

CHAPTER 2

CULTURES AND COMPLIANCE

Introduction

2.1 The Committee's reports thus far have focused on the specific measures taken by the regulatory authorities in response to mass marketed schemes, and on the extent to which further action or regulation is required in order to resolve the current problems and to curb future outbreaks of aggressive tax planning.

2.2 The academic literature on regulation and citizen compliance with taxation law, however, increasingly recognises that regulatory enforcement is only one, and not necessarily the most effective way of achieving a desired outcome. Or, putting the point differently, it recognises that tax planning and paying behaviours arise out of particular contexts or cultures. Understanding and addressing the political, social and psychological background of those behaviours may assist agencies to promote compliance far more effectively, than an approach which relies purely on the threat of enforcement or punishment.

2.3 In this Chapter, the Committee briefly outlines some of the theoretical findings on the relationship between cultures and compliance. It then analyses evidence from those involved in mass marketed schemes with a view to understanding how cultural factors affected choices to participate and responses to the ATO's action.

2.4 Finally, the Committee discusses the Commissioner's recent statements concerning the responsibility of the wider community of taxation professionals for the integrity of the tax system, the response of that community, and the extent to which appeals of that sort can be relied upon to promote a culture of compliance in relation to taxation matters.

Modelling compliance

2.5 A key issue for taxation agencies is the efficacy of punishment or deterrence versus that of persuasion or compliance in ensuring taxpayer conformity to the law. Research on regulation in a range of fields indicates that, in tax matters as in many others, a 'mix' of the two approaches produces the best outcome.¹

2.6 One kind of theoretical model for such a mix is known as a 'regulatory pyramid'. As a result of the work of the Cash Economy Taskforce in 1997-98, the

¹ Valerie Braithwaite and John Braithwaite, 'An Evolving Compliance Model for Tax Enforcement' in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), p.406.

ATO has adopted such a regulatory pyramid as its Compliance Model for all ATO operations.²

2.7 The premise of the pyramid is that regulatory action relies upon a broad base of voluntary taxpayer compliance and self-regulation, with the role of the ATO being to promote taxpayer understanding and acceptance of obligations. As the pyramid climbs and narrows towards the apex, taxpayer ‘postures’ or attitudes harden from acceptance to capture, to resistance and finally disengagement. The role of the ATO in managing those postures alters correspondingly, escalating through a range of sanctions to the final option of prosecution at the top. Academics from the Centre of Tax System Integrity, a joint research project involving the Australian National University and the ATO, have argued:

Regulatory pyramids provide tax officers a set of tools that can be applied without regard to reasons for noncompliance. One starts with the expectation of cooperation, and escalation on the pyramid occurs only when one or the other becomes noncooperative or defaults.³

2.8 An important feature of the ATO’s Compliance Model is its capacity to explain the dynamic nature of the relationship between taxpayer motivations and attitudes, and regulatory sanctions.

2.9 As noted earlier, the model posits four ‘motivational postures’ that may be adopted by taxpayers.

2.10 There are two ‘compliant’ postures, namely the postures of accommodation and capture. ‘Accommodation’ involves a deliberate and conscious commitment to fulfilling one’s obligations under the taxation law, while ‘capture’ involves accepting one’s taxation obligations, without necessarily embracing them or having a particular view about their value.

2.11 These two compliant postures are mirrored by the two non-compliant postures of ‘resistance’ and ‘disengagement’. ‘Resistance’ is a confrontational approach to tax officers and the tax system, which sees the tax system as burdensome, oppressive and, perhaps, unfair. ‘Disengagement’ is like resistance, but incorporates a ‘spirit of hopelessness’ in addition. ‘The state of disengagement is accompanied by non-

² Valerie Braithwaite and John Braithwaite, ‘An Evolving Compliance Model for Tax Enforcement’ in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), p.406. See also, Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office*, March 2000, p.11 and Appendix 3.

³ Valerie Braithwaite and John Braithwaite, ‘An Evolving Compliance Model for Tax Enforcement’ in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), p.410.

responsiveness ... Cynicism about the tax system is likely to be matched by cynicism about the power of government'.⁴

2.12 The research suggests that individuals whose attitudes are characterised by accommodation and capture feel part of the regulatory community. Those who resist feel apart from the community but still want to feel respected by it, whereas those who are disengaged experience a 'psychological separation' from the community without feelings of loss.

2.13 According to this model, a serious difficulty for the regulator is that its own attempts to ensure compliance may result in taxpayer attitudes hardening through this scale and thus in taxpayers being less inclined to see themselves as part of and respected by the regulatory community. Thus:

As regulators expose behaviour that is non-compliant, those being regulated protect themselves from disapproval by placing more social distance between themselves and their accusers. Through construing the situation in terms of 'us' and 'them', the non-compliers are able to hide in the safety of an identity that is at odds with the 'demonic' other. To sustain this protective mechanism, the social rift must be allowed to continue and grow. When non-compliers pursue this path, cooperative resolution of the problem is difficult. The challenge for the regulator then becomes one of changing the motivational posture.⁵

2.14 Importantly in the context of this inquiry, the research further indicates that:

To the extent that social rift is manufactured through feelings of shame, offering cooperation displays the elements of social reintegration that are a necessary part of eliciting compliance in the future. Offering cooperation to resistant and disengaged non-compliers, however, may not always be the response that regulators feel like making. If regulators respond to resistance and disengagement in a like manner, they may exacerbate the social rift already in existence.⁶

2.15 The explanatory power of this model seems confirmed in many respects by the evidence to this inquiry. In the following section, the Committee employs the

⁴ Valerie Braithwaite and John Braithwaite, 'An Evolving Compliance Model for Tax Enforcement' in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), pp.410-411.

⁵ Valerie Braithwaite and John Braithwaite, 'An Evolving Compliance Model for Tax Enforcement' in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), p.411.

⁶ Valerie Braithwaite and John Braithwaite, 'An Evolving Compliance Model for Tax Enforcement' in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), p.412.

ATO's Compliance Model in attempting to analyse more fully aspects of the climate in which tax effective schemes were mass marketed and to characterise the climate which has developed since the ATO's crackdown.

Culture of scheme participants

2.16 Overwhelmingly, participants whose deductions have been disallowed by the ATO told the Committee that they had always been, and had prided themselves on being, 'good' taxpayers. They said that their motives for participating in schemes could be entirely explained in terms of their desire for a long-term investment income, their desire to provide for their own retirements and to invest in Australian industries, particularly rural industries.

2.17 For example, Mr Peter and Mrs Linda Southern wrote that:

...[we] have been enthusiastic supporters on 'buy Australian' schemes ... We have always paid our taxes on time and are happy to do so, realising that this money is used to keep this country great in providing infrastructure etc.⁷

2.18 Mrs Geraldine and Mr Roger Farr submitted:

As 'babyboomers' we have been constantly urged by politicians, academics and the media to attempt to provide for our own retirements ... Like so many other families who invested in Budplan, we invested in good faith expecting an opportunity to grow our nest egg for the future.⁸

2.19 Mr Michael McGinty explained:

As a law abiding tax paying Australian citizen I saw Budplan as an opportunity to become involved in a project which could not only provide a good investment return but also create wealth and intellectual property for this country.⁹

2.20 These quotations represent a tiny sample, selected almost at random, from the close to 900 submissions received by the Committee. The sentiments expressed in them could be multiplied more or less indefinitely.

2.21 In terms of the ATO's Compliance Model, these participants represent themselves as having had 'compliant' attitudes towards their taxation obligations. That is, their attitudes or 'motivational postures' were, at worst, postures of 'capture',

⁷ Mr Peter and Mrs Linda Southern, Submission No. 415, p.1.

⁸ Mrs Geraldine and Mr Roger Farr, Submission No. 405, p.1.

⁹ Mr Michael McGinty, Submission No. 401, p.1.

and, at best, postures of ‘accommodation’. On these accounts, the ‘tax effectiveness’ of the schemes was not a significant factor in participants’ decisions to invest.

2.22 One witness, however, questioned whether participants’ characterisation of their pre-scheme attitudes to taxpaying were entirely accurate. Mr Rick Shenton, who sold schemes extensively in Western Australia, told the Committee:

When people give information to this Committee sometimes the truth and they themselves do not sit in the same seat and their recollections are convenient recollections because they feel sorry for themselves, they need to tell lies or they have to blame somebody else.¹⁰

2.23 Speaking of his experience in selling scheme participations at mine sites in Western Australia, Mr Shenton claimed that the prospect of a substantial tax refund ‘had these clients crawling’. He said:

I was going to mines at 8 o’clock at night and was still working at 6 o’clock the next night – honest to God! One lady in a mine ... was actually bringing people to me on the half hour. They were queuing up. There was almost a fight at one stage because one man was in a queue half an hour after he thought he should have been seen. You can imagine that a \$10,000 refund is a lot of money, because you have got to realise that most of these people, even against the evidence that they have given you, might earn \$80,000 a year and pay \$30,000 tax, but they usually spend \$55,000 a year. They have usually got credit cards and a four-wheel drive or whatever, and they are usually up to their ears in debt. Desperation breeds lack of judgement.¹¹

2.24 On this account, it seems unlikely that all individuals who chose to participate in this sort of scheme could be described as having motivational postures of ‘accommodation’ towards their taxation obligations. At best, they seem to have been ‘captured’ and prepared to accept an offer of ‘freedom’ if assured of the legality of the alternative. There may even have been an overlaying element of ‘resistance’ to the loss of ‘hard earned income’ to taxation and a preparedness to avoid such loss if possible.

2.25 The Committee notes that generalisations about the ‘motivational postures’ held by individuals are difficult to make and may be misleading. In particular, different kinds of scheme may have appealed to very different underlying values or sets of motivation, and the Committee does not assume that Mr Shenton’s account of the attitude of some participants can be extrapolated to all.

¹⁰ In-camera evidence, p.15.

¹¹ In-camera evidence, p.14. That many scheme participations were sold in terms of their tax benefits is also confirmed by the sales pitch to be used for selling at least one of the mass marketed schemes. See Evidence, pp.794-797.

2.26 The evidence to the inquiry indicates that, by and large, participants want to see themselves as law-abiding citizens and as part of the regulatory community. This is true whether or not, as Mr Shenton suggests, some individuals are retrospectively ‘dressing up’ or excusing what they did, and indeed would explain why such ‘dressing up’ is required.

2.27 That desire then seems to go a large way to explaining the acute sense of outrage and shock experienced by participants at being labelled ‘tax cheats’ or ‘avoiders’ because of the ATO’s crackdown on schemes. Such labelling, according to the testimony of many witnesses, has dislocated their sense of their own identity and their sense of connection with the broader taxpaying community.

2.28 From the point of view of future compliance, the danger posed by this dislocation is that participants move out of the motivational posture of ‘compliance’ into postures of resistance and disengagement. In the words of John and Valerie Braithwaite, quoted earlier:

As regulators expose behaviour that is non-compliant, those being regulated protect themselves from disapproval by placing more social distance between themselves and their accusers. Through construing the situation in terms of ‘us’ and ‘them’, the non-compliers are able to hide in the safety of an identity that is at odds with the ‘demonic’ other.

2.29 Many participants express just such feelings of ‘social distance’ between themselves and the regulator, as well as a sense of loss of trust in the institutions of government. For example, Mr Michael McGinty began his submission in the following way:

The Australian Tax Office, the Commissioner of Taxation and the Deputy Commissioner of Taxation, Mr Steve Chapman, have classified me as a tax cheat.

I AM NOT A TAX CHEAT!

I am writing this letter in the hope that my situation, as small and insignificant as it may be, may be heard without prejudice, disinterest or ulterior motive.¹²

2.30 Other participants wrote to the Committee of their ‘extreme distress and bewilderment regarding the treatment afforded us by the Australian Taxation Office’. The Farr family wrote that:

... we find we are labelled tax cheats by the ATO as it relentlessly pursues us, along with all other hapless Budplan investors ... It is

¹² Mr Michael McGinty, Submission No. 401, p.1.

difficult to fully convey the pain and embarrassment the actions of the ATO have caused us. I beseech you to consider the disastrous impact of this whole attack upon our personal integrity and financial position on our family and thousands of other well meaning Australians.¹³

2.31 Mr Ian Parkinson said ‘I am very disillusioned, concerned and disappointed in our Australian Bureaucracy [for] leaving the ATO to weave its path of destruction’¹⁴, while Mr Peter and Mrs Linda Southern wrote ‘to express our disdain for the ATO in its labelling of investors in so-called “tax effective investments” as tax cheats’.¹⁵

2.32 In terms of the ATO’s Compliance Model these expressions of disillusionment, disdain, disappointment and unfairness indicate postures of resistance tending towards disengagement on the part of these taxpayers. This supports the theory that:

When sanctioning strategies communicate increasing disapproval to the taxpayer, the social rift between non-compliers and the regulatory culture likely increases, and the entrenchment of non-compliant regulatory postures is more likely to follow.¹⁶

2.33 The challenge for the ATO, then, is to try to re-establish a dialogue with scheme participants, such that interaction between the two parties can be resumed as soon as possible at the bottom of the pyramid.

2.34 The Committee notes that a complication for the ATO in this regard may be that aspects of the organisation’s own culture tend towards the escalation of strong enforcement behaviour rather than towards cooperation with perceived non-compliers.

2.35 The Committee received only very limited and anecdotal evidence about the ATO’s internal culture. However, that evidence did suggest the possibility that there may be tensions within the organisation between an older regulatory culture of enforcement and deterrence, and a newer culture of cooperation and dialogue in the ATO. For example, in reporting on the work of the Cash Economy Task Force, from which the ATO’s Compliance Model emerged, researchers observed:

Setting out styles of regulatory interaction was important for ATO staff. Different groups dealt with problems at different levels, and

¹³ Mrs Geraldine and Mr Roger Farr, Submission No. 405, p.1.

¹⁴ Mr Ian Parkinson, Submission No. 412, p.1.

¹⁵ Mr Peter and Mrs Linda Southern, Submission No. 415, p.1.

¹⁶ Valerie Braithwaite and John Braithwaite, ‘An Evolving Compliance Model for Tax Enforcement’ in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), pp.413-414.

each group had its own culture and set of beliefs as to the ‘correct’ regulatory style.¹⁷

2.36 The Committee notes that through its collaboration in the Centre for Tax System Integrity, the ATO is actively researching ways of working with taxpayers to achieve compliance through cooperation rather than punishment. In particular, the Committee notes the significance of current research into the reintegration into the regulatory community of taxpayers bruised by their experience of the ATO in its crackdown on mass marketed tax effective schemes.

2.37 The Committee commends the ATO for the initiative and creativity of its approach to compliance issues and to trying to improve its relationships with the taxpaying community.

Culture of taxation professionals

2.38 The ATO’s Compliance Model focuses on the motivational postures of the general taxpaying community. Recently, the ATO has also turned its attention to the attitudes of the community of tax professionals. To borrow again from the Compliance Model, the ATO has seemingly been attempting to promote a culture of ‘accommodation’ amongst that group.

2.39 In speeches to the community of taxation professionals, Mr Carmody and other ATO officers have asked that community to consider its role in maintaining the integrity of the tax system and have asked for its help in monitoring and controlling the activities of aggressive tax planners.¹⁸

2.40 For example, in a speech to the Taxation Institute of Australia, Assistant Commissioner Michael O’Neill concluded with the following exhortation:

If taxation is the price we pay for civilisation, we tax advisers, lawyers and accountants, each have a key role in advancing our community. Your advice will assist clients when considering the legal and financial benefits of investing in year end schemes.¹⁹

2.41 Mr Carmody told the Committee that:

¹⁷ Valerie Braithwaite and John Braithwaite, ‘An Evolving Compliance Model for Tax Enforcement’ in *Crimes of Privilege: Readings in White-Collar Crime*, eds. Neal Shover and John Paul Wright (New York: Oxford University Press, 2001), pp.412-413.

¹⁸ See the Commissioner’s speech, ‘A New Tax System – Changing Cultures’, 19 November 1998, Sydney, <http://www.ato.gov.au/printcontent.asp?doc=/content/Corporate/sp9807.htm> (25 June 2001); and, Assistant Commissioner Michael O’Neill’s speech, ‘Taxes, Death & Civilisation: a look at year end “tax effective products”’, 15 May 2001, Brisbane, <http://www.ato.gov.au/content.asp?doc=/content/corporate/sp200103.htm> (6 June 2001).

¹⁹ Michael O’Neill, ‘Taxes, Death & Civilisation: a look at year end “tax effective products”’, 15 May 2001, Brisbane, <http://www.ato.gov.au/content.asp?doc=/content/corporate/sp200103.htm> (6 June 2001), p.10.

In my view, the community's tax system would be best protected by others supporting the tax office in meeting this objective. In particular, the tax profession, which is at the coal face on a day-to-day basis, could provide a valuable role in bringing developments to our attention. There are mixed views on this in the profession, some preferring the view that their only responsibility is to their client and that this would be compromised by taking a community responsibility. This view raises for me a number of responsibility issues that are worthy of considering. In saying that, is it saying that tax professionals know or knew the schemes were ineffective but, because the tax office had yet to act, they would recommend or support claims made for them? Otherwise, why not make them available to us? If so, is there no responsibility to the community for the integrity of the tax system, even when they know or expect the arrangements will not pass muster under the law?²⁰

2.42 Clearly, the ATO would like to encourage a sense of responsibility among tax professionals for the promotion of taxpayer compliance, not only with the letter of the law, but also with its spirit and policy intent. As Mr Carmody told the Institute of Chartered Accountants:

It is one thing to approach an interpretation of the law from the perspective of advising a client, particularly where the whole objective is to minimise tax payable. It is another thing to approach the law from the perspective of a responsibility to the community for the integrity of the law.²¹

2.43 In terms of the Compliance Model outlined earlier, this strategy is part of the broader focus on fostering a community consensus on the importance of 'doing the right thing' in tax matters.

Professional response

2.44 As the Commissioner conceded in the evidence quoted above, the response of the taxation profession to this strategy has been 'mixed'. The reasons for that ambivalence are complex, and cannot necessarily be dismissed simply by assuming a lack of ethics or community spirit in the profession.

2.45 The ATO asked professional bodies at a meeting of the National Tax Liaison Group (NTLG) on 9 March 2001 whether they accepted that 'when they did come across an issue that impacted on the integrity of the tax system it would be in the

²⁰ Evidence, pp.798-799.

²¹ 'A New Tax System – Changing Cultures', 19 November 1998, Sydney, <http://www.ato.gov.au/printcontent.asp?doc=/content/Corporate/sp9807.htm> (25 June 2001), p.5.

interests of the professional bodies and of their members to have matters drawn specifically to the ATO's attention'.²²

2.46 Representatives of the Certified Practising Accountants of Australia (CPAA) agreed with that proposition, although they remarked that if aggressive schemes were already entrenched by the time professional bodies became aware of them, then the bodies were in a difficult position. That is:

By the time the bodies were in a position to inform the ATO, this could result in grief for a large number of members, who in turn complain about the behaviour of their representatives.²³

2.47 The National Tax and Accountants Association (NTAA) expressed its willingness to work with the ATO to identify schemes, so that the ATO could develop an early view of the arrangements. Likewise the Institute of Chartered Accountants of Australia (ICAA) and the Taxation Institute of Australia (TIA) said the provision of early warnings by the ATO of concerns about particular arrangements would allow them to work with members to identify the type of arrangements in question.²⁴

2.48 However, the TIA also expressed the view that:

... private practitioners were not interested in owning the tax system other than incidentally. They are in business to sell advice and make money. To overlay a community responsibility of not promoting aggressive tax planning on tax practitioners or their representative bodies was not realistic according to the TIA.²⁵

2.49 The TIA said that sometimes problems with aggressive schemes start when someone is given an incorrect private ruling from the ATO which is then exploited in the development of dubious arrangements. The TIA warned:

... tax agents or representative bodies helping the ATO or telling the ATO about the error in an isolated private ruling was frankly 'Fairyland'. Moreover, in the TIA's view, to expect a professional body to reveal the existence of resultant mass marketed schemes amounted to a conflict of interest.²⁶

²² National Tax Liaison Group, Minutes 9 March 2001 meeting, p.13, ATO Additional Information, 27 July 2001.

²³ National Tax Liaison Group, Minutes 9 March 2001 meeting, p.14, ATO Additional Information, 27 July 2001.

²⁴ National Tax Liaison Group, Minutes 9 March 2001 meeting, pp.14-15, ATO Additional Information, 27 July 2001.

²⁵ National Tax Liaison Group, Minutes 9 March 2001 meeting, p.14, ATO Additional Information, 27 July 2001.

²⁶ National Tax Liaison Group, Minutes 9 March 2001 meeting, p.13, ATO Additional Information, 27 July 2001.

2.50 In a similar vein, the Law Council of Australia (LCA) advised that, in its view:

... the primary role of an adviser is to give proper advice, even where that went against the ATO view. Proper advice nevertheless included advising clients when the ATO took or was likely to take an alternative view.²⁷

2.51 The Committee asked a number of witnesses to respond to the argument that tax professionals have a responsibility for the integrity of the tax system, such that they should be prepared to assist the ATO in identifying and deterring aggressive tax planning arrangements. Again, the response was mixed.

2.52 Mr Robert O'Connor QC, who advised the promoters of a number of schemes in Western Australia, gave a response to this issue which the Committee considers is worth quoting at length. He wrote:

In my opinion, the culture of the tax advising community is *not* one of tax minimisation. The duty of a tax adviser is to advise what, in his or her opinion, is the correct interpretation of the law, based on Court decisions already given and opinion as to what views a Court would hold if the matter comes before a Court in the future ... In interpreting the meaning of a law, morality is not a relevant consideration. An Opinion is being sought on what the *law* is. That is the adviser's specialisation. If an Opinion on morals or ethics is required, the person requiring an Opinion should go to a moralist or an ethicist. If morality had to be taken into account in interpreting the meaning of a law, whose morals should be applied? The answer as to what the law is would vary and depend on the morals of the particular person giving the Opinion. The appropriate course is that the adviser states what in his or her opinion is the law, and then it is up to the taxpayer to apply his or her own morals as to whether to adopt the advice given as to what the law is.²⁸

2.53 Mr Richard Gelski of Blake Dawson Waldron took this point a step further, telling the Committee that:

... not only is it our obligation to advise on the law as it is – we can be sued if we do anything else – but if we fail to advise a client that a transaction can be carried out in a more tax effective manner we can be sued for negligence by that client.²⁹

²⁷ National Tax Liaison Group, Minutes 9 March 2001 meeting, p.13, ATO Additional Information, 27 July 2001.

²⁸ Mr Robert O'Connor QC, Submission No. 891, pp.8-9.

²⁹ Evidence, p.524.

2.54 Somewhat by way of contrast, Deloitte Touche Tohmatsu submitted that the professional somehow has to balance the private interests of the clients against the public interest of the community. In this sense, there are competing ethical demands at stake. Mr Michael de Palo, National Managing Partner – Tax, wrote that the Institute of Chartered Accountants’ Code of Professional Conduct prescribes that:

‘Members must at all times safeguard the interests of their clients provided that they do not conflict with the duties and loyalties owed to the community and its laws’. In this context, a tax expert, at the same time as providing client advice, is obliged to ‘help to establish confidence and efficiency in, and the fair application of, the tax system’.³⁰

2.55 Mr de Palo continued:

The balance between these two ethical requirements often cannot be reached without difficulty. The professional advisor must make this judgement call often at the advisor’s peril. Further, there are decided cases that say an advisor has a duty to advise his client as to how to lawfully minimise tax.³¹

2.56 The Committee notes that the complexity of this issue arises in part from the fact that the line between legal tax minimisation and avoidance which is punishable by the application of Part IVA may sometimes be difficult to find.

2.57 The Commissioner’s call for an ethos of broad community responsibility or civic mindedness within the tax profession seems to be a call for an approach which is more generous in its interpretation of the overall spirit of the law. As quoted earlier, the Commissioner has said:

It is one thing to approach an interpretation of the law from the perspective of advising a client, particularly where the whole objective is to minimise tax payable. It is another thing to approach the law from the perspective of a responsibility to the community for the integrity of the law.³²

2.58 As is evident from the response of the profession, however, that call may be seen to conflict with other professional duties, such as duties to act in the best interests of one’s client.

2.59 Further, tax professionals may well argue that precisely what they are doing is taking responsibility for the ‘integrity of the law’. If certain actions are allowable

³⁰ Deloitte Touche Tohmatsu, Submission No. 894, p.3.

³¹ Deloitte Touche Tohmatsu, Submission No. 894, p.3.

³² ‘A New Tax System – Changing Cultures’, 19 November 1998, Sydney, <http://www.ato.gov.au/printcontent.asp?doc=/content/Corporate/sp9807.htm> (25 June 2001), p.5.

under the law, then performing those actions even with the objective of minimising tax payable, does not undermine the law's integrity. There is, arguably, no penumbra or spirit which causes legal minimisation strategies to lack integrity simply because they do not fully conform to a broader ethic of civic-mindedness.

2.60 The Committee acknowledges that the appropriate balance between the legal rights of individuals to minimise their tax and the community's interest in the generous observance of the intent as well as the letter of taxation law may sometimes be difficult to find. However, the Committee strongly endorses the view that tax professionals do have obligations to the broader community as well as to individual clients.

2.61 The Code of Professional Conduct published by the Institute of Chartered Accountants states that:

A distinguishing mark of a profession is its acceptance of its responsibility to the public. The accountancy profession's public consists of clients, credit grantors, governments, employers, employees, investors, the business and financial community and others who rely on the objectivity and integrity of members to maintain the ordinary functioning of commerce. This reliance imposes a public interest responsibility on members. The public interest is defined as the collective well-being of the community of people and institutions that the members serve.³³

2.62 The Code goes on to say that the 'member's responsibility is not exclusively to satisfy the needs of an individual client or employer'.³⁴ In the Committee's view, these principles of professional conduct serve as an admirable benchmark for all those involved in advising on taxation matters.

2.63 The Committee is thus not convinced by those who suggest that their only responsibility is to their clients and that the law will look after itself. Clearly tax paying and planning behaviours are observed and modified, not only through the enforcement or amendment of black letter law, but also by the community's consensus about the values and expectations that surround that law and its interpretation.

2.64 The Committee considers that members of the taxation profession and their representative bodies should take responsibility for their role in shaping that consensus.

2.65 To this end, the Committee considers that a review of the sort of public interest role that the tax profession should adopt would be timely and valuable. Such a review would provide the tax profession with an opportunity to reach consensus on its

³³ 'Code of Professional Conduct', Section B.1 in Deloitte Touche Tohmatsu, Submission No. 894, p.8.

³⁴ 'Code of Professional Conduct', Section B.1 in Deloitte Touche Tohmatsu, Submission No. 894, p.8.

responsibilities to the broader community, as well as the long-term interests of its clients. Without such consensus, further regulation of the profession may be required.

2.66 The Committee recommends that the Government appoint an appropriately qualified person to conduct the review. As part of the review, the appointed person should consult with the Board of Taxation, the ATO, the tax profession and other relevant business and community bodies.

2.67 The Committee also considers that, as part of the review, the role of tax professionals in the mass marketed schemes episode deserves closer analysis. This episode highlights many of the dilemmas that tax lawyers, accountants and other financial advisers face in tendering advice on grey or contested areas of the law, particularly in relation to tax minimisation (see Chapter 3). It also raises questions as to whether tax professionals, especially lawyers, should be obliged to provide advice that extends beyond the particular issues at law raised by clients to wider matters that could affect the client's interests (such as Part IVA anti-avoidance issues). All these questions relate to the broader concerns about the need for tax professionals and their representative bodies to meet responsibilities to both clients and the community.

Recommendation

2.68 The Committee recommends that a review be conducted into the nature and extent of the public interest responsibility that tax professionals should adopt for the integrity of the tax system. The review should be conducted by an appropriately qualified person, who should consult with the Board of Taxation, the ATO, the tax profession and other relevant business and community bodies. The review should include consideration of the issues of tax planning and the mass marketed schemes episode.