

Taxpayer Rights in Australia twenty years after the introduction of the Taxpayers' Charter

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Introduction

Twenty years ago, I set out a framework for formulating a Taxpayers' Charter of Rights.¹ My proposition was that the nature of any charter is complex and the final product will always depend both on what the drafters are trying to achieve and how they go about achieving it. The Australian Taxpayers' Charter ('the Charter') has probably achieved far more than its drafters anticipated. Its nature and content has also gone beyond initial expectation.²

However, its effect remains constrained by its formulation as an administrative statement. As a standard bearer for the infusion of a service culture into the tax administration; as a support for the effective implementation of increasingly sophisticated compliance frameworks; as a basis for engaging more effectively with taxpayers in how the tax administration should operate: it has undoubtedly fulfilled its purpose. And that may have been quite adequate for the Australian tax system.

The Charter has done little to extend or clarify legal rights. That is not to underplay its role in developing 'soft law'.³ But its function was, at most, to articulate the administrative operation of legal rights. Any extension of legal rights was specifically excluded at its introduction.

Twenty years on, is its current role still sufficient? Or should there be consideration of a different approach?

First I outline the context for the introduction of the Charter and explore the problem it was trying to solve as one of a range of policy measures. Second, I describe its nature and how it has developed as an important element of a stable system to fulfil its objectives: first as part of the tax compliance framework; and second as part of the legal framework. Third, I outline some of the pressing challenges to tax policy and administration, and use two current challenges to illustrate how these might develop in light of the experience in other jurisdictions and undermine current stability. Fourth, I set out a framework, in which the Charter plays an integral part, to address these challenges.

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¹ D Bentley, "Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules" (1996) 25 *Australian Tax Review*, 97 (Bentley: 1996a).

² D Bentley, "The Taxpayers' Charter: More Than a Mission Statement" (1995-96) 4 *Taxation in Australia Red Edition*, 259 (Bentley: 1995).

³ D Bentley, "The rise of "Soft Law" in tax administration: Good news for taxpayers?", (2008) 14 *Asia-Pacific Tax Bulletin* 32.

The introduction of the Charter

In 1990, the OECD noted the importance of mutual trust between taxpayers and the tax administration.⁴ The OECD argued that it would be more likely “if the taxpayers’ rights are clearly set out and protected”.⁵ This built on a growing body of compliance literature,⁶ which was a driver for the introduction of a self-assessment system in Australia.⁷ The introduction in Australia of partial self-assessment from 1 July 1986 and full self-assessment for companies and superannuation funds from 1 July 1989 highlighted areas of uncertainty.⁸ A system of binding public and private rulings was introduced in 1992 to make it easier for taxpayers to comply.⁹

The Joint Committee of Public Accounts (‘JCPA’), a joint parliamentary committee which oversees the lawfulness, efficiency and effectiveness with which Commonwealth agencies use public monies, reported in November 1993 on the tax assessment system.¹⁰ In light of the introduction of self-assessment and the importance of encouraging voluntary compliance, it recommended the introduction of a taxpayers’ charter of rights and obligations to redress ‘the balance of authority between the ATO and the taxpayer’.¹¹ It is a delicate balance that had framed the thinking of earlier reviews of the tax system, particularly flowing from the 1975 Asprey Report.¹²

The Asprey Report and later reviews have consistently framed their recommendations based on the premise that a tax system should operate in accordance with the principles of equity and fairness, certainty and simplicity, efficiency, neutrality and effectiveness.¹³ In order to be seen to give effect to these principles and to develop an acceptable basis for the self-assessment system, the ATO was an early adopter of the Ayres/Braithwaite model and has sought to adapt it to reflect developments in compliance research and practice over the years.¹⁴

⁴ OECD, *Taxpayers’ Rights and Obligations* (1990 Paris OECD), 7.

⁵ *Ibid.*

⁶ A comprehensive analysis and review of the research to the late 1980s can be found in JA Roth, JT Scholz and AD Witte (eds) *Volume 1 - Taxpayer Compliance: An Agenda for Research* and JA Roth and JT Scholz (eds) *Volume 2 - Taxpayer Compliance: Social Science Perspectives* (1989 University of Pennsylvania Press). Research in the early 1990s is reviewed in J Wickerson, “The Changing Roles of Taxpayer Audit Programs: Some Recent Developments in the Australian Taxation Office” (1994) 4 *Revenue Law Journal* 125, J Hasseldine, “How do Revenue Audits Affect Taxpayer Compliance?” (1993) 47 *IBFD Bulletin* 424, and V Tanzi and P Shome, “A Primer on Tax Evasion” (1994) 48 *IBFD Bulletin* 328; and Simon James and Clinton Alley, ‘Tax Compliance, Self-Assessment and Tax Administration’ (2002) 2(2) *Journal of Finance and Management in Public Services* 27.

⁷ Described in Auditor-General, *Audit Report No.3 2001-2002, Performance Audit, The Australian Taxation Office’s Administration of Taxation Rulings* (2001 Commonwealth of Australia) 173ff.

⁸ *Ibid.*, 178.

⁹ *Taxation Laws Amendment (Self Assessment) Act 1992* (Cth).

¹⁰ Joint Committee of Public Accounts, Parliament of Australia, *Report No. 326 An Assessment of Tax, A Report on an Inquiry into the Australian Taxation Office*, AGPS, 1993.

¹¹ *Ibid.*, 308.

¹² Taxation Review Committee (‘Asprey Report’), *Full Report* (1975) 13.

¹³ Asprey Report, *ibid.*, 13 and see further the analysis in CR Alley and D Bentley, “Remodelling Adam Smith’s Tax Design Principles”, (2005) 20 *Australian Tax Forum* 579.

¹⁴ See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the deregulation debate*, Oxford University Press, 1992, and its extension in, for example, V Braithwaite (ed), *Taxing democracy: Understanding tax avoidance and evasion*, Ashgate, 2003; R Whait, “Developing risk management strategies in tax administration: the evolution of the Australian Tax Office’s compliance model” (2012) 10 (2) *eJournal of Tax*

It is in this context that the ATO released a Discussion Draft Taxpayers' Charter in 1995. It was an administrative charter based on the examples of similar charters in Canada, New Zealand, the United Kingdom and the United States. Taxpayer representative groups remained unconvinced that an administrative charter would achieve the JCPA aim for the ATO to redress the balance of authority between the ATO and taxpayers.

There was much debate as to whether it should be legally enforceable.¹⁵ A range of stakeholders expressed concern that the rights and obligations in the Taxpayers' Charter were expressed in the form of a service charter and this formulation would undermine the operation of existing legal rights. First, informal articulation of legal rights would water down taxpayers' knowledge and understanding of the extent of their rights at law. Second, listing unenforceable rights was felt to be potentially meaningless.

However, as I pointed out at the time, there are three main approaches a taxpayers' charter can take.¹⁶

1. An administrative charter, which identifies, protects and enhances the ordinary rights of most taxpayers as they seek to comply with their obligations under the tax law. It focuses on the daily interface between taxpayers and the tax administration and seeks to improve the quality of interaction through 'collaborative capacity building'.¹⁷ It does not preclude and often reflects rights protected by separate legislation.
2. A legislative charter, which operates to protect taxpayers against the breach of specified legal rights that relate to the operation and application of the tax law.
3. A combination of legislated rights supplemented by an administrative charter, which is formulated and implemented as a complete and integrated set of rules. The aim is to protect taxpayers' basic legal rights in the context of an effective compliance framework so that the two are mutually reinforcing.

Similar to most jurisdictions at the time, the proposed Australian Charter was administrative in nature, but it was integral to the ATO's application of responsive regulatory theory. This meant that it was a critical component of the ATO's policy approach to improve taxpayer compliance and assure the integrity of the Australian tax system.

In part it was framed by history. It was a clear break from the extended period of tax avoidance and evasion that occurred through the 1970s and 1980s, which was seen by the ATO as a failure of the system to respond to blatant taxpayer activity.¹⁸ A new approach required a robust tax system (introduced progressively from 1985), supported by responsive regulation (the new compliance model), and effective administrative regulation reinforced

Research, 436; S Hamilton, "New dimensions in regulatory compliance – building the bridge to better compliance" (2012) 10 (2) *eJournal of Tax Research*, 483; and OECD, *Co-operative Compliance: A Framework*, OECD, 2013, DOI: 10.1787/9789264200852-en.

¹⁵ The debate is described and analysed in D Bentley, "A Taxpayer's Charter: Opportunity or Token Gesture?" (1995) 12 *Australian Tax Forum* 1; Bentley:1996a, above n 1; and Bentley:1995, above n 2.

¹⁶ Bentley 1996a, above n 1, 100.

¹⁷ John Braithwaite, "The Essence of Responsive Regulation" (2011) 44:3 *UBC Law Review* 475.

¹⁸ Documented colourfully by former Commissioner of Taxation, Trevor Boucher in *Blatant, Artificial and Contrived: Tax schemes of the 70s and 80s* (Australian Taxation Office 2010).

by legislation upheld by the courts (a combination of self-assessment, a comprehensive binding rulings system and effective and enforceable anti-avoidance provisions).¹⁹ An administrative Charter was therefore introduced from 1 July 1997 following systematic preparation, a review of previous experience and widespread consultation.²⁰

The nature of the Charter and its development

The tax compliance framework

In 2004, the Australian National Audit Office ('ANAO') undertook a Performance Audit of the Taxpayers' Charter (ANAO 2004).²¹ The role of the ANAO is "to provide the Parliament with an independent assessment of selected areas of public administration, and assurance about public sector financial reporting, administration, and accountability".²² In the context of the ATO, it ensures that, "The ATO uses compliance strategies to help optimise collections and to instil confidence in the community that the taxation system is operating effectively".²³

ANAO 2004 noted that the Charter "sets out the way the ATO will conduct itself when dealing with taxpayers".²⁴ Importantly, it found that the ATO developed and used the three interlinked tools of the Charter, the ATO Compliance Model and its Brand Management to develop and instil confidence in the tax system.²⁵ The Charter uses the basic concepts of responsive regulation to provide the sense for taxpayers that they are being treated fairly. It was developed in conjunction with a taxpayer-focused service model using an increasingly risk-based approach towards taxpayers based on their behaviour. The Brand Management provided an effective communication strategy to both to present a consistently professional approach to taxpayer and tax agent engagement and to reinforce the messaging of the twin pillars of the Charter and the Compliance Model. By 2004 the ANAO found that the Charter was indeed integral to the ATO's approach to compliance, although, unsurprisingly for the introduction of such a significant cultural change process, there were still areas requiring further systematic integration, improved quality assurance and performance measurement and evaluation.²⁶

The ATO adoption of responsive regulation means that much of its focus is on influencing taxpayer behaviour, engaging with taxpayers and 'nurturing willing participation'. The compliance model is based on an understanding that there are significant contextual factors affecting taxpayer compliance as shown in the first diagram at Figure 1.

¹⁹ Ibid, ch 61-62; R Krever, 'Avoidance, Evasion and Reform: Who Dismantled and Who's Rebuilding the Australian Income Tax System' (1987) 10(2) *University of New South Wales Law Journal* 215; V Braithwaite and J Braithwaite, 'Managing Taxation Compliance: The Evolution of the Australian Taxation Office Compliance Model', in M Walpole and C Evans (eds) *Tax Administration in the 21st Century* (Prospect Media 2001) 215.

²⁰ Described in M McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review* 22.

²¹ The Auditor-General, *Audit Report No 19 2004-05 Performance Audit: Taxpayers' Charter*, Australian Taxation Office, Commonwealth of Australia, 2004

²² See ANAO, <http://www.anao.gov.au/about-us>.

²³ ANAO, above n 21, 13.

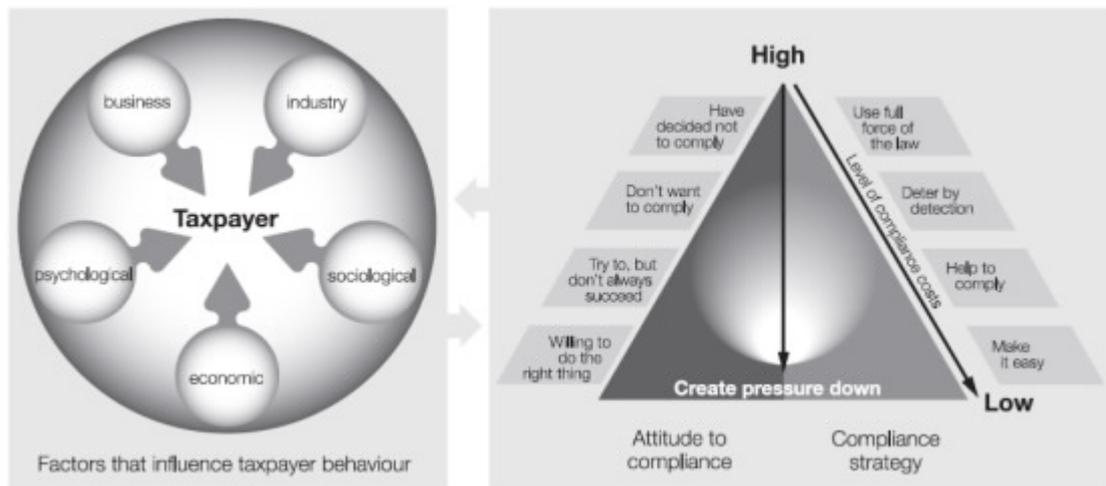
²⁴ Ibid.

²⁵ Ibid, 14.

²⁶ Ibid, 23ff.

The ATO recognises that it needs to help to shape the impact of these contextual factors on how taxpayers interact with the tax system, if it is to address the cooperative capacity building depicted in the pyramid, shown in the second diagram at Figure 1. As noted by Braithwaite, there is substantial theory underpinning and supporting the responsive regulatory pyramid, which nonetheless is a useful tool to capture the essence of a ‘strengths based’ approach to regulation that supports capacity building.²⁷

Figure 1²⁸



The ATO has developed a comprehensive strategy to implement a strengths based approach to its regulation.²⁹ The pyramid in Figure 1 demonstrates the starting point and allocation of most significant resources is at the base of the pyramid. Here the focus is on improving the attitude to compliance (and reducing associated compliance costs) and maintaining the strongest possible engagement to engender cooperation between the tax administration and taxpayers. The Charter provides the norms (taxpayer rights and obligations) underpinning that cooperation and the educative approach used in the first escalatory steps up the pyramid. The aim is to educate, build capacity and move taxpayers back down the pyramid. It is only for taxpayers that do not wish to comply that punitive approaches are taken reluctantly once dialogue and education has failed.³⁰

Deterrence increases as a taxpayer moves up the pyramid, but the broad level of voluntary compliance among taxpayers means that the bulk of ATO resources can be applied to servicing, reinforcing and educating taxpayers. Much smaller levels of resource are committed to deterrence and punishment, but with significant publicity attached to emphasise the Charter values of justice and fairness and paying tax as ‘the right thing to do’. The combination of the Charter values and the practical steps taken by the ATO at every stage powerfully reinforce voluntary compliance through legitimating the tax system.

²⁷ Braithwaite, above n 17, 480.

²⁸ Available at, <https://www.ato.gov.au/Print-publications/Developing-effective-compliance-strategies/?page=5>.

²⁹ See, for example, *Guide for compliance officers: Developing effective compliance strategies* (2009 Australian Taxation Office); available at www.ato.gov.au.

³⁰ Analysed in Braithwaite, above n 17, 482.

For example, the penalty framework has been carefully integrated with the self-assessment system, particularly the rulings regime, to encourage taxpayers to enter into early dialogue with the ATO. This positive reinforcement to move taxpayers back down the pyramid can be seen in the combination of the law and ATO rulings, which both give significant discretion to the Commissioner and his staff in applying penalties and interest.³¹ Wilful non-compliance is dealt with severely, but every effort is made to encourage back down the pyramid those who don't want to or don't care about complying.

Figure 2 sets out the business model designed to take a risk-based approach to managing compliance in a self-assessment environment.

Figure 2³²



The ATO has embraced recent research supporting its model, which has demonstrated the importance of high levels of both legitimate power and reason-based trust as the key determinants of effective tax compliance.³³ A focus on developing trust and strong legitimacy is reflected in the next stage of the ATO's implementation of responsive regulation: *Reinventing the ATO*,³⁴ which the Commissioner of Taxation introduces by saying that "Our blueprint for reinvention reflects what the community wants from the ATO – the kind of experience they want to have when they participate in the tax and super systems". Concomitant with the effort to develop high levels of trust is recognition of the importance of demonstrating: vigorous enforcement to ensure tax compliance; whole of government detection; and punishment of tax evasion.

The focus on the exercise of legitimate authority and coercive power can be seen in a range of recent activities including the high profile Project Wickenby, which was a cross-agency task force established in 2006 to fight tax evasion, avoidance and crime; its successor, the Serious Financial Crime Taskforce to combat international tax evasion; and the publicity afforded to global cooperation including the ATO to combat tax avoidance, evasion and organised tax crime. The Government has supported ATO efforts with a range of measures, including the broadening of the general anti-avoidance provisions to combat

³¹ See, for example, Part 4-25 Schedule 1 Tax Administration Act 1953 (Cth) and Practice Statement PAS LA 2014/4. This is demonstrated further in the educative process demonstrated in ATO digital and other taxpayer engagement with the introduction of the new administrative penalty regime for Self-Managed Superannuation Funds from 1 July 2014: see www.ato.gov.au/Super/Self-managed-super-funds/administerin-and-reporting.

³² Ibid, 7.

³³ E Kirchler E Hoelzl and I Wahl, "Enforced Versus Voluntary Tax Compliance: The "Slippery Slope" Framework", (2008) 29 *Journal of Economic Psychology*, 210; and E Hofmann, K Gangl, E Kirchler and J Stark, "Enhancing Tax Compliance through Coercive and Legitimate Power of Tax Authorities by Concurrently Diminishing or Facilitating Trust in Tax Authorities" (2014) 36 (3) *Law & Policy*, 290.

³⁴ See <http://reinventing.ato.gov.au/>.

multinational tax avoidance,³⁵ which has led to a four-year International Structuring and Profit Shifting compliance program targeting companies that have undertaken international restructures or have significant cross-border arrangements.³⁶

The aim is to reinforce and develop reason-based trust at the same time as exercising legitimate power to enforce compliance with the law.³⁷ The result is to move from an antagonistic climate to a service climate based on well-defined rules and standards.³⁸ Taxpayers voluntarily comply because they perceive the tax authorities as largely supportive and competent in a stable environment. Single instances of poor service do not destroy the relationship as there is mutual interest in continuing to make the system work effectively. However, a “disadvantage of a service climate may be the bureaucracy entailed in producing elaborate written rules as well as complex procedures to treat taxpayers fairly, which results in substantial administrative overheads”.³⁹

Once the service climate is well-established, Gangl, Hofmann and Kirchler suggest that the next step is to move to a confidence climate where implicit trust prevails based on automatic cooperation and trust.⁴⁰ Habitual compliance is founded in shared moral values and a commitment to society that is reflected in compliance with the spirit of the law, removing the need for “specific and complicated tax legislation”.⁴¹ While, the authors acknowledge that a confidence climate may be considered too optimistic, progress towards it is engendered through the stability and consistent practice of a service-based approach.⁴²

The ATO has grounded its development of the Charter deeply in its theoretical framework. The Charter is represented as comprising the norms and values of the compliance framework and the way the ATO operates. This is consistent with both the theories underlying responsive regulation and the ‘Slippery Slope Framework’. The theories emphasise the importance of a service climate that establishes legitimate authority: service builds trust as it supports taxpayers and builds their capacity to comply with the law. The theories also encourage the exercise of power both to enforce compliance in the interests of justice and fairness and to deter non-compliance.

James, Murphy and Reinhart in 2004 argued that the Charter “has moved on from a simple list of principles and become more embodied in the culture of the ATO”.⁴³ Twelve years later, the Charter is still clearly seen by the ATO as a fundamental component of its culture and norms. The Inspector-General of Taxation is currently undertaking a review of the Charter and this will shed further light on whether and to what extent the ATO’s perspective is shared by taxpayers.⁴⁴

³⁵ The Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015 (Cth) enacted on 11 December 2015.

³⁶ *ATO Corporate Plan 2015-19*, 8, available at www.ato.gov.au.

³⁷ K Gangl, E Hofmann and E Kirchler, ‘Tax authorities’ interaction with taxpayers: A conception of compliance in social dilemmas by power and trust’ (2015) 37 *New Ideas in Psychology* 13, Section 4.

³⁸ *Ibid*, Section 5.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² *Ibid*, Section 6.

⁴³ Simon James, Kristina Murphy and Monika Reinhart, ‘The Taxpayers’ Charter: A Case Study in Tax Administration’ (2004) 7(2) *Journal of Australian Taxation* 336, 356.

⁴⁴ Inspector-General of Taxation, *Review into the Taxpayers’ Charter and taxpayer protections*, www.igt.gov.au.

The legal framework

Australia opted for an administrative taxpayers' charter. There is no legislative charter and neither is there a combination of legislated rights supplemented by an administrative charter, which is formulated and implemented as a complete and integrated set of rules. Nonetheless, there is legislation that protects taxpayers' basic legal rights. The question is whether the compliance and legal frameworks are mutually reinforcing.

Australia has a number of primary legal rights at the international or constitutional level that have high level but very limited application to tax matters. For example, although Australia is signatory to a range of international treaties, most do not relate to taxation and, where they do, they provide a margin of appreciation limiting the treaty's interference with a state's right to tax.⁴⁵ Given that international instruments are only given force if implemented by domestic legislation and do not prevent the Commonwealth from limiting rights, their force is 'generally only through the interpretation of statutes that are clear or unambiguous'.⁴⁶ However, the Human Rights Commission actively promotes and reports on compliance with the human rights treaties to which Australia is signatory and this work helps to inform changes to domestic legislation.⁴⁷

Under Section 51(ii) of the Constitution, the Commonwealth has the power to make laws with respect to taxation provided it does not discriminate between States or part of States. When the Commonwealth increased income tax rates and provided grants to reimburse and compensate the States on the proviso they ceased to levy their own income taxes under Section 96 of the Constitution, this action was unsuccessfully challenged by the States both in 1942 and subsequently in 1957 in the *Uniform Tax Cases*.⁴⁸ As a result, income tax is levied by the Commonwealth and any taxpayer rights in respect of income, consumption and other Commonwealth taxes derive from Commonwealth legislation.⁴⁹

None of the five explicit Constitutional rights relate directly to individual taxation.⁵⁰ There have been cases brought under Section 99 of the Constitution, which forbids the Commonwealth to prefer one State over another in matters of trade, commerce or revenue,

⁴⁵ See, for example, Marrakesh Agreement Establishing the World Trade Organization, Legal instruments – Results of the Uruguay Round, vol 1, 33 ILM (1994) 1125, 1144. See further <http://www.wto.org> and JH Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed 1997). Discussed in AC Warren Jr, "Income Tax Discrimination Against International Commerce" (2001) 54 *Tax Law Review* 131.

⁴⁶ *Dietrich v The Queen* (1992) 177 CLR 292, 305. The effect of international law on Australian domestic legislation is discussed at length in Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (2015: ALRC Report 129) para 1.9 and 2.35ff, available at www.alrc.gov.au.

⁴⁷ This process and the work of the Human Rights Commission is described on its website <https://www.humanrights.gov.au/about/what-are-human-rights>.

⁴⁸ *South Australia v Commonwealth* (1942) 65 CLR 373 and *Victoria v Commonwealth* (1957) 99 CLR 575.

⁴⁹ This also largely limits the application of the Victorian and ACT Bills of Rights to protection of broader rights relevant to the application of State tax legislation, for example, the right to a fair hearing and rights in criminal proceedings: Charter of Human Rights and Responsibilities Act 2006 (Victoria); and Human Rights Act 2004 (Australian Capital Territory). See further *Momcilovic v The Queen* (2011) 245 CLR 1.

⁵⁰ The right to vote (s 41); protection against acquisition of property on unjust terms (s51(xxxi)); the right to trial by jury (s80); freedom of religion (s116) and prohibition of discrimination on the basis of in which State a person is resident (s117).

to challenge disparities in effective tax rates,⁵¹ but recognised causes of action for individual taxpayers are extremely unlikely.⁵² Recently implied rights relate to freedom of speech and have limited application in income tax cases.⁵³ This means that the traditional scrutiny mechanisms that ensure Australian laws are compatible with fundamental rights and principles are less meaningful in the context of tax law.⁵⁴

That said, the Acts Interpretation Act 1901 (Cth) provides the courts with guidance on interpretation of legislation. This is based upon the constitutional separation of powers and, as then Justice Brennan said,⁵⁵ “Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly”. The Constitution is therefore supplemented by a range of traditional rights and freedoms protected under the common law, which provides a firm basis for robust judicial statutory interpretation.⁵⁶

Section 15AA requires a purposive interpretation to give effect to the purpose or object of the Act. The purpose is framed in the context of the common law and, particularly in respect of laws limiting rights; the courts pay close regard to the principle of proportionality.⁵⁷ Section 15AB specifically allows the use of extrinsic materials by the courts to help determine the purpose of legislation, where the ordinary meaning of a provision is not clear. Reports of bodies such as the Human Rights Commission and treaties or other international agreements are specifically included as material that may be considered by the courts in such circumstances.⁵⁸

Despite the absence of explicit rights, the effect of the Constitution and other statutes, as interpreted by the courts in the light of the common law, does therefore ensure that taxes must be imposed by law.⁵⁹ This satisfies the basic requirement that tax rules should not be arbitrary.⁶⁰ Tax laws must be enacted in accordance with the Constitutional requirements for a valid law and are therefore published and transparent; tax laws must be

⁵¹ For example, *Permanent Trustee* (2004) 220 CLR 388.

⁵² See the analysis of the approach to the High Court’s reasoning in A Simpson, “The High Court’s Conception of Discrimination: Origins, Applications and Implications” (2007) 29 *Sydney Law Review* 263.

⁵³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁵⁴ The robustness of these mechanisms is the subject of Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report*, ALRC Report 129, December 2015, www.alrc.gov.au/publications.

⁵⁵ *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.

⁵⁶ Described in a speech by Chief Justice Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009). See also George Williams and David Hume, *Human Rights under the Australian Constitution* (2013 Oxford University Press, 2nd ed) 33.

⁵⁷ See G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) and the analysis in ALRC, above n 56 para 2.62ff.

⁵⁸ For further examination of the role of the courts in interpretation, see the speeches by the Judges of the Australian High Court, available at www.hcourt.gov.au and, in particular, Justice Crennan, *Statutes and the Contemporary Search for Meaning*, 1 February 2010.

⁵⁹ The history of the principle is analysed in James Spigelman, ‘The Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 775.

⁶⁰ D Bentley, *Taxpayers’ Rights: Theory, Origin and Implementation* (2007 Kluwer Law International) 220.

understandable; the courts will interpret legislation so that it is not contradictory; and the courts will interpret tax laws so that they can be obeyed.⁶¹

Tax law, because of its fiscal nature, is often retrospective, although there is a presumption that accrued rights will be retained except where expressly altered and that retrospectivity must be intentional.⁶² The politics of tax law change operate as a significant check on the exercise of government power.⁶³ The Government is therefore aware of the potential impact of retrospective legislation and this is supported by scrutiny processes in the Senate.⁶⁴ The Australian Treasury, which is responsible for the formulation of tax policy, undertakes significant stakeholder consultation before new laws are implemented, especially where the date of effect is retrospective.⁶⁵ The Australian Law Reform Commission (ALRC) notes that, while in most cases the Government makes sufficiently detailed announcements of changes to be enacted and follows that with legislative enactment within a reasonable time, in some cases the time taken to make changes and the scope of those changes is contested.⁶⁶

Legal rights on which taxpayers may rely are found either in the laws governing the judicial and administrative process or in the tax laws themselves. These laws may be interpreted so as not to conflict with other laws protecting the individual, such as the Racial Discrimination Act 1975 (Cth),⁶⁷ the Sex Discrimination Act 1984 (Cth), the Disability Discrimination Act 1992 (Cth) and the Age Discrimination Act 2004 (Cth).⁶⁸

Practice has tended to follow a process of amending offending provisions rather than recognising an individual right of challenge to legislation. For example, in 2007, the Human Rights and Equal Opportunity Commission noted in its report, *Same-Sex: Same Entitlements* that “It is clear that same-sex couples and families are denied access to a range of tax offsets and concessions which are available to opposite-sex de facto couples and parents”.⁶⁹ The report recommended amending the offending legislation, outlined in detail where the problems lay across a number of Acts, including taxing Acts, and set out how they should be

⁶¹ These issues were specifically addressed in relation to capital gain and loss provisions of the Income Tax Assessment Act 1936 (Cth) in *FCT v Cooling* (1990) 22 FCR 42 and *Hepples v FCT* (1990) 22 FCR 1. See generally, *Coco v The Queen* (1994) 179 CLR 427, 437.

⁶² *Repatriation Commission v Keeley* (2000) 98 FCR 108 at 123 and *MacCormick v FCT* (1984) 158 CLR 622.

⁶³ C Alley, D Bentley and S James, “Politics and Tax Reform: A Comparative Analysis of the Implementation of a Broad-Based Consumption Tax in New Zealand, Australia and the United Kingdom” 24 (2015) 15 *Revenue Law Journal* (<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1244&context=rlj>).

⁶⁴ Standing Order 44.

⁶⁵ See the discussion of how this process might be improved further in Australian Government, *Re:think, Tax Discussion Paper*, Commonwealth of Australia, 2015, ch 11, available at <http://bettertax.gov.au/publications/discussion-paper/>.

⁶⁶ ALRC, above n 46, para 13.89ff.

⁶⁷ The Racial Discrimination Act is a good example of one of the few occasions where an international human rights treaty (the Convention on the Elimination of Racial Discrimination 1969) has been legislated in Australia

⁶⁸ Discussed in N Wilson-Rogers and D Pinto, “Tax Reform: A Matter of Principle? An Integrated Framework for the Review of Australian Taxes” (2009) 7 *eJournal of Tax Research* 72, 77.

⁶⁹ *Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, Human Rights and Equal Opportunity Commission, 2007, 8.15.

amended to ensure compliance with the Sex Discrimination Act.⁷⁰ Reforms were enacted in 2008.⁷¹

In Australia, as in any jurisdiction, tax law operates within the framework of the legal system and the operation of the rule of law. Taxpayers therefore have many rights that flow from the application of the law, which are not peculiar to taxation. Some are embedded in legislation and others arise under the common law. Examples include the operation of the court system, rights embedded in the criminal law, rights to legal aid, rights under administrative law, rights under family law, and rights at equity.

Specific legal rights exist in relation to each aspect of the tax process. However, what is important to note is that there is a combination of law and what is termed 'soft law', which I describe as pragmatic rights. Pragmatic rights are administrative practices that comprise good practice and non-legal frameworks, which often can bring greater clarity and meaning to the law.⁷² For example, the extension by the Commissioner, as an administrative discretion, of client legal privilege to accountants' working papers,⁷³ and the Commissioner's self-imposed restraint during audits as set out in the ATO's published administrative guidelines.⁷⁴

Within each step of the tax process, taxpayers have legal rights embedded in the tax legislation. Some reflect the broader legal process but are tailored to tax matters, such as objection, review and appeal rights. In some areas, such as collection and enforcement, there are significant areas for the Commissioner to exercise discretion. The advantage of this is that the more stringent requirements of, for example, the Criminal Code are not applied to an administrative process. However, there is less recourse for the taxpayer.

This goes to the heart of the issue as to whether there is a gap in legal protection. In administering the tax law, the actions and decisions of the Commissioner are subject to both legal and merits review under the Taxation Administration Act 1953 (Cth) (TAA 53), and in specific sections of the relevant taxing acts. There is very limited legal review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act), except for serious breaches of procedural fairness or natural justice in the making of a decision. The latter might apply where there has been a breach of the requirement to provide reasons for certain decisions, for example, a decision not to remit the general interest charge or a decision to exercise access powers.⁷⁵

The rights of review under the AD(JR) Act deal with the legality of a decision by the Commissioner or his representative. Schedule 1(e) of the AD(JR) Act excludes decisions reviewable on their merits in other forums, such as a decision connected with the making or

⁷⁰ Ibid.

⁷¹ Same-Sex Relationships (Equal Treatment in Commonwealth Laws--Superannuation) Act 2008 (Cth).

⁷² Discussed in Bentley, above n 3 and D Bentley, "International Constraints on National Tax Policy" 30 (11) (16 June 2003) *Tax Notes International* 1127.

⁷³ See M Italia, 'Taxpayers' Legal privilege in the US and New Zealand: Lessons for the UK and Australia' (2014) 5 *British Tax Review* 642 and *Guidelines to Accessing Accounting Advisors' Papers*, available at www.ato.gov.au.

⁷⁴ See, for example, Audit Statistical Sampling Guidelines, Access and Information Gathering Manual, available at www.ato.gov.au.

⁷⁵ Section 13 Administrative Decisions (Judicial Review) Act 1977, with the approach to be taken by the ATO set out in Practice Statement Law Administration 2013/1, available at www.ato.gov.au.

amending of assessments or the calculation of tax or duty. The onus of proving bad faith or improper purpose is the taxpayer's and is a question of fact. Very few actions succeed.

The office of Inspector-General of Taxation (IGT), an independent statutory agency,⁷⁶ reviews, investigates and provides advice to the government on the administration of the tax system for its improvement and to identify systemic issues. In 2015, it took over the complaint handling function of the Commonwealth Ombudsman in relation to matters of tax administration.⁷⁷ The scope of the complaint handling powers is very broad and includes extensive investigatory powers. It also includes the right to refer questions to the Administrative Appeals Tribunal or to recommend that a principal officer in the ATO makes such a referral. The IGT's complaint handling role is included in the report to the Assistant Treasurer, which is tabled in Parliament.

The IGT therefore provides an important check on the power of the ATO. The combination of the IGT's review and reporting on broader and systemic issues of tax administration with its complaint handling function ensures that it has a clear view of those areas of most concern to taxpayers. However, the IGT cannot provide legal remedies, but holds the ATO to its own standards of good practice.

Australia has taken the approach that the fundamental basis of the legal system and basic human rights are protected by the Constitution and international treaties implemented through domestic legislation. Rights are further assured by the requirement for the courts to take a purposive interpretation of both statutes and the common law and to uphold the rule of law and the concepts of justice embodied within it.

However, the legal rights relevant to tax law are limited. This is understandable, as they act to curtail the State's powers to tax. The development of a robust compliance framework, supported by an ombudsman, has ameliorated the negative effects of limited legal rights for taxpayers and provided the basis for mutual trust. The question is whether this is sufficient in times of challenge.

Challenges to tax policy and administration

The Australian tax system has moved from the highly antagonist relationship between taxpayers and tax administrators in the 1970s and 1980s⁷⁸ to a stable service environment that has strengthened incrementally since 2000. A document such as *Reinventing the ATO* would have been unthinkable as the strategy document for the ATO two decades ago. The Charter has become a living document that represents the values and norms and service culture that are increasingly prevalent across the ATO. The levels of voluntary compliance also demonstrate high levels of societal trust in the ATO.⁷⁹

Nonetheless, there are challenges on the horizon, which threaten the stability of the current system. The Charter and the responsive regulation model will increasingly depend

⁷⁶ Inspector-General of Taxation Act 2003 (Cth).

⁷⁷ Ibid.

⁷⁸ Above n 18 and n 19.

⁷⁹ See the performance indicators in the ATO Annual Reports, available at <https://annualreport.ato.gov.au/>. Not only does the performance against the metrics show consistent improvement over time, but the nature of the information measured has changed to reflect a service culture.

upon a clear perception in society that the Government and the ATO are exercising legitimate authority.⁸⁰

I will outline some of the immediate challenges and use those challenges to illustrate the potential threat to the stability of the current system. In the next section I will outline the necessary development of an integrated legal framework that can reinforce and maintain stability in the face of significant challenge.

The compliance framework outlined so far is predicated on a steady and systematic development of a 'positive dynamic between legitimate power and reason-based trust'.⁸¹ The ATO strategy, *Reinventing the ATO*, implicitly assumes continued societal stability that will not impact negatively either on reason-based trust in what it is trying to achieve or the legitimacy of the authority and power which it exercises. A breakdown in either can trigger movement down the 'Slippery Slope' back towards an antagonistic culture.

Yet, there are multiple challenges facing societies and these in turn threaten the revenue systems that support them. It is by no means certain that power of Governments or the ATO will continue to be viewed as reassuringly and increasingly legitimate in an environment of growing trust between citizens, their government and civic institutions. I summarise just a few areas that illustrate the fragility of our assumptions:

- A stable, democratic Australia with one of the world's most robust economies, reinforced by membership of the most powerful economic, strategic and defence alliances, assures our future as citizens. The geopolitical reality is that financial (Greece and the global financial crisis), political (the 2016 US election or political collapse in a significant neighbour), economic (the actions of a major trading partner), security (escalating tensions in North Korea, the South China Sea and the renegotiation of the Antarctic Treaty) and geographic (earthquakes, drought and climate change) events or catastrophes could lead to a chain of events that radically changes our position.
- There is no visible public discussion of the consequences to revenue collection of specific anticipated events such as terrorism and major disease outbreaks. It is not yet possible, for example, to determine the likely demographic and associated revenue impact of the rapid spread of antibiotic resistant diseases. We do know that the 1918 Spanish influenza infected approximately one-third and killed up to 5% of the world's population.⁸²
- Economic stability is based on the reality of free trade for Australia and the assumption that trade flows will continue unabated. Similar assumptions underpinned the availability of credit prior to the global financial crisis. The interconnectedness of economies both diversifies and potentially increases risks to the Australian economy depending on the location and extent of any crisis.

⁸⁰ Gangl, Hofmann and Kirchler, above n 37, Section 6.

⁸¹ Ibid.

⁸² Jeffrey K Taubenberger and David M Morens, "1918 Influenza: the Mother of All Pandemics" (2006) 12(1) *Emerging Infectious Diseases* 15.

- Domestic stability is assumed, although increasing Commonwealth and State government gridlock over long-term policy, combined with lessons from the political stress faced in both the UK and the US suggest increasing fragility in domestic political systems. Significant instability, such as the fall of political and economic systems in Europe, comprehensive upheaval in the Middle East and radical changes across Africa, Latin America and Asia are not often canvassed as possible in Australia based on current debate.
- The rise of ‘monitory democracy’:⁸³ the increasing intensity of media and popular scrutiny and monitoring through the use of instantaneous technology combined with extra-parliamentary power-monitoring institutions is potentially reinventing democracy as it currently exists. Keane describes it as “the longing to bend the present world into a different and better future”.⁸⁴ It has arguably already influenced the longevity of Australian Prime Ministers⁸⁵ and will impact on how revenue authorities and other agencies will need to act.⁸⁶
- The unanticipated disruption of the digital era, ranging from political uprisings, cyber-crime and cyber warfare, to undreamed of capacity to transfer and use big data is almost impossible to model at scale and is therefore largely ignored beyond incremental change based on the known.
- The extent of future economic constraint and difficulties in assuring the national tax base in the face of the growth of corporate and individual mobility is the subject of public review and much hyperbole. However, political and public commentary remains largely uninformed, increasingly hysterical and largely ignores the inability of individual nation states to enforce their tax systems in the face of unconnected and highly competitive systems.⁸⁷

The potential for global disruption is self-evident. Its impact on the tax system could significantly upset the stability of the current compliance framework. To illustrate some potential effects, I consider just two recent developments arising from the last point: increasing debate over confidentiality of information; and pressure on resourcing the ATO. The first, confidentiality of information is a subject that has been widely discussed but the

⁸³ See John Keane, *The Life and Death of Democracy* (Simon & Schuster London 2009).

⁸⁴ *Ibid*, 1.

⁸⁵ For example, Troy Bramston, “Revolving-door PMs not healthy for the nation”, *The Australian*, September 28, 2015, available at <http://www.theaustralian.com.au/opinion/columnists/revolving-door-pms-not-healthy-for-the-nation/story-fnbcok0h-1227546277572>.

⁸⁶ Kathryn James, in “An examination of convergence and resistance in global tax reform trends”, *Theoretical Inquiries in Law*, (2010) 11(2) 475 analyses a number of factors that can both “contribute to tax policy convergence and provoke fierce resistance” (at 486ff). She examines factors such as the environment, power distribution, culture and institutions.

⁸⁷ This is not a new phenomenon. See, for example, A Greenbaum, “United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?” in D Bentley (ed) *Taxpayers’ Rights: An International Perspective* (1998 *The Revenue Law Journal*) 347. For more recent examples, see Heath Ashton, “Senate aims to out tax dodgers with register of offending corporates” *The Sydney Morning Herald*, August 16, 2015, <http://www.smh.com.au/federal-politics/political-news/senate-aims-to-out-tax-dodgers-with-register-of-offending-corporates-20150815-gizpdu.html> and, on the other side, Joe Harpaz, “Congress Girds for a Showdown Over Global Tax Plan” *Forbes*, Jun11, 2015, <http://www.forbes.com/sites/joeharpaz/2015/06/11/will-u-s-congress-throw-a-wrench-in-beps/>.

consequences of significant changes in the nature of how and where information is processed and kept is still in flux. The second, resourcing of the ATO is not yet a material issue in Australia, but examples from elsewhere demonstrate its potential to become so and the consequences that might flow.

These challenges can almost be viewed as ‘business as usual’. However, they are already sufficient to illustrate the importance of greater integration of legal rights and the compliance model to assure the stability of the tax system.

The ATO has extensive information gathering powers, including data matching, to prosecute its detection, deterrence and punishment of non-compliance.⁸⁸ These extend to obtaining information about a taxpayer from third parties, other government departments and other jurisdictions under information exchange provisions. Australian taxpayers are required to produce records and information on request, attend interviews and may be subject to search of both business premises and private dwellings and associated seizure of documents without a search warrant.⁸⁹

As noted above, the grounds for review of the ATO’s decisions under the AD(JR) Act, are largely limited to improper exercise of power or abuse of power, both of which are difficult for a taxpayer to prove. Important rights available to taxpayers are the common law right to client legal privilege, which is supported by an administrative right extending recognition of most aspects of privilege to accountants’ working papers;⁹⁰ and protection of privacy and confidentiality of information.⁹¹ However, there is no privilege against self-incrimination and⁹² privilege does not extend to contractual and equitable obligations owed to third parties or spouses.⁹³

The ATO uses information gathering extensively to support its compliance program and help it to manage the risk of non-compliance. It uses its search and seizure powers sparingly, concentrating on high risk taxpayers. This is an appropriate approach to managing the compliance framework and reinforces its attempt to balance the exercise of its power and maintain taxpayer trust. However, there are areas where taxpayers who are potentially non-compliant or are suspected of non-compliance have limited rights. Fairness and justice in the system depend upon the ATO implementing its compliance model effectively.

For example, the power to search individual dwellings without a search warrant, but simply with authorisation from a senior ATO officer, goes beyond normal international standards.⁹⁴ Similarly, subject to general privacy and confidentiality laws, the scope of the ATO’s information gathering powers is unlimited. There is little redress for taxpayers if third parties react adversely to an investigation into the taxpayer, where extensive information is

⁸⁸ Sections 263, 264 and 264A ITAA 36.

⁸⁹ M Dirkis and B Bondfield, “The developing international framework and practice for the exchange of tax related information: evolution or change?” (2013) 11(2) *eJournal of Tax Research* 115, 116ff discuss the scope and limits of these provisions in an international context.

⁹⁰ Above n 73.

⁹¹ The Privacy Act 1988 (Cth) and Division 355 Schedule 1 TAA 53.

⁹² *Binetter v DCT* (2012) 90 ATR 327, *McMunn v The Queen* (2007) 69 ATR 384 and *DCT v De Vonk* (1995) 31 ATR 481.

⁹³ *Clyne v FCT* (1985) 16 ATR 938 and *Australian Crime Commission v Stoddart* (2011) 84 ATR 365.

⁹⁴ See OECD, *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies*, OECD, 2015, DOI:10.1787/tax_admin-2015-en and the analysis in Bentley, *above n 60*, ch 8.

required from the third party. The broader economic, commercial and personal ramifications are simply not covered by either legal or administrative rights. For example, a bank may delay or refuse a loan request when it is made aware that a taxpayer is under investigation, even though the taxpayer may be completely unaware both of the investigation and the request for information by the ATO from the taxpayer's bank. The consequences for taxpayers subsequently found to have no case to answer could be significant.

The ATO's restraint in most cases where there is low perceived risk, as articulated in its rulings and guidelines,⁹⁵ has ensured that the full force of its power have been reserved for cases of suspected intentional non-compliance. Project Wickenby and the Serious Financial Crime Taskforce, described above, are consistent with this approach. As are the ATO's efforts to ensure that Australia's revenue base is not undermined by international tax fraud and evasion. Dirkis and Bondfield note this requires a range of international institutional bodies to "develop complementary policy, administrative and legal responses",⁹⁶ if the international institutional framework is to work effectively "to enhance and monitor tax information exchange".⁹⁷

Currently there are limited taxpayer rights and remedies in respect of information exchange. However, this is balanced in part by the limits on revenue authorities in their practical and legal ability "to exercise the essential taxation administrative processes (such as information gathering) needed to counter cross border tax avoidance and evasion".⁹⁸

Australia's international tax treaties are supplemented by a significant number of taxation information exchange agreements based on the Organisation for Economic Cooperation and Development (OECD) process,⁹⁹ the Joint International Tax Shelter Information Centre Network,¹⁰⁰ and the Australia and US intergovernmental agreement to implement the US Foreign Account Tax Compliance Act.¹⁰¹

Most agreements contain some general protection, reflective of most OECD countries' and Australia's own requirements, for example recognising the confidentiality of communications between a client and their admitted legal representative, and a right not to disclose trade secrets. The OECD has a comprehensive guide to the protection of information exchange for tax purposes.¹⁰² However, they do not provide a taxpayer under

⁹⁵ See, for example, the name of the ATO compliance program, "Building Confidence" and the documentation supporting the ATO approach to public and international groups, described at <https://www.ato.gov.au/General/Building-confidence/Public-and-international-groups/>.

⁹⁶ Dirkis and Bondfield, above n 89, 127.

⁹⁷ Ibid.

⁹⁸ Ibid, 122, citing the example, of *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324 and Foreign Judgments Act 1991 (Cth), ss 3(1) and 5(4).

⁹⁹ Art 26 Model Tax Convention on Income and Capital, www.oecd.org/tax/treaties/, Convention on Mutual Administrative Assistance in Tax Matters <http://www.oecd.org/tax/exchange-of-tax-information/> Global Forum on Transparency and Exchange of Information for Tax Purposes, <https://www.oecd.org/tax/transparency/> where? And TIEA's where?

¹⁰⁰ Described at <http://www.oecd.org/tax/forum-on-tax-administration/ftajitsicnetwork.htm>.

¹⁰¹ Signed on 28 April 2014, the ATO has published extensive guidance material as to its operation and the obligations of Australian Financial Institutions at <https://www.ato.gov.au/General/International-tax-agreements/In-detail/International-arrangements/FATCA-detailed-guidance/>.

¹⁰² OECD, *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*, available at <http://www.oecd.org/ctp/exchange-of-tax-information/keeping-it-safe-report.pdf>.

investigation with any notification or appeal rights. They also offer the opportunity for the ATO to obtain significant quantities of data, often without the knowledge of the taxpayer or consequent recourse until it may be used.

While these measures are arguably important steps to protect the Australian revenue base, it does represent nonetheless an increasing commitment by the Australian Government and its agencies to transfer information to other jurisdictions. This in turn raises concerns that have yet to be fully considered and addressed. The issues include:

- The use of taxpayer information for “naming and shaming” and the right of redress where this is found to be inappropriate and causes damage or harm to a taxpayer;
- Greater clarity and specificity on levels of authorisation and the reasons required before confidential information is released to third parties;
- Clarity on whether a taxpayer should ever have rights to be informed when information is being released either domestically or cross-jurisdictionally and any rights of review;
- Greater clarity and specificity on the scope and extent of information that can be exchanged with other jurisdictions and the process of assessment of equivalent protection to Australia before such information is exchanged;
- Rights of redress where information provided cross-jurisdictionally causes damage or harm to a taxpayer; and
- Rights of redress where information provided to the ATO is subject to cyber-crime that causes damage or harm to a taxpayer;

The ATO’s compliance model means that there is currently considered application of each level of the compliance framework, with a focus on significant penalty only in cases of intentional avoidance or evasion. The stability of the system ensures that taxpayers accept the ATO approach and maintain a high level of trust.

However, the escalation in the number of taxpayers now engaging in cross-border commerce, in large part driven by government policy and incentives,¹⁰³ means that the confidence and self-assurance the ATO displays on issues of domestic taxation may give way to a less consistent approach to grey areas in transactions that cross borders.¹⁰⁴ Where the taxpayers involved are confined to large taxpayers with the resources to fully understand their own position, this does not necessarily give rise to increased antagonism.¹⁰⁵ On the other hand, where large groups of smaller business and individual taxpayers become part of a more uncertain tax environment, tensions can quickly grow.¹⁰⁶

¹⁰³ See, for example, <http://www.austrade.gov.au/>; <http://www.business.vic.gov.au/export>; and <http://www.industry.nsw.gov.au/export-from-nsw/export-assistance/export-capability-building-program>.

¹⁰⁴ Considered in the light of the experience in the European Union, by Philip Baker QC, “The Right to Confidentiality and Privacy in an Age of Transparency”, paper presented to the International Conference on Taxpayer Rights, 18-19 November 2015, Washington DC.

¹⁰⁵ See, for example, Business Council of Australia comment on the OECD’s Base Erosion and Profit Shifting (BEPS) measures, “BCA Welcomes Release of OECD BEPS Package”, Media Release, 6 October 2015, <http://www.bca.com.au/media/bca-welcomes-release-of-oecd-beps-package> but with the warning from the OECD BEPS Action Plan highlighted that, without careful coordination, unilateral measures “could lead to global tax chaos marked by the massive re-emergence of double taxation”.

¹⁰⁶ One example is the US Foreign Account Tax Compliance Act, which has seen taxpayers in many countries subject to sometimes draconian effects. See, for example, the UK Daily Mail, “US ant-tax evasion law, FATCA,

A second area of potential challenge is resource constraints on revenue authorities. In the US, in the preface to her *2015 Annual Report to Congress – Volume One*, the National Taxpayer Advocate states:¹⁰⁷

... the IRS future state now under internal discussion proposes changes in agency operations that assume a constrained funding environment and therefore minimizes agency costs. As a result, these proposed changes have serious ramifications for taxpayers and taxpayer rights. Most significantly, the IRS future state vision redefines tax administration into a class system, where only taxpayers who are the most *noncompliant* or who can “pay to play” will receive concierge-level service or personal attention. The compliant or trying-to-comply taxpayers will be left either struggling for themselves or paying for assistance they formerly received for free from the IRS.

Similar concerns have been raised in the United Kingdom¹⁰⁸ and Italy.¹⁰⁹ In answer to criticism of falling standards, the 2016 UK Budget, for example, increased HMRC funding by £71 million “to improve the service it provides taxpayers”, including extending service hours, reducing call waiting times and supporting a transition to digital services.¹¹⁰

It may be that the ATO will always be well resourced and will maintain its current levels of taxpayer satisfaction with its services. However, that may become more difficult, not just because more taxpayers are engaged in areas of controversy, such as cross-border commerce, but because as more taxpayers move into higher tax brackets they will become more engaged in ways they can reduce their tax burden.¹¹¹

In the event that the ATO has to prioritise services such that its compliance framework cannot be delivered as effectively as it is currently, there is a danger that observance of taxpayer rights will deteriorate, as the National Taxpayer Advocate identifies has occurred in the US. Where, as in the UK, the issue has been recognised and remedial steps are taken, it is uncertain how much remediation is required to arrest the retreat down the ‘slippery slope’ towards an antagonistic relationship.

There is an argument therefore from ‘business as usual’ challenges, to consider a more integrated model of legal and administrative rights, simply because it may not always be possible to rely on the goodwill of the ATO to provide comprehensive taxpayer protection. The untested hypothesis is that a comprehensive and integrated legal framework can maintain stability and arrest a deteriorating relationship between tax authorities and taxpayers.

starts to hit home”, 7 November 2014, <http://www.dailymail.co.uk/wires/afp/article-2824688/US-anti-tax-evasion-law-FATCA-starts-hit-home.html>; and A Christians, “Know Thyself: Self-certification and the Taxpayer’s Right to be Informed”, paper presented to the International Conference on Taxpayer Rights, 18-19 November 2015, Washington DC.

¹⁰⁷ www.TaxpayerAdvocate.irs.gov/2015AnnualReport.

¹⁰⁸ CCH Daily, “HMRC reorganisation risks pushing tax authority to breaking point”,

<https://www.cchdaily.co.uk/hmrc-reorganisation-risks-pushing-tax-authority-breaking-point>, and

¹⁰⁹ G Tieghi, “The Italian Taxpayer Bill of Rights 15 Years Later”, paper presented to the International Conference on Taxpayer Rights, 18-19 November 2015, Washington DC.

¹¹⁰ HM Treasury, *Policy Budget Paper 2016*, paras 4.11 and 7.38,

<https://www.gov.uk/government/publications/budget-2016-documents/budget-2016>. Note that the UK Budget 2016 also set HMRC a compliance yield target of £27 billion, para 7.36.

¹¹¹ Australian Government, *Re:think: Tax discussion paper*, March 2015, ch 3,

<http://bettertax.gov.au/publications/discussion-paper/>.

Addressing the challenges

The model of taxpayer protection as it currently stands relies on primary legal rights, which go to the formulation of the law itself and fundamental notions of justice and due process. There are few legal rights available to mirror the detailed and incremental escalation of the compliance framework.

In the same way that the compliance framework requires detail at each stage of the process to ensure compliance, so there needs to be a detailed and integrated set of legal rights to support the administrative rights at each stage of an integrated legal and compliance framework. I set these out in my Model of Taxpayer Rights in 2007, reflecting on over a decade of practical implementation of administrative charters.

There is little dispute as to the content, which has been reflected in prior and subsequent legal analysis,¹¹² and provides detailed rules that mirror each stage of the compliance process. They do not represent a phalanx of rules designed to act against the administration of the tax system. Rather they provide legal support to the recognised and requisite service standards. In keeping with incremental escalation to encourage taxpayer compliance, so the rights provide incremental escalation to encourage the ATO to observe taxpayer rights in the context of detailed taxpayer obligations.

The case against providing legal rather than administrative support for such rights is traditionally framed in ‘fakers and floodgates’ arguments: simply making such rights available at law will result in a plethora of cases, often spurious, which will grind the system to a halt under the burden of costs and legal procedures.¹¹³ The argument is framed in terms of risk to revenue and misallocation of resources on the basis of speculation as to how many taxpayers might claim the protection. As in the US, Cardozo CJ put it in the context of negligence, the argument puts a concern that the courts should avoid, ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’.¹¹⁴

Such arguments are generally given short shrift by judges and legal theorists.¹¹⁵ There is little empirical evidence to substantiate such arguments and fear of potential consequences should not undermine the basic principles that are at stake and which the law

¹¹² See, for example, Bentley, above n 87; D Albregtse and H van Arendonk, *Taxpayer Protection in the European Union* (1998 Kluwer Law International); A Sawyer, ‘A Comparison of New Zealand Taxpayers’ Rights with Selected Civil Law and Common Law Countries - Have New Zealand Taxpayers Been “Short-Changed”?’ (1999) 32 *Vanderbilt Journal of Transnational Law*, 1345; P Baker, ‘Taxation and the European Convention on Human Rights’ [2000] *British Tax Review*, 211; P Baker and A-M Groenhagen, *The Protection of Taxpayers Rights – An International Codification* (London, European Financial Forum, 2001); HLM Gribnau, *Legal Protection Against Discriminatory Tax Legislation* (2003 Kluwer Law International); S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (2004 Hart Publishing); W Nykiel and M Sęk (eds), *Protection of Taxpayer’s Rights: European, International and Domestic Tax Law Perspective* (2009 Oficyna); BJ Croome, *Taxpayers’ Rights in South Africa* (2010 Juta & Company); and M Cadesky, I Hayes and D Russell, *Towards Greater Fairness in Taxation: A Model Taxpayer Charter* (2013, AOTCA, CFE, STEP).

¹¹³ Justice Blackmun (dissenting) in *Bivens v Six Unknown Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971) at 430, was unsuccessful in convincing the majority with his arguments that the case might open a barrage of litigation that would burden federal agents and potentially alter their behaviour to avoid it.

¹¹⁴ *Ultramares Corporation v Touche* (1931) 174 NE 441, 444.

¹¹⁵ See, for example, a recent consideration in MK Levy, “Judging the Flood of Litigation” (2013) 80 (3) *The University of Chicago Law Review* 1007; and TS Kaye, “Risk and Predictability in English Common Law”, in G Woodman and D Klippel (eds), *Risk and the Law* (2008), available at SSRN: <http://ssrn.com/abstract=1263481>.

is designed to protect.¹¹⁶ The arguments also fail to recognise that almost every law is designed with its consequences in mind and the legal system itself has transformed and modernised its processes such that it can rarely be manipulated.¹¹⁷ The courts have addressed the issue of cost and access to justice with a similar regulatory and process response to the compliance framework.

The basic principles taken from dispute resolution theory that need to be applied to make the framework effective, can be described as follows:¹¹⁸

1. Prevent unnecessary conflict through notification, consultation and feedback
2. Create ways of reconciling the interests of those in dispute
3. Build in “loop-backs” to negotiation
4. Provide low-cost alternatives where negotiation fails
5. Create sequential procedures moving from low-cost to high-cost
6. Provide the necessary motivation, skills and resources to allow the system to work
7. Provide effective mechanisms for measuring qualitative success
8. Provide mechanisms for monitoring, review and continuous improvement both at individual and systemic levels.

The ATO has an extensive and highly effective dispute resolution service designed to prevent most cases from escalating and resolves approximately 80% of disputes in this way.¹¹⁹ When an issue does go to a court or tribunal, mandated alternative dispute resolution, which is part of the normal tribunal and court process, results in over 80% of matters being resolved without proceeding to a formal hearing.¹²⁰ Add to these the Inspector-General of Taxation’s complaint handling powers (discussed above) and there is a comprehensive framework of arrangements already in place to give effect to an integrated legal and compliance framework.

When applied to a mirror pyramid to that used for the compliance framework, it can be framed as shown in Figure 3.

¹¹⁶ See, for example, *Clinton v Jones* 520 US 681 (1997).

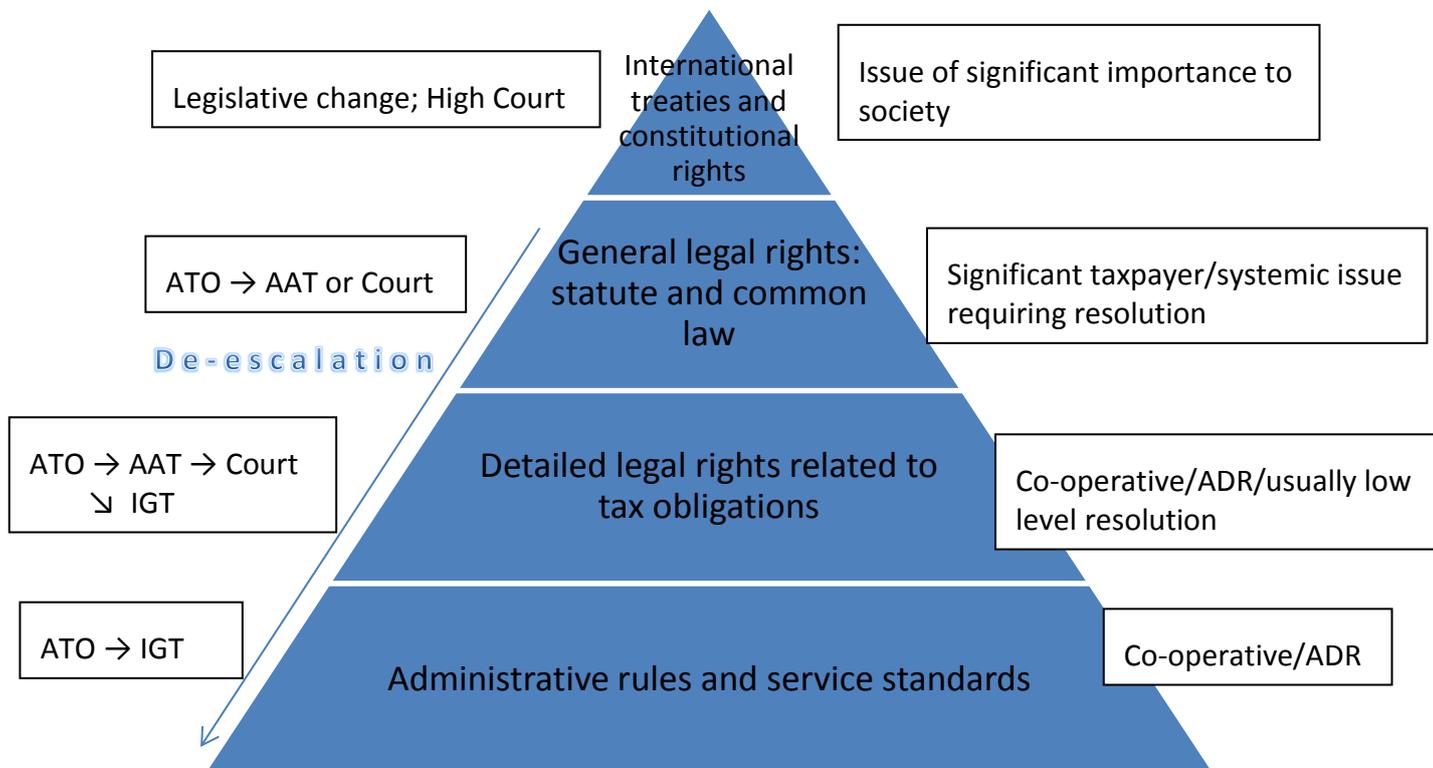
¹¹⁷ Consider the deep concerns that surrounded the introduction of a general anti-avoidance provision in the form of Part IVA Income Tax Assessment Act 1936 (Cth) in 1981 and the judicial and legislative responses that have since ensured that the Commissioner’s powers remain equal to challenges ranging from individual high net worth tax evasion seen in Project Wickenby (discussed above), transfer pricing activity seen in *Chevron Australia Holdings Pty Ltd v FCT (No 4)* [2015] FCA 1092 and the introduction of the Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015.

¹¹⁸ Bentley, above n , 212, drawing from WL Ury, JM Brett and SB Goldberg, *Getting Disputes Resolved* (1993 The Program on Negotiation at Harvard Law School). In Chapter 5, I set out the theory and its detailed application to this model.

¹¹⁹ See <https://www.ato.gov.au/About-ATO/Access-accountability-and-reporting/Informing-the-community/Our-effectiveness/Resolving-disputes/Our-dispute-resolution-strategies/>.

¹²⁰ See, for example, Administrative Appeals Tribunal, *Practice Direction, Review of Taxation and Commercial Decisions*, www.aat.gov.au.

Figure 3



Mirroring the key influences on taxpayer behaviour, there are a number of key influences on taxpayer perception that drive trust in the tax system. These include:¹²¹

- Certainty
- Consistency
- Convenience
- Effectiveness
- Efficiency
- Equity
- Fairness
- Non-discrimination
- Reasonableness
- Transparency

The danger, in not applying an integrated legal and compliance framework, is that when the compliance framework is challenged, as in the examples set out above, a trust gap begins to develop, which triggers the movement down the 'slippery slope'. Taxpayer perception in the trust influencers begin to decline.

¹²¹ Analysed in Alley and Bentley, above n 13.

Where the rules and their enforcement to counter increasing external and internal challenges begin to outweigh significantly the framework of enforceable rights, this can be described as ‘regulation and enforcement bloat’ giving rise to a ‘trust gap’. As indicated in the work of Kirchler et al,¹²² the negative effect of enforcement momentum can cope with some system failures, but as these build up, so the trust gap widens, moving from a trust-laden, stable legal and compliance framework back to an antagonistic framework, dependent for its success on regulation and enforcement bloat.

Despite arguments to the contrary, I suggest that the assumption that legal recognition of taxpayer rights act as an impediment to the effective implementation of the compliance framework is misplaced. Instead, the insertion into the model of a legal framework to create an integrated legal and compliance framework acts as a support and a safety net not simply for taxpayers, but to secure the stability of the system itself.

It would not be difficult to achieve. For example, the ALRC could be charged to use the extensive work already completed domestically and internationally to complete a set of recommendations that builds upon its 2015 Report into traditional rights and freedoms.¹²³

Conclusion

Twenty years on, the Charter has shown how a clearly articulated set of values embedded into the culture of the ATO has supported the transformation of the ATO/taxpayer relationship. It has formed an integral part of the compliance framework and has developed with that framework to ensure that the ATO administers the tax system through relatively stable and co-operative engagement with taxpayers.

Thus far the calls for the legislation of taxpayer rights or for the Charter to be incorporated into a legal document have seemed unnecessary. International trends and potential challenges have highlighted two concerns: one related to the undermining of basic legal rights and the other related to the impact on taxpayer rights of government and revenue authority responses to threats to the revenue base and the effectiveness of traditional methods of taxation. Both are relevant to consideration of how the Taxpayers’ Charter might provide prospective protection against potential breaches of accepted taxpayer rights.

Although the development of soft law and the effectiveness of administrative rights have proven highly beneficial, there remains a question of whether they are sufficient to assure the stability of the compliance framework in the face of significant challenge.

The United States provides a useful illustration of why both points are important. Although taxpayer rights and a National Taxpayer Advocate preceded similar developments in Australia, the National Taxpayer Advocate in 2014 succeeded in gaining acceptance for and the introduction of a Taxpayer Bill of Rights 2014.¹²⁴

The creation of an integrated legal and compliance framework provides greater opportunity to protect the stability of the taxpayer/revenue authority relationship than

¹²² Above n 33.

¹²³ Above n 46.

¹²⁴ Available at <https://www.irs.gov/Advocate/Taxpayer-Rights>.

relying solely on the capacity of the more powerful party (in this case the ATO) to do so alone. After all, as we celebrate now over 800 years since the signing of the Magna Carta, it is worth recalling that it formalised a separation of powers and a system of checks and balances, because the King could not always be relied on in times of crisis.

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