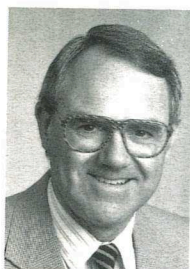


Taxpayers' Bill of Rights



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In its 50th anniversary year, the Taxation Institute of Australia has drafted and circulated for public comment a Taxpayers' Bill of Rights, with the objective of enshrining conditions for a fair and open system of tax law administration.

The system of taxation operating in Australia at a federal level today touches all Australians. Taxation law is complex and highly technical and can apply without regard to the individual's capacity to comprehend it.

Given that the essence of an efficient tax system is central to the very existence of government, it is essential that taxpayers as citizens be assured that their rights under the tax system are inalienable in our system of government.

There are already many safeguards built into our tax system that are designed to protect taxpayers, on the one hand, and the revenue, on the other. The intention of the Taxpayers' Bill of Rights is to make taxpayers aware of their existing rights under the tax system and, also, to set minimum standards in respect of those matters that are not presently reflected in our tax system.

It is proposed that the Taxpayers' Bill of Rights should have the force of law and that existing legislation should be read as subject to it; so that, where an inconsistency occurs, the Taxpayers' Bill of Rights will take precedence.

THE RIGHTS

■ RIGHT NUMBER 1

Taxpayers shall have the right to reasonable certainty under the law in respect of their liability for tax.

This Right reflects the need for taxpayers to be able to determine, with a reasonable degree of certainty, whether a taxation liability is likely to arise in relation to a proposed transaction or activity or where a transaction or activity has already been entered into or engaged in.

No-one would presently argue with the proposition that the *Income Tax Assessment Act 1936* (the Act), containing more than 1,200 sections and over a million words has reached the stage where, particularly for the average taxpayer, there is little or no hope that they can ascertain their taxable position.

Until such time as the Act can be either replaced or thoroughly overhauled, the only way to safeguard taxpayers' rights is to provide to taxpayers the benefit of the doubt where the law is unclear. That was once an accepted rule of interpretation for taxing statutes. Right 1 of the

proposed Taxpayers' Bill of Rights would operate to require a finding in a taxpayer's favour if the law was so uncertain as to not enable a taxpayer to ascertain, with reasonable certainty, his or her liability with respect to particular activities engaged in or proposed to be engaged in.

In the recent *Hepples Case* 92 ATC 4013, in which the High Court had cause to consider the former secs.160M(6) and (7), each of seven judges expressed differing views as to the meaning of those provisions. Although the taxpayer was ultimately successful in that case because of a technicality that enabled the High Court to favour the taxpayer, under the proposed Bill of Rights a court or tribunal could simply rely on Right 1 to disallow an assessment where liability is not clearly established by the Act.

This Right will be a powerful reminder to the legislature and executive government to ensure that only taxation laws that are clear in their operation will be effective.



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■ RIGHT NUMBER 2

Taxpayers shall have the right to a full explanation of the basis of any assessment imposing on them a liability for tax.

Not only is it important that taxpayers are able to ascertain with reasonable certainty the relevant tax law affecting their activities or proposed activities, but, also, taxpayers must be able to ascertain the basis of any assessment made in relation to them.

Under former sec. 190(b) of the Act, which is now reflected in secs 14ZZK and 14ZZO of the *Taxation Administration Act 1953*, a taxpayer seeking review of an objection decision has the onus of proving that the original assessment is excessive. In order to satisfy that that is so, a taxpayer should be in a position to know the basis on which the assessment was made. That is particularly relevant in the case of an asset betterment assessment made under sec. 167 of the Act.

In *George v FCT* (1952) 86 CLR 183, where an assessment under sec. 167 was raised against the taxpayer, the High court refused the taxpayer's request for particulars as to the basis of the assessment. It was held that there was no obligation under the Act to provide such information. That aspect of the decision was followed in *Briggs v FCT* 87 ATC 4278.

It is, of course, now open to a taxpayer to seek relevant documents from the Taxation Office pursuant to the *Freedom of Information Act 1986* (see *Dalco v FCT* 88 ATC, at p. 4649). Therefore, it is thought that the rights under the *Freedom of Information Act* probably meet the requirements of Right 2. However, a more direct right would be preferable.

This Right is not intended to impose an obligation on the ATO to provide a full explanation in relation to every assessment, as in most cases that will not be required. Clearly, however, where a taxpayer seeks that information, a full explanation ought to be available as a matter of right.

■ RIGHT NUMBER 3

Taxpayers shall be entitled to equal treatment under the law and to equal treatment by the Australian Taxation Office. Taxpayers shall also be entitled to fair and courteous ATO treatment.

The purpose of this Right is to ensure that taxpayers are treated equally under the taxation law.

In a recent case, *David Jones Finance and Investments Pty Ltd v FCT* 91 ATC 315, the Full Federal Court considered a situation where the taxpayer sought to complain to the Court that it was being discriminated against because the strict requirement that only actual shareholders are permitted a sec. 46 rebate was enforced against a taxpayer, although ATO practice over the previous 30 years had been not to enforce that requirement in respect of any taxpayer. In the absence of a right to equal treatment, a taxpayer has virtually no recourse in such a situation.

The requirement for equal treatment by Taxation Officers ensures that all taxpayers are extended the benefit of any concessions that are available under the taxation law.

It does not mean, however, that a taxpayer's actual circumstances cannot be taken into account in determining the application of the law in a particular instance.

The need for fair and courteous treatment is further highlighted in circumstances where the Taxation Officer seeks to exercise one or more of the wide-ranging powers that have been conferred under the Act and related Taxation Acts.

For example, the Commissioner's access powers under sec. 263 of the Act require particular care. In *FCT v Citibank Ltd* 89 ATC 26, the Full Federal Court considered the position of a taxpayer who was raided by 37 Taxation Officers after communications between the taxpayer and the ATO had broken down.

This Right also seeks to ensure that Taxation Officers as servants of the public must act at all times in a fair and courteous manner, both on a personal level and otherwise. At an individual level, many taxpayers greatly fear the presence of a Taxation Officer, whether or not there are rational grounds for such fear.

It is fundamental that taxpayers be entitled as a matter of right to be treated fairly and courteously by Taxation Officers.

■ RIGHT NUMBER 4

Taxpayers shall have the right to object and appeal against decisions made against them by the ATO, either in respect of actions taken during the course of an examination of their affairs or in respect of any determination of their liability to tax at any time.

It is fundamental to a system of taxation under the Constitution that taxpayers have the right to the review of decisions taken against them to impose taxation (see *MacCormick v FCT* 84 ATC 4230 at 4237). The purpose of this Right is to highlight rights of appeal and to ensure that ancillary decisions associated with the imposition of taxation are also subject to full review.

In that regard, it is only recently that full review rights have been conferred in relation to taxpayer penalties (see sec. 14ZS of the *Taxation Administration Act*). Section 14ZS, however, still provides a limitation in respect of reviewing penalties imposed in relation to the refusal or failure to furnish a return or to any information where the penalty is less than 20 per cent of the tax properly payable in respect of the year of income.

That limitation would be overridden by this Right.

■ RIGHT NUMBER 5

The cost of exercising rights of review shall be reasonable and have regard to the resources of the taxpayer concerned. Taxpayers shall have the right to have decisions of Taxation Officers reviewed internally by the ATO and to have disputes with the ATO resolved quickly, with the least cost to the taxpayer.

The purpose of this Right is to seek to ensure that taxpayers are not subjected to an obligation to incur unreasonable expenses in pursuing ordinary review rights.

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Thus, the Right would operate in relation to taxpayers faced with multiple objection fees where, for example, presently a taxpayer wishing to challenge a decision in relation to a number of years of income is required to pay lodgment fees, currently \$300 in respect of each year of income.

Where the issue is essentially the same, a taxpayer ought to be able to pay a single lodgment fee to protect his/her rights in respect of each year of income under review.

This Right also seeks to impose an obligation on the ATO to resolve the issues internally to avoid, if possible, the need to pursue rights in the courts or a tribunal. Although the cost of litigation is effectively out of the reach of most taxpayers, this Right is not intended to operate to require a form of compulsory legal aid. Rather it is intended to ensure that, as far as possible, taxpayers can have issues resolved without resorting to costly litigation.

However, it is envisaged as providing a right to taxpayers to be funded by the ATO where the ATO wishes to pursue its rights against a taxpayer. For example, where the ATO desires to test a matter before the Federal Court and proposes to appeal against an adverse decision of the Administrative Appeals Tribunal, the taxpayer's reasonable costs should be paid by the ATO. That is already recognised administratively by the ATO (see Treasurer's press release, Vol. 21 *Taxation In Australia*, p.174).

This Right also emphasises the entitlement of taxpayers to have disputes resolved quickly, having regard to the nature of the issue or issues. Disputes that extend over several years without fault on the part of the taxpayer involved become oppressive in nature simply because of the uncertainty created by the delay involved.

This Right is intended to confer on taxpayers an entitlement to a speedy resolution of disputes. In the event that a matter is not resolved quickly, there would be grounds on which a taxpayer could have the matter discontinued.

The requirement that issues be resolved quickly and with the least cost to a taxpayer is intended to confer on taxpayers a legitimate expectation that, for example, alternate dispute resolution mechanisms are available where necessary or appropriate.

■ RIGHT NUMBER 6 *Taxpayers shall have the right to obtain confidential advice from any recognised adviser in respect of their taxation affairs.*

This Right is intended to recognise and protect confidential communications between taxpayers and their advisers, whether they are accountants, lawyers or other recognised professional tax advisers.

Although the High Court has recognised that the ATO's access powers (secs 26 and 264 and equivalents in other Assessment Acts) must be read subject to the doctrine of legal professional privilege, it does not extend to other recognised tax professionals providing advice to taxpayers.

The ATO has, however, recognised the need for taxpayers to obtain confidential advice; see the Guidelines for the Exercise of Access Powers in Relation to External Accountants Papers. Those Guidelines are administrative only and, therefore, do not guarantee to taxpayers the right to maintain confidentiality.

■ RIGHT NUMBER 7 *Taxpayers shall be entitled at all times to be represented when dealing with the ATO and shall be entitled to natural justice in respect of those dealings.*

While for most taxpayers the need to be represented by a tax adviser will be rare, that does not lessen the need to ensure that, should the occasion arise, a taxpayer should be able to exercise the right to be represented by his/her agent when dealing with a Taxation Officer.

It was held in *Dunkel v DFCT* 91 ATC 4142 that a taxpayer is entitled to have a legal adviser present at an examination by a Taxation Officer pursuant to sec. 264 of the Act. It would appear that a taxpayer, however, does not have a right to have present a non-legally qualified adviser. That is an anomaly, since many taxpayers obtain taxation advice from accountants and tax agents who are not otherwise legally qualified.

This Right also seeks to preserve the entitlement to natural justice at all times. In most instances, the courts have been prepared to apply principles of natural justice in relation to taxpayer dealings with the ATO. The inclusion of the right to natural justice in this Right seeks to ensure that it cannot be abrogated by changes to the taxation law.

■ RIGHT NUMBER 8 *Taxpayers shall be entitled to exercise their legal and other rights without adverse inferences being made against them.*

This Right simply underlines what is a fundamental tenet of Australia's legal system, of which, in the criminal law area, the most common example is the right to remain silent.

Where a person chooses to remain silent during the course of a criminal investigation, the exercise of that right does not of itself give rise to evidence that may be used in a later prosecution against that person.

That is not to say, however, that in such a circumstance a person choosing to remain silent may not, in fact, be subjected to closer scrutiny than might have otherwise been the case had he/she not chosen to exercise that right. It is for that reason that this Right has been included in the Taxpayers Bill of Rights.

In relation to a taxpayer, the most common example where a taxpayer would seek to exercise his/her rights would be in pursuing an objection or appeal against an assessment or seeking access under the *Freedom of Information Act* in relation to information held by the ATO.

It should be noted that this proposed Right would not operate to set aside a taxation law that otherwise limited taxpayers' rights generally. So, for example, a law that



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required taxpayers to answer questions (see s. 264) would not of itself breach this Right.

■ RIGHT NUMBER 9 *Taxpayers shall have the right to privacy in respect of their taxation affairs.*

This Right seeks to ensure that taxpayers' right to privacy in respect of their taxation affairs is safeguarded. There are presently well-developed rules relating to taxpayer privacy. The rules relating to the use of tax file numbers are one example. There are also the associated Privacy Guidelines issued by the Privacy Commissioner.

It is recognised that the needs of government dictate that there are circumstances where non-tax government agencies are entitled to obtain information held by the ATO in relation to a taxpayer. That is not the focus of this Right; however, that is not to say that circumstances may not arise where such a law so violated a taxpayer's privacy that Right 9 would not be breached.

Right 9 is primarily directed to protecting taxpayers' affairs from access by non-government agencies. That is already a feature of the taxation law (see sec. 16). It is not envisaged that Right 3 would entitle a taxpayer pursuing an appeal in respect of his/her assessment in the courts to obtain a suppression order in relation to his/her identity. Unless there are strongly overriding reasons, courts by their very nature must function in public.

On the other hand, this Right would ensure that the present closed system for hearings in the Administrative Appeals Tribunal continues.

■ RIGHT NUMBER 10 *Taxpayers shall be entitled to rely on advice provided to them by the ATO. To that end, taxpayers shall have the right to be compensated for loss resulting from any actions taken against them by the ATO without lawful authority or cause.*

Taxpayers need to be able to rely on advice provided to them by Taxation Officers in the course of their duties as Taxation Officers. That is presently the position (see *Shaddock v Parramatta City Council* (1981) 36 ALR 35 and ATO Policy Paper – Compensation for Maladministration [OG 52, *Australian Tax Practice* Vol. 3, Butterworths]).

Right 10 will alert taxpayers to that right and will also preserve the position.

There are, however, significant limitations under the present law. For example, a taxpayer would have little redress where oral advice had been obtained from a Taxation Officer in circumstances where, in the absence of negligence on the part of the Taxation Officer, the ATO was not prepared to honour the advice provided.

Under the new system of binding rulings, taxpayers can

obtain a binding ruling that will protect them in most cases. Under the provision providing for binding taxation rulings, there is scope for the ATO to withdraw a binding ruling in certain circumstances. That would normally be only on a prospective basis: for example, where a taxpayer has entered into a transaction, but the Commissioner considers that a person other than the person who has obtained the ruling would suffer a disadvantage if the ruling is not withdrawn, and that disadvantage would be greater than any disadvantage the Commissioner considers the first person would suffer if the ruling is withdrawn, the ruling may be withdrawn (see sec. 14ZAU(2)(b), *Taxation Administration Act*).

Right 10 is not intended to override the operation of a provisions such as sec. 14ZAU, since binding rulings are provided subject to existing limitations. The primary purpose of this Right is to ensure that taxpayers seeking assistance from the ATO are not disadvantaged as a result of their dealings.

The Right seeks to ensure that taxpayers will be entitled to compensation for any actions taken against them by the ATO without lawful authority or where, through negligence or other acts, damage is caused to a taxpayer.

Generally speaking, that is presently the position and the Right seeks to preserve that position.

■ RIGHT NUMBER 11 *There shall be a Taxation Ombudsman who shall have access to all such resources as are necessary to enable the investigation and resolution of all matters taxpayers may bring before his/her office.*

It is considered that there should be a Taxation Ombudsman. The Taxation Ombudsman would have the same role as the present Commonwealth Ombudsman, but with specific responsibility for taxation matters. The Commonwealth Ombudsman would no longer deal with taxation matters.

The need for a specific Taxation Ombudsman arises because of the specialised nature of tax administration and the perception that taxpayers may be more willing to raise matters of concern to them with an Ombudsman having an exclusive role in relation to tax administration matters.

The purpose of this Right would also seek to ensure that a Taxation Ombudsman was sufficiently resourced to enable proper investigation and resolution of matters raised with the office of the Taxation Ombudsman.

The perception is that there has been an under-resourcing of Ombudsman offices in Australia. Although it is recognised that unlimited funding of a Taxation Ombudsman's Office is not realistic, the purpose of this Right is to seek, as far as it is possible, to ensure that a reasonable level of funding is guaranteed. ■