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# Taxpayers' Rights in Australia

## **Abstract**

This article discusses the main rights of taxpayers in the Australian tax system. It looks at powers of the Commissioner of Taxation which most affect taxpayers' privacy and liberty, concluding that there is scope for taxpayers' rights to be strengthened without comprising the Commissioner's ability to assess and collect tax.

## **Keywords**

taxpayers rights, Australia, tax, law

## TAXPAYERS' RIGHTS IN AUSTRALIA



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This article discusses the main rights of taxpayers in the Australian tax system. It looks at powers of the Commissioner of Taxation which most affect taxpayers' privacy and liberty, concluding that there is scope for taxpayers' rights to be strengthened without compromising the Commissioner's ability to assess and collect tax.

### Introduction

The Australian government must raise, as efficiently and equitably as possible, the revenue necessary to enable it to run its programs. There is a need to strike a balance between protecting and promoting the individual rights of taxpayers, whilst also ensuring the greatest degree of compliance by taxpayers and accuracy by the Australian Taxation Office ("ATO") within the limited resources available.<sup>1</sup>

The issue of taxpayers' rights is, or ought to be, as important to the tax administration as it is to taxpayers themselves. This is because voluntary compliance is central to the successful functioning of Australia's relatively new self-assessment system and taxpayers' perceptions of the integrity of the system are crucial to maintaining a high level of compliance.<sup>2</sup>

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<sup>1</sup> These resources are set to fall with the proposed Budget cuts of 3000 jobs in the ATO: Australian Tax Practice, 1996 *Weekly Tax Bulletin* para [643].

<sup>2</sup> The Right Honourable Sir Ivor Richardson, "Directions for Tax Administration: Two Recent Reports" (1994) 22 *Federal Law Review* 461 at 464-465.

Unlike taxpayers in some other countries, for example the USA and the UK, Australian taxpayers have, as yet, no separate charter of rights, although one is being developed. A picture of the rights of Australian taxpayers can be formed only by identifying and piecing together provisions from taxation legislation, other relevant Commonwealth statutes and common law principles which give taxpayers rights vis-a-vis the taxation administration.<sup>3</sup> The picture is not complete without also considering the powers and discretions available to the ATO, which is the government's principal revenue collection and tax administration agency.

This article identifies the principal rights of Australian taxpayers and examines them critically in the context of the powers and discretions available to the ATO. Following a brief overview of the Australian taxation system and the powers and discretions available to the Commissioner, the article examines what might be described as the best-known right of an Australian taxpayer - the right to appeal to an independent court or tribunal against an adverse taxation decision. For many taxpayers, this right will only be available well into the tax process, that is after an assessment has been made. Other "quasi-legal" appeal mechanisms are also discussed. Next, the other two areas of clearly-defined rights are looked at - the right of taxpayers to information and advice and their right to confidentiality of taxation information. These rights are available to taxpayers much earlier in the tax process. The article then considers the powers of the Tax Commissioner associated with the assessment and collection of tax, and the gathering of information for those purposes, and looks at the implied rights of taxpayers in the context of these powers. The article looks, finally, at proposals for a Taxpayers' Charter, before concluding that there is scope for improving the rights of taxpayers without compromising the Commissioner's important function of tax assessment and collection.

### **The Australian taxation system**

The Australian tax system is statute-based, although some key concepts in our tax system (like "income") are still determined by the common law. Tax legislation is enacted by the Commonwealth Parliament, pursuant to the powers granted by the Commonwealth

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<sup>3</sup> This article is confined to tax collection by the Commonwealth Government. State governments also collect tax revenue, principally in the form of stamp duties, payroll tax and land tax.

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Constitution.<sup>4</sup> The Australian tax system is based principally on the taxation of income and certain realised capital gains, the main taxing statute being the Income Tax Assessment Act 1936 (Cth) ("the ITAA"). Under other statutes, the government also taxes certain benefits provided to employees by their employers, and taxes consumption in the form of excise duty on certain products and in the form of wholesale sales tax on many goods. A separate statute, the Taxation Administration Act 1953 ("the TAA"), deals with many important aspects of taxation administration, including appeals and offences.

Australia now has a "self-assessment" system, which has been introduced progressively since 1986 as a fundamental reform to tax administration. The system relies heavily on voluntary compliance by taxpayers. The change to self-assessment means that the ATO has largely abandoned the technical scrutiny of tax returns prior to making assessments. The ATO now issues assessments which generally accept as correct taxpayers' own determination of their taxable income and tax liability. The ATO now emphasises post-assessment audits, and computer matching of information in returns with data from other sources, such as financial institutions and companies.

Parliament has given the Commissioner increased powers in some areas to support the self-assessment system. These include: a period of up to four years in which the Commissioner can amend an assessment after it has been issued and the tax assessed has been paid;<sup>5</sup> and increased administrative penalties<sup>6</sup> and interest charges where audits reveal that taxpayers have understated their tax liability, particularly where a taxpayer has failed to exercise "reasonable care" in the preparation of tax returns. Other features of the self-assessment system aim to assist taxpayers. These include the introduction, in 1992, of a system of public and private rulings which are binding on the Commissioner.<sup>7</sup> Since 1986, a new system of objections and appeals has been put in place in stages<sup>8</sup> and the period

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<sup>4</sup> Section 51 gives Parliament the power to make laws for the peace, order and good government of the Commonwealth with respect to:- (ii) Taxation; but so as not to discriminate between States or parts of States.

<sup>5</sup> ITAA s 170(2)(b)(i) and (ii). The Commissioner may amend an assessment at any time where there has been an avoidance of tax which, in his opinion, is due to fraud or evasion: ITAA s 170(2)(a).

<sup>6</sup> ITAA s 207; ss 222-227.

<sup>7</sup> TAA Parts IVAA and IVAAA.

<sup>8</sup> TAA Part IVC.

during which a taxpayer can object to an assessment has been extended.<sup>9</sup>

### General powers of the tax authority

All the functions and powers associated with the assessment and collection of tax are concentrated in one administrator, the Commissioner of Taxation.<sup>10</sup> It is the size and complexity of the Commissioner's task which might be said to justify the powers and discretions conferred on the office by Parliament. The ATO receives more than 10 million tax returns every year and collects more than \$74 billion.<sup>11</sup> As well as the massive task of tax collection, general administration of the tax system, future planning and the pursuit of tax reform,<sup>12</sup> the ATO must address the perennial problems of tax avoidance and evasion. All of this must be done within a limited budget.

The Commissioner's powers take two main forms, statutory powers and administrative discretions. Not surprisingly, the Commissioner, as the administrative head of the ATO, has been given extensive statutory powers which permeate the whole tax administration process. The tax legislation gives the Commissioner the power, for example, to amend and make default assessments, to prevent a tax debtor leaving the country, and to impose heavy administrative penalties where he judges that a taxpayer has failed to exercise reasonable care in the conduct of her or his tax affairs. More controversial are the Commissioner's powers under s 263 of the ITAA to have full access to buildings and records for any of the purposes of the tax law and under s 264 to compel persons, whether taxpayers or not, to attend to give evidence and furnish other information concerning any person's assessment.

There are also extensive statutory discretions, many of which are undefined, conferred on the Commissioner and his delegates and exercised in the day-to-day administration of the tax system.<sup>13</sup> In

<sup>9</sup> In most cases to 4 years: TAA s 4ZW(aa).

<sup>10</sup> ITAA s 8.

<sup>11</sup> Joint Committee of Public Accounts, *Report 326: An Assessment of Tax 1993 AGPS* ("Report 326") at p 207 (1992/93 figures).

<sup>12</sup> For example, the Tax Law Simplification Project, which aims to rewrite the ITAA.

<sup>13</sup> There were approximately 900 discretionary provisions in the ITAA in mid-1992: Woellner, Vella, Burns and Barkoczy, *Australian Income Tax Law* (6th ed 1996 CCH Australia Ltd) 58-59.

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some important areas (such as taxpayer audits), the legislation has not caught up with the changing priorities of the ATO, leaving the Commissioner to determine, with little or no legislative guidance, what the practice of the ATO will be. This practice can also include decisions not to apply certain legislative provisions in particular circumstances.<sup>14</sup>

The difficulties posed for individual taxpayers in ascertaining how discretions will be exercised in particular circumstances, or what are the practices of the ATO, are addressed by the ATO through the publication of public and private rulings and other advice on how the ATO interprets and applies the tax laws, as well as in the formal and informal dealings of the ATO with practitioners and taxpayers. These rulings are not formal law. The courts have confirmed that no administrative action taken by the Commissioner or his officers can prevent a tribunal or court applying the correct interpretation of the law.<sup>15</sup> It follows that taxpayers have the right to seek independent review of many of the decisions which follow from the exercise by the Commissioner of these discretions. Nevertheless, in many situations the practice of the ATO creates what might be called "informal law", in that practitioners and taxpayers accept ATO rulings or practices without formal challenge and structure their affairs according to the ATO's view of the operation of the tax law.

## OBJECTIONS AND APPEALS

### Rights of objection and appeal

The right to appeal against a tax assessment is probably the most fundamental right of the taxpayer. The right is available near the end of the tax process, after the Commissioner has exercised his power to assess the taxpayer on the basis of a taxpayer's return and any other information available to him. It has long been accepted that, under the Constitution, liability to tax cannot be imposed upon citizens without leaving open to them some judicial process by which they may show that they are not in fact liable to tax or not liable in the amount assessed.<sup>16</sup> The "judicial processes" available to

<sup>14</sup> See, eg, Dwyer TM and Dwyer DR, "Everett Assignments: To settle or not?" 1992 *Butterworths Weekly Tax Bulletin* para [26].

<sup>15</sup> *Inglis v FCT* 87 ATC 2037, following *FCT v Wade* (1951) 84 CLR 105 at 116-117 per Kitto J.

<sup>16</sup> *DFCT v Brown* (1958) 100 CLR 32 at 40-41.

taxpayers in Australia comprise the right to appeal against a taxation decision to the Federal Court or the Administrative Appeals Tribunal ("the AAT") pursuant to Part IVC of the TAA and, in respect of some administrative decisions in the tax area, to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 ("the ADJR Act"). There is also a very limited right of appeal pursuant to s 39B of the Judiciary Act 1903.

Taxpayers may also seek to have administrative actions taken by the ATO reviewed under the Ombudsman Act 1976 and may have access to compensation for maladministration through the ATO itself. These avenues for redress will be mentioned briefly.

### A uniform code for taxation appeals

Part IVC of the TAA (ss 14ZL to 14ZZS) establishes a uniform code of procedures for review of "taxation decisions" made under Commonwealth tax statutes and notified after 1 March 1992.<sup>17</sup> A "taxation decision" is defined broadly in s 14ZQ to include any assessment, determination, notice or decision made or issued by the Commissioner against which an objection may be made. Private rulings are now included in the group of reviewable decisions.

To initiate the appeals process, the taxpayer must first lodge the objection in writing with the Commissioner (s 14ZZ). The Commissioner is required to make a decision on the objection and to notify the taxpayer of that decision in writing, although no time limit is specified.<sup>18</sup> Importantly for taxpayers, the Commissioner is now required to comply with the *Code of Practice for Notification of Reviewable Decisions and Rights of Review*, gazetted by the Attorney-General under the Administrative Appeals Tribunal Act 1975 (Cth). This means the Commissioner must inform the taxpayer of the taxpayer's rights on matters like further review, fees for review and time limits.

If dissatisfied with the Commissioner's decision on the objection, the taxpayer may apply for review of the decision by the AAT, in the case of a "reviewable objection decision", or appeal to the Federal

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<sup>17</sup> The provisions replace separate provisions formerly in each tax act. The right to object is still created by the substantive act, eg, ITAA s 175A creates the right to object against an assessment.

<sup>18</sup> TAA s 14ZY. There is a statutory mechanism where certain taxpayers may give notice to the Commissioner requiring the Commissioner to make an objection decision: s 14ZYA.



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Court, where the decision is an "appealable objection decision".<sup>19</sup> In the many cases where the decision is both reviewable and appealable, the taxpayer's choice of forum will be determined by the characteristics of the individual case. However, the AAT is preferred by many taxpayers because it is able to exercise all the administrative powers and discretions of the Commissioner in reviewing the merits of the decision, and is not confined to deciding whether the Commissioner's decision has been made according to law. Another important factor is that parties before the AAT generally bear their own costs. The usefulness of AAT review will be enhanced by the establishment of the Small Tax Claims Tribunal in 1997, which will handle tax disputes involving amounts below \$5,000, with an emphasis on mediation of disputes and streamlined procedures, rather than formal hearings.

The two most important procedural aspects for the taxpayer are defining the grounds of objection and time limits for lodging an objection. The taxpayer's objection must state "fully, and in detail" the grounds the taxpayer relies on.<sup>20</sup> This requirement has not been a barrier for objectors because of the broad interpretation given to those words by the courts. The objection must be more than a general complaint, but the grounds need not be lengthy and complicated - for example, an informal letter stating simply that an assessment is wholly excessive and re-affirming that the taxpayer's original returns contained true and complete statements of income will satisfy the provision.<sup>21</sup>

### *Grounds of appeal*

The taxpayer is generally limited to the grounds stated in the objection, although where the objection is disallowed by the Commissioner and the taxpayer seeks review of that decision, the grounds of an objection may be amended at the discretion of the court or the tribunal hearing the appeal.<sup>22</sup> The AAT had taken the view

<sup>19</sup> Section 14ZZ(a). Certain income tax and sales tax remission decisions, including the remission of additional tax payable under s 207 of the ITAA, are not "reviewable objection decisions" for the purposes of Part VC: ss 14ZS and 14ZT. Certain decisions (eg, on tax clearance certificates) are not "appealable objection decisions": s 14ZQ.

<sup>20</sup> TAA ss 14ZU(a) and 14ZU(c).

<sup>21</sup> *Szajntop v FCT* (1992) 23 ATR 403; *Garrett v FCT* (1982) 12 ATR 684.

<sup>22</sup> TAA ss 14ZZK(a) and 14ZZO(a) (formerly ITAA s 190(a)). Prior to 1986, taxpayers were limited by the legislation to the grounds stated in their original objection, a situation criticised as unjust to taxpayers by the

that the discretion should not be exercised in favour of the taxpayer where he or she sought to introduce entirely new grounds of objection.<sup>23</sup> However, it is now settled that, on the plain reading of the provision, both the court and the AAT have a wide discretion to allow fresh grounds to be advanced by the applicant, even if they require consideration of matters not first considered by the Commissioner in the original process of deciding the objection. The decision whether to allow an amendment should be made on the same considerations of justice upon which such decisions are regularly made in litigation.<sup>24</sup> The exercise of such a discretion is important in facilitating consideration by a court or tribunal of the substantive issues of a tax appeal. However, it must also be borne in mind that the precise grounds of objection may not be relevant where the taxpayer is objecting to an assessment as excessive, because the question for the court or AAT is not whether the grounds are made out, but whether the burden of proof has been discharged.<sup>25</sup>

Where the objection is to an amended assessment, the taxpayer is limited to grounds which relate to the particular alterations or additions made by the Commissioner. The taxpayer cannot raise objections to unamended parts of the original assessment: s 14ZV. By contrast, it appears that, in the case of tax appeals before the Federal Court, the Commissioner may effectively defend his assessment of the taxpayer on any ground, including grounds not taken into account when the assessment was made, provided that the taxpayer had been given notice of the grounds on which the Commissioner would rely. In addition, the Court is not limited to considering only those parts of the Commissioner's decision about which the taxpayer is dissatisfied in deciding the appeal.<sup>26</sup>

### *Time limits*

The second important procedural matter for taxpayers are the time limits within which objections must be lodged. Before 1992, the

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courts and other commentators: see, eg, *Lighthouse Philatelics Pty Ltd v FCT* (1991) 22 ATR 707 at 710.

<sup>23</sup> See, eg, *AAT case 6307* (1990) 21 ATR 3776. This led to objections which were "ridiculously massive submissions of up to 120 pages" in order to cover every possible ground: "Objections: Trading Punches With the Taxman" (1992) 27 *Taxation in Australia* 4 at 6.

<sup>24</sup> *Lighthouse Philatelics Pty Ltd v FCT* (1991) 22 ATR 707 at 715.

<sup>25</sup> *FCT v ANZ Savings Bank Limited* 94 ATC 4844 (High Court, reversing the decision of the Federal Court) at 4849.

<sup>26</sup> *Ibid.*

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taxpayer was required to lodge an objection within 60 days of notification by the Commissioner of the tax decision, although the taxpayer could seek an extension of time to lodge.<sup>27</sup> Objections are now required to be lodged within 4 years of the service of the taxation decision objected against.<sup>28</sup> Where this period has expired, the taxpayer may apply to the Commissioner for an extension of time to lodge, and to the AAT against the Commissioner's refusal to treat the objection as having been lodged within time.<sup>29</sup> The extended period in which to lodge an objection is equivalent to the period within which the Commissioner may now amend a taxpayer's assessment.<sup>30</sup>

### *Onus of proof*

The applicant taxpayer faces a considerable hurdle in discharging the statutory onus of proof where the application for review or the appeal is against an assessment. The most problematic areas are for those taxpayers who have been issued with default assessments under s 167 of the ITAA following an audit, or based on assets betterment statements.<sup>31</sup> The TAA provides, in ss 14ZZK(b) and 14ZZO(b), that the applicant/appellant has the burden of proving, on the balance of probabilities, that "the assessment is excessive". The courts have held that, in order to satisfy this onus, the taxpayer must show not only that the assessment is wrong, but also what correction should be made to make it right, or more nearly right.<sup>32</sup> The taxpayer cannot rely on the Commissioner's alleged errors in making the assessment, as the provisions do not place any onus on the Commissioner to show that an assessment was correctly made, nor is

<sup>27</sup> For a discussion of the factors to be considered in deciding whether to allow an extension, see *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344. (See also Taxation Ruling IT 2455).

<sup>28</sup> TAA ss 14ZU and 14ZW. Where the assessment or determination is an amended assessment or determination, the taxpayer has until the later of 4 years from the original notice of assessment or determination, or 60 days from the service of the amendments, to object: TAA s 14ZW(1B). The 60 day objection period still applies to assessments or amended assessments for years of income up to 30 June 1992.

<sup>29</sup> TAA s 14ZW.

<sup>30</sup> ITAA s 170.

<sup>31</sup> In cases where the taxpayer has filed no returns or inadequate returns, the Commissioner may estimate the taxpayer's income by determining how much the taxpayer's assets have increased over a designated period and adding an estimate of the taxpayer's consumption to determine income.

<sup>32</sup> *Trautwein v FCT* (1936) 56 CLR 63 at 88 per Latham CJ; affirmed in *Dalco v FCT* (1990) 168 CLR 614 at 623-624 per Brennan J.

there any statutory requirement that his assessment should be sustained or supported by evidence.<sup>33</sup> Even where the Commissioner attempts unsuccessfully to prove a positive case in support of his assessment, the taxpayer will still fail unless he or she discharges the onus of proof - the Commissioner is thus entitled to rely on the failure of the taxpayer to prove that the amount assessed is excessive.<sup>34</sup>

The High Court has posited in obiter comments that there might be a case where it appeared that an assessment had been made "on no intelligible basis even as an approximation". This would not, of course, mean a decision in favour of the taxpayer, but would justify the court setting aside the assessment and remitting it to the Commissioner for further consideration.<sup>35</sup>

### *An excessive burden?*

According to the Joint Committee of Public Accounts, there was no better example of the powers of the ATO and the inferior standing of taxpayers than the statutory requirement that taxpayers should satisfy the burden of proving their cases.<sup>36</sup> The burden cast upon the taxpayer by ss 14ZZK(b) and 14ZZO(b) has been characterised as a "reversal of the onus of proof".<sup>37</sup> This is because the Commissioner, by issuing an assessment, proves conclusively thereby that the assessment is correct (s 177(1)) - he is not required to lead evidence in support of this assertion, but instead it is the "defendant" taxpayer who must satisfy the tribunal of the fact that the assessment is excessive.<sup>38</sup>

The justification put forward for the onus placed on the taxpayer is that "the true facts of the situation lie uniquely within the taxpayer's knowledge".<sup>39</sup> The taxpayer must therefore satisfy the

<sup>33</sup> *Gauci v Commissioner for Taxation* (1975) 135 CLR 81 at 89 per Mason J (in dissent); affirmed in *Macmine Pty Ltd v Commissioner of Taxation* (1979) 53 ALJR 362; *McCormack v FCT* (1979) 143 CLR 284 at 303.

<sup>34</sup> *Galea v FCT* 90 ATC 5060.

<sup>35</sup> *Trautwein v FCT* (1936) 56 CLR 63 at 88 per Latham CJ.

<sup>36</sup> Report 326, above n 11 at 307.

<sup>37</sup> Warnock R, "Guilty Until Proven Innocent" (1992) 62 *Australian Accountant* 26.

<sup>38</sup> It has been argued that the burden would be the same, even without ss 14ZZK(b) and 14ZZO(b). See Doyle S, "The Onus of Proof Borne by Taxpayers" (1996) 8 *CCH Journal of Australian Taxation* 28 at 29.

<sup>39</sup> *Case VI26 88 ATC 784*.

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tribunal, on review or appeal, that her or his version of the facts is correct on the balance of probabilities. Numerous taxpayers have succeeded,<sup>40</sup> but the burden of substantiation and record-keeping rests heavily with all taxpayers under self-assessment and those who have been careless and cannot corroborate assertions as to the source of funds may be defeated by the onus of proof, even where the Commissioner's assessment is based on arbitrary figures,<sup>41</sup> incorrect calculations or guesswork.<sup>42</sup>

### Review of tax decisions under the ADJR Act

Judicial review at common law is available to taxpayers in certain circumstances and so the development of judicial review doctrines in administrative law generally will influence the review of tax decisions. The Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act") provides a system of judicial review at a federal level which is more comprehensive and less rigid than the common law. However, review under the ADJR Act is not available generally for tax decisions, as the Act specifically excludes from review decisions relating to assessments or calculations of tax and decisions disallowing objections to assessments.<sup>43</sup> The Federal Court has read these exclusions quite narrowly, emphasising the "essential need for a connection between the decision and the assessment" and observing that a decision does not lead to the making of an assessment merely because it precedes the assessment or because its purpose is to facilitate the assessment.<sup>44</sup> This means that a broader range of tax decisions are reviewable under the Act than might be first thought on a reading of the exclusionary provisions. In addition, a taxpayer may have the advantage of a choice of review procedure. The Federal Court has held that, where a decision is

<sup>40</sup> See further, Doyle S, above n 38 and the cases discussed there.

<sup>41</sup> *Vale Press Pty Ltd v FCT* (1994) 29 ATR 207 (arbitrary percentage applied by Commissioner in sales tax assessment).

<sup>42</sup> *Briggs v DFCT (WA); ex parte Briggs* (1987) 18 ATR 570. The Court held that an assessment may go close to guesswork and yet still be lawful.

<sup>43</sup> See paras (e), (ea) and (ga) of Schedule 1A. Para (ga) was added to Schedule 1 in 1991 specifically to exclude from review under the ADJR Act the Commissioner's objection decisions under s 14ZY of the TAA.

<sup>44</sup> *DFCT v Clarke & Kann* 84 ATC 4273 at 4276 (Full Federal Court). For example, the Court has held that the Commissioner's estimate of a taxpayer's taxable income, for provisional tax purposes, was not excluded by the schedule because the calculation of a liability to pay provisional tax was not a calculation of "tax" under the ITAA: *Clyne v DFC of T* 86 ATC 4580.

reviewable under the ADJR Act and also has its own review procedures in the taxing statute, the avenues are not mutually exclusive.<sup>45</sup>

The importance of the ADJR Act for taxpayers lies in the avenue it provides (in cases where the threshold requirements of the ADJR Act are satisfied) for review of a range of important tax decisions not connected to the assessment process. These include decisions of the Commissioner to issue a Departure Prohibition Order under s 14S of the TAA,<sup>46</sup> to issue notices under ss 263 and 264,<sup>47</sup> to refuse an extension of time to pay tax under s 206 of the ITAA<sup>48</sup> and to issue proceedings for the recovery of tax.<sup>49</sup> Decisions of the Taxation Relief Board are also reviewable.<sup>50</sup> Judicial review is also available where the Commissioner refuses to make a private ruling under s 14ZAN and where the Commissioner fails to provide reasons for the delay in responding to a request for a private ruling under s 14ZAO.

Importantly, those decisions which are reviewable under the Act carry the right to reasons under s 13, a right which is not otherwise available as a legal right to taxpayers unless they institute review proceedings.<sup>51</sup> Indeed, some very important decisions which have been instrumental in more clearly delineating the powers of the Commissioner have been decided under the ADJR Act. On this basis, the Act has been arguably of considerable benefit to taxpayers.<sup>52</sup>

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<sup>45</sup> See, eg, *Domaine Finance Pty Ltd v FCT* (1985) 16 ATR 778. However, the Federal Court does have the discretion under the Act to refuse to grant an application for review where there is an alternative avenue for review, or where the applicant has sought review other than under the ADJR Act.

<sup>46</sup> *Briggs v DFCT* 85 ATC 4569.

<sup>47</sup> *Southern Farmers Group Ltd v DFCT* 90 ATC 4056; *FCT v Citibank Ltd* 89 ATC 4268 (s 263); *Waterhouse v DFCT* 86 ATC 4639.

<sup>48</sup> *Nestle Australia Ltd v FCT* 87 ATC 4409.

<sup>49</sup> *Terrule Pty Ltd v DFCT* 85 ATC 4173.

<sup>50</sup> For example, *Van Grieken v Veilands* 91 ATC 4865.

<sup>51</sup> *Southern Farmers Group Ltd v DFCT* 90 ATC 4056. See s 38 Administrative Appeals Tribunal Act 1975.

<sup>52</sup> For example, *Allen Allen and Hemsley v DFCT* 89 ATC 4294 and *Citibank Ltd v FCT* 89 ATC 4268, both of which considered the limits on access by the Commissioner to information for the purpose of tax investigations.

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### **Tax appeals under s 39B of the Judiciary Act 1903 - challenging the making of a tax assessment**

Section 39B of the Judiciary Act 1903 (Cth) gives the Federal Court original jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth. The provision is directed to the pursuit of remedies for administrative decisions made contrary to law, rather than to the creation of substantive rights.<sup>53</sup> Whether the provision gives the Federal Court the jurisdiction to consider a challenge by a taxpayer to the Commissioner's procedure in making an assessment pursuant to s 177 of the ITAA has been considered by the High Court. Following the decision in *DFCT v Richard Walter Pty Ltd*,<sup>54</sup> it appears that the capacity of a taxpayer to mount such a challenge is extremely limited.

An assessment is not invalid simply because the Commissioner has failed to comply with any provision of the Act: s 175. Section 177(1) provides that the production of a notice of assessment shall be conclusive evidence of the due making of the assessment and, except in review or appeal proceedings under Part IVC of the TAA, that the amount and all the particulars of the assessment are correct. The Full Federal Court in the *David Jones* case had held that the effect of s 177 was purely jurisdictional and could not operate to deny to the courts the authority under s 39B to inquire into the due making of an assessment.<sup>55</sup> In the *Richard Walter* case, the High Court declined to follow this reasoning, confirming an earlier decision of the High Court that production by the Commissioner of a notice of assessment pursuant to s 177 is conclusive evidence that the assessment was duly made and that the Commissioner has complied with all the necessary statutory formalities.<sup>56</sup> However, the members of the Court differed in their views on the combined operation and effect of s 177 and s 39B.<sup>57</sup>

<sup>53</sup> *Re Hassell; ex parte Pride* (1984) 52 ALR 181.

<sup>54</sup> *DFCT v Richard Walter Pty Ltd* 95 ATC 4067.

<sup>55</sup> *David Jones Finance and Investments Pty Ltd v FCT* 91 ATC 4315.

<sup>56</sup> *FJ Bloemen Pty Ltd v FCT* (1981) 147 CLR 360.

<sup>57</sup> The scope, operation and interaction of s 177 of the ITAA and s 39B of the Judiciary Act 1903 are analysed in Orow N, "Challenging an Assessment Otherwise Than Through Prescribed Procedures Under the Income Tax Assessment Act" (1996) 24 *Australian Business Law Review* 195.

The effect of the decision for taxpayers is that, whilst the taxpayer is entitled to dispute his substantive liability using the appeals provisions of the TAA, the taxpayer generally may not dispute the procedural aspects of an assessment. However, four of the judges acknowledged (in obiter comments) that there may be circumstances in which s 175 and s 177(1) will not operate to protect an assessment. The provisions will not create a valid assessment where no assessment has been made at all, or where an assessment is incomplete or tentative.<sup>58</sup> The provisions will also not protect an assessment made in bad faith<sup>59</sup> or not made bona fide,<sup>60</sup> and might not cover those made for "improper purposes".<sup>61</sup> These limitations on s 177(1) are designed to protect taxpayers from being unfairly disadvantaged by any improper administration of the Act.<sup>62</sup>

Whilst taxpayers cannot generally rely on s 39B of the Judiciary Act to challenge assessments, the provision can still be used to challenge administrative actions by the Commissioner in "non-assessment" cases.<sup>63</sup>

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<sup>58</sup> *FJ Bloemen Pty Ltd v FCT* (1981) 147 CLR 360; 81 ATC 4280 at 4286 and 4289-4290 per Mason and Wilson JJ; *DFC of T v Richard Walter Pty Ltd* 95 ATC 4067 at 4072 per Mason CJ, at 4082 per Brennan J, and at 4092-4093 per Dawson J. In *FCT v S Hoffnung and Company Ltd* (1928) 42 CLR 39, it was held that tentative or provisional assessments were not assessments within the meaning of the legislation. See also *FCT v Stokes* 1997 ATC 4,001.

<sup>59</sup> 95 ATC 4067 at 4082 per Brennan J.

<sup>60</sup> 95 ATC 4067 at 4087-4089 per Deane and Gaudron JJ (close up not made bona fide); contra *McHugh J* - s 177 precludes a taxpayer from challenging under 39B, even if an assessment was not made bona fide or was made for an improper purpose.

<sup>61</sup> See, eg, *Briggs v DFCT*; *ex parte Briggs* 86 ATC 4748 (in this case, the Commissioner admitted in interlocutory proceedings that he had made no ascertainment of the taxpayer's income but issued the assessment in order to persuade the taxpayer to begin negotiations with the ATO).

<sup>62</sup> Cooper G, "Hello Richard Walter, Goodbye David Jones" (1995) 29 *Taxation in Australia* 598.

<sup>63</sup> For example, *Consolidated Press Holdings Ltd v FCT* 95 ATC 4231, in which the taxpayer successfully restrained the Commissioner from divulging confidential information about the taxpayer held by the ATO to persons outside the Tax Office, as being contrary to the secrecy provisions in s 16 of the ITAA.



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### Other review mechanisms

The following less formal review mechanisms can be important to taxpayers who have suffered at the hands of the tax administration but who have no formal (ie, legal) rights of review.

#### *Ombudsman*

The power of the Commonwealth Ombudsman to review administrative actions of the ATO is useful for taxpayers for whom no other review mechanism is available, but may also be used, at the discretion of the Ombudsman, by taxpayers who do have the right to use a formal review mechanism.<sup>64</sup> Pursuant to the Ombudsman Act 1976 (Cth), the Ombudsman has the power to act upon a complaint or, on her or his own motion, to investigate administrative actions of government agencies, including the ATO. There is now a special Tax Adviser to the Ombudsman supported by a team of tax experts, whose role it is to "serve as a check to administrative errors ... open up another avenue for independent review of ATO action, and ... significantly improve equity in the tax system".<sup>65</sup>

The Act gives the Ombudsman broad powers of investigation, including the right to access records, enter premises and to require persons to attend to answer questions. However, the Ombudsman has no power to implement any recommendations which may follow from investigation of complaints - her or his power is limited to reporting the results of investigations and recommendations to the ATO or, if necessary, to the Prime Minister and to Parliament. Nevertheless, the Ombudsman has often negotiated successfully with the ATO on behalf of aggrieved taxpayers and arguably promotes improved tax administration by drawing public attention to criticisms of ATO decision-making.<sup>66</sup>

### Internal ATO appeals and compensation

Taxpayers can obtain an internal review through one of the ATO's Problem Resolution Units, which seek to resolve quickly more serious problems of an administrative character where taxpayers have no

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<sup>64</sup> If a right to review has been exercised, the Ombudsman is required not to investigate the action unless there are "special reasons" justifying an investigation: Ombudsman Act s 6(2).

<sup>65</sup> Press Release by the Commonwealth Assistant Treasurer No 91 (1994).

<sup>66</sup> See, eg, *Commonwealth Ombudsman Media Release*, 14 October 1994, "Australian Taxation Office: over-zealous recovery action".

formal avenue of review or redress. This provides at least one option for taxpayers with no legal recourse, but the fact that it is a purely internal procedure throws doubt over the perceived neutrality of the review.

Compensation for serious "maladministration" may be available to taxpayers through the ATO in cases of extraordinary delays, misleading advice and other more serious problems. The Audit Act 1901 (Cth) permits "act of grace" payments or the waiver of tax liability in circumstances where a taxpayer is affected financially by maladministration on the part of the ATO.<sup>67</sup> An act of grace payment or waiver will not be supported by the ATO where it would have the effect of overriding a specific statutory provision. Compensation for delays in determining objections is specifically provided by the interest on overpayments legislation. The same applies to delays in referring disputed matters to the AAT or to court.

## TAXPAYERS' RIGHTS TO INFORMATION AND ADVICE

The legal right of taxpayers to information arises in two ways - first, taxpayers are able to get general and specific information about the application by the ATO of tax laws through public and private rulings. The taxpayer is most likely to seek such information at the earliest stage of the tax process, before returns are submitted. Secondly, there is a general right of citizens to request information held by Commonwealth government departments and agencies under the Freedom of Information Act 1982 (Cth). Taxpayers will most likely want to exercise this right at a much later stage of the tax process, for example, when they have received an assessment and are considering an appeal and they wish to know in detail on what information the Commissioner has based his assessment.

Finally, taxpayers are protected by a statutory duty of confidentiality on those who hold information about their financial affairs.

### Access to tax advice - the rulings system

The rulings system is one of the most important innovations in the administration of income tax law. Rulings are now binding on the

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<sup>67</sup> Audit Act 1901 (Cth), ss 34A, 70C.

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Commissioner in many circumstances, and constitute an important aspect of taxpayer rights.

Public and private rulings are administrative guidelines which provide advice to taxpayers on the application of the tax law in particular situations and are important in guiding taxpayers as to how they should self-assess.<sup>68</sup> Such guidance is necessary in view of the size, complexity and convoluted drafting of the ITAA.

### *Public rulings*

The public rulings system has existed since 1982, prompted by the introduction of freedom of information legislation. However, early rulings were not binding on the ATO or the courts, being merely an expression of the opinion of an administrative officer (the Commissioner). This left taxpayers vulnerable to be reassessed or penalised when a ruling on which they had relied was overturned. A new rulings system was introduced by the Taxation Laws Amendment (Self Assessment) Act 1992 (Cth) in recognition of the importance of taxpayers being able to ascertain their tax position with reasonable certainty in a system where they are required to self-assess. The new provisions affect rulings published on or after 1 July 1992.

Part IVAAA of the TAA defines a public ruling as "a determination of the Commissioner of the way in which a tax law or tax laws would apply to any person in relation to a class of arrangements, a class of persons in relation to an arrangement or a class of persons in relation to a class of arrangements".<sup>69</sup> Public rulings made under the new laws now bind the Commissioner in the sense that a taxpayer, relying on an appropriate and relevant ruling, is protected from penalty or other adverse action by the ATO in the event that the ruling on which the taxpayer relied, is later held to be wrong by a court, or overturned by legislation.

### *Private rulings*

It has always been part of ATO practice to issue to taxpayers private rulings or "advance opinions". Typically, a private ruling is sought by a taxpayer who wishes to know how the Commissioner would exercise his discretion, or would interpret a provision of the tax

<sup>68</sup> Barton G, "The Rulings System: Twilight Zone of Tax Law" (1993) 1 *Taxation in Australia (Red Edition)* 284.

<sup>69</sup> TAA ss 14ZAAE, 14ZAAF, 14ZAAG.

legislation, in the particular circumstances of that individual taxpayer. Under the new rulings system, the Commissioner will also be bound by private rulings, but only in respect of the taxpayer requesting the ruling. However, a taxpayer who requests and is given a private ruling but does not follow the ruling when preparing her or his return is liable to pay a penalty of 25% of any tax shortfall which results from failure to follow the ruling. This is inconsistent with the status of rulings as administrative opinions, which do not have the status of statutory provisions or delegated legislation.

Appeals against private rulings are possible under Part VC of the TAA, although the legal principles arising in such appeals are yet to be elucidated by the courts.<sup>70</sup>

### *The rulings system and taxpayers' rights*

There are many advantages for the taxpayer in the rulings system. As the Commissioner has the statutory power to administer the taxation laws, it is important and valuable that the Commissioner makes known to individual taxpayers how those powers are to be exercised.<sup>71</sup> Also, taxpayers as a group have an interest in seeing consistency and clarity of interpretation by the ATO of the tax laws. The rulings system encourages this.

Nevertheless, the fact that rulings are given the status of "quasi-law" means that the line between the making of laws by Parliament and the courts and the application of the law by administrators becomes blurred. This may have adverse consequences for taxpayers and for the tax system overall. As indicated above, a taxpayer who declines to follow a private ruling is considered to have failed to exercise reasonable care in the conduct of her or his tax affairs, which is contrary to the status of rulings as merely one interpretation of the law. Private rulings have been overturned by subsequent public rulings and by judicial interpretation, and there have been inconsistent private rulings issued by the ATO. For these reasons, it might be argued in favour of taxpayers that advice in rulings should not be considered to be infallible and that penalties should not

<sup>70</sup> The courts have not ruled on the substantive merit of the ruling being appealed against, preferring to remit the rulings back to the Commissioner for further consideration after obtaining further information from the taxpayer. See, eg, *CTC Resources NL v FCT* (1994) 27 ATR 403.

<sup>71</sup> Report 326, above n 11 at 99.

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automatically apply for failure to follow a private ruling.<sup>72</sup> The answer does not lie in the right to appeal against a private ruling. The time it takes to hear an appeal makes it an empty right where a private ruling about the likely tax consequences of a proposed arrangement is needed quickly, before the arrangement is entered into.<sup>73</sup>

Under the self-assessment system, public rulings are also given a status in law above that of other opinions on the law.<sup>74</sup> The ITAA now provides that, where a taxpayer has a tax shortfall of more than \$10,000, it must have been "reasonably arguable" that the interpretation of the law adopted by the taxpayer was correct, taking into account the relevant authorities.<sup>75</sup> These authorities include court and tribunal decisions, and also specifically include public rulings within the meaning of Part IVAAA of the TAA.<sup>76</sup>

It might be argued that taxpayers cannot have it both ways. The certainty that taxpayers now have that the Commissioner will be bound by public and private rulings is balanced by the fact that ATO rulings are acknowledged to be a primary source of advice and opinion, which must be taken seriously by the taxpayers in conducting their tax affairs. On the positive side for the taxpayer, the Commissioner, at times, impliedly acknowledges that the law is defective and makes a ruling favourable to taxpayers that could not be supported on a strict legal analysis.

A number of things must be noted about the new system when considering the protection it offers taxpayers. First, Part IVAAA provides that binding rulings can only be issued on the application of the "law".<sup>77</sup> Accordingly, "rulings" on matters other than the calculation of tax liability, for example, rulings on audit or tax collection procedures, will not be "public rulings" as defined, and will therefore not be binding on the Commissioner. Second, pre-1992 rulings remain in force unless and until they are specifically or

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<sup>72</sup> Ibid at 114-115.

<sup>73</sup> Pagone GT, "Live Issues, Dead Certainties" (1994) 29 *Taxation in Australia* 68.

<sup>74</sup> On one view, rulings have been elevated by the 1992 legislative amendments to something more akin to a judicial opinion: see Report 326, above n 11 at 107.

<sup>75</sup> ITAA s 226K.

<sup>76</sup> ITAA s 222C(4).

<sup>77</sup> "Tax law" is defined in s 14ZAAA as an "income tax law" or a "fringe benefits law".

impliedly withdrawn.<sup>78</sup> Thirdly, the Commissioner continues to issue advance opinions and make statements which do not come within the new regime.<sup>79</sup>

This raises the question of the position of taxpayers who rely on pre-July 1992 rulings or other "non-ruling" advice from the ATO where that advice proves later to be incorrect, for example, where the legislation is amended or there is a court or tribunal decision which takes a position different to that of the Commissioner.<sup>80</sup> The legal position is that no conduct on the part of the Commissioner can operate as an estoppel against the operation of the tax law.<sup>81</sup> However, there have been recent developments in the law of estoppel which suggest that the traditional views need to be revised.<sup>82</sup> It has been argued persuasively that a substantive body of administrative law doctrine now recognises that a court should restrain revenue authorities from acting contrary to undertakings or agreements made with taxpayers, if this would constitute an unfair or unreasonable exercise of administrative power, for example, where it would be analogous to a breach of contract or representation.<sup>83</sup> The public interest would be served if the Commissioner, in the exercise of his administrative powers under the Act, is required to recognise that the legitimate expectations of taxpayers as to the Commissioner's conduct ought not to be lightly set aside.<sup>84</sup>

Looking at the broader picture, the power of the Commissioner to make binding rulings might be argued to be administratively efficient, but administrators may be in danger of turning real discretions into mechanical formulae which are not necessarily the correct view of the law. ATO employees may come to see rulings as having the status of law and excessive reliance on rulings gives the

<sup>78</sup> Old rulings are impliedly withdrawn insofar as they are inconsistent with rulings issued after 1 July 1992: TAA s 14ZZAK(2).

<sup>79</sup> Under s 169A, a taxpayer who is not entitled to seek a private ruling on an issue may seek the views of the Commissioner on a matter at the time the return is lodged.

<sup>80</sup> The ATO has a general administrative policy not to depart from a non-binding ruling except where there are good and substantial reasons, such as a contrary Tribunal decision.

<sup>81</sup> *FCT v Wade* (1951) 84 CLR 105 at 117 per Kitto J.

<sup>82</sup> See the discussion of some recent cases in Rider C, "Estoppel of the Revenue: A Review of Recent Developments" (1994) 23 *Australian Tax Review* 135.

<sup>83</sup> *Ibid.*

<sup>84</sup> Above n 82 at 152.

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Commissioner powers which are hard to distinguish in practical terms from a legislative function. Taxation rulings have been described as belonging to "the twilight zone of tax law, where there is neither legislative clarity nor judicial clarification".<sup>85</sup> In practical terms, they are "the law" until withdrawn or judicially repudiated.

#### Access to ATO-held information under the FOI Act

The common law has never imposed an obligation on administrators to give reasons for their decisions. Unless a decision taken by the ATO is one to which the ADJR Act applies, there is no general legal right of taxpayers to reasons for decisions, unless the taxpayer has instituted review or appeal proceedings.<sup>86</sup> This makes the right of access to information provided by the Freedom of Information Act ("the FOI Act") very important to individual taxpayers. On a more general level, the Act facilitates the scrutiny of ATO policy and practice, thereby providing an important check on the ATO's activities.

Under the Act, the ATO (like any other Commonwealth department or agency) is required to make available for inspection and purchase by the public, documents containing the "internal law" it applies in making decisions or recommendations about the rights, obligations or privileges of any persons under any legislation or scheme administered by it: s 9. This requirement led to the publication of the first series of non-binding income tax rulings, which was the precursor to binding public and private tax rulings. The Act also confers on every person the right to have access to documents in the possession of Ministers or government agencies, unless the document is "exempt": s 11.

There are 17 exemptions in Part IV of the Act.<sup>87</sup> Sections 36, 37, 40 and 42 are particularly relevant to taxpayers seeking access to information held by the ATO. Section 36 is the exemption for "internal working documents". The exemption protects documents relating to opinion, advice or recommendation obtained or prepared

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<sup>85</sup> Above n 68 at 284.

<sup>86</sup> Where the taxpayer applies to the AAT for review of a decision, the Commissioner is required to provide reasons and other supporting documentation under s 37 of the Administrative Appeals Tribunal Act. For Federal Court appeals, normal pre-trial discovery according to the Federal Court Rules will apply.

<sup>87</sup> Sections 32-47.

in the course of the "deliberative processes" involved in the functions of a government agency or minister, where disclosure of the documents would be contrary to the public interest. The courts have sought to restrain the scope of the s 36 exemption, tending to confine it to those documents relating to high level decision-making and to policy making.<sup>88</sup> The applicant's right to know is one of the matters to be considered in deciding if disclosure would be contrary to the public interest.<sup>89</sup>

Section 37 exempts documents whose disclosure may prejudice the investigation of a breach of the law and which may be expected to prejudice the conduct of tests or audits by the ATO: s 40. The ATO has relied successfully on s 37 where disclosure would give away to the taxpayer seeking access, and to other taxpayers under investigation, the nature of the Commissioner's investigations and the extent of his knowledge.<sup>90</sup> Review of such decisions is possible by the AAT or the Federal Court. Section 42 provides an exemption for documents to which legal professional privilege applies.

### Taxpayer privacy - the duty of confidentiality

A taxpayer's right to privacy is more properly described as a statutory duty on government officers not to disclose information about taxpayers except in very limited circumstances.<sup>91</sup> The need to assure privacy is important for taxpayers, given the increased use of modern technology in tax assessment and collection, although taxpayers are not protected from the Commissioner's access to premises and information under ss 263 and 264. Confidentiality provisions appear in both data-matching and income tax legislation.

The Data-Matching Program (Assistance and Tax) Act 1990 (Cth) allows specified government agencies including the ATO to match data to facilitate the detection of persons who are failing to declare income on their returns. Secrecy provisions prevent disclosure of data between agencies other than for strictly prescribed purposes. The Privacy Commissioner is empowered to investigate any act or practice which may breach the Act or its guidelines. The Act prohibits an officer of an agency from making a record of or disclosing

<sup>88</sup> *Murtagh v FCT* (1985) 15 ATR 787; *Re Walker and the FCT* (1995) 95 ATC 2001.

<sup>89</sup> *Re Walker and the FCT* 95 ATC 2001 at 2003.

<sup>90</sup> *Re Briggs (No 1) and Australian Taxation Office* 86 ATC 2034.

<sup>91</sup> *Consolidated Press Holdings Ltd v FCT* 95 ATC 4231 at 4322-4323 per Lockhart J.



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information obtained only through the performance of functions or duties under the Act. A breach of this prohibition involves a penalty of imprisonment for two years or a fine of \$12,000 or both.

The ITAA imposes requirements of confidentiality on ATO employees and others. Section 16(2) provides that "an officer shall not, either directly or indirectly, except in the performance of any duty as an officer ... make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer", where that information has been obtained under the income tax laws: s 16(2). The provision also applies to officers in other agencies to whom information is made available. The Act also makes it an offence for a non-officer who receives information about the affairs of a taxpayer in breach of s 16 to record that information or pass it on to anyone else.

The exception for disclosure by officers in the performance of their duties permits disclosure to the DPP and the Australian Government Solicitor for the purpose of tax recovery proceedings,<sup>92</sup> and permits production of information to a Court, only when it is necessary to do so for the purpose of carrying into effect the provisions of the ITAA.

There is also a deeming provision in s 16(1A), which treats a person as an "officer" for the purposes of s 16 where the person, although not employed by the Commonwealth, performs services for the Commonwealth. Private accountants have been held to be "deemed officers", so that no breach of the provisions occurred when the ATO passed to an accountant for analysis the complex financial information provided to the ATO by the taxpayer in support of the taxpayer's application for an extension of time to pay tax.<sup>93</sup>

The courts have generally interpreted the provision to protect the taxpayer and it has been strictly construed. An attempt by the Deputy Commissioner to use the secrecy provisions to deny information to a company concerning its own file was rejected by the Federal Court.<sup>94</sup>

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<sup>92</sup> *Saunders v FCT* 88 ATC 4349.

<sup>93</sup> *Consolidated Press Holdings v FCT* 95 ATC 4231. However, the Court found that the ATO had breached the requirement to accord procedural fairness to the taxpayer when it handed over the sensitive information, without first seeking the taxpayer's permission and giving the taxpayer the option of withdrawing the request for an extension.

<sup>94</sup> *Norper Investments Pty Ltd v DFCT* 77 ATC 4211.

The maximum penalty for breach of the secrecy rules is a fine of \$10,000 or 2 years imprisonment, or both. The Commissioner has the power to apply to the Federal Court for an injunction to prevent a breach of the secrecy rules.

Similar secrecy obligations are imposed on officers of the Commonwealth by other Acts within the administrative responsibility of the Commissioner, for example, ss 3C and 8XB of the TAA. The TAA also contains provisions prohibiting persons from requesting the Tax File Numbers (TFNs) of other persons (s 8WA) and recording, using, divulging or communicating the TFNs of others, except for certain specified purposes (s 8WB). Documents to which the secrecy obligations apply are exempt documents for the purposes of FOI legislation (s 38).<sup>95</sup>

### COMMISSIONER'S POWERS OF ASSESSMENT

We now turn to the powers of the Commissioner. The Commissioner has been provided with substantial powers to get access to information for assessment purposes. The increasingly prominent audit function of the ATO is supported by powers in the ITAA to amend assessments and to issue default assessments, and the powers to gain access to information and to investigate taxpayers for the purposes of the tax law. The ITAA also places detailed requirements on taxpayers in respect of record-keeping and substantiation generally, and penalties follow where a taxpayer has not taken reasonable care.<sup>96</sup> The availability and use of these powers raises issues for taxpayers, such as the possible infringement of civil liberties and the burden and cost of compliance with the tax law.

As discussed under the heading Objections and Appeals above, the Commissioner's general power of assessment in s 177(1) "is intended to be a powerful weapon in the Commissioner's hands".<sup>97</sup> Taxpayers face considerable difficulties in challenging an assessment on procedural grounds and a heavy onus is placed by the ITAA on taxpayers to prove that an assessment is "excessive". The other important aspects of the assessment provisions are the powers of the Commissioner to amend assessments and to raise default assessments.

<sup>95</sup> See also *FCT v Swiss Aluminium Australia Ltd* (No 2) 86 ATC 4364.

<sup>96</sup> Penalty tax may be imposed under ss 222-227 of the ITAA. As well, the TAA ss 8A - 13C creates offences for which a taxpayer may be prosecuted.

<sup>97</sup> Woellner et al, above n 13 at 153.

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*Default and amended assessments*

The Commissioner may amend assessments previously made through a general discretionary power under s 170 of the ITAA. The courts have indicated that the process of raising an assessment does not preclude the Commissioner from making further inquiries into the affairs of a taxpayer, as long as those inquiries are undertaken for the purposes of the Act.<sup>98</sup> The power to amend is not conditional on any belief or suspicion on the Commissioner's part.<sup>99</sup> Before the change to self-assessment, the Commissioner could amend an assessment in only a limited range of circumstances. The Commissioner now has an almost unlimited power to amend an assessment within 4 years of the date on which the tax became due and payable where there has been an avoidance of tax: s 170(2)(b)(i) and (ii). The term "avoidance" does not imply any wrongdoing on the part of the taxpayer, but refers merely to the payment of less tax than is required.<sup>100</sup> Where there has been fraud or evasion, the Commissioner may amend an assessment at any time: s 170(2)(a). There is also a time limit of four years in which an amendment which *reduces* a taxpayer's liability under an assessment can be made: s 170(3). These time limits do not affect the general power to amend in order to give effect to a Court or Tribunal decision: s 170(7). The criteria and time limits are subject to change and sometimes specific sections of the Act give time limits for amendments or for application of particular provisions. Section 170A allows the Commissioner to utilise the time limit that is most beneficial to him.<sup>101</sup>

Section 167 gives the Commissioner the power to make a default assessment where no return has been made or the Commissioner is not satisfied as to the contents of a return. The Commissioner typically forms a judgment for the purposes of s 167 from audit activity which culminates in the identification of income not disclosed in the taxpayer's return or, where the Commissioner is not able to identify the taxpayer's source of income, in the preparation of an assets betterment statement. As the ITAA does not indicate how such assessments are to be made, the Commissioner has considerable

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<sup>98</sup> *Industrial Equity Ltd v DFCT* (1990) 170 CLR 649 at 658.

<sup>99</sup> *Ibid* at 657.

<sup>100</sup> *FCT v Westgarth* (1950) 81 CLR 396 at 414 per Fullagar J.

<sup>101</sup> The Commissioner can claim interest on underpaid tax pursuant to s 170AA and this interest is now deductible. The Commissioner is obliged to pay interest on overpaid tax pursuant to the Taxation (Interest on Overpayments) Act 1983 (Cth).

discretion in ascertaining the "amount upon which in his judgment income tax ought to be levied": s 167. The Commissioner must use reasonable investigation processes and all relevant evidence, but the assessment will not be invalidated if the Commissioner has used "honest guesswork" to arrive at the assessment.<sup>102</sup> Such an assessment will stand, unless the taxpayer discharges the burden of proving that the assessment is excessive. The onus might prove decisive against the taxpayer in borderline cases.

### Substantiation requirements

The ITAA requires certain records to be kept by all taxpayers for the purposes of verifying their taxable income and substantiating their deductions.<sup>103</sup> Section 262A requires every person carrying on business to keep sufficient detailed records of income and expenditure to enable assessable income and allowable deductions to be ascertained. Records must be kept for a minimum of five years and fines of up to \$3,000 may be imposed on conviction for failing to comply with record retention requirements. The provision ensures the creation and retention of a minimum fund of information which may be accessed under the Commissioner's substantive investigatory powers, although the Commissioner is not limited to information required by the Act to be kept.

Special record-keeping requirements apply also for fringe benefits tax and capital gains tax purposes (s 160ZZU) and under numerous provisions which support the foreign tax accruals system. The ATO also has access to information through the tax file number and financial transactions reports systems.

### *Costs to taxpayer and burden of substantiation*

Compliance costs are an important aspect of the tax system as they affect the capacity of business to function profitably. High compliance costs may also adversely affect the actual level of compliance. Independent studies of compliance costs for public companies suggest that they are higher for Australian taxpayers compared to other countries.<sup>104</sup> The cost of compliance for individuals

<sup>102</sup> *Briggs v DCT (WA); ex parte Briggs* (1987) 18 ATR 570.

<sup>103</sup> Schedule 2B of the ITAA sets out the substantiation rules for wage and salary earners for the years 1994/95 onwards (previous years are covered by ss 82KT - 82 KZBB).

<sup>104</sup> The total cost of compliance of public companies in Australia for the 1986/87 tax year was between 11.4% and 23.7% of public companies' tax

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has been estimated at between 7.9% and 10.8% of tax revenue, or about \$4 billion.<sup>105</sup> It was the view of the Joint Committee of Public Accounts that the necessary assumption of a self-assessment system - that all taxpayers understand and have the capacity to apply the law - was responsible for higher compliance costs, in particular, the cost to taxpayers of receiving professional advice.<sup>106</sup>

In practice, the ATO is addressing the issue of costs, at least indirectly, by making much more information about the tax law available to the public generally (for example *TaxPack* 1996). Also, the ATO recognises that the "reasonable care" expected of taxpayers in preparing their returns will depend on the knowledge, skill and circumstances of the taxpayer and the level of penalty imposed on a taxpayer for incorrect returns will reflect this.<sup>107</sup>

The burden placed on employee taxpayers by some of the substantiation rules has been criticised by the tax profession as well as the AAT. The requirements to keep diaries of certain expenses incurred was described as a "Herculean task" and the substantiation provisions themselves as a "jungle of gibberish".<sup>108</sup>

#### **The Commissioner's powers of access: s 263**

Sections 263 and 264 are widely considered to be the most powerful (and accordingly are amongst the most controversial) provisions of the ITAA. They assist assessment, but are most likely to be used in investigations and audits after an assessment has already been raised and in the recovery of tax.<sup>109</sup> Section 263 provides that the Commissioner or an authorised officer shall "at all times have full and free access to all buildings, places, books, documents and other papers..." for any of the purposes of the Act. This includes computer records and microfiche.<sup>110</sup> The section does not authorise the removal of records, but copies and extracts of materials may be taken.

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revenue, compared to compliance costs in the UK of around 2.2%: Pope J, Fayle R and Chen D-L, *The Compliance Costs of Public Companies' Income Taxation in Australia 1986/87* (1991 Australian Tax Research Foundation). The figures included professional costs but not the ATO costs of collection.

<sup>105</sup> Pope J, Fayle R and Duncanson M, *The Compliance Costs of Personal Income Taxation in Australia* (1990 Australian Tax Research Foundation).

<sup>106</sup> Report 326, above n 11 at 81.

<sup>107</sup> See Taxation Ruling TR 94/4.

<sup>108</sup> *AAT Case 8387* (1992) 24 ATR 1175.

<sup>109</sup> *Simionato Holdings Pty Ltd v FCT* (No 2) 95 ATC 4720.

<sup>110</sup> Acts Interpretation Act 1901 (Cth) ss 25, 25A.

The courts have interpreted the access power in s 263 widely. It is not limited to the taxpayer's own records, or to the records required to be kept under s 262A.<sup>111</sup> There is no requirement that there be a suspicion of wrongdoing. The provision can be used as part of a general audit function, to verify or ascertain a taxpayer's liability. It is irrelevant that the taxpayer is chosen randomly, for example, because it is one of the top 100 Australian companies.<sup>112</sup> The Commissioner may also access information held about a taxpayer, for example, documents held by an accountant about her or his clients.<sup>113</sup> However, s 263 may not be used as part of a fishing expedition in relation to a court case already on foot, as this would be a contempt of the discovery rules of the particular court.

The Commissioner has no obligation to comply with the requirements of natural justice before issuing a s 263 authorisation, nor is it necessary for the authorisation to specify the premises to be searched, or the documents which are the subject of the search. However, a failure by the Commissioner or authorised officer to explain what it is he wants, or to give adequate notice of it, may in some cases be so unreasonable that the search will be invalid.<sup>114</sup> Where there is a substantial question as to the validity of the authorisation, the Commissioner may be restrained from looking at the books to which access is sought, pending resolution of the matter.<sup>115</sup>

Under s 263(3), the "occupier" of premises to be searched must provide the authorised officer with all reasonable facilities and assistance for the effective exercise of the s 263 powers.<sup>116</sup> This would include indicating where records are kept, providing access to areas where documents are held, providing work space and perhaps providing photocopying facilities. If necessary, force may be used against physical assets, but the force used must be necessary and not

<sup>111</sup> *South Western Indemnities Ltd v Bank of NSW and FCT* (1973) 4 ATR 130.

<sup>112</sup> *Industrial Equity Ltd v DFCT* (1989) 20 ATR 1681.

<sup>113</sup> *Clyne v DFCT* 85 ATC 4597.

<sup>114</sup> *FCT v Citibank Ltd* 89 ATC 4268. The bank was the subject of simultaneous searches by tax officers in six different areas. The Court held that the bank had not been given sufficient opportunity to assert claims for legal professional privilege due to the lack of notice as to the scope of the search and the search was therefore invalid.

<sup>115</sup> See *Sharp v DFCT* 88 ATC 4259.

<sup>116</sup> The section was amended in 1987 to overcome the decision in *Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1, in which the Court held that bank officers were under no obligation to assist the tax officers to gain access to documents held by the bank in a locked vault.

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excessive.<sup>117</sup> An occupier who fails to provide the necessary facilities or assistance is liable to be fined up to \$1,000. It has also long been an offence actually to obstruct or hinder any tax officer in the discharge of his or her duties.

#### **Powers of investigation: s 264**

Section 264 confers inquisitorial powers on the Commissioner. Under this section, an authorised officer may serve a notice in writing on any person, whether a taxpayer or not, to furnish information, to attend and give evidence concerning any person's income or assessment, or to produce books, documents or other papers in his custody or under his control.

As with s 263, the High Court has held that s 264 gives the Commissioner a discretion to select taxpayers randomly for audit, for the purpose of ascertaining the taxpayer's taxable income. It is not necessary that a dispute of fact must have already arisen between the taxpayer and the Commissioner, or that the Commissioner has a suspicion about a taxpayer, before the Commissioner can use the powers in s 264. The courts have recognised that, in order to ascertain the taxpayer's taxable income, the Commissioner may need to make wide-ranging inquiries and to make them long before any issue of fact arises between him and the taxpayer. The proscription on "fishing expeditions" in curial proceedings does not extend by analogy to investigations by the Commissioner under s 264.<sup>118</sup> To put himself in a position where he can identify the documents with sufficient clarity, the Commissioner may as a preliminary step get the holder of the documents to give him a general description of them, but not full details of their contents.<sup>119</sup>

The decision to issue a s 264 notice is one to which the ADJR Act applies. However, it appears that, as with s 263, the Commissioner is not required to accord natural justice before issuing and serving a s 264 notice.<sup>120</sup> Nor is the power subject to the privilege against self-incrimination, although it is subject to legal professional privilege. These matters are discussed separately below.

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<sup>117</sup> *Kerrison and Banich Management Pty Ltd v FCT* (1986) 17 ATR 338.

<sup>118</sup> *FCT v The Australia and New Zealand Banking Group Ltd (Smorgon No 3)* 79 ATC 4039.

<sup>119</sup> *Geosam Investments Pty Ltd v ANZ Banking Group Ltd* 79 ATC 4418.

<sup>120</sup> *Sixth Ravini Pty Ltd v DFCT; Eighth Oupan Pty Ltd v DFCT* 85 ATC 4307 at 4313.

There are some restrictions imposed upon notices issued pursuant to s 264. The information called for must be that required under the Act. The documents referred to must relate to a specified taxpayer and that person must be named or otherwise indicated in the notice.<sup>121</sup> A notice requiring a person to produce documents about another's affairs must show that those documents relate to the income or assessment of an identified person. A s 264 notice may be invalid if its ambit is too wide.<sup>122</sup>

The Commissioner's powers are limited to the relevant material in the "control or custody" of the person who is served with the notice.<sup>123</sup> Any contractual duty of a third party such as a bank, accountant or solicitor to a taxpayer client to refrain from producing the documents held by the third party has been held to be overridden or read subject to the obligation to comply with the s 264 notice.<sup>124</sup> It is an offence to refuse or fail to produce a book or paper required by the Commissioner.<sup>125</sup> The offence has been found to be one of strict liability, although the accused can raise a defence that they held an honest and reasonable belief in a state of facts which, if they existed, would have made the acts innocent.<sup>126</sup>

Whilst there is no provision in the tax legislation which specifically gives the Commissioner power to seize books and papers, the Commissioner may seek a search warrant under s 10 of the Crimes Act 1914 (Cth). Such a warrant cannot authorise seizure of documents covered by a claim for legal professional privilege.<sup>127</sup> To the extent that a warrant fails to allow for such a claim, it may be invalid. As well as these broad powers, the Commissioner has the ordinary rights of discovery and inspection.<sup>128</sup>

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<sup>121</sup> Above n 118.

<sup>122</sup> *In Clarke v DCT (Qld)* 89 ATC 4521, the ATO was investigating the affairs of two persons and served a notice on their solicitor requiring the production of all the solicitor's trust account records. Because the notice did not confine itself to the taxpayers under investigation, it was considered to be too wide in its ambit.

<sup>123</sup> Above n 118.

<sup>124</sup> *Griffin & Elliott v Marsh* 94 ATC 4354.

<sup>125</sup> TAA s 8d(1)(a).

<sup>126</sup> *Griffin & Elliott v Marsh* 94 ATC 4354. The Federal Court held that a belief by a company director and secretary that they were not required to answer questions posed pursuant to a s 264 notice as to the whereabouts of certain company documents was a belief as to the state of the law not fact.

<sup>127</sup> *Baker v Campbell* 83 ATC 4606.

<sup>128</sup> *Royal Australia Investments Pty Ltd v FCT* 88 ATC 4172.



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*Legal professional privilege*

The only significant limitation on the powers in ss 263 and 264 is that legal professional privilege may apply. The privilege applies where the sole purpose of a communication is obtaining advice or for use in litigation. Consequently, it does not apply to solicitors' trust account records.<sup>129</sup> There is no similar privilege arising out of any duties owed by a banker to his or her clients,<sup>130</sup> or by accountants to their clients.<sup>131</sup> A Taxation Officer must give the occupier sufficient opportunity to examine documents and claim legal professional privilege, if appropriate.<sup>132</sup> While the High Court recently restricted privilege in the company law context, the Court has consistently applied it to ss 263 and 264.<sup>133</sup>

*Self-incrimination*

The courts have held that a taxpayer cannot resist a s 264 notice by invoking the privilege against self-incrimination.<sup>134</sup> The Full Federal Court reached this conclusion on the grounds that the legislative policy of giving the Commissioner wide powers would be frustrated if this common law privilege was found not to have been abrogated, although it was conceded by one judge (Wilcox J) that the Parliament might have used stronger words to convey its intention to do so. The decision has been characterised as "an unfortunate decision and further confirms the significant abrogation of the rights of the individual that have occurred over the last ten years".<sup>135</sup> However, the Court held that the section would not operate to allow compulsory interrogation where it would amount to a contempt of court.<sup>136</sup> The possibility of contempt arises where there are legal proceedings on foot and the Commissioner's administrative inquiry might amount to an interference with the course of justice.

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<sup>129</sup> *Allen Allen & Hemsley v DCT* (1989) 20 ATR 321.

<sup>130</sup> *FCT v Citibank Ltd* 89 ATC 4268.

<sup>131</sup> There has been a strong push by the accountancy profession, resisted by the ATO, for privilege to be extended to accountants' papers. However, Guideline OG58 indicates that the Commissioner will not seek access to accountants' advice documents and working papers.

<sup>132</sup> *Allen Allen & Hemsley v DCT* (1989) 20 ATR 321; *FCT v Citibank Ltd* 89 ATC 4268.

<sup>133</sup> See *CAC v Yuill* (1991) 9 ACLC 843.

<sup>134</sup> *Donovan v DCT* (1992) 23 ATR 129.

<sup>135</sup> Williams D, "Donovan's case and the further abrogation of the rights of the individual" 1992 *Butterworths Weekly Tax Bulletin* para [182].

<sup>136</sup> *De Vonk v DCT* 95 ATC 4538.

*Criticisms of the access and investigation powers*

These sections have been criticised by the courts and by public inquiries as placing too much power in the hands of the Commissioner and by implication infringing unjustifiably on the rights of the taxpayer. It has been pointed out that these provisions give the Commissioner powers greater than any other Australian law enforcement agency which encroach unjustifiably on individual liberty and privacy.<sup>137</sup> Sections 263 and 264 are stated in extremely broad terms and it is the absence of limitations on the powers which has been argued as a fundamental concern for citizens, particularly as there are no written constitutional protections for the individual against government powers of search, access and information gathering.<sup>138</sup>

**Audits**

A "tax audit" is an examination of a person's financial affairs by the Commissioner for the purposes of a tax law.<sup>139</sup> As already mentioned, tax audits are a major tool of the ATO compliance strategy, particularly since the introduction of self-assessment. The ATO sees audits as a major tool in encouraging voluntary compliance amongst taxpayers generally, as well as a revenue-collection tool.<sup>140</sup>

The notion of a tax audit is not a separate notion to the various access powers and powers in relation to returns and assessments. There is no separate power of audit in the tax statutes. The audit regime is an administrative system that has been developed in the context of the Commissioner's powers of assessment, access and investigation. The courts have held audits to be supported by the powers in ss 263 and 264, so that a random audit is not outside the Commissioner's powers.<sup>141</sup>

The ATO has developed guidelines on audits which set out "mutual expectations" for the behaviour of taxpayers and tax auditors. In the case of desk audits, for example, a taxpayer has the right to a

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<sup>137</sup> Report 326, above n 11 at xxxvii.

<sup>138</sup> McSweeney P, "Sections 263 and 264 of the ITAA: Another Missed Opportunity for Reform" (February/March 1996) *CCH Journal of Australian Taxation* 38.

<sup>139</sup> TAA s 14ZAA.

<sup>140</sup> Carmody M, "Tax Auditing and Future Directions in Compliance" 1988 *University of NSW Continuing Legal Education* at 13-20.

<sup>141</sup> *Industrial Equity Ltd v DCT* (1990) 21 ATR 934.

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reasonable period of time to get tax records in order for inspection, to have an accountant or other representative present at the interview and to obtain a record of interview. The guidelines do not have the force of law and are not binding on either party.

Negotiation of settlements with taxpayers are part of the general discretion of the Commissioner for the general administration of the ITAA pursuant to s 4.<sup>142</sup> The negotiation of settlements following any audit is governed by the ATO's *Guidelines for Negotiated Settlements of Taxation Liabilities*. It sets out the principles under which the ATO will negotiate with taxpayers and their representatives for the settlement of issues arising during, or as a result of, an audit of the taxpayer's affairs. It is ATO policy that officers do not use the threat of either prosecution or the imposition of severe penalties as a lever in settlement negotiations. In *Caratti v DFCT*,<sup>143</sup> the WA full Supreme Court set aside summary judgment, obtained when three related taxpayers defaulted under an agreement reached to settle their tax debts. The Court ruled that there was a question to be tried as to whether the Commissioner had obtained the agreement by applying illegitimate pressure amounting to economic duress.

These various guidelines raise some interesting issues about taxpayers' rights. The first is their status as administrative guidelines only - they have no legal status (given that they are not Rulings, and probably would not qualify as interpretations of a "taxation law" anyway) and they provide taxpayers little real guarantee of fair treatment. Their application is not reviewable by the AAT or the Federal Court.

## COLLECTION AND ENFORCEMENT

The collection of tax is the most important function of the ATO. A large proportion of tax is collected through deduction of tax at source (such as PAYE tax and the prescribed payments system) and by instalments (such as from companies, and from individuals subject to provisional tax). The tax legislation imposes numerous obligations, supported by penalties, to ensure that requirements for deductions at source are complied with.<sup>144</sup> Where individual tax debtors are concerned, the Commissioner has the general common law rights

<sup>142</sup> *Precision Pools v FCT* (1992) 24 ATR 43 at 54.

<sup>143</sup> 93 ATC 5192.

<sup>144</sup> For example, ITAA ss 221A - 221Y (PAYE tax instalments).

available to creditors, as well as a range of specific powers of collection which provide him with distinct advantages over other creditors.

### General powers

For taxpayers other than companies and superannuation funds, tax is due and payable on the date specified in the notice of assessment: ITAA s 204. Tax which remains unpaid after the due date for payment incurs a penalty as well as interest for late payment: ss 207 and 207A. On the due date for payment, the tax is a debt due to the Commonwealth and may be sued for in a court of competent jurisdiction: s 209. A court has the power to stay execution of a judgment debt in appropriate circumstances,<sup>145</sup> although the power is rarely exercised.

The Commissioner's rights as a creditor under the ITAA take precedence over provisions in state judgment debt recovery acts, effectively denying taxpayers certain advantages under those acts, such as seeking to pay the judgment debt by instalments.<sup>146</sup> However, the Commissioner has a discretion to extend the time for payments or permit payments by instalments: s 206.<sup>147</sup> The Act is silent on what matters the Commissioner should take into account in exercising his discretion, but the courts will intervene where it appears that he has exercised the discretion improperly.<sup>148</sup>

The Commissioner may sue and recover payment of a tax debt, notwithstanding that there is an objection or appeal. Where there is an objection, the Commissioner is usually prepared to allow part deferral of payment if 50% is paid "up front", subject to the taxpayer paying late payment tax under s 207 on the balance if the appeal is unsuccessful.<sup>149</sup>

### Collection from companies and company directors

Where the Commissioner reasonably suspects that a person has failed to remit tax instalment deductions, he has the power under

<sup>145</sup> *DCT v Palumbo* (1992) 23 ATR 469.

<sup>146</sup> See, eg, *DCT v Homewood* (1991) 21 ATR 1426; *Re Mazuran*; *Ex parte DFCT* 90 ATC 4814; *DFCT v Zarzycki* 90 ATC 4707.

<sup>147</sup> See Ruling IT 2569.

<sup>148</sup> *Ahern v DFCT* 86 ATC 4023 at 4030-4031.

<sup>149</sup> See Ruling IT2569. The Commissioner may remit the penalty in certain circumstances.

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Divisions 8 and 9 of Part VI of the ITAA to make an estimate of the unremitted amount and to proceed to recover that amount, where it remains undischarged after the prescribed time. A duty is imposed under Division 9 on directors of companies to cause the company to remit PAYE deductions to the Commissioner. Where a director fails to do so, he or she will be liable to a penalty equal to the unremitted amount unless he or she makes a payment arrangement with the Commissioner, appoints an administrator or commences the winding up of the company. Directors will not be held liable in some circumstances, for example, if they were not concerned in the management of the company at the relevant time.<sup>150</sup>

In addition, there are provisions in the TAA which deem persons concerned in the management of the company to have committed taxation offences of the company: s 8Y. If successfully prosecuted, directors may be subject to heavy penalties. There is also a discretion in the court to require such individuals to make reparation to the Commonwealth.<sup>151</sup> The provision is used most often in cases where companies have failed to remit PAYE deductions or sales tax to the Commissioner. Recent trends show more consistent use of criminal sanctions, including heavy penalties, against directors of companies for the taxation offences committed by the company.<sup>152</sup> Section 8Y(2) provides a defence to the charge, that the director was not knowingly concerned in the act or omission of the company giving rise to the taxation offence, but cases have shown that the defence is very difficult to make out.<sup>153</sup>

### Garnishee notices, injunctions and Departure Prohibition Orders

There are several powerful collection tools provided to the Commissioner by the ITAA for collection from individual tax debtors. By notice in writing, the Commissioner may require any person who owes money to a tax debtor, or who holds money for or on account of the tax debtor, to pay that money directly to the Commissioner: s 218. Failure to obey a notice is an offence carrying a penalty of \$1,000. A notice may be validly issued even before the debt owed by the person to the taxpayer falls due.<sup>154</sup> Under ss 14ZZR

<sup>150</sup> The harsh operation of the provisions is illustrated by *Fitzgerald v DFCT* 95 ATC 4587. In that case, a penalty was imposed on Fitzgerald, who had been director of a non-remitting company for only 17 days and was not in fact a director at the time the Div 9 notice was served on the company.

<sup>151</sup> Section 21B, Crimes Act 1914. See, eg, *Vlahov v FCT* (1993) 26 ATR 49.

<sup>152</sup> See, eg, *Johannessen v Collins*; *Lee v Collins* (1993) 24 ATR 306.

<sup>153</sup> *Buist v FCT*; *ex parte Buist* 88 ATC 4376.

<sup>154</sup> *Clyne v DCT (NSW)* (1981) 12 ATR 173.

and 14ZZM of the TAA, the fact that an application for review or an appeal has been lodged by the taxpayer does not prevent the Commissioner from issuing a s 218 notice. The issue of a s 218 notice also does not prevent the Commissioner from pursuing other means of having the tax debt paid, such as obtaining a judgment.

The decision to issue a notice is subject to review under the ADJR Act. The courts have been quick to ensure that the provision is not misused, on the grounds that it is a fundamental principle that a citizen's property should not be subject to arbitrary seizure.<sup>155</sup>

Other powers enable the Commissioner to recover tax from third parties (ss 255 - 259 ITAA), including liquidators and receivers and the trustee of a deceased taxpayer's estate (ss 215 and 216). At common law, the Commissioner may apply for a Mareva injunction to prevent the disposal of assets contrary to a court order.<sup>156</sup>

### *Departure Prohibition Orders*

Where the Commissioner has reason to believe that a person liable to pay tax may leave the country before the tax is due and payable, the tax becomes due and payable on a date specified by the Commissioner: ITAA s 205. Under s 14S of the TAA, the Commissioner is empowered to issue a Departure Prohibition Order ("DPO") if he believes on reasonable grounds that it is desirable to make such an order to ensure that a taxpayer does not leave the country without either wholly discharging the tax liability or making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged. The Federal Court has held that an order will be invalid if issued for a purpose other than those set out in s 14S(1).<sup>157</sup>

An order remains in force until varied or revoked by the Commissioner under s 14T or unless set aside by a court. However, the Commissioner may authorise the departure from Australia of a person in respect of whom a DPO is currently in force (s 14U).

<sup>155</sup> *Edelsten v Wilcox* 88 ATC 4484 at 4494-4496.

<sup>156</sup> *DFC of T v Ousley* 92 ATC 4168.

<sup>157</sup> *Skase v FCT* 92 ATC 4001. There was evidence that the Commissioner wished to put pressure on the taxpayer to file a debtor's petition as a step towards bankruptcy of the taxpayer, a motivation not contemplated by the legislature under s 14S.

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A person aggrieved by the making of a DPO may appeal to the Federal Court or to a Supreme Court of a State or Territory (s 14Z). The nature of an appeal pursuant to the section was considered by the Full Federal Court in *Poletti v DFCT*.<sup>158</sup> The Court held that it was the intention of the legislature that an appeal under s 14V against a DPO is not by way of a rehearing leading to all of the issues being retried. To hold otherwise would mean that the Court would be exercising the administrative function of the Commissioner, that is, non-judicial power. However, the appeal was not solely on a question of law. The purpose of the appeal is to enable DPOs to be set aside where the person against whom the order is made is not subject to a tax liability, or where the Commissioner's belief is not held bona fide or is not based on reasonable grounds. The onus lies with the appellant to establish that any one of the essential elements necessary to found the order was absent. The Commissioner does not bear the onus of establishing the validity of the order. In order to determine whether the Commissioner's belief was held on reasonable grounds, the evidence before the court would be the material upon which the Commissioner formed his belief and made the order. The court could also consider material in the taxpayer's possession, of which the Commissioner was not aware, but which would have resulted in the order not being made had he been aware of it.

#### Relief from tax obligations - the Taxation Relief Board

The ITAA provides a mechanism by which a taxpayer may be totally or partially relieved from the payment of a tax debt or penalty tax: s 265. An independent Taxation Relief Board considers applications for relief. The taxpayer must be able to show that the payment of the full amount would entail "serious hardship" because of any loss the taxpayer has suffered, the particular circumstances of the taxpayer or the circumstances of dependants of a deceased taxpayer who would have been liable to tax had he lived.<sup>159</sup> Where the amount of relief claimed is \$10,000 or more, the Relief Board must refer the application to the AAT for an examination of the applicant and report back to the Board.<sup>160</sup> Where the amount of liability in question is \$500 or less, the Commissioner has the power to grant the release himself.

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<sup>158</sup> (1994) ATC 4639.

<sup>159</sup> The provision does not cover remission to the ATO of group tax deductions by an employer: see, eg, *Re Tune Masters Pty Ltd* 90 ATC 5006.

<sup>160</sup> This procedure is optional where the amount of relief claimed is less than \$10,000.

The Board has the discretion to refuse relief even in cases where it finds that serious hardship exists.<sup>161</sup> However, the fact that a taxpayer has made an application for relief may, in conjunction with other factors, justify a Court in refusing to make the taxpayer bankrupt on the basis of unpaid tax debts.<sup>162</sup> A taxpayer dissatisfied with the Board's decision can apply to the Federal Court for judicial review.<sup>163</sup>

### PROPOSED TAXPAYERS' CHARTER - BETTER PROTECTION FOR TAXPAYERS?

The idea that there should be a formal Taxpayers' Charter in Australia was one of the principal recommendations arising from the Report of the Joint Committee of Parliamentary Accounts *Report 326 An Assessment of Tax*, published in 1993. The Committee believed that in a democratic society the formal statements in the tax law about the obligations and responsibilities of taxpayers should be balanced with a formal acknowledgement of taxpayers' rights.<sup>164</sup> Precedents exist in other countries, for example the UK and the USA.<sup>165</sup>

The Committee recommended that there be developed a formal written Charter which set out clearly both the ATO's obligations and standards of service and taxpayers' rights. These rights, in the Committee's view, "are really no more than the currently unstated expectations of ordinary taxpayers and common law rights of citizens in their dealings with the State".<sup>166</sup> In the view of the Committee, the ATO as the body established to administer the taxation laws was obliged to clearly, concisely, accurately and consistently advise taxpayers of their duties and rights. Such publicity should not be restricted to circumstances in which taxpayers were required to confront the ATO. Although the Committee found no *prima facie* evidence of maladministration in the ATO, it observed that, as in

<sup>161</sup> *Corlette & Anor v MacKenzie* 95 ATC 4578. In this case the Board found that although there was serious hardship, a grant of relief would not alleviate that hardship but would in fact benefit other creditors.

<sup>162</sup> *Re Gray; ex parte DFCT* 89 ATC 4728.

<sup>163</sup> *Powell v Evreniades* 89 ATC 4415.

<sup>164</sup> *Report 326*, above n 11 at 307-321.

<sup>165</sup> For comments on the US Taxpayer Bill of Rights, see "Finally, Taxpayer Bill of Rights 2 Nears Enactment" *Tax Notes*, 22 July 1996 at 394.

<sup>166</sup> *Report 326*, above n 11 at 308.



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any large organisation, individual officers have the capacity to exercise powers conferred on the organisation as a whole in an excessive, oppressive or arbitrary manner.<sup>167</sup> The Charter should establish enforceable rights and formal mechanisms for redress where standards were breached and rights infringed.<sup>168</sup>

In response to this recommendation, the ATO is currently developing a draft charter in consultation with the community and representative community organisations.<sup>169</sup> The November 1995 draft charter consists of a simple statement of taxpayers' current basic legal rights and obligations and a very general list of what the taxpayer can expect in his or her dealings with the ATO. The draft charter refers readers to a range of separately issued pamphlets on different aspects of dealings between the taxpayer and the ATO, for example, assessment and privacy.

The draft specifically avoids creating any new legal rights for taxpayers. It strongly emphasises taxpayers' responsibilities, out of a concern by the Tax Commissioner that "taxpayers, as part of the community, have the right to expect that people will meet their tax obligations so that the taxation burden is more fairly distributed under the law and so that there is appropriate contribution to the provision of community services".<sup>170</sup> Whilst it provides a reasonable range of information to taxpayers in readily accessible form, the draft charter states what the taxpayer can expect of the ATO in only the briefest and most general way and certainly does not meet the recommendation of the Joint Committee that there be a concrete statements of taxpayers' rights vis-a-vis the tax administration, supported by mechanisms for redress where rights are infringed. The draft charter is a far cry from that passed into law in the USA which, for example, imposes penalties on IRS employees who illegally browse through taxpayer information, and makes available up to \$1 million compensation for direct economic damage to taxpayers who are victims of reckless IRS collection action.<sup>171</sup>

<sup>167</sup> Ibid at 311.

<sup>168</sup> "Brave New World - Dawn Rises on Tax Rights" (1994) 29 *Taxation in Australia* 176, at 180, quoting the President of the Taxation Institute, David Russell QC.

<sup>169</sup> *Taxpayers' Charter*, Discussion Draft (November 1995 ATO). The draft has undergone substantial consultation and a final recommendation is expected to go to the government late in 1996.

<sup>170</sup> Carmody M, "Taxpayers' Charter: ATO Perspective" University of NSW Australian Taxation Studies Program, *Current Issues in Taxation* (April 1996) at 3.

<sup>171</sup> Above n 165 at 394 and 395.

## CONCLUSIONS

There is no doubt that the Commissioner of Taxation has substantial powers and discretions provided to him by Parliament in Australian tax legislation, "exceptional powers" in the opinion of some.<sup>172</sup> The importance of the role of the principal revenue collection agency in assessing and collecting tax can hardly be underestimated. Substantial powers and wide discretions can be argued to be necessary if the job is to be done as efficiently as possible, in particular to ensure compliance from those taxpayers who are perhaps not as willing as they might be to pay their fair share to the pool of government revenue.

It is clear that taxpayers have defined rights of appeal and review of many tax decisions, as well as access to less formal review mechanisms, and to information both about the application of the tax law and about themselves held by the ATO. It must be acknowledged that the introduction of the self-assessment system has increased the amount of information available to taxpayers (a necessary thing, and more is needed) and improved the certainty of the application of the law, insofar as this is possible given the size and complexity of the tax legislation. But, at the same time, the Commissioner has been given greater powers to re-assess and to impose heavy penalties for incorrect returns. Taxpayers are also faced with heavier burdens of substantiation and, arguably, increased costs of compliance.

In spite of the changes which have advantaged taxpayers, it is arguable that the move to self-assessment has made the position of the taxpayer much less certain and too little has been done to address this uncertainty. Under self-assessment, auditing of taxpayers has vastly increased, but the central tax statute, the ITAA, has failed to acknowledge the central role of auditing in tax administration and to spell out the powers and discretions available to the Commissioner, as the central tax administrator for this purpose. Instead, the audit function is supported legislatively by ss 263 and 264, which are expressed without any substantive limitations, in spite of the intrusions they permit into personal privacy and property.<sup>173</sup> Whilst administrative guidelines exist, they depend very much on the goodwill of the administrator (who already has the upper hand in the case of an audit) and are not enforceable by the taxpayer. Whilst the taxpayer may be able to

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<sup>172</sup> *Report 326*, above n 11 at vii.

<sup>173</sup> *McSweeney P*, above n 138 at 39.

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seek review of the ultimate re-assessment, many of the administrative actions along the way may not be reviewable.

A Charter which states comprehensively the current rights (and obligations) of taxpayers would make a significant contribution to the level of awareness of taxpayers in the community. In addition, the substantial powers and discretions available to the Commissioner, particularly under ss 263 and 264 and in audits, ought to be more carefully delineated to improve the certainty of taxpayers in their dealings with the ATO. This, plus the establishment of the Small Tax Claims Tribunal and the rewriting and simplification of the tax laws, will all contribute positively to taxpayers' rights.