

ATO ACCOUNTABILITY AND TAXPAYER FAIRNESS: AN ASSESSMENT OF THE PROPOSAL TO SPLIT THE AUSTRALIAN TAXATION OFFICE

JOHN BEVACQUA*

I INTRODUCTION

Prior to the 2013 election, the Liberal–National Party Coalition flagged the need for an inquiry to investigate the potential to split the Australian Taxation Office (‘ATO’) to separate its tax investigation responsibilities from its tax prosecutorial functions. Specifically, then Shadow Treasurer Joe Hockey observed in his 2013 post-budget speech to the National Press Club that ‘the Coalition stands ready to break up the tax office, so its policeman functions are separate to its responsibility for administering the tax system’.¹

Mr Hockey made his comments in the context of complaints about the ATO’s ‘insular and inward-looking culture’, its ‘overly aggressive’ interpretations of tax laws and the perception that ‘when dealing with taxpayers, the tax office has everything in its favour’.² This article examines the extent to which a split of the ATO along the lines proposed by Mr Hockey would aid in addressing these concerns.³

The analysis reveals that, *prima facie*, these mooted structural reforms are likely to generate long-term benefits in terms of greater ATO accountability and taxpayer fairness. However, to effectively address the issues raised by Mr Hockey, the reforms proposed must form part of a package of broader reforms. This article proposes that this package of reforms should include a number of measures directly aimed at redressing the current imbalance between taxpayer rights and ATO powers.

Part II specifically examines the case for reforms along the lines envisaged by Mr Hockey. It assesses the potential contribution of such measures, particularly in terms of engendering greater fairness toward taxpayers and increasing ATO accountability. It considers both the long-term and short-term

* Dr John Bevacqua, Senior Lecturer, School of Law, La Trobe University.

1 Joe Hockey, ‘Post Budget Reply’ (Speech delivered at the National Press Club, Canberra, 22 May 2013).

2 *Ibid.*

3 This article will not seek to examine whether these concerns are well founded, although, clearly, this is a matter for debate.

effects of the proposed ATO restructuring and, while highlighting a number of uncertainties, confirms the existence of a prima facie case for reform.

Part III more closely scrutinises the prima facie case for reform by highlighting a number of key differences between criminal justice (the context in which the case for separation of investigative and prosecutorial functions is strongest) and tax administration. The discussion highlights a number of weaknesses and uncertainties in the prima facie case for reform which arise out of these fundamental differences and which, while not completely discrediting the prima facie case for reform, suggest proceeding only with caution and after closer critical analysis.

Part IV shifts the focus to identifying and discussing a framework of broader reforms necessary to fully accomplish the objectives of the proposed break-up of the ATO. These include reforms to consolidate the functions of the Commonwealth Ombudsman and the Office of the Inspector-General of Taxation ('IGT') and endowing the Taxpayers' Charter with legislative force. They also include a range of other legislative and judicial oversight measures which have been introduced in a number of comparable jurisdictions and which specifically aim to ensure tax authority accountability and fair treatment of taxpayers.

II THE CASE FOR REFORM

The precise nature of the division between the 'administration' and 'policing' functions proposed by the Coalition is unclear from the then Shadow Treasurer's 2013 speech. The complete silence on the issue since the election of the Coalition Government in 2013 does nothing to clarify the issue.⁴ However, an earlier speech by the then Shadow Treasurer Mr Hockey in November 2012 to the Institute of Chartered Accountants provides a slightly clearer view of the Coalition proposal if it is to ultimately proceed. In that speech, Mr Hockey observed:

If the taxpayer decides to contest a matter, their objection ... will have to be examined by the ATO.

It's that reconsideration of the issue at the objection stage that potentially puts the ATO into the situation of investigator and prosecutor ...

There should be a completely new team that considers the objection.⁵

4 There have been media suggestions that the current ATO Commissioner Chris Jordan is taking steps to appease the Coalition Government by implementing other ATO structural changes to minimise the prospects of an ATO split. See, eg, Nassim Khadem, 'Will the ATO Be Split under the Coalition? Not if Chris Jordan Keeps Singing from the Abbott-Hockey Song Sheet', *Business Review Weekly* (online), 24 September 2013 <http://www.brw.com.au/p/business/hockey_keeps_singing_chris_split_Rmo3etbCuw2SuiGvZ832ZM>.

5 Joe Hockey, 'A Coalition Government's Approach on Tax' (Speech delivered at the Institute of Chartered Accountants National Tax Conference, Sydney, 23 November 2012) <<http://www.charteredaccountants.com.au/taxconference/~media/Files/Training/Tax/National%20Tax%20Conference%20Brochure%202012.ashx>>.

Accordingly, at the heart of the proposed ATO split is a desire to separate ATO investigative and adjudicative or review functions which Mr Hockey characterises as ‘prosecutorial’.⁶ Such a split would be broadly consistent with the recent recommendations of the IGT in his report into the ATO’s use of early and alternative dispute resolution.⁷ In that report, the IGT calls for a separation of the objection and litigation functions from the investigative arm of the ATO: ‘The IGT considers that separating the objections and litigation functions from the investigative arm of the ATO will assist in enhancing both the actual and perceived independence of review of original ATO decisions’.⁸

The IGT proposal extends to a departmental division within the existing ATO, rather than a complete split of the ATO into two separate entities.

Generally speaking, such a suggestion is not new. In fact, as the IGT points out in his 2012 report, such a structure existed in the ATO prior to 1994 when the ATO abolished its Appeals and Review Group and consolidated these functions into its existing business lines.⁹ The 1994 changes were prompted by the Joint Committee of Public Accounts (‘JCPA’) recommendation in its 1993 report into the administration of the tax system. The JCPA took the view that the internal review role carried out by the Appeals and Review Group was relevant not only to cases going to objection but in all cases. Hence, those functions should be integrated into the ‘on-going decision making processes of the Australian Taxation Office’.¹⁰ The hope was that such a change would bring about a greater taxpayer focus within the ATO.

Accordingly, reverting to a separate prosecutorial and investigative framework would be a return to structures of the past. Nevertheless, the IGT concludes that

a separate appeals and review section would provide an avenue for taxpayers to raise concerns regarding an ATO view, and have the alternate interpretation or view considered as part of the independent review. The IGT believes that this would ensure that only genuine and fundamental disputes on interpretation or application of the law are litigated.¹¹

Separating investigatory and prosecutorial functions is a long-accepted philosophical principle in our legal system, particularly the criminal justice system. In that context, it has been noted that ‘it is of the utmost importance that

6 Despite this technical inaccuracy, this is the definition of ‘prosecutorial’ adopted in this article, rather than confining the meaning of the term simply to the ATO’s prosecution of ‘minor’ criminal matters under its longstanding arrangement with the Commonwealth Director of Public Prosecutions. This restrictive reading of ‘prosecutorial’ would exclude the objection and review functions conducted by the ATO with respect to non-criminal matters, which clearly would be inconsistent with the intent of the reforms flagged by Mr Hockey.

7 Inspector-General of Taxation, *Review into the Australian Taxation Office’s Use of Early and Alternative Dispute Resolution* (Report, May 2012) (‘*Review into ATO Dispute Resolution*’).

8 Ibid 105 [6.33]. Joe Hockey refers to these recommendations in his November 2012 speech: Hockey, ‘A Coalition Government’s Approach on Tax’, above n 5.

9 *Review into ATO Dispute Resolution*, above n 7, 105 [6.34].

10 Joint Committee of Public Accounts, Parliament of Australia, *An Assessment of Tax – A Report on an Inquiry into the Australian Taxation Office* (1993) 270–1.

11 *Review into ATO Dispute Resolution*, above n 7, 106 [6.44].

the roles of investigator and prosecutor be kept distinct'.¹² The IGT drew a comparison with the criminal justice system in his report, citing a desire that 'the ATO's litigation function would, like the Director of Public Prosecutions in criminal matters, have ultimate discretion as to which matters the ATO would litigate, which would be conceded and which should otherwise be settled'.¹³ Consequently, therefore, many of the arguments raised in the criminal justice system context are worth examining in a tax administration setting.

Specifically, there are three main arguments for separating investigatory and prosecutorial functions often mentioned in the criminal justice context that could also resonate in the tax context. These include the potential benefits in terms of increased accountability and checks and balances in the tax administration system, greater impartiality in dealings with taxpayers, and long-term efficiency gains. These broadly match the policy concerns raised by Mr Hockey.¹⁴ The question is whether or to what extent an organisational split of the ATO would achieve these core objectives.

A Greater Accountability/Checks and Balances

A solid argument could be raised that a division of the ATO along investigatory–prosecutorial lines would introduce greater checks and balances into the tax administration system. Arguably, the external flow of information between two different bodies would lay bare each organisation's actions to the scrutiny of the other, remove opportunities for misfeasance or collusion against any taxpayer and, hence, allow for greater scrutiny and accountability.

For example, the need to pass on the file to another organisation would make it very difficult for either organisation to operate behind a wall of silence in dealing with any particular case. Similarly, exposure to the scrutiny of a separate organisation could lead to practical improvements such as better record-keeping and a greater willingness to change decisions when those decisions cannot stand up to external scrutiny. On this score, the changes suggested by Mr Hockey could have a direct impact on eliminating perceptions of 'overly aggressive' interpretations of tax laws. This would certainly be true if a separation of prosecutors from the investigation process brought about a more dispassionate approach to litigation against taxpayers.

Procedural justice improvements could also be implemented more easily. For example, protocols could be put in place more easily to restrict communications between auditors and litigators except within strictly monitored parameters.

12 Tony Krone, 'Police and Prosecution' (Paper presented at the Third National Outlook Symposium on Crime in Australia, Canberra, 22–23 March 1999) 3.

13 *Review into ATO Dispute Resolution*, above n 7, 105 [6.33].

14 Of course, it is possible to speculate on political motivations for the proposed split. It has been pointed out that such revenue authority restructuring 'could give the impression of reducing the size of the core civil service, while at the same time preparing the ground for possible privatisation of the activity, or at least opening the activity up to competition': Nick Devas, Simon Delay and Michael Hubbard, 'Revenue Authorities: Are They the Right Vehicle for Improved Tax Administration?' (2001) 21 *Public Administration and Development* 211, 212.

These parameters could include requirements of notice to the taxpayer and providing the taxpayer with an opportunity for input prior to any exchange of information.

Similarly, a split of ATO investigative and prosecutorial functions could generally make the ATO more accountable to the public for its actions. The importance of accountability in tax administration processes is widely acknowledged. The comments of Braithwaite are typical:

Failure to administer the tax system in a way that demonstrates basic respect for the democratic principles of participation and accountability is a dangerous game. A tax authority that de-legitimizes itself in the eyes of citizens limits its effectiveness and short-changes citizens in terms of what they can expect from democracy.¹⁵

Accordingly, any improvement in ATO accountability generated by a division of investigatory and prosecutorial functions could be expected to have a direct effect in terms of instilling taxpayer confidence in the tax system and, potentially, greater taxpayer willingness to voluntarily comply with tax obligations.¹⁶

Even if these expectations do not materialise, a separation of ATO prosecutorial and investigatory functions would, at the very least, aid in fostering a *perception* that the internal workings of the ATO were being exposed to greater public scrutiny. Consequently, such a change might invite a less adversarial approach by taxpayers toward their relationship with the ATO. To the extent that such a change would *actually* result in greater ATO accountability, the ATO too might be less inclined to treat taxpayers as adversaries. This would directly address Mr Hockey's concern with the ATO's apparently over-aggressive approach toward taxpayers.

B Impartiality/Fairness to Taxpayers

Another potential benefit of a split of the ATO as proposed by the then Shadow Treasurer is likely to be greater resultant fairness toward taxpayers. Mr Hockey makes express reference in his 2012 speech to the need for taxpayers to be confident that they are being treated fairly and impartially by the ATO.¹⁷ The pursuit of fair treatment of taxpayers has long been an aspiration of the ATO. It is

15 Valerie Braithwaite, 'Tax System Integrity and Compliance: The Democratic Management of the Tax System' in Valerie Braithwaite (ed), *Taxing Democracy* (Ashgate, 2003) 271, 287.

16 For a discussion of the link between changes in tax authority structural organisation and taxpayer satisfaction, see Joel D Aberbach and Tom Christensen, 'The Challenges of Modernizing Tax Administration: Putting Customers First in Coercive Public Organizations' (2007) 22 *Public Policy and Administration* 155.

17 Hockey, 'A Coalition Government's Approach on Tax', above n 5.

a commitment contained in the Taxpayers' Charter¹⁸ and is regularly mentioned by tax commissioners.¹⁹ For example, Commissioner Chris Jordan recently highlighted tax system fairness as a major theme and current concern of the ATO in his speech to the ATAX 11th International Tax Administration Conference, observing that 'in order to deliver to government, the ATO must use its power legitimately, build trust in its judgment and demonstrate fairness and integrity'.²⁰

Insofar as fulfilling this aspiration is concerned, it is certainly intuitively logical to suggest that it is difficult for a single organisation such as the ATO, which is exclusively charged with administration and enforcement, to remain impartial in its approach to evaluating taxpayer arguments. The logical conclusion is that if the ATO were less involved in the enforcement process, more impartiality could be introduced into the system. While the extent to which this argument can be sustained will ultimately depend on the precise structure and guidelines put in place as part of the Hockey recommendations, it is reasonable to expect some validation of this argument.

If this is the case, then there are also likely to be significant positive flow-on effects. These would include systemic benefits in terms of fostering a greater willingness among taxpayers to comply with their tax obligations. This is because there is a well-accepted link between taxpayer fair treatment and willingness to comply. For example, the former Commissioner of Taxation, Michael D'Ascenzo has observed: 'Procedural fairness, courtesy and integrity underpin a world class tax administration. This is important because the success of any tax system is highly dependent on people's propensity to voluntarily comply with their tax obligations'.²¹

In addition, the Organisation for Economic Co-operation and Development Centre for Tax Policy and Administration has noted that '[t]axpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply'.²² Judges have also recognised that fair treatment of taxpayers is in the 'interest not only of all individual taxpayers ... but also in the

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- 18 The Australian Charter contains a commitment by the ATO to treat taxpayers 'fairly and reasonably'. This includes commitments under that heading to treat taxpayers with courtesy, consideration and respect, behave with integrity and honesty, act impartially, respect and be sensitive to the diversity of the Australian community, make fair and equitable decisions in accordance with the law, and to resolve taxpayer concerns, problems or complaints fairly and as quickly as possible: Australian Taxation Office, *Taxpayers' Charter: What You Need To Know* (Publication No NAT 2548-06.2010, June 2010) 2.
- 19 Eg, the former Australian Commissioner of Taxation, Michael D'Ascenzo referred to fairness in the preamble to an earlier version of the Australian *Taxpayers' Charter* pointing to an aspiration to be 'professional, responsive and fair': Australian Taxation Office, *Taxpayers' Charter: What You Need To Know* (Publication No NAT 2548-01.2007, January 2007) 1.
- 20 Chris Jordan, Commissioner of Taxation, 'Reinventing the ATO – Building Trust in Australia's Tax Administration' (Speech delivered at the ATAX 11th International Tax Administration Conference, Sydney, 14 April 2014).
- 21 Michael D'Ascenzo, Commissioner of Taxation, 'It Is the Community's Tax System' (2006) 2 *Journal of the Australasian Tax Teachers Association* 9, 13.
- 22 Centre for Tax Policy and Administration, Organisation for Economic Co-operation and Development, *Principles of Good Tax Administration* (Practice Note No GAP001, 21 September 2001) 3 [3].

interests of the revenue authorities'.²³ Research into compliance behaviour is rapidly extending to examination and confirmation of various aspects of the link between fair treatment and tax compliance.²⁴

However, a note of caution is necessary on this point. As the IGT has pointed out, 'public and professional confidence in the independence and expertise of staff ... would take time to develop' after any restructure.²⁵ Consequently the public trust necessary to foster greater compliance may take some time to emerge following any ATO restructure and split of ATO investigative and prosecutorial functions and must be considered a potential long-term benefit rather than a short-term gain.

C Efficiency Gains

Maureen Kidd of the International Monetary Fund Fiscal Affairs Department has identified the role of reviews of tax administration organisational structures in ensuring public sector accountability and efficiency:

Governments are seeking ways to improve operational results while increasing transparency and accountability within their departments and agencies. The organization structure of the tax administration is a key component in these efforts.²⁶

More pertinently, insofar as the Hockey reform suggestions are concerned, however, Kidd has also identified that a 'functions-based' approach for the organisation of tax administration bodies is capable of generating significant efficiencies. Specifically, Kidd reasons that grouping together similar activities that require similar skills or specialisations can produce real gains through increased depth of knowledge in core business areas.²⁷

However, the ATO is already functionally organised. It comprises three core divisions: (1) compliance; (2) enterprise services and technology and organisations; and (3) corporate services and law. Arguably, though, a formal

23 *Vestey v Inland Revenue Commissioners [No 1]* [1979] Ch 177, 197 (Walton J).

24 See, eg, Robert Mason and Lyle D Calvin, 'Public Confidence and Admitted Tax Evasion' (1984) 37 *National Tax Journal* 489; Michael L Roberts and Peggy A Hite, 'Progressive Taxation, Fairness, and Compliance' (1994) 16 *Law & Policy* 27; Steven M Sheffrin and Robert K Triest, 'Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance' in Joel Slemrod (ed), *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press, 1992) 193; Josef Falkinger, 'Tax Evasion, Consumption of Public Goods and Fairness' (1995) 16 *Journal of Economic Psychology* 63; F A Cowell, 'Tax Evasion and Inequity' (1992) 13 *Journal of Economic Psychology* 521. Typically such studies focus on the positive compliance effects of fostering a relationship of trust and confidence between taxpayer and tax authority. For a good Australian example of such a study, see Jenny Job and Monika Reinhart, 'Trusting the Tax Office: Does Putnam's Thesis Relate to Tax?' (2003) 38 *Australian Journal of Social Issues* 299. See also Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders' (2004) 28 *Law and Human Behaviour* 187. There has also been significant international focus on the relationship between trust and compliance behaviour: see, eg, John T Scholz, 'Trust, Taxes, and Compliance' in Valerie Braithwaite and Margaret Levi (eds), *Trust and Governance* (Russell Sage Foundation, 1998) 135.

25 *Review into ATO Dispute Resolution*, above n 7, 107 [6.47].

26 Maureen Kidd, Fiscal Affairs Department, International Monetary Fund, *Revenue Administration: Functionally Organised Tax Administration* (Technical Note, June 2010) 1.

27 *Ibid* 2.

separation of prosecutorial and investigatory functions could generate additional efficiencies in terms of further specialisation and depth of knowledge.²⁸

Support for potential efficiency gains from a separation of ATO investigative and prosecutorial functions can also be gleaned from the IGT's consideration of the issue. The IGT refers to indirect efficiency gains resulting from separating prosecutorial and investigatory functions of the ATO because of the greater likelihood of tensions and disagreements between ATO auditors and appeal reviewers under such a structure:

The IGT considers that tensions of this nature are not necessarily undesirable in ensuring robust and tested outcomes are achieved, thereby reducing the overall level of taxpayer disputes and the cost to the broader tax system.²⁹

However, just as with any potential gains in terms of fairness and accountability, a separation of ATO investigative and prosecutorial functions is equally unlikely to bring about short-term efficiency gains. As the IGT has also pointed out, even a significant structural change within the ATO itself to separate investigatory and prosecutorial functions 'would be a major undertaking and ... some time may be required for the ATO to build up sufficient internal capability to manage a separate appeals and review section'.³⁰ Consequently, any efficiency gains are unlikely to be experienced in the short term.

The quantum and time frame for achieving any potential efficiency gains will undoubtedly depend on the structure ultimately recommended if the Hockey proposal proceeds. However, it seems especially likely that if the ultimate path chosen is to divest the ATO entirely of its prosecutorial functions in favour of another (presumably public) body, the likely complexity and cost of such an undertaking will make it extremely difficult to achieve any short- or medium-term efficiency gains. While it is a task beyond the scope of this article to resolve, conceiving of a new public body that could be charged with these prosecutorial responsibilities and achieve significant efficiencies, even in the medium- or long-term, would be a significant challenge.

III DISTINGUISHING CRIMINAL JUSTICE FROM TAX ADMINISTRATION: ADDING NUANCE TO THE PRIMA FACIE CASE FOR SPLITTING THE ATO

The discussion in Part II touched upon a number of contingencies and uncertainties involving the proposed separation of ATO investigative and prosecutorial functions. However, to this point there has been little challenge to the underlying assumption that a split of this type, which is so intuitively logical in the context of the criminal justice system, should transfer without adjustment to the tax administration context. This Part presents deeper analysis, which raises

28 Although, as discussed in detail in Part III, the specialisation argument taken to its logical conclusion may actually be a good argument against any ATO split.

29 *Review into ATO Dispute Resolution*, above n 7, 106 [6.45].

30 *Ibid* 107 [6.47].

a number of considerations and which, at a minimum, suggests caution in proceeding on this assumption.

For example, in the criminal justice context an argument is often made that police are not competent prosecutors and prosecutors are not sufficiently trained in investigation.³¹ Hence, a division of these responsibilities allows for necessary specialisation in both fields. However, this argument does not translate neatly to the taxation context. In the taxation context it could be argued that the relative complexity of the tax system requires a level of specialisation which is simply only possible in an organisation which is completely appraised of this complexity.³²

It has been observed for example that ‘the technical aspects of regulatory requirements and their complexity’³³ can mean that the experience of the investigating agency is of relatively greater importance, particularly when there are broad discretions as to whether to prosecute. In the tax context, the decision to prosecute is not merely a question of law, but a question involving the weighing up of difficult technical, policy and legal issues. The ATO’s own Prosecution Policy explains the regulator’s primary belief in voluntary compliance and that ‘[p]rosecution is not seen as an end in itself. It is a means of encouraging or securing compliance, not only by a specific taxpayer but also by the wider taxpaying community generally’.³⁴

While the ATO has to date been silent on the issue of whether the mooted split would be resisted on this basis, there is real potential for resistance to arise. For example, United Kingdom (‘UK’) Customs and Excise observed, when faced with the suggestion that prosecutorial powers should be shifted to an independent public prosecutor, that

it is the possibility of prosecution which in the last analysis underpins the machinery of tax collection, and the Commissioners value highly their prerogative to decide when prosecution is necessary and their powers to take alternative forms of action without prosecution.³⁵

Irrespective of any similar ATO resistance, at a minimum, this argument militates against creating a completely new entity and favours creating new divisions within the ATO itself.

31 See, eg, United Kingdom, Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (1981); K W Lidstone, Russell Hogg and Frank Sutcliffe, Royal Commission on Criminal Procedure (UK), *Prosecutions by Private Individuals and Non-police Agencies* (1980).

32 Lidstone, Hogg and Sutcliffe, above n 31. The authors pose the valid question of whether ‘a public prosecutor’s office [can] develop the expertise to cope adequately with specialised areas like income tax’: at 190.

33 See Nuno Garoupa, Anthony Ogus and Andrew Sanders, ‘The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?’ (2011) 70 *Cambridge Law Journal* 229, 241.

34 Australian Taxation Office, *ATO Prosecution Policy* (Publication, July 2001) para 2.3(C). This document no longer appears on the ATO Website, although numerous mentions are made to it and there is no evidence of any ATO shift from this position.

35 K W Lidstone, Russell Hogg and Frank Sutcliffe, above n 31, 191, quoting HM Customs and Excise, Evidence to Royal Commission on Criminal Procedure (UK).

There are a number of related arguments against splitting ATO investigative and prosecutorial functions which are also sometimes raised where a body is entrusted with administering particularly complex fields of government policy such as taxation. Key among these is the fear that attempts to split the existing regulatory body in this manner are potentially difficult or possibly futile (particularly if a separate body is to be endowed with some of the existing regulator's responsibilities). Applied in the tax context, the argument is that investigative and prosecutorial functions would not necessarily be easily separable, or that to do so would be inordinately costly.³⁶ Potentially, such a change might involve significant legislative and policy change to a tax administration system which has been built around both investigative and prosecutorial powers residing in a single body.

A further historical argument made in the criminal context has been that police endowed with prosecutorial functions might prosecute with excessive zeal. Consideration of this issue in the UK in the 1980s suggests that this fear might not directly translate to regulatory agencies such as the ATO.³⁷ Revenue agencies do not typically prosecute with excessive zeal. In part, this is due to the complexities of doing so:

The subject matter of the charges is often complex ... The defendants are often sophisticated and well advised. If a guilty plea is unlikely then prosecution may well be discouraged, especially if ... other courses are open to the agency.³⁸

The figures presented in the 2012/13 ATO annual report support this assertion. During that period '[o]ut of 16.2 million tax returns lodged, only 962 cases were lodged in courts or tribunals and only 185 cases proceeded to a decision after a full hearing'.³⁹ Although it would obviously be too simplistic to draw solid conclusions from these figures alone, prima facie the figures hardly suggest an overzealously prosecutorial ATO, at least insofar as case volume is concerned.

This ostensible relative lack of emphasis on prosecution also stems from the fact that, unlike the main participants in administering the criminal justice system, revenue authorities have a primary function of collecting revenue with prosecution being only one way of achieving this primary objective. For example, the ATO has a significant educational and persuasive function advising

36 Similar arguments were raised in the context of a similar suggestion regarding the UK Financial Services Authority (although the ultimate recommendation was to proceed with a split of investigation and prosecutorial functions): see Financial Services Authority (UK), *Enforcement Process Review – Report and Recommendations* (Report, 2005) <http://www.fsa.gov.uk/pubs/other/enf_process_review_report.pdf>.

37 See generally Lidstone, Hogg and Sutcliffe, above n 31.

38 Ibid 183.

39 Australian Taxation Office, *Commissioner of Taxation Annual Report 2012–13* (3 October 2013) 57 <https://www.ato.gov.au/uploadedFiles/Content/CR/Annual_Reports/Annual_Report_2012-13/Downloads/complete.pdf>. Of course there is a possibility that such a risk-averse attitude to prosecution and litigation may attract individuals who are not motivated to investigate or prosecute to seek out roles as tax officials – which may be counterproductive.

taxpayers of their rights and compliance obligations.⁴⁰ Separating out ATO prosecutorial functions, therefore, runs the risk of changing this emphasis – either deliberately or incidentally.

Finally, the case is often made in the criminal context that if prosecutorial and investigative functions are not split, then there is a greater incentive to ensure weaknesses or errors in cases are not fully disclosed because of the greater investment (and hence, reputational risk) for a single organisation invested with responsibility for the entire investigation and prosecution process.⁴¹ It is easy to see how a similar case could be made in the tax administration context.

However, provided there is a sufficiently robust adversarial process and sufficient taxpayer protections against abuses of power or ATO errors, then the risk of these problems creating taxpayer injustice or developing into a culture of over-aggressive attitudes toward taxpayers can be minimised. Conversely, if the tax administration lacks such protections, splitting ATO investigative and prosecutorial powers cannot be an absolute guarantee against potential aggression or abuse of power. The key issue, therefore, becomes one of determining whether the systemic underpinnings of the tax administration system are sufficiently developed and understood. This is the crux of the argument taken up in Part IV.

IV SPLITTING THE ATO AS PART OF A BROADER REFORM AGENDA

Despite the short-term challenges and the potential uncertainties that the arguments in favour of splitting criminal investigative and prosecutorial roles will translate to the tax administration context, there remains a viable *prima facie* argument that separating ATO investigatory and prosecutorial functions could bring about some long-term systemic benefits in terms of greater accountability, efficiency and fairness. However, any such likely long-term benefits, particularly in terms of greater ATO accountability and fairness, will be muted at best, unless the foreshadowed reforms form part of a broader package of reforms aimed at exposing how the ATO does its job to greater scrutiny than is presently possible.

Mr Hockey referred to some of these in his 2013 speech, including committing to ongoing support of the Board of Taxation and the IGT, referring to

40 Eg, information on taxpayer rights, taxpayer compliance and taxpayer consultation and education activities and publications feature prominently on the ATO website homepage including links to background and information about the Taxpayers' Charter. See generally Australian Taxation Office, Australian Government, *Australian Taxation Office* <www.ato.gov.au>.

41 For a good example of detailed discussion of such a case, see Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (Oxford University Press, 4th ed, 2010) chs 7–13. Interestingly, there have been suggestions in the United States that some of these problems are exacerbated by separation of prosecutorial and investigative functions and associated 'communication gaps' with some state jurisdictions shifting back to joint units to minimise these problems. For discussion, see John Buchanan, 'Police-Prosecutor Teams: Innovations in Several Jurisdictions' (1989) 214 *National Institute of Justice Reports* 1.

the need to inject greater private sector experience in the management of the ATO and the need for higher quality community consultation and engagement by the ATO. However, even when viewed as part of this broader set of commitments, underlying questions of ATO accountability and fairness to taxpayers will remain without deeper structural changes to the tax administration system, and in particular, a commitment to bolstering taxpayer rights to redress any current imbalance between ATO powers and taxpayer rights.

A good starting point would be endowing the Taxpayers' Charter with legislative force.⁴² The Taxpayers' Charter was introduced to redress what the JCPA in its 1993 report into the ATO saw as the 'imbalance between taxpayers and the ATO in relation to their formally stated rights and obligations'.⁴³ It already contains many ATO undertakings and commitments to treat taxpayers fairly and even-handedly, and to treat taxpayers with courtesy and respect rather than approaching them as an adversary.⁴⁴ And yet, the perception of heavy-handed and unfair treatment of taxpayers prevails.⁴⁵ It is difficult to envisage, therefore, how the changes proposed by Mr Hockey (which broadly aim to achieve the same objectives as the Taxpayers' Charter, but through less direct means) could have any greater prospects of success than the Charter itself has had in reversing this perception.

Even setting aside this argument, including Taxpayers' Charter reform in any package of ATO structural reforms of the type advocated by Mr Hockey is particularly pertinent. This is because if cynicism of the type expressed by Mr Hockey is to be directed at a situation in which the ATO is both the investigator and prosecutor of taxpayer compliance behaviour, an equally cynical attitude could be taken by taxpayers towards 'a charter which purports to uphold their

42 For a good example of a recent comprehensive case for such a reform see John Bevacqua, 'Redressing the Imbalance – Challenging the Effectiveness of the Australian Taxpayers' Charter' (2013) 28 *Australian Tax Forum* 377.

43 Joint Committee of Public Accounts, above n 10, xxii.

44 See, eg, the Taxpayers' Charter commitments reproduced above n 18. Speeches by the Commissioner of Taxation are full of similar commitments and undertakings. See, eg, the comments attributed to current Commissioner Chris Jordan and his predecessor Michael D'Ascenzo reproduced in Part II of this article, above nn 18–21 and accompanying text.

45 The author passes no judgment on whether these perceptions accord with reality. It is noteworthy, however, that there has been a trend of increased complaints about the ATO to the Commonwealth Ombudsman, perhaps indicating increasing taxpayer dissatisfaction with the ATO. In his annual report for 2010/11, the Commonwealth Ombudsman notes:

In 2010–11 we received 2589 approaches and complaints about the ATO, an increase of 43% from the 1810 received in 2009–10. This was a continuing trend from the previous year and amounts to an 82% increase in the two years to 2010–11. It is the highest number of complaints about the ATO in five years.

Commonwealth Ombudsman, *Annual Report 2010–2011* (15 December 2011) 134. The trend continued in 2011/12 with 2717 complaints, the highest in 10 years: Commonwealth Ombudsman, *Annual Report 2011–2012* (24 September 2012) 69. However, complaint numbers dropped significantly in 2012–13 with only 1795 complaints against the ATO received by the Commonwealth Ombudsman: Commonwealth Ombudsman, *Annual Report 2012–2013* (4 October 2013) 55. Further, even at their 2011/12 peak, complaint numbers were still well below the record numbers (3332 complaints) recorded in 2000/01 following the introduction of the Goods and Services Tax: Commonwealth Ombudsman, *Taxation Ombudsman Activities 2007* (Report, 4 January 2008) 18.

rights against the ATO, when the author and interpreter of the charter, and the primary judge as to when breaches have occurred, is the ATO itself.⁴⁶ Why not eliminate the criticism in both contexts?

Tellingly, the IGT has included in his 2014 work program a review of the Taxpayers' Charter and taxpayer protections. The IGT describes his concerns as follows:

Stakeholders have raised a range of concerns regarding the adequacy of the ATO's Taxpayers' Charter and related taxpayer protections. These concerns included access to enforceable remedies for defective ATO administration, commitment to procedural fairness and, more broadly, adherence to the model litigant obligations ... The review will consider the above stakeholders concerns, including the nature of the Taxpayers' Charter, the existing avenues available to taxpayers seeking redress for defective ATO administration and further forms of redress that may be required.⁴⁷

Such actions would appear to be a much more direct and potentially effective way of tackling ATO accountability and tax administration fairness than the proposal to separate ATO investigative and prosecutorial functions. Certainly, they must form part of any package of complementary reforms aimed at making the ATO more accountable and ensuring fairer treatment of taxpayers.

The IGT also makes specific reference in his 2014 work program to consideration of calls for reforms similar to the Taxpayer Bill of Rights ('TBOR') legislation introduced in the United States. This legislation includes a number of enhancements to taxpayer rights which should also be considered as part of Mr Hockey's package of suggested reforms to improve ATO accountability and fairness.

One of the innovations included in the United States TBOR legislation has been the creation of the Office of the Taxpayer Advocate: an independent office for oversight of the Internal Revenue Service ('IRS'). The specific functions of the Taxpayer Advocate are described as follows:

- (i) assist taxpayers in resolving problems with the Internal Revenue Service,
- (ii) identify areas in which taxpayers have problems in dealings with the Internal Revenue Service,
- (iii) to the extent possible, propose changes in the administrative practices of the Internal Revenue Service to mitigate problems identified under clause (ii), and
- (iv) identify potential legislative changes which may be appropriate to mitigate such problems.⁴⁸

In effect, therefore, the role takes in elements of the roles fulfilled in Australia by both the Commonwealth Ombudsman and the IGT. Consequently,

46 Duncan Bentley, 'A Taxpayer's Charter: Opportunity or Token Gesture' (1995) 12 *Australian Tax Forum* 1, 23. Carey has made similar observations, noting that such a charter can be perceived to 'lack credibility': Annamaria Carey, 'Taxpayers' Charter' (1996) 30 *Taxation in Australia* 543, 544.

47 Inspector-General of Taxation, *New IGT Work Program* (Publication, 10 April 2014) 2. This is not the first time the IGT has noted concerns with the Taxpayers' Charter and taxpayer rights to compensation including most recently in the 2012/13 annual report: Inspector-General of Taxation, *Annual Report 2012-13* (September 2013) 7.

48 *Taxpayer Bill of Rights 2*, Pub L No 104-168, § 101, 110 Stat 1452, 1453-4 (1996).

in addition to the Ombudsman-like role of assisting individual taxpayers in their dealings with the IRS, the Advocate, like our IGT, also continues to press for further systemic changes such as legislative recognition of taxpayer rights.⁴⁹ The introduction of a similar oversight body in Australia might not only achieve the Coalition objectives of greater ATO accountability and taxpayer fairness,⁵⁰ but might also bring about efficiency savings through pooling the resources of the IGT and the Commonwealth Ombudsman and eliminating any potential existing overlaps in responsibilities.

Accountability through such oversight mechanisms is particularly pertinent in the tax context as only a small proportion of cases ever reach the courts for judicial scrutiny and, thus, accountability to the courts.⁵¹ Accordingly, the case for a single point of external accountability akin to the United States Taxpayer Advocate is a strong one as some commentators have observed:

Other accountability structures, for example the Ombudsman and the public audit institutions, have emerged in a fragmented and piecemeal fashion. It has been argued that the very diversity of the arrangements can in aggregate exercise powerful constraints ... but it is more likely that the incoherence of the arrangements tends to dilute their impact.⁵²

The United States model also includes legislative measures specifically directed at ensuring fair treatment of taxpayers by tax officials which are equally worthy of consideration as a complement to the foreshadowed ATO structural reforms. For example, the TBOR legislation includes a statutory requirement that the IRS evaluate the performance of its employees based on how fairly and equitably those employees have treated taxpayers. Specifically, section 1204(b) of the *Internal Revenue Service Restructuring and Reform Act* requires IRS managers to 'use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance'.⁵³ Further, section 7803(d)(1) of the *Internal Revenue Code of 1986* requires the Treasury Inspector

49 Eg, the Taxpayer Advocate continues to recommend the enactment of a taxpayer bill of rights, observing that

[i]t has been 13½ years since we have had major taxpayer rights legislation. Our laws have not kept pace with our notions of procedural fairness in 21st century tax administration, particularly given the tax system's expanded and diverse taxpayer base and duties. We thus reiterate our call for Congress to pass a Taxpayer Bill of Rights, and we include in that recommendation many of the legislative proposals we have made in previous reports, some of which have been introduced in Congress, and all of which, we believe, will provide taxpayers with needed protections and instill greater confidence in the tax system.

Taxpayer Advocate (US), *2011 Annual Report to Congress – Volume One* (31 December 2011) vii.

50 It has been argued that such oversight bodies can eliminate the need to separate investigative and prosecutorial functions altogether. See Garoupa, Ogun and Sanders, above n 33, 250.

51 For the figures from the 2012/13 ATO annual report, see above n 39 and accompanying text.

52 Garoupa, Ogun and Sanders, above n 33, 256.

53 *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub L No 105-206, § 1204(b), 112 Stat 685, 722 (1998).

General for Tax Administration to annually evaluate whether the IRS has complied with section 1204(b).⁵⁴

In terms of ensuring tax official accountability, section 1203 of the third (and current) iteration of the TBOR legislation is also worthy of consideration. This provision requires the Commissioner of Internal Revenue to terminate the employment of any employee on misconduct grounds if there is a final administrative or judicial determination that the employee committed one or more of a range of 10 infringements of taxpayer rights. These include infringement of a taxpayer's constitutional rights and a range of other civil rights, violations of tax laws and IRS policies in order to harass a taxpayer, and a range of other wilful or personally motivated activities adversely affecting taxpayers.⁵⁵

54 26 USC § 7803. The latest report of the Treasury Inspector General found 15 instances of noncompliance with § 1204(b) requirements: Treasury Inspector General for Tax Administration, *Fiscal Year 2013 Statutory Audit of Compliance with Legal Guidelines Restricting the Use of Records of Tax Enforcement Results* (15 August 2013) 4.

55 The specific infringements as set out in the *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub L No 105-206, § 1203(b), 112 Stat 685, 721 (1998) are:

- (1) willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets;
- (2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative;
- (3) with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of –
 - (A) any right under the *Constitution* of the United States; or
 - (B) any civil right established under –
 - (i) title VI or VII of the *Civil Rights Act of 1964*;
 - (ii) title IX of the *Education Amendments of 1972*;
 - (iii) the *Age Discrimination in Employment Act of 1967*;
 - (iv) the *Age Discrimination Act of 1975*;
 - (v) section 501 or 504 of the *Rehabilitation Act of 1973*; or
 - (vi) title I of the *Americans with Disabilities Act of 1990*;
- (4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;
- (5) assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;
- (6) violations of the *Internal Revenue Code of 1986*, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service;
- (7) willful misuse of the provisions of section 6103 of the *Internal Revenue Code of 1986* for the purpose of concealing information from a congressional inquiry;
- (8) willful failure to file any return of tax required under the *Internal Revenue Code of 1986* on or before the date prescribed therefor (including any extensions), unless such failure is due to reasonable cause and not to willful neglect;
- (9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and
- (10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

These have been described by some commentators as the ‘ten deadly sins’⁵⁶ and provide a direct sanction for unfair treatment of taxpayers by tax officials.⁵⁷

Even if these specific legislative suggestions are not accepted by the government, Mr Hockey has now directly raised the issue of whether there should be a re-calibration of the balance between taxpayer rights and tax authority powers in Australia. This re-calibration requires a fundamental shift in perceptions of protections afforded to the Commissioner of Taxation and a reassessment of policy issues such as if or when the Commissioner of Taxation owes duties to taxpayers in addition to his duties to the Crown in carrying out his tax administration functions.

For example, should systemic protections of the ATO such as the privative clauses in sections 175 and 177 of the *Income Tax Assessment Act 1936* (Cth) (‘ITAA’) remain undisturbed?⁵⁸ These provisions provide specific protection from scrutiny of ATO decision-making processes. Courts have interpreted these clauses quite broadly and they have been used as a basis to reject the availability of judicial review in tax cases except in cases where the complaint is either not directly related to a tax assessment or there is evidence of bad faith, illegality or improper purpose.⁵⁹ Express statutory restrictions on reviewability of tax assessment decisions in the *Administrative Decisions (Judicial Review) Act 1977*

56 See, eg, Leandra Lederman, ‘Tax Compliance and the Reformed IRS’ (2003) 51 *University of Kansas Law Review* 971; Christopher M Pietruszkiewicz, ‘A Constitutional Cause of Action and the *Internal Revenue Code*: Can You Shoot (Sue) the Messenger?’ (2004) 54 *Syracuse Law Review* 1.

57 Some commentators have argued that these provisions have led to overly defensive behaviour among IRS officials. Eg, Pietruszkiewicz takes the view that the enactment of the ‘Ten Deadly Sins’ was one of the key causes of a dramatic decline in IRS collection enforcement activities in the late 1990s: Pietruszkiewicz, above n 56, 5.

58 Section 175 provides: ‘The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with’. Subsection 177(1) provides:

The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

ITAA 1936 (Cth) s 177(1).

59 Walpole more fully expands on the circumstances in which judicial review might be available to a taxpayer generally:

The major ground on which an action for review might be based would be: that the Commissioner did not have jurisdiction to make the decision; that the decision was not authorized by the Act; that the making of the decision was an improper exercise of the power conferred by the Act, because the Commissioner failed to take a relevant consideration into account or exercised the power in a way that constitutes an abuse of power; or that the decision was otherwise contrary to the law.

Michael Walpole, ‘Taxpayer Rights and Recourses – Australia, New Zealand and China’ (Paper presented at the Second World Tax Conference, Dublin, 1 May 2001) 345. For recent High Court authority on the availability of judicial review in the tax assessment context, see *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

(Cth) (*ADJR Act*)⁶⁰ and the restrictive interpretation by courts of the availability of judicial review pursuant to section 39B of the *Judiciary Act 1903* (Cth)⁶¹ have further strengthened the position of the ATO relative to taxpayers in any dispute.

Collectively, these ATO protections have also inhibited the adoption in Australia of other doctrinal developments such as the incorporation in our law of the UK doctrine of legitimate expectations, a doctrine which has largely developed out of tax cases and which is rooted in a requirement to treat citizens fairly.⁶² It seems unlikely that while such protections of the Commissioner remain unchallenged, any checks and balances afforded by a split of the ATO as suggested by Mr Hockey will live up to their full potential.

The problem is compounded by the fact that in Australia the generally accepted view is that the Commissioner's duties are duties owed exclusively to the Crown. Consequently, none of the traditional common law avenues for relief to redress unfairness or injustice have any realistic scope for application against the ATO. For example, in *Lucas v O'Reilly*,⁶³ a case involving allegations of

60 *ADJR Act* sch 1 item (e) excludes from review decisions forming part of the process of making, leading up to the making of, or refusing to amend, an assessment of tax. These exclusions have been interpreted as clearly prohibiting review of decisions dealing with the calculation of tax, irrespective of whether the decisions are unfair. See the comments of Beaumont J in *Constable Holdings Pty Ltd v Federal Commissioner of Taxation* (1986) 11 FCR 136, 138–40; Ellicott J in *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64, 78; Smithers J in *Intervest Corporation Pty Ltd v Federal Commissioner of Taxation* (1984) 3 FCR 591, 595–6.

61 Section 39B of the *Judiciary Act 1903* (Cth) provides the Federal Court of Australia with original jurisdiction in respect of any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The Federal Court generally allows applications under both s 39B and the *ADJR Act* to be made and heard concurrently. In tax proceedings, the s 39B jurisdiction may be preferred given the absence of any express tax-specific limitations on review similar to those contained in *ADJR Act* sch 1 item (e).

62 While cases such as *Bellinz Pty Ltd v Federal Commissioner of Taxation* (1998) 84 FCR 154, *Darrell Lea Chocolate Shops Pty Ltd v Federal Commissioner of Taxation* (1996) 72 FCR 175 and *David Jones Finance & Investment Pty Ltd v Federal Commissioner of Taxation* (1990) 21 ATR 718 discuss the UK legitimate expectation cases, the doctrine has clearly been rejected in Australia in accordance with the approach taken by the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. Justices Gummow and McHugh stated in that case that 'nothing in this judgment should be taken as ... adoption of recent developments in English law with respect to substantive benefits or outcomes': at 21. The approach of Gummow and McHugh JJ is consistent with earlier High Court authority such as *A-G (NSW) v Quin* (1990) 170 CLR 1. Further, as former High Court Chief Justice Sir Anthony Mason has extra-judicially observed that '[i]t would require a revolution in Australian judicial thinking to bring about an adoption of the English approach to substantive protection of legitimate expectations': Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 108. Another former High Court Justice, Michael Kirby, has recently written a paper outlining the increasing influence of European Union Law in Australia, but there is no evidence of such reasoning being applied in Australian tax cases to indicate that the revolution alluded to by Sir Anthony Mason has begun: see Justice Michael Kirby, 'Australia's Growing Debt to the European Court of Human Rights' (2008) 34 *Monash University Law Review* 239.

63 (1979) 336 FLR 102.

tortious breach of statutory duty by the Commissioner of Taxation,⁶⁴ Young CJ, in comprehensively rejecting the taxpayer's submissions, stated:

If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show ... that the statute creating the duty confers upon him a right of action in respect of any breach ... However, it is, I think, clear that the defendant owes the plaintiff no such duty. The duty of the commissioner is owed to the Crown.⁶⁵

This confinement of the Commissioner's duties to the Crown is a recurring theme in Australian tax cases and extends to equitable as well as common law taxpayer claims against the Commissioner.⁶⁶

In this regard, Australia has slipped behind comparable countries such as the UK, Canada and the United States. In the UK, the adoption of European Union laws and the development of the doctrine of legitimate expectations have seen an increase in accountability of Her Majesty's Revenue and Customs through an increasing recognition of the existence of private law rights alongside tax authority duties to the Crown.⁶⁷ In Canada, a similar shift has seen courts being increasingly prepared to consider the extension of common law avenues of relief such as the tort of negligence in tax cases and development and application in the tax context of a new tort of negligent investigation.⁶⁸ In the United States, Congress has enacted a limited statutory right to compensation for negligent tax

64 Breach of statutory duty was also separately unsuccessfully pleaded by the taxpayer in *Harris v Deputy Commissioner of Taxation* (2001) 47 ATR 406.

65 *Lucas v O'Reilly* (1979) 36 FLR 102, 107–8. This is very similar to the stance taken in *Harris v Deputy Commissioner of Taxation* (2001) 47 ATR 406. In that case, Grove J asserted that '[t]here is no basis upon which to conclude that there is a tort liability in the ATO or its named officers towards a taxpayer arising out of the lawful exercise of functions under the *ITAA*': at 409 [12].

66 Eg, similar views, strongly suggestive of the extreme judicial sensitivity to encroaching on statutorily imposed duties of the Commissioner, were plainly stated by Hill J in the equitable estoppel context in *AGC (Investments) Ltd v Federal Commissioner of Taxation* (1991) 91 ATC 4180, 4195:

there is no room for the doctrine of estoppel operating to preclude the Commissioner of Taxation from pursuing his statutory duty to assess tax in accordance with law. The *Income Tax Assessment Act* imposes obligations upon the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart.

67 For cases illustrating the increasing influence of European Law principles in the UK in taxpayer rights cases, see, eg, *R v Allen* [2002] 1 AC 530; *R v Dimsey* [2002] 1 AC 509. For discussion of these cases, see Graham Virgo, 'Cheating the Public Revenue' (2000) 59 *Cambridge Law Journal* 42; Graham Virgo, 'Cheating the Public Revenue: Fictions and Human Rights' (2002) 61 *Cambridge Law Journal* 47. For discussion of the expansion of the UK doctrine of substantive legitimate expectations including discussion of the key tax cases, see Nicholas Bamforth, 'Fairness and Legitimate Expectation in Judicial Review' (1997) 56 *Cambridge Law Journal* 1. See also Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62 *Cambridge Law Journal* 93; Cameron Stewart, 'Substantive Unfairness: A New Species of Abuse of Power?' (2000) 28 *Federal Law Review* 617.

68 For a comprehensive discussion, see John Bevacqua, 'Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments' (2013) 61 *Canadian Tax Journal* 893.

collection activities by the IRS⁶⁹ and United States taxpayers have a right to bring damages actions against the IRS for breaches of their constitutional rights.⁷⁰ Without consideration of similar extensions of taxpayer rights in Australia, the likely benefits accruing from the foreshadowed structural reforms of the ATO flagged by Mr Hockey are likely to be comparatively small.

V CONCLUSIONS

It remains to be seen whether the Coalition Government has the will to implement the plans for splitting ATO investigative and prosecutorial functions as advocated by Mr Hockey prior to the 2013 election. However, this article has shown that there is merit in considering such a proposal, although caution should be taken before accepting that dividing investigative and prosecutorial responsibilities will be as successful in a tax administration context as it has arguably been in the criminal justice context.

Nevertheless, some benefits are likely to accrue from a split of ATO prosecutorial and investigative functions in terms of increased ATO accountability and fairer treatment of taxpayers. Equally, irrespective of the form any split ultimately takes, while there are likely to be short-term costs of such a significant change (particularly if the proposal is to create a new entity charged with some of the ATO's current responsibilities), there are also likely to be long-term efficiency gains.

Notwithstanding these points, it is also clear that any gains will be modest at best unless the changes flagged form part of a broader suite of changes which redress the imbalance between taxpayer rights and ATO powers presently entrenched as part of the Australian system of tax administration. This is particularly true insofar as the pursuit of fair and even-handed treatment of taxpayers is concerned. After all, the prevailing ATO culture which the Coalition and Mr Hockey seek to change has arisen out of the current taxpayer rights landscape – not just the current ATO structure.

This article suggests consideration of a range of measures aimed specifically at fostering fairer treatment of taxpayers such as endowing commitments in the Taxpayers' Charter with legislative force. More fundamentally, however, this article also calls for a reconsideration of current legal conceptualisations of the

69 Section 7433(a) of the United States *Internal Revenue Code* presently relevantly provides that [i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

Internal Revenue Code of 1986, 26 USC § 7433(a) (1998).

70 These are known as 'Bivens' actions after the case of *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971). In that case the United States Supreme Court created a constitutional damages action allowing citizens whose constitutional rights have been infringed by a public official to sue that public officer personally for damages, even where there was no statutory avenue of relief. Taxpayers frequently bring *Bivens* actions against IRS officials, although they rarely succeed.

duties of the Commissioner of Taxation as duties owed exclusively to the Crown. This reconsideration will open the door for the development of legal remedies in appropriate cases of infringements of taxpayer rights and assist Australia to keep pace with the development of similar remedies in comparable foreign jurisdictions in recent years.

It is troubling that no mentions of such systemic changes have been made by either Mr Hockey or other members of the Government, either before or since they took office in 2013. Arguably, unless and until this is corrected, the advances in fairness, even-handedness and efficiency achievable by splitting ATO investigative and prosecutorial functions are likely to be relatively limited. The Government risks diverting effort ‘into a major institutional change which does not deal with the underlying problems of the tax system or tax administration’.⁷¹

71 Devas, Delay and Hubbard, above n 14, 216.