

# Australian Tax Controversies and Human Rights

8 September 2016

by Justin Dabner

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Increasing conflicts and fears of overreach by tax administrators have seen many countries generate taxpayer-specific statements of rights. Australia has a [Taxpayer's Charter](#) but experience with this illustrates the limitations of both the Charter, unsupported by legislative mandate, and the traditional legal remedies in the resolution of tax controversies. The evident need for more effective recognition of taxpayers' rights has resulted in the Inspector-General of Taxation currently [reviewing the Charter](#).

## Current administrative review processes are inadequate

Most tax controversies of an administrative nature are intended to be dealt with under the [Administrative Decisions \(Judicial Review\) Act 1977 \(Cth\)](#) (the "Judicial Review Act"). In rare situations review is also possible pursuant to s.39B of the [Judiciary Act 1903 \(Cth\)](#). Nevertheless, circumstances can arise where a taxpayer aggrieved by a decision of the Australian Taxation Office (ATO) cannot have that decision reviewed. This can occur where a matter neither gives rise to a "taxation decision," thereby making it reviewable under the usual process in Part IVC of the [Taxation Administration Act 1953 \(Cth\)](#), nor a "decision...under an enactment," reviewable under the Judicial Review Act.

The lack of legal remedy is also at the heart of the criticisms that have been voiced suggesting that the ATO's Taxpayers' Charter [is inadequate](#). The Charter outlines, amongst other things, the rights of taxpayers and the service and standards to be expected from the ATO. However, it creates no legal rights. Since the issue of the Charter, in many instances taxpayers and their advisers have had to resort to lobbying politicians, publicity campaigns and even strikes in order to remedy heavy-handed administration. Well-connected and resourced taxpayers may have the luxury of embarking on such campaigns, but the average taxpayer lacking a legal remedy is left to the vagaries of the ATO's internal dispute resolution procedure or that of the [Commonwealth Ombudsman](#) and, now, [Inspector-General of Taxation](#).

## Human rights protection in Australia

Running contemporaneously with the debate over the better protection of taxpayers' rights is the more fundamental issue of the protection of human rights generally. Australia stands almost alone as a Western democracy that has so far resisted the proclamation of a bill of rights notwithstanding strong support for such a measure. Clearly such a development would be much more significant and pervasive than a bill of rights solely focused on taxpayers. However one outcome could be that citizens in their capacity as taxpayers might also receive some protection under such a bill.

What of Australia's recognition of human rights in international treaties? Although Australia ratified the [International Convention on Civil and Political Rights](#) and the [International Convention on Economic, Social and Cultural Rights](#) in 1980 and 1975 respectively, these conventions lack force of law in the absence of being given effect to by statute. Although there is an avenue to complain to the international Human Rights Committee where all domestic remedies have been exhausted, decisions of the Committee are not binding. To date no tax matters have been the subject of a referral and, in any event, the Australian government has demonstrated stoic resistance to any political pressure generated by HRC decisions that it does not agree with.

### What can we learn from the European Convention on Human Rights?

European countries have enshrined a statement of fundamental rights in their [Convention on Human Rights](#) ("ECHR"). Although not promulgated with taxation specifically in mind, there have been many occasions in which the European Court of Human Rights has had to adjudicate on the application of these rights to a taxation dispute.

A worthy enquiry is to what extent the ECHR, if adopted in Australia together with the interpretative approach of the European Court of Human Rights, would provide a legal remedy for taxpayer grievances in circumstances where taxpayers are currently left to pursue an administrative or political outcome?

Several rights within the ECHR have been held to have an impact on taxation including:

- Right to property (Article 1 of the 1<sup>st</sup> Protocol) – the right of people to peaceful enjoyment of their possessions, subject to the right of the state to secure the payment of taxes or other contributions or penalties.
- Right to a fair trial (Article 6) – in the event of the determination of civil rights and obligations or criminal charges a fair and public hearing within a reasonable time by an independent tribunal is mandated.
- Non-discrimination (Article 14) – ECHR rights are to be enjoyed without discrimination on any ground.
- Right to privacy (Article 8) – the right to respect for private life except where necessary for the protection of the country and its citizens.

The European Court of Human Rights has developed a set of general principles for the interpretation of the ECHR which are relevant to taxation. The principle of margin of appreciation provides a primary limitation on the ability of the ECHR to impact the laws of member states. The basis for this limitation is that the Court should not rush to substitute its views for decisions or legislation of governments, which are best placed to assess the needs of their society, unless such decisions are manifestly unreasonable or blatantly inconsistent with the ECHR. The principle of proportionality acknowledges that there should be a reasonable relation between goals pursued and the means used, finding a balance between the rights of individuals and those of the community.

These human rights are somewhat qualified in application to tax cases. The terms of

Article 1 of the 1<sup>st</sup> Protocol to the ECHR, qualify personal property rights with the right of the state to “secure the payment of taxes”. The result is that there have been few cases dealing with the imposition or amount of tax. However, it is possible to state some principles which can apply to substantive tax matters. Grossly excessive taxation or fines might be disallowed on the basis that they amount to a confiscation of property, because they place such an excessive burden that they undermine a citizen’s financial position, or because they are disproportionate as amounting to a grossly arbitrary extraction.

Rather, tax cases have tended to focus on procedural fairness, sanctions, and tax litigation. Delayed repayment of tax or compensation for overpayments may amount to a failure to respect the right to property. The Article 6 guarantee of a fair trial is also often activated, although the decision in *Ferrazzini v Italy* ECtHR, 12 July 2001, [2001] STC 1314 holds that this does not extend to proceedings relating to the assessment or imposition of tax.

Tax cases that raise the Article 14 prohibition against discrimination reflect a generous margin of appreciation being granted to the states recognizing that tax systems typically differentiate between groups of taxpayers. The same may be stated in relation to the Article 8 right to privacy, on the basis that tax systems depend for their efficacy on the supply of information about the affairs of taxpayers.

## Australian tax controversies

The last two decades have witnessed numerous tax controversies in Australia for which no legal review has been available. These include:

- the enforcement of non-binding positions, such as the “accountants’ papers concession”;
- the ATO’s management of mass marketed tax schemes;
- delayed refund payments;
- excessive taxation of superannuation contributions;
- inappropriate management of high net worth individuals’ and risk based audits;
- the imposition of unrealistic processes leading to a tax accountants’ strike; and
- the collection of disputed tax prior to dispute resolution.

Even if aggrieved taxpayers and their advisers were, or might be, able to seek administrative or political intervention in such cases, this process may not necessarily lead to an appropriate resolution of a controversy. Escalation to dispute resolution by the ATO might be met with a response weighted on vindicating the institution. An overworked and underwhelmed Inspector-General might not give the matter their full attention. Political engagement will not always be achievable or forthcoming, and will likely depend more on the taxpayer’s influence rather than the merits of the case. By contrast, a taxpayer would have recourse to a defined legal process if their rights were enshrined in law and a controversy with the ATO arose which arguably infringed on those rights.

Whilst a legislative charter for Australian taxpayers remains conceivable, the current political environment in Australia may not be conducive to its introduction. Adverse publicity over tax avoidance by multinational companies and high net worth individuals sours the case in support of the advancement of taxpayer rights generally.

In the absence of a taxpayers’ charter founded in legislation it might be that taxpayers could find protection under a general bill of rights. However, during a period of heightened concern over national security and illegal immigration, and with a conservative government in power, the movement in support of an Australian bill of rights is unlikely to generate much traction.

Nevertheless, it seems inevitable that Australia will follow the lead of other Western

democracies, if not in enshrining taxpayers' rights in law, then in enacting a general bill of rights. In either of these cases, it could be expected that the four ECHR articles identified above would be represented in some form. Furthermore, in the interpretation of a bill of rights, an Australian court might have reference to the tax jurisprudence of the European Court.

To test the application of the ECHR's articles, if they were adopted in the Australian legal framework, it can be hypothesized how they might have applied to recent Australian tax controversies.

The ECHR articles may have assisted in a resolution of disputes as to access to accountants' opinions, delayed refund payments, collection of disputed tax and complaints arising from the high net worth individuals' tax investigations. In contrast, the ECHR's articles, based on the tax cases in the European Court, would most likely not have provided a resolution to the excessive taxation of excess superannuation contributions, the ATO's aggressive treatment of taxpayers under the 1990s mass marketed tax scheme program, and the circumstances leading to the tax accountants' strike.

In an Australian bill of rights, the limitations on ECHR Article 6 in the European Court tax jurisprudence might be addressed so as to ensure that the right to a fair trial is applied to all tax proceedings, including preliminary investigations and audit activity.

Taking the articles of the ECHR as a blueprint, with amendment to address the limitations identified by the case law, Australian taxpayers may be well served by a general bill of rights.

This article is based on Dabner, Justin, "Resolving Australian tax controversies: does the tax jurisprudence under the European Convention on Human Rights suggest a better way?" (2016) 31 Australian Tax Forum 213.

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#### CITATION :

Dabner, Justin (2016), *Australian Tax Controversies and Human Rights*, Austaxpolicy: Tax and Transfer Policy Blog, 8 September 2016, Available from:  
<http://www.austaxpolicy.com/australian-tax-controversies-human-rights/>

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#### TOPICS :

Human Rights, International Tax Treaties, International taxation, Tax Administration, Tax Reform

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