

2 May 2022

Inspector-General of Taxation and Taxation Ombudsman
GPO Box 551
Sydney NSW 2001

By email: gpa@igt.gov.au

Dear Inspector-General of Taxation and Taxation Ombudsman

The Exercise of the Commissioner's General Powers of Administration

The Tax Institute welcomes the opportunity to make a submission to the Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) on *The Exercise of the General Powers of Administration* and associated terms of reference (**the Investigation**).

The General Powers of Administration (**GPA**) gives the Commissioner of Taxation (**Commissioner**) a discretionary power relating to matters that affect the administration of the taxation and superannuation legislation. The GPA underpins a large portion of the Australian Taxation Office's (**ATO**) activities and can have a significant impact on taxpayers' management of their affairs and their interactions with the Commissioner.

We have had the benefit of reviewing the submission prepared by the Business Law Section of the Law Council of Australia (**LCA**) for the purposes of the Investigation (**LCA Submission**). The Tax Institute endorses and supports the LCA submission. Please consider the LCA submission to be generally a reflection of our views regarding the GPA and the matters raised in the terms of reference for the Investigation. In addition, we have set out below comments in **Appendix A** which build on key points outlined in the LCA Submission, and also reflect feedback from The Tax Institute's members.

We consider that it would be beneficial to hold a roundtable discussion involving members of The Tax Institute and the IGTO's office, to discuss the matters and concerns outlined in this letter. Please contact Tax Counsel, Julie Abdalla, on 02 8223 0058 to arrange a suitable time for a meeting at your convenience.



The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix C** for more information about The Tax Institute.

Yours faithfully,



Jerome Tse

President

APPENDIX A

We have set out below our detailed comments and observations regarding the Commissioner's use of the GPA for your consideration.

Increasing Commissioner's use of the General Powers of Administration

The Tax Institute supports a review into further administrative actions the Commissioner can undertake to better support taxpayers through the use of the GPA. However, we do not consider that the Commissioner should be required to codify, prescribe, or otherwise limit the extent or frequency by which the GPA is able or required to be exercised. It is important for the Commissioner to retain flexibility in the exercise of the GPA and focus on increasing the frequency and visibility of its utilisation to better assist taxpayers to comply with their taxation obligations and resolve tax disputes.

In particular, we recommend that the IGTO should examine the extent to which the Commissioner is currently using the GPA to assist vulnerable taxpayers (such as those who are experiencing difficult personal circumstances, including mental health concerns, substance abuse, and family and domestic violence). While we consider that the ATO generally manages its response to widespread crises and disasters (such as the COVID-19 pandemic, and bushfires and floods throughout parts of Australia) well, feedback from our members indicates that the ATO has been less successful when responding to more acute or personal vulnerabilities. This category of taxpayers is more likely to require tailored assistance that requires the exercise of the GPA and the extent of relief or accommodation provided by operation of the GPA is usually less visible and more uncertain in this regard.

Further, feedback from our members has identified several instances where the ATO has not exercised, or considered exercising, the Commissioner's GPA as a means to resolve issues. This has resulted in inequitable outcomes for taxpayers, especially in instances where the cause of the issue was a mere mistake or misunderstanding of the taxpayer's obligations. Some examples of these instances are outlined below.

- Family trust elections – a member has shared details of an instance where ATO officers have felt constrained by the ATO's interpretation of the legislation and processes in relation to family trust elections. In this case, the taxpayer sought a rectification to include an entity into a family group after making a voluntary disclosure in relation to a tax dispute. The ATO officer formed the view that they were unable to assist the taxpayer with the rectification. The taxpayer was provided the options of either proceeding to an audit of the issue in order to seek a potential rectification, or to continue without the rectification. In our view, in this instance, the ATO officer should have been able to consider the use of the GPA to determine if the rectification sought was available. We have received permission to include a redacted record of the taxpayer's interactions with the ATO on this matter, contained in **Appendix B**. We understand from our members that this is not an isolated example in this particular context, or more broadly for similar provisions with a 'bright-line' test that have the potential to result in unfair outcomes for otherwise compliant taxpayers.

- 60-day limit on defences for Director Penalty Notices (**DPNs**) – feedback from our members indicates that the ATO generally does not consider defences for DPNs under section 269-35 of the *Taxation Administration Act 1953 (TAA)* if the defences are lodged after 60 days of the DPN being issued. We understand that this position is adopted by the ATO even in instances where the defence is valid pursuant to section 269-35, and would have otherwise been granted if it were lodged within the 60-day period. Member feedback indicates that the GPA has historically not been exercised in these instances to allow an extension of time to provide the defence. Instead, we understand that taxpayers have been advised to await collection action being commenced, with a view to raising the taxpayer’s circumstances as a defence at the litigation stage. This can result in increased costs and stresses for the relevant director.
- Revocation of Goods and Services Tax (**GST**) Registration – pursuant to section 27-22 of the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)*, a taxpayer is able to revoke an election under section 27-10 of one month tax periods within 12 months of making the original election. Although revocations and refusals to revoke are reviewable decisions,¹ feedback from our members indicates that, in their experiences, the ATO has not exercised this discretion favourably for taxpayers in instances where the revocation was made after 12-month period. This can lead to taxpayers receiving multiple penalties where they have misunderstood the obligations of a monthly registration. The potential for the Commissioner to use the GPA in such circumstances should be investigated.
- Amendments beyond the period of review – the Commissioner has a broad discretion to consider objections beyond the relevant period of review.² However, feedback from our members indicates that in their interactions with the ATO, the ATO has frequently declined to apply a similar approach to simple out-of-time credit amendments. Instead, taxpayers have been required to incur the expense and compliance burden of undergoing a complete objection process to reach the same outcome. We suggest that the IGTO consider recommending that the ATO should examine the availability of a similar administrative approach that allows taxpayers to make minor credit amendments to tax returns beyond the period of review. We note that reasonable limits may need to be imposed, such as the period of time after which amendments are allowed or limiting amendments to simple errors.

If the Commissioner is unable to apply GPA in these instances, we consider that the Commissioner should provide reasons detailing why the GPA was not an available option (e.g. the legislation may not permit an extension). This will allow for further advocacy to better assist taxpayers who have been adversely impacted in the scenarios noted above.

¹ *Subsection 110-F of Schedule 1 of the TAA.*

² Refer to Practice Statement Law Administration PS LA 2003/7: *How to treat a request to lodge a late objection.*

While we maintain the importance of flexibility in the exercise of the GPA, we have some concerns with its use in the context of the increasing number and significance of Practical Compliance Guidelines (**PCGs**) in the ATO's administration of the tax system. The premise of PCGs in outlining the ATO's compliance approach and risk appetite in the context of particular transactions and dealings is helpful for taxpayers, particularly when read together with rulings and other interpretative guidance.

However, despite being a risk indicative tool, we have received consistent feedback across our membership as to taxpayers' experiences of ATO officers treating PCGs as quasi-law. While professed to be voluntary in nature, failure to comply with a PCG and specifically to meet the relevant requirements for low-risk designation, tends to have repercussions for taxpayers including greater audit attention and allocation of compliance resources. This is the case despite circumstances where the efforts to meet the low-risk criteria create a disproportionate compliance burden and can in some cases be nearly impossible to satisfy. It is also relevant to note that while a position taken may be inconsistent with a PCG, or higher than the lowest risk rating indicated, it may still be supportable, or even reasonably arguable, at law.

We would support greater transparency, governance and oversight of the process of developing PCGs as well as their application in practice. This could be provided by requiring the ATO to provide more supporting information for each PCG such as:

- a detailed risk methodology utilised to determine the relevant risk zones;
- supporting justification for how the approach and risk categories are consistent with the legislative intent and existing case law on the relevant measures or provisions;
- identifying the relevant stakeholders within the ATO that were consulted and those responsible for signing off on the final product; and
- providing greater opportunities for industry stakeholders to provide early feedback on the proposed risk framework and whether the compliance approach and risk zones proposed to be outlined in a particular PCG are reflective of commercial understanding and practices.

The Tax Institute considers there are significant systemic issues with the use of PCGs and would be pleased to engage with the IGTO further on this matter.

Taking a purposive approach to the legislation

Feedback from our members, and The Tax Institute's experiences of engaging with the ATO on pertinent issues, indicates that there is a growing trend for ATO officers across all business lines to adopt a strict, black letter approach to the law. In practice, this has led to instances where important issues that could have been resolved through the adoption of a purposive approach have instead required alternate action such as ardent advocacy to senior ATO officers, the Treasury, or Government.

For example, Law Companion Ruling LCR 2021/2³ and Practical Compliance Guideline PCG 2020/5⁴ outline an ATO view that strictly interprets the text of the legislation, resulting in an outcome that goes beyond the underlying policy intent of the legislation and has the potential to inequitably and adversely impact the superannuation balance of every Australian.⁵ However, despite several professional bodies, including The Tax Institute, advocating against the ATO's approach, the ATO has maintained a strict interpretation of the legislation and its compliance approach. While this issue could have been somewhat addressed through a more purposive interpretation of the law, it is pleasing to see the recent announcement of proposed legislative changes to the NALI provisions.⁶

To minimise the occurrence of such issues, we consider it important for the ATO's processes to include procedures that ensure that a purposive approach to the legislation is in fact adopted across all matters, ranging from individual tax disputes to the development of new guidance material. We recommend that the IGTO enquires into the ATO's current approach and culture in this regard, and we recommend the implementation of procedural changes that will better achieve these goals. We refer to paragraphs 15 to 20 of the LCA's submission which includes an analysis of how a purposive approach to interpreting legislation should be undertaken. For example, it may be beneficial to require the ATO to implement checks and sign-off that the relevant action is consistent with the underlying intent of the legislation. Alternatively, a panel comprising ATO and industry stakeholders may be utilised to determine the underlying policy intent and design solutions to keep the intent at the forefront of ATO decision-making.

In addition to the suggestions listed in paragraph 28 of the LCA submission, we consider that the Public Rulings Panel, or equivalents, should be utilised for all public guidance material including Practice Statements of Law Administration and Practical Compliance Guidelines. We note that consideration may need to be given to the constitution of such panels, with processes in place to ensure that there is transparency over their deliberation and decision making.

³ Law Companion Ruling LCR 2021/2: *Non-arm's length income - expenditure incurred under a non-arm's length arrangement*.

⁴ Practical Compliance Guideline PCG 2020/5: *Applying the non-arm's length income provisions to 'non arm's length expenditure' - ATO compliance approach for complying superannuation entities*.

⁵ Refer to The Tax Institute's submissions to the ATO and Treasury detailing the impact of the issues for Australians. Available at <https://www.taxinstitute.com.au/tisubmission/the-tax-institute-submission-non-arm-s-length-income-and-expenses-lcr-2019/d3-and-pcg-2019/d6>, <https://www.taxinstitute.com.au/tisubmission/the-tax-institute-submission-reform-of-non-arm-s-length-income-and-expense-rules>, and <https://www.taxinstitute.com.au/tisubmission/the-tax-institute-submission-joint-submission-superannuation-non-arm-s-length-income-rules>.

⁶ The Tax Institute, (2022, March 22), *Super balances dodge a bullet as Government announces NALI/NALE changes*, available at <https://www.taxinstitute.com.au/timediarelease/super-balances-dodge-a-bullet-as-government-announces-nali/nale-changes>.

Further, we consider that the ATO's current processes would benefit from a greater involvement by external stakeholders. As noted above, The Tax Institute has concerns that the ATO's overall culture has shifted towards a stricter, black letter approach to the interpretation of legislation. The increased use of external parties in decision making processes will enable an exchange of knowledge and assist ATO officers to better understand the realities of business practices and challenges taxpayers face when applying the legislation. It will also instil greater public confidence in the ATO's decision making processes and introduce an extra, measured form of public scrutiny.

The Tax Institute also supports a careful consideration of the circumstances in which legislative references to the permissive 'may' are required to be read as the mandatory 'must'. While there is case law which points to specific instances where this is appropriate, we are not aware of any direct authority to suggest that Part IVA is one such category. The interpretative approach taken can significantly impact the outcome of the decisions made, or compliance approaches adopted, by the Commissioner. It is important to ensure that ATO officers do not adopt a blanket approach of reading all legislative references to 'may' as 'must', and instead undertake careful analysis in relevant context to ensure that the correct interpretation is adopted.

Raising public awareness

We support raising public awareness with respect to how the Commissioner exercises the GPA on a regular basis, the considerations the Commissioner is required to take into account, and the scope of the GPA. Feedback from our members indicates that taxpayers and tax professionals are not sufficiently familiar or aware about the GPA. We consider that increasing public awareness will aid taxpayers in understanding the extent of the assistance the Commissioner is able, or required, to provide them in the management of their tax affairs and resolution of their tax disputes.

Comparing equivalent powers in other jurisdictions

For the purposes of this Investigation, we also consider that the IGTO would benefit from inquiring into the processes and utilisation of equivalent powers to the GPA by tax administration agencies in other jurisdictions.

Our preliminary research indicates that Her Majesty's Revenue & Customs (**HMRC**) in the United Kingdom has a relatively wide discretion to undertake a range of actions which the Commissioners think is necessary or expedient in connection with, or incidental or conducive to, the exercise of their function of collecting and managing revenue.⁷ This empowers HMRC to form purposive approaches to anomalies and address instances of hardship, or manage cases where enacting amending legislation would occupy a disproportionate amount of Parliament's time and resources.⁸

⁷ Section 9 of the *Commissioners of Revenue and Customs Act 2005* (UK).

⁸ *R. v Her Majesty's Commissioners of Inland Revenue; ex parte Wilkinson* [2005] UKHL 30.

New Zealand's Inland Revenue (**IR**) has a general authority to oversee the tax system to collect the highest net revenue under the law as practicable, while balancing the IR's resourcing, promoting taxpayer compliance and reducing the compliance burden imposed on taxpayers.⁹ The IR is limited to exercising this authority in a manner consistent with the principles of statutory interpretation, affording utmost consideration to the text of the legislation.¹⁰ In practice, we understand that the IR's general powers of administration are usually applied in a narrower context than that of HMRC or indeed the ATO.

We consider that the flexibility provided to the Commissioner through the GPA falls somewhere between that provided to Commissioners of HMRC and the IR. Despite differences in the scope of the underlying powers, there are likely to be learnings that the Commissioner could adopt when considering use of the GPA. For example, we note that HMRC has recently undertaken certain reviews to identify shortcomings in its tax administration and make changes to ensure public confidence in its management of the United Kingdom's tax system.¹¹ The findings and commitments undertaken by HMRC may be of assistance when investigating new methods that better enable the Commissioner to take a broad approach to the GPA. These include:¹²

- the range of factors considered, and associated guidance provided, by HMRC when determining if a taxpayer has made a genuine mistake;
- improvements to the communication channels to better inform taxpayers of their rights and obligations;
- working with the private sector to identify and better support individuals who need extra assistance; and
- establishing and improving the processes of a Guidance Forum to identify strategic priorities for guidance and explore opportunities to strengthen the awareness of, and learnings from, the feedback process.

⁹ Subsections 6A(2) and (3) of the *Tax Administration Act 1994* (NZ).

¹⁰ Interpretation Statement IS 10/07 *Care and Management of the Taxes Covered by the Inland Revenue Acts*, available at <https://www.taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/interpretation-statements/is1007.pdf?modified=20200316220036>.

¹¹ HM Revenue and Customs '*Evaluation of HMRC's implementation of powers, obligations and safeguards introduced since 2012*', available at <https://www.gov.uk/government/publications/evaluation-of-hmrCs-implementation-of-powers-obligations-and-safeguards>; and the '*Tax administration framework review: supporting a 21st Century tax system*', available at <https://www.gov.uk/government/consultations/call-for-evidence-the-tax-administration-framework-supporting-a-21st-century-tax-system>.

¹² HM Revenue and Customs, '*Evaluation of HMRC's implementation of powers, obligations and safeguards introduced since 2012*' January 2021, page 8, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958474/Evaluation_of_HMRC_s_implementation_of_powers_obligations_and_safeguards_introduced_since_2012.pdf.

APPENDIX B

We have provided with our submission an extract of the redacted communications between a taxpayer and an ATO officer regarding a family trust election. We received written consent from the taxpayer to provide this information to the IGTO for the purposes of this Investigation. However, we will not publish this extract with our submission and respectfully request that these communications not be circulated further or published without an opportunity to consult and seek permission from the taxpayer.

APPENDIX C

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.