

Report to the Inspector-General of Taxation on Taxpayer Rights

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1. Introduction

The Inspector-General of Taxation (IGT) is conducting a review under section 8(1) of the *Inspector-General of Taxation Act 2003* (IGT Act) of the rights a taxpayer has when dealing with the Australian Taxation Office (ATO)¹. In terms of that review the IGT has requested the School of Taxation and Business Law (incorporating ATAX) at the University of New South Wales, Australia (UNSW) to research the tax laws² and common law with a view to identifying for the IGT the rights that are currently available to taxpayers.

This report to the IGT is limited in a number of respects and is based on some fundamental understandings and assumptions. The first relevant assumption is the meaning of a ‘right’ that has been identified for the purposes of the research. For these purposes a ‘right’ is a right that is actionable in that it may be enforced in courts. In the process of this research project we have also identified a category of positions that taxpayers may find themselves in that we have termed ‘presumptions’. A ‘presumption’ is not enforceable in this way but describes a situation in which a taxpayer may believe that they will be treated in a particular way or afforded a particular indulgence that is weaker than a right but which they and the Australian community might regard as fair in the circumstances.

It should be noted that aside from the discussion of ‘presumptions’ above, before considering statutory entitlements to judicial review there is a brief reference to the concept referred to as a ‘legitimate expectation’ and whether any act or omission by the Commissioner could give rise to a legitimate expectation and the consequences that may flow from a failure to meet such an expectation. In this part of the report, reference is made to the *Public Governance, Performance and Accountability Act 2013* (PGPA) and the *Public Service Act 1999* (PSA).

Subject to this, the first limitation is that the report does not consider those statutes that afford taxpayers certain entitlements such as tax offsets or deductions or the ability to choose some or other method of calculating income or a deduction. The second limitation is that the report does not consider all cases where the Commissioner is granted discretion to alleviate the

¹ References to the ATO or Commissioner of Taxation (the Commissioner) are used interchangeably throughout unless the context suggests otherwise.

² These are the laws administered by the Commissioner including Fringe Benefits Tax (FBT); Goods and Services Tax (GST), Superannuation and Income Tax.

effects of the tax laws either partially or in whole.³ Neither of these establishes rights of taxpayers as envisaged by the IGT.

Thirdly there are various statutes that the Commissioner administers or which may impact on how he deals with a taxpayer. Most of these statutes do not grant taxpayers any rights in their capacity as taxpayer and are not referred to further. Examples of such statutes include the *Income Tax Assessment Act 1997*; *Fringe Benefits Tax Act 1986*; *Fringe Benefits Tax Assessment Act 1986*; and *Crimes (Taxation Offences) Act 1980*. Some of the tax laws impose criminal sanctions on taxpayers. Other than to furnish a brief over view of the nature of the criminal process these are not considered although Appendix A describes the offences and penalties that can be imposed under the *Taxation Administration Act 1953* (TAA).

A fourth limitation is that the report does not directly consider any customs or excise laws or rights that may arise from the administration of these imposts. Finally, as the issues covered in this report including (but not limited to): common law rights of taxpayers, estoppel, the *Administrative Appeals (Judicial Review) Act 1977*, *Judiciary Act 1903*, the TAA are topics of significant length and complexity, and on which there are vast bodies of case law, this report can of necessity only deal with them succinctly as it is impossible to cover all aspects or all of the cases on any one aspect in this report.⁴ The report reviews some of the leading cases that have bearing on the matters considered. This approach best meets the purposes of the report and provides a sound and adequate basis for evaluation.

The report is based on sundry sources. In support of some of its conclusions, reference is from time to time made to extracts from cases. Where the extract is clear in communicating the concept sought to be conveyed, no further comment is made in relation to it.

The section headed ‘Collection and recovery of tax-related liabilities and other amounts’ contains references to the *Corporations Act 2001* and insolvency issues albeit under the general heading of the TAA.

This report deals separately with each of the tax laws which may grant taxpayers’ rights in response to any act or omission by the Commissioner and then turns to the common-law and

³ Examples include the discretion of the Commissioner to remit all or part of a penalty imposed or not to collect all or part of a tax debt.

⁴ See for example John Bevacqua, Taxpayer rights to compensation for tax office mistakes, CCH and ATTA Doctoral series No3, *CCH Australia Ltd* (Bevacqua); Duncan Bentley, A Model of taxpayers rights as a guide to best practice in tax administration, Thesis presented for the degree of PhD at Bond University.

other statutes. The order in which these matters are considered appears from the table of contents to this report. A summary of the rights of taxpayers and the section numbers in which they are considered appear from the table immediately after this section. Even though something is described as a right in the table below, no comment is passed on a taxpayer's prospects of success in launching proceedings to enforce such rights. Such comments appear in the body of this report.

Table of Taxpayer Rights and Presumptions

Right	Effect/Consequences	Legal Basis	Discussion in Report
Defend criminal charges arising from a breach of the tax laws. As part of this right the accused is generally entitled to the presumption of innocence.	To defend criminal proceedings.	Common law. Section 2A TAA incorporates Chapter 2 of the <i>Criminal Code</i> to all offences under the TAA.	Section 2.
Challenge (most) assessments, determinations, notices and decisions made by the Commissioner of Taxation.	Challenge via the Administrative Appeals Tribunal (AAT) and/or Federal Courts. Incorporated within this right are a number of ancillary rights. An example is the ability of a taxpayer to approach the Administrative Appeals Tribunal for relief if the taxpayer has noted an objection to an assessment out of time and the Commissioner has not agreed to accept it as being in time.	Part IVC TAA.	Section 3.1.
Taxpayers may seek an amendment of their income tax return.	To ensure an assessment is issued on the correct information.	Section 170 <i>Income Tax Assessment Act</i> 1936.	Section 3.1

Individual taxpayers are entitled to represent themselves in any proceedings before any court or tribunal.	Individual taxpayer's representation in challenges to acts or omissions of the Commissioner.	Common-law.	Section 3.1.
Challenge the issue/failure to issue a private ruling by the Commissioner of Taxation.	Challenge via the AAT or Federal Court the ruling or failure to provide a ruling.	Part IVC TAA.	Section 3.2.
Appeal an AAT or Federal Court decision.	To overturn the decision of the tribunal or court of first instance.	Part IVC TAA.	Section 3.3.
Request a referral on a question of law to the full bench of the Federal Court.	Obtain ruling on question of law before AAT determines matter.	Section 44 <i>Administrative Appeals Tribunal Act 1975.</i>	Section 3.4.
Request a variation or revocation of a departure prohibition order (DPO).	Variation or revocation of such orders.	Section 14T TAA.	Section 3.5.
Where a DPO has been issued request a departure authorisation certificate.	To permit the taxpayer to leave Australia for a limited time.	Section 14U TAA.	Section 3.5.
Challenge the issue of a departure prohibition order.	Challenge via the Federal Court or State Supreme Courts.	Section 14V TAA.	Section 3.5.
A taxpayer who had withholding payments deducted from amounts due to it is entitled to credits by the Commissioner for the sums withheld irrespective of whether the paying entity has	Credits on liability for tax.	Schedule One to the TAA- section 18-15.	Section 3.6.

accounted to the Commissioner for these monies.			
If more than a taxpayer's assessed tax liability has been withheld the Commissioner must refund the excess.	To ensure correct tax collected.	Schedule One to the TAA.	Section 3.6.
If the fact of the overpayment is discovered early the taxpayer may obtain a refund from the entity that withheld the amount.	Obtain refund for excess withholding payment withheld.	Schedule One to the TAA- sections 18-(65-80).	Section 3.6.
The Commissioner must provide taxpayers with a tax receipt for an income year.	To enable taxpayers to know how tax assessed to that taxpayer for the income year is notionally used to finance different categories of Commonwealth government expenditure.	Section 70-5 TAA.	Section 3.7.
Object to an excess concessional contribution determination under Part IVC.	Overtake such a determination either in whole or in part.	Section 97-10 TAA.	Section 3.8.
Elect to pay an excess concessional contribution determination from a superannuation interest.	Payment of an excess concessional contribution determination.	Section 96-5(1) TAA.	Section 3.8.
Request an assessment of an indirect tax.	Obtain assessment to enable challenge.	Section 105-20 TAA.	Section 3.9.
Demand an assessment if no assessment is issued 6 months after return submitted.	Obtain an assessment.	Section 155-30 TAA.	Section 3.10.

The Commissioner may not amend an assessment after the period for review as elapsed.	Finality of assessment.	Section 155-40 to 155-60. TAA.	Section 3.10.
A taxpayer may extend the time period for review if requested by the Commissioner.	To afford Commissioner further time to assess taxpayer.	Section 155-35 TAA.	Section 3.10.
A garnishee notice may be challenged under the <i>Administrative Decisions (Judicial Review) Act 1977</i> (AD(JR)A) or <i>Judiciary Act 1903</i> (JA) or Constitution.	Set aside garnishee.	Various statutes mentioned in first column.	Section 3.11.
The Commissioner may recover a debt owing under an assessment notwithstanding proceedings in AAT or Federal Court are in progress. A taxpayer may apply for a stay of execution on grounds of serious hardship.	Stay execution.	Sections 14 ZZM and 14 ZZR TAA.	Sections 3.1 and 3.11.
Discharge from bankruptcy (subject to an exception relating to secured debts) operates to release a taxpayer from all debts.	Release from debts.	Section 153 <i>Bankruptcy Act 1966</i> .	Section 3.11.
If bankruptcy deprives a taxpayer the right to challenge an assessment a stay of those proceedings may be granted.	Stay of bankruptcy proceedings.	Common-law.	Section 3.11.
Right to review a demand for a security deposit under AD(JR)A or JA or	Set aside requirement for security.	Various statutes mentioned in	Section 3.12.

Constitution.		first column.	
Challenge an assessment for an administrative penalty under Part IVC.	Set aside penalty.	Section 298-30 TAA.	Section 3.13.
Apply to remit a penalty.	Reduce penalty either in whole or in part.	Section 298-20 TAA.	Section 3.13.
Challenge a refusal to remit either in whole or in part a penalty if amount payable after refusal is \$360 (2 penalty units) or greater.	Challenge refusal to remit penalty.	Section 298-20 TAA.	Section 3.13.
On an inspection under section 353-15 TAA ATO officers may not remove original documents.	ATO officers may only make copies of documents.	Section 353-15 TAA.	Section 3.14.
The individual entering on premises under section 353-15 on behalf of the Commissioner must produce proof of authority on request.	Must have authority to enter on premises.	Section 353-15 TAA.	Section 3.14.
Taxpayers have the right to claim legal professional privilege when responding to requests for information or documents by the Commissioner under sections 353-10 and 353-15 TAA.	Right to claim legal professional privilege.	Common-law.	Section 3.14.
The exercise of powers under sections 353-10 and 353-15 are subject to review under the AD(JR)A or JA or Constitution.	Conduct of Commissioner subject to judicial review.	AD(JR)A; JA and Constitution.	Section 3.14.
Notices to give evidence under	To ensure party giving	Section 353-10	Section 3.14.

section 353-10 must specify the entity against which information is sought, give a reasonable time and place for the giving of evidence and the notice must specify the nature of the evidence sought with clarity.	evidence knows what's required.	TAA and common-law.	
A taxpayer is obliged to comply with a notice under section 353-(10-15) only to the extent they are able to do so.	Comply with notices.	Common-law.	Section 3.14.
Where information is held offshore and a taxpayer does not comply with a notice under section 264A ITAA 36, the information contained in such documents may not be used in challenge proceedings, other than with the consent of the Commissioner, unless this prohibition would result in an incontestable tax.	May not have an incontestable tax.	Section 264A (13) ITAA 36.	Section 3.14.
Personal taxpayer information, including tax file numbers are secret and may only be disclosed by the ATO in limited circumstances.	Right of taxpayers to have affairs kept confidential.	Division 355 TAA, <i>Privacy Act 1988</i> .	Section 3.15 and section 6.
Rulings whether public, private or oral are binding on the Commissioner and if taxpayers bring themselves within their terms taxpayers	Taxpayers can arrange tax affairs in terms of rulings.	Divisions 357 to 360 TAA.	Section 3.16.

are entitled to be assessed as provided by such ruling.			
Taxpayers are not obliged to accept the terms of a ruling and may apply their own interpretation of the law if they are of the view that the Commissioner's view is incorrect.	Taxpayers can elect whether to accept a ruling as correct.	Divisions 357 to 360 TAA.	Section 3.16.
Time periods are specified as to when the Commissioner may amend an assessment.	To bring finality to assessment process.	Section 170 <i>Income Tax Assessment Act</i> 1936.	Section 4.
Taxpayers are entitled to interest on certain over and pre-paid amounts and to be compensated for a payment made under a mistake of fact or law.	To ensure taxpayers are compensated for the use of their money by ATO.	<i>Taxation (Interest on Overpayments and Early Payments) Act</i> 1983.	Section 5 and 14.
Taxpayers have the right to access government documents.	To ensure knowledge of how government and its departments operate.	<i>Freedom of Information Act</i> 1982 (FOI).	Section 6.
Taxpayers can request a notation or amendment on information held by the Commissioner which they believe to be incomplete or incorrect.	To ensure correct information is held.	Section 48 FOI.	Section 6.
If a request for information has been refused other than by the principal officer of the agency or the responsible Minister, the taxpayer may apply in writing	Request an internal review of a refusal to furnish information.	Section 54 and 54B FOI.	Section 6.

for an internal review of that decision.			
If refusal to grant access to information or on internal review the decision is affirmed a taxpayer may request an Information Commissioner Review (ICR).	To ensure review of decision.	Section 54 FOI.	Section 6.
During an ICR a taxpayer may request the Information Commissioner to hold a hearing.	To obtain a ruling on access to information.	Section 55B FOI.	Section 6.
Taxpayer can appeal a decision of the Information Commissioner to the Federal Court on question of law or take it on review to the AAT. The AAT decision may be appealed on a question of law.	Appeal review finding.	Sections 56, 57 FOI.	Section 6.
If the ATO breach the privacy principles a taxpayer may complain to the Information Commissioner or Inspector-General of Taxation (IGT).	Remedies for breach of privacy principles under <i>Privacy Act 1988</i> .	Section 36 <i>Privacy Act 1988</i> .	Section 7.
Taxpayer can commence proceedings in Federal Court to enforce a determination of Information Commissioner.	Enforce determination.	Section 55A <i>Privacy Act 1988</i> .	Section 7.
Taxpayers may lodge complaint about treatment by ATO other than on assessments to IGT.	Ensure treated as required by tax laws.	<i>Inspector-General of Taxation Act 2003</i> .	Section 8.
If a taxpayer follows in good	Remedies for following	Section 361-5	Section 9.2.

faith non-binding advice the taxpayer is not liable to pay the general interest or the shortfall interest charges.	non-binding advice.	TAA.	
A taxpayer is entitled to be treated procedurally fairly in all dealings with the Commissioner.	To obtain procedurally fair treatment from ATO.	Common-law.	Section 9.2.
Object (subject to exceptions set out in the <i>Administrative Decisions (Judicial Review) Act</i>) to administrative decisions made ‘under an enactment.’	A statutory route by which to challenge qualifying decisions made by the administrator via an application to the Federal Court or Federal Magistrates’ Court.	<i>Administrative Decisions (Judicial Review) Act</i> AD(JR)A).	Section 9.3.
Right to obtain reasons for a decision.	To understand the basis and grounds of a decision.	Section 13 AD(JR)A.	Section 9.3.7.
Challenge constitutional validity of a tax law.	To set aside an invalid tax law.	Common-law read with sections 51, 53 and 55 of the Constitution.	Section 9.4.1.
Right to apply to High Court for relief against Commissioner for wrongful conduct.	Review of conduct of Commissioner.	Section 75 of the Constitution.	Section 9.4.2.
Right to apply to Federal Court for wrongful conduct of Commissioner.	Review of conduct of Commissioner.	Section 39B <i>Judiciary Act</i> 1903.	Section 9.5.
Right to know that any discretion exercised by Commissioner will be exercised in the same manner	To ensure certainty of conduct of Commissioner.	Common-law.	Section 10.1.

for all taxpayers with identical characteristics.			
Taxpayers are entitled to reasons for the manner in which discretion is exercised by the Commissioner.	To know the basis for the exercise of a discretion.	Common-law.	Section 10.1.
ATO staff need to ensure they do not act in such a way that causes damage to a taxpayer's person or property whilst administering the tax laws.	To grant a claim to a taxpayer where ATO staff, in the actual or ostensible pursuit of the ATO's interests cause physical damage to a taxpayer's property or person.	Common-law.	Section 10.3.
Taxpayers have the right to seek compensation under the Scheme for Compensation for Detriment caused by Defective Administration.	Compensation for defective administration.	Executive power of the Commonwealth under section 61 of the Constitution and the <i>Public Governance, Performance and Accountability Act 2013</i> .	Section 10.4.1
Taxpayers have the right to claim damages for pure economic loss.	To ensure taxpayers are compensated for loss due to wrongful acts by the ATO.	Common-law.	Section 10.4.2
Taxpayers have right to apply for summary judgment in the Federal court.	To shorten proceedings.	Section 31(A) <i>Federal Court of Australia Act</i>	Section 11.1.

		1976; Federal Court Rule 26.01.	
If a Mareva order is granted against a taxpayer he/she is entitled to an undertaking from the Commissioner as to damages.	To prevent abuse of process.	Common-law.	Section 11.7.
A taxpayer is entitled to accept that the Commissioner will comply with any agreement concluded between the parties.	Prevent breaches of agreements.	Common-law.	Section 12.
If Commissioner enters into an agreement with a taxpayer and that agreement is made an order of court the Commissioner cannot act contrary to that agreement unless the judgment is set aside.	To prevent unconscionable conduct by Commissioner.	Common-law.	Section 13.
If a judgment is granted on an issue between the Commissioner and a taxpayer, the taxpayer can rely on the principle of res judicata in relation to those issues determined by the court.	To prevent multiple cases on the same issues.	Common-law.	Section 13.
The common law protects taxpayer litigants where the State is a party.	To ensure the Commissioner does not take unfair advantage of limited resources of taxpayers.	Common-law.	Section 16.
Presumptions by Taxpayers			

Under certain circumstances an administrative penalty may be reduced by between 20 and 100% if certain criteria are met.	Reduce administrative penalties.	Divisions 284-298 TAA.	Section 3.13.
Taxpayers will be treated in terms of the taxpayer's charter and other forms of non-binding advice.	To be treated fairly.	Common-law.	Section 9.2.
The Commissioner will act in such a way so as to recognise a taxpayer's human rights.	To ensure taxpayer is treated fairly.	<i>Australian Human Rights Commission Act 1986</i> and common-law.	Section 15.
Taxpayers have a presumption they will be treated in terms of the model litigant rules.	To be treated fairly when litigating against the ATO.	Section 55ZF of JA read with Appendix B to Legal Services Directions 2005 - F2006L00320, [2].	Section 16.

2. Criminal Offences⁵

Part 3 of the TAA prescribes certain criminal offences⁶ arising from breaches of the tax laws. Taxpayers have the right to defend themselves against any criminal charges brought against them.

A principle of criminal law is that a person is innocent until proven guilty. Lacey refers to this as the jewel in the crown of criminal law doctrine.⁷ The presumption of innocence is almost universally recognised. The criminal trial is usually an adversarial proceeding brought by the Crown against the accused. The Crown must prove its case. A defendant cannot be compelled to give evidence in defence of a plea of not guilty. The prosecution must prove the guilt of the accused by evidence other than the compulsory answers or assistance of the accused. The onus of proving guilt is generally on the Crown and does not shift to the accused.⁸

The onus on the Crown is generally to prove beyond a reasonable doubt⁹ (the criminal standard) that all the elements of the offence are present. Normally a criminal offence requires both the commission of the crime together with a mental element. The *Criminal Code Act 1995* (Cth) (*Criminal Code*) refers to the criminal act and necessary intent to commit a crime as the physical and mental elements of a crime.¹⁰ Chapter 2 of the *Criminal Code* applies to all offences against the TAA: section 2A. A number of taxation offences, however, are either strict or absolute liability offences where the Crown does not have to prove the fault element of an offence.¹¹

⁵ This section, with some minor variations, is an extract from Kalmen Datt, *A critical evaluation of how aspects of the tax system in Australia are administered and their impact on corporations and directors*, (Australian Tax Research Foundation) Research Study 49, 2015.

⁶ Appendix A sets out these various offences and the penalties that may be imposed. This appendix is an extract from Kalmen Datt *ibid*.

⁷ Nicola Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (Oxford University Press, (2004) 21.

⁸ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 [17], [30] (McHugh J).

⁹ 'Proof beyond reasonable doubt is a very high standard to meet. This test per Kos J in *R v Rowley and Skinner* (No 2) (2012) 25 NZTC ¶20-133 is the following:

I must be sure the accused is guilty. If I have an honest and reasonable uncertainty left in my mind about the guilt of the accused on a count, after thorough and impartial consideration given to all the evidence, I must enter a verdict of not guilty on that count.

¹⁰ In serious cases of tax evasion, general Commonwealth fraud and money laundering offences are brought pursuant to the *Criminal Code*.

¹¹ With absolute liability, there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact is unavailable. With strict liability, there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact is available: sections 6.1–6.2 of the *Criminal Code*.

With some offences the legislature has reversed the onus of proof, effectively deeming guilt unless the accused shows on a balance of probabilities¹² that he/she is not guilty of the offence. An example is section 8Y TAA which inter alia provides that if a corporation commits a tax offence a director of that corporation is deemed to have committed that offence simply by virtue of the office that person holds. It is difficult to discharge this onus. The courts have variously said that it is difficult to prove a negative,¹³ that it is notoriously difficult to prove a negative¹⁴ and that the forensic difficulty of proving a negative is well known.¹⁵ That the onus can be discharged on a balance of probabilities (the civil standard) makes no difference to this basic fact.

In addition to the offences mentioned in Appendix A, sections 8WA to 8WC deal with offences relating to the use of tax file numbers, while section 8X refers to unauthorised access to taxation records.

Some of the offences in Appendix A are Prescribed Taxation Offences (PTOs). These offences do not carry the possibility of a prison term on conviction. All taxation offences committed by a corporation are PTOs.¹⁶ In a prosecution for a PTO, the court may award costs against any party.¹⁷

A prosecution for a taxation offence¹⁸ may be commenced at any time.¹⁹ A successful prosecution does not relieve the taxpayer of the liability to pay any tax, duty or charge that would otherwise be payable.²⁰ A claim for a civil penalty under the TAA is not the prosecution of a taxation offence.²¹

¹² In *Bai v FCT* [2015] FCA 973 [31] Rares J described this test as follows:

There is a substantive difference in requiring the exclusion of a possibility and the conventional civil onus of proof of establishing a matter on the balance of probabilities. It is one thing not to be satisfied about a matter because, weighing all the evidence, the decision-maker is not persuaded that it is more likely than not that a fact existed or did not exist, and quite another thing to require the proof of that matter by excluding all other possibilities. The latter is akin to applying the criminal onus of proof beyond reasonable doubt.

¹³ *Vaughan v The King* (1938) 61 CLR 8.

¹⁴ *Cassell v The Queen* (2000) 201 CLR 189 [66].

¹⁵ *A v NSW* (2007) 233 ALR 584 [60].

¹⁶ Section 8A.

¹⁷ Section 8ZN.

¹⁸ A 'taxation offence' means an offence against a taxation law, or an offence against s 6 of the Crimes Act or sections 11.1, 11.4 or 11.5 of the *Criminal Code*, being an offence that relates to an offence against a taxation law: section 8A.

¹⁹ Section 8ZB.

²⁰ Section 8ZH.

²¹ *Christis v DFC of T* 2011 ATC ¶20–285 [14].

If a taxpayer is liable to pay by way of penalty an amount under a taxation law because of an act or omission of that taxpayer and a prosecution is instituted against that person for a taxation offence constituted by the act or omission; then (whether or not the prosecution is withdrawn) the person is not liable to pay that penalty. Any such amount paid, or applied by the Commissioner, in total or partial discharge of that liability is to be refunded, or applied by the Commissioner in total or partial discharge of another tax liability of the taxpayer.²²

If found guilty of any offence, in addition to any sentence that might be imposed, the operation of sections 19B or 21B *Crimes Act 1914 (Crimes Act)* or the *Proceeds of Crime Act 2002 (Proceeds Act)* may come into effect.²³ A brief discussion of these provisions follows.²⁴

Section 19B allows a court to discharge a person charged with a federal offence²⁵ without proceeding to conviction, or to dismiss the charge under certain circumstances even though the offence is proved.²⁶ These orders can be made conditional on the accused giving reparation or restitution or paying compensation in respect of the offence. For example, a court could discharge an accused, but make the discharge conditional on the outstanding tax of the taxpayer being paid if such non-payment were part of the offence.

Under section 21B, if a person is convicted of a federal offence or an order is made under section 19B, that person can be ordered to make reparation to the Commonwealth or to a public authority under the Commonwealth²⁷ in respect of any loss suffered or any expense incurred by reason of the offence.²⁸ If a reparation order is made, it has the effect of a civil judgment in favour of the Commonwealth or that public authority, and is enforceable in all respects as a final judgment. This enables a court to order a taxpayer to pay to the Commonwealth any tax shortfall occasioned by the offence.

²² Section 8 ZE.

²³ The predecessor of the *Proceeds Act* is the *Proceeds of Crime Act 1987 (Cth)*. The earlier Act was a conviction-based statute that required proof on the criminal standard. Although still on the statute book, it is only operative in relation to matters that commenced before January 2003.

²⁴ For an overview of how these statutes operate see, Denis Barlin and Michael Bennet, 'Directors Duties—The Tax Perspective' (Paper delivered at the Law Society of New South Wales Young Lawyers' CLE, Sydney, 2011).

²⁵ A federal offence is an offence against the law of the Commonwealth: *Crimes Act* section 16.

²⁶ In *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 (7 September 2001), an order under section 19B was made on charges of failing to submit income tax returns in time.

²⁷ A public authority under the Commonwealth includes the ATO: *Crimes Act* section 3.

²⁸ The court can also make awards in favour of any person, by way of money payment or otherwise, in respect of any loss suffered as a result of the offence: *Crimes Act* section 21B.

A reparation order is discretionary and forms part of the sentencing process. The loss for which reparation is made may not be difficult to prove. It is sufficient to show that the state has been deprived of money that it would have been paid had it not been for the commission of the offence.²⁹

The *Proceeds Act* has four types of recovery orders: forfeiture, automatic forfeiture, pecuniary penalty and literary proceeds. Forfeiture and automatic forfeiture orders are used to recover assets that are the proceeds of or were used in a crime. Pecuniary penalty orders are awarded against entities for the benefits derived from crime, and literary proceeds orders are used to recover any profits made through the commercial exploitation of criminal activity. The standard of proof is on a balance of probabilities. The *Proceeds Act* also provides for an order, described as an unexplained wealth order, requiring a person to pay an amount of their total wealth, calculated by reference to that which they have been unable to prove is not derived from committing the offence in question (again, a reverse onus).³⁰

For the *Proceeds Act* to apply, the offence alleged to have been committed must be either indictable or serious. Serious offences are those offences that are an indictable offence, punishable by imprisonment for three or more years, and that involve: unlawful conduct by a person that causes, or is intended to cause, a benefit to the value of at least \$10,000 for that person or another person; or unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least \$10,000. An indictable offence is one that may be dealt with on indictment, even if it may also be dealt with as a summary offence in some circumstances.³¹

The courts have applied the forfeiture measures under the *Proceeds of Crime Act 1987* (Cth) to taxation and corporate law offences.³² It seems likely that the courts will make similar forfeiture orders under the current *Proceeds Act*. The ATO is aware of its rights under both the *Crimes Act* and the *Proceeds Act*.³³ It is extremely difficult for an accused to be successful if a claim under the *Proceeds Act* is made against it.

²⁹ *Hookham v The Queen* (1994) 181 CLR 450 [7].

³⁰ *Proceeds Act* Part 2–6.

³¹ *Ibid* section 338.

³² Examples of how forfeiture measures were applied under this Act include: *Studman v DPP (Cth)* [2007] NSWCA 285; *DPP (Cth) v Dawson* [2006] WADC 55; *R v Gaitanis* [1998] VSCA 57; *Beard v The Queen* [2003] WASCA 262.

³³ ATO, *Fraudulently Altered or Created Income Tax Returns or Activity Statements*, PSLA 2008/11 (26 June 2008).

Finally, before leaving the topic of tax crimes it should be noted the Commissioner does not have the power to issue a search warrant (see section 3.14 below for discussion of the Commissioner's information gathering powers). Where the issue of a search warrant is necessary, the Commissioner can request the assistance of the Australian Federal Police. An ATO officer or other person may accompany and assist the police in the execution of the warrant.³⁴

The foregoing reflects the fact that taxpayers have the right to defend themselves in the event of criminal charges being laid due to an alleged breach of the tax laws. In defending themselves defendants are generally entitled to accept the prosecution must prove guilt by evidence other than the compulsory answers or assistance of the accused. Individual taxpayers may represent themselves in all courts and tribunals but it is advisable that legal representation be obtained.

This report now considers non-criminal provisions of the various tax laws that afford taxpayer's rights.

³⁴ Section 3G *Crimes Act* 1904; *Kennedy v Baker* [2004] FCA 562.

3. *Taxation Administration Act 1953 (TAA)*³⁵

3.1 Objection Decisions

Part IVC TAA deals with objections by taxpayers to assessments, decisions and determinations made by the Commissioner and objections to the content of or failure to make a private ruling. This section first considers assessments, decisions and determinations, and then turns to the question of private rulings. This report only considers those provisions that may afford taxpayers some rights.

Taxpayers dissatisfied³⁶ with an assessment, determination, notice or decision may object to it.³⁷ Such an objection is known as a ‘taxation objection’.³⁸ Various parts of the tax laws make provision for challenges under Part IVC. No such parts are specifically itemised in this report or the table appended thereto. If the legislation does not provide for a challenge under Part IVC³⁹ then some other remedy must be sought such as under the *Administrative Appeals (Judicial Review) Act 1977 (AD(JR)A)* reviewed in section 9.3 below.

There are time periods specified in the TAA for a taxpayer to notify the Commissioner of the challenge and the grounds for the challenge: section 14ZW. These provisions are complex and care must be taken to ensure one complies with the prescribed time limits. These limits are generally either 4 years or 2 years or 60 days depending on the nature of the taxation objection.

If a taxpayer notes its objection outside the time limits it may request the Commissioner to accept the objection as having been lodged in time. If the Commissioner declines to do so the taxpayer has the right to approach the Administrative Appeals Tribunal (AAT) to extend these periods.⁴⁰ In order to be successful the taxpayer should inter alia give an explanation for the delay and show that it has an arguable case on the merits of the objection.⁴¹ A taxpayer does not have to show that it will ultimately be successful in the proceedings before the AAT or Federal Court. There is no onus imposed on taxpayers in these applications but

³⁵ All references in this section are to the TAA.

³⁶ *CTC Resources NL v. Federal Commissioner of Taxation* (1994) 48 FCR 397 *CTC* discusses what is meant by dissatisfied.

³⁷ Section 14ZL (1).

³⁸ Section 14ZL (2).

³⁹ Examples of where Part IVC either applies or does not apply appears from CCH on line tax library [¶972-540] *Application of Pt IVC to taxation objections*.

⁴⁰ Section 14 ZX.

⁴¹ PS LA 2003/7 Taxation objections — late lodgement. The leading case on this is *Brown v FC of T* 99 ATC 4516; [1999] FCA 563.

the court must be satisfied that extending the time limits is the correct decision. Taxpayers are often successful in these types of applications.

Once the objection has been lodged and is either in time or deemed to be in time the Commissioner is obliged to give a decision as to whether he accepts or rejects the taxation objection either in part or in whole. This decision is referred to as an objection decision.⁴² When formulating the objection decision, the Commissioner is not limited to the taxpayer's grounds of objection. The Commissioner may consider any matters relevant to arrive at the correct tax position. If the Commissioner does not make a decision within the time periods specified in the legislation a taxpayer may cause a notice to be served on the Commissioner to make the objection decision within a period of 60 days.⁴³ If the Commissioner still fails to make a decision he is deemed to have rejected the objection in its entirety.⁴⁴ A taxpayer may withdraw its taxation objection at any time before the 60 day notice period has expired if the Commissioner has not responded.⁴⁵

Once the objection decision has been made the taxpayer has the right to approach either the Federal Court or AAT to adjudicate on its objection. Before proceedings are commenced both the AAT and the Courts usually require the parties to have first sought resolution of their disputes directly with the Tax Office. This may involve one or both of the following:

- attempts to resolve the dispute before the taxpayer makes a formal objection; or
- attempts to resolve the dispute after the taxpayer makes a formal objection.

If these attempts are unsuccessful and if the objection decision is a reviewable objection decision, the taxpayer may apply to the AAT for review of the decision or appeal to the Federal Court.⁴⁶ All objection decisions are reviewable objection decisions unless it is an ineligible income tax remission decision.⁴⁷ If the objection decision is not a reviewable objection decision then the taxpayer may only proceed in the Federal Court: section 14ZZ. In all cases where an objection decision is challenged:

⁴² Section 14 ZY.

⁴³ Section 14 ZYA.

⁴⁴ Ibid.

⁴⁵ *FCT v McGrouther* [2015] FCAFC 34.

⁴⁶ Section 14 ZZ.

⁴⁷ Section 14 ZQ. An ineligible income tax remission decision is defined in section 14 ZS.

- the taxpayer (the party who commences the proceedings) is referred to as the applicant and the Commissioner as the respondent; and
- the applicant (taxpayer) has the burden of proving, if the taxation decision concerned is an assessment, that the assessment is excessive or otherwise incorrect and what the assessment should have been, or in any other case-that the taxation decision should not have been made or should have been made differently.⁴⁸

In *Dalco*⁴⁹ the court discussed the term ‘excessive’ and found it refers to the amount of the assessment and not to any unauthorised step in the process of its calculation.

The onus referred to in the second bullet point above is a fundamental issue for taxpayers.⁵⁰ The Commissioner does not have to prove anything. It is the taxpayer that must prove its case on a balance of probabilities. There are provisions in the tax laws that provide, subject to a Part IVC challenge, that once an assessment is made they are deemed to be correct and any defect in process in making that assessment is irrelevant.⁵¹ Regardless of the type of assessment (default, ordinary or amended) the onus is on the taxpayer. The taxpayer carries this burden throughout any appeals from the AAT or Federal Court even if the appeals are initiated by the Commissioner.⁵²

Time periods are prescribed as to how soon after an objection decision is received before proceedings must be commenced. Where a challenge to an assessment is made the time period is 60 days for both the AAT and Federal Court.⁵³ If proceedings are commenced after the 60 day period the AAT has power to extend these periods.⁵⁴ Essentially the same criteria for a late notice of objection must be placed before the tribunal to enable it to make a decision. The Federal Court does not have power to extend this 60-day period.

Generally, it is only the taxpayer who has the right to make application to the AAT or Federal Court against an objection decision. Any other person ‘whose interests are affected by the decision’ being reviewed may apply in writing to the Tribunal to be made a party to the

⁴⁸ Section 14 ZZK and section 14 ZZO.

⁴⁹ *FCT v Dalco* (1990) 168 CLR 614.

⁵⁰ For an example of a case where the taxpayer did not discharge this onus see *Rigoli v Commissioner of Taxation* [2016] FCAFC 38.

⁵¹ Section 350-10; Section 175 *Income Tax Assessment Act* 1936 (ITAA 36).

⁵² *FCT v Mantle Traders Pty Ltd* (1980) 11 ATR 348.

⁵³ Section 14 ZZC read with section 29 *Administrative Appeals Tribunal Act* 1975 (AATA) for proceedings in the AAT. For proceedings in the Federal Court see section 14ZZN.

⁵⁴ Section 29 (7) and (8) AATA.

proceedings.⁵⁵ The Tribunal has discretion whether to allow the relevant person to become a party to the proceedings but it can only do so if it is satisfied that the applicant consents to that happening.⁵⁶ If the Tribunal decides that the interests of the person applying to be a party are affected by the decision being reviewed then its decision is final. However, if the Tribunal decides that the interests of that person are not so affected then that person may appeal to the Federal Court. This appeal is different to the right of appeal from the Tribunal to the Federal Court on an objection decision in that such appeal is limited to a question of law, whereas this appeal right is not so limited.

Both the AAT and Federal Court have their own rules once an objection decision comes before them for adjudication.⁵⁷

With challenges to objection decisions taxpayers should note:

- the grounds of objection relied on should be clearly set out;
- the AAT and Federal Court have the power to refer both the taxpayer and Commissioner to undertake some alternative dispute resolution (ADR) process before the matter comes before it as a hearing;⁵⁸
- before the parties can proceed in the Federal Court they must comply with the *Civil Disputes Resolution Act 2011* (CDRA). Section 4 CDRA requires the applicant (taxpayer) to demonstrate they have taken genuine steps to resolve the matter, and if they have not, they must specify reasons why not. In return, the respondent (Commissioner) who is given a copy of a genuine steps statement filed by the applicant, must state whether they agree with it or not;
- the proceedings in the AAT are less formal than in the Federal Court;
- the AAT cannot make an adverse cost order against the unsuccessful party whereas the Federal Court usually does;
- if an amended assessment is in dispute a taxpayer may challenge only that part of the assessment to which the amendment refers;⁵⁹

⁵⁵ See *Re Control Investment Pty Ltd* (1980) 3 ALD 74 for discussion of what is meant by ‘whose interests are affected by the decision.’

⁵⁶ Section 14 ZZD.

⁵⁷ See for example sections 14ZZA to 14 ZZJ of the TAA read with the provisions of the AATA for proceedings in the AAT. For proceedings in the Federal Court see *Federal Court of Australia Act 1976* and *The Federal Court Rules 2011*.

⁵⁸ The ADR options utilised at the AAT are: conferences, conciliation, mediation, case appraisal and neutral evaluation.

⁵⁹ Section 14 ZV.

- if a dispute proceeds to the AAT or Federal Court or even on appeal from an adverse finding by a tribunal or court of first instance the liability for the tax debt created by the disputed assessment is not suspended;⁶⁰
- notwithstanding the foregoing a court has the power to stay execution on that debt.⁶¹ This power is exercised sparingly.⁶² The AAT does not have this power.⁶³ Some personal hardship arising from execution has to be shown by the taxpayer (discussed in section 3.11 below). The practice of the Commissioner is generally to require payment of half the disputed amount unless he believes it expedient to require payment of the full amount pending the decision on the objection decision. If there is a finding in favour of the taxpayer by the AAT or Federal Court on the challenge the Commissioner will refund the monies paid together with interest;⁶⁴
- the AAT is not bound by the rules which govern the admissibility of evidence whereas the Federal Court is so bound; and
- the AAT is empowered to make a full administrative review of the objection decision, and in doing so may exercise afresh the powers and discretions of the Commissioner⁶⁵ but only for the purposes of making the decision under review. They do not include any powers and discretions which may be vested in the decision maker for some other purpose.⁶⁶

If after the process has commenced and with the leave of the tribunal or court hearing the matter a taxpayer may apply to amend its grounds of objection even if they require consideration of matters not considered by the Commissioner when first making an assessment.⁶⁷ The right to amend is not absolute and the court has discretion to refuse such an application. The closer to the trial the application is made the less likely the prospects of success.⁶⁸

⁶⁰ Section 14 ZZM and section 14 ZZR.

⁶¹ *DFC of T v Australian Machinery & Investment Co Pty Ltd* (1945) 8 ATD 133.

⁶² *Snow v DFC of T* 87 ATC 4078.

⁶³ Section 14ZZB TAA read with section 41 AATA; *Coshott and Commissioner of Taxation* [2013] AATA 822.

⁶⁴ PS LA 2011/4 Recovering disputed debts. See also section 5 below dealing with the *Taxation (Interest on Overpayments and Early Payments) Act* 1983.

⁶⁵ *FCT v Jackson* 90 ATC 4990, 5000.

⁶⁶ *Fletcher & Ors v FCT* 88 ATC 4834, 4845.

⁶⁷ Sections 14 ZZK and ZZO. *Lighthouse Philatelics Pty Ltd v. Federal Commissioner of Taxation* 91 ATC 4942.

⁶⁸ See for example *Gilder v FCT* 91 ATC 5062; *Lambert v FCT* 2013 ATC ¶10-322.

The Federal Court does not have the power to permit a taxpayer to amend its grounds of objection when the matter comes before it on appeal from the AAT. Section 44(1) AATA provides that an appeal from the AAT to the Federal Court must be on a question of law only.

In *Liedig*⁶⁹ Justice Hill considered the ability of the Federal Court, sitting as a court of appeal from an AAT decision, to amend a taxpayer's grounds of objection and stated:

At the outset of the proceedings before me counsel for Mr Liedig applied, by way of motion, for orders that Mr Liedig be permitted now to amend his notices of objection to permit him to argue that the amounts in question were allowable deductions under s. 51(1) of the Act. However, counsel rightly conceded that this Court had no power to permit such an amendment. Because the objection decisions were made after 1 March 1992, the provisions of Part IVC of the *Taxation Administration Act 1975* (Cth) ("the Administration Act") were applicable rather than the provisions of s. 190(a) of the Act. Section 14ZZO of the Administration Act confers power on the Court to extend the grounds of objection in an appeal brought directly to it, just as s. 14ZZK of the same Act gives that power to the Tribunal in respect of an objection decision referred to it. But nowhere in the Act is the Court given the power to extend grounds of objection where an application for review has been made to the Tribunal. The Court's jurisdiction, where the matter has been referred to the Tribunal, is limited to that conferred upon it by s. 44 of the *Administrative Appeals Tribunal Act*, namely, to determining a question of law. Although the Court is empowered by s. 44(4) to make such orders as it thinks appropriate by reason of its decision on that question of law, and the Court has the powers referred to in s. 44(5) of that Act, those powers do not extend to exercising discretions conferred upon the Tribunal by statute and upon the Tribunal alone.

Counsel for Mr Liedig therefore sought to take a different tack. He sought, and was granted, leave to amend the notice of appeal to raise a ground that the Tribunal erred in law in not granting an extension of the grounds of the taxpayer's objection on the basis that it was bound so to do on its own initiative or at least bound to raise the matter and subject to permitting the Commissioner to be heard upon it, to extend the grounds of objection...

⁶⁹ *Liedig v FCT* 94 ATC 4269, 4271-4272.

For the taxpayer to succeed in the present case it would be necessary to show that there was some legal obligation imposed upon the Tribunal, on its own motion, to raise the question of extending the grounds of objection. With respect there is no such obligation. There is conferred upon the Tribunal a power to extend grounds of objection but no obligation is imposed upon it to do so of its own volition. In these circumstances the failure of the Tribunal to consider whether to extend the grounds of objection in circumstances where neither the taxpayer nor the Commissioner has requested it so to do and where the Commissioner has been given no right to advance any argument to the contrary could not involve the Tribunal in having erred in law. This being the case, the amended ground of appeal must fail.

The effect of the foregoing decision is that:

- a court sitting as a court of appeal from an AAT decision does not have the power to amend a taxpayer's grounds of objection; and
- the AAT does not have the power on its own volition to vary a taxpayer's grounds of objection.

The position may not be as clear where there is an appeal from a single judge sitting as a court of first instance. Here appeals are not limited to questions of law. On appeal from a single judge it seems a court will not permit an amendment of the grounds of objection on appeal. Even though an appeal court has the power to allow new evidence this discretion would be exercised very rarely. This discretion does not seem to extend to effectively changing the basis of a challenge to an assessment on appeal.

The position described above as to the rights of a taxpayer to amend its grounds of objection is the same where the Commissioner seeks to amend the basis on which a taxpayer is sought to be held liable. As noted by Kitto J 'No conduct on the part of the commissioner could operate as an estoppel against the operation of the Act.'⁷⁰ Thus in a tribunal or court of first instance the Commissioner could amend the basis on which it was contended a taxpayer was liable to tax. However, if the Commissioner has exercised his discretion in a particular way it seems he would not be permitted to seek to exercise that discretion differently even in a court of first instance. There can be only one conclusion when exercising discretion.

⁷⁰ *Federal Commissioner of Taxation v Wade* [1951] HCA 66 [7].

On appeal the Commissioner would not be permitted to change the grounds of assessment. In *Dismin* the Federal Court on appeal unanimously held that:

Consistently with the authorities to which we have referred, we are of the view that the Commissioner should not now be allowed to argue, for the first time on appeal, a basis for assessment not argued at first instance and a basis, had it been argued at first instance, which would have called for consideration by the appellant whether to lead evidence not called having regard to the manner in which the case was run below.⁷¹

If a taxpayer determines that an error has been made in its return it is not obliged to proceed by way of litigation to challenge an assessment made on the incorrect information.

Section 170(5) ITAA 36 provides:

The Commissioner may amend an assessment even though the limited amendment period has ended if, before the end of that period, the taxpayer applies for an amendment in the approved form. The Commissioner may amend the assessment to give effect to the decision on the application.

A taxpayer can request the Commissioner to amend an assessment if information contained in their return is incorrect.⁷² They do so by seeking to amend the information furnished with their return or other documents lodged with their return.

Such an amendment results in a notice of amended assessment, showing the new amount payable or refundable. If the amendment increases the tax payable the ATO would presumably treat it as a voluntary disclosure of unpaid tax. This means the ATO are likely to apply concessional treatment to any penalties that accrue (see section 3.13 below). A taxpayer may seek to amend a return for a particular income year more than once although the time limits in which the Commissioner may amend an assessment under section 170 ITAA 36 limits this right.

Even where there is an objection by a taxpayer the Commissioner may accept in whole or in part the contentions of the taxpayer either because of attempts by the parties to resolve the dispute between them or because the Commissioner accepts in whole or in part the taxpayer's contentions. If the Commissioner accepts the objection in its entirety that would presumably

⁷¹ *Dismin Investments Pty Ltd v Federal Commissioner of Taxation* [2001] FCA 690 [36].

⁷² See for example *Case 5/2001* [2001] AATA 831.

be the end of the matter. If acceptance is only in part then the taxpayer must determine whether or not to proceed on the amount still in dispute by way of Part IVC.

The effect of the foregoing is that, subject to the limitation on the powers of the Commissioner to amend an assessment in terms of the tax laws, a taxpayer may request an amendment to the information supplied to the Commissioner in connection with their return on multiple occasions.

Once the proceedings have been launched in the AAT or Federal Court both parties are entitled to know precisely what case they have to meet. The AAT⁷³ and Federal Court have power to order the Commissioner to furnish additional information or documents to facilitate the taxpayer understanding what case it has to meet.

If an individual taxpayer institutes a challenge under Part IVC or commences proceedings in any court for other forms of relief they are entitled to represent themselves. They obviously may have representation if they wish and generally it is advisable that they do so. The representation in the AAT, unlike the Federal Court, need not be by a legal representative.⁷⁴ If the taxpayer is a company they are obliged to obtain legal representation in the Federal Court unless leave of that court is granted for the taxpayer to be represented by an officer of that company.⁷⁵

In both the AAT and Federal Court a hearing will be held. Each party will have their chance to lead evidence and call witnesses. Generally, proceedings before the AAT or any court are public.

Both the AAT and Federal Court must furnish reasons when handing down a decision.

The AAT is obliged to give reasons for any decision made by it either orally or in writing.⁷⁶ Where its decision is not in writing a taxpayer may request the Tribunal to give a statement in writing of the reasons for its decision, and the Tribunal shall, within 28 days after receiving the request, give such a statement.⁷⁷ Such reasons must include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based. Section 43 (5AA) AATA then continues that when handing down a copy of its

⁷³ See for example sections 37 and 38 AATA.

⁷⁴ Section 32(1) AATA.

⁷⁵ Rule 4.01 *Federal Court Rules* 2011.

⁷⁶ Section 43(2) AATA.

⁷⁷ Section 43(2A) AATA.

decision the Tribunal must inter alia advise the party to whom the decision is handed of that party's right to appeal to a court on a question of law.

What is meant by 'reasons' was explained in *Telstra*⁷⁸ as follows:

In summary, the Court will not be concerned with looseness in the language of a tribunal nor with unhappy phrasing of a tribunal's thoughts. Further, the Court will not construe the reasons for the decision under review "minutely and finely with an eye keenly attuned to the perception of error".

Additional principles specifically relevant to review of reasons provided by the Tribunal include that:

- There is no requirement for the Tribunal to refer to every piece of evidence and every contention that may be advanced.
- There is no requirement that the reasons of the Tribunal provide an unarguable logical progression to a conclusion: (references omitted)

As French J explained in *Secretary, Department of Employment and Workplace Relations v Homewood* [2006] FCA 779; 91 ALD 103 at [40]:

... the Tribunal will have discharged its duty under s 43 if its reasons disclose its findings of fact, the evidence on which they were based and the logical process by which it moved from those findings to the result in the case.

*Yusuf*⁷⁹ considered what is understood by the phrase 'material question of fact' (the legislation considered was not the AATA but the principles enunciated are of application). The majority in the High Court said:

It was said that "material" in the expression "material questions of fact" must mean "objectively material". Even if that were right, it would by no means follow that the Tribunal was bound to set out findings that it did not make... All that s 430(1)(c) obliges the Tribunal to do is set out its findings on those questions of fact which *it* considered to be material to the decision which it made and to the reasons *it* had for reaching that decision. ..It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that

⁷⁸ *Telstra Corporation Limited v Hunter* [2016] FCA 318 [73-75].

⁷⁹ *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 per McHugh, Gummow and Hayne JJ [68-69].

conclusion... The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review by the Federal Court under Pt 8 of the Act, or by this Court in proceedings brought under s 75(v) of the Constitution.

A full bench of the Federal Court in *Kent Osborne*⁸⁰ noted the following about the reference in section 43 AATA to the ‘reasons’ being either oral or in writing:

The nature of the distinction intended between reasons given orally and reasons given in writing is not absolutely clear... In my opinion, reasons are given in writing within the meaning of s.43(2) if and when they are issued by the Tribunal in written form, whether or not they have been delivered orally in the first place. Of course, if very informal reasons are delivered orally, and a request is then made under sub-s.43(2A), the Tribunal will be unlikely to comply with sub-s.(2B) unless more elaborate, written reasons are then produced. ..Where there are (as is usual in the Tribunal) no pleadings or other documents formally defining the questions which the parties desire to have decided, sub-s.(2B) does not necessarily and always require discussion of every point which might have been raised before the Tribunal, whether or not it has been argued.

Section 66B (1) AATA provides that:

The Tribunal may, by any means it considers appropriate, publish its decisions and the reasons for them.

The AAT thus has discretion as to the means by which it publishes its reasons thereby effectively making them accessible to all who wish to see what was stated in the judgment.

It is open to the Federal Court to give oral reasons for judgment immediately prior to pronouncing its judgment at the end of the hearing. The more usual course is for the court to reserve its judgment at the end of the hearing, pronouncing judgment (with written reasons) at a later time.

Unlike the AAT, there is no mechanism whereby the Federal Court can be requested to provide written reasons for its judgment. However, the Full Court of the Federal Court has held that ‘in all cases it is important that parties to litigation are able to understand the

⁸⁰ *Re Commissioner of Taxation v Kent Osborne* [1990] FCA 362.

reasons why the Court arrived at its decision.’⁸¹ The High Court described the normal practice of courts as follows:

The decision in that case that the failure to give reasons was an error in law may have broken new ground, but there was nothing new in saying that judges are under an obligation to give reasons where that is necessary to enable the matter to be properly considered on appeal. It has long been the traditional practice of judges to express the reasons for their conclusions by finding the facts and expounding the law (see *Deakin v Webb* (1904) 1 CLR 585 at 604–5 and *Jacobs v London County Council* [1950] AC 361 at 369) and there have been many cases (some of which are collected in *De Iacovo v Lacanale* [1957] VR 553 at 558–9) in which it has been held that it is the duty of a judge or magistrate to state his reasons.⁸²

Justice Monahan in *De Iacovo*⁸³ stated:

In Broom’s *Constitutional Law* (1st ed., 1866), at pp. 152-3, the learned author observes: “A public statement of the reasons for a judgment is due to the suitors and to the community at large--is essential to the establishment of fixed intelligible rules and for the development of law as a science...A judgment once delivered becomes the property of the profession and of the public; it ought not, therefore, to be subsequently moulded in accordance with the vacillating opinions of the judge who first pronounced it.” In my view this statement has general application to all persons exercising judicial functions. From time to time appellate courts have pointed out the difficulties which result from the fact that reasons have not been given for judicial pronouncements...Such a statement is desirable for the information of the parties, and in order to afford assistance to the Court of Appeal in the event of there being an appeal... In *Robinson v Robinson*, [1898] P 153, and again in *Cobb v Cobb*, [1900] P 145, it was stated that when making orders of this kind, from which an appeal lies to other courts, it is the duty of the magistrate, not only to cause a note to be made of the evidence, and of his decision, but to give the reasons for his decision and to cause a note to be made of his reasons...Elaborate judgments are not required, but the reasons which lead the magistrate to make his order must be explicitly stated.

⁸¹ *Bourke v Beneficial Finance Corp Ltd* (1993) 47 FCR 264

⁸² *Public Service Board of NSW v Osmond* [1986] HCA 7; (1986) 159 CLR 656 per Gibbs CJ [10].

⁸³ *De Iacovo v Lacanale* [1957] VR 553, 566-557.

The effect of the foregoing is that it is a principle that proceedings and all evidence and information before the AAT and court be made public and that the decision and reasons for the decision be published. The AAT (as does the Federal Court considered below) does, have power (particularly where confidentiality of parties or evidence is important) to:

- determine that a hearing be held in private or prescribe who may be present at a hearing;
- give directions prohibiting or restricting the publication or other disclosure of information that may reveal the identity of or concerning any witness or party to the proceedings or any party related or associated with any party to the proceedings; and
- give directions prohibiting or restricting the publication or other disclosure of information that relates to the proceedings; or evidence or information about evidence; or information lodged or given to the AAT.⁸⁴

The *Federal Court of Australia Act 1976* (FCA) has similar provisions. It can make suppression or non-publication orders provided the court takes into account the fact that a primary objective of the administration of justice is to safeguard the public interest in open justice.⁸⁵ To this end it can make similar orders to those of the AAT set out above.⁸⁶ The Court may make such orders on its own initiative or on the application of a party to the proceeding concerned; or any other person considered by the Court to have a sufficient interest in the making of the order.⁸⁷ These orders can be made at any time and may be made subject to such exceptions and conditions as the Court thinks fit and specifies in the order.⁸⁸ These orders may be interim orders or for such period as the court deems appropriate.⁸⁹ Failure to comply with such an order is an offence.⁹⁰

This report now turns to challenges to private rulings.

3.2 Challenges to Private Rulings

Taxpayers can object to private rulings provided the Commissioner has not already made an assessment in respect of the matters raised in the ruling or the ruling refers to withholding tax

⁸⁴ Section 35 AATA.

⁸⁵ Section 37AE FCA.

⁸⁶ Section 37 AF FCA.

⁸⁷ Section 37 AH (1) FCA.

⁸⁸ Section 37 AH (3-4) FCA.

⁸⁹ Section 37 AI FCA; Section 37 AJ FCA.

⁹⁰ Section 37 AL FCA.

that has become payable.⁹¹ (Rulings are discussed in section 3.16 below). As is the case with other challenges under Part IVC time limits are prescribed as to when a taxpayer must challenge a private ruling.⁹²

There are two forms of challenge associated with a private ruling:

- The Commissioner failing to furnish a ruling after notice is given to do so; and
- A ruling is given and the taxpayer does not agree with its conclusion.

In the former case once a taxpayer has requested a private ruling and 60 days have elapsed from the date of the request,⁹³ and the Commissioner has not declined to make a ruling nor has he issued a ruling, the taxpayer can put the Commissioner on notice to make a ruling.⁹⁴ If the Commissioner still has not made the ruling or declined to do so within 30 days of the notice the taxpayer may object under Part IVC. In such a case the taxpayer must lodge a draft private ruling with their objection.⁹⁵

Where a ruling has been made and the taxpayer is dissatisfied with it, the ruling is deemed to be a taxation decision making it capable of challenge under Part IVC.⁹⁶

A taxpayer may not note an objection against an issue raised in a ruling and again on an assessment based on that ruling unless the grounds relied upon in the later challenge could not have been raised in the original objection.⁹⁷

A taxpayer may withdraw a request for a ruling at any time before the ruling is made.⁹⁸

In carrying out a review of a private ruling issued by the Commissioner the Federal Court has held that:

In reviewing the Commissioner's opinion on the application of the law to the specified scheme, the only material to which the court can have regard is the ruling and documents identified in the description of the scheme which were either provided

⁹¹ Section 359-60 (3).

⁹² Section 14 ZW.

⁹³ This 60-day period can be extended under certain circumstances. Section 359-50; Section 357-120.

⁹⁴ Section 359-50.

⁹⁵ Section 359-50.

⁹⁶ Section 359-60.

⁹⁷ Section 14 ZVA.

⁹⁸ Section 359-10.

by the applicant or were used by the Commissioner: *Bellinz v FCT* [1998] FCA 615; (1998) 84 FCR 154 at 160; [1998] FCA 615; 39 ATR 198 at 204; 98 ATC 4634 at 4639; [1998] FCA 615; 155 ALR 220 at 226. The court is confined by the scheme description in the ruling, which remains constant throughout any appellate process.⁹⁹

And

In describing an arrangement, the Commissioner is entitled to incorporate by reference a description found in a document. That is not a licence for the Tribunal, on review, itself to examine those documents to the end of making a finding of fact which is at variance with or not found in the Commissioner's description of the facts of an arrangement for the purposes of the ruling. Nor can the Tribunal draw inferences of fact which are at variance with or not found in the description the Commissioner has given of the arrangement.¹⁰⁰

3.3 Appeals from AAT and Federal Court as Courts of First Instance

An unsuccessful party in the AAT has the right to appeal to the Federal Court against the decision provided it is on a question of law.¹⁰¹ This appeal must be noted within 28 days¹⁰² after the judgment against which the party wishes to appeal has been handed down. If the taxpayer is late in noting this appeal the Federal Court can extend the time periods.¹⁰³ If unsuccessful in the Federal Court and the appeal from the AAT was heard by a single judge a taxpayer has the right to appeal against that decision to the full bench (3 judges) of the Federal Court. If the original appeal was heard by three judges then in such instance the unsuccessful party may appeal to the High Court but only if leave has been granted by that court to do so.

An appeal from a decision of a judge at first instance is to the full bench of the Federal Court and is not limited to a question of law.

⁹⁹ *Rosgoe Pty Ltd v Commissioner of Taxation* [2015] FCA 1231 [16].

¹⁰⁰ *Ibid* [20].

¹⁰¹ Section 44 (1) AATA. It is often not easy to determine if an issue is a question of law or fact.

¹⁰² Section 44 AATA.

¹⁰³ Rule 33.13 *Federal Court Rules* 2011.

3.4 Referral to a Full Bench of the Federal Court from AAT

Pursuant to section 45 AATA, the Tribunal may, of its own motion, or at the request of a party, refer a question of law arising in a proceeding before the Tribunal to the Federal Court for decision. Subsection 45(2A) AATA states the matter is to be heard in the Full Court of the Federal Court. The Full Court exercises its appellate jurisdiction, because it is hearing a matter referred to it by a lower court or tribunal. This procedure of referring a question of law to the Full Federal Court can be very useful where there are important questions of law which come before the Tribunal. The procedure provides a ‘fast track’ method of obtaining a decision of significant precedential value on the particular question of law. When such an issue is referred to the Federal Court the proceedings are stayed in the AAT until the Federal Court has delivered its decision on the point of law. The matter is then referred back to the AAT which must determine the case based on the legal findings of the Federal Court

3.5 Departure Prohibition Orders

Under certain circumstances, the Commissioner can issue without prior notice, and also physically enforce, a departure prohibition order (DPO). A DPO prevents a person who is subject to a tax liability leaving the country: Section 14S. The penalty for breaching a DPO is a maximum fine of \$8,500, one year’s imprisonment or both: Section 14R. Where a departure prohibition order is made the Commissioner must cause the person to be informed of the order.

Where a departure prohibition order is in force the Commissioner may of his own volition or on application revoke or vary the DPO provided certain criteria are met.¹⁰⁴ The Commissioner must give notice to all persons who received notice of the DPO that it is revoked or varied.

The Commissioner may where a DPO has been issued on application by the taxpayer issue a departure authorisation certificate permitting the taxpayer to leave Australia for a limited time provided certain criteria set out in section 14U are met.

A person aggrieved by the making of a DPO may appeal to the Federal Court or the Supreme Court of a State or Territory against the making of the DPO.¹⁰⁵ This appeal is not an appeal under Part IVC of the TAA. Applications may be made to the Tribunal for review of

¹⁰⁴ Section 14 T.

¹⁰⁵ Section 14 V.

decisions of the Commissioner under sections 14T (revocation or variation of a DPO) or 14U (issue of a departure authorisation certificate).¹⁰⁶

The onus of proof that the DPO is invalid generally rests with the tax debtor. But given the potentially oppressive and serious consequences of a DPO, the Courts have also found that the Tax Office has to demonstrate that recoverability of the tax liability will be adversely affected by the departure of the taxpayer.¹⁰⁷

This report now turns to Schedule 1 of the TAA.

3.6 PAYG

The PAYG system has 2 components: PAYG withholding and PAYG instalments. The latter affords no taxpayer rights and is not considered.

Under the PAYG withholding system amounts are deducted from particular kinds of payments or transactions. The entity that withholds these monies is obliged to pay the amount to the Commissioner.¹⁰⁸ These withheld amounts are credited against any tax that might be payable in respect of assessable income derived by an individual. A summary of the items covered by this regime appear in the table to section 10-5 (1). Examples include payments of salary, payments to directors of companies and unused leave payments. An entity may enter into a voluntary agreement with an individual to withhold tax even though the rules do not make provision for this provided it is under an arrangement which, in whole or in part, involves the performance of work or services (whether or not by the individual).¹⁰⁹ These rules do not apply to exempt income, or income that is otherwise not assessable.¹¹⁰

The amount required to be withheld from a payment is to be worked out under the withholding schedules made under section 15-25. However, if the regulations prescribe how the amount is to be worked out, then it is to be worked out under the regulations.¹¹¹

An entity that withholds an amount is discharged from all liability to pay or account for that amount to any entity other than the Commissioner.¹¹² A failure to withhold an amount

¹⁰⁶ Section 14 Y.

¹⁰⁷ *Troughton v Deputy Commissioner of Taxation* [2008] FCA 18.

¹⁰⁸ Section 6-5 (2).

¹⁰⁹ Section 12-55.

¹¹⁰ Section 6-5 (3).

¹¹¹ Section 15-10.

¹¹² Section 16-20.

required by Division 12 is a strict liability offence.¹¹³ In the alternative to criminal proceedings the Commissioner may elect to impose an administrative penalty.¹¹⁴

If more than a taxpayer's assessed tax liability has been deducted as a withholding payment the Commissioner is obliged to refund that excess. If the fact of the overpayment is discovered early the taxpayer may obtain a refund from the entity that withheld the amount.¹¹⁵

Within 14 days after the end of a financial year, the payer must give a payment summary (and a copy of it) to the party from whom monies were withheld during the year. This summary must cover inter alia each of the withholding payments made, except one covered by a previous payment summary given by the payer to the recipient under section 16-160.¹¹⁶

The effect of section 18-15(1) is that the taxpayer who had withholding payments deducted from amounts due to it is entitled to credits by the Commissioner for the sums withheld irrespective of whether the paying entity has accounted to the Commissioner for these monies. Note that for the taxpayer to be successful in claiming these credits, they must discharge the onus of proving that the amounts were in fact deducted. Where the withholding is represented by journal entries this may not be sufficient to discharge this onus. There has to have been a legitimate process of withholding undertaken by the payer.¹¹⁷

Section 20 -80 sets out those provisions in the PAYG rules that may be challenged under Part IVC.

3.7 Tax Receipts

The Commissioner must provide taxpayers with a tax receipt for an income year if they are an individual and the total tax assessed to that taxpayer for the income year is \$100 or more (or such other amount as determined by the Commissioner from time to time).¹¹⁸ The tax receipt must include information inter alia about how the total tax assessed to that taxpayer for the income year is notionally used to finance different categories of Commonwealth government expenditure.

¹¹³ Section 16-(20-25).

¹¹⁴ Section 16-30.

¹¹⁵ Section 18-65-18-80.

¹¹⁶ Section 16-155.

¹¹⁷ *Cassanti v Commissioner of Taxation* [2010] FCA 641.

¹¹⁸ Section 70-5.

3.8 Release of Excess Concessional Contributions

Excess concessional contributions are included in assessable income. If a taxpayer has excess concessional contributions for a financial year, the Commissioner must make a written determination stating the amount of those excess concessional contributions; and the amount (if any) of the excess concessional contributions charge the taxpayer is liable to pay for the corresponding income year.¹¹⁹ A taxpayer may object to such a determination under Part IVC.¹²⁰

The Commissioner will also forward an election form together with the determination. If the taxpayer receives an excess concessional contributions determination or an amended contribution determination for a financial year, the taxpayer may elect to release from their superannuation interest (usually their fund) an amount not exceeding 85% of the excess concessional contributions stated in the determination by giving the Commissioner notice of that intention.¹²¹

If the Commissioner advises the taxpayer that the provider did not pay the Commissioner the contribution the taxpayer may make another election and choose another superannuation interest from which the withdrawal is to be made. Released concessional contributions are paid to the Commissioner. The election is not mandatory but once made cannot be revoked. The taxpayer gets a credit for the released amount. Surplus credits are refunded to the taxpayer.

3.9 Administration of Indirect Taxes

A taxpayer may request the Commissioner at any time to make an assessment of an indirect tax.¹²² The amount payable does not depend on and is not in any way affected by, the making of such an assessment. Failure to issue an assessment after a request has been made does not affect the validity of the assessment.¹²³ A decision involving an assessment may be challenged under Part IVC.¹²⁴

¹¹⁹ Section 97-5.

¹²⁰ Section 97-10.

¹²¹ Section 96-5(1).

¹²² Section 105-10.

¹²³ Section 105-20.

¹²⁴ Section 105-45.

A request to the Commissioner to treat a document as a tax invoice for the purposes of attributing a credit to a tax period is taken to be a notification of the taxpayer's entitlement to such credit.¹²⁵

Section 105-65 (1) deals with restrictions on GST refunds. As this does not give any rights to taxpayers it is not considered although a relevant decision may be challenged under Part IVC.¹²⁶

A taxpayer may challenge under Part IVC certain GST decisions referred to in the table in section 110-50(2).

Division 111 gives taxpayers the right to object under Part IVC against decisions disallowing the whole or part of a claim for a wine tax credit. These decisions are specified in the table to section 111-50(2).

Division 112 gives taxpayers the right to object under Part IVC against fuel tax decisions. These decisions are specified in the table to section 112-50(2).

3.10 Assessments

If 6 months have elapsed from the day on which a return for an assessable amount is given to the Commissioner and no assessment has been issued the taxpayer may give the Commissioner 30 days' notice to so issue an assessment. If the Commissioner still fails to do so the taxpayer may object, in the manner set out in Part IVC to the Commissioner's failure to make the assessment.¹²⁷ This does not apply if the assessable amount is the Division 293 tax payable in relation to an income year in relation to that taxpayer's taxable contributions for the income year. Division 293 reduces the concessional tax treatment of certain superannuation contributions made for very high income individuals: section 293-1.

The Commissioner may amend an assessment of an assessable amount within the period of review for the assessment.¹²⁸ A taxpayer may voluntarily extend the review period if requested to do so by the Commissioner or the Commissioner may apply to the Federal Court to extend these time periods.¹²⁹ The Commissioner cannot, subject to certain exceptions

¹²⁵ Section 105-55 (2A).

¹²⁶ Section 105-65 (4).

¹²⁷ Section 155-30.

¹²⁸ Section 155-35(1).

¹²⁹ Section 155-35(4).

noted in sections 155-40 to 155-60 further amend an amended assessment of an assessable amount if the period of review for the assessment has ended.¹³⁰ Two examples of these exceptions are that the Commissioner can always amend: to give effect to a decision on a review or appeal; or if the Commissioner is of the opinion there has been fraud or evasion.

3.11 Collection and Recovery of Tax-Related Liabilities and Other Amounts

As was noted in section 3.1 above irrespective of whether a challenge to an assessment is noted the Commissioner can enforce payment of the debt arising from an assessment. If payment is made and the taxpayer is successful in its challenge the Commissioner must refund the amount overpaid with interest.

The Commissioner has various means of enforcing his right to payment in relation to a tax related liability. A tax related liability is defined in section 255-1 (1) as a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). These methods include execution of a judgment debt, winding up or bankruptcy proceedings.

There are special rules when the entity that is liable is a liquidator, receiver, an agent winding up a business for a foreign resident principal or the trustee/administrator of a deceased estate.¹³¹ These are not considered here as the relevant provisions do not afford taxpayers any rights.

Under section 260-5 the Commissioner may cause a notice described as a garnishee notice to be issued to a third party who is indebted to a taxpayer whereby the third party is required to pay to the Commissioner the amount owing to the taxpayer. This obligation is limited to the amount owing to the taxpayer by the third party or the tax debt whichever is the smaller. If such payment is made, the liability of the taxpayer is reduced accordingly.¹³² Under section 260-15 an amount that the third party pays to the Commissioner is taken to have been authorised by the debtor; and any other person who is entitled to all or a part of the amount; and the third party is indemnified for the payment.

¹³⁰ Section 155-65.

¹³¹ Subdivisions 255 D –E.

¹³² Generally on garnishee notices see *Clyne v DFC of T* 81 ATC 4429.

A garnishee notice may not be challenged under Part IVC.¹³³ Such decisions are, however, capable of challenge under the AD(JR)A.

Macquarie Health Corp Ltd v Commissioner of Taxation 2000 ATC 4015 held that a garnishee notice requiring monies to be paid to the Commissioner created a statutory charge on the debt in favour of the Commissioner, even if the debt was not then due and payable. This charge remains valid even if the taxpayer is wound up before the due date of such debt. A garnishee on the debtor of a company served after a winding up order is granted is invalid.¹³⁴

In *Zumtar*¹³⁵ the Commissioner had applied for and was granted a Mareva order (considered in section 11.7 below). Subsequent to this the Commissioner caused a garnishee to be served on a debtor of the taxpayer. The taxpayer argued that the garnishee was a breach of the Mareva injunction as this constituted dealing by the taxpayer with assets that had been enjoined. The court said:

In my opinion, it would be an absurdity if the making of an order restraining an individual from disposing of or charging, diminishing or dealing in any way with his assets had the effect of nullifying a s218 notice served upon a person holding moneys which may ultimately be due to the individual against whom the order was made (section 218 was the predecessor to section 260-50).

A few points arise with garnishee notices:

- a garnishee may not be issued to a debtor of a company in liquidation.¹³⁶
- state limitation Acts have no application to federal tax debts notwithstanding section 64 *Judiciary Act* 2003 which provides that:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.¹³⁷

¹³³ *Rossi v FCT* [2015] AATA 601.

¹³⁴ *Bruton Holdings Pty Ltd (in liq) v FC of T & Anor* [2009] HCA 32.

¹³⁵ *DFCT v Zumtar* 93 ATC 451.

¹³⁶ *Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation* [2009] HCA 32 (26 August 2009).

¹³⁷ *DFCT v Moorebank Pty Ltd* (1988) 165 CLR 55 (1988) 165 CLR 55.

Notwithstanding the right of the Commissioner to enforce payment of an amount assessed, if a taxpayer can show payment would cause serious hardship, a court has the power to stay execution.

In *Akers*¹³⁸ Nathan J noted that if payment of tax caused serious hardship this was a basis for a court to exercise its discretion to stay the enforcement of a tax liability pending a determination of a Part IVC challenge to an assessment but:

- the obligation to pay tax does not of itself impose an extreme personal hardship; and
- the possibility that the taxpayer may be bankrupted is not of itself an extreme personal hardship.¹³⁹

The foregoing views were accepted by the Queensland Court of Appeal in *Denlay*¹⁴⁰ but the Court unanimously held serious hardship would ensue if execution were to proceed and the loss of the taxpayer's property would have the effect of precluding the taxpayer from prosecuting their appeals against the Commissioner's assessment. The judgment continued:

It is preposterous to contend that the loss of the respondents' entire estate, and with it any chance of demonstrating that the basis for the assessments was wrong so that they should not have lost their property, could not be a hardship rightly called extreme. It is not easy to imagine a greater hardship in this context. Certainly the primary judge cannot be criticised for so regarding it.¹⁴¹

A word of caution should be noted. Although in the circumstances of *Denlay* a stay was granted the court looks at all the circumstances in reaching a decision. A delay in seeking a stay and challenging an assessment may be destructive of an application to appeal. As was noted in *Denlay*:¹⁴²

The decision in *Ho* cannot, I think, be criticised. The fact that Ho had not sought to challenge the assessments in the two and a half years since they were issued was itself enough to refuse a stay. It was not really a case in which bankruptcy would deprive

¹³⁸ *DFCT v Akers* 89 ATC 4725.

¹³⁹ *Ibid* 4727.

¹⁴⁰ *Deputy Commissioner of Taxation v Denlay & Anor* [2010] QCA 217 [39-41].

¹⁴¹ *Ibid* [50].

¹⁴² *Ibid* [32].

the taxpayer of his right of challenge. The taxpayer had never sought to exercise that right. The remarks relied upon are, therefore, obiter dicta.

Notwithstanding the full bench decision in *Denlay* granting a stay, the Commissioner sought to issue a garnishee notice to a debtor of the taxpayer in apparent conflict with that order. An application was made under the AD(JR)A to set aside the garnishee notice.¹⁴³ The application was successful.

Inability to pay is not a basis for a stay of execution even if there is an arguable case on the merits. Even if execution takes place and bankruptcy will follow may not be a basis for a stay. But if execution would effectively preclude the taxpayer from challenging an assessment this may, depending on the facts, give grounds for a stay on the basis of personal hardship.

In considering the Commissioner's right to claim payment of an amount assessed sight should not be lost of the case where the taxpayer is declared bankrupt. Discharge from bankruptcy:

- operates to release the taxpayer from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally; but
- does not affect the right of a secured creditor, or any person claiming through or under that creditor, to realize or otherwise deal with its security if the creditor does not prove the secured debt in insolvency.¹⁴⁴

If a statutory demand is received by a company, the operation of the demand may be stayed if there is a genuine dispute about liability. It is not a dispute as envisaged by the *Corporations Act 2001* if the debt is a tax debt and a challenge has been made under Part IVC as the liability has to be paid notwithstanding such challenge.¹⁴⁵

*Mossimo*¹⁴⁶ was a case where a statutory demand under the *Corporations Act 2001* was sought to be set aside by 7 companies. The basis of this application was there was genuine dispute as the company/ies had offsetting claims against the Commissioner. In delivering

¹⁴³ *Denlay v FCT* 2013 ATC ¶20-382.32.

¹⁴⁴ Section 153 (1) and (3) *Bankruptcy Act* 1966.

¹⁴⁵ *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41.

¹⁴⁶ *Mossimo Systems International Pty Ltd v Deputy Commissioner of Taxation* [2010] NSWSC 1430.

judgment the court held that by virtue of the provisions of section 175 ITAA 36 and 350-10 TAA which create a conclusive liability in favour of the Commissioner (subject to challenges under Part IVC) when issuing an assessment it was not open to the taxpayers to argue that there was no debt owing.

With bankruptcy proceedings it would seem similar criteria for a postponement of the bankruptcy proceedings may operate as was the case with *Denlay*. In *Ahern* an application was made to stay bankruptcy proceedings pending an appeal against assessment made by the Commissioner. This was refused by the court of first instance. The Federal Court on appeal in considering the matter noted that:¹⁴⁷

It is well established that an appellate court will rarely interfere with a trial judge's exercise of discretion upon an application for adjournment. However, the refusal to grant an adjournment may in some cases prevent the party seeking it from presenting his case or defence and in some circumstances this may result in injustice of such kind or magnitude as to warrant interference on appeal.

The court upheld the appeal noting that:

These cases rest on the broad principle that before a person can be made bankrupt the court must be satisfied that the debt on which the petitioning creditor relies is due by the debtor and that if any genuine dispute exists as to the liability of the debtor to the petitioning creditor it ought to be investigated before he is made bankrupt. Bankruptcy is not mere *inter partes* litigation. It involves change of status and has quasi-penal consequences.¹⁴⁸

The court then set aside the bankruptcy order and granted the postponement.

3.12 Security Deposits

Since 1 July 2010 the Commissioner has been able to require a taxpayer to give security for the payment of an existing or a future tax related liability under division 255-D of Schedule 1 TAA. Section 255-100(1) enables the Commissioner to require a security deposit if he has reason to believe that:

¹⁴⁷ *Ahern v DFC of T (QLD)* (1987) 76 ALR 137, 146.

¹⁴⁸ *Ahern v DFC of T (QLD)* (1987) 76 ALR 137, 148.

1. the taxpayer is establishing or carrying on an enterprise in Australia; and
2. the taxpayer intends to carry on that enterprise for a limited time only; or
3. the Commissioner reasonably believes that the requirement is otherwise appropriate having regard to all relevant circumstances.

The Federal Court¹⁴⁹ considered the ambit of this power and said:

It is to be observed that s 255-100(1)(a) refers both to the circumstance of a person or entity “establishing” an enterprise and a person or entity “carrying on” an enterprise. The juxtaposition of the words “establishing” and “carrying on” in s 255-100(1)(a) shows that Parliament intended that the power to issue a notice is enlivened in circumstances, even before the person or entity had commenced carrying on the proposed enterprise, and was no further advanced in that endeavour than engaging in the process of establishing the enterprise. Because the concept of “establishing” an enterprise embraces preliminary activities that do not have the trading connotations associated with “carrying on” a business, it is apparent that the power to issue a notice may be enlivened well before the circumstance contended for by the applicant in this case, namely, the sale of one or more of the subdivided lots.

The taxpayer in the above case also argued that the power to require security was outside the powers envisage under the Constitution and was invalid (see section 9.4.1 below). The court rejected this argument.

The Commissioner is required by section 255-105(2) to give notice of his requirement which, amongst other things, is to include an explanation of why he requires the security, the amount of the security, the means by which the security is to be provided, when it is to be provided and how the decision may be reviewed. That review is an internal review. There is no provision conferring jurisdiction on the AAT to consider the matter. The decision of the Commissioner could be reviewed by the Federal Court on technical grounds under the AD(JR)A.

3.13 Administrative Penalties under Division 284

Division 284 sets out the circumstances in which administrative penalties apply for various breaches of the tax laws. It also sets out how to calculate the quantum of such penalties.

¹⁴⁹ *Keris Pty Ltd (Trustee) v Deputy Commissioner of Taxation* [2015] FCA 1381 [27].

A taxpayer is not liable to an administrative penalty for a statement that is false or misleading in a material particular if the taxpayer or its agent took reasonable care¹⁵⁰ in connection with the making of the statement.¹⁵¹ A taxpayer is also not liable if a registered tax agent makes a statement that is false or misleading in the circumstances set out in section 284-75 (6).

The Commissioner must make an assessment of the amount of an administrative penalty under Division 284. An entity that is dissatisfied with such an assessment made about the entity may object to it in the manner set out in Part IVC.¹⁵²

The base penalty amount is reduced by 20% if: the Commissioner tells the taxpayer that an examination is to be made of the taxpayer's affairs relating to a taxation law for a relevant period; and the taxpayer then voluntarily tells the Commissioner about the shortfall which can reasonably be estimated to have saved the Commissioner a significant amount of time or significant resources in the examination.¹⁵³

The base penalty amount for a shortfall amount or scheme shortfall amount, or part of it, is reduced by 80% if the shortfall amount is \$1,000 or more; or reduced to nil if it is less than \$1,000 if the following criteria are met;

- where the taxpayer voluntarily tells the Commissioner, in the approved form, about the shortfall amount before the day the Commissioner tells the taxpayer that an examination is to be made of the taxpayer's affairs; or
- where the taxpayer tells the Commissioner about the shortfall on or before the day specified by the Commissioner in a public statement requesting entities to make a voluntary disclosure by a particular day about a scheme or transaction that applies to that taxpayer's affairs.¹⁵⁴

The Commissioner may remit all or a part of a penalty. If the Commissioner refuses, on application, to remit all or part of a penalty; and the amount of penalty payable after the

¹⁵⁰ Reasonable care was described in these terms by Finn J in *R & D Holdings Pty Ltd v DFCT* [2006] FCA 981 [182]:

I would add that encompassed in what constitutes reasonable care in this context is the need for the taxpayer, or its advisers who are reasonably relied upon, positively to advert to the applicability of the law in question to the taxpayer's circumstances and actually to form a reasoned view on the matter.

¹⁵¹ Section 284-75(5).

¹⁵² Section 298-30.

¹⁵³ Section 284-220.

¹⁵⁴ Section 284-225. The terms 'shortfall amount' and or 'scheme shortfall amount' are defined by sections 284-80 and 284-150 respectively. Base penalty amount is defined in section 284-160.

refusal is more than 2 penalty units (\$360.00); the taxpayer may object to the decision in the manner set out in Part IVC.¹⁵⁵

3.14 Powers of the Commissioner to Obtain Information and Evidence

Sections 353-10 and 353-15 only became effective 1 July 2015. Prior to this, sections 263 and 264 of the ITAA 36 contained much the same detail. Paragraph 2.26 of the Explanatory Memorandum to the *Treasury Legislation Amendment (Repeal Day) Bill 2014*, explicitly states that although the sections have been moved into the TAA and been re-phrased, there has been no change in definition, policy or meaning of sections 263 and 264 of the ITAA 36.

Notwithstanding the foregoing the new provisions appear to go further than did the former sections 263 and 264 ITAA 36. For example section 353-10 (1) (a-c) operate ‘for the purpose of the administration or operation of a taxation law’ whereas section 264 (1)(b) operated only in relation to matters ‘concerning a taxpayer’s or any other person’s income or assessment.’ This may mean that in using the powers granted under section 353-10 as opposed to the former section 264(1)(b) the ambit of the enquiry may be broader. Further section 353-15 (1)(d) is a new provision that reads that the Commissioner ‘may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.’

The Commissioner’s powers under sections 353-10 and 353-15 are sometimes seen as being draconian, and so potentially oppressive. Reflecting this, there have been a significant number of cases concerning the Commissioner’s use of these powers. Collectively those cases have confirmed the wide reach of these sections.

Under section 353-15 the Commissioner or an individual authorised by the Commissioner may enter and remain on any land, premises or place; and is entitled to full and free access to any documents, goods or other property; and may inspect, examine, make copies of, or take extracts from, any documents; and may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and take samples.¹⁵⁶

The occupier/taxpayer has the following rights:

¹⁵⁵ Section 298-20.

¹⁵⁶ Section 353-15.

- should the Commissioner wish to take copies of documents for further consideration or use, the taxpayer is entitled to retain the originals whilst the Commissioner is limited to taking copies of those documents.
- the taxpayer is entitled to demand from the Commissioner’s representatives that they produce proof of authority;
- the taxpayer is entitled to claim legal professional privilege (LPP)¹⁵⁷ in relation to one or more documents the Commissioner may wish to copy and/or examine. The taxpayer must be given an opportunity of claiming this privilege;¹⁵⁸
- a taxpayer has the right to challenge the issue of such a notice under the AD(JR)A or *Judiciary Act* 1903 or Constitution.¹⁵⁹ The Commissioner cannot make copies of all documents in the taxpayer’s possession (documents include information stored electronically) without first making some reasonable attempt to ensure the documents copied are relevant to the enquiry by the ATO¹⁶⁰ and
- a taxpayer is required to comply with a notice under section 353-(10) only to the extent they are able to do so.

The common law privilege against self-incrimination is not available to the taxpayer.¹⁶¹

The right to claim LPP is important when the Commissioner seeks to exercise powers under either section 353-10 or 353-15. Reference is made in this and other sections of this report to *Commissioner of Taxation v Donoghue*.¹⁶² This is an important and far reaching decision. What this judgment appears to stand for is that:

- if the Commissioner comes into possession of a taxpayer’s legally privileged documents or documents subject to a right of confidentiality from a third party then irrespective of the basis on which the third party obtained these documents the Commissioner must have regard to these documents in determining a taxpayer’s assessable income. The exception appears to be when the Commissioner obtains

¹⁵⁷ LPP is only available where the ‘dominant purpose’ of a confidential communication from the legal advisor to a client involves either:

- legal advice about some matter, or
- pending or anticipated litigation.

¹⁵⁸ *Commissioner of Taxation & Ors v Citibank Ltd* (1989) 20 FCR 403; 89 ATC 4268; *Daniels Corp International Pty Ltd v ACCC* (2002) HCA 49.

¹⁵⁹ For a discussion on injunctions see *Cardile v Led Builders Pty Ltd* [1999] HCA 18.

¹⁶⁰ *JMA Accounting Pty Ltd v Michael Carmody, Commissioner of Taxation* [2004] FCAFC 274.

¹⁶¹ *Stergis & Ors v Federal Commissioner of Taxation & Anor* 89 ATC 4442.

¹⁶² *Commissioner of Taxation v Donoghue* [2015] FCAFC 183 [71-77].

these documents directly from the taxpayer under the powers granted to him under sections 353-10 and 353-15 TAA.

- if an ATO employee unlawfully comes into possession of such documents and hands them to an investigating officer who is not a party to the wrongful conduct such documents must be taken into account in determining a taxpayer's assessable income.
- the provisions of section 166 ITAA 36 take primacy over claims (other than as set out in the first bullet point above) to claims for privilege or confidentiality. Section 166 reads as follows:

From the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:

- a. the amount of the taxable income (or that there is no taxable income) of any taxpayer; and
- b. the amount of the tax payable thereon (or that no tax is payable); and
- c. the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).

Under section 353-10 the Commissioner may by notice in writing require a taxpayer to do all or any of the following: to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a taxation law; to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law; to produce to the Commissioner any documents in their custody or under their control for the purpose of the administration or operation of a taxation law.

Taxpayers should note the following in relation to section 353-10:

- for it to be valid the notice must specify the person(s) about whom information is being sought;¹⁶³
- the notice must specify a reasonable time and place when the evidence is to be given;
- the notice must specify with sufficient clarity the kind of information or evidence which is being sought (oral, documents, under oath or affirmation etc.);¹⁶⁴

¹⁶³ *ANZ and New Zealand Banking Group Ltd and Ors v DFC of T* 2001 ATC 4140.

- the documents being sought by the Commissioner have to be in existence;¹⁶⁵ and
- in *Hua Wang Bank Berhad*, the Federal Court upheld the validity of a section 264(1)(b) (predecessor to section 353-10) notice which required production of documents where (it was argued that) production would breach the (criminal) laws of another country. However, the Federal Court observed that an Australian court must act cautiously where there is a possible intrusion on the sovereignty of a foreign nation.¹⁶⁶

A liquidator must comply with a s353-10 notice.¹⁶⁷

The practical reach of sub sections 353-(10-15) is limited where the information being sought is held partly or exclusively outside Australia. Section 264A ITAA 36 therefore complements these sections by empowering the Commissioner to issue an ‘offshore information notice’ to a person subject to Australian income tax. The information sought under section 264A ITAA 36 can only relate to the assessment of the taxpayer unlike under sections 353-(10-15) which can refer to persons other than the person on whom the notice is served. It is not an offence to fail to provide information under section 264A ITAA 36 whereas a breach of either section 353-10 or 353-15 is an offence. A failure to provide the documents requested under a section 264A ITAA 36 notice makes those documents, in some circumstances, inadmissible in any future challenge to an assessment by the Commissioner other than with the consent of the Commissioner.¹⁶⁸ However section 264A (13) ITAA 36 provides:

In spite of anything in this section, the Commissioner must give consent under subsection (10) in any case where a refusal would have the effect, for the purposes of the Constitution, of making any tax or penalty incontestable. In *MacCormick*, the majority stated that the legislature could not determine conclusively for itself its power to enact legislation by putting beyond examination compliance with the constitutional limits upon that power.¹⁶⁹

¹⁶⁴ *Federal Commissioner of Taxation v Smorgon* [1976] HCA 53; (1976) 134 CLR 475.

¹⁶⁵ *Perron Investments Pty Ltd & Ors v Deputy Federal Commissioner of Taxation* (1989) 90 ALR 1.

¹⁶⁶ *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28; *Australia and New Zealand Banking Group Limited v Konza* [2012] FCAFC 127.

¹⁶⁷ For a case where the liquidator did not do so and was held personally liable for costs see *FCT v Warner (No 2)* [2015] FCA 1281.

¹⁶⁸ Section 264A (10).

¹⁶⁹ *MacCormick v. Federal Commissioner of Taxation* (1984) 158 CLR 622.

The reason for the foregoing provision is that a law which imposes an incontestable tax is constitutionally invalid and can be set aside by the High Court (see discussion on the Constitution in section 9 below).

3.15 Secrecy Provisions

Information about the tax affairs of taxpayers including their tax file numbers is protected information and cannot be disclosed unless specifically authorised under a statute. The objects of Division 355 TAA are to: protect the confidentiality of taxpayers' affairs by imposing strict obligations on taxation officers (and others who acquire protected tax information); to encourage taxpayers to provide correct information to the Commissioner; and to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes.¹⁷⁰ Protected information is defined as information that was disclosed or obtained under or for the purposes of a taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained; relates to the affairs of an entity; and identifies, or is reasonably capable of being used to identify, the entity.¹⁷¹ Subdivision 355 B (section 355-50 to 355-75) sets out the circumstances where a taxation officer may make such disclosures and to whom. Possibly the most common is where this information is made available to a court in proceedings where the Commissioner and taxpayer are parties.

Subdivision 355 C (sections 355-150 to 355-210) sets out the limited circumstances in which a non-taxation officer may make such disclosures.

The disclosure of protected tax information that has been unlawfully acquired is prohibited and may not be disclosed other than in very limited circumstances: Subdivision 355D. Again from a taxpayer perspective the most important exception would appear to be where that entity's actions are required or permitted by a taxation law or reasonably necessary in order to comply with an obligation imposed by a taxation law; or if the record was made for or the information was disclosed to a taxation officer; and for a purpose connected with administering a taxation law.

¹⁷⁰ Section 355-10.

¹⁷¹ Section 355-40.

3.16 Rulings

Public rulings apply to entities generally or a class of entities; in relation to a particular scheme. Rulings must be published and stated to be a public ruling.¹⁷² Section 357-55 specifies the taxes to which a ruling may relate.

A public ruling binds the Commissioner from the time it is published, or from such earlier or later time as is specified in the ruling. The Commissioner withdraws a public ruling, either wholly or in part, by publishing notice of the withdrawal in the *Gazette*. The withdrawal is effective from the time specified in the notice which cannot be retrospective. Where a public ruling is withdrawn, that ruling continues to apply to schemes¹⁷³ to which it applied that had begun to be carried out before the withdrawal took place, but does not apply to schemes that begin to be carried out after the withdrawal.¹⁷⁴ A taxpayer relies on the ruling by acting (or omitting to act) in accordance with the ruling.¹⁷⁵

A taxpayer may rely on the ruling at any time unless prevented from doing so by a time limit imposed by a taxation law. It is not necessary to do so at the first opportunity.¹⁷⁶ Taxpayers are not obliged to rely on a ruling and may apply their own interpretation of the law.¹⁷⁷ However if the public ruling is applicable to their circumstances and they have not followed it, the ATO may amend their assessment in accordance with the ATO view expressed in that ruling. If the taxpayer disagrees it may challenge the assessment under Part IVC.

The Commissioner may, on application, make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to the taxpayer in relation to a specified scheme. This is a private ruling.¹⁷⁸

The essential difference between a private ruling and a public ruling is that a private ruling deals with a specific course of action by a particular taxpayer, whereas a public ruling is provided for the information of taxpayers generally, or a class of taxpayers.

¹⁷² Section 358-5.

¹⁷³ A scheme is defined in section 995 *Income Tax Assessment Act 1997* as meaning:

- (a) any arrangement; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

¹⁷⁴ Section 358-20.

¹⁷⁵ Section 357-60(1).

¹⁷⁶ Section 357-60(2).

¹⁷⁷ Section 357-65.

¹⁷⁸ Section 358-5.

Oral rulings constitute the third type of advice available to taxpayers that is legally binding on the Commissioner. Oral rulings are legally binding in much the same way as are private rulings. They are available only to individual taxpayers with simple tax affairs. Under section 360-5 to be eligible for an oral ruling:

- the advice sought cannot be in relation to a business matter
- the advice must not be complex, and
- the matter sought to be ruled upon must not be one that is already being, or has been, considered by the Commissioner for that taxpayer.

All rulings are statutorily binding on the Commissioner and taxpayers can expect that if they bring themselves within the ambit of a ruling they are entitled to be assessed on its terms.

The Commissioner has created a new form of document which either in whole or in part may be described a public ruling. These documents are referred to as Law Companion Guidelines (LCGs).

LCGs are issued either in whole or in part as public rulings. Those portions of a LCG that are a public ruling are binding on the Commissioner. A LCG is an expression of how the Commissioner believes a newly enacted law will apply to taxpayers and his interpretation of that law. The Commissioner makes at least one and possibly two contentious propositions in his publication explaining how a LCG will operate.¹⁷⁹

First he says that taxpayers may only rely on a LCG if they rely on it in good faith. Examples are then given as to what the Commissioner means by 'rely on a LCG in good faith'. This would appear to conflict with the section 357-60 TAA which provides that a ruling binds the Commissioner (whether or not you are aware of the ruling) if the ruling applies to you; and you rely on the ruling by acting (or omitting to act) in accordance with the ruling. Nothing is said in the section about acting in good faith. How a court will approach the Commissioner's qualification is unclear but prima facie unless the legislation is amended this qualification may not be accepted.

¹⁷⁹ ATO LCG 2015/D1 Law Companion Guidelines: purpose, nature and role in ATO's public advice and guidance (updated 10 March 2016).

The Commissioner states that because a LCG is operative from the time an enactment comes into force it is not informed by real world experiences. Then in a second possible contentious statement the Commissioner continues:

Where a statement in a Guideline is later found to be incorrect, that part of the Guideline may be withdrawn or amended. Where the change is less favourable to taxpayers, this would usually be done with prospective effect only.¹⁸⁰

The foregoing suggests (it is put no higher than this) that in certain circumstances a LCG may be amended retrospectively. The Commissioner refers to paragraph 43 of TR 2006/10¹⁸¹ in support of the above. This paragraph reads:

Where a public ruling does not specify the time at which it ceases to apply, the ruling will apply until it is withdrawn.

There is nothing contentious about the statement in the ruling but the ruling does not deal with the possibility of a retrospective amendment or withdrawal. The possibility of a retrospective withdrawal or amendment of the part of a LCG which is a ruling appears to be in conflict with section 358-20 (2) TAA which states that a public ruling may not be withdrawn retrospectively irrespective of whether the change is or is not favourable to taxpayers.

Practical Compliance Guidelines are not considered as the Commissioner accepts they are for internal ATO use only.¹⁸²

¹⁸⁰ Ibid paragraph 40.

¹⁸¹ ATO, TR 2006/10: Public Rulings in support of the proposition that that a guideline may be withdrawn or amended (updated 6 October 2006).

¹⁸² PCG 2016/D1, Practical compliance guidelines: purpose, nature and role in AT)'s public advice and guidance (16 March 2016).

4. *Income Tax Assessment Act 1936 (ITAA 36)*

Section 162 provides that:

A person must, if required by the Commissioner, whether before or after the end of the year of income, give the Commissioner, within the time required and in the approved form:

- a. a return or a further or fuller return for a year of income or a specified period, whether or not the person has given the Commissioner a return for the same period; or
- b. any information, statement or document about the person's financial affairs

This power can be used separately from or in conjunction with sections 353-10 and 353-15 TAA.

Reference has previously been made to section 166 in section 3.14 above.

Section 170 and the regulations published under the ITAA 36 specify the time period when and the circumstances under which the Commissioner may amend an assessment. An amended assessment issued outside these periods can be successfully challenged under Part IVC.

Section 202F refers to a range of decisions that may be taken on review to the AAT. Note these are not challenges under Part IVC TAA.

Section 264A was considered in section 3.14 above.

5. Taxation (Interest on Overpayments and Early Payments) Act 1983

Under the above legislation taxpayers are entitled to interest on various amounts paid more than 14 days prior to the day when the liability for which payment is made becomes due and payable. These items include income tax, shortfall interest or general interest charges.¹⁸³ Interest is not payable on PAYG or PAYG instalments. However where amounts deducted such as PAYG (on which interest is not payable) are greater than the amount assessed, interest is payable on the excess.¹⁸⁴ If there is an overpayment as a result of a decision of the Commissioner upon an objection; or a decision of the Tribunal in relation to an objection; or a decision of a court in relation to an objection, interest is payable.¹⁸⁵

Generally with individual taxpayers interest is for the period calculated from the beginning of the 30th day after the day on which the person furnishes the return of income until the end of the day on which the notice of assessment is issued.¹⁸⁶

There are a range of other pre or overpayments on which interest is payable by the Commissioner. These are specific provisions in the above Act that refer to overpayments under the following statutes:

- *Superannuation Contributions Tax (Assessment and Collection) Act 1997;*
- *Termination Payments Tax (Assessment and Collection) Act 1997;* and
- *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997*

There are also specific provisions relating to running balance accounts.¹⁸⁷

¹⁸³ Section 8A and section 12A *Taxation (Interest on Overpayments and Early Payments) Act 1983*.

¹⁸⁴ *Ibid* section 8E.

¹⁸⁵ *Ibid* sections 9-11.

¹⁸⁶ *Ibid* section 8F (1).

¹⁸⁷ *Ibid* sections 12AA to 12 AF.

6. *Freedom of Information Act 1982 (FOI)*

The purpose of the *Freedom of Information Act 1982* is to give members of the public a legally enforceable right of access to government documents that are not exempt from disclosure: section 11. Requests for such information must be made in writing.¹⁸⁸ Documents covered by the secrecy provisions of the TAA are exempt from disclosure.¹⁸⁹

If information is supplied to a taxpayer that is in the possession of the Commissioner and the taxpayer believes it is incomplete, incorrect, out of date or misleading; and that has been used, is being used or is available for use by the agency or Minister for an administrative purpose; the taxpayer may apply to the agency or Minister for: an amendment; or an annotation; of the record kept of that information.¹⁹⁰

If a request for information has been refused other than by the principal officer of the agency or the responsible Minister, the entity may apply in writing for an internal review of that decision.¹⁹¹

If there has been a refusal to grant access or on internal review the decision is affirmed a party may apply in writing for an Information Commissioner Review (ICR).¹⁹² Such an application may be withdrawn at any time.¹⁹³ At any time during an ICR a review party may request the Information Commissioner¹⁹⁴ to hold a hearing.¹⁹⁵ The onus is not on the review applicant.¹⁹⁶ A review party may appeal to the Federal Court on a question of law, from a decision of the Information Commissioner.¹⁹⁷ Time periods are specified for all these processes but they may be extended on application.

A decision of the Information Commissioner may also be taken on review to the AAT.¹⁹⁸ This is not a challenge under Part IVC. The AAT decision may be appealed to the Federal

¹⁸⁸ Section 15 FOI.

¹⁸⁹ Section 38 read with Schedule 3 FOI. *Federal Commissioner of Taxation v. Swiss Aluminium Australia Limited & Ors* 86 ATC 4200. Documents subject to legal professional privilege are also exempt: section 40 FOI.

¹⁹⁰ Section 48 FOI.

¹⁹¹ Sections 54; 54B FOI.

¹⁹² Sections 54M; 54N FOI.

¹⁹³ Section 54R FOI.

¹⁹⁴ This official is appointed under the *Australian Information Commissioner Act 2010*.

¹⁹⁵ Section 55B FOI.

¹⁹⁶ Section 55D FOI.

¹⁹⁷ Section 56 FOI.

¹⁹⁸ Section 57A FOI; *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623.

Court on a question of law. Taxpayers have reasonable prospects of success in these matters.¹⁹⁹

¹⁹⁹ *Murtagh v FC of T* 84 ATC 4516; *Re Walker & Ors and FC of T* 95 ATC 2001; *Re Saunders and FC of T*, 88 ATC 2067.

7. Privacy Act 1988 (Privacy Act)

Schedule one to the *Privacy Act* sets out the Australian Privacy Principles. By the very nature of the functions performed by the ATO some of these principles would not apply to the Commissioner. The principles binding the Commissioner include: not collecting sensitive information unless the collection of the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities (Principle 3 (4) (d)). Principle 6 is important and inter alia provides:

If an APP [Australian Privacy Principles] entity (the ATO is such an entity) holds personal information about an individual that was collected for a particular purpose (the *primary purpose*), the entity must not use or disclose the information for another purpose (the *secondary purpose*) unless... the individual has consented to the use or disclosure of the information; or ...the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or ...the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

Information about tax file numbers is also personal to a taxpayer and may not be made publically available.²⁰⁰

If a taxpayer believes there has been a breach of the privacy principles he may complain to the Information Commissioner or IGT.²⁰¹ If the complaint is upheld the Information Commissioner can make one or more of a range of orders.²⁰² These orders include:

- the agency has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct; and
- make a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint.

Such determinations are not binding²⁰³ but the Information Commissioner must state any findings of fact relied upon in making such determination. However a complainant or the

²⁰⁰ Section 17 *Privacy Act*. See also Division 355 TAA.

²⁰¹ Section 36 *Privacy Act*. The *Inspector-General of Taxation Act 2003* is considered in section 8 below.

²⁰² Section 52 *Privacy Act*.

Information Commissioner may commence proceedings in the Federal Court or the Federal Circuit Court of Australia to enforce a determination: section 55A(1). Section 55A(5) provides that the court is to deal by way of a hearing de novo with the question whether the person or entity in relation to which the determination applies has engaged in conduct that constitutes an interference with the privacy of an individual. If the court is satisfied that an interference with privacy has occurred, it may make such orders (including a declaration of rights) as it thinks fit: section 55 A(2).

²⁰³ Section 52(1B) FOI.

8. Inspector-General of Taxation Act 2003

Prior to the coming into effect of the *Tax and Superannuation Laws Amendment (2014 Measures No 7) Act 2015* the powers of the IGT were limited to examining systemic problems with systems established by the ATO to administer the tax laws. The IGT may now in addition investigate individual taxpayer complaints. This is achieved through transferring the investigative and complaint handling powers and functions of the Ombudsman to the IGT so far as they relate to taxation law matters.

The legislation referred to above wholly transfers all of the investigative and complaint handling powers and functions of the Ombudsman insofar as they relate to matters of administration under a taxation law by a tax official from the Ombudsman to the IGT. The amendments merge those powers and functions with the Inspector-General's existing powers and functions of conducting systemic reviews. This power is extensive and offers taxpayers a non-litigious way of obtaining redress for wrongs committed against them. The right of investigation of the IGT does not extend to challenges to assessments.

The IGT may not compel the ATO to act in a manner found to be necessary but the IGT furnishes an annual report to Parliament where issues such as this would be brought to the attention of Parliament and the general public. Failure on the part of the ATO to act on a recommendation effectively results in the ATO being 'named and shamed' as all refusals are reported to Parliament when the IGT makes a report to that body. This is a powerful incentive for the ATO to acquiesce in an IGT recommendation.

9. Other Legislation

9.1 General

The ATO is accountable to Parliament, which has special offices that oversee the ATO,²⁰⁴ and is subject to the scrutiny of the courts inter alia through the *Judiciary Act* 1903 (Cth), the Constitution and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). No penalties are imposed on the ATO if they issue an incorrect assessment other than a possible costs order if successfully challenged in the Federal Court.

Before considering the various statutes that give taxpayers the right to seek judicial review it is necessary to consider whether any act (particularly any statement made either orally or in writing) on the part of the Commissioner which is not binding on him would entitle the taxpayer to some relief. This is considered next.

9.2 Legitimate Expectations

If a taxpayer, in good faith, relies on: advice (other than a ruling) given to the taxpayer or its tax agent; or a statement in a publication approved in writing by the Commissioner and the statement or publication, is labelled as non-binding (if not stated to be a ruling and has no other legislative authority it constitutes non-binding advice) the taxpayer is not liable to pay the general interest or the shortfall interest charges.²⁰⁵ This does not prevent the Commissioner from issuing an assessment that reflects what he considers to be a correct application of the tax laws which may be inconsistent with such non-binding advice. The status of non-binding advice was authoritatively stated by the full bench of the Federal Court in *Macquarie Bank*.²⁰⁶ In this case the taxpayer sought declaratory relief (see section 11.2 below) that the Commissioner had not acted in terms of a practice statement that had been issued by him. The court unanimously held:

The power of the general administration of tax legislation given to the Commissioner, by provisions like s 8 of the 1936 Act, s 356-5 of schedule 1 of the 1953 Act and s 44 of the Financial Management and Accountability Act 1997 (Cth) ('1997 Act'), does not permit the Commissioner to dispense with the operation of the law. *The power of general administration in such provisions is not a discretion to modify, or which*

²⁰⁴ Examples include the Inspector-General of Taxation and the Australian National Audit Office.

²⁰⁵ Section 361-5 TAA.

²⁰⁶ *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119. See also *Stewart v The Deputy Commissioner of Taxation* [2010] FCA 402 [9, 10].

modifies, the liability to tax imposed by the statute...the practice statement could not fetter the Commissioner's duty of assessment or re-assessment where the law operated to impose liability nor could it fetter the lawful process of making an assessment to that end...any failure by the Commissioner to comply with his view in the practice statement will not alter the taxpayer's liability upon an assessment or the Commissioner's duty to assess upon the correct view of the law...Whatever the sanction may be for the Commissioner not complying with the practice statement, it is not to relieve the taxpayer of the liability correctly imposed by the Act...(Emphasis added).

The court made it clear that non-binding documents cannot impede the obligations of the Commissioner to assess in terms of the tax laws. They are published under the Commissioner's powers of general administration of the tax laws under section 8 ITAA 36 or equivalent legislation and have no binding legal effect. The Commissioner is obliged to assess in terms of the tax laws and non-binding advice cannot impact on that obligation.

The issue that arises in circumstances such as this is whether taxpayers have any rights against the Commissioner when he acts contrary to published non-binding advice.

It is in this context that the High Court in *Haoucher* considered the concept of 'legitimate expectations.' As will be seen below this phrase no longer finds favour with the High Court. It prefers to speak of a person's right to be treated procedurally fairly when dealing with regulators such as the ATO. This report will use both phrases interchangeably. Deane J noted that 'the word "legitimate" is prone to carry with it a suggestion of entitlement to the substance of the expectation whereas the true entitlement is to the observance of procedural fairness before the substance of the expectation is denied.'²⁰⁷ McHugh J noted that:

A legitimate expectation that a person will obtain or continue to enjoy a benefit or privilege must be distinguished, however, from a mere hope that he or she will obtain or continue to enjoy a benefit or privilege. *A hope that a statutory power will be exercised so as to confer a benefit or privilege does not give rise to a legitimate expectation sufficient to attract the rules of natural justice: South Australia v. O'Shea [1987] HCA 39; (1987) 163 CLR 378, at p 402. To attract the operation of the rules of procedural fairness, there must be some undertaking or course of conduct acquiesced*

²⁰⁷ *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] HCA 22; (1990) 169 CLR 648 [2].

*in by the decision-maker or something about the nature of the benefit or privilege which suggests that, in the absence of some special or unusual circumstance, the person concerned will obtain or continue to enjoy a benefit or privilege (Emphasis added).*²⁰⁸

Accordingly the requirements of procedural fairness may not require that ‘each person affected be accorded an effective opportunity of being personally heard before a decision is made but nonetheless requires that the decision-maker be, and appear to be, personally unbiased.’²⁰⁹ This right to procedural fairness does not give rise to substantive rights.²¹⁰

The High Court has recently had an opportunity of revisiting the concept of ‘legitimate expectations’ in *WZARH*.²¹¹ Kiefel, Bell and Keane JJ stated:

The use of the concept of “legitimate expectation” as the criterion of an entitlement to procedural fairness in administrative law has been described in this Court as “apt to mislead” “unsatisfactory” and “superfluous and confusing”...

More recently, in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*, Gummow, Hayne, Crennan and Bell JJ referred to the discussion of the concept by four members of the Court in *Lam*, and said that:

“the phrase ‘legitimate expectation’ when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded.”...

The “legitimate expectation” of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness. It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions. Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the

²⁰⁸ *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] HCA 22; (1990) 169 CLR 648 [16].

²⁰⁹ *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] HCA 22; (1990) 169 CLR 648 [2].

²¹⁰ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 [148].

²¹¹ *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 [28-30].

decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made (Emphasis added).

Gaegler and Gordon JJ in *WZARH* stated:

The concern of procedural fairness, which here operates as a condition of the exercise of a statutory power, is with procedures rather than with outcomes. It follows that a failure on the part of an assessor or reviewer to give the opportunity to be heard which a reasonable assessor or reviewer ought fairly to give in the totality of the circumstances constitutes, without more, a denial of procedural fairness in breach of the implied condition which governs the exercise of the Minister's statutory powers of consideration.²¹²

If the Commissioner changes his view contained in non-binding advice he should give notice of this to all taxpayers. It seems he need not communicate with each taxpayer separately. Even if there were a taxpayer directly impacted by this change the general notification should suffice. What constitutes procedural fairness depends on all the circumstances of the case including the statutory basis for the administrative decision. This was highlighted in the Federal Court in *Macquarie Bank* sitting as a court of first instance (accepted by the full bench on appeal) where the following was said:

There is some analogy here with the instructions (termed “Guidelines”) which successive Ministers for Immigration have issued to their officers, as to classes of cases that are to be brought to the Minister’s attention for the possible exercise of one of the non-compellable ministerial discretions under the *Migration Act 1958* (Cth). This Court has repeatedly refused to entertain attempts to enforce those instructions by seeking orders against the officers based on alleged non-compliance with them...The matter must be considered in the appropriate statutory context. *That context relevantly includes the comprehensive review and appeal mechanisms in Part IVC. The present case does not have anything comparable to the special features of Plaintiff M61 just mentioned.* In particular, a decision of the kind contemplated in PS LA 2011/27 may affect whether the ATO takes “compliance action” but does not

²¹² Ibid [55-57].

have a necessary or direct relationship with any particular exercise of statutory power (Emphasis added).²¹³

The fact that there are contained in Part IVC TAA challenge rights to assessments suggests that the possibility of judicial review due to a lack of procedural fairness is unlikely to be successful where an assessment or a step leading to an assessment is in issue. Further support is found in the judgment of Justice Robertson who held that:

There is specific authority for the proposition that a challenge under s 39B of the *Judiciary Act* to an assessment is not maintainable on the ground of mere denial of procedural fairness (references omitted).²¹⁴

In *Chemical Trustee*, the Court noted that ‘the effect of sections 175 and 177 is to preclude judicial review of assessment decisions in proceedings under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth) for error of law, failure to take into account mandatory relevant considerations and breaches of procedural fairness.’²¹⁵

The position may be different where a challenge under Part IVC is not available. In this case, if a court finds, having reviewed all the circumstances, that there was a lack of procedural fairness in the manner in which the Commissioner has acted towards a taxpayer the Commissioner’s decision could be set aside with an order that he reconsider the matter. This appears from the judgment of Justice Perram in *Stewart* where the following was said:

The only remedy available for a breach of the rules of procedural fairness would be an order setting aside the Commissioner’s decision to depart from the concession with a concomitant order to reconsider his decision to do so: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 21 [66]-[67] per McHugh and Gummow JJ, 48 [148] per Callinan J; *Rush v Commissioner of Police* [2006] FCA 12; (2006) 150 FCR 165 at 186-187 [82] per Finn J.²¹⁶

The relief available to a taxpayer not because there was some ‘expectation’ on the part of the taxpayer that the Commissioner would act in a particular way but rather one or more of the grounds for judicial review had been made out.

²¹³ *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887 [85-86].

²¹⁴ *Pratten v Commissioner of Taxation* [2015] FCA 1357 [23].

²¹⁵ *Deputy Commissioner of Taxation v Chemical Trustee Ltd* [2010] FCA 1297 [49].

²¹⁶ *Stewart v The Deputy Commissioner of Taxation* [2011] FCA 336 [13].

The decision of the Court of Sessions in Scotland in *Al Fayed* raises an important issue when considering legitimate expectations of taxpayers.²¹⁷ In this case the revenue authorities in Scotland had entered into a forward tax agreement with the petitioners in 1997 under which the petitioners agreed to pay specified annual sums in respect of specified future years of assessment. The Revenue agreed to accept those sums in lieu of any income tax and capital gains tax to which the petitioners might otherwise have been liable. This agreement was ultra vires the powers of the Revenue and was cancelled by the Revenue. The taxpayers sought to contend that they had a legitimate expectation that the Revenue would abide by the agreement. The court unanimously said:

We have already reached the conclusion that, as the 1997 Agreement was ultra vires, the respondents did not have any discretion to continue to abide by the Agreement once they knew that it was ultra vires. A decision taken at that stage to continue to be bound by the Agreement for the remainder of its contractual duration would, in our opinion, have been outwith the powers of the respondents. *However, under our domestic law a legitimate expectation can only arise on the basis of a lawful promise, representation or practice. There can be no legitimate expectation that a public body will continue to implement an agreement when it has no power to do so.* In our opinion, the petitioners could not have had a legitimate expectation that the respondents would have adopted a course of action which was outwith their powers, and continued to maintain a contract which was unlawful. *While the petitioners may well have had an expectation, it was not, in the particular circumstances of this case and according to our common law, a legitimate expectation.* Accordingly, we consider that the petitioners' case based on a breach of legitimate expectation must fail. We should add that, if the petitioners did have a legitimate expectation that the respondents would abide by the terms of the 1997 Agreement until its stipulated expiry date, we are satisfied, for the reasons which we have already set out, that the respondents' decision to bring the Agreement to an end in June 2000 was not unfair and was not an abuse of power (Emphasis added).²¹⁸

²¹⁷ *Al Fayed and others v Advocate General for Scotland (representing the Inland Revenue Commissioners)* [2004] STC 1703.

²¹⁸ *Ibid* [119].

If the act of the Commissioner in respect of which it is said the legitimate expectation arises is outside his powers no legitimate expectation can arise. Even though *Al Fayed* is a Scottish case it is submitted an Australian court would come to a similar conclusion.

Having regard to the provisions of the tax laws and the inferences of legislative intent that can be drawn from these laws²¹⁹ coupled with the judgment in *Macquarie Bank* it would appear that other than for rulings or other legislative determinations made by the Commissioner, publications by the ATO of non-binding advice have no practical utility when considering proceedings against the Commissioner when the act complained of is a step in making an assessment or the issue of an assessment itself. Even if a legitimate expectation is found to be present it seems the Commissioner can discharge his obligations in one of a number of ways. These are: by publicising the fact that he will not act in terms of the non-binding advice; or by ensuring there are no perceptions of bias on his part; or giving the taxpayer an opportunity of putting its case as to why the Commissioner should abide by his previous statement and giving such submissions proper consideration.

There are two statutes that may possibly impact on the foregoing. They are the *Public Governance, Performance and Accountability Act 2013* (PGPA) and the *Public Service Act 1999* (PSA). In his 2014-15 Annual Report the Commissioner acknowledged he is bound by the PGPA and all government employees are governed by the PSA. In all the cases referred to in this section the PGPA was not cited as it only became operative on 1 July 2013. Section 5 of the PGPA states its objects are inter alia:

- (a) to establish a coherent system of governance and accountability across Commonwealth entities...
- (c) to require the Commonwealth and Commonwealth entities:
 - (i) *to meet high standards of governance, performance and accountability; and*
 - (ii) to provide meaningful information to the Parliament and the public; ... (Emphasis added).

²¹⁹ *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475 per Kitto J [13].

In terms of the PGPA officials of a Government entity must perform their tasks in good faith and with reasonable care and diligence: section 25. An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose: section 26. The PSA (section 13 (1-2)) provides all government employees must behave honestly and with integrity, act with care and diligence and not provide false or misleading information in response to a request for information that is made for official purposes. Section 13(4) of the PSA provides that ‘An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws.’ The full bench of the Federal Court in *Denlay* had occasion to deal with this latter subsection of the PSA and stated with reference to the decision in *Futuris*²²⁰ that:²²¹

Their (the majority judgment in *Futuris*) views are concerned with making the point that an assessment which is the result of bad faith towards a taxpayer is not an assessment worthy of that description in the ITAA 1936. It may be accepted that such a purported assessment would be contrary to s 13(4) of the *Public Service Act*. But the reasons of the majority of the High Court in *Futuris* do not support the notion that an assessment, made in good faith on the basis of information believed to be accurate, may be vitiated by reason of a breach of s 13(4) of the *Public Service Act* in the course of obtaining that information.

The Federal Court in *Leaver*²²² amplified the foregoing by stating:

In all respects what the pleading lacks is the fundamental element required to establish a pleading of bad faith, namely, the material facts said to constitute the consciousness or awareness or knowledge of wrongdoing. Neither bad faith nor conscious wrongdoing is established by knowledge, awareness or consciousness of acts, facts or circumstances which the person concerned does not believe to be wrongful. Facts, acts or circumstances may be wrongful and that wrongfulness may result in such other remedies as may be available in respect of that wrongdoing, but wrongdoing does not establish bad faith of the kind contemplated in *Futuris* or *Denlay*.

²²⁰ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

²²¹ *Denlay v Commissioner of Taxation* [2011] FCAFC 63 [80].

²²² *Deputy Commissioner of Taxation v Leaver* [2015] FCA 1454 [9].

It may be arguable that in issuing these non-binding documents the Commissioner is acting under the specific legislative provisions noted above and that he creates a legitimate expectation of future conduct in the mind of a taxpayer. It seems the PGPA and PSA do not afford taxpayer's any rights such as to convert non-binding advice into substantive rights on the part of taxpayers. As was noted in *Broadbeach* 'The notion that the Commissioner can, absent specific statutory authority, 'qualify' the operation of a federal statute is a hopeless contention, bereft of support and having no place in proceedings responsibly drawn.'²²³

Notwithstanding the views expressed above there have been dicta that suggest that non-binding publications by the Commissioner may give rise to a legitimate expectation. An example is *One.Tel*²²⁴ where Burchett J had this to say:

It seems to me that the formality and detail with which the Guidelines are framed and the nature of their subject matter point strongly in favour of the view that they give rise to a legitimate expectation that the Commissioner will conduct himself in the manner he has so carefully set out...The more difficult question is whether there is a legitimate expectation, of the kind held to arise in *Haoucher*,...But here, too, I think the formality and particularity of the Guidelines, together with the Commissioner's own care to set out in them the justification supporting each aspect of them, require the conclusion that they do give rise to such a legitimate expectation...I do not think that natural justice makes the same demand here as it did in *Haoucher*...*a person may be entitled to less than full particulars of the facts and views which may be considered sufficient to deny his expectation* (Emphasis added).

In *obiter dicta* Goldberg J in *Deloitte Touche*²²⁵ said:

A key issue in the proceeding is the relevance of the guidelines in the manual and whether they were complied with by the respondent. It is important to understand the significance of the guidelines for they do not have the status of a legislative enactment but are rather the creation of the Commissioner and the Australian Taxation Office. It is submitted by the respondent that they do not constitute a source of rights. In my opinion, the manner in which they have been promulgated and their contents make it clear that they are, at the least, a relevant consideration to which the respondent and

²²³ *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41.

²²⁴ *One.Tel Ltd v Deputy Commissioner of Taxation* [2000] FCA 270 [42].

²²⁵ *Deloitte Touche Tohmatsu & Ors v DFCT* 98 ATC 5192, 5207.

officers of the Australian Taxation Office must have regard and at the most (without deciding the issue) they are matters which create a legitimate expectation in taxpayers and their professional accounting advisors that they will be complied with according to their terms.

If the views expressed in *One.Tel* and *Deloitte Touche* are correct (particularly where an assessment is not in issue) the publication of non-binding documents possibly does give rise to a legitimate expectation on the part of taxpayers. It seems, however, that the obligation to act procedurally fairly may not be difficult to meet. As noted previously it seems that all that is required to ensure procedural fairness is that the Commissioner must ensure there are no perceptions of bias or give notice that he will depart from the content of the document in issue or give the taxpayer impacted an opportunity of putting its case and giving that case proper consideration. The judgment in *May* could possibly limit this right. The court said

There may well be good reasons of public policy why, as between public officials and persons directly affected by the exercise of a power, such persons should as a rule be notified of decisions exercising that power. But if such an obligation is to be imposed, notwithstanding the obvious practical difficulties it could entail, it is one for parliament, not for the courts, to prescribe. It has not done so to date. Rather our system of judicial review contemplates the very contingency that a person aggrieved by a decision may not receive official notice of it and may only ascertain that it has been made at some later date: see e.g. ADJR Act, s 11(4) and (5); and see *Worthley v Australian Securities Commission* (1993) 11 ACLC 610; (1993) 42 FCR 578.

Fourthly, given the circumscribed scope of the requirements of procedural fairness, we consider that no proper basis exists for calling into question the observations made by judges of this Court in *Sixth Ravini Pty Ltd v FC of T*, in *Allen, Allen & Hemsley v DFC of T*, and in *Minosea Pty Ltd v ASC*, above, that the obligation of procedural fairness does not apply to a decision to issue a notice under s 264(1) or equivalent statutory provisions.²²⁶

It seems if a legitimate expectation does arise then very little may be required of the Commissioner to ensure taxpayers are treated procedurally fairly.

²²⁶ *May v DFCT* 99 ATC 4587 [36-37].

In any event the Commissioner currently puts a caveat at the beginning of some non-binding documents that they are for example only for the use of ATO staff.

There are two types of non-binding documents that require special mention. These documents afford taxpayers some limited form of LPP. They are what are known as the ‘accountant’s concession’ and the ‘corporate board concession.’ These documents and the rights afforded to taxpayers under them are not steps in issuing an assessment (see for example section 9.3.3.1 below).

9.2.1 Accountants’ Concession²²⁷

This is an ‘administrative’ concession granted by the Commissioner, which applies to taxpayer documents prepared by external professional accounting advisors who are independent of the taxpayer. It takes the form of a qualified LPP. Although the ATO has access powers to request documents, there are a certain class of documents which the Commissioner recognises should not be accessed unless there are exceptional circumstances. This is intended to give taxpayers the confidence to communicate frankly with their accounting advisors in discussing their tax affairs.

The accountants’ concession classifies taxpayer documents into three categories:

- source
- restricted source, and
- non-source documents.

Source documents are not covered by the accountants’ concession. They include documents recording details about transactions and arrangements. Examples include ledgers, balance sheets and tax working papers.

According to the ATO, restricted source and non-source documents will only be accessed by the Tax Office in exceptional circumstances. These categories of documents include documents which discuss sensitive issues associated with source documents or documents

²²⁷ This can be accessed at <<https://www.ato.gov.au/general/gen/guidelines-to-accessing-professional-accounting-advisors--papers/#>> .

which provide opinions on an item contained in the client’s tax return, or advice provided, but not acted upon by the taxpayer.

Exceptional circumstances include:

- taxpayer with a history of serious non-compliance or a history of taking aggressive tax positions;
- the anti-avoidance provision may apply;
- reasonable suspicion of tax evasion, fraud, offences under the TAA or any other illegal activity; and
- likelihood of source documents being destroyed or lost.

Justice Perram considered the accountant’s concession, in one of the series of *Stewart*²²⁸ cases and stated:

The concession is not, and could not be, a rule of law. It is plain that no other party apart from the Commissioner is affected by it. In particular, it was not, and it could not have been, suggested that the material seized by the ACC under warrant was immune from production under that warrant for the concession in no way bound the ACC (Emphasis added).

And

Whilst it is true the concession has been held to engender a legitimate expectation that it will be applied so that unnotified departure from it will involve a breach of the rules of procedural fairness (One.Tel Ltd v Commissioner of Taxation [2000] FCA 270; (2000) 101 FCR 548 at 567-568 [42] per Burchett J) in no universe of discourse does it operate so as to prevent the Commissioner from discharging his public obligations under the Act which may well include using the documents seized from Mr Stewart . In effect, the applicants’ argument must rise as high as an assertion that the concession could operate to qualify the operation of the Act itself. Indeed, the applicants do allege that s 8 of the Act, which vests administration of the Act in the Commissioner, “has been qualified by” the concession (see paragraph 3 of the statement of claim).

²²⁸ *Stewart v The Deputy Commissioner of Taxation* [2010] FCA 402 [5-6] and [9-10].

This argument is contrary to axiomatic principles of Australian law. Under that system, Parliament makes the law and the Executive, of which the Commissioner is a part, administers it. *The notion that the Commissioner can, absent specific statutory authority, “qualify” the operation of a federal statute is a hopeless contention, bereft of support and having no place in proceedings responsibly drawn* (Emphasis added).

The accountant’s concession does not apply if the Commissioner obtains documents whether they are restricted or non-source documents from a third party.²²⁹

9.2.2 Corporate Board Concession

The ‘corporate advice on tax compliance risk’ (‘corporate board concession’) is another administrative concession the Commissioner has granted taxpayers. Documents may be protected from access by the ATO if the information within the document is created:

- by advisors (in-house or external);
- for the sole purpose of providing advice or opinion to a corporate board relating to a major transaction, arrangement, corporate system or process; or
- in relation to the likelihood and impact of tax compliance risk, likely view held by the Tax Office or to manage the tax compliance risk.²³⁰

Even if the taxpayer claims the corporate board concession, the ATO can lift the concession in similar exceptional circumstances as apply to the accountant’s concession above.

The report now turns to the AD(JR)A.

9.3 Administrative Decisions (Judicial Review) Act 1977 (AD(JR)A)

The broad policy intent of the AD(JR)A is to provide a ‘simple’ path for judicial review of disputes over Commonwealth administrative decisions. This includes taxpayers’ disputes with the Tax Office.

Where an application has been made for a judicial review under the AD(JR)A, section 15(1) states that this:

²²⁹ *Stewart v The Deputy Commissioner of Taxation* [2011] FCA 336.

²³⁰ PS LA 2004/14 ATO access to advice for a corporate board on tax compliance risk.

does not affect the operation of the decision or prevent the taking of action to implement the decision but:

- a. the Court or a Judge may, by order, on such conditions (if any) as it or he or she thinks fit, suspend the operation of the decision; and
- b. the Court or a Judge may order, on such conditions (if any) as it or he or she thinks fit, a stay of all or any proceedings under the decision.

There are a number of criteria that must be met before a claim under the AD(JR)A will be successful. These are considered below.

9.3.1 The Applicant must be a ‘Person Aggrieved’

Section 3 (4) AD(JR)A defines what is meant by an ‘aggrieved person’. Essentially it is a person whose interests are adversely affected by the decision; or a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.

This threshold requirement is a low one. Generally, the courts have taken a wide interpretation of the term ‘person aggrieved.’

9.3.2 The Application must be made in time

The taxpayer generally has 28 days after the day that the document containing the decision is provided, to apply for judicial review in accordance with section 11 AD(JR)A but the court has discretion to extend the time period.

9.3.3 There must be a ‘Decision’ ‘Conduct’ or ‘Failure’ Within Scope of the AD(JR)A

To fall within the ambit of the AD(JR)A a decision must be of an administrative character and made under an enactment: section 3.

The ‘two bars’ of this requirement entail the interpretation by the Courts of what constitutes, first, ‘a decision of an administrative character’ and, second, ‘a decision made under an enactment’. Each is considered below.

9.3.3.1 A Decision of an Administrative Character

Since *Australian Broadcasting*²³¹ it is clear that the decision must be substantive rather than only procedural in character. It cannot involve just a step in the course of reasoning toward an ultimate decision.

ATO decisions that have been found to be of an administrative character include decisions to:

- exercise section 353-15 TAA access powers;
- issue a section 353-10 TAA notice;
- institute court recovery action for unpaid tax; and
- prosecute persons under various offence provisions.

Tax Office determinations made under Part IVA ITAA 36 (the general anti-avoidance rule) and interim Tax Office audit reports have been found to form part of the process of making an assessment, and so are not reviewable under the AD(JR)A.²³² Expressions of opinion are not amenable to review under the AD(JR)A.²³³

9.3.3.2 A Decision Made under an Enactment

The term enactment mostly covers Commonwealth Acts and Ordinances, by-laws and instruments made thereunder.

A decision will only have been made under an enactment if it has been made under the authority of a particular provision in the relevant legislation. In considering whether or not this has been the case, the Courts look to the immediate or proximate source of power rather than to an ultimate source residing in the Federal legislation.

Sections 8 of the ITAA 36 (and similar provisions in other tax laws) are problematic. It provides that the Commissioner shall have the general administration of the Act. The view today is that acting under these provisions is not a decision under an enactment.²³⁴

²³¹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321

²³² *Meredith v FC of T & Ors* 2002 ATC 4730.

²³³ *Pegasus Leasing Ltd v FCT* 91 ATC 4972.

²³⁴ *Knuckey v FC of T* 97 ATC 4911; *PFTF Stock Pty Ltd v Deputy Commissioner of Taxation* [2010] FCA 557.

9.3.4 The Decision Must Not Be ‘Excluded’ from the Scope of the AD(JR)A

Certain decisions which otherwise would be reviewable are expressly excluded from review. These exclusions are contained in Schedule 1 to the AD(JR)A. Those concerning tax include:

- e. Decisions making or forming part of the process of making, or leading up to the making of assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending or refusing to amend, assessments or calculations of tax, charge or duty, under any of the *Income Tax Assessment Act* 1997, ITAA 36 and TAA, but only so far as the decisions are made under Part 2-35, 3-10 or 4-1 in Schedule 1 to that Act; and
 - ga. decisions under section 14ZY TAA disallowing objections to assessments or calculations of tax, charge or duty; and
 - gaa. decisions of the Commissioner of Taxation under Subdivision 268-B or section 268-35 TAA.

To overcome this hurdle the taxpayer must prove the decision is ‘so far removed from the assessment process that it does not, in the relevant sense, lead up to the making of an assessment.’²³⁵

9.3.5 The Applicant Must Establish One of the ‘Grounds for Relief’ Set Out in the AD(JR)A

The grounds of review outlined in sections 5 and 6 of the AD(JR)A are primarily the same. These include:

- (a) a breach of the rules of natural justice;
- (b) procedures that were required by law ... were not observed;
- (c) [the decision-maker] ... did not have the jurisdiction to make the decision
- (d) the decision was not authorized by the enactment in pursuance of which it was purported to be made;

²³⁵ *Intervest Corporation Pty Ltd v Commissioner of Taxation* (1984) 3 FCR 591.

- (e) [the decision-making involved] ... an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(Subsection 5(2) identifies the following situations where there will be such an improper exercise of the power:

- taking an irrelevant consideration into account in the exercise of a power
 - failing to take a relevant consideration into account in the exercise of a power;
 - an exercise of a power for a purpose other than a purpose for which the power is conferred;
 - an exercise of a discretionary power in bad faith;
 - an exercise of a personal discretionary power at the direction or behest of another person;
 - an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
 - an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power (Commonly referred to as the *Wednesbury* principle-see section 9.6 below);
 - an exercise of a power in such a way that the result of the exercise of the power is uncertain, and
 - any other exercise of a power in a way that constitutes abuse of the power.)
- (f) the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) the decision was induced or affected by fraud;
- (h) there was no evidence or other material to justify the making of the decision;
- (j) the decision was otherwise contrary to law.

Section 7 AD(JR)A refers to a situation where the decision maker has a duty to make a decision, but has failed to make the decision. If there is no prescribed period in which the decision maker has to make the decision, then there is a ground of relief for unreasonable delay in making the decision. If there is a prescribed period in which the decision maker has

to make the decision, and it has expired, then there is a ground of relief for failing to make a decision within the prescribed period.

9.3.6 The Exercise of the Court’s Discretion to Grant Relief

If the applicant has satisfied the previous five requirements the courts have considerable discretion as to whether or not to grant the relief. If the taxpayer has some other form of relief available the court would probably exercise its discretion against the taxpayer except in exceptional circumstances.²³⁶ As to the form of relief available to a taxpayer the High Court in *Park Oh Ho*²³⁷ noted that:

In that regard, it is relevant to mention that both declaratory and injunctive orders, as distinct from an order for damages, can readily be seen as appropriate remedies of judicial “review” of administrative decisions and actions.

The foregoing would suggest damages are not appropriate orders when administrative actions are reviewed.

9.3.7 The Right to Reasons for a Decision

Section 13 AD(JR)A is a crucial provision to enable applicants (taxpayers) to seek reasons from a decision maker for any decision. These reasons can be fundamental in determining whether to proceed for example under the AD(JR)A or Part IVC or to take no further action. Specifically, subsection 13(1) provides:

Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Circuit Court under section 5 in relation to the decision may ... request ... a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

Key points to observe from subsection 13(1) are the following:

- the person seeking the reasons must be ‘a person who is aggrieved by a decision.’

²³⁶ See for example *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

²³⁷ *Park Oh Ho v Minister for Immigration & Ethnic Affairs* [1989] HCA 54; (1989) 167 CLR 637.

- a person can request a statement of reasons separate and independently from an application for judicial review. But the person must be ‘entitled’ as per the legislative steps outlined above.

For section 13 to apply a “decision” has to have been made.

9.3.7.1 Requests

The taxpayer must request a statement of reasons. The form and content of the request is not prescribed other than that it must be in writing and it seems the request should be made within 28 days of the decision.²³⁸ Although there is no legislative time limit to request a statement of reasons, section 13(5)(a) allows the decision maker to refuse to provide a statement of reasons if the request is not made within 28 days.

Under section 13(5)(b), where the decision was not provided in writing, the request for a statement of reasons has to be made within a ‘reasonable time after the decision was made.’ Subsection 13(6) specifies that the Courts have to decide what constitutes ‘reasonable’ when the parties cannot agree on this matter.

If the decision maker refuses to provide a statement of reasons because the request was not made within 28 days or within a reasonable time, the decision maker must respond within 14 days from receipt of the request. That response must advise of the refusal and provide reasons for refusing: section 13(5).

9.3.7.2 Responses

Once an entitled person has made their request the decision-maker then has to do one of the following:

- provide the statement within 28 days: section 13(2);

(The statement should make intelligible the true basis of the decision and not camouflage it.)²³⁹

- under subsection 13(7) if the Federal Court is of the opinion the statement does not contain adequate particulars of findings on material questions of fact, an adequate

²³⁸ *Ansett Transport Industries (Operations) Pty Ltd v Wraith* [1983] FCA 179.

²³⁹ *ARM Constructions Pty Ltd v DCT (NSW)* (1986) 17 ATR 459.

reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the court may order the person who furnished the statement to furnish to the taxpayer who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons; or

- under section 13(3), within 28 days either:
 - (i) advise the applicant/taxpayer that they do not believe they are an entitled person, or
 - (ii) seek a court order determining that the applicant is not entitled to a statement.

(Note: in the case of (i), above under subsection 13(4A) the applicant can seek a court order declaring that they are entitled to a statement.)²⁴⁰

Taxpayers should note that section 13(11)(c) excludes any decisions listed in Schedule 2. Relevant to taxation matters are decisions relating to: the administration of criminal justice (item e), decisions to initiate court proceedings to recover unpaid tax and penalties arising under the ITAA 36²⁴¹ (item f) and enforcement of judgments or recovery of money by the Commonwealth (item m).

Section 13(8) states regulations can declare certain decisions or classes of decisions not to be decisions for section 13 purposes. Currently there are no such decisions listed under the *Administrative Decisions (Judicial Review) Regulations 1985*.

Having examined the AD(JR)A it is now time to examine the alternative legislative routes to seek judicial review of a taxation decision. These are:

- a review by the High Court, under section 75 of the Constitution; and
- a review by the Federal Court under section 39B of the *Judiciary Act 1903* (JA).

Claims under the AD(JR)A or JA or Constitution can be in the alternative.

²⁴⁰ Generally see *Re Ansett Transport Industries (Operations) Pty Ltd and Another v Kenneth F Wraith and Others* [1983] FCA 179.

²⁴¹ *Mostyn v DCT* 86 ATC 4930.

9.4 The Constitution²⁴²

9.4.1 Challenging Validity of Tax Laws

Sections 51 (ii), 53 and 55 are important provisions in the Constitution which prescribe Parliaments powers to make laws in relation to taxation. If Parliament enacts laws in breach of the empowering provisions they may be capable of being set aside by the High Court. Section 51(ii) is probably the more important provision and provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) ...
- (ii) taxation; but so as not to discriminate between States or parts of States.

The challenge, if ultimately successful, would bring a matter to a conclusion without having to deal with the merits of an assessment.

Factors the courts take into account in such a challenge are set out below.

First regard must be had to the implied grant of legislative power inherent in the fact that the heads of power appear in a Constitution.²⁴³ It does not matter if a law falls within the ‘core’ of a grant of power under section 51, or within the incidental scope of the power, there is but a single grant. The basic test for validity is whether a sufficient connection has been shown between the law in question and the subject matter of the head of power.

Second whilst the title to an Act, its preamble and statement of objects may sometimes be usefully referred to in aid of a task of constitutional characterisation, they may not usurp the function of the courts. Neither the title nor preamble nor any statutory statement of an Act’s objects can cure constitutional invalidity where the court finds such invalidity to exist. Neither the economic consequences of a statute nor the motive behind its enactment is determinative of its character. The problem in every case is to ascertain from the terms of the law impugned its true nature and character.²⁴⁴

²⁴² *Commonwealth of Australia Constitution Act* (1900).

²⁴³ The general principles, unless otherwise stated, are adapted from the judgment of Kirby J in *Leask v Commonwealth of Australia* 35 ATR 91.

²⁴⁴ *Fairfax v FC of T* [1965] HCA 64; (1965) 114 CLR 1[13].

A tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is negligible.²⁴⁵

Next, tax laws may be unjust or cause harm but provided they meet the constraints prescribed in the Constitution there is no limit to the power of Parliament to enact such laws.

Finally, if taxation is merely secondary to some other objective this does not disqualify a charge from being a tax.²⁴⁶

Accordingly, if Parliament follows the criteria prescribed in the Constitution its power to enact legislation with respect to taxation is unfettered. The purpose or motive of the legislature in passing the enactment is irrelevant. If the statute is one with respect to taxation, it does not matter if the imposition of the tax is inadvertent.

Challenges against legislation as being invalid often turn on whether an exaction is or is not a tax. The High Court has set out what is a tax.²⁴⁷ Although success is rare there have been cases where tax legislation has been found to be unconstitutional.²⁴⁸

This report now turns to the power of the High Court to review acts of the Commissioner.

9.4.2 Section 75 of the Constitution

Under section 75 of the Constitution, the High Court has original jurisdiction in relation to matters where:

- the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party: section 75(iii)
- a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: section 75(v).

These possible remedies are usually only considered by the High Court when, given the circumstances, all other available remedies have been exhausted.

²⁴⁵ Ibid per Kitto J.

²⁴⁶ *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

²⁴⁷ *Mathews v The Chicory Marketing Board (Vic)* (1938) 60 CLR 263 read with *Air Caledonie International and others v Commonwealth of Australia* (1988) 82 ALR 385. Gaudron and Hayne JJ in *Luton v Lessels* [2002] HCA 13 [60] said 'Imposing a financial burden on one group in society for the benefit of another group in society will often constitute a tax.'

²⁴⁸ *Air Caledonie International and others v Commonwealth of Australia* (1988) 82 ALR 385.

Since *Futuris*²⁴⁹ challenges to an assessment can only be made under the Constitution or *Judiciary Act* 1903 (JA) in circumstances where:

- the assessment is provisional or tentative (and even here it is arguable that a taxpayer may be limited to a challenge under Part IVC of the TAA), or
- there has been:
 - conscious maladministration; or
 - deliberate failure to comply with the provisions of the Act; or
 - fraud, bribery or other improper purpose; or
 - misfeasance in public office.²⁵⁰

It is difficult to be successful in cases where there are allegations of the kind that would justify a claim on the grounds set out above. As was noted in *Futuris*:²⁵¹

Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld. Remarks by Hill, Dowsett and Hely JJ in *Kordan Pty Ltd v Federal Commissioner of Taxation* are in point. Their Honours said:

‘The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed, one would hope that this was and would continue to be the case. As Hill J said in *San Remo Macaroni Company Pty Ltd v FCT* it would be a rare case where a taxpayer will succeed in showing that an assessment has in the relevant sense been made in bad faith and should for that reason be set aside.’

The aforesaid was applied and explained by the full bench of the Federal Court in *Denlay* in the following terms:²⁵²

²⁴⁹ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

²⁵⁰ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32. John Bevacqua describes misfeasance as a tort that permits an individual to recover for the loss or damage suffered consequent upon administrative action taken by the holder of public office, if the officer acted maliciously or knew that the action was beyond power and was likely to harm the plaintiff.

²⁵¹ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 [60].

Those observations highlight that their Honours were concerned, in their reference to conscious maladministration, with bad faith in the exercise of the decision-making power under challenge and the need for proof of an allegation of bad faith against the Commissioner or his officers. Their Honours were concerned with actual bad faith, not with some form of “constructive” bad faith established by unwitting involvement in an offence...The observations of the majority in *Futuris* do not support the proposition that any breach of the law by officers of the Commissioner in the course of processes anterior to, or even in the course of, making an assessment, suffices to establish conscious maladministration which is apt to vitiate the assessment. Conscious maladministration, as explained in *Futuris*, involves actual bad faith on the part of the Commissioner or his officers.

9.5 Section 39B of the *Judiciary Act 1903* (JA)

The power of judicial review under section 75 of the Constitution has been given to the Federal Court via section 39B of the JA. The Federal Court’s jurisdiction complements that of the High Court. However, unlike section 75 of the Constitution, section 39B is not ‘constitutionally entrenched’ and so it can be amended or repealed.

Since the decision in *Futuris*²⁵³ the JA may only be used to challenge an assessment in the limited circumstances as described in the previous section.

The grounds of review under the JA or Constitution can be the same as for claims under the AD(JR)A but are not limited to such grounds. The prerogative writs (mandamus, certiorari, prohibition and injunction) discussed in sections 11.3 to 11.6 of this report are examples of the type of relief that may be sought in these types of cases.

9.6 General Comment on Judicial Review

Often the relief where there has been a failure to act procedurally fairly falls under one or more of the AD(JR)A or JA or Constitution.

For example, in *Stewart* the Australian Crime Commission had obtained documents created by the taxpayer’s accountants under a search warrant and had made them available to the Commissioner. The case was concerned with the access the Commissioner had to these

²⁵² *Denlay v Commissioner of Taxation* [2011] FCAFC 63 [76-78].

²⁵³ *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32_[66].

documents. It was inter alia contended such access was a breach of the accountant's concession (see section 9.2.1 above). The court noted:

But if the Commissioner puts in place decision-making procedures which give the impression that such confidences will be observed then it will generally be procedurally unfair for him to proceed on some other basis without first hearing from the affected person. In such a case, the decision maker's breach of the requirements of procedural fairness will take the exercise of power outside the statutory grant in s 8 of the *Income Tax Assessment Act 1936* (or s 1.7 of the *Income Tax Assessment Act 1997* or s 3A of the *Taxation Administration Act 1953*). In each of those cases there will be an excess of jurisdiction which this Court can remedy under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).²⁵⁴

The taxpayer in *Stewart* also argued that the Commissioner's decision to access these documents was so unreasonable that that no reasonable decision maker could have arrived at it. This is commonly referred to as the *Wednesbury* principle. The High Court explained this principle in *SZMDS*.²⁵⁵

In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. *A court should be slow, although not unwilling, to interfere in an appropriate case.*

²⁵⁴ *Stewart v The Deputy Commissioner of Taxation* [2011] FCA 336 [29].

²⁵⁵ *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16.

What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. *If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.*²⁵⁶ (Emphasis added).

The *Wednesbury* principle is encapsulated in section 5(e) AD(JR)A as one of the grounds for judicial review of an administrative action.

The report now considers whether taxpayers have any rights against the Commissioner under the common-law.

²⁵⁶ Ibid [130-131] per Crennan and Bell JJ.

10. Common Law

There are a range of rights available to entities under the common law. The issue that arises here is whether they extend to taxpayers in their capacity as such. These rights will be considered under different heads.

10.1 Discretions

In *Pickering*²⁵⁷ Cooper J held that:

The respondent when asked to exercise the discretion in favour of the second, third, fourth and fifth applicants was under a legal duty to them to act fairly. In *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, Lord Scarman said (at 651):-

“... I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.”

Dowsett J dealing with the identical issue noted that²⁵⁸:

Different discretions usually involve different considerations. The principle identified by Cooper J appears to be that a discretion should be exercised consistently. It does not follow that different discretions must be exercised so as to produce outcomes which are the same. Further, there is no evidence that the respondent was ever asked to exercise any such discretion or that he declined to do so.

From the foregoing it seems clear that the Commissioner cannot exercise the same discretion differently between persons having identical tax characteristics.

It seems that where the Commissioner exercises discretion a taxpayer is entitled to reasons for the manner in which the discretion was exercised. As Barwick CJ noted:²⁵⁹

²⁵⁷ *Pickering & Ors v FCT* 97 ATC 4893, 4900.

²⁵⁸ *Pickering v Deputy Commissioner of Taxation* [1998] FCA 16905.

²⁵⁹ *Giris Pty Ltd v FC of T* 69 ATC 4015; *Kolotex Hosiery (Aust) Pty Ltd v FC of T* 75 ATC 4028 [6].

However, in my opinion, the Commissioner is under a duty in each case to form an opinion and the taxpayer is entitled to be informed of it, and upon the taxpayer's request, the Commissioner should inform the taxpayer of the facts he has taken into account in reaching his conclusion.

There is nothing exceptional about this and there are legislative provisions that are to similar effect. See for example section 13 AD(JR)A and sections 37 and 38 AATA.

10.2 Can the Commissioner be Prevented from Issuing an Assessment Even if it is Incorrect?

*Lucas*²⁶⁰ was a case where a taxpayer sought to prevent the Commissioner issuing an assessment. It was alleged by the taxpayer that the cause of action relied upon was the right of the plaintiff to prevent the Commissioner from exercising a statutory power when he had no authority to do so. It was said that the Commissioner had no authority or power to assess the plaintiff to additional tax in the manner which it was feared he would attempt to do. Young CJ held that

- to the extent that any duty is owed by the Commissioner that duty is owed not to taxpayers but the Crown; and
- the Commissioner cannot be restrained from issuing an assessment that is incorrect.

Doubt on the validity of *Lucas* was raised in *Biga Nominees*.²⁶¹ *Biga Nominees* was a case where the respondent sought declaratory relief that a certain vehicle was exempt from sales tax under legislation passed in the 1930's. The Commissioner argued inter alia that the taxpayer had no standing to approach the court for relief as the Commissioner owed a duty only to the Crown. This legislation did not have provisions equivalent to Part IVC TAA and an assessment could not be challenged in *Biga Nominees*. The court found in favour of the taxpayer. This case is distinguishable as under the current legislation Part IVC is the only way (subject to some minor exceptions) an assessment can be challenged.

Gyles J had occasion²⁶² to revert to this issue in *Young*²⁶² where the Commissioner had indicated he would no longer allow deductions for certain types of transactions. The taxpayer

²⁶⁰ *Lucas v. O'Reilly* 79 ATC 4081.

²⁶¹ *Federal Commissioner of Taxation v Biga Nominees Pty. Ltd* 88 ATC 4270.

²⁶² *Young v FCT* 2000 ATC 4133 [19-20].

sought declaratory relief that the Commissioner was to assess as he had done in the past. The learned judge said:

The mere fact that the act which it is alleged would be a breach of the law will not take place until a future time does not necessarily establish that a question as to the lawfulness of the act is hypothetical. Whether this is so or not will be influenced by the effect that such an act would have. In the present case, all that is to be done is that an assessment will be issued. There is no other action which will have any directly adverse effect upon the applicant such as would normally be found *quia timet* relief...

This is particularly true where the act in question, assessment, cannot, for relevant purposes, be challenged otherwise than in accordance with Pt IVC of the Taxation Administration Act 1953 (Cth) by reason of the operation of s 175 and s 177 of the Act (references deleted). Whilst, as Dawson J pointed out in Oil Basins Ltd (supra), the sections do not in terms relate to the period anterior to assessment, it would, in my opinion, be anomalous to permit issues which could not be agitated after assessment to be agitated before assessment, when it is only the assessment which gives effect to the unlawfulness so far as the applicant is concerned. (Emphasis added).

The Commissioner cannot be prevented from issuing an assessment even if incorrect. Part IVC TAA provides the remedy if an assessment is incorrect.

The report now turns to the vexed question whether the Commissioner owes taxpayers a duty of care.

10.3 Is a Duty of Care Owed to Taxpayers?

If a duty of care is owed by the Commissioner to a taxpayer then, in the event of breach of that duty, an action for damages or possible other relief may lie against the Commissioner. This section seeks to determine whether such a duty is owed.

In *Crimmins*²⁶³ McHugh J set out 6 questions the answers to which, in the learned judge's opinion, would indicate whether an entity such as the ATO would owe taxpayers a duty of care in their capacity as taxpayer. The questions were:

²⁶³ *Crimmins v Stevedoring Committee* [1999] HCA [93].

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
5. Would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? If yes, then there is no duty.
6. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g., the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.

Each of these questions and their answers suggests the ATO would not owe such a duty.

Hayne J in *Crimmins* noted:²⁶⁴

Put at its most general and abstract level, the fundamental reason for not imposing a duty in negligence in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private or individual focus. To impose a private law duty will (or at least will often) distort that focus. This kind of distinction might be said to find reflection in the dichotomy that has been drawn between the operational and the policy decisions or functions of public bodies. And a quasi-legislative function can be seen as lying at or near the centre of policy functions

²⁶⁴ Ibid [292].

if policy and operational functions are to be distinguished. But as more recent authority suggests, that distinction may not always be useful and I do not need to apply it in deciding the present matter (Emphasis added).

In *Crimmins* Gaudron J noted that a factor to be considered when seeking to determine if a duty of care is owed is to determine ‘whether the powers and functions conferred on the Authority are compatible with the existence of that duty.’²⁶⁵

The foregoing suggests the Commissioner does not owe such a duty to taxpayers in the performance of his duties in administering the tax laws. *Bevacqua* appears to be of the same view where he notes that:

There is the policy question of statutory intent and statutory context. In tax, this translates to a concern with assessing whether and to what extent a tortious duty of care to taxpayers is compatible with the public duties and powers of the Commissioner set out in tax and tax administration legislation. It is the judicial approach to determining this public policy issue which has provided an apparent extended scope of immunity from tortious suit for the Commissioner of Taxation.²⁶⁶

Finally on the issue that the Commissioner owes taxpayers a duty of care such as to found a claim in tort was considered in *Harris*²⁶⁷ where Grove J said:

I deal first with negligence. There is no identified duty of care specified as being owed by the defendants to the plaintiff. Such a duty is not established by reference to proclamations such as the Taxpayers Charter which express aims of treating citizens from whom tax is to be levied, fairly and reasonably. Even if there was a departure from some standard specified in such a document, it could not vest a private right to recover tort damages in a person affected by the departure. In recent times the determination of the existence of a duty of care has been directed to be established by recognition of novel areas of duty on an incremental or case by case basis: *Perre v Apand Pty Limited* [1999] HCA 36; 1999 198 CLR 180; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 1999 200 CLR 1. There is no basis

²⁶⁵ *Ibid* [18].

²⁶⁶ *Bevacqua* gives detailed consideration to claims for negligence against the Commissioner. John Bevacqua, Taxpayer rights to compensation for tax office mistakes, CCH and ATTA Doctoral series No3, *CCH Australia Ltd*.

²⁶⁷ *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550.

upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act. The pleading does not suggest that the steps taken were outside of the scope of the Act. There is no identified act or omission which could give rise to an entitlement of the plaintiff to damages against any intended defendant.

The document misconceives the basis upon which damages may be payable to one who suffers loss as a result of an alleged breach of statutory duty. An action for breach of statutory duty is not available to all persons suffering special damage consequent upon a breach of public duty. What must be shown is that the duty was owed to the injured party at least in the sense that the duty was created for the benefit of a class of person less extensive than the general public of which the injured party was a member. To state this is not to imply that there can be discerned any asserted breach for which damages would be available to a member of a definable class. I have already commented that much of the verbiage in the pleading adverts to alleged procedural unfairness for which tort damages are not an available remedy. There is nothing in this pleading, whether referring to statute or regulation, which could vest a cause of action for damages in the plaintiff.²⁶⁸

Bevacqua's views on the policy questions to be considered in connection with the issues of statutory intent and statutory context reinforce the views expressed in this report that the Commissioner does not owe taxpayers a duty of care. Bevacqua is of the view that these questions translate to a concern with assessing whether and to what extent a tortious duty of care to taxpayers is compatible with the public duties and powers of the Commissioner set out in tax and tax administration legislation. It is the judicial approach to determining this public policy issue which has provided an apparent extended scope of immunity from tortious suit for the Commissioner of Taxation.²⁶⁹

The foregoing suggests that it is very difficult to find any duty of care that the ATO might owe to taxpayers in performing its functions in administering the tax laws. Further the recent decisions which appear to give the ATO and its administration of the tax laws primacy

²⁶⁸ *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550 [12, 13].

²⁶⁹ See for example *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550.

reinforce this view.²⁷⁰ To the extent such a duty exists it will be very difficult for a taxpayer to be successful in any claim against the ATO.

A related issue is whether the Commissioner can be held vicariously liable for the acts or omissions of ATO staff that cause physical or property damage to a taxpayer in circumstances where the Commissioner or more properly ATO staff go outside the ambit of the powers granted to them, such as in enforcing rights under section 353-10 TAA. This is considered next.

With claims other than for pure economic loss (considered in section 10.4 below) Gummow and Hayne JJ in *Lepore*²⁷¹ note, after an extensive review of the law relating to vicarious liability:

For present purposes, it is enough to conclude that when an employer is alleged to be vicariously liable for the intentional tort of an employee, recovery against the employer on that basis should not be extended beyond the two kinds of case identified by Dixon J in *Deatons*: first, where the conduct of which complaint is made was done in the intended pursuit of the employer's interests or in the intended performance of the contract of employment or, secondly, where the conduct of which complaint is made was done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having.

If claims for personal injury or damage to property were made arising from the administration of the tax laws it is possible the ATO staff member may have acted outside the purpose for which the servant was employed. If, in the unlikely event an ATO staff member acted in such a way that caused damage (and acting within the course and scope of their employment with the ATO) the Commissioner would be liable.

Further in *Futuris* the majority noted that:²⁷²

The issue here is whether, upon its proper construction, s 175 of the Act brings within the jurisdiction of the Commissioner when making assessments a deliberate failure to comply with the provisions of the Act. A public officer who knowingly

²⁷⁰ See for example *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41, *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 [60].

²⁷¹ *New South Wales v Lepore* [2003] HCA 4 [239].

²⁷² *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32 [55].

acts in excess of that officer's power may commit the tort of misfeasance in public office in accordance with the principles outlined earlier in these reasons. Members of the Australian Public Service are enjoined by the Public Service Act (s 13) to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest. These considerations point decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms.

The foregoing reflects the view that the provisions of the tax laws providing for the conclusive nature of assessments do not preclude claims for misfeasance in public office (a deliberate failure to administer the law according to its terms). This is subject to what was stated by the majority in *Mengel*²⁷³ who noted that:

So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, *he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability* (Emphasis added).

It seems if a claim for misfeasance in public office were instituted, only the tax officer concerned would be liable. If the ATO accepts some form of liability or indemnifies the member of staff that is a different issue.²⁷⁴

The report now turns to claims for pure economic loss.

10.4 Pure Economic Loss

This part first considers the Scheme for Compensation for Detriment caused by Defective Administration and then looks to claims for pure economic loss.

²⁷³ *Northern Territory v Mengel* [1995] HCA 65 [60].

²⁷⁴ See for example *Young and Commissioner of Taxation* [2008] AATA 155 [2].

10.4.1 Scheme for Compensation for Detriment Caused by Defective Administration

The Commissioner accepts that where a claim under the Scheme for Compensation for Detriment caused by Defective Administration arises it could be as a consequence of a legal liability (for example, negligence).²⁷⁵ Such claims arise inter alia as a consequence of the executive power of the Commonwealth under section 61 of the Constitution and the PGPA. If a claim is made under the Scheme for Compensation for Detriment caused by Defective Administration, the relevant Minister and possibly the Commissioner, in their absolute discretion, may make an award in favour of a taxpayer if that taxpayer has suffered detriment as a result of defective administration. The prospects of success are slim in these circumstances.

This section now reviews claims for pure economic loss.

10.4.2 Claims for Pure Economic Loss

McHugh J describes pure economic loss in the following terms:

Where a defendant knows or ought reasonably to know that its conduct is likely to cause harm to the person or tangible property of the plaintiff unless it takes reasonable care to avoid that harm, the law will prima facie impose a duty on the defendant to take reasonable care to avoid the harm. Where the person or tangible property of the plaintiff is likely to be harmed by the conduct of the defendant, the common law has usually treated knowledge or reasonable foresight of harm as enough to impose a duty of care on the defendant. Where a person suffers pure economic loss, however, the law has not been so willing to impose a duty of care on the defendant. By pure economic loss, I mean loss which is not the result of injury to person or tangible property.²⁷⁶

The manner in which the tax legislation has been drafted and interpreted by the courts suggests that few claims, if any, for monetary compensation as a consequence of pure economic loss would be entertained. There are various reasons for this such as the need to

²⁷⁵ Applying for Compensation < <https://www.ato.gov.au/Forms/Applying-for-compensation/> > (Last modified 5 May 2015).

²⁷⁶ *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180 [73].

avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class.²⁷⁷

It seems that to the extent conduct of the Commissioner or any staff of the ATO acting in their capacity as such gives rise to a claim in tort it will usually be for pure economic loss and then generally for negligent misstatement such as might occur when the Commissioner issues non-binding statements and a taxpayer relies on them. A majority of the High Court in *San Sebastian*²⁷⁸ had this to say about claims of this nature:

There is a special problem in defining the circumstances in which a duty of care arises in the context of statements. One facet of this problem is that it is more difficult to apply the standard of reasonable foreseeability to the consequences which flow from the making of a statement, than it is to apply that standard to the consequences which flow from acts. This is because damage flows, not immediately from the defendant's act in making the statement, but from the plaintiff's reliance on the statement and his action or inaction which produces consequential loss. A second facet of the problem arises from the propensity of negligent statements to generate loss which is purely economic. The recovery of economic loss has traditionally excited an apprehension that it will give rise to indeterminate liability. And there is also an apprehension that the application of the standard of reasonable foreseeability may allow recovery of economic loss of such magnitude and in such circumstances as to provoke doubts about the justice of imposing liability for it on the defendant.

Claims in tort against the Commissioner for damage to person or property or for pure economic loss seem unlikely to succeed.

The report now discusses the various court processes and similar stratagems that may be of assistance to taxpayers.

²⁷⁷ *Bryan v Maloney* (1995) 182 CLR 609, 618.

²⁷⁸ *San Sebastian Pty Ltd v Minister* [1986] HCA 68 [15].

11. Court Processes

There are a number of processes initiated by the courts which may be of use to taxpayers. Before considering specific aspects, it may be apposite to cite what the majority of the High Court had to say on the ability of the courts to utilise new processes and procedures to meet the exigencies of cases.

The course which the proceedings followed in the Federal Court can only be understood against the background of the unavoidable complexity, costs and delays which would attend the judicial resolution of the appellants' individual claims by separate and individual proceedings. Only then will the desire of the parties (and of the Federal Court itself) to find an efficient way to proffer for judicial decision any justiciable issues common to the many claims before that Court be appreciated. The Constitution does not require this Court to adopt a view of the judicial power which would unduly restrict innovative procedures and flexible remedies made available in the courts to resolve new and complex problems in modern litigation. Within applicable constitutional restraints the procedures of the courts should be allowed to adapt to the necessities of the time. Otherwise the inevitable consequence will be that courts become irrelevant to, or effectively unavailable for, the determination of the disputes of parties such as those now before this Court. That cannot be the purpose and meaning of the Australian Constitution in providing for the Judicature as a branch of the government of the nation.²⁷⁹

This report now considers various court processes. These processes do not constitute rights in themselves (unless otherwise stated) but merely means by which a taxpayer may enforce those rights they have.

11.1 Summary Judgment

A party may apply for summary judgment in the Federal Court (not the AAT) where in that party's opinion it believes the other side has no reasonable prospect of success or no reasonable cause of action or defence is disclosed.²⁸⁰ Such an application may also be made in respect of part of a claim or defence. If an order is made dismissing part of the proceeding, the proceeding may be continued for that part of the proceeding not disposed of by the order.

²⁷⁹ *Bass v Permanent Trustee Co Ltd* [1999] HCA 9 [71].

²⁸⁰ Section 31(A) *Federal Court of Australia Act 1976*; Federal Court Rule 26.01.

In *Spencer*²⁸¹ French CJ and Gummow J dealing with summary judgment said:

Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this Court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success.

Collier J in *Hii* noted that ‘As has been repeatedly observed in cases dealing with summary judgment, the Court ought not lightly make an order for summary judgment.’²⁸²

It is difficult to obtain orders of this type particularly in tax proceedings although the remedy is available. Summary judgment was sought in *McDonald's*.²⁸³ Gyles J considering an application for summary judgment by the taxpayer against the Commissioner said:

[S]ection 14ZZO of the Administration Act provides that the applicant has the burden of proving that the declaration should not have been made or should have been made differently. *An application for summary judgment by a party which bears the burden of proof can be properly described as ambitious, particularly where the proceeding is at an early stage – no evidence has been filed, there has been no discovery, no subpoenas have been issued and where there are no formal pleadings. It must also be borne in mind that the Commissioner has no first-hand knowledge of the underlying facts and circumstances* (Emphasis added).

It seems it would be difficult for a taxpayer to obtain summary judgment against the Commissioner when an assessment is being challenged. An application for summary judgment by the Commissioner was successful in *Roberts*.²⁸⁴

²⁸¹ *Spencer v Commonwealth of Australia* [2010] HCA 28 [28].

²⁸² *Hii v Commissioner of Taxation* [2015] FCA 375 [44].

²⁸³ *McDonald's Australia Ltd v Commissioner of Taxation* [2008] FCA 37.

²⁸⁴ *Roberts v Deputy Commissioner of Taxation* [2013] FCA 1108.

11.2 Declaratory Relief

In order to obtain such relief a party must show various things described by Lockhart J delivering the judgment of the full court in *Aussie Airlines*²⁸⁵ as follows:

- the proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies: *Re Judiciary Act 1903 and Navigation Act 1912* (1921) 29 CLR 257. The answer to the question must produce some real consequences for the parties.
- the applicant for declaratory relief will not have sufficient status if relief is ‘claimed in relation to circumstances that [have] not occurred and might never happen’ or if the court's declaration will produce no foreseeable consequences for the parties (references omitted).
- the party seeking declaratory relief must have a real interest to raise it;
- generally there must be a proper contradictor.

The relief is discretionary.²⁸⁶

Declaratory relief in tax cases is dependent on whether an assessment has or has not been issued. Thus in *Platypus Leasing*²⁸⁷ after an assessment was handed up to the court it dismissed the application for relief. The courts have held that once an assessment has been issued it is precluded from dealing with issues related to such assessments except (subject to limited exceptions) under Part IVC TAA.²⁸⁸

As relief is discretionary, if other relief is available to the taxpayer there is a risk the application will not be granted.

A taxpayer cannot test whether an assessment is valid by means of this process.²⁸⁹

²⁸⁵ *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663 at 670-671.

²⁸⁶ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

²⁸⁷ *Platypus Leasing Inc v Commissioner of Taxation* (2005) 61 ATR 239.

²⁸⁸ *Platypus Leasing Inc & v Commissioner of Taxation* [2005] NSWCA 399.

²⁸⁹ *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 27; (1981) 147 CLR 360.

The applicant for declaratory relief has the burden of proof. This applies equally to the Commissioner if he seeks declaratory relief.

11.3 Mandamus

Where a legal duty is imposed on a public official who refuses to perform that duty an order of mandamus may be granted compelling performance of that duty provided it cannot be enforced by any other adequate legal remedy. A court may order a public officer to exercise a discretionary power but will not direct how that power is to be discharged.

The High Court unanimously held in *Ozone Theatres*²⁹⁰ that in relation to all the prerogative writs (mandamus, certiorari, prohibition and injunction):

The writ...is not a writ of right nor is it issued as of course. There are well recognized grounds upon which the court may, in its discretion, withhold the remedy.

For example, the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld. The question whether there are any grounds for refusing the remedy will be discussed after the question of the jurisdiction of the Court of Conciliation and Arbitration has been considered.

These prerogative writs can be sought separately or in conjunction with each other.

11.4 Certiorari

Certiorari is an order setting aside a decision. If a decision has been made unlawfully an order for *certiorari* may be sought.

²⁹⁰ *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 [6-7].

11.5 Prohibition

This order precludes a party from doing something illegal or continuing with unlawful conduct.

11.6 Injunction

An injunction can prevent or require certain action.

The court is able to grant one or more of these prerogative writs in the same order. As the High Court noted:

The power to grant declaratory and injunctive relief in addition to the power to quash or set aside (with effect from a specified date) an impugned decision is clear. It is to allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of in a way which will achieve what is ‘necessary to do justice between the parties’²⁹¹

The following section is also a form of court process but is not available to taxpayers. Only the Commissioner may avail himself of this form of relief.

11.7 Mareva Injunction

The Commissioner can seek a ‘Mareva injunction’ from a Court to prevent a taxpayer or a related-party dissipating or transferring assets beyond the reach of the Commissioner. The courts accept that, in some cases, a Mareva injunction may be ordered before a tax debt is payable. A Mareva injunction can also impose travel restrictions on a taxpayer. A breach of a Mareva injunction constitutes a contempt of court, and can result in imprisonment.

To obtain a Mareva injunction, five elements must be established:

1. a *prima facie* cause of action;
2. full disclosure is made to the court;
3. there must be assets available, though these need not ever have been in Australia;
4. there is a real risk of dissipation of the assets; and

²⁹¹ *Park Oh Ho v Minister for Immigration & Ethnic Affairs* [1989] HCA 54; (1989) 167 CLR 637 [11].

5. an undertaking is given as to damages.²⁹²

A Mareva order is not there just for the asking. In *Rosenthal*²⁹³ O'Bryan J said:

There must be demonstrated a real danger that the defendant intends to remove assets from the jurisdiction or dispose of assets within the jurisdiction to defeat the plaintiff. One might suppose that the first-named defendant is most apprehensive about the outcome of this litigation. The amount claimed with additional tax is a vast sum. However, the Mareva procedure was not designed to freeze a defendant's assets to make a plaintiff's claim fruitful. There must be evidence to show that the risk to the assets has materialised or will probably materialise.

The High Court has noted that:

In Australia, for many years, *Mareva* orders have been made in aid of the exercise of the specific remedies provided for execution against judgment debtors. Such orders are not interlocutory as they may operate after the recovery of final judgment, yet they are impermanent in the sense that they preserve assets and assist and protect the use of methods of execution and do not substitute for them. In respect of their operation after, as well as before, the making of orders for final relief, the *Mareva* order should, in general, be supported by an undertaking as to damages.²⁹⁴

A Mareva injunction can be issued in conjunction with a garnishee order.²⁹⁵

Although there are a number of jurisdictional facts that must be present for the grant of a Mareva injunction the Commissioner does from time to time apply for such orders and they are generally granted. A recent example is the *Regent Pacific* decision in the Federal Court.²⁹⁶

This report now turns to consider the various forms of estoppel and whether their application affords a taxpayer any rights.

²⁹² See for example *Mareva Compania Naviera SA v International Bulkcarriers SA* (1975) 2 Lloyd's Rep 509; (1980) 1 All ER 213.

²⁹³ *Deputy Federal Commissioner of Taxation v. Rosenthal & Ors* 85 ATC 4031.

²⁹⁴ *Cardile v Led Builders Pty Ltd* [1999] HCA 18.

²⁹⁵ *DFC of T v Zumtar* 93 ATC 4351.

²⁹⁶ *Commissioner of Taxation v Regent Pacific Group Limited* [2013] FCA 36.

12. Estoppel

Rich J has described estoppel in the following terms:

In *Greenwood v. Martins Bank Ltd*, Lord Tomlin said:-

The essential factors giving rise to an estoppel are I think:- (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (3) Detriment to such person as a consequence of the act or omission.

Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.²⁹⁷

There are various forms of estoppel such as being estoppel by judgment (also known as *res judicata*) (considered in the next section), issue estoppel which is an extension of the *res judicata* principle, estoppel by deed and estoppel by representation being estoppel by word or conduct (the most common). Where a judgment has been given, issue estoppel arises not only in respect of the right and cause of action claimed and put in suit (*res judicata*), but also in respect of every issue of fact or law alleged or denied in the proceedings, the existence of which was a matter necessarily decided in the proceedings.²⁹⁸ Estoppel by deed was described in *Case 2/2014*²⁹⁹ as follows:

Estoppel by deed refers to the principle that a party to a deed is prevented from disputing any distinct allegation of fact which he or she made in it. Relevantly, it is a rule of evidence based on the principle that an unambiguous statement in a deed must be taken as binding between the parties and therefore not allowing any contradictory proof. An important qualification, however, is that the statement of fact must be precise and unambiguous and, in this regard, it is not enough to draw inferences from the deed.

²⁹⁷ *Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507 [4].

²⁹⁸ CCH tax library [¶81-125].

²⁹⁹ *Case 2/2014*, 2014 ¶ATC 1-064 [57].

Estoppel by deed should not impact on the Commissioner in performing his tasks in administering the tax laws but if he enters into an agreement and both parties act upon the agreement he cannot be seen to deny its terms and not act accordingly.³⁰⁰ Such a claim could be based on estoppel or simply under the law of contract.

In so far as the Commissioner is obliged to determine the liability to tax and issue an assessment to taxpayers Kitto J noted that ‘No conduct on the part of the commissioner could operate as an estoppel against the operation of the Act.’³⁰¹ Estoppel by representation does not operate against the Commissioner in these circumstances. In *AGC Hill* J stated this principle succinctly when he said:

The last question merely reflects the reasons why there is no room for the doctrine of estoppel operating to preclude the Commissioner of Taxation from pursuing his statutory duty to assess tax in accordance with law. The *Income Tax Assessment Act* imposes obligations upon the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart. In my view the doctrine of estoppel cannot be invoked by a taxpayer so as to prevent the Commissioner assessing pursuant to his duty so to do.³⁰²

No statement or publication (other than rulings) can operate to prevent the Commissioner from assessing according to law.

The Commissioner on the other hand could raise estoppel against a taxpayer but would have to make it clear at the outset that he intends to do so.³⁰³

³⁰⁰ *Queensland Trustees Ltd v Fowles* [1910] HCA 51; (1910) 12 CLR 111.

³⁰¹ *Federal Commissioner of Taxation v Wade* [1951] HCA 66; (1951) 84 CLR 105 [7].

³⁰² *AGC (Investments) Ltd v FC of T* 91 ATC 4180, 4195.

³⁰³ *Saffron v FCT* 91 ATC 4501.

13. Res Judicata

Justice Dixon described this estoppel in the following manner:

A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.

Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. *In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived.* But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J. in *R. v. Inhabitants of the Township of Hartington Middle Quarter*, the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

In the phraseology of Lord *Shaw*, ‘a fact fundamental to the decision arrived at’ in the former proceedings and ‘the legal quality of the fact’ must be taken as finally and

conclusively established (*Hoystead v. Commissioner of Taxation*). But *matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation (Emphasis added).*³⁰⁴

Notwithstanding the foregoing in it was held that the determination of an issue in one income year is not determinative of the identical issue in a different income year.³⁰⁵

An important decision from a taxpayer perspective is the decision in the High Court in *Chamberlain*.³⁰⁶ In this case the Commissioner sued for certain monies owed by virtue of an assessment. The matter was settled and the settlement made an order of court. The Commissioner then sued again for additional monies he contended were owed for the same income year in respect of which an order of court had been made. The majority (the court was unanimous as to the outcome) held:

To determine whether or not the appellant's argument should succeed, it is necessary to identify the cause of action upon which the respondent relied in the first proceeding. There can be no doubt that the respondent sued for a debt due to the Crown by the appellant in respect of income tax assessments and additional tax for late payment for the years in question. Equally, there is no doubt that in the second proceeding the respondent sued for a debt due to the Crown in respect of the same assessments and the same additional tax for late payment. Whether one focuses on the facts supporting a right to judgment or on the right impugned or on the substance of the action, the conclusion is inevitable that the cause of action relied upon by the respondent in the second proceeding is that upon which he had earlier relied. The additional credit reflecting the amount paid by the appellant after judgment was entered in the earlier proceeding was not part of the cause of action; it was simply an amount paid in respect of that cause of action.³⁰⁷

³⁰⁴ *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464.

³⁰⁵ *Orica Ltd & Anor v FC of T* 2001 ATC 4039; *Spassked Pty Ltd v FC of T* 2007 ATC 5406.

³⁰⁶ *Chamberlain v Deputy Federal Commissioner of Taxation* [1988] HCA 21; (1988) 164 CLR 502.

³⁰⁷ *Ibid* [14].

The court then continued:

It may well be true that, as the respondent submitted, estoppel by representation affords no answer to a claim in exercise of a statutory power or duty or a right conferred in the public interest: see *Maritime Electric Co. v. General Dairies, Ltd.* (1937) AC 610, at pp 619-621. And it may well be that no conduct on the part of the Commissioner can operate as an estoppel against the operation of the Act: *Federal Commissioner of Taxation v. Wade* [1951] HCA 66; (1951) 84 CLR 105, at p 117. It is equally true that the Commissioner is not bound by a determination made in respect of an assessment for one year, so far as other years are concerned: *Caffoor v. Income Tax Commissioner* (1961) AC 584, at pp 598-601. Likewise, there can be no issue estoppel against the operation of a statute which creates public rights and duties or which enacts imperative provisions: *Bradshaw v. M'Mullan* (1920) 2 Ir R 412, at pp 425-426; *Griffiths v. Davies* (1943) KB 618; *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* (1964) AC 993, at pp 1015-1017.

All this may be accepted for the purposes of the present appeal but it has little to do with the question at issue. This is not a situation in which all that is involved is the conduct of the respondent or indeed the operation of an Act which imposes liability for income tax and provides the means by which that tax may be assessed and recovered. *The point of the present appeal is that the respondent brought an action against the appellant and recovered judgment against him. He obtained a judgment of the court in which the cause of action upon which he relied merged, thereby destroying its independent existence so long as that judgment stood. And, so long as that judgment stands, it is not competent for the respondent to bring further proceedings in respect of the same cause of action.* It is no answer to say that the court might, if appropriate, stay the second action as an abuse of process. The impediment goes deeper than that; *res judicata* may sustain a plea of abuse of process but in that case the appropriate remedy is to strike out the later action: *Greenhalgh v. Mallard* (1947) 2 All ER 255, at p 257; *Dallal v. Bank Mellat* (1986) QB 441, at pp 451-454. *So long as the respondent chooses, as he does, to take no step to set aside the judgment and to raise no issue in the second action as to the circumstances in which that judgment was obtained, he must accept the consequences of res judicata.* There is nothing in the Act or arising from the position of the respondent as a public officer that precludes the operation of that doctrine. The matter is not one for the

discretion of the Court; by operation of law the cause of action relied upon by the respondent has ceased to exist (Emphasis added).³⁰⁸

If a judgment is granted for tax owed in respect of one income year it seems the Commissioner cannot then seek to claim additional sums contended to be owed in respect of tax in the same income year unless the first judgment is set aside.

The issues of the various bases for estoppel seem to be of little value to taxpayers although depending on the facts estoppel may be used as a shield against a claim by the Commissioner.

³⁰⁸ Ibid [20-21].

14. Unjust Enrichment

A claim:

for an amount paid under fundamental mistake of fact should now be recognized as lying not in implied contract but in restitution or unjust enrichment...In other words, receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment.³⁰⁹

The High Court has also recognised a mistake of law giving rise to such a claim.³¹⁰

The Federal Court has held (obiter) that no claim for unjust enrichment arises for taxes overpaid because they were inconsistent with the statutory scheme.³¹¹ The reasons for this conclusion were:

- the taxpayer's entitlement to a restitutionary remedy does not arise on payment of the tax incorrectly demanded (as it would under the general law), but only when the assessment is set aside.
- section 172 of the *Assessment Act* imposes a duty on the Commissioner to refund tax overpaid in certain circumstances — that is, where by reason of an amendment of an assessment, the taxpayer's liability to tax is reduced. This language suggests an intention to provide an exclusive remedy for the recovery of overpaid tax, within the framework of the objection and appeals process.
- if the taxpayer can recover tax incorrectly assessed under principles of unjust enrichment before the assessment is amended, s 172(1) is rendered nugatory. If, on the other hand, the taxpayer can only claim a remedy founded on unjust enrichment once the assessment is amended, the general law remedy has been curtailed by the statutory scheme to the point where it is unrecognisable.
- if a taxpayer can rely on restitutionary remedies, the statutory limitations on the recovery of interest might be circumvented by more generous provision for interest under the general law.

³⁰⁹ *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17; (1988) 164 CLR 662 [11].

³¹⁰ *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48.

³¹¹ *Lamesa Holdings BV v FCT* 99 ATC 4545 [106].

This issue once again came up for consideration in a case concerning sales tax where the court said:

In any event, I consider that the Interest Act constitutes a code for the recovery of interest on overpaid sales tax. It would be curious if the legislature, in circumstances such as those presently under consideration, intended to restrict the right to recover interest under the Interest Act, as it has in Part III of the Interest Act, yet intended to allow an unrestricted right, derived from the general law, to remain available at the same time.³¹²

The Federal Court had occasion to consider this issue once again in *State Bank*.³¹³ Sales tax was overpaid and the Commissioner agreed to refund the overpayment but declined to pay interest on the overpayment. The *Taxation (Interest on Overpayments and Early Payments) Act* 1983 did not apply to this overpayment. The court said:

This notion is reflected in a passage in the judgment of Deane J in *Pavey & Mathews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257 in which he said the concept of unjust enrichment "constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case". At a later stage of his reasons, Deane J related this conceptual approach to the determination of the quantum of compensation. He said at 263:

"What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted."

The court awarded interest in favour of the taxpayer.

³¹² *Qantas Airways Ltd v FCT* 2001 ATC 4760 [78].

³¹³ *State bank of New South Wales v FCT* 95 ATC 4734.

Unjust enrichment arose in another case involving stamp duty where the Commissioner acknowledged tax has been overpaid but declined to refund the overpayment. The Commissioner contended that she (the Commissioner) had discretion to decline to refund because the relevant statute provided that:

Where the [Commissioner] finds in any case that duty has been overpaid, whether before or after the commencement of the *Stamps Act 1978* he may refund to the company, person or firm of persons which or who paid the duty the amount of duty found to be overpaid.³¹⁴

The majority (Brennan J with whom Toohey and McHugh JJ concurred) held (the remaining judges delivered separate concurring judgments):

The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter. It may be that, if Royal recovers the overpayments it made, the policy holders will be entitled themselves to claim a refund from Royal of so much of the overpayments made by Royal to the Commissioner as represents the amount paid to Royal by the policy holder. However that may be, no defence of “passing on” is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys.³¹⁵

The *Royal Insurance* case had unusual facts to justify a finding of unjust enrichment.

It seems today, in the vast majority of cases a claim for unjust enrichment would fail. However, depending on the facts there is a slight possibility that a taxpayer may be successful.

³¹⁴ *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 [12].

³¹⁵ *Ibid* [19].

15. Human Rights

The *Human Rights (Parliamentary Scrutiny) Act* 2011 creates a committee of Parliament to examine all legislation to see if it is compatible with human rights and to report their findings to the Parliament. Human Rights are defined broadly in this legislation but do not appear to impact on any tax legislation that has passed through Parliament. The European Court has set aside some tax legislation due to breaches of enshrined rights such as those to property but this is of little precedential value in Australia.³¹⁶

Australian domestic law provides that where there is a ratified treaty it only has effect when incorporated into domestic law.³¹⁷ Thus for any treaty to be enforceable in Australia legislation would have to be passed that provides that the treaty terms are part of the laws of Australia. This has been done in limited circumstances. For example, the International Covenant on Civil and Political Rights is enforceable in Australia but the Universal Declaration of Human Rights does not appear to have been incorporated into legislation.

The tax laws do not impact on any treaties that have been incorporated into Australian law. This statement does not take account of double tax treaties, Division 815 *Income Tax Assessment Act* 1997 (dealing with transfer pricing issues) nor any agreements or legislation that may be passed in relation to the various reports on base erosion profit shifting (usually referred to as BEPS) by the OECD.

The *Australian Human Rights Commission Act* 1986 (HRC) has a schedule incorporating the International Covenant on Civil and Political Rights into Australian law. If a taxpayer contends he or she has been discriminated against in terms which bring that taxpayer within the ambit of the HRC then the Human Rights Commission may investigate the complaint. The Human Rights Commissioner cannot make binding determinations.

³¹⁶ See for example *Tax Law Design and Drafting*, (Ed) Victor Thuronyi, international Monetary Fund 1996 <<https://books.google.com.au/books?id=ab4Q9tktrX0C&pg=PA33&lpg=PA33&dq=human+rights+and+tax+law&source=bl&ots=eq4seuQJtc&sig=FAkt9mHS1QsRR9KLciWyzwFvp5c&hl=en&sa=X&ved=0ahUKEwiyj9jF4e7KAhUFUZQKHV8kBbw4ChDoAQhBMAI#v=onepage&q=human%20rights%20and%20tax%20law&f=false>>.

³¹⁷ Kathrin Bain and Richard Krever, Australia, in *Tax Rules in Non Tax Agreements*, (ed.) Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer and Alfred Storck (IBFD 2012).

*Re Burrowes*³¹⁸ is a case where human rights were an issue. In response to an application for sequestration by the Commissioner due to the non-payment of taxes properly assessed, the taxpayer argued:

- he had paid in the form of shovels; and
- in any event he was not bound by the tax laws of Australia as it involved a violation of his right to conscientiously object against paying tax which was used by the Australian Government to finance military activities and the nuclear arms race. He relied on Article 18 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;
- it was a violation of his legal duty under international law. Obedience to superior orders was no defence to a breach of that law as established at the Nuremburg War Trials;
- the tax was used for nuclear weapons which were illegal pursuant to international treaties to which Australia was a signatory; and
- the non-payment of tax would help prevent the imminent peril of a nuclear holocaust. This was justified by the law of necessity

The court held that:

1. Income tax regulation 58 requires taxpayers to pay income tax by cash, banknotes or cheques. In other words, in the ordinary form of legal tender for debts. Accordingly, the tax debt had not been paid.
2. The Australian system of democratic government assumes that an elected Parliament passes laws which have force in Australia. The rule of law requires that those laws be enforced and does not give individuals the choice of disobeying them because they happen to offend an individual's conscience, however sincere and rational those beliefs may be. Although the International Covenant on Civil and Political Rights appears as a Schedule to the Human Rights and Equal Opportunity Commission Act, it is not part of the domestic law of Australia in the sense of creating legal rights and obligations in Australian courts. It does not provide a legal basis which allows Australian taxpayers at their individual option to withhold any part of the tax which is otherwise payable.

³¹⁸ *Re Burrowes; Ex parte DFCT 91 ATC 5021.*

3. The events of the Nuremburg War Trials are not applicable to the taxpayer's obligations under the Assessment Act. There can be no suggestion that the payment of tax assessed under Australian law involves the breach of international law.
4. Australia's obligations under international treaties are a matter of international relations between nations and do not form part of the Australian domestic law.
5. The defence of necessity relates to a charge of a criminal offence only and does not extend to enable taxpayers to opt out of their obligations because they disagree with the use to which the Government may use tax moneys.

In *Ellenbogen*³¹⁹ there was a claim that the tax laws were racially discriminatory but the claim was dismissed. The head note to the judgment reads:

The court found there was no evidence in this case of a breach of the Racial Discrimination Act. The Commissioner's decision was not made on the basis of the national or ethnic origin of the taxpayer. Neither sec. 51 nor any other provision of the Income Tax Assessment Act deprives a person of any particular race, colour or national or ethnic origin of a right, or limits their enjoyment of a right, enjoyed by persons of any other race, colour or national or ethnic origin.

In addition to the legislation cited above there are further enactments that have reference to human rights. These are:

- *Age Discrimination Act 2004*;
- *Disability Discrimination Act 1992*;
- *Sex Discrimination Act 1984*; and
- *Electronic Transactions Act 1999*.

Having regard to the self-assessment system adopted in Australia and the manner in which the tax laws are administered it is unlikely that there could be a breach of any one of these statutes against a taxpayer in their capacity as taxpayer.

It would seem human rights do not afford taxpayers any rights in their capacity as taxpayers.

³¹⁹ *Ellenbogen v Federal Commissioner of Taxation* 88 ATC 2012.

16. Model Litigant Rules

Pursuant to section 55ZF of the JA the Attorney-General may issue directions that are to apply generally to Commonwealth legal work; or that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter. Under section 55ZF a direction has been issued that inter alia requires the ATO to act as a model litigant in proceedings before the courts and other tribunals. The model litigant rules require that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency.

However, section 55 ZG (2-3) provides that:

2. Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General.
3. The issue of non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.

This would seem to suggest a taxpayer litigant cannot avail itself of the direction issued under section 55ZF.

This was affirmed in *Croker*³²⁰ where the court held that:

It was not necessary for his Honour to explore this issue further because compliance with the directions was not enforceable by Mr Croker and could not be raised in any proceeding other than by or on behalf of the Commonwealth.

However in *Caporale*³²¹ the court noted:

It is important to note the limited field of operation of ss 55ZG(2) and (3). I accept the submission on behalf of the respondent as follows:

To the extent that the common law has recognised any principles that govern or regulate the conduct of bodies politic or other public bodies involved in litigation (as to which see *Melbourne Steamship Co. Ltd v Moorehead* [1912] HCA 69; (1912) 15

³²⁰ *Croker v Commonwealth of Australia* [2011] FCAFC 25 [19].

³²¹ *Caporale v Deputy Commissioner of Taxation* [2013] FCA 427 [51].

CLR 333 at 342; *Scott v Handley* [1999] FCA 404; (1999) 58 ALD 373 at [43]- [44]), ss 55ZG(2) and (3) say nothing about who may seek to agitate, rely upon or enforce obligations said to arise under such principles forming part of the common law.

The sole effect of ss 55ZG(2) and (3) is in relation to obligations that arise under Legal Services Directions made under s 55ZF of the *Judiciary Act*.

*Caporale*³²² suggests the common law protects litigants where the State is a party. The state must treat its subjects fairly and not seek to take unfair advantage of a litigant either because of some error on the part of that litigant or the state. The effect of the foregoing is effectively a common-law reiteration of the model litigant rules. This is exemplified in the following extract from *Scott*:³²³

The second respondent is, as we have noted, an officer of the Commonwealth. As such he properly is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect - and where there has been a lapse therefrom, to exact - from the Commonwealth and from its officers and agencies. The spirit of this “model litigant” responsibility, now long enshrined in a policy document of the Commonwealth, is perhaps best captured in the observations of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* [1912] HCA 69; (1912) 15 CLR 333 at 342:

“I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.”

Insistence upon that standard is a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government (References omitted)...

As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for

³²² Ibid.

³²³ *Scott v Handley* [1999] FCA 404 [43-46].

example, spoken positively of a public body's obligation of “*conscientious compliance with the procedures designed to minimise cost and delay*”: *Kenny's case*, above, at 273; and of assisting “*the court to arrive at the proper and just result*”: *P & C Cantarella Pty Ltd v Egg Marketing Board*, above, at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure: *Yong's case*, above, at 166; of not unfairly impairing the other party's capacity to defend itself: *Saxon's case*, above, at 268; and of not taking advantage of its own default: *SCI Operations Pty Ltd*, above, at 368.

In the present instance the second respondent... has fallen considerably short of the standard properly to be expected of the Commonwealth.

LVR was a tax case where the AAT effectively copied the Commissioner's written submissions in handing down its decision on a challenge. The matter went on appeal on grounds unrelated to this. This problem was ascertained by virtue of the court of appeal reading the transcript of the proceedings with a view to preparing for the hearing of the appeal. The full bench of the Federal Court had this to say about the ATO acting as a model litigant:

Being a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards. This obligation may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations: see notes 2 and 3 to clause 2 of Appendix B to the *Legal Services Directions 2005* made under section 55ZF of the *Judiciary Act 1903* (Cth)). That statutory instrument reflects an expectation the courts in our system of justice have of the executive government and its emanations...Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. *And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar...In our opinion, counsel representing the executive government must pay scrupulous attention to what the discharge of that obligation requires, especially*

where legal representatives who are independent of the agency are not involved in the litigation (Emphasis added).³²⁴

The appeal was upheld inter alia on the grounds raised by the court itself and referred back to the tribunal to reconsider its decision.

A case where a taxpayer was successful in raising the obligation to act as a model litigant is *Comaz*.³²⁵ In this case a crucial witness was not called by an unrepresented applicant. Neither the tribunal nor the Commissioner made the taxpayer aware of the rule in *Jones v Dunkel*³²⁶ that an adverse inference could be drawn in such circumstances. The court on appeal from the AAT said:

One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding.³²⁷

The court continued:

The failure of the Tribunal to even attempt to clarify or explain the manner in which an inference may be drawn, and indeed was drawn, in regard to the failure to call Mr Alderuccio resulted in a breach of procedural fairness of a most serious kind. As I have indicated, any notion that such a defect could have been cured by counsel for the Commissioner merely raising the issue in closing submissions without any further steps being taken, such as advising Ms Hirst of the possibility of re-opening Comaz's case to recall Mr Alderuccio, sorely misses the point. In many ways, the fact that the point was raised in closing submissions, and accepted by the Tribunal in its reasons, only serves to highlight how important the issue was to the conduct of the trial in a

³²⁴ *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 [42].

³²⁵ *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* [2015] VSC 294.

³²⁶ *Jones v Dunkel* [1959] HCA 8.

³²⁷ *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* [2015] VSC 294 [2].

manner which provided procedural fairness...The course followed also raises some concern in relation to the conduct of the Commissioner as a model litigant.³²⁸

*Denlay*³²⁹ has been referred to earlier. The taxpayer sought to set aside a garnishee order issued notwithstanding a stay of proceedings in an earlier decision. The court implicitly regarded this as a breach of the obligation to act as a model litigant stating:

Even so, I am not prepared, in respect of a statement of reasons which makes no reference to a Supreme Court judgment which expressly took into account the prospect that not to grant a stay might render nugatory the then extant taxation appeals, to infer that the decision-maker took this same prospect into account. Instead, what I infer from the absence of reference is that the Commissioner did not take the potential impact on the taxation appeals into account.

I reach that conclusion without regard to the fact that the Denlays did later become bankrupt and that this did result in the dismissal of the taxation appeals without completion of the hearing. What the Commissioner did or did not take into account must be judged by the circumstances prevailing at the time when the decisions under review were made and by reference to the reasons which the decision-maker gave, not by the wisdom of hindsight.

That conclusion does not carry with it the further conclusion that the Commissioner deliberately set out to hamstring the Denlays' ability to complete the prosecution of their taxation appeals. Such a finding ought not to lightly be made, even in a civil proceeding. Such a decision would not just be invalid but might also evidence a grave contempt of court. In this instance, the decisions are grounded in ignorance, not malice. That the Commissioner chose, voluntarily, to disclose his reasons for making the decisions reinforces why the further conclusion is not open.³³⁰

The last paragraph of the above extract is cited as a further example of the reluctance of the courts to find the Commissioner has acted illegally.

Unfortunately for taxpayers the breach of the obligation to act as a model litigant would generally occur during the course of proceedings and possibly even only become apparent as

³²⁸ Ibid [54].

³²⁹ Above n 252.

³³⁰ *Denlay v Commissioner of Taxation* [2013] FCA 307 [76-78].

was the case in *Comaz* in closing argument or even later: See *LVR*. An appeal if there was some breach of natural justice could be successful depending on the prejudice suffered by the taxpayer.

It seems these rules are of assistance to taxpayers but the breach would have to impact significantly on taxpayer litigant rights. It is probably of most value when the taxpayer is unrepresented in the AAT or Federal Court. A legal representative would presumably be aware of these obligations and ensure the Commissioner complied with them. If the AAT made an interlocutory order which would impact the outcome of the hearing in breach of this obligation it is possible applications under the AD(JR)A or JA or Constitution may be possible in limited circumstances.³³¹

³³¹ D Pearce, *Administrative Appeals Tribunal*, 2015 (4th Ed) LexisNexis Australia, 413-415.

17. Conclusion

This report on taxpayer rights under the tax laws has evidenced that there are a few rights available to taxpayers against the Commissioner both under statute and the common-law. These include rights vested in taxpayers under such tax laws as the TAA, AD(JR)A, JA or Constitution. The onus on taxpayers to succeed in many of these cases may often prove difficult to discharge.

Important common law rights such the right to claim LPP have, to some extent, been negated by cases such as *Donoghue*. It seems LPP can only be claimed as a right where there is a provision in a statute that compels production of documents such as section 353-15 TAA. However, if these confidential documents have come into the possession of a third party (the means by which the third party came into possession of these documents appear to be irrelevant) and that party hands these documents to the Commissioner he is entitled and in terms of *Donoghue*, obliged to have regard to these documents in determining the amount by which the taxpayer is to be assessed.

Possibly the best avenue for challenging the Commissioner, other than in court proceedings, would be to note a complaint with the IGT. However, the IGT cannot investigate or look into matters dealing with an assessment. An example given under section 7 (the powers of the IGT) of the *Inspector-General of Taxation Act 2003* is where a taxpayer seeks compensation under an administrative scheme because of action by a tax official during the course of an audit that caused the taxpayer detriment. The Inspector-General can investigate the action that caused the detriment, and any action by a tax official under the scheme.

Appendix A: Offences and Penalties under TAA

Section No.	Obligation/Offence	Strict or Absolute Liability	Penalty for Individual	Penalty for Corporation
8C	A person refuses or fails to furnish an approved form or any information to the Commissioner.	Absolute.	First offence: 20 penalty units. ³³² Second offence: 40 penalty units. Subsequent offences: 50 penalty units or imprisonment for a period not exceeding 12 months, or both.	First offence: 20 penalty units. Second offence: 40 penalty units. Subsequent offences: 250 penalty units.
8D	A person when attending before the Commissioner refuses or fails to answer a question, or to produce a book, paper, record or other document.	Strict.	As for section 8C.	As for section 8C.
8G	N/A	N/A.	If convicted of an offence against section 8C or 8D, the court may, in addition to imposing a penalty, order the person to comply with the requirement within a specified time or at a specified place and time.	As for individual.
8H	Failure to comply with a court order made under section 8G.	Strict.	50 penalty units or imprisonment not exceeding 12 months or both.	250 penalty units.
8HA	If convicted of an offence under section 8C, 8D or 8H and the court is satisfied that the purpose of the offending was to facilitate the avoidance of a tax liability of the convicted person or another person. ³³³	N/A.	In addition to any sentence, a court may order the convicted person to pay twice the amount of tax avoided, or if convicted on two or more occasions, three times that amount.	As for an individual.
8K	A person makes a false or misleading statement.	Absolute.	First offence: 20 penalty units. Second and further offences: 40 penalty units.	As for an individual.
8L	Any accounts, accounting	Absolute.	As for section 8K.	As for

³³² A penalty unit is \$170: *Crimes Act* s 4AA.

³³³ Avoidance in this context means more than a breach of the GAAR: *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23; *Federal Commissioner of Taxation v Westgarth* (1950) 81 CLR 396.

	records or other records do not correctly record and explain the matters, transactions, acts or operations to which they relate.			section 8K.
8N	Recklessly making false or misleading statements to a taxation officer.	N/A.	First offence: 30 penalty units. Subsequent offences: 50 penalty units or imprisonment for a period not exceeding 12 months, or both.	First offence: 30 penalty units. Subsequent offences: 250 penalty units.
8Q	Recklessly presenting accounts and records that do not correctly record and explain the matters, transactions, acts or operations to which they relate.	Strict.	As for section 8N.	As for section 8N.
8T	Records that do not correctly record and explain the matters, transactions, acts or operations to which they relate; or that are (whether in whole or in part) illegible, indecipherable, incapable of identification or are used with the intention to deceive, mislead or obstruct the Commissioner.	N/A.	First offence: 50 penalty units or imprisonment for a period not exceeding 12 months, or both. Subsequent offences: 100 penalty units or imprisonment for a period not exceeding two years, or both.	First offence: 250 penalty units. Subsequent offences: 500 penalty units.
8U	Conduct that results in or facilitates the falsification or concealment of the identity of, or the address or location of a place of residence or business of the person or another person, with any of the intentions specified in section 8T.	N/A.	As for section 8T.	As for section 8T.
8W (1)	If convicted of an offence under sections 8K, 8L, 8N or 8Q and the court is satisfied that the proper amount of a tax liability of the convicted person or another person exceeds the amount that would have	N/A.	In addition to any sentence, a court may order the convicted person to pay to the Commissioner an amount not exceeding three times the amount of the excess where the	As for an individual.

	been the amount of the tax liability if it were assessed or determined on the basis that the statements were not false or misleading, or the relevant accounts or records were correct.		person has been convicted two or more times for a breach of sections 8N or 8Q TAA, and in any other case, twice the amount.	
8W(2)	Where a person is convicted of an offence against section 8T or 8U and the court is satisfied that the purpose of, or one of the purposes of, the conduct was to facilitate the avoidance of an amount of a tax liability of the convicted person or another person.	N/A.	In addition to any sentence, a court may order the convicted person to pay to the Commissioner an amount not exceeding three times the amount of the excess if previously convicted of such an offence, or in any other case, double that amount.	As for an individual.