

# **Tax and time travel: looking backwards and looking forwards. Resolving Australian tax controversies of the future: does the European Convention on Human Rights suggest a better way?**

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## **Abstract**

In both his 2013 and 2014 annual reports the Australian *Inspector-General of Taxation* wrote of the need to consider the adoption of a taxpayers' bill of rights in Australia. Whilst a charter of taxpayer rights has been a feature of ATO administration for almost two decades it does not provide a legal remedy for an aggrieved taxpayer. In the absence of constitutional protection for fundamental rights, and the inapplicability of Australian human rights legislation to taxation matters, the courts have been reluctant to extend legal protections to taxpayers. If neither the *Taxation Administration Act 1953* nor the *Administrative Decisions (Judicial Review) Act 1977* are applicable then, typically, taxpayers are left to the vagaries of the ATO's internal dispute resolution procedures or to attempt to convince the Ombudsman, and now Inspector-General, of the merits of their case.

It is notable that in Europe there is a body of jurisprudence on the application of the *European Convention on Human Rights* to taxation matters by virtue of decisions of the European Court of Human Rights ("ECtHR"). It is proposed to examine these developments to identify if there are any lessons for Australia as we (again) consider the need for, and possible framework of, a taxpayers' bill of rights. The various articles of the Convention that impact on tax matters will be outlined together with the approach by the ECtHR to interpreting these articles.

These principles will then be applied to past Australian controversies (which otherwise lacked a legal remedy) using as a reference the ECtHR tax jurisprudence. The aim will be to gauge whether an appropriate resolution would have been achieved in these matters had these articles been incorporated into Australian law. It will be demonstrated that, in many cases, with some amendment or re-interpretation, these articles would have provided a legal solution. The paper adds to the chorus of the need to enshrine taxpayer, if not citizen rights, in a legally enforceable document.

# Tax and time travel: looking backwards and looking forwards. Resolving Australian tax controversies of the future: does the European Convention on Human Rights suggest a better way?

## 1.0 Introduction

At the 2015 ATTA conference I presented a background paper identifying the limitations in the dispute resolution regime applying to Australian taxpayers. The Australian experience has demonstrated the inadequacies of both the taxpayers' charter, unsupported by legislative mandate, and the traditional legal remedies. The evident need for more effective recognition of taxpayers' rights is reflected in the *Inspector-General of Taxation's* elevation of the issue to his current list of priorities.<sup>1</sup>

The 2015 paper identified that running contemporaneously with the debate over the better protection of taxpayers' rights is the more fundamental issue of the protection of human rights generally. Australia stands almost alone as a Western democracy that has so far resisted the proclamation of a bill of rights, notwithstanding strong support for such a measure. Clearly such a development would be much more significant and pervasive than a bill of rights solely focused on taxpayers. One outcome could be that citizens in their capacity as taxpayers might also receive some protection under such a bill.

It was acknowledged that European countries have for some time enshrined a statement of fundamental rights in their *Convention on Human Rights*.<sup>2</sup> Although not promulgated with taxation specifically in mind there have been occasions in which the *European Court of Human Rights* ("ECtHR") has had to adjudicate on the application of these rights to a taxation dispute.

This paper reviews the articles of the Convention that have been at issue in tax disputes and identifies the approach of the ECtHR. It examines whether if these articles, together with the interpretative approach of the ECtHR, were adopted in Australia they would provide a legal remedy for taxpayer grievances in circumstances where taxpayers are currently left to pursue an administrative or political outcome. To explore this proposition the articles and their associated

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<sup>1</sup> Discussed in Nassim Khadem, "Taxpayer bill of rights on the table for discussion, says Inspector-General of Taxation Ali Noroozi", *Australian Financial Review* (25 October 2013) available at [http://www.afr.com/p/professions/taxpayer\\_bill\\_inspector\\_rights\\_general\\_R4jyTdHDSys1XSMupURO2K](http://www.afr.com/p/professions/taxpayer_bill_inspector_rights_general_R4jyTdHDSys1XSMupURO2K) (last visited 21 August 2014). Also see the *Inspector-General of Taxation Annual Report 2013-14*, September 2014 at page 7 available at [http://www.igt.gov.au/content/reports/2013\\_14\\_annual\\_report/downloads/IGT\\_Annual\\_Report\\_2013-14.pdf](http://www.igt.gov.au/content/reports/2013_14_annual_report/downloads/IGT_Annual_Report_2013-14.pdf) (last visited 31 October 2014).

<sup>2</sup> Available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (last visited 9 October 2015).

tax jurisprudence are reviewed to determine whether they could have resolved past Australian tax controversies. This analysis identifies some inadequacies in this jurisprudence and provides lessons for Australia in drafting a bill of rights that might also provide citizens, in their capacity as taxpayers, with some protection.

## 2.0 Legal protection of taxpayers' rights in Australia

Disputes over tax liability are dealt with under Part IVC of the *Taxation Administration Act 1953* (Cth). This Part primarily extends to issues relating to the quantum of tax or penalties payable although, by virtue of a broad definition of “taxation decision” to which the Part applies, some administrative decisions are also within its ambit.<sup>3</sup> However most decisions of an administrative nature are to be dealt with under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (“*ADJRA*”).<sup>4</sup> Review is also sometimes available under s.39B of the *Judiciary Act 1903* (Cth).<sup>5</sup>

Notwithstanding these various avenues of redress, circumstances continue to arise where a taxpayer aggrieved by a decision of the ATO is without a reviewable decision, or at least one in relation to which they are unable to pursue a legal remedy. This can occur where a matter neither gives rise to a “taxation decision” (so reviewable under Part IVC) nor a “decision...under an enactment” (so reviewable under the *ADJRA*). Whilst there is judicial acknowledgment that s.39B of the *Judiciary Act 1903* (Cth) might sometimes provide a remedy this would only be available where a taxpayer could establish lack of good faith or the exercise of the access powers was not for the purpose of the tax laws – traditionally an exceptionally difficult assignment.

This lack of legal remedies is also at the heart of the inadequacies that have been voiced in relation to the ATO's *Taxpayers' Charter*.<sup>6</sup> The charter states both high end principles (eg that the ATO will treat taxpayers fairly and reasonably) and contains specifics, such as response times. However, it creates no legal rights and the perception has been that it has had little impact on improving the taxpayer experience of the administrator.<sup>7</sup>

Furthermore, as Australia has no constitutional charter of rights at the national level this too is not an avenue that an aggrieved taxpayer can pursue. Although most other democratic

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<sup>3</sup> See s.14ZQ and see “taxation objection” in s.14ZL. So, for example, decisions relating to Australian Business Numbers and some decisions relating to Pay as You Go administration are reviewable under this procedure.

<sup>4</sup> Provided that there was a “decision” within the meaning of s.5.

<sup>5</sup> Jurisdiction under s.39B(1A)(c) extends to a “matter... arising under any laws made by the Parliament”.

<sup>6</sup> A detailed survey of the literature both in support of and criticising the charter, including the 1993 report of the Joint Committee of Parliamentary Accounts (“JCPA”) that recommended its introduction in the form of a mere administrative document can be found in Bevacqua 2013. Most early commentators lamented the lack of legal rights created by the charter. As an example of support for a legislative bill of rights rather than an administrative charter see Duncan Bentley, “The Commissioner's powers: democracy fraying at the edges?” (1994) 4 *Revenue Law Journal* 85.

<sup>7</sup> Justin Dabner, “The Australian Tax Office / Tax Profession partnership: lessons from a pilot interview program”, (2008) 23 *Australian Tax Forum* 29.

jurisdictions have supplemented their legal system with a bill of rights Australia has resisted notwithstanding the calls that a national bill of rights is needed.<sup>8</sup> The many attempts to establish national protections have all been derailed.<sup>9</sup>

Human rights are recognised at an international level by virtue of the United Nation's *Universal Declaration of Human Rights* and the 1966 *International Convention on Civil and Political Rights* ("ICCPR") and the *International Convention on Economic, Social and Cultural Rights* ("ICESCR"). Although these conventions were ratified by Australia in 1980 ("ICCPR") and 1975 ("ICESCR"), due to Australia being a dualist state<sup>10</sup> they lack force of law in the absence of being given effect to by statute.<sup>11</sup> However, by virtue of protocols to the conventions<sup>12</sup> there remains an avenue to complain to the *Human Rights Committee* where all domestic remedies have been exhausted. Whilst decisions of the Committee are not binding they do carry significant political pressure,<sup>13</sup> although the Australian Government does have a history of ignoring Committee findings.<sup>14</sup> In any event, whilst there have been some tax matters referred to the Human Rights Committee from other countries, to date no taxpayer has been successful. Still these decisions reveal that the ambit of the conventions could cover tax disputes, in particular where the claim is as to disproportionate and unreasonable taxes, discriminatory taxes, absence of due process or breaches of privacy.<sup>15</sup>

A further source of human rights recognition is the *European Convention on Human Rights*. Although this Convention clearly has no binding legal significance outside the Council of Europe member states, its provisions and the subsequent decisions of the ECtHR provide a source of human rights law that foreign legislators and courts, such as those of Australia, could draw upon for inspiration. Most relevantly, there have been many decisions of the ECtHR that have considered the application of principles of human rights to tax law. As it might be expected that a future Australian bill of rights would draw upon the ECHR for inspiration this raises the question whether an Australian bill modelled on the ECHR might provide remedies for Australian taxpayers.

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<sup>8</sup> Kirby 2010, and refer to other protagonists there cited.

<sup>9</sup> Such as the Human Rights Bills of 1974 and 1984, the constitutional referendum of 1984 and the "National Human Rights Consultation" of 2008/09; the latter giving rise to a recommendation for a national charter which was subsequently rejected by the government in favour of a "framework" for human rights protection: Kirby 2010.

<sup>10</sup> In contrast to a monist state where international treaties once ratified can be self-executing.

<sup>11</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>12</sup> Especially the optional Protocol of the *International Covenant on Civil and Political Rights* 1966.

<sup>13</sup> On some occasions complaints concerning human rights abuses in Australia have also surfaced in reports of United Nations rapporteurs and agencies. For example, see the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People (James Anaya, Geneva, 27 August 2009).

<sup>14</sup> Devika Hovell, "The Sovereignty Stratagem: Australia's response to UN Human Rights Treaty Bodies", (2003) 28 *Alternative Law Journal* 6.

<sup>15</sup> See Marco Greggi, "Bridging a sea: human rights and supranational limits to tax law", 14<sup>th</sup> *Mediterranean Research Meeting, Workshop 8 Constitutional and Supranational review on Tax Legislation across the Mediterranean* (25 – 28 March, 2009) available at SSRN: <http://ssrn.com/abstract=1376242>.

### 3.0 European Convention on Human Rights and taxation disputes

The Convention dates from 1950 as a product of the *Council of Europe*, itself created in 1949.<sup>16</sup> The Convention particularises numerous rights to which citizens of member states may make reference as a last resort in disputes with their government.<sup>17</sup> An aggrieved party has the option of taking disputes to the ECtHR<sup>18</sup> or a domestic court. The latter is likely to be a quicker and cheaper option although the desirability of such a course may depend on the extent to which the Convention has been adopted in domestic law and the attitude of domestic judges. Decisions of the ECtHR are binding on its 47 member states, in the sense that declarations of rights violations and damages awards are possible outcomes. The member state is then expected to amend the law accordingly.<sup>19</sup>

Whilst all 28 EU member states are members of the Council of Europe the EU itself is not. However the EU has proposed to accede to the ECtHR<sup>20</sup> although these endeavours have been set back by the finding of the CJEU that the draft accession agreement is incompatible with EU law.<sup>21</sup> Notably, however, EU law has included, since 2009, a *Charter of Fundamental Rights* which, amongst other things, entrenches the ECHR, importantly in relation to EU bodies and institutions.<sup>22</sup>

Particular rights within the ECHR that have been held to have an impact on taxation<sup>23</sup> include the:<sup>24</sup>

- *Right to property* (Article 1 of the 1<sup>st</sup> Protocol) – peaceful enjoyment of possessions is mandated except in the public interest and subject to conditions provided for by law. The right

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<sup>16</sup> See <http://www.coe.int/aboutCoe/> (last visited 3 July 2015).

<sup>17</sup> The ECHR has numerous protocols attached amending or expanding on its terms.

<sup>18</sup> No distinction is drawn here between decisions of the ECtHR and the *Commission of Human Rights*, the latter which ceased to operate in 1999.

<sup>19</sup> Whilst the ECtHR is a last resort court, domestic courts are expected to embrace the principles enshrined in the Convention. Thus, for example, pursuant to the *Human Rights Act 1998* (UK) the protections contained in the Convention are incorporated in UK law and may be relied upon by litigants in British cases with an ultimate right to petition the ECtHR. In particular, s.3 requires domestic legislation to be interpreted in conformity with the Convention with a declaration of incompatibility under s.4 the alternative outcome if this is not possible. Public authorities are also required to act in conformity with the Convention unless domestic legislation under which they are operating is itself inconsistent with it (s.6). As to the features of and significance of the 1998 Act in domestic UK tax matters see: Natalie Lee, “The effect of the Human Rights Act 1998 on taxation policy and administration”, [2004] *eJITaxR* 8; 2(2) *eJournal of Tax Research* 155 (“Lee 2004”) and Philip Baker, *The application of the European convention on human rights to tax matters in the United Kingdom*, available at [http://www.taxbar.com/documents/App\\_European\\_Convention\\_Philip\\_Baker\\_QC.pdf](http://www.taxbar.com/documents/App_European_Convention_Philip_Baker_QC.pdf) (last visited 3 September 2014).

<sup>20</sup> [http://www.coe.int/t/der/EU\\_en.asp](http://www.coe.int/t/der/EU_en.asp) (last visited 3 July 2015).

<sup>21</sup> <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf> (last visited 3 July 2015).

<sup>22</sup> [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm) (last visited 3 July 2015).

<sup>23</sup> For a comprehensive statement of the tax jurisprudence as at 2000 see Philip Baker, “Taxation and the European Convention on Human Rights,” [2000] 4 *BTR* 211 (“Baker 2000”).

<sup>24</sup> The right to liberty (Article 5) can also be significant where a criminal offence relating to taxation obligations imposes a custodial sentence.

of a state to secure the payment of taxes or other contributions or penalties is, however, not to be impaired.

- *Right to a fair trial* (Article 6) – in the event of the determination of civil rights and obligations or criminal charges a fair and public hearing within a reasonable time by an independent tribunal is mandated.
- *Non-discrimination* (Article 14) – Convention rights are to be enjoyed without discrimination on any ground.<sup>25</sup>
- *Right to privacy* (Article 8) – the right to respect for private life except where in accordance with the law and as is necessary in a democratic society for the protection of the country and its citizens.

In the interpretation of the Convention's articles the ECtHR has developed a set of general principles that determine its approach.<sup>26</sup> These principles seek to establish a balance. The Convention is not to be muted by excessive literalism and formality. At the same time state sovereignty is to be respected within reason.

Of these principles, those of particular significance to complaints as to tax laws and tax administration are margin of appreciation and proportionality.

### ***Margin of appreciation and proportionality***

A primary limitation on the ability of the Convention to impact the laws of member states is the principle that the ECtHR does not rush to substitute its views for decisions / legislation by governments best placed to assess the needs of their society unless such decisions are manifestly unreasonable or arbitrary or blatantly inconsistent with the Convention.<sup>27</sup> The theory is that domestic public authorities may be in a better position than an international judge to weigh up application of the Convention against competing priorities. However, any departures from the Convention in pursuit of specified legitimate aims must be shown to be necessary in the sense of being justified by a pressing social need.

Furthermore, the principle of proportionality acknowledges that there should be a reasonable relation between goals pursued and the means used, finding a balance between the rights of individuals and those of the community. This principle is supported by the general framework of

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<sup>25</sup> Article 14 is non-free standing in the sense that it does not prohibit discrimination as such but only in relation to other rights vested by the Convention. Typically, in the tax context, it is raised in conjunction with Article 1 of the 1<sup>st</sup> Protocol with the argument that the right to property was denied to the taxpayer in an unjustified and discriminatory way: Baker 2000 at 249.

<sup>26</sup> Karen Reid, *A practitioner's guide to the European Convention on Human Rights*, Sweet and Maxwell, 4<sup>th</sup> edition, 2012. ("Reid 2014"). My thanks to Dr Werner Haslehner for access to an unpublished paper examining in detail ECtHR tax jurisprudence.

<sup>27</sup> *Handyside v United Kingdom*, no 5493/72 (7 December 1976) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{"itemid":\["001-57499"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{) (last visited 7 July 2015).

the rights which tend not to be absolute but rather carry with them qualifications, such as, for example, allowing a right to be compromised in the interests of national security or for the economic wellbeing of a state.

Together, these two concepts take centre stage in the application of the Convention to tax cases. That this should be the case is self-evident from the terms of Article 1 of the 1<sup>st</sup> Protocol with its raising of tax qualification. The result is that there have been few cases dealing with the imposition or amount of tax. However some principles might be stated, namely grossly excessive taxation or fines might be disallowed on the basis that they amount to a confiscation of property or place such an excessive burden that they undermine a citizen's financial position or are disproportionate as amounting to a grossly arbitrary extraction.<sup>28</sup> Overall though, the ECtHR pays a great deal of respect to state sovereignty in tax policy matters<sup>29</sup> and it has been suggested that taxpayers relying on the Convention have had less success than citizens mounting challenges to more serious and fundamental infringements.<sup>30</sup>

Rather the tax cases have tended to focus on the fairness of procedures and sanctions and tax litigation.<sup>31</sup> Delayed repayment of tax or compensation for over payments may amount to a failure to respect the right to property. That Article also covers contributions not strictly taxes, such as child support payments.<sup>32</sup> The Article 6 guarantee of a fair trial is also often activated, although the decision in *Ferrazzini v Italy*<sup>33</sup> has significantly restricted this guarantee, holding that it does not extend to proceedings relating to the assessment or imposition of tax.<sup>34</sup> Where these Articles do apply to a tax authority they place a focus on whether the authority acted not only reasonably and in good faith but, in addition, as to whether its conduct was proportionate to the aim pursued.<sup>35</sup>

Tax cases that raise the Article 14 prohibition against discrimination again reflect a generous margin of appreciation being granted to the states recognizing that tax systems typically differentiate between groups of taxpayers.<sup>36</sup> The same may be stated in relation to the Article 8 right to privacy on the basis that tax systems depend for their efficacy on the supply of information about the affairs of taxpayers.

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<sup>28</sup> Reid 2014 at 783 – 784.

<sup>29</sup> Roger Persson-Osterman, *Human rights in the field of taxation: a view from Sweden*, 1999 at 439. (“Persson-Osterman 1999”) Also see Lee 2004 at paras 55 and following.

<sup>30</sup> Lee 2004 at para 148.

<sup>31</sup> Contrasted with substantive taxation: see the General Report and the papers there referred to in Georg Kofler, Miguel Poiaras Maduro and Pasquale Pistone (eds), *Human rights and taxation in Europe and the World*, IBFD 2011 at 17 – 33.

<sup>32</sup> Reid 2014 at 787.

<sup>33</sup> ECtHR, 12 July 2001, [2001] STC 1314.

<sup>34</sup> Reid 2014 at 786.

<sup>35</sup> Lee 2004.

<sup>36</sup> Reid 2014 at 787 – 788.

### *Other interpretative principles*

Numerous other interpretative principles are relied upon by the Court, some more or less of significance to tax matters.<sup>37</sup> Two that should be mentioned, due to their relevance to the analysis below, are:

#### *Individual rights*

Complaints must be as to specific existing circumstances rather than general or abstract allegations of breach.

#### *Legitimate expectations*

This principle is often invoked to justify the paramountcy of a right over a domestic law. In particular it is a means by which legal force may be given to (otherwise) soft law.

## **4.0 Australian tax controversies**

For the purposes of considering the appropriateness of the Convention and the tax jurisprudence of the ECtHR for Australia the following tax controversies will be considered:

- non-binding advice, in particular the accountants' papers concession,
- mass marketed tax schemes,
- delayed refund payments,
- excessive taxation of superannuation contributions,
- high net worth individuals' audits, risk based audits and threats,
- the tax accountants' strike,
- the collection of disputed tax, and
- other instances of inadequate legal remedies.

The common element in these disputes was/is the absence of a legal path to resolve them. Notably dissatisfied taxpayers in such circumstances have been left to attempt resolution using the internal ATO complaints system or lodge their complaint with the Commonwealth Ombudsman.<sup>38</sup> Since 2003 the Inspector-General of Taxation has also considered complaints indicating a systemic issue. Notably the government has proposed that over four years from 2014/15 all tax complaints are to be removed from the Ombudsman to the Inspector and, furthermore, a new House of Representatives Tax and Revenue Committee was established in late 2013 with an additional scrutineer mandate.

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<sup>37</sup> Reid 2014 at 783 – 788.

<sup>38</sup> *Ombudsman Act 1976* (Cth).



Whilst an aggrieved taxpayer might seek administrative (or even political intervention) such a process may not necessarily lead to an appropriate resolution of the matter. Escalation to the ATO dispute resolution section might be met with an institutional response. An overworked and underwhelmed Ombudsman or Inspector-General might not give the matter its full attention. Political engagement will not always be achievable or forthcoming and will likely depend more on the taxpayer's influence rather than the merits of the case. However should taxpayer rights be enshrined in the law then if a controversy with the ATO arguably infringed on these then the taxpayer would have recourse to a defined legal process.

#### **4.1 Non-binding advice**

The Australian income tax system is premised on the principle of self-assessment under which taxpayers are to take responsibility to return their income and expenses from which return an assessment will issue. Checks and audits predominantly occur post-assessment at which time any identified errors leading to tax payment shortfalls will result in a liability for shortfall interest and possibly the imposition of penalties. It is, therefore, critical that taxpayers get their returns correct.

To assist taxpayers the ATO issues numerous publications seeking to clarify taxpayer obligations, especially as to the assessability or deductability of amounts. At one extreme are designated public rulings which are expressly made binding on the ATO. Similarly where a taxpayer requests and is issued with a private ruling these will be binding on the ATO, in the absence of misinformation being provided by the taxpayer or a transaction subsequently occurring in a different way to that ruled on.

But there are a plethora of other types of communications, some of a general nature and some directed to a specific taxpayer query, which are not legally binding on taxpayers. For example, oral advice is not binding<sup>39</sup> nor are statements of practice.<sup>40</sup> Thus in *Macquarie Bank v FCT*<sup>41</sup> the Full Federal Court held that the bank was unable to force the ATO to comply with a practice statement previously issued (and since departed from) as to the application of the offshore banking rules where this was inconsistent with the provisions. There was no decision, as defined in the legislation, enforceable against the Commissioner.

The non-binding nature of many ATO communications is part of a larger issue which developed the description "u-turns." This concept describes a situation where there has been a perception created as to the ATO position on a matter, or interpretation of legislation, where the ATO then alters its views. Taxpayers who have acted in the belief that the position they have taken was consistent with the way that the law would be administered are then placed in a difficult position

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<sup>39</sup> *Pegasus Leasing v FCT* 91 ATC 4972.

<sup>40</sup> *MacQuarie Bank v FCT* [2013] FCAFC 119.

<sup>41</sup> [2013] FCAFC 119.

of either contesting the ATO's (apparent) new view or suffering a tax penalty. Ultimately this issue led to be a review by the Inspector-General of Taxation with recommendations as to better consultation, reduced delays in stating positions, the issue of interim views and the use of more precise terminology in ATO pronouncements.<sup>42</sup>

How might such scenarios play out in the context of the Convention? An article that might conceivably have an application is **Article 6** (right to a fair trial) on the basis that the administration of the tax laws is part of the assessment basis determining a taxpayer's "civil rights and obligations". This is a stretch but the argument has even less traction given that the ECtHR jurisprudence invariably holds Article 6 inadmissible where the matter involves determination of a tax liability, limiting the notion of "civil rights and obligations" to those arising under private law.<sup>43</sup> Problematic exceptions do apply, such as where a tax penalty pursuant to a criminal charge is at stake<sup>44</sup> or where the tax proceedings lead to the determination of a private law right, such as restitution of overpaid taxes.<sup>45</sup> These exceptions raise difficult distinctions between penal and non-penal ordinary tax and between the determination of a tax liability and tax recovery and refund cases.

Thus a taxpayer such as Macquarie Bank would need to argue that the practice statement was part of the process of determining either its private law rights or the imposition of penalty tax and departure from it was unfair. Then presumably the doctrine of legitimate expectations might apply to ensure that the right supplanted the strict application of the tax law. Given both the uncertainty inherent in whether the process of assessment was within the ambit of Article 6 and complications created by the restrictive interpretation and then problematic exceptions, this outcome has little to recommend itself. Even taxpayers aggrieved by ATO departures from non-binding advice that clearly went to recovery / refund issues or the imposition of penalty tax may still have an argument to stretch the Article to encompass assessment.

Cases where the ATO has provided concessions or favourable interpretations of the law impacting on a taxpayer's right to property under **Article 1 of the 1<sup>st</sup> Protocol**, such as in *Macquarie Bank*, might also raise **Article 14**, the non-discrimination mandate, where they are not followed in respect of a particular taxpayer. However, apart from the obvious evidential difficulties that might burden a taxpayer seeking to show that the concession has been provided to other taxpayers and there are no distinguishing circumstances, there is case law suggesting

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<sup>42</sup> Inspector-General of Taxation, *Review into delay or changed Australian Tax Office views on significant issues*, A report to the Assistant Treasurer, Commonwealth of Australia, March 2010 available at <http://igt.gov.au/files/2014/12/views-on-significant-issues.pdf> (last visited 21 July 2015).

<sup>43</sup> Especially see ECtHR 12 July 2001, *Ferrazzini v Italy* [2001] STC 1314. See the discussion and criticism of the cases in Baker 2000 at 230 - 232, Philip Baker, "Should Article 6 ECHR (Civil) apply to tax proceedings?" (2001) 6/7 *intertax* 205 and Lee 2004.

<sup>44</sup> Baker 2000 at 235 - 238. For example, ECtHR 24 February 1994, *Bendenoun v France*, application no. 12547/86.

<sup>45</sup> Baker 2000 at 233 - 235. For example, ECtHR 23 October 1997, *National and Provincial Building Society and Others v United Kingdom*, application no. 21319/93.

that no extra-legal concession will be enforced in favour of a taxpayer even if this amounts to a breach of the Convention.<sup>46</sup> Furthermore, a very wide margin of appreciation is permitted by the ECtHR in allowing jurisdictions to tax different taxpayers differently.<sup>47</sup>

It could also be argued that to the extent that a strict interpretation of the legislation is irreconcilable with the position taken by the ATO this generates uncertainty that is inconsistent with the rule of law and hence offends **Article 1 of the 1<sup>st</sup> Protocol**. However this uncertainty argument is not well developed in the case law and clearly could have major implications for complicated tax legislation. Proportionality considerations would err on an appreciation of the need for both broad tax legislation and the flexible application of the law by the tax administrator in the exercise of its general powers of administration. The uncertainty created would, barring extreme incompetence on the part of the legislature, draftsmen, administrator or courts,<sup>48</sup> be simply a by-product of a tax system directed towards the public interest. Notably in the *Yukos case* it was held that the duty of diligence on a large company was greater and it should have obtained specialist advice in which case it would have foreseen that its behaviour might have fallen within the anti-avoidance rule.<sup>49</sup>

### ***The accountants' papers concession***

The most contentious issue in Australian tax law relating to non-binding concessions relates to ATO access to advice prepared by tax accountants. This deserves particular consideration.

Sections 353-10 and 353-15 of schedule 1 of the *Taxation Administration Act 1953* (Cth) empower the ATO to access documents held by, and information in the knowledge of, taxpayers for any purposes relating to tax administration.<sup>50</sup> These documents, or this information, may concern other taxpayers. Thus banks can be required to provide information on interest paid, companies on dividends paid and other entities on any dealings with a particular taxpayer.

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<sup>46</sup> *R (on the application of Wilkinson) v IRC* [2003] EWCA 814; [2003] 1 WLR 2683 where the Commissioner's granting of an extra-legal concession to widowers to put them in the same position under legislation, expressed to only apply to widows, was not enforced even though this amounted to a breach of Article 14's mandate. It is suggested that the appropriate course therefore would be for the court to issue a declaration of incompatibility in respect of the legislation.

<sup>47</sup> *Baker* 2000 at 250 and 253.

<sup>48</sup> An example of which might be illustrated by the decision in ECtHR 20 September 2011, *OAO Neftyanaya Kompaniya Yukos*, application no. 14902/04 ("*Yukos case*") that the Russian court, by creating a new exception to the time limit applicable to the case, had gone beyond statutory interpretation and had breached the rule of law. Discussed in Jose Manuel Calderon Carrero and Alberto Quintas Seara, "International/Russia - transfer pricing disputes, abusive tax schemes and the protection of the European Convention on Human Rights against oppressive tax actions: The Yukos case," (2013) 67(6) *Bulletin for International Taxation* 283.

<sup>49</sup> The facts disclosed a complicated plan to avoid tax possibly influencing the decision.

<sup>50</sup> S.353-10 (information notices) was previously s.264 and s.353-15 (access powers), previously s.263, of the *Income Tax Assessment Act 1936* (Cth). Rewritten by *Treasury Legislation Amendment (Repeal Day) Act 2015*.

There are few limits placed on these powers but the most significant is that documents or advice subject to legal professional privilege may not be accessed.<sup>51</sup> However a feature of the tax advisory environment in Australia is that the bulk of tax advice is provided by non-lawyers, namely accountants and tax agents, and so is not protected by privilege. During the late 1980s this was particularly contentious as the ATO became more aggressive in the exercise of its information gathering powers. Eventually, high level engagement between the profession and the ATO resulted in a “resolution” of the issue whereby the Commissioner undertook that accountants’ advice would only be accessed in rare circumstances, where the ATO suspected tax evasion or fraud, and only then upon the approval of the most senior officers within the ATO.

Whilst this undertaking made its way to a practice statement,<sup>52</sup> there continue to be instances where taxpayers have asserted that the undertaking has not been complied with. In no cases where such disputes have progressed to a decided case has the taxpayer been successful in enforcing the undertaking.<sup>53</sup> The courts have held that neither principles of estoppel nor the doctrine of legitimate expectations can avail the taxpayer. Subsequent calls for an accountants’ papers privilege to be enshrined in legislation have gone unheeded.<sup>54</sup>

Consider the ECHR. The limitations from the restrictive interpretation of the “civil” element of the fair trial **Article 6** confuse the picture and might deny a taxpayer client of an accountant any assistance where breach of the practice statement is alleged. However possibly the reach of the Article to criminal matters might be relied upon. Refusal to comply with an information notice or access powers is an offence carrying penalties which, in the event of two or more previous convictions on similar offences, can include a period of imprisonment up to 12 months.<sup>55</sup> Also the material identified might lead to criminal proceedings.

The issue as to whether tax matters are, or can be, criminal in nature and so within Article 6 has vexed both the ECtHR and domestic courts applying the Convention principles.<sup>56</sup> A detailed consideration of this case law is beyond the parameters of this paper but the primary considerations are as to the nature of the offence (eg if it involves dishonesty) and the level of

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<sup>51</sup> See Justin Dabner, *Commentary on Section 263 of ITAA 1936: access to book etc.* and *Commentary on Section 264 of ITAA 1936: Commissioner may require information and evidence* in *Australian Tax Practice*, Thomson Legal and Regulatory, Pyrmont, NSW, 2007. (“Dabner 2007”)

<sup>52</sup> Dabner 2007 at paras 263/500 and 264/640.

<sup>53</sup> Dabner 2007 at paras 263/520 and 264/660.

<sup>54</sup> Notably the *Australian Law Reform Commission* issued a discussion paper in 2007 recommending a statutory client accountant privilege: *ALRC Discussion Paper 73, Client Legal Privilege and Federal Investigatory Bodies* available at <https://www.alrc.gov.au/sites/default/files/pdfs/publications/DP73.pdf> (last visited 7 July 2015). Also see David Bloom QC, “The Commissioner’s access guidelines”, 2007 *Queensland State Convention Tax Institute of Australia* August 2007.

<sup>55</sup> S.8B – s.8E of the *Taxation Administration Act 1953* (Cth).

<sup>56</sup> For example, see *Engel v The Netherlands* [1976] ECHR 3; (1976) 1 EHRR 647; ECtHR 21 May 2003, *Vastberga Taxi Aktiebolag and Vulic v Sweden*, application no 36985/97; ECtHR 23 May 2003, *Janosevic v Sweden*, application no 34619/97. The UK courts would appear to have endorsed a wider definition of criminal for these purposes: *Han v Customs and Excise Commissioners* [2001] STC 1188.

penalty. Certainly the form of the penalty provision and how it is described is not relevant to the determination (unless the domestic law does, in fact, describe the offence as criminal). It could be argued that the ECtHR has demonstrated a tendency to hold Article 6 applicable to tax proceedings where a tax penalty exists on the basis that the regime has a deterrent and punitive element.<sup>57</sup> Certainly where the penalty includes a potential period of imprisonment or the imposition of a fine with imprisonment in default of payment the Article is more likely to have an application.<sup>58</sup> It has even been argued that a penalty of 25% or more of the tax liability is likely to be viewed as a criminal matter.<sup>59</sup>

Importantly, in *Ravon and others v France*<sup>60</sup> the ECtHR held a search of a taxpayer's home in breach of Article 6 on the basis that there was no review of the decision possible. The search was in respect of alleged tax fraud. The case was followed in *Andre and another v France*<sup>61</sup> this time in relation to the search of a lawyer's office in relation to a client, again suspected of tax fraud. In both cases it was simply accepted that the matter fell within the Article.

In these cases the purposes of the searches appeared to influence the decision. Tax investigations might be, and often are, conducted in respect to both an obligation to pay tax and the uncovering of potential crimes. The issue arises, therefore, whether the investigations are impressed with a criminal character from the start of the engagement with the taxpayer or as to whether they can gain this character at a later stage.

Related to this question is when could it be said that proceedings within the ambit of Article 6 actually commenced. Is the investigation part of the relevant proceedings or merely preliminary? The case law takes the approach that criminal proceedings commence at such time when the taxpayer is substantially affected by those proceedings. Thus receipt of a letter from the tax authority seeking confirmation of certain facts would not be within the Article but a search of a taxpayer's home would.<sup>62</sup> Arguably the exercise of the ATO's access powers to require provision of an accountant's opinion would then be an element of the proceedings.<sup>63</sup> In any

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<sup>57</sup> ECtHR, 24 February 1994, *Bendenoun v France*, application no. 12547/86 and 23 November 2006, *Jussila v Finland*, application no. 73053/01. Arguably recent cases more readily accept that tax penalties trigger an application of the Article: ECtHR 7 June 2012, *Segame SA v France*, application no. 4837/06.

<sup>58</sup> Baker 2000 at 236.

<sup>59</sup> Baker 2000 at 237. In the *Yukos case* the penalty at issue was 40%. In *Pakodzi v Hungary* a 50% tax surcharge in the circumstances was held to amount to a criminal charge: ECtHR 25 November 2014, application no. 51269/07.

<sup>60</sup> ECtHR 21 February 2008, application no. 18497/03. See Philip Baker, "Some recent decisions of the European Court of Human Rights on tax matters", (2009) 7 *European Taxation* 596.

<sup>61</sup> ECtHR 24 July 2008, application no. 18603/03. See Philip Baker, "Some recent decisions of the European Court of Human Rights on tax matters", (2008) 6 *European Taxation* 315.

<sup>62</sup> *Abas v Netherlands*, application no. 27943/95 (26 February 1997).

<sup>63</sup> In *Sabou*, application no. C-276/12 (22 October 2013) the CJEU relied on a distinction between the investigative and contentious stages of a tax dispute to deny a taxpayer a right to be heard in relation to an exchange of information procedure. Also the United States manual on tax practice standards (Bernard Wolfman, James P Holder and Kenneth L Harris, *Standards of Tax Practice*, Tax Analysts, 5<sup>th</sup> edition, 1999) draws a distinction between a tax advocate and a tax adviser. The key to the distinction is the extent to which the practitioner is engaged in adversarial

event, the alleged unfairness might be so integral to the existence of subsequent proceedings that it is inconceivable that it would not activate a consideration of Article 6.

An even stronger argument based on Article 6 exists should the ATO exercise its access and information notice powers once legal action has commenced against a taxpayer. It could be argued court sanctioned discovery is then appropriate and any attempt to use broader information gathering powers to gain a tactical advantage in the litigation would be unfair. Once again, though, in relation to the proceedings at issue, it would still be necessary to overcome the narrow interpretation of civil rights that excludes most tax matters from the ambit of the Article. In any event, there may be adequate existing protections in the law. The use of these powers against a person subject to existing litigation could amount to the wrongful interference with the due administration of justice and so constitute contempt.<sup>64</sup>

The application of Article 6 to the information gathering powers would have substantial implications beyond the issue of access to accountants' opinions. The rights to silence and against self-incrimination have been recognised as integral to the notion of a fair trial.<sup>65</sup> It has been held that these rights are not available to taxpayers subject to the ATO's investigatory powers.<sup>66</sup> The application of Article 6 would challenge this position.<sup>67</sup> Arguably the ATO would need to maintain procedures consistent with police investigations, such as ensuring that taxpayers are first cautioned and any interview recorded.<sup>68</sup>

The powers contained in s.353-10 and s.353-15 also raises the issue of privacy. As observed in section 2 the ATO is subject to the *Privacy Act 1988 (Cth)*. Accordingly, it has established a privacy policy which provides for a complaints procedure<sup>69</sup> and taxpayers may also lay a complaint with the Information Commissioner where they can allege a breach of the Act. The remit of these laws though is on the retention and use of the material and, otherwise, does not impact on the ATO's access and information seeking powers.

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proceedings. Whilst this may be some support for a narrower view of proceedings for the purposes of the application of Article 6, the authors do acknowledge that the distinction is not always easy to delineate (at 49 – 52).

<sup>64</sup> The issue would be whether the access is for the purposes of obtaining information relevant to the existing litigation by methods not available to it through the normal processes of the court and/or whether the issuing of the notice with its penalty for non-compliance could be interpreted as an attempt to achieve by threats an advantage in the proceedings. Where the existing litigation is not with the ATO then the question becomes whether the use of the access could advantage or disadvantage any party to the litigation. See Dabner 2007 at paras 263/760 and 264/600.

<sup>65</sup> Baker 2000 at 243 – 245. For example see *R v Allen* [2001] UKHL 46; [2002] 1 AC 509 per Lord Hutton; ECtHR 3 May 2001, *JB v Switzerland Netherlands*, application no. 31827/96.

<sup>66</sup> See Dabner 2007 at paras 263/600 and 264/600.

<sup>67</sup> For example, see *R v Allen* [2001] UKHL 45; [2001] STC 1537 and *Murrell v Commissioners for Customs and Excise*, case no 16878 (LON/99/121), 13 October 2000. See the discussion in Baker 2000.

<sup>68</sup> The recording of interviews and option to have legal advice is a normal procedure in any event: see Dabner 2007 at paras 263/780 and 264/140 & 620.

<sup>69</sup> <https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Privacy-notice/Privacy-policy/> (last visited 17 July 2015).

**Article 8** of the ECHR provides a person with the right to privacy. There are, however, qualifications to the right, importantly, in the context of taxpayers, where the access to information is in accordance with the law and is necessary in the interests of the economic well-being of the country or to prevent or investigate a crime. Thus a taxpayer, subject to a tax administrator's access or information seeking powers, who is unable to prove that the conduct is outside the domestic law, will need to establish that the law is disproportionate as between the competing interests of the taxpayer and the public interest.

The tax jurisprudence focuses on whether the law sufficiently safeguards taxpayers against abuse of power by the tax authority.<sup>70</sup> In particular, where searches by tax authorities do not require the preliminary involvement of an independent judge in granting a warrant (as in Australia) the ECtHR is particularly vigilant as regards proportionality.<sup>71</sup> Even where the search is authorised by a judge there is authority to the effect that Article 8 mandates extra safeguards to protect legal professional privilege.<sup>72</sup> It could be envisaged, therefore, that access to accountants' opinions by the ATO would raise the right to privacy and the lack of statutory protection would focus attention on whether the administrative protections were adequate.

Finally, some interesting British jurisprudence exists in relation to Article 8. Following *Foxley v UK*<sup>73</sup> Lord Hoffmann in *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*<sup>74</sup> stated that legal professional privilege is a fundamental human right. Taking this line of authority, and by extension, it might be argued that providing a legislative privilege for accountants' opinions is necessary to accord with Article 8.<sup>75</sup> Thus, it may not be sufficient to merely provide an extra-legal concession but rather domestic legislation should enshrine the protection.

## 4.2 Mass marketed schemes

During the 1990s a new scourge in tax avoidance came to the attention of the ATO. Tax schemes, especially those generating greater tax deductions from an investment than the amount outlaid, were being devised and marketed to wage and salary earners. Particularly targeted were well paid taxpayers who were unlikely to have high financial literacy skills and so the phenomenon of "salesmen" descending mine shafts to sign up miners emerged. Whilst a large

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<sup>70</sup> See, for example, ECtHR 25 February 1993, *Funke v France*, application no. 10828/84

<sup>71</sup> ECtHR 16 December 1997, *Camenzind v Switzerland*, application no. 21353/93.

<sup>72</sup> ECtHR 24 July 2008, *Andre and Another v France*, application no. 18603/03.

<sup>73</sup> [2001] 31 EHRR 637.

<sup>74</sup> [2002] UKHL 21; [2002] STC 786.

<sup>75</sup> In *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1 the Supreme Court refused to extend legal professional privilege to tax advice provided by accountants suggesting that it was up to Parliament to make such a change. Notably human rights principles do not appear to have been raised before the court.

number of miners signed up for these schemes they were by no means the only takers. Airline pilots, medical practitioners and even accountants and lawyers flocked to be part of the action.<sup>76</sup>

A feature of these arrangements was that they were often accompanied by an impressive looking opinion from a prominent tax QC or the like attesting to the bona fides of the arrangement. Faced with such a testimony even otherwise cautious taxpayers were encouraged to take part. When the ATO was slow off the mark to respond to the schemes, and even gave affirmative rulings to some promoters, this simply confirmed the growing community sentiment that they were tax effective.<sup>77</sup>

However eventually the ATO did harness the anti-avoidance rules at its disposal and, in almost all the matters that proceeded to court, was successful.<sup>78</sup> Encouraged by its legal successes it aggressively audited taxpayers it suspected of involvement in the schemes, imposing penalties and interest. Given the initial delay in investigating the schemes the interest charge, in particular, was, by the time the amended assessments issued, often financially crippling on the taxpayers concerned.

The very large number of “ordinary” taxpayers caught out, ultimately, led to political pressure on the ATO to ease up. Local politicians were inundated with taxpayers arguing that they were being unfairly treated by the ATO given that they were duped into schemes that they thought were bona fide, a situation contributed to by the ATO’s initial tardiness. The outcome was that, in many cases, penalties and even interest payments were waived.<sup>79</sup>

Had the politicians not responded, as might have been expected if only a few taxpayers were caught up in the schemes, then the taxpayers would not have had any legal recourse against the ATO. Neither the tacit endorsement through ATO inactivity, knowledge of private rulings granted to other taxpayers or in relation to similar schemes, the express endorsement of the schemes by tax experts or the apparent community consensus as to the bona fides of the schemes would have provided any legal defence to the issue of amended assessments and imposition of interest and penalties.

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<sup>76</sup> See chapter 2, Senate Economics References Committee, *Inquiry into mass marketed tax effective schemes and investor protection Final Report*, Parliament of the Commonwealth of Australia, February 2002 available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Completed\\_inquiries/2002-04/massmark/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2002-04/massmark/index) (last visited 7 July 2015). Interim reports are also available at this site.

<sup>77</sup> See the discussion in the interim report of the Senate Economics References Committee (June 2001) at chapter 4.

<sup>78</sup> An ATO summary of the main cases can be found at: [https://www.ato.gov.au/General/Tax-planning/In-detail/Mass-marketed-schemes/Mass-marketed-investment-schemes---a-historical-overview/?page=4#Summary\\_of\\_the\\_eleven\\_decisions](https://www.ato.gov.au/General/Tax-planning/In-detail/Mass-marketed-schemes/Mass-marketed-investment-schemes---a-historical-overview/?page=4#Summary_of_the_eleven_decisions) (last visited 7 July 2015).

<sup>79</sup> See the discussion in the interim report of the Senate Economics References Committee (June 2001) at chapter 5 in particular.



Again it might be that **Article 6** could have an application here but again, as interpreted, it is unclear that it could have provided taxpayers with protection against ATO amended assessments. At issue was, primarily, the application of the anti-avoidance rules.<sup>80</sup> These allow for the imposition of potentially heavy penalties of 50%<sup>81</sup> plus interest, which was running at the time at around 14%. Thus the issue would be whether this constituted a criminal penalty, within the principles discussed earlier and so the Article might have an application. However even if the Article could apply the availability of any remedy based on legitimate expectations might be difficult to establish where no express representation exists (such as an oral statement or non-binding practice statement) and rather a representation by acquiescence is sought to be relied upon.

### 4.3 Delayed refund payments

As discussed in section 4.1, during the early 1990s the Australian income tax system moved to a self-assessment system whereby ATO checks of returns/assessments (other than merely arithmetic confirmation) would occur post-lodging. However concerns with the quantum of refunds being issued to wage and salary earners resulted in the ATO implementing, in 2011, a program to undertake pre-assessment checks where the refund was particularly high and other risk factors existed. A result was that many genuine refund payments were delayed, often for extended periods, whilst the backlog of returns was investigated.

This program was poorly communicated to the profession and taxpayers generally with the result that there was great anxiety about the delayed refund cheques with many taxpayers claiming that this generated cash flow stress for them. Instances of financial difficulty were reported.<sup>82</sup> Furthermore, the communications from the ATO left taxpayers anxious that the ATO regarded them as fraudulent or dishonest. Meanwhile the ATO stubbornly stuck to its new procedure with the profession forced to embark on an administrative and political lobbying campaign to resolve the issue for future years.<sup>83</sup>

This controversy raises the question of whether under **Article 1 of the 1<sup>st</sup> Protocol** a taxpayer could claim a right to an expedient refund of the over payment of tax. That is, could it be argued that the delayed return of overpaid tax breaches the right to property mandate or is it excused by either or both the public interest and taxation exceptions. The latter is in the terms that the Article

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<sup>80</sup> Primarily Part IVA of the *Income Tax Assessment Act 1936* (Cth).

<sup>81</sup> S.226 (repealed) of the *Income Tax Assessment Act 1936* (Cth).

<sup>82</sup> Nassim Khadem, "ATO refunds under scrutiny", *BRW* (21 November 2012) available at [http://www.brw.com.au/p/professions/ato\\_refunds\\_under\\_scrutiny\\_UZRhXkGpUy67tNNiBx2vcM](http://www.brw.com.au/p/professions/ato_refunds_under_scrutiny_UZRhXkGpUy67tNNiBx2vcM) (last visited 13 July 2015).

<sup>83</sup> Resulting in a report and recommendations by the Inspector-General of Taxation, *Review into the Australian Tax Office's compliance approach to individual taxpayers – income tax refund integrity program*, A report to the Assistant Treasurer, Commonwealth of Australia, September 2013 available at <http://igt.gov.au/files/2014/11/income-tax-refund-integrity-program.pdf> (last visited 13 July 2015). ("IGOT Sept 2013")

is not to “impair the right of a state to enforce such laws as it deems necessary ...to secure the payment of taxes.” Possibly these qualifications could lead to the argument that the delays were necessary to determine the integrity of the refunds and protect the Revenue. In the balancing of these considerations the case law appears to only favour a taxpayer if it can be demonstrated that the authority is exercising a broad discretionary power with inadequate judicial supervision.<sup>84</sup>

Indeed the holding back of the refunds was within the Commissioner’s general power of administration for which no legal review (other than if mala fides was alleged) would be available, as discussed in section 2. The issue under Article 1 might then turn on whether the delays were unreasonable. As the Inspector-General’s report identified, the ATO had issued letters specifying a 12 week minimum period before refunds might be expected. No explanation for the length of this period was provided and, in fact, the statistics identified that for the 2011 tax year half the matters in dispute took over 120 days to resolve.<sup>85</sup>

In *Buffalo Srl v Italy*<sup>86</sup> the ECtHR held that delays in the reimbursement of tax rebates of between 5 to 10 years amounted to a violation of the right to property. Clearly these were excessive periods compounded by the absence of a justification. The claim for reimbursement was itself not contested. The facts of this case are so extreme that the decision does not assist in clarifying a situation where the delay was, say, 3 or 6 months otherwise than to recognise that a legal avenue for resolution might be available. It might be expected that the principle of proportionality would feature in the court’s reasoning on a dispute as to a delayed refund. Then considerations, such as those relied on by the Inspector-General in identifying the need for improved ATO procedures, might be relevant in assessing whether the ATO had acted reasonably and proportionately. A further consideration might be whether some form of compensation was offered, such as interest.<sup>87</sup>

#### **4.4 Excessive taxation of superannuation contributions**

The Australian income tax system provides tax concessions to encourage the accumulation of funds for retirement. An aspect of the regime is the recognition of superannuation or pension funds where income is accumulated in a low tax environment and subject to further tax concessions when paid out. To further encourage investment in these funds contributions (up to a cap) are tax deductible, termed “concessional contributions”.<sup>88</sup>

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<sup>84</sup> Baker 2000 at 228.

<sup>85</sup> IGOT Sept 2013, see chapter 4 especially Table 14.

<sup>86</sup> ECtHR 3 July 2003, application no. 38746/97. Also see ECtHR 9 March 2006, *Eko-Elda Avee v Greece*, application no. 10162/02 where again the delay was over 5 years, and *DC v Italy*, application no. 13120/87 where the delays were 8 years 3 months and six years and 2 months. In ECtHR 23 May 2007, *Intersplav v Ukraine*, application no. 803/02 the application of Article 1 to the unjustified non-payment of VAT refunds was upheld.

<sup>87</sup> In *Ferretti v Italy*, application no. 25083/94 a 10 year delay in repayment of overpaid tax was excused on the basis that interest was paid so satisfying the proportionality mandate.

<sup>88</sup> For a detailed explanation of the taxation regime applying to superannuation contributions see: Inspector-General of Taxation, *Review into the Australian Tax Office’s compliance approach to individual taxpayers – superannuation*

The cap on contribution deductibility is designed to limit the tax advantage that the superannuation arrangements otherwise present to high income earners. This is supported by further limits on contributions for which no deduction is claimed (“non-concessional contributions”).<sup>89</sup> Following amendments in 2007 an effective tax penalty was applied to any contributions that exceeded either the concessional or non-concessional contribution caps. The essence was that taxpayers would be taxed at the highest marginal rate of tax on their excessive contributions (irrespective of the actual marginal tax rate they were facing). One particularly harsh aspect of the regime though was that any excess concessional contributions were counted against the non-concessional contributions cap which could have the effect of causing both caps to be breached with the tax then effectively levied twice on the same contributions. This gave rise to purported instances of excess non-concessional contributions being taxed at extremely high rates of tax, even in excess of 90%.<sup>90</sup>

This high tax rate was compounded by the fact that other aspects of the very complex regime might see taxpayers inadvertently breach the caps. This could occur where errors were simply made such as where there was a misunderstanding of what was the quantum of the cap that applied<sup>91</sup> or where contributions made late in a financial year were not received by the superannuation fund in time and so were reported in the following year. Also as contributions could come from a number of sources, other than the taxpayer concerned, then, particularly where the taxpayer had a number of employers, they could lose track of contributions being paid on their behalf. Given that some industrial awards provided for significant employer contributions and the concessional contribution cap was quite low this issue was not solely the concern of high income earners.<sup>92</sup>

The harsh elements of this regime were brought to the attention of the ATO who demonstrated little sympathy arguing that there was limited or no discretion in them other than to impose the penalty rates.<sup>93</sup> Taxpayers and their advisers were then forced to seek a political solution and over a number of years were able to convince an initially intransigent government to amend the regime. Initial amendments in 2011 enacted a one off refund offer for excess concessional

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*excess contributions tax, A report to the Assistant Treasurer, Commonwealth of Australia, March 2014, chapter 1* available at <http://igt.gov.au/files/2014/11/superannuation-excess-contributions-tax.pdf> (last visited 13 July 2015). (“IGOT March 2014”)

<sup>89</sup> Discussed in “IGOT March 2014”.

<sup>90</sup> For a summary of the history of the problem and amending legislation see John Wasiliev, “The final wrap on excess superannuation contributions”, *The Australian Financial Review* (18 April 2015) available at <http://www.afr.com/personal-finance/the-final-wrap-on-excess-superannuation-contributions-20150417-1mjv2v> (last visited 13 July 2015).

<sup>91</sup> There were transitional caps and some different caps depending on the age of the taxpayer. Furthermore, there was an ability to bring forward two years’ worth of the non-concessional cap which would then not be available for the next two years.

<sup>92</sup> “IGOT March 2014” at chapter 1.

<sup>93</sup> “IGOT March 2014” at chapter 2.

contributions of \$10,000 or less. Continued lobbying led to amendments being introduced in 2012 that provided a further partial solution, effective for contributions from 1 July 2013, allowing for a taxpayer to elect to have excessive concessional contributions (and related earnings) repaid to them out of the fund and taxed at their marginal rate of taxation.<sup>94</sup> Finally, amendments were introduced in 2014 providing a similar regime for non-concessional contributions.<sup>95</sup> Whilst this eradicated the repressive features of the regime for the future it was too late for many taxpayers.

The imposition of excessively high rates of tax is a further scenario that could conceivably offend **Article 1 of the 1<sup>st</sup> Protocol**. Again the qualifications to the Article are called into play raising the question of proportionality between the means applied and intended purpose. The ECtHR in its application of a liberal margin of appreciation to such cases requires a complete lack of a reasonable foundation for the law to hold it offensive leading to the suggestion that the rate of tax, on its own, is unlikely to be seen as a violation.<sup>96</sup> Even where the effective rate of (wealth) tax was alleged to have exceeded the entire income of the taxpayer the Article was not infringed in the absence, at least, of financial distress for the applicants.<sup>97</sup>

However there are a series of decisions that illustrate that a very high tax rate, when viewed with other factors, might infringe the Article. In a series of ECtHR decisions involving a Hungarian severance payment tax<sup>98</sup> the rate of 98% applied to part of a severance payment (resulting in an overall 50 - 60% tax rate compared with the general personal income tax rate of 16%) was held in violation of Article 1. These cases may be heralding a rethink on the application of this Article although the element of retrospectivity and the selective nature of the tax were significant considerations.

In the case of low income taxpayers who are simply being made subject to the highest marginal rate of tax it is unlikely that the jurisprudence of the ECtHR would assist their cause. On the other hand, although the tax only applied to contributions (not all their income), taxpayers exposed to a 90% or higher tax rate might have a better argument under Article 1 especially as

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<sup>94</sup> "IGOT March 2014" at chapter 1.

<sup>95</sup> Contained in *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Act 2014* available at: <https://www.ato.gov.au/General/New-legislation/In-detail/Super/Refund-excess-non-concessional-contributions/> (last visited 13 July 2015).

<sup>96</sup> Persson-Osterman 1999 at 445. See the old case of *X v Germany* (application no. 551/59) involving a 100% levy. Also note ECtHR 14 December 1988, *Wasa Liv v Sweden*, application no. 13013/87. That case concerned a one off tax on life insurance entities at 7% of the value of a taxpayer's assets (in excess of a threshold).

<sup>97</sup> ECtHR 4 January 2008, *Imbert de Tremiolles v France*, application nos. 25834/05 and 27815/05. See Philip Baker, "Some recent decisions of the European Court of Human Rights", 48 *European Taxation* 6 (2008) 315.

<sup>98</sup> ECtHR 14 May 2013, *NKM v Hungary*, application no. 66529/11; 25 June 2013, *Gall v Hungary*, application no. 49570/11 and 2 July 2013, *R Sz v Hungary*, application no. 41838/11. Discussed in Philip Baker, "Some recent decisions of the European Court of Human Rights on tax matters", (2013) 53 *European Taxation* 393 and (2013) 53 *European Taxation* 619.

the high tax rate arose inadvertently and was not a product of considered government policy with the impact on the taxpayer weighed up against the greater good.

#### **4.5 High net worth individuals, risk based audits and threats**

The ATO uses a number of parameters to select taxpayers for investigation. Clearly the likelihood of a significant amount of unpaid tax is the ultimate criterion but a number of risk factors can point to this possibility. The existence of international transactions and offshore accounts and entities are focused upon and trappings of wealth out of proportion to income returned are some of the factors increasing the risk of audit. High net worth individuals are, therefore, often a target, a priority admitted by the ATO.<sup>99</sup> Furthermore, the selection of small businesses for audit is often undertaken by comparing standard business ratios with taxpayer returns for anomalies. Whoever the taxpayer, an audit can be a stressful, time consuming and expensive exercise.

The indiscriminate use of business ratios for selection purposes has been particularly controversial as it has been alleged that taxpayers have been unnecessarily subjected to an audit simply because the ATO did not understand their unique business circumstances which caused their business ratios to differ from the standard.<sup>100</sup> Eventually taxpayer and adviser complaints precipitated reviews by the Inspector-General of Taxation who made numerous recommendations directed at a more refined data matching process and improving the ability of taxpayers to challenge and explain the data.<sup>101</sup>

The basis of selection for an audit, though, is merely part of a bigger controversy surrounding tax audits. Aggressive tactics by the ATO have been alleged exacerbating the financial and emotional strain for taxpayers, many of whom are ultimately exonerated. The essential proposition has been that once selected for an audit there is a presumption of guilt within the ATO influencing its behaviour. Furthermore, attempts to have matters escalated and reviewed by more senior ATO officers have been tainted by a perception of a lack of independence.

The ATO program against high net worth individuals has particularly drawn criticism with many taxpayers subject to large legal bills and put to considerable effort with the ATO having little success to be able to justify its imposition. Instances of departure prohibition orders being

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<sup>99</sup> See the ATO publication *Building Confidence* available at <https://www.ato.gov.au/General/Building-confidence/> (last visited 7 July 2015).

<sup>100</sup> Chris Wallis, "ATO small business benchmarks. Pin the tail on the donkey." *inTax*, Thomson Reuters (October 2011).

<sup>101</sup> Inspector-General of Taxation, "Review into the Australian Tax Office's compliance approach to individual taxpayers – use of data matching. A report to the Assistant Treasury, Commonwealth of Australia, October 2013 available at <http://igt.gov.au/files/2014/11/use-of-data-matching.pdf> (last visited 13 July 2015) and "Review into the ATO's use of benchmarking to target the cash economy. A report to the Assistant Treasurer," Commonwealth of Australia, July 2012 available at <http://igt.gov.au/files/2014/11/benchmarking-to-target-cash-economy.pdf> (last visited 14 July 2015).

unjustifiably executed, including one famously on actor Paul Hogan when he visited the country, have particularly drawn fire.<sup>102</sup> Although there is a compensation mechanism for maladministration its inadequacies and those of any common law remedies have been documented.<sup>103</sup>

Taxpayer and adviser complaints eventually saw the issue of tax disputes elevated to the Inspector-General of Taxation.<sup>104</sup> In his report he called for a separate high level appeals group to be established within the ATO to review and oversee tax dispute management. This proposal has since been endorsed by the House of Representatives Standing Committee on Tax and Revenue which also handed down a report on tax disputes.<sup>105</sup>

There are two related issues here. First, whether a taxpayer is able to resolve the potential for a costly audit at an early stage by demonstrating to the ATO that their audit selection parameters are erroneous. Secondly, where an audit is underway and the taxpayer is the subject of an audit team that is approaching the audit with pre-conceived ideas and, possibly, employing aggressive tactics can the taxpayer have the matter removed to a more neutral auditor.

Possibly the first issue might raise **Article 14**, the anti-discrimination right. This is breached where two comparable situations are treated differently unless it can be shown that there is a reasonable justification. A taxpayer subject to an audit based on a faulty methodology might argue that they are discriminated against. Other comparable taxpayers are not the subject of audit simply because their business ratios approach the norm. So, for example, a coffee shop located in a poorer neighbourhood may report a lower gross profit for a particular stock of coffee beans than the average shop so triggering an audit and a suspicion of unreported transactions. The truth may simply be that the local market cannot bear high margin cappuccinos.

The discrimination in such a case is based on a false perception of reality by the tax administrator, although honestly held. The ATO perceives a difference that, in fact, does not exist. It is difficult to rationalise this as discrimination – rather possibly poor administration. Although there is tax jurisprudence applying Article 14, most commonly to taxes distinguishing

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<sup>102</sup> Cf. Article 2 of Protocol 4 to the ECHR and 23 May 2006, *France*, application no. 46343/99.

<sup>103</sup> Chris Seage, “Taxpayers rights: calls to clean up ATO ‘disgrace’”, *Smart Company* (22 July 2013) available at <http://www.smartcompany.com.au/finance/tax/32765-taxpayer-rights-calls-to-clean-up-ato--disgrace.html#> (last visited 18 September 2014). Also see the complaints by ATO whilst blowers: Peta Carlyon, *ABC Broadcast* (09/04/2012) available at <http://www.abc.net.au/7.30/content/2012/s3473563.htm> (last visited 18 September 2014).

<sup>104</sup> Inspector-General of Taxation, “The management of tax disputes. A report to the Assistant Treasurer” Commonwealth of Australia, January 2015 available at [http://igt.gov.au/files/2015/04/management\\_tax\\_disputes.pdf](http://igt.gov.au/files/2015/04/management_tax_disputes.pdf) (last visited 13 July 2015).

<sup>105</sup> Available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Tax\\_and\\_Revenue/Inquiry\\_into\\_Tax\\_Disputes](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Tax_and_Revenue/Inquiry_into_Tax_Disputes) (last visited 13 July 2015).

between men and women,<sup>106</sup> it is not conceivable that the Article could have an application to taxpayers inappropriately selected for audit. In terms of proportionality it might be argued that an audit selection strategy is a rational and reasonable policy and it may be that in its application there is collateral damage, a proportionate and reasonable risk. This could lead to the matter ultimately being determined on the reasonableness or otherwise of the design of the data collection and selection methodology. However, as identified above, as Article 14 is not free standing and requires an allegation of discrimination in relation to one of the other Convention rights, it is difficult to envisage which such right might apply in the case of an allegation of discriminatory selection for an audit.

As for taxpayers the subject of aggressive and pre-conceived tax audits **Article 6**, the right to a fair trial, is again conceptually applicable. However, as was discussed in section 6.1, the jurisprudence has restricted the application of this Article, in the case of tax matters, to primarily those of a criminal nature. Even where it can be argued that the audit might lead to criminal charges there remains the issue of whether the audit is encompassed within the parameters of proceedings envisaged by the Article. It might be argued that it is occurring at the investigation stage and preliminary to any proceedings to which Article 6 could have an application.

### **Threatening correspondence and interim reports**

One particular aggressive tactic, by no means restricted to the high net worth individuals' program, is worthy of specific mention. The general body of taxpayers can often be the recipients of threatening letters of impending audit activity. In other situations "interim" reports may be issued against specific taxpayers to elicit payment in threat of escalation. Such tactics, if employed in an indiscriminate manner, as has been alleged, can result in unnecessary expenditure on professional advice and emotional strain. Again the available legal remedies are typically inadequate in restraining such behaviour as illustrated by the decision in *Halls v FCT*<sup>107</sup> where it was held that there was no legal basis for a taxpayer to contest an interim audit report notwithstanding the adverse implications for him.

Whilst litigation by taxpayers in receipt of more generalised threatening correspondence than *Halls* faced might be an unlikely proposition, the existence of statutory rights that might be infringed could assist to focus the attention of the ATO on whether such behaviour is acceptable. Notably this activity has continued to occur under the watch of the Inspector-General and the Ombudsman and notwithstanding the ATO's adoption of a Taxpayers' Charter and a model litigant's policy.

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<sup>106</sup> For example, ECtHR 18 July 1994, *Schmidt v Germany*, application no. 13580/88 and ECtHR 21 February 197, *Van Raalte v The Netherlands*, application no. 20060/92.

<sup>107</sup> [2014] FCA 775.

Again the difficulty with the application of the Convention's articles to such behaviour is that the conduct is, arguably, too early in time to come within the fair trial mandate, particularly where the behaviour constitutes threatening letters sent out to a sector of taxpayers.

#### 4.6 The tax accountants' strike

The relationship between the tax profession and the ATO had reached an all-time low in 2002. The profession had been under enormous stress following a lengthy period of tax reform. It had taken the view that inadequate assistance had been provided during a period in which many extra obligations had been imposed on it and, in particular, there was inadequate recognition of the pressures on the profession in the ATO's approach to compliance deadlines and penalties. At the same time the mass marketed schemes fiasco discussed in section 4.2 was still playing out. In this environment tensions between the ATO and the profession resulted in threats by the profession to strike. Ultimately this had the effect of bringing the ATO to the table to negotiate a renewed relationship.<sup>108</sup>

From this low point the ATO embarked on an enhanced strategy of the provision of assistance and engagement with the profession on matters of significance.<sup>109</sup> In addition to various procedural changes and improved services and information dissemination at the operational level<sup>110</sup> the ATO committed to an improved consultative platform. Whilst there is likely to always be strains on the relationship the thirteen years since the strike threat has been characterised by a more open conciliatory relationship. Furthermore, greater oversight is now placed over the affairs of the ATO by virtue of the Inspector-General of Taxation and various Senate Committees.

None of the articles of the Convention would conceivably have assisted the profession in contesting, in a legal venue, the matters that brought the strike threat to a head. Focusing on one of the main complaints, the tight lodgement deadlines being imposed by the ATO, these are at the discretion of the ATO and are not enshrined in legislation. Even if it could be argued that failure to meet a lodgement deadline might result in tax penalties on a client thereby, at least in theory, raising **Article 1 of the 1<sup>st</sup> Protocol** or, possibly **Article 6**, it would be necessary to have an actual taxpayer's circumstances under review rather than assert a case in the abstract. However the length of time needed to get to this stage would render any victory Pyrrhic as the lodgement season would have long passed.

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<sup>108</sup> Discussed in Australian National Audit Office, *The Auditor-General Audit Report No 19 2002-03. Performance Audit: The Australian Taxation Office's management of its relationship with tax practitioners* at 85-86. ("ANAO 19/2002-03")

<sup>109</sup> ANAO 19/2002-03 at 19 - 20 and see the recommendations of the Auditor-General detailed at 30 - 33 all of which were endorsed by the ATO.

<sup>110</sup> Discussed in Greg Farr, "Benefits gained from listening and responding to tax agents", (2006) 40 *Taxation in Australia* 602.



This dispute scenario does illustrate that the articles of the Convention may need to be supplemented by other authorities sometimes better placed to deal with broader concerns impacting on taxpayers and, possibly, citizens generally. Alternatively, the absence of a legal avenue to resolve the impasse that affected tax administration may suggest that providing a court with jurisdiction to make declarations on abstract issues before they escalate to impacting on individual citizens is worthy of consideration.<sup>111</sup>

#### 4.7 The collection of disputed tax

The policy of the tax legislation is weighted heavily in favour of the ATO's tax collection rights at the expense of the protection of taxpayers. Conclusive presumption and provisions exist that enable the ATO to commence and maintain recovery proceedings against taxpayers even where the tax is disputed and notwithstanding that the taxpayer has commenced proceedings to contest the liability.<sup>112</sup> Generally this permits the ATO to issue and rely on a statutory demand in insolvency proceedings where a taxpayer does not pay tax assessed albeit that the taxpayer has commenced proceedings to overturn the assessment. No review of the decision to commence recovery is available under the *ADJRA* as there is no decision under an enactment.<sup>113</sup> It might only be where the taxpayer can establish unconscionable, oppressive or abusive conduct or conduct productive of substantial injustice that the courts may have discretion to set aside a statutory demand or stay insolvency proceedings.<sup>114</sup>

In the context of an extended dispute resolution process a requirement to pay tax now and dispute later may have disastrous financial consequences for a taxpayer even if ultimately successful. In particular, it may impact on the ability of the taxpayer to prosecute the primary proceedings.<sup>115</sup> Notably the Australian position is to be contrasted to comparable jurisdictions and has led to calls for reform to better balance revenue protection with taxpayers' rights.<sup>116</sup>

Utilising legal proceedings to seize property where alternative proceedings are in play conceivably might infringe either, or both, **Article 1 of the 1<sup>st</sup> Protocol** and **Article 6**. As to Article 1, proportionality considerations might impact on the ATO's right to payment of disputed tax given the approach adopted by comparable jurisdictions to give greater weight to the rights of

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<sup>111</sup> This would require Constitutional change or a (very) new interpretation of the term "matter" as it applies in defining judicial power. For a discussion of judicial power see Justice James Allsop, "An Introduction to the Jurisdiction of the Federal Court of Australia", [2007] *Federal Judicial Scholarship* 15 available at <http://www.austlii.edu.au/au/journals/FedJSchol/2007/15.html> (last visited 15 July 2015).

<sup>112</sup> S.177(1) of the *ITAA 1936* (Cth) allows the ATO to rely on the notice of assessment as conclusive proof of a liability in recovery proceedings.

<sup>113</sup> *Golden City Car and Truck Centre Pty Ltd v FCT* 99 ATC 4131 and *Ruddy v DFCT* 98 ATC 4369.

<sup>114</sup> Sylvia Villios, "The legislative interface between the creation of a liability to tax and the right to challenge that liability", (2014) 29 *Australian Tax Forum* 551.

<sup>115</sup> See: Inspector-General of Taxation, *Debt Collection, A report to the Assistant Treasurer*, Commonwealth of Australia, July 2015, paragraphs 4.124 – 4.168 available at <http://igt.gov.au/publications/reports-of-reviews/atos-approach-to-debt-collection/> (last visited 17 July 2015). ("IGOT July 2015")

<sup>116</sup> IGOT July 2015.

individual taxpayers. This could conceivably be a rare case where tax policy might be seen as infringing the Article. Notably, in the *Yukos case*<sup>117</sup> the taxpayer had been successful under Article 1 on the basis that the enforcement of the taxes at issue could have been achieved in ways that might not have led to the demise of the company. The collection of tax raises similar considerations to the delayed repayment of refunds discussed in section 4.3 where the analysis identified that the central issue is the balancing of individual rights against the need to protect the Revenue.

As to the potential application of **Article 6** the issue would be whether proceedings to secure tax in dispute might be seen as impacting on a fair consideration of the merits of the dispute. Once again, though, in relation to the dispute, it would still be necessary to overcome the narrow interpretation of civil rights that excludes most tax matters from the ambit of the Article.

#### **4.8 Other instances of inadequate remedies**

The previous paragraphs of this section have identified major tax controversies of recent times in Australia in relation to which the legal regime was inadequate as a source of resolution. In addition to these there are many ad hoc instances where individual taxpayers may not, or have been held not to, have recourse to argue for a legal remedy.

The limitations of the existing legal avenues for Australian taxpayers were identified in section 2. In essence, taxpayers may be left without a cause of action where a matter neither gives rise to a “taxation decision” (so reviewable under Part IVC of the *TAA* 1953) nor a “decision...under an enactment” (so reviewable under the *ADJRA* 1977). The latter has been interpreted in such a way that a substantial decision determining liability is necessary (not merely an interim or non-determinative step) in relation to a specific power (not merely pursuant to the general power to administer the tax laws).<sup>118</sup> In extreme cases s.39B of the *Judiciary Act* 1903 (Cth) might provide a remedy but this would only be available where a taxpayer could establish lack of good faith or any exercise of ATO powers was for not for the purpose of the tax laws.

Some of the ad hoc instances where taxpayers could be, or have been, left without a potential remedy and the implications should the articles of the ECHR have an application are considered below.

#### **Revision of private rulings**

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<sup>117</sup> ECtHR 20 September 2011, *OAO Neftyanaya Kompaniya Yukos*, application no. 14902/04.

<sup>118</sup> See Michael Blisseden, “The review processes under the Administrative Decisions (Judicial Review) Act 1977 (Cth) - jurisdictional issues in the income tax arena,” [2000] *JlATax* 3; (2000) 3(1) *Journal of Australian Taxation* 22 available at <http://www.austlii.edu.au/au/journals/JATax/2000/3.html#fn48> (last visited 16 July 2015). (“Blisseden 2000”)

A fundamental protection under the self-assessment system is the ability for taxpayers to obtain private rulings that they can rely on in the knowledge that they are enforceable against the ATO. However the ATO retains the authority to revise a ruling, otherwise favourable to a taxpayer, upon it reaching a state of satisfaction that there has been a material change in the taxpayer's circumstances since the original ruling was issued.<sup>119</sup> Notably such a determination does not constitute a "taxation decision" within the meaning of Part IVC so the appeals procedure is unavailable to an aggrieved taxpayer. Furthermore, as the decision is part of the process leading up to the making of an assessment or revised ruling it is expressly excluded from review under the *ADJRA* 1977.<sup>120</sup>

Although a taxpayer might await the issue of a revised ruling or amended assessment to pursue Part IVC proceedings it has been suggested that this unfairly advantages the ATO and, in any event, Part IVC does not address procedural unfairness attending the exercise of the revision power being rather concerned with outcomes. Thus it has been argued that taxpayers are in need on an alternative remedy to preserve a reasonable expectation of fair opportunity to make representations refuting revocation of a favourable ruling prior to its revocation.<sup>121</sup>

**Article 6** would conceivably be infringed in such circumstances but again the restrictive tax jurisprudence limiting the Article to, essentially, tax matters of a criminal nature might deny it an application. Also once again the question would arise as to whether the process leading to an assessment could be considered part of the proceedings envisaged by the Article.

### **Demands for withholding tax alleged to be payable**

In *Century Yuasa Batteries v FCT*<sup>122</sup> the taxpayer sought review of the amount of tax required to be withheld from interest payments to a foreign lender. Although the judge at first instance considered the merits of the matter (in favour of the taxpayer) his Honour did this in obiter having concluded that the taxpayer did not have standing under the *ADJRA*. The Commissioner in advising the taxpayer of its withholding tax obligations was not making a decision under an enactment. There was no express or implied power to make such a determination nor was it a pre-condition to liability.

On appeal the Full Federal Court did not consider the standing issue but upheld the taxpayer's claim on the merits. This is a peculiar outcome. Presumably, although the judgment does not illuminate the issue, the parties took the lead of the judge at first instance to come to some agreement on amending the application so that the merits of the matter might be finally

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<sup>119</sup> See s.359-55 of Schedule 1 to the *Taxation Administration Act* 1953, Taxation Ruling TR 2006/11 and John Azzi, "Practical injustice and the private tax rulings system", 27<sup>th</sup> *Australasian Tax Teachers Association Conference*, Adelaide, Australia, January 2015. ("Azzi 2015")

<sup>120</sup> Schedule 1, paragraph (e).

<sup>121</sup> Azzi 2015.

<sup>122</sup> 97 ATC 4299 and 98 ATC 4380.

determined on appeal. Fortunately, commonsense seems to have prevailed on this occasion although the case again highlights difficulties that can arise for taxpayers seeking to resolve controversies.

Had the ECHR applied then the only Article potentially applicable would be **Article 1 of the 1<sup>st</sup> Protocol**. Conceivably it could be argued that the law was unclear and the decision of the ATO (on whether tax indemnity payments are themselves interest subject to withholding tax) arbitrary. The lack of precision, together with a lack of a procedure to have the matter clarified (assuming no other legal avenue), might render the application of the withholding tax to the payments too unclear to have the required quality of law to justify interference with the property rights of the applicant.<sup>123</sup> This uncertainty as to whether Article 1 has the potential to broadly impact complex and unclear tax laws was canvassed in section 4.1 where it was acknowledged that the argument is not well developed in the case law.

#### **Decision to issue a determination under Part IVA**

In *Meredith v FCT*<sup>124</sup> the applicant sought review of decisions by the ATO to apply the general anti-avoidance rules of Part IVA of the *ITAA 1936* to deny him deductions relating to a franchise arrangement. The taxpayer apparently wished to have his dispute resolved before it resulted in an amended assessment (notwithstanding that he would be free, at that stage, to pursue Part IVC proceedings). The Court, however, held that he had no standing under either the *ADJRA 1977* or the *Judiciary Act 1903* (Cth). Where a determination had been made under Part IVA then this was but a step in the assessment of the taxpayer and specifically excluded from *ADJRA* proceedings. Furthermore, some of the taxpayer's complaints related to statements by ATO officers of an intention to make determinations made in the course of eliciting more information from the taxpayer before the determinations were actually made. These statements of intention did not constitute decisions that were reviewable.

The outcome in this case reflects a tension between the understandable desire of a taxpayer to have a controversy settled as quickly as possible, maybe thereby lessening the emotional and financial strain, and the need for there to be some final and substantial decision that can be litigated. The legislative scheme and case law also appears cognizant of the need to allow the ATO to get on with its job without excessive interference that might be the result if every decision or, statement of opinion, could be litigated. Ultimately it is not clear in this case that the merits of the matter lie with the taxpayer as, in due course, he clearly would have had a cause of action to secure a legal remedy if he was aggrieved. It may be in other circumstances, though, that the forming of an opinion may lead to consequences for a taxpayer where no legal remedy lies.<sup>125</sup>

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<sup>123</sup> Cf. ECtHR 14 October 2010, *Shchokin v Ukraine*, application nos. 23759/03 and 37943/06.

<sup>124</sup> [2001] FCA 1135.

<sup>125</sup> Such as the issue of audit selection dealt with in section 4.5.

**Article 6**, with its restrictive case law qualifications, would once more be the operative article. If the matter related to a potential criminal liability, and it could be concluded that the offending conduct formed part of the relevant proceedings, then it might be actionable. Whilst Meredith was facing substantial penalties, which could give the matter a criminal characterization, the complained of conduct by the ATO officers occurred at an early stage in the investigation and so might be difficult to categorize as part of the proceedings determining liability. It would also be expected that the existence of the Part IVC procedure once an amended assessment was issued, under which the taxpayer would then be able to have the merits of the matter tested, would also factor in to any margin of appreciation and proportionality assessment.

### **Selecting taxpayers for review**

In *Knuckey v FCT*<sup>126</sup> the clients of a tax agent had been selected for review. The tax agent sought review of this decision under the *ADJRA* 1977. It was held that the decision was not a reviewable decision as it was not a decision under an enactment but only pursuant to the Commissioner's general power of administration. It might also have been argued that there was no substantial final decision. The action taken by the Commissioner to identify taxpayers for audit might eventually result in substantive determinations relating to the tax liability of certain taxpayers but, arguably, the decision to select certain taxpayers was not reviewable.<sup>127</sup>

Both at first instance and on appeal<sup>128</sup> the courts went on to consider the validity of the audit selection program under s.39 of the *Judiciary Act* 1903, effectively allowing the agent to have his grievances about being included in the program adjudicated upon, albeit unsuccessfully.

The agent's primary complaint was that his selection in the program had resulted in the loss of clients to other agents with the attendant loss of income. In terms of the ECHR this could conceivably infringe **Article 14** together with **Article 1 of the 1<sup>st</sup> Protocol**. Again margin of appreciation and proportionality would be relevant in applying the Articles. Importantly the courts in *Knuckley* found that the audit selection program was valid and not for an improper purpose. The selection of the agent, at least in the second year, was based on statistical analysis suggesting that his clients may have had a higher degree of non-compliance with the law. All the evidence was that the selection of the agent occurred pursuant to a properly implemented program based on objective criteria directed at improving the administration of the tax system.

### **Prosecution for breach of privacy**

In *Schokker (No 2) v FC of T*<sup>129</sup> Schokker asserted that certain ATO staff had breached the secrecy provisions of the *ITAA* 1936. Schokker was an ATO officer under investigation and alleged that other officers, in the process of auditing his wife and daughter, had inappropriately

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<sup>126</sup> 97 ATC 4911.

<sup>127</sup> *Blissenden* 2000.

<sup>128</sup> 87 FCR 187.

<sup>129</sup> 98 ATC 4263.

passed information onto the investigating officers. Upon his complaint the Commissioner declined to refer the matter on to the Department of Public Prosecutions (“DPP”) for prosecution of the staff members concerned. On an application under the *ADJRA* 1977 Schokker sought judicial review of this lack of referral by the Commissioner.

The Court held that there was both a “decision” by the Commissioner, within the meaning of the *ADJRA* 1977, and that it was substantial in the sense that it was not interim but rather final and determinative of Schokker’s rights. However the decision was not made “under an enactment” in the sense of specifically required or authorised but rather made as part of the Commissioner’s general powers of administration of the department under the *Public Service Act* 1922 (Cth). Therefore, no review was available.

The ATO is subject to the *Privacy Act 1988* (Cth)<sup>130</sup> and has established a privacy policy which provides for a complaints procedure. Breaches of the *Privacy Act* may also be elevated to complaints to the Information Commissioner themselves leading to reviewable decisions.<sup>131</sup> Furthermore, Division 355 of the *Tax Administration Act* 1953 imposes secrecy obligations on taxation officers and specifies the circumstances in which such officers are permitted to make disclosures to other entities. The underlying principle is that disclosure is only permitted where the public benefit overrides the private interest in maintaining privacy.<sup>132</sup> S.355-25 makes it an offence for taxation officers to disclose certain taxpayer information except in limited circumstances although no civil action is provided for.

There are, therefore, considerable protections in relation to taxpayer information in Australian law, some of which might provide an aggrieved taxpayer, such as Schokker’s wife and daughter in this case, with the right to judicial review. It is unclear why Schokker adopted the approach he did or, indeed, whether he pursued any other avenues. Had these all been exhausted then certainly **Article 8** of the ECHR would provide a taxpayer, or person in Schokker’s position, alleging a breach of privacy a cause of action. Whilst there are qualifications to the right, namely where the access to information is in accordance with the law and is necessary in the interests of the economic well-being of the country or to investigate a crime, nevertheless, Schokker may have had under Article 8 an opportunity to have his allegations, rejected by the Commissioner, tested before a court.

A taxpayer or person in Schokker’s position who is able to prove that personal information was acquired by the ATO may need to establish that it was not acquired pursuant to the law. Where this cannot be established and there is a right vested in the ATO to acquire the information then, as discussed in section 4.1, the issue will be whether the law is proportionate as to the competing interests of the individual and the public interest.

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<sup>130</sup> See <http://www.oaic.gov.au/privacy/privacy-news> (last visited 3 September 2014).

<sup>131</sup> <http://www.oaic.gov.au/privacy/privacy-complaints> (last visited 17 July 2015).

<sup>132</sup> S.355-1 of the *TAA* 1953.

### **Failure to issue a timely private ruling**

In *IOOF Holdings Ltd v FCT*<sup>133</sup> the Full Federal Court held that a since repealed rule relating to tax consolidation could not apply to a taxpayer company that had applied for a private ruling before the effective date of repeal but which had not actually received a ruling due to ATO procrastination. The decision that the taxpayer did not have an accrued substantive right to have the law applied as it was before the amending legislation, to even a casual observer, would seem to infringe principles of fairness.<sup>134</sup> As the failure to issue the ruling was even in breach of the ATO's self-imposed 28 day service standard the case well illustrates the inadequate protection provided by soft law ATO administrative "protections".

Although there are clearly issues of fairness, and possibly even discrimination, tinged in this outcome it is difficult to conceive of any of the Articles potentially benefitting the taxpayer. There was no criminal matter involved and, in any event, for the reasons previously advanced, the failure to give a ruling is difficult to include within the notion of **Article 6** proceedings. Finally, in the absence of evidence that the ATO purposively delayed (not found) with the intention of denying this taxpayer the (favourable) ruling that they had a right to expect discrimination could not be alleged.

### **Entitlement to claim PAYG credits**

In *James v FCT*<sup>135</sup> it was held that there was no jurisdiction to review a decision by the Commissioner about whether an employee medical practitioner was entitled to claim PAYG credits<sup>136</sup> where her alleged entitlement differed from that of her service company. Following previous authorities<sup>137</sup> it was held that a decision by the Commissioner with respect to PAYG credits does not constitute an objection decision under Part IVC and was, therefore, unreviewable. The decision was, in substance, "a particular of the statement of account between the taxpayer and the Commissioner" and nothing more.

On the facts this may have been a harsh outcome. However the case law referred to in the judgment illustrates that whether, in fact, PAYG was withheld can be enquired into by the tribunal on the question of penalties. At this stage fairness might be achieved between the parties. It is to be observed that in these prior cases there was real doubt as to whether instalments had been deducted to the full extent as alleged by the taxpayers. The *Cassaniti case* also illustrates that although the tribunal is not empowered to amend the taxpayer's assessment it might make a declaration which could have the effect of resolving the controversy.<sup>138</sup>

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<sup>133</sup> [2014] FCAFC 91.

<sup>134</sup> Mark Mathews, "Oh, for the want of a ruling", (2014) 49(4) *Taxation in Australia* 206.

<sup>135</sup> [2015] AATA 136.

<sup>136</sup> Tax withholdings by her employer from her wages.

<sup>137</sup> *Re Confidential and FCT* [2014] AATA 257 and *David Cassaniti v Commissioner of Taxation* [2010] FCA 641.

<sup>138</sup> [2010] FCA 641.

The a priori unfairness in the inability of a tribunal to consider Mrs James' objection was, therefore, open to amelioration, albeit in a roundabout way. Had these domestic remedies been exhausted though it is not clear that the articles of the ECHR would necessarily have assisted a taxpayer such as Mrs James. Possibly she could have raised the **Article 6** right to a fair trial but with the caveat expressed elsewhere in this paper about the narrow interpretation of civil proceedings and whether this controversy could be said to relate to relevant proceedings at all. An alternative argument, based on the alleged PAYG credits being property of the taxpayer (akin to tax refunds), so raising **Article 1 of the 1<sup>st</sup> Protocol**, might have had a greater chance of permitting Mrs James access to the courts. Then the issue would be as to whether she could substantiate an entitlement to the credits.<sup>139</sup>

## 5.0 Conclusion

Whilst a legislative charter for Australian taxpayers remains conceivable the current political environment in Australia may not be conducive to its introduction. Adverse publicity over tax avoidance by multinational companies and high net worth individuals sours the case in support of the advancement of taxpayer rights generally.

In the absence of a taxpayers' charter founded in legislation it might be that taxpayers could find protection under a general bill of rights. However, it is again conceded that during a period of heightened concern over national security and illegal immigration, and with a conservative government in power, the movement in support of an Australian bill of rights is unlikely to generate much traction.

Nevertheless, there is a sense of inevitability that Australia will follow the lead of the other Western democracies, if not in enshrining taxpayers' rights in law, then in enacting a general bill of rights. In any expression of either it could be expected that the four articles from the ECHR considered here would be represented in some form. Furthermore, in the interpretation of this charter or bill it might be expected that an Australian court might have reference to the tax jurisprudence of the ECtHR.<sup>140</sup>

To test the application of the Convention's articles, if they were adopted in the Australian legal framework, this paper hypothesized how they might have applied to past Australian tax controversies. It was identified that the articles may have assisted in a resolution of disputes as to access to accountants' opinions, the issue over delayed refund payments, collection of disputed

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<sup>139</sup> ECtHR 23 May 2007, *Intersplav v Ukraine*, application no. 803/02.

<sup>140</sup> It is notable that decisions of the ECtHR are already influencing the Australian courts: Michael Kirby, "Australia and the European Court of Human Rights", *The Australian National University Centre for European Studies College of Arts and Social Sciences Conference on Re-appraising the judicial role – European and Australian comparative perspectives*, Canberra, 14 February 2011 available at <http://ces.anu.edu.au/sites/ces.anu.edu.au/files/2010/SPEECH%20-%20ANU%20CONFERENCE%2014%20FEBRUARY%202011.pdf> (last visited 2 September 2014).



tax and complaints arising from the high net worth individuals' tax investigations. These examples required taxpayers to engage in political lobbying to achieve an outcome. It is argued that a defined legal process would be preferable to such an ad hoc and uncertain pathway.

In contrast, the Convention's articles, at least as explained in the tax jurisprudence of the ECtHR, would most likely not have provided a resolution to the excessive taxation of excess superannuation contributions, the ATO's aggressive treatment of taxpayers under the 1990s mass marketed tax scheme program and the circumstances leading to the tax accountants' strike.

The limitations of the Convention in relation to matters like excessive taxation reflect the ECtHR's consciousness of the necessary compromise with sovereign rights. This compromise, though, has been at the heart of complaints about the weak application of the Convention to tax cases.<sup>141</sup> However, of course, if Australia was to adopt a bill of rights, given that it would not be imposed by a supra-national body, this concern to reconcile state sovereignty should not be as significant a factor in the approach of the courts.<sup>142</sup>

The ECtHR case law reveals other restrictive elements which are more difficult to rationalize. In this regard the case law is instructive in providing lessons about the inadequacies in the drafting of the Convention's articles from a tax perspective. In particular, in an Australian bill the limitations in Article 6, identified in the tax jurisprudence might be addressed with a view to ensuring that the right to a fair trial applied to all tax proceedings, including preliminary investigations and audit activity.<sup>143</sup> The inadequacies in the application of the Convention to non-criminal tax cases, have been illustrated in this paper, and well documented by others, with even the suggestion of the need for the creation of a protocol specifically addressing tax matters.<sup>144</sup>

The possibility of allowing courts applying a bill of rights to make advisory declarations on the application of interested parties might also be considered. However, it should be acknowledged that the Inspector-General of Taxation has, since the mid-2000s, played a key role in investigating and reporting on systemic issues within the tax system reducing the impetus for such a measure in the tax area. Arguably, had the Inspector-General function been instituted during the period of the mass marketed schemes or the accountants' strike those controversies

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<sup>141</sup> For example, Philip Baker, "Some recent tax decisions of the European Court of Human Rights", (2011) *European Taxation* 545 at 547.

<sup>142</sup> It could be expected to be a vexed consideration in the drafting of the bill though.

<sup>143</sup> Although maybe with a caveat of no right to silence in relation to non-criminal tax matters: Baker 2000 at 248. Contrast Hilliard who would retain the privilege subject to proportionality considerations: Jonathan Hilliard, "Article 6 and the scope of the right not to incriminate oneself in the tax field", [2002] *BTR* 470 at 472 – 473. ("Hilliard 2002")

<sup>144</sup> As taxation was not at the forefront of the minds of the drafters of the Convention: Baker 2000 at 268. Particular issues are as to whether coercion should be permitted and the privilege against incrimination be available in all tax matters not just ones of a criminal nature: Hilliard 2002.

would likely have been resolved earlier and more effectively without the need for political engagement.<sup>145</sup>

This paper, thus, supports the idea that a general bill of rights could, if properly drafted with a citizen's engagement with the tax regime in mind, provide much needed legal protections for taxpayers. Not all possible controversies might necessarily be catered for and the need for other strong institutional over-sight would remain. However taking the articles of the ECHR as a blueprint, with amendment to address the limitations identified by the case law, taxpayers may be well served by a general bill of rights.

A final caveat must be stated. History demonstrates that sometimes the best intentioned reforms, directed at protecting weaker parties, can be hijacked by more powerful concerns. Caution must be exercised in the event that a bill of rights can become a tool by which such concerns might attempt to thwart or, at least, delay the government in its proper exercise of legislative power. Much might depend on the philosophical perspective adopted but the author has in mind examples such as the reliance of US corporations on their legal "personality" to bring themselves under the protection of the 14th amendment initially inserted in response to slavery,<sup>146</sup> the reliance on the Australian Constitutional protection of property rights by big tobacco in an attempt to prevent plain label packaging<sup>147</sup> and reliance on investor state dispute settlement clauses in treaties to obfuscate governments attempting environmentally responsible legislation.<sup>148</sup> How and whether rights legislation can be quarantined to deserving parties in society, and not merely become another tool for multi-national corporations and other powerful groups to usurp sovereign authority, is a topic outside the scope of this paper but one that needs to be explored.

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<sup>145</sup> Recent controversy over ATO lodgement requirements for agents (especially the 85% rule) was resolved through the ATO consultative arrangements and with Inspector-General oversight: Inspector-General of Taxation, *The Australian Tax Office's level of support and service for tax practitioners*, Commonwealth of Australia, July 2015 available at <http://igt.gov.au/files/2015/07/Review-2015-ATO-Services-Support-Tax-Practitioners-Final-Report.pdf> (last visited 24 July 2015).

<sup>146</sup> Thom Hartman, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. St. Martin's Press, New York, 2002.

<sup>147</sup> The tobacco companies lost their High Court appeal: *British American Tobacco Australasia Limited and Ors v The Commonwealth of Australia*, Case S389/2411 available at <http://www.hcourt.gov.au/cases/case-s389/2011> (last visited 7 July 2015).

<sup>148</sup> Clair Provost and Matt Kennard, "The obscure legal system that lets corporations sue countries", *The Guardian* (10 June 2015) <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> (last visited 7 July 2015). The tobacco companies are also using this procedure to continue their assault on plain packaging running parallel to proceedings before the World Trade Organisation Dispute Settlement Body: see <http://www.ag.gov.au/tobaccoplainpackaging> (last visited 7 July 2015).