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PROCEDURAL UNFAIRNESS: SELF-INCRIMINATION WITHOUT IMMUNITY IN TAX ADMINISTRATION

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I. INTRODUCTION

The Australian Taxation Office (ATO) is responsible for collecting the substantial revenue required to support Australia's economic stability, support social service initiatives, and develop public infrastructure.[1] To fulfil this mandate, the Commissioner of Taxation (the Commissioner) has wide-ranging duties and authority to administer, assess, and enforce tax obligations.[2] The administrative nature of the Commissioner's powers underpins a complex relationship between the government and taxpayers, necessitating a careful balance between administrative efficiency and the protection of taxpayer rights.[3] Indeed, the efficacy of Australia's self-assessment framework requires voluntary compliance, which can only be achieved when taxpayers perceive integrity in the taxation system.[4] This article contends that one aspect of this balance, the treatment of compelled self-incriminating evidence in tax investigations, has tipped decisively against taxpayer protection, a claim developed across the analysis that follows.

Procedural fairness is a foundational common law doctrine requiring administrative decision-makers to observe fair procedures when exercising their executive powers. The High Court's decision in *Kioa v West* affirmed that procedural fairness applies whenever an administrative decision may prejudice rights, interests, or legitimate expectations,[5] thereby extending its reach to virtually all forms of administrative action. This doctrine is given effect through two cardinal elements, the hearing rule and the rule against bias. The focus of this article is on the former element, which comprises three fundamental requirements. A person affected by the decision must be given adequate notice of the case to be met, be made aware of adverse material relied upon, and receive a genuine opportunity to respond before adverse decisions are finalised.[6] The cumulative effect of these requirements provides affected persons with an equal standing to understand and challenge

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1 Stephen Barkoczy, *Foundations of Taxation Law* (Cambridge University Press, 15th ed, 2024) 112.

2 Ibid.

3 Karen Wheelwright, 'Taxpayers' Rights in Australia' (1997) 7(1) *Revenue Law Journal* 226, 226.

4 Ibid. See also Ruth Owen, 'The Principle of Good Tax Administration' (2025) 54(1) *Australian Tax Review* 4, 4; Organisation for Economic Co-operation and Development, *Principles of Good Tax Administration – Practice Note*, GAP001, 21 September 2001, cl 15.

5 (1985) 159 CLR 550, 582 (Mason J) ('*Kioa v West*').

6 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ). See also Westlaw AU, *The Laws of Australia* (online at 14 October 2025) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.10].

government decisions that prejudice their rights, thereby safeguarding individual liberty against arbitrary administrative action.[7]

Considering the Commissioner's powers are administrative in nature, and the doctrine of procedural fairness applies to administrative decision-making, the Commissioner is bound by the hearing rule unless statute expressly excludes the obligation.[8] The Inspector-General of Taxation (IGTO) has acknowledged that the ATO must promote fairness and respect natural justice in all circumstances.[9] This requires that taxpayers be given adequate notice of the case against them, access to adverse material on which findings will be based, and a genuine opportunity to respond before decisions affecting their rights, interests, or liabilities are made.[10] Judicial authority confirms that this obligation extends across all the Commissioner's administrative functions, including investigatory procedures preceding formal decisions.[11] In *Binetter v Commissioner of Taxation*, the Federal Court held that procedural fairness governs the Commissioner's procedures in reviewing amended assessments, requiring taxpayers to be able to respond to allegations and access relevant documents.[12] Similarly, *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation* recognised that while the Commissioner's investigatory powers are broad, they must be exercised lawfully, and courts retain oversight to ensure that they are exercised for a proper purpose and in a manner that protects fundamental fairness.[13]

Notwithstanding this common law framework, various statutory provisions systematically undermine the hearing rule in tax administration, providing the Commissioner with significant evidentiary advantages while depriving taxpayers of procedural protections. This article examines a particularly egregious example: the abrogation of the privilege against self-incrimination without a corresponding use or derivative-use immunity. Under sections 353-10 and 355-70, in Schedule 1 to the Taxation Administration Act 1953 (Cth) ('TAA'), taxpayers face an untenable choice between penalties for non-compliance and providing self-incriminating evidence that can be used against them in subsequent proceedings. The analysis proceeds in three parts. First, it examines the statutory abrogation of the privilege and its implications for the hearing rule. Second, it contrasts the tax regime's lack of immunity protections with safeguards that exist in other Commonwealth administrative contexts. Third, it demonstrates how the statutory authority to disclose compelled information to prosecutors creates the exact scenario the High Court has condemned as incompatible with fair process. This statutory framework privileges administrative efficiency at the expense of fundamental procedural safeguards the common law would otherwise require.

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7 *Kioa v West* (n 5) 582 (Mason J); Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (Report No 129, 1 March 2016) 414 ('*Traditional Rights and Freedoms-Encroachments by Commonwealth Laws*').

8 Paul Kenny et al, *Australian Tax 2024* (LexisNexis Australia, 2024) 707-15. See also *Annetts v McCann* (1990) 170 CLR 596; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

9 Inspector-General of Taxation, *Exercise of the Commissioner's General Powers of Administration: Final Report* (Report, May 2023).

10 See especially *Kioa v West* (n 5) 582 (Mason J). See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ). See also Westlaw AU, *The Laws of Australia* (online at 14 October 2025) 2 Administrative Law, '2.5 Judicial Review of Administrative Action: Procedural Fairness' [2.5.10].

11 *Yung v Adams* (1997) 80 FCR 453, 455 (Davies J).

12 (2016) 249 FCR 534, [36]-[63] (Siopis J), [154]-[193] (Perram and Davies JJ).

13 (1990) 170 CLR 649, 670-1 (Gaudron J). See also *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1989) 20 FCR 576, 583-4 (Pincus J).

II. COMPULSION WITHOUT IMMUNITY: SELF-INCRIMINATION RISKS

In terms of tax investigations, the privilege against self-incrimination was effectively abrogated by the 1984 amendments to the TAA.[14] The accompanying Explanatory Memorandum rendered it clear that the privilege would not constitute a defence for failing to provide information under a section 264 notice.[15] A justification for this abrogation emerged in *Donovan v DCT* ('*Donovan's Case*'), where the Federal Court reasoned that the right to silence would frustrate the Commissioner's statutory powers during investigations.[16] However, commentators have described the decision as an 'unfortunate one', noting that it favours administrative efficiency over fundamental taxpayer protections.[17] Indeed, it is hard to reconcile how administrative convenience justifies the abrogation of a right so deeply entrenched in the common law that it has protected individuals against arbitrary state power for over a century.[18] The precedent established in *Donovan's Case* has proven durable and consequential, with successive decisions reinforcing the abrogation of self-incrimination rights, carrying material implications for taxpayers. In *Deputy Commissioner of Taxation (Cth) v De Vonk*, the Full Federal Court held that taxpayers must answer questions pursuant to section 264 notices even when facing concurrent criminal charges related to the same subject matter.[19] More recently, in *Binetter v Deputy Commissioner of Taxation,* the Full Federal Court unanimously confirmed that this position remains good law despite subsequent legislative amendments.[20]

Before turning to the practical consequences of this abrogation, it is worth pausing on why the privilege exists at all, since the strength of the taxpayer's complaint depends on what is actually lost when the privilege is displaced. The High Court has described the privilege as a 'fundamental bulwark of liberty', standing apart from other evidentiary rules, and has traced its rationale to the protection of personal freedom, privacy and human dignity, rather than to any narrower concern with the reliability of compelled testimony.[21] On this view, the privilege is not merely a technical safeguard against unreliable confessions, but an expression of the accusatorial structure of the criminal process itself, under which the state must establish guilt through evidence independently obtained, rather than by conscripting the accused into proving the case against himself.[22]

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14 Bernard McCabe, 'The Investigatory Powers of the Commissioner Under the Income Tax Assessment Act and Individual Rights' (1993) 3(1) *Revenue Law Journal* 1, 4 ('McCabe'), citing Explanatory Memorandum, Taxation Laws Amendment Bill 1984 (Cth). See also *Taxation Laws Amendment Act 1984* (Cth).

15 Ibid. Section 264 of the *Income Tax Assessment Act 1936* (Cth) empowers the Commissioner to issue written notices (section 264 notices), requiring persons to provide information, attend and give evidence, or produce documents relevant to the administration or operation of taxation laws. (Now contained in s353-10 of Schedule 1 to the TAA).

16 McCabe (n 14), citing *Donovan v Deputy Commissioner of Taxation* (1992) 34 FCR 355, 363-4 (Wilcox J) ('*Donovan's Case*').

17 McCabe (n 14), quoting Williams D, 'Donovan's Case and the Further Abrogation of the Rights of the Individual' (1992) *Butterworths Weekly Tax Bulletin* 182.

18 McCabe (n 14) 4.

19 (1995) 61 FCR 564, 588-9.

20 (2012) 206 FCR 37, [30] (Edmonds, Perram and Jagot JJ).

21 *Pyneboard Pty Ltd v Trade Practices Commission; Dunlop Olympic Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (Mason ACJ, Wilson and Dawson JJ) ('*Pyneboard*'); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498 (Mason CJ and Toohey J).

22 *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ); *Pyneboard* (n 21) 346 (Murphy J).

Consequently, the privilege protects something broader than the individual answer given under compulsion: it protects the structural position of the citizen relative to the coercive power of the state.

This framing matters for assessing whether the abrogation in tax administration can be justified by reference to the compliance objectives of the self-assessment system. The orthodox response, reflected in *Donovan's Case* and its successors, is that the Commissioner's investigatory function would be frustrated if taxpayers could decline to answer on the ground that a truthful answer might incriminate them, given that the system depends on taxpayers furnishing accurate information about their own affairs.[23] That justification, however, addresses only the compulsion itself, not the absence of any accompanying immunity. The Australian Law Reform Commission's review of laws abrogating the privilege proposes that any such abrogation be assessed by reference to whether it goes no further than necessary to achieve its stated purpose, and whether the information could reasonably be obtained by other means.[24] Judged against that standard, the compliance rationale for compulsion does not extend to a rationale for admissibility. The Commissioner's need to obtain accurate information for the purpose of an assessment is satisfied once the information is provided. Nothing about that administrative purpose requires that the same information also be available to a prosecutor seeking a conviction in a later, and entirely separate, proceeding. A use or derivative-use immunity would preserve the Commissioner's ability to compel and rely on information for assessment purposes while withholding it from subsequent prosecution, and it is difficult to identify what legitimate administrative interest this would sacrifice. The absence of such an immunity in the tax context is therefore not a necessary incident of an effective compliance framework, but an unexplained departure from it.

The absence of the privilege against self-incrimination means the Commissioner can compel taxpayers to provide information, testify, or produce documents, even if doing so is incriminating. This coercive power is heightened by the absence of an accompanying use or derivative use immunity in section 353-10, in Schedule 1 to the TAA. Section 353-10 empowers the Commissioner to compel taxpayers to provide information, testify, or produce documents, but the provision does not itself authorise disclosure of that information to law enforcement. As explained below, that question is instead governed by section 355-70. What section 353-10 does not do is preserve the privilege or supply any corresponding use or derivative use immunity, with the result that information given under compulsion may ultimately be used against the individual who supplied it in subsequent criminal or civil penalty proceedings.[25] This statutory gap constitutes a significant encroachment on the common law privilege against self-incrimination, as neither section 353-10 nor any other provision of the TAA preserves the privilege or balances its abrogation with a statutory use or derivative use immunity.[26] This evidentiary advantage is unique to the tax office, as nearly all laws that abrogate the privilege are accompanied by a use immunity safeguard regarding the answer given.[27] In fact, the *Guide to Framing Commonwealth Offences* stipulates that, where legislation overrides the privilege against self-incrimination, it is standard practice to include a use or derivative use immunity.[28] The rationale for this safeguard is that withdrawing the privilege

23 *Donovan's Case* (n 16) 360-2 (Wilcox J).

24 *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (n 7) ch 11.

25 Ibid 325.

26 Ibid.

27 Ibid 322.

28 Ibid, quoting Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide, September 2011) 88.

constitutes a serious encroachment on personal liberty for individuals compelled to provide self-incriminating evidence.[29] Indeed, both the Human Rights Committee and the Scrutiny of Bills Committee have observed that the abrogation of the privilege against self-incrimination is more likely to be regarded as justifiable when accompanied by provisions granting both use and derivative use immunity.[30] The abrogation of the taxpayers' right to silence and the irregular lack of any corresponding use immunity safeguard undermine the hearing rule's requirement that affected persons have a genuine opportunity to respond to allegations. Under the current regime, taxpayers face an ultimatum: either remain silent and face penalties for non-compliance or respond and risk providing evidence that may be used against them in subsequent proceedings. This ultimatum systematically denies taxpayers the protection of the hearing rule when they furnish information to the Commissioner during tax investigations.

Outside taxation law, the courts' power to exclude coerced evidence serves as a critical safeguard for individuals compelled to provide self-incriminating information during administrative investigations. This exclusionary power has been used to justify the statutory abrogation of the privilege because judicial intervention mitigates the risk of unfair trials resulting from compelled disclosures during investigations.[31] The High Court affirmed this principle in *X7 v Australian Crime Commission*,[32] holding that the ACC's power to conduct compulsory examinations could not be exercised after criminal charges had been laid.[33] The decision vindicated the judiciary's inherent ability to prevent the admission of evidence that could lead to an unfair trial.[34] The principle was reinforced in *Lee v The Queen* ('*Lee*'),[35] where the High Court held that the prosecution's possession of compelled examination transcripts posed a risk to the prospect of a fair trial.[36] The Court found that arming the prosecution with the accused's compelled evidence fundamentally altered the appellant's position at trial and represented a critical departure from the criminal trial process.[37] Significantly, it was unnecessary to prove that the transcripts were actually used or that they caused practical unfairness in the conduct of the trial.[38] Instead, the prosecution's mere possession constituted a miscarriage of justice requiring the convictions to be quashed and a re-trial ordered.[39] These authorities establish a clear principle that evidence obtained through coercive administrative powers ordinarily cannot be used in subsequent proceedings. This safeguard preserves the hearing rule's requirement of fair process by precluding the admission of prejudicial evidence obtained through the use of coercive investigative powers.

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29 Ibid.

30 *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (n 7) 322, citing Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills and Legislative Instruments introduced 17-20 September 2012* (Report, October 2012) [1.58]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2006* (Report, 21 June 2006) 81.

31 *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (n 7) 322.

32 (2013) 248 CLR 92.

33 Ibid 150 (Hayne, Kiefel and Bell JJ).

34 *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (n 7) 322. See also *Dietrich v The Queen* (1992) 177 CLR 292.

35 (2014) 253 CLR 455 ('*Lee*').

36 Ibid 471-2 (French CJ, Crennan, Kiefel, Bell and Keane JJ).

37 Ibid 473-4.

38 Ibid 470-1.

39 Ibid.

In taxation matters, however, the taxpayer is deprived of this safeguard because evidence obtained under the Commissioner's coercive powers can be used by the prosecution in subsequent proceedings. The TAA expressly permits the Commissioner to disclose compelled information to law enforcement agencies for both the investigation and prosecution of serious offences.[40] This creates the scenario condemned by the High Court in *Lee*, whereby prosecutors are armed with compelled evidence before any court intervention is possible. This procedure was recently confirmed in *R v Van Eps*, where the Queensland Court of Appeal ruled that the Commissioner is lawfully entitled to share information obtained through compulsory examination with prosecutors prior to a trial.[41] Van Eps was charged with attempting to obtain a false research and development tax offset unlawfully. Before being charged, he was compulsorily examined by the Commissioner, and the examination transcript was provided to the Commonwealth Director of Public Prosecutions (CDPP) for use as evidence at trial. The Court found that the wording of the TAA 'could not be clearer', expressly permitting the Commissioner to share information obtained in investigative proceedings with prosecutors.[42] Consequently, section 355-70 of the TAA provides express statutory authority for the exact scenario the High Court condemned in *Lee* as incompatible with the hearing rule's protection against prejudicial use of compelled evidence.

This reading of section 355-70 must, however, be qualified by reference to the earlier decision in *R v Leach*,[43] which arose on materially similar facts. There, the applicant's compulsorily examined ATO interview transcript was likewise disclosed to the Commonwealth Director of Public Prosecutions and relied upon at his trial, but the Queensland Court of Appeal quashed his conviction, holding that provision of the compelled evidence to the prosecution was a fundamental departure from the accusatorial character of the criminal trial process.[44] However, the apparent tension between *Leach* and *Van Eps* is resolved by timing rather than principle. In *Van Eps*, the compulsory examination and subsequent disclosure to the CDPP occurred before any charge was contemplated, whereas in *Leach* the disclosure took place once the applicant's prosecution was already in view.[45] This distinction offers taxpayers scant practical protection. Because section 355-70 imposes no requirement that the Commissioner first assess the likelihood of prosecution before disclosing compelled material, a taxpayer under audit has no way of knowing, at the moment they are compelled to answer, which side of that line their evidence will ultimately fall on. The courts have thus drawn a distinction in principle without supplying taxpayers any corresponding safeguard in practice.

The combined effect of section 353-10's abrogation of the privilege against self-incrimination and section 355-70's statutory authority to disclose compelled information to law enforcement establishes a regime that substantially departs from the core requirements of the hearing rule. Rather than providing taxpayers with any meaningful protection against the use or disclosure of compelled evidence, these provisions systematically erode the safeguards that would otherwise prevent prejudicial evidentiary practices. By enabling compelled questioning and facilitating the transmission of such information to prosecutors, the statutory scheme blurs the distinction between investigatory and prosecutorial roles. In doing so, the regime not only disregards the basic principles of the hearing rule, but it also denies taxpayers the structural protections that courts have

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40 TAA sch 1 s 355-70(1) item 1.

41 *R v Van Eps; Ex parte Commonwealth Director of Public Prosecutions* [2024] QCA 46, [73]-[77] ('*R v Van Eps*').

42 Ibid [73], citing TAA sch 1 s 355-70(1).

43 [2018] QCA 131.

44 Ibid.

45 See ibid; *R v Van Eps* (n 41).

recognised as fundamental to fair process in other administrative contexts. As a result, evidentiary practices in taxation investigations depart markedly from the standards that usually prevent compelled responses from being used to prejudice individuals in later proceedings.

III. CONCLUSION

The abrogation of the privilege against self-incrimination in tax administration, combined with the absence of immunity protections and express authority to disclose compelled information to prosecutors, systematically displaces the hearing rule in ways unparalleled in Commonwealth administrative law. Taxpayers face an untenable ultimatum: comply under threat of penalties or provide self-incriminating evidence that can be used against them in subsequent criminal proceedings. This regime enables precisely the scenario the High Court condemned in *Lee* as fundamentally incompatible with a fair hearing. Nevertheless, it operates with express statutory endorsement in matters of taxation.

The structural imbalance identified in this analysis cannot be justified by administrative efficiency alone. Nearly every other Commonwealth statute that abrogates the privilege includes corresponding immunity protections, reflecting the settled view that compulsion requires safeguards. The tax regime's departure from this standard is anomalous and indefensible. Legislative reform is essential to realign the Commissioner's coercive powers with the basic tenets of procedural fairness. Specifically, section 353-10 of the TAA should be amended to include automatic use and derivative-use immunity for compelled disclosures, and section 355-70 should prohibit the disclosure of compelled information to law enforcement agencies for prosecutorial purposes. These reforms would align the tax regime with established Commonwealth practice without compromising the Commissioner's ability to conduct effective investigations.

The hearing rule constrains arbitrary administrative action and ensures decisions are made with transparency and accountability. Procedural protections are foundational to the legitimacy of government authority, particularly in taxation, where voluntary compliance depends on perceptions of system integrity. The current regime privileges efficiency over fairness, undermining both the rule of law and public confidence in tax administration.