



Law Council
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Business Law Section

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Inspector-General of Taxation & Taxation Ombudsman (IGTO) - Investigations into Commissioner of Taxation's General Power of Administration (GPA) and Remedial Power (CRP)

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (the **Committee**) is pleased to take the opportunity to make a public submission in respect of both the Investigations into the GPA and CRP announced on 9 December 2021.

The Commissioner's Position on the GPA and CRP

2. As noted in the Terms of Reference, the GPA is a broad enabling power. The power to undertake many aspects of tax administration is derived from the GPA, perhaps in combination with s 15 of the *Public Governance, Performance and Accountability Act* (2013) (Cth). Various examples recognised by the Courts include:
 - a. all things that are reasonably necessary to recover tax due to the Commonwealth and payable to the Commissioner in reliance on the GPA;¹
 - b. allocation of ATO audit resources;²
 - c. establishment of a program to require substantiation by a category of tax agents defined by risk criteria of work-related expenses claimed as deductions.³
3. Confirming the breadth of the GPA as an enabling provision, the Commissioner of Taxation states in PSLA 2009/4 [4] that:

The courts have recognised that the general administration provisions reinforce the principle that the Commissioner is authorised to do whatever may be fairly regarded as incidental to, or consequential upon, the things that the Commissioner is authorised to do by the taxation laws.
4. A well-known example of GPA in practice is where the duty to collect revenue and the duty of good management may be in conflict so the GPA is relied upon to permit

¹ *Hutchins v DCT* (1996) 136 ALR 153; 32 ATR 620; 41 ALD 193; 65 FCR 269; 96 ATC 4372.

² *Industrial Equity Ltd v DCT* (1990) 65 ALJR 1.

³ *Knuckey v FCT* 98 ATC 4903.

the Commissioner to form a judgement in appropriate cases that the tax liabilities should be settled or compromised. ⁴

5. Many more examples could be added, reflecting the breadth and depth of the ATO as an administrator of tax laws, which do not find their source of power in specific statutory provisions.
6. Nevertheless, the Commissioner is clear that the GPA is a narrow power from the perspective of providing relief for taxpayers. As the Commissioner states in a passage immediately following that just quoted in PSLA 2009/4[4]:

The GPA are narrow in scope and governed by the operation of administrative law principles. A proper exercise of the powers is confined to dealing with management and administrative decisions, such as the allocation of compliance resources more broadly recognised as practical compliance approaches.

The Commissioner's GPA cannot be used to remedy defects or omissions in the law. It is the Commissioner's remedial power which provides discretion to modify the operation of a tax law to ensure it can be administered to achieve its intended purpose or object.

7. The Commissioner's view that the GPA is subject to the law is clearly reinforced by the decision of the Full Federal Court in *Macquarie Bank Ltd v Commissioner of Taxation* [2013] FCAFC 119. The Court stated at [11]:

The power of the general administration of tax legislation given to the Commissioner, by provisions like s 8 of the 1936 Act, s 356-5 of schedule 1 of the 1953 Act and s 44 of the Financial Management and Accountability Act 1997 (Cth) ('1997 Act'), does not permit the Commissioner to dispense with the operation of the law. The power of general administration in such provisions is not a discretion to modify, or which modifies, the liability to tax imposed by the statute: the power in such provision for general administration (coupled with whatever discretion they may contain) affects the administration of the Acts and not the Commissioner's duty to act according to law and to assess taxpayers to the correct amount of liability imposed by the legislation.

8. The Committee adds that it is also well established that there is no estoppel against the operation of the law as a result of a statement made by the Commissioner: *Federal Commissioner of Taxation v Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105.
9. The Commissioner's position is clear that solutions based on law interpretation, taking a purposive approach to the construction of statutes, should be exhausted before consideration is given to resort to the GPA. ⁵ The Commissioner states:

In the course of administering tax laws on behalf of the Commissioner, our primary focus should be on interpreting the law in a manner which supports

⁴ PSLA 2009/4 Appendix B[4]; *Grofam Pty Ltd & Ors v The Commissioner of Taxation of the Commonwealth of Australia* [1997] FCA 660; *IRC v National Federation of Self-Employed & Small Businesses Ltd* [1982] AC 617.

⁵ PSLA 2009/4 [3].

that law's purpose. This means that where the law is open to more than one interpretation the alternative interpretations of the law should be explored before considering reliance on the GPA.

In the rare circumstance where the operation of the law is unclear or leads to unforeseen or unexpected consequences, it may be appropriate to consider whether the issue can be resolved using the Commissioner's GPA.

10. What then, once law interpretation solutions have been exhausted, may the Commissioner do to relieve the position of taxpayers aside from exercise of the CRP, which is itself a narrow power that may only be exercised in defined circumstances?

11. The Commissioner points to "practical compliance approaches", which are explained as follows:

Consistent with the ATO's intent to concentrate our efforts on matters that pose the highest risk to efficient and effective administration of the tax and superannuation systems, we also understand that most people want to do the right thing. Given this, we may choose to not allocate compliance resources or take other compliance action to examine certain interactions with the tax and superannuation systems so we can better utilise our limited resources for an optimal outcome.⁶

12. Two examples are given in PSLA 2009/4:

- a. decisions not to undertake compliance action affecting a class of taxpayers or industry group for prior years or periods;
- b. third party errors affecting income tax assessments.

Observations

13. The Committee agrees generally with the Commissioner's account of the legal position in PSLA 2009/4.

14. The Committee makes the following observations drawn on member experience.

Purposive Legal Interpretation

15. As noted earlier, the Commissioner's policy is to exhaust the possibilities of a purposive legal interpretation before consideration is given to resort to the GPA.

16. The Committee understands that this policy requires that statutory interpretation is to be undertaken having regard to principles as stated by the High Court, noting the legislative direction in s 15AA of the *Acts Interpretation Act 1901* (Cth) that

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

⁶ PSLA 2009/4 [6].

17. The Committee agrees with the importance placed by the Commissioner on seeking to find relief for taxpayers from harsh or unintended legislative consequences in purposive legal interpretation.
18. However, application of this policy is necessarily difficult in particular cases because of the need to discover and evaluate evidence of legislative purpose, based on specific legislative text, context and, where relevant, secondary materials as permitted by s 15AB of the *Acts Interpretation Act 1901* (Cth).
19. A variety of purposes will be evident in legislation of the length and complexity of Australian taxation legislation. Depending upon the provision, the legislature may intend, for example, to impose tax, allocate taxing rights, provide for duties or discretions, protect the integrity of particular measures or the system as a whole, establish procedures, benefit taxpayers or provide economic incentives.
20. The Committee considers that the purpose is never singular across taxation legislation such as to protect the revenue or that all other purposes are subject to an over-riding obligation to protect the revenue.
21. The complexity of discovering the true purpose can be indicated by some common examples.
22. *First*, in the general formula for income tax legislation, whilst tax is imposed simplistically on assessable income, it would be wrong to say that the purpose of the legislation is simply to impose tax without also taking into account the allowance of deductions necessarily incurred in the gaining or production of that income. The purpose of the legislation to tax assessable income is not to the exclusion of promotion of the activity which generates it. It would therefore not be a correct purposive approach to the task of interpreting the law to maximise what is taxable income and minimise what is an allowable deduction.
23. The majority of the High Court also observed in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27; 83 ALJR 1152; 260 ALR 1; (2009) ATC 20–134; 73 ATR 256 in paragraph 51:

Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in *Carr v Western Australia*⁷ when he said:

"[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such

⁷ [74] (2007) 232 CLR 138 at 143 [6].

principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling."

24. *Second*, in integrity provisions, such as Part IVA or section 100A of the *Income Tax Assessment Act 1936* (Cth) whilst the ultimate goal of the provisions is integrity of a measure or of the system, the legislature also intended that in some cases the integrity rule does not apply. A correct purposive approach to the task of law interpretation gives effect to both purposes.
25. Particular care also needs to be taken to ascertain whether the provision imposes a duty or a discretion on the Commissioner, which may be a question where legislation provides for a procedure. The answer may not always be resolved simply by language such as "may" to indicate a discretion because there are cases in which the Courts find that "may" means "must" such as in authorities finding that the Commissioner has no residual discretion not to make a Part IVA determination when otherwise in possession of all the facts that make out the conditions for making a determination. As the Commissioner notes in PSLA 2005/24 [47]:

The word 'may' in subsection 177F(1) refers to the exercise of a power which arises when it is found that there is a tax benefit obtained in connection with a scheme to which section 177D applies. There is no over-arching or final discretion independent of the exercise of this power: Cumins v. Federal Commissioner of Taxation (2007) 66 ATR 57; 2007 ATC 4303; [2007] FCAFC 21 at [41]. That case demonstrates that, if the objective criteria for the application of Part IVA are present, the Commissioner's decision to go ahead and cancel the tax benefit under section 177F is not open to challenge on the basis that the Commissioner ought not to have exercised that power because, for example, he has in doing so failed to take into account some further matter that is said to be relevant. See also the remarks of Hill J (Carr and Hely JJ agreeing) in Federal Commissioner of Taxation v. Sleight (2004) 136 FCR 211; 2004 ATC 4477; (2004) 55 ATR 555; [2004] FCAFC 94 at [103] to [110] and [114].

26. Resolution of the correct legal interpretation is available in the Courts but this necessarily takes time and is subject to appeals, potentially to the High Court.
27. Applying the Commissioner's policy to pursue a purposive legal interpretation before considering the general power of administration is nothing if not challenging. Awaiting judicial clarification, whilst giving certainty, will usually take a period of time that will significantly delay the giving of relief to taxpayers. Clearly there is the option of seeking the exercise of the Commissioner's remedial power but current experience is that its exercise is infrequent. In the end, however, the GPA does not provide relief for taxpayers from the operation of the law.
28. The Committee recommends that the IGTO inquire into the administrative measures behind the Commissioner's policy to exhaust the possibilities of a purposive legal interpretation to provide relief for taxpayers where there will otherwise be harsh or unintended consequences. These fall into a number of areas.
- a. Whether there is a sufficiently clear ATO statement as to what is purposive legal interpretation, whether it is widely disseminated within and outside the ATO and whether it is followed faithfully in the ATO as part of its organisational culture. This statement needs to be more than a recitation of applicable judicial statements. It needs to set out clear principles as to what it means to make a purposive interpretation of the law and analytically how

those principles are to be applied. Detail and nuance are required in the principles as necessary to address the wide variety of difference in legislative context and legislative complexity.

- b. Training programs for ATO officers engaged in law interpretation to ensure that the Commissioner's policy in respect of purposive law interpretation is given due deference. This should extend to testing that the programs inculcate a nuanced and searching approach to the discovery of legislative purpose as discussed earlier rather than inculcation of a singular purpose of revenue protection.
- c. ATO input into legislation design and production of legislative guidance seek to ensure that legislative purpose is clearly articulated. This should extend to achieving clarification as to what is a duty on the Commissioner as compared to what is a discretion. This is an area that lends itself to standardisation by way of statements in, for example, Explanatory Memoranda and Law Companion Rulings. Further the ATO is well placed to identify legislative opportunities to enlarge its discretions especially in respect of procedural matters so that it is empowered to give taxpayers relief. A simple example is in respect of conferring a clear power for the Commissioner to give an extension of time. Presently these powers are sometimes conferred, sometimes not. It is hard to ascertain what is the consistent and rational policy that explains the position in either case. The Committee submits that the ATO is well placed to identify opportunities for procedural discretions to be included in the law based on a standard policy that it should have a discretion to provide taxpayers relief, such as an extension of time, in appropriate cases.
- d. The ATO needs proper governance of law interpretation to ensure that the correct approach to purposive law interpretation is taken uniformly across the agency. The Committee acknowledges the valuable role played by senior panels such as the Public Rulings Panel, sometimes with expert external parties as members. The IGTO should also consider whether the ATO applies an appropriate level of rigour to ATO guidance products like tax determinations, private rulings and guidance not in the form of rulings such as in fact sheets and online.
- e. The ATO Tax Counsel Network, the ATO's network of retired judges and the independent Bar, are already powerful agents that should be able to support the governance framework for purposive law interpretation and bring to bear skills that can be widely leveraged in aid of the Commissioner's policy. The question that we invite the IGTO to examine is whether those agents are effective in those roles and whether their influence could be extended more widely in aid of the Commissioner's policy.
- f. Transparency of the application of the Commissioner's policy where there are competing views of the purposive interpretation of the law and the resolution of that competition. The Committee acknowledges that in the end the Commissioner must form a view of the law in a timely way, but the question is whether that process effectively and transparently resolves competing views of the purposive interpretation. The Committee acknowledges current measures such as including alternative views in public rulings and recording alternative views in compendiums as part of consultation processes. The Committee questions whether that type of approach can go further, calling in sooner and more widely the ATO Tax Counsel Network to assist with the

resolution of competing views. The Committee recognises that sometimes consultation occurs on a confidential basis but suggests that views provided confidentially may be able to be noted without attribution so as to guard confidentiality and ensure a degree of transparency.

What else can the Commissioner Do? Raising Awareness

29. It would be useful to raise awareness of common situations, such as in audits, assessments, recovery and collection, in which the Commissioner does or does not have a power or duty so that taxpayers, the tax profession and policy makers are properly informed as to whether the Commissioner can provide taxpayers relief.
30. Presently this lack of awareness derives from several problems:
 - a. The legal position is not seen as core to day to day tax practice as compared to substantive income tax law;
 - b. There are difficult questions involved, some of which require judicial consideration eg when does the Commissioner have a duty as against a discretion or scope for use of the GPA or CRP.
31. As long as these powers and duties are not widely understood, false expectations will continue to have currency as to what the Commissioner can do administratively and there will be lost opportunities because of a wrong belief that the Commissioner cannot assist.
32. Awareness could be raised by an ATO guidance product and tax profession education. Further there could be development of the Taxpayers Charter.

Is there more that can be done using the GPA?

33. The Committee considers that it is open to the Commissioner to apply the GPA more widely in respect of genuine taxpayer mistakes in the completion of tax returns, making elections, giving notices and completing approved forms generally.
34. In that regard we observe that the second example the Commissioner gives, noted above, of a permitted use of a GPA is in respect of third-party mistakes. The Committee considers that the same logic could apply to genuine taxpayer mistakes.
35. Clearly a taxpayer must be able to establish that the mistake is genuine so that the integrity of the tax system is not exposed to abuse.
36. The Committee considers that the Commissioner could develop clearer guidelines for what is a “genuine mistake” and other practical compliance approaches to provide taxpayers relief from those mistakes.
37. The Committee recognises that there will be limitations such as amendment periods of review but does not see a need for legislation to empower the Commissioner, in the absence of countervailing duties or legal obligations, to allow a taxpayer to correct a genuine mistake.
38. That said the GPA is not a relieving provision for the operation of the law nor to restrain the Commissioner’s duties to apply the law, as noted in *Macquarie*. If this is seen as a problem, then the solution is legislative.

39. A comparison between the Australian position and different legislative regimes with respect to the general power of administration including New Zealand is undertaken in the enclosed paper by DW Marks QC “*Not My Money To Give Away*” The Tax Specialist, August 2018 [18-29].

Equity

40. The Committee is concerned about unequal treatment of taxpayers in the same position that arises when the Commissioner’s view of the law changes. The situation of concern arises where the Commissioner decides, in reliance on the GPA, to not commit compliance resources retrospectively. If the Commissioner’s new view of the law is stricter than previously, those who acted on the old view of the law receive more favourable treatment than taxpayers subject to the new view of the law. If the Commissioner’s new view of the law is more lenient than previously, those who acted on the old view of the law receive a stricter treatment than taxpayers subject to the new view of the law.
41. The Committee recognises that the achievement of equity is not a simple matter. This is a topic warranting further consultation by the ATO before it seeks to take “practical compliance approaches” in particular cases in the event the ATO view of the law changes.
42. The Committee does see a difference between where the cause of the interpretation change is a supervening event such as legislative change or a Court decision as against the ATO otherwise changing its view for no apparent reason. The former is of less concern because the ATO is there responding to those events as distinct from the latter where the legal interpretation process is entirely within its control.
43. It would be helpful if the ATO consulted on and published guidelines to deal with the issues under discussion concerning the practical compliance approaches where there is a change of ATO view of the law.

Reviewability

44. Decisions by the Commissioner in reliance upon the GPA appear not to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) because they are not counted as decisions under an enactment.⁸ As a consequence those decisions are practically unreviewable unless a case based on manifest bad faith could be established in the course of a proceeding brought under s 39B of the *Judiciary Act 1903* (Cth). It is the lack of judicial review that is of concern to the Committee.
45. Nevertheless, the Commissioner requires that the GPA be exercised in accordance with administrative law principles.⁹ Whilst this is a step in the right direction the absence of review remains a concern.
46. The Committee considers that in some cases decisions made in exercise of the GPA should be reviewable. Generally, we consider that review should be available where all the other conditions for obtaining review under the ADJR Act exist but for there not being a decision under an enactment due to *Hutchins*. An area ripe for attention is in the collection and recovery process.

⁸ See *Hutchins*, op cit.

⁹ PSLA 2009/4 [4], Appendix B [10-11].

47. To overcome the problem in *Hutchins*, legislation would be necessary eg a legislative regime for the Commissioner's decision whether to enter into a 50/50 arrangement.

CRP

48. The CRP has the potential to provide relief for taxpayers in circumstances where other powers, including the GPA, are not up to the task. Unfortunately, the CRP has only been exercised rarely. The Committee believes this is mainly because of deficiencies in the drafting and interpretation of the CRP. These deficiencies are outlined in the submission by the Corporate Taxpayers Association, which the Committee has had the benefit of seeing. The Committee endorses that submission.
49. The experience of members of the Committee is that the process for applying for the exercise of the CRP is insufficiently understood by taxpayers and the tax profession. This lack of knowledge could be remedied by better publicising the existence of the CRP and the process for applying for its application.

Conclusion and further contact

50. The Committee would be pleased to discuss any aspect of this submission.
51. Please contact the Deputy Chair of the Committee, Michael Bersten, at BerstenBarrister@bigpond.com, if you would like to do so.

Yours faithfully



Philip Argy
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