

(Note: Highlighting and red text is by Self Employed Australia to identify key points)



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Australian Government
Inspector-General of Taxation
Taxation Ombudsman

GPO Box 551
Sydney NSW 2001

Our reference number: IGT/19/02558

19 March 2021

Dear Mr Reid

RE: IGTO VIEW

Introduction

1. I refer to the complaint¹ you lodged on behalf of your company, PMT Pty Ltd (ACN: 611 351 412) (PMT), with the Inspector-General of Taxation and Taxation Ombudsman (IGTO) on 6 November 2019.
2. Details of the complaint are set out in detail in section A.
3. Our **investigation of this complaint did not involve a full and comprehensive** investigation into every technical aspect of the Australian Taxation Office's (ATO) audits and related dispute resolution with PMT.
4. The **IGTO considered the following two** decisions and actions as relevant to our investigation.
 - **the decision and action to issue garnishee notices in PMT's case; and**
 - **the decision and action to remove PMT from the GST deferred scheme.**
5. We have independently reviewed the information provided by you so far as they relate to the concerns raised in this complaint. We have also asked the ATO to provide contemporaneous records (source documents or file notes which support or verify its reasons) **including its decision to issue garnishee notices** in respect of the trading account of PMT **on and around 6 March 2018**. We provided the ATO with an opportunity to present information which it considers relevant to the concerns raised by you.
6. As a result of ATO responses given during the investigation and the ATO's records which relate to the issuing of the garnishee notices, it has been necessary to consider events taking place during

¹ PMT, Complaint to the IGTO, 6 November 2019.

the audit of PMT as well as the ATO's broader compliance activities in relation to the precious metals industry. In doing so, we drew upon the information that the IGTO had obtained during the Review into the *ATO's Fraud Control Management*² and Review into *GST Refunds*³.

7. The IGTO's preliminary views regarding the ATO's garnishee actions and removal of PMT from the deferred GST scheme were provided to the ATO on 27 August 2020. The ATO provided its response to these views on 14 September 2020. The IGTO has considered the additional information provided in the ATO's response in forming our final views which are set out below.
8. The IGTO provided a further opportunity for the ATO to respond to our views before we finalised this investigation report.

Summary of IGTO's views

IGTO's views on the ATO's decision to issue garnishee notices

9. During the IGTO's investigation, the ATO explained that PMT's representatives did not make contact with the ATO to discuss the debt using the contact details provided in the ATO's audit decision letter or Notice of Amended Assessment. **The ATO does not have records of the voicemails left by PMT's representative with an ATO officer in Debt Case Leadership.** The ATO also confirmed its view that issuing garnishee notices without notice to you or your representative was the appropriate avenue to collect the tax liabilities because of the risks it had identified. These risks include:
 - a. The lodgement of BAS and input tax credit claims matched the "pattern observed generally in the precious metals scheme cases whereby an entity is created with scant apparent business reason beyond deriving the tax benefit of the scheme".
 - b. PMT did not hold sufficient assets to pay off the tax liabilities.
 - c. **Given the risk evident in the precious metals scheme,** there were concerns that "the taxpayer may undertake some actions to defeat the creditors, such as dissipating assets, moving funds beyond the reach of the Commissioner and putting the company into liquidation" if they were forewarned about the garnishee notices.
10. The ATO referred the IGTO to emails between the audit area and debt area as well as a submission that **sought approval to issue garnishee notices before the debt was due and payable** and its decision to issue garnishee notices in PMT's circumstances.
11. Having considered the information provided by the ATO, the **IGTO is unable to verify if a voicemail message was left by your representatives with the ATO Debt Case Leadership officer** before the due date for the debt without accessing the ATO Debt Case Leadership officer's telephone. Given the impact the ATO's actions may have on taxpayers, the **IGTO considers that all debt officers should have an attached recorded message service to direct all debt related contacts to an appropriate channel.** This would improve the experience and service for taxpayers generally and assist in ensuring all time sensitive enquiries are directed through to an appropriate channel.

² IGTO, *Review in the ATO's Fraud Control Management* (2018), pp 227-250 ('AFCM review').

³ IGTO, *Review into GST Refunds* (2018), pp 71-81 ('GST refunds review').

ATO Comment

The audit area issued the Notice Of Assessment (NOA) and Reason For Decision (RFD) on 1 February 2018. The audit area had been in contact with Ms Reid on these issues prior to issuing the assessments.

The penalty assessments were not due until March 2018.

While we acknowledge that we did not provide a dedicated debt officer on the letter, the finalisation letter states that they can contact the auditor and under the heading 'Outstanding tax' as follows:

'Your assessments and penalty notices will show the amounts you need to pay. Any refunds retained are applied to the amounts payable. If you have trouble paying, we may be able to work with you to set up a payment plan.

You can find information about payment plans on our website ato.gov.au/paymentarrangement '

A referral was made to Significant Debt Management – Resolutions (SDMR) on 29 January 2018. The matter was not allocated to a dedicated officer in the debt area at time the RFD letter was issued.

There is no reason for the client to randomly contact a person in Debt Case Leadership, which is not a frontline area and is not a channel of input into the ATO advised in the website.

Further, the ATO is not resourced to have individual client managers, which is why contact points are provided in order for the client or their authorised representative to discuss the options relevant to the interactions (in this case, inviting contact with the auditor, referring to the ATO website, and providing contact details on the Statements of Account when they issue).

IGTO's response to ATO comment

The IGTO has reviewed the audit finalisation letter, including the extracts mentioned above and disagree with the ATO's view that the audit finalisation letter makes it clear that PMT may contact the auditor in relation to payment of the debt.

As noted in paragraph B.72, it is not unusual for experienced representative to contact known ATO officer directly rather than the general frontline area. In this case, PMT's representative had been in contact with the Debt Case Leadership for a separate matter.

The IGTO acknowledges that the ATO is not resourced to have individual client managers assigned to each taxpayer. The IGTO considers that all debt officers should have a recorded message to direct debt related contacts to the appropriate channel. This will minimise the likelihood of taxpayers or their representatives inadvertently calling a debt officer known to them but who is not allocated to the specific matter they are calling about.

12. Notwithstanding the unresolved issue as to whether contact was made by your representative, the IGTO is of the view that we are unable to provide assurance that the ATO's garnishee action was reasonable in the circumstances and was in accordance with PSLA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts* (PSLA 2011/18) and PSLA 2011/14 *General debt collection powers and principles* (PSLA 2011/14). This is because, in our view, the ATO did not take into account a number of relevant considerations when assessing the risk that PMT would not pay the relevant tax liabilities. These relevant considerations include:

- a. PMT’s assets in the form of gold stock and retained profits;
- b. PMT’s positive cashflow position and its ability to fund a payment arrangement;
- c. The impact the garnishee notices would have on the financial viability of PMT;
- d. The impact the garnishee notices would have on the health of the PMT’s directors;
- e. The impact the garnishee notices would have on PMT’s ability to fund its appeal;
- f. The liabilities raised were based on previously unexpressed views and would be the subject of dispute;
- g. Other alternative arrangements available to recover payment of the debt;
- h. PMT’s behaviours since being alerted to the liabilities raised in the amended assessment; and
- i. PMT and their representative’s level of engagement with the ATO.

ATO Comment in relation to part a above ‘gold stock and retained profits’.
Gold stock
 While the objections officer may have taken into account what was lodged on the BAS for what amount of stock the client had at 17 January 2017, we disagree that we are to assume to know that is what they have on hand in March 2018, which is more than a year since the relevant date.

Additionally, the RFD paragraph 24 indicates the taxpayer did not keep adequate records and the storage of the Gold and its ownership is not clear (i.e. it was difficult to distinguish between personal ownership of the directors as investment from PMT stock). Consequently, we stand by that we would not be able to accurately estimate what Gold PMT has on hand in March 2018.

IGTO’s response to ATO comment
 While the ATO may not have been able to accurately estimate what gold PMT has on hand, PMT’s assets is nevertheless a relevant consideration for the ATO to consider. The information provided to the IGTO does not indicate that the ATO had at least considered PMT’s assets position at the time the decision was made to issue garnishee notices.

- 13. Further details on the above relevant considerations are provided in paragraphs B.38 to B.75.
- 14. In the IGTO’s view, the ATO also took irrelevant considerations into account. These irrelevant considerations include:
 - a. Removal of assets;
 - b. Rearrangement of affairs to avoid payment;
 - c. Involvement in missing trader, asset flipping and/or changing entity arrangements;
 - d. A pattern of ITC claims made by entities created for the sole purpose of obtaining a tax benefit;
 - e. Commencement of mischief started in 2013; and

- f. Links to criminals or organised crimes.
15. We also note that the debt amount arises principally from shortfall penalties which were imposed by the ATO. Our analysis is set out in paragraphs A.3 – A.5.
16. Further details on the irrelevant considerations taken into account by the ATO are provided in paragraphs B.18 to B.36.
17. The IGTO's view is that it is important that the ATO considers its debt recovery actions based on the individual circumstances of a taxpayer and that the risk of non-compliance with a taxation law should be distinguished from the risk of non-payment of a tax debt. Further details on the IGTO's views on the ATO's decision and action to issue garnishee notices are outlined in section B. It is important to note, however, that we make no comment regarding the ATO's basis for assessing PMT's tax liability as this issue is more appropriately a matter to be determined by the courts.

IGTO's views on the ATO's decision and action to remove PMT from the deferred GST scheme

18. The IGTO is of the view that PMT should not have been removed from the GST deferred scheme in circumstances where they had already reached an agreement with the ATO to pay the liabilities through a payment arrangement at the time they were removed from the scheme. The IGTO note that PMT was subsequently reinstated to the GST deferred scheme when the ATO was alerted to it by PMT's representative.
19. Further details on the IGTO's views on the ATO's decision and action to remove PMT from the deferred GST scheme are outlined in section C.

Summary of IGTO's recommendations

20. Based on the information reviewed and the issues identified as part of our investigation and the personal impact on the directors of PMT, on 27 August 2020 we recommended the ATO take the following remedial actions:
- provide an appropriate apology to PMT's directors;
 - offer to consider compensation for the costs that were incurred by PMT in seeking the ATO's withdrawal of the garnishee notices and reinstatement to the deferred GST scheme;
 - develop a template for ATO decision-makers to complete in high risk cases when deciding to issue garnishee notices before the debt is due and payable or without notice/warning to the taxpayer. The template should:
 - (1) set out the types of relevant considerations that should be taken into account, including those identified in PSLA 2001/18 regarding the issuing of a garnishee notice and PSLA 2011/6 regarding the risk to collection of a disputed debt; and
 - (2) provide instruction that the factors should be considered with reference to taxpayer's individual circumstances.

21. Further details on our recommendations, reasons for making these recommendations and the ATO's response to our recommendations are outlined in sections B and C.
22. The IGTO has reviewed the ATO's apology to PMT (issued on or around 25 September 2020) and is of the view that the ATO should consider re-issuing its apology to you and your wife in recognition of the impact the garnishee notices and the removal of PMT from the deferred GST scheme has had on the directors of PMT. Further details on this recommendation are outlined in section D.

Guide to this complaint investigation report

23. The following sections set out further detail in relation to our complaint investigation:

Annexure A	<p>Detailed Discussions</p> <p>Section A - Background to the IGTO investigation and other related context</p> <p>Section B - ATO's decision and action to issue garnishee notices</p> <p>Section C - ATO's decision and action to remove PMT from the deferred GST scheme</p> <p>Section D – ATO's apology issued to PMT</p>
Annexure B	Chronology of events surrounding the ATO's compliance project on the gold industry and PMT

24. If you believe that your complaint has not been appropriately addressed, please let me know within 10 business days of this email by:
 - dialling 1300 44 88 29, choosing Option 1 and entering the extension 8185, or
 - sending an email to service@igt.gov.au which includes in the subject line of your email the reference number above.

Your review rights

25. If you are not satisfied with our decision, you have the right to have this decision reviewed. Your review rights are described in the following document on our website: [Review of our decision on your complaint](#).

We value your feedback

26. To assist us in improving our service to you and the tax paying community, we are conducting a survey to gather feedback from individuals who have lodged a complaint with our office recently. You will shortly receive an email from noreply@qualtrics-survey.com or ORIMA Research Pty Ltd to invite you to participate in the survey. We highly value any feedback you may have in this regard. We expect the survey to take no more than 5 minutes to complete. If you do not wish to participate in the survey, please let our survey coordinator know by sending an email to survey@igt.gov.au by 9 April 2021.

Kind regards

Rosina Lai

Manager

Tax Complaints and Review

Inspector-General and Taxation Ombudsman

A. Background to IGTO investigation and other related context

Annexure A – Detailed Discussions

A. Background to IGTO investigation and other related context

A.1. This section outlines the following background material:

- an outline of PMT's complaint and related background;
- relevant principles regarding a taxpayer's obligations to pay tax liabilities and opportunities to trade out of debt;
- the ATO's policies on garnishee notices; and
- the ATO's compliance projects on the precious metals industry.

An outline of PMT's complaint and related background

Related background

A.2. You and your wife, Mrs Reid bought a gold refining business in June 2016 that had been in operation for a number of years. Mrs Reid has been working in the gold refining business since 2008.

A.3. On 1 August 2016, PMT was notified of the ATO's retention of their July 2016 BAS refunds. Subsequently, PMT's refunds from the August 2016 BAS, September 2016 BAS, October 2016 BAS, November 2016 BAS, December 2016 BAS and January 2017 BAS were also retained by the ATO pending verification of their BAS claims. The ATO finalised its audit on 1 February 2018 which reduced the GST credits claimed and imposed a tax shortfall penalty of \$502,856.80. Taking into account the amount of refunds that were retained by the ATO, PMT had a debt of \$173,107.80 due on 2 March 2018 following the conclusion of the audit.

A.4. Based on the summary below, the debt amount of \$173,107.80 appears to arise principally because, after ATO audit adjustments, the ATO imposed a shortfall penalty of \$502,856.80.

A.5. The following table summarises the breakdown of PMT's debt with the ATO.

A. Background to IGTO investigation and other related context

	Credit (refund due to PMT)	Debit
July 2016 BAS	\$122,706	
August 2016 BAS	\$134,137	
September 2016 BAS	\$270,488	
October 2016 BAS	\$298,629	
November 2016 BAS	\$322,929	
December 2016 BAS	\$32,101	
January 2017 BAS	\$128,575	
Total refunds retained by the ATO	\$1,309,565	
ATO audit adjustment		\$978,816.00
Shortfall penalties imposed by the ATO		\$502,856.80
Debt due to the ATO		\$173,107.80

- A.6. The ATO notified PMT of its findings and amendments by way of letter dated 1 February 2018. On 28 February and 2 March 2018, PMT's representative left voicemail messages with an officer of the Debt Case Leadership area to discuss repayment. However, the ATO has explained that the Debt Case Leadership officer has no record of any voicemail messages from the representative on those dates.
- A.7. PMT's debt was previously referred to the ATO's debt collection area for action and a submission was prepared to issue garnishee notices before PMT's debt was due. The ATO issued garnishee notices to three banking institutions on 6 and 7 March 2018, 2 business days after the debt was due. No information has been made available to the IGTO to evidence that before issuing the garnishee orders, the ATO attempted contact with PMT.
- A.8. On 9 March 2018, PMT's representatives sent an email to the ATO advising that they have been instructed to negotiate a payment arrangement and had attempted to contact an ATO officer prior to the due date of PMT's debt. The ATO contacted PMT's representatives on 9 March 2018 by phone to discuss payment arrangements and the garnishee notices that were issued. Further information and supporting documents were provided by PMT's representatives to the ATO and the ATO agreed to a payment arrangement on 13 March 2018. The ATO also varied the garnishee notices issued to Westpac and withdrew the garnishee notices issued to ANZ and CBA.
- A.9. The payment arrangement was not entered into the ATO system and confirmed until 11 April 2018, after the ATO received the payment from the garnishee notice. The payment from the garnishee notice was received by the ATO on 23 March 2018 but it was not allocated to the correct account until 9 April 2020. As a result, the ATO sent an email to PMT on 14 March 2018 advising PMT that unless it meets its tax obligations within 14 days, PMT will be removed from the GST deferred scheme.
- A.10. PMT's director, Mrs Reid, contacted the ATO on 14 March 2018 following receipt of the ATO's email dated 14 March 2018 and then authorised the ATO officer to speak with Sacha Rayner. The

A. Background to IGTO investigation and other related context

ATO's note of this conversation states that "[PMT] accept that the DGST role will be revoked". However, Mrs Reid has advised the IGTO that she is unable to confirm this as she could not recall the details of the discussion she had with the ATO officer.

ATO Comment

Our response of 14 September 2020 to the original preliminary review advises that Ms Reid authorised Sacha Rayner to speak to the ATO about the DGST issue (refer to page 3).

IGTO's response to ATO comment

The IGTO acknowledges that Mrs Reid authorised Sacha Rayner to speak to the ATO on 14 March 2018. However, the Siebel notes indicate that Mrs Reid called the ATO on 14 March 2018 and then passed the phone to Sacha Rayner.

As noted in paragraph C.10, it appears that the payment arrangement that had been agreed to on 13 March 2018 was not discussed during this telephone conversation. If the ATO officer was aware that a payment arrangement had been agreed to on 13 March 2018, the discussion about the ATO's review on PMT's participation in the deferred DGST scheme may have been different.

- A.11. Subsequently, PMT was advised on 3 April 2018 that it had been removed from the GST deferred scheme because of "overdue payment". PMT's representatives followed up with the ATO and PMT was reapproved for the scheme on 6 April 2018.

An outline of PMT's complaint

- A.12. You raised a concern about the actions of tax officials of the ATO in relation to the collection of approximately \$173,000 in tax liabilities which had remained outstanding following an audit adjustment of approximately \$1.48m in Goods and Services Tax (GST). In particular, you expressed concern that the ATO issued garnishee notices on 6 and 7 March 2018 on PMT's trading banking accounts (ANZ, Westpac, CBA) two business days after the debt was due and whilst PMT's representatives were still negotiating a repayment arrangement with the ATO for the remaining 12% of the liability that was outstanding at the time. You have also raised concern that the garnishee notices contributed to a deterioration in the health of you and your wife when the ATO was already aware that you were in vulnerable circumstances.
- A.13. On 13 March 2018, the ATO agreed to remove the garnishee notices and enter into a payment arrangement for repayment of the debt over 3 years on the basis of PMT's forecasted cashflow, together with other information available to the ATO and within the ATO's knowledge. Soon after this agreement, on 3 April 2018 the ATO removed PMT from the deferred GST scheme on the basis of non-payment of the debt. As a result, PMT incurred costs in engaging representatives to contact the ATO to seek reinstatement to the deferred GST scheme. We understand PMT was in fact reinstated on 5 April 2018.

A. Background to IGTO investigation and other related context

Relevant principles regarding a taxpayer's obligation to pay tax liabilities and opportunities to trade out of debt

- A.14. As a starting point, taxpayers have an obligation to pay their tax liabilities by the due date. Generally, businesses are expected to have made provision for upcoming tax liabilities throughout the relevant reporting period so that these liabilities can be paid by the due date. However, **businesses may not have anticipated liabilities for a number of reasons, including liabilities arising from ATO audit adjustments.**
- A.15. The Commissioner has been entrusted with strong powers for debt recovery. **The community expects the Commissioner to exercise such powers in a fair and proportionate basis.** For example, where a debt arises from an audit adjustment and a business could not otherwise pay the total amount by the due date without compromising its financial viability, the ATO may agree to repayment of the debt by instalments where the business has the capacity and willingness to do so. This affords opportunities for viable businesses to trade out of debt.⁴
- A.16. In the IGTO's view, debt recovery actions must seek to minimise the risk of non-payment of a debt, but do so proportionate to the individual circumstances of the case, having regard to the taxpayer's capacity and willingness to pay as well as the severity of any impact that the collection actions will have on the taxpayer, such as their financial and physical well-being.
- A.17. The ATO must also take **into account relevant considerations by reference to the individual circumstances of the case.** Such information should also be based on logically probative material and inferences be based on objectively verifiable information, having regard to the risk of confirmation bias.

ATO's policies on garnishee notices

- A.18. **The above principles are elucidated in the Commissioner's legally enforceable instructions to ATO officers, namely Law Administration Practice Statements PSLA 2011/18 and PSLA 2011/14.**
- A.19. At a broad level, the Commissioner instructs ATO officers to take appropriate debt recovery or assistance action on the basis of the risk that the taxpayer and the unpaid liability pose to revenue collection. It is important to understand that the risk to be assessed in this context is the risk of non-payment of a tax liability, as distinct from the risk of incorrectly reporting a self-assessed liability to pay tax.

Capacity to pay, willingness to pay and proportionate action

- A.20. The Commissioner instructs ATO officers to adopt strategies that evaluate the overall compliance risk posed by the taxpayer based on the individual circumstances, which involves an examination

⁴ IGTO, *Review into the Tax Office's small business debt collection practices* (2005).

A. Background to IGTO investigation and other related context

of the taxpayer's capacity and willingness to pay as well as ensuring that the action taken is proportionate⁵:

... in other words the ATO needs to differentiate its treatments of taxpayers according to their ability to meet their tax responsibilities and the circumstances they facing doing it... [and] clearly links the degree of debtors attitudes (and consequent behaviours) to the severity of the strategies...⁶

Logically probative, open and fair

A.21. ATO officers are also expected to “form an opinion on risk based on an impartial review of the facts”.⁷ The Commissioner expects his officers to be open and fair in this risk assessment process.⁸

Proper documentation of reasons

A.22. ATO officers must also properly document in the case management system, reasons for decisions including to:

enable a ready response to any requirement...[including] complaints by the taxpayer... [and to] enable... [a] requirement for statement of reasons under ADJR to be dealt with efficiently and effectively..⁹

Consideration for issuing garnishee notices and ‘high risk’ debt

A.23. The ATO's internal training program on garnishees provides that a garnishee order should not place a taxpayer in financial hardship and the taxpayer should be able to meet their current business expenses.¹⁰ It further instructs officers that:

In every instance [the ATO] must consider the impact a notice will have on the businesses viability and the ability to pay staff or the debtor's ability to provide for a family. [ATO officers] will need to identify if the notice will adversely limit the client's access to income.

A.24. Where the ATO assess a “high risk” of non-payment, the garnishee may be issued before the due date.¹¹

⁵ ATO, *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts*, PS LA 2011/18, 11 April 2019, para [102].

⁶ ATO, *Risk management in the enforcement of lodgement obligations and debt collection activities*, PSLA 2011/6, 6 May 2020, para [12].

⁷ *ibid.*, para [37].

⁸ *ibid.*, para [10].

⁹ *ibid.*, para [40].

¹⁰ ATO, *Garnishee Overview Training*, April 2018

¹¹ Above n 5, para [19].

A. Background to IGTO investigation and other related context

PROJECTS ON THE PRECIOUS METALS INDUSTRY

A.25. Due to the ATO's reasons above and its reference to the **pattern seen in other cases in the ATO's Precious Metals Project (PMP)**, the decision to issue garnishee notices in PMT's case should be considered in the context of the Commissioner's expectations of ATO officers generally as well as the circumstances surrounding the broader ATO compliance projects, the Gold Bullion Project and the PMP. The ATO has previously provided information to the IGTO about the projects during the AFCM review¹² and GST Refunds review¹³. The IGTO has drawn upon the information provided by the ATO during these reviews to consider the key attributes of entities which the ATO considered a risk of non-payment.

¹² Above n 2, pp 227-251.

¹³ Above n 3, pp 71-81.

B. ATO's decision and action to issue garnishee notices

Summary of issue investigated

- B.1. The IGTO commenced an investigation on 22 November 2019 into whether the ATO garnishee action was reasonable in the circumstances, including whether the ATO:
- took irrelevant considerations into account; and
 - did not take relevant considerations into account in deciding to issue the garnishee notices.

Information provided by the ATO in relation to its garnishee action

B.2. The ATO explained that a contemporaneous record of the decision to issue a garnishee order in PMT's circumstances **did not exist**.

B.3. The ATO explained, however, that the reasons for its decision to issue garnishee notices in PMT's circumstances are outlined in the following documents which were provided to the IGTO:

- a submission that sought approval to issue garnishee notices before PMT's debt was due;
- emails between ATO audit officers and debt officers; and
- emails among debt officers.

B.4. The ATO has also explained that the audit finalisation letter includes the name and contact details of the ATO officer for PMT to contact in relation to the audit decision. The Notice of Amended Assessment also includes a contact number to discuss the debt and payment of it. However, the ATO has explained that it did not receive contact from PMT's directors or PMT's representatives through any of these channels provided before the debt was due.

B.5. **The ATO Debt Case Leadership officer has no record of any voicemails received from PMT's representatives.** The ATO has also explained that the Debt Case Leadership is not a frontline client contact area and generally they would refer contacts from taxpayers and representatives to the correct contact point to discuss the outstanding debt and payment options.

B. ATO's decision and action to issue garnishee notices

Submission that sought approval to issue garnishee notices before PMT's debt was due

- B.6. The submission¹⁴ that sought approval to issue garnishee notices before PMT's debt was due was included as an attachment to an email¹⁵ sent among debt officers on 28 February 2018. This email included a copy of the audit finalisation letter sent to PMT, dated 1 February 2018.
- B.7. The submission recounted background facts, including those concerning the identification of the debt and date for payment, the establishment of PMT, the BAS periods reviewed and the main findings of the audit. It then stated:

There is the real risk as taxpayer is linked with individual or entities that are involved in the supply chain of gold bullion wherein large ITC's were claimed. Most of these claims are withheld by the ATO and continuously being investigated. The identified individual or entities found to be linked with organised crime conducting gold bullion trading.

It is our belief that the behaviour and activities support the issuing of garnishees prior to the due and payable date. This recommendation is in accordance with PLSA 2011/6 Risk Management in the enforcement of lodgement obligations and debt collection activities and PLSA 2011/18 Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts.

- B.8. No further reasoning or information was provided in support of this belief at the time, either in this email or the subsequent email which was in that email chain. The ATO has explained that the audit influenced the decision made in regard to the options available to the ATO to recover the debt.

Additional information provided by the ATO during the IGTO complaint investigation

- B.9. In providing the above information during our complaint investigation, in late 2019, the ATO explained to the IGTO that it considers issuing garnishee notices without notice to you or your representative was the appropriate avenue to collect the tax liabilities because of the following risks it had identified¹⁶:
- The lodgement of BAS and input tax credit claims matched the "pattern observed generally in precious metals scheme cases whereby an entity is created with scant apparent business reason beyond deriving the tax benefit of the scheme".

¹⁴ ATO, Email from Significant Debt Management to Debt Case Leadership, 'Re: Submission to issue garnishee notice before due date', 28 February 2018.

¹⁵ *ibid.*

¹⁶ *ibid.*, p 1.

B. ATO's decision and action to issue garnishee notices

- PMT did not hold sufficient assets to pay off the tax liabilities.
- Given the risk evident in the precious metals scheme, there were concerns that “the taxpayer may undertake some actions to defeat the creditors, such as dissipating assets, moving funds beyond the reach of the Commissioner and putting the company into liquidation” if they were forewarned about the garnishee notices.

B.10. The ATO also noted that:

The information we provide about the decision to garnishee demonstrates the available factual matrix of the client at the time, including:

- **activity under the precious metals task force**
 - *a pattern of company structuring and (at least partially) non compliant lodgement that followed the pattern of other participants in the precious metals scheme*
 - *broad compliance deficiencies coupled to links with identified participants of related schemes*

This supports the contention that the garnishee was reasonable in the circumstances, and is consistent with our policy and stated practice.¹⁷

B.11. The ATO is of the view that the submission that sought approval to issue garnishee notices before PMT's debt was due and emails between ATO officers provide a reasonable basis for the issuing of the garnishee notices in this case. The ATO's explanations to the IGTO also noted that you or your representative did not make contact with the audit officer to discuss the tax liabilities after the audit finalisation letter was issued.

B.12. **The ATO is also of the view that it is not required to “demonstrate the risk of dissipation of assets by ‘actual’ acts of asset dissipation”** and similar to the evidentiary requirement for a freezing order, inference of dissipation can be sufficiently demonstrated based on acts of dishonesty or fraud and that the liquidity of assets present a more immediate risk. The removal of assets and rearrangement of affairs to avoid payment by other unrelated entities that are involved in the same scheme is relevant in PMT's circumstances.

Our findings

B.13. As stated before, taxpayers have an obligation to pay their tax liabilities by their due date and the Commissioner has been entrusted with powers to pursue debt recovery actions. However,

¹⁷ ATO, Attachment in email from Significant Debt Management to ATO External Scrutineers, 'FW: IGT/19/002558 PMT Pty Ltd – IGTO request for information regarding debt collection – final response to be sent 4 December 2019', 4 December 2019.

B. ATO's decision and action to issue garnishee notices

the community expects that the Commissioner exercises powers in a fair and proportionate basis, taking into account each taxpayer's circumstances.

B.14. In this case, enduring garnishee notices were issued to financial institutions to garnish the trading accounts of PMT. As the IGTO has observed previously in the, *Review into the ATO's use of garnishee notices*¹⁸, such notices have the practical effect of 'freezing' the accounts until the garnishee notices are lifted. They also alert the financial institution to debts and expose the business to the financial institution using that information to reassess the level of credit provided to the business and the terms on which it is provided.

B.15. The IGTO is unable to provide assurance that the ATO's garnishee action was reasonable in the circumstances and was in accordance with PSLA 2011/18 and PSLA 2011/6. This is because, in our view, the ATO's decision to issue garnishee notices took into account irrelevant considerations. This included the behaviours of unrelated entities which were relied upon to suggest PMT was unwilling to pay the debt. However, 88% of the debt was satisfied by offsetting refunds that were otherwise due and the remaining 12% was a debt which was overdue by just 2 days. The ATO has not provided evidence to demonstrate the behaviours of unrelated entities were also observed in PMT.

B.16. The ATO's assessment of risk of non-payment also failed to take into account relevant considerations, including PMT's assets and positive cash flow, the impact garnishee notices would have on PMT's financial viability and the health of the directors, PMT's behaviours after been alerted to the liabilities and level of engagement with the ATO.

B.17. Particulars of these irrelevant and relevant considerations are detailed below.

Irrelevant considerations were taken into account by the ATO

B.18. In this case, the debt officer, was of the view that there were 'low' prospects of recovery based on PMT's asset position¹⁹:

There is the real risk as taxpayer is linked with individual or entities that are involved in the supply chain of gold bullion wherein large ITC's were claimed. Most of these claims are withheld by the ATO and continuously being investigated. The identified individual or entities found to be linked with organised crime conducting gold bullion trading.

It is our belief that the behaviour and activities support the issuing of garnishees prior to the due and payable date.

¹⁸ IGTO, *Review in the ATO's use of garnishee notices* (2019), p 78.

¹⁹ Above n 51.

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B.19. In reviewing the information provided by the ATO it appears that the inferences of behaviours were based on behaviours identified in unrelated entities. The behaviours observed in other unrelated entities include:

- Removal of assets (paragraphs B.20 to B.23);
- Rearrangement of affairs to avoid payment, for example restructuring (paragraphs B.24 to B.26);
- Involvement in missing trader, asset flipping and/or changing entity arrangements (paragraphs B.27 to B.29);
- A pattern of ITC claims made by entities that were been created for the sole purpose of obtain a tax benefit (paragraphs B.30 to B.32);
- Commencement of mischief in 2013 (paragraph B.33); and
- Links to criminals or organised crimes (paragraphs B.34 to B.36).

Removal of assets

B.20. The records made available to the IGTO provide evidence that PMT disagreed with the basis for the relevant tax liabilities and expressed concerns regarding the impact that the retention of refunds was having on the ability of the business to facilitate large jobs and on the health of the directors.

B.21. One of the factors outlined in PSLA 2011/18 that the ATO should have regard to when deciding to undertake garnishee is "whether the revenue is placed at risk because of the actions of the tax debtor". No records have been made available to the IGTO that indicate that PMT was acting to remove its assets and not pay debts.

B.22. The ATO has made references to the evidentiary requirement for a freezing order where the ATO is required to demonstrate the risk of dissipation of assets. The ATO has explained that inference of dissipation can be sufficiently demonstrated based on acts of dishonesty or fraud. The ATO's PSLA 2011/18 states that "the Commissioner must provide grounds for believing that there is a risk of the assets being moved from the jurisdiction or dissipated...A fear held by the Commissioner that the assets are likely to be improperly dealt with is not sufficient to seek a freezing order".

B.23. In PMT's circumstances, the IGTO is of the view that the ATO has not provided sufficient evidence to support the ATO's belief that there was a real risk of dissipation which warrants the issuing of garnishee notices.

ATO Comment B22 – we invite further discussion with the IGTO in relation to this commentary.
The ATO provided comments in relation to this in our response of 14 September 2020 to the first preliminary view and reiterate that the tax mischief uncovered by Audit and set out in their finalisation letter contains significant evidence that the client's behaviour supports a concern for the risk of dissipation of assets. We have previously set out some case law that supports the inference that tax

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mischief identified during audit is sufficient to demonstrate acts of dishonesty or fraud, however, there have been many more such case examples that are publicly available.

In this particular matter, we believe that the factors concluding there had been recklessness and intentional disregard for the law is set out in the audit finalisation letter, and the contrivance of the refining process itself to create GST credit, were sufficient to demonstrate actions that would point to a risk of dissipation.

ATO Comment B23

Apart from the equipment with little value, audit has indicated that PMT's major assets are cash on hand and gold stocks. Based on Paragraph 24 of the finalisation letter, it is clear that PMT did not keep proper records for its stocks, therefore, it would be difficult for us to take recovery actions against the gold stocks. With respect to cash, it is a liquid asset and easy to dissipate. Considering the uncertainty of PMT's fixed asset position, without a proper way to prevent PMT to dissipate its cash, there is a risk to the revenue.

IGTO's response to ATO comment

The IGTO maintains the view that the ATO has not provided sufficient evidence to support its belief that there is a risk of asset dissipation. The submission to issue garnishee notice prior to the due date of the debt includes the finalisation letter as an attachment but did not clearly set out the grounds to support the ATO's view that PMT was acting to remove its assets.

Rearrangement of affairs to avoid payment

- B.24. The ATO considered that other similar entities had changed arrangements to avoid the payment of liabilities, before assessment and after receiving amended assessment and this is a relevant factor for its decision to issue garnishee notices.
- B.25. In PMT's case, no evidence has been made available to the IGTO which shows that PMT sought to wind up/liquidate during or after the relevant compliance activity. Apart from disputing the basis to retain refunds and disputing the basis for the amendments, PMT did not display the same behaviours of ATO concern as other entities had during compliance activities or following the receipt of amended assessments.
- B.26. It is reasonable, in our view, that taxpayers expect the ATO to take a particular action having considered their individual circumstances and that the ATO's decision is not solely based on the actions of others involved in the same scheme. Without considering a taxpayer's individual circumstances, the ATO's actions may be perceived as unfair and without basis.

ATO Comment

We agree that the taxpayer's individual circumstances should be considered. In this particular matter, as we outlined above, the majority of assets are either without proper record or are liquid assets, which means they are easy to dissipate. When taken other factors into consideration, there is a real risk that the taxpayer can easily transfer its assets to other entities without any notification to the ATO, to avoid the payment of tax. Besides that, whilst the taxpayer holds gold stocks and cash on hand, the garnishee would not significantly impact their financial situation.

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IGTO's response to ATO comment

Based on the information provided by the ATO, it does not appear that the ATO took PMT's individual circumstances into account in deciding whether there was a risk that PMT would rearrange its affairs. Importantly, PMT did not display the same behaviours of concern compared to other entities.

Involvement in missing trader, asset flipping and/or changing entity arrangements

B.27. The ATO suspected PMT's involvement in missing trader and asset flipping arrangements which it had observed in other entities under the PMP. The ATO observed these other entities as being involved in 'complex webs', collusion with others in the supply chain and changing missing traders.

B.28. In PMT's case, the ATO challenged transactions involving 4 of PMT's suppliers, including one supplier who accounted for 60% of PMT's acquisition and later liquidated²⁰ and another supplier which PMT refused to deal with after the first transaction and which PMT had reported to the ATO. PMT claimed the ITC from this transaction in its BAS which the ATO considered to be false or misleading during audit because PMT overstated their ITC claim.²¹ PMT reported others that it did not deal with. Also, PMT continues to deal with many of the same customers and suppliers before the sale and which the ATO has not challenged.²²

B.29. The IGTO has not been provided evidence that ATO debt officers considered the level of risk of non-payment posed by PMT's involvement in missing trader and asset flipping arrangements and its supply chain.

ATO Comment

We made the decision based on the information on hand, including the finalisation letter that the auditor had provided in the referral to SDMR. Appendix A of the finalisation letter included diagram which indicated that the taxpayer's involvement in a supply chain of entities, most of which were subject to audit or believed to be involved in this scheme/arrangement.

IGTO's response to ATO comment

The submission to issue garnishee notices before the due date of the debt includes the audit finalisation letter as an attachment. However, the submission did not specifically consider how PMT's involvement in the supply chain demonstrated a level of risk of non-payment that warrants the issuing of garnishee notices.

A pattern of ITC claims made by entities created for the sole purpose of obtaining a tax benefit

B.30. The ATO was concerned with BAS lodgements and ITC claims that matched a "pattern... [of] entities created without any apparent business reason beyond driving a tax benefit".²³ The ATO

²⁰ ATO, Response to IGTO's preliminary view, 14 September 2020.

²¹ *ibid.*

²² Above n 1, Appendix E, p 1.

²³ Above n 54.

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hypothesised that the refiner refund retention strategy and SFCT's Intelligence Bulletin would result in a reduction of illegitimate refund claims.²⁴

B.31. In an ATO internal assessment of the effectiveness of the refiner refund retention strategy and the SFCT's Intelligence Bulletin, **the ATO observed 'no significant change in behaviour' by PMT in its BAS refund positions**, along with another refiner that it considered was operating a legitimate business. In contrast, the ATO did observe a significant reduction in the amounts of refunds that others had claimed.²⁵

B.32. **Also, the ATO observed no significant change in PMT's BAS claim behaviours as a result of the refiner retention strategy, unlike others.**²⁶ In fact, the ATO declined to release PMT's retained refunds. One of the ten factors it considered in declining the release was that the retention did not 'materially affect PMT's financial position' due to the positive cash flow (ex-the retained refunds) evidenced in PMT's BAS claims.²⁷

ATO Comment

We accept that we did not consider that there were no changes in PMT's behaviours. However, based on the information available to us, we have taken the following into consideration:

PMT was established on 16 March 2016 and started to claim input tax credit refunds in the monthly BAS July 2016, which was its second BAS lodgment (the first BAS was nil balance). **It generated concerns as the entity was created to participant in the precious metal scheme** and derive the tax benefit.

The above concern can also be supported by the following findings in according with the audit finalisation letter:

- a. Paragraph 24: PMT did not keep proper record for its stocks;
- b. Paragraphs 36-37: As a refiner, it appears that its staff that in charge of refining was not familiar with the process; and
- c. Paragraphs 28-32: As a refiner, it appears that PMT does not have proper certification/accreditation for them to sell Hallmarked bullions

IGTO's response to ATO comment

The IGTO is of the view that had the ATO considered that there were no changes in PMT's behaviours after the retention of the refund, it may have changed the ATO's concerns that the entity was created to participate in the precious metal scheme. Furthermore, PMT continues to operate after being alerted to the audit and after the audit finalisation letter was issued.

²⁴ATO, Executive Summary SFCT Evaluation Intel Bulletin Precious Medals, 1 March 2017, p 4.

²⁵ ibid.

²⁶ ibid., p 6.

²⁷ Above n 1, Appendix F, ATO objection decision 22 September 2017, para [91].

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Commencement of mischief started in 2013

- B.33. There is also no evidence that the ATO debt officers considered the distinction between the date which a business started trading and the date that new business owners took over the trading of the business. Here, the ATO did not consider that the precious metal refinery business had been in operation for more than 16 years, albeit purchased by the new directors in 2016. According to PMT, the GST reporting systems and practices remained the same, a couple of the key employees were retained²⁸ and many previous clients were retained²⁹.

ATO Comment

At the time, we understood that the director acquired the business in 2016 and had concern that whether the business was transferred via an arms-length transaction or was method that the former director used to conceal himself in the business/the scheme.

We therefore the submission to issue garnishee notices considered the risks based on the information available to us, and determined that issuing garnishee notice was an appropriate action.

IGTO's response to ATO comment

The information provided to the IGTO, in particular, the submission to issue garnishee notice prior to the due date of the debt does not indicate that the ATO considered this risk. PMT continues to trade after being notified of the audit and after the audit decision letter was issued.

Links to criminals or organised crimes

- B.34. Just before the directors took over the running of the business, the ATO assessed industry participants links to criminal organisations. Since that assessment, the ATO did not identify new participants that presented risks. The ATO also has not alleged that the directors or employees of PMT engaged in criminal action.
- B.35. In any event, it appears that the ATO ultimately gave little weight to any criminal links as the ATO agreed to very generous repayment terms based on a cash flow of the business over three years. On this basis, it appears that the ATO was confident that the business would not attempt to liquidate or otherwise rearrange its affairs to avoid payment, and was satisfied that PMT had the capacity to repay the debt over time.

ATO Comment

The payment arrangement was granted on the basis that a portion of tax will be paid by way of the garnishee notice that issued to Westpac (the other two issued to CBA and ANZ were withdrawn). We received this 'upfront' payment and then determined that the risk is manageable, providing the taxpayer was willing to address the tax liability in a proper way and the remaining will be paid via payment instalment that the taxpayer has capacity to maintain.

²⁸ ATO, Audit finalisation letter, 1 February 2018, para [18].

²⁹ Above n 1.

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IGTO's response to ATO comment

The IGTO acknowledges the ATO's comment that the ATO determined the risk was manageable after receipt of the 'upfront' payment. However, it does not appear that the debt officer who agreed to the payment arrangement considered whether any links to criminals or organised crimes would be a risk to PMT meeting the payment arrangement.

- B.36. PMT also had reported people to the ATO that they considered suspicious.³⁰ For example, a transcript of an ATO examination of the directors records one of the directors stating, "I sent her away and gave you are her details... I just didn't feel comfortable with them and the same with an Adelaide group that I sent you all the details through of some lads that came in".³¹ Photo of the scrap provided by the supplier looked like they poured a cast and that the Director suspected that something was not right about these people and refusing to buy any more from that supplier.³²

ATO Comment

Paragraph 238.4 of the audit finalisation letter states:

'Despite having suspicions that the scrap gold from Gold Hub was not genuine scrap you created an RCTI for an acquisition of scrap gold, reported and claimed ITCs on the supply. Given your extensive experience in the metal refining industry, your knowledge of how the GST law applies to acquisitions of scrap gold and gold bullion and your awareness of the issue the ATO had with the re-refining of 'precious metal', it is reasonable to expect that there was a risk in claiming ITCs from the acquisition of melted gold bullion bars.'

Based on this information, it indicated that PMT still claimed input tax credits from the purchase of gold whilst they had suspicions about others involved in the industry.

IGTO's response to ATO comment

At the time PMT claimed the ITCs, the ATO had not expressed its views on refiner's entitlement to claim ITCs. As the ATO had not expressed its views, it is not unreasonable for PMT to claim ITCs despite their suspicions about others involved in the industry.

Relevant considerations were not taken into account by the ATO

- B.37. The IGTO is also of the view that the ATO's decision to issue garnishee notices failed to take into account relevant considerations, being:

- PMT's assets in the form of gold stock or retained profits in the business (see paragraphs B.38 to B.40);
- PMT's positive cashflow position and its ability to fund a payment arrangement (paragraphs B.41 to B.42);

³⁰ Above n 1.

³¹ Above n 1.

³² Above n 65, paras [177] to [186].

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- The impact the garnishee notices would have on the financial viability of PMT (paragraphs B.43 to B.48);
- The impact the garnishee notices would have on the health of the PMT's directors (paragraphs B.49 to B.52);
- The impact the garnishee notices would have on PMT's ability to fund its appeal (paragraphs B.53 and B.54);
- The liabilities raised being based on previously unexpressed views and would be the subject of dispute (paragraphs B.55 to B.59);
- Other alternative arrangements available to recover payment of the debt, for example a 50/50 arrangement (paragraphs B.60 to B.63);
- PMT's behaviours after it was alerted to the liabilities raised in the amended assessment (paragraphs B.64 to B.66); and
- PMT and their representative's level of engagement with the ATO (paragraphs B.67 to B.75).

PMT's assets in the form of gold stock and retained profits

B.38. In this case, the audit officer identified relevant assets as an unknown amount of gold stock, plant and equipment, bank accounts and the director's real property. They itemised the plant and equipment and indicated it would not have a high enough resale value to cover the debt based on its age:

Asset profiling data – property, shares, bank accounts etc

- Gold stock unknown

- Asset value list attached however most P&E assets are old and I expect if sold may not cover the debt

- Directors own real property – let me know if you want these details

- 2 Westpac bank accounts – BSB 034230 Accounts 44-1376 & 44-1368³³

B.39. The ATO officer did not know the value of the gold stock, however, an ATO objection officer had earlier calculated that PMT would have approximately \$1.2 million of gold stock by the end of January 2017 based on PMT's BAS lodgements.³⁴ This indicates that the ATO has information in its possession to make a reasonable estimate of the amount of assets in the form of gold stock or retained profits in the business.

³³ Above n 51.

³⁴ Above n 1, Appendix F, para [84].

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B.40. There is no indication that the ATO's estimated value of gold stock was considered by the debt officer in deciding to issue the garnishee notices. On this basis, in the IGTO's view, the ATO failed to take into account a relevant consideration.

ATO Comment:

Please refer to our comments above. Based on the audit finalisation letter, PMT did not keep proper record of those gold stocks. It would be difficult for us to determine the value of those stocks. In addition to that, those gold stocks are difficult to monitor, and it also would be difficult for the Commissioner to take recovery actions against the gold stocks as well.

IGTO's response to ATO comment

Refer to above IGTO's response in relation to the ATO comment about gold stocks and retained profits.

PMT's positive cashflow position and its ability to fund a payment arrangement

B.41. The ATO was also aware that PMT was in a positive cash flow position which allowed it to increase the capital purchased, albeit the retained GST refunds had an impact on the ability of the business to 'facilitate large jobs, requiring it to turn work away from longstanding customers'.³⁵ The ATO also referred to this positive cash flow as a factor in declining to release retained refunds³⁶, as the ATO concluded that the retention of the refunds 'did not materially affect PMT's financial position'³⁷.

B.42. There is no indication from the ATO's submission and related emails that it considered PMT's positive cash flow position regarding its ability to fund a repayment arrangement as an alternative to garnishee notices.

ATO Comment:

Whilst PMT may be in a positive cash flow position to fund the payment arrangement, it did not mean that PMT was willing to address the tax liabilities voluntarily by way of arrangement. Please also note that PMT did not have the same view that they were in a good financial position after the retention of GST.

Furthermore, the cash is a liquid asset and can be easily dissipated. Considering the uncertainty of PMT's fixed asset position, without a proper way to prevent PMT to dissipate of its cash, there is still a risk to the revenue.

IGTO's response to ATO comment

The IGTO's observations here is that at the time the decision was made to issue garnishee notices, the ATO did not consider PMT's cashflow position. The IGTO is of the view that this is a relevant consideration.

³⁵ Above n 1, Appendix E, p 1.

³⁶ PMT, Response to ATO Division 165 Position Paper, Annexure A, Email from AC Ian Read to Teresa Dyson, 'Re: doctors letter [MCR-W.FID3316031]', 20 February 2017.

³⁷ Above n 1, Appendix F, para [91].

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The impact the garnishee notices would have on the financial viability of PMT

- B.43. The ATO's debt recovery actions must be proportionate to the risk to revenue and the ATO's ability to recover the debt while having regard to taxpayers' individual circumstances. The ATO must also take into account the likely impact garnishees will have on the taxpayer's ability to trade and pay their business expenses.
- B.44. Although there is difference of views regarding the level of financial impact suffered by PMT as a result of the ATO's retention of \$1.3m in GST refunds³⁸, it is clear that PMT continued to trade during the period of that retention.³⁹
- B.45. The ATO was of the view that the business maintained a positive cash flow position over this period. This was after excluding the contribution that the retained GST refunds would have otherwise had to PMT's position. On this basis, the ATO concluded that PMT was not in financial difficulty as a result of the retention of refunds.
- B.46. The directors of PMT were of the view that PMT's cash flow was stretched due to retention of refunds⁴⁰ —PMT required sufficient working capital to continue to operate to pay wages and, importantly, pay for gold acquired from customers. In earlier correspondence with the ATO, they explained that the retained GST refund amounts of \$1.3 million the bank account balances reflected the bare minimum in working capital required for the business to continue to operate. As a result, the directors were starting to face financial distress.
- B.47. If enduring garnishee notices were issued on PMT's trading account, all cash flow would effectively stop. This is because the banks would freeze those accounts where the amount of the garnishee order exceeded the balance.⁴¹ As the business required cash flow to pay for expenditures and purchases to continue to trade, the garnishee notices would have significant impact on its ability to continue to trade. As a result, the garnishee notices would likely have significant adverse impact on the financial viability of the business.
- B.48. The IGTO has not been provided with any contemporaneous records which show that such impacts were considered when deciding whether to issue garnishee notices.

ATO Comment

PMT held gold stocks at the time and the ATO audit viewed that it maintained a positive cash flow position over the period. Therefore, it is questionable that whether the garnishee would impact PMT's financial position.

³⁸ Above n 1, Appendix E, p 1.

³⁹ ATO, Email from an officer in Indirect Tax Complex Assurance, "PMP issuing amended assessments", 23 January 2018 at 3:17 PM.

⁴⁰ PMT, *Payment Arrangement Proposal*, 13 March 2018.

⁴¹ Above n 55.

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As advised above, there were also concerns that the only purpose of setting up such business is to derive the input tax credits from the scheme. The issue of garnishee notices would disrupt such arrangement.

In addition to that, a garnishee is not generally a tool to initiate engagement with the taxpayer, but we still expect that PMT to contact with us to have a suitable arrangement in place to address the tax liabilities.

IGTO's response to ATO comment

The IGTO's comments relate to a lack of records to show that the ATO considered the impact the garnishee notices would have on the financial viability of PMT at the time the decision was made to issue garnishee notices. Furthermore, as noted in paragraphs B.82 to B.84, it appears that the ATO issued the garnishee notices in this case as a strategy to prompt PMT to contact the ATO. This is in contrast to the ATO's policies that garnishee notices should only be issued after consideration of the risk of non-payment.

The impact the garnishee notices would have on the health of the PMT's directors

- B.49. The debts have arisen during a period when the directors of the business were facing significant personal and financial stress.
- B.50. The ATO was already aware that PMT's directors considered the ATO's retention of refunds and audit had placed significant stress on their health. The directors had previously provided medical practitioners' views to the Deputy Commissioner in support.⁴² In particular, one medical practitioner was of the view that this deterioration was directly due to stress attributable to ongoing ATO issues⁴³ and that the level of stress was potentially life-threatening to both directors.⁴⁴
- B.51. ATO debt officers are generally aware that there is a risk that enduring garnishee notices can effectively freeze the trading accounts of businesses. In PMT's case, such action would be likely to increase the level of stress experienced by the directors with potential to adversely impact on their health.
- B.52. The IGTO has not been provided information which shows that the ATO decision maker had considered the impact that issuing garnishee notices would have on the health of PMT's directors.

IGTO's comment

ATO comments were provided on the above section but retracted on finalisation at the request of the ATO.

⁴² Above n 1.

⁴³ PMT, Letter from Dr John F Arbuckle, 16 December 2016.

⁴⁴ PMT, Letter from Dr John F Arbuckle, 15 February 2017.

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The impact the garnishee notices would have on PMT's ability to fund its appeal

- B.53. As the garnishee notices would have the impact of freezing the trading accounts of the business, it would likely have significant impact on PMT's ability to fund pursuit of its right of review regarding the basis for the tax liabilities.
- B.54. The IGTO has not been provided information which shows that the ATO decision maker had considered the impact that issuing garnishee notices would have on the ability of PMT to fund its appeal in addition to fund its continuing trade. On this basis, in the IGTO's view, the ATO failed to take a relevant consideration into account.

ATO Comments

The audit determined PMT held gold stocks at the time and it maintained a positive cash flow position over the period. Therefore, it is questionable whether the garnishee action would impact PMT's ability to fund the appeal.

IGTO's response to ATO comment

Regardless of how significant the impact the garnishee notices would have on PMT's ability to fund its appeal, it is still a relevant consideration for the ATO to consider. The information provided by the ATO does not indicate that the ATO considered whether there would be any impact on PMT to fund its appeal.

The liabilities raised were based on previously unexpressed views and would be the subject of dispute

- B.55. 75% of the increase in GST liabilities was attributable to the ATO's interpretation of what is required for supplies of precious-metals to be GST free under section 38–385 of the *GST Act 1999*. The ATO's view of "1st refinement" was a previously unexpressed view at the time and was the subject of dispute. Also, PMT has raised concerns regarding the evidentiary basis for the ATO's conclusions of facts as well as the practicality of meeting the ATO's expectations of the types of inquiries that it expected refiners to make of the parties who supplied them with precious metals as well as the parties that supplied those suppliers.
- B.56. The IGTO makes no comment on the ATO's or PMT's views as this is a matter for the courts. However, the sustainability of a view in the context of the ATO's previously expressed views is a relevant consideration in determining a taxpayer's compliance attitude and behaviours for the purpose of assessing the risk of non-payment.

ATO Comment

The *Taxation Administration Act 1953* (TAA) permits the Commissioner to recover tax that is disputed on appeal (s 14ZZR of the TAA). The Commissioner's policies in this area are publicly available in ATO Law Administration Practice Statements *PS LA 2011/4 'Collection and Recovery of Disputed Debts'* and *PS LA 2011/18 'Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts.'* Under the law and policy, the Commissioner can issue garnishee notices to third parties holding money for a taxpayer to collect outstanding tax, particularly if a significant recovery risks exists. Where tax is paid and an appeal is resolved in a taxpayer's favour, the Commissioner will pay the taxpayer interest on overpayments under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, depending on the type of tax involved.

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IGTO's response to ATO comment

The IGTO acknowledges that taxpayers may be entitled to interest on overpayments and that the ATO may recover tax that is the subject of a dispute. The IGTO is of the view that the ATO should have considered that the liabilities raised were based on previously unexpressed view and the likelihood of a dispute in determining whether there was a risk of non-payment.

- B.57. In the IGTO's view, the fact that the liabilities raised were based on previously unexpressed views and would be the subject of dispute, were relevant in considering the proportionate nature of debt recovery actions.
- B.58. The ATO's audit finalisation letter also shows that approximately 75% of the tax liability flowed from a view of the law which was previously unexpressed by the ATO, with the remainder based on a previously unexpressed view regarding the extent of verification/assurance that taxpayers were obliged to undertake and a view of the evidence on which a conclusions of facts were disputed. The IGTO makes no comment on the sustainability of the ATO's or PMT's views on the basis for tax liabilities.
- B.59. No information has been made available to the IGTO which shows that the relevant decision maker took these considerations into account when deciding to issue garnishee notices. On this basis, the IGTO is of the view that the ATO failed to take this relevant consideration into account.

Other alternative arrangements available to recover payment of the debt, for example 50/50 arrangement

- B.60. In February 2018, the ATO issued GST assessments of approximately \$980,000 and penalty assessments of \$500,000, totalling \$1.48 million. This total was offset against the \$1.3 million that had been retained. As a result, an amount of \$173,000 remained payable by the date 2 March 2018. At the time of deciding to issue garnishee notices, the ATO had already retained approximately 88% of tax liabilities raised as result of the ATO's amended assessments.
- B.61. This placed the ATO in a better position than it would have been if no amounts had been retained and it entered into a 50/50 arrangement. Such an arrangement is not available when the ATO considers a high risk of non-payment.
- B.62. In the IGTO's view, although the ATO debt officer recounted the quantum at risk, no record has been made available that it was considered that 75% of the liability was based on an ATO view which was previously unexpressed, that 88% of the liability had already been paid via retained refunds. By contrast, if the ATO was assured of a taxpayer's willingness and capacity to pay and entered into a 50-50 payment arrangement, only 72% of the outstanding debt would have been payable under the 50-50 payment arrangement. This is due to the amount of liability attributable to the unexpressed ATO view which was the subject of dispute.

ATO Comment

At the time, we understood that PMT has lodged objection regarding the retention of the refund and will lodge objection against the assessments. Both objections are separate processes and therefore, there is a possibility that the refund can be re-issued to the taxpayer prior to the determination of the assessments.

B. ATO's decision and action to issue garnishee notices

In addition to that, whilst part of the liability had already been recovered via retention of input tax credits, the risk assessments would still focus on the following:

1. The taxpayer's financial ability to pay the outstanding tax, including the nature and the liquidity of the assets.
2. Whether there is a risk to the revenue.

In this matter, by considering various factors, we determined that this matter posed unacceptable risk to the revenue and we considered garnishee notice would be the proper way to protect the revenue.

IGTO's response to ATO comment

The IGTO acknowledges the ATO's view that there was a risk to revenue and the issuing of the garnishee notices was appropriate. However, the information provided by the IGTO does not indicate that the ATO considered whether there were other alternative arrangements available to recover payment of the debt. Furthermore, as noted in paragraphs B.82 to B.84, it appears that the garnishee notices were used as a prompt for PMT to make contact with the ATO.

- B.63. In the IGTO's view, the ATO failed to take into account whether issuing garnishee notices would be disproportionate in the circumstances, when taking into account the amount of the liability already recovered and alternative recovery arrangements.

PMT's behaviours since being alerted to the liabilities raised in the amended assessment

- B.64. The ATO audit area notified the ATO debt area of the impending conclusion of the compliance activities; a conclusion which would alert PMT to the tax liabilities. Thirty-six days after this notification, as well as after the taxpayer had been notified of the liabilities, the ATO debt area prepared a submission for approval to issue garnishee notices before the debt was due. This submission was provided to the Debt Case Leadership area for approval. **The ATO has not made available to the IGTO the specific identity of the decision maker in this case.** Almost a week later, 2 business days after the due date, those garnishee notices issued.⁴⁵
- B.65. **In summary, the ATO issued the garnishee notices 26-32 days after PMT was made aware of the liability and 4 days (2 business days) after the liabilities became due.** This lack of ATO urgency is inconsistent with a real concern that the taxpayer represented a high risk of non-payment of the debt.
- B.66. The IGTO has not been provided information which shows that the ATO decision maker had considered PMT's behaviours since being alerted to the quantum of the tax liabilities raised in the amended notices of assessment. **On this basis, in the IGTO's view, the ATO failed to take a relevant consideration into account when assessing the risk of non-payment.**

⁴⁵ 23/1/18 – 2/2/18 ITX providing information ATO Debt unit needed; 2/2/18 – 12/2/18 Debt unit allocating case; 12/2/18 – 28/2/18 Debt unit drafting submission and approving issue of garnishee; 28/2/18 – 6/3/18 Debt issuing garnishee notice (42 days to issue garnishee notice after ITX notified Debt, including 8 days for ITX to provide information Debt needed, 7 days to allocate, 14 days to prepare submission, 6 days after approval given)

B. ATO's decision and action to issue garnishee notices

ATO Comment

Before issuing the garnishee notice, we had confirmation that PMT did not contact the general debt line (as per detail on the notice of assessment) or auditor (as per detail on the audit finalisation letter) to discuss the way to address the tax.

IGTO's response to ATO comment

The behaviour contemplated by the IGTO in paragraphs B.65 to B.67 relates to behaviours demonstrating a risk of non-payment and assets dissipation, as opposed, to making contact with the ATO regarding payment of the debt.

PMT and their representative's level of engagement with the ATO

B.67. In this case, at the time of deciding to issue the garnishee notices, there is evidence that PMT's representatives maintained a high level of engagement with the ATO. This included:

- promptly providing responses to the ATO during the audit, albeit the ATO doubted the veracity of its answers;
- alerting the ATO to entities with which PMT had suspicions⁴⁶; and
- requesting guidance during the audit (both the prior and current owners), which appears not have been provided by the ATO.

B.68. In relation to PMT's engagement regarding the outstanding debt, the ATO had provided contact numbers for account enquiries and information about payment plans on its Notice of Amended Assessment.⁴⁷

B.69. The ATO also provided a contact number for the auditor and a message on the audit finalisation letter to contact the auditor if the taxpayer had any questions about the decision.⁴⁸ It is important to note that that decision was one regarding liability and not payment of the liability.

If you have any questions about this decision, you can phone on 1300 650 815 between 8.00am and 5.00pm, Monday to Friday. Ask for [the auditor].

B.70. According to PMT, it had approached its tax agent regarding payment arrangements and had instructed its lawyers to negotiate a payment arrangement prior to the due date for payment (2 March 2018). Given no known debt management officer had been allocated, PMT's lawyers had sought to raise the matter with an officer in the ATO Debt Case Leadership area, by way of several voice messages left prior to the due date. According to PMT's lawyers, voice messages were left regarding the need to negotiate a payment arrangement for a new matter on 28 February 2018 and 2 March 2018. However, the officer in Debt Case Leadership area only

⁴⁶ Above n 1; Above, n 65.

⁴⁷ ATO, Notice of Amended Assessment, 1 February 2018.

⁴⁸ Above n 65.

B. ATO's decision and action to issue garnishee notices

responded on Monday, 12 March 2018 that he **had been on extended leave**. It seemed no alternative officer was checking his voicemail.

- B.71. The ATO has said that such attempt was misdirected as the representative had not attempted contacted via the details given, which were provided on the ATO audit finalisation letter and, alternatively, the general phone number listed on the Notice of Amended Assessment.
- B.72. In the IGTO's view, it is not uncommon for experienced representatives to make contact with known ATO officers directly to facilitate compliance with their client's obligations. Here, the nature of the liabilities in the matter were part of the ATO's larger and more complex compliance projects aimed at addressing one of the largest liability risks identified, reportedly involving \$2.45B of risk to government revenue.⁴⁹ On this basis, it appears incongruous that the ATO would expect entities with liabilities raised in this project to make contact via the general debt call centre number to negotiate repayment. Further, the Debt Case Leadership area was intimately involved in recovery activities in this compliance project, if not the area making decisions on the nature of those activities.
- B.73. **The IGTO is unable to verify whether voicemail messages were left by PMT's representative with the ATO's Debt Case Leadership officer.** Furthermore, although the ATO's audit decision letter provided contact details to discuss the audit decision, it is not clear that this was the appropriate contact for debt concerns. Should PMT or their representatives have concerns about the consequent debt matters, then it is not clear that they should also contact the ATO officer who issued the audit decision.
- B.74. The IGTO considers that a dedicated debt officer or team with an attached recorded message service for all debt related contacts would improve the experience and service for taxpayers generally and assist them with meeting their payment obligations.
- B.75. **The IGTO is also of the view that the ATO should provide an apology to PMT's directors regarding its failure to attempt contact before deciding to issue garnishee notices and for its failure to take into account PMT's individual circumstances as well as acknowledging the impact that these failures have had on the financial and personal well-being of PMT and its directors.**

Reasons for IGTO's views

- B.76. **The ATO may have considered there was an unwillingness to pay based on prior experience with others in the PMP project and based on an assumption that PMT would also engage in those behaviours.**
- B.77. However, on the basis of the risks identified during the PMP and the ATO's records in this case, it appears that a number of important elements that underpinning the **'pattern' of behaviour** which underlay the risk of non-payment, **were not reflected in the facts of PMT's case**. The ATO

⁴⁹ In the IGTO's *AFCM review*, the ATO had at one time estimated that \$2.34 billion was at risk.

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has not provided evidence to show that PMT has also engaged in those behaviours. The ATO's information did not include sufficient details specific to PMT to demonstrate a high level of risk to the ATO's ability to recover the debt.

- B.78. **The IGTO is of the view that the behaviours identified in other unrelated entities in the PMP were not relevant considerations in the ATO's decision to issue garnishee notices in PMT's cases.** This is because the ATO's decision should be based on the individual circumstances of the taxpayer.⁵⁰ The risks that the ATO has identified with non-payment of the debt should be specific to the taxpayer and not solely based on the risks identified in other unrelated taxpayers.
- B.79. As outlined in paragraphs B.38 to B.75s, **the ATO failed to take into account a number of relevant and material considerations in making the decision to issue garnishee notices.** If it had, it would have likely come to the view that PMT's risk of non-payment of the liability, based on its capacity to pay, was sufficiently low to agree to a repayment arrangement. It should be noted that it appears that the ATO did come to this view one week later when it agreed to such an arrangement. This agreement was on the basis of the same information that the ATO had available to it a week earlier, apart from a forecast of estimated cash flow.
- B.80. **The ATO has not made available any evidence that its debt officers attempted to contact PMT before** issuing the garnishee notices. There is also no indication that, at the time, the ATO believed that if it had attempted to make contact before advising PMT of the debt, that such attempts would increase the risk of PMT not paying the debt.
- B.81. Furthermore, there is a comment in **the internal emails that an ATO officer said "I think we can issue the garnishee notices first and see what we can get then determine the next step".**⁵¹ It appeared that the decision to issue garnishee notices was influenced by other ATO officers' advice. In the absence of a reason for the decision, there is little indication that the ATO had not been influenced by it (as it acted consistent with it).
- B.82. **Such an approach is also contrary to the Commissioner statement⁵² in Parliament and the IGTO's recommendations in its 2015 Debt Collection review.⁵³ The Commissioner in his statement to Parliament explained that the ATO uses garnishees and other firmer debt recovery actions only after attempts to engage with a taxpayer has failed and that the ATO on average makes nineteen attempts to engage with the taxpayer before issuing garnishee notices.**
- B.83. In the IGTO's view, the actions in this case suggest that the garnishee notices were being used as a strategy to prompt the taxpayer to take action. **This is in contrast to the ATO's practice statements where garnishee notices should only be issued if the ATO has determined it is the**

⁵⁰ Above n 5.

⁵¹ Above n 51.

⁵² Commonwealth, Senate Economics Legislation Committee, *Proof Committee Hansard – Estimates*, 23 October 2019, p 84 (Commissioner of Taxation Chris Jordan).

⁵³ IGTO, *Review into Debt Collection* (2015), recommendation 4.1(c).

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most effective way to collect payment of the debt following consideration and assessment of the relevant risks of non-payment based the taxpayer's individual circumstances.

B.84. Accordingly, the IGTO is unable to provide assurance that the ATO's garnishee action was reasonable in the circumstances and that the ATO had taken all relevant factors into account as outlined in PSLA 2011/18 and PSLA 2011/6 in issuing the garnishee notices.

ATO's documentation for reasons for decision

- B.85. During the course of our investigation, the IGTO has also observed that ATO officers' documentation of their reasons for the decision to issue garnishee notices along with their consideration of taxpayers' individual circumstances was in complete and did not consider the factors outlined in PSLA 2011/18 and PSLA 2011/6.
- B.86. The internal ATO emails recommending the issue of garnishee notices provide some facts and then a conclusion. However, there does not appear to be any analysis or 'weighing' of relevant facts and why the facts supported that recommendation. Furthermore, the email refers to the audit finalisation letter in support. This letter, however, provides reasons regarding the risk of liability, not the risk of non-payment.
- B.87. The IGTO has not been provided with a record of the decision maker's reasons for their decision to issue garnishee notices. The ATO has referred the IGTO to internal emails, including one which recommends issuing garnishee notices. Based on this information, it is unknown what facts the decision maker considered relevant and how they were weighed.
- B.88. The decision made to issue garnishee notices can be contrasted with the decision made to enter a repayment arrangement. The decisions were made one week apart from each other and only one new fact became available to the ATO in that week — that fact was PMT's calculation of its forecasted cash flow over three years. In the IGTO's view, such a calculation is, at best, an educated estimation, due to the range of variables that may affect a business over a three-year period.
- B.89. In the IGTO's view, had the ATO officer complied with the ATO's requirements to document their reasons for decision (see PSLA 2011/6), it would have required the officer to consider the merits of the case with respect to the individual facts of the case. Although the context of the broader PMP compliance activities were relevant, an officer would fall into error if they failed to assess the individual facts against the 'pattern' seen by other entities in that compliance program.

Our recommendations

- B.90. The IGTO made recommendations that the ATO take the following actions:
- provide an appropriate apology for the impact the garnishee notices has had on the directors, the impact that this action has had on the directors;
 - offer to consider compensation for the costs that were incurred in seeking the ATO's withdrawal of the garnishee notices; and

B. ATO's decision and action to issue garnishee notices

- develop a template for ATO decision-makers to complete in high risk cases when deciding to issue garnishee notices before the debt is due or without notice/warning to the taxpayer. The template should:
 - set out the types of relevant considerations that should be taken into account, including those identified in PSLA 2001/18 regarding the issuing of a garnishee notice and PSLA 2011/6 regarding the risk to collection of a disputed debt; and
 - provide instruction that the factors should be considered with reference to taxpayer's individual circumstances.

Reasons for our recommendations

B.91. The reasons we have recommended the above actions are:

- the ATO did not appropriately take into account all relevant factors as outlined in PSLA 2011/18 and PSLA 2011/6 and the ATO took irrelevant considerations into account in issuing the garnishee notices;
- the personal impact the garnishee notices have had on PMT's directors;
- the absence of contemporaneous and appropriate documentation of reasons for decisions to issue garnishee notices made it difficult to understand the officer's consideration of PSLA 2011/18 and PSLA 2011/6 and the application of these policies to PMT's individual circumstances; and
- PMT's representative was engaged to seek a withdrawal of the garnishee notices. This may not have been required if the ATO had appropriately considered the risk of non-payment in PMT's circumstances in accordance with the ATO practice statements.

ATO's response to our findings and recommendations

Apology for the ATO's garnishee action

- B.92. The ATO has stated that it considers the issue of garnishee notices appropriate in this case. This is because the ATO had concerns that PMT would have taken actions to move funds out of their reach. The ATO had observed this behaviour in respect of other unrelated entities in the ATO compliance project. This compliance project **concerns a potential \$2.45 billion revenue risk** in the precious metals industry.
- B.93. The ATO maintains that the decision to issue garnishee notices was "commensurate with the risk that the taxpayer may take action to mitigate debt collection efforts, such as dissipating assets, moving funds beyond the reach of the Commissioner, and putting the company into liquidation."
- B.94. The ATO also explained that it is not necessary for actual dissipation of assets to have occurred to demonstrate a real risk of dissipation and that this risk can be inferred by behaviours identified during audit, the actions taken to avoid payment by other unrelated parties in the same scheme and the highly liquid nature of gold stock. In the ATO's view, the "liquidity of assets presents a more immediate risk which would require action without notice".

B. ATO's decision and action to issue garnishee notices

- B.95. The ATO agreed to issue an apology in recognition of the impact the garnishee notices may have had on you and your wife. The apology was issued by the ATO on 25 September 2020.

ATO Comment

The letter of apology that issued on 25 September 2020 advises the ATO reviewed the circumstances of issuing the garnishee and confirmed they had issued correctly. Given the length of time that has passed since the garnishees in question issued (nearly 3 years ago) the ATO does not believe a further apology is required. Note that the complainant has not approached the ATO in response to the letter of apology that has issued.

IGTO's response to ATO comment

Mr Reid raised concerns with the IGTO about the apology the directors (Mr Reid and Mrs Reid) received from the ATO. In particular, they consider the apology does not sufficiently address their concerns and the impact the garnishee notices has on them.

Compensation

- B.96. The ATO will consider an application for compensation for Detriment caused by Defective Administration (CDDA) Scheme if an application is submitted by PMT.

ATO Comment

As per our response of 14 September 2020 to the original preliminary review the ATO will consider an application for compensation for Detriment caused by Defective Administration (CDDA) Scheme if one is submitted by the client.

IGTO's response to ATO comment

The IGTO will advise Mr and Mrs Reid that the ATO will consider an application for compensation under the CDDA scheme.

ATO's process for issuing of a garnishee notice

- B.97. The ATO has explained that since the issuing of garnishee notices in PMT's circumstances, it has made changes to its process for undertaking garnishee action. Following a review in November 2018, ATO officers are required to complete a template documenting the reasons for undertaking garnishee action at the time the decision is made and the template is reviewed by a team leader before garnishee notice is issued. In March 2019, the ATO made a further change to its process and the decision to issue garnishee notice needs to be approved by an Executive Level 2 officer where the debt is likely to be disputed.
- B.98. The ATO has also issued a Practice Note to instructs its officers to provide detailed reasons to taxpayers where the ATO is taking debt collection action based on the exceptional circumstances of the taxpayer. The ATO has explained that the exceptional circumstances applicable for this Practice Notice would be similar to that of PMT.

C. ATO's decision and action to remove PMT from the deferred GST scheme

Summary of issue investigated

C.1. PMT's participation in the deferred GST scheme was revoked by the ATO despite the ATO's agreement with PMT's representative to enter into a payment arrangement to pay the outstanding debts prior to the revocation.

C.2. The IGTO investigated the ATO's decision and action to remove PMT from the deferred GST scheme.

Information provided by the ATO in relation to PMT's participation in the deferred GST scheme

C.3. The ATO has explained that to participate in the deferred GST scheme, a taxpayer must meet the following requirements:

Lodge and pay business activity statements (BAS) online using:

- *the Business Portal*
- *Standard Business Reporting (SBR)-enabled software*
- *a registered tax and BAS agent – lodging on behalf of the client using Online services for agents*
- *online services for individuals and sole traders – using the client's individual myGov account.*

Lodge on time – if the client doesn't lodge on time, they may be withdrawn from the deferred GST scheme.

Keep up to date with payments – if the client defaults from a payment plan, they may be withdrawn from the deferred GST scheme.

C.4. In PMT's circumstances, PMT's access to the deferred GST scheme was revoked because an outstanding payment was not received within 14 days of the due date of debt. The debt officer dealing with the garnishees did not input the payment arrangement details onto the ATO system until the payment from the garnishee notices was received by the ATO. As part of the negotiation of the payment arrangement, the ATO agreed that \$34,000 would be transferred to the ATO from the bank pursuant to the garnishee notice. PMT's representative was advised that the payment plan could not be entered into the system until after the payment was received, otherwise the payment plan would include an incorrect amount.

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- C.5. The ATO also provided the IGTO with a timeline of interactions between the ATO, PMT's director and representative in relation to the payment arrangement and revocation of participation in the deferred GST scheme.

Our findings

- C.6. In order for entities to participate in the deferred DGST scheme, they must lodge and pay BAS online using the specified channels, lodge on time and keep up to date with payments.

- C.7. In PMT's circumstances, the ATO revoked PMT's access to the deferred scheme because PMT's debt has been outstanding, payments were not made within 14 days and the payment arrangement had not been inputted in the system.

- C.8. In the IGTO's view, the ATO had opportunities to stop the removal of PMT from the GST deferred scheme after it agreed to a payment arrangement. However, despite the ATO debt officer's escalation to the ATO's internal deferred GST mailbox with reasons why the payment arrangement was not recorded on the system, PMT was removed from the deferred GST scheme. The ATO's failure to stop the removal PMT from the GST deferred scheme resulted in PMT's directors incurring unnecessary costs for which the ATO should consider compensation.

Reasons for our views

- C.9. The ATO removed PMT from the GST deferred scheme because it has "missed a payment", however, the ATO had already agreed to a payment arrangement. While the ATO informed the representative that the payment arrangement could not be entered into the system until the ATO received the payment from the garnishee notice, it is unclear whether the ATO also informed the representative that the resulting implication is that PMT's participation in the deferred GST scheme will be reviewed by the ATO and may then be revoked.
- C.10. The ATO officer's note of the conversation on 14 March 2018 indicates that PMT accepted that the participation in the deferred GST scheme will be revoked. However, PMT's director could not recall the details of the discussion. Based on the note made by the ATO officer of this conversation, it appears that there was no discussion on the payment arrangement that had been agreed to on 13 March 2018. If the ATO officer was aware that a payment arrangement had been agreed to on 13 March 2018, the discussion about the ATO's review on PMT's participation in the deferred DGST scheme may have been different.
- C.11. Notwithstanding the above, the ATO was also sent an email by PMT's director on 28 March 2018 in relation to the ATO's review into PMT's participation in the deferred GST scheme. The ATO debt officer referred the email to the ATO's internal deferred GST mailbox on 29 March 2018 and included a note to advise that the ATO had agreed to a payment arrangement and the reasons why the payment arrangement was not yet entered into the ATO system. The ATO debt officer specifically asked "[c]an you please review the account and clarify whether the taxpayer can still be eligible for the Deferred GST Scheme?"

C. ATO's decision and action to remove PMT from the deferred GST scheme

- C.12. It is unclear what consideration took place following the debt officer's referral. **It is also unclear why the ATO considered PMT was no longer eligible for the deferred** GST Scheme despite the debt officer's note that a payment arrangement had been agreed to. Following the debt officer's referral, the ATO could have deferred its review of PMT's participation in the deferred GST scheme pending confirmation of the payment arrangement on 11 April 2019. If the ATO had deferred its review, PMT's participation in the deferred GST scheme would not have been revoked on 3 April 2018.
- C.13. In any event it caused unnecessary stress and additional concerns for PMT's directors after going through a lengthy 2-year audit process with the ATO and a legitimate expectation that the agreed payment arrangement would have concluded the 2-year experience. In addition to the emotional stress experienced, it caused PMT's directors to incur costs in engaging their representatives to liaise with the ATO to follow up on the removal and subsequent reinstatement to the GST deferred scheme.

Our recommendations

C.14. The IGTO made recommendations that the ATO take the following actions:

- provide an appropriate apology for the ATO's failure to stop the removal of PMT from the deferred GST scheme and the impact that this action has had on the directors; and
- offer to consider compensation for the costs that were incurred in seeking the ATO's reinstatement to the GST voluntary reverse charge.

Reasons for our recommendations

C.15. The reasons we have recommended the above actions are:

- the additional stress on the directors caused by the ATO's failure to stop the removal of PMT from the deferred GST scheme despite the agreement of a payment arrangement prior to the removal; and
- PMT's representative was engaged to seek PMT's reinstatement to the deferred GST scheme. This may not have been required if the ATO had stopped the removal of PMT from the GST deferred scheme.

D. The ATO's apology issued to PMT

D.1. The ATO issued its apology to you and your wife in a letter dated 25 September 2020 following the IGTO's recommendations. The apology stated:

...

Thank you for outlining your concerns, I apologise for any impact that the issuing of garnishee notices and the cancellation of your Deferred GST registration may have had. In reviewing the circumstances, I can confirm that the garnishee notices were issued correctly.

However, I recognise that your Deferred GST registration was incorrectly cancelled on 3 April 2018, after having entered into a payment arrangement on 13 March 2018 and the registration was reinstated on 5 April 2018. I apologise for any inconvenience that may have been caused in seeking reinstatement of PMT Pty Ltd's access to the Deferred GST scheme.

Our views on the ATO's apology

D.2. The NSW Ombudsman published factsheet on apologies details the elements that should be incorporated into an apology for it to be effective.⁵⁴ An effective apology includes the following 6 elements:

- Recognition – description and recognition of the action to which the apology applies;
- Responsibility – an acknowledgment of responsibility;
- Reasons – explanation of the cause;
- Regret – apology and sincerity of communication;
- Redress – action taken to address the problem; and
- Release – request for forgiveness.

D.3. **The ATO's apology did not fully acknowledge its responsibility for its actions and the impact they have had on PMT's directors.** It did not include an explanation as to why the ATO decided to issue garnishee notices without notice to you or your representative and why the ATO revoked PMT's participation in the GST scheme. It also did not include the actions taken by the ATO to address the issue.

⁵⁴ NSW Ombudsman, *Apologies*, 16 June 2012, <www.ombo.nsw.gov.au>.

D. The ATO's apology issued to PMT

D.4. In the IGTO's view, the ATO's apology may not be viewed as a sincere apology and the apology may not fully addresses and resolve their concerns. A sincere and effective apology will help to restore the relationship between you and the ATO, especially in your circumstances where both PMT directors' health have been affected as a result of the ATO's actions. It will also help to rebuild your trust with the ATO and fostered greater confidence with the ATO's processes for undertaking garnishee actions and participation in the deferred GST scheme.

Our recommendations

D.5. The IGTO recommends that the ATO considers issuing a further apology to PMT's directors and includes:

- the reasons the ATO issued the garnishee notices without communication with the you or your legal representative;
- the reasons the ATO revoked PMT's participation in the deferred GST scheme despite contacts made by PMT's director;
- a more fulsome acknowledgment of the impact the ATO's actions has had on the you and your wife; and
- the improvements made by the ATO on its process to issue garnishee notices where the debt is likely to be disputed.

Annexure B – Chronology of events surrounding the ATO’s compliance project on the gold industry and PMT

2000

1. From 2000, PMT (ABN 53 076 602 956) had lodged Business Activity Statements (BASs). This entity owned the precious metal refining business which was later purchased by the current owners of PMT.

2001

2. On 9 March 2001, the ‘PMT’ hallmark was registered with the Registrar of Trade Marks.⁵⁵

2008

3. From about 2008, Mrs Reid (nee Crux) worked in the PMT precious metal refining business which was owned by Alan and John Richmond at that time.⁵⁶

2012

4. In May 2012, the ATO commenced enquiries into the non-remittance of GST for gold purchases by a now defunct and unrelated entity.⁵⁷

2013

5. In about 2013, Gary Stacey joined the PMT business as a metal refiner.⁵⁸
6. On 2 May 2013, the ATO’s Serious Non-Compliance (SNC) business line commenced covert investigations into groups that were suspected to be exploiting the GST rules for gold.⁵⁹
7. By July 2013, the Indirect Tax (ITX) business line asked that ATO teams dealing with entities engaged in precious-metals trading provide information and insights to it.⁶⁰

⁵⁵ Above n 28, para [29].

⁵⁶ Above n 28, para [244].

⁵⁷ Above n 2, p 235.

⁵⁸ Above n 1, Appendix E, p 1.

⁵⁹ Above n 2, p 236.

⁶⁰ Above n 2, p 237.

October 2013

8. By October 2013, PMT operated in the precious metals refining industry on the Gold Coast with less than 10 employees.⁶¹ PMT, at that time, was owned by Alan and John Richmond.
9. In October 2013, the PMT business was subject to an ATO GST audit which related to the retention of PMT's September 2013 GST refund. PMT states that it asked the ATO auditor, Neil Jury, (the first ATO auditor), to arrange a GST champion to visit PMT premises so that they could obtain guidance and ensure they were fully complying.⁶²
10. On 25 October 2013, 11:28 AM, the first ATO auditor sent an email to Alan Richmond at PMT with the subject line "please call".⁶³
11. On 30 October 2013, the ATO released media release 2013/33 that reported the ATO was investigating \$65m of suspected GST fraud in the precious metals industry and that search warrants had been issued, with future audits to be undertaken:⁶⁴

It is alleged that companies fraudulently claimed GST credits and failed to report GST correctly. They formed syndicates to conceal the true nature of their activities and to avoid detection.

... Further audits of industry participants will be undertaken in the near future and we will continue to work closely with other government and law enforcement agencies to pursue those suspected of abusing the system...

12. Immediately following the issuing of search warrants on 30 October 2013, the ATO commenced a criminal investigation into certain unrelated entities in the gold industry as well as audits into entities that were suspected to be participating in the supply chains of those entities.⁶⁵
13. On 31 October 2013, the first ATO auditor sent an ATO audit finalisation letter to Mr Richmond, **PMT (ABN 53 076 602 956), that advised no further action was required for the GST audit.**⁶⁶

Thank you for your assistance during our recent audit and for providing the information we requested for your 1 July 2013 – 30 September 2013 activity statement.

We advise that, based on this information no further action will be required."...the completion of this audit does not prevent us from initiating further action if relevant information becomes available."

November 2013

14. On 27 November 2013, an ATO GST Tax Counsel Network (TCN) officer, Gordon Brysland, finalised his view on "Application of s 38-385 to 'precious metal' refined from scrap"⁶⁷:

⁶¹ PMT, www.pmt.net.au/meet-pmt/, accessed 16/3/2020

⁶² Above n 1.

⁶³ Above n 1, Annexure B, Emails between the first ATO auditor to PMT in 2003.

⁶⁴ ATO, Media release 2013/33, 30 October 2013.

⁶⁵ Above n 2, p 239.

⁶⁶ Above n 1, Annexure A, ATO letter dated 31 October 2013.

⁶⁷ PMT, Email from PMT representative Lyndon Garbutt to IGTO, 13 November 2019.

Section 38–385 (a) extends to subsequent refining of “precious metal” from scrap and is not confined to any original refining for ore or doré. There is little if any prospect in my view that a court would reach a different conclusion, either on the words of the provision itself or by reference to extrinsic materials...

15. On 17 December 2013, 12:27 PM, Alan Richmond at PMT replied to the first ATO auditor’s 25/10/13 11:28 AM email with a subject line “RE: A GST-champion visitation:⁶⁸

Hi Neil,

Any progress on getting a GST-champion to visit us as we discussed in October?

Thanks and cheers, Alan

2015

16. In March 2015, the ATO increased its quantification of the estimated revenue at risk in the precious metals industry from \$300 million to \$2.45 billion.⁶⁹

17. On 12 May 2015, ATO TCN officer, Walter Hadeed, sent an email to Brian Hudson which said that there needs to be collaboration and collusion between an entity like PMT and the entities in its supply chain before Div 165 can be invoked⁷⁰:

We need evidence that the parties set out to deliberately manufacture ITCs with no apparent motive to pay the corresponding GST such that the revenue is at a loss similar to missing trader arrangements...

18. On 8 June 2015, Mr and Mrs Reid sold their home.⁷¹

19. In July 2015, the ATO commenced its Gold Project that involved a more holistic approach to the risk treatment and reduced audit timeframes.⁷²

20. On 8 July 2015, settlement was completed on the 8 June 2015 sale of the Reid’s home with all proceeds (\$978,370.53) being paid to the bank mortgagee.⁷³

21. By October 2015, the ATO’s ITX Serious Evasion area (Complex Assurance and Evasion) had stratified the risk population in the precious metals industry into different groups. In relation to refiners, they intended the risk hypothesis to be tested, amongst others, to include:

Knowingly and incorrectly report the form of the metal to manipulate their GST obligations: 1.Receive precious-metals (GST free/Input taxed) but report as scrap/taxable in order to obtain a GST credit; or 2. Knowingly receive “defaced or damaged” precious metal and report it as scrap in order to obtain a GST credit.⁷⁴

⁶⁸ Above n 1, Annexure B, Emails between the first ATO auditor to PMT in 2003.

⁶⁹ Above n 2, pp 22–243.

⁷⁰ Above n 36, para [3.15]; Above n 36 Annexure B, Email from Walter Hadeed to Brain Hudson 12 May 2015.

⁷¹ Above n 1, Appendix E, Schedule 1, p 2.

⁷² Above n 2, p 243.

⁷³ Above n 1, Appendix E, Schedule 1, p 2.

⁷⁴ ATO, ITX Complex Case Assurance and Evasion (CA &E) precious metals project case guidelines, October 2015, pp 5–6.

2016

March 2016

22. On 16 March 2016, J&L Precious Metals Technology Pty Ltd (J&L Precious Metals) was incorporated (registered with ASIC in Qld).⁷⁵ Mrs and Mr Reid were the directors and shareholders, each owning one of the two ordinary shares of the company.⁷⁶ On this date, PMT also obtained an ABN (37 611 351 412) in relation to a 'Precious metal scrap dealing wholesaling' business and registered for GST, reporting on a monthly basis.⁷⁷

June 2016

23. In (late) June 2016, La Gajjar made initial contact with PMT via its website.⁷⁸
24. On 24 June 2016, Mrs Reid and Mr La Gajjar first met each other.⁷⁹
25. In late June 2016, PMT had its initial meeting with La Gajjar's representatives and La Gajjar's accountant. PMT representatives made enquiries of La Gajjar including in relation to proving its identity and the source of their gold. La Gajjar said that they were sourcing their gold from Ghana among other places. Identification was taken and PMT made enquiries on publicly available databases (corporate and ABN records).⁸⁰
26. On 27 June 2016, J&L Precious Metals changed its name to PMT Pty Ltd.⁸¹
27. **On 30 June 2016, PMT Pty Ltd (previously known J&L Precious Metal Technology Pty Ltd, ABN 37 611 351 412) entered into a (unsigned⁸²) sale agreement with PMT Pty Ltd (now known as J&L Precious Metal Technology Pty Ltd, A.C.N 076 602 956) and Barwae Pty Ltd (A.C.N. 076 602 938) to acquire precious refining business named PMT Pty Limited. PMT Pty Ltd acquired the precious metal refining business a GST-free going concern for a purchase price of \$342,368.⁸³ The amount was to be repaid in \$3292/week payments over two years.⁸⁴ The refinery business was purchased from Alan and John Richmond as a GST-free supply.⁸⁵ Mr and Mrs Reid said that they saw an opportunity to grow the business by targeting international gold markets and investing in improved equipment.⁸⁶**

⁷⁵ ATO, Attachment in email from an ATO officer in Significant Debt Management to Debt Case Leadership, 'Re: Submission to issue garnishee notice before due date', 28 February 2018; Above n 65, paragraph 11; Above n 1, Appendix F, p 2.

⁷⁶ Above n 65, para [13].

⁷⁷ Above n 1, Appendix F, ATO objection decision dated 22 September 2017, p 1; Above n 65, para [12].

⁷⁸ Above n 65, 1 February 2018, para [84.15].

⁷⁹ Above n 65, 1 February 2018, para [244].

⁸⁰ Above n 73, paras [5.9] and [5.14] to [5.19].

⁸¹ Above n 1, Appendix F, ATO objection decision dated 22 September 2017, p 1; ATO, Attachment in email from an ATO officer in Significant Debt Management to Debt Case Leadership, 'Re: Submission to issue garnishee notice before due date', 28 February 2018; Above n 65.

⁸² Above n 1, Appendix F, ATO objection decision dated 22 September 2017, p 1.

⁸³ ATO, Attachment in email from an ATO officer in Significant Debt Management to Debt Case Leadership, 'Re: Submission to issue garnishee notice before due date', 28 February 2018; Above n 65, para [15].

⁸⁴ Above n 1, Appendix F, p 1.

⁸⁵ Above n 65, para [244.1].

⁸⁶ Above n 73, para [5.1].

July 2016

28. On 1 July PMT (ABN 37 611 351 412) took over the business⁸⁷ and began trading.⁸⁸ Until at least 15 December 2016, Mrs Reid was the Admin/Finance Officer and Mr Jeremy Reid was the Operations Manager of PMT.⁸⁹ PMT had \$125,000 in its trading account to facilitate the trade of gold.⁹⁰

August 2016

29. In August 2016, the ATO commenced its 'refund retention' strategy in which the refunds for 7 refiners were retained pending verification of their BAS claims.⁹¹ In this strategy, the ATO reviewed each of the refiner's supply chains in a linear manner and then laterally review the encompassing gold network to verify the legitimacy of refunds and test whether gold was being recirculated through the industry via the supply chains.
30. On 2 August 2016, PMT claimed \$131,734 GST input tax credits in its July 2016 BAS amounting to a net refund of \$122,706. The ATO retained this refund.⁹²
31. On 9 August 2016, PMT contacted the ATO regarding the GST refund. They were advised that someone would be in touch.⁹³
32. On 10 August 2016, the ATO notified PMT that it had retained refund from its July 2016 BAS because the information on its BAS required verification.
33. On or about 18 August 2016, ATO officer, Rebecca Anson (the second ATO auditor) asked for various information regarding PMT's July 2016 BAS. This information was emailed to her.⁹⁴
34. On 20 August 2016, PMT entered into a Recipient Created Tax Invoice agreement with Gold Hub.⁹⁵ This gave PMT permission to generate invoices on Gold Hub's behalf for the supplies it made to PMT.
35. On 26 August 2016, PMT was advised that the GST audit case was being passed onto another ATO officer.⁹⁶

⁸⁷ Above n 1, Appendix E, Schedule 1, p 1.

⁸⁸ Above n 65, para [244.1].

⁸⁹ Above n 65, para [18].

⁹⁰ Above n 1, Appendix E, para [13(d)].

⁹¹ Above n 2, p 236–237.

⁹² Above n 65, paras [19] and [20].

⁹³ Above n 1.

⁹⁴ *ibid.*

⁹⁵ Above n 65, para [55].

⁹⁶ Above n 1, p 2.

September 2016

36. On 1 September 2016, Mrs Reid met with Gold Hub's director, Imitiaz Malik, and accepted a supply of gold from him.⁹⁷
37. On 1 September 2016, PMT's directors asked for a senior ATO officer to contact them.⁹⁸
38. On or after 1 September 2016, an ATO officer (Michael Haskew) contacted PMT and PMT asked for guidance regarding people deemed suspicious turning up at their premises⁹⁹ and to ensure that the GST risk was being appropriately managed.¹⁰⁰ PMT states that the ATO officer declined to provide guidance to PMT saying "if you lay down with dogs, you get fleas".
39. On 2 September 2016, PMT charged Gold Hub \$305.36 to assay and process the gold that Gold Hub had supplied to PMT. After assaying the metal, Mrs Reid suspected 'something a bit untoward because the scrap turned out to be pure'.¹⁰¹
40. On 6 September 2016, PMT claimed \$146,408 GST input tax credits in its August 2016 BAS amounting to a net refund of \$134,137. The ATO retained this refund.¹⁰²
41. On or about 7 September 2016, PMT asked the second ATO auditor why there was no contact details for the new officer.¹⁰³
42. On 7 September 2016, ATO officer, Christina Carboni (the team leader of the third auditor), contacted PMT to say that she would be dealing with the case.¹⁰⁴
43. On 8 September 2016, ATO officer, Vivi Widjaja (the third ATO auditor), sent an email to PMT asking for more information regarding the July 2016 BAS to be emailed to the third ATO auditor.¹⁰⁵
44. Before mid-September 2016, Mrs Reid told Gold Hub's director that PMT was unable to do anymore work for Gold Hub.¹⁰⁶
45. In mid-September 2016, an associate of Gold Hub's director approached PMT. Mrs Reid advised the associate that PMT was unable to business with her and that PMT was only interested in refining genuine gold scrap.¹⁰⁷
46. On 20 September 2016, the ATO notified PMT that it had retained the refund from its August 2016 BAS as the information reported on the BAS required verification.¹⁰⁸

⁹⁷ Above n 65, para [77].

⁹⁸ Above n 1, p 2.

⁹⁹ *ibid.*

¹⁰⁰ PMT's draft objection, 1 February 2018, p 2, para [4(b)].

¹⁰¹ Above n 65, paras [58] and [61].

¹⁰² Above n 65, paras [19] and [20].

¹⁰³ Above n 1.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ Above n 65, para [61].

¹⁰⁷ *ibid.*, para [6].

¹⁰⁸ Above n 1, Appendix F, ATO objection decision dated 22 September 2017, p 1.

47. On 20 September 2016, ATO officer, Vasiliki Tsiavos (the fourth ATO auditor), asked for information regarding the August 2016 BAS. PMT states that this information was asked by numerous different ATO officers. PMT asked to speak with someone higher up. ATO officer, Lois Bentley, spoke with PMT and said that she would assign only one person to their case.¹⁰⁹
48. By 30 September 2016, Al's Gold acquired approximately 7.3 kg of gold from PMT. There were 29 separate transactions between Al's Gold and PMT over a three month period and the total consideration was \$422,329.¹¹⁰

October 2016

49. On 6 October 2016, ATO officer, Bradley Davidson (the sixth ATO auditor), telephoned PMT to say that he would be taking over the case. Via email, the sixth ATO auditor asked for numerous documents and information regarding the July-October 2016 BASs. PMT states that receipt of information was never acknowledged unless PMT insisted he confirmed receipt. PMT had two more phone conversations with the sixth ATO auditor in which PMT says he did not provide information saying 'I can't tell you that' including in response to a request for an end date.¹¹¹
- D.6. On 12 October 2016, the Serious Financial Crimes Taskforce publicly released an intelligence bulletin:

Targeting fraud in the precious metals refining industry... We are seeking sophisticated arrangements that attempt to secure transactions of recycled "investment form" precious metals.

We believe there are groups or networks of industry participants, including refiners, bullion dealers, gold kiosks, dealers and buyers within established supply chains involved in gold recycling (or carousel type) arrangements, seeking to exploit the GST rules in relation to precious metals.

... The Taskforce view schemes that exploit GST rules using artificial arrangements to be fraud...¹¹²

50. On 19 October 2016, PMT claimed \$283,953 GST input tax credits in its September 2016 BAS amounting to a net refund of \$270,488. The ATO retained this refund.¹¹³

November 2016

51. From November 2016, PMT changed arrangements with La Gajjar. PMT explained that regarding the consideration for supplies over November 2016 to January 2017, they do not fully align with the assay reports because during this period the payments to La Gajjar were for purchases of bullion rather than purchases of scrap gold. In other words, the consideration for supplies as per the bank records for this period reflect the changed arrangements whereby gold was first received

¹⁰⁹ Above n 1.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² ATO, Serious Financial Crimes Taskforce, Intelligence Bulletin, 12 October 2016.

¹¹³ Above n 65, paras [19] and [20].

on consignment, processed by the refiner on the consignor's behalf and then purchased by PMT once the gold was refined.¹¹⁴ PMT received 19.2Kg of gold under this arrangement.¹¹⁵

52. On 1 November 2016, the ATO notified PMT that it had retained the refund from its September 2016 BAS as the information reported on the BAS required verification.¹¹⁶
53. On 9 November 2016, PMT claimed \$309,641 GST input tax credits in its October 2016 BAS amounting to a net refund of \$298,629. The ATO retained this refund.¹¹⁷
54. On 14 November 2016, the ATO notified PMT of its objection rights regarding the refund retained from its July 2016 BAS.¹¹⁸ The ATO objection decision was issued by email on 15 November 2016.¹¹⁹
55. On 16 November 2016, PMT lodged a complaint with the ATO regarding the retention of refunds.¹²⁰
56. On 17 November 2016, ATO complaints officer, Christine Dixon, telephoned to discuss the complaint and advised she would have to carry out further inquiries.¹²¹
57. On 22 November 2016, the ATO complaints officer telephoned and asked for further information and that she would get back to PMT.¹²²
58. On 23 November 2016, the ATO notified PMT that it had retained the refund from its October 2016 BAS as the information reported on the BAS required verification.¹²³
59. On 28 November 2016, the ATO complaints officer telephoned PMT to advise she was not happy with the ATO responses and would go higher. She indicated that she could see no reason why PMT could not be given an end date and it seemed as if the ATO was stalling.¹²⁴

December 2016

60. On 2 December 2016, PMT made several calls to the ATO complaints officer for an update but received no response.¹²⁵
61. On 5 December 2016, the ATO complaints officer telephoned PMT. PMT said that the ATO complaints officer said that she was stunned with the response from the person she spoke to and who told her to tell PMT "tell him we are acting within the protocols of the ATO and this is how it is being done". PMT explained that the ATO complaints officer advised them to submit an

¹¹⁴ Above n 1.

¹¹⁵ Above n 65, paras [240] to [249].

¹¹⁶ Above n 1, Appendix F, ATO objection decision 22 September 2017, p 1.

¹¹⁷ Above n 65, paras [19] and [20].

¹¹⁸ *ibid.*, para [20].

¹¹⁹ Above n 57.

¹²⁰ Above n 1.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*, Appendix F, ATO objection decision 22 September 2017, p 2.

¹²⁴ Above n 1.

¹²⁵ *ibid.*

objection to the holding of the GST refund and said that the ATO was not following protocols and it was unlawful. She said she had never seen anything handled this way in 15 years that she worked for the ATO and felt that they were not being treated fairly.¹²⁶

62. On 7 December 2016, the ATO issued a letter outlining the outcome of their complaint investigation.¹²⁷ The letter stated:

We have reviewed the contents of your complaint and reviewed the processes and procedures being undertaken in this audit and confirm that the auditors are applying those processes and procedures. As advised the auditors are not in a position to advise when the audit will be completed, however you are able to lodge an objection to the retention as advised by the auditor in letter dated 15th November 2016. You indicated that you would consider pursuing this option.

63. In December 2016, PMT instructed legal services of McCullough Robertson.¹²⁸
64. On 6 December 2016, the ATO sent an information request to PMT regarding the 1/8/16 – 31/10/16 period and required a response by 16 January 2017.¹²⁹
65. On 8 December 2016, the ATO interviewed Mr Malik of Gold Hub.¹³⁰
66. On 8 December 2016, PMT lodged the objection to the retention of the GST refund for the July 2016 period.¹³¹
67. By letter dated 14 December, N&P Services Pty Ltd stated that they have been a customer of PMT since July 2011, that PMT stopped paying any GST component of their invoices since December 2016. This has placed financial pressure on N&P and PMT is having to turn away N&P work as it no longer has sufficient working capital for the jobs.¹³²
68. By letter dated 15 December 2016, Teresa Dyson (a consultant of McCullough Robertson) wrote on behalf of PMT to Michael Cranston, Deputy Commissioner of Taxation, regarding the retention of refunds. The letter argued that:¹³³

although the presence of fraudulent activities in the gold industry was a relevant factor in deciding to retain GST refunds, it should not be outweighed by other factors identified in PSLA 2012/6 regarding retention decisions.

Mr and Mrs Reid were starting to face financial distress due to the ATO retaining \$1m in GST refunds.

Both Mr and Mrs Reid were facing health issues as a consequence of the financial stress.

PMT had promptly provided information to the ATO for each request since August 2016.

¹²⁶ *ibid.*

¹²⁷ Above n 57.

¹²⁸ Above n 1.

¹²⁹ *ibid.*, Appendix E, p 2.

¹³⁰ Above n 65, para [63].

¹³¹ Above n 1, Appendix F, ATO objection decision 22 September 2017, p 1.

¹³² Above n 1, Appendix E, Schedule 1, p 2.

¹³³ Above n 1, Appendix E, p 1.

PMT had reported to the ATO people they deemed to be suspicious.

Factor 2 – minimal risk of fraud and evasion as Mr Reid, director, had a distinguished career in law enforcement from 1989-2015 and no integrity issues – 16 years in Thames Valley Police Service including CID and protection team for the UK PM, 2 years in the SA police service and 7 years in Qld police service in general policing and forensics. A Thames Valley supervisor report dated 14/1/2009 was attached. Also, they reported any suspicious approaches to the ATO. PMT appointed a tax agent to help with ongoing obligations. The ATO was satisfied in an audit of the previous PMT business and Mrs Reid maintained the same systems and procedures.

Factor 3 – Mr and Mrs Reid sold all significant personal assets to acquire PMT. The business is in a sensitive financial position as it is in its first 6 months of trading. The retention of \$1m is severely compromising the business 'viability and cash flow as it is unable to pay its debts in full and no longer has sufficient working capital to facilitate large jobs, requiring it to turn work away from longstanding customers. PMT also has a weekly obligation to pay the previous owners \$342,368 over 2 years (\$1646/week). PMT has not paid the GST component to a longstanding customer N&P, which has placed financial pressure on N&P and PMT has been unable to do some of N&P's work as it has insufficient working capital.

Factor 4 – The ATO was satisfied in a previous audit and PMT continues to deal with the same customers and suppliers before the sale. The same key employees were also employed (Ms Crux = Mrs Reid – general manager for about 5 years, Sacha Rayner, admin assistant for about 10 years, Mr Reid, general employee, Gary Stacey, metal refiner worked for about 3 years, Paul Stoker, general assistant was replaced by Dylan Richmond)

Factor 6 – PMT was notified of first retention on 10/8/16, the most recent ATO information request relates to 1/8/16 – 31/10/16 and example 16 provides that an audit not progressing in a timely or satisfactory manner would be a factor in favour of it not being reasonable to continue to retain the refunds for verification.

Factor 10 – Taxpayers Charter – "We presume you tell us the truth and that the information you give us is complete and accurate unless we have reason to think otherwise". The mere possibility of GST fraud in the industry should be outweighed by the merits of each case. Mr and Mrs Reid both suffering from stress related illness due to the financial pressure created by the retention of \$1m. Letters are being obtained from medical practitioners.

69. On 16 December 2016, PMT claimed \$338,565 GST input tax credits in its November 2016 BAS amounting to a net refund of \$322,929. **The ATO retained this refund.**¹³⁴
70. On 16 December 2016, an email was sent to **Deputy Commissioner Mr Michael Cranston** which attached a letter, dated 16 December 2016 and signed by Dr Arbuckle.¹³⁵ The letter stated that:¹³⁶

I have been seeing this couple [Jeremy and Lynn Reid, Directors of PMT] as patients for several years. They are both very stressed, I believe as a direct result of complicated and protracted dealings with the ATO regarding their fledgling business. Jeremy has recently developed hypertension and has an elevated cortisol (stressed related) on his blood tests.

He illustrates a depressed mood.

Lynn shows symptoms of quite severe anxiety and borderline depression.

¹³⁴ Above n 65, paras [19] and [20].

¹³⁵ Above n 77, para [8.a.i].

¹³⁶ Above n 80.

Any help in expediting a solution to the ATO problem would help their respective healths greatly.

71. On 19-20 December 2016, PMT assayed approx. \$400,000 worth of gold for La Gajjar.¹³⁷
72. On 21 December 2016, the ATO sent a letter to 60 of the entities under review at that time to make an offer regarding future GST refunds. If the entities adopted a voluntary reverse charge approach to their business GST claims, there would be less chance of ATO enquiries as there would not be a net refund.¹³⁸ Under these agreements, the buyer would remit on behalf of the seller the GST payable on the sale, which was normally remitted by the other.
73. On 22 December 2016, the ATO notified PMT that it had retained the refund from its November 2016 BAS as the information reported on the BAS required verification.¹³⁹

2017

January 2017

74. In January 2017, PMT visited La Gajjar's premises and only observed a nut business and no gold.¹⁴⁰
- [PMT Note: PMT has said that the premises was located interstate. Prior to this, it had met with the representatives and made inquiries of publicly available information. The ATO has misconstrued Mrs Reid's the comments about seeing only nuts at La Gajjar's premises. The transcript evidences that while she observes that the downstairs of the premises was a warehouse where crates were stored, in La Gajjar's upstairs offices there were packets of nuts. Mr Reid's transcript evidence is that La Gajjar had explained to the taxpayer's representatives that he traded in all sorts commodities, including nuts. It would be highly unusual for high value quality such as gold to be stored on the open floor of the commercial warehouse, so this did not raise any suspicions. Mr Reid specifically said in his interview that there was nothing to suggest that La Gajjar she was doing anything untoward.¹⁴¹]
75. On 13 January 2017, the ATO issued a letter to PMT advising it considered the objections for the August – October periods were invalid because the period to lodge the objections had not commenced.¹⁴²
76. On 17 January 2017, PMT claimed \$42,782 GST input tax credits in its December 2016 BAS amounting to a net refund of \$32,101. The ATO retained this refund.¹⁴³
77. From August 2016 until January 2017, the ATO retained PMT's monthly GST refunds, totalling approximately \$1.3 million GST over that period.

¹³⁷ Above n 1, Appendix F, ATO objection decision 22 September 2017, pp 6-7.

¹³⁸ Above n 2.

¹³⁹ Above n 1, Appendix F, ATO objection decision 22 September 2017, p 1.

¹⁴⁰ Above n 65, para [245].

¹⁴¹ Above n 1.

¹⁴² *ibid.*, Appendix F, ATO objection decision dated 22 September 2017, p 1.

¹⁴³ Above n 65, paras [19] and [20].

78. On 18 January 2017, the ATO notified PMT of its objection rights regarding the refund retained from its August 2016 BAS.¹⁴⁴
79. On 19 January 2017, PMT lodged the objection to the retention of the GST refund for the August 2016 period.¹⁴⁵
80. On 25 January 2017, the ATO received PMT's 19 January 2017 objection.¹⁴⁶
81. On 30 January 2017, the ATO notified PMT that it had retained the refund from its December 2016 BAS as the information reported on the BAS required verification.¹⁴⁷

February 2017

82. On 13 February 2017, Tim Phillips from Hermes Capital sent an email to Mrs Reid, referring to an earlier meeting they had declined to offer financing because they had nothing to fund against due to PMT being paid before shipment of goods.¹⁴⁸
83. On 15 February 2017, PMT claimed \$159,224 GST input tax credits in its January 2017 amounting to a net refund of \$128,575. The ATO retained this refund.¹⁴⁹
84. On 17 February 2017 at 3:26PM, Teresa Dyson sent an email to Deputy Commissioner Mr Tim Dyce and Assistant Commissioner Ian Read which attached a letter, dated either 15 or 17 February 2017 and signed by Dr Arbuckle.¹⁵⁰ The email asked the ATO to urgently reconsider its decision to retain refunds. It stated that PMT has no real property and therefore it is difficult to secure funding but has secured alternative funding. It raised concerns regarding the ATO's decisions on the directors' health. The attached letter from Dr Arbuckle stated that:¹⁵¹

This couple [Jeremy and Lynn Reid, Directors of PMT] have been patients of mine for some years. I have watched their mental health deteriorate over several months as a direct result I feel of their difficulties with their ATO problems.

Today I have commenced the both on Anti – Depressant medication and have written referrals for Psychiatric help.

Lynn in particular shows evidence of suicidal ideation.

This is a good hardworking couple with generally minimal health concerns. Anything which could be done to relieve their stress levels would be of great benefit to their deteriorating health.

85. On 20 February 2017, Assistant Commissioner Ian Read, replied to Teresa Dyson's 7 February 2017 email stating that he understood the concerns in relation to the directors' health and that the

¹⁴⁴ Above n 65, para 20.

¹⁴⁵ Above n 1, Appendix F, ATO objection decision dated 22 September 2017, p 1.

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ PMT, Email from Time Phillips of Hermes Capital to Mrs Lyn Reid, 13 February 2017.

¹⁴⁹ Above n 65, paras [19] and [20].

¹⁵⁰ Above n 73, Annexure A, Email from AC Ian Read to Teresa Dyson, 'Re: doctors letter [MCR-W.FID3316031]', 20 February 2017; Above n 77, para [8.a.i].

¹⁵¹ Above n 81; Above n 1, Annexure D.

compliance team were working to understand the supply chain. He noted a near doubling of capital purchased from December 2016 and a tripling of purchases and a 4-fold cost in salary and wages. He noted that PMT continues to pay for scrap where others in the industry have changed their model to a 'toll refining' or 'refine on behalf of' basis.¹⁵²

March 2017

86. By 1 March 2017, the ATO's precious metals program assessed the change in claims by the refiners of interest which were made as a result of retention of refiners' refunds and/or the release of a 12 October 2016 SFCT Intelligence Bulletin.
87. In March 2017, the sixth ATO auditor advised that he is going on leave and to send all documentation through to Christine Jeffrey (the seventh ATO auditor). The sixth ATO auditor never communicated with the taxpayers again.¹⁵³
88. On 1 March 2017, Second Commissioner, Neil Olesen, stated at Senate Estimates that the ATO was "continuing to hold [refunds] that would otherwise have been due". He also stated that the introduction of a voluntary reverser charge and a new tax determination on second-hand goods appeared to have had the effect of reverting refund levels in the gold industry back to what was seen in earlier periods.¹⁵⁴
89. On 1 March 2017, PMT met with Assistant Commissioner Ian Read, who understood was the head of the audit team, together with two other staff members and an ATO lawyer to discuss the taxpayer's matter.
90. On 1 March 2017, the ATO notified PMT of the retained refund from its January 2017 BAS.¹⁵⁵
91. On 12 March 2017, Mrs Reid sent an email to the sixth ATO auditor.¹⁵⁶
92. On 23 March 2017, the ATO notified PMT of its objection rights regarding the refund retained from its September 2016 BAS.¹⁵⁷
93. On 28 March 2017, PMT lodged the objection to the retention of the GST refund for the September 2016 period.¹⁵⁸

April 2017

94. With effect from 1 April 2017, the GST law was changed to impose a mandatory reverse charge for business to business transactions between purchasers and suppliers of precious metals. The reverse charge requires purchasers to pay the GST directly to the ATO, avoiding the risk that the

¹⁵² Above n 73, Annexure A, Email from AC Ian Read to Teresa Dyson, 'Re: doctors letter [MCR-W.FID3316031]', 20 February 2017.

¹⁵³ Above n 1.

¹⁵⁴ Commonwealth, Senate Economics Legislation Committee, *Proof Committee Hansard – Estimates*, 1 March 2017, p 104 (Second Commissioner of Taxation Neil Olesen).

¹⁵⁵ Above n 1.

¹⁵⁶ Above n 65, para [64].

¹⁵⁷ Above n 65, para [20].

¹⁵⁸ Above n 1, Appendix F, ATO objection decision, 22 September 2017, p 1.

supplier does not remit the GST amount to the ATO. The law change also ensured that GST credits could not be claimed in respect of second hand goods which contained precious metals.¹⁵⁹

95. On 19 April 2017, the ATO notified PMT of its objection rights regarding the refund retained from its December 2016 BAS.¹⁶⁰
96. On 20 April 2017, PMT lodged the objection to the retention of the GST refund for the December 2016 period.¹⁶¹
97. On 26 April 2017, the ATO notified PMT of its objection rights regarding the refund retained from its October 2016 BAS.¹⁶²
98. On 28 April 2017, PMT lodged the objection to the retention of the GST refund for the October 2016 period.¹⁶³

May 2017

99. On 9 May 2017, the ATO notified PMT of its objection rights regarding the refund retained from its November 2016 BAS.¹⁶⁴
100. On 12 May 2017, PMT lodged the objection to the retention of the GST refund for the December 2016 period.¹⁶⁵
101. On 15 May 2017, PMT met with Deputy Inspector-General of Taxation, Andrew McLoughlin.¹⁶⁶
102. On 26 May 2017, the ATO notified PMT of its objection rights regarding the refund retained from its January 2017 BAS.¹⁶⁷
103. On 30 May 2017, Mr and Mrs Reid as well as PMT's gold refiner, Mr Stacey, were formally interviewed by the ATO¹⁶⁸ at the ATO's Upper Mount Gravatt office.¹⁶⁹

June 2017

104. On 13 June 2017, PMT submitted a request to be a part of the deferred GST scheme.¹⁷⁰

¹⁵⁹*Treasury Laws Amendment (GST Integrity) Act 2017; A New Tax System (Goods and Services) Act 1999, Div 86.*

¹⁶⁰ Above n 65, para [20].

¹⁶¹ Above n 1, Appendix F, ATO objection decision, 22 September 2017, p 1.

¹⁶² Above n 65, para [20].

¹⁶³ Above n 1 Appendix F, ATO objection decision, 22 September 2017, p 1.

¹⁶⁴ Above n 65, para [20].

¹⁶⁵ Above n 1, Appendix F, ATO objection decision, 22 September 2017, p 1.

¹⁶⁶ Above n 1.

¹⁶⁷ Above n 65, para [20].

¹⁶⁸ *ibid.*, paras [46] and [47].

¹⁶⁹ Above n 1.

¹⁷⁰ Above n 57.

105. On 15 June 2017, the ATO issued a letter approving PMT for the deferred GST scheme.¹⁷¹ The letter stated:

Your approval to defer GST will continue until you cancel it or it is revoked. We may revoke your approval if you:

- *Don't meet your tax obligations by lodging and paying by the due date, or*
- *No longer meet the requirements to defer GST, including lodging your activity statements online.*

September 2017

106. On 22 September 2017, an ATO RDR officer, Charles Morris, issued his objection decision that disallowed PMT's 12/5/17, 28/4/17, 20/4/17, 28/3/17, 25/1/17, 8/12/16 objections to withhold refunds pursuant to section 8AAZLGA of the *Taxation Administration Act 1953*. The basis for his decision was that:¹⁷²

... due to the early stage of trading, the quantum and nature of the claims gave rise to material concerns as to the accuracy of the information (para 51)

...nature of the information reported in each of the [BASs] for the relevant periods, in light of the fact that the business had just commenced and the known issues in the industry, gives rise to an increased likelihood that the notified information was affected by fraud or evasion, intentional disregard or recklessness. (para 77)

... Information from a number of gold suppliers within PMT's supply chain indicates that, for the relevant periods, the supply and acquisition of gold may not be genuine and the information that has been notified to the Commissioner is likely to be affected by fraud or invasion, intentional disregard or recklessness. (para 80)

... Based on the acquisition of stock, available financial resources and the lack of corroborating evidence to support the statements made above (i.e. that it has borrowed money to assist in satisfying debts and it had debts that it is unable to pay in full) we do not accept that the retention of the refund amounts materially affects PMT's financial position (para 91)

... Based on the BAS lodged for the July 2016 to January 2017 periods:

A. It appears that PMT is in a positive cash flow position;

... D. According to the BAS for the December 2016 period, the purchases and sales of PMT resulted in a surplus of funds of approximately \$1.4 million. (para 82)

Based on the gold in and gold out summary...

D. If PMT started with no gold stock when it commenced trading on 1 July 2016, by the end of January 2017 it would've held 20,700.76 grams of gold valued at approximately \$1,231,706. (Para 84)

... No financial loan agreements have been provided (para 87)

¹⁷¹ Above n 57.

¹⁷² Above n 1, Appendix F, ATO objection decision, 22 September 2017, p 1.

... No documents have been provided which show PMT has debts it is unable to satisfy (para 88)

It appears the only debt PMT has is the purchase price of the business of \$342,368 which is paid in weekly instalments of \$3292 from the date of purchase (30 June 2016) to the previous owners of the business... Furthermore, working expenses include paying (the previous owners) rent for the use of the warehouse in which the PMT Business operates and wages of \$101,200 each. (Para 89).

At the time the commissioner made his decision to retain the amounts, there was no evidence to show that PMT owned any assets. (Para 93)

PMT has advised that the directors have invested all of their personal assets into the business (para 108)

Upon further investigation, the directors jointly owned:

A. 3103 Forest Hills Drive Hope Island, QLD, 4212 which was purchased for \$570,000 on 6 April 2016; and
56 Candlebark Circuit Upper Coomera QLD, 4209 which was purchased for \$200,000 on 20 December 2007. (Para 109)

Medical opinions concerning the health of (the directors) have been provided to the Commissioner (para 110)

... Serious ongoing concerns about artificial arrangements operating in the precious metals industry. This includes allegations that:

A. Supply chains melt, adulterate or the face of gold bullion, thereby changing its GST treatment from a GST-free or input taxed supply to a taxable supply; and

B. Supply chains made of gold acquisitions and incorrectly treated the transaction as if it was not "precious-metals" under a New Tax System (Goods and Services Tax) Act 1999, and created documents purporting to record the acquisition to disguise its true form. (Para 112)

[The ATO concluded...] "The likelihood that the notified information was affected by fraud or evasion, intentional disregard recklessness (factor two), the real risk to revenue (factor 4)..."

[The ATO acknowledged that...] "The stated impact of the directors' health (factor 10) (paragraphs 114-115)

2018

107. On 23 January 2018, 3:17PM, an undisclosed officer from ITX Complex Assurance sent an email to another undisclosed officer advising that:¹⁷³

As discussed we will be issuing amended assessments relating to the following refund retention cases:

... 2. PMT Pty Ltd – Case Id 1-9FBYDG6

...

GST amended assessments will be issued next week = \$979,816 plus penalty \$502,856.80 less refunds retained \$1,309,565 = \$173,107.80 Debt

¹⁷³ ATO, Email from ITX Complex Assurance, 'PMP issuing amended assessments', 23 January 2018 at 3:17 PM.

Directors are Lynn and Jeremy Reid

Client still trades as a gold refiner

108. On 24 January 2018, 10:24AM, an undisclosed officer replied to the 23/1/18 3:17PM email, copying in “SDMR Referrals Melbourne”.¹⁷⁴ The response stated:

I have forwarded your referral to the our [sic] referral team for them.

However in order to assist us to get your case assign to the appropriate areas, please provide us the following information to our referral team:

Audit papers i.e. Position paper, RFDs etc

Asset profiling data – property, shares, bank accounts etc

Any Austrac data

Related parties i.e. directorship and shareholding details (if applicable and not already outlined in any audit papers)

Risk identified during audit – collection, compliance/disruption, dissipation of assets, sham arrangements

Project type i.e. Operation Rubix and a history of the project if applicable

Recovery prospects based on asset position – high, medium or low

February 2018

109. On 1 February 2018 the ATO issued its GST audit finalisation letter for tax periods 1 July 2016 to 31 January 2017.¹⁷⁵ The address on the finalisation letter is PMT Pty Ltd C/- A Counting House (QLD) Pty Ltd, PO Box 152, Mermaid Beach QLD 4218. The letter included the following table which provides a summary of the changes made and penalties:

1. Reduced GST credits	2. \$979,816.00
3. Tax shortfall penalty (activity statement)	4. \$502,856.80
5. Less retained refund amounts	6. -\$1,309,565.00

The letter also included ATO officer’s contact details and information on payment arrangement, specifically, it stated:

¹⁷⁴ ATO, Email from an undisclosed ATO officer, ‘Re: PMP issuing amended assessments’, 24 January 2018 at 10:24 AM.

¹⁷⁵ Above n 65.

If you have any questions about this decision, you can phone us on 1300 650 815 between 8.00am and 5.00pm, Monday to Friday. Ask for [the seventh ATO auditor].

... Outstanding tax

Your assessments and penalty notices will show the amounts you need to pay. Any refunds retained are applied to the amounts payable. If you have trouble paying, we may be able to work with you to set up a payment plan. You can find information about payment plans on our website ato.gov.au/payment arrangement.

110. On 1 February 2018 the ATO issued a notice of amended assessments of net amount to PMT Pty Ltd (ABN 37 611 351 412).¹⁷⁶ The address on the notice is PMT Pty Ltd A Counting House (QLD) Pty Ltd PO Box 152 Mermaid Beach QLD 4218. The outcome of the notice was DR\$979,816.00 which was “applied to [PMT’s] tax account”. The notice also included information on how to contact the ATO:

Phone enquiries: 13 28 66

... How to contact us

For account enquiries and objection information phone 13 28 66 (8.00am-6.00pm Monday to Friday)

For information about payment plans, phone us on 13 11 42 (8.00am – 6.00pm Monday to Friday)

If you do not speak English and need help from us, phone the Translating and Interpreting Service on 13 14 50.

If you have a hearing or speech impairment, phone the National Relay Service on 13 36 77.

If you do not have access to TTY or modem equipment, phone the Speech to Speech Relay Service on 1300 555 727.

111. On 1 February 2018 the ATO issued a notice assessments of shortfall penalty to PMT Pty Ltd (ABN 37 611 351 412).¹⁷⁷ The address on the notice is PMT Pty Ltd A Counting House (QLD) Pty Ltd PO Box 152 Mermaid Beach QLD 4218. The total amount due was \$502,855.80 and the due date for payment was 2 March 2018. The notice also included a phone enquiries number in the header of the assessment: 13 28 66. Over the page information on payment and how to contact the ATO was provided:

Payment of tax

You must pay the amount shown in this notice by the due date even if you have lodged an objection. The amount owing may be partially or fully offset by any credit or surplus on your running balance account-refer to your statement.

If your statement shows a debit, you are required to pay that outstanding balance. We offer you a range of convenient payment options, both in Australia and overseas. Go to www.ato.gov.au/howtopay for more information. General interest charge applies to any amounts not pie not paid by the original due date. If

¹⁷⁶ ATO, Notice of amended assessments of net amount, 1 February 2018.

¹⁷⁷ ATO, Notice of assessments of shortfall penalty, 1 February 2018.

you cannot pay on time, phone us on the numbers listed below to discuss your situation. We may be able to make other arrangements for payment....

... How to contact us

For account enquiries - phone 13 28 66 (8.00am-6.00pm Monday to Friday)

If you do not speak English and need help from us, phone the Translating and Interpreting Service on 13 14 50.

If you have a hearing or speech impairment, phone the National Relay Service on 13 36 77.

If you do not have access to TTY or modem equipment, phone the Speech to Speech Relay Service on 1300 555 727.

[IGTO Note: The amounts payable arising from the amendments and penalty notice were offset against the approx. \$1.3m retained refunds. As a result, \$173,107.80 more was due and payable on 2 March 2018.]

112. The ATO's 1 February 2018 audit finalisation letter provided the following ATO views for the tax shortfalls it assessed:

- a \$38,393 shortfall for ITCs that were not paid in relation to sales of gold bullion made to a buyer, Al's Gold, over the 1/7/2016 – 30/9/2016 period that were, in the ATO's view, taxable supplies as the bullion was unable to be verified as being in investment form (as PMT's records do not state the form of the metal, whether a hallmark was affixed, the weights produced were not in kilos or troy ounces, PMT's directors and an employee gave conflicting information about the form and weight of gold sold to Al's Gold, third party information that the first 3 supplies were granules and coins), the price paid is not making commercial sense for the purchaser (6-7% over spot, indicating the price was not struck by the spot price alone), and the purchaser was not operating as a dealer in precious metals as required by s38-385 of the GST Act (they had not lodged a BAS since 2015).¹⁷⁸
- \$99,434 shortfall due to ITCs claimed on purchasers of second hand precious metals from a supplier, JM Cash N Gold, that were not creditable acquisitions as they were not taxable supplies. In the ATO's view, the number and value of purchases which were not able to be corroborated with WA Police records to whom the supplier was required to report according to state law. The ATO also concluded that there were discrepancies between the supplier's records and the WA Police records, the supplier had failed to maintain the records required by state law for 27% of purchases and that the supplier may have been receiving goods that were not genuine or lawful as over a quarter of purchases by the supplier were from repeat suppliers.¹⁷⁹
- \$5,356 shortfall due to ITCs claimed on purchases from Gold Hub for precious metals which had already been refined and therefore input taxed supplies, based on the metal's purity, the purchase by an associate of the supplier of investment grade gold 2 days prior to the supply. PMT's director commenting that the photo of the scrap provided by the supplier looked like they poured a cast and that the director suspected that something was not right about these people and refusing to buy any more from that supplier.¹⁸⁰

¹⁷⁸ Above n 65, paras [156] to [166].

¹⁷⁹ *ibid.*, paras [167] to [176].

¹⁸⁰ *ibid.*, paras [177] to [186].

- \$101,239 shortfall due to ITCs claimed on purchases from La Gajjar that the ATO considered implausible (differences between PMT and La Gajjar’s records over the purity of gold sold by La Gajjar to PMT and the amounts of gold acquired by La Gajjar from Ghana as well as the shortfall in La Gajjar’s stock of gold compared to sales to PMT and others) or alternatively, was previously refined by KJC or ABCRA¹⁸¹
- an additional \$735,394 shortfall due to ITCs claimed on purchases of scrap from La Gajjar which were not GST free (under s 38-385 of the GST Act) as the ATO considered them not to be the first supply of the precious metal after its refining (based on its view that there would only be one ‘first supply’ of metal within the meaning of s38-385 and that all subsequent supplies of that metal fall within s40-100) and that:
- the second supply was identifiably and materially the same metal prior to its adulteration as:
 - over the July and August 2016 period, the scrap that La Gajjar supplied PMT originated from gold bullion that La Gajjar acquired from ABCRA and KJC, with a little added silver (La Gajjar had insufficient scrap to supply PMT (19.266Kg) and others and the only other source of La Gajjar’s acquisition was 2.95Kg of gold from ABCRA and KJC, La Gajjar’s records did not support it acquiring the purity of gold it supplied to PMT, La Gajjar owned some silver and admitted to having a furnace and doing a small amount of refining);
 - Over the 1 September 2016 to 31 January 2017 period, the scrap that La Gajjar supplied PMT originated from scrap that PM Melt, GB Refiners and GB Traders had supplied to La Gajjar (QN Traders and R&N Metals sold 99.99% gold bullion via cash cheques to AX Traders and Manila Exchange, who then sold ‘melted scrap gold bars’ to GB Traders (based on identical gross weight, net weight and purity on the source documents) who sold it to GB Refiners and PM Melt. GB Refiners sold it to PM Melt and La Gajjar; E.g. at para 207.4, on 18/1/17: Baird & Co sold net weight 18Kg of 99.99% to QN Traders, who sold the same it to Manila Exchange, who sold net weight 17.9734Kg of 90% to GB Traders who, on 19/1/17, sold 15.8277Kg of 89.6% to La Gajjar, who 4 days later, sold 15.8112Kg of 89.6% to PMT)
 - The gold acquired from GB Traders from La Gajjar was ‘always intended to be sold by’ PMT due to the 6 minutes interval between booking Qantas flights from GB Traders to La Gajjar and Flights from La Gajjar to PMT.¹⁸²
- Penalties totalling \$502,856.80 were applied as:
 - There was a shortfall on the amounts omitted at label 1A (GST collected), label 1B (GST collected) and label 9 (GST refund) of the BAS. The ATO was of the view that PMT had made false and misleading statement because they understated the amounts of GST collected by PMT, based on the reasoning above.¹⁸³

¹⁸¹ *ibid.*, paras [167] to [197].

¹⁸² *ibid.*, paras [198] to [211].

¹⁸³ *ibid.*, paras [215] to [228].

- 75% for intentional disregard in relation to omitting GST on sales to Al's Gold (applied to \$38,393 shortfall) as the ATO was of the view that PMT knew what the correct tax treatment was and deliberately chose to ignore its tax obligations ("facts and evidence indicate that [PMT] made sales of gold granules and/or scrap gold to Al's Gold but reported them as precious metal supplies on [its] sales invoices", the PMT director's responses at interview evidenced that PMT knew how the GST law applied to supplies of scrap gold, gold granules and gold bullion and by making statements that supplies were GST free on the BAS statements were made knowing them to be false) and based on Mrs Reid's level of involvement in transactions with Al's Gold and her evidence which was said to be inconsistent with the objective facts.¹⁸⁴
- 50% recklessness in relation to claiming ITCs on acquisitions (shortfalls of \$99,434, \$5,356, \$836,633) from:
 - JM Cash N Gold (penalty of \$49,717) – PMT maintained a close relationship which appeared to operate on uncommercial terms (PMT was JM Cash's sole refiner, PMT pre-paid the majority of the amount due for goods, PMT paid 6% more than what Perth Mint would pay for the same supplies, PMT pays GST on those supplies whereas Perth Mint does not and PMT advised JM Cash that the ATO would call them about their supplies, PMT could have informed itself via the internet of JM Cash's holding and reporting obligations as a second hand dealer, PMT knowingly accepted suppliers from JM Cash without implementing any procedures to ensure the goods came from legitimate sources and in circumstances in which a reasonable person would have foreseen a risk of possibly receiving unlawful goods, PMT failed to maintain records of the items acquired from JM Cash that provided more detailed description of the items than "Gold alloy <95%" or "Gold" which was significantly short of the standard expected of a reasonable person in similar circumstances) as well as Mrs Reid's role as director and level of involvement with the transactions with JM Cash¹⁸⁵
 - Gold Hub (penalty of \$2,678) – PMT knew that the gold received from Gold Hub was 100% pure after assaying it and charged a refining fee to give the impression that it was refined in order to claim ITCs, whereas it was 'feedstock' and did not require further refinement. PMT failed to conduct adequate due diligence to verify the source of the gold or that Gold Hub's supply had not been gold bullion previously, despite having suspicions that their gold was not genuine scrap and being aware of GST schemes involving deliberate defacing of gold bullion. PMT's acceptance amounted to indifference¹⁸⁶

¹⁸⁴ *ibid.*, paras [230] to [232].

¹⁸⁵ *ibid.*, paras [233] to [236].

¹⁸⁶ *ibid.*, paras [237] to [239].

- La Gajjar (penalty of \$50,619.50 for July and August 2016 and \$367,697) – the ATO had doubts whether the transactions occurred as reported by PMT (substantial deficits of weight and purity between the scrap acquired for La Gajjar and what they had acquired) and gold that had its origins as precious metal previously (La Gajjar consistently supplied substantial amounts of high purity scrap gold when scrap sourced from the public is less than 90%). The ATO considered that PMT created RCTIs to support acquisitions of 19.2 Kg of scrap gold that PMT either knew did not exist or knew that it was acquiring gold bullion that was defaced. ATO considered PMT instrumental in entering into a contract refining arrangement which shifted the GST benefit to La Gajjar as they would be in a GST refund position. The ATO considered that it would have been reasonable for PMT to realise a significant risk but it did not implement adequate risk assessment procedures or undertake enquiries regarding Mr Gajjar’s source of gold (Mrs Reid having been involved in the gold industry for more than 9 years and aware of the ATO’s concerns with alteration of precious metals and being on-sold as scrap. Within 7 months of meeting Mr Gajjar, he had become PMT’s largest gold supplier with 200kg of scrap gold (approx. \$8.36m ex-GST) and there were no concerns with him. Due diligence was conducted via face to face meeting, reviewing their website and discussing the source of gold and their company id. Mr Stacey as refiner did not have history in metallurgy and learnt gold refining through YouTube. PMT did not visit La Gajjar’s premises until 5 months after dealing him, seeing a nut business and one month before ceasing the relationship. Mr Gajjar was unable to specify to the ATO what gold bullion he supplied PMT and conceded that there was no change in their supply of scrap arrangement despite PMT proposing a contract refining arrangement with La Gajjar to place him into a GST refund position.¹⁸⁷
- The base penalty was increased 20% due to previous base penalties, even though the penalty assessments were issued at the same time. However, the ATO remitted the penalties for recklessness by 20%, as the penalties were assessed on the same day.¹⁸⁸

113. On 2 February 2018 1:34PM, ATO officer replied to the ATO officer 24 January 2018 10:24AM email recipient stating:¹⁸⁹

We finalised the PMT Pty Ltd case (Id 1-9FBYDG6) yesterday and issued amended assessment and penalty notices. Current debt on system is approximately \$173,100.

I also expect that this client will object to our decisions as they objected to our retention of refunds and have appointed McCullough Robertson as their legal representative.

Refer below for further information. ...

¹⁸⁷ *ibid.*, paras [240] to [249].

¹⁸⁸ *ibid.*, paras [250] to [256].

¹⁸⁹ ATO, Email from an officer in ITX Complex Assurance, ‘Amended assessments issued for Precious Metals case’, 2 February 2018 1:34 PM.

[IGTO Note: text in red below was added to the 24/01/18, 10:24AM email, which was attached to the email]

...

Audit papers i.e. Position paper, RFDs etc – attached

Asset profiling data – property, shares, bank accounts etc

- Gold stock unknown

- Asset value list attached however most P&E assets are old and I expect if sold may not cover the debt

- Directors own real property – let me know if you want these details

- 2 Westpac bank accounts – BSB 034230 Accounts 44-1376 & 44-1368

Any Austrac data

Related parties i.e. directorship and shareholding details (if applicable and not already outlined in any audit papers)

Risk identified during audit – collection, compliance/disruption, dissipation of assets, sham arrangements

Under reported GST – sold gold granules (taxable) as bullion (GST free or input taxed)

Over claimed ITCs – for a majority of the ITCs claimed we argued that the purported scrap gold the client acquired was sourced from bullion and that they were not entitled to the GST free exemption under s38-385. Therefore we considered the clients supplies to be input taxed and as a result they were not entitled to ITCs claimed on their acquisitions. A scheme arrangement is currently being considered by our case leadership who have prepared a submission to be heard by GAAR Panel.

Project type i.e. Operation Rubix and a history of the project if applicable – Precious Metals Project

Recovery prospects based on asset position – high, medium or low - low

114. On 5 February 2018, 9:05AM, an undisclosed officer in the Significant Debt Management area forwarded the 2/2/18 1:34PM, 24/1/18 10:24AM and 23/1/18 3:17PM emails to the “SDMR Referrals Melbourne” email box, stating:¹⁹⁰

Hi Triage team,

Another new Gold case.

I note:

...

2. The taxpayer may lodge objections.

¹⁹⁰ ATO, Email from an officer on behalf of SDMR Referrals Melbourne to an undisclosed officer, ‘FW: Amended assessments issued for Precious Metals case’, 9 February 2018 at 2:07 PM.

I think we can issue the garnishee notices first and see what we can get then determine the next step.

115. On 9 February 2018, 2:07PM, **another undisclosed ATO Significant Debt Management Resolution officer** sent an email “on behalf of SDMR Referrals Melbourne” and forwarded the 5/2/18 9:05AM email (together with the history of that email) to an undisclosed recipient stating:¹⁹¹

Could do the referral below be allocated to a case officer please? It is related to Precious Metals Project

[IGTO note: It reproduced the dot points and red text from the 24 January 2018 10:24AM email]

116. On 9 February 2018, 4:09PM, **a third undisclosed Significant Debt Management Resolution officer** forwarded the 9/2/18 2:07PM email (together with the history of that email) to an undisclosed recipients and copying others including the “SDMR Referrals Melbourne” email box, stating:¹⁹²

A new referral for allocation.

This part of Precious Metals project. So once allocated and review/profiling has been done please ensure a discussion occurs with [undisclosed], who is the project lead for these matters.

117. On 12 February 2018, 4:39PM, **a fourth undisclosed officer from Significant Debt Management**¹⁹³ forwarded the 9/2/18 4:09PM email (together with the history of that email) to an undisclosed recipient and copying others including the “SDMR Referrals Melbourne” email box, stating:¹⁹⁴

[redacted] advised that you have capacity for a new case so I have allocated the below to you.

Can you please review the below email and liaise with [redacted] to discuss the case strategy.

118. On 28 February 2018, PMT’s representative, West Garbutt, left a voicemail message with ATO officer], Service Delivery - Debt Case Leadership.¹⁹⁵

119. On 28 February 2018, 12:23PM, **a fifth undisclosed ATO debt officer** in Significant Debt Management sent an email to the “Debt Case Leadership” email box attaching a submission to issue garnishee notice before due date.¹⁹⁶ The email stated:

Please find attached submission seeking approval to issue garnishee notice before due date.

The attached submission stated:

PMT Pty Ltd

¹⁹¹ ATO, Email from an officer in Significant Debt Management Resolution to three undisclosed officers, ‘FW: Amended assessments issued for Precious Metals case’, 9 February 2018 at 4:09PM.

¹⁹² *ibid.*

¹⁹³ ATO, Email from an officer in Significant Debt Management to undisclosed ATO officer, ‘FW: Attention: Kevin Situ – Urgent – PMT Pty Ltd – request for payment arrangement’, 13 March 2018 at 2:54PM.

¹⁹⁴ ATO, Email from an officer in Significant Debt Management to an undisclosed officer, ‘RE: Amended assessments issued for Precious Metals case’, 12 February 2018 at 4:39PM.

¹⁹⁵ Above n 77, para [8.a.vi]; PMT, PMT’s objection, 1 February 2018, para [184(h)].

¹⁹⁶ ATO, Email from an officer in Significant Debt Management to Debt Case Leadership, ‘Re: Submission to issue garnishee notice before due date’, 28 February 2018.

... CAC \$173,107.82 (Due for payment 02/03/18)

I am seeking approval to issue garnishee notice prior to the due and payable date of the liability. [It then recounted facts regarding the establishment of the entity, its change of name and application for ABN and its acquisition of the pre-existing business as well as total GST refund claims over July 2017 - Jan 2018]

As a result of audit it was found that PMT Pty Ltd:

did not make taxable supply to Al's Gold between 01/07/2016 to 30/09/2016;

not correctly reported their creditable acquisition of scrap gold from JM Cash N Gold for the tax period from 1/07/2016 to 31/12/2016;

is not entitled to input tax credits on the acquisition of scrap gold bars from Gold Hub;

is not entitled to input tax credits on the acquisition of scrap gold bars from La Gajjar for period from 01/07/2016 to 31/08/2016; and

supply of precious metal which was refined by PMT from scrap gold acquired from La Gajjar are not considered to be GST-free supply of precious metal from period 01/07/2016 to 31/10/2017.

There is the real risk as taxpayer is linked with individual or entities that are involved in the supply chain of gold bullion wherein large ITC's were claimed. Most of these claims are withheld by ATO and continuously being investigated. The identified individual or entities found to be linked with organised crime conducting gold bullion trading.

It is our belief that the behaviour and activities support the issuing of garnishees prior to the due and payable date. This recommendation is in accordance with PLSA 2011/6 Risk Management in the enforcement of lodgement obligations and debt collection activities and PSLA 2011/18 Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts.

[IGTO Note: The ATO later advised the IGTO that "The information we provide about the decision to garnishee demonstrates the available factual matrix of the client at the time, including:

- activity under the precious metals task force
- a pattern of company structuring and (at least partially) non-compliance lodgement that followed the pattern of other participants in the precious metals scheme
- broad compliance deficiencies coupled to links with identified participants of related schemes

This supports the contention that the garnishee was reasonable in the circumstances, and is consistent with our policy and stated practice."^{197]}

120. On Wednesday 28 February 2018, 2:20PM, an undisclosed ATO Debt Case Leadership officer forwarded the 28 February 2018, 12:23PM email to another undisclosed ATO officer.¹⁹⁸

¹⁹⁷ ATO, Attachment in email from ATO Significant Debt Management to ATO External Scrutineers, 'FW:IGT/19/002558 PMT Pty Ltd – IGTO request for information regarding debt collection – final response to be sent 4 December 2019', 4 December 2019.

¹⁹⁸ ATO, Email from Case Leader Service Delivery – Debt Case Leadership, 'FW: RE: Submission to issue garnishee notice before due date', 28 February 2018 at 2:20 PM.

March 2018 – garnishee notices issued (6/3/18)

121. Friday, 2 March 2018 was the due date for payment.¹⁹⁹
122. On 2 March 2018, your representative, West Garbutt, left a voicemail message with an ATO officer in Service Delivery - Debt Case Leadership.²⁰⁰
123. On Tuesday, 6 March 2018, the ATO issued a garnishee notice to Westpac Bank Corporation under section 260-5 of Schedule 1 of the TAA 1953 for any amounts held by them for PMT Pty Ltd ACN 611 351 412 of 15 Precision Drive, Molendinar, Qld 4214) up to an amount of \$173,273.30.²⁰¹
124. On 6 March 2018, the ATO sent a letter to PMT at 15 Precision Drive, Molendinar QLD 4214, advising it that a garnishee notice had been issued to Westpac and attached a copy of the 6/3/18 letter sent to Westpac.²⁰²
125. On or around 6 March 2018, a note was placed on the case file on the ATO's Siebel system. This Siebel activity states that:

This note is added under the direction of my senior technical adviser.

Amended assessment and penalty notice issued to PMT Pty Ltd. Now current account balance is \$173,273.30.

Risk identified – Taxpayer under reported GST and over claimed ITCs. They were found not to be entitled to the GST free exemption under s38-385. Therefore we considered the clients supplies to be input taxed and as a result they were not entitled to ITCs claimed on their acquisitions.

Garnishee issued to and by fax:

Westpac Banking Corporation

Compulsory Notices & Insolvencies – IGN 6

1 King Street

Concord West NSW 2138

Copy to taxpayer and tax agent:

PMT PTY LTD

15 PRECISION RIVE

MOLENDINAR QLD 4214

¹⁹⁹ ATO, Notice of assessments of shortfall penalty, 1 February 2018.

²⁰⁰ Above n 77, para [8.a.vi].

²⁰¹ ATO, ATO's garnishee notice to Westpac Banking Corporation, 6 March 2018.

²⁰² ATO, Letter to A Counting House (QLD) Pty Ltd, 6 March 2018.

A COUNTING HOUSE (QLD) PTY LTD

'MERMAID SHOPPING CENTRE'

SUITE 1 LEVEL 1 2563 GOLD COAST HIGHWAY

MERMAID BEACH QLD 4218

126. On 6 March 2018, the ATO sent a letter to A Counting House (QLD) Pty Ltd that it has issued a garnishee notice to Westpac Banking Corporation (Westpac) in relation to their client, PMT Pty Ltd and enclosed a copy of the garnishee notice.²⁰³
127. On Wednesday, 7 March 2018, the ATO issued a garnishee notice to Australia and New Zealand Banking Group Limited (ANZ) in similar terms to the notice issued on 6 March 2018 to Westpac. This letter was sent by an undisclosed ATO Significant Debt management officer.²⁰⁴
128. On 7 March 2018, the ATO sent a letter to PMT at 15 Precision Drive, Molendinar QLD 4214, advising it that a garnishee notice had been issued to ANZ and attached a copy of the 7/3/18 letter sent to ANZ.²⁰⁵
129. On 7 March 2018, the ATO sent a letter to A Counting House (QLD) Pty Ltd to advise them that the ATO has issued a garnishee notice to ANZ in relation to their client, PMT Pty Ltd and enclosed a copy of the garnishee notice.²⁰⁶
130. On 7 March 2018, the ATO issued a garnishee notice to Commonwealth Bank of Australia similar terms to the notice issued to ANZ on 7 March 2018.²⁰⁷
131. On 7 March 2018, the ATO sent a letter to PMT at 15 Precision Drive, Molendinar QLD 4214, advising it that a garnishee notice had been issued to Commonwealth Bank and attached a copy of the 7/3/18 letter sent to the Commonwealth Bank.²⁰⁸
132. On 7 March 2018, the ATO sent a letter to A Counting House (QLD) Pty Ltd to advise them that the ATO has issued a garnishee notice to Commonwealth Bank of Australia in relation to their client, PMT Pty Ltd and enclosed a copy of the garnishee notice.²⁰⁹
133. On Friday, 9 March 2018, in the morning, PMT directors “became aware their bank accounts had been frozen”.²¹⁰

²⁰³ ATO, Letter to A Counting House (QLD) Pty Ltd, 6 March 2018.

²⁰⁴ ATO, ATO’s garnishee notice to Australia and New Zealand Banking Group Limited, 7 March 2018.

²⁰⁵ ATO, ATO’s garnishee notice to Westpac Banking Corporation, 6 March 2018.

²⁰⁶ ATO, ATO’s letter to A Counting House (QLD) Pty Ltd, 7 March 2018.

²⁰⁷ ATO, ATO’s garnishee notice to Commonwealth Bank of Australia, 7 March 2018.

²⁰⁸ ATO, ATO’s letter to A Counting House (QLD) Pty Ltd, 7 March 2018.

²⁰⁹ ATO, ATO’s letter to A Counting House (QLD) Pty Ltd, 7 March 2018.

²¹⁰ PMT, Email from West Garbutt to the IGTO dated 13 November 2019.

134. On Friday, 9 March 2018 at 11:40 AM, Mr Garbutt sent an email to an officer in the Debt Case Leadership area²¹¹ in relation to the garnishee action.²¹² The email stated:

I have left a voicemail message for you. ... hope you can help us to resolve an ATO debt management matter.

... They [PMT Pty Ltd ABN 37 611 351 412] had an amount of \$173,107.80 due on 2 March. We had been instructed to negotiate a payment arrangement on their behalf of \$6,000/month. I had left several voice messages for David Murray (Service Delivery – Debt case leadership) in the lead up to the due date, and again early this week, to see which team should be allocated the matter.

Apparently the ATO issued garnishee notices on 6 March.

We would like to urgently speak with the relevant ATO officer who authorised/issued the garnishee so that we can hopefully negotiate a payment arrangement.

135. On 9 March 2018, 1:43PM, an undisclosed ATO officer forwarded Mr Garbutt's 9/3/18 11:40AM email to an undisclosed ATO Significant Debt Management officer, stating: ²¹³

This is the email to which I referred earlier.

136. On 9 March 2018, 2:46PM, an ATO officer, forwarded the 9/3/18, 1:43PM email (together with Mr Garbutt's 9/3/18 11:40AM email in the history) to an undisclosed ATO Debt Case Leadership officer stating: ²¹⁴

Are you aware of this one?

137. On 9 March 2018, 3:20PM, an undisclosed ATO Debt Case Leadership officer, replied to the ATO officer's 9/3/18 2:46PM email, sending the email to 3 email recipients and copying in one recipient, stating:²¹⁵

No, I am not aware of it and [ATO officer] isn't in today to ask.

...

There are two activities concerning recently issued garnishees, one prepared by [ATO officer] and one by [ATO officer]. Can I leave it with you to arrange a response to the email from Lyndon Garbutt below?

138. On 9 March 2018 after 11:40AM, Mr Garbutt spoke with ATO officer, Mr Kevin Situ, by phone.²¹⁶

²¹¹ PMT, Email from West Garbutt to the ATO dated 9 March 2018 at 11:40 AM.

²¹² Ibid.

²¹³ ATO, Email from an officer in Significant Debt Management to an undisclosed officer, 'FW: ATO debt management matter – garnishees issued by ATO', 9 March 2018 at 1:43PM.

²¹⁴ ATO, Email from an officer in Significant Debt Management to an undisclosed officer, 'FW: ATO debt management matter - garnishees issued by ATO', 9 March 2018 at 2:46 PM.

²¹⁵ ATO, Email from an officer in Debt Case Leadership to three undisclosed officers, 'RE: ATO debt management matter – garnishees issued by ATO', 9 March 2018 at 3:20 PM.

²¹⁶ Above n 283; Above n 77, para [1].

139. On 9 March 2018, 3:29PM, ATO officer forwarded the 12/2/18 4:39PM email (together with the history of that email) to an undisclosed recipient with no text.²¹⁷

140. On 9 March 2018, 3:34PM ATO officer forwarded the 9/3/18 3:20PM email (together with its history) to 2 undisclosed recipients, copying in 4 undisclosed recipients, stating:²¹⁸

Can you please assist with the query below and liaise with [undisclosed].

The matter is part of the Precious Metals Project and I've attached the original referral for your information.

141. On Friday, 9 March 2018, Kevin Situ and PMT's representative had a telephone conversation.²¹⁹

142. A document dated 11 March 2018, titled "Compilation Report to PMT Pty Ltd ("THE CLIENT") was prepared by PMT's accountant, A Counting House (QLD) Pty. Ltd.²²⁰

143. Monday, 12 March 2018 was a public holiday in Victoria, Tasmania, South Australia and the ACT.

144. On 12 March 2018, ATO officer from Service Delivery – Debt Case Leadership, confirmed (via email²²¹) with the taxpayer's legal representative that he had been on extended leave. It appeared to PMT's representative that no officer had checked his voicemail.²²²

145. A letter, dated 13 March 2018 and signed by Dr Jane Wehipeihana, stated:²²³

The above patient, Mr Jeremy Reid has been suffering from severe stress secondary to ongoing issues with the Australian Tax Office. This has led to Hypertension and increasing requirement for higher dosing of his medication. Ongoing high sustained stress levels will eventually cause other medical issues. I am monitoring Mr Reid closely.

146. A letter, dated 13 March 2018 and signed by Dr Arbuckle, stated:²²⁴

This couple have been patients of mine for some years. For 20 months they have been under enormous pressure from the dealings with the Australian Tax Office. They are both depressed, anxious and both suffering from suicidal ideation. I am extremely concerned and would ask for any possible consideration and help in a very fragile and now worsening situation.

147. On Tuesday, 13 March 2018 at 11:15 AM (Brisbane time), Mr Garbutt sent an email to Mr Situ (at the SRProjects@ato.gov.au email box) and referred to a discussion they held on the previous Friday afternoon and provided the following information asking for urgent consideration:

- Proposed payment plan and request for the garnishee notices to be withdrawn urgently;

²¹⁷ ATO, Email from an officer in Significant Debt Management Resolution to two undisclosed officers, 'RE: ATO debt management matter – garnishees issued by ATO', 9 March 2018 at 3:34PM.

²¹⁸ Above n 284.

²¹⁹ PMT, Email from West Garbutt to the ATO, 13 March 2018.

²²⁰ PMT, Compilation Report to PMT Pty Ltd prepared by A Counting House (QLD) Pty. Ltd., 11 March 2018

²²¹ PMT, PMT objection, 1 February 2018, paragraph 184(h).

²²² Above n 77, para [8(vi)].

²²³ Letter from Dr Winhipeihana, 13 March 2018.

²²⁴ Letter from Dr Arbuckle, 13 March 2018.

- Copies of medical reports dated 16 December 2016 and 15 February 2017 which were previously provided to the ATO; and
- Copy of a medical report dated 13 March 2018.²²⁵

148. By letter dated 13 March 2018 and addressed to Mr Situ, Mr Garbutt stated:²²⁶

... I confirm that our firm acts for PMT Pty Ltd... We have been instructed to negotiate a suitable payment arrangement regarding assessments of primary tax and penalty assessments...

The importance of negotiations has been heightened given the ATO proceeded to issue garnishee notices only two business days after the payment due dates, effectively bringing the Taxpayer's business almost to a complete halt.

Garnishee notices were issued without any attempts to contact the Taxpayer or its authorised representatives and accordingly urgent consideration is now required to determine if an appropriate arrangement can be entered into with the Taxpayer.

Outstanding lodgements

1. We are advised that there are nil outstanding returns and activity statements.

Proposed payment arrangement

1 At the time of assessments issuing, the true debt of the Taxpayer owing to the ATO was \$173,108 after the application of GST refund amounts withheld of some \$1,309,565. The assessments include penalties of \$502,856.80 (based on a base rate of 50% for recklessness)..

2 The Taxpayer is in the process of preparing objections to primary tax and penalties. We note that if the base penalty rate is reduced to 25% for lack of reasonable care, then the current \$173,273 amount owing would be reversed and the ATO would in fact owe a refund to the Taxpayer.

[A payment arrangement of \$6000 a month over three years together with a upfront "good-faith payment" of 20% of the amount was offered. In support, a forecast of the cash inflows and outflows for each month was prepared by the registered tax agent to show "the importance of the ATO withdrawing the garnishee notices so that the Taxpayer has sufficient working capital to manage the business."]

... 4 It is our view that such an arrangement is reasonable in the circumstances, given the ATO has already collected 88.32% of the primary tax and penalties assessed by offsetting retained GST refunds amounts for the periods to which the assessments relate. In other words the amounts for which the garnishee has issued reflects less than 12% of the amounts assessed.

[8.a.]i. The ATO is already aware that the ATO audit has placed significant stress on the directors of the Taxpayer, to the point that medical practitioners have confirmed the level of stress is potentially life threatening to both directors. [It referred to Medical practitioner reports that were previously provided to 2 Deputy Commissioners on 16/12/16 and 17/2/17 and stated] the fact that the ATO has disregarded these medical practitioner reports and proceeded with issuing garnishee notices (effectively freezing the taxpayer's sole assets) has only intensified this stress, as per the medical practitioner reports [in Annexure C – what are these?].

²²⁵ Above n 292.

²²⁶ Above n 77.

ii. *Circumstances in which debt arose – the Taxpayer commenced operating the business on 1 July 2016, not aware that the ATO was about to audit every participant in the gold refining industry. One of the directors, [Mrs Reid], had previously been employed by the taxpayer entity that had been conducted up until 30 June 2016. [Mrs Reid] was aware that the vendor entity had been audited by the ATO relatively recently and everything had been found to be in order. [Mrs Reid] ensured that the GST reporting systems and practices remain the same. When the Taxpayer was first audited by the ATO, [Mr and Mrs Reid] indicated to the ATO that if there were issues, what practices and procedures would be required to guard against any perceived risks. The ATO refused to provide this guidance, and is now asserting that the Taxpayers actions were reckless – leading to \$173,000 shortfall.*

iii. *Quantum of debt -whilst the quantum of total tax and penalty liabilities owing is significant, a large portion of this asserted liability has been offset by GST refund amounts retained for periods as early as July 2016, which total \$1,309,565...*

iv. *Established business – the gold refining business operated by the Taxpayer is an established business within the gold referring industry. Through its industry contacts, it has the ability to generate significant work, generate employment opportunities on the Gold Coast and contribute to the Federal revenue on an ongoing basis.*

v. *Business requires sufficient working capital to remain in business-for the Taxpayer’s business to continue to operate it requires sufficient working capital to pay wages and more importantly pay for gold etc acquired from customers. With the retained GST refund amounts of \$1.3 million the bank account balances reflected the bare minimum in working capital required for the business to continue to operate.*

vi. *Steps taken to negotiate a payment arrangement – the Taxpayer had been in discussions with its registered tax agent regarding payment arrangements and had instructed our firm to negotiate this arrangement prior to the due date for payment (2 March 2018). Given no debt given no known debt management officer had been allocated, West Garbutt had sought to raise the matter with Mr David Murray, ATO service delivery-debt case leadership, by way of several voice messages left prior to the due date. Voice messages were left regarding the need to negotiate a payment arrangement for a new matter on 28 February 2018 and 2 March 2018. Mr Murray has only confirmed on Monday, 12 March 2018 that he had been on extended leave and it seems no alternative office officer was checking Mr Murray’s voicemail.*

... “It is noted:

i. *As previously referred to, the Taxpayer’s current tax position has been significantly impacted by an extensive GST audit, which commenced just under two years ago. Despite an audit running almost two years, they have been no findings of anti-avoidance and the ATO has only taken issue with five issues (i.e. transactions with only four customers/suppliers).*

ii. *The debts have arisen during a period when the directors of the business were facing significant personal and financial stress. Whilst the directors of the Taxpayer are aware of the objection and appeal process to narrow any issues in dispute, its ability to do so will be completely negated if the garnishee notices stay in force.*

[The letter referred to paragraph 15 and paragraph 6 of PSLA 2011/14 which required each case to be continued considered on its particular merits and case officers to exercise their own judgement in arriving in an appropriate decision made in good faith and without bias.]

We have concerns that given the ATO proceeded to issue a garnishee notices within two business days of the due date that the particular merits of this case have not been fully considered, given no attempts were made to contact either the Taxpayer or its authorised representatives to understand the relevant facts and circumstances, so that the relevant officers could exercise their own judgement in arriving at an appropriate decision, in good faith without bias and certainly not in a manner that will more than likely fetters the Taxpayers objection and appeal rights so that the law can be applied appropriately.

149. On Tuesday, 13 March 2018, 2:54PM, an undisclosed ATO officer sent an email from the "SRProjects" email box to an undisclosed ATO officer with the subject line "FW: Attention: Kevin Situ – URGENT – PMT Pty Ltd – request for payment arrangement [DLM=Sensitive]".²²⁷

150. On 13 March 2018 at 3:51 PM, ATO Debt Collection Officer, Mr Kevin Situ sent an email from the "SRProjects" email box, forwarding the 13/3/18 2:54PM email, to Mr Garbutt and stated:

I refer to your email and our phone conversation today regarding your client's payment arrangement proposal.

I confirm that:

1. *A Garnishee Variation Notice issued to Westpac requesting them to forward to the Commissioner an amount of \$34,654.60 as agreed.*

2. *Garnishee Withdrawal Notices issued to ANZ and CBA, in relation to the garnishee notices dated 7 March 2018.*

3. *Your client's payment proposal was granted with the instalment of \$6,000.00 a month commencing from 30 April 2018. Correspondence will issue to your client outlining the details and conditions of the arrangement.*²²⁸

151. On 13 March 2018, 10:57PM, Mr Garbutt forwarded Mr Situ's 13/3/18 3:51PM email to you and your wife.²²⁹

152. On 13 March 2018 at 5:33PM, the following note was placed by ATO officer, in ATO case management system, Siebel:

The legal representative rang us on 9 March 2018 to request the payment arrangement.

I have requested the legal representative to provide us the payment proposal in writing with the support documents.

The payment proposal with support documents were provided on 13 March 2018 together with the directors' medical report.

I have granted the payment plan with the following details:

1. *Upfront payment of \$34k (20%) of debt via garnishee notice.*

2. *\$6000 a month commencing on 30 April 2018.*

*Payment arrangement confirmation letter will be issued when the \$34k received.*²³⁰

153. On 14 March 2018 at 9:47 AM, the ATO sent an automated email to PMT²³¹. The email provided the ATO's 13 28 66 phone number and website address and stated that:

²²⁷ ATO, Internal ATO email, 13 March 2018 at 2:54PM

²²⁸ ATO, Email to Lyndon Garbutt, 13 March 2018.

²²⁹ *ibid.*

²³⁰ Above n 57.

²³¹ ATO, Email to PMT, 14 March 2018.

We know you're busy and we only email you when we have to. Our records show you have missed a payment. When we approved you for the deferred GST scheme, you made a commitment to keep up to date with all your tax obligations and lodge online.

If you don't meet your tax obligations within the next 14 days, we will remove you from the scheme.

154. On 14 March 2018, Mrs Reid telephoned the ATO and then authorised the ATO officer to speak with Sacha Rayner regarding its letter about the deferred GST scheme.²³² The following note was placed by the ATO officer in Siebel on 14 March 2018 at 11:45AM:

Call received from Sacha Rayner who is not authorised for CAC account. Director, Lynn Reid gave permission for discussing GST matter. Entity has received DGST review email and has 14 days to pay o/s CAC debt. Sacha said that the coy has dispute about amount in debt and that they will accept that the DGST role will be revoked.

155. On 23 March 2018, the ATO received a payment of \$34,654.60 from Westpac.²³³

156. On 28 March 2018, 2:37PM, Alex Whitney on behalf of Mr Garbutt emailed Mr Situ a copy of the ATO's emailed dated 14 March 2018 regarding the GST deferral scheme.²³⁴

157. On 28 March 2018, the Commissioner of Taxation (Chris Jordan) made the following statement in the House of Representatives Standing Committee on Tax and Revenue in a hearing into its inquiry of the ATO is 2017 annual report:

... We only use stronger action like garnishees and bankruptcy proceedings when taxpayers refuse to engage with us and don't deal with their tax debt over a period of time. In all cases except a small few where there is a very high risk, we issue a warning letter to taxpayers before undertaking further actions such as the issue of garnishees.²³⁵

158. On 29 March 2018, Mr Situ referred the 28 March 2018 from Alex Whitney on behalf of Mr Garbutt to ATO's internal 'DGST' email box and provided the following information in the referral:

The taxpayer has tax liabilities in its CAC account and has entered into payment arrangement on 13 March 2018. Please refer to the Siebel activity 1-DYQCXUM and note that I did not input the payment arrangement in RMS as we are still waiting for the garnishee payment from bank. The taxpayer received the below email recently, which advised that it may lose the benefit of Deferred GST Scheme as it has the CAC debts. Can you please review the account and clarify whether the taxpayer can still be eligible for the Deferred GST Scheme?

Please advise your decision to the taxpayer directly.

159. On 29 March 2018, Westpac sent a letter to the ATO in response to the garnishee notice with payment of \$34,654.60 attached.²³⁶

²³² Above n 57.

²³³ *ibid.*

²³⁴ PMT, Email from West Garbutt to the ATO, 28 March 2018.

²³⁵ Commonwealth, Standing Committee on Tax and Revenue's Inquiry into *Australian Taxation Office annual report 2016-17*, House of Representative, 28 March 2018, p 13 (Commissioner of Taxation Chris Jordan).

²³⁶ Above n 57.

April 2018

160. On 3 April 2018, PMT objected to the ATO's GST assessments.²³⁷
161. On 3 April 2018 at 11:52AM, the following note was placed in Siebel²³⁸:
- DGST role revoked due to client no longer meeting eligibility requirements – outstanding CAC debt. Revocation email issued*
162. On 3 April 2018, 12:49PM, the ATO sent an email to PMT that it is no longer a part of the deferred GST scheme.²³⁹ The email stated that:
- From 03 April 2018 you can no longer defer GST on imported goods. This means that Customs will keep your goods until you pay GST.*
- The reason for this is you have an overdue payment.*
- If you think we've made a mistake, you have 60 days to object. [It provided details on how to obtain and lodge the required form]*
- You can reapply for the scheme once you meet the eligibility requirements.*
163. On 3 April 2018, 12:52PM, Mrs Reid, forwarded the ATO's 3/4/18, 12:49PM email to PMT's lawyer.²⁴⁰ PMT's lawyer replied to the 12:52PM email and stated that they would follow up with Mr Situ to confirm if someone at the ATO was looking into it.²⁴¹
164. On 5 April 2018, 10:17AM, Mrs Reid replied to PMT's lawyer 3/4/18 12:52PM email asking:²⁴²
- ...Have we had any news from the ATO regarding the deferred GST? Our customer is harassing us to get things going and we are having to keep stalling, which isn't portraying us in the manner we want to be seen to operate.*
- If just seems ridiculous that the ATO issue you with penalties and then limit your trading whilst still expecting you to pay.*
165. On 5 April 2018, 10:22AM, PMT's lawyer replied to Mrs Reid's 3 April 2018 10:17AM email stating:²⁴³
- I have followed up with the ATO debt management team again. They only have a 1300 number, so I have forwarded your email, asking that Kevin follow it up.*
166. On 5 April 2018 at 1:53PM, an ATO officer placed the following note in Siebel:

²³⁷ Above n 1; PMT, Email from West Garbutt to the ATO, 5 July 2018 at 6:17PM.

²³⁸ Above n 57.

²³⁹ ATO, Email to PMT, 3 April 2018.

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² PMT, Email from Mrs Lynn Reid to West Garbutt, 5 April 2018 at 10:17AM.

²⁴³ PMT, West Garbutt email to PMT directors, 5 April 2018 at 10:22 AM.

Phone call rec'd from Natalie UCYN3 regarding Debt email sent to DGST 29/3/18 & the client being revoked from the DGST scheme. She advised that the Garnishee money has been rec'd but hasn't been put onto the account as yet. I advised her that I would reactivate the DGST role today & send the client a letter advising that it been approved. Welcome email also sent to be sent.

167. On 5 April 2018, between 10:22AM and 2:34PM, ATO officer, Mr Situ, telephoned PMT's lawyer to advise that the deferral scheme has been reapproved and an approval letter has been issued on the same day. PMT's lawyer sent an email to Mrs Reid at 2:34PM to advise her of this.²⁴⁴
168. A letter dated, 16 April 2018, signed by medical practitioner (Doctor Gregor) stated that Mrs Reid had shingles due to "ongoing stress levels related to the ATO investigation/audit". A print out of Medlab Pathology's, 19 April 2018, blood test results detected the relevant shingles virus.²⁴⁵
169. By 16 April 2018, garnishee notices were withdrawn.

June 2018

170. On 11 June 2018, PMT offered a settlement that did not conceded its position.²⁴⁶

August 2018

171. On 31 August 2018, PMT applied for Test Case funding.²⁴⁷
172. On 25 September 2018, the Test Case funding panel met and declined PMT's application.²⁴⁸
173. On 10 October 2018, ATO send a letter to PMT confirming that the test case funding panel had rejected PMT's application for test case funding.²⁴⁹ The reasons included that possible future litigation was too vague and an absence of a crystallised dispute. Also, the language of the statute was unambiguous in the Panel's view and would therefore offer little or no law clarification.²⁵⁰
174. On 19 December 2018, ATO notified PMT, in a letter dated 17/12/18, via its accountant the ATO's intention to issue a re-assessment applying Division 165 of the GST Act.²⁵¹

2019

175. On 25 February 2019, PMT lodged a response to the ATO's 17/12/18 letter regarding the ATO's intention to apply Division 165.²⁵²
176. On 23 October 2019, the Commissioner appeared before the Senate and in his opening statement stated that:

²⁴⁴ PMT, West Garbutt email to PMT's directors, 5 April 2018.

²⁴⁵ Above n 1, Annexure D, 16 April 2018 letter from Dr Gregor.

²⁴⁶ *ibid.*; PMT, PMT's Offer to settle, 11 June 2018.

²⁴⁷ Above n 1; PMT, Test case funding application, 31 August 2018

²⁴⁸ ATO, Test case funding panel decision – PMT Pty Ltd, 10 October 2018.

²⁴⁹ Above n 1; Above n 321.

²⁵⁰ Above n 321.

²⁵¹ Above n 73, para [1.1].

²⁵² Above n 1.

*On average, there have been 19 interactions or attempts to engage a taxpayer before we exercise garnishee powers.*²⁵³

177. On 29 October 2019, the GAAR panel considered the ATO's proposed application of Division 165 to PMT's arrangements.²⁵⁴
178. On 6 November 2019, PMT lodged a complaint with the IGTO.

²⁵³ Commonwealth, Standing Committee on Tax and Revenue's Inquiry into *Australian Taxation Office annual report 2016-17*, House of Representative, 28 March 2018, p 13 (Commissioner of Taxation Chris Jordan).

²⁵⁴ ATO, Email from ATO complaints officer to Lyndon Garbutt, 31 October 2019 at 12:33PM.