



OmbudsmanSA

## Report

### Full investigation - *Ombudsman Act 1972*

Complainant	X
Agency	Public Trustee
Ombudsman reference	2016/06774
Agency reference	1020170 FG01
Date complaint received	22 August 2016
Issues	<ol style="list-style-type: none"><li>1. Whether the Public Trustee failed to appropriately manage the complainant's finances</li><li>2. Whether the Public Trustee failed to explain to the complainant how their tax debt accumulated</li><li>3. Whether the Public Trustee inappropriately failed to provide the complainant with a copy of bills</li><li>4. Whether the Public Trustee inappropriately managed the complainant's child support liability</li><li>5. Whether the Public Trustee acted reasonably in relation to a formal valuation of the complainant's home</li><li>6. Whether the Public Trustee charged excessive income commission fees, and failed to properly explain the reasons for excess fees</li><li>7. Whether the Public Trustee failed to conduct a formal review and appropriately respond to the complainant's complaint</li><li>8. Whether the Public Trustee inappropriately managed the complainant's tax liability by failing to lodge an Application for Release</li></ol>

## Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

## Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the agency
- clarifying the response with Ms Debra Contala, Public Trustee
- considering the Ombudsman Act
- preparing this report.

## Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>1</sup> It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...<sup>2</sup>

## Response to my provisional report

### *The complainant*

1. The complainant responded to my provisional report, and made a number of comments which have been considered in my final report. In summary, the complainant:
  - continued to dispute many of the agency's submissions as to why a decision was made to cease payments to the ATO and submit a Code 21
  - considered that the agency had a responsibility to make the Application for Release to the ATO, before exploring other options such as the sale of their house
  - was concerned that the late payment of bills was not an isolated incident, and that there may be a systemic problem within the agency as they also incurred late payment fees for their telephone service, resulting in their telephone being disconnected
  - was concerned that the information provided by the agency regarding their outstanding tax debt as of September 2016 may have been misleading
  - remained of the view that the agency should have liaised with them directly in regard to their tax debt, prior to the meeting in December 2015
  - considered that the agency further failed to communicate with them about their financial affairs, as they were informed by their appointed liaison persons that the agency refused to discuss financial matters with them as the agency was only authorised to speak about such matters with the complainant directly.

<sup>1</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

2. In addition to these submissions, the complainant disputed the necessity of ceasing ATO contributions on the basis that:

...[around 2011/2012] my understanding was that the agency was holding in Trust around \$15,000.00 of my money and they had sufficient funds to pay for my necessary and significant motor vehicle repairs.

3. I have assessed the complainant's account records for the 2011/2012 period, and confirm that an amount of \$17,847.15 was available in January 2011. However, the complainant's account balance was negative by the time PAYG instalments were varied in November 2011, therefore, I do not consider it is necessary to comment further on this matter in my final report.
4. The complainant also commented that the agency's submission that their Application for Release had been rejected was misleading, as they had been advised by the ATO that it had not been rejected.
5. The ATO advised the complainant that the application could not be processed on the ground that the Public Trustee had written to the ATO to inform them that they were under an Administration Order pursuant to the *Guardianship and Administration Act 1993* and that as the Public Trustee was acting as the financial administrator for their financial affairs, the complainant did not have authority to lodge the application themselves.
6. As a result, the ATO could not process the complainant's application, but it had not been rejected. This issue is considered in the body of my report.
7. I also note that the complainant advised this Office on 1 February 2017 that the administrative order appointing the Public Trustee as full administrator of their affairs had been revoked by the South Australian Civil and Administrative Tribunal (**SACAT**) on 31 January 2017.

#### *The agency*

8. The agency also provided a response to my provisional report, as well as a response to the complainant's submission regarding the Application for Release.
9. The agency conceded that their assertion that the application had been rejected by the ATO was inaccurate, and that it had in fact not been rejected. Rather, the ATO had been unable to process it as the complainant was not authorised to make the application at that time.
10. The agency also made submissions in response to my provisional findings as follows:

...In this matter Public Trustee has duties under the terms of the Guardianship and Administration Act 1993 (GAA), which are stated in the Act to include the duties and responsibilities of a trustee (s39(1)(b), GAA). The powers set out in section 39(2) of that Act are expressed to be discretionary, i.e. "An administrator may..." It is therefore appropriate for an administrator under the terms of the GAA to manage the financial affairs of a protected person in accordance with the general law of trusts. In doing so Public Trustee may prefer one creditor over another, or pay one sum due in preference to another, always keeping in mind that the law of trusts requires that the best interests of a beneficiary be seen as a whole and be the overarching rationale for any decision by a trustee.

[X's] estate has been a complex matter and estate officers have constantly been required to balance [X's] and [their] carers' requests for funds against other pressures. The complainant's comments at para 33 of the Ombudsman's provisional findings about [their] current budget demonstrates [their] lack of acceptance of the need to make reductions in

expenditure. The complainant is of the view the current budget and expenditure reductions are due to [their] tax liability. This is not the case - the budget has reduced expenditure allowance because it now provides for [X's] PAYG tax instalments as they fall due.

The decision by Public Trustee to reduce the PAYG payments to nil was done to enable [X] to be able to fund a range of medical, lifestyle and child support costs. Public Trustee is now of the view that, while this decision was reasonable, given all the circumstances in [X's] life, a formal strategy for repayment of the tax liability should have been put in place at the time the decision was taken.

...Public Trustee will review its procedures and delegations to ensure that the action of amending the PAYG payments regime is undertaken with increased oversight and internal controls. This aims to ensure that in future PAYG payments are not amended without an agreed budgetary plan to meet the tax liability.

...Public Trustee believes that its communications with the ATO were transparent. Our initial advice to the ATO about the reason for needing to reduce PAYG instalments to nil (through the tax portal) were clear that [X] had extraordinary expenditure at that time and minimal funds. Code 21 was used later when the ATO standard form was required and it was seen as the best available description option within the constraints of the ATO system. The Code was used knowing that the appropriate reasons for the change had already been provided to the ATO via the tax portal.

...Public Trustee has reimbursed [X's] estate with \$174 for late energy invoice fees identified to date.

Public Trustee continued to pursue information about any possible further late fees from Power Direct on behalf of [X] until the revocation of Public Trustee's authority under the *Guardianship and Administration Act 1993*.

...In about August 2016, Public Trustee was advised by [Y], an advocate for [X], that [they] had already applied for a hardship application on behalf of [X]. On 27 October 2016, Public Trustee received notification that [X's] hardship application had been declined. [X] has been advised of this.

...Public Trustee has a duty as a trustee to manage all of the assets of a protected person, including real estate. In order to affect (sic) this duty properly, professional property inspections are required.

## **Response to my revised provisional report**

### *The complainant*

11. The complainant responded to my revised provisional report, stating that:

- They disagreed with the agency's assertion that Y had informed the complainant in August 2016 that Y had lodged a Hardship Application with the ATO. The complainant stated that they lodged the application themselves on 23 January 2017.
- Since the revocation of the administrative order on 31 January 2016, they have become aware of further late payment of bills and various other creditors, for example, their pharmacy and physiotherapist accounts. The complainant considers this to be further evidence of systemic late payment of fees by the agency. The complainant also suggested I give special consideration as to:

whether the Public Trustee should pay bills by the due date or make alternative arrangements, so as to avoid late-payment fees, penalties of interest charges or disconnection notices? (sic)

- I should reconsider my decision to not make a recommendation in relation to the agency's failure to consider making a hardship application to the Child Support Agency (CSA).
- Reconsider whether the issues raised by their complaint may be systemic.

*The agency*

12. The agency also responded to my revised provisional report, stating that:
  - I had not given sufficient consideration to the 'dire' state of the complainant's financial situation and obligations to the ATO at the time they were appointed as the complainant's administrators.
  - I had not given sufficient consideration to the work done by the Public Trustee to attempt to meet the complainant's tax liabilities over the years.

**Background**

13. On 29 September 2005 the Public Trustee (**the agency**) was appointed as full financial administrator for the complainant by the former Guardianship Board (now the South Australian Civil and Administrative Tribunal (**SACAT**)).

*The agency's management of the complainant's tax contributions*

14. According to the agency, at that time, the last tax return lodged by the complainant was for the year ended 30 June 1999. Following the agency's appointment as administrator, the agency lodged six overdue tax returns (30 June 2000 to 30 June 2006) to bring the complainant's tax affairs up to date. The result was income tax payable of \$85,316.15 and tax office penalties of \$46,964.95.
15. The agency told my investigation that at the time of the complainant's 2007 income tax assessment, the complainant had an outstanding tax debt of \$168,230.96. In December 2007, the agency successfully applied to the Australian Tax Office (**ATO**) to have the complainant released from paying \$123,232.54 in income tax and ATO general charges amounting to \$44,998.42 (i.e. a total write back of \$168,230.96).
16. The agency lodged tax returns on behalf of the complainant for each of the following years until 30 June 2015. According to the agency, each of those tax returns included the taxable income received from the complainant's Income Protection Insurance. That income is received by the Public Trustee without any tax being deducted by the insurance company. The agency has stated that the complainant's income tax was paid in full each year up to 30 June 2011 through regular quarterly Pay As You Go (**PAYG**) instalments and annual income tax assessment payments.
17. According to the initial complaint to my Office, from 30 June 2012 until 27 May 2016, the complainant accumulated an unpaid tax debt of \$35,226.88. The agency has confirmed that, as of June 2016, the unpaid tax debt was \$35,769.11 (as set out in a document from the ATO entitled 'Income Tax Account - Statement of Account' dated 12 July 2016) (**the tax debt**).
18. The complainant noted that the Public Trustee made no arrangements in 2012 and 2013 to pay any tax in spite of lodging tax returns for those years and in spite of being issued with Notices of Assessment for those years.

19. The complainant provided my investigation with Notices of Assessment from the ATO which show that the following amounts were payable for the respective years set out below:
  - 2012: \$11,523.00
  - 2013: \$21,221.30
  - 2014: \$6,480.95
  - 2015: \$16,970.85.
20. By my calculations, the total sum of these figures amount to \$56,196.10 indicating a discrepancy between the total amount payable to the ATO from 2012 - 2015, and the total unpaid tax debt at the time of the complaint. Upon viewing printouts from the ATO, I note that this discrepancy is due to eventual repayments made by the Public Trustee from 2014, in addition to various family tax benefits paid directly to the ATO.
21. The agency's explanation for the unpaid tax debt was:

[X's] income from the Income Protection Insurance is not subject to PAYG withholding tax. [X's] quarterly and annual tax liability accumulated over this period. Public Trustee was unable to negotiate expenditure reductions within [X's] budget that would have freed up funds to contribute to the tax liability. From 30 June 2012 to June 2016, [X] accumulated an unpaid tax debt of \$35,769.11.

A payment plan was entered into with the ATO in April 2014. Despite Public Trustee making regular payments against this plan, further income tax was payable on the income received in that year and subsequent years.

Public Trustee has attempted to reduce [X's] other expenses in order to pay [their] tax debt and explained [their] circumstances to [them], however previous budget changes proposed by Public Trustee were rejected by [X].

We have been advised that [X] has [themself] now made an application to the ATO to extinguish this debt on the basis of financial hardship.

#### *Payment plans*

22. My investigation asked the agency for further information in regard to the payment plan entered into with the ATO. The agency responded by letter dated 7 October 2016 advising that:

Two payment plans were issued by the ATO both dated 7 May 2014. The plan for the Income tax account had \$500 monthly instalments for the first 6 months from June 2014 and then \$1,000 per month for the next 31 months until June 2017 with a final payment of \$132.36 due July 2017. (Total \$34,081.39).

The plan for the Integrated Client Account stipulated 6 instalments of \$500 commencing May 2014 with a final payment of \$50.97 due November 2014 (total \$3057.97).

Public Trustee's budget of 1 August 2016 provides for the repayment to the ATO of \$500 per fortnight as required under the ATO Payment Arrangement of May 2014. This required [X] to reduce some discretionary expenditure but will ensure [they reduce their] tax debt.

More recently, we have agreed with the ATO that the repayment be reduced to \$500 per month until the outcome of [X's] application for financial hardship is known.

23. In a letter dated 6 December 2016, the Public Trustee provided the following update in regard to the payment plan:

Personal Estates Officer, Kim Nelson, and Manager Personal Estates, Jan Baxter attended a SACAT hearing on 9 September 2016 in relation to [X's] application to be

revoked or for the administration order to be managed by another party other than Public Trustee.

After the hearing, Ms Nelson and Ms Baxter met with [X], [Z] and [Y] to further discuss the recent change in [X's] budget. [X] expressed concerns that the amounts allocated in the strict budget meant that [they] could not live sustainably. [X] advised that [they] had contacted the ATO and [the ATO] had advised [X] that [they] could pay a much lesser amount to repay [their] tax debt than the amount that Public Trustee had allocated in [their] budget.

Therefore, in order to assist [X], Ms Nelson and Ms Baxter agreed to again review the budget and contact the ATO to seek approval and investigate the comments that [X] had made regarding the minimum amount that would be required by the ATO.

Ms Nelson contacted the ATO on 12 September 2016 to investigate [X's] comments regarding the minimum amount the ATO would agree to, as per attachment (r). This file note attachment confirms that the ATO would temporarily agree to a reduction in the repayments to \$500 per month - pending the outcome of the Financial Hardship Application that [X] had lodged prior to the hearing date.

Public Trustee was advised on 14 November 2016 by the ATO that [X's] Financial Hardship Application had been denied and that the tax debt stands.

Public Trustee is continuing to pay the ATO \$500 per month until advised otherwise. Public Trustee understands from the ATO that \$500 per month is not reducing the debt, however at this stage [X] cannot afford to contribute any more unless [they agree] to amend [their] lifestyle and cost of living.

Revised budget reflecting this \$500 ATO payment and Public Trustee fees is attached (o).

24. In regard to the lack of payments made by the Public Trustee to the ATO in 2012 - 2013, the complainant stated that they were recently advised by the ATO that on or around 14 February 2012, the agency ('or its agent, representative, or registered tax agent') made an amendment to their PAYG instalment on an activity statement by lodging a form with the ATO advising that they were no longer required to pay tax.

25. The complainant further stated that:

This Code suggests that my income would have reduced significantly to a point where it appeared that I was not earning enough income to be liable to pay tax. It has become apparent, the next instalment ordinarily due on or around 22 October 2012, reflected that I was no longer required to pay tax and I can only presume this was due to the Code 21 being lodged.

26. The complainant noted that their income had not changed, and they continued to receive income protection insurance payments of approximately \$77,000.00 gross per annum (in or around 2012) while still incurring tax debts each financial year. According to the complainant, their current income protection insurance is paid at a rate of approximately \$89,000.00 per year.

27. This was put to the agency, who explained that:

In November 2011, the Personal Estates Officer (PEO) managing [X's] case requested the Taxation Branch of Public Trustee to vary [X's] quarterly PAYG to nil as [X's] capacity to pay tax quarterly in advance on [their] Income Protection Insurance income had diminished for a range of reasons. [X] had significant motor vehicle repair costs in 2011-12 and from 2012-13 [X] enrolled [their] child in a private school. The cost of private schooling continued to rise and in 2014-15 [X] paid \$12,485.29 in private school fees.

In 2012-13, [X's] desire to fund lifestyle choices in excess of [their] income continued to be unsustainable. [They] therefore could not continue to pay quarterly PAYG instalment

amounts and income tax assessments raised by the ATO at the end of each financial year. Requests by Public Trustee for [X] to moderate [their] expenditure within [their] means have strained [X's] relationship with Public Trustee.

Public Trustee wrote to the ATO in November 2011 via the Tax Agents' Portal and requested the September 2011 quarterly PAYG instalment be reduced to \$Nil as [X] needed funds to meet other financial commitments. The ATO reduced the PAYG instalment to \$Nil. No code was used at this time. This arrangement remained in place until the next tax return was lodged.

At the time the next tax return was lodged in September 2012, a new request needed to be submitted to the ATO. Code 21 was used on this second request, which is one of seven codes that can be used to explain the reason to vary the instalment. Code 21 is "change in investments" for varying the PAYG instalments. I am advised that Code 21 was used as it was the code that best described [X's] financial situation at that time.

28. The complainant considers that the Code 21 (**the code**) was lodged in error and stated:

It is apparent that on or around April 2014, (or between April -12 Sept 2014), the Public Trustee realised their error because the Public Trustee entered into a payment arrangement to start paying off the tax debt and then a year later, on or around 1 October 2015, re-entered my tax file no./name into the ATO's PAYG instalment system, (thus reversing the effect of the Code 21 lodgement). This information was recently provided to me by an Officer from the ATO. It is unclear why this took so long.

29. The agency denied that it 'reversed' the code, stating:

Code 21 is one of seven codes that can be used to vary a PAYG instalment. PAYG instalments are calculated on the last lodged income tax return.  
Public Trustee did not reverse a 'code 21'. Public Trustee lodged the 30 June 2013 income tax return and it was assessed by the ATO on 21 March 2014. This assessment then resulted in the ATO recalculating the PAYG instalments for the following year.

30. My investigation sought further explanation as to why quarterly payments had been reduced to \$Nil, and why a Code 21 had been submitted in order to do so as the ATO website states that this code is to be used in circumstances where it is expected that a person's 'investment strategy or policy has changed (which) will significantly affect (their) annual tax liability'.

31. In response to that request, the agency submitted the following:

Public Trustee wrote to the ATO in November 2011 via the Tax Agent Portal and requested the September 2011 quarterly PAYG instalment be reduced to \$nil, as [X] needed funds to meet other financial commitments.

Under the PAYG instalment rules, the taxpayer is required to make regular payments towards their expected future annual income tax liability.

As the PAYG instalments were towards an expected future tax liability and [X] was having difficulty meeting [their] current tax liability, we requested the instalments be reduced to \$nil.

PAYG instalments are payments to the ATO towards an expected future annual income tax liability.

We had previously requested that the PAYG instalments for [X's] future tax debt be reduced to \$nil as [X] did not have sufficient funds to pay [their] current income tax debt. This initial request was made in writing over the Tax Agent Portal and explained that [X] was unable to pay the PAYG instalments. The ATO accepted this and reduced the instalments to \$nil.

The subsequent request was made using the standard ATO form for this purpose. The ATO form uses a limited set of codes to describe the reason for the variation in PAYG instalments. The ATO instructions are to choose the code that best describes why you decided to vary your instalment amount or rate. None of the available codes were appropriate to [X's] situation. Given that the ATO had previously agreed to reduce the PAYG instalments to \$nil following our written request, in which we explained the inability to pay the instalments, code 21 was used as the least inappropriate choice of the available codes.

*Repayments made to date*

32. In regard to the payment of the tax debt, the agency told my investigation that separate payment plans were agreed with the ATO for the complainant's Income Tax Account and Integrated Client Account. According to the agency:

When possible, funds have been applied to the ATO Payment Plans as they have become available in [X's] estate at Public Trustee.

*Income Tax Account*

33. Payments due under the Income Tax Account payment arrangement as at 2 September 2016 totalled \$24,949.03. As at 2 September 2016, the agency had paid a total of \$24,500.00, leaving a balance of \$449.03 in unpaid planned payments.

*Integrated Client Account*

34. The complainant was unable to distinguish between the Income Tax Account and the Integrated Client Account.
35. My understanding is that the Income Tax Account reflects actual income tax assessments raised each year on lodged tax returns, whereas the Integrated Client Account reflects PAYG instalments towards future tax liabilities. Therefore, the repayments by the agency to the ATO were for both existing and future tax liabilities, and that future tax liabilities continued to accrue from 2014.
36. As at September 2016 the 'Integrated Client Account payments totalled \$3,050.97. The agency paid a total of \$1000.00 leaving a balance of \$2,050.97 in unpaid planned payments.<sup>3</sup>
37. The agency has not been issued with any notices of default (on behalf of the complainant) by the ATO in relation to the two repayment plans. While no late fees have been incurred as a result of non-payments, the General Interest Charge continues to accrue on the outstanding balance. That interest is not linked to any particular non-payment of planned payments, but is calculated on the total outstanding amount. As at 2 September 2016, the General Interest Charge is \$4,861.04.
38. The agency explained that while the amount of instalments increased under the payment plans, each year the complainant's tax debt increased as the repayments only dealt with past debt and not current years' tax payable on income received. The agency referred to correspondence provided to my investigation as evidence of its attempts to reduce the complainant's expenditure in order to make provision for their growing income tax liability.

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<sup>3</sup> The applicant was unsure whether this information, as submitted by the agency, was correct. I have viewed the ATO printout and confirm the information is true and correct. As of September 2016, a total of \$3,050.97 was paid to the to the Integrated Client Account. I also confirm that at that time, the total outstanding debt to the ATO for the Income Tax Account was \$34,555.68 and \$15,696.04 for the Integrated Client Account.

- 39. The correspondence includes several email exchanges between the Public Trustee and the complainant's social workers.
- 40. The complainant has stated that they were recently advised by the ATO that despite arrangements being put in place to repay the tax debt, the Public Trustee defaulted on the third payment due and sporadically thereafter (i.e. no payment was made for July, August or October 2014).
- 41. In response to this concern, the agency clarified that:

The total of the scheduled payments as of 4 August 2014 was \$1,500, actual payments made by Public Trustee as of 4 August 2014 were \$2,000.

The total of the scheduled payments as of 2 October 2014 was \$2,500, actual payments made by Public Trustee as of 2 October 2014 were \$2,500.

Public Trustee made the above payments prior to the scheduled dates in the repayment plan - hence these were paid in advance.

#### *Discussions about the debt*

- 42. My investigation asked the agency when and how the complainant was first advised of the tax debt. The agency responded:

[X's] social workers have been advised of [X's] tax debt over the years and there are a number of emails attached, which make reference to this.

At a meeting in December 2015 with [X] [and [X's] SACAT ordered representatives], Team Leader - Gary Campbell and PEO - Tom Correll discussed the tax debt directly with [X].

- 43. When questioned as to why it had taken so long for the Public Trustee to discuss the tax debt with the complainant, the agency provided the following response:

Public Trustee has had difficulties engaging directly with [X] over the time we have been [their] administrator. As demonstrated in the copies of the emails we have previously sent you, our communications have been through [X's] social workers from DSCI as provided for in the SACAT order.

[X] met with Personal Estates Officer, Tom Correll and Team Leader, Gary Campbell in December 2015 at the Disability SA office at Mount Barker. During this meeting, the tax debt was explained and there was discussion about the need for budgetary restraint on [X's] part.

Following the meeting, Public Trustee did not hear directly from [X]. All correspondence thereafter was arranged through [X's] social workers or [Z] ([X's] brother).

Public Trustee has attempted to contact [X], however we have not been successful in speaking with [them]. Attached are copies of further emails relevant to the various discussions that Public Trustee has had with [X's] social workers.

- 44. The complainant states that during the December 2015 meeting options were discussed including the possibility of the complainant refinancing the mortgage over their real property to pay off the tax debt. The complainant does not consider that a bank would consider that a viable option.
- 45. According to the complainant, since the December 2015 meeting, the agency has asserted that the complainant's property should be sold to pay off the tax debt and has taken steps to refuse approval for various living expenses which have included, for example:

..gross reduction of my grocery and personal allowances; the disconnection of my internet and telephone services; cessation of allocation of funding to pay for my [child's] school fees and other essential services, including reduced budget funding allocated to support my medical needs (please see the table and point 30 [b]below for the complete effect of changes the Public Trustee has made to my budget).

46. The table referred to by the complainant is as follows:

Expenditure	Actual budget expenditure prev 12 mths 19/7/2015 - 19/7/2016	Effective 1/8/2016
	Per fortnight	Per fortnight
Personal Allowance	\$306.35	\$150.00
Extra Personal Allowance	\$20.96	\$0.00
Groceries	\$244.62	\$120.00
Physiotherapy	\$156.28	\$72.50
Chemist	\$262.10	\$248.00
Veterinary	\$31.86	\$0.00
Life insurance	\$65.76	\$14.00
Carer's payment	\$4.70	\$0.00
Electricity	\$161.72	\$185.00 (\$4,810.00 per annum)
Child support	\$295.87	\$531.00
Internet (plus home phone in plan)	\$52.92	\$0.00
Other property expenses	\$103.06	\$42.00
Sundry expenses	\$61.73	\$62.00
Re-imbursement	\$4.46	\$0.00
Educational expenses (private schooling for [X's child])	\$278.38	\$0.00
ATO debt	\$557.69	\$500.00

47. The complainant raised the following issues in relation to the budget:

- the table does not show the fees for the costs associated with managing the complainant's affairs that the agency pays itself on a monthly basis from the complainant's funds - according to the complainant's quarterly statements, those fees are around \$458.00 per month
- the complainant's weekly food allocation was reduced to \$60.00 per week
- one of the complainant's children live with them 50% of the time, and attends private school, as did the child's siblings; the agency did not allocate any money in the new budget to pay for the complainant's child's school fees
- it is unacceptable, and not in the interests of the complainant's child to change their schooling and they should not be negatively impacted by the agency's 'negligent mismanagement' of the complainant's finances
- given that physiotherapy expenses had been halved, the complainant could not attend essential weekly physiotherapy appointments
- the complainant could not afford to pay for life insurance from their personal allowance
- at no time did the agency consider it an option to seek a review of the complainant's child support liability in an effort to reduce that liability and/or make an alternative arrangement with the ATO to repay the debt at a more manageable rate; as a result, the complainant had to make their own application in relation to child support which is currently being processed.

48. In relation to the issue of selling the complainant's property, the agency responded:

In order to address the issue of budget sustainability, Public Trustee has suggested to [X] that a change of living arrangements might be the best outcome for [them] because:

- [X's] current house is potentially larger than necessary for [their] current family requirements ([they have] care of one child for three days per week);
- The energy costs of [X's] current accommodation are high;
- Public Trustee has been advised [another of X's children] resides in the rear shed on the property and does not contribute to accommodation costs; and
- Some proceeds of sale could be used to meet [their] tax liability. Through downsizing, [X] would be in a better financial situation.

Public Trustee is only proposing this approach as one possibility, to improve [X's] financial position, so a forced sale of [their] house does not become necessary in the future.

49. My investigation sought a response from the agency as to whether it considered that the complainant's budget at the time was reasonable in all of the circumstances and an outline of the process by which that budget was reached. The agency responded:

A revised budget was developed and implemented for [X] as of 1 August 2016. Public Trustee's process for developing a budget for a customer is to determine all income and expected expenditures, taking into account assets and liabilities and the customer's needs and personal requirements.

The August 2016 budget had the result of eliminating a number of discretionary payments that were previously funded. We have advised [X] that [they] may need to make [their] own arrangements via the fortnightly personal allowance [they receive] via Public Trustee to meet some of [their] choices.

Under the 1 August budget payments to the ATO to deal with the outstanding debt were increased to \$500 per fortnight and a sub-account within [X's] Public Trustee estate was established to provide for current PAYG taxation.

If the current budget were successfully implemented, Public Trustee believes it provides a way forward to deal with the tax debt and meet essential expenses from [X's] existing income.

With the more up-to-date valuation of [X's] house, Public Trustee is in discussions with [their] mortgage provider to explore the option of extending the home mortgage and using any available funds to contribute to the ATO debt as the interest on the ATO debt is higher than that of a current extended home mortgage. The lender at this time has not yet agreed to a mortgage increase. A copy of the correspondence to [X] about this budget is attached in attachment (g).

Since receipt of your letter the following variation to [X's] 1 August budget have been identified:

- The allowance for groceries has been increased from \$60 per week to \$125 per week following the SACAT hearing on 9 September 2016;
- Repayment to the ATO has reduced to \$500 per month pending the outcome of [X's] financial hardship application; and
- Public Trustee's income commission of 5.5% needs to be provisioned

[X] should expect the current budget to be further refined following receipt of advice from the ATO.

*The agency's communication with the complainant's liaison persons*

50. The complainant's understanding is that, despite the December 2015 meeting, their brother had only recently been made aware of the true extent of the tax debt.
51. Both the complainant's brother and Ms Thompson had been appointed as liaison persons by order of SACAT.<sup>4</sup> The complainant alleged that, despite their repeated requests the complainant's brother and their Disability SA Service Coordinator, Ms Julie Thompson, be kept up to date with their matter and receive copies of all correspondence in relation to their financial affairs, the agency did not adhere to their requests.
52. The agency responded to the allegation that it failed to provide information to the complainant's liaison persons as follows:

Public Trustee has the ability to communicate with any person relevant to the protected person's needs whether or not appointed as a liaison person by SACAT.

The role of liaison person is to facilitate communication about the protected person's needs. It is not a formal role and does not have any statutory basis.

Public Trustee has not failed to provide correspondence to [X's] liaison persons. Public Trustee provides appropriate reports to [X] about [their] financial circumstances in line with the order made by SACAT. [X] is the only person nominated as a receiver of financial information on the order, which covers [X's] administration.

[X's] liaison people, as listed on SACAT Order 3 November 2015, are [Z] and the Service Coordinator at Disability SA (DSA).

*Electricity bills*

53. The complainant raised concerns that the agency had not routinely provided them with copies of electricity bills until 15 August 2016. At this time, the complainant was also advised by their electricity provider, Power Direct, that late-payment fees had accrued on 29 separate occasions in 6 years due to late payments by the Public Trustee.
54. In response to enquiries about the complainant's electricity bills, the agency stated the following:

[X] was not provided a copy of [their] electricity bills from 2010 to 2016. During 2015, several were sent to [their] social worker for that person to raise with [X their] excessive energy consumption and cost. It was also a topic of discussion and highlighted as a cause for concern in the meeting with [X] in late 2015. Unfortunately, there has been no reduction in power usage.

Monthly accounts were not sent to [X] as no request for them was received and it is not normal practice for Public Trustee to send copies of invoices received to our customers.

On 9 September 2016, at a SACAT hearing, [X] requested copies of all [their] electricity invoices for this period. Public Trustee is retrieving these records in order to provide them to [X].

Public Trustee will investigate any electricity accounts that have been paid late for this period. If any late payments are found and they are found to be attributable to Public Trustee's administration [X's] estate will be reimbursed.

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<sup>4</sup> Order of Presiding Tribunal Member Tredrea dated 3 November 2015.

*Child support payments*

55. In regard to the complainant's concerns about the agency's efforts in seeking to reduce their child support liability, the agency stated that:

[X] currently makes Child Support Agency (CSA) payments for three children under the age of 18 years.

Public Trustee contacted CSA in 2015 and was advised that the figures held by CSA (incomes, care ratios etc), that the assessed liability were accurate.

Public Trustee subsequently advised [X's] social worker of the outcome of this correspondence, and requested that if any changes of circumstances should occur, [X] was to notify CSA.

Public Trustee has not received any information that suggests [X's] obligations or circumstances, with regard to child support, have changed.

*Valuation of the complainant's home*

56. According to the complainant, the agency continued to assert that the most viable option to deal with the tax debt was to sell the complainant's home.
57. The complainant submitted that on or around 11 July 2016, a Service Coordinator from Disability SA advised the agency, via telephone, that the complainant urgently required a hot water service as their existing service had broken down. The complainant submitted that, in response to that request, the agency's Personal Estates Officer advised the complainant's Service Coordinator that the only way for the complainant to have a heater installed would be for them to agree to authorise a valuer into their home to prepare a formal valuation for the agency.

58. The complainant stated:

At that time, I felt under duress as I had no other choice, but to agree because my children and I did not have any access to hot water. Ultimately we were left without hot water for 5 days; a heater was finally installed on the 13 July 2016.

59. The agency responded that at the time of being notified of the damage to the hot water system, the Personal Estates Officer made immediate enquiries regarding the complainant's contents insurance to determine whether the replacement could be covered under 'accidental damage'. It was determined that the complainant did not have that type of damage listed in their insurance (and the agency has recommended that it be included in their insurance policy going forward).
60. Given that no deductions had been made for the previous month's expenses, the cost of the hot water system would put the complainant in a negative balance to the agency of at least \$1,400. According to the agency:

The PEO emailed [the complainant's Service Coordinator] and asked if [X] would agree to a valuation of [their] property as there was a potential for [X] to have a substantial negative balance at Public Trustee. Previous attempts to obtain this valuation had met with resistance from [X].

As Public Trustee had been continuously advancing [X's] monies out of the Common Funds, it was felt important that we had some current documentation as to the equity in [their] home. This was by no means a condition of the approval of the replacement of the hot water system. The valuation would, however, offer the support for the advancing of funds to [X] to meet the unexpected expenditure on the hot water system and would be available to assist in the discussions with [their] mortgage lender.

In undertaking our duties as trustee it is standard practice for Public Trustee to obtain independent valuations of the assets of customers.

61. My investigation requested further details in regard to the valuation, such as whether the complainant was required to pay for it, whether the complainant was provided with a copy, and why the agency had insisted on the valuation despite opposition from the complainant. The agency provided the following response:

The cost of the valuation was \$300 and was paid from [X's] account. As Public Trustee receives no government funding all customer costs, including valuation services, are met by their own estate funds.

[X] was not provided with a copy of the valuation report. At the time, the request was refused as consideration was being given as to whether the report was commercial in confidence. Public Trustee has now clarified this and a copy of the report has been sent to [X].

Public Trustee has a legal requirement to account for and manage the assets of protected people. Accordingly, it is our policy to have regular professional property inspections and valuations undertaken on the properties owned by all relevant customers.

#### *Income commission fees*

62. The complainant stated in their complaint that the agency had charged them approximately \$458.00 per month in fees associated with the management of their annual \$77,000 income.
63. In response to enquiries as to whether the agency considered the fees charged by the Public Trustee had been reasonable, the agency stated that:

'Public Trustee's fees are set by the Government and are published on our website. The monthly charge for the management of a protected persons' estate is 5.5% of income received. Under the Public Trustees Act 1995, Section 29 Common Funds, clause (6a), Public Trustee may withdraw funds from any amount held for a customer for the purpose of recovering commission, fees or expenses. The amount of those fees is set by the government under the Public Trustees Regulations 2010.'

64. A calculation of the fees at a rate of 5.5% of a \$77,000 income was conducted, which amounted to approximately \$353.00 per month. As there appeared to be a discrepancy between this rate and the amount the complainant alleged they had been paying, my investigation sought clarification as to why the complainant may have encountered additional fees, and why reasons for charging higher fees had not been given. The agency provided the following response:

Year to date for 2016 (11 months) [X's] receipts amounted to \$71,528.91. The total fees and commissions charged over that 11 months has been \$2,670.57 (monthly average of \$242.78). The fees include taxation fee and administration and audit fees.

Had 5.5% income commission been applied, Public Trustee's fees for the period would have amounted to \$3,934.09. The lower amount of commission and fees actually charged was due to an administrative error whereby [X] was charged capital commission instead of income commission on the receipt of some funds.

Similarly in 2015 calendar year, [X's] receipts amounted to \$94,958.55 and the fees and commission taken was \$3,762.54 (monthly average of \$313.55). Had 5.5% income commission (and fees) been charged Public Trustee's fees would have been \$5,222.59.

At the time of responding, I have had the records examined for each year back to 2007 and find that there has not been any year where [X] has paid in excess of the regulated fees and commissions applicable to [their] estate. In fact, for the periods outlined above,

it appears [X] has been undercharged. I am currently having an examination of historical records back to 2005 undertaken.

Public Trustee receives no appropriation from Government and charges fees in line with legislation set by the Parliament.

*Request for a formal review*

65. The agency stated that the following steps were taken to conduct a formal internal review as requested by the complainant in their letter of 24 May 2016:

Following receipt of [X's] complaint about [their] taxation liability in May 2016, I asked the Manager Personal Estates and the Manager Taxation Services in Public Trustee to investigate the matter and report to Ms Frankie Anderson, General Manager Customer Services.

A briefing was prepared by the relevant team leaders (both past and present) and further enquiries were made by Ms Anderson into details of [X's] file.

I am satisfied that the consideration of [X's] complaint of May 2016, was thorough and independent as neither Ms. Anderson or I had not previously had any direct dealings with [X's] estate.

**Whether the Public Trustee failed to appropriately manage the complainant's finances**

66. I have considered the complainant's concerns in regard to the accumulation of a significant tax debt, and the agency's response as to how such a debt was accrued.
67. The agency submitted that the debt accrued as a result of the complainant's own actions, and that regular payments were unable to be made between September 2011 - April 2014 due to the complainant overspending from their budget. As a result, the agency considers it had no other option than to reduce quarterly PAYG instalments to '\$Nil'.
68. On balance, I do not consider that the agency appropriately managed the complainant's accumulating tax debt for the period between September 2011 - April 2014.
69. Whilst I acknowledge the complainant may have regularly overspent from their budget during this period of time, I do not consider that refusing to make contributions to the ATO was a reasonable decision to have made in an attempt to resolve the underlying issue of overspending.
70. It is reasonable to conclude that failing to make regular contributions would not absolve the complainant's tax liabilities, and it should have been apparent to the agency that it would in fact make the complainant's ability to meet payments more difficult in the future.
71. As a result of the agency's actions, not only must the complainant now make significant contributions to the ATO to meet both future payments in addition to the debts accumulated, the complainant must also meet General Interest Charge repayments accrued on the outstanding balance.
72. Although the agency should have been aware that it was inappropriate to continue to not make repayments on behalf of the complainant because it was obvious that a debt was likely to accrue, the potentially erroneous decision should have been further highlighted when submitting the 'Code 21' to the ATO.

73. As the wording of the code indicates, its purpose is to reduce contributions where a person's, 'investment strategy or policy has changed (which) will significantly affect (their) annual tax liability'.
74. It is clear from the outset that this Code was not relevant to the complainant's circumstances, as their income was relatively fixed.
75. Although the agency states that the Code was used as, 'it was the code that best described [X's] financial situation at that time', I am not convinced it would have even closely resembled their financial situation.
76. I have also viewed all other available reason codes listed by the ATO, and do not consider these other reasons apply either:

Code	Reason	Description
21	Change in investments	<p>Your investment strategy or policy has changed and this will significantly affect your annual tax liability. For example:</p> <ul style="list-style-type: none"> <li>• the sale or purchase of investments such as shares or residential property</li> <li>• the use of investments for private purposes</li> <li>• when moving from the accumulation phase to pension phase for your superannuation benefits</li> </ul>
22	Current business structure not continuing	<p>Your current business has stopped trading or has changed its structure. For example, your business has:</p> <ul style="list-style-type: none"> <li>• permanently closed or been sold</li> <li>• stopped trading because of a merger or takeover</li> <li>• gone into bankruptcy or liquidation</li> <li>• been placed in the hands of a receiver/manager.</li> </ul>
23	Significant change in trading conditions	<p>Abnormal transactions relating to your business income or expenses will significantly affect your annual tax liability. For example:</p> <ul style="list-style-type: none"> <li>• you have bought or sold a major piece of machinery</li> <li>• your trading conditions have been affected by local or global competition.</li> </ul>
24	Internal business restructure	<p>You have restructured your business. For example, it has undergone an expansion or contraction, which will significantly affect your annual tax liability.</p>
25	Change in legislation or product mix	<p>A change in legislation, or the product mix of your business, will significantly change your annual tax liability.</p>
26	Financial market changes	<p>Your business is involved in financial market trading and has been affected by domestic or foreign financial market changes. This includes businesses whose income is affected by changes in financial products,</p>

		such as banks and finance and insurance businesses.
27	Use of income tax losses	You will be using income tax losses, including capital losses transferred from another entity that will significantly affect your annual tax liability.
33	Consolidations	A head company can vary its consolidated instalment based on its estimate of the expected consolidation outcomes for the year. When varying as a result of consolidation, use the special variation code 33 on the consolidated activity statement.

77. In light of my reasoning above, I am of the opinion that the agency should have exercised better judgement and come to the conclusion that the complainant was not an appropriate candidate ceasing PAYG instalments, as they would have continued to be liable to make payments to the ATO at some stage.
78. If the complainant continued to spend more than their budget would allow, one would assume that the agency could have explored other options for ensuring that money could be withdrawn for the purpose of making tax contributions as the agency has primary responsibility for managing the complainant's finances.
79. I also consider it is worth noting that by delaying payment to the ATO, the complainant must now pay their outstanding debt in addition to their ongoing PAYG instalments, effectively doubling their payments to the ATO.
80. I also consider that as the agency regularly manages the finances of vulnerable people, who have been determined to be unable to manage their finances, the agency should be held to a higher standard. Whilst a member of the public may have made the error of deciding to cease making PAYG instalments at a time of financial stress, leading to a significant tax debt, I do not consider this to have been a reasonable approach for the agency to have taken.
81. Therefore, I consider that the agency's actions in regard to the management of the complainant's debt were unreasonable. I do not consider that the agency appropriately managed the complainant's finances, resulting in the complainant facing further difficulties in meeting other expenses within their budget.
82. By way of comment, I have considered the agency's recent submissions, which highlight the complexity of the complainant's case and external considerations such as the law of trusts and the competing interests of various creditors.
83. These submissions have not affected my view, as the agency ultimately had a duty to manage the complainant's finances responsibly and I do not consider the agency fulfilled this duty. The failure to pay the ATO was a significant error of judgement, and I do not accept the agency's assertion that prioritising the complainant's other expenses was in accordance with the law of trusts.
84. Although I am not familiar with all facets of the complainant's case, I would assume that meeting the complainant's tax liabilities should have been high on the agency's list of priorities. As a result, I do not consider under any interpretation of the law of trusts, that payments to the ATO should have been neglected prior to implementing other budgetary control measures.

85. It is worth noting that the agency has acknowledged that a formal strategy for repaying the tax debt should have been put into place at the time the decision was made.
86. I do not doubt the agency's many submissions that the complainant bore some responsibility for exceeding their budget, however, it was the agency who had ultimate control over their finances.
87. Further, I consider it necessary to highlight that the complainant is currently in a position that their budget is even further constrained by having to meet both past and future tax liabilities in addition to interest payments on their debt. Had the agency better managed to control the complainant's expenditure at the time the over-expenditure began to occur, the agency would have had a much less difficult task of meeting the complainant's lax liabilities than it did once the debt had significantly accrued.
88. I also note the complainant raised concerns about the agency's failure to pay their electricity bills on time, and that they consider this may be a more systemic issue within the agency.
89. As indicated in my provisional reports, the agency has reimbursed the complainant for late fees incurred. I had informed the parties that in light of the reimbursement, I had considered the matter resolved as there was no evidence there was a systemic issue.
90. Although the complainant has since provided other examples of late payments, particularly in relation to their pharmaceutical expenses, I still do not consider there is sufficient evidence to suggest this is a systemic issue within the agency.
91. The complainant had a significant number of expenses, and it is likely the agency may have had to delay payments from time to time to meet the complainant's other needs. Whilst this is not necessarily an ideal practice, it does not appear from the documents provided that the complainant accrued significant late payment fees.
92. However, by way of comment, I suggest the complainant raise this issue with the agency directly in order to assess whether the agency could reimburse them for any late payment fees that could have possibly been avoided.

## Opinion

93. In light of the above, my view is that by deciding to cease PAYG instalments on behalf of the complainant, the agency acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.
94. It is also my view that the agency's actions in regard to submitting the Code 21 was wrong within the meaning of section 25(1)(g).
95. In my provisional report, I advised both parties that I did not intend to make any recommendations in connection with these findings because the errors were made by individuals and did not appear to be systemic or a reflection of the agency's practices in general.
96. However, on reflection and in light of the agency's response to my provisional report, I consider it is necessary to make a recommendation.
97. Although the agency submitted that it:

...will review its procedures and delegations to ensure that the action of amending the PAYG payments regime is undertaken with increased oversight and internal controls. This

aims to ensure that in future PAYG payments are not amended without an agreed budgetary plan to meet the tax liability.

the agency has made it clear that it does not accept responsibility for the complainant's financial situation, and that it considered its actions were reasonable at the time.

98. I also do not consider that this undertaking provides sufficient protection for vulnerable persons, and I am concerned about the agency's view that the complainant's case is an example of circumstances where it is appropriate to cease making contributions.
99. Therefore, I recommend under section 25(2) of the Ombudsman Act that the agency develop and implement a guideline for ceasing payments to the Australian Taxation Office, within two months from the date of the final report, which clearly sets out that such decisions can only be made:
  - with the written authority of a delegate
  - only in exceptional and temporary circumstances, and not as a general means of decreasing overall budget expenditure
  - only in the event that all other avenues for meeting the liability have been explored and exhausted.

#### **Whether the Public Trustee failed to explain to the complainant how their tax debt accumulated**

100. I refer to the agency's submissions in regard to communications with the complainant about their tax debt:

[X's] social workers have been advised of [X's] tax debt over the years and there are a number of emails attached, which make reference to this.

At a meeting in December 2015 with [X] [and [X's] SACAT ordered representatives], Team Leader - Gary Campbell and PEO - Tom Correll discussed the tax debt directly with [X].

Public Trustee has had difficulties engaging directly with [X] over the time we have been [their] administrator. As demonstrated in the copies of the emails we have previously sent you, our communications have been through [X's] social workers from DSCL as provided for in the SACAT order.

[X] met with Personal Estates Officer, Tom Correll and Team Leader, Gary Campbell in December 2015 at the Disability SA office at Mount Barker. During this meeting, the tax debt was explained and there was discussion about the need for budgetary restraint on [X's] part.

Following the meeting, Public Trustee did not hear directly from [X]. All correspondence thereafter was arranged through [X's] social workers or [Z] ([X's] brother).

101. In regard to the agency's submissions that emails were provided to my investigation which make reference to the complainant's social workers being advised of the debt, I note that the earliest email provided which makes reference to the debt is dated 22 September 2015. The email states:

...I expect a significant 14/15 FY tax bill soon which will be added to [the complainant's] already significant tax debt, and the tax office applies interest to this debt at around 9%.

102. I also note that I have inspected the copies of correspondence provided by the agency, and whilst they indicate that correspondence occurred primarily through the complainant's social workers, there are also direct letters and emails to the complainant

since June 2016. Therefore, I am not persuaded that the agency had no ability to contact the complainant directly to discuss the debt as it continued to accrue from 2011.

103. I am not convinced that the emails infer that the tax debt, nor strategies to reduce the debt was discussed with the complainant's social workers. However, whilst such discussions may have been useful, it would be obstructive to the agency's duties if they were required to consult with a person, or their representatives, on all matters relating to their finances.
104. I do not consider on balance that the agency acted unreasonably in all the circumstances as the agency is not obliged to communicate such matters to the complainant.
105. Further, I do not consider the complainant's submissions in response to my provisional report, in regard to advice that was allegedly given by the agency to the complainant's liaison persons, are of particular relevance to my findings above. As stated above, it does appear the agency was able to communicate with the complainant's liaison persons at some point in time, however, I do not consider the agency was obliged to have such discussions.

### **Opinion**

106. In light of the above, my view is that the agency did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

### **Whether the Public Trustee inappropriately failed to provide the complainant with a copy of bills**

107. The agency concedes that copies of bills were not provided to the complainant until they were requested on 9 September 2016 at a SACAT hearing, at which time they were provided.
108. I note that the agency has explained that it is not usual practice for bills to be provided to individuals, and I reiterate my comments above that I consider it would be obstructive to the agency's duties if they were required to consult with a person, or their representatives, on all matters relating to their finances
109. The agency has agreed to investigate the incidents of late payments, and has agreed to reimburse the complainant for any late-payment fees accrued as a result of the agency's failure to make payments on time.

### **Opinion**

110. In light of the above, my view is that having regard to the circumstances of the case, continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

### **Whether the Public Trustee inappropriately managed the complainant's child support liability**

111. I refer to the agency's response in regard to their attempts to have the complainant's child support payments reassessed:

[X] currently makes Child Support Agency (CSA) payments for three children under the age of 18 years.

Public Trustee contacted CSA in 2015 and was advised that the figures held by CSA (incomes, care ratios etc), that the assessed liability were accurate.

Public Trustee subsequently advised [X's] social worker of the outcome of this correspondence, and requested that if any changes of circumstances should occur, [X] was to notify CSA.

Public Trustee has not received any information that suggests [X's] obligations or circumstances, with regard to child support, have changed.

112. My investigation made enquiries with the Department of Human Services (DHS) in regard to whether debts to the ATO would be considered when assessing child support payments. DHS advised that such debts could be considered, and that a person could submit a hardship application if they were unable to meet their child support payments.<sup>5</sup>
113. My investigation further enquired as to how often payments were recalculated, and who was responsible for causing a reassessment to be made. DHS advised that the onus was on the complainant to apply for a reassessment and to put forward any relevant changes to their circumstances. An automatic reassessment would only usually apply where the complainant's income was shown to have increased.
114. As the agency submits that it has not contacted the CSA since 2015, and did not clarify whether it had submitted a hardship application, I am not satisfied that the agency has made sufficient attempts to appropriately manage the complainant's child support liability.
115. I also do not consider it was appropriate for the agency to place responsibility on the complainant to notify the CSA of any changes to their circumstances, as this would appear to be within the scope of the agency's duties as Public Trustee.

### **Opinion**

116. In light of the above, my view is that the agency's failure to lodge a hardship application in light of the tax debt was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.
117. In my provisional report, I advised both parties that I intended to make a recommendation under section 25(2) of the Ombudsman Act that the agency consider whether it is appropriate to lodge a hardship application to the CSA on behalf of the complainant.
118. However, in light of the fact that the Public Trustee is no longer the administrator of the complainant's affairs, I no longer intend to make this recommendation as the agency is no longer authorised to submit the application on the complainant's behalf.
119. Although the complainant requested that I reconsider making a recommendation in regard to this finding, my views have not changed. As the agency no longer has the power to make decisions on the complainant's behalf, I do not consider making a specific recommendation in relation to child support payments as originally proposed would provide any meaningful outcome.

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<sup>5</sup> Telephone advice as at 13 December 2016.

120. I also consider that the general recommendation I have made above in relation to the development and implementation of a guideline for ceasing payments to the Australian Taxation Office, sufficiently covers consideration of matters such as child support payments.

**Whether the Public Trustee acted reasonably in relation to a formal valuation of the complainant's home**

121. The agency submits that a valuation of the complainant's home became necessary at the time a replacement hot water system was required, as the installation was expected to cause the complainant to come into a negative account balance. As such, the agency submits that a valuation of the property was required so that the agency could explore the possibility of refinancing or selling the complainant's property.
122. The complainant submits that they felt under duress when they eventually agreed to the valuation, as by that stage they had been without hot water for 5 days and the agency had indicated that the hot water system would not be replaced without first obtaining the valuation.
123. The agency further submits that the valuation was not a condition of the hot water system replacement, and I am inclined to accept the agency's submission that it was requested merely as an attempt to explore further options to address the complainant's negative balance, which would have been significantly exacerbated by the cost of the hot water system.
124. Whilst I do not necessarily agree that the valuation would have immediately resolved the issue of the negative balance, and in fact would have placed the complainant at a further negative balance as it was paid for by them, I do not consider the decision was unreasonable.
125. It is apparent the agency has had difficulties in meeting all of the complainant's day to day expenses, and as a result, it was not unreasonable that selling the complainant's home was considered.

**Opinion**

126. In light of the above, my view is that the agency did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

**Whether the Public Trustee charged excessive income commission fees, and failed to properly explain the reasons for excess fees.**

127. The complainant submits that agency charged them approximately \$458.00 per month in fees associated with the management of their annual income of \$77,000.
128. In light of the agency's submissions detailed in paragraph 52, I am persuaded that the complainant's calculations are incorrect. The agency has demonstrated that fees charged to the complainant have been consistently less than the prescribed 5.5% of the complainant's annual income.

## Opinion

129. In light of the above, my view is that the agency did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act

### Whether the Public Trustee failed to conduct a formal review

130. I refer to the agency's response in regard to the complainant's concerns about a lack of a formal review of their letter of complaint dated 24 May 2016:

I asked the Manager of Personal Estates and the Manager Taxation Services in Public Trustee to investigate the matter and report to Ms Frankie Anderson, General Manager Customer Services.

A briefing was prepared by the relevant team leaders (both past and present) and further enquiries were made by Ms Anderson into details of [X's] file.

I am satisfied that the consideration of [X's] complaint of May 2016, was thorough and independent as neither Ms. Anderson or I had not previously had any direct dealings with [X's] estate.

131. I have viewed the agency's '*Compliments and Complaint's Procedure*' (**the procedure**), which sets out how the agency deals with complaints. The procedure is of significant length, therefore I have not set it out in full, however, it appears that key elements of the complaints process have been followed. For example, the procedure states that:

It may be appropriate for the Manager to undertake a full review of the estate to ensure objectivity and an unbiased response to the complaint.<sup>6</sup>

...Manager to meet with General Manager or the Public Trustee to brief and to provide and discuss final response. It may be appropriate to meet with the General Manager in the first instance to review the proposed response.<sup>7</sup>

132. In light of the agency's submissions in regard to the review that was conducted of the complainant's complaint, which I consider to be consistent with the procedure, I am persuaded by the agency's submission that a satisfactory review of the complaint was conducted.
133. However, as a comment I note that the letter dated 8 June 2016 in response to the complainant could have provided more detail as to how the debt had accrued. In specific reference the accrual of debt, the letter merely states that:

...From 30 June 2012 to 27 May 2016, you accumulated an unpaid tax debt of \$35,226.88.

A payment plan was entered in to with the Australian Taxation Office, and the amount of instalments increased several times, but the tax debt continued to grow faster than the payments.

I do not consider this response adequately explains the agency's actions in ceasing PAYG instalments, which is the underlying reason for how the debt accrued.

134. I also consider it would have been helpful for the agency to have explained how the complainant's complaint had been reviewed, and an outline of the agency's policy in regard to reviewing complaints.

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<sup>6</sup> Public Trustee, '*Compliments and Complaint's Procedure*', page 5, last updated August 2015.

<sup>7</sup> Public Trustee, '*Compliments and Complaint's Procedure*', page 19, last updated August 2015.

## Opinion

135. In light of the above, my view is that the agency did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act

### **Whether the Public Trustee inappropriately managed the complainant's tax liability by failing to consider lodging an Application for Release**

136. I have viewed the letter dated 2 December 2016 from the ATO to the complainant, which states that:

The South Australian Public Trustee Office has informed us that, under an Administration Order pursuant to the Guardianship and Administration Act of 1993 they act as a financial administrator for your financial affairs.

To comply with the Administrative Order your application for release must be lodged on your behalf by the Public Trustee.

137. I have also viewed the email dated 14 November 2016 from an ATO officer to the agency, advising the Public Trustee that the ATO would be:

...informing [X] that we [the ATO] cannot accept [their] release application as the Public Trustee has control of [their] financial affairs and all financial matters have to go through them.

138. It is clear from both the letter and the email that the complainant's Application for Release had not been denied, and I find that the agency's characterisation of it as such was incorrect. However, I do not consider that there is any evidence before me that the agency intended to deliberately mislead my Office.
139. In light of this oversight, the issue of relevance for me to consider is whether the agency should have considered making an application on the complainant's behalf at an earlier date.
140. As it is clear the agency did not consider the complainant had the ability to meet their obligations to pay their taxes, as demonstrated through its actions in ceasing PAYG instalments, I consider the agency should have considered submitting an Application for Release on the grounds of hardship.

## Opinion

141. In light of the above, my view is that the agency's failure to consider lodging Application for Release was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.
142. I do not intend to make any recommendations in relation to this finding, as it appears to have been a consideration that was relevant to the complainant's individual circumstances at the time. I consider it was an isolated error and not a systemic issue.
143. However, I refer to my earlier recommendation which notes that a decision to cease PAYG instalments should only be made:

...in the event that all other avenues for meeting the liability have been explored and exhausted

144. I am of the view that consideration as to whether an Application for Release should be lodged is relevant to that recommendation, as it is a reasonable avenue to explore in the event that a person is unable to pay their existing or future tax liabilities.

## **Summary and Recommendations**

In light of the above, my views are as follows:

- by deciding to cease PAYG instalments on behalf of the complainant, the agency acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the agency:

1. Develop and implement a guideline for ceasing payments to the Australian Taxation Office, within two months from the date of the final report, which clearly sets out that such decisions can only be made:

- with the written authority of a delegate
- only in exceptional and temporary circumstances, and not as a general means of decreasing overall budget expenditure
- only in the event that all other avenues for meeting the liability have been explored and exhausted

I also consider:

- the agency's actions in regard to submitting the Code 21 was wrong within the meaning of section 25(1)(g) of the Ombudsman Act
- the agency's failure to lodge an Application for Release was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

I have not made recommendations in regard to these findings for the reasons already stated.

In regard to the other matters I have investigated, namely:

- whether the Public Trustee failed to explain to the complainant how their tax debt accumulated
- whether the Public Trustee inappropriately failed to provide the complainant with a copy of bills
- whether the Public Trustee acted reasonably in relation to a formal valuation of the complainant's home
- whether the Public Trustee charged excessive income commission fees, and failed to properly explain the reasons for excess fees
- whether the Public Trustee failed to conduct a formal review and appropriately respond to the complainant's complaint,

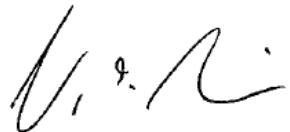
my view is that the agency did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

I have provided a copy of my report to the Honourable John Rau MP, Attorney-General in accordance with section 25(3) of the Ombudsman Act.

In accordance with section 25(4) of the Ombudsman Act the department should report to the Ombudsman by **7 July 2017** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines  
**SA OMBUDSMAN**

11 April 2017