised on the New Zealand government continuing to support the current tax settings and that from a business perspective, ways to reduce compliance costs are accepted. The outcome of Inland Revenue's consultation on Pillar 2 was confirmed with the decision to implement Pillar 2 which is part of the Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill 2023, currently with the Finance and Expenditure Committee. Assuming that the Bill is enacted largely as proposed, then the application date for the GloBE rules will be set by Order in Council once the New Zealand government determines that a critical mass of countries has adopted those rules. In terms of its approach to digitalisation, Strauss and co-authors conclude<sup>41</sup> that strategic goals with a strong digital focus for New Zealand include 'information and intelligence gathering by ensuring that decisions and actions are intelligence-led' and '[d]igital by fully embracing their place in the digitally connected world'.

The article now moves its focus onto the area of Business Transformation (BT) in New Zealand, where the tax administration undertook a significant project to digitalise the tax administration process as well as update the IT system. While this project has been a great success in digitalising the tax administration system in New Zealand, it has created a number of significant issues.

This author in an earlier paper,<sup>42</sup> taking a taxpayers' rights perspective, focuses on the impact of digital delivery on taxpayer assistance, especially those that are digitally challenged. New Zealand's BT was 'successfully' implemented in its entirety in 2022, replacing Inland Revenue's aging IT systems, and making the digital interface the principal mechanism for taxpayer interaction with Inland Revenue. BT came with huge risks, including technical complexity and 'disturbing' previous compliance activities, but also does not provide sufficient accessible service engagement mechanisms for all members of society, especially for the 'digitally challenged'.<sup>43</sup> The New Zealand government failed in its pledge to close the digital divide by 2020,<sup>44</sup> notwithstanding

<sup>40</sup> See Darshana Elwela, 'BEPS 2.0 – The Final Frontier?' *KPMG New Zealand* (2021), <https://home.kpmg/nz/en/home/insights/2021/10/beps-2-0-the-final-frontier.html> (emphasis added) (accessed 28 February 2023).

<sup>41</sup> Strauss et al, above n 26, 387 (citing Inland Revenue, *Annual Report 2019*).

<sup>42</sup> Adrian Sawyer, 'The Impact of Digital Delivery on Taxpayer Assistance – A New Zealand Perspective' (Paper presented at the Fourth International Conference on Taxpayers Rights, University of Minnesota Law School, Minneapolis, 23-24 May 2019).

<sup>43</sup> Inland Revenue has made some significant steps to assist those who are digitally challenged; see, for example, Inland Revenue, *Inland Revenue Annual Report: Te Tari Taake Pūrongo ā-Tau 2021–22* (2022) 21, 65.

<sup>44</sup> See Digital Economy and Digital Inclusion Ministerial Advisory Group; Hon Clare Curran (Broadcasting, Communications and Digital Media and Government Digital Services Minister), 'Digital

the boost that the Covid-19 pandemic has offered to speed up the roll out of digital platforms.

Most recently, Granger and this author<sup>45</sup> examine the level of preparedness of Australia and New Zealand's revenue authorities for a digital environment. Specifically, in an exploration of the two jurisdictions' 'digital journeys' with respect to how digitalisation is shaping their revenue administrations, a key feature is that each tax authority evolved in time to meet the challenges they faced. That study applies a tax policy lens and a largely positivist approach, with some normative suggestions offered. It also observes how institutional factors influence the ability of the state to create productive political relationships with key groups, such as tax practitioners. In the context of New Zealand, the digital history of Inland Revenue is analysed from the early 1990s until the full implementation of BT in 2022. This includes the regular addition of new services, such as income support and student loans to Inland Revenue's IT system. The use of big/smart data has become a feature, along with growing interconnectedness within New Zealand and with agencies in other jurisdictions (such as through data sharing and data transparency). The just in time feature was significant in enabling both jurisdictions to respond to the Covid-19 pandemic and function as the major vehicle for the delivery of governmental fiscal support.<sup>46</sup>

That study concludes with five significant policy issues that emerge from the analysis:<sup>47</sup>

- (1) The design of information technology infrastructure is moving away from being tax-specific to being *integrated and networked*.

It is essential to plan for contingencies and be prepared, not just for today's requirements and the envisaged future, but also for significant change (COVID-19 is a potent example) during the redevelopment of systems, while remaining nimble and adaptable.

- (2) The role of tax administrations is expanding as a *smart data hub for a whole-of-government approach*.

The data collected and tax administrations' ability to exploit this to support digital services is a valuable resource that can provide valuable insights and intelligence well beyond tax-related interactions. More regular and expanded sharing of data throughout the government (and in some cases between jurisdictions) should be expected.

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Advisory Group to Be Established' (Media Release, 15 December 2017), <https://www.beehive.govt.nz/release/digital-advisory-group-be-established>. As at December 2020 the New Zealand government had set out its vision but was far from achieving it: New Zealand Government, 'Closing the Digital Divide 8/15' (6 December 2020), <https://www.beehive.govt.nz/feature/closing-digital-divide-815>.

<sup>45</sup> Jennie Granger and Adrian Sawyer, 'Digitally Prepared? The Journeys of the Revenue Administrations in Australia and New Zealand' in Nella Hendriyetty, Chris Evans, Chul Ju Kim and Farhad Taghizadeh-Hesary (eds), *Taxation in the Digital Economy: New Models in Asia and the Pacific* (Routledge, 2022) 166.

<sup>46</sup> See further, John Cuthbertson, 'Why the Taxman Is Our Unsung COVID Hero', *NZ Herald* (28 September 2020), <https://www.nzherald.co.nz/business/john-cuthbertson-why-the-tax-is-our-unsung-covid-hero/GHAH46X42AYJDPE55ISSKXUZM/>. See further: Adrian Sawyer, 'Navigating Challenging Times: A New Zealand Perspective' (Paper Presented at the ATTA Annual Conference, Brisbane, 19-20 January 2023).

<sup>47</sup> Granger and Sawyer, above n 45, 185-186 (emphasis added in headers).

(3) The shift from merely consulting stakeholders during the design process to collaborating with them.

Stakeholders must be actively involved in the design and implementation phases, reflecting a two-way engagement. This reflects the fact that the reach of tax administrations extends well beyond taxation, being linked to welfare and other government services – they are effectively a digital intermediary between citizens and businesses, and the government.

(4) *Support people through transition*, especially the vulnerable.

An outstanding challenge is to invent new approaches for the digitally challenged and vulnerable for whom the digital approach is unsatisfactory. Recognizing that not all businesses are highly digitalized is vital to help them transition to becoming more digitalized.

(5) Managing ecosystem risks.

High levels of system integration mean that risks, such as system outages, extend beyond the tax system.

Inland Revenue itself is reflecting upon what tax administration should be like in a digital world now that the BT is complete.<sup>48</sup> With a shift to operating in an even more digitalised environment, three key areas are seen as being impacted:<sup>49</sup>

- **External parties:** Their potential to meet the needs of taxpayers and recipients of payments and what changes are necessary to facilitate this.
- **Data:** Rationalising data collection and unlocking value through taxpayers authorising Inland Revenue to share their data.
- **Tax rule changes:** Adapting the tax system to more digital processes and making changes that facilitate a more automated approach to determining tax obligations.

In moving towards a fully digitalised system, Inland Revenue observes:<sup>50</sup>

#### **A fully digital system**

1.9 Businesses are moving online and this shapes our thinking about the future world in which the tax system will operate. Key features of this world are likely to be:

- Businesses operating in a digital ecosystem – that is, they're connected digitally to their suppliers and customers.

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<sup>48</sup> Inland Revenue, *Tax Administration in a Digital World: An Officials' Issues Paper to Support Future Tax Administration* (Policy and Regulatory Stewardship, February 2022). This document and the submissions received have informed the 2021-22 Tax Policy Work Program (TPWP), available at: <https://www.taxpolicy.ird.govt.nz/work-programme>.

<sup>49</sup> Ibid 15 (emphasis in original).

<sup>50</sup> Ibid 5-6 (emphasis in original).



- Administration of tax and social policy payments integrated into broader economic systems, for instance individuals or businesses can use a common digital identity across a range of services.
- Tax administration processes embedded in the natural systems businesses are using, that is, the systems that businesses use to suit their business rather than to suit tax obligations.
- Digital processes enabling data to flow in real time.

#### 1.10 Further features of this future tax administration could include:

- Taxpayers granting and managing consents to the party or parties they want to represent them or manage their tax affairs and with whom they are comfortable having their data shared.
- Processes being streamlined through there being one source of truth for data and information. Rather than there being separate data repositories that need to be reconciled, participants would access this data when needed.
- Increased partnering between Inland Revenue and the external parties who provide the apps and services that taxpayers will use.

Inland Revenue sees that the process of moving towards this ideal will take at least a decade, recognising that the needs of taxpayers, social policy customers, and businesses vary. In particular, it has identified that in moving forward in this direction it will require evolution in all aspects of its strategy. Thus, the coming years should provide interesting material for further reflection and analysis.

Having outlined the prior literature and debate over the impact of globalisation and digitalisation, both globally and with a particular focus on New Zealand, what are the takeaways that can be learnt from the last decade or so, and the observations moving forward? The current author expects that New Zealand will support and implement the BEPS 2.0 two-pillar approach, at least with respect to Pillar 2 through adopting the GloBE rules (assuming a critical mass of other countries do the same), but may implement a DST if it believes progress remains slow on BEPS 2.0.

## 4. DISCUSSION

A good point to start is to reflect upon the discussion in the prior section and focus on the research question:

**RQ:** *How have globalisation and digitalisation impacted tax administration in New Zealand?*

It is important to note that in referring to tax administration this article focuses on tax authorities but also recognises that globalisation and digitalisation impact other significant stakeholders in the tax administration process, such as tax practitioners and taxpayers, and less directly, the law-makers. In one respect a major driver has been the G20/OECD response via BEPS 2.0, measured principally through the overarching leadership of the Inclusive Framework. It should be recognised that there are numerous other digitally-based initiatives affecting the administration of tax in New Zealand, such as new goods and services tax (GST) rules for digital platforms (which will be discussed

shortly), as well as relatively recent rules for GST to be applied on offshore services. Another example is Inland Revenue's recent responsiveness to the Covid-19 pandemic, which was highly successful and to a very large extent driven by its investment through the BT program in digital platforms and revised methods of working. This was also discussed in the previous section of the article.

While the G20/OECD are desirous of a multilateral and cooperative approach, a number of jurisdictions have responded with a range of unilateral measures, such as diverted profits taxes (DPTs), DSTs, expanded definitions of a permanent establishment (PE), new levies and additions to turnover-type taxes and the like. Potentially a consensus-based solution with the active and meaningful engagement of all governments (via the Inclusive Framework) and stakeholders may contribute significantly to the long-term stability of the international tax system. Since one of the major aims is that the 'solutions' are global and inclusive in nature, then these solutions must be practicable for all tax administrations, including those with few resources (such as in many developing countries).

In this regard New Zealand has enacted a more expansive definition of a PE and has a policy proposal for a DST (but no clear indication of whether it will be advanced any further), and no proposal for a DPT. Otherwise, New Zealand has adopted the OECD's recommendations and is an active member within the Inclusive Framework. Thus, from a high-level perspective, New Zealand's tax administration (especially Inland Revenue as the tax authority) is adapting to the challenges of globalisation and digitalisation in the spirit of the OECD's recommendations, with legislative amendments made to reflect domestic ratification (at least with respect to BEPS 1.0). The New Zealand government has clearly indicated that it will implement the GloBE rules as part of the two-pillar approach of BEPS 2.0 (with application depending upon a sufficiently large degree of global adoption).

What all of this shows with respect to globalisation and BEPS is that the OECD is the leading 'player' and influential institution that is shaping international taxation. The OECD has evolved over the last 10 to 15 years to be the 'global tax authority' in the absence of any effective alternative body. While working on the basis of consensus, few 'small nations' have stood up to the OECD's recommendations. Indeed, being a small nation and one that sees itself as good global citizen (and a 'responsible' OECD member), New Zealand has felt constrained to adopt OECD guidance and recommendations. As such this reflects this author's expectations when applying a New Institutionalism lens.

Digitalisation is impacting many parts of the tax system (especially administration), not just the international rules. This includes the gig and sharing economies,<sup>51</sup> where online multi-sided platforms are operating with potential significant impact on tax status of individuals and revenues. This raises issues over educating taxpayers of their obligations and looking to have a level playing field with existing players providing similar services. Tax administrations need to use digital tools to deliver improved

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<sup>51</sup> For New Zealand's response on this issue, see Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2) 2022 (enacted into law on 31 March 2023). For discussion on the earlier discussion paper and the Bill, respectively, see Vivian Cheng and Cameron Jacob-Sauer, 'Tax Update' [2022] (3, April) *New Zealand Law Journal* 76; Chris Harker and Matt Handford, 'Tax Update' [2022] (9, October) *New Zealand Law Journal* 296.

taxpayer service (eg, more precise pre-filing, or more personalised assistance). Concurrently tax administrations need to harness big data to enhance tax compliance (eg, identifying trends and using ‘nudges’).<sup>52</sup> These approaches need to be taken with caution to protect against risks (eg, blockchain (in the form of crypto currencies) are impacting tax transparency and adding to risk).

New Zealand’s Inland Revenue has embraced these changes, with its online platform (myIR) the principal way in which it engages with taxpayers and tax practitioners (but not without a number of hiccups and challenges).<sup>53</sup> It is making extensive use of big data in all aspects of its operations, and in many respects is taking a less technical and complex approach<sup>54</sup> in dealing with taxpayers concerning their international tax obligations compared to other jurisdictions such as Australia. The role of institutionalism takes more of a national focus when it comes to digitalisation and Institutional Theory, with Inland Revenue as the tax authority filling the role of the powerful institution that requires all that need to engage with it to adapt to the environment created by BT. That said, Inland Revenue’s leading and influential role was vital in New Zealand’s fiscal response to Covid-19.

The response needs to be ongoing and adaptive as new developments emerge. While taking action that supports New Zealand as a whole, such as through tax base protection is important, this must be evaluated against its international obligations as an OECD member, and the ‘global good’. New Zealand has the advantage of being a small nation, and as such, is able to be reasonably nimble in its actions. That said, New Zealand does not tend to be a leader in new initiatives, but seeks to come ‘mid-pack’ to evaluate the implications for early adopters. It also has a tradition, until recent years,<sup>55</sup> of being very transparent and consultative in developing tax policy responses through use of the GTPP.

Going forward there are some New Zealand unique features that will need to be embraced, regardless of the developments in globalisation and digitalisation. These include the impact of the growing indigenous Māori economy,<sup>56</sup> assessing whether the current tax system is fit for purpose (including the proposed new tax principles reporting framework<sup>57</sup>), and the final outcome of BEPS 2.0.

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<sup>52</sup> In addition to big data, other relevant technology trends include analytics, artificial intelligence (AI), machine learning, the Internet of Things (IoT), mobility and cloud computing. For a discussion on how AI may affect the operations of the Australian Taxation Office by 2030, see Duncan Bentley, ‘Tax Officer 2030: the Exercise of Discretion and Artificial Intelligence’ (2022) 20(1) *eJournal of Tax Research* 72.

<sup>53</sup> For a useful overview of how a revenue authority may successfully embark on a digital transformation journey, see Microsoft and PwC, *Digital Transformation of Tax Administration* (2018), available at: <http://info.microsoft.com/rs/157-GQE-382/images/Digital%20Transformation%20of%20Tax%20Administration%20White%20Paper.pdf>.

<sup>54</sup> See, for example, Inland Revenue, *Offshore Tax Transparency* (IR 1246, 2022).

<sup>55</sup> See Sawyer, ‘Tax Policy Without Consultation’, above n 31.

<sup>56</sup> The ‘Māori economy’, all business assets of people and entities who identify as Māori, in 2018 was estimated to be worth approximately NZD 69 billion.

<sup>57</sup> The Tax Principles Reporting Bill 2023 was tabled as part of Budget 2023 on 18 May 2023. The proposed tax principles are horizontal equity, vertical equity, efficiency, revenue integrity, compliance and administrative costs, certainty and predictability, and flexibility and adaptability. The Bill focuses on reporting by the Commissioner each year but is silent about how the information may be used. There is no reference to the current Broad Base Low Rate (BBLR) framework. The Bill received Royal Assent on 29 August 2023 and became effective the next day.

Alongside the forces of globalisation and digitalisation, there are uniquely New Zealand issues impacting upon tax administration. In terms of supporting the Māori economy, Inland Revenue's Policy and Regulatory Stewardship group is at the start of its Māori perspectives journey.<sup>58</sup> This panel was established to help guide the development of Inland Revenue's internal practices to embed Māori perspectives and effective Māori engagement to inform the formulation of its tax and social policy advice. It comprises a Chair and six advisors from across the Māori sector, meeting at least three times a year. The panel is now into its second year of operation and has considered the following policy items:

- Officials' framework for environmental and resource pricing;
- Tax Administration in a Digital World;
- New Zealand Income Insurance; and
- Tax[ation] Principles [Reporting] Act.

The panel has considered how it might use *He Ara Waiora* (to assist the New Zealand Treasury through applying a Māori approach to lifting living standards by understanding *waiora* or wellbeing<sup>59</sup>) to frame its own advice. In particular, it has requested all policy items/officials work through *He Ara Waiora* before coming to the panel to encourage thought as to how policy might impact on Māori.

While it may not be readily apparent that such 'domestic' issues are of direct relevance to globalisation and digitalisation, the New Zealand government has made it clear that the Māori economy is critical to New Zealand's approach to globalisation and digitalisation, and that the Treasury's Wellbeing measures (via the Living Standards Framework),<sup>60</sup> are to be applied to all aspects of government action, including how government departments and ministries operate, as well as tax policy development.

New Zealand's future tax administration system will be driven by a mix of globalisation and digitalisation, and domestic features. Major forces will include:<sup>61</sup>

- enhanced use of automation;
- greater use of business systems to capture required tax information;
- resolving data ownership, control and access issues;
- clarifying the rights and obligations of tax intermediaries;

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<sup>58</sup> This is drawn from a presentation by Selwyn Hayes and Heta Hudson to the 2022 Chartered Accountants Australia New Zealand Tax Conference in 2022.

<sup>59</sup> See further Matthew Scobie (Kāi Tahu) and Tyron Rakeiora Love (Te Ātiawa), 'The Treaty and the Tax Working Group: *Tikanga* or Tokenistic Gestures?' (2019) 21(2) *Journal of Australian Taxation* 1.

<sup>60</sup> See NZ Treasury, *The Living Standards Framework 2021* (28 October 2021), available at: <https://www.treasury.govt.nz/information-and-services/nz-economy/higher-living-standards/our-living-standards-framework>.

<sup>61</sup> This draws upon a presentation made by Scott Mason and John Cuthbertson to the 2022 Chartered Accountants Australia New Zealand Tax Conference in 2022.

- balancing the level of information required as between the utility to Inland Revenue and the time/cost of taxpayer compliance;
- revisiting of self-assessment options;
- revising the penalties regime;
- improving the resolution of tax disputes, and
- a revision of the privacy rules.

Vigilance is therefore needed to monitor developments globally and New Zealand's response to these developments as they emerge.

## 5. CONCLUSIONS, LIMITATIONS AND FUTURE RESEARCH

This exploratory single country case study has sought to answer the question: *How have globalisation and digitalisation impacted tax administration in New Zealand?* The prior discussion commenced broadly with developments globally before moving to focus on New Zealand. It has focused on the impact of major institutions such as the G20/OECD globally, and Inland Revenue and the New Zealand government domestically. Collectively these organisations form a sizeable number of the major stakeholders, along with taxpayers and tax practitioners, and to a lesser degree other organisations.

Applying Heij's research model, the major causes identified in box 1 of Figure 1 in section 2 are all present in shaping tax administration (with a particular focus on BEPS). The state structure was simplified in focusing on a single jurisdiction (New Zealand), although an in-depth analysis of the political institutions and government role (box 2) was not undertaken. Indications of the culture of public institutions is one of being upfront and reasonably transparent, but with some major limitations in recent years. The international influences of relevance here (box 3) come from the organisations discussed in relation to box 1, especially the OECD for matters regarding globalisation and international tax policy, and Inland Revenue within New Zealand for digitalisation via BT. The political response (box 4), using a tax policy lens to focus on the impact on tax administration, has been driven by Inland Revenue (often at the request of the government) in New Zealand, being largely informed by the work of the OECD and to a lesser extent, what is in New Zealand's self-interest. There have been significant changes in legislation to address issues from BEPS 1.0, with the response to BEPS 2.0 still a work in progress but with a clear direction with respect to the GloBE rules being adopted as part of Pillar 2.<sup>62</sup> Other significant changes have come from the impact of digitalisation through the development of a new information system and enhanced inter-relationships between tax policy and social policy. As indicated earlier, the content of box 5 has had a minor role for the purposes of this article other than acknowledging that there are New Zealand domestic groups that have exerted pressure on the changes in tax administration, such as the professional accounting bodies (eg, Chartered Accountants

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<sup>62</sup> See Inland Revenue, *OECD Pillar Two: GloBE Rules for New Zealand, An Officials' Issues Paper* (May 2022) for the recommendations concerning the approach New Zealand should take and the New Zealand government's response in the Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill 2023. This Bill remains at the select committee stage with expectations that after the October 2023 General Election it will be revived by whatever parties form the new government. There is no evidence of any political opposition to Pillar 2 being implemented in New Zealand.

Australia and New Zealand (CA-ANZ)) and the New Zealand Law Society (NZLS). Thus, there is emerging evidence through an Institutional Theory lens to conclude that the OECD is shaping global tax policy by seeking to set new normative approaches, while domestically this is more focused on the actions of a particular revenue authority (Inland Revenue in the case of New Zealand). This conclusion becomes more nuanced when BEPS 2.0 is the focus since this brings into close proximity the BEPS initiatives (from globalisation) with digitalisation (BT in New Zealand case).

Bassey and co-authors<sup>63</sup> conceptual model fits well although the cycle remains incomplete. At this point, while it is circular in nature, the context aspect and the role of stakeholders is clear as digitalisation has been embraced. The technology is in place but the challenge that remains is to provide demonstrated results that justify the investment and new approach. This should become clearer in the coming months.

While New Zealand has largely embraced the implications that globalisation and digitalisation have presented through adopting the G20/OECD's recommendations on BEPS 1.0 (with the 'jury being out' on BEPS 2.0 Pillar 1 but clarity is needed with respect to adopting the GloBE rules under Pillar 2), it must also make adaptations that fit the uniquely New Zealand features, such as the need to recognise the partnership with Māori and the work that the New Zealand Treasury is undertaking on measuring wellbeing.

However, one needs to be cautious in drawing conclusions, particularly given the incomplete nature of the responses to BEPS 2.0 initiatives in New Zealand (as well as globally, especially concerning Pillar 1). While it is likely that the modernisation of New Zealand's tax system, which has been progressing steadily, makes it more likely that it can comfortably address globalising initiatives, it is not clear that the converse is necessarily true. While the digital initiatives under BT having been completed in roughly the same period as BEPS 1.0 and the concepts behind BEPS 2.0, finalisation of BEPS 2.0 has not been achieved. That said, New Zealand is in a good position to respond to BEPS 2.0 through its digitalisation initiatives.

In terms of limitations, this article is a single case study, the findings of which are unlikely to be fully transferable to other jurisdictions. Unsurprisingly, the analysis is based upon publicly available information and the author's own interpretation of that information. Furthermore, the full impact of globalisation and digitalisation is yet to be felt, with the response through BEPS 2.0 far from certain in terms of the extent of adoption by Inclusive Framework members.

In some respects, these limitations provide opportunities for future research, such as undertaking a similar analysis for other jurisdictions, such as Australia, and to undertake follow up research when the full impact of globalisation and digitalisation (especially as seen through BEPS 2.0) can be assessed. Once BEPS 2.0 is finalised, future research should assess its impact on addressing issues arising from globalisation and digitalisation.

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<sup>63</sup> Bassey et al, above n 27.

# Blurring the separation of powers – a legal and political study of the phenomenon of tax administrations moving from the executive branch towards the legislative branch

Yvette Lind\*

## ***Abstract***

This article elucidates the more recent developments concerning the role and mandate of tax administrations and the consequential contemporary challenges that these events pose to democracy, in particular the separation of powers. In some jurisdictions, there has been a noticeable evolution whereby tax administrations have moved from being the executive branch, stated differently, enforcing tax laws, and collecting tax revenues, towards being part of the legislative branch. The Covid-19 pandemic and the emergency mandates that were enacted amidst it facilitated various governmental agencies, such as the tax administration, to gain greater numbers of mandates and to operate without boundaries due to the ongoing crisis. However, the extension of the mandate given to tax administrations was already noticeable in some jurisdictions before the pandemic with Sweden being one good example, a pre-existing process that the author argues has been enabled and exacerbated by the last three decades of international tax developments at the OECD and EU levels in connection to the regulation of international tax competition and harmful tax practices. Sweden is used as a case study, but the findings are applicable to a multitude of jurisdictions given the nature of the topic and subsequent discussions.

**Keywords:** international tax, BEPS project, rule of law, separation of powers, comparative tax, Sweden, tax harmonisation

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## 1. INTRODUCTION AND RESEARCH APPROACH

The 15th ATAX conference employed the theme of *Tax Administration: Evolution or Revolution*. In this article, the theme is explored through the lens of the Swedish tax administration but the findings in the article are of relevance to many jurisdictions around the globe given ongoing global developments taking place.

Consequently, the objective of this article is to identify and analyse the role and mandate of tax administrations in the context of international tax developments, most prominently those taking place at the Organisation for Economic Co-operation and Development (OECD) and European Union (EU) levels over the last three decades. The introduction of a toolbox of minimum substance rules via the OECD Base Erosion and Profit Shifting (BEPS) actions and the two-pillar structure have arguably had an impact on the law-making process in many countries, not least EU Member States.<sup>1</sup> In this context, these countries are no longer making tax laws in accordance with their retained tax sovereignty and individual needs as they are implementing them as prescribed by the EU and the OECD.

It should be noted that this article does not focus on federalism and the tax sovereignty issues that have been linked to EU Member States. These areas have already been successfully researched by scholars within tax law and EU law. Instead, the emphasis of this article is on how international tax developments have, once more, impacted tax sovereignty and the making of taxes.

This article argues that the above-described global developments make the law-making process generally more of an administrative process rather than a political one and that this poses new challenges to democracy. As a result, the article attempts to discern whether the Swedish tax administration has evolved over time or whether it has become actively revolutionary when considering its role in the Swedish law-making process in the light of these global developments.

Two recent Swedish legislative processes involving exit taxes and mandatory reporting arrangements make the foundation for this study. There have been other similar movements in connection to, for instance, the Swedish implementation of controlled foreign companies (CFC) rules,<sup>2</sup> the enhanced cooperation procedure<sup>3</sup> and the

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<sup>1</sup> Tax scholarship has debated whether the implementation of the minimum substance rules prescribed by the EU tax directives erodes tax sovereignty and the legitimacy of domestic tax systems as the EU has managed to 'bypass' traditional law-making processes involving the parliaments of the individual countries. This is naturally interlinked to the topic of this article yet not the focus of it and, as such, is omitted in further discussions.

<sup>2</sup> Skatteverket (Swedish Tax Agency), '*Skatteverkets Promemoria Genomförandet av CFC-regler i EU:s direktiv mot skatteundandraganden*', Dnr 202 94868-18/112 (9 April 2018), available at: <https://www.skatteverket.se/download/18.41f1c61d16193087d7fe266/1523606459426/Fi2018-00823-S3.pdf> (accessed 25 February 2023). Also see Lars Samuelson and Christian Karlsson, '*Skatteverkets förslag till ändringar i CFC-lagstiftningen*' [2010] (7-8) *Skattenytt* 530.

<sup>3</sup> Robert Pålsson, '*SKV:s projekt fördjupad samverkan i svensk offentligrättslig miljö*' [2012] (12) *Skattenytt* 831; Robert Pålsson, '*Skatteverket vill ha lagändringar och nya samverkansformer*' [2022] (6) *Skattenytt* 693; Anna-Maria Hambre, '*Fördjupad Dialog – En studie av Skatteverkets arbetsform fördjupad dialog ur ett svenskt offentligrättsligt perspektiv*' (Iustus, 2018); Lotta Björklund Larsen and Lynne Oats, '*Taxing Large Businesses: Cooperative Compliance in Action*' (2019) 54(3) *Intereconomics* 165; Ulf Bernitz and Jane Reichel, '*Effektivitet eller legalitet? En bedömning av Skatteverkets nya samarbetsformer, s.k. fördjupad dialog*' [2015] (7-9) *Skattenytt* 508; Ann-Sophie Sallander, '*Fördjupad samverkan mellan*



settlement of foreign tax.<sup>4</sup> However, the article has chosen to focus specifically on the implementation of the exit tax and mandatory reporting arrangements as these are among the most debated taxes. In this context, they provide beneficial case studies when extracting the evolution of the tax administration from the studied material (legislative and governmental sources, legal scholarship and media coverage).

The two case studies enable a concrete framing of the arguably ongoing phenomenon of tax administrations moving from the executive branch towards the legislative branch. The case studies are naturally limited by their focus on a specific national context and two specific taxes yet, given the nature of the selected legislative examples, the findings are still relevant to most jurisdictions involved in the OECD BEPS Project and/or EU Member States.

The article applies a research approach consisting of traditional legal methodology infused with political philosophy when: (1) identifying the existence and extent of this blurring of the separation of powers, and (2) analysing the challenges it poses to democracy, most prominently democratic legitimacy and legal certainty. With traditional legal methodology, the article refers to the commonly applied doctrinal approach often ascertained within tax scholarship, especially in Europe.<sup>5</sup> The application of a doctrinal approach in tax scholarship generally indicates an emphasis on tax technicalities derived from legal sources such as legislative acts and case law.<sup>6</sup> This doctrinal approach is, as is often the case with the author's research, supplemented with policy considerations extracted from legislative preparatory works and other reports of governmental and political nature. Moreover, there are some comparative elements, primarily theoretical considerations linked to legal culture and legal traditions, embedded in the descriptive and analytical parts of the study.

## 2. THEORETICAL FOUNDATION

### 2.1 Rule of law and the separation of powers

Separation of powers as a theory originates from 18th century philosopher Montesquieu and provides a model that divides the government into separate branches, each of which has distinct and independent powers.<sup>7</sup> By having multiple branches of government, this model aims to ensure that no branch is more powerful than another. Characteristically, the theory divides the government into three branches: the legislative branch, the

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*Skatteverket och Sveriges största koncerner. Konsekvenser av HFD:s dom rörande sekretess* [2013] (11) *Skattenytt* 771.

<sup>4</sup> SFS (Swedish Collection of Statutes) 2009:195, *Lag om ändring i lagen (1986:468) om avräkning av utländsk skatt*. For a description of the proposal from the Swedish Tax Agency, see Martin Berglund, 'Ändringar i systemet för – avräkning av utländsk skatt – en kommentar' [2009] (1-2) *Skattenytt* 8.

<sup>5</sup> For a more comprehensive discussion on this, see Wolfgang Schön, 'Tax Law Scholarship in Germany and the United States' (Max Planck Institute for Tax Law and Public Finance Working Paper No. 2016-7, 2016).

<sup>6</sup> For a more comprehensive discussion on doctrinal research within legal scholarship, see Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar, 2021).

<sup>7</sup> Charles De Montesquieu, *Montesquieu: The Spirit of the Laws*, tr and ed Anne M Cohler, Basia C Miller and Harold Stone (Cambridge University Press, 1989 [1748]). For a nuanced discussion on the promise and failings of the theory, see Jeremy Waldron, 'Separation of Powers in Thought and Practice?' (2013) 54(2) *Boston College Law Review* 433.

executive branch, and the judicial branch. These will be discussed more closely below when describing the Swedish context.

Consequently, the theory provides a rationale of checks and balances for dispersing power in a constitutional system. It is therefore natural to link the theory to that of rule of law. The rule of law theory can be interpreted as a principle of constitutionalism that assumes a division of governmental powers that ultimately inhibits the use of arbitrary state power. Such a prohibition entails a fundamental separation of powers between the legislature or law-maker and those governmental institutions that execute or administer the laws.<sup>8</sup>

This separation of powers can be described as follows:

Law is the result of a pluralistic political programme characterized by the Habermasian ‘discourse principle’, courts solve conflicts based on legislation and try to achieve legal certainty and justice as an impartial party on the basis of legal argumentation and democratically enacted and accepted fair procedures, and the administration implements legislation that is not selfexecuting.<sup>9</sup>

Issues associated with the separation of powers are general to all legal areas in jurisdictions where legislative competence lies with the parliament but is often shifted to the governments and/or the courts. In fiscal matters, there is an additional layer of complexity as the tax administration must consider the application and interpretation of vague concepts and ambiguous laws. To what extent the tax administrations and the courts are awarded discretion and authorisation to do so will naturally differ depending on the jurisdiction. Legal cultures and legal traditions jointly with the constitutional provisions of the state in question will consequently determine what role the tax administration and the courts play and what mandates they have when considering the possibilities to create, interpret and apply (tax) laws.

## 2.2 The role and impact of the tax administration in a rule of law context

As the executive, the tax administration’s main task is to interact with the taxpayers and collect the taxes on the behalf of the state. The Swedish Tax Agency is responsible, among other things, for matters concerning taxes, social security contributions, civil registration and certain creditor information. The Swedish government assigns the Swedish Tax Agency with certain tasks such as those mentioned above. But it could also be assigned with other tasks dependent on the needs of the government. For instance, the government gave the Swedish Tax Agency the task of developing and delivering information technology (IT) services to the Swedish Payment Authority and assisting in the prevention of welfare benefit fraud in March 2023.<sup>10</sup>

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<sup>8</sup> TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003) ch 2.

<sup>9</sup> Ana Paula Dourado, ‘General Report – In Search of Validity in Tax Law: The Boundaries Between Creation and Application in a Rule-of-Law State’ in Ana Paula Dourado (ed), *Separation of Powers in Tax Law* (IBFD Publications, 2010) 27, section 1.1 (‘Introduction: Identifying the Problem Using a Two-Fold Approach’).

<sup>10</sup> Swedish Department of Finance, ‘Skatteverket får i uppdrag att leverera it-tjänster till Utbetalningsmyndigheten’ (press release, 16 March 2023).

In the context of separation of powers and the law-making process it is essential to clarify what mandate the executive, the tax administration, has when considering discretion and de facto law-making. There is an extensive body of literature on this discretion as it will vary between differing jurisdictions. This study emphasises the contemporary challenges that currently stress the traditional separation of powers between the legislature, the executive and the judiciary. Consequently, contemporary theories on rule of law and tax administration are of particular interest.

Heath makes a compelling claim when discussing an expansive conception of the rule of law in the context of public administration.<sup>11</sup> This implies a pragmatic approach to the rule of law theory where the two extremes of written rules, on the one hand, and perfect justice on the other are contrasted. A tax code that fails to achieve the redistribution that an ideal conception of justice recommends can still be applied in a way that satisfies the rule of law. Equally so, a tax provision can be applied in a manner that is satisfactory to its exact wording yet, at the same time, fail to respect the rule of law and subsequently result in an arbitrary, capricious, discriminatory, unaccountable or secretive outcome.<sup>12</sup> He consequently promotes a pragmatic interpretation and application by the tax administrations as a way of overcoming these potential hurdles.

Such an approach requires the tax administration to take initiatives, at least to some extent. Therefore, it is important to consider whether the constitutional constraints and legal traditions of the state in question allow such initiatives or alternatively provide opportunities for such discretion or de facto law-making. It is important to acknowledge that the rule of law not only concerns legal constraints but also norms and fundamental principles. An account follows below of the Swedish system and the norms and principles that provide the structure for the Swedish tax administration.

### 3. INTRODUCTION TO THE SWEDISH TAX SYSTEM AND LEGAL TRADITION<sup>13</sup>

Traditionally, comparative law scholars classify and consequently analyse jurisdictions in accordance with the traditional division between common law and civil law.<sup>14</sup> This classification is less relevant when considering the Nordic countries as their scholars and practitioners rarely relate to or identify the features of common law or civil law.<sup>15</sup> Consequently, these scholars do not classify their legal systems in accordance with this simplified dichotomy. Instead, there is a mixture of civil law and common law elements

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<sup>11</sup> Joseph Heath, *The Machinery of Government: Public Administration and the Liberal State* (Oxford University Press, 2020).

<sup>12</sup> *Ibid* 254-255.

<sup>13</sup> Legal culture and legal tradition are often used synonymously, and scholars such as Patrick Glenn have claimed that 'legal culture' should be used as an epistemological tool in comparative study of law. The separation between and use of these two concepts are not elaborated on in this article as the outcome of the study does not rely on such a separation or distinction. Instead, legal tradition is explicitly used as it generally embodies the ideas of and expectations for law, and particularly the idea that the factual shaping of law according to these ideas and expectations is done in institutions, or at least institution-like structures. For an in-depth discussion on legal culture vs legal tradition, see Jaakko Husa, 'Legal Culture vs Legal Tradition – Different Epistemologies?' (Maastricht European Private Law Institute Working Paper, 2012) 18.

<sup>14</sup> Konrad Zweigert and Heinz Kötz, *An Introduction to Comparative Law*, tr Tony Weir (Oxford University Press, 3<sup>rd</sup> ed, 1998).

<sup>15</sup> Justice Clement Endresen, 'Exciting Times, but Business as Usual for the Judges' (2019) 73(8) *Bulletin for International Taxation* 408.

among the individual Nordic countries. This mixture noticeably contributes to the divergences between the systems as will become evident in this study.

Norwegian Professor and Justice Peter Lødrup argued the following in 1961:

Here in the United States there is a widespread tendency to classify legal systems as either common law or civil law. By ‘civil law’ is meant law which derives from the Roman law; to a Scandinavian jurist, this division of legal systems into two parts is a surprising over simplification. And if Norwegian law is classified as ‘civil law’ and thereby declared to be based on Roman law, the labeling is simply incorrect.<sup>16</sup>

Sweden is often referred to as a civil law state, yet this should be perceived as a modified truth. Its legal system is indeed based on the civil law tradition; however, it differs from the French and Germanic legal systems as it is not built around codification but instead around statutory law.<sup>17</sup> The Swedish system is highly formalistic by nature.<sup>18</sup> This entails that only the legislature (the Parliament) may enact laws with strong support from the constitutionally regulated *legalitetsprincipen* (the Principle of Legality),<sup>19</sup> and the role of the judiciary is that of an overseer of the law rather than a participant of law-making. Consequently, the Swedish system could be described as being governed by the non-delegation doctrine similar to the case of the United States.

Additionally, the Swedish Constitution of 1974 does not identify the judiciary as part of the state power, and thus the legislature is considered superior. Subsequently, it would be beyond the constitutional authority of the courts to create judicial doctrines although this sentiment has slowly begun to erode recently when considering other areas of law. The Swedish Supreme Administrative Court is arguably very strict in its interpretation of legislative acts and very rarely deviates from the central wording that has been provided by the legislature.<sup>20</sup> The deficient role of the Swedish judiciary clarifies why the Swedish system, unlike other civil law states, is not built on codification.

The Swedish administrative model contains features that distinguish it from most other comparable jurisdictions with Finland being the exception. Specifically, there is an organisational division of responsibilities between the government and the administration. This division rests mainly on two principles. The first principle

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<sup>16</sup> Peter Lødrup, ‘Norwegian Law: A Comparison with Common Law’ (1961) 6(4) *Saint Louis University Law Journal* 520.

<sup>17</sup> Codification is the process of converting and consolidating judge-made law or uncodified statutes enacted by the legislature into statute law.

<sup>18</sup> Swedish Instrument of Government (*Regeringsformen*) Chapter 2, 10§ para 2. Also see tax scholarship: Anders Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen* (Norstedts Juridik, 1995); Yvette Lind, *Crossing a Border – a Comparative Tax Law Study on Consequences of Cross-Border Work in the Öresund- and the Meuse-Rhine Regions* (Jure, 2017) ch 19.

<sup>19</sup> It should be noted that the Nordic concept of the Principle of Legality distinguishes itself regarding how it is considered in the British legal system and, most likely, the Australian legal system. In the Nordic context, the principle entails that statutory law takes precedence and that the judiciary, as a rule, cannot be contrary to the will of the legislature or the expressed intention of the law in question. Therefore, an extensive amount of preparatory work is generally attached to the legislation and acts as a primary legal source when the judiciary interprets and applies the law. Naturally, the judiciary may need to fill in gaps or situations not elaborated on in the preparatory works, but the allowance for the judiciary to do so varies between the Nordic countries, and the tax area is often considered in a more conservative fashion than other areas of law in this respect.

<sup>20</sup> Mats Tjernberg, ‘*Regeringsrättens strikta lagtolkning*’ [2003] (1-2) *Skattenytt* 14.

embodies the ban on ministerial rule<sup>21</sup> that entails that the administrative authorities are subordinate to the government as a collective and not the executive minister. The second principle clarifies that the administrative authorities have a certain discretion for independent decision-making and that no one, not the government, the Parliament, or any other institution, may intervene in this decision-making.<sup>22</sup> This dualism has its origins in the development in the Swedish system in the period 1720 to 1770 and was introduced as a response to the past management of the administration during periods of absolute monarchy.<sup>23</sup> Although the administrations at the present time function in a very different context, there are still traces of these historical considerations within the Swedish system.<sup>24</sup>

As a result, the Principle of Legality is central to the understanding of the independent position of the Swedish administrative authorities. The principle clarifies that all exercising of public power requires constitutional support.<sup>25</sup> Bernitz and Reichel explain the essence of the principle as:

*Lagarna får sin demokratiska legitimitet genom att de antas av folkets representanter och förvaltningsmyndigheterna kommer genom att följa lagarna att agera i enlighet med folkets vilja.*<sup>26</sup>

(English translation by author:

The laws gain their democratic legitimacy through their adoption by the people's representatives, and the administrative authorities will, by following the laws, act in accordance with the will of the people.<sup>27</sup>)

The actual relationship between the administration and the Parliament can be described as asymmetrical.<sup>28</sup> Since the introduction of parliamentarism in Sweden, the Swedish state has been based on the principle of distribution of functions. This entails that the Parliament, as the people's main representative, is the legitimate exerciser of public power and that special functions are then distributed to other governmental bodies.<sup>29</sup> Consequently, the Swedish Constitution stipulates that the government is to govern the state under the condition that it is responsible under the jurisdiction of the Parliament. Note that the Parliament only controls the government while the latter controls the administration.

<sup>21</sup> *Regeringsformen*, above n 18, Chapter 7 §3 and Chapter 12 §1.

<sup>22</sup> *Ibid* Chapter 12 §2.

<sup>23</sup> Catrin Andersson, *Tudelad trots allt: dualismens överlevnad i den svenska staten 1718–1987* (Statsvetenskapliga institutionen Stockholms universitet, 2004) 38ff.

<sup>24</sup> Anna Jonsson, 'Förvaltningens självständighet och förbudet mot ministerstyre: en analys av konstitutionsutskottets betänkanden från 2000 till 2005' in Lena Marcusson (ed), *God förvaltning – ideal och praktik, De lege Juridiska fakulteten i Uppsala årsbok* (Iustus, 2006) 174f.

<sup>25</sup> There is an extensive literature by Swedish tax scholars on the importance of the principle of legality. One of the most central publications is Hultqvist, above n 18.

<sup>26</sup> Ulf Bernitz and Jane Reichel, *Effektivitet eller legalitet? En bedömning av Skatteverkets nya samarbetsformer* (Svenskt Näringsliv, June 2015), available at: [https://www.svensktnaringsliv.se/sakomraden/rattssakerhet/effektivitet-eller-legalitet-en-bedomning-av-skatteverkets-nya-sa\\_1098649.html](https://www.svensktnaringsliv.se/sakomraden/rattssakerhet/effektivitet-eller-legalitet-en-bedomning-av-skatteverkets-nya-sa_1098649.html) (accessed 25 February 2023).

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

<sup>29</sup> For a more comprehensive introduction to the Swedish system, see Wiweka Warnling Conradson, Hedvig Bernitz, Lena Sandström and Karin Åhman, *Statsrättens grunder* (Norstedts Förlag, 2022).

In the context of globalisation and increased global cooperation through, for instance, the below described developments at the OECD and EU levels, some concerns have been raised. It has been argued that the internationalisation of the administrative authorities' activities may result in the authorities becoming increasingly detached from their national governments.<sup>30</sup> With the Swedish administrative model in which the authorities are organisationally separated from the government, such a development can become particularly noticeable.<sup>31</sup> Within Swedish tax scholarship, a good example of this disconnection can be found in the introduction of the enhanced cooperation procedure that stems from ongoing developments at the OECD level.<sup>32</sup> Below is an outline of these and the subsequent changes that are currently occurring at the EU level.

#### 4. INTERNATIONAL TAX DEVELOPMENTS AS STRESSORS TO THE OLD PARADIGM

##### 4.1 Developments at the OECD level

The need for a reformation of international corporate taxation became increasingly noticeable over the past three decades. Individual countries had historically engaged in tax competition between themselves and mimicked the behaviour of strategic actors,<sup>33</sup> and this development instigated the fears of a race to the bottom when considering levels of taxation. The competition between countries ultimately led to a situation where large multinational enterprises (MNEs) were not only able to minimise their global tax burdens but also exercise influence over national tax administrations and legislatures. The European Commission's state aid investigations involving favourable tax rulings awarded to MNEs such as Starbucks and McDonalds elucidated how tax administrations, most noticeably in Luxembourg and the Netherlands, awarded MNEs selective tax treatments when compared to other corporations. Furthermore, some MNEs began a practice of publicly pressuring national law-makers to accommodate the formers' needs, most often financially through fiscal requests, as the host countries otherwise risked an exodus of MNEs.

After decades of harmful tax competition, it was recognised that intricate tax schemes combining domestic laws and tax treaties in cross-border situations enabled corporate entities to exploit disparities between differing legal frameworks and consequently have their corporate profits untaxed or taxed at very low levels. It became evident that existing tax frameworks originating from the intense tax competition provided multiple opportunities for tax avoidance.

This effectuated a paradigm shift as it was believed that the cure for the ongoing tax base erosion executed through profit shifting was to be found in international cooperation focused on the prevention of (aggressive) tax planning and tax avoidance. This shift from tax competition towards global tax cooperation was to profoundly

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<sup>30</sup> Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law* 187.

<sup>31</sup> SOU (Swedish Public Investigations/Reports) 2008:118, *Styra och ställa – förslag till en effektivare statsförvaltning*, 82ff.

<sup>32</sup> For references on this debate, see n 3 above.

<sup>33</sup> For a more detailed description of this development, see Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press, 2018). Before Dagan, Cedric Sandford had shed light on the fact that individual tax decisions of individual countries were tied to those of competitor countries. See Cedric Sandford, *Successful Tax Reform: Lessons from an Analysis of Tax Reform in Six Countries* (Fiscal Publications, 1993).

change the international tax landscape, and the idea of the OECD Base Erosion and Profit Shifting (BEPS) Project began to slowly evolve.

The OECD published its initial report on the use of financial instruments in tax schemes in 1994.<sup>34</sup> This was the first major study on (hybrid) financial instruments and shed new light on how contemporary developments had facilitated what was later often described as aggressive tax planning and tax avoidance:

Financial markets have been deregulated; exchange controls have been liberalised and in most countries completely removed; communications have improved and computer and information technology has revolutionised financial dealing.<sup>35</sup>

In 1998, the OECD published a report on harmful tax competition and, by doing so, initiated the first step towards legislation aimed at preventing the growing problem of aggressive tax planning and, as such, provided the foundation for the forthcoming OECD BEPS Project along with its BEPS Actions.<sup>36</sup>

At this time, the EU initiated similar mappings of what was commonly referred to as aggressive tax planning activities. For instance, the European Commission was mandated with the task ‘to ensure that EU company tax systems cater for the increased cross-border activity and modern organizational structures of companies’.<sup>37</sup> This parallel development signalled a transition from the EU considering double taxation as an undesired problem to the functioning of the internal market towards the perception of double non-taxation as a threat to the tax bases of the EU Member States. This development is more comprehensively described in the following section of this article.

The same argumentation, ie, double non-taxation being the main threat to tax bases, was also promoted at the OECD level:

...fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.<sup>38</sup>

The BEPS Project was conceptualised from the findings of the initial OECD reports and provides substantive rules through 15 concrete BEPS Actions (Action Plans). These Actions address differing identified gaps and challenges within international corporate taxation, including different issues regarding the global economy and taxation. They encompass: Action 1, ‘Tax Challenges Arising from Digitalisation’; Action 2, ‘Neutralising the Effects of Hybrid Mismatch Arrangements’; Action 3, ‘Controlled Foreign Company’; Action 4, ‘Limitation on Interest Deductions’; Action 5, ‘Harmful Tax Practices’; Action 6, ‘Prevention of Tax Treaty Abuse’; Action 7, ‘Permanent Establishment Status’; Actions 8-10, ‘Transfer Pricing’; Action 11, ‘BEPS Data Analysis’; Action 12, ‘Mandatory Disclosure Rules’; Action 13, ‘Country-by-Country

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<sup>34</sup> OECD, *Taxation of New Financial Instruments* (OECD Publications, 1994).

<sup>35</sup> *Ibid* 7.

<sup>36</sup> OECD, *Harmful Tax Competition: An Emerging Issue* (OECD Publications, 1998).

<sup>37</sup> European Commission, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Tax Policy in the European Union – Priorities for the Years Ahead*, COM(2001) 260 final (10 October 2001).

<sup>38</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publications, 2013) 13.

Reporting’; Action 14, ‘Mutual Agreement Procedure’, and Action 15, ‘Multilateral Instrument’.

The above-listed BEPS Actions are often referred to as BEPS 1.0. However, there were arguably limitations with the tools offered by these Actions as they did not address digital transactions and the developments of the digital economy in a satisfactory manner. The limitations of the tools offered by this phase of the BEPS Project subsequently instigated BEPS 2.0.

BEPS 2.0 expanded the framework and introduced the two-pillar design which jointly aimed at addressing the global action plan. Pillar 1 focuses on rules for taxing rights and profits linked to the digital economy while Pillar 2 provides a global minimum tax. Briefly after the introduction of BEPS 2.0 came the introduction of the inclusive framework (agreed on in July 2021) and the minimum income tax rules (published December 2021).

In November 2022, the United Nations General Assembly adopted a resolution with unanimous consensus that mandates the UN to strive for global tax leadership.<sup>39</sup> This marks a historic turning point as the OECD has reigned as the leading rule-maker in global tax matters for the last sixty years. This was announced merely a month after Pascal Saint-Amans, the Director of the OECD's Centre for Tax Policy and Administration, announced his retirement.<sup>40</sup> Evidently, these are tumultuous times in the global tax environment, and it will be interesting to follow future developments. The EU has already introduced their ambition to enforce a global minimum tax among the EU Member States. Additionally, there are ongoing discussions on the taxation of the digital economy through concrete tax measures such as digital service taxes.<sup>41</sup> The latter has already been introduced by some individual EU Member States.<sup>42</sup>

## 4.2 Developments at the EU level

Taxation in the EU consists of the two main components of direct and indirect taxation. The EU is mandated to harmonise certain areas of law within the Member States to ensure free movement of the internal market.<sup>43</sup> Some EU directives applicable to direct taxation, primarily corporate taxation, have been enacted. Consequently, the EU has established a number of harmonised standards for company and personal taxation in addition to measures aimed at preventing tax avoidance and double taxation.<sup>44</sup> Yet,

<sup>39</sup> United Nations, *Concluding Its Session, Second Committee Approves 11 Draft Resolutions, Including Texts on Women's Development, Global Tax Cooperation, Entrepreneurship, Meetings Coverage and Press Releases*, GA/EF/3579 (23 November 2022).

<sup>40</sup> OECD, ‘Statement by the Secretary-General on the Centre for Tax Policy and Administration’ (5 September 2022).

<sup>41</sup> European Commission, *Proposal for a Council Directive on the common system of a digital service tax on revenues resulting from the provision of certain digital services*, COM(2018) 148 Final (21 August 2018).

<sup>42</sup> As at early 2023 the following EU Member States have implemented a digital services tax: Poland, Hungary, and Portugal. The following EU Member States have repealed their planned digital services taxes contingent on Pillar 1 implementation: France, Spain, Italy and Austria.

<sup>43</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2012] OJ C 326/47 (entered into force 1 November 1993), Arts 110-113 and 115 (‘TFEU’).

<sup>44</sup> European Council, *Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States* [2011] OJ L 345/8 (‘Parent-Subsidiary Directive’); European Council, *Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets*



overall, tax sovereignty over direct taxation remains with the individual Member States as these taxes have not been positively harmonised within the EU. Therefore, the relationship between the EU and its Member States concerning direct taxes has resulted in negative harmonisation that is highly dependent on the (dynamic) case law established by the Court of Justice of the European Union (CJEU).

Indirect taxes, on the other hand, have been harmonised as the EU coordinates value added taxation (VAT) and excise duties as a result of the tangible impact that indirect taxes have on the free movement of goods and the freedom to provide services in the single market.<sup>45</sup> This harmonisation ensures that competition in the internal market is not distorted by variations in indirect tax rates and tax systems giving businesses in one state an unfair advantage compared to others.

As a result, direct taxes are, at least in principle, a matter of the Member States' national sovereignty; however, it is noticeably limited by EU law aspects of which the free movement and state aid rules are essential. Historically, the upholding of the internal market through free movement law has dominated EU tax law. Over time, this has changed as other areas of law, such as state aid rules, are more frequently being applied to tax matters.

The intervention through state resources in the market competition is, as a rule, prohibited by EU competition law jointly with adjacent EU state aid law if the intervention is of a selective nature, ie, benefits a specific sector of undertakings or production.<sup>46</sup> This prohibition aims to make the situation between enterprises fairer and more balanced. Aid awarded through state resources differs and takes various forms, eg, direct contributions, sale of public property on non-market terms, a purchase of goods or services for which there is no factual need, or reduced public fees. The aid can

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*and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States* [2009] OJ L 310/34 ('Merger Directive'); European Council, *Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States* [2003] OJ L 157/49 ('Interest and Royalty Directive'); European Council, *Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments* [2003] OJ L 157/38 ('Savings Directive'), repealed on 10 November 2015 on introduction of European Council, *Directive 2014/107/EU of 9 December 2014 Amending Directive 2011/16/EU As Regards Mandatory Automatic Exchange of Information in the Field of Taxation* [2014] OJ L 359/1 ('Directive on Mandatory Exchange'); European Council, *Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC* [2011] OJ L 64/1 ('Administrative Cooperation Directive'); European Council, *Directive (EU) 2018/822 of 25 May 2018 Amending Directive 2011/16/EU As Regards Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements* [2018] OJ L 139/1 ('Automatic Exchange of Information/DAC 6 Directive'); European Council, *Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market* [2016] OJ L 193/1 ('Anti-Tax Avoidance Directive/ATAD'), etc.

<sup>45</sup> European Parliament and European Council, *Directive 2011/76/EU of 27 September 2011 Amending Directive 1999/62/EC on the Charging of Heavy Goods Vehicles for the Use of Certain Infrastructures* [2011] OJ L 269/1; European Council, *Directive 2003/96/EC of 27 October 2003 Restructuring the Community Framework for the Taxation of Energy Products and Electricity* [2003] OJ L 283/51.

<sup>46</sup> *TFEU*, above n 43, Arts 107-109 contain the primary EU state aid law provisions of which Article 107 comprises the main prohibition. Article 107(1) *TFEU* prohibits state aid as a rule and is supplemented by Article 107(2) which conditions what state aid *shall* be allowed and Article 107(3) which conditions state aid that *may* be allowed.

therefore be provided either directly, eg, direct cash grants, or indirectly, eg, tax incentives.<sup>47</sup>

The prohibition against state aid includes taxes as they may also distort competition neutrality and the trade between Member States.<sup>48</sup> A tax that results in a favourable tax treatment on a selective basis constitutes what is known as fiscal state aid. The form of the measure is not important in the context of state aid; instead, it is the factual economic effect of the measure that is considered.<sup>49</sup> Fiscal state aid therefore comes in many forms, eg, tax subsidies, tax incentives, tax exemptions, alternatively as taxes that apply different tax rates to equivalent tax subjects/tax objects. Direct taxes, tax relief and tax exemptions are regarded as a loss in tax revenue compared to the outcome if the tax had been collected which is considered a loss in state resources and consequently state aid.<sup>50</sup>

Subsequently, EU state aid rules ensure that individual Member States do not favour undertakings or certain production as a part of ongoing (harmful) tax competition between Member States through a more favourable tax treatment aimed at attracting foreign companies.<sup>51</sup> EU state aid rules may be considered as a safeguard to those situations when free movement law and the principle of non-discrimination do not apply. This line of reasoning has been actively pursued by the European Commission through numerous state aid investigations. They target potential preferential tax treatments awarded by EU Member States either through their tax legislation or alternatively through their tax administrations when considering compliance control and/or tax rulings. Several high-profile cases involving multinational enterprises such as Apple, Starbucks and Amazon have been dealt with over the last decade by the European Commission and later by the CJEU. Unfortunately, there were often unpredictable and debated outcomes that subsequently instigated criticism towards the actions of the European Commission and the introduction of alternative legal instruments through new EU corporate tax directives.<sup>52</sup>

To summarise, EU tax law consists of three main components:

- *negative harmonisation* through the CJEU's enforcement of free movement and the functioning of the internal market in its case law;
- *positive harmonisation* through secondary law, ie, EU directives;

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<sup>47</sup> For more extensive description of fiscal state aid and EU Law, see Wolfgang Schön, 'Taxation and State Aid Law in the European Union' (1999) 36(5) *Common Market Law Review* 911 ('Taxation and State Aid Law in the European Union'); Yvette Lind, 'Designing Aviation Taxes Within the EU – Chartering Ongoing Challenges and Proposing Future Solutions' (2021) 24(1) *Florida Tax Review* 784; Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, *EU State Aids* (Sweet and Maxwell, 5<sup>th</sup> ed, 2016); Yvette Lind, 'The Fundamentals of Tax Incentives' (2023) 42(1) *Skatterett* 15.

<sup>48</sup> See for instance *Italy v Commission* (C-173/73, EU:C:1974:71, 2 July 1974).

<sup>49</sup> *Ibid.*

<sup>50</sup> See, for instance *Chronopost SA, La Poste and French Republic v Union Française de L'Express (Ufex) and Others* (Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, 3 July 2003).

<sup>51</sup> Schön, 'Taxation and State Aid Law in the European Union', above n 47; Yvette Lind, 'Attracting Multinational Tech-Companies Through Environmental Tax Incentives' (2021) 49(11) *Intertax* 885.

<sup>52</sup> Some of this criticism has, for instance, been dealt with in Ruth Mason and Stephen Daly, 'State Aid: The General Court Decision in *Apple*' (2020) 99(10) *Tax Notes International* 1317; Stephen Daly, 'The Constitutional Implications of an EU Arm's Length Principle' (2020) 60(2/3) *European Taxation* 70.

- application of adjacent legal areas when upholding the functioning of the internal market, more specifically EU competition law and subsequent EU *state aid provisions*.

The impact and importance of these individual components have arguably wavered over time which contributes to a general legal uncertainty within the area of direct taxes. There is currently an unprecedented number of new EU corporate tax directives being introduced. This development may be interpreted as the EU taking a more proactive stance in protecting the tax bases of its Member States which is noteworthy when considering how the CJEU has historically ruled in direct tax cases and the protection of national tax bases.

The upholding of the free movement law and the internal market have for long taken precedence over the attempts of individual Member States to protect their tax bases. This case law is now, in some parts, revised as new corporate tax directives are introduced and enforced in a more rapid fashion than ever before. Tax provisions such as the below-described exit taxes in addition to controlled foreign company (CFC) rules are favourable examples of such change. The CJEU has historically ruled against such tax measures when applied domestically by EU Member States. Thus, this historical approach is in stark contrast to the contemporary approach where the same tax measures are presently being enforced at EU Member State level through the Anti-Tax Avoidance Directive (ATAD).

This drastic change is most likely associated with the above-described advancements currently taking place at the OECD/G20 level in which several EU Member States have been, and still are, directly involved. Germany, among others, has noticeably been a driving force. In fact, several of the EU tax tools that have been introduced over the last years, for instance, exit taxes that are now mandated by the ATAD, were initially modelled after the German rules.

It could also be argued that the EU has taken a pragmatic response to the OECD BEPS Project developments. The EU Anti-Tax Avoidance Package is factually an implementation of the OECD BEPS Action toolbox as it contains interest limitation rules (Article 4, ATAD<sup>53</sup> and OECD BEPS Action 4), a general anti-avoidance rule (GAAR) (Article 6, ATAD and OECD BEPS Action 6), CFC rules (Articles 7-8, ATAD and OECD BEPS Action 3), hybrid mismatch rules (Article 9, ATAD and OECD BEPS Action 9), country-by-country reporting standards (DAC4<sup>54</sup> and OECD BEPS Action 13) and mandatory disclosure rules (DAC6<sup>55</sup> and OECD BEPS Action 12).<sup>56</sup> In connection to the EU implementation of the BEPS toolbox, the EU also introduced its own tools with the most notable being exit tax provisions (Article 5, ATAD). Exit taxes are not unique for EU Member States, yet they are clearly an addition to the BEPS toolbox as no BEPS Action specifically details exit tax rules. Moreover, the EU is, as

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<sup>53</sup> *Anti-Tax Avoidance Directive/ATAD*, above n 44.

<sup>54</sup> European Council, *Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU As Regards Mandatory Automatic Exchange of Information in the Field of Taxation* [2016] OJ L 146/8 ('*Rules on Country-By-Country Reporting/DAC4*').

<sup>55</sup> *Automatic Exchange of Information/DAC6 Directive*, above n 44.

<sup>56</sup> For a more comprehensive analysis of this, see Pasquale Pistone and Dennis Weber (eds), *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* (IBFD Publications, 2018).

mentioned above, contemplating the introduction of BEPS 2.0 (the taxation of the digital economy and the global minimum tax) through EU corporate tax directives.

Of importance to this article is that these EU tax directives prescribe tax measures that are mandatory for the EU Member States to implement domestically. The tax directives offer minimum substance rules, and it is at the discretion of the individual states to decide if they wish to only implement the minimum standards or introduce substance rules that are more far-reaching. There is a broad variety among the individual EU Member States on how they have chosen to do so thereby adding to the complexity of corporate taxation within the EU despite the efforts toward its increased harmonisation.

Moreover, these minimum substance rules have arguably had an impact on the law-making process in the EU Member States.<sup>57</sup> In this context, these EU countries are no longer making tax laws in accordance with their retained tax sovereignty and individual needs. Instead, they are merely implementing them as prescribed by the EU and the OECD as they originate from the discussions surrounding the OECD BEPS Actions. This makes the law-making process generally more of an administrative process rather than a political one. Additionally, in this administrative process, the tax administrations of the individual countries have gained a more noticeable role. They provide the guidance from the experience and insight of being the executive institution in charge of overseeing and applying these tax measures once implemented in the domestic tax system.

Sweden has introduced several OECD and EU legal instruments combating tax avoidance and tax evasion with its involvement in the OECD community in combination with its EU membership. This article argues, as will become evident in the following sections, that this introduction of the OECD/EU toolbox has facilitated a paradigm shift in the Swedish law-making process. Below are two case studies on how Sweden has introduced two of these tools: data exchange through mandatory reporting for tax advisors and exit taxes.

## 5. THE DAWN OF THE NEW PARADIGM

### 5.1 The Swedish implementation of mandatory reporting through DAC6

In April 2017, the Swedish government delegated a special investigator with the task to oversee the possibilities for introducing mandatory reporting for tax advisors.<sup>58</sup> The investigator was specifically tasked with considering how ongoing developments at both the OECD (Action 12) and EU (the future introduction of DAC6) levels would impact the Swedish system.

In May 2018, the EU's Economic and Financial Affairs Council (ECOFIN) adopted the amendments to the Directive on administrative cooperation in the field of taxation (DAC6) as regards the mandatory automatic exchange of information in relation to reportable cross-border arrangements.<sup>59</sup> The reporting obligations apply to cross-border

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<sup>57</sup> As noted previously (see n 1, above), tax scholarship has debated that the implementation of the minimum substance rules prescribed by the EU tax directives erodes tax sovereignty and the legitimacy of domestic tax systems as the EU has managed to 'bypass' traditional law-making processes involving the parliaments of the individual countries. This is naturally interlinked to the topic of this article yet not the focus of it and, as such, is omitted in further discussions.

<sup>58</sup> Dir: 2017:38 *Informationsskyldighet för skatterådgivare*.

<sup>59</sup> *Automatic Exchange of Information/DAC 6 Directive*, above n 44.

arrangements if they display one or more characteristics, so called hallmarks, that are provided in the directive. Consequently, the directive targets tax arrangements presumed to be in a higher risk of tax avoidance and the hallmarks assist in identifying these arrangements. In June 2018, DAC6 was published in the Official Journal of the European Union.<sup>60</sup> As described above, Sweden and the other EU Member States are now mandated to implement these rules into their domestic tax systems. The initial deadline for this implementation was initially set to July 2020 yet there was a six-month extension due to the Covid-19 pandemic.

There was a wide range of differing DAC6 implementations among the Member States due to the directive merely providing minimum standards. Member States such as Italy, France and the Netherlands implemented the directive strictly with the minimum framework that was provided while other states such as Germany and Poland went further and introduced more far-reaching standards such as increased penalty fees, application to a wider range of taxes, and application to purely domestic arrangements in addition to cross-border arrangements.

The most fundamental discussion of the implementation was whether the directive would apply only to cross-border transactions or, alternatively, also to purely domestic arrangements. The latter would entail far-reaching domestic legislation and became highly debated among law-makers, taxpayers, and tax advisors across the EU. The Swedish proposal initially contained an inclusion of domestic tax arrangements, yet this was removed at a later stage. However, it should be noted that the Swedish government has stressed that there may be future legislative changes where domestic arrangements could be included as well.<sup>61</sup> There were additional functions of DAC6 that also became subject to heated discussions.

For instance, there is a variation between Member States when considering what intermediaries the mandatory reporting standards should apply to due to the broad scope set forth by the directive. As a result, the term intermediary can include lawyers, accountants and tax advisors and individual Member States can have regulated exemptions. For instance, Sweden introduced an exemption for tax-advising lawyers due to the attorney-client privilege under the exemption provided by DAC6.<sup>62</sup> As a result, the mandatory reporting responsibility falls on the client, the taxpayer, in such situations. For cases where the tax advisor is an employee of a limited company (tax-advising firm for instance), the corporate entity is responsible and not the individual tax advisor.

Figure 1 below illustrates a simplified understanding of the reporting process.<sup>63</sup>

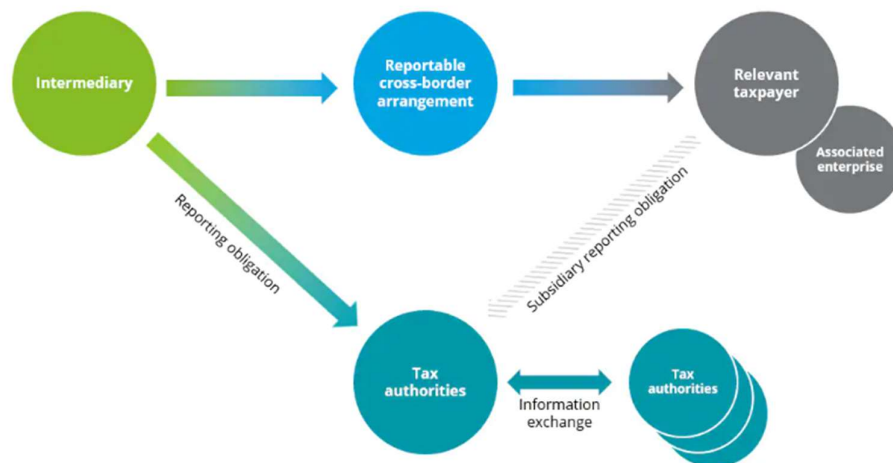
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<sup>60</sup> [2018] OJ L 129/1 (5 June 2018).

<sup>61</sup> Prop. 2019/20:74 *Genomförande av EU:s direktiv om automatiskt utbyte av upplysningar som rör rapporteringspliktiga gränsöverskridande arrangemang*, 40.

<sup>62</sup> Article 8ab(5) of DAC6 allows Member States to take the necessary measures to exclude legal advisors from the obligation where it would breach legal professional privilege under the national law of the Member State. Of interest is that on 8 December 2022, the CJEU ruled that article 8ab(5) of DAC6 violates article 7 of the Charter of Fundamental Rights of the European Union due to the confidentiality of all correspondence between individuals, and in particular with their lawyers, and is therefore invalid. See *Orde van Vlaamse Balies and Others v Vlaamse Regering* (Case C-694/20, EU:C:2022:963, 8 December 2022).

<sup>63</sup> Deloitte Luxembourg, 'Understanding DAC 6', <https://www2.deloitte.com/lu/en/pages/tax/articles/dac-6-directive.html> (accessed 27 February 2023).

**Fig. 1: Simplified DAC6 Reporting Process**

Source: Deloitte Luxembourg, 'Understanding DAC 6', <https://www2.deloitte.com/lu/en/pages/tax/articles/dac-6-directive.html> (accessed 27 February 2023).

Furthermore, the directive does not prescribe specific sanctions but requires that effective, proportionate and dissuasive penalties shall apply. The levels of such penalty fees vary widely between the EU Member States. For instance, they reach between EUR 1,300 in Estonia (where the cap was also set to EUR 3,200)<sup>64</sup> up towards EUR 830,000 (the Netherlands).<sup>65</sup> Sweden implemented penalty fees at three differing levels and for differing actions: (1) in the case of reporting that contains incorrect or incomplete data, there is a fee of EUR 1,500 for tax advisors and EUR 750 for taxpayers reporting themselves due to their tax advisors being exempted from mandatory reporting; (2) in the case where reporting has not been done on time a second penalty fee is applicable, corresponding to EUR 5,000 for tax advisors and EUR 2,500 for taxpayers reporting themselves, and (3) in the case where the reporting has been delayed and it concerns business activity the fees are higher and determined in accordance with the company's annual turnover. Consequently, the highest penalty fee is EUR 50,000 for tax advisors and EUR 25,000 for taxpayers.

The implementation of DAC6 was subject to an unusually intensive debate when compared to the introduction of previous EU tax directives.<sup>66</sup> Some of the sensitive issues have already been addressed above. The main arguments concerned the administrative burden placed on the taxpayer, legal certainty and legality; in other

<sup>64</sup> Estonian Tax Information Exchange Act passed 18 December 2014.

<sup>65</sup> Jasper Korving, 'A Guide to the Netherlands DAC6 Guidelines' (2021) 61(1) *European Taxation* 12.

<sup>66</sup> For an in-depth discussion of the Swedish implementation of EU law in tax matters, see Stig von Bahr, 'Svensk anpassning till unionsrätten' in Anders Hultqvist, Peter Melz and Robert Pålsson (eds), *Skattelagstiftning. Att lagstifta om skatt* (Norstedts Juridik, 2014) 147.

words, the role of the Swedish Tax Agency and the constitutional principle that only the Parliament is able to enact taxes.

One example of how the boundary between the executive and the legislature was at risk of becoming blurred in this context was the broadly defined and often unclear requirements attached to the mandatory reporting. The tax administration would be able to determine which domestic tax arrangements that could potentially fall under the mandatory reporting standards when given the mandate to define the hallmarks.<sup>67</sup> Conversely, the tax administration would be in the position to exclude individual taxpayers from mandatory tax reporting depending on how it interpreted and applied the hallmarks. In other words, the Tax Agency would have the discretion to decide if a tax arrangement displays any of the characteristics of the hallmarks embedded in the directive. And dependent to that assessment the Tax Agency will ultimately decide if a taxpayer is to be subject to the mandatory reporting arrangement or not.<sup>68</sup> As previously described in section 3 of this article, the Swedish Constitution states that a law may not be amended or repealed without legislative support. In other words, it falls on the Parliament to make such decisions and not the executive institution.

The same argument can be applied to the expressed ambition of the Swedish Tax Agency to propose new legislative tax measures once new (aggressive) tax planning schemes have been identified through the mandatory reporting process. There is no constitutional support for the tax administration to take on this law-making role. This is discussed further below.

## 5.2 The Swedish exit tax and the aftermath of ATAD

An exit tax is paid when a person or an asset moves across national borders. The objective of a tax measure such as this is to tax the economic value of the profit created within the territory of the state being moved from even if it has not been realised at the time of crossing the border. Consequently, an exit tax aims to protect the national tax base and acts as a safeguard or defensive tax measure. Exit taxes are controversial to some extent as they act as a disincentive for cross-border movements on the one hand and protect the domestic tax base of the country in which the asset has been nurtured on the other.

The former has long been held by the EU, and there is an extensive amount of CJEU case law upholding the free movement within the internal market through judgments ruling against the application of domestic exit taxes. However, the CJEU became less stringent over time and ultimately allowed Member States to legislate exit taxes if the domestic tax measures did not result in discriminatory treatment. For instance, the CJEU concluded in the *National Grid Indus* case<sup>69</sup> that exit taxes on latent gains restrict the freedom of establishment. Nevertheless, the Court further argued that such taxes may be justified by the need to preserve the allocation of taxing powers between Member States. The CJEU additionally developed outlines for a proportionate exit tax doctrine

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<sup>67</sup> David Kleist discusses this in length in 'Reglering om rapporteringspliktiga arrangemang från ett rättssäkerhetsperspektiv' [2019] (8) *Svensk Skattetidning* 521.

<sup>68</sup> The taxpayer will still need to file annual taxes; the question is whether the taxpayer needs to submit all additional information surrounding the tax arrangement. The latter is sensitive as corporate taxpayers often regard this information as a part of business strategy and therefore may wish to keep it from being disclosed.

<sup>69</sup> *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (Case C-371/10, EU:C:2011:785, 29 November 2011) ('*National Grid Indus*').

as the Court argued that immediate recovery on unrealised gains at the time of transfer would be considered excessive. This exit tax doctrine was later optimised through other cases such as *DMC*<sup>70</sup> and *Verder LabTec*.<sup>71</sup>

The introduction of ATAD with its exit tax provision finally overturned the idea of exit taxes being harmful to the functioning of the internal market. Instead, the EU is signalling that, while exit taxes may inherently stifle cross-border movement and act in a discriminatory way, they have become necessary when protecting the domestic tax bases of the Member States. Therefore, the ATAD mandates all Member States to implement the exit tax minimum standard as prescribed by Article 5, ATAD and furthermore allows Member States to enforce exit taxes going beyond that of the minimum standards. The way in which the CJEU will determine how such exit taxes relate to the already existing case law and exit tax doctrine continues to be uncertain.

As far as exit taxation of corporate assets is concerned, Sweden already had legislation coordinated with the case law from the CJEU that must now be synchronised to the tax provisions provided by ATAD. However, the implementation of the ATAD naturally also incited discussions on whether Sweden should introduce an exit tax and, if so, how it would be designed. Before discussing that, some historical context will be provided.

Sweden has developed several different methods over time for ensuring such taxation to avoid or circumvent assets exiting without being taxed. Sweden taxes corporate income at two stages, ie, initially at a corporate level when profits arise and then at the shareholder level when they either receive a dividend or divest shares. Individual taxpayers (shareholders) are subsequently taxed with a 30 per cent flat rate in the income category of capital (the Swedish tax system utilises three income categories: employment income, business income, and capital income).

Sweden does not currently levy any explicit exit tax but has instead applied what is referred to as a 10-year rule for the last four decades to secure the taxation of capital gains on shares.<sup>72</sup> The rule was explicitly introduced with the ambition to prevent tax evasion.<sup>73</sup> The rule conditions the shareholder to remain liable for Swedish taxation when divesting their shares within a 10-year period after exiting Sweden. This defensive tax rule is motivated by the idea of the profit having been generated by a company based in Sweden and thus under the protection of Swedish laws.

The 10-year rule has managed to survive over the past four decades due to a strong political consensus over the need for it. However, it is arguably ineffective in some respects as it is often applied in a limited capacity, ie, the tax is applied with a time period below the prescribed 10 years. This is due to tax treaty negotiations with the other contracting state in addition to the possibility of the rule being circumvented via letterbox companies located in low-tax jurisdictions within the EU. The CJEU dealt with the latter in the Swedish *X and Y case* from 2020 which also instigated a legislative change in the Swedish Income Tax Act.<sup>74</sup> Consequently, in reality the rule is only

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<sup>70</sup> *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* (Case C-164/12, EU:C:2014:20, 23 January 2014).

<sup>71</sup> *Verder LabTec GmbH & Co KG v Finanzamt Hilden* (Case C-657/13, EU:C:2015:331, 21 May 2015) ('*Verder LabTec*').

<sup>72</sup> Swedish Income Act/*Inkomstskattelag* (1999:1229) Chapter 3 §19.

<sup>73</sup> Prop. 1982/83:144 *om utvidgning av skattskyldigheten i Sverige för aktievinster, m.m.*, 1.

<sup>74</sup> *X and Y v Riksskatteverket* (Case C-436/00, EU:C:2002:704, 21 November 2002).



applicable for 5 years due to limitation of tax treaties entered into by Sweden. One of the most noticeable exemptions would be in relation to Portugal as Sweden recently terminated the tax treaty between Sweden and Portugal. In the absence of a tax treaty the 10-year rule is, once more, applied for a full 10 years.

The numerous exit tax proposals that have been brought forward during this four-decade period have not been as politically resilient as the 10-year rule. Several Swedish governments have explored the possibility of legislating a more general and effective exit tax regime on capital gains. One of the most recent legislative initiatives was in 2017 in connection to the implementation of the ATAD and in the aftermath of CJEU cases such as the *National Grid Indus*,<sup>75</sup> *Verder LabTec*,<sup>76</sup> *Oy*,<sup>77</sup> and *Commission v Portugal*.<sup>78</sup>

In November 2017, the Swedish Tax Agency published a memorandum<sup>79</sup> which contained a concrete legislative proposal for a new type of tax applicable to capital assets belonging to individual taxpayers. This new rule was argued to replace the existing 10-year rule. The tax agency proposed that the new rule had the potential to yield an additional SEK 1 billion (approximately USD 97 million) on an annual basis while the existing 10-year rule was rarely applied and consequently raised no substantial tax revenues. This author would, jointly with the critiques of the proposal, argue that it is unlikely that the proposed exit tax would have the potential to yield such a substantive revenue stream and, as such, is questionable as the primary motive of introducing an exit tax. It is of interest that there was no mention of the prevention of tax evasion as was the case with the introduction of the 10-year rule and the main ambition with the EU directive. It would have been politically strategic to emphasise the prevention of tax base erosion and tax evasion instead of relying on exaggerated tax revenue figures since there were pre-existing expectations for Sweden to introduce an exit tax in accordance with the provisions outlined in the ATAD.<sup>80</sup>

The tax agency's legislative proposal became increasingly controversial when it was later referred to by the Swedish government when presenting the official legislative proposal for a Swedish exit tax. The media response was harsh, and the influential interest organisation Swedish Business (*Svenskt Näringsliv*)<sup>81</sup> also demonstrated its discontent over the executive branch and consequently the counterpart in tax matters thereby taking on the role of a law-maker. Most importantly, nearly all consulting bodies (*remissinstanser*) involved in the legislative process strongly critiqued the proposal.<sup>82</sup>

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<sup>75</sup> *National Grid Indus*, above n 69.

<sup>76</sup> *Verder LabTec*, above n 71.

<sup>77</sup> *Oy v Commission* (Case C-816/18 P, EU:C:2019:486, 12 June 2019).

<sup>78</sup> *Commission v Portugal* (Case C-503/14, EU:C:2016:979, 21 December 2016).

<sup>79</sup> Dnr. 202 467348-17/113 *Skatteverkets Promemoria: Exitbeskattning för fysiska personer - Beskattning av realiserade kapitalvinster som upparbetats i Sverige*, available at: <https://www.skatteverket.se/omoss/varverksamhet/rapporterremissvarochskrivelser/skrivelser/arkiv/ar/2017/skrivelser2017/20246734817113.5.b1014b415f3321c0de40a2.html> (accessed 21 February 2023).

<sup>80</sup> For support of Sweden being among the more compliant EU Member States in this context, see von Bahr, above n 66.

<sup>81</sup> For more information in English about this organisation, see their webpage in English: <https://www.svensktnaringsliv.se/english/> (accessed 24 February 2023).

<sup>82</sup> Fi2017/04529/S1 *Remiss av Skatteverkets promemoria Exitbeskattning för fysiska personer*.

The attempt to introduce an exit tax was ultimately abandoned in the spring of 2018.<sup>83</sup> The Swedish government did not dare to risk pursuing an introduction of the proposed exit tax partially due to the above-described extensive critique aimed against it and partially due to political disagreement with only months left to the next general election.

In May 2022, the new government, via the Ministry of Finance, appointed a special investigator to submit a proposal for a new exit tax. As was expressed, it was proposed as a tax rule capable of ensuring effective capital taxation of natural persons who move out of Sweden and consequently cease to be liable for full taxation. Alternatively, it could also apply to a natural person who, according to a tax treaty, becomes domiciled in another contracting state.<sup>84</sup> It is of interest that the instructions to the special investigator expressed a clear desire to protect the Swedish tax base and ensure that the Swedish tax system was fully compliant with EU law. The latter entails compliance with the ATAD and the exit tax provision.<sup>85</sup> The special investigation was initially expected to report on 15 February 2024; however, the investigation was closed in December 2022. Unlike the failed attempt in 2017 when the Swedish Minister of Finance publicly announced the repealed proposal, there was no public announcement that time. This came as less of a surprise as the investigation had been initiated by the social democratic government that was replaced a few months later (October 2022) by the new conservative government. The new conservative government does not pursue the same agenda as the former social democratic one. Instead of finding new revenue streams, there is an emphasis on making the Swedish tax system internationally competitive and to promote the situation of Swedish business life when attempting to compete internationally.

## 6. CONCLUDING REMARKS AND PROPOSALS FOR FUTURE RESEARCH

To conclude, international tax developments in the OECD and EU have trickled down to a domestic level, and it is evident from the Swedish case study that the Swedish law-making practice is subject to a paradigm shift.

This author would argue that in the case of Sweden the Swedish tax administration has to some extent been coerced into participating in the legislative process rather than actively seeking to be a part of it. The article will come back to the importance in this separation further below. However, before that, some discussion ensues on whether this evolution has been successful.

It is evident that the Swedish Tax Agency's recent movement between the roles of executive and legislature has been unsuccessful thus far in the sense that it entails that the legislative proposals that have been proposed have not been legislated or significantly revised. A logical reason for why the legislative initiatives that have been proposed by the tax administration have been unsuccessful is the very fact that it is thinking like the executive role for which it has been trained.

The exit tax attempt is a prime example of this behaviour. As argued, it would have been strategic to emphasise the protection of the Swedish tax base and the need to comply with the ATAD and EU directives rather than emphasising the potential tax

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<sup>83</sup> Magdalena Andersson, 'Vi skrotar Exitskatten', *Dagens Industri* (28 March 2018).

<sup>84</sup> Dir. 2022:45 *En effektiv beskattning när fysiska personer med orealiserade kapitalvinster som upparbetats i Sverige flyttar ut*. 22 May 2022.

<sup>85</sup> *Ibid* 4.

revenues.<sup>86</sup> The latter only sparked antagonism from Swedish taxpayers and larger corporations while the former line of argumentation would have been considered less controversial as Sweden generally implements EU directives without issues.<sup>87</sup> However, it is an understandable argumentation as the role of the Swedish Tax Agency is to collect taxes and maximise tax compliance rather than to politically strategise. This sentiment can be supported by other circumstances; for instance, the tax agency had not included any consequence analyses on how the proposed exit tax would impact business life in Sweden. This is generally considered common practice in the legislative process when administered by the government and Parliament.<sup>88</sup> The break with the norms of making Swedish taxes was corrected in the 2022 initiative as the government did not delegate the task of investigating a new exit tax to the Swedish Tax Agency nor did the government put forward a proposal initially drafted by the tax administration. Furthermore, the government clearly expressed in its instructions that the potential introduction of an exit tax would be done with the intent to protect the Swedish tax base and ensure EU law compliance. These are two common and, as such, safer political justifications for new tax instruments.<sup>89</sup>

Furthermore, the Swedish implementation of DAC6 and mandatory reporting for tax advisors proved uncharacteristically controversial when compared to past implementations of EU tax directives. Admittedly, there were similar controversies in other EU Member States, but this author would argue that the involvement of the Swedish Tax Agency intensified the debate and the amount of critique brought forward. For instance, there were tax administrative statements on how mandatory reporting of big data could be used for the identification of future tax planning schemes and the subsequent possibility for the tax administration to introduce new legislative proposals for eliminating exploited legislative gaps.<sup>90</sup> Such a development would risk eroding legal certainty and democratic legitimacy and ultimately induce fears over arbitrary administrative practices underpinned by political agendas.

However, why then is the Swedish Tax Agency becoming increasingly active in providing legislative proposals for new tax measures? As initially proposed as a hypothesis, it is possible that the tax administrations have become more actively involved because of the increase in global collaboration and harmonisation. These OECD and EU tax measures have already, to a large extent, been designed by others

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<sup>86</sup> It is possible to contend that the premise of securing tax revenues is interchangeable with the argument of protecting the tax base. However, the author would argue in this case that securing tax revenues was expressed in a more aggressive fashion as the proposal included an expansion of the tax base through, for instance, the introduction of thresholds that would effectuate exit taxation at very low income levels (compared to exit taxes in other countries). Consequently, protecting the tax base would imply a defensive tax measure in this context while the tax administration's sentiment was to gain additional tax revenues which can be supported by the inflated estimate of potential tax revenues.

<sup>87</sup> For support of Sweden being among the more compliant EU Member States in this context, see von Bahr, above n 66.

<sup>88</sup> See, for instance, Anders Hultqvist, 'Beredning av skattelag' in Anders Hultqvist, Peter Melz and Robert Pålsson (eds), *Skattelagstiftning. Att lagstifta om skatt* (Norstedts Juridik, 2014) 61.

<sup>89</sup> For an in-depth discussion of the Swedish implementation of EU law in tax matters, see von Bahr, above n 66.

<sup>90</sup> This function has been voiced by tax administrators in differing context during the implementation talks in Sweden and is also mentioned in David Kleist, 'DAC6 Implementation in Sweden' (2021) 61(1) *European Taxation* 21. This may be contrasted to the need for the Swedish Tax Agency to express itself in an objective and neutral fashion which has also been discussed in Swedish tax scholarship: see for instance Mats Höglund, 'Ska Skatteverket vara opartiskt i skatteärenden?' [2012] (1) *Skattenytt* 29.

rather than the national legislature. As such, the act of implementation becomes more of a tax technical act handled by the tax administration (and later Parliament when officially enacted as domestic law) rather than a political act managed by the government and Parliament.

Moreover, the Swedish Ministry of Finance has voiced the view that a reduction in the funding for its overall functions has driven the need to outsource parts of the legislative process to other parties, such as the tax administration. The tax administration can certainly add valuable points of input to the design of tax measures through its unique technical expertise from enforcement and interaction with taxpayers, and scholars such as Waldron have emphasised the benefits of such an involvement in the legislative processes.<sup>91</sup> Moreover, the tax administrations are privy to large data sets which also have the potential to assist in the technical implementation of new tax legislations. However, there is still a significant need to separate the roles of the differing institutions as they otherwise cause erosion of both legal certainty and democratic legitimacy. From the Swedish case, it is also evident that the tax administrations may be less familiar with domestic law-making norms and, as such, fail to provide a satisfactory legislative investigation when drafting a legislative proposal.

However, it should be underlined that the exit tax proposal that was proposed by the Swedish Tax Agency in 2017 was not instigated by the Swedish government via the Ministry of Finance. The memorandum was initiated by the tax administration itself which implies a desire for a more active role in the law-making process. The previous statement of how the identification of new tax schemes would instigate new proposals from the tax administration also accentuates this ambition. A long-term plan of the Swedish Tax Agency wanting to take an active law-making role could possibly be discerned and, as such, that it could become a revolutionary actor over time.

Another potential reason for the change in the Swedish tax administration could be the strong influence from stakeholders such as Swedish Business. Swedish Business holds an exceedingly influential lobbying position,<sup>92</sup> and it could be that the evolution of the tax administration has been effectuated by a need for counterbalancing.

In conclusion, tax developments at the OECD and EU levels create new challenges, yet the one presented in this article has been given only minimal attention thus far. The evolution of the tax administration in legislative matters has been explored to some extent, for instance, in the report from the 2009 Congress of the European Association of Tax Law Professors (EATLP)<sup>93</sup> and the IBFD edited conference volume from 2011.<sup>94</sup> However, the impact of the BEPS era has so far remained relatively unexplored by tax scholarship despite its potential impact across the globe.<sup>95</sup> It is reasonable to expect that the shift in the global tax climate, going from tax sovereign states competing with each

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<sup>91</sup> Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).

<sup>92</sup> One concrete example of this influencing is the extent of Swedish Business influencing at the OECD and EU levels through, for instance, Krister Andersson and Jesper Barenfeld.

<sup>93</sup> Ana Paula Dourado (ed), *Separation of Powers in Tax Law* (IBFD Publications, 2010).

<sup>94</sup> Chris Evans, Judith Freedman and Richard Krever (eds), *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD Publications, 2009).

<sup>95</sup> Admittedly, the practice of tax rulings exercised under the discretion of tax administrations has been explored in connection to BEPS developments, yet as a larger phenomenon and in particular in connection to the law-making process, there is still much work to be done. For work on tax discretion and tax rulings, see, for instance, Stephen Daly, *Tax Authority Advice and the Public* (Hart Publishing, 2020).

other towards global cooperation and tax harmonisation, will require tax administrations to be more active in the law-making process as the implementation of the toolboxes provided by the OECD and EU becomes more of a tax technical implementation unlike past practices where the domestic legislatures have taken their own initiatives based on the needs and traditions of respective individual nations.

The tax administrations have an inherent technical expertise, competence, as well as taxpayer data suitable for this development and their potential new role. However, the constitutions of individual states, such as Sweden in this study, do not provide the necessary discretion or mandate for such actions. Therefore, it is evident that many jurisdictions around the globe may need to consider adapting their constitutional restraints in the light of the fundamental change in the global tax climate. This is indeed a contemporary tax challenge that requires further research by tax scholars from various disciplines such as law, anthropology and political economics.