Sacrificial victims — ambiguities in the ATO's power to settle disputes

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Abstract

The Australian Taxation Office (ATO) is granted a broad power to settle tax disputes under its Code of Settlement. The policy basis for that power is straightforward enough; if it is in the public interest for the ATO to limit its expenditure by settling disputes, then it ought to do so. That basis has been codified in shorthand as the "good management rule", which posits that effective administration of the tax system necessitates limiting inefficient expenditure. As justifiable as the basis for the power may be, its application is theoretically in tension with the overarching requirement for the ATO to collect the "correct" amount of tax from taxpayers. That tension is increased when the concept of settlement is understood as including agreements in respect of tax liabilities that have yet to arise or remain otherwise indeterminate. Analysis of the exercise of the settlement power in that way and the resultant tension is sparse. This article engages in that analysis by tracing the good management rule to its British origins and examining the ambiguity that has since developed.

Acknowledgements
I would like to express my gratitude to the two independent reviewers for their invaluable feedback and contributions to this article, as well as my non-independent friends for their earlier contributions to it. Thank you to members of the Melbourne KWM Tax team for inspiring this article by encouraging me to ask interesting questions. I am also grateful to Professor Miranda Stewart for her engaging classes on tax law. All errors in this article are my own.

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This article was accepted for publication on 15 December 2025.

1 Introduction

Adam Smith implored in the *Wealth of Nations* that an efficient tax system ought to focus on bringing money into the public treasury of the state whilst limiting the amount kept out of the pockets of the people.[1] Efficient tax systems, in his view, avoid outcomes which "may require a great number of officers, whose salaries may eat up the greater part of the produce of the tax".[2] The Australian Taxation Office (ATO) adopts a similar ethos by exercising its dispute settlement power in circumstances that would otherwise require public resources to be expended in pursuit of contested tax liabilities. That power has been described in Australian jurisprudence as a codification of the "good management rule", which promotes settlement in circumstances where it limits the expenditure of public resources. The power to settle does, however, have some theoretical inconsistency with the Commissioner of Taxation's duty to collect the correct amount of tax under the Australian tax framework – not a penny more, not a penny less.[3]

This article examines how the inconsistency between the ATO's settlement power and its duty to collect the correct amount of tax can theoretically manifest in ways that threaten to undermine the creation of private agreements and equitable obligations. It is argued that the ATO's Code of Settlement[4] (ATO Code) imports the good management rule from potentially problematic jurisprudence grappling with the same inconsistency in the United Kingdom (UK). Nevertheless, a prioritisation of either the settlement power or orthodox contract law is not contended for as a part of this article. Its aims are more modest. It explores how the tension has led to the development of the settlement power in a way which has fostered uncertainty and now leaves the ATO Code in a position where improper exercises of it can theoretically take taxpayers as sacrificial victims. It is contended that the uncertainty creates a scenario which permits entry into settlement agreements regarding future tax liabilities, with the analysis centring around the various issues at play at the point of entry into such agreements, as distinct from issues that may arise were the ATO to resile from such agreements.[5]

The analysis proceeds in four parts. Part 2 sets out the good management rule in Australia and how far the concept of settlement can be stretched under the rule. Part 3 traces the

1 Adam Smith, "The Wealth of Nations" (1776) 677 <https://www.rrojasdatabank.info/Wealth-Nations.pdf>.
2 Ibid. The same point is made in the economic literature: see Louis Kaplow, "Optimal Taxation with Costly Enforcement and Evasion" (1990) 43 *Journal of Public Economics* 221, 221–7; Agnar Sandmo, "Income Tax Evasion, Labour Supply, and the Equity-Efficiency Tradeoff" (1981) 16 *Journal of Public Economics* 265, 265–76.
3 *Clark v Commissioner of Taxation* [2007] FCA 1426, quoting *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148.
4 ATO, "Code of Settlement" (Practice Statement Law Administration PSLA 2015/1, 15 January 2015) (ATO Code). For the consumer-facing guide, see "Code of Settlement", *Australian Taxation Office* (Web Page, 24 June 2024) < https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/settlement/code-of-settlement>.
5 Analysis of the power to resile has been comprehensively covered elsewhere. See, eg, Cameron Rider, 'Estoppel of the Revenue: A Review of Recent Developments' (1994) 23(3) *Australian Tax Review* 135; John Bevacqua, 'Public Policy Concerns in Taxpayer Claims against the Commissioner of Taxation: Myths and Realities' (2011) 40(1) *Australian Tax Review* 10.

history of the good management rule to the seminal case of *Fayed v Clark* (*Fayed*).[6] The outcome and reasoning of that case are critiqued as a means of highlighting why it has proved infertile ground to establish an ill-defined settlement power in favour of taxation and revenue offices. Part 4 discusses the fettering doctrine, a further basis on which issues of ambiguity arise as to the limits of settlement under the good management rule. Part 5 briefly explores the issues created by the ambiguity and argues in favour of explicit guardrails as the antidote to implicit ambiguities.

2 The source and limits of good management in Australia

The ATO Code promotes settlement as part of good administration of the tax system. The practical guide to the Code states:[7]

> [s]ettling disputed matters is consistent with good management of the tax system, overall fairness and best use of ATO and other community resources. This has become known as "the good management rule", which has been endorsed by the courts.

The reference to endorsement by the courts is an allusion to the traditional reliance on the good management rule by the ATO in settling tax disputes.[8] Since 2013, the ATO's obligation to promote the proper use and management of public resources has been statutory, codified by the *Public Governance, Performance and Accountability Act 2013* (Cth) and introduced as a "fundamental duty of accountable authorities".[9] However, the justification for the good management rule can be traced further back to the observation of the Full Court of the Federal Court in *Grofam Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (*Grofam*).[10] *Grofam* concerned a dispute about whether the Commissioner was entitled to make adjustments to the income and losses of the appellants under a settlement agreement.

The Commissioner had completed an audit of the Grollo group and had agreed to settle the ensuing dispute on the basis of a bifurcation of the issues into two categories, labelled the non-Rialto issues and the Rialto issues. A settlement sum of $27.5 million was agreed in full and final discharge of the Grollo group's liabilities in respect of the non-Rialto issues. In exchange for the Commissioner issuing assessments in respect of those issues capped at $27.5 million, the Grollo group agreed to forego certain carried forward losses. The parties also agreed to settle the Rialto issues for a total sum not exceeding $39 million, with the Commissioner retaining the power to issue alternative assessments. A dispute arose as to whether, on the true construction of the terms of settlement, the Commissioner, in

6 [2002] *Simon's Tax Cases* 910 (*Fayed*). See also *Al Fayed v Advocate General for Scotland* [2004] ScotCS 278, [36] (*Fayed Appeal*).

7 "Practical Guide to the ATO Code of Settlement", *Australian Taxation Office* (Web Page, 14 October 2024) <https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/settlement/a-practical-guide-to-the-ato-code-of-settlement>.

8 *Pinot Nominees Pty Ltd v Commissioner of Taxation* (Cth) [2009] FCA 1508, [34]; *Cash World Gold Buyers Pty Ltd v Federal Commissioner of Taxation* [2020] AATA 1546, [225].

9 Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013, 19 [131].

10 (1997) 36 ATR 493 (*Grofam*).

making the Rialto assessments, was entitled to make adjustments to the income and losses returned by the appellants in respect of issues other than the Rialto issues.

Justice Olney, delivering judgment in the first instance on the Federal Court, was of the view that the bifurcation of the issues into the non-Rialto and Rialto streams was not a course of action which the Commissioner had power to undertake:[11]

> [b]y separating the income of the applicants into two separate streams, that is the Rialto income and the non-Rialto income, the terms of settlement contemplate a procedure not otherwise open to the Commissioner in the assessment of income tax payable by each individual applicant. Ordinarily, the tax assessed to a taxpayer would take into account all of the taxable income of the taxpayer from all sources, and in that process the taxable income of each taxpayer would from year to year reflect the effect of any losses carried forward from previous years …

The isolation of this conduct by Justice Olney was described on appeal by the Full Court of the Federal Court as lying "at the heart of the present problem". In its analysis, the Full Court affirmed that the Commissioner has the power to settle taxation proceedings in appropriate cases and noted that the power to do so "derives from s 8 of the Act which provides that the Commissioner shall have the general administration of the Act". The Court then limited that power by reference to the judgment of Justice Spender in *Precision Pools Pty Ltd v FCT* (*Precision Pools*):[12]

> [t]hat administration has to be bona fide and for the purposes of the Act, but it is a grant of wide power and would encompass, for instance, the power to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved.

It was conceded by the Full Court that Justice Olney's findings highlighted that "there will often be a tension between the compromise of a complex dispute such as this and the Commissioner's duty to administer the Act in accordance with its terms".[13] Nevertheless, the Full Court held that the procedure contemplated by the settlement was open to the Commissioner meaning, necessarily, the Commissioner had the requisite power to enter the settlement agreement.

The judicial tying of compromise with efficient management in *Grofam* and *Precision Pools* is a means of codifying settlement as within the scope of the Commissioner's broad statutory power of administration. Both the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth) (together the "Income Tax Assessment Acts") state, in ss 8 and 1-7 respectively, that "[t]he Commissioner has the general administration of this Act". Although simple in its wording, it has been said that "the Commissioner in fact derives substantial powers from this section, powers which facilitate the practical operation of the

11 *Grofam Pty Ltd v Commissioner of Taxation* (1994) 29 ATR 608, 614.
12 (1992) 37 FCR 554.
13 *Grofam* (n 10) 503.

tax system".[14] It is accepted that the practical operation of the system requires compromise. The outer limits of that compromise, however, are not overly clear.

The ATO Code codifies the ability to compromise through the settlement power and defines "settlement" in the following terms:[15]

> [a] settlement involves an agreement between parties to resolve matters in dispute where one or more parties make concessions on what they consider is the legally correct position.

A necessary condition of a settlement is therefore the existence of matters in dispute. That view aligns with the academic definition of settlement whereby a compromise "does not arise until some dispute or difference of view exists".[16] While the definitions do presuppose that a dispute precedes settlement thereof, they do not inherently define what the scope of a "dispute" is. The traditional view of a dispute as "engag[ing] in argument or discussion" is not overly useful in this respect.[17] What is needed instead is an understanding of when a dispute which is capable of settlement *materialises*.

David Foskett argues that, while it is not necessary for there to be pending litigation, there must be some "actual" or "potential" dispute before settlement can occur.[18] An "actual" dispute, he argues, "will not exist until a claim is asserted by one party which is "disputed" by the other".[19] Conversely, a "potential" dispute is framed as a theoretical dispute "which might subsequently be advanced in connection with whatever incident or state of affairs had brought the parties into [actual] dispute".[20] In this way, the concept of the "potential" dispute reflects settlement agreement wording that settles all claims which a party has or may have arising against the other party.[21] That wording reflects what Foskett refers to as the "long-established practice" of "buying off" a potential claim. The concept of the "dispute" is taken further still by Foskett, who notes that even disputes which are unarticulated and uncontemplated can be the subject of a true compromise between the parties.[22] By extension, the concept of the dispute in the abstract is not as integral to the settlement itself as the breadth of wording of the settlement agreement.

There is some temporal confusion created by the breadth of this conception of the "dispute". The definitions of "settlement" imply that the dispute precedes the settlement. However, this is clearly not a complete picture of when the dispute needs to arise. In reality, it is the requisite *identification* of the dispute which must precede the settlement. In other words, so long as the settlement agreement can be construed as covering a dispute which has

14 CCH Australia, *Income Tax Commentary*, Section 8, Commissioner has general administration of the Act (online at 29 August 2024).
15 ATO Code (n 4) [2].
16 David Foskett, *Foskett on Compromise* (10th edition, Sweet & Maxwell) 5; see also Encyclopaedic Australian Legal Dictionary definition of "settle".
17 Macquarie dictionary definition of "dispute".
18 Foskett (n 16) 5.
19 Ibid 5.
20 Ibid 8.
21 Ibid.
22 Ibid 9–10.

already eventuated or which eventuates later, it can be said that the agreement to settle has post-dated the dispute. Presumably then, a settlement agreement with the ATO which identifies potential or unarticulated disputes has validly settled those disputes.[23] However, whether limits exist on the ATO's settlement power that restrict or permit such agreements is unsettled and worthy of scrutiny.

3 Forward-facing agreements and the good management rule

The basic case of a settlement with the ATO takes the form of a settled position as to the quantum of tax owing which is lower than the initial ATO position on that quantum.[24] The basic case is relatively straightforward to conceptualise in that it reflects the settlement of an "actual" dispute as to the tax liability attaching to a party's affairs. A trickier case arises in respect of the hypothetical scenario where the ATO exercises its power to settle in respect of a "potential" dispute which may arise in a future tax year. Extant judge-made law on this scenario is sparse despite the evident mutual benefit derived from an agreement where the ATO settles potential disputes that may arise in the future (a "go-forward" tax agreement). A go-forward agreement benefits the taxpayer by providing quantitative certainty as to future tax liability, with a reciprocal benefit to the ATO of avoiding the use of its limited resources in protracted disputes. The issue canvassed so far in this article is whether the ATO has the authority to enter go-forward agreements. On one view, a broad administrative power to settle disputes arguably does provide the ATO with that authority. There is, however, no definitive jurisprudential consideration of the issue in Australia. A similar issue did, however, arise in the UK in the Court of Session's 2002 decision of *Fayed*.

Fayed concerned the tax affairs of the late Mohamed Fayed, owner of Harrods and father to Dodi Fayed (the late Dodi Fayed, who passed away alongside Princess Diana in the infamous 1997 car crash).[25] Several taxpayers, all related to Mohamed Fayed, opposed the Inland Revenue Commission (IRC) in respect of an agreement Fayed had reached with the IRC in that same year (the 1997 Agreement).[26] The IRC had felt it prudent to enter the 1997 Agreement on the basis that Fayed, as a resident not domiciled in the UK, could avoid any tax on foreign remittances through careful and expensive tax planning. The 1997 Agreement stipulated that, in lieu of any possible tax on remittances, Fayed would pay £240,000 each year to the IRC for assessment years 1997/1998 to 2002/2003. Presumably that figure represented the calculus of several factors, including the convenience to the IRC of not engaging in a costly and possibly fruitless pursuit of Fayed's tax payable, the savings to Fayed in not engaging in costly tax planning, and an estimation of what his tax payable

23 Ibid 85. It should be noted that a contract also needs to have validly been formed (at Ch 3).

24 "Settlements", *Australian Taxation Office* (Web Page, 14 October 2024) <https://www.ato.gov.au/individuals-and-families/your-tax-return/if-you-disagree-with-an-ato-decision/settlement/settlements>.

25 "Timeline: How Diana Died", *BBC* (Web Page, 14 December 2006) <https://web.archive.org/web/20220914192953/http://news.bbc.co.uk/2/hi/uk_news/6217366.stm>.

26 LJ Priestley, "Commissioner's Powers of Settlement and Compromise" (2002) 12(1) *Revenue Law Journal* 40, 48.

would normally look like.[27] In effect, the IRC was conceding that £240,000 was an appropriate estimation that eliminated the need to spend public resources laden with the risk of no return.

By early 2000, the IRC considered certain of Fayed's financial affairs to be a concern but had no clear factual basis for bringing the 1997 Agreement to an end.[28] Despite this, the IRC would write to Fayed's accountants on 7 March 2000 to advise that the agreement was suspended. Such a situation appeared inevitable as the growing public pressure on Fayed's financial accountability made private agreements appear particularly egregious.[29] The basis for public opposition to private agreements of that nature, between a wealthy putative taxpayer and the tax collector, is patent. Robin Hood and his "good stout yeomen" are an early example of justice being brought to oppressors who had "wrung from the poor by unjust taxes, or land rents, or in wrongful fines".[30] The tale of the fiscal oppressor is archetypal of the reality of an early English parliament which granted "frequent and piecemeal individual exemptions" from taxation to "some nobles, some monastic houses, some officials, and some undertenants".[31] Such arrangements were cyclical in the English system and frequently opposed by the broader taxpaying citizenry.[32]

As justifiable as the public opposition to Fayed's tax affairs may have been however, the IRC had found itself halfway through the term of an apparently validly entered agreement with no factual basis to resile. Counsel for the IRC, seemingly aware of the tightrope it had to walk, argued that the agreement was ultra vires or, in other words, that the IRC had no power to enter into a "go-forward" tax agreement.[33] Solicitors for Fayed countered that the IRC was abusing its power by suspending the 1997 Agreement and brought a petition in the Court of Session in Scotland seeking a declaration that the IRC was bound to abide by the 1997 Agreement.[34]

It was agreed between the parties that if the 1997 Agreement was not ultra vires, the IRC was in breach of it and the petition ought to be granted.[35] A separate consideration for the Court was whether the petition should still be granted even if the 1997 Agreement was ultra vires.[36] Justice Gill decided that the 1997 Agreement had been ultra vires of the IRC and referred to s 13(1) of the *Inland Revenue Regulation Act 1890* (UK) (*Inland Revenue Regulation Act*), which required the IRC to "collect and cause to be collected every part of Inland Revenue".[37] The Lord President, writing for the Scottish Court of Session on appeal, agreed.[38]

27 Ibid 48. See also *Fayed Appeal* (n 6) [17].
28 Priestley (n 26) 48.
29 Ibid.
30 Howard Pyle, *The Merry Adventures of Robin Hood of Great Renown in Nottinghamshire* (1883), available at <https://www.gutenberg.org/files/10148/10148-h/10148-h.htm>.
31 JR Maddicott, *The Origins of the English Parliament 924-1327* (Oxford University Press, 2012) 418.
32 Ibid. See also James Tan, *Power and Public Finance at Rome, 264–49 BCE* (Oxford Academic, 2017) Ch 2 "The Use and Abuse of Tax Farming, Power and Public Finance at Rome".
33 Priestley (n 26) 48.
34 Ibid 49.
35 Ibid.
36 Ibid.
37 Ibid.
38 *Fayed Appeal* (n 6) [82].

3.1 Inherent tension between revenue maximisation and fairness

It was not in dispute in *Fayed* that the IRC had a managerial discretion as to the best and most practicable means of maximising taxes for the Exchequer. Indeed, Lord Diplock's judgment in *IRC v National Federation of Self-Employed and Small Business Limited*[39] was quoted in support of that proposition on appeal, where his Lordship stated:[40]

> the board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of these functions the board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the *highest net return that is practicable* having regard to the staff available to them and the cost of collection.

This passage elucidates the difficulty of competing objectives that the tax collector is faced with. The theoretical objective is that each taxpayer is treated equally. The practical objective, as Lord Diplock suggests, is to maximise the net return of the collector. Hypothetically, any instance where treating a taxpayer unequally can create a higher net return for the tax collector creates a situation where one of the objectives needs to be compromised. In other words, such a scenario permits neither fairness (through treating taxpayers equally) nor return-maximisation to become absolute objectives of the tax collector without necessarily impugning on the other.

The question appears to become which objective is to be prioritised by the tax collector. In *Fayed*, we can readily presume that prioritising the theoretical objective and treating Fayed equally would have meant enlivening the potential of Fayed engaging in tax planning to avoid paying any tax in the UK and the IRC foregoing its £240,000 of yearly inland revenue. Conversely, prioritising the practical objective would mean a yearly increase to inland revenue of £240,000 at the cost of treating Fayed equally by assessing his remittances to the UK.

Lord Gill appears to sidestep this conundrum by refusing to accept that the £240,000 can "be characterised as a collection of Inland Revenue", stating:[41]

> [i]n my opinion the [IRC] do not have power to enter into agreements for the payment of money to them by an individual on the basis that the individual could so organise his affairs as not to incur any liability to United Kingdom tax.

The logical extension to this proposition is that there was no cost to the prioritisation of the theoretical objective, in that the £240,000 was not revenue, meaning collection of it was not a proper exercise of the IRC's duties and was thereby ultra vires.

The difficulty with the proposition, however, is that it begs the question. Without more, all the proposition suggests is that the £240,000 was not revenue because it was beyond power and it was beyond power because it was not revenue. The gap is a precise explanation

39 [1982] AC 617.
40 Ibid [36] (emphasis added).
41 *Fayed* (n 6) [118].

of what the £240,000 represented and, crucially, what the IRC believed it represented. Justice Gill represents the amount as the purchase price of Fayed receiving complete immunity from UK tax:[42]

> [o]n the threat that the other party may avoid any liability to pay United Kingdom tax at all, the [IRC] accepted payment of a fixed sum that *entitles the other party* to receive foreign remittances in the United Kingdom of any amount, and even if they represent income or capital gains, during the period of the agreement.

This interpretation of the 1997 Agreement posits Al Fayed as having held the IRC hostage with the threat of avoiding tax liability in the UK, in order to gain an *entitlement* against the IRC. Perhaps that was so; one can certainly conceive of a scenario where the wealthy putative taxpayer uses financial leverage to attain immunity in part or in whole from a taxing authority. Yet that view ran expressly counter to contractual wording in *Fayed*, whereby Fayed and the IRC expressly accepted that the £240,000 reflected the "full and final settlement" of potential disputes which may otherwise have arisen upon remittance to the UK. By framing the £240,000 as settlement, the 1997 Agreement acknowledges that it does in fact represent a calculus of factors, including, crucially, Fayed's theoretical future tax liability and the cost to the IRC of determining that liability. The tax liability limb of that settlement amount, as collected in the counterfactual, would of course have represented inland revenue to the IRC. By supplanting the wording of the 1997 Agreement for a view that the IRC sold Fayed an entitlement to avoid the execution of the IRC's duties, Lord Gill managed to frame the £240,000 as something other than intra vires revenue, a view that was shared on appeal in referring to the sum as "truly random".[43] In the process, however, the IRC's judgment at the point of execution of the 1997 Agreement, as well as its express contractual wording, was undermined.

3.2 Judgment and good management

It is worth noting that the provision under analysis in *Fayed*, s 13(1) of the *Inland Revenue Regulation Act*, was much narrower in its import than the present-day wording in the Income Tax Assessment Acts. Rather than providing the Commissioner with a broad administrative power, s 13(1) simply mandated that the Commissioner collect all Inland Revenue.[44] However, that did not mean that the Commissioner was not provided with a broad discretion in pursuit of that objective. Lord Diplock explicitly supported that proposition in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* (*Fleet Street*):[45]

> the board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of

42 Ibid [115] (emphasis added).
43 Ibid.
44 The *Inland Revenue Regulation Act* was repealed in 2005 and replaced by the *Commissioners for Revenue and Customs Act 2005* (UK): see s 5. The new legislative regime charges the Commissioner for Revenue and Customs with the "collection and management" of income, corporations, and capital gains tax: see s 12(1); see also *Taxes Management Act 1970* (UK) s 1.
45 [1982] AC 617, 636 (*Fleet Street*).

> these functions the board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.

In the same case, Lord Scarman endorsed the view that:[46]

> in the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.

Lord Scarman went on to position the good management rule as an explicit modification to the general rule requiring the fair treatment of all taxpayers:[47]

> the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, *subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims*. The duty has to be considered as *one of several* arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.

Far from imposing a strict duty of fairness, achieved through a rigid application of the tax laws equally to all taxpayers in the collection of maximal revenue, Lord Scarman's judgment empowered the IRC to fulfil that duty only insofar as it was not otherwise impacted by the exercise of the good management rule. Notably, Bingham LJ's observation in *R v IRC ex parte MFK Underwriting Agents Limited*[48] that "the [IRC's] judgment on the best way of collecting tax should not lightly be cast aside" was authoritatively quoted on appeal in *Fayed*.[49]

Given the IRC had a wide discretion to exercise good management in pursuit of revenue maximisation, it is difficult to see the basis on which Lord Gill decided that the £240,000 did not reflect Inland Revenue. To place its collection outside the power of the IRC, Lord Gill was left having to displace the IRC's good management judgment in entering the 1997 Agreement in place of his own. By doing so, the IRC's ability to sidestep its duty of non-discrimination in favour of good management was undermined. That outcome is open to scrutiny given the explicit power for the IRC to exercise good management and the high threshold for the Court to undermine that exercise.[50] It is also open to scrutiny on a further ground whether, assuming Lord Gill was correct to undermine the IRC's exercise of good management on the basis of a lack of fairness, the 1997 Agreement did *in fact* create manifest unfairness.

46 Ibid 651.
47 Ibid.
48 [1990] 1 WLR 1545.
49 *Fayed Appeal* (n 6) [36].
50 Priestley (n 26) 49.

3.3 Fairness

Lord Diplock's judgment in *Fleet Street* asserts that the IRC is charged with return maximisation through the collection of taxes. One might respond that a tax collecting authority is not in fact concerned with return maximisation *per se* but is in fact concerned with return maximisation within the parameters of justifiably collectible tax within the tax system. In other words, whilst there might be a variety of ways that a tax collecting authority could maximise its return, a necessary first step should be determining whether it *ought* to maximise its return if doing so will lead to unfair treatment. That view posits the theoretical objective of fairness as dominant and pares back the practical objective of return maximisation to operate as secondary to that theoretical objective.

The assumption inherent when the practical objective is pared back in that way is that the tax system in which the collector operates is fair when applied in totality. That assumption clearly sets the bar too high. Arguably a system which permitted Fayed to treat all his income in the UK as capital receipts through expensive tax planning was not a fair system. We might then concede that the objective is not *practical* fairness but is in fact *aspirational* fairness. In other words, even if the application of the rules in totality is not practically fair, the rules individually and collectively aspire to be fair. If we accept that framework, then the act of entering into the go-forward agreement needs to be in the context of a system which, whilst (necessarily) incapable of achieving *practical* fairness, *aspires* for fairness when applied in totality. Formulated in that fashion, we would ask ourselves whether agreeing to receive a lump sum from Fayed each year in lieu of the cumbersome analysis of his finances was a decision which aspired for fairness.

This is a vexed question and not one which can be authoritatively answered here. On the one hand is the view expressed by Lord Gill that the IRC had in fact sold Fayed a right to not be taxed on transactions. That view interprets the agreement as *creating* nonfeasance of UK tax law by Fayed. By extension, the transactions which Fayed would engage in after the agreement would not have transpired in the counterfactual scenario in which the agreement was not signed. Yet the entire premise of the 1997 Agreement was that it was entirely possible for Fayed to organise his affairs in a way such that he only brought capital into the UK and thus avoided tax in the UK entirely.

At the time of the decision, Fayed was accepted by the IRC as resident but not domiciled in the UK.[51] Domicile, a concept born out of the Roman tradition, is effectively a means of resolving a conflict of laws.[52] The conflict arises in the scenario where an individual is born in one jurisdiction and then later resides in another, requiring determination as to which jurisdiction's laws apply to that individual.[53] In determining which jurisdiction's laws should apply, UK statutes which applied to the person of the individual would apply on the basis of domicile, or, more simply, where the person's permanent home was.[54]

51 Ibid 47; *Fayed Appeal* (n 6) [3].
52 *Fayed Appeal* (n 6) [3].
53 Leon Trakman, "Domicile of Choice in English Law: An Achilles Heel?" (2015) 11(2) *Journal of Private International Law* 1.
54 Ibid.

The relevance of Fayed's non-domicile status was owing to the UK being what Stephen Edge referred to as:[55]

> a tax haven for non-domiciled individuals who can so manage their affairs that they do not generate United Kingdom source or gains and do not have to remit foreign source income or gains to the United Kingdom to cover their living costs.

Fayed, having substantial capital in Switzerland,[56] was one such individual. As Edge notes, non-domiciled individuals only pay tax on income or capital gains which they remit to the UK. Monetary amounts representing capital, even when remitted, are not chargeable to income tax at all. Before 2008,[57] if a non-domicile individual sold a capital item for a gain, any amount remitted from the entire sum would be treated pro-rata to the ratio of capital to gain. In other words, if someone were to have purchased a capital item for £400,000 and sold it for £500,000, a remittance of £100,000 would be treated as 80% capital and 20% gain (a split representing the ratio of profit to initial capital outlay of the £500,000 proceeds). Tax would ultimately be chargeable on £20,000 of the £100,000. To avoid the issue altogether, an individual with a substantial portfolio of capital could have sold overseas assets which had not appreciated and remitted the proceeds to the UK without paying tax.

To segregate a portfolio such that remittances to the UK came from a fund of non-appreciating (or minimally appreciating) capital would have been a careful and expensive process for Fayed's portfolio valued at north of £500 million.[58] It was mutually accepted in *Fayed* that professional advisers would need to be engaged to "be absolutely certain that no funds received in the UK represent[ed] income".[59] The inference to be drawn from that agreed upon position is that the only change between a world in which Fayed had signed the go-forward agreement and one where he had not is that, in the latter, Fayed would have sought professional advice to alter the source of his remittances to the UK. There was no indication that the amount of those remittances would be different in the two scenarios.

In one sense, the go-forward agreement did permit Fayed to engage in transactions which otherwise would have been taxed. To conclude that this outcome was not fair is justified when we consider that conclusion in a vacuum, distinct from the counterfactual. In other words, it was an aspirational act of fairness to resile from the agreement on the basis that others were not entitled to the same concessions Fayed was. However, the counterfactual is key in refuting that conclusion. The alternate reality to the one in which an agreement permitted Fayed to remit proceeds from any funds into the UK was presumably one where Fayed would remit proceeds from a capital fund. The practical reality would be the same, save for the fact that in the former scenario the IRC received a fixed amount representing,

55 Stephen Edge, "Taxation — By Source or Residence?" in Jacqueline Dyson (ed), *Recent Tax Problems* (Butterworths, 1985) 73, 86, cited by Timothy Lyons, "The Reform of the Law of Domicile" [1993] *British Tax Review* 42.

56 *Fayed Appeal* (n 6) [7].

57 Antony Seely, "Taxation of Non-Domiciles: The 2008 Reforms" (House of Commons Library, 6 October 2017).

58 *Fayed Appeal* (n 6) [17]; see also "Mohamed Al Fayed Obituary", *The Guardian* (Web Page, 3 September 2023) <https://www.theguardian.com/world/2023/sep/02/mohamed-al-fayed-obituary>.

59 *Fayed Appeal* (n 6) [7], [17].

in part, estimated tax payable by Fayed, whereas in the latter scenario a private adviser would receive an amount representing the cost of organising remittances through a capital fund. Framed in this way, the only practical difference between the two scenarios was the recipient of Fayed's resources to negate assessment in the UK.

In its pursuit of enforcing the theoretical objective, the court in *Fayed* may have gone too far in minimising the practical reality that the IRC, hamstrung by the favourable tax concessions to non-domiciliaries, made a policy decision under the good management rule to maximise its returns in a scenario where it otherwise faced a time-consuming investigation of Fayed's remittances which may have ultimately proved futile.[60] Given that an overwhelming majority of taxpayers in the UK would not have possessed the capital infrastructure or domiciliary status to avoid tax in that way, there is an argument that having the IRC collect any revenue at all from Fayed was a pragmatic exercise in practical fairness. On that basis alone, it could be argued that the power to enter such agreements in the handful of scenarios where individuals can manipulate the tax laws to suit their interests was within the ambit of good management of the IRC and remains within the ambit of good management for its contemporaries.

4 The position in Australia

The conclusions presented thus far are open to criticism. There are several bases on which the judicial prioritisation of the theoretical objective of fairness can be justified where the legislature and the tax authority otherwise fail to do so. Indeed, this article is not attempting to argue that the Court's prioritisation of the theoretical objective in *Fayed* was clearly misconstrued. There is no robust counterargument in principle to the position that each taxpayer should be treated equally. Yet the analysis thus far has highlighted that a case with the practical nuances of *Fayed* was not the appropriate basis to establish and import into the ATO Code a doctrine which could allow a statutory authority to undermine established principles of contract. By saying the agreement was ultra vires and therefore avoidable, the Court effectively supplanted its own judgment in place of the IRC's initial judgment. This meant that a contract validly entered into by the IRC, subject to review and renegotiation,[61] could be avoided by the IRC at a later date when the terms were no longer suitable on the basis that the IRC never actually had power to enter the agreement.

The ATO arguably has an even broader statutory ambit to collect taxes where it is charged with "general administration" and has an explicitly codified mandate to settle disputes. However, the same issue in *Fayed* may present itself were the ATO to ever exercise its settlement power in respect of a future tax year and resile from it in that future tax year on the basis that it never had power to enter the settlement agreement. The extension of the analysis of *Fayed* is to advance the view that the ATO's power to enter those agreements is worthy of closer scrutiny than has yet been afforded. Although largely beyond the scope

60 Ibid [17].
61 Ibid [12].

of this article, one could also foresee a host of issues arising where, even if a particular go-forward agreement was deemed intra vires, the ATO opted to resile from it at a later date. Notwithstanding, the argument that such an agreement is ultra vires could be founded on two prominent bases, being (i) the orthodox view that the ATO cannot estop itself from the exercise of its statutory duties, and (ii) the proposition that the ATO cannot contractually fetter its obligation to exercise those duties.[62]

4.1 Estoppel and government authorities

In *Federal Commissioner of Taxation v Wade*, Justice Kitto remarked that "[n]o conduct on the part of the commissioner could operate as an estoppel against the operation of the Act.[63] The doctrine of estoppel has emerged in private sector dealings and precludes, on equitable grounds, one party from denying an assumption that it encouraged in a counter-party which that counter-party relied on to its detriment.[64]

The priority of a statutory authority acting pursuant to a statutory provision over the equitable doctrine of estoppel appears to have roots in early 20th century English jurisprudence. In support of his remarks in *Wade*, Justice Kitto contrasted the following excerpt from Lord Parker of Waddington in *Commissioners of Inland Revenue v Brooks*:[65]

> [i]t was further suggested that, on the general principles of law governing estoppels, neither the subject nor the Crown ought to be at liberty to go behind the amount of profit and gains when once determined by any competent authority. I do not dispute these general principles, but it seems to me that where there is a statutory provision requiring an estimate to be made for a statutory purpose and by a statutory authority, the principle of estoppel cannot be invoked to render the provision nugatory in cases where such principle might otherwise have applied.

This affirmation of Parliamentary supremacy from Lord Parker was perhaps unsurprising given his decision as Justice Parker in Chancery delivered two years prior in *Bowles v Bank of England*.[66] *Bowles* concerned a deduction against a dividend made by the Bank of England on the basis of a resolution of the Committee of the House of Commons for Ways and Means.[67] The question for Justice Parker was whether such a resolution authorised the Crown to levy an income tax that had not yet been imposed by Act of Parliament.[68] In his reasoning, Justice Parker appears traditionally deferential to the supremacy of the English Parliament:[69]

62 Not considered in this article is the UK doctrine of substantive legitimate expectations, by which an expectation about the outcome of a decision-making process can be protected judicially. The unfavourable reception of the doctrine in Australia has been discussed elsewhere: see, eg, Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32(2) *Melbourne University Law Review* 470, 495–521.

63 (1951) 84 CLR 105, 117.

64 NC Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 2018) [5.25], citing *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (*Maher*).

65 (1915) AC 478, 491–2.

66 [1913] 1 Ch 57.

67 Ibid 83.

68 Ibid 84.

69 Ibid 84–5.

> [b]y the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange to find them relied on as justifying the Crown in levying a tax before such tax is actually imposed by Act of Parliament.

The supremacy of Parliamentary mechanism, as adopted in its enshrined form by Justice Kitto, proved naturally difficult to displace on equitable grounds even with the establishment of the "new" estoppel in *Waltons Stores (Interstate) Ltd v Maher* (*Maher*).[70] Certainly in the realm of taxation, dominated by statute and overseen by a statutory authority, justification for departure appeared even harder to come by,[71] notwithstanding academic derision against the "elevation of Kitto J's remarks to the status of authority for a general exclusion of the doctrine of estoppel from Australian income tax law".[72] In *AGC (Investments) Ltd v FCT*, Justice Hill cited *Wade* in stating the following:[73]

> there is no room for the doctrine of estoppel operating to preclude the Commissioner from pursuing his statutory duty to assess tax in accordance with law. The Income Tax Assessment Act imposes obligations on the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart.

Cameron Rider suggests that the reluctance to apply the doctrine of estoppel against the Commissioner evidenced by the case law "must rest in large part on the reasoning that it would be contrary to … law … to permit a taxpayer to escape assessment to the full amount of tax lawfully payable".[74] Rider nevertheless argues that "the position may not be as unequivocal as some of the judgments … suggest",[75] referencing the cases of *Cox*[76] and *Fowles*[77] to highlight that the rigidity of *Wade* is best qualified by some instances where the Commissioner can be bound by contract to not impose tax in respect of "a particular matter in contention".[78] Nevertheless, the prevailing view judicially appears to be that *Wade* stands for the general proposition that "the Commissioner cannot bind himself by administrative practice or by contract to give the tax laws an operation which they do not

70 *Maher* (n 64). See NC Seddon and RA Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis Butterworths, 11th Australian edn, 2017) Ch 2; Seddon, *Government Contracts* (n 64) [5.25].
71 See, eg, *AGC (Investments) Ltd v FCT* (1991) 91 ATC 4180 (*AGC (Investments)*).
72 See, eg, Rider (n 5) which sets out a compelling basis to question the orthodox view that estoppel cannot bind the Commissioner.
73 *AGC (Investments)* (n 71) 4195.
74 Rider (n 5) 4.
75 Ibid 4.
76 *Cox v Deputy Federal Commissioner of Land Tax (Tas)* (1914) 17 CLR 450 (*Cox*).
77 *Queensland Trustees Ltd v Fowles* (1910) 12 CLR 111 (*Fowles*).
78 Rider (n 5) 4.

have".[79] At minimum then, considerations of equitable or contractual rights against the ATO appear subsidiary to the proper execution of the tax laws.

4.2 The fettering doctrine

A further consideration tending away from the ATO being held to go-forward agreements is the general prohibition against impermissible fettering of legislative function. The doctrine of impermissible fetter rests on the basic proposition that a government body cannot "bargain away the important powers that the legislature has conferred on it".[80] The common law in this area has developed from the general maxim *quilibet potest renunciare juri pro se introducto* – "no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of".[81] A right, in this context, seemingly operates in the same way as an obligation to fulfil a duty.

The modern fettering doctrine, sometimes referred to as the doctrine of executive necessity, operates on this premise. The logic is that a statutory obligation cannot be avoided through private agreement. While straightforward enough in theory, the doctrine has the potential to create problems for bona fide counterparties who have had their expectation of contractual performance frustrated by a governmental body that cites a statutory duty to resile from private agreement. The doctrine and its implications have been analysed extensively elsewhere.[82] For present purposes, a relevant aspect of the doctrine is the distinction between contracts which are the exercise of a power or discretion and contracts which fetter statutory duties. The distinction posits that certain contracts are within the discretionary power of the ATO whereas others impinge on the ATO's statutory duties.

A case which illustrates the distinction is *The Power Co Ltd v Gore District Council*,[83] where the New Zealand Court of Appeal had to determine whether an agreement under which electricity was supplied at a fixed rate of one penny per unit "for all time hereafter" could be terminated by notice.[84] The issue before the Court was whether the electricity company had fettered its statutory discretion by disabling itself from setting new charges for the supply of electricity. The Court held that, while statutory powers and discretions cannot generally be fettered by contract, there are limitations on the doctrine of impermissible fetter:[85]

> [p]ublic bodies will often need to enter into contracts, sometimes long-term contracts, if they are to achieve their public purposes. In recognition of that need, Parliament does in fact almost invariably confer broad contractual powers on them and in some cases it will follow … that the exercise of such powers so as to create a right extending over a period of time will to that extent prevent the exercise of those or other statutory powers in respect of the same subject-matter.

79 *Ziegler v Federal Commissioner of Taxation* [2025] FCAFC 168 (*Ziegler*).
80 Seddon, *Government Contracts* (n 64) [5.10]. *Ransom and Luck v Surbiton Borough Council* [1949] 1 Ch 180, 193 (Lord Greene).
81 H Broom, *A Selection of Legal Maxims* (Sweet & Maxwell Ltd, 10th edn, 1939) 477.
82 See, eg, Seddon, *Government Contracts* (n 64).
83 [1997] 1 NZLR 537 (*Power Co*).
84 Seddon, *Government Contracts* (n 64) [1.4].
85 Ibid [5.11] (quoting *Power Co* (n 83) 548).

The question is therefore not whether a subsequent discretion is limited by the initial discretion to enter the contract. Rather, "attention must be paid to the relevant power or discretion in question and, in particular, *when* it is appropriate to exercise it".[86] Seddon argues that, if it is consistent with the nature of the decision for it to be made through, and at the time of, the contract, then the contract is valid.[87]

Whether a go-forward agreement for a future tax year is an appropriate decision to be made through a contract in the current tax year is an open question. The ATO is clearly empowered to fetter its discretion to assert tax liability before a court on the basis of good management by entering a settlement agreement. It is also clear, on the other end of the spectrum, that the ATO cannot contract out of a power or discretion conferred by existing legislation or contractually bind itself to legislate or not legislate in support of the contract. Somewhere in the range of contracts created in that spectrum lies the go-forward agreement. It is arguable that a go-forward agreement in respect of methodologies and certain fixed sums in future tax years could be framed in a way which does not offend the fettering doctrine. Such an agreement could validly caveat that material changes to the law or to the circumstances of the taxpayer would bring such agreements to an end.[88] It could also specify that it represented a full and final settlement of disputes that may arise in respect of known and predictable inputs. Each scenario exists in the negative space between agreements which are clearly permitted and agreements which clearly offend the fettering doctrine. In any case, the ATO's position on whether go-forward agreements impermissibly fetter its statutory discretion remains somewhat ambiguous.

5 Issues with ambiguity

The ambiguity around the power to enter and enforce go-forward agreements creates two primary issues in the tax system. The first is the potential for misplaced reliance by businesses on go-forward agreements with the ATO. The second is the inefficiency faced by ATO in having an undefined position on whether it can enter go-forward agreements with taxpayers and whether it can resile on existing go-forward agreements. Those issues, and the responses they have created in Australia, are explored below.

5.1 Reliance

It is well accepted that a party that brought a consenting mind and will to an agreement ought to be held to that agreement. The party's consent is established by signature, an act which provides the counterparty a reasonable basis to rely upon the terms of the agreement.[89] The concept of reliance was taken further still by Chancery in the eighteenth century, binding parties to representations that had been relied upon by counterparties,

86 Seddon, *Government Contracts* (n 64) [5.11].
87 Ibid.
88 Such wording would likely be superfluous because the contract would be frustrated: see, eg, JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) [23.410].
89 Ibid [7.130].

forming the basis for the contemporary equitable doctrine of estoppel.[90] The doctrine was codified in Australia in the oft cited judgment of Justice Brennan in *Maher*.[91] Seddon notes:[92]

> [i]n so far as governments engage in ordinary commercial (or other) dealings, there is no reason why estoppel should not apply, *so long as no question of executive necessity, fettering or acting beyond power arises*. However, just as the government may not be able to fetter its future exercise of a discretion or power by contract, so too estoppel may not be used to bind the government in similar circumstances.

The basis for limiting estoppel in that way is justified on two bases:[93]

> [f]irst, there is a parallel with contract in that estoppel may not be pleaded if to do so would impair the government's ability to govern. Secondly, estoppel may not be used to bind the government to illegal action or to a course of conduct that is inconsistent with the exercise of a statutory power or discretion.

The ATO, as a statutory authority carrying an important function in Australian government, could theoretically argue that entry into a go-forward agreement bound it to a course of conduct which was inconsistent with the exercise of statutory powers of assessment. Two points can be made in response to this. The first is that, practically, there is no new theoretical ground covered by the denial of an estoppel claim that is not already covered by the assertion of impermissible fetter. In other words, where the ATO were to say that a go-forward agreement impermissibly fettered its statutory discretion to apply the Income Tax Assessment Acts, the same rationale would prevent the application of an estoppel claim. There does not therefore appear to be any conceptual utility to the estoppel claim ¾ if the go-forward agreement does not impermissibly fetter statutory discretion, then an estoppel claim would stand on the same basis and, in the inverse, would fail if the go-forward agreement did impermissibly fetter statutory discretion. The second point is that settlement of actual disputes also *necessarily* denies the ATO the power to exercise its statutory discretion of assessment (or at least the enforceability of the exercise of that discretion). Again, if future inputs to assessment are known and predictable, the conceptual leap between the settlement of an actual dispute and potential dispute is arguably not far enough to justify a departure from doctrines which protect a contractual counter-party's reliance.

5.2 Departmental inefficiency

Former Commissioner of the ATO, Chris Jordan AO, spoke of his role as a "constant balancing act" at his address to the National Press Club of Australia.[94] Indeed, administration of the tax system has been described as requiring "judgment calls on complex factual

90 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th edn, 2014) [17-180].
91 Ibid [17-260], citing *Maher* (n 64).
92 Seddon, *Government Contracts* (n 64) [5.25].
93 Ibid.
94 "Commissioner's Address to the National Press Club 2024", *Australian Taxation Office* (Web Page, 21 February 2024) <https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-national-press-club-2024>.

situations".[95] Nevertheless, the ATO holds itself to certain aspirational standards. The Code of Settlement explicitly requires consistency in the approach to taxpayers in similar circumstances.[96] Consistent application of the law is also at the forefront of ATO policy more broadly.[97] The imprecision of the ATO Code in respect of settlement is at odds with a consistent administration of the Australian tax law. The lack of delineation between intra vires and ultra vires settlement creates the possibility of inconsistent treatment of go-forward agreements within and between ATO administrations. For instance, a go-forward agreement entered into by one ATO administration may subsequently be undermined by a following ATO administration, assuming the span of its term covered income years in the following administration. That uncertainty has the potential to undermine faith in commercial dealings with the ATO and disincentivise good faith engagement with the ATO more broadly.[98]

5.3 Responsive developments

That the power of general administration suffers from imprecision is not novel ground that this article is covering. In 2023, the Inspector-General of Taxation and Taxation Ombudsman (ITGO) published a report on the Commissioner's general powers of administration.[99] The final report acknowledged that the ill-defined power of administration appeared to be "contrary to the Australian Administrative Law Policy Guide which states that – *Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear*".[100] The report grappled with the overarching issue elucidated in this article, being the "lack of clarity about the nature and objective of the [general power of administration]".[101] The ITGO discussed the specific impact of that issue on settlements as part of a case study in the final report.

The case study on the use of the general power of administration in settlements proceeds on the basis that the conclusion of a settlement impacts the ATO's resource allocation and directly concerns the good management of Commonwealth resources.[102] The ITGO sets out a list of administrative decisions relating to settlement for consideration, being (a) decisions to consider and enter into settlement discissions; (b) decisions to accept negotiated settlements; and (c) decisions to not devote further resources to settled

95 Committee Hansard, 9 February 2000 <https://www.aph.gov.au/binaries/hansard/senate/commttee/s661.pdf>.

96 ATO Code (n 4) [4].

97 "Introduction and Considerations for Types of Super Fund Transfers", *Australian Taxation Office* (Web Page, 8 October 2024) <https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/apra-regulated-funds/fund-reporting-protocol/successor-and-intra-fund-transfer-reporting-protocol/introduction-and-considerations-for-types-of-super-fund-transfers>; "What's New?", *Australian Taxation Office* (Web page, 9 December 2020) <https://www.ato.gov.au/forms-and-instructions/company-tax-return-2020-instructions/whats-new>.

98 James Alm, "What Motivates Tax Compliance" (Tulane Economics Working Paper Series, April 2019) 15. The revenue impacts are well documented: see, eg, Joel Slemrod and Shlomo Yitzhaki, "The Optimal Size of a Tax Collection Agency" (1987) 89(2) *Scandinavian Journal of Economics* 183.

99 ITGO, *The Exercise of the Commissioner's General Powers of Administration* (Commonwealth of Australia, May 2023).

100 Ibid vii.

101 Ibid.

102 Ibid 132.

issues.[103] Interestingly enough, the meaning of "settlement" does not attract direct analysis in the report, but the span of the settlement power does receive implicit elucidation in a quoted extract from the *Instrument of the Commissioner's Delegations and Authorisations*:[104]

> [p]ursuant to section 8 of the Taxation Administration Act 1953, I, Chris Jordan, Commissioner of Taxation, DELEGATE *all my powers* and functions to … conclude settlements, and … *execute deeds and agreements with respect to* how provisions of a taxation law … apply in the particular circumstances of a matter … pursuant to my powers of general administration of the Acts … relating to, [among other things], *tax-related liabilities that have not yet arisen* under a taxation law or which may arise in respect of future income years or other future periods.

In other words, within the scope of delegable settlement powers, the Commissioner wields a power of general administration to settle tax liabilities in respect of future periods. That passage, and the implications it carries regarding the scope of the word "settlement", is not the subject of any specific analysis in the report. Instead, the ITGO invites the reader of the report to draw comfort from the governance processes or frameworks available to the decision-maker at large. Those processes and frameworks include PSLA 2015/1,[105] which sets out the Code of Settlement, as well as PSLA 2007/6,[106] which refers to PSLA 2015/1 but outlines "more stringent processes and considerations to consider widely-based settlement[s]".[107] This article does not seek to call into question the veracity of those processes and frameworks. The position advanced is that uniformity and clarity in the scope of the settlement power should exist alongside those processes and frameworks. Until that clarity is provided, the ATO theoretically wields a power which carries varying consequences for taxpayers intra and inter-administration.

6 Conclusion

The ATO is delicately placed as a governmental authority enforcing laws that directly impact the Australian economy. The pursuit of ideals such as fairness, revenue maximisation, and efficiency creates a tension in certain scenarios where the ATO is given a broad ambit to administer the Australian tax system. That tension can lead to outcomes where, as explored in this article, the taxpaying entity can theoretically be left without remedial recourse at the behest of a discretionary exercise of general statutory power.

This article has explored the ambiguity of the ATO's settlement power and has argued that, borrowing the language of Lord Scarman, the "sacrificial victims" of the ATO's imprecisely defined settlement power may prove to be the established equitable and contractual

103 Ibid.
104 Ibid, citing Commissioner of Taxation, *Instrument of the Commissioner's Delegations and Authorisations* (7 February 2022).
105 See ATO Code (n 4).
106 ATO, "Guidelines for Settlement of Widely Based Tax Disputes" (Practice Statement Law Administration PSLA 2007/6, 24 April 2025).
107 ITGO (n 99) 134. Widely-based settlements, in this context, refer to settlements that are likely to affect or apply to a larger group of taxpayers, thus requiring consistency and fairness in the treatment of those taxpayers.

principles, along with counter-parties acting in reasonable reliance on those principles. Whilst accepting that tax arrangements with the features of Fayed's 1997 Agreement appear noxious to principles of fairness, this article has shown that genuine theoretical justifications for such arrangements exist, meaning care is required before the reliance of the taxpayer and the judgment of the taxing authority is undermined.

Notwithstanding, it may be entirely legitimate to exclude from the scope of the ATO's settlement power agreements which pre-determine payable tax with sums that are not reflective of known inputs in future tax years. If this is to be the case, however, the onus still rests on the ATO to clearly delineate where its power in respect of settlements begins and ends. Without that clarity, the risks created by ambiguities in the ATO Code remain live. To that end, documented intention and scope seems a sensible approach to transparently developing the settlement power in the ATO Code.