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Abstract
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Achieving the appropriate expression of the community demand for independence and accountability as the system changes is a continuing policy challenge that this article explores.

Keywords
Commissioner of Taxation, independence, tax law

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Presented at the Law Council of Australia Taxation Law Workshop, Coolum, Queensland (9 November 2002). The views expressed are those of the author only and do not necessarily reflect those of Deloitte Touche Tohmatsu or its Practice Entities.

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ARTICLES

INDEPENDENCE AND ACCOUNTABILITY OF THE COMMISSIONER OF TAXATION*

Michael Bersten[1]

Part 1: Introduction

The independence and accountability of the Commissioner of Taxation is fundamental for community confidence in the tax system. Without it, history demonstrates that the efficiency and effectiveness of the system is endangered.

Achieving the appropriate expression of the community demand for independence and accountability as the system changes is a continuing policy challenge that this article explores.

Initially, this article seeks to locate the enduring value in an independent and accountable Commissioner of Taxation in the historical record of the rise in England of the rule of law and parliamentary democracy. This lays a foundation for policy debate about the independence and accountability of the Commissioner grounded in basic democratic principles and values. The article will then examine the topic of the independence and accountability of the Commissioner.

These are:

- The Commissioner's administration of the tax laws
- Tenure of the Commissioner of Taxation
- Information transparency and secrecy
- Commissioner and the Parliament
- Commissioner and the Executive
- Commissioner and the Public Service
- Performance accountability
- Inspector-General of Taxation and the Tax Ombudsman
- Judicial review and litigation.

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* Presented at the Law Council of Australia Taxation Law Workshop, Coolum, Queensland (9 November 2002). The views expressed are those of the author only and do not necessarily reflect those of Deloitte Touche Tohmatsu or its Practice Entities.

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The issues raised will explore the need for independence of the Commissioner balanced against the community's expectation for real accountability.

We need also to ask whether we are at risk of over-taxing tax administration to the point that we are jeopardising the ability of the Commissioner to deliver the revenue that the parliament levies, the government budgets and the community needs.

Part 2: Historical Context

We need to take a little journey into history. We have to prize open the dusty and broken vault of the past and pass by the ghosts of s 260 clanking their chains,[2] the *Asprey Report* and abandon our entrenched concept that the history that matters is very recent, perhaps starting in 1936 or in 1983 or 1997 or maybe when the *Master Tax Guide* was first published.

If you must, stop to chat with Sir Garfield Barwick, but do not tarry, we have a lot further back to go. The point about talking about the rule of law and democratic principles today is not advanced by reliving tired old 1970s and 1980s debates about the interpretation of revenue statutes and the *Duke of Westminster*; we have to go further back in time to go forward. We need to go back at least a millennium.

Let's look at Richard I (Crusader, Coeur-de-Lion), King of England from 1189-1199. To support his expedition to Palestine, wars in France and to pay his ransom whilst in captivity, every known source of revenue was exhausted. Whilst taxes were at oppressive levels, they were broadly accepted.[3]

There was however a tax administration problem. As Richard I was away from England or in captivity for almost all his reign, England was run by justiciars, like viceroys, combining a mix of executive and judicial functions.

Fairness was an ongoing issue. At one point there was an unsuccessful uprising led by "William with the Beard" against the unjust assessment of tax because rich citizens "sparing their own purses, willed that the poor should pay the whole". More successful was the refusal of the regular clergy in 1198 to pay land tax. The tax was ultimately withdrawn and the justiciar, Archbishop Hubert Walter, resigned.

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2 *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 414.

3 *Taswell-Langmead's English Constitutional History* (11th ed, 1960) 61-62.

Growing concerns about the arbitrariness of taxation led to the Confirmation of the Charters in 1297 by Edward 1. The principle was accepted that the King had no arbitrary right to taxation.

A further development was the acceptance of the principle that taxation without consent of Parliament was unlawful, a proposition that was affirmed and reaffirmed, after challenge, on many occasions such as under Richard II (1397)[4], under Henry VII (1485-1509)[5] and in the Bill of Rights 1689.

Parliamentary accountability of the Revenue also has a long tradition, demonstrated by the right of the House of Commons to inquire into and amend the abuses of the Revenue administration. For example, in 1340 a parliamentary committee examined the accounts of the collectors and discovered a major problem. They found that the tax estimated for collection was not achievable because the tax was based on an incorrect number of parishes - the official estimate was 45,000 but the Committee found there were only 8,600.[6]

Independent administration of taxes took hold after the Restoration of the monarchy in 1660 with the return of Charles II. At that time a clear division emerged between the Exchequer, which handled the most ancient types of revenue and Special Commissioners, who independently administered new taxes such as emergency war taxes.[7]

The various arms of the Revenue were brought under control of the First Lord of the Treasury, a title that during the eighteenth century evolved by public usage "either derisively or resentfully" into the Prime Minister[8] and was formalised in English Law in 1905.[9]

In 1758, Blackstone, the English Solicitor-General, in his seminal *Commentaries on the Laws of England*, documents the emerging independence of the Commissioners of Taxation from the Executive and its formation of an accountable relationship with the Parliament.

Blackstone notes that there was an historic concern about so many different officers in the command of the Crown (created and removed at pleasure) collecting the revenue.[10] Blackstone hailed the reforms to parliamentary

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4 Ibid 169.
5 Ibid 222.
6 Ibid 160.
7 Ibid 607.
8 Ibid 608-10.
9 Ibid 611.
10 William Blackstone, *Commentaries on the Laws of England* (first published 1765) vol 2, 324.

sovereignty and democracy from the Glorious Revolution in 1688 to 1758. He said the reforms,

> (by the desire of his present majesty) set bounds to the civil list,[11] and placed the administration of the Revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors.[12]

It is of great current significance that the accountability of the Revenue to the Parliament is reported by Blackstone to be a political achievement of equal standing to that of the independence of the judiciary.

The eighteenth century saw major steps on the road towards achieving the balance of independence and accountability in the administration of the Revenue.

Given the dominance of the regency by the Georges, including one Mad George,[13] one might say that, by George, the professional tax collecting bureaucracy became a core political institution during the eighteenth century. Indeed, in 2001, in his acclaimed historical study *The Cash Nexus*, Professor Niall Ferguson of Oxford University describes the Revenue under the parliament as no less than one of the four pillars of modern democracy, the other pillars being taxation by parliament, the national debt and central banks.[14]

Tax collection shifted from the corrupt private sector of tax farmers, who kept a large proportion of tax revenue for themselves, to salaried officials.[15] The lack of community confidence in tax farmers in France resulted in some 36 tax farmers arrested during the French Revolution and 28 guillotined on 8 May 1794.[16]

That said, despite community confidence in tax collection by public officials, the growth of the bureaucracy was of concern. Between 1682-1782, the fiscal bureaucracy in England trebled in size and "the excise became known as the monster with 10,000 eyes".[17]

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11 The Civil List was a major source of revenue, comprising various hereditary revenues of the Crown.
12 Blackstone, above n 9, vol 4, 433.
13 George II reigned 1727-1760; "mad" George III was King from 1760.
14 Niall Ferguson, *The Cash Nexus* (Allen Lane, The Penguin Press, 2001) 15.
15 Ibid.
16 Ibid 95.
17 Ibid.

The growth of the bureaucracy led to the problem of patronage and the need to clearly separate the position of Members of Parliament and tax officials. As one historian explains:

> early attempts by the House of Commons to prevent, or at least control, the "winning over" of its members by the King coincided with a great increase in the number of government employees, as a result of the abandonment of farming as a method for collecting the Customs duties in 1671, the Excise duties in 1671, the Health duties in 1684, and other duties later. The reform in the method of collection, and the consequent employment of something like 8,000 revenue officers, was criticised, throughout the eighteenth century, less on its merits than the ground that it represented a great increase in the volume of government patronage. *For an increase in government patronage was a threat to the independence of parliament because it provided more loaves and fishes with which individual members of parliament could be won over to support the crown.*[18] [Emphasis added]

This concern led in England to the principle that no Member of Parliament may hold an office of profit under the Crown, a rule provided for in s 44 (iv) and (v) of the Australian Constitution.

It took some time to give effect to the principle in England. In 1693, Bills were introduced in Parliament to forbid members of the House of Commons being concerned with the management or collection of taxes, other than the Commissioners of Customs and Excise (they were later excluded 1701 and 1699 respectively). In 1742, Deputies and Clerks were barred from sitting in the House of Commons.

In parallel with the introduction of measures to contain and eliminate patronage, there emerged greater independence of the English Customs and Excise Commissioners and a greater desire for their departments to be professional and well run instead of being run into the ground by politically connected toadies and the idiot sons of the aristocracy. Also, in their role as advisers they were "not reluctant to urge their views on the Treasury".[19]

Administrative reform from the 1780s was driven by inquiries into the methods and organisation of Revenue departments.[20] This resulted in abolition of useless Offices such as what one writer calls "perfect sinecures", namely Offices without duties such as the Housekeeper in Excise, Ware-Housekeeper to the

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18 B Kemp, *King and Commons 1660-1832* (Macmillan, England, 1968) 56.

19 M Thomson, *Constitutional History of England* (*1642 to 1801*) (Methuen, 1938) vol 4, 445.

20 Kemp 104-105.

Stamp Office, Constable of the Castle of Limerick and hundreds of similar offices.[21]

Nevertheless, institutionalised patronage in the Revenue took some time to be excised, dying out in Customs only after 1829 with the introduction and development of professional standards.[22] An independent, professional revenue bureaucracy did not really emerge until a merit system was introduced governing employment and promotion of staff during the nineteenth century.[23]

The watershed from which a modern, independent, apolitical[24] professional public service dates is the Northcote-Trevelyan Report of 1853.[25] As a result of its recommendations, the merit system of public service exams was introduced. The idea of the merit system came from the Chinese system of examinations and professional bureaucracy that had existed for over 2000 years.[26]

There is clear evidence that institutional developments in England quickly were progressively transported into the Australian colonies.[27]

From 1828, the NSW public service was paid for by colonial revenue and reporting to the Governor, but the English Treasury was still in reality in control of important decisions, eg permanent Customs appointments.[28] Although representative government was introduced in NSW in 1842,[29] there were no major changes in the public service until 1856 when NSW its own parliament and responsible government was introduced.[30] Colonial reforms followed English reforms such as in respect of patronage and examinations.[31]

In 1895, a NSW Royal Commission into the establishment of an independent public service, resulted in the framework reflected in the NSW *Public Service Act 1895* and the Commonwealth *Public Service Act 1902*.

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21 PG Richards, *Patronage in British Government* (University of Toronto Press England 1963) 27-28.
22 Ibid 30.
23 Thomson above n 19, 444.
24 *Halsbury Laws of England* Vol 8(2), para 550.
25 Fulton Report (1986), *Report of the Committee on the Civil Service* (Cmnd 3638) – reproduces Northcote-Trevelyan Report in Appendix P.
26 JK Fairbank & EO Reischauer, *China* (Allen & Unwin Australia 1990, 2nd edn) 69-104.
27 A McMartin, *Public Servants and Patronage* (Sydney University Press 1983).
28 Ibid 185-190.
29 Ibid 229.
30 Ibid 238-252.
31 FA Bland, *Government in Australia* (NSW Government Printer 1944, 2nd ed) p xiii.

In summary, what we see is an underlying set of design principles for the independence and accountability of the Revenue that has developed over the last 400 years, echoing principles emerging over 2000 years. Those principles are interlocking and may be summarised as follows:

- Only a democratically elected parliament may raise taxes;
- The administration of the Revenue should be vested in an independent Commissioner, served by a professional bureaucracy, to ensure it is independent and apolitical;
- In order to eliminate the opportunity for patronage, Officers of the Revenue must not be Members of Parliament;
- Politicisation of the Revenue must also be guarded against, eg by merit based examination and promotion of public officials;
- Revenue administration must be fair, eg in terms of treating all taxpayers impartially;
- The Revenue is directly accountable to the Parliament, not subject to the direction of the Executive Government;
- There is a Minister who is responsible for the Revenue in the Parliament.
- The imposition of a tax is contestable before a Court by the taxpayer;
- The administration of tax laws is subject to judicial review.

Part 3: Independence and accountability in Australia

How well do we recall and regard these design principles in today's policy debates? When we hear claims that the Australian Taxation Office (ATO) is falling short of the mark do we give pause to consider the democratic principles requiring an independent and accountable Commissioner of Taxation before we call for sweeping changes? When the ATO designs its administration of tax laws, are these principles articulated? Are the Government and its policy advisers in the Department of the Treasury and the Board of Taxation attuned to the principles underlying the independence and accountability of the Commissioner?

In a general sense, I expect many will say that they do and that these issues are really of little practical significance, so we should now seal history into its chamber for another 1000 years and we can get back to business. I'd like to challenge that attitude.

The Commissioner's administration of the tax laws

The first major guarantee of the Commissioner's independence is the exclusive vesting in the Commissioner, rather than any other person or entity, of the power of general administration of various tax laws.[32] This general power provides a legal framework for the administration of the whole of the tax laws.

In terms of the day to day independence and accountability of the Commissioner, however, the critical powers exclusively vested in the Commissioner are the powers to assess and collect tax.[33] In addition, various tax laws specifically empower the Commissioner to do particular things that would otherwise be unlawful, such as obtain access to premises or require the production of documents or to have questions answered.[34]

Threats to the independent exercise of those powers in particular are regarded as liable to result in unfairness and in the undermining of community confidence. In that respect the community expectation of independence of the Commissioner's position in relation to these powers is similar to that of the independence expected of a prosecutor in exercising the decision to prosecute or the decision of a police officer to make an arrest.[35] Abuse of these powers is typically of grave community concern and accordingly real accountability is expected.

To balance the competing requirements for high levels of independence and accountability, these specific powers are made clearly independent from the direction of the Executive but are subject to judicial review and accountability in a general way before the Parliament.

The boundaries of the Commissioner's general power of administration have rarely been tested by the courts. This may in part be because of an acceptance of the generality of the powers conferred and the infrequency with which cases have come before the courts which deal with the general power of administration. One reason is that the courts have repeatedly found that decisions referable to the general power are not decisions "under an enactment" and therefore fall outside the operation of the *Administrative Decisions (Judicial Review) Act 1977*.[36] Another is that, perhaps most wisely, the

32 Section 8 of the *Income Tax Assessment Act 1936* and comparable powers in other tax laws.

33 Sections 166-170, 204 *Income Tax Assessment Act 1936*; Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953*.

34 Sections 263 and 264 of the *Income Tax Assessment Act 1936* and comparable powers in other tax laws.

35 Michael Bersten, 'Police and Politics in Australia: The Separation of Powers and the Case For Statutory Codification' (1990) 14 *Criminal Law Journal* 302-316.

36 See s 3 definition 'decision to which this Act applies'.

Commissioner is in no rush to have judges define the general power of administration or to impose conditions or qualifications on it.

The main question that has arisen before the Courts has been the Commissioner's power to settle a tax liability for an amount less than that originally due and payable under an assessment. The Commissioner's power to settle for tax that has already become due has been clearly affirmed by the Courts.[37] A recent UK decision has, however, ruled that there is no power to settle future tax liabilities.[38]

From English cases has emerged the so-called "good management" rule,[39] namely that the general power of administration envisages that the tax law will be administered by the Commissioner in ways that in the Commissioner's opinion reflects good management of the Revenue.

A sense of the rule is echoed in the broader obligation on the Commissioner as a CEO imposed by s 44 of the *Financial Management and Accountability Act 1997*. That section provides:

> (1) A Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible.
>
> (2) If compliance with the requirements of the regulations, Finance Minister's Orders, Special Instructions or any other law would hinder or prevent the proper use of those resources, the Chief Executive must manage so as to promote proper use of those resources to the greatest extent practicable while complying with those requirements.
>
> (3) In this section: *proper use* means efficient, effective and ethical use.

It is also the duty of the Commissioner to assess tax and he has no discretion not to.[40] To permit otherwise would authorise the Commissioner to assess some taxpayers and not others, thereby authorising unfairness.

The purity and practicality of this duty to assess is called into question in a self-assessment environment where inquiries or audits and Commissioner assessments do not occur in all cases but are typically driven by a risk management approach.

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37 *Grofam Pty Ltd v Commissioner of Taxation* (1997) 36 ATR 493, 503.

38 *Al Fayed v Advocate General for Scotland* [2002] STC 910.

39 Eg, *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617.

40 *Vestey v IRC* (1979) 54 TC 503, 582; *Bellinz Pty Ltd v FCT* 98 ATC 4634, 4645.

A purist might argue that risk management is in conflict with the duty to assess because it involves necessarily selecting some taxpayers rather than others for examination and therefore there is a greater likelihood of increased tax assessments.

The retort may be made that risk management is an example of the "good management" rule in operation and is therefore authorised by the Commissioner's general power of administration and s 44 of the *Financial Management and Accountability Act 1997*.

A further area of interest in the general power of administration is the absence of any provision in the tax laws identifying any purposes or objects for which the Commissioner must administer the law. This is in stark contrast to many statutes that include an objects clause conferring powers on agencies. The Commissioner, because of the absence of an objects clause, is given a broad power to determine how and for what purpose tax laws will be administered provided that the "good management" principle is adhered to. The practical effect is that the Commissioner is authorised to determine how much tax is assessed and collected.

An objects clause for the Commissioner might conceivably address a series of objectives or purposes or requirements such as:

- Levying and collecting the amount of revenue the Government budgets;
- Administering the law so that taxpayers pay the correct amount of tax;
- Reducing taxpayer compliance and ATO administrative costs;
- Efficiency and competitiveness of the Australian economy;
- Support for the policy or benefits intended underlying all Australian laws (eg, concessions or subsidies for business);
- A Taxpayers' Charter of Rights and Responsibilities.

Articulating and justifying such a clause helps expose some of the difficulties in defining whatever it is that the Commissioner should be doing and in conferring on the Commissioner a workable administration.

For example, if the Commissioner is required to both collect budgeted revenue and collect the correct amount of tax, a conflict in administration is quite possible. This is because the correct amount may be higher or lower than the budgeted amount. A further problem may be that the budget estimate proves to be unachievable for reasons out of the control of the Commissioner (eg, economic slowdown).

Other objects may be too vague or are incapable of being satisfied. For example, how does one make the economy more competitive through administration of the tax law? One way might be to raise less tax so business has higher profits to reinvest or to attract inbound investment. But, if less tax is raised, then government has less revenue to spend in the economy and that may, on a Keynseian model, be the best way to make the economy competitive and prosperous. Or is competitiveness to ensure that like businesses are equally taxed, so that one business does not get an unfair advantage over another? But is there a level playing field if one industry is treated differently to another because of an administrative choice by the ATO (say based on perceived revenue risk)?

Another example would be that the tax law should be administered to support government policy. The law may encourage research and development through tax concessions, but is the ATO supporting the policy by checking that the claims are sound and knocking out arrangements it perceives accesses the concession in a way that amounts to tax avoidance? These difficulties arise whether or not there is an objects clause.

Would the situation be improved by substituting the Commissioner's view on these matters with those of a Board of Administration or a Minister directing the Commissioner?

Tenure of the Commissioner of Taxation

The second major guarantee of the Commissioner's independence is the Commissioner's appointment by the Governor-General to a term of seven years.[41] The Governor-General may remove the Commissioner from Office if:

- On the basis of proved misbehaviour or mental or physical incapacity, both Houses of Parliament in the same session give the Governor-General an address praying for removal;
- The Commissioner is bankrupt (or similar), engages in unapproved paid employment outside his duties as Commissioner, or is absent from duty without leave for 14 consecutive days or 28 days in any 12 months.[42]

The seven year term is designed to avoid the politicisation of the appointment of the Commissioner by any elected Federal Government because it is a term that exceeds the term of the Government. Accordingly, the appointment and removal of the Commissioner is not linked to elections and, in the event of a change of government, there is no power to change the Commissioner.

41 *Taxation Administration Act 1953* ss 4 and 5.

42 *Taxation Administration Act 1953* s 6C. The Commissioner cannot be removed otherwise than provided for by this section: s 6C(8).

No Commissioner has ever been removed in Australia's federal history and it is not hard to see why. The grounds and procedure for removal will only ever be satisfied in an extreme case.

It is significant that the Commissioner's guarantee of independence under the tenure provisions seems much more pronounced today than when the tenure provisions were first introduced. This is because today heads of public service departments have no tenure, but around a century ago they had a permanent status hard to practically distinguish from that of a revenue commissioner.

At the commencement of the Australian Federation, the principal Commonwealth revenue was collected by Her Majesty's Customs. The position of Comptroller-General of Customs was created under the *Customs Act 1901* as "permanent head of Customs" with "chief control of the Customs" "under the Minister".[43]

As best as can be determined, under the *Public Service Act 1902*, the Comptroller-General, like a Department Secretary, was responsible for the Department[44] and could only be removed from Office in the event of conviction of an offence or bankruptcy sequestration, fraud or extravagance.[45]

The tenure provisions for the Commissioner of Taxation were lifted from the land tax legislation in NSW and Victoria in 1895[46] as later enacted in 1910 in the Commonwealth Land Tax statute.[47]

The tenure of a permanent head of a Commonwealth Department was fairly similar to the tenure of the Commissioner, save for the seven year term, until the late 1970s and early 1980s. For example, in 1984 fixed terms for Department Secretaries were introduced. The jeopardy faced by a Secretary is illustrated by the litigation concerning the removal under the *Public Service Act 1922* of the Commonwealth Department Secretary of Defence, Paul Barrett, in Court decisions in 1999 and 2000.[48] The jeopardy has increased under the *Public Service Act 1999*, which empowers the Prime Minister to remove Secretaries from office at any time.[49] One might say that the Commissioner of

43 *Customs Act 1901* s 7.
44 *Public Service Act 1902* s 12.
45 *Public Service Act 1902* s 66.
46 *Land And Income Tax Assessment Act 1895* (NSW); *Land Tax Act 1895* (Vic)
47 In the second reading speech to the *Taxation Administration Act 1953*, the Treasurer, Sir Arthur Fadden said that the original provisions regarding the Commissioner go back to the 1910 Land Tax statutes.
48 (1999) 165 ALR 605; (2000) 170 ALR 529.
49 *Public Service Act 1999* s 59.

Taxation and a Department Secretary, at least in terms of tenure, are as far apart as Westminster and Washington.

Should the Commissioner continue to enjoy essentially the same level of tenure over the last 100 years when for Department Secretaries their position has changed from permanency to being appointees at pleasure? Has the Commissioner's tenure now become a barrier to appropriate accountability in the name of guarding against threats to independence that are no longer real or can be handled in other ways?

Information transparency and secrecy

Before we can assess current accountability arrangements, however, we need to examine how information about tax administration is handled, because information is critical to accountability.

The Commissioner is subject to the general information obligations placed on Commonwealth Departments and Agencies under the *Privacy Act 1988*, *Freedom of Information Act 1982* and *Archives Act 1983* and through parliamentary processes (such as Committee Hearings). These obligations are common across the Australian public service. They seek to balance a range of potentially competing public interests of transparency in government against the damage that may result from disclosure to, for example, protection of the Revenue,[50] the proper and efficient operation of an agency and the financial and property interests of the Commonwealth.[51] They are, therefore, of practical significance in terms of independence and accountability of the Commissioner.

The unique obligations on the Commissioner concern the long-standing tax secrecy provisions.[52] In summary, under these provisions, the Commissioner may not disclose taxpayer information, except when it is in the course of duty to do so or when one of some 25 exceptions apply (each concerned with information transfer within government).

How do the secrecy provisions affect the relationship between the Commissioner and taxpayers and the Commissioner and Ministers? The secrecy framework within which the Commissioner is obliged to work is designed to encourage open information flow from taxpayers to the Commissioner. This is because the secrecy provisions are intended to remove any fear that the taxpayer may have that its information will be provided by

50 *Privacy Act 1988* s 14-11, Privacy Principle 11.1(e).
51 See the exemptions in Part IV of the *Freedom of Information Act 1982*.
52 *Income Tax Assessment Act 1936* s 16 and analogous provisions in other tax laws.

the Commissioner to a third party such as the police.[53] With some 25 exceptions to the secrecy obligation, restrictions on the ATO are less onerous than they used to be. Nonetheless, disclosure of protected information is still tightly regulated under tax secrecy provisions.

Notably, the Commissioner is prohibited from ever passing on taxpayer information to a Minister.[54] This prohibition was added in 1941 by amendment of a Bill in Committee. The concern was to ensure that release by the tax department to the war-time prices commissioner avoided any possibility that ministerial interference may follow. Sir Arthur Fadden stated that, "In no circumstances should the files of taxpayers be made available to a Minister of the Crown." Prime Minister Chifley agreed.[55]

Here emerges a key design feature - that information transparency with taxpayers is to be encouraged but information disclosure to the Minister is prohibited and disclosure otherwise is highly regulated. How then, in respect of matters held secret by the Commissioner from the Minister, can there be accountability to the Executive and can the Minister (such as the Treasurer or Minister for Revenue) truly be held responsible for tax administration in the Parliament?

A further issue is how do taxpayers on their own hold the ATO accountable given that they may not necessarily have access to all ATO information or documents relevant to the ATO decisions and processes that affect them?

Commissioner and the Parliament

Consistent with Blackstone's comments in 1758, the Commissioner is accountable to the Parliament through:

- the provisions for removal or suspension of the Commissioner from Office;[56]
- regular examination of the Commissioner and his officers, inquiries and reports by Parliamentary Committees;
- regular inquiries into and reports on the ATO by the Auditor-General and the Commonwealth Ombudsman to the Parliament;[57]

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53 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 per Lord Wilberforce.

54 *Income Tax Assessment Act 1936* s 16(5A).

55 Bill for *Income Tax Act 1941* (No 58/1941); *Hansard* 19 November 1941 551, 555.

56 *Taxation Administration Act 1953* s 6C. See further discussion in Part 3, above.

57 For a summary of recent inquiries and reports see *ATO Annual Report 2001-2002* 158-171.

- annual reporting by the Commissioner through the Treasurer to the Parliament on any "breaches or evasions" of the *Income Tax Assessment Act 1936*.[58]

To facilitate free information flow and dialogue with the Commissioner, the Parliament normally permits the Commissioner to not disclose confidential matters (such as concerning individual cases or matters which if published would threaten the integrity of the revenue or law enforcement issues) in public session but to disclose such matters by way of confidential submissions or to committee hearings *in camera*.

The annual reporting power is of significance for the Commissioner to regularly inform the Parliament as to the performance of the ATO in the last year and on the state of the tax system. The need for the power to encourage open disclosure and advice to the Parliament is illustrated by the ruling of the High Court in *Jackson v Maguire*[59] that this reporting power provides a defence for the Commissioner against a defamation claim.

In 2000 and 2001, the issue emerged as to the extent of the Commissioner's powers to report on "breaches and evasions" concerning barristers in NSW who were believed by the Commissioner to be avoiding their tax responsibilities through the resort to bankruptcy and other forms of non-compliance such as non-lodgement of income tax returns and not having tax file numbers. The Commissioner, acting on legal advice, declined to include in his *Annual Report* the names of certain barristers who were persistent debtors.[60]

Aside from the question of the scope of the reporting power, the question may be asked as to the effectiveness of the parliamentary accountability processes. As a matter of policy, any doubts as to the scope of the annual reporting power should be clarified.

A more basic issue is whether genuine accountability is compromised by the party-political overtones of the parliamentary committee process and whether the committees in any event have the resources to effectively handle the scale and complexity of tax issues that they are expected to deal with.

58 *Income Tax Assessment Act 1936* s 14 and analogous provisions in other tax laws.
59 (1947) 75 CLR 293.
60 *Annual Report 1999-2000* Ch 1 – 'Persistent Debtors'.

Commissioner and the Executive

The Treasurer is the senior Minister responsible to the Parliament[61] for tax issues.[62] Under arrangements following the November 2001 election, a new Ministry was created, called the Minister for Revenue, to assume day to day responsibility for the tax system. The Minister for Revenue, who is a member of the outer Ministry, assists the Treasurer, who is a Cabinet Minister.

The formalities underlying these arrangements are little known and are therefore set out. Interestingly, no mention whatsoever is made of the ATO. Under Part 16 of the Administrative Arrangements Orders (AAOs) signed by the Governor-General,[63] the Treasurer is assigned the administration of all tax laws. Under the AAOs, taxation and matters arising from legislation administered by the Treasurer are matters dealt with by the Department of the Treasury.

The arrangements described in the AAOs may appear to conflict with the general administration of the tax laws conferred on the Commissioner under statute.[64] There is no conflict, however, because the purpose of the AAOs is to allocate responsibility as between Ministers and Departments for the purpose of general administration and responsibility in the Parliament.

Indeed, by the establishment of the Office of Minister for Revenue with a direct line of reporting from the Commissioner of Taxation on tax administration issues, together with the transfer of the legislation development and design function from the ATO to the Department of the Treasury,[65] the lines of Executive reporting have been clarified. Prior to that there was a more complex reporting line to Ministers directly with or through the Department on policy issues with the Commissioner reporting directly to Treasury Ministers on tax administration issues.

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61 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146-147; *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1, 23-24; *NSW v Commonwealth* (1975) 135 CLR 337, 364-365; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364-365.

62 Treasurer's Press Release No 96/2001 (14 November 2001): *Treasury Portfolio - Allocation of Ministerial Functions*.

63 Dated 26 November 2001, amended on 20 December 2001 and 8 August 2002.

64 See further discussion in Part 3, above.

65 Treasurer's Press Release No 22/2002 (2 May 2002): *Reforms to Community Consultation Processes and Agency Accountabilities*.

The first Minister for Revenue, Senator the Hon Helen Coonan, stated in a speech on 26 July 2002,[66]

> Of course, the Commissioner of Taxation has absolute autonomy in the actual administration of the tax laws.
>
> Perceptions of a non-partisan administration of the taxation laws are as fundamental to successful tax systems (and hence successful government) as are non-partisan judicial systems to the rule of law and sustaining a democratic society.
>
> For this and other reasons, the Commissioner of Taxation has - and will continue to have - absolute discretion in the day to day administration of the tax laws.
>
> At the same time, democratic government is held accountable by society for the taxation system that it imposes and so must be able to deliver a system that accords with democratically expressed preferences.
>
> This is the part of tax administration that is within the Government's domain - tax administration policy - and this is my challenge as Minister for Revenue.
>
> The Government's roles in tax administration include:
>
>> putting in place a robust tax design framework that generates tax laws that are unambiguous, responsive to the legitimate concerns of taxpayers, and conducive to effective administration;
>>
>> adequately resourcing the tax administration function; and ensuring that appropriate accountability and review mechanisms are in place to identify and remedy any problems in tax administration.
>
> These, then, are my broad responsibilities as Minister for Revenue and Assistant Treasurer …

The Minister's statements are exactly in line with the democratic principles outlined earlier in our historical review of tax administration.

Nevertheless, even if the formalities and rhetoric are clear, is the independence and accountability of the Commissioner in relation to the Executive in reality appropriate and workable? Compelling as Senator Coonan's statement is, what is to be made of the fact that Ministers have no power of direction over the Commissioner in respect of how the Commissioner administers the tax laws and that the Commissioner is prohibited at pain of criminal penalties from

66 Speech to the Challis Tax Discussion Group.

disclosing information to the Minister concerning information protected by tax secrecy provisions? Is the Minister in a powerless position? How does the relationship work in reality?

In fact, real world dynamics and history suggest that Ministers and the Commissioner seek to form a partnership in the bona fide pursuit of the public interest and collection of budgeted revenue, with due attention to convention and their respective responsibilities, restrictions and obligations.

The Commissioner does not hold all the cards because the Government enjoys many areas of significant direct and indirect influence over tax administration, eg,

- through the parliamentary process allocates the Commissioner's budget;
- the ability to amend the tax laws;
- the ability to transfer administrative responsibilities to or from the ATO (eg, transferring the legislation development and design function to the Department of the Treasury; transferring the Child Support Agency away from the ATO; transferring the Excise function to the ATO);
- administration of many areas of government that bear on the ATO (such as the Public Service Commissioner, financial and administrative arrangements under the Department of Finance and Administration and the *Financial Management and Accountability Act 1997*);
- the power to appoint the Commissioner and Second Commissioners.[67]

This is not to say these powers are abused. Indeed, the checks and balance on government as a whole put a brake on that and governments are, in general, assiduous in their attention to probity and objective decision-making about public administration. A recent and important example is in the appointment of an independent output pricing review for consideration by the government, resulting in additional ATO funding from 2002-2003 onwards.[68]

Nonetheless, the Commissioner's active support is critical to deliver government policy outcomes such as:

- collecting budgeted revenue;
- implementing new legislation.

The potential for tension between the Treasury Ministers and the Commissioner remains and it would be denying political reality to ignore the fact that the ATO's relationship with the community is of vital political

67 *Taxation Administration Act 1953* s 4.
68 *ATO Annual Report* 2001-2002, 81.

significance for the government as well as the ongoing confidence of the community in the tax system and, ultimately, the fate of the Commissioner. Far from suggesting that attention to the politics of tax administration is improper, it would seem to be of the utmost propriety for the government and the Commissioner to be responsive to community concerns.

It is in this context that the relationship with the Executive becomes a critical one. If the Commissioner ignores or miscalculates the handling of an area of community concern about tax administration, the heat will quickly be on the Treasury Ministers and it is usually here that the first real accountability mechanisms start to kick in. I say "first" because parliamentary and judicial accountability are by their nature usually far slower to get into gear. A sense of public responsibility energised with self-interest will prod Ministers to promptly let the Commissioner know there is a problem. It does not need to be said, although sometimes it is, that a consequence will be found for failure to find a solution. That is so, even though the Commissioner's tenure deprives the Minister aiming to give the Commissioner a swift kick of an iron foot inside the Minister's velvet slipper. For that reason, whilst it is naive to think all problems can be nipped in the bud, ideally the Commissioner will have anticipated problems and have them under control or, better, sorted out before the Minister calls the Commissioner or, worse, calls for the dressing gown and associated footwear.

Accordingly, adjustment in accountability arrangements is ongoing. Sometimes this is reactive, for example to recommendations of Parliamentary Committees, the Ombudsman, the Auditor-General and so forth. Sometimes it is proactive. The Commissioner will seek to keep ahead of the game by ensuring that, for example, a Taxpayers' Charter exists, is kept up to date, backed up by a Problem Resolution Service and so forth. Deeper systemic changes are also sought.

But rarely is everyone happy with the administration of tax laws in Australia, witness in March 2003 the passage of the Bill to establish the Office of the Inspector-General of Taxation and the ongoing tax agents, work to rule campaign against the perceived failure of the ATO to provide services of the required standard.[69]

69 Institute of Chartered Accountants Australia, Taxation Institute of Australia, National Tax Agents Association Australia, Joint Press Release 13 August 2002, threatening to abandon electronic lodgement of tax returns from 28 October 2002. The Commissioner's response is summarised in his speech "A New Compact with the Tax Professions" (22 October 2002).

Commissioner and the Public Service

As noted in the previous sections, the Commissioner in many respects is subject to the same general regulatory and operating systems that apply to other public service departments such as those concerning budgets, finance, human resource, administrative resources and information management.

How does the Commissioner differ from a Departmental Secretary in relation to accountability to the Executive Government (that is, through the responsible Minister)? Not much, perhaps, aside from the already mentioned differences in tenure and statutory powers.

The similarities are evident in that the Commissioner, although not subject to the *Public Service Act* 1999 in respect of tenure issues,[70] is treated as the Head of a Statutory Agency comprised by the Commissioner and the Australian Public Service (APS) Employees assisting the Commissioner.[71] As an Agency Head, the Commissioner, in addition to ATO staff, are bound by the APS values.[72]

The APS Values are as follow (emphasis added):

(a) *the APS is apolitical, performing its functions in an impartial and professional manner*;

(b) *the APS is a public service in which employment decisions are based on merit*;

(c) the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;

(d) *the APS has the highest ethical standards*;

(e) *the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public*;

(f) *the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs*;

70 *Taxation Administration Act 1953* s 5(3). Note that this subsection appears in a section concerning tenure and should therefore be read as only operating to disapply the *Public Service Act* provisions relating to the removal of agency heads.

71 *Taxation Administration Act 1953* s 4A(2).

72 *Public Service Act 1999* s 10. The values apply to agency heads: s 12.

(g) *the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public*;

(h) the APS has leadership of the highest quality;

(i) the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;

(j) the APS provides a fair, flexible, safe and rewarding workplace;

(k) the APS focuses on achieving results and managing performance;

(l) the APS promotes equity in employment;

(m) the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment;

(n) *the APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government*;

(o) the APS provides a fair system of review of decisions taken in respect of APS employees.

The APS Code of Conduct that also binds the Commissioner and ATO staff. It provides[73]:

The APS Code of Conduct

(1) An APS employee must behave honestly and with integrity in the course of APS employment.

(2) An APS employee must act with care and diligence in the course of APS employment.

(3) An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.

(4) *An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:*

(a) *any Act (including this Act), or any instrument made under an Act; or*

(b) *any law of a State or Territory, including any instrument made under such a law.*

73 *Public Service Act 1999* s 13.

(5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.

(6) *An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.*

(7) *An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.*

(8) An APS employee must use Commonwealth resources in a proper manner.

(9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.

(10) An APS employee must not make improper use of:

(a) inside information; or

(b) the employee's duties, status, power or authority;

in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

(11) *An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.*

(12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.

(13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

The emphasis is added because many of those lessons of history reviewed earlier were legislated as public service values, for the first time in Australia, in 1999. Indeed, the *Public Service Act 1922* contains important forms of accountability by way of the threat of public service discipline proceedings and loss of employment due to breach of the APS Values and Code of Conduct.

So perhaps, save for tenure, the Commissioner is really in a very similar position to a Departmental Secretary? The importance of their difference in tenure is linked to the issue of alleged politicisation of the position of Departmental Secretary.

The events surrounding the so-called “children overboard incident” drew into the public eye again the issue of politicisation of the public service in a way that has not been seen for quite some time. Some media writers also linked the issue of Secretaries being beholden to the Government for performance pay as a

recipe for short-termism, a lack of political impartiality and a failure by the public service to be independent, frank and fearless in their administration.[74] That Secretaries are at risk because of their tenure is evident from the Government appointing four and removing two Defence Secretaries in the last three years.

By comparison, one wonders how many Commissioners of Taxation over the last 100 years would have been appointed and removed but for the tenure protections for the Commissioner. One also wonders what would have been in the best interests of the community and the tax system?

Performance accountability

An important facet of the accountability of any organisation is in respect of its performance. Perusal of the Commissioner's Annual Reports and the ATO website show the Commissioner regularly measures the performance of the ATO and publishes the results. Indicative of the wide range of areas in which performance is measured includes:

- revenue collection;
- taxpayer compliance statistics;
- against the service standards under the Taxpayers' Charter;
- quality standards for tax technical work;
- handling of Ministerial correspondence;
- call centre performance;
- administrative costs against revenue performance;
- tax return and related processing.

Consistent with APS-wide policies, the Commissioner has also been undertaking a comprehensive program investigating whether outsourcing of particular functions within the ATO (primarily corporate services) may be appropriate and then market testing ATO performance against the market to determine where value for money is best obtained.[75]

ATO performance is also evaluated by the Auditor-General in a wide range of areas as well as agencies such as the Department of Finance & Administration and the Public Service Commission in respect of resource management.

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74 Michelle Grattan, 'Why It Pays To Please The Minister', *Sydney Morning Herald*, 28 March 2002, 11; Geoffrey Barker, 'Fallen Pillars: The Assault On Public Institutions', *Australian Financial Review (Weekend)*, 28 March – 1 April 2002, 31.

75 *ATO Annual Report 2001-2002* 191.

Nevertheless, ATO performance is sometimes criticised for falling short of expectations. Accounting and tax professional bodies report member complaints about the ATO on an ongoing basis, such as the tax agent "work to rule" campaign noted earlier. These complaints can undermine community confidence in tax administration.

The question arises whether, despite the evident commitment of the ATO to performance measurement and improvement, there is a lack of direct consequences for non-performance and therefore a gap in accountability.

One option for consideration is whether there should be the discipline of a market relationship between the ATO as service provider and tax agent and taxpayer as consumer to bridge this gap in accountability. Put another way, the ATO in some senses is like a major financial services institution, except that those institutions are subject to the discipline of shareholders, bank customers, investors or policyholders switching to another institution if service or the overall value proposition is not up to scratch. Certainly these institutions have a lot of market leverage, but they also have a highly mobile customer and shareholder base. The ATO's customers cannot choose to go to another tax office, unless they escape the Australian tax jurisdiction.

How might this be addressed? At least two performance accountability options suggest themselves. One is simply to outsource; the other is to establish a purchaser/provider relationship within the public sector.

The outsourcing option may offer potential cost savings and is already being examined, as noted earlier. Outsourcing, however, can only proceed if risks can be managed, such as:

- the function is one that the public interest does not require be kept within the public sector;
- compliance can be assured with service standards and policies that would be expected of any supplier (be it the ATO private sector); and
- in the event of service provider failure, business continuity can be maintained.

The purchaser/provider model, which applies in a number of areas of service provision to the community such as welfare services and already applies to the ATO in respect of its undertaking the role of the Family Assistance Office,[76] would involve an area of government acting as the purchaser of some core ATO services.

76 *ATO Annual Report 2001-2002* 73.

Under this model, the volume, price and standard of services would be agreed on a contractual basis. There would be an incentive for the ATO to improve its service standards so as to "make a profit" and to "avoid a loss". The discipline would be that, in the event of either eventuality, the ATO's performance would not only be measured but would have a consequence.

To make this work, the ATO would need to separate out the areas that would be subject to a purchaser/provider model from the core business of the ATO. For example, all ATO processing functions might be put into a separate entity that had its services "purchased" by another entity responsible for acting as a proxy of the end users of those services, eg tax agents, taxpayers.

Inspector-General of Taxation and the Tax Ombudsman

A recent addition to the debate on accountability of the ATO has come in the form of the Government's 2001 election campaign proposal for an Inspector-General of Taxation, as part of a broader review of the structures and governance of Commonwealth statutory authorities.[77] After Labor and minor party opposition in the Senate, a Bill to establish the Office of the Inspector-General of Taxation was passed by the Parliament at the end of March 2003.

The Inspector-General will act as a taxpayer advocate in undertaking investigations into and reporting on systemic issues in tax administration. Although the Special Tax Adviser to the Commonwealth Ombudsman would claim to have had a systemic focus, the Government has evidently found that this is not sufficient. Instead, the Act envisages an Office with an exclusive focus on systemic issues, leaving the role of investigating particular complaints by taxpayers to the Ombudsman. The Ombudsman and Inspector-General will be required to co-ordinate and it remains possible that there will be some overlap in their functions.

Section 3 of the Inspector-General of Taxation Act 2003 states:

> **The objects of this Act are to:**
>
> (a) improve the administration of the taxation law for the benefit of all taxpayers; and
> (b) provide independent advice to government on taxation administration; and
> (c) identify systematic issues in taxation administration.

77 Coalition Policy Statement, *Securing Australia's Prosperity* (November 2001) 15-16; Review announced by Prime Minister in a media release issued on 14 November 2002 *Review of Corporate Governance of Statutory Authorities and Office Holders*.

The meaning of this clause may perhaps be adduced from the Explanatory Memorandum for the original clause.

The *Explanatory Memorandum* states:

> **Clause 3 Object of this Act**
>
> 3.3 This clause makes it clear that the object of the Inspector-General of Taxation Act will be to improve the administration of the tax laws for the benefit of all taxpayers. It will be necessary for the Inspector-General to balance the individual benefits that might flow to a particular taxpayer or group of taxpayers from simplifying an administrative system, with the need to protect the integrity of the tax system for the benefit of Australian taxpayers as a whole.

The second sentence in this statement exposes potential tension within the concept of the Inspector-General as a taxpayer advocate. The Inspector-General is expected to balance competing considerations or requirements so that the interests of all taxpayers are advanced. No doubt this is a signal that the Inspector-General must not be an advocate for some taxpayers against the interests of others.

This puts the Inspector-General into the position in which governments frequently find themselves, namely seeking to balance competing stakeholder and policy requirements. In practice, it is impossible to establish a balance that has winners without losers, except where there is a total consensus or a total compromise.

This expectation of balancing is unrealistic. Take an example to illustrate the problem. The Inspector-General might report that the level of litigation test case funding is insufficient. The question whether it should be increased, however, involves a number of competing interests. Internally, for the ATO to find extra funds for test case funding, funds must be taken away from another area, so all taxpayers suffer from another function being deprived of funding. Alternately, the government has to allocate further funds to the ATO, depriving all taxpayers of some other function going unfunded or those funds being used to fund some purpose of community benefit such as public debt reduction. A further difficulty is that Commonwealth legal aid policy considerations may be inconsistent with increasing funding on the basis of the Government decision that legal aid funding should be capped overall or given only to the most deserving cases (what is more important - funding the legal defence of a murder defendant or a tax case?).

The Inspector-General envisaged in the Act will presumably become embroiled in all these tradeoffs before coming to a recommendation on solving any systemic problem. A better approach is for the Inspector-General to identify

systemic problems, canvass possible solutions and let those whose job it is to make the tradeoffs do so and explain their decision. That is, leave the Commissioner, the Cabinet or other decision maker to address the systemic issue, rather than muting the Inspector-General by a requirement that effectively forces compromises to be made before the Inspector-General reports.

Also, $2m annual budget may be insufficient for the Inspector-General to function effectively.

Judicial review and litigation

Judicial review is the final area of accountability to consider. Judicial review, that is contestability in court of a tax liability, is essential for a tax to be constitutional. As Windeyer J stated in *Giris*;

> to impose what has been described as an "incontestable" tax: see *Deputy Commissioner of Taxation v. Hankin* (1959) 100 CLR 566, at pp 576, 577, and it was rightly conceded by counsel for the Commissioner that a law which sought to prevent a taxpayer from having recourse to the courts in order to test the legality or the correctness of an assessment to tax would be beyond the power of the Parliament: see *Dawson v. The Commonwealth* (1946) 73 CLR 157, at p 182 ; *Deputy Federal Commissioner of Taxation v. Brown* (1958) 100 CLR 32 , per Dixon C.J. (1958) 100 CLR, at p 40 and per Williams J. (1958) 100 CLR, at p 52 ; *Hughes and Vale Pty. Ltd. v. New South Wales (No. 2),* per Dixon C.J., McTiernan and Webb JJ. (1955) 93 CLR 127, at p 165.[78]

The tax jurisdiction has some main attributes:

- tax assessments and private binding rulings may be subject to objection and appeal under Part IVC of the *Taxation Administration Act 1953*;
- within the appeal process, the decision-making of the Commissioner required under tax laws to make an assessment, such as the formation of an opinion (as was the case in *Giris*), is open to challenge in so far as it bears on whether the assessment is excessive;
- a limited range of Commissioner decisions may be subject to the *Administrative Decisions (Judicial Review) Act 1977*, including decisions to exercise most of the specific powers conferred on the Commissioner such as for access to premises and requiring the provision of information or production of documents;[79] but excluding decisions such as those relating to the making of an assessment) referred to in Schedule 1 and decisions made

78 *Giris Pty Ltd v FCT* (1969) 119 CLR 365, 389.

79 Under ss 263 and 263 *Income Tax Assessment Act 1936.*

under the Commissioner's general power of administration (and therefore not a decision under an enactment subject to the Act);[80]

- the High Court or Federal Court may exercise its jurisdiction to review the due making of an assessment if bad faith can be established;[81]

A question that occasionally arises is whether the jurisdiction of the Courts should be enlarged. Some ideas for expansion would not be constitutionally permissible such as for the Courts to review public rulings in the abstract. Such an exercise of power, being analogous to the giving of an advisory opinion, is not a valid exercise of judicial power because there is no "matter" at issue between parties concerning their legal rights, powers or obligations.[82]

A policy debate sometimes occurs around the Schedule of exclusions under the ADJR Act. From a strict accountability point of view, there is a gap, but also there is an evident trade-off. That trade-off is that in most cases taxpayers can either challenge the excessiveness of the assessment in Part IVC proceedings or take procedural points under s 39B of the *Judiciary Act 1903*, albeit the litigant has more procedural rights under the ADJR Act. For that trade-off the Commissioner is relieved of having all procedural decisions exposed to judicial scrutiny, a potentially massive workload that may not be a justified cost for the community.

The remaining accountability to mention concerns the Commissioner in litigation. The Commissioner as an agent of the Crown in the right of the Commonwealth has always been required by the courts in litigation to act as a model litigant and also to observe other litigation policies established by the Attorney-General. The administrative supervision of compliance with those policies until 1998 was via the Commonwealth Crown Solicitor and then its successor the Australian Government Solicitor (under the Attorney-General) undertaking the conduct of all Commonwealth litigation. Since 1998, that supervision has passed to the Office of Legal Services Co-ordination (OLSC), a Division of the Attorney-General's Department. Comprehensive Legal Services Directions have been issued by the Attorney-General [83] and are administered by the OLSC.

A practical constraint on review by the Courts is the financial and other costs of litigation. The establishment of the Administrative Appeals Tribunal and the Small Tax Claims Tribunal within it has been of some assistance, as has the establishment of the Litigation Test Case Funding Program. Nevertheless,

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80 See s 3 definition 'decision to which this Act applies'.

81 Exercising jurisdiction under s 39B of the *Judiciary Act 1903*. See *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168.

82 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

83 Pursuant to s 55ZF of the *Judiciary Act 1903*.

for those without the means to pursue the Commissioner in litigation, accountability through judicial or administrative tribunals remains illusory.

The final area of judicial accountability is for the Commissioner personally as a defendant in proceedings against him for damages or money such as a tax refund, as distinct from an administrative law or judicial review proceeding or a proceeding by a taxpayer against a tax liability.

The Commissioner, like all federal public officials, may be sued for damages for a civil wrong. The Commonwealth will cover the Commissioner's exposure to orders for damages and costs,[84] provided the wrong relates to circumstances in which the Commissioner was acting in the normal course of his duties and he was acting reasonably and responsibly.

A more complex question arises as to whether or when the Commissioner might be subject to an order against him personally, as distinct from the Commonwealth or as agent for the Commonwealth, for paying a tax refund. The issue almost arose in the unusual circumstances of the so-called Swimming Pools litigation and the answer remains one that will need to be resolved on a case by case basis for cases not covered by statute. [85]

Part 4: Reform issues

Incremental change

Reform of tax administration has been piecemeal, with the core legislative framework changed little since the Commonwealth borrowed the colonial land tax system as the basis for Commonwealth land tax in 1910.

Notable recent examples of fine-tuning include separation of the policy and administration functions by the transfer of legislation development and design resources from the ATO to the Department of the Treasury[86] and the

84 See *Attorney-General's Legal Services Directions*, Appendix E, made Pursuant to s 55ZF of the *Judiciary Act 1903*.

85 *Commonwealth & Commissioner of Taxation v Precision Pools Pty Ltd* (1994) 94 ATC 4727, paras 18-26.

86 Treasurer's Press Release No 22/2002 (2 May 2002): *Reforms to Community Consultation Processes and Agency Accountabilities*. The transfer of the legislation development and design functions to the Department of the Treasury is also less fundamental than might first appear. This is because the Department of the Treasury always had a tax policy function. What has changed is that in addition to advising the Government on major tax policy matters, ATO resources that developed policy details and translated those into drafting instructions to the Office of Parliamentary Counsel transferred to the ATO. Moreover the ATO is far from uninvolved in the tax policy process - the Commissioner is a member of the

establishment of the Board of Taxation[87] to undertake certain tax policy projects. Additionally, as discussed earlier, the Government has introduced legislation to establish the Office of the Inspector-General of Taxation to be a taxpayer advocate to inquire into and report on tax administration systemic issues.

These reforms carefully avoid disturbing the fundamental design of the tax administration system in terms of its independence and accountability. Significantly, for example, the establishment of the Office of the Inspector-General of Taxation is premised on the ATO's continuing "absolute autonomy in the actual administration of the tax laws".[88]

More challenging attacks on the ATO, most notably from Parliamentary Committees, have been met with practical reforms that address recommendations or issues but have not changed fundamental institutional arrangements. For example:

- The establishment of the Special Tax Adviser to the Ombudsman as a result of the 1993 Report of the Joint Committee of Public Accounts *An Assessment of Tax*[89] is best characterised as an increase in resources for an existing institution, namely the Commonwealth Ombudsman.
- The creation of the Taxpayers' Charter as a statement of administrative, rather than legal standing, that sets out and explains existing taxpayer rights and responsibilities and is supported by resources for problem or complaint resolution.
- The appointment by the Commissioner, initially for two years, of an independent "Integrity Adviser" to undertake reviews, provide advice and co-ordinate organisational risk management processes in the ATO.[90]
- The so-called "revolt" by tax agents and the tax profession over ATO service levels, resulting in a joint statement by the ATO and professional bodies,

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Board of Taxation and the ATO continues to advise on tax policy proposals and draft legislation from a tax administration perspective. It remains to be seen whether the consolidation of policy functions within the Department will improve tax policy making and the introduction of new administrative arrangements to support new tax laws. This topic deserves attention, especially in the light of the focus on integrated tax design in the Review of Business Taxation, *A Tax System Redesigned* (July 1999).

87 Treasurer's Press Release No 83/2000 (10 August 2000): *Board of Taxation: Membership*.

88 *Explanatory Memorandum* to the *Inspector-General of Taxation* Bill, para 1.5.

89 Report No 326, 17 November 1993.

90 *ATO Annual Report 2001-2002* 151.

the appointment of a First Assistant Commissioner responsible for tax agents and other administrative reforms.[91]

My opinions

It may be that the reform experience just outlined demonstrates the good sense and durability of the underlying arrangements to guard the independence of the Commissioner and ensure real accountability. The legislated architecture of the arrangements has certainly been durable - it has not fundamentally changed in the entire period of Australia's federation. But longevity does not of itself make it right for the future.

I would, however, be concerned that we move away from an arrangement that did not seek to ensure the independence and accountability of the Commissioner. Those values have proved of enduring value, even if there is a continuing tension in giving them full expression as the tax system changes and new challenges emerge.

The question of introducing an objects clause to govern the Commissioner's general administration of the Act is a vexed one. Whilst there is some theoretical appeal in a statutory statement of the objectives or purposes of tax administration, would it really add value without cost? The clause would not be easy to agree as a matter of policy and may introduce an unworkable inflexibility into tax administration. The mechanisms for addressing a failure to observe the objects clause would also require consideration. Would the determination of a breach be a matter properly for the Judiciary, the Executive or the Parliament? What consequences, if any, would be imposed on the Commissioner? The answers are far from clear, so the merits of an objects clause are also far from established.

One suggestion is for the introduction of a Board of Administration. Such arrangements exist in a number of countries including the USA. In theory a balance could be struck between a Board providing governance and strategic direction without interfering in the Commissioner's administration at the level of individual taxpayers. This model may offer advantages in terms of:

- greater community input into and transparency of tax administration,
- provide the ATO with access to the expertise and support of Board members;

91 Institute of Chartered Accountants Australia, Taxation Institute of Australia, National Tax Agents Association Australia, Joint Press Release 13 August 2002, threatening to abandon electronic lodgement of tax returns from 28 October 2002. The Commissioner's response is summarised in his speech *A New Compact with the Tax Professions* (22 October 2002).

- superior corporate governance in creating a CEO and Board relationship along the line expected of publicly listed corporations.

Disadvantages could be that:

- the Board may come between the Commissioner on the one hand and Treasury Ministers and the Parliament on the other, clouding the accountability of tax administration;
- the processes of appointment to and accountability of the Board itself may introduce some risks to the overall independence and accountability of tax administration, thereby jeopardizing community confidence;
- a Board may result in over-regulation of and second-guessing of the Commissioner, making tax administration unworkable.

Australian experience with Boards over statutory authorities and statutory corporations has been a mixed one in developing appropriate corporate governance. The particular demands in each situation (be it the ATO, the police, the DPP, the ABC or a transport regulator) necessitates a case by case approach. Evaluation of the benefits of Boards over revenue authorities in other countries would also need to be considered.

There is no strong case for giving the Commissioner the tenure of a Departmental Secretary, but we can readily see the collapse in community confidence in the tax system from exposing the Commissioner to ministerial or political interference that results from a loss of tenure. The dynamics of Executive and Parliamentary accountability need continued monitoring and refinement.

I would like to see parliamentary committees continue their regular scrutiny of tax administration, albeit in a less party-politicised way and with more skilled resources to support the Committee.

Ministerial oversight of tax administration, by way of a Minister for Revenue, with clarified lines of reporting by the Commissioner, is welcome. There is no case, however, for empowering the Minister to direct the Commissioner in the administration of the tax laws and sensibly the current Minister is clear in not seeking this. Nor is the Minister seeking any weakening of the prohibition on disclosure of protected taxpayer information to the Minister. As a protection against Ministerial interference and politicisation of the Commissioner and the ATO, that prohibition continues to be appropriate.

There is room for introducing more discipline into the accountability of the ATO for its performance as a service provider. We should explore the extension of market disciplines through purchaser/provider models in some areas such as

ATO processing and for outsourcing to continue, provided the risks are properly managed.

An aspect of independence that warrants more exploration is whether the Commissioner should have any role in relation to the Australian Valuation Office (AVO) or in relation to the regulation of tax agents.

The AVO is a group that has moved back under the administration of the Commissioner. This is an ill-advised arrangement as it may compromise or appear to compromise the independence of the AVO. This is especially important given that market value tests pervade the tax laws and the need for independent expert valuations in which there is unquestioned community confidence is critical for tax administration.

In relation to the regulation of tax agents, which is the subject of ongoing review, there is a risk of compromising the actual or perceived independence of the regulator if the ATO has a regulatory role. The legitimate interest of the ATO in the integrity of the tax profession is protected by giving the Commissioner an advisory role in making its views known to the regulator and having them taken into account but not in running the regulator itself.

I think the current review arrangements reflect a reasonably fair balance between reviewability and workable tax administration. To me, the real issue is not about jurisdiction but about ensuring taxpayers within the current system to have better access to the Courts and the AAT in worthy cases.

I see no reason to enlarge or reduce the liability of the Commissioner in damages, or for other orders to be any wider than that for any other public official. The Commissioner is accountable before the Courts, but only exposed to personal risk when his actions are outside the course of duty or where he has acted other than reasonably and responsibly. That is a fair balance.

Finally, I would like to raise the problem that the Commissioner is obliged to administer the tax law in accordance with the law, irrespective of the resulting unfairness that may be palpable and agreed by all. This unfairness might be an absurd and unintended outcome for a particular taxpayer or a technical flaw in the law that prevents the Commissioner from administering the law without unfairly disadvantaging a taxpayer. It would be a result that cannot be ameliorated by the existing rulings process.

Currently, cases of unfairness may be dealt with by either the Commissioner referring the issue to the Government to seek an amendment of the law or in finding a practical administrative solution, sometimes reflected in general administrative practice or in the resolution of particular cases. There is a risk that an administrative solution not strictly authorized by the law may be found

in particular cases that will not come to public notice whilst, if the problem is raised more publicly, the Commissioner is unable or unprepared to implement the same solution in a public and general way.

Whilst a general power for the Commissioner to dispense with the law in the case of perceived unfairness would be going too far in abandoning the supremacy of the Parliament and reposing too much power in the Commissioner, there is a legitimate question whether the Commissioner should be given by the Parliament an express power in a carefully defined area to ameliorate unfairness and that that power be subject to clear transparency and checks and balances to prevent abuse.

That carefully defined area might comprise cases where on a clear view of the law an unintended result occurs which is absurd but which the Commissioner is obliged to adopt in administering the law. Checks and balances, which are necessary to ensure that a power to ameliorate unfairness is not abused, might comprise the Commissioner making a formal recommendation to a Treasury Minister for decision. That process would be transparent and subject to formal reporting to the Parliament to ensure that there is clear and public accountability. This may also be a catalyst for legislative amendment to remove the anomaly, because each decision would be confined to the particular case. By the Commissioner having a power of recommendation, the Minister is unable to make a decision unilaterally. The recommendation and decision process would also be open to judicial review.

Part 5: Conclusion

There is unison in the lament about the length and complexity of Australia's tax laws. We should also beware of elaborate and perhaps overly restrictive arrangements that exist for the independence and accountability of the Commissioner.

Before we wrap the Office of the Commissioner in more processes in the name of the noble democratic values of independence and accountability, the overall result must serve the important purpose of collecting the revenue levied by an elected Parliament to pay for programs the Government is elected to deliver.

To conclude, I would like to share a story from a recent biography of Sir Richard Burton, not the actor but the nineteenth century adventurer and translator of oriental literature. I hope you will remember his assessment of British tax administration in the Indian Subcontinent. His biographer takes up the story:

> (Sir Richard Burton) could not help comparing the comparative affluence of the villages under native rule with the wretchedness of those under British collectors. Later, after he had made a nuisance of himself by insisting on explanations, the differences were clarified for him. Under British collectors, taxes were set and had to be paid whether or not they had a good year. The Gaikwar collector, on the other hand, varied his taxes according to the harvest, and thus natives preferred their own rulers. However, the British system had two things in its favour; there was no torture when payments could not be made, and if a householder had a windfall he was not compelled to hand it over.[92]

We might see shortcomings in the current framework, but we need to be alive to the price we pay for the alternative. A tax system without an independent and accountable Commissioner is so unhealthy that the community will not have any confidence in it, whatever the promised benefits. And independence is not an excuse for a lack of accountability and accountability that interferes with independence is repugnant. Both are necessary.

92 M Lovell, *A Rage to Live: A Biography of Richard and Isabel Burton* (Little Brown and Company, England, 1988) 34.