THE PLAINTIFF-PROOF BARRIER — THE JUSTICIABILITY OF ACTIVITIES OF THE COMMISSIONER OF TAXATION IN TORTIOUS AND EQUITABLE ESTOPPEL TAXPAYER CLAIMS

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ABSTRACT

Justiciability is the concern with ensuring that only those cases involving matters which are appropriate for judicial scrutiny are determined in our courts. This article contends that both in tortious and equitable estoppel actions by taxpayers against the Commissioner of Taxation, justiciability considerations underlie the usual denial of relief to the plaintiff. In part II it is demonstrated that, although not expressly acknowledged, justiciability considerations underlie the especially restrictive judicial approach to determining such claims. In part III, the role which justiciability concerns have played in the determination of tortious and equitable estoppel claims by taxpayers against the Commissioner of Taxation is critically examined. An express, more coherent and uniform approach to justiciability considerations in tax cases is proposed.

I. INTRODUCTION: THE DOCTRINE OF JUSTICIABILITY AND TAX ADMINISTRATION ACTIVITIES

A justiciable matter is one which is considered capable of judicial determination. Conversely, non-justiciable matters are those which cannot be subjected to judicial determination for one or more of a number of interrelated reasons which can be broadly categorised as competency and separation of powers concerns. Competency concerns stem from the view that some cases cannot be judicially determined because they are cases which courts are 'ill-equipped and ill-suited to assess.'[1] This argument is sometimes expressed in terms of lack of 'judicial competency' or 'institutional competence.'[2]

Competency-based justiciability concerns are raised in a range of matters, including those which give rise to political issues or bring into question high-level policy decisions. They are also raised in those matters which are considered as being unsuited to the adversarial nature of our system of judicial resolution, and its rules of evidence and procedure, because they raise multifaceted interests and diverse public policy concerns. Such matters are often described as 'polycentric'.[3] It is also typically political or high-level policy decisions which display polycentric characteristics.[4]

The separation of powers underpinning of the justiciability doctrine is a desire to ensure an appropriate separation of powers between the legislature, the executive and the judiciary

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1 Paul Craig and Duncan Fairgrieve, 'Barrett, Negligence and Discretionary Powers' [1999] *Public Law* 626, 632.

2 For a good discussion of institutional competence concerns as they relate to the concept of justiciability, see Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.

3 Peter Cane has described a polycentric matter as one which requires 'account to be taken of a large number of interlocking and interacting interests and considerations.' See Peter Cane, *An Introduction to Administrative Law* (1986) 150. American commentator Lon Fuller has vividly described polycentricity by analogy with a spider's web, noting that: 'This is a "polycentric situation" because it is "many centred" — each crossing of the strands is a distinct centre for distributing tensions.' See Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 at 395.

4 See, eg, the judgment of Bowen CJ in *Minister for Arts Heritage and Environment v Peko-Walsend* (1987) 15 FCR 274, 278-279, in which a disputed decision as to the Heritage listing of part of Kakadu National Park was described as follows: '[T]he whole subject matter of the decision involved complex policy questions relating to the environment, the rights of Aborigines, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests ... It appears to me that the subject-matter of the decision in conjunction with its relationship to the terms of the Convention placed the decision beyond review by the Court ... The matter appears to my mind to lie in the political arena.'

is maintained and respected. This concern clearly forms a strong basis for classifying as non-justiciable those matters which are largely political or which involve high-level policy decisions. It also encompasses the grounds for rejection of cases involving certain subjects that are considered inherently unsuitable for judicial revisitation or intrusion, such as executive decisions concerning national security.[5]

Within these basic parameters, justiciability is a fluid and multifaceted concept which has been described as 'a complex phenomenon that weaves together a number of strands to create a whole that is perhaps greater than the sum of its parts.'[6] Notwithstanding this fluidity, with a basic understanding of the competency and separation of powers 'strands' of justiciability in mind, it is possible to identify a range of circumstances in which tortious or equitable challenges to tax administration activities of the Commissioner of Taxation can readily be considered 'non-justiciable.'

For example, judges may well be reluctant to allow a taxpayer to proceed with a damages action against the Commissioner in circumstances that directly or indirectly result in the successful taxpayer paying less tax than would otherwise have been payable on an ordinary reading of the relevant taxation law provisions. There are two main reasons for justiciability concerns in these circumstances. First, the rules of evidence which confine the judicial process may make it impossible for a judge to properly assess the competing public policy ramifications of such a result. Second, and perhaps most compelling, such a result could be viewed as an incursion by the judiciary into the legislature's domain through creation of an exception to an otherwise legislatively sanctioned taxpayer liability.

Similarly, even in cases which do not involve payment of damages by the Commissioner to a taxpayer, it is easy to appreciate judicial justiciability concerns. For example, any result which would substitute the decision of the Commissioner with the decision of a judge could be viewed as an imposition on the Commissioner of a legal burden which might otherwise operate to restrict or modify the Commissioner's legislatively sanctioned role. Again, it could be argued that such a determination would pose a judicial challenge to the legislative authority of Parliament.

It is contended in this paper that these types of justiciability concerns have been used as a judicial filter in many tax cases at common law and in equity. The result has been the imposition of significant restrictions on the availability of a number of private law remedies to taxpayers aggrieved by the acts or omissions of the Commissioner of Taxation. Part II of this paper addresses this contention. Specifically, discussion will centre upon the tortious remedy of negligence and the equitable remedy of promissory estoppel. It is contended that both of these avenues of relief serve as useful examples of the extremely restricted availability of private law relief to Australian taxpayer plaintiffs in claims against the Commissioner of Taxation, by virtue of either explicit or implicit concerns with ensuring one or more of the underlying strands of the doctrine of justiciability are not offended.

Part III critically examines the role of justiciability in private-law tortious and estoppel cases against the Commissioner of Taxation. It argues for a more explicit, coherent and uniform approach to justiciability in those cases. Such an approach would better ensure that disputes are dealt with in a manner which respects the sound principles underlying the concept of justiciability and fosters good tax administration practices, without unduly restricting the avenues of relief available to aggrieved taxpayers. The tortious policy/operational dichotomy is proposed as a useful starting framework for such an explicit, coherent and uniform approach to justiciability in taxpayer tortious and equitable claims against the Commissioner.

5 Ibid 304: Wilcox J noted in his judgment that the relevance of a decision to questions of national security would render a matter 'inappropriate' for judicial review.

6 Finn, above n 2, 241.

II. THE CURRENT JUSTICIABILITY BARRIER IN NEGLIGENCE AND ESTOPPEL CLAIMS AGAINST THE COMMISSIONER OF TAXATION

The focus in this part of the paper will be on identifying the relevance of justiciability concerns in tortious claims of negligence and equitable estoppel claims. These two causes of action provide a useful representative picture of the role of justiciability in private-law tortious and equitable claims against the Commissioner of Taxation. They allow examination of its relevance both in claims where damages are sought and in claims of a declaratory or injunctive nature. They also capture the approach to justiciability in claims against the Commissioner of Taxation at common law as well as in equity.

A. The Justiciability of Negligence of the Commissioner of Taxation

Historically, the justiciability of negligence cases against statutory authorities such as the Commissioner of Taxation has been determined by an application of the 'policy/operational' dichotomy. The policy/operational dichotomy was described by Mason J in *Sutherland Shire Council v Heyman*[7] in the following terms:

> [A] public authority is under no duty of care in relation to decisions which involve or are dictated to by financial, economic, social or political factors or constraints … But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[8]

In effect, therefore, applying the policy/operational dichotomy, an activity which is fundamentally operational in nature will be capable of being made subject to a duty of care in negligence. Conversely, a matter which is fundamentally of a policy or discretionary nature will not be capable of sustaining a claim in negligence.

The reference by Mason J to the absence of any duty of care in cases concerning 'decisions which involve or are dictated to by financial, economic, social or political factors or constraints' is strongly indicative of the justiciability grounding of the policy/operational dichotomy.[9] This grounding has been expressly highlighted. It has been noted that:

> The phrase planning or policy decision is simply a recognition of the concept of justiciability in the area of negligence and public bodies. When a court feels that the allegation of negligence is unsuited to judicial resolution it will apply the label planning decision to express that conclusion.[10]

Accordingly, applying the policy/operational dichotomy, only planning or policy acts or omissions of the Commissioner of Taxation should be ruled non-justiciable. Conversely,

7 (1985) 157 CLR 424.

8 Ibid 469. The policy/operational dichotomy was first expressly enunciated in Commonwealth courts by the UK House of Lords in *Anns v Merton London Borough Council* [1978] AC 728. However, as Stephen Bailey and Michael Bowman point out, prior to the *Anns* decision, Lord Diplock in *Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004 clearly had in mind drawing a line between the statutorily authorised damage and damage caused by negligent exercise of statutory power. For a detailed discussion, see Bailey and Bowman, 'The Policy-Operational Dichotomy — Cuckoo in the Nest' (1986) 45 *Cambridge Law Journal* 430, 431-436. The original source is usually credited as the case law concerning a similar test contained in United States *Federal Tort Claims Act 1946*(US), most notably: *Dalehite v United States* 346 US 15 (1953); *Indian Towing Co v United States* 350 US 61 (1955); and, more recently, *United States v Gaubert* 499 US 315 (1991). For a comprehensive discussion of the basis for the distinction in American law, see Heinz Hink and David Schutter, 'Some Thoughts on American Law of Government Tort Liability' (1965-1966) 29 *Rutgers Law Journal* 710, 721-724.

9 In the UK, justiciability concerns are similarly not far from the surface in application of the policy/operational dichotomy. For example, *Rowling v Takaro Properties Ltd* [1988] AC 473, 501: Lord Keith of Kinkel noted that the policy/operational distinction was developed to address 'the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution'.

10 Paul Craig, *Administrative Law* (1983), 535. See similar comments in Richard Buckley, 'Negligence in the Public Sphere: Is Clarity Possible?' (2000) 51 *Northern Ireland Legal Quarterly* 25, 41; and John Doyle, 'The Liability of Public Authorities' (1994) 2 *Tort Law Review* 189, 197.

purely administrative or operational malfunctions should be capable of forming the basis for a justiciable tortious claim.

The policy/operational dichotomy has recently lost favour in Australian courts.[11] Instead, Australian courts today favour an 'incremental approach'[12] founded on incremental developments of the law using the approach taken in categories of cases analogous with the factual matrix at issue. However, the policy/operational dichotomy, and the justiciability concerns which it represents, remain important for determining the sustainability of a claim in negligence in cases where a statutory authority such as the Commissioner of Taxation is concerned.

McHugh J gave clear guidance as to the continued relevance of the issue in delivering the leading incremental approach judgment in *Crimmins v Stevedoring Industry Finance Committee*.[13] His Honour applied a six-stage test for imposition of liability, the fifth step of which closely resembles the policy/operational dichotomy and the justiciability concerns it encapsulates. His Honour described the fifth stage of his six-stage test in the following terms:

> 5. Would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? If yes, then there is no duty.[14]

While the McHugh approach is far from settled law in Australia, it is strongly suggestive that justiciability measured in terms equivalent to the policy/operational distinction should remain a core component of a judicial assessment of any allegation of negligence raised against a public authority such as the Commissioner of Taxation.[15] However, the case law to date reveals that the Commissioner of Taxation enjoys immunity from suit in negligence far beyond what would be suggested through an application of either the McHugh J incremental approach or the policy/operational dichotomy.

The position in Australia is that no Australian taxpayer has ever sustained allegations of negligence against the Commissioner of Taxation in a full hearing.[16] There are very limited reported cases in which negligence has been asserted, and in none of these do the allegations appear to have been pursued to a full trial. In cases where the allegation has been judicially considered, the comments of Grove J in *Harris v Deputy Commissioner of Taxation*[17] are typical of the full extent of the treatment. In that case, His Honour stated:

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11 In large part, this is due to the difficulty in delineating between policy and operational acts. The dilemma was enunciated by Lord Slynn in the English case of *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 571: 'It does not … mean that if an element of discretion is involved in an act being done … common law negligence is necessarily ruled out … as has often been said even knocking a nail into a piece of wood involves the exercise of some choice or discretion and yet there may be a duty of care in the way it is done.' Lord Slynn's reference to 'knocking in a nail' is derived from the US case of *Ham v Los Angeles County* (1920) 45 Cal App 148, 162, in which it was noted that '[i]t would be difficult to conceive of any official act, no matter how directly ministerial that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.'

12 In Australia, this rationale was first broached by Brennan J in *Sutherland Shire Council v Heyman*, above n 7, 481, in the following terms: 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of duty or the class of persons to whom it is owed.' For similar views applied in the UK, see: *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 751 (Lord Browne-Wilkinson); and *Barrett v Enfield London Borough Council* [2001] 2 AC 550. The incremental approach was adopted in recent leading Australian cases involving allegations of negligence against public authorities including: *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Pyrenees Shire Council v Day* (1998) 192 CLR 375; and *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.

13 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

14 Ibid 24-25.

15 It should be noted, however, that there is a current absence of uniformity in the High Court as to how the incremental approach should be applied, which precludes the possibility of more definite conclusions. For a good discussion of the various recent approaches to the question of duty of care by the High Court, see Prue Vines, 'The Needle in the Haystack: Principle in the Duty of Care in Negligence' (2000) 23(2) *University of New South Wales Law Journal* 35.

16 Elsewhere, I have set out the circumstances in which a successful negligence claim might be mounted by a taxpayer against the Commissioner of Taxation, concluding that negligence is largely an illusory remedy in the arsenal of remedies available to Australian taxpayers. John Bevacqua, 'The Unicorn in the Stable: A Detailed Assessment of the Potential for a Successful Negligence Action Against the Commissioner of Taxation' (Paper presented at the Australasian Tax Teachers Association Conference, Hobart, Tasmania, 23-25 January 2008).

17 (2001) 47 ATR 406.

> There 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.[18]

This sweeping rejection of the possibility of an action in tort against the Commissioner is effectively a declaration of non-justiciability of negligence allegations against the Commissioner of Taxation. Although Grove J does not elaborate on the basis for his stance, at face value His Honour's approach is clearly far more restrictive than the policy/operational dichotomy or incremental approach to the question of justiciability.

The Grove J approach is not, however, without precedent in tax cases considering tort liability of the Commissioner. It is consistent with the approach taken in cases involving allegations of tortious breach of statutory duty[19] against the Commissioner of Taxation.[20] For example, in *Lucas v O'Reilly*,[21] a case in which the taxpayer alleged, among a number of causes of action, a breach of statutory duty on the part of the Commissioner in respect of a foreshadowed (and, the taxpayer argued, erroneous) Notice of Assessment of his tax liability,[22] Young CJ, in comprehensively rejecting the taxpayer's submissions, stated:

> If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show ... that the statute creating the duty confers upon him a right of action in respect of any breach ... However, it is, I think, clear that the defendant owes the plaintiff no such duty. The duty of the Commissioner is owed to the Crown.[23]

According to the Young CJ reasoning, the Commissioner owes no duty at all to taxpayers in his tax assessment function. The duty of the Commissioner is owed exclusively to the Crown. This view is open to some challenge, particularly given that there is no express statement to this effect in the *Income Tax Assessment Acts*.[24] Further, the Young CJ and Grove J stance is clearly contrary to views expressed by Isaacs J in *Moreau v FCT*,[25] in which His Honour asserted in relation to the duties of the Commissioner that '[h]is function is to administer the Act with solitude for the Public Treasury and with fairness to taxpayers.'[26] It is also inconsistent with similar views expressed more recently in the United Kingdom by Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd*[27] to the effect that 'modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly.'[28] These views have been positively received in a number of Australian

18 Ibid 410.

19 Central to any case of alleged breach of statutory duty is a search for legislative intent to create a civil cause of action for a breach of the relevant statutory duty. See Sir Anthony Mason, 'Negligence and the Liability of Public Authorities' (1998) 2 *Edinburgh Law Review* 3, for discussion of the requirements of the tort of breach of statutory duty in Australia. See also Keith Stanton et al, *Statutory Torts* (2003); and Colin Phegan, 'Breach of Statutory Duty as a Remedy Against Public Authorities' (1974) 8 *University of Queensland Law Journal* 158. The concern is obviously to ensure that no judicial interpretation is applied to the relevant law provision such that it would operate to engage the Court in quasi-legislative activity by imputing the existence of a statutory duty not intended by the legislature to accompany the relevant provision. Clearly, therefore, separation of powers-based justiciability concerns are never far from the surface of judicial deliberations in cases of alleged breaches of statutory duty.

20 Similar to negligence, breach of statutory duty has only rarely been raised against the Commissioner of Taxation, and the argument has never succeeded in a full hearing.

21 (1979) 79 ATC 4081.

22 Breach of statutory duty was also pleaded in the alternative and also rejected by Grove J in *Harris v Deputy Commissioner of Taxation* (2001) 47 ATR 406.

23 *Lucas v O'Reilly* (1979) 79 ATC 4081, 4085.

24 Aside from a brief reference to a view that the *Taxpayers' Charter* creates no tortious duties to taxpayers, His Honour makes no direct reference to any supporting legislative or administrative instrument authority. The *Taxpayers' Charter* consists of a series of booklets released by the Australian Taxation Office in 1994. See *Taxpayers' Charter: What you need to know* [NAT 2458]; *Taxpayers' Charter: Expanded version* [NAT 2547]; *Treating you fairly and reasonably* [NAT 2549]; *Your honesty and complying with the tax laws* [NAT 2550]; *Who can help you with your tax affairs* [NAT2555]; *Your privacy and the confidentiality of your tax affairs* [NAT 2552]; *Accessing information under the Freedom of Information Act* [NAT 2554]; *Getting advice from the Tax Office* [NAT 2553]; *If you're not satisfied* [NAT 2556]; *Fair use of our access and information gathering powers* [NAT 2559]; and *If you're subject to enquiry or audit* [NAT 2558].

25 (1926) 39 CLR 65.

26 Ibid 67.

27 [1982] AC 617.

28 Ibid 651.

tax cases, although not expressly confirmed as correct.[29] However, none of these cases were pleaded in tort.

Irrespective of the correctness or otherwise of the Young CJ and Grove J stance, the issue is one which clearly warrants some judicial consideration in the tortious context. There is little evidence of such consideration in the Grove J or Young CJ judgments. Instead, inherent in both the Young CJ and Grove J approaches to potential tortious liability of the Commissioner is a judicial deference to an unstated legislative intent to preclude the availability of tortious relief in tax cases. This deference renders non-justiciable almost all allegations of tortious liability by Australian taxpayers against the Commissioner of Taxation.[30]

B. Justiciability in Equitable Estoppel Claims Against the Commissioner of Taxation

In equitable estoppel cases, the justiciability concern typically manifests itself as the 'non-fetter' principle. This is the principle that 'government should not be shackled in exercising its power to make decisions in the public interest in the future.'[31] In the estoppel context, this translates into a principle known as the *Southend-on-Sea* principle, 'that an estoppel may not be raised to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion.'[32]

Unlike negligence which, as noted above, is largely judicially untested against the Commissioner of Taxation, estoppel has been tried with some limited success. However, in most cases alleging estoppel against the Commissioner of Taxation, the taxpayer has failed. In Australia, the general position regarding the prospect of estopping the Commissioner of Taxation has been bluntly and concisely stated by Kitto J in *Federal Commissioner of Taxation v Wade*[33]: 'No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act.'[34]

Similar views, strongly suggestive of the extreme judicial sensitivity to encroaching on statutorily imposed duties of the Commissioner, have been reiterated more recently in *AGC (Investments) Ltd v Federal Commissioner of Taxation*[35] by Hill J:

> [T]here is no room for the doctrine of estoppel operating to preclude the Commissioner from pursuing his statutory duty to assess tax in accordance with law. The *Income Tax Assessment Act* imposes obligations on the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart.[36]

29 See, eg, *David Jones Finance and Investment Pty Ltd v FCT* 90 ATC 4730; *Darrell Lea v C of T* (1996) 72 FCR 175; and *Bellinz v Federal Commissioner of Taxation* (1998) 39 ATR 198.

30 Except for perhaps those cases involving 'intentional' torts, such as misfeasance in public office where any breach of duty is carried out with a deliberate malicious intent. For a discussion of the role of malicious intent in establishing this tort see Robert Evans, 'Damages For Unlawful Administrative Action: The Remedy For Misfeasance in Public Office' (1982) 31 *International and Comparative Law Quarterly* 640; Gerald Fridman, 'Malice in the Law of Torts' (1958) 21(5) *The Modern Law Review* 484; Sarah Hannett, 'Misfeasance in Public Office: The Principles' (2005) 10 *Judicial Review* 227; and Robert Sadler, 'Liability for Misfeasance in Public Office' (1992) 14 *Sydney Law Review* 137.

31 Margaret Allars, 'Tort and Equity Claims Against the State' in Paul D Finn (ed), *Essays on Law and Government, Volume 2: The Citizen and the State* (1996) 49, 86. For further enlightening discussion of the non-fetter principle, see Christopher Hilson, 'Policies, the Non-fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place?' (2006) 11 *Judicial Review* 289; Christopher Hilson, 'Judicial Review, Policies and the Fettering of Discretion' [2002] *Public Law* 111; and G Tony Pagone, 'Estoppel in Public Law: Theory, Fact and Fiction' (1984) 7 *University of New South Wales Law Journal* 267.

32 Allars, above n 31, 86. The *Southend-on-Sea* principle derives its name from the case of *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1962] 1 QB 416.

33 (1951) 84 CLR 105.

34 Ibid 117.

35 (1991) 91 ATC 4180.

36 Ibid 4195. In relation to this case, it was noted in *Bellinz v Federal Commissioner of Taxation* (1998) 39 ATR 198, that: '[i]t was not suggested that the appellants could rely on estoppel, although the administrative law arguments advanced in reality seek to activate a doctrine of estoppel in a different guise.' The incursion of estoppel in administrative law cases often takes the form of the closely related administrative law doctrine of legitimate expectations. For a comprehensive exposition between the two causes of action ,see Dean Knight, *Estoppel*

Such comments indicate an implicit concern not to offend the central separation of powers ideals which underlie the principle of justiciability as reflected in the non-fetter principle.[37] However in neither of these judgments is there any of the close and detailed discussion of the nature of the specific statutory duties or powers of the Commissioner, usually evident where the non-fetter principle is applied to determine whether a Crown instrumentality should be estopped.[38] Nor is there evidence of any associated weighing up of public and private interests, which is usually central to determining whether a relevant statutory provision is capable of forming the basis for an estoppel action. While it seems highly likely that an examination of whether the relevant provisions of the *Income Tax Assessment Acts* would result in a determination that those provisions are 'not for the benefit of any individuals or body of individuals, but for considerations of State'[39] and, therefore, incapable of sustaining a taxpayer estoppel claim against the Commissioner, no such analysis is entered into in the relevant tax cases to date.

The Commissioner has only been estopped in Australia in extraordinary cases in which the Commissioner has sought to resile from explicit and clear commitments made to an individual taxpayer tantamount to a contractual commitment.[40] One such example is the case of *Cox v Deputy Federal Commissioner of Land Tax (Tas)*.[41] That case concerned a settlement of certain land tax liabilities of the taxpayer through an agreement between the Commissioner and the taxpayer. The Commissioner subsequently sought to reopen the land tax assessments. Griffith CJ, in denying the Commissioner's request to reopen the assessments said:

> That matter was in actual litigation between the parties in the manner prescribed by the Act. While that litigation was pending an agreement was come to by which the respondent submitted to the appellants' claim, paid their costs and paid the amount claimed from him. Under those circumstances it seems to me impossible to re-open the matter. Although it is not, strictly speaking, *res judicata*, the compromise followed by payment operates as an executed agreement for valuable consideration.[42]

These specific quasi-contractual exceptions to the general preclusion of estoppel claims against the Commissioner are special in that they are cases where the Commissioner has clearly and unambiguously sought to bind himself to a particular taxpayer and the application of estoppel presents no 'substantial departure from statutory obligations.'[43]

The vast majority of estoppel claims could not be resolved without the risk of substantial departure from statutory obligations. Holding the Commissioner to a representation made to a taxpayer or class of taxpayers, singling them out for special treatment or concession, would arguably be tantamount to binding the legislature to the decision of the Commissioner of Taxation as an unelected public servant. Such a result

(Principles?) in Public Law: The Substantive Protection of Legitimate Expectations (LLM Thesis, University of British Columbia, 2004).

37 There are also echoes in the comments of Hill J of the Young CJ approach to tortious breach of statutory duty in *Lucas v O'Reilly* (1979) 79 ATC 4081, discussed above.

38 For example, in *Commonwealth v Verwayen* (1990) 170 CLR 394, arguably the leading Australian authority on the application of promissory estoppel principles against the Crown, a significant portion of each of the judgments of the High Court is dedicated to a close examination of the statutory intent, meaning and duties created by the relevant section of the *Limitation of Actions Act 1958* (Vic), upon which the Commonwealth was seeking to rely to deny the possibility of the plaintiff bringing his action out of time, contrary to earlier representations not to do so. In contrast to the restrictive approach to estoppel in the tax cases, in that case, Mason CJ concluded, at 417, that: 'It was not argued that any special rule of estoppel applies to assumptions induced by government, either so as to expand or so as to contract the field of operation of the doctrine.'

39 *Admiralty Commissioners v Valverda (Owners)* (1938) AC 173, 185. This test was cited by Mason CJ in *Commonwealth v Verwayen* (1990) 170 CLR 394 as central for determining whether the relevant statutory provision is capable of being waived (and, consequently, also capable of forming the basis for an estoppel action).

40 Other cases in which the taxpayer has been successful in having estoppel-like responsibilities imposed on the Commissioner of Taxation are: *Precision Polls Pty Ltd v FCT* (1992) 92 ATC 4549; and *Queensland Trustees v Fowles* (191) 12 CLR 111. For a detailed exposition of these cases, see Cameron Rider, 'Estoppel of the Revenue: A Review of Recent Developments' (1994) 23 *Australian Tax Review* 135.

41 (1914) 17 CLR 450.

42 Ibid 455.

43 Rider, above n 40, 137.

would clearly offend the separation of powers 'strand' of the principle of justiciability. The fact therefore remains that, with few exceptions, the vast majority of estoppel claims against the Commissioner would not presently be considered justiciable.

III. TOWARD A NEW APPROACH TO JUSTICIABILITY IN NEGLIGENCE AND ESTOPPEL CASES AGAINST THE COMMISSIONER OF TAXATION

Part II of this paper has illustrated the pervasiveness of justiciability concerns in negligence and estoppel claims involving the Commissioner of Taxation. It was suggested that justiciability concerns would render both remedies inapplicable in almost all cases involving allegations by taxpayers against the Commissioner of Taxation. This situation raises a number of interesting interrelated questions concerning the robustness of this restrictive judicial approach and how justiciability might be more satisfactorily accommodated in such tax cases. The first specific question is whether, and to what extent, such an overwhelming concern with limiting justiciability of tax cases brought in tort or equity is justified.

At a generic level, the importance placed on justiciability has been criticised.[44] It has been pointed out, for instance, that concerns with justiciability should be tempered by the reality of the absence of a clear separation of powers in Australia.[45] Consequently, to the extent that justiciability concerns are aimed at ensuring an absolute separation of powers, it could be argued that this pursuit is in vain and unnecessary.

Further, the competency-based strands of the justiciability doctrine are similarly questionable if pursued over-zealously.[46] For example, almost any case involving the Commissioner of Taxation could at some level be viewed as raising polycentric interests.[47] Every taxpayer's interests, as a user of tax-funded government services and infrastructure, are affected by the challenge to the revenue posed by a significant individual taxpayer claim. Further, any question involving a publicly funded office such as that held by the Commissioner of Taxation necessarily raises direct or indirect questions of the allocation of scarce public resources. These questions are inherently political. As one commentator has noted in the administrative law context:

> [T]he 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.[48]

Notwithstanding these easy criticisms and challenges to the over-zealous pursuit of the doctrine of justiciability, it is readily apparent why some limits on the justiciability of claims against the Commissioner of Taxation should be imposed. For example, to allow judicial scrutiny of every act of the Commissioner, as the officer primarily responsible for the collection of Commonwealth tax revenue, would impose unacceptable contingencies on the viability of vital government initiatives and services funded by that revenue. In extreme cases, these contingencies might bring about inefficiency and fiscal chaos. Inefficiency or fiscal chaos might result if a longstanding tax practice was successfully

44 See, eg, Finn, above n 2; and Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14 *Sydney Law Review* 432.

45 Allars, above n 31, 36, notes that 'in some respects there is no separation of powers in Australia. Legislative and executive power are not clearly separated. Federal Ministers who form the Federal Executive council and the Cabinet and administer federal government departments are Members of Parliament. ... Nor is there a true separation of legislative from judicial power. Judges have power to make rules of court, a legislative function'.

46 This has led one commentator to observe, in the context of discussion of the continued relevance of the concept in judicial review of administrative action, that justiciability 'is a blunt instrument which fails to have regard in a nuanced way to those characteristics of a particular decision which make it unsuited to judicial review': Peter Bayne, 'The Court, the Parliament and the Government — Reflections on the Scope of Judicial Review' [1991] 20 *Federal Law Review* 1, 3. Another noted that '"non justiciability" is a confused amalgam of rationales, none of which bear great weight when closely examined': see Finn, above n 2, 262.

47 For discussion of this fact, see, eg, Fuller, above n 3; John Allison, 'The Procedural Reason for Judicial Restraint' [1994] *Public Law* 452; and Bayne, above n 46.

48 Finn, above n 2, 249.

challenged in a taxpayer claim.[49] Such an uncertain environment would also be ripe for abuse by vexatious or opportunistic taxpayer litigants and would create few incentives for voluntary compliance behaviour.

Clearly, therefore, the answer is not to entirely do away with justiciability as a filter for appropriate claims against the Commissioner of Taxation. The challenge is to deal with the justiciability issue in a manner which is conducive to the efficient administration of the taxation system, to ensure that the Constitutional and competency-based underpinnings of the concern with justiciability are not unduly compromised, and for all this to be achieved without unduly eroding taxpayer rights. Hill J extrajudicially commented on the importance of striking the right balance, noting that

> the most important role of the judiciary is to stand between the State and the citizen. It must always be remembered that the Commissioner of Taxation is ultimately the State. The Income Tax legislation may impose trust in the Commissioner to perform his tasks properly and impartially as he generally does, but his actions must not be immune from review. The inescapable fact that taxation is the cornerstone of society must not be allowed to stand as a justification for arbitrary acts, bullying or the erosion of civil rights in the name of exaction of taxes.[50]

Unfortunately, as we have seen in part II, justiciability is presently dealt with indirectly in negligence and estoppel actions through application of various principles and approaches such as the policy/operational dichotomy, the incremental approach and the non-fetter principle. Further, in the taxation context, negligence and estoppel actions have been ruled non-justiciable without explicit detailed reference to any of these usual established tests. One of the problems with dealing with justiciability in this diverse, restrictive and indirect way is the lack of transparency which such an approach engenders.

At its extreme, dealing with justiciability in this way creates the perception that determination of the issue is carried out by way of little more than an exercise in judicial discretion.[51] This means that lawyers seeking to advise clients as to the prospects of a successful claim against the Commissioner might find it difficult to give clear guidance. There is always the prospect that even an otherwise strong claim may be defeated on justiciability grounds. In such an uncertain environment, taxpayer civil rights are devalued and weakened. At its extreme, this could lead to loss of taxpayer confidence and trust in the system of tax administration and possibly discourage voluntary compliance behaviour.[52] It is clearly preferable, therefore, to strive for a systematic and transparent approach to applying any justiciability filter.

The question then becomes one of how that might be best achieved. The simplest answer would be for our judiciary to deal with justiciability as an undisguised question of justiciability, rather than in the context of the application of various other judicial tools and principles. It is conceded, though, that it would take an unlikely and substantial shift in judicial thinking to abandon the various well-entrenched tools, such as the policy/operational dichotomy or the non-fetter principle, used to address the issue in the past in favour of an unveiled and free-form approach.[53]

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49 The terms 'inefficiency' and 'fiscal chaos' have been most comprehensively examined in the literature and case law concerning restitutionary relief from the state. For good discussion, see Belinda Wells, 'Restitution from the Crown: Private Rights and the Public Interest' (1994) 16 *Adelaide Law Review* 191, 201; and the discussion by La Forest J in the Canadian case of *Air Canada v British Columbia* [1986] 2 SCR 539.

50 Justice Graham Hill, 'What Do We Expect from Judges in Tax Cases?' (1995) 69 *Australian Law Journal* 992, 1005.

51 Similar comments have been made by Keith Stanton in the context of discussion of the judicial trend generally toward determining negligence actions against public authorities by reference to a 'checklist' of policy factors. See Stanton et al, above n 19, 98. See, also Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Jane Stapleton and Peter Cane (eds), *The Law of Obligation: Essays in Celebration of John Fleming* (1998); and Anthony Dugdale and Keith Stanton, *Professional Negligence* (3rd ed, 1998).

52 The importance of engendering trust and confidence between taxpayers and the Commissioner of Taxation has been recognised by the Commissioner in his preamble to the Taxpayers' Charter. See Australian Taxation Office, *Taxpayers' Charter: What You Need to Know* (2007) Australian Taxation Office <http://www.ato.gov.au/content/downloads/N2548charterweb.pdf> at 9 December 2008.

53 Although to some extent the shift in tort toward an incremental approach and away from rigid application of the policy/operational dichotomy is evidence that such a shift might be possible with time. In tort law there have also

A more realistic alternative would be an express judicial acknowledgement that principles such as the policy/operational dichotomy or the non-fetter principle are being applied specifically to determine the question of justiciability. This, at least, would recalibrate the focus of these tools to emphasise the core questions of judicial competence and separation of powers inherent in the justiciability doctrine. There would be clear advantages to such an approach.

One such advantage is that justiciability concerns are likely to be more closely and directly scrutinised in a transparent environment. Presently, these concerns have been allowed to prevail without being put to any rigorous evidentiary test in the tax context. For example, in the estoppel context, competing public interests could be weighed more readily against the non-fetter principle. The fact that the public interest entails at least some consideration of individual interests might also be acknowledged.[54] Consequently, valid questions might be raised about what is gained through encouraging behaviour in administration of our taxation system which would otherwise be viewed as unconscionable,[55] for fear of offending the justiciability doctrine.

At least two beneficial outcomes might result from bringing justiciability directly into question in estoppel claims against the Commissioner in this way. First, the emphasis would shift away from the non-fetter principle per se. Instead, the justiciability issues would be weighed against the ramifications for the proper administration of the taxation system of finding for the plaintiff taxpayer. There is academic support for such a shift in emphasis:

> The appropriate criteria to decide whether estoppel ought to be allowed should be the proper functioning of public administration. We should not be concerned about whether to allow an estoppel in a particular case would fetter public powers but rather whether as a general rule is more or less conducive to better public administration.[56]

A second benefit is that justiciability might cease to be seen as an all-or-nothing issue and, consequently, better promote improvements in tax administration practices.[57] This could be achieved through applying appropriate remedies which respect justiciability concerns, provide the taxpayer with a remedy and encourage better tax administration practices through the taxpayer's success. For example, to bind the Commissioner to a clear but erroneous representation to a taxpayer, reasonably and detrimentally relied upon by that taxpayer, might clearly offend core justiciability concerns. The problem, however, is that to render such matters non-justiciable does nothing to promote error-free and conscionable tax administration practices.

It may, however, be possible to reconcile these apparently conflicting concerns through application of the appropriate remedy in an estoppel action. For example, imposing a

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been academic calls to abandon tools such as the policy/operational dichotomy and deal with the question of justiciability directly in an undisguised form. For example, Stanton et al note in Stanton et al, *Statutory Torts* (2003), above n 19, 77 that '[c]haracterising a decision as "operational" or "policy" may well coincide with saying it is or is not justiciable. But viewing the matter as one of justiciability enables a more nuanced approach to the problem of deciding the extent to which decisions giving effect to policy should be subject to a concurrent private law liability.'

54 Mason CJ in *Attorney-General v Quin* (1990) 170 CLR 1, 18, acknowledged that public interest necessarily comprehends an element of justice to the individual: '[A]s the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.' These comments have been positively acknowledged in the tax literature in Rider, above n 40.

55 The aim of estoppel is to discourage unconscionable behaviour. Thomson points out that 'the basic purpose of private law estoppel is to prevent a person from unconscionably departing from a representation upon which another party has relied, where departure from this representation would cause detriment to the second party.' See Joshua Thomson, 'Estoppel By Representation in Administrative Law' (1998) 26 *Federal Law Review* 83, 89-90. This is consistent with judicial comments such as those of Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419, to the effect that '[t]he element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity'. See also the discussion of the requirement of 'unconscientious conduct' by Deane J in *Commonwealth v Verwayen* (1990) 170 CLR 394.

56 Pagone, above n 31, 281-282.

57 The 'all or nothing' tendency of the justiciability doctrine is questioned extensively by Bayne, above n 46.

monetary penalty on the Commissioner in these circumstances instead of injuncting or reversing the decision of the Commissioner respects traditional justiciability concerns.[58] In addition, though, it provides the taxpayer with recompense and sends an unambiguous signal of disapproval of unacceptable tax administration practices.[59] A transparent and direct approach to dealing with justiciability would more readily allow for such a lateral-thinking approach to the notion of justiciability and its proper place in our tax administration system.

Having conceded that the abandonment of the existing tools for dealing with justiciability is unlikely, and that a transparent approach to application of those existing tools is the next best alternative, one final question arises. The question is whether there is any common thread among the current diverse approaches to the question of justiciability which could be used to recalibrate those existing tools and be applied across the boundaries of common law and equity.

There is only one existing tool which has potential to achieve this — the policy/operational dichotomy. The first reason is that the dichotomy has been, and continues to be, applied across common law and equitable boundaries.[60] In tort, as noted in part II, while the dichotomy has lost favour as the primary determinant of public authority immunity from suit in negligence cases, it remains a relevant concern in the modern incremental approach to novel tortious claims.

In the estoppel context, the relevance of the policy/operational distinction has come to the fore as a qualification to the *Southend-on-Sea* principle and has been applied in a number of cases. The most notable example is *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*.[61] In that case, Gummow J stated:

> The planning or policy level of decision making wherein statutory discretions are exercised has, in my view, a different character or quality to what one might call the operational decisions which implement decisions made in exercise of that policy … where a public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel.[62]

In addition to its capacity to cross common law and equitable boundaries, it is also capable of capturing both the competency-based and separation of powers concerns inherent in the justiciability doctrine. Polycentricity concerns go hand in hand with assessments of political or high-level policy decisions which would be caught as non-justiciable through application of the dichotomy. Similarly, high-level policy decisions will capture those subject matters considered fundamentally unsuitable for judicial revisitation, such as questions of national security. Operational matters of an implementation character, and/or carried out by low-level public servants, are unlikely to raise separation of powers

58 There is no limitation on damages being awarded in estoppel actions. The various State Supreme Court Acts give the courts express powers in this regard. For example, the *Supreme Court Act 1970* (NSW) provides, in s 68: 'Where the court has power (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act; or (b) to order the specific performance of any covenant, contract or agreement, the court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.' This legislation mirrors 19th century British legislation known as the 'Lord Cairns' Act', the *Chancery Amendment Act 1858* (UK).

59 The objections raised to such an approach are usually founded on the inadequacy of a monetary penalty for plaintiffs in many circumstances. This would not be expected to be a significant issue in the tax context where almost all claims would concern questions of monetary liability of the taxpayer in any event. For a general discussion of this issue, see Pagone, above n 31, 278.

60 It has also successfully crossed the public private law divide through application in administrative law boundaries which, of itself, indicates its suitability for resolving justiciability concerns, as these lie at the heart of all applications for judicial review of administrative action. See, eg, the comments of Hayne J in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, in which His Honour pointed out the link between the policy/operational dichotomy and the administrative law *Wednesbury* unreasonableness test. See also Bayne, above n 46, 7-8; Richard Spann, *Government Administration in Australia* (1979), 17-18; and Robert Stewart Parker, 'Policy and Administration' in Richard Spann and Geoffrey Curnow (eds), *Public Policy and Administration in Australia: A Reader* (1975) 144, 145.

61 (1990) 21 FCR 193. For a good discussion of the relevant cases see Allars, above n 31, 88-90.

62 *Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 215.

concerns through being subjected to judicial scrutiny. These matters would be considered justiciable through application of the policy/operational dichotomy.

None of the other existing judicial tools devised to address the issue of justiciability have this breadth or compatibility with the concept of justiciability. Further, the uncertainty in determining where the dividing line between policy and operational acts should be drawn, which has been the source of much of the criticism of the dichotomy,[63] can be turned to advantage when applied to questions of justiciability. This flexibility allows for the nebulous and fluid nature of the justiciability doctrine to be accommodated within a well-established framework. This fact has not escaped the notice of some commentators:

> Another argument which is commonly invoked by dissenters is that the policy-operational distinction is inherently uncertain. Yet, uncertainty is effectively unavoidable ... There is no acceptable bright-line method of delimiting justiciable and non-justiciable issues. It is inevitable that the courts will need to look closely at the factual basis of claims to ascertain whether it is appropriate for it to reassess a particular administrative act ...[64]

Of course, this does lead us to an obvious and inescapable truth: the application of the policy/operational dichotomy to determine the justiciability issue in a transparent and overt manner should not, and cannot, be looked upon as a solution to the inherent challenges in applying the doctrine of justiciability, which will undoubtedly continue to be raised in some difficult tax cases. It would, however, be an advance on the current treatment of justiciability in tortious and equitable estoppel cases involving the Commissioner of Taxation.

IV. CONCLUSION: THE DOCTRINE OF JUSTICIABILITY AS A MOVEABLE PLAINTIFF-PROOF BARRIER

It is clear from the preceding analysis that justiciability is a complex issue which has vexed, and continues to vex, judges in tort and equity. In the taxation context, the need to protect Commonwealth tax revenue from undue challenge gives rise to a strong case for ensuring an appropriate boundary is drawn between justiciable and non-justiciable cases against the Commissioner of Taxation. This allows the Commissioner substantial immunity from suit. However, as the analysis in part II of this paper has illustrated, the balance to date has been heavily skewed in favour of the protection of revenue, without significant express judicial exposition of the reasons for this protective stance. There are two particular challenges highlighted in this paper which must be addressed in any attempt to redress, or at least assess, the balance between taxpayer rights, good tax administration practices and the protection of revenue.

The first challenge is to determine a method of assessment of justiciability concerns which is direct, consistent and transparent. In this regard, ideally, justiciability should be dealt with as a specific and overt threshold concern in its own right. Alternatively, if the existing judicial tools for determining justiciability are to continue to be used, they need to be recalibrated to emphasise their role as tools for determining questions of justiciability. This could be most efficiently achieved by applying the policy/operational dichotomy which has already been applied in a number of tortious and equitable cases in the past.

The second and most difficult challenge lies in determining the boundary between justiciable and non-justiciable matters. This paper offers no bright-line delineation of justiciable and non-justiciable matters in answer to this challenge. The fact remains that the complex considerations of judicial competency and the constitutional separation of powers

63 See the comments cited, above n 11.

64 Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) 62. See also similar comments in Buckley, above n 10, 41; and Osborne Reynolds, 'The Discretionary Function Exceptions of the *Federal Torts Claims Act*' (1968) 57 *Georgetown Law Journal* 81, 128-129.

that lie at the core of the question of justiciability cannot be categorically and uniformly resolved in all cases.

The proposed broad-based application of the policy/operational dichotomy can assist in predicting the approach that will be taken to the issue in any particular case, but cannot alter this fundamental fact. In essence, it is conceded that the line dividing the justiciable from the non-justiciable must remain a moveable barrier. A moveable barrier, however, is far preferable to the present largely impenetrable and invisible barrier to the justiciability of negligence or estoppel cases against the Commissioner of Taxation.