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The Hardship Discretion – Building Bridges with the Community

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1. INTRODUCTION AND SCOPE

Under the *Income Tax Assessment Act* (ITAA) 1997, the Commissioner of Taxation is charged with responsibility for administration of the taxation system,[1] and a major part of this function comprises the responsibility for the collection of tax which has been validly assessed. However, the legislative scheme also provides the Commissioner with a discretion not to collect taxes, but rather to provide relief from the tax due, in whole or in part. This discretion arises in the situation when the collection of tax would, in the opinion of the Commissioner, cause hardship to the taxpayer.

The purpose of this paper is to examine the nature and scope of the Commissioner's discretion to provide relief to taxpayers in circumstances of hardship. The paper initially examines the considerations which go towards establishing hardship, being the threshold test for the exercise of the Commissioner's discretion to grant relief. Given the broad nature of the discretion, the paper reviews the principles which traditionally surround the exercise of such discretionary powers, focusing on those matters which would be considered in determining whether or not to exercise the discretion in a particular case.

The paper finally considers how the scope of the discretion fits within the broad administration of the tax system. As part of this discussion, consideration is given as to the potential impact the exercise of the discretion may have on taxpayer attitudes to compliance.

2. LEGISLATIVE FRAMEWORK

The current legislative basis for relief from a taxation liability on the basis of hardship was introduced by *Taxation Laws Amendment Act (No 6)* (Act 67 2003), which enacted Div 340 in Part 4-50 of Schedule 1 of the *Tax Administration Act* 1953 (TAA). These provisions replaced the previous s 265 *Income Tax Assessment Act*

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[1] Section 8 *Income Tax Assessment Act* 1936; s 3A *Tax Administration Act*.

1936 (ITAA 1936) which had provided a discretion for the Tax Relief Board to release taxpayers from a tax liability in the case of hardship. The new provisions in Div 340 TAA granted the discretion to release taxpayers in cases of hardship directly to the Commissioner.

The operative provision in the new regime provided for individuals to be released from a taxation liability if meeting the liability would cause serious hardship, and for trustees of deceased estates to be released from a liability if dependants of the deceased would suffer serious hardship if required to satisfy the liability.[2] Application must be made for release from the taxation liability,[3] with the taxes from which release may be sought including:

- income tax;
- fringe benefits tax or a Fringe Benefit Tax (FBT) instalment;
- Medicare levy including the surcharge;
- Pay As You Go (PAYG) instalments; and
- additional taxes, penalties and interest charges associated with these taxes.[4]

The new provisions also allowed for review of the Commissioner's discretion decision through the objection and review procedures in Part IVC TAA.[5]

The Explanatory Memorandum (EM) accompanying the new measures explained that the purpose of the amendment was to streamline the decision process, as the previous requirement for a three-member Tax Relief Board to convene to consider hardship cases had become resource intensive and inflexible, leading to backlogs and delays in

[2] *Section 340-5(3) Sch 1 TAA Release by the Commissioner*
The Commissioner may release you, in whole or in part, from the liability if you are an entity specified in the column headed "Entity" of the following table and the condition specified in the column headed "Condition" of the table is satisfied.

Entity and condition		
Item	Entity	Condition
1	an individual	you would suffer serious hardship if you were required to satisfy the liability
2	a trustee of the estate of a deceased individual	the dependants of the deceased individual would suffer serious hardship if you were required to satisfy the liability
Person and condition		
Item	Person	Condition
1	an *individual	you would suffer serious hardship if you were required to satisfy the liability
2	a *trustee of the estate of a deceased person	the dependants of the deceased person would suffer serious hardship if you were required to satisfy the liability

[3] Section 340-5(1)&(2) Sch 1 TAA.
[4] Section 340-10(1)&(2) Sch 1 TAA.
[5] Section 340-5(7) Sch 1 TAA.

considering applications.[6] The sole criteria for release from a taxation liability remained serious hardship, with the EM suggesting that release from a liability would not normally be granted where the release would not relieve the hardship, an example being where the existence of other creditors made bankruptcy inevitable, and a release would advantage other creditors at the expense of the Australian Taxation Office (ATO).[7]

While the EM provides no guidance as to the circumstances which may be sufficient to establish serious hardship, it does specify that the onus is on the applicant to furnish sufficient information to satisfy the Commissioner that a release on the basis of serious hardship would be appropriate.[8]

3. APPLYING THE LEGISLATION

In a consideration of the operation of the previous s 265 ITAA 1936, which had dealt with the serious hardship discretion, Hill J looked to the language of the section, and previous authorities, in determining that the application of the provision required a two-step process.[9] The first required a determination of whether circumstances were such that payment of the taxation liability would result in serious hardship. If such a determination could be made, his Honour considered the second step as an exercise of the discretion available to decide whether there should be release of the liability. As his Honour explained:

> As the language of s.265 discloses, and as is clear from what was said in *Trebilco*, the Board acting under s.265 must proceed in two steps. Where, as here, the case is one arising after the death of a taxpayer the Board must first decide whether owing to the death of the original taxpayer that person's dependants are in such circumstances that the exaction of the full amount of tax would entail serious hardship. If that question is answered favourably to the applicant for relief the Board must then address the next set of issues, namely whether there should be release in the circumstances and if so whether that release will be of the whole or part of the liability. It is obvious that the factors that may be relevant to the second of these steps could be a great deal wider than the factors which are relevant to the first of the steps.[10]

In relation to the new provision in s 340-5(3), the Administrative Appeals Tribunal (AAT) in *Re Filsell and Commissioner of Taxation*[11] adopted a similar position:

> In the Tribunal's opinion, the language of the legislation requires a two stage approach. First, the decision-maker must decide whether the settlement of the liability will result in serious hardship. If that decision is favourable to the applicant, the discretion offered by sub-section 340-5(3) then falls for consideration. In reaching the decision to release in whole or part, the question to be addressed is whether, in all the circumstances, it is just and proper to provide the requested relief. Matters pertaining to the incidence and consequence of the tax and the effect of its exaction upon the affairs of the person will bear upon the issue of whether the relief is just and proper. Support for the two stage approach is to be found in the decision of

[6] EM at para 4.4.
[7] Ibid at para 4.26.
[8] Ibid at para 4.28.
[9] *Powell v Evreniades* [1989] FCA 114
[10] Ibid at para 40.
[11] [2004] AATA 1012.

> the High Court in *Rex v Trebilco; ex parte F.S. Falkiner & Sons Ltd* (1936) 56 CLR 20.

The discussion in this paper follows this two step process, initially examining the factors in establishing serious hardship, before analysing the exercise of the Commissioner's discretion as to whether to release the taxpayer from the taxation liability.

4. ESTABLISHING SERIOUS HARDSHIP

No legislation formulation is provided as to the establishing of serious hardship, and no guidance is available from the EM. As noted by Hill J in *Powell v Evreniades*:

> There is no definition in s.265 of what is meant by "serious hardship" nor would one expect there to be. Each of the words in the phrase is an ordinary English word having a well understood meaning. The context in which the words appear makes it clear that the Relief Board is to consider whether the exaction of the full amount of tax would involve the dependants of a deceased taxpayer in financial difficulty which in all the circumstances can be said to be serious. The financial difficulty will be such that the dependants will be in significant need warranting action by the Relief Board to relieve their condition.[12]

His Honour was of the view that the circumstances of each particular case would be indicative of the level of hardship in that case, suggesting that it would be inappropriate to attempt an abstract test:

> It would seem that the expression "serious hardship" has not been the subject of judicial comment in the present context. Counsel for the respondents referred me to the decision of Williams A.M. of the Supreme Court of Victoria in *Deputy Commissioner of Taxation (Vic.) v. Hoare* (1987) 19 ATR 772. That case concerned an application for a stay of judgment by a taxpayer who had been sued by the Commissioner for outstanding tax. Among the criteria relevant to the exercise of the discretion of the court in stay proceedings is clearly financial hardship to the defendant if the stay were refused. It was in this context that Williams A.M. considered the issue of financial hardship. However, I find the case quite unhelpful for two reasons. The first is that the context in which the analysis of financial hardship arose is completely different to that in s.265. Second, the phrase is not a statutory one but merely an expression of a factor relevant to the exercise of a judicial discretion, which factor is in other parts of the judgment referred to as "extreme" financial hardship. Clearly, there is a distinction between, on the one hand hardship which is serious, and on the other hand, hardship which may be said to be extreme although it is obvious enough that what will constitute either will depend upon the circumstances of a given case.

It is inappropriate to endeavour in the abstract to state tests of what will and what will not constitute serious hardship within the context of s.265. Clearly there would be severe financial hardship if the dependants of a deceased person were left destitute

[12] Above note 9 at para 19.

without any means of support. That is not to say that in any particular case something less than that will not constitute serious hardship. [13]

In relation to the previous operation of the Taxation Relief Boards, The Commissioner had issued Tax Ruling IT2440 which set out some of the guidelines which the Relief Board could follow in determining whether serious hardship existed. The ruling noted that the term 'serious hardship' had not been defined in the law, and that while the ruling could not prescribe an exhaustive list of factors to consider, the ruling was intended to identify some of the circumstances which may or may not indicate serious hardship.[14]

The ruling clarified that tests applied

> … follow from a conceptual position that the term serious hardship has connotations of unduly burdensome consequences, the magnitude of which would be likely to lead to persons being deprived of necessities according to normal community standards. Thus, serious hardship would be seen to exist where payment of a tax liability would result in the taxpayer being left without the means to achieve reasonable acquisitions of food, clothing, medical supplies, accommodation, education for children and other basic requirements.[15]

In circumstances where payment of a tax liability would lead to such consequences as a limitation of social activities or entertainment, or loss of access to goods and services of a more luxurious nature or standard, the ruling suggested that the element of hardship may be seen as marginal or minor rather than serious.[16] Additionally, where the taxpayer's circumstances alone may indicate that meeting the tax liability may create serious hardship, the ruling also suggested that the income or assets of other family members could be relevant to assessing the taxpayer's overall financial circumstances.[17]

The ruling provides a three-step process by which the Relief Board would evaluate the merits of an individual case:

> The tests under this heading are concerned with quantifying the taxpayer's capacity to meet the tax liability from his or her current income. The tests in sequence are:
>
> - Firstly, what is the taxpayer's capacity to pay, as measured by the income and outgoings stated in the application or supporting documents. i.e., what net income remains after deducting total outgoings from total income?
>
> - Secondly, does the Board accept that the income and outgoings stated are accurate and that the outgoings are necessary, or is there scope to increase the net income available to meet the tax debt without serious detriment to living standards?

[13] Ibid at paras 20 – 21.
[14] IT2440 para 5.
[15] Ibid at para 6.
[16] Ibid at para 7.
[17] Ibid at para 9.

- Thirdly, if there is a margin by which available income exceeds reasonable outgoings, is it sufficient to allow the liability to be met within an acceptable time scale?[18]

The case of *Re Ferguson and Ferguson v Commissioner of Taxation*[19] saw the AAT interpret IT2440 as signifying that 'serious hardship' was "… less severe than extreme financial hardship but, nevertheless, hardship of a significant kind in terms of normal community standards."[20] In the later AAT case *Re The Taxpayer and Commissioner of Taxation*,[21] the AAT rejected an application for severe financial hardship in relation to a Higher Education Contribution Scheme (HECS) debt where the taxpayer could have reorganised her affairs but did not do so. Tthe AAT suggested that "… plainly hardship is to be assessed in relation to the assessed amount,"[22] indicating that the issue was whether payment of the particular assessed amount would cause the taxpayer to suffer actual, hypothetical or prospective serious hardship.

In a test case brought before the Federal Court,[23] Stone J considered the meaning that should attach to 'serious hardship'. Her Honour had regard to the examples given by Hill J in *Powell*, that there would be severe financial hardship if persons were left destitute without any means of support, and the elucidation in ruling IT2440 para 6 extracted above. Her Honour saw no inconsistency between these examples, but did highlight the fact that these were only examples, and they did not exclude the possibility that something less than destitution would constitute serious financial hardship. The AAT had noted that what was needed for proper maintenance and support was a relative question "… that could only be answered with regard to the whole of the taxpayer's circumstances,"[24] and in this case her Honour found nothing to suggest that the AAT had misunderstood the meaning of serious hardship.[25]

A matter for consideration in this case had been whether the AAT had concluded that bankruptcy itself would constitute serious hardship. The Commissioner argued that a finding of serious hardship was not open to the Tribunal on the evidence, with the Commissioner submitting that even if the taxpayer were forced to bankruptcy, there was nothing to suggest that bankruptcy, of itself, constituted serious hardship. [26]Stone J applied the 'whole of circumstance' approach in concluding that in considering the consequences of bankruptcy, the Tribunal "… quite properly concentrated on the whole of the respondent's individual circumstances,"[27] and this had been by reference to normal community standards.[28] On this basis her Honour was able to conclude that the Tribunal did not, in effect, find that bankruptcy per se would constitute serious hardship.[29]

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[18] Ibid at para 11.
[19] [2004] AATA 779.
[20] Ibid at para 35.
[21] *Re Taxpayer*[2004] AATA 1073.
[22] Ibid at para 24
[23] *Commissioner of Taxation v A Taxpayer* [2006]FCA 888.
[24] Ibid at para 19.
[25] Ibid at para 20.
[26] Ibid at para 52.
[27] Ibid at para 53.
[28] Ibid at para 55.
[29] Ibid at para 55.

A further issue for judicial consideration has been whether the existence of an unresolved objection or appeal against an assessment may be used to find serious hardship by the payment of the disputed amount. The courts have displayed a marked reluctance to prevent collection of taxes pending resolution of a dispute as to the assessment.

Asprey J in *DCT v Niblett*[30] observed that:

> It may be thought to be a hardship that a taxpayer should have to pay the tax assessed when an objection to the assessment has not been decided upon but there are obvious financial considerations of high policy that must be weighed in the balance against cases of individual hardship with which the Commissioner through the appropriate use of his powers under [the Assessment Act] can cope ... Where the meaning of the words of a statute is clear 'it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like' – *Attorney-General v Carlton Bank."*[31]

In the decision in *DCT v Roma Industries*,[32] Bowen CJ in Eq commented on this issue in terms that "…Such a statutory provision may in some cases lead to hardship on a taxpayer, particularly where he has paid the amount of tax assessed and later wins his appeal."[33]

Along similar lines, Mason and Wilson JJ have remarked in *FJ Bloeman Pty Ltd v FCT*[34] that the legislation:

> contains large powers to enable the recovery of tax; powers the exercise of which may make life uncomfortable both for the taxpayer and perhaps others who owe money to the taxpayer. So much may be conceded, but [the Assessment Act] does not proceed upon the hypothesis that the Commissioner will be motivated in the exercise of his powers by improper or collateral purposes.[35]

Given such a strong line of authority it would be surprising for a taxpayer to be able to establish serious hardship solely on the basis that the taxation assessment was subject to an unresolved objection or appeal.

5. EXERCISING THE COMMISSIONER'S DISCRETION

If a taxpayer has been able to establish that payment of the tax liability would create a circumstance of serious hardship, the second step identified is for the Commissioner to exercise the legislation discretion in determining whether or not to release the taxpayer from the tax liability. As noted by Stone J in *A Taxpayer*, "The Tribunal's conclusion as to 'serious hardship' does not conclude the matter. The decision to release the respondent from his tax obligation is clearly discretionary."[36]

The matter at issue which has arisen on a number of occasions in this regard relates to the matters which may be considered in determining how the discretion should be

[30] (1965) 83 WN (Pt 1) (NSW) 405
[31] Ibid at 411.
[32] (1976) 6 ATR 54.
[33] Ibid at 57.
[34] (1981) 147 CLR 360.
[35] Ibid at 375.
[36] Above, note 23 at para 58.

exercised. In the decision in *Powell*, Hill J took the view that the factors considered in relation to exercising the discretion to release the debt would be at large, and "… could be a great deal wider than the factors which are relevant in determining the first of the steps [serious hardship]."[37]

It follows from *Trebilco* that in the course of consideration of the release of tax under s.265 the Board may consider not only such matters as go to the issue of serious hardship but also other matters which in the discretion of the Board may be relevant, those other matters being merely proscribed by the general principle that the discretion must be exercised bona fide and for the purposes for which it was conferred, there being jurisdiction in this Court to intervene if in the overall exercise of the discretion the Board does take into account considerations which, having regard to the purposes served by s.265, can be seen to be irrelevant.[38]

Further, Hill J referred to the dictum of Windeyer J in *Giris Pty Ltd v FCT*[39] concerning the need, when exercising a discretion, "… to be guided and controlled by the policy and purpose of the enactment, so far as that is manifest in it [and to] exclude from … consideration any matter which it would be unlawful … to take as a criterion."[40]

In reviewing which matters could be considered by a decision-maker in exercising an unfettered discretion, Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*[41] had made a similar finding:

> In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard: ... By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.[42]

In the taxation context,[43] French J in *FCT v Swift*[44] noted that:

> Instead of endeavouring to spell out the circumstances in which burdens imposed by the legislation might be lifted, the Parliament has provided for a dispensation that is capable of exercise by reference to the widest range of factors. In this context, the scope and purpose of the Act can be seen as the collection of company tax subject to a dispensing power. The dispensing power is incidental and ancillary to the primary object of the legislation. On the spectrum of cases in which it could conceivably be

[37] Above, note 9 at para 40.
[38] Ibid at para 36.
[39] (1969) 119 CLR 365.
[40] Ibid at 384 in *Powell* at para 36.
[41] (1986) 162 CLR 24.
[42] Ibid at page 40.
[43] Concerning the discretionary powers in the *Taxation (Unpaid Company Tax) Assessment Act* 1982.
[44] (1989) 89 ATC 5101.

> exercised, there will be a threshold beyond which it would defeat the primary object of the legislation.[45]

While the discretion provided to the Commissioner would appear to be at large, there are broadly stated limits on the discretion to be exercised by the Commissioner. Windeyer J in *Giris Pty Ltd v FCT*[46] spoke of the need, when exercising a discretion, " … to be guided and controlled by the policy and purpose of the enactment, so far as that is manifest in it [and to] exclude from … consideration any matter which it would be unlawful … to take as a criterion."[47]

There have been attempts to outline the types of factors which would be expected to be considered. In *Re Wilson v Minister for Territories*,[48] Deputy President Hall said:

> The considerations that will be relevant to the proper exercise of the discretion whether or not to grant remission when undue hardship is established will vary from case to case. However, in my view, relevant considerations are likely to include the circumstances out of which the hardship arose; whether those circumstances were within the capacity of the applicant to have foreseen and controlled; whether the applicant has over-committed himself financially; whether the applicant or any of his dependants has suffered serious illness or accident involving irrevocable financial loss to the applicant; whether the applicant has been in regular employment; whether the circumstances of the hardship are likely to be of a temporary or recurring nature; and whether a decision to remit the rates would, as a matter of administrative justice and fairness be appropriate having regard to the fact that ratepayers, other than pensioners, are normally obliged to pay their rates in full ...[49]

The matter highlighted by this passage, and a matter which has proven significant in a number of decisions, is the degree of culpability by the taxpayer in contributing to the 'severe hardship' in which they find themselves. As stated by Wilcox J in *Corlette v Mackenzie & Ors*,[50] "It would be extremely odd if a taxpayer who was the author of his or her misfortunes, through imprudent or extravagant expenditure, was entitled, as a matter of right, to a release of unpaid income tax."[51]

The significance of this factor was highlighted by Deputy President Block in *Rollason v FCT*[52] when noting that is the cases of *A Taxpayer* and *Milne*, in both of which relief was granted, the taxpayers were able to establish both serious hardship, and the fact that hardship arose from misfortune for which they were not responsible.[53]

Taxpayer behaviour which may contribute to the hardship condition is one matter listed in ruling IT2440 as a factor to consider in the exercise of the discretion. The ruling recognises that, in exercising the discretion, the decision-maker "… is obliged to act reasonably and responsibly, and should not act arbitrarily or capriciously."[54] As

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[45] Ibid at 5116.
[46] Above, note 39.
[47] Above, note 39 at 384 in *Powell* at para 36.
[48] (1985) 7 ALD 225.
[49] Ibid at para 24.
[50] (1996) 62 FCR 597.
[51] Ibid at 598.
[52] [2006] AATA 962.
[53] Ibid at para 44.
[54] Above, note 14 at para 19.

a guide to the types of factors which may result in the exercise of the discretion to grant relief against a taxpayer suffering hardship, the examples provided by the ruling encompass such factors as:

- whether the taxpayer has disposed of funds without making provision for tax liabilities;
- whether granting relief would not reduce hardship, such as where there was a prospect of bankruptcy, and relief would only serve to advantage other creditors;
- whether the taxpayer has failed to pursue debts,;
- whether the hardship is associated with a single event or short term outcome.

While three of these factors relate to the taxpayer personally, the second factor is arguably wider, and takes into account the greater public interest in the collection of revenue, and not serve to advantage creditors to the detriment of the revenue if the taxpayer is declared bankrupt.

Given the wider scope of this second factor, it may appear somewhat surprising that in *A Taxpayer* the Commissioner had argued that the discretion in s 340-5(3) allowed the Commissioner to take into account only matters relating to the particular taxpayer. The argument of the Commissioner suggested that by taking into account the public interest in the taxpayer continuing in a highly paid position and paying tax at the top marginal rate, the AAT had erred in law by considering an irrelevant consideration.

Stone J agreed that the 'public interest' would be an irrelevant consideration in determining the first issue of whether the taxpayer faced severe hardship, but her Honour was satisfied it was not irrelevant to the exercise of the discretion as to where to provide relief.[55]

If the greater public interest is an element for consideration in exercising the discretion as to the granting of relief, a further aspect of this is arguably the impact the exercise of the discretion may have on taxpayer perceptions, and the potential for impact on future taxpayer compliance.

That such is the case has been recognised by the current Commissioner in noting that:

> In the foreseeable future, tax administrators will need to be even more careful in balancing the need to be fair, efficient and effective. On the one hand, they must be vigilant for abusive tax practices so as to provide a level playing field, but at the same time empathetic to taxpayers facing real hardship.[56]

The final part of this paper considers the potential for an overly-restrictive exercise of the relief discretion to impact on taxpayer perceptions and resultant compliance behaviour.

[55] Above, note 23 at para 63.
[56] D'Ascenzo M, "Sustaining good practice tax administration," (2009) 38 *AT Rev* 76 at 85.

6. IMPACT ON COMPLIANCE

Given that the "… taxpayer experience of dealing with the tax system is at the heart of good tax administration,"[57] it may be expected that taxpayer perceptions of their treatment when applying for relief will potentially influence their future degree of compliance.

It would be expected that taxpayers approach the hardship relief application from a range of perspectives. While it must be conceded that for some taxpayers an application for hardship relief may be less than genuine and little more than a cynical exploitation of the system, for many the hardship relief application would be at least embarrassing, and at worst traumatic, depending on the circumstances which had driven them to the situation. In such circumstances, the approach taken in evaluating their application, and exercising the discretion in relation to relief, must have a real potential to colour the taxpayer's perception of the ATO, and influence future compliance behaviour.

The evidence in this area would suggest that, in dealings with authority, people who feel that they have been treated fairly by an organization would be more likely to trust the organisation and be inclined to accept its decisions and follow its directions.[58] When people believe that an authority is trying to be fair and deal fairly with them, they are more likely to trust the motives of the authority and develop a long-term commitment to accepting its decisions.[59]

In relation to treatment by revenue authorities, "… tax studies in general suggest that individuals do not react to authorities primarily or exclusively in terms of what they do or do not receive from these authorities. Instead they react on how they are treated."[60] In particular, the suggestion is that taxpayers are generally more compliant when they consider that they have been treated fairly and respectfully by a tax authority.[61]

In the current context of an application for hardship relief, genuine taxpayers would generally be expected to feel at a disadvantage in dealing with a large organization, at a time when they are in distressed financial circumstances. In such a situation it may be expected that the treatment by the revenue authority may potentially have a significant impact on the lasting perception of the ATO, and the future compliance of the taxpayer.

This is not to suggest that any and all applications for hardship relief should be granted. The suggestion is that the manner in which the discretion to grant relief is exercised has the potential to impact on the future compliance of the taxpayer. Given the wide scope of the discretion, the onus must be on the Commissioner to show not only a bona fide exercise of the discretion, but if the discretion is exercised against a taxpayer the manner of exercising the discretion should not be such as to see the taxpayer 'lost' to the tax system.

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[57] Ibid at 84.
[58] Lind EA and Tyler TR, *The Social Psychology of Procedural Justice*, 1988, Plenum Press, NY.
[59] Murphy K, "Procedural justice and tax compliance", *Australian Journal of Social Issues*, Vol 38, No 3, August 2003 at 381.
[60] Ibid at 383.
[61] Ibid.

7. APPLYING THE DISCRETION

With the discretion associated with hardship claims now vesting exclusively with the ATO, the question arises as to how the discretion has been exercised. In Issues Paper No 4 issued by the Inspector General of Tax, the Inspector General noted that "There is concern that some tax officials in the ATO do not recognise the rights of taxpayers to apply for hardship relief and will not assist in lodgement of an application. There is a perception in the private sector that hardship applications are mostly rejected."[62]

While this may have been the perception at the time of the Issues Paper, there is evidence that the percentage of individual applicants being granted release on the basis of serious hardship has increased. In the 2002-2003 financial year, of the 1600 applications received, 49% were granted full or partial release from taxation debts.[63] In 2003, responsibility for administering the hardship provision was transferred to the ATO. Of more recent times, in 2007-2008, the percentage of individuals granted full or partial release on the basis of serious hardship had risen to 80%, with the number in 2008-2009 being 78% of the 2334 applicants.[64]

This increase in both the number of applications, and more significantly in the percentage of applications being granted release in whole or part, would appear to lend credence to the Commissioner's stated aim that "Our approach to compliance has been to strike a balance between efficiency and fairness."[65]

8. HARDSHIP VERSUS HARD TIMES

The ATO is aware that voluntary compliance is a key feature of good tax administration and assists taxpayers to meet their obligations when they have encountered hard times which are out of their control. This is separate from the specific hardship legislation. Obvious examples of hard times are drought, flood, bushfire and other natural disasters. Media Releases are issued after one of these disasters occurs encouraging taxpayers to call an ATO emergency support line, offering advice and extending due dates for lodgment and payment of activity statements.

These media statements contain a standard checklist of the type of assistance offered: [66]

- fast tracking refunds
- giving people extra time to pay debts—without interest charges
- giving more time to meet BAS and other lodgment obligations—without penalties

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[62] Inspector-General of Taxation, Issues Paper No 4 ATO Law Enforcement and Governance, para 41, http://www.igt.gov.au /content/Issues_Papers/Issues_Paper_4.asp accessed 21/10/2010.
[63] Ibid at para 42.
[64] Commissioner of Taxation, Annual Report 2008-09 page 56.
[65] D'Ascenzo M, "Do you see what I see?" Speech to the 22nd Australasian Tax Teachers Association Conference, http://www.ato.gov.au/corporate/content.asp?doc=content/00228656.htm accessed 21/10/2010.
[66] More tax help for people affected by bushfires and floods, 24 Feb 2009 http://www.ato.gov.au/corporate/content.asp?doc=/content/00181433.htm

- helping reconstruct tax records where documents have been destroyed
- offering visits from field officers to help reconcile lost records, and
- helping them claim tax hardship concessions.

9. NON COMMERCIAL LOSSES

Division 35 of ITAA 1997 restricts losses from a non-commercial business activity from being offset against income from other sources unless the activity satisfies one of the commerciality tests[67] or the Commissioner exercises his discretion under s35-55 (1) not to apply the rule. Section 35-55(1) provides that the Commissioner may exercise his discretion not to apply the rule on the grounds it would be unreasonable to do so because (a) the business activity was or will be affected by special circumstances outside the control of the operators of the business activity, including drought, flood, bushfire or some other natural disaster. This may include earthquakes, pest plagues, hailstorms or diseases destroying livestock or crops. The Commissioner's approach is discussed in Taxation Ruling TR 2007/6 paragraphs 8 and 29(1)(a).This is a further example of the ATO taking taxpayers' individual circumstances into account even when they make not technically qualify for the hardship relief.

10. CONCLUDING REMARKS

Tax administration relies on voluntary compliance. Research has consistently demonstrated that the treatment of taxpayers by the revenue authority authority can assist in improving voluntary compliance. This would suggest that the exercise of the hardship discretion may have an influence on the future compliance of taxpayers who are in a position of having to seek release from taxation debts.

The specific hardship legislation, in addition to the use of the Commissioner's discretion in hard times and under Division 35 demonstrates that the ATO is committed to supporting taxpayers in their effort to meet their obligations under Australia's tax legislation.

[67] Sections 35-30, 35-35, 35-40, 35-45.ITAA 1997.