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1 Overview

Writing is an imperfect medium of communication.

Revenue laws are written.[1]

They are an imperfect mode of communication.

No two truthful witnesses give an identical account. It matters not whether the event was recent or distant.

Trials carry uncertainty. Failure to call a witness; failure to ask a question; how a proposition is framed for the Court; how the Court responds to a witness or proposition: these are but a few of the uncertainties that may be determinative.

Tax administration must be carried out with finite resources. Practical decisions are made every day, so as to manage the revenue in a cost effective and principled way.

- A sampling method is accepted in an audit.
- An amnesty is offered.[2]
- A class of evidence is generally accepted, as usually reliable.[3]
- Small risks are identified, and treated proportionately.
- Large risks are identified and more resources allocated.

1.1 A contested area

What is the scope of the Revenue authority's ability to make practical decisions in management of the revenue?

This is discussed in the context of tax legislation which is expressed in words; and this is against the twin backdrops of uncertainty, and of limited resources.

I will be telling nothing to the Revenue authorities, when I say that sophisticated decisions are made constantly, to manage the revenue.

[1] *Morley v Hall* (1834) 2 Dowl. 494, 497 (Taunton J); though perhaps this puts it a bit high: *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* [1995] HCA 44; (1995) 184 CLR 453, [39].
[2] Eg the recent Victorian amnesty for the motor vehicles industry.
[3] Eg NSW DUT012 version 2

1.2 The purpose of litigation

The binary outcome of a tax appeal is usually: that a certain amount of tax is, or is not, payable by the subject.

Perhaps, by full investigation of facts, and after full litigation of doubtful questions of law, a binary answer, to a contested question, would emerge.

Even that understates the level of risk, within which the parties act.

Courts quell disputes. They are properly armed with the legitimacy of the State in doing so.

Courts do not provide the "right" outcome, nor deliver "justice", in some hypothetical or Utopian sense; but rather as understood within the terms of their respected and legitimate place in our society.

So, a failure to call a witness on the part of a Revenue authority - an accident of litigation - has been decisive of a point in favour of a taxpayer in one case.[4]

We have all see witnesses spectacularly fail to come up to proof.

A failure to ask a question of a witness in cross-examination can be fatal.[5]

One year I had 2 witnesses die before cases.[6]

Any number of things can occur.

Thus, in the context of settlement of litigation, both sides – not simply the taxpayer – recognise litigation risk. The court does not investigate factual matters.[7] The outcome is dependent on a series of forensic decisions, and human factors.

But a Revenue authority can legitimately say, during settlement negotiation, that "this is not my money to give away".

It certainly is not the Revenue authority's money to give away.

What would a careful guardian of the Executive's money properly do in the management of the Revenue?

1.3 Tales from the trenches

As we will see, as I work through the case law from here and abroad, this remains a contested area.

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[4] *Commissioner of Taxation v Macquarie Bank Ltd* (2013) 210 FCR 164, [311]-[317].

[5] See the discussion in *Brian Reilly Freighters (NSW) Pty Ltd v FCT* 96 ATC 5122, 5128 (Hill J)

[6] One of those cases was *Ide Enterprises Pty Ltd v Hale's Engineering Pty Ltd* [2015] QDC 98. See how we handled the challenge, at fn 58 of the reasons. The other case was hopelessly prejudiced by the death, and the taxpayer was ultimately bankrupted, since his deceased wife had kept the books.

[7] The Court decides factual matters based on the evidence presented. It is exceedingly rare for a Court to call its own evidence, and it is only known in crime: eg *R v Peros* [2018] 1 Qd.R. 1.

The best we can do is examine:

- local statute law, and
- cases that have cropped up, both here and overseas,

and then draw our own conclusions.

1.4 Starting with a recent story

But I will start with the recent statement of Steward J, on 22 June 2018, in dealing with the complaint of a Mr Bosanac, who was excluded from the Commissioner of Taxation's recent programme, "Project DO IT".[8]

It would seem that Mr Bosanac considered himself unfairly excluded from the benefit of this limited 'amnesty' (for want of a better word). In short, Mr Bosanac fell within one of the exclusion conditions for "Project DO IT", as he was already under audit in relation to omitted offshore income, at the time the project was announced by the Commissioner.[9]

It is notable that in closing addresses, Mr Bosanac conceded that his reliance on the "Project DO IT" ground did not assist him in relation to primary tax, in a Part IVC tax appeal.[10] However the point was persisted in, in terms of penalty.

While the factual basis for making a contention about penalties was not made out,[11] what his Honour had said in the introduction to his reasons is worthwhile as a contemporary statement about such a programme:

> 4. The lawfulness of this initiative was not challenged before me. In my view, it probably operated as a compromise of the Commissioner's power to recover income tax potentially owed to him: s 8 of the 1936 Act and s 1-7 of the *Income Tax Assessment Act 1997* (Cth …; c.f. *Grofam Pty Ltd v Federal Commissioner of Taxation* … and *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd* … As such, the Commissioner was free to specify the conditions of eligibility and to withdraw from Project DO IT at any time.

Steward J encapsulates important concepts about a Revenue authority's powers, in this brief passage. It confirms what has been the position now for decades, subject to any particular local statute.

I proceed by surveying the case law, which I hope can be done briefly and entertainingly. I then return to specific things to cover particular issues that arise in our practices:

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[8] "Project DO IT" was explained by the *International Tax Bulletin* as: "a last chance opportunity for those who haven't declared their overseas assets and income, to come back into the system **before 19 December 2014**, to avoid steep penalties and the risk of criminal prosecution for tax avoidance." See 2014 *International Tax Bulletin* 2014.4 (Thomson Reuters).

[9] *Bosanac v Commissioner of Taxation* [2018] FCA 946, [118]-[119].

[10] At [114].

[11] His Honour had very stern words indeed about this, at paragraphs [122]-[124].

- Attempts to force particular action by an official.
- Attempts to restrain particular action by an official.
- Settlement negotiations before and after assessment.

In doing so, I will refer to the place of the Revenue in our modified Westminster systems of government, by looking at the way revenue laws sit with other money matters.

I will, with great hesitation, then attempt to state the scope of the power of general administration.

I do so tentatively because local legislation will impact on the responsibilities and duties of public officials in different ways.

What I will tender will have to be understood then against a background of the laws concerning public officials, public accountability, and specific rules about compromise assessments, in each State and Territory. Nevertheless I hope it is a solid base from which to work.

2 Fleet Street Casuals

Discussion begins with *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*,[12] another example of something in the nature of an amnesty.[13]

The facts can be shortly stated (paraphrasing the speech of Lord Wilberforce):[14]

> The "Fleet Street casuals" were workers in the printing industry. Under a practice apparently sanctioned by their unions and employers, they had for some years engaged in a process of depriving the Inland Revenue of tax due in respect of their casual earnings. They did so by filling in false or imaginary names on the call slips presented on collecting their pay. The sums were very considerable. The Inland Revenue became aware of this. Through negotiation with employers and unions, they came to an arrangement by which the workers would register in respect of their casual employment, so that in the future tax could be collected in the normal way. Arrears of tax from the prior financial year were to be paid and current investigations were to proceed. Investigations as to tax lost in earlier years were not to be made.

The statutory matrix was summarised by Lord Wilberforce, and again I paraphrase his Lordship:[15]

- The Inland Revenue Commissioners were a statutory body.
- Their duties were defined in two Acts.
- The first of those Acts authorised appointment of Commissioners "for the collection and management of inland revenue".
- It conferred on the Commissioners "all necessary powers for carrying into execution every Act relating to inland revenue".
- It said that the Commissioners must "collect and cause to be collected every part of inland revenue and all money under their care and management and keep distinct accounts thereof".
- The second Act provided that income tax should be "under the care and management of the commissioners".
- That Act contained very wide powers of the board and of inspectors of taxes to make assessments. Specifically with regard to casual employment, there was a procedure laid down by a statutory instrument by which inspectors might proceed by way of direct assessment, or in accordance with any special arrangements which the Commissioners might make for the collection of tax.

This case is continually cited for propositions concerning standing in public law proceedings - the interest required successfully to bring an application for judicial review. The applicant here was

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[12] [1980] 1 QB 407 (CA); [1982] AC 617 {HL).

[13] I note that the House of Lords did not agree with the label "amnesty". But it is a useful, if somewhat inaccurate label.

[14] At 629

[15] At 631H.

apparently concerned that its members, working in a different industry, had been treated quite differently.[16]

For present purposes, I am more concerned with what the case tended to reveal about the powers of the commissioners.

Lord Wilberforce, having worked through the statutory matrix mentioned above, said:[17]

> … it is clear that the Inland Revenue Commissioners are not immune from the process of judicial review. They are an administrative body with statutory duties, which the courts, in principle, can supervise. They have indeed done so … [giving examples]. It must follow from these cases and from principle that a taxpayer would not be excluded from seeking judicial review if he could show that the revenue had either failed in its statutory duty toward him or had been guilty of some action which was an abuse of their powers or outside their powers altogether.

Then comes the critical thing. Lord Wilberforce said that:[18]

> As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over-assessed: indeed, there is a strong public interest that he should not. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest.

The fact-dependent part of the case, which perhaps would have decided it (if those facts had been dealt with below) emerged from the sworn evidence about the trouble that the Inland Revenue had had in trying to address what was estimated to be £1M lost tax per year in this industry.[19]

A close reading of the evidence shows that Mr Hoadley, of the Inland Revenue, who was charged with negotiating a solution and providing a recommendation to the Commissioners, did a good job.

That there were compromises on the journey to the agreement with the several unions and the employers is obvious. But Lord Wilberforce said:[20]

> On the evidence as a whole, I fail to see how any court considering it as such and not confining its attention to an abstract question of locus standi could avoid reaching the conclusion that the Inland Revenue, through Mr Hoadley, were acting in this matter genuinely in the care and management of the taxes, under the powers entrusted to them. This has no resemblance to any kind of case where the court ought, at the instance of a taxpayer, to intervene. To do so would involve permitting a taxpayer or a group of taxpayers to call in question the exercise of management powers and involve the court itself in a management exercise. Judicial review under any of its headings does not extend into this area.

Lord Diplock agreed with that assessment.[21] His Lordship put the broader matter, of the extent of the powers of the Commissioners, this way:[22]

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[16] At 633G.
[17] At 632D.
[18] AT 633D.
[19] The detail of the evidence appears at pages 634-635.
[20] At 635F.
[21] At 637C.
[22] At 636-637.

> All that I need say here is that the board are charged by statute with the care, management and collection on behalf of the Crown of income tax … In the exercise of these functions the board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection. … I do not doubt, however, and I do not understand any of your Lordships to doubt, that if it were established that the board were proposing to exercise or to refrain from exercising its powers not for reasons of "good management" but for some extraneous or ulterior reason, that action or inaction of the board would be ultra vires and would be a proper matter for judicial review if it were brought to the attention of the court by an applicant with "a sufficient interest" in having the board compelled to observe the law.

His Lordship dealt at length with matters of standing, which are important in this area of the law, but will divert me if I go down that way.

Lord Fraser agreed with Lord Wilberforce, and with Lord Roskill (to whose reasons I come in a moment.) Lord Fraser's speech is then confined to matters of "sufficient interest".

Lord Scarman's speech is the most quoted.

Again there is a concentration on the standing issue.

However, more tellingly for present purposes, his Lordship analysed the statutory foundation for the role of the Commissioners and other officers[23] and said that statute placed:

> … income tax under their care and management for that purpose confers upon them and inspectors of tax very considerable discretion in the exercise of their powers. It also imposes upon them the very significant duty of confidence in investigating, and dealing with, the affairs of the individual taxpayer.

The confidentiality of a taxpayer's affairs featured in the Revenue's argument. Counsel for the Commissioners:[24]

> … relied on the existence of this duty [of confidence] as an indication that the statute imposed no duty owed to a taxpayer (or the general body of taxpayers) in respect of the collection of taxes due from another taxpayer … He rightly observed that in the daily discharge of their duties inspectors are constantly required to balance the duty to collect "every part" of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.

We will see that this has featured, for example in New Zealand jurisprudence.[25] It is a practical reason why one taxpayer usually will not, as a matter of principle - and indeed as a matter of forensic presentation of a case - succeed in claiming that another taxpayer should be treated in a particular way.

Then we have the best known passage from that speech of Lord Scarman (emphasis added):[26]

> But I do not accept that the principle of fairness in dealing with the affairs of taxpayers is a mere matter of desirable policy or moral obligation. Nor do I accept that the duty to collect "every part of inland revenue" is a duty owed

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[23] At 650-651.
[24] At 651B.
[25] See heading 3, and particularly as to confidentiality see the cases at footnote 37.
[26] At 651E-G.

> exclusively to the Crown. … I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.

However the question of standing would arise.[27]

Lord Roskill also considered that the duties described in the statutes were legal duties, and dealt at some length with questions of standing. On the latter issue, his Lordship took a restrictive view, which is consistent with how the law has developed.

On the matters more material to the present paper, Lord Roskill described the evidence about the compromise reached as follows:[28]

> … what was done was a matter of taxes management, and I can see no shadow of dereliction of duty by the appellants, or any suggestion of improper or unlawful conduct on their part. On the contrary, what they did seems to me to have been a matter of administrative common sense. Instead of wasting public time and money in seeking to collect taxes from persons whose names were unknown and whose ability to pay was therefore equally unknown, they made an arrangement which enable taxes not hitherto able to be collected or in fact collected, collectible in the future at a cost to the general body of taxpayers of foregoing the collection of that which in reality could never have been collected.

This case spurred academic literature. It has also spurred a living jurisprudence. I will approach this topic by looking at the latter.

As with most things in law, the best thing to do here is to concentrate on the facts.

To begin, we can appreciate, in the *Fleet Street Casuals* case, the sensible scheme that Mr Hoadley managed to negotiate, in the face of a difficult industrial background on Fleet Street, and albeit at the theoretical expense of revenue for past years.

This negotiated scheme receives favourable comment in the speech of each of the Law Lords who directed his attention to that issue.

A secondary point to take from this, which I will not seek to resolve today, is the standing that a person or body will need, to agitate against such a managerial decision. Suffice to say that the applicant Federation, in this case, had no such standing. It has historically been difficult to establish such standing.

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[27] At 652D-F.

[28] At 663-664.

3 Developments in New Zealand

The *Fleet Street Casuals* case has generated interest in New Zealand. I come to NZ first, as their legislature has occasionally led ours in important matters. NZ picked up some of the language from the *Fleet Street Casuals* case, to overcome doubts that arose about the scope and purpose of the general power of administration.

3.1 Statutory intervention

Nowadays, New Zealand has statutory intervention concerning the content of the power to administer tax laws. And there is an Interpretation Statement, IS 10/07.[29]

Section 6 was modified in 1995:

> Responsibility on Ministers and officials to protect integrity of tax system
>
> (1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.
>
> (2) Without limiting its meaning, the integrity of the tax system includes—
>
> (a) taxpayer perceptions of that integrity; and
>
> (b) the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
>
> (c) the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
>
> (d) the responsibilities of taxpayers to comply with the law; and
>
> (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
>
> (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

And s 6A of the *Tax Administration Act 1994* (NZ) provides:

> Commissioner of Inland Revenue
>
> (1) The person appointed as chief executive of the department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.

[29] "Care and Management of the Taxes Covered by the Inland Revenue Acts' Section 6A(2) and (3) of the Tax Administration Act 1994".

(2) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

(3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

(a) the resources available to the Commissioner; and

(b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(c) the compliance costs incurred by taxpayers.

The Interpretation Statement explains the statutory history and reasons, and is an important resource. To Australian eyes, it may seem odd that clarification by insertion of subsections (2) & (3) would be necessary, but we do not know the pre-existing statutory framework. Subsections (2) & (3) seem natural concomitants of subsection (1).

This was the result of public discussion of the Commissioner's powers, after such cases as *Lemmington*, below and *Brierly Investments Ltd v Bouzaid.*[30]

It is now quite apparent that the Commissioner has power, under s 6A, to make a commercial settlement.[31]

I will address a few of the New Zealand cases, just to illustrate that similar streams of thought have occurred there.[32] But some caution must be taken with cases after the 1995 amendments. Thus I only refer to one recent income tax case, and to a Customs case, post-dating that amendment

3.2 Some NZ Cases

Lemmington Holdings Ltd v Commissioner of Inland Revenue[33] involved something like a statutory certificate from the Commissioner allowing tax withholding rates to be reduced for employees who had invested in a particular scheme.

Such certificates were issued to investors in a particular scheme, but the Commissioner commenced an investigation which led to him withdrawing those certificates in most cases.

The majority of the Court of Appeal acknowledged that it might be possible, in light of the *Fleet Street Casuals* case, to challenge the "legitimacy of the process by which a purported assessment was

[30] [1993] 3 NZLR 655 (CA)

[31] See for eg *Accent Management Ltd v CIR (No.2)* 2007 23 NZTC 21,366; [2007] NZCA 231, [13] (CA)

[32] See Justice Susan Glazebrook "Taxation Disputes in New Zealand", https://www.courtsofnz.govt.nz/speechpapers/Taxation-Disputes-in-New-Zealand-22-January-2013.pdf/at_download/file

[33] 82 ATC 6030; appeal allowed [1982] 1 NZLR 517; NZCA decision cited with approval on the estoppel point by Gummow J in *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, 401

arrived at or a proposed assessment is to be made … on traditional administrative law grounds".[34] But it was not necessary to decide that point.

The majority went on to say:[35]

> As we have said, the Commissioner cannot be estopped by past conduct from performing his statutory obligation to make assessment as and when he thinks proper. It is his present judgment as to the statutorily imposed liability for tax that counts. The correctness of that judgment and of the Commissioner's view of the law and facts which lead him to make his assessment cannot be challenged outside the objection procedures. So it cannot be said that he lacks jurisdiction to make the proposed assessments.

This slim glimpse of hope in the majority's decision was apparently enough to inspire further litigation.

Challenge Realty Ltd v Commissioner of Inland Revenue [1990] 3 NZLR 42 involved a challenge to a change in view by the Commissioner that real estate salesmen, previously regarded as independent contractors by the Commissioner, were now to be regarded as subject to PAYE tax deductions. The Court of Appeal[36] reiterated the burden of what had been decisive in *Lemmington*. The application failed.

The contest moved to the context of Customs Duty, in *Comptroller of Customs v Terminals (NZ) Ltd* [2014] 2 NZLR 137.

The taxpayer apparently relied on assurances given to it over the telephone by the Comptroller, concerning the applicable rate of duty for certain blends of spirit. This was said not to give rise to a legitimate expectation that the Comptroller would not change his mind. Unsurprisingly, it was said that a taxpayer in those circumstances could hardly assume anything other than that customs duty would have to be paid in accordance with law.[37]

I have not attempted a full survey of New Zealand case law. Debate goes on.

Most recently, in *Chatfield & Co Ltd v CIR*[38] Wylie J put down an argument by the CIR that her decisions, about international information gathering under the NZ-Korean DTA, were not justiciable. His Honour cited Lord Scarman's famous passage in *Fleet Street Casuals*[39] in reasons for judgment that dealt in a conventional way with this bold contention.

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[34] [1982] 1 NZLR 517, 522 lines 48-50.

[35] At 523.

[36] At 71-73

[37] There has been other activity in the New Zealand courts, but this emphasises another aspect of the *Fleet Street Casuals* case. That aspect is to do with secrecy in the administration of taxation laws. Refer *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 2 NZLR 709 (NZSC); and *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (NZCA).

[38] [2017] NZHC 3289; forthcoming in the NZLR. Appeal to NZCA pending.

[39] [1982] AC 617, 652

4 Applications of "Fleet Street Casuals" that would not be employed in Australia

When we look overseas at how the *Fleet Street Casuals* case has been applied, we must be conscious of differing statute books, and different development of administrative law even within the Commonwealth of Nations.

In some of that Commonwealth case law, there is a reference to Lord Scarman's quote about fairness,[40] which is to the effect that there is:

> …a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.

I turn to a couple of Commonwealth examples, simply to illustrate approaches we would find less helpful in Australia.

For example, we accord decisions of the Singapore High Court respect, particularly in international tax matters.

The decision of *AQQ v Comptroller of Income Tax*[41] is unlikely to be cited in Australia, however. The question there was, relevantly, the application of the anti-avoidance provision[42] in Singapore.

Andrew Ang J stated (emphasis added):[43]

> From a plain reading of s 33, it is clear that the Comptroller's power to "disregard or vary the arrangement and make such adjustments as he considers appropriate" is to be exercised to "counteract any tax advantage obtained or obtainable by the person from or under that arrangement". The Comptroller's powers … must be exercised in a manner that is fair and reasonable … in order to achieve the purpose of counteracting the tax advantage obtained or obtainable from the arrangement. He must exercise his statutory discretion reasonably and treat taxpayers fairly … [then quoting Lord Scarman].

Likewise, I cannot see us citing *Chandulals Pharmacy Ltd v CEO Fiji Revenue & Customs Authority*[44], in an Australian court. There is a bare citation of Lord Scarman's speech, for the proposition that the Revenue (and thus the Fijian High Court) had to act fairly toward the taxpayer.

I mention this to emphasise that the Australian understanding of Lord Scarman's remarks involves a constrained concept of a duty of "fairness".

Recall that Lord Scarman went on to say that the duty:

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[40] [1982] AC 617, 651

[41] [2012] SGHC 249 (Andrew Ang J).

[42] This appears to have been a very simple (and, with respect, elegantly drafted) version of Part IVA, allowing voiding or variation of an arrangement.

[43] At 162.

[44] [2015] FJHC 320.

> has to be considered as one of several arising within the complex considered in the care and management of a tax, every part of which it is their duty, if they can, to collect.

That latter aspect is to be given weight.

The closest I have seen to this kind of application of the *Fleet Street Casuals* case, in Australia, is a couple of decisions of the NSW ADT, where the Tribunal has become concerned about a possible change in practice by the Revenue authority, and thus remitted a matter for further consideration on the basis of the need for fairness (in terms of equality of treatment).[45] There can be little harm in that approach, and more likely a deal of good.

[45] *Vlahos v Chief Commissioner of State Revenue* [2013] NSWADT 215, [33]-[35]; *Woods v Chief Commissioner of State Revenue* [2014] NSWCATAD 151, [33]-[40]

5 Centrality of Statute

5.1 The grant of power

As in the *Fleet Street Casuals* case, we must begin with the statute in each case.

In **Queensland**, the *Taxation Administration Act 2001* (Qd) provides for the office of "Commissioner of State Revenue": section 7.

That Commissioner "is responsible for the administration and enforcement of the tax laws": section 8(1).

She has "the powers given under the tax laws": section 9(1).

In addition, she "has the power to do all things necessary or convenient to be done in performing the commissioner's functions": section 9(2).

I will return to the Queensland statutory matrix in a moment.

However it is also important to note comparative provisions interstate. In **New South Wales** the provisions are at sections 60-64 of the Administration Act. Where there is a Chief Commissioner, as now, he "has the general administration" of the Administration Act and the other taxation laws and "may do all such things as are necessary or convenient to give effect to" those laws: section 61.

The position in **Victoria** is similar, the Commissioner of State Revenue having "the general administration of the taxation laws". He "may do all things that are necessary or convenient to give effect to the taxation laws": section 63(1).

In **South Australia**, the Commissioner of State Taxation "has the general administration" of the Administration Act and the other taxation laws: section 61.[46]

In **Western Australia**, the Commissioner of State Revenue "has the general administration of the taxation Acts and may do anything necessary or convenient to be done for that purpose": section 7(1).

The WA Administration Act specifically provides that the Commissioner may deal with any matter (or thing) arising under (or in relation to) a taxation Act "in any manner". The Commissioner may exercise, in relation to such a taxation matter, any discretion.

The **Tasmanian** Administration Act follows language familiar from the above, with the Commissioner of State Revenue having "the general administration of the taxation laws", and "any other function imposed on him or her by any other Act": section 8(1). The Commissioner "may do anything necessary or convenient to give effect to the taxation laws": section 8(2).

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[46] The responsible Minister formally takes a larger role in the administration of those laws, because the objection to an assessment is lodged with the Minister, who is to decide it: Part 10 of the Administration Act. This does not detract from the more general point.

In the **Northern Territory,** section 11(3) of the Administration Act goes a little further than the language employed elsewhere, by stating that the Commissioner of Territory Revenue "is not subject to ministerial control or direction in relation to" the interpretation of a taxation law or in relation to the exercise of a function under a taxation law.[47]

The **Australian Capital Territory** again uses similar language, to that seen above, for the role of the Commissioner for Australian Capital Territory Revenue: section 74 Administration Act.

5.2 Taking an example

I said above that I would have to return to **Queensland** in more detail, because it is not possible to conduct an exhaustive analysis of each of the jurisdictions' statutory matrices. It is nevertheless thought that there are many elements of commonality with other jurisdictions, and that the analysis of Queensland laws is of assistance.

The majority of the above provisions refer to "general administration".

Queensland does not refer to "general administration", but that probably does not detract from the need for the Queensland Commissioner to conduct the administration and enforcement of taxation laws, as required by section 8(1).

Let us take one example of exercise of this power. The Commissioner issues rulings, for the guidance of her officers and taxpayers.

A workaday example is the ruling on how to treat a transaction denominated in barter or trade "dollars".[48] With that clear guidance, taxpayers can predict how the law will usually be applied. And her officers do not have to research the issue on every occasion it occurs. Anyone practising in the 1990s will recall that this was a practical problem, before such guidance.

Turning to the detail of the Queensland *Taxation Administration Act*:

- the Commissioner "must make an assessment" in certain circumstances.
- in other circumstances she may do so.
- once there is an amount payable under a tax law, by any means, it "must be paid to the commissioner".[49]
- again the Commissioner "may" recover such an amount: section 45(2).

For self-assessed taxes such as payroll tax, there is thus permissive language - the word "may" - in relation to both the powers of assessment and recovery.

I do not see that use of permissive language takes us far.

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[47] That probably does not affect the analysis in this paper, but does emphasise the centrality of the role of the Commissioner.
[48] DA 501.2.1
[49] Section 45 of the Administration Act

But it means that the Commissioner perhaps does not need to do more than lodge her proof, in a hopeless liquidation, to take one clear example.

She is perhaps not obliged to seek leave to bring proceedings against a bankrupt, to take another clear example.

The background, little appreciated by practitioners, is the complex of legislation and standards that support and enable efficient government operations. As a taster:

- *Financial Accountability Act 2009* (Qd)
- Its subordinate legislation, especially the *Financial and Performance Management Standard 2009* (Qd)
- A policy mentioned in the Standard, the *Queensland Government Performance Management Framework Policy*
- The *Financial Accountability Handbook*, maintained by Queensland Treasury, and mentioned in the Policy
- *Public Sector Ethics Act 1994* (Qd)
- *Public Service Act 2008* (Qd)

Each of these documents is part of a wider system of codes and standards.

And I suspect there is a similar complex of rules in each State and Territory.

No official has a free hand to dispense public money. Nor has an official a free hand to ignore a tax obligation.

There is an additional twist in Queensland.

In Queensland, to seek review or to appeal, the tax (and certain related amounts) must be paid in full prior to filing: section 69(1)(b).[50]

This does change the dynamic, and the analysis, in relation to negotiation once an appeal or review is under way.

This is because settlement that involves a refund necessarily involves finding a standing appropriation clause in a statute, enabling tax to be refunded.

In a jurisdiction where payment of tax prior to filing is not required, the parties do not face this complication if the tax has not already been paid.

The matter is more complicated in Queensland because a person is not entitled to a refund of an amount paid (or purportedly paid) under a tax law except under Part 4 Division 2 of the Taxation Administration Act: section 36.

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[50] Compare Victoria, s.108 (where an order may be made requiring tax to be paid before an appeal or review further proceeds); SA, s.93 (appeal general y requires 50% of tax paid, unless other decision is made by the Minister);

The standing appropriation is in section 37(2) *Taxation Administration Act* (Qd). The administrative[51] calculation under sections 38 and 39 must first be completed before settling on the amount of the refund.

There are other standing appropriations in Queensland law:

- It looks to me as if section 36 *Taxation Administration Act* (Qd) trumps section 11 *Crown Proceedings Act 1980* (Qd).
- On the other hand, an act of grace payment would not be a refund of an amount paid or purportedly paid under a tax law, but rather a sum paid by the State for some good reason. Presumably the standing appropriation under section 35 *Financial Accountability Act 2009* (Qd) would answer.[52]

[51] *Commissioner of Taxation v Official Receiver* (1956) 95 CLR 300, 323.5

[52] The reason why we talk about finding an appropriation of consolidated revenue, in Queensland called the "Consolidated Fund" under section 64 *Constitution of Queensland 2001*, is the requirement that any payment from consolidated revenue be authorised by an Act. In Queensland that requirement is in section 6 of the Constitution. See also Twomey *The Constitution of New South Wales* pages 540-546 and Taylor *The Constitution of Victoria*, pages 349-351. See also *Odgers' Australian Senate Practice (13th Edition)*.

6 Development of an Australian Case Law

6.1 David Jones Litigation

First, some background. There was an intercorporate dividend rebate, designed to alleviate layers of taxation within corporate groups, prior to the franking regime.

To qualify, the company to whom the dividend was paid had to be a "shareholder" of the company paying the dividend.

In the dividend stripping case, *Patcorp*, it was established that it was insufficient that a company stood in the register by its nominee. The company had to be a shareholder on the register, or perhaps have an immediate right to registration.[53]

This left a problem. Having put down a dividend stripping scheme, the Commissioner of Taxation was left with legislation which had now been interpreted by the High Court of Australia as denuding intercorporate dividend rebates from all genuine structures involving nominee shareholders. The nominee shareholding business in Australia is considerable.

Apparently some accommodation was reached.

Matters came to a head in *David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation*, in 1990.[54]

The taxpayer was disappointed to find disallowance of the intercorporate dividend rebate. The taxpayer had a nominee shareholding in the company which had paid the dividend. It appears that the nominee companies might have taken the benefit of the rebate, though that is uncertain.[55]

The pleading by the taxpayer was that the Commissioner had adopted a practice in relation to the administration of the *Income Tax Assessment Act* which would be at variance with the decision in *Patcorp*. The practice was described in the pleading as follows:

> That practice has been one pursuant to which the respondent and his officers have not insisted that to be entitled to the rebate of tax … corporate taxpayers become registered as the holder of shares beneficially owned by them. And the respondent and his officers have administered the Act on the basis that the requirements of that section are met where corporate taxpayers are the beneficial owners of shares registered in the name of corporate nominees.

The claims pleaded by the taxpayer are summarised in the headnote:

> The taxpayers alleged that departure from this practice without warning from the Commissioner constituted an abuse of power, lack of procedural fairness and a legitimate expectation which warranted intervention from the court.

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[53] *Commissioner of Taxation v Patcorp Investments Limited* (1976) 140 CLR 247. Most people quote the decision of Gibbs J, at 295.4 and following.
[54] (1990) 21 ATR 718 (O'Loughlin J).
[55] At 720.2.

The Commissioner brought an application to strike out the statement of claim.

There is a high threshold, for success on a strike out.

Nevertheless, O'Loughlin J acceded to the Commissioner's motion. On appeal to the Full Court, the issue narrowed to the significance of tender of an assessment, in litigation which was not a tax appeal. The Full Court overturned O'Loughlin J, and remitted. That very serious point, about the effect of tender of the assessment, probably would have gained a grant of special leave to appeal to the High Court of Australia, but for the fact that the parties had substantially settled the matter (subject to performance of some integers of the agreement) by the time that the special leave application was called on for hearing.[56]

Thus, the brief comments of O'Loughlin J, on the Commissioner's application for strike out, may have limited currency nowadays. Nevertheless O'Loughlin J spoke about the *Fleet Street Casuals* case, including the remedy for breach of statutory duties of the Revenue.[57]

O'Loughlin J outlined the course of the development of the law in the United Kingdom. Then, critically his Honour said:

> This power of general administration, included, so the applicants argued, a power in the Commissioner to do that which he has done for the past 14 years or so — to ignore the *Patcorp* decision. I do not find it necessary to express a view on that interpretation of s 8 in these reasons. I consider that it is sufficient for present purposes, to acknowledge that, in respect of matters of general administration, and more so, in matters of the exercise of discretionary powers, the combined effect of s 39B of the Judiciary Act and the United Kingdom authorities would enable a taxpayer to argue that the Commissioner is amenable to judicial review. Were it not for the provisions of Part V of the ITA Act, it is my opinion that the pleadings disclose grounds that might, if established, justify the court in intervening.

As noticed above, however, tender of the assessment, and the effect of sections 175 & 177 *Income Tax Assessment Act* 1936 (in Part V of that Act) then overtook these statements of general principle.

Nowadays, we would say that O'Loughlin J got to the correct decision, but would approach it differently:

- His Honour would have been precluded by *Futuris*[58] from going behind the notice of assessment, if tendered (as it was).
- His Honour would have found the argument, that the Commissioner's alleged practice of ignoring the law, was unenforceable at the suit of a taxpayer, following *Macquarie.*[59]

For this reason, I treat citation of *David Jones* cautiously nowadays.

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[56] The Full Court decision is at (1991) 28 FCR 484. The special leave is reported at (1991) 22 ATR 397; 91 ATC 4635.
[57] (1990) 21 ATR 718, 722.4 and following.
[58] (2008) 237 CLR 146
[59] See heading 6.2.

6.2 Macquarie

Macquarie Bank Ltd v Commissioner of Taxation[60] involved review of the Commissioner of Taxation's decision refusing to apply a particular view of the law, where that view of the law was said to have been contained in a Practice Statement, PS LA 2011/27. The Commissioner sought summary dismissal of the application.

So far as the application was based on the *Administrative Decisions (Judicial Review) Act* (Cth), known as the AD(JR)A, the application failed as, at least, there was no decision under an enactment.

However the Court also had to deal with the section 39B *Judiciary Act* relief sought.

Edmonds J held:

- No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Income Tax Assessment Acts: para 69;
- The Practice Statement dealt with the matter in now familiar terms, speaking of devotion of compliance resources.
- It was thus possible to read down the Practice Statement as referring "to circumstances where there are resource allocation decisions to be made – eg whether to initiate an audit or some other form of investigation": para 71.
- The Practice Statement did not purport to require officers to decide whether to make an assessment on the basis of the ATO's "current understanding of the law or on the basis of some other understanding": para 71;
- An instruction (had it been given) to an officer to require a decision to be made about whether to apply the current understanding of the law, or some other understanding, would be "inconsistent with fundamental requirements of the income tax Acts": para 72.

Referring then to the structure of the income tax Acts, as requiring an assessment to be made of the amount of taxable income of a taxpayer, and on the tax payable, and of the definitions of each of those integers, Edmonds J went on to agree with this statement of the conclusions to be drawn:[61]

> (1) There is no scope for discretion in the making of an assessment, except to the extent that a particular taxing provision might make the amount included in assessable income (or the amount of a deduction) depend on the Commissioner's view of what is reasonable or appropriate, eg, s 109 of the 1936 Act. The relevant taxing provisions apply according to their terms, and the Commissioner's role is to calculate as best he can the result of their application to the taxpayer's circumstances in the relevant year. There is no scope for discretionary consideration of whether those taxing provisions should be treated as if they had some different operation.
>
> (2) No different rule applies where the Commissioner decides, under s 170 of the 1936 Act, to amend an assessment. The assessment once amended must still be an "assessment" — ie, an ascertainment of the taxpayer's "taxable income" for the relevant tax year and the tax payable thereon. That ascertainment involves the

[60] (2013) 215 FCR 403 (Edmonds J); affirmed [2013] FCAFC 119.
[61] At [73]

application of the relevant taxing provisions to the circumstances of the taxpayer as the Commissioner finds them to be. The only exceptions to this regime are deemed assessments under s 166A and the default assessment provided for by s 167 of the 1936 Act.

(3) Obviously there may be scope for doubt or disagreement as to the correct construction of a taxing provision or its application to a particular case. The resolution of such disagreements is one of the functions of the objection, review and appeal process provided for in Pt IVC of the Taxation Administration Act 1953 (Cth) ("the TAA"), the scope of which is broadly defined. The outcome of a review or appeal may be that the Commissioner is required to amend an assessment, so as to give effect to the correct understanding of the relevant taxing provisions as identified by the Court or Tribunal. In making an assessment, however, the only understanding of the relevant taxing provisions which is open to the Commissioner (through his officers) to apply is that which, taking into account relevant authorities and legal advice, he ascertains to be the correct understanding.

Thus it was not possible to grant a writ of *mandamus* to require the Commissioner to make a decision about whether to apply one or another understanding of the law: para 75. (Likewise other relief sought could not succeed, and for various reasons.)

Edmonds J said:

77. This lack of statutory force and the lack of any identifiable obligation to consider exercising his "powers of general administration" in this way [in the Practice Statement] is an additional reason why *mandamus* in the terms sought in the amended application does not lie against the Commissioner.

The Full Court disposed of the appeal briefly. The Court said at para 11:

The power of the general administration of tax legislation given to the Commissioner … does not permit the Commissioner to dispense with the operation of the law. The power of general administration in such provisions is not a discretion to modify, or which modifies, the liability to tax imposed by the statute: the power in such provision for general administration (coupled with whatever discretion they may contain) affects the administration of the Acts and not the Commissioner's duty to act according to law and to assess taxpayers to the correct amount of liability imposed by the legislation. It may be accepted for the purposes of argument … that the Commissioner's power of general administration … gives him a "discretion" in making compliance decisions to reassess and "in relation to the evidence he is willing to accept to ascertain the taxable facts" (although the latter may be doubtful or, at least, requires heavy qualification), and (b) permits the Commissioner "to decline to consider re-assessing, or to decline to in fact re-assess a taxpayer"; but no such "discretion" can be exercised to fetter an assessment or re-assessment when the Commissioner has formed the view that the statute imposes a liability contrary to some view he may previously have had, or had, accepted. His duty then is to apply the law as he understands it to be.

Nevertheless, the Full Court acknowledged that the Commissioner:

- May compromise the amount of any debt to be recovered upon an assessment.
- May adopt a view of the law, or of its application, that may reasonably be open, or about which he may otherwise have some doubt: para 11.

6.3 Grofam

The most robust way of testing the outer limits of this is to consider a case such as *Grofam Pty Ltd v Commissioner of Taxation* (1994) 29 ATR 608, where the taxpayer actively disputes the effect of terms of settlement reached with the Revenue. *Grofam* is a fairly extreme example.

There appears to have been some complexity arising from an audit.

There were essentially two groups of issues, those to do with the construction of the Rialto Building in Melbourne, and other issues, non-Rialto issues.

The parties and the Commissioner signed terms of settlement under which the taxpayers would pay the Commissioner $27.5 million, and the Commissioner would issue assessments for a total not exceeding $27.5 million in respect of the non-Rialto issues. This was to finalise all liability in respect of non-Rialto issues.

On the Rialto issues, it was agreed that the Commissioner could issue assessments in the amount of $39 million (as well as alternative assessments) reserving a right to object to the taxpayers.

It would seem that the Revenue and the taxpayers then fell out over whether the agreed amount of the non-Rialto issues took into account available losses including carried forward losses.

If they did, and those losses were absorbed in coming to the agreed figure of $27.5 million, there would be no losses available (or further losses) in relation to the Rialto issue.[62]

Olney J characterised the written settlement as follows:

> By separating the income of the applicants into two separate streams … the terms of settlement contemplate a procedure not otherwise open to the Commissioner in the assessment of income tax payable by each individual applicant. Ordinarily, the tax assessed to a taxpayer would take into account all of the taxable income of the taxpayer from all sources, and in that process the taxable income of each taxpayer would from year to year reflect the effect of any losses carried forward from previous years …
>
> In my opinion the effect of … the terms of settlement is that the agreed sum of $27.5 million represents the tax payable on the taxable incomes of the applicants for the various periods referred to in the definition of "non-Rialto issues" after taking into account all losses capable of being carried forward … but without regard to any income that may have been derived from the construction of the Rialto building. …
>
> The terms of settlement provide an agreed framework from which to facilitate, in isolation from all other issues relating to the taxable affairs of the applicants, the determining of the question first as to whether any taxable profit or income was derived by or from the construction of the Rialto Building and second, if so, what amount of tax is payable. It necessarily follows that in issuing the Rialto assessments the Commissioner was entitled to entirely ignore any returns lodged by any of the applicants, which returns it is conceded were prepared without regard to any taxable profit or income derived from the construction of the Rialto Building. The Commissioner was however entitled to assess as income only such amount of profit or income as was derived from the construction of the Rialto Building.

[62] This is certainly the form of the alternative declaration suggested by the Commissioner's counsel, at page 615 lines 39-45.

The taxpayers appealed to the Full Court.[63] The Full Court observes (emphasis added):[64]

> It would appear that the problems which now confront the Court arose when the Commissioner began the complex and difficult task of actually making assessments and issuing notices of assessment. It would seem likely that that was when difficulties arose which were not perceived at the time that the terms of settlement were entered into. The Commissioner had to issue valid assessments. He could not divide the matter up in the way that his Honour envisaged because the assessments had to be valid assessments in accordance with the law. The Commissioner could not pretend that a particular Grollo company which was in receipt of income from a number of sources had received income relating to non-Rialto issues which was to be the subject of allowable deductions in respect of those issues and at the same time treat the Rialto matter separately by assessing only the Rialto income and the allowable deductions in respect of it. The task had to be one task.

This is an interesting observation. Olney J had contemplated an artificial exercise as being authorised by the settlement agreement. Certainly the settlement agreement could have been read that way.

After enumerating the difficulties that had arisen in the matter, the Full Court finally observed at page 4674 (emphasis added):

> Perhaps further discussions between the parties and their legal advisers will result in a sensible adjustment of the matters raised by the application for declaratory relief made by the appellants. The alternative is probably further protracted litigation with its consequent delay and expense. We realise that the Commissioner is mindful of the important public duty which he has in administering the Act. Nevertheless, if this were a commercial dispute, there would be much to be said for the view that a further attempt at settlement should be made, perhaps with the aid of an appropriate mediator. We see no reason associated with the Commissioner's powers and duties which should dissuade him from that course if he thought it otherwise an appropriate one for him to follow.

The Australian Tax Cases report records the fact of the subsequent mediation, resulting in settlement of outstanding issues, and the consent dismissal of the appeals and cross-appeals.[65]

6.4 Pantral

Pantral Pty Ltd v Commissioner of Taxation (2002) 120 FCR 371 involved an attempt by the Commissioner to settle disputes involving a number of industry participants, concerning sales tax on motor vehicle manuals.

Sales tax had some unusual features, including an early version of a ruling system, by which the Commissioner could enter into an agreement with the taxpayer about calculating taxable values of particular taxable dealings.

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[63] The more complete report is 97 ATC 4656. The report at 35 ATR 493 omits brief reasons given by the Full Court for consent dismissal following the mediation which the Full Court had suggested. Note there must have been a cross-appeal by the Commissioner, but details are not necessary for present purposes.

[64] 97 ATC 4656, 4671-4672.

[65] At page 4658.

Here, the agreement about an issue having been found to be invalid (but appeals being under way), the Commissioner issued demand for what the Commissioner contended was the correct amount of sales tax (absent the section 43 agreement), but annexed to that demand a new section 43 agreement.

Evidently, the idea was for the matter to be compromised, before a further appeal was heard, on the basis of the new section 43 agreement, to avoid further litigation.

What evidently concerned the taxpayer (one of many in a whole industry, who had all received the correspondence) was that the Commissioner's demand for money (under s76) might be for an ulterior purpose, when accompanied by an offer to settle the prior periods on the basis of a new s43 agreement.

The Commissioner enclosed an explanatory statement, with his offer, outlining how he saw the alternative outcomes in the litigation, if the appeal went ahead:

- First alternative – former s43 agreement upheld, and status quo, with no refund.
- Second alternative – former s43 agreement upheld, but refund entitlements denied.
- Third alternative – former s43 agreement held ineffective, refund for the auto manual (about $3.30 refund per manual), but recalculation of sales tax on vehicles (exposure of perhaps $600 on say a larger family vehicle).

Conti J cited authorities concerning what amounted to making a genuine tax assessment, but then said at para 18:

> It is more however than a long bow for Pantral to bend by equating a failure of the Commissioner to exercise a statutory obligation, or to fulfil a statutory duty, to bona fide ascertain and assess taxation correctly … with an endeavour by the Commissioner to compromise an amount of taxation considered by the Commissioner bona fide to be payable by a taxpayer as a quid pro quo for acceptance of liability by the same taxpayer for tax referrable to a related but arguably different subject of taxation liability, for reasons associated for instance with bona fide settlement of legally controversial issues awaiting resolution by judgment of a court at first instance or on appeal. That is how I would describe the reality and substance of the circumstances giving rise to the present claim for injunctive relief. In that kind of situation, the Commissioner thereby exercises the statutory power of general administration, in the case of sales tax conferred by s111 of the Act … The Commissioner's power and authority to bona fide compromise controversial assessments or claims of tax, whether income tax or sales tax, and indeed to make bona fide estimates thereof for instance in circumstances of an absence of full and true disclosure by a taxpayer, has never been doubted, and has been exercised on occasions too numerous to estimate.

Conti J said at para 21 that the Commissioner was:

> …affording to each of the industry participants individually the option of foregoing the benefit of a possibly favourable result [in pending proceedings], in return for the continuance of the status quo of the substantially larger financial benefit of the existing consensual taxing arrangements in relation to motor vehicles, albeit to be thereafter maintained explicitly without regard to the taxability of motor vehicle manuals.

Thus the Commissioner was within rights to make an offer to proceed for the past periods on an agreed basis, in the context of a demand for payment of an assessed amount which he was prepared to compromise should the taxpayer agree terms. The Commissioner had power to make a bona fide compromise of a controversial assessment or tax claim.

6.5 Bilborough

Bilborough v Deputy Commissioner of Taxation (2007) 162 FCR 160 involved alleged inconsistent treatment of participants in a film scheme.

The taxpayer in question had been assessed, and denied deductions connected with a particular investment in a film. The Commissioner subsequently wrote to investors in the film offering a "settlement opportunity".

The taxpayer in question did not take up the settlement within the time allowed by the Commissioner's offer, but about two years later returned the signed documents claiming the benefit of the settlement offer.

The Commissioner nevertheless commenced proceedings to collect the full amount of tax together with interest. The taxpayer made an offer of compromise of the debt, and sought an extension of time to pay, but these approaches were rejected.

The decision of Kiefel J ranges widely, but for present purposes I will concentrate on the allegations of inconsistent conduct and the power to make the first offer of compromise. Her Honour considered that a decision to compromise, or not compromise, a taxation debt fell within the general powers given by the income tax assessment and taxation administration laws: para 22.

Her Honour considered that the general power of administration, taken together with the specific powers to recover, "necessarily extended to all matters incidental to suing for the tax, including decisions to compromise proceedings and recovering tax by extra-curial means": para 11.

While the taxpayer was unsuccessful in *Bilborough,* Kiefel J's decision is an important indication of the ability of the Commissioner to compromise even once an assessment has been issued. The compromise was of the recovery, in the circumstances postulated by her Honour.

7 Offering to settle – costs consequences

Cost advantage may be gained by making either an offer under rules of court, or by making a *Calderbank* offer.[66]

The decision of *Clark* is well known. Greenwood J found no reason why the Commissioner of Taxation could not, as a matter of policy, be subject to the ordinary rules of court about costs in such a case.[67]

There is authority in the Victorian Court of Appeal for the proposition that the Victorian Commissioner is likewise subject to the ordinary rules about costs in the case of an offer.[68]

Care should be taken in Tribunals. It is possible, for example, for either side to make the QCAT a costs jurisdiction by an offer under Rule 86. Most litigants do not appreciate this, but it is something that must be looked at for each Tribunal.

However, in some respects the State (and certain other public litigants) are not ordinary litigants. *Linville Holdings Pty Ltd v Fraser Coast Regional Council (No. 2)* [2018] QSC 62 illustrates circumstances where a revenue authority would be justified in refusing an offer of settlement made under the principle in *Calderbank*. The company had commenced proceedings seeking a declaration against the local authority concerning the validity of rates and charges, owing to alleged defects in the resolution at the local authority's budget meeting. The company was successful. Other proceedings had been commenced for recovery of the rates and charges, by the local authority, in a lower court.

The company offered to resolve the Supreme Court and Magistrates Court proceedings on a walk away basis, one element of which involved the company's obligations to pay the rates and charges (the subject of the Magistrates Court proceedings) being waived. This was put as a *Calderbank* offer.

The company was successful in the Queensland Supreme Court. It now sought its costs on the indemnity basis. Recall that it is important for success under a *Calderbank* offer that it be unreasonable to reject the offer in the circumstances.

Jackson J took into account the argument that acceptance of the offer would have involved treatment of the taxpayer on a more favourable basis than other ratepayers: at [9]. His Honour also considered that the matters were of considerable public importance, thus justifying the decision by the respondent not to compromise: at [12].

Such considerations sometimes do not come into calculation for an offer made under rules of court, though it varies from Court to Court.

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[66] [1976] Fam 93.

[67] (2010) 22 FCR 102; [2010] FCA 889.

[68] *Commissioner of State Revenue v Landrow Properties Pty Ltd* (2010) 79 ATR 800.

8 Attempts to Force Particular Action by an Official

It follows that it is inherently difficult to force (let alone to restrain) particular action by the Revenue authority based only on the principle of fairness derived from the *Fleet Street Casuals* case.

Rare examples of success (and they were not very successful) might be *Pickering v Deputy Commissioner of Taxation*[69] and *Biga Nominees Pty Ltd v Commissioner of Taxation*.[70]

Pickering involved assessments to a husband, wife and their children of TUCT. This was the form of tax used to put down certain "bottom of the harbour" activities, though from this brief report it is certainly not possible to say that the taxpayers here had been involved in any such activity (and no allegation is made that they were).

Two of the several children had a discretion exercised by the Commissioner in their favour, wholly to waive or reduce the TUCT. The other children were left with substantial assessments. Cooper J considered it "clearly arguable that the duty of fairness" required that the discretion to waive TUCT be exercised in favour of the other infant children, "if they were truly in the like situation to the two daughters who received a favourable exercise of the discretion and if the applicants prove upon trial a breach of the duty they will be entitled to have the refusal quashed and the respondent required to exercise the discretion according to law".[71]

However, *Pickering* was determined upon a strike out application, and is not a final determination.

Biga involved sales tax, which as we have seen, involves other considerations. The curiosity of *Biga* was that there was a flow on effect to the present applicant, as lessee, if the Commissioner taxed the owner of the vehicle. This is another of those rare cases where the present applicant arguably had sufficient standing to attempt to enforce the so called duty of fairness. It was directly affected by the tax imposed on another entity.

Again, there is no final determination as the matter came up on appeal from a strike out application.

Perhaps the most extreme, recent example of withdrawal of a concession, mid-way through negotiations, was the "fluff" case, in England.

In *R (Veolia) v Commissioners for HM Revenue and Customs*[72] one company in an industry "missed the boat" in terms of negotiating a settlement of a long running dispute of industry-wide significance.

There was a landfill tax imposed on operators. The landfill sites needed an impervious membrane, but proper treatment of that membrane necessitated heavy and sharp objects being excluded for an initial layer when filling the landfill site. Typically this was about 2m deep and was known as "base fluff".

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[69] (1997) 37 ATR 41
[70] (1991) 104 FLR 75 affirmed [1988] VR 1006.
[71] (1997) 37 ATR 41 at [50].
[72] [2016] EWHC 1880 (Admin)

Ultimately the Commissioners accepted a decision of the Court of Appeal concerning this aspect and issued a notice publicly about their treatment of landfill tax thereafter.

Landfill site operators then submitted various claims for repayment. It emerged that landfill operators also said that there was a "fluff" component up the sides of the landfill site as well, called "side fluff". Finally, as the landfill sites had to be capped, a further idea emerged of "top fluff".

A number of operators settled with the Commissioners. The Commissioners decided to resist paying for "top fluff" claims, and finally decided to stop repaying on base and side fluff as well.

One operator, Veolia had received no part of its fluff claim at that point, and another operator, Viridor, had received only part of its fluff claim.

They brought proceedings to compel consideration of their claims.

In a complex decision, the High Court said of the *Fleet Street Casuals* fairness argument at [190]:

> First, the Commissioners' decision only has the potential for significant unfairness if the true position as a matter of tax law is that fluff was in fact taxable. That is because if the true position is that fluff was not taxable, Viridor can … establish that in due course in its appeal to the tribunal. So one only needs to assess the unfairness on the assumption that fluff was in fact taxable.

The Court also noted that the taxpayers had not arranged their affairs in the expectation of a particular treatment based on guidance or a specific ruling. Any expectation was in relation to repayment after the fluff layers had been laid down: at [191].

For those and a variety of other reasons, the claims wholly failed.

That is the usual course of events for taxpayers. It is not possible in most cases to force particular conduct, nor to restrain conduct as against other taxpayers. Even if the *Fleet Street Casuals* notion of "fairness" has real content, for the most part it will be impossible to establish standing, let alone gain remedy.

Nevertheless, the idea of fairness in administration of the tax laws is accepted as a public duty, albeit one not easily enforced by the individual taxpayer or even by an industry group.

9 Settlement Negotiations

As the Revenue authority is most likely susceptible to an adverse costs order in the long run, should the taxpayer succeed, there is every reason for the Revenue authority to take into account both the weaknesses, and the strengths, of its case.

Before assessment, the question between the parties is uncomplicated by a document crystallising liabilities in a way that generally cannot be contested otherwise than by review or appeal.

But even at that stage, my custom now is to make a *Calderbank* offer in seriously contested negotiations, somewhere near the end of audit (or after discussion of position papers). (Of course, the offer would need to be reviewed and repeated as matters progressed, but it is not a bad start.)

The Federal Court was prepared to award indemnity costs against the Commissioner of Taxation in *Clark.* The Full Federal Court and was prepared to endorse mediation in *Grofam*, as being consistent with the obligations of a Revenue authority properly to manage the revenue. There is no reason why settlement should not be full explored.

Once an assessment issues, the dynamic does change because recovery proceedings are expedited if the Revenue authority presses. Also, in jurisdictions where the tax must be paid before review or assessment (or where the Revenue authority can apply for an order that it be paid before proceedings continue), the dynamic also changes considerably.

Nevertheless, this simply invites greater creativity in settlement negotiations on both sides. The taxpayer will most likely make an offer under the rules of court (where available) or will make an offer under the principles in *Calderbank*. The Revenue authority must realistically assess the merits of its defence of the review or appeal, and likewise the taxpayer. If there is scope for settlement on the part of the Revenue authority, but the taxpayer appears resistant, there is no reason why the Revenue authority ought not to make such an offer, as well. Any rational litigant would.

If the tax has not been paid, it is possible for the Revenue authority to compromise a review or appeal on the basis of compromising recovery, as seen above.

Where the tax has been paid, the simplest mechanism for settlement is raising new assessments, including considering use of the compromise assessment powers where available.[73]

[73] I was asked not to trespass into other speakers' territory, by discussing compromise assessment powers. Cf - AF Tolhurst *Australian Gift and Estate Duties* (6ed), p.267.

10 True Scope of the Power

In truth, a Commissioner has broad powers and duties, commodiously described as the general power of administration. These derive from statute. But they involve many things, consistent with efficiently gathering the revenue.

We see practical approaches being adopted by revenue authorities every day. In the last month:

- the Victorian SRO has invited voluntary disclosure in the motor vehicle industry (to gain access to a lower rate of penalty);
- the New South Wales Revenue Authority has reissued its ruling on dutiable transactions evidence of value (DUT012 version 2, which provides assistance in terms of knowing the proper evidence to produce in most cases);
- the Commissioner of Taxation issued a Practical Compliance Guideline concerning exempt car benefits, PCG 2018/3. It indicates a way of practically complying with the complex FBT laws in cases where full compliance would overwhelm the small amount of tax likely to be garnered.

I am rather taken by the New Zealand formulation, above at heading 3.1. It seems harmonious with the ideas, and indeed the language, in the *Fleet Street Casuals* case.

One idea derived from that case is a duty of fairness owed by a Revenue authority to taxpayers.

Actually enforcing that public duty is problematic, though the odd instance has been given above where the application by a taxpayer has at least not been struck out.

One major limitation of that idea is that the Commissioner is not authorised to ignore the law.

The Commissioner cannot be estopped against taking a view today which is at variance with a prior view.

And it is inherently difficult for an individual taxpayer (or even a group of like-minded taxpayers) to show that they have a sufficient interest in a matter to prevent the Revenue authority treating another taxpayer or group of taxpayers more favourably than the applicant.

Another idea, consistent with management of the revenue, is settlement.

The courts do recognise the ability of the Revenue authority to compromise in circumstances where there is uncertainty - whether uncertainty as to the law or as to the facts.

None of these things involves an enforceable right for a taxpayer, usually. Each of these things is a sensible management tool, given the risk to the revenue and the costs of compliance activities on both sides.

Recall that in the *Fleet Street Casuals* case, Mr Hoadley, the official from the IRC, was faced with massive non-compliance on an ongoing basis, and the improbability that any investigation of past years would yield significant revenue. The compromise reached with the unions and employers in

that case was a sensible management decision, recognised the realities about past lost revenue, and tended to ensure future compliance at minimal real cost.

There was no way that the House of Lords would second guess such a sensible management decision by the Commissioners.

David W Marks QC

Chambers

24 July 2018