

## In her name<sup>1</sup>

The office of the Commissioner of Taxation is occupied by an individual appointed by the Governor-General. The *Taxation Administration Act 1953* provides that unless terminated by resignation, death or removal, the person holds office for a fixed term of 7 years, capable of extension by re-appointment at a remuneration determined by the Remuneration Tribunal.

The current Commissioner's arrangements have described a different path: the Commissioner's term was extended by joint press release by the then Federal Treasurer and Minister for Revenue and Financial Services in April 2017 well before his initial term of 7 years had expired (31 December 2019), and for a further period, measuring less than 7 years.

Apart from the Second Commissioners, who are similarly appointed under the terms of the *Taxation Administration Act 1953* and enjoy the same tenure as the Commissioner, the staff employed to assist the Commissioner in discharging her functions are employees whose employment is governed by the *Public Service Act 1999*.

The person appointed as Commissioner may be removed or suspended by the Governor-General. Bankruptcy, holding multiple employments or extended absences while not on leave of absence, are actionable paths to the termination of the officeholder without the participation of Parliament. The Commissioner can be suspended for misbehaviour or physical or mental incapacity. The Commissioner can only be removed from office if these grounds are proven on presentation of a case for removal by both houses of Parliament within the same Parliamentary session.

To date the office of the Commissioner of Taxation has been occupied by men. Inevitably that will change; inevitability portends no precise timing. When the powers, duties and obligations of the Commissioner of Taxation are exercised and discharged by a woman, matters will be conducted in her name. How soon? Hopefully soon enough<sup>2</sup>.

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<sup>1</sup> My thanks to those who "volunteered" to read this paper for sense and sensitivity. They were last seen, variously, at the Northern Beaches, Castle Cove, Newcastle, Manchester and London. Naturally, all errors and insensitivities are mine.

<sup>2</sup> The Australian National Audit Office website (<https://www.anao.gov.au/about/the-auditor-general>, accessed 11 April 2023) reveals that the office of Auditor General of the Commonwealth has always been occupied by men. Another oversight?

The Commissioner is answerable to Ministers of the Government of the day: primarily the Treasurer, but with significant interaction with other Treasury Ministers. With appreciable dexterity, the Commissioner, on occasion, also acts as a delegate of the Treasurer.

Save for instances of express delegated authority, the Commissioner's accountability extends beyond the delivery of corporate plans and reports to Ministers as required to the publication by tabling in Parliament of the annual performance statement of, at least, the Australian Taxation Office (**ATO**), which is a "statutory authority" for the purposes of the *Public Service Act 1999*.

The Commissioner also serves as the Registrar of the Australian Business Register and the Australian Business Registry Services and is an ex-officio member of the Board of Tax. The Commissioner leads the Serious Financial Crime Task Force and, beyond the parameters of that taskforce, maintains liaison functions with other government agencies.

The Commissioner has responsive relationships with the Auditor General and the Inspector General of Taxation respectively. These relationships cover similar ground. The primary responsive relationship is with the Auditor General who is, unlike others, an officer of the Parliament and who reports direct to Parliament. While the lesser relationship is with the Inspector General of Taxation who reports to the responsible Minister, the Inspector General has express administrative policy making recommendation powers to the Minister and hence the Government (as does the Department of Treasury for all taxation matters) which the Auditor-General does not have. (Were it not for this difference, it may be thought that the Inspector General's role and function readily could be subsumed into the Australian National Audit Office.)

Accountability flows from scrutiny, whether by public appearance before Parliamentary Committees, engagement with the Australian National Audit Office on a range of systemic and compliance issues, periodic findings from Royal Commissioners and reports and recommendations of the Inspector General of Taxation and Taxation Ombudsman.

On any examination, the individual appointed to the office of the Commissioner of Taxation faces a daunting workload. Not only is the Commissioner the "accountable entity" for the ATO, she is also recognised as a member of the ATO in its guise as a "listed entity" for the purposes of the *Public Governance, Performance and Accountability Rule 2014* (Cth), with the disclosure, reporting and management responsibilities that comes with it. The Commissioner is responsible for the use and management of public resources for achieving the purposes of the ATO and for promoting the financial sustainability of the ATO.

Long associated with the administration of the *Income Tax Assessment Acts* and the *Taxation Administration Act 1953* in the collection of the income tax, the Commissioner has, according to the Inspector General of Taxation's 2021 *Corporate Report*, administration of, or partial administration of 34 primary enactments. In addition to the preparation of the substantial annual statutory report to Parliament, the duties of the Commissioner also extend to, at least, the administration of Fringe Benefits Tax; GST; Superannuation Guarantee Charge; Wine Equalisation Tax; administration of the National Tax Equivalents regime; acting as the competent authority in the administration of Australia's mutual agreement obligations under Australia's bilateral income tax treaties; representing Australia at the OECD's Forum on Tax Administration and its derivative body the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC); collecting child support under a Heads of Agreement with the Department of Human Services; data matching with Centrelink by monitoring Single Touch Payroll; and with ASIC the administration of Australia's superannuation laws.

Although cyber-security falls outside the Commissioner's primary remit, it is such a pervasive issue that the resources available to the Commissioner may be enlisted and her views sought should cyber-security issues arise for the Government of the day.

As each administered law operates within the framework provided by the existing general body of law (referred to hereafter as the **general law**), the administration of these laws requires the Commissioner (and necessarily her delegates, authorised representatives and employees) to proceed with a cogent and comprehensive appreciation of the general law and how it intersects with, moulds or restricts the specific regulatory and administrative regimes listed above.

Two examples are the Commissioner engaging with the general law in exercise of the general power of administration; and, perhaps more frequently and exactly, the Commissioner maintaining understanding across those in her workforce who administer the standard of proof required from taxpayers (and other subjects of administration), of the clear difference between being persuaded of the existence of facts on the balance of probabilities, and of proof beyond reasonable doubt.

The Commissioner is fully conversant with the latter standard of proof due to her involvement in the Serious Financial Crime Task Force, but this is not the only acquaintance the Commissioner has with the scope and operation of criminal and penalty regimes. The Commissioner may initiate criminal and/or civil penalty proceedings and may refer matters to the Director of Public Prosecutions.

With so many information processing functions to discharge, the Commissioner has access to a vast amount of information which, subject to specific and burgeoning exceptions relating to an ATO

employee's performance of her or his duties as a taxation officer or to other stipulated government bodies or departments, must be kept secret. At the domestic level, those exceptions include disclosures to the National Crime Authority, law enforcement agencies and Royal Commissions and co-operation with ASIO.

Representing Australia the Commissioner may also disclose information received under the common reporting standards (including FATCA); the mutual exchange procedures (as affected by the Multilateral Instrument); TIES; and the exchange of foreseeably relevant information under the exchange of information articles of Australia's bilateral tax treaties.

Determining whether an exception to the domestic secrecy provisions applies, or whether Australia has international obligations in relation to the disclosure of information, often involves the Commissioner's satisfaction of the existence of preconditions authorising that exclusion or compelling an international disclosure. As noted below, given the Commissioner's propensity to publish, this suggests that carefully considered unpublished guidelines have been formulated.

Another avenue requiring care in the dissemination of confidential information lies in the exercise of public consultation in relation to new legislative and administrative measures. The Commissioner's role extends beyond supplying the topics and contributing to the proposals for consideration and review – more often than not the Commissioner selects the confidential consultation participants, or at least the sector of the community from which they are drawn. If the Commissioner were a widely known, socially mobile leader, known by many and mixing with more, her choice or endorsement of external participants for consultation, without guidelines or oversight, may unexpectedly and unhelpfully assail her independence, a common issue faced in other aspects of her various activities; an issue shared with many others holding public appointment.

With so many functions to discharge, and the adoption of a self-assessment regime in the administration of the income tax laws, the Commissioner publishes a vast amount of information spanning rulings, policies for internal use, tax preparation guides, taxpayer alerts, decision impact statements, conference papers, webinars and the general advice found on ato.gov.au. When trawling through the extent of this information about income tax and GST alone, the reader may wonder whether the Commissioner may lay claim to be the most prolific publisher in Australia, publishing original material and updating it regularly enough for the information presented to be reliable. The manner in which material is presented by the Commissioner raises questions of whether she creates "legitimate expectation" of future conduct, capable of administrative enforcement.

Resource constraints may explain the decrease in the publication of material by the Commissioner which binds her when assessing a taxpayer.

Administrative judgment may explain the growth in communication by press release and the attendant increase in the number of the Commissioner's staff focusing on public relations.

I hope that the growth in the latter does not diminish the precision of the information conveyed, or lead to some sacrifice of the quality, quantity and relevance of binding guidance rendered in plain English necessary to address the more arcane aspects of Australia's tax laws.

I also trust that the level of certainty obtained by taxpayers from the Commissioner's publications does not decrease as the Commissioner descends to the more generalised, vague visual depiction of risk, reliant on coloured panels to convey levels of risk, about compliance with carefully drawn, complex legislation which is often grounded in nested definitions occasionally spread across multiple enactments. Colour coding may be as useful as attempting to convey advice and risk primarily if not solely, orally or in charts, diagrams or evanescent visual depiction.

Few duties are discharged by the Commissioner personally. It would be impossible to do otherwise. Many of her duties are discharged by delegates and authorised representatives of the Commissioner (and the difference between the two does matter) and her employees in the ATO and other departments.

However, despite the difference between delegates and others, the office of the Commissioner of Taxation bears responsibility for the actions of all of those persons. Some of the avenues for the Commissioner's accountability were mentioned above.

Publicised examples of mistakes and missteps of the Commissioner's employees (both perceived and actual) have been widely reported, perhaps disproportionately. Criminal sanction against the Commissioner personally, or in her official capacity, is unknown although criminal proceedings have been brought against ATO officers. Reported examples of mistakes and missteps highlight an additional obligation of the Commissioner: she must keep her officers, delegates, authorised representatives and employees together and on message, attentive and responsive at the legally acceptable level.

A public face is associated with the incumbent Commissioner. In some cases the public personality which has accompanied that public face, has emerged at keynote public speeches, in exchanges with members of Parliamentary committees and other avenues. In my experience, over the last 40 years

the Commissioner's opportunities to present a public face have increased as they have been embraced, and the avenues for disseminating information have increased in response to greater societal complexities flowing from changing domestic and international influences.

Public comment from the Commissioner (or her people) has real value because it can promote certainty and reduce risk. Unsurprisingly, public comment from the Commissioner is not immune from scrutiny or litigation. Public comment attracts press coverage, particularly when those reporting those comments consider the comments to be candid or critical.

Rarely, public comment can ground proceedings to which the Commissioner personally is party, rather than in her official capacity. While the Commissioner's public comments made outside Parliament are not immune from private suit in defamation brought against her personally, those comments may be an occasion of qualified privilege where made in response to an attack on the Commissioner, her officers or the Australian Taxation Office. Broad immunity is provided for public comments made while appearing before Parliamentary committees where those comments relate to "proceedings in Parliament" as defined.

In her official capacity the Commissioner is scarcely immune from review, and on occasion, criticism. The Commissioner is not above the law and must abide by the general law on which the tax law is based, subject to available immunities.

Preservation of the common law right or common law immunity of legal professional privilege, properly understood, is commonly acknowledged by the Commissioner, but when claimed by taxpayers, is frequently challenged

Generally the Commissioner cannot make law although she can make legislative instruments. Two types of legislative instrument are noteworthy: the annual notice - now the length of a small novella - requiring the lodgment of income tax returns; and modifications to the operation of the tax laws if the modification would not be inconsistent with the intended purpose and object of the legislative provision and several other conditions are satisfied.

Confident expositions of what the law is, found in public rulings and PSLAs, PCGs and LCGs, and Decision Impact Statements, are not decisive. In appropriate circumstances some may well be challenged. Whether a topic addressed in a public ruling (including PCGs or LCGs) is properly the subject of a public ruling will turn on whether the content of the document is a general exposition of the Commissioner's view of the law or is a view which is capable of applying to a taxpayer who hopes to rely on it. The change in language from the previously repealed rulings regime raises doubt about

whether more recently published documents, including those registered under the Register of Legislative Instruments, may be a public ruling binding on the Commissioner.

The Commissioner is reviewed frequently, and perhaps not always fairly, by commentators and persons described as tax professionals. A common theme is the fairness exhibited by the Commissioner in her treatment of different taxpayers. The fairness expected of the Commissioner in her administration is acknowledged but scarcely laboured. Australia does not have a Bill of Rights, or equivalent, and the Taxpayer's Charter, is aspirational rather than enforceable.

In limited circumstances the Commissioner's behaviour, seen as discriminatory, has not been permitted. The Commissioner's assessed inapplicability of a discretion has been overturned when the elements necessary for the operation of the discretion were shown to be present. The Commissioner cannot prescribe absolutely the circumstances in which discretions must be refused; nor can she apply an inflexible policy upon a topic of assessment without regard to the merits of an individual taxpayer's circumstances.

The Commissioner's conduct cannot result in an estoppel against the operation of the Tax Acts. On the rare occasions when limitations have been imposed on the Commissioner, the actions complained of concerned modified collection and settlement regimes published by the Commissioner from which she could not depart.

Focusing solely on the income tax laws, the statutory appeal and review rights afford taxpayers the greatest field for review of the Commissioner's decisions. Those rights focus solely on the correctness of the assessed quantum of a tax liability, conclusions expressed in private rulings or statutory determinations, where each latter instance relates to an integer in producing an assessment. Limited success has resulted from alternate courses of action: from the pursuit of declaratory relief, prerogative writs, administrative remedies, invoking the *Judiciary Act 1903* and allegations of conscious maladministration.

It is only the quantum of the assessment that can be challenged and not the steps taken preparatory to the issue of the assessment. Those steps may include when the Commissioner, by her officers, investigates the affairs and disclosures of a taxpayer; to determine the scope of information gathering, to identify foreseeably relevant information to exchange under treaty obligation, and to choose an approach to information gathering which may inform the evidence later adduced in proceedings.

Pre-assessment decisions taken for the Commissioner, by her officers, are so broad ranging that they defy summary. However, notable decision types include: determining what is ordinary and what is

not, in relevant context; decisions about the purpose of complex commercial transactions undertaken by well capitalised public groups of entities, to the veracity of differing ethnic community practice matters as it affects community behaviour; evaluations of commercial and financial choices available to a taxpayer, to acceptance of, or challenge to, the consequences of general compliance (or not) with aspects of the formation, management and administration of different entities; from acceptable reliance on financial records as evidence of challenged activity to inferences which may be drawn from poorly or minimally documented activities.

Decisions taken before the issue of an amended assessment include whether an assessment or amended assessment is grounded in s 167 of the 1936 Act. Such a decision may have a material impact on how the taxpayer tries to discharge the burden of proof that the challenged assessment is excessive.

The Commissioner may decide, legitimately, to pursue multiple or alternate courses, whether through multiple determinations or by the issue of multiple assessments to one or more taxpayers.

Each of these matters have been addressed in the context of the general duty to behave fairly which, subject to the preservation of procedural fairness to the taxpayer, has less content than its label suggests.

The Commissioner's actions expand once an assessment is challenged. Those Commissioner's officers, independent from those who authorised the issue of assessments decide whether some, all or none of the grounds of a taxpayer's objection should be allowed, while other officers within the ATO's dispute resolution cohort may well decide whether a potential dispute should be settled. In the latter case, yet another group – associated as a Panel – determine the reasonableness of the settlement under consideration. Unlike other Panels overseen by the Commissioner, taxpayers are not afforded address rights to the Settlement Panel, although it is believed that settlement offers made on behalf of taxpayers are considered by members of the Settlement Panel.

As a challenge by a taxpayer may extend to administrative penalties and statutory interest, both of which may be remitted in part or whole, the Commissioner, through her independent objections' officers, must determine whether and how the remittance discretion may be exercised.

Rejection of grounds of objection may result in the commencement of proceedings by a taxpayer. At this point, the Commissioner may be required to consider whether the dispute warrants test case funding and, if so, the terms on which that funding may be provided.

Once the challenge to an assessment matures into proceedings, the Commissioner is exposed to the additional requirements to act as a model litigant and to assist the AAT (and Federal Court). That does not impose on the Commissioner any burden to prove the accuracy of the assessment. As noted above, the Commissioner can contribute to the weight of that burden depending on whether the Commissioner has decided to assess using s 166 unaided or augmented by s 167 of the 1936 Act.

In appropriate circumstances the Commissioner or her delegate have supported the appointment of *amicus curiae* to act as contradictor in proceedings.

If the actions of the taxpayer impel the Commissioner to assess but also to initiate criminal or civil penalty proceedings, the Commissioner must consider procedural issues which may impinge on a taxpayer's substantive legal rights. Initiating those proceedings may impose additional constraints on the taxpayer, be they resource constraints, or forensic decisions in relation to the conduct of the criminal and civil proceedings.

Once the assessment issues the Commissioner can seek recovery of the debt arising and is not prevented from doing so even if the taxpayer initiates dispute proceedings. The abolition of Crown priority to debts owed does not seem to inform whether debt collection is expedited. However, whether the Commissioner should initiate collection proceedings during the course of hearing an application or appeal is a different matter altogether.

The Commissioner may decide to grant terms of payment of the debt owed. Those terms may require the taxpayer to provide security for the repayment of the debt. In cases where she is concerned that the taxpayer may seek to dissipate his assets – even on pain of proceedings under the *Crimes (Taxation Offences) Act 1980* – the Commissioner may seek freezing orders preventing the disposal by the taxpayer of his property. More commonly the Commissioner will avail herself of the statutory garnishee regime, unless, by the time the Commissioner moves to collect the debt the taxpayer is in liquidation, in which case a different avenue is available.

To avoid an ending reminiscent of Thucydides – abruptly; part way through a sentence – we appreciate the Commissioner by recounting her responsibilities and activities - from contributing to the text and tenor of the laws for which she has administrative responsibility, directly and indirectly, domestically and internationally; tending to a consistently reliable back office administering registrations, data collections, collections and payments; exercising discretions which quantify tax liabilities; engaging with and reinforcing the rule of law; rallying and effectively leading her employees by conduct and to

inspired aspiration; to collecting the revenue to fuel Government projects – which are all in a day’s work for the Commissioner.

At the end of an exceptionally long day, the work, in her name, begins again.

Ian Stanley

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