Chapter 2 identified the basis for a general model of taxpayers' rights grounded in rights theory and in a context of domestic and international acceptance of standard setting in taxation. The chapter emphasised that the Model should contain rights that have general acceptance and that the rights should be broad enough to be adapted to the particular context of each jurisdiction.

Chapter 3 set out the principles that underlie the tax system. It showed that they have broad acceptance and can inform the nature and content of taxpayers' rights included in a model. However, the Chapter also warned that interpretation of the meaning of both the principles and the content of taxpayers' rights can be blurred across jurisdictions so that even rights that appear to be the same may have different substance when interpreted in a different context. Identifying the differences can be difficult given the inherent barriers that hinder easy access to a common meaning. The chapter concluded that there is a trend towards some commonality of meaning, which will increase with the adoption and subsequent interpretation of rights from the Model.

Chapters 4 and 5 provide the framework for a detailed analysis of the rights in Chapters 6 to 8. To analyse a right it is essential to place it in context. A broad context is provided in the first part of the chapter. It demonstrates the expanding role of government
Chapter 4

but, in response, the increasing protection of general rights and taxpayers’ rights. It shows that a Model of taxpayers’ rights as a guide to best practice in tax administration is both timely and beneficial.

The type of right and the manner of its enforcement governs its nature, interpretation and application. The second part of this chapter provides a classification of taxpayers’ rights in the context of the mechanisms for their enforcement. Chapter 5 explores those mechanisms in detail to identify the strengths and weaknesses of each. It will be demonstrated that the nature of the rights included in a model of taxpayers’ rights depends upon the method of enforcement used.

II THE CONTEXT FOR A MODEL: EXPANDING GOVERNMENT

It is beyond the scope of this thesis to provide more than a cursory overview of the legal and political environment that must shape any model of taxpayers’ rights. However, it is important to provide an overview of recent developments that influence the rule-making environment and the nature of the rules that depend upon it. This in turn provides the basis for arguing that a Model of taxpayers’ rights is timely and beneficial.

John Milton once said:  

[John Milton's quote]

The power of kings and magistrates is nothing else, but what only is derivative, transformed and committed to them in trust from the people to the common good of them all, in whom the power yet remains fundamentally and cannot be taken from them, without a violation of their natural birthright.
That is the basis for democracy and, arguably, it is only in democracies where there is genuine operation of the rule of law\(^2\) that taxpayers' rights can have real meaning.\(^3\) Nonetheless, most jurisdictions rely for their economic survival through foreign direct investment on some level of recognition of legal protection, albeit that the protection afforded to foreign investors is sometimes greater than that provided to citizens.\(^4\)

Arguably, what is meant by the rule of law can determine the extent to which citizens can rely on rights given to them by law. Hayek states that:\(^5\)

> Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

Neumann argues that this is simply recognition of procedural justice and it is in Hayek's effective addition of a moral dimension to the concept of the rule of law that he gives a broader meaning to the concept that distinguishes conditions under a free government

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3. This is brought home by the example of the charges leveled at Mikhail Khodorkovsky, the Russian oil billionaire, and Yukos, the oil company he controlled, for tax evasion. According to a Special Report in *The Economist* (May 21st – 27th 2005), pp. 24-25, "Last December, in a transaction surreal even by Russian standards, Yuganskneftegaz, Yukos's main production arm, was forcibly sold in another rigged auction, to a company registered at a provincial grocery shop." Mr Andrei Illarionov, President Putin's economic adviser is reported to have called it 'the swindle of the year' (at p. 25). Whatever the truth of these allegations of rough justice, there was a general perception that the rule of law was not consistently upheld and that this affected taxpayers' rights in particular.
from that under an arbitrary government. Neumann calls this a thickening of the rule of law.

Neumann defines the rule of law as a thin concept without added moral content, where 'there are certain minimum external standards for law and for legitimate state action' that make a system not morally but legally good. The thin concept provides the basis for arguing that there is rule of law in some jurisdictions although the content of that law that may be morally repugnant. It is also relevant to the discussion of which rights should be included in the Model in Chapter 6. Given that taxpayers' rights exist in some form in any jurisdiction that is not collecting revenue through arbitrary expropriation of property, it is helpful to begin there with a thin concept of the rule of law and add moral content thereafter.

In examining the ideal context for taxpayers' rights, however, arguably it should be a democratic regime in which the rule of law as a thicker concept can be applied as the moral dimensions of justice and fairness are more obviously present. This is by no means certain, as Blackstone observed, for politicians who exercise the sovereignty of an absolute and unconditional majority in a democracy may exercise that power unchecked.

To counter Blackstone's concern, democratic government is nowadays based upon some form of separation of powers to prevent the re-emergence of the problems seen in

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7 Ibid., p. 5.
democracies particularly in the first half of the 20th century. Theoretically the executive is responsible, as in the US, directly to the people; or, as in the Westminster System, to the legislature. The legislature is elected by the people. Judicial power rests with the courts. Judges are usually appointed, not elected, and do not participate in political activity. This protects them from the necessity of applying the law to satisfy the will of the majority. It enables them to maintain the independence necessary to effect the impartial administration of justice and to act as a check on the other branches of government.

Largely a feature of the last 50 years, 'making judges responsible for testing the legitimacy of laws passed in the name of the people, against rules and principles that are embedded - more or less explicitly - in a constitutional text, has flourished as never before.' Not traditionally a feature of European jurisprudence, the roles taken by the German Constitutional Court, the European Court of Human Rights and the European Court of Justice have made this approach more acceptable. The drive towards judicial autonomy has meant that governments not seen as democratic will still usually operate with at least some of the elements of judicial independence.


In the US, the political battles over the confirmation of presidential appointments to the federal bench and Supreme Court sometimes reach epic proportions. See, e.g., "The battle over the judges: Armageddon for the Senate" *The Economist,* (May 21st -- 27th 2005), p. 35. The article includes an interesting table (at p. 36), showing that the percentage of confirmations of presidential judicial appointments to the District and Circuit Courts ranged from 61.5% for President Clinton in 1999 through to 97% for President Carter in 1977. However, research has shown that appointees often do not satisfy the hopes of their presidential appointers as they exercise their independence of thought. See further, L. Tribe, *God Save This Honourable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York, Random House, 1985); R.L. Pacelle, *The Supreme Court in American Politics: The Least Dangerous Branch* (Boulder, Westview Press, 2001); and D.M. Beatty, ibid.

Although the effectiveness decreases with the autocracy of the executive and the proper functioning of the tax administration. See, in the historical context of the Venezuelan tax system, M.C. Arauza, 'Remarks' in R.M. Bird and M. Casanegra de Jantscher (eds), *Improving Tax Administration in Developing Countries* (Washington DC, IMF, 1992), p. 336.
Fundamental to any democratic system is the principle that the organs of government are subject to mutual checks and balances. However, this is not always effective. In recent years the executive arm of governments has grown in importance, increasingly and, perhaps necessarily, usurping the role of the legislature. Many of the powers that the executive arm exercises are too broad; too complex; too detailed, for the legislature to be able to participate in, more than to act in a monitoring role. The size and extent of the activity of the executive and its public service places a heavy burden on the courts, as they seek to arbitrate on the meaning of the law, particularly when it requires the overturning of executive decisions. As they exercise their roles in the midst of such complexity, it will be shown, for example in Chapter 5 in the context of enforcement, that standards are becoming increasingly useful as guides for all three arms of government.

Although theories of judicial decision-making provide a strong basis for saying that decisions of judges are removed from bias and personality, the majority of lower courts with burgeoning workloads simply do not have the luxury of time knowingly to integrate broader issues of principle into their decisions. Beatty argues that it is time to focus not on what judges should be doing, but on 'how courts actually exercise their powers of judicial review'. Practice suggests that the desire for the courts to act as a check on the activities of the executive is not always met.

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15 Writers such as Dworkin and Posner have large bodies of work that provide the theoretical analysis of decisions even in hard cases that suggest judges do or should effect such integration. In most jurisdictions the larger matters of principle are recognised only at the level of the higher courts.

16 D.M. Beatty, above n. 10, p. 34.
The problem for the courts is that administrative decision-making is often not subject to the law, except in narrow procedural areas. This leaves large tracts of what effectively is the law, unguarded by an independent and impartial judiciary. Some argue that it strikes at the heart of the democratic form of government. Sir Gerard Brennan, then Chief Justice of Australia, recalled Lord Hailsham's statement that, 'We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice'. The Chief Justice noted that, in Australia:  

[the] description is close to the mark....But there are dangers in maintaining a structure which lends itself to the concentration of political power in the Executive Government. There is a risk of efficiency turning to tyranny....The traditional checks and balances are inadequate to protect minorities and the interests of individuals.

This description may be overly pessimistic. Nonetheless, as the separation of powers is based on checks and balances, it is timely to consider any means to strengthen the understanding of how the checks and balances can operate, particularly where one arm of government in a jurisdiction may be more powerful than another. Guidelines and standards both domestically and internationally can assist law-makers, judges and administrators in the proper exercise of their powers.

It raises issues for tax administration. Tax law is complex and voluminous. Revenue authorities are often given extensive discretion. Although the substance of tax law is almost always subject to review by the courts, this is much less the case in its administration.

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19 Ibid., p. 15 and p. 17.
Taxpayers' rights are therefore largely concerned with the effect of tax administration as it is administered by the revenue authority bureaucracy. They provide useful checks on power.

In democratic jurisdictions there is concern over the extensive power and authority of the executive, through its bureaucracy. It is interesting to note that the IMF and World Bank, in particular, have been providing guidance to numerous countries over a number of years on the reform of their tax systems. Much of this guidance is based on standards developed to best ensure success. Many of these countries are viewed as fledgling democracies. Some would be considered undemocratic. However, the nature and importance of revenue collection is such that even in the most undemocratic countries this is one element of the legal system that all regimes try to ensure operates as efficiently and effectively as possible. Developing countries and those in transition are encouraged in this approach by the IMF and the World Bank, as discussed in Chapter 2. These countries face problems where they have either weak courts or a weak bureaucracy.

As noted by Vanistendael, in some jurisdictions the judicial system does not function effectively and this constitutes, 'a substantial impediment to the rule of law in tax matters.' This problem is compounded if there are flaws in the operation of the legislature and executive. Gordon and Thuronyi suggest that tax reform should take place with appropriate collaboration between the executive and the legislature. They note that this is particularly difficult if there has not yet been the opportunity to properly establish a tax

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20 V. Thuronyi, above n. 14, vol. 1, xxvii.
22 For a review of developments in this direction across a range of developing countries, see R.M. Bird and M. Casanegra de Jantscher, above n. 13.
23 Above n. 14.
The Context and Classification of Taxpayers' Rights

It would leave effective responsibility for the legislation and administration of the tax law squarely in the hands of the executive.

In many jurisdictions, without some adherence to the rule of law, corruption flourishes. Even in the most established and stable democracies corrupt practices exist and are routinely the subject of inquiries and commissions. However, the threat to the proper administration of the tax system is most serious in those jurisdictions where bribery and corruption is rife.

Logically, there would therefore be a continuum that begins with countries that have little in the way of the rule of law (even in Neumann's thinnest form, i.e. effective but without moral content) and seek to extract revenue from their citizens by methods generally accepted as inappropriate. This is most commonly seen in countries experiencing civil war. Their lack of success in raising the necessary revenues to support the government's programs would usually be reflected in their level of economic development. Taxpayers' rights would largely be alien to these jurisdictions, at least in substance if not in form.

Along the continuum there would be other countries that, although not fully democratic or generally known for a strong system of law, nonetheless would have systems in place to ensure collection of revenue. These would usually be accompanied by limited taxpayers' rights, such as the right to appeal against an assessment. Developing countries and countries in transition are often represented in this group. The effectiveness of taxpayers' rights would depend very much on the operation of the procedural rules and

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26 Reflected in the work of Transparency International.
28 Ibid., a recurrent theme in R.M. Bird and M. Casanegra de Jantscher.
safeguards and the respect by administration officials for the system.\textsuperscript{29} It is as these jurisdictions introduce reforms of the tax system that there is most scope for use of a model of taxpayers' rights in guiding the shape of the legislative and administrative framework.

Luoga\textsuperscript{30} identifies the factors that both encourage and militate against change, based on research in the context of Tanzanian tax reform. Factors that are likely to prevent change tend to focus strongly on administrators' fear of loss of autocratic control of the tax system and include:\textsuperscript{31}

- fear by bureaucrats of a loss of power, particularly if they perceive limits on their discretion;
- fear of loss of revenue as taxpayers embrace their newly-found rights to oppose prerogative powers over taxation;
- fear that carefully cultivated co-operation between government and business that maintains the status quo would be upset; and
- the costs associated with implementation of reform, including the potential invalidation of existing taxes.

Ranged against this focus on retention of control are a range of factors that are likely to precipitate change over time despite the strength of the opposition. Many of these factors

\begin{footnotes}
\item[29] Ibid., p. 135. Even in a generally corrupt system, not all tax officials are necessarily corrupt. In the most authoritarian regime there will be tax officials who interpret the regulations more favourably for taxpayers than others. See further, O-H. Fjeldstad and B. Tungodden, 'Fiscal corruption: A vice or virtue', (2003) 31 World Development, 1459.
\item[31] Ibid.
\end{footnotes}
are common to both developing and developed countries and some of the more important can be grouped into three broad areas.

The first group flows from the sheer force of change driven by the economic, social and technological environment. As governments are forced to reform their tax policy to cope with these changes, the economic imperative of establishing a broader tax base requires a shift in approach within the tax administration. This drives a response from taxpayers. They become aware the level of tax they pay compared with the public benefits they receive, particularly in developing countries in fiscal crisis, where the impact of change on the taxpayer is greater. If taxpayers are suddenly required to pay substantially more tax, they want to see some benefit for their real sacrifice.

The second group reflects the broader issues influencing the context for change. The focus on governance, integrity and transparency has forced its way into every area of decision-making. Take three examples: the global response to corporate collapses such as Enron both legislative and through changes to international accounting standards; the response of supranational organisations such as the OECD to issues such as harmful tax competition; and the international implementation of anti-terror legislation. Governments are no longer insulated from international pressure to exhibit at least the semblance of compliance with agreed standards. More specifically for developing countries, aid and loans are increasingly linked to genuine progress on good governance, reflected, for example, in the IMF Code of Good Practices on Fiscal Transparency. Luoga relates that in Tanzania public awareness of the requirement for good governance is forcing the government and

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33 R.M. Bird and M. Casanegra de Jantscher, above n. 15, ch. 1.
34 F.D.A.M. Luoga, above n. 30, p. 28.
Chapter 4

bureaucrats to broaden public consultation to engender the public cooperation required to implement change.36

The third group reflects the development of a more organised public response to change. This has been more obvious in the political changes forced by the public response to dubious elections, as in Ukraine's Orange Revolution of 2004-5 following allegations of endemic corruption, voter intimidation and electoral fraud. Even in the most autocratic regimes, such as Zimbabwe, opposition members of Parliament are emboldened to speak out against the excesses of the ruling regime.37 Luoga reports that in a developing country such as Tanzania, the growth of multiparty politics has 'invigorated critical scrutiny of government affairs. ...It means therefore the parliament is becoming more accessible to the public and increasingly receptive to ideas from constituencies in legislating'.38 Luoga further notes that in developing countries, taxpayers have been more willing to use their capacity to paralyse the state by refusing to collect or pay taxes.39

Most jurisdictions are now striving to operate within at least Neumann's thin form of the rule of law. Even if they are not generally regarded as democratic, the demands of foreign investment and the other elements of change identified above increasingly require that their tax systems at least reflect the basic rights expected of a stable tax system.

Progress on one front, however, is countered by deterioration of taxpayers' rights on another. Many jurisdictions, even though they may not have mature or effective judiciaries, will experience the domination of the executive in the development of their tax system in the way identified by Sir Gerard Brennan and Lord Hailsham. This experience will grow with the plethora of rule-making that is increasingly a feature of modern society. The

36 F.D.A.M. Luoga, above n. 30, p. 28.
37 See, e.g., the major amendments to the new constitution of 2005 proposed by the Movement for Democratic Change (but rejected by the Government) to incorporate stringent human rights protections. Second Reading of the Constitution Amendment 17 Bill in Parliament, Tuesday 23 August 2005, Hansard (Zimbabwe).
38 F.D.A.M. Luoga, above n. 30, p. 29.
advantage of mature democracies is that they at least have the benefit of an active legislature and the generally effective operation of the rule of law to support taxpayers’ rights. However, even the most mature democracies cannot always rely on their current systems to ensure taxpayer protection, given the volume of rules that require implementation. The development of accepted standards of administration provides a useful set of arguments against excessive exercise of power.

III THE CONTEXT FOR A MODEL: INCREASING PROTECTION

Tax administration is notorious for its complexity and, often, its lack of accountability. One only has to review the search and seizure legislation in a number of jurisdictions, to see the significant powers of tax administrators. On the other hand, revenues must be collected to fund governments. There is a tension that will grow with advances in technology, and as societies become increasingly international in content and outlook.

For those governments most focused on the preservation of the rule of law with a broader content, they protect their citizens with a constitutionally entrenched bill of rights. As the executive arm of government inevitably becomes more powerful in order to cope

39 Ibid.
with the speed of change, these governments recognise that it is no longer sufficient that citizens should have to rely for the protection of their basic rights on limited statutes and administrative conventions.\textsuperscript{43} This may not be the only answer to provide some form of safety net for citizens in the face of the growth of executive power. However, it is increasingly popular, as seen in the implementation of Bills of Rights in Canada, New Zealand, South Africa and the United Kingdom.\textsuperscript{44}

To state that such matters fall outside the scope of a discussion pertaining to taxation is to ignore the fact that taxation laws affect every transaction undertaken. The beneficial effect of legislation such as the Canadian Charter and the South African Constitution is that they provide clear legal parameters within which the revenue laws must operate. This provides guidance for the executive as it seeks to maintain its revenue base in an international environment where taxpayers and other governments are trying to erode it for their own advantage. In desperate times, governments take desperate measures.\textsuperscript{45} A general bill of rights assists in the operation of the rule of law in revenue matters.

Against this backdrop, the power of executive arms of government will inevitably increase as society and government becomes more complex. The legislative arms of government will pursue more vigorously their role as the monitor of legislation.\textsuperscript{46} They will introduce more rigorous requirements that statutory instruments and other regulations are

\begin{footnotesize}
\footnote{12} Discussed further in Chapter 8.
\footnote{43} See further on this theme, D. Goldberg, QC, 'Between the Taxpayer and the Executive; Law's Inadequacy; Democracy's Failure?' [1996] \textit{British Tax Review}, 9.
\footnote{45} And always have: see B. Bartlett, 'How Excessive Government Killed Ancient Rome' (1994) 14 (2) \textit{Cato Journal}, 287.
\footnote{46} This was seen in particular in the US with the passage of the so-called Taxpayer Bills of Rights amendments to the Internal Revenue Code: A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?' in D. Bentley (ed.), \textit{Taxpayers' Rights: An International Perspective} (Gold Coast, Revenue Law Journal, 1998), p. 347.
\end{footnotesize}
The CoLi/ext alld C/flssijimtioll
of TaxjJa)'m' Rigbts
laid before them for comment. There will be more review by standing committees. Regulations will be subject to sunset clauses. However, the lack of time and expertise of members of parliaments may limit their effectiveness. The role of courts will remain largely that of interpreting substantive law, with a few exceptions perhaps in the context of interpretation of bills of rights. The courts will try to maintain due process, but against a backdrop of their limited ability to interfere with the exercise of administrative discretion. Their significant influence will remain largely confined to the broader policy issues found in bills of rights. However, their interpretation of these rights has the potential to shape the way that the executive exercises its growing powers.

The significant step forward is the growing focus by governments on their responsibility to their citizens and the need to introduce broad administrative protection against abuse of power. This trend is likely to continue. A concern is that it may do so at the expense of rights that are independently created and administered. Administrative due process will be effective for most citizens, who will not notice the gradual increase in executive power. They will accept the arguments that governments need wider powers to protect law-abiding citizens. However, administrative protection is likely not to spread widely enough to protect those citizens who fall, whether innocently or not, outside the standard operation of government administration.

Valerie Braithwaite argues cogently however, that it is incumbent upon revenue authorities to preserve the democratic order by upholding tax system integrity and creating

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Chapter 4

the environment to maximise taxpayer compliance.\textsuperscript{51} She suggests that integrity of the system means that, 'in return for taxes, taxpayers should not only receive goods and services, but also sound governance that is respectful and protective of democratic principles and processes'.\textsuperscript{52} Given the nature of a democracy, she asserts that institutional engagement through education and persuasion should be combined with a commitment to 'convert democratically responsive principles of action into concrete operations and routines in the day-to-day practices of tax officers'.\textsuperscript{53}

This view is shared increasingly by tax authorities. For example, a past Australian Commissioner of Taxation, Michael Carmody, regularly expressed the view that: \textsuperscript{54}

\begin{quote}
The community has the right to expect that we are there to protect their interest within the terms of the law and to promote with government changes to the law where that interest is being challenged....If we are to have the community's confidence in their tax administration it is essential they know how we are operating, what to expect of us in their individual dealings with us and also that there are accessible avenues to seek redress where they do not believe we are acting according to the standards we profess.
\end{quote}

It is an approach reflected in the Australian Commonwealth Treasury's Review of Aspects of Income Tax Self Assessment, which recommended a number of refinements to the

\begin{footnotesize}
\footnotesize{\begin{itemize}
\item As has occurred internationally with the introduction in several jurisdictions of anti-terrorism legislation that impacts on civil liberties.
\item Ibid.
\item Ibid., p. 275.
\end{itemize}}
\end{footnotesize}
Australian tax system. These, it suggested, would redress the balance of fairness in favour of the taxpayer and make the tax system more flexible.

There is recognition that with the expansion of government, increased responsibility is placed on the executive in its administration of the laws. Revenue authorities, as Braithwaite argues, play a particularly important role in safeguarding democracy and the rule of law. Although the scope of legal protection is broadened at the highest levels, the day-to-day administration of the tax rules and processes falls increasingly within the discretion of the executive, so that legal constraint is limited and difficult to enforce. Fortunately, the revenue authorities in many jurisdictions have recognised their responsibility to maintain the integrity of the system. Cynics argue that this may be in part because it increases taxpayer compliance and enables them to perform better against their targets. Nonetheless, these revenue authorities are demonstrating the 'basic respect for the democratic principles of participation and accountability' that legitimates their actions. In doing so, they are increasingly co-operating to develop appropriate standards of tax administration.

The context discloses therefore that there is increasing recognition of taxpayers' rights. This is flowing in two directions. The first is an increase in recognition of fundamental rights in the context of bills of rights and similar instruments. The second is in the context of the expansion of administrative protection of rights, given the limits on general legal protection of taxpayers' rights in the day-to-day application of the tax rules and processes. Development of acceptable standards of taxpayers' rights is therefore timely and beneficial. However, it is also important to consider the content of the rights. As will

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56 Ibid., p. 5.
57 V. Braithwaite, above n. 51, p. 287.
be seen in the discussion below, the manner of enforcement can have a significant effect on the content of a right, underlining the importance of current trends.

IV AN OVERVIEW OF TYPES OF RIGHTS

Taxpayer protection varies, depending upon the rights to be protected and the method of enforcement used to provide that protection. Usually, methods of enforcement flow naturally from the rights that a society sees as needing protection. The first question is: what rights are protected? The list is long. For simplicity, we can identify two main types of rights, which can then be broken down into different classes, according to their method of enforcement.

The first type of right encompasses the ordinary rights of most taxpayers who attempt to comply with the law and want to see fairness and efficiency in the daily operation of the tax administration, collection and enforcement process. These rights tend to occur at the interface between the tax collection authority and the taxpayer, and focus on process.

Rights of this kind are protected by both legislative and administrative measures, but, as discussed below, the scope of the rights depends largely on the nature of enforcement. The charters of taxpayers' rights in Canada, New Zealand and Australia, for example, all state that the revenue authorities will respect the confidentiality of taxpayer information on an administrative basis. Yet, in all those jurisdictions, there are also legislated secrecy provisions applicable to officers of the revenue collection authority, prohibiting them from

58 The classification of rights put forward in this section has had a long gestation and was first set out in D. Bentley, 'Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules', above n. 17, on which much of this part is based.
The second type of right encompasses those rights that relate to the specific validity, operation and application of the tax law. Rights of this kind tend to arise at the interface between the tax law and the taxpayer. They are enforced by law and focus on the fundamental operation of the law and its substance. As such, they usually apply generally, and not simply to tax law. An example would be a requirement that laws should not discriminate.

Some would argue that there is a third type of right: the right to a standard of service and treatment by the tax authority. However, as discussed below, although these so-called rights are included in taxpayers' charters they are goals, expectations or promises. They are administrative in character.

Taxpayers' rights of the same kind can be protected by both administrative and legislative mechanisms. However, as the mechanism affects the scope and nature of the right, it is important to identify the form of protection and enforcement.

For example, in Germany, procedural rights that govern the operation of revenue administration are given detailed statutory enforcement. One of the main advantages for taxpayers is that statutory protection provides a right of appeal to a court. In Australia, the same rights are given administrative protection only. The right of appeal against dissemination of information concerning taxpayers that they have access to because of their work.

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59 Some countries have a variety of protection, but see e.g. in the United Kingdom, the Official Secrets Act; in Canada, Income Tax Act, s. 241; in New Zealand, Tax Administration Act 1994, s. 81; and in Australia, Income Tax Assessment Act 1936 (Cth), s. 16.

60 Traditionally, taxpayer rights were considered almost exclusively in relation to the powers of tax authorities and taxpayer rights of review and appeal. This began to expand, e.g., in Organisation for Economic Co-operation and Development, Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries (OECD, 1990), and D. Albregtse and H.P.A.M. van Azendonk (eds), Taxpayer Protection in the European Union (The Hague/London/Boston, Kluwer Law International, 1998).

61 As has been done in the USA and France.

62 As seen in formal human rights legislation in Hong Kong, Canada and New Zealand.

63 OECD, above n. 60, p. 21.
administrative action is, in most jurisdictions, limited to right of review of the decision-making process: that does not protect taxpayer rights in the courts; it simply ensures that administrative decisions follow the rules of natural justice (in the broad meaning of the term). So, administrative protection has to rely on alternative mechanisms, such as an ombudsman or problem resolution units within the revenue authority.

In most jurisdictions, there is a separation of powers between the judicial, the legislative and the executive arms of government. The perceived benefit of legislative enforcement of rights centres on this separation, and the right of the courts to question the executive's interpretation of the rights that the legislature has given to taxpayers. However, legislative enforcement is a broad policy tool that does not usually cover the rights that fall within the detailed administration of a tax system.

On the other hand, administrative enforcement of taxpayers' rights depends upon the executive arm of government and usually exists at the discretion of the executive. Administratively enforced rights cannot be claimed before either the judiciary in its decision-making role, or the legislature in its formulation of the tax law. In other words, a tax authority may provide protection of rights to taxpayers, but usually the exercise of the protection and the existence of that protection remain at the discretion of that authority. Many administrative concessions to taxpayers given by tax authorities operate in this way and they can provide rights beyond the scope of those provided legislatively. For example, in the United Kingdom the Inland Revenue has, from time-to-time, issued extra-statutory concessions. They permit taxpayers to ignore the normal operation of the law, where there are anomalies that produce unlooked for consequences. Extra-statutory concessions exist solely at the discretion of the Inland Revenue.65

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65 Although the courts have suggested that there is no legal basis for extra-statutory concessions, *Vesty and Others v. IRC* (No. 2) [1979] 3 WLR 915, they have gained some acceptance. See S. Eden, 'Judicial control of tax negotiation' paper presented at the 6th International Conference on Tax Administration, Atax
Administrative and legislative enforcement combine to form a complementary and comprehensive framework for the protection of taxpayer rights. By themselves the protection they give is limited. This becomes apparent through the classification of rights.

A Classification

An analysis of taxpayers' rights is helped by further classification. Otherwise there is too much variation within each of the types of rights and their method of protection for meaningful analysis. The classification that follows provides the practical means to examine the main groups of rights within each type.

Primary legal rights focus on the process of law making, and what makes a tax law a valid law. It may be that for a tax law to be valid it must comply with certain criteria. For example, a tax law may have to be clear in its imposition of a tax; it may have to be certain; there may be limits on its retrospective application. In this way, primary legal rights are interpreted by the judiciary, and constrain the actions of the executive and the legislature.

At the next level of classification there are enforceable taxpayers' rights. Secondary legal rights focus on the specific operation of the law. They are concerned with the protection of rights at both a general and specific level. At a general level, rights will provide a standard for the operation of the administration, collection and enforcement processes within the law. For example, there may be rights requiring the confidentiality of information provided to the revenue authorities or that every taxpayer should have the right to a fair and impartial hearing in relation to any tax dispute.

Chapter 4

At the specific level, secondary legal rights protect taxpayers in the context of individual procedures and specific processes within the law. An example of a right relating to an individual procedure would be where the revenue authority makes a decision, and there is a requirement to provide reasons for that particular decision. A right relating to a specific process would be where there are rules governing the way that the revenue authority considers an application for an advance ruling and how such a ruling is to be made.

It is also possible to protect elements of secondary legal rights administratively. The mode of protection depends largely on the approach of the authorities in the relevant jurisdiction. Where rights of this kind are protected administratively, they are called primary administrative rights as they are also enforceable rights. The nature of secondary legal rights and primary administrative rights does differ, even though they may appear to provide the same protection.

For example, take legal professional privilege. It is a right protected by statute or at common law in many jurisdictions. In its basic form, it provides professional privilege in respect of documents passing between lawyers and their clients in certain situations. Professional privilege can also be given administrative protection. For example, in Australia, only lawyers can claim legal professional privilege. By an administrative concession, the Commissioner of Taxation has extended similar rights to certain documents passing between professional accountants and their clients. Lawyers can claim a narrow privilege that is defined and protected by the judiciary, and that can only be

effect tax law in Japan: see T. Okamura, 'Due Process and the Taxpayer' (1993) 11 International Tax and Business Law, 123.
overridden by the legislature. Accountants can claim a broader privilege that is given at the discretion of the Commissioner of Taxation, and which can be withdrawn by the Commissioner of Taxation at any time. The difference between the rights in this example illustrates the fact that legal rights at this level tend to be narrower in scope than administrative rights purporting to cover the same ground.

Secondary administrative rights are rights that could not be legislated efficiently and that are given in the context of detailed processes. An example would be where taxpayers are given the right to receive timely assistance from the revenue authority where they seek help in meeting their taxation obligations. This is a more subjective right than the requirement to give reasons for a decision. It is concerned with how the agents and employees of a revenue authority conduct themselves when they provide services to taxpayers. Administrative implementation and enforcement is far more appropriate than an attempt to legislate protection of such rights.

There are other administrative rights that are not rights at all, but expectations, social rules, or performance indicators, often described as rights. They are common in administrative charters. For example, a charter may state that a taxpayer has a right to polite service and courteous treatment by revenue authority employees. This is a performance measure and cannot easily be enforced by the taxpayer. Any assessment as to whether the expectation has been met is necessarily subjective. It cannot be translated into a legal rule. On the one hand, it is a social rule that taxpayers would like tax officers to follow, which if they do not, constitutes a breach of social etiquette. On the other it is a management tool and may be accompanied by a specific performance indicator. Breach of the rule will usually result in complaint, a demand for conformity with the rule by the taxpayer and/or the revenue officer's manager, and in this instance, a return to polite
treatment. There is a general acknowledgment in society that such complaints and demands are justified. However, the nature of the rule remains social and not legal. These social rules have become increasingly important as a reflection of the mutuality of the relationship that is now becoming commonplace in many jurisdictions between taxpayers and the revenue authority. They comprise a substantial component of any document issued by a revenue authority that sets out the rights and obligations of taxpayers. Secondary administrative rights and rights that are effectively social rules or unenforceable administrative goals are perhaps most usefully classified as principles of good practice.

B Application

With a classification system in place, it is simpler to make sense of the different types of rights that are given in different jurisdictions. It is also easier to understand why authorities have chosen the rights they have in the light of the mechanisms that they use for enforcement. The next section examines the effectiveness of the classification system.

V CLASSIFYING TAXPAYERS' RIGHTS

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69 Reflected in the terminology used in tax documents. In Australia, the Income Tax Assessment Act 1997 (Cth) was drafted to reflect this relationship and the term 'the taxpayer' was replaced with the more friendly 'you'. This despite the fact that the number of taxpayers reading the legislation is minimal. However, it represents the quantum change in approach in the ATO. See further, M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review*, 22, and pp. 29–31.
A classification system must allow a clear analysis, not only of the type of right, but also its effect. Otherwise it is very difficult to understand the true content of any right. To provide a clear understanding of the operation of the classification system this section works through examples to illustrate each type of right. Chapter 5 then explores in some detail the methods of enforcement of legal and administrative rights. Chapters 6 to 8 detail the rights of each kind that should be included in a Model.

A Enforceable Taxpayers' Rights: Primary Legal Rights

Primary legal rights are concerned with specific requirements of valid tax law. Some are covered in the constitution, others through supranational instruments. The remainder form part of the general body of legislation. Returning briefly to Neumann's analysis of the rule of law, the thin and thick conceptions of the rule of law are useful in determining the nature and extent of some rights. The thick conception includes a significant moral content and incorporates the principles discussed in Chapter 3. The thin conception can be used to identify the basic rules that are required for a valid law. This is explored further in Chapter 6.

1 Constitutional Protection

Constitutions provide the strongest form of primary legal right enforceable by law. Some jurisdictions, such as the United Kingdom, do not have written constitutions. Others do have constitutions and these may or may not include express protection of rights. Australia
Chapter 4

provides an example of a constitution with some express and some implied rights.\(^{71}\) Such constitutional rights are usually only indirectly related to taxation, but can underpin the basic framework for the operation of tax administration, collection and enforcement.

For example, the Swedish Constitution does not contain many express rights, but there is a prohibition against the retroactive effect of tax statutes.\(^{72}\) It requires Parliament to pass a tax statute into law before the new law can have the effect of taxing transactions. However it is substantially watered down by an exception. This allows proposed legislation to have effect from the date that detail of any new legislation is provided to Parliament. Nonetheless, the details required are sufficient to provide taxpayers with warning as to the content of new legislation. The revenue base is protected from taxpayers taking advantage of loopholes in the law between the time a change is announced and when it is passed into law. Taxpayers are protected from the retroactive effect of tax legislation in the form of a primary legal right. It goes beyond the practice in many countries, where the government provides a warning, in the form of an announcement, that the law will change in an area of the tax law, and also advises that any changes that eventuate will take effect from the date of the announcement.\(^{73}\)

The German constitution provides a number of rights to taxpayers (although it does not contain a bill of rights).\(^{74}\) For example, Article 3 requires there to be equality before the law. As it applies to taxation, the Constitutional Court has interpreted this article to mean

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\(^{70}\) Neumann argues that both Fuller and Raz adopt the thin conception. M. Neumann, above n. 6, p. 7.


\(^{72}\) Chapter 2, para. 10 Regeringsformen, 1974 (Sweden). See further A. Hultqvist, 'Taxpayers' Rights in Sweden' in D. Bentley, above n. 46.

\(^{73}\) Discussed comprehensively in C. Sampford, Retrospectivity and the Rule of Law (Oxford, OUP, 2006), p. 156 et seq. In Australia, awareness of this problem has lessened the instances over time but there is no primary legal right preventing it. In the past, taxpayers have sometimes waited well over a year for the detail of legislation to be revealed that was already supposed to be governing everyday transactions. For example, legislation governing the tax treatment of employee share schemes took 20 months from its announcement in the 1994 Budget to the passing of the Taxation Laws Amendment Bill (No. 2), 1995.

\(^{74}\) See C. Daiber, above n. 63.
that those with an equal ability to pay tax should bear the same tax burden. The Court has held that a tax on real estate breached this principle, as it placed a heavier tax burden on the relevant taxpayers than they would have borne had they invested in other forms of property.\textsuperscript{75} Tax applicable to investment income was also found to breach the equality principle, as there was no mechanism in place to enforce withholding tax on interest, thereby favouring it as a form of investment.\textsuperscript{76} The German constitution also protects information, privacy, property, and a right of appeal.\textsuperscript{77} Clearly, taxpayers are protected, not simply in the procedures available within the tax system, but also in the substance of the tax law, which must comply with basic constitutional principles to be effective.

Constitutional bills of rights, to the extent they apply to taxpayers, provide a stronger form of protection for primary legal rights. Canada and South Africa provide examples. Li writes, "The Charter is the supreme law in Canada. Its effect on Canadian law and legal development has been profound. The area of taxation is no exception."\textsuperscript{78} The fundamental rights entrenched in Chapter 3 of the South African Constitution have had a similar impact.\textsuperscript{79} In both countries the introduction of a bill of rights has resulted in the amendment of the income tax law to remove conflicting provisions.

However, the content of primary legal rights differs between jurisdictions, as noted in Chapter 2 in the discussion of the diversity of tax systems. For example, the Supreme Court of Canada has not followed the liberal approach of the German Constitutional Court to equal treatment. It has been reluctant to find that provisions of the income tax law breach constitutional rights, and has taken the view that the essence of the income tax law is 'to make distinctions, so as to generate revenue for the government while equitably

\textsuperscript{75} 2 BvL 37/91 of 22 June 1995, BStBl II 1995, 655.
\textsuperscript{76} 27 June 1991, BVerfGE, vol. 84, p. 239.
\textsuperscript{77} See C. Dalber, above n. 63.
\textsuperscript{78} J. Li, 'Taxpayers' Rights in Canada' in D. Bentley, above n. 46.
\textsuperscript{79} R.C. Williams, '"Taxpayers' Rights in South Africa' in D. Bentley, above n. 65, p. 282.
reconciling a range of necessarily divergent interests.\textsuperscript{50} In \textit{Smythe v. The Queen},\textsuperscript{81} to take one example, the Supreme Court held that a restriction on the amount of deduction of child care expenses did not have a disproportionate impact on women to the extent that it breached s. 15 of the Canadian Charter of Rights and Freedoms (Canadian Charter). Taking a rather narrow approach, as compared with the German Constitutional Court, it held that although women were more likely to bear the social costs of child care, there was no evidence that women were more likely to bear the financial costs of child care, and that s. 63 affected only the financial costs of child care.\textsuperscript{82}

However, there is some element of convergence as judges take into account the development of the law in other jurisdictions. The South African Constitutional Court has tended to look more towards North American decisions for guidance than to European decisions. This is not surprising given the closeness in much of the content of the South African and Canadian bills of rights.

For example, application of s. 8 of the Canadian Charter, the right to privacy, resulted in the restriction of Revenue Canada’s powers of search and seizure, and amendment of the relevant provisions of the Canadian Income Tax Act.\textsuperscript{83} Certain requirements were introduced to satisfy s. 8, including the need for prior judicial authorisation for any search, and that the judge must have discretion as to whether a search warrant should be granted. South Africa has strong search and seizure powers available to revenue officials under its Income Tax Act. They reflect those in its Investigation of Serious Offences Act, which were challenged under the privacy provision in the Constitution, in \textit{DA Park-Ross v. The Director, Office for the Investigation of Serious Economic

\textsuperscript{50} Thibault v. Canada, [1995] 1 CTC 212, 392.
\textsuperscript{51} [1994] 1 CTC 40. See the general discussion in J. Li, above n. 78.
\textsuperscript{52} J. Li, Ibid.
\textsuperscript{53} Ibid., and see R.C. Williams, above n. 79. The Canadian Income Tax Act, s. 231, was amended in 1986 and then again in 1994 in an effort to comply with the requirements laid down by the Supreme Court of Canada in \textit{MNR v. Kruger Inc}, [1984] CTC 506 and \textit{Barou v Canada}, [1993] 1 CTC 111.
The right to privacy is similar to that in the Canadian Charter, and the court turned to the Canadian jurisprudence for assistance in determining whether the search and seizure provisions of the Act impaired the right of privacy no more than was necessary to achieve the objective of the Act.\textsuperscript{45}

On the basis of the Canadian decision in *Hunter v. Southam*,\textsuperscript{86} the court found that the search and seizure provisions were unconstitutional. It did so on the grounds that there was no 'prior authorisation of the search and seizure, usually in the form of a warrant, by an impartial and independent person who was bound to act judicially in so doing.'\textsuperscript{87}

The courts in Canada and South Africa may not take a broad approach to substantive matters, but, as can be seen from these few examples, they do try to give effect to the purpose of the Charter in procedural matters. It is pertinent to note the difference in protection afforded primary legal rights between jurisdictions with and without bills of rights. Both Canada and South Africa had search and seizure powers in their Income Tax Acts similar to those in most common law countries that did not require prior judicial authorisation of searches by revenue authorities. This approach can be contrasted with a Civil Law country, such as Sweden, where there is a tradition of requiring court approval for investigations involving search and seizure. There, the concern is that even this is insufficient, which means the existence of a right of action under the European Convention of Human Rights is seen by commentators as very important.\textsuperscript{88}

It underlines the increasing influence of supranational protection on primary legal rights. The legal basis for taxpayer protection is broadening. As with constitutional

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\textsuperscript{45} 1995 (2) SA 198 (C).
\textsuperscript{46} R.C. Williams, above n. 79.
\textsuperscript{47} (1985) 14 SCC (3d) 97 SCC.
\textsuperscript{48} R.C Williams, above n. 79.
\textsuperscript{86} A. Hultqvist, above n. 72.
protection, it is often only indirectly applicable to taxation, but the effect is becoming more apparent.

2 Supranational Protection

Supranational protection comes in two main forms: where a treaty automatically has the force of law within a participating state, and where a treaty has to be translated into domestic law before it is recognised by the municipal courts. There is little consistency in approach, but the distinction is important, as the right of a taxpayer to claim a right depends upon recognition by a municipal court that the taxpayer can make such a claim.

Most common law jurisdictions require that 'treaties cannot operate of themselves within the state, but require the passing of an enabling statute'. In contrast, Article VI Section 2 of the United States Constitution provides that a ratified treaty immediately becomes part of municipal law, without further enabling legislation. The Netherlands, France and Germany all accept that treaties form a part of the domestic law. However, where the Netherlands requires no translation, both France and Germany may require enabling legislation if treaty provisions require domestic action for them to have effect.

Treaties often require that the provisions should apply in the domestic law of the signatories. For example, the members of the European Union have all had to give direct municipal effect to the provisions of the Treaty of European Union. This means that the
provisions may be invoked by individuals in municipal courts. Judicial acceptance of this principal is based, fittingly, in a tax case.

In *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, a chemical product was imported into the Netherlands from Germany. The rate of import duty was challenged under Article 12 of the Treaty establishing the European Economic Community. It was argued that the chemical product was reclassified by the Netherlands customs authorities, effectively increasing the duty - a result which was prohibited under Article 12. The Government of the Netherlands submitted that individuals could not invoke the provisions of the Treaty. The European Court of Justice found that the Treaty imposed obligations and also conferred rights on individuals. The rights conferred can be both express and implied.

The effect for taxpayers is to extend their protection beyond the provisions of their own jurisdiction. The European Union Treaty (EU Treaty) provides an interesting example of the effect of a regional trade agreement, albeit the most pervasive and sophisticated of its kind. The economic focus means that protection under the Treaty is often more applicable to taxpayers than those under specific human rights treaties. Many of the leading cases under the EU Treaty consider discrimination between EU Member States. It is a considerable advance in right protection that individuals can bring their governments to a supranational court, which can require those governments to give effect to the principles embodied in an international treaty.

Of the numerous tax cases under the EU Treaty, a small sample illustrates the kind of protection of primary legal rights available to EU taxpayers. In a leading case from

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95 Art. 59 of the Basic Law.
96 For a more comprehensive review of the effect of the EU Treaty, examined from the context of Germany, see C. Daiber, above n. 63.
1983, the *Avoir Fiscal Case*[^97] the European Court of Justice found that the French Government was discriminating against branches and agencies established in France by insurance companies based in other Member States. Branches and agencies established in France were not able to utilise shareholders' tax credits on the same terms as could French companies. The Court held that this was a breach of the EU Treaty, especially the freedom of establishment (Art. 52 EU-Treaty). The regional economic focus is clear. The EU Treaty did not allow outright discrimination by a Member State in favour of its own nationals even in tax cases. This was reflected in two later cases: *Biehl v. Luxembourg*[^8] and *R v. Inland Revenue Commissioners, Ex parte Commerzbank AG*.[^99] In both cases, the European Court of Justice found that Member States could not deny the right to repayment of overpaid tax, if that denial only applied to non-residents. Such action was discriminatory and a breach of the EU Treaty. A similar approach was taken in cases where employees were denied tax deductions because they were not resident in a Member State[^100] and where companies were denied the deduction of tax losses.[^101] They uphold the principle of inter-nation equity, discussed in Chapter 2.

Although the European Court of Justice provides support for primary legal rights, in most cases even within the EU the support is limited. The EU Treaty provides for laws to be made by the Council and Commission of the European Union, mainly in the form of regulations and directives.[^102] A primary aim is to harmonise the law of the Member States. As James and Oats have stated, the main aim of corporate tax harmonisation is to reduce,

[^101]: Marks & Spencer plc v. Honey (HM Inspector of Taxes), Case C-446/03 [2006] Ch 184.
[^102]: Art. 249 of the Treaty establishing the European Community.
if not remove, distortions arising as a result of cross border investment. However, larger economic concerns are of little help to the taxpayer. The taxpayer is concerned with the protection from discrimination that is available in a court of law when harmonisation is given effect. This will only happen where a Directive is self-executing and intends to give rights to individuals. Because tax harmonisation is primarily concerned with eliminating distortions between systems, most Directives are unlikely to provide rights sufficiently detailed for taxpayers to rely on. Supranational support for primary legal rights should therefore not be overstated.

Regional trade agreements are one source of support for primary legal rights. Human rights treaties are another. The European Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (ECHR), has been signed by all member states of the Council of Europe and is incorporated into the law of the European Union by virtue of Article F(2) of the EU Treaty. This Article requires that members of the EU ‘shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’. How the signatories to the ECHR, including the members of the European Union, ensure the protection of the guaranteed rights is left to the individual states.

As with most human rights treaties, the scope is limited within the ECHR for protection of rights relating to taxpayers. Article 1 of Protocol 1 of the ECHR specifically

104 See C. Daiber, above n, 63.
105 Directives that relate to tax include the Merger Directive (434/90/EC), the Parent-Subsidiary Directive (435/90/EC), and the Directive on Mutual Assistance Between Member States of the European Union (799/77/EC).
provides for states to secure payment of taxes. The Convention tends to apply to taxpayers where the application of the tax law breaches another protected right, for example, where criminal provisions apply to a taxpayer and there is a question as to whether the taxpayer has received a fair trial. More extreme taxpayer positions that inevitably appear from time to time, have been rejected. Article 9 of the ECHR provides for the right to freedom of thought, conscience and religion. The European Commission found that tax paid by a Quaker could be used for defence purposes, whatever the concerns of the Quaker. Court jurisprudence suggests that Article 9 does not extend to where a state has a neutral institution or practice that requires an individual to participate in an activity that is inimical to the individual’s belief, however conscientiously held. For the most part, the cases have held that taxes do not relate to conscience, but apply neutrally and generally in the public sphere.

Where the ECHR has been influential in the tax context, is to ensure that there are procedural safeguards available to taxpayers, and proportionality in the treatment of taxpayers. Article 1 of Protocol 1 of the ECHR gives states a wide margin of appreciation in the way they secure payment of taxes. But the European Court of Human Rights has

107 The European Commission for Human Rights can hear a case only if national remedies have been exhausted. It provides a report in which it gives an opinion as to whether there has been an infringement of the ECHR. Only then can the case be heard by the European Court of Human Rights, and many cases are settled once the opinion of the Commission is given.
108 _C.n United Kingdom, Case No. 10358/83_ (1983) 37 DR 142.
110 The same approach is taken in interpreting constitutional rights of a similar kind. For example, J. Lj, above n. 78, writes in respect of the Canadian Charter of Rights and Freedoms, that ‘no taxpayer has succeeded in convincing a court that the payment of tax is a violation of the right to freedom of conscience and religion’.
found in favour of taxpayers where it feels that a state’s actions have upset the balance of interests between the individual and the state.112

For example, Article 6 of the ECHR protects the right to a fair trial, but it does not mention the right to silence or the right not to incriminate oneself. Yet, in Funke v. France, these rights were found to be necessary for a fair trial, in the context of a customs investigation.113 The right was earlier found to be broad enough to govern the provision of information about business records and legal persons.114 The Court in Funke held that, 'the relevant legislation and practice must afford adequate and effective safeguards against abuse'.115 The facts showed that, in relation to a customs investigation involving entry, search and seizure, 'in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, ... appear too lax and full of loopholes for the interferences in the applicant’s rights to have been strictly proportionate to the legitimate aim pursued'.116

Not all human rights treaties have as high a standard of protection to extend to taxpayers. Cases heard by the Inter-American Commission on Human Rights tend to focus on protecting the basic procedural rights taken for granted in most Western European democracies.117 Nonetheless, for tax systems in the most sophisticated democracies, the ECHR offers some salutary lessons. The finding against the government in Funke would apply equally in Australia. There is no requirement for a warrant in the Australian Taxation Office’s powers of search and seizure, nor is there provision for a taxpayer to claim the

114 Sezale Stemm v. France, European Commission of Human Rights, Application No. 11598/85, Report of 30 May 1991, 14 EHRR 509. The applicant was a company limited by shares and no objection was raised.
115 Above n. 113, para. 56.
116 Ibid., para. 57
right to silence and the privilege against self-incrimination, whereas both are available in criminal investigations.¹¹⁸

Taxpayers’ rights are generally specifically excluded from human rights agreements. Yet, it is in the different forms of supranational protection that taxpayers will see an unexpected, albeit limited, increase in their primary legal rights by implication and association. On the other hand, in some areas, their traditional rights will be intentionally eroded.

Trading blocs and other international interest groupings are creating a proliferation of multilateral and bilateral treaties. Treaties of cooperation usually include statements of principles that are intended to apply in some form to the citizens of signatories. Where OECD countries are involved there is significant pressure from their own and other OECD citizens and representative groups to include references to human rights. Although, whether or not human rights are mentioned, as we have seen in Europe, economic cooperation normally includes some consideration of such concepts as freedom of movement of goods and non-discrimination. As soon as such concepts become part of the general jurisprudence of a country, whether or not they are translated into the domestic legislation, they can start to influence the courts to provide more substantial primary legal rights.

3 Legislative Protection

Primary legal rights are most commonly afforded protection through ordinary legislation. In most jurisdictions there is nothing to distinguish primary from secondary legal rights.

This has meant that less attention has been paid to protecting the fundamental rights of taxpayers than has perhaps been warranted. In many jurisdictions the right to impose tax and the requirement that it should be imposed by law are given constitutional protection. However, the power of administration of the tax system is generally set out as part of the ordinary tax legislation. The framework for exercise of discretion in tax administration is less likely to be stated explicitly. Yet, all three exercises of power form part of the larger power to tax.

This is explored further in Chapter 6. However, it will be seen that without constitutional or supranational restrictions, few of the primarily legal rights are available to taxpayers in many jurisdictions. They are well recognised and many flow directly from the principles set out in Chapter 3. However, just as legal systems do not necessarily protect the human rights that they recognise as principles that should underpin a legal system, neither do they specifically protect primary legal rights that flow from tax principles recognised as features of a good tax system.119

The advantage of classification is to identify clearly which are the primary legal rights and where they are protected, if at all. Policy makers and legislators can then specifically decide whether they need additional protection in the tax law. At least then their exclusion is intentional rather than by oversight. As discussed in Chapter 3, it does not make sense to make much of the basic principles underlying tax policy only to ignore them when it comes to translating the policy into legislation. The problem for policy-makers is that primary legal rights recognise that taxpayers do have rights. The human rights debate in many countries shows how difficult it is for any legislature to accept that existing protection is insufficient. It often takes a catalyst, such as major reform, the intervention of an external agency such

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as the IMF, or political outcry of the kind seen in the US when the Taxpayer Bills of Rights were introduced, for primary legal rights to be considered.

B \textit{Enforceable Taxpayers' Rights: Secondary Legal Rights}

Most jurisdictions have secondary legal rights that provide protection for taxpayers in the context of the operation of the law. Such rights are commonly found in the legislation that governs the administration of the revenue assessment, collection, and enforcement processes. They are therefore fairly easily identifiable and distinguishable from primary legal rights.

Two main issues arise. First, the breadth of legal protection very much depends upon the legal system and the way it operates. Many countries rely on administrative rules to implement procedures, and any statutory protection is limited. The secondary legal rights do not therefore form a complete framework for protection, which would be found in combination with primary administrative rights. Often they are interchangeable in form, although they are different in substance. Second, even where there is fairly broad statutory protection, it is usually embodied within the legislation in the context of a specific procedure or rule: there is usually no systematic and comprehensive treatment of taxpayers' rights. Nonetheless, the existence of secondary legal rights is often used as an argument against providing greater statutory protection to taxpayers when an administrative chatter or bill of rights is introduced.\textsuperscript{120}

Particularly in the common law countries, administrative regulations, proclamations, orders, and rulings have become commonplace, particularly in the area of taxation.
Statutory protection is designed to ensure that decisions and procedures are fair and equitable. For example, in Australia, the Administrative Decisions (Judicial Review) Act 1977 (Cth) was introduced 'to simplify and clarify the grounds for judicial review, thereby facilitating access to the courts and enabling the individual to challenge administrative action which adversely affected his interests'.

Administrative decision-making has certain features that can prejudice the interests of the individual. Sir Anthony Mason identified five in particular: it lacks independence and is susceptible to political, ministerial and bureaucratic influence; decisions are not usually made in public; the administrator usually does not have to give reasons for a decision; the administrator does not always observe the standards of natural justice or procedural fairness; and the claims of justice of the individual are often subordinated to the more general demands of public policy.

It is for these reasons that many jurisdictions allow legal rights of review of administrative decisions. In most jurisdictions they extend to a review of decisions made by revenue authorities. Australia introduced an Administrative Appeals Tribunal to review administrative decisions, and a large part of its case load is concerned with taxation matters. Similar rights of review are available in most OECD jurisdictions. These rights of review are a particularly important example of a secondary legal right.

In its 1990 survey of taxpayers' rights and obligations, the OECD identified six basic principles which apply to the protection of taxpayers and these have been retained in the

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120 As in Japan. See K Ishimuro, 'The State of Taxpayers' Rights in Japan' in D. Bentley, above n. 46. This was also the position taken by the Australian Government when it decided to introduce an administrative charter of taxpayer rights.


122 Ibid., p. 30.

123 OECD, above n. 60, p. 12.
2003 guideline on Taxpayer Rights and Obligations. The rights to pay no more than the correct amount of tax and to certainty are primary legal rights. So, too, is the right to publication of the tax rules, but it is phrased as the lower level primary administrative right to be informed, assisted and heard, which is a subset of the primary legal right. The remaining three are secondary legal rights: the right of appeal; the right to privacy; and the right to confidentiality and secrecy.

Secondary legal rights of this kind cannot normally be implemented using administrative measures. They involve the structure of the legal system and legal enforcement mechanisms. However, common law countries often favour administrative measures where these are possible and primary administrative rights form the larger part of taxpayers' rights.

In contrast, some civil law countries have developed a more complete system of secondary legal rights with detailed statutory regulation of the revenue administration process. This imposes limits on the actions of revenue administrators, and affords a greater degree of certainty to taxpayers.

For example, the German Fiscal Code (Abgabenordnung) provides extensive rights to taxpayers who are subject to field audits. Some of these rights are not commonly found in statutes, and include: a taxpayer is entitled to be informed during an audit of any facts that are discovered and their tax consequences; an audit must take place during normal office hours; the taxpayer or her or his representative is entitled to be present during an audit; the taxpayer has a right to a final audit meeting; during a final audit meeting the taxpayer is entitled to discuss disputed facts, their legal consequences and the

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125 See Chapters 8 and 9.
126 OECD, GAP002, above n. 124, pp. 4-5.
127 For a detailed discussion, see C. Daiber, above n. 63.
result of the audit and its legal consequences; and the taxpayer is entitled to a written audit report prior to the raising of an assessment based upon the report.

There are often cultural and historical reasons for countries taking one approach rather than another. Japan and Singapore prefer administrative discretion in administering the tax system, not simply because their tax systems were based on common law models, but for cultural reasons too.¹²⁸ That could be a reason why Hungary has followed the more detailed German approach, although the Hungarian Taxation Order Act is not as comprehensive and systematic.¹²⁹

Historically, the US Internal Revenue Code sets out a statement of the law, while the provisions governing its application are detailed in extensive regulations. In 1988 Congress passed the Taxpayer Bill of Rights.¹³⁰ Its name suggests that it constitutes a systematic statutory treatment of taxpayer rights within the Internal Revenue Code. This is far from the case, and it has been suggested that this and the subsequent Taxpayer Bills of Rights 2 (of 1996) and 3 (of 1997) are misnamed. They were merely part of an omnibus law, and 'provided a variety of procedural changes to the Internal Revenue Code without any coherent scheme'.¹³¹

Nonetheless, the US approach is different to the approach taken in most other jurisdictions, as there has been a considered approach to the question of statutory protection of taxpayers' rights. Elsewhere, the statutory protection has developed with the revenue law and, where there has been a systematic review of taxpayers' rights, it has taken place at the administrative level. The US Taxpayer Bills of Rights may have been

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¹²⁹ See D. Deak, 'Taxpayer Rights and Obligations: The Hungarian Experience' in D. Bentley, above n. 46.
¹³⁰ Technical and Miscellaneous Revenue Act of 1988 PL 100-647 Subtitle J.
¹³¹ A. Greenbaum, above n. 46. For further discussion of the Taxpayer Bills of Rights, see L.B. Gibbs, 'Taxpayer Bill of Rights', College of William and Mary 35th Annual Tax Conference (Williamsburg, 8-9 December 1989); C.R. Meland, 'Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political
introduced into the Internal Revenue Code in a piecemeal fashion, but the aim was to identify specifically, potential abuses of power by the US Internal Revenue Service, and to provide taxpayers with the necessary legislative protection.

Many of the provisions included in the three Taxpayer Bills of Rights are similar to those found in the German Fiscal Code, which give taxpayers certainty in the process of tax administration. For example: assessment notices must be accompanied by explanatory information and reasons for the assessment; the process of the conduct of an audit and, in particular, audit interviews is codified; and there are procedural safeguards that form part of the general collection process and, specifically, with respect to the fairly draconian search and seizure rules.

Other aspects of the Bills of Rights go further, and aim to ameliorate the often harsh effects of the operation of the US revenue law. A criticism of the process of making regulations was that there was insufficient consultation to determine the effect that the introduction of a regulation would have, particularly on small business. Now, any proposed regulation must be commented on for its effect by the Administrator of the Small Business Administration. There was a concern that the remedies available to taxpayers were too limited where Internal Revenue Service employees were inspecting or browsing taxpayers' returns and information. Criminal penalties have been introduced to prevent unauthorised inspections of tax returns and civil remedies provided for taxpayers whose information has been unlawfully disclosed. As in many jurisdictions, taxpayers argued that regulations made under the Internal Revenue Code were increasingly applied retrospectively. Now this is unlawful, except in specified circumstances.

The types of taxpayer protection discussed in the last paragraph cannot be provided through administrative guidelines. They should be distinguished from the procedural rights,

such as those governing the conduct of an audit or the information provided with an assessment, which can. There are then two main types of secondary legal right available to taxpayers: first, those that can equally be provided through some form of administrative regulation or guideline; and second, those that can only be given in legislative form.

Revenue administrators and governments prefer the flexibility and authority of administrative guidelines. Nonetheless, statutory protection for taxpayers in procedural matters is available, to some degree, in all OECD jurisdictions. It is the extent of that protection in Germany and Hungary, for example, which contrasts with that given in most common law countries. Usually, the difference in effect on taxpayers is probably small, but legislative protection, by its nature, offers more certainty. On the other hand, whereas legislative concessions are often interpreted strictly, administrative guidelines can expand readily to meet new situations, as revenue authorities always retain the option of later narrowing or removing, fairly easily, any concessions that they give.\footnote{132} It is likely, given the trend towards government through delegation, that administrative rule-making will increase at the expense of legislative rule-making.

A distinct and separate secondary legal right that supports this approach is the right to request the intervention of an ombudsman in tax matters. Provided there is adequate access to the ombudsman, particularly where statutory rights are limited, it is a major step forward in rights protection. A secondary legal right instituting an ombudsman or similar office supports the implementation of administrative rights. An ombudsman can provide the authority to ensure that revenue administrators give effect to their own administrative guidelines. The office represents the intervention of an independent and impartial third party, where access to the courts is limited.

\footnote{1996} TaxR 535.
\footnote{132} Discussed further in D. Bentley, above n. 17, p. 107.
Chapter 4

Australia has successfully introduced a Special Tax Adviser in the Office of the Commonwealth Ombudsman. The United Kingdom uses a Revenue Adjudicator. The Swedish *justitieombudsmannen*, which played an important role in monitoring the committees of locally-elected laypeople that were responsible for assessing Swedish income tax until 1991, issues guidelines which are used in administrative practice. The US used a Taxpayer Ombudsman for some years, but in Taxpayer Bill of Rights 2 the office was replaced by a Taxpayer Advocate. The Taxpayer Advocate reports directly to the Commissioner of the Internal Revenue Service but must make two reports to the House of Representatives Ways and Means and the Senate Finance Committees each year that are not subject to prior review by any official of the Internal Revenue Service or the Treasury. The first report sets out the objectives of the office for the year ahead and the second report identifies the major problems from the past year, with recommendations for their resolution. In addition, the Taxpayer Advocate has significant powers to assist taxpayers. Austria, Denmark, and France have also used an ombudsman successfully.

Politically, it is beneficial for governments to appoint an ombudsman responsible for assisting taxpayers. It is also a secondary legal right that provides significant additional protection for taxpayers and acts as a balance in the trend towards administrative rights. Publicity and transparency are particularly strong weapons against administrative

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135 A. Hultqvist, above n. 72.
136 IRC § 7803(c)(2)(B).
137 Published on <www.irs.gov/advocate>, 1 November 2006.
138 See National Taxpayer Advocate's 2007 Objectives Report to Congress, ibid.
139 OECD, above n. 60, p. 20.
This is particularly significant now that revenue authorities are focusing on the importance of taxpayer goodwill in improving compliance.

C Enforceable Taxpayers' Rights: Primary Administrative Rights

Primary administrative rights are often interchangeable with secondary legal rights, in that they could be legislated. As discussed above, governments prefer administrative rights to statutory rights for a number of reasons. Administrative rights are flexible. A concession may be given, but it can as easily be taken away. For example, in Australia, there is a legal right to legal professional privilege covering communications or documents in relation to litigation, or to legal advice from lawyers to their clients. The Commissioner of Taxation has chosen to extend this right to a wider selection of documents than would be possible at common law, and to a wider group of persons, including accountants. However, in a number of speeches in the past, the then Commissioner of Taxation expressed concern that this concession was being abused, and indicated the possibility that the ATO may withdraw it.

The example also illustrates the capacity for an administrative right to be extended beyond that available at law. Provided there is a capacity to withdraw a concession in case of necessity, revenue administrators are often willing to broaden the rights they offer to taxpayers in order to improve their ongoing relationship.

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140 D. Bentley, above n. 46.
141 Grant v. Duman, (1976) 135 CLR 674 and Baker v. Campbell, (1983) 153 CLR 52. A similar concession is available in the Netherlands, but there, priests, notaries, lawyers, doctors and pharmacists are all given privilege, see the General Act on Taxation of 1959, art. 53a. R. Fisher, 'Confidential Tax Communication: A Right or a Privilege?' (2005) Australian Tax Forum, 555, compares the administrative approach taken in Australia with the statutory extension of the privilege in New Zealand.
142 See, e.g., 'ATO Directions and Operations', an address by M. Carmody, the Commissioner of Taxation, to the 1996 Taxation Institute of Australia NSW Convention (Canberra, 21 March 1996).
Administrative rights can assist revenue administrators in improving taxpayer goodwill, which has the flow-on effect of increasing compliance. This has often been at least part of the reason for the introduction of an administrative advance rulings system.\textsuperscript{143}

The flexibility of administrative rights is particularly beneficial in tax matters, where changes are so frequent. Revenue administrators can change rights easily to suit the current demands of the substantive law. They can also be more flexible in applying the rights and concessions. For example, they may wish to create exceptions when applying a concession, depending upon the circumstances of a particular case, perhaps where they feel that the taxpayer is taking unfair advantage of it, or where it would not be in the best interests of the community to allow the concession.

Administrative rights can be a precursor to adoption as legal rights. For example, where advance rulings are given on an administrative basis. Over time they become an integral part of revenue administration. The logical progression is that they are then given some form of legislative recognition. This has happened in Australia, the Netherlands and India. In Canada, on the other hand, Revenue Canada considers itself bound by the advance rulings that it provides, but there is no legal requirement for it to do so.\textsuperscript{144}

The Netherlands provides an interesting example of administrative rights that are, nonetheless, given legal recognition. This occurs through the application by the courts of the principle of legitimate expectation. It makes certain information that is given to taxpayers by the revenue authority binding on that authority. For example, the revenue authority provides an explanatory brochure with tax returns. The explanatory brochure is

\textsuperscript{143} In Australia, see the Second Reading Speech to the Taxation Laws Amendment (Self Assessment) Bill 1992.

binding on the authority if the taxpayer relies on an incorrect explanation, where it is not readily apparent that there is a conflict with the existing law.\textsuperscript{145}

In Japan, on the other hand, there are a number of administrative processes that have little or no source in the law. Ishimura cites the example of extended audits. He suggests that, although there is no real provision for them in the legislation, they are reported to have been used even as a form of harassment. This is made easier under the administrative rules governing audits, which do not regulate search and seizure during audits. Ishimura states that 'it is not unknown for audit officers to go through the handbag or desk drawers of the audit subject without obtaining consent, even during voluntary audits'.\textsuperscript{146} These examples serve to illustrate the importance of administrative protection where the revenue authorities have significant powers and independence under the law.

\textbf{D Principles of Good Practice: Secondary Administrative Rights}

Secondary administrative rights are given in the context of detailed processes that could not be legislated efficiently, and often take the form of guidelines issued by revenue authorities. Many secondary administrative rights are found in administrative charters of taxpayer rights, which, although they contain statutory and primary administrative rights, also make statements that taxpayers have rights that really are not practically enforceable, except in a general sense.

In Canada, the Declaration: Your Rights tells taxpayers that, 'You have the right to get complete, accurate, and clear information about your rights, entitlements, and


\textsuperscript{146} K. Ishimuta, above n. 120.
Chapter 4

Some of this information can be provided through legislation and explanatory memoranda. However, much of it has to be issued via the website, information brochures, booklets and pamphlets published by Revenue Canada. Taxpayers can place reasonable reliance on such information in ordering their affairs, but in many situations they are relying on the information provided by Revenue Canada, with only the promise of the Declaration of Rights to protect them if they are wrong: the doctrine of legitimate expectation is not as broad in Canada as it is in the Netherlands. The statements made in information brochures that do not flow directly from the law, are usually secondary administrative rights. They could not be legislated, but form the framework of minor rules and procedures for the operation of the system.

Of particular importance to administrative rights is the way that a revenue officer exercises delegated authority to make a decision. When the law delegates decision-making powers, it usually lays down guidelines as to how the decision is to be made, or relies on standard principles of administrative procedure. However, a decision is usually discretionary in nature and depends upon the particular circumstances of the individual taxpayer. That is the reason for the delegation of the decision-making power in the first place.

Normally a revenue authority will publish guidelines as to how it will make decisions and the factors it will take into account in exercising its discretion. Administrative guidelines governing the decision-making process are primary administrative rights as they could be legislated. The decisions flowing from these powers are often secondary administrative rights. Typically these are found in such areas as the application of penalty provisions where there is a late payment of tax. Many jurisdictions have culpability components that are determined at the discretion of a revenue officer. The revenue

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147 See <www.cra-arc.gc.ca/agency/fairness>, 1 November 2006.
authority can have a wide discretion in both procedural and substantive matters. For example, in respect of the same taxpayer it might have to determine whether to audit the taxpayer or not, and, if it does, whether to apply an anti-avoidance provision to a scheme or transaction. As the discretion and decision-making powers vested in revenue administrators are broad, so, too, is the importance of the administrative guidelines they publish in relation to the exercise of those powers. In most cases, the only enforcement mechanism that exists for a taxpayer in relation to procedural matters is to take up a breach of revenue authority guidelines with the authority's own internal problem resolution service, where it exists, or with the relevant ombudsman.

That said, practice has shown that internal problem resolution units can be remarkably effective in resolving disputes between line officers of a revenue authority and taxpayers.149 As discussed above, an ombudsman can also resolve disputes, even where the office has no direct authority to enforce a resolution, simply because of the publicity and reporting capabilities that usually attach to the office.

Some jurisdictions do not provide this kind of protection to support secondary administrative rights. For example, in Japan legislative provisions are stated in broad terms and leave considerable discretion to the tax authorities. The tax authorities usually do provide guidance as to how they will exercise their discretion, but there is little recourse for taxpayers if they disagree with that exercise.150 Ishimura states that, 'it is not possible for taxpayers or tax specialists to interpret or apply tax laws or to check the validity of specific treatment by the tax authorities, without consulting tax circulars. In other words, circulars do virtually have the force of law, and do have de facto binding effect on the taxpayer.'151

148 See J. Li, above n. 78.
149 D. Beatley, above n. 46.
150 K. Ishimura, above n. 120.
151 Ibid.
A slightly different form of this approach to revenue administration is sometimes used. Where the law in a jurisdiction is out of date and it would be impossible, ludicrous or unfair to apply it in a particular way, revenue authorities will issue rulings or extra-statutory concessions. These state that they will not apply the law as it stands and that taxpayers should not follow it. In this way the revenue authority maintains both the goodwill of taxpayers, and a respect for the law as it is applied.

Secondary administrative rights are elusive. Primary administrative rights are recognisable as they provide the formal administrative rules and procedures for the operation of the tax system and could normally be legislated as secondary legal rights. Secondary administrative rights form that vast body of quasi-rules and processes on which taxpayers rely on a daily basis for the efficient and effective operation of the system. In a Model these rights are articulated in the form of general principles of good tax administration. Their importance is recognised in taxpayers’ charters and the OECD general administrative principles. The aim is to identify clearly that secondary administrative rights are important to the proper functioning of a model modern tax administration.

E Principles of Good Practice: Administrative Goals

Administrative goals are often also included in charters and similar administrative statements of taxpayer rights. They are concerned largely with the attitudes of revenue authority staff and the manner of their relationship with taxpayers. For example, Revenue Canada’s Fairness and Client Rights document states, inter alia, that ‘you have the right to

152 OECD, GAP002, above n. 124.
be treated with courtesy, respect and consideration'. The Australian Taxpayers’ Charter states that, ‘You can expect us to offer you professional service and assistance to help you to understand and meet your tax obligations’. New Zealand taxpayers are entitled to ‘prompt, courteous and professional’ service under the Inland Revenue charter.

Administrative goals are essentially an attempt to set a code of conduct. They should be seen in the context of the move by revenue authorities towards engendering taxpayer goodwill. It is not surprising that revenue authorities most interested in improving taxpayer compliance through good relationships with taxpayers provide administrative goals. They have flexible content and depend largely upon contextual interpretation of social rules. Nonetheless, they are important in that they do represent the trend towards a service oriented approach within a revenue administration that espouses them. As the OECD survey of taxpayers’ rights in 1990 stated, ‘An efficient tax administration also requires that taxpayers are treated in a courteous and efficient manner and that the possibility of dialogue between the administration and the taxpayer is provided.’

When charters of rights were first introduced taxpayers were justifiably sceptical of the importance of administrative goals. However, the development of modern management processes within tax administrations has seen a strong emphasis on statements of service standards accompanied by performance measurement. A review of revenue authorities in the 2006 OECD Comparative Information Series Report on tax

153 With apologies to Gilbert and Sullivan.


administration shows that most annual plans and reports are now both linked to achievement of specific performance standards and guided by formal taxpayers' rights in law or official documents. They form part of the OECD Principles of Good Tax Administration. It is therefore appropriate to consider administrative goals as an important part of the broader administrative framework for taxpayers' rights.

Take both Australia and the US as illustrations. The ATO regularly commissions external reports on how well it is achieving its administrative goals and published charter standards. The 2005 review identified that, for example, taxpayers saw the way ATO staff treated them as particular strengths of the revenue authority. This is a particularly pleasing result for the ATO as it has developed a compliance model that assumes taxpayers are honest and has worked assiduously to mould its culture to reflect this. The 2007 National Taxpayer Advocate Objectives reflect a similar focus in the IRS. For example, the Taxpayer Advocate is undertaking several research studies that 'should help the IRS craft an approach to taxpayer service that meets taxpayers' individual needs' as part of the IRS Taxpayer Assistance Blueprint. Where performance is being judged publicly and transparently on achievement of administrative goals, it makes them valuable instruments in the development and protection of a broader framework of taxpayers' rights.

For the Model, as with secondary administrative rights, the classification recognises that administrative goals form part of the general principles of good administrative
practice. They are not generally within the scope of an ombudsman’s review. However, because they form part of the reporting and evaluation process for the revenue authority there is strong incentive for revenue officers to meet the articulated standards. It is therefore legitimate to suggest that administrative goals do form part of the Model as they can ensure improved taxpayer treatment.\textsuperscript{163}

VI CONCLUSION

Chapter 2 explored the reasons why a Model of taxpayers’ rights is timely and beneficial in the context of developments in tax administration and the broader legal framework in the latter part of the 20\textsuperscript{th} and early part of the 21\textsuperscript{st} centuries. However, it is difficult to identify exactly which rights should be included. The traditional principles that underpin tax policy are well known, but Chapter 3 showed how their content and meaning was less well defined. It put forward a simplified and generally acceptable common meaning for those principles that are regarded as forming the basis for tax systems. They should also therefore influence taxpayers’ rights.

Although an agreed set of principles is an important starting point for common agreement, Chapter 3 also outlined the difficulties that flow from the interpretation of any international model set of rules or guidelines. There may be significant differences in interpretation and therefore application of rules. It will depend on a range of factors, from variations in the legal system through to cultural mores that dictate how a rule or process should be implemented. Chapter 3 stressed that the rights contained in the Model will contain common content, but must be flexible enough to cope with variations in approach.

\textsuperscript{163} National Taxpayer Advocate’s 2007 Objectives Report to Congress, above n. 138, p. vii.
Chapter 4

to their implementation. Rules should not be implemented unless it is within the context of
the legal system, culture, economy and broader environment of a jurisdiction. A Model that
is not expressed broadly enough to facilitate contextual implementation is of little use.

This chapter has explored the different types of right that could be included in a
model and how best to classify them. The classification takes place in an environment,
where the way government works is changing, in part because of its scope. In the context
of expanding government, there is, paradoxically, increasing taxpayer protection and a need
for standards and guidelines to assist in the exercise of power. Where once it may have
been thought that the only substantive protection available to citizens was through
legislation, because administrative protection was fairly limited, this is no longer the case. It
is therefore important to classify taxpayers' rights in a way that reflects their different
content. The differences are often found in the means of enforcement and these are
explored further in Chapter 5.

This Chapter has shown how important it is to recognise the differences between
each type of right. Their nature will produce a radically different result. Any jurisdiction
should identify the rights it affords taxpayers across the tax system. It is no longer
sufficient, if policymakers are serious about providing a comprehensive framework for
taxation, to leave it to the protection given elsewhere in the law without determining
whether or not it is appropriate. A comprehensive approach requires review of both legal
and administrative rights, recognising the widely different impact depending upon which
method of enforcement is used.

The nuances in the classification of rights become particularly significant as countries
seek to implement greater taxpayer protection as part of the reform of their tax systems. By
understanding the different classes of right they will be able to identify much more easily

163 S. James, T. Svetalekth and B. Wright, above n. 156.
the appropriate framework of rights for their particular tax administration. This will cater to the operation of the rules in the system, the effect of those rules, and the gaps in those rules. The rules and principles within the classification system are found in Chapters 6 to 8. Chapter 6 focuses on the primary legal rules that provide the legislative framework governing the taxation system. Chapter 7 explores the general principles of good tax administration, secondary legal rights and administrative goals – those elements related to how the tax administration exercises its powers. Chapter 8 analyses the secondary legal rights and primary administrative rights that form much of the substance of taxpayers' rights in any tax system. The rights then translate into the Model in Chapter 9.