



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

**Lacey and Commissioner of Taxation (Taxation) [2019] AATA 4246 (18
October 2019)**

Division: TAXATION AND COMMERCIAL DIVISION

File Number: **2018/2853**

Re: **Raymond Hamilton Lacey**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Senior Member Ehrlich QC**

Date: **18 October 2019**

Place: **Melbourne**

The Tribunal affirms the decision under review.

.....[sgd].....

Senior Member Ehrlich QC

Catchwords

TAXATION – superannuation excess transfer balance – whether pension drawdown debits or reduces transfer balance account – where applicant submits led into error by misleading content on ATO website – whether Tribunal has jurisdiction to determine whether content misleading – decision under review affirmed

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)

Income Tax Assessment Act 1997 (Cth)

Superannuation (Excess Transfer Balance Tax) Imposition Act 2016 (Cth)

Taxation Administration Act 1953 (Cth)

Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth)

Cases

Australian Competition and Consumer Commission (ACCC) v viagogo AG [2019] FCA 544

Browne v Dunn (1893) 6 R 67

Cooper and Commissioner of Taxation, Re [2003] AATA 296

Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577

Hamed v Commissioner of Taxation, Re [2010] AATA 684

Hammerton and Comcare Australia, Re [1995] AATA 63

Perla and Secretary, Department of Social Services, Re [2014] AATA 724

Sharkey and Commissioner of Taxation, Re (2007) 95 ALD 509

Secondary Materials

Explanatory Memorandum, Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth)

REASONS FOR DECISION

Senior Member Ehrlich QC

18 October 2019

INTRODUCTION AND BACKGROUND

1. The Applicant, Mr Lacey, is an unrepresented litigant.
2. Mr Lacey's Application for Review of Decision dated 22 May 2018 (**Application**) concerns an excess transfer balance determination made under section 136-10 of the *Taxation Administration Act 1953* (**TAA 1953**) in respect of Division 294 of the *Income Tax Assessment Act 1997* (**Division 294**) (**ITAA 1997**).¹
3. Division 294 was introduced with effect from 1 July 2017 as part of a package of measures dealing with superannuation contained in the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016*. Relevantly, the Division places a cap on the amount that can be transferred to support a retirement phase superannuation income stream and thereby operates to "*limit the total amount of an individual's superannuation income streams that receive an earnings tax exemption*": section 294-5.
4. Such income is tax exempt. This should be contrasted with income earned on superannuation assets that are not supporting superannuation income streams, which is generally taxed at the concessional rate of 15%.
5. In summary, Division 294 operates as follows:
 - (a) Individuals who have retired may take their superannuation in the form of a lump sum or an income stream. To the extent that an individual's superannuation is used to pay retirement phase superannuation income stream benefits, income earned on the capital that supports the income stream is exempt from tax.

¹ Unless otherwise stated, references to sections are references to sections in the *ITAA 1997*.

- (b) An individual has a "*transfer balance account*" if the individual is a "*retirement phase recipient*" (within the meaning of section 294-20) of a "*superannuation income stream*" (within the meaning of section 307-70).
- (c) The table in section 294-25(1) sets out the circumstances in which there will be a credit to (or increase in) an individual's transfer balance account.
- (d) Conversely, the table in section 294-80(1) sets out the circumstances in which there will be a debit to (or reduction in) an individual's transfer balance account.
- (e) An individual has an "*excess transfer balance*" if the balance (**transfer balance**) in their transfer balance account exceeds their "*transfer balance cap*": section 294-30. The transfer balance cap for the 2017-2018 financial year was \$1.6 million (**transfer cap**): section 294-35(3).
- (f) If an individual has an excess transfer balance in their transfer balance account, the Commissioner of Taxation (**Commissioner**) may make a written determination called an "*excess transfer balance determination*" stating the amount of that excess transfer balance: section 136-10(1) and section 136-10(2) of the *TAA 1953*.
- (g) Notice of an excess transfer balance determination is *prima facie* evidence of the matters stated in the notice: section 136-10(5) of the *TAA 1953*.
- (h) If dissatisfied with an excess transfer balance determination, the individual may object against the determination in the manner set out in Part IVC: section 136-15 of the *TAA 1953*.
- (i) If, a determination having been made, the individual does not notify the Commissioner that there has been a debit to their transfer balance account within 60 days, the Commissioner must issue a commutation authority to the superannuation fund: section 136-55 of the *TAA 1953*.
- (j) Within 60 days the superannuation fund must commute an amount equal to the amount set out in the commutation authority: section 136-80 of the *TAA 1953*. If the superannuation fund does not do so, the superannuation income stream will cease to be in the retirement phase from that time, and so will no longer qualify for the earnings tax exemption: section 307-80(4).

- (k) Where an individual has an excess transfer balance for a period, they are liable to pay excess transfer balance tax with respect to that “*excess transfer balance period*” as imposed by the *Superannuation (Excess Transfer Balance Tax) Imposition Act 2016* for the period: section 294-230(1).
 - (l) The individual is liable to pay excess transfer balance tax regardless of whether or not the Commissioner has issued an excess transfer balance determination: see the note to section 136-10(1) of the *TAA 1953*.
6. It is relevant to observe that, as part of the transitional provisions, a general grace period of 6 months applied from 1 July 2017 to 31 December 2017, if on 1 July 2017 the individual was over the transfer cap by \$100,000 or less. This allowed individuals that period of time to bring their transfer balance within the transfer cap of \$1.6 million.
7. Mr Lacey elected to take part of his superannuation in the form of an income stream in accordance with Division 294. It is not in dispute in this proceeding that:
- (a) at relevant times, Mr Lacey was a retirement phase recipient of a superannuation income stream and so had a transfer balance account; and
 - (b) as at the end of 30 June 2017, Mr Lacey’s transfer balance account was over \$1.6 million by the sum of \$63,607.73.
8. This meant that the grace period applied to Mr Lacey, and that it operated so as to permit Mr Lacey to bring his transfer balance account within the transfer cap of \$1.6 million by the end of 31 December 2017; and thereby suffer no adverse taxation consequence.
9. It is now common ground that Mr Lacey did not, by the amount of \$33,607.73, bring his transfer balance account within the transfer cap of \$1.6 million by the end of 31 December 2017. As expanded upon below, it is the disputed cause of that partial failure which is at the heart of the controversy in this proceeding.
10. The events relevant to this proceeding which occurred prior to 31 December 2017 are as follows:
- (a) **As at the end of 30 June 2017:** Mr Lacey's transfer balance was \$1,663,607.73.
(T4)

- (b) **4 October 2017:** Mr Lacey's superannuation fund manager (Australian Super) lodged a Member Contribution Statement with the Australian Taxation Office (**ATO**) showing that the value of the superannuation interest supporting Mr Lacey's superannuation income stream, and therefore the transfer balance in his transfer balance account, was \$1,663,607.73 as at the end of 30 June 2017. (T3)
 - (c) **14 December 2017:** Mr Lacey, knowing that this transfer balance was over the transfer cap by \$63,607.73, transferred \$30,000 from his transfer balance account to his accumulation account (**14 December transfer**). (T5)
11. It is not now in dispute in this proceeding that, as at 14 December 2017 when he transferred \$30,000 from his transfer balance account to his accumulation account, Mr Lacey:
- (a) had received, or knew he would by 31 December 2017 receive, pension drawdowns totalling \$41,589.96 from his superannuation income stream (**pension drawdowns**);²
 - (b) *believed* that the pension drawdowns would, when combined with the 14 December transfer, operate to bring his transfer balance account within the transfer cap of \$1.6 million by the end of 31 December 2017.
12. The events which occurred after 31 December 2017 are as follows:
- (a) **11 January 2018:** The ATO issued a superannuation excess transfer balance determination requiring Mr Lacey to commute the remaining amount of \$36,422.08 from his superannuation income stream by 13 March 2018. The amount comprised \$33,607.73 (excess transfer balance) and \$2,814.35 (excess transfer balance earnings). (T6)
 - (b) **2 February 2018:** Mr Lacey lodged an objection to the excess transfer balance determination on the ground that he had removed \$41,589.96 from his superannuation income stream by way of the pension drawdowns before 31 December 2017. (T7)

² At hearing the Commissioner accepted that the pension drawdowns had been made and received in full on or before 31 December 2017.

- (c) **24 April 2018:** The ATO disallowed Mr Lacey's objection (**objection decision**). (T2) (T10)
 - (d) **2 May 2018:** The ATO issued a commutation authority to Australian Super requiring it to commute the amount of \$36,422.08 with respect to Mr Lacey's account by 2 July 2018. (T11)
 - (e) **18 May 2018:** Mr Lacey commuted an amount of \$33,608.00 from his superannuation income stream.
 - (f) **22 May 2018:** Mr Lacey applied to the Tribunal for review of the Commissioner's objection decision pursuant to the Application. (T1)
 - (g) **9 June 2018:** The Commissioner issued an adjusted commutation authority to Australian Super to commute the remaining excess of \$2,814.08. (T12)
 - (h) **25 June 2018:** Australian Super commuted \$2,814.08 from Mr Lacey's superannuation income stream in compliance with the adjusted commutation authority issued on 9 June 2018.
13. As can be seen from the above, on the Commissioner's determination Mr Lacey's transfer balance account still exceeded the transfer cap (\$1.6 million) by the sum of \$36,422.08 as at 31 December 2017. In consequence:
- (a) the Commissioner required the remaining amount of \$36,422.08 to be commuted from his superannuation income stream;
 - (b) Mr Lacey commuted an amount of \$33,608.00 from his superannuation income stream on 18 May 2018;
 - (c) because the full sum of \$36,422.08 had not then been commuted in full, on 9 June 2018³ the Commissioner required Australian Super to commute the remaining excess of \$2,814.08;

³ It was not explained why the Commissioner did this prior to the 'deadline' of 2 July 2018 but nothing turns on this.

- (d) on 6 August 2018 the Commissioner issued a notice of assessment for excess transfer balance tax of \$596.20 to Mr Lacey, being 15% of the notional earnings on the excess transfer balance (**NOA**). The NOA is an assessment within the meaning of section 14ZZK(b) of the TAA 1953.

14. Thus, this proceeding ultimately concerns the assessed sum of \$596.20.

15. The Application was commenced on 22 May 2018 and the NOA was not issued until 6 August 2018, which was after the 60 day period referred to in section 14ZZC(1)(d) of the TAA 1953 had expired.⁴ By his Application Mr Lacey made clear that he was seeking review of “any additional tax” that flowed from the excess transfer balance determination. In this regard, his Application relevantly stated as follows:

“ATO did not allow an objection to a superannuation excess transfer balance determination.

That disallowance arose from the ATO adversely interpreting the instructions on the ATO website in regard to removal of excess amounts.

Whilst the applicant removed sufficient funds to comply , the ATO held that 'removal' meant 'commutation'. The relevant website did not make that distinction.

This appeal seeks to set aside the finding in ATO objection Reference No 1-DXJ68IR of 24 April and any additional tax arising from that.”

16. It was apparent from the Amended Statement of Facts, Issues and Contentions lodged by the Commissioner that the Commissioner proceeded on the basis that the “correctness of the NOA” can be determined in this proceeding.⁵

⁴ It was not explained at hearing why the Commissioner did not issue the NOA contemporaneously with the objection decision (dated 24 April 2018), noting that the ATO’s “Reasons for our decision”, which accompanied the objection decision, stated that “A separate ‘Excess transfer balance tax of assessment’ detailing the tax amount payable will issue to you shortly” (underlining added). (T2)

⁵ At paragraphs 10(2) and 11 of his ASFIC, the Commissioner stated as follows:

“10. The issues in this proceeding are:

...

(2) if the excess transfer balance determination was correctly issued, whether the Commissioner’s calculation of the superannuation excess transfer balance tax of \$596.20 as set out in the notice of assessment (NOA) was incorrect.

11. It is noted in relation to issue (2) that the NOA was issued after Mr Lacey filed his “Application for Review of Decision” with the Tribunal on 22 May 2018, although Mr Lacey did indicate in his application for review that his appeal seeks to set aside “any additional tax arising”. The Commissioner does not raise any procedural or jurisdictional objection to the Tribunal considering the correctness of the NOA.”

17. Strictly speaking, that could not be so because, whilst Mr Lacey lodged an objection to the NOA on or about 15 August 2018, that objection has not been determined⁶; such that there is no reviewable objection decision pertaining to the NOA and, it follows, no jurisdiction for the Tribunal to affirm, set aside or vary the NOA. The Tribunal notes that it is trite law that a court or tribunal cannot be invested with jurisdiction by the entreatment or agreement of parties. The Tribunal either has jurisdiction or it does not.
18. The Tribunal raised this issue with the Commissioner at the commencement of the hearing on 23 August 2019; and at the conclusion of the hearing made a direction requiring the Commissioner to file a submission addressing it, together with the related issue of whether the Application had been rendered inutile by the issue of the NOA.⁷
19. By its subsequent submission, the Commissioner acknowledged that the Tribunal did not have jurisdiction to affirm, set aside or vary the NOA; but he now submitted that section 14ZZL of the TAA 1953 would operate so as to require him to withdraw the NOA if the Tribunal was to set aside the objection decision and allow Mr Lacey's objection:
- "Whilst the Tribunal does not have jurisdiction to affirm, set aside or vary the said assessment, if the Tribunal decides to set aside the Decision here under review and substitute for it a decision to allow Mr Lacey's objection against the ETB Determination, then to give effect to the Tribunal's decision as required by s 14ZZL, the Commissioner will be required to amend the ETB Determination, adjust Mr Lacey's transfer balance account to reflect that the superannuation income stream benefit payments (drawdowns) created transfer balance debits and, significantly for this question, amend the assessment. This reflects the words of s 14ZZL which require the Commissioner to "take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision". Therefore, this proceeding has not been rendered inutile."*
20. I accept that section 14ZZL will so operate, such that if the Tribunal was to set aside the objection decision the Commissioner would be bound to amend the NOA. I proceed on that basis.

⁶ From what the Tribunal was informed at hearing the objection procedure has been held in abeyance pending the hearing and determination of this proceeding.

⁷ Direction dated 23 August 2019. The Submission was received on 20 September 2019. Mr Lacey did not exercise his right to file a reply submission.

THE TRIBUNAL'S REVIEW FUNCTION

21. For reasons that will become evident, it is necessary to make clear that the Tribunal has a limited review function.⁸

22. Section 14ZZK of the TAA 1953 relevantly provides as follows:

“TAXATION ADMINISTRATION ACT 1953 - SECT 14ZZK

Grounds of objection and burden of proof

On an application for review of a reviewable objection decision:

- (a) the applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and*
- (b) the applicant has the burden of proving:*
 - (i) if the taxation decision concerned is an assessment--that the assessment is excessive or otherwise incorrect and what the assessment should have been; or*
 - (ii) in any other case--that the taxation decision concerned should not have been made or should have been made differently.”*

23. Further, merits review under the *Administrative Appeals Tribunal Act 1975 (AAT Act)*, in which the Tribunal substitutes its own decision for the decision of the original decision-maker, is an exercise of the administrative power of the Commonwealth and not of the judicial power of the Commonwealth.

24. This limited administrative jurisdiction (authority to decide) is itself not at large because the jurisdiction conferred on the Tribunal by sections 25 and 43 of the *AAT Act* requires the Tribunal to stand in the shoes of the primary decision-maker so as to determine for itself, on the material before it, the decision which it considers should be made in the exercise of the powers conferred on the primary decision-maker. The Tribunal exercises the same powers as the primary decision-maker, subject to the same constraints. The Tribunal must address the same question the primary decision-maker was required to address and that question determines the considerations that must or must not be taken into account by the Tribunal in reviewing that decision.

⁸ See generally *Re Hamed v Commissioner of Taxation* [2010] AATA 684.

25. It is true that the Tribunal's function often involves the exercise of discretion. But that involves the exercise of discretion that was open at law to the original decision maker in the making of the decision being reviewed. What that means is that, to the extent the law confers jurisdiction on the Tribunal, the Tribunal can exercise the same powers and discretions that the law confers on the original decision maker in that narrow process.
26. This is reflected by the phrase which is usually used to describe the decision-making function of the Tribunal, namely that the Tribunal must make the "*correct or preferable decision*": *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591 per Bowen CJ and Deane J. The conjunction is used to accommodate the difference between a matter susceptible of only one decision, in which the "*correct*" decision must be made, and a decision which requires the exercise of a discretion or a selection between more than one available decision, in which case the word "*preferable*" is appropriate.

MR LACEY'S SUBMISSIONS

27. In his Application, as elaborated upon in his second Statement of Issues, Facts and Contentions lodged on 26 April 2019 (**SFIC**), Mr Lacey put his case in two ways, summarised as follows.

First Submission

28. First, Mr Lacey submitted that the pension drawdowns did operate in law, when combined with the 14 December transfer, to bring his transfer balance below the transfer cap during the grace period.
29. Mr Lacey did not press this submission at hearing. He was right not to do so because the submission was incorrect as a matter of law. A pension payment does not cause a debit to, or reduction in, a transfer balance account because it is not covered by any of the items in section 294-80(1). Mr Lacey did not submit otherwise at hearing.
30. The position applying in respect of the pension drawdowns should be contrasted with the 14 December transfer, which did fall within item 1 in section 294-80(1) because it involved a transfer of \$30,000 from his transfer balance account to his accumulation account. Item 1 provides for a debit if:

“you receive a superannuation lump sum because a superannuation income stream of which you are a retirement phase recipient is commuted, in full or in part.”

31. It follows that the transfer of \$30,000 from Mr Lacey’s transfer balance account to his accumulation account was a relevant *commutation*.
32. However, item 1 had no like application to the receipt of the pension drawdowns because it did not involve receipt of a *superannuation lump sum* as defined by the Act.⁹ To the contrary, pension drawdowns are superannuation income stream benefits and therefore excluded from the relevant definition of superannuation lump sum.
33. Nor was there any *commutation* involved in the receipt of the pension drawdowns in any event.¹⁰
34. This result is consistent with the scheme of the reform. As paragraph 3.100 of the *Explanatory Memorandum to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* relevantly explains:

“Superannuation income stream benefit payments that reduce the value of a superannuation interest that supports a superannuation income stream (pension drawdowns) are not debited from the individual’s transfer balance. This reflects the expectation that, once an individual has utilised their cap, the value of the individual’s retirement phase assets will eventually decline as the individual uses this income to support themselves in their retirement.”

35. It follows that Mr Lacey’s first submission would have been rejected had it been pressed at hearing. To the extent necessary, I do reject it.

⁹ Which has the following meaning given by section 307- 65:

- “(1) A superannuation lump sum is a superannuation benefit that is not a superannuation income stream benefit (see section 307-70).
- (2) Treat a lump sum payment arising from a partial commutation of a superannuation income stream as a superannuation lump sum for the purposes of this Act (other than Subdivision 295-F).”

¹⁰ “Commutate” is not defined in the legislation and so must take its ordinary meaning. Previous decisions in the Tribunal have found that a commutation has the effect of changing the essential nature of periodical pension payments into something else: *Re Hammerton and Comcare Australia* [1995] AATA 63; *Re Cooper and Commissioner of Taxation* [2003] AATA 296.

Second Submission

36. Mr Lacey's second, and primary, submission was that he was misled by the "*poor use of language*" used on the ATO website (ato.gov.au) and in consequence was led into error; his error being a belief that the pension drawdowns would operate to bring his transfer balance below the transfer cap when combined with the 14 December transfer.
37. In summary, Mr Lacey claimed that his error was *caused* by his reliance on what he submitted to be misleading content on the ATO website; and that as a result he should be relieved of consequence – relevantly being, in the case of this second submission, "*remission or crediting of Tax paid in the matter.*"
38. At paragraphs 6 and 7 of his SFIC he contended as follows:
- "The ATO surely understand that the general public rely on their website. As per the ATO website 'How we deal with your objection' at page 3 'Our commitment to you' includes the following: 'If you follow our information and it turns out to be incorrect or misleading and you make a mistake as a result, we will take that into account when determining what action we will take.' Clearly the ATO have not met that commitment in this case, albeit that the 'mistake' was taking the ATO's advice.*
- If the only way to achieve compliance with the transitional provisions relating to Transfer balance caps is to transfer funds to another account, then the word 'commute' should have been used, rather than 'remove'. The ATO have misled due to their poor use of language."*
39. The original T-documents did not contain the relevant web document relied upon by Mr Lacey and the web address he provided (<https://www.ato.gov.au/individuals/super/super-changes/New-transfer-balance-cap-for-retirement-phase-accounts/>) was unresponsive and returned the message "*page not found*" when loaded into a web browser.
40. In consequence, pursuant to a request from the Tribunal, the Commissioner provided the Tribunal with a copy of the iteration of the relevant document that was in use on the ATO website during December 2017 (from approximately 30 August 2017 to approximately 27 January 2018).
41. The document (which I will call the **ATO document**) consists of five pages and is headed "*New transfer balance cap for retirement phase accounts.*" It was placed into evidence at hearing together with all earlier and subsequent iterations including, as elaborated upon below, the current iteration dated 3 July 2018.

42. The relevant content of the ATO document, which appeared on page 1 under the heading “*What is the transfer balance cap?*”, read as follows:
- “If you exceed your transfer balance cap, you may have to remove the excess from one or more retirement phase income streams, and pay tax on the notional earnings related to that excess.”*
43. Similarly, on page 3 the following was stated in a text box under the heading “*What you need to do from 1 July 2017*”:
- “If, on 1 July 2017, you are over your \$1.6 million cap by \$100,000 or less and you remove this excess by 31 December 2017, then you will not have to pay excess transfer balance tax or account for notional earnings on the excess.”*
44. Specifically, as noted above, Mr Lacey complains about the use of the word “remove” instead of the word “commute”.
45. By his SFIC, and at hearing, Mr Lacey sought to rely upon determinations of misleading and deceptive conduct made by courts under statutory consumer protection laws. Mr Lacey specifically relied upon the decision of Burley J in *Australian Competition and Consumer Commission (ACCC) v viagogo AG* [2019] FCA 544 – being a case involving misleading and deceptive content published on a website.
46. At the commencement of the hearing I explained to Mr Lacey that the Tribunal is not a court and that my preliminary view was that it had no jurisdiction to entertain or determine an application against the Commissioner for misleading and deceptive conduct.
47. Notwithstanding the preliminary jurisdiction issues I put to Mr Lacey at the commencement of the proceeding, no application was made by the Commissioner to deal with Mr Lacey’s second submission on a summary or preliminary basis.
48. Rather, in opening submissions the Commissioner submitted as follows:
- “SENIOR MEMBER: Well, while we’re on this, and I mentioned this to Mr Lacey, are you proposing to join issue on that? Because it seems to me –is it the Commissioner’s position that I have no jurisdiction in relation to such questions and that it’s not relevant to the determination before me or does the Commissioner take the view that it is relevant?*
- COUNSEL: The Commissioner takes the view that what is on his website is not binding on him. That’s a matter of law.*

SENIOR MEMBER: No, I understand that but is it – it's a different question. The question I'm asking you is it a matter of any relevance to the decision that I have to adjudicate upon?

COUNSEL: There are two points I would make in relation to that. The first one is no. But the second one is that Mr Lacey has made some accusations about what is on the website of the Commissioner and there is a concern certainly on this side of the Bar table, this end of the Bar table, that if those accusations are completely ignored it would have two negative effects. One is they would be left out there without being answered and that could affect the perception of what is in them. And the other thing is that Mr Lacey – and if I may, this is also an issue. Mr Lacey is here to be heard and one aspect I would suggest of Mr Lacey being heard is to also hear the arguments against, so that there is a meeting, if that's what he desires, on that issue.”¹¹

49. No application being made, Mr Lacey therefore gave evidence and was cross-examined.

MR LACEY'S EVIDENCE

50. In circumstances where Mr Lacey was cross-examined, I have concluded that it is appropriate, especially out of fairness to Mr Lacey, to set out my positive findings as to his evidence, notwithstanding the final jurisdictional conclusion I have come to, as expressed below.
51. I accept Mr Lacey as a witness of truth. Mr Lacey answered questions directly and he made concessions that might have been seen by him as against his interests including, for example, the possibility of his looking at the documents that were linked to the ATO document.
52. Mr Lacey's evidence-in-chief was succinct. He gave evidence of the events of December 2017 to the following effect:
- (a) on 14 December he knew his transfer balance was over the transfer cap by about \$63,000;
 - (b) he knew he had to do something about it by the end of the calendar year;
 - (c) he knew that pension payments of \$41,000 would be transferred to him by 15 December;

¹¹ Transcript page 12 lines 25-47.

- (d) he looked at the ATO website to seek information advice about what to do;
- (e) he read the boxed information, as set out in the ATO document, as to what to do if, on 1 July 2017, you are over your \$1.6 million cap by \$100,000 or less;
- (f) on that basis he shifted \$30,000 out of the pension fund into the accumulation fund and relied upon the pension payments to make sure he would otherwise bring himself under the transfer cap by 31 December.

53. Because it is short in compass, it is worthwhile setting out Mr Lacey's relevant evidence:

"I shifted \$30,000 out of the pension fund into the accumulation fund, as a result of doing some sums saying I had 41,000, I had to get 63,000 or something as I recall. So, give a bit of margin, I get 30.

...The pension – the pension payments come on the 15th. By the 15th the 41,000 would have transferred. So if you take 41,000 from 63,000 which was the amount that had to be dealt with, you get about 30 odd – 27 or something, round it out to 30 to make sure there's no mistakes. And that's what I did.

...I was aware I had to do something by the end of the financial – by the end of the calendar year. So I went and looked at the website and sought an information advice what to do.

...What you need to do from 1 July 2017. And the second box says,

'If you are already prior to July receiving an income stream from your super, action. If on 1 July 2017 you are over your \$1.6m cap by 100,000 or less and you remove this excess by 31 December, then you will not have to pay excess transfer balance tax or account for notional earnings on the excess'

*If they had said, 'If you're over and you commute', I would've commuted.'*¹²

54. None of this evidence-in-chief was challenged in cross-examination.

55. At the conclusion of the cross-examination I asked Counsel for the Commissioner, so as to ensure compliance with the rule in *Browne v Dunn*¹³, whether Mr Lacey's evidence about being mistaken was challenged as false. Counsel responded that his evidence was not so challenged and that there was no suggestion that Mr Lacey was attempting to be dishonest. Nor was it submitted that his evidence was reconstructed.

¹² Transcript page 24 line 30 to page 25 line 19.

¹³ (1893) 6 R 67.

56. In closing submissions, Counsel for the Commissioner properly confirmed, as one would expect from Counsel of Dr Jacques' standing, that Mr Lacey's credit, and the truth of his evidence, was not attacked.
57. In my view this was a proper course because submissions to the contrary would have been unsound, given that Mr Lacey had commuted \$30,000 on 14 December 2017.
58. The only rational explanation for Mr Lacey's failure to commute a further \$36,607.73 on 14 December 2017 was a *genuine belief* on his part that the pension payments would, in combination with the 14 December transfer, operate to bring his transfer balance below the transfer balance cap.
59. Specifically, there was nothing to be gained, and tax to be paid, by Mr Lacey determining only to commute \$30,000 and not the full amount of \$63,607.73. Rhetorically, if not mistaken, why else would he have not commuted a further \$36,422.08 on 14 December?
60. I therefore find that Mr Lacey did, on 14 December 2017, have a genuine belief that the pension payments would, in combination with the 14 December transfer, operate to bring his transfer balance below the transfer balance cap and that he held his belief as a consequence of reading the ATO document. Mr Lacey thereby acted under a mistake, and I so find.
61. This is not, however, a finding that the ATO document was *objectively* misleading. For reasons expressed below, it is not jurisdictionally open to me to make that finding and I make no finding that the ATO document was objectively misleading.
62. Having determined not to challenge Mr Lacey's credit and subjective belief, the cross-examination focused on demonstrating that Mr Lacey ought not to have been mistaken.
63. The cross-examination thus went to the question of *objective* mistake. This was primarily done by putting to Mr Lacey that he may have looked at other documents on the ATO website, both prior to and in December 2017, that objectively made clear that pension drawdowns did not debit the transfer balance account.

64. Mr Lacey was specifically taken to one document which is referred to on page 5 of the ATO document under the heading "See also:". That document, which is one of five so listed, is "LCG¹⁴ 2016/9 Superannuation reform: transfer balance cap"(LCG 2016/9).

65. The relevant part of the ATO document read as follows:

"See also:

- *Transfer balance cap (including what counts towards your cap)*
- *LCG 2016/8 Superannuation reform: transfer balance cap and transition-to-retirement reforms: transitional CGT relief for superannuation funds*
- *LCG 2016/9 Superannuation reform: transfer balance cap*
- *LCG 2016/10 Superannuation reform: defined benefit income streams – non-commutable, lifetime pensions and lifetime annuities*
- *LCG 2017/1 Superannuation reform: defined benefit income streams – pensions or annuities paid from non-commutable, life expectancy or market-linked products"*

66. These documents all appeared as a link on the ATO document when viewed online by Mr Lacey in December 2017.

67. Mr Lacey had earlier given evidence that it was possible that he may have looked at the documents there linked but he could not recall. That earlier evidence was as follows:

"And specifically to page 5 and the bullet points I asked you about earlier?---Yes.

*And from what you said now, it's quite possible that you did look at those documents but you don't remember doing so, isn't it?---It is – yes, it is possible, yes. But it's not something that I can recall."*¹⁵

68. LCG 2016/9 is 17 pages long and contains some 107 paragraphs. Mr Lacey was taken to paragraph 25 which reads as follows:

"Consequently, making a large pension draw-down does not reduce your transfer balance and would not bring you under your transfer balance cap. You must

¹⁴ "LCG" is an acronym for Law Companion Guideline.

¹⁵ Transcript, page 33 lines 33-38.

commute an amount of your superannuation income stream in order to reduce your transfer balance so that you no longer exceed your transfer balance cap.”

69. He was also taken to other parts of LCG 2016/9.¹⁶

70. But having taken Mr Lacey to this document, Mr Lacey gave evidence that he had never seen it. The relevant evidence was as follows:

“SENIOR MEMBER: Before you do that, are you putting to Mr Lacey that he saw this document in December?

COUNSEL: Mr Lacey has indicated that he might have?---I have indicated that it's not probable - it is possible - and when I read this I can assure you I haven't.”¹⁷ (emphasis added)

71. That evidence was not challenged and I accept it. Again, if Mr Lacey had read paragraph 25 then there is no reason to believe that he would not have acted upon it and commuted the full amount of \$63,607.73. Indeed, his evidence was to that effect.

72. Paragraph 25 is, of-course, a double-edged sword for the Commissioner, because it immediately demonstrates how simple it would have been for the Commissioner to place a similar statement in the body of the ATO document to which LCG 2016/9 is linked.

THE TRIBUNAL HAS NO JURISDICTION TO ADDRESS THE ISSUE OF MISLEADING CONDUCT

73. The Tribunal has determined that it does not have jurisdiction to consider Mr Lacey's second submission and that it is therefore not appropriate for the Tribunal to determine whether the ATO document was or was not *objectively* misleading – either when looked at in isolation, or together with other documents linked to it or otherwise available to Mr Lacey on the ATO website in December 2017.

74. This is not only because it is irrelevant to the limited review function under section 14ZZK of the *TAA 1953*. It is also because, lacking such jurisdiction, the Tribunal has no legal framework or standard upon which to address or consider the issue.

¹⁶ Mr Lacey was not taken to the other linked documents and for that reason the Tribunal has not had regard to them.

¹⁷ Transcript page 45 lines 22-27.

75. The Tribunal is not a court as defined under any Commonwealth or State consumer protection statutes and neither does it have any analogous general law jurisdiction: see *Re Perla and Secretary, Department of Social Services* [2014] AATA 724.
76. Whilst there are circumstances where this Tribunal is empowered to make determinations as to whether or not conduct was misleading and deceptive, such jurisdiction only arises because of the specific decision under review – for example, whether or not banning orders should be imposed on licensed financial advisers for alleged contraventions by them of consumer protection laws.
77. But in no circumstance does the Tribunal have jurisdiction to enquire into the general conduct of a decision-maker *per se*.
78. Specifically, neither the *TAA 1953* nor the *AAT Act* gives the Tribunal jurisdiction to enquire into, or adjudicate upon, an allegation that a taxpayer has been led into error because the Commissioner has engaged in misleading or deceptive conduct. This is so both in respect of an application for review of a reviewable objection decision and generally.
79. In *Re Sharkey and Commissioner of Taxation* (2007) 95 ALD 509 Senior Member Taylor SC said that the burden placed on a taxpayer is to prove that the Commissioner's decision 'should' have been different and in that sense is not an appropriate result of the exercise of the statutory power or discretion. That statement is correct and I apply it.
80. Discretionary considerations can only arise in the limited way referred to above. The Tribunal is only empowered to apply the legal framework that overlays the decision under review. The Tribunal's role is to reach the correct or preferable decision on the material before it, applying the law. In making that decision, the Tribunal exercises the same powers and discretions – and is bound by the same limits – as the original decision-maker.
81. It follows that the Tribunal cannot, as a matter of jurisdiction, review the objection decision on the basis of Mr Lacey's second submission. The Tribunal must therefore reject Mr Lacey's second submission because it is not an avenue of review open to Mr Lacey

under the *AAT Act* or the *ITAA 1997*. Specifically, it is irrelevant to section 14ZZK of the *TAA 1953*.

82. It is relevant to observe, however, that the current iteration of the ATO document has been significantly amended. The relevant paragraph under examination in this proceeding now reads as follows:

"If you exceed your transfer balance cap, you have to rectify the excess by making a lump sum commutation from one or more retirement phase income streams. You can usually transfer the lump sum into an accumulation account; otherwise it can be withdrawn from the super system. You may have to pay tax on the notional earnings related to that excess."

83. Although the current iteration does not expressly say that pension drawdowns do not reduce transfer balance, it is objectively a much more instructive document than its predecessor. It could not likely cause a taxpayer to believe that a pension drawdown qualified as a *lump sum commutation*.
84. In final submissions I asked Counsel for the Commissioner about the changes in the current iteration and was informed that "[w]e can only speculate as to why those words have changed. There is no evidence as to that..." But as I immediately observed,¹⁸ the Commissioner does know why the change was made; and the change provides fuller and more complete information to taxpayers. An obvious inference arises.
85. Relevantly, if the current iteration was in use in December 2017 it is unlikely that Mr Lacey would have made the mistake he complains about. As I have already observed, Mr Lacey gave unchallenged evidence to the effect that had the word commute been used he would not have erred and would have commuted the full amount of \$63,607.73.
86. In this circumstance, it is to be regretted that significant Commonwealth resources have been expended in seeking to defend the content of a document (the ATO Document) where the Tribunal lacked relevant jurisdiction to determine whether it was, or was not, misleading and where the document has, in any event, been replaced by a much more informative iteration.

¹⁸ Transcript page 61 lines 10-16.

DECISION

87. For the above reasons the Tribunal rejects both submissions made by Mr Lacey.
88. It follows that Mr Lacey has failed in proving that the taxation decision under review should not have been made or should have been made differently within the meaning of section 14ZZK of the TAA 1953.
89. The Tribunal therefore affirms the decision under review.

*I certify that the preceding
eighty-nine (89) paragraphs are a
true copy of the reasons for the
decision herein of Senior Member
Ehrlich QC*

....[sgd].....

Associate

Dated: 18 October 2019

Date of hearing:	23 August 2019
Date final submission received	20 September 2019
Applicant:	Self-represented
Counsel for the Respondent:	Dr Julianne Jaques
Solicitor for the Respondent:	Mr Jack Clarke Review and Dispute Resolution, Australian Taxation Office