PS LA 2009/4 - Escalating a proposal requiring the exercise of the Commissioner's powers of general administration

This cover sheet is provided for information only. It does not form part of *PS LA 2009/4 - Escalating a proposal requiring the exercise of the Commissioner's powers of general administration*

This practice statement is being amended as a result of the publication of PS LA 2012/1 and withdrawal of PS LA 2004/4. Until this amendment is finalised, references to escalation to the Tax Counsel Network or Centres of Expertise in this practice statement should be read having reference to the new guidelines for engagement of Law as provided in PS LA 2012/1. Further guidance can be obtained from the contact officer if required.

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Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2009/4

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FOI status: may be released

This practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO staff must follow their business line's escalation process.

SUBJECT:	**Escalating a proposal requiring the exercise of the Commissioner's powers of general administration**
PURPOSE:	**To explain the process for escalating a proposal that would require the exercise of the Commissioner's powers of general administration**

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BACKGROUND

The Commissioner's powers of general administration

1. The Acts (or parts of Acts)[1] administered by the Commissioner generally contain a provision which states that 'the Commissioner shall have the general administration of this Act' or 'the Commissioner has the general administration of this Act'. Some examples 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. Broadly, the purpose of the general administration provisions is to place the day to day administration of various taxation laws in the hands of the Commissioner. The courts have recognised that these 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.[2] For example:

   - The Commissioner's decision to audit taxpayers, even at random, is supported by the powers of general administration (*Industrial Equity Ltd and Another v. Deputy Commissioner of Taxation and Others* (1990) 170 CLR 649 and *Knuckey v. FC of T* (1998) 87 FCR 187).
   - The Commissioner's power to settle or compromise proceedings to which he is a party is derived from the powers of general administration (*Grofam Pty Ltd & Ors v. FC of T* (1997) 97 ATC 4656 at 4665).

3. The powers of general administration assist the Commissioner to administer the taxation laws in accordance with Parliament's legislative intent.[3] The Commissioner's powers of general administration are **narrow in scope** in that they can only be exercised in relation to management and administrative decisions. They 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 Commissioner's powers of general administration also cannot remedy defects or omissions in the law. In addition, where the law is open to more than one interpretation the

[1] See, for example, section 6 of the *Superannuation Industry (Supervision) Act 1993*.
[2] 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.
[3] As set out in, for example, the accompanying explanatory memoranda and second reading speeches.

alternative interpretations of the law should be explored before considering reliance on the powers of general administration.

4. Further information about the powers of general administration is contained in Appendix B at the end of this practice statement.

SCOPE

5. The settlement of cases and the compromise of tax debts are not within the scope of this practice statement (see paragraph 14 of this practice statement for further information).

STATEMENT

The escalation process

6. Tax officers must prepare and escalate a proposal[4] requiring the exercise of the Commissioner's powers of general administration where:

   - the matter is non-routine[5], or
   - a practical compliance solution, including the publication of a General Administration Law Administration Practice Statement (LAPS (GA)), is being recommended.

   Where a LAPS (GA) is being recommended, *Law Administration Practice Statements PS LA 1998/1 Law Administration Practice Statements* and *PS LA 2003/10 Management of Priority Technical Issues (PTIs)* will also apply. Relevant PTI participants should be involved in the steps outlined in paragraphs 7 and 8 of this practice statement, where appropriate.

7. The proposal (addressing the criteria in paragraph 12 of this practice statement) must be:

   (a) escalated within the business line that has carriage of the matter for consideration, in accordance with business line work practices

   (b) approved by an appropriate SES officer in that business line, and

   (c) escalated by the business line to the Administration, Business and Personal Taxes Centre of Expertise (AB&PT COE), via the Admin Brisbane mailbox, for advice on whether the proposal is considered to be within the Commissioner's powers of general administration.

8. Where the AB&PT COE advises that the proposal is considered to be within the Commissioner's powers of general administration, the business line must:

   (a) prepare a submission for the Commissioner containing the information outlined in paragraph 13 of this practice statement

   (b) obtain the relevant business line Deputy Commissioner's approval of the submission and the endorsement of the relevant Second Commissioner[6], and

   (c) escalate the submission to the Commissioner via the Second Commissioner (Corporate Services and Law) for a decision on whether the powers of general administration will be exercised in relation to the proposal.

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[4] A template for escalating proposals to the AB&PT COE is available on the AB&PT COE's intranet site (a hyperlink to the template can be found at the end of this practice statement).
[5] See paragraphs 17 and 18 of this practice statement for further information about non-routine matters.
[6] That is, the Second Commissioner (Compliance) or the Second Commissioner (EST and Operations).

9. Where the AB&PT COE advises that the proposal is **not** considered to be within the Commissioner's powers of general administration and the business line disagrees with this advice the business line can escalate the matter to the Tax Counsel Network (TCN) for consideration. The business line must then follow the steps outlined at subparagraphs 8(a) to 8(c) of this practice statement.

10. A flowchart summarising the escalation process is contained in Appendix A at the end of this practice statement.

11. Where the business line needs assistance in determining whether a matter is non-routine, the matter can be escalated to the AB&PT COE following the relevant business line's escalation process.

Information to be provided

The proposal to the AB&PT COE

12. The proposal must address each of the following criteria:

    (a) background information on the identified issue

    (b) a clear explanation of the current interpretation of the relevant legislative provisions and its impact on affected taxpayers, as well as any alternative interpretations and relevant ATO views

    (c) details regarding the number and class(es) of taxpayers affected and the amount of revenue involved

    (d) details of all discussions with relevant stakeholders (for example, affected taxpayers, industry groups, other government agencies, tax counsel, a centre of expertise and/or other business lines) that have been held or sought

    (e) specific details of the proposal, including:

        (i) what the intended administrative solution is

        (ii) how the intended solution will address the identified issue

        (iii) how the ATO intends to administer the arrangements and similar arrangements into the future

        (iv) where a *de minimis*[7] threshold is being proposed, how the threshold was determined

        (v) the impacts of adopting and not adopting the proposal, including a discussion of (but not limited to):

            - 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 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)

        (vi) what taxpayers will need to do to take advantage of the proposal, and

[7] Latin phrase meaning 'of minimum importance' or 'trifling'.

(vii) how the proposed administrative action will be communicated to affected taxpayers[8]

(f) a statement from the relevant SES officer as to whether the business line supports the proposal, and

(g) an explanation as to how the proposal satisfies all of the following criteria (or if not relevant, explain why):

(i) the compliance approach must be consistent with the achievement of the policy intent of the legislation;

(ii) the approach must achieve substantive compliance at a reduced cost to taxpayers

(iii) the approach should, as far as practicable, reflect industry practice

(iv) any resulting risks to the revenue must be appropriately managed

(v) the approach should not lead to material adverse impacts on third parties, and

(vi) taxpayers should be able to choose whether to adopt the approach or not.

The submission to the Commissioner

13. The submission to the Commissioner must include:

(a) a written briefing of the key points included in the proposal, including the issue and proposed solution

(b) an assurance that the proposal maintains the legislative intent

(c) a statement as to whether the AB&PT COE agrees that the proposal is within the Commissioner's powers of general administration and any TCN advice (if relevant)

(d) a copy of the proposal sent to the AB&PT COE;

(e) a copy of the advice from the AB&PT COE and/or TCN, and

(f) a statement also seeking the endorsement of the Second Commissioner (Corporate Services and Law) for the proposal.

EXPLANATION

Routine and non-routine matters

14. The Commissioner has not delegated any parts of the powers of general administration with the exception of:

- the settlement of cases (refer to the *Code of Settlement Practice*[9]), and
- the compromise of tax debts (refer to *Law Administration Practice Statement PS LA 2011/3 Compromise of taxation debts*).[10]

[8] Communication products can include a LAPS (GA), fact sheet or website information. The AB&PT COE can provide advice on the appropriate method of communication.

[9] See Law Administration Practice Statements: *PS LA 2007/5 Settlements* and *PS LA 2007/6 Guidelines for the settlement of widely-based tax disputes*.

[10] Note that these powers can only be exercised where it is in the best interests of the Commonwealth.

Instead the Commissioner relies on the *Carltona*[11] principle, which enables officers to authorise others to exercise statutory powers on their behalf.

15. As a matter of law, the principle that a delegate's functions may be so numerous and varied that he or she could never personally attend to them all has been recognised in Australia in *O'Reilly v. Commissioners of the State Bank of Victoria* (1982) 153 CLR 1 at 11 and 12, where the High Court accepted the principle set out in *Carltona*.[12]

16. The *Carltona* principle allows employees to make decisions only in relation to routine matters. Deciding whether or not a matter involving the exercise of the Commissioner's powers of general administration is routine is a **matter of judgment**.

17. A matter is unlikely to be routine where:

- no clear guidelines/criteria exist
- ATO or legislative policy is unclear
- the proposed resolution may be contentious or may be perceived to be unjust, anomalous or to have an improper motivation or outcome, and/or
- taxpayers or a class of taxpayers are adversely affected.[13]

18. In deciding whether a matter is contentious, consideration should be given to factors such as:

- the degree of sensitivity
- its significance
- its complexity
- whether taxpayers are significantly disadvantaged
- risks to reputation or revenue, and
- the implications for the integrity of the tax and/or superannuation system.

19. An example of a routine matter involving the exercise of the Commissioner's powers of general administration is the 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. Routine matters do not need to be escalated in accordance with this practice statement.

20. An example of a non-routine matter involving the exercise of the Commissioner's powers of general administration would be the decision not to undertake active compliance action in relation to a **particular class of taxpayers or an industry group** in respect of prior years or periods, where the ATO identifies that the particular class of taxpayers or industry group have not been complying with the law. To illustrate, a business line may identify that taxpayers in a particular industry group have incorrectly been claiming tax deductions for certain expenses. A decision not to pursue compliance action in relation to prior income years for that particular industry group would be non-routine. The decision may be seen as contentious because it could result in, for example, risks to reputation and/or revenue as well impact on the integrity of the tax system.

[11] *Carltona Ltd v. Commissioner of Works* [1943] 2 All ER 560 at 562-563.
[12] See also paragraphs 2.7.2 and 2.73 of the *Delegations and Authorisations Manual*.
[13] See paragraph 2.10.6 of the *Delegations and Authorisations Manual.*

21. In contrast, generally a decision by an individual tax officer, in consultation with their manager, not to pursue compliance action for prior years against a specific taxpayer would be a routine decision. Such a decision would be based on risk assessment, existing business line guidelines or criteria and made in the ordinary course of the tax officer's duties. There may, however, be examples where due to the nature or profile of a specific taxpayer that a matter should be escalated as non-routine.

22. A decision not to undertake active compliance action in respect of prior years or periods **does not have to be escalated** in accordance with this practice statement where:

- the decision is agreed to, or made by, the Policy Implementation Forum, the matter – see for example *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 Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively*.

Practical compliance solutions

23. Examples of practical compliance solutions can be found in publications such as the *Correcting GST mistakes* guide and the LAPS (GA) series, which are published on the ATO legal database.

Further information

24. Further information[14] about the Commissioner's powers of general administration, and the exercise of those powers, can be found in:

- the AB&PT COE's intranet site;
- paragraphs 2.2.9 to 2.2.21 and 2.10.2 to 2.10.9 of the *Delegations and Authorisations Manual,* which discuss implied authorisations and the powers of general administration
- paragraphs 25 to 32 and paragraphs 44 to 46 of PS LA 1998/1, which provide further information on LAPS (GA)s
- Commissioner Michael D'Ascenzo's speech on 12 March 2009 given to the Taxation Institute of Australia's 24th National Convention, titled *Challenging Times*
- then Second Commissioner (Law) Bruce Quigley's speech on 12 March 2009 given to the Taxation Institute of Australia's 24th National Convention, titled *The Commissioner's powers of general administration: how far can he go?*
- Commissioner Michael D'Ascenzo's speech on 1 September 2007 given to the Law Council of Australia Rule of Law Conference, titled *The rule of law: a corporate value*
- then Second Commissioner Michael D'Ascenzo's address in May 2004 to the Corporate Tax Association's 2004 Convention, titled *Consolidation: making choices - risk management in action*;, and

[14] Hyperlinks to the documents referred to in this practice statement can be found at the end of the practice statement.

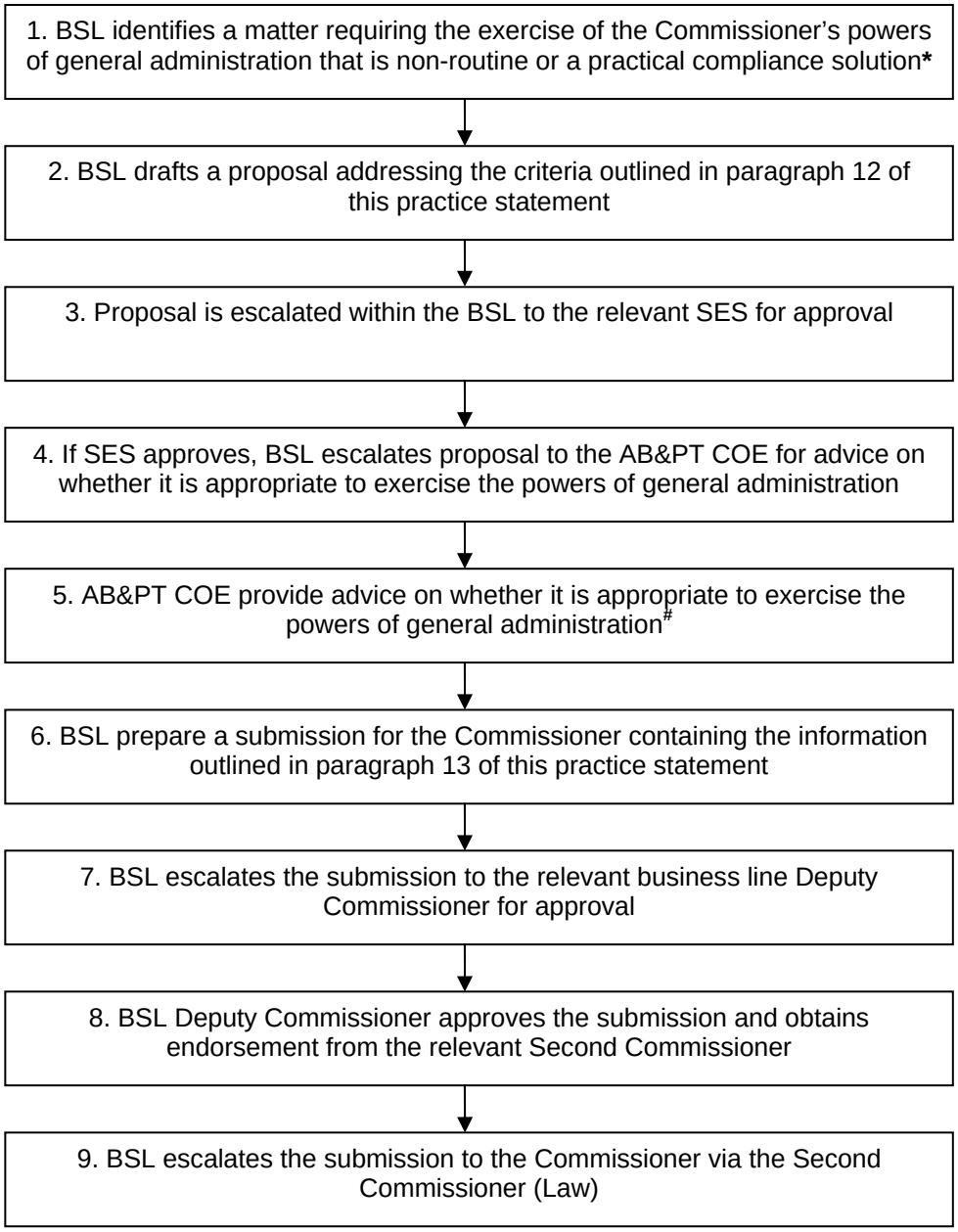
- former Commissioner Michael Carmody's speech on 15 April 2004 to the 6th International Conference on Tax Administration, titled *The Art of Tax Administration: Two Years On*.

25. Further information about LAPS (GA) generally can also be obtained in PS LA 1998/1 and in *the Information Kit For Authors and Sponsors* on the intranet.[15] The PTI and Public Rulings Branch manage the practice statement system, and can be contacted via the Practice Statement mailbox.

26. Specific questions about delegations and authorisations can be referred to the National Delegations and Authorisations Coordinator in the Legal Services Branch.

[15] Hyperlinks to the documents referred to in this practice statement can be found at the end of the practice statement.

APPENDIX A – ESCALATION FLOWCHART



***** When preparing a proposal involving the publication of a LAPS (GA), officers should also refer to PS LA 1998/1 and PS LA 2003/10 and involve relevant PTI participants in the process.

[#] Where the AB&PT COE advises that the proposal is not considered to be within the Commissioner's powers of general administration and the business line disagrees with this advice, the business line can escalate the matter to the Tax Counsel Network for consideration before continuing with step 6.

APPENDIX B – INFORMATION ABOUT THE COMMISSIONER'S POWERS OF GENERAL ADMINISTRATION

Purpose and effect of the general administration provisions

1. Broadly, the purpose of the general administration provisions is to 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]

3. In other words, 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. It is also clear that the powers of general administration include and augment the specific powers given to the Commissioner by the Act: *Industrial Equity Limited and Another v. Deputy Commissioner of Taxation and Others* (1990) 170 CLR 649; *Hutchins v. Commissioner of Taxation* (1996) 65 FCR 269.

Scope and use of the powers of general administration

4. The Commissioner's powers of general administration, also sometimes referred to as the general powers of administration, are narrow in scope in that they can only be exercised in relation to management and administrative decisions.

5. The principles of administrative law and statutory interpretation require the Commissioner to operate within the bounds of the powers conferred on him by Parliament and to use them to give effect to Parliament's legislative intent as discerned by the application of those principles.[17] As such, the powers of general administration cannot be used to extend, confine or undermine Parliament's intentions.

6. Furthermore, the Commissioner's role is to apply the law not the policy, and the powers can not be used to remedy defects or omissions in the law. Instead, the Commissioner has a responsibility to 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.[18]

7. In addition, the powers of general administration cannot be used as an interpretative aid. Where the law is open to more than one interpretation, the

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[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] D'Ascenzo, M, *The rule of law: a corporate value*, 1 September 2007, p. 4.

alternative interpretations of the law are to be explored before considering the use of the Commissioner's general administration powers.

8. The boundaries of the powers of general administration are not constant. They shift around depending on the focus of administration at any given time, for example the introduction of new legislation (such as the new tax system), natural disasters or the global financial crisis.

9. In exercising the powers conferred on him, 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]

10. That duty must be reconciled with another duty borne by the Commissioner. That duty is the 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.

11. 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.

[19] *Lighthouse Philatelics Pty Ltd v. FCT* (1991) 32 FCR 148 at 155 per Lockhart, Burchett and Hill JJ.
[20] *Brown v. Federal Commissioner of Taxation* (1999) 42 ATR 118 at 130 per Hill J.

12. The *Financial Management and Accountability Act 1997* (FMAA) also supports the duty of good management. Section 44 of the FMAA imposes a general obligation on the Commissioner to manage the affairs of the ATO in a way that promotes proper use of the Commonwealth 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 and ethical use of those resources. However in doing so he must still comply with the law (subsection 44(2) of the FMAA).

13. 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]

14. It should also be noted that section 16 of the *Taxation Administration Act 1953* restricts the operation of the powers of general administration. It does this by providing an exception to the general rule about payments out of the Consolidated Revenue Fund – any payments made under the general administration provisions are not able to be paid out of the Consolidated Revenue Fund.

Some matters to be considered in exercising the Commissioner's powers of general administration

15. The exercise of any power, including the powers of general administration, is constrained by the principles of administrative law. These principles are directed to the questions 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]

16. While it is not possible to discuss the many elements of all the administrative law principles in this overview, it is possible to make some observations about them in relation to the operation of the general administration provisions:

- The Commissioner must make a decision based on the merits of each individual case.
- The Commissioner must act fairly, in good faith and without bias, and must afford each party the opportunity to adequately state their case.
- The Commissioner has a duty to treat taxpayers fairly and equitably. This does not mean that every taxpayer has to be treated in exactly the same manner, however taxpayers in like circumstances should, at least, be treated equally.
- The Commissioner must ensure that he does not confer an advantage on a taxpayer or a group of taxpayers in the sense that there is

[21] See paragraphs 15 and 16 in Appendix B of this practice statement.

[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 15 in Appendix B of this practice statement.

created 'a privileged group who are not so much taxed by law as untaxed by concession'.[23]

- The Commissioner must not act outside of the authority conferred on him by the law – such an action would be invalid and of no legal effect.
- The powers of general administration must not be used for an improper purpose or in bad faith – it must be for a purpose that is stated in, or implied by, the tax laws.
- The Commissioner can not fetter his discretion by inflexibly applying a policy or rule. While the Commissioner is generally entitled to adopt a policy governing the exercise of a power or discretion, the policy must not conflict with another principle of administrative law, and he must generally be prepared to depart from the policy in appropriate cases, even if it is only in exceptional circumstances.
- The Commissioner must not act under dictation (that is, at the direction of someone else), delegate his power to anyone else unless he is 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.
- Generally, the Commissioner can not be prevented from lawfully exercising his discretion by the doctrine of estoppel.

How the powers of general administration are exercised

17. As with many other powers and duties that are 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.

18. 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 Practice* 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 (formerly Operations). Other exercises of power reliant on the general administration provisions would be covered by an oral or implied authorisation.[25]

19. 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 FMAA, the delegations for which are administered by ATO Finance.

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

[23] *Vestey v. Inland Revenue Commissioners (Nos 1 and 2)* [1980] AC 1148.
[24] *Carltona v. Commissioner of Works* [1944] 2 All ER 560 and *O'Reilly v. Commissioner of the State Bank of Victoria* (1982) 153 CLR 1.
[25] Refer to paragraphs 2.10.2 to 2.10.9 of the *Delegations and Authorisations Manual* for further information on implied authorisations in relation to the powers of general administration, and the escalation process for non-routine matters.

Criteria to consider when determining whether the powers of general administration should be exercised

21. Consistent with administrative law principles, the following criteria are suggested as relevant matters to take into account in determining how the powers of general administration can be exercised in a way that will assist taxpayers in meeting their compliance obligations:

(i) *The proposed compliance approach needs to 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.

(ii) *The approach adopted achieves substantive compliance at reduced cost*

The tax system ultimately benefits the community and it's the community which ultimately bears the cost of tax administration. The approach needs to maintain substantive compliance with the taxation laws while reducing compliance costs for taxpayers – making the compliance experience with the tax laws one that is *easier, cheaper and more personalised*.

(iii) *The approach should, as far as practical, reflect industry practice*

Solutions to practical compliance issues are sought which rely on industry benchmarks/practices currently used by taxpayers to meet their business obligations.[26]

A higher level objective is to have the output from 'natural' business systems reflected in the compliance obligations of taxpayers thus building the community's confidence in the tax system.

(iv) *Any resulting risks to the revenue need to be appropriately managed (including the application of the approach where there is evidence of tax avoidance)*

In determining the manner in which the general administration provisions will be exercised, the Commissioner will apply the ATO's risk assessment process[27] and take into account whether there is any risk to either the Revenue or the tax system more generally.

When considering the revenue risk, the Commissioner will also have regard to the need to minimise compliance costs while at the same time maintaining community confidence in the tax system.

The administrative outcomes that will result from a practical compliance approach should generally be revenue neutral. Application of the general administration provisions would not be considered and could not be relied on in situations where there is evidence of tax avoidance.[28]

(v) *Material adverse impacts on third parties should be avoided*

[26] D'Ascenzo, M, *Making choices: risk management in action*, May 2004, p.5.
[27] See Corporate Management Practice Statement PS CM 2003/02 Risk and Issues Management.
[28] D'Ascenzo, M, *Making choices: risk management in action*, May 2004, p.5.

Application of the general administration provisions in relation to a legislative provision should not result in outcomes that adversely impact on the rights of third parties.[29]

For example, use of the general administration provisions might be considered 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.

(vi) *Taxpayers to retain the choice as to whether or not to adopt the approach*

Use of the general administration provisions to address a particular issue in relation to the application of the law should not prevent taxpayers from choosing to either:

- follow a Law Administration Practice Statement outlining what is acceptable to the Commissioner as a means of meeting their obligations, or
- use other (more complex) methodology in line with an earlier established practice. For example, it may well be that taxpayers have built 'special applications' to meet their obligations and wish to continue using them.

Common situations involving the exercise of the powers of general administration

Decisions not to undertake compliance action affecting a class of taxpayers or industry group for prior years or periods

22. The Commissioner cannot use his powers of general administration 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.

23. In determining whether or not to undertake compliance action for prior years or periods on a particular issue that affects a class of taxpayers or industry group, the Commissioner will consider all of the circumstances, including:

- the estimated amount of revenue at risk
- the potential number of taxpayers affected
- the cost of identifying and pursuing non-compliance
- the 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[30]
- the likely impact on future voluntary compliance by taxpayers if compliance action is not taken
- the relative priority of the compliance risk compared to other identified risks
- the strength of the ATO view on the issue, and

[29] D'Ascenzo, M, *Making choices: risk management in action*, May 2004, p.5.

[30] *Law Administration Practice Statement PS LA 2011/27 Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively* amplifies and clarifies this specific factor. It also explains the relevant practices and procedures to be followed.

- any proposed change of law affecting the issue including the proposed date of effect of any such change.

Third party errors affecting income tax assessments

24. In many cases, a third party will provide information to a taxpayer for the purposes of enabling the taxpayer to complete their income tax return or calculate amounts that will have an effect on the taxpayer's income tax liability.

25. However, sometimes a mistake can be made by the third party in their calculations or in their reporting of this information. This may result in a large number of taxpayers inadvertently making errors in their income tax returns and therefore either overpaying or underpaying their income tax for that year.

26. In order to maintain the reputation of the third party in the market while correcting the error, the third party will sometimes approach 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 powers of general administration.

27. When considering whether it is appropriate to exercise the Commissioner's powers of general administration, each case must be considered on its own merits, having regard to the facts and circumstances of that case. In determining whether or not to exercise the power in these circumstances, specific attention should be paid to the following:

    - the number of taxpayers involved and the size of the adjustments
    - whether there is any lost revenue
    - whether 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, etc) which cannot be easily quantified
    - whether any proposed compensation to the ATO makes provision for the time value of money of any revenue estimated to have been lost
    - whether the period in which the Commissioner can amend the relevant income tax assessment has expired
    - whether the third party intends to disclose its mistake to the affected taxpayers and where appropriate to any relevant regulatory authority, and
    - whether the third party has taken steps to ensure that the particular error does not occur on an ongoing basis.

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

Amendment history

Date of amendment	Part	Comment
27 July 2011	Paragraph 22 Paragraph 23 of Appendix B Throughout	Clarify that decisions involving the application of PS LA 2011/27 (issued 27 July 2011) do not need to be escalated to the Commissioner. Links the factor on whether the Commissioner contributed to non-compliance to PS LA 2011/27. Minor editorial amendments.
29 March 2011	Throughout Contact details	Tax Office references updated to ATO as per ATO Style Guide recommendations. Updated.

Subject references	Tax administration Commissioner's powers
Legislative references	A New Tax System (Goods and Services Tax) Act 1999 Acts Interpretation Act 1901 Excise Act 1901 7 Financial Management and Accountability Act 1997 FBTAA 1986 3 Fuel Tax Act 2006 ITAA 1936 8 Superannuation Industry (Supervision) Act 1993 6 SGAA 1992 43 TAA 1953 Sch 1 356-5 TAA 1953 16
Case references	Brown v. Federal Commissioner of Taxation [1999] FCA 563;(1999) 42 ATR 118; (1999) 99 ATC 4516 Carltona Ltd v. Commissioner of Works [1943] 2 All ER 560 Grofam Pty Ltd & Ors v. FC of T (1997) 97 ATC 4656; (1997) 36 ATR 493 Hutchins v. Commissioner of Taxation (1996) 65 FCR 269; (1996) 32 ATR 620; (1996) 96 ATC 4372 Industrial Equity Ltd and Another v. Deputy Commissioner of Taxation and Others (1990) 170 CLR 649; (1990) 90 ATC 5008; (1990) 21 ATR 934 Inland Revenue Commissioners v. National Federation of Self-employed and Small Businesses Ltd [1982] AC 617; [1981] STC 260 Knuckey v. FC of T (1998) 87 FCR 187; (1998) 40 ATR 117; (1998) 98 ATC 4903 Lighthouse Philatelics Pty Ltd v. F C of T (1991) 32 FCR 148; (1991) 91 ATC 4942; (1991) 22 ATR 707 O'Reilly v. Commissioners of the State Bank of Victoria (1982) 153 CLR 1; (1982) 82 ATC 4671; (1982) 13 ATR 706 Vestey v. Inland Revenue Commissioners (Nos 1 and 2) [1980] AC 1148
Related practice statements	PS LA 1998/1; PS LA 2003/10; PS LA 2007/5; PS LA 2007/6; PS LA 2007/11; PS LA 2008/12; PS LA 2011/13; PS LA 2011/27; PS CM 2003/2 (link available internally only)
Other references	AB&PT COE intranet site (link available internally only) Carmody, M, *The Art of Tax Administration: Two Years On*, speech to the 6th International Conference on Tax Administration, 15 April 2004 *Code of Settlement Practice* *Correcting GST mistakes* (Nat 4700-07.2004) D'Ascenzo, M, *Consolidation: making choices - risk management in action* address to the Corporate Tax Association's 2004 Convention, May 2004 D'Ascenzo, M, *The rule of law: a corporate value*, speech given to the Law Council of Australia Rule of Law Conference, Brisbane, 1 September 2007 D'Ascenzo, M, *Challenging Times*, speech given to the Taxation Institute of Australia's 24th National Convention, Sydney, 12 March 2009 *Delegations and Authorisations Manual* (link available internally only) Escalation template (link available internally only) Hotop, S D 1985, *Principles of Australian Administrative Law*, 6th edn., Law Book Company, Sydney Information Kit for Authors and Sponsors

	(link available internally only) Quigley, B, *The Commissioner's powers of general administration: how far can he go?* speech given to the Taxation Institute of Australia's 24th National Convention, Sydney, 12 March 2009 Sykes, E et al 1997, *General Principles of Administrative Law*, 4th edn., Butterworths, Sydney *Taxation Authorisations Guidelines* (link available internally only)
File references	2008/9202
Date issued	21 May 2009
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Other Business Lines consulted	All