

## CHAPTER 1

### INTRODUCTION

#### I BACKGROUND TO THE RESEARCH AND INITIAL JUSTIFICATION

In 2003, Messere, De Kam and Heady<sup>1</sup> identified major trends in taxation and benefits during the second half of the 20th Century. The trends included: increased social security contributions; the adoption and expansion of Value Added Tax ("VAT"); structural changes to personal income tax, corporate income tax and taxes on capital; changes to the tax/benefit treatment of families; and changes in the tax mix, in part to make tax systems more efficient and more effective.<sup>2</sup> The reforms to implement these trends were associated with significant improvements in tax administration.<sup>3</sup> The tax law was increasingly used to facilitate tax administration; new management techniques and computerisation changed the way the system was administered; and voluntary compliance completely transformed the approach to tax administration.<sup>4</sup>

In a wider context, following the Second World War, there was significant development in the protection of human rights. The United Nations Charter and the Universal Declaration of Human Rights sparked a proliferation of human rights treaties and conventions.<sup>5</sup> Some of these, notably the European Convention on Human Rights, took a role in the protection of human rights previously guarded jealously by domestic

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<sup>1</sup> K. Messere, F. de Kam and C. Heady, *Tax Policy: Theory and Practice in OECD Countries* (Oxford, OUP, 2003), ch. 2.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid, pp. 30-31.

<sup>4</sup> Ibid.

<sup>5</sup> C. Ovey and R.C.A. White, *Jacobs & White: The European Convention on Human Rights* (4th edn., Oxford, OUP, 2006), ch. 1.

law.<sup>6</sup> The strengthening human rights focus saw the introduction across the world of constitutions containing strong human rights protection and numerous charters or bills of rights. The strength of this movement coincided in part with the inexorable spread of democratic government and the rule of law.<sup>7</sup> A significant feature of almost all rights documents was the broad exclusion of matters pertaining to taxation.<sup>8</sup>

Yet, in 1987, the International Fiscal Association held its first seminar on *Taxation and Human Rights*.<sup>9</sup> It explored a range of tax matters influenced by the application of the European Convention on Human Rights. In the years that followed, it was found that both international human rights instruments and domestic protection of human rights began to influence tax matters. Albrechtse and Van Arendonk in 1998 published a compilation of papers from a 1996 European Fiscal Studies Conference, which explored the growing range of protection for taxpayers in a number of European countries.<sup>10</sup> This was followed by a range of articles and books exploring the influence of human rights on tax matters.<sup>11</sup>

The major changes in tax administration, meanwhile, had altered the way revenue authorities were treating taxpayers, particularly as they sought to encourage voluntary compliance with the tax law.<sup>12</sup> As a reflection of this, in 1990 the OECD released a report of a survey of taxpayers' rights and obligations.<sup>13</sup> The report focused not on human rights influences, but the relationship of taxpayers' rights to the compliance and enforcement

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<sup>6</sup> Ibid., p. 4.

<sup>7</sup> Ibid., pp. 4-6.

<sup>8</sup> Discussed, for example, in P. Baker, 'Taxation and the European Convention on Human Rights' [2000] *British Tax Review*, 211, 213.

<sup>9</sup> International Fiscal Association, *Taxation and Human Rights* (Rotterdam, Kluwer Law and Taxation Publishers, 1988).

<sup>10</sup> D. Albrechtse and H. Van Arendonk, *Taxpayer Protection in the European Union* (London, Kluwer Law International, 1998).

<sup>11</sup> For example, P. Baker, above n. 8; C.O. Lenz, 'The Jurisprudence of the European Court of Justice in Tax Matters', (1997) 2 *EC Tax Review*, 80; S. Raventós, 'Recent Income Tax Cases before the European Court of Justice: Impact on Future Tax Policy in Europe' (1998) 38 *IBFD Bulletin*, 336; R. Persson-Österman, 'Human Rights in the Field of Taxation: a View from Sweden' (1999) 2 *The Cambridge Yearbook of European Legal Studies*; and M. Lang (ed.), *Direct Taxation: Recent ECJ Developments* (The Hague, Kluwer Law International, 2003). Further examples are used throughout the thesis.

<sup>12</sup> K. Messere, F. de Kam and C. Heady, above n. 1, p. 31.

<sup>13</sup> OECD, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (Paris, OECD, 1990).

powers of revenue authorities.<sup>14</sup> The report reflected the increase in interest in taxpayers' rights and that interest was reflected in the subsequent growth in the number of administrative charters of taxpayers' rights.<sup>15</sup>

Something of a two-strand approach to taxpayers' rights developed. The revenue authorities concentrated closely on relating the development of rights to the improvement in the relationship between the revenue authority and taxpayers.<sup>16</sup> This is reflected by then Australian Commissioner of Taxation, Michael Carmody, in 1998, when he said in a paper aptly entitled, 'Future Directions in Tax Administration Or Community Confidence: The Essential Building Block':<sup>17</sup>

At the end of the day, any tax system relies on the underlying support of the community. Equally, any tax administration will only be capable of performing its role effectively if it has the confidence of the community in the way it goes about its job. It is this recognition that is fundamentally shaping our approach to tax administration.

A number of international reports were issued reinforcing the importance of taxpayer right protection. For example, the OECD Centre for Tax Policy and Administration

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<sup>14</sup> Ibid., p. 7.

<sup>15</sup> Described e.g., in D. Bentley (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998); P. Baker and A.M. Groenhagen, *The Protection of Taxpayers Rights – An International Codification* (London, European Financial Forum, 2001); M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review*, 22; S. James, K. Murphy and M. Reinhart, 'The Taxpayer's Charter: A Case Study in Tax Administration' (2004) 7 *Journal of Australian Taxation*, 336; and S. James, K. Murphy and M. Reinhart, 'The Citizen's Charter: How such Initiatives might be More Effective' (2005) 20 *Public Policy and Administration*, 1.

<sup>16</sup> A comprehensive analysis and review of the research to the late 1980s can be found in J.A. Roth, J.T. Scholz and A.D. Witte (eds), *Volume 1 - Taxpayer Compliance: An Agenda for Research* and J.A. Roth and J.T. Scholz (eds), *Volume 2 - Taxpayer Compliance: Social Science Perspectives* (Pennsylvania, University of Pennsylvania Press, 1989). Later research is reviewed in J. Wickerson, 'The Changing Roles of Taxpayer Audit Programs: Some Recent Developments in the Australian Taxation Office' (1994) 4 *Revenue Law Journal*, 125; J. Hasseldine, 'How Do Revenue Audits Affect Taxpayer Compliance?' (1993) 47 *IBFD Bulletin*, 424; V. Tanzi and P. Shome, 'A Primer on Tax Evasion' (1994) 48 *IBFD Bulletin*, 328; G.S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (Amsterdam, IBFD and ATRF, 1997); and V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot, Ashgate Publishing Ltd, 2003).

<sup>17</sup> M. Carmody, 'Future Directions in Tax Administration or Community Confidence: The Essential Building Block' in C. Evans and A. Greenbaum (eds), *Tax Administration: Facing the Challenges of the Future* (1998 Prospect), ch. 16.

published in its Tax guidance series, *Principles of Good Tax Administration – Practice Note* (2001) and *Taxpayer Rights and Obligations* (2003),<sup>18</sup> which stressed the importance of outlining and communicating to taxpayers their rights and obligations. The IMF *Manual on Fiscal Transparency* said that ‘Taxpayers’ rights should be clearly stated’.<sup>19</sup>

However, commentators began to explore a larger framework for taxpayers’ rights looking beyond rights as a basis for improved compliance towards a broader rights context.<sup>20</sup> This formed the basis for and was specifically raised by most contributors in the author’s 1998 comparative work on taxpayers’ rights.<sup>21</sup> Sawyer’s 1999 work called for an international statement on taxpayers’ rights so that consistent rights could be developed.<sup>22</sup> Baker and Groenhagen argue forcefully for an international codification of taxpayers’ rights.<sup>23</sup>

To bring together the two strands: taxpayers’ rights supporting voluntary compliance; and taxpayers’ rights in the broader legal application; requires a more substantial theoretical framework and classification of rights than is available in the general literature. Both relate to tax administration and together cover the legal and administrative aspects of taxpayers’ rights. The OECD statements of best practice identify some of the more important rights. However, they are brief and restrict themselves largely to administrative rights in the context of improving voluntary compliance. There is a stated need for a comprehensive statement of taxpayers’ rights covering both the administrative and the legal. The statement should be grounded in a framework that goes beyond compliance to encompass the legal theoretical basis for taxpayers’ rights.

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<sup>18</sup> Available at <[www.oecd.org](http://www.oecd.org)>, 1 November 2006.

<sup>19</sup> Fiscal Affairs Department, *Manual on Fiscal Transparency* (Washington DC, IMF, 2001), p. 20.

<sup>20</sup> Above n. 15, and see also, e.g., D. Deák in ‘Right to Right Tax Laws’ (2000) 28(3) *Intertax*, 110; A. Halkyard, ‘Treating Taxpayers Right: Taxpayers’ Rights with Special Reference to Hong Kong’ (2001) 9 *Asia Pacific Law Review*, 133; and A. Sawyer, ‘A Comparison of New Zealand Taxpayers’ Rights with Selected Civil Law and Common Law Countries - Have New Zealand Taxpayers Been “Short-Changed”?’ (1999) 32 *Vanderbilt Journal of Transnational Law*, 1346.

<sup>21</sup> D. Bentley, above n. 15.

<sup>22</sup> A. Sawyer, above n. 20, p. 1347.

<sup>23</sup> P. Baker and A-M. Groenhagen, above n. 15.

The need is greater in that Messere et al,<sup>24</sup> identify that the move to reform continues unabated. The rationale for the OECD practice statements is to provide guidance for revenue authorities as they try to develop best practice. This is important both for developing countries as a standard to follow<sup>25</sup> and for developed countries as a benchmark for quality assurance.<sup>26</sup> Currently, there is therefore no comprehensive best practice statement in the area of taxpayers' rights beyond the minimal guidance provided in the OECD practice statements.

Based on this analysis, a guide to best practice in the area of taxpayers' rights would be useful to a range of groups including:

- governments, policy advisers and consultants involved in the review or the reform of tax systems;
- revenue authorities for benchmarking and quality assurance;
- taxpayer representative groups to provide input into best practice tax administration;
- taxpayers to understand the scope and content of their rights; and
- researchers in taxation in both legal and non-legal disciplines to understand the legal framework for taxpayers' rights.

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<sup>24</sup> K. Messere, F. de Kam and C. Heady, above n. 1.

<sup>25</sup> Discussed in R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thuronyi, (ed.), *Comparative Tax Law* (The Hague, Kluwer Law International, 2003), p. 95, p. 110.

<sup>26</sup> The stated aim of the two practice notes, see OECD, above n. 18.

## II HYPOTHESIS

Based on the current literature on taxpayers' rights and noting the gap in the research for a comprehensive statement of taxpayers' rights, firmly grounded in legal theory, this thesis will show that:

*It is timely and beneficial to articulate a Model of Taxpayers' Rights as a guide to best practice in tax administration.*

The thesis concludes that it is timely and beneficial to articulate such a Model of Taxpayers' Rights ('Model') given the international demand for guidance on best practice in tax administration. It concludes also that it is possible to articulate a Model as a guide to best practice in tax administration and does so in Chapter 9 of the thesis.

## III METHOD AND OUTLINE

This thesis combines three types of legal research method, identified in the Pearce Report<sup>27</sup> in its review of Australian legal education in 1987. First, in the early chapters and where relevant in the later chapters it uses theoretical research to understand and formulate the conceptual bases of the legal rules and principles considered. Second, in understanding existing rules it employs doctrinal research, in which there is the systematic exposition, analysis and critical evaluation of legal rules and their interrelationships. Third, the underlying thread for the research is to propose reform by providing recommendations for change, based on critical examination.

The research uses a mix of analysis and synthesis as it draws from a broad range of diverse materials across disciplines and jurisdictions. It recapitulates the relevant elements of the concepts found in a wide range of legal theory. From these it expounds and analyses, through a mix of induction and deduction, the application of the theory, rules and principles to the development of a Model of taxpayers' rights. The choice of relevant rules and standards relies on making connections across often dissimilar and unrelated comparative and international concepts. The proposals for reform are finely nuanced as they require critical understanding of context across diverse jurisdictions and simultaneous appreciation of the implications of developments in the different international fields to take advantage of what is possible.

Chapter 2 provides the rationale for a Model from an examination of legal and rights theory. It determines from the literature covering both theory and practice of tax administration that a two-tier Model is appropriate to provide guidance on best practice to both developed and developing countries. It also concludes that the Model need not include both rights and obligations. The analysis of the literature and practice concludes that in the global context a Model is realistic and that there is significant incentive for states to adopt the rights contained in a Model.

Chapter 3 analyses a wide range of major reports into tax systems and demonstrates that they have developed a common set of principles. These principles can be applied in later chapters to provide justification for the rights chosen for a Model. Chapter 3 identifies the difficulties that will arise in interpreting the rights contained in the Model based on an analysis of current international experience. It recommends that this can be solved in part by recognising both the divergence between legal systems but also the development of common standards.

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<sup>27</sup> D. Pearce, E. Campbell, and D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra, AGPS, 1987), para. 9.14.

Chapter 4 first assesses the need for a guide to best practice in relation to taxpayers' rights in the context of both national and international developments. It then derives from a range of legal theory a classification for the rights chosen based on whether they are enforced by law or administratively. This in turn provides the foundation for the analysis of the rights in subsequent chapters.

Chapter 5 explores the nature of rights through their method of enforcement. It demonstrates from constitutional and alternative dispute resolution theory that there is scope for a wide range of measures to enforce taxpayers' rights effectively and analyses each method of legislative and administrative enforcement. The Chapter concludes that the method of enforcement is critical to the scope, content and effectiveness of a right.

Chapters 6 to 8 provide an analysis of individual rights to be included in the Model based on methods of enforcement described in Chapter 5 and an analysis of internationally accepted standards of best practice. Chapter 6 examines the primary legal rights that underlie the fundamental operation of the tax system. Chapter 7 analyses the features of good tax administration and the rights that flow from it. This includes an examination of taxpayers' charters and principles of good administrative practice. Chapter 8 analyses rights which flow from the essential functions and operation of the tax administration. Chapter 8 uses a functional analysis in examining the rights attaching to information gathering, audit and investigation; assessment; sanctions and enforced collection; and objection and appeal.

Chapter 9 proves the hypothesis by articulating a Model of Taxpayers' Rights as a guide to best practice in tax administration.

#### IV SIGNIFICANT LIMITS AND ASSUMPTIONS

Although it attempts a comparative analysis, this thesis focuses significantly on common law jurisdictions in the examples it provides and the theories to which it refers. This is an acknowledged weakness in the analysis behind the Model. The author was constrained in part by language to materials in English. However, the weakness does not undermine the Model itself, which reflects a number of international instruments, documents and surveys that when drawn together, produce much common content.

The thesis has a strongly Australian emphasis, because that is the jurisdiction in which it was written. However, Australia is widely recognised as one of the leaders in best practice in tax administration, which provides justification for this approach.

The thesis is constrained in its analysis in each chapter by the vast literature on almost every topic that exists both generally and in each jurisdiction. The general literature on taxpayers' rights is very limited and is reviewed comprehensively. However, the literature on each specific topic and right is substantial, often warranting many books to cover the breadth of the topic. It is impossible to cover thoroughly each area and the literature from each jurisdiction. The thesis therefore takes the approach that the generally accepted rules and principles provide a basis for best practice. This can be idiosyncratic but it provides a sufficient framework for discussion, opposition and amendment.

The target of the Model is not the general public, although they would benefit from knowledge of the Model. It largely comprises governments, policy makers, revenue authorities, consultants and taxpayer representative groups. There is therefore no need to provide an educational document designed to enhance voluntary compliance. It is also unnecessary to provide a comprehensive tax code containing obligations as well as rights. That goes far beyond the scope of this project.

The Model is based largely in the law and legal theory. Reference is made to the work of accountants, economists and other disciplines. However, the thesis does not pretend to cover the literature of those disciplines except insofar as it is directly relevant to issues considered. It also uses legal research method, which can be distinctly different from research methodologies used in other disciplines.

The Model provides a guide to best practice that applies primarily to international standard setting for domestic laws governing tax administration. There are some implications for international agreements and this would often mean that the procedures would be more onerous if suggested changes to comply with best practice are introduced.

The Model is drafted so that it can be adapted for legislative or administrative enactment. As is made clear in the thesis and introduction, it is essential to adapt it to the relevant context. Accordingly, it does not adopt a drafting style suitable for a particular kind of legislation but is cast generally for ease of understanding.

The law and practice is current at 1 October 2006. Some adjustment has been made for documents issued during October and the first half of November 2006.

## V CONCLUSION

This Chapter has set out the background to the research and the initial justification for the choice of hypothesis. The hypothesis and the outline of the process and method to prove it are articulated. Assumptions and limitations clarify the scope of the thesis. Chapter 2 now provides the rationale for articulating a Model of Taxpayers' Rights as a guide to best practice in tax administration.