No to a desperado ATO

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LEGAL BRIEF

Powers enshrined in a new tax promoter law don't do anybody any favours

Desperado, why don't you come to your senses?
You been out ridin' fences for so long now
Oh, you're a hard one
I know that you got your reasons
These things that are pleasin' you
Can hurt you somehow

Who would have thought that in 1973 the Eagles were singing about the Australian Taxation Office (ATO) of 2005. It seems to me that the ATO's support for the new "Tax promoter: Let's get 'em" law just proves that they've been out ridin' fences *too* long now.

We moved to a new level of reform of the financial services industry with the introduction of this law, more formally known as the Tax Laws Amendment (2005 Measures No. 6) Bill 2005, which introduces the new tax promoter rules into the Taxation Administration Act 1953 — and you should be worried.

I know the ATO has its reasons, and that this new law is pleasin'. It allows them to get back at the promoters who caused the ATO some degree of humiliation before the Senate inquiry into the mass-marketed tax schemes of the 1990s. But don't be fooled by the apparent social intent behind the new laws. You should worry.

Not me, I'm a good person. I don't engage in that tax promotion stuff. Don't fool yourself, these rules are aimed at all who dabble in taxation matters, including financial planners. Recent announcements on section 251L make clear an adviser's rights to charge for non-representational tax advice; we moved one step forward only to be potentially marched 100 steps back by these new rules.

My main frustration lies in the fact that these tax promoter rules are unnecessary. The power already exists and has for years. Either governments have not perceived sufficient personal political kudos to urge their bureaucrats into action or jealous bureaucratic demarcations have disabled any possibility of cross-bureaucratic teams working to a single goal. Since 1998, the Australian Securities & Investments Commission (ASIC) has had the power to deal with misleading and deceptive conduct. Part two of the ASIC act is all about consumer protection in relation to financial services.

How will the Let's get 'em law change the attitude of the bureaucrats administering the law? If they did not use the powers they possessed, why give them more powers to ignore? The Let's get 'em law gives the Commissioner of Taxation the power to impose civil penalties, seek statutory injunctions and accept voluntary undertakings. ASIC has had these powers for years. And before ASIC it was (and still is) within the purview of the ACCC.

So where was the political will to pursue tax promoters when the

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power existed? Can't the ATO work with ASIC and the ACCC? Or is it below ASIC's and the ACCC's dignity to work with the ATO?

Before introducing another law, the Government needs to address what Professor Bob Baxt, former chairman of the Trade Practices Commission (now the ACCC), says is the failure of the regulators to enforce statutes they are responsible for. He counsels against the Federal Government tending to over-regulate, and doing so in knee-jerk fashion. Baxt was not talking about this new law, but he may as well have been.

Personally, I am fearful of the Commissioner of Taxation having such powers — he already has substantial powers, and he knows how to use them. The Let's get 'em law in the hands of the Commissioner is like asking a Sumo wrestler to dance Swan Lake. I am far more comfortable with ASIC exercising these powers; it has far more skill and experience in these administrative areas. Why not create a joint ATO-ASIC task force? In fact, why wasn't this done 10 years ago?

The fact is, the Commissioner of Taxation is not independent enough to administer this law fairly. It clothes the ATO with draconian powers to attack taxation arrangements that it does not like. The ATO is not always wrong with its views on current taxation strategies, but it is not always right either.

Let's look at the superannuation re-contribution strategy. It is reasonable to conclude that a client will have entered into or carried out the re-contribution strategy with the sole or dominant purpose of getting a benefit. If the Commissioner is of the view that the benefit is not available at law, then we have a tax exploitation scheme. Once this view is formed, any person who promotes the scheme by implementing it, advancing it or encouraging its growth or interest in it, and who receives (directly or indirectly) consideration in respect of

the scheme, where it is reasonable to conclude that the individual has had a substantial role in promoting the scheme, is a promoter.

What troubles me is that the "promoter" net captures financial planners. Often they will have a duty to implement, advance or encourage the growth or interest of the client in a particular arrangement. Soon they will do this under the fear of the ATO targeting them as a tax promoter.

It is no answer to refer to the note: "the condition … would not be satisfied if the implementation of the scheme for all participants were in accordance with binding advice from the ATO". Often the ATO lags behind industry; the superannuation re-contribution strategy has been around since 1983, but the ATO press release "allowing" it was issued only last August. And what about the current super flavour of the month, the pre-retirement-pension coupled with a prospective-salary-sacrifice-into-super? Is this available at law?

The ruling seems to affect the individual who has had a substantial role in promoting the scheme. Is this the planner who tells his clients about the arrangement? Is it the in-house techo for the licensee? Is it the head of sales and distribution?

In the same month as the commissioner gave the super re-contribution strategy the nod, United States President George W. Bush said: "Our enemies are innovative and resourceful, and so are we. They never stop thinking about new ways to harm our country and our people, and neither do we". The Let's get 'em law is a good example of this.

I am not alone in my views. In a recent speech, Anthony Mason, former chief justice of the High Court of Australia, said of the tax promoter law: "My concern is primarily with the position of tax and legal practitioners and, to a lesser extent, with financiers and financial planners."

Too many defend the draconian law by falling back on the softening words of the explanatory memorandum (EM). But Mason asks: "Why then do they [the softening words] appear in the EM instead of the statute, and what purpose are they supposed to be serving? In what way will they influence the interpretation of the statutory provisions?" Mason recognises that a court has very little or no power to consult EMs, and he cites the 2004 House of Lords decision in *Wilson v First County Trust (No. 2)* as his authority.

Is the drafter of the Let's get 'em law a scorned man out for revenge? Is there a secret deal to deliberately insert wide powers into the legislation, but to include softening politically correct and acceptable language in the EM?

If we have to have this law, then let's at least make the bureaucrats responsible for their failings — if, as a result of being too heavy handed, the business career of a person is destroyed, the bureaucrats must bear responsibility. But the new law specifically bans such an idea.

The court cannot require the Commonwealth to give any undertakings as to damages as a condition of granting an injunction. The EM explains that this is because the commissioner is acting in the public interest. In applying for an injunction, the commissioner's intent is to protect the interests of taxpayers, the public revenue and the integrity of the tax system.

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My experience is that the vast majority of the employees of the ATO undertake their roles with care and responsibility. However, like many large organisations, there can be renegades whose actions may go sufficiently unnoticed to allow them to destroy the careers of others.

In the early 1990s it took a Parliamentary committee to determine that the Australian Customs Service "was at best incompetent, or at worst conspiratorial and deceitful" in investigating the affairs of Midford Paramount Pty Ltd. An ex gratia payment totalling $27 million was paid to Midford and others, but it took a Parliamentary committee to do this many years after the fact.

If we must have the Let's get 'em law, it must require the Commonwealth to be responsible. It is otherwise not fair. If you or I seek an injunction against another, the courts will ask us to secure the other person against the fact that our injunction actions were wrong. The Federal Government must bear the same responsibility.

I don't understand why the ATO would want these powers. They are much better off, and we are as well, working with the other government bodies who have the skills. Giving Let's get 'em powers to the ATO will expose it to a level of criticism that it does not need: if one of its people goes too far, often because they are too close to the issues, the reputation risk to the ATO is severe.

We do not need the new law: sufficient powers already exist in other regulators who are already experienced. Maybe some of those laws need some tweaking, but ASIC and the ACCC should be tasked to do their job, perhaps in a collaborative manner with the ATO. We would then have the best of all skills. The ATO should open its gate and let ASIC and the ACCC into its world. I know it can do this: I've seen it do it with other government organisations.

I leave the last word to the Eagles:

Desperado, why don't you come to your senses?
Come down from your fences, open the gate
It may be rainin', but there's a rainbow above you. Asset