

From Moral Duty to Legal Rule – A Blueprint for Reform of Taxpayer Rights to Fair Treatment in the UK and Australia

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Abstract

Tax authorities both in the UK and Australia aspire to treat taxpayers fairly. This article assesses the extent to which these aspirations have been recognised in formal legal rules in both countries. It shows that neither jurisdiction has imposed on the Revenue any broad express legal obligation to treat taxpayers fairly. The legislatures in both jurisdictions have largely left the matter to the judiciary. As a consequence, neither country is far advanced along the path to translating the moral duty of tax officials to treat taxpayers fairly into a clear and certain legal right. This chapter proposes a number of reforms which, taken together, set out a blueprint for addressing this situation. The proposed reforms comprise legislative clarification of taxpayer rights to fair treatment, taxpayer rights to compensation for serious failures to treat taxpayers fairly and formal monitoring and sanctions to ensure compliance with Revenue commitments to treat taxpayers fairly.

INTRODUCTION

Tax authorities in the UK and Australia share a common aspiration to treat taxpayers fairly. The Australian Commissioner of Taxation refers to fairness in his preamble to the Australian *Taxpayers' Charter*, pointing to an aspiration to be “professional, responsive and fair”.² The Australian *Charter* itself contains a commitment by the Australian Taxation Office (ATO) to treat taxpayers “fairly and reasonably”.³ In the UK, Her Majesty’s Revenue and Customs (HMRC) have also recently adopted a new Charter which incorporates an aspiration to provide “even-handed” treatment, tantamount to a commitment to treat taxpayers fairly.⁴ In that document HMRC further expressly refer to their desire to provide “a service that is even-handed, accurate and based on mutual trust and respect.”⁵

These revenue authority aspirations to treat taxpayers fairly are, in part, motivated by self-interest. Judges have recognised that fair treatment of taxpayers is in the “interests not only of all individual taxpayers...but also in the interests of the

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² Australian Taxation Office, “Taxpayers’ Charter: What You Need to Know” available at http://www.ato.gov.au/content/downloads/cor63133_n2548.pdf [Accessed 20 April 2012], foreword.

³ Australian Taxation Office, “Taxpayers’ Charter: What You Need to Know”, above fn. **Error! Bookmark not defined.**, 2. This includes the following specific commitments under that heading: “We will:

- treat you with courtesy, consideration and respect
- behave with integrity and honesty
- act impartially
- respect and be sensitive to the diversity of the Australian community
- make fair and equitable decisions in accordance with the law
- resolve your concerns, problems or complaints fairly and as quickly as possible.”

⁴ Many of the commitments captured under the heading of the right to be treated fairly set out above at fn. 3 are also contained in the HMRC Charter, albeit under different headings.

⁵ Her Majesty’s Revenue and Customs, “Your Charter” available at <http://www.hmrc.gov.uk/charter/charter.pdf> [Accessed 12 April 2012].

Revenue.”⁶ The OECD Centre for Tax Policy and Administration explains why, noting that “[t]axpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.”⁷ Research into compliance behaviour is rapidly extending to examination and confirmation of various aspects of the link between fair treatment and tax compliance.⁸

Given this accepted link between tax compliance and fair treatment, it is pertinent to assess the extent to which aspirations to treat taxpayers fairly have been legally recognised in Australia and the UK as legally enforceable rules.⁹ This chapter makes this assessment and draws on it to propose a blueprint for effectively dealing with the common challenges and obstacles in the way of translating a moral commitment to treat taxpayers fairly into enforceable legal requirements.

Part I discusses the recognition of the right to fair treatment in the UK. It focuses predominantly on the cases which have developed the UK doctrine of legitimate expectations. That doctrine has its roots in a requirement that taxpayers are treated fairly. The discussion extends to consideration of the potential extension of taxpayer rights to fair treatment facilitated by the application within the UK of law emanating from the Human Rights Act 1998 and European Union law.

Part II discusses the Australian position. The emphasis is on demonstrating how Australian courts, while recognising the desirability of treating taxpayers fairly, have avoided setting precedents imposing on the Commissioner a legal duty to treat taxpayers fairly. This judicial trend extends to the rejection of the UK doctrine of legitimate expectations in Australia, and an overriding concern to ensure duties to individual taxpayers do not impinge on Revenue duties to the Crown.

Part III sets out guidelines for both countries in translating the right to fair treatment from a mere moral duty into an enforceable legal right. Specifically, it makes three recommendations which, taken together, could be used as a blueprint for effectively dealing with the common challenges inherent in striking the appropriate balance between taxpayer rights to fair treatment and tax official public law duties. These recommendations are: (1) legislative clarification of taxpayer rights to fair treatment; (2) rights to compensation for serious failures to

⁶ *Vestey v Inland Revenue Commissioners* [1977] STC 414, 439 per Walton J.

⁷ OECD, Centre for Tax Policy and Administration, *Principles of Good Tax Administration* (2001), OECD, Practice Note GAP0013, 154. The UK Treasury also recently acknowledged that “the service standards provided by HMRC cannot be treated as a separate issue from the collection of tax revenues and the level of tax compliance.” House of Commons. Treasury Committee, *Administration and Effectiveness of HM Revenue and Customs - Sixteenth Report of Session 2010-12* (2011), (Session 2010-11), Vol. 1, 47.

⁸ See, for example, Robert Mason and Lyle Calvin, “Public Confidence and Admitted Tax Evasion” (1984) 37 *National Tax Journal* 489; Michael Roberts and Peggy Hite, “Progressive Taxation, Fairness and Compliance” (1994) 16 *Law and Policy* 27; Steven Sheffrin and Robert Triest, “Can Brute Deterrence Backfire? Perceptions and Attitudes in Tax Compliance” in Joel Slemrod (ed), *Who Pays Taxes and Why? Tax Compliance and Enforcement* (1992) 193; Josef Falkinger, “Tax Evasion, Consumption of Public Goods and Fairness” (1995) 16 *Journal of Economic Psychology* 63; and Frank Cowell, “Tax Evasion and Inequity” (1992) 13 *Journal of Economic Psychology* 521. Typically, such studies focus on the positive compliance effects of fostering a relationship of trust and confidence between taxpayer and tax authority. For a good Australian example of such a study see Jenny Job and Monika Reinhart, “Trusting the Tax Office: Does Putnam’s Thesis relate to Tax?” (2003) 38 *Australian Journal of Social Issues* 307. See also Kristina Murphy, “The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders” (2004) 28 *Law and Human Behaviour* 187. There has also been significant international focus on the relationship between treatment of taxpayers and compliance behaviour. See, for example, John Scholz, “Trust, Taxes and Compliance” in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (1998), 135.

⁹ This mirrors the question posed by UK judge Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd (Fleet Street Casuals)* [1981] UKHL 2, 18; [1981] STC 260, 280: “Is it [fairness] a mere moral duty, a matter for policy but not a rule of law?”

treat taxpayers fairly; and (3) formal and independent avenues for enforcement and oversight of Revenue commitments to treat taxpayers fairly.

Part I – Fairness in the UK

There is no express statutory recognition of taxpayer rights to fair treatment in the UK. There has, however, been judicial recognition of limited legally enforceable taxpayer rights to fair treatment, particularly in cases where HMRC has sought to resile from conduct or representations reasonably relied upon by taxpayers. The focus in this Part is on explaining these judicial developments. The examination also extends to consideration of further enhancements of taxpayer rights to fair treatment due to the increasing influence of European Union law in the UK.

Judicial recognition of UK taxpayer rights to fair treatment

The right to fair treatment has been discussed in the UK in a number of relatively recent cases which have recognised and developed a doctrine of legitimate expectations in judicial review proceedings against the Revenue. This doctrine, which recognises a right to substantive as well as procedural justice, has been judicially described as “rooted in fairness”.¹⁰ In this context, in 1982, Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd*¹¹ (*Fleet Street Casuals*) stated that “modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly.”¹²

His Lordship pointed out that this duty is more than simply a matter of “desirable policy or moral obligation”¹³ and that the duty extends to ensuring HMRC officials:

“...use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.”¹⁴

Subsequently, in *R. v Inland Revenue Commissioners Ex p. Preston*¹⁵ (*Preston*) Lord Scarman, while falling short of suggesting that fairness, on its own, could constitute a basis for judicial review, confirmed that fairness is a key consideration in determining whether a statutory power has been abused or

¹⁰ Bingham LJ in *R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agencies Ltd (MFK Underwriting)* [1990] 1 WLR 1545, 1569-1570; [1989] STC 873, 892-893.

¹¹ *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 280. This case involved a special arrangement under which the Revenue agreed not to collect back taxes owed by certain casual workers. The Federation respondent alleged this arrangement unfairly discriminated against the Federation’s members who were typically vigorously pursued by the Commissioner for non-payment of taxes. The case has become popularly known as the “Fleet Street Casuals” case.

¹² *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 280. His Lordship cites a number of authorities in support of this proposition including *Latilla v Inland Revenue Commissioners* (1943) 25 TC 107 (CA); *Vestey v Inland Revenue Commissioners (No. 2)* [1978] STC 567 (HC); and *Congreve v Inland Revenue Commissioners* (1948) 30 TC 163 (HL).

¹³ *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 280.

¹⁴ *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 280.

¹⁵ *R. v Inland Revenue Commissioners Ex p. Preston* [1984] UKHL 5; [1985] STC 282.

exceeded by the Revenue.¹⁶ In *Preston* Lord Templeman also further elaborated on the link between unfairness and abuse of power:

“...[A] taxpayer cannot complain of unfairness merely because the commissioners decide to perform their statutory duties... The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that ‘the unfairness’ of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners.”¹⁷

Lord Templeman also made it clear that unfairness could form the basis for successful judicial review proceedings against HMRC by a taxpayer where HMRC conduct is equivalent to a breach of contract or breach of representation capable of sustaining a common law estoppel action. Such circumstances could also be considered so unfair as to constitute an abuse of power.¹⁸

However, UK courts have also been quick to point out the practical factual limitations of the doctrine. For instance, taxpayers cannot complain of unfairness if they have not themselves acted in a transparent and open manner. Nor can they complain of unfairness if they rely on qualified or indefinite representations made and ultimately resiled from by HMRC. Bingham LJ in *R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agencies Ltd*¹⁹ pointed out that:

“...fairness is not a one-way street. It imports the notion of equitable dealing, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue’s discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure... Nor, I think...would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation.”²⁰

As a consequence of factual limitations such as these, no taxpayer succeeded in any substantive legitimate expectations claim against HMRC until *R. v Inland Revenue Commissioners Ex p. Unilever plc*²¹ (*Unilever*). In *Unilever* the taxpayer had lodged claims taking advantage of loss relief provisions contained in the *Income Incorporation Taxes Act 1988* outside of the statutory time limit - as it had done for over 20 years. HMRC’s past practice had been to allow the claims, despite being out of time. However, HMRC now sought to resile from that practice and enforce the statutory time limit. In finding for the taxpayer, the Court of Appeal concluded that to reject the taxpayer’s claim in this instance was so unfair as to amount to an abuse of power.²²

The finding in *Unilever* was also significant in that it established that in appropriate cases, fairness demands that the Revenue be bound by previous

¹⁶ *Preston*, above fn. 15, [1985] STC 282, 298.

¹⁷ *Preston*, above fn. 15, [1985] STC 282, 293.

¹⁸ *Preston*, above fn. 15, [1985] STC 282, 294.

¹⁹ *MFK Underwriting*, above fn. 10, [1989] STC 873.

²⁰ *MFK Underwriting*, above fn. 10, [1989] STC 873, 892-892.

²¹ *R. v Inland Revenue Commissioner Ex p. Unilever plc* [1996] STC 681 (CA).

²² Simon-Browne LJ, in *Unilever*, above fn. 21, [1996] STC 681 at 695, elaborated on the link between unfairness and abuse of power, observing that “it is illogical or immoral or both for the public authority to act with conspicuous unfairness and in that sense abuse its power.”

practices or conduct falling short of express and unqualified statements made to, and relied upon by, particular taxpayers - even where the relevant practice is evidenced only by passive acquiescence. The Court of Appeal in *Unilever* also pointed out that the potential categories of unfair treatment capable of sustaining a taxpayer claim against the Revenue remain open, with precedent acting “as a guide not a cage”²³ requiring each case to be judged on its own facts.

In recent years, numerous attempts have been made to expand the categories of recovery, including attempts to hold HMRC to erroneous oral advice. While none of these cases have succeeded, the possibility of success remains open. However, in *Bourne v HMRC*²⁴ it was noted that “it will usually be difficult or impossible to prove such a claim unless the guidance given by HMRC is recorded in writing.”²⁵

In addition to these practical challenges, numerous commentators have called for a clearer account of the general standards and role of fairness in judicial review proceedings. The observations of Bamforth are typical:

“No real attempt has been made...to clarify what – as a general matter – counts as ‘fair’ or ‘unfair’, or the role which fairness plays in the overall scheme of judicial review.”²⁶

Despite the practical challenges and continuing uncertainty as to the precise role of fairness in judicial review proceedings, it is clear that the right to fair treatment remains an important consideration in weighing up public and private interests to determine whether a taxpayer can succeed in judicial review proceedings against HMRC.²⁷

European influences on UK taxpayer rights to fair treatment

As already noted, there is no direct statutory recognition of a taxpayer right to fair treatment in the UK. However, arguably, statutory recognition of human rights via enactment of the *Human Rights Act 1998* (HRA) “has caused fundamental changes to the Constitutional structure of England and the relationship between the courts and government”²⁸ which have facilitated judicial dynamism allowing the development of the doctrine of legitimate expectations described above.

The HRA brings into law the provisions of the European Convention for Protection of Human Rights and Fundamental Freedoms (Convention).²⁹ Section

²³ *Unilever*, above fn. 21, [1996] STC 681, 690.

²⁴ *Bourne v HMRC (Bourne)* [2010] UKFTT 294 (TC).

²⁵ *Bourne*, above fn. 24, [2010] UKFTT 294 (TC) at [27]. For similar reasoning see also *Watson v HM Customs and Excise* (2004) (VAT 18675) and *Corkteck Ltd v HMRC* [2009] EWHC 785 (Admin).

²⁶ Nicholas Bamforth, “Fairness and Legitimate Expectation in Judicial Review” (1997) 56 *Cambridge Law Journal* 1, 1. See also Richard Clayton, “Legitimate Expectations, Policy and the Principle of Consistency” (2003) 62 *Cambridge Law Journal* 93; and Cameron Stewart, “Substantive Unfairness: A New Species of Abuse of Power?” (2000) 28 *Federal Law Review* 617.

²⁷ This weighing up process was explained by Lord Woolfe MR in *R. v North and East Devon Health Authority Ex p. Coughlan* [1999] EWC Civ 1871, at [57]: “Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that ... the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”

²⁸ Matthew Groves, “Substantive Legitimate Expectations in Australian Administrative Law” [2008] 32 *Melbourne University Law Review* 470, 492.

²⁹ The HRA came into force on 2 October 2000.

6(1) of the HRA provides that “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.”³⁰

There have been numerous attempts to apply the provisions of the HRA in cases of alleged unfair treatment of taxpayers. For instance, arguments concerning the potential infringement of the right to a fair hearing in Article 6 of the Convention³¹ have been raised in a number of cases where HMRC have sought to use coercive powers against taxpayers accused of tax evasion.³² In one of these cases - *R. v Allen*³³ - the Court acknowledged that HMRC’s coercive powers to compel the disclosure of information must be exercised in a manner which does not violate the right against self-incrimination.³⁴

Allegations of unfair treatment have also been central to numerous cases in which allegations of breaches of the Convention Article 14 right to non-discrimination on grounds of sex have been levelled against HMRC.³⁵ For example, in *R. v Commissioners of Inland Revenue Ex p. Wilkinson*³⁶ the taxpayer alleged discrimination through being denied a tax deduction known as a “widow’s bereavement allowance” simply because he was a widower rather than a widow.³⁷ The taxpayer’s claim was ultimately unsuccessful.³⁸ However, subsequent successful challenges by widowers on grounds of discrimination have been made direct to the European Court of Human Rights.³⁹ These taxpayer successes demonstrate that unfairness amounting to discrimination by the Revenue is now clearly actionable in the UK by virtue of the influence of the HRA and related jurisprudence of the European Court of Human Rights.

The influence of EU law in the UK is also likely to further specifically aid taxpayers in cases alleging unfairness constituting a breach of the doctrine of legitimate expectations. The protection of legitimate expectations is recognised in

³⁰ Section 6(2) qualifies this general principle: “Subsection (1) does not apply to an act if— (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.”

³¹ Article 6(1) provides (among other things) that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

³² See, for example *R. v Allen (Allen)* [2001] UKHL 45; [2001] STC 1537 and *R. v Dimsey* [2001] UKHL 46; [2001] STC 1520. For discussion of these cases see Graham Virgo, “Cheating the Public Revenue” (2000) 59 *Cambridge Law Journal* 42 and Graham Virgo, “Cheating the Public Revenue: Fictions and Human rights” (2002) 61 *Cambridge Law Journal* 47.

³³ *Allen*, above fn. 32, [2001] STC 1537.

³⁴ The taxpayer did not succeed on factual grounds in this case. The taxpayer had been compelled to supply certain ultimately self-incriminatory information pursuant to the Commissioners’ exercise of power pursuant to section 20(1) of the *Taxes Management Act 1970* (UK).

³⁵ Article 14 provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

³⁶ *R. v Commissioners of Inland Revenue Ex p. Wilkinson* [2005] UKHL 30; [2006] STC 270.

³⁷ The widows’ allowance was set out in section 262 of the *Income and Corporation Taxes Act 1988* (UK). In challenges taken to the European Court of Human Rights prior to enactment of the *HRA* the Commissioner had settled similar claims. These included two separate similar claims by widowers Crossland and Fielding in 1997.

³⁸ The court held that the case fell within the exception to the general requirement to comply with the Convention (contained in section 6(2)(b) of the *HRA*) because HMRC were acting so as to give effect to a statutory provision which could not reasonably be read or given effect so as to make it compatible with the Convention rights. Section 6(2) is set out in full above at fn. 30.

³⁹ In 2006, in *Hobbs, Richard, Walsh and Geen v United Kingdom* [2006] ECHR 63684/00, four widowers took their cases to the European Court of Human Rights. The court found that the denial of the widows’ allowance to widowers was discriminatory and violated the Convention.

EU law.⁴⁰ In *Mavridis v Parliament*⁴¹ the European Court of Justice has observed that “...the right to rely on the principle of the protection of legitimate expectation ...extends to any individual who is in a situation in which it appears that the administration’s conduct has led him to entertain reasonable expectations.”⁴²

However, the approach under EU law is more expansive than the UK doctrine. For example, a plaintiff may recover even in some cases where upholding a legitimate expectation would result in a breach of a statutory duty imposed on the relevant offending authority.⁴³ Such an approach is yet to be applied in the UK. It is conceivable that this approach could influence and embolden UK judges to eventually expand the circumstances in which taxpayer rights to fair treatment are recognised as legally enforceable.

Part II – Fairness in Australia

There are a number of informal acknowledgements of a right to fair treatment of Australian taxpayers but, similar to the UK, none of these have legislative backing, the breach of which is enforceable against the Australian Commissioner of Taxation.⁴⁴ Given this absence of any legislative recognition of a right to fair treatment of Australian taxpayers, the focus of this Part is on judicial attitudes to the recognition and legal enforceability of such a right.

In Australia, the concept of a duty to treat taxpayers fairly was first judicially flagged by Isaacs J in his 1926 judgment in *Moreau v FCT*⁴⁵ (*Moreau*). His Honour stated in that case that the Commissioner’s function “is to administer the Act with solicitude for the Public Treasury and with fairness to the taxpayers”⁴⁶ (emphasis added). While these views have been positively received in a number of subsequent Australian tax cases, there has been no express confirmation of their correctness. Generally, the effect of subsequent cases has been to qualify the general right to fair treatment recognised by Isaacs J.

⁴⁰ The principles of legitimate expectation were applied by the European Court of Justice in the tax context in a case involving Dutch VAT: *Gemeente Leusden v Staatssecretaris van Financien* (C-487/01 and C-7/02) [2004] ECR I-5337; [2007] STC 776.

⁴¹ *Mavridis v Parliament* (*Mavridis*) (C-289/81) [1983] ECR 1733.

⁴² *Mavridis*, above fn. 41, [1983] ECR 1733 at [21].

⁴³ The European doctrine is derived from the German concept of *Vertrauensschutz*. In the development of that concept in German law it has been recognised that requiring an administrator to act illegally is not necessarily a bar to legal protection of a citizen’s substantive legitimate expectations that the administrator will so act. Legality needs to be weighed against the expectation of certainty in determining whether a legitimate expectation should be remedied in these circumstances. Forsyth describes this weighing up process as follows: “There had to be a weighing of the principles to determine whether the public interest in the legality of the administration outweighed the need to protect the trust placed by the citizen in the validity of the administrative act. Only in that event was an unlawful administrative act revocable.” Christopher Forsyth, “The Provenance and Protection of Legitimate Expectations in Administrative Law” (1988) 47 *Cambridge Law Journal* 238, 244.

⁴⁴ As noted in the Introduction of this article, Australia has a *Taxpayers’ Charter* which recognises a taxpayer right to fair treatment. However, the Charter remains a document without any legislative force and which does not purport to create any new legal rights. This is contrary to the recommendations of the Australian Joint Committee of Parliamentary Accounts, *Report 326 - An Assessment of Tax* (1993); and OECD, Committee of Fiscal Affairs Working Party, “Taxpayers Rights and Obligations - A Survey of the Legal Situation in OECD Countries” (Paper Number 8, OECD, 1990). The legal enforceability of the Charter was keenly debated prior to its adoption in 1997, with many commentators critical of the non-binding nature of the Charter and most commentators at the time calling for legislative entrenchment of the Charter rights. See, for example, Karen Wheelright, “Taxpayers’ Rights in Australia” in Duncan Bentley (ed), *Taxpayers’ Rights: An International Perspective* (Gold Coast: Revenue Law Journal, 1998), 57; and Duncan Bentley, “A Taxpayers Charter: Opportunity or Token Gesture” (1995) 12 *Australian Tax Forum* 1.

⁴⁵ *Moreau v FCT* (1926) 39 CLR 65.

⁴⁶ *Moreau*, above fn. 45, (1926) 39 CLR 65, 67.

For example, in *David Jones Finance & Investments Pty Ltd v FCT*⁴⁷ (*David Jones*), the Commissioner resiled from his usual practice of allowing inter-corporate dividend rebates, contrary to a decision of the Australian High Court in *FCT v Patcorp Investments Ltd*.⁴⁸ The taxpayer unsuccessfully argued that this was unfair and constituted an abuse of process by the Commissioner. O’Loughlin J, in the first instance hearing of the case, distinguished the remarks of Isaacs J in *Moreau*, by confining them to the specific statutory provision in question in *Moreau*.⁴⁹

His Honour was, however, prepared to concede that the mandate given to the Commissioner under s8 of the *Income Tax Assessment Act 1936* (Cth)⁵⁰ (ITAA36) “requires him to exercise his statutory powers with ‘procedural fairness’”⁵¹.

Similarly, in *Bellinz v Federal Commissioner of Taxation*⁵² (*Bellinz*) Hill, Sundberg and Goldberg JJ recognised a taxpayer right to fair treatment in principle, but similarly imposed clear boundaries on this right, observing that:

[t]here is little difficulty in accepting that, where a decision-maker, including the Commissioner of Taxation, has a discretion, a principle of fairness will require that that discretion be exercised in a way that does not discriminate against taxpayers... But ... it is difficult to see how the Commissioner can properly be said to have acted unfairly, even if there is an element of discrimination, where he has acted in accordance with the law itself.⁵³

However, the key limitation on the development of any recognition of rights to fair treatment in Australian Courts either in judicial review proceedings or in common law proceedings has been the judicial interpretation of the various express or implicit statutory protections of the Australian Commissioner of Taxation.

In judicial review proceedings the key limitations are the privative clauses contained in sections 175 and 177 of the ITAA36. These were acknowledged in *David Jones* as the main obstacles barring the possibility of the taxpayer succeeding in its claim against the Commissioner. According to section 175, an assessment is not invalid merely because the Commissioner has not complied with any provision of the ITAA36. Further, section 177(1) provides that where the Commissioner produces a notice of assessment, that assessment will be conclusive evidence of the due making of the assessment and that the amount and details of that assessment are correct.⁵⁴ These provisions have been interpreted as prohibiting judicial review except in cases where the complaint is either not

⁴⁷ *David Jones Finance & Investments Pty Ltd v FCT* (1991) 21 ATR 1506.

⁴⁸ *FCT v Patcorp Investments Ltd* (1976) 6 ATR 420.

⁴⁹ His Honour observed (*David Jones*, above fn. 47, (1990) 21 ATR 718, 722) that in “In assessing the significance of these remarks and the introduction of the concept of ‘fairness’ it is, in my opinion, relevant to note that Isaacs J, was discussing a provision of the legislation which was dealing with the Commissioner having ‘reason to believe’ that the taxpayer had defrauded or attempted to evade the revenue law. Hence the obligation to act fairly related to the activities of the Commissioner and his officers in determining whether there was ‘reason to believe.’”

⁵⁰ This section provides that “[t]he Commissioner shall have the general administration of this Act.”

⁵¹ *David Jones*, above fn. 47, (1990) 21 ATR 718, 723.

⁵² *Bellinz v Federal Commissioner of Taxation* (1998) 155 ALR 220.

⁵³ *Bellinz*, above fn. 52, (1998) 155 ALR 220, 233-234. There is a striking contrast between this reasoning and the European approach to application of the doctrine of legitimate expectations which expressly recognises the potential for recognising taxpayer rights even where that would result in the administrative official being required to act outside the law, as discussed in Part I.

⁵⁴ The section does preserve the rights of taxpayers to seek a review or appeal against the assessment using the procedures contained in Part IVC of the *Taxation Administration Act 1953* (Cth) (ADJR). These procedures too, however, make no allowance for unfairness as a sufficient ground for appeal.

directly related to a tax assessment or there is evidence of bad faith, illegality or improper purpose.⁵⁵ Mere unfairness is not enough.

Express statutory restrictions on reviewability of tax assessment decisions in the *Administrative Decisions (Judicial Review) Act 1977* (Cth)⁵⁶ and the restrictive interpretation by courts of the availability of judicial review pursuant to section 39B of the *Judiciary Act 1903* (Cth)⁵⁷ have further hindered the possibility of development of any principle of any enforceable taxpayer entitlement to fair treatment – either procedural or substantive.

Consequently, the only instances in which taxpayers have succeeded in administrative law proceedings against the Commissioner on grounds of unfairness have been cases in which the facts of the case allowed a finding for the taxpayer without breaching these statutory limitations. For instance, in *Darrell Lea Chocolate Shops Pty Ltd v Commissioner of Taxation*⁵⁸ (*Darrell Lea*), Spender Burchett and Hill JJ had no difficulty confirming that “the extensive powers conferred upon the Commissioner in connection with the assessment and collection of sales tax, or for that matter any other tax, must be so exercised as to deal fairly with each taxpayer.”⁵⁹ The Court freed itself of the constraints of the privative clause in the sales tax legislation in question (which protected from review decisions concerning ascertainment or calculation of tax) by holding that there was no genuine assessment in this case as the Commissioner had made his “assessment” on facts known by him to be untrue. Hence, the taxpayer was able to succeed in its claim of unfair treatment by the Commissioner.⁶⁰ However, as most taxpayer complaints concern bona fide tax assessment activities such successes are likely to remain exceedingly rare.

⁵⁵ Walpole more fully expands on the circumstances in which judicial review might be available to a taxpayer generally: “The major ground on which an action for review might be based would be: that the Commissioner did not have jurisdiction to make the decision; that the decision was not authorized by the Act; that the making of the decision was an improper exercise of the power conferred by the Act, because the Commissioner failed to take a relevant consideration into account or exercised the power in a way that constitutes an abuse of power; or that the decision was otherwise contrary to the law.” See Michael Walpole, “Taxpayer Rights and Remedies - Australia, New Zealand and China” in *Second World Tax Conference* (Dublin: Institute of Taxation, 2001).

⁵⁶ Paragraph (e) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) excludes from review decisions forming part of the process of making of, leading up to the making of, or refusing to amend, an assessment of tax. The exclusions in paragraph (e) of Schedule 1 have been interpreted as clearly prohibiting review of decisions dealing with the calculation of tax, irrespective of whether the decisions are unfair. See the comments of Beaumont J in *Constable Holdings Pty Ltd v Federal Commissioner of Taxation* (1987) 72 ALR 265 at 268-269; Ellicott J in *Tooheys Ltd v Minister for Business & Consumer Affairs* (1981) 36 ALR 64 at 78; and Smithers J in *Intervest Corporation Pty Ltd v FCT* (1984) 3 FCR 591 at 595-596.

⁵⁷ Section 39B of the *Judiciary Act 1903* (Cth) provides the Federal Court of Australia with original jurisdiction in respect of any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The Federal Court generally allows applications under both section 39B and the ADJR to be made and heard concurrently. In tax proceedings, the section 39B jurisdiction may be preferred given the absence of any express tax-specific limitations on review similar to those contained in paragraph (e) of Schedule 1 of the ADJR. However courts have broadly interpreted sections 175 and 177 of the ITAA36 to restrict their jurisdiction to review tax cases under section 39B. Aside from *Moreau*, above fn. 45, (1926) 39 CLR 65, all of the cases discussed above in this Part concerned applications for judicial review under section 39B.

⁵⁸ *Darrell Lea Chocolate Shops Pty Ltd v Commissioner of Taxation* (1996) 141 ALR 713. In this case the Commissioner issued four separate assessments for sales tax of the same taxpayer in respect of the same transactions in the same goods made under a four different assessment Acts - and all without making any genuine attempt to assess the sale value of particular goods under each Act and on a factual basis which the Commissioner knew was wrong.

⁵⁹ *Darrell Lea*, above fn. 58, (1996) 141 ALR 713, 726. For similar comments, made in the context of discussing the line of UK legitimate expectation cases discussed in Part I of this article see *Pickering v Deputy Commissioner of Taxation* (1997) 37 ATR 41; *Ando Minerals NL v Deputy Federal Commissioner of Taxation* (1994) 94 ATC 4163; and *Federal Commissioner of Taxation v Biga Nominees Pty Ltd* (1988) 88 ATC 4270.

⁶⁰ The High Court recently re-examined the issue in *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, with the Court confirming that judicial review is only available in cases involving a tax assessment decision where the assessment is tentative or provisional or there has been conscious maladministration by the Commissioner. Again, no room was allowed for mere unfairness as a sufficient ground for review of an assessment.

There has also been no judicial recognition in Australia of any legal right to fair treatment in the equally rare cases involving taxpayer attempts to invoke the common law to enforce their rights. Australian judges have refused to impose any common law duties alongside the Commissioner's duties to the Crown for fear of contradicting an implicit legislative intent that the Australian Commissioner of Taxation owes duties only to the Crown. For example, in *Lucas v O'Reilly*⁶¹ a case involving allegations of tortious breach of statutory duty by the Commissioner of Taxation,⁶² Young CJ, in comprehensively rejecting the taxpayer's submissions, stated:

“If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show...that the statute creating the duty confers upon him a right of action in respect of any breach...However, it is, I think, clear that the defendant owes the plaintiff no such duty. The duty of the Commissioner is owed to the Crown.”⁶³

This confinement of the Commissioner's duties to the Crown is a recurring theme in Australian tax cases and extends to equitable as well as common law taxpayer claims against the Commissioner.⁶⁴ This prevailing judicial attitude allows little scope for recognition of any private law taxpayer right to fair treatment in Australia in the foreseeable future.

Australian judges have also rejected the UK doctrine of legitimate expectations. While cases such as *Bellinz*, *Darrell Lea* and *David Jones* discuss the UK legitimate expectation cases, the doctrine has clearly been rejected in Australia.⁶⁵ Further, as former High Court Chief Justice Sir Anthony Mason has extra-judicially observed; “[i]t would require a revolution in Australian judicial thinking to bring about an adoption of the English approach to substantive protection of legitimate expectations.”⁶⁶

This suggests that, in the absence of legislative intervention, any significant legal recognition of Australian taxpayer rights to fair treatment in the foreseeable future is highly unlikely.

⁶¹ *Lucas v O'Reilly (Lucas)* (1979) 79 ATC 4081.

⁶² Breach of statutory duty was also separately unsuccessfully pleaded by the taxpayer in *Harris v Deputy Commissioner of Taxation (Harris)* (2001) 47 ATR 406.

⁶³ *Lucas*, above fn. 61, (1979) 79 ATC 4081, 4085. This is very similar to the stance taken in *Harris v Deputy Commissioner of Taxation*, above fn. 62, (2001) 47 ATR 406. In that case, Grove J asserted, at 408, that “[t]here is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.”

⁶⁴ For example, similar views, strongly suggestive of the extreme judicial sensitivity to encroaching on statutorily imposed duties of the Commissioner, were plainly stated by Hill J in the equitable estoppel context in *AGC (Investments) Ltd v Federal Commissioner of Taxation* (1991) 91 ATC 4180, at 4195: “[T]here is no room for the doctrine of estoppel operating to preclude the Commissioner from pursuing his statutory duty to assess tax in accordance with law. The *Income Tax Assessment Act* imposes obligations on the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart.”

⁶⁵ In accordance with the approach taken by the High Court in *Re Minister for Immigration & Multicultural & Indigenous Affairs: Ex parte Lam* (2003) 214 CLR 1. Gummow and McHugh JJ stated in that case, at 21, that “...nothing in this judgment should be taken as ... adoption of recent developments in English law with respect to substantive benefits or outcomes.” The approach of Gummow and McHugh JJ is consistent with earlier High Court authority such as *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

⁶⁶ Sir Anthony Mason, “Procedural Fairness: Its Development and the Continuing Role of Legitimate Expectations” (2005) 12 *Australian Journal of Administrative Law* 103, 108. Another former High Court Chief Justice, Sir Michael Kirby has recently written a paper outlining the increasing influence of human rights law in Australia, but there is no evidence of such reasoning being applied in Australian tax cases to indicate that the revolution alluded to by Sir Anthony Mason has begun. See Sir Michael Kirby, “Australia's Growing Debt to the European Court of Human Rights” (2008) 34 *Monash University Law Review* 239.

Part III – Fair treatment of taxpayers as a legal rule – A blueprint for reform

The preceding analysis reveals a number of common challenges inherent in translating the moral duty to treat taxpayers fairly into an enforceable legal right which does not unduly impinge on the Revenue's tax administration duties to the Crown. This Part proposes a blueprint in the form of three recommendations for addressing these challenges. These recommendations are:

- (A) An express legislative pronouncement on the issue;
- (B) Extending the availability of compensation as a remedy for taxpayers treated unfairly; and
- (C) Establishing mechanisms for independent oversight to monitor and sanction tax officials for unfair treatment of taxpayers.

Each of these recommendations is discussed in turn below:

Legislative pronouncement

It is evident from the analysis in the preceding Part that one of the primary impediments in the way of entrenching the moral duty to treat taxpayers fairly in enforceable legal rules is a judicial concern with interfering with the legislature and executive by imposing duties to taxpayers on the Revenue which are inconsistent with legislatively-imposed primary public duties to administer and collect taxes. The preceding analysis reveals that this concern is particularly prominent in Australia. This concern is evident both in Australian administrative law cases and private law cases involving claims of unfair treatment of taxpayers by tax officials.

However, this judicial concern with justiciability and offending the doctrine of separation of powers by imposing private law duties to individual taxpayers which might conflict with Revenue duties to the Crown is also evident in the reasoning of UK judges in considering claims of unfair treatment of taxpayers.⁶⁷ For example, in the UK, some judges have conceded that the duties of HMRC are owed exclusively to the Crown, hence judicial recognition of duties to individual taxpayers might be considered “subversive to the whole system”⁶⁸.

This is very similar reasoning to that often used by Australian judges to deny relief to taxpayers complaining of unfair treatment.⁶⁹ Further, the development of the doctrine of legitimate expectations in the UK requires judges to specifically weigh up private duties to taxpayers against the public responsibilities of the Revenue.⁷⁰ Inherent in such a weighing up are questions of justiciability and separation of powers which have deeply troubled many Australian judges.

⁶⁷ For discussion about the prevalence of such concerns in tax cases see John Bevacqua, ‘Public Policy Concerns in Taxpayer Claims against the Commissioner of Taxation – Myths and Realities’ (2011) 40 *Australian Tax Review* 10.

⁶⁸ Lord Wilberforce in *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 266. Cf the comments of Lord Scarman who, in the same case, at 280, directly rejected the suggestion that “the duty to collect ‘every part of inland revenue’ is a duty owed exclusively to the Crown.”

⁶⁹ See, for example, the comments of Young CJ in *Lucas*, above fn. 61, (1979) 79 ATC 4081, reproduced above in the text accompanying fn. 63.

⁷⁰ As explained by Lord Woolfe MR in *R. v North and East Devon Health Authority Ex p. Coughlan* [1999] EWCA Civ 1871, at [57]. This explanation is reproduced above at fn. 27.

Despite these common threads of judicial concern, direct comparisons are difficult as the different constitutional frameworks and conventions in each country underpin the various judicial approaches. For example, in explaining the rejection of any administrative law recognition of a right to substantive fairness in Australia, it has been observed that:

“...notions of ‘good administration’ and ‘fairness’ inform English administrative law. Australian administrative law reflects more of a separation of powers approach, perhaps influenced by the character of the Australian Constitution as a delineation of government powers rather than as a charter of citizen’s rights.”⁷¹

Similarly, the specific legislative frameworks establishing and regulating the ATO and HMRC also significantly influence the willingness and ability of courts to recognise legally enforceable rights to fair treatment of taxpayers. This fact also makes generalisations difficult. For example, UK judges are guided by the “care and management” provisions contained in section 5(1) of the *Commissioner for Revenue and Customs Act 2005*.⁷² Australian judges have less legislative guidance but, as discussed in Part II, must be mindful of provisions such as the privative clauses protecting tax assessment decisions contained in sections 175 and 177 of the ITAA36.

Nevertheless, there is a clear lesson which can be extrapolated from the preceding analysis: the desirability of express and clear legislative guidance to assist courts to reconcile taxpayer rights to fair treatment with the Revenue’s primary public tax administration and collection duties. A detailed and comprehensive legislative statement setting out when (if at all) taxpayers have a legal right to take action for unfair treatment by tax officials would enable judges to proceed with greater confidence as to the intent of the legislature than presently possible for judges in either the UK or Australia.

In Australia, the absence of express legislative guidance on these issues has seen judges consistently err on the side of caution by denying the existence of any enforceable taxpayer rights to fair treatment in almost every case in deference to unstated legislative intent to confine the duties of the Commissioner to the Crown.⁷³ This may at first seem counter-intuitive as it could be argued that a legislative vacuum such as that in Australia leaves scope for judges to fill that vacuum by confirming rather than denying taxpayers legal rights to fair treatment. However, this result depends on the prevailing judicial culture and the various degrees of judicial deference to the legislative law-making function. Most

⁷¹ Sir Anthony Mason, “Procedural Fairness: Its Development and Continuing Role of Legitimate Expectations” (2005) 12 *Australian Journal of Administrative Law* 103, 109. These comments echo the sentiments expressed by Gummow J in *Re Minister for Immigration and Multicultural Affairs ex parte Lam*, above fn. 66 at 24 where His Honour, in rejecting the recognition of the UK doctrine of legitimate expectations in Australia, observed that “a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs both from the English and other European systems ...”

⁷² This subsection requires the Commissioners for Revenue and Customs to be responsible for the “collection and management of revenue”. The Act imputes the same meaning on this phrase as in the express references to “care and management” contained in the *Taxes Management Act 1970* (UK) which was repealed in 2005 and replaced with the *Commissioner for Revenue and Customs Act 2005* (UK). This care and management requirement was a focus of significant judicial consideration in cases such as *Fleet Street Casuals*, above fn. 9, [1981] STC 260.

⁷³ See for example, the cases discussed above at fn. 61 to fn. 63.

Australian judges have not been willing to adopt the expansive approach to judicial activism advocated by Lord Scarman in *Fleet Street Casuals*:

“Are we in the twilight world of “maladministration” where only Parliament and the Ombudsman may enter, or upon the commanding heights of the law? The courts have a role, long established, in the public law ... I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed upon the Revenue are complex and call for management decisions in which discretion must play a significant role.”⁷⁴

Of course, the legitimate expectations cases in the UK show that many UK judges also do not share Lord Scarman’s permissive attitude to judicial activism.⁷⁵

This variability in judicial attitudes is natural. It also illustrates that the development of judicially recognised rights to fair treatment of taxpayers will necessarily be slower, more uncertain and more piecemeal than considered legislative action. Neither taxpayers nor the Revenue are likely to benefit from the uncertainty and cost associated with this type of incremental judicial development. Given the recognised link between voluntary taxpayer compliance and fair treatment, delay and uncertainty are especially insidious. Consequently, this fact also advances the case for clear and express legislative guidance on the question of taxpayer rights to fair treatment by tax officials. Judges in both Australia and UK would benefit from such guidance, as would Revenue officials, taxpayers and other tax administration system stakeholders.

A right to compensation for unfair treatment

A second recommendation for addressing the challenges in recognising taxpayer rights to fair treatment evident from the preceding analysis is the desirability of a taxpayer right to compensation for unfair treatment by the Revenue. There are a number of reasons for considering compensation as a particularly effective tool for striking an appropriate balance between ensuring fair and proper treatment of taxpayers and the public duties of revenue officials.

The primary reason is that an express right to damages would provide a more nuanced approach to dealing with the continuing separation of powers and other public policy concerns expressed by judges in taxpayer claims asserting unfair treatment at the hands of tax officials.

For example, there has been much debate in the UK and in Australia centred on the desirability of recognising a right to *substantive* fairness as distinct from a right to procedural fairness alone. The concern judges express in many such cases is that allowing substantive relief comes dangerously close to engaging courts in matters which offend the longstanding administrative law principle in both of those countries that judges do not engage in merits review.⁷⁶

⁷⁴ *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 280.

⁷⁵ The various judicial approaches have resulted in the uncertainty as to the role of unfairness in judicial review proceedings in the UK, as discussed in the articles cited in fn. 26.

⁷⁶ For detailed discussion see Groves (2008), above fn. 28.

A more nuanced approach to such cases is possible if a right to damages for substantive unfairness is conceded.⁷⁷ Presently, courts in such cases typically respect any separation of powers and other administrative law policy concerns by not overturning the substantive discretionary decision of the Revenue in such a case even where the result would be patently unfair on the taxpayer. However, the same result could be achieved through leaving the Revenue's substantive decision unchanged but recognising resulting unfairness to taxpayers through an award of damages. Such an award could be considered a "price" for upholding the Revenue's stance. Fordham provides an example of how such a system might operate:

"Take, for example, the situation of a 'substantive legitimate expectation', but where it is said to the Court that there is some 'overriding public interest' by virtue of which the State should be able to interfere with the expectation. It may very well be that, in such a case, the Court could ... reconcile (a) the need to vindicate the claimant's expectation and (b) the public interest in the State defeating it, by ensuring reparation, as the 'price' for upholding the state action, whether offered to or exacted by the Court."⁷⁸

Monetary compensation awards used in this way serve a dual purpose in that they can act as a "powerful incentive to improve service"⁷⁹ and treat taxpayers fairly without, strictly speaking, being directive in the sense of imposing changes in decisions or behaviour on the Revenue. The relevance of this distinction can be appreciated with an example utilising the facts in *David Jones*.⁸⁰ It will be recalled from Part II that in this case, the Australian Commissioner resiled from his usual practice of allowing inter-corporate dividend rebates. The taxpayer unsuccessfully argued that this was unfair and constituted an abuse of process by the Commissioner.⁸¹

Despite the apparent unfairness to the taxpayer, the Australian Court's decision has a logical appeal. For the court to have directed the Commissioner to revert to his previous practice would have been tantamount to restricting or fettering the Commissioner's legislatively sanctioned discretion in applying the tax laws.⁸² The Court would have potentially faced the criticism of having overstepped its role and infringed the principles of justiciability and the underlying doctrine of

⁷⁷ Forsyth suggests that the availability of damages has been one of the reasons for the more expansive European approach to recognising substantive legitimate expectations. See Forsyth (1988), above fn. 43.

⁷⁸ Michael Fordham, "Reparation for Maladministration: Public Law's Final Frontier" (2003) 8 *Judicial Review* 104, 107.

⁷⁹ Office of the Commonwealth Ombudsman, Commonwealth of Australia, *To Compensate or Not to Compensate? Own Motion Investigation of Commonwealth Arrangements for Providing Financial Redress for Maladministration* (1999), 11.

⁸⁰ *David Jones*, above fn. 47, (1991) 21 ATR 1506.

⁸¹ The factual similarity with the UK case of *Unilever*, above fn. 21, [1996] STC 681, is striking. It will be recalled from the discussion in Part I that the taxpayer succeeded in that case.

⁸² Similar reasoning is applied in both Australia and the UK to generally deny the availability of an estoppel action against the Revenue. In Australia, the traditional position has been bluntly and concisely stated by Kitto J in *FCT v Wade* (1951) 84 CLR 105: "No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act." See also the comments of Wade J in *AGC (Investments) Ltd v FCT* (1991) 91 ATC 4180. The broader principle underlying this restrictive approach is known as the "non-fetter" principle that "government should not be shackled in exercising its power to make decisions in the public interest in the future." See Margaret Allars, "Tort and Equity Claims Against the State" in Paul Finn (ed), *Essays on Law and Government* (North Ryde: Law Book Company, 1996) Vol. 2, 49, 86. For further discussion of the non-fetter principle see Chris Hilson, "Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place?" (2006) 11 *Judicial Review* 289; and Chris Hilson, "Judicial Review, Policies and the Fettering of Discretion" [2002] *Public Law* 111.

separation of powers. Accordingly, it is understandable that the Court left the taxpayer with no remedy.

However, if the option of an award of damages was open to the Court in *David Jones*, the result could have been very different. An award of damages in such a case could not be seen as a substitution of the Court's decision for that of the Commissioner. It would, however, place a "price" on the Commissioner changing his long-standing practices where such changes would unfairly cause loss to taxpayers. While the public expectation that a tax authority should be free to change its position in the public interest is respected, an award of damages recognises that the public may be best placed to bear the losses flowing from that freedom, rather than adversely affected individual taxpayers.⁸³

Additionally, in a broader sense, the operation of compensation as a signalling mechanism for the boundaries of acceptable tax administration behaviour in such cases could be valuable for maintaining tax administration legitimacy.⁸⁴ A monetary remedy sends an unambiguous signal of disapproval of unfair tax administration activity.⁸⁵ This signal potentially plays an important role in taxpayers having confidence that the system of tax administration will operate within reasonable boundaries. This, in turn, will aid in fostering a climate of voluntary tax compliance.⁸⁶ Again, therefore, legislative reform aimed at recognising taxpayer rights to compensation for specific forms of unfair treatment by tax officials is worthy of serious consideration.⁸⁷

Independent oversight and sanctions for unfair treatment

There is no lack of aspirational statements and informal, often self-administered systems, standards and guidelines aimed at ensuring fair treatment of taxpayers in the UK and Australia. As already noted, in both jurisdictions, Charter entitlements to fair treatment are recorded.⁸⁸ Further, service standards and other measures exist to measure compliance with these commitments to taxpayers.⁸⁹ These

⁸³ The utilitarian argument is that levying everyone to compensate for losses suffered by particular individuals increases the total good. Cohen discusses this argument at length. See David Cohen, "Suing the State" (1990) 40 *University of Toronto Law Journal* 630, 644-645.

⁸⁴ The legitimacy argument has long been recognised in the US – see, for example, Bernard Schwartz, *An Introduction to American Administrative Law* (New York: Oceana Publishing, 1962), 218.

⁸⁵ Writers such as McBride, Roots and Fordham make this point in calling for the availability of damages awards in administrative review proceedings – see Jeremy McBride, "Damages as a Remedy for Unlawful Administrative Action" (1979) 38 *Cambridge Law Journal* 323; Lachlan Roots, "A Tort of Maladministration: Government Stuff-Ups" (1993) 18 *Alternative Law Journal* 67, 71; and Michael Fordham (2003), above fn. 78.

⁸⁶ As confirmed in numerous studies including those noted above at fn. 8.

⁸⁷ It is beyond the scope of this article to formulate a specific statutory damages remedy. However, an example of a general monetary compensation remedy for loss caused by tax official wrongs is formulated and presented in John Bevacqua, *Taxpayer Rights to Compensation for Tax Office Mistakes* (Sydney: CCH, 2011).

⁸⁸ See for example, the commitments referred to above at fn. 3 – fn. 5.

⁸⁹ For example, the Australian Taxation Office has shown an increasing concern with responsiveness benchmarks which strongly indicate a taxpayer service-oriented attitude. See Australian Taxation Office, "Our Service Standards" available at http://www.ato.gov.au/corporate/distributor.aspx?menuid=0&doc=/content/25940.htm&page=2#P24_2573 [Accessed 1 February 2013]; and Australian Taxation Office, *Annual Report 2010-11* (2011). Further, it has close to 50 consultative forums with taxpayers, professionals and other stakeholders. See Australian Taxation Office, "Stakeholder Consultation Overview" available at <http://www.ato.gov.au/corporate/content.asp?doc=/content/00131220.htm&mnu=430198mfp=001> [Accessed 1 February 2013]. This is also a strong indicator of the perceived importance of providing good and fair service to taxpayers. Similarly, in the UK, HMRC are currently producing a performance management system. It has produced a business plan as part of its performance management system which describes its vision as including making taxpayers "feel that the tax system is...even-handed..." HM Revenue & Customs, "Business Plan 2011-2015" available at <http://www.number10.gov.uk/wp-content/uploads/2011/01/HMRC-Business-Plan.pdf> [Accessed 21 April 2012], 1. Similar commitments are made in HM Revenue & Customs, "HMRC Service Standards for Excise, Customs, Stamp Taxes and

guidelines and standards are an important cog in ensuring fair treatment of taxpayers and should not all be enshrined in legislation enforceable by taxpayers against the Revenue. It is undesirable to allow taxpayers to recover compensation in every conceivable instance of unfair treatment.⁹⁰ As Lord Wilberforce observed in *Fleet Street Casuals*, “the income tax legislation contains a large number of anomalies which are naturally not thought to be fair by those disadvantaged.”⁹¹ Further, in practical terms it would be impossible to objectively judge every instance of fair treatment encapsulated in value-laden concepts such as “courtesy” and “politeness” which are often referred to in Revenue service charters and guidelines.⁹²

However, it is possible to devise legal rules which make revenue authorities accountable and incentivise revenue authorities to treat taxpayers fairly which do not create any commensurate taxpayer avenues of relief for unfair treatment. Such laws are an essential third limb of any attempt to translate taxpayer moral rights to fair treatment into legal rules. Precedents for devising such laws already exist. For example, the US Congress has enacted a number of provisions which might serve as a useful template for Australian and UK lawmakers.

The US Congress has enacted legislative provisions expressly requiring tax official performance of Internal Revenue Service (IRS) employees to be measured by reference to fair and equitable treatment of taxpayers.⁹³ Further provisions charge the US Treasury Inspector General for Tax Administration with the task of annually evaluating IRS compliance with this obligation, ensuring a high level of accountability.⁹⁴ Congress has also enacted a list of “ten deadly sins”⁹⁵ which requires the IRS Commissioner to terminate the employment of any employee on misconduct grounds in cases of proven commission of one or more of these “sins”. This also provides further specific and real incentives for tax officials to treat taxpayers fairly.⁹⁶

Money Services Customers” available at <http://www.hmrc.gov.uk/customs/ecsm-service-standards.pdf> [Accessed 1 February 2013], 3.

⁹⁰ The filing of frivolous lawsuits may well ensue. Such a concern led one judge in the US to observe that “filing of frivolous lawsuits merely to protest the assessment of federal income tax has become a new and unpleasant indoor sport” (*McKinney v Regan* 599 F.Supp. 126, 129-30 (M.D. La. 1984)); similarly, the filing of such suits has been judicially described as a vampire requiring a sharpened stake to kill it (*United States v Craig*, 73 A.F.T.R.2d 1099 (D.N.D. 1994)).

⁹¹ *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 266.

⁹² See, for example many of the commitments contained in the list of commitments under the heading of fairness and reasonableness contained in the Australian Taxpayers’ Charter and reproduced above at fn. 3.

⁹³ Specifically, section 1204(b) of the *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub L No 105-206, 112 Stat 685 (1998) directly requires IRS managers to “use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance.”

⁹⁴ Section 7803(d)(1)(2000) of the US Internal Revenue Code requires the Treasury Inspector General for Tax Administration to annually evaluate whether the IRS has complied with section 1204(b) of the *Revenue Service Restructuring and Reform Act of 1998*, Pub L No 105-206, 112 Stat 685 (1998).

⁹⁵ Section 1203 of the *Revenue Service Restructuring and Reform Act of 1998*, Pub L No 105-206, 112 Stat 685 (1998) requires the Commissioner of Internal Revenue to terminate the employment of any employee on misconduct grounds if there is a final administrative or judicial determination that the employee committed one or more of a range of ten infringements of taxpayer rights including infringement of a taxpayer’s Constitutional rights and a range of other civil rights, violations of tax laws and IRS policies in order to harass a taxpayer and a range of other wilful or personally motivated activities adversely affecting taxpayers. These have become known as the “ten deadly sins.”

⁹⁶ The Australian regulation of tax official fair treatment of taxpayer provides a stark contrast to the US approach. In *Commissioner of Taxation v Futuris Corporation Ltd* above fn. 60, (2008) 237 CLR 146, the High Court made reference to the requirement that tax officials, as members of the Australian Public Service act with care and diligence, honesty and integrity in accordance with the *Public Service Act 1999* (Cth). Australian tax officers, as members of the Australian Public Service are, indeed, required to act in accordance with Australian Public Service values and standards of conduct. These are set out in the *Public Service Act 1999* (Cth) and *Public Service Regulations 1999* (Cth). Further, section 13 of the *Public Service Act 1999* (Cth) contains the Australian Public Service Code of Conduct which emphasises the need to deliver “services fairly, effectively, impartially and courteously to the Australian public.” (See Australian Public Service Commission, “APS Code of Conduct” available at <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values->

These enactments provide a particularly pertinent starting point for formulating similar rules in the UK and Australia given the judicial concern in both jurisdictions that entrenching a right to fair treatment through providing taxpayers with avenues of relief against the Revenue might create inconsistencies with the public duties the Revenue. This is because provisions such as these focus on incentivising tax officials to treat taxpayers fairly without directly disturbing any specific Revenue decision concerning any particular taxpayer.

CONCLUSION

This chapter has not sought to pass judgment on the effectiveness of laws for ensuring fair treatment of taxpayers in either Australia or the UK. However, it is clear that in each jurisdiction the current approach is neither perfect nor complete. This is unsurprising because taxpayer rights to fair treatment at the hands of tax officials will always be the subject of a delicate balancing exercise between the private interests of individual taxpayers and the public interest in ensuring that the vital tax administration function is not unduly obstructed or fettered.

Consequently, assessments as to the adequacy of protection of taxpayer rights to fair treatment necessarily involve value-laden judgments of how to resolve the trade-off between these competing interests. These judgments will evolve and shift over time.⁹⁷ Further, final determinations must be considered in the context of the constitutional and political framework in which the relevant decision-makers operate.

None of these facts, however, are sufficient reasons for law-makers to shy away from the issue entirely. Legislators and judges are regularly faced with having to make difficult trade-offs between public and private interests.⁹⁸ The preceding analysis demonstrates that both in the UK and Australia legislators have not taken up the challenge of weighing up these competing interests. The result in both countries has been that the judiciary has been left with this responsibility.

UK judges, by developing the doctrine of legitimate expectations, have shown a greater willingness to accept this responsibility than Australian judges. Arguably, the increasing influence of the HRA and the recognition of the doctrine of legitimate expectations under European Union law has aided in fostering this judicial receptiveness in the UK. By comparison, Australian judges have been less willing to set precedents which recognise taxpayer fair treatment as more than a mere moral duty on tax officials. The difference in judicial approaches is at least in part explained by the differing constitutional and legislative frameworks of the two countries. However, neither country is far advanced along the path to

[and-code-of-conduct/code-of-conduct](#) [Accessed 1 February 2013]. However, the only sanction for breach of the Code is contained in section 15 which provides for a number of possible employee sanctions including possible termination of employment, reprimand, demotion or reduction in salary. In contrast with the US system, there is nothing in this legislation which requires independent oversight of public official compliance with these requirements or which *compels* managers to terminate the employment of officials for particular breaches of the Code.

⁹⁷ As Bentley has noted “[e]ssentially taxation can be seen as a barometer of the *developing* balance between State and individual rights.” (emphasis added). See Duncan Bentley, *Taxpayers’ Rights: Theory, Origin and Implementation* (Alphen aan den Rijn: Kluwer, 2007), 15.

⁹⁸ As one author has generally noted: “If all such political ‘hot potatoes’ were to be deemed unsuitable for judicial scrutiny the administrative law casebooks would be slim volumes indeed.” Chris Finn, “The Justiciability of Administrative Decisions: A Redundant Concept?” (2002) 30 *Federal Law Review* 239, 249.

translating the moral duty of tax officials to treat taxpayers fairly into a clear and certain legal right.

This chapter has set out three recommendations for effectively translating the moral duty to treat taxpayers fairly into enforceable legal rules and injecting a degree of clarity and certainty in both jurisdictions. Only one of these recommendations directly centres on providing taxpayers with enhanced formal avenues of relief for unfair treatment – the recognition of a limited right to compensation for unfair treatment. Of the remaining two recommendations, one calls for a statutory pronouncement of taxpayer rights to fair treatment. The second calls for legal rules aimed at providing independent oversight and real incentives for tax officers to treat taxpayers fairly, akin to those in countries such as the US.

The aim of these recommendations is not a *per se* increase in taxpayer ability to successfully sue tax officials in cases of unfair treatment – the desirability or otherwise of such an increase is a matter for the UK and Australian legislatures. Instead, the primary objective is to break the legislative silence in order to assist judges to resolve many of the public policy difficulties which have troubled judges in considering cases concerning claims of unfair treatment by tax officials. While the challenge of striking the appropriate trade-off between taxpayer rights to fair treatment and the public duties of tax officials will always be a difficult one, these three recommendations provide a useful starting point for proactively and directly addressing the issue. By acting directly and proactively in this way we can at least start the search for an answer to the question posed by Lord Scarman about the obligation to treat taxpayers fairly: “Is it a mere moral duty, a matter for policy but not a rule of law?”⁹⁹

⁹⁹ *Fleet Street Casuals*, above fn. 9, [1981] STC 260, 280.

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