

GENERAL

LAW COUNCIL OF
AUSTRALIA

UNCLASSIFIED

1 SEPTEMBER 2007

SEGMENT

AUDIENCE

CLASSIFICATION

DATE



Australian Government

Australian Taxation Office

The rule of law: a corporate value

Speech by Michael D'Ascenzo, Commissioner of Taxation

Law Council of Australia
Rule of law conference
Brisbane, 1 September 2007

THE RULE OF LAW: A CORPORATE VALUE

The challenges of a changing world are in steady supply. Our tax and superannuation systems are not exempt from the increasing interconnectedness and complexity of our society. If for example, taxation is the price we pay for a civilised society,¹ it is that society that acts as the price-setting mechanism.

Globalisation and the digital revolution have commoditised human experiences, integrated markets and spawned new business practices. Hybrid and stapled transactions and cloned relationships are for some the 'wonder of our brave new world'.

The rule of law provides an anchor for legislative regimes such as taxation and superannuation operating as they do in this choppy sea of change. Whilst this constancy safeguards rights and obligations, its ambulatory restrictions, the inherent vagaries of words, and the infinite variety of personal circumstances impose daunting difficulties on policy makers, legislators and administrators.² Where the law blurs into 'indeterminacy'³ there are difficulties also for taxpayers and their advisers, and the potential for disputation increases.⁴

A shift in focus

The role of the Australian Taxation Office (ATO) is to administer legislative systems such as taxation and superannuation. Accordingly, our mission is to promote an environment where people have a reasonable understanding of their rights and obligations or can readily obtain adequate guidance; where in practice the law can be complied with voluntarily; where necessary the law is applied and enforced fairly; and where disputes about the law's operation can be resolved expeditiously.⁵

¹ Justice Oliver Wendell Holmes, *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* (1927) 275 US 87, 100.

² For example, the then Second Commissioner of Taxation, Brian Nolan referred to the *Income Tax Assessment Act 1936* as a "vast cauldron of boiling spaghetti" in Editorial by David St L Kelly in 1993 reproduced in D Bentley, 'Ten Years of the Revenue Law Journal', *Revenue Law Journal*, (2000) 10 *Revenue Law Journal* 4; The then Government responded by establishing the Tulip project intended to rewrite the income tax law to make it more easily understood by a wider audience. This gave rise to the *Income Tax Assessment Act 1997*. However, the continued existence of the *Income Tax Assessment Act 1936* imposes additional complexity, particularly for lawyers and accountants. The Board of Taxation has been supporting a strategy that will ultimately consolidate the remaining parts of the 1936 Act into the 1997 Act, following on from its work on recommending the repeal of inoperative provisions.

³ M Burton, "Responsive Regulation and the Uncertainty of Tax Law – Time to Reconsider the Commissioner's Model of Cooperative Compliance?" (2007) 5(1) *eJournal of Tax Research* 71.

⁴ Under Australian tax law, a taxpayer who is uncertain as to the tax effect of an existing or contemplated transaction can seek a binding and reviewable private ruling from the ATO. The resulting reduction in indeterminacy promotes a reduction in the potential for disputation.

⁵ C Saunders and K Le Roy, "Perspectives on the Rule of Law", in C. Saunders and K. Le Roy (eds), *The Rule of Law* (Federation Press, Melbourne, 2003), 5.

Our Strategic Statement 2006-10 reflects a change in emphasis. We have moved from 'optimising collections' to 'optimising voluntary compliance' with the range of laws we administer.⁶ The desired relationship with the community is reflected in our corporate suite of documents⁷ which highlight the values and approach to administration to which we aspire. For example, our Corporate Plan⁸ outlines our key areas of focus for the next 12 months and the Taxpayers' Charter, a charter of taxpayers' rights, sets out the principals and values that guide our relationship with the community – one based on mutual trust and respect.⁹ This approach is constructive and collaborative and based on an even-handed approach to both the interpretation of the law and the advice we provide Treasury and Government.

The distinction between guidance and the law

It would be unrealistic and inappropriate to paraphrase every section in the law in a way that assumes that such paraphrasing makes the legislative intent clearer than the words chosen by Parliament. In any event no administration is likely to have the capacity to conceive of the myriad of actual activities that occur or might occur and which are best known to the participants themselves. It could never adequately explain how each section of the law may apply to those circumstances without the taxpayer providing the administration with the material facts.¹⁰ In any event if all this paraphrasing was to be binding on the community, and these binding opinions not tightly confined, such an approach would run the risk of usurping the rule of law and working against the interests of those in the community who have adhered to that law.

Nevertheless in order to help people to comply with the law the ATO does provide an extensive range of materials that suit different needs and audiences. Most of this is in the form of practical guidance tailored to the needs of particular segments of the community; some with broader application. They take a layered approach. Most of this material provides

⁶ M D'Ascenzo, 'Creating the right environment: transparency, cooperation and certainty in tax' (Speech delivered to Financial Executives International of Australia, Sydney, 19 June 2007).

⁷ This includes the Strategic Statement, the Compliance Model and the 2007-08 Compliance Program. The Strategic Statement provides the direction and framework for Tax Office activities over the next three years. The Compliance Model is represented by a regulatory pyramid which seeks to encourage as many taxpayers as possible to the base of the pyramid - where there is self regulation and high levels of voluntary compliance. This contrasts with the more narrow apex which is characterised by a wilful minority who seek to abuse the tax system. The 2007-08 Compliance Program announces the compliance priorities for the current year. All these documents can be found on the ATO's website, www.ato.gov.au.

⁸ Values we seek to demonstrate as listed in the Corporate Plan are; being fair and professional, applying the rule of law, supporting taxpayers who want to do the right thing and being fair but firm with those who don't, being consultative, collaborative and willing to co-design, including at a whole-of-government level, being open and accountable, and being responsive to challenges and opportunities.

⁹ Commissioner's online update commemorating the 10th anniversary of the Taxpayers' Charter. <http://atogovau/corporate/content.asp?doc=/content/86369.htm>.

¹⁰ Australia's binding and reviewable private ruling system gives taxpayers an opportunity to provide the tax office with their material facts to seek advice - free of charge - on how the law applies to their specific circumstances.

procedural guidance which does not carry a legal import, for example 'use this form', 'put your facts here' and so on. Other materials communicate changes to the law, or provide a layperson's summary, often in general terms, of aspects of the legislation that have been raised as giving rise to uncertainty. It would be confusing for many people if guidance and communication material of this type tried to cover every nuance of how the law might apply to all possible scenarios. The very purpose of these materials is to provide a simple guide or tips in general terms to help people to comply with the relevant law; or to alert them to things they should look out for or which they may need.

Sometimes, the guidance provided by the ATO is more expansive on a topic, and often a person can seek further, more detailed guidance in our publications or on our website. However, the focus of these materials remains on providing practical guidance and they are written in that way.

As the law is not prescriptive in some cases, that is its application is dependent on the facts,¹¹ it is inappropriate for an administrative product to do more particularly where its intention is transparency or practical assistance. However it would be consistent with the rule of law if a person who followed administrative advice, and was misled by that advice, was not subject to any penalty. On the other hand, it would be contrary to the rule of law if that person was not then required to comply with the law in the same way as others in the community have done. For example in the field of taxation, it is fair that a person misled by guidance from the administration should not be disadvantaged relative to other taxpayers; it is equally fair for other taxpayers that a taxpayer who was innocently misled should not profit from that honest mistake at the relative expense of other taxpayers.

The Australian taxation system provides this level of fairness to taxpayers. Where a person follows ATO guidance they have exercised reasonable care and they are not subject to culpability penalties.¹² Thus the law itself strikes a fair balance between the individual and the community as a whole.

The Australian taxation system goes even further and provides a level of certainty to taxpayers that is not rivalled anywhere in the world. Taxpayers who seek an 'assessment of tax liability or refund' on an existing or proposed transaction can do so by providing the ATO with the relevant facts and seek a binding and reviewable private ruling.¹³ If dissatisfied with the private ruling the taxpayer has rights of objection and appeal. Further, the ATO is able to provide public binding rulings which provide certainty to a segment of the

¹¹ For example, what mark up in a related party transaction is grossly excessive? The answer depends on the facts of each case. The most an administration can do in these circumstances is to explain the legal principles and indicate the features of mark-ups that are likely to attract our attention in terms of possible adjustment. The latter reflects the fact that no tax administration is resourced on the basis that there will be a 100% checking of all taxpayers and transaction. If it were its activities would impose additional compliance costs on the community. An economically and socially more efficient approach for the community is for the tax administration to operate on the basis of risk management.

¹² Taxpayers can also seek compensation under the Commonwealth non-statutory scheme for *Compensation for Detriment Caused By Defective Administration* (the CDDA scheme) if any damage is caused. See PS CM 2004/05 Handling compensation and similar monetary claims against the ATO.

¹³ *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*; TR 2006/11; *Australian Tax Handbook* (2007) Thomson, [48 110].

community on a particular interpretation of the law where that advice is favourable to the taxpayer. The original design of the binding public ruling regime was limited to a class of persons or a class of arrangements. In large measure it was the context of taxpayers' rights under the old assessment system,¹⁴ and the limitations around the subject matter and circumstances that gave these binding rulings regimes, legislative exceptions to the rule of law, their legitimacy.¹⁵

The underlying assumption that goes to the legitimacy of these regimes is that such binding advice would be subject to appropriate checks and balances and extensive quality assurance processes, given their asymmetry in binding the community¹⁶ but not the taxpayer.

Like private rulings, public binding rulings merely represent the Commissioner's view of the law; they do not bind the taxpayer. Their usual audience is the tax profession, who are generally looking for a high level of technical proficiency. They are written in legal terms both to meet the needs of their intended audience and the technical requirements of the law.

The processes in place for developing a public ruling provide an instructive example of the rigour that we think is necessary to safeguard community interests. The process starts with the initial identification of major issues that require further clarification as to our view of the law. Input can come from various sources, be they tax professional, industry representative bodies or ATO intelligence on emerging issues.¹⁷

A robust process is undertaken to settle the ATO view. The Public Rulings Panels for example are comprised of not only the most senior ATO technical experts but also include external experts.¹⁸ I am not aware of any other jurisdiction in the world where this occurs.

The parties gathered around the public rulings table, whether they are ATO officers or external experts, are expected to be independent professionals searching for a sensible resolution of the issue within the framework of the tax law. They are not apologists for a particular view. The process for developing the ATO view is inquisitorial, and is informed by consultation with relevant external stakeholders and an understanding of the underlying policy.

Once a view is formed, the ruling is issued as a draft so further consultation can be achieved. The issue of draft rulings enables the Tax Office to consider community feedback on its preliminary views before finalising its views on major interpretative issues.

¹⁴ Under the assessment system, the Commissioner, having reviewed assessments up front, could not re-open an assessment merely on the basis of a mistake of law. However, the Commissioner could re-open an assessment if there was not a full and frank disclosure of material facts.

¹⁵ Otherwise, arguably, such regimes are contrary to the rule of law because they allow administrative decision-making to displace the rule of law.

¹⁶ Represented by the state.

¹⁷ The National Tax Liaison Group has a monitoring role over the ATO's Public Rulings Process, including ensuring that the highest priority issues are included on the program.

¹⁸ External experts on the Panel include: Ray Conwell, Kevin Burges, Kevin Pose, David Williams and Richard Shaddick, Richard Vann.

Interpretation of law

Our goal is to develop a view of the law which, to the extent allowed by the words used in the legislation, reflects the underlying policy and produces a coherent fabric of tax law for the community. This has been reiterated many times.¹⁹

Our approach to the application of the law to the particular facts of a case is to have regard to the words of the Act read in light of the scheme of the Act and the history and objects of the relevant provisions. Where the words of the Act and their statutory context allow, a view of the law that reflects the underlying policy is preferred. In legal terms this is referred to as a 'purposive' approach.²⁰ The role of the ATO is to administer the tax laws in accordance with the intent of those laws, tempered in the margins by a fair, reasonable and transparent application of administrative common sense. If more than one of the available interpretations promotes the policy intent, we will generally favour the interpretation that reduces taxpayer compliance costs.²¹

Justice Hill described the judicial approach to the interpretation of tax legislation as one where,

"The Courts will construe...legislation having regard to its context in the widest sense of that word with a view to adopting a construction which gives effect to the legislative policy to be found in the language which Parliament has used but having regard to relevant intrinsic materials."

"...A construction will not be adopted which is absurd or irrational but even the literal meaning of the words used may be departed from if to do so is necessary to give effect to the purpose or objects of the legislation, but not merely because the interpretation to be adopted conforms to some personal

¹⁹ For example, M D'Ascenzo, "Along the Road to Damascus: A Framework for Interpreting the Tax law" (2000) *Journal of Australian Taxation* 384; M D'Ascenzo, 'A unique taxation partnership for the benefit of the Australian community' (speech delivered by M D'Ascenzo and Steve Martin at the ATO/AGS/Counsel Workshop, 3 April 2004); M D'Ascenzo, 'Working with business' (speech delivered by M D'Ascenzo to the Business Council of Australia, Sydney, 30 January 2006); See *Acts Interpretation Act 1901* (Cth), s 15AA.

²⁰ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; "It was in the High Court case of *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1980) 147 CLR 297 that the High Court signalled a shift away from the literalist approach to a more purposive approach" in J Tretola,, "The interpretation of taxation legislation by the courts – A reflection on the views of Justice Hill", delivered at 18th Australasian Tax Teachers Association Conference 2006 *Old Taxes in a New World* (Melbourne Law School, University of Melbourne, Melbourne, 30 January 2006 – 1 February 2006); *Acts Interpretation Act 1901* (Cth), s 15AA; M D'Ascenzo 2004, *op. cit.*; Kirby J in *Austin v The Commonwealth* (2003) 51 ATR 654, 723-724 said, "That in the case of federal legislation, the purposive principle is supported by the *Acts Interpretation Act 1901* (Cth); Large business and tax compliance 2006, http://atogovau/content/downloads/77898_N8675-08-2006_w.pdf .

²¹ Large Business and tax compliance 2006, http://atogovau/content/downloads/77898_N8675-08-2006_w.pdf

*theory of justice*²²

The ATO endeavours to be consistent with this approach. Nevertheless there is a lingering perception held by some that the ATO promotes a win-at-all costs culture and is overly legalistic and pro-revenue. The shift in emphasis in our Strategic Statement reaffirms a corporate approach that is more sophisticated than simplistic stereotypes. While the degree of subjectivity that is inherently involved in these processes poses a risk to the consistency of our approach, this risk is mitigated by skilling strategies, appropriate checks and balances²³ such as a precedent set,²⁴ the use of external experts on our Panels, team environments, peer review and quality assurance, and the use of external counsel on all major litigation.²⁵ This framework for tax technical decision making is likely to be more stringent and comprehensive than those used by other parties to a dispute.

When there are legitimate differences of opinion on interpretative issues in tax law between the ATO and a taxpayer, the taxpayer can seek to have the matter resolved by the Administrative Appeals Tribunal or the courts. The ATO approaches litigation in accordance with the Attorney-General's Model Litigant Guidelines.²⁶ We have a strong interest in having contentious areas of the law clarified in a sensible and coherent way consistent with the underlying policy of the law.²⁷ The Hon. Justice Beaumont noted in this regard that the "responsible professional attitude usually adopted by the Commissioner has expedited the flow of tax litigation considerably."²⁸

Managed investment schemes

The ATO must be responsive to developments in the law and discharge its administrative responsibilities accordingly. At times, legal developments may require the ATO to change its view. For example, dicta in cases such as *Puzey*²⁹ led us to reconsider our view on the deductibility of investments in both forestry and non-forestry managed investment schemes.

²² J Tretola, "Some thoughts on the principles applicable to the interpretation of GST" *ATAX UNSW-15th Annual GST & Indirect Tax Conference*, April 2003, at p 30, quoting Justice Hill and Hill J in "A Judicial Perspective of Tax Law Reform" (1998) 72 *Australian Law Journal* 685.

²³ PS LA 2001/4 Provision of written advice by the Australian Taxation Office; The Public Rulings Manual is the Tax Office's main source of information about the processes involved in and rationale for the publication of its formal series of public rulings. It forms part of the Online Resource Centre for Law Administration (ORCLA) which sets out the policies and explains the processes and procedures governing the provision of written binding tax technical advice and objections; PS LA 2003/9 prescribes the mandatory use of ORCLA for Tax Office staff.

²⁴ ATO Interpretative Decisions.

²⁵ PS LA 2007/12 Conduct of Tax Office litigation in courts and tribunals.

²⁶ The Commonwealth's obligation to act as a model litigant can be found in Appendix B of the *Legal Services Directions* 2005, issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act* 1903.

²⁷ M D'Ascenzo 2004, *op cit*.

²⁸ The Hon Justice B. Beaumont, "Anatomy of a Federal Court Tax Case", (2000) 23 (2) *UNSW Law Journal* 237 at 238; M D'Ascenzo 2004 *op cit*.

²⁹ *Puzey v FC of T* [2003] FCAFC 197; See also *Enviro Systems Renewable Resources Pty Ltd v. Australian Securities and Investment Commission* (2001) 80 SASR; and *Vincent v FC of T* [2002] FCAFC 291.

As the matter is not free from doubt, it is best clarified by the courts. First however there needs to be a dispute. While we can offer to fund such a case it is up to the promoters of these arrangements to find a case and to commence such proceedings.

We have been working closely with industry and affected taxpayers to urgently identify and expedite a test case while allowing transitional relief in the interim. To expedite matters, we intend to seek (with industry consent) two motions in the Federal Court: an urgency motion to have the test case resolved quickly, and a request for a hearing by the Full Federal Court on the basis of importance and the public interest. In progressing this matter, the promoters could use a private binding ruling application on a real project that would be offered in the 2008/9 financial year as the basis for the test case.³⁰

Indooroopilly and use of declaratory proceedings

In instances where the law is ambiguous, an appropriate avenue for resolution may be through the courts to obtain judicial clarification of the law. We took this approach recently with regard to deductions claimed in employee benefit arrangements. We consistently won these cases on the basis that the companies were not entitled to deductions under s.8-1 of the *Income Tax Assessment Act* 1997.³¹ However, concerned by the possibility of the 'holy grail' of deductibility and no fringe benefits tax in relation to such schemes,³² and armed with our understanding of the policy intent of the relevant provisions and a view that we had reasonable prospects of success, we sought to have the FBT issue tested by the Full Federal Court, notwithstanding decisions by single judges contrary to our submission. This course of action culminated in the Full Federal Court case of *Commissioner of Taxation v. Indooroopilly Children Services (Qld.) Pty. Ltd.*³³

There is a long history to this matter which arose following the Court's decision in December 2002 in the *Essenbourne* case.³⁴ This case involved an employment benefit trust scheme in which the Court decided that the taxpayer

³⁰ I am told that the promoters are adjusting their current offerings to address the arguments raised by the ATO to the effect that the payments by the investors are capital in nature. If these adjustments are effective in converting the investments to revenue account, that will set the new bar of what the law requires in relation to future arrangements. Clarification of what the law requires will be a good outcome.

³¹ *Essenbourne Pty Limited v Commissioner of Taxation* 2002 ATC 5201; *Walstern Pty Ltd v FC of T* 2003 ATC 5076; *Kajewski & Ors v FC of T* 2003 ATC 4375; *Cajkusic & Anor v FC of T* 2006 ATC 2098; *Cameron Brae v FC of T* 2006 ATC 4433.

³² *Walstern Pty Ltd v FC of T* 2003 ATC 5076, 5078 where Hill J said: "The ability of a private company employer to obtain unlimited deductions for contributions made to a superannuation fund benefiting employees who are directors and shareholders without either the trustee of the fund being liable to pay tax on the amounts contributed or the employer being liable to pay fringe benefits tax must be the holy grail for tax planners."

³³ [2007] FCAFC 16

³⁴ 2002 ATC 5201.

was not entitled to a deduction for its contribution to an employee incentive trust. The Court also decided that the contribution was not subject to FBT.³⁵

The Court in *Indooroopilly* criticised our course of action. The essence of the criticism being that we should have followed the single justice decisions or promptly initiated other court proceedings, such as seeking a declaration from the Full Court on the FBT issue.

It is important that we explore opportunities for improving the litigation process including particularly the timeliness of law clarification on important issues.

Following on from the comments by the Federal Court we obtained advice from the Commonwealth Solicitor-General, David Bennett QC, the Chief General Counsel of the Australian Government Solicitor, Henry Burmester QC and other legal counsel on the following matters:

- the use of declaratory proceedings to resolve taxation disputes; and
- whether the Tax Office must always follow a single instance decision of a judge.

The Solicitor-General and counsel's advice can be found on our website at http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion3.pdf

Declaratory Proceedings

The Solicitor-General and counsel have advised that it would not usually be appropriate for the Commissioner to seek to use declaratory proceedings to resolve taxation disputes. In many cases, a declaration from the court would not be available to test an interpretation of the law because the question would be hypothetical or advisory. The advice confirms that the usual objection and appeal processes involving assessments and private rulings should be used to resolve issues between a taxpayer and the ATO.³⁶

Single Judge Decisions

The Solicitor-General and counsel have confirmed their earlier advice that the ATO is not required to follow a single judge decision if, on the basis of legal advice,³⁷ there are good arguments that, as a matter of law, the decision is

³⁵ On 14 March 2003 we published a fact sheet stating that we proposed to further test the Court's construction of the FBT law, explaining also that we did not appeal this aspect of the decision in view of the Court's findings that the payments were not in respect of employment, in which case FBT had no application, and because we had succeeded on our primary argument. In hindsight it may have been better to appeal, notwithstanding these reasons, if we had known that this was open to us.

³⁶ See also Daryl Davies QC, 'The relationship between the Commissioner of Taxation and the Judiciary,' *Taxation in Australia*, Volume 41, No. 10 May 2007, pp 630 - 633.

³⁷ Legal advice provided by Solicitor-General Henry Burmester QC on 16 January 2006 advises that internal ATO legal advice provided by an appropriate officer would constitute sufficiently robust and credible advice for this purpose.

incorrect and prompt action is being taken to clarify the position.³⁸ In the rare circumstances where the Commissioner does not appeal a decision which is considered incorrect, the ATO will seek to take prompt action to test the issue before the Full Court.³⁹ It is our intention in all such cases to act with “due propriety”.

Law improvement and design

Where the law is clear, we have a duty to apply that law, even if it produces inconvenient outcomes for the community or for an individual taxpayer. We also see ourselves as having a responsibility to advise Treasury where the tax and superannuation laws do not give effect to their underlying policy, for example, where they produce unintended consequences, anomalies, or significant compliance costs inconsistent with the policy intent, or where a legislative solution may be needed to address an emerging compliance issue.

We have a number of processes in place to deal with these types of issues.

First, we have internal ATO processes to ensure that significant technical issues are escalated and given attention by our Tax Counsel Network. These issues can come from a range of sources. Some come from ruling requests or audits. Others come from our 50 plus consultative forums such as the NTLG sub-committees. Others emerge from our day-to-day experience in the care and management of Australia’s tax and superannuation systems.

In some cases we may suggest a law change to clarify the law. Our goal in doing this is to promote administrable legislation that provides certainty for taxpayers.⁴⁰ We take an even-handed approach consistent with our Strategic Statement which emphasises the proper administration of legislative regimes. Consistent with the criterion whether the law operates in accordance with its policy intent, the descriptors ‘pro-revenue’ or ‘helpful to taxpayers’ are largely irrelevant in bringing matters to Treasury’s attention.

In reviewing the range of recommendations to Treasury for law improvement over the last two financial years, it is clear that there has been an even-handed approach. For example, some changes to the consolidation regime were announced after they were initially raised at the NTLG Consolidation sub-committee. However, as this advice is essentially ‘government in-confidence’ it would be inappropriate for the ATO to divulge our efforts in this regard.

We have processes for discussing significant issues with Treasury. We have a formal ATO/Treasury protocol that outlines how the two agencies work

³⁸ Legal advice available at http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion1.pdf ; http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion2.pdf; http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion3.pdf

³⁹ D Davies QC, *op. cit.*

⁴⁰ D St L Kelly, *op. cit.* p 7.

together in the design and administration of taxation and superannuation laws. The Taxation Policy Coordination Committee, comprising senior leadership of each agency, oversees the operation of the protocol.

The ATO works with Treasury from the time when tax policy is being developed until it is implemented. We provide input based on our administrative and interpretative experience in relation to tax and superannuation laws. This includes the administrative impacts of a proposal, revenue consequences of new tax proposals, and also what in our experience are likely to be the administration issues and compliance costs for taxpayers and their advisers.

After a Government decision has been made we work with Treasury on the design of the tax law to give effect to the decision. Treasury has primary responsibility for the design of tax laws and the Office of Parliamentary Counsel prepares draft legislation for introduction to Parliament. We are strong supporters of an integrated tax design process.⁴¹

Conclusion

“The focus of the rule of law is upon controlling the exercise of official power by the executive government. The foundational principle is that agencies and officers of government, from the Minister to the desk official, require legal authority for any action they undertake, and must comply with the law in discharging their functions.”⁴²

I know of no public or private organisation other than the ATO that has the rule of law as one of its values. Understandably, there are thousands of years of history that, correctly or incorrectly, cast the ‘humble tax gatherer’ as self-interested and anti-social.⁴³ In a modern democracy such as Australia, and in respect of an organisation such as the ATO that administers a range of laws, ultimately designed to promote the wellbeing of Australians, wisdom would have it that the opposite to this stereotyped view should be the case. I believe that in the main it is.

⁴¹ M D’Ascenzo, ‘Designing the delivery of legislative measures’, (speech delivered to International Quality and Productivity Conference, Canberra, 17 May 2004); *Improving Australia’s Tax Consultation System*, report by Board of Taxation, Feb 2007; Recommendations in report endorsed by Treasurer Peter Costello in press release of 16 August 2007, <http://www.treasurer.gov.au/tsr/content/pressreleases/2007/076.asp>

⁴² Prof J McMillan, ‘The Ombudsman and the Rule of Law’ (speech delivered to Public Law Conference, Canberra, 5-6 November 2004).

⁴³ One recalls the Pharisees saying to Jesus: “Why do you eat and drink with tax collectors and sinners?": Luke 6:5.