Address to Perth Business Breakfast
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Introduction

My sincere thanks to the Chief Justice for his generous introduction.

It is truly a great honour to be introduced by someone of your stature.

I'd also like to thank Richard Walley for his Welcome to Country, and to pay my respect to his ancestors - their history, their culture and their custodianship of the land.

It's a pleasure to be here this morning as a guest of Carmel School, and let me start by saying how fortunate the school is to have a principal of the calibre of Shula Lazar. I know Shula from her time in Melbourne and I know her to be an exceptional educator.

I don't get to Perth as often as I'd like but when I do, I am always struck by the vibrancy of the city, which has a lot to do with the vibrancy of the business community here.

So I was delighted to be invited to address this morning's gathering, and to be given free licence to talk on a topic or topics of my choice.

For anyone who knows me, it will come as no surprise that I'm going to talk about two issues that, on face value, have very little in common: good tax administration and constitutional recognition.

What they do have in common is that I care very deeply about both of these issues. And I believe that, in different ways, they both fundamentally matter to the Australian business community and the nation as a whole.

Perspectives on tax administration

I'm going to start with the tax system.

And it makes me sound a lot older than I feel to say that for almost 50 years, I've worked as a lawyer specialising in tax.

I chose tax for the constant intellectual challenge it offers, to understand and stay abreast of complex provisions of the Tax Acts.

But more than that, I chose tax for challenges that go well beyond the technical intricacies of black letter law.

The reality is that being an effective tax professional also involves layers of human interaction.

And much of that interaction is bound up in negotiating the all-too-often opaque workings of the Australian Tax Office, where I've had the privilege of working particularly closely with four Commissioners, including the incumbent.

While I've always been aware of it, an invitation to address the opening session of the Tax Institute of Australia's annual convention this year really focussed my mind on the extraordinary power that rests with the ATO in general, and the Commissioner of Taxation in particular.

I made this the theme of my address to the Institute, but not because I see any other way of protecting the nation's revenue stream, while simultaneously protecting the taxpayers who contribute to it.

The law is far too blunt an instrument to fulfil these two imperatives in a constantly changing global economy.

However, it is vitally important for tax advisers to recognise that it's not enough to understand the law. They need to recognise the vast power that rests with the Commissioner and his empire to interpret and apply the law.

This is also true for you, as business people.

Many of you would have seen recent reports on the Four Corners program and in Fairfax newspapers, alleging heavy-handed treatment of small business owners by the ATO.

The reports triggered two separate inquiries - one by Revenue Minister Kelly O'Dwyer and the other by the Inspector-General of Taxation, Ali Noroozi.

The Inspector-General issued his report just last week and, while it makes a number of criticisms of the ATO and offers some constructive suggestions on how its operations could be improved, the report concludes that allegations of systemic abuse cannot be substantiated.

I'll come back to the issue of incidental versus systemic abuse a little later.

Commissioner's powers

But first, let me outline the vast statutory power wielded by Australia's Commissioner of Taxation.

The Commissioner is vested by the Australian Parliament with the general administration of the Tax Acts.

Individual Australians who take issue with the conduct of the Tax Office in relation to their tax affairs have no direct recourse to the government, to the Treasurer or Finance Minister, or to their own member of parliament.

The Commissioner can require the production of documents, gain access to private premises, and even compel individuals to attend and give evidence about their own tax affairs or the tax affairs of others.

Even more draconian is the Commissioner's power of assessment.

Under the self-assessment regime, the full scope of this power lurks beneath the surface like a salt-water crocodile.

It would come as a surprise to most taxpayers, and perhaps some tax practitioners, that the Commissioner has almost unlimited power to assess any person to any amount at any time.

The Commissioner can raise an assessment on almost any basis he pleases, and then require the taxpayer to prove before the Administrative Appeals Tribunal or the Federal Court what their liability should have been.

Merely proving that the Commissioner's assessment was incorrect will not suffice.

If put to proof, how many taxpayers would have sufficient evidence to justify every cent of expenditure incurred? And even if they could provide justification, imagine the cost!

To add insult to injury, the Commissioner can require payment in full as soon as the amount assessed becomes due and payable.

It is a testament to the integrity of the office of the Commissioner that there are no reported cases in which this power has been abused or used for political purposes, as it has been in less scrupulous jurisdictions around the globe.

The Commissioner reserves this treatment for a minority of taxpayers, and typically in the most serious examples of non-compliance.

But the extent of his power does beg the question of whether the Commissioner effectively makes the law, as opposed to simply interpreting or clarifying it.

Technically, of course, his role does not extend to lawmaker.

But when the Commissioner’s interpretation is at odds with that of a taxpayer, the taxpayer has little choice but to accept the Commissioner’s view or embark on a protracted and expensive legal battle.

It means that, when considering complex commercial transactions, likely to give rise to important but uncertain tax consequences, businesses - particularly large businesses - face a dilemma.

If the transaction proceeds and the Commissioner takes a different view of the tax consequences than the business predicted, the tax liability could more than offset whatever commercial advantages were afforded through the transaction.

What's more, the correct application of the law to the proposed transaction might not be determined by the courts for some years.

For taxpayers who want to avoid the delay and the expense of action through the courts or tribunals, the only way of achieving a reasonable degree of certainty and timeliness is to seek an early ruling from the Commissioner.

For those enterprises, and for all intents and practical purposes, it's effectively the Commissioner who lays down the law.

Checks and balances

So, having outlined the Commissioner's main powers, let me touch on the vitally important checks and balances.

There are several, including the responsibility of the Commissioner to give effect to government policy and, of course, the secrecy provisions of the Tax Administration Act, which prohibit the Commissioner from disclosing individual taxpayer information.

But this morning, because it's more topical, I want to focus on the role of the Inspector-General of Taxation.

The office of the Inspector-General was created in 2003 in response to the mishandling of the mass marketed Budplan schemes by the Tax Office.

As it's turned out, the Inspector-General has played a critical role in enhancing the administration of the tax system for the benefit of the Australian community.

No single tax practice, let alone practitioner, has a sufficiently broad practice to be able to identify issues in every area of Tax Office activity.

But because the Inspector-General receives input from taxpayers and tax practitioners throughout Australia, and has the power to collect information directly from the ATO, he is well-placed to identify systemic issues.

The Inspector-General has an extremely valuable role to play, not only in protecting taxpayers but in maintaining the integrity of, and community confidence in, the Australian Taxation Office.

Which brings me back to the joint Fairfax/Four Corners reports.

The essential claim being made was of serious, systemic abuse by ATO officers in the small business area.

The Tax Commissioner, Chris Jordan, addressed the claim directly when he appeared before a Senate Estimates committee at the end of May.

While acknowledging that the Tax Office wasn't perfect and, like any large organisation, made mistakes from time to time, the Commissioner accused the media outlets of presenting a distorted and damaging picture of what happens within the ATO.

He was particularly incensed, quite legitimately in my view, about the title of the Four Corners program: "A mongrel bunch of bastards".

Also appearing before Senate Estimates, the Inspector-General of Taxation, Ali Noroozi, said his investigation of the allegations would seek to restore public confidence in the system by either dispelling them, or by making recommendations for improvements.

As it has transpired, his report does both.

In summary, it finds no evidence of the ATO systematically targeting small businesses but suggests that there are matters that need to be addressed and improved.

These include the option of establishing a new and dedicated compensation scheme for tax matters, where decisions on compensation are made independently of the ATO.

I've worked closely with Chris Jordan and, in my view, he would actually support this development.

Culture

Before I move onto the theme of Indigenous recognition, I want to finish my remarks on tax administration by touching on the all-important issue of culture in ensuring that the considerable power of the Tax Commissioner is being exercised for the benefit of the nation.

No checks or balances can deliver the right culture.

Yet, without it, power is all too easily abused or misdirected.

Effecting meaningful cultural change in a large organisation is difficult - a bit like a tug boat trying to turn around an aircraft carrier.

Under the guidance of three former Commissioners who I knew and consulted with - Trevor Boucher, Michael Carmody and Michael D'Ascenzo - the ATO became a far more open and transparent organisation, which consulted more and more with the community.

And having practised in the area of tax for as long and as extensively as I have, I believe I'm well placed to observe that the cultural change being driven by the current Commissioner is necessary, well targeted and increasingly evident in my day-to-day dealings with the Tax Office.

This is real and impressive organisational change and it's taking place within an organisation whose power extends into each and every Australian home and business.

There is a long way to go, but Chris Jordan deserves our praise and our thanks for taking an approach which is undoubtedly in the interests of the nation.

Constitutional recognition

Try as I might to come up with a clever segue between tax and Constitutional recognition of our First Peoples, I was stumped.

So, I'm simply going to change hats ….

For more than a decade, Australia has been telling its First Peoples that the nation is finally ready to recognise them in its founding document - the Australian Constitution.

For more than a decade, we have considered and debated options for how this might be done in a way that is both likely to succeed at a referendum, and that accords with the aspirations of Aboriginal and Torres Strait Islander Peoples.

In May 2017, the proposal of a constitutionally enshrined advisory Voice to Parliament was unanimously supported by Aboriginal and Torres Strait Islander delegates to the historic National Constitutional Convention at Uluru.

It was communicated to the Australian people in the form of the Uluru Statement from the Heart and informed the recommendations contained in the Referendum Council's final report, which was delivered to the Prime Minister and Opposition Leader a month later.

The government rejected the recommendation, citing a number of spurious reasons I'll come to in a moment.

As someone who has been involved in the recognition journey for many years now, my view is that the proposal is a far more modest, reasonable and achievable option than any other that has emerged over the last decade.

The Uluru Statement identified the advisory Voice to Parliament as the only acceptable model because, without infringing on parliamentary sovereignty, it would constitutionally enshrine the opportunity for Aboriginal and Torres Strait Islander peoples to influence laws and policies that affect their lives - lives that on average remain poorer, sicker, harder and shorter than the lives of other Australians.

Having served as Co-Chair of both the Referendum Council on Constitutional Recognition of Aboriginal and Torres Strait lslander Australians, which reported in June 2017, and the Expert Panel, which reported back in 2012, it was bit like Groundhog Day for me to make a personal submission to the Joint Select Committee now charged with finding a way through the impasse.

The Committee is required to chart a way forward that achieves cross party support, is capable of being supported by an overwhelming majority of Australians and, most importantly, accords with the wishes of Aboriginal and Torres Strait lslander peoples.

Given the government's rejection of the form of constitutional recognition that Aboriginal and Torres Strait lslander delegates unanimously endorsed at Uluru, in my view, the Committee faces a near-impossible conundrum.

For those of you who have not followed the process, the Uluru Statement was the culmination of an inclusive, principled and focused consultation process, the like of which Australia has never seen.

With bipartisan support, the Referendum Council hosted a series of lndigenous-designed and led consultations, which placed the voices of Aboriginal and Torres Strait lslander people at the centre of our deliberations.

Twelve hundred delegates took part in the lndigenous-specific dialogues, from a total population of about 600,000 Aboriginal and Torres Strait lslander peoples nationally.

We believe this to be the most proportionally significant consultation process ever undertaken with lndigenous Australians.

l was privileged to be at Uluru to observe the final days of the National Convention and the adoption of the Uluru Statement from the Heart.

As a lawyer, l am a creature of instruction, and the instruction on what Aboriginal and Torres Strait lslander Peoples want and expect from constitutional recognition was made clear at Uluru.

I feel duty bound to convey that instruction wherever and whenever I can - hence my plea to you this morning to look beyond the government's rhetoric in rejecting the Voice to Parliament.

Any suggestion that it would represent a third chamber, for example, is utterly misconceived.

Whatever the source of this misconception, it is imperative that this myth be dispelled once and for all to build cross-party and community support.

All proponents of the Voice to Parliament agree that the body would have no power of veto on proposed legislation and its advice would not be binding on either House of Parliament.

lnstead, the advisory body would be dependent upon Parliament's genuine engagement and political will to consult effectively, with constitutional enshrinement offering important protection against the body being abolished or defunded.

Proponents of the Voice to Parliament, including experienced lawyers from different ends of the political spectrum, have also emphasised that because it will be up to the Parliament to determine the roles, composition and powers of the advisory body, there is no risk whatsoever that it would undermine current parliamentary processes.

The body would create the opportunity for a dialogue with Parliament, but leave parliamentary sovereignty completely and utterly undiminished.

It should be remembered that the membership of the Referendum Council included five lawyers, including a former Chief Justice of the High Court no less, as well as former federal and state politicians.

With just one exception, members of the Referendum Council were wholly united in our belief that the type of advisory body called for in the Uluru Statement could be established with no adverse consequences to the smooth operation of the Parliament.

Quite the contrary, it would provide Parliamentarians with valuable input to help ensure that laws and high cost public policy decisions concerning Aboriginal and Torres Strait lslander Australians yield better outcomes than has been the case to date.

Is it asking too much of non-Aboriginal Australia and Australians that we support this aspiration? Are we so mean-spirited, so lacking in national ambition and imagination that we would tell Aboriginal and Torres Strait Islander peoples we reject their advice to the nation as to how they wish to be recognised?

I have absolute confidence that if Parliament allocates the time and resources for the proposal to be developed, and then gives the Australian people the information and the opportunity to make their own decision, they will support it.

lf the Committee feels compelled to pursue a form of recognition that was considered and rejected through the Referendum Council's lndigenous consultation process, not only would it be disrespectful in the extreme but it would have no chance of success at a referendum.

I live in hope that the Joint Committee might convince the government to revisit its decision around the Voice proposal.

After all, it is the prerogative of governments to be allowed to change their minds as and when it is deemed to be for the benefit of the nation.

This has occurred on multiple occasions in the past.

Policy shifts in line with prevailing community sentiment is one of the

hallmarks of a truly healthy democracy, a fact acknowledged by the Prime Minister in his pithy comment on the announcement of the Banking Royal Commission that the "...government's policy remains the same until it's changed.”

An informed and respectful reconsideration by the government of all that the Uluru Statement provides and symbolises represents a historic opportunity to reinforce Australia's democracy, and the health and wellbeing of our nation.

I encourage those of you who agree with me to make your views known in whatever form and using whatever means you have.

I want to finish with a quote from the address to Parliament delivered by Senator Dean Smith when he introduced the Same-Sex Marriage Bill on 15 November 2017:

“To those who want and believe in change — and to those who seek to seek to frustrate it — I simply say:

Don't underestimate Australia.

Don't underestimate the Australian people.

Don't underestimate our country's sense of fairness, its sense of decency and its willingness to be a country ‘for all of us’.

Not only does our country live these values, it votes for them as well.”

I’m now happy to take questions on either or both of the themes I’ve covered this morning.