



Australian Government
Inspector-General of Taxation
Taxation Ombudsman

THE EXERCISE OF THE COMMISSIONER'S GENERAL POWERS OF ADMINISTRATION

Introduction

The Australian taxation system (including the superannuation system) has been described as being amongst the most complex in the world¹ with over 14,000 pages of legislation, intended to deliver different policy outcomes for different taxpayers in different situations². The Commissioner of Taxation has administration, or partial administration, of 34 primary pieces of legislation (not counting delegated legislation).³ The Commissioner is granted certain discretionary powers to administer these laws. This review investigation examines the administration of the Commissioner's powers to generally administer the Acts. The IGTO is also undertaking another review investigation examining the Commissioner's Remedial Power.

The General Powers of Administration (GPA)

A number of pieces of legislation specifically provide that the Commissioner shall have general administration of the relevant Act⁴ (commonly referred to as the General Power of Administration, or GPA).⁵ These provisions only grant the Commissioner discretion in relation to the administration of provisions set out in the respective Acts. It is arguable that any administrative decision made by the Commissioner (or a delegate, or duly authorised officer) that is not a decision under a specific legislative power is an exercise of the GPA. In this sense, the scope and breadth of the GPA is extremely broad. For example, exercises of GPA may include decisions to:

- determining that debt is uneconomical to pursue;
- suspend active debt recovery action (e.g. sending letters or making phone calls) for taxpayers within areas affected by natural disaster;
- settle tax disputes;

¹ See, for example: Joint Committee of Public Accounts and Audit, *Report 410: Tax Administration* (2008); Richard Krever, "Taming Complexity in Australian Income Tax" (2003) 25(4) *Sydney Law Review* 467.

² The Treasury, *Complexity – a sketch in five slides* (2015) <<https://treasury.gov.au/review/tax-white-paper/in-five-slides>>.

³ Inspector-General of Taxation and Taxation Ombudsman, *Corporate Plan 2021-22* (2021) p 44.

⁴ For example: section 8 of the *Income Tax Assessment Act 1936*, section 43 of the *Superannuation Guarantee (Administration) Act 1992*, section 7 of the *Excise Act 1901*, section 3 of the *Fringe Benefits Tax Assessment Act 1986* and section 356-5 of Schedule 1 to the *Taxation Administration Act 1953*.

⁵ Note: Although legislation provides the Commissioner with the power of 'general administration' of the relevant act, these powers are more commonly known as 'general powers of administration'.

- communication of broad compliance approaches to particular issues or areas as set out in Practice Compliance Guidelines; and
- accepting a simplified calculation of work-related expense deductions for those working from home during the COVID-19 pandemic.

However, there are also limits to the exercise of the GPA in its operation. In *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 (upholding the single judge decision), the Full Court of the Federal Court observed that the GPA:

...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.⁶

Practice Statement PS LA 2009/4

The Commissioner's instruction to ATO staff - PS LA 2009/4 *When a proposal requires an exercise of the Commissioner's powers of general administration* - notes the following:

2. The Commissioner's GPA

Provisions located within various taxation laws place the power to conduct the day to day administration of those laws in the hands of the Commissioner.[1] These powers exist in order to assist the Commissioner to administer the taxation laws in accordance with Parliament's legislative intent.[2]

3. A purposive interpretation of law

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 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.

4. Circumstances in which the Commissioner's GPA may be properly exercised

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]

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. [emphasis added]

⁶ *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 at

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.^[5]

The scope and extent of these powers is outlined in greater detail in Appendix B of this practice statement.

Paragraph 16 of the PS LA 2009/4 notes the following criteria when determining how the GPA might be exercised:

- Proposed compliance approach must be consistent with achievement of the policy intent of the legislation
- The approach adopted achieves substantive compliance at reduced cost
- The approach should, as far as practical, reflect industry practice
- Resulting risks to the revenue must be appropriately managed (including the application of the approach where there is evidence of tax avoidance)
- Avoid material adverse impacts on the rights of third parties
- Taxpayers can choose whether or not to adopt the approach

It is important to note that not all exercises of discretion under the GPA are required to be undertaken by reference to the detailed processes set out in PS LA 2009/4, nor would it be desirable for that to occur as that would lead to undue delay in administration.

Furthermore, PS LA 2009/4 complements other specific practice statements and guidance about the exercise of discretion in relation to administrative matters. For example, these include:

- PS LA 2011/14 in relation to general debt collection powers and principles;
- PS LA 2011/15 in relation to lodgement obligations, due dates and deferrals; and
- PCG 2016/1 concerning practical compliance guidelines.

A purposive interpretation of the law

PS LA 2009/4 instructs ATO officers that the ATO's primary purpose should be to interpret the law in a manner that support its purpose, particular where more than one interpretation may be possible. Whilst there may be different opinions as to what a purposive approach to interpretation entails, the High Court of Australia has stated that:⁷

...the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision in particular the mischief it is seeking to remedy

Accordingly, the ATO's understanding and application of principles of purposive statutory interpretation will be a relevant area for consideration in this investigation.

⁷ *Alcan (NT) Alumina Pty Ltd V Commissioner of Territory Revenue (NT)* [2009] HCA 41 at [47].

TERMS OF REFERENCE

The IGTO's investigation does not propose to examine every type of decision that may be made under the GPA, but will draw from case studies in our complaints investigation service as well as stakeholder submissions to identify and investigate particular areas raised as examples of exercise of the GPA that should be investigated. In particular, the IGTO is interested to understand how broad-based GPA decisions (i.e., those affecting large groups of taxpayers) are identified and determined. As there are limited avenues for taxpayers and tax practitioners to challenge the exercise of the GPA, it is important to ensure that processes and procedures underpinning these decisions are robust and effective.

Through case studies and examples, the IGTO's investigation will examine:

1. the processes by which GPA matters are identified and considered, and how the ATO assures itself that its consideration of the issues accord with a purposive interpretation of the law;
2. the regulatory and compliance impact (including the frequency and circumstances) of the use of the GPA;
3. whether the ATO's systems and processes to receive, consider and determine matters for the exercise of GPA are operating effectively, efficiently and with timeliness and transparency taking into account all relevant factors and stakeholder feedback;
4. how consideration and decisions in relation to the GPA recorded and communicated, both internally and externally;
5. whether processes in relation to the GPA are well-known and well-understood across the tax practitioner community and within the ATO; and
6. any other relevant matters that arise during the course of the IGTO investigation or as identified by stakeholders in submissions.

The IGTO welcomes feedback from stakeholders – including professional and industry bodies, tax practitioners and taxpayers – on any concerns they have in relation to the GPA processes and potential improvements that may be implemented.

HOW TO LODGE A SUBMISSION

The closing date for submissions is **28 February 2022**. Submissions may be lodged by telephone (02 8239 2111) or be sent by:

Post to: Inspector-General of Taxation and Taxation Ombudsman

GPO Box 551

Sydney NSW 2001

Fax: (02) 8088 7815

Email to: gpa@igt.gov.au

CONFIDENTIALITY

Submissions provided to the IGTO are maintained in strict confidence (unless you specify otherwise). This means that the identity of the taxpayer, the identity of the adviser and any information contained in such submissions will not be made available to any other person, including the ATO. Section 37 of the *Inspector-General of Taxation Act 2003* safeguards the confidentiality and secrecy of such information provided to the IGTO – for example, the IGTO cannot disclose the information as a result of a Freedom of Information (FOI) request, or as a result of a court order generally. Furthermore, if such information is the subject of client legal privilege (also referred to as a legal professional privilege), disclosing that information to the IGTO will not result in a waiver of that privilege.

Professional bodies and others (e.g. advisers) who wish to have their contribution to the IGTO investigation formally acknowledged should accordingly expressly waive confidentiality for these purposes.