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Inspector-General of Taxation
Taxation Ombudsman

When is the Commissioner of Taxation required to give a taxpayer reasons? ... Understanding a Taxpayer's Rights

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The following article examines the legal and administrative requirements for the Commissioner of Taxation (*the Commissioner*) to provide reasons for administrative decisions and actions taken by ATO officers.

Setting clear expectations and providing a framework for determining when the Commissioner should or must provide a taxpayer with reasons for a decision, and clarity on what those reasons should contain, are touchstones of good tax administration.

The Commissioner may choose to give reasons, even in the absence of a statutory or common law obligation to do so. This is confirmed in both the *Taxpayers' Charter*¹ and Practice Statement Law Administration PSLA 2013/1 - *Commissioner's guidance on how to prepare a statement of facts and reasons under s13 of the ADJR Act (PS LA 2013/1)*.²

Taxpayer rights to reasons supports voluntary compliance

In its Practice Note on Principles of Good Tax Administration, the OECD encourages revenue authorities to apply tax laws in a "fair, reliable and transparent manner".³ The OECD also notes that:

The promotion of voluntary compliance should be a primary concern of revenue authorities. The ways by which revenue authorities interact with taxpayers and employees impact on the public perception of the tax system and the degree of voluntary compliance. Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.

These principles are also reflected in the IGTO's summary of features of good tax administration, many of which support the need for clear communication of reasons for decisions and actions, including:

- providing accountability for decisions;
- improving certainty and consistency;
- ensuring correct administration; and
- providing administration that is professional, respectful and collaborative.⁴

A Taxpayer's Perspective

From the taxpayer's perspective, a statement of reasons provides assurance that the taxpayer has been dealt with fairly and transparently.⁵ Also, a statement of reasons is often critical to the taxpayer making an informed decision about whether to accept a decision or take action to dispute it. Apart from highlighting any facts or issues in dispute, reasons may be necessary for a taxpayer to understand the precise nature of the decision that was made or action that was taken and what review rights are available.

Put another way, reasons are necessary in order to achieve administrative and procedural fairness and for the efficient handling of disputes within the taxation administration system.

The Commissioner's Perspective

From the Commissioner's perspective, a requirement to give reasons is a safeguard against decisions being made improperly or without due consideration. It requires the ATO decision maker to meaningfully consider and articulate:

- what is the relevant law;
- what are the relevant material facts (with reference to the information and documents in the ATO's possession);
- what considerations have been taken into account; and
- what ATO guidance should be followed to ensure consistency of outcomes?

These matters relate to themes that are being explored as part of the IGTO's current (as at May 2021) investigation - 'An investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal'.⁶ This short summary and overview is intended to provide an overview of this somewhat complex area of taxation administration.

Overview - legislative requirements for giving reasons

In light of the importance and utility to the tax system of taxpayers understanding why a decision has been made in relation to their obligations to pay taxation, many taxpayers and practitioners might be surprised to learn that there is no general duty at common law for the Commissioner to give reasons for an administrative decision.⁷ Any obligations to give reasons are sourced in legislation, including the following Acts:

1. *Taxation Administration Act 1953 (Cth) (TA Act)*;
2. *Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act)*; and
3. *Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)*.

The statutory requirements to provide reasons tend to be conditional on the existence of particular circumstances or the satisfaction of certain requirements. Obligations to give reasons under the TA Act are an exception to this rule, as they arise automatically once a specified decision is made. However, the range of decisions covered by the TA Act is very limited and does not extend to decisions regarding the imposition of substantive tax.

In contrast, requirements to give reasons under the AAT Act and the ADJR Act apply to a more extensive range of decisions and extend to the imposition of substantive taxes, but they are not automatically triggered by the making of the decision. In some cases, they only arise if reasons are requested by the taxpayer, and then, only if requested within the specified time frame and in writing. In other cases, somewhat curiously, they only arise if an application to the Tribunal for review of the decision has been made – that is, a taxpayer could be put in the position of having to decide whether or not to contest the decision without necessarily knowing the basis on which the decision was made – or, as might be the case for practical reasons, of having to incur the costs of initiating the dispute for the purpose of obtaining and understanding the reasons.⁸ This design may lead to a number of disputes commencing but not proceeding once the reasons for the decision become clear, which

potentially places unnecessary strain on the resources of taxpayers, the Commissioner and the Tribunal.

The Commissioner may adopt an administrative practice of providing reasons for his decisions, as a matter of good tax administration, even where there is no express statutory obligation to do so. The *Taxpayers' Charter* contemplates that the Commissioner will be “open, transparent and accountable” in his dealings with taxpayers and that he will explain the decisions the ATO makes about taxpayers.⁹ This principle is related to themes explored in our current (as at May 2021) review, [‘An investigation into the effectiveness of ATO communications of taxpayers’ rights to complain, review and appeal’](#).¹⁰ The IGTO review investigation will explore the effectiveness of communications by the ATO of a taxpayer’s right to receive reasons for an administrative decision or action. It is instructive and useful to consider this against the backdrop of the existing legislative requirement to give reasons, if only to set a baseline for community expectations.

An overview of the rules for some categories of decisions and actions is set out below in Table 1 by way of introduction:

Table 1 – Overview of Statutory requirements to provide reasons for administrative decisions

Type of Decision	Is the Commissioner required to provide reasons under various Tax statutes?			
	<i>Taxation Administration Act 1953</i>	<i>Administrative Appeals Tribunal Act 1975 – s. 28 – ie before a review by the Tribunal is commenced?</i>	<i>Administrative Appeals Tribunal Act 1975 – s. 37 – ie after a review by the Tribunal is commenced?</i>	<i>Administrative Decisions (Judicial Review) Act 1977 – s.13</i>
<p>Reviewable objection decision – see endnote 12</p> <p><i>Examples include:</i></p> <p><i>A decision to deny or allow an objection to an assessment.</i></p> <p><i>A decision to retain a refund while the Commissioner verifies information.</i></p>	<p>There is no general rule.</p> <p>The TA Act prescribes that certain decisions require reasons to be provided. This does not depend on whether the decision is a reviewable objection decision.</p> <p>There is some overlap; for example, a decision about the imposition of administrative penalties is both a reviewable objection decision and a decision in respect of which reasons must be given under the TA Act.</p> <p>See section 1 below.</p>	<p>No</p> <p>This outcome arises because of the modification of s. 28 by s.14ZZB of the <i>Taxation Administration Act 1953</i>.</p> <p>See section 2 below.</p>	<p>Yes</p> <p>Section 37 is modified to this effect by 14ZZF of the <i>Taxation Administration Act 1953</i>.</p> <p>See section 2 below.</p>	<p>There is no general rule.</p> <p>The ADJR Act generally allows a request for reasons to be made for decisions of an administrative character which are eligible for judicial review under s.5 of the ADJR Act.</p> <p>The requirement to give reasons does not depend on whether the decision is a reviewable objection decision. Many types of reviewable objection decisions fall within the various exclusions (e.g. decisions about the calculation or assessment of tax are specifically excluded under Schedule 1).</p> <p>A request must be made in writing and other requirements must be satisfied.</p> <p>See section 3 below.</p>
<p>Decision reviewable directly by the Tribunal (no reviewable objection)</p>	<p>There is no general rule.</p> <p>The Act prescribes which decisions require reasons</p>	<p>Yes. A request must be made and other</p>	<p>No general requirement, but under s. 37(1AB) the Tribunal can require a</p>	<p>No, as there is a specific exclusion if s. 28 applies.</p>

Type of Decision	Is the Commissioner required to provide reasons under various Tax statutes?			
	<i>Taxation Administration Act 1953</i>	<i>Administrative Appeals Tribunal Act 1975 – s. 28 – ie before a review by the Tribunal is commenced?</i>	<i>Administrative Appeals Tribunal Act 1975 – s. 37 – ie after a review by the Tribunal is commenced?</i>	<i>Administrative Decisions (Judicial Review) Act 1977 – s.13</i>
<p>decision required) – see endnote 12</p> <p><i>Examples include:</i></p> <p><i>A decision to refuse to vary or revoke a departure prohibition order</i></p>	<p>to be provided and this does not depend on whether the decision is directly reviewable by the Tribunal.</p>	<p>requirements must be satisfied.</p> <p>See section 2 below.</p>	<p>statement of reasons to be filed.</p>	
<p>Decisions not reviewable by the Tribunal</p> <p><i>Examples include:</i></p> <p><i>A refusal to grant early release of superannuation</i></p> <p><i>Refusal to remit general interest charge</i></p>	<p>There is no general rule. The Act prescribes which decisions require reasons to be provided and this does not depend on whether the decision is reviewable by the Tribunal.</p> <p>A decision to decline to issue a private ruling is an example of a decision that is not reviewable by the Tribunal, but reasons are nevertheless required to be given under the TA Act.</p>	<p>No</p>	<p>No</p>	<p>There is no general rule, but decisions that are not reviewable by the Tribunal are less likely to be excluded as the s. 28 exclusion will not apply.</p> <p>The ADJR Act generally allows a request for reasons to be made for decisions of an administrative character which are eligible for judicial review under s.5 of the ADJR Act.</p> <p>A request must be made in writing and other requirements must be satisfied.</p> <p>See section 3 below.</p>

Detailed Analysis - legislative requirements for giving reasons

1 *Taxation Administration Act 1953*

The Commissioner is required to give reasons under the TA Act in the following circumstances:

TAA 1953, Schedule 1	
A decision not to remit a shortfall interest charge in certain circumstances	Section 280-165
A liability to pay an administrative penalty, including the reasons why the entity is liable to pay the penalty	Section 298-10
A decision not to remit an administrative penalty; or to remit only part of the penalty	Section 298-20
A decision declining to make a private ruling	Section 359-35
A refusal of an Education Direction variation	Section 384-35
A decision to suspend a trustee of an ancillary fund, change the time the suspension of a trustee of an ancillary fund ends or remove a trustee of an ancillary fund, the Commissioner must give to the trustee a written notice: <ul style="list-style-type: none"> (a) setting out the decision; and (b) giving reasons for the decision; and (c) where appropriate, setting out the time the suspension ends. 	Section 426-125

As noted above, these provisions impose an automatic requirement for the Commissioner to give reasons when certain decisions are made – that is, a request for reasons by the taxpayer is not required. The decisions are typically based on the conduct of a taxpayer or a related individual or the refusal to exercise a discretion.

None of the specified circumstances relate to a decision made by the Commissioner in relation to the imposition of a substantive tax liability.

2 *Administrative Appeals Tribunal Act 1975*

Sections 28 and 37 of the AAT Act impose a requirement for the Commissioner to provide reasons for a decision in certain circumstances. Section 28 relates to the period prior to the initiation of proceedings in the Tribunal (i.e. proceedings need not be commenced in order for s. 28 to apply) and s. 37 applies after the commencement of proceedings (i.e. s.37 applies only if, and after, proceedings are commenced).

An explanation of when these sections give rise to a requirement to give reasons is set out below. It is important to note at the outset that taxation decisions can be subject to merits review in the AAT in two ways:

1. **Reviewable objection decisions** - Where a person who is dissatisfied with the tax decision lodges an objection against that decision. The ATO, after reviewing that objection, provides an objection decision in the manner set out in Part IVC of the TA Act 1953. The Tribunal may only review a decision to allow, wholly or in part, or to disallow a taxation objection under Part IVC of the Taxation Administration Act 1953.
2. **Other decisions** - Tax decisions that can be lodged directly with the Tribunal.

The Tribunal helpfully publishes an AAT Reviewable Decisions List (last updated on 31 May 2019) which sets out the Acts and legislative instruments which state certain decisions may be reviewed by the AAT and helpfully, for present purposes, specifies whether the application for review may be made directly to the AAT or whether the AAT only has jurisdiction to review a decision following the making of an objection and objection decision.

Section 28

Section 28(1) of the AAT Act requires a statement of reasons to be given to a taxpayer on request, even prior to, or in the absence of, the commencement of proceedings in the Tribunal, as follows:

Request for statement of reasons

*(1) Subject to subsection (1AAA), if a person makes a decision in respect of which an application may be made to the Tribunal for a review, **any person** (in this section referred to as the applicant) **who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision, request that person to give to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and give to the applicant, such a statement.***

Whilst s. 28 is far reaching in terms of creating an obligation to provide reasons for administrative decisions that are reviewable by the Tribunal (regardless of whether a review has been commenced), it has limited application in the context of tax decisions, due to the modification of the section by s.14ZZB of the TA Act. Section 14ZZB states:

14ZZB Sections 27, 28, 41 and 44A of the AAT Act not to apply to certain decisions

(1) ...

*(2) Sections 28 and 44A of the AAT Act **do not apply in relation to a reviewable objection decision.***

As a consequence of the modification in s. 14ZZB of the TA Act, s. 28 will only have the effect of requiring the Commissioner to provide reasons for a tax decision where the decision is reviewable by the Tribunal and is not a 'reviewable objection decision'.¹¹

Decisions which are reviewable objection decisions – that is, where the taxpayer must first raise a formal objection under Part IVC of the TAA 1953

Decisions to which Part IVC of the TAA 1953 applies, pursuant to s 14ZZ(1)(a)(i) of the Act include a decision to:

Decision to:	Reference
retain a refund	s. 8AAZLGA(1)
to amend an assessment of an assessable amount	s 155-35
issue an assessment of an outstanding tax-related liability in relation to a deceased person's estate	s.260-140
determine the total amount of outstanding tax-related liabilities in relation to an un-administered estate	s.260-145

This means that the taxpayer must first lodge an objection with the ATO before the decision can be reviewed by the Tribunal. As the taxpayer is limited to the grounds stated in their objection decision¹² in any later appeal (with the Tribunal or Federal Court), the objection is advisedly fulsome in its content. In many cases, the ATO is under no obligation to provide reasons to enable or assist with the preparation of this objection notice.

It is also worthwhile noting that, while not strictly a decision to which Part IVC would apply, a recent budget measure has been announced to extend the AAT's powers to 'pause or modify ATO debt recovery action in relation to disputed debts that are being reviewed by the Small Business Taxation Division (SBTD)'.¹³ The scope of these new powers will ultimately rest in the details of the relevant legislative changes.

Decisions which are not reviewable objection decisions

There are a number of decisions that fall within this category; i.e. decisions that can be reviewed directly by the Tribunal, in the absence of a reviewable objection decision, and are therefore subject to s. 28.¹⁴ Examples include a decision to:

- i. refuse to vary or revoke a departure prohibition order under s. 14T of the TA Act;
- ii. issue, or refuse to issue, a certificate authorising a person to depart from Australia for a foreign country on or before the seventh day after a day specified in the certificate under s. 14U of the TA Act; and
- iii. refuse to deal with an objection as if it had been lodged within the time limit under s.14ZX(1).

A request for reasons can be made under s. 28 regardless of whether an application for review has been made to the Tribunal. Consequently, a request for reasons can be made by taxpayers who do not wish to apply to the Tribunal for review, or who would seek to understand the reasons for the Commissioner's decision before deciding whether an application for review is appropriate.

Section 28 can also be of assistance to taxpayers who wish to appeal to the Federal Court rather than make an application to the Tribunal, as there is no equivalent provision in the Federal Court rules.

Time limits

There is no time limit on when a request must be made under s. 28, but the decision maker can refuse to provide reasons under s. 28(1A) if, in the case of a written decision, reasons were requested more than 28 days after the written decision was given to the applicant, or, in any other case, the request was not made within a reasonable time. The Tribunal can make a declaration, under s. 28(1B), that the request was made within a reasonable time on application by the person making the request.

Exclusions

There is an exclusion to the requirement to furnish reasons if a document has already been given to the person that sets out the reasons for decision (s. 28(4)).

There is an additional exclusion where the Attorney-General has given a certificate stating that disclosure of the matters contained in such a statement would be contrary to the public interest (s.28(2)).

Section 37

Subsection 37(1) of the AAT Act requires reasons for a decision to be provided to the Commissioner and the taxpayer following the commencement of Tribunal proceedings, as follows:

(1) Subject to this section, a person who has made a decision that is the subject of an application for review (other than second review) by the Tribunal must, within 28 days after receiving notice of the application (or within such further period as the Tribunal allows), lodge with the Tribunal a copy of:

(a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and

(b) subject to any directions given under section 18B, every other document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal.

The application of s. 37 is modified in respect of *reviewable objection decisions*¹⁵ by s. 14ZZF of the TA Act, which relevantly states:

Section 37 of the AAT Act applies in relation to an application for review of a reviewable objection decision as if:

(a) the requirement in subsection (1) of that section to lodge with the Tribunal a copy of:

(i) a statement giving the reasons for the decision; and

(ii) the notice of the taxation decision concerned; and

(iii) the taxation objection concerned; and

(iv) the notice of the objection decision; and

(v) every other document that is in the Commissioner's possession or under the Commissioner's control and is considered by the Commissioner to be necessary to the review of the objection decision concerned; and

(vi) a list of the documents (if any) being lodged under subparagraph (v); and

(b) ..."

It follows from the joint operation of ss. 37 of the AAT Act and 14ZZF of the TA Act that, in respect of *reviewable objection decisions*, the Commissioner may be required to file with the Tribunal and serve on the taxpayer a statement of reasons. However, **this obligation only arises after an application for review is filed in the Tribunal (if one is filed)**. Specifically, the Commissioner must file the reasons (with other documents) within 28 days of receiving notice of the application.¹⁶ The Tribunal may allow the Commissioner additional time.¹⁷

As s. 37 only applies after the making of an application to the Tribunal, it will not apply in respect of reviewable objection decisions that are appealed directly to the Federal Court. There are separate requirements for documents to be filed under the Federal Court Rules, such as an appeal statement (which should set out the Commissioner's contentions, as well as the facts and issues)¹⁸ but not a statement of reasons for making the reviewable objection decision *per se*. However, the Court will order particulars as and when necessary.

With respect to decisions that can be reviewed directly by the Tribunal in the absence of a reviewable objection decision (discussed above), the modification to s. 37 in s. 14ZZF does not apply and there is a requirement to file a statement of findings on material questions of fact rather than a statement of reasons. However, under s. 37(1AB), the Tribunal may direct a person who is required to lodge a copy of a statement under s. 37(1) to lodge a copy of a document setting out the reasons for the relevant decision, instead.

3 *Administrative Decisions (Judicial Review) Act 1977*

Section 13 of the ADJR Act imposes an obligation on the Commissioner to provide a written statement of reasons with respect to certain decisions that can be the subject of judicial review under s. 5 of the ADJR Act. The statement of reasons need only be provided if and when reasons are requested by a person who is aggrieved by the decision and certain other conditions and requirements are satisfied (as discussed below). In this regard, s. 13(1) states:

13 Reasons for decision may be obtained

(1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Circuit Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

Section 13 thereby imposes a number of requirements that must be satisfied in order for the obligation to give reasons to crystallise. These include the following:

- a. the request must be in writing;
- b. the request must be within the specified timeframe;
- c. the person making the request must have standing;
- d. the decision must be a decision to which the ADJR Act applies;
- e. exclusion 1: the decision must not be a decision to which s. 28 of the AAT Act applies;
- f. exclusion 2: reasons must not have already been provided;
- g. exclusion 3 : the decision must not be a decision listed in Schedule 2; and
- h. the decision must not be subject to any other exclusions.

Each of these requirements are discussed, in turn, below.

- a. Request in writing

Subsection 13(1) provides that where the other applicable requirements are satisfied, a person may, "by notice in writing given to the person who made the decision," request that a statement in writing be furnished that sets out, among other things, the reasons for the decision. There are no specific requirements as to the form of the request.¹⁹ It does not need to be framed using the wording of

s.13(1), nor does not need to refer to the ADJR Act.²⁰ However, it must be a request for reasons and not a simple request for further information.²¹

b. Within specified time frame

Whereas a request can be made at any time, under s. 13(5) the Commissioner can refuse to furnish a statement if:

- the request was not made on or before 28 days after a written decision was provided to the taxpayer (if one was provided); or
- a written decision was not provided and the request was not made “within a reasonable time” after the decision was made.

Under s. 13(6), the reasonable time requirement can be satisfied by applying to the Court to make a declaration to that the application was made within a reasonable time.

c. The person making the request must have standing

Subsection 13(1) provides that the request for reasons can be made by the person who is entitled to make an application to the Federal Court or Federal Circuit Court under section 5 in relation to the decision. Section 5(1) provides that a person can apply to the Court for review of a decision if he or she “is a person who is aggrieved by a decision”. Under s. 3(4)(a), a person is aggrieved by the decision includes a person whose interests are adversely affected by the decision.²²

d. The decision must be a decision to which the ADJR Act applies

An obligation to provide reasons under s. 13(1) only arises in respect of a decision to which the ADJR Act applies, but does not arise with respect to all decisions to which the ADJR applies, as discussed in the context of the exclusions below. That is, the application of the ADJR Act is not the only requirement, but it is a threshold requirement.

The meaning of “a decision to which this Act applies” is defined in s. 3(1) and relevantly includes:

a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

*(a) under an enactment referred to in paragraph (a), (b), (c), (d) or (e) of the definition of **enactment**; or*

*(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca), (cb) or (f) of the definition of **enactment**;*

other than:

(c) a decision by the Governor-General; or

(d) a decision included in any of the classes of decisions set out in Schedule 1.

The definition of “enactment” at s. 3 of the ADJR Act relevantly includes:

enactment means:

(a) an Act, other than:

(i) the Commonwealth Places (Application of Laws) Act 1970; or

(ii) the Northern Territory (Self-Government) Act 1978; or

(iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or

...

Most decisions made by the Commissioner under his statutory authority will be covered by paragraph (a) of the definition of ‘enactment’, as tax decisions are unlikely to fall within any of the exclusions listed at (i)-(iii). However, some decisions are not “made under an enactment” and do not fall within the parameters of the definition. Consequently, they are not reviewable under the ADJR Act and a statement of reasons cannot be requested under s. 13(1). These include (but are not limited to) the following:

- a decision to vote at a meeting of bankrupt’s creditors;²³
- a decision to commence recovery proceedings;²⁴
- a decision not to defer recovery proceedings;²⁵
- a decision not to accept an offer of compromise in relation to a tax debt;²⁶
- a decision to apply a company tax instalment against outstanding liabilities.²⁷

Additionally, a wide range of tax decisions are listed in Schedule 1 to the ADJR Act and are, by operation of s. 13(1)(d), not subject to the requirement to give reasons. These include, as listed in Schedule 1:

- (e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts:

A New Tax System (Goods and Services Tax) Act 1999

A New Tax System (Luxury Car Tax) Act 1999

A New Tax System (Wine Equalisation Tax) Act 1999

Customs Act 1901

Customs Tariff Act 1995

Excise Act 1901

Fringe Benefits Tax Assessment Act 1986

Fuel Tax Act 2006

Income Tax Assessment Act 1936

Income Tax Assessment Act 1997

Petroleum Resource Rent Tax Assessment Act 1987

Superannuation Guarantee (Administration) Act 1992

Taxation Administration Act 1953, but only so far as the decisions are made under Part 2-35, 3-10, 3-30 or 4-1 in Schedule 1 to that Act

Training Guarantee (Administration) Act 1990

Trust Recoupment Tax Assessment Act 1985;

- (ga) decisions under section 14ZY of the *Taxation Administration Act 1953* disallowing objections to assessments or calculations of tax, charge or duty;
- (gaa) decisions of the Commissioner of Taxation under Subdivision 268-B or section 268-35 in Schedule 1 to the *Taxation Administration Act 1953*;

The exclusions listed above include the making of assessments or calculations of tax as well as objection decisions disallowing objections to assessments of tax. It follows that no obligation for the Commissioner to provide a statement of reasons under s. 13(1) of the ADJR Act arises with respect to those decisions (nor do they arise under s. 28 of the AAT Act, as discussed above).

- e. The exclusions in s. 13(11) must not apply

Section 13(11) further narrows the circumstances in which the Commissioner is required to provide a statement of reasons under s. 13(1) by excluding 3 categories of cases where the ADJR Act otherwise applies.

Exclusion 1: A decision to which s. 28 of the TAA Act applies

Under s. 13(11)(a), there is no obligation for the Commissioner to provide a statement of reasons pursuant to s. 13(1) if a statement may be sought under s. 28 of the AAT Act. As discussed above, whether s. 28 applies to a decision made by the Commissioner must be considered in light of the application of s. 14ZZB and, as a consequence of s. 14ZZB, s. 28 does not apply to reviewable objection decisions. Consequently, there may be a requirement to give reasons for the making of reviewable objection decisions under s. 13(1) to the extent that they are not otherwise excluded (NB as noted above, objection decisions related to assessments or calculations of tax are excluded under s. 13(1)(d)).

Exclusion 2: Reasons have already been provided

Subsection 13(11)(b) provides that s. 13(1) does not apply to “a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision.” That is, if the Commissioner included a statement of reasons with the decision, he does not need to provide them again.

Exclusion 3: A decision included in any of the classes of decision in Schedule 2.

There is an additional category of cases listed in Schedule 2 to the ADJR Act to which the ADJR Act applies, generally, but, pursuant to s. 13(11)(c), s. 13(1) does not give rise to a requirement to give reasons. With respect to decisions made by the Commissioner, the following categories are likely to be relevant:

- decision in connection with the enforcement of judgments or orders for the recovery of monies;
- decisions relating to the administration of criminal justice; and
- decisions in connection with civil proceedings.

A review of these decisions may nevertheless be sought under the ADJR Act.

- f. Other exclusions

There is an additional exclusion in s. 13(8) for a class or classes of decisions declared by the regulations to be decisions to which s. 13(1) does not apply. No regulations of this kind are currently in force which relate to decisions of the Commissioner.

No requirement to give reasons for an amended assessment

The cumulative effect of ss. 28 and 37 of the AAT Act and s. 13 of the ADJR Act is that there is, in fact, no statutory requirement for the Commissioner to give reasons for a decision to amend an assessment unless, and until, proceedings are commenced in the Tribunal and a statement of reasons is required by s. 37 of the AAT Act. In the case of a reviewable objection decision concerning an amended assessment, in respect of which no review or appeal is sought, or that is appealed directly to the Federal Court, no reasons for the decision need ever be provided, albeit that in the case of an appeal to the Federal Court the Commissioner will typically defend the outcome of the amended assessment in the proceedings by setting out his contentions in an appeal statement and by filing submissions.

This appears somewhat curious in the context of a self-assessment regime, where pre-populated information is increasingly relied upon. Where the Commissioner assesses tax in accordance with the return as lodged, the Commissioner is simply assessing as the taxpayer has self-assessed. No reasons may be expected in this instance because the taxpayer has provided the information upon which they are assessed. However, where the Commissioner makes a decision to amend an assessment (which may mean not accepting information as pre-populated), a failure to provide reasons will result in information asymmetry for the taxpayer and their adviser.

Of course, even if the Commissioner gives reasons, in the context of an amended assessment, he is not bound by them. Once the Commissioner amends an assessment, the burden falls on the taxpayer to persuade the Commissioner by way of objection that the amendment should not have been made, including by stating fully and in detail the grounds that the taxpayer relies on.²⁸ If the objection is disallowed, the taxpayer, who is bound by the grounds of the objection (subject to being given leave by the Tribunal or Court to expand or vary the grounds) has the onus of proving that the objection decision is wrong.²⁹ The Commissioner, on the other hand, can change his reasons for making the decision as frequently as he chooses within the parameters of what the Tribunal or Court will allow in practice.³⁰

Nevertheless, despite the potential for the Commissioner's reasons to shift or change, understanding what those reasons are when an assessment is amended, or when a subsequent objection decision is made, is highly valuable for taxpayers and the tax system generally. A statement of reasons helps to ensure that any facts or issues in dispute are:

- identified at the outset;
- addressed efficiently;
- resolved early in the dispute if possible; and
- dealt with in the most appropriate platform for resolution of the dispute.

It may also illuminate for the taxpayer that no further steps to dispute the amended assessment are appropriate or necessary. No less important, a statement of reasons is likely to provide confidence to a taxpayer that their matter has been considered carefully, fairly and transparently, whereas the withholding of reasons from the taxpayer is likely to have the opposite effect.

The latter point is particularly relevant in the context of fraud or evasion (FE) opinions. Whereas in the ordinary course, the Commissioner is permitted to amend a taxpayer's assessment within two or four year periods of review, where the Commissioner forms an opinion that there has been FE, the period of review is extended indefinitely. Notwithstanding the significant impacts that an FE opinion can have on the taxpayer, there are few opportunities for the taxpayer to be informed ahead of time that such an opinion is being contemplated and very rarely would there be opportunity for the taxpayer to engage with the process before the opinion is formed.³¹ It is also difficult to obtain the reasons which have informed the opinion, or the evidence upon which the ATO has based its opinion, as in many cases, such evidence may have been obtained as part of covert audits or there may be a need to protect the identities of third party informants. The issue has been identified previously by the IGTO as a potential area for review³² and has been raised with Parliamentary committees on a number of occasions.³³

The content of the Statement of Reasons

No universal requirements

There are no universal requirements as to what the statement of reasons must contain. There are requirements pertaining to what must accompany the statement of reasons; specifically, it must be accompanied by findings on material questions of fact and refer to evidence or other materials on which those findings were based,³⁴ but these do not constitute the reasons.³⁵ A statement of reasons must do more than restate the decision.³⁶

The courts have, in recent cases, held that there is a limited number of factors that comprise an “adequate set of reasons”.³⁷ In *Wingfoot*³⁸ the Court framed the requirement for reasons as forensic, indicating that in exercising a statutory function the decision-maker’s decision was an “expert opinion” rather than an adjudication and explained that the decision should provide the losing party with enough information to form a view on whether to appeal.

If the Court considers s. 13(1) reasons to be deficient, an order can be made under s. 13(7) of the ADJR Act requiring the decision-maker to provide adequate reasons. Similarly, if the Tribunal considers s.28 reasons to be inadequate, the applicant can apply for the Tribunal to make a declaration that the statement does not contain adequate particulars of the reasons for the decision and the person must, as soon as practicable and no later than 28 days after the declaration, give the applicant an additional statement containing further and better particulars of the relevant matters (s. 28(5) and (6) of the AAT Act).

The template in PS LA 2013/1

With respect to a statement of reasons made under s. 13(1) of the ADJR Act, the Commissioner has published guidelines, a sample template for a statement of reasons and a checklist of factors to consider when preparing reasons, in Practice Statement Law Administration PS LA 2013/1.

In addition to requiring that the statement be contextualised with background, findings on material questions of fact and evidence and other material on which the decision is based, the template in PS LA 2013/1 calls for ATO officers to reproduce relevant provisions or sections under which the decision is made and to indicate why the decision was made, with reference to documents and findings of fact. The practice statement also indicates that the reasons should be written in plain language and include headings where possible.

As there are no requirements as to the content of a statement of reasons that are specific to s. 13 of the ADJR Act, it stands to reason that this guidance in PS LA 2013/1 could be utilised, generally, where a statement of reasons is required to be provided by the Commissioner.

The Commissioner may choose to give reasons in the absence of a statutory requirement

The Commissioner may choose to give reasons, even in the absence of a statutory or common law obligation to do so. Providing reasons is consistent with the Commissioner’s commitments in the Taxpayers’ Charter, which states:

Explaining the decisions we make about you

We explain to you the decision we make about your affairs and provide you with a contact number or email address for the area of the ATO handling your case. We will explain our decisions clearly. If you have questions, think we made a mistake, or have not given adequate reasons for our decision, contact us using the details provided to you or your nominated representative.

Generally, we explain our decision in writing. If we give you our decision verbally, we will give you the explanation at the same time. In some very limited circumstances, we will not be able

to explain our decisions fully, although we still provide as much information as we can. For example, if:

- another person is involved, releasing information about our decision may breach their privacy or the secrecy provisions in the tax laws
- we suspect fraud, we may not release information because it might jeopardise our investigations.

Under the Administrative Decisions (Judicial Review) Act 1977 (ADJR), you are entitled to get a free written statement setting out the reasons for some decisions we make about your tax affairs. The Act does not cover all decisions and there are some important exceptions – for example, decisions about assessments.

In PS LA 2013/1, the Commissioner acknowledges that it may be appropriate to respond favourably to a request for reasons, even where the requirements of s. 13 are not satisfied and there is otherwise no obligation to provide them. In this regard, the Commissioner states the following:

Provision of statement if no entitlement exists

48. In some circumstances, a request for a statement of reasons will be received where no entitlement under section 13 exists. In these circumstances, the decision maker should consider whether it is appropriate to provide a statement setting out the reasons for the relevant decision to assist the person requesting the statement to better understand the decision. Provision of a statement of reasons in these circumstances would generally be consistent with our commitment under the Taxpayers' Charter to explain our decisions and be accountable for our actions, and would align with the beneficial aims of the ADJR Act. However, the decision maker should make it clear to the applicant that the statement of reasons has not been provided pursuant to section 13.

In litigious matters, the Commissioner must also consider the Commonwealth's obligation to act as a Model Litigant as set out in Appendix B of the *Legal Services Direction 2017*. Whereas the obligation does not specifically require reasons to be given, it imposes duties that would be difficult or impossible for the Commissioner to discharge without being transparent as to the reasons for making a decision in dispute. For example, r. 2(e) requires the Commissioner to keep the costs of litigation to a minimum, where possible, by not requiring the other party to prove a matter which the ATO knows to be true and by engaging in alternative dispute resolution processes. He is also required to endeavour to "avoid, prevent and limit the scope of legal proceedings wherever possible" under r.2(d). It is difficult to imagine how these objectives could be achieved if the taxpayer is not made aware of the Commissioner's reasons for making the disputed decision.

In practice, these principles likely underpin the Commissioner's practice of frequently providing statements of reasons to taxpayers, even in the absence of a requirement to do so; for example, reasons usually accompany reviewable objection decisions, which is not a requirement of s. 28 of the AAT Act or s. 13(1) of the ADJR Act and is not necessary under s. 37 of the AAT Act until proceedings are commenced.

What this means for Taxpayers

It is important for taxpayers to keep in mind that reasons are not always provided, nor are they required to be. The fact that they are typically provided makes any refusal to do so, when it occurs, seem exceptional and, in many cases, unfair. However, in the absence of any change in law or policy, it is ultimately a matter for the Commissioner/ATO to decide and which might be revisited only once a decision to litigate the decision has been made by the Taxpayer.

The Taxpayer's Charter does set an expectation that the Commissioner will be "open, transparent and accountable" in his dealings with taxpayers. Accordingly, despite the limitations on a taxpayer's legal

right to reasons, if a taxpayer is met with a refusal by the Commissioner to provide reasons, or receives insufficient reasons and this impedes their ability to understand a decision or weigh up next steps, the taxpayer should consider availing themselves of their right to complain, including via:

- the ATO Complaints Unit and/or
- the IGTO complaints service.

In this way, taxpayer concerns can be appropriately addressed, ensuring fairness and transparency of the system and encouraging voluntary compliance. This is important because, as the OECD observes ... *Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.*

End Notes

¹ Extract from the **Taxpayer's Charter**

Explaining the decisions we make about you

We explain to you the decisions we make about your affairs and provide you with a contact number or email address for the area of the ATO handling your case. We will explain our decisions clearly. If you have questions, think we made a mistake, or have not given adequate reasons for our decision, contact us using the details provided to you or your nominated representative.

² Extract from **PSLA 2013/1**

Provision of statement if no entitlement exists

48. In some circumstances, a request for a statement of reasons will be received where no entitlement under section 13 [of the ADJR Act] exists. In these circumstances, the decision maker should consider whether it is appropriate to provide a statement setting out the reasons for the relevant decision to assist the person requesting the statement to better understand the decision. Provision of a statement of reasons in these circumstances would generally be consistent with our commitment under the Taxpayers' Charter to explain our decisions and be accountable for our actions, and would align with the beneficial aims of the ADJR Act. However, the decision maker should make it clear to the applicant that the statement of reasons has not been provided pursuant to section 13.

³ *General Administrative Principles – GAP001 Principles of Good Tax Administration – Practice Note*, OECD Committee of Fiscal Affairs Forum on Strategic Management, 2 May 2001. The OECD guidance under Taxpayer Relations also encourages revenue authorities to:

1.2 outline and communicate to taxpayers their rights and obligations as well as the available complaint procedures and redress mechanisms;

1.3 consistently deliver quality information and treat inquiries, requests and appeals from taxpayers in an accurate and timely fashion;

1.4 provide an accessible and dependable information service on taxpayers rights and obligations with respect to the law ...

⁴ Inspector-General of Taxation and Taxation Ombudsman, *Community Expectations for Tax Administration* <<https://www.igt.gov.au/community-expectations-tax-administration>>.

⁵ An application made under the *Freedom of Information Act* 1982 may also assist in this regard, but FOI applications often take a considerable amount of time to be processed and can, in some cases, be protracted and costly; for example, if there is a dispute with the Commissioner regarding the material to which the applicant is entitled. At the outset of making an FOI application and in light of the exclusions in the FOI Act, there is little certainty for taxpayers as to whether, at the end of the process, they will be in a position to reliably piece together the Commissioner's reasons for making a decision with reference to the material that is provided.

⁶ For more information, see: [An Investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal | IGT](#)

⁷ *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. There have been rare cases where written reasons have been required in the absence of a legislative requirement because of the "exceptional circumstances" contemplated in *Osmond*. See Robinson SC, *Administrative Law The Laws of Australia*, 2016 (Thomson Reuters) at [2.3.320].

⁸ Section 14ZZB of the TA Act provides that s. 28 of the TA Act does not apply to a reviewable objection decision. There is a requirement to give a statement of reasons in relation to a reviewable objection decision under s. 37 of the TA Act as modified by s. 14ZZF of the TA Act, but s. 37 only applies if the decision is the subject of an application to the Tribunal for review. See also the decision of Aickin J in *Bailey v Federal Commissioner of Taxation* [1997] HCA 11 at [13] where his Honour expresses the view that, "[t]here is nothing in the policy of the Act nor in general considerations of policy to require that the Commissioner should not

inform the appellant prior to the commencement of the hearing of those details so that the case may proceed in an orderly and comprehensible manner. It is not in the interests of the proper administration of justice that, when the matter comes before the court, the appellant should have to speculate about, and adduce evidence to negate, every possible kind of agreement or arrangement and avoidance which the imagination of his advisers can conjure up. Such a process is not merely time-wasting but is likely to obscure the real issues.”

⁹ See ‘Taxpayers’ Charter’ under the heading, “Taxpayers’ Charter – what you need to know.” The Taxpayer’s Charter is discussed further below.

¹⁰ For more information, see: [An Investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal | IGT](#)

¹¹ section 14ZZ(1)(a)(i) of the TA Act 1953. See endnote 14.

¹² section 14ZV TA Act, Section 14ZZK of TA Act – that is unless the Tribunal orders otherwise.

¹³ Australian Government, *Budget 2021-22: Budget Measures Budget Paper No 2 2021-22*, p 19.

¹⁴ See: [List of reviewable decisions as at 31 May 2019 \(RTF\) \(aat.gov.au\)](#)

¹⁵ See endnote 12.

¹⁶ Section 37(1) of the AAT Act

¹⁷ Ibid

¹⁸ Rule 33.03 of the *Federal Court Rules 2011*

¹⁹ *Ansett Transport Industries (Operations) Pty Ltd v Wraith* [1983] FCA 179, cited in PS LA 2013/1 at para 26.

²⁰ Ibid

²¹ *Soldatow v Australia Council* [2002] FMCA 98 at [21]-[22], cited in PS LA 2013/1 at para 29.

²² See related discussion *Trollope v Hon Justice Middleton* [2008] FCA 564, cited in PS LA 2013/1 at para 18.

²³ *Hutchins v Deputy Commissioner of Taxation* (1996) 65 FCR 269 cited at para 12 of PS LA 2013/1.

²⁴ *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] FCA 538 cited at para 13 of PS LA 2013/1.

²⁵ Ibid

²⁶ *Bilborough v Deputy Commissioner of Taxation* [2007] FCA 773 cited at para 13 of PS LA 2013/1.

²⁷ *Golden City Car & Truck Centre Ltd v Commissioner of Taxation* [1998] FCA 29 cited at para 13 of PS LA 2013/1.

²⁸ Section 14ZU of the TA Act 1953.

²⁹ Section 14ZZK with respect to Tribunal proceedings and s. 14ZZO with respect to Federal Court appeals.

³⁰ It is noted that the Commissioner can depart from his reasons for a decision at will up to the commencement of litigation. Once a litigious dispute is progressed, the Tribunal or Court will weigh up prejudice to the taxpayer as a factor in deciding whether to allow the Commissioner to change his arguments. However, prejudice to the taxpayer is not a decisive factor and any prejudice will often be mitigated by providing the taxpayer an opportunity to respond to the new arguments (whilst bearing the time and costs that entails), rather than precluding the Commissioner from changing his approach. By way of example, in the High Court decision of *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49, the Court notes that in the appeal the Commissioner abandoned the arguments he had presented in the Full Federal Court (where he was unsuccessful) and in the Federal Court (at [26]). He was not prevented from running a new argument in his appeal to the High Court, which was ultimately successful.

³¹ It is noted that PS LA 2008/6 *Fraud or evasion* states the following under the heading “What work practices apply in relation to fraud or evasion cases?”:

“You should consider if there is behaviour that may indicate fraud or evasion at the earliest practicable opportunity in an audit. This allows us to obtain and consider relevant evidence before any opinions of fraud or evasion are formed.

In the normal course of communication, a taxpayer should also be made aware that you are looking into the issue of possible fraud or evasion. Advise the taxpayer of our preliminary view in a position paper and invite their comment before forming any opinion about fraud or evasion.”

PS LA 2008/6 also states that forming an opinion that there has been fraud or evasion requires the exercise of sound judgment and fairness. The ATO’s practice and the taxpayer experience may be considered by the IGTO in the context of a future review (see endnote 30).

³² IGTO, *Register of Potential Investigation Topics*, Topic 2021-9 <<https://www.igt.gov.au/our-investigations/register-potential-investigation-topics>>; IGTO; *IGT Work Program 2017* (2017) <<https://www.igt.gov.au/our-reviewsprevious-work-programs/igt-work-program-2017>>.

³³ A summary of previous occasions on which the issue has been raised with Parliamentary Committees is provided in the Submission of TaxResolve to the House of Representatives Standing Committee on Tax and Revenue’s *Inquiry into the Annual Report of the Australian Taxation Office 2018-19* <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Tax_and_Revenue/AnnualReport2018-19/Submissions>.

³⁴ Section 13(1) of the ADJR Act; see also s. 25D of the Acts Interpretation Act 1901.

³⁵ *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675 and other cases cited at footnote 3 of [2.3.415] of Robinson SC, *Administrative Law The Laws of Australia*, 2016 (Thomson Reuters).

³⁶ *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 and other cases cited at footnote 3 of [2.3.415] of Robinson SC, *Administrative Law The Laws of Australia*, 2016 (Thomson Reuters).

³⁷ *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 cited at [2.3.420] of Robinson SC, *Administrative Law The Laws of Australia*, 2016 (Thomson Reuters).

³⁸ *Ibid*