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Committee Secretariat
House of Representatives Standing Committee
Parliament of Australia
Parliament House
Canberra
ACT
2606

Dear Committee Secretariat,

Inquiry into Disputes between taxpayers and the Australian Taxation Office

The Law Institute of Victoria (**LIV**) welcomes the opportunity to make the enclosed submission regarding the House of Representatives Standing Committee Inquiry into tax disputes.

In the submission, the LIV focuses on the need for legislative amendment in the separation of powers between tax assessments and objections to ensure that any actual or apparent bias under the current system is removed.

The LIV also notes the need for any proposed legislative amendments to address the difficulties faced by reviewing officers being bound by public rulings, to enable the reviewing officer to assess whether these rulings apply fairly or accurately to a taxpayer's objection at hand.

The LIV has prepared this submission based on comments from expert tax practitioners of the LIV Taxation and Revenue Committee who represent both small and large taxpayers in the community, including Mr Bernard Marks, who was first offered the position of the then newly created position of Chief Tax Counsel.

If you wish to discuss this matter further, please do not hesitate to contact myself, Ms Angela Gidley Commercial Lawyer [redacted], or Mr Bernard Marks LIV Taxation and Revenue Committee on [redacted].

Sincerely yours,

[redacted]

Geoff Bowyer

President

LAW INSTITUTE VICTORIA

Inquiry into Disputes between Taxpayers and the Australian Taxation Office

Submission to the House of Representatives Standing Committee

To: Parliament of Australia, Parliament House, Canberra, ACT 2606
Email: TaxRev.reps@aph.gov.au

Date: 4 July 2014

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Introduction

In a media release dated 6 June 2014, the House of Representatives Standing Committee on Taxation and Revenue announced its Inquiry into tax disputes (**the Inquiry**).

The Law Institute of Victoria (**LIV**), which represents over eighteen thousand Victorian legal practitioners, sincerely welcomes the Inquiry and notes that some of the issues flagged in the Terms of Reference have, for a number of years, been topics of concern to many of our members. We also note that there has been communication in the last few years between parliamentarians and some of our tax-specialist members about the conduct of disputes between taxpayers and the Australian Taxation Office (**ATO**).

Given the one-month timeframe in which to make a submission to the Standing Committee, the LIV has limited its comments to the Terms of Reference topic of "the governance frameworks for disputes". In particular, the LIV has confined its comments to the *proper level of separation between assessments and objections*. These comments are set out below.

Executive Summary

The Australian tax appeals system has an intermediate step between the making of original decisions and appeals to the Administrative Appeals Tribunal (**AAT**) or Federal Court. In this submission the term "original decision" includes the making of a default assessment or an amended assessment following an audit or the making of a determination or issuing (or refusing to make) a private ruling or a class ruling as a result of an application by a taxpayer. This intermediate step is the lodgment by a taxpayer who disputes the original decision of an objection – the objection is then "determined" by a

reviewing officer who applies the law to the relevant facts. In practice, this is end of the appeals process for most taxpayers who wish to challenge original decisions because of the high costs and time and the use of their often-scarce resources in taking their matter further to the AAT or the Federal Court (less than 3% of objection decisions are taken on appeal to the AAT and less that 0.5% to the Federal Court). The intermediate step is regarded by the community as the only practical process that should allow an independent "fresh look" of a taxpayer's position at a low cost to the government and the taxpayer.

The LIV's unqualified position is that this intermediate step must be one that is conducted by an impartial and independent officer of the Commonwealth who is skilled and experienced, even to the extent that they can recognise and balance the risks to the ATO if a taxpayer's objection is upheld by the AAT or the Federal Court. Under the existing system, an officer from the ATO considers the objection and makes the decision, that is, an officer from the very same agency that has made the original decision.

The LIV believes that there should be a major change to the existing intermediate ATO process for dealing with, on the one hand, the making of original decisions, and, on the other hand, the review of objections made by taxpayers to those original decisions. The change is necessary to ensure that all taxpayers' objections are treated not only competently but also fairly and impartially – and it is these elements that are necessary bases for taxpayer voluntary compliance in a self-assessment system as well as to enhance community confidence in the ATO.

The LIV notes and endorses the ATO's published position on the functional separation between the decision makers of original decisions from those who review objections. However, the reality – based on the experience of our members -- is that the actual

separation that is necessary to ensure a fair and impartial review without apparent or actual bias does not always happen in practice. In fact, the system would lead the community to a reasonable view that there is no functional separation.

The LIV therefore believes that a formal and legislative change is necessary to bring about a division between decision makers (who make original decisions) and those who review objections to those decisions. The LIV believes that this approach will prevent any apparent or actual bias within the taxation system which will ensure more public confidence in our Federal tax system -- generating savings to both the Commonwealth and the taxpaying community overall.

ATO's Stated Position

The following appears on the ATO website:

> *We recognise and value the importance of independent internal review. Your objection will be considered by a person who was not involved in the original decision. Areas and roles that undertake reviews are separate from and independent of those that make the initial decisions. The review will be conducted in an impartial manner, free of influence or bias.*[1]

The LIV supports this position but notes that ATO statement does not explain how the two different roles are functionally separated and how this separation is policed. There is no statement about what remedies might be available to taxpayers when – usually by accident -- it is later discovered (often well after the time for the lodgment of an appeal from a negative review decision) that the reviewing process had not been totally

[1] Australian Taxation Office, *Independent Internal Review* <https://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/Dispute-(object-to)-an-ATO-decision/Independent-internal-review/>

independent from the original decision making process. Moreover, there is no rule requiring the reviewing officer to tell a taxpayer who has lodged an objection or their lawyer that there has been contact with the original decision maker. Clearly, if the original decision maker has made any statement about the facts or the law, natural justice would require that the taxpayer be given the same information.

The LIV is not aware of any independent study of whether taxpayers, and their tax agents and lawyers believe that the current review of objections process is fair and impartial or whether they think that the system is overly weighted in favour of the ATO.

ATO Practice

The experience of LIV members who specialise and practice in taxation law is that the ATO's stated position is not always applied in practice, especially in difficult cases. Examples demonstrating how easily this can occur (and the Standing Committee is asked to assume that they are hypothetical) might include:

1. An original decision maker in a complex matter may seek expert advice from an officer in the ATO's Tax Counsel Network and that officer assumes a significant role in advising the decision maker in issuing an assessment or making a determination, sometimes after discussions with the taxpayer's lawyers. And when the taxpayer lodges an objection to review the decision, the same officer from the Tax Counsel Network is involved with, and influences, the officer making the review decision (to disallow the objection).

2. An original decision maker in a complex matter may ask for advice from the ATO's Tax Counsel Network. An officer in the Tax Counsel Network will then give the advice and cause an *Interpretative Decision* (generally referred to as an "ATOID") to issue that has the effect of "formalising" that view of the law. And when the taxpayer lodges an objection to review the decision, the reviewing officer states that they cannot make an independent decision on the law (because they are "bound" by the ATOID), even if they privately and off-the record express a view that the ATOID may be incorrect. That is, the reviewing officer cannot *in practice* make an independent decision on the interpretation of the law.

The LIV submits that in these types of cases the ATO's practice breaches the 'apparent bias rule', if not the 'actual bias rule', in administrative law. In addition to this, the lack of separation of roles in the above examples raises the issue of whether real compliance with sec. 13(11) of the *Public Service Act 1999*, which sets out in the Australian Public Service (**APS**) Code of Conduct, can occur.

The LIV makes its submission not because there are numerous cases where lawyers have been met with actual bias. Figures in the ATO *Annual Report* for 2012-13 lead to an inference that, in that period, of the 470,000 adjustments from audits there were about 17,000 objections lodged on substantive issues – that is, about 3.6% (there were also about 9,600 lodged on shortfall interest and decisions on extension of time). However, data published by the Inspector-General Taxation commenting on the Standing Committee's Inquiry gives a different perspective:

> *… between 1 July 2012 and 31 December 2012, the ATO reported that, with respect to large businesses, it conducted 230 compliance activities which resulted*

in liability adjustments. There were 130 objections which suggest that an objection was raised in 56% of the cases. Over the same period, the ATO conducted 226,200 such activities and received 16,480 objections in relation to all taxpayers (7.2%).

In every one of these cases there is apparent bias. The LIV stresses that it does not make this submission based on the numbers**. Rather, the LIV's contention is that the actual foundation of the current ATO review of decisions system is wrong because it engenders apparent bias and does not withstand scrutiny.** The LIV believes that this problem of apparent bias stems from the 1994 restructure of the tax review system in which the then quasi-independent Appeals and Review Group was folded it into various "business lines" within the ATO general structure. That is, since 1994 officers who have been making and advising on original decisions work without any formal separation from officers who review objections from those decisions.[2] Unfortunately, as will be explained below, the 1994 re-structure was made in conjunction with the introduction of regime of "binding rulings" in 1992 that took away a major part of the independence and impartiality of a reviewing officer -- even if they had continued to be totally separate from their colleagues who made original decisions.

The fact that LIV members have encountered actual bias in the review of objections might be beside the point but it is also an important factor in making this submission.

[2] Australian Taxation Office, Practice Statement Law Administration, 2003/3, para 11

Administrative Review Council's Position

We bring to the attention of the Standing Committee the view of the Commonwealth Administrative Review Council Report:

> *Both the bias rule and the APS Values and Code of Conduct place Australian government employees and statutory office holders under a duty to avoid conflicts of interest when making decisions. The values and code establish broader ethical standards that go beyond the requirements of natural justice. An important difference between the bias rule and the code lies in the consequences of a breach.*
>
> *An Australian government employee or statutory office holder who breaches the code is liable to disciplinary penalties under the Public Service Act 1999. Non-compliance with the bias rule gives an affected person grounds to have the unlawful government decision set aside.*[3]

To assist members of the Standing Committee, we refer to an explanation of the bias rule in the Commonwealth Administrative Review Council Report (our emphasis):

> ***Other forms of the bias rule***
>
> *The bias rule of natural justice is not only concerned with conflict of interest: it also requires that a decision maker be impartial and free of actual or apparent bias.*
>
> ***'Actual bias'** means that the decision maker has a predisposition to decide the matter otherwise than with an impartial and unprejudiced mind.*
>
> ***'Apparent bias'** means that in the circumstances a fair-minded observer might*

[3] Commonwealth, Administrative Review Council, *Decision Making: Natural Justice, Best Practice Guide 2*, (2007) 4

> *reasonably suspect that the decision maker is not impartial. In most cases, apparent bias is enough to disqualify a person from making a decision.*
>
> *Whether a decision maker is disqualified or not is a legal question. A decision maker is not disqualified simply because a person whose interests are affected by the decision alleges bias or asks for a different decision maker. It is not about whether an affected person thinks the decision maker is biased;* ***it is about whether a fair-minded observer would reasonably suspect bias.***
>
> *An apprehension or suspicion of bias can arise from things the decision maker says or does that suggest he or she is either partial or hostile to one side or has formed prejudgments and is not open to persuasion. A closed mind might be demonstrated by ignoring evidence or dismissing it for insufficient reason. Actual or apprehended bias can arise if a decision maker plays conflicting roles, such as making allegations and fact finding.*[4]

The Administrative Review Council explains that a breach of the bias rule may have the effect that the reviewing decision is unlawful[5] and 'non-compliance with the bias rule gives an affected person grounds to have the unlawful government decision set aside'[6].

The LIV understands that there is anecdotal evidence to suggest that breaches of the bias rule by officers of the ATO in the review of original decisions process may more often occur where the reviewing officer is not a lawyer and they require legal-type advice in making a decision on a complex legal matter to disallow an objection.

[4] Ibid
[5] Ibid 10
[6] Ibid 4

Certainly, there is a real perception that the ATO objection review process is not independent from the assessing and original decision making process.

The Treasurer's Position

The LIV is an apolitical member-focused organisation and among its members are supporters of all political parties – it has a reputation of fearlessly expressing robust but well-reasoned opinions when the law and legal processes impact negatively on the community.

Without commenting on unrelated statements or policies from any political party, politician or political analyst, the LIV notes and welcomes the comments of The Hon. Joe Hockey when he was Shadow Treasurer on functionally separating the original decision making process from the review process to prevent any appearance or taint of bias in taxation objections. In a speech to the Institute of Chartered Accountants Mr Hockey said (our emphasis)[7]:

> ***Resolution of taxation disputes***
>
> *The other important point about compliance is that the community has to have confidence that everyone is pulling their weight and the system isn't being gamed.*
>
> *A typical dispute scenario starts after the taxpayer has received their tax assessment.*
>
> *The ATO's review of the taxpayer's business and its relationship to the content of its tax return may progress from a risk assessment to an audit.*
>
> *Audits are invariably slow.*

[7] The Hon Joe Hockey ' A Coalition Government's Approach on Tax' Speech delivered to The Institute of Chartered Accountants, Sydney, 23 November 2012

There may have been attempts to resolve matters, but if there is still a sticking point, the ATO team will issue an amended tax assessment.

If the taxpayer decides to contest a matter, their objection to the amended assessment will have to be examined by the ATO.

It's that reconsideration of the issue at the objection stage that potentially puts the ATO into the situation of investigator and prosecutor.

The team that has undertaken the audit and just issued the amended assessment is unlikely to come to a different conclusion when they look at the taxpayer's objection.

There should be a completely new team that considers the objection.

The perception that there may not have been a fair consideration of the matter needs to be addressed.

To do that, the function of the audit must be separated from the second stage review that happens when a decision is to be made about an objection.

Mr Hockey noted the submission of the Inspector-General of Taxation in the 2011 Tax Forum about separating the two functions and suggested (with our emphasis)

An alternative approach could be to move the appeals section out of the ATO into a different agency, recognising that the audit function is different from an independent review*.*

The LIV's Position

The LIV puts the following positions to the Standing Committee:

1. There is more than a likelihood of *apparent bias* within the current ATO structure because its officers (employees in the same agency and not formally or legally separated) make both original decisions and conduct objection reviews. There is no reason for the community to take any other view that a fair-minded observer would reasonably suspect bias.
2. There will always be *actual bias* when an ATO officer has dual roles (whether direct or indirect) in both making a decision and the review of that same decision.
3. The *rationale* for the ATO to use a particular officer who has been designated as an "expert" in a specific area of taxation law in dual roles (advising an original decision maker and consulting with or even conferring, directly or indirectly, with a reviewing officer in an objection from that decision) because there is an "efficiency dividend" within the ATO demonstrates a failing of due process. In such cases there will always be the perception of apparent bias because human experience tells us that the ATO "expert" has a vested interest in supporting their original advice.

The LIV's Recommendations

To limit or prevent apparent and actual bias occurring and to ensure that the Australian community has respect and confidence in the fairness, transparency and efficacy of the Australian tax system, the LIV makes the following recommendations to the Standing Committee:

1. Parliament ensure that the Australian tax appeals system retain the review of objections as an intermediate step between the making of original decisions and taxpayer appeals to the AAT or Federal Court.

2. Parliament creates, through a new Act, a separate small and efficient independent agency to accept objections, conduct reviews and conduct ATO litigation headed by its own statutory officer.

3. Parliament excise that part of the law that deals with objections and appeals from the existing legislation (Part IVC of the *Taxation Administration Act 1953*), together with the law dealing with prosecutions and offences (Part III of the *Taxation Administration Act 1953*) and copy it (with obvious amendments) into the new Act that creates the objections, review and appeals agency.

4. The new Act provide that any officer in the new agency who actually makes decisions on the review of objections where an issue of law can arise must be legally qualified.

5. The new Act set out a mission statement for any officer conducting the review of an objection: this will be, if possible and where there are reasonable competing views, to make a fair and impartial determination of which view is correct according to the facts and the law. This process would not only bring efficiencies to the review process as full and frank negotiated settlements would take place prior to a matter being referred to the AAT, it would enhance voluntary compliance as well as maintain and increase community confidence in the ATO.

6. The new Act put into legislative form the bias rule as a mandatory principle in the making of decisions in the review of ATO original decisions as well as in the conduct of appeals. The LIV notes that although the Commonwealth Administrative Review

Council has observed in its Report that '*The bias rule can be excluded by statute, although this is rare',*[8] its firm view is that the bias rule should be specifically **included** in any new legislation, as well as inserted in the continuing *Taxation Administration Act 1953*.

7. The current "expert"/Tax Counsel Network/"centre of expertise" officers should have no role in the review of objections if, as a group, they give advice to assessing officers. The new agency must not use the services of any officer who is or could have been involved in the audit or assessing or original decision-making process. There must be an effective information barrier.

8. Officers of the new agency, when undertaking independent and impartial review of objections, should have the power to ignore or depart from ATO issued *Public Rulings, Determinations, Interpretative Decisions*, and *Decision Impact Statements* and, where necessary, *Practice Statements* where the taxpayer seeking the review of an assessment or determination claims the ATO's position on the relevant law as set out in a *Ruling, Determination, Interpretative Decision, Decision Impact Statement* or *Practice Statement* is incorrect and the reviewing officer, for proper reasons, agrees that the ATO's statements in those documents could reasonably be said to be incorrect, misleading or confusing or it would be unfair to apply them. Members of the Standing Committee should be aware that the Commissioner regards these documents, including drafts, as being "precedential ATO views".[9] This recommendation is discussed in the Addendum to this submission titled 'The rulings problem'.

[8] Commonwealth, Administrative Review Council, *Decision Making: Natural Justice, Best Practice Guide 2*, (2007) 4
[9] Australian Taxation Office, Practice Statement Law Administration, 2003/3, para 5

A final comment

The LIV acknowledges that some of these recommendations, particularly the last one, may be seen by some stakeholders in the tax dispute context as difficult to achieve because they challenge the balance of power and leverage of the ATO over the community. Some of the recommendations may at first even be considered too complicated. Indeed, it may be necessary for a LIV tax lawyer with administrative law experience who has been extensively involved in these issues in practice to explain them in more detail at a hearing of the Standing Committee. Obviously, no disclosure of facts that supports "anecdotal evidence" can be given if it in any way breaches client confidentiality.

The LIV believes that if the objections review process is seen by the community as being totally independent from the ATO which conducts the audit and amended assessment process, there will be considerably more confidence in the efficacy and validity of decisions made on the review of objections.

Contacts

The LIV welcomes formal and informal contact with members of the House of Representatives Standing Committee on Tax and Revenue and its staff about this submission. If necessary, Mr Bernard Marks, a senior practitioner and a member of the LIV Taxation and Revenue Committee, is prepared to meet members of the Standing Committee on an informal basis as well as to be formally questioned by the Standing Committee and explain the submission. Bernard is a former Professor of Taxation Law at the University of Melbourne and who for some years acted for the ATO in numerous large

case/complex audits and now is a full-time independent tax solicitor whose extensive practice is mainly limited to taking briefs in complex audits and objections on complex issues.

Addendum – The rulings problem

The LIV raises with the Standing Committee two inter-related matters relating to ATO issued *Public Rulings, Determinations, Interpretative Decisions*, *Decision Impact Statements* and, to some extent, *Practice Statements*. The comments below are mainly directed to *Public Rulings* for the sake of brevity but they generally apply to "precedential ATO views".[10]

(1) The LIV's eighth recommendation

The first comment is a background explanation for our eighth recommendation that officers who review objections in an independent agency not be subject to the binding rulings system. The ATO's practice is that *Taxation Rulings*, that is, public rulings issued under Division 358 of Schedule 1 of the *Taxation Administration Act 1953* (***TAA1953***), are binding on all ATO officers, including officers making a decision on a taxpayer's objection to an original decision. This has been the case since 1992 (see the now repealed Part IVAAA of the *TAA1953*). The current law is sec. 358-10(1)) of Schedule 1 of the same Act which simply states:

> *A public ruling applies from the time it is published or from such earlier or later time as is specified in the ruling.*

[10] Australian Taxation Office, Practice Statement Law Administration, 2003/3, para 5

The Australian Taxation Office Practice Statement PS LA 2008/3 at paragraph 35 sets out the Commissioner's practice to the same effect.[11]

There is no issue that sec. 358-10(1) applies to ATO officers who make original decisions but there is a reasonable view that it may not, and should not, bind those reviewing officers who are deciding objections from those original decisions. One could ask whether Parliament really considered when it enacted Part IVAAA of *TAA1953* in 1992[12] and Division 358 of Schedule 1 of *TAA1953* in 2005[13] that a ruling made by the Commissioner about tax law must necessarily bind a reviewing officer vis-à-vis a taxpayer in making a decision on an objection in the context of an independent, informed, and impartial "fresh look". The LIV believes that it could not. One could also question whether, on reflection, the decision to fold the ATO Appeal and Review Group into the ATO "business Lines' group was the best way forward given that this would enable the Commissioner to issue public rulings that bound an officer deciding an objection. Importantly, prior to 1992 the Commissioner issued rulings, such as *Income Tax Rulings* (the "IT" series) and *Miscellaneous Rulings* (the "MT" series) but they never had a binding effect on an Appeals and Review officer.[14]

Why is this issue so important? Clearly, if an officer in making a decision on an objection expresses an independent view that a particular public ruling on the law, in whole or in part, is incorrect but the ATO's position is that the reviewing officer is required to apply it in the actual disallowance of the objection, that officer will not have acted independently or

[11] See also Australian Taxation Office, *Taxation Ruling,* 2006/10, at para 30
[12] Introduced by *Taxation Laws Amendment (Self-Assessment) Act 1992*
[13] Introduced by *Taxation Laws Amendment (Improvement to Self-Assessment) Act (No 2) 2005*
[14] See generally, Inspector-General of Taxation Report, *Review into Australian Taxation Office's use of early and Alternative Dispute Resolution* (May 2012) at paras 6.34 - 6.38

impartially in applying an actual law or regulation. A *Public Ruling* is merely the Commissioner's "view" – it has never been laid before Parliament and is neither a law nor a regulation – although it is Gazetted. But the ruling in effect becomes the law. One could ask whether Parliament intended that the bias rule was ***not*** to apply to ATO reviewing officers in making review decisions. In addition, how does the reviewing officer advise the objecting taxpayer when they are challenged to confirm in writing the application of the statement on the ATO website:

The review will be conducted in an impartial manner, free of influence or bias.

The LIV suggests that the Standing Committee grasp the opportunity provided by this Inquiry to give full and proper consideration to this issue. The LIV also suggests that the Standing Committee should call upon the ATO to explain and support the proposition (that sets out the *status quo*) that a reviewing officer who is an integral part of the same agency that has made a reviewable decision ***and*** is bound by that agency's interpretation of the law is independent, impartial, free of influence and necessarily free from both apparent and actual bias.

The LIV's view is that the logical consequence of the ATO's practice (that public rulings bind an officer in the review of an objection even if that officer believes that the public ruling is incorrect) is that, if a taxpayer argues that their tax return is correct despite it being at variance with a public ruling – because they have been advised by their lawyer that the public ruling is incorrect, misleading or confusing and that an alternative view is more sound – and an officer making an amending assessment simply follows (as they must) the public ruling in making that original decision, the lodgment of an objection is

necessarily futile if the reviewing officer is also necessarily bound by the same public ruling.

In such a case, the taxpayer has no choice but to take the expensive and difficult route to the AAT or Federal Court. Or should, perhaps, the taxpayer have a right, without any fee or charge, to take their objection directly to those institutions since there is no realistic alternative. This is because the objection process will be just a waste of time, resources and money – the taxpayer will have known the only answer before the objection is lodged because the reviewing officer is not permitted to take an independent "fresh look" at the issue of whether the public ruling is actually correct.

The obvious alternative is to make the reviewing officer truly independent and not be bound by the public ruling as it applies to the taxpayer (while keeping it binding on those officers who make original decisions). The LIV suggests that this can easily be achieved by removing Part IVC from the *Taxation Administration Act 1953* and putting it in a separate Act (with lots of other incidental but easily made amendments) so that Act can specifically deal with objections and appeals. In addition, that Act will expressly include the bias rule.

(2) Rulings can create tax disputes

Lawyers give tax advice – and the community relies on that advice -- by examining and interpreting two different sets of codes. The first set consists of the various acts, regulations and treaties. These are sometimes difficult to read documents, often dealing

with complex issues and they are lengthy. They are skillfully written by expert lawyers at the Office of Parliamentary Counsel and are the product of Parliament. They are the law.

The second set of codes is the aggregate of ATO issued *Public Rulings, Determinations, Interpretative Decisions*, *Decision Impact Statements* and *Practice Statements* which are, in effect, a commentary on the first set. They now consist of many thousands of pages. Lawyers often spend more time examining these than the first set. They tell us what the Commissioner believes Parliament has said. They may even infer that the reader should reject the clear language of a section of an Act because another meaning was intended or that an ordinarily understood word in a section should really mean something else. Lawyers cannot simply give advice that departs from this second set of codes without warning their clients. If there is a conflict between the two sets then for assessing purposes the second set takes precedence over what Parliament has produced and the conundrum is broken in objections to private ruling determinations or even by lodging an objection to a self-assessment so that the issue comes before the ATO without incurring a penalty.

The LIV suggests that the Standing Committee might reflect on the large volume of *Public Rulings, Determinations, Interpretative Decisions*, *Decision Impact Statements* and *Practice Statements* that now exist and ponder the huge cost to the ATO in producing and applying them and the cost to the community in trying to understand what they mean. They are not necessarily written by expert lawyers. The LIV notes the comments of Merkel J in *Bellinz Pty Ltd v FC of T*[15] that a public ruling might be written in a way that does not necessarily provide certainty and that public rulings "in such terms obviously have a

[15] [1998] FCA 284

tendency to mislead, which is antithetical to the system of certainty and fairness intended to be provided to taxpayers by the public ruling system".

More importantly, the LIV suggests that the Standing Committee should recognise that the existence of the two sets of codes creates tension that, often unwittingly, causes major disputes between the ATO and taxpayers on both simple and complex matters. Indeed, the author of the Explanatory Memorandum to the *Tax Laws Amendment (Improvement to Self-Assessment Bill (No 2) 2005* (the Bill that introduced sec. 358-10(1)) even expressed the view to Parliament that some aspect of a public ruling may be "on reflection, incorrect"[16].

The LIV suggests that the Standing Committee consider these factors in accepting the eighth recommendation so that a reviewing officer can deliberately analyse conflicts between an act and a ruling and interpret what Parliament has enacted by reference to the current rules of statutory interpretation rather than the Commissioner's own understanding.

[16] Explanatory Memorandum to the *Tax Laws Amendment (Improvement to Self-Assessment Bill (No 2) 2005* at para 3.58