Australian Government
Inspector-General of Taxation
Taxation Ombudsman

The Exercise of the Commissioner's General Powers of Administration

Final Report

By the Inspector-General of Taxation

May 2023

Acknowledgement of country

In the spirit of reconciliation the Australian Government Inspector-General of Taxation acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

Letter of transmittal

Australian Government
Inspector-General of Taxation
Taxation Ombudsman

31 May 2023

The Hon Stephen Jones, MP
Assistant Treasurer and Minister for Financial Services
Parliament House
Canberra ACT 2600

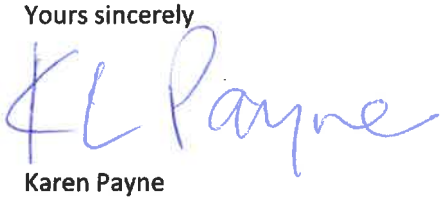
Dear Minister

I am pleased to present you with the report of my investigation into *The Exercise of the Commissioner's General Powers of Administration.* This report is produced pursuant to section 18 of the *Inspector-General of Taxation Act 2003* (IGT Act).

Pursuant to sub-section 8(5) of the *Ombudsman Act 1976* (which operates in relation to this report by virtue of section 15 of the IGT Act), the Commissioner of Taxation has been afford an opportunity to make submissions and respond to the matters contained in this report.

Pursuant to sub-section 18(2) of the IGT Act you are required to cause a copy of the report to be made publicly available within 25 sitting days of the House of Representatives. The report, together with any formal responses, will subsequently be made available on the IGTO website (igt.gov.au).

Yours sincerely



Karen Payne
Inspector-General of Taxation and Taxation Ombudsman

Acknowledgments

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) is pleased to present this report of our investigation into *The Exercise of the Commissioner's General Powers of Administration.* The IGTO acknowledges and thanks officers of the Australian Taxation Office for their professionalism, assistance and insights during the conduct of this investigation.

This report has also benefited from insights provided by a range of professionals in tax and law including registered tax practitioners, barristers and solicitors, academics and our colleagues in other government organisations, both in Australia and overseas.

The IGTO gratefully acknowledges the contributions of the following stakeholders:

- Business Council of Australia
- Chartered Accountants Australia and New Zealand
- Corporate Tax Association
- CPA Australia
- Dr John Bevacqua, Monash University
- Institute of Financial Professionals Australia (formerly Tax and Super Australia)
- Institute of Public Accountants
- Law Council of Australia
- Self Managed Super Fund Association
- Society of Trust and Estate Planners
- The Tax Institute

The IGTO is also grateful for the time and insights provided by former senior Tax Officials who assisted by sharing their perspectives, understanding and views on this important area of tax administration.

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Executive summary

Some taxation legislation (amongst others) includes a provision that states that the Commissioner shall have the general administration of the Act. The provision has generally been referred to as the Commissioner's powers of general administration or the general powers of administration (**GPA**). Although many day-to-day administrative decisions and actions are taken as an exercise of the GPA, the GPA is also relied upon by the Commissioner (or his delegate, or duly authorised tax official) in a number of significant areas of tax administration including:

- settlement of tax disputes;
- compromise of tax debts;
- development of practical compliance guidelines;
- administering tax laws following significant judicial decisions;
- implementing aspects of the Government's coronavirus economic support measures; and
- implementing a shortcut deduction method for working from home expenses during the COVID-19 pandemic.

Despite its broad application and usage in tax administration, the legislation does not define or describe the purpose, nature or scope of the GPA. This appears to be contrary to the Australian Administrative Law Policy Guide which states that - *Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear*. Judicial consideration of the GPA is limited and has tended to focus on the specific facts and context within which the particular case was concerned (i.e., the Court did not rule generally on the parameters of the GPA).

The IGTO commenced this review investigation following observations made in a number of complex dispute investigations in which the Australian Taxation Office (**ATO**) applied the GPA as part of its administrative actions and decisions. The review investigation examined a broad range of research and other materials, and consulted widely with current and former senior officers of the ATO, academics and leading tax practitioners and professional bodies about their understanding of the GPA and what it encapsulates.

Through this research and consultation, the IGTO has observed that there is no universal understanding of the GPA and there is a lack of clarity about the nature and objective of the GPA. In particular, the IGTO considers that it is unclear whether the GPA simply imposes a duty upon the Commissioner which carries with it no additional administrative discretions or whether it is a power in its own right to allow the Commissioner to administer the tax laws as enacted by Parliament in a sensible and practicable manner.

Executive summary

The report examines the use of the GPA through the lens of five case studies that serve to illustrate the complexities of the GPA, often in the absence of a clear framework for decision making. The case studies highlight a number of conceptual and practical challenges with the GPA including that:

- the Commissioner's exercises of the GPA are generally not able to be challenged in the Administrative Appeals Tribunal or the Federal Court of Australia, and so taxpayers have little recourse where the exercise of the GPA adversely impacts them;
- unlike other jurisdictions and other statutory regimes in Australia, there is no statutory framework to guide the exercise of the GPA in Australia;
- it is often difficult to delineate what aspects of the ATO's actions or decisions are made under the GPA and what aspects are pursuant to express statutory provisions or discretions;
- the exercise of the GPA may include the introduction of parameters or thresholds as part of decision making which necessarily exclude those that do not come within the set parameters; and
- exercises of the GPA may result in taxpayers in materially similar circumstances being treated differently or inconsistently.

The IGTO supports the flexibility that the GPA affords the Commissioner to achieve sensible and practicable outcomes for taxpayers as part of his or her administration of the tax system. However, the IGTO considers that the administration of the tax system and the taxpayer's experience when engaging with the tax system would be enhanced through the implementation of a principled framework to guide decision making under the GPA.

As an overarching primary observation, the IGTO notes that before implementation of the recommendations are considered, steps should be taken to clarify whether the GPA is intended to act only as a duty upon the Commissioner or whether it is a power. The clarification could take a number of forms, including through legislation, judicial clarification or by the Executive through a Statement of Expectations.

The IGTO has made three recommendations to the ATO for administrative improvements aimed at enhancing education and awareness of the GPA, significant decisions that rely upon the GPA and reporting of significant exercises of the GPA.

The IGTO has also made three recommendations to the Government. These recommendations are aimed at establishing a principled framework to guide tax administration (decisions and actions) through the exercise of the GPA. This framework is considered analogous to provisions found in New Zealand's tax administration legislation which includes obligations of care and management. Further recommendations suggest developing a standard suite of discretions to allow the Commissioner to administer taxation laws in a manner that assists taxpayers and which would apply in all cases unless expressly excluded by Parliament and enhancing overall reporting of significant GPA decisions.

The IGTO considers that the implementation of these recommendations would improve the tax administration system by yielding more transparent and fairer outcomes for taxpayers and tax practitioners while also ensuring that ATO decision-making is consistent, efficient and effective to achieve the intended purpose of legislation as enacted by Parliament. This would enhance the accountability of decision making and the overall integrity of the tax system.

These features and qualities are recognised as important in administrative law design generally[1] and tax administration design internationally, since:

"Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply".[2]

[1] Attorney-General's Department, *Australian Administrative Law Policy Guide* (2011) pp 8 – 10.

[2] Organisation for Economic Co-operation and Development, *General Administration Principles – GAP001 Principles of Good Tax Administration* [PDF 64.0KB] (21 September 2001) p 3.

Primary Observation and List of Recommendations

Observation

The Inspector-General of Taxation and Taxation Ombudsman observes that it is not clear whether the Commissioner's GPA is simply a duty (which carries no administrative discretion) or if it is a power.

Consistent with the Australian Administrative Law Policy Guide, it would be useful to clarify if the Commissioner's GPA is simply a duty (which carries no administrative discretion) or if it is a power and if a power, the limits of that power to administer the tax and superannuation laws practically and pragmatically.

Accordingly, the recommendations made in this report would be supported and enhanced by clarification about the nature and intended purpose of the Commissioner's GPA.

Whilst several means of clarification are available, Executive clarification (e.g., via a Statement of Expectation) or Legislative clarification would provide the highest levels of certainty for the community.

Recommendation 1

The IGTO recommends that the ATO consider establishing an advisory or oversight panel to assist and guide broad reaching exercises of the Commissioner's GPA – that is, where such exercises are likely to impact large sections of the taxpayer population.

Recommendation 2

The IGTO recommends that the ATO consider ways in which it could raise awareness and understanding of the Commissioner's general powers of administration, including by considering whether PSLA 2009/4 remains fit for purpose and any additional guidance that may be developed to support greater (public and tax official) understanding of the GPA.

Recommendation 3

The IGTO recommends that the ATO consider ways in which it could enhance accountability and transparency for broad reaching exercises of the Commissioner's GPA and to enable taxpayers to more easily identify and track exercises of the GPA that may affect them.

This recommendation is related to Recommendation 6.

Recommendation 4

The IGTO recommends (for the reasons set out in Chapter 5) that the Government consider enacting a framework of guiding principles for the exercise of the Commissioner's GPA. Without prescribing what principles or factors should make up that framework, the IGTO provides, by way of example, some principles which may be suitable to be included in the framework.

For example:

The Commissioner of Taxation shall exercise his powers of general administration in a way that is practicable and in accordance with the law and in furtherance of:

(a) fostering voluntary compliance and willing participation of all taxpayers within the tax and superannuation systems;

(b) minimising the cost of compliance for taxpayers to participate within the tax and superannuation systems;

(c) ensure that the resources of the ATO are applied to optimise compliance assurance and revenue collection;

(d) resolving disputes in a procedurally fair and proportionate manner having regard to the GPA principled framework;

(e) assisting taxpayers who make honest mistakes to correct their mistake where this assists to achieve outcomes and results as intended by specific measures;

(f) promoting fairness in all the circumstances; and

(g) respecting the requirements of procedural fairness.

Recommendation 5

The IGTO recommends that the Government consider improving tax administration by providing the Commissioner with an express administrative discretion, unless expressly excluded by Parliament (i.e. the legislation may expressly prevent the discretion from applying), to:

(a) alter any procedural requirement in the interests of reducing compliance costs for taxpayers;

(b) allow taxpayers to correct an honest and reasonable mistake or error in any lodgement or filing for the purposes of a taxation law or to withdraw an erroneous form or application and resubmit a corrected one;

(c) extend the time for a taxpayer to exercise their rights, apply for access to support or provide further or additional information in support of such an application; and

(d) suspend a penalty subject to certain conditions which promotes future voluntary compliance (including for example, a named period of demonstrated compliance).

Recommendation 6

The IGTO recommends that the Government consider improving tax administration by legislating a requirement for the Commissioner to annually publish and table a record of the exercises of his general powers of administration where it affects a broad class or broad range of taxpayers.

1

INTRODUCTION

This chapter sets out the purpose and scope of the investigation and provides general background to the matters discussed later in the report.

1. Introduction

1.1. Purpose and scope of this report

The Australian taxation system (including the superannuation system) has been described as being amongst the most complex in the world[3] with over 14,000 pages of legislation, intended to deliver different policy outcomes for different taxpayers in different situations.[4] The Commissioner of Taxation (**Commissioner**) is conferred powers and functions under a wide range of laws. There are 31 main tax and superannuation laws over which the Commissioner has administration, or partial administration (not counting delegated legislation).[5]

The Commissioner is appointed by the Governor-General on the recommendation of the Executive Branch of Government and, on behalf of the Commonwealth of Australia, is personally responsible to administer these laws, consistent with the purpose or object of the Act[6] as reflected in legislation as passed by Parliament. Isaacs J has previously observed that the 'The Commissioner is a trusted officer appointed by the Government to put the Act into practical operation'.[7]

Unlike private citizens, statutory officers (such as the Commissioner of Taxation) and entities and public servants generally, may not act or do anything unless it is authorised by an enacted law and actions or decisions which are not authorised by law may be found to be unlawful or *ultra vires*. The Commissioner may also be provided with certain statutory discretions to administer these laws.

A 2007 review by the Treasury identified some 1,515 discretions in the *Income Tax Assessment Act 1936* (**ITAA 1936**), *Income Tax Assessment Act 1997* (**ITAA 1997**) and the *Taxation Administration Act 1953* (**TAA 1953**).[8] The Tax Law Improvement Project reduced the number of discretions to 825 (principally by replacing liability discretions with objective tests, consistent with the self-assessment system of taxation introduced in 1991).

[3] 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.

[4] The Treasury, *Complexity – a sketch in five slides* (2015).

[5] Commissioner of Taxation, *Annual Report 2021-22* (2022) p 198.

[6] *Acts Interpretations Act 1901*, s 15AA.

[7] *Commonwealth Agricultural Service Engineers Ltd (in Liq) v Commissioner of Taxes (SA)* [1926] HCA 30; (1926) 38 CLR 298 at 293.

[8] The Treasury, *Review of Discretions in the Income Tax Laws Discussion Paper* (2007) p 4.

Of these remaining discretions, Treasury identified:

- 114 liability discretions (24 of these related to superannuation);
- 499 discretions relating to administrative matters (30 of these related to superannuation); and
- 212 discretions to prevent tax avoidance (11 of these related to superannuation).

Given the number of years that has elapsed since the 2007 Treasury report, it is likely that the number of statutory discretions has increased beyond the 825 that was identified in 2007. It is beyond the scope of this review to update the Treasury review of taxation laws to identify the current number of administrative discretions. However, at some future point this may be useful.

The Treasury Discussion Paper raises the suggestion that it may be possible to reduce the volume of tax law considerably by presenting the 500+ operative administrative discretions in a different way.[9] The Treasury Discussion paper also notes that it may be possible to establish a general principle that the Commissioner may alter any procedural requirement in the interests of reducing compliance costs for taxpayers.[10]

These observations are of relevance for the purposes of this review investigation.

[9] Ibid.

[10] Ibid, p 9.

1.2. Australian Administrative Law Requirements

Administrative law provides an important framework of principles for fair decision making and actions. Administrative law provides the relevant context in understanding the validity of decisions made in exercise of a power that is conferred by statute on statutory positions and office holders (and public servants generally). In its instructions to its officers, the ATO has noted that the GPA provisions are 'governed by the operation of administrative law principles.'[11]

A brief summary of some important administrative law requirements and principles is set out below as relevant context to the discussion in the remainder of this report.

Administrative law requirements generally attach to the exercise of statutory powers. However, judicial review is not always available to a person affected by a decision.

a. Australian jurisprudence about judicial review under the general law is generally focussed on the concept of jurisdictional error. A breach of administrative law requirements that involves a jurisdictional error is generally regarded as outside the proper scope of the statutory power.
b. There are also unresolved issues about the extent to which administrative law requirements attach to the exercise of non-statutory executive power.

Notwithstanding the limited scope for judicial review of some decisions and the lack of enforceability by a person affected by the decision, there is an expectation (or requirement) that a public official will make decisions consistent with the principles of good management[12] and requirements of procedural fairness.[13] That is, public officials are nonetheless expected to model their decisions and actions on the administrative law principles and framework.

Australian Administrative Law Policy Guide

The following extracts from the Australian Administrative Law Policy Guide located on the Department of the Attorney General's website[14] are useful and important context for this report.

[11] Australian Taxation Office, *PSLA 2009/4 When a proposal requires an exercise of the Commissioner's powers of general administration* (6 May 2020) para 4.

[12] *Public Governance, Performance and Accountability Act 2013*, part 2-4.

[13] *Administrative Decisions (Judicial Review) Act 1974*, ss 5 and 6.

[14] Attorney-General's Department, *Australian Administrative Law Policy Guide* (2011) pp 8-9 <https://www.ag.gov.au/legal-system/publications/australian-administrative-law-policy-guide>.

4.1 A whole-of-system approach to accountability

The administrative law system is based on the fundamental values of fairness, lawfulness, rationality, openness and efficiency.[15] How government interacts with the public in individual cases influences public trust and confidence in government administration more broadly. By showing a commitment to delivering justice through administrative decision making, review mechanisms and other accountability mechanisms, the Federal Government can play an active role in improving the quality of access to justice for individuals.

…

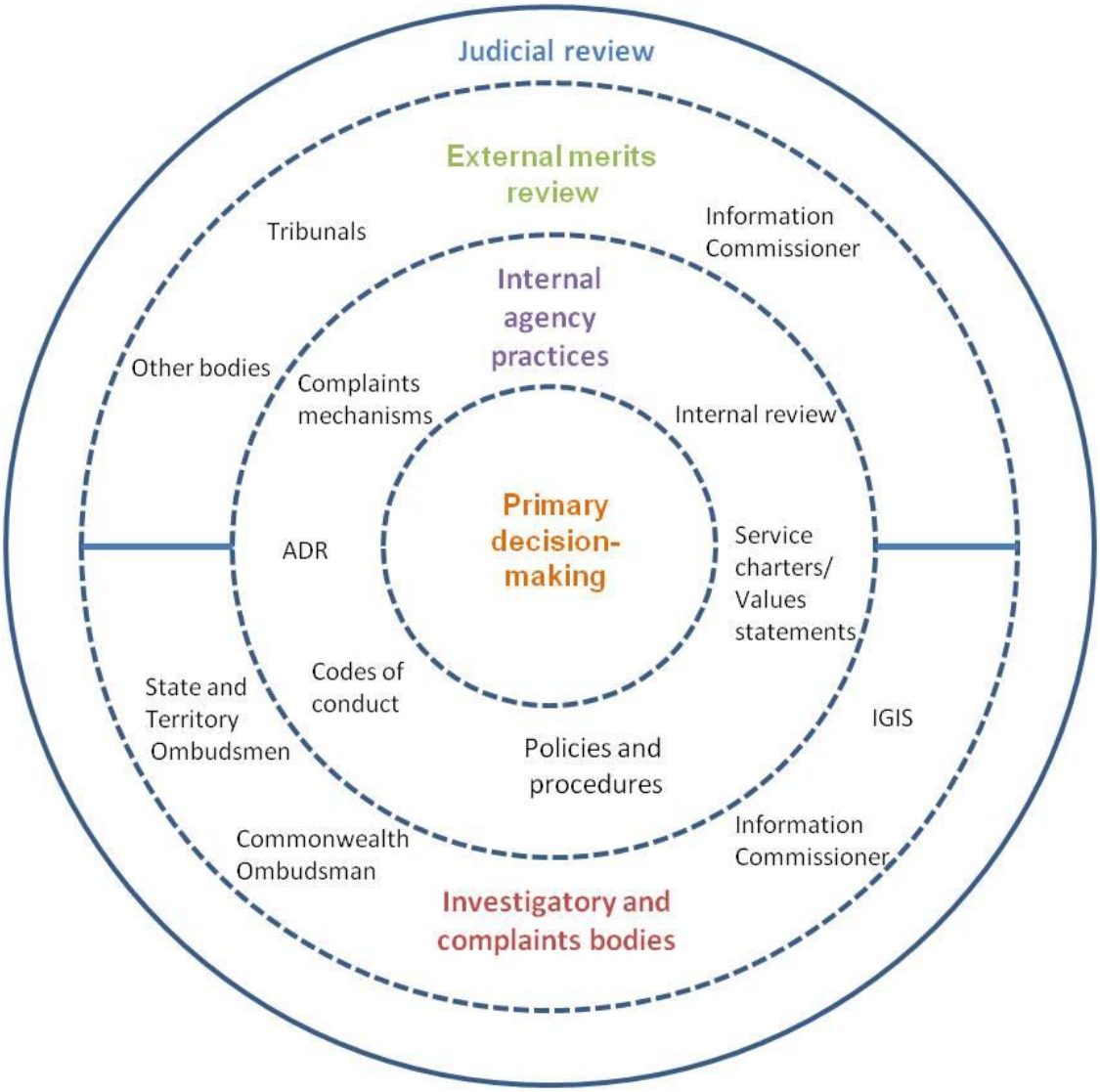
Many of the accountability features of the administrative law system, such as the availability of judicial review, the jurisdiction of the Ombudsman, the jurisdiction of the Merit Protection Commissioner and obligations under freedom of information and privacy legislation, will be applicable to agency decision making regardless of whether they are specified in individual statutes. They are of general application, with limited or no scope for exemptions.

Together, these mechanisms create a comprehensive administrative law system that provides for:

- *decision making that is fair, high-quality, efficient and effective*
- *individual access to review of both the merits and lawfulness of decisions and conduct*
- *accountability for government decisions and conduct, and*
- *public access to information about government decisions and processes, and individual access to personal information held by the government.*

[15] See Administrative Review Council, Submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Certain Matters Relating to the Role and Functions of the Administrative Review Council* (1996) at [15]; Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (revised 2009).

The administrative law system



[IGTO note: As the Attorney-General's Department's guide was published in 2011, it did not separately include the Taxation Ombudsman in the above diagram. The independent Taxation Ombudsman function was transferred to the Inspector-General of Taxation in May 2015. The Taxation Ombudsman function was previously (between 1995 and 2015) part of the Commonwealth Ombudsman.

The guide further explains that:[16]

> *Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers, delegate power to a person without setting criteria which that person must meet, or fail to provide for people to be notified of their rights of appeal against administrative decisions are of concern to the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances.*

In respect of discretionary powers, the guide notes:

> *Policy makers should consider whether statutory criteria would be appropriate to guide the decision maker in the exercise of a discretionary power. Where a broad discretion is proposed, this should be clearly explained in the explanatory material for the legislation. It is often desirable to include examples of relevant considerations even where the decision maker is exercising a broad discretion.*[17]

The APS Code of Conduct

In addition, the employment of personnel in the Australian Public Service (**APS**) is governed primarily by the *Public Service Act 1999* (the PS Act). The PS Act provides the standards of conduct required of APS employees and the possible consequences of misconduct. The PS Act sets out the APS Values, the APS Employment Principles, the APS Code of Conduct (the Code) and provisions about how to deal with possible breaches of the Code. Importantly the APS Code of Conduct includes a requirement that an APS employee:

1. must behave honestly and with integrity in the course of APS employment.
2. must act with care and diligence in the course of APS employment.
3. when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
4. when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:

   (a) any Act (including this Act), or any instrument made under an Act; or

   (b) any law of a State or Territory, including any instrument made under such a law.

[16] Attorney-General's Department, *Australian Administrative Law Policy Guide* (2011) p 11.
[17] Ibid.

Although APS Code of Conduct standards are enforceable by the employer by way of disciplinary action carried out in accordance with the PS Act, they are not duties owed to individual members of the public or others and accordingly are not enforceable by them.

The essential requirements of administrative law for good decision-making

The New South Wales Ombudsman (for example) describes the essential requirements of administrative law for good decision-making as follows:

Proper authorisation

1. There is a legal power to make the decision.

2. The person making the decision has the legal authority to do so.

3. The decision is within the scope of the decision-making power (including, in particular, within the bounds of any discretion that is a component of the power).

Appropriate procedures

4. The decision has followed a fair process.

5. The procedure meets other legal and ethical obligations.

6. Reasons are given for the decision (particularly decisions that affect the rights or interests of individuals).

Appropriate assessment

7. The decision answers the right question (which necessitates asking the right question).

8. The decision is based on a proper analysis of relevant material.

9. The decision is based on the merits and is reasonable in the circumstances.

Adequate documentation

10. The circumstances surrounding the making of decisions are adequately documented and records kept.

[Emphasis added]

1.3. The Commissioner's General Powers of Administration

In addition to the statutory discretions noted above, legislation administered, wholly or partly by the Commissioner generally includes a provision[18] that the Commissioner shall have general administration of the relevant Act (sometimes referred to as the General Power of Administration or powers of general administration).[19]

Although the exact wording of the GPA may vary between different legislation administered by the Commissioner, they are generally expressed simply and succinctly without elucidation as to the purpose, scope or parameters of the GPAs. Section 8 of ITAA 36 has included a general power of administration since inception in 1936 as follows:

> ***Section 8 ITAA 1936***
>
> *The Commissioner shall have the general administration of this Act.*

There was a rewrite of taxation administration provisions in 2010 that resulted in similar provisions being created or consolidated into existing legislation. For example, in the TAA 1953 there are four separate provisions which set out GPAs:

> ***Section 3A of the TAA 1953***
>
> *The Commissioner has the general administration of this Act.*
>
> ***Section 356-5 of Schedule 1 to the* TAA 1953**
>
> *The Commissioner has the general administration of each indirect tax law.*
>
> **Section 356-10 of Schedule 1 to the TAA 1953**
>
> *The Commissioner has the general administration of the Major Bank Levy Act 2017.*
>
> ***Section 356-15 of Schedule 1 to the TAA 1953***
>
> *The Commissioner has the general administration of the Offshore Petroleum (Laminaria and Corallina Decommissioning Cost Recovery Levy) Act 2022.*

A list of references to the GPA in main pieces of legislation administered by the Commissioner is provided in **Appendix C**.

The role and scope of these provisions to assist the Commissioner and the ATO to put into practical operation the various Tax Acts and superannuation laws is to be explored in this review investigation.

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[18] For example: *Income Tax Assessment Act 1936* s 8; *Superannuation Guarantee (Administration) Act 1992* s 43; *Excise Act 1901* s 7; *Fringe Benefits Tax Assessment Act 1986* s 3; *Taxation Administration Act 1953* sch 1 s 356-5.

[19] 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'.

1.4. Additional obligations for an Accountable Authority

In addition to obligations and responsibilities under the various Taxation Acts, the Commissioner as the Accountable Authority[20] of the listed entity known as the Australian Taxation Office also has general duties of good management and responsibilities to comply with other finance laws.

Section 15 of the *Public Governance, Performance and Accountability Act 2013* (**PGPA Act**) for example provides:

> ***15 Duty to govern the Commonwealth entity***
>
> *(1) The accountable authority of a Commonwealth entity must govern the entity in a way that:*
>
> *(a) promotes the proper use and management of public resources for which the authority is responsible; and*
>
> *(b) promotes the achievement of the purposes of the entity; and*
>
> *(c) promotes the financial sustainability of the entity.*
>
> *Note: Section 21 (which is about the application of government policy) affects how this duty applies to accountable authorities of non corporate Commonwealth entities.*
>
> *(2) In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions on public resources generally.*

Section 16 of the PGPA Act provides:

> ***16 Duty to establish and maintain systems relating to risk and control***
>
> *The accountable authority of a Commonwealth entity must establish and maintain:*
>
> *(a) an appropriate system of risk oversight and management for the entity; and*
>
> *(b) an appropriate system of internal control for the entity;*
>
> *including by implementing measures directed at ensuring officials of the entity comply with the finance law.*

[20] As defined in the *Public Governance, Performance and Accountability Act 2013.*

1.4.1. The Good Management Rule

The PGPA Act provisions outlined above is arguably a legislative articulation of the good management rule, recognised by the Courts. In *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd* (often referred to as the 'Fleet Street Casuals' case), Lord Scarman said:[21]

> *… that in the daily discharge of their duties inspectors are constantly required to balance the duty to collect "every part" of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.*

Justice Spender has also noted in *Precision Pools Pty Ltd v Commissioner of Taxation & Anor [1992] FCA 746* in the context of sales tax that:[22]

> *[the Commissioner's general] administration has to be bona fide and for the purposes of the Act, but it is a grant of a wide power and would encompass, for instance, the power to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved.*

The Full Court in Grofam[23] further observed that:

> *Perhaps further discussion between the parties and their legal advisers will result in a sensible adjustment of the matters... The alternative is probably further protracted litigation with its consequent delay and expense. We realise that the Commissioner is mindful of the important public duty which he has in administering the Act. Nevertheless, if this were a commercial dispute, there would be much to be said for the view that a further attempt at settlement should be made, perhaps with the aid of an appropriate mediator. We see no reason associated with the Commissioner's powers and duties which should dissuade him from that course if he thought it otherwise an appropriate one for him to follow.*

The ATO guide to the Code of Settlement includes the following statement:

> *In formulating what has been called the 'good management rule', the courts have recognised that it is open to the Commissioner to make sensible decisions having regard to the best use of the limited resources available. The Commissioner is not obliged to relentlessly pursue every last tax dollar where that would clearly be uneconomic or where the outcome is at best problematic.*

and

[21] *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd* [1982] AC 617 at 636-637.

[22] *Precision Pools Pty Ltd v Federal Commissioner of Taxation* [1992) 37 FCR 554 at 567.

[23] *Grofam Pty Ltd v Federal Commissioner of Taxation* 97 ATC 4656 at 4665; (1997) 36 ATR 493 at 503.

> *The good management rule has broad application, extending beyond individual cases. For example, there may be occasions where the Commissioner might consider it to be in the overall interests of the administration of the tax laws not to pursue retrospective audit and/or assessing action in return for acceptance by a section of the public or group of taxpayers of the Commissioner's position for current and future years.*

Although binding upon the Commissioner of Taxation, it is important to recognise that the PGPA Act and 'good management rule' apply to statutory officers more generally and are not tax specific. They are separate and discrete from the Commissioner's GPA.

However, good management provisions apply equally to the requirements of the various tax laws and have been observed to intersect with the administration of the tax system through areas such as settlements, practical compliance guidelines and retrospective application of laws or changed views on technical issues.

1.5. Purpose of this Investigation

This investigation seeks to examine the ATO's decision making approach in applying the Commissioner's GPA and the policies, procedures and guidance available to ATO staff to assist them in making 'good decisions'. It will also consider what guidance and communications are available to taxpayers and tax practitioners to assist them in understanding the nature, scope and ATO approach to the GPA.

The IGTO's investigation does not propose to examine the context of every type of exercise of the GPA but will rather focus on identifying and considering case studies that illustrate the ATO's approach in relation to the GPA. In particular, the IGTO will focus on examining the ATO's governance processes for identifying, considering and determining whether an exercise of the GPA is appropriate in various circumstances – including those that have whole-of-system impact, or where large segments of the taxpayer population may be affected.

The investigation draws upon a range of case studies from the IGTO's complaints and dispute investigation service as well as feedback and submissions from stakeholders. The IGTO consulted extensively with tax and legal practitioners as well as senior officers (current and former) from the ATO as part of this investigation.

The investigation aims to provide assurance to the Government, ATO senior executive, and the community at large that the GPA is appropriately managed and administered, and decisions made under the GPA are appropriate and consistent with legal principles and intended outcomes.

This investigation was undertaken pursuant to section 7(1)(b) if the *Inspector-General of Taxation Act 2003* (**IGT Act**). Pursuant to subsection 8(5) of the *Ombudsman Act 1976* (which applies by virtue of section 15 of the IGT Act), the Commissioner of Taxation and other senior officers of the ATO were afforded an opportunity to provide feedback and to make submission before it was finalised.

1.5.1. Community Views about GPA

A wide spectrum of views are held in the community about the purpose, scope and intent of the GPA. At one end of the spectrum, the GPA encompasses decisions made at the most micro levels of operation within the ATO. For example, an ATO officer allowing a taxpayer 4 weeks to provide requested documentation where standard procedures may dictate 3 weeks. At the other end of the spectrum, decisions made under the GPA can affect all taxpayers within the tax system or large segments of the taxpayer population. For example, to manage the expected influx of working from home deductions during the COVID-19 pandemic in 2020 (1 March to 30 June), 2021 and 2022 financial years, the GPA was exercised to allow taxpayers to adopt a 'shortcut' method for calculating working from home deductions.

1.5.2. Overview of stakeholder issues and feedback

The investigation was prompted by observations made by the IGTO in a number of dispute investigations concerning the early release of superannuation and military superannuation.

Stakeholder feedback was sought during initial consultations by the IGTO to develop the terms of reference. Subsequent submissions lodged in response to the terms of reference suggested or identified the following additional areas for review:

- The overall nature and scope of the GPA, and the obligations that it imposes upon the Commissioner and/or other decision makers acting on his or her behalf.
- How the ATO approaches the task of statutory interpretation to give effect to Parliament's intent and what intersection this has with the operation of the GPA.
- Perceptions that the lack of specificity surrounding the GPA provides the Commissioner with greater flexibility but may also lead to inconsistencies or a position in difficult or complex cases to not apply the GPA in a way that would fetter the Commissioner's statutory duties.
- There is a lack of clarity in relation to whether or not the GPA may be used as a curative provision to alleviate adverse or unintended outcomes for taxpayers.
- Having regard to the various roles held by the Commissioner (auditor, regulator, tax collector, adviser, provider of assistance and relief), through what lens does the Commissioner (and Tax Officials acting as his agent or delegate) view the GPA and whether this varies depending on the specific task or function being performed.[24]
- The exercise or non-exercise of the GPA may give rise to unfairness or unequal treatment between taxpayers in like circumstances. The example given is where the ATO has changed its view on the operation of a particular provision and the exercise of the GPA in relation to whether or not compliance resources should be devoted to applying the changed view retrospectively.

[24] For example – a position that requires an Official to protect the revenue may be suitable when the Tax Official is assessing tax, but less appropriate when administering provisions which provide relief, litigating or indeed collecting debts in circumstances where there is serious financial hardship, natural disaster or other personal misadventure.

- There may be a general lack of understanding and appreciation, both in the community and within the ATO, about the nature, purpose and scope of the powers conferred by the GPA, how they should be exercised and who may exercise them.
- Some exercises of the GPA are perceived to be directed at addressing policy issues rather than administrative matters.

1.6. Structure of the Report

The remainder of the report is structured as follows:

- Chapter 2 provides an in-depth discussion of the nature, scope and purpose of the GPA drawn from case law and other research as well as the ways in which the Commissioner may devolve his or her personal responsibilities through delegations and authorisations;
- Chapter 3 presents five case studies illustrating different applications of the GPA by the Commissioner and the similarities and the different approaches that have been taken in respect of the exercise of the GPA;
- Chapter 4 provides a brief discussion and commentary on the stakeholder concerns that have been raised through submissions and other discussions between the IGTO and stakeholders, together with recommendations were appropriate; and
- Chapter 5 sets out the IGTO's key observations from the report and relevant recommendations.

2

UNDERSTANDING THE COMMISSONER'S GPA

This chapter provides a detailed discussion of the nature, purpose and scope of the GPA and the delegations and authorisations from the Commissioner.

2. Understanding the Commissioner's General Powers of Administration

This Chapter provides an in-depth discussion of the GPA as well as key principles of administrative law in relation to the use of delegations, authorisations and the application of the *Carltona* principle. The chapter is set out as follows:

- A discussion of administrative law principles of delegation and authorisation, including the application of the *Carltona* principle
- The statutory framework currently in place for the administration of the tax system
- Judicial rulings on the GPA
- The range of different views that have been raised with the IGTO about the nature, purpose and scope of the GPA
- ATO guidance on the GPA
- How GPA interacts with rules of statutory interpretation
- Brief discussion of some areas where the GPA has been exercised
- Rights to external review or challenge of the GPA
- International comparisons

2.1. Administrative law principles of delegation and authorisation

The Australian Government Solicitor has published a Legal briefing – *Delegations, authorisations and the Carltona principle*[25] (hereafter the AGS Briefing) – which provides a useful summary of the administrative law principles, requirements and consequences for each of these [powers] in the context of good administrative decision making.

The following is an extract from the AGS Briefing:[26]

> *It is a fundamental principle of administrative law that when parliament vests power in a person, that person is prima facie required to exercise the power personally. The principle is expressed in the maxim delegatus non potest delegare; that is, a delegate may not delegate to another person the*

[25] Australian Government Solicitor, *Legal Briefing - Delegations, authorisations and the Carltona Principle* (2022).
[26] Ibid.

power which has been delegated to them. The exercise of the power by another person will be invalid if the person in whom the power is vested is held to have abdicated the exercise of the power to that other person.

However, the maxim is not absolute; it yields to any contrary indicator found in the language, scope or object of the statute. There are 3 main ways in which the devolution of authority can be achieved:

1. An express power to delegate

Legislation may expressly provide a statutory procedure for the devolution of a power. This most commonly takes the form of an express power to delegate the power to a person in writing. Such a delegate can then exercise the power in their own right.

Whether a legislative power to delegate needs to be in express terms will depend on the particular statutory context. In Northern Land Council v Quall, a majority of the High Court held that the power in the establishing statute of the Northern Land Council for it to do 'all things necessary or convenient to be done for or in connexion with the performance of its functions' permitted it to delegate a function conferred on it by another Act, provided that the delegation was 'necessary or convenient'.

2. An express power to appoint an authorised officer

Some legislation expressly provides for the appointment of 'authorised officers', or the authorisation of persons, to exercise specified statutory powers.

Usually, an 'authorised officer' is described as a person authorised in writing by a particular person (such as the minister or the secretary).

Legislation may provide that the authorised or appointed officer has a specific title reflecting their statutory role – for example, 'biosecurity officers' authorised under the Biosecurity Act 2015; 'monitoring officers' and 'verification officers' authorised under the Customs Act 1901. These statutory authorisations operate in a similar way to delegations, and an authorised officer exercises the power in their own right.

3. An implied power to authorise

A person in whom a statutory power is vested may, in some circumstances, be able to rely on an implied power to authorise an official to exercise the statutory power on the person's behalf, whether an express power of delegation is available or not. Such a power is commonly referred to as an implied power to authorise, the 'alter ego' principle, or the Carltona principle.

This administrative law context is important in understanding the validity of decisions made in exercise of a power that is conferred by statute on statutory positions and office holders and public servants generally.

The AGS Briefing also notes that:[27]

- It is preferable and sometimes required that a delegation or authorisation is expressed in writing, that is, by making a written instrument of delegation or authorisation;
- A power to authorise cannot be implied where Parliament intends a power be exercised personally; and
- A written instrument of authorisation will provide greater certainty as to who has the authority to exercise a particular power. However, where it is clear from the policy and administrative practices of a department that certain officials exercise a power, particularly **a routine administrative power**, for and on behalf of the holder of that power, a written instrument may not be necessary. Having said that, it is generally preferable to execute a written instrument of authorisation. [emphasis added]

Although the legal validity of an administrative decision made contrary to the principles outlined above raises interesting and vexed administrative law questions – including whether it can be remade or corrected or cured if it appears there is a legal or factual error with the original decision – this is outside the scope of this Review Investigation.

However, understanding this administrative law context is important for understanding the context in which the Commissioner and ATO Officials make administrative law decisions pursuant to the Commissioner's GPA under various taxation laws. This is explored further below.

2.2. Statutory framework for the administration of the tax system

All federal taxation laws in Australia are contained in Acts of Parliament and have as their base the taxation power in the Australian Constitution.[28] The administration of taxation laws may be contained within the body of legislation imposing particular liabilities or obligations, or they may be generally referenced in TAA 1953 which provides the administrative framework for federal tax laws in Australia. This includes the collection and recovery of income tax and other liabilities, objections, reviews and appeals processes, charges and penalties, rulings, and other tax administration matters.[29]

[27] Ibid.

[28] *Australian Constitution* s 51(ii).

[29] *Taxation Administration Act 1953.*

2. Understanding the Commissioner's General Powers of Administration

The earliest example of the GPA in legislation that is still in force is found in ITAA 1936.[30] The Commissioner has, since then, been **personally** vested with the power of general administration under the income tax act (and later under various other taxation laws) and each of the Second Commissioners is expressly **not** vested with such powers. This is illustrated in the following:

Section 4 of the TAA 1953 provides:

> *There shall be a Commissioner of Taxation and 3 Second Commissioners of Taxation, who shall be appointed by the Governor-General.*

Section 6D of the TAA 1953 sets out the powers of the Second Commissioners as follows:

> *(1) Subject to subsection (2) and to the regulations, a Second Commissioner has all the powers, and may perform all the functions, of the Commissioner under a taxation law.*
>
> *(2) Subsection (1) **does not apply in relation to**:*
>
> *(a) section 8 of this Act; or*
>
> *(b) a provision of a taxation law that:*
>
> *(i) provides that the Commissioner has the general administration of the taxation law; or*
>
> *(ii) requires the Commissioner to furnish to the Minister a report on the working of the taxation law during any period.*
>
> *(3) When a power or function of the Commissioner under a taxation law is exercised or performed by a Second Commissioner, the power or function shall, for the purposes of the taxation law, be deemed to have been exercised or performed by the Commissioner.*
>
> *(4) The exercise of a power, or the performance of a function, of the Commissioner under a taxation law by a Second Commissioner does not prevent the exercise of the power, or the performance of the function, by the Commissioner.*
>
> [emphasis added]

Taxation laws confer a range of powers and functions upon the Commissioner, personally, as well as the Second Commissioners, and contemplates that staff may be engaged under the PS Act to assist the Commissioner.[31] These may include staff engaged as Deputy Commissioners of Taxation which are specifically referred in the TAA 1953, although they are not statutory appointees.[32]

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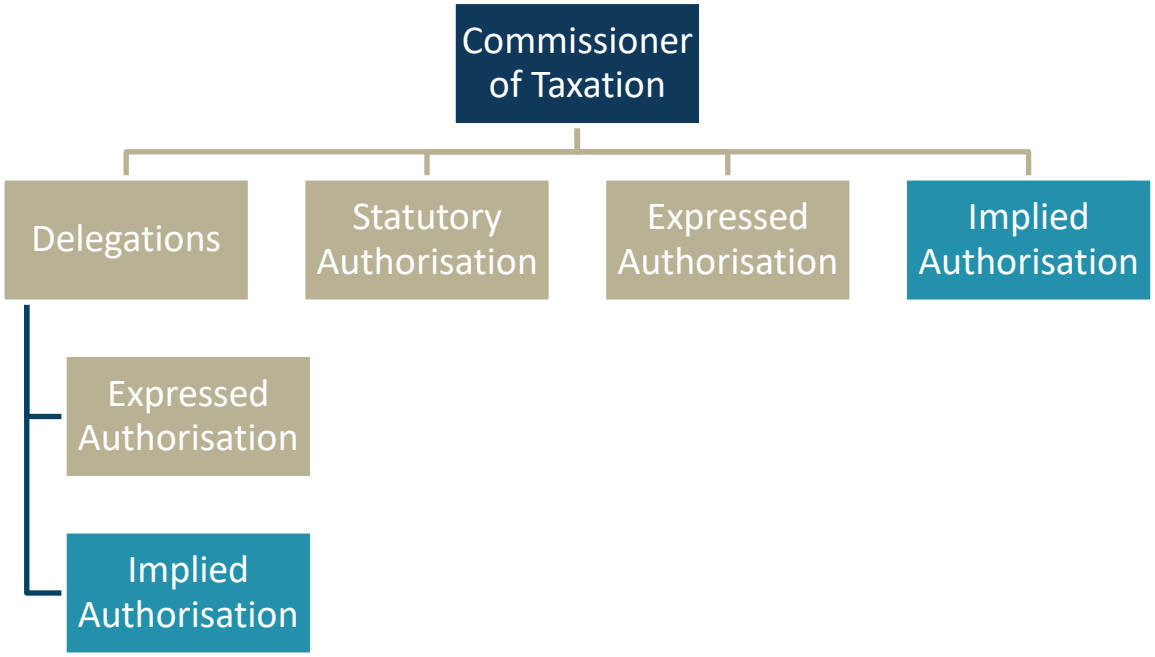
[30] Earlier examples of the appearance of a GPA include the *Income Tax Assessment Act 1915,* s 5(1).

[31] *Taxation Administration Act 1953*, s 4A.

[32] Ibid, s 7.

The cascading of power and functions from the Commissioner down through senior executives and frontline staff of the ATO is illustrated in Figure 2.1, below.

Figure 2.1: Cascade of powers and functions of the Commissioner to ATO officer



The Commissioner's delegations are generally only issued to members of the Senior Executive Service (e.g., Second Commissioners, Deputy Commissioners and Assistant Commissioners as well as the Chief Service Delivery Officer). In some instances, delegations have also been issued to Directors in certain areas of the ATO. Directors are typically employed at the Executive Level 2 classification.

As most powers and functions under a taxation law vest in the Commissioner personally,[33] there are a number of mechanisms that may be employed to cascade those powers to Deputy Commissioners or other frontline officers. Namely, these mechanisms are by way of written delegations (generally or otherwise), written authorisations or implied authorisation. Understanding the *Carltona* principle is also important to appreciate how an exercise of the GPA occurs where the power is not exercised by the Commissioner personally or is not expressly delegated.

[33] Some provisions grant powers and functions to officers other than the Commissioner. For example, section 255-5(2) of Schedule 1 to the *Taxation Administration Act 1953* provides that in addition to the Commissioner, a Second Commissioner or a Deputy Commissioner may sue in his or her official name for the recovery of a tax-related liability.

The effect and consequences of each style of decision is summarised in the Table 2.1 below.

Table 2.1: Effect and consequences of decisions made under delegations and authorisations

Decision is made by/under	Source of power	Who is the decision maker?	Who is accountable for the decision?
Person named in the Statute	Statute	Person named in the Statute (i.e. The Commissioner)	Person named in the Statute
Delegation			
Express (Written) Delegation - General	Statute and Written instrument of delegation	The delegate but s8(2) of the TAA 1953 provides that the decision is deemed to be made by the Commissioner.	The Commissioner
Express (Written) Delegation - Specific	Statute and Written instrument of delegation	The delegate but s8(2) of the TAA 1953 provides that the decision is deemed to be made by the Commissioner.	The Commissioner
Authorisation			
Statutory Power	Statute and written instrument of authorisation	Person named in the Statute (i.e. The Commissioner)	The Commissioner
Express (Written) Authorisation - General	Written instrument of authorisation	The authorised representative but in the name of the person authorising and noting s8(2) of the TAA 1953 provides that any delegated decision is deemed to be made by the Commissioner.	The Commissioner
Express (Written) Authorisation - Specific	Written instrument of authorisation	The authorised representative but in the name of the person authorising and noting s8(2) of the TAA 1953 provides that any delegated decision is deemed to be made by the Commissioner.	The Commissioner

Decision is made by/under	Source of power	Who is the decision maker?	Who is accountable for the decision?
Implied	Agency of necessity arises (is implied) from the terms of the statute	The implied authorised representative but in the name of the Commissioner.	The Commissioner

2.2.1. Delegations

Sub-section 8(1) of the TAA 1953 provides the Commissioner with an express power to delegate by writing as follows:

> *The Commissioner may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the Commissioner, delegate to a Deputy Commissioner or any other person all or any of the Commissioner's powers or functions under a taxation law or any other law of the Commonwealth or a Territory, other than this power of delegation.*

A delegation is a documented process through which a person given statutory powers or functions entrusts that power to another official (the delegate). Although an exercise of a delegated power by a delegate will be deemed to have been exercised or performed by the Commissioner,[34] the delegate may exercise the power in his or her own right.[35]

The Commissioner has issued a number of broad written delegations that cover most of his powers under the taxation laws. The Commissioner's Instrument of Delegations and Authorisations (as at 7 February 2022) includes one General Delegation,[36] eleven Specific Delegations of nominated powers[37] and six Authorisations.[38]

Although a delegate cannot further delegate their powers, they may authorise other officers to perform functions and duties for and on their behalf (i.e., instead of performing functions and duties in their own right, the authorised officers are acting as an alter ego of the delegate). The form of authorisations is not fixed and may either be written or implied. However, it has been noted that it is generally preferable to execute and issue written instruments of authorisation.[39]

[34] *Taxation Administration Act 1953,* s 8(2).

[35] Australian Government Solicitor, *Legal Briefing - Delegations, Authorisations and the Carltona principle* (2022).

[36] Commissioner of Taxation, *Instrument of the Commissioner's Delegations and Authorisations* (7 February 2022), Sch 1.

[37] Ibid, Sch 2-12.

[38] Ibid, Sch 13-18.

[39] Australian Government Solicitor, *Legal Briefing - Delegations, Authorisations and the Carltona principle* (2022).

2.2.2. Expressed power to appoint authorised officers

Some legislation expressly provides a power to appoint authorised officers to exercise decision making in their own name. These statutory authorisations operate in a similar manner to delegations, with the authorised officer exercising any powers conferred in their own name rather than on behalf of another person.[40]

Examples where these statutory authorisations appear are in relation to 'biosecurity officers under the *Biosecurity Act 2015* or 'monitoring officers' and 'verification officers' under the *Customs Act 1901*.[41]

Officers who are authorised in this manner differ to those with expressed or implied authorisation under the *Carltona* principle, discussed in the next section.

2.2.3. The *Carltona* principle

The case most often cited in support of the proposition that a person may act as an agent of necessity for and on behalf of another (even without a written delegation or authorisation) is the House of Lords decision in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (*Carltona*).

The Carltona principle essentially recognises that Ministers will, of necessity, need assistance to fulfil the many and varied statutory powers and duties placed on them personally. The principle recognises the implied power of a Minister to act through the agency of others.[42]

Furthermore, the *Carltona* principle is an interpretative principle through which the courts have construed the provisions of a statute to determine whether Parliament intended that a particular duty, function or power must be exercised personally by the statutory officer holder or through an agent. As was said by Gibbs J in *O'Reilly* (at [6]):[43]

> *Those authorities [being Carltona and others] established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorised officer of his department.*

An authorisation made in reliance on the *Carltona* principle may be in writing or implied. As noted below, a written authorisation should be preferred, not only for the avoidance of doubt but also because where the statutory scheme permits wide and comprehensive powers of delegation, an implied authorisation may not be assumed without an express delegation or authorisation of the powers or functions contemplated. This is particularly so where the relevant power or function involves the exercise of a discretion or the formation of an opinion.[44]

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[40] Ibid.

[41] Ibid.

[42] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

[43] *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, per Gibbs CJ at [6].

[44] *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, per Mason J at [14]; *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion* (1979) 2 ALD 86, per Brennan J at [94].

> *The practical administrative necessity which warrants an authority's exercising his power by the acts of another disappears when the authority is empowered to delegate all of his powers and functions to that other.*[45]

This passage was cited and discussed by Gibbs CJ in *O'Reilly* where his Honour said:[46]

> *In Re Reference Under Ombudsman Act, s. 11 (1979) 2 ALD, at p 94 , Brennan J. said that "The practical administrative necessity which warrants an authority's exercising his power by the acts of another disappears when the authority is empowered to delegate all of his powers and functions to that other." The existence of a power to delegate is of course an important consideration in deciding whether the designated authority may act through an authorized agent. However, the fact that the Act itself contemplates that the delegation will be to a Deputy Commissioner only (notwithstanding that s. 8(1) of the Taxation Administration Act confers a wider power of delegation) suggests that it was not intended that there should be a wholesale delegation of powers to comparatively minor officials. But in any case it would hardly be practicable to make a delegation of that kind, and it seems to me that there exists, as the Parliament must have known, a practical necessity that the powers conferred on the Commissioner by the Act should be exercised by the officers of his Department who were acting as his authorized agents. On the whole I have reached the conclusion that the powers conferred by s. 264 were not intended to be exercised only by the Commissioner or his delegate personally but may be exercised through a properly authorized officer.*

Chief Judge McClellan's decision in *Centro Properties* includes a summary of the *Carltona* principle in the following terms:[47]

> *…The principle, first identified in war time, provides that where an administrative function has been entrusted to a minister but has been performed by an official employed in the ministry or the minister's department, the minister is entitled to rely on that person's decision in relation to the relevant function. The law does not regard there as having been a delegation of power. Instead, the relationship is a type of agency (Peko-Wallsend at 37-38) whereby an officer is the vehicle through which a ministerial power is exercised, although the minister remains responsible for that official's actions or conclusions. In Carltona, Lord Greene MR articulated the rationale for this so-called "alter ego" principle in these terms (at 563):*
>
> > *In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them… It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon the ministers and the powers given to the ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The*

[45] *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion* (1979) 2 ALD 86, per Brennan J at [94].
[46] *O'Reilly v Commissioner of State Bank of Victoria* (1983) 153 CLR 1 at 12.
[47] *Centro Properties Limited v Hurstville City Council and Another* [2004] NSWLEC 401; (2004) 135 LGERA 257 at 268.

> *minister is responsible…* ***The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.*** [Emphasis added]

The New South Wales Ombudsman has provided the following summary (emphasis added) of the *Carltona* principle as part of his office's investigation into the use of machine technology in administration decision making:[48]

> ***Even when a function has not been formally delegated, the person who has been conferred the function may be able to obtain assistance in the exercise of the function.*** *Bodies corporate can only act through human agents, but even human administrators may be assisted in performing their statutory functions, at least to some extent.*
>
> *This principle, sometimes referred to as the Carltona principle, recognises that, in conferring a statutory function on an administrator,* ***Parliament does not necessarily intend that the administrator personally undertake every detailed component or step of the function. As a matter of 'administrative necessity', some elements of a function might need to be shared with others who are taken to be acting on the administrator's behalf.*** *The extent to which performance of functions can be shared under the Carltona principle will depend on the particular statutory function.*
>
> *The reasoning underlying the Carltona principle appears to be sufficiently general that it could extend to permit at least some uses of machine technology. That is,* ***if the holder of a statutory function, having regard to 'practical necessity', cannot be expected to personally perform every step of a function in every case, there seems no reason why they should be limited to assistance only from human agents.***
>
> *Instead, they may be able share performance of components of the function with a machine. However, whether using human or machine assistants,* ***the Carltona principle only permits assistance that is consistent with the administrator remaining, at all times, the one who ultimately retains control of the function and is accountable for its performance. There may also be doubt as to whether assistance can extend to activities that are not routine or that involve the exercise of a statutory discretion.***
>
> ***Further, the principle is based on a necessity imperative. The holder of a statutory function cannot rely on it to authorise sharing performance of a function merely on the basis that it might be more efficient or otherwise desirable to do so. While it is possible the Carltona principle may be extended in the future, whether and how that might happen is not clear.***
>
> *To date, the Carltona principle has been concerned only with the ability of administrators to rely on human agents. The reasoning that underpins that principle means it has the potential also to support some uses of machine technology.* [Emphasis added]

[48] New South Wales Ombudsman, *The new machinery of Government: using machine technology in administrative decision-making* (2021) pp 28-29.

This principle of agency has been applied to statutory officers as well. The *Carltona* principle has been applied in Australia and extended to apply to senior public servants acting under written delegations from the Commissioner of Taxation, to properly authorise through appropriate written authorisations more junior personnel of their agencies and departments to take certain actions and make certain decisions for and on their behalf – see *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 (*O'Reilly*). The High Court in *O'Reilly* based its decision on the 'practical necessity' that must have been intended by Parliament and in reliance on the principle of 'administrative necessity'.

Gibbs CJ in *O'Reilly* observed:[49]

> *Since there are literally millions of taxpayers (according to Year Book Australia 1982, p. 577, there were over 5.6 million individual taxpayers in the year 1979-80) it would reduce the administration of the taxation laws to chaos if the powers conferred by those sections could be exercised only by the Commissioner or a Deputy Commissioner personally. It can not be supposed that the Parliament intended such a result.*

In the absence of a power to delegate or an expressed power to authorise, the ability of a decision maker to authorise another to make the decision *on their behalf* turns upon the implied power to authorise under the *Carltona* principle. The implied power to authorise under *Carltona* is enlivened in circumstances of administrative necessity, as noted in *O'Reilly* by reference to the 'literally millions of taxpayers'. Earlier in his judgment, Gibbs CJ observed:[50]

> ***The answer to the question whether the statute requires the power to be exercised personally by the person designated depends on the nature of the power and all the other circumstances of the case****: cf. Re Reference under Ombudsman Act, s. 11 (1979) 2 ALD 86, at p 93, per Brennan J. However, I should mention the line of authorities which commenced with Carltona Ltd. v. Commissioners of Works (1943) 2 All ER 560 and which are discussed in In re Golden Chemical Products Ltd. (1976) Ch 300 . Those authorities established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorized officer of his department. This result depended in part on the special position of constitutional responsibility which Ministers occupy, and in that respect these authorities are distinguishable from cases such as the present. However, they also rest on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally.* [Emphasis added]

The pertinent question then for the exercise of the GPA is whether the decision needs to be made by the decision maker (in this case, the Commissioner) personally.

Much of the ATO's current guidance in this area places the obligation on its officers to consider whether the decision to be made falls within their 'usual duties' – presumably by reference to their position, level of seniority, and scope of their usual duties. The latter point is not identified in *Carltona* or *O'Reilly* but was referred to by Justice Vickery in *Rail Signalling Services Pty Ltd v Victorian Rail Track* in finding

[49] *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 7.

[50] Ibid, at 6.

implied authority vested in a Senior Executive who reported to the CEO of Victrack[51] and in *Secretary, Department of Social Security v Giuseppe Alvaro* in which the court observed that:[52]

> *…where a question arises whether the officer who formed the requisite opinion and raised a debit under s.1224 had authority to do so, it will be necessary to consider evidence as to the nature and scope of the duties of the position which the officer held.*

In the IGTO's view, two relevant factors to consider are whether the decision to be made is:

- not routine; or
- requires an exercise of a statutory discretion.

Although not determinative in and of themselves, a decision involving a significant exercise of discretion with broad-reaching impact, or a decision of a non-routine nature might more readily be considered to only be made by the designated decision maker, or a delegate of that person.

2.2.3.1. Carltona Authorisations may be expressed or implied

A *Carltona* authorisation may either be expressed (e.g., in a written instrument) or implied. As noted in the AGS Briefing:[53]

> *Whether a written authorisation is required will depend on the nature of the power and the administrative arrangements in place in the particular department.* ***A written instrument of authorisation will provide greater certainty as to who has the authority to exercise a particular power****.* [emphasis added]
>
> *However, where it is clear from the policy and administrative practices of a department that certain officials exercise a power, particularly a routine administrative power, for and on behalf of the holder of that power, a written instrument may not be necessary. Having said that, it is generally preferable to execute a written instrument of authorisation.*
>
> *A person acting on another's behalf under an authorisation acts in the name of the holder of the power. Accordingly, they would execute documents in particular circumstances either by affixing a facsimile signature of the holder of the power or by signing for that person. Strictly speaking, it is not necessary for a person acting under such an authorisation to include their own name but it is good administrative practice to do so.*

2.2.3.2. Expressed authorisations used by the ATO

The Commissioner can also directly authorise officers. Therefore, authorisation can be in addition to delegations. These authorisations seek to establish parameters for the exercise of powers for and on behalf of the Commissioner or the delegate. Unlike delegations, authorisations (whether expressed or otherwise) are generally not statutorily based.

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[51] *Rail Signalling Services Pty Ltd v Victorian Rail Track* [2012] VSC 452 at [98], [101]-[102].

[52] *Secretary, Department of Social Security v Giuseppe Alvaro* [1994] FCA 1124 at [29].

[53] Australian Government Solicitor, *Legal Briefing - Delegations, Authorisations and the Carltona principle* (2022).

The ATO has issued an extensive collection of authorisation guidelines aimed at assisting officers exercising authorised power on behalf of a delegate. The most recent version of these guidelines exceeds 100 pages.

The ATO explains in the preface to the guidelines that:[54]

> *Prior to 1992 the instruments of authorisations contained conditions as to how powers were to be exercised. In practice, this meant that officers may have been limited in what they were authorised to do by conditions being placed on the scope of their authority. There was concern that, where an authorisation is subject to a condition and that condition is breached, it may be held that an otherwise authorised officer acted without authority.*
>
> *In 1992 guidelines replaced conditions to avoid this problem.*

In explaining the interaction between the guidelines and instruments of delegations and authorisation, the ATO states:[55]

> *The guidelines do not override the instruments of delegation or authorisation.*
>
> *They are a recognition that the Tax Office is a large organisation with diverse responsibilities. The guidelines enable the Deputy Commissioner and other senior Tax Office managers to match the broad powers the authorisations give officers with the specific decisions officers make.*
>
> *The guidelines may require that a particular power be exercised by a person having a classification higher than that permitted by the relevant authorisation. For example, the instrument may allow an APS2 to determine substituted accounting periods, while the guidelines may specify that no-one below an APS4 should make this decision (See guideline 5.8.1). This is not a contradiction. It allows the instrument to operate nationally because the authorised level is the lowest APS level previously authorised in the Tax Office.*
>
> *While each Deputy Commissioner has accepted that this is a reasonable level from a legal point of view, he or she may want a person of a higher level to carry out the tasks because of existing management practices in that particular Business Line. It should be noted that, if the level of person who can make a decision were to be lower in the guidelines than it is in the instrument of authorisation, a decision made by a person at that lower level in reliance on the guidelines would have been made without authorisation and would be invalid. This is because the guidelines cannot extend authorisations made by an instrument, although they may restrict them.*

[54] ATO, *Taxation Authorisation Guidelines* (as at 9 May 2022), p 3.

[55] Ibid, p 2.

2.3. Judicial rulings on GPA

Decisions made under the GPA are not reviewable under Part IVC of the *Taxation Administration Act 1953*. Furthermore, the decision in *Hutchins*[56] stands for the proposition that they are not necessarily decisions made under an enactment such that they would enliven the review rights under the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**). However, decisions made under the GPA are decisions of an officer of the Commonwealth which enlivens review rights under section 39B of the *Judiciary Act 1903* and, potentially, section 75 of the Constitution.

There have been few cases brought to challenge the exercise of the GPA and there is limited judicial guidance on the general nature and scope of the GPA. The body of law relating to the GPA has largely examined the exercise within the context of the specific facts of the case in question, or the particular exercises of the power. While these cases provide some guidance, they do not provide broad judicial guidance on the GPA. A brief summary of the cases that have considered the GPA within the tax context is set out below.

In *Macquarie Bank Limited v Commissioner of Taxation* (*Macquarie Bank*), the taxpayer sought judicial review under the ADJR Act and section 39B of the *Judiciary Act 1903* of a decision by the Commissioner's delegate not to apply a view of the law on a prospective basis only. In relation to the nature of the GPA as contained in section 8 of the ITAA 1936, Edmonds J observed:[57]

> *While that may in some senses be properly described as a "power", though more accurately described as a duty, **it does not include a power to make decisions that create, extinguish or modify the legal rights of taxpayers**; nor does it include a power to promulgate rules that create legal rights or immunities or that otherwise have the force of delegated legislation. [**Emphasis added**]*

On appeal, the Full Federal Court made some further observations and comments about the GPA which, on one reading, provides some indication as to the outer limits of the scope of GPAs. Specifically, their Honours stated:[58]

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

[57] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887 at [76].

[58] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 at [11]; *IOOF Holdings Limited v Commissioner of Taxation* [2014] FCAFC 91 at [142].

> *given by provisions like s 8 of the 1936 Act, s 356-5 of schedule 1 of the 1953 Act and s 44 of the 1997 Act, gives him a "discretion" in making compliance decisions to reassess and "in relation to the evidence he is willing to accept to ascertain the taxable facts" (although the latter may be doubtful or, at least, requires heavy qualification), and (b) permits the Commissioner "to decline to consider re-assessing, or to decline to in fact re-assess a taxpayer"; but no such "discretion" can be exercised to fetter an assessment or re-assessment when the Commissioner has formed the view that the statute imposes a liability contrary to some view he may previously have had, or had, accepted. His duty then is to apply the law as he understands it to be.*

In *Precision Pools Pty Ltd v Federal Commissioner of Taxation* (cited with approval in *Grofam Pty Ltd & Ors v Commissioner of Taxation*), Spender J commented on section 4 of the Sales Tax Assessment Act (No 1) 1930 [now repealed], a GPA provision expressed in the same terms as section 8 of the ITAA 1936, and observed that:[59]

> *That administration has to be bona fide and for the purposes of the Act, but it is a grant of wide power and would encompass, for instance, the power to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved.*

The Federal Court's decisions in *Grofam*[60] (dealing with settlements) and *Knuckey*[61] (in relation to programs of audit and selection of auditees for the program) both confirmed that the Commissioner may exercise his administrative powers to achieve what is fairly regarded as incidental to, or consequential upon, matters he or she is required or authorised to do under the laws.

Beyond these cases, there is little else by way of judicial rulings that assist to cast light on the purpose, nature and scope of the GPA. The limited number of judicial pronouncements on the GPA is likely a product of the difficulties with mounting a challenge against an exercise of the GPA as discussed later in this chapter.

[59] *Precision Pools Pty Ltd v Federal Commissioner of Taxation* [1992) 37 FCR 554 at 567; See also *Grofam Pty Ltd v Federal Commissioner of Taxation* [1997] FCA 660; 97 ATC 4656.

[60] *Grofam Pty Ltd v Federal Commissioner of Taxation* [1997] FCA 660; 97 ATC 4656.

[61] *Knuckey v Federal Commissioner of Taxation* 98 ATC 4903.

2.4. Other views on the scope of the Commissioner's GPA vary significantly

The text of the various GPA provisions adopted across some 34 pieces of tax legislation administered or partially administered, by the Commissioner is simply stated and uncontroversial. However, there is virtually no guidance or consensus on their nature, purpose and scope.

2.4.1. The ATO view communicated as part of this IGTO Review Investigation

In feedback provided to the IGTO as part of this review investigation, the ATO expressed its view that:[62]

> *The purpose of the general administration provisions is to nominate the Commissioner as the person responsible for the administration of the taxation laws, and by whom decisions about the administration of those Acts may be made.*
>
> *This creates a duty, owed by the Commissioner to the Commonwealth, to administer the taxation laws. While these provisions may authorise a broad range of administrative actions, this authority does not extend to the Commissioner modifying the rights or obligations of taxpayers. It is the expressed powers in the taxation laws which are the source of the power of the Commissioner to modify such rights or obligations*.

2.4.2. Other Stakeholder Views

The IGTO also consulted with a range of stakeholders on their views and understanding of the GPA. A number of different (not necessarily contradictory) views emerged:

- The GPA confers a distinct power - that is separate from other provisions in the statute and which therefore can be expressly or impliedly delegated or authorised.
- The GPA imposes an obligation or duty on the Commissioner only – that is, to administer taxation laws - and does not confer any separate or distinct power on the Commissioner.
- In combination with the ruling system, the GPA may be used by the Commissioner to make determinations on interpretative issues or intended compliance approaches.
- The GPA confers power only to the extent that it is necessary and incidental to the administration of other provisions in the statute.
- The GPA confers power only in relation to resource allocation decisions.

[62] ATO communication to the IGTO, 14 March 2023.

- The GPA confers no additional power but merely serves to denote that a piece of legislation, or part thereof, is a taxation law for the purposes of the definition in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) which then invokes various secrecy and confidentiality provisions.
- Some combination of the above.

Each of these is discussed further below, in turn.

2.4.3. A separate and distinct power

In its 2004 *Review on Aspects of Income Tax Self-Assessment* (**ROSA Report**), the Treasury observed that:[63]

> *In order to fulfil his role in the tax system, the Commissioner of Taxation has a general power to administer the income tax laws. This power has been provided for because it is recognised that in order to administer the Australian tax system efficiently and fairly, the Commissioner must necessarily make judgments and take actions, in the interest of good management of the system, that are not necessarily spelt out in detail in the statutes.*
>
> *In practice, this 'power' means that the Commissioner has the ability to make administrative decisions in a way that will give effect to the object and purpose of the legislative provision being applied, improve the smooth running of the tax laws and assist taxpayers to more easily comply with the tax law.*

Judicial rulings have also at times observed that the power granted by the GPA is a 'wide power' and encompasses the power to compromise proceedings and efficiently management disputes in which the Commissioner is involved.[64]

The views of the Treasury and observations made in judicial rulings tend to suggest that the GPA exists for day-to-day administration but importantly imports a requirement for the Commissioner to consider principles of efficiency, fairness, good management of the system, smooth running of the tax laws and assisting taxpayers to easily comply.

2.4.4. A duty to administer

In his judgment in *Macquarie*, Edmonds J observed that while the GPA (as set out in section 8 of the ITAA 36):[65]

> *…may in some senses be properly described as a "power", though more accurately described as a duty, it does not include a power to make decisions that create, extinguish or modify the legal rights of taxpayers; nor does it include a power to promulgate rules that create legal rights or immunities or that otherwise have the force of delegated legislation.*

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[63] The Treasury, *Report on Aspects of Income Tax Self-Assessment* (2004), 72.

[64] *Precision Pools Pty Ltd v Federal Commissioner of Taxation* [1992) 37 FCR 554 at 567; See also *Grofam Pty Ltd v Federal Commissioner of Taxation* [1997] FCA 660; 97 ATC 4656.

[65] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887 at [76].

In this sense, the court appears to suggest that the GPA does no more than reinforce the duty of the Commissioner to administer the law in accordance with the tax acts and lends support to the view that the GPA does not confer any additional or distinct powers.

2.4.5. A power in relation to Interpretative issues and intended compliance approach based on the interpretation

A further extension to the notion that the GPA confers a separate power for the Commissioner is also found in the ROSA report. Several submissions to the Treasury consultations in 2004 asserted that the Commissioner could use the GPA more effectively by adopting a system of extra-statutory concessions (**ESC**) such as that adopted in the United Kingdom (**UK**).[66]

The Treasury, at the time observed that the adoption of ESCs into the Australian tax system was unnecessary as similar outcomes could already be achieved through the GPA in combination with the binding ruling system. Specifically, it observed:[67]

> *Using slightly different means, the Australian system achieves the same result. Through the binding ruling system (especially as modified by the recommendations of this review) and the general administrative power, the Tax Office may make statements of interpretation or intended compliance practice. Having made such a statement, any favourable application of the law by the Commissioner under the statement will effectively bind the Commissioner, even if his opinion is later found to be incorrect at law. All that is required is that such action be taken in good faith, in the interests of the proper administration of the system and that the position is not detrimental to taxpayers compared to the position under the law.*

It was observed in the ROSA Report that the ATO had made no request for further statutory powers to facilitate its administration, and accordingly it was concluded that further statutory provisions were not required for the Commissioner to fulfil his duties as administrator of tax laws in Australia.[68]

Interestingly, in 2009 a separate review of tax law design recommended that consideration be given to providing an ESC power to the Commissioner.[69] This led to the Treasury issuing a discussion paper[70] which appears to have been the catalyst for the enactment of the Commissioner's Remedial Power in 2017.[71] This is the subject of a separate IGTO Review investigation.

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[66] The Treasury, *Report on Aspects of Income Tax Self-Assessment* (2004), 72.

[67] Ibid, 73.

[68] The Treasury, *Report on Aspects of Income Tax Self-Assessment* (2004), 73.

[69] Tax Design Review Panel, *Better Tax Design and Implementation* (2008) Recommendation 24, p 41.

[70] The Treasury, *An 'extra-statutory concession' power for the Commissioner of Taxation* (12 May 2009).

[71] *Taxation Administration Act 1953*, Sch 1, Div 370.

2.4.6. A necessary and incidental power

Another view of the GPA is that it is a narrow power and only directed to empower the Commissioner '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.'[72] For example, in discharging his duties to ensure compliance with taxation laws, the Commissioner is authorised to undertake audits with any decisions relating to what and whom to audit being encompassed by the GPA.[73]

Under this view, the Commissioner can do no more than operate within the boundaries of the powers conferred by Parliament and cannot use the GPA to extend, confine or undermine Parliament's intentions.[74] This is so, even in circumstances where the law as enacted produces an unintended, or inconvenient outcome for taxpayers. In such circumstances, rather than using the GPA to seek to remedy such anomalies, the Commissioner assumes a:[75]

> *…responsibility to advise Treasury where the tax and superannuation laws do not give effect to their underlying policy, for example, where they produce unintended consequences, anomalies, or significant compliance costs inconsistent with the policy intent, or where a legislative solution may be needed to address an emerging compliance issue.*

2.4.7. A resource allocation power

It is axiomatic that there is a tension between the Commissioner's duties to assess and collect the right amount of tax and the allocation of scarce resources to optimise, although not necessarily maximise, tax collection.[76] In *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd*, Lord Scarman in the UK House of Lords said:

> *Nor do I accept that the duty to collect 'every part of inland revenue' is a duty owed exclusively to the Crown … I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.*[77]

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[72] Mark Leibler AC, *Tax and the Rule of Law* (Annual Tax Lecture, Melbourne Law School, 23 March 2022) p 5; Bruce Quigley, *The Commissioner's powers of general administration: how far can he go?* (Paper delivered at the 24th National Convention of the Taxation Institute of Australia, 12 March 2009) 4-5.

[73] See for example: *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649; *Knuckey v Federal Commissioner of Taxation* (1998) 87 FCR 187.

[74] Bruce Quigley, *The Commissioner's powers of general administration: how far can he go?* (Paper delivered at the 24th National Convention of the Taxation Institute of Australia, 12 March 2009), 5.

[75] Michael D'Ascenzo, *The rule of law: a corporate value* (Speech delivered at the Law Council of Australia's Rule of Law Conference, 1 September 2007).

[76] Bruce Quigley, *The Commissioner's powers of general administration: how far can he go?* (Paper delivered at the 24th National Convention of the Taxation Institute of Australia, 12 March 2009), 5.

[77] *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd* [1982] AC 617 at 636-637.

and

> *… in the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.* [78]

The duty of good management has been legislated in Australia and is found in section 15 of the PGPA Act which states:

> *(1) The accountable authority of a Commonwealth entity must govern the entity in a way that:*
>
> *a) promotes the proper use and management of public resources for which the authority is responsible;*
>
> *b) promotes the achievement of the purposes of the entity; and*
>
> *c) promotes the financial sustainability of the entity.*

Given this express statutory requirement as set out in the PGPA Act and Rules, it is unclear what additional powers or duties a GPA may therefore authorise or permit.

In *Macquarie Bank*, the Full Federal Court observed that in relation to practice statements issued by the ATO that:[79]

> *The learned primary judge held that the practice statement had not purported to bind the Commissioner because references in the practice statement to taking action or compliance action were to be read as referring to circumstances where there are resource allocation decisions to be made.*

A common iteration of the ATO's use of the GPA to support resource allocation decisions is Practical Compliance Guidelines (**PCG**). As the ATO has explained:[80]

> *The provision of compliance guidance can be seen as consistent with the duty of good management stemming from the Commissioner's general powers of administration of the taxation laws. Balanced against the duty to assess and collect the revenue properly payable under the law, the duty of good management involves efficient resource allocation decisions to achieve optimal, though not necessarily maximum, revenue collection. Practical compliance guidelines will transparently communicate the ATO's assessment of risk in relation to tax law compliance issues and consequential resource allocation intentions.*

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[78] Ibid, at 651.

[79] *Macquarie Bank Ltd v Commissioner of Taxation* [2013] FCAFC 119 at [12].

[80] ATO, *PCG 2016/1 Practical Compliance Guidelines: purpose, nature and role in the ATO's public advice and guidance* (3 June 2016), [8].

2.4.8. The GPA confers no additional powers or discretions

It has also been posited that the GPA confers no additional powers on the Commissioner and serves only to denote that a particular piece of legislation, or part thereof, is a taxation law. That is, as defined in section 995-1 of the ITAA 1997 which relevantly provides:

> *"**taxation law**" means:*
>
> *(a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or*
>
> *(b) legislative instruments made under such an Act (including such a part of an Act); or*
>
> *(c) the Tax Agent Services Act 2009 or regulations made under that Act.*
>
> [emphasis added]

Support for this view can be found in notes accompanying certain GPA provisions. For example, section 32 of the *Register of Foreign Ownership of Water or Agricultural Land Act 2005* states:

> ***32 Commissioner has the general administration of this Act***
>
> *The Commissioner has the general administration of this Act.*
>
> *Note: This Act is therefore a taxation law for the purposes of the Taxation Administration Act 1953 (among other laws). That Act contains a wide range of provisions about gathering, protecting and dealing with information, the exercise of powers and the performance of functions, under taxation laws, and the enforcement of taxation laws.*

Similarly, sub-section 5(7) of the *Superannuation Industry (Supervision) Act 1993* (**SISA**) states:

> *(7) To avoid doubt, for the purposes of the definition of taxation law in subsection 995 1(1) of the Income Tax Assessment Act 1997, the Commissioner of Taxation is taken to have the general administration of a provision of this Act or the regulations that confers powers and duties on the Commissioner of Taxation.*
>
> *Note: An effect of a provision being administered by the Commissioner of Taxation is that people who acquire information under the provision are subject to the confidentiality obligations and exceptions in Division 355 in Schedule 1 to the Taxation Administration Act 1953.*

A similar mechanism is employed in the *International Agreements Act 1953* which, although missing an express statement of general administration, incorporates the ITAA 36 and ITAA 97 and requires that they be read as one, with one effect being that the secrecy provisions which would otherwise have applied to prevent the sharing of information are overcome.[81] As explained by the explanatory memorandum:[82]

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[81] See the Note to section 4(1) of the *International Agreements Act 1953.*

[82] Explanatory memorandum to the International Tax Agreements Amendment Bill (No. 1) 2006 pp 19-20.

> *2.9 To date, exchange of information in Australia's international agreements generally extended to income tax only. Secrecy provisions preventing the disclosure of information relating to income tax are contained in section 16 of the ITAA 1936.*
>
> *2.10 Section 16 of the ITAA 1936 is overridden for the purpose of Exchange of information Articles in Australia's international agreements by virtue of section 4 of the International Tax Agreements Act 1953. Section 4 incorporates the Assessment Acts (Income Tax Assessment Act 1936 (ITAA 1936) and Income Tax Assessment Act 1997 (ITAA 1997)) into the International Tax Agreements Act 1953 and requires the latter Act to override the former Acts to the extent of any inconsistency between the two. As a result, treaties contained in the International Tax Agreements Act 1953 override section 16 of the ITAA 1936 and information can be exchanged in relation to income tax.*
>
> *2.11 The incorporation of the ITAA 1936 and the ITAA 1997 into the International Tax Agreements Act 1953 ensures that the disclosure of information, when discharged by the Commissioner or a duly authorised officer thereof, in accordance with the international agreement is not a breach of the secrecy provisions in the ITAA 1936.*

Under this approach, the GPA does no more than enable a piece of legislation to enliven existing statutory provisions dealing with tax administration matters and to impose duties, such as those of confidentiality and secrecy on the Commissioner.

Further support for this view may be found in the fact that there are more than 500 express administrative discretions[83] to be found scattered throughout the various taxation acts. The fact that Parliament has expressly authorised the Commissioner to exercise discretion in some circumstances, as a matter of ordinary rules of statutory construction may imply that no such discretion can otherwise be imported as a residual power into a GPA.

2.4.9. A combination of the some or all of the above

A final suggestion is that the GPA may not be neatly defined within any of the above suggestions and that it is more likely that the nature and scope of the GPA is a combination of one or more of the previously listed definitions. The lack of consensus amongst stakeholders with whom the IGTO engaged, and the differences in judicial commentary, tend to support the notion that the GPA encompasses at least more than one of the above definitions.

[83] See: The Treasury, *Review of Discretions in the Income Tax Laws Discussion Paper* (2007).

2.5. IGTO Observations

The IGTO does not believe that it is necessary for the IGTO to conclude on which of these views is correct, apposite or useful. Indeed, as the GPA is a statutory provision that permeates taxation law, and other legislation, any clarification or conclusion about the GPA is most appropriately done by the Judiciary, Executive or Parliament.

The preceding discussion does highlight however that, based on the range of views outlined above that there is ambiguity as to the scope, purpose and Parliamentary intent of the Commissioner's GPA.

2.5.1. Duty vs Power

It is worth noting that the legislative references to GPA is not expressed as a power but rather a statement that the Commissioner has the general administration of the Act. However, the ATO's Law Administration Practice Statement PS LA 2009/4 – *When a proposal requires an exercise of the Commissioner's general powers of administration* (**PS LA 2009/4**), since its first iteration does refer to the GPA as a 'power' and it has been referred to as such by a former Second Commissioner of Taxation.[84]

Some of the views set out above tend to support the view that the GPA is simply a *duty* imposed by Parliament on the Commissioner to the administer the laws as written. This interpretation arguably offers the Commissioner very little, if any, discretion beyond those discretions expressly stated in the legislation or that would be administratively necessary to give effect to those provisions. The GPA would then simply be the means to operationalise the requirements of the statute – **without compromise**. Any discretion would need to be statutorily granted – that is, expressed in the statute. This view arguably aligns with Justice Isaac's observation that 'The Commissioner is a trusted officer appointed by the Government to put the Act into practical operation'.[85]

Former Commissioner Michael Carmody acknowledged the importance of the GPA in addressing the practicality of administration of taxation laws.[86] This view may align with some community expectations of practical or pragmatic administration.

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[84] Bruce Quigley, *The Commissioner's powers of general administration: How far can he go?* (12 March 2009).

[85] *Commonwealth Agricultural Service Engineers Ltd (in Liq) v Commissioner of Taxes (SA)* [1926] HCA 30; (1926) 38 CLR 298 at 293.

[86] Former Commissioner Michael Carmody in his speech *the Art of Tax Administration, Two Years on* made the following observations: *In a dynamic business environment, it is difficult for any law, let alone one as expansive as tax law to contemplate fully the practicality of administration for all types of tax payers - from large international corporations to small, home-based businesses. This is particularly the case given the past tendency towards more prescriptive or black letter law. At times, this can lead to potentially disproportionate costs because the detailed evidentiary requirements for compliance are out of step with what is reasonably practical for business. At other times, a failure to meet the formalities of compliance can have severe consequences, notwithstanding that there has been substantive compliance with the law. This has raised the question of the extent to which my power of general administration of the law - which embodies the good management rule - can be utilised to address these issues. …The point of this discussion is that I believe more can be done in the interest of reducing compliance costs. Having said that tricky areas of balance will arise and need to be addressed. Transparency also will also be critical.* [The speech is collected and piled in Rodney Fisher and Michael Walpole, *Global Challenges in Tax Administration (ATAX Tax administration Series Volume 1*), May 2005.

2. Understanding the Commissioner's General Powers of Administration

If the GPA is indeed a *power*, then a question necessarily needs to be asked about the conditions under which the power may be exercised and the parameters of that power. A recent case has suggested that if the GPA were a power, it is not one of limitless bounds and does not entitle the Commissioner to take an action that is otherwise impermissible under the law.[87]

It is also worth noting that various 'powers' that are not strictly or purely managerial or resource allocation decisions and actions are nonetheless described as exercised in the name of the GPA, including:

- Tax settlements – see PSLA 2007/6 and 2015/1;
- Compromise of tax debts – see PSLA 2011/3;
- The shortcut method to work from home deductions – see PCG 2023/1 and Chapter 3 section 5;
- Various PSLA GAs – see Chapter 3 (specifically 3.4.3);
- Various PCGs – see discussion about the use of GPA in the context PCGs in Chapter 3, section 3.4;
- PSLA 2009/4 – When a proposal requires an exercise of the Commissioner's general powers of administration - which sets out the ATO internal procedure to escalate exercises of the Commissioners' GPA to the Commissioner himself; and
- The administrative practice of granting a two-month grace period for taxpayers to complete a trust distribution statement for tax purposes (prior to the High Court decision in Bamford).[88]

This list (which is not intended to be exhaustive) may tend to suggest that the ATO's reliance on the GPA in administering taxation laws is in fact more than simply as a duty.

It is also worth noting that the fact that some 'compromises' of tax law are permitted or ostensibly exercised in reliance upon the GPA, may be a potential source of community misunderstanding, confusion or misaligned expectations. This is especially so where the reasons are not apparent and where there is no framework or objective to 'guide' the exercise of the GPA.

For these reasons and as further explained in the remainder of this report, it would be useful to clarify if the GPA is simply a duty (which carries no administrative discretion) or if it is a power and if so, the limits of that power to administer the tax and superannuation laws practically and pragmatically. Such clarification would also accord with the recommendations in the Australian Administrative Law Policy Guide[89]

[87] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at 109. Note: the case was appealed to the High Court of Australia, but issues concerning the GPA were not raised in appeal.

[88] *Commissioner of Taxation v Bamford*; *Bamford v Commissioner of Taxation* [2010] HCA 10.

[89] See: Attorney General's Department, *Australian Administrative Law Policy Guide* (2011) p 11.

- *Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers, delegate power to a person without setting criteria which that person must meet, or fail to provide for people to be notified of their rights of appeal against administrative decisions are of concern to the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances.*

  …

- *Policy makers should consider whether statutory criteria would be appropriate to guide the decision maker in the exercise of a discretionary power. Where a broad discretion is proposed, this should be clearly explained in the explanatory material for the legislation. It is often desirable to include examples of relevant considerations even where the decision maker is exercising a broad discretion.*

Primary Observation

The Inspector-General of Taxation and Taxation Ombudsman observes that it is not clear whether the Commissioner's GPA is simply a duty (which carries no administrative discretion) or if it is a power.

Consistent with the Australian Administrative Law Policy Guide, it would be useful to clarify if the Commissioner's GPA is simply a duty (which carries no administrative discretion) or if it is a power and if a power, the limits of that power to administer the tax and superannuation laws practically and pragmatically.

Accordingly, the recommendations made in this report would be supported and enhanced by clarification about the nature and intended purpose of the Commissioner's GPA.

Whilst several means of clarification are available, Executive clarification (e.g., via a Statement of Expectation) or Legislative clarification would provide the highest levels of certainty for the community.

2.6. ATO guidance on the GPA – PSLA 2009/4

The ATO has publicly issued a number of documents to provide information and guidance on the nature and exercise of the GPA. The main guidance is found in Law Administration Practice Statement PS LA 2009/4 – *When a proposal requires an exercise of the Commissioner's general powers of administration* (**PS LA 2009/4**) which was first issued on 21 May 2009 and subsequently updated a number of times.

2. Understanding the Commissioner's General Powers of Administration

In its original version (issued on 21 May 2009), PS LA 2009/4 described the GPA as follows:[90]

> *Broadly, the purpose of the general administration provisions is to place the day to day administration of various taxation laws in the hands of the Commissioner. The courts have recognised that these 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.*
>
> *…The powers of general administration assist the Commissioner to administer the taxation laws in accordance with Parliament's legislative intent. The Commissioner's powers of general administration are narrow in scope in that they can only be exercised in relation to management and administrative decisions. They do not authorise the Commissioner to administer the taxation laws inconsistently with their purpose or object, whether express or implied, or their plain meaning. They support the principle that the Commissioner must interpret and administer each Act to give effect to its intention as discerned from it as a whole, not, for example, by interpreting a particular section in isolation from the rest of the Act. The provisions must be interpreted having regard to the context in which they appear. The Commissioner's powers of general administration also cannot remedy defects or omissions in the law. In addition, where the law is open to more than one interpretation the alternative interpretations of the law should be explored before considering reliance on the powers of general administration.*

PS LA 2009/4 (as originally drafted) makes clear that the Commissioner has not delegated any GPA powers other than the power to enter settlements and to compromise taxation debts.[91] The most recent version of PSLA 2009/4 also reiterates that:[92]

> *The Commissioner has expressly delegated the following GPA (neither of which is within the scope of this practice statement):*
>
> - *the settlement of cases, and*
> - *the compromise of tax debts.*

It should be noted that two additional expressed delegations of the GPA have been issued, in relation to securities[93] and powers and functions under the coronavirus economic response package.[94]

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[90] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 21 May 2009).

[91] Ibid, para 14.

[92] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 6 May 2020), para 5.

[93] ATO, *Instrument of the Commissioner's Delegations and Authorisations* (February 2022) Schedule 11.

[94] Ibid, Schedule 12.

The PSLA, as originally drafted, goes on to state that in all other matters, the Commissioner relies upon the *Carltona* principle and provides that it 'allows employees to make decisions only in relation to routine matters. Deciding whether or not a matter involving the exercise of the Commissioner's powers of general administration is routine is a **matter of judgment**'.[95] [sic] The distinction between matters that are routine and non-routine is explained in the PS LA as follows:

> *17. A matter is unlikely to be routine where:*
>
> - *no clear guidelines/criteria exist*
> - *ATO or legislative policy is unclear*
> - *the proposed resolution may be contentious or may be perceived to be unjust, anomalous or to have an improper motivation or outcome, and/or*
> - *taxpayers or a class of taxpayers are adversely affected.*
>
> *18. In deciding whether a matter is contentious, consideration should be given to factors such as:*
>
> - *the degree of sensitivity*
> - *its significance*
> - *its complexity*
> - *whether taxpayers are significantly disadvantaged*
> - *risks to reputation or revenue, and*
> - *the implications for the integrity of the tax and/or superannuation system.*

In the latest version of PS LA 2009/4 (issued on 6 May 2020), the terminology of routine vs non-routine has been removed and replaced with a requirement for officers to consider whether or not the decision to be made falls within the scope of their usual duties.[96] It is worthwhile noting that the criteria listed to assist officers to determine whether a decision is within scope of duties is identical to those used to assess whether a decision is routine or non-routine.[97]

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[95] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 21 May 2009) [14], [16].

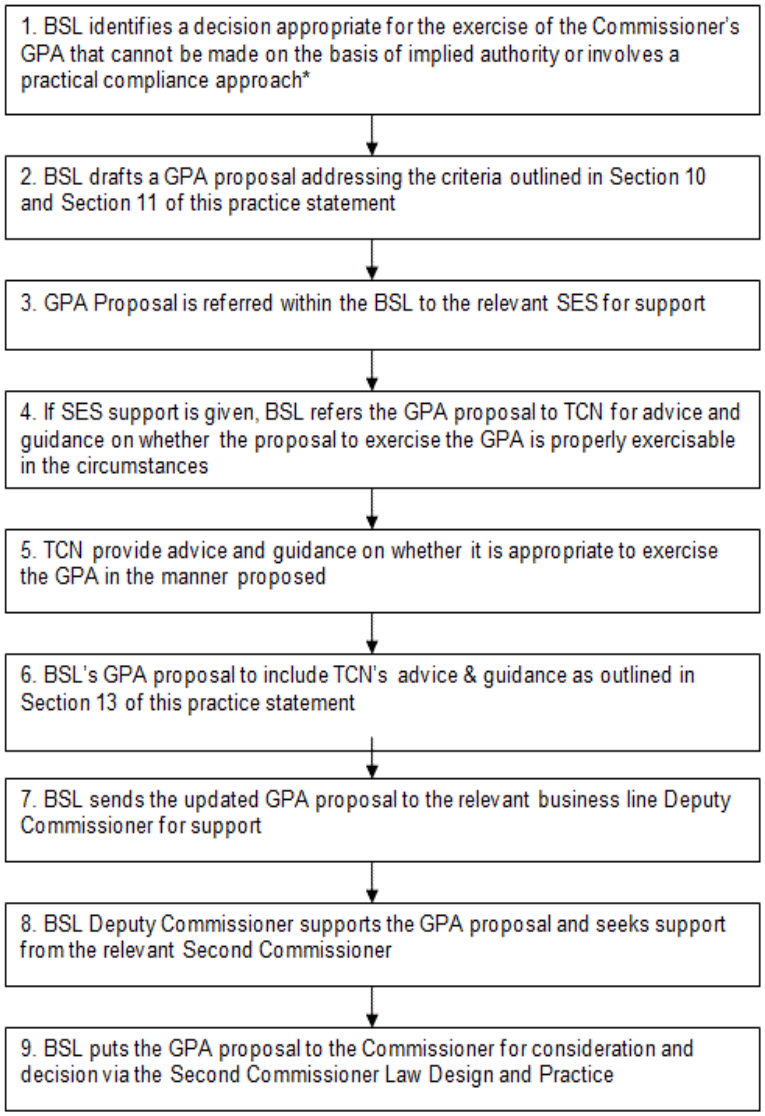
[96] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 6 May 2020) [8].

[97] Ibid, [8].

2. Understanding the Commissioner's General Powers of Administration

Since it was first issued, PSLA 2009/4 has set out a flow chart in Appendix A which details the process to be followed by officers if they wished to escalate a potential GPA matter for consideration. In the original version of the PS LA, this escalation must be used for 'non-routine' matters.[98] The mandate appears to have been removed in the latest version which leaves open an option for officers to escalate matters they consider to be outside the usual scope of their duties.[99] The flow chart is reproduced below.

APPENDIX A – PROPOSAL FLOWCHART



* When preparing a GPA proposal involving the publication of a PCG, officers should also refer to PCG 2016/1 and PS LA 2012/1 and involve relevant TCN participants in the process.

[98] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 21 May 2009) [6].

[99] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 6 May 2020) [8]-[9].

The GPA Proposal and approval process, as set out in Annexure A to PSLA 2009/4, involves approval at all levels within the ATO, including by Second Commissioners and the Commissioner. This process recognises, not only that an exercise of the GPA is a power exercised by or on behalf of the Commissioner as the holder of a statutory office, but also the importance of internal sign off as part of any escalation process absent formal and written delegations, to administer matters which are non-routine.

The ATO has advised the IGTO that, in the last five years, it is aware of five examples of exercises of the GPA that were escalated to the Commissioner in accordance with the process set out in the flowchart. These instances are set out in the Table 2.2.

Table 2.2: Exercises of the GPA that were escalated to the Commissioner FY18 to FY22

Date	Brief description
14 May 2018	Issuing penalty notices for some inadvertent errors.
21 August 2018	'STP engagement authority' for the purpose of Single Touch Payroll (STP) reporting.
21 June 2019	Misattribution of reported lump sum payments in arrears.
29 June 2020	Refunds from the Services Australia online compliance program.
13 April 2022	Issuing failure to lodge (FTL) penalty notices.

Source: Information provided by the ATO.

This short list would suggest that the vast majority of tax official decisions involving the exercise of the GPA have been within the usual duties of the decision maker and that there were limited circumstances where it could be said that:

- no clear guidelines or criteria exist;
- the ATO view or the legislative policy is unclear;
- the proposed resolution may be contentious or may be perceived to be unjust, anomalous or to have an improper motivation or outcome; and/or
- taxpayers or a class of taxpayers are adversely affected.

2.6.1. The ATO's view on principles of administrative law and the GPA

Since it was first published in May 2009, Annexure B to PSLA 2009/4 has stated that principles of administrative law apply to the Commissioner's exercise of the GPA and further stipulates:[100]

> ***What the Commissioner must do***
>
> *Make decisions based on merit*
>
> *Act fairly, in good faith and without bias, enabling each party the opportunity to state their case.*
>
> *Treat taxpayers fairly and equitably. This means treating taxpayers equally, rather than treating them in exactly the same manner.*
>
> *Avoid conferring an advantage on a taxpayer (or taxpayers) thereby creating 'a privileged group who are not so much taxed by law as untaxed by concession'.*
>
> ***What the Commissioner cannot do***
>
> *Exceed the authority conferred on him by the law - such actions being invalid and of no legal effect.*
>
> *Use the powers for improper purposes or in bad faith - the powers must be used for a purpose that is stated in, or implied by, the tax laws.*
>
> *Limit his discretion by inflexibly applying a policy or rule. Policy must not conflict with another principle of administrative law, and the Commissioner must generally be prepared to depart from the policy in appropriate (if only exceptional) cases.*
>
> *Act at the direction of someone else, delegate his power to anyone else (unless authorised to do so), or enter into a binding undertaking regarding the future exercise or non-exercise of his discretionary power in a way that is against the public interest.*
>
> *Be prevented from lawfully exercising his discretion by the doctrine of estoppel.*

In requiring the Commissioner to make decisions based on merit, act fairly, act in good faith and without bias, enabling each party an opportunity to state their case and treating taxpayers fairly and equally, the PSLA imposes a procedural fairness element in all considerations for the exercise of the GPA. The IGTO has been unable to identify any case law in Australia (or elsewhere) that has questioned the legal correctness or appropriateness of the matters set out above in the context of exercises of the GPA.

[100] For all versions of PSLA 2009/4 up to and including 6 November 2014, see paragraphs 15 and 16 of Annexure B. All versions after 4 November 2014 include these principles in paragraphs 10 and 11 of Annexure B.

2.7. Other ATO guidance on the GPA

It is worthwhile noting that PSLA 2009/4 is not the only source of guidance on exercises of the Commissioner's GPA. There is specific guidance in relation to the ATO's approach to settlements[101] and compromise of tax debts.[102] Furthermore, where exercises of the GPA relate to a practical compliance approach, these are usually communicated by way of a PCG. Guidance on the development and issue of a PCG are set out in *PCG 2016/1: purpose, nature and role in ATO's public advice and guidance*. Additionally, the ATO also publishes information on certain pages of its website regarding the exercise of the GPA.[103]

As the preceding analysis demonstrates, the authority for an officer to exercise a power vested in the Commissioner may take many forms. For any officer facing a question as to whether or not they can make a decision that is dependent upon the GPA, and on what basis, the IGTO considers that the existing guidance and instructions issued by the ATO in PSLA 2009/4 are of limited assistance to determine where the lines are to be drawn between delegations, expressed authorisations or implied authorisations that arise in the course of an officer's usual duties and further enquiry beyond the practice statement is necessary.

In addition to the instruments of delegation and authorisation, the Taxation Authorisation Guidelines specify the relevant dollar ($) limits that apply to various levels of ATO officers. That is the limits that they are authorised to, amongst other things:

- select taxpayers or entities for audit;
- suspend action to enforce payment obligations;
- approve the issue or agree to the withdrawal of a creditor's petition (individual) in bankruptcy or an application for winding up (companies);
- approve 50/50 arrangements;
- conclude settlements; and
- issue, and withdraw administratively binding advice.

Furthermore, there are also training modules available to ATO staff to assist them in understanding their authorisations, as well as seeking guidance from managers and senior officers. Where no written delegation or authorisation applies, information regarding ATO structure and business lines, role descriptions, escalation and approval processes all provide guidance and instructions to officers to assist them in determining whether an implied authority exists. In the event it is required, officers may also seek guidance from Office of the General Counsel regarding delegations and authorisations.

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[101] ATO, *Code of Settlement* (18 August 2015).

[102] ATO, PSLA 2011/3 *Compromise of undisputed tax-related liabilities and other amounts payable to the Commissioner* (4 December 2014).

[103] ATO, *Annual Compliance Arrangements – what you need to know* (8 November 2018).

2.8. The GPA and Statutory interpretation

The intersection between the GPA and the Commissioner's approach to statutory interpretation has been identified in submissions as an area requiring further investigation. As discussed earlier some views have been posited that, when taken together with the binding rulings system, the GPA empowers the Commissioner to make statements on interpretative issues and intended compliance practice.[104] Former senior ATO officers have posited the view that the Commissioner can only take the law as it is, even if the law gives rise to unintended, anomalous or inconvenient outcomes. At best, the Commissioner has a duty to advise Treasury about these outcomes with a view to having them rectified legislatively.[105]

On the issue of statutory interpretation, PS LA 2009/4 (since 4 February 2016) includes the following statement which has remained in all subsequent versions of the PS LA:[106]

> ***A purposive interpretation of law***
>
> *In the course of administering tax laws on behalf of the Commissioner, an officer's 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.*

The text of the PS LA tends to suggest, at least in some circumstances, that when faced with legislation that is unclear or which leads to unforeseen or unintended consequences, the ATO should first seek to address the issue through adopting a purposive interpretation of the statute. Where that fails to address the issue, consideration may be given to whether the GPA could be applied to address the matter.

The statutory instructions to guide the interpretation of all Commonwealth legislation, including taxation legislation, are set out in the *Acts Interpretation Act 1901*. Section 15AA of that Act provides:

> ***Section 15AA Interpretation best achieving Act's purpose or object***
>
> *In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.*

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[104] The Treasury, *Report on Aspects of Income Tax Self-Assessment* (2004) 73.

[105] Bruce Quigley, *The Commissioner's powers of general administration: how far can he go?* (Paper delivered at the 24th National Convention of the Taxation Institute of Australia, 12 March 2009) 5; Michael D'Ascenzo, *The rule of law: a corporate value* (Speech delivered at the Law Council of Australia's Rule of Law Conference, 1 September 2007).

[106] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 4 February 2016) at [3].

The rules of statutory interpretation are independent rules, unaltered and unadjusted because of a GPA conferred on the Commissioner. This view is summarised succinctly in paragraph 11 from the joint judgment of the Full Federal Court in *Macquarie Bank* cited earlier.

2.9. Areas where the GPA has been exercised

While the GPA are confined to dealing with management and administrative decisions such as the allocation of compliance resources, these decisions occur frequently across the agency and at various levels. Decisions regarding which taxpayers to audit, what periods to review and how to gather evidence are typically made under the GPA. Decisions to not allocate resources toward auditing particular taxpayers are also exercises of the GPA and may occur, for example, where new legislation has been announced but not yet enacted.[107]

2.9.1. Public guidance on ATO administrative approaches

Historically, the ATO published 'General administration Law Administration Practice Statements' (**PS LA (GA)**) in relation to an exercise of the Commissioner's GPA. They reported publicly on any exercise of the Commissioner's GPA and provide practical compliance solutions in situations where a strict interpretation of the law may be unsatisfactory.[108] The last PS LA (GA) was issued in 2013.[109]

Since 2016,[110] the ATO has published PCGs to broadly communicate its assessment of tax compliance risk and how it will apply audit resources as well as provide practical compliance solutions where tax laws are uncertain or creating unsustainable compliance burdens.[111] PCGs are described as consistent with duties of good management stemming from the GPA:[112]

> *8. The provision of compliance guidance can be seen as consistent with the duty of good management stemming from the Commissioner's general powers of administration of the taxation laws.*

[107] ATO, *PS LA 2007/11 – Administrative treatment of taxpayers affected by announced but unenacted legislative measures which will apply retrospectively when enacted* (as at 2 April 2020).
[108] ATO, *PS LA 1998/1 – Law Administration Practice Statements* (as at 2 April 2020), [4].
[109] ATO, *PS LA 2013/4 (GA) – Apportioning taxable fuel used in a vehicle for powering the auxiliary equipment of a vehicle (issued 19 December 2013, now withdrawn).*
[110] By way of completeness, the ATO has also informed the IGTO that compliance approaches may also be included as appendices in some public rulings and determinations, which may cover material similar to those found in PCGs.
[111] ATO, *PCG 2016/1 – Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance* (as at 3 June 2016).
[112] Ibid, at [8].

2.9.2. Recovery of disputed debts

Taxpayers disputing a debt may, under the GPA, enter into an arrangement where the ATO remits 50% of the general interest on unpaid debts in dispute and defers recovery of the disputed debt (**50/50 arrangement**). As part of the arrangement, the taxpayer must agree to pay all undisputed debts and a minimum of 50% of the disputed principal tax debt, co-operate fully in providing any requested information relevant to early determination of the dispute (i.e., objection) and pay all tax liabilities which arise subsequently that are not in dispute and to which there is no deferral of legal action granted.[113]

The Commissioner's general powers to recover unpaid taxes can involve entering 50/50 arrangements and not allocating resources to recover disputed debts in particular circumstances. The decision to provide for such outcomes (as outlined in PS LA 2011/4) are decisions of an administrative character to which GPA may be relevant.

Some decisions made, or actions taken, as part of a 50/50 arrangement are done so pursuant to specific statutory powers. For example, a decision to defer legal recovery action for disputed debts for a specific taxpayer or particular subset of taxpayers would generally be made under section 255-5 of Schedule 1 to the TAA.[114] Similarly, decisions to remit general interest charge that may accrue over the period of the 50/50 arrangement are actioned under the specific remission provisions. However, broader decisions, such as pausing firmer debt collection activity, may be more appropriately characterised as exercises of the GPA.

2.9.3. Settlements and Compromise of Tax debts

The ATO sometimes enters into settlements with parties to resolve matters in dispute where one or more parties make concessions on what they consider is the legally correct position. This can occur at any stage, including prior to an assessment being raised. Whereas processes such as assessment, amended assessment, objections and litigation generally occur under an express statute, settlements are an exercise of the GPA.[115]

Separate from settlement, the Commissioner may exercise the GPA to permanently not pursue recovery of an undisputed debt, known as a 'compromise of a taxation debt'.[116]

2.9.4. Natural disasters

The ATO provides various types of support to disaster affected taxpayers, such as fast-tracking refunds, lodgement deferrals, payment arrangements or deferrals and remitting penalties or interest. Most support occurs by way of a statutory discretion and is not an exercise of the GPA, however, one

[113] ATO, *PS LA 2011/4 – Collection and recovery of disputed debts* (26 February 2015) at [26]-[45].

[114] *Hyder v Commissioner of Taxation* [2023] FCAFC 29 at [80].

[115] ATO, *Practical guide to the ATO Code of settlement* (as at 17 March 2022) at [8]; ATO, *PS LA 2015/1 – Code of settlement* (15 January 2015). [PS LA 2015/1]

[116] ATO, *PS LA 2011/3 – Compromise of taxation debts* (as at 4 December 2014).

exception is where the ATO assists taxpayers to reconstruct records and make reasonable estimates when their original records have been destroyed by a natural disaster.[117]

Another broad exercise of the GPA occurred in response to the COVID-19 pandemic, where social distancing measures saw many Australians working from home and incurring additional running expenses in relation to their income-producing activities for the first time. In response, the ATO issued a PCG which allowed employees and business owners working from home to use a temporary simplified method (shortcut method) to calculate their additional running expenses for the period they worked from home. Those eligible were required to keep a record of the time spent working from home and could claim 80 cents per hour worked at home as a proxy for the additional running expenses incurred.[118]

Detailed illustrative case studies of exercises of the GPA are provided in Chapter 4.

2.10. External review processes in the tax system and reviewability of decisions to exercise GPA

The primary mechanism for external review of ATO decisions is contained in Part IVC of the TAA 1953. A person that is dissatisfied with the Commissioner's (internal) objection decision may appeal to either the Administrative Appeals Tribunal or Federal Court of Australia.[119] However, the right to object is not automatic and is dependent upon the relevant Act or legislative instrument providing such a right.[120] Decisions made under the GPA are not reviewable under Part IVC.

Where there is no right to object, another potential avenue for review is the ADJR Act 1977. Under the ADJR Act 1977, a person who is aggrieved by a decision to which the Act applies may apply to the Federal Court for review.[121] Broadly, the Act applies to decisions made under an enactment other than those that have been expressly excluded (see Schedule 1 of the ADJR Act 1977).[122]

Whether an exercise of the GPA occurs 'under an enactment' was considered in *Hutchins v Deputy Commissioner of Taxation* (1996). Black CJ, Lockhart J and Spender J agreed that a decision made under the GPA in section 8 of the ITAA 1936 was not a decision 'under an enactment' and therefore not a decision to which the ADJR Act 1977 applies. Black CJ said:[123]

> *If a decision is neither expressly nor impliedly required by an enactment and, although authorised, is authorised by an enactment only in a very general way, it is unlikely to have the character of a*

[117] ATO, *PS LA 2011/25 – Reconstructing records and making reasonable estimates for taxpayers affected by a disaster* (as at 6 May 2020).
[118] ATO, *PCG 2020/3 – Claiming deductions for additional running expenses incurred whilst working from home due to COVID-19*, (as at 15 October 2021).
[119] *Taxation Administration Act 1953,* s 14ZZ.
[120] Ibid, 14ZL.
[121] *Administrative Decisions (Judicial Review) Act 1977,* s 5.
[122] Ibid, s 3.
[123] *Hutchins v Deputy Commissioner of Taxation* (1996) 96 ATC 4375.

decision for which provision is made under an enactment. The connection between the text of the enactment and the decision is likely to be too remote for the decision to have the requisite character.

Additionally, Schedule 1 to the ADJR Act 1977, excludes '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' under the majority of Acts administered by the Commissioner.[124] Consequently, there is little scope for exercises of the GPA to be reviewed under ADJR Act 1977.

Section 39B of the *Judiciary Act 1903* allows the Federal Court to review any matter arising under any laws made by the Parliament in which a writ of mandamus or prohibition or an injunction is sought against an 'officer of the Commonwealth'.[125] An applicant would need to show there has been an error of law in the decision-making process that affects the decision (jurisdictional error). This review right does apply to exercises of the GPA, although it has not been widely used in this manner. Most notably, in *Macquarie Bank* the applicants sought review under 39B to for a 'decision' to be quashed and the Commissioner to be compelled to determine whether to apply the ATO view of the law solely on a prospective basis.

2.11. International comparisons

There are few jurisdictions that have provisions analogous to the GPA. The IGTO has identified New Zealand (**NZ**) and the UK as having provisions that appear to align in form and/or intent with the GPA.

2.11.1. New Zealand

The head of New Zealand Inland Revenue is the Commissioner and Chief Executive. The present Commissioner and Chief Executive is Mr Peter Mersi.

NZ assigns duties of care and management on the Commissioner (which may be considered as equivalent to the Commissioner's GPA) in its *Tax Administration Act 1994 (NZ)*. Before exploring the New Zealand provisions further it is worth noting some historical context and background.

Historical Background

Two reviews in New Zealand completed in the early 1990's have considered the administration requirements imposed upon the NZ Tax Commissioner and Inland Revenue Department (**IRD**), namely:

- The First Report of the Working Party on the Re-organisation of the Income Tax Act 1976 (the Valabh Report) was concluded in 1993; and
- The Second was an Organisational Review of the Inland Revenue Department (the Richardson Report), concluded in 1994.

[124] *Administrative Decisions (Judicial Review) Act 1977*, sch 1 (e).

[125] *Judiciary Act 1903*, s 39B.

Both reports identified an incongruity between the requirements of the statute (the Tax Acts) and what was practical and sensible to be achieved. A framework of guiding principles was accordingly enacted in New Zealand to address this incongruity. IRD has observed in its Interpretation Statement that:

> *… the Inland Revenue Acts arguably obligated the Commissioner to collect all taxes owing, regardless of the costs and resources involved. According to this view, the Commissioner could decide not to collect taxes owing only if a specific statutory discretion or power authorised him to do so. The possibility that the Commissioner was required to collect all taxes owing (subject only to the specific relief and remission provisions) was problematic, because it:*
>
> *• was an unrealistic obligation given the Commissioner's limited resources; and*
>
> *• sat uncomfortably with the appropriation and financial accountability requirements under the Public Finance Act 1989 and State Sector Act 1988.*
>
> *3. As a result, section 6A(2) and (3) were enacted to make clear that the Commissioner is not required to collect all taxes owing.*

Care and Management in New Zealand

The NZ provision assigns some responsibilities to every officer of a government agency as well as the relevant Ministers and duties of care and management on the Commissioner himself or herself. The NZ provision describes the factors that need to be considered for these care and management purposes within the statute:

> *6 Responsibility of Ministers and officials to protect integrity of tax system*
>
> *Best endeavours to protect integrity of tax system*
>
> *(1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of tax and for the other functions under the Inland Revenue Acts must at all times use their best endeavours to protect the integrity of the tax system.*
>
> *Meaning of integrity of tax system*
>
> *(2) Without limiting its meaning, the integrity of the tax system includes—*
>
> *a) the public perception of that integrity; and*
>
> *b) the rights of persons to have their liability determined fairly, impartially, and according to law; and*
>
> *c) the rights of persons to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other persons; and*
>
> *d) the responsibilities of persons to comply with the law; and*

> *e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of persons; and*
>
> *f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.*
>
> ***6A Commissioner's duty of care and management***
>
> *Care and management*
>
> *(1) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.*
>
> *Highest net revenue practicable within the law*
>
> *(2) In collecting the taxes committed to the Commissioner's charge, and despite anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—*
>
> *a) the resources available to the Commissioner; and*
>
> *b) the importance of promoting compliance, especially voluntary compliance, by all persons with the Inland Revenue Acts; and*
>
> *c) the compliance costs incurred by persons.*

Inland Revenue (NZ) published an interpretative statement of the Commissioner's view of the 'care and management' provisions in section 6A as well as their interaction with section 6.[126] The interpretative statement explains that:

> *Section 6 does not provide taxpayers with a basis for challenging the Commissioner's decisions. It does not render amenable to judicial review any conduct (not involving a decision) that might be said to be inconsistent with the obligation to protect the integrity of the tax system. Consequently, section 6 does not provide a means of challenging an assessment; assessments can be challenged only by way of the statutory objection procedure:* ***Russell v Taxation Review Authority*** *(2003) 21 NZTC 18,255 (CA), at paragraphs 34-36;* ***Tannadyce Investments Ltd v CIR*** *(2009) 24 NZTC 23,036, at paragraph 63. Further, section 6 does not create rights enforceable by taxpayers such as those found in the New Zealand Bill of Rights Act 1990:* ***Russell v Taxation Review Authority****, at paragraph 47.*[127]

Section 6A imposes two interrelated responsibilities on the Commissioner. 'Care' means that the Commissioner is responsible for promoting the integrity and effective functioning of the tax system. To discharge this responsibility, the Commissioner must seek to foster the tax system's capacity to function effectively in light of economic, commercial, technological and other changes. 'Management' means that he is responsible for making managerial decisions in the interests of bringing about the efficient and

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[126] Inland Revenue (NZ), *"Care and management of the taxes covered by the inland revenue acts" – section 6A(2) and (3) of the Tax Administration Act 1994* [PDF 231KB], 22 October 2010.

[127] Ibid, at [142].

effective administration of the tax system. The 'management' responsibility recognises that the Commissioner makes decisions as to the allocation of his limited resources. In order to discharge his duties, the Commissioner must compare the available courses of action, as to their likely effect on the amount of net revenue he collects over time. To do this the Commissioner must consider the short and long term implications of each course of action having regard to paragraphs 6A(2)(a)-(c).[128] When deciding how to act, the Commissioner must consider the extent to which the available courses of action might undermine, or support, the integrity of the tax system.[129]

Examples of decisions to which the care and management provisions apply include:

- whether or not to audit, or investigate a past years' tax liability;
- a decision to not allocate resources to pursuing a tax in a manner that accords with anticipated legislation change (particularly where any change is likely to be retrospective in application); and
- what debt recovery proceedings to take (such as entering into a payment arrangement or bankrupting a taxpayer).[130]

The care and management provisions do not allow the Commissioner to remedy unfair or unworkable legislative outcomes, nor address legislative anomalies or ambiguities.[131]

The Commissioner can settle litigation on a basis that does not necessarily correspond to his or her view of the correct tax position if he considers that doing so is consistent with subsection 6A(2) and section 6.[132] In deciding whether to settle litigation, the Commissioner will act consistently with a Protocol between the Solicitor-General and Commissioner of Inland Revenue and consult with the Solicitor-General. Litigation settlements will be jointly approved by Crown Law and Inland Revenue (NZ) (except where the settlements concern debt matters and summary prosecution in which Inland Revenue solicitors represent the Commissioner).[133]

These provisions attempt to do more than establish responsibilities for the Commissioner in his role as Chief Executive of Inland Revenue. They provide a principled framework and Parliamentary instruction on what factors should be considered in administering the taxation system in New Zealand.

[128] Ibid, at [162]-[167].
[129] Ibid, at [171].
[130] Ibid, at [172]-[200].
[131] Ibid, at [203]-[210].
[132] Ibid, at [152].
[133] Ibid, at [160].

2.11.2. United Kingdom

The UK's collection and management functions are set out in section 5 of the *Commissioners of Revenue and Customs Act 2005 (UK)*:

> ***Commissioners' initial functions***
>
> *(1) The Commissioners shall be responsible for*
>
> *a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,*
>
> *b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and*
>
> *c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section*

Accordingly, Her Majesty's Revenue and Customs (UK) (**HMRC**) is responsible for the collection of tax revenues,[134] payment of tax credits[135] and payment of Child Benefit.[136]

It is worth noting that provisions setting out responsibility for the collection and management of newer taxes have also appeared in a range of other Finance Acts. For example, Paragraph 1(2) of Schedule 10 of the *Finance Act 2022* (UK) states:

The tax is to be known as public interest business protection tax and the Commissioners for Her Majesty's Revenue and Customs are responsible for its collection and management. Section 1 of the *Taxes Management Act 1970 (UK)* provides the taxes that are under the care and management of 'the Board' i.e., the Commissioners of Inland Revenue:

> ***1 Taxes under care and management of the Board***
>
> *(1) Income tax, corporation tax and capital gains tax shall be under the care and management of the Commissioners of Inland Revenue (in this Act referred to as " the Board "), and the definition of " inland revenue " in section 39 of the [1890 c. 21.] Inland Revenue Regulation Act 1890 shall have effect accordingly.*
>
> *(2) The Board shall appoint inspectors and collectors of taxes who shall act under the direction of the Board.*
>
> *(3) Any legal proceedings or administrative act relating to any tax begun by one inspector or collector may be continued by another inspector or, as the case may be, another collector; and any inspector or collector may act for any division or other area.*

[134] *Commissioners of Revenue and Customs Act 2005 (UK)* s 5.

[135] *Tax Credits Act 2002 (UK)* s 2; *Commissioners of Revenue and Customs Act 2005 (UK)* s 5.

[136] Ibid, s 53.

HMRC has published an Admin Law Manual and dedicates a chapter to explaining the Collection and Management functions.[137] The publication states that HMRC must manage its responsibilities in the most effective way and that this means applying the law correctly. Commissioners cannot choose to move away from this position merely because the result seems unfair or unreasonable as this would be contrary to the will of Parliament.[138]

Where an exercise of discretion would result in a more efficient management of the revenue, the Commissioners and, through them, HMRC officers may choose to do so. Neither ministers nor other departments can exercise discretion in this regard. The circumstances where the Commissioners can exercise this discretion are set out in case law and are tightly defined.[139]

The extent of the discretion was examined in *R (Wilkinson) v Commissioners of Inland Revenue* [2003] EWCA Civ 814, which considered whether the Commissioners may use discretion to extend a bereavement allowance provided to widows[140] to widowers as well. The Commissioners had settled previous cases on this issue that were brought before the European Commission of Human Rights on grounds of discrimination,[141] however, in *Wilkinson* it was contended that the Commissioner's care and management functions[142] can and should be used to grant widowers an equivalent allowance to that of widows. The Court disagreed, with Lord Phillips noting:

> *43. The extent of the powers of the Commissioners under [the care and management provisions] was directly in issue in R v IRC, ex parte the National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617… Lord Diplock described [the Commissioners] powers at pp.636-7 as follows… "...the board are charged by statute with the care, management and collection on behalf of the Crown [of these taxes]. In the exercise of these functions, the board have managerial discretion as to the best means of obtaining for the national exchequer the highest net return that is practicable having regard to the staff available to them and the cost of collection."*
>
> *…*
>
> *46. No doubt, when interpreting tax legislation, it is open to the Commissioners to be as purposive as the most pro-active judge in attempting to ensure that effect is given to the intention of Parliament and that anomalies and injustices are avoided. But we do not see how [the care and management provisions] can authorise the Commissioners to announce that they will deliberately refrain from collecting taxes that Parliament has unequivocally decreed shall be paid [just] because the Commissioners take the view that it is objectionable that the taxpayer should have to pay the taxes in question.*

[137] HMRC, *Admin Law Manual ADML3000 - Collection and Management*, Last modified 10 February 2022.

[138] Ibid, Legal Background.

[139] Ibid.

[140] *Income and Corporation Taxes Act 1988 (UK)* s 262.

[141] *R (Wilkinson) v Commissioners of Inland Revenue* [2003] EWCA Civ 814 [4]-[6].

[142] *Taxes Management Act 1970 (UK)* s 1(1).

2. Understanding the Commissioner's General Powers of Administration

When exercising discretion under the care and management functions, HMRC provides the following tests to apply:[143]

> ***What would give the highest net return?***
>
> *…For example, if it would cost £10,000 to collect £1,000 in tax due, a higher net return… would be achieved by not collecting the tax… It would therefore be reasonable to allow concessionary treatment…*
>
> ***Purposive Interpretation***
>
> *…where the law in a particular situation is unclear HMRC can make a purposive interpretation by interpreting the effect Parliament intended to achieve and act accordingly…*
>
> ***Is there a minor or temporary anomaly that needs to be addressed?***
>
> *In some cases the strict application of the law could have unforeseen or unintended effects that would cause difficulty for taxpayers or the department, or would be counter to the intended effects of the law. If these effects are likely to be considerable or to be of indefinite length, it is not generally possible to exercise the powers of discretion to overcome them…*
>
> *…However where these unintended effects are minor or temporary, it may be possible to exercise discretion to overcome them. [emphasis added]*

There is no right of appeal against HMRC's decision to exercise discretion or not to exercise discretion, however the decision may be challenged by judicial review.[144]

HMRC publishes ESCs, which are currently described as statements as to how the 'collection and management' discretion will be exercised in relation to circumstances affecting a group of customers.[145] Specifically:[146]

> *An Extra-Statutory Concession is a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.*
>
> *The concessions … are of general application, but it must be borne in mind that in a particular case there may be special circumstances which will need to be taken into account in considering the application of the concession. A concession will not be given in any case where an attempt is made to use it for tax avoidance.*

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[143] HMRC, *Admin Law Manual ADML3000 - Collection and Management*, Last modified 10 February 2022, Tests to apply.

[144] Ibid, Legal Background.

[145] HMRC, *Admin Law Manual ADML4000 - Extra-statutory concessions*, Last modified 10 February 2022.

[146] Her Majesty's Revenue and Customs, *Extra-Statutory Concessions – Concessions as at 6 April 2018* (2018) p 1.

ESCs were historically used to fix problems in the law, however, in 2005 the House of Lords ruled in *R (Wilkinson) v Inland Revenue* [2005] UKHL 30 that the practice was not lawful:

> *21. …[The care and management provision] does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant...*

ESCs after this decision are limited by the above interpretation and HMRC undertook a review of its ESCs with a view to establishing whether they were compliant with the principles set out in *Wilkinson*.[147] For ESC's issued before 2008, section 160 of the *Finance Act 2008 (UK)* was enacted to enable these to be given statutory effect, where possible, and appropriate remaining ESCs that exceeded the scope of HMRC's discretion would be withdrawn, typically following consultation and a period of notice.[148]

2.11.3. United States and Canada

The United States and Canada do not appear to have provisions analogous to the GPA or those in NZ and the UK.

Title 26 of the United States Code (commonly to as the Tax Code) provides for the appointment of a Commissioner of the Internal Revenue Service[149] and further states that 'the Commissioner shall have such duties and powers as the Secretary [of the Treasury] may prescribe, including the power to administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party.'[150]

In Canada, section 36 of the *Canada Revenue Agency Act* (SC 1999, c 17) provides that:

> *The Commissioner is the chief executive officer of the Agency and is responsible for the day-to-day management and direction of the Agency.*

These provisions, while setting out the role and functions expected of the respective Commissioners is perhaps more closely aligned with management of the agency (as its Chief Executive Officer) as a whole, rather than approaches to the tax system and associated legislation. In this respect, they are perhaps more analogous to the good management rule contained in subsection 15(1) of the PGPA Act 2013.

[147] Her Majesty's Revenue and Customs, *Withdrawal of extra-statutory concessions summary of responses* [PDF 164KB] (July 2015) para 1.1.

[148] Ibid, para 1.2.

[149] Internal Revenue Code, 26 U.S.C § 7803(a)(1)(A).

[150] Internal Revenue Code, 26 U.S.C § 7803(a)(2)(A).

3

EXERCISES OF THE GPA – SOME ILLUSTRATIVE CASE STUDIES

This chapter discusses five (5) case studies to illustrate how the GPA has been exercised in different contexts.

3. Exercises of the GPA – Some illustrative examples

This chapter sets out five case studies of the ATO's use of the GPA within different contexts. These case studies are:

- Issues investigated on behalf of complainants following the Federal Court decision in *Douglas* on behalf of veterans as members of the Military Superannuation Benefits Scheme;
- Issues investigated on behalf of complainants arising from the administration of the Early Release of Superannuation;
- The use of GPA in Settlements;
- The use of GPA in Practical Compliance Guidelines; and
- The Implementation of the Shortcut Method for Work from Home deductions during the COVID-19 pandemic.

Each case study is discussed in turn. The Military Superannuation case study was drawn from complex dispute investigations undertaken by the IGTO between April 2021 and December 2022. The Early Release of Superannuation case study is extracted from complex dispute investigations undertaken between August 2020 and December 2022. In relation to the remainder, the IGTO has drawn upon internal ATO information to detail the approaches in relation to the exercise of the GPA in these contexts.

3.1. Case Study 1: The *Douglas* Case and Military Superannuation

3.1.1. Background and Context - The *Douglas* decision

On 4 December 2020, the Federal Court handed down its decisions in the following cases - *Commissioner of Taxation v Douglas*; *Commissioner of Taxation v Burns*; *Commissioner of Taxation v Walker* [2020] FCAFC 220.[151]

The cases were funded by the ATO under the Test Case Litigation Program 2020–21 and are cited as *Commissioner of Taxation v Douglas [2020] FCAFC 220*. However their origin dates back to 12 August 2017 when these matters first appeared on the ATO Test case litigation register - the *Douglas* Administrative Appeals Tribunal (**AAT**) matters - under 'approved matters in progress'.

[151] *Commissioner of Taxation v Douglas*; *Commissioner of Taxation v Burns*; *Commissioner of Taxation v Walker* [2020] FCAFC 220.

3. Exercises of the GPA – Some illustrative examples

The Commissioner of Taxation was the appellant in this test case, which was ongoing for over 3 years. The ATO therefore had an opportunity to consider, plan and prepare for the possible outcomes and consequences of the Court's decision.

In summary, the Court determined that specific invalidity benefit payments paid under pensions that commenced on or after 20 September 2007 by the Defence Force Retirement and Death Benefits (**DFRDB**) Scheme and the Military Superannuation Benefits (**MSB**) Scheme are **superannuation lump sum payments** rather than **superannuation income stream benefits** as defined.

Different taxation consequences arise for the veteran recipients as a result of this characterisation, including the taxation of pension payments received dating back to 20 September 2007. This includes the determination of the tax free and taxable components of the payments which are established at the time of each payment for a **superannuation lump sum payment** but once only for **superannuation income stream benefits.**

Invalidity benefits paid under pensions provided under the MSB Scheme or the DFRDB scheme that commenced before 20 September 2007 are **superannuation income stream benefits** unless they cease and re-commence after that date.

Since the decision there have been a number of Government announcements and enactments to address any adverse impacts for affected veterans, including:

- on 24 November 2021, the Government announced that it would be introducing legislation to ensure that no veteran will be made worse off due to the *Douglas* decision
- Services Australia has been allocated $5.7 million in 2022-23 and $14.4 million over 4 years to deliver Act of Grace Payments to ensure that veterans and their former partners don't receive a child support debt because of the *Douglas* decision.

IGTO complaint investigations were not concerned with the Federal Court decision or related questions of law or with the underlying policy, law interpretation or tax outcomes but rather with the administrative decisions and actions taken following this decision to implement and administer the taxation laws consistent with the decision of the Federal Court.

The Full Federal Court's decision effectively changed the tax liabilities for affected veterans whose service ended on medical grounds:

- The decision had retrospective impact on approximately 12,000 affected veterans[152] prior year income tax liabilities, spanning back to the 2007–08 income year. Many of these veterans were now entitled to significant refunds of prior tax paid;
- The decision also had prospective impact on approximately 16,000 affected veterans – as the amounts to be withheld from their fortnightly pension payments may need to change;

[152] Based on data that was made available to the ATO as at 17 June 2021 i.e. the estimated number of affected veterans is approximately 12,000.

- There was also potential consequential impact on other benefits and obligations and government support payments that take into account the taxable income, such as:
  - Family Tax Benefits
  - Child Care Subsidy
  - Parental Leave Pay
  - child support

It was not necessarily the case that all individuals impacted by this decision would benefit from the decision. Some veterans may be adversely affected. Implementation of the tax impacts of the decision also required significant systems changes to accommodate any changes to Pay-As-You-Go (**PAYG**) withholding calculations.

The IGTO received 39 complaints (as at 29 November 2022) and commenced investigations into various ATO administrative decisions and actions following the decision about consequential matters arising from the decision. It is estimated that approximately 16,000 veterans were similarly affected by the administrative matters raised in these complaints.

The IGTO investigations focused on the following issues:

1. Whether the ATO has taken reasonable steps to minimise the risk of perceptions of unreasonable ATO delay in amending income tax returns for affected individuals, including for example:
   (a) whether the ATO provides updates on its progress in executing the streamlined amendment process;
   (b) whether the ATO communicates the factors which affect the ATO's ability to make amendments, their impact on expected timeframes and actions being taken to address these factors; and
   (c) whether the ATO has responded to enquiries in manner that would allay the concerns of reasonable taxpayers.
2. Whether the ATO has unreasonably delayed amending income tax returns for affected individuals.
3. Whether the ATO has taken reasonable action to mitigate the risk for individuals in financial difficulties, for example, by providing priority processing of amendments for individuals raising such concerns.
4. Whether the ATO has taken reasonable steps to provide access to knowledgeable and authorised ATO staff who may promptly respond to address concerns raised.
5. With respect to the withholding of PAYG tax liabilities:
   (a) whether the ATO has taken reasonable steps available to it to minimise the compliance burden on withholders; and

(b) whether the ATO has provided sufficient certainty to affected veterans to enable them to verify the accuracy of the amounts withheld from their fortnightly payments.

3.1.1.1. IGTO Observations on Issues 5a and 5b

Initially, the ATO acted quickly to reduce some of the compliance burden on the Commonwealth Superannuation Corporation (**CSC**) by relieving CSC of the requirement to issue a Payment Summary form with every fortnightly payment it made. Also, the ATO exercised discretion to issue two class PAYG withholding variations within 7 months of the *Douglas* decision. For a substantial number of affected veterans this may have reduced the gap between the total PAYG withheld from their fortnightly payments and their end-of-year income tax liability, when compared to that which was required by the law as per the *Douglas* decision. However, CSC raised concerns that these variations may require more PAYG amounts to be withheld from a substantial number of affected veterans' fortnightly payments than would have otherwise been needed to approximately meet the end of year income tax liabilities. While the initial variation provided reductions in the PAYG withholding to account for tax-free thresholds and Medicare levy exemptions, the second variation required even more complexity in the calculations than CSC could practically implement in the short-medium term, unless the requirement to recalculate the superannuation components for every payment was addressed.

Later, the ATO used statutory discretions to good effect when it issued Legislative Instruments that provided an alternative method for calculating the tax free and taxable components of affected veterans' superannuation benefits for income tax purposes. As these instruments directly reduced one of the key causes of complexity in calculating affected veterans' income tax liabilities for the prior and current years, they also helped to reduce some of the complexity in calculating the PAYG amounts to be withheld. These instruments demonstrated that an administrative solution could achieve two seemingly competing outcomes: ensuring compliance with the law and providing administrative simplicity.

However, with respect to simplifying the PAYG withholding calculations, those Legislative Instruments had effect for a single financial year. Also, the ATO issued them after the relevant financial year had started and fortnightly payments had already been made. The ATO advised that it declined to issue instruments with longer-term effect as it would override the tax laws on an ongoing basis, which it considered a policy matter for Government. Based on recent statements by the Senate Committee on Scrutiny of Delegated Legislation, however, it appears the ATO may have been able to issue an instrument with effect for up to three years. Also, it remains unclear how an exercise of an express statutory discretion to set/vary PAYG withholding[153] could result in an override of the tax laws on an ongoing basis when it is recalled that the PAYG withholding regime requires pro-rated amounts to be deducted from certain payments to effectively help taxpayers prepay *approximate* amounts needed to meet their expected income tax at the end of the year. Further, the Commissioner's remedial power to reduce the impact of disproportionate compliance costs is available where exercise of that discretionary power would not be inconsistent with the intended purpose of the relevant provisions and would have no more than a negligible budget impact. On this basis, the IGTO considers the ATO's view regarding the Legislative Instruments' longer-term effect was inconsistent with express statutory discretions provided in the tax laws. The IGTO also observed that the ATO's approach to the PAYG Withholding issue was a

[153] See: *Taxation Administration Act 1953,* Sch 1, s 15-15.

contributing factor to adverse perceptions of the ATO's administration and contributed to adverse impacts on veterans' experience with the tax administration system.

3.1.2. What administrative action or decision was made and what was the issue being addressed?

For the purpose of this review investigation, the IGTO is concerned with ATO decisions and actions that complainants said caused them uncertainty over the amounts to be withheld from the veterans' fortnightly payments under the PAYG withholding system on a prospective basis.

That is, with respect to prospective withholding of PAYG tax liabilities:

- whether the ATO has taken reasonable steps to minimise the compliance burden on withholders; and
- whether the ATO has provided sufficient certainty to affected veterans to enable them to verify the accuracy of the amounts withheld from their fortnightly payments.

The review investigation is also concerned to understand the steps taken by the ATO to implement announced but unenacted measures in these circumstances.

3.1.2.1. Prospective impact of PAYG withholding on affected veterans' fortnightly payments

There are practical difficulties associated with assessing tax and calculating PAYG withholding liabilities for affected veterans' fortnightly lump sum payments which did not exist prior to the *Douglas* decision. In particular:

- The application of the proportioning rule for assessment and PAYG withholding tax purposes – the proportion of the superannuation benefit's tax free and taxable components of the underlying interests needs to be recalculated for every payment because the law requires the tax-free component to be reduced by amounts that have previously been paid out;
- There is an additional tax-free component for lump sum payments which adds complexity for superannuation funds, such as the CSC (where the superannuation lump sum also meets the requirements of being a disability superannuation benefit pursuant to section 307-145 of the ITAA 1997);
- Payment summaries are required for each lump sum payment, whereas only one payment summary per financial year is required for income streams; and
- Withholding calculations are made more complex by the shifting nature of the proportioning rule.

3.1.3. What was the GPA decision?

It should be noted that any exercise of the GPA needs to be implementing the terms of the taxation laws themselves, consistent with the intended purpose and objective of those laws. Whether or not the GPA is also, in and of itself, the source of legislative authority for the Commissioner to undertake actions is

doubtful but any view on this matter is not free from doubt. The ATO's compliance approach following the *Douglas* decision, including:

- pro-actively gathering information from CSC for the primary purpose of streamlining anticipated objections without necessarily using that information to assess[154] unless a taxpayer sought an amendment and
- any decision to delay the ATO's phase 2 work to proactively contact those affected veterans who had not yet contacted the ATO to amend their prior year assessments (and may not have been aware that they could do so),

is a type of decision that would arguably be expected to be dealt with by applying the Commissioner's GPA.

PSLA 2009/4 requires tax officers to prepare and escalate a proposal requiring the exercise of the Commissioner's powers of general administration in certain circumstances. The Practice Statement (in its present form) offers the following guidance:

> ***5. The appropriate authority to exercise the Commissioner's GPA***
>
> *The Carltona[6] principle allows employees to exercise the GPA on the Commissioner's behalf, but only when there is an implied authority for them to do so.[7]*
>
> *An implied authority to exercise the GPA on the Commissioner's behalf exists if it is within the scope of your usual duties to make a judgment call or decision that affects the allocation of resources, including your own time. Generally speaking such every day decisions are made by officers at all levels in the course of their usual duties.*
>
> *The Commissioner has expressly delegated the following GPA (neither of which is within the scope of this practice statement):*
>
> - *the settlement of cases[8], and*
> - *the compromise of tax debts.[9]*
>
> *If a judgment call or decision needs to be made that is not necessarily within the course of your usual duties, you may need to consider preparing a proposal as to whether it is appropriate for the Commissioner to exercise his or her GPA in the circumstances.[10]*
>
> *…*

[154] The Commissioner may by notice in writing require 'you' to provide him with information for the purpose of the administration or operation of a taxation law - refer section 353-10 of Schedule 1 of the TAA 1953; The Commissioner has an obligation to assess based on all information available to him - see: *Income Tax Assessment Act 1936* (ITAA 1936), s.166. Although the Commissioner may amend an assessment pursuant to s.170 ITAA 1936, including to give effect to a decision on a review or appeal or as a result of an objection lodged by a taxpayer, this is subject to relevant time limitations and it is not clear that the Commissioner has power to amend (absent an objection or appeal involving the taxpayer) to give effect to a decision or because a prior assessment was issued based on a now revised (judicially clarified) position at law.

7. Seeking guidance on whether it is appropriate for the Commissioner to exercise his or her GPA

The GPA are legislatively vested in the hands of a single statutory office holder - the Commissioner. Consequently the Commissioner personally holds the direct authority to exercise the GPA.

Guidance can be sought from the relevant business line's GPA Community of Practice (GPA CoP) representative[11] or from Tax Counsel Network (TCN).[12]

8. How do I identify circumstances that necessitate a decision that is outside the scope of my usual duties?

This is a matter for your judgment. As a guide, a proposal that requires the Commissioner's attention is likely to exhibit one or more of the following attributes:

- *no clear guidelines/criteria exist*
- *ATO or legislative policy is unclear*
- *proposed resolution may be contentious or may be perceived as unjust, anomalous or to have an improper motivation or outcome, and/or*
- *taxpayers, or a class of taxpayers, are adversely affected.*

When deciding if a matter is contentious, you should consider the following:

- *degree of sensitivity*
- *significance*
- *complexity*
- *whether taxpayers are significantly disadvantaged*
- *risks to reputation or revenue, and*
- *implications for the integrity of the tax and/or superannuation system.*

Just as the GPA itself is not a source of statutory authorisation for a decision or action that is otherwise not authorised in law, the identification of an officers' 'usual duties' in and of itself is not sufficient to identify the source of legislative authority to undertake actions or make decisions. The concept of 'usual duties' as used within PSLA 2009/4 should be considered as simply an aid for officers to determine whether or not a decision under the GPA needs to be escalated for approval (that is, where it is not routine or is not discretionary).[155]

[155] *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* [2014] NSWCA 377 at [38]; See also New South Wales Ombudsman, *The new machinery of government: using machine technology in administrative decision-making* (2021) p 29.

3. Exercises of the GPA – Some illustrative examples

As noted earlier in this report, the PSLA sets out the escalation process which includes escalation and approval through two of the three Second Commissioners of Taxation to the Commissioner of Taxation himself for his approval. That is, unless the decision is an exercise of powers of general administration in accordance with an express written delegation on behalf of the Commissioner of Taxation.

The decisions in these circumstances were made by a Band 2 Steering Committee (noting that decisions cannot be delegated to a Committee but rather must be delegated to individuals) or Deputy Commissioners forming the Committee without further escalation. Paragraph 14 of the PSLA states that the Commissioner has not delegated any parts of the GPA with the exception of settlements and compromise of tax debts. The IGTO is also not aware of any express delegation of the Commissioner's GPA that would apply in these circumstances or provide an exception to the escalation required by PSLA 2009/4 to exercise the GPA.

Although the ATO has stated that this was a decision within the normal duties of Deputy Commissioners, the fact that:

- it effectively involved a decision to either take or not take action in accordance with a Government announced intention to amend the law following a test case decision of the Federal Court,
- many veteran taxpayers would be affected,
- the compliance approach was customised to affected and vulnerable taxpayers, and
- that there were material revenue and related risks to be considered

suggests that this was an exercise of a power in the nature of the GPA and therefore should be escalated for ATO Executive consideration and oversight.

However, as noted above, these issues were not escalated to the Commissioner.

The application of the Commissioner's GPA was exercised in some cases as part of other express statutory discretions and powers. The following ATO actions and decisions are relevant for this purpose:

- On 11 February 2021, the ATO advised the CSC that it must use Schedule 12 (i.e. the lump sum superannuation rates) to calculate the PAYG amounts to be withheld from each payment made under the affected invalidity pensions.[156]
- The ATO also issued the CSC with a notice which required the CSC to issue a single PAYG payment summary each financial year and exempted it from issuing PAYG payment summaries for each and every payment made from affected pensions (i.e. those that the Douglas decision had determined were superannuation lump sums for the purposes of the ITAA 1997) to the recipient within 14 days of each payment.[157]

[156] ATO, communication to the IGTO, 19 May 2021.

[157] ATO, internal correspondence, 11 February 2021.

On 4 December 2020, the Federal Court handed down its decisions on:

Commissioner of Taxation v Douglas [QUD103/2020]

Commissioner of Taxation v Burns [QUD114/2020]

Commissioner of Taxation v Walker [QUD115/2020].

The case is cited as Commissioner of Taxation v Douglas [2020] FCAFC 220.

In those matters, the Court determined that specific invalidity benefit payments paid under pensions that commenced on or after 20 September 2007 by the Defence Force Retirement and Death Benefits (DFRDB) Scheme and the Military Superannuation Benefits (MSB) Scheme are superannuation lump sum payments rather than superannuation income stream benefits. Invalidity benefits paid under pensions provided under the MSB Scheme or the DFRDB scheme that commenced before 20 September 2007 are superannuation income stream benefits unless they cease and re-commence after that date.

Consequently, as soon as practicable (and no later than from 1 July 2021) you should begin to apply the rates set out in Schedule 12 – Tax table for superannuation lump sums to invalidity payments you make this year and in future years to members of the Military Superannuation Benefits (MSB) Scheme, and the Defence Force Retirement and Death Benefits (DFRDB) Scheme where invalidity benefit payments are paid under pensions that commenced on or after 20 September 2007. We note that while we have indicated a latest effective date of 1 July 2021, impacted members may expect this change to be implemented sooner and reflected in the payments they receive. This is why we advise you to complete the changes as soon as practicable.

To assist you, in practical terms, to identify if you have made, and are making invalidity benefits this income year under pensions provided under these schemes which commenced on or after 20 September 2007, the tax table for superannuation lump sums applies to invalidity payments made, or being made this income year to members who:

- *have a date of discharge on or after 20 September 2007.*
- *have a date of discharge prior to 20 September 2007 and the date of determination of incapacity was made after that date*
- *have a date of discharge prior to 20 September 2007 and was:*
    - *receiving invalidity payments prior to that date*
    - *that pension ceased on or after that date because their entitlement to invalidity payments was cancelled or they were classified as Class C and*
    - *the member is receiving, or has received, invalidity payments this year because they later became entitled to invalidity benefits.*

A formal notice is enclosed exempting you from issuing PAYG payment summary – superannuation lump sum to the recipient within 14 days of each of these payments. Instead, the CSC will be required to issue a single PAYG payment summary – superannuation lump sum within 14 days after the end of the financial year to the member covering total superannuation lump sum payments made, total tax withheld and any other reportable components for the financial year.

- On 23 April 2021, the ATO issued a class withholding variation to CSC prescribing conditional reductions to the amount of withholding to account for tax-free thresholds and Medicare levy exemptions.

- On 1 April 2021, the ATO replied to the CSC's 26 March 2021 email, suggesting it issue a class variation to Schedule 12 that would take into account the tax-free threshold and Medicare levy exemption for those members who had elected to access that threshold and were not over 59 years old with less than $70,000 of taxable-untaxed income. It also stated that members could apply to the ATO for individual PAYG withholding variations:[158]

*… *We understand that CSC may not necessarily know if the member has other sources of income, so in working out whether they have income of at least $70,000, we assume this assessment would need to be based on payments CSC is making to the member (unless the member has otherwise informed CSC of that other income).*

Schedule 12 in its current form will continue to apply for members who are aged 60+ with taxable income less than $70,000 as we expect this group will need to pay more tax as a result of the payments being lump sums. Testing of the sample data for this group demonstrated that applying the variation may cause some of these taxpayers to have a tax debt payable at year-end.

For the excluded group subject to Schedule 12, the members may still apply for individual variations if their personal circumstances would otherwise mean that the amount of withholding is more than necessary to meet year end income tax liabilities.

If there are no concerns with this approach, we can prepare a variation notice next week. …

- On 7 April 2021, the ATO provided a draft PAYG withholding class variation to the CSC for comment reflecting its 1 April 2021 proposal:[159]

In case this assists your consideration, please find attached a draft variation notice reflecting what we discussed on [1/4/2021].

Unless there are any further changes required, we can finalise this pretty quickly. We're also in the process of finalising some draft web content on PAYG(W) for military invalidity benefits which will

[158] ATO, communication to the IGTO, 2 August 2021.

[159] Ibid.

hopefully help to clarify the difference between withholding and year-end tax outcomes, which we'll share with you shortly.

- On 16 April 2021, the ATO sent an email to the CSC to confirm that it would send a new PAYG withholding class variation which did not have age and income factors and only depended on whether the tax-free threshold was claimed. It was also drafting two Determinations - in effect, the proportion of tax-free component for all payments made until 30/6/2021 would be that at commencement of the pension, whereas the proportion following 1/7/2021 would have to recalculated for each payment. It also asked the CSC to confirm whether the 'pension commencement date' in the CSC data was a date that was well before when the invalidity pension actually commenced for income tax purposes (e.g. if a determination is backdated), and if so, to provide the ATO with the actual commencement dates:[160]

… thanks for sending through that AMM material, we'll take a look through in case there anything in there that impacts on our proposed comms for the Service Offer etc.

Just thought I would confirm a few things we discussed on Wednesday to help you progress the withholding changes.

Variation to Sch 12:

We will remove age and income as factors from the variation notice – this will mean the variation will only depend on whether the member has claimed the tax-free threshold and/or Medicare levy exemption, and should simplify the withholding changes required (noting there may still be individual variation requests).

We are updating the notice and should have a revised draft to you early Monday.

Tax-free component legislative instruments

We are drafting two legislative instruments under subsection 307-125(5) of the Income Tax Assessment Act 1997 to set out methods for calculating the tax-free component for those payments impacted by the decision – broadly these will have the effect that:

- *the tax free component of all payments made in the period from 20 September 2007 to 30 June 2021 from a MSBS or DFRDB invalidity pension that are super lump sums for income tax purposes is determined, by multiplying the amount of the lump sum payment by the original tax free component percentage for the invalidity pension as worked out by the CSC just before the pension commenced, and*
- *the tax free component of the first payment made on or after 1 July 2021 from a DFRDB or MSBS invalidity pension that is a super lump sum benefit for income tax purposes is determined by multiplying the amount of the lump sum payment by the original tax free component percentage for the invalidity pension as worked out by CSC just before the*

[160] Ibid.

> *pension commenced; and that the tax free component of the second and subsequent lump sum payments from the invalidity pension be determined in accordance with paragraph 307-125(3)(b) and subsection 307-210(2) of the ITAA 1997*

We'll share drafts of those once they have gone through our internal approvals process.

Clarification of data for remediation of historical years

As foreshadowed on Wednesday, [we] sent a query through last night which is critical to our remediation of prior years in terms of our ability to correctly identify those who are impacted. We think that the 'pension commencement date' in the data provided could be a date that is well before when the invalidity pension actually commenced for income tax purposes (e.g. if a determination is backdated).

We're seeking urgent confirmation if that assumption is correct, and if so, we will need the actual commencement dates for the invalidity pensions where the date is before 20 September 2007.

This is because, while we can safely assume any member with a date after 20 September 2007 had their invalidity pension commence after then (and are impacted by the Court decision), it will not mean that everyone with a 'pension commencement date' before 20 September 2007 did not actually commence their invalidity pension (for income tax purposes) after. As this is the key deciding factor on whether a member's invalidity payments are super income streams or super lump sum payments, it will be needed for both the ATO remediation of prior years, and the withholding changes CSC need to make for current and future payments.

- On 23 April 2021, the ATO issued a PAYG withholding class variation notice to the CSC which took into account the tax-free threshold and Medicare levy exemptions.[161] It applied prospectively and effectively required the CSC to vary the amount of PAYGW for affected pensions from that which would otherwise be required for a superannuation lump sum:[162]

Variation to the amount of withholding

Withholding for fortnightly payments made to members will be calculated using Schedule 12 – Tax table for superannuation lump sums, adjusted as follows:

1. Tax-free threshold

Reduce the Taxable – taxed component by the lesser of the Taxable – taxed component and $700 before applying the applicable withholding rate. Any balance remaining should be applied to reduce the Taxable – untaxed component when calculating withholding.

2. Full Medicare levy exemption

[161] ATO, communication to the IGTO, 19 May 2021.

[162] ATO, Internal Communications, 23 April 2021.

If the member has advised on a Medicare levy variation declaration that they are entitled to a full Medicare levy exemption, reduce the rate of withholding shown in the tax table by 2%.

3. Half Medicare levy exemption

If the member has advised on a Medicare levy variation declaration that they are entitled to a half Medicare levy exemption, reduce the rate of withholding shown in the tax table by 1%

- On 11 May 2021, the ATO published a "Pay as you go withholding for military superannuation payments" on its website which explained that affected veterans did not need to do anything unless they wished to seek an individual PAYG withholding variation or claim the tax-free threshold or Medicare levy exemption.

- On 4 June 2021, the ATO sent an email to the CSC, attaching a draft PAYG withholding class variation that was intended to replace the 23 April 2021 PAYG withholding class variation. That draft allowed the CSC to reduce withholding if the payments fell under the fortnightly threshold to pay Medicare levy:[163]

I don't believe we have yet received CSC's analysis for the 9,555 individuals… however, in the interests of time and to ensure we are doing everything we can to ensure appropriate outcomes for the veteran population, we have done some further work to try to identify why this might be.

We have come up with a draft revised variation, which we are hoping will ensure the withholding more closely approximates anticipated year-end tax outcomes as much as possible (without risking the individual ending up in a debt position) and have attached it for your consideration.

Noting we haven't had the benefit of CSC analysis, we can't be certain this will address the issues and would therefore appreciate your feedback on whether this version would address your concerns. I do acknowledge it is a more complex variation than that we issued on 23 April 2021, but ultimately we think it will be a choice between:

- *retaining the simpler class variation from 23 April 2021, accepting that it will mean some veterans have more withholding than needed and that they may seek individual variations, or*

- *(assuming the draft revised class variation addresses CSC's concerns about increased withholding) putting in place a slightly more complex variation that will hopefully be more accurate and minimise the number of individual variations.*

- On 10 June 2021, the ATO sent an email to the CSC, in response to a further request by CSC for a PAYG withholding variation that more accurately reflected actual tax payable.[164] Attached to this email was a notice to the CSC of a second variation to *Schedule 12* of the tax table for superannuation lump sums.[165] It was materially the same as the draft provided to the CSC on 4 June

[163] ATO, communications to the IGTO, 11 June 2021.

[164] Ibid.

[165] ATO, communications to the IGTO, 22 November 2021.

2021. The variation prescribes additional steps to calculate the amount of PAYG withholding compared to the original variation issued on 23 April 2021:

1. Applicable withholding rate

Step 1: The first $700 is taxed at 2% where the payment component is subject to a withholding rate when using schedule 12. This applies to taxed and untaxed elements as follows: Reduce the untaxed element of the taxable component by the lesser of the untaxed element of the taxable component and $700. Any balance remaining should then be applied to reduce the taxed element of the taxable component. The rate of withholding is varied to 2%.

Step 2: Reduce any unused untaxed element of the taxable component from Step 1 by the lesser of the unused untaxed element of the taxable component and $1,030 before applying the applicable withholding rate in schedule 12. Any balance remaining should then be applied to reduce the taxed element of the taxable component when calculating withholding. The rate of withholding in respect of this $1,030 is the lesser of 21% and the rate specified in Table A of schedule 12.

Step 3: The rate of withholding on the amount in excess of $1,730 is the rate specified in Table A of schedule 12.

2. Full Medicare levy exemption

If the member has advised on a Medicare levy variation declaration that they are entitled to a full Medicare levy exemption, reduce the rate of withholding shown in Table A of schedule 12 by 2%.

3. Half Medicare levy exemption

If the member has advised on a Medicare levy variation declaration that they are entitled to a half Medicare levy exemption, reduce the rate of withholding shown in Table A of schedule 12 by 1%

4. Below Medicare levy threshold

Reduce the withholding rate by 2% in Table A of schedule 12 if the taxable component amount is below the Medicare levy fortnightly income threshold of $876 (no dependants) or the adjusted threshold as calculated for where there are dependants. (For adjustments refer to Schedule 1 - Statement of formulas for calculating amounts to be withheld.)

5. Rounding

Add up the different withholding amounts and round the total amount to withhold to the next higher dollar.

- The ATO actions following the Government announcement on 24 November 2021 that it would introduce legislation to ensure no veteran will be made worse off following the Douglas decision (the legislation would ensure that the affected benefits were treated as income streams, create a non-refundable tax offset for recipients and incorporation of the changes in the PAYG system), included the following:

- On 9 December 2021, the ATO made a determination by legislative instrument, effective 4 January 2022 – LI 2022/1 that extended the lump sum calculation method that originally applied to payments up to 30 June 2021 through to 30 June 2022.
- On 15 December 2021 the ATO websites were updated to announce that Phase 2 of the streamlined amendment process would be postponed, pending the legislative amendments announced but not yet passed.[166] The ATO would give a further update after that law had passed and gave affected veterans guidance on their resulting options:[167]

  If you have already had amendments made under our remediation program, you do not need to do anything, we will contact you on passage of law if there are any changes/impacts to you.

  If you have not yet sought remediation per Douglas, you may either:

  - *wait for legislation to pass, or*
  - *seek these amendments. However, further remediation may be required once the final legislation is enacted.*

  Until the legislative changes take effect, you may seek a review of your assessments for previous years by completing a simplified Request for objection – for recipients of certain invalidity benefits form. You can complete the form and mail to us if you:

  - *are impacted by the court decision, and*
  - *have lodged all overdue income tax returns.*

  You can also use this form to seek a review of your assessments if you have recently received a determination for a disability superannuation benefit.
- Various communications with stakeholders (CSC, veterans and other Government Departments);

- The ATO subsequently published various draft and final legislative instruments as follows:
  - First Legislative Instrument – MS 2021/1 – on 19 May 2021, the ATO issued draft legislative instrument, MS 2021/D1 prescribing an alternate method for payments before 1 July 2021, The ATO made a final determination by legislative instrument (MS 2021/1) on 25 June 2021;
  - Draft Second Legislative instrument – MS 2021/D2 - on 19 May 2021, the ATO issued draft legislative instrument MS 2021/D2 prescribing an alternate method for relevant lump sum payments made on or after 1 July 2021. It effectively prescribes that same treatment as MS 2021/1 for the first payment made, then calculates all future payments (second, third and

[166] The ATO has advised that objections and amendment requests continued to be received and processed and some amendments were also finalised where the veteran indicated they wished for this to occur.

[167] ATO, 'Treatment of military invalidity benefits following Full Federal Court decision' (ATO webpage update QC 62497), 15 December 2021. [Note: this page has since been replaced with a new page on the ATO website.]

ongoing) as if the components reduce consistent with subsection 307-210(2) of the ITAA 1997. This solution was considered unworkable by industry as outlined below;

- Draft Third Legislative instrument – MS 2021/D3 - The ATO withdrew MS 2021/D2 and issued a new draft legislative instrument – MS 2021/D3 – which sets out the same alternative method for calculating the tax free and taxable components of pension payments as MS 2021/1, but applying to payments made between 1 July 2021 and 30 June 2022.
- Second Legislative Instrument – LI 2022/1 - on 9 December 2021, the ATO made a determination by legislative instrument, effective 4 January 2022 – LI 2022/1. The instrument extends the approach taken in MS 2021/1 to apply to affected superannuation benefits paid during the 2021–22 financial year. This would ensure that no affected pension recipient is disadvantaged by the recalculation during the 2021–22 financial year.
- Third Legislative Instrument – LI 2022/33[168] – on 19 September 2022, the ATO made a determination by legislative instrument, effective 15 October 2022. The instrument extends the approach taken in MS 2021/1 to apply to affected superannuation benefits paid during the 2022–23 financial year.

- The ATO also allowed CSC to provide one consolidated payment summary per individual for the 2020-21 financial year and this approach has continued in 2021-22.

An analysis of the legislative powers for various ATO actions is set out below.

[168] ATO, *Legislative Instrument LI 2022/33*, 19 September 2022. Authorised by Deputy Commissioner of Taxation, Policy Analysis and Legislation, tabled 14 October 2022.

3.1.4. What were the relevant decisions and actions and who authorised them?

The Table below sets out a number of decisions made and actions taken to administer the law and give effect to the decision in *Douglas.* Many of the decisions are referrable to express statutory provisions. The decisions and actions were in many instances based upon an express statutory discretion or authority to make a determination.[169] Some decisions were not referrable to expressed statutory discretions, such as decisions to gather information, decisions or actions taken to communicate the changed legal position and deciding what amendment or interim actions needed to be taken. These decisions and actions are arguably made under the GPA in furtherance of the Commissioner's duty to administer the changed law in light of the decision in *Douglas.* The table sets out the breadth of the decisions and actions following *Douglas* taken by the ATO. They illustrate the challenge in seeking to delineate where there is an exercise of an express statutory discretion or power and administrative actions taken under the GPA.

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
11 February 2021 – ATO issues CSC formal notice exempting it from issuing a PAYG payment summary within 14 days after each payment and instead requiring CSC issue one annual payment summary	s 16-180 of Schedule 1 to the TAA – The Commissioner may exempt an entity from specified requirements …	The decision to exempt CSC from issuing a payment summary within 14 days after each payment (i.e. issuing up to 26 payment summaries for each affected taxpayer each income year), and instead replacing that with an obligation to issue one annual payment summary, reduced the administrative burden on both CSC and the ATO. This ensured an	Assistant Commissioner of Taxation, Superannuation and Employer Obligations	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 5.4

[169] Note for completeness:
The ATO in reviewing this report has advised the IGTO that in their view each provision includes an incidental power to do those things necessary to exercise the grant of power expressed in the provision. The incidental power that flows with each provision is not extinguished by the provision that confers general administration of the Acts on the Commissioner.
The IGTO notes that one view of the GPA is the power to do everything that is necessary and incidental to give effect to the statutory provisions. That is, the GPA is itself the necessary and incidental power to operationalise the express statutory requirements.

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
		experience for affected taxpayers in line with their historical experience of receiving payment summaries from CSC.		
2 March 2021 - ATO entered into a data-matching program with CSC to obtain information required to amend returns following Douglas	s 254(2) of the SISA – For the purposes of this Act, the Regulator or an authorised person may, by written notice to a trustee of a superannuation entity, require each trustee of the entity to ensure that, within a specified period, the Regulator or an authorised person is given, in relation to a specified year of income of the entity, such information, or a report on such matters, as is set out in the notice. s 353-10 of Schedule 1 to the TAA	The information was requested to allow a streamlined amendment of prior year returns without requiring veterans to file objections.	Assistant Commissioner of Taxation, Superannuation and Employer Obligations (as Project Senior Accountable Officer)	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 1.11
19 January 2021, ATO announced it is developing a streamlined process to allow taxpayers affected by the Douglas decision to seek	The streamlined process itself was based on an application of the assessment provisions in the ITAA 1936 and the objection provisions in the TAA - see the	The decision to make the announcement and the streamlined process outlined in the announcement were administrative decisions.	Assistant Commissioner of Taxation, Superannuation and Employer Obligations (as Project Senior Accountable Officer)	Commissioner's general delegation and Deputy Commissioner's Authorisations and

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
amendments to historical income tax assessments by using information the ATO already held as well as obtaining further information directly from CSC	item below for a discussion on the legislation underpinning the streamlined remediation process.			Taxation authorisation guidelines 1.2; 1.3; 1.15 and the Commissioner's GPA
10 March 2021, ATO published the details of its streamlined amendment process	The decision to publish web content was an administrative decision.	The decision to publish the web content and the streamlined process outlined in the web content were administrative decisions.	Assistant Commissioner of Taxation, Superannuation and Employer Obligations (as Project Senior Accountable Officer)	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 1.2; 1.3; 1.15 and the Commissioner's GPA
The ATO has issued 14,705 (as at 20 February 2023) amended notices of assessment covering the financial years FY2008 to FY2020 to approximately 2,700 veterans to give effect to the decision in Douglas.	The streamlined amendment process itself relied on the provisions governing assessments in the ITAA 1936 and objections under Part IVC of the TAA 1953, which allowed affected taxpayers to lodge: (i) a request to amend income tax assessments within the period of review in s 170 of the ITAA 1936; and			

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
	(ii) an objection (s 175A of the ITAA 1936 and Part IVC of the TAA), and a request for an extension of time to lodge the objection (s 14ZW(2) and (3) of the TAA), to income tax assessments that were outside the period of review. in a simplified manner by modifying the 'approved form' requirements (under s 388-50(3) of Schedule 1 to the TAA) for taxpayers who were members of a defined class (i.e. taxpayers affected by the Douglas decision).			
23 April 2021, the ATO issued a PAYG withholding class variation notice to CSC	s 15-15 of Schedule 1 to the TAA	There is an express administrative discretion in the TAA to vary withholding for special circumstances. The class withholding variation modified the amount of withholding required under Schedule 12 for affected taxpayers to better approximate	Assistant Commissioner of Taxation, Superannuation and Employer Obligations	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 5.4 and the Commissioner's GPA

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
		their end-of-year income tax position. The methodology in Schedule 12 is based on the provisions for the taxation of superannuation lump sums in Div 301 of the ITAA 1997, and accordingly did not cater for special circumstances following Douglas - a scenario where an individual receives ongoing fortnightly superannuation lump sums.		
19 May 2021, the ATO issued draft legislative instruments, MS 2021/D1 and MS 2021/D2. Only the first was finalised as MS 2021/1.	Draft legislative instruments were released for community consultation in accordance with principles in s 17 of the *Legislation Act 2003*. The draft LIs are enabled by s 307-125(5) of the ITAA 1997	The Legislative Instrument: • preceded a Government announcement of their intention to amend the law following a test case decision of the Federal Court, • affected many veteran taxpayers, • involved a compliance approach that was customised to affected and vulnerable taxpayers, and	Deputy Commissioner of Taxation, Policy Analysis and Legislation	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 2.8 and the Commissioner's GPA

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
		• involved material revenue and related risks to be considered dating back many years		
10 June 2021, the ATO issued a PAYG withholding class variation notice (replacing the 23 April 2021 notice)	s 15-15 of Schedule 1 to the TAA	This class withholding variation further refined the methodology applied in the original class withholding variation to better replicate the end-of-year income tax outcome for affected veterans.	Assistant Commissioner of Taxation, Superannuation and Employer Obligations	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 5.4 and the Commissioner's GPA
25 June 2021, ATO made a determination by legislative instrument (MS 2021/1)	subsection 307-125(5) of the ITAA 1997 s 17 of the *Legislation Act 2003*	As set out in the Explanatory Statement to MS 2021/1, it was considered appropriate to make the legislative instrument in order to ensure that no taxpayer affected by the *Douglas* decision was disadvantaged by a recalculation of the tax free and taxable components of their historical invalidity pension payments.	Deputy Commissioner of Taxation, Policy Analysis and Legislation	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 2.8 and the Commissioner's GPA

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
24 November 2021, the ATO postponed writing to impacted individuals about prior year amendments		The decision to postpone was made to minimise any confusion for affected taxpayers given the government had announced it intended to introduce legislation to amend the tax treatment of military invalidity pensions paid under the two superannuation schemes considered in the Douglas decision.	Military Super Band 2 Steering Committee[170]	Commissioner's general delegation and Deputy Commissioner's Authorisations and the Commissioner's GPA
9 December 2021, ATO made a determination by legislative instrument *Income Tax: Alternative method for calculating the tax free component and taxable component of a superannuation benefit paid during the 2021–22 financial year for recipients of certain pensions under the Defence Force Retirement and Death Benefits Act 1973 and the Trust Deed referred to in section*	Subsection 307-125(5) of the ITAA 1997 s 17 of the *Legislation Act 2003* Subsection 12(2) of the *Legislation Act 2003*	As noted in the Explanatory Statement, the 2021-2022 year being part way through, the instrument extends the approach taken in MS 2021/1 to apply to affected superannuation benefits paid during the 2021–22 financial year to ensure that no affected pension recipient is disadvantaged by the recalculation during the 2021–22 financial year.	Deputy Commissioner of Taxation, Policy Analysis and Legislation	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 2.8 and the Commissioner's GPA

[170] Military Super Band 2 Steering Committee comprised: Deputy Commissioner of Taxation, Superannuation and Employer Obligations; Deputy Commissioner of Taxation, Individuals and Intermediaries; Deputy Commissioner of Taxation, Review and Dispute Resolution; Deputy Commissioner of Taxation, Client Account Services.

3. Exercises of the GPA – Some illustrative examples

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
4 of the Military Superannuation and Benefits Act 1991		The original decision to write to impacted veterans, and then the decision to postpone doing so, were administrative decisions to manage the client experience.		
19 September 2022 – LI 2022/33	Income Tax: Alternative method for calculating the tax-free component and taxable component of a superannuation benefit paid during the 2022-23 financial year for recipients of certain pensions under the Defence Force Retirement and Death Benefits Act 1973 and the Trust Deed referred to in section 4 of the Military Superannuation and Benefits Act 1991	This was a further extension of the original alternate method to 30 June 2023	Deputy Commissioner Policy, Analysis and Legislation, make this determination under subsection 307-125(5) of the ITAA 1997.	Commissioner's general delegation and Deputy Commissioner's Authorisations and Taxation authorisation guidelines 2.8 and the Commissioner's GPA

3.1.5. IGTO Observations – PAYG Withholding class variations

On 11 February 2021, the ATO wrote to CSC to advise:

- Of the Federal Court decision handed down on 4 December 2020;
- That it should as soon as practicable (and no later than from 1 July 2021) begin to apply the PAYG withholding rates set out in *Schedule 12 – Tax payable for superannuation lump sums* to fortnightly invalidity payments (made this year and in future years) to members; and
- Was exempt from issuing a PAYG payment summary - superannuation lump sum within 14 days of each of fortnightly payment to each and every affected member and instead, would be required to issue a single PAYG payment summary – superannuation lump sum within 14 days after the end of the financial year to the affected members covering total superannuation lump sum payments made, total tax withheld and any other reportable components for the financial year.

The ATO issued PAYG class variations to CSC on 23 April 2021 and 10 June 2021.

CSC advised the ATO that the PAYG class variations, as an administrative solution proposed to address prospective PAYG withholding in accordance with Schedule 12, were unworkable on several occasions including:

- 4 March 2021 – CSC sought a variation which would exempt the CSC from applying Schedule 12 until 1 July 2021 as this would allow the CSC and the ATO to focus on remediation. It also mentioned that contact from its members was detracting resources from implementing the systems changes:

  … As you know, CSC is working to implement this change as a matter of utmost priority. As you are aware, this requires a significant change to CSC's administration IT platform, which necessarily involves rigorous design, build and testing.

  Prioritising a system fix will ensure that all affected members have the tax treatment of their payments aligned to the relevant rates as soon as practicable and reduces the risk of errors arising as a result of ad-hoc adjustments. It is also most consistent with CSC's broader obligations to ensure that expenditure and commitment of resources are directed to achieving outcomes that are in the best interests of the membership as a whole.

  Whilst we move toward implementing the system fix, there is a risk that ambiguity in relation to CSC's obligations in the interim will leave both the ATO and CSC open to complaints and potential disputes from affected members. The likely result is confusion for the affected members as a whole, potentially unequal treatment of members (for example, if AFCA makes certain determinations) and a deviation of key resources away from the broader system fix, potentially delaying the implementation of the change for the group as a whole. As you know, we are already receiving additional contact from members who cannot understand the implications of this for them and spending time addressing each of those matters is taking away from our ability to implement necessary system changes. Additionally, we understand that members are putting in tax variations with the ATO given the uncertainty.

Accordingly, are you able to advise what we need to do to seek a formal variation of the amounts to be withheld in accordance with s 15-15 of Schedule 1, Chapter 2 of the Tax Administration Act 1953? Our view is that we would seek the variation up until 30 June 2021 to allow both us and the ATO to focus on the remediation of this matter. We would essentially be seeking that a variation be made in terms that CSC is NOT required to apply schedule 12 until 30 June 2021 and can continue applying the tax rates in Schedule 13 – Tax table for superannuation income streams, until 30 June 2021.

Whilst there may be other options, such as reducing withholding to zero, there is no viable "bulk" way to do this (that will not distract from the work needed to be ready for 1 July) without possibly disadvantaging some members…

- On 9 March 2021, the CSC advised the ATO that a number of veterans will have higher PAYG amounts withheld from their invalidity pensions if Schedule 12 rates are applied. The ATO advised the IGTO that the CSC was unable to identify why.

- On 18 March 2021, the CSC sent an email to the ATO, asking again for a PAYG withholding class variation. It said 13,000 of 15,000 affected veterans would have increased amounts of PAYG withholding deducted if Schedule 12 rates were applied. It also considered implementation of the ATO's 11 February 2021 advice direction "highly inefficient" because the resources to undertake systems modifications were substantial and would need to be done again when these rates were replaced with a permanent solution. It also said that altering the rates more than once could have negative consequences to affected veterans and their families due to mental health challenges:[171]

Further to my email [4/3/21, 11:32], I would like to re-raise the possibility of a withholding variation. Whilst I understand in previous discussions that you were hesitant to grant the variation on the basis that it is not in accordance with ATO principles for withholding variations to allow people to "over withhold", implementing Schedule 12 will make us withhold even more (than if we just continued to withhold per Schedule 13) for approximately 13,000 out of 15,000 members.

We also note that you have recently realised that Schedule 12 is problematic for this particular cohort of members as it may lead to excess (unnecessary) withholding due to Schedule 12 not considering the tax free threshold. You have indicated a likelihood of either a modification to Schedule 12 for this cohort or a further Schedule that will be applicable to these people.

The resources required (both monetary and human) to undertake system modifications to give effect to altered withholding arrangements are substantial. As such, should the ATO be considering making amendments to Schedule 12, we consider it highly inefficient for CSC to expend resources to move to Schedule 12 when it will only be altered again. Further, should CSC implement Schedule 12 now as it is written, a significant proportion of the membership will have taxation over withheld by CSC.

From the feedback we have received to date from members, additional withholding significantly impacts their day to day lives; the fact that they will receive a tax return at a later stage does not

[171] ATO, communication to the IGTO, 2 August 2021.

matter to many members as they have indicated to us that they survive day to day on what they receive in the hand each fortnight.

Beyond the costs to CSC (and therefore to the membership as a whole), noting that many of the impacted members have mental health challenges, we are also concerned that varying their payments more than once could have negative outcomes for their, and their families, overall wellbeing.

As such, we urgently seek your advice on how to pursue the withholding variation so that our members have certainty while this complex matter is being resolved.

- On 26 March 2021, the CSC sent an email following up on its 24 March 2021 email. It urged the ATO to reconsider its 11 February 2021 requirement for the CSC to apply Schedule 12 rates and that it only be asked to make one change to the rates (i.e. the permanent change). It stated that Sch 12 would increase withholding for 13,000 of the 15,000 affected veterans, and unlikely to be implemented by 1 July 2021 due to increasing complaints and ATO requests for test runs for the Sch 12 rates:

I understand the data you have requested has been provided. The data that we have provided is, in our view, a representative sample of the potentially impacted population. That is, the vast majority of the population will be negatively impacted should we proceed to apply Schedule 12.

We accept the ATO's position that the withholding variation to continue to apply Schedule 13 would not be in accordance with the Federal Court outcome. That being the case, we now need to urgently address the go-forward position. Should we pause the current work we are doing to implement Schedule 12 we will not be able to achieve a 1 July effective date. A delay of even a week at this stage will mean that the implementation will not occur on time.

Bearing this in mind, the position set out in your email below is rapidly becoming untenable. If the ATO plans to get CSC to test run the 2016 variation over the potentially impacted population this will be a large piece of IT work and will be utilising the same resources that are currently trying to implement the changes required to apply schedule 12. We cannot continue to implement Schedule 12, test run alternative withholding options, and then build a system to apply that alternate option all by 1 July.

We are receiving complaints from a growing number of increasingly frustrated individuals and the tone of their complaints is increasing our concern for them. We think we are approaching the point that we need to tell our members that the reason we are not applying Schedule 12 is that it will increase withholding for around 13,000 out of 15,000 people and that while we are seeking clarity from the ATO, we are unable to implement changes. We have pre-emptively advised Defence of this and our likely need to change our communications strategy so that our members understand we are actively trying to help by not implementing Schedule 12. Defence support our approach.

It seems we all agree that implementing Schedule 12 is not the best path forward but an alternate path is yet to be established. As such, we ask that you urgently revisit the position expressed in your letter of 11 February to capture the difficult situation in which we now find ourselves. Perhaps we could also reconsider the options of just applying a flat withholding rate (10 – 20%) for a temporary period whilst the ATO take the time to work out the preferable withholding schedule.

Give the time sensitivities, we are seeking a permanent go forward solution by Easter and for the ATO to provide an effective communication of this. Do you think this be possible?

The ATO's approach to the Schedule 12 class variations had the effect of imposing significant compliance costs and complexity on CSC as the administrator of the Fund, without regard for the consequent benefits of collected tax. This is despite the fact that PAYG withholding is not a final tax assessment in these circumstances.

The ATO ultimately has issued a series of rolling Legislative Instruments – which as their name suggests, actually changed the assessment of final tax by altering the method for calculating the tax free component and taxable component of a superannuation benefit paid – *Income Tax: Alternative method for calculating the tax free component and taxable component of a superannuation benefit paid during the 2022-23 financial year for recipients of certain pensions under the Defence Force Retirement and Death Benefits Act 1973 and the Trust Deed referred to in section 4 of the Military Superannuation and Benefits Act 1991*. This simultaneously simplified the PAYG withholding requirements under Schedule 12.

However, the question that remains unanswered as a result of these developments is – Can or Should the Commissioner's GPA be exercised in ways which have regard to the compliance costs that are otherwise imposed on taxpayers and to achieve simplified tax administration both for taxpayers and the ATO?

3.1.5.1. PAYG Withholding requirements

The Commissioner has broad powers to make withholding schedules for the purposes of Part 2-5 of the TAA 1953, including specifying amounts, formulas and procedures to be used in working out the amount to be withheld. The object of PAYG withholding as set out in section 6-1 of the TAA 1953 is to help taxpayers meet their annual income tax liability. That is, they are required to pay amounts of their income at regular intervals as it is earned during the year – that is progressively.

PAYG withholding requires amounts of tax to be collected in respect of particular kinds of payments or transactions. Discrete provisions deal with withholding for the different types of payments:

Item	Description	Section reference
7	A *superannuation income stream or an annuity	12-80
8	A *superannuation lump sum or a payment for termination of employment	12-85

PAYG withholding is not typically a final assessment of tax for resident taxpayers but rather as the name suggests a withholding to be credited against your final tax liability upon lodgement.

Schedule 12, which is the relevant schedule for superannuation lump sums, does not anticipate a situation where lump sums will be paid as a fortnightly pension – that is, throughout the period. However, the ATO approach to PAYG withholding post the decision was to approximate the actual tax payable on each and every fortnightly payment - that is, tax payable on each and every fortnightly payment should be calculated and withheld according to *Schedule 12 – Tax payable for superannuation*

lump sums – that is, as if there was a final assessment in accordance with the specific provisions of the law.

Section 15-30 of Schedule 1 of the TAA 1953 requires the Commissioner to have regard to a list of specified matters when making a withholding schedule. These include, relevantly:

> *(a) the rates of income tax as specified in the Income Tax Rates Act 1986;*
>
> *(b) the rates of *Medicare levy as specified in the Medicare Levy Act 1986;*
>
> *(ca) the percentages specified in section 154-20 (about repayments of accumulated HELP debt) of the Higher Education Support Act 2003 for any financial year starting on or after 1 July 2005;*
>
> *(caa) the percentage referred to in the definition of applicable percentage of repayment income in subsection 23EA(1) (about repayments of accumulated VETSL debts) of the VET Student Loans Act 2016 for any financial year starting on or after 1 July 2019;*
>
> *(cb) the percentage referred to in the definition of applicable percentage of repayment income in subsection 1061ZVHA(1) (about repayments of accumulated SSL debt) of the Social Security Act 1991 for any financial year starting after the commencement of this paragraph;*
>
> *(cc) the percentage referred to in the definition of applicable percentage of HELP repayment income in subsection 10F(1) (about repayments of accumulated ABSTUDY SSL debt) of the Student Assistance Act 1973 for any financial year starting after the commencement of this paragraph;*
>
> *(cd) the percentage referred to in the definition of applicable percentage of repayment income in subsection 46(1) (about repayments of accumulated TSL debt) of the Trade Support Loans Act 2014 for any financial year starting on or after 1 July 2014;*
>
> *(da) the percentages specified in section 1061ZZFD (about repayments of accumulated FS debts) of the Social Security Act 1991 for any financial year starting on or after 1 July 2006;*
>
> *(db) the percentages specified in section 12ZLC (about repayments of accumulated FS debts) of the Student Assistance Act 1973 for any financial year starting on or after 1 July 2006;*
>
> *(d) any *tax offsets;*
>
> *(e) the family tax benefit (within the meaning of the A New Tax System (Family Assistance) Act 1999);*
>
> *(f) the periods in respect of which *withholding payments are made;*
>
> *(fa) in relation to withholding payments that are *working holiday taxable income – whether an entity is registered under section 16-147;*
>
> *(g) any other prescribed matter.*

The interpretation versus administration consequences is important to note and compare in the ATO solutions outlined above.

It is also important to note that the objective of PAYG and the fact that it is not a final tax assessment.

Each of the second and third Legislative Instruments also had the intended effect of simplifying PAYG withholding calculations in accordance with Schedule 12. However the ATO was not prepared to issue PAYG 'variations' pursuant to section 15-15 of Schedule 1 of the TAA 1953. Instead the Legislative Instruments were issued which changed the actual assessment of the final tax – that is, by altering the method for calculating the tax free component and taxable component of a superannuation benefit paid – which then had PAYG calculation consequences.

3.1.5.2. Public communications

Veterans that approached the CSC were advised in early February 2021 that until the ATO provided it with advice on PAYG withholding, it would continue to administer their entitlements in line with pre-existing arrangements.

On 11 February 2021, the ATO advised the CSC that "as soon as practicable (and no later than from 1 July 2021) you should begin to apply the rates set out in Schedule 12 – Tax table for superannuation lump sums to invalidity payments you make this year and in future years to [affected veterans]".

The DFWA website reported the CSC advice that PAYG withholding would continue at current rates as it would take time for the CSC to change their systems, but that the ATO would refund any excess via end of year income tax assessments. The CSC also announced on its website on 26 February 2021 that changing its systems was "a complex, technical change and may take some months to implement."

Further, the ATO did not appear to act on the CSC's suggestions that there needed to be communication of the difficulties faced to allay its members' concerns.

It could be argued that the delays were due to the CSC's data quality and lack of systems capability to quickly implement the required changes. However, such an argument ignores the necessary time to implement computer systems changes generally and the adverse impact that the ATO's direction to apply Schedule 12 would have on the vast majority of affected veterans and the 3 months taken to issue a variation which halved the amount of veterans who would have more PAYG withheld from their fortnightly payments than would be required for payment of tax liabilities at end of the income year.

3.1.5.3. CSC increasing PAYG withholding amounts

The ATO notified CSC on 11 February 2021 that it was required to withhold tax as per the calculations and rates set out in *Schedule 12 – Tax payable for superannuation lump sums* as soon as possible and no later than 1 July 2021. The ATO issued the CSC with two class variation notices on 23 April 2021 and 10 June 2021. The CSC initially did not implement these changes for adversely affected veterans due to the government announcement to provide a legislative solution. Ultimately, the CSC has made the decision to implement the variation given its legal obligation to do so and uncertainty surrounding the timeframe for a legislative solution.

3.1.6. IGTO Observations – the Commissioner's discretion under 307-125(5) of the ITAA 1997

The Commissioner used his statutory discretion to good effect when issuing the first legislative instrument that removed the requirement for the CSC to recalculate the tax-free component and taxable component for each historical payment affected by the Douglas decision. This solution reduced the burden on the CSC of implementing the Douglas decision without disadvantaging affected veterans. In doing so, the Commissioner demonstrated that an administrative solution could achieve two seemingly competing outcomes: ensuring compliance with the law and providing administrative simplicity. The cost of achieving this was borne by the Commonwealth, as the solution meant that the tax-free component proportion of historical payments did not reduce over time.

The IGTO considered that, similar to the first legislative instrument, the Commissioner should explore options to provide further administrative simplicity to the CSC (and veteran members), for the purposes of calculating PAYG withholding on prospective payments and to determine at what cost to the Commonwealth.[172]

The IGTO raised the prospect of simpler options in meetings with the ATO on 2 September 2021 and 6 October 2021. For example, the Commissioner could:

- provide a legislative instrument [for PAYG withholding purposes] where the proportioning rule under section 307-125 of the ITAA 1997 is static for affected veterans and does not change with each payment. This would align the treatment of lump sums with that of income streams, while also allowing for veterans to claim the additional tax-free component that applies only to lump sums under section 307-145 of the ITAA 1997.
- Allow PAYG withholding to be calculated using the taxable and tax-free components once in the financial year; and/or
- calculating the components at the time of first payment in the financial year and revising the calculation only if there is a pension payment adjustment, for example, when the pension is indexed.

In discussions, the ATO was asked whether simpler legislative instruments could be issued for PAYG withholding purposes, as these were effectively part-payments made towards an anticipated an end-of-year income tax liability. That is, they were not a collection of final tax liability. The ATO indicated that it was not prepared to use a calculation for PAYGW purposes which departed from the end-of-year income tax calculation. Each fortnightly PAYG withholding payment had to be calculated by matching how the tax-free component and taxable component of a superannuation lump sum that is paid from a superannuation interest would be calculated under Division 307 of the ITAA 1997 – that is, in calculating the final end-of-year tax under Division 307 of the ITAA 1997.

[172] IGTO, Bulk investigation notice to ATO, 27 August 2021.

However, following the government announcement to provide a legislative solution, the ATO withdrew MS 2021/D2 and issued a comparatively simpler solution in LI 2022/1 until 30 June 2022 and then another until 30 June 2023.

The IGTO commends the approach taken by the ATO in LI 2022/1 which minimises the compliance burden, but queries why this approach could not occur sooner or extend beyond 30 June 2022.

The IGTO queries whether the ATO's initial reluctance to exercise the Commissioner's discretion in a way which is favourable to taxpayers and in the interests of reduced red tape and compliance cost was due to the lack of an administrative objective or framework which provides guidance or factors to consider when exercising discretions such as those contained in subsection 307-125(5) of the ITAA 1997.

The IGTO observes that the ATO may have utilised the Commissioners discretion to assist taxpayers more pro-actively and promptly if such guidance existed pending the Government's response to any ATO briefing on this ongoing issue.

In the IGTO's view, simpler and more timely solutions, such as maintaining the same proportions for the proportioning rule until legislative change is achieved, would reduce complexity.

The IGTO considers that simpler administrative solutions and legislative change should be explored to reduce the compliance burden, confusion and for administrative ease.

A closer consideration is also warranted regarding the availability of the Commissioner's remedial power under Sub-Division 370-A of Schedule 1 to the TAA 1953 in these circumstances. As both administrative and legislative solutions may impact consolidated revenue, the revenue and compliance cost impacts would need to be assessed.

3.1.7. IGTO Observations – Processes undertaken to arrive at the GPA decision?

The decisions made in reliance on the Commissioner's GPA in responding to administration of taxation laws post the Federal Court decision appear to have been made under an implied authority, rather than through any formal delegation. In this sense, they appear to be decisions of the kind contemplated by PSLA 2009/4 and the process set out in that PSLA.

It is arguable that the circumstances following the *Douglas* decision were of such a significant nature, affecting almost 20,000 veterans that they should not be exercised as a matter of administrative necessity – that is, they fell outside the scope of usual duties. Namely, the decision was significant and complex, affecting a large number of taxpayers who could have potentially been adversely affected.[173] In these circumstances, the PSLA contemplated the issue will be escalated through to the Commissioner. Based on materials available to the IGTO, that does not appear to have occurred. Accordingly, while the decisions were made by senior executive officers of the ATO, it is arguable that they were not done so in accordance with the requirements of the PSLA (the Commissioner's own instructions).

[173] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 6 May 2020), para 8.

This also raises the question – if decisions of the kind made in relation to the *Douglas* issues which affect many thousands of people need not be escalated under PSLA 2009/4, what kinds of decisions would need to be escalated?

3.2. Case study 2: Early release of superannuation

3.2.1. Background and Context

During the COVID-19 pandemic, taxpayers who met certain eligibility criteria could make an application to access up to $10,000 of their otherwise 'preserved' superannuation funds[174] in each of FY20 and FY21. That is, on compassionate grounds.

Eligibility was determined according to a number of aspects of the applicant's personal circumstances as set out in the regulations. The law defined proxies for entitlement by reference to employment, income and whether the applicant was in receipt of other Government assistance as follows:

> *(1) A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity or entities may be released on the ground that it is required to assist the person to deal with the adverse economic effects of the coronavirus known as COVID-19 if:*
>
> *a) the person is unemployed; or*
>
> *b) the person is eligible to receive any of the following under the Social Security Act 1991:*
>
> *i) jobseeker payment;*
>
> *ii) parenting payment;*
>
> *iii) special benefit; or*
>
> *c) the person is eligible to receive youth allowance under the Social Security Act 1991 (other than on the basis that the person is undertaking full-time study or is a new apprentice); or*
>
> *d) the person is eligible to receive farm household allowance under the Farm Household Support Act 2014; or*
>
> *e) on or after 1 January 2020 the person was made redundant, or their working hours were reduced by 20% or more (including to zero); or*
>
> *f) for a person who is a sole trader--on or after 1 January 2020 the person's business was suspended or suffered a reduction in turnover of 20% or more.*

[174] Superannuation Industry (Supervision) Regulations 1994, sub-reg 6.19B.

3. Exercises of the GPA – Some illustrative examples

The COVID-19 ERS process is a two-step process:

(a) an application is made by the individual, and

(b) a determination is then made by the Commissioner.

Once an application is made in accordance with regulation 6.19B of the Superannuation Industry (Supervision) Regulations 1994 (**SISR**), the Commissioner is required (provided he is satisfied that the applicant meets the relevant criteria), under subregulation 6.19B(3) of the SISR to issue a determination that a 'condition of release' has been satisfied. This determination effectively notifies and allows the applicant's superannuation member benefits to be released by the nominated superannuation fund.[175]

Subregulation 6.19B(5) of the SISR states the determination must specify the superannuation entity or entities from which the benefits are to be released, as well as the amount that may be released from each specified entity.

The IGTO investigated 67 complaints concerning the ATO's administration of the COVID-19 early release of super (**COVID-19 ERS**), which had a common theme. The applicants concerned had made an error in completing their application for COVID-19 ERS. Effectively, one or more of the superannuation accounts nominated on their application did not have sufficient funds to pay the entirety of the amount that had been applied for to be released. That is, the taxpayer did not nominate the correct fund.

Where this was detected before an ATO determination had issued to the superannuation fund, then it was possible to address the error by transferring (rolling over) funds from one or more other superannuation funds, so that sufficient funds were held in the fund nominated on the application form.

Where the ATO had issued a determination to the nominated superannuation fund, then the ATO's administration depended on whether the applicant had made an application for $1,000 or less or for more than $1,000. The ATO was prepared to 'administratively disregard' the application for the former but not the latter.

The following Case studies illustrate the circumstances in the complaint investigations:

3.2.1.1. Case Study A: Application of the GPA where there is 'genuine error' (in the ordinary meaning of honest mistake)

1. In this complaint scenario:

- The complainant successfully applied for COVID-19 ERS from their fund, 'xx Retirement Trust' in May 2020.
- Two months later in July 2020, the complainant contacted their fund twice to check the balance in their super account and was advised on both occasions that the balance was just over $4,300. This was done in preparation for a second release of super. They believed that they only had one fund with 'xx Retirement Trust'.

[175] *Superannuation Industry (Supervision) Regulations 1994*, regs 6.18 and 6.19.

- When the complainant tried to apply for COVID-19 ERS again in July 2020 through the ATO's application system, they saw one fund which had a different name (albeit still with the word 'Retirement' in the name) and it had a balance of $3. They called their fund who confirmed that the balance of their account was $4,300 and that the ATO would fix the issue once they lodged their application. They selected the fund and entered $4,000 into the application.

- However, it turned out that the fund they had selected with the $3 balance was not the correct fund and was also not the fund they had been calling. It also turned out that the correct fund had changed its name entirely and no longer contained any of the words it originally contained.

- The incorrect fund was unable to release the requested amount of $4,000 as it had an extremely low balance of just over $3.

- Shortly after the application was made, just over $3 was released to the complainant from the incorrect fund.

3.2.1.2. Case Study B: Application of the administrative solution where the ATO provided incorrect advice

2. In this complaint scenario:

- The complainant had accidentally sought release of $10,000 from Fund A instead of Fund B. Unfortunately, there was only $2,600 in Fund A.

- The complainant subsequently contacted Fund A, which explained that they could either release the $2,600 or put the payment on hold. Fund A explained that they weren't sure what processes the ATO had in place to rectify or resolve the situation and suggested that the complainant contact the ATO.

- The complainant then contacted the ATO and asked whether Fund A should release the funds or whether the payment should be put on hold. The ATO officer advised the complainant to tell Fund A to release the funds. This advice was contrary to ATO procedures, which instructs ATO officers to:

  Confirm if the client has received any money (and if yes, how much) as a result of their application. Advise the client that…if money has already been released, [the ATO] may not be able to rectify the issue as legislation permits only one release...[176]

- The complainant relied on ATO advice and asked Fund A to process the $2,600 payment. Once this occurred, the complainant could no longer resolve the issue by rolling over an amount from one or more other superannuation funds, so that sufficient funds were held in

[176] ATO, 'ATO Contact centre scripting and procedures – Coronavirus – early release of superannuation program' (internal ATO document, 17 July 2020) p 19.

the nominated fund (Fund A) to perform the release (because of items 107A and 207AA of Schedule 1 of the SISR).

3.2.2. What was the administrative issue needing to be addressed?

3.2.2.1. Can the application be amended or revoked by the applicant or the ATO?

During the IGTO's investigation of these complaints, the ATO explained that human errors and mistakes in their COVID-19 ERS application could not be fixed as there was no specific power provided in the SISR that would allow an individual to amend or revoke their application. Furthermore, the ATO explained that it was not possible to overwrite or supplant the application with a new one as only one application was allowed for the relevant period, as per subregulation 6.19B(2) of the SISR. However, it could accept another application for the same period where it decided through exercise of the GPA to 'administratively disregard' the first application. The ATO has informed the IGTO that there were only limited circumstances where they could administratively disregard an application.

The IGTO independently examined the legal analysis of the tax and superannuation legislation and regulations. Based on this analysis, the IGTO is of the view that there is no legislative right in the tax or superannuation legislation that allows an individual to amend or revoke an application generally where 'errors of fact' or honest mistakes (e.g. selecting the wrong fund) were made in that application.

This may be because of deliberate policy design or a drafting oversight. Regardless, it is somewhat surprising that genuine errors or honest mistakes cannot be rectified or corrected as a matter of general tax administration practice especially in the design of measures which are aimed to assist or provide relief during periods of economic hardship.

However, the absence of an express statutory power is also not determinative since the overriding obligation of statutory interpretation is to construe the statutory text with regard to its context and purpose and, where there is a choice, to choose the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act).

3.2.2.2. Can the determination issued by the ATO to the superannuation fund be amended or revoked under the *Acts Interpretation Act 1901*?

The IGTO sought to understand whether the ATO would be able to amend or revoke the determination that was issued to the super fund (as opposed to the application). In particular, the IGTO asked the ATO to consider how subsection 33(3) of the *Acts Interpretation Act 1901*(**AIA**), which confers on the ATO the power to amend, vary or revoke an administrative instrument, such as the determination in question, could apply.

Subsection 33(3) of the AIA, provides as follows:

> *Power to make instrument includes power to vary or revoke etc. instrument*
>
> *(3) Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.*

The ATO agreed with the IGTO that it had a general power to amend or revoke determinations made under subregulation 6.19B(3) of the SISR.

However, the ATO explained that any determination made under subregulation 6.19B(3) of the SISR must be 'in respect of an application made by the person in the financial year.' Furthermore, the ATO explained that a COVID-19 ERS application made under subregulation 6.19B(1) of the SISR must be 'for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity or entities may be released.' According to the ATO, the references to the 'amount' and 'superannuation entities' in this subregulation infers that any determination made under subregulation 6.19B(3) of the SISR is to be limited to the information contained in the application. That is, there is in effect NO power to repeal, rescind, revoke, amend, or vary the determination in these circumstances.

Stated simply, even though the ATO has the power to amend the determination issued to an applicant's super fund, the ATO view is that it does not have a power to amend it in such a way to make it inconsistent with the information contained in the original (but unfortunately erroneous) application. Similarly, while the ATO also has the power to revoke the determination issued to a super fund, it considers that it does not have the power to subsequently issue a new determination to a super fund that is inconsistent with the information contained in the original application.

3.2.3. IGTO view

One of the key factors that the IGTO is to consider as part of any complaint investigation is whether there are shortcomings in the ATO's administrative decision making process, including its interpretation of administrative provisions in the law. For example, whether the ATO's action is contrary to the law, unreasonable, discriminatory or otherwise based on a mistake of law.[177]

The ATO view is that any determination must be consistent with the information contained in the application and any power to amend the determination cannot be used to remedy situations where a taxpayer has selected the wrong fund in their application. That is, where the taxpayer has made an honest mistake or genuine error.

The IGTO considers the ATO's reasons for refusing to rely upon this power are not unreasonable but are based on a very narrow and strict reading of the law. Notwithstanding the ATO's view and discussions undertaken during this investigation, the IGTO remains unclear why a construction which permitted a taxpayer to correct a genuine error or honest mistake was not supported – especially where this construction is open based on the purpose of the COVID-19 ERS provisions in conjunction with subsection 33(3) of the AIA.

Whilst subregulation 6.19B(5) of SISR requires the ATO to specify an amount and superannuation entities in the determination, there is no explicit requirement that those amounts and entities be the ones stated in the application. Furthermore, to consider otherwise might render s33(3) of the AIA ineffective, as it would prevent the ATO from amending determinations if the determination must always and only match

[177] *Ombudsman Act 1976*, s 15.

what is in the application. The non-application of the part of s33(3) which allows the ATO to amend determinations would also be difficult to reconcile with the clear intention that subregulation 6.19B(4), which requires s33(3) to operate for the ATO to be able to revoke determinations.

Although the ATO's administration (and view) was not so unreasonable to be arbitrary or discriminatory, in the IGTO's view, it did result in inconsistencies in administration in circumstances where it was also reasonably open for the ATO to arrive at a view that would produce more coherent administration and which was beneficial for applicants who had made genuine errors, consistent with the objectives of compassionate release.

The COVID-19 ERS measure was intended to provide people in serious economic hardship (as defined by their economic circumstances) with the funds to support themselves and their families during this difficult time. Australians (and other temporary or permanent residents) who were eligible to apply for COVID-19 ERS were especially vulnerable to the financial effects of the pandemic because they were unemployed, on social security payments, or have had their working hours or business turnover significantly reduced. Anyone who met this criteria as envisioned by the Australian Parliament, was entitled under the law to seek release of up to $10,000 in each of the FY20 and FY21.

3.2.4. Administrative solutions involving the Commissioner's GPA

Over the course of our investigations, the IGTO had numerous discussions with the ATO's superannuation and tax technical areas to discuss the ATO's ability to assist in like complaint cases. In some situations, the ATO was able to utilise an 'administrative solution' to assist the taxpayer. The ATO's decision to exercise GPA was outlined in the following internal documents:

- The 26 April 2020 steering committee minute written by an Assistant Commissioner to a Deputy Commissioner, copying in 5 other Assistant and Deputy Commissioners (see section 3.2.6 below); and
- Various versions of internal instructions to tax officials, some of which are discussed further in sections 3.2.4 to 3.2.8 below.

3.2.4.1. Cases where the complainant identified their error before they had received any money from their superannuation fund

A simple administrative solution was used for 21 of the 67 cases received by the IGTO.

This situation most typically occurs where the applicant had identified that they had made an error on their application and took steps to contact their superannuation fund to put a hold on the payment. Even though the superannuation fund which had received the ATO's determination did not initially have sufficient funds, the ATO's determination itself was valid and permitted that fund to release up to the amount on the determination (which was usually $10,000 for most complainants). Accordingly, if an individual had not yet received any money from their superannuation fund, they could rollover money from their other superannuation funds into the fund which had received the ATO's determination. Once the rollover was completed, the superannuation fund which had received the ATO's determination would then have sufficient funds to release the full amount in the determination. This effectively allowed the individual to receive the full amount that they had applied for, even though they had mistakenly

selected a fund which did not (initially) have a sufficient fund balance to pay the entirety of the amount that was seeking to be released.

Unfortunately, this solution is not available to individuals who had received any amount of money released from their superannuation fund. The condition of release for the determination (items 107A and 207AA of Schedule 1 of the SISR) provided for '[a] single lump sum, not exceeding the amount determined, in writing by the Regulator (ATO) in relation to the fund.' This means that a super fund could only make one release in relation to a single determination.

3.2.4.2. Cases where individuals had advised that they made a genuine error and applied for $1,000 or less

The ATO first explained on 19 May 2021 that it relied upon a more complex administration solution to apply the Commissioner's GPA to provide remediation where applicants had made a 'genuine error' in their application but had applied for $1,000 or less.

The ATO explained that this administrative solution was developed after the ATO discovered that some applicants who had applied in the 2019-20 income year (also known as tranche 1) were affected by a display error on the ATO Online application in combination with certain devices and software used to access that application. For affected individuals, the application form did not correctly show the number of digits entered by the affected individual. Accordingly, affected individuals could not be sure whether they had entered $10,000, $1,000, $100 or $10. This display error heightened the risk that the applicant may had left out a digit in their application. In such a scenario, the error affecting the application was due to matters entirely out of the applicant's control.

The approach adopted by the ATO to assist these individuals required the ATO to exercise the Commissioner's GPA to 'administratively disregard' the individual's original application and then revoke the determination so that the amount released would not be considered to have been released under the COVID-19 ERS provisions. Instead, the amount released under the original determination would be treated as being assessable income of the individual, who would have to pay tax on those amounts when they lodge their tax returns. Subsequently, the individual would then lodge another application (since the ATO will treat the initial application as administratively disregarded – i.e., as having never been lodged) where they would apply for the difference between what they originally requested and what they intended to apply for, such that the total amount released did not exceed $10,000. Whilst this approach may have resulted in the superannuation funds breaching their obligations under the law where the super fund released the amount after the ATO had revoked its determination, APRA explained that no action will be taken against them for these breaches.[178]

While this administrative solution is complex and requires the individual to pay additional tax, it was nevertheless a very attractive option for some individuals. If the individual had only received a very small amount from their initial erroneous application, then the additional tax that they would have to potentially pay would be minimal. Accordingly, this administrative solution would have put them into

[178] Australian Prudential Regulations Authority, *Frequently Asked Questions – Superannuation Trustees' response to COVID-19*, Question 13.

almost the same situation as they would have been in if they had not made an error in their original application.

The ATO explained that it was able to implement the more complex administrative solution by exercising the Commissioner's GPA. Subsection 5(1) of the SISA provides the Commissioner with a general power to conduct the day-to-day administration of the SISR. According to the Commissioner's instructions, the exercise of the GPA is confined to dealing with management and administrative decisions and cannot be used to remedy defects or omissions in the law.

The ATO confirmed that the GPA was exercised in accordance with PSLA 2009/4. The decisions were not made under an express delegation and therefore relied upon implied authorisation in accordance with the Carltona principle (that is, being one of administrative necessity). While the decision to implement the complex administrative solution was made by a panel of ATO senior executive officers, it is arguable that the decision to use the GPA in these cases was of a kind that was significant and contentious, such that PSLA 2009/4 required that it be escalated to the Commissioner for his consideration. This did not occur and therefore it appears that the requirements under PSLA 2009/4 were not followed. The IGTO acknowledges that these decisions were made in the context of the COVID-19 pandemic, which was a dynamic environment, and in which it was necessary to make decisions in a highly compressed timeframe. However, the IGTO also acknowledges that this was a financially uncertain and stressful time for taxpayers as well.

The circumstances and decision making process does raise similar questions as did the earlier Military superannuation case study, about the types of decisions contemplated by PSLA 2009/4 which are required to be escalated to the Commissioner for his personal consideration.

3.2.4.3. Cases where the complainant had applied for more than $1,000 and had received some money from their superannuation fund

When the IGTO sought to investigate why remediation was not offered by the ATO in other situations where a genuine error had clearly been made (such as in the Case Study A example noted above), the ATO explained that:

> *9. ... these [genuine error] categories cover the limited circumstances where a determination made by the ATO was different in amount to the amount believed by the client to have been submitted in their application form. The phrase 'genuine error' was used in the Original Office Minute as shorthand to describe an error caused by the display issue, or other error beyond the client's control, that resulted in this outcome.*
>
> *10. Importantly, the phrase 'genuine error' did not take, and was not intended to have, a more generic or lay meaning. It was not used in the Original Office Minute to encompass all mistakes made by an applicant that were inadvertent, unintended or 'honest'. It did not encompass circumstances where an applicant caused their application to be submitted in one form when they should have, or might subjectively preferred for it to have been, submitted in another.*[179]

[179] ATO information provided to the IGTO on 29 August 2022.

The ATO explained that where the amounts applied for was less than $1,000, the GPA was applied automatically to provide remediation. However, the ATO is of the view that cases where the amount applied for was more than $1,000 were 'unlikely to be a genuine error' caused by the display issue and were not automatically remediated. The ATO stated that these cases were instead referred to a senior decision maker for further consideration to determine whether the facts fit within the 'limited set of circumstances' for remediation.

Given this explanation, the IGTO reviewed all cases on hand to determine the ones which involved an ATO error. On 2 August 2021, the IGTO asked the ATO to consider offering remediation for Case Study 2 (as in the example noted above) where incorrect ATO advice provided to the complainant prevented the complainant from using the simple administrative solution. However, the ATO was not willing to offer remediation in this case as the ATO believes that whilst its advice was confusing, it did not contribute to the original error made in the application.

The case was escalated to the head of the IGTO agency on 22 September 2021, and several meetings were held to discuss how to progress these cases. Specifically, the IGTO sought to investigate why the GPA could not be applied in circumstances other than the ATO's pre-existing categories for remediation.

The ATO provided a response on 19 October 2021, explaining that there was a legal impediment to the exercise of the GPA as the legislation only allows one application a year and that there is no provision allowing applicants to amend, vary or revoke the application.

However, the IGTO notes that whilst the legislation does not expressly allow for applicants to amend, vary or revoke an application, the ATO had used the GPA to remediate some cases – that is, where the ATO 'administratively disregarded' the original application and processed a new application. As such, it would appear that whilst the applicant did not have the right to amend, vary or revoke their application the ATO had the power to process a new application applying the Commissioner's GPA.

On 23 February 2022, the IGTO issued a report to the ATO's Assistant Commissioner outlining the inconsistency above as well as exploring other options for remediation, such as rectification. The matter was subsequently escalated further within the ATO to its Second Commissioner on 28 March 2022. A response was provided by the Second Commissioner to our report on 31 August 2022. The ATO's response:

- re-iterated the ATO's view from 19 May 2021 that the phrase 'genuine error' was not intended to encompass all honest mistakes that were inadvertent, unintended or honest but rather describes a more 'limited set of circumstances'; and
- explained that:
  - *the GPA does not permit the Commissioner to make a determination other than in response to an application and reflective of the information contained in it. In the circumstances in question, where no application containing the correct information was made prior to this date [31 December 2020 being the end date for the ERS], the GPA does not give the Commissioner the*

power to extend this date or make a determination responsive to an application contrary to the terms of the subregulation.

Although the IGTO accepts that the ATO has no power to unilaterally extend the end date for the ERS, for applications made before this date, the explanation appears to be inconsistent and at odds with the ATO's reliance on the GPA to remediate some cases (i.e., those within the pre-existing category for remediation) where the ATO allowed or processed a new application with new information, and subsequently issued a determination based on the new application.

3.2.5. IGTO Observations

The ATO has explained that it selected a $1,000 threshold because it could not rule out a display error – that is, the application form may have displayed truncated amounts that an applicant had entered. In our investigations, we observed that the ATO relied upon the Commissioner's GPA to provide an administrative solution to applicants who had applied for $1,000 or less, including in some cases where the error involved the insertion of the wrong fund name – that is, where the potential 'display error' had not contributed to the error (refer extracts from ATO instructions below).

The ATO acknowledges that its internal procedures may have been interpreted and applied to allow some applicants who applied for $1,000 or less to change their nominated super fund.

Based on the IGTO investigations, the SMART procedures and instructions directed ATO staff to do exactly this.

Genuine errors *Amount applied for is* ***$1,000 or less*** *and the client has provided an:* • *Incorrect amount, or* • *Incorrect fund*	*Proceed to task 3 to re-key the application.* ***Warning alert:*** • *Ensure you use the* ***Override Previously Approved button*** *(located under the* ***Coronavirus*** *tab). If you do not select* ***Yes*** *at* ***Override Previously Approved****, the client's application will automatically issue as* ***Not approved****.* • *You may only rekey new application for the difference between what client has requested and what the client intended to apply for up to $10,000. The total amount* ***cannot*** *ever total more than $10,000 for a financial year (i.e. Client requests $100 but was meant to key $10,000. The new application will be for $9,900* ***regardless*** *if client has received monies or not. Even if your client states they managed to stop incorrect amount monies from being released, we will* ***only*** *be rekeying the difference.*

The ATO's 20 September 2020 internal instructions, directed staff to automatically reject cases over the $1,000 threshold and not to escalate them for further consideration by more senior personnel. There

was no pathway to have the matter considered by a specialist team as the instructions state '**we are unable to escalate this matter further'**.

Genuine errors *Amount applied for is* ***$1,000.01*** ***or more*** *and the client has provided an:* • *incorrect amount, or* • *incorrect fund*	*Advise the client that:* • *legislation permits only one release per financial year and we cannot remediate their application* • ***we are unable to escalate this matter further*** • *you can suggest that if client is eligible to apply again, if they haven't already done so, to check their latest balance information before lodging their next application.* *If the client has called in relation to a previously escalated activity (either of their own accord or because they have received an ATO voicemail) that falls into this category of error, locate any open Siebel activity where the matter had been previously escalated:* • *please close off the activity, recording your notes of the discussion you have had with client* • *go to task 5 (finalise the activity).*[180]

The IGTO investigated 67 cases in total as follows:

Issue	Number of Cases
Error in Fund Name	64
Error in Amount	3
Total	**67**

The results were as follows:

Type of Issue and remediation requested	The Solution	Number of Cases
The applicant selected a superfund which had a nil-balance and the super fund was unable to act on the determination.	The applicant was asked to rollover money into the account they had selected, allowing the super fund to act on the determination and release money to the applicant. This workaround was a solution identified by the	21

[180] ATO, 'ATO Contact centre scripting and procedures – Coronavirus – early release of superannuation program' (internal ATO document, 8 September 2020) pp 22-23.

3. Exercises of the GPA – Some illustrative examples

Type of Issue and remediation requested	The Solution	Number of Cases
	ATO and did not require the ATO to use its GPA powers.	
The applicant requested a rollover at or around the same time as applying for COVID early release of super and applied for release from the fund that has a nil balance	The ATO issued a determination but considered it to be 'ineffective'. The ATO then processed a new application to the correct fund. This required the ATO to use its GPA powers.	3
The applicant selected a fund that was closed at the time the ATO issued its determination due to a successor fund transfer occurring between the time the complainant made the application and the time the ATO issued its determination.	The ATO issued a determination but considered it to be 'ineffective'. The ATO then processed a new application to the correct fund. This required the ATO to use its GPA powers.	2
Note - The Member Account Attribute Service (MAAS) is an ATO online service that superannuation funds must use to advise the ATO of member account details, such as an account opening, closing or changing phase. In one case, a MAAS reporting error resulted in the member account the individual wished to select not showing on the application screen (the account was not matched to the individual's account). In the other case, a MAAS reporting error resulted in a closed account being displayed on ATO Online.	The ATO processed an additional determination. This required the ATO to use its GPA powers.	2
The ATO provided incorrect advice to complainant about what information to input into application	The ATO rekeyed a second application for the difference between what the applicant had already received and what the applicant had intended to receive. This required the ATO to use its GPA powers.	1
Applicant had selected the wrong amount	No remediation was provided to the applicant	3
Complaint withdrawn	No remediation was provided to the applicant	3
The applicant made a mistake by selecting the wrong fund (including where the actual balance in the fund was less than the amount specified in the application form)	Complaint closed with an unfavourable outcome. No remediation was provided to the applicant	32*
	Total	**67**

* The IGTO's investigations included 32 cases which were not remediated. Of this, only 12 cases (37.5%) were escalated to a different specialist team within the ATO but there was no evidence of escalation for the remainder (62.5%) and no evidence of escalation to an SES Officer (0%).

Further, if the ATO's rationale is that the ATO application form may have contributed to truncation errors in specifying the AMOUNT, this does not explain why people who applied for less than $1,000 were also allowed remediation to change the NAME OF THE FUND. This is because the act of selecting the wrong fund had nothing whatsoever to do with the truncation error on the application form. The IGTO observed that some taxpayers (who applied for less than $1,000) could have their applications remediated outside the 'limited circumstances' and others could not. The IGTO further observes that in the original Steering Committee minutes, remediation was not available for change of fund.

The IGTO considers the ATO's administration in these circumstances was inconsistent with the policy objectives, across taxpayers and was a departure from the Steering Committee office minutes. That is, because the ATO provided remediation to some taxpayers who selected the wrong fund but not others and to some taxpayers who made an honest mistake in specifying the amount but not others.

The IGTO also considers that an honest and genuine mistake is an unreasonable basis for limiting the exercise of the GPA. The circumstances of the COVID-19 pandemic were a crisis presenting real financial stress and personal hardship with consequent stress and anxiety. There is every reason to believe that in these circumstances an applicant could have made a genuine error and honest mistake in selecting the wrong fund or the wrong amount. In our view, the ATO instructions resulted in unfair and inconsistent tax administration because it was possible for a reasonably careful applicant who applied for more than $1,000 to make an error in the ATO's electronic application form. Notwithstanding the ATO's adoption of a specific definition for 'genuine error' (which it has advised is a shorthand way of referring to the application form truncation error), the IGTO considers that the use of such a general term was also apt to confuse and, moreover, did not provide instructions (after September 2020) for escalation of cases above the monetary threshold.

Furthermore, the ATO's explanations for its refusal to apply GPA in these cases appears inconsistent at a fundamental level.

The ATO's instructions to ATO staff, may also reasonably be interpreted to prevent an administrative solution from being applied to anyone who made a genuine error who applied for more than $1,000. This is a denial of procedural fairness to affected applicants as it effectively prevented rectification of other genuine errors. The ATO has indicated to the IGTO that applications of more than $1,000 that were purportedly a result of other categories of errors (including ATO error or where a super fund which had received a determination had a closed account) were escalated to the Assistant Commissioner of the Superannuation and Employer Obligations business line for consideration.

In our view, it was open to the ATO to amend the determination to remedy a shortcoming in the application and reflect an applicant's intention. However, the ATO does not agree with the IGTO's views because it believes that it cannot issue a determination that is inconsistent with the information in the original application – that is notwithstanding section 33 of the AIA and the Commissioner's GPA.

The IGTO does not find the ATO's explanations persuasive.

Further the IGTO notes that the remedy of rectification for a unilateral mistake made by a taxpayer in completing an instrument (for example, completing an application) can be available in the Federal

Court.[181] That is, where there is *evidence which convincingly proves that the written words of a document failed to properly express the … [correct] intention*. However, the IGTO questions if this form of relief is an efficient use of the Court's time and an affordable remedy for most taxpayers.

For completeness, some relevant extracts of Justice Gordon's decision in *GE Capital Finance Australasia Pty Ltd & Anor V FC of T [2011] FCA 849* is set out below:

> *89 Moreover, the mistake or omission need not be one apparent from the face of the document -- the objective background context may reveal the error. In Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 at [24], Lord Hoffmann stated that:*
>
> *"... in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."*
>
> ***Is a "form" capable of rectification?***
>
> *105 There was no dispute that the doctrine of rectification applies equally to unilateral instruments and instruments between two or more parties:[182]*
>
> *I accept that the Court has power to rectify a unilateral document.*
>
> ***Intention***
>
> *106 Rectification turns on the subjective intentions of the maker (or makers) of a document:[183]*
>
> *…*
>
> *116 There is one final consideration - was the mistake a mistake capable of rectification? This question was considered in Gibbon v Mitchell [1990] 3 All ER 338. Millett J stated at 343 that:*
>
> *"... wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponer did not intend the transaction to have the effect which it did.* ***It will be set aside for mistake whether the mistake is a mistake of law or of fact so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.*** *The proposition that equity will never relieve against mistakes of law is clearly too widely stated."*

[181] *GE Capital Finance Australasia Pty Ltd & Anor V Federal Commissioner of Taxation* [2011] FCA 849.

[182] See, by way of example: *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* 95 ATC 4620; [1996] ANZ ConvR 219; (1996) Aust Contract Reports 90-061; (1996) NSW ConvR 55-761; (1995) 41 NSWLR 329 at 345; *Kent v Brown* (1942) 43 SR (NSW) 124 at 128; In *Re Butlin's Settlement Trusts* [1976] Ch 251 at 260-2 and *Allnutt v Wilding* [2006] EWHC 1905 (Ch) at [16].

[183] See: *Carlenka* at 331-2; *Butlin's Settlement Trusts* at 262; *Allnutt v Wilding* [2007] EWCA Civ 412 at [11].

(Citations omitted).

117 The "usual type" of mistake capable of rectification involves incorrectly recording the intention of the maker of a document. Such a mistake may be rectified by inserting words or deleting words, or substituting different words because the words that are there have the wrong meaning: see Allnutt v Wilding [2007] EWCA Civ 412 at [12]; Butlin's Settlement Trusts at 260. This is such a case. Vanderkley was not mistaken as to the consequences or tax advantages which would arise out of forming a MEC group and notifying the respondent via the 7024 Form. He was mistaken as to the legal effect of the 7024 Form. He mistakenly believed that the 7024 Form as submitted to the respondent would result in certain tax advantages, but because of the omission of the date, it failed to have that effect.

118 In the circumstances, I am satisfied that the omission of the words "10 November 2003" in Part 3 of the 7024 Form next to the words "[i]f joined after date of consolidation, give date joined the group", in the sections dealing with GEMIH and GEMICO, is a mistake that the Court could and should rectify in the manner sought by the applicants.

119 Before leaving this issue, there is one final matter which should be noted. In Wills v Gibbs, Rimer J noted that the purpose of the claim was to achieve a tax advantage. His Honour stated that that was not, of itself, a bar to a rectification order, but that in accordance with Racal Group Services v Ashmore [1995] STC 1151 at 1157, the Court would not order rectification if the only effect would be to secure a fiscal benefit, and the rights of the parties would be unaffected. The Court had to be satisfied that there was an issue, capable of being contested, between the parties. Here that was not in issue. The respondent accepted that this case affects the parties' rights.

3.2.6. The exercise of the Commissioner's GPA as outlined in PSLA

3.2.6.1. Tranche 1

On 26 April 2020, a process for exercising the Commissioner's GPA in tranche 1 applications was submitted to an ATO Steering Committee made up of senior ATO officers at the Assistant Commissioner and Deputy Commissioner level. The Steering Committee had been set up to provide governance and oversight over the administration of the COVID-19 ERS measures. The Steering Committee office minutes dated 26 April 2020 (unsigned and therefore unapproved) set out the types of cases in which the ATO would exercise its GPA.[184]

The ATO's external communications reflected the intent of the office minute, stating that it will assist applicants who had made a genuine error in their application. For example, on an ATO webpage intended for use by superannuation funds, it was stated:

[184] ATO, 'Office minute' (internal ATO document, 26 April 2020).

- An application can be revoked if there is a genuine error or mistake.
- We will work with individuals if there has been a genuine error in their application.
- The ATO is working with individuals if it has established that the individual has made a genuine error in their application. In those cases, the SISR allows for the determination to be revoked.
- To ensure that those individuals who have made a genuine mistake are not disadvantaged and unable to access the early release benefits, we will revoke the first determination and issue a new determination.
- We will not notify the trustee of any revocation in the instance of a genuine error and trustees should continue to make payments in response to any and all determinations received from us, even in circumstances where a second determination for a member is received in respect of the same financial year, and whether or not payment has yet been made in response to the first determination.
- Once a determination is made, it cannot be varied. It can be revoked where there is a genuine error.
- The determination will not be revoked if there was no genuine error in their application and a member changes their mind.

The Steering Committee office minutes provide guidance on the criteria that would indicate a 'genuine error' and lead to the application of the GPA. Where an applicant has advised that they had made a 'genuine error' and had applied for $1,000 or less, the ATO would automatically apply the administrative solution on the basis that it was relatively easy for the applicant to have made a 'genuine error', particularly given the known display error noted earlier.

The ATO Steering Committee office minute also explained that if the applicant advised that they had made a genuine error 'where the original release amount is greater than $1,000', then the ATO is to 'advise client that the release amount may not be able to be changed once a determination is made but the matter will be escalated to a specialist team' and that 'revocation only to occur with SEO SES approval.' It further states that amounts greater than $1,000 are 'unlikely to be a genuine error'.

The rationale for this $1,000 threshold appears to be that the display error may have caused applicants to leave off a digit in their application. For example, if an applicant applied for a release of $800, due to the display error, the applicant may have intended to apply for $8,000. However, if the amount applied for was greater than $1,000, for example, $4,852, then it is unlikely that this error was a result of the display issue as adding an extra zero would take the amount to $48,520 – that is, above the $10,000 application limit.

In this respect, the Steering Committee office minutes state the following:[185]

[185] ATO, 'Office minute' (internal ATO document, 26 April 2020) p 3-4.

6. Client advises genuine error – release amount *Where original release amount is not greater than $1,000* *This threshold has been selected on the basis that it is relatively easy to leave a zero off the release amount, particularly given the ATO contributed to the issue by way of a display error on the application form which was fixed the evening on 21 April 2020.*	*ATO (CAS) to advise client that the matter will be escalated to a specialist team and to expect a call-back within 5 business days.* *ATO (SEO) to:* • *contact client* • *review case and determine if revocation of original determination on the basis of genuine error is appropriate* • *advise client that a new application can be made over the phone on the basis that it be for an amount that together with the original release does not exceed $10,000 and that the original amount released will need to be included in their income tax return.* • *file note of decision prepared* *ATO (CAS) to contact client to rekey application in accordance with ATO (SEO) revocation decision. As part of client declaration, they will need to confirm that they will include the original release amount in their income tax return.* *Note: We will require APRA to issue a communication to funds that there will be no action taken for amounts released in accordance with the ATO's initial determination*
7. Client advises genuine error – release amount *Where original release amount is greater than $1,000.* *This threshold has been selected to ensure that any remediation is done is consistent with the policy intent of measure. Amounts greater than this are unlikely to be a genuine error.*	*ATO (CAS) to advise client that the release amount may not be able to be changed once a determination is made but the matter will be escalated to a specialist team.* *ATO (SEO) to:* • *contact client* • *review case and determine if revocation of original determination on the basis of genuine error is appropriate.* • *Revocation only to occur with SEO SES approval.* • *If revocation approved, advise client that a new application can be made over the phone on the basis that it be*

	for an amount that together with the original release does not exceed $10,000 and that the original amount released will need to be included in their income tax return. • *file note of decision prepared* • *ATO (CAS) to contact client to rekey application in accordance with ATO (SEO) revocation decision. As part of client declaration, they will need to confirm that they will include the original release amount in their income tax return.* *Note: We will require APRA to issue a communication to funds that there will be no action taken for amounts released in accordance with the ATO's initial determination notwithstanding that it has since been revoked.*

The Steering Committee Office minute clearly distinguishes situations where a 'genuine error' may have been made with situations where the applicant had simply changed their mind. The minutes make it clear that the ATO would not consider remediation in any situations which may potentially be driven by a change in mind, as to do so would be inconsistent with the statutory context and policy intent of the legislation, which clearly states that only one application would be allowed per financial year.

5. Client advises change of mind–release amount (this includes where the amount released was less than expected)	*ATO (CAS) to advise client that the release amount cannot be changed due to a change of mind. Only one application per financial year is allowed to be submitted.*[186]

The April 2020 instructions provided to frontline ATO contact centre staff similarly outlined separate procedures for applicants who had advised that they had made a 'genuine error', depending on how much they had applied for. According to the July 2020 version of these instructions (extract below), where an applicant has advised that they had made a 'genuine error' and had applied for $1,000 or less, the ATO would automatically apply the administrative solution. Where the applicant advised that they

[186] ATO, 'Office minute' (internal ATO document, 26 April 2020) p 3.

had made a 'genuine error' but had applied for more than $1,000, the instructions outline a process for escalation to a specialist team.[187]

Genuine errors *Amount applied for or amount received is $1,000.01 or more and the client has provided an:* *Incorrect amount, or* *Incorrect fund*	*Confirm if the client has received any money (and if yes, how much) as a result of their application.* *Advise the client that:* *you will escalate the matter for investigation and that at this time we cannot provide a date as to when they will be contacted.* *if money has already been released, we may not be able to rectify the issue as legislation permits only one release in the 2020 FY* *if the client will apply again in the 2021 FY, they should ensure all information is correct.* *If you locate an open Siebel activity where the matter has already been escalated:* *advise the client their application is already under review* *we do not have a timeframe we can give them, even if service standard has passed* *Staff need to check the escalation in the Siebel activity to ensure all information has been captured that we require* *Confirm with the client all contact details are up to date whilst you have them on the phone.* *Escalate to SD Super Product via the InfoPath using the following parameters:* *Select COVID* *Select incorrect amount over $1000 – genuine error from dropdown selection* *Subject: COVID ERSB genuine fund/amount error above $1000* *Description:* *Siebel activity ID* *Client contact number*

[187] ATO, 'ATO Contact centre scripting and procedures – Coronavirus – early release of superannuation program' (internal ATO document, 17 July 2020) pp 19-20.

	Client has received money: Y/N (and provide amount) *Why or how the error was made: <provide details>* *Super Product area: leave blank* *Product that enquiry relates to: #COVID19* *Priority: Standard* *Client identifier: Client TFN* *Attach copy of any email/infopath escalations to your Siebel activity.* *Advise the client the service standard for their query is 28 days.* *Go to task 5.*

The September 2020 version of these instructions outlined a different process for applicants who had advised that they had made a 'genuine error' but applied for more than $1,000. The updated instructions explained that requests for remediation from applicants in this category were to be automatically rejected. There is no pathway to have the matter considered by a specialist team as the instructions state 'we are unable to escalate this matter further'. The updated procedures as at September 2020 state:[188]

Genuine errors *Amount applied for is* ***$1,000.01 or more*** *and the client has provided an:* *incorrect amount, or* *incorrect fund*	*Advise the client that:* *legislation permits only one release per financial year and we cannot remediate their application* *we are unable to escalate this matter further* *you can suggest that if client is eligible to apply again, if they haven't already done so, to check their latest balance information before lodging their next application.* *If the client has called in relation to a previously escalated activity (either of their own accord or because they have received an ATO voicemail) that falls into this category of error, locate any open Siebel activity where the matter had been previously escalated:* *please close off the activity, recording your notes of the discussion you have had with client* *go to task 5 (finalise the activity).*

[188] ATO, 'ATO Contact centre scripting and procedures – Coronavirus – early release of superannuation program' (internal ATO document, 8 September 2020) pp 22-23.

3.2.6.2. Tranche 2

Whilst an ATO internal document stated that the system display error identified by the ATO was quickly resolved on 21 April 2020, the ATO later clarified that this was not correct as the ATO could not replicate the error and could not be confident that it had been resolved for all browsers across all devices.

However, the ATO changed the design of its systems for tranche 2 applications to adopt a more proactive approach. Rather than wait for applicants to contact the ATO to advise that they had made a genuine error in their application, the ATO would automatically suspend the application process of any tranche 2 applications that were below $1,000. The ATO would then send an SMS to the individual, telling them to contact the ATO. Where the individual contacted the ATO within a few days, the ATO was able to speak with the individual to change the amount in the application, at which point the application was processed and finalised (presumably with correct details).

Even though the ATO implemented a system design change to minimise the instances of this error materialising, the ATO continued to assist applicants who had applied for $1,000 or less.

Similar to the tranche 1 remediation of applications for $1,000 or less, these tranche 2 system design changes also involved the ATO's exercise of GPA under an implied authority, as the ATO considered the changes to be within the scope of an ATO officer's usual duties.

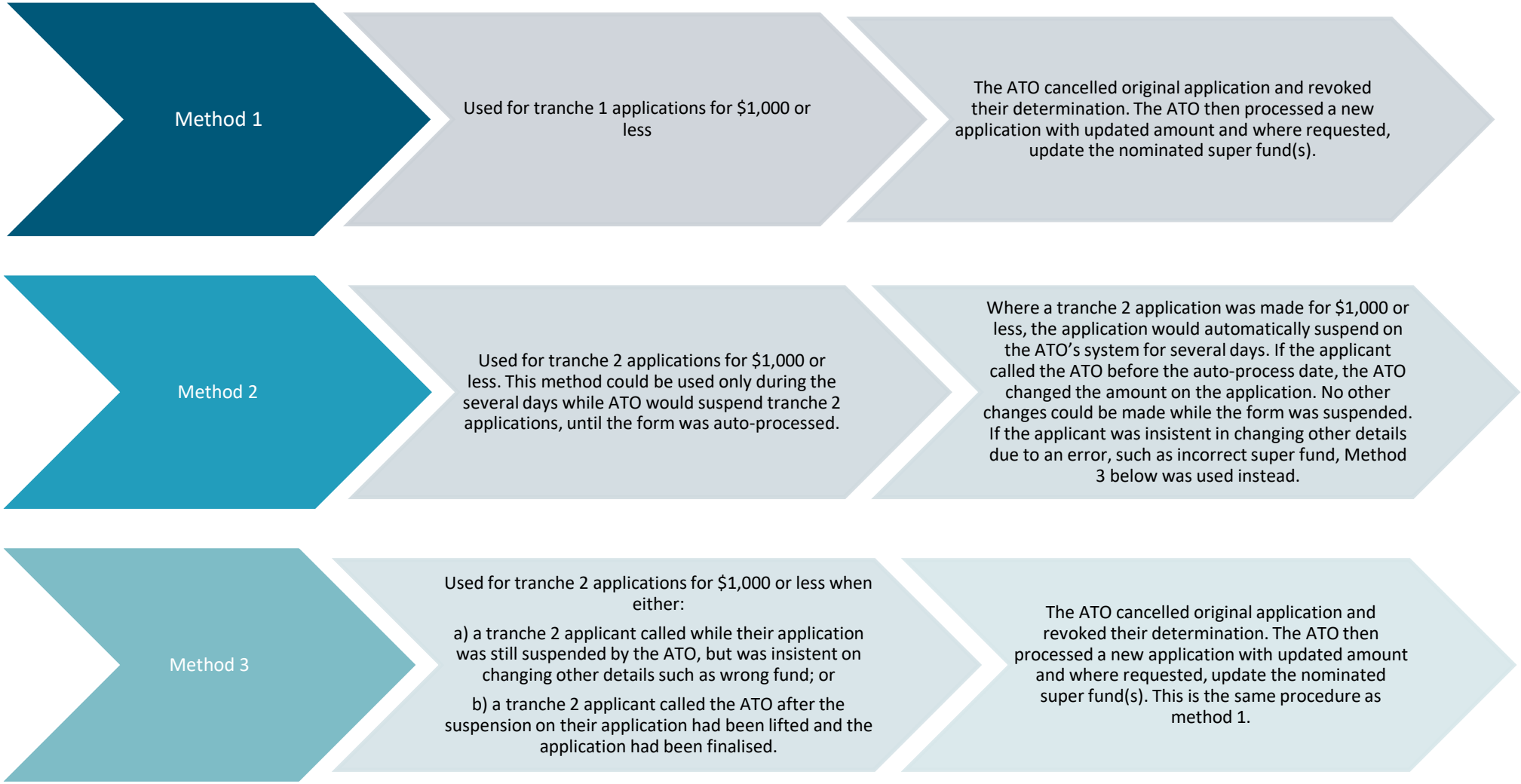
In certain situations, and in accordance with the ATO's internal instructions to staff, the ATO adopted the GPA process for tranche 1 applications to assist applicants in tranche 2. For example, where a tranche 2 applicant, who had applied for $1,000 or less, contacted the ATO and insisted upon changing details other than the amount on their application (such as the nominated super funds), ATO procedures allowed the ATO to administratively disregard the original, suspended application and process a new application instead. According to the ATO's internal procedures:

> *If the client on the phone is insistent in changing other details due to an error, such as incorrect superfund, incorrect bank details etc, you may be able to cancel their application and rekey a new form at this point.*

Where tranche 2 applicants who had applied for $1,000 or less did not contact the ATO during the period their application was suspended, the ATO resumed processing of the application and the application was finalised using the original amount. Where those applicants called the ATO after their tranche 2 applications had been finalised, ATO procedures still allowed the ATO to remediate the application by administratively disregarding the original application and processing a new application instead. This was the same procedure the ATO used to remediate tranche 1 applications for $1,000 or less.

In summary, the ATO's procedures allowed for both tranche 1 and tranche 2 applicants who applied for $1,000 or less to remediate their application and change their nominated super fund(s). The different methods the ATO used to remediate applications for $1,000 or less is summarised in the diagram below.

Figure 3.1: Methods the ATO used to remediate COVID ERS applications made for $1,000 or less



3.2.7. What was the GPA decision?

There were two tranches of decision as noted above.

3.2.8. Who made the GPA decision?

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
The ATO administratively disregarded the original application, revoked the determination, the taxpayer agrees to include funds released as assessable income, new application was agreed and a new determination was issued.	Subregulation 6.19B(1) of the SISR sets out the legal grounds on which a person may make an application to the Commissioner for a determination that an amount of super benefit may be released on compassionate grounds – compassionate grounds for coronavirus. Effectively, an individual can make such an application to the Commissioner if they satisfy the relevant criteria in the subregulations 6.19B(1A), (1B), or (1C) of the SISR. The SISR does not contain any provisions that enable the individual or ATO to amend, vary or revoke an application once it is made, including where there has been a genuine error or mistake in completing the application.	In very limited circumstances where an applicant had applied for $1,000 or less and the applicant had requested an incorrect amount, the ATO followed the below administrative solution to allow remediation: 1. the ATO and the client agree for the ATO to administratively 'disregard' the original application 2. the ATO revokes the determination that had been made in respect of that application. The amounts released would lose its character as NANE and become assessable. 3. The applicant agreed to report the released amounts as assessable income in their tax return	The administrative approach was approved by the SES Band 2 Steering Committee. They used an implied authority to exercise the GPA (see ATO email to IGTO on 4/11/2021).	The Commissioner's GPA (see ATO email to IGTO on 4/11/2021).

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
		4. The application agrees that their new application will be limited to the difference between the original amount and what they intend to apply for (the total cannot exceed $10,000) 5. A new determination is issued in respect of the new application (see ATO legal reasoning received 10/9/20).		
The ATO automatically suspended the processing of all tranche 2 applications that were below $1,000. The ATO would then send an SMS to the individual telling them to contact the ATO.	N/A	The ATO automatically suspended the application process of any tranche 2 applications that were below $1,000. The ATO would then send an SMS to the individual, telling them to contact the ATO. Where the individual contacted the ATO within a few days, the ATO was able to speak with the individual to change the amount in the application, at which point the application was processed and finalised. The ATO noted that it did not amend nor	Unclear, but we note that this tranche 2 system changes occurred after the 26 April 2020 Steering Committee office minute which provided guidance on the scenarios in which the GPA would be applied.	ATO stated in its 4/11/21 email: "Tailoring the design of the ATO's systems and the administration of its programs in response to our experience commonly occurs and is considered within the scope of an ATO officer's usual duties."

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
		administratively disregard the applications but rather updated the suspended applications (see ATO email to IGTO on 4/11/2021).		
The ATO's consideration of whether there was a genuine error.	Sections 23 and 33 of the AIA. Subregulation 6.19B(1) of the SISR.	The April 2020 instructions provided to frontline ATO contact centre staff outlined procedures for applicants who had advised that they had made a 'genuine error', depending on how much they had applied for. According to the July 2020 version of these instructions, where an applicant has advised that they had made a 'genuine error' and had applied for $1,000 or less, the ATO would automatically apply the administrative solution. Where the applicant advised that they had made a 'genuine error' but had applied for more than $1,000, the instructions outline a process for escalation to a specialist team.	Unclear, but we note that this tranche 2 system changes occurred after the 26 April 2020 Steering Committee office minute which provided guidance on the scenarios in which the GPA would be applied.	The Commissioner's GPA (see ATO email to IGTO on 4/11/2021).

Relevant ATO decision or action	Legislative reference	Description	Who authorised?	What authority?
		The September 2020 version of the ATO internal instructions outlined a process for applicants who had advised that they had made a 'genuine error' and explained that requests for remediation from applicants in this category were to be automatically rejected.		

3.3. Case Study 3: The use of GPA in Settlements

3.3.1. Background and Context

The use of GPA within the context of the settlement of tax disputes is well-documented and has been the subject of a number of prior reviews and examinations by the IGTO,[189] the Auditor-General[190] as well as being the subject of various litigation.[191] The ATO publishes details of its settlements in its Annual Report.[192]

Settlements, particularly large settlements, are therefore well-known and well-publicised.[193] It is also arguable that they are the best discrete example of the ATO's use of the Commissioner's GPA - outside of day-to-day routine and micro exercises of the power (such as selecting taxpayers for audit).

At a general level, 'a settlement is an agreement between the ATO and the taxpayer to resolve matters in dispute where one or both parties make concessions on what they consider to be the legally correct position.'[194] In FY22, the ATO reported that it had concluded 453 settlements. Fifteen (15) cases were reviewed in that same year (some of which may relate to earlier years) as part of the ATO's Independent Assurance of Settlements program.[195] The ATO's annual report notes that all cases that were reviewed as part of the Independent Assurance of Settlements Program were found to be fair, reasonable and in the interests of Australia.

[189] See for example: Inspector-General of Taxation, *Review into Aspects of the Tax Office's settlement of active compliance activities* (2009); Inspector-General of Taxation, *Review into the Australian Taxation Office's use of early and alternative dispute resolution* (2012); Inspector-General of Taxation, *The management of tax disputes* (2015).

[190] Australian National Audit Office, *The Australian Taxation Office's Use of Settlements* (2017).

[191] See for example: *Grofam Pty Ltd & Ors v Commissioner of Taxation* 97 ATC 4565 at [4665]-[4666].

[192] See for example: Commissioner of Taxation, *Annual Report 2021-22* (2022) pp 203-204.

[193] ATO, *ATO secures settlement of marketing hub tax dispute* (20 July 2022).

[194] Australian National Audit Office, *The Australian Taxation Office's Use of Settlements* (2017) p 7.

[195] Commissioner of Taxation, *Annual Report 2021-22* (2022) p 203.

A breakdown of the settlements concluded by the ATO in FY22 is set out in the Table below.[196]

Table 3.1: Settlements concluded by the ATO in FY22

Client group	Settlement cases	% of total settlements	ATO position $m	Settled position $m	Variance $m	Variance %
Individuals[b]	20	4	2.6	1.7	0.9	34
Small business	41	9	32.3	16.7	15.6	48
Privately owned and wealthy groups	263	58	672.7	373.0	299.7	45
Public and multinational businesses	56	12	2,556.9	1,404.8	1,152.1	45
Not-for-profit organisations[c]	0	0	0	0	0	0
Self-managed superannuation funds	71	16	5.8	1.2	4.6	80
APRA-regulated superannuation funds	2	0	245.7	167.4	78.2	32
Total	**453**	**100**	**3,516.0**	**1,964.8**	**1,551.2**	**44**

Notes
(a) Totals may differ from the sum of components due to rounding.
(b) The client group Individuals does not include those who are in business – for example, sole traders.
(c) The client group Not-for-profit organisations includes government entities.

3.3.2. What is the administrative issue needing to be addressed?

Australia has had a self-assessment system of taxation since 1986-87, which generally requires taxpayers to lodge a tax return based on their own self-assessment of their taxable income. However there remains a positive obligation on the Commissioner to assess tax from the returns and other information in his possession.[197]

Each year, the ATO undertakes a large number [and range] of active compliance activities (audits, reviews, …etc.). In FY22, for example, the ATO reported 1.1 million active compliance activities with adjustments arising in 537,278 cases (approximately 49%).[198] Such adjustments are likely to increase the tax liability of the taxpayer who was subject to the active compliance activity. The taxpayer may dispute and challenge these decisions through objections and litigation. At any point throughout the process, a decision may be made to enter into settlement discussions and conclude a settlement.[199]

[196] Commissioner of Taxation, *Annual Report 2021-22* (2022) p 204.
[197] *Income Tax Assessment Act 1936*, s 166.
[198] Commissioner of Taxation, *Annual Report 2021-22* (2022) pp 70 & 203.
[199] Ibid, p 204.

Fundamentally, the conclusion of a settlement has a direct effect on the resource allocation decisions of the Commissioner and the good management of Commonwealth resources contemplated in the PGPA Act discussed earlier.

3.3.3. What is the decision that relies upon the GPA?

A number of administrative decisions need to be considered in this regard:

- A decision to consider and enter into settlement discussions,
- A decision to accept the negotiated settlement, and
- A decision to not devote further resources to the settled issue.

Who is delegated or authorised to make the decision?

The Commissioner has delegated his power to conclude settlements to the Second Commissioners of Taxation as well as to all Senior Executive Service officers employed in the ATO. Specifically, Schedule 5 of the *Instrument of the Commissioner's Delegations and Authorisations* states:[200]

> *Pursuant to section 8 of the Taxation Administration Act 1953, I, CHRIS JORDAN, Commissioner of Taxation, DELEGATE all my powers and functions to:*
>
> > *conclude settlements, and*
> >
> > *execute deeds and agreements with respect to how the provisions of a taxation law, defined in section 995-1 of the Income Tax Assessment Act 1997, apply in the particular circumstances of a matter,*
>
> *pursuant to my powers of general administration of the Acts, or of the relevant provisions of the Acts, referred to in the tables to subsection 250-10(1) and subsection 250-10(2) of Schedule 1 to the Taxation Administration Act 1953, relating to:*
>
> *tax-related liabilities, defined in subsection 255-1(1) in Schedule 1 to the Taxation Administration Act 1953 as arising under a taxation law, including the tax-related liabilities arising under the Acts and Regulations set out in subsection 250-10(1) and subsection 250-10(2) in Schedule 1 to the Taxation Administration Act 1953, and*
>
> *tax-related liabilities that have not yet arisen under a taxation law or which may arise in respect of future income years or other future periods, including the tax-related liabilities under the Acts and Regulations set out in subsection 250-10(1) and subsection 250-10(2) in Schedule 1 to the Taxation Administration Act 1953,*

[200] As at February 2022.

AND do all things necessary to conclude settlements under the Acts and laws set out in Column A of Appendix 1, including in relation to:

- *assessments of tax,*
- *assessments of penalties,*
- *payments,*
- *objections to assessments,*
- *franking credits and debits,*
- *foreign tax credits,*
- *credits and refunds of indirect taxes,*
- *collection of taxes,*
- *recovery of taxes,*
- *administrative penalties, including any remissions,*
- *general interest charge, including any remissions,*
- *additional tax by way of penalty, including any remissions,*
- *interest by way of penalty, including any remissions,*
- *interest, including any remissions,*
- *interest awarded by a court*

to the persons from time to time who hold, occupy, or perform the duties of the position of:

Second Commissioner of Taxation

Officer in the Senior Executive Service employed in the Australian Taxation Office.

The Practical guide to the ATO Code of Settlements published on the ATO website further states that:

In some areas other ATO officers are authorised to make a settlement decision.

As noted above, where officers are exercising powers under an authorisation, they do not do so in their own names. In this case, it is likely the authorised officers would be concluding a settlement on behalf and in the name of the Commissioner or the delegated officer.

3.3.4. What governance processes or frameworks are available to guide the decision-maker?

The administration of settlements is supported by a range of guidance both at general and at more specific levels within specific business lines in the ATO.

3.3.4.1. General guidance – Practice Statements and the Code of Settlement

The primary ATO policy and guidance on settlements is set out in PSLA 2015/1 – *Code of Settlement*. PSLA 2015/1 notes that:[201]

> *The ATO has an obligation to administer the taxation and superannuation laws through assessing, collecting taxes and determining entitlements. The ATO also has an obligation to administer the taxation system in an efficient and effective way balancing competing considerations and applying discretion and good sense.*
>
> *Settlement is an important element of the administration of the tax system.*

It also provides the following guidance on factors that must all be considered in deciding whether or not to settle a tax dispute as well as circumstances were settlement would not be considered:

> *When deciding whether or not to settle, all of the following factors must be considered:*
>
> - *the relative strength of the parties' position*
> - *the cost versus the benefits of continuing the dispute*
> - *the impact on future compliance for the taxpayer and broader community.*
>
> *Settlement would generally not be considered where:*
>
> - *there is a contentious point of law which requires clarification*
> - *it is in the public interest to litigate*
> - *the behaviour is such that we need to send a strong message to the community.*

A secondary practice statement PS LA 2007/6 – *Guidelines of settlement of widely-based tax disputes* refers to PSLA 2015/1 but outlines more stringent processes and considerations to consider widely-based settlement proposes. These settlements are likely to affect or apply to a larger group of taxpayers rather than just one taxpayer and, as such, issues such as ensuring consistency of decision-making and treatment of taxpayers in likely circumstances must be considered.

A distinguishing factor between widely-based settlements and other settlements is the existence of the Widely-Based Settlement Panel which was established in November 2004. The Panel is composed of

[201] ATO, PSLA 2015/1 *Code of Settlement* (15 January 2015) para 3.

senior ATO officers and provides advice to ATO decision makers on widely-based settlements. PSLA 2007/6 notes that the role of the Panel aims to ensure:[202]

> *a) consistency in the factors taken into consideration when a decision-maker is contemplating whether to make, accept or reject a settlement proposal*
>
> *b) consistency in similar situations about the way factors are applied, and the elements, terms and conditions of widely-based settlement proposals*
>
> *c) appropriate differentiation and weighting of factors according to differences in the circumstances of the taxpayers involved in the dispute, and*
>
> *d) transparency around the advice and reasons for recommending whether a proposal should be accepted, modified or rejected.*

PSLA 2007/6 makes clear that the Panel does not exercise any decision-making power and is purely advisory in nature:[203]

> ***Decision-makers***
>
> *19. The power to settle a dispute in accordance with the Code of Settlement Practice is delegated only to senior officers. While these delegated officers may authorise other officers to carry out their responsibilities, the intention is to limit the exercise of the power to settle taxation disputes to a restricted range of taxation officers.*
>
> *20. The Panel does not exercise a delegated power to settle disputes. Its role is purely advisory. All decision-makers referring settlement proposals to the Panel for advice must ensure that duly made delegations and authorisations are in place.*
>
> *21. The basic principle that there should be no unilateral decision making in relation to settlements applies to widely-based tax disputes. This means that a case officer or team leader who is approached with an offer to settle a dispute or who reaches a view that it may be appropriate to make a settlement offer to the participants must refer the matter to an officer at an appropriate level external to the team to decide whether the settlement process should be initiated.*
>
> *22. Once it is decided that a matter needs to be referred to the Panel for advice, the Submission to the Panel must be made by a senior officer who holds a delegation or authorisation to conclude a settlement.*

In addition to these general and public guides, different areas of the ATO have established their own internal guidance in relation to settlements. Given the varied subject-matter and potential complexity of disputes, processes between different business lines and business areas within the ATO necessary vary. A brief outline of some core elements of each is provided below.

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[202] ATO, *PSLA 2007/6 Guidelines for settlement of widely-based tax disputes* (21 May 2012) para 10.

[203] Ibid, para 28.

Small Business

Settlements which arise outside of objection or litigation, are managed by the relevant business line managing Small Business cases. It requires officers contemplating settlement in their cases to first contact a designated Settlement Coordinator to inform them that settlement is being considered and to determine what advice and assistance may be needed. A number of procedural steps are undertaken to add the Settlement Coordinator as participants in the ATO's case management system. All settlements being considered within the Small Business area of the ATO are required to be raised and discussed at the SMB Case Leadership Panel – Settlements which is convened weekly. The ATO's internal guidance explains:[204]

> *The SMB Case Leadership Panel adds assurance and support on decisions and judgments made in significant, concerning, complex, difficult and sensitive cases and rulings. Advice and assurance regarding settlements is provided through panel conversations with senior officers not directly involved in the case or ruling.*

Individuals and Intermediaries

The Individuals and Intermediaries (**I&I**) settlement processes largely follow a similar process to that for Small Business. It involves identifying and engaging with a designated Settlement Coordinator with the business line, conducting discussions with relevant team leaders and technical advisers and adding the Settlement Coordinator as a participant on the case management system.

All settlements with this business line must be referred to a panel:[205]

> *I&I have adopted the practice of involving appropriate technical staff within the SES or EL2 settlement decision making process. The settlement panel process can provide guidance to the SES or EL2 decision maker on:*
>
> *whether the matter can or should be settled under the Code of settlement; and*
>
> *an indicative framework/range for the settlement, to use in negotiations.*
>
> *The panel is formed by the case owners (such as the team leader or team director) inviting the relevant SES or EL2, relevant technical officer and Settlement Coordinator to participate in the settlement submission process.*

Superannuation

The Superannuation business line may engage in settlement discussions on a range of different disputes including refund of excess non-concessional contribution disputes SISA disputes and superannuation guarantee (**SG**) disputes. Of particular interest, the ATO's internal guidance on SG dispute settlements refers to the GPA in the following way:

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[204] ATO, *SMB Settlement page* [ATO intranet page, last updated 17 December 2021].

[205] ATO, *Individuals and Intermediaries Settlement page* [ATO intranet page, last updated 17 March 2020].

> *Under section 43 of the Superannuation Guarantee (Administration) Act 1992 (SGAA), the Commissioner has the general administration of the SGAA.*
>
> *An SG dispute typically arises following an employer's objection to the decision by the ATO to issue a SGC default assessment or an SGC amended assessment. It can also arise at the audit stage when the ATO establishes a SGC liability.*
>
> *The SGC is imposed on an employer's superannuation guarantee shortfall for a quarter. The shortfall consists of three components: the total of the employer's individual SG shortfalls for the quarter, the employer's nominal interest component for the quarter and the employer's administration component for the quarter.*
>
> *It has been confirmed that the SGAA does not give the Commissioner discretion to remit the SGC.* ***However, the Commissioner may use his general powers of administration under section 43 of the SGAA to reduce an SGC amount by settlement of a SG dispute****. It is important therefore to note the distinction between remission and settlement of SGC.*

[emphasis added]

The superannuation guidelines are the only ones in which the IGTO has observed the ATO referencing its power under the GPA to reach settlement.

Privately owned and wealthy groups

Officers within the Integrated Compliance and Private Wealth business line manage settlements for taxpayers in privately owned and wealth groups. In this context, the ATO's internal guidance notes that:[206]

> *Each proposed settlement needs a decision maker (Decision Maker) who has the authority to conclude a settlement. That Decision Maker is required to attend the Private Wealth Technical and Settlement Panel (Panel) to lead the Panel discussion and participate in the settlement negotiations with the taxpayer and must take contemporaneous notes of their negotiations and decisions.*
>
> *All SES officers have been delegated the power to conclude settlements as Decision Makers.*
>
> *Executive Level 2 officers in Integrated Compliance and Private Wealth have authorisation to conclude settlements as Decision Makers for up to $10 Million, being the maximum amount of tax (including interest and penalties) that can be remitted.*
>
> *Executive Level 1 officers in Integrated Compliance and Private Wealth have authorisation to conclude settlements as Decision Makers for up to $1 Million, being the maximum amount of tax (including interest and penalties) that can be remitted.*
>
> *From time to time, SES officers may separately authorise officers to conclude settlements as Decision Makers on particular terms.*

[206] ATO, *Integrated Compliance & Private Wealth – Settlement page* [ATO intranet page, last updated 11 February 2022].

The Decision Maker must sign (execute) the settlement deed.

All decisions to offers to settle are referred to a Technical and Settlements Panel for consideration. The panel is composed of officers at the Senior Executive Service level as well as senior technical officers who consider the settlement offer and, where appropriate, provide advice on the settlement parameters:[207]

The Decision Maker is expected to attend the Panel meeting, when the settlement submission is presented.

The Panel first considers whether the matter can or should be settled under the Code, and provides recommendations in this regard.

If a settlement is appropriate, the Panel will:

Discuss and set an indicative framework for settlement, taking into consideration the facts of the case, other expert views, for example counsel, and relevant parts of the Code, and

Provide recommendations regarding settlement (for example, by providing settlement parameters).

Minutes are issued after the Panel meeting, which must be attached to the relevant Siebel case.

It is generally expected with all settlements that the recommendations of the Panel are strongly considered.

Decision makers may settle outside of the parameters advised by the Panel but where they do so, they are required to document the rationale for departing from the set parameters, including any considerations taken into account and application of litigation risk.

Settlements may be selected for review by the ATO's Independent Assurance of Settlements process, with the guidance noting that cases of particular interest include those where:

- *Pre-settlement position is greater than $50 million*
- *Settlement amount is greater than $20 million*
- *Variance is greater than $20 million*
- *Case is considered significant (so is selected by a Deputy Commissioner for assurance purposes)*

Public groups and international

Internal ATO guidance refers officers seeking information on public groups and international settlement processes to the PG&I Disputes Strategy Intranet page which provides general information and links and contact details for officers who are able to provide further guidance. Furthermore, a Settlement Process Plan – ROADMAP for PGI Case Teams has also been developed which sets out the key steps in the

[207] Ibid.

settlement process for PG&I officers and includes links to various instructions for each step and the relevant document templates needing to be completed.

The instructions available to officers indicate that prior to commencing settlement discussions, officers must seek approval from an Assistant Commissioner[208] and according to the ATO's Taxation Authorisation Guidelines PGI is the only business area where settlements may only be concluded by a Senior Executive Service officer.[209] This is likely reflective of the fact that disputes within the PG&I business involve more complex matters, often with significant amounts of revenue at risk.

Objections and Litigation

In addition to officers within the client engagement business lines, officers who work in the objections and litigation areas of the ATO may also conclude settlements that may arise at those stages of the dispute. Officers at the objection stage may draw upon information and resources set out in an intranet page with links to template documents and other officer contacts who may provide advice on the settlement process. Furthermore, a process flow chart has been developed to guide the officer through the necessary steps to submit the settlement for approval.

The guidance available for litigation officers managing settlements includes a discussion on six litigation risk factors and guides the officer through assessing each of these factors to determine the appropriateness of settlement in the context of the specific case.

3.3.5. Assurance processes after a settlement has been concluded

In February 2017 the ATO has implemented an assurance process that reviews settlements concluded with large and multinational businesses. As part of the assurance process, the ATO engages former Federal Court judges to provide it with independent assurance that the settlements examined have provided 'fair and reasonable' outcomes for the Australian community.[210] Since its initial implementation, the criteria for cases to be reviewed under this process has been expanded to include those nominated by Deputy Commissioners as being significant or sensitive cases, irrespective of the size or market segment.[211] The IGTO notes, with support, that the Australian National Audit Office (**ANAO**) has observed that further flexibility in case selection independent assurance could be extended by including a random selection of smaller cases in this process.[212]

In FY22, 15 of a potential 56 (26.7%) concluded settlements with Public and Multinational groups were subjected to review under this process.[213]

The ANAO's audit methodology is set out in their 2017 audit report on the ATO's use of settlements. The IGTO has not sought to duplicate this audit but the conclusions support the importance of good record keeping and guidance in the form of policies and procedures. The ANAO concluded:

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[208] ATO, *Settlement procedure* [ATO intranet page, last updated 4 May 2022].

[209] ATO, *Taxation Authorisation Guidelines* (2022) p 34.

[210] Australian National Audit Office, *The Australian Taxation Office's Use of Settlements* (2017) p 7.

[211] Ibid, p 49-50.

[212] Ibid, p 50.

[213] Commissioner of Taxation, *Annual Report 2021-22*, p 203.

6. The ATO effectively uses settlements to resolve disputes with taxpayers. The ATO has made many improvements to its approach to settlements in recent years, including refreshing the Code of Settlement and introducing the Independent Assurance of Settlement process that has found settlements with large businesses and multinational enterprises to have been fair and reasonable.

7. The ATO's settlement practices are effective, in that settlements have been entered into, negotiated and followed up largely in line with its settlement policies and procedures, including the principles outlined in the Code of Settlement.

8. The ATO has comprehensive policies and procedures to provide guidance to officers with settlement responsibilities, although there is scope for improved conformance with requirements to retain adequate settlement case records in its case management system. Effective mechanisms are in place for the ATO to identify issues, share lessons learnt and make improvements to settlement policies and procedures. The ATO has provided higher levels of public reporting about settlement activities than comparable national revenue authorities.

The ANAO also summarised some key learnings and areas for improvement that may be considered by other Commonwealth entities. Again these learnings and findings reinforce the importance of good record keeping and written policies and procedures.

Quality assurance and continual improvement

- *Processes that can support assurance and continual improvement include:*
    - *external review by independent experts, who can also contribute to the design of the review processes;*
    - *consultation with external stakeholders (including the community, industry and professionals) to gain external perspectives on initiatives, discuss and develop strategies, and help identify areas for improvement;*
    - *an internal network of practitioners or coordinators across functional units to share information, learn from others, promulgate better practices and identify potential improvements at an enterprise level. This group can also provide assurance of the integrity of policies, practices and procedures; and*
    - *internal assurance processes such as enterprise-wide assurance mechanisms (that address customer service, accountability, accuracy and performance) and additional local assurance mechanisms aimed at reviewing higher risk cases.*

Record keeping

- *Entities should retain adequate documentation and records to support the rationale for decisions made and actions undertaken. Keeping sufficient evidence of the decision-making processes and business activities is fundamental to accountability and transparency.*

Fit for purpose policies and procedures

- *Conformance with enterprise policies and procedures by entity staff is important for ensuring the accuracy of outcomes and consistency of decision-making. Any variations in processes and procedures among different business areas should be appropriately tailored to risk and supported by clear rationale.*

3.3.6. IGTO observations

The processes that govern the ATO's use of settlements extends across a wide range of products and involve a number of different checks and advisory points including through dedicated settlement coordinators to provide early guidance, senior and technical panels to provide input and advice to ensure consistency of outcomes and alignment with the general Code of Settlement.

The IGTO has observed that within the context of the Code of Settlement, the factors listed as being those which must be considered align with the principles set out in section 6A of the New Zealand *Taxation Administration Act 1994*. Namely, the requirement within the Code to consider the costs versus benefits of pursuing a dispute as well as the impact on future compliance for the taxpayer as well as the broader community. That is, they closely align with the section 6A requirements to consider resources of the Commissioner, compliance cost on the taxpayer and the promotion of voluntary compliance.

Similarly, the factors listed in the Code which tend or operate against considering settlements include the need to continue litigation in the public interest and the need to send a strong message to the community about certain behaviours. These also align with the principles of promoting voluntary compliance.

In all procedures, other than those for superannuation, the IGTO has observed that the ATO noted the potential for review and assurance of the settlement decision by the ATO's Independent Assurance of Settlements process. As noted earlier, since its original implementation, the scope of the independent assurance program has expanded beyond the large and multinational business settlements and may include those nominated by Deputy Commissioners, regardless of size and market segment. The ANAO has also suggested (but did not formally recommend) the expansion of the program to include a random selection of smaller settlements. The IGTO supports this suggestion because it better aligns with the principle of equality and consistency for all taxpayers.

The combination of both the pre- and post-settlement guidance and assurance processes to ensure consistency and alignment with the broader Code of Settlement procedures suggests to the IGTO that within the context of settlements, the exercise of the GPA follows a generally robust framework that is referrable back to a set of established, guiding principles for the exercise of the GPA. While there may be variances in how each business line or business area approaches the consideration of settlements, at their core, they are largely consistent due to the overarching requirements of the Code of Settlement and the principles that all delegates and authorised officers who conclude settlements must have regard. The ex post facto review of settlements by independent, external retired Federal Court judges further reinforces the need for officers to ensure adherence with the established principles in the Code.

3.4. Case Study 4: The use of GPA in Practical Compliance Guidelines

3.4.1. Background and Context

PCGs are a relatively new guidance product on the exercise of the Commissioner's GPA, having only been implemented in 2016. The ATO explains, on its website that:

> *Practical compliance guidelines provide broad law administration guidance, addressing the practical implications of tax laws and outlining our administrative approach. For example, they might set out:*
>
> - *how we assess tax compliance risk across a range of activities or arrangements in relation to a certain area of the law – where we would consider an activity or arrangement low risk (unlikely to require scrutiny) and where we might consider an activity or arrangement high risk (likely to attract scrutiny)*
> - *a practical compliance solution where tax laws are creating a heavy administrative or compliance burden, or where the tax law might be uncertain in its application.*
>
> *These guidelines can provide you with additional certainty and compliance savings, and allow us to direct our compliance resources to higher risk areas of the law.*

Although PCGs as a product are a relatively new development, guidance about the ATO's administrative approaches have previously existed in other forms including through the PSLA (GA) series which ceased in 2013. PSLA 1998/1 - *Law Administration Practice Statements* explains the system of Law Administration Practice Statements.

> *1. Why do we have Law Administration Practice Statements?*
>
> *Law Administration Practice Statements (LAPS) are corporate policy documents, which provide instructions to ATO staff on the way they should perform certain duties involving the application of the laws administered by the Commissioner - usually referred to as 'technical' work.*
>
> *Policy for the performance of technical work should be issued in the form of LAPS. Office minutes and other communications shouldn't be used for this purpose, except as an interim measure whilst a LAPS is being developed.*
>
> *2. What are LAPS?*
>
> *The following provide the basic principles behind LAPS:*
>
> *The primary purpose of a LAPS is to provide instruction to staff. Although technical issues may be discussed in LAPS, this should only be to the extent required to give sense to the instruction. LAPS are not intended to provide interpretative advice.*
>
> *LAPS do not express a precedential ATO view.*

Although the primary audience for a LAPS is ATO staff, in the interest of open tax administration, they are published externally.

A taxpayer who relies on particular LAPS will remain liable for any tax shortfall if those LAPS are incorrect, or are misleading and the taxpayer makes a mistake as a result. However, they will be protected against any shortfall penalty that would otherwise arise. In addition, they will be protected against interest charges on the shortfall if the particular LAPS were reasonably relied on in good faith.[1]

3. What are your responsibilities in relation to LAPS?

You must be aware of and follow LAPS relevant to the task you are performing.

When developing guidelines, work instructions or other tools to support policy outlined in a LAPS, you are to ensure that the underlying intent of the LAPS is maintained, and you must include a link and a reference to the LAPS.

If you think that the application of a particular LAPS has an unintended consequence, or that the particular LAPS is incorrect, you must escalate the matter using your business line escalation process.

4. What are the types of LAPS?

There are two series of LAPS - the standard series (such as this one) and the general administration series.

General administration LAPS are identified by a (GA) after their number. ***These LAPS outline an exercise of the Commissioner's powers of general administration (which are set out in the various Acts administered by the Commissioner)[2], and provide practical compliance solutions in situations where a strict interpretation of the law may be unsatisfactory.***

Note: we no longer prepare GA LAPS. If necessary, you should discuss an alternative advice and guidance product (such as a practical compliance guideline) with your BSL PAG Unit.

In response to queries from the IGTO, the ATO advised that the decommissioning of the PSLA (GA) series was part of a broader rationalisation of the ATO's public advice and guidance. Furthermore PCG 2016/1 provides the following additional explanation:[214]

Relationship with law administration practice statements and website information

12. Advice in the nature of compliance guidance has previously been provided by the ATO in the form of law administration practice statements (practice statements) or information published on the ATO website.

13. Although practice statements are published in the interests of open administration, their intended audience is ATO staff and they have a main purpose of providing instructions to staff on the manner of

[214] ATO, *PCG 2016/1 Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance* (3 June 2016) paras 12 – 13.

> *performing law administration duties. Going forward, practice statements will align more closely with their main purpose and practical compliance guidelines will be the appropriate communication product providing broad law administration guidance to taxpayers.*

[Emphasis added]

This suggests that the PSLA(GA) product, which provides instructions to ATO staff and transparency to taxpayers and the public around the exercise of the Commissioner's GPA has been withdrawn without an equivalent replacement product. The ATO does not agree with this view and has explained to the IGTO that in substance, PCGs perform a similar role to PSLA (GA) and that the changed terminology between different ATO products is, in part, reflective of the intended audience of the product (e.g., instruction to ATO officers vs guidance for taxpayers) as well as evolving styles over time.

3.4.2. What was the administrative issue needing to be addressed?

As the ATO explains in PCG 2016/1, the purpose of PCGs is to convey to taxpayers the ATO's assessment of relative levels of tax compliance risk in relation to certain behaviours or arrangements. It is aimed at assisting taxpayers to 'swim between the flags' and thereby position themselves within behaviours and transactions that the ATO would consider to be low risk and therefore unlikely to attract its scrutiny.

An effect of this is that it points out the behaviours or transactions to which the ATO will and will not devote resources to audit or otherwise investigate – i.e., a resource allocation decision of the kind referenced in the *Macquarie Bank* case.[215] Specifically, PCG 2016/1 provides:

> *6. Broader guidance can also enable the ATO to communicate how it will sensibly apply its audit resources or provide practical compliance solutions where tax laws are uncertain in their application or are found to be creating unsustainable administrative or compliance burdens in light of, for example, evolving commercial practices.*
>
> *7. Guidance of the kind described in paragraphs 5 and 6 of this Guideline (compliance guidance) can provide useful insights into the practical implications of tax laws and ATO administrative approaches, going beyond views on how particular provisions apply and the matters ancillary to that interpretation.*
>
> *8. The provision of compliance guidance* ***can be seen as consistent with the duty of good management stemming from the Commissioner's general powers of administration of the taxation laws. Balanced against the duty to assess and collect the revenue properly payable under the law, the duty of good management involves efficient resource allocation decisions to achieve optimal, though not necessarily maximum, revenue collection****. Practical compliance guidelines will transparently communicate the ATO's assessment of risk in relation to tax law compliance issues and consequential resource allocation intentions.* [Emphasis added]

[215] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887, para 71; *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119, para 12.

3.4.3. What is the decision that relies upon the GPA?

The administrative issue at the centre of a PCG is a resource allocation decision. While the PCG provides broad guidance to taxpayers and tax practitioners, it effectively signals where the Commissioner will allocate resources and the behaviours or transactions that will more likely than not trigger a need for compliance resources to be devoted.

Although the allocation of resources is one example of an exercise of the Commissioner's GPA, there are many other examples that could be addressed under the previous PSLA GA series that could seemingly not be addressed or within scope of the PCG product. This would include for example:

- PS LA 2004/3 (GA) - Trading stock: valuation of goods taken from trading stock for private use by sole traders or partners in a partnership
  - This Law Administration Practice Statement explains how to value goods taken from trading stock for private use by sole traders or partners in a partnership.
- PS LA 2006/1 (GA) - Calculating cost base of CGT asset where there is insufficient information to determine any Division 43 capital works deduction
  - This Law Administration Practice Statement outlines when a taxpayer is not required to reduce the asset's cost base and reduced cost base for Division 43 capital works expenditure.
- PS LA 2006/2 (GA) - Operation of Division 7A of the Income Tax Assessment Act 1936 on loans that have become statute barred
  - To advise that statute barred private company and trustee loans made prior to the enactment of Division 7A will not be treated as giving rise to a deemed dividend under Division 7A.
- PS LA 2008/1 (GA) - GST and input tax credits for acquisitions related to making supplies under a disclosed hire purchase agreement entered into before 1 July 2012
  - To outline the Commissioner's approach to calculating the input tax credit entitlement for acquisitions that relate to the making of supplies under disclosed hire-purchase agreements.
- PS LA 2013/3 (GA) - Treatment of input tax credits claimed by a recipient of a non taxable supply where the Commissioner has the discretion to give a refund of the overpaid GST to the supplier due to the operation of section 105-65 of Schedule 1 to the Taxation Administration Act 1953.
  - To explain the circumstances in which the Commissioner will use his powers of general administration to allow a recipient to retain an input tax credit that it has claimed where a transaction was incorrectly treated by a supplier as giving rise to a taxable supply.
- PS LA 2013/4 (GA) - Apportioning taxable fuel used in a vehicle for powering the auxiliary equipment of a vehicle
  - To set out what will be considered a fair and reasonable apportionment of the taxable fuel used to power the auxiliary equipment of a vehicle and therefore not subject to the road user charge.

The ATO has provided the IGTO with feedback and information to note that issues similar to those listed above may be addressed in public rulings and determinations. Examples provided by the ATO include:

- TD 2022/15 *Income tax: value of goods taken from stock for private use for the 2022-23 income year,* and
- TD 2017/7 *Income tax: can freshwater crayfish be trading stock and, if so, can you use a reasonable estimate of the number of freshwater crayfish to value them under Subdivision 70-C of the* Income Tax Assessment Act 1997*?*

The ATO has advised that, alternatively, similar issues may also be set out in compliance approaches appended to public rulings. Examples provided to illustrate this include:

- GSTD 2021/2 *Goods and services tax: adjustable beds, pressure management mattresses and pressure management overlays*
- TD 2017/26 *Income tax: employee share schemes - when a dividend equivalent payment is assessable to an employee as remuneration*
- TR 2019/4 *Income tax: capital allowances: expenditure incurred by an entity that collects, processes and provides multi-client seismic data*

3.4.4. Who is delegated or authorised to make the decision?

The Commissioner's instruments of delegation do not specifically refer to the approval and issuing of public advice and guidance. However, Schedule 1 of the *Instrument of the Commissioner's Delegations and Authorisations* provides generally that:

> *Pursuant to section 8 of the Taxation Administration Act 1953, I, CHRIS JORDAN, Commissioner of Taxation, DELEGATE all my powers and functions in the Acts specified in column A of Appendix 1 to this Instrument, except the powers and functions specified in column B of Appendix 1, to the persons from time to time who hold, occupy, or perform the duties of the position of:*
>
> *Second Commissioner of Taxation,*
>
> *Officer in the Senior Executive Service employed in the Australian Taxation Office.*

This includes powers to issue statutory advice products such as private and public rulings. The ATO's PAG Manual provides that the issue, amendment and withdrawal of public rulings requires approval by a delegated Senior Executive Service officer, or in the case of certain class rulings a duly authorised officer of that Senior Executive.[216] In the case of other advice, including private rulings, administratively binding advice and self-managed superannuation fund specific advice, more junior officers may be authorised to approve but they do so in the name of a Deputy Commissioner:[217]

[216] *Public Advice and Guidance Manual* (ATO internal document, last updated 18 November 2022) section 4 step 7.

[217] ATO, *Taxation Authorisation Guidelines* (2022) p 34.

1.19.3. Private rulings

In the name of a Deputy Commissioner, issue, refuse to issue, or withdraw private rulings.*

Level	*APS1*	*APS2*	*APS3*	*APS4*	*APS5*	*APS6*	*EL1*	*EL2*	*SES*
*Super, Service Delivery, SMB and ITX**	*No*	*No*	*No*	*No*	*No*	*Yes*	*Yes*	*Yes*	*Yes*
PW and IC	*No*	*No*	*No*	*No*	*No*	*No*	*Yes*	*Yes*	*Yes*
PGI	*No*	*No*	*No*	*No*	*No*	*No*	*No*	*Yes*	*Yes*

**ITX includes GST and Excise functions within SB, PW, IC, PGI*

1.19.4. Administratively binding advice

In the name of a Deputy Commissioner or the Deputy Chief Tax Counsel (National Office), issue, and withdraw administratively binding advice.*

Level	*APS1*	*APS2*	*APS3*	*APS4*	*APS5*	*APS6*	*EL1*	*EL2*	*SES*
*SB and ITX**	*No*	*No*	*No*	*No*	*No*	*Yes*	*Yes*	*Yes*	*Yes*
Super and PW and IC	*No*	*No*	*No*	*No*	*No*	*No*	*Yes*	*Yes*	*Yes*
PGI and TCN	*No*	*No*	*No*	*No*	*No*	*No*	*No*	*Yes*	*Yes*

**ITX includes GST and Excise functions within SB, PW, IC, PGI*

1.19.5. Self managed superannuation fund specific advice

In the name of the Deputy Commissioner, issue, refuse to issue, or withdraw SMSF specific advice.

Level	*APS1*	*APS2*	*APS3*	*APS4*	*APS5*	*APS6*	*EL1*	*EL2*	*SES*
	No	*No*	*No*	*No*	*No*	*No*	*Yes*	*Yes*	*Yes*

Neither the Commissioner's delegation nor the Taxation Authorisation Guidelines refers to the issue of PCGs. The ATO has indicated that there are no specific delegations issued in relation to PCGs. Rather, the Deputy Commissioners who authorise the issuing of PCGs do so in accordance with an implied authority extending from their delegations from the Commissioner and the duties and functions encompassed by those.

The ATO has further explained that:[218]

The practical compliance approach or approaches outlined in a Practical Compliance Guideline (PCG) must be approved by the Deputy Commissioner of the business line with responsibility for the relevant risk and/or client group.

[218] ATO, Communication to the IGTO, 15 December 2022.

The ATO explains that PCGs are automatically classed as 'High Risk Public Advice and Guidance' and the ATO's internal PAG Manual states:[219]

> *However note that, regardless of the issue, public rulings (including law companion rulings, taxation determinations, and rewrites of or addendums to existing public rulings), PCGs, Taxpayer Alerts and any other matter which involves a Ministerial Briefing are automatically high risk unless excluded by Strategy and Publishing', and the attached 'Guide to managing high risk technical issues.*

The ATO has advised that the Deputy Chief Tax Counsel of the TCN Work Focus Group for the particular commercial or industry operation segment affected by the PCG must provide approval for publication of the document itself, or if the Deputy Chief Tax Counsel requests, the Chief Tax Counsel may be asked to provide this approval.

3.4.5. What governance processes or frameworks are available to guide the decision-maker?

The development of PCGs is guided by process set out in the ATO's internal Public Advice and Guidance (**PAG**) Manual. While the PAG Manual is not aimed specifically at the development of PCGs, it provides guidance to officers on the escalation of issues for public advice consideration, selection of the best vehicles to communicate the public advice and relevant approvals needing to be undertaken. At a general level, there are 9 broad steps that ATO officers follows:[220]

- Step 1: Determining the approach and the product to be used;
- Step 2: Completing a notification to relevant areas of the ATO if the product being developed will require external and internal publication resources, involve the Tax Counsel Network or impact multiple market segments;
- Step 3: Create a case on the ATO's case management system;
- Step 4: Plan the development of the product;
- Step 5: Prepare a draft of the product;
- Step 6: Undertake relevant consultation, with the Manual noting that low risk advice may not require consultation;
- Step 7: Obtain approval to finalise the product;
- Step 8: Send the product for publication; and
- Step 9: Undertake necessary post-publication steps which may include quality assurance, media monitoring and finalisation of any outstanding consultations.

[219] *Public Advice and Guidance Manual* (ATO internal document, last updated 18 November 2022) at 3.

[220] ATO, *Taxation Authorisation Guidelines* (2022) p 34.

A Public Advice and Guidance Panel may also be to provide advice on the development of certain products. The ATO notes that the panel is chaired by a Deputy Chief Tax Counsel with expertise in the matters being discussed and its membership includes external tax specialists, academics and representatives from state and territories (where GST issues are being discussed). The ATO explains on its website that:[221]

> *The panel offers advice on interpretative matters and technical accuracy. It may also advise on a range of related issues associated with the preparation of public advice and guidance, including:*
>
> - *the suitability of the topic*
> - *whether the structure and wording can be improved to make it easier to understand*
> - *whether there are realistic examples we can include to make it more useful*
> - *the most appropriate date of effect*
> - *whether there are other related topics that may also be appropriate.*

The Manual notes that the Panel may be involved where there has been disagreement about the technical view during consultation, significant alternative views are held or where the technical merits of the decision warrant further testing.[222]

As PCGs may not necessarily turn on technical merits, it is not clear whether or not they may be the subject of advice from the Panel.

3.4.6. IGTO observations

Similar to the use of GPA in Settlements, the issuing of PCGs as a means through which the Commissioner makes a decision about the allocation of compliance resources is one of the more public exercises of the GPA due to each being published on the ATO website.

Although the ATO's PAG Manual provides detailed processes through which all public advice and guidance (including PCGs) is developed, it appears to be aimed more so at the development of binding advice (public or private rulings) without strong or specific references to the development and approval processes for PCGs.

Similarly, the IGTO was unable to identify specific details within the Commissioner's instrument of delegation or the ATO's Taxation Authorisation Guidelines about who is delegated, or authorised to make decisions approving, varying or withdrawing PCGs. Intuitively, it would appear that, if public and private rulings required sign off by a delegated Senior Executive Service officer, or someone authorised to do so in that officer's name, that the same governance standards would be applied to PCGs. This would make sense as decisions relating to resource allocation are made by officers at these levels rather

[221] ATO, *How we develop public advice and guidance* (1 October 2019).

[222] ATO, *Public Advice and Guidance Manual* (ATO internal document, last updated 18 November 2022).

than someone more junior. However, this is not immediately ascertainable from the instruments of delegation or the authorisation guidelines.

Although there is an absence of expressed written delegation, a distinguishing feature of PCGs is the level at which they are authorised and executed as well as the Panel framework to provide technical and other administrative advice in relation to the development of the PCG. In this regard, PCGs are similar to Settlements in that there are advisory and oversight processes to ensure consistency and governance in the exercise of these powers.

A similar approach – i.e., an advisory panel – could be beneficial to guide the exercise of broad-reaching exercises of the GPA where it is likely to be contentious, complex or affect a large class of taxpayers. Such an approach could complement the guiding framework that is discussed in Chapter 5.

3.5. Case Study 5: Shortcut method for work from home deductions during the COVID-19 pandemic

3.5.1. Background and Context

The COVID-19 pandemic and associated lockdowns and restrictions imposed by the government at both the Commonwealth and State/Territory level resulted in a significant proportion of the workforce working from home on a regular basis. According to the Australian Bureau of Statistics, in August 2021 40.6 per cent of employed people working from regularly, with this figure increasing to 64% for professionals and managers.[223]

The Commissioner exercised a number of discretions, both statutory and under the GPA, to help alleviate the impacts of the pandemic on taxpayers and tax practitioners. Some examples were the deferrals of lodgements, acceptance of payment arrangements and suspending active debt recovery activity (i.e., not devoting resources to actively pursue debt collection).

A significant exercise of the GPA during this period was the implementation of a Shortcut Method to allow taxpayers working from home to claim work from home expense deductions.

3.5.2. What was the administrative issue needing to be addressed?

The increased number of people working from home regularly meant that there would be a higher than usual level of claims for deductions associated with working from home expenses. These deductions would likely come from people who previously may not have needed to make such deduction claims and who therefore were unlikely to be familiar with the Fixed Rate and Actual Cost Methods of claiming deductions, and the associated substantiation requirements.

[223] Australian Bureau of Statistics, *More than 40 per cent of Australians worked from home* (Media Release, 14 December 2021).

The ATO explained to the IGTO that early in 2020, following early signals that large numbers of taxpayers would be required to work from home, it undertook a review of the 'Fixed Rate' Method for work from home deductions which was one of two options available to taxpayers. It explains that:[224]

> *The fixed rate method is based only on estimated electricity and gas consumption, cleaning expenses and the estimated decline in value of furniture. It did not cover other common working from home expenses such as computer consumables, stationery, phone and internet expenses or the decline in value of a computer, laptop or similar device. Taxpayers using the method were also required to have a separate home office. As such, if only the fixed rate method was available, taxpayers would have been required to record their hours worked at home along with maintaining full written evidence to substantiate those expenses that are not covered by the fixed rate method. Further, if they did not have a separate home office, they would have been required to claim their actual working from home expenses which would have required keeping additional substantiation and complex apportionment calculations.*

If the ATO had not permitted a more streamlined approached to these claims, it was likely that taxpayers would have either been unable to claim certain deductions, or faced higher compliance costs in seeking to claim deductions to which they were entitled. Furthermore, tax practitioners may have experienced increased workloads due to heightened levels of claims and the ATO itself would have needed to devote greater resources to verifying the legitimacy of deduction claims and seeking substantiating documentation.

3.5.3. What is the decision that relies upon the GPA?

Between 1 March 2020 and 30 June 2022 and for FY21 and FY22, a 'shortcut' method was implemented to allow workers to claim work from home expense deductions at a rate of 80c per hour for each hour that the taxpayer worked from home. The Shortcut method was an all-inclusive deduction and did not allow for a separate or additional claim for any other expenses, including expenses incurred in acquiring new equipment. The Shortcut method was formally communicated through the issuing of PCG 2020/3 – *Claiming deductions for additional running expenses incurred whilst working from home due to COVID-19*.

The ATO has explained that the Shortcut method covered all working from home expenses, including:

- *phone and data expenses*
- *internet expenses*
- *the decline in value of equipment and furniture*
- *electricity and gas for heating, cooling and lighting.*

[224] ATO, communication to the IGTO, 15 December 2022.

As part of implementing the Shortcut method, the ATO provided that taxpayers only needed to keep records of the hours that they worked from home in the form of a timesheet, roster or a diary.[225]

In contrast, the Fixed Rate Method requires taxpayers to maintain records as follows:

> ***Record keeping for the fixed rate method***
>
> *To claim the work-related portion of your working from home expenses, you must keep:*
>
> - *a record of the number of actual hours you work from home during the income year or a diary for a representative 4 week period to show your usual pattern of working at home*
> - *receipts or other written evidence that shows the amount spent on expenses and depreciating assets you buy*
> - *phone accounts identifying your work-related phone calls and private phone calls to work out your percentage of work-related use for a 4 week representative period*
> - *a diary that shows*
>   - *your work-related internet use*
>   - *the percentage of the year you use your depreciating assets exclusively for work.*
>
> *If you record the hours you work from home during a 4 week representative period you can use it across the rest of the income year to work out the total number of hours you work from home. However, if your work pattern changes you need to create a new record.*
>
> *If you don't have a representative 4 week period of your hours worked from home or your work-related use of your phone, internet and depreciating assets because they vary throughout the income year, you will need to keep records for the entire income year.*

Similarly the Actual Cost Method required the following recording keeping:

> ***Record keeping for actual costs method***
>
> *To claim your work from home expenses using actual costs, you must either keep a:*
>
> - *record of the number of actual hours you work from home during the income year*
> - *diary for a representative 4 week period to show your usual pattern of working at home.*
>
> *You must also keep all the receipts, bills and other documents which show the additional running expenses you incurred while working from home and that you used to work out your deduction.*

[225] ATO, *Shortcut Method* (22 August 2022); ATO, Practical Compliance Guideline PCG 2020/3 *Claiming deductions for additional running expenses incurred whilst working from home due to COVID-19*, para 28.

The significantly simpler record keeping requirements for the Shortcut Method exercised the Commissioner's discretion to not require substantiation of certain claims where records did not exist or were not easily obtainable, similar to approaches the ATO adopts where taxpayers have been affected by natural disaster. At the Senate Estimates hearing on 9 November 2022, in response to a question about loss or destruction of records as a result of natural disasters or cyber attacks, the Commissioner and Second Commissioner responded as follows:

> ***Mr Jordan:*** *We work with them to do our best jointly to reconstruct their records. And we may rely on past years or the most recent information that we have.*
>
> ***Mr Hirschhorn:*** *Sometimes the bank records will survive. We will help people reconstruct from whatever survives the event.*
>
> ***Mr Jordan:*** *And if we can't get it perfect, we've got to deal with the facts as we've got them. We'll make a best estimate, agree that and move on. If they've genuinely lost the material, they can't do anything about it. We can't. We'll make the best effort to work with them to reconstruct whatever records, like bank account records, are available. But ultimately we just have to agree something and move on.*

At the same time, the decision to implement the Shortcut Method also exercises the Commissioner's GPA to not allocate resources to undertake compliance verification action where taxpayers have adopted the Shortcut Method and, presumably, where the hours claimed by the taxpayer did not fall outside the realms of reasonableness having regard to standard working days.

3.5.4. Who is delegated or authorised to make the decision?

As the Shortcut Method was officially implemented through the use of a PCG, the delegation and authorisation discussion set out earlier in relation to PCGs is applicable.

3.5.5. What governance processes or frameworks are available to guide the decision-maker?

Given the scope of the exercise of the GPA in relation to this particular initiative, the ATO explained that a number of different areas of the ATO were engaged including the ATO's economists to set the applicable Shortcut rate. They drew upon published data from the Australian Bureau of Statistics (such as the Household Expenditure Survey) to inform its advice.

The ultimate decision-maker to implement the Shortcut Method for FY20 (1 March 2020 to 30 June 2020), and the decision to extend the Method through FY21 and FY22, was the Deputy Commissioner for the Individuals and Intermediaries business line. In both the implementation, and the subsequent extension, of the Shortcut method, the Second Commissioner – Client Engagement Group was briefed and supported the measures being adopted. In respect of approval to issue the relevant PCG, that decision was made by a Deputy Commissioner.

The ATO advised the IGTO, similar to the earlier discussion, that:

> *No specific delegations or authorisations were made by the Commissioner covering the decisions to implement or extend the Shortcut Measure. These decisions were made based on implied authority, which, as noted in our earlier response regarding PCGs, can be inferred by such things as the overall organisational structure, the role descriptions of the relevant senior officers (in particular, in this case, that the Deputy Commissioner of the Individuals and Intermediaries Business Line) and internal instructions.*

3.5.6. IGTO observations

The Australian community faced considerable challenges throughout the pandemic and action on many fronts was needed to provide necessary support and assistance to all affected taxpayers. Within that context, the implementation of the Shortcut Method for work from home deductions provided significant compliance relief for many taxpayers who may have found themselves working from home consistently for the first time in their careers.

The use of the GPA to implement the Shortcut Method by the ATO was an effective and important exercise of the power during a period where time was of the essence and the approaches that could otherwise have been contemplated – e.g., public rulings and other binding processes – would not have provided timely advice and comfort to the community and the tax profession. However, the content of the exercise in this instance aligns more with the format of PSLA (GA) rather than PCGs which have emerged in more recent years to replace PSLA (GA).

The form of the exercise of the GPA (as a PCG only dealing with the allocation of ATO compliance resources) may be perceived as wanting relative to a formal notification through a PSLA GA outlining acceptable alternate substantiation and compliance requirements. However, the ATO has advised that of those taxpayers who indicated that they had claimed a work from home deduction in FY21, approximately 19.5% or 960,000 used the shortcut method.

The IGTO observes that the decision to implement the Shortcut Method as an exercise of the GPA did not strictly align with the processes set out in PSLA 2009/4. The ATO advise that there was no written delegation to implement the Shortcut Method and that the decision was made under an implied authority to exercise the Commissioner's GPA escalated to a Deputy Commissioner within the ATO for decision making, and formally communicated via the issue of a PCG that was approved by the Deputy Commissioner. The Second Commissioner for the Client Engagement Group was briefed and supported the measure, but was not the ultimate decision maker. This aligns, in spirit if not within strict compliance, with the requirements set out in the PSLA.

4

ADDRESSING STAKEHOLDER CONCERNS

This chapter sets out and discusses the range of stakeholder concerns raised with the IGTO in relation to the GPA.

4. Addressing stakeholder concerns

This Chapter sets out the range of stakeholder concerns that were brought to the IGTO's attention via submissions or through other stakeholder engagement activities. The IGTO has sought to present ATO information, where available, in response to the stakeholder concerns and made observations and recommendations as appropriate.

4.1. The ATO's use of GPA potentially encroaches on tax policy

4.1.1. Stakeholder concerns

A submission to the IGTO suggested that the ATO's exercise of the GPA may at times appear as though the ATO were looking to make or influence tax policy decisions. Two examples were provided in submissions. The first concerned draft PCG 2022/D1 *Income Tax: Section 100A Reimbursement Agreements – ATO compliance approach*. The IGTO has not examined this matter in detail as the draft PCG was the subject of ongoing consultation between the ATO and tax professionals for most of 2022 and only finalised in December of that year, by which time this investigation had progressed towards finalisation.

The other example highlighted by stakeholders was in relation to Practical Compliance Guideline PCG 2021/4 – *Allocation of Professional Firm Profits – ATO Compliance Approach*. PCG 2021/4 deals with the ATO's compliance approach to the allocation of profits or income from professional firms in the assessable income of the individual professional practitioner (**IPP**). Stakeholders highlighted that while IPPs largely fall outside of the Personal Services Income rules and make use of tax effective structures, the risk matrixes used in the PCG effectively sought to create a de facto minimum income tax rate for IPPs.

4.1.2. ATO information

The ATO explains in PCG 2021/4 that:[226]

> *21. The framework in this Guideline will be used to differentiate risk and tailor our engagement with IPPs.*

[226] ATO, *Practical Compliance Guideline PCG 2021/4 – Allocation of Professional Firm Profits – ATO Compliance Approach* (2021) paras 21-23.

22. IPPs may use this Guideline to:

- *determine the level of risk regarding your profit allocation arrangement based on the risk assessment framework*
- *determine the level of engagement that you can expect from us based on your assessment of the risk regarding your arrangement*
- *decide whether to contact us to discuss your self-assessment of the arrangement if you determine it is high risk, or*
- *support your application for binding advice, if you wish to obtain certainty.*

23. This Guideline is designed to give you confidence that, if your circumstances align with the low-risk rating set out in this Guideline, we will generally not allocate compliance resources to test the relevant tax outcomes of your arrangement.

The PCG provides two tables for IPPs to assess their risk and understand whether their intended approach would be considered low risk, moderate risk or high risk.[227]

Risk assessment factor	Score					
	1	2	3	4	5	6
(1) Proportion of profit entitlement from the whole of firm group returned in the hands of the IPP	>90%	>75% to ≤90%	>60% to ≤75%	≥50% to ≤60%	>25% to <50%	≤25%
(2) Total effective tax rate for income received from the firm by the IPP and associated entities [6]	>40%	>35% to ≤40%	≥30% to ≤35%	>25% to <30%	>20% to ≤25%	≤20%
(3) Remuneration returned in the hands of the IPP as a percentage of the commercial benchmark for the services provided to the firm	>200%	>150% to ≤200%	>100% to ≤150%	>90% to ≤100%	>70% to ≤90%	≤70%

Source: ATO PCG 2021/4.

[227] ATO, *PCG 2021/4 – Allocation of Professional Firm Profits – ATO Compliance Approach* (2021) paras 76-79.

Risk zone	Risk level	Aggregate score against first two factors	Aggregate of all three factors*
Green	Low risk	≤7	≤10
Amber	Moderate risk	8	11 & 12
Red	High risk	≥9	≥13

Source: ATO PCG 2021/4.

4.1.3. IGTO observations

Stakeholder concerns about the ATO's administration potentially encroaching on policy matters is not novel. Academic research into areas of administrative law have commented on what is termed 'soft law'.

> *Soft law – or as it was dubbed by a Commonwealth Interdepartmental Committee - 'grey letter law' – is a rule which has no legally binding force but which is intended to influence conduct. As such, the expression is capable of covering multiple edicts.*
>
> *Descriptions of soft law embrace instruments many of which will be familiar to the administrative law community. They include 'internal guidelines, rule books and practice manuals', 'circulars, operational memoranda, directives, codes [of conduct]'. Two leading English authors on this topic list eight categories of soft law: procedural rules, interpretive guides, instructions to officials, prescriptive/evidential rules, commendatory rules, voluntary codes, rules of practice, management or operation, and consultative devices and administrative pronouncements.*[228]

A former Commissioner of Taxation also previously observed the impact of 'soft law' in tax administration, and cited the definition of the Administrative Review Council of 'soft law' and its three elements:

[228] Robin Creyke, *'Soft Law' and administrative law: A new challenge* (2009) 61 Australian Institute of Administrative Law.

> *Soft law is concerned with rules of conduct or commitments. Second, these rules or commitments are laid down in instruments which have no legally binding force as such, but are nonetheless not devoid of all legal effect. Third, these rules or commitments aim at or lead to some practical effect or impact on behaviour.*[229]

Based upon the definitions above, PCGs arguably are 'soft law'.[230] While this report is not concerned with the correct characterisation of PCGs as 'soft law' or quasi-policy instruments, the discussion is nonetheless helpful to appreciate some of the stakeholder concerns in this area. In this respect, PCG 2021/4 provides a good example to highlight stakeholder concerns.

In PCG 2021/4, the IGTO notes that the ATO goes to some lengths to indicate in the PCG itself that it is not requiring IPPs to conform to the rates set out in the matrixes, but merely providing its assessment of what it considers to be low, moderate and high risk approaches. The practical effect is that an IPP not wishing to unnecessarily come within the ATO's compliance activity would need to apply rates consistent with those identified as "low risk" even if they would otherwise have applied different rates.

The situation is not new and was previously examined by the IGTO in the context of our investigation into the ATO's changed views on significant technical issues (so-called 'U-turns').[231] In that review, the IGTO observed that in certain areas where the ATO had been notified of certain risks but had chosen not to apply resources to address those risks, they were perceived both internally and externally to have 'tacitly' approved the approaches even where they may not have been consistent with the law.[232]

Stakeholders have not identified any instances where the exercise of the GPA, either in a PCG or otherwise, could be unequivocally said to demonstrate the ATO seeking to create tax policy. Indeed, discussions with the ATO and others as part of this review have made it clear that the GPA cannot be used to modify the law or create new or additional rights or obligations where no such rights exist.

However, it is important to acknowledge that the ATO's administrative approaches may nonetheless tacitly endorse certain behaviours or approaches. It is also important to acknowledge that where there are differing interpretations of the tax law and consequently how it should be administered, this can create a perception or the appearance of reliance on GPA to achieve tax policy outcomes – that is to support a particular interpretation.

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[229] Administrative Review Council 'Soft Law', Attachment E to paper 22306 *Complex Business Regulation Project* (18 May 2007) cited in Michael D'Ascenzo, *Effectiveness of Administrative Law in the Australian Public Service* (2007) Australian Institute of Administrative Law Forum 57.

[230] Michael Jenkins, *"Practical" safe harbours and Australia's transfer pricing rules* (2019) Taxation in Australia Vol 53:10, pp 543-546.

[231] IGTO, *Follow up review into delayed or changed Australian Taxation Office views on significant issues* (July 2014).

[232] Ibid, pp 20, 26, 47.

- On the one hand, the ATO has a duty to administer the tax laws and for this purpose needs to be clear in its legal interpretation position to determine where best to devote its compliance resources. Where the position presented is vague, it would serve little purpose for taxpayers or tax practitioners seeking to rely on it as a guide for their self assessment.
- On the other hand, a taxpayer should not feel compelled to apply a position posited in general guidance such as PCGs – which ultimately is not binding on the Commissioner. In those circumstances, taxpayers should seek certainty by availing themselves of the rulings process.

There are a number of existing ATO stakeholder consultation forums that exist so that industry and profession wide matters of tax interpretation and administration can be raised.

There is some merit in using existing external advisory and consultation forums (such as the Technical and Settlements Panel, the National Tax Liaison Group, etc) to assist in improved governance arrangements and therefore improved taxation administration. The ANAO has previously commented on the value in seeking external independent assurance in the context of its review of ATO's use of settlements:

> *…The ATO implemented the Independent Assurance of Settlements external review as an ongoing business-as-usual process in February 2017. The intent of this review is to provide the community with an appropriate level of assurance that settlements undertaken are a fair and reasonable outcome for the Australian community.*[233]

and

> *3.34 The IAS pilot has contributed to improvements in the ATO's settlement process. During the pilot process, Justice Downes made a number of recommendations in his two reports aimed at improving the ATO's documentation of reasons for using settlements to resolve disputes and deciding settlement terms. The settlement submission template was consequently revised to improve clarity and transparency. The three business lines that deal with the large market and multinational market are currently using the latest version of the template while the other business lines are using an earlier version. Justice Downes also recommended that reviews of settlement procedures and guidelines in relation to panel referrals and authority to settle be undertaken but they are yet to be progressed further by the ATO (refer paragraphs 2.24 and 2.25).*
>
> *3.35 The ongoing IAS process is an effective mechanism for the ATO to identify issues and potential improvements in relation to the conduct of settlements, and to share learnings from the process. The assurers undertaking the IAS reviews provide a report with their findings on each case to the ATO. The reports are distributed to the relevant executives (Deputy Commissioners and Assistant*

[233] Australian National Audit Office, *The Australian Taxation Office's Use of Settlements* (2017) p 20.

> *Commissioners) for discussion, and fortnightly IAS Triumvirate meetings are held to discuss feedback from the assurers and the learnings from the IAS process. The IAS Triumvirate meetings also identify and discuss cases to be considered for the IAS review and other administrative aspects of the IAS process. The reports will subsequently be distributed to the case teams, followed by debrief sessions for the case teams to share their learnings from the IAS process and suggested improvements around settlement practices.*[234]

It may also be possible for such panels or forums to confirm and report formally to either the Minister(s), Parliamentary Committee(s) or some other oversight forum to advise:

- matters of legal interpretation which have broad taxpayer ramifications or are otherwise in the public interest and where there is disagreement, conjecture or need for Ministerial, Parliamentary or judicial clarification;
- confirmation of the nature and scope of the GPA as expressed in PCGs;
- whether the proposed exercises of the GPA is consistent with a purposive interpretation that supports the policy intention in the law; and
- the impacts of proposed actions on different classes of taxpayers and whether those impacts may create inequitable or inconsistent outcomes as between different taxpayer classes.

The use of an advisory or oversight panel could also help to mitigate such perceptions by providing independent and expert input and assurance about the processes adopted to arrive at the decision. The ATO could leverage existing expertise within its consultation forums to give effect to an advisory panel that could inform both the ATO's senior executives as well as the Minister about the range of matters set out above in relation to the exercise of the GPA.

The IGTO notes that the ATO has established a range of advisory and oversight panels to assist with decisions that may be sensitive or have wide-reaching impact. Some examples of these include the General Anti-Avoidance Rule panel, the Public Advice and Guidance panel, the various settlement panels discussed in the previous chapter, and its Test Case Litigation Funding panel. The IGTO considers that there would be merit in the ATO considering establishing an advisory or oversight panel to provide advice and assurance that broad-reaching exercises of the GPA which impact large sections of the taxpayer population are appropriate and consistent with policy intent.

[234] Ibid, pp 49-50.

Recommendation 1

The IGTO recommends that the ATO consider establishing an advisory or oversight panel to assist and guide broad reaching exercises of the Commissioner's GPA – that is, where such exercises are likely to impact large sections of the taxpayer population.

4.2. The exercise of the GPA may give rise to inconsistent or unequal outcomes for taxpayers in like circumstances

4.2.1. Stakeholder concerns

Stakeholders have raised concern that as the GPA is fundamentally a discretion exercised by the Commissioner or by a delegate or authorised officer of the Commissioner, it may give rise to inconsistent or unequal outcomes for taxpayers in like circumstances.

Examples brought to the IGTO's attention have typically been at the micro level and related to exercises of the GPA in relation to specific taxpayers including those relating to debt disputes (i.e., a refusal to accept a 50/50 agreement) or a refusal to compromise a taxation debt.

4.2.2. ATO information

The IGTO drew upon findings in complaint and dispute investigations in examining this concern, as noted in the Case studies set out in Chapter 3. The IGTO did not specifically request new or additional information from the ATO.

4.2.3. IGTO observations

The IGTO recognises that some PCGs do offer a compliance approach which reduces overall compliance costs and complexity for taxpayers without differentiation between different groups of taxpayers. The following examples have been cited in academic literature:[235]

- PCG 2017/2 *Simplified transfer pricing record-keeping options*
- PCG 2016/18 *GST and countertrade transactions*
- PCG 2018/6 *Inbound tour operators and agency*
- PCG 2016/8 *Fuel Tax Credits – Apportioning fuel for fuel tax credits*
- PCG 2018/3 *Exempt car benefits and exempt residual benefits: compliance approach to determining private use of vehicles*

[235] Michael Bersten, *A Field Guide to Practical Compliance Guidelines: ATO Innovation or Overreach?* (Working Paper, 2023) pp 39-40.

However, the exercise of a discretion, any discretion, may give rise to a perception of unequal treatment, particularly where the taxpayer is outside the class that receives a favourable exercise of that discretion. The examples provided to the IGTO by taxpayers are largely anecdotal and relate to their own affairs. While it is possible to conjecture that some error of judgement on the part of an ATO officer has resulted in an unequal treatment, it is also possible that there were other factors available to the ATO officer which differentiated the taxpayer's case from those of others.

The following examples have also been cited in academic literature of PCGs that potentially give rise to unequal treatment of taxpayers in like circumstances at a broader level:

> *PCG 2016/7 "GST Joint Ventures in the energy and resource industry" points nicely to the question of why as a matter of good public policy that industry enjoys special treatment over others. It is hard for the author to bracket that industry with some of the more worthy classes benefited by some fuel tax PCGs such as farmers in a disaster affected area where a special case exception hardly needs to be explained.*
>
> *PCG 2016/10 "Fleet Cars: simplified approach for calculating fringe benefits" is another example where the good public policy explanation for simplification applies to fleet cars but not other cases of FBT payers.*
>
> *Another example where a PCG benefits a narrow class without immediately obvious policy explanation is PCG 2021/1 "Application of market value substitution rules when there is a buy-back or redemption of hybrid securities – methodologies for determining market value for investors holding their securities on capital account". Here the PCG offers a technical explanation:*
>
> > *4. The ATO recognises the practical problems faced by investors in determining the market value of a hybrid security for the purposes of calculating capital proceeds from a buy-back or redemption. This Guideline provides a practical compliance approach for determining the market value of a hybrid security for capital gains tax (CGT) purposes when it is bought back or redeemed (as relevant) from an investor holding it on capital account.*
>
> *It may be confidently observed that hybrid securities are not the only case where the CGT rules present challenges in determining market value so why have a PCG for only this situation and not others?*[236]

Furthermore, the case study presented earlier in this report in relation to Early Release of Superannuation provides a good illustration. In drawing a line at a monetary threshold of $1,000 to allow taxpayers to correct errors in their application, the ATO potentially deprived taxpayers who similarly made an honest mistake or genuine error from the same treatment.

[236] Michael Bersten, *A Field Guide to Practical Compliance Guidelines: ATO Innovation or Overreach?* (Working Paper, 2023) pp 39-40.

It is difficult to say whether this unequal treatment has resulted in unequal outcomes without further analysis. We can however say that the *perception* of unequal treatment is itself problematic and diminishes trust and confidence in the fairness of the tax system and accordingly reduces the integrity of the tax system.

In certain areas of the exercise of GPA – namely its use in settlements – as discussed earlier in this report, the ATO has developed detailed frameworks (guidance and PSLA GA) and assurance through a panel of Federal Court judges to review the correctness and consistency in settlement decisions both prior to, and after, the settlement being concluded. These frameworks do not exist in all areas of broad exercises of the GPA.

The IGTO believes that such frameworks are important to ensure consistency and fairness of outcomes. A more detailed discussion and recommendation on the development of such a framework is set out in the final chapter of this report.

4.3. Lack of community understanding of the scope and nature of the GPA

4.3.1. Stakeholder concerns

Stakeholders have raised concerns that there appears to be limited awareness or appreciation about the nature, scope and purpose of the GPA and how it relates to the day to day interactions between taxpayers and tax practitioners with the ATO. One submission observed the dearth of published research and commentary about the GPA, and noted that it can be opaque and perceived to be esoteric.

Other submissions have identified the lack of awareness as potentially being due to the legal positions or interpretations of the GPA not being seen as critical to day to day operations of tax practice when compared with substantive tax law considerations. Secondly, the limited judicial guidance on the nature of the GPA broadly makes it difficult to define.

A consequence of the powers and duties of the Commissioner in this respect not being widely understood is that false expectations may arise (to fill the void so to speak) as to what the Commissioner can do administratively, and then disappointment and possibly lost confidence where those expectations are not met. Similarly, the lack of understanding may also result in lost opportunities for the Commissioner to consider the GPA to assist taxpayers to ease the compliance burden and achieve outcomes consistent with Parliament's intent.

Submissions generally supported broader activities to raise awareness about the GPA and the Commissioner's approach to the GPA. There was support to raise awareness specifically with tax practitioners as well as members of the community more generally.

4.3.2. ATO information

There is limited public material about the GPA. As outlined earlier in the report, the main public guidance about the GPA generally is contained in PSLA 2009/4 with additional guidance found throughout other practice statements in relation to specific exercises of the GPA – settlements, 50/50 arrangements, compromise of tax debts…etc. The exercise of GPA in the development and issue of PCGs is also explained through PCG 2016/1.

4.3.3. IGTO observations

The IGTO agrees with stakeholder submissions and observations that the GPA is not well understood notwithstanding that it is present in many of the day to day interactions between taxpayers, tax practitioners and the ATO, and is the basis for most if not all non-statutory decisions that are made. There is very limited information about the GPA publicly beyond some speeches from former executives of the ATO, the published PSLAs relating to the GPA generally and specific exercises of the GPA and guidance about PCGs.

A search of the ATO's website using the terms 'GPA', 'General Powers of Administration', 'Powers of General Administration' and 'general administration' did not yield any results discussing the GPA itself. Rather, results tended to relate to the Commissioner's remedial power as well as pages discussing specific administration in other areas.

The IGTO's discussions with stakeholders about the GPA also highlighted the range of understanding and interpretations about the GPA as set out earlier in this report. The varied views on what the GPA is, its nature and scope lends further support to the lack of clarity about the GPA itself even amongst seasoned tax and legal practitioners.

The IGTO believes that greater accountability in tax administration is possible where there is improved information and awareness regarding the GPA and its purpose and scope. That is, because where taxpayers, tax practitioners and tax officials alike understand the nature of the GPA and its purpose there is likely to be better accountability as to its application. Such awareness would serve two main purposes. Firstly, it would better manage and temper expectations about the scope of the GPA and minimise the risk of taxpayers expecting outcomes which simply cannot be achieved – like interpreting the law inconsistent with the text of the legislation. Secondly, it would assist the taxpayers and tax practitioners to better identify and approach the ATO with issues that may be addressed through the appropriate exercise of the GPA.

The IGTO does not have a particular view as to the mode through which awareness and understanding of the GPA could be raised more broadly. A number of different options may be considered including additional website material, consultation forums, through stakeholder newsletters and other communique, and via existing guidance products such as PSLAs. In relation to the latter, the IGTO notes that while specific PSLAs relating to areas such as settlements are detailed and tailored to their context, PSLA 2009/4 is very general in nature which may diminish its usefulness to readers. There is merit in the ATO considering whether or not PSLA 2009/4 is still fit for purpose and if there are opportunities to consider developing additional and more specific guidance on the GPA.

Recommendation 2

The IGTO recommends that the ATO consider ways in which it could raise awareness and understanding of the Commissioner's general powers of administration, including by considering whether PSLA 2009/4 remains fit for purpose and any additional guidance that may be developed to support greater (public and tax official) understanding of the GPA.

4.4. A lack of consistency in how the ATO communicates exercises of the GPA

4.4.1. Stakeholder concerns

A submission to the IGTO observed that there appears to be no consistency in how the ATO communicates exercises of the GPA. As an example, the stakeholder identified the ATO's approach to circumstances where small underpayments occur in account-based pensions. The consequences of small underpayments can be significant for such pensions and may cause the pension to 'fail' for the whole of the year of income. This would result in a loss of pension fund tax concessions, may result in a compliance breach for certain pension products and may also have transfer balance cap consequences.

In certain circumstances, the Commissioner has applied the GPA to treat pensions as continuing despite small underpayments – in effect, creating a *de minimis* approach to compliance. While the stakeholder welcomed the exercise of the GPA to provide relief to funds in these circumstances, they noted that the communication of this decision was via a webpage[237] rather through an advice or guidance product, such as a PCG.

The stakeholder expressed concern that communication of exercises of the GPA in this way makes it impossible for users to track the GPA, particularly given the ephemeral nature of website materials and the risk of it being modified, moved or removed.

4.4.2. ATO information

There are no specific requirements about how the exercise of GPA needs to be communicated. At its most micro level, officers making minor GPA decisions will communicate them to the taxpayer or their representatives directly.

[237] ATO, *Starting and stopping a super income stream (pension)*, updated 20 June 2019.

4. Addressing stakeholder concerns

The ATO's public guidance on the exercise of the GPA requires officers, as part of their proposal, to consider 'how the proposed administrative action will be communicated to affected taxpayers'[238] with a footnote reference that further explains:

> *The appropriate communication product where the GPA has a public audience would normally be a Practical Compliance Guideline.*[239]

The ATO's internal *Public Advice and Guidance Manual* provides the following guidance:

> *7. Deciding on advice or guidance to address the issues*
>
> *Public advice and guidance is a wide concept that covers a range of public products to help our clients understand how the law applies to them so they can meet their obligations.*
>
> *Public advice and guidance includes:*
>
> - *content on ato.gov.au*
> - *documents published on the Legal database -*
> - *public rulings*
> - *practical compliance guidelines*
> - *decision impact statements*
> - *law administration practice statements*
> - *ATO interpretative decisions*
> - *taxpayer alerts*
> - *technical discussion papers*
> - *miscellaneous documents – such as the minutes of The Tax Institute Round Table*
> - *general guidance material, publications, booklets*
> - *media releases*
> - *social media.*
>
> *To meet the needs of our clients, sometimes we need to issue a combination of products, depending on the issues involved.*
>
> *General considerations for selecting your product*

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[238] ATO, *PSLA 2009/4 When a proposal requires an exercise of the Commissioner's powers of general administration* (as at 6 May 2020) para 10.

[239] Ibid, Footnote 14.

Your early consultation with the relevant internal and external stakeholders will guide your decision on the most appropriate product for the issues you are dealing with.

Before making the product decision for the risk you are addressing, you need to consider a number of related factors, including:

- *The extent of information already available on the matter, and how this new product will fit into any existing hierarchy of advice and guidance.*
- *The purpose of the product*
  Are you cautioning taxpayers? Are you trying to provide clarity? Is there a particular compliance outcome that we're seeking? You should consider the source of the demand for the product.
- *Any restraints imposed by time or resources and the urgency of the issue for taxpayers. Sometimes, an urgent interim response is required while the optimum solution is being considered. For example this might mean that the information we have 'out there' is at least correct while we're sorting out a better way to present it.*
- *Any restraints imposed by the different product types themselves. Remember, for example:*
  - *we can only issue binding public rulings (including law companion rulings) on legislatively defined topics. There is an exhaustive list of topics on which administratively binding advice can issue. Sometimes the content of a proposed product can't be binding because a taxpayer following the advice in the product could not have a tax shortfall as a consequence of doing so.*
  - *the advice will consist of guidelines for the exercise of a discretion rather than providing definitive instruction. If the content can't be binding, there is no point in issuing a public ruling.*
- *Whether a precedential ATO view is required. First, you should ensure all the publicly available information on the topic has been reviewed and consideration has been given to the protection that existing information provides to taxpayers. You should ensure that any new document:*
  - *has been through consultation and escalation processes*
  - *has been technically approved*
  - *includes dates of application (and earlier versions, if it supersedes other 'Schedule' documents)*
  - *has been considered for release in the form of a public ruling or determination*
  - *does not conflict with an existing precedential ATO view.*

- *Whether the law is contentious or not settled.*

Public rulings also lend themselves to situations where

- *the audience for the product can be clearly defined with certain common characteristics OR*
- *the transaction or scenario which will be discussed in the product can be clearly defined.*

If the audience for the product is wide and diverse, or the transaction may apply in different ways to different circumstances, then the information provided may not adequately cover all circumstances and a non-binding product should be preferred.

Different weight might be applied to the above factors depending on the risk under consideration.

4.4.3. IGTO observations

The ATO's approach does not appear to mandate any particular form of communication where exercises of the GPA are concerned. Instead, it is left to the officers and teams considering the action to identify the best and most appropriate channel for communication. As set out in the ATO's Public Advice and Guidance Manual, the range of products through which the ATO may communicate advice and guidance to the public is broad with products that are statutorily mandated and constrained (i.e., public rulings) while others are at the ATO's discretion (such as the website).

A secondary consideration in relation to the mode of publication is the level and degree of protection for a taxpayer. While the ATO's website represents the broadest and most flexible communication channel, but offers only low levels of protection when compared with other, non-binding products.

In *Lacey v Commissioner of Taxation* [2019] AATA 4246, Counsel acting for the Commissioner submitted to the Tribunal that:

The Commissioner takes the view that what is on his website is not binding on him. That's a matter of law.

The ATO has indicated that good faith reliance on website content attracts the same level of protection as PCGs, PSLAs and other similar guidance – i.e., protection from interest on tax shortfall and, false and misleading statement penalties.

However, additional explanatory text in relation to PCGs suggest that they may afford a higher degree of certainty:

The ATO has good reason to stand by approaches outlined in practical compliance guidelines. These guidelines are intended to guide the behaviour of taxpayers who wish to operate in a low tax risk environment, as well as to signal when the ATO considers certain behaviour to be of a higher risk of non-compliance with the law. These objectives would be undermined if the guidelines were not applied consistently by the ATO.

As such, it is understandable why an ATO approach set out in a formal product, such as a PCG would appear to provide a greater comfort to taxpayers and the tax community.

The need for effective communication of the ATO's exercise of the GPA, especially where it affects a broad range of taxpayers, is critical to ensure:

- appropriate transparency and accountability for the exercise of the GPA; and
- ensure that taxpayers who are affected, and their advisers, are sufficiently informed to take appropriate action.

Although it would not be feasible or desirable to mandate that all broad exercises of the GPA be communicated in a particular way or through a particular product, the IGTO considers that it would nonetheless be helpful if the ATO were to consider ways in which it could enhance accountability and enable taxpayers to more easily identify and track exercises of the GPA that may affect them – that is, even where the original communication has been removed as part of a website update. For example, a register of broad exercises of the GPA may be appropriate where the exercise is only communicated by the ATO website.

Recommendation 3

The IGTO recommends that the ATO consider ways in which it could enhance accountability and transparency for broad reaching exercises of the Commissioner's GPA and to enable taxpayers to more easily identify and track exercises of the GPA that may affect them.

This recommendation is related to Recommendation 6.

5

A FRAMEWORK TO GUIDE THE EXERCISE OF THE GPA

This chapter sets out the IGTO's discussion about the need for a framework of principles and objectives to guide the exercise of the Commissioner's GPA.

5. A framework to guide the exercise of the GPA

The Commissioner's GPA is a long standing feature of Australia's income tax laws (at least) and arguably is a critical element of the administration of the tax and superannuation system in Australia more generally. However, it is a complex and little understood or discussed area of tax administration – accountability and decision making. The foregoing discussion in this report has highlighted the sometimes amorphous nature of the GPA, and what it may represent in terms of powers and duties for the Commissioner. The absence of clear definition of the GPA affords the Commissioner significant flexibility in administration but, at the same time, can create uncertainty for taxpayers and generate perceptions of unequal or inconsistent treatment.

As discussed earlier in the report, the Australian Administrative Law Policy Guide notes the following in relation to Decision making that is fair, high quality, efficient and effective:[240]

> ***4.1.2 What should be in a primary decision making power?***
>
> *…*
>
> ***Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers, delegate power to a person without setting criteria which that person must meet, or fail to provide for people to be notified of their rights of appeal against administrative decisions are of concern*** *to the Senate Scrutiny of Bills Committee[241] and the Senate Standing Committee on Regulations and Ordinances.[242] …*
>
> ***4.1.3 Criteria for decision making***
>
> ***Policy makers should consider whether statutory criteria would be appropriate to guide the decision maker in the exercise of a discretionary power. Where a broad discretion is proposed, this should be clearly explained in the explanatory material for the legislation. It is often desirable to include examples of relevant considerations even where the decision maker is exercising a broad discretion.***

[240] Attorney-General's Department, *Australian Administrative Law Policy Guide* (2011) pp 11-12 <https://www.ag.gov.au/sites/default/files/2020-03/Australian-administrative-law-policy-guide.pdf>.

[241] See for example, Senate Scrutiny of Bills Committee, Parliament of Australia, *The Work of the Committee during the 41st Parliament November 2004 – October 2007* (2008). The issues relate to (ii) of the Committee's terms of reference to report on whether Bills 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

[242] See: Senate Scrutiny of Bills Committee, Parliament of Australia, *Committee Reports*.

Where a decision is likely to affect individuals' rights or freedoms, criteria in legislation (to which a decision maker may have regard) may include principles in relevant human rights instruments. …

4.1.4 Procedural fairness

Decision makers should act in a manner which affords people affected by decisions procedural fairness (or natural justice), and explain those decisions in a manner which people can understand. Procedural fairness forms the basis for a ground of judicial review under the common law and the ADJR Act, and requires certain standards and procedures to be observed in administrative decision making. Broadly, procedural fairness requires that the decision maker be, and appear to be, free from bias and/or that the person receives a fair hearing. ***'The precise contents of the requirements... may vary according to the statutory context; and may be governed by express statutory provision'.***

As a matter of policy, the Administrative Law Branch agrees with the comments of the ARC that ***'procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances'. The ARC considers that, to promote public law values, legislation may specify the procedural obligations of decision makers where the requirements are not sufficiently certain, but should not attempt to cover all aspects of procedural fairness.***

[Emphasis added]

It is clear from submissions and other feedback that stakeholders are not in support of any codification or prescription of the GPA that may constrain the flexibility with which the Commissioner may exercise the power. This is consistent with the IGTO's approach and the Attorney General 's Department Policy Guide. The aim of the investigation was to better inform the community and better understand the nature, scope and purpose of the GPA. The IGTO's aim is to ensure that the Commissioner uses all of the powers available to him to administer the tax and superannuation systems in a fair, equitable and transparent manner. The GPA plays an important role in this respect.

5.1. Resource allocation is not an optimal exercise of the GPA

It is axiomatic that the Commissioner cannot investigate every mischief and pursue every dollar of tax outstanding. Such an approach is not expected, nor would it be beneficial to overall confidence in the tax system. The ATO's current approach to the GPA largely centres on the concept of resource allocation. That is, it is a duty or power that is to be applied in the negative (i.e., rather than taking action, the GPA is applied to effect that no resources will be applied to the particular action).

The resource allocation decision also arises from the Commissioner's duties of good management under the PGPA Act. This was acknowledged in the ANAO's 2018 report on the ATO's use of settlements – refer paragraph 1.9:

> *A responsibility of the Commissioner of Taxation is to administer tax law through assessing and collecting taxes and determining entitlements. In exercising that duty, the Commissioner of Taxation has an obligation to administer the taxation system in an efficient and effective way, balancing competing considerations and applying discretion and good sense.* ***The 'good management rule', which has been endorsed by the courts, recognises that it is open to the Commissioner of Taxation to make sensible decisions having regard to the best use of the limited resources available. This is reinforced by the Public Governance, Performance and Accountability Act 2013 that imposes an obligation on the Commissioner of Taxation to manage the affairs of the ATO in a way that promotes the efficient, effective and ethical use of Commonwealth resources.*** *Settling disputed matters is consistent with good management of the tax system, overall fairness and best use of resources. Settlements usually involve the need to balance competing considerations and require the application of discretion in achieving a sensible settlement decision.*
>
> [Emphasis added]

With limited resources to discharge his statutory obligations, choices necessarily need to be made about where those limited resources should be applied to optimise administration of the tax system. These may include:

- selecting which taxpayers may the subject of compliance activity, the areas and years of review;
- the pursuit of debt and decisions to temporarily not pursue certain debts either as a result of natural disasters or other system impacts, or because it is deemed uneconomical to do so;
- settlement of tax disputes and compromise of taxation debts, both of involve some form of "give", a necessary element of which is that the Commissioner will no longer devote resources to examine the settled issues or pursue the components of debt that have been compromised; and
- implementing disaster response initiatives, which were seen evidently throughout much of 2021, and much of 2022 in response to the COVID-19 pandemic and the natural disasters affecting large parts of Australia.

However, the IGTO does not believe that confining administration in reliance on the GPA to 'resource allocation' decisions is reasonable or tenable in the long term or optimal in the interests of good tax administration.

  - From the Commissioner's perspective, it potentially constrains the exercise of the GPA to not taking action, rather than administration resulting in positive action taken to assist taxpayers which may provide greater comfort and relief to those affected.
  - For taxpayers, it can result in perceptions of unfair or unequal treatment, particularly where taxpayers do not fall within the parameters set by the ATO. Furthermore, it provides a taxpayer with little comfort or certainty about the tax positions that they have adopted.

As the IGTO observed in earlier reviews, while the decision to not allocate resources to a particular issue in one year provides some relief for taxpayers, nothing prevents the Commissioner from deploying resources in a subsequent year to that same issue.[243] Indeed good risk management practice and governance would not support a 'set and forget' approach. While the Commissioner may commit to not deviate from a view expressed in guidance about how he intends to approach administration issues, the Court has been clear that such commitments do not fetter his statutory duties to assess or re-assess according to law.[244] The ATO also acknowledges the limits of these approaches, noting on its website that reliance on administrative approaches and guidance, absent formal binding advice, can only protect a taxpayer from interest on tax shortfall and penalties for false and misleading statement.[245]

Any subsequent relief to the taxpayer through compromise of tax debts, settlement or other mechanisms again reverts to the exercise of the GPA and, once again, returns to the question of resource allocation.

In the IGTO's view, greater clarity about the GPA and its parameters and guiding framework would assist the ATO, taxpayers and tax practitioners to better understand what the ATO may and may not do in the legitimate exercise of the GPA. In this respect, the IGTO considers that a principled framework to guide the exercise of the GPA is both necessary and beneficial.

5.2. Examples where a guiding framework has been implemented

As noted earlier, a framework of guiding principles was enacted in New Zealand following two reviews that were conducted 1993 and 1994, namely the *First Report of the Working Party on the Re-organisation of the Income Tax Act 1976* (the Valabh Report) and the *Organisational Review of the Inland Revenue Department* (the Richardson Report). New Zealand IRD has observed in its Interpretation Statement that:

> *the Inland Revenue Acts arguably obligated the Commissioner to collect all taxes owing, regardless of the costs and resources involved. According to this view, the Commissioner could decide not to collect taxes owing only if a specific statutory discretion or power authorised him to do so. The possibility that the Commissioner was required to collect all taxes owing (subject only to the specific relief and remission provisions) was problematic, because it:*

[243] See for example: IGTO, *Review into delayed or changed Australian Taxation Office views on significant issues* (2010); IGTO, *Follow up review into delayed or changed Australian Taxation Office views on significant issues* (2014).
[244] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 at [11].
[245] ATO, *How our advice and guidance protects you* (last updated 12 August 2022).

- *was an unrealistic obligation given the Commissioner's limited resources; and*
- *sat uncomfortably with the appropriation and financial accountability requirements under the Public Finance Act 1989 and State Sector Act 1988.*

3. As a result, section 6A(2) and (3) were enacted to make clear that the Commissioner is not required to collect all taxes owing.

The New Zealand Inland Revenue Commissioner's duty of care and management is set out expressly within its *Taxation Administration Act 1994* and requires that:

In collecting the taxes committed to the Commissioner's charge, and despite anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

(a) the resources available to the Commissioner; and

(b) the importance of promoting compliance, especially voluntary compliance, by all persons with the Inland Revenue Acts; and

(c) the compliance costs incurred by persons.

Some of the New Zealand principles may be inferred in other contexts in Australia. For example, regard to the resources available to the Commissioner could reasonably be referenced back to the requirements of the PGPA Act whilst the importance of promoting voluntary compliance correlates well with the ATO's strategic purpose of 'fostering [willing] community participation in the tax and superannuation systems'.[246] To a lesser extent, it could also be said that the ATO's focus on enhancing the client experience as part of its strategic direction also includes elements of reducing compliance costs for taxpayers.

Although not within a taxation law, a framework to guide the exercise of functions and powers can be found with the *Australian Charities and Not-for-Profits Commission Act 2012*. Section 15-10 of that Act requires that:

15-10 Commissioner to have regard to certain matters in exercising powers and functions

In performing his or her functions and exercising his or her powers, the Commissioner must have regard to the following:

(a) the maintenance, protection and enhancement of public trust and confidence in the not-for-profit sector;

[246] ATO, *Strategic Direction* (updated 2 October 2020).

(b) the need for transparency and accountability of the not-for-profit sector to the public (including donors, members and volunteers of registered entities) by ensuring the public has access to information about not-for-profit entities;

(c) the benefits gained from providing information to the public about not-for-profit entities;

(d) the maintenance and promotion of the effectiveness and sustainability of the not-for-profit sector;

(e) the following principles:

(i) the principle of regulatory necessity;

(ii) the principle of reflecting risk;

(iii) the principle of proportionate regulation;

(f) the need for the Commissioner:

(i) to cooperate with other Australian government agencies; and

(ii) to administer effectively the laws that confer functions and powers on the Commissioner;

(including in order to minimise procedural requirements and procedural duplication);

(g) the benefits gained from assisting registered entities in complying with and understanding this Act, by providing them with guidance and education;

(h) the unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia.

Within the specific contexts of areas of tax administration such as settlements and PCGs, the ATO has also administratively instituted a framework of guiding principles. In the case of settlements, the ATO articulates that:

When deciding whether or not to settle, all of the following factors must be considered:

- *the relative strength of the parties' position*
- ***the cost versus the benefits of continuing the dispute***
- ***the impact on future compliance for the taxpayer and the broader community.***

> *Settlement would generally not be considered where:*
>
> - *there is a contentious point of law which requires clarification*
> - ***it is in the public interest to litigate***
> - ***the behaviour is such that we need to send a strong message to the community.***

[emphasis added]

In the case of PCGs, the ATO states:

> *Broader guidance can also enable the ATO to communicate how it will sensibly apply its audit resources or* ***provide practical compliance solutions where tax laws are uncertain in their application or are found to be creating unsustainable administrative or compliance burdens*** *in light of, for example, evolving commercial practices.*

[emphasis added]

In the case of PCGs, the regard to compliance burdens is referrable to the New Zealand legislation's factor relating to the compliance costs incurred.

As such, the idea of a framework to guide general administration decisions in Australia would not be novel or unique by world or domestic standards. At present, there are administratively established parameters within certain areas of the exercise of the GPA although these may vary from issue to issue and may not apply consistently across all areas of the GPA.

5.3. Preserving flexibility for the Commissioner

As noted earlier, stakeholders have expressed a view that the flexibility that is currently afforded to the Commissioner by the GPA should not be constrained or otherwise limited. The IGTO also supports the need to maintain flexibility of the GPA, notwithstanding the IGTO's view that a framework of guiding principles should be established to help guide the exercise of the GPA in a more consistent and effective manner.

As part of this review, the IGTO has considered a number of options to give effect to these outcomes including:

- an ATO commitment that is administratively binding and is communicated widely (like the Taxpayers' Charter);

- a Statement of Expectations from the Government to the ATO together with an ATO response committing to those expectations – the IGTO notes that such Statements have been issued in the past, some of which are still active; and
- legislative change to add the guiding principles to the exercise of the GPA.

An administrative solution would be the quickest and most easily implemented. However, it would also provide the lowest level of assurance and certainty for taxpayers. A number of administrative approaches have been discussed in this report, including the ATO's use of PCGs. While administrative solutions may provide more immediate relief for taxpayers, nothing would prevent these administrative approaches from being altered or withdrawn.

Similarly, the Government may periodically issue a Statement of Expectations as to how certain statutory authorities fulfil their roles and responsibilities, to which the statutory authority is required to respond with a formal Statement of Intent. In recent years, the IGTO has been aware that such Statements have been issued to the Australian Securities and Investments Commission[247] as well as the Australian Prudential Regulation Authority.[248] Such statements are issued by Ministers to statutory agencies within their portfolio and through them, it is expected that the responsible Ministers are able to:[249]

> *…to provide greater clarity about government policies and objectives relevant to a statutory authority, including the policies and priorities it is expected to observe in conducting its operations.*

As the Statements are not statutorily mandated and not issued on a set cycle, it is not clear whether Statements issued previously continue to have effect until revoked. The IGTO identified that a Statement of Expectations was issued to the ATO with a Statement of Intent being issued by the ATO in 2014.[250] Furthermore, the Statements are general in nature and address such matters as deregulation, the relationships between the ATO and the Government, the Responsible Minister, and Treasury as well as regulatory cooperation, transparency, accountability, organisational governance and financial management.[251]

Due to their general nature, the IGTO does not consider that a Statement of Expectations and Statement of Intent in response is likely to address the need for a guiding framework. It would not provide taxpayers and the ATO with the level of certainty and consistency contemplated.

The IGTO believes that legislative amendment to introduce a principled framework for exercising the GPA and more generally administering the tax system, would provide the highest level of assurance and certainty for the Commissioner and for taxpayers and for the Australian Parliament. The IGTO recognises,

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[247] Australian Securities and Investments Commission, *Statements of Expectations and Intent* (August 2021).

[248] Australian Prudential Regulations Authority, *Statement of Expectations 2018*; Australian Prudential Regulations Authority, *Statement of Intent 2018*.

[249] Treasury, *Statements of Expectations* (undated).

[250] Ibid.

[251] Treasury, *Statement of Expectations – The Australian Taxation Office* (undated).

however, that such a route would not be simply implemented, having regard to the current legislative agenda. Furthermore, the IGTO recognises that through legislative change, there is a risk of inadvertent limitation or constraint of the GPA which is expressly not the IGTO's intent. Rather, the IGTO considers that the GPA could be more effectively exercised in support and assistance of taxpayers, where the Commissioner has a referrable framework in which to base such decisions. It will be important in the development of any law changes to consult broadly both with the ATO and with expert tax professionals to ensure that in creating the principles against which the GPA is to be exercised, the current level of flexibility is retained.

5.4. What could be included within the framework?

The IGTO considers that the principles articulated in the New Zealand *Taxation Administration Act 1994* are sound and sensible, and accord with the ATO's own administratively imposed principles for the exercise of the GPA in relation to settlements and PCGs, and accords with its strategic direction more generally. That is, an exercise of GPA should be:

> *practicable within the law having regard to—*
>
> *(a) the resources available to the Commissioner; and*
>
> *(b) the importance of promoting compliance, especially voluntary compliance, by all persons with the Inland Revenue Acts; and*
>
> *(c) the compliance costs incurred by persons.*

In addition to these principles, based upon the IGTO's complaints and dispute investigation, two further areas of clarification are warranted. Both are of course subject to any contrary intent expressed by Parliament.

- Firstly, a taxpayer should be afforded an opportunity to correct any genuine errors or honest mistakes they make as part a lodgement or application for access to services and support administered by the ATO. In the case study concerning early release of superannuation, the IGTO considers that the denial of an opportunity to correct a genuine error based upon a monetary threshold is too arbitrary and it stands to reason that some taxpayers would feel unfairly treated as a result.
- Secondly, the Commissioner should have the ability to grant an extension of time for a taxpayer to lodge a form or apply for access to services and support. At present, certain discretions to allow an extension of time exists in the tax laws (e.g., extension of time to lodge an objection) but where the statute is silent, there may be misunderstanding or dispute as to whether or not the Commissioner has the 'general' discretion to allow an extension of time as part of his powers of general administration.

The IGTO accepts that there may be circumstances where it may be desirable to limit the ability of taxpayers to lodge more than one application (i.e., to correct an error) or to allow taxpayers to lodge out of time, particularly where there is a need to impose time limits on certain measures. In those cases, the IGTO believes that as part of the law design process, such requirements should be expressed positively in the legislation (rather than presumed in the negative) to avoid any doubt. In the absence of such an expressed prohibition, the IGTO considers that the GPA should be clarified to allow the Commissioner to exercise such a discretion in all matters.

5.5. What are the practical intended and expected benefits of a principled framework?

The IGTO believes that the adoption of a principled framework to guide GPA decision making will yield a number of practical benefits both for the ATO and for the taxpayer community more broadly.

Firstly, due to its discretionary nature and limitations on the ability of taxpayers to challenge GPA decisions, a principled framework would provide a degree of comfort and assurance that GPA decisions are referrable to a set of principles or objectives set down by Parliament. In this way, even where a decision cannot effectively be challenged, there is nonetheless some assurance either by the ATO instructions and processes when approached by taxpayers or tax practitioners, or through disputes and complaints channels such as the IGTO investigation function.

Secondly, where taxpayers and tax practitioners are able to link GPA decisions to relevant principles, it would enhance overall transparency and accountability of the decision making process and minimise perceptions of unfairness or unequal treatment between taxpayers in like circumstances.

Thirdly, it provides a consistent basis for ATO officials when approaching GPA proposals or GPA decision making. The existing guidance for ATO officials to exercise the Commissioner's GPA is insufficient in some circumstances and depends simply upon individual judgment[252] – albeit informed by duty statements and principles established through administrative means such PSLAs and internal ATO materials. These materials may change over time with changing personnel and shifting corporate knowledge. A legislative framework of guiding principles would aid to ensure that the underlying principles are not eroded with time, and may be relied upon as a basis to build more robust and consistent guidance materials.

Fourthly, it would promote a better use of resources by laying down a foundation to guide decision making and hence make them more efficient, more guided and more coherent.

[252] See: ATO, *PSLA 2009/4 When a proposal requires an exercise of the Commissioner's powers of general administration* (as at 6 May 2020) paras 5 and 8.

Fifthly, the framework when coupled with other governance procedures such as pre- and post-implementation advice and assurance (as in the case of settlements) or intervention of an oversight or advisory panel would enhance overall procedural fairness through adoption of consultation, submission or other engagement processes where decisions may potentially adversely impact certain taxpayers. This would elevate decision making in line with administrative law principles of procedural fairness and natural justice.

Sixthly, such a framework would enhance the overall accountability of decision making – especially in respect of GPA matters of broader significance. A decision maker would be able to rely upon the framework as a basis on which to 'positively' make and implement relevant GPA decisions rather than 'negatively' administratively disregarding certain outcomes or behaviours, and document their reasoning by reference to the principles in the framework. This would serve as a basis to address any accountability concerns, queries or criticisms arising from the exercise of the GPA.

Finally, and perhaps most importantly, as was observed as part of an organisational review of the New Zealand Inland Revenue Department in 1994 [253] 'the objective [of tax administration] must be clear and unambiguous so that the Government, as well as the tax administration, can determine how well the objective is being achieved'.[254] The report noted that:[255]

> *Tax administration is one component of the total tax system which has an overall objective that comprises: **sufficiency** of revenue for the Government, **efficiency** (a mix of taxes that collects the required revenue while minimising distortions to the economy, and administration and compliance costs, given other objectives), and **fairness**.*

A framework of guiding principles would therefore benefit the administration of the tax system as a whole including – the Australian Parliament, the ATO, the Commissioner, Tax Officials, taxpayers and their advisers.

5.6. How should the framework be implemented?

The IGTO acknowledges that it is possible for the framework to be implemented administratively – that is, by the Commissioner and the ATO. Indeed, as part of this investigation, the IGTO has observed discrete areas where frameworks with principles for consideration have been established. For example, in the context of settlements, considerations of cost and benefits of continuing the dispute as well as

[253] Ivor Richardson, David Edwards, David Henry and Murray Horn, *Organisational Review of the Inland Revenue Department* (1994).
[254] Ibid, p 47.
[255] Ibid, p 47.

'the impact on future compliance for the taxpayer and broader community' must be considered by the decision maker.[256] Similarly, when considering compromise of taxation debts, the ATO's PSLA 2011/3 notes that 'the broader objective of achieving voluntary compliance is more important than the amount recovered in any individual case.'[257]

However, the principles that have been administratively implemented by the ATO are dispersed and operate within the specific contexts in which they have been established. E.g., settlement principles could not apply in other exercises of the GPA. Furthermore, administrative frameworks may not be enduring and may be subject or change or removal altogether.

A legislative framework necessarily would provide a more consistent and robust foundation upon which other guidance may be built. It would be more enduring and the risk of erosion to the principles is mitigated or subject to the Parliamentary process.

As the IGTO has set out earlier in this report, there is precedent for the enactment of guiding principles to improve and assist tax administration - in Australia (the not-for-profit sector for example) and outside Australia, notably in New Zealand following observations and a recommendation in the Organisational Review of the Inland Revenue Department:[258]

> *The Review Committee considers the objective for the tax administration function of IRD should incorporate several elements, namely that IRD should:*
>
> - *operate within the law;*
> - *collect the highest revenue that is practicable over time. (This recognises that the tax administration's objective should not be to collect either 'all' or only 'some' revenue);*
> - *collect revenue at the least administrative cost;*
> - *operate within the resources appropriated by Parliament; and*
> - *have regard for the compliance costs incurred by taxpayers.*
>
> *The Review Committee recommends the following objective which should be incorporated into a revised section 4 of the Inland Revenue Department Act. The objective combines the elements above with the requirement for an unambiguous and clearer objective-*

[256] ATO, *Code of Settlement* (18 August 2015).

[257] ATO, *PSLA 2011/3 Compromise of undisputed tax-related liabilities and other amounts payable to the Commissioner* (as at 4 December 2014) para 46.

[258] Ivor Richardson, David Edwards, David Henry and Murray Horn, *Organisational Review of the Inland Revenue Department* (1994) pp 49-50.

In meeting accountabilities to the Minister, the primary objective for IRD should be -

The Inland Revenue Department will collect over time the highest net revenue that is practicable within the law having regard to:

- ***the resources available to the Inland Revenue Department;***
- ***the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and***
- ***the compliance costs incurred by taxpayers.***

The recommendation from the report ultimately saw a set of principles adopted in the New Zealand *Tax Administration Act 1994*.

The IGTO acknowledges that the report was conducted in relation to the IRD and specifically within the context of the New Zealand tax system but considers the principles set out in the report are nonetheless apt and applicable in the current Australian context.

In the IGTO's view, a legislative framework to guide GPA decisions would provide the highest level of assurance and confidence for the community. The nature of the framework or legislative amendment that is needed or would be desirable to implement depends on whether Parliament intends the GPA to impose only a *duty* on the Commissioner to administer the tax system or if Parliament intends that the GPA confers some *powers* on the Commissioner to assist in practical and pragmatic administration of the tax system.

The GPA is ostensibly a conferral by Parliament upon the Commissioner (personally). It is therefore appropriate that Parliament should consider the nature of what they have conferred upon the Commissioner and the appropriateness of a framework through which the general administration of those laws should operate to achieve the objects of tax administration generally. For example, such a framework could ensure that taxpayers who make genuine errors are assisted to correct them, unless the law specifically precludes such correction, or to provide for certain 'safe harbours' that foster voluntary compliance with taxation laws for both the taxpayer as well as the broader community. The IGTO notes that elsewhere in the law, legislation has been enacted to provide a standard suite of powers that create various frameworks within regulatory regimes that may be easily adopted into other legislation.[259]

[259] See, for example: *Regulatory Powers (Standard Provisions) Act 2014.*

Recommendation 4

The IGTO recommends (for the reasons set out in Chapter 5) that the Government consider enacting a framework of guiding principles for the exercise of the Commissioner's GPA. Without prescribing what principles or factors should make up that framework, the IGTO provides, by way of example,, some principles which may be suitable to be included in the framework.

For example:

The Commissioner of Taxation shall exercise his powers of general administration in a way that is practicable and in accordance with the law and in furtherance of:

(a) fostering voluntary compliance and willing participation of all taxpayers within the tax and superannuation systems;

(b) minimising the cost of compliance for taxpayers to participate within the tax and superannuation systems;

(c) ensure that the resources of the ATO are applied to optimise compliance assurance and revenue collection;

(d) resolving disputes in a procedurally fair and proportionate manner having regard to the objectives set out in the GPA principled framework;

(e) assisting taxpayers who make honest mistakes to correct their mistake where this assists to achieve outcomes and results as intended by specific measures;

(f) promoting fairness in all the circumstances; and

(g) respecting the requirements of procedural fairness.

Recommendation 5

The IGTO recommends that the Government consider improving tax administration by providing the Commissioner with an express administrative discretion, unless expressly excluded by Parliament (i.e. the legislation may expressly prevent the discretion from applying), to:

(a) alter any procedural requirement in the interests of reducing compliance costs for taxpayers;

(b) allow taxpayers to correct an honest and reasonable mistake or error in any lodgement or filing for the purposes of a taxation law or to withdraw an erroneous form or application and resubmit a corrected one;

(c) extend the time for a taxpayer to exercise their rights, apply for access to support or provide further or additional information in support of such an application; and

(d) suspend a penalty subject to certain conditions which promotes future voluntary compliance (including for example, a named period of demonstrated compliance).

Recommendation 6

The IGTO recommends that the Government consider improving tax administration by legislating a requirement for the Commissioner to annually publish and table a record of the exercises of his general powers of administration where it affects a broad class or broad range of taxpayers.

APPENDICES

Appendix A – Terms of Reference

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 world[260] with over 14,000 pages of legislation, intended to deliver different policy outcomes for different taxpayers in different situations.[261] The Commissioner of Taxation has administration, or partial administration, of 34 primary pieces of legislation (not counting delegated legislation).[262] 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 Act[263] (commonly referred to as the General Power of Administration, or GPA).[264] 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;

[260] 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.

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

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

[263] 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*.

[264] 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:[265]

> *…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.*

Practice Statement PS LA 2009/4

The Commissioner's instruction to ATO staff - PS LA 2009/4 - 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,*

[265] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 at [11].

such as the allocation of compliance resources more broadly recognised as practical compliance approaches. [emphasis added]

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 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:[266]

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

…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.

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: [Redacted]

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 continued 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.

Appendix B – ATO Response

Second Commissioner of Taxation

Australian Government
Australian Taxation Office

Karen Payne
The Inspector-General of Taxation and Taxation Ombudsman
GPO BOX 551
SYDNEY NSW 2001

Dear Karen,

Re: Review on the Exercise of the Commissioner's General Powers of Administration

We welcome the finalisation of your review of the Exercise of the Commissioner's General Powers of Administration and thank you for the opportunity to provide a response to the final draft of your report.

The general administration provisions in the tax and superannuation laws play a very important role: they identify the Commissioner of Taxation as the individual responsible for administering those laws, to the exclusion of all others. In doing so, the general administration provisions create a duty on the Commissioner to administer the taxation and superannuation laws enacted by Parliament and authorise a broad range of administrative actions for that purpose.

Your review has been helpful in identifying areas in which we can consider continual improvements to process and decision-making in this regard, and to the communication of broad-reaching general administration decisions that affect the ability of people to meet their taxation and superannuation obligations.

In implementing your recommendations, we will maintain our focus on three main areas to ensure that the Commissioner continues to administer the taxation and superannuation laws according to law, and in a manner that fosters trust and confidence in the taxation and superannuation systems:

- Reviewing our existing guidance for the community and our people in relation to the Commissioner's general administration of the taxation and superannuation laws and the processes for making general administration decisions.
- Effective communication of general administration decisions, particularly where this enables and supports taxpayers to meet their taxation and superannuation obligations.
- Processes enabling informed general administration decision-making, including input from stakeholders and advice where appropriate.

We appreciate a review of this nature involves a level of conceptual complexity and understand why you have sought to examine this topic through the use of case studies. We note that case studies 1 and 2 reflect your views of certain ATO action taken in response to the *Douglas* case and in relation to the COVID early release of superannuation program, and that those views were formed during your investigation of complaints made by a small number within the large populations that have engaged with the ATO in its administration of these matters. We acknowledge that there remain differences in our

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respective views of the actions taken by the ATO in those matters. In the context of the present review, we also consider that many of the decisions detailed in those case studies were made in the exercise of express statutory powers, and are therefore not necessarily representative of the types of decisions made in the conduct of the Commissioner's general administration.

Our detailed response to the recommendations is attached. In responding to the recommendations we consider that the scope of decisions to which the recommendations apply is a critical threshold issue, and in particular, we note the distinction between decisions made in the general administration of the taxation and superannuation laws, and those made under express statutory powers.

Finally, I would like to acknowledge the efforts of all involved in undertaking this review and thank you and your team for your professional and constructive approach in the conduct of the review.

Yours sincerely

Kirsten Fish
Second Commissioner of Taxation

22 May 2023

IGTO Review on the Exercise of the Commissioner's General Powers of Administration

ATO responses to the final draft report recommendations

In responding to the recommendations, a reference to general administration decisions is a reference to decisions made in the general administration of the taxation and superannuation laws, as distinct from decisions made under express statutory powers. In addition, a threshold question for the ATO to consider in implementing Recommendations 1 and 3 is the types of general administration decisions to which the recommendations should apply – for example, it may not be appropriate to include many day-to-day administrative decisions or decisions impacting the integrity of the tax and superannuation systems.

Recommendation	ATO Response
Recommendation 1 The IGTO recommends that the ATO consider establishing an advisory or oversight panel to assist and guide broad reaching exercises of the Commissioner's GPA – that is, where such exercises are likely to impact large sections of the taxpayer population.	**ATO Response – Agree** The ATO agrees that stakeholder input and advice each play an important role in making general administration decisions affecting large sections of the taxpayer population. The ATO's risk management and governance framework includes multiple advisory panels and committees, and many broad-reaching or high-risk general administration decisions are already subject to internal and/or external stakeholder input or advice. Having regard to these existing processes for seeking input or advice, the ATO will consider whether there are categories of general administration decisions affecting large sections of the taxpayer population for which it would be appropriate to establish an advisory or oversight panel.

Recommendation	ATO Response
Recommendation 2 The IGTO recommends that the ATO consider ways in which it could raise awareness and understanding of the Commissioner's general powers of administration, including by considering whether PSLA 2009/4 remains fit for purpose and any additional guidance that may be developed to support greater (public and tax official) understanding of the GPA.	**ATO Response – Agree** The ATO agrees there are benefits in increasing the awareness and understanding of the principles underlying the nature and scope of general administration decisions. The ATO will review PSLA 2009/4 and consider whether it should be updated. The ATO will also consider whether other forms of guidance, both internal and external, are needed.
Recommendation 3 The IGTO recommends that the ATO consider ways in which it could enhance accountability and transparency for broad reaching exercises of the Commissioner's GPA and to enable taxpayers to more easily identify and track exercises of the GPA that may affect them. This recommendation is related to Recommendation 6.	**ATO Response – Agree** The ATO agrees that accountability and transparency are critical in maintaining trust and confidence in the tax and superannuation systems, and recognises the value of an appropriate and effective communication strategy for broad-reaching general administration decisions that assist taxpayers to meet their taxation and superannuation obligations. However, the ATO notes that not all general administration decisions affect a taxpayer's ability to meet their tax and superannuation obligations, and a taxpayer does not need knowledge of all general administration decisions, even those that are broad-reaching, in order to do so. As such, it may not be appropriate in all cases to communicate broad-reaching decisions including where doing so may impact the integrity of the tax and superannuation systems. The ATO will consider whether its existing communication channels enable affected persons to identify relevant decisions where appropriate.
Recommendation 4 The IGTO recommends (for the reasons set out in Chapter 5) that the Government consider enacting a framework of guiding principles for the exercise of the Commissioner's GPA. Without prescribing what principles	**ATO Response** This is a matter for Government.

Recommendation	ATO Response
or factors should make up that framework, the IGTO provides, by way of example, some principles which may be suitable to be included in the framework. For example: The Commissioner of Taxation shall exercise his powers of general administration in a way that is practicable and in accordance with the law and in furtherance of: a) fostering voluntary compliance and willing participation of all taxpayers within the tax and superannuation systems; b) minimising the cost of compliance for taxpayers to participate within the tax and superannuation systems; c) ensure that the resources of the ATO are applied to optimise compliance assurance and revenue collection; d) resolving disputes in a procedurally fair and proportionate manner having regard to the GPA principled framework; e) assisting taxpayers who make honest mistakes to correct their mistake where this assists to achieve outcomes and results as intended by specific measures; f) promoting fairness in all the circumstances; and g) respecting the requirements of procedural fairness.	
Recommendation 5 The IGTO recommends that the Government consider improving tax administration by providing the Commissioner with an express administrative discretion, unless expressly excluded by Parliament (i.e. the legislation may expressly prevent the discretion from applying), to:	**ATO Response** This is a matter for Government.

Recommendation	ATO Response
a) alter any procedural requirement in the interests of reducing compliance costs for taxpayers; b) allow taxpayers to correct an honest and reasonable mistake or error in any lodgement or filing for the purposes of a taxation law or to withdraw an erroneous form or application and resubmit a corrected one; c) extend the time for a taxpayer to exercise their rights, apply for access to support or provide further or additional information in support of such an application; and d) suspend a penalty subject to certain conditions which promotes future voluntary compliance (including for example, a named period of demonstrated compliance).	
Recommendation 6 The IGTO recommends that the Government consider improving tax administration by legislating a requirement for the Commissioner to annually publish and table a record of the exercises of his general powers of administration where it affects a broad class or broad range of taxpayers.	**ATO Response** This is a matter for Government.

Appendix C – GPA provisions in main legislation administered by the Commissioner

This table provides an overview of the main pieces of legislation administered by the Commissioner of Taxation and whether or not they contain express GPA provisions. It is not intended to be a complete list of all legislation that may confer some administration function or power on the Commissioner.

Act	Express GPA provision? (Y/N)	Section	Comments (if any)
A New Tax System (Australian Business Number) Act 1999	Y	28(4)	
A New Tax System (Goods and Services Tax) Act 1999	N	2-30	2-30 refers to the provisions for administration, collection and recovery in Schedule 1 to Tax Administration Act 1953 (TAA 1953).
A New Tax System (Luxury Car Tax) Act 1999	N	2-25	2-25 refers to the provisions for administration, collection and recovery in Schedule 1 to TAA 1953.
A New Tax System (Wine Equalisation Tax) Act 1999	N	2-33	2-33 refers to the provisions for administration, collection and recovery in Schedule 1 to TAA 1953.
Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020	Y	3	
Commonwealth Places Windfall Tax (Collection) Act 1998	Y	5	

Act	Express GPA provision? (Y/N)	Section	Comments (if any)
Coronavirus Economic Response Package (Payments and Benefits) Act 2020	Y	5	
Coronavirus Economic Response Package Omnibus Act 2020	N	-	This is an amending Act only. It made amendments to a number of existing Tax Acts, each with their own expressed GPA.
Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020	N	-	This is an amending Act only. It made amendments to a number of existing Tax Acts, each with their own expressed GPA.
Excise Act 1901	Y	7	
Excise Tariff Act 1921	Y	1A	
Foreign Acquisitions and Takeovers Act 1975	Y	138	
Fringe Benefits Tax Assessment Act 1986	Y	3	
Fuel Tax Act 2006	Y	2-1	
Higher Education Support Act 2003	Y	238-8	
Income Tax Assessment Act 1936	Y	8	
Income Tax Assessment Act 1997	Y	1-7	
International Tax Agreements Act 1953	N	-	Section 4(1) incorporates the Assessment Act (i.e., the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997*) to be read as one with this Act. The Assessment Acts each contain an express GPA.

Appendix C – GPA provisions in main legislation administered by the Commissioner

Act	Express GPA provision? (Y/N)	Section	Comments (if any)
Petroleum Excise (Prices) Act 1987	N	-	The Minister, or a person appointed or engaged under the *Public Service Act 1999* authorised by the Minister to exercise the Minister's powers.
Petroleum Resource Rent Tax Assessment Act 1987	Y	15	
Product Grants and Benefits Administration Act 2000	Y	7	
Product Stewardship (Oil) Act 2000	Y	7	
Register of Foreign Ownership of Water or Agricultural Land Act 2015	Y	32	
Small Superannuation Accounts Act 1995	Y	6	
Superannuation Contributions Tax (Assessment and Collection) Act 1997	Y	30	
Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997	Y	26	
Superannuation (Government Co-contribution for Low Income Earners) Act 2003	Y	46	
Superannuation Guarantee (Administration) Act 1992	Y	43	
Superannuation Industry (Supervision) Act 1993	Y	5	
Superannuation (Self-managed Superannuation Funds) Taxation Act 1987	Y	9	
Superannuation (Unclaimed Money and Lost Members) Act 1999	Y	40	

Act	Express GPA provision? (Y/N)	Section	Comments (if any)
Taxation Administration Act 1953	Y	3	
Taxation (Interest on Overpayments and Early Payments) Act 1983	Y	4	
Trust Recoupment Tax Assessment Act 1985	N	4	There is no express or implied provision as such, however section 4 does state the premises of how the application of this legislation will work in reference to the TAA 1953.

Appendix D – Glossary and defined terms

Abbreviation or term	Definition
AAT	Administrative Appeals Tribunal
ADJR Act 1977	*Administrative Decisions (Judicial Review) Act 1977*
AFP	Australian Federal Police
Aged Debt	Debtors are categorised according to the period overdue. i.e.: • <1 Month • 1–2 Months • 2–3 Months • 3–6 Months • 6–12 Months • 1–2 Years • 2–5 Years • 5–10 Years • 10+ Years
AGIS	Australian Government Investigation Standards
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
APH	Parliament of Australia
APPs	Australian Privacy Principles, as defined in Schedule 1 of the *Privacy Act 1988*
APS	Australian Public Service
ATO	Australian Taxation Office
ANZOA	Australian and New Zealand Ombudsman Association
ANZSCO	Australian and New Zealand Standard Classification of Occupations
ANZSIC	Australian and New Zealand Standard Industrial Classification
BAS	Business Activity Statement
CDDA	Scheme for Compensation for Detriment caused by Defective Administration
Client Experience	Broadly the ATO divides taxpayers into client experiences. All taxpayers are allocated to a primary client experience population for reporting purposes. The client experience allocation is based on definitions and hierarchical approach. It is also subject to the information we have for a particular taxpayer. The Client Engagement Group uses the client experience lens to view risk, investment and effectiveness and the ATO's Service Delivery Group uses it to report on the monthly debt holdings.
Client Experience – Individuals	Individual clients who have no: • business or personal services income; or • links to an active micro entity, excluding a link type of "member of an SMSF" if they receive passive income it is from investments or distributions only.
Client Experience – Not-for-Profit organisations	An organisation is not-for-profit if it is not carried on for the profit or gain of its individual members. This applies for direct and indirect gains, both while the organisation is being carried on and on its winding up. We accept an organisation as not-for-profit if its constitution or governing documents prohibit distribution of profits or gains to individual members and its actions are consistent with the prohibition.

Abbreviation or term	Definition
Client Experience – Privately Owned and Wealthy Groups	The ATO views privately owned and wealthy groups as: • companies and their associated subsidiaries (often referred to as economic groups) with an annual turnover greater than $10 million, that are not public groups or foreign owned; or • resident individuals who, together with their business associates, control net wealth over $5 million.
Client Experience – Public and Multinational Businesses	Includes Australian public companies, listed and unlisted; widely held Australian partnerships, superannuation funds and managed investment trusts; and majority foreign owned entities.
Client Experience – Self-Managed Superannuation Funds	A complying superannuation fund with fewer than five members, who are individual trustees of the fund.
Client Experience – APRA regulated superannuation Funds	Large and small APRA-regulated superannuation funds.
Client Experience – Small Business	A business with less than $10 million aggregated turnover in the previous financial year. Prior to 2016-17, the threshold was $2 million. This group may include individual taxpayers by reason of their association with another entity – for example, director of a company, or a partner in a partnership.
Collectable Debt	Debt due to the ATO that is not subject to objection or appeal or to some form of insolvency administration.
Commissioner	Commissioner of Taxation
Complaint	A complaint is defined AS/NZS 10002:2014 Guidelines for complaint management in organizations • *Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.* • *Disputes – Unresolved complaints escalated internally or externally, or both.* • *Feedback – Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.*
Compromise of debt	The Commissioner may permanently agree not to pursue recovery of the balance of a debt (effectively, to accept a sum less than the primary debt in full satisfaction of that debt) from an insolvent taxpayer under a compromise proposal. The circumstances in which this will occur are limited.
CPI	Consumer Price Index
Disclosures as part of a review and Investigation	these disclosures are protected because there is a Review and the disclosure of information assists in achieving a public purpose.
Disputed Debt	Debt which is subject to objection or appeal – identified in systems by disputed accounting treatments.
DPN	Director Penalty Notice

Appendix D – Glossary and defined terms

Abbreviation or term	Definition
Entity	an entity is defined in section 960-100 of the *Income Tax Assessment Act 1997* that is: • an individual • a body corporate • a body politic • a partnership • any other unincorporated association or body of persons • a trust • a superannuation fund
ESC	Extra-statutory concessions
FOI	Freedom of Information
FOI Act 1982	*Freedom of Information Act 1982*
FY19	Financial Year ended 30 June 2019
FY20	Financial Year ended 30 June 2020
GPA	General Powers of Administration
GST	Goods and Services Tax
HMRC	Her Majesty's Revenue and Customs (UK)
High Wealth Individual	An Australian resident who controls net assets of over $30 million.
IGIS	Inspector-General of Intelligence and Security
IGT Act 2003	*Inspector-General of Taxation Act 2003*
IGTO	Inspector-General of Taxation and Taxation Ombudsman. The acronym "IGTO" is used throughout the submission to denote both the "Inspector-General of Taxation", as named in the enabling legislation, and "Inspector-General of Taxation and Taxation Ombudsman" as recently adopted due to recent calls for greater understanding and awareness of our complaints' services function.
Impairment	Impairment in the administered financial statements includes the following: • Impairment allowance – The ATO estimates an impairment allowance on all unpaid debts recognised as receivables in the financial statements. This requirement arises from AASB 136 Impairment of Assets. This standard states that, "An asset is impaired when its carrying amount exceeds its recoverable amount." (Paragraph 8). • Impairment on receivables (expense) – this amount includes: – Calculated movements in the impairment allowance, and – Actual write-offs of receivables.
Insolvent Debt	Debt which is subject to some form of insolvency administration – identified in systems by insolvent accounting treatments.
Irrecoverable at law	The Commissioner is satisfied that the debt is not legally recoverable, and the debt has been written off as authorised by an act.
IRS	Internal Revenue Service
ITR	Income tax return
JCPAA	Joint Committee of Public Accounts and Audit
Liabilities	Debts or amounts that the business owes. Liabilities are the claims of creditors against the assets of the business. These are to be met in the future.
Macquarie Bank	*Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119

Abbreviation or term	Definition
Net Tax Collections	Total tax collections less refunds paid to taxpayers.
Non-Pursuit	The Commissioner can determine not to pursue a debt considered uneconomical to pursue (in which case it can be re-raised later), or permanently extinguish a debt that is irrecoverable at law.
NTA	National Taxpayer Advocate
NZ	New Zealand
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
PAYG	Pay As You Go
Payment Plan or Payment Arrangement	An agreement with a client for scheduling of payments to repay their tax debt over a period of time.
Payment on Time	A liability is deemed to be "paid on time" if it has a zero balance within 7 days after the due date or the date the liability is reported to the ATO, whichever is the latter.
PCG	Practical Compliance Guidelines
PGPA Act 2013	*Public Governance, Performance and Accountability Act 2013*
PGPA Rule 2014	*Public Governance, Performance and Accountability Rule 2014*
PID Act 2013	*Public Interest Disclosure Act 2013*
PS LA	Law Administration Practice Statement
PS LA GA	General administration Law Administration Practice Statement
Receivables	A receivable is an amount the ATO recognises in the administered financial statements when the following conditions are met: • the right to receive revenue is established by the relevant statutory requirements (for example, by the Taxation Administration Act 1953), • we have sufficient information to establish that a taxpayer has a taxation liability, • an assessment can legally be raised and applicable penalties and charges imposed. These amounts are recognised as receivables in the ATO's financial statements until paid, impaired or written off.
Release	The law allows for an individual to be partially or fully released from particular liabilities if payment would result in serious hardship. The provision also applies to the trustee of a deceased estate where the dependants of the deceased individual would suffer serious hardship if the trustee paid the liability.
SCTR	House of Representatives Standing Committee on Tax and Revenue
Settlement	A settlement is an agreement or arrangement between parties to finalise their matters in dispute. Settlements involve the balancing of the Commissioner's duties to administer the tax law and the tax system in a fair, efficient and effective way.
SG	Superannuation Guarantee
SGC	Superannuation Guarantee Charge
STP	Single Touch Payroll
TAA 1953	*Taxation Administration Act 1953*
Tax Gap	The tax gap is the difference between the actual amount of tax collected and the amount the ATO would expect to collect if every taxpayer were fully compliant.
Tax Official	The term 'tax official' is defined in section 4 of the *IGT Act 2003* to mean: • an ATO official; or

Appendix D – Glossary and defined terms

Abbreviation or term	Definition
	• a Board member of the Tax Practitioners Board; or • an APS employee assisting the Tax Practitioners Board as described in section 60-80 of the Tax Agent Services Act 2009; or • a person engaged on behalf of the Commonwealth by another tax official (other than an ATO official) to provide services related to the administration of taxation laws; or • a person who: • is a member of a body established for the sole purpose of assisting the Tax Practitioners Board in the administration of an aspect of taxation laws; and • receives, or is entitled to receive, remuneration (but not merely allowances) from the Commonwealth in respect of his or her membership of the body. For the purpose of this report, the term 'tax official' is also used to refer to a 'taxation officer' to whom subdivision 355-B of Schedule 1 to the TAA 1953 applies.
TFN	Tax File Number
TPB	Tax Practitioners Board
UK	United Kingdom
Uneconomical to pursue	The Commissioner considers that it is not cost effective to pursue recovery of the debt. Non-pursuit of debt is the decision to remove a debt from the account – it can be re-raised later.
Waiver	The Finance Minister may waive amounts owing to the Commonwealth. A waiver permanently extinguishes a debt owed to the Commonwealth. The Commonwealth cannot pursue the debt at a later date if the financial circumstances of the person or organisation which received the waiver improve. The Commissioner does not have the power to grant a waiver.
Write-off	A reduction in the recorded amount of receivables in the financial statements and occurs when the Commissioner ceases to pursue a debt. This includes debts that are not economical to pursue, irrecoverable at law, released due to serious hardship and amounts waived by the Finance Minister.
50/50 arrangement	Taxpayers disputing a debt may enter into an arrangement where the ATO remits 50% of the general interest on unpaid debts in dispute and defers recovery of the disputed debt. To obtain this, the taxpayer must pay half of the disputed debt, all undisputed debts, co-operate during the objection and pass a risk assessment.