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John Azzi

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Abstract

Judicial review of the decision of the Australian Taxation Office ('ATO') to lift the Accountant's Concession has proved a fruitless and expensive exercise for taxpayers. The Accountant's Concession lays down administrative arrangements restricting access to papers prepared by professional accounting advisers. While it has been suggested reliance on 'exceptional circumstances' to lift the concession best serves capital and tax markets, elsewhere it has been argued that the concession must be rethought if the policy of enabling full and frank disclosure is to be achieved.

This article examines initiatives aimed at shielding tax advice of accountants from the Tax Commissioner's coercive access powers under the Income Tax Assessment Act 1936 (the 'Act') and elevating the current administrative arrangement into the statute. This would make the limited procedural legitimate expectation a substantive procedural right. This would remove the different treatment of lawyers and accountants offering tax advice and eradicate the delays and uncertainty associated with the separate tax advice privilege recommended by the Australian Law Reform Commission.

Keywords

accountants' concession, tax advice, client legal privilege

JUDICIAL REVIEW OF THE ACCOUNTANTS' CONCESSION: A CASE FOR IMPROVING TAX ADMINISTRATION AND ACCOUNTABILITY

JOHN AZZI*

Judicial review of the decision of the Australian Taxation Office ('ATO') to lift the Accountant's Concession has proved a fruitless and expensive exercise for taxpayers. The Accountant's Concession lays down administrative arrangements restricting access to papers prepared by professional accounting advisers. While it has been suggested reliance on 'exceptional circumstances' to lift the concession best serves capital and tax markets, elsewhere it has been argued that the concession must be rethought if the policy of enabling full and frank disclosure is to be achieved.

This article examines initiatives aimed at shielding tax advice of accountants from the Tax Commissioner's coercive access powers under the Income Tax Assessment Act 1936 (the 'Act') and elevating the current administrative arrangement into the statute. This would make the limited procedural legitimate expectation a substantive procedural right. This would remove the different treatment of lawyers and accountants offering tax advice and eradicate the delays and uncertainty associated with the separate tax advice privilege recommended by the Australian Law Reform Commission.

BACKGROUND

In *Privilege in relation to tax advice: Discussion Paper April 2011* (the 'Discussion Paper') the Assistant Treasurer, Bill Shorten, commends accountants for the 'excellent job' they did during the Global Financial Crisis. He calls them the 'consiglieri of suburban prosperity' whose intimate knowledge of 'kitchen table budgets ... is an expertise of the margins by which a small business prevails, or goes under.'¹ Building on the work of the Australian Law Reform Commission, which recommended extension of

* Senior Lecturer, School of Law, University of Western Sydney, BEc (Syd), LLB (Syd), SJD (Syd).

¹ Australian Treasury, *Privilege in relation to tax advice: Discussion Paper* (2011) page v <http://www.treasury.gov.au/documents/2005/PDF/DP_Privilege_in_relation_%20to_tax_advice.pdf> at 22 February 2012.

legal professional privilege to tax advice of accountants (the 'ALRC Report'),² the Discussion Paper seeks input into how best to shield certain tax advice documents from the Commissioner's extremely broad information gathering powers in ss 263 and 264 of the *Income Tax Assessment Act 1936* ('the Act').³

Accepting that in the tax area accountants perform similar work to that done by lawyers, and given the complexity of Australia's taxation law and the self-assessment regime, the Commissioner of Taxation provides an administrative concession known as the accountants' concession. The concession is contained in *Guidelines to Accessing Professional Accounting Advisors' Papers* (the 'Guidelines'),⁴ and seeks to promote full and frank disclosure between taxpayers and their accounting advisers by restricting in 'all but exceptional circumstances' access to a class of documents that shed light on transactions and other advice documents.

If the Commissioner decides to lift the concession and access documents, the scope for overturning this decision is extremely limited. Courts have held the Guidelines merely engender a procedural legitimate expectation, which entitles an affected person to a reasonable and adequate opportunity to argue that there are no exceptional circumstances. The accountants' concession does not qualify the Commissioner's access powers under the Act. There is no obligation to provide written reasons for the decision, with scrutiny of the decision itself limited to ascertaining whether the Commissioner had regard to the Guidelines. As an administrative arrangement, the Commissioner can easily abandon the existing Guidelines.

There is anecdotal evidence suggesting the enforcement of the Guidelines is dysfunctional, leading some to call for a policy revision. In 2007, the ALRC recommended introduction of a statutory privilege regime similar to that implemented in New Zealand. The Discussion Paper and some academics question the benefits of such a separate regime.

² Australian Law Review Commission, *Legal professional privilege and Commonwealth investigatory bodies* (2007) recommendation 6-6.

³ Sections 263 and 264 of the Act allow the Commissioner 'to undertake a roving inquiry and a fishing expedition' – see *Deloitte Touche Tohmastu v DCT* [1998] FCA 1439, (1998) 40 ATR, 450 (Golberg J). See also *South Western Indemnities Ltd v Bank of New South Wales* (1973) 129 CLR 512 (regarding s 263 of the Act) and *FCT v Australia and New Zealand Banking Group* (1979) 143 CLR 499 (regarding s 264).

⁴ Australian Taxation Office ('ATO'), *Guidelines to Accessing Professional Account Advisors' Papers* (2010) <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/51665.htm>> at 22 February 2011. The Guidelines form part of the ATO's, *Access and Information Gathering Manual* (the 'Manual') (2010) <<http://www.ato.gov.au/corporate/content.asp?doc=/content/51010.htm&page=2&H2>> at 22 February 2011.

INTRODUCTION

This article argues that the accountants' concession should be formalised in statutory form, and mandate written reasons for decisions to lift the concession. This should ensure greater procedural fairness. Currently, the Guidelines do not confer any rights on taxpayers, beyond a reasonable opportunity to dispute access. There is no mechanism allowing for scrutiny of the reasons for lifting the accountants' concession.

In contrast, judicial review of statutory provisions that require an administrative decision-maker to reach a certain state of satisfaction calls for closer scrutiny of the decision-makers' reasons, to discern abuses of power.⁵ This effectively promotes accountability in decision-making and stricter adherence to the rule of law.⁶ It accommodates the public interest in flexibility, which enables decision-makers to adapt to the particular circumstances of the particular case ('operational flexibility'),⁷ by ensuring discretionary power to access sensitive documents is not exercised capriciously.⁸

A statutory provision allowing full merits review will help strike a fairer balance between the public interest in flexibility and the expectation of fair treatment under the Guidelines. This benefits private individuals and the ATO, promotes transparency and accountability, leading to consistency in decision-making.

The model proposed in this article means every step taken by the decision-maker under the Guidelines would be deemed to be for the purpose of the Act.⁹ A reviewable error will arise if a decision is not made according to law. It may also arise where a decision is infected with procedural unfairness, for example, where an applicant is misled to believe the decision maker had considered particular relevant information favourable to the applicant.

Increasing the capacity to review a decision to lift the concession will further stem the growing and disquieting perception of improper enforcement of the Guidelines.

⁵ See *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, 363 (Dixon J); cited with approval in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1168 (Gleeson CJ).

⁶ See *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 (McHugh and Gummow JJ). See also *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* (2004) 75 ALD 151, 156; Leighton McDonald, 'The entrenched minimum provision of judicial review and the rule of law' (2010) 21 *Public Law Review* 14, 27.

⁷ See P Sales & K Steyn, 'Legitimate expectations in English public law: an analysis' (2004) *Public Law Review* 564, 564.

⁸ *Ibid* 569.

⁹ See *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 4.

More heightened scrutiny not only promotes full and frank disclosure, allowing taxpayers to openly communicate with their accounting advisers without fear of unreasonable or unfair access requests, it goes some way to mitigating the lack of 'competitive neutrality' that exists under the current arrangement. Presently, some legal firms advertise that their clients' documents are better protected than if an accounting firm were consulted.¹⁰ This is not surprising given a decision to lift the concession is not a decision 'under an enactment' for purposes of the *Administrative Decisions (Judicial Review) Act 1977* (the 'ADJR Act') and disclosure of less than full particulars is sufficient to deny a person's expectation of an opportunity to refute disclosure.

The proposed procedures involve less inefficiencies and opportunities for abuse and delay compared with the ALRC proposal. The ALRC proposal offers considerably less protection than the common law professional legal privilege and may encourage unfounded privilege claims to frustrate investigations. In contrast, the proposed model encourages transparency and consistency in process with minimal interference with operational flexibility. Compared with the current arrangement, this reduces opportunities for improper exercise of discretion under the Guidelines and, consequently, taxpayer disaffection. It also redresses the comparative advantage lawyers have over accountants providing tax advice.

This article comprises the following sections. Section I (**The Accountants' Concession**) examines the policy and operation of the accountants' concession. Section II (**Taxpayer Rights under the Accountants' Concession**) examines the relevant authorities expounding the limited scope for judicial review of administration of the concession by reference to the doctrine of legitimate expectations. Section III (**The Accountants' Concession in Practice**) collects anecdotal evidence of improper exercise of the accountants' concession in Australia and highlights the need for reform.

Section IV (**An Alternative Model**) examines the ALRC recommendation of a separate tax advice privilege and its shortcomings. This section explains why insertion of an alternative statutory review mechanism better achieves the policy objectives underpinning the accountants' concession, compared to the ALRC preferred model. This is followed in Section V (**The Proposed Procedures**) with a discussion of the statutory framework that best achieves such objectives and ensures that the information gathering functions of the ATO are not unduly delayed or frustrated. Section VI (**The Conclusion**) concludes with a summary of the preceding discussion.

¹⁰ Above n 1 [62].

THE ACCOUNTANTS' CONCESSION

The complexity of Australian taxation law and the self-assessment regime, which requires taxpayers to ascertain their taxable income and deductions, means taxpayers need an understanding of their rights and obligations before they can assess their tax liability.¹¹ Since 1998, the Commissioner of Taxation has recognized many tax accountants perform similar work to lawyers. However, tax advice of lawyers is protected by client legal privilege, which entrenches rights to confidentiality. The privilege facilitates the administration of justice by promoting full and frank disclosure between client and legal advisor.

The accountants' concession is contained in the Guidelines, which lay down administrative procedures, and provide for a discretionary decision to exempt certain documents from the concession.¹² Specifically, they detail how the Australian Taxation Office ('ATO') should exercise the Commissioner's coercive powers to allow taxpayers to consult with their accountants, to enable full discussion regarding their rights and obligations under tax laws, and for advice to be communicated frankly.¹³ Disclosure of confidential information by consent of the advisor and taxpayer to independent third parties will not result in loss of client confidentiality.¹⁴

To this end, the Guidelines restrict 'in all but exceptional circumstances' access to a class of documents that shed light on transactions and other advice documents (known, respectively, as 'restricted source documents' and 'non-source documents'). These documents are prepared either contemporaneously or prior to the relevant transaction or arrangement and includes 'opinions expressed by professional accounting advisors in such documents'.¹⁵

Restricted source documents include tax advices prepared by accountants on how to structure or present a transaction.¹⁶ On the other hand, non-source documents include tax working papers, advice papers on arrangements that have not been put into effect and do not relate to transactions that have been implemented, and papers prepared during a statutory or prudential audit. They also include documents that would not ordinarily attract client legal privilege such as professional advisor's opinion on the matters presented in a tax return.¹⁷

¹¹ Above n 2, [6.276].

¹² *White Industries Australia Ltd v FCT* (2007) 160 FCR 298, 94 (Lindgren J).

¹³ Above n 4, Guidelines, part 1.0.

¹⁴ Above n 4, Guidelines, section 4.

¹⁵ Above n 4, Guidelines, section 3.2.

¹⁶ Above n 4, Guidelines, section 2.2.

¹⁷ Above n 4, Guidelines, section 2.3.

Consistent with the principles of legal professional privilege, where privilege does not generally attach to evidence of transactions such as contracts or conveyances even if provided to a lawyer for advice or for use in litigation,¹⁸ the accountants' concession does not extend to 'source documents' (documents which explain the setting, context and purpose of the transaction). Full and free access to these documents is considered essential for the Commissioner to carry out his responsibilities under the Act. To this end, the Guidelines contain a detailed description of what constitutes non-privileged source documents.¹⁹

Limiting access to restricted source and non-source documents in all but 'exceptional circumstances' is widely acknowledged as the 'best approach for balancing tax and capital markets requirements.'²⁰ Pursuant to this approach, before ATO officials can access disputed documents they must obtain 'the (personal) written approval' of a Deputy Commissioner of Taxation or another member of the senior executive service ('SES officer') within the ATO who is independent of the audit team.²¹ The reason for independent approval is relevant to the entitlement in the Guidelines to procedural fairness or natural justice. This requires consideration of the degree to which circumstances require the ATO to advise and hear the affected party.²²

The requesting officer must make 'all reasonable effort' to obtain sufficient information from the taxpayer and/or adviser and may request a statement of both the facts and understanding of the tax consequences where non-confidential documents provide insufficient factual information. Access 'will only be sought where access to restricted source documents does not provide the necessary information.'²³

In general, a mutually agreed time will be allowed to enable the taxpayer and professional accounting advisor to consult and ascertain whether the taxpayer wishes

¹⁸ *Baker v Campbell* (1983) 153 CLR 52, 86.

¹⁹ Examples of source documents include traditional accounting records such as ledgers, journals and balance sheets, documents comprising the permanent audit file held by a professional adviser performing a statutory audit and certain tax working papers: above n 1, section 2.1.

Documents prepared before the completion of a tax return and those showing an analysis of shareholdings to establish continuity of ownership are also regarded as source documents: Australian Tax Office, 'Taxation Determination 93/222' (1993) <<http://law.ato.gov.au/pdf/pbr/td1993-222.pdf>> at 22 February 2012.

²⁰ Paul Paton, 'Accountants, Privilege, and the Problem of Working Papers' (2005) *Dalhousie Law Journal* 353, 353.

²¹ Above n 4, Guidelines, section 5.

²² See above n 4, Manual [7.2.5].

²³ Above n 4, Guidelines, section 6.

to claim client confidentiality in relation to documents the ATO is seeking. Where it is considered that those documents are properly subject to confidentiality, the taxpayer and/or advisor must provide a list, *inter alia*, detailing the nature of the documents (e.g., letter, opinion, advice, file note, etc), the identity of the person who prepared them and the reason why each document is categorized as restricted-source and/or non-source document. An affected party must do so on a document-by-document basis.²⁴

In case of disagreement, the Guidelines dictate that the affected person provide the ATO with a list of all restricted source and non-source documents, which are sealed in an envelope and not inspected by the audit officer until a decision by the relevant Deputy Commissioner is made in accordance with the Guidelines on whether access should be granted to all or some of the sealed documents. The same procedure applies for disputes about whether a document is a source document or restricted source or non-source document.²⁵

On the other hand, approval to access restricted source and non-source documents may be sought without following procedures in the Guidelines where:

- a) there are *reasonable grounds* to believe that fraud or evasion, or an offence under the Taxation Administration Act, or any other illegal activity has taken place;
- b) non-confidential (i.e., source) documents have been lost or destroyed and the ATO officers are not able to obtain *sufficient information* to describe, verify or determine the tax consequences of a transaction or arrangement;
- c) the source documents appear on *reasonable grounds* to have omissions or other material deficiencies, and an explanation or a statement of the facts and tax consequences provided by the taxpayer *does not adequately explain* the transaction or arrangement;
- d) the taxpayer or the taxpayer's professional accounting advisors refuse to provide source documents, and other parties' available source documents are *insufficient for the ATO officer to ascertain* the facts and purpose of, and such of the surrounding circumstances as are necessary to determine the tax consequences of, the transaction or arrangement;
- e) neither the taxpayer's records nor the taxpayer can be located; or

²⁴ Above n 4, Guidelines, section 3.2.

²⁵ Above n 4, Guidelines, section 8.

- f) some or all of the records of a taxpayer are maintained overseas, and the taxpayer denies access to, or claims an inability to obtain those records or documents.²⁶ (Emphasis added).

The italicized expressions above indicate how exercise of the discretion to seek access is largely unfettered. There is no mechanism readily available to affected parties for testing whether there are in fact reasonable grounds or sufficient information to justify the primary decision to seek access in the first place. An analogously broad discretion is available in identifying 'exceptional circumstances', which arise if:²⁷

- i. the accountant's concession is claimed and the ATO 'is unable to ascertain from the documents which have been provided the facts necessary to determine the taxation consequences of the particular transactions or arrangements';
- ii. the law requires a determination of the purpose for which a transaction or arrangement is entered into and this cannot be ascertained from the documents provided;
- iii. there is a scheme or arrangement for the purposes of Part IVA; or
- iv. one of the circumstances referred to (b) above applies.

In other instances, the decision to lift the concession may be made after the ATO has gained access to source documents and the client and/or advisor have given particulars in support of a concession claim. Each case must be considered on its merits, but in all cases the relevant ATO officer should consult an access specialist prior to seeking approval from the Deputy Commissioner, or an SES officer.²⁸

For its part, the ATO is required to provide an affected person with a copy of the relevant SES decision that exceptional circumstances exist. An example notification is at paragraph 7.2.7 of the Manual, which relevantly states that the SES has:

considered the submission, the relevant ATO guidelines, and [the affected party's] recommendation to access relevant documents [and] on the facts outlined in the submission, I am satisfied that exceptional circumstances exist....

While undefined, it would appear 'submission' is a reference to requesting officer's reasons for request.

Once approval is obtained at the audit stage, approval at the litigation stage is not necessary. Moreover, the Guidelines permit the ATO, at the litigation stage, to use restricted source and non-source documents that would otherwise not be obtained 'where the rules of evidence will mean that alternative avenues of demonstrating to

²⁶ Above n 4, Guidelines, section 6.

²⁷ Above n 4, Manual [7.2.3],[7.2.4].

²⁸ Above n 4, Manual [7.2.4].

the court known facts relating to a contested assessment are unavailable to the ATO in arguing its case.'²⁹

TAXPAYER RIGHTS UNDER THE ACCOUNTANTS' CONCESSION

Unlike the rights asserted by clients of lawyers under legal professional privilege, the Guidelines do not give rise to any private legal rights. The interest or entitlement under the Guidelines is best described as a promise as to the procedure which the decision-maker will adopt in arriving at its decision to exercise its discretionary powers, distinct from a promise as to the substantive outcome of such a decision.³⁰

This emasculated version of legitimate expectations reflects the 'procedural legitimate expectation' expounded by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*.³¹ In *Teoh*, the legitimate expectation was generated by reason of by Federal Parliament's ratification of the *UN Convention on the Rights of the Child*, and required the decision-maker to notify and give persons affected an adequate opportunity of presenting a case against a course of action that is inconsistent with the expectation.³² Like the Guidelines, the UN Convention is not accorded the domestic legal status of a rule of law. And therefore, a decision-maker cannot be compelled to act in accordance with either the Guidelines or the Convention, as both give rise to non-statutory administrative / executive power.³³ As explained by Mason CJ and Deane J:

To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. ...

But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.³⁴ (Emphasis added)

As the Guidelines are not a Legislative Instrument for purposes of the *Legislative Instruments Act 2003* (as they were generated without parliamentary prompting),³⁵

²⁹ Above n 4, Guidelines, section 5.

³⁰ See above n 7, 578.

³¹ (1995) 183 CLR 273.

³² See P Sales QC & J Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 124 *Law Quarterly Review* 388, 408. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-287 (Mason CJ and Deane J).

³³ See above n 32, P Sales QC & J Clement, 408. See also *Stewart v FCT* [2010] FCA 402, [9] (Perram J).

³⁴ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291-2.

³⁵ See *Deloitte Touche Tohmatsu v DCT* (1998) 40 ATR 435, 451. See also Aronson, Dyer & Groves *Judicial Review of Administrative Action* (4th ed 2009) 162.

they can be described as a hybrid-type of guideline or code, lying halfway between statutory and non-statutory schemes.³⁶ They spring from the Act, in the sense that they regulate the conduct of the Commissioner in administration of the Act, but in no way 'qualify' the Act by preventing the Commissioner from discharging his public obligations under section 8 of the Act.³⁷ This is 'radically different' to the position in England where courts 'reserve the possibility of judicial review of a non-statutory scheme for unreasonableness or irrationality, or even for violation of a legitimate expectation'.³⁸

In one respect however, Australian courts appear to come close to the position in England where the Federal Court in *Minister for Immigration v Gray* recognized that although '[p]olicies are not statutory instruments ... a serious misconstruction of its terms or misunderstanding of its purpose in the course of decision-making may result in an improper exercise of power.'³⁹ And based on the decision of Gummow J in *Khan v Minister for Immigration and Ethnic Affairs*,⁴⁰ courts will set aside an administrative decision involving inflexible application of policy.⁴¹

However, the policy directive in *Khan* was reviewable under the ADJR Act⁴², while in *Gray* the policy statement would have constituted a reviewable Legislative Instrument, being set out in a statement made to the Parliament by the Minister.⁴³ This is not the case in relation to a decision to lift the concession under the Guidelines.

³⁶ Ibid 156 (footnotes omitted).

³⁷ *Stewart v FCT* [2010] FCA 402, [9] (Perram J).

³⁸ Above n 35, Aronson, Dyer & Groves, 156. See also Kristina Stern, 'Substantive fairness in UK and Australian law' (2007) *Australian Bar Review* 266. In its recently released Consultation Paper, the Administrative Review Council ('ARC') foreshadowed amendments to the ADJR Act to expand its scope and allow for review of non-statutory schemes: Administrative Review Council, *Judicial Review in Australia: Consultation Paper* (2011) 106.

³⁹ (1994) 50 FCR 189, 208 per French and Drummond JJ; cited with approval in *Elliott v Minister for Immigration and Multicultural Affairs* (2007) 556, 559, 572.

⁴⁰ (1987) 14 ALD 291.

⁴¹ See *SZICT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1144, [10] (Jacobson J).

⁴² See *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292 (Gummow J).

⁴³ See *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 33 ALD 13, 26; *Legislative Instruments Act 2003* s.5(1), and *cf Basile v Minister for Immigration and Citizenship* [2011] FCA 237, [20].

Judicial review of the current administrative arrangement

A decision to lift the accountants' concession is not covered by the statutory review regime in the ADJR Act, unless it can be set aside on the grounds that it was reached by a departure from the Guidelines and caused unfairness,⁴⁴ made in bad faith,⁴⁵ or reached by deliberate or 'conscious maladministration'.⁴⁶ Access to restricted documents may only be sought in 'exceptional circumstances' upon written approval of a SES officer or the Deputy Commissioner, with the requesting ATO officer required to 'specify, to the extent practicable, the relevant documents applicable to the issue under review'. Therefore, it can hardly be said that the functions performed by either the requesting or approving officer is purely procedural.⁴⁷ And even if it were so, 'constitutional writs'⁴⁸ may apply where a determination is antecedent to the ultimate decision, with the requesting officer required to act judicially.⁴⁹

Although the requesting officer is not required to act judicially in applying the Guidelines, nevertheless the requirement to specify the relevant documents on the subject of exceptional circumstances, affects a party's legitimate expectation of confidentiality. Put differently, a determination of 'exceptional circumstance' is capable of having a material effect on the outcome of the affected person's claim for confidentiality.⁵⁰ This would render a decision under the Guidelines susceptible to judicial review. Given an officer of the Commonwealth approves access, there is little doubt the Federal Court has jurisdiction to entertain any judicial review proceedings under section 39B of the *Judiciary Act 1903*.⁵¹ However, the scope for review of a decision under the Guidelines is extremely limited.

⁴⁴ See *Re Minister for Immigration and Multicultural Affairs Ex parte Lam* (2003) 214 CLR 1, [34] (Gleeson CJ); cited in *Stewart v FCT* [2010] FCA 402 [22] (Perram J).

⁴⁵ *Stewart v FCT* [2010] FCA 402 [23], citing *SCAS v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 397 [19] (Heerey, Moore and Kiefel JJ).

⁴⁶ See *FCT v Futuris Corporation Ltd* [2008] HCA 32.

⁴⁷ Above n 4, Guidelines, Part 5.

⁴⁸ Which in the federal context is a reference to 'prerogative writs' and covers both writs of mandamus or prohibition referred to in s 75(v) of the *Constitution* as well as the writ of certiorari: *Heli-Aust Pty Ltd v Cahill* [2011] FCAFC 62 [190] (Flick J).

⁴⁹ *Singh v Motor Accidents Authority of New South Wales* [2010] NSWSC 550 [37].

⁵⁰ *Cf Rodger v De Gelder* [2011] NSWCA 79 [67] (Beazley JA, McColl and Macfarlan JJA agreeing).

⁵¹ Section 39B(1) of the *Judiciary Act 1903* confers on the Federal Court original jurisdiction to determine proceedings 'with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.' Jurisdiction to grant a writ of certiorari is an aspect of the jurisdictional grants under section 39B: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 507 (Gaudron,

In *One.Tel Ltd*, Burchett J held that the Guidelines engender a procedural legitimate expectation, which requires the Commissioner to give the person affected:

a prior opportunity of arguing that there is no such exceptional circumstance ... [albeit] a person may be entitled to less than full particulars of the facts and views which may be considered sufficient to deny his expectation... [where] it will at any rate be sufficient ... if the person affected knows or 'is in a position to anticipate what the issues are'.⁵²

Accordingly, the Commissioner now accepts an affected person has a 'legitimate expectation' or is entitled to a reasonable and adequate opportunity to argue that there are no exceptional circumstances.⁵³

Burchett J rejected the taxpayer's contention that it was not open to the Commissioner to regard the possible application of Part IVA as an exceptional circumstance. His Honour observed that such a contention required construing an expression in the Guidelines as if it were contained in the Act, which was not permitted. His Honour concluded it was a matter for the Commissioner whether application of Part IVA constitutes an exceptional circumstance.⁵⁴

In *Deloitte Touche Tohmatsu*, Goldberg J held the Guidelines constitute a relevant consideration to which ATO officers must have regard. However, the Guidelines in no way qualify the Commissioner's coercive information gathering power under s 264 of the Act, as they do not have the status of a legislative enactment.⁵⁵ To this end, it was sufficient that the approving ATO officer 'had become aware of information which he thought may have an impact on the revenue',⁵⁶ regardless of whether that information was based on findings or inferences of fact supported by logical grounds.⁵⁷

More recently however, Australian courts have been prepared to entertain the possibility that a decision under the Guidelines may be set aside for *Wednesbury*⁵⁸ unreasonableness.⁵⁹ Namely, the decision was so unreasonable that no reasonable person could have made it. The source of the court's jurisdiction in this regard

McHugh, Gummow, Kirby and Hayne JJ); see *White Industries Australia Ltd v FCT* (2007) 160 FCR 298 [100], [112] (Lindgren J).

⁵² *One.Tel Ltd v DCT* (2000) 58 ALD 103, 120-1 (Burchett J).

⁵³ See above n 4, Manual [7.2.5].

⁵⁴ *One.Tel Ltd v DCT* (2000) 58 ALD 103, 121.

⁵⁵ *Deloitte Touche Tohmatsu v DCT* (1998) 40 ATR 435, 450-1.

⁵⁶ *Ibid* 451.

⁵⁷ *Cf Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224, 232 (Gummow and Hayne JJ).

⁵⁸ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁵⁹ *Stewart v FCT* [2010] FCA 402, [21].

appears to be based on an implication that the statutory power of general administration in s 8 of the Act, must be exercised in accordance with the rules of procedural fairness.⁶⁰

Not surprisingly, however, affected parties have been remarkably unsuccessful in invoking *Wednesbury* unreasonableness, given judicial review of administrative action in this regard is 'extremely confined'⁶¹ and a 'quite demanding level of unreasonableness has been required.'⁶² A decision (whether based on exercise of statutory power or discretion)⁶³ is not unreasonable simply if 'reasonable minds might differ in respect of the conclusions to be drawn ... or ... because one conclusion has been preferred to another possible conclusion.'⁶⁴ Although unreasonableness may manifest from the decision-maker's reasoning process,⁶⁵ the determination of how probative evidence is and the weight to attach to it, is entirely a matter for the decision-maker.⁶⁶

In *Stewart v FCT*, Perram J rejected a *Wednesbury* unreasonableness submission that the approving ATO officer could not have reached the view there were exceptional circumstances without first having viewed the documents himself.⁶⁷ His Honour was content that the approving officer had considered the auditor's submissions suggesting the relevant documents related to setting up structures to avoid paying Australian tax, even though in his decision the officer did not allude to whether there were reasonable grounds to believe there was fraud or evasion. In *Deloitte Touche Tohmatsu v DCT*, Goldberg J went further and upheld a decision to access non-source documents where the relevant ATO officer was in 'investigative mode', albeit the relevant officer had not formed a view about the proper taxation consequences of the arrangement.⁶⁸

⁶⁰ Ibid [27].

⁶¹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

⁶² *Lukacevic v Coates-Hire Operations Pty Ltd* [2011] NSWCA 112, [45] (Giles JA). See also, above n 35, Aronson, Dyer & Groves, 270, 371.

⁶³ *Lukacevic v Coates-Hire Operators Pty Ltd* [2011] NSWCA 112, [46] (Giles JA).

⁶⁴ *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, [131] (Crennan and Bell JJ), [77] (Heydon J). See also *Minister for Immigration v Eshetu* (2001) 197 CLR 611, 626 (Gleeson CJ and McHugh J); *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48 [34].

⁶⁵ Ibid [53] (Gummow ACJ and Kiefel J, in dissent).

⁶⁶ *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51 [26]-[28] (North and Lander JJ).

⁶⁷ [2011] FCA 336 [30],[32] and [39].

⁶⁸ (1998) 40 ATR 435, 451-452 (Goldberg J); *Contra Stewart v FCT* [2011] FCA 336 [39] (Perram J).

In *One.Tel*, Burchett J rejected the taxpayer's unreasonableness contention on the basis that it was open to the Commissioner to make the decision to lift the concession by reason of the potential application of Part IVA, notwithstanding that well over a year and a half earlier ATO officers noted: 'At this point we have no evidence to support a current argument on [the Part IVA] ground.' Finding an onus on the affected party, his Honour was neither persuaded by the applicant's evidence on the issue of unreasonableness nor by the submission that the relevant facts are peculiarly within the knowledge of the Commissioner.⁶⁹

The *One.Tel Ltd* and *Deloitte Touche Tohmatsu* cases were deemed to involve decisions connected with a statutory power (respectively, s 108 of the now repealed *Sales Tax Assessment Act 1992* and s 264 of the Act), making them susceptible to judicial review under the ADJR Act.⁷⁰ However, decisions forming part of the process of making, or leading up to the making of, assessments (eg, a threatened assessment,⁷¹ or Part IVA determination)⁷² are not reviewable under the ADJR Act. So, too, a decision to lift the accountants' concession during the litigation phase pursuant to a request for discovery.⁷³

THE ACCOUNTANTS' CONCESSION IN PRACTICE

Taxpayers' unhappy experiences

Despite the ALRC Report not finding evidence that the concession is not working appropriately, the Discussion Paper nevertheless alludes to practitioner concerns about the accountants' concession, in particular:

- the fact that the concession is not enshrined in law and that the Commissioner expressly permits departures from it in exceptional circumstances;
- whether there is consistency of interpretation and administration of the concession by Tax Audit staff;

⁶⁹ *One.Tel Ltd v DCT* [2000] FCA 270; (2000) 58 ALD 103, 121-2.

⁷⁰ See *White Industries Australia Ltd v FCT* (2007) 160 FCR 298, [90]-[93], and [85], where, after confessing some confusion about the bases for the decisions in *One.Tel* and *Deloitte Touche Tohmatsu*, Lindgren J opined that Burchett J's 'reference to natural justice and to unreasonableness suggest that he may have been thinking in terms of s 5(1)(a) and s 5(1)(e) and (2)(g) of the ADJR Act, although he did not refer to that Act.'

⁷¹ *Independent Holdings Ltd v DCT* (1992) 28 ALD 501 (Spender J).

⁷² *Meredith v FCT* (2004) 76 ALD 33 (Lee, Cooper and Nicholson JJ, dismissing the appeal from French J).

⁷³ *White Industries Australia Ltd v FCT* (2007) 160 FCR 298, [90].

- the escalation procedures where parties disagree with the Tax Office audit staff decisions or approaches; and
- the practicalities of claiming the concession (that is, the forms involved).⁷⁴

The Discussion Paper then examines arguments for and against a tax advice privilege, including international precedents for protecting the confidentiality of tax advice. It accepts the need for confidentiality, and poses some Guiding Questions for views on what problems are being experienced under the current arrangement, and what procedures should be implemented to best serve the policy objective of full and frank disclosure. To this end, encouraging open and frank communication between taxpayers and their accounting advisers is 'critical for maintaining access to the information required for [tax] audits and public confidence in the capital markets'.⁷⁵

Disturbingly, however, there is anecdotal evidence suggesting improper enforcement of the accountants' concession. Such evidence suggests a growing propensity of the ATO to allege potential Part IVA concerns in order to gain access to restricted and non-source documents. Affected parties are finding it 'very difficult if not impossible to enforce the Guidelines',⁷⁶ leading to calls for a re-think on this aspect of the accountants' concession. Despite an affected party providing information to determine the tax consequences or purpose of a transaction, the Commissioner is now using the general anti-avoidance rule far more than previously, with allegations based on Part IVA often withdrawn between the audit phase (when access is likely to be sought) and the litigation phase.⁷⁷

Other illustrations of improper exercise of discretion under the present administrative arrangement abound. And although raised only as a hypothetical, the example postulated by Mr Stewart in *Stewart v FCT* to illustrate impermissible exercise of discretion under the Guidelines is worrying. The complaint is that by asserting Part IVA in a 'blanket manner', the Commissioner can improperly gain access to a great many documents relating to 'anodyne tax advisors' advice' simply because they happen to be in a bundle of a hundred accounting advices of which only five could be categorised as relevant to a Part IVA scheme or fraud or evasion.⁷⁸

⁷⁴ Above n 1 [18]-[19].

⁷⁵ Above n 20, 353.

⁷⁶ Jerome Tse and Julian Roberts 'The accountant's concession: time for a re-think?' (2010) 45 *Taxation in Australia* 205-212, 209.

⁷⁷ Ibid 206. See also, above n 20, 354 who reports on 'the impediment to efforts by accountants and auditors to facilitate responsible and legitimate disclosure within the self-reporting tax system' due to Canada Revenue Agency (CRA) officials routinely requesting taxpayer's audit working papers.

⁷⁸ *Stewart v FCT* [2011] FCA 336 [20].

Equally concerning is the complaint raised in a letter by Mr. Stewart to the authorising ATO officer, which ultimately was not pursued in Court. The letter had regard to the inability to specifically refute Part IVA or fraud or evasion allegations without access to the auditor's reasons for such allegations. Being satisfied that submissions had in fact been made about those two matters however, Justice Perram was not required to decide the matter.

The growing perception of the lack of *bona fides* in exercise of the discretion to lift the concession becomes particularly disquieting as the ATO appears to be increasingly applying Part IVA to mainstream businesses undertaking ordinary transactions,⁷⁹ with courts commensurately overturning more Part IVA assessments than previously. Significantly, there were at least 9 Part IVA cases decided in 2010, whereas it took almost 10 years for the first Part IVA case to appear after its introduction in the Act in 1981. From the nine cases, the Commissioner was successful in three, partially successful in one, unsuccessful in four and would have been unsuccessful in the last case had it been necessary to rule on the Part IVA determination.⁸⁰ From this it was surmised that:

Despite his mixed success in 2010 ... the Commissioner will be seeking to apply Part IVA in more and more cases as each year passes, with little guidance to taxpayers as to when it will be invoked.⁸¹

Accordingly, and without any reform, it is expected the accountants' concession will be lifted more often in increasingly questionable circumstances that do not objectively or reasonably give rise to Part IVA concerns. This further erodes the effectiveness of the current arrangement in facilitating full and frank disclosure. This is notwithstanding that the ATO has more recently reevaluated its application of Part IVA in light of recent court decisions.⁸²

The need for reform

As discussed, the doctrine of legitimate expectation in Australia is of limited utility and scope, with any distinct role it may have played in Australian public law being

⁷⁹ 'Tax avoidance rules shake-up' *Australian Financial Review*, 19 November 2010, p 3.

⁸⁰ See Robert Allerdice, 'Upping the ante on the anti-avoidance provisions?' (2011) *Taxation in Australia* 518, 518.

⁸¹ *Ibid.*

⁸² See Decision Impact Statements:

(1) *FCT v AXA Asia Pacific Holdings Ltd* (2010) 189 FCR 204 <<http://law.atolaw.gov.au/atolaw/view.htm?DocID=LIT/ICD/VID917of2009/00001>> at 22 February 2012; and

(2) *FCT v Trail Bros Steel & Bros Ltd* (2010) 79 ATR 780 <<http://law.atolaw.gov.au/atolaw/view.htm?DocID=LIT/ICD/QUD275of2009/00001>> at 22 February 2012.

supplanted by the development in the case law of procedural fairness.⁸³ As an administrative arrangement, the ATO can abandon the Guidelines so long as the new Guidelines are lawful, not in contravention of some statutory or general law obligation, and the Commissioner gives necessary notice to those with a legitimate expectation that the policy will be followed.⁸⁴ Equally, the ATO cannot be compelled to act in particular way, notwithstanding the existence of a legitimate expectation a decision-maker will act in a particular way.

Similarly, the entitlement to notification is much lower under the Guidelines than that, for example, conferred on visa applicants under the *Migration Act 1958* (Cth). A want of procedural fairness was found to exist for purposes of the *Migration Act 1958* (Cth) where an applicant's legitimate expectations were defeated when misled into thinking the decision maker had considered particular relevant information favourable to the applicant.⁸⁵ This could not constitute inadequate notice under the current arrangement, as it would impermissibly elevate a legitimate expectation under an administrative arrangement into a procedural right.⁸⁶

However, elevating legitimate expectations under the Guidelines to procedural rights should not impede operational flexibility. Rather, it will more likely enhance accountability by encouraging transparency in the decision-making process, compared with the current arrangement. Analogously with the decision to grant a visa under the *Migration Act 1958*, which requires the relevant decision-maker to be satisfied of certain criteria, a decision to approve access to restricted documents is based upon the satisfaction of a senior ATO officer that exceptional circumstances exist. A decision in both instances can have significant adverse consequences.

Arguably, there is no compelling public interest reason for the extra latitude afforded the ATO under the Guidelines given the importance of the accountants' concession in facilitating administration of taxation law under a self-assessment regime. For this reason, it is suggested that giving the decision-making process under the Guidelines legislative force will give added content to the limited doctrine of legitimate expectation by reference to a greater suite of procedural fairness obligations.⁸⁷

⁸³ See *Re Minister for Immigration and Multicultural Affairs Ex parte Lam* (2003) 214 CLR 1 [65]-[81] (McHugh and Gummow JJ).

⁸⁴ *Country Energy v Williams* [2005] NSWCA 318, [97]-[99] (Basten JA; Spigelman CJ and Giles JA agreeing).

⁸⁵ See *NAFF of 2002 v MIMIA* (2004) 211 ALR 660, 676-7; *Muin v Refugee Review Tribunal*; *Lie v Refugee Review Tribunal* [2002] HCA 30.

⁸⁶ *Country Energy v Williams* [2005] NSWCA 318 [95] (Basten JA; Spigelman CJ and Giles JA agreeing).

⁸⁷ See *Daihatsu Australia Pty Ltd v FCT* [2001] FCA 588 [38] (Finn J).

AN ALTERNATIVE MODEL

The ALRC recommended model

In an effort to facilitate voluntary compliance and enable tax advisors to give their clients candid and independent advice,⁸⁸ the ALRC recommended Australia follow the practice in New Zealand. In 2005, New Zealand introduced a statutory privilege for confidential tax advice documents made for, or in the course of, communications with a registered tax adviser about the operation and effect of tax laws.⁸⁹ Unlike the accountants' concession, the New Zealand model applies to information subject to a discovery obligation.⁹⁰ Prior to 2005, New Zealand had in place policy guidelines⁹¹ similar to the accountants' concession that were 'promulgated as an acknowledgement of the disparity between lawyers and other tax professionals'.⁹²

Notwithstanding, the ALRC conceded greater efficiency and effectiveness with its proposed tax advice privilege requires federal bodies to 'address the significant issues and problems associated with the practices and procedures for making and resolving claims in federal investigations.'⁹³ This would undoubtedly involve a lengthy adjustment period and a significant outlay of public funds that will be needed to effectively implement the new procedures,⁹⁴ train ATO staff on how to handle privilege claims and embark on an extensive public education program.

Comparatively, the ALRC proposed model would be less efficient and more costly than the current arrangement. This is largely because the former incorporates a 'dominant purpose' test with its attendant costly procedures for claiming privilege, which, *inter alia*, may require certification from a lawyer there are reasonable grounds for the making of the claim.⁹⁵ Depending on how a decision about whether a document satisfies the dominant purpose test is construed (either as an exercise of

⁸⁸ Above n 2, [2.64],[6.275]; See also Andrew Maples and Michael Blissenden, 'The proposed client-accountant tax privilege in Australia: How does it sit with the common law doctrine of legal professional privilege?' (2010) 39 *Australian Tax Review* 20, 28.

⁸⁹ This was the model preferred by the ATO in its submissions to the ALRC: above n 2.

⁹⁰ See section 20B of the *Tax Administration Act 1994* (NZ), discussed in above n 1, [44] – [46].

⁹¹ New Zealand Inland Revenue Department, *Commissioner's Policy on Access to Advice and Other Workpapers Prepared by Accountants* (1993).

⁹² Above n 89, Andrew Maples & Michael Blissenden, 22.

⁹³ Above n 2, 32.

⁹⁴ See Joanne Dunne, 'Legislating the accountants' concession – considering the New Zealand experience' (2011) *Taxation in Australia* 727, 732-3, for an exposition of the 'large number' of technical issues to be addressed if Australia were to adopt the same approach as New Zealand.

⁹⁵ Above n 2, Recommendation 8-3(b)(2)(ii). For an outline of other recommended procedures see Recommendations 8-3 to 8-5.

statutory or non-statutory executive power), there will likely be numerous protracted (administrative and judicial) disputes about which communications are made for the dominant purpose of providing tax advice. In turn, it will add substantially to costs of compliance and enforcement, lead to delays and general disaffection, compared with the existing disquiet about how the ATO applies the Guidelines.

And while some commentators contend that introduction of a separate statutory privilege will at least 'enhance perceptions of the fairness of the tax system and potentially positively impact ... tax compliance', they also express concern having a dual system of privileges will cause uncertainty, particularly as to the scope of the statutory privilege.⁹⁶ At the practical level, they argue that the protection afforded taxpayers under the New Zealand model is 'considerably less'⁹⁷ than the common law professional legal privilege, which, *inter alia*, attaches to legal documents while tax advice documents are not automatically protected, even if eligible.⁹⁸ Further, the Discussion Paper expressed concern that the scope of any tax advice privilege would necessarily have to be narrower than professional legal privilege.⁹⁹

Equally, the US model examined (and rejected) by the ALRC, which extends the common law legal professional privilege to communications '[w]ith respect to tax advice ... between a taxpayer and any federally authorized tax practitioner',¹⁰⁰ does not redress the competitive disadvantage accountants encounter under the current arrangement. As explained in the Discussion Paper, notwithstanding that 'tax advice' is given a broad meaning, the US model is limited to communications concerning non-criminal matters.¹⁰¹ Similarly, the other approach considered and rejected in the ALRC Report, s 20B of the United Kingdom *Tax Management Act 1970*, was found to be more limited than the New Zealand approach, and does not reflect the current scope of legal privilege in Australia.¹⁰²

A less costly and inefficient alternative

Given the shortcomings of the ALRC preferred approach, it is suggested instead that a provision be inserted into the Act grounding exercise of discretion to lift the

⁹⁶ See above n 89, Andrew Maples and Michael Blissenden, 37-8.

⁹⁷ *Ibid* 20.

⁹⁸ See *Blakely v CIR* (2008) 23 NZTC 21865, 21870 (Hansen J). Although this decision concerns the New Zealand tax advice privilege, Andrew Maples and Michael Blissenden (above n 89, 34) agree that it will equally apply if the ALRC approach is adopted in Australia.

⁹⁹ Above n 1 [72]-[73].

¹⁰⁰ *Internal Revenue Code* (1954) 26 USC §§7525(3)(B). Above n 2, [6.213].

¹⁰¹ Above n 2, 288-289 [6.214]. In Australia, proceeds of crime are taxable (*La Rosa v FCT* (2003) 53 ATR 1) and therefore any tax-related communications should rightly be privileged.

¹⁰² Above n 1, [52].

accountants' concession in statutory form.¹⁰³ This is notwithstanding that a decision to lift the accountants' concession already brings into play a limited suite of procedural fairness principles.¹⁰⁴ The requirements of procedural fairness must always be moulded to the particular circumstances of the case,¹⁰⁵ so the statutory framework within which a decision-maker exercises statutory power is critically important.¹⁰⁶

Without a proper statutory framework, judicial review of whether exceptional circumstances exist will remain mired in uncertainty and unduly constrained. As mentioned, the Guidelines do not themselves generate a legal right but rather an expectation that the ATO will follow them. Therefore, this renders the reasons for seeking access in the first place (i.e., the primary decision) unreviewable. Moreover, the ATO is not required, nor expected, to afford an affected person procedural fairness by (a) indicating that it was unable to find in the affected person's favour on the basis of the material in its possession, and (b) inviting the individual to provide additional information. This is in contradistinction to the concept of procedural fairness at common law,¹⁰⁷ or under the *Migration Act 1958*.¹⁰⁸

It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.*¹⁰⁹ (Emphasis added)

¹⁰³ An alternative approach would be for the relevant Minister to promulgate the Guidelines in Parliament, thus giving them 'legislative character' for purposes of s. 5 of the *Legislative Instruments Act 2003* (Cth). Analysis of this approach is beyond the scope of this article.

¹⁰⁴ See *Stewart v FCT* [2011] FCA 336 [24]-[26] where Perram J relies *inter alia* on the principle of legality espoused in *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309, 329 (Gleeson CJ) to suggest that procedural fairness applies to regulate the conduct of the approving senior ATO officer in granting access to non-source documents under the Guidelines.

¹⁰⁵ *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 99; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 72 ALD 613; 622 (Gleeson CJ), 624-625 (McHugh and Gummow JJ).

¹⁰⁶ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161.

¹⁰⁷ See *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-2.

¹⁰⁸ See *NAVX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 287 [5].

¹⁰⁹ *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592; endorsed in *SZBEL v Minister for Immigration and Citizenship* (2006) 228 CLR 152, 162 (Gleeson CJ and Kirby, Hayne, Callinan and Heydon JJ).

A statutory review regime will qualify the Commissioner's power to access sensitive documents even in investigatory mode, turning the current legitimate expectation into a procedural right. This would effectively operate as a constraint upon 'operational flexibility' to ensure discretionary power is not exercised capriciously,¹¹⁰ without creating substantive legitimate expectations. It will also strike a fairer balance between the public interest in the ATO being allowed to develop its policy flexibly, and fair treatment for individuals by ensuring power is exercised in good faith.¹¹¹ Importantly, the presently advocated approach does not breach Australian courts' reluctance to entertain, albeit not necessarily uniformly,¹¹² expectation of substantive relief to assure a final outcome as distinct from fair treatment.¹¹³

Under the approach suggested, every step taken by the decision-maker will be deemed taken for the purpose of the Act. Therefore, a decision-maker falls into error of law for refusing to afford procedural fairness or to decide an application for confidentiality according to law.¹¹⁴ Capricious or unreasonable exercise of power is ameliorated in circumstances where the 'mission' of Australian courts in reviewing administrative decisions is to ensure they are assessed in terms of 'a minimum level of rationality and logic'.¹¹⁵ This was not always the case in Australia. The position previously was that there is no place in judicial review for want of logic.¹¹⁶

Permitting a person who is dissatisfied with a determination of 'exceptional circumstance' access to the existing objection, review or appeal mechanism in Pt IVC of the *Taxation Administration Act 1953* (the 'TA Act'), will further correct the current power imbalance in favour of the ATO. Specifically, the right of review provided to

¹¹⁰ Above n 7, 569-570.

¹¹¹ Cf P Sales & K Steyn, 'Legitimate expectations in English public law: an analysis' (2004) *Public Law Review* 580.

¹¹² See also Kristina Stern, 'Substantive fairness in UK and Australian law' (2007) *Australian Bar Review* 285.

¹¹³ Cf GL Peiris, 'Wednesbury Unreasonableness: the expanding the canvass' (1987) 46 *Cambridge Law Journal* 53, 79.

¹¹⁴ See *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 4 [78]. In this case, the High Court unanimously held that all steps taken by a decision-maker in assessing claims of an 'unlawful non-citizen' processed under the 'offshore processing regime' to protection obligations were taken under and for the purpose of the *Migration Act 1958*. This is because steps taken (including making inquiries for purposes of procedures in administrative guidelines) prolonged the detention of the person and therefore had a direct impact on the rights and interests of the plaintiffs.

¹¹⁵ Above n 35, Aronson, Dyer and Groves, 176.

¹¹⁶ See *Amaba Pty Ltd (under NSW administered winding up) v Booth* [2010] NSWCA 344 [22] (Basten JA; Beazley & Giles JJA agreeing), referring to *Australian Broadcasting Tribunal v Bond* 170 CLR 321, 356 (Mason CJ).

the Administrative Appeals Tribunal ('AAT') under the TA Act is an important civic right. It provides an independent review of the merits of an administrative decision, and permits the AAT to make the 'correct or preferable' decision or 'objectively the right one to be made'.¹¹⁷

The ability of citizens to review the merits of a decision is fundamental to the integrity of the decision-making process.¹¹⁸ One way to readily and effectively facilitate this is to amend both the Act and the TA Act to deem a determination of exceptional circumstance as a private ruling. As the law stands, a private ruling is binding in very limited circumstances.¹¹⁹ However, this is not expected to provide an insurmountable obstacle, as private rulings ordinarily deal with a specified scheme, which is widely defined. Such schemes may deal with anything involved in the application of a relevant provision, including issues relating to administration and procedure.¹²⁰

Operational flexibility may dictate that an ATO officer sometimes has unfettered discretion to seek approval not in accordance with the Guidelines (i.e., where there are reasonable grounds to suspect fraud or evasion, etc). This further underlines the need for a formalised review mechanism to safeguard against abuse or improper exercise of discretion. Giving the exercise of discretion a statutory context will guarantee that even an unfettered discretion must be exercised in good faith and within the scope and for the purposes of the statute.¹²¹

Accordingly, an ATO officer (either the relevant SES officer or the requesting audit officer) will, in every case, be obliged to give his own genuine and unfettered

¹¹⁷ *Hong v MIAC* [2011] FCA 842, [9] (Buchanan J); citing *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 420–421 (Bowen CJ and Deane J) and 429–430 (Smithers J).

¹¹⁸ Administrative Review Council, *Internal Review of Agency Decision Making*, 44 (2000) [1.7] <[http://www.crimeprevention.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(CFD7369FCAE9B8F32F341DBE097801FF\)~report44.pdf/\\$file/report44.pdf](http://www.crimeprevention.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~report44.pdf/$file/report44.pdf)> at 22 February 2012.

¹¹⁹ See Australian Taxation Office, 'Taxation Ruling TR 2006/11' (2006) [19] <[http://law.ato.gov.au/atolaw/view.htm?rank=find&criteria=OR~PAC%2F19530001%2FSch1-359-40~makesref~exact::OR~PAC%2F19530001%2FSch1-359-40\(%3F~makesref~exact&target=E%20EA&style=html&sdocid=TXR/TR200611/NAT/ATO/00001&recStart=1&PiT=99991231235958&lookupdocument=PAC%2F19530001%2FSch1-359-40&lookupquery=rank%3Dfind%26style%3Dhtml%26sdocid%3DPAC%2F19530001%2FSch1-359-40%26recStart%3D1%26PiT%3D99991231235958&lookuptitles=Principal%20Legislation~TAXATION%20ADMINISTRATION%20ACT%201953~SECTION%20359-40~VALUATIONS&recnum=2&tot=2&pn=ALL:::E](http://law.ato.gov.au/atolaw/view.htm?rank=find&criteria=OR~PAC%2F19530001%2FSch1-359-40~makesref~exact::OR~PAC%2F19530001%2FSch1-359-40(%3F~makesref~exact&target=E%20EA&style=html&sdocid=TXR/TR200611/NAT/ATO/00001&recStart=1&PiT=99991231235958&lookupdocument=PAC%2F19530001%2FSch1-359-40&lookupquery=rank%3Dfind%26style%3Dhtml%26sdocid%3DPAC%2F19530001%2FSch1-359-40%26recStart%3D1%26PiT%3D99991231235958&lookuptitles=Principal%20Legislation~TAXATION%20ADMINISTRATION%20ACT%201953~SECTION%20359-40~VALUATIONS&recnum=2&tot=2&pn=ALL:::E)> at 22 February 2011, for circumstances when a private ruling binds the Commissioner.

¹²⁰ *Ibid* [15]–[16].

¹²¹ See *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 [59] (French CJ).

consideration to the question before him.¹²² This is in stark contrast to the position currently where there is very limited scope (i.e., *Wednesbury* unreasonableness) to seek judicial review of the manner in which evidence that was before the approving senior ATO officer was used.

Why the additional judicial scrutiny?

Although the judicial review system in Australia has been described as 'an extremely dense and complex patchwork',¹²³ this should not detract from the appeal and utility of increased judicial scrutiny. As the ARC explained, the administrative law system in Australia has a dual purpose:

- to improve the quality, efficiency and effectiveness of government decision making generally; and
- to enable people to test the legality and merits of decisions that affect them.¹²⁴

And despite the current difficulties and high failure rate, applications for judicial review of 'exceptional circumstance' determinations are only expected to increase. This can be attributed to the growing evidence of improper enforcement of the Guidelines, as the ATO increasingly asserts Part IVA concerns in questionable circumstances. Without access to an internal review mechanism (available to taxpayers dissatisfied with a tax assessment or other tax decision), judicial review is the last resort for individuals wishing to uphold privilege.

In effect, increased judicial scrutiny will create an intermediate category of legitimate expectation, that is, somewhere between purely procedural and substantive legitimate expectations. It will require the decision-maker (auditor and/or independent senior officer) to have genuine regard to relevant information and a proper reason for seeking access and/or lifting the concession. This will occur where the exceptional circumstance determination was reasonably open in that it 'was based on findings or inferences of fact ... supported by some probative material or logical grounds.'¹²⁵ However, this has not always been the case as more and more

¹²² See P Sales QC and J Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 124 *Law Quarterly Review* 411.

¹²³ Michael Taggart, 'Australian 'Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 6.

¹²⁴ Administrative Review Council, *Judicial Review in Australia: Consultation Paper* (2011) [2.30] <http://152.91.15.12/agd/WWW/arcHome.nsf/Page/Latest_News_Current_Projects_Consultation_paper_-_Judicial_Review_in_Australia> at 22 February 2012.

¹²⁵ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 657 [145] (Gummow J). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1172 (McHugh and Gummow JJ); *Minister for Immigration and*

Part IVA determinations are being reversed in the courts. Giving statutory context to exercise of the administrative discretion under the Guidelines will enable affected individuals to more effectively demur to Part IVA exceptional circumstance determinations in judicial review proceedings.

Heightened protection of the individual's legitimate expectation would, arguably, result in minimal infringement of the public interest need for operational flexibility. This is particularly when, apart from the above-mentioned instances of fraud and non-disclosure, the decision-maker had specific and precise information relevant to the transaction in question, and was in a position to make a full and accurate assessment of its implications.¹²⁶ To this end, the procedures proposed in this article will further mitigate opportunities for improper application of the Guidelines compared with the position currently.

On the other hand, ALRC claims of greater efficiency and effectiveness overlook a very important function served by the concept of 'exceptional circumstance'. The incorporation of the 'dominant purpose' test into the ALRC preferred model adds substantially to uncertainty and the high compliance and administration costs associated with the proposed arrangement.

Compared with the ALRC preferred model, the proposal suggested in this article is arguably more effective and efficient in balancing the needs for flexibility in decision-making and accountability, which enables individuals to test the legality and merits of an administrative decision. At the very least, the suggested alternative will likely require less time and resources to effectively enforce, as the ATO and taxpayers are already well familiar with initiating and defending statutory and s 39B judicial review proceedings in relation to administrative determinations under the Act.

Another reason for not adopting the ALRC preferred approach is the likely increased scope for abuse and delay from extending a similar level of protection for tax advice of accountants to that provided to lawyers. Unlike lawyers, accountants do not owe a paramount duty to the court and the administration of justice. The ALRC recommendation for mandatory ethical training for accountants, in response to the ATO submission for 'some direct oversight of the professional integrity of accountants involved in tax privilege claims',¹²⁷ will unlikely remedy this situation

Citizenship v SZOCT [2010] FCAFC 159 [18] (Jacobson J); *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108 [40] (Kenny J; Rares J agreeing generally); and *Tisdall v Webster* [2011] FCAFC 76 [91] (Greenwood J; Tracey J agreeing).

¹²⁶ Cf above n 7, 579-80.

¹²⁷ Above n 2, 512 [9.104], 527 [9.168].

given the 'skeptical criticism' of the effectiveness of the 'heightened ethical demands' already imposed on lawyers.¹²⁸

Jurisdictional error

Under the approach suggested in this article, the level of protection afforded individuals is determined by reference to 'jurisdictional error'.¹²⁹ Jurisdictional error defines the limits of procedural fairness when statutory provisions operating upon a state of satisfaction of the administrative decision-maker are involved. This is not the case under the present arrangement as non-statutory administrative powers are involved.

If adopted however, statutory entrenchment of the administrative discretion under the Guidelines would mean courts will have greater scope to discern and quash exercises of administrative power beyond jurisdiction, where '[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error'.¹³⁰ Pursuant to this approach, whether the state of satisfaction about a jurisdictional fact was reasonably attained is critically informed by whether the decision-making procedures were fair.

The increased judicial scrutiny is expected to further enhance accountability by requiring exercises of discretion tainted with jurisdictional error to be re-exercised according to law. This assuages the underlying tension in two discordant sets of values, namely the 'important public interest'¹³¹ of unimpeded access by public bodies to relevant information, and the private interest need for confidentiality. In turn, striking a more appropriate balance between the dictates of operational flexibility and enhanced individual legitimate expectations.

Based on recent case law, what constitutes an unreasonable exercise of statutory discretion is informed by whether the decision-maker actively applied his/her mind

¹²⁸ Above n 1, [73].

¹²⁹ A 'jurisdictional error' is an error made by a decision maker about the scope of the decision-maker's power as, for instance, where the decision-maker identifies 'a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion': *Craig v South Australia* (1995) 184 CLR 163. See also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 (McHugh, Gummow and Hayne JJ).

¹³⁰ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 [71] (French CJ; Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹³¹ *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 100 [29]; affirmed in *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448, 458 [32] (French CJ; Gummow, Hayne, Kiefel and Bell JJ).

to the facts of the particular case, or whether he/she properly engaged with the Guidelines,¹³² or whether he/she misapplied department policy.¹³³ Abuse (or improper or unreasonable exercise) of power has equally been held to manifest where a decision-maker makes an irrational,¹³⁴ illogical,¹³⁵ or absurd determination,¹³⁶ or fails to have genuine regard to relevant information.¹³⁷

And although there is currently no requirement to give reasons for lifting the concession under the Guidelines, 'if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason',¹³⁸ where 'the fact that [the decision-maker] has not made known the reasons why he was not satisfied will not prevent the review of his decision.'¹³⁹ This ensures a refusal to give reasons for granting access is at least reviewable in the Courts, where the capacity of Courts to entertain judicial review applications derives from and is 'to a large extent grounded in an evolving common law'.¹⁴⁰

Indeed, requiring the Commissioner to act rationally, provide a statement of reasons and invite an affected party to comment on adverse findings, should help redress the serious imbalance that has resulted under the current arrangement, where exercise of discretion is largely unfettered and unreviewable. In this regard, widening the scope for judicial review will ensure the opportunity to dispute access is more than an 'empty gesture'.¹⁴¹

¹³² See *Minister for Immigration & Citizenship v Khadgi* [2010] FCAFC 145.

¹³³ See *Elliott v Minister for Immigration and Multicultural Affairs* (2007) 156 FCR 559, 572 [41]-[42] (Ryan, Tamberlin and Middleton JJ), referring to *Gray*, above n 43. Cf *Attorney-General of New South Wales v Quin* (1990) 170 CLR 1, 36 (Brennan J); *Minister for Immigration v Eshetu* (1999) 197 CLR 611 [41].

¹³⁴ See *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108 [72] (Kenny J) and [87]-[88], [98] (Rares J) for explanation when it may be inferred that a decision-maker acted irrationally or arbitrarily. See also *WHP v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 87 [7] (Lee J).

¹³⁵ See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

¹³⁶ See *Berenguel v Minister for Immigration and Citizenship* [2010] HCA 8.

¹³⁷ See *Lafu v Minister for Immigrations and Citizenship* (2009) 112 ALD 1.

¹³⁸ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 663-664 (Gibbs CJ; Wilson, Brennan and Dawson JJ agreeing), relying on *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997.

¹³⁹ *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, 360 (Dixon J).

¹⁴⁰ Above n 35, 176.

¹⁴¹ Cf *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* [2003] FCAFC 126; (2004) 75 ALD 151, 156 [33] (Gray, Cooper & Selway JJ).

An opportunity to dispute disclosure in a statutory context implies evidence be given proper, genuine and realistic consideration.¹⁴² An invitation to put contradictory evidence and arguments implies that it be 'real and meaningful', requiring the approving / requesting officer to consider all evidence relevant to any issue that he is required to determine.¹⁴³ It further implies that an affected party be given an opportunity to deal with adverse information that was credible, relevant and significant to the decision to be made.¹⁴⁴

Part IVA allegation demurrers

Within a statutory framework, the function of an administrative decision-maker is to respond to the case that the applicant advances.¹⁴⁵ To be valid therefore, a decision to lift the concession based on the potential application of Part IVA will generally require the Deputy Commissioner or SES officer to be satisfied that a determination of exceptional circumstance adequately responds to the taxpayer's evidence bearing on the question whether or not the particular scheme or arrangement was entered into for the dominant purpose of obtaining a 'tax benefit'.¹⁴⁶

Whether or not a taxpayer had a purpose to obtain a tax benefit depends on 'prediction as to events'¹⁴⁷ – an enquiry as to what the taxpayer would reasonably be expected to have done if the scheme had not been entered into (referred to in the

¹⁴² *Minister for Immigration v SZJSS* [2010] HCA 48 [29], referring to *NAIS v Minister for Immigration and Multicultural Affairs* (2005) 228 CLR 470, 482-483 (Gummow J), and 526 (Callinan and Heydon JJ).

¹⁴³ See *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 [32]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* (2005) 88 ALD 304 [38] (Kenny and Lander JJ, Spender J agreeing) (regarding whether or not the Tribunal had given genuine consideration to the applicant's notice under s.361 of the *Migration Act 1958* (Cth) to take evidence from a prospective witness after asking about the 'value of the evidence'); cited in *Chen v Minister for Immigration and Citizenship* [2011] FCAFC 56 [19], where the Full Court noted the Tribunal in *Maltsin* committed jurisdictional error where it did not take oral evidence from witnesses and then found them to be deceitful.

¹⁴⁴ See *Plaintiff M61-2010E v Cth* [2010] HCA 41, [74]-[75], [91], *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, [2], *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550, 629, and 569, 582, 602, 633.

¹⁴⁵ *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 73 ALD 321, 337 (Kirby J).

¹⁴⁶ A tax benefit will arise under s 177C(1) of the Act where either an amount is not included in assessable income or a deduction has been allowed in a particular year of income which otherwise might reasonably have been expected to have been included or not to have been allowable in that particular year.

¹⁴⁷ *FCT v Peabody* (1994) 181 CLR 359, 385.

cases as the 'counterfactual' or the 'alternative postulate').¹⁴⁸ By concentrating on conduct that would have taken place but for the scheme, evidence of the counterfactual is relevant in deciding whether a scheme was entered into for the purpose of obtaining a tax benefit.

Evidence bearing on the counterfactual may be established either by leading expert evidence or direct evidence from the taxpayer of an alternative postulate. This evidence includes the steps or the particular course the taxpayer would have undertaken or adopted, or would have been likely to undertake or adopt, in lieu of the scheme.¹⁴⁹ Each has a bearing upon the objective determination of the alternative postulate,¹⁵⁰ and therefore, whether Part IVA concerns legitimately exist. However, to be relevant, counterfactual evidence must show an alternative course of action was both reasonable and more than a mere possibility.¹⁵¹ In this regard, purpose may be discerned, for example, from company minutes or other relevant business records.

Accordingly, a Part IVA exceptional circumstance determination may be set aside for jurisdictional error if it ignores evidence bearing on the counterfactual. And although the process by which the ATO reaches its state of satisfaction under the Guidelines is merely inquisitorial (there is strictly no onus or burden of proof)¹⁵² taxpayers will be expected to lead evidence establishing that none of the persons involved in the arrangement had the objective purpose of gaining a tax benefit to succeed in overturning a Part IVA determination.¹⁵³

As a corollary, an unreasonable exercise of statutory power will exist if an ATO officer makes a bare assertion that 'exceptional circumstances' exist because the purpose for which a transaction was entered into cannot be ascertained from the documents provided, if the determination fails either to engage the Guidelines by disregarding contradictory reliable evidence,¹⁵⁴ respond to a substantial argument,¹⁵⁵

¹⁴⁸ See, generally, *FCT v Ashwick (Qld) No 127 Pty Ltd* [2011] FCAFC 49 [151] (Edmonds J; Bennett and Middleton JJ agreeing).

¹⁴⁹ Evidence of alternative postulate is not limited to the content of the scheme and may even contain elements of the scheme: *FCT v Trail Bros Steel & Plastics Pty Ltd* (2010) 186 FCR 410 [29] (Dowsett and Gordon JJ) [62] (Edmonds J).

¹⁵⁰ *FCT v Ashwick (Qld) No 127 Pty Ltd* [2011] FCAFC 49 [153] (Edmonds J; Bennett and Middleton JJ agreeing); relying on *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 423-4, *FCT v Trail Bros Steel & Co* (2010) 186 FCR 410 [36]; *FCT v AXA Asia Pacific Holding Ltd* (2010) 189 FCR 204 [139].

¹⁵¹ *FCT v Ashwick (Qld) No 127 Pty Ltd* [2011] FCAFC 49 [152] (Edmonds J; Bennett and Middleton JJ agreeing).

¹⁵² *Minister for Immigration and Indigenous and Multicultural Affairs v QAAH of 2004* [2006] HCA 53 [40].

¹⁵³ *Cf De Simone v FCT* (2009) 75 ATR 543.

¹⁵⁴ *Cf Minister for Immigration & Citizenship v Khadgi* [2010] FCAFC 145 [55].

or take into account relevant information informing a jurisdictional fact¹⁵⁶ (the purpose of the transaction or evidence of the counterfactual).¹⁵⁷

Although the immediately preceding principles derive from migration law, where a degree of latitude is afforded applicants who regularly represent themselves without legal assistance, the ATO must similarly respond to the case the applicant advances. The case advanced would have to be better particularized, as a professional will likely have prepared it. The broad inquisitorial power conferred on decision-makers under the *Migration Act 1958* (Cth), where a decision-maker is not restricted to 'acting only on material that was expressly referred to in the course of a particular review ... [is] not bound by rules of evidence and ... obviously expected to develop ... a body of knowledge upon which their views ... were formed'¹⁵⁸, should, analogously, inform exercise of discretion under the Guidelines.

The ATO would not be acting in a generally inquisitorial way if, as is the case under the current arrangement, it merely has regard to the Guidelines and 'submission' in approving access to disputed documents. It must demonstrate 'active intellectual engagement with the question how evidence [of purpose] was taken into account'¹⁵⁹ and that it did not misapply the law in construing the Guidelines. Expecting decision-makers to reveal the procedures and specialised knowledge applied in making an exceptional circumstance determination will not only promote accountability, it will facilitate consistent and fair application of the Guidelines. Hopefully, it will do so in a similar fashion to how the private and public tax rulings systems are co-opted to facilitate better tax compliance and administration.

¹⁵⁵ *Cf Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 73 ALD 321, 326 (Gummow and Callinan JJ), 1102 (Hayne J). See also *Plaintiff M61/2010E v Minister for Immigration and Citizenship* [2010] HCA 41 [90] (the Court), and *Minister for Immigration & Citizenship v SZJSS* [2010] HCA 48 [35] (the Court).

¹⁵⁶ *Cf Lafu v Minister for Immigrations and Citizenship* (2009) 112 ALD 1; see also *See Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351-2 (McHugh, Gummow and Hayne JJ).

¹⁵⁷ Separately, the ATO now accepts that before issuing a Part IVA notice it must 'test' any evidence supporting the taxpayer's version of the counterfactual: Decision Impact Statement *FCT v AXA Asia Pacific Holdings Ltd* (2010) 189 FCR 204 <<http://law.at0.gov.au/atolaw/view.htm?DocID=LIT/ICD/VID917of2009/00001>> at 22 February 2012.

¹⁵⁸ See *Muin v Refugee Review Tribunal* (2002) 68 ALD 257, 316-7 (Hayne J), cited with approval in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 73 ALD 321, 326 (Kirby J).

¹⁵⁹ *Lafu v Minister for Immigrations and Citizenship* (2009) 112 ALD 1 [49], citing *Tickner v Chapman* (1995) 57 FCR 451, 462.

Other benefits of the suggested model

Retaining the current procedure for asserting confidentiality, where access to source documents falls outside the Guidelines, will substantially ameliorate the feared delays and considerable cost from taxpayers deliberately creating privilege over vital source documents.¹⁶⁰ Given the limited role courts play in reviewing administrative error, where courts may not engage in merits review,¹⁶¹ there will be fewer opportunities for judicial review with respect to classification of documents as source documents if, as is current practice, the ATO maintains a list of detailed examples of source documents.¹⁶² It is anticipated courts will summarily dismiss many judicial review applications concerning document classification. Such an outcome compares favourably with the ALRC preferred approach, which demands development of clarifying principles and procedural issues for resolution of privilege claims.¹⁶³

Equally, retaining the policy of confidentiality over a class of documents 'in all but exceptional circumstances' will unlikely add to concerns about the whole burden of taxation falling on 'diligent and honest taxpayers.'¹⁶⁴ Negligent and dishonest taxpayers will not be able to manipulate the system and neither will their advisors. In *Stewart v FCT*, Perram J refused to set aside the decision to lift the concession as there were reasonable grounds to believe fraud or evasion had taken place. The fact that the losing party is also generally required to pay the considerable litigation costs of the other side is an added incentive for taxpayers and their advisors not to engage in abuses of the kind feared in the discussion paper, and for the Commissioner to more carefully (and reasonably) make a determination to lift the concession.

Transforming the opportunity to dispute access to more than a hollow gesture increases transparency in process, which is 'fundamental' to the integrity of the decision-making process. As the ARC found in its report on internal review mechanisms (i.e., a process of review on the merits that is usually undertaken by another officer within the same agency), transparency enhances accountability by encouraging 'better primary decision making ... and the delivery of a cost effective and time efficient review process to applicants.'¹⁶⁵ Under the present arrangement however, there is no internal review mechanism despite the requirement that each

¹⁶⁰ Above n 1, [74]-[76].

¹⁶¹ Which occurs 'when the ground of asserted unreasonableness is giving too much or too little weight to one consideration or another': *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 627 (Gleeson CJ & McHugh J), citing Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 42.

¹⁶² See above n 23.

¹⁶³ Above n 1, [74].

¹⁶⁴ *New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1, 4, as cited in above n 1, [56].

¹⁶⁵ Above n 118, Foreword.

case be considered on its merits after consultation with an access specialist. This is because there is no opportunity to test the merits of the primary decision to seek access, rendering the current consultation process otiose for enhancing accountability.

It is unclear why operational flexibility requires an auditor's decision to seek access under the Guidelines be excluded from judicial review. For, while the exclusion may be necessary or justified on efficiency grounds, it also serves to excuse bad primary decision making and breaches one of the fundamental prerequisites for good administrative practice, namely, transparency. Paradoxically, an opaque primary decision-making process will create an environment where less information is available to tax authorities by driving taxpayers to seek tax advice from lawyers.

In contrast, the procedures proposed in this article enhance accountability by extending judicial review to access decisions made at the audit stage. This will encourage better primary decision-making by exposing to judicial scrutiny the reasons for seeking access in the first place. This ensures the auditor and independent senior officer operate within the limits of the rule of law. This way the suggested model also helps ameliorate competitive non-neutralities currently existing between tax lawyers and tax accountants, whose communications the Discussion Paper acknowledges should be treated equally.¹⁶⁶ It further strengthens entitlements to confidentiality without the added costs associated with the myriad 'dominant purpose' disputes expected to arise under the proposed ALRC model.

Eventually, it is envisaged the suggested alternative model will lead to more consistency in administrative decisions as decision-makers learn both from other colleagues' successes (whose decisions were upheld on review) and mistakes (whose decisions were set aside on review). Being incidental to the Commissioner's coercive information-gathering powers, there is unlikely to be any inconsistency between statutorily entrenched Guidelines and the *International Tax Agreements Act 1953*,¹⁶⁷ which incorporates international tax treaties with other Contracting States into Australian municipal law.¹⁶⁸

And neither is such a framework expected to cause significantly more delays and costs compared with a separate tax privilege regime. Improper claims for legal professional privilege occur regularly and widely, and it is expected that abuse of

¹⁶⁶ Above n 1, [62].

¹⁶⁷ See B L Jones, 'The Use of the Commissioner's Formal Powers and Requests for the Exchange of Information under Double Tax Agreements' (2001) 30 *Australian Tax Review* 39, 43.

¹⁶⁸ See *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54 [14] (Gummow ACJ).

any putative tax privilege will similarly occur.¹⁶⁹ Even with clarifying principles and procedures, establishment of a tax advice privilege will remain problematic as the boundary between tax advice and legal advice is not always clear. This makes it difficult to isolate communications made for dual or multiple purposes (i.e., an accountant performing tax and non-tax advice work).¹⁷⁰

In contrast, the expected substantial increase in judicial review applications under the entrenchment approach proposed in this paper would unlikely create more avenues for abuse and delay compared with the ALRC's proposal. For one thing, the risk of substantial adverse costs orders for an unsuccessful challenge would provide an added disincentive to institute unmeritorious or hopeless judicial review applications. In any case, the attendant accountability benefits of a transparent decision-making process should far outweigh the additional costs and delays associated with an expected increase in judicial review applications compared with the position presently.

At any rate, any additional enforcement costs will likely be a fraction of those associated with Project Wickenby, which commonly shares (with the approach suggested in this paper) the objectives of improving community confidence in the Australian regulatory system and reform of administrative practice.¹⁷¹ Although there is some debate about the deterrent value generated by the publicity surrounding some of the high profile tax prosecutions resulting from Project Wickenby, to date, it has raised \$554 million of outstanding revenue¹⁷² at a cost of some \$431 million to taxpayers.¹⁷³

THE PROPOSED PROCEDURES

What follows is not intended to be an exhaustive description of procedures necessary to put into effect the above-proposed approach. Nevertheless, it is envisaged that at least three provisions are required to be inserted into the Act – a provision that

¹⁶⁹ Above n 1, [77].

¹⁷⁰ Above n 1, [64].

¹⁷¹ Australian Tax Office, 'Project Wickenby: Ongoing Compliance' (2012) <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/00220075.htm&page=18>> at 22 February 2012. For further discussion see also Michael Dirkis, 'The Australian Taxation Office's investigatory powers and practices: Evolution or change?' (Paper presented at the 22nd Australian Tax Teachers' Conference, UNSW, 20-22 January).

¹⁷² Australian Tax Office, 'Project Wickenby: Ongoing Compliance' (2012) <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/00220075.htm&page=18>> at 22 February 2012.

¹⁷³ Adele Ferguson, 'Wickenby renders havens high-risk' *The Age* (Melbourne) 30 June 2011, <<http://www.smh.com.au/business/wickenby-renders-havens-highrisk-20110629-1gqz0.html>> at 22 February 2011.

operates upon a state of satisfaction (**Clause 1**); a provision that requires the decision-maker to furnish a statement of reasons for decision and invite further comment (**Clause 2**); and a provision (**Clause 3**) allowing access to the objection and review mechanism in Part IVC of the TA Act by treating a determination of exceptional circumstance as if it were a private ruling. This latter change is unlikely to require major revisions as the Guidelines already contain detailed procedures on how affected parties may claim confidentiality in relation to documents the ATO is seeking. And as with private rulings, a determination under the Guidelines is non-binding and only applies to specific information/facts bearing on the claim.

The following explains why each of the clauses is required and how it might operate in practice. Some example clauses are provided, albeit without consideration of criteria necessary for their effective enactment.

Clause 1: A statutory provision operating upon state of satisfaction

Exercise of discretion to grant access under the Guidelines is analogous with the discretion exercised by the Minister in refusing grant of visa under the *Migration Act 1958* (Cth). Both involve consideration of relevant criteria and are sufficiently important to warrant more substantive protection through increased judicial scrutiny. Insertion of a provision such as s 65 of the *Migration Act 1958* (Cth) into the Act attracts jurisdictional error relief, ensuring affected parties are afforded fair treatment and the decision-maker acts rationally and reasonably. All are manifestations of procedural fairness which discerns whether or not relevant documents have been properly deemed non-privileged. For instance, a decision to lift the concession within the proposed statutory context will be set aside if infected by some mistake of law or other jurisdictional error. As Dixon J explained in *Avon Downs*:

But it is for the Commissioner [of Taxation], not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review... The conclusion he has reached may, *on a full consideration of the material* that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the

relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition.¹⁷⁴ (Emphasis added)

Accordingly, a putative provision giving effect to the preceding might read:

Clause 1(1): Subject to Clause 2(1), the Commissioner or an authorized person (viz., the Deputy Commissioner or an SES officer) may only approve access to 'restricted source documents' and 'non-source documents' if satisfied that an 'exceptional circumstance' (as defined in the Guidelines) exists.

Insertion of Clause 1 would attract not only constitutional writ relief under section 39B of the *Judiciary Act 1903* (Cth) but also statutory judicial review relief under the ADJR Act.

Clause 2: Statement of reasons and invitation to comment

Fair treatment is usually assessed in terms of both the manner in which the Commissioner applies the Guidelines, and the reasons advanced for lifting the concession. In most cases, improper exercise of power may be discerned from the reasons. Unlike the rights arising under the proposed arrangement however, there is no legitimate expectation under the current administrative arrangement for a statement of reasons for decision to be provided to an affected party.

Although a decision may be susceptible to judicial review regardless of whether or not a statement of reasons is supplied, it is important that there be inserted into the Act a general provision covering procedures broadly requiring the decision-maker to *inter alia* give reasons and invite comment on adverse material. This should not prove unduly burdensome. Under the Guidelines a requesting officer must already consult an access specialist and make submissions in support of access.

Imposing a requirement to provide written reasons allows courts, in assessing the adequacy of those reasons, to determine whether the decision-maker adequately indicated to the affected party that it was unable to find in his/her favour on the basis of the material supplied, and invited the individual to provide additional information. However, as a decision under the proposed approach would constitute an enactment for purposes of the ADJR Act, an affected party should be entitled to request the decision-maker set out in a written statement his or her findings on material questions of fact.¹⁷⁵

¹⁷⁴ *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, 360 (Dixon J); affirmed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1168 (Gleeson CJ).

¹⁷⁵ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13.

In each instance, the reviewing court may infer that any matter not mentioned in the statement was not considered by the decision-maker to be material that may, in turn, reveal some basis for judicial review.¹⁷⁶ In *BAT Advocacy NSW v Minister for Environmental Protection, Heritage and the Arts*, the Full Federal Court explained:

A statement of reasons given by a decision maker can constitute evidence of the material put before the decision maker, the way in which that material has been dealt with and the reasons for which the decision was made. A failure to include reference to a matter in a statement of reasons may justify the inference that, as a matter of fact, the matter was not taken into account.¹⁷⁷

Although Courts must accord a 'beneficial construction' and not scrutinize reasons for decision with a fine-tooth comb with an eye keenly attuned for error,¹⁷⁸ this does not make the reasons non-reviewable. In *SZCBT v Minister for Immigration and Citizenship*, Stone J observed a 'beneficial' approach to the Tribunal's reasons does not require this Court to assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal's comments suggest the issue was overlooked.¹⁷⁹ A decision-maker acts beyond power if he/she asks him/herself the wrong question, which may be revealed through ambiguity in the expression of reasons for decision,¹⁸⁰ or where those reasons demonstrate the decision-maker misapplied relevant law,¹⁸¹ or fails to engage with the question at hand.¹⁸²

The following is an example of a clause mandating provision of particulars and written reasons:

Clause 2(1): Subject to subsection (2), The Commissioner or an authorized delegate must:

- (a) invite a person (referred to as the *affected person*) to give information in accordance with procedures in the Guidelines as to why an exceptional circumstance does not exist, and

¹⁷⁶ *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 346 (McHugh, Gummow and Hayne JJ).

¹⁷⁷ [2011] FCAFC 59 [46] (Emmett, Mackerracher and Foster JJ).

¹⁷⁸ See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* 185 CLR 259, 272 (Brennan CJ and Toohey, McHugh and Gummow JJ).

¹⁷⁹ [2007] FCA 9 [26].

¹⁸⁰ As occurred in *SZCBT v Minister for Immigration and Citizenship* (2009) 107 ALD 134.

¹⁸¹ As occurred in *SZMFJ v Minister for Immigration and Citizenship* (2009) 107 ALD 134, where Jagot J set aside an administrative decision that misinterpreted relevant case law.

¹⁸² As occurred in *Lafu v Minister for Immigrations and Citizenship* (2009) 112 ALD 1, and *SZGKX v Minister for Immigration and Citizenship* (2007) 94 ALD 604.

- (b) give particulars of the *relevant information* to the affected person in the way the Commissioner or the authorized person considers appropriate in the circumstances; and
- (c) ensure, as far as is reasonably practicable, that the affected person understands why it is relevant to the determination;
- (d) invite the applicant to comment on it; and
- (e) provide upon request a statement of reasons setting out findings on any material questions of fact and referring to evidence on which those findings were based.

Clause 2(2) In this section *relevant information* means information the Commissioner or an authorized delegate considers:

- (a) would be the reason, or a part of the reason, for why an exceptional circumstance exists; and
- (b) specifically bears upon an affected party; and
- (c) was not given by an affected party for the purposes of subsection (1).

Sub-clause 2(1)(e) not only encourages both transparency and consistency, as appears immediately below, it is necessary to facilitate access to merits review.

Clause 3: Merits review mechanism

As mentioned, one of the fundamental roles of Commonwealth administrative review is to enable the public to test the merits of decisions that affect them.¹⁸³ One way to do this, with respect to an exceptional circumstance determination, is to grant them access to the statutory review mechanism in Part IVC of the TA Act by, for example, deeming a decision to lift the accountants' concession to constitute a private ruling for the purposes of the Act. Why this is necessary and feasible is explained further below.

Administrative review is 'beneficial'¹⁸⁴ both to affected persons and the ATO. In the case of taxation decisions, full merits reviews are undertaken by the Administrative Appeals Tribunal (AAT), which may exercise all the powers and statutory discretions conferred on the Commissioner, and affirm, vary or set aside, and substitute or remit, his decision.¹⁸⁵ In this way, a *de facto* internal review mechanism is established. This promotes transparency and accountability.

¹⁸³ Above n 65, [1.7].

¹⁸⁴ Above n 65.

¹⁸⁵ *Administrative Appeals Tribunal Act 1975* (Cth) (the 'AAT Act'), s 43(1).

A party to Part IVC proceedings may request the AAT supply written reasons for its decision under section 43(2A) AAT Act, which 'shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.'¹⁸⁶ The AAT must also allow parties to inspect and make submissions on documents that it proposes to use in its decision-making,¹⁸⁷ 'not unlike the obligation of disclosure applying to other decision-makers by reason of the procedural fairness'.¹⁸⁸ This ensures affected parties have an opportunity to be heard and informed of relevant adverse material.

Under s 44 of the AAT Act, a party to a proceeding before the AAT may appeal to the Federal Court on a 'question of law' (which encompasses 'jurisdictional error'¹⁸⁹ and a wrong finding of 'jurisdictional fact'¹⁹⁰) from any decision of the AAT.¹⁹¹

Accordingly, it is suggested a third clause be inserted into the Act to:

- (a) deem lodgment of list of documents in accordance with s 3.2 of the Guidelines an application for a private ruling (within the TA Act);
- (b) deem the subsequent decision of the relevant SES officer in accordance with paragraph 7.2.7 of the Manual a private ruling;
- (c) provide a mechanism whereby a dissatisfied person is deemed to have objected to the decision by requesting a written statement of reasons; and
- (d) deem the requested written statement an 'objection decision' (within Part IVC of the TA Act).

To give practical effect to the preceding, concomitant amendments to the TA Act (particularly sections 14ZW(1A) and Sch 1, Division 359) are required to deem a putative determination of exceptional circumstance a private ruling, and the

¹⁸⁶ AAT Act, s 43(2B). Cf s 430 of the *Migration Act 1958 (Cth)* in relation to the content of written reasons supplied by the Refugee Review Tribunal.

¹⁸⁷ AAT Act s 39; considered most recently in *Civil Aviation Safety Authority v Ovens* [2011] FCAFC 75 [34].

¹⁸⁸ Above n 35, 576 (footnote 404).

¹⁸⁹ *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ).

¹⁹⁰ *SZNPNG v Minister for Immigration and Citizenship* [2010] FCAFC 51 [28] (North and Lander JJ) (The High Court special leave application was dismissed on 13 May 2011: [2011] HCA Trans 135).

¹⁹¹ The error of law an appellant must rely on to succeed on appeal 'must arise on the facts as the AAT has found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make. There is no error of law simply in making a wrong finding of fact': *Waterford v Commonwealth* (1987) 71 ALR 673, 689 (Brennan J)).

lodgment of a confidentiality claim in accordance with the Guidelines the making of an application for TA Act purposes. This will give affected parties an opportunity to seek merits review in the AAT.

While it is not intended to detail the proposed amendments, there is no fundamental reason why a person dissatisfied with an exceptional circumstance determination should be treated differently from a rulee dissatisfied with a private ruling. That a private ruling is ordinarily issued in response to an application by the taxpayer whereas the tax auditor usually makes a request for disclosure is a difference more in form than substance.

Presently, the Commissioner is obliged to set out his view and assumptions in making the ruling regarding a taxpayer who has applied in writing for a private ruling on either an administrative matter or a question of fact.¹⁹² In some circumstances, the Commissioner will exercise his discretion favourably.¹⁹³ In other circumstances, however, a rulee may wish to object against an unfavourable ruling. If that does not produce a favourable outcome, the rulee may have the latter objection decision set aside by applying to the AAT for a review of, or appeal to, the Federal Court against that decision.¹⁹⁴

Analogously, the Guidelines require the ATO to give an affected person an opportunity to, in effect, object to a putative determination of exceptional circumstance by providing evidence in support of confidentiality. Unlike a dissatisfied rulee however, a person that is unfavourably affected by a decision made in accordance with the Guidelines is not entitled to administrative review of the primary decision. And, without statutory entitlement to merits review, the above-suggested elevation of legitimate expectations under the Guidelines would result in a similarly unsatisfactory outcome as currently exists.

CONCLUSION

The approach suggested in this paper favours the view that operational flexibility must yield to accountability, which demands clarity and dictates that administrative power be exercised reasonably and in good faith. Currently, judicial review of an exceptional circumstance determination is limited to considerations of whether the

¹⁹² Above n 119.

¹⁹³ *Taxation Administration Act 1953 (Cth)* 359-35.

¹⁹⁴ A rulee may not object where an assessment has been made in respect of the year of income covered by the private ruling (*Taxation Administration Act 1953 (Cth)*, Sch 1 section 359-60(3)(a)). In this situation the matter is resolved by lodgment of an objection against the relevant assessment: above n 192, TR 2006/11.

ATO followed the Guidelines, without an opportunity to review reasons for that determination or consider whether an affected party was given adequate notice.

Compared with the ALRC proposal, the suggested model involves fewer inefficiencies and opportunities for abuse and delay. It encourages transparency and consistency in process with minimal infringement on operational flexibility. It also reduces opportunities for improper enforcement of the Guidelines and taxpayer disaffection compared with the current arrangement, which, surprisingly, some regard as 'very successful'¹⁹⁵.

Overall, the enhanced accountability associated with the approach suggested in this paper clearly better fulfills the 'two fundamental roles of Commonwealth administrative review, namely: enabling people to test the lawfulness and the merits of decisions that affect them; and improving the quality, efficiency and effectiveness of government decision making generally.'¹⁹⁶ It also goes some way in redressing the perception of serious imbalance that appears to be developing between accountants giving tax advice and tax lawyers, some of whom are increasingly referring to their comparative advantage with accountants when advertising their services.

¹⁹⁵ Coleman et al, *Principles of Taxation Law* (2011) [24.590].

¹⁹⁶ Above n 118 [1.7].