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Twenty years after the introduction of the Australian Taxpayers' Charter this article reviews its purpose, its development and its sufficiency to meet future challenges. It outlines, in the context of developments in compliance theory, the Charter's important role in developing trust between taxpayers and the Australian Taxation Office. However, the article outlines future challenges and identifies the growing importance of research into a balanced legal and compliance framework.

## 1. INTRODUCTION

Twenty years ago, I set out a framework for formulating a Taxpayers' Charter of Rights.<sup>2</sup> My proposition was that the nature of any charter is complex and the final product will always depend both on what the drafters are trying to achieve and how they go about achieving it. The Australian Taxpayers' Charter (the Charter) has probably achieved far more than its drafters anticipated.<sup>3</sup> Its nature and content has also gone beyond initial expectation.

However, its effect remains constrained by its formulation as an administrative statement. As a standard bearer for the infusion of a service culture into the tax administration; as a support for the effective implementation of increasingly sophisticated compliance frameworks; as a basis for engaging more effectively with taxpayers in how the tax administration should operate: it has undoubtedly fulfilled its purpose. And that may have been quite adequate for the Australian tax system.

The Charter has done little to extend or clarify legal rights. That is not to underplay its role in developing 'soft law'.<sup>4</sup> But its function was, at most, to articulate the administrative operation of legal rights. Any extension of legal rights was specifically excluded at its introduction.

Twenty years on, is its current role still sufficient? Or should there be consideration of a different approach?

First, I outline the context for the introduction of the Charter and explore the problem it was trying to solve as one of a range of policy measures. Second, I describe its nature and how it has developed as an important element of a stable system to fulfil its objectives: first as part of the tax compliance framework; and second as part of the legal framework. Third, I outline some of the pressing challenges to tax policy and administration, and use two current challenges to illustrate how these might develop in light of the experience in other jurisdictions and undermine current stability. Fifth, I set out a framework, in which the Charter plays an integral part to address these challenges.

## 2. THE INTRODUCTION OF THE CHARTER



There was much debate as to whether it should be I



a useful tool to capture the essence of a 'strengths based' approach to regulation that supports capacity building<sup>28</sup>.

Figure 1<sup>29</sup>

by the ATO at every stage powerfully reinforce voluntary compliance through legitimating the tax system.

For example, the penalty framework has been carefully integrated with the self assessment system, particularly the rulings regime, to encourage taxpayers to enter into early dialogue with the ATO. This positive reinforcement to move taxpayers back down the pyramid can be seen in the combination of the law and ATO rulings, which both give significant discretion to the Commissioner and his staff in applying penalties and interest.<sup>32</sup> Wilful non-compliance is dealt with severely, but every effort is made to encourage back down the pyramid those who don't want to or don't care about complying.

Figure 2 sets out the business model designed to take ~~based~~ approach to managing the tag . eTT1 .7 f21232



authority: service builds trust as it supports taxpayers and builds their capacity to comply with the law. The theories also encourage the exercise of power both to enforce compliance in the interests of justice and fairness and to deter non compliance.

James, Murphy and Reinhart in 2004 argued that the Charter<sup>44</sup> moved on from a simple list of principles and become more embodied in the culture of the ATO. Over a decade later, the Charter is still clearly seen by the ATO as a fundamental component of its culture and norms. The outcomes from the Inspector General of Taxation 2015/16 review of the Charter will shed further light on whether and to what extent the ATO's perspective is shared by taxpayers.<sup>45</sup>

### 3.2 The legal framework

Australia opted for an administrative taxpayers' charter. There is no legislative charter and neither is there a combination of legislated rights supplemented by an administrative charter formulated and implemented as a complete and integrated set of rules. Nonetheless, there is legislation that protects taxpayers' basic legal rights. The question is whether the compliance and legal frameworks are mutually reinforcing.

- 9 Australia has a number of primary legal rights at the in a ha 9t15pattart foustu wha5P <<

Cases<sup>49</sup> As a result, income tax is levied by the Commonwealth and any taxpayer rights in respect of income, consumption and other Commonwealth taxes derive from Commonwealth legislation<sup>50</sup>.

None of the five explicit Constitutional rights relate directly to individual taxation<sup>51</sup>. There have been cases brought under Section 99 of the Constitution, which forbids the Commonwealth to prefer one State over another in matters of trade, commerce or revenue, to challenge disparities in effective tax rates<sup>52</sup>, but recognises causes of action for individual taxpayers are extremely unlikely<sup>53</sup>. Recently implied rights relate to freedom of speech and have limited application in income tax cases<sup>54</sup>.





enforcement, there are significant areas for the Commissioner to exercise discretion. The advantage of this is that the more stringent requirements of, for example, the Criminal Code are not applied to an administrative process. However, a wider discretion means that there is also more limited right of review for the taxpayer.

The tax law cannot set out every step of every process. Administrative rules that can change as the context changes ensure that the system can operate effectively. This goes to the heart of the issue as to whether there is a gap in legal protection. In administering the tax law, the actions and decisions of the Commissioner are subject to both legal and merits review under the Taxation Administration Act 1953 (Cth) (TAA 53), and in specific sections of the relevant taxing acts. However, there is very limited legal review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act), except for serious breaches of procedural fairness or natural justice in the making of a decision. The latter might apply where there has been a breach of the requirement to provide reasons for certain decisions, for example, a decision not to remit the general interest charge or a decision to exercise access powers.

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Australia has taken the approach that the fundamental basis of the legal system and basic human rights are protected by the Constitution and international treaties implemented through domestic legislation. Rights are further assured by the requirement for the courts to take a purposive interpretation of both statutes and the common law and to uphold the rule of law and the concepts of justice embodied within it.

However, the legal rights relevant to tax law are limited. This is understandable, as they act to curtail the State's powers to tax. The development of a robust compliance framework, supported by an ombudsman, has ameliorated the negative effects of limited legal rights for taxpayers and provided the basis for mutual trust. The question is whether this is sufficient in times of challenge.

#### 4. CHALLENGES TO TAX POLICY AND ADMINISTRATION

The Australian tax system has moved from the highly antagonistic relationship between taxpayers and tax administrators in the 1970s and 1980s to a stable service environment that has strengthened incrementally since 2000.



and will impact on how revenue authorities and other agencies will need to act.<sup>87</sup>

6. The unanticipated disruption of the digital era, ranging from political uprisings, cybercrime and cyber warfare, to undreamed of capacity to transfer and use big data is almost impossible to model at scale and is therefore largely ignored beyond incremental change based on the known.
7. The extent of future economic constraint and difficulties in assuring the national tax base in the face of the growth of corporate and individual mobility is the subject of public review and much hyperbole. However, political and public commentary remains largely uninformed, increasingly hysterical and largely ignores the inability of individual nation states to enforce their tax systems in the face of unconnected and highly competitive systems.<sup>88</sup>

The potential for global disruption is self-evident. Its impact on the tax system could significantly upset the stability of the current compliance framework. To illustrate some potential effects, I consider just two recent developments arising from the last point: increasing debate over confidentiality of information; and pressure on

both business premises and private dwellings and associated seizure of documents without a search warrant.<sup>90</sup>

As noted above, the grounds for review of the ATO's decisions under the AD(JR) Act, are largely limited to improper exercise of power or abuse of power, both of which are difficult for a taxpayer to prove. Important rights available to taxpayers are the common law right to client legal privilege, which is supported by an administrative right extending recognition of most aspects of privilege to accountants' working papers,<sup>91</sup> and protection of privacy and confidentiality of information.<sup>92</sup> However, there is no privilege against self-incrimination and<sup>93</sup> privilege does not extend to contractual and equitable obligations owed to third parties or spouses.<sup>94</sup>

The ATO uses information gathering extensively to support its compliance program and help it to manage the risk of non-compliance. It uses its search and seizure powers sparingly, concentrating on high risk taxpayers. This is an appropriate approach to managing the compliance framework and reinforces its attempt to balance the ex

compliance. Project Wickenby and the Serious Financial Crime Taskforce, described above, are consistent with this approach. As are the ATO's efforts to ensure that Australia's revenue base is not undermined by international tax fraud and evasion. Dirkis and Bondfield note this requires a range of international institutional bodies to 'develop complementary policy, administrative and legal responses' to the international institutional framework is to work effectively to 'enhance and monitor tax information exchange'<sup>98</sup>

Currently there are limited taxpayer rights and remedies in respect of information exchange. However, this is balanced in part by the limits on revenue authorities in their practical and legal ability to exercise the essential taxation administrative processes (such as information gathering) needed to counter cross border tax avoidance and evasion<sup>99</sup>

Australia's international tax treaties are supplemented by a significant number of taxation information exchange agreements based on the Organisation for Economic Cooperation and Development (OECD) process, the Joint International Tax Shelter Information Centre Network,<sup>101</sup> and the Australia and US intergovernmental agreement to implement the US Foreign Account Tax Compliance Act.<sup>102</sup>

Most agreements contain some general provisions, reflective of most OECD countries' and Australia's own requirements, for example, recognising the confidentiality of communications between a client and their admitted legal representative, and a right not to disclose trade secrets. The OECD has a comprehensive guide to the protection of information exchange for tax purposes.<sup>103</sup> However, they do not provide a taxpayer under investigation with any notification or appeal rights. They also offer the opportunity for the ATO to obtain significant quantities of data, often without the knowledge of the taxpayer or consequent recourse until it may be used.

While these measures are arguably important steps to protect the Australian revenue base, it does represent nonetheless an increasing commitment by the Australian Government and its agencies to transfer information to other jurisdictions. This in turn raises concerns that have yet to be fully considered and addressed.

The issues related to cross border information exchange are not new. They were identified by Amparo Grau Ruiz in 2003, analysed extensively by Bentley in 2007,

<sup>97</sup> Dirkis and Bondfield, above 90, 127.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid 122, citing the example, of *Jamieson v Commissioner for Internal Revenue* (2007) NSWSC 324 and *Foreign Judgments Act 1991* (Cth), ss 3(1) and 5(4).

<sup>100</sup> Art 26 Model Tax Convention on Income and Capital, <http://www.oecd.org/tax/treaties/> at 11 June 2016, Convention on Mutual Administrative Assistance in Tax Matters <<http://www.oecd.org/tax/exchange-tax-information/>> at 11 June 2016, Global Forum on Transparency and Exchange of Information for Tax Purposes, <https://www.oecd.org/tax/transparency/> at 11 June 2016.

<sup>101</sup> Described at <http://www.oecd.org/tax/forum-on-tax-administration/ftajitsicnetwork.htm> at 11 June 2016.

<sup>102</sup> Signed on 28 April 2014, the ATO has published extensive guidance material as to its operation and the obligations of Australian Financial Institutions <https://www.ato.gov.au/General/International-tax-agreements/Detail/International-arrangements/FATCA-detailed-guidance/>, (7s)4.3 v (g)2.6 (i)-6 (l)-ab(an)-10.I



confidence and self-assurance the ATO displays on issues of domestic taxation may give way to a less consistent approach to grey areas in transactions that cross borders.<sup>109</sup> Where the taxpayers involved are confined to large taxpayers with the resources to understand fully their own position, this does not necessarily give rise to increased antagonism.<sup>110</sup> On the other hand, where large groups of smaller business and individual taxpayers become part of a more uncertain tax environment, tensions can grow quickly.<sup>111</sup>









8. Provide mechanisms for monitoring, review and continuous improvement both at individual and systemic levels.

The ATO has an extensive and highly effective dispute resolution service designed to prevent most cases from escalating and resolves approximately 80% of disputes in this way, although both Mookhey and Jone argue that the system could be improved further.<sup>136</sup> When an issue does go to a court or tribunal, mandatory alternative dispute resolution, which is part of the normal tribunal and court process, results in over 80% of matters being resolved without proceeding to a formal hearing.<sup>137</sup> Add to these the Inspector General of Taxation's complaint handling powers (discussed above) and there is a comprehensive framework of arrangements already in place to give effect to an integrated legal and compliance framework that fosters early resolution of disputes.

When depicted in a pyramid similar to that used for the compliance framework, a legislative rights framework can be shown in Figure 3.

Figure 3: Legislative rights framework

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<sup>136</sup> See [https://www.ato.gov.au/AboutATO/Access/accountal5J0v3\(A\)13.3itys](https://www.ato.gov.au/AboutATO/Access/accountal5J0v3(A)13.3itys),

Mirroring the ATO's identification of key influences on taxpayer behaviour shown in Figure 2, there are a number of key influences on taxpayer perception that drive trust in the tax system. These include:<sup>138</sup>

1. Certainty
2. Consistency
3. Convenience
4. Effectiveness
5. Efficiency
6. Equity
7. Fairness
8. Non-discrimination
9. Reasonableness
10. Transparency

The danger, in failing to apply an integrated legal and compliance framework, is that when the compliance framework is challenged, as in the examples set out above, a trust gap begins to develop, which arguably triggers the movement down the 'slippery slope'.<sup>139</sup> The result would be that taxpayer perception in the trust influencers begins to decline.

An associated question arises when complex rules develop to counter increasing external and internal challenges to the tax system. Do these rules and the rules that ensure their enforcement, begin to outweigh significantly the framework of enforceable rights?<sup>140</sup> If compliance declines as complexity increases, as Richardson's study suggests, it can be argued that 'regulation and enforcement bloat' gives rise to a 'trust gap'.

As indicated in the work of Kirchler et al,<sup>141</sup> the negative effect of enforcement momentum can cope with some system failures. However, the combination of external factors placing stress on compliance and reduced resourcing internally, can soon build up pressure on the effective operation of the compliance framework. There is a danger that the trust gap will widen and result in movement from a stable, stable legal and compliance framework back to an antagonistic framework. Absent a robust legal rights framework to act as a balance to regulatory bloat and aggressive enforcement, there is a danger that the downward momentum is inevitable in the context shown in Figure 4.

<sup>138</sup> Analysed in Alley and Bentley, above n 4.

<sup>139</sup> See the UK National Audit Office Report, above n 12.

<sup>140</sup> See the work of G Richardson, 'An exploratory cross cultural study of tax fairness perceptions and tax compliance behaviour in Australia and Hong Kong' (2005) 31 *International Tax Journal* and 'Determinants of tax evasion: A cross country investigation' (2006) 15 *Journal of International Accounting Auditing and Taxation* 150.

<sup>141</sup> Above n 34

Figure 4

Thus far the calls for the legislation of taxpayer rights or for the Charter to be incorporated into a legal document have proved unnecessary. International trends and potential challenges have highlighted two concerns: one related to the undermining of basic legal rights and the other related to the impact on taxpayer rights of government and revenue authority responses to th