

# **Tax – it's time for change**

## **ATTA Conference, University of Adelaide January 2015**

**Taxpayer protection under the  
European Convention on human rights:  
lessons for Australia?**

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# Taxpayer protection under the European Convention on human rights: lessons for Australia?

## Introduction

- The intersection of tax law and human rights
  - Administrator over-reach and taxpayer rights
  - The taxpayers' charter
  - Inspector General of Taxation 2013 priorities
  - Human rights protection
  - European Convention on Human Rights and the European Court of Human Rights ("ECHR")
  - A blueprint to resolve Australian tax controversies?
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# Protecting taxpayers' rights in Australia

## Avenues available:

- Part IVC of the Taxation Administration Act 1953
  - Administrative Decisions (Judicial Review) Act 1977
  - S.39B of the Judiciary Act 1903
  - ATO complaints system
  - Ombudsman
  - Inspector-General of Taxation
  - Freedom of Information Act 1982
  - CDDA scheme
  - Privacy Act 1988
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## Protecting taxpayers' rights in Australia (cont)

### Are these adequate?

- Non-reviewable decisions: oral advice, withholding tax, interim audit reports, accountants' advices
  - Recent example: Macquarie Bank v FCT
  - Taxpayers' Charter and the rise of soft law
  - Co-operative compliance and practical compliance
  - What happens when common sense is lacking?
  - The inadequacy of the common law rights: Harris v DFCT
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# Protecting Human Rights in Australia

The bill of rights controversy

Ad hoc legislation: eg privacy laws and anti-discrimination laws

National Human Rights Consultation Committee 2009, the *Human Rights (Parliamentary Scrutiny) Act* 2011 and the Parliamentary Joint Committee on Human Rights

International human rights principles:

- an aid to statutory interpretation?
  - influence on the Common law
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# The International Human Rights framework

*Universal Declaration of Human Rights*

*International Convention on Civil and Political Rights (“ICCPR”) and the*

*International Convention on Economic, Social and Cultural Rights (“ICESCR”).*

Ratified in Australia but no force of law

*Human Rights Committee*

*European Convention on Human Rights and the ECHR*

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# European Convention on Human Rights and Taxation

Domestic courts and the ECHR as a last resort

Particular rights relevant to taxation:

- *Right to property (Article 1 of the 1st Protocol)*
- *Right to a fair trial (Article 6)*
- *Non-discrimination (Article 14)*
- *Right to privacy (Article 8)*

Some interpretation principles:

- *Margin of appreciation*
- *Autonomous concepts, effectiveness and essence of the right*
- *Strict limitations*
- *Necessity*
- *Proportionality*
- *Individual rights*
- *Living instrument*
- *Legitimate expectations*
- *Evidence and burden of proof*

Dichotomy in the tax jurisprudence: tax policy v procedural complaints

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## Conclusion

A bill of rights for Australia?

A bill of taxpayers' rights for Australia?

The European Convention and Australian tax controversies:

- mass marketed tax schemes,
  - the tax advisor strike,
  - delayed refund payments,
  - high net worth individuals' investigations,
  - excessive taxation of superannuation contributions,
  - the accountants' papers concession,
  - non-binding advices,
  - threats and interim reports
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