

Behavioural insights in tax collection: getting the legal settings right

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Abstract

There has been a growing appreciation of the potential of behavioural insights (BI) to improve tax payment and collection. We examine the Australian federal tax payment regimes, especially for individuals and small to medium enterprises (SMEs). The legal regime for tax collection is still largely focused on debts after they are due, with mechanisms ranging from payment plans to garnishee notices, interest and penalties. This contrasts with the highly effective Pay-As-You-Go (PAYG) withholding system that ensures payment of anticipated tax in real time. We discuss BI as applied to tax payment and then canvass important limits on BI approaches including procedural fairness and taxpayer rights. We then examine existing rules and consider whether they are suitable for BI-influenced approaches. Finally, we propose directions for reform indicated by BI payment thinking to support easy, fair and timely tax payment for individuals and businesses.

Key words: tax administration, tax withholding, garnishee notices, behavioural insights, nudge, taxpayer rights

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1. INTRODUCTION

The Australian Taxation Office (ATO) has been on a journey of Reinvention under Commissioner Chris Jordan during the last few years.¹ One aspiration is for tax compliance and payment to be made easy and timely for taxpayers while reducing unpaid debt. The ATO aims for streamlined, tailored and personalised minimal touch services for improved experience and outcomes in the tax system, especially for individuals (ATO, 2015, p. 18). At the same time, we have seen ongoing concerns from taxpayers about ATO investigative and collection powers, most recently in the controversy about the ATO's garnishee powers in respect of small businesses as reported by the ABC.² The Inspector-General of Taxation (IGT) is undertaking an investigation of the garnishee power and its implementation by the ATO in response to the story.³

This research forms part of a joint project between the Australian National University (ANU) and the ATO on the use of behavioural insights (BI) and tax compliance (the BI Project). The BI Project is testing a range of designed interventions in relation to tax payment with randomised control trials (RCTs). The BI Project uses the concept of 'payment system thinking' pioneered by the Swedish tax agency (OECD, 2014; Skatteverket, 2005). Payment system thinking emphasises the process of tax payments, both before, and after, tax liabilities are due and payable or tax debts have crystallised. It aims to achieve comprehensive solutions from beginning to end of the compliance process. A critical element of the approach is to target taxpayers with outstanding obligations, with the right intervention at the right time.

Our article examines the ATO's legal, regulatory and administrative powers and processes for tax collection in the context of the broader tax compliance and enforcement process in Australia. We consider whether and how tax payment systems might be reformed to improve the taxpayer experience and payment metrics, drawing on research in BI and payment system thinking, while supporting individual taxpayer rights, privacy and procedural fairness that underpin legitimacy in the tax system.

The BI Project applies evidence about tax payment from the BI literature (Hallsworth et al., 2017; Biddle & Holzinger, 2016) in the broader framework of responsive regulatory theory, which aims to reconcile traditional deterrent policies with those that emphasise voluntary compliance. It also draws on research into payment systems that operate to collect tax at a time when the payer has income to pay it; this is the logic of third party withholding and instalment systems, which exist in various forms in the tax system, and of income-contingent loan design (such as Australia's Higher Education Contribution Scheme) which piggy-backs on the PAYG system (Biddle & Holzinger, 2016, p. 26; Chapman, Higgins & Stiglitz, 2014). A third goal is to combine voluntary engagement of taxpayers with mandatory direct and third party obligations for tax payment.

¹ See ATO, 'Program Blueprint Summary', <https://www.ato.gov.au/about-ato/managing-the-tax-and-super-system/strategic-direction/program-blueprint-summary/> (accessed 20 January 2019); ATO (2015).

² Australian Broadcasting Corporation (ABC) (2018). The Commissioner has vigorously defended ATO staff.

³ See IGT, 'Review into the Australian Taxation Office's use of garnishee notices', <https://igt.gov.au/publications/reports-of-reviews/use-of-garnishee-notices/> (accessed 30 June 2018).

Section 2 sets out some relevant insights from BI research and some of the limits on application of BI findings and approaches to tax payment from a procedural justice perspective. We highlight the importance of taxpayer rights as an expression of rule of law in tax administration. Section 3 summarises the main aspects of the regimes for tax payment and collection in Australia. Section 4 considers withholding and other intermediary mechanisms for tax payment. The existing rules for tax payment, either directly or through withholding or intermediary mechanisms, are in many cases quite old. They have been reformed in an ad hoc manner over time. Section 5 presents options for reform to adapt current settings to be suitable for BI-influenced approaches. Section 6 concludes.

2. BEHAVIOURAL INSIGHTS AND PAYMENT THINKING

Economic literature has long acknowledged that people are not perfectly rational and make choices within contexts since at least the 1950s (Simon, 1955). The literature sets out many aspects of BIs that are relevant to public policy. Since the publication of Thaler and Sunstein's *Nudge* in 2008, the use of 'choice architecture' has assumed a growing prominence in policy design and administration. Governments have enthusiastically embraced the concept of 'nudge', in combination with a strong turn towards data analytics. BI units have sprung up in Australia⁴ and in other governments around the world, including in the United States, United Kingdom, western Europe, India, Brazil, Mexico, Singapore and New Zealand.⁵

The concept of 'nudge' has also been analysed from legal and philosophical perspectives (Amir & Lobel, 2008; Hausman & Welch, 2010).⁶ Academic researchers have investigated the operation of regulatory systems through empirical research methods such as RCTs and quasi-experimental methods (Biddle & Holzinger, 2016). Some legal and philosophical researchers into BI or nudge theory have criticised it on the basis that it has the potential for illiberality, coercion and lack of respect for individual rights (e.g., Yeung, 2016; Baldwin, 2014).

2.1 Models of tax regulation and taxpayer compliance

The ATO commenced work on 'design thinking' in the mid-2000s, pre-dating the establishment of its BI unit. It aimed to adapt the creative strategies that designers use in developing spaces, products or services to tax administration. This has involved shifting the ATO's focus from tax *collection* to the *taxpayer*, now called the 'client'. Design thinking brings an awareness of how taxpayers experience their interactions with the ATO, from written correspondence, to online tools, to conversations with ATO staff

⁴ Including in the ATO, the Department of Prime Minister and Cabinet, and the New South Wales Department of Premier and Cabinet.

⁵ For a useful overview, see Chen, Bendle and Soman (2017, p. 10).

⁶ There is a paradox at the core of nudge theory: can an approach that offers 'rational' policy-making to address problems resulting from bounded rationality itself overcome the limits of bounded rationality? (Lodge & Wegrich, 2016, p. 2; Klick & Mitchell, 2006, p. 1622). One response to this is that governments are different (more rational) than individuals because of their superior resources. Governments are therefore able to constrain their behaviour through generating procedural safeguards and the establishment of expert specialist agencies like the ATO (Lodge & Wegrich, 2016, p. 6). Viscusi and Gayer (2015) argue that a framework of behavioural public choice should take into account that policy-makers and regulators are themselves behavioural agents subject to psychological biases.

and also in relation to the management of tax debts. It was adopted in the context of a pre-existing framework of responsive regulation, adopted by the ATO.

The ANU-ATO BI Project builds on the path-breaking work carried out at the ANU with the ATO on responsive regulation and voluntary compliance by the Centre for Tax System Integrity (CTSI), in the decade to 2006.⁷ The responsive regulation framework presented a ground-breaking view of tax compliance and enforcement. It utilised the now well-known pyramid of regulatory compliance, with cooperative strategies placed at the base of the pyramid (the base represents the first encounter with the non-compliant taxpayer). The 'pyramid' takes the approach that in a world of self-assessment and trust, most taxpayers are located at the 'compliant' base of the pyramid. This is illustrated in Figure 1.

Enforcement strategies become progressively firmer going up the pyramid. The objective is to guide voluntary tax compliance among the majority of taxpayers and to reduce, as far as possible, the number of people who require enforced compliance, while ensuring collection systems are effective and not reducing tax morale (Braithwaite & Wenzel, 2008). Ahmed and Braithwaite have characterised the approach towards the bottom of the pyramid as 'dialogic', with tax administrators aiming to create a genuine change of beliefs in small business taxpayers about the tax system, what it represents and what it provides the community (Ahmed & Braithwaite, p. 556).

Fig. 1: Regulatory Pyramid



Source: ATO.

More recent empirical research by Wurth and Braithwaite (2017) modifies the pyramid approach which implies that most taxpayers are at the (most compliant) base of the

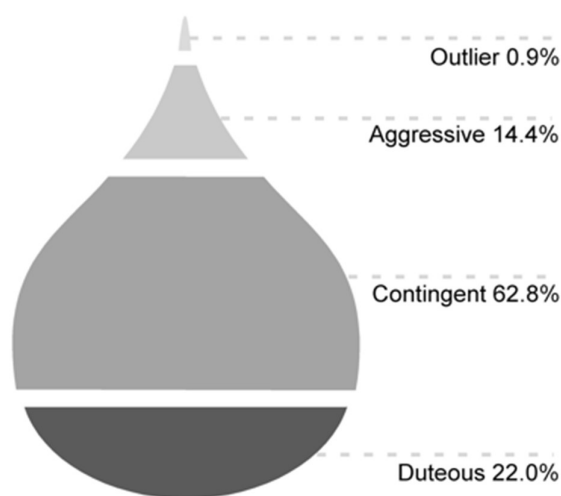
⁷ A forerunner to the TTPI and the current project, and led by Professor Valerie Braithwaite; see the archived CTSI materials at http://archives.cap.anu.edu.au/ctsi_org_au/.

pyramid. Wurth and Braithwaite model tax advisors' behaviour as more contingent on context, networks, and opportunity than the pyramid approach suggests, based on a large empirical study of tax practitioners (1,373 individuals). They develop a theory of tax practitioners as members of a set of networks: the small two-person dyad with a client; the workplace network; professional networks; citizen networks; family networks; friendship networks and commercial networks (2017, p. 331). Together, these networks influence the likelihood of tax compliance. Individuals are responsible for their decisions (and have their own behavioural and heuristic biases), but this individualistic model takes our attention away from the social-relational and market forces contributing to tax avoidance or a lack of compliance.

Based on their empirical findings, Wurth and Braithwaite propose a 'teardrop' of tax compliance, in which tax practitioners may be divided into four groups. This is illustrated in Figure 2. The teardrop is a propensity and opportunity model which shows:

... how tax practitioners carve out a market that suits them and attracts clients who want the services they offer. Some will choose to operate in a 'duteous' sphere with networks that support their outlook. Some will choose an 'aggressive' sphere with networks that are well informed and supportive of their operations. The majority will claim a contingent space, choosing to remain 'adaptive' and tuning into networks that will tell them which way the wind is blowing regarding avoidance, evasion and enforcement by the tax authority (2017, p. 331).

Fig. 2: Teardrop of Tax Practitioner Compliance



Source: Wurth and Braithwaite (2017, Fig. 21.2).

Practitioners inhabit different categories, sometimes simultaneously with different clients. The motivations to be aggressive, contingent, duteous or an outlier differ, but the common influence on practitioners is their networks. The 'duteous' practitioner at

the bottom (comprising 22% of the population) has a sense of what is professionally, ethically and legally correct to such an extent that opportunistic pathways are not on their radar. For these tax practitioners, there is no tension between having a successful business and being an ethical professional.

The ‘aggressive’ tax practitioner at the top of the teardrop model (14.4%) has a risk-taking disposition which ignites interest in tax avoidance schemes. For them, opportunity dominates any sense of moral obligation. Aggressive tax practitioners will turn to new pastures for practising tax avoidance on behalf of their clients once a crackdown of a current scheme is mobilised by the tax authority. Practitioners in this group were ‘distinguished by an increased propensity to compromise their preparation ethics and exploit the opportunity afforded by ambiguity within their clients’ tax affairs (Wurth & Braithwaite, 2017, p. 330). The largest proportion of practitioners (62.8%) are in the middle, described as being ‘adaptive’, or ‘contingent’ in their tax behaviour, depending on their networks and the opportunities available to them.

The ‘contingent’ group are most likely to be responsive to norms and behavioural interventions. They may take either cautious or aggressive positions depending on their client and the circumstances and opportunities that arise for them. They will move toward more aggressive positions when that appears to be what others are doing, there are opportunities to do so, and it appears to be safe to do so because tax authorities are tolerating such an activity.

Similar to the initial work in regulatory theory, the teardrop model of tax compliance recommends reining in non-compliance with enforcement action, without adversely affecting non-targeted groups (Wurth & Braithwaite, 2017, p. 334). The approach of targeted enforcement action needs to be made credible and legitimate through being embedded in a suite of mechanisms about which there is a central and coherent narrative. This narrative, geared to discouraging particular avoidance activities, needs to be shared by many authorities and networks that influence the practitioner – government, revenue authorities, professional associations and tax practitioner boards (Wurth & Braithwaite, 2017, p. 331).

It is not clear whether the Wurth and Braithwaite findings about tax practitioners can be applied to taxpayer behaviour more generally. However, tax payment ultimately requires engagement directed to taxpayers themselves who are ultimately responsible and this requires further evidence.

2.2 Nudge and tax

It is suggested that by shaping the context in which people make decisions, they can be ‘nudged’ towards making certain choices. Accordingly, nudges may be used to procure desirable behaviours including timely tax payment. Up until *Nudge*, design-based control techniques were neglected as a focus of regulatory scholarship (Yeung, 2016, p. 186). However, some tax payment systems which pre-date nudge are successful precisely because they build (deliberately or not) on insights about taxpayer behaviour, including withholding and default systems which have a long history dating back centuries (see, e.g., Soos, 1995, pp. 49-91).

Baldwin (2014) makes the important distinction between government nudges of citizens and commercial nudges of customers, and categorises nudges into first, second and third-degree nudges. Specifically, applying choice architecture in the area of tax

compliance is premised on the basis that as James (2017) observes, taxation is not voluntary but is a legal obligation. Therefore, the issue is not whether the state should influence individual decision-making about whether or not to pay tax, but how best to encourage individuals to do so (James, 2017, p. 324). To date, the majority of behavioural research on tax has focused on individual taxpayers and the payment of income tax or specific fines or penalties and taxpayers have been observed to influence each other about taxation. Taxpayers tend to interact with each other about how to comply with their tax obligations, not whether to comply (Onu & Oats, 2015).

The model of ‘contingent’ and ‘adaptive’ behaviour seems to be consistent with BI approaches to regulation. Tax practitioners and taxpayers who are ‘contingent’ in their behaviour may be open to nudges and can be a key target group for regulatory intervention and the application of BI. This is because they are the majority and because by virtue of their personal and situational characteristics, they may be the most responsive to interventions. They will notice and heed tax authority warnings and crackdowns on what is deemed unacceptable practice (Wurth & Braithwaite, 2017, p. 330). This also suggests that changes in opportunities and costs, such as systems that make payment easier, will have a positive effect. If tax payment, law interpretation and compliance systems are easy to find, apply and join, and difficult to bypass, then this could modify ‘contingent’ behaviour to become more dutiful and move ‘down’ the teardrop, bringing it more into line with the pyramid model.

2.2.1 Segmenting the target population and tax nudges

The OECD (2017) highlights the importance of baseline standards for governments making use of BI. Among these, the OECD recommends that governments should consider that applications could work for a part of the population but not for the entire population. The particular legal and cultural context is important (OECD, 2017, p. 55). The taxpayer population comprises taxpayers who pay their tax directly, and intermediaries of different sizes and in different industries, especially businesses, who remit tax on behalf of other taxpayers. The ATO recognises that regulatory recommendations need to be tailored for different segments and increasingly they take this approach in tax administration (see, e.g., Beeston, 2016; ATO, 2014). Taking this further, the compliance approach, timing and payment schedules and systems also need to be tailored for each segment of the taxpaying population.

The evidence available suggests that BI has a role in improving compliance of small and medium enterprises (SMEs), but that trust, opportunity and cash-flow may be just as important. Biddle and Holzinger’s survey of the literature shows that the type of tax and the taxpayer can make a significant difference to the behavioural determinants of compliance (2016, p. 3). SMEs and the self-employed bear high compliance costs and often find it difficult to navigate the compliance process, with their tax liabilities often made up of various tax types. As a result, a service approach is important to them (Biddle & Holzinger, 2016, p. 24). Capacity to comply is important, especially as it relates to SMEs. There is also some evidence that having an ability to express a non-binding preference as to the use of tax paid increases compliance (Lamberton, De Neve & Norton, 2018).

Gangl et al. (2014) find that tight supervision of newly established firms crowded out timely payments of tax obligations. Hence, promoting tax morale and a taxpaying culture is as important as implementing traditional deterrence techniques such as monetary penalties. Studies also suggest that systems that are service driven and are

easy to navigate produce better compliance. For example, Beers, Nestor and San Juan (2013) conducted a study of SMEs, finding that the treatment of taxpayers in the tax process had a major impact on compliant behaviour.

At the time of writing, two RCTs have been designed and implemented with the ATO as part of the ANU-ATO BI Project (Biddle, Fels & Sinning, 2017). One clear point to emerge is the importance of segmentation, by type of tax and taxpayer, and the use of interventions which assist taxpayers to comply. The first RCT was called the BAS Revision Trial, and tested the effect of personalised letters to the businesses. The second RCT was the Employer Obligations Trial, testing the effect of changing internal guidelines by field auditors, as well as the effect of a simplified letter and changed phone script used by desk auditors. The Employer Obligations Trial produced the finding that the treatments led to improvement, 'indicating that businesses are responsive to nudges like simplification and the provision of help with setting up an individualized payment schedule' (Biddle, Fels & Sinning 2017, p. 3).

2.2.2 *Interventions should build trust*

Trust in the tax system and legitimacy of the ATO is important both for BI approaches and tax administration more generally. Braithwaite and Wenzel argue that:

when tax authorities and taxpayers have a psychological contract that communicates mutual respect, loyalty and commitment to the deliberative process, the individual takes on the persona of citizen who is engaged in the democratic process and accepts responsibility for contributing to the collective good. The system prioritizes promotion of trust between citizens and the state above a sense of fear (Braithwaite & Wenzel, 2008, pp. 322-323).

Interventions which make paying easy and foster a socialised setting for interacting about tax payment should be prioritised. It is important for governments to identify and contain the potential for illiberality that nudging carries (Baldwin, Cave & Lodge, 2011, p. 126). Accepting the potential but also the limitations of nudge theory implies that the most valuable contribution of experimental studies

lies in providing an incremental, highly contextual, approach to developing new legal and policy initiatives intended to alter people's behaviour, experimenting with small interventions whose outcomes can be carefully studied in order to identify whether they may be applied to other similar situations (Yeung, 2012, p. 29).

2.3 **Law and technology as constraints on tax payment systems**

There are two more fundamental constraints on the redesign of payment systems. The first constraint, which is not the main subject of this article, concerns the limits of data analysis and automation in regulatory systems. The second constraint is the shape and limits of the law.

Technological and data constraints are not just an inconvenience or cost, but shape what is feasible in regulation. Tax administrators have more real time data, and better technology, available to them than ever before; but the management and best use of this data, and the effective operation of automated systems is not easy. The challenge of effectively instituting automated collection or payment systems has been more visible in the context of social security or welfare systems than the tax system. The Centrelink

‘robo-debt’ issues in Australia (see, e.g., Towell, 2017; Sydney Morning Herald, 2017; Belot, 2017), and the very significant challenges that have been encountered in the UK’s attempt to implement universal credit (Watt, Syal & Malik, 2013; Tetlow, 2018), are illustrative. Even the process of the ATO establishing Single Touch Payroll,⁸ which has the relatively limited goal of connecting wage withholding and Superannuation Guarantee (SG) real time information systems for businesses, and commenced on 1 July 2018, posed a significant challenge for the administrator and taxpayers.

The second constraint is the framework of the law itself: how law is made and what it can do. Underpinning a behavioural and ‘make it easy’ approach to tax compliance and payment are the tax and administrative laws which structure the rights and duties of the revenue authority and the taxpayer, and the tax practitioner or other intermediaries or third parties in the system.

Law in the area of administration and collection is particularly aimed at procedural fairness, with a fundamental goal of equal treatment of taxpayers, or a level playing field. Procedural justice may have a significant impact on voluntary compliance (Biddle & Holzinger, 2016, p. 15, citing van Dijke & Verboon, 2010; Murphy, Tyler & Curtis, 2009). Properly implementing responsive regulatory theory can be difficult, since the difference between the appropriate uses of enforced versus cooperative tax compliance can be hard to determine in practice (Biddle & Holzinger 2016, p. 28).

Tax law in substance and procedure is usually (and usually should be) formal and uniform, with clearly defined and certain categories, powers, accountability and review mechanisms, especially for mandatory obligations such as taxation. Law is therefore not, usually (or ideally), informal, individually tailored,⁹ discretionary or vague.

The stability, predictability and respect for rights of law is a strength but it may limit adaptation to behaviourally-driven, voluntary, flexible and personalised payment and collection systems. More work is needed to design legal or regulatory regimes for compulsory payment that will also suit BI and nudge approaches, while remaining stable, predictable and delivering fairness and taxpayer rights. For example, to what extent can, or should, tax payment be designed as a voluntary or client-oriented system? When should automation or algorithms dominate? If voluntary elements are included in tax payment systems, should they be designed as opt-in, or default, or otherwise responsive to BI insights? How can mandatory or voluntary obligations be designed to incorporate third parties, platforms or intermediaries, not just the taxpayer?

2.4 Taxpayer rights and the Taxpayers’ Charter

Good design interventions for tax payment should enhance the legitimacy of the overall tax system and respect taxpayer rights, as well as satisfying payment and collection goals. Yeung (2012) argues that nudge approaches fail to give due respect to the role and significance of rights. The importance of legal rights also implies that transparency of nudges is needed, for them to be capable of being scrutinised. However, the BI

⁸ Single Touch Payroll requires businesses to report wages, PAYG withholding and superannuation to the ATO each time the business pays its employees, on or before the day on which the payment is made. The requirement applies to businesses with 20 employees or more from 1 July 2018, and for businesses with 19 employees or less from 1 July 2019.

⁹ By contrast, policy drives a focus on particular segments of the community, leading to tailoring by tax administrations in respect of how the law applies to those segments.

literature suggests that many interventions based on nudges work best when they are not consciously perceived by those whose behaviour the nudger seeks to change. In the lexicon of nudge, this would be justified for governments because of ‘libertarian paternalism’, where citizens remain free to make their own choices but are nudged to make certain choices by a government that knows best.

The Taxpayers’ Charter sets out the rights and obligations of the ATO and taxpayers.¹⁰ Taxpayer rights call for procedural fairness, certainty and due process, as in any coercive legal setting. The concept of taxpayer rights as it is expressed by the ATO is based on mutual obligation: just as the taxpayer owes certain obligations to the state, the ATO owes obligations to the taxpayer. These obligations cover the areas of openness and transparency, accountability and procedural justice. The Taxpayers’ Charter commits the ATO to treating taxpayers fairly and reasonably; offering professional service; explaining the decisions it makes about a taxpayer; and respecting the right of a taxpayer to make a complaint. Taxpayers have six important obligations that apply to their dealings with the ATO: honesty; record-keeping; reasonable care; timely lodgement; prompt payment; compliance and cooperation.

The lack of transparency associated with nudge techniques diminishes the extent to which policy-makers can be rendered accountable for their use. It has been argued that this generates scope for abuse (Yeung 2017, p. 837 referring to Bovens, 2008; Yeung 2012). Any change to the process of how taxpayers pay tax raises potential issues for taxpayer rights. In turn, interventions which impact on taxpayer rights affect their legitimacy. However, that is not to say that all nudges breach taxpayer rights. An alternative perspective is that it is less a case of government knowing best, and more a case of the government highlighting what is the public interest, having regard to existing laws and community standards. Many nudges in the tax context simply communicate the goal and effects of taxation, or a particular aspects of tax payment, and ideally they make payment easier to do and the reasons and process for it clearer to the taxpayer.

While the ATO has committed to acting in accordance with the Charter, it does not have the force of law. Nor do the ATO’s Law Administration Practice Statements (PS LAs), which explain to ATO staff the way they should perform their duties but which cannot be relied on by taxpayers.¹¹ However, the *Taxation Administration Act 1953* Part IVC process for objection and appeal of tax assessments permits review of assessments by the Administrative Appeals Tribunal and the Federal Court. Also important is the right to seek judicial review under s 39B of the *Judiciary Act 1903* (Cth), by which taxpayers may allege an assessment is invalid because of *mala fides* or similar process issues,¹² which is not otherwise available under the Part IVC process¹³ or the *Administrative Decisions (Judicial Review) Act 1977* (Cth).¹⁴ In addition, there are options for use of Freedom of Information legislation; and investigation by the Commonwealth Ombudsman and the Privacy Commissioner.

¹⁰ ATO, ‘Taxpayers’ Charter’, https://www.ato.gov.au/About-ATO/Commitments-and-reporting/Taxpayers--charter/?=banner_home_sec_Taxpayers%27_charter/ (accessed 19 January 2019).

¹¹ *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119.

¹² See, e.g. *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

¹³ *Kennedy v AAT* (2008) 168 FCR 566.

¹⁴ See item (e) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

In a recent review, the Inspector-General of Taxation noted that conflicting perceptions regarding the status of the Taxpayers' Charter between taxpayers and the ATO had given rise to a lack of stakeholder confidence in the Charter itself. The IGT stated that:

it has been noted that on the one hand, the ATO has delivered a document purporting to set out 'taxpayers' rights' while, on the other hand, argued in litigation specifically against the conferral of any rights under the very same document (IGT, 2016, p. 38).

The ATO has stated to the IGT that its approach to administering the tax system, particularly under its Reinvention program, goes well beyond the Charter, to 'build a relationship with taxpayers and their representatives based on mutual trust and respect rather than affording rights' (IGT, 2016, p. 40). To the extent that this is the case, the IGT recommended that the Charter be updated to reflect the higher standards of the Reinvention program, going on to say that 'the ATO cannot be in a perpetual state of "Reinvention" and such higher standards should be captured in an enduring and fundamental document such as the Charter' (p. 40). As Bentley has observed, the Charter and the ATO's responsive regulation model will increasingly depend upon a clear perception in society that the ATO is exercising legitimate authority (2016, p. 304 citing Gangl, Hofmann & Kirchler, 2015).

Given the ATO's position in respect of the Reinvention program, interventions to modify payment approaches need to fit within the Charter and the ATO's additional commitments. These commitments include:

1. making it as easy as possible for taxpayers to get things right;
2. understanding and considering taxpayers' circumstances and offering a fair and differentiated service;
3. treating all people with respect and dignity;
4. building trusted relationships;
5. being pragmatic and fair in its decision making;
6. giving the right answers, at the right time and in the right way; and
7. using its skills and expertise to assist taxpayers to do the right thing.

The first, fourth and seventh of these commitments are the most relevant for the purposes of BI interventions in tax payment systems.

3. TAX PAYMENT SYSTEMS

Australia's tax system is largely based on self-assessment, combined with payment and enforcement systems. In 2016-17, the ATO collected AUD 359.3 billion in net tax, up AUD 16.7 billion (4.9%) over the previous year, but AUD 4.2 billion (1.2%) below the amount expected at the time of the 2016-17 Budget (ATO, 2017). The ATO had an operating expense budget in 2016-17 of AUD 3.5 billion and a workforce of 20,435 employees. The ATO reports that its average cost of collection of net revenue of AUD 100 is 90 cents and it is recognised internationally as an effective tax administrator.

While the majority of taxpayers pay their tax on time, challenges in the economy, trade debts, issues with business solvency and, potentially, administrative and compliance factors, all contribute to delays and failures in tax payment. The ATO has year-end debt inventories below 7.5% of net revenues, low relative to many other countries (OECD, 2015, Table 6.14). Nonetheless, ATO reported that tax debt, including debt under dispute, was in excess of 10% of net revenue collections at the end of 2013. Between 2010-11 and 2016-17, collectable debt increased from AUD 14.1 billion to AUD 20.9 billion (ATO, 2015; ATO, 2017). Recent empirical research using previously unreleased ATO data has found that the majority of financial penalties imposed by the ATO on deliberate tax evaders are never paid (Leech, 2018). The ATO writes off more than 20% of outstanding debt (OECD, 2015, Table 6.15; IGT, 2015). Accordingly, the ATO's goal for improving tax collection is increasingly aimed at avoiding tax debts altogether, an approach which is factored into our recommendations in this article.

For individuals, tax payment is primarily achieved by withholding of wage and similar income in the PAYG system (which shifts the immediate payment obligation to the employer from the employee), through tax instalments on investment or business income in the instalments system where this is more than AUD 4,000 in a year,¹⁵ and ultimately following reconciliation in an annual tax return and the issue of an assessment.

For businesses, especially SMEs, tax assessment requires filing of the Business Activity Statement (BAS) and payment of income tax, goods and services tax (GST), PAYG withholding payments and other taxes under specified time schedules ranging from a fortnight to a month, quarter or year, followed by reconciliation in an annual self-assessed tax return.

3.1 Tax-related liabilities

Tax debts are covered by standardised rules for 'tax-related liabilities' contained in Part 4-15 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (TAA). A tax-related liability is defined as a pecuniary liability to the Commonwealth arising directly under a taxation law (TAA, Sch 1, s 255-1). A tax-related liability that is due and payable is a debt due to the Commonwealth and is payable to the Commissioner, who may recover an unpaid tax-related liability by court action (TAA, Sch 1, s 255-5).

Tax-related liabilities are defined 'inclusively' and include income tax, PAYG instalments, PAYG withholding amounts, withholding tax on dividends, GST, Fringe Benefits Tax (FBT) and the superannuation guarantee charge. Administrative penalties and interest are also tax-related liabilities. Unlisted obligations are still tax-related liabilities for the purposes of the standardised rules if they fall within the definition of 'tax-related liability': *Muc v DCT* (2008) 72 ATR 369 at [41]-[57].

Where a tax-related liability exists, the ATO adopts a range of approaches to recovering the tax owed, from 'soft touch' assistance or support of taxpayers, through to enforcement, seizure of assets and recovery. The escalation of strategies by the ATO is based on an evaluation of the compliance risk posed by the taxpayer. The ATO recognises there is a difference between unwillingness to pay a debt and a willingness to pay, combined with an inability through circumstances outside the taxpayer's

¹⁵ See ATO, 'How to start paying instalments', <https://www.ato.gov.au/General/PAYG-instalments/How-to-start-paying-instalments/>.

control.¹⁶ Its debt collection strategy is premised on prompt payment as it recognises that an ageing debt becomes more difficult to collect. Any factor which is likely to cause or contribute to delay in the collection of a debt must be regarded as an inherent element of risk.¹⁷

3.2 Interest on early and late payment of tax

The ATO has a regime of interest for shortfalls (underpayments of tax) (the Shortfall Interest Charge (SIC)), unpaid tax (the General Interest Charge (GIC)), and for early payments of tax. The object of the SIC is to neutralise benefits that taxpayers would otherwise receive from shortfalls of tax, so that they do not receive an advantage in the form of a free loan relative to those taxpayers who assess correctly (TAA, Sch 1, subdiv 280-B). It applies to shortfalls of income tax, petroleum resource rent tax, excess non-concessional contributions tax, Division 293 tax or diverted profits tax that are revealed when the Commissioner amends a taxpayer's assessment.

The GIC on unpaid income tax is calculated from when the tax is due and payable, not from when a tax assessment is made (*Income Tax Assessment Act 1997*, s 5-15). The GIC regime was streamlined in 1999. Like the SIC, it compounds daily and applies to most taxes including income tax, FBT and GST, as well as PAYG obligations. Since 2001, the GIC has been the 90-day Bank Accepted Bill rate plus an uplift factor of 7%. For the current year, the GIC (also updated quarterly) is set out in Table 1 below.

The SIC applies to amendments of tax for 2004-05 and later years' income tax assessments. It is discretionary and is applied at a uniform rate that is lower than the GIC. It is applied for each day in the period beginning when the tax was due and payable, and ending on the day on which the Commissioner issues the amended notice of assessment. For the current year, the SIC (which is updated quarterly) is also set out in Table 1 below.

¹⁶ ATO, 'Risk management in the enforcement of lodgement obligations and debt collection activities', PS LA 2011/6 [15].

¹⁷ Ibid [20]-[21].

Table 1: General Interest Charge (GIC) and Shortfall Interest Charge (SIC) for 2017-18 year

Quarter	GIC annual rate	GIC daily rate	SIC annual rate	SIC daily rate
April – June 2018	8.77%	0.02402740%	4.77%	0.01306849%
January – March 2018	8.72%	0.02389041%	4.72%	0.01293151%
October – December 2017	8.70%	0.02383562%	4.70%	0.01287671%
July – September 2017	8.73%	0.02391781%	4.73%	0.01295890%

Source: www.ato.gov.au.

For self-assessment entities such as companies, income tax debt begins to accrue after the first day of the sixth month after the income year (*Income Tax Assessment Act 1997*, s 5-5(4)). If a business has the same income year as the financial year, its tax debt would therefore accrue on 2 December. For individuals, income tax debt accrues 21 days after the day by which the taxpayer is required to lodge their tax return. However, if an individual lodges their tax return on or before the return day and the Commissioner issues a notice of assessment after the return day, the income tax is due and payable 21 days after the Commissioner issues the notice (*Income Tax Assessment Act 1997*, s 5-5(6)).

Since 1983, with various modifications, the ATO has had a regime for interest on overpayment, or (of particular interest to us), early payment of tax, established by the *Taxation (Interest on Overpayments and Early Payments) Act 1983*.¹⁸ Under s 8A of the *Taxation (Interest on Overpayments and Early Payments) Act*, a person (including a corporation) who makes a payment of tax more than 14 days before the liability is due to be paid is entitled to interest on the payment. For companies, interest is payable from the beginning of the day on which payment is made until the end of the due day. The interest rate on early tax payment is one quarter of that for late payment. Interest is payable at the base interest rate set out in s 8AAD of the TAA, calculable at the monthly average yield of the 90-day Bank Accepted Bills published by the Reserve Bank of Australia for two months before the end of the preceding quarter. There is no uplift factor applied to interest on early payments. The most recently publicised rates for interest on early payments are set out in Table 2.

¹⁸ See the explanation in ATO, 'Credit interest', PS LA 2011/23 (last amended 23 January 2015).

Table 2: Interest on Early Payments, Overpayments and Delayed Refunds

Period	Interest rate (% pa)
1 July 2016 to 30 September 2016	2.01
1 October 2016 to 31 December 2016	1.76
1 January 2017 to 31 March 2017	1.76
1 April 2017 to 30 June 2017	1.78

Source: ATO, Fact Sheet, QC51246 (modified 25 May 2017), www.ato.gov.au.

Interest received on early or overpayments of tax, or on delayed refunds, is assessable income when it is received and must be declared by the taxpayer as interest paid by the Commissioner under the *Taxation (Interest on Overpayments and Early Payments) Act* (Income Tax Assessment Act 1997, s 15-35). The following tax payments attract interest if payment is made more than 14 days before the due date:

- income tax (including Medicare levy and Medicare levy surcharge)
- compulsory Higher Education Loan Program (HELP) repayment amounts
- Student Financial Supplement Scheme assessment debts
- compulsory Student Start-up Loan (SSL) repayment amounts
- compulsory ABSTUDY Student Start-up Loan (SSL) repayment amounts
- compulsory Trade Support Loan (TSL) debt repayment amounts
- interest on distributions from non-resident trust estates
- income tax penalties for late lodgement of returns in the 1999-2000 and earlier income years
- GIC relating to a late tax return for the 1999-2000 and earlier income years
- GIC on increase in tax payable resulting from an amended assessment for the 1999-2000 and earlier income years
- a shortfall interest charge.

To claim entitlement to interest on early payment, the taxpayer may claim it as a credit on their tax return for the relevant year, which requires the taxpayer to calculate the amount of the interest entitlement; or write to the ATO to claim it. These low interest rates on early payment are designed to prevent ‘gaming’ of the payment system whereby taxpayers may use the ATO as a source of funds or make large payments, to claim refunds (with interest) later. We return to this design issue in section 5.4.

3.3 Running balance account (RBA)

A taxpayer may set up a running balance account (RBA) with the ATO for payment of primary tax liabilities. An RBA records a taxpayer’s liabilities and payments for different taxes in a single account, rather than splitting out the liabilities for different

tax debts (TAA, Part IIB, ss 8AAZA to 8AAZN). The ATO policy on payment and allocation of RBAs is stated in PS LA 2011/20, while PS LA 2011/21 deals with offsetting of refunds and credits against taxation and other tax debts and PS LA 2011/22 deals with refunds of RBA balances and surpluses.¹⁹

The ATO is not required to follow any instruction given by the taxpayer when allocating payments to an RBA (PS LA 2011/20 [3]). A credit to an RBA will:

- normally be offset against a debt that is due, but not yet payable, where the credit and the debt due relate to the same tax type, are administered in the same account, or the debt is a BAS amount.
- normally be offset against a tax debt that is subject to a payment arrangement, unless the ATO did not tell the taxpayer that this would occur when it agreed to the arrangement.
- normally not be offset if the credit is of a different tax type to the debt due, unless the debt relates to BAS amounts or the taxpayer has a poor compliance record (PS LA 2011/20 [4]).

Where payments are made voluntarily for an anticipated tax debt (in full or in part), the ATO should allocate that to the anticipated tax debt, provided there are no other tax debts (PS LA 2011/20, Attachment A). The effect of offsets in the RBA on the cash flow of the taxpayer should always be considered when arrangements are negotiated. If an offset during the course of a payment arrangement does cause the taxpayer unexpected cash flow problems, they can apply to have a temporary variation to that arrangement. Generally speaking, unless there is a valid reason not to do so, the ATO's policy for allocating a payment for which no direction is received is to allocate to the oldest debt within an account first (PS LA 2011/20 [5]).

The Commissioner has the discretion to refund tax debts rather than offset them (TAA, s 8AAXZL). The Commissioner must refund any surpluses or credits in respect of a company's RBA and may not retain a refund, irrespective of whether a prior notification is outstanding, or has not been processed, if the entity can demonstrate, or information held in the ATO confirms, the viability of the business will be compromised if the refund is retained (PS LA 2011/22 [13]). Voluntary payments made in anticipation of tax debts will only be refunded where the entity requests (TAA, s 8AAZLF(2)).

The Commissioner may consider paying a refund under subsection 8AAZLH(3) of the TAA electronically to a nominated third party account (that is, other than one meeting the conditions under TAA, s 8AAZLH(2A)) where the account is held by:

- a parent entity or nominated member entity for a related group of entities including special purpose entities;
- a manager, custodian, administrator or agent charged with the responsibility of managing some financial aspects of a large number of separate entities such as,

¹⁹ ATO, 'Payment and credit allocation', PS LA 2011/20; ATO, 'Offsetting of refunds and credits against taxation and other debts', PS LA 2011/21; ATO, 'Refunds of running balance account surpluses and credits – Commissioner's discretion to retain refunds and the discretion to pay refunds in a different way', PS LA 2011/22.

strata titles, property trusts, managed investment funds or superannuation funds;

- a trustee for a number of trusts; or
- a representative of an incapacitated entity, for example, a liquidator or receiver.

3.4 Payment plans

The Commissioner has a range of options to assist the taxpayer before and after a tax debt has crystallised. These approaches are used before moving towards coercion methods of securing payment of tax debts.

The Commissioner may defer the due date for payment of a tax debt, however generally a deferral is not granted unless the debtor can demonstrate that circumstances beyond their control precluded payment.²⁰ The Commissioner also has discretion to release an individual taxpayer from payment of a tax liability if satisfying the liability would cause that person serious hardship (TAA, Sch 1, s 340-5). We do not explore these options further in this article, focusing instead on systems established to ensure taxpayers pay their tax due on time, or processes for payment of existing debts.

The Commissioner may require security for existing or future tax-related liabilities where an entity is carrying on an enterprise in Australia and the Commissioner has reason to believe that the enterprise will be carried on for a limited time only; or where the Commissioner reasonably believes that the required security is otherwise appropriate (TAA, Sch 1, s 255-100). Such other circumstances include where a taxpayer requests a deferral of payment or payment of a tax debt by instalments. It is an offence not to provide the Commissioner security when requested to do so.

If a taxpayer cannot pay the tax debt in full the Commissioner will consider a payment plan (payment by instalments) (TAA, Sch 1, s 255-15). These arrangements can be entered into before the liability has arisen. Indeed, the ATO advises making the application before the due date for payment passes. To permit payment by instalments the Commissioner may, having regard to the circumstances of a particular case, permit the taxpayer to pay an amount of a tax-related liability by instalments under an arrangement between the taxpayer and the Commissioner. The provision for a payment plan is quite short and reads as follows:

S 255-15 To permit payments by instalments

(1) The Commissioner may, having regard to the circumstances of your particular case, permit you to pay an amount of a * tax-related liability by instalments under an * arrangement between you and the Commissioner (whether or not the liability has already arisen).

(2) The *arrangement does not vary the time at which the amount is due and payable.

²⁰ See ATO, 'General debt collection powers and principles', PS LA 2011/14 [32].

An arrangement for a payment plan does not vary the time at which the amount is due and payable. Accordingly, any GIC or other relevant penalty, if applicable for any unpaid amount of the liability, begins to accrue from the date the tax is due and payable.

A decision to enter into an arrangement to accept payment by instalments will be made in accordance with PS LA 2011/14 and will be determined by the risk management guidelines in PS LA 2011/16 ('Insolvency – collection, recovery and enforcement issues for entities under external administration'). In practice, taxpayers often seek payment plans that extend over a longer period than the Commissioner is willing to provide. Usually one year, but up to two years, is the accepted range. This will also involve an up-front payment of a substantial part of the tax debt, the amount of which should be to the extent of the taxpayer's capacity to do so (PS LA 2011/14 [62]).

It is the tax debtor's responsibility to demonstrate that payment cannot be made by the due date. In making the application for an instalment plan, the taxpayer must supply the Commissioner with all necessary information (within the timeframes for such provision agreed with the Commissioner), failing which enforcement procedures for the tax-related liability may be commenced without further notice.

The ATO is unlikely to agree to a payment plan where the taxpayer has a history of failing to lodge, pay or meeting previous payment plans on time. The Commissioner may also require security as a precondition to such a payment plan. The individual circumstances of the taxpayer will be considered in each case, including steps taken or proposed to be taken by the taxpayer to mitigate risk. The Commissioner will also consider the taxpayer's past behaviour and reasons for any previous non-compliance (PS LA 2011/14 [56]). The factors to be taken into account in determining whether to accept payment by instalments include, but are not limited to, the information provided by the taxpayer, the taxpayer's current financial position and solvency of the taxpayer. Payment by instalments will not be accepted if prospects of recovery in the longer term would be diminished or the revenue would be disadvantaged (PS LA 2011/14 [63]).

If the Commissioner decides to accept payment by instalments, the taxpayer will be advised in writing of the details of the payment arrangement. They will also be advised of the likely consequences if they fail to pay as required under the arrangement. Arrangements to accept payment of a debt by instalments will stipulate that GIC imposed by legislation applies from the original due date of the liabilities and will continue to accrue while the debt remains outstanding. If possible, taxpayers will be provided with an indication of the likely quantum of interest they will be required to pay under the arrangement (PS LA 2011/14 [67]).

If the tax debtor fails to meet a term of any agreed payment plan the Commissioner is likely to commence recovery proceedings thereafter. Taxpayers are expected to acknowledge the debt and, if legal proceedings have commenced or are about to commence, consent to the Commissioner being granted judgment in the event of any default in payment. The payment plan can also be terminated if the tax debtor's information, as provided to the Commissioner in applying for the plan, is false, the tax debtor's circumstances substantially change or the tax debtor fails to comply with ongoing tax obligations as to lodgement and payment.

Payment plans can be drawn up online, an option available to individuals or sole traders with debts of AUD 100,000 or less. The ATO has found that online payment plans are effective from a behavioural perspective, the 2015-16 Annual Report noting that people

with outstanding debts are often more willing to initiate contact with the ATO and enter into an arrangement to pay them off if they can do this online or via an automated phone service.

The interaction of payment plans and the running balance account (RBA) may be complicated. Where the outstanding tax debt is a deficit debt of an RBA, the Commissioner will usually consider an application to pay by instalments based on the RBA deficit debt rather than on each of the individual component tax debts that contribute to that balance.

Presumably, if a payment plan is not followed by the taxpayer (or payment defaults), the taxpayer reverts to the normal tax debt and recovery processes and the case may be escalated. It is less clear if the payment plan is binding on the Commissioner. Further research is needed to understand how well payment plans are working including how many taxpayers have taken up the option of drawing them up online; whether taxpayers are adhering to them; and how well the ATO's internal systems manage complexity, for example, where a payment plan has been taken out in respect of an RBA and a new tax debt accrues.

3.5 Cash Flow Management Program

Payment capacity – the availability of cash flow – is important for tax payment by SMEs and should be accessed early in the earnings cycle. For example, Poppelwell, Kelly and Wang's New Zealand study (2012) shows that by using analytics to identify businesses at risk of non-compliance, and subsequently employing educational programs on compliance as well as providing flexible payment arrangements, voluntary compliance substantially improved.

The ATO notes in its 2016-17 Annual Report that cash flow issues are endemic for SMEs and states that it has developed a Cash Flow Management program with industry and business, based on adult learning and BI principles, to take action to improve their cash flow situation, enabling them to pay tax on time. However, at this stage, the cash flow management program appears only to direct small business taxpayers to information about how to set up a budget and improve cash flows in their operation.²¹

3.6 Risk evaluation and recovery action

When deciding appropriate action to deal with outstanding debts, the ATO considers the compliance history of a taxpayer, including both payment and lodgement records (PS LA 2011/14 [8]). The Commissioner will also assess the tax debtor's capacity to pay their debts, including their gross income and expenditure, access to liquid assets, ability to convert fixed assets to cash, and ability to obtain loans or funds. Factors or circumstances which led to the inability to pay will also be considered.

The Commissioner has accepted the Inspector-General of Taxation's recommendations that the ATO should differentiate between small business tax debtors that want to comply with their payment obligations but need short term assistance, and small

²¹ ATO, 'Manage your cash flow', <https://www.ato.gov.au/business/managing-your-small-business-records/manage-your-cash-flow/>, directing taxpayers to Australian Government, 'Improve your business' financial position', <https://www.business.gov.au/Info/Run/Finance-and-accounting/Managing-finances/Improve-your-business-financial-position> (accessed 16 January 2019).

business tax debtors that are either incapable of meeting their payment obligations within a relatively short timeframe or are serial defaulters.

There are three essential elements to risk evaluation:

1. The risk: This involves determining the most cost-effective method of lodgement enforcement or debt recovery and determining if and when the document will be lodged or the debt will be paid.
2. The risk probability: This requires using all available information and applying the compliance model to determine whether the outstanding debt is likely to escalate and whether payment is likely to occur and when.
3. The risk exposure: The ATO determines the extent of any loss to the revenue that could result and the risk of being seen to encourage non-compliant behaviour.²²

Matters that may need to be considered when evaluating risk include the amount of debt, the characteristics of the debt; attitude, behaviour and circumstances of the taxpayer.

The Commissioner has a broad range of enforcement measures at its disposal. These include ‘softer’ versions of enforcement like telephone or further written contact with the tax debtor, through to equitable remedies/declaratory and restitution orders obtained through legal action.²³ Although the Commissioner is entitled to commence proceedings to recover any unpaid tax, notwithstanding that the debt is disputed and an objection or appeal is withstanding, the courts have discretion to stay the proceedings. Case law indicates that the clear policy of the legislation is to give priority to the recovery of tax in preference to the determination of the taxpayer’s challenge to the relevant assessment: see, e.g., *DCT (NSW) v Mackey* (1982) 13 ATR 547, 549.

In addition to the regime for recovery of tax debt in court under s 255-5 of the TAA, the Commissioner may be able to use the *Corporations Act 2001* to recover the debt if a tax-related liability is due and payable by a company. For example, the Commissioner may serve a statutory demand under section 459E. The Commissioner may also bring forward the time for payment if the Commissioner has a reasonable belief that the taxpayer may leave Australia before the time at which the tax liability becomes due (TAA, Sch 1, s 255-20).

One example of a BI-influenced approach to debt collection is the ‘Purposeful First Action’ model, where taxpayers receive more flexible or firmer responses based on analytics of their previous behaviours (ATO 2017b, p. 16). The ATO is also using BI to encourage people to transact with the agency digitally, which, it has found, often results in faster processing, more accurate data and a better experience for the taxpayer with an ultimate aim of encouraging willing participation in the tax and superannuation systems (p. 17).

²² ATO, ‘Risk management in the enforcement of lodgement obligations and debt collection activities’, PS LA 2011/6 [31].

²³ ATO, ‘Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts’, PS LA 2011/18.

4. THIRD PARTY WITHHOLDING

Tax collection is substantially strengthened by involving third parties, either in collecting and providing information or in withholding and remitting tax payment. Third parties may be involved in tax collection either before debts are due and payable, or after a debt is due, to facilitate recovery of the debt. There are also numerous systems for information collection and provision to the ATO by intermediaries. The most well-known example is reporting of interest by the banks to the ATO. The bank must withhold tax at the top marginal rate unless the bank account holder provides their Tax File Number (TFN) to the bank.

New approaches involve levels of publicity about tax payment and debt. An exposure draft of the Treasury Laws Amendment (Tax Transparency) Bill 2018: Transparency of taxation debts was released in early 2018 but is yet to be introduced to parliament. The legislation would allow ATO officers to report to credit reporting bureaus the tax debt information of businesses that ‘do not effectively engage with the ATO to manage [their tax] debts’. It achieves this by providing an exception to the general prohibition on taxation officers disclosing protected information, contained in Division 355 of the TAA. At this stage, only business debts will be disclosed by the ATO, but the debts of partnerships, trusts and individuals may be brought in over time. This legislation would create another deterrence measure for the ATO to add to its toolkit in preventing and pursuing tax debts. The nature of the measure would be more punitive, given the potentially serious outcomes for businesses that fail to pay their tax debts on time and who therefore have impediments to accessing necessary lines of credit.

4.1 PAYG tax withholding

Wage withholding dates from 1941 in Australia’s federal income tax, and earlier in the State income taxes which were imposed prior to 1942. Today, PAYG wage withholding touches almost all wage earners and employers as well as many other payments and entities. The introduction of wage withholding was a critical administrative adaptation in Australia, as in many other tax systems. Hood observed (1985, p. 14) that in the UK, where PAYG was introduced in 1944, it ‘changed income tax from a lump-sum, payment-in-arrear system to a cumulative withholding tax’, building and essentially outsourcing tax collection.

Withholding fundamentally changed the dynamic of tax payment, permitting administrative adaptation and substantial cost saving by outsourcing most of the work to employers in the formal economy. This locates the time of tax payment as soon as income becomes available. It makes tax payment easier, or even invisible, for the employee, who is also motivated to put in the tax return so as to claim deductions or seek the end of year ‘tax refund’ beloved by many Australian individual taxpayers. As a result of the success of withholding, the most ‘non-compliant’ segment of the Australian taxpaying population shifted from individual workers to SMEs.

4.1.1 *Mandatory PAYG withholding*

The PAYG regime is set out in Part 2-5 of Schedule 1 of the TAA. The regime is compulsory for the withholder/payer. The basic obligation is expressed as follows:

S 2-35 Payment to employee

An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity).

The PAYG regime does not remove the employee obligation to pay tax according to law following an assessment (the tax owed is reconciled with that already recorded as paid by withholding).²⁴ Instead, it overlays an *additional* obligation on the employer to withhold and remit to the ATO, with accompanying deadlines, penalties and reporting obligations. The effectiveness of the PAYG regime depends on enforcement in relation to the employer. This has many efficiencies. However, weaknesses of PAYG systems include where the employer is not otherwise visible to the tax system in a business or employer registration setting, for example, for private household employers of nannies and cleaners. Even cash payments by quite large employers – such as supermarkets, agricultural or construction businesses – may be done off the books. A second weakness is the characterisation of workers as contractors, not employees, an issue endemic to the ‘cash’ and digital economy.

Nonetheless, the PAYG withholding obligation has been extended in various ways since it was introduced. For example, the Australian PAYG regime covers labour hire firms, which operate as intermediaries between the business for which the work is done and the individual doing the work:

S 12-60 Payment under labour hire arrangement, or specified by regulations

(1) An entity that *carries on an *enterprise must withhold an amount from a payment that it makes to an individual in the course or furtherance of the enterprise if:

(a) the enterprise is a *business of arranging for persons to perform work or services directly for clients of the entity, or the enterprise includes a business of that kind that is not merely incidental to the main activities of the enterprise; and

(b) the payment is made under an *arrangement the performance of which, in whole or in part, involves the performance of work or services by the individual directly for a client of the entity, or directly for a client of another entity.

The provision distinguishes between core and *de minimis* contractor hiring. Example 1 in the section presents a situation of a labour hire firm, ‘Staffprovider Ltd’, which

keeps a database of skilled persons who are willing for their services to be provided to third parties and arranges with Corporate Pty Ltd to provide to it the services of a computer programmer in return for payment. Staffprovider arranges with Jane for her to do computer programming for Corporate. Staffprovider must withhold amounts under this section from payments it makes to Jane under the arrangement with her.

²⁴ There is, however a statutory right to a credit for the amount of tax that has been ‘withheld’: Section 18-15 of Schedule 1 of the TAA; *FCT v Cassaniti* [2018] FCAFC 212 (30 November 2018).

By contrast, in Example 2, a solicitor who regularly briefs barristers to represent his clients is not required to withhold from payments made to barristers, as briefing barristers is merely incidental to the solicitor's main activities.

The PAYG obligation also includes payments made by a business if the supplier does not provide an Australian Business Number (ABN) (TAA, Sch 1, s 12-190). A further set of provisions mandates withholding for payments from investment funds and payments offshore, and where a TFN is not provided by the recipient of the payment; as noted above, the most common example is bank interest. There are many other situations; the full list is summarised in TAA, Sch 1, s 10-5.

A withholding entity must be registered with the ATO and under specified withholding schedules, the withholder is obliged to withhold from a payment, and then pay the withheld amount to the ATO (TAA, Sch 1, Div 16). Withholding entities are also required to notify the ATO that a withholding of an amount (even if nil) that is obliged to be withheld and paid, has been completed. When withholding and payment to the Commissioner is done according to law, importantly, the withholding entity is then discharged from any liability to pay any other person the amount (for example, an employer who withholds and remits to the ATO an amount of tax in respect of an employee's salary, as required under the TAA, is relieved of the legal obligation to pay that amount of salary to the employee). That is, the withholding obligation trumps the private or other legal obligation of an employer to pay salary to their employee. The withholder must give an annual payment summary to the payment recipient (e.g., the employee) of the amount of tax withheld and the total payment (TAA, Sch 1, s 16-155). Failure to withhold and remit PAYG amounts is an offence resulting in imposition of administrative penalties and interest, and potential criminal penalties.

4.1.2 Voluntary PAYG withholding

While it is central to the effectiveness of PAYG withholding that it is mandatory, we are interested in making timely payment of tax easier and in this context, it is noteworthy that Australia has a regime for voluntary withholding by agreement. Taxpayers may also voluntarily join the payment instalment system.

A voluntary agreement may be entered into in relation to tax due by an individual taxpayer who performs work or services and is paid for it, under section 12-55 of Schedule 1 to the TAA, and where PAYG does not apply. The provision establishes a *binding* obligation to withhold on a third party, to implement this *voluntary agreement* with the individual taxpayer. The requirements of the voluntary PAYG regime are fairly onerous on both the individual taxpayer and the entity that pays the taxpayer, as indicated in the provisions of section 12-55 extracted below (our emphasis).

S 12-55 Voluntary agreement to withhold

- (1) An entity *must* withhold an amount from a payment it makes to an individual if:
 - (a) the payment is made under an * arrangement the performance of which, in whole or in part, involves the performance of work or services (whether or not by the individual); and
 - (b) no other provision of this Division requires the entity to withhold an amount from the payment; and

(c) the *entity and the individual are parties to an agreement (the voluntary agreement)* that is in the * approved form and states that this section covers payments under the arrangement mentioned in paragraph (a), or under a series of such arrangements that includes that arrangement; and

(d) the individual has an * ABN that is in force and is * quoted in that agreement. ...

(2) Each party must keep a copy of the voluntary agreement from when it is made until 5 years after the making of the last payment covered by the agreement. [subject to a penalty] ...

(3) A party to the voluntary agreement may terminate it at any time by notifying the other party in writing.

It is an interesting question whether an entity paying an individual for work or services would willingly agree to such an arrangement, as this establishes a liability for the entity to withhold, pay, and keep documentation in respect of payments, where not mandated and which do not relate to its own tax obligations. The ATO does not report on how many voluntary PAYG arrangements are in place, how much revenue is collected and how effective these are.

4.2 Garnishment

As was noted in section 1, the Commissioner's garnishment power has been subject to negative publicity recently and its use is being reviewed by the IGT. The garnishment power is broadly drafted and does not rely on the existence of a judgment debt or court order:

S 260-5 Commissioner may collect amounts from third party

Amount recoverable under this Subdivision

(1) This Subdivision applies if any of the following amounts (the debt) is payable to the Commonwealth by an entity (the debtor) (whether or not the debt has become due and payable):

(a) an amount of a * tax-related liability;

(b) a judgment debt for a * tax-related liability;

(c) costs for such a judgment debt;

(d) an amount that a court has ordered the debtor to pay to the Commissioner following the debtor's conviction for an offence against a * taxation law.

Where any tax-related liability is payable by a taxpayer, such as assessed income tax, or penalties and the GIC, the Commissioner can issue a notice in writing to a third party that owes money to the taxpayer, requiring that third party to pay the money to the Commissioner. Such 'garnishee notices' must require that the third party pay the debt or the available money immediately after, or at or within a specified time after, the

amount of the money concerned becomes owing to the debtor. Garnisheeing may be done from employers, trade debtors and certain other parties.²⁵

There is no right to administrative review of the ATO's decision to issue a garnishee notice under the Part IVC process: *Rossi v Commissioner of Taxation* [2015] AATA 601. Taxpayers do, however, have the right to judicial review.²⁶

The garnishee power applies even if a debt is not due and payable for a tax-related liability, judgment debt, costs or a court-ordered amount. For example, if the Commissioner issues an assessment on Day 1, and the debt is due and payable 21 days later under s 5-5(5) of the *Income Tax Assessment Act 1997*, the Commissioner can issue a garnishee notice between Day 1 and Day 20 before the debt is due and payable. The provision is therefore narrower than regimes for payment plans or voluntary withholding which can apply even where no tax-related liability exists, but it is nonetheless broadly drafted, empowering collection of existing tax debts in a range of circumstances.

5. ADAPTATION OF PAYMENT SYSTEMS FOR BI APPROACHES

As set out above, Australia's legal framework for tax compliance makes provision for the payment of tax debts before they accrue, including through running balance accounts (RBAs), interest on early payments and the PAYG system. Other parts of the framework provide for payment plans, voluntary withholding, instalments and collection of tax by garnisheeing payment from third parties. Interest on overpayment or early payment of tax is payable, but at a low rate, and it is assessable. Interest expense on underpaid tax may be deductible but is at a much higher rate. Variation of these approaches may be supported but is not easy to achieve, and would seem to require significant effort by the taxpayer who currently, or may in future, owe tax, as well as support by third parties such as employers.

Building on the existing law, the ATO's Reinvention direction, early findings from the BI Project, and the literature on taxpayer rights, we suggest in this section some options for reform of the legal regimes. These proposals are made with a view to making tax payment easier, more current and in line with learning from BI approaches, placing the taxpayer and the system they inhabit at the centre of the reforms. Some of the proposals relate to individuals, and some to business taxpayers. The options for reform we discuss in this section overlap to some extent and should be read as initial ideas for consideration, and not a comprehensive set of proposals. Some initial complications for each option are presented also.

²⁵ If a garnishment order is made and money taken, but it later becomes clear that the ATO should not have made the order as a matter of policy such as hardship, then the ATO has no power to refund the money. The garnished funds are payment of a debt due to the Commonwealth and go into consolidated revenue. The garnishment cannot be 'undone' even if the ATO later considers that it should not have been done.

²⁶ There are numerous cases: see, e.g., *Edelsten v Wilcox* (1988) 83 ALR 99; *Heath v Deputy Commissioner of Taxation* (1995) 30 ATR 536 (Olney J); *Saitta Pty Ltd v Commissioner of Taxation* [2002] FCA 1105 (Finkelstein J); *Uratoriu v Commissioner of Taxation* [2008] FCA 1531; *Transtar Linehaul Pty Ltd v Deputy Commissioner of Taxation* [2011] FCA 856; *Queensland Maintenance Services Pty Ltd v Commissioner of Taxation* [2011] FCA 1443 (Collier J).

5.1 Extend PAYG withholding systems

5.1.1 PAYG to cover other tax liabilities

As set out in section 4, taxpayers can (and may be required by law to) make payments of anticipated tax under the PAYG instalment system, in respect of tax that is not withheld by another party (such as through wage withholding).

Presently, PAYG applies to income tax of businesses and individuals. Businesses must pay other taxes separately, for example GST is paid through the Business Activity Statement (BAS). One possibility is that these diverse payments could be streamlined so that different forms of tax may be paid using the one PAYG system. The goal would be to relieve businesses of some of the administrative burden of separate tax systems. However, this goal may not be straightforward to achieve. It is also desirable to achieve segmentation by type of taxpayer and type of tax. If there are several different tax obligations in PAYG withholding, some personal to a taxpayer and some arising from a quasi-fiduciary intermediary relationship, clarity in communicating the different types of payment to the taxpayer may be important.

An extension of PAYG in this way would require amending the legislation governing the PAYG system, the *A New Tax System (Pay As You Go) Act 1999*. As drafted, the PAYG system does not extend to the payment of other taxes. Legislation which pertains to other taxes being brought within the PAYG system would also likely need to be amended, for example Part 207 of the *A New Tax System (Goods and Services Tax) Act 1999* which deals with GST returns. The ATO's Business Portal would also require potentially substantial amendment, which may itself act as an impediment to this option.

Even within the income tax, there are options to extend PAYG operation. One option would be to permit a taxpayer who is already in the PAYG withholding system, for example in respect of salary earned on one job, to rely on that existing system to manage all of their tax owed on other sources of income such as investment or business income.

Currently, an employee can arrange an upward variation of their PAYG tax withheld, up to a limit, by entering into an agreement with their employer to vary the amount of withholding (ATO, 2018, p. 8). Employers are not obliged to accept a variation but are able to decline the taxpayer's request; they may be inclined to do so if it increases their administrative burden (p. 9). Taxpayers outside the PAYG system can also initiate, subject to rather onerous agreement requirements, a voluntary arrangement with a payer that mimics the features of PAYG withholding. Again, the payer (such as an employer) is not obliged to enter into such an arrangement.

The benefit of expanding PAYG is that it extends a pre-existing system, with taxpayers already operating within it, and having a level of knowledge about it. The scope of any expansion, and the obligations it does not cover, would need to be carefully managed and explained, especially with individuals who had not been part of the system beyond wage withholding. An important challenge is that each type of tax, and perhaps even types of income (wages or business income) are subject to different rules about timing of tax payment and liability, as well as credits or refunds; all of these rules may need review if a substantial reform was initiated.

5.1.2 *PAYG for existing tax debts*

A more limited approach, which the ATO is exploring, is expanded PAYG withholding for individual taxpayers to support payment of existing tax debts. Currently, this investigation is limited to individual taxpayers with income tax debts of over AUD 100,000 which can be addressed within two years (ATO, 2018, p. 4). In its 2015 review of the ATO's tax debt management strategies, the IGT noted that the agency was investigating options to encourage prepayment of anticipated debts using existing tax payment systems to deduct tax at the source of income (IGT, 2015).

One system which the ATO has considered is the 'coding out' program of the UK's revenue authority, HM Revenue and Customs (HMRC), which allows taxpayers to prepay anticipated debts. HMRC explains that to collect in this way, it assigns a new code to the taxpayer, meaning that:

...the normal deductions made from a taxpayer's earnings by their employer will be increased to include an amount that will pay off the sum they owe to HMRC over the year. Because the deductions are made before the individual receives their net pay, the payments are made without the individual needing to take further action (HMRC, 2013, p. 8).

In the UK, the amount of debt to be collected through the pay-as-you-earn (PAYE) code is then shown on the Annual Coding Notice which is sent to the taxpayer before the new tax year starts. The benefit, according to HMRC, is that coding out is a robust automated system: once it has been set up, the debt due is recovered automatically via PAYE with no need for further intervention by HMRC. This incorporates one of the main aspects of payment system thinking: to make tax payment easy and simple to do. Using the PAYE system to collect debt frees up collection resources to focus on other debts (p. 10). A sliding scale from GBP 3,000 to 17,000 per year based on income limits the amount which can be coded out, and there is an inbuilt safeguard to prevent employers deducting more than 50% of an employee's pay.

The IGT has suggested that the ATO also look at an 'at source' option for individuals and micro-businesses given their contributions to overall tax debt. Given that the ATO's exploration of at source payment initiatives was still ongoing at the time of the IGT's review, it did not go so far as to recommend the ATO implement such an initiative but rather to bring a number of relevant initiatives into its analytics, including the identification of taxpayers who are most likely to experience cash flow difficulties; a program to identify the underlying causes of cash flow and payment difficulties for micro businesses and individual taxpayers and develop preventative strategies; an online facility which taxpayers and practitioners could use to prepay anticipated tax debts (IGT, 2015, Recommendation 2.1). The ATO agreed with the recommendation and noted that it was 'intent on making it easier for all taxpayers to manage their tax payments and thereby avoid failing into debt.' It is continuing to explore the issue but has not made any public proposal yet for such an initiative.

5.1.3 *Extension of withholding to other intermediaries*

A much broader conceptual extension to PAYG withholding is to expand the role of, for example, banks in withholding; or to incorporate large, digital platform or 'gig economy' intermediaries such as Airbnb or Uber into the tax payment system. For example, as recently established in the courts, Uber drivers are liable for GST from the

first dollar of ride income.²⁷ Those who operate Airbnb, Airtasker or other platform-based employment or income systems are not currently required to register for GST until they reach AUD 75,000 turnover per year, which is unlikely for many operators. While they are generally performing services and would be SMEs, they are not presently classified as employees or subject to withholding but they will be liable to income tax on any profit generated from the activity. Such an extension would support the ATO's goal of avoiding tax debts rather than chasing taxpayers after debts fall due. There is no scope to explore these issues in the present article, but they clearly warrant further investigation given the ATO's goal of digital, easy, real time tax payment.

5.2 New and improved payment plans

Presently, payment plans are drawn up by the ATO for taxpayers only when debts are due (post assessment). The idea of the new Payment Plan is that it could be established before any tax debt is due. It would operate as a type of instalment process, linked to a taxpayer's bank account that receives income such as wages, business payments. If, through the instalment process, the taxpayer overpays tax they would receive a refund.

As with the idea of the Tax Account in section 5.4 below, a higher rate of interest could apply to overpayments than to any underpayments. Alternatively, the taxpayer could nominate to leave the refund in their Payment Plan account to be applied to future liabilities.

5.3 Voluntary garnishment with enhanced taxpayer protections

Given the questions raised in the media around potential overreach by the ATO in its use of garnishee notices, we recognise that it is a challenging time to propose a wider use for garnishment. However, the IGT's evaluation of how the ATO is using the power may be an opportunity to enhance taxpayer protections, on the one hand, and reconceptualise garnisheeing to embrace responsive regulatory theory and BI, on the other. As the Law Council has noted, there is a need for transparency and fairness around the policy and practice of the ATO in the area of garnishee notices (2018, p. 8).

The garnishment power is expansive in Australia, and taxpayers do not have a right to a TAA, Part IVC objection/appeal process to review the ATO's decision to issue a garnishee notice. By way of contrast, the UK's Recovery of Debt program, introduced in 2015, is narrower, with the government guaranteeing that every debtor receives a face-to-face visit with a representative of HMRC to discuss the debt first. It also extended the time period for taxpayers to respond to a direct debt recovery demand, provided a right of appeal to the County Court, and established a vulnerable customers unit in HMRC's Debt Management division (Seely, 2018, p. 14).²⁸

A voluntary arrangement for garnishment to support tax payment could reframe an employer garnishee from something quite negative to a 'voluntary employer arrangement' or voluntary wage assignment (ATO, 2018, p. 14). From a legal perspective, the existing provisions in section 260-5 of Schedule 1 of the TAA are broad enough that they could allow for voluntary garnishment. As we set out in section 4.2, amounts are recoverable by the ATO from third parties under the section where tax

²⁷ *Uber BV v Commissioner of Taxation* [2017] FCA 110.

²⁸ These changes were introduced by the *Finance (No. 2) Act 2015* and the Enforcement by Deduction from Accounts (Prescribed Information) Regulations 2015.

related liabilities are payable to the Commonwealth by the debtor, whether or not the debt is due and payable. Other debts, beyond tax-related liabilities, are covered by the section too. This would appear to cover the situation where the ATO is the ‘first mover’ to invoke the garnishment provisions or whether it was the debtor themselves.

A voluntary ‘garnishment’ could also be from a bank account or even from customers or clients at the time of payment for services. Any changes to the garnishment power would require consultation and careful design and, for the sake of clarity, the section could be amended to clarify that it permits voluntary garnishment arrangements.

There are a range of complexities associated with the voluntary garnishment proposal, including where tax is not paid by the employer (or third party) to the ATO, breaching the garnishee notice, and recovery action needs to bring them in as a third party. Third parties may not wish to be brought into an arrangement that creates additional obligations on them, even if they are not ultimately responsible for the tax debt in question. Nonetheless, the ability to collect a proportion of tax directly from a third party, upfront, has potential to facilitate timely tax payment for example, for individuals or SMEs with numerous clients (such as those in trades or direct service provision), easing compliance and reducing tax debt.

5.4 Your ‘Tax Account’

All taxpayers, individuals and businesses, could have a ‘tax account’ with the ATO (this could be optional or mandatory) into which taxpayers could make payments of tax at any time, not just when debts accrue. This proposal builds direct engagement between the taxpayer and the ATO, in contrast to the withholding and garnishee notice proposals above. The Swedish Tax Account provides an example of this approach. As the Swedish Tax Agency itself describes, everyone who has to pay any type of tax to the tax agency is allocated a Tax Account (Skatteverket, 2013, p. 3) which operates to some extent like a bank account held directly with the Swedish Tax Agency.

The Tax Account could operate similarly to a running balance account (RBA) where tax is paid into the account for ongoing or anticipated tax debts; however, the RBA system is complex and is not used by most individuals. The creation of an ATO Tax Account would require a new law establishing the Account and its interaction with other methods of regular tax payment such as RBAs.

An issue is the various categories of tax that may be due in the Tax Account, especially for intermediaries such as businesses. The design of the Tax Account should make clear to the taxpayer the specific tax to which a payment is attributed, such as income tax or GST. Administrators could also consider separating out those taxes that a taxpayer pays because they arise from their own liability, as compared to those that the taxpayer collects as a quasi-fiduciary on behalf of another taxpayer (such as GST or wage withholding). This relates to the point we made earlier (section 2.2.1) about segmenting taxpayer populations. Existing ATO systems like Single Touch Payroll might be harnessed so that tax payments are shown in real time.

A question is how interest would be treated on the tax account. It is interesting to note that the Swedish regime for interest is quite different to that in Australia. In Sweden, interest on overpayments is exempt from taxation, while it is not deductible for underpayments. If tax is underpaid, interest is calculated daily and must be paid within 90 days. If tax is overpaid, the Agency pays a refund of the surplus on the tax debt. By

contrast, in Australia the taxpayer must calculate their own interest on early payment on the tax return (after the fact) or write to the ATO to ask for it to be paid. Interest on early payments is assessable and deductible for underpayments.

We identify some potential similarities and differences between the current RBA provisions and interest rules, and a possible Tax Account, in the Table below.

Table 4: Your Tax Account Compared to Running Balance Account (RBA)

	RBA	Your Tax Account (<i>potential</i>)
Payments	You can make a payment into your tax account any time	You can make a payment into your tax account any time
Interest on early/overpayment	If the ATO does not pay a surplus which is requested within 14 days, the surplus attracts interest at the overpayment rate (relatively low). GIC occurs when the account balance changes to a debit amount (that is, the RBA goes into debit), and is calculated on a daily compounding basis for each day the account is in debit.	You automatically earn interest on a surplus and pay it on a deficit. The interest earned on a surplus is set at a higher rate than currently (although perhaps not equal to the interest owed on underpayments), to provide an incentive to ensure there are funds in the Tax Account.
Taxation of interest	Interest is assessable income	Interest is tax-exempt (proposed)
Refunds of surplus	A surplus is automatically refunded where it is in excess of existing tax debts. Voluntary payments in anticipation of a tax debt are only to be refunded on request.	Default treatment of surplus (perhaps up to a threshold) is to retain it in the Tax Account to cover future tax liabilities. Opt-in or selection of refund to go automatically to personal account is available.
Withdrawals	Does not operate like a bank account. If an offset during the course of a payment plan causes the taxpayer unexpected cash flow problems, they can apply for a temporary variation to that arrangement.	Operates like a bank account. If a taxpayer in good standing has cashflow issues, can withdraw up to a specified amount. Opt-in to special arrangements to manage cashflow (potential).
All taxpayers?	Open to all entities, which includes individuals. But mostly used by larger business taxpayers.	Open to all entities, which includes individuals. Establish for all taxpayers who derive over minimum thresholds of income. Cross-reference to PAYG where withholding applies to cover all tax e.g. wages.

Source: Authors.

A possible innovation is that taxpayers may earn interest on any surplus at a reasonable rate (higher than the current rate), although this rate may still be lower than the interest payable on a deficit. It may be necessary to amend the tax treatment of interest in Australia, such that interest on a surplus would be tax exempt and the payment of interest on a deficit would not be deductible.

The use of defaults, learning from BI approaches, is also important. Surplus amounts or excess tax paid could by default remain in the Tax Account. However, there may need to be an opt-in to request a refund automatically to a nominated bank account of the taxpayer. To prevent excessive tax payment ('bank of choice' behaviour), above a certain threshold an automatic refund of the surplus would be warranted. The Tax Account would offer the benefit of being an account from which the taxpayer could withdraw funds if and when they have cashflow issues, up to a specified amount.

The idea of a financial incentive to pay needs to be balanced against a favourable cost benefit outcome for administration of the Tax Account that will prevent engineering surpluses and refunds ('gaming' the system). Attractive interest rates for early payment may produce wide swings in behaviour in SME and investor populations. The cost of administering or managing this behaviour among an already compliant population may not be worthwhile. The assumption that early payments, even if overpaid, would be worth more to the ATO needs to be empirically tested, for example, by the use of RCTs, to identify if a significant change in behaviour is observed. One possible way to contain the cost of the measure would be to limit the taxpayer categories that are able to establish the Tax Account, for example individuals and SMEs only.

Recalling the challenge of cash flow and book-keeping for many SMEs, it should be noted that shifting tax payment to the time of receiving income means paying out of cashflow, rather than business profit. This distinction may not become clear to the business owner until a later point in time and they may face issues with business cash-flow or other credits. The ATO would need to be careful to explain these second round implications, and to offer ongoing guidance. Again, RCTs could be brought to bear to test whether businesses run into problems of paying their trade bills because they had been making payments of tax early.

6. CONCLUSION

This article has discussed new approaches to tax payment that build on insights about regulatory design and taxpayer behaviour. We consider BI about individuals and businesses, including through the use of defaults; supporting taxpayers to overcome short term thinking and manage current payments; and aiming ultimately to prevent future debts. The goal is to structure opportunities, incentives and coercive mechanisms for tax payment, while protecting taxpayer rights.

We have reviewed Australia's various rules for tax payment which operate through several mechanisms. The existing regime contains rules and processes that do three things:

- Provide help to a taxpayer to work out tax due and their risk and options, for example through payment plans where the taxpayer is able to make payments of tax that is due and payable by instalments;

- Withhold tax from existing intermediaries, primarily employers but also some contractors, through the PAYG system; and
- Collect tax debts which already exist, rather than debts which are yet to be, or may be, incurred at some stage in the future, either directly or from third parties through garnisheeing or voluntary withholding.

The tax withholding regime dynamically engages the taxpayer – whether the ultimate individual or an intermediary – as a permanent, or ongoing participant in the tax system. In contrast, the tax debt regime is static, engaging the taxpayer on incurring a particular debt at a particular time, and almost always only after that debt is due. These rules are quite separate and distinct and do not interact or ‘talk to’ each other. This internal incoherence may be an obstacle to the types of behavioural approaches to tax compliance we have put forward in this article.

Nonetheless, the existing Australian tax payment system has many of the building blocks in place to institute BI approaches. Of particular importance are third party withholding mechanisms; instalment systems; interest rules; and coercive debt collection and garnishment powers. Implementing any of the ideas set out in section 5 will require us to combine existing mandatory and voluntary payment regimes in new ways.

First, we consider the extension of tax withholding ‘at source’ options for taxpayers. The idea of these options is that tax could be paid directly to the ATO by a payer, or when an amount is received by a taxpayer in a payment, which is likely to be *before* a tax-related liability becomes due and payable. This extends the concept of withholding, or of garnisheeing, beyond recovery of existing debts, but in a manner that combines the coercive power with voluntary and timely commitments by the taxpayer. Second, we suggest that payment settings should be reformed to encourage taxpayers to pay early, pay often and be rewarded for it, with the basic assumption that tax payment is a ‘part of life’: hence, the Tax Account.

The concepts of a Tax Account, structured withholding, and payment plans for anticipating debt, all aim to reward and facilitate engagement and enable paying tax at source or when cash flow is available. These approaches build on the idea that taxpayers (and their advisors) behave in ‘contingent’ ways depending on the opportunities available to them, and on behaviour of peers and of the revenue agency. Any changes in the system would require careful consideration and broad consultation and, likely, law reform to make the powers and obligations of the Commissioner and taxpayers transparent and ensure new approaches are accountable and procedurally fair.

7. REFERENCES

- Ahmed, E & Braithwaite, V 2005, ‘Understanding small business taxpayers: Issues of deterrence, tax morale, fairness and work practice’, *International Small Business Tax Journal*, vol. 23, no. 5, pp. 539-568.
- Amir, O & Lobel, O 2008, ‘Stumble, predict, nudge: How behavioral economics informs law and policy’ (Review of Thaler, R H & Sunstein, C R, *Nudge: Improving decisions about health, wealth, and happiness* (2008) and Ariely, D, *Predictably irrational: The hidden forces that shape our decisions* (2008)), *Columbia Law Review*, vol. 108, no. 8, pp. 2098-2137.

- Australian Broadcasting Corporation (ABC) 2018, 'A mongrel bunch of bastards', *Four Corners*, 9 April, available at: <https://www.abc.net.au/4corners/mongrel-bunch-of-bastards/9635026> (accessed 16 January 2019).
- Australian Taxation Office (ATO) 2014, *ATO Corporate plan 2015-19*, Canberra, https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/ATO-corporate-plan-2015-19_n7769_js34841_w.pdf.
- Australian Taxation Office (ATO) 2015, *Reinventing the ATO: Program blueprint*, Canberra, March, <https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/program-blueprint-march-2015.pdf>.
- Australian Taxation Office (ATO) 2017a, *Annual report 2016-17*, Canberra, <https://www.ato.gov.au/About-ATO/Annual-report-2016-17/>.
- Australian Taxation Office (ATO) 2017b, Submission to the Inquiry into taxpayer engagement with the system, February.
- Australian Taxation Office (ATO) 2018, 'Increased voluntary withholding', feasibility analysis, 19 February (Confidential document shared with authors).
- Baldwin, R 2014, 'From regulation to behaviour change: Giving nudge the third degree', *Modern Law Review*, vol. 77, no. 6, pp. 831-857.
- Baldwin, R, Cave, M & Lodge, M 2011, *Understanding regulation: Theory, strategy and practice*, 2nd edn, Oxford University Press, Oxford.
- Beers, T, Nestor, M & San Juan, E 2013, 'Small business compliance: Further analysis of influential factors', in National Taxpayer Advocate, *2013 annual report to Congress – Vol. 2, Taxpayer Advocate Service research and related studies* (Washington, DC), pp. 34-56.
- Beeston, J (Assistant Commissioner) 2016, 'The ATO's evolving approach to client and industry engagement', speech to the Tax Institute Fourth Annual Forum, Melbourne, 5 October, available at: <https://www.ato.gov.au/Media-centre/Speeches/Other/Our-evolving-approach-to-client-and-industry-engagement/> (accessed 16 January 2019).
- Behavioural Insights Team (UK) 2012, *Applying behavioural insights to reduce fraud, error and debt*, Cabinet Office, London, available at: https://www.bi.team/wp-content/uploads/2015/07/BIT_FraudErrorDebt_accessible.pdf (accessed 16 January 2019).
- Belot, H 2017, 'Centrelink debt recovery system "so flawed it was set up to fail"', Senate Committee says', *ABC News*, 21 June, available at: <https://www.abc.net.au/news/2017-06-21/senate-hands-down-report-into-centrelink-debt-recovery/8640004> (accessed 16 January 2019).
- Bennett, M 2015, 'ATO powers and how to respond to them', paper presented at the Third Annual Asset Protection Conference, Gold Coast, 16 October.
- Bentley, D 2016, 'Taxpayer rights in Australia twenty years after the introduction of the Taxpayers' Charter', *eJournal of Tax Research*, vol. 14, no. 2, pp. 291-318.

- Biddle, N, Fels, K & Sinning, M 2017, 'Behavioural insights and business taxation: Evidence from two randomized controlled trials', Tax and Transfer Policy Institute Working Paper 2/2017, Canberra, May.
- Bovens, L 2008, 'The ethics of nudge', in Grüne-Yanoff, T & Hansson, S (eds), *Preference change: Approaches from philosophy, economics and psychology*, Springer, Dordrecht, pp. 207-219.
- Braithwaite, V & Wenzel, M 2008, 'Integrating explanations of tax evasion and avoidance', in Lewis, A (ed), *The Cambridge Handbook of psychology and economic behaviour*, Cambridge University Press, Cambridge, pp. 304-331.
- Brown, S, Taylor, K & Price, S W 2005, 'Debt and distress: Evaluating the psychological cost of credit', *Journal of Economic Psychology*, vol. 26, no. 5, pp. 642-663.
- Chapman, B 1997, 'Conceptual issues and the Australian experience with income contingent charges for higher education', *The Economic Journal*, vol. 107, no. 442, pp. 738-751.
- Chapman, B & Ryan, C 2002, 'Income-contingent financing of student charges for higher education: Assessing the Australian innovation', *The Welsh Journal of Education*, vol. 11, no. 1, pp. 64-81.
- Chapman, B, Higgins, T & Stiglitz, J (eds) 2014, *Income contingent loans: Theory, practice and prospects*, Palgrave Macmillan Ltd, New York.
- Chen, K, Bendle, N & Soman, D 2017, 'Policy by design: The dawn of behaviourally-informed government', Rotman School of Management research report, University of Toronto, 27 March.
- Committee on Higher Education Funding (Hon N K Wran, chair) 1988, *Report of the Committee on Higher Education Funding*, Canberra.
- Gangl, K, Hofmann, E & Kirchler, E 2015, 'Tax authorities' interaction with taxpayers: A conception of compliance in social dilemmas by power and trust', *New Ideas in Psychology*, vol. 37, pp. 13-23.
- Gangl, K, Torgler, B, Kirchler, E & Hofmann, E 2014, 'Effects of supervision on tax compliance: Evidence from a field experiment in Austria', *Economics Letters*, vol. 123, no. 3, pp. 378-382.
- Hallsworth, M, List, J, Metcalfe, R & Vlaev, I 2017, 'The behavioralist as tax collector: Using natural field experiments to enhance tax compliance', *Journal of Public Economics*, vol. 148, pp. 14-31.
- Hausman, D & Welch, B 2010, 'Debate: To nudge or not to nudge', *Journal of Political Philosophy*, vol. 18, no. 1, pp. 123-136.
- HM Revenue and Customs (HMRC) 2013, 'How to improve HMRC's collection of debt: Coding out', London, July.
- Holzinger, L A & Biddle, N 2016, 'Behavioural insights of tax compliance: An overview of recent conceptual and empirical approaches', *Tax and Transfer Policy Institute Working Paper 8/2016*, October.
- Hood, C 1985, 'British tax structure development as administrative adaptation', *Policy Sciences*, vol. 18, no. 1, pp. 3-31.

- Inspector-General of Taxation (IGT) 2015, *Debt collection: A report to the Assistant Treasurer*, Sydney, July.
- Inspector-General of Taxation (IGT) 2016, *Review into the Taxpayers' Charter and taxpayer protections*, Sydney, December.
- James, S 2017, 'Taxation and nudging', in Altman, M (ed.), *Handbook of behavioural economics and smart decision-making: Rational decision-making within the bounds of reason*, Edward Elgar, Cheltenham, UK and Northampton, MA, pp. 317-330.
- Kahneman, D 2011, *Thinking, fast and slow*, Macmillan, New York.
- Klick, J & Mitchell, G 2006, 'Government regulation of irrationality: Moral and cognitive hazards', *Minnesota Law Review*, vol. 90, no. 6, pp. 1620-1663.
- Lamberton, C, De Neve, J-E & Norton, M I 2018, 'The power of voice in stimulating morality: Eliciting taxpayer preferences increases tax compliance', *Journal of Consumer Psychology*, vol. 28, no. 2, pp. 310-328.
- Law Council of Australia 2018, Submission to the Inspector-General of Taxation review into the ATO's use of garnishee notices, 29 June.
- Lee, P-C, Chen, C-M & Chou, C-H 2014, 'Decreasing tax collectors' perceived social loafing through collaborative behaviors of taxpayers', *Journal of Public Administration Research and Theory*, vol. 24, no. 4, pp. 1037-1063.
- Leech, C 2018, 'Detect and deter or catch and release: Are financial penalties an effective way to penalise deliberate tax evaders?', Tax and Transfer Policy Institute Working Paper 6/2018, April.
- Levi, M 1988, *Of rule and revenue*, University of California Press, Berkeley.
- Lodge, M & Wegrich, K 2016, 'The rationality paradox of nudge: Rational tools of government in a world of bounded rationality', *Law and Policy*, vol. 38, no. 3, pp. 250-267.
- Murphy, K, Tyler, T R & Curtis, A 2009, 'Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?', *Regulation and Governance*, vol. 3, no. 1, pp. 1-26.
- Onu, D & Oats, L 2016, '"Paying tax is part of life": Social norms and social influence in tax communications', *Journal of Economic Behavior and Organization*, vol. 124, pp. 29-42.
- Organisation for Economic Co-operation and Development (OECD) 2014, *Working smarter in tax debt management*, OECD, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2017, *Behavioural insights and public policy: Lessons from around the world*, OECD, Paris.
- Poppelwell, E, Kelly, G & Wang, X 2012, 'Intervening to reduce risk: Identifying sanction thresholds among SME tax debtors', *eJournal of Tax Research*, vol. 10, no. 2, pp. 403-435.

- Seely, A 2018, 'Direct recovery of tax debts', House of Commons Library Briefing Paper, No. 7051, 11 May.
- Simon, H A 1955, 'A behavioral model of rational choice', *Quarterly Journal of Economics*, vol. 69, no. 1, pp. 99-118.
- Skatteverket 2005, 'Right from the start – Research and strategies', Stockholm.
- Skatteverket 2013, 'Tax account brochure', SKV 408B edition 6, Stockholm.
- Soos, P E 1995, 'Taxation at the source and withholding in England, 1512-1640', *British Tax Review*, vol. [1995], no. 1, pp. 49-91.
- Stewart, M 2015, 'The tax state, benefit and legitimacy', in Harris, P & de Cogan, D (eds), *Studies in the history of tax law vol. 7*, Hart Publishing, Oxford, pp. 483-515.
- Sydney Morning Herald 2017, 'Centrelink robo-debt bungle demonises the innocent' (editorial), *Sydney Morning Herald*, 10 March.
- Tetlow, G 2018, 'Universal credit rollout poses “risk” to public spending', *Financial Times*, 26 January.
- Thaler, R & Sunstein, C 2008, *Nudge*, Yale University Press, New Haven.
- Towell, N 2017, 'Centrelink's debt: 230,000 have now been hit', *Canberra Times*, 13 January.
- Van Dijke, M & Verboon, P 2010, 'Trust in authorities as a boundary condition to procedural fairness effects on tax compliance', *Journal of Economic Psychology*, vol. 31, no. 1, pp. 80-91.
- Viscusi, W K & Gayer, T 2015, 'Behavioral public choice: The behavioral paradox of government policy', *Harvard Journal of Law and Public Policy*, vol. 38, no. 3, pp. 973-1007.
- Watt, N, Syal, R & Malik, S 2013, 'Universal credit: Iain Duncan Smith blames civil servants for IT failings', *The Guardian*, 5 September, available at: <https://www.theguardian.com/politics/2013/sep/05/universal-credit-iain-duncan-smith> (accessed 16 January 2019).
- Wurth, E & Braithwaite, V 2017, 'Tax practitioners and tax avoidance: Gaming through authorities, cultures, and markets', in Hashimzade, N & Epifantseva, Y (eds), *The Routledge companion to tax avoidance research*, Routledge, London, pp. 320-339.
- Yeung, K 2012, 'Nudge as fudge' (review article, Thaler, R & Sunstein, C, *Nudge: Improving decisions about health, wealth and happiness* (2008)), *Modern Law Review*, vol. 75, no. 1, pp. 122-148.
- Yeung, K 2016, 'The forms and limits of choice architecture as a tool of government', *Law and Policy*, vol. 38, no. 3, pp. 186-210.
- Yeung, K 2017, 'Are human biomedical interventions legitimate regulatory policy instruments?', in Brownsword, R, Scotford, E & Yeung, K (eds), *The Oxford handbook of law, regulation and technology*, Oxford University Press, Oxford, pp. 823-853.