January 1995

Taxpayers’ Charter: Opportunity or Token Gesture?

Duncan Bentley

Bond University, Duncan_Bentley@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/law_pubs

Recommended Citation


This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.
The Australian Government has proposed the introduction of a Taxpayers' Charter of Rights. Crucial to the success of this charter is its enforcement. The paper reviews the different possible levels of enforcement in the light of experience in other countries. Each level of enforcement is analysed to determine whether it is appropriate for the Taxpayers' Charter. The article concludes by putting forward a proposal which should ensure a balance of rights between taxpayers and the Australian Taxation Office.

Introduction

On 9 August 1994, the Australian Government released its response to the Report of the Joint Committee of Public Accounts (‘JCPA’) into...
the administration of the tax system. The Assistant Treasurer, Mr George Gear, in announcing the government’s response, highlighted the fact that the taxation system must both be fair and seen to be fair. He said that a balance is needed between ‘the responsibilities of the Tax Commissioner to collect tax and the rights of taxpayers to a fair and impartial hearing when they believe the Tax Office is at fault.’

A major initiative to ensure that the tax system is seen to be fair, is the Taxpayers’ Charter. The government responded positively to the first part of Recommendation 131 of the JCPA Report that ‘the Government consider establishing a Taxpayer’s Charter based on a review of the various models available.’ The Assistant Treasurer said:

The Government will sponsor the development of a Charter which informs taxpayers of their rights in dealing with the ATO.

I expect the Charter to set out the right of taxpayers to be treated fairly and courteously in their dealings with the Tax Office, to be given full reasons for decisions, and to be entitled to an independent review where they are in dispute. The Charter will make it clear that taxpayers have the right not only to seek Tax Office advice, but to be able to rely on that advice.

The Commissioner of Taxation will draw up a draft charter in consultation with taxpayers’ representatives and professional bodies, community groups and relevant government bodies such as the ombudsman and the Privacy Commissioner. The charter will be subject to final approval by the government.

At the time of writing, a review body is in the process of drawing up a Taxpayers’ Charter, following the receipt of submissions from all interested parties. In the context of this review, this article examines each of the various possible levels of enforcement for a Taxpayers’ Charter. The major advantages and disadvantages of each type of enforcement are discussed. In the light of this discussion, the conclusion

3. JCPA, supra note 1, at 314.
suggests the most appropriate level of enforcement for an Australian Taxpayers’ Charter.

**Level of Enforcement**

There are numerous models for enforcement of Bill of Rights legislation. A Taxpayers’ Charter is a specific Bill of Rights and the same principles apply. There are different levels of enforcement and this section examines in the following order, those models representative, in general terms, of each level of enforcement:

- constitutional enforcement;
- legislative entrenchment;
- use of an interpretation clause;
- pre-legislative scrutiny;
- administrative guidelines.

**CONSTITUTIONAL PROVISIONS**

Most countries now have written constitutions. In addition to setting out the structure and operation of government, many constitutions incorporate protection of the rights of citizens. Constitutional Bills of Rights have become increasingly common, with the growing emphasis worldwide on human rights.  

Constitutional protection of human rights should provide the strongest assurance to citizens that their rights will indeed be protected. For after all, in the words of de Smith, the constitution comprises ‘the law behind the law – the legal source of legitimate authority.’ Whether this is because of an intrinsic rule of recognition or because of its pedigree,

---

5. The proliferation of human rights treaties and declarations bears testimony to this. One example from the Commonwealth is the Harare Commonwealth Declaration arising out of the Commonwealth Heads of Government Meeting in Harare in 1991, which not only pledged to work to uphold democracy, but also to protect fundamental human rights.


the constitution is viewed as a higher form of law, 'hierarchically superior to other laws.'

As a higher law, the constitution is not normally alterable except by special procedures. These can be flexible, where amendment is simply by special majority of the legislature. Or they can be rigid, as in Australia, where the Commonwealth Constitution can be amended only by an absolute majority of Parliament, with the approval of a majority of electors both overall and in a majority of States.

The Australian Constitution does not include a Bill of Rights, despite strong arguments that one should be added. Rather, some rights are expressly included. Examples of express rights are the requirement that the Commonwealth not discriminate between States or parts of States in its taxation laws and the requirement that acquisition of property be on just terms. Other rights exist only by implication and rely on the High Court to articulate and uphold their existence. It is the power of the High Court, as chief interpreter of the Constitution, which is central to the effectiveness of the Australian federal system.

Early cases, such as *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, may have, 'in espousing a text-based method of interpretation, enabled the emasculation of express and implied constitutional rights by the High Court.' It is argued that this may no longer be so, following cases such as *Australian Capital Television Pty Ltd v Commonwealth* and *Nationwide News Pty Ltd v Wills*. The High Court seems to have signalled a change in its approach to the

10. Constitution, s 128.
11. For example, Senator Murphy in 1973–74 and Senator Evans in 1985–86.
12. Refer Constitution, s 51(ii).
13. Refer Constitution, s 51(xxxi).
14. This is obvious, not only from Australian constitutional history, but also from the that of the United States and Canada, where the respective Supreme Courts have played pivotal roles.
15. (1920) 28 CLR 129.
interpretation of the Constitution, which will give greater scope for the protection of certain democratic rights. Nonetheless, Mason CJ expressed the position unequivocally in *Australian Capital Television Pty Ltd v Commonwealth*, *supra*, at 136 when he states, with respect to the Constitution that, 'it is difficult, if not impossible to establish a foundation for the implication of general guarantees of fundamental rights and freedoms.'

It is not difficult to see that the rights that a Taxpayers' Charter will protect, are not those protected by implication by the Constitution. If a Bill of Rights were incorporated into the Australian Constitution, taxpayers' rights could be included as a category of protected rights. Until then, some other form of enforcement is necessary.

**ENTRENCHMENT**

The problem facing the courts, when an apparent breach of rights comes before them, was well set out by Brennan J in *Nationwide News Pty Ltd v Wills*, *supra*, at 43:

>A court will interpret laws of the Parliament in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms but the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the courts' opinion, should be preserved.

To overcome this problem, it is possible to introduce a 'manner and form' provision, designed to entrench the legislation embodying the Taxpayers' Charter. A 'manner' provision generally sets a mechanism for amendment or repeal of a piece of legislation, which goes beyond the usual simple majority requirement. An example would be the

---


requirement of a greater than simple majority of both Houses of Parliament,\textsuperscript{21} or approval by a referendum of electors.\textsuperscript{22} A ‘form’ provision generally prescribes an express form that an amendment or repeal must take. An example would be a requirement that legislation inconsistent with a Bill of Rights, to be effective, expressly declare that it should operate notwithstanding the Bill of Rights.\textsuperscript{23} To be effective, a manner and form provision would also generally be entrenched.\textsuperscript{24}

The advantage of entrenching a Taxpayers’ Charter using a manner and form provision is that it overcomes the principle that where a subsequent Act of Parliament conflicts with an earlier Act, the later Act repeals the earlier.\textsuperscript{25} It would mean that the Taxpayers’ Charter could not be repealed expressly or by implication by a later Act of Parliament unless that Act complied with the requirements set out in the manner and form provision. In other words, it would require that any change to the Taxpayers’ Charter ‘be directly considered and intended by the drafters of the later Act rather than be merely an unintended consequence of an implied inconsistency.’\textsuperscript{26}

However, the major problem with entrenchment of a federal law, is whether such entrenchment is possible. The power to tax income was effectively appropriated to the Commonwealth through the 1942 Commonwealth Tax Scheme. Accordingly, any entrenchment of taxpayer rights must take place at the federal level.\textsuperscript{27}

Winterton suggests that the Commonwealth Parliament may enact ‘form’ provisions to direct the courts in their interpretation of valid legislation.\textsuperscript{28} This allows for a provision requiring an express declaration

\textsuperscript{21} See, for example, \textit{The Bribery Commissioner v Pedrick Ranasinghe} [1965] AC 172.

\textsuperscript{22} See, for example, Constitution, s 128.

\textsuperscript{23} See further, Winterton, \textit{supra} note 17, at 171, who gives the example of The Bill of Rights 1960 (Can), s 2.

\textsuperscript{24} Winterton, \textit{supra} note 17, at 172 and Carney, \textit{supra} note 17, at 70.

\textsuperscript{25} Carney, \textit{supra} note 17, at 71.

\textsuperscript{26} Carney, \textit{supra} note 17, at 72.

\textsuperscript{27} Carney, \textit{supra} note 17, at 95, shows that the State Parliaments have the capacity to bind themselves using manner and form provisions. He is less sanguine about the ability of the Commonwealth Parliament to bind itself using manner and form provisions other than by Constitutional amendment.

\textsuperscript{28} Winterton, \textit{supra} note 17, at 190–202.
in any later Act that that Act is to operate notwithstanding a Taxpayers’ Charter. Without an express declaration, a later Act would be inoperative, or perhaps invalid, in so far as it purported to abrogate, abridge or infringe the rights contained in the Taxpayers’ Charter.\(^\text{29}\)

A Taxpayers’ Charter is, by its very nature, an unusual type of legislation. It is broad in scope and is directive, aimed at safeguarding rights, rather than prescriptive as to how that should be done. Protection of fundamental rights through entrenchment is arguably justifiable in the restriction it places on Parliament. It is strongly arguable that ‘form’ provisions, at least, could be used validly to entrench a Taxpayers’ Charter. Whether the rights embodied in a Taxpayer’s Charter are generally viewed as sufficiently fundamental to warrant entrenchment is doubtful. If entrenchment of rights was to take place, it is likely that it would be in the form of a general Bill of Rights rather than a more limited Taxpayers’ Charter. The political and practical difficulty of obtaining passage through Parliament of any bill of rights was shown in New Zealand. The original proposal for a Bill of Rights protected through entrenchment gave way to a model based on a weaker level of enforcement using interpretation provisions.

**PROTECTION THROUGH INTERPRETATION**

A weaker type of protection available for a Taxpayers’ Charter would be a clause, incorporated as part of the enacting legislation, which required subsequent Acts of Parliament affecting taxation matters to be interpreted in accordance with the Taxpayers’ Charter. This method is used in s 4 of the Hong Kong Bill of Rights. In s 4(1) of the Hong Kong Bill of Rights, it states that:

> All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

As an ordinary piece of legislation, the Bill of Rights will override earlier ordinances. Later ordinances which explicitly infringe rights

\(^{29}\) Winterton, *supra* note 17, at 191 and 201.

\(^{30}\) As in s 2 of the Bill of Rights 1960 (Can), which was upheld in *R v Dry-bones* [1970] SCR 282.
protected by the Bill of Rights will prevail.\textsuperscript{31} The strength of such a provision is that the judiciary is required to interpret subsequent legislation to be consistent with the Bill of Rights. To overcome this presumption of consistency, it is necessary for the legislative branch of government to do so explicitly in later legislation.

If the Taxpayers’ Charter adopted this style of interpretive provision, the legislature would have to focus specifically on any proposed breach of the charter. Past experience suggests that it would be politically difficult to pass legislation explicitly permitting any breach of the charter.\textsuperscript{32} The judiciary in Australia is a strong, independent force which could almost certainly be relied upon to interpret legislation in accordance with an explicit provision requiring a construction consistent with a Taxpayers’ Charter.

The Taxation Institute of Australia (‘TIA’) used an interpretive provision in its 1993 proposal for the enactment of a Taxpayers’ Bill of Rights, which envisaged:

\textit{... that the Taxpayers’ Bill of Rights should have the force of law and that existing legislation should be read as subject to it; so that, where an inconsistency occurs, the Taxpayers’ Bill of Rights will take precedence.}\textsuperscript{33}

The New Zealand Bill of Rights Act 1990 uses a weaker interpretive construction. Unlike the Hong Kong Bill of Rights, the New Zealand Bill of Rights will not override earlier inconsistent legislation. Section 4 of the New Zealand Bill of Rights states that:

No Court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights)–

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

\textsuperscript{31} J Allan, A Bill of Rights for Hong Kong [1991] Public Law 175 at 178.

\textsuperscript{32} This is particularly so where the government of the day does not also control the Senate.

\textsuperscript{33} Taxpayers’ Bill of Rights (1993) 28 Taxation in Australia 50.
(b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.

This section must be read in conjunction with ss 5 and 6 of the Bill of Rights Act. Section 5 states that:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 6 goes on to say:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

These sections require the courts to interpret Acts of Parliament as though they are consistent with the Bill of Rights. This is the usual rule of interpretation adopted by the courts. As Lord Blackburn stated in *Garnett v Bradley*:

> When the new enactment is couched in general affirmative language and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together ... But when the new affirmative words ... by their necessity ... import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together; the second repeals the first.

Section 4 will only need to save a law passed prior to the Bill of Rights from implied repeal by the Bill of Rights where there is a clear contradiction between that law and the Bill of Rights. A subsequent law

---

34. (1878) 3 App Cas 944 at 966.
35. The principle of *leges posteriores priores contrarias abrogant* as interpreted by Lord Blackburn, is an accepted element of Australian jurisprudence. See, for example, *Butler v Attorney-General (Vic)* (1961) 106 CLR 268.
clearly contradictory to the Bill of Rights, would first be subject to s 6, which emphasises that a meaning consistent with the Bill of Rights is to be preferred over any other meaning. Where a meaning consistent with the Bill of Rights in its broad form is not possible, then s 5 can be used to assist with the interpretation. As stated by Hardie Boys J in Ministry of Transport v Noort: 36

There must be many a statute which can be read consistently with the Bill’s rights and freedoms if it is accepted that the statute has imposed some limit or qualification upon them; in other words, that although the statute cannot be given a meaning consistent with the Bill’s rights and freedoms in their entirety, it can be given a meaning consistent with them in a limited or abridged form. It is obviously consistent with the spirit and purpose of the Bill of Rights Act that such a meaning should be adopted rather than that s 4 should apply so that the rights and freedoms are excluded altogether. 37

In examining the New Zealand Bill of Rights as a model for a Taxpayers’ Charter, it is clear that it is not as strong in its protection of the rights it contains as the Hong Kong model. Nonetheless, the strictures of the ordinary rules of statutory interpretation, together with the specific added requirements as to consistency in interpretation, do add weight to the New Zealand Bill of Rights.

Such legislation might serve little purpose in less democratic nations than New Zealand and Australia. Just as most Commonwealth nations now have constitutional bills of rights, it is sadly the case that many of these entrenched rights are honoured more in the breach than the observance. 38 In contrast with this, it would be difficult politically for an Australian or New Zealand government overtly to pass legislation in breach of protected rights. This is so, even where, as with the New Zealand Bill of Rights, the rights legislation allows for its own restriction or override. Accordingly, provided an active opposition

37. For an extensive discussion of this and other cases which have examined ss 4, 5 and 6 of the Bill of Rights, see JB Elkind, On the limited applicability of Section 4, Bill of Rights Act [1993] New Zealand Law Journal 111.
remains, Australia could probably use either an express override clause as in the Hong Kong model, or merely an interpretive clause as in the New Zealand model, to achieve much the same effect.

A large part of the burden for upholding rights under either of these models lies with the judiciary. Here lies the problem with both interpretive models described. They rely in large part for their effect, on the willingness of the judges to adopt interpretations consistent with the intention of the human rights legislation.39

The judgments of the Australian High Court have often been controversial. Upholding the power of the Commonwealth in the Uniform Tax cases is a prime example.40 Nonetheless, the High Court's judgments have reflected, at least in part, community attitudes of the time. So in 1977, the case of Cridland v FCT41 represented the high point in the High Court's broad interpretation of legitimate tax avoidance. As community attitudes changed, so too did those of the High Court. When Sir Harry Gibbs became Chief Justice, the make-up of the High Court changed and the approach taken to tax avoidance and the interpretation of s 260 of the Income Tax Assessment Act 1936 (Cth) in the Doctor cases42 was a far cry from that taken in the Cridland case. A similar change can be seen in other areas of the law. In Coe v The Commonwealth,43 in 1978, an attempt to question the doctrine of terra nullius failed. In Mabo v The State of Queensland,44 the doctrine was overturned by a strong majority led by Mason CJ. Similar extensions of rights can also be seen in Australian Capital Television Pty Ltd v Commonwealth45 and Nationwide News Pty Ltd v Wills.46

At present, a reliance on the High Court to uphold rights legislation seems well-placed. Problems may arise if community attitudes, and the

39. For an interesting analysis of the various case law interpretations of ss 4, 5 and 6 of the Bill of Rights Act in New Zealand, see Elkind, supra note 32.  
41. (1977) 140 CLR 330; 77 ATC 4538.  
42. FCT v Gulland; Watson v FCT; Pincus v FCT (1985) 160 CLR 55; 85 ATC 4765.  
43. (1979) 53 ALJR 403.  
44. (1992) 175 CLR 1.  
45. (1992) 177 CLR 106.  
attitudes of the judges, which usually represent a conservative reflection of community attitudes,\textsuperscript{47} harden against preserving those rights in some form. For example, the rights of a particular ethnic group, or in the tax arena, a particular socio-economic group,\textsuperscript{48} may be threatened.\textsuperscript{49}

But the possibility that judges may take what is now seen as an inappropriate line of interpretation of a Charter of Rights in the future is not as much of an issue as it might seem. For in a democratic society, legislation passed by the Parliament is reflective of the will of the people. If legislation clearly inconsistent with a Charter of Rights is passed, it is not up to the judiciary to defeat the will of Parliament by eliminating the inconsistencies through judicial interpretation.\textsuperscript{50} If protection of rights against changes in community attitudes is required, entrenchment should be used. Then if attitudes do change, the Parliament or the people, depending on the entrenching mechanism used, have to be quite clear as to the effect of any changes to the rights legislation which they are making.

Enactment of a Taxpayers’ Charter, with either a strong or weak clause requiring consistent interpretation of other legislation, would be the most effective of the feasible enforcement options for a Taxpayers’ Charter. It would make full use of the doctrine of the separation of powers in upholding the rights of taxpayers. Furthermore, abrogation in whole or in part of protected rights, could generally only take place with the express consent of Parliament. However, it should be

\textsuperscript{47} See, for example, K Llewellyn, \textit{The Common Law Tradition} (Boston: Little, Brown & Co, 1960) 35–45.

\textsuperscript{48} As Australia becomes an increasingly cosmopolitan society, it would be naive to think that the ethnic hatreds present in countries throughout the world ‘could never happen here’.


\textsuperscript{50} Although this argument may begin to touch on the moral issues faced by judges in applying seemingly unjust laws, as raised after World War II by the German legal philosopher, Gustav Radbruch, it is beyond the scope of this article to explore this issue further. The extent of the Australian Constitutional independence of the judiciary is explored in various guises in HP Lee & G Winterton, \textit{Australian Constitutional Perspectives} (Sydney: Law Book Co, 1992).
recognised that the legislative process is not fool-proof. Accordingly, taxpayers’ rights would best be protected by a combination of provisions governing legislative interpretation and pre-legislative scrutiny.\(^{51}\)

**PRE-LEGISLATIVE SCRUTINY**

It is clear that new legislation should not unintentionally contradict earlier legislation, particularly where the earlier legislation guarantees certain rights. This places a strong focus on the safeguards included in the legislative process itself.

This has been highlighted in the United Kingdom. By 1991, the European Court of Human Rights had decided against the United Kingdom on 28 occasions. Of these, 22 were direct violations of rights by domestic legislation enacted by Parliament. Instead of decreasing over time, as would be expected as the meaning of the protected rights became clear to Parliament, statutory violations are increasing. Seven cases of statutory violation were decided between 1975 and 1985 compared with 15 such cases between 1985 and 1991.\(^{52}\) As a solution, various proposals have been put forward to increase parliamentary scrutiny of all legislation specifically to avoid statutory infringement of human rights.\(^{53}\) Certainly, parliamentary scrutiny is an effective element in upholding rights. The question in the context of a Taxpayers’ Charter, is whether parliamentary scrutiny is sufficient by itself.

Pre-legislative scrutiny commenced in earnest in Australia with the appointment of the Standing Committee on Regulations and Ordinances in 1932. In 1978, the Senate Standing Committee on Constitutional and Legal Affairs tried to extend the scrutiny to primary legislation and recommended that:

\[\ldots\] a parliamentary committee should be established to maintain a watching brief on all bills introduced into Parliament so as to highlight those provisions which have an impact on persons either

---

51. A comprehensive analysis of the arguments for and against pre-legislative scrutiny has been undertaken by Kinley, *supra* note 39.

52. The statistics in this paragraph are taken from Kinley, *supra* note 39, at 11 and 181.

by interfering with their rights or subjecting them to the exercise of undue delegations of power ... A joint committee would enable consideration of bills as soon as they are introduced into the Parliament, regardless of the House into which they are first introduced, and it would enable members of both Houses to properly fulfil their obligations in respect of legislative scrutiny.\textsuperscript{54}

The committee's recommendations were rejected by the government on the grounds that the legislative process might be delayed and that ample opportunities for scrutiny already existed.\textsuperscript{55} This conclusion was questionable and in 1981 the Senate Standing Committee for the Scrutiny of Bills was appointed to review primary legislation. Nonetheless, the concern is that although policy issues may well be debated at length, the technical detail of legislation is seldom afforded sufficient scrutiny.\textsuperscript{56}

'Technical details' here may well involve important questions of civil liberties such as search rights without warrants, reversal of the onus of proof and the absence of appeal rights. The excessive complexity of modern drafting of Commonwealth legislation adds to the problem.\textsuperscript{57}

Support for this contention was found in a study of provisions of bills passed by Parliament in 1980 and 1981 by the staff of the Regulations and Ordinances Committee. The bills were measured against the same principles applied to delegated legislation. A significant number of provisions were found, which if they had been 'presented as regulations or ordinances, would have been reported to the Senate and strongly queried'.\textsuperscript{58}

\begin{itemize}
  \item \textsuperscript{56} House of Representatives Standing Committee on Legal and Constitutional Affairs, \textit{Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth} (Canberra: AGPS, 1993) 179, states that still in 1993, 'the Committee believes that consideration of legislation in standing committees may well help enhance the quality of scrutiny of legislation and thus the standard of legislation'.
  \item \textsuperscript{57} Missen, \textit{supra} note 45, at 130.
  \item \textsuperscript{58} Missen, \textit{supra} note 45, at 130.
\end{itemize}
This is hardly surprising and, despite the efforts of the Committee for the Scrutiny of Bills, little improvement should be expected. The mean time spent in parliamentary scrutiny of legislation is on a downward trend. Just over five minutes is the mean time spent considering each page of primary legislation. This figure is likely to decrease, as ‘the volume of primary and subordinate legislation considered by Parliament or its committees has generally increased each year over the past decade, and shows no sign of diminishing. Furthermore, laws affecting the rights of taxpayers are more likely to be declared to be urgent and guillotined, dealing mainly as they do, with finance matters. The Senate’s use of a cut-off date, after which Bills received from the House of Representatives are automatically adjourned to the next sittings, often forces finance bills even more quickly through the House of Representatives, reducing even further the time available to scrutinise the legislation.

Drafting errors add to the problem. In his submissions to the Inquiry into Legislative Drafting by the Commonwealth (‘the Inquiry’), Ian Turnbull QC, First Parliamentary Counsel, made it clear that the unrealistic deadlines placed upon drafters of legislation mean that they often do not have the time to review the finished product adequately. He went on to say:

But I think our problem is that we do have deadlines that are far too tight and they are made worse by the fact that policy changes are made at a late stage.

59. House of Representatives Standing Committee on Legal and Constitutional Affairs, supra note 46, at 170.
60. House of Representatives Standing Committee on Legal and Constitutional Affairs, supra note 46, at 168.
62. For example, in his submission at p S280, House of Representatives Standing Committee on Legal and Constitutional Affairs, supra note 46 at 161, he said that:

When a law is completely drafted and the drafter is satisfied that it has the correct legal effect, the drafter should then review the whole law in order to simplify it as much as possible. This step is usually denied through lack of time.

63. House of Representatives Standing Committee on Legal and Constitutional Affairs, supra note 46, at 163.
Where a Parliamentary Inquiry finds that parliamentary scrutiny of legislation is minimal and that the demands placed on the drafters of that legislation are too great, we have a situation where both the drafters and the quality controllers are relying on each other's work to maintain the detailed quality of the legislation. In the interpretation of that legislation, particularly the complex technical detail, which most commonly gives rise to litigation, the judiciary is required to adopt 'a construction that would promote the purpose or object underlying the Act' rather than a construction that would not.\(^6^4\) The problem is that the purpose of the Act in relation to the details in question is not always clear.

A classic example of the interpretive conundrum which faces judges from time to time, is that of the old ss 160M(6) and (7) of the Income Tax Assessment Act 1936 (Cth). In *Hepples v FCT*,\(^6^5\) Mason CJ described the provisions as:

> ... extraordinarily complex. They must be obscure, if not bewildering, both to the taxpayer who seeks to determine his or her liability to capital gains tax by reference to them and to the lawyer who is called upon to interpret them.\(^6^6\)

Here is the nub of a Taxpayers' Charter. Taxpayers have to self assess on the basis of legislation that the High Court itself often cannot understand. The High Court has to interpret legislation in accordance with policy that is not translated with any clarity into the legislation itself. The Inquiry into Legislative Drafting by the Commonwealth offers little hope of improvement. Whatever the mode of implementation of the Taxpayers' Charter, it is essential for its proper working, that a parliamentary scrutiny committee be appointed to review all bills presented to Parliament relating to taxation, to ensure that the charter is not inadvertently over-ridden by the express terms of a hurriedly-drafted piece of legislation. It is probably and sadly inevitable, however, that such a scrutiny committee will only be appointed if the Taxpayers' Charter is itself enacted as legislation.

Scrutiny of legislation by committee already takes place. The committees' presence as part of the legislative process gives it the

---

64. Section 15AA(1) of the Acts Interpretation Act 1901 (Cth).
65. *(1991) 173 CLR 492; 91 ATC 4808.*
credibility and influence necessary to be effective. The proposal to extend such scrutiny to protect the rights guaranteed by a Taxpayers' Charter involves little innovation, but gives the specific focus necessary to guard such rights adequately. The vetting should extend to delegated taxation legislation.

The advantages of including such scrutiny in the legislative process go beyond mere quality control. The successful operation of the existing scrutiny committees 'demonstrates the potential for the protection of broad principles of rights and liberties through scrutiny of legislation by parliamentary committees.'\textsuperscript{67} As pointed out by Ryle,\textsuperscript{68} it would be an embarrassment to ministers to have their legislation the subject of a formal report from a parliamentary committee pointing out the ways in which their legislation breached a Taxpayers' Charter. More care would likely be taken in the preparation. The committee scrutiny would also provide the opportunity for submissions from experts and interested parties, which could be published. This would add to the general understanding of what is meant by the rights in a Taxpayers' Charter and should lead ultimately to better legislation.\textsuperscript{69}

There are disadvantages to such a committee. There is a danger that the committee chosen to scrutinise legislation would have numerous other responsibilities and that the pressure of time would diminish their effectiveness in this particular area. Bills involving taxation matters are often the subject of particular time pressure, which may further reduce the committee's effective review of the fine detail. One of the major advantages of a scrutiny committee is to draw attention to offending legislation. If Parliament is unmoved by legislative breaches of a Taxpayers' Charter, the charter will lose much of its effect. This is not a far-fetched scenario, given the record of legislation to date on the protection of individual liberties.\textsuperscript{70} Nonetheless, legislative enactment

\textsuperscript{67.} Kinley, \textit{supra} note 39, at 103.

\textsuperscript{68.} Ryle, \textit{supra} note 43, at 194.

\textsuperscript{69.} Ryle, \textit{supra} note 43, at 195.

together with a scrutiny committee should provide sufficient weight to balance the expediency argument that use of a scrutiny committee alone would not.

**ADMINISTRATIVE GUIDELINES**

The Statement by the Assistant Treasurer of 9 August 1994 announcing the government response to the JCPA recommendations states that the proposed Taxpayers’ Charter will be drawn up by the Commissioner of Taxation. It will be ‘subject to final approval by the Government’. This clearly indicates that the present intention of the government is to have a Taxpayers’ Charter in the form of an administrative guideline. Legislative enactment is not proposed. The advertisements for the position of Taxation Ombudsman (‘the Ombudsman’) suggest that the Ombudsman will also be involved in drafting the Taxpayers’ Charter. The implication to be drawn from these developments is that the Ombudsman would be able to rely on the Taxpayers’ Charter in investigating complaints against the ATO.

This is similar to the United Kingdom model. There the Inland Revenue has published a Taxpayers’ Charter setting out the treatment:

... that a taxpayer is entitled to expect from the Revenue Departments and indicates how dissatisfied taxpayers can complain. It states also that, in return, taxpayers should be honest, provide accurate information and pay on time.71

A series of Codes of Practice have been issued by the Inland Revenue, covering specific aspects of its work and setting out the principles which will govern its conduct.72 An important element of the United Kingdom Taxpayers’ Charter, is that it operates in conjunction with an independent Revenue Adjudicator. The Revenue Adjudicator’s jurisdiction covers the handling of the tax affairs of taxpayers, but does not extend to questions of tax law or the assessment of tax payable. The Revenue Adjudicator can make recommendations concerning the affairs of individual taxpayers and as to the general operation of the tax

---

72. Id.
system. However, the jurisdiction does not extend to making recommendations on tax policy matters.73

Where the Revenue Adjudicator cannot resolve an issue to the satisfaction of the parties, he or she will write ‘with findings and recommendations to the Inland Revenue Controller responsible for the taxpayer’s affairs.’74 The Revenue Adjudicator makes an annual report to the Board of Inland Revenue,75 in much the same way as the Commonwealth Ombudsman.76

The Commonwealth Ombudsman’s main functions are not dissimilar to those of the Revenue Adjudicator and probably reflect those to be given to the new Taxation Ombudsman. Those functions are to receive complaints, to investigate these and other administrative actions and to report on them.77 An ombudsman is essentially established to identify bad administrative practices, so that those practices can be corrected and, where individuals have been adversely affected, so that some form of recompense can be given. The real power of an ombudsman lies in the publicity attached to an annual report to the Parliament. Ministers and senior public servants can be embarrassed by the media attention which results.78

The ATO has issued several sets of guidelines, which indicate how its officers will act in specific situations. For example, guidelines were issued in January 1994 covering the ATO’s litigation policy. In conjunction with a Taxation Ombudsman a Taxpayers’ Charter would give added weight to the rights of taxpayers and the proper administrative procedures set out in guidelines and rulings, with which the ATO has agreed to comply. Independent investigations by an ombudsman and public annual reports into ATO administrative

73. These points are made in a useful review of the Revenue Adjudicator’s position in D Oliver, The Revenue Adjudicator: A New Breed of Ombudsper- son? [1993] Public Law 407 at 408–409. Elizabeth Firkin took up her appointment as the first Revenue Adjudicator on 1 July 1993.
74. Id, at 409.
75. Id, and Sandford and Wallschutzky, supra note 60, at 611.
76. Ombudsman Act 1976 (Cth), s 19(1).
77. Ombudsman Act 1976 (Cth), Pt II.
78. As happened to the ATO with the release of the Annual Report of the Commonwealth Ombudsman for 1993–94.
practices, would give the ATO considerable impetus to avoid undue embarrassment. The Taxation Ombudsman’s effectiveness would be further enhanced, if a recommendation of the United Kingdom Parliament’s Select Committee inquiry into ombudsmen was implemented here: that ombudsmen should be able to conduct administrative audits. So, where several complaints are received concerning a particular area of the ATO, the Taxation Ombudsman could conduct an audit of the operation of the administrative procedures of that area to highlight any deficiencies.

Administrative enforcement of a Taxpayers’ Charter would not be left wholly to the Taxation Ombudsman. The Administrative Appeals Tribunal (‘AAT’), in reviewing a decision, may exercise all the powers and discretions that are conferred upon the Commissioner. As such, the AAT offers an alternative forum for review of the ATO’s administrative practices to the Taxation Ombudsman. The implementation of a Taxpayers’ Charter will provide the AAT with the opportunity to review decisions to ensure that they are consistent with the rights protected therein. If the Commissioner has to exercise his decision-making powers in a manner consistent with the rights contained in the Taxpayers’ Charter, even if only as an administrative concession, then the AAT may presume that the Commissioner intended to act in accordance with the Taxpayers’ Charter and may vary, set aside or remit for further consideration, any decisions which do not so conform.

The usefulness of the AAT as a guardian of any rights contained in a Taxpayers’ Charter will depend first, upon the decisions of its members and their interest in upholding taxpayers’ rights. Second, it will depend upon the parties to any dispute. If they choose to have the issue heard by the Federal Court instead of the AAT, the power to review the Commissioner’s decision in light of the Taxpayers’ Charter would fall away. The charter would not have the force of law and the Federal Court would not be entitled to review whether the Commissioner had exercised his powers under the Act in accordance with the charter.

80. Administrative Appeals Tribunal Act 1975 (Cth), s 43.
There would be no requirement at law to comply with the charter and the Federal Court cannot, unlike the AAT, put itself in the Commissioner's position, subject to his own internal guidelines, in determining the appropriate exercise of his powers.\footnote{See, for example, George v FCT (1952) 86 CLR 183.} For the charter to work under these circumstances it depends very much upon the Commissioner's willingness to implement the recommendations of a Taxation Ombudsman and, where appropriate, to subject himself to the review of the AAT rather than the Federal Court.

**Conclusion**

The fundamental issue for those deciding the level of enforcement of a Taxpayers' Charter, is the extent of the protection needed for those rights contained in that charter. If the rights are fundamental to a democratic society, then some form of constitutional entrenchment is appropriate. If the rights are viewed as important, but on occasion subject to limited abrogation in the interests of the community as a whole, this should be achieved by some form of legislative enactment with the capacity for legislative supervision. If the rights are simply beneficial in their application to assist in the fair and efficient administration of the tax law, then they should be implemented as administrative guidelines, backed up by the review power of an ombudsman and the AAT.

There has been no indication by the government as to the rights it expects to be included in the Taxpayers' Charter. As its Jubilee Project, the TIA drafted a Taxpayers' Bill of Rights.\footnote{See supra note 30.} The TIA is one of the most influential bodies in the tax arena. Accordingly, its draft Bill of Rights includes those rights which the private sector will most likely be putting forward for inclusion in the Taxpayers' Charter.

A review of the draft Bill of Rights shows that there are rights relating to both the application of the law and the operation of the administrative process.\footnote{For a detailed analysis of the rights included in the TIA's Taxpayer's Bill of Rights, see B Pape, Taxpayers' Rights and Obligations, a paper presented to a conference on Current Issues in Tax Administration, University of Newcastle, 7–8 April 1994.} For example, the first right is that 'Taxpayers...
shall have the right to reasonable certainty under the law in respect of their liability for tax. \(^84\) It relates specifically to the application of the law and would permit a court or tribunal to find in a taxpayer's favour:

... if the law was so uncertain as to not enable a taxpayer to ascertain, with reasonable certainty, his or her liability with respect to particular activities engaged in or proposed to be engaged in. \(^85\)

The second right relates to the administrative process. It states that, 'taxpayers shall have the right to a full explanation of the basis of any assessment imposing on them a liability for tax.' \(^86\) It seeks to ensure that the ATO provides a full explanation of the basis of any assessment when requested by a taxpayer.

It would be meaningless for the first right to be included in a Taxpayers' Charter issued as an administrative guideline. For it to have effect, as stated in the foreword to the TIA's Bill of Rights, it 'should have the force of law' and 'existing legislation should be read as subject to it; so that, where an inconsistency occurs,' the Taxpayers' Charter will take precedence. \(^87\) However, the second right could have some effect if included in an administrative guideline, subject to review by the ombudsman. It could also possibly be of use to the AAT in determining the appropriateness of a decision made by the Commissioner.

It would seem an opportunity lost if the Taxpayers' Charter contains only administrative rules. Legislation should provide the parameters for the interpretation of the tax law. The argument is not for radical change to the interpretation of the tax laws. The argument is for the protection of rights which have, until now, had little need of protection, being fundamental to the operation of the rule of law. It is the Orwellian spectre of legislative abrogation of fundamental rights that provides ample reason for the enactment of legislative safeguards. The most frightening aspect of legislative abrogation is that it often appears to be unintentional.

---

84. See supra note 30.
85. See supra note 30.
86. See supra note 30, at 51.
87. See supra note 30, at 50.
Enactment of a Taxpayers’ Charter should be combined with the appointment of a scrutiny committee of both Houses of Parliament. Scrutiny of all tax legislation prior to its enactment will ensure that embarrassing and unintended technical breaches of the charter are avoided.

Prior to the enactment of a constitutional bill of rights, it would be inappropriate and politically impossible for any constitutional or entrenched legislation to be passed in relation to the protection of taxpayers’ rights. Protection through an enactment containing provisions as to its interpretation would be sufficient, in the manner of the Hong Kong or New Zealand bills of rights. This would provide the strongest form of protection for taxpayers’ rights. It would also be consistent with statements from both the ATO and the government that they both have a real concern as to the rights of taxpayers. The mere use of administrative guidelines could undermine the efforts the ATO has made to convince taxpayers of its intention to assist them only in paying the right amount of tax. There is a perception among taxpayers that bad publicity would seldom in fact prevent any revenue organisation from exercising its powers to the fullest extent possible when it felt it was in the right, whatever the rights of the taxpayers involved. 88 In addition, there is no requirement that the recommendations of a Taxation Ombudsman have to be implemented by the ATO.

For the government to be seen as serious in attempting to redress the rights between the ATO and the taxpayer, a Taxpayers’ Charter should be legislated. Anything less would tend to be seen as token rather than real. Taxpayers could be forgiven for taking a cynical attitude towards a charter which purports to uphold their rights against the ATO, when the author and interpreter of the charter, and the primary judge as to when breaches have occurred, is the ATO itself. This article has shown that the Taxpayers’ Charter can be enforceable at law, without undermining the effectiveness of tax administration and enforcement.

88. See, for example, the case of FCT v Citibank (1989) 20 FCR 403.