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General Editor's note

Roger Timms

As the recently appointed General Editor of the *Australian Tax Law Bulletin*, I am pleased to welcome readers to this edition of the Newsletter. You will no doubt be aware that the Newsletter was not published during the 2020 year, a victim of the global pandemic which wreaked havoc with so many commercial and personal endeavours around the world.

During 2020 the focus of the tax community was, to a large extent, on the various stimulus measures introduced by governments to support businesses, employees and the self-employed. These measures were, of necessity, often introduced on the basis of hastily drafted legislation resulting in uncertainty in the application of those laws which required considerable time and resources to be devoted by the private sector and the Australian Taxation Office (ATO), to ensure the legislation was able to achieve its intended purpose. During this period there was also a significant reduction in the number of cases which passed through the courts as the legal system adjusted to life in a Zoom courtroom and tax legislation being enacted by Parliament (other than stimulus measures) was limited.

All of these factors contributed to a reduction in the output of scholarly articles on matters of interest to the taxation community. However, during this period, a small number of articles were submitted for publication in the Newsletter and those articles make up the content for this edition.

Adrian Chek, Jay Prasad and Nancy Goh of Allens have jointly authored an article which considers whether certain wind farm assets should be considered fixtures or chattels.

Whilst the case upon which the article is based in the NSW Supreme Court decision in *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue*¹ which considers liability to landholder duty, the case has potential relevance to the taxation treatment of such assets. Interestingly, the NSW decision is at odds with a decision of the Victorian Supreme Court in a case involving similar assets; this inconsistency in the treatment of wind farm assets is further evident in various binding private rulings issued by ATO. The extent of capital investment in renewable energy assets will increase

exponentially in coming years and therefore the issue as to whether wind farm assets are fixtures or chattels may need to be resolved by the introduction of specific tax legislation.

An article comprehensively analysing the circumstances in which the Commissioner of Taxation is required to give reasons for administrative decisions made by ATO officials has been prepared by Karen Payne and a number of her senior colleagues at the Office of the Inspector-General of Taxation and Tax Ombudsman. It may come as a surprise to many readers to learn that, in the absence of litigation, there are limited opportunities under the tax laws for taxpayers to compel the Commissioner to disclose the reasons which underpin the making of administrative decisions. The avenues available to taxpayers would typically be found in the Administrative Appeals Tribunal Act 1975 (Cth) and the Administrative Decisions (Judicial Review) Act 1975 (Cth). This article should be of practical assistance to taxpayers and advisors grappling with administrative decisions and actions undertaken by ATO officials.

In the final article Bill Mavropoulos comments on the High Court decision in *Bywater Investments Ltd v Federal Commissioner of Taxation; Hua Wang Bank Berhad*² (*Bywater*) which involves the issue of corporate tax residency. Bill poses the question as to whether the decision of the court might open the door for a radically different interpretation of the definition of "resident" in the Income Tax Assessment Act 1936 (Cth) than that which has been generally accepted in the past. Readers can analyse the proposition put forward and make up their own minds as to the degree of risk they foresee that such a change in interpretation may occur.

Bywater is an important case in that it forms the basis for an ATO change in approach to the question of corporate residency, and central management and control of a company. We will therefore further develop the implications of the *Bywater* decision in a future edition of the Newsletter.

I trust readers find these articles interesting and informative. My task now is to return the Newsletter to a regular publishing schedule which, hopefully, can be achieved during the remainder of the 2021 year.

Roger Timms
General Editor
Australian Tax Law Bulletin

2. *Bywater Investments Ltd v Federal Commissioner of Taxation; Hua Wang Bank Berhad* (2016) 260 CLR 169; 154 ALD 30; [2016] HCA 45; BC201609799.

Footnotes

1. *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 395; BC202102869.

When is the Commissioner of Taxation required to give a taxpayer reasons? — understanding a taxpayer's rights

Robyn Thomas, Karen Payne, Duy Dam, Rosina Lai and Anita Hong INSPECTOR-GENERAL OF TAXATION AND TAXATION OMBUDSMAN

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

Statutory rights to receive reasons for administrative decisions are in many cases limited or not available unless and until a taxpayer commences litigation.

However, good tax administration creates an expectation that taxpayers should receive reasons for decisions which affect them.

The ATO can always volunteer to provide a taxpayer with reasons and ATO's own guidance (see for example, PSLA 2013/1¹ and the Taxpayer's Charter) encourages this.

Accordingly, if a taxpayer does not get reasons or sufficient reasons from ATO to understand their experience in the tax system, they may complain to ATO complaints unit or the Inspector-General of Taxation and Taxation Ombudsman (IGTO) to obtain that understanding. This is important because as the Organisation for Economic Co-operation and Development (OECD) notes: "Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply."²

This article is intended to provide an overview and introduction to this somewhat complex area of taxation administration.

These themes are also to be explored in the IGTO's Review Investigation (as at May 2021).³

When is the Commissioner of Taxation required to give a taxpayer reasons? — understanding a taxpayer's rights

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.⁴

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".⁵ 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.⁶

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.⁷ 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

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.⁸ Any obligations to give reasons are sourced in legislation, including the following Acts:

- Taxation Administration Act 1953 (Cth) (TA Act)
- Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act), and
- 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.⁹ 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.

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

The Commissioner may choose to give reasons in the absence of a statutory requirement — and frequently does

The Commissioner may choose to give reasons, even in the absence of a statutory or common law obligation to do so, as a matter of good tax administration — and frequently does. This is confirmed in both the Taxpayers' Charter¹⁰ and Practice Statement Law Administration PSLA 2013/1 — *Commissioner's guidance on how to prepare a statement of facts and reasons under s 13 of the ADJR Act* (PS LA 2013/1).¹¹

The Taxpayers' Charter contemplates that the Commissioner will be “open, transparent and accountable” in their dealings with taxpayers and that they will explain the decisions the ATO makes about taxpayers.¹²

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 13.¹³

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 (Cth). 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. They are 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.

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?			
	TA Act	AAT Act — s 28 ie, <i>before</i> a review by the Tribunal is commenced?	AAT Act — s 37 — ie, <i>after</i> a review by the Tribunal is commenced?	ADJR Act — s 13
Reviewable objection decision — see endnote 12 Examples include: A decision to deny or allow an objection to an assessment. A decision to retain a refund while the Commissioner verifies information.	There is no general rule. 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. 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. See detailed analysis of the TA Act below.	No This outcome arises because of the modification of s 28 by s 14ZZB of the TA Act. See detailed analysis of the AAT Act below.	Yes Section 37 is modified to this effect by s 14ZZF of the TA Act See detailed analysis of the AAT Act below.	There is no general rule. 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. 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 (eg, decisions about the calculation or assessment of tax are specifically excluded under Sch 1). A request must be made in writing and other requirements must be satisfied. See detailed analysis of the ADJR Act below.

Decision reviewable directly by the Tribunal (no reviewable objection decision required) — see endnote 12 Examples include: A decision to refuse to vary or revoke a departure prohibition order	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 directly reviewable by the Tribunal.	Yes. A request must be made and other requirements must be satisfied. See detailed analysis of the AAT Act below.	No general requirement, but under s 37(1AB) the Tribunal can require a statement of reasons to be filed.	No, as there is a specific exclusion if s 28 applies.
Decisions not reviewable by the Tribunal Examples include: A refusal to grant early release of superannuation Refusal to remit general interest charge	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. 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.	No	No	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. 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. A request must be made in writing and other requirements must be satisfied. See detailed analysis of the ADJR Act below.

Detailed analysis — legislative requirements for giving reasons

Taxation Administration Act

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

	TA Act, Sch 1
A decision not to remit a shortfall interest charge in certain circumstances	ss 280–165
A liability to pay an administrative penalty, including the reasons why the entity is liable to pay the penalty	ss 298–10
A decision not to remit an administrative penalty or to remit only part of the penalty	ss 298–20
A decision declining to make a private ruling	ss 359–35

A refusal of an Education Direction variation ss 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:

- setting out the decision
- giving reasons for the decision, and
- where appropriate, setting out the time the suspension ends

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.

Administrative Appeals Tribunal Act

Overview

Taxation decisions are generally subject to merits review pursuant to the AAT Act¹⁴ in two ways:

- *Reviewable objection decisions* — Where a person who is dissatisfied with the tax decision lodges an objection against that decision with the ATO and the ATO after reviewing that objection, provides an objection decision in the manner set out in Pt IVC of the TA Act.
- *Other decisions* — Some tax decisions can be lodged directly with the Tribunal.

Decisions which are reviewable objection decisions — that is, where the taxpayer must first raise a formal objection under Pt IVC of the TA Act

The Tribunal may only review a decision to allow, wholly or in part, or to disallow a taxation objection under Pt IVC of the TA Act. Decisions to which Pt IVC of the TA Act 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	ss 155–35
issue an assessment of an outstanding tax-related liability in relation to a deceased person's estate	ss 260–140
determine the total amount of outstanding tax-related liabilities in relation to an un-administered estate	ss 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 decision¹⁵ 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 Pt 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)".¹⁶ The scope of these new powers will ultimately rest in the details of the relevant legislative changes.

Other decisions — which are not reviewable objection decisions

There are a number of decisions that fall within this category, ie, decisions that can be reviewed directly by the Tribunal, in the absence of a reviewable objection decision, and are therefore subject to s 28.¹⁷ Examples include a decision to:

- refuse to vary or revoke a departure prohibition order under s 14T of the TA Act
- 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
- refuse to deal with an objection as if it had been lodged within the time limit under s 14ZX(1)

Statutory requirements to provide reasons under the AAT Act

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 (ie, proceedings need not be commenced in order for s 28 to apply) and s 37 applies after the commencement of proceedings (ie, 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.

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.¹⁸ 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.¹⁹

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".²⁰

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.²¹ The application of s 37 is modified in respect of *reviewable objection decisions*²² by s 14ZZF of the TA Act, which relevantly states:

- (1) 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.²³ The Tribunal may allow the Commissioner additional time.²⁴

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)²⁵ 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.

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.²⁶ 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).

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:

- the request must be in writing
- the request must be within the specified timeframe
- the person making the request must have standing
- the decision must be a decision to which the ADJR Act applies

- exclusion 1: the decision must not be a decision to which s 28 of the AAT Act applies
- exclusion 2: reasons must not have already been provided
- exclusion 3: the decision must not be a decision listed in Sch 2, and
- the decision must not be subject to any other exclusions

Additionally, a wide range of tax decisions are listed in Sch 1 to the ADJR Act and are, by operation of s 13(1)(d), not subject to the requirement to give reasons.²⁷ The exclusions as listed in Endnote 24 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).

Specific exclusions in s 13(11) must not apply

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

Exclusion 1: a decision to which s 28 of the TA Act applies

Importantly, 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 — refer s 13(11)(a). 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 (as noted above, objection decisions related to assessments or calculations of tax are excluded under s 13(1)(d)).

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 their reasons for making the decision as frequently as they choose 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.

Fraud or evasion opinions

Whereas in the ordinary course, the Commissioner is permitted to amend a taxpayer's assessment within 2 or 4 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 Australia Partners Pty Ltd v Kocak*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.

Court or Tribunal can order adequate reasons

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 rea-

sons. 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 decision-maker 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.

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 their 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.*

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Footnotes

1. Australian Taxation Office PSLA 2013/1 — Statements of reasons pursuant to s 13 of the Administrative Decision (Judicial Review) Act 1977 (7 February 2013).
2. Organisation for Economic Co-operation and Development (OECD) *Principles of Good Tax Administration — Practice Note* (21 September 2001) cl 3.
3. For more information, see Inspector-General of Taxation and Taxation Ombudsman (IGTO) *An Investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal*.
4. Inspector-General of Taxation and Taxation Ombudsman, Community Expectations for Tax Administration, www.igt.gov.au/community-expectations-tax-administration. 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.
5. Above n 2, cl 15:
 - 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;
6. Above n 2.
7. An application made under the Freedom of Information Act 1982 (Cth) may also assist in this regard, but freedom of information (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.
8. *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; 63 ALR 559; [1987] HCA 7; BC8601404 (*Osmond*). 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 M Robinson SC, *Administrative Law — The Laws of Australia*, Thomson Reuters, 2016, [2.3.320].
9. Taxation Administration Act 1953 (Cth) (TA Act), s 14ZZB 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* (1977) 136 CLR 214; 13 ALR 41; 7 ATR 251; BC7700020 at ALR 51 where his Honour expressed the view that:

There 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.

10. Extract from the ATO, Taxpayers' Charter — what you need to know, 3 December 2020,

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.

11. Extract from ATO, Practice Statement Law Administration — PSLA 2013/1, 31 January 2013

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 state-

ment 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.

12. Above n 2 and 3.
13. Above n 1.
14. The Tribunal helpfully publishes an Administrative Appeals Tribunal (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.
15. TA Act, ss 14ZV and 14ZZK — that is unless the Tribunal orders otherwise.
16. Australian Government *Budget 2021–22: Budget Measures* Budget Paper No 2 (2021–22) p 19.
17. See: Administrative Appeals Tribunal *AAT Reviewable Decisions List* (31 May 2019) www.aat.gov.au/AAT/media/AAT/Files/Lists/List-of-Reviewable-Decisions.pdf.
18. Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act), s 28:

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 [emphasis added].

19. 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*.
20. TA Act, s 14ZZ(1)(a)(i).
21. AAT Act, s 37(1AAA)(1):

(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.

- 22. Above n 15.
- 23. AAT Act, s 37(1).
- 24. Above.
- 25. Federal Court Rules 2011 (Cth), r 33.03.
- 26. ADJR Act, s 13:

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.

- 27. ADJR Act, Sch 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*;

- 28. TA Act, s 14ZU.
- 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 their 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 their 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 their approach. By way of example, in the High Court decision of *Commissioner of Taxation v MBI Properties Pty Ltd* (2014) 254 CLR 376; 315 ALR 32; [2014] HCA 49; BC201410158, 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 ATO, Practice Statement Law Administration — PS LA 2008/6, 14 May 2020 *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.

32. IGTO, Register of Potential Investigation Topics, Topic 2021–9 www.igt.gov.au/our-investigations/register-potential-investigation-topics; IGTO; IGT Work Program 2017 (2017) 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* www.aph.gov.au/Parliamentary_Business/Committees/House/Tax_and_Revenue/AnnualReport2018-19/Submissions.
34. ADJR Act, s 13(1); see also Acts Interpretation Act 1901 (Cth), s 25D.
35. *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675; 24 ALR 161; 53 ALJR 478; BC7900053 and other cases cited at fn 3 of [2.3.415] of Robinson, above n 8.
36. *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323; 62 ALD 225; [2001] HCA 30; BC200102757 and other cases cited at fn 3 of [2.3.415] of Robinson, above n 8.
37. *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; 303 ALR 64; [2013] HCA 43; BC201314108 cited at [2.3.420] of Robinson, above n 8.
38. Above.