

The Tax Summit

Session 3.2: The Commissioner's powers to issue an assessment – what do I need to know?

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1. Introduction

The self-assessment regime underpins the Australian income taxation system. Broadly, this means that the responsibility rests with the taxpayer to calculate their own tax liability and ensure that the income tax return and relevant forms are lodged on time and in compliance with the taxation laws each year.

Under this regime, the Commissioner of Taxation (**Commissioner**) accepts the information provided by a taxpayer is complete and accurate. However, in the event the Commissioner detects an error, the Commissioner has the ability to re-calculate the tax payable and issue an amended assessment. Likewise, if a taxpayer fails to lodge its income tax return and relevant forms, the Commissioner has the ability to raise a default assessment.

This paper explores the nature of an income tax assessment and the ability, processes and avenues for challenging an income tax assessment. The first part of the paper will delve into the intricacies of the assessment making process and the different types of assessments. It will then explore the realm of review and appeal rights provided under Part IVC of the TAA, in particular providing a detailed explanation of the objection process and signalling areas in which taxpayers can potentially make errors and reduce their chances of successfully challenging their tax assessment. The paper will also explore the pros and cons of the different Part IVC review and appeal rights and other avenues such as judicial review mechanisms, including a discussion of the evidentiary burdens associated with appeal. Finally, the paper will briefly examine some other avenues for taxpayers to expeditiously deal with and resolve a tax dispute, including early engagement with the ATO.

Overall, there are a number of practical and strategic considerations that ought to be factored at the various stages of a tax dispute – the assessment being just the beginning.

All references in this paper to:

- **Commissioner** means the Commissioner of Taxation of the Commonwealth of Australia
- **ITAA 1936** means the Income Tax Assessment Act 1936 (Cth)
- **ITAA 1997** means the Income Tax Assessment Act 1997 (Cth)
- **TAA** means the Taxation Administration Act 1953 (Cth)
- **Evidence Act** means the Evidence Act 1997 (Cth)

2. The Commissioner's assessment making powers and duties

It is important to understand what constitutes an assessment and to identify the *nature* of the assessment. This is because an assessment crystallises the liability to pay tax, determines when the tax is due, and entitles the taxpayer to object against the liability to tax if they are dissatisfied in accordance with Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**).

On receipt of a tax assessment notice, a taxpayer should consider a number of matters in relation to whether the assessment is valid and correct, the consequences of the assessment and how to challenge the assessment if it is considered to be incorrect.

2.1 What is an assessment?

An 'Assessment' is defined in section 995-1 of the ITAA 1997 as follows: "in relation to a tax-related liability, has the meaning given by a * taxation law that provides for the assessment of the amount of the liability".¹

'Assessment' is defined in section 6 of the ITAA 1936 to mean, in part:

- (a) *the ascertainment:*
 - (i) *of the amount of taxable income (or that there is no taxable income); and*
 - (ii) *of the tax payable on that taxable income (or that no tax is payable); and*

...

The Court has made clear that the making of an assessment is a process, not a document.² In *Batagol v FCT*,³ the Court provides that an 'assessment' as a mere calculation has no legal effect. Rather, the tax becomes due and payable where the Commissioner has gone through the process of calculation and then serves on the taxpayer a notice that he has assessed the taxable income and the tax at specified amounts.

Several matters have been raised to clarify when the notice of assessment received by the taxpayer does represent a lawful assessment, triggering a tax liability. Relevantly, these include (1) an assessment must be definitive, in that it does not purport to raise a provisional or contingent liability,⁴ and (2) an assessment must be a bona fide application of the tax law. That is to say, the Commissioner is not permitted to determine a tax liability with no grounding in fact or law.⁵ To do so could constitute an *ultra vires* act.

It is worth noting that, unlike an amended assessment, the income tax law does not set a specific time limit for the Commissioner to make an initial assessment. However, under section 171(1) of the ITAA 1936, if a taxpayer submits a tax return but does not receive an assessment notice within 12 months, they have the option to formally request the Commissioner to make an assessment through a written request sent by registered post.

¹ *Commissioner of Taxation v Ryan* (2000) 201 CLR 109 [5]

² *R v Deputy FC of T, Ex Parte Hooper* (1926) 37 CLR 368.

³ (1963) 109 CLR 243 251-252.

⁴ *FC of T v S Hoffnung & Co Ltd* (1928) 1 ATD 310.

⁵ *Pezzano, ex parte DC of T* 89 ATC 4255.

2.2 The power to assess

2.2.1 General assessing power

Section 166 of the ITAA 1936 provides that from the taxpayer's returns and from any other information in his possession, the Commissioner must make an assessment of:

- (a) the amount of the taxable income (or that there is no taxable income) of any taxpayer; and
- (b) the amount of the tax payable thereon (or that no tax is payable); and
- (c) the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).

There are several other provisions which gives the Commissioner the power to assess.

Amended Assessments

An amended assessment formally records the Commissioner's recalculation of a taxpayer's liability for any given year. Typically this occurs following an ATO audit where the Commissioner may exercise this power to amend a taxpayer's prior year assessment by issuing an 'amended assessment'.

Section 170 of the ITAA 1936 provides the Commissioner with the power to amend original or deemed assessments within certain time limits, known as the limited amendment period. Generally, for individual taxpayers with simple affairs, the limited amendment period is 2 years from the date the notice was served on the taxpayer. In certain cases, this period is extended to 4 years, usually in cases where the taxpayer is a company or a trustee conducting a large business. However, there is no time limit where the Commissioner makes a finding of fraud or evasion with respect to the taxpayer, or as a result of a Court or Tribunal decision where tax liability is varied.

During a review or audit, the Commissioner is alert to the time limits imposed in section 170 of the ITAA 1936. If there is a concern the Commissioner may run out of time to make an amended assessment, he will usually seek consent from the taxpayer to extend the time in accordance with section 170(7) of the ITAA 1936. A taxpayer may refuse such request and if so, the Commissioner can apply to the Federal Court for an order extending the period for amendment, or proceed with issuing an assessment before the expiry of the limited amendment period.

Default assessment

Section 167 of the ITAA 1936 allows the making of a "default" assessment where a person defaults in furnishing a return, the Commissioner is not satisfied with a return furnished or the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income. Under these circumstances, the Commissioner may make "an assessment of the amount upon which in his judgement income tax ought to be levied".

In deciding to make a default assessment the Commissioner should have regard to Practice Statement PS LA 2007/24 which provides that a default assessment must be on reasonable grounds and supported by sufficient information. In determining the amount of income tax which "ought to be levied", the Commissioner "may come directly to the task of determining a figure which, once determined becomes the taxable income"⁶, as opposed to being required to determine the taxpayer's assessable income and deductions. In certain instances, particular where the Commissioner considers that there is "unexplained wealth", the Commissioner may use an "asset betterment" approach to determine the amount of income tax which "ought to be levied". The asset betterment approach involves determining an individual's net worth at the end of an income year and comparing that to what it was at the start of the income year. The difference is then treated as assessable income.

⁶ *Briggs v DFC of T (WA) & Ors* 87 ATC 4278, 4291 (per Sheppard J).

Whilst this involves the Commissioner making 'best efforts' to ascertain the taxpayer's assessable income, it is possible for the Commissioner to make errors, some common errors can include:

- Not identifying exempt or non-assessable income;
- Incorrect classification of expenditure (classifying business expenditure as private or domestic); and
- Inadvertently double counting transactions.

Alternative Assessment

Section 177 of the ITAA 1936 provides the Commissioner power to make 'alternative' assessments. This means that the Commissioner may, alongside a primary assessment, issue a document purporting to be an assessment but not necessarily expressed in definitive terms. If this is the case, the secondary assessment is called an alternative assessment. The alternative assessment may contemplate the collection of tax on the same income from a different taxpayer or on a different basis. It is an alternative assessment because the ATO is flagging it may collect tax on the alternative basis if the ability to collect tax on the primary assessment fails for any reason.

The operation and nature of alternative assessments were recently explored in *Hyder & Ors v Commissioner of Taxation* [2022] FCA 264. This matter arose in relation to three related taxpayers: Mr H, SEPL Pty Ltd, and the EMH Trust. Following an audit, the Commissioner issued an alternative assessment to the EMH Trust which resulted in certain distributions being found to be *void ab initio* and increase the EMH Trust's assessable income. The alternative assessment did not purport to quash an assessment still outstanding against SEPL Pty Ltd. Therefore, the Commissioner was purporting to tax the same income in the hands of both SEPL Pty Ltd (as a partner of a partnership) and the GMH Trust (as the trustee that would otherwise distribute to said partnership).

Of the several issues considered in this matter, the relevant issue is the alleged double collection issue that arose from the alternative assessments. The Appellants argued the Commissioner was attempting to double collect on the same tax from both SEPL Pty Ltd and the GMH Trust.

The Court did not grant the injunction sought by the Appellants because there was already Part IVC proceedings on foot and in accordance with *Futuris* (discussed below), the matter was to be resolved via that route. However, significantly, the Court did declare the Commissioner's conduct as "oppressive" and quashed the decision to not defer the payment of the liability by SEPL Pty Ltd and the GMH Trust.

The Court rebuked the position that the Commissioner should not issue alternative assessments in cases such as this. It appears from the judgement at paragraph [208] that the Commissioner fully accepted that both the primary assessment issued to SEPL Pty Ltd and the alternative assessment issued to the GMH trust were independently enforceable debts but that as soon as one assessment was proven to be correct, the other would no longer constitute an enforceable debt. However, he still intended to collect on both. This position would inevitably direct the Court to the rule against oppressive conduct by the Commissioner as detailed in *Richardson v FC of T*.⁷

2.2.2 Validity of assessments

Turning to the validity of an assessment, section 175 of the ITAA 1936 specifically provides that the validity of any assessment shall not be affected if the provisions of the Act have not been complied with. Further, section 350-10(1) of Schedule 1 to the TAA provides that the production of a notice of assessment is conclusive evidence that the assessment was properly made and the amounts in the assessment are correct. As a result of these provisions, it is difficult to attack the validity of an assessment, which is demonstrated in the following cases.

Donoghue

⁷ (1932) 2 ATD 19.

In *Donoghue v FC of T*,⁸ the Commissioner issued amended assessments to a taxpayer based predominantly on documents illegally given to him by his representative. The lawyer and the taxpayer had a falling out over a disputed invoice at which stage the representative, who was involved with the taxpayer's daughter, gave documents, emails and two laptop computers to the Commissioner without the taxpayer's consent. This disclosure was a violation of legal professional privilege. On review, the taxpayer contended that as the assessments were based on evidence the Commissioner knew to be privileged, the assessment was the result of maladministration.

The Court disagreed and held that the assessments were valid – if the taxpayer wanted to challenge them he had to pursue an objection and then seek review – the Court could not grant a writ in these circumstances. However, the Court also held that legal privilege reposed a right to not be compelled to produce documents – as the representative had willingly given up the information, nothing prevented the Commissioner from relying on it.

Therefore, relying on these documents was not the type of maladministration that would subject the assessments to a writ under the *Judiciary Act 1903* (Cth). However, the Court did note that the taxpayer may have recourse to sue the representative who had violated professional privilege and confidentiality in revealing this information to the Commissioner.

The case reminds practitioners to be mindful that the protections generally associated with state intervention into private rights do not necessarily apply to the Commissioner. In this example, the issue was the Commissioner's use of illegally obtained evidence. Other examples of these powers include the Commissioner's extensive information gathering powers, the power to compel attendance at an interview and be interviewed, and the power to issue garnishee notices without court approval.⁹ Therefore, it is important not to conflate the powers of the Commissioner with similar powers that are exercised by law enforcement agents because the former are, arguably, relatively unconstrained when compared to those of the latter.

Futuris

FCT v Futuris Corporation Ltd (2008) 69 ATR 41 dealt with a taxpayer disposing of part of its corporate group. In order to achieve the disposal, it recognised some of the companies beneath an intermediate holding company and floated the shares on the stock exchange. The disposal occurred in 1998 and the taxpayer lodged its return. The Commissioner proceeded to review this return in 2002 and issued an amended assessment in 2002 (the first amendment). The taxpayer objected to this and then sought further review. In 2004, the Commissioner issued a further amended assessment making a determination under section 177F of the ITAA 1936 (the second amendment). The taxpayer objected to the second amendment and then sought judicial review.

The taxpayer raised a further complaint that the two amendments, when read together, double counted a certain amount of income. The taxpayer sought to have the amendments quashed on this basis outside of the Part IVC of the TAA review that was still progressing in respect of both assessments.

The High Court held, in granting the Commissioner's appeal, that both assessments were valid and therefore a writ under section 39B of the *Judiciary Act 1903* was not available. In reaching this conclusion, the Court concluded that:

- Section 175 of the ITAA 1936 immunised assessments from judicial intervention in almost all cases, the exclusions to this being:
 - Judicial review conducted under Part IVC of the TAA;
 - Assessments that were in fact not assessments as they were not sufficiently specific or definitive; and
 - Assessments that were the result of deliberate maladministration by the Commissioner.

⁸ [2015] FCAFC 183.

⁹ *Taxation Administration Act 1953* (Cth) sch 1, s260-5.

- The taxpayer had not proven that the assessments were the result of deliberate maladministration, nor that either assessment was not an assessment.

Therefore, the only route forward for the taxpayer was Part IVC review. This case is important as it clarified that section 175 of the ITAA 1936 functioned as a privative clause. However, the section does not protect the Commissioner from any and all review. Consequently, the near totality of judicial review of assessments was shifted to the procedure set out in Part IVC of the TAA rather than the *Judiciary Act* or the Court's original jurisdiction.

2.3 Payment of assessments

Upon issuing a valid assessment, a liability is raised from the taxpayer to the Commonwealth equal to the amount of tax assessed. Section 5-5 of the ITAA 1997 sets out when income tax that a taxpayer must pay for a financial year is due and payable.

Very importantly, 14ZZM and 14ZZR of the TAA 1953 provide that a pending review or appeal is not to affect the implementation of a taxation decision:

This means that the Commissioner can seek to recover the debt, notwithstanding that there are review or appeal proceedings on foot.¹⁰ In addition, after the due date, the general interest charge (**GIC**) will begin to accrue on the debt. It is important to note that the Commissioner has instituted a policy whereby it is possible to agree to what is commonly known as a 50:50 arrangement. Under a 50:50 arrangement, the taxpayer agrees to pay the Commissioner half of the disputed debt and the Commissioner will agree not to pursue the debt whilst the review is underway. In some cases the Commissioner may also agree to security, as opposed to a payment of 50% of the disputed tax debt.

The Commissioner is also empowered to extend the time for paying a tax debt.¹¹ The ATO sets out its policy for administering this power in PSLA 2011/14.

¹⁰ *Taxation Administration Act 1953* (Cth) s 14ZZM; 14ZZR

¹¹ *Taxation Administration Act 1953* (Cth) Sch 1 s 255-10.

3. Part IVC Review

A taxpayer who is dissatisfied with an assessment may object against it in the manner set out in Part IVC of the TAA by virtue of section 175A(1) of the ITAA 1936. Part IVC of the TAA establishes the framework for review and appeal rights related to tax decisions made by the Commissioner. These provisions outline the process by which taxpayers can seek to review and/or appeal against a decision made by the Commissioner, fulfilling the constitutional requirement that an assessment must be contestable in order to be a valid exercise of the federal taxation power.¹² As discussed above, cases like *Furturis* have brought these provisions to forefront of administrative review.

A taxpayer who is dissatisfied with an assessment is able to object to the assessment and challenge it on the basis that they are excessive or otherwise incorrect. Not all objections relate to assessments;¹³ however, the focus of the paper is on the Commissioner's assessment-making power and most Part IVC proceedings relate to assessments.

For the purposes of section 175A of the ITAA 1936, a taxpayer is “dissatisfied” if the Commissioner has made an assessment that is adverse to the taxpayer and the taxpayer has grounds for challenging that assessment. The meaning of ‘dissatisfied’ was considered in *CTC Resources NL v FCT* (1994) 27 ATR 403, where Gummow J held:

...It is a dissatisfaction with the absence of a favourable decision upon the objection which would, if now rectified by the court, place the party in the position for the administration of the taxation laws which should have applied if the ruling had been made by the Commissioner in the terms sought. A mere curiosity or interest in having a formal ruling by the Commissioner for some collateral commercial purpose of the applicant is not sufficient to amount to ‘dissatisfaction’ in the relevant sense.

In this regard, a person is not “dissatisfied” for the purposes of section 175A of the ITAA 1936 if the motivation for objecting is merely abstract and hypothetical,¹⁴ and the threshold is greater than being simply “displeased with”.¹⁵ A taxpayer can be dissatisfied with an assessment because the taxable income or tax payable is too low. For instance, an assessment may be too low if certain income should have been included in a different year or in an assessment for a different taxpayer.¹⁶

3.1 Making of an objection

The first step in challenging an assessment is for the taxpayer to lodge an objection. Under section 14ZU of the TAA, the Commissioner requires the following:

1. An objection must be made in writing in the approved form. Subsection 388-50 of Schedule 1 to the TAA sets out the requirements that must be satisfied in order for a document to be in an “approved form”. The ATO provides forms for taxpayers and their advisors on its website; however, there is no requirement to use these so long as the taxpayer meets the conditions within subsection 388-50 of Schedule 1 to the TAA.

¹² Section 51(ii) of the Constitution. Noting that the validity of the Commissioner's decisions can be challenged outside of Part IVC for jurisdictional error.

¹³ For example, a taxpayer can object to a private ruling, decision to retain refunds, decision that you are not entitled to a JobKeeper payment for a period etc.

¹⁴ *CTC Resources v FCT* 94 ATC 4072, per Gummow J at FCR 408; ATC 4082; ATR 414.

¹⁵ *CTC Resources v FCT* 94 ATC 4072 ATC 4100; ATR 435.

¹⁶ *Henderson v. Federal Commissioner of Taxation* (1970) 119 CLR 612, 70 ATC 4016, (1970) 1 ATR 596; *Isaacs v. Federal Commissioner of Taxation* (2006) 151 FCR 427, 2006 ATC 4330, (2006) 63 ATR 390.

2. An objection must be lodged within the period set out in section 14ZW of the TAA. The following limits apply (noting that the time limits start from the date of the assessment or notice of decision):
 - a. In relation to income tax assessments:
 - i. 2 years for individuals and small businesses; and
 - ii. 4 years for all other taxpayers
 - b. In relation to income tax amended assessments, the later of
 - i. 60 days from the date the amended assessment was given; and
 - ii. 2 years for most individuals and small businesses, and 4 years for all other taxpayers.
 - c. In relation to a shortfall penalty, the later of
 - i. 60 days from the date the penalty notice was given; and
 - ii. The last day for lodging an objection to the assessment to which the penalty relates.

The Commissioner retains a discretion to extend the objection period if the taxpayer requests such an extension in writing.¹⁷ An objection outside of the time limit cannot be lodged without this associated extension of time. The leading decision setting out the applicable principles governing this power is *Brown v FCT*¹⁸ and the Commissioner sets out further guidance in PSLA 2003/7.¹⁹ The considerations of whether to grant an extension generally include the taxpayer's explanation for the delay, their circumstances, the prospects of the taxpayer's case, and whether the delay will prejudice the Commissioner's review of the decision. Notably, in the most recent iteration of PSLA 2003/7, the Commissioner has added at paragraph 6 which provides that merely appointing a new advisor is not an appropriate reason for granting an extension of time.

3. The objection must state "fully and in detail" the grounds the taxpayer relies upon. The phrase "fully and in detail" has been considered in a number of cases. The leading authorities of *ex parte Copley*²⁰ and *H R Lancey Shipping Co Pty Ltd v. FC of T*²¹ provide that an objection will be sufficient if it clearly indicates to the Commissioner that the taxpayer is objecting to the assessment, is precise enough to direct the Commissioner to the aspects of the assessment considered to be incorrect; and gives reasons for considering the assessment to be incorrect.

Per sections 14ZZK and 14ZZO of the TAA, the taxpayer will be limited to the grounds stated in the objection when applying to the AAT or Federal Court for review or on appeal of the objection decision (unless the Tribunal or Court orders otherwise). Therefore, it is important that the grounds of objection are carefully considered and cover the taxpayer's arguments otherwise it can have an adverse effect if the matter proceeds to litigation (discussed below). Therefore, it is recommended that you speak to your advisor to assist in preparing the grounds of objection and ensure that review and appeal rights are adequately preserved through the grounds as drafted.

3.2 Arriving at an objection decision

Once an objection is lodged, section 14ZY of the TAA compels the Commissioner to make an 'objection decision'. The ATO Objection Team will consider the details of the objection and may engage with the taxpayer to provide further information and/or submissions. The ATO Objection Team working on the matter is to be "independent" insofar as the ATO officer will not have had any prior involvement in the matter as part of the original decision-making process in relation to the assessment or amended assessment. Nevertheless, the ATO Objection Team often consults with the original decision maker and other divisions of the ATO in arriving at an objection decision.

¹⁷ *Taxation Administration Act 1953* (Cth) ss 14ZW(2), 14ZX.

¹⁸ 99 ATC 4516.

¹⁹ Practice Law Administration Statement 2007/3, *How to treat a request to lodge a late objection* (30 July 2003).

²⁰ (1923) 30 ALR 86.

²¹ (1951) 9 ATD 267.

Once the objection has been considered, the Commissioner will determine whether to allow or disallow or partly allow the objection. In this regard, the 'taxation objection' will produce an 'objection decision' which is reviewable. A taxpayer may seek to review the decision before the AAT or appeal before the Federal Court within 60 days of receipt of the notice of the objection decision. At this point, taxpayers ought to consider their options and next steps based on a risk assessment – do you continue to pursue an appeal or engage in settlement discussions?

It is worth noting that if no objection decision is made, a taxpayer may issue a section 14ZYA notice to require an objection decision to be made within 60 days. Where the Commissioner does not make a decision after receiving a section 14ZYA notice, the Commissioner is deemed to have made a decision to disallow the objection. The use of a section 14ZYA notice is often a strategy for taxpayers to expedite the process and force the dispute to the litigation phase. This can be viewed by the Commissioner as an aggressive tactic and can damage the relationship. However, a taxpayer may consider that the ATO objection process will provide little utility in resolving the dispute and/or there are benefits in having the technical issues considered by an independent tribunal or court.

The recent *Mylan* case is an example of a case where the taxpayer compelled the Commissioner to determine its objections under section 14ZYA. The decision of the interlocutory application for discovery in *Mylan Australia Holding Pty Ltd v Commissioner of Taxation* [2023] FCA 672 refers to whether or not an application for discovery by the Commissioner was relevant to the Part IVA question that the substantive review related to. The taxpayer compelling the Commissioner to produce the original objection decision under section 14ZYA may indicate that when those decisions were produced, the Commissioner did not have all the information he would have otherwise relied on in drafting the decision.

This presents a challenge in that the Commissioner may still be in the information gathering stage of the dispute even once progressed to litigation. As such, they may seek leave to discover more documents from the taxpayer which will prolong the review process.

3.3. Challenging the objection decision

If a taxpayer is dissatisfied with the 'objection decision', the taxpayer has a choice to apply for a **review** in the Administrative Appeals Tribunal (**AAT**) or lodge an **appeal** in the Federal Court against that decision within 60 days of receipt of the Commissioner's objection decision.²² In either a review or appeal, the taxpayer bears the burden of proof in relation to demonstrating that the assessment is 'excessive or otherwise incorrect and what the assessment should have been'.²³ This section of the paper will explore the key differences between challenging an objection decision before the AAT and the Federal Court. The following considerations may be helpful in deciding the choice of forum.

Overall, no matter which forum is chosen, it is imperative to understand that in discharging the onus it is not sufficient for the taxpayer to demonstrate that the Commissioner's assessment is wrong, the taxpayer must also provide evidence demonstrating what their taxable income should be²⁴. This salient, and sometimes overlooked point, is discussed further below.

3.4 Choice of forum

In both the AAT and Federal Court, the Tribunal member or judge is required to consider the evidence and make a finding of fact and apply the law to those facts. One of the key distinctions is in relation to the type of decision that the Commissioner has made as part of the assessment process.

It is first important to explain the difference between merits review and judicial review.

²² *Taxation Administration Act 1953* (Cth) s 14ZZ.

²³ *Taxation Administration Act 1953* (Cth) ss 14ZZK(b)(i), 14ZZO(b)(i).

²⁴ *Gashi v FCT* [2012] FCA 638

Merits review is conducted by the AAT. The AAT assesses not only the legality and procedural fairness of the decision but also the merits of the case, including the factual evidence and the application of the law. Merits review is concerned with the fact finding of the decision making and involves a re-examination of the decision itself, considering the facts, evidence, and reasoning that led to the decision. The AAT has the power to stand in the shoes of the decision maker under section 43 of the AAT Act and make the correct and preferable decision.²⁵ In this regard, the AAT can affirm, vary, or set aside the original decision, and may substitute its own decision if it finds the original decision to be incorrect, unreasonable, or unfair.

In contrast, the Federal Court is a superior court of record and a court of law and equity. The Federal Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law and some summary and indictable criminal matters. The Federal Court hears taxation matters on appeal from the AAT. It also exercises a first instance jurisdiction to hear objections to decisions made by the Commissioner of Taxation. It performs a judicial review of the relevant decision by the Commissioner by looking at the legality of the decision-making process after making findings of fact and ensuring that the ATO, or other relevant authority acted within its legal authority, followed proper procedures, and acted in accordance with the law. In this regard, a court has only limited power to intervene where there has been an exercise of a discretionary power by the Commissioner. The Court may only examine the exercise of the discretionary power to see whether the Commissioner has acted in accordance with correct legal principles. Therefore, a dispute involving the exercise of a Commissioner's discretion is better off to be referred to the AAT.

The statement of principle on the extent to which the exercise of discretionary power is examined by a court is found in the judgment of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949).²⁶ *Avon Downs* concerned former section 80(5) of the ITAA 1936, which provided that the right of a private company to deduct a loss incurred in a prior year of income was contingent on the company establishing "to the satisfaction of the Commissioner" that at least 25% of its voting power was beneficially held by the same persons at the end of the year of income in which the loss was incurred and at the end of the year of income in which the loss was claimed as a deduction.

Dixon J said that it was for the Commissioner, not for him, to be satisfied of what was happening at the time of the decision to grant the deduction. In this case, it was for the Commissioner to be satisfied of who were the shareholders of the company at the time the carried forward losses deduction was claimed. However, Dixon J concluded that the Commissioner's decision was not beyond question. He stated that if the Commissioner did not answer the question that was before him, if his conclusion was affected by some mistake of law, or if he consider irrelevant considerations in answering that question, then on any of those grounds the Commissioner's conclusion was liable to review. These are uncontroversial tenets of administrative law which indicates the Court's intention was to ensure the review of tax decisions did not stray too far from ordinary administrative review.

Further, Dixon J provided that if the Commissioner did not provide reasons for his decision, it is not necessary that the taxpayer should be sure of the precise particular in which he had gone wrong. It would be enough if the taxpayer can show that in some way the Commissioner had failed in the discharge in his exact function according to law. However, this position may not continue to be applicable in this exact form as there have been significant legislative amendments since that judgement.

The views of Dixon J have been applied in other cases, such as the High Court's decision in *Kolotex Hosiery (Australia) Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1975) 132 CLR 535. This case concerned the exercise of a discretionary power in sections 80A and 80C of the ITAA 1936. The Court approved the statement of Dixon J in *Avon Downs* and Gibbs J confirmed that the Court is confined to the material which was before the Commissioner when the assessment was made when determining whether an error was made by the Commissioner in exercising the discretion.²⁷

²⁵ *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

²⁶ 78 CLR 355.

²⁷ 568.

3.4.1 Reasons why AAT may be preferred

At the outset, it is worth noting that the Australian Government announced in December 2022 that the AAT will be abolished and replaced with a new federal administrative review body.²⁸ All cases currently before the AAT will continue and many cases currently before the AAT will be decided or finalised before the AAT is abolished. A key feature of the reform is to implement a transparent and merit-based appointment process as well as increase the number of members and resources to deal with the existing backlog of cases and improve efficiency.²⁹ In this regard, there remains as at today's date some uncertainty in relation to the new administrative body and process.

As it currently stands, there are several reasons why the AAT may be the preferred forum for a particular taxation matter.

- The AAT is an ideal forum for fact-finding. Additionally, merits review allows for a comprehensive examination of both legal and factual aspects of a case. In this regard, if a taxpayer is seeking to challenge a discretionary decision, the preferred avenue may be to seek a review in the AAT as the AAT will exercise the discretion afresh. Conversely, the Federal Court cannot substitute a discretionary decision – it can only overturn the decision on the basis that there was an error of law in making it.
- The AAT process is generally less expensive than a Federal Court proceeding. For example, an AAT application for taxation matters is significantly less than the Federal Court's filing fees.
- Taxpayers have the ability to request that a hearing is held in private under section 14ZZE of the TAA and identities can be anonymized under Section 14ZZJ of the TAA. If the hearing is held in private, Section 14ZZJ of the TAA requires that the applicant is not to be identified in the Tribunal's reasons for decision. Conversely, it can be difficult to obtain confidentiality orders in the Federal Court to withhold the names of the parties as it is up to the discretion of a judge.
- The AAT does not have a requirement to comply with the rules of evidence and is therefore unburdened by technical rules of admissibility.
- There are no costs orders under the AAT (as opposed to judicial review) and thus most parties must bare their individual costs. This has a benefit to the unsuccessful party as they are not exposed to an adverse costs order.³⁰

Having regard to the above, there are several reasons why the Federal Court may be the preferred forum for a particular taxation matter.

- The AAT is unable to provide a judicial determination of binding law like that of the Federal Court. This On the other hand, the Federal Court can provide authoritative interpretations of the law, ensuring consistent application and legal certainty. In addition, members of the AAT are not bound to follow other AAT decisions. Therefore, different AAT panels could arrive at varying decisions on similar matters, potentially leading to inconsistency in tax law application.
- If a taxpayer is successful they may be able to make an application that the Commissioner pays their costs of the proceedings. However, as noted above, this also runs the other way where the unsuccessful taxpayer may bear the burden of an adverse costs order.

3.4. Burden of proof

When challenging an assessment (either at the objection stage, in the Federal Court or AAT), a taxpayer bears the burden of proving that the assessment is excessive or otherwise incorrect and what the assessment should have been.³¹ The courts have held that this position is justified given that "the facts in relation to [a taxpayer's] income are peculiarly within the knowledge of the taxpayer".³²

²⁸ [A new federal administrative review body | Administrative Appeals Tribunal \(aat.gov.au\)](#)

²⁹ [A new system of federal administrative review | Attorney-General's Department \(ag.gov.au\)](#)

³⁰ *Administrative Appeals Tribunal Act 1975*(Cth) s 69.

³¹ *Taxation Administration Act 1953* (Cth) s 14ZZO(b); *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 13 ATR 825.

³² *Trautwein v FC of T* (1936) 56 CLR 63, 87–8 (Latham CJ).

A taxpayer's onus of proof is not discharged merely by showing that the assessment is wrong or there were errors in the Commissioner's process to arrive at the amount assessed. Rather, a taxpayer must prove unequivocally what their actual taxable income was in order to establish that the assessment was excessive.³³

In relation to the burden of proof, the starting point is often *Federal Commissioner of Taxation v Dalco (Dalco)*.³⁴ In *Dalco*, the Commissioner issued a default assessment to the taxpayer and the taxpayer sought to disprove the Commissioner's amended assessments by showing the Commissioner had wrongly treated the income of certain companies and trusts as assessable income. In other words, the taxpayer sought to identify an error made by the Commissioner, rather than establishing what their true taxable income was. The High Court held that the burden "*lies upon the taxpayer of establishing affirmatively that the amount of taxable income for which he has been assessed exceeds the actual taxable income which he has derived during the year of income*".³⁵

***Binitter and Ors v CoT* [2016] FCAFC 163.**

The concept of onus of proof in relation to tax reviews was further explored in *Binitter*.³⁶ The question in that case was whether the taxpayer bore the burden of proving the absence of fraud and evasion where the Commissioner relied on this finding to amend an assessment.

The taxpayers included Ms Binitter, the estate of her deceased husband and her daughter. Together, they objected to a series of assessments issued by the Commissioner outside of the assessment period.

In order to be able to issue amended assessments outside the limited amendment period, the Commissioner had to make a finding of fraud or evasion.

The Appellants argued that as the Commissioner was contending there was fraud, it fell on him to prove that fact. The Full Court dismissed the appeal because section 14ZZK of the TAA effectively relieved the AAT of its fact-finding obligations. Ordinarily, a review at the Tribunal occurs via de novo assessment of the application. This means the Tribunal looks at the application afresh and must satisfy itself of the facts that underlie the decision being reviewed in order to then be satisfied that the decision was correct.

The Court held that section 14ZZK neutralised this obligation because the taxpayer bore an onus of proving that their tax assessment was excessive. Effectively, the Tribunal did not need to be satisfied that the decision was correct or that facts that underlay the decision were true, rather it had to be satisfied by the taxpayer that the facts underlying the decision were false.

The Court then went further to conclude that this was not procedurally unfair such that the decision of the Tribunal should be set aside. The burden borne by the taxpayer to disprove the existence of fraud was a statutory requirement, not a procedural burden adopted by the Tribunal. As such, a complaint of procedural unfairness could not succeed. The appeal was dismissed as the burden had not been discharged.

***Federal Commissioner of Taxation v Cassaniti* [2018] FCAFC 212**

Moreover, *Cassaniti*³⁷ concerned the taxpayer's entitlement to a tax credit under the TAA in respect of PAYG withholding payments that may or may not have been withheld by the taxpayer's employer. The key question was whether the taxpayer had discharged her burden of proving that she was in fact entitled to the credit. The Commissioner appealed this matter on the basis that the contract of employment and payslips provided by the taxpayer in the Court at first instance did not affirmatively prove that the withholding to the Commissioner had actually happened. The Commissioner argued that these documents could have been fabricated or did not actually establish the fact propounded.

³³ *Taxation Administration Act 1953* (Cth) s 14ZZO(b)(i).

³⁴ (1990) 168 CLR 614.

³⁵ *Ibid.*

³⁶ *Binitter and Ors v CoT* [2016] FCAFC 163.

³⁷ *Federal Commissioner of Taxation v Cassaniti* [2018] FCAFC 212.

The appeal was dismissed. In considering the matters before it, the Court affirmed the distinction between a burden of proof and a standard of proof. The burden of proof was borne by the taxpayer to prove what her assessable income was. The standard of proof was the level of certainty she must substantiate to satisfy that burden. In this case, that was the balance of probabilities. By adducing evidence to substantiate her position and corroborated external evidence, she had done this. It was further held it was not for the Court to speculate on what evidence might have been adduced or what might be said to exist. If the Commissioner contended a fact to be true at Court, he bore an obligation to prove that fact rather than simply asserting something and demanding the taxpayer disprove it. As such, it follows that there exists a limit to the application of sections 14ZZK and ZZO of the TAA.

***Buzadic v FCT* [2023] FCA 954**

In *Buzadic*, the Commissioner amended each of the taxpayers' assessments for the relevant years to include the undeclared amounts as income and imposed penalties on the basis there had been fraud and/or evasion. Mr B conceded that the undeclared interest amounts and the undeclared capital gain were assessable but claimed there had not been any fraud or evasion.

On the taxpayers' objections, the Commissioner conceded that a small number of assessed amounts had been adequately explained but otherwise maintained the assessments. The taxpayers then sought review, first to the AAT and then to the Federal Court.

The taxpayer's appeal was primarily grounded in the view that the AAT had erroneously applied a too high standard of proof in requiring him to prove the absence of fraud or evasion associated with the amended assessments. The Court held this was incorrect as the Tribunal had correctly applied the TAA to the taxpayer's situation. This case effectively affirmed and continued the approach taken in *Binniter* above.

3.5 Standard of proof

As raised above, there is a distinction between the burden and standard of proof. Where the burden or onus describes who is required to prove a fact, the standard of proof refers to the threshold that must be met for proving the fact.

The standard of proof applicable to taxation reviews is on the balance of probabilities.³⁸ The balance of probabilities broadly stands for the proposition that the more likely state of affairs is the correct one. That is, the taxpayer must affirmatively prove that their version of events is more probable than the Commissioner's.

In *Briginshaw v Briginshaw*, the High Court held that, when considering the balance of probabilities, the tribunal of fact should weigh the gravity of the alleged fact and only make a finding where a commensurate level of evidence is provided.

This standard can raise issues when the Commissioner asserts something that must be disproven. In *Hines*,³⁹ the Court accepted that it was difficult, though not impossible, to discharge this standard in the negative. In that case, the Commissioner had alleged the taxpayer acted with a specific purpose. It then fell to the taxpayer to affirmatively prove that they did not act with said purpose.

If an appeal is pursued in the Federal Court, the *Evidence Act 1995* (Cth) will apply. Whilst this legislation has little to say on the standard of proof itself, it imposes technical burdens that arguably make it more difficult to satisfy that standard (discussed at 5).

³⁸ *Taxation Administration Act 1953* (Cth) s 14ZZO.

³⁹ *Hines v FC of T* (1952) 9 ATD 413.

3.6 Judicial review under the Judiciary Act or ADJR Act

A taxpayer also has rights of judicial review under section 75(v) of the Constitution or section 39B of the *Judiciary Act 1903* (Cth) against an officer of the Commonwealth if a purported notice of assessment of tax is (1) tentative or provisional, or (2) was made in bad faith.⁴⁰ In addition, certain decisions of the Commissioner may be referred to the Federal Court for review under the ADJR Act.

However, it should be noted that the scope of application of section 39B is limited. This is because of the operation of section 175 of the ITAA 1936 which provides that the validity of an assessment is not be affected by reason that any of the provisions of the ITAA 1936 have not been complied with, and section 350-10(1) of Schedule 1 to the TAA, which states that the production of a notice of assessment is conclusive evidence of the due making of the assessment, and except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

Prior to the issue of an assessment – Declaratory Relief

The Court has a wide discretionary power to make declarations under section 21 of the *Federal Court of Australia Act 1976* (Cth). There are three key criteria for the making of a declaration:⁴¹

1. the question must be real and not a hypothetical or theoretical one,
2. the applicant must have a real interest in raising it; and
3. there must be a proper contradictor.

Prior to the issue of an assessment, it is possible for a taxpayer and / or the Commissioner to seek declaratory relief. Interestingly, a number of GST disputes have been determined by way of declaratory proceedings in both the Federal Court and State Supreme Courts.⁴² Unlike liability to income tax, a GST liability is not dependant upon the Commissioner making an assessment of the taxable income of a taxpayer.

⁴⁰ *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 [24] and [25].

⁴¹ *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 437-438.

⁴² See for example *Marana Holdings Pty Ltd v FCT* [2004] FCA 233.

4. Preparing the case

Properly preparing for your case before it is heard by the AAT or Court is crucial to presenting a strong and well-structured argument, supported by relevant evidence and legal principles. The following is a general guide to assist in understanding the issues to consider in preparing your case to challenge an objection decision.

4.1 Understand the decision and grounds of appeal

Careful review and understanding of the objection decision made by the Commissioner is critical. This means having a thorough understanding of the specific reasons for the decision and the grounds on which appeal may be sought. This will form the basis of your argument during the appeal.

Unlike other forms of review, section 14ZZK of the TAA prevents an applicant from introducing new grounds of review at the AAT unless it grants permission for them to do so. A corresponding provision applies to court processes (see section 14ZZO of the TAA). This law was introduced to recognise the inherent advantage a taxpayer has in knowing the state of their own affairs and to bring the administrative review processes of tax objections in line with the procedures found in regular court processes.

Grounds of objection are, therefore, analogous to pleadings in a statement of claim. Indeed, the Explanatory Memorandum that accompanied the amending act directed the court and tribunal to consider matters that would be considered in an application to amend pleadings when deciding whether to grant leave to amend the grounds of objection.

Therefore, it is important that representatives have a full grasp of the issues that impact a decision before objecting. Practically speaking, this means that it is critical that the Grounds of Objection are given sufficient consideration. This will require a practitioner identifying the key legal and factual issues subject to review and prioritise them depending on how strong the merits of those positions are. Similarly, the grounds should be articulated with sufficient clarity to ensure that the arguments supporting that ground are properly captured. For example, in *Lambert v FCT* [2013] AATA 442 the taxpayer was unable to argue that penalties should be remitted because the grounds of objection were not articulated in a manner that enabled this. Consequently, the Tribunal lacked the jurisdiction to consider those arguments.

Similarly, in cases where it is considered that the AAT itself has failed to consider an argument, the Federal Court may remit the case back to the AAT. This is what happened in *Le v FCT* [2021] FCA 303, where the Federal Court held that the AAT should hear the case again on the basis that one of the taxpayer's critical arguments regarding why the assessments were excessive was not considered by the AAT.

4.2 The Statement of Facts Issues and Contentions (SFIC)

Whilst not strictly a pleading, the SFIC is critical to the case as it sets out your arguments and legal position. A well-constructed SFIC should clearly identify the issues at hand, the relevant legal principles and the application of those principles to the matter before the Tribunal.

Importantly, a SFIC should not adhere to the rigid formality of pleadings and does not need to particularise every fact upon which the Applicant intends to rely – however, the AAT may refuse to consider material that was not identified if doing so would be unfair to the Commissioner.

Therefore, a SFIC should generally contain the following sections:

- Introduction – setting out the parties and a very high level factual summary;
- Relevant facts – containing a more detailed explanation of the background information concerning the dispute;
- Issues – identifying the questions that are been asked in this dispute;
- Relevant law – setting out the relevant legislation and cases upon which the parties rely; and
- Submissions – setting out the parties' arguments in relation to each ground of review.

Poor drafting often involves discussion of irrelevant topics, is overly emotional or involves personalised attacks on the Commissioner or his representatives. Whilst anecdotally, these pitfalls seem to be more prevalent amongst inexperienced/ lay representatives and self-represented litigants - this does not release seasoned practitioners from the risk of falling into similar traps. The AAT has issued a practice direction,⁴³ which provides a template SFIC which can be used to guide its contents.

4.3 Gather evidence

It is important to consider gathering evidence as early as possible to support your case. Taxpayers should have begun the process of collecting the evidence needed to support their position well before the commencement of proceedings before the AAT or Federal Court in order to have the best chances of discharging the onus of proof.

Most tax matters that proceed to litigation follow a lengthy ATO audit, which involved large amounts of information-gathering. The Commissioner has broad information gathering powers for the administration of the tax law, whereby the Commissioner seeks information both formally and informally⁴⁴. The increase in activity is borne out by the ATO's increased use of its formal powers, with the number of formal notices increasing over the past 8 years.⁴⁵ The Commissioner can also gather information from third parties. In this regard, the Commissioner and the taxpayer spend a considerable amount of time gathering and collating evidence.

As noted in the Federal Court's Taxation Practice Note (TAX-1), the parties are to assume that discovery is not necessary or only limited and targeted discovery will occur given the significant amount of information gathering that has taken place prior. Though in the recent interlocutory decision in *Mylan Australia Holdings Pty Limited* [2023] FCA 672 discovery was granted in favour of the Commissioner. In that case, the Commissioner argued that discovery may be warranted in a Part IVC appeal if the material on which the taxpayer sought to conduct the appeal was 'selective' and material had been 'hidden' from the Commissioner.

The various types of evidence are discussed in detail in section 5.

⁴³ Review of Taxation and Commercial Decisions Practice Direction (Direction, 30 June 2015).

⁴⁴ See former sections 264 and 264A of the ITAA 1936 and sections 353-10 and 353-25 of Schedule 1 to the TAA

⁴⁵ Commissioner of Taxation Annual Report 2020-21 ([ato.gov.au](https://www.ato.gov.au)); Commissioner of Taxation annual report 2021-22 ([ato.gov.au](https://www.ato.gov.au))

5. Evidentiary considerations

Tax disputes often arise because the Commissioner and taxpayer have differing views about facts, evidence or the way that the law applies to a particular set of facts. Many areas of the income tax law are factually intensive and give rise to tax disputes. In addition to this, if the objection decision in dispute relates to an income tax assessment, the taxpayer bears the burden of proving that the Commissioner's assessment is excessive, or otherwise incorrect, and the amount of tax that should be payable⁴⁶.

The following section examines the evidentiary considerations in taxation appeals, namely, an appeal to the Federal Court of Australia, pursuant to section 14ZZ(1)(a)(ii) of the TAA against a reviewable objection decision of the Commissioner.

The law of evidence applicable to a taxation appeal is found in the *Evidence Act 1995* (Cth). This Act applies not just to a taxation appeal but to every other proceeding in the Court. In order to discharge the burden of proof, an applicant in a taxation appeal must do so by evidence which is admissible under the *Evidence Act*.

In the *Evidence Act*, the key requirement as to the admissibility of any evidence is that it must be 'relevant'.⁴⁷ Evidence is relevant if it "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".⁴⁸

5.1 Types of evidence

In identifying the facts in issue, the evidence required to prove those facts can take a number of different forms, such as documentary or oral and expert or lay evidence. To determine what type of evidence may be relevant or necessary requires consideration of what facts are likely to be in issue from the grounds of objection.

5.1.1 Documentary vs oral evidence

Documentary evidence refers to any written or recorded material that is presented as evidence in a legal proceeding. This can include a wide range of materials, such as contracts, letters, emails, photographs, maps, financial records, and more.

Under the *Evidence Act*, documentary evidence is generally considered to be a form of real evidence, as it provides tangible records that can be examined by the Court. For documentary evidence to be admissible, it must be relevant to the case and be authenticated.

On the other hand, Oral evidence refers to testimony given by witnesses who provide their account of events, observations, or experiences verbally in court. Witnesses can be both lay persons and expert witness (explained in further detail below). Similar to documentary evidence, oral evidence needs to be relevant to be admissible. A court will also assess the credibility and reliability of oral evidence, taking into consideration factors such as the demeanour of the witness, consistency, and corroborative evidence.

5.1.2 Lay evidence

Lay evidence is typically given by ordinary people who have personal knowledge or observations about a situation or event. This type of evidence is contrasted with expert evidence, which is provided by individuals who possess specialised knowledge, skills, or expertise in a specific area. Lay evidence can be important in legal proceedings as it provides firsthand accounts or observations of events, circumstances, or situations.

In transfer pricing disputes, for example, the Commissioner often conducts functional interviews to assist with understanding the functions, assets and risks. The Commissioner relies on formal interviews of individuals

⁴⁶ TAA 1953 s 14ZZK and 14ZZO

⁴⁷ *Evidence Act 1995* (Cth) s 56.

⁴⁸ *Evidence Act 1995* (Cth) s 55.

within the business during the audit stage. The quality of those interviews will depend on who is conducting the interviews.

Suitable lay witnesses should be in a position to provide an understanding of the actual circumstances of the taxpayer, including the functions it performed and the risks undertaken leading up to and during the relevant income years, in the context of the broader operation of the relevant business or industry. Multiple lay witnesses may be needed to cover all relevant income years.

It is also important to consider the suitability and credibility of persons if they will need to give evidence in a Court or Tribunal. The credibility of the lay witnesses can be challenged during cross-examination, where opposing parties can question their perceptions, memory, and biases. In particular, self-serving statements will be scrutinised as well as any statement which contract contemporaneous documents.

The rules regarding the admissibility and use of lay evidence are governed the *Evidence Act*. In this regard, lay evidence must be relevant to the issues in the case, lay witnesses are generally not allowed to give opinions on matters that require specialised knowledge or expertise, and hearsay evidence is generally admissible.

5.1.3 Expert Evidence

Expert evidence plays a crucial role in cases that involve complex technical tax issues that require a level of knowledge or expertise beyond what a lay person would possess. Similarly, expert evidence is governed by the rules in the *Evidence Act* to ensure its reliability and relevance.

An expert witness is a person who has specialised knowledge, skill, experience, or training in a particular field relevant to the case.⁴⁹ Before being accepted as an expert witness, the Court must be satisfied that the person has the necessary qualifications and expertise to provide opinion evidence on the subject matter. It is important to note the divergence between subjects in which a person is specifically trained to proffer an opinion and subjects in which they are experienced. For example, a trained accountant may give expert evidence in the application of accounting standards, but not in proper conduct of directors despite regularly attending board meetings.⁵⁰ The role of the expert is to assist the Court and not to be an advocate for any of the parties. In this regard, expert witnesses are to give opinion evidence on matters within their area of expertise which are based on facts. The expert should remain aware of what the facts and presumptions they have based their opinion on so that they can assist the Court in identifying the shortfalls in their own evidence.

Expert witnesses typically provide written reports outlining their opinions and the basis for those opinions. These reports are exchanged between the parties before trial and can assist in the preparation of the case. In some cases, experts may be asked to give evidence concurrently (referred to as “hot-tubbing”), where they engage in a discussion led by the judge or counsel. This allows for a more interactive and collaborative examination of their opinions. However, it is notable that the *Evidence Act* precludes evidence of an opinion being evidence about the fact related to that opinion.⁵¹ This rule does not apply to the extent the person is opining within an area of expertise (i.e they are experts).⁵²

It is further critical that experts retain their independence in providing evidence. Where an expert begins to advocate for a position or become combative, their credibility can be damaged. Allsop CJ noted this in *Evans Deakin Pty Ltd v Sebel Furniture Ltd* where he distinguished between expert evidence and expert assistance.⁵³ Expert assistance was marshalling and formulating arguments in relation to subjects in which that expert was specialised. And whilst this did not preclude that expert from also giving evidence, it endangered the credibility of that evidence because the expert would potentially develop a commitment to the argumentative position taken on the evidence. When engaging an expert, these matters should be kept front of mind and appropriately mitigated to maintain prospects during litigation.

⁴⁹ *Evidence Act 1995* (Cth) s 78A.

⁵⁰ *ASIC v Vines* (2003) 48 ASCR 291.

⁵¹ *Evidence Act 1995* (Cth) s 76.

⁵² *Evidence Act 1995* (Cth) s 78A.

⁵³ *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171.

There are a number of lessons to be learnt in relation to the proper briefing of expert from recent transfer pricing litigation in Australia, namely *Chevron*, *Glencore* and *Singtel*. Care must be taken in formulating the questions for an expert so as not to suggest a particular answer or response is desired and precludes the expert from giving a certain view. In *Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation* [2021] FCA 1597 at [234] and [268], certain questions asked by the taxpayer of the expert were criticised by Moshinsky J on the basis that they did “not conform to the statutory test” (under Subdivision 815-A of the ITAA 1997). Similarly, in *Glencore Investment Pty Ltd v Commissioner of Taxation* [2019] FCA 1432 at [324], certain questions asked by the Commissioner of the expert were criticised on the basis that they “elided the... statutory questions”.

In addition, caution must be exercised in conferring with experts as a party may be compelled to disclose communications with experts. It has been observed in the credibility of an expert may be discounted on the basis that the expert had become an advocate of the party through the exchange of pre-trial communications.

To ensure that expert evidence is admissible and credible, the Court has outlined the particular expectations in relation to the duties of expert witnesses and those who retain them for the purposes of a proceeding in the Court's Expert Evidence Practice Note (GPN-EXPT). This Practice Note is applicable to taxation appeals as well as any other proceeding in the Court. While a failure to draw to an expert's attention to or non-compliance with the Practice Note does not automatically disqualify expert evidence, it may lead to the exclusion of the opinion pursuant to section 135 of the *Evidence Act* on the basis that its probative value is substantially outweighed by the danger that it might mislead or confuse or be unfairly prejudicial to a party.⁵⁴

⁵⁴ Wood v R [2012] NSWCCA 21.

6. Avenues to resolve

Having explored the various nuances and complexities in relation to challenging an assessment and preparing a case for litigation, the final part of this paper explores some of the different avenues for taxpayers to expeditiously deal with and resolve a tax dispute.

6.1 Early engagement with the ATO (including voluntary disclosures)

Depending on the type and size of the taxpayer as well as issues at stake, there are various avenues available to engage with the ATO directly to gain certainty or practical comfort regarding the position being taken. Some of these include through a pre-ITR lodgement review, pre-lodgement of a PBR and the New Investment Engagement Service (**NIES**). The NIES is an ATO engagement service tailored for investors seeking guidance prior to the execution of a commercial transaction.

In addition, if a taxpayer forms the view that a mistake may have been made, they can also engage with the ATO and lodge a voluntary disclosure to correct the mistake. The ATO will review the disclosure and engage with the taxpayer regarding the disclosure.

Importantly, for the purposes of section 284-225 of Schedule 1 to the TAA, the Commissioner will generally reduce the penalties and interest that would have otherwise applied on the resulting tax shortfall. Section 285-225 of Schedule 1 to the TAA provides that the amount of administrative penalty imposed under Subdivision 284-B and 284-C is reduced where an entity voluntarily tells the Commissioner about a shortfall amount. This extent of the reduction is dependent on the timing of the voluntary disclosure. For example, a 20% reduction in penalties is afforded where the voluntary disclosure is made after the Commissioner tells the taxpayer that an examination of their affairs is to be conducted relating to a taxation law, and the disclosure will save the Commissioner a significant amount of time and resources in the examination. An 80% reduction in penalties is afforded where the voluntary disclosure is made before the Commissioner tells the taxpayer that an examination of their affairs is to be conducted or a public statement by the Commissioner seeking voluntary disclosures about a scheme that applies to the taxpayer.

In relation to the imposition of interest, a voluntary disclosure prior to the commencement of an audit or review is not an automatic right to the remission of interest. However, the Commissioner has acknowledged in PSLA 2006/8 the following:

[T]here may be some cases where the circumstances surrounding the voluntary disclosure will make it fair and reasonable to remit interest charges. Where remission on the basis of a voluntary disclosure is considered appropriate, it will generally be to the base rate.⁵⁵

The PSLA sets out a list of factors that the Commissioner will consider in determining where remission to the base rate is warranted, which includes the timeliness of the disclosure after the error was detected, whether the disclosure was made before being told of the commencement of an examination, the size of the shortfall and the taxpayer's compliance history.

In this regard, there are a number of benefits with the making of a voluntary disclosure, particularly before the commencement of an audit or review.

6.3 Lodge and Object

In some instances, taxpayers may choose to file their income tax return on their 'preferred basis', then either object against any unfavourable assessment subsequently given under Part IVC. This is particularly the case where the taxpayer has an opinion or advice on the issue and/or RAAP and therefore has a reasonable level of

⁵⁵ Practice Law Administrative Statement 2006/8, *Remission of shortfall interest charge and general interest charge for shortfall periods* (1 August 2006) [20C].

comfort regarding the position taken. The same can also be achieved in reverse, whereby a taxpayer can file on the basis of the Commissioner's preferred position, then object.

6.2 Settlement or Alternative Dispute Resolution

Depending on the circumstances, it may be worthwhile to explore settlement options or alternative dispute resolution (**ADR**) mechanisms before proceeding to a review in the AAT or appeal in the Federal Court. This can save time, costs, and potential uncertainty associated with a Part IVC legal proceeding.

The Commissioner has expressed a willingness to resolve disputes early through the use of ADR. This is evident through the public recording of several high-profile settlements between the ATO and Rio Tinto, Google, Ampol, BHP Billiton, and Chevron.

It is not uncommon for the parties to settle, or at least engage in settlement discussions well before an objection process has been initiated. It is often thought to be beneficial to the taxpayer to engage in discussions early before the views of the ATO compliance or objections teams become entrenched and it sheds some insights into the Commissioner's thinking and risk assessment. Moreover, litigation carries its own risks and there is never a guarantee that a judge will view the case and decide it in a particular way.

7. Conclusion

This paper has identified and discussed some of the most prescient issues relating to the Commissioner's assessment related powers. Key takeaways include:

- the nature and scope of the Commissioner's assessment making powers and the limitations and considerations in relation to challenging an unfavourable assessment.
- the limits placed on reviewing assessments by cases such as *Futuris*, *Hyder* and *Donoghue*. These cases demonstrate the legislative and judicial push for review of tax matters to comply with the procedure set out in Part IVC of the TAA.
- the process provided by Part IVC of the TAA, including the technical and evidentiary requirements to meet in order to successfully seek a review (AAT) or appeal (Federal Court) of a tax decision.
- the administrative aspects of preparing a case for hearing have been canvassed, alongside the underlying legal factors that practitioners should remain cognisant of when completing these tasks.
- the choice of forum and the related evidentiary considerations have been addressed with further elaboration on the potential ADR options available when in dispute with the ATO.