# *PS LA 2009/4 - Decisions made by the Commissioner in the general administration of the taxation laws*

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# PS LA 2009/4
# Decisions made by the Commissioner in the general administration of the taxation laws

This Practice Statement explains the Commissioner's general administration of the taxation laws, who can make general administration decisions and the process for escalating a general administration decision to the Commissioner.

*This Practice Statement is an internal ATO document and is an instruction to ATO staff.*

## 1. What this Practice Statement is about

This Practice Statement outlines:

- the Commissioner's general administration of the taxation laws[1]
- the scope of decisions that can be made in the Commissioner's general administration
- when and how to seek advice about whether a proposed general administration decision is within scope of the Commissioner's general administration
- the appropriate authority for making a general administration decision, and when and how to seek guidance about whether you have that authority
- the process for escalating a general administration decision proposal to the Commissioner.

## 2. The Commissioner's general administration of the taxation laws

Provisions located within various taxation laws place the day-to-day administration of those laws in the hands of the Commissioner[2], by nominating the Commissioner as the person responsible for the administration of the taxation laws and by whom decisions relating to the general administration of those laws may be made.[3]

## 3. The scope of decisions that can be made in the Commissioner's general administration

The Commissioner must reconcile various duties and obligations in the day-to-day administration of the taxation laws. For example, the Commissioner has a duty to collect the right amount of tax from all taxpayers while also having a duty to apply ATO resources sensibly given our finite resources.[4] The Commissioner resolves these competing duties by making a multitude of general administration decisions about the allocation of our resources to achieve an outcome that appropriately balances these duties.

While this might mean that the Commissioner cannot recover all the revenue potentially owed, the obligations still exist and the Commissioner must still administer each taxation law in a manner that supports that law's purpose.[5] Like other decisions made under the taxation laws, general administration decisions are governed by the operation of administrative law principles. The Commissioner must never knowingly act contrary to their duties as an officer of the Commonwealth in exercising executive power.

In this sense, the general administration decisions that can be made by the Commissioner are narrow in scope and confined to management and administrative decisions[6], such as the allocation of compliance resources which might, for example, give effect to a practical compliance solution.[7]

The Commissioner's general administration cannot remedy defects or omissions in the law. There is a specific statutory power – the Commissioner's

[1] 'Taxation laws' is used as a reference to any Act or part of an Act of which the Commissioner has the general administration. For example, those laws listed below at footnote 2 of this Practice Statement.

[2] 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* (TAA) for the indirect tax laws (including the goods and services tax law and the fuel tax law).

[3] See section 8 (More information) of this Practice Statement.

[4] Arising out of what is commonly called the 'duty of good management' and the Commissioner's general obligation under section 15 of the *Public Governance, Performance and Accountability Act 2013* to govern the ATO in a way that promotes the efficient, effective, economical and ethical use of public resources.

[5] See section 15AA of the *Acts Interpretation Act 1901*.

[6] These are not types of decisions that meet the description of a 'decision … under an enactment' in terms of the *Administrative Decisions (Judicial Review) Act 1977*.

[7] See Practical Compliance Guideline PCG 2016/1 *Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance* for an explanation of one type of practical compliance solution.

remedial power[8] – that the Commissioner (or a delegate) can use to modify the operation of a taxation law in limited circumstances. This power can be used, subject to strict statutory criteria being met, to resolve some unforeseen or unintended outcomes in the taxation laws.

The scope of decisions that can be made in the Commissioner's general administration of the taxation laws, and the powers necessary to carry that administration into effect[9], are outlined in greater detail in Appendix B to this Practice Statement.

## 4. Seeking guidance on whether a proposed general administration decision is within scope of the Commissioner's general administration

Whenever the Commissioner's authority for a particular action, or the basis for reconciling competing duties, is being considered, it is not sufficient to refer only to a general administration provision in a general sense. Rather, consideration must be given to the specific statutory provisions that are directly relevant to what is proposed to be done, or not done. All powers and duties relevant in the circumstances can then be identified and their limits ascertained to determine whether a proposed general administration decision can be made.

Where there is doubt about the basis for the proposed decision, guidance can be sought from the relevant technical specialist area or from Tax Counsel Network (TCN).[10]

## 5. The appropriate authority for making a general administration decision

The general administration of the taxation laws is legislatively vested in the hands of a single statutory office holder – the Commissioner of Taxation. Consequently, the Commissioner personally holds the direct authority to make general administration decisions.

The *Carltona*[11] principle allows ATO officers to make general administration decisions on the Commissioner's behalf, but only when there is an express authority or an implied authority for them to do so.[12]

An implied authority to make a general administration decision on the Commissioner's behalf exists if it is within the course of your usual duties to make the decision. For example, this might include a judgment call or decision that affects the allocation of resources, including your own time or that of the team, branch or business line you lead. Generally speaking, such everyday decisions are made by ATO officers at all levels in the course of their usual duties.

Whether a particular decision is within your usual duties can be determined or inferred from your role description, organisational structure and internal instructions (including the *Taxation Authorisation Guidelines*, law administration practice statements, and practical compliance guidelines). For example, it might reasonably be inferred that a Senior Executive Service (SES) officer with responsibility for a particular taxpayer segment is impliedly authorised to make most general administration decisions concerning that segment because this is within the course of their usual duties.[13]

Relevantly, the Commissioner has expressly delegated the making of the following decisions (which fall outside the scope of this Practice Statement):

- the settlement of cases[14]
- the compromise of tax debts[15], and
- the taking of security.[16]

If a general administration decision needs to be made that is not clearly within the course of your usual duties, you should escalate the decision to a tax officer

[8] See section 370-5 of Schedule 1 to the TAA.

[9] Including that express powers will be construed as impliedly authorising whatever may be fairly regarded as incidental to, or consequential upon, the express power itself.

[10] Law Administration Practice Statement PS LA 2012/1 *Engaging Tax Counsel Network on tax technical issues* outlines the TCN technical engagement process and when TCN engagement is mandatory, such as for any technical issue rated with a significant or higher risk. Consistent with the guidance in section 7 of this Practice Statement, TCN must also be engaged before submitting a general administration decision proposal to the Commissioner.

[11] *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 at [562–563].

[12] The principle that a delegate's functions may be so numerous and varied that they 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*.

[13] See section 6 of this Practice Statement for a list of attributes indicating that a decision cannot be made on the basis of implied authority.

[14] 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.*

[15] 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.

[16] Refer to Annexure C to Law Administration Practice Statement PS LA 2011/14 *General debt collection powers and principles*.

with the appropriate authority (advice can also be sought from the Office of General Counsel about who has the authority to make the decision). If the decision cannot be made on the basis of implied authority, you may need to consider preparing a proposal for the Commissioner to personally make the decision.[17]

### 6. What attributes indicate that a decision cannot be made on the basis of implied authority and may need to be escalated to the Commissioner?

As a guide, a proposal that requires the Commissioner's attention is likely to exhibit one or more of the following attributes:

- the proposed resolution is a novel or unusual approach to our administration
- ATO or legislative policy is unclear
- the proposed resolution may be contentious or may be perceived as unjust, anomalous or to have an improper motivation or outcome
- the proposed resolution affects multiple taxpayer segments, whether favourably or unfavourably, and
- the proposal is made in response to a 'very high' or greater risk, or the adoption of the proposal would represent such a risk.[18]

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

- degree of sensitivity
- significance
- whether taxpayers are significantly disadvantaged or advantaged (including by what might be perceived as the creation of an 'uneven playing field')
- risks to reputation or revenue, and
- implications for the integrity of the tax, superannuation or registry systems.

#### *Example 1: deciding not to apply compliance resources to a specific taxpayer's affairs for prior years*

Generally, a decision not to apply compliance resources to a specific taxpayer's affairs for prior years is a general administration decision made by the relevant tax officer on the basis of implied authority. The decision would normally be based on a risk assessment and 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 escalated to a more senior officer or put to the Commissioner for consideration.

#### *Example 2: deciding not to apply compliance resources to individuals in respect of prior years, where we have identified that a small number of those individuals may have a change in their tax position due to a remediation program being undertaken by another government agency*

Another government agency is undertaking a remediation program that may affect the tax position of a small number of individuals and result in some having an additional tax liability as the remediation affects previous years' returns. The circumstances that led to the remediation program were high-profile, contentious and widespread. There would be significant impact across the community as well as significant demand for our resources to answer queries if all individuals affected by the remediation were also required to review their tax position from past years and request amendments where needed, particularly where for the majority of impacted individuals there is no overall tax impact.

The large number of individuals affected by the remediation program and significant impact to the community and ATO if the proposal were not adopted, notwithstanding the low risk to revenue, suggested the appropriate risk rating for the situation under our enterprise risk management framework was 'very high'. In these circumstances it would be appropriate to apply to the Commissioner personally to make a decision not to apply compliance resources to determine whether a tax liability would arise for the impacted individuals.

#### *Example 3: deciding not to apply compliance resources to a particular class of taxpayer where they use a specified shortcut calculation method that represents a suitable proxy for calculating deductions*

Absent any contrary instructions, the decision not to apply compliance resources in this circumstance would normally be within the usual duties of either the Assistant Commissioner, or Deputy Commissioner leading the business line, responsible for the relevant taxpayer segment.

[17] See sections 7 to 11 of this Practice Statement.

[18] See Risk Management Tool: ATO Risk Matrix. More generally, Chief Executive Instruction *Risk management* (links available internally only) sets out ATO employee responsibilities for risk management within the ATO Enterprise Risk Management Framework.

### *Example 4: deciding to temporarily pause firmer debt collection activity for taxpayers affected by an adverse event such as a natural disaster*

A decision to temporarily pause firmer debt collection activity for taxpayers impacted by an adverse event would normally be within the usual duties of an SES officer from within Frontline Operations Group at either Assistant Commissioner or Deputy Commissioner level, depending on the scale of that event. However, a decision to pause all firmer debt collection activity for an extended period of time made in response to a severe and enduring adverse event that affects the whole country may need to be made by the Commissioner personally.

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### *Exceptions*

A decision not to undertake compliance action in respect of prior years or periods can also be made in the following circumstances:

- the decision is agreed to, or made by, the Policy Implementation Committee (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*.

## 7. How do I put a general administration decision proposal to the Commissioner?

Appendix A to this Practice Statement provides a summary of the process for putting a proposal to the Commissioner for their 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.[19]

Before submitting a proposal to the Commissioner, TCN must be engaged to provide advice on whether the proposal is within scope of the Commissioner's general administration.[20]

### 7a. *What information must I include in the general administration decision 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 or classes 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, TCN or other business lines).

Your proposal should also include:

- the intended solution
- how the solution will address the issue
- how we will administer the arrangements and similar arrangements into the future
- how you determined any *de minimis*[21] threshold (as relevant)
- confirmation from relevant SES officers that the proposal is supported by the business line or lines
- the impacts of adopting (or not) the proposal, including, but not limited to, a discussion of
  - whether the integrity of the tax, superannuation or registry systems is at risk (for example, the effect on taxpayer perceptions, our responsibilities to 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 or externally (such as other government agencies) or both
- how the proposal will be practically implemented by taxpayers, and

[19] More than one business line may be involved in this process (for example, if a proposal is expected to affect multiple client experiences).

[20] Consistent with the guidance in section 4 of this Practice Statement, TCN may have already been engaged if there is doubt about whether the proposed general administration decision is within scope of the Commissioner's general administration.

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

- how the proposed solution will be communicated to affected taxpayers.[22]

### 7b. *Criteria to be addressed in any general administration decision proposal*

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

- The 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.

### 7c. *If my business line SES supports my proposal, what's next?*

If the relevant business line SES[23] supports your proposal and TCN have advised that the proposal is within scope of the Commissioner's general administration, you must:

- prepare a submission for the Commissioner
- obtain the support of the
  - relevant Group Head, and
  - Second Commissioner, Law Design and Practice[24], and
- submit your proposal to the Commissioner via the Second Commissioner, Law Design and Practice.

### 7d. *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 proposal is within scope of decisions that can be made in the Commissioner's general administration
- a copy of the proposal sent to TCN, and
- evidence of the support of the relevant Group Head and the Second Commissioner, Law Design and Practice.

## 8. More information

For more general information on:

- the Commissioner's general administration of the taxation laws, refer to Appendix B to this Practice Statement
- practical compliance guidelines and public advice and guidance generally
  - refer to Practical Compliance Guideline PCG 2016/1 *Practical Compliance Guidelines*: *purpose, nature and role in ATO's public advice and guidance*
  - refer to Producing PAG product, (link available internally only) or
  - contact your business line PAG Unit or the PAG Governance team in the Office of the Chief Tax Counsel (links available internally only)
- the Commissioner's remedial power, refer to the Policy, Analysis & Legislation (link available internally only) business line SharePoint site
- delegations and authorisations, contact the Office of General Counsel (link available internally only)

[22] The appropriate communication product where the general administration decision has a public audience would normally be a practical compliance guideline. Your business line Public Advice and Guidance (PAG) Unit, or the PAG Governance team in the Office of the Chief Tax Counsel can provide advice on the appropriate method of communication.

[23] Generally the Deputy Commissioner or Deputy Commissioners leading the business line or lines.

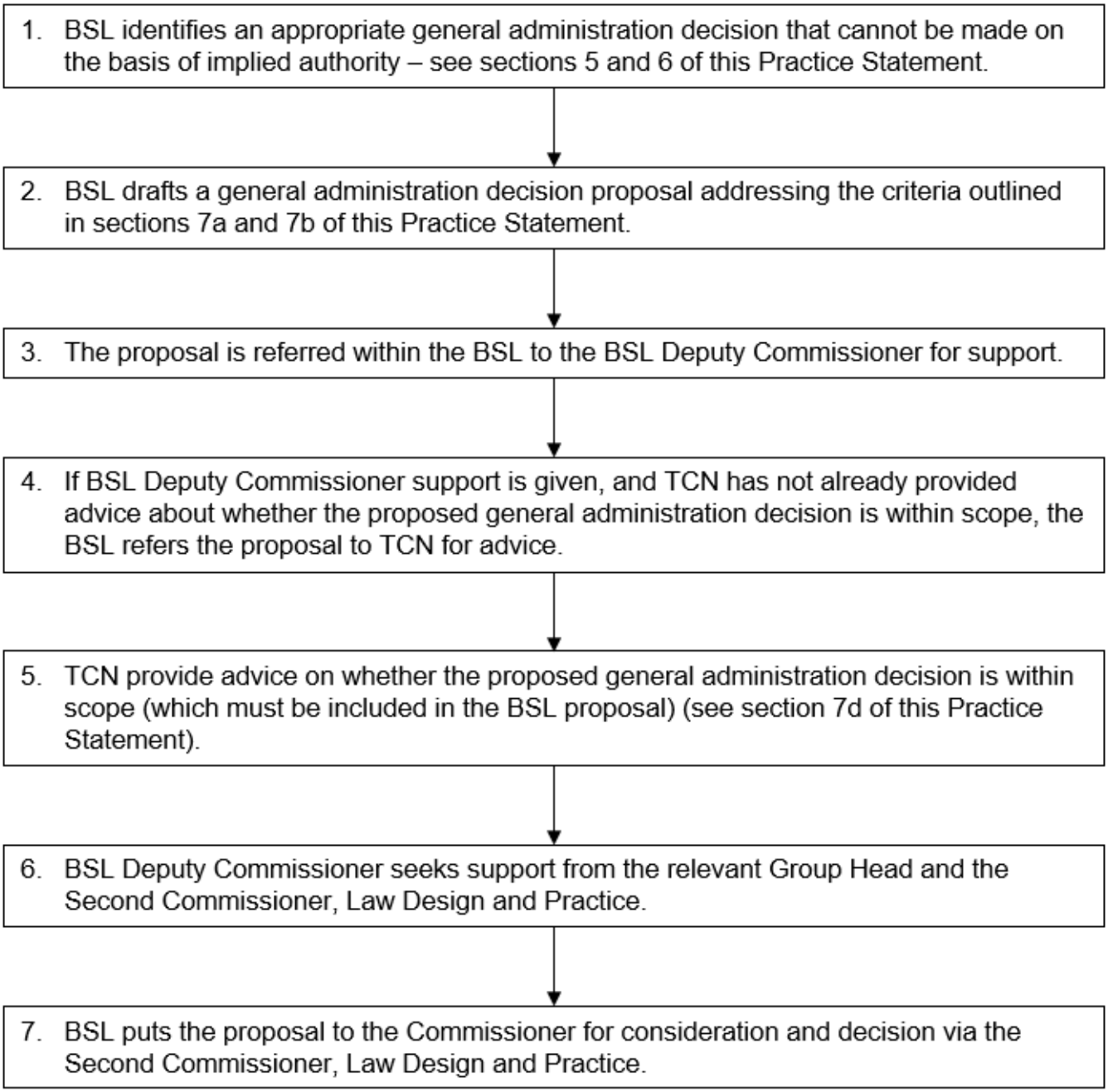
[24] It might also be determined at this stage that the relevant Group Head has the appropriate authority to make the decision, in the course of their usual duties, in which case it will not be necessary to escalate the proposal to the Commissioner; see, further, sections 5 to 6 of this Practice Statement. The operation of subsection 6D(2) of the TAA does not preclude a Second Commissioner being delegated the authority, or expressly or impliedly authorised, to make these decisions.

- obtaining TCN advice, refer to How to engage Tax Counsel Network (TCN) (link available internally only).

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**Date of effect:** 21 May 2009
**Business line:** TCN

## APPENDIX A – Process for putting a proposal to the Commissioner

Diagram 1: Summary of process for putting a general administration proposal to the Commissioner



## APPENDIX B – The Commissioner's general administration explained

### Consequence of the general administration provisions

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

2. While this may in some senses be described as creating a 'power' in the Commissioner, it is more accurately described as placing a duty on the Commissioner.[25] The courts have acknowledged 2 consequences that arise out of this responsibility to administer the taxation laws:

- Firstly, it is the Commissioner in carrying those laws into effect who must reconcile competing duties by making general administration decisions – which means the Commissioner has wide managerial discretion in administering the taxation laws.[26]
- Secondly, parliament must have intended that the Commissioner have the authority to fulfill those duties – which necessitates implying further powers on the Commissioner beyond those expressly provided.[27]

### *General administration decision-making: reconciling revenue collection versus duty of good management*

3. In exercising the powers conferred on them, 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[28]:

> … to ensure that the correct amount of tax is paid, "*not a penny more, not a penny less*",

and[29]:

> … 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.

4. 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 administration decisions as to the allocation of scarce resources to achieve the optimum revenue collection within the limitations imposed by the resources available. 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.

5. This 'conflict' of duties was described in the English case *Inland Revenue Commissioners v National Federation of Self-employed and 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.

6. 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.

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[25] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887 at [76].
[26] See paragraphs 3 to 8 in Appendix B to this Practice Statement.
[27] See paragraphs 9 to 12 in Appendix B to this Practice Statement.
[28] *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* [1991] FCA 667, per Lockhart, Burchett and Hill JJ.
[29] *Brown v Commissioner of Taxation* [1999] FCA 563, per Hill J.

However, in doing so they 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).

7. While the Commissioner has wide managerial 'discretion' in administering the taxation laws, this cannot be used to fetter the Commissioner's duty to assess or re-assess when the Commissioner has formed the view that the law imposes a liability – 'His duty then is to apply the law as he understands it to be'.[30]

8. Further, as a matter of statutory construction, the Commissioner must administer the taxation laws consistent with their purpose or object, whether express or implied, and their plain meaning. 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.

### *Necessary powers: carrying administration of the taxation laws into effect*

9. With parliament holding the Commissioner responsible for the general administration of the taxation laws, the courts have recognised the conferral on the Commissioner of the authority necessary to discharge those responsibilities[31], reinforcing the principle of statutory interpretation that express powers will be construed as impliedly authorising whatever may be fairly regarded as incidental to, or consequential upon, the express power itself.[32] For example:

- The Commissioner's decision to audit taxpayers, even at random, supports the administration of the taxation laws which place a duty on the Commissioner to make assessments of tax due (*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 they are a party is derived from the administration of the taxation laws which places a duty on the Commissioner to pursue the recovery of tax-related liabilities (*Grofam Pty Ltd & Ors v The Commissioner of Taxation of the Commonwealth of Australia* [1997] FCA 660).

10. So, while the Commissioner is often referred to as having the 'powers of general administration' or 'general powers of administration' (GPA), this must be understood in the context of the Commissioner's administration of the express provisions of the taxation laws, rather than as an independent source of 'power' in the Commissioner.

11. Further, while reference might be made to the Commissioner's general administration as a 'power' or being the 'GPA', this does not give rise to any power 'to make decisions that create, extinguish or modify the legal rights of taxpayers; nor does it include a power to promulgate rules that create legal rights or immunities or that otherwise have the force of delegated legislation'.[33] Nor does this '[permit] the Commissioner to convert the liability imposed by the statute into one mediated through an unstated discretion'.[34] To the extent that the Commissioner can do those things, that ability arises out of express powers in taxation laws.

12. It should also be noted that section 16 of the TAA restricts what the Commissioner can do in reliance on the general administration provisions. 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.

### Scope of decisions that can be made in the Commissioner's general administration

13. The table below outlines the scope of decisions that can be made in the Commissioner's general administration.

[30] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 at [11], per Middleton, Pagone, Davies JJ.
[31] *Sop & Sop Pty Ltd v Commissioner of Taxation* [2019] FCA 102 at [25], per Kenny J.
[32] *Dunkel, M v The Deputy Commissioner of Taxation* [1990] FCA 797 at [16] per Shephard J. 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.
[33] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887 at [76], per Edmonds J.
[34] *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 at [12], per Middleton, Pagone, Davies JJ.

Table 1: Scope of decisions that can be made in the Commissioner's general administration

| Extent of scope | Operating within the scope |
|---|---|
| The Commissioner can make management and administrative decisions, such as about the allocation of ATO resources. | While the Commissioner might not be able to exhaustively discharge all of their duties because of the finite resources available, this does not modify or discharge any obligations imposed by the law, they still exist. |
| The Commissioner must operate within the bounds of the powers conferred on them by parliament and use the powers to give effect to parliament's legislative intent as discerned by the application of the principles of statutory interpretation.[35] | The Commissioner cannot administer the law so as to extend, confine or undermine parliament's intentions. |
| The Commissioner must apply the law not the policy; general administration decisions cannot be used to remedy defects or omissions in the law.[36] | The Commissioner must advise Treasury where the taxation laws do not give effect to their underlying policy. For example:<br>• where they produce unintended consequences, anomalies, or significant compliance costs inconsistent with the policy intent, or<br>• where a legislative solution may be needed to address an emerging compliance issue. |
| The Commissioner's general administration does not displace the need to interpret the law. | All powers and duties relevant in the circumstances must be discerned. This means that where the law is open to more than one interpretation, the alternative interpretations of the law must be explored as part of making a general administration decision. |
| The boundaries of the Commissioner's general administration are not constant. | The relative weighting of individual duties can shift depending on the focus of administration at any given time, for example the introduction of new legislation, natural disasters, a global financial crisis or other adverse events. |

### Framework within which the Commissioner's general administration must operate

14. The Commissioner's general administration of the taxation laws is 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.[37]

[35] 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.

[36] Section 370-5 of Schedule 1 to the TAA 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.

[37] Sykes, E, et al (1997) *General Principles of Administrative Law*, 4th edn, Butterworths, Chatswood 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 2 questions cited in these dot points in paragraph 14 in Appendix B to this Practice Statement.

15. How administrative law principles govern the Commissioner's general administration of the taxation laws 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'[38].
- **What the Commissioner cannot do**
  - Exceed the authority conferred on them by the law – such actions being invalid and of no legal effect.
  - Use powers for improper purposes or in bad faith – powers must be used for a purpose that is stated in, or implied by, the taxation laws.
  - Limit their 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 their power to anyone else (unless authorised to do so), or enter into a binding undertaking regarding the future exercise or non-exercise of their discretionary power in a way that is against the public interest.
  - Be prevented from lawfully exercising their discretion by the doctrine of estoppel.

## Authority to make general administration decisions

16. 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 of the taxation laws.[39] Consequently, the courts recognise that the Commissioner is able to delegate or authorise others to make decisions on their behalf. In this regard, the general principles of administrative law apply. In practice, general administration decisions will sometimes, but not always, be made under a general or specific delegation or authorisation from the Commissioner. Generally, when not oral or written, they will happen according to an authorisation that is implied from our structure and practices.

17. Relevantly, the Commissioner has made 3 specific delegations in relation to the general administration concerning the settlements of tax issues, the compromise of tax debts and the taking of security. Most other decisions reliant on the general administration provisions would be covered by an express or implied authorisation.

18. If a general administration decision or action has financial (in a non-tax sense) implications or consequences and is covered by the PGPA Act, the delegation is administered by ATO Finance.

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

## Criteria to be considered when making general administration decisions

20. Consider the following criteria when making general administration decisions that help taxpayers meet their compliance obligations. Note that not all these criteria may be relevant to the proposed general administration decision.

[38] *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].
[39] *Carltona* and *O'Reilly*.

Table 2: Criteria to be considered when making general administration decisions

| 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, superannuation and registry systems. Therefore, the approach must maintain substantive compliance with the taxation laws whilst making the 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 and practices used by taxpayers to meet their business obligations. A further objective is to increase community confidence in the tax, superannuation and registry systems 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[40] and take into account whether there is any risk to either the revenue or the tax, superannuation and registry systems generally.<br>When considering the revenue risk, the Commissioner recognises the need to minimise compliance costs while at the same time maintaining community confidence in the system.<br>Administrative outcomes resulting from a practical compliance solution should generally be revenue neutral. Practical compliance solutions would not be adopted, 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 implement a practical compliance solution 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:<br>• following a practical compliance guideline or law administration practice statement outlining what is acceptable to the Commissioner as a means of meeting their obligations, or<br>• using another (more complex) methodology in line with an earlier established practice that complies with the law. For example, a taxpayer may have built 'special applications' to meet their obligations and wish to continue using them. |

[40] See Chief Executive Instruction *Risk management* (link available internally only).

## Making general administration decisions: a common example

### *Decisions not to apply compliance resources to a class of taxpayers or industry group for prior years or periods*

21. The Commissioner cannot fetter their duty to assess or re-assess when they have formed the view that the law imposes a liability (that is, the Commissioner cannot accept non-compliance with the law). However, as part of their duty of good management, the Commissioner can decide not to apply compliance resources to a particular issue that affects a class of taxpayers or industry group for prior years or periods.

22. In making a decision, the Commissioner will consider all of the relevant circumstances, which may include:

- 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 an ATO view in respect of the issue, where known
- whether we have contributed to non-compliance[41]
- whether inaction could reasonably be expected to undermine the integrity of the tax system including by affecting 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.

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

## Amendment history

**28 November 2024**

| Part | Comment |
|---|---|
| Section 6 | Updated 'severe' to 'very high', in line with the update to the ATO Risk Matrix. |
| Throughout | Updated in line with current ATO style and accessibility requirements. |

**31 July 2024**

| Part | Comment |
|---|---|
| Throughout | Replaced most references to 'Commissioner's powers of general administration' or 'Commissioner's GPA' with 'Commissioner's general administration'. |
| Section 1 | Updated to reference new section headings and a new footnote on the term 'taxation laws'. |
| Section 2 | Additional context regarding the limitations on the scope of general administration decisions. |
| Section 3 | Former Section 3 titled 'A purposive interpretation of law' removed and relevant content now included elsewhere in the Practice Statement.<br>This Section now incorporates former Section 4 titled 'Circumstances in which the Commissioner's GPA may be properly exercised' with additional context for the limitations on the scope of general administration decisions. |
| Section 4 | This Section now incorporates aspects of former Section 7 'Seeking guidance on whether it is appropriate for the Commissioner to exercise his or her GPA' and describes the analysis required to determine whether a proposed decision is within scope of the Commissioner's general administration. |
| Section 5 | This section has been updated to reflect that decisions can also be made at other levels, including new examples in Section 6.<br>Updates to reference current delegations and seeking advice from the Office of General Counsel. |
| Section 6 | Updates to the attributes indicating that a proposal requires the Commissioner's attention to provide more practical guidance and link to the ATO Enterprise Risk Management Framework.<br>Examples replaced or expanded to provide relevant guidance. |
| Section 7 | Updates to the escalation process to clarify the appropriate person to approve a proposal and that decisions may be made at different levels. |
| Section 8 | Removal of outdated references and updated to reflect current knowledge management. |
| Appendix A | Flowchart updated to reflect the changes made to Section 7. |
| Appendix B – paragraphs 1 to 12 | Additional content explaining the consequences of the Commissioner having responsibility to administer the taxation laws, and that the general administration provisions place a duty on the Commissioner. |
| Appendix B – paragraph 13 | Table outlining the scope of decisions updated to reflect that the Practice Statement is primarily focussed on making general administration decisions about the allocation of ATO resources. |
| Appendix B – paragraph 17 | Updated to reflect the current number of relevant delegations. |

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|---|---|
| Appendix B – paragraphs 20 to 22 | Updated to note that not all criteria listed may be relevant when a making general administration decision. Table updated to refer to practical compliance guidelines and solutions.<br>Removal of example that is no longer applicable. |
| Throughout | Updated in line with current ATO style and accessibility requirements. |
| References | Updated in line with current references within document. |

**6 May 2020**

| Part | Comment |
|---|---|
| Throughout | Updated CEI title. |

**6 June 2019**

| Part | Comment |
|---|---|
| Section 4 | Reference added to the Commissioner's remedial power. |
| Throughout | Updated to reflect the Commissioner's powers of general administration (not Commissioner's general powers of administration). |

**13 June 2017**

| Part | Comment |
|---|---|
| Appendix A | Correct a flowchart. |

**16 March 2017**

| Part | Comment |
|---|---|
| Part 6 | Inserted reference to Practical Compliance Guideline PCG 2017/2. |
| Other references | Inserted reference to Practical Compliance Guideline PCG 2017/2. |

**4 February 2016**

| Part | Comment |
|---|---|
| Throughout | Updated to new LAPS format and style. |

**6 November 2014**

| Part | Comment |
|---|---|
| Throughout | Remove outdated legislative and internal guidance references.<br>Remove obsolete references to A, B & PT CoE and replace with references to TCN. |

**28 July 2011**

| Part | Comment |
|---|---|
| Paragraph 22 | Clarify that decisions involving the application of PS LA 2011/27 (issued 27 July 2011) do not need to be escalated to the Commissioner. |

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|---|---|
| Paragraph 23 of Appendix B | Links the factor on whether the Commissioner contributed to non-compliance to PS LA 2011/27. |
| Throughout | Minor editorial amendments. |

**29 March 2011**

| Part | Comment |
|---|---|
| Throughout | Tax Office references updated to ATO as per ATO style guide recommendations. |
| Contact details | Updated |

## References

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|---|---|
| **Legislative references** | Acts Interpretation Act 1901 15AA<br>Administrative Decisions (Judicial Review) Act 1977<br>Excise Act 1901 7<br>Public Governance, Performance and Accountability Act 2013 15<br>Public Governance, Performance and Accountability Act 2013 21<br>Public Service Act 1999 13(4)<br>Public Service Act 1999 14<br>FBTAA 1986 3<br>ITAA 1936 8<br>SGAA 1992 43<br>TAA 1953 6D(2)<br>TAA 1953 Sch 1 356-5<br>TAA 1953 Sch 1 370-5<br>TAA 1953 16 |
| **Case references** | Brown v Commissioner of Taxation [1999] FCA 563; 42 ATR 118; 99 ATC 4516<br>Carltona Ltd v Commissioner of Works [1943] 2 All ER 560<br>Dunkel, M v The Deputy Commissioner of Taxation [1990] FCA 797; 27 FCR 524; 21 ATR 1279; 91 ATC 4142<br>Grofam Pty Ltd & Ors v The Commissioner of Taxation of the Commonwealth of Australia [1997] FCA 660; 97 ATC 4656; 36 ATR 493<br>Industrial Equity Ltd v Deputy Commissioner of Taxation [1990] HCA 46; 170 CLR 649; 90 ATC 5008; 21 ATR 934; 96 ALR 337; (1990) 65 ALJR 1<br>Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd [1982] AC 617; [1981] STC 260<br>Knuckey, Ross Randall v Commissioner of Taxation of the Commonwealth of Australia [1998] FCA 1143; 87 FCR 187; 40 ATR 117; 98 ATC 4903<br>Lighthouse Philatelics Pty Ltd v. Commissioner of Taxation [1991] FCA 667; (1991) 32 FCR 148; (1991) 91 ATC 4942; (1991) 22 ATR 707<br>Macquarie Bank Limited v Commissioner of Taxation [2013] FCA 887; 215 FCR 403; 97 ATR 591<br>Macquarie Bank Limited v Commissioner of Taxation [2013] FCAFC 119<br>O'Reilly v Commissioners of State Bank of Victoria [1983] HCA 47; 153 CLR 1; 13 ATR 64; 83 ATC 4156; 57 ALJR 342<br>Sop & Sop Pty Ltd v Commissioner of Taxation [2019] FCA 102 |

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| | Vestey v Inland Revenue Commissioners (Nos 1 and 2) [1980] AC 1148; [1979] ALL ER 976 |
| **Other references** | ATO Risk Matrix (link available internally only)<br>Chief Executive Instruction Risk management (link available internally only)<br>Code of settlement<br>Hotop, S D (1985) *Principles of Australian Administrative Law*, 6th edn, Law Book Company, Sydney<br>Office of General Counsel (link available internally only)<br>PCG 2016/1<br>Policy, Analysis & Legislation (link available internally only)<br>Producing PAG product (link available internally only)<br>Sykes, E, et al (1997) *General Principles of Administrative Law*, 4th edn, Butterworths, Chatswood<br>Taxation Authorisations Guidelines (link available internally only)<br>How to engage Tax Counsel Network (TCN) (link available internally only) |
| **Related Practice Statements** | PS LA 1998/1<br>PS LA 2007/6<br>PS LA 2007/11<br>PS LA 2011/3<br>PS LA 2011/14<br>PS LA 2011/27<br>PS LA 2012/1<br>PS LA 2015/1 |

### ATO references

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