33rd National Convention

Tax Institute of Australia

Keynote Address by Mark Leibler AC

"Perspectives on Tax Administration"

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Introduction

I want to start by acknowledging the traditional owners of the land on which we gather this afternoon, and by paying my respect to their culture, their history and their custodianship of the land.

It's a real honour to be addressing the opening session of this year's convention, which coincides with the 75th anniversary of the Tax Institute.

It makes me sound a lot older than I feel to say that for almost 50 of those 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.

My talk today focuses on the extraordinary power that rests with the ATO in general, and the Commissioner of Taxation in particular.

I've chosen this theme, 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.

Indeed, as lawyers, accountants, tax agents or bureaucrats, it is vitally important that every tax professional in this room recognises that it's not enough to understand the law.

To represent our clients to the best of our abilities, we need to recognise the vast power that rests with the Commissioner and his empire to interpret and apply the law.

We need to fear and respect this power, and we need to know how to utilise it for the benefit of our clients.

To that end, I'm going to begin by outlining the breadth of the Commissioner's authority.

I'll examine some important checks and balances in the system, but then return to the main theme and the reality that, as tax law becomes more complex and uncertain, the role and power of the Commissioner is only escalating.

And I'll finish with a message that I've conveyed to each and every Commissioner I've worked with over the years.

And that is, that it's all very well for them to appreciate how their awesome powers are best applied in the interests of the nation.

But for these fine intentions to manifest as they should, they need to be reflected in the culture of the Australian Tax Office, and the attitudes and behaviour of every officer at every level.

The powers of the Commissioner

So, let's start by considering the extent of the statutory power wielded by our Commissioner of Taxation.

The Commissioner is vested by the Australian Parliament with the general administration of the Tax Acts.[1]

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 Australian Taxation Office operates as an independent authority.

And one need only flip through the Tax Administration Act 1953 - the Act that largely dictates the administration of the tax system - to get a sense of the Commissioner's colossal mandate.

The Tax Administration Act covers issues including:

- the payment and collection of tax
- running balance accounts
- objection and appeal processes, and
- administrative penalties.

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.[2]

If put to proof, how many taxpayers would have sufficient evidence to justify every cent of expenditure incurred - even in the internet age where almost every action and interaction is logged online? And even if they could provide justification, imagine the cost!

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[1] See, eg, *Income Tax Assessment Act 1936* (Cth) s 8; *Superannuation Guarantee (Administration) Act* 1992 (Cth) s 43; *Excise Act 1901* (Cth) s 7; *Fringe Benefits Tax Assessment Act 1986* (Cth) s 3; *Taxation Administration Act 1953* (Cth) sch 1 s 356-6. For a good discussion about the Commissioner of Taxation's general powers of administration, see Australian Taxation Office, *When a Proposal Requires an Exercise of the Commissioner's General Powers of Administration,* PS LA 2009/4, 21 May 2009 (last updated 13 June 2017).

[2] *Taxation Administration Act* 1953 (Cth) ss 14ZZK(b)(i) and 14ZZO(b)(i); *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, 621.

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.

However, as the Commissioner's authority continues to expand in scope and reach,[3] it is essential for taxpayers to be made aware of the very real and ever-expanding risks they face.

In his recent interview series with *The Australian* newspaper the current Commissioner, Chris Jordan, highlighted a joint initiative between the Tax Office and the Australian Federal Police to establish the Serious Financial Crime Taskforce.[4]

As the Commissioner looks to target organised crime and offences such as money-laundering, phoenix activity and serious fraud, the remit of this multi-agency Taskforce also covers tax havens and offshore evasion.[5]

Tax information exchange agreements Australia now has in place with countries across the globe have provided the Commissioner with eyes and ears in multiple foreign jurisdictions.[6]

Checks and balances

Government policy

So, having described the Commissioner's statutory powers, let me touch on the vitally important, though far from clear cut, checks and balances.

And let me start with the obvious.

Generally speaking, the relationship between the Tax Office and the government of the day, through Treasury and the relevant Ministers' offices, sees the tax system operating in a way that's consistent with government policy.

After all, one of the central responsibilities of the Commissioner, like any civil servant, is to give effect to government policy as set out in tax legislation.

A stark example of the disconnect that can arise between the government and the Tax Office is the recent disagreement over corporate tax cuts for small and medium companies.

The government's clear intention was that the reduced tax rate only apply to companies carrying on a business. It was plainly not its intention to extend this concession to passive investment vehicles or bucket companies.

Yet, shortly after the law was enacted, the Commissioner released a draft tax ruling stating that his "preliminary, but considered" view was that there is a rebuttable presumption that limited and no-liability companies carry on a business.[7]

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[3] See, eg, the growing number of taxation information exchange agreements under the *International Tax Agreements Act 1953* (Cth); the Multinational Anti-Avoidance Law introduced by the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017* (Cth); and its companion the *Diverted Profits Tax Act 2017* (Cth).

[4] Nick Tabakoff, 'Tax Office in "Al Capone" Bid to Stop Bikies', *The Australian* (Sydney), 1 December 2017, 2.

[5] Australian Taxation Office, 'ATO Commissioner Statement Regarding "Week of Action"' (Media Release, 6 September 2016) <https://www.ato.gov.au/media-centre/media-releases/ato-commissioner-statement-regarding-week-of-action/>.

[6] *International Tax Agreements Act 1953* (Cth) s 23.

[7] Australian Taxation Office, *Income Tax: When Does a Company Carry on a Business within the Meaning of Section 23AA of the* Income Tax Rates Act 1986*?*, TR 2017/D7, 18 October 2017, [44]–[46].

The draft ruling went on to assert that this was the case "even if the company's activities are relatively limited, and primarily consist of passively receiving rent or returns on its investments and distributing them to its shareholders".

The example offered in the draft ruling was of a corporate beneficiary reinvesting unpaid present entitlements in a family trust at a commercial rate of interest.

The inconsistency of interpretation from the Tax Office and the government forced the government to introduce further legislation[8] to achieve its objective, and another layer of complexity for the taxpayer to navigate.

The Inspector-General of Taxation

Another check on the power of the Tax Commissioner, a valuable and important one in my view, is the Inspector-General of Taxation.

The Commissioner has recently observed that the Tax Office is under the spotlight regarding its "competence, transparency, ethics and integrity, and its capacity and speed to respond".[9]

Key amongst those people and organisations scrutinising the Tax Office is the Inspector-General of Taxation, who is tasked with investigating and improving the administration of the tax system, including the investigative responsibilities formerly held by the Ombudsman.[10]

The office of the Inspector-General was created in 2003[11] 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.

Moreover, the Inspector-General of Taxation 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.

Allow me to explain my position by way of example.

In a column published in *The Australian* late last year, business commentator Robert Gottliebsen made the following audacious claim, and I quote:

> "The good news is that <u>while significant sections of the ATO are power corrupted</u> there are still honest and reputable people in the organisation and they shine".[12]

This sweeping accusation was made in response to an alleged instance of maladministration by the Tax Office in the case of one individual.

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[8] Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2018 (Cth).
[9] Chris Jordan, 'Address by Commissioner of Taxation' (Speech delivered at the IPA National Congress, RACV Royal Pines, Gold Coast, 23 November 2017) <https://www.ato.gov.au/Media-centre/Speeches/Commissioner/IPA-National-Congress/>.
[10] *Tax and Superannuation Laws Amendment (2014 Measures No 7*) *Act 2015* (Cth) sch 2.
[11] *Inspector-General of Taxation Act 2003* (Cth).
[12] Robert Gottliebsen, 'Unfair ATO a Dangerous Threat to Innovation', *The Australian* (Sydney), 10 October 2017, 29.

While it would be inappropriate for the Commissioner of Taxation to react defensively to such a spray, the Inspector-General can and does reassure the public that an isolated case of alleged maladministration is just that - and that it doesn't reflect any systemic failing within the Tax Office as a whole.

The Inspector-General's role necessarily requires the collection, consideration and assessment of negative information about the Tax Office.

This has generated a degree of tension between the two offices.

But the reality is that the published reports of the Inspector-General provide a critically important window into the Tax Office. They offer a balanced assessment of its strengths and weaknesses and, in recent years, the Inspector-General has highlighted and commended improvements made in systems and processes.

Indeed, the Commissioner of Taxation should use these reports to promote the very significant cultural changes that have taken place on his watch.

Which is why I remain a big fan of the role played by the Inspector-General in keeping the Tax Office on its toes, while protecting it from ill-founded criticism and maintaining community confidence in the system.[13]

Secrecy provisions

The other main check on the power of the Commissioner of Taxation is, of course, the secrecy provisions of the Tax Administration Act,[14] which prohibit the Commissioner from disclosing individual taxpayer information.

These provisions impose strict obligations on tax officers and others who receive tax information. They are critically important to the success of the tax system because compliance with tax laws is predicated on taxpayers having confidence that the information they provide can only be used for limited purposes.

But, it would be a mistake for any taxpayer or their adviser to view the secrecy provisions as a definitive limitation on the Commissioner's powers.

Because, under exceptional circumstances, the Commissioner is *not* bound by these provisions, and it is largely up to him to decide when circumstances become exceptional enough for him to speak out.

At that point, the Commissioner can, by law, be unburdened from the strictures of the secrecy provisions in the context of giving evidence before a parliamentary committee, where anything that is said is fully protected by parliamentary privilege.

While successive Commissioners have stated that they would not abuse this privilege by disclosing individual taxpayer information, Chris Jordan has made it clear - and with justification in my view - that if a taxpayer uses the same privilege protections to make statements that are factually incorrect, and that could undermine public confidence in the ATO, he may choose to go public himself to set the record straight.[15]

[13] The ATO is also subject to parliamentary oversight through the Commissioner's annual report to Parliament and the oversight of various parliamentary committees. In addition, the Australian National Audit Office ('ANAO') conducts regular audits of the ATO. This includes mandatory annual financial statement audits as well as performance audits of specific aspects of the ATO's operation. The ANAO typically carries out multiple performance audits of the ATO per year.

[14] *Taxation Administration Act 1953* (Cth) sch 1 div 355.

[15] Evidence to Economic References Committee, Parliament of Australia, Sydney, 8 April 2015, 39 (Chris Jordan).

Most of you would be aware of the steps taken by the Commissioner to correct erroneous information put forward by business leaders during the recent Senate inquiry into Corporate Tax Avoidance.[16]

Second Commissioner Andrew Mills backed the Commissioner by reinforcing that the ATO will move to correct the record if a business owner publicly makes incorrect or misleading claims regarding their own tax affairs.[17]

Clearly, the Commissioner needs to be very careful to ensure that any correction made without the benefit of parliamentary privilege doesn't breach the secrecy provisions, which are there to protect taxpayers and the system overall.

But let's remember that these same taxpayers whose secrecy is protected are also part of a broader Australian community, which demands transparency, honesty and integrity from the ATO, and is quick to conclude its officers have done something wrong.

In this context, the secrecy provisions are a two-edged sword because they make it very difficult for the Commissioner to publicly defend the Tax Office against specific allegations of misconduct.

The ATO employs more than 20,000 people. It's inevitable that, very occasionally, there will be cases of misconduct, impropriety and maladministration, and interactions with taxpayers that don't meet the standards enshrined in the Taxpayers' Charter.

What matters, as I said earlier, is whether such cases are evidence of systemic failure, or whether they are isolated instances you'd be hard pressed to completely avoid in any large organisation.

That's where the Inspector-General of Taxation comes to the fore, uniquely placed, as he is, to make this assessment.

Guidance in a complex, uncertain environment

So, having set the scene by describing the Commissioner's powers under the law, as well as the obvious and not-so-obvious impact of the main checks and balances in the system, I want to move to the more subtle, but even more significant, power of the Commissioner to provide guidance where legislation doesn't speak for itself.

It is a fundamental principle of the rule of law that the law should be sufficiently certain to enable those bound by it to determine their rights and obligations.

When I was admitted to practice in 1966, the Income Tax Assessment Act was a considerably shorter document than it is today.

We didn't have to contend with such wonders as the plain English of the 1997 Act,[18] or the 448 pages of "Simplified Superannuation" released in 2007.[19]

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[16] Ibid.

[17] Andrew Mills, 'Tax Administration Continuum - "The Law was Made for Man, not Man for the Law"' (Speech delivered at the 2017 Queensland Tax Forum, Brisbane Marriott Hotel, 24 August 2017) <https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-Administration-Continuum---The-Law-was-Made-for-Man,-not-Man-for-the-Law/>.

[18] *Income Tax Assessment Act 1997* (Cth).

[19] *Tax Laws Amendment (Simplified Superannuation) Act 2007* (Cth); *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Amendment Act 2007* (Cth); *Superannuation (Departing Australia Superannuation Payments Tax) Act 2007* (Cth); *Superannuation (Excess Untaxed Roll-over Amounts Tax) Act 2007* (Cth); *Superannuation (Excess Non-concessional Contributions Tax) Act 2007* (Cth); *Superannuation (Excess Concessional Contributions Tax) Act 2007* (Cth); *Superannuation Legislation Amendment (Simplification) Act 2007* (Cth); *Income Tax Amendment Act 2007* (Cth); *Income Tax (Former Complying Superannuation Funds) Amendment Act 2007* (Cth); *Income Tax (Former Non-Resident Superannuation Funds) Amendment Act 2007* (Cth); *Income Tax Rates Amendment (Superannuation) Act 2007* (Cth).

These kinds of changes may have been well intentioned, but rather than clarifying the rights and obligations of taxpayers, they've further muddied the waters.

It is often overlooked that when tax law becomes more complex, it imposes a burden, not just on taxpayers, but also on the Tax Office.

Because where the interpretation of a provision is sufficiently uncertain, tax professionals rely on the Commissioner's view to advise their clients.

A case in point is the approach taken by the Commissioner in response to the anti-avoidance provisions contained in Part IVA[20] - in my view, the most problematic provisions of the Income Tax Assessment Act when it comes to certainty and predictability.

Predicting the result of litigation where a taxpayer challenges adjustments made by the Commissioner based on the provisions of Part IVA is as difficult as predicting the weather in my home city of Melbourne.

Indeed, there have been a number of cases where a decision by a judge of the Federal Court has been appealed to the Full Federal Court, and subsequently appealed to the High Court.

At each stage and each judicial level, the judges in these cases have expressed different, inconsistent views on the application of Part IVA.[21]

Which leaves us in the position where the only way a taxpayer can have certainty before entering into a transaction is by obtaining guidance from the Commissioner of Taxation.

I have discussed the application of Part IVA with successive Commissioners - one of them conceded that the only way to get to a result in some of these difficult cases was by applying what he referred to in Tax Office jargon as "the smell test".

A good example of the Commissioner's guidance, which readily springs to mind, arises from the Commissioner's concern, which only came to light in recent years, about the potential application of Part IVA to professional firms operated by partnerships, where the income flowed through to trusts or companies and was subject to tax at a lower rate than would have been the case had it been taxed directly to the partner whose trust structure received the income. Personally, I think the application of Part IVA in these circumstances is highly problematic. The mere fact that the trust structure does not provide an associated partner with advantages such as limited liability or asset protection does not rule out other non-tax explanations for the structure.

However, be that as it may, it will probably take some years to get a definitive opinion from the courts. In those circumstances, the Commissioner's guidance "Assessing the Risk: Allocation of profits within professional firms"[22] in 2015 was welcome news and was preceded by in-depth consultations with the relevant professional bodies.

This guidance has now been suspended as of 14 December 2017[23] because, in the view of the ATO, it is being "misinterpreted in relation to arrangements that go beyond the scope of the guidelines". However, the guidelines themselves, currently being reviewed, will continue to apply, for those who have entered into arrangements before 14 December 2017.

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[20] *Income Tax Assessment Act 1936* (Cth) pt IVA.

[21] See, eg, *Mills v Commissioner of Taxation* (2012) 250 CLR 171; *Commissioner of Taxation v Hart* (2004) 217 CLR 216; *Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235; *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404; and *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359.

[22] Australian Taxation Office, 'Assessing the Risk: Allocation of Profits within Professional Firms', 8 October 2014 (revised on 30 June 2015).

[23] Australian Taxation Office, 'Assessing the Risk: Allocation of Profits within Professional Firms', 14 December 2017 <https://www.ato.gov.au/Business/Income-and-deductions-for-business/In-detail/Professional-firms/Assessing-the-risk--allocation-of-profits-within-professional-firms/>.

Overall, these guidelines are a good example of the Commissioner articulating safe-harbours and minimising risk for those taxpayers entering into arrangements in circumstances where there is a risk that the anti-avoidance provisions of Part IVA could be applicable.

Commissioner as lawmaker

All this begs 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.

When I wrote *The Politics of Tax Administration* for the Australian Tax Review back in 1990,[24] I observed that when considering complex commercial transactions, likely to give rise to important but uncertain tax consequences, large businesses faced a dilemma.

If the transaction proceeded and the Commissioner took a different view of the tax consequences than the business had 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.

I argued that the only one way of achieving a reasonable degree of certainty and timeliness was for the enterprise to seek an early ruling from the Commissioner.

So for that enterprise, and for all intents and practical purposes, it's effectively the Commissioner who lays down the law.

In the years since I made that slightly controversial point, not a great deal has changed.

Taxpayers, swimming in far more complex waters, continue to face the same essential dilemma.

For taxpayers who want to avoid the delay and the expense of action through the courts or tribunals, the Commissioner effectively continues to act as lawmaker, and those taxpayers still need to feel the pulse of the Commissioner before they can chart the best way forward.

Retrospectivity not the best way forward

Which brings me to an important point about retrospectivity rarely being the best way forward when it comes to rulings by the Tax Commissioner.

The public cannot be expected to have confidence in the tax system if the Commissioner imposes the law retrospectively, in a way that is inconsistent with his own previous practice.

Although the Commissioner cannot be bound by past practice as he is with rulings, he has an ethical duty to act consistently when assessing taxpayers who have relied on that practice to make important decisions.

This duty is recognised in the Commissioner's practice statement on U-Turns, PSLA 2011/27.[25]

[24] Mark Leibler, 'The Politics of Tax Administration' (1990) 19 *Australian Tax Review* 9.
[25] Australian Taxation Office, *Determining Whether the ATO's Views of the Law Should be Applied Prospectively Only*, PS LA 2011/27, 28 July 2011 (last updated 29 October 2015).

Of course, the Commissioner remains free, indeed obligated, to change his position if and when he determines that previous practice was inconsistent with the law.

This happened recently, when Taxation Determination TD 2017/20 was issued.

In this determination, the Commissioner opined that a person who is not a beneficiary of a trust is still capable of receiving a distribution for the purposes of the trust loss rules.

This directly contradicted the view expressed in ATO ID 2012/12[26] (now withdrawn), and the contradiction is acknowledged in the new determination.

Consistent with his practice statement on U-Turns, the 2017 determination does not apply to transactions undertaken on or before 7 June 2017.[27]

Practice Statement Law Administration PSLA 2011/27 was updated in 2014[28] following the decision of Justice Edmonds in the Macquarie Bank case,[29] where it was held that the Commissioner cannot use his powers of general administration to accept non-compliance with the law. This gave rise to a very substantial potential problem in the case of a well-established previous administrative practice which the Commissioner subsequently viewed as being contrary to law. However, fortunately the court did sanction the Commissioner choosing not to undertake compliance action on a particular issue for particular years or periods.[30]

For me, this problem of potentially applying a changed view of the law retrospectively, has been a major issue. My initial advice to the Commissioner at the time was that the issue needed to be fixed by appropriate legislation.

However, I was convinced and remain convinced to this day, that it's best to first give the Tax Office a chance to deal with an issue administratively - knee-jerk legislative fixes inevitably bring unintended consequences.

This was consistent with the approach I'd taken over decades.

Some 30 years ago now, on 1 July 1987, I lodged a submission to the Senate Standing Committee on Legal and Constitutional Affairs which was conducting an inquiry into income tax rulings.[31]

At the time rulings were not legally binding, and it was my view that it would be counter-productive to make them legally binding, a view then supported by the Commissioner of Taxation[32] and the Senate Committee.[33]

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[26] Australian Taxation Office, *Trust Losses: Whether the Writing Off of a Trade Debt by a Trustee Constitutes a Distribution to the Debtor,* ATO ID 2012/12, 2 March 2012 (withdrawn 8 June 2017).

[27] Australian Taxation Office, *Income tax: Is a Person Who is not a Beneficiary of the Trust Capable of Having a Distribution Made to Them for the Purposes of section 272-60 of Schedule F to the* Income Tax Assessment Act 1936*?*, TD 2017/20, 15 November 2017, [4]. However, the Commissioner is not actually in a position to state that the determination does not apply retrospectively. The decision in *Macquarie Bank Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 403 clarifies the Commissioner's general powers of administration, namely that while he must apply the law as he understands it and cannot accept non-compliance with the law, he may exercise discretion in making resource allocation decisions. The Commissioner could therefore have better expressed his position in TD 2017/20 by stating that the ATO will not allocate compliance resources or take other compliance action to examine those specified transactions. It should be noted that the previous Interpretative Decision, ATO ID 2012/12, did not have the status of a ruling and, accordingly, would not bind the Commissioner in relation to primary tax should the Commissioner take a different view in relation to the application of the law (see Australian Taxation Office, *Provision of Advice and Guidance by the ATO*, PS LA 2008/3, 28 February 2008 (last updated 20 February 2014)).

[28] Australian Taxation Office, *Determining Whether the ATO's Views of the Law should be Applied Prospectively only*, PS LA 2011/27, 28 July 2011 (as updated on 4 December 2014).

[29] *Macquarie Bank Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 403.

[30] *Macquarie Bank Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 403; *Macquarie Bank Ltd v Federal Commissioner of Taxation* [2013] FCAFC 119.

[31] Commonwealth, *Parliamentary Debates*, Senate, 27 May 1987, 2969 (Nick Bolkus).

[32] Letter from Brian Nolan Second Commissioner of Taxation to Mark Leibler, 26 June 1987, [2].

In my submission, I stated:

> "The reality is such that the Commissioner of Taxation will stand by and honour his rulings in favour of taxpayers who have entered into transactions in circumstances where it was reasonable for the taxpayers concerned to have relied on the terms of such rulings. Such a taxpayer will not be prejudiced by a subsequent decision of an administrative tribunal or court which adopts an interpretation of the law which is adverse to the taxpayer and conflicts with the interpretation set out in the relevant ruling. This state of affairs is not based on law but derives directly from a sensible, fair and commendable administrative practice adopted by the Commissioner of Taxation. I know of no case where the Commissioner of Taxation has deviated from this practice. Any such deviation would seriously undermine the confidence of the public in the integrity of the administration of our income tax system."[34]

In general terms, I regard these observations as being equally sound today.

So far, the Commissioner's administrative approach, as enshrined in PSLA 2011/27, appears to be working satisfactorily.

This will continue to be the case so long as the Commissioner is in a position to make pragmatic decisions around resource allocation, which take account of a whole range of factors including the potential impact of a retrospective change on public confidence in the system.

But no tax practitioner can afford to be complacent.

If a matter involving prior administrative practice proceeds to litigation, or if the ATO was required to state its view of the law in certain situations - for example, in deciding an objection - the Commissioner would have no choice but to apply the view of the law he holds currently.[35]

The importance of culture

Let me now turn to the all-important issue of culture in ensuring that the considerable and flourishing 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.

Let me draw on Chris Jordan's own explanation, in 2015, of what needed to change in the Australian Tax Office and why:

> "With the intent of building community trust and confidence, we have shifted the way we interact with clients and stakeholders to be more collaborative, more relationship-oriented, more outcome and future-focused."[36]

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[33] Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Income Taxation Rulings* (1987) 19–21 [2.29]–[2.42].
[34] Mark Leibler, Submission to the Senate Standing Committee on Constitutional and Legal Affairs, 1 July 1987, 3–4.
[35] Australian Taxation Office, *Determining Whether the ATO's Views of the Law Should be Applied Prospectively Only*, PS LA 2011/27, 4 December 2014, [25]–[37].
[36] Australian Taxation Office, *Commissioner of Taxation Annual Report 2014-15* (2015) v. <*https://annualreport.ato.gov.au/sites/g/files/net376/f/AR_14-15_Vol1_n0995_js34758_w.pdf*>.

Enshrined within the Taxpayers' Charter is a series of ethical obligations. In summary, the Charter commits the Tax Office:

- to "the fair and professional use" of its powers
- to achieve "sensible and equitable" outcomes in light of individual circumstances
- to act "consistently"
- to "apply the law with balance, judgement" and "common-sense", and
- to "the fair treatment" of all individuals who deal with it.

Adherence to law and ethics matters throughout public administration.

But adherence by the Commissioner and the Tax Office has special significance.

As I have emphasised today, the Commissioner possesses immense powers. A dispute with the Tax Office is quite unlike any other commercial dispute because the burden of proof lies with the taxpayer.

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.

This can be seen, for example, in the development of rulings, guidance on the application of Part IVA and the articulation of the general powers of administration as set out in PSLA 2011/27.

Under Michael D'Ascenzo's tenure, this more open and consultative approach accelerated.

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.

The crucial difference in the impact Chris Jordan is having to what I've seen previously is the extent to which changes are permeating through the organisation.

While there will always be some tensions between the regulator and tax professionals, recent changes are gradually improving this relationship, and enhancing the effective operation of our tax system.

I have noticed a shift in attitudes on the part of tax officers I deal with at all levels of the Tax Office.

Interactions have become less confrontational, and rulings and advice emanating from the Tax Office have been more objective.

It is refreshing to see tax officers initiating contact with tax advisers, with a view to settling tax disputes in a sensible and commercial way.

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

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.

As contributors and as beneficiaries, we all have a stake in encouraging a well-run tax system that reflects Australia's values.

Carrot and stick approach

Before summing up, I just want to touch on a recent example of where the Commissioner has demonstrated quintessentially Australian pragmatism and values to great effect.

I was heavily involved in both the design and the implementation of Project Do-It, which applied the Commissioner's well-worn carrot and stick approach to entice Australian taxpayers to disclose offshore assets.

My firm, Arnold Bloch Leibler, was established more than 60 years ago to advise migrants, many of them refugees, who had fled war-torn Europe.

Many of these people had been reluctant or unable to bring all their money with them and, over time, they found themselves in a fearful bind.

They wanted to bring the money they'd left behind back to Australia but couldn't because of the potential tax problems that would arise.

In broad terms, the carrot offered by the Commissioner was the commitment not to allocate compliance resources beyond the four year amendment period, not to refer taxpayers for prosecution and to impose lower penalties than might otherwise have applied.

The stick was the threat that individuals who failed to take advantage of the concession may be referred for prosecution.

They would be subject to an unlimited amendment period (for fraud or evasion) and be issued with higher penalties.

Project Do-It was a stunning success, with over $600 million of omitted income disclosed and some $6.5 billion in assets being brought within the Australian tax net.[37]

It also resulted in the detection of inappropriate offshore arrangements, including those of taxpayers who failed to voluntarily disclose assets and income.

And most important for me, it gave clients and friends with fraught histories greater peace of mind.

Conclusion

So to sum up now very briefly.

The quality of public discourse about taxation in general, and tax administration in particular, is inversely proportional to its importance.

Sadly, this often includes the quality of debate conducted by our media organisations, elected representatives and their bureaucratic minders.[38]

The Senate Economics Reference Committee Hansard is not the best place to look for high-minded debate about the administration of Australia's tax system.

At times it more closely resembles the transcripts of the House Un-American Activities Committee in the cold war era.

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[37] Nassim Khadem, 'ATO amnesty to recoup billions', *Australian Financial Review* (Sydney), 28 March 2014, 3.

[38] See, eg, Emma Alberici, 'Why Many Big Companies Don't Pay Corporate Tax', *The ABC* (online), 14 February 2018 <http://www.abc.net.au/news/2018-02-14/why-many-big-companies-dont-pay-corporate-tax/9443840>, Emma Alberici, 'There's No Case for a Corporate Tax Cut When One in Five Corporations Don't Pay It', *The ABC* (online), 14 February 2018 (revised and republished as 'More to Jobs and Growth Than a Corporate Tax Cut', 22 February 2018 <http://www.abc.net.au/news/2018-02-22/more-to-jobs-and-growth-than-a-corporate-tax-cut/9471856>), Andrew Leigh, 'Labor Has No Love for Tax Avoiders this Valentine's Day' (Media Release, 14 February 2018) <http://www.andrewleigh.com/labor_has_no_love_for_tax_avoid>; and the subsequently released Australian Taxation Office, 'ATO Statement on Corporate Tax' (Media Release, 14 February 2018) <https://www.ato.gov.au/Media-centre/Media-releases/ATO-statement-on-corporate-tax/>.

And don't expect your clients to grow their knowledge of the tax system by reading or hearing about it in the media, where it's difficult to predict day to day whether the Commissioner will be vilified for being too rapacious or too restrained.

While the media's disclosure of leaked legal documents, such as the poetically named Panama and Paradise Papers, has assisted authorities in their pursuit of undisclosed assets, the coverage has also served to reinforce people's ignorance about the legitimate use of offshore entities.

The point I'm trying to make is that, in this hothouse of complexity, exaggeration and misinformation, as tax professionals, we need to maintain a clear and balanced picture of the system in which we operate.

And that's not a set-and-forget exercise for any of us.

Because despite the many things that have stayed the same, taxation practice and administration have changed markedly over the course of my long career as a tax practitioner.

While the average taxpayer is no more likely to understand the intricacies of the system than they were in the past - how could they? - social media and a more combative political environment often makes them think they do.

Even two decades ago, as far as tax was concerned, Australia was an island. Today it's a global village. Taxpayers have nowhere to hide.

Technology and hyper-connectivity intensifies the spotlight, not only on taxpayers, but on tax administrators and advisers as well.

So how does a Tax Commissioner with so much power and so much responsibility come to terms with this constantly changing reality?

There's no simple answer to that but it's incumbent on us to keep one simple truth in mind:

The Commissioner of Taxation is extraordinarily powerful but he is also human.

We should not expect him to exhibit the strength, reflexes, and balance of Spiderman, or have a subconscious ability to sense everything in his surroundings - I believe it's called "spider-sense".

What we can and must expect is for the Commissioner to be mindful of the powers at his or her disposal, and equally mindful of the ethical responsibility to ensure those powers are used to serve this great country with distinction.