



Australian Government  
Inspector-General of Taxation  
Taxation Ombudsman

# The Exercise of the Commissioner's General Powers of Administration

A Review Investigation Report

# Introduction

- General Powers of Administration (**GPA**) wording has been included as part of the *Income Tax Assessment Act 1936* (section 8) since inception, and as early as 1915. GPA provisions generally take the following form:
  - *The Commissioner shall have the general administration of this Act*
- Most taxation acts currently administered by the Commissioner of Taxation (approximately 31 Acts) have a GPA provision.
- This is in part because a 2010 administrative law rewrite inserted (amongst other things) a new definition of taxation law for the purposes of invoking secrecy and confidentiality provisions, which linked secrecy & confidentiality to Acts which the Commissioner has general administration
- Although the tax law does not use the expression *general powers of administration* or *powers of general administration*, it is generally referred to as such, including in the Commissioner's Instructions to his staff – including Practice Statement Law Administration *PSLA 2009/4 - Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* – first issued on 21 May 2009
- There are limited avenues for taxpayers and tax practitioners to challenge the exercise of the Commissioner's GPA.
- Decisions made under the GPA are largely not reviewable by the Courts and in many cases appear to be exercised by tax officials on behalf of the Commissioner, without written delegation or authorisation but rather as a matter of implied authority and without an objective or principled framework but simply as a matter of individual judgement.

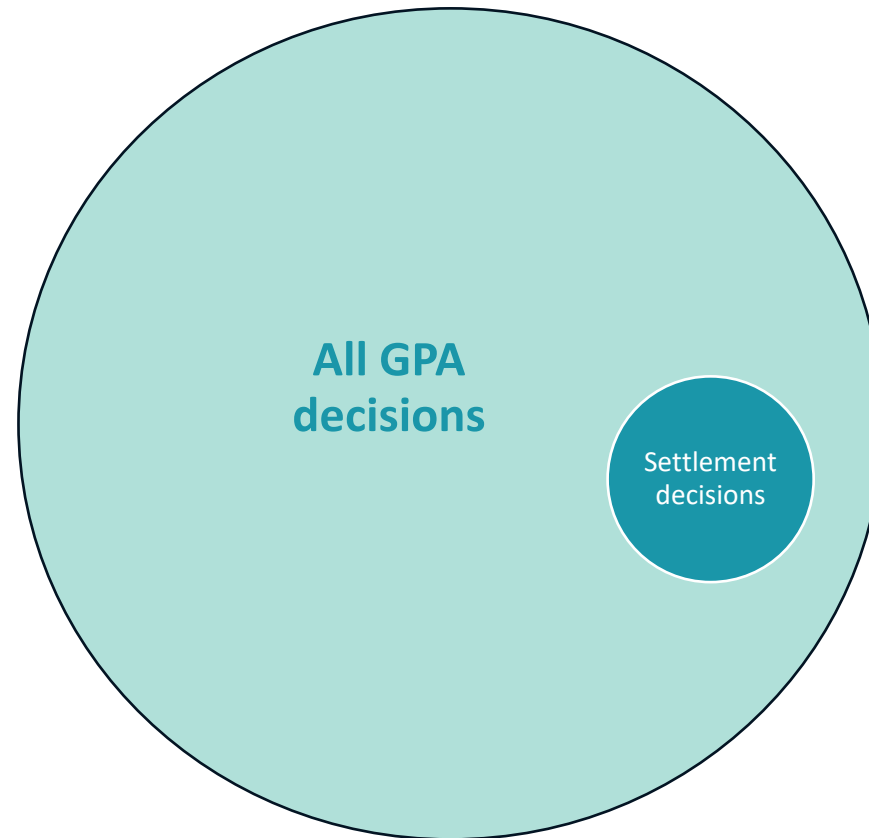
# Introduction

- Although many unremarkable tax administration decisions are made every day in reliance on the Commissioner's GPA ... a number of significant tax administration decisions and actions are made by Tax Officials which depend on or are exercised in reliance upon the Commissioner's GPA 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.

# Understanding GPA decisions

Most GPA decisions are not settlement decisions and are made:

- based on an implied power,
- without express written delegations,
- without a principled framework,
- as a matter of individual judgement



*Please note the GPA diagram is illustrative only and is not drawn to scale*

Settlement decisions are a subset of GPA decisions

These decisions are made:

- in accordance with express written delegations;
- guided by written PSLA instructions and guiding materials including guiding factors;
- subject to an internal review Panel or independent assurance of settlements program; and
- published transparently in the ATO Annual Report

# Settlements – an example of what can occur

## An administrative framework informs settlement decisions

- Settlements are an exercise of the Commissioner's GPA
- Expressly delegated to persons in the position of Second Commissioner and SES Officers
- Governed by an Instrument of Delegation and various PSLAs:
  - PSLA 2015/1 Code of Settlement;
  - PSLA 2007/6 – Guidelines for Settlement of widely based tax disputes;
  - PSLA 2009/9 – Conduct of ATO litigation and engagement of ATO dispute resolution;
  - PSLA 2011/7 – Settlement of debt litigation proceedings

**Table 3.1 Settlements concluded by the ATO in FY22** – source ATO Annual Report FY22

Client group	Settlement cases	% of total settlements	ATO position \$m	Settled position \$m	Variance \$m	Variance %
Individuals <sup>(a)</sup>	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 <sup>(c)</sup>	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
<b>Total</b>	<b>453</b>	<b>100</b>	<b>3,516.0</b>	<b>1,964.8</b>	<b>1,551.2</b>	<b>44</b>

#### 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.

# Settlements – an example of what can occur

## Settlement considerations – are expressly stated in PSLA 2015/1

### 5. Settlement considerations

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.

## PSLA 2007/6 - Guidelines for settlement of widely-based tax disputes

Widely based settlement decisions are considered by a Panel of senior ATO officers

10. When considering a settlement proposal the objective of the Panel is to ensure:

- 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.

# Some examples – taken from A Practical Guide to the Code of Settlement

## Example 3.6 - Future superannuation guarantee compliance

An employment agency that provides workers in a service industry has always considered the workers to be independent contractors and never made required superannuation guarantee (SG) contributions. After the receipt of additional information it was recognised that the taxpayer acted on a genuine belief that the workers were independent contractors. The workers had been receiving a higher level of remuneration to compensate for not getting superannuation support. An agreement between the agency and the ATO is reached where the agency will correctly treat the workers as employees for SG purposes and will commence making superannuation contributions on a prospective basis commencing on an agreed date.

## Example 3.12 - Third party settlement

The ATO has identified an issue with the net income of a Managed Fund which could ultimately impact 20,000 beneficiaries. Although the trustee may not directly be in dispute, the beneficiaries would be likely to be in dispute once their assessments were adjusted. The ATO negotiates a settlement with the trustee as a practical resolution and to avoid unnecessary and costly disputes.



# Case Study – Dispute Investigation where a Taxpayer makes a mistake

## Early Release of Superannuation

- IGTO investigated 67 complaints where the taxpayer had made a genuine mistake or error in their application
  - For example: nominated the wrong fund, inserted an incorrect amount (eg \$1 rather than \$1,000)
- Section 33(3) of the *Acts Interpretation Act 1901* – provides a power to amend or revoke but ATO view was that it could not amend or revoke inconsistently with the original application (ie to correct the honest mistake or genuine error)

**Should Taxpayers be able to correct their genuine mistakes?**





# Primary Observation

- It is not clear [and hence it would be useful to clarify] whether the Commissioner's GPA is simply a duty (which carries no administrative discretion) or if it is a power and if it is a power, the limits of that power to administer the tax and superannuation laws practically and pragmatically?
  - Clarification would be consistent with the Australian Administrative Law Policy Guide
- 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

# The Australian Administrative Law Policy Guide

Issued by the Attorney-General's Department (AGD)

- Administrative law is the body of law that regulates government decision making
  - It provides a framework for accountable, government decision making
- 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

# The Australian Administrative Law Policy Guide

- The administrative law system is based on the fundamental values of:
  - fairness
  - lawfulness
  - rationality
  - openness, and
  - efficiency
- How government interacts with the public in individual cases influences public trust and confidence in government administration more broadly

# The Australian Administrative Law Policy Guide

- Australia has 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.

# The Australian Administrative Law Policy Guide

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 ...

...

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.

- page 11

# Legislative frameworks exist elsewhere to guide tax administration

## Internationally

- New Zealand

## Domestically

- Australian Charities and Not-for-Profits Commission Act 2012





# New Zealand *Tax Administration Act 1994*

## 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.

# New Zealand *Tax Administration Act 1994*

## Section 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.

# Australian Charities and Not-for-Profits Commission Act 2012

- 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;
  - 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.

# 6 Recommendations for improved general administration

3 for ATO

3 for Government



# Administrative Law values informed our recommendations

As the Australian Administrative Law Policy Guide notes:

- The administrative law system is based on the fundamental values of fairness, lawfulness, rationality, openness and efficiency. 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.

# Recommendation 1 (to ATO)

## Recommendation 1 (to ATO)

- 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



# Recommendation 2 (to ATO)

## Recommendation 2 (to ATO)

- 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

# Recommendation 3 (to ATO)

## Recommendation 3 (to ATO)

- 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

# Recommendation 4 (to Government)

## 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

# Recommendation 4 cont'd (to Government)

**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:

- fostering voluntary compliance and willing participation of all taxpayers within the tax and superannuation systems;
- minimising the cost of compliance for taxpayers to participate within the tax and superannuation systems;
- ensure that the resources of the ATO are applied to optimise compliance assurance and revenue collection;
- resolving disputes in a procedurally fair and proportionate manner having regard to the GPA principled framework;
- assisting taxpayers who make honest mistakes to correct their mistake where this assists to achieve outcomes and results as intended by specific measures;
- promoting fairness in all the circumstances; and
- respecting the requirements of procedural fairness.

# Recommendation 5 (to Government)

## 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 (ie in the legislation) to:
  - alter any procedural requirement in the interests of reducing compliance costs for taxpayers
  - 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
  - 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
  - suspend a penalty subject to certain conditions which promotes future voluntary compliance (including for example, a named period of demonstrated compliance)

# Recommendation 6 (to Government)

## Recommendation 6

- The IGTTO 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.



# Benefits of a Principled Framework for GPA decisions and actions

- The IGTO believes that a framework of guiding principles to guide GPA decision making will yield a number of practical benefits and improve the administration of the tax system as a whole including for the benefit of the Australian Parliament, the ATO, the Commissioner, Tax Officials, taxpayers and their advisers



Provide assurance and accountability that decisions are principled;

Minimise perceptions of unfairness;



Enhance consistency;

Guide efficiency;



Improve Procedural Fairness;

Facilitate Positive administration;



An objective by which to measure performance;

# Benefits of a Principled Framework for GPA decisions and actions

## Firstly

- due to its discretionary nature and limitations on the ability of taxpayers to challenge GPA decisions, a principled framework would provide a measure of comfort and assurance that GPA decisions are referable to a set of principles or objectives set down by Parliament.

## Secondly

- where taxpayers and tax practitioners are able to link GPA decisions and actions 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.

# Benefits of a Principled Framework for GPA decisions and actions

## 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 – 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.

# Benefits of a Principled Framework for GPA decisions and actions

## 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

## Fifthly

- the framework when coupled with other governance procedures would enhance overall procedural fairness through the 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

# Benefits of a Principled Framework for GPA decisions and actions

## 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 ‘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’.

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