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A Model Policy for the Regulation of Tax Crime in Australia

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Introduction

“At the end of the day, any tax system relies on the underlying support of the community. Equally, any tax administration will only be capable of performing its role effectively if it has the confidence of the community in the way it goes about its job.”

(Michael Carmody AO, former Commissioner of Taxation)

Introduction

Tax crime

- There is a fundamental tension between tax administration and the criminal law and process.
- The Australian Taxation Office (ATO) and Commonwealth Director of Public Prosecutions (CDPP) commence an average of 2,000 summary prosecutions and 50 serious fraud prosecutions respectively each year.
- There is a paucity of scholarly literature in relation to the regulation of tax crime in Australia.
- This presentation is the culmination of aspects of the presenter's PhD research (Atax, UNSW) and experience in private practice.
 - This presentation will propose a model policy for the regulation of tax crime in Australia, which has been informed by this research.

Existing regulatory options

Regulatory options in relation to tax crime presently available to the Commonwealth include:

1. Taking no action;
 2. Administrative penalties only (Schedule 1, *Taxation Administration Act 1953* (Cth) (TAA));
 3. Civil forfeiture (*Proceeds of Crime Act 2002* (Cth)) (not addressed in this presentation);
 4. Summary criminal prosecution (TAA);
 5. Indictable prosecution (Schedule to the *Criminal Code Act 1995* (Criminal Code)).
- There are also multiple indictable criminal offences which apply to the same conduct (e.g. s 135.1(1) and 134.2(1) Criminal Code which impose a maximum of 5 and 10 years gaol respectively).
 - It is noted that this broad range of options, and the associated discretion, has of itself been criticised: *R v Whitnall* (1993) 42 FCR 512, 518 per Justice Higgins.

The fundamental tension

Tax administration

- The '*nucleus*' of tax administration is perhaps the assessment process.
- Where the Commissioner has formed the opinion that there has been fraud or evasion and issues an assessment, production of the notice of assessment is conclusive evidence of the due making of the assessment and (except in Part IVC TAA proceedings) is conclusive evidence that the amount involved and all the particulars of the assessment are correct.
- An assessment thus crystallises a tax-related liability and the Commissioner is entitled to summary judgment based upon it whether or not the content (but not existence) of the assessment is questionable.

The fundamental tension

Criminal process

“Throughout the web of the English Criminal Law one golden thread is always to be seen that is the duty of the prosecution to prove the prisoner’s guilt subject to... any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

(Woolmington v DPP [1934] AC 462)

First principles

Taxpayers' rights

- There is no single human rights instrument in relation to taxpayer rights.
 - The Taxpayers' Charter, rather, refers to taxpayer expectations.
- To the extent taxpayers enjoy enforceable '*rights*' they represent a veritable patchwork quilt of substantive and procedural law.
- Perhaps most fundamental is the manifestation of the political ideal of the rule of law *in law*, in the form of the requirement for certainty.
- Furthermore, there are a number of assertions of practical conclusions said to be required by the rule of law that are relevant *in law* in the context of tax crime. These include:
 - Separation of powers; and
 - Natural justice (the hearing rule and the bias rule).

First principles

Criminal Process

1. Places a high burden of proof (beyond a reasonable doubt) on the prosecutor;
2. Requires the presence of mental elements such as intent;
3. Gives the accused certain procedural protections in the face of investigation and prosecution;
4. Imposes greater ethical obligations of candour, fairness and disclosure on the prosecutor;
5. Confers a privilege against self-incrimination and a protection against double-jeopardy upon the accused;
6. Extends the range and severity of sentencing powers, including imprisonment.

(ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) (ALRC 95))

- Where a matter is prosecuted on indictment, the matter *must* be tried by jury: s 80 *Constitution*.

First principles

Information being peculiarly within the knowledge of the taxpayer

- In *civil* cases, the rule that s/he who asserts must prove is relaxed when the subject matter of the allegation lies peculiarly within the knowledge of one of the parties: *Williamson v Ah On* (1926) 39 CLR 95.
 - This secondary rule is the justification for placing the burden of proof on a taxpayer in Part IVC TAA reviews/appeals.
- In *criminal* proceedings, relaxation of the rule that s/he who asserts must prove enjoys little traction.
 - The CDPP, in its submissions to the 1991 Gibbs Review counselled against transferring the onus in all but the most exceptional circumstances.
 - The Gibbs Review ultimately recommended that even if a transfer of the onus might be called for, it should not automatically follow that the legal (rather than merely evidential) burden should be transferred.

First principles

- The Gibbs Review ultimately deferred deciding whether there was any justification for applying revenue-specific considerations pending two Australian Law Reform Commission (ALRC) reports on customs and excise.
 - The ALRC ultimately considered that any special considerations were merely historical.
- The Gibbs Review's recommendations were adopted in part by the Attorney-General's guide to framing Commonwealth offences (Commonwealth offence guide).
- In relation to the requirement for the presence of mental elements (point 2, ALRC 95), the Commonwealth offence guide goes on to prescribe that dispensation in the form of strict or absolute liability offences (i.e. mens rea is not an element of the offence) may be appropriate in circumstances where an offence is objectively less serious and its application relates to protection of the revenue.
- It is suggested therefore that the '*golden thread*', even in tax crime prosecutions, remains largely intact.

Specific tensions

Civil/administrative

- The ATO enjoys an *in perpetuum* amendment power in the case of 'fraud or evasion'.
- The mischief addressed by the power is that tax evaders who successfully avoid detection by exploiting the self-assessment system would effectively have tax-free income.
- 'Fraud' in this context means common law fraud. 'Evasion' is more opaque.
- A contemporary tendency has developed however whereby the terms 'evasion' and 'avoidance' are being used loosely and even interchangeably. They are not synonymous:
 - 'Evasion' means an *unlawful* blameworthy act or omission: *Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)* (1949) 79 CLR 296; *R v Meares* (1997) 37 ATR 321.
 - 'Avoidance' on the other hand does not involve any notion of active or passive fault: *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23.

Specific anomalies

Summary offences

- The summary criminal regime in the TAA is integrity and protection-oriented. It contains both tax-specific criminal offences and associated procedural provisions.
- Offences in the TAA may be brought as '*prescribed taxation offences*'.
- There is confusion about whether '*prescribed taxation offences*' are a sub-species of criminal law or a civil penalty.
 - The Uniform Evidence Law in its dictionaries excludes '*prescribed taxation offences*' from the definition of '*criminal proceeding*'.
 - The TAA's adoption of the Criminal Code however confirms that the proceedings, if proved, result in a criminal conviction.
- The Uniform Evidence Law's characterisation of '*prescribed taxation offences*' not being a '*criminal proceeding*' appears to create a number of bizarre consequences including (expressly contrary to *Woolmington*) that accused persons are compellable to give evidence.

Specific anomalies

Indictable offences

- Indictable tax crimes generally fall into two camps:
 - Fraud offences; and
 - Money laundering offences (not addressed in this presentation).
- The old and classic tax fraud offence (Defrauding the Commonwealth – s 29D *Crimes Act 1914*) was replaced by the offence of General dishonesty (135.1 Criminal Code).
 - The maximum penalty for this offence was reduced from 10 to five years' gaol on the basis that it was '*far too high*': Explanatory Memorandum.
- It has been held that both the offence of General dishonesty and another offence, Obtaining a financial benefit by deception (134.2(1) Criminal Code) are available in the context of tax crime: *Pratten v R* [2014] NSWCCA 117.
 - Obtaining a financial advantage by deception carries a maximum penalty of ten years' gaol.

A model policy

Administrative/civil responses

- Because of the self-assessment system and taxpayers' circumstances being peculiarly within their knowledge, taxpayers ought to bear the burden of proof in administrative and/or civil proceedings, even in cases where fraud or evasion is alleged.
 - By definition, the standard of proof in civil proceedings is the civil standard (balance of probabilities) having regard to the gravity of the allegations made.
- Where the Commissioner of Taxation is of the opinion that a taxpayer has engaged in evasion, he ought to particularise what is said to be the *illegal* blameworthy act or omission.

A model policy

Summary criminal responses

- Summary criminal prosecution ought to be available as a regulatory option and *some* dispensation with the criminal procedure is justified here:
 - e.g. strict/absolute liability offences.
- Summary offences however should not be used as a hybrid or 'stop-gap' regulatory response:
 - '*Prescribed taxation offences*' should not be excluded from the definition of '*criminal proceeding*' in the Uniform Evidence Law.

A model policy

Indictable offences

- The indictable offence regime should be clear insofar as available offences are concerned.
 - There should not be multiple indictable offences with very different penalties covering exactly the same conduct.
- It is inconsistent with indictable criminal process for persons alleged to have engaged in fraud or evasion to have to conduct administrative/civil proceedings where the matter is the subject of criminal investigation (and later prosecution).
 - Tax reviews/appeals ought to 'trail' criminal investigations/prosecutions.
- It is inconsistent with the criminal process for assessments to be used in criminal prosecutions to prove the *quantum* of tax evaded.
 - The constitutional law prescription for trial by jury means that it is the jury who must ascertain the tax consequences of a transaction (assisted with directions by the judge).

Conclusion

- The phenomenon of tax crime in Australia has not been the subject of extensive *legal* research.
- By way of deductive and inductive analyses of existing law this presentation has proposed a model policy for the regulation of tax crime in Australia.
- The policy acknowledges the self-assessment system of taxation and the need for administrative, civil and criminal responses as part of the Commonwealth's regulatory framework.
- It proposed a number of variations to the existing regime informed by the first principles identified.
- It is suggested that the model will not only contribute to certainty but may also facilitate more effectively the underlying support of the community.

References

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