PS LA 2009/4 - When a proposal requires an exercise of the Commissioner's powers of general administration

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PS LA 2009/4

When a proposal requires an exercise of the Commissioner's powers of general administration

This Law Administration Practice Statement explains when, and how, the Commissioner's powers of general administration can be exercised.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

If taxpayers rely on this practice statement, they will be protected from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What is this practice statement about?

This practice statement outlines:

- the Commissioner's powers of general administration (GPA)
- a purposive interpretation of the law
- circumstances in which the Commissioner's GPA may be properly exercised
- the appropriate authority for the exercise of the Commissioner's GPA, and
- when and how you seek guidance and advice on whether it is appropriate for the Commissioner's powers to be exercised.

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.[3] 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 unforseen 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, such as the allocation of compliance resources more broadly recognised as practical compliance approaches.

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.

[1] These include section 8 of the *Income Tax Assessment Act 1936* for the income tax laws, section 43 of the *Superannuation Guarantee (Administration) Act 1992* for the superannuation guarantee law, section 7 of the *Excise Act 1901* for the excise laws, section 3 of the *Fringe Benefits Tax Assessment Act 1986* for the fringe benefits tax law and section 356-5 of Schedule 1 to the *Taxation Administration Act 1953* for the indirect tax laws (including the goods and services tax law and the fuel tax law).
[2] See the More information section of this practice statement.
[3] See section 15AA of the *Acts Interpretation Act 1901*.
[4] Under administrative law, actions by a public authority which are outside the terms of its express powers, or not at least incidental to, or consequential upon, that express authority, are invalid.
[5] See section 370-5 of Schedule 1 to the *Taxation Administration Act 1953*.

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]

6. What is a practical compliance approach?

Consistent with the ATO's intent to concentrate our efforts on matters that pose the highest risk to efficient and effective administration of the tax and superannuation systems, we also understand that most people want to do the right thing. Given this, we may choose to not allocate compliance resources or take other compliance action to examine certain interactions with the tax and superannuation systems so we can better utilise our limited resources for an optimal outcome.

Refer to publications such as the Practical Compliance Guideline PCG 2017/2 *Simplified transfer pricing record-keeping options*, the various examples of administrative safe harbours and the LAPS (GA) series, published on the ATO Legal database, for examples of practical compliance solutions.

[6] *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 at 562-563 (*Carltona*).

[7] The principle that a delegate's functions may be so numerous and varied that he or she could never personally attend to them all and, as a matter of administrative necessity, may allow others to perform them on their behalf has been recognised in Australia in *O'Reilly v Commissioners of State Bank of Victoria* [1983] HCA 47 (*O'Reilly*), where the High Court accepted the principle set out in *Carltona*.

[8] Refer to the *Code of Settlement* and see Law Administration Practice Statements PS LA 2015/1 *Code of settlement* and PS LA 2007/6 *Guidelines for settlement of widely based tax disputes*.

[9] Refer to Law Administration Practice Statement PS LA 2011/3 *Compromise of undisputed tax-related liabilities and other amounts payable to the Commissioner*, and note that these powers can only be exercised in the best interests of the Commonwealth.

[10] See sections 9 to 13 of this practice statement.

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.

Example 1: selection of taxpayers for audit for an active compliance project

Guideline 1.4.1 in the *Taxation Authorisations Guidelines* provides that officers at certain levels can list or select particular taxpayers for audit in the name of the Deputy Commissioner. This is an exercise of the Commissioner's GPA done on the basis of implied

[11] See the More information section of this practice statement for a link to the GPA CoP eLibrary wiki and a list of GPA CoP members.

[12] Via the TCN technical engagement process outlined on the TCN SharePoint page.

authority. No further guidance would be required in this or other similar circumstances.

Example 2: deciding not to undertake active compliance action regarding a particular class of taxpayers or industry group in respect of prior years or periods, where the ATO identified that those taxpayers or industry group have not complied with the law

For example, a business line may identify that taxpayers in a particular industry group have incorrectly claimed tax deductions for certain expenses. A decision not to pursue compliance action in relation to prior income years for that particular industry group may not be a decision necessarily made in the course of usual duties. The decision may be contentious. It could result in risks to reputation and/or revenue, as well as impact the integrity of the tax system. In this or similar circumstances further guidance should be sought.

Exceptions

A decision not to undertake compliance action in respect of prior years or periods does not require further guidance if:

- the decision is agreed to, or made by, the Policy Implementation Forum, see Law Administration Practice Statement PS LA 2007/11 *Administrative treatment of taxpayers affected by announced but unenacted legislative measures which will apply retrospectively when enacted*, or
- the decision is made in accordance with Law Administration Practice Statement PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only*.

Example 3: deciding not to pursue compliance action for prior years against a specific taxpayer

Generally, this is an exercise of the Commissioner's GPA undertaken on the basis of implied authority. The decision would normally be based on a risk assessment, existing business line guidelines or criteria and made in the ordinary course of the relevant tax officer's duties. There may however be examples where, due to the nature or profile of a specific taxpayer, a matter should be put to the Commissioner for consideration.

9. How do I put a GPA proposal to the Commissioner?

Appendix A of this practice statement provides a summary of the process for putting a proposal to the Commissioner for his or her consideration.

In accordance with business line work practices, you should prepare a proposal within, and for consideration by, the business line responsible for the proposed exercise.

Your proposal requires approval by an appropriate SES officer in that business line prior to engaging TCN. Law Administration Practice Statement PS LA 2012/1 outlines the process for referring a proposal to TCN to provide advice on whether the proposal is considered to be within the Commissioner's GPA.

10. What information must I include in the GPA proposal?

Your proposal to your business line SES, and to TCN, must:

- include background information on the issue
- explain the current interpretation of relevant legislative provisions and its impact on affected taxpayers, as well as any alternative interpretations and relevant ATO views
- detail the number and class(es) of taxpayers affected and the amount of revenue involved, and
- detail all discussions held, or sought, with relevant stakeholders (for example, affected taxpayers, industry groups, other government agencies, tax counsel and/or other business lines).

Your proposal should also include:

- the intended administrative solution
- how the solution will address the issue
- how the ATO will administer the arrangements and similar arrangements into the future
- how you determined any *de minimis*[13] threshold
- confirmation from the relevant SES officer that the business line supports the proposal
- the impacts of adopting (or not) the proposal, including, but not limited to, a discussion of:
  - whether the integrity of the tax and/or superannuation system is at risk (for example, the effect on taxpayer perceptions, the ATO's responsibilities to

[13] Meaning 'of minimum importance' or 'trifling'.

administer the law fairly and impartially and to apply the rule of law)

- details of any other risks that could result if the proposal is adopted or not adopted (for example, reputation or revenue risks), and
- the effect, if any, on other areas within the ATO and/or externally (such as other government agencies).

- how taxpayers take advantage of the proposal, and
- how the proposed administrative action will be communicated to affected taxpayers.[14]

11. Criteria to be addressed in any GPA proposal

Ideally you should address all of the criteria listed in this section. If any criterion is irrelevant reasons should be given.

- The compliance approach is consistent with the achievement of the policy intent of the legislation.
- The approach achieves substantive compliance at a reduced cost to taxpayers.
- The approach reflects industry practice (as far as possible).
- Any resulting risks to the revenue are appropriately managed.
- The approach does not lead to material adverse impacts on third parties.
- Taxpayers can choose whether or not to adopt the approach.

12. If my business line SES supports my GPA proposal, what's next?

If your business line SES supports the proposal, you must:

- prepare a submission for the Commissioner
- obtain the support of the relevant business line Deputy Commissioner and support of the relevant Second Commissioner[15], and
- submit your proposal to the Commissioner via the Second Commissioner Law Design and Practice Group for a decision on whether the GPA is to be exercised.

13. Information to be provided to the Commissioner

You must provide the Commissioner with:

- the key points included in your proposal, including the issue and proposed solution
- an assurance that the proposal maintains the legislative intent
- TCN's advice on whether the GPA proposal is within scope
- a copy of the GPA proposal sent to TCN, and
- a statement also seeking the Second Commissioner Law Design and Practice's support for the proposal.

14. More information

For more general information on:

- The GPA – refer to:
  - the GPA Community of Practice (CoP) eLibrary Wiki
  - the GPA Register
  - the Commissioner's GPA – frequently asked questions document, and
  - Appendix B of this practice statement.
- Practical compliance guidelines and public advice and guidance generally – refer to:
  - PCG 2016/1 *Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance*
  - the *Public advice and guidance manual*, and
  - contact your business line PAG Unit or the PAG Centre in TCN.
- Commissioner's remedial power – refer to the Policy, Analysis & Legislation business line SharePoint site.
- Delegations and authorisations – contact General Counsel.

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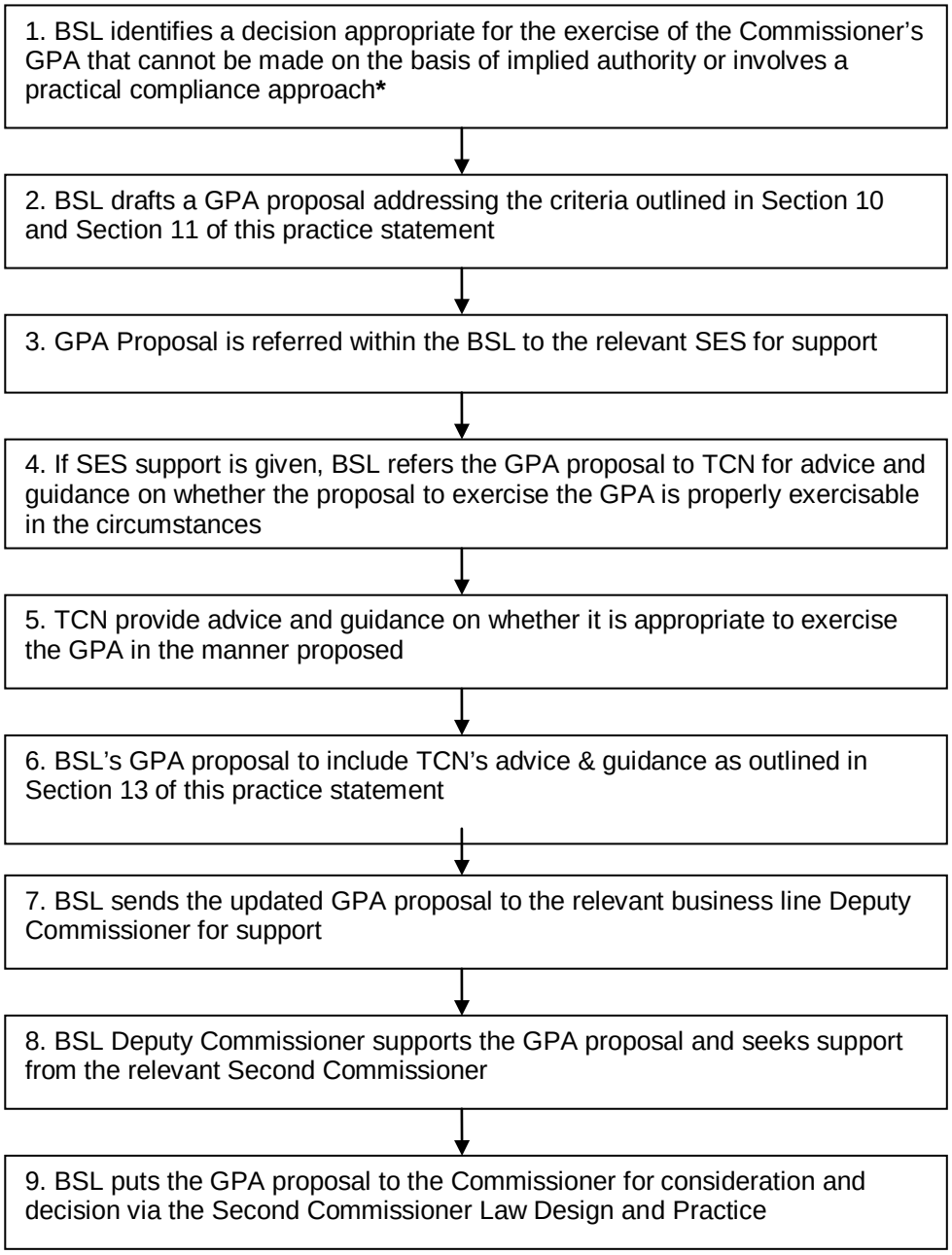
[14] The appropriate communication product where the GPA has a public audience would normally be a Practical Compliance Guideline . Your business line PAG Unit, or the PAG Centre in TCN can provide advice on the appropriate method of communication.

[15] Second Commissioner (Client Engagement Group) or the Chief Service Delivery Officer.

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.

APPENDIX B – THE COMMISSIONER'S GPA EXPLAINED

What the general administration provisions are designed to do

1. The general administration provisions place the day to day administration of various tax laws in the hands of a statutory office holder, the Commissioner of Taxation.

2. Judicial discussion of the general administration provisions shows that the courts accept that these 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 tax laws.[16] For example:

   - The Commissioner's decision to audit taxpayers, even at random, is supported by the GPA (*Industrial Equity Ltd v Deputy Commissioner of Taxation* [1990] HCA 46 and *Knuckey, Ross Randall v Commissioner of Taxation of the Commonwealth of Australia* [1998] FCA 1143.

   - The Commissioner's power to settle or compromise proceedings to which he is a party is derived from the GPA (*Grofam Pty Ltd & Ors v The Commissioner of Taxation of the Commonwealth of Australia* [1997] FCA 660).

3. The provisions 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 GPA include and augment the specific powers given to the Commissioner by the Act: *Industrial Equity Ltd v Deputy Commissioner of Taxation* [1990] HCA 46; *Hutchins, Peter Graeme v Deputy Commissioner of Taxation* [1996] FCA 201.

Scope and use of the GPA

Extent of scope	Operating within the scope
Scope is narrow.	Powers can only be exercised in relation to management and administrative decisions.
Commissioner must operate within the bounds of the powers conferred on him by Parliament and use the powers to give effect to Parliament's legislative intent as discerned by the application of those principles.[17]	The powers cannot be used to extend, confine or undermine Parliament's intentions.
The Commissioner must apply the law not the policy; the powers cannot be used to remedy defects or omissions in the law.[18]	The Commissioner must 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.
The Commissioner's powers cannot be used as an interpretative aid.	Where the law is open to more than one interpretation, the alternative interpretations of the law must be explored before considering the use of the Commissioner's general administration powers.

[16] Under administrative law, any action by a public authority which is outside the terms of its express statutory powers, or not at least incidental to, or consequential upon, that express authority, is *ultra vires* and invalid – see Hotop, S D 1985, *Principles of Australian Administrative Law*, 6th edn., Law Book Company, Sydney at p. 217.

[17] Section 15AA of the *Acts Interpretation Act 1901* states that in interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether or not that purpose or object is expressly stated) shall be preferred to a construction that would not promote that purpose or object.

[18] Section 370-5 of Schedule 1 to the *Taxation Administration Act 1953* allows the Commissioner to make, by disallowable legislative instrument, one or more modifications to the operation of a taxation law to ensure the law can be administered to achieve its intended purpose or object.

Extent of scope	Operating within the scope
The boundaries of the powers are not constant.	Boundaries shift depending on the focus of administration at any given time, for example the introduction of new legislation, natural disasters or the global financial crisis.

Conflicting priorities: revenue collection versus duty of good management

4. In exercising the powers conferred on him or her, the Commissioner must reconcile various duties and powers. For example, one duty is to collect the revenue properly payable under the law. The courts have described the Commissioner's duty as:

> …to ensure that the correct amount of tax is paid, 'not a penny more, not a penny less'[19]

And:

> …to collect tax in accordance with a correct assessment, that is to say, to collect the correct amount of tax, no more and no less. If an assessment is excessive it would be improper for the Commissioner to seek to collect tax payable under it.[20]

5. That duty must be reconciled with the Commissioner's duty of good management. Having regard to the competing duties and powers that arise under the taxation laws, the courts have acknowledged that the Commissioner must make administrative decisions as to the allocation of scarce resources to achieve an optimal, though not necessarily the maximum, revenue collection. This ensures that the Commissioner is not obliged, for example, to pursue every last cent of revenue where the cost of doing so is prohibitive.

6. This 'conflict' of duties was described in the English case *Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617. At page 651, Lord Scarman of the House of Lords considered the equivalent administration power of the Inland Revenue Commissioners. He said 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.

He observed that the relevant statutory provisions:

> … establish a complex of duties and discretionary powers imposed and conferred in the interest of good management upon those whose duty it is to collect the income tax … I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of 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.

7. The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) supports the duty of good management. Section 15 of the PGPA Act imposes a general obligation on the Commissioner to manage the affairs of the ATO in a way that promotes proper use of the public resources for which the Commissioner is responsible. 'Proper use' in this context means that the Commissioner needs to make decisions about the allocation of ATO resources to compliance and other activities which promote the efficient, effective, economical and ethical use of those resources. However in doing so he must still comply with the law (section 14 and subsection 13(4) of the *Public Service Act 1999*) and government policy (section 21 of the PGPA Act).

8. When the Commissioner, or a tax officer acting in the course of his or her duties, considers that a course of action is justified by the duty of good management, but requires the Commissioner to assume a power that can only be implied by reference to a general administration provision, the tax officer should bear in mind that the exercise of any power is constrained by the principles of administrative law.[21]

9. Section 16 of the *Taxation Administration Act 1953* restricts the operation of the GPA. In an exception to the general rule, any payments made under the general administration provisions are not able to be paid out of the Consolidated Revenue Fund.

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[19] *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* [1991] FCA 667, per Lockhart, Burchett and Hill JJ.
[20] *Brown v Commissioner of Taxation* [1999] FCA 563, per Hill J.
[21] See paragraphs 10 and 11 in Appendix B of this practice statement.

Framework within which the Commissioner's GPA must operate

10. The GPA are constrained by the principles of administrative law. These principles govern whether:

- the administrative authority has the power to deal with the subject matter, or
- the mode in which the authority deals with the matters entrusted to it, satisfies certain standards that have been developed by the courts in interpreting the common law.[22]

11. How administrative law principles govern the operation of the general administration provisions is summarised below.

✓ **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'.[23]
✗ 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.

How the GPA are exercised

12. As with many other powers and duties conferred on a Minister or statutory office holder, no one person could ever personally attend to all aspects of the general administration powers.[24] Consequently, the courts recognise that the Commissioner is able to delegate the powers or authorise others to exercise the powers and duties on his behalf. In this regard, the general principles of administrative law apply. In practice, the exercise of these powers will sometimes, but not always, happen under a general or specific delegation or authorisation from the Commissioner. Generally, whether oral or written, they will happen according to an authorisation that is implied from the structure and practices of the ATO.

13. In practice, the Commissioner has made two specific delegations in relation to the general administration powers. One is concerned with settlements of tax issues. The *Code of settlement* explains how this delegation is to be used. The other delegation is concerned with the compromise of tax debts. The latter delegation is to named individuals, who generally work in Debt. Other exercises of power reliant on the general administration provisions would be covered by an oral or implied authorisation.

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[22] Sykes, E et al 1997, *General Principles of Administrative Law*, 4th edn., Butterworths, Sydney at pp. 5 and 6, state that the content of administrative law is a statement of the rules casting light on the question whether a decision or determination of an administrative authority is to be subject to the controls of the superior courts of law. They say that the controls are directed to the two questions cited in these dot points in paragraph 10 in Appendix B of this practice statement.

[23] *Ali Fayed & Ors v Advocate General* [2002] ScotCS 349 at [124] per Lord Gill, citing Lord Wilberforce in *Vestey v Inland Revenue Commissioners (Nos 1 and 2)* [1980] AC 1148 at 1173.

[24] *Carltona* and *O'Reilly*.

14. If a decision or action taken pursuant to a general administration provision has financial (in a non-tax sense) implications or consequences, that decision or action is covered by the PGPA Act, the delegations for which are administered by ATO Finance.

15. The decision making process to provide practical compliance solutions involves balancing different perspectives, and needs to be transparent.

Criteria to be met when exercising the GPA

16. Apply the following criteria when determining how the GPA might be exercised such that they help taxpayers meet their compliance obligations.

Criteria	Explanation
Proposed compliance approach must be consistent with achievement of the policy intent of the legislation	Application of the general administration provisions in relation to a legislative provision should result in an administrative outcome which is consistent with the underlying policy intent sought from the provision.
The approach adopted achieves substantive compliance at reduced cost	The community both bears the cost and reaps the benefit of the tax system. Therefore, the approach must maintain substantive compliance with the taxation laws whilst making the tax law compliance experience easier, cheaper and more personalised.
The approach should, as far as practical, reflect industry practice	We seek an approach that leverages industry benchmarks / practices used by taxpayers to meet their business obligations. A further objective is to increase community confidence in the tax system by reflecting the output from 'natural' business systems in taxpayers' compliance obligations.
Resulting risks to the revenue must be appropriately managed (including the application of the approach where there is evidence of tax avoidance)	As part of this process, the Commissioner will apply the ATO's risk management policy[25] and take into account whether there is any risk to either the Revenue or the tax system generally. When considering the revenue risk, the Commissioner recognises the need to minimise compliance costs while at the same time maintaining community confidence in the tax system. Administrative outcomes resulting from a practical compliance approach should generally be revenue neutral. General administration provisions would not be applied, and could not be relied on, in situations where there is evidence of tax avoidance.
Avoid material adverse impacts on the rights of third parties	For example, we might use the general administration provisions to simplify the current arrangements for employers to determine their fringe benefits tax liability. However, if this approach would result in an increase in reportable fringe benefits for some employees, it would not be pursued.
Taxpayers can choose whether or not to adopt the approach	Voluntariness is critical, a taxpayer may opt to apply an approach such as: • following a Law Administration Practice Statement outlining what is acceptable to the Commissioner as

[25] See Chief Executive Instruction (CEI) *Risk Management CEI*.

Criteria	Explanation
	a means of meeting their obligations, or • using other (more complex) methodology in line with an earlier established practice. For example, a taxpayer may have built 'special applications' to meet their obligations and wish to continue using them.

Exercising the GPA: two common examples

Example 1: decisions not to undertake compliance action affecting a class of taxpayers or industry group for prior years or periods

17. The Commissioner cannot use his GPA to accept non-compliance with the law. However, as part of his duty of good management, the Commissioner can decide not to undertake compliance action on a particular issue for prior years or periods on a particular issue that affects a class of taxpayers or industry group.

18. In making his decision, the Commissioner will consider all of the circumstances, including:

- estimated amount of revenue at risk
- potential number of taxpayers affected
- cost of identifying and pursuing non-compliance
- extent to which some taxpayers have complied with the ATO view in respect of the issue, where known
- whether the ATO has contributed to non-compliance[26]
- likely impact on future voluntary compliance by taxpayers if compliance action is not taken
- relative priority of the compliance risk compared to other identified risks
- strength of the ATO view on the issue, and
- any proposed change of law affecting the issue including the proposed date of effect of any such change.

Example 2: third party errors affecting income tax assessments

19. In many cases, a third party provides information to a taxpayer enabling them to complete their income tax return or calculate amounts that will have an effect on the taxpayer's income tax liability.

20. Sometimes the third party makes a mistake in their calculations or in their reporting of this information. This may result in large numbers of taxpayers inadvertently making errors in their income tax returns and therefore either overpaying or underpaying their income tax for that year.

21. In order to maintain their reputation in the market, while correcting the error, the third party sometimes approaches the ATO seeking an administrative arrangement to resolve the tax issues in a way that will minimise the impact on the affected taxpayers. The decision whether or not to accept such a proposal involves the exercise of the Commissioner's GPA.

22. When considering whether to exercise the Commissioner's GPA, each case must be considered on its own merits, having regard to the facts and circumstances of that case. However, specific attention should be paid to, the number of taxpayers involved and the size of the adjustments and whether:

- there is any lost revenue
- the error is likely to significantly affect items other than the basic income tax rate (for example entitlement to offsets, family tax benefit, liability for Medicare levy surcharge, etcetera) which cannot be easily quantified

[26] PS LA 2011/27 amplifies and clarifies this specific factor. It also explains the relevant practices and procedures to be followed.

- any proposed compensation to the ATO provides for the time value of money of any estimated revenue loss
- the period in which the Commissioner can amend the relevant income tax assessment has expired
- the third party intends to disclose its mistake to the affected taxpayers and, where appropriate, to any relevant regulatory authority, and
- the third party has taken steps to ensure that the particular error does not occur on an ongoing basis.

23. It is important to remember that no agreement between the third party and the Commissioner is binding on the affected taxpayers. An affected taxpayer retains their rights under the taxation laws.