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The Burden of Proof in Taxation Disputes: Does Section 170 or Part IVA of the *Income Tax Assessment Act 1936* (Cth) Offend the Rule of Law?

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Abstract

For the purposes of assessing tax, section 170 of the *Income Tax Assessment Act 1936* (Cth) permits the Commissioner to determine that the taxpayer has committed fraud or evasion. The taxpayer then bears the onus of showing that they have not. There is no requirement that the Commissioner show that such determination is correct, nor to support it with evidence. The Commissioner may, if they wish, do nothing more than put the taxpayer to proof by tendering their assessment as evidence. This article sets out in detail how the reversal of the onus of proof in cases arising from the Commissioner's determination of fraud or evasion offends the principle of procedural fairness, as well as the principles of certainty and prospectivity. This paper also extends that analysis to disputes arising out of the commissioner's determination of tax avoidance under Part IVA of the *Income Tax Assessment Act 1936* (Cth). This paper further considers whether general administrative law principles, in particular the *Briginshaw Principle,* may obviate some of the concerns regarding the reversal of the onus of proof. It is contended that the reversal of the onus of proof in cases arising out of the Commissioner's determination of fraud or evasion under section 170 and tax avoidance under Part IVA significantly offend fundamental tenets of the rule of law, namely, the principles of procedural fairness, certainty and prospectivity. It is further contended that requiring the Commissioner to adduce evidence to support the opinion or allowing the Commissioner's determination to be judicially examined would obviate the offence to the rule of law.

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I Introduction

In October of 2021, the House of Representatives Standing Committee on Tax and Revenue released its Report on the 2018–19 Commissioner of Taxation Annual Report.[1] The Committee's Report recommended, *inter alia*, that the onus of proof should lie with the Commissioner in establishing fraud or evasion for the purpose of assessing tax under section 170 of the *Income Tax Assessment Act 1936* (Cth); as indeed had been recommended in the Committee's previous 2015 Report on Tax Disputes.[2]

These reports argue that placing the burden of proof on the taxpayer in such circumstances significantly undermines the application of the rule of law and, in particular, the principle of procedural fairness. While there are a number of laws that place the onus of proof on the party defending a claim made against them, and several justifications given for this,[3] these reports suggest that the affront to the principle of procedural fairness is particularly severe in respect of the Commissioner's determination of fraud or evasion. Indeed, practitioners in the field of taxation are habituated to the inequality of power inherent in the review process. However, as Russell notes, were a candid description of the review process given to a lawyer or public servant in any other area of public administration, the response would range from 'disbelief to outright horror at the extent of the power imbalance in favour of the ATO'.[4]

This paper expands on the arguments advanced in the Committee's reports and sets out in detail how the reversal of the onus of proof in cases arising from the Commissioner's determination of fraud or evasion offends the principle of procedural fairness, as well as the principles of certainty and prospectivity. This paper also extends that analysis to disputes arising out of the commissioner's determination of tax avoidance.

This paper further considers whether general administrative law principles, in particular the *Briginshaw Principle,* may obviate some of the concerns regarding the reversal of the onus of proof.

It is contended that the reversal of the onus of proof in cases arising out of the Commissioner's determination of fraud or evasion under section 170 and tax avoidance under Part IVA significantly offend fundamental tenets of the rule of law, namely, the principles of procedural fairness, certainty and prospectivity. It is further contended that requiring the Commissioner to adduce evidence to support the opinion or allowing the Commissioner's determination to be judicially examined would obviate the offence to the rule of law.

II How the Burden of Proof Applies in Taxation Law Disputes

In criminal trials, the prosecution bears the burden of proof beyond all reasonable doubts of the accused's guilt. Whereas, in a civil claim, while the burden of proof on the balance of probabilities will generally lie

1. The Parliament of the Commonwealth of Australia House of Representatives Standing Committee on Tax and Revenue, *2018–19 Commissioner of Taxation Annual Report* (Report, October 2021) ('*2018–19 Commissioner of Taxation Annual Report*').
2. The Parliament of the Commonwealth of Australia House of Representatives Standing Committee on Tax and Revenue, *Tax Disputes* (Report, March 2015) ('*Tax Disputes*'); this was also reiterated in the Committee's 2016 *External Scrutiny of the ATO* (Report, April 2016), *2016 Annual Report of the Australian Taxation Office Performance Review 2015–16* (Report, March 2017), 'Taxpayer Engagement with the Tax System' (Report, August 2018) and *2017 Annual Report of the Australian Taxation Office—Fairness, functions and frameworks—performance review* (Report, February 2019) (*'Fairness, functions and frameworks'*).
3. The Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Interim Report 127, July 2015) ('*Traditional Rights and Freedoms*').
4. David Russell, 'Submission 33 to House of Representatives Standing Committee on Tax and Revenue Inquiry Tax Disputes' (Written Submission, December 2014).

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with the plaintiff on all essential elements of the claim,[5] there are a number of instances where the burden of proof, on some aspects of the claim, willrest with the defendant.[6] However, the distinction between civil and criminal proceedings is less clear in administrative law cases where the state has made a determination against the individual and the individual seeks to challenge that determination. Indeed, as noted in the Australian Law Reform Commission's 2003 report on civil and administrative penalties,

> [The] traditional dichotomy between criminal and non-criminal procedures no longer accurately describes the modern position, if it ever did. The functions and purposes of civil, administrative and criminal penalties overlap in several respects. Even some procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable.[7]

In such cases, where there is a blurring of the distinction between criminal and civil penalties, further scrutiny of any reversals of the burden of proof is merited.[8] Indeed, the Parliamentary Joint Committee on Human Rights has noted that domestic civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the *International Covenant on Civil and Political Rights* (*'ICCPR'*), notwithstanding that it may be a wholly civil action under Australian domestic law.[9]

The *Taxation Administration Act* 1953 (Cth) contains a number of civil penalty provisions that reverse the burden of proof. For instance, the legal burden lies with the defendant to establish defences to the charges of making false or misleading statements and the incorrect keeping of records.[10] Most notably, however, sections 14ZZK and 14ZZO operate such that, in appeals to the Administrative Appeals Tribunal ('AAT') or Federal Courts, the taxpayer bears the onus of proof in showing that the Commissioner's assessment is excessive, or otherwise incorrect.

This is a considerable departure from the usual practice in administrative review proceedings where it is generally accepted that there is no burden of proof.[11] Notwithstanding that the relevant facts must be supplied by the applicant in sufficient detail to enable the examiner to establish the relevant facts.[12]

5. *Currie v Dempsey* (1967) 69 SR 116, 125 (Walsh JA).
6. *Traditional Rights and Freedoms* (n 3) [11.95]–[11.102]. Indeed, the ongoing utility of such a distinction is debatable and it has been suggested that a third category of proceedings should be recognised for actions that are neither properly civil, nor criminal, and the essence of which is, and should properly be considered to be, a crime *see* Anthony Gray, 'The Compatibility of Unexplained Wealth Provisions and Civil Forfeiture Regimes with *Kable'* (2012) 12 *QUT Law and Justice Journal* 18, 19.
7. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2003) 84.
8. Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 281, [9.111] ('*Traditional Rights and Freedoms*, Final Report').
9. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Offence Provisions, Civil Penalties and Human Rights* (Guidance Note No 2, 2014).
10. *Taxation Administration Act* 1953 (Cth) s 8K, s 8L.
11. Bertus De Villiers, 'Burden of Proof and Standard of Proof in the WA State Administrative Tribunal—a Case of Horses For Courses' (2013) 32(1) *University of Queensland Law Journal* 187. See also; *Yao-Jing v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275, 288.
12. Ibid.

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The justification given for the taxpayer bearing the onus of proof has typically been that they are best placed to discharge such burden given that they are in possession of the underlying facts, which may be peculiarly within the taxpayer's knowledge.[13] Whether this is a sufficient justification for the taxpayer bearing the onus of proof in tax disputes is, however, a matter of contention, particularly in consideration of the significant evidentiary burden and limited means of challenging the Commissioner's assessment.

In order to determine whether this burden is justified, it is necessary to set out how the burden of proof operates in respect of the Commissioner's determination of fraud or evasion under section 170 and tax avoidance under Part IVA.

A *Burden of Proof and the Commissioner's Determination of Fraud, Evasion or Tax Avoidance*

There are two criminal charges that may be issued in cases of tax fraud or tax evasion, obtaining a financial advantage by deception[14] and conspiracy to defraud.[15] The maximum penalty for each offence being 10 years' imprisonment or, more commonly, a civil penalty of up to $133,200.[16] These are serious criminal charges and, appropriately, the burden is on the Commonwealth to show beyond all reasonable doubts that the accused is guilty.[17]

However, for the purposes of assessing tax, section 170 of the *Income Tax Assessment Act 1936* (Cth) permits the Commissioner to determine that the taxpayer has committed fraud or evasion and the taxpayer bears the onus of showing that they have not. There is no requirement that the Commissioner show that such determination is correct, nor to support it with evidence.[18] The Commissioner may, if they so wish, do nothing more than put the taxpayer to proof by tendering the assessment as evidence.[19]

Indeed, the Commissioner is entitled to, and often does, rely on the taxpayer being unable to evidence their position.[20]

It is, however, important to note that the Commissioner may not allege a material fact without adducing evidence to establish it.[21] This is not, however, to say that the Commissioner must establish a *prima facie* case against the taxpayer. Indeed, the Commissioner is entitled to rely on evidence of exceedingly limited probative value; such that it is often a case of 'We say it is, you prove it isn't'.[22]

While the Commissioner must adduce evidence to set out the case against the taxpayer, the Commissioner need not prove that evidence, rather, it is for the taxpayer to disprove it.

13. Bradley Jones, 'The Role of the Burden of Proof in Tax Appeals' *Taxation in Australia* (2009) 43(11) 650, 655 citing *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1, 12.
14. *Criminal Code Act* 1995 (Cth) s 132.2.
15. Ibid s 135.4.
16. *Crimes Act* 1914 (Cth) s 4B.
17. Notwithstanding, that tax may be assessed independently on the basis of fraud or evasion as determined by the Commissioner, with the taxpayer baring the burden of establishing the absence fraud or evasion for the purpose of assessment. See the *Income Tax Assessment Act 1936* (Cth) s 170 and the *Taxation Administration Act* (n 10) s 14ZZK, s 14ZZO.
18. *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81, 89 (Masson J).
19. *George v Federal Commissioner of Taxation* (1952) 86 CLR 183, 190 (Kitto J).
20. Gareth Redenbach, 'The onus of proof following the Cassaniti decision' (2019) 54(2) *Taxation in Australia* 84, 85.
21. Bradley Jones, 'The Role of the Burden of Proof in Tax Appeals' (2009) 43(11) *Taxation in Australia* 650, 651.
22. *Tax Disputes* (n 2) 33.

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Therefore, although the taxpayer need only prove error on the reduced balance of probabilities standard, it necessitates that the bar be set relatively low; such that the slightest balance of probative evidence in favour of the taxpayer shall be sufficient to refute the assessment.[23] However, although the slightest balance of probative evidence in favour of the taxpayer will be sufficient, mere 'speculation, conjecture or surmise from the bar table' will not.[24]

Consequently, the evidentiary burden is significantly higher on the taxpayer. This is particularly concerning given the ATO's practice of requiring supporting evidence to substantiate a taxpayer's objection at the internal review stage[25] and the increasingly prevalent practice in the Federal Court of summarily dismissing applications for judicial review that state grounds other than the narrow grounds identified in the case of *Commissioner of Taxation v Futuris Corporation Limited* (2012) 205 FCR 274.[26]

Accordingly, a taxpayer is often confined solely to Part IVC of the *Taxation Administration Act* 1953 (Cth) and, as Azzi notes, '[T]he purported assessment cannot be invalidated unless the taxpayer can affirmatively disprove [fraud or evasion]—regardless of whether the opinion enlivening the amendment power may have lacked an evident and intelligible justification'.[27] This is particularly stark in cases where the taxpayer alleges that there was no evidence to justify the opinion; as Azzi notes, 'Such an allegation cannot be entertained in pt IVC proceedings'.[28]

It is of significant concern that the constitutional function and duty of courts to examine the exercise of executive power should be dependant, as Azzi suggests, 'on the existence or otherwise of material disproving [fraud or evasion], particularly where the opinion informing the decision to amend was based on "unwarranted assumptions" or not supported by probative evidence'.[29] Noting also that '[t]he sufficiency of material in this latter regard is, ultimately, a question for the judiciary in judicial review proceedings which is not possible in Part IVC proceedings'.[30]

The Taxpayer's burden of refuting the Commissioner's determination is similarly harsh in respect of the determination of tax avoidance for the purposes of Part IVA *Income Tax Assessment Act 1936* (Cth). It amounting to a serious allegation of misconduct on the part of the taxpayer that enlivens significant penalties. Indeed, this may be considered as punitive, with the administrative penalties for tax avoidance (and fraud or evasion) being up to 75% of the tax avoided.[31] Meaning that the administrative penalties can significantly exceed those applied in criminal cases of tax fraud. In this respect, the Commissioner's determination of tax avoidance (or fraud or evasion) is *quasi*-offence like.

The burden of proof operates in the same manner as it does for fraud or evasion. Namely, the Commissioner determines that, in accordance with Section 177D, the taxpayer has avoided tax and, in accordance with section 177F, reassess the taxpayer. There is similarly no requirement that the

23. Jones (n 13) citing *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1, 8.
24. Richard Edmonds 'Part IVA & Anti-Avoidance—Where Are We Now?' (2002) *Revenue Law Journal* 12, 60, 68.
25. The Taxation Institute, '3 things you need to know about the burden of proof' (Technical Paper, 2018).
26. John Azzi, 'Preserving The Constitutional Function of Courts and Increasing Confidence In The Tax System: Time To Reconsider *Futuris'* (2019) 43(1) *Melbourne University Law Review* 44, 91.
27. Ibid.
28. Ibid.
29. Ibid quoting Perram, Perry and O'Callaghan JJ in *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94; (2018) 161 ALD 441, 450 [36]. See also *Assistant Minister for Immigration and Border Protection v Splendido* [2019] FCAFC 132, [107]–[108] (Mortimer J, Moshinsky J agreeing at [113]), [131]–[132] (Wheelahan J).
30. Azzi (n 26) 90.
31. *Taxation Administration Act* (n 10); see also Australian Taxation Office, *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard* (MT 2008/1, 1 April 2015).

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Commissioner show that the determination is correct, nor to support it with evidence.[32] The Commissioner may, if they so wish, do nothing more than put the taxpayer to proof by tendering the assessment as evidence.[33]

B *Application of General Administrative Law Principles*

The harshness of the taxpayer's burden is blunted, to some extent, by the operation of the *Briginshaw Principle.*[34] The principle holds that, the more serious, grave or morally opprobrious the nature and circumstances of the allegations are, the stronger and more reliable the evidence put forward to prove the facts in issue needs to be.[35] The application of this principle in taxation disputes is particularly well summarised in a paper by barrister, Mathew Leighton-Daly.[36] As he suggests, while generally arising under the auspices of the law of evidence, the *Briginshaw Principle* encompasses three distinct concepts: the presumption of innocence, the burden of proof and the standard of proof.[37]

In respect of the presumption of innocence, though most often associated with criminal proceedings, it is, as Leighton-Daly suggests, equally 'important to remember that the concept is a rule of substantive law that also has application in civil cases'.[38] Indeed, in *Briginshaw,* Dixon J held that weight is to be given to the presumption in circumstances such that, unless a person or entity has actually been convicted of a criminal offence, they are presumed to be innocent in both criminal and civil proceedings.[39]

In respect of the burden of proof, as discussed previously, it is effectively shared between the Commissioner and the taxpayer. The Commissioner being required to adduce, though not prove, evidence to establish the fraud, evasion or tax avoidance enlivening his assessment. In contrast, the taxpayer is required to adduce and prove evidence in order to establish the absence of those facts upon which the Commissioner has based their assessment. Indeed, as Leighton-Daly suggests, it is perhaps better to view Sections 14ZZK and 14ZZO of the *Taxation Administration Act* 1953 (Cth) as creating merely a rebuttable presumption rather than reversing the onus of proof.[40]

In respect of the standard of proof, while the Commissioner remains entitled to rely on evidence of exceedingly limited probative value, the *Briginshaw Principle* may go some way to redressing this. Dixon J summarised what is required as,

> it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the

32. *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81, 89 (Masson J) ('*Gauci'*).
33. *George v Federal Commissioner of Taxation* (1952) 86 CLR 183, 190 (Kitto J).
34. *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*').
35. Justice Duncan Kerr, 'Keeping the AAT from Becoming a Court' (Speech, Australian Institute of Administrative Law (NSW) Seminar, 27 August 2013). The *Briginshaw* is a somewhat nebulous concept, having been described as the Rorschach inkblot of Australian case law: see Hayley Bennett and GA Broe 'The civil standard of proof and the "test" in *Briginshaw*: Is there a neurobiological basis to being "comfortably satisfied"?' (2012) 86 *Australian Law Journal* 258, 258.
36. Mathew Leighton-Daly, 'The Briginshaw Standard in tax litigation: A substantive law taxpayer protection?' (2010) 44(9) *Taxation in Australia* 490.
37. Ibid.
38. Ibid.
39. *Briginshaw* (n 34) 363.
40. *Traditional Rights and Freedoms* (n 3).

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> inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.[41]

It would seem iniquitous that these provisions should permit the Commissioner to allege what amounts to serious misconduct on the part of the taxpayer, and assess tax on that basis, without the Commissioner being required to substantiate that allegation to the reasonable satisfaction of the tribunal.

Indeed, as a Rees suggests, it is consistent with the principle of procedural fairness that, at a minimum, a decision-maker must base findings of fact and the ultimate decision upon some probative evidence.[42] The rationale for this requirement was explained by Deane J in *Minister for Immigration and Ethnic Affairs v Pochi:*

> It would be both surprising and illogical if, in proceedings before a statutory tribunal involving an issue of [significant gravity], the rules of natural justice were restricted to the procedural steps leading up to the making of a decision and were completely silent as to the basis upon which the decision itself might be made. There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by such a tribunal if, in the outcome, the decision maker remained free to make an arbitrary decision. If [the] decision, in such a case, were to be based on mere suspicion or speculation, the rules of procedure aimed at governing the process of making findings of material fact would involve no more than a futile illusion of fairness.[43]

It is, in any event, a requirement that a decision maker base their decision upon some evidence;[44] it being an error of law to make a finding of fact which is not supported by any evidence at all.[45] This obligation arising inherently from the application of natural justice.[46]

However, as Deane J noted in *Pochi* '[these] requirements, like all the ordinarily applicable rules of natural justice, may be modified or abolished by the express words or intendment of the legislation establishing the tribunal or conferring jurisdiction upon it . . .'[47] In this regard, sections 175 and 177[48] displace this requirement accepting the Commissioner's assessment at face value and validating it regardless of any deficiency in its making. Indeed, in *Gauci*,[49] Mason J said plainly that 'there [is no] statutory requirement that the assessments should be sustained or supported by evidence'.

It reasons that, just as in any other administrative review proceeding, the basis upon which the Commissioner made their determination should be subject to review. Indeed, as the determination amounts to an allegation of criminal or *quasi* criminal conduct, fundamental principles of procedural

41. *Briginshaw* (n 34) 361–2.
42. Neil Rees, 'Procedure and evidence in 'court substitute' tribunals' (2006) 28(1) *Australian Bar Review* 41, 55.
43. *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 67 (Deane J) ('*Pochi*').
44. *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 32 (Gleeson CJ and Handley JA).
45. *R v Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 117–18 (Dixon CJ, Williams, Webb and Fullager JJ).
46. Rees (n 42) 56. See also: *Mahon v Air New Zealand* [1984] AC 808, 820.
47. *Pochi (*n 43*)* 67–8. Deane J reaffirmed these comments when he sat as a member of the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321,366.
48. *Income Tax Assessment Act* (n 17) s 177.
49. *Gauci* (n 32) 89.

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fairness would generally demand that a person making such an allegation be required to substantiate it.

The reversal of the onus of proof in disputes regarding the application of Part IVA or section 170 would appear, *prima facie*, to affront such a principle. Indeed, the current law allows the Commissioner an exceedingly broad discretion to determine what constitutes tax avoidance, fraud or evasion and assess tax, including the imposition of significant penalties.[50] This, therefore, leaves the taxpayer with only limited means of refuting the Commissioner's assessment.

This raises fundamental questions as to whether the application of Part IVA and section 170 offend fundamental tenets of the rule of law.

III Does Section 170 or Part IVA Offend the Rule of Law?

Both the *2018–19 Commissioner of Taxation Annual Report*[51] and the previous *2015 Report on Tax Disputes*[52] noted the impact that the taxpayer bearing the onus of proof had on the principle of procedural fairness. In particular, the 2015 report noted that it is difficult to accept,

> that any objective observer would consider the current objection process to appear to be fair. Again, this is a matter of perception. Nonetheless, the weight of evidence on this point is considerable. There is perceived bias in the current objection system. The system does not closely align with the best practice outlined by the Administrative Review Council, nor does the Commonwealth Ombudsman consider the current system to be perceivable as fair.[53]

This section sets out in further depth how the application of sections 14ZZK and 14ZZO of the *Taxation Administration Act* 1953 (Cth) offends the notion of procedural fairness in respect of the Commissioner's determination of fraud, evasion or tax avoidance. It is then further contended that the reversal of the onus of proof in such cases significantly offends other fundamental tenets of the rule of law, namely, the principles of certainty and prospectivity. The justifications for sections 14ZZK and 14ZZO offence to these principles are also discussed.

A *Procedural Fairness*

A fair procedure for decision making is fundamental to the rule of law, recognised at common law as a duty to accord a person procedural fairness.[54] There is no fixed content to the duty with the fairness of the procedure dependant on the nature of the matters in issue, and what would constitute a reasonable opportunity for parties to present their cases in the relevant circumstances.[55] Indeed, as Mason J stated in *Kioa v West*, 'the expression "procedural fairness" … conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.[56]

50. Where section 170 or Part IVA is applied a taxpayer will be liable to pay penalties (up to 75% of the shortfall amount) and interest charges (3.07% at time of writing) as well as the increase in tax.
51. *2018–19 Commissioner of Taxation Annual Report* (n 1).
52. *Tax Disputes* (n 2).
53. Ibid 105.
54. *Traditional Rights and Freedoms*, Final Report (n 8).
55. Ibid.
56. *Kioa v West* (1985) 159 CLR 550, 585 ('*Kioa*').

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The requirement that the taxpayer bears the onus of proof in cases concerning application of section 170 and Part IVA of the *Income Tax Assessment Act 1936* (Cth) offends the notion of procedural fairness in a number of aspects. Namely, the limited review available to the taxpayer, the significant evidentiary burden placed on them and the lack of information given as to the charge made against them.

B *Limited Review*

In respect of the application of section 170, the Commissioner's satisfaction that the taxpayer has committed fraud or evasion is central. That is, that the Commissioner, or his delegate, must actually form the opinion that the taxpayer has committed fraud or evasion. However, often no such opinion is formed. Computer programs examine taxpayers' bank account records using AUSTRAC information and automatically generate *pro forma* letters that state that the ATO has formed the opinion that there has been fraud or evasion.[57]

Part IVA is not subject to this same difficulty, as its application is subject to strict formalised procedures. If a Tax Office auditor considers that Part IVA applies, they will refer the matter to a senior officer in the Tax Office's tax counsel area.[58] If the tax counsel officer supports the auditor's view, the case is then referred to the Tax Office's General Anti-Avoidance Rules Panel.[59] The panel comprises senior internal and external experts chosen for their ability to provide specialist advice.[60] The role of the panel is purely advisory, with the relevant decision under Part IVA taken by the appropriate tax officer having considered the panel's advice.[61]

It was suggested in the *2015 Report* that a similar panel be established to advise whether a finding of fraud or evasion is appropriate or, at the least, that the decision should rest with senior members of the ATO.[62] Indeed, in that regard, the ATO updated its practice statement PS LA 2008/6 in 2018 to provide for a more robust internal process before the Commissioner can form an opinion that there has been fraud or evasion. However, the Standing Committee on Tax and Revenue's 2019 performance review[63] suggests that this has done little to address concerns regarding the ATO's administration of fraud and evasion cases.

Clearly, the failure to properly form an opinion offends the principles of procedural fairness and, at the very least, procedural fairness should require the Commissioner to form a *bona fide* opinion that the taxpayer has committed fraud or evasion before applying the provision.

It is, however, common that administrative discretions are preconditioned on the decision maker being satisfied about a particular matter, or forming an opinion as to the existence of a particular set of facts.[64] In such cases, when reviewing satisfaction or opinion, the courts look to whether the opinion has been properly formed and, where the opinion was reached, either by taking into

57. *Tax Disputes* (n 2) 32.
58. Australian Taxation Office, *Law Administration Practice Statement* (PS LA 2005/24, 28 May 2020) Pt IVA ('*Practise Statement LA 2005/24*').
59. Ibid.
60. Ibid.
61. Ibid.
62. *Tax Disputes* (n 2).
63. *Fairness, functions and frameworks* (n 2).
64. Philip Bender, 'Administrative law update: natural justice, appeals on questions of law and administrative discretions' (Victorian Bar Paper, undated).

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account improper considerations or not otherwise formed *bona fide,* it will be taken not have been properly formed.[65] Accordingly, in ordinary circumstances, if a decision maker abrogated their duty to properly form an opinion the decision would be invalidated by that act and subject to judicial review.

However, though decisions of the Taxation Commissioner are *prima facie* reviewable pursuant to section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903* (Cth) for jurisdictional error,[66] sections 175 and 177(1) of the *Income Tax Assessment Act 1936* (Cth) significantly buffer the ability of a court to review the Taxation Commissioner's decisions.[67] The taxpayer is therefore confined solely to Part IVC of the *Taxation Administration Act* 1953 (Cth) and, thus, unable to invalidate the Commissioner's assessment without adducing evidence to disprove the Commissioner's determination. Notwithstanding that it may have lacked any evident and intelligible justification. In such cases, the taxpayer is required to show that there was no evidence to justify the opinion, not merely that it was improperly made. In this regard, it has been noted that the process of challenging the Commissioner's determination is onerous and clearly biased towards the revenue.[68]

C *Significant Evidentiary Burden*

Similarly, taxpayers face a significant evidentiary burden as it is often the case that evidence no longer exists. Indeed, taxpayers are only legally required to hold their records for five years.[69] However, section 170 permits the Commissioner an unlimited period in which to make their assessment. Such that, as is often the case, the taxpayer is required to refute the Commissioner's assessment several years later when there is only exceedingly limited evidence available. It is suggested that this also offends the notion of procedural fairness.

A number of measures could be employed to counter this, for instance, it has been suggested that the Commissioner should be required to make out a *prima facie* case[70] before the taxpayer should have the legal burden of refuting the Commissioner's assessment.[71] Alternatively, that the period be limited, with a judge having discretion to extending this period, or, as is the case in other jurisdictions, that the burden of proof should revert to the Commissioner when the statutory period for the retention of records has expired.[72] Indeed, Part IVA limits the Commissioner to a period of four years to amend an assessment which is well within the five-year period that taxpayers are required to hold their records.

65. *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd (No 2)* (1944) 69 CLR 407.
66. Sue Milne, 'The Bottom Line for Review of an Assessment—a Case Note on *Commissioner of Taxation v Futuris Corporation Ltd*' (2010) 36(2) *Monash University Law Review* 181.
67. Ibid.
68. *Income Tax Assessment Act* (n 17) s 262A; see also Australian Taxation Office, *Income tax: record keeping—section 262A—general principles,* (TR96/7, 18 April 2012).
69. Arthur Athanasiou, 'Privative Clauses' (2007) 42(1) *Taxation in Australia* 39; see also James Meli, 'Judicial Review in Tax Matters: the Impact of the Futuris Decision' (2009) 60 *Forum of the Australian Institute of Administrative Law* 58.
70. That is, something more than what is required under the *Briginshaw Principe.*
71. *Tax Disputes* (n 2).
72. Ibid.

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D *Lack of Information*

Further, procedural fairness demands that a decision-maker inform a person affected by the decision and disclose to them adverse information that is credible, relevant and significant.[73] However, in tax disputes, there is no general duty at common law for the Commissioner to give reasons for an administrative decision and only exceedingly limited requirements to give decisions under the various statues.[74] Though reasons are often given on request and, should the matter be disputed in the AAT or the Federal Court, the Commissioner will be required to adduce evidence to establish any material fact, thus informing the taxpayer on what basis the allegation is made.

In this regard, as discussed above, the *Briginshaw Principle* may go some way to affording the taxpayer procedural fairness in respect of fraud or evasion; however, in respect of tax avoidance, the principle affords no comfort. Indeed, the Commissioner may allege tax avoidance on exceptionally limited evidence, thus providing the taxpayer exceedingly little information about what is alleged against them. It is submitted that this aspect of the application of section 170 and Part IVA also denies the taxpayer procedural fairness.

E *Apparent Justification for Offending Principle of Procedural Fairness*

Clearly, the operation of section 170 and Part IVA does not sit comfortably within the common law duty to accord a person procedural fairness. However, as discussed above, this has typically been justified on the basis that the taxpayer is best placed to discharge the burden of proof given that they are in possession of the underlying facts, which may be peculiarly within their knowledge. There are, however, further justifications given.

One common justification that is given is the proportionality argument. This is generally regarded as the accepted test for justifying most limitations on rights.[75] Indeed, the Parliamentary Joint Committee on Human Rights notes that reversal of the burden of proof is likely to be 'compatible with the presumption of innocence where [it is] reasonable, necessary and proportionate in pursuit of a legitimate objective'.[76] This is also accepted in other jurisdictions. The European Court of Human Rights, for instance, noting in *Salabiaku v France* that,

> Presumptions of fact and law operate in every legal system. Clearly, the [European Convention] does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law.
>
> Article 6(2) [of the European Convention] does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[77]

73. *Kioa* (n 56) 629; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96.
74. See *Taxation Administration Act* (n 10); *Administrative Appeals Tribunal Act* 1975 (Cth); *Administrative Decisions (Judicial Review) Act* 1977 (Cth).
75. *Traditional Rights and Freedoms* (n 3).
76. Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, December 2014) 2.
77. *Salabiaku v France* [1988] ECHR 19, [28].

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The proportionality test, as applied to the burden of proof, was summarised eloquently by the House of Lords per Lord Bingham as requiring that,

> the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.[78]

In this regard, it is submitted that the significant evidentiary burden placed on the taxpayer in requiring them to establish the non-existence of a particular intention, or otherwise adduce evidence several years after the fact, is such that it is not reasonable, taking into account the seriousness of what is alleged, that the taxpayer bear the onus of proof.

Conversely, the seriousness of tax fraud, evasion and tax avoidance is often posited as justifying placing a legal burden of proof on the taxpayer.[79] Related thereto, another alternative argument, often used in cases concerning the application of administrative provisions, is that the penalty is not severe and, thus, it is justifiable to shift the burden of proof.[80] The logic being that 'while the breach of such provisions often carries the potential for extensive and severe harm, the penalties are often fairly minor'.[81] This, however, does not hold true in the case of tax avoidance, fraud or evasion. While it may be argued that the detriment to revenue as a result of these activities justifies the reversal of the burden of proof, the penalties that may be imposed administratively are so significant as to outweigh this. Indeed, the financial penalties are substantially higher than those that may be imposed by a court in respect of a criminal conviction for tax-related offences.

In respect of convictions for fraud or evasion,[82] a court may impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty of up to $11,100 (at time of writing).[83] However, where section 170 or Part IVA is applied, a taxpayer may be liable to pay penalties of up to 75% of the shortfall amount, being the difference between the Commissioner's determination of the taxpayer's tax liability or credit entitlement, and the liability or entitlement as submitted in the taxpayers returns,[84] and will further be subject to interest charges (3.07% at time of writing)[85] in addition to the increase in tax. With interest accruing by defult, and the Commissioner retaining discretion to remit them where it would be fair and reasonable to do so.[86]

The penalties are also payable upfront, before the taxpayer has had the opportunity to challenge the Commissioner's assessment. Where the Commissioner has formed the opinion that a debt exists and has issued a notice of assessment, sections 14ZZM and 14ZZR of the *Taxation Administration*

78. *Sheldrake v DPP* [2005] 1 AC 264, [21].
79. *Traditional Rights and Freedoms* (n 3).
80. Ibid.
81. David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66(1) *The Cambridge Law Journal* 142.
82. Being charges of Obtaining a Financial Advantage by Deception under s 134.2 and Conspiracy to Defraud under s 135.4 of the *Criminal Code Act* (n 14).
83. *Crimes Act* 1914 (Cth) s 4B.
84. *Taxation Administration Act* (n 10) s 284–75(1); see also Australian Taxation Office, *Administration of the false or misleading statement penalty - where there is a shortfall amount* (PS LA 2012/5, 2 March 2023).
85. *Taxation Administration Act* (n 10) s 280–105.
86. Ibid s 8AAG, sch 1 s 280–160.

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Act 1953 (Cth) provide that the debt stands payable even where disputed by the taxpayer or currently before the AAT or a Federal Court pending verdict.

Notwithstanding the ATO's practice of refraining from enforcing payment where a debt is objected to or whist it is subject to review,[87] this adds significant weight to the seriousness of the penalties imposed. Indeed, the Standing Committee on Tax and Revenue has recommended that debts should not be payable until a final determination is made by the relevant body or court; with the ATO required, as all other plaintiffs, to apply to the court for an injunction if it fears that the debt will not be paid.[88]

The above evidences that, in disputing the Commissioner's determination of tax avoidance, fraud or evasion, the taxpayer is in an extremely unenviable position. Contrary to almost every other area of law, the taxpayer is afforded exceedingly limited information as to what is alleged against him, bears the onus of refuting those allegations and is subject to significant penalties, which may be exacted from him immediately, notwithstanding that he may ultimately refute those allegations. This raises strong concerns that section 170 and Part IVA breach the fundamental duty to accord a person procedural fairness. However, this is not the only aspect of these provisions that raises potential issues regarding the rule of law.

F *Certainty and Prospectivity*

Legal certainty is another fundamental tenet of the rule of law. The principle of legal certainty states that laws must be accessible and, so far as possible, intelligible, clear and predictable; to that end, questions of legal right and liability should ordinarily be resolved by the application of law and not the exercise of administrative discretion.[89] The principle is well founded in common law, particularly in respect of commerce. In *Vallejo v Wheeler,*[90] Lord Mansfield said of the principle that 'in all mercantile transactions the great object should be certainty. [It is] of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon'. This is equally true in respect of taxation law, perhaps more so.

Indeed, The OECD Committee on Fiscal Affairs goes as far as to define certainty as a right, in so far as taxpayers have a right to a degree of certainty in determining what the tax consequences of their actions will be.[91]

It is worth noting that certainty may not always be possible, particularly in the application of anti-avoidance or fraud provisions; however, it is clearly a goal of the tax system that a taxpayer should be able to anticipate the consequences of their ordinary personal and business transactions.[92] Certain tax laws are integral to the proper function of the tax system. Where laws are certain the predictability and, in turn, stability of the tax system are increased, allowing each taxpayer to rationally

87. Australian Taxation Office, *Collection and Recovery of Disputed Debts*, (PS LA 2011/4, 26 February 2015); Australian Taxation Office, *Enforcement Measures used for the Collection and Recovery of Tax-Related Liabilities and Other Amounts* (PS LA 2011/18, 11 April 2019).
88. *2018–19 Commissioner of Taxation Annual Report* (n 1) Recommendation 11.
89. Tom Bingham, *The Rule of Law* (Allen Lane, 1st ed, 2010).
90. *Vallejo v Wheeler* (1774) 1 Cowp 143, 153.
91. OECD Committee on Fiscal Affairs, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in the OECD Countries* (1990) 12 ('OECD Committee').
92. Nabil F Orow, 'Part IVA: Seriously Flawed in Principle' (1998) 1(1) *Journal of Australian Taxation* 57.

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plan their financial transactions.[93] This, in turn, promotes greater faith in the tax system and, thus, compliance, making the collection of tax 'palatable if not pleasant'.[94] Related thereto is the principle that laws should be applied prospectively. It is another fundamental tenant of the rule of law that the law is capable of being known to everyone, so that everyone can comply. Thus, a law with retrospective application is, by its nature, incapable of being known and complied with as a person cannot know of and comply with a law that does not yet exist.

Part IVA and section 170 fall well short of this ideal. Indeed, it is not immediately apparent to the taxpayer whether their actions will amount to tax avoidance, fraud or evasion in the Commissioner's view. This aspect of both Part IVA and section 170 offends the principles of certainty and prospectivity, as the taxpayer is made aware of the standards by which his conduct will be assessed *ex post facto*.[95] Indeed, as Atkinson suggests, an uncertain law is in effect a retrospective law, as it is not possible to determine what the law was prior to undertaking the relevant action.[96] The ability of a taxpayer to foresee the tax consequences of their economic activities is a fundamental part of the rule of law.[97]

Although there is significant guidance as to whether the Commissioner is likely to apply Part IVA or form an opinion as to the existence of fraud or evasion,[98] as Venables notes, the innocent '\should not have to depend on the administrative discretion of revenue officials as to whether they will suffer the full rigours of a too widely drawn provision.'[99]

G *Justification for Offence to Principle of Certainty and Prospectivity*

Administrative discretion is, however, both an inevitable and often positive aspect of the tax system.[100] Indeed, it permits the application of the taxing provisions, *mutatis mutandis*, in circumstances where either parliament or the courts would be unable to apply the provisions.[101] Nonetheless, there must, by necessity, be limits to this discretion. In particular, it should be noted that the ATO is an administrative body charged with both interpreting and applying the tax laws and collecting the tax calculated thereunder.[102] As Atkinson puts it,

> The fox is in charge of the hen house. There is clearly a delicate balance between the revenue authority's role of dispassionately interpreting tax legislation on the one hand, while maximising tax receipts on the other. This balance can only be maintained where any discretion vested in the revenue authority is subject to clear and coherent standards against which the courts can compare their conduct.[103]

93. Alexander V Demin, 'Certainty and Uncertainty in Tax Law: Do Opposites Attract?' *Journal* (2020) 9(4) *Multidisciplinary Digital Publishing Institute Law* 9.
94. Ibid.
95. Sotirios Apostolou, 'General Anti-Avoidance Rules and the rule of law' (LLM Thesis, Lund University, 2016), 22.
96. Chris Atkinson, 'General Anti-Avoidance Rules: Exploring The Balance Between The Taxpayer's Need For Certainty And The Government's Need To Prevent Tax Avoidance' (2012) 14(1) *Journal of Australian Taxation* 1, 13.
97. Apostolou (n 95) 24.
98. See PS LA 2005/24 and PS LA 2008/6, respectively.
99. Robert Venables QC, 'Tax Avoidance: A Practitioner's Viewpoint' in Adrian Shipwright (ed), *Tax Avoidance and the Law: Sham, Fraud or Mitigation* (Key Haven Publications, 1997) 64.
100. Atkinson (n 96).
101. Ibid citing K Brooks, 'A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada' in Chris Evans, Judith Freedman and Rick Krever (eds), *The Delicate Balance: Tax, Discretion and the Rule of* Law (IBFD, 2011) 69.
102. Atkinson (n 96).
103. Ibid.

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In the absence of such standards, the revenue authority is left to determine which activities constitute fraud, evasion or tax avoidance. Indeed, as Atkinson notes, '[t]hey are, in effect, being asked not merely to apply the law, but to create it', noting further that '[t]hese are matters more appropriately left to parliament'.[104] However, as with the issues that arise in respect of the onus of proof, there are justifications given for this breach of the rule of law. The primary justification being that, as a matter of practicality, a degree of uncertainty is necessary for the purpose of Part IVA. Once tax avoidance schemes are detected, specific anti-avoidance measures may be enacted to prohibit those practices. This is generally successful in preventing further proliferation.[105] However, there is no means to recover taxes from those schemes entered into before the enactment of the specific anti-avoidance measures. The primary advantage of a Part IVA, at least from a revenue perspective, is that it does permit the recovery of taxes, as the provision was in operation at the time of the taxpayer's avoidance. Further, it has been suggested that uncertainty is, in fact, an inherent feature of anti-avoidance or fraud provisions. Indeed, as Justice Pagone notes,

> The uncertainty, in short, is embedded in the application of [such provisions] and acts as a sword of Damocles over the heads of taxpayers each time a taxable event occurs or a taxable transaction is entered into. We have adopted, as the provision of last resort, a provision which may operate at least in part from fear of the unknown (with the full impact of the chilling effect upon commerce and economic activities which that may bring).[106]

While some degree of uncertainty must, by its nature, be necessary in the application of any anti-avoidance or fraud provisions, it is important to note that there is a point at which a purported law becomes so 'uncertain and devoid of meaning that it ceases to promulgate a coherent and discernible standard or rule'.[107] Indeed, as Orow notes,

> In such circumstances, particularly where the legislature has vested plenary discretionary power in the relevant administering authority to do whatever it considers reasonable in the circumstances, that law fails to prescribe the limits of its operation and arguably loses or never acquires the character of law.[108]

Practical justifications aside, as Prebble and Prebble note,

> In the face of such an obvious breach of the rule of law, the fact that so many countries have general anti-avoidance rules seems difficult to account for. The idiosyncrasies of tax law no doubt make general anti-avoidance rules necessary, but it is unlikely that the public tolerance of general anti-avoidance rules is due to public knowledge of these idiosyncrasies.[109]

The 'dubious' moral status of tax avoidance perhaps accounting for the public acceptance of this quite apparent affront to the rule of law.[110] As Lord Denning said in *Re Weston's Settlements*, 'the

104. Ibid.
105. Lex Fullarton, *Heat, Dust, And Taxes: A Story Of Tax Schemes In Australia's Outback* (Columbia University Press, 2014).
106. Anthony Pagone, 'Tax Uncertainty' (2009) 33(3) *Melbourne University Law Review* 886.
107. Nabil F Orow, 'Part IVA: Seriously Flawed in Principle' (1998) 1(1) *Journal of Australian Taxation* 57.
108. Ibid.
109. Rebecca Prebble, John Prebble 'Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study' (2010) 55(1) *Saint Louis University Law Journal* 21, 42.
110. Ibid 43.

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avoidance of tax may be lawful, but it is not yet a virtue'.[111] Indeed, retrospective legislation has long been justified on the basis that 'the wrongful nature of the conduct ought to have been apparent to those who engaged in it'.[112]

However, although this argument may carry some weight in respect of fraud or evasion, the highly technical and complex nature of tax law is such that it is hard to sustain that a taxpayer, even a sophisticated and well advised one, could be quite certain as the whether their actions will amount to tax avoidance. Further, it remains that the most effective means of preventing tax avoidance is comprehensive anti-avoidance legislation.[113] In directing the courts to divine the supposed intentions or parliament or identify the spirit of a given law, the parliament is abrogating this responsibility, leaving it to the ATO and the judiciary to give shape to the law.[114]

IV Conclusion

It is submitted that the application of sections 14ZZK and 14ZZO of the *Taxation Administration Act* 1953 (Cth) in cases concerning the application of section 170 and Part IVA of the *Income Tax Assessment Act 1936* (Cth) runs contrary to the rule of law and does so in no small measure. However, the affront that these provisions make to the rule of law need not be accepted as an inevitability. Indeed, as Loiacono and Mortimer note,

> We should not accept this as *de rigueur*. Taxpayers and their advisors need certainty when engaging in business or investment activities. Legislators must write sound and clear legislation on which taxpayers can rely. Legislation which does not achieve its aims or contains provisions which are easily avoided must be amended in order to protect the revenue. The government must move quickly to overcome these deficiencies but will have to bear the cost of inadequate legislation, rather than impose retrospective legislation on law abiding taxpayers.[115]

While there are a number of justifications given for these apparent breaches, none are accepted as justifying their continuance. Instead, it is submitted the provisions should be reformed in following respects.

Sections 14ZZK and 14ZZO should be revised such that, in respect of both the Commissioner's determination of fraud or evasion under section 170 and tax avoidance under Part IVA, that the Commissioner be required to make out a *prima facie* case against the taxpayer before the taxpayer bear the onus of refuting the assessment. This could be achieved by exempting these determinations while maintaining the reverse burden of proof as the general rule and would thereby enshrine the application of the *Briginshaw Principle* in taxation disputes and appropriately extend its application to the *quasi*-offence of tax avoidance. This reform would provide a reasonable opportunity for both the taxpayer and the revenue to fairly present their case and thus give effect to the duty to accord

111. *Re Weston's Settlements; Weston v Weston* [1969] 1 Ch 223, 245.
112. *Polyukhovich v Commonwealth* (1991) 172 CLR 501 per Deane J at 643, see also; *R v Kidman* (1915) 20 CLR 425.
113. Apostolou (n 95) 27.
114. Ibid.
115. Rocco Loiacono and Colleen Mortimer, 'Retrospective tax law: has Pandora's Box opened never to be shut again?' *E \ (2012) 15(1) Journal of Tax Research* 105, 112.

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procedural fairness. It would also accord with the generally accepted practice in administrative review proceedings, whereby each party bares the onus of convincing the decision makers of what the correct or preferable position should be.[116]

However, as Gummow ACJ, Heydon, Crennan and Kiefel JJ noted in the High Court in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*, 'harsh though the operation of these provisions may be, they implement a longstanding legislative policy to protect the interests of the revenue'.[117] Alternatively, another possible reform would be to allow the Commissioner's determination to be judicially examined. As Azzi notes, it would be a relatively simple matter to amend sections 175 to stipulating that it does not apply to validate an assessment made without the requisite state of satisfaction about fraud or evasion, or indeed tax avoidance.[118] Notwithstanding the decision in *Futuris*[119] there is support for this position in several cases. Toohey J in *Richard Walter*[120] held that the provision 'does not operate where the power of the Commissioner to make an assessment is at issue'. Similarly, Dawson J in *Hickman*[121] held that section 177 does not render the assessment conclusive for all purposes.

Further, although there is significant guidance as to whether the Commissioner is likely to apply Part IVA or form an opinion as to the existence of fraud or evasion,[122] the taxpayer should not have to depend on administrative discretion but rather that it should be apparent on a plain reading of the provisions whether their conduct will amount to tax avoidance, fraud or evasion. It is suggested that this could be achieved by enacting new provisions that establish what conduct will amount to fraud or evasion for the purpose of section 170 and that Part IVA be revised to more clearly establish what conduct amounts to tax avoidance. Such measures would, so far as possible, provide that these laws were sufficiently intelligible, clear and predictable that it would be apparent to a taxpayer what the law was prior to undertaking any given action. Consequently, a taxpayer could foresee the tax consequences of their actions, thus giving effect to the principles of certainty and prospectivity.

Such reforms would require considered thought and attention but are well within the realm of possibility and the significant impact that such reforms would have in affirming the rule of law warrant, at the least, that they be given further consideration.

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116. Bertus De Villiers, 'Burden of Proof and Standard of Proof in the WA State Administrative Tribunal—a Case of Horses For Courses' (2013) 32(1) *University of Queensland Law Journal* 187. See also, *Yao-Jing v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275, 288.
117. *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at [44].
118. John Azzi, 'Preserving The Constitutional Function of Courts and Increasing Confidence In The Tax System: Time To Reconsider (2019) 43(1) *Futuris' Melbourne University Law Review* 44, 66.
119. *Commissioner of Taxation v Futuris Corporation Limited* (2012) 205 FCR 274.
120. *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 233.
121. *R v Hickman; Ex parte Fox* (1945) 70 CLR 598.
122. See PS LA 2005/24 and PS LA 2008/6, respectively.

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