FROM MORAL DUTY TO RULE OF LAW – LESSONS FROM THE UNITED STATES IN TREATING
TAXPAYERS FAIRLY

ABSTRACT

Tax authorities both in Australia and the United States aspire to treat taxpayers fairly. This paper assesses the extent to which these aspirations have been recognised in formal legal rules in both Australia and the United States. It shows that the United States Congress has enacted a number of statutory provisions designed to promote fair treatment of taxpayers and provide formal sanctions against the Internal Revenue Service for failures to treat taxpayers fairly. In contrast, in Australia, the Revenue’s commitment to treat taxpayers fairly remains little more than an aspiration or moral duty. There has been minimal recognition by either the judiciary or the legislature of any legally enforceable taxpayer right to fair treatment.

From the analysis of the two jurisdictions, this paper identifies three lessons for Australia from the United States approach to establishing a system capable of providing taxpayers with legal rights to fair treatment without derogating from the public law duties of the Revenue. These comprise the enactment of legislation to clarify minimum expected standards of fair treatment of taxpayers, the provision of taxpayer rights to compensation for unfair treatment and the establishment of enforceable and independently overseen measures of tax official compliance with Revenue commitments to treat taxpayers fairly.
Tax authorities in Australia and the United States share a common aspiration to treat taxpayers fairly. In the United States, the Mission Statement of the Internal Revenue Service (‘IRS’) states that:

[It is the Internal Revenue Service’s mission to provide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.]^{1} (emphasis added)

The Australian Commissioner of Taxation refers to fairness in the preamble to the Australian Taxpayers’ Charter pointing to an aspiration to be ‘professional, responsive and fair’^{2}. The Australian Charter itself contains a commitment by the Australian Taxation Office (‘ATO’) to treat taxpayers ‘fairly and reasonably’^{3}.

These aspirations of these revenue authorities to treat taxpayers fairly are, in part, motivated by self interest. Judges have recognised that fair treatment of taxpayers is in the ‘interests not only of all individual taxpayers…but also in the interests of the Revenue.’^{4} The OECD 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.’^{5} Research into compliance behaviour is...
rapidly extending to examination and confirmation of various aspects of the link between fair treatment and tax compliance.⁶

Given this link between tax compliance and fair treatment, it is pertinent to assess the extent to which aspirations to treat taxpayers fairly have been recognised in Australia and the United States, either directly or indirectly, as rules of law.⁷ This paper makes this assessment and draws on this assessment to propose general guidelines for effectively translating a moral commitment to treat taxpayers fairly into legal rules.

Specifically, Part I discusses the recognition of the right to fair treatment in the United States. The focus is on outlining legislative provisions introduced as part of the numerous rounds of United States Taxpayer Bill of Rights legislation and how that legislation has given rise to enforceable legal rights to fair treatment. The analysis also extends to a brief examination of tax cases which have considered damages actions for breach by tax officials of fundamental constitutional rights of taxpayers.

Part II discusses the Australian position, identifying the effective judicial refusal to impose a legal duty on the Australian Commissioner of Taxation to treat taxpayers fairly. Part II also discusses the lack of any legislative attempts to enshrine a legal right to fair treatment or any private law duties on the Commissioner which might have that effect.

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⁷ This mirrors the question posed by United Kingdom judge Lord Scarman in Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd [1982] AC 617, who asked, at 651: ‘Is it [fairness] a mere moral duty, a matter for policy but not a rule of law?’
Part III sets out the lessons for Australia which can be gleaned from the United States approach to translating a moral commitment to treat taxpayers fairly into an enforceable legal right. It distils the key elements of the United States approach and makes three specific - legislative clarification of taxpayer rights to fair treatment; rights to compensation for failures to treat taxpayers fairly; and formal and independent avenues for enforcement and oversight of Revenue commitments to treat taxpayers fairly.

**PART I – FAIRNESS IN THE UNITED STATES**

There is no per se recognition of a taxpayer legal right to fair treatment in the United States. However, in response to numerous horror stories of unfair treatment of taxpayers at the hands of the IRS, Congress has enacted numerous rounds of Taxpayer Bill of Rights (‘TBOR’) legislation which have introduced and gradually refined a number of provisions aimed at ensuring fair treatment of taxpayers by increasing IRS accountability and regulation. The TBOR legislation is the focus of this Part. However, the analysis also extends to the limited recognition of taxpayer rights to fair treatment by United States courts in considering constitutional damages claims brought by taxpayers against the IRS.

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8 Shaya observes that introduction of the TBOR-1 legislation into Congress was ‘[p]rompted by thousands of horror stories received from constituents concerning dealings with the IRS...’ (emphasis in original). See Linda Shaya, ‘The New Taxpayer’s Bill of Rights: Panacea or Placebo?’ (1988) 65 University of Detroit Law Review 445. Shaya recounts a number of the more prominent horror stories disclosed in the Congress hearings prior to the introduction of TBOR-1. Questionable liens and other property seizure practices feature prominently in these anecdotes. Typical are the experiences of Mrs Lojeski who had her bank account frozen and a lien placed on her property as part of IRS enforcement proceedings against her boyfriend. These actions almost bankrupted Mrs Lojeski. The IRS believed that her live-in friend, Thomas Treadway, had transferred proceeds to her to shield those proceeds from the IRS. The assessments against Treadway were subsequently dropped and the lien against the Lojeski property released. This was not before, however, Shirley Lojeski suffered substantial financial hardship due to the effective freezing of her financial assets by the IRS. For further discussion of the Lojeski story see Leandra Lederman, ‘Of Taxpayer Rights, Wrongs, and a Proposed Remedy’ (2000) 87 Tax Notes 1133, 1137-1138. The Lojeski story featured in the debates preceding the introduction of the TBOR legislation. Thomas Treadway gave evidence before the Finance Subcommittee on Private Retirement Plans and Oversight of the IRS on 10 April 1987, in which he recounted at length his experiences which he describes as a ‘nightmare.’ See Evidence to the Senate Finance Subcommittee on Private Retirement Plans and Oversight of the Internal Revenue Service, United States, 100th Congress, 1st Session, 10 April 1987 (Thomas Treadway).
A **TBOR Recognition of United States Taxpayer Rights to Fair Treatment:**

The TBOR legislation is concerned with a very broad range of issues, many of which are capable of assisting in ensuring fair treatment of taxpayers by tax officials. Any number of these could be considered a potential aid to ensuring fair treatment of taxpayers by the IRS. However, three developments are particularly pertinent: (1) the introduction of § 7433 of the Internal Revenue Code (‘IRC’) right to sue for damages sustained due to unauthorised tax collection activities; (2) the creation of the Office of the Taxpayer Advocate; and (3) provisions establishing rules for evaluating the performance of IRS personnel based on how fairly they have treated taxpayers.

1 **The TBOR Statutory Damages Provisions:**

The initial tranche of TBOR legislation was introduced in 1988 (‘TBOR-1’). It provided taxpayers with a right, through the introduction of § 7433 of the IRC, to sue for damages sustained due to unauthorised tax collection activities. Recovery of damages under this provision of TBOR-1 extended to reckless or intentional disregard by a tax officer of any provision of the IRC in connection with the collection of federal tax from a taxpayer.

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9 These include rules relating to requirements that the IRS advise taxpayers of their rights. For example, § 2 of *The Technical and Miscellaneous Revenue Act of 1988*, Pub L No 100-647, 102 Stat 3342 (1988) (‘TBOR-1’) required the IRS to prepare a comprehensive statement of taxpayer rights within 180 days of enactment of the legislation, with a view to that statement being distributed to all taxpayers with any tax forms sent to them. Also introduced were various rules for conducting taxpayer interviews and audits and rules and procedures for challenging levies on properties and liens. For example, TBOR-1 § 13 set out procedures for administrative appeals of liens. TBOR-1 § 14 dealt with levies on properties, precluding levies on properties where the expenses of imposing the levies would be greater than the value of the property or the tax liability.


11 The legislation also introduced a right to sue for damages against the IRS for wrongful failure by the federal government to remove a lien on a taxpayer’s property. Subsequent rounds of TBOR legislation have introduced additional specific statutory rights to compensation, but none are as broadly applicable as § 7433. Hence, this paper will focus on § 7433.
Numerous limitations, both of a substantive and procedural nature, were imposed on this right to bring an action in damages against the IRS for unauthorised tax collection activities, including a monetary limit of US$100,000. A substantially revised second version of the TBOR legislation was passed into law in 1996 (‘TBOR-2’). TBOR-2 increased the cap on damages available under § 7433 from US$100,000 to US$1 million. A further (and the current) version of the TBOR legislation was introduced in 1998 (‘TBOR-3’). It expanded the scope of § 7433 of the Code to include a limited avenue for recovery of monetary compensation for negligent collection activities by the IRS.

Section 7433 presently relevantly provides that:

If, 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

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15 Internal Revenue Service Restructuring and Reform Act of 1998, Pub L No 105-206, 112 Stat 685 (1998) (‘TBOR-3’). A fourth Bill, the Taxpayer Bill of Rights 2000, passed the House of Representatives on April 11 2000, but ultimately was not put to the Senate and was never passed into law. It was cleared from the books at the end of the 106th Congress and never reintroduced. There was nothing in that legislation which proposed to alter § 7433 or introduce any further taxpayer rights to statutory damages. A further similar attempt at reform is contained in the Taxpayer Bill of Rights Act of 2008, HR5716, however this bill has not yet passed Congress. The United States Taxpayer Advocate continues to press for further change - in particular, the introduction of a single comprehensive statement of United States taxpayer rights. See Taxpayer Advocate, Annual Report To Congress (2008) vol 1, 338.

16 A cap of US$100,000 on recoverable damages is applied where negligent behaviour is alleged under the amended § 7433. This is in contrast to the US$1 million cap on civil damages recoverable for reckless or intentional behaviour in breach of the section. For discussion, see Abe Greenbaum, ‘United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?’ in Duncan Bentley (ed), Taxpayers’ Rights: An International Perspective (1998) 347.
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... 17

Throughout the legislative evolution of the TBOR legislation there has also remained a requirement that any award in favour of a taxpayer under § 7433 be reduced by the extent to which the loss could have reasonably been mitigated by the aggrieved taxpayer. 18 Taxpayers must also exhaust all other administrative avenues of relief before having recourse to the § 7433 remedy. 19 A further limitation is that a relevant action can only be brought within two years after the date the right of action accrues. 20 Perhaps most significantly, the remedy also remains limited to collection activities as distinct from tax assessment activities. 21

2 TBOR and the Taxpayer Advocate:
The second major TBOR enhancement of taxpayer rights to fair treatment by tax officials is the creation of the office of the Taxpayer Advocate. The office of the Taxpayer Advocate was introduced in TBOR2. The Taxpayer Advocate is charged expressly with assisting taxpayers in resolving disputes with the IRS. 22

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18 Sub-section 7433(d)(2) provides that: ‘The amount of damages awarded under sub-section (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.
19 The requirement of all administrative avenues of relief having been exhausted prior to seeking § 7433 relief was reintroduced with TBOR-3 after having been relaxed in TBOR-2. See TBOR-3, Title III, Subtitle B, § 3102. For discussion see Abe Greenbaum, above n 16, 372.
20 This limitation is contained in § 7433(d)(3). United States Treasury Regulations provide that a right of action accrues at the time when the taxpayer has a reasonable opportunity to discover all essential elements of a possible cause of action. See Treasury Regulations 26 CFR Ch 1 (4-1-06 Edition) § 301.7433-1(g)(2) and § 301.7433-2(g)(2).
22 The Taxpayer Advocate replaced the Taxpayer Ombudsman. The congressional Joint Committee on Taxation set forth the following reasons for change: ‘To date, the Taxpayer Ombudsman has been a career civil servant selected by and serving at the pleasure of the IRS Commissioner. Some may perceive that the Taxpayer Ombudsman is not an independent advocate for taxpayers. In order to ensure that the Taxpayer Ombudsman has the necessary stature within the IRS to represent fully the interests of taxpayers, Congress
The specific functions of the Taxpayer Advocate were described in § 110 of TBOR-2 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.’ TBOR3 took further steps to ensure the independence of the position including changes in the line of reporting and promotion of local taxpayer advocates.\(^2^3\)

In her most recent Annual Report to Congress, the National Taxpayer Advocate, Nina Olsen, indicates a concern to ensure fair treatment of taxpayers, referring expressly to the need for the law to be ‘enforced fairly and consistently.’\(^2^4\) The Advocate continues to press for further legislative recognition of taxpayer rights to fair treatment by the Internal Revenue Service. For example, the Taxpayer Advocate continues to recommend the enactment of a Taxpayer Bill of Rights which explicitly contains a right to ‘a fair and just system’\(^2^5\) observing that:

> It 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,

\(^2^3\) This independence has been welcomed by commentator such as Kaufman who has observed that ‘[t]he independence of the position...will ensure that the IRS meets its new commissioner’s customer service goals.’ Seth Kaufman, ‘IRS Restructuring and reform Act of 1998: Monopoly of Force, Administrative Accountability and Due Process’ (1998) 50 Administrative Law Review 819, 836. TBOR3 also created the IRS Oversight Board to approve and oversee IRS reform activities.

\(^2^4\) National Taxpayer Advocate, 2011 Annual Report to Congress – Executive Summary – Preface and Highlights (31 December 2011), x.

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.  

3 TBOR Monitoring of IRS Fair Treatment of Taxpayers:
The third major development on the path to recognition of taxpayer legal rights to fair treatment introduced by TBOR was the TBOR3 enactment of a requirement that the IRS evaluate the performance of its employees based on their fair and equitable treatment of taxpayers. Specifically, § 1204(b) of that Act requires IRS managers to ‘use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance.’ Further, § 7803(d)(1)(2000) of the IRC requires the Treasury Inspector General for Tax Administration to annually evaluate whether the IRS has complied with § 1204(b). The latest report of the Treasury Inspector General found that ‘IRS managers did evaluate employees on the fair and equitable treatment of taxpayers and did prepare quarterly self-certifications showing their compliance’ with § 1204(b).

Further, § 1203 of TBOR3 was also introduced and 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 ten infringements of taxpayer rights including 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. These have been described by some

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28 The specific infringements as set out in § 1203 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
commentators as the ‘ten deadly sins’ and provide a direct sanction for unfair treatment of taxpayers by tax officials.

**B Judicial Recognition of Taxpayer Rights to Fair Treatment in the United States:**

There has been no express judicial recognition of taxpayer rights to fair treatment by the United States Courts. However, cases involving Constitutional damages actions have led to significant judicial consideration of the issue.

In *Bivens v Six Unknown Named Federal Agents of Federal Bureau of Narcotics* (‘*Bivens’*) 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. In *Carlson v Green*, the Supreme Court summarised the availability of *Bivens* relief in these terms:

> ‘the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.’

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30 Some commentators have argued that these provisions have led to over-defensive behaviour among IRS officials. For example, Pietruszkiewicz, ibid at 5, 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 1990’s.


32 446 U.S. 14 (1980).

33 Ibid, 18.
The Court limited the availability of relief only to situations in which Congress had not provided ‘an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.’

The Bivens doctrine was both extended and refined in subsequent cases. In Schweiker v Chiliki (‘Schweiker’) the availability of a Bivens action was restricted to only those situations in which Congress has not ‘provided what it considers adequate remedial mechanisms for constitutional violations that may occur’ in the course of administration of the relevant Government program.

Many Bivens tax cases fail on the grounds that the IRC provides adequate mechanisms for relief, thus precluding the availability of Bivens actions. There have, however, been instances in which Bivens actions have been allowed in tax cases. In Rutherford v United States the Fifth Circuit Court of Appeals allowed a Bivens action for a breach by the IRS of the taxpayer’s Fifth Amendment right to liberty which it characterised as an ‘abuse in tax collection.’

However, since the bolstering of taxpayer rights to compensation in the United States through the enactment of the various rounds of TBOR legislation and, in particular, the enactment of § 7433, the ability to bring a Bivens action, in light of the principles set down by the Supreme Court in Schweiker has proved more difficult. For example, in Vennes v An Unknown Number of Unidentified Agents of the United States it was held that Bivens recovery against IRS agents was precluded on the basis that provisions such as § 7433 indicate that the Congressional ‘refusal to permit unrestricted damage

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34 Ibid, 23.
36 Ibid, 423. For similar comments see also Vennes v An Unknown Number of Unidentified Agents of the United States, 26 F.3d 1448 (8th Cir. 1994), especially at [23] where the Eighth Circuit Court of Appeals emphasise that where Congressional action indicates that a refusal to permit unrestricted damage actions by taxpayers has not been inadvertent, Bivens recovery should be denied.
37 702 F.2d 580 (5th Cir. 1983).
38 Ibid, 585. Although ability to bring action has frequently been denied. See, for example, Capozzoli v Tracey 663 F.2d 654 (5th Cir. 1981); and Morris v United States 521 F.2d 872 (9th Cir. 1975).
39 Vennes v An Unknown Number of Unidentified Agents of the United States, 26 F.3d 1448 (8th Cir. 1994).
actions by taxpayers has not been inadvertent."\textsuperscript{40} There was a similar result in \textit{National Commodity and Barter Association, National Commodity Exchange v Gibbs} \textsuperscript{41} (‘Gibbs’).

However, in \textit{Gibbs}, the door was left open for a potential \textit{Bivens} action in the tax context with the Court pointing out that:

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...while the comprehensive scheme of the Internal Revenue Code should not be indiscriminately disrupted by the creation of new remedies, certain values, such as those protected by the first and fourth amendments, may be superior to the need to protect the integrity of the internal revenue system.\textsuperscript{42}
\end{quote}

Despite the continuing uncertainty, in general terms \textit{Bivens} actions will be unavailable if the breach of Constitutional rights occurred in the context of tax assessment or collection activities.\textsuperscript{43} However, action is possible outside of those activities, for example in cases involving criminal prosecutions where IRS officers have acted in breach of the taxpayer’s Constitutional rights.\textsuperscript{44} This is not to say that taxpayers will succeed. In fact, the case law indicates that taxpayers will typically lose\textsuperscript{45}, even in cases involving extreme instances of abuses by tax officials.\textsuperscript{46} The case law is far from

\textsuperscript{40} Ibid, [23].
\textsuperscript{41} 886 F.2d 1240 (10th Cir. 1989).
\textsuperscript{42} Ibid, 1248.
\textsuperscript{43} This principle holds even where the available remedies might be ineffective or inadequate for remedying the plaintiff’s injury. For detailed discussion see Ridgeley A. Scott, above n 21, especially the discussion of cases such as \textit{Wages v. IRS}, 915 F.2d 1230 (9th Cir. 1990); \textit{McMillan v. United States}, 960 F.2d 187 (1st Cir. 1991); and \textit{Cameron v. IRS}, 773 F.2d 126 (7th Cir. 1985).
\textsuperscript{44} See, for example, \textit{Heller v Plave} 743 F.Supp. 1553 (1990), in which IRS officers were held to have induced the taxpayer’s accountant to give false testimony in a criminal prosecution of the taxpayer and in which the defendants’ claim for immunity against the plaintiff’s suit was denied by the Florida District Court.
\textsuperscript{45} Ridgeley A. Scott, above n 21, at 561, cites statistics that from 1980 to 1986 over 1000 Bivens actions were launched against IRS officers and in not a single case did the taxpayer succeed. ‘During the 1987 hearings on the Taxpayers’ Bill of Rights, the Commissioner bragged that none of over 1,000 \textit{Bivens} actions had been Successful.’
\textsuperscript{46} Extreme cases do exist. A prime example is \textit{Vennes v An Unknown Number of Unidentified Agents of the United States}, 26 F.3d 1448 (8th Cir. 1994), in which the court rejected the plaintiff’s \textit{Bivens} claim, despite broadly accepting the plaintiff’s factual account which clearly revealed behaviour which Heaney J in his dissenting judgment characterised as ‘outrageous’. The facts were as follows: IRS agents posing as Chicago businessmen approached him and encouraged him to launder $100,000 using his European connections. After an associate made off with the funds, the IRS Agents revealed themselves as mafia operatives and
settled with writers such as Pietruszkiewicz asserting that ‘a Bivens remedy may or may not be available depending on the Circuit in which the case is litigated…’ 47
Despite this continuing uncertainty, the threat of a Bivens action remains a material legal incentive for ensuring fair treatment of taxpayers. 48

PART II – FAIRNESS IN AUSTRALIA

The Australian Taxation Office has recently come under attack from whistleblowers within its own ranks alleging that taxpayers being investigated as part of the current ‘Project Wickenby’ investigation of tax compliance by high wealth individuals were not being afforded basic rights such as procedural fairness. 49 However, there is little recognition by either the judiciary or the legislature in Australia of any legally enforceable taxpayer rights to fair treatment. Further, there is no perceptible push by either the Legislature or the judiciary for the creation or fostering of such a right through formulation of legal rules in the foreseeable future.

Given the absence of any legislative recognition of a right to fair treatment of Australian taxpayers the focus of this Part will be on judicial attitudes to the recognition and legal enforceability of such a right.

A Judicial Recognition of Australian Taxpayer Rights to Fair Treatment

In Australia, the concept of a duty to treat taxpayers fairly was first judicially flagged by Isaacs J, in his 1926 judgment in Moreau v FCT 50 (‘Moreau’). His Honour stated in that case that the Commissioner’s function ‘is to administer the Act with solicitude for the

threatened to dismember the plaintiff’s children if he failed to recoup the loss. They suggested Vennes engage in illegal drug and firearms transactions in an effort to recoup this money and thereby avoid serious bodily harm to him and his family.

47 Christopher Pietruszkiewicz, above n 29, 55.
48 One writer has described this threat as Damocles Sword observing that: ‘The sword of Damocles does exist; however, it does little more than deter Internal Revenue employees from carrying out their duties.’ Christopher Pietruszkiewicz, ibid, 67-68.
49 These allegations were publically aired by Australian Taxation Office senior auditor Serene Teffaha on 7:30 ABC TV on 9 April 2012 – transcript and video available on <http://www.abc.net.au/7.30/content/2012/s3473563.htm>.
50 (1926) 39 CLR 65.
Public Treasury and with fairness to the taxpayers\textsuperscript{51} (emphasis added). However, while these views have been positively received in a number of subsequent Australian tax cases, there has been no express confirmation of their correctness. Generally, the effect of subsequent cases has been to continue to limit the general right to fair treatment recognised by Isaacs J.

For example, in \textit{David Jones Finance & Investments Pty Ltd v FCT}\textsuperscript{52} (‘\textit{David Jones}’), the Commissioner resiled from his usual practice of allowing inter-corporate dividend rebates, contrary to a decision of the High Court in \textit{FCT v Patcorp Investments Ltd}.\textsuperscript{53} The taxpayer unsuccessfully argued that this was unfair and constituted an abuse of process by the Commissioner. O’Loughlin J distinguished the remarks of Isaacs J in \textit{Moreau}, by confining them to the specific provision in question in \textit{Moreau}.\textsuperscript{54}

Similarly, in \textit{Bellinz v Federal Commissioner of Taxation}\textsuperscript{55} (‘\textit{Bellinz}’) Hill, Sundberg and Goldberg JJ recognised a taxpayer right to fair treatment but similarly imposed clear boundaries on this right, observing that:

\begin{quote}
[i]here is little difficulty in accepting that, where a decision-maker, including the Commissioner of Taxation, has a discretion, a principle of fairness will require that that discretion be exercised in a way that does not discriminate against taxpayers… But … it is difficult to see how the Commissioner can properly be said to have acted unfairly, even if there is an element of discrimination, where he has acted in accordance with the law itself.\textsuperscript{56}
\end{quote}

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\textsuperscript{51} Ibid, 67.
\textsuperscript{52} (1990) 21 ATR 718.
\textsuperscript{53} (1976) 6 ATR 420.
\textsuperscript{54} O’Loughlin J specifically observes: ‘In assessing the significance of these remarks and the introduction of the concept of “fairness” it is, in my opinion, relevant to note that Isaacs J, was discussing a provision of the legislation which was dealing with the Commissioner having “reason to believe” that the taxpayer had defrauded or attempted to evade the revenue law. Hence the obligation to act fairly related to the activities of the Commissioner and his officers in determining whether there was “reason to believe.”’ \textit{David Jones Finance & Investments Pty Ltd v FCT} (1990) 21 ATR 718, 722. His Honour was, however, prepared to concede (at 723) that the mandate given to the Commissioner under s8 of the \textit{Income Tax Assessment Act 1936} (Cth) ‘requires him to exercise his statutory powers with “procedural fairness”’
\textsuperscript{55} (1998) 84 FCR 154.
\textsuperscript{56} 155 ALR 220, 233 -234.
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However, the key limitation on the development of any recognition of rights to fair treatment in Australian Courts either in judicial review proceedings or in common law proceedings has been the judicial interpretation of the various express or implicit statutory protections of the Australian Commissioner of Taxation.

In judicial review proceedings the key limitations are the privative clauses in sections 175 and 177 of the *Income Tax Assessment Act 1936* (Cth). These provisions have been interpreted as prohibiting judicial review except in cases where the complaint is not directly related to the assessment of substantive tax liability unless there is evidence of bad faith, illegality or improper purpose. The express statutory restrictions in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) on reviewability of tax decisions and the restrictive interpretation by courts of the availability of judicial review pursuant to s39B of the *Judiciary Act 1903* (Cth) have further hindered the possibility of development of any principle of any enforceable taxpayer entitlement to fair treatment.

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57 These were acknowledged by O’Loughlin J in *David Jones* as the main obstacles barring the possibility of the taxpayer succeeding in his claim against the Commissioner in that case. According to section 175, an assessment in not invalid merely because the Commissioner has not complied with any provision of the *Income Tax Assessment Act 1936* (Cth). Further, Section 177(1) provides that where the Commissioner produces a notice of assessment, that assessment will be conclusive evidence of the due making of the assessment and that the amount and details of that assessment are correct. The section does preserve the rights of taxpayers to seek a review or appeal against the assessment using the procedures contained in Part IVC of the *Taxation Administration Act 1953* (Cth).

58 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.’ See M Walpole, ‘Taxpayer Rights and Remedies - Australia, New Zealand and China’ in *Second World Tax Conference* (2001).

59 Paragraph (e) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) excludes from review decisions forming part of the process of making of, leading up to the making of, or refusing to amend, an assessment of tax. The exclusions in paragraph (e) of Schedule 1 have been interpreted as clearly prohibiting review of decisions dealing with the calculation of tax. See the comments of Beaumont J in *Constable Holdings Pty Ltd v Federal Commissioner of Taxation* (1987) 72 ALR 265, 268-269; Ellicott J in *Tooheys Ltd v Minister for Business & Consumer Affairs* (1981) 36 ALR 64, 78; and Smithers J in *Intervest Corporation Pty Ltd v FCT* (1984) 3 FCR 591, 595–6.

60 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 paragraph (e) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
The only instances in which taxpayers have succeeded against the Commissioner on grounds of unfairness have been cases in which the facts of the case allowed a finding for the taxpayer without breaching these limitations. For instance in *Darrell Lea Chocolate Shops Pty Ltd v Commissioner of Taxation*\(^{61}\) (‘Darrell Lea’), Spender Burchett and Hill JJ had no difficulty confirming that ‘the extensive powers conferred upon the Commissioner in connection with the assessment and collection of sales tax, or for that matter any other tax, must be so exercised as to deal fairly with each taxpayer.’\(^{62}\) The Court further construed that no ascertainment or calculation of tax was involved as the Commissioner had acted unfairly and oppressively by making an assessment on facts known by the Commissioner to be untrue.\(^{63}\) Hence, the taxpayer was able to succeed in his claim of unfair treatment by the Commissioner.

Further, while cases such as *Bellinz*, *Darrell Lea* and *David Jones* discuss overseas developments in formally judicially recognising taxpayer rights to fair treatment, such developments are typically rejected. The prime example is the Australian judicial rejection of the United Kingdom cases establishing a doctrine of substantive legitimate expectations based on an entitlement to fair treatment.\(^{64}\) As former High Court Chief Justice Sir Anthony Mason has extra-judicially observed; ‘[i]t would require a revolution

\(^{61}\) (1996) 72 FCR 175. In this case the Commissioner issued four separate assessment for sales tax of the same taxpayer in respected of the same transactions in the same goods made under four assessment Acts - and all without making any genuine attempt to assess the sale value of particular goods under each Act and on a factual basis which the Commissioner knew was wrong.

\(^{62}\) Ibid, 188. Cases such as *Pickering v Deputy Commissioner of Taxation* (1997) 37 ATR 41; *Ando Minerals NL v Deputy Federal commissioner of Taxation* (1994) 94 ATC 4163; and *Federal Commissioner of Taxation v Biga Nominees Pty Ltd* (1988) 88 ATC 4270 also discuss with approval concepts of fairness in the context of discussing the potential applicability of the developing United Kingdom doctrine of legitimate expectations.

\(^{63}\) The High Court recently re-examined the issue in *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, with the Court concluding that judicial review is only available in cases involving a tax assessment decision where the assessment is tentative or provisional or there has been conscious maladministration by the Commissioner.

\(^{64}\) See, for example, the approach taken by the High Court in *Re Minister for Immigration & Multicultural & Indigenous Affairs: Ex parte Lam* (2003) 214 CLR 1. Gummow and McHugh JJ 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.’ Ibid, 21. The approach of Gummow and McHugh JJ is consistent with earlier authority such as *Attorney-General (NSW) v Quin* (1989) 170 CLR 1.
in Australian judicial thinking to bring about an adoption of the English approach to substantive protection of legitimate expectations.\textsuperscript{65}

The negative attitude of the Australian Courts toward doctrines such as the United Kingdom doctrine of legitimate expectations is in part explained by the Australian judicial concern with offending the Constitutional separation of powers.\textsuperscript{66} Concern with offending the separation of powers also underlies the judicial rejection of any substantive right to fair treatment in the rare cases involving taxpayer attempts to invoke the common law in Australia even where no tax assessment or calculation decision was directly being challenged. Australian judges have allowed little scope for the imposition of any private law duties alongside the Commissioner’s duties to the Crown for fear of contradicting any unstated legislative intent that the Australian Commissioner of Taxation owes duties only to the Crown. For example, in Lucas \textit{v} O’Reilly\textsuperscript{67} a case involving allegations of tortious breach of statutory duty by the Commissioner of Taxation,\textsuperscript{68} Young CJ, in comprehensively rejecting the taxpayer’s submissions, stated:

\begin{quote}
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
\end{quote}


\textsuperscript{66} As Busch has noted in the context of the United Kingdom doctrine of legitimate expectations: ‘In the view of the Australian courts, the doctrine of substantive legitimate expectation is positively misguided…Consistently with this position, the courts have also been unsupportive of the view that substantive fairness might constitute a ground of review in its own right. From the Australian perspective, such a principle…necessarily involves the courts in an illegitimate process of merits-review and, therefore, offends against the key Constitutional precept of the separation of powers.’ L Busch, ‘Standards of review of administrative decision-making and the role of deference in Australian public law’ (2006) 11 \textit{Judicial Review} 363, 368.

\textsuperscript{67} (1979) 79 ATC 4081.

\textsuperscript{68} Breach of statutory duty was also separately unsuccessfully pleaded by the taxpayer in \textit{Harris \textit{v} Deputy Commissioner of Taxation} (2001) 47 ATR 406. Professor Luntz has summarised the elements of the tort of breach of statutory duty as follows: ‘[T]he plaintiff must prove the right to the performance of the statutory duty in question is enforceable by an action in tort; that the duty is imposed on the defendant; that the plaintiff is a person protected by the statutory duty; that the harm suffered by the plaintiff is within the class of risks at which the legislation is directed; that the defendant was in breach of the duty; and that the breach caused the harm for which the plaintiff seeks damages.’ Harold Luntz and David Hambly, \textit{Torts – Cases and Commentary} (3\textsuperscript{rd} ed, 1992), 587.
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.\footnote{Ibid, 4085. This is very similar to the stance taken in \textit{Harris v Deputy Commissioner of Taxation} (2001) 47 ATR 406, a case involving allegations of negligence against the Australian Commissioner of Taxation. In that case, Grove J asserted, at 408, that ‘[t]here is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.’}

B Legislative Recognition of Australian Taxpayer Rights to Fair Treatment

There are a number of informal acknowledgements of a right to fair treatment of Australian taxpayers but none of these have been backed up by legislation, the breach of which is enforceable against the Australian Commissioner of Taxation.

For example, the Australian Taxpayer’s Charter contains a number of references to a right to be treated fairly. The Commissioner of Taxation makes reference to fairness in his preamble to the Taxpayers’ Charter pointing to an aspiration to be ‘professional, responsive and fair, taking into account people’s circumstances and previous compliance behaviour.’\footnote{Australian Taxation Office, \textit{Taxpayers’ Charter: What You Need to Know}, above n 2. The Commissioner’s policies and publications regularly make reference to the Commissioner’s acceptance of a duty to treat taxpayers fairly. For example, the Commissioner in his Practice Statement Law Administration PS LA 2009/4 notes that the Australian Taxation Office has a ‘duty to administer the law fairly and impartially.’ Australian Taxation Office, \textit{Practice Statement Law Administration PS LA 2009/4 - Escalating a Proposal Requiring the Exercise of the Commissioner’s Powers of General Administration} (28 July 2011), [16].} The Charter has been in force in Australia since 1997 and was substantially revised in 2003.\footnote{It was substantially revised in 2003, but otherwise remains unchanged.} Nevertheless, throughout that period it has remained a document without any legislative force and which does not purport to create any new legal rights.

There is no discernible push in Australia to endow the Taxpayers’ Charter with legislative force or to otherwise enact a taxpayer bill of rights akin to that in the United States. Further there is no other legislation which enshrines any enforceable right to fair treatment of taxpayer by the Australian Commissioner of Taxation.

In \textit{Commissioner of Taxation v Futuris Corporation Ltd}\footnote{(2008) 237 CLR 146.} the High Court, referred to the requirement that tax officials, as members of the Australian Public Service act with care...
and diligence, honesty and integrity in accordance with the Public Service Act 1999 (Cth). Section 13 of the Public Service Act 1999 (Cth) contains the Australian Public Service Code of Conduct. This emphasises the need to deliver ‘services fairly, effectively, impartially and courteously to the Australian public.’ However, the only sanction for breach of the Code is contained in section 15 which provides for a number of possible employee sanctions including possible termination of employment, reprimand, demotion or reduction in salary. There is nothing in this legislation which provides aggrieved citizens with any cause of action for breach of the Code.

There are a number of other schemes and avenues for potential recovery for a taxpayer in cases of unfair treatment at the hands of a tax officer. Equally however, none of these provide any formal legal entitlement to recovery. For example, a remedy could be sought in accordance with the principles of the Scheme for Compensation for Detriment caused by Defective Administration (‘CDDA Scheme’). Alternatively, the taxpayer could seek to have the matter investigated by the Commonwealth Ombudsman or otherwise complain directly to the Australian Taxation Office via ATO Internal Complaints.

PART III – FAIR TREATMENT OF TAXPAYERS AS RULES OF LAW - LESSONS FOR AUSTRALIA FROM THE UNITED STATES

73 Australian tax officers, as members of the Australian Public Service are required to act in accordance with Australian Public Service values and standards of conduct. These are set out in the Public Service Act 1999 (Cth), Public Service Regulations 1999 (Cth) and the Australian Public Service Code of Conduct. The Australian Public Service values incorporated in the Australian Public Service Code of Conduct include a focus ‘on achieving results and measuring performance’ and delivering ‘services fairly, effectively, impartially and courteously to the Australian public.’ See Australian Public Service Commission, APS Values (8 March 2012) <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/aps-values>. These are derived from s10(1) of the Public Service Act 1999 (Cth).

74 This scheme is not unique to the ATO - it is an Australian Government scheme administered by the Minister for Revenue. For a detailed discussion of the Scheme, see Department of Finance and Deregulation, Commonwealth of Australia, Finance Circular No 2006/05 (2006) issued to all agencies under the Financial Management and Accountability Act 1997 (Cth) by the Department of Finance and Administration.

75 Under s 5(1) of the Ombudsman Act 1976 (Cth) the jurisdiction of the Commonwealth Ombudsman extends to investigation of any ‘action, being action that relates to a matter of administration’ of a “department” or a “prescribed authority.” Section 3(1) of the Ombudsman Act defines these terms. The Australian Taxation Office constitutes a ‘prescribed authority’ by virtue of the clearly public role which the office of the Commissioner of Taxation fulfils.
Translating the moral duty to treat taxpayers fairly into an enforceable legal right poses a number of challenges. This Part isolates the three core elements of the United States approach to dealing with those challenges. It makes the case for the employment of each of these elements as pillars for establishing fair treatment of Taxpayers as an Australian legal principle. These pillars comprise:

(1) An express and considered legislative pronouncement on the issue;
(2) An extension of the availability of compensation as a remedy for taxpayers treated unfairly; and
(3) The imposition of mechanisms for independent oversight to monitor and sanction tax officials for unfair treatment of taxpayers.

The following discussion addresses each of these in turn:

A Legislative Involvement

It is evident from the analysis in the preceding Part that one of the primary impediments in recognising any legally enforceable right to fair treatment of taxpayers in Australia is a judicial concern with interfering with the legislature and executive by imposing on Revenue duties to taxpayers which are inconsistent with their legislatively-imposed primary public duties to administer and collect taxes.

In Australia this concern is largely responsible for the stagnation of any development which might translate aspirations to treat taxpayers fairly into enforceable rules of law. As discussed in Part II, this concern is evident both in Australian administrative law cases and private law cases involving claims of unfair treatment of taxpayers by tax officials.

Judicial concern with offending constitutional conventions by imposing private law duties to individual taxpayers is also evident in the reasoning of United States judges in considering claims of unfair treatment of taxpayers. For example, as noted in Part I, United States judges considering the potential for Bivens Constitutional damages claims in tax cases continue to grapple with the question of whether the comprehensive
legislative scheme for compensating taxpayers for wrongs done to them by tax officials effectively bars the possibility of other avenues of relief being applied in the tax context.\textsuperscript{77} However these concerns have not resulted in the same stagnation in the recognition of taxpayer rights to fair treatment by tax officials evident in Australia.

Of course, the distinctly different constitutional frameworks of Australia and the United States make comparisons difficult. However, these differences aside, the key reason for this divergence is the existence in the United States of a far more comprehensive legislative scheme for dealing with complaints of unfair treatment of taxpayers by tax officials than Australia. This has enabled United States judges to proceed with greater confidence as to the intent of the legislature than Australian judges. This is particularly true since the enactment of the statutory damages provisions such as § 7433 in the TBOR legislation, particularly where tax collection activities are concerned. These provisions have led to United States judges being able to confidently conclude in taxpayer \textit{Bivens} damages actions that ‘[t]hese carefully crafted legislative remedies confirm that, in the politically sensitive realm of taxation, Congress’ refusal to permit unrestricted damages actions by taxpayers has not been inadvertent.’\textsuperscript{78}

Judicial comments such as these illustrate that detailed legislative guidance doesn’t guarantee increased prospects of success for taxpayers alleging unfair treatment. However, as the analysis in Part II has shown, the relative legislative vacuum in Australia has seen Australian judges consistently err on the side of caution and, as a result, deny the existence of any enforceable taxpayer rights to fair treatment in almost every case. The lack of legislative attention makes it difficult to determine whether this consistent judicial rejection concurs with legislative intentions and societal expectations. Accordingly a legislative statement would assist, even if only to provide such clarity and certainty.

\textsuperscript{77} Numerous commentators have affirmed the correctness of this deference to legislative provision in this field. See, for example, Pietruszkiewicz, above n 29; and, more generally, Antonin Scalia, \textit{Judicial Deference to Administrative Interpretation of Law} (1989) \textit{3 Duke Law Journal} 511, 515 who has observed that: ‘Under our democratic system, policy judgments are not for the courts but for the political branches...’

\textsuperscript{78} \textit{Vennes v An Unknown Number of Unidentified Agents}, 26 F.3d 1448, 1454 (8th Cir.1994).
Even if the prevailing Australian judicial attitudes were to dramatically shift toward greater judicial activism in recognising taxpayer rights to fair treatment by tax officials, the case for legislative intervention is not weakened. The fact remains that the development of judicially recognised rights to fair treatment of taxpayers will necessarily be slower, more uncertain and more piecemeal than considered legislative action. Neither taxpayers nor the Revenue are likely to benefit from the uncertainty and cost associated with this type of incremental judicial development. Consequently, the case for clear and express legislative guidance on the question of taxpayer rights to fair treatment by tax officials is a strong one. The United States TBOR approach, while far from perfect, could usefully be employed as a starting point for the Australian legislature.

B A Right to Compensation for Unfair Treatment

The second critical element of any attempt to formalise a taxpayer right to fair treatment is the express recognition of a right to compensation in instances of unfair treatment by the Revenue. The United States TBOR recognition of limited statutory rights to compensation for certain unauthorised tax collection activities could be a useful starting point for the development of an Australian taxpayer right to fair treatment by tax officials.79

There are a number of reasons for considering compensation as a particularly effective tool for ensuring fair and proper treatment of taxpayers. As Scott has observed in the United States context:

In addition to compensating plaintiffs for their injuries, money damages also tend to regulate the conduct of defendants ... Thus, if the IRS and its employees know there is a reasonable possibility that improper conduct will lead to a successful damage suit, they will be more likely to take steps to avoid causing injuries.80

More broadly, the operation of compensation as a signalling mechanism for the boundaries of acceptable tax administration behaviour in such cases could also be valuable for maintaining the legitimacy of the tax administration system.\textsuperscript{81} A monetary remedy sends an unambiguous signal of disapproval of unfair tax administration activity. This signal potentially plays an important role in taxpayers having confidence that the system of tax administration will operate within reasonable boundaries and, thus, aid in fostering tax compliance.

For Australia, however, an express right to damages would be particularly useful. This is because such a right could potentially provide a more nuanced approach to dealing with the continuing separation of powers and other public policy concerns expressed by Australian judges in taxpayer claims asserting unfair treatment at the hands of tax officials. This is because damages can be used to compensate an unfairly treated taxpayer without necessarily engaging courts in merits review through second-guessing the decisions of the Commissioner of Taxation.

The use of damages in this way can be simply illustrated utilising the facts in \textit{David Jones Finance & Investments Pty Ltd v FCT}\textsuperscript{82} (‘David Jones’). It will be recalled from Part II that in \textit{David Jones} the Australian Commissioner resiled from his usual practice of allowing inter-corporate dividend rebates, contrary to a decision of the High Court in \textit{FCT v Patcorp Investments Ltd}.\textsuperscript{83} The taxpayer unsuccessfully argued that this was unfair and constituted an abuse of process by the Commissioner.

Despite the apparent unfairness to the taxpayer, the Court’s decision is understandable. For the court to have directed the Commissioner to revert to his previous practice would have been tantamount to restricting the Commissioner’s legislatively sanctioned discretion in applying the tax laws. The Court would have potentially faced the criticism of having overstepped its role and infringed the principles of justiciability and the

\textsuperscript{81} The legitimacy argument has long been recognised in the United States – see, for example, Bernard Schwartz, \textit{An Introduction to American Administrative Law} (1962), 218.
\textsuperscript{82} (1991) 21 ATR 1506.
\textsuperscript{83} (1976) 6 ATR 420.
underlying doctrine of separation of powers. Accordingly, it is understandable that the Court left the taxpayer with no remedy.

However, if the option of an award of damages was open to the Court in *David Jones*, the result could have been very different. An award of damages in such a case could not be seen as a substitution of the Court’s decision for that of the Commissioner. It would, however, place a ‘price’ on the Commissioner changing his long-standing practices where such changes would unfairly cause loss to taxpayers. While the public expectation that a tax authority should be free to change its position in the public interest is respected, an award of damages could be used to recognise that the public may be best placed to bear the losses flowing from that freedom, rather than adversely affected individual taxpayers.  

**C Independent Oversight and Sanctions for Unfair Treatment**

The preceding analysis has revealed that there is no lack in either Australia or the United States of aspirational statements and informal, often self-administered systems, standards and guidelines aimed at ensuring fair treatment of taxpayers. These guidelines and standards are an important cog in ensuring fair treatment of taxpayers. In practical terms it would be simply impossible to objectively judge every instance of fair treatment encapsulated in value-laden concepts such as ‘courtesy’ and ‘politeness’ which are often referred to in Revenue service charters and guidelines. Even if these practicalities could be overcome, it is obviously undesirable to allow taxpayer recovery in every conceivable instance of unfair treatment.

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84 The utilitarian argument is that levying everyone to compensate for losses suffered by particular individuals increases the total good. Cohen discusses this argument at length. See David Cohen, ‘Suing the State’ (1990) 40 *University of Toronto Law Journal* 630, 644-645.

85 See, for example many of the commitments contained in the list of commitments under the heading of fairness and reasonableness contained in the Australian Taxpayers’ Charter and reproduced above at n 3.

86 The filing of frivolous lawsuits may well ensue. Such a concern led one judge in the United States to observe that ‘filing of frivolous lawsuits merely to protest the assessment of federal income tax has become a new and unpleasant indoor sport.’ Parker J in *McKinney v Regan* 599 F.Supp. 126, 129-30 (M.D. La. 1984); similarly, the filing of such suits has been judicially described as a vampire requiring a sharpened stake to kill it (*United States v Craig*, 73 A.F.T.R.2d 1099 (D.N.D. 1994)).
It is, however, possible to recognise a right to fair treatment in legal rules which aim to make revenue authorities accountable and incentivise revenue authorities to treat taxpayers fairly without providing any corresponding legal entitlement to recovery on the part of the affected taxpayers. The United States TBOR approach provides a good example of how this can be done.

The charging of the United States Treasury Inspector General for Tax Administration with the task of annually evaluating IRS compliance with the obligation to treat taxpayers fairly and equitably ensures a high level of scrutiny. The enactment of the ‘ten deadly sins’ which requires the Commissioner of Internal Revenue to terminate the employment of any employee on misconduct grounds in cases of proven commission of one of these ‘sins’ provides further specific and real incentives for tax officials to treat taxpayers fairly. The efforts to endow the United States Taxpayer Advocate with independence and genuine influence ensure that the IRS will continue to be closely scrutinised to ensure compliance with legislative requirements to treat taxpayers fairly.

In comparison to these formal oversights and sanctions, the relatively informal Australian approach of simply recording taxpayer entitlements to fair treatment in the Taxpayers’ Charter 87 and using Australian Taxation Office Service Standards and other similar self-determined measures to gauge compliance with these commitments to taxpayers 88 looks decidedly flimsy. While some United States commentators argue that the provisions of TBOR are still ‘not forceful enough’ 89 they would serve as a useful starting point for devising formal Australian rules for ensuring adherence with Revenue commitments to treat taxpayers fairly.

87 As set out above at n 3.
88 For example, the Australian Taxation Office has shown an increasing concern with responsiveness benchmarks which strongly indicate a taxpayer service-oriented attitude. See Australian Taxation Office, Our Service Standards, <http://www.ato.gov.au/corporate/distributor.aspx?menuid=0&doc=/content/25940.htm&page=2#P24_2573>; and Australian Taxation Office, Annual Report 2010-11 (2011). Further, it has close to 50 consultative forums with taxpayers, professionals and other stakeholders. Australian Taxation Office, Stakeholder Consultation Overview <http://www.ato.gov.au/corporate/content.asp?doc=/content/00131220.htm&mnu=430198&mfp=001>. This is also a strong indicator of the perceived importance of providing good and fair service to taxpayers.
CONCLUSION

This paper has not sought to pass judgment on the effectiveness in ensuring fair treatment of taxpayers of either United States or Australian laws. It is clear that in each jurisdiction the current approach is ‘neither perfect nor complete.’

This is unsurprising. This is because taxpayer rights to fair treatment at the hands of tax officials will always be the subject of a delicate balancing exercise between the private interests of individual taxpayers and the public interest in ensuring that the vital tax administration function is not unduly obstructed or fettered. Consequently, assessments as to the adequacy of protection of taxpayer rights to fair treatment will necessarily involve value-laden judgments of where to resolve the trade-off between these competing interests. These judgments will evolve and shift over time and will also undoubtedly vary from jurisdiction to jurisdiction. Further, final determinations must be considered in the context of the Constitutional and political framework in which the relevant decision-makers operate.

None of this, however, is a reason for law-makers to shy away from the issue entirely. Legislators and judges are regularly faced with having to make difficult trade-offs between public and private interests. The preceding analysis demonstrates that judges and legislators in the United States have been more willing to engage in a weighing up of these competing interests than their Australian counterparts. The result has been some recognition in the United States of a taxpayer right to fair treatment in rules of law which either expressly recognise fair treatment as a taxpayer right and/or arm taxpayers with

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90 Christopher Pietruszkiewicz, above n 29, 67 - commenting on the adequacy of United States TBOR rights to compensation and whether they should preclude the availability of Bivens relief.

91 As Bentley has noted ‘[e]ssentially taxation can be seen as a barometer of the developing balance between State and individual rights.’ (emphasis added). See Duncan Bentley, Taxpayers’ Rights: Theory, Origin and Implementation (2007), 15.

92 As one administrative law commentator notes: ‘...the potential scope of an exclusion of “political” matters from the purview of the courts is enormous. If all such political “hot potatoes” were to be deemed unsuitable for judicial scrutiny the administrative law casebooks would be slim volumes indeed.’ Chris Finn, ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ (2002) 30 Federal Law Review 239, 249.
formal legal avenues of relief to ensure that tax officials are held accountable where their treatment of taxpayers falls outside boundaries of behaviour accepted as fair.

In contrast, in Australia, neither the judiciary nor the legislature has been willing to progress meaningfully beyond a recognition of a mere moral duty on tax officials to treat taxpayers fairly contained in administrative pronouncements with no force of law such as the Taxpayers’ Charter. Clearly, the United States is further along this path and the United States experience in undertaking that journey can provide useful pointers for Australian law makers minded to head in the same direction.

This paper has distilled these pointers into three basic pillars for effectively translating the moral duty into enforceable legal rules. Only one of these directly centres on providing taxpayers with enhanced formal avenues of relief for unfair treatment – the recognition of a right to compensation for unfair treatment. Of the remaining two recommendations, one calls for a statutory pronouncement of taxpayer rights to fair treatment. The aim of this recommendation is not a per se increase in taxpayer rights to fair treatment. Instead, the primary objective is break the legislative silence in order to assist judges to resolve many of the public policy difficulties which have troubled judges in considering cases concerning claims of unfair treatment by tax officials. The other centres on the desirability of legal rules aimed at providing independent oversight and real incentives for tax officers to treat taxpayers fairly beyond self-administered aspirational statements and service standards.

While the United States is clearly the furthest down the path of building these three pillars for enshrining legal taxpayer rights to fair treatment by tax officials, the analysis and the continuing calls for reform in that country show that the challenge of striking the appropriate trade-off between taxpayers rights to fair treatment and the public duties of tax officials is a difficult one. However, the central importance of a tax administration system built on mutual trust and confidence demands that we cease shying away from that challenge.