

# eJournal of Tax Research

Volume 2, Number 2 2004

## CONTENTS

- 155** The Effect of the Human Rights Act 1998 on Taxation Policy and Administration  
**Natalie Lee**
- 183** **Towards Community Ownership of the Tax System:**



# Towards Community Ownership of the Tax System: The taxation Ombudsman's perspective

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## *Abstract*

Philip Moss reviews the various "controls" over the exercise of his powers of administration by the Commissioner of Taxation in Australia. He considers the terms of the legislation under which the Commissioner operates, the reporting requirements and the compliance with audit guidelines h-dTJ9Cocis

1936, which states that the Commissioner shall have the general administration of this Act.

The Constitution in Chapter two anticipates that there will be an executive arm of Government responsible for the administration of Government policy and legislation. The tax system has always been grounded in legislation, which confers powers on the Commissioner of Taxation. The result is now a heavily legislated area. The Government has retained the right to determine tax policy, but it will choose legislation to implement that policy. The reality inevitably is that the tax system as we know it in Australia is established in legislation.

I understand that for many years it has been the practice for the Government of the day, when dealing with complaints about day-to-day decisions of the ATO, to assert that it is the Commissioner of Taxation who is responsible for the administration of the taxation law. In other words, freedom of the Commissioner from political interference in routine decision-making, and conversely non-accountability of the Minister in respect of routine decisions, and consequent freedom to concentrate on policy issues, would seem to have been a key value in our taxation system.

Of course, the Commissioner of Taxation has never been at large to do as he pleased. For example, he is controlled by the terms of the legislation he administers, he must report to Parliament and the Government, he is subject to audit, and his decisions may be subjected to judicial scrutiny. Other Government agencies, particularly the Treasury, contribute tax policy advice to the Government.

From the early days of taxation in Australia, it was possible for taxpayers to object to taxation assessments and, if the objection were disallowed, to seek review of the decision by a Taxation Board of Review. (In many respects, this arrangement was a pioneer model for administrative review, akin to the current Administrative Appeals Tribunal). The Boards were empowered, for the purpose of reviewing decisions, effectively to stand in the shoes of the Commissioner and exercise his powers (including discretions), and make decisions on the merits. This mix of external scrutiny for the tax office may have been<sup>59.42</sup> 12tic2912

Then came the *Ombudsman Act 1976*. From that time, taxpayers with a complaint had an important additional avenue to seek a remedy, the right to seek an impartial review of ATO decisions by the Commonwealth Ombudsman. Taxpayers were quick to make use of this facility:

In 1977-78, the first year of operation, the Ombudsman received 333 tax complaints. Numbers have fluctuated considerably over the years, reaching a peak of 3354 during 2000-2001.

The law on judicial review was reformed, with the enactment of the *Administrative Decisions (Judicial Review) Act 1977*. As a result, it became easier to seek judicial review of a wide range of decisions of the ATO.

The reform continued into the 1980s, with the enactment of the *Freedom of Information Act 1982*, helping to underwrite democratic ideals by creating rights of access to information and documents, and helping to prevent improper practice and corruption.

The Taxation Boards of Review were subsumed into the Administrative Appeals Tribunal in 1986, bringing to bear the greater capacity and resources of that Tribunal (including Presidential members) on review of decisions on objections to taxation assessments.

No doubt picking up on the mood of the times the ATO, apparently largely on its own initiative, began to consult more widely with the community. This included establishment in 1985 of National and State Taxation Liaison Groups (with representation from professional associations and the Treasury) and the Commissioner's Advisory Panel (CAP) from 1989 (including various business and community associations).<sup>4</sup> The ATO also established better internal complaint handling mechanisms, responding to an increasingly educated public, more conscious of their rights, including the right to complain.

One particular example of the ATO becoming more involved with the community was its sponsorship of the development of Atax here at the University of New South Wales (from around 1990). This initiative would have assisted the growth of external centres of excellence in taxation, and independent study, comment, and dialogue on taxation issues. This series of conferences is perhaps but one example of that process in operation.

## **MORE RECENT DEVELOPMENTS**

### **Parliamentary Scrutiny**

An interesting feature of the last decade or so has been the influence of the Federal Parliamentary committee system. The deliberations of committees can include the taking of evidence from the public as well as from tax officers and other public officials, such as the Ombudsman. Importantly, there can be input from the Opposition, minor parties and independents, so the reports do not necessarily represent Government policy, and can reflect a much wider community influence.

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<sup>4</sup> Report 326, *An Assessment of Tax* (November 1993), Joint Committee of Public Accounts, Commonwealth Parliament.







complement the work of the other and cooperate closely and consistently with our respective legislation.

We envisage that we would do fewer ATO-specific own motion investigations in future. These investigations would seem to fall more logically in the Inspector-General of Taxation's area of responsibility. However, the Ombudsman often undertakes own motion investigations into matters of more general administration such as FOI, record keeping, compensation and oral advice that cover many agencies. The ATO is a significant part of the federal bureaucracy and as such would naturally be included in such studies.

The establishment of the Inspector-General of Taxation has allowed the Taxation Ombudsman to refocus on achieving systemic remedies that arise from investigation of individual complaints. Some individual complaints indicate the presence of broader problems that can be redressed by the relatively efficient and informal processes of an Ombudsman inquiry.

This sort of approach would keep the Taxation Ombudsman's main focus on individual complaints and systemic remedies.

The Ombudsman provides an independent and informal avenue for taxpayers to raise their individual concerns. The Taxation Ombudsman follows a practical approach to complaint handling – identifying issues, setting the complaint on the path to resolution, and explaining the process to the taxpayer in a clear and open way. This serves the interests both of the individual taxpayer and of the tax system generally. The objective of our office, to achieve practical solutions to tax problems, remains vitally important.

#### **INTERNATIONAL COMPARISONS**

The facility for a citizen to be able to complain about taxation decisions to an official with an Ombudsman type function is



to proceed. Otherwise, there is to be consultation about the shape of the changes, after an announcement of the policy change.

In the USA, disquiet about the functioning of the Internal Revenue Service (IRS) led to the enactment of the *Internal Revenue Service Restructuring and Reform Act 1998*.

Existence of multifaceted arrangements for consultation and review does present some problems for taxpayers and their professional advisers. When a remedy is needed, what is the most appropriate course to pursue: complaint to the ATO, complaint to a Member of Parliament or the Government, objection to an assessment and subsequent review or litigation, judicial review, complaint to the Ombudsman, or seek to involve the Inspector-General or the Board of Taxation? Or press all the buttons at once?

The answer depends largely on the nature of the problem. Is the issue one of interpretation of the law, does it raise a general systemic issue or affect large numbers of taxpayers, is a change in government policy required, or is the decision under question perceived to be contrary to law, unreasonable, unjust, oppressive or improperly discriminatory? The course to be adopted will remain one requiring some judgement, as well as an appreciation of the roles of the various agencies that might be able to assist and is as much a challenge to the tax administrators, and those overseeing the system, as for taxpayers and their advisers.