



THE TAX INSTITUTE
THE MARK OF EXPERTISE

12 March 2015

Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: tina.obrien@alrc.gov.au; freedoms@alrc.gov.au

Dear Ms Wynn,

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

The Tax Institute (Institute) wishes to make a submission to the Australian Law Reform Commission (ALRC) in relation to its Inquiry into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Inquiry).

The Institute is Australia's leading professional association in tax, with approximately 15,000 members. Further details about The Tax Institute are included at Appendix A.

Given the broad terms of this Inquiry, we have focused below on those aspects of Commonwealth tax law that are of particular interest or relevance to our members and we have responded to specific questions in the Issues Paper in relation to those laws.

Executive Summary

1. The Federal Commissioner of Taxation (the Commissioner) has extraordinary powers in relation debt collection which are exercisable without prior external oversight. External review mechanisms are available *ex post facto* but, in their current form, they do not facilitate timely access to a low cost jurisdiction.
2. There are currently announced tax measures with start dates as far back as 1 July 2001, which have yet to be legislated. Where urgent circumstances require a retrospective measure, its terms should be announced quickly and precisely, and it should gain priority in legislative development toward prompt enactment.
3. The privilege against self-incrimination is abrogated by the Commissioner's information gathering powers and are not balanced by statutory limitations on derivative use of the information in criminal proceedings.

4. The burden of proof is shifted to the taxpayer in most appeals of tax-related matters. There are matters where the Commissioner seeks to make a positive assertion and/or has information not within the taxpayer's knowledge, where the shift in the burden of proof is unjustifiable.
5. The Commissioner can use a tax assessment as evidence in recovery proceedings, notwithstanding the fact that the taxpayer is concurrently seeking a review or is in the process of appealing the issue of the relevant assessment. These proceedings can deny the taxpayer's ability to seek appeal or seek a review of the underlying decision.
6. Taxpayers effectively have no power to seek judicial review of the decisions made by ATO officers leading up to the issuing of an assessment

Property Rights

Question 6-2 Which Commonwealth laws unjustifiably interfere with vested property rights, and why are these laws unjustified?

7. Pursuant to section 8AAZLGA of the Taxation Administration Act 1953 (the TAA), the Commissioner has the power to withhold a refund, pending verification of entitlement to that refund. The entitlement to a refund under a provision such as section 8AAZLF of the TAA is in the nature of an administrative right, however a lay person would see a right to a refund of tax as a practical and important property right.
8. There are defects in the Commissioner's power to withhold a refund pursuant to section 8AAZLGA of the TAA that require clarification. The power does not contain a requirement for written notice, giving rise to uncertainty as to the time at which the power has been exercised. There is also uncertainty as to time at which the Commissioner must begin considering entitlement to refund, and when the Commissioner must conclude that consideration.
9. The taxpayer has limited review rights in relation to the exercise of the Commissioner's power to withhold a refund. Pursuant to subparagraph 14ZW(1)(aad)(i) of the TAA, the taxpayer cannot object to the retention of the refund until 60 days following the time the Commissioner is required to give notice of the retention. In circumstances where the taxpayer objects at the expiry of that period, the Commissioner cannot be compelled to do anything for a further 60 days. Pursuant to section 14ZYA of the TAA, a deemed decision by the Commissioner in relation to the objection only follows from the taxpayer giving a notice to the Commissioner and the passage of a further 60 days from that notice. Only then can the taxpayer proceed to have the exercise of the retention power externally reviewed. Throughout this entire period, the taxpayer is without their refund.
10. In *Sanctuary Australasia Pty Ltd and Commissioner of Taxation* [2013] AATA 371, it was held that the right to object against the retention of refund decision ceased once the assessment issued because there was no longer any entitlement to a refund that was being retained. At that point, the taxpayer has separate rights of objection and review in respect of the assessment under Part IVC of the TAA.
11. Pursuant to sections 255-100 through 255-110 of Schedule 1 of the TAA, the Commissioner may also give a notice requiring a person to provide security for an existing or future tax related liability. The security may be required to be provided by way of an encumbrance upon a person's property. Again, the Commissioner has internal guidelines

about exercise of this power (PS LA 2011/14). However, there is no prior external oversight, and failure to post security in the required form is an offence.

12. The Commissioner may give a notice to a third party, indebted to a taxpayer, requiring that the third party pay the Commissioner instead of the taxpayer. This power to give a notice, often called a “garnishee” notice, is contained in section 260-5 of Schedule 1 of the TAA.
13. To facilitate the effectiveness of such a notice, it has been said that the Commissioner need not give the taxpayer an opportunity to be heard: see *Lis-Con Concrete Constructions Pty Ltd v Commissioner of State Revenue* [2011] QSC 363, [7].
14. PS LA 2011/18 provides the Commissioner's directions to ATO officers as to the appropriateness, timing of and amounts subject to garnishee notices. This represents the only oversight of this power prior to its exercise, and it occurs within the Commissioner's own office.
15. The above powers may be exercised without appropriate checks and balances insisted upon by Courts of law when entertaining an application for a *Mareva* injunction. Judicial review *ex post facto* is available, but that does not facilitate timely access to a low cost jurisdiction.
16. The Commissioner's power to act without prior external oversight are extraordinary. There are policy reasons for those extraordinary powers, such as the necessity for the Commissioner to move quickly to prevent the withdrawal of funds from Australian shores. However, the existence of these powers makes it essential that there are quick, cost-effective and clearly defined mechanisms for reviewing those decisions once made.

Retrospective Laws

Question 7-2 Which Commonwealth laws retrospectively change legal rights and obligations without justification? Why are these laws unjustified?

17. All taxpayers require certainty as to the identification and scope of tax laws that frame both the obligations to be observed and the liabilities that are to be paid.
18. Such certainty is essential to the proper functioning of our tax system for a variety of reasons, including the need to allow:
 - (a) taxpayers to self-regulate behaviour in order to minimise tax risk;
 - (b) the fostering of voluntary and informed compliance with tax laws;
 - (c) taxpayers to make investment decisions and strike commercial bargains with certainty as to the tax cost resulting from the relevant transaction;
 - (d) corporate taxpayers to make informed dividend policy decisions; and
 - (e) listed companies to produce timely financial statements that accurately reflect their tax expense.
19. Tax laws are amended retrospectively, particularly to deal with:

- (a) concessional announcements, where it is proposed that a person should have a benefit from a given date but the legislative programme does not allow for immediate enactment; and
 - (b) strengthening of tax laws, where an issue has come to the attention of the Commissioner requiring prompt attention (subject again to the legislative programme).
20. In recent years, the build-up of announced but unenacted measures has become a clear issue in terms of maintenance of the rule of law in Australia. There are currently tax measures with announced start dates as far back as 1 July 2001 which have yet to be legislated: See Assistant Treasurer's Media Release "Integrity restored to Australia's tax system" 14 December 2013.
21. Such a situation should never be allowed to develop again. Where urgent circumstances require a retrospective measure, its terms should be announced quickly and precisely, and it should gain priority in legislative development toward prompt enactment.

The Privilege against Self-incrimination

Question 10-2 Which Commonwealth laws unjustifiably exclude the privilege against self-incrimination, and why are these laws unjustified?

22. The privilege against self-incrimination is abrogated by section 264 of the *Income Tax Assessment Act 1936* (the ITAA 1936): see *DFC of T v De Vonk* (1995) 61 FCR 564 and *Binetter v Deputy Commissioner of Taxation* [2012] FCAFC 126. The section allows the Commissioner to require any person to furnish information and attend and give evidence concerning a person's income or assessment. It is our view that this section should be subject to the privilege against self-incrimination.
23. Having gathered information, potentially of a very sensitive nature, it is not known what protocols the Commissioner has for dealing with such information. Section 355-25 of Schedule 1 of the TAA create an offence concerning disclosure of information by taxation officers. Exceptions under section 355-50 of Schedule 1 of the TAA exist in relation to disclosure to a court for the purpose of criminal proceedings that are related to a taxation law.
24. Such administrative examinations, intrusions and questioning occur without warrant. Thus they occur without external judicial supervision, other than *ex post facto* challenge to the giving of the notice or the attendance of an ATO officer at premises.
25. The Commissioner must sometimes act quickly. Powers of compulsion, for example to overcome banker-customer confidentiality, are necessary. But too much is sacrificed by not having external review (even *ex parte*) of the process of issuing a notice, conducting an attendance at premises, or requiring information.
26. A natural reason why it may be in the interests of a taxpayer to give information is that the taxpayer bears the onus of showing an assessment is excessive (note sections 14ZZK & 14ZZO of the TAA). This is an important feature in assessing how the balance between the citizen and the Executive should be struck with tax laws.
27. A related issue is the use of information obtained from a taxpayer in any subsequent criminal proceedings against that taxpayer. Under the scheme of the TAA, the abrogation of the privilege against self-incrimination, and the use against a taxpayer for tax purposes

of information provided by the taxpayer under compulsion is not balanced by statutory limitations on derivative use of the information in criminal proceedings. This stands in contrast to other statutory regimes akin to section 353-10 of Schedule 1 of the TAA (and section 264 of the ITAA 1936) where protections against derivative use in criminal proceedings are in place. For instance, subsection 155(7) of the *Competition and Consumer Act 2010 (Cth)* abrogates (in the context of information required to be provided under subsection 155(1)) the privilege against self-incrimination but then provides that the information furnished by the person is not admissible in evidence against the person in any criminal proceedings, other than in relation to offences under section 155 or the “false or misleading” offences under the *Criminal Code*. There is a similar restriction on use provided for in section 68 of the *Australian Securities and Investments Act 2001 (Cth)* (in the context of ASIC’s power to obtain information and documents under section 19 of the ASIC Act). As a matter of policy, similar restrictions against derivative use of elicited evidence should be part of the tax regime.

Burden of Proof

Question 9-2 Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

28. Sections 14ZZK and 14ZZO of the TAA are examples of provisions that, in a tax context, operate to shift the burden of proof. In respect of most appeals of tax-related matters, the provisions operate by placing the burden of proof on the taxpayer of showing that the relevant assessment (or amendment) is excessive or other cases that the relevant taxation decision should not have been made or should have been made differently. Furthermore, in satisfying the burden of proof, the provision requires the taxpayer to show not only that the relevant assessments are excessive, but prove what they should have been.
29. The Issues Paper notes that it is recognised that the shift in the burden of proof may be justified where it shifts the burden to the party that has the requisite knowledge and evidence to adduce truth in proceedings. In the context of a standard tax dispute, sections 14ZZK and 14ZZO of the TAA operate appropriately and are consistent with this recognised basis for the shift in the burden of proof. This is because it is the taxpayer that holds the requisite knowledge and / or evidence to establish their taxable position.
30. However, in more recent times various provisions have been introduced into the tax law which allow the Commissioner to make determinations based on what the Commissioner considers to be a reasonable or arm’s length state of affairs in a hypothetical scenario. Examples include Part IVA and recently introduced transfer pricing amendments to Division 815 of the *Income Tax Assessment Act 1997*. In these cases, the Commissioner makes the relevant determination, based on his assertion of what the relevant state of affairs should be. Once made, the burden of proof shifts to the taxpayer to establish not only what they did, but also prove the negative of the Commissioner’s assertion.
31. Similar issues arise where the Commissioner’s positively asserted case is based on third party evidence or material obtained by the Commissioner that was not within the taxpayer’s knowledge.
32. The establishment of an objective state of affairs in a hypothetical situation is not an example of a circumstance where the taxpayer is the party that has the requisite knowledge and evidence to adduce truth, and thus the shift in the burden of proof by

operation of section 14ZZK and 14ZZO of the TAA in these cases is not justified by the exception. Rather, as it is the Commissioner who is making a positive assertion, the burden of proof should remain with the Commissioner to prove the assertion made. Alternatively, the law should provide sufficient flexibility to allow the decision maker (Court or Tribunal) to be shift the burden back to the Commissioner where it considers it appropriate to do so.

Procedural Fairness

Question 14-2 Which Commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?

33. As discussed below under the heading Judicial Review, sections 175 and 177 of the ITAA 1936 operate as conclusive evidence provisions. A consequence of the operation of these provisions is that the assessment remains standing, and can be used as evidence in recovery proceedings, notwithstanding the fact that the taxpayer is concurrently seeking a review or appealing the issue of the relevant assessment.
34. These debt proceedings enable the Commissioner to seek and obtain sequestration orders or winding-up orders against the taxpayer prior to the taxpayer being provided with an opportunity to exercise their review and appeal rights. This is subject to the Court's discretion to grant a stay – which is a matter in which merits may be taken into account, but only if there is sufficient material before a Court to enable it to establish a view on the merits: see *Southgate Investments Funds v FCT* (2013) 211 FCR 274, 294 [77(c)]; *Cywinski v DFCT* [1990] VR 193, 202 per Kaye J.
35. Once a winding up or sequestration order is made the taxpayer's ability to seek appeal or seek a review of the underlying decision is effectively quashed. Accordingly, the law can operate in a way which denies the taxpayer their appeal and review rights. This denial could be ameliorated by providing taxpayers with a substantive right to obtain stay of any recovery proceedings or requiring any review or appeal to be heard concurrently.

Judicial Review

Question 18-2 Which Commonwealth laws unjustifiably restrict access to judicial review, and why are these laws unjustified.

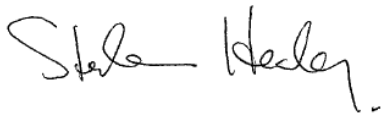
36. The exercise of executive powers should not, by operation of legislation or otherwise, be non-justiciable unless that is the parliament's clear intention. That is, the public should retain a right to seek review of executive decisions (and executive decision making) in accordance with general administrative law principles and legislation should not operate to curtail the ability of the public to challenge the exercise of executive powers unless the parliament specifically intends to constrain such review.
37. Sections 175 and 177 of the ITAA 1936 are known as the conclusive evidence provisions. Section 175 provides that the validity of an assessment shall not be affected by reason that any of the provisions of the tax legislation have not been complied with. Section 177 has the effect that a notice of assessment is conclusive evidence of its due making and that the amount and all the particulars of the assessment are correct. This section also provides that the only avenue for review or appeal of the amount and the particulars of the assessment is by way of the procedures set out in Part IVC of the TAA, which requires a taxpayer to prove that the assessment is excessive and by how much.

38. In 2008, the High Court considered the scope of challenges to the validity of an assessment outside of the statutory regime provided by Part IVC in *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 (***Futuris***).
39. The majority of the High Court in *Futuris* held that section 175 comes into effect where an 'assessment' has been made and, in circumstances where section 175 applied to an assessment, errors in making that assessment would not attract relief under section 75(v) of the Commonwealth Constitution or section 39B of the *Judiciary Act 1903* (Cth), unless the assessment process could be said to have not amounted to a true 'assessment' of a taxpayer's liability to tax.
40. Other than where an assessment is tentative or provisional, or the taxpayer can demonstrate that there has been '*conscious maladministration*' during the assessment process (such that there is no "assessment" to which section 175 applies), a taxpayer now has no power to seek judicial review of the decisions made by any ATO officer leading up to the issue of an assessment.
41. This impingement of a taxpayer's rights is compounded by the issue discussed under the heading Procedural Fairness above.
42. The majority decision in *Futuris* concerning the interpretation of sections 177 and 175 of the ITAA 1936 has the effect of confining the jurisdiction of the Courts to review executive decision making under section 75(v) of the Commonwealth Constitution and section 39B of the *Judiciary Act 1903* (Cth). As a result, there is a clear tension between the operation of sections 177 and 175 and a taxpayer's ability to seek review of the process, or 'due making', of an assessment by the Commissioner and his officers.

Conclusion

43. The Institute, along with its expert members, would be pleased to provide additional details on any of the matters set out above or to address the ALRC more generally, either in writing, by phone or in person.
44. If you would like to discuss this matter, please contact me or Tax Counsel, Thilini Wickramasuriya on 02 8223 0044.

Yours sincerely,



Stephen Healey
President

Appendix A

About The Tax Institute

The Tax Institute is Australia's leading professional association and educator in tax, with more than 15,000 members. We set the benchmark for the most up-to-date tax professional development events and education programs in the country. Meaning our members are best placed to have the highest level of expertise in the field.

Our growing membership base includes tax professionals from commerce and industry, academia, government and public practice throughout Australia.

In 2012, we introduced the internationally recognised Chartered Tax Adviser (CTA) designation to ensure our members have the credentials to demonstrate their tax expertise to employers and clients.

In 2014, we became accredited as a higher education provider and introduced the Graduate Diploma of Applied Tax Law, which has been designed to meet the changing needs of the tax profession.

Our reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the numerous specialist, practical and accurate tax publications – all of which ensure that the latest information is available at their fingertips.

Established in 1943, the purpose of The Tax Institute was to provide education and information products and services to the tax profession as well as support improvements in the tax law and its administration. That core purpose remains.

Today we lead the tax profession with a strong and authoritative voice in supporting a fair and equitable tax system in Australia, whilst at the same time providing a full suite of education and information products that keep today's tax professional up-to-date and build the capacity of the next generation of tax professionals.

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