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Australian business taxpayer rights to compensation for loss caused by tax official wrongs – a call for legislative clarification

John Bevacqua*

Abstract

Australian business taxpayers seeking compensation for losses caused by the wrongs of tax officials have a number of judicially-enforceable and non-judicial avenues of relief. This article outlines each of these options and assesses the suitability and effectiveness of each for resolving compensation claims of business taxpayers. This examination reveals that there are no broadly applicable judicial avenues of relief with any realistic prospects for recovery available to assist Australian business taxpayers. Business taxpayers must turn to non-judicial avenues for recovering compensation from the Commissioner of Taxation. This article contends that these non-judicial avenues of relief are ill-suited for resolving many business compensation claims. Consequently, unlike other taxpayers, Australian business taxpayers often will have no appropriate, broadly applicable avenue for recovering compensation for tax official wrongs. This article calls for an express statutory statement to address this disadvantage by providing businesses with clarity and certainty as to their entitlements to compensation for loss caused by the wrongs of tax officials.

1. INTRODUCTION

There is no comprehensive Australian statutory statement of taxpayer rights to compensation for loss caused by the wrongs of tax officials.¹ Taxpayer rights to monetary compensation from tax officials derive from a patchwork of judicial and non-judicial discretionary avenues of relief. This article contends that this patchwork of remedies especially disadvantages business taxpayers. It recommends the enactment of legislation to address this situation by clarifying business taxpayer rights to compensation for loss caused by tax official wrongs.²

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¹ A broad interpretation of the meaning of ‘wrong’ is adopted in this article. For the purposes of this article, the term encompasses not just tortious wrongs but any activity causing loss to business taxpayers which is not legislatively sanctioned. Legislatively-sanctioned losses would obviously include the collection of taxes by the Commissioner in accordance with the law. While statutory damages are available for particular wrongs such as breaches of the privacy principles in the *Privacy Act 1988* (Cth), there are no broad-based Australian statutory remedies.

² The author made broader similar recommendations in John Bevacqua, *Taxpayer Rights to Compensation for Tax Office Mistakes* (2011).

I set out the judicial avenues for recovering compensation. It deals with tortious avenues of relief, the equitable option of promissory estoppel, the possibility of recovering damages via a breach of contract action and the availability of damages in judicial review of administrative action proceedings. It reveals the very limited applicability in the tax context of all of these key legal paths to recovery of compensation.

Next I set out the various non-judicial avenues of compensatory relief. The examination extends to consideration of the Taxpayers' Charter, investigation by the Commonwealth Ombudsman, appeal to Australian Taxation Office ('ATO') Internal Complaints and ex gratia relief available under the Scheme for Compensation for Detriment caused by Defective Administration ('CDDA Scheme') administered by the Commonwealth Department of Finance and Administration.

The discussion reveals that the non-judicial avenues of relief provide the broadest and most viable options for taxpayers to pursue the Commissioner of Taxation for compensation for tax official wrongs.³ Equally, however, these same avenues for relief are the least suitable for resolving claims which are factually complex, large and/or involve serious questions of law. Accordingly, they are not well suited for resolving many business taxpayer claims for compensation. This places business taxpayers at a distinct practical disadvantage relative to other taxpayers when seeking compensation from the Commissioner of Taxation. I next set out this argument.

Lastly I make the case for legislative action to address this disadvantage. It specifically calls for legislation to clarify the rights of business taxpayers to compensation for tax official wrongs to provide businesses with certainty and to foster a climate of trust and confidence in the Australian system of tax administration.

2. JUDICIAL AVENUES FOR BUSINESSES SEEKING COMPENSATION FOR TAX OFFICIAL WRONGS

This section deals with tortious, contractual, equitable and administrative law avenues for potential recovery of compensation from the Commissioner of Taxation. The discussion that follows addresses each of these avenues of relief in turn and illustrates the exceedingly slim prospects for businesses seeking to recover monetary compensation from the Commissioner through court action.

³ In this article the Commissioner of Taxation is variously referred to as 'the Commissioner' and 'the ATO'. Almost all of the avenues of relief examined in this article provide for recovery from the Commissioner of Taxation and not from the Commissioner's tax officers personally. The only exception is the tort of misfeasance in public office which is technically a personal tort against the offending official. However, the Commissioner has historically always agreed to indemnify any officer against whom allegations of misfeasance have been made. See, for example, *Re Young v Commissioner of Taxation* [2008] AATA 115. Accordingly the rights to compensation for tax official wrongs are essentially equivalent to the rights to recovery from the Commissioner of Taxation and the distinction is not laboured in this article.

2.1 Recovering Compensation in Tort

To date, no business or individual taxpayer has succeeded in recovering compensation from the Commissioner in any reported Australian tort case. In fact, very few attempts have been made to pursue the Commissioner in judicial proceedings. Some writers have speculated that this is because '[t]he ATO often pre-empts such legal claims, where negligence and subsequent financial loss to the taxpayer are clear from the facts, and pays compensation.'⁴ However, the principles that have emerged from judicial consideration in these cases suggest that the Commissioner has little to fear in any compensation claims involving allegations of breaches of tortious duties.

For example, in cases where allegations of negligence or breach of statutory duty have been judicially considered, the uniform result has been summary dismissal. The comments of Grove J in *Harris v Deputy Commissioner of Taxation*⁵ ('Harris'), which involved a negligence claim against the Commissioner by the operator of a horse-breeding business, are typical of the full extent of the treatment. In that case His Honour stated:

There 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.⁶

In arriving at this conclusion, Grove J in *Harris* did not apply any of the usual common law tools or principles for determining questions of tortious duties of care applied in cases where public authority tortious liability is in question.⁷

In *Lucas v O'Reilly*⁸ ('Lucas'), Young CJ dealt similarly expediently with an argument by a partner of a share-trading business who alleged, among a number of causes of action, a breach of statutory duty by the Commissioner in respect of a foreshadowed (and, the taxpayer argued, erroneous) Notice of Assessment of his tax liability. His Honour stated:

If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show not only that the duty which is alleged

⁴ Duncan Bentley, 'The Taxpayers' Charter: More than a Mission Statement' (1995-1996) 4 *Taxation in Australia Red Edition* 259, 261.

⁵ (2001) 47 ATR 406.

⁶ Ibid, 408.

⁷ His Honour only makes passing reference to the currently prevailing 'incremental approach' to resolving questions of public authority tortious duties of care. Above n 5, at 409, His Honour merely observes: 'In recent times the determination of the existence of a duty of care has been directed to be established by recognition of novel areas of duty on an incremental or case by case basis: *Perre v Appand Pty Limited* (1999) 198 CLR 180; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.'

⁸ (1979) 79 ATC 4081.

to have been or to be about to be broken is a duty owed to him but also 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.⁹

Even torts specifically aimed at compensating citizens wronged by public officials such as the tort of misfeasance in public office¹⁰ have not resulted in a single dollar of compensation to any Australian business to date. Misfeasance in public office allegations against the Commissioner usually fall at the hurdle of demonstrating that a tax official has acted with malice directed toward the taxpayer.¹¹ The difficulties of demonstrating the lack of good faith necessary to prove malice where tax officers are concerned were highlighted by Hill, Dowsett and Hely JJ in *Kordan Pty Ltd v Federal Commissioner of Taxation*¹², a case involving the treatment of trading stock and business losses by the taxpayer:

The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that allegations directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed one would hope that this was and would continue to be the case.¹³

Hill, Dowsett and Hely JJ do not go so far as to suggest a presumption by our courts of tax official honesty. However, in most cases, the dishonesty requirement has served as

⁹ Ibid, 4085.

¹⁰ The tort can not apply to private individuals and is only applicable to public officers. Expressing this idea in the context of the equality principle, Sadler points out that the tort of misfeasance ‘...is the only exception to the principle that, generally speaking, a public officer is not liable in tort unless the act complained of would, if done by a private individual, be actionable. It is the only tort having its roots and applications within public law alone. It cannot apply in private law; the defendant must be a public officer and the misfeasance complained of must occur whilst the public officer is purporting to exercise the powers of his or her office.’ Robert Sadler, ‘Liability for Misfeasance in Public Office’ (1992) 14 Sydney Law Review 137, 138-139.

¹¹ Knowledge of absence of power and malice have long been accepted as two separate limbs of the tort of misfeasance in public office. As Smith J noted in *Farrington v Thomason* [1959] VR 289, 292: ‘Some of the authorities seem to assume that in order to establish a cause of action for misfeasance in a public office, it is, or may be necessary to show that the officer acted maliciously in the sense of having an intention to injure...it appears to me, however, that this is not so, and that it is sufficient to show that he acted with knowledge that what he did was an abuse of his office.’ More recent literature views these simply as two types of malice, the former being referred to as ‘untargeted’ malice and the latter as ‘targeted’ malice. This is the approach taken in the leading UK misfeasance case, *Three Rivers District Council v Bank of England* [2000] 3 All ER 1.

¹² (2000) 46 ATR 191.

¹³ Ibid, 193. The High Court recently discussed these comments favourably in *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146.

a significant practical impediment to the ability of business taxpayers to recover compensation via this tort.¹⁴

The door has been left open for misfeasance claims against the Commissioner by cases such as *Lucas*¹⁵ and, more recently, the High Court decision in *Commissioner of Taxation v Futuris Corporation Ltd*¹⁶ ('*Futuris*'). It was observed in *Futuris* that s175 of the *ITAA36* would not protect the Commissioner from a challenge to a Notice of Assessment on the basis of an ATO officer having committed a misfeasance in public office.¹⁷ This pronouncement, however, does not change the principles applied in misfeasance cases. Accordingly, it does little to advance the practical prospects of business taxpayer victims of the Commissioner's wrongdoing recovering compensation via a tortious action.

2.2 Recovering Compensation for Breach of Contract

No cases involving allegations of contractual breach arising out of the usual taxpayer interactions with the Commissioner have proceeded to judicial determination. It is generally accepted, however, that the Commissioner owes no contractual duties to taxpayers in carrying out his normal tax administration activities. Isaacs J in his 1926 judgment in *Moreau v FCT*¹⁸ perhaps came the closest to imposing such duties on the Commissioner, asserting that the Commissioner's function was '...to administer the

¹⁴Cases in which the taxpayer has failed to demonstrate bad faith on the part of the relevant tax official include *Henderson v Deputy Commissioner of Taxation* [2005] FCA 1806, *Engler v Commissioner of Taxation* (No 3) [2003] FCA 1571, *Gates v Commissioner of Taxation* [2006] FCA 739, and *Madden v Madden & Ors* (1996) 136 ALR 98. For a detailed discussion of these cases see John Bevacqua, 'A Bridge too Far – The Prospect of a Successful Misfeasance Claim against the Commissioner of Taxation in the Wake of *Futuris* (2010) in ATAX, *International Tax Administration: Building Bridges* (2010), 43.

¹⁵Above n 8. In this case the taxpayer alleged that the Commissioner threatened to issue a Notice of Assessment knowing that it was not lawfully authorised and for a purpose foreign to the purpose for which the power to assess was granted. Young CJ held that this constituted a cause of action founded in misfeasance in public office even though not expressed in those terms in the plaintiff's Statement of Claim. His Honour further held that a sufficiently arguable case on this basis could be mounted and refused the application of the Commissioner to strike out the Plaintiff's Statement of Claim. The case never proceeded to a full hearing of the misfeasance argument.

¹⁶Above n 13.

¹⁷Section 175 of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA36*') provides that an assessment in not invalid merely because the Commissioner has not complied with any provision of the *ITAA36*. The majority in *Futuris*, above n 13 at 164, observed that: 'The issue here is whether, upon its proper construction, s 175 of the Act brings within the jurisdiction of the Commissioner when making assessments a deliberate failure to comply with the provisions of the Act. A public officer who knowingly acts in excess of that officer's powers may commit the tort of misfeasance in public office...Members of the Australian Public Service are enjoined by the Public Service Act (s13) to act with care and diligence and to behave with honesty and integrity...These considerations point decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms.'

¹⁸(1926) 39 CLR 65. This case involved an ultimately unsuccessful challenge by the taxpayer to the powers of the Commissioner to amend a number of Notices of Assessment of the affairs of the taxpayer after the expiration of three years from the date when the tax payable on the assessment was originally due and payable.

Act with solicitude for the Public Treasury *and with fairness to the taxpayers*¹⁹ (emphasis added). However, even Isaacs J stopped short of suggesting any implied *contractual* duty to treat taxpayers fairly. In any event, such comments have received little judicial attention in Australia.²⁰ The prevailing view remains akin to that expressed in the tortious cases discussed above; that the Commissioner's duties are owed exclusively to the Crown. There seems to be little room in this approach for implied contractual duties - of fairness or otherwise - to taxpayers.

The only situations in which the Commissioner has been held to owe quasi-contractual duties to taxpayers are cases where the Commissioner has made express binding promises to taxpayers (usually in the process of litigation settlement negotiations), and then later has sought to back away from those promises. One such case is *Cox v Deputy Federal Commissioner of Land Tax (Tas)*²¹ ('Cox').

This case concerned a settlement of certain land tax liabilities of the taxpayer through an agreement between the Commissioner and the taxpayer. The Commissioner subsequently sought to re-open the land tax assessments. Griffith CJ denied the Commissioner's request to re-open the assessments, characterising the compromise followed by payment by the taxpayer as 'an executed agreement for valuable consideration.'²²

Such cases are exceedingly rare.²³ Contractual relief is, therefore, unlikely to be a viable option for business taxpayers seeking compensation for loss caused by tax officer wrongdoing.

2.3 Recovering Compensation in Equity

Compensatory relief is available in equity in appropriate equitable estoppel actions.²⁴ Brennan J in *Waltons Stores v Maher*²⁵ clarifies that within the scope of the basic

¹⁹ Ibid, 67.

²⁰ The implication of fairness has recently received judicial attention in a number of cases involving business taxpayers in the United Kingdom. Typical are the comments of Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 in which His Lordship observed, at 651, that 'modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly.' Cases in which these comments have been positively received in Australia include *David Jones Finance and Investment Pty Ltd v Federal Commissioner of Taxation* (1990) 90 ATC 4730; *Darrell Lea v Commissioner of Taxation* (1996) 72 FCR 175; and *Bellinz v Federal Commissioner of Taxation* (1998) 39 ATR 198. None of these cases involved taxpayer compensation claims and the sentiments remain to be fully embraced in Australia. For further discussion of the duty of the Commissioner to act fairly see Bruce Quigley, 'The Commissioner's Powers of General Administration: How Far Can He Go?' (Paper presented at the 24th TIA National Convention, Sydney, 12 March 2009).

²¹ (1914) 17 CLR 450.

²² Ibid, 455.

²³ Similar findings arose in *Queensland Trustees v Fowles* (1910) 12 CLR 111 and, more recently, *Precision Polls Pty Ltd v FCT* (1992) 92 ATC 4549.

injunctive goal of estoppel, there is ample opportunity for monetary compensation to be awarded to a plaintiff.²⁶ Accordingly, monetary recompense for expenditure incurred has been awarded in some estoppel claims.²⁷

Again, though, there has been no successful taxpayer claim for compensation in any equitable estoppel action against the Commissioner. In fact, irrespective of the remedy sought, estoppel is a difficult action to make out against the Commissioner. The prevailing judicial stance was bluntly and concisely stated by Kitto J in *Federal Commissioner of Taxation v Wade*²⁸, a case involving a dairy farm business and the treatment of cattle as trading stock:

No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act.²⁹

More recently, in *AGC (Investments) Ltd v FCT*³⁰, a claim relating to tax assessment of the plaintiff's insurance business activities, Hill J expressed similar views:

[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

²⁴ While monetary relief may also be available via equitable relief through an unjust enrichment claim, the monetary relief in such cases is not compensatory in nature. In the case of unjust enrichment any monetary award is calculated to reflect the enrichment of the wrongdoer, rather than compensating for the loss suffered by the victim. Accordingly, the discussion in this section does not extend to consideration of the equitable doctrine of unjust enrichment.

²⁵ (1990) 170 CLR 394.

²⁶ His Honour points out, *ibid* at 423, that the goal of equitable relief in cases of promissory estoppel is 'not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.' Where the only viable avenue for avoiding the plaintiff's detriment is an award of monetary compensation, there is no prohibition on the court doing so. The various State Supreme Court Acts give the courts express powers in this regard. For example the *Supreme Court Act 1970* (NSW) provides in s 68 - 'Where the court has power (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act; or (b) to order the specific performance of any covenant, contract or agreement, the court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.' This legislation mirrors 19th Century British legislation known as "Lord Cairns' Act" (the *Chancery Amendment Act 1858*).

²⁷ For example, *Raffaele v Raffaele* [1962] WAR 238. See also the cases cited in J D Heydon, W M Gummow and R P Austin, *Cases and Materials on Equity and Trusts* (4 ed, 1993), 423. In a tax case involving allegations of estoppel by a business taxpayer, the sorts of compensable losses that might arise would 'include penalties and interest for non-compliance with the law, out of pocket expenses related to aborted transactions, and harm from paying more tax than might otherwise have been the case were it not for the erroneous representation.' Glen Loutzenhiser, 'Holding Revenue Canada to its Word: Estoppel in Tax Law' (1999) 57 *University of Toronto Faculty of Law Review* 127, 128.

²⁸ (1951) 84 CLR 105.

²⁹ *Ibid*, 117.

³⁰ (1991) 91 ATC 4180.

Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart.³¹

Consequently, there have been very few successful estoppel claims against the Commissioner of Taxation. The only successful cases have been those in which the Commissioner has sought to resile from a commitment tantamount to a contractual commitment to a taxpayer.³² Accordingly, in the vast majority of cases, an equitable action is an unlikely option for businesses seeking to recover compensation from the Commissioner.

2.4 Recovering Compensation in Administrative Law Proceedings

The option of seeking compensatory relief via administrative law judicial review proceedings is not available in Australia. There is clear authority that monetary compensation is not available as a remedy for successful applicants.³³ Section 16(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') sets out the available remedies in cases of judicial review under that Act.³⁴ While these remedies are 'very wide indeed'³⁵ this breadth has not been interpreted as permitting the Court to award damages in cases of review under any of the grounds set out in the *ADJR Act*.³⁶

³¹ Ibid, 4195. In relation to this case it was noted in *Bellinz v Federal Commissioner of Taxation*, above n 20, that: 'It was not suggested that the appellants could rely on estoppel, although the administrative law arguments advanced in reality seek to activate a doctrine of estoppel in a different guise.'

³² One of these very rare cases, *Cox*, above n 21, has already been discussed as an example of a case concerning a binding quasi-contractual commitment made by the Commissioner. Similar cases are listed above at n 23. For a detailed exposition of these cases see Cameron Rider, 'Estoppel of the Revenue: A Review of Recent Developments' (1994) 23 *Australian Tax Review* 135.

³³ See, for example, *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 81 ALR 288; *Conyngham v Minister for Immigration and Ethnic Affairs* (1986) 68 ALR 441; *Pearce v Button* (1986) 8 FCR 408; and *O'Neil v Wratten* (1986) 65 ALR 451.

³⁴ Section 16(1) provides as follows: (1) On an application for an order for review in respect of a decision, the Federal Court or the Federal Magistrates Court may, in its discretion, make all or any of the following orders: '(a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies; (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit; (c) an order declaring the rights of the parties in respect of any matter to which the decision relates; (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.' Sub-sections (2) and (3) of s 16 respectively provide identical remedies in cases of conduct engaged in for the purposes of making a decision, and failure to make a decision or failure to make a decision within the requisite timeframe.

³⁵ Michael Walpole, 'Taxpayer Rights and Remedies - Australia, New Zealand and China' in *Second World Tax Conference* (2001), 31.

³⁶ As Sweeney J observed in *Park Oh Ho v Minister for Immigration and Ethnic Affairs*, above n 33 ('*Park Oh Ho*'): 'An applicant who merely establishes a ground of review under s 5 of the ADJR Act is not thereby entitled to an award of damages. The remedies of judicial review are those in the nature of certiorari, prohibition, mandamus, injunction and declaration, as s 16 of the ADJR Act makes plain.'

The availability of damages utilising s 22 of the *Federal Court of Australia Act 1976* (Cth)³⁷ and the jurisdiction of the Federal Court set out in s 39B of the *Judiciary Act 1903* (Cth) as an alternative to review under the *ADJR Act* has also been rejected.³⁸

Accordingly, the recovery of damages as a remedy both in cases pursued by a business taxpayer under the *ADJR Act* as well as those pursued under the jurisdiction of the Federal Court set out in s39B of the *Judiciary Act 1903* (Cth) appears to be precluded.³⁹

The overall picture that emerges is that business taxpayers are extremely unlikely to recover compensation via judicial avenues in Australia. The potential for recovery is slim and uncertain. This is especially true of the typical common law avenues for recovery – for breach of tortious or contractual duty. This is evident from the consistently restrictive judicial interpretation of the applicability of private law principles in claims against the Commissioner of Taxation. Judges have demonstrated a clear reluctance to impose on the Commissioner any private law duties which could be used as a foundation for a claim of damages. Judges generally accept that the duties of the Commissioner are owed exclusively to the Crown. This is despite the fact that there is no express statutory statement to this effect in any Australian tax legislation.⁴⁰

³⁷ Section 22 provides: ‘The Court shall, in every matter before the Court grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.’

³⁸ Sweeney J rejected this argument in *Park Oh Ho*, *ibid*, 297-298, observing that ‘[s]ection 22 does not enlarge the provision of substantive law so as to authorise the award of damages in circumstances for which the law does not provide.’ Morling J (at 310) and Foster J (at 317) made similar comments in that case. This case was subsequently overruled on other grounds by the High Court, but is still good authority on the question of the availability of damages in cases of judicial review of administrative action.

³⁹ This approach is consistent with the rejection in Australia of the availability of substantive relief in administrative law. Sir Anthony Mason has observed that ‘[i]t would require a revolution in Australian judicial thinking’ to bring about a change in this approach. Sir Anthony Mason, ‘Procedural Fairness: Its Development and the Continuing Role of Legitimate Expectations’ (2005) 12 *Australian Journal of Administrative Law* 103.

⁴⁰ Australian legislation even falls short of expressly imposing a duty on the Commissioner to collect the maximum amount of revenue payable under the law. This is in contrast to jurisdictions such as the United Kingdom and New Zealand which have both enacted legislation to that effect. For example see s13 of the *Inland Revenue Regulation Act 1890* (UK) and s6A of the *Tax Administration Act 1994* (NZ). In New Zealand, these provisions have been used as an express legislative basis for rejecting the existence of private law duties to taxpayers. For example, Keane J in the New Zealand negligence case of *Ch’elle Properties (NZ) Ltd v Commissioner of Inland Revenue* [2005] NZHC 190 at [96] characterised such provisions as creating an ‘intricate balance ... between efficacy, accountability and due process’ which would be inconsistent with the imposition of a private law duty of care. Commentators have also asserted that equitable duties are precluded by virtue of these provisions. See Andrew Alston, ‘Taxpayers’ Rights In New Zealand’ (1997) 7 *Revenue Law Journal* 211.

3. NON-JUDICIAL AVENUES FOR BUSINESSES SEEKING MONETARY COMPENSATION FOR TAX OFFICIAL WRONGS

The non-judicial alternatives for recovering compensation from the Commissioner of Taxation include damages payouts resulting from breaches of the Taxpayers' Charter, an investigation by the Commonwealth Ombudsman or from complaint to ATO Internal Complaints and the various options accessible via that avenue including ex gratia relief under the CDDA Scheme administered by the Department of Finance. This section discusses each of these options.

3.1 Recovering Compensation for Breach of the Taxpayers' Charter

The Taxpayers' Charter (the 'Charter') consists of a series of booklets released by the Commissioner of Taxation in 1997.⁴¹ The Charter lists taxpayer rights and obligations and Australian Tax Office standards of service, although none of these booklets are specifically aimed at business. The Charter has no legislative force⁴² so it does not actually create any additional legal rights for taxpayers.⁴³ However, the Charter

⁴¹There was a substantial review of the Charter in 2003. A revised version was introduced in November of that year. The Charter publications are Australian Taxation Office, Taxpayers' Charter: What You Need to Know, NAT 2548 (2011) <http://www.ato.gov.au/content/downloads/cor63133_n2548.pdf> at 11 April 2011; Australian Taxation Office, Taxpayers' Charter: Treating You Fairly and Reasonably, (2011) <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/25829.htm&pc=001/001/002/017&mnu=0&mfp=&st=&cy=>> at 11 April 2011; Australian Taxation Office, Taxpayers' Charter: Treating You as Being Honest, (2011) Australian <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/25833.htm&pc=001/001/002/017&mnu=0&mfp=&st=&cy=>> at 11 April 2011; Australian Taxation Office, Taxpayers' Charter: Helping You Get Things Right, NAT 15026 (2011) <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/68494.htm&pc=001/001/002/017&mnu=0&mfp=&st=&cy=>> at 11 April 2011; Australian Taxation Office, Taxpayers' Charter: Respecting Your Privacy and the Confidentiality, (2007) <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/25915.htm&pc=001/001/002/017&mnu=0&mfp=&st=&cy=>> at 11 April 2011; Australian Taxation Office, Taxpayers' Charter: Accessing Information Under the Freedom of Information Act, (2011) <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/25917.htm&pc=001/001/002/017&mnu=0&mfp=&st=&cy=>> at 11 April 2011; Australian Taxation Office, Taxpayers' Charter: Fair Use of Our Access and Information Gathering Powers, NAT 2559 (2011) <http://www.ato.gov.au/content/downloads/cor63142_n2559.pdf> at 11 April 2011; and Australian Taxation Office, Taxpayers' Charter: If You're Subject to Review or Audit, NAT 2558 (2011) <http://www.ato.gov.au/content/downloads/cor63140_n2558.pdf> at 11 April 2011.

⁴²Contrary 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).

⁴³Numerous authors have been critical of this fact. See, for instance, Karen Wheelright, 'Taxpayers' Rights in Australia' In Duncan Bentley (ed), *Taxpayers' Rights: An International Perspective* (1998). The criticism by Wheelright (at 60) is typical: 'The new Charter does not have legislative force and therefore does not create any new legal rights for Australian taxpayers. This compares unfavourably to countries like the USA and represents, on one view, a missed opportunity for Australia.' See also Adrian Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries - Have New Zealand Taxpayers been "Short-Changed"?' (1999) 32 *Vanderbilt Journal of Transnational Law* 1345, and Duncan Bentley, 'A Taxpayers Charter: Opportunity or Token Gesture' (1995) 12 *Australian Tax Forum* 1.

publications envisage the possibility of awards of compensation for breaches of some Charter commitments. For example, the Commissioner in his publication *Taxpayers' Charter – What You Need to Know* states that '[i]n some circumstances you may be entitled to be paid compensation.'⁴⁴ However the entitlement to compensation for a breach of any of the commitments set out in the Charter is always at the discretion of the Commissioner. There is no right to compensation.⁴⁵

It is also apparent from Commonwealth Ombudsman annual reports that in many cases the aggrieved taxpayer does not receive the desired remedy – including, in some cases, monetary compensation.⁴⁶ At best, the aggrieved taxpayer may obtain a concession from the Commissioner that the taxpayer has been treated unjustly or unfairly and that a taxation liability that has been assessed against the taxpayer (or the denial of a deduction or other concession) should be reversed.

Such remedies disregard the economic losses that might have been suffered by the taxpayer. This is particularly pertinent for business taxpayers where economic losses such as lost business opportunities or loss of profit might be significant heads of damage resulting from tax official wrongs. In such cases, the potential utility of this otherwise broad avenue for compensatory relief is significantly reduced.

3.2 Recovering Compensation through Complaint to the Commonwealth Ombudsman

Under s 5(1) of the Ombudsman Act 1976 (Cth) the jurisdiction of the Commonwealth Ombudsman extends to investigation of any 'action, being action that relates to a matter of administration' of a 'department'⁴⁷ or a 'prescribed authority'.⁴⁸ The Commissioner of Taxation is a 'prescribed authority'.⁴⁸ The Commonwealth Ombudsman has powers to make a broad range of recommendations in any investigation report.⁴⁹ These extend to a possible recommendation that the Commissioner pay monetary compensation to a taxpayer.

⁴⁴ Above n 41, 11.

⁴⁵ As noted by Wheelright, above n 43, at 69, compensation may be available through the ATO's internal dispute resolution mechanisms in cases of serious maladministration such as extraordinary delay or misleading advice - but this possibility remains purely at the discretion of the ATO. This issue is discussed further in section 5 of this article.

⁴⁶ For example, at page 6 of his 2006 report, Office of the Commonwealth Ombudsman, *Activities 2006* (2007), the Commonwealth Ombudsman expressly notes the perceived inadequacy of the existing range of remedies: 'Many of the people who approach the Ombudsman's Office are frustrated that the system is seemingly unable to provide them with the resolution and remedies that they are seeking.'

⁴⁷ 'Department' is defined as a Department within the meaning of the *Public Service Act 1999* (Cth). Section 7 of the *Public Service Act* excludes from the meaning of that term any body that is a statutory agency. Section 4A of the *Taxation Administration Act 1953* (Cth) confirms that the Commissioner of Taxation and his employees are a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth).

⁴⁸ 'Prescribed authority' is relevantly defined in s 3(1) of the *Ombudsman Act 1976* (Cth) as including a body established for a public purpose by or in accordance with the provisions of an enactment. The Australian Taxation Office constitutes a 'prescribed authority' by virtue of the clearly public role which the office of the Commissioner of Taxation fulfils.

⁴⁹ In accordance with s 15 of the *Ombudsman Act 1976* (Cth).

Nevertheless, any finding by the Commonwealth Ombudsman that the Commissioner should pay compensation to an aggrieved business taxpayer is not enforceable.⁵⁰ The sanction for ensuring the adoption of Commonwealth Ombudsman recommendations is the threat of adverse publicity. This is usually a sufficient incentive⁵¹, however Bentley has questioned the perceived effectiveness of this sanction in the taxation context:

There is a perception among taxpayers that bad publicity would seldom in fact prevent any revenue organisation from exercising its powers to the fullest extent possible when it felt it was in the right, whatever the rights of the taxpayers involved.⁵²

If this perception accords with reality, the ramifications for business are significant. This is because, while Ombudsman investigation may generate a positive result for a business taxpayer, such a result cannot be predicted or budgeted for – even where the taxpayer is confident that the Ombudsman will recommend the payment of compensation.

3.3 Recovering Compensation via ATO Internal Complaints

The ATO makes passing reference to the government policies and ATO administered mechanisms for dealing with monetary compensation claims in the Taxpayers' Charter. The booklet Taxpayers' Charter – What You Need to Know contains the following statement:

In some circumstances, you may be entitled to be paid compensation. If you feel that our actions have directly caused you to suffer a financial loss, contact our toll-free compensation assistance line... For more information about compensation and when it may be available, visit our website at www.ato.gov.au and search for 'Compensation'.⁵³

The Commissioner has also released a publication, 'Applying for Compensation', which elaborates on the availability of taxpayer compensation through direct approach

⁵⁰There is occasional resistance to the Ombudsman's recommendations, particularly where compensation is recommended. Sir Anthony Mason has observed that: 'Although the Ombudsman appears to have become a permanent feature of the federal landscape, he has stated that there is an unwillingness on the part of some federal agencies to implement his recommendations, notably for the payment of ex gratia compensation.' Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1988-1989) 18 Federal Law Review 122, 123.

⁵¹Section 16 of the *Ombudsman Act 1976* (Cth) entitles the Commonwealth Ombudsman to inform the Prime Minister of the failure of an authority to take action recommended by the Commonwealth Ombudsman within a reasonable time. Further, reports of the Commonwealth Ombudsman are to be tabled before Parliament in accordance with s 19 of the *Ombudsman Act 1976* (Cth).

⁵²Duncan Bentley, above n 43, 23.

⁵³Australian Taxation Office, *Taxpayers' Charter – What You Need to Know*, above n 41, 11.

to the ATO.⁵⁴ This specifies two general circumstances in which a claim for compensation can be made:

- compensation for legal liability (for example, negligence), or
- compensation under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme).⁵⁵

Where legal liability is alleged, there are a number of circumstances in which compensation might be paid.⁵⁶ These include negligence in the provision of tax advice to taxpayers, claims arising out of contracts with service providers, claims for breaches of privacy or for discriminatory actions or employment-related disputes such as industrial actions.

Where payments are sought for defective administration in circumstances other than those which give rise to legal liability to the taxpayer, the Commissioner will provide compensation in accordance with the principles of the Scheme for Compensation for Detriment caused by Defective Administration ('CDDA Scheme').⁵⁷

In the event that cases do not fall under the CDDA Scheme⁵⁸ or give rise to relief by virtue of established grounds of legal liability an 'act of grace' payment can be sought. The Commissioner's publication *Claiming Compensation*⁵⁹ explains 'act of grace' payments:

The act of grace power is a unique discretion given to the Minister for Finance and Administration to make payments to people who may have been unintentionally disadvantaged by the effects of Australian Government legislation, actions or omissions and who have no other way to make a claim.

⁵⁴ *Applying for Compensation*, NAT 11669 (2009)

<<http://www.ato.gov.au/corporate/content.asp?doc=/content/48904.htm>> at 11 April 2011.

⁵⁵ *Ibid*, 1.

⁵⁶ The ATO define compensation claims for allegations of legal liability consistent with the *Legal Service Directions 2005* issued by the Attorney-General under s 557F of the *Judiciary Act 1903* (Cth). See Attorney-General's Department, Commonwealth of Australia, *Legal Service Directions 2005* (2005).

⁵⁷ This scheme is not unique to the ATO - it is an Australian Government scheme administered by the Minister for Revenue. For a detailed discussion of the Scheme, see Department of Finance and Deregulation, Commonwealth of Australia, Department of Finance and Deregulation, Commonwealth of Australia, Finance Circular No 2006/05 (2006) issued to all agencies under the Financial Management and Accountability Act 1997 (Cth) by the Department of Finance and Administration.

⁵⁸ Under the CDDA Scheme 'defective administration' is defined as: a specific and unreasonable lapse in complying with existing administrative procedures; an unreasonable failure to institute appropriate administrative procedures; an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official's power and knowledge to give (or reasonably capable of being obtained by the official to give); or giving advice to (or for) a claimant that was, in all the circumstances, incorrect or ambiguous. Finance Circular No 2006/05, *ibid*, 14. This is a direct reproduction of the definition as described in paragraph 23 of the CDDA Scheme itself.

⁵⁹ Australian Taxation Office, *Claiming Compensation*, NAT 11668 (2009)

<<http://www.ato.gov.au/corporate/content.asp?doc=/content/48878.htm>> at 6 February 2009. This document is still referred to in the Commissioner's Application for Compensation form, however does not appear to be available via the Commissioner's website or for order. A search for its title and its NAT catalogue number reveals no trace. Consequently, it is unclear whether the document is still current.

The act of grace power should be seen as a remedy that may only be applied in special circumstances to ensure consistency and equity in the impact of Government activities.⁶⁰

All this has a number of implications for business taxpayers with compensation claims. First, to the extent that a claim flows from a formal legal wrong, the same limitations on relief that apply in respect of the relevant formal legal wrong alleged (eg negligence) would equally apply as a constraint on potential recovery of compensation through the ATO's Internal Complaints mechanisms. As discussed in section 2 of this article, these constraints can be significant. Further, assuming the Commissioner is aware of these significant limitations there is little incentive for the Commissioner to be receptive to the taxpayer's claim in any settlement negotiations.⁶¹

Where recovery does not turn on demonstrating legal liability, the 'defective administration' and 'act of grace' avenues of informal relief hold much better prospects for recovery. However, there is no precedent, guide or assurance which can be relied upon by business to assess the prospect of a successful claim. The Department of Finance describes the CCDA Scheme as based on 'general principles' rather than 'prescriptive rules'.⁶² Ex gratia payments, in particular, are acknowledged as not having pre-set criteria in the same way as other discretionary schemes⁶³ and as being based on 'moral' rather than 'legal' obligation.⁶⁴ Accordingly, it is difficult for businesses to plan, budget or predict a likely outcome or quantum utilising these compensatory mechanisms.

The preceding analysis reveals that, despite a number of shortcomings, the non-judicial avenues of relief raise significantly better prospects than judicial avenues of relief for businesses seeking to recover compensation from the Commissioner of Taxation. All of the non-judicial avenues of relief have the scope to apply to a broad range of factual circumstances giving rise to a compensation claim. There are advantages over court action in terms of cost, simplicity and procedural flexibility and informality.⁶⁵ These advantages are significant.⁶⁶ Further, there is no evidence of any

⁶⁰ Ibid, 3. The payments are authorised under s 33 of the *Financial Management and Accountability Act 1997* (Cth). At page 4, *Financial Circular No 2006/05*, above n 57, describes the circumstances in which 'act of grace' payments are payable. Notably, the circumstances under which a payment may be made extend to situations where the claim is a moral claim rather than a legal claim and can extend to cover both economic and non-economic losses sustained.

⁶¹ According to the Commissioner's publication, *Applying for Compensation*, above n 54, the Commissioner will seek independent legal advice whenever a claim is for more than \$10,000. Accordingly the Commissioner will almost certainly be provided with advice which gives a realistic assessment of the prospects of a taxpayer's formal legal claim succeeding (eg a claim alleging negligence) and this will inform the Commissioner's negotiations with the taxpayer.

⁶² *Finance Circular 2006/05*, above n 57, 3.

⁶³ Ibid, 6.

⁶⁴ Ibid, 11. It could be argued that allowing recovery of compensation in the absence of demonstrated legal liability breaches the Rule of Law by replacing it with non-legal values. An argument to this effect is advanced by Edwards. See Harry Edwards, 'Alternative Dispute Resolution: Panacea or Anathema' (1985) 99 *Harvard Law Review* 668, 678.

⁶⁵ It is conceded that the non-judicial avenues of relief hold a clear advantage over formal private law causes of action in each of these respects. For example, see The Law Commission, United Kingdom, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008), in which the

policy of reluctance to recognise any private law duties of the Commissioner which, as revealed in section 2 of this article, fetters application of the judicial alternatives. Recovery is also possible based upon ‘moral’ justification rather than formal legal liability.

However, there are inherent uncertainties that are associated with the informal and discretionary nature of these non-judicial avenues of relief.⁶⁷ There are also real doubts that remain about the suitability of these avenues of relief for determining business taxpayer claims. Section 4 of this article explores the reasons for these doubts.

4. THE SPECIAL DISADVANTAGES OF BUSINESS TAXPAYERS IN CLAIMING COMPENSATION FOR TAX OFFICIAL WRONGS

The preceding analysis of the various options available to businesses for pursuing compensatory relief for tax official wrongs reveals that the non-judicial avenues of relief are the only broad-based realistic alternatives. The judicial alternatives have all had their potential utility significantly restricted by judicial interpretation. As illustrated in section 2 of this article, judges typically summarily deny relief on the basis of an assumption that the duties of the Commissioner are owed exclusively to the Crown. This is despite the absence of any express legislative statement to that effect or any real attempt at elaborating an alternative justification for this stance. As a consequence the judicial view is that there is generally no room for imposing on the Commissioner common law or equitable duties to taxpayers.⁶⁸

UK Law Commission note, at [3.10], that court-based systems are at a disadvantage relative to non-court dispute resolution mechanisms due to the characteristically expensive and time consuming nature of court processes. For similar conclusions see also W P Jeffries, ‘ADR: The Advantages and Disadvantages from a Legal Viewpoint’ (1992) 18 *Commonwealth Law Bulletin* 763. The Australian Law Reform Commission notes the Australian research on the issue in *Adversarial Background Paper 2: Alternative or Assisted Dispute Resolution* (1996). For a challenge to the generally accepted views of speed and time savings associated with informal dispute resolution mechanisms see James Kakalik *et al*, *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* (1996).

⁶⁶It is easy, though, to be seduced into viewing ‘efficient and inexpensive dispute resolution as an important societal goal, without regard for the substantive results reached.’ Sir Anthony Mason, ‘From Procedure to Substance and Refinement of Legal Principle’ (1995) 7 *Singapore Academy of Law Journal* 253, 257. As Korteling has observed, the primary goal in resolving tax disputes should be the fostering of ‘good tax administration’ - not simply the efficient and expeditious resolution of disputes. See David Korteling, ‘Let Me Tell You How it Will Be: Here’s One for You and Nineteen for Me: Modifying the Internal Revenue Service’s Approach to Resolving Tax Disputes’ (1993) 7 *Administrative Law Journal of the American University* 659, 684.

⁶⁷Addressing these uncertainties is a key motivation for the call for legislative reform of business taxpayer rights to compensation for tax official wrongs set out in section 5 of this article.

⁶⁸Underlying this judicial approach are concerns that to impose common law duties on the Commissioner would see courts engaged in determining matters which were not intended by the legislature to be justiciable. In effect, there is an underlying policy concern not to offend the separation of powers. For comprehensive discussion see John Bevacqua, ‘The Duties of Tax Commissioners: The Sustainability of the General Judicial Denial of any Tortious or Equitable Duties to Australian and New Zealand Taxpayers’ (2009) 4 *Journal of the Australasian Tax Teachers Association* 95.

At first glance this places business taxpayers in a position no worse than other taxpayers. The Commissioner simply enjoys significant protection from suit in taxpayer damages actions - irrespective of the nature of the taxpayer plaintiff.⁶⁹ However, examined more closely, business taxpayers are more likely to be disadvantaged by having to rely on non-judicial avenues for recovery of compensation than other taxpayers. This is because the nature of business compensation claims makes them ill-suited to resolution through non-judicial means.

First, business compensation claims will often raise serious and/or complex legal issues. Such claims are ill-suited for resolution by non-judicial means. It has, in fact, been argued that it is 'necessary' and 'vital' that such claims are resolved through court action.⁷⁰ Underpinning the complexity in taxpayer compensation claims are important public law considerations such as weighing up the public duties of the Commissioner of Taxation against any private law duties owed to taxpayers or particular classes of taxpayers. Informal discretionary avenues of relief are especially inappropriate vehicles for resolving this public/private duty trade-off.⁷¹

It could be argued that the non-judicial avenues of relief will be entirely suitable for addressing business taxpayer claims for compensation from the Commissioner of Taxation once this public/private duty trade-off has been resolved (either judicially or through legislative action).⁷² It is clear, however, from the exposition of the current state of the law in the preceding sections of this paper that these issues are presently far from settled in Australia.

Large quantum claims are also better suited to judicial determination. Business taxpayer disputes will more often involve large quantum than individual taxpayer claims. Goldstein has observed that:

An individual with a small amount at stake in a dispute...is likely to seek a more expedient and less-expensive resolution technique. Conversely, a party with a large financial stake in a transaction may be more willing to resort to litigation to protect his investments.⁷³

Testament to this reality is the fact that almost all the reported cases of taxpayers suing the Commissioner for compensation have involved business taxpayers.

⁶⁹This article makes no judgment on whether this is appropriate or desirable. This would undoubtedly be a fertile matter for further and independent investigation. This article clears the way for such further investigation.

⁷⁰The UK Law Commission, for example, has observed that '[f]or making findings of negligence and awarding complex and structured damages, civil courts are normally appropriate. If these are the types of remedies required by claimants, then access to the court is necessary and it is vital from the point of view of both the claimant and the respondent...' Above n 65, [3.93].

⁷¹Some writers have gone so far as to describe the use of non-judicial avenues for resolving these difficult public/private law conflicts as 'wholly inappropriate'. Harry Edwards, above n 64, 672.

⁷²An general argument to this effect outlining the role of non-judicial avenues of relief in these circumstances is posited by Killefer in Campbell Killefer, 'A Hard-Nosed Look at Costs, Benefits of Pursuing ADR' (1993) 3(4) *Experience* 37.

⁷³Bernard Goldstein, 'Alternatives for Resolving Business Transaction Disputes' (1984) 58 *St Johns Law Review* 69, 74.

Even if a business taxpayer compensation claim does not raise important or complex legal issues and is not for a large quantum, business taxation arrangements more frequently raise complex factual questions than individual taxpayer claims. Courts are arguably also the most appropriate forum for resolving these questions.⁷⁴ The reasons include the fact that evidence is typically recorded in written form enabling close analysis and scrutiny and witnesses can be cross-examined on the factual complexities.⁷⁵ Most pertinently, however, courts are well-versed in resolving complex factual questions of causation, fault and assessment of damages.⁷⁶

Such complex factual questions are especially difficult to answer where a taxpayer's claim is for pure economic loss because economic loss claims are 'frequently the result of complex human relationships where the effects of any action can be particularly unpredictable.'⁷⁷ Further, economic loss claims raise particularly acute public policy concerns about 'floodgates and the fettering of decision-making and the creation of heavy demands on public funds.'⁷⁸ Business taxpayer compensation actions are most likely to include pure economic loss claims – typically centred on losses of profit and/or losses of business opportunities. Again, therefore, the absence of a realistic court-based or other formal legal mechanism for resolving compensation claims particularly disadvantages business taxpayers.

It is difficult to foresee any shift in judicial attitudes which would correct this disadvantage through significantly increasing business taxpayer prospects of recovering compensation from the Commissioner via any of the judicial avenues examined in this paper. The important implication is that any clarification or expansion of taxpayer rights to compensation from the Commissioner will need to be driven by legislative action. Section 5 of this article advances this argument.

5. STATUTORY REFORM OF BUSINESS TAXPAYER RIGHTS TO COMPENSATION FOR LOSS CAUSED BY TAX OFFICIAL WRONGS

Business taxpayers should not expect success in every compensation claim for loss caused by tax officials. They are, however, entitled to expect to be able to pursue their claims via avenues which are appropriate for resolving them and which hold some realistic and predictable prospects of recovery. The preceding sections of this paper have demonstrated that, due to the absence of any realistic judicial avenue for

⁷⁴It is conceded that not everyone agrees with this viewpoint. See, for example, Barry Boyer, 'Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues' (1972) 71 *Michigan Law Review* 111.

⁷⁵Cross-examination is especially seen as a critical safeguard for ensuring complex factual matters are resolved in a fair and just manner. It has been described as 'the greatest legal engine ever invented for the discovery of truth.' Hein Kotz, 'Civil Justice Systems in Europe and the United States' (2003) 13 *Duke Journal of Comparative and International Law* 61, 62.

⁷⁶For detailed discussion of the merits of use of judicial hearings where complex or genuine and substantial issues of fact are raised see J. Skelly Wright, 'The Courts and the Rule-Making Process: The Limits of Judicial Review' (1974) 59 *Cornell Law Review* 375, especially at 384.

⁷⁷The Law Commission, United Kingdom, Above n 65, [4.60].

⁷⁸*Ibid*, [4.61] citing Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (2006).

recovery and the unsuitability of the non-judicial avenues of relief for resolving business compensation claims, this expectation is not presently being met.

Further, the discretionary and informal nature of the non-judicial avenues of relief does little to provide clarity and certainty as to the entitlements to compensation of business taxpayers for losses caused by tax official wrongs. The absence of any express statutory directive to confirm the correctness of the judicial preclusion of private law compensatory relief in almost every situation on the grounds that the Commissioner's duties are owed exclusively to the Crown also adds to the uncertainty and lack of clarity.

These findings make a strong case for legislative intervention. The goal of this legislative intervention should be to address the current practical disadvantage of business taxpayers in claiming compensation from the Commissioner. To this end, any legislative instrument should encompass two interrelated primary objectives:

- Definition of the proper scope of application of existing judicial avenues of compensatory relief by defining if and when the Commissioner owes private law duties to taxpayers ; and
- The provision of greater general clarity and certainty as to business taxpayer rights to compensation through a formal statement of those rights.

The balance of this section explains how these interrelated objectives will aid in fostering a relationship of business trust and confidence in our system of tax administration and should, therefore, be pursued with or without any accompanying explicit policy determination to dramatically expand business taxpayer rights to compensation.⁷⁹

5.1 Legislating to Define the Commissioner's Private Law Duties to Taxpayers

If business taxpayers are to be denied compensatory relief for ATO caused losses – as is presently the case in private law court actions - the reasons for any such denial should be fully explained and understood. This explanation and understanding is lacking in the current unquestioned acceptance by the judiciary that the duties of the

⁷⁹There are a number of intuitively logical reasons which could be argued both for and against such a move. For example, the Commissioner could oppose the move through arguing that any extension of liability would open the floodgates to litigious taxpayers and see the Commissioner involved in a large and possibly indeterminate number of claims. In particular, this concern is a central consideration in cases involving claims for pure economic loss. The use of this argument to resist extension of taxpayer rights in Australia is comprehensively discussed by the author in John Bevacqua, above n 68. Conversely, taxpayers could argue that the increased efficiencies in ATO functioning which would result from greater exposure to liability to taxpayers would outweigh any possible counter-arguments. For a comprehensive general discussion of such an argument see Lachlan Roots, 'A Tort of Maladministration: Government Stuff-Ups' (1993) 18 *Alternative Law Journal* 67. The resolution of this controversy is beyond the scope of this article and is a challenge most appropriately left to the legislature.

Commissioner are owed exclusively to the Crown. This view may be correct but there is presently no express legislative backing for it.⁸⁰

Further, no judge has explained the reasons for deviation in tax cases from application of the usual private law principles for determining when public authorities owe duties to citizens.⁸¹ At a minimum, therefore, there is also a role for legislative clarification to either confirm or reject this judicial approach.

Any such legislative clarification would serve to confirm the boundaries of acceptable tax administration behaviour toward business taxpayers. Any resultant recognition that the Commissioner owes some private law duties to taxpayers would restore the operation of compensation as a signalling mechanism for those boundaries of acceptable tax administration behaviour. Such a legislative move would consequently serve as a valuable aid in maintaining the legitimacy⁸² and acceptability of the tax collection function of the Commissioner in the eyes of the business community.

Further, such legislative action could correct any current ‘feelings of frustration and alienation which breed adversity between individuals and institutions’⁸³ stemming from the current denial of effective private law avenues of compensatory relief. If this is true, statutory clarification and confirmation of the availability of private law compensatory relief may also help to avoid ‘overtly adversarial relations’⁸⁴ between business taxpayers and the Commissioner.

For example, the Commissioner might presently be well-advised to adopt an aggressive and adversarial approach to non-judicial settlements, safe in the knowledge that recourse to the courts for aggrieved business taxpayers presently holds little prospect of success. Statutory clarification and confirmation of the availability of private law compensatory relief for business taxpayers could remove the attraction of such an aggressive and adversarial stance.⁸⁵

⁸⁰See the discussion in section 2 of this article and above at n 40.

⁸¹For example, in the case of the tort of negligence, the scope of any duty of care of public bodies in Australia has historically been determined through application of a guiding principle or approach such as the ‘policy/operational dichotomy’ (for example, see the judgment of Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424), various proximity-based approaches (for example, see the approach of Deane J in *Jaensch v Coffey* (1983) 155 CLR 549) and, more recently, through the consideration of various public policy issues as part of an explicit preference for an ‘incremental approach’ to determining novel or difficult tortious actions (the rationale for which was described by Brennan J in *Sutherland Shire Council v Heyman*). Each of these approaches require consideration and weighing up of a range of issues around the nature of the complained of activity, the relationship between the citizen and the relevant authority and the many public policy ramifications which might be relevant to the determination of the existence or otherwise of a duty of care.

⁸²Goodin discusses at length the general role compensation can play in the legitimisation of various government activities. See Robert Goodin, ‘Theories of Compensation’ (1989) 9 *Oxford Journal of Legal Studies* 56.

⁸³*Ibid.*

⁸⁴Richard Miller and Austin Sarat, ‘Grievances, Claims, and Disputes: Assessing the Adversary Culture’ (1980-81) 15 *Law Society Review* 525, 565.

⁸⁵It could, of course, be argued that such legislation might simply create incentives for taxpayers to be more aggressive through clarifying or improving their prospects of recovery. However this is a matter that could be addressed through considered drafting of any legislative statement to ensure a reasonable

To the extent that such legislative action might encourage the use of formal reported avenues for business taxpayer recovery of compensation from the Commissioner it would also enhance business trust and confidence in our system of tax administration by making it easier to assess the Commissioner's performance in his interactions with business taxpayers.⁸⁶ Given that currently most compensation claims are resolved via confidential settlements or other unreported means, it is presently difficult to independently assess ATO performance by measuring the incidence or severity of loss causing mistakes or wrongs by tax officials.

This lack of transparency does little to foster taxpayer trust. In fact, it may serve to erode trust by raising suspicions that via confidential settlements and other unreported resolutions of claims the Commissioner is presently 'purchasing illegality',⁸⁷ or that the Commissioner may be using informal resolutions of claims as a 'tool for diminishing the judicial development of legal rights.'⁸⁸

5.2 Legislating for General Clarity and Certainty of Business Taxpayer Rights

Beyond the clarification of business taxpayer private law rights to compensation via court action, there is a role for legislation to play in resolving a number of the general uncertainties stemming from the current heavy dependence on discretionary non-judicial avenues of compensatory relief. This clarification is also likely to bring about worthwhile benefits in terms of engendering greater business taxpayer trust and confidence in our system of tax administration.⁸⁹ In turn, this is likely to lead to increased business taxpayer compliance.⁹⁰

For example, any legislative clarification which would more precisely specify the circumstances in which compensation will be available for losses caused by the wrongs of tax officials would enhance business trust and confidence by eliminating

confinement of any rights to recover compensation from the Commissioner. It is not a sufficient argument for outright opposition to any legislative action.

⁸⁶It might also lead to positive improvements in standards of service delivery of the ATO. For a forceful exposition of this type of argument see Lachlan Roots, above n 79.

⁸⁷Carol Harlow, *State Liability: Tort Law and Beyond* (2004), 105.

⁸⁸Harry Edwards, above n 64, 679.

⁸⁹The Commissioner has been keen to foster taxpayer trust and confidence in recent times. For example, the Commissioner in his foreword to the *Taxpayers' Charter* observes that: 'We want to manage the tax system in a way that builds community confidence. To do this, we need to have a relationship with the community based on mutual trust and respect.' Michael D'Ascenzo, *Commissioners Foreword - Taxpayers' Charter* (2009), Australian Taxation Office, <<http://www.ato.gov.au/corporate/content.asp?doc=/content/25824.htm>> at 5 April 2011.

⁹⁰The link between trust and confidence in tax administration systems and taxpayer voluntary compliance has been investigated in Australia. See Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders' (2004) 28 *Law and Human Behaviour* 187; and Kristina Murphy, 'Procedural Justice and Tax Compliance' (2003) 38 *Australian Journal of Social Issues* 379. Murphy's conclusion is that a clear link exists, on the basis that if taxpayers 'perceive an authority to be acting fairly and neutrally, and they feel treated with respect and dignity, they will be more willing to trust that authority and will voluntarily obey and defer to its decision and rules.' See Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders' (2004) 28 *Law and Human Behaviour* 187, 190. Similar results have been found in overseas studies. See, for example, John Scholz and Mark Lubell, 'Trust and Taxpaying: Testing the Heuristics Approach to Collective Action' (1998) 42 *American Journal of Political Science* 398.

any possible allegations of bias which could be directed at the present system, with its heavy dependence on discretionary self-enforced mechanisms such as the Taxpayers' Charter and appeal to ATO Internal Complaints.⁹¹ The ATO are keen to dispel such allegations.⁹² However, the potential for a perception of impartiality to be associated with any self-administered or government-administered system for monetary compensation clearly remains.⁹³ This is enough to erode taxpayer trust and confidence.

In general terms the elimination of the uncertainty associated with a system of business taxpayer rights to compensation which turns almost exclusively on uncertain discretionary avenues of relief has much to recommend it. Uncertainty has been linked to taxpayer non-compliance⁹⁴ and its elimination features prominently as a core underlying value of any model of a desirable tax system.⁹⁵

The uncertainties inherent in the present system of discretionary self-administered avenues of compensatory relief which could be addressed by a formal legislative statement of business taxpayer rights to compensation are readily apparent. For example, with mechanisms such as the ATO Internal Complaints and the Taxpayers' Charter, the ATO decides on the scope of application of the remedy and the levels of compensation available. They can change the criteria or withdraw the avenue of relief entirely. Interpretation of the eligibility criteria for relief is also at the whim of the Commissioner.⁹⁶ These uncertainties erode business trust and confidence in our

⁹¹See, for example, the comments of Wheelright in Karen Wheelright, 'Taxpayers Rights in Australia' (1997) 7 *Revenue Law Journal* 226, 240-241.

⁹²This is consistent with the intent of the CDDA Scheme as set out in Department of Finance and Deregulation, Commonwealth of Australia, *Finance Circular No 2006/05* (2006), above n 56, which specifies, at 11, that 'decisions should be taken impartially.' The Commissioner does appear to have taken this approach to heart if the data cited by the Commonwealth Ombudsman is credible: 'Tax complainants should be especially encouraged to know that between 50 and 66 per cent of all complaints handled by ATO Complaints are either fully or partially upheld in the complainant's favour.' Office of the Commonwealth Ombudsman, *Activities 2005* (2006), 6.

⁹³Bentley, in the context of calling for a binding *Taxpayers' Charter*, has alluded to the cynicism such self-administered mechanisms for taxpayer recovery can generate among taxpayers: 'Taxpayers could be forgiven for taking a cynical attitude towards a charter which purports to uphold their rights against the ATO, where the author and interpreter of the charter, and the primary judge as to when breaches have occurred, is the ATO itself.' Duncan Bentley, above n 43, 21.

⁹⁴For example, Schuck has pointed out, whilst acknowledging the absence of empirical research into the issue, that '[t]axpayers bewildered by tax law's complexity and uncertainty appear more likely to violate it.' Peter Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 *Duke Law Journal* 1, 23-24.

⁹⁵For example, Bentley in his survey of the various international attempts to define the basic values underpinning desirable tax systems identifies twelve different such attempts - nine of which include some direct reference to certainty and/or simplicity as desirable traits. See Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (2007), 62-64. The Bentley list includes perhaps the most often cited characterisation of principles of a good tax system; the list of Adam Smith. The Smith list consists of certainty, convenience, economy and equity. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* in Robert Heilbroner (ed), *The Essential Adam Smith* (1986). Bentley confirms, at 67, that 'certainty and simplicity are two of the most favoured, yet most elusive, qualities of any tax system.'

⁹⁶For similar criticisms made in the context of discussion of ex gratia compensation schemes generally see the UK Law Commission, above n 65, [3.49].

system of tax administration. They also leave taxpayers and their advisers with the almost impossible task of predicting the outcome of any claim.⁹⁷

Recent changes to the Taxpayers' Charter illustrate the point. The Commissioner in the current iteration of the Charter has removed a number of express references to rights to compensation which were contained in previous Charter publications. For example, the superseded publication *Taxpayers' Charter – Expanded Version* expressly referred to a right to compensation for financial loss or other damage suffered 'as a result of relying on misleading or incorrect advice or information',⁹⁸ from the ATO. There is no equivalent statement in the current suite of Charter publications. It is unclear whether this indicates a change in the Commissioner's attitude to taxpayer rights to compensation.

The CDDA Scheme and the Commonwealth Ombudsman at least take the decision to make such changes out of the hands of the Commissioner. Nevertheless, all aspects of entitlement to compensation remain at the discretion of the administering authority. Hence they also fall far short of providing the certainty and consequent taxpayer confidence that a statutory pronouncement of business taxpayer rights to compensation could provide.

6. CONCLUSION

This article has shown that there are no judicial avenues for businesses seeking to recover compensation from the Commissioner of Taxation with any realistic prospects of success. The judicial options for recovery all have very limited scope of application, either by virtue of the elements required to prove them or the general judicial reluctance to impose private law duties on the Commissioner. There is no evidence of any judicial inclination to adopt a less-restrictive approach to the applicability of private law avenues for recovering compensation from the Commissioner of Taxation.

This article has also shown that non-judicial discretionary avenues of relief, while promising reasonable prospects for recovery, are no substitute for the absence of a realistic judicially-enforceable option for business taxpayer claims for compensation.

⁹⁷ Some of these arguments have been raised to support the call for a legislatively binding Charter of Taxpayer Rights in Australia. See, for example, the comments of Russell in David Russell, 'Brave New World - Dawn Rises on Tax Rights' (1994) 29 *Taxation in Australia* 176.; McClellan in Margaret McClellan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review* 22; and the views expressed in Taxation Institute of Australia, 'Taxpayers' Bill of Rights' (1993) 28 *Taxation in Australia* 50. See also the sources cited above at n 43. For general discussion of the need for charters of rights to be endowed with binding legislative force see Simon James, Murphy Kristina and Reinhart Monika, 'The Citizens' Charter: How Might such Initiatives be more Effective?' (Working Paper 65, Australian National University, 2005); Nicholas Deakin, 'Accentuating the Apostrophe: The Citizen's Charter' (1994) 15 *Policy Studies* 48; and Gavin Drewry, 'Whatever Happened to the Citizen's Charter?' [2002] *Public Law* 9.

⁹⁸ Australian Taxation Office, *Taxpayers Charter – Expanded Version*, Nat 2547 (2007) at 9 stated: 'If you sustain financial loss or other damage as a result of relying on misleading or incorrect advice or information from us, you may be eligible for compensation or other redress.' This statement is nowhere to be found in the current version of the Charter. The publication *Taxpayers' Charter – What You Need to Know*, above n 41, merely states that if ATO information is incorrect or misleading 'we will take that into account when determining what action, if any, we or you should take.'

Non-judicial discretionary avenues of relief are unsuitable for resolving many business taxpayer claims. In particular, the existing non-judicial options for recovery are inappropriate for resolving business claims which are factually complex, are for large quantum and/or raise serious legal questions. Thus, in such cases, business taxpayers are left with no suitable remedy.

In light of these findings, this article advocates legislative intervention to clarify the legal rights of business taxpayers to compensation for wrongs of tax officers. Two measures are specifically called for – clarification of the Commissioner's private law duties to taxpayers and a legislatively binding general pronouncement of business taxpayer rights to compensation.

It is conceded that this legislative intervention is likely to bring about an incidental extension of business taxpayer rights to compensation for tax official wrongs. However, this paper has not sought to advocate for any per se extension of business taxpayer rights to compensation.⁹⁹ Instead, this paper has called for legislation principally aimed at providing a clear backdrop of legal rules for determining business taxpayer compensation claims. This paper has demonstrated that there are likely to be significant benefits in terms of fostering business taxpayer trust and confidence in our system of tax administration which, of themselves, justify this type of legislative clarification.

In short, this article has stressed the importance of business taxpayer compensation claims for loss caused by tax official wrongs being dealt with in a clear and legally certain environment. This is a minimum requirement for fostering an environment of business confidence and trust in our tax administration system. It is also a minimum requirement for the proper administration of justice.

The reform recommendations in this paper undoubtedly burden legislators with the responsibility for dealing with difficult questions of public policy, taxpayer rights and tax administration standards. It is clear, though, that legislators ultimately need to take the lead in dealing with these issues rather than leaving judges, the Commonwealth Ombudsman and the Commissioner himself to operate largely in a legislative vacuum in determining business taxpayer compensation claims.

This legislative vacuum has allowed the inadequacies in the current system for compensating business taxpayers for losses caused by the wrongs of tax officials exposed by this paper to flourish. This article provides a primer for the filling of that vacuum. From this position we are less likely to see any further unconscious 'erosion of civil rights in the name of exaction of taxes'¹⁰⁰ in cases of wrongs of tax officials which cause business taxpayer loss.

⁹⁹Debate about the extent to which private law compensatory rights of taxpayers should be permitted to impinge upon the important statutory duties and responsibilities of the Commissioner is rightly left to the legislature. As noted above at n 69, this would undoubtedly be a fertile matter for further and independent investigation. This article flags the path for such further investigation without attempting to cover that territory.

¹⁰⁰D G Hill, 'What do we Expect from Judges in Tax Cases?' (1995) 69 *Australian Law Journal* 992, 1005.