THE ADJR ACT : ITS EFFECT ON TAXATION ADMINISTRATION

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1 INTRODUCTION

The Australian Taxation Office ("ATO") currently employs in excess of 18,000 staff engaged in collecting all the main taxes and charges imposed by Parliament (except customs, excise duties and departure taxes). For the year ended 30 June 1990, the ATO collected $75.96 billion in Commonwealth revenue.[1] Through its National Office, sixteen Branch Offices and eighteen Regional Offices, the ATO received over 11 million income tax returns, issued over 8 million tax assessments, conducted over 25,000 audits[2] and answered over 4 million taxpayer enquiries and requests for advisings during that year. These figures show that the work of the ATO is very much a matter of mass decision making.

It is not surprising, therefore, that the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act") has had an effect on taxation administration. However, the perspective of the ATO is that the ADJR Act has had a substantial impact on some areas of that administration and little or no impact on others. As I will discuss later, some of this impact is seen by the ATO as being beneficial to administration, but the Act has also been used at certain crucial times to hinder and delay the performance of the ATO's functions.

Two important facts are worth noting in this discussion. First, most ATO decisions are made by lower level officers (Administrative Service Officer Grades 1-5). Very few of these officers have any legal training and thus usually approach the decision-making process in a way different from that expected by administrative lawyers. Secondly, with the progressive introduction of self-assessment of taxation liabilities and the automation of business systems through the ATO modernisation program, the mechanisms for making decisions within the ATO will change. The interesting question is whether administrative law should adapt to administrative changes such as this or whether the changes should be driven by the procedures of the law.

In this paper, I will deal first with the structure of decision making within the ATO and the place of the ADJR Act in the review of ATO decisions. Secondly, I will deal with the impact of the ADJR Act on various areas of taxation administration. Thirdly, I will discuss the beneficial aspects of that impact. Fourthly, I will discuss how the ADJR Act has been used to hinder and delay the performance of ATO functions. Finally, I will consider how the ADJR Act may come to affect the ATO in the next ten years.

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1 Commissioner of Taxation, *69th Annual Report* (June 1990) 130, Appendix 3.

2 *Ibid* 144-145, 153-156.

2 DECISION MAKING IN THE ATO AND ITS REVIEW

Parliament has, by statute, vested in the Commissioner of Taxation the general administration of the various Acts which relate to the taxes and charges collected by the ATO. Various statutory powers have also been vested in the three Second Commissioners. Through the process of delegation and authorisation, most of the Commissioner's powers are distributed throughout the ATO. The vast majority of decisions made under those powers and having the potential to affect an aggrieved person are made in sixteen Branch Offices. To assist officers at all levels in making those decisions, the ATO introduced the Taxation Ruling system of policy guidelines. Rulings also serve to inform taxpayers of the Commissioner's interpretation of the taxation laws.

The various Acts administered by the Commissioner are structured around provisions which impose taxation liabilities on taxpayers. The Acts then give the Commissioner various powers to ensure that those liabilities can be collected - that is, powers of assessment, information gathering, debt recovery and penalty impositions. The Acts also provide the Commissioner with discretions to ameliorate the operation of the general scheme in individual cases. Except in the area of sales tax, the Commissioner cannot collect taxation revenue until he has assessed individual taxpayers on the liabilities imposed.

Since the Commonwealth first imposed taxation in 1915, there has been a form of judicial review of assessments made by the Commissioner. While that review has been on legal grounds and not generally upon the merits of a case, a provision in each of the relevant assessing Acts[3] has ensured that a challenge has been only to the substantive taxation liability of a taxpayer. Both *George v FCT*[4] and *McAndrew v FCT*[5] have held that the procedural steps leading to the making of an assessment were not open to challenge in any proceedings unless they went to issues of substantive liability. Assessments have been subject to administrative review since 1921 when the Board of Appeal was established.[6] That Board was replaced in 1925 by the Board of Review[7] (further Boards of Review were established in 1947 and 1950), which existed until 1986, when the AAT took over the assessment review jurisdiction. This well-established system of judicial and administrative review of assessments is one of the main reasons why assessment decisions are excluded from the ambit of the ADJR Act by Schedule 1(e).

Prior to the introduction of the ADJR Act, common law judicial review did not have any significant impact on other decisions made within the ATO. While partly because such review was generally overly technical and complex, it was probably also due to the fact that taxation issues were not as important to the community then as they became in the 1980's. However, occasional use has been made of the writ of mandamus to compel the Commissioner to perform various

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3 The Income Tax Assessment Act 1936 (Cth) s 177, Sales Tax Assessment Act (No 1) 1930 (Cth) s 67, and the Fringe Benefits Tax Assessment Act 1986 (Cth) s 126 are main examples.

4 (1952) 86 CLR 183, 206-207 (judgment of the Full Court).

5 (1956) 98 CLR 263, 281 *per* Taylor J.

6 Income Tax Assessment Act, No 31 of 1921, s 10.

7 Income Tax Assessment Act, No 28 of 1925, ss 9 & 10.

statutory duties, for example in *Central Broadcasters Ltd v DFCT*,[8] and *Bayford Wholesale Pty Ltd v Boucher*.[9] Apart from administrative review of assessments, there was no administrative review of other decisions made within the ATO until the introduction of the Ombudsman Act 1976 (Cth).

3 IMPACT OF THE ADJR ACT ON TAXATION ADMINISTRATION

The first request for a statement of reasons under s 13 of the ADJR Act was received by the ATO in late 1982. The first application under s 5 for an order of review in relation to an ATO decision was taken out in 1983 and the first reported ADJR Act case involving taxation matters was decided in 1983.[10] In each year since then, the Commissioner and his officers have been respondents to between 30 and 60 applications for an order of review, and the ATO has received twice to thrice as many requests for statements of reasons.

During 1983-84, the ATO took large-scale action to recover taxation debts which had arisen from the tax avoidance era of the late 1970's. Many of the debts were substantial, especially those raised against the promoters of the avoidance schemes. It is not surprising, therefore, that most of the ADJR applications during that time sought to review the exercise of the Commissioner's debt recovery powers and discretions, that is, institution of recovery or bankruptcy proceedings; issue of "garnishee" notices; possible extensions of time to pay taxation debts; and remissions of penalties imposed for late payment of debts.

One of the largest categories was formed by applications made by promoters and others involved in the tax avoidance era to review decisions to institute recovery proceedings. These cases were characterised by a "scatter gun" approach to the grounds of review, that is, a recital of the grounds in s 5 of the ADJR Act with no real attempt made to provide particulars. They were also accompanied by an application to the Federal Court requesting it to exercise its powers under s 15 of the ADJR Act to order a stay of the recovery proceedings. The stay was invariably granted. However, not one of these cases was decided in favour of the applicant. There is little doubt, as the Commissioner recognised at the time, that most of these applications were designed more to delay the recovery of taxes than made for the purpose of having a genuine dispute resolved by the Federal Court.[11] As a result, few major recovery cases in that period proceeded without considerable delays from stays which arose from unsuccessful ADJR applications.

The other significant category of cases during this period involved the review of decisions refusing an extension of time to pay income tax and refusing to remit additional tax imposed for late payment of income tax.[12] It was in this area, which involves very broad discretions, that some of the ATO's decision-making practices were found to be defective. In about half of the cases which went to hearing, the Federal Court found errors in two main areas: failure to

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8 (1934) SASR 50.

9 (1984) 55 ALR 189.

10 *Huston v DFCT* (1983) 49 ALR 566.

11 Commissioner of Taxation, *64th Annual Report* (June 1985) 67; *65th Annual Report* (June 1986) 59.

12 Decisions made under ITAA, ss 206(1) & 207(1A) respectively.

take a relevant consideration into account and exercise of a discretion according to policy without regard to the merits of a case.

In *Ahern v DFCT*,[13] the taxpayer applied for an extension of time under s 206 of the Income Tax Assessment Act 1936 (Cth) ("ITAA") to pay a tax liability in excess of $1.5m. In making his decision, the decision maker implemented a policy document (which was later to become Taxation Ruling IT 2091). That policy stated that an extension of time would only be granted where criteria set out therein were established to the ATO's satisfaction. One matter of which the decision maker was aware, but which was not considered because it was not referred to in the policy, was that there were outstanding statutory objections to the tax assessments. Those objections claimed to raise a genuine dispute about the correctness of the assessments. The Court held that this matter was relevant to the exercise of the discretion conferred by s 206, as the existence of a dispute indicates that a taxpayer's liability cannot be said to be firmly established.[14] The Court also held that the decision maker applied ATO policy without particular reference to the circumstances of the case.[15]

In *ARM Constructions Pty Ltd v DFCT*,[16] the taxpayer claimed that payment of the tax on the due date would wholly or partially abolish its business. In relying on Taxation Rulings IT 2091 and 2156, the decision maker did not consider this matter nor the merits of the taxpayer's objections. The Court held that these were matters which should have been considered. The Court also found error with the decision maker's reliance on IT 2091 in *Nestle Australia Ltd v FCT*.[17] Many matters were put to the decision maker by the taxpayer's accountant before the decision was made. In refusing the extension of time, there was rigid adherence to the terms of IT 2091. The Court held that the decision maker had failed to consider many relevant matters as a result of that adherence.

The major impact of these decisions was to help to cause a revision of the Commissioner's guidelines on extensions of time and remissions of additional tax. The rigid and directory style of Taxation Rulings IT 2091 and 2156 has been replaced by the flexible style of IT 2569 and 2570. The ATO realised that the earlier guidelines were inappropriate to the wide discretions existing in ss 206 and 207(1A). It also recognised the danger of attempting to limit the matters which a decision maker should consider when exercising these recovery discretions.

In late 1987, the taxpayer audit operations of the ATO were substantially restructured. One of the most important changes was the introduction of the Large Case Audit Program to conduct audits into the income tax affairs of the 100 largest corporate groups in Australia. The Program commenced operations in early 1988 and by the end of 1990, 87 audits had commenced and eleven were completed. It was envisaged that each team would carry out its audit over a period of about two and a quarter years and would be examining the records of each group and their professional advisers during that period. As large corporate groups in Australia had never previously been subject to an audit

13 (1983) 50 ALR 177.
14 *Ibid* 190-191 *per* Sheppard J.
15 *Ibid* 187-191 *per* Sheppard J.
16 (1986) 65 ALR 343.
17 87 ATC 4409.

program of this size and intensity, it was not surprising that the Commissioner's information gathering powers in ss 263 and 264 of the ITAA became the subject of intense scrutiny by the Federal Court during the late 1980's.

As with earlier challenges to recovery decisions, the ATO perspective is that many of the challenges taken under the ADJR Act against recent decisions made under ss 263 and 264 have been motivated more by the desire to delay the conduct of audits than genuinely to seek review of the decisions. Applicants have routinely applied for and been granted stays of the operation of notices seeking information and/or documents under s 264 and of exercises under s 263 seeking access to documents: *Perron Investments Pty Ltd v DFCT*;[18] *Holmes v DFCT*;[19] *FCT v Citibank Ltd*;[20] *Allen, Allen & Hemsley v DFCT*;[21] *Sharp v DFCT*; [22] and *Industrial Equity Ltd v DFCT*.[23] Only in *Citibank* and *Perron Investments* were the applicants successful in having any parts of the decisions overturned. However, in all cases there were substantial delays caused to the audit process by the inability to obtain important information. In *Perron Investments*, five s 264 notices were issued in late 1985 and early 1986 and the case was only finally determined in late 1989. Of the five notices, two were held to have been validly issued.

However, there is no doubt that the decision in the *Citibank* case has changed the way that the ATO conducts its audits to take account of possible claims for legal professional privilege. In that case, each small team which sought access to a different part of the company's premises contained an officer to handle any claims of privilege. The Federal Court held that this procedure did not provide sufficient protection to the company in making claims on behalf of its clients. It considered that the ATO needed to give adequate warning of a decision to seek access to documents so as to enable proper claims for privilege to be made if need be. As a result of the decision, the ATO consulted with interested groups such as the Law Council of Australia and devised public Access Guidelines, for the use of audit staff, which take heed of the principles in the Court's decision.

4 POSITIVE IMPACT OF THE ADJR ACT

As discussed earlier, an important impact of the ADJR Act has been on Taxation Rulings which provide guidance on the wide discretionary powers used by the ATO. We have recognised, partly as a result of criticism from the Federal Court, that some of our older Rulings in this area were too directive. They lacked the flexibility which is the essential feature of a wide discretionary power. The new Rulings still provide broad parameters within which the ATO staff should operate. However, they emphasise the need to consider the particular circumstances of each case.

Most staff in the ATO, particularly those in audit and revenue collection areas, are now very interested in learning about the Act and the principles of

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18 (1989) 90 ALR 1.
19 (1988) 20 FCR 342.
20 (1989) 20 FCR 403.
21 (1989) 20 FCR 576.
22 88 ATC 4259.
23 (1989) 90 ALR 603.

judicial review. However, this is probably more out of a sense of self-preservation than out of any inherent interest in the area. While orders of review are sought against the Commissioner or a delegated Deputy Commissioner, the actual decision maker is the one who has to explain the decision-making process to the Court. This often requires the decision maker not only to prepare a statement of reasons under s 13 of the ADJR Act, but also to swear an affidavit and to be prepared to be cross-examined in evidence by the applicant's counsel. Many ATO staff are keenly aware that this has happened and are equally keen to ensure that their decisions are found to be correct in the public eye.

As a result, there has been substantial effort made in the last few years within the ATO to produce training programmes which can explain the sometimes complex principles of judicial review in terms which can be usefully understood by the average decision maker. The emphasis in these programmes has been on judicial review as a common sense series of decision-making skills which can be applied to a range of decision making processes in the ATO.

5 NEGATIVE IMPACT OF THE ADJR ACT

As mentioned earlier, the perception of the ATO is that the Act has been used strategically at certain key times to hinder and delay the performance of its functions. From the ATO's perspective, important recovery cases and large case audits were unacceptably delayed by largely fruitless ADJR challenges. While the ATO recognises the importance of the stay power that exists in s 15, it believes that the Federal Court could be more rigorous in perusing applications for an order of review before granting any stay. Alternatively, the Court could consider the administrative cost of a stay when deciding whether to grant it. It is interesting to note that the cost of delay from unsuccessful challenges has not been borne by promoters from the tax avoidance era of the late 1970s or by the large corporate taxpayers, but by the ATO and, ultimately, the taxpaying public.

ADJR litigation has tended to be the most resource intensive form of litigation with which the ATO has been involved. Applications have usually made substantial use of the interlocutory processes of the Federal Court, which involves operational officers being taken off their normal duties to prepare material for those processes. This involves an opportunity cost which is often forgotten when attempting to measure the effect of the ADJR Act.

One disturbing aspect of ADJR litigation over the past three or four years has been the inclusion of the actual decision maker as a respondent. There seems to be no logical reason for this apart from costs, as the Federal Court has held that damages are not a remedy of judicial review: *Park Oh Ho v Minister for Immigration and Ethnic Affairs*,[24] and as any order ultimately directed to the Commissioner or Deputy Commissioner will also bind the actual decision maker. Actual decision makers have perceived this as a threat to make them financially responsible for actions done in the normal course of duties.

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[24] (1988) 20 FCR 104, 113-115 *per* Sweeney J, 126-127 *per* Morling J and 134 *per* Foster J: not considered by Full Court of the High Court on appeal in (1989) 167 CLR 637.

6 FUTURE EFFECTS OF THE ADJR ACT

As noted earlier, the progressive introduction of the self-assessment system and the automation of the ATO's business systems through the modernisation program have the greatest potential in the future to change the way that the ADJR Act affects decisions made by the ATO. Current assessment procedures are precluded from judicial review by Schedule 1(e). Although it is proposed that all taxpayers will assess their own income taxation liabilities, a new system of statutory rulings by the ATO on liability issues is an essential part of the proposed self-assessment system.[25] These rulings are likely to be amenable to review under the ADJR Act. Judicial review of the procedural steps involved in deciding liability issues would then be a reality: something which has not existed since 1915. The modernisation program will gradually result in some further automation of the ATO's decision-making processes. The challenge for the ATO is to ensure that judicial review principles are not abandoned in the creation and running of these new systems.

7 IN SUMMARY

The perspective of the ATO is that the ADJR Act has largely had an impact on taxation administration at certain key times, that is the recovery of tax avoidance debts in the mid-1980s and the large-case audit programmes of the late 1980s. The ATO believes that, while largely motivated by a desire on the part of applicants to hinder those initiatives, ADJR litigation has had some beneficial effects on administration via some adverse comments from the Federal Court. However, the ADJR Act has had limited impact on the majority of mass decision making in the ATO. Depending on legislative and administrative changes in the future, that impact may become wider.

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25 "A Full Self Assessment System of Taxation - A Consultative Document" in the Treasurer's Statement on Tax Simplification (13 December 1990).