


# ***PS LA 2013/1 - Statements of reasons pursuant to section 13 of the Administrative Decision (Judicial Review) Act 1977***

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# Practice Statement Law Administration

**PS LA 2013/1**

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**FOI status: may be released**

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*This law administration practice statement is issued under the authority of the Commissioner of Taxation. ATO staff, including non-ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO staff must follow their business line's escalation process.*

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

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**SUBJECT:** **Statements of reasons pursuant to section 13 of the Administrative Decision (Judicial Review) Act 1977**

**PURPOSE:** **To outline guidelines to be followed by tax officers preparing statements of reasons pursuant to section 13 of the Administrative Decision (Judicial Review) Act 1977**

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## INTRODUCTION

1. Access to reasons for decisions is fundamental to the scheme of administrative review provided for in the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)*<sup>1</sup> and is recognised as a fundamental component of fair procedure.
2. Section 13 imposes an obligation on decision makers to provide a written statement of reasons in relation to certain decisions.
3. The underlying reasons for imposing the obligation in section 13 to furnish statements of reasons are:
  - (a) from the point of view of a citizen seeking to resolve a grievance:
    - (i) to overcome any grievance a person might experience when he or she is not told why something affecting him or her has been done, and

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<sup>1</sup> All legislative references are to the ADJR Act unless otherwise indicated.

- (ii) to enable a person affected by a decision to see what considerations were taken, or not taken, into account and whether an error has been made so that he or she is sufficiently informed to determine whether to challenge the decision and if so to adopt the most appropriate means for doing so, and
- (b) from the point of view of the administrative decision-maker:
  - (i) to encourage that person to consider carefully the correct and proper decision to be made in the circumstances and, thereby, to improve the quality of the decision-making, and
  - (ii) to cause that person to identify the reasons which motivate the decision.

## **ENTITLEMENT TO SECTION 13 STATEMENT**

4. Subsection 13(1) provides that:

Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Circuit Court of Australia under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

5. There is no entitlement to a statement of reasons unless the requirements of subsection 13(1) are satisfied. These requirements are:
- (a) a decision to which section 13 applies, and
  - (b) the person requesting the statement (the applicant) must be a person who is entitled to make an application to the Federal Court or the Federal Circuit Court of Australia (the Court) under section 5 for review of the decision.

## **Decision to which section 13 applies**

6. Subsection 13(1) applies only where a person (for example, the Commissioner, the Registrar of the Australian Business Register) makes a 'decision to which this section applies' as defined in subsection 13(11).
7. Subsection 13(11) provides that a 'decision to which this section applies' means a 'decision to which this Act applies', subject to three specific exclusions. These specific exclusions and further exclusions are discussed at paragraphs 29 to 43 of this practice statement.
8. A 'decision to which this Act applies' is defined in subsection 3(1) to mean:
- a decision of an administrative character made, proposed to be made, or required to be made...under an enactment...other than:...a decision included in any of the classes of decisions set out in Schedule 1.

The categories of decisions set out in Schedule 1 are discussed at paragraphs 33 to 34 of this practice statement.

## **Decision**

9. A 'decision' for the purposes of review under the ADJR Act must be 'final or operative and determinative': Mason CJ in *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321, at 337. A conclusion reached along the way is not a reviewable decision.

10. The right to obtain reasons under section 13 only applies to decisions reviewable under section 5, not conduct leading to a decision or failure to make a decision (reviewable under sections 6 and 7 respectively).

### **Made under an enactment**

11. To be a decision made under an enactment, the decision:
- (a) must be expressly or impliedly authorised by the enactment, and
  - (b) must itself confer, alter or affect legal rights or obligations *Griffith University v. Tang* (2005) 221 CLR 99.
12. The definition of 'decision to which this Act applies' also excludes decisions not made under an enactment, for example a decision by the Commissioner to vote at a meeting of a bankrupt's creditors: *Hutchins v. Deputy Commissioner of Taxation* (1996) 65 FCR 269.

### **Examples of reviewable and non reviewable decisions**

13. The following are examples of decisions held to be reviewable under the ADJR Act:
- decision not to remit general interest charge under section 8AAG of the *Taxation Administration Act 1953* (TAA): *Elias v. FCT* [2002] FCA 1132
  - decision to exercise access powers under section 263 of the ITAA 1936: *Commissioner of Taxation v. Citibank* [1989] FCA 126
  - decision to issue a notice to produce documents under section 264 of the ITAA 1936: *Waterhouse v. Deputy Federal Commissioner of Taxation* (1986) 17 ATR 997, and
  - decision under section 161 of the ITAA 1936 refusing to grant an extension of time for the lodgement of a tax return: *Balnaves v. Deputy Commissioner of Taxation* (1985) 8 FCR 589; [1985] FCA 362.
14. The following are examples of decisions that have been held not to be reviewable under the ADJR Act:
- decision to commence recovery proceedings and refusing to defer such proceedings: *Rawson Finances Pty Ltd v. Deputy Commissioner of Taxation* [2010] FCA 538
  - decision not to accept a taxpayer's offer to compromise a debt: *Bilborough v. Deputy Commissioner of Taxation* [2007] FCA 773, and
  - decision not to refund a company tax instalment and to apply it against outstanding tax liabilities: *Golden City Car & Truck Centre Pty Ltd v. Deputy Commissioner of Taxation* [1998] FCA 29.

### **Who can request a statement**

15. A person may request a statement under subsection 13(1) if he or she is entitled to make an application to the Court under section 5 in relation to the decision.
16. A person may apply to the court for review of a decision if he or she is 'a person who is aggrieved by a decision' to which the ADJR Act applies: subsection 5(1).
17. Under paragraph 3(4)(a), a person who is aggrieved by a decision includes:
- (i) a person whose interests are adversely affected by the decision; or

- (ii) in the case of a decision by way of the making of a report or recommendation – a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.
18. A person will be aggrieved by a decision if his or her 'interests', broadly defined, are affected by the decision: *Trollope v. Hon Justice Middleton* [2008] FCA 564 (*Trollope*).
  19. The nature of the particular decision and the extent to which the interests of an applicant rise above those of an ordinary member of the public are relevant: see *Australian Institute of Marine & Power Engineers v. Secretary, Department of Transport* (1986) 13 FCR 124.
  20. A person with a right, interest or legitimate expectation which entitles him or her to be heard prior to a particular decision being made is more likely to be treated as being aggrieved by the decision: *Trollope*.
  21. A person can obtain a section 13 statement independent of his or her right to make an application for review. However, he or she must be entitled to make such an application. The general right to be provided, on request, with a statement under section 13 may, therefore, be exercised independently of an application for judicial review of the decision.

#### **Timeframe for making request**

22. There is no legislative time limit for requesting a statement. However, subsection 13(5) provides that a decision maker may refuse to prepare and furnish a statement if:
  - (a) in the case of a written decision provided to the applicant – the request was not made on or before the twenty-eighth day after the day on which the written decision was so furnished; or
  - (b) in any other case – the request was not made within a reasonable time after the decision was made.
23. Subsection 13(6) provides that a request for a statement shall be deemed to have been made within a reasonable time after the decision was made if the Court, on application by the applicant, declares that the request was made within a reasonable time after the decision was made.
24. If the decision maker intends to refuse the request for a statement on the basis that:
  - (a) it was not made within 28 days of written notification of the decision, or
  - (b) it was not made within a reasonable time after the decision was made in any other case,the decision maker must, within 14 days of receiving the request, notify the applicant that the statement will not be furnished to him or her and give the reason why the statement will not be provided: subsection 13(5).

#### **Form and content of request**

25. The request under subsection 13(1) must be made by notice in writing given to the person who made the decision.
26. Beyond the requirement that it be in writing, no form of request for a statement of reasons is prescribed: *Woodward J in Ansett Transport Industries (Operations) Pty Ltd v. Wraith* [1983] FCA 179 (*Ansett*).

27. The request may:
- (a) may be in the form of an informal letter, and
  - (b) may be made by an agent of the person entitled: *Morling J in Becerra v. Fowell* [1983] FCA 21.
28. The request does not have to:
- (a) use the wording of subsection 13(1)
  - (b) state that it is being made pursuant to the ADJR Act: *Woodward J in Ansett*.
29. A simple request for further information relating to a decision will not constitute a request for a statement of reasons: *Soldatow v. Australia Council* [2002] FMCA 98.

### **Exclusions**

30. A request for a statement of reasons in relation to a decision may be declined on a number of bases, including that:
- (a) the person requesting the statement is not entitled to request a statement
  - (b) the decision is not reviewable under section 5
  - (c) the decision is within a class of decisions excluded under Schedule 1
  - (d) the decision is within a class of decisions excluded under Schedule 2
  - (e) an entitlement exists to a statement of reasons under section 28 of the *Administrative Appeals Tribunal Act 1975* (AAT Act)
  - (f) the decision is excluded by regulation
  - (g) a statement of reasons has already been provided, or
  - (h) the request is made out of time.
31. These exclusions are discussed below.

### ***Person requesting statement not entitled***

32. A request for a statement of reasons may be refused where the Applicant is not a person aggrieved by the decision for the purposes of section 5.
33. Alternatively, the decision maker may apply to the Federal Court for an order declaring that the Applicant was not entitled to make the request: paragraph 13(3)(b).

### ***Decision is not reviewable under section 5***

34. Section 13 applies only in respect of decisions reviewable under section 5, that is, decisions that have been made, not conduct leading to a decision or failure to make a decision (reviewable under sections 6 and 7 respectively).

### ***Classes of decisions included in Schedule 1***

35. Schedule 1 sets out a list of classes of decisions that the ADJR Act does not apply to.
36. The classes of decisions listed in Schedule 1 which are the responsibility of the Commissioner are:

- (e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts:
- A New Tax System (Goods and Services Tax) Act 1999*
  - A New Tax System (Luxury Car Tax) Act 1999*
  - A New Tax System (Wine Equalisation Tax) Act 1999*
  - Customs Act 1901*
  - Customs Tariff Act 1995*
  - Excise Act 1901*
  - Fringe Benefits Tax Assessment Act 1986*
  - Fuel Tax Act 2006*
  - Income Tax Assessment Act 1936*
  - Income Tax Assessment Act 1997*
  - Petroleum Resource Rent Tax Assessment Act 1987*
  - Superannuation Guarantee (Administration) Act 1992*
  - Taxation Administration Act 1953*, but only so far as the decisions are made under Part 3-10 in Schedule 1 to that Act
  - Training Guarantee (Administration) Act 1990*
  - Trust Recoupment Tax Assessment Act 1985*
- (ga) decisions under section 14ZY of the *Taxation Administration Act 1953* disallowing objections to assessments or calculations of tax, charge or duty;
- (gaa) decisions of the Commissioner of Taxation under Subdivision 268-B or section 268-35 in Schedule 1 to the *Taxation Administration Act 1953*;

### **Classes of decisions included in Schedule 2**

37. Schedule 2 sets out a list of classes of decisions that are not decisions to which section 13 applies: paragraph 13(11)(c).
38. The decisions listed in Schedule 2 which may be made by the Commissioner include, but are not limited to paragraphs (e) (decisions relating to the administration of criminal justice), (f) (decisions in connection with civil proceedings), (m) (decisions in connection with the enforcement of judgments or orders for the recovery of monies) and (q) (decisions in connection with personnel management).
39. These classes of decisions are still reviewable by the Court under the ADJR Act.

### **Entitlement to statement of reasons under section 28 of the AAT Act**

40. Section 13 of the ADJR Act excludes decisions for which a statement of reasons may be sought under section 28 of the AAT Act: paragraph 13(11)(a).
41. Section 28 of the AAT Act is a provision similar to section 13. It provides that:<sup>2</sup>

<sup>2</sup> Subsection 14ZZB(2) of the TAA provides that section 28 of the AAT Act does not apply in relation to a reviewable objection decision (being decisions reviewable under Part IVC of the TAA).



if a person makes a decision in respect of which an application may be made to the Tribunal for a review, any person (in this section referred to as the *applicant*) who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision, request that person to give to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and give to the applicant, such a statement.

### ***By regulation***

42. Subsection 13(8) provides that the regulations to the ADJR Act may declare a class or classes of decisions to be decisions that are not decisions to which section 13 applies.
43. There are currently no decisions listed in the *Administrative Decisions (Judicial Review) Regulations 1985* which are within the responsibility of the Commissioner.

### ***Statements of reasons already provided***

44. Section 13 excludes decisions for which a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision have already been provided: paragraph 13(11)(b).

### ***Request made out of time***

45. There is no legislative timeframe for requesting a statement under section 13. However, a request may be refused on the basis that it is made more than 28 days after a written decision was provided, or not made within a reasonable time for decisions not provided in writing: subsection 13(5).
46. If the decision maker refuses to provide a statement on this basis, the decision maker must give the applicant, within 14 days after receiving the request, notice in writing stating that the requested statement will not be furnished to him or her and giving the reason why the statement will not be so furnished: subsection 13(5).
47. If a request for a statement is refused on this basis, there is no provision in the ADJR Act which allows the Court to extend the 28 day timeframe for requesting a statement.

### ***Provision of statement if no entitlement exists***

48. In some circumstances, a request for a statement of reasons will be received where no entitlement under section 13 exists. In these circumstances, the decision maker should consider whether it is appropriate to provide a statement setting out the reasons for the relevant decision to assist the person requesting the statement to better understand the decision. Provision of a statement of reasons in these circumstances would generally be consistent with our commitment under the Taxpayers' Charter to explain our decisions and be accountable for our actions, and would align with the beneficial aims of the ADJR Act. However, the decision maker should make it clear to the applicant that the statement of reasons has not been provided pursuant to section 13.

## PROVIDING A SECTION 13 STATEMENT

### Obligation to provide statement personal to decision maker

49. It is important to note that the obligation to furnish the statement attaches personally to the decision maker. Where a statement is to be provided, it must be the statement of the decision maker.
50. Section 17 provides for situations where a decision maker no longer holds the office they held at the time of making the decision or for some reason is not performing the duties of that office, for example, temporary absence due to illness, leave or overseas travel. See for example, *Pinchback v. Wilenski* (1983) 6 IR 111.
51. In these circumstances the notice should be directed to the person identified under paragraphs 17(c) and 17(d), that is, to the person then acting in the position of the decision-maker or, where there is no person acting in the position or the position no longer exists, to the relevant Minister or a person nominated by the relevant Minister for that purpose.

### Timeframe for providing statement

52. The statement must be prepared and provided to the applicant as soon as practicable, and in any event within 28 days after receiving the request: subsection 13(2).
53. Whilst section 13 of the ADJR Act does not provide a remedy for an applicant to compel the provision of a statement of reasons (though mandamus<sup>3</sup> could be sought under section 39B of the *Judiciary Act 1903*), the decision maker should always work to ensure that the statement is provided within 28 days. Where delay is encountered, the decision maker should contact the applicant to advise of the possible delay.

### Form and content of statement

54. There is no prescribed form of statement, other than the requirement that it be in writing.
55. The requirements of section 13 will be satisfied by:
  - a statement in writing setting out the findings on material questions of fact,
  - referring to the evidence or other material on which those findings were based, and
  - giving the reasons for the decision.
56. The statement should be written using 'clear and unambiguous language' not 'vague generalities or the formal language of the legislation': Woodward J in *Ansett*.
57. Woodward J in *Ansett* (at 507) also noted that:

The appropriate length of the statement...will depend upon consideration such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.
58. Appendix A of this practice statement sets out suggestions for the form of statements to be prepared by ATO decision makers.

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<sup>3</sup> Mandamus is an order issued by the court against a tribunal, public body or official requiring it to perform a duty which it has failed to perform.

## **Required content**

### *Material facts*

59. Material facts are those facts that can affect the decision. They are those facts that are necessary to support the decision.
60. The decision maker should set out in the statement those facts that he or she took into account in making the decision.
61. The decision maker should only set out his or her findings on the material facts, and should not provide a chronology or list of all the facts of the matter (though non-material facts could be listed in a Background section).
62. The findings included in the statement must be those that the decision maker actually did make, and not those that the relevant provision requires the decision maker to make: *Minister for Immigration and Multicultural Affairs v. Yusuf* (2001) 206 CLR 323. If a matter was regarded by the decision maker as material, and was considered by him or her, then the findings of fact in relation to the matter must be set out in the statement.
63. The decision maker must include all findings on material facts. If the statement of reasons does not set out the material findings of fact relied on in making the decision, it is possible that on judicial review of the decision the court may infer that those facts not stated were considered to be immaterial. If the Court finds that those facts are material, it may follow that the decision maker has erred in law: see *Sullivan v. Department of Transport* (1978) 20 ALR 323 at 348-9 and 352-3 and *Public Services Board of NSW v. Osmond* (1986) 4 Leg Rep 1 at 2.
64. Findings on facts are distinguishable from subjective judgments or opinions. Where a subjective judgment or opinion is based on facts, it is desirable that those underlying facts should be set out as well as the judgment or opinion formed on the basis of them.

### *Evidence or other material*

65. A statement of reasons must refer to the evidence or other material on which the findings of material fact are based.
66. The decision maker is not required to list all evidence considered by him or her in making the decision. However, depending on any regulations made on judicial review of the decision, the court may have regard to all documents before the decision maker (being all documents held by the government department): *Canwest Global Communications Corp v. Australian Broadcasting Authority* [1997] FCA 540; *Nestle Australia Ltd v. Deputy Commissioner of Taxation* (1986) 10 FCR 78.
67. The material relied on by the decision maker can include ATO documents, such as rulings or practice statements.
68. There is no obligation to provide copies of material and evidence in addition to the statement: *Chapman v. Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 1 at 11; 133 ALR 74 at 86.
69. On judicial review of the decision, the range of documents before the court will be likely to be wider than those referred to in the statement of reasons. The person to whom the decision relates may also be able to obtain the documents referred to in the statement and a wider range of documents through a Freedom of Information request.

70. Decision makers frequently act upon recommendations, reports and results of investigations carried out by subordinate officers or appropriately qualified experts. Where these recommendations are considered in making a decision, the statement of reasons should incorporate the recommendation as well as the facts (and a reference to the evidence or other material on which they are based) and the reasons leading to the recommendation.

#### *Reasons for the decision*

71. The statement should explain the steps of the reasoning process that led to the decision.
72. The actual reasons relied upon at the time the decision was made are to be set out in the statement, and not other reasons or facts which may subsequently have come to light or appear to be more desirable: *Palmer and Minister for the Capital Territory* [1979] AATA 45.
73. The reasoning should identify any element of official policy or guidelines, such as a practice statement or ruling, which formed part of the justification for the decision made. Care must, however, be taken in attributing weight to criteria found in policies or guidelines and relied upon to justify the decision. An inflexible application of a policy or guideline is not a proper exercise of discretion.
74. Where an applicant has presented arguments, submissions or evidence to the decision maker, it is desirable that the statement of reasons should refer to these, and indicate the response or conclusion on these.
75. The decision maker should prepare a record of the reasons for his or her decision at the time it is made. This will assist in preparing a statement fulfilling the requirements of section 13 if later requested.
76. Wherever practicable at the time a decision is made, it is advantageous for the decision to be accompanied by a statement setting out findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision. If this is done, paragraph 13(11)(b) would be satisfied and this process would obviate the need to later furnish a statement of reasons under subsection 13(1). Further, this accords with the ATO's commitment in the Taxpayers' Charter to explain our decisions.

#### ***Exclusion of certain information from a statement***

77. The requirement to provide a statement is subject to further exclusions set out in sections 13A and 14.

#### *Section 13A – third party information*

78. Certain information relating to the personal affairs or business affairs of a third party may be excluded from a statement: section 13A.
79. Subsections 13A(1) and 13A(2) provide that the decision maker is not required to include in the statement information that:
- (a) relates to the personal affairs or business affairs of a person, other than the applicant; and
  - (b) is information:
    - (i) that was supplied in confidence;
    - (ii) the publication of which would reveal a trade secret;

- (iii) that was furnished in compliance with a duty imposed by an enactment; or
  - (iv) the disclosure of which would contravene an enactment that expressly imposes on the decision maker a duty not to divulge or communicate to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances (for example, taxation officers' obligations under Subdivision 355-B of Schedule 1 to the TAA).
80. The decision maker must notify the applicant in writing that the relevant information has not been included and give the reason for not including the information: paragraph 13A(3)(a).
81. Where the statement would be false or misleading without the relevant information, the decision maker is not required to provide the statement: paragraph 13A(2)(b). In this case, the decision maker must notify the applicant in writing that the statement will not be provided and give the reason for not providing the statement: paragraph 13A(3)(b).
82. Exclusion of the information, or non-provision of the statement because of this information, does not preclude the Court on review from making an order for discovery of documents or to require the giving of evidence or the production of documents to the Court: subsection 13A(4).

*Section 14 – where disclosure contrary to public interest*

83. A decision maker is not required to include certain information which the Attorney-General has certified would, if disclosed, be contrary to the public interest in a statement furnished under subsection 13(1): subsections 14(1) and 14(2).
84. Subsection 14(1) indicates the Attorney-General may certify that a disclosure of information concerning a specified matter would be contrary to public interest:
- (a) by reason that it would prejudice the security, defence or international relations of Australia;
  - (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
  - (c) for any reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed.
85. As with section 13A, the decision maker is not required to include the relevant information in the statement: paragraph 14(2)(a). Further the decision maker must notify the applicant in writing that the relevant information has not been included and give the reason for not including the information: paragraph 14(3)(a).
86. Where the statement would be false or misleading without the relevant information, the decision maker is not required to provide the statement: paragraph 14(2)(b). In this case, the decision maker must notify the applicant in writing that the statement will not be provided and give the reason for not providing the statement: paragraph 14(3)(b).
87. Exclusion of the information, or non-provision of the statement because of this information, does not preclude the Court on review from making an order for discovery of documents or to require the giving of evidence or the production of documents to the Court: subsection 14(4).

### ***Additional statement containing further and better particulars***

88. The applicant, on receiving the statement of reasons, may apply to the Federal Court or Federal Circuit Court of Australia if they consider that the statement does not contain adequate:
- (a) particulars of findings of facts,
  - (b) reference to the evidence or other material on which those findings of fact were based, or
  - (c) particulars of the reasons for the decision: subsection 13(7).
89. If the Court considers that the statement does not contain adequate:
- (a) particulars of findings of facts,
  - (b) reference to the evidence or other material on which those findings of fact were based, or
  - (c) particulars of the reasons for the decision,
- the Court may order the decision maker to, within a specified time, provide an additional statement, or statements, containing further and better particulars in relation to matters specified in the order: subsection 13(7).

### **Use of statement**

90. The statement of reasons, unless effectively challenged, is evidence of the reasons for the decision to which it relates: *Sezdirmezoglu and Another v. Acting Minister for Immigration and Ethnic Affairs* (1983) 51 ALR 561 per Smithers J at 570.
91. The statement cannot be used as evidence of the facts underlying the decision itself but is evidence of the maker's state of mind at the relevant time: *Minister for Immigration and Ethnic Affairs v. Arslan* (1984) 55 ALR 361 at 364.
92. If a fact is not contained in the statement, then an inference can be drawn that the fact was not taken into account in reaching the decision. However, the decision maker cannot rely on the statement to assert that the failure to mention a fact meant that it was not taken into account: *Minister for Immigration and Ethnic Affairs v. Taveli and Others* (1990) 23 FCR 162.
93. Errors contained in a section 13 statement may lead to an inference that the decision maker took irrelevant considerations into account and failed to take into account relevant considerations: *Lally v. The Minister for Immigration & Ethnic Affairs* (unreported, 17 January 1985, Keely J).
94. The Court may also look at reasons provided by a decision maker and conclude that he did not give any consideration at all to relevant matters: *Tagle v. Minister for Immigration & Ethnic Affairs* (1983) 46 ALR 379 at 386-7.

### **Approach of the court to review of reasons**

95. Lockhart J in *Smith v. Minister for Immigration and Ethnic Affairs* (1984) 53 ALR 551 at 554 indicated that:
- ...it is not legitimate to scrutinise reasons for decisions of government officers too finely or precisely. Such reasons should be studied carefully but sensibly, and not zealously in the pursuit of error.

96. Hill J, endorsing Lockhart J's comments, in *Powell v. Evreniades* (1989) 87 ALR 117 at 122, observed that:
- The court will not subject such a statement to a fine analysis with a view to finding through a microscopic study of it some error of law.
97. Keifel, Weinberg and Edmonds JJ in *Inglewood Olive Processors Ltd v. Chief Executive Officer of Customs* [2005] FCAFC 101 at paragraph 26 stated that:
- Where an administrative decision maker starts and ends their deliberations with the correct legal test, a court should not readily infer legal error as a consequence of infelicitous or loose language somewhere in between.

## **PROCESS FOR PREPARATION**

### **Identifying and determining validity of a request**

98. ATO staff should identify requests for statements of reasons as soon as possible.<sup>4</sup>
99. Correspondence which appears to be requesting a statement of reasons should be referred immediately to both:
- (a) the decision maker, and
  - (b) the relevant state Tax Resolution Practice (TRP) Legal Services Branch (LSB) Manager.
100. When seeking to identify the decision maker, note that the decision maker will not always be the officer listed on the relevant correspondence. When unsure, send the request to the listed contact, and raise the issue with LSB.
101. The TRP LSB manager will appoint an LSB officer to assist the decision maker in reviewing the request for the statement of reasons.
102. The decision maker will engage with the LSB officer to determine the validity of the request – including eligibility, jurisdiction and timing issues.
103. The validity of the request should be determined no later than 7 days from receipt of the request.
104. If the request is valid, the decision maker is to prepare a draft statement and provide it to the LSB officer no later than 14 days from receipt of the request.
105. In conjunction with the LSB officer, the decision maker will draft, finalise and serve a statement of reasons, within a total of 28 days of the office receiving the request.
106. If the request is not valid, the decision maker will convey this view to the applicant, within the required timeframe (14 days where the request is declined on the basis that it is not made within time and 28 days where the request is not considered valid, for other reasons).
107. If the request relates to third parties, even if the applicant is entitled to request a statement, the decision maker, in conjunction with the LSB officer, should consider whether privacy or secrecy obligations restrict the ability to respond.

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<sup>4</sup> ATO staff should refer to BSL processes and policies regarding recording of requests on the enterprise wide management system (Siebel).

## Responding to a request for a statement

108. In response to a request for a statement of reasons, a decision maker may:
- (a) prepare and provide the statement as soon as practicable and in any event within 28 days after receiving the request: subsection 13(2), subject to exclusions under sections 13A and 14
  - (b) notify the applicant in writing within 14 days of request that he or she is not entitled to the reasons because the request was made out of time (either because the request was not made within 28 days of receiving the written decision or the request was not made within a reasonable time): subsection 13(5)
  - (c) notify the applicant in writing within 28 days that they are not entitled to make the request: paragraph 13(3)(a) (note – the applicant may then apply to the Federal Court or Federal Circuit Court of Australia for an order declaring they are entitled to a statement: subsection 13(4A)), or
  - (d) apply to the Federal Court or Federal Circuit Court of Australia within 28 days for an order that the applicant is not entitled to make the request: paragraph 13(3)(b).

## Preparing the statement

109. Statements of reasons prepared by ATO staff should:
- (a) include the required content listed at paragraph 84 of this practice statement,
  - (b) identify the decision maker, and his/her authority to make the decision
  - (c) refer to, and set out, the relevant law that authorises the decision to be made, and
  - (d) state what the decision is.
110. The statement should be written in plain language and use headings where possible (for a sample statement see Appendix A of this practice statement). It should be written 'in terms which can be understood by the people affected by [the decision]': per Woodward J in *Commonwealth v. Pharmacy Guild (Aust)* (1989) 91 ALR 65; 19 ALD 510 at 67.
111. The statement should not be too long. The appropriate length of the statement will depend on considerations such as the nature and importance of the decision and its complexity.
112. The decision maker may draft the statement in the form of the sample statement provided in Appendix A of this practice statement, or adapt the sample to suit the circumstances of the relevant decision.
113. Appendix B of this practice statement contains a checklist of matters to consider when preparing the statement.
114. If it appears that the reasons for the decision to which the request relates were inadequate or erroneous and render the decision unlawful, the decision maker and LSB officer should consider whether the decision should be withdrawn and a new one rendered.
115. Similarly, if it appears that a different decision would be preferable, the decision maker and LSB officer should consider whether the decision should be withdrawn and a new one rendered. If the original decision is the preferable one, but further or better reasons appear than those which actuated it, it will be necessary to either:



- (a) furnish separately from the actual reasons for the decision a statement of these further or better reasons; or
  - (b) where the reasons are changed to such an extent that it would be better to withdraw the original decision, withdraw the decision, assuming there is power to do so, and render a new one.
116. If a new decision is to be rendered, it is to be communicated to the person who made the request together with a statement of reasons for the new decision.

### Sample template for statement of reasons

#### Request for statement of reasons pursuant to section 13 of the *Administrative Decisions (Judicial Review) Act 1977* by [taxpayer name]

- type of decision
- section reference and
- name of legislation

*For example: Decision to approve access without prior notice pursuant to section 353-15 of Schedule 1 to the Taxation Administration Act 1953 and subsection 263(1) of the Income Tax Assessment Act 1936*

#### Background

- details of person making statement (the decision maker), including name, position and relevant authorisation or delegation held
- details of the decision, including date the decision was made, the decision made, by reference to legislation, and where applicable, action taken pursuant to the decision

*For example: I, Joseph Delegate, am a Senior Assistant Commissioner of Taxation and a Senior Executive Service officer of the Australian Taxation Office (ATO). I am a delegate of the Commissioner of Taxation of the Commonwealth of Australia, and may exercise, amongst other matters, the powers under section 353-15 of Schedule 1 to the Taxation Administration Act 1953 (TAA 1953) and section 263 of the Income Tax Assessment Act 1936 (ITAA 1936)*

*Pursuant to the authorisation I granted, access was undertaken at 123 Main Street, Sydney, New South Wales on 27 and 28 October 2011. During the course of the access, officers of the ATO identified various documents and product samples which accessed by officers of the ATO.*

- details of the request for a statement of reasons, including date and name of person requesting the statement
- For example: By letter dated 5 November 2011, Law Firm, solicitors for Green Pty Ltd requested a statement of reasons pursuant to section 13 of the Administrative Decisions (Judicial Review) Act 1977*

#### Findings on material questions of fact

- findings of fact on which decision was based, with reference to the source of the findings

## Evidence and other material on which these findings were based

Provide list of documents and information on which findings of fact were based, for example:

- reports
- submissions prepared by taxpayer
- submissions prepared by ATO staff or other government departments
- policy and/or practice documents, including taxation rulings, practice statements, etc
- documents obtained or submitted by taxpayer
- ATO records
- Decision maker's own understanding of relevant legislation, case law and public rulings

*For example: I based my foregoing findings on:*

1. *a written submission by Jane Case-Officer dated 11 October 2011*
2. *ATO Access and Information Gathering Manual, in particular Chapters 1 and 7, and*
3. *my own understanding of the relevant legislation, case law and public rulings*

## Reasons for the decision

- reproduce relevant provision or section under which decision is made

*For example: the decision was made under section 353-15(1) of Schedule 1 to the TAA 1953 and subsection 263(1) of the ITAA 1936 which provides as follows:*

### **353-15 Access to premises for the purposes of the indirect tax laws**

- (1) *For the purposes of an indirect tax law, the Commissioner, or an individual authorised by the Commissioner for the purposes of this section:*
  - (a) *may at all reasonable times enter and remain on any land or premises; and*
  - (b) *is entitled to full and free access at all reasonable times to any documents, goods or other property; and*
  - (c) *may inspect, examine, make copies of, or take extracts from, any documents; and*
  - (d) *may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.*

.....

- 263(1) *The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.*

- indicate why decision made was made, with reference to documents and findings of fact

*For example: The buildings, places, books, documents and other papers referred to above that the Commissioner seeks access to are considered crucial in ascertaining whether the taxpayers have complied and are complying with their Australian tax obligations. Where appropriate, samples of product/materials are also considered crucial in ascertaining whether illicit manufacture and movement of excisable product has occurred...*

## **Conclusion**

- summarise decision, and basis for decision

*For example: The records that the Commissioner seeks to access are considered crucial in ascertaining whether the taxpayers have complied with their Australian tax obligations. I authorised access without notice pursuant to section 263 of the ITAA 1936 on the basis that exceptional circumstances existed, as set out above.*

- Signature
- Name
- Position title
- Date of statement

**Checklist of factors to consider in preparing a section 13 statement**

The following factors should be taken into consideration when preparing the statement:

- (a) the decision and any related papers the subject of the request
- (b) any document setting out the terms of the decision furnished to the person who made the request
- (c) whether the decision maker was properly authorized to make the decision
- (d) whether the decision was based on a report or recommendation of some other subordinate officer
- (e) the facts leading up to the decision including any relevant correspondence with the Applicant, or related parties, and any discussions or interviews held with him or her
- (f) any other considerations taken into account by the decision maker at the time the decision was made
- (g) if there were procedures that were required by law to be observed in connexion with the making of the decision (whether by statute, regulations or otherwise), whether those procedures were observed by the decision maker
- (h) whether the decision made is still regarded as a lawful decision, and could be successfully defended on the basis of the reasons for decision, and supporting material, at the time the decision was made
- (i) whether on examination it appears to the decision maker that a different decision would have been preferable, and whether the original decision should be withdrawn and a new decision (based on more adequate or other reasons) made
- (j) whether the decision is regarded as lawful and could be successfully defended for reasons other than, or in addition to, those at the time the decision was made
- (k) relevant provisions of the appropriate taxation Act, regulations, etc. and relevant taxation rulings, practice statements and other guidance documents
- (l) the ATO view (if any) in the matter, whether the decision was made in accordance with that policy and, if so, whether and how the merits of the particular case were also taken into account
- (m) whether there are matters in prior or subsequent years or periods which affect the decision made, and
- (n) whether the decision, if an application for an order of review is made, will affect other taxpayers.

Subject references	judicial review of decisions statement of reasons
Legislative references	ADJR Act 1977 ADJR Act 1977 3(1) ADJR Act 1977 3(4)(a) ADJR Act 1977 5 ADJR Act 1977 5(1) ADJR Act 1977 6 ADJR Act 1977 7 ADJR Act 1977 13 ADJR Act 1977 13(1) ADJR Act 1977 13(2) ADJR Act 1977 13(3)(a) ADJR Act 1977 13(3)(b) ADJR Act 1977 13(4A) ADJR Act 1977 13(5) ADJR Act 1977 13(6) ADJR Act 1977 13(7) ADJR Act 1977 13(8) ADJR Act 1977 13(11) ADJR Act 1977 13(11)(a) ADJR Act 1977 13(11)(b) ADJR Act 1977 13(11)(c) ADJR Act 1977 13A ADJR Act 1977 13A(1) ADJR Act 1977 13A(2) ADJR Act 1977 13A(2)(b) ADJR Act 1977 13A(3)(a) ADJR Act 1977 13A(3)(b) ADJR Act 1977 13A(4) ADJR Act 1977 14 ADJR Act 1977 14(1) ADJR Act 1977 14(2) ADJR Act 1977 14(2)(a) ADJR Act 1977 14(2)(b) ADJR Act 1977 14(3)(a) ADJR Act 1977 14(3)(b) ADJR Act 1977 14(4) ADJR Act 1977 17 ADJR Act 1977 17(c) ADJR Act 1977 17(d) ADJR Act 1977 Sch 1 ADJR Act 1977 Sch 2 TAA 1953 8AAG TAA 1953 14ZZB(2) TAA 1953 Pt IVC TAA 1953 Sch 1 353-15 TAA 1953 Sch 1 353-15(1) TAA 1953 Sch 1 Subdiv 355-B ITAA 1936 161 ITAA 1936 263 ITAA 1936 263(1) AAT Act 1975 28 Judiciary Act 1903 39B Administrative Decisions (Judicial Review) Regulations 1985

Case references	<p>Australian Broadcasting Tribunal v. Bond (1990) 170 CLR 321  Ansett Transport Industries (Operations) Pty Ltd v. Wraith [1983] FCA 179; (1983) 48 ALR 500  Australian Institute of Marine &amp; Power Engineers v. Secretary, Department of Transport (1986) 13 FCR 124  Balnaves v. Deputy Commissioner of Taxation (1985) 8 FCR 589; [1985] FCA 362  Becerra v. Fowell [1983] FCA 21  Bilborough v. Deputy Commissioner of Taxation [2007] FCA 773  Canwest Global Communications Corp v. Australian Broadcasting Authority [1997] FCA 540  Chapman v. Minister for Aboriginal and Torres Strait Islander Affairs (1995) 37 ALD 1; (1995) 133 ALR 74  Commissioner of Taxation v. Citibank [1989] FCA 126  Commonwealth v. Pharmacy Guild (Aust) (1989) 19 ALD 510; (1989) 91 ALR 65  Elias v. FCT [2002] FCA 1132  Golden City Car &amp; Truck Centre Pty Ltd v. Deputy Commissioner of Taxation [1998] FCA 29  Griffith University v. Tang (2005) 221 CLR 99  Hutchins v. Deputy Commissioner of Taxation (1996) 65 FCR 269  Inglewood Olive Processors Ltd v. Chief Executive Officer of Customs [2005] FCAFC 101  Lally v. The Minister for Immigration &amp; Ethnic Affairs (unreported, 17 January 1985, Keely J)  Minister for Immigration and Ethnic Affairs v. Arslan (1984) 55 ALR 361  Minister for Immigration and Ethnic Affairs v. Taveli and Others (1990) 23 FCR 162  Minister for Immigration and Multicultural Affairs v. Yusuf (2001) 206 CLR 323  Nestle Australia Ltd v. Deputy Commissioner of Taxation (1986) 10 FCR 78  Palmer and Minister for the Capital Territory [1979] AATA 45  Pinchback v. Wilenski (1983) 6 IR 111  Powell v. Evreniades (1989) 87 ALR 117  Public Services Board of NSW v. Osmond (1986) 4 Leg Rep 1  Rawson Finances Pty Ltd v. Deputy Commissioner of Taxation [2010] FCA 538  Sezdirmezoglu and Another v. Acting Minister for Immigration and Ethnic Affairs (1983) 51 ALR 561  Smith v. Minister for Immigration and Ethnic Affairs (1984) 53 ALR 551  Soldatow v. Australia Council [2002] FMCA 98  Sullivan v. Department of Transport (1978) 20 ALR 323  Tagle v. Minister for Immigration &amp; Ethnic Affairs (1983) 46 ALR 379  Trollope v. Hon Justice Middleton [2008] FCA 564; 169 FCR 507  Waterhouse v. Deputy Federal Commissioner of Taxation 86 ATC 4639; (1986) 17 ATR 997</p>
Other references	Taxpayers' Charter (NAT 2548)
File references	1-3D7UALI
Date issued	31 January 2013
Date of effect	31 January 2013
Other Business Lines consulted	L&P, SME, LBI, MEI, ITX, SPR, Debt