Dear Administrative Review Council,

Re: Administrative Review Council – Judicial Review in Australia

Submission - The Commissioner of Taxation of the Commonwealth of Australia


Please find enclosed a submission on behalf of the Commissioner of Taxation of the Commonwealth of Australia.

Thankyou for the one week extension to provide our submission.

Please contact Assistant Commissioner Nick Westerink on (07) 3213 5328 if you have any enquiries.

Yours sincerely,

Andrew England
Acting Second Commissioner

Attached: Submission: ARC Consultation paper – Judicial Review in Australia
Submission – Judicial Review in Australia

A. SCOPE OF SUBMISSION........................................................................................................... 2

B. STATUTORY REVIEW MECHANISMS – PART IVC .............................................................. 2
   Question 2 .................................................................................................................................. 2

C. STATUTORY REVIEW MECHANISMS – SECTION 44 .......................................................... 3
   Question 26 ............................................................................................................................... 3
   Challenging procedural decisions of the Administrative Appeals Tribunal ..................... 4

D. OTHER STATUTORY REVIEW MECHANISMS ..................................................................... 4

E. EXCLUDED DECISIONS UNDER THE AD(JR) ACT ........................................................... 5
   Question 9 .................................................................................................................................. 5

F. REASONS FOR DECISION ..................................................................................................... 8

G. COURT PROCEDURES .......................................................................................................... 9
   Questions 21 and 22 ................................................................................................................. 9

H. CONCLUDING COMMENTS .................................................................................................. 10
A. SCOPE OF SUBMISSION

1. As an administrator the Commissioner of Taxation ("the Commissioner") makes numerous decisions which can impact upon the rights and obligations of persons or entities. The Commissioner values the necessity for appropriate and efficient mechanisms for review or challenge to those decisions, and provides the following comments in response to the Administrative Review Council’s Consultation Paper, ‘Judicial Review in Australia’ (the “consultation paper”).

2. The Commissioner provides no comment or submission of what should be the general ambit or scope of judicial review in Australia, or as to the appropriate mechanisms or reform necessary to give effect to that policy.

B. STATUTORY REVIEW MECHANISMS – PART IVC

Question 2

What are other examples of statutory judicial review? What are the appropriate policy reasons for having a statutory appeal or review mechanism as opposed to relying on general judicial review mechanisms? What characteristics should such a scheme have?

3. Part IVC of the Taxation Administration Act 1953 provides a statutory review mechanism for certain decisions made under Acts administered by the Commissioner. The process includes an internal review process (an ‘objection’), followed by the ability to apply to the Administrative Appeals Tribunal or Federal Court of Australia for review. It therefore provides administrative and judicial review avenues (“Part IVC”).

4. Question 2 queries whether there are “appropriate policy reasons” for having a specific statutory review mechanism. It is also noted that the consultation paper comments, in respect of such review mechanisms, that “their role could be reconsidered as part of the development of a new general statutory review scheme”.¹

5. We make the following observations regarding Part IVC:

   a. the policy behind the regime allows an affected person to seek administrative or judicial review of certain decisions, whilst preserving the Commissioner’s ability to seek recovery of the underlying taxation liability relating to that decision;²

   b. the regime is a quick and efficient mechanism for review of numerous decisions. For instance, in the year ended 30 June 2010, there were 654 Part IVC taxation appeals – which is 3% of objections lodged, and 0.02% of active compliance activities. Approximately 80% of those taxation

¹ Consultation paper at page 100, paragraph 4.165.
² See for instance, Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd; Deputy Commissioner of Taxation v MA Howard Racing Pty Ltd; Deputy Commissioner of Taxation v Neutral Bay Pty Ltd (2008) 237 CLR 473 at 497, paragraph 61, as per Gummow ACJ, Heydon, Crennan and Kiefel JJ.
appeals were reviews before the Administrative Appeals Tribunal. It would not be practical or cost effective for the judicial review system to manage such a volume; and,

c. whilst there are differences between Part IVC and the regimes that preceded it, the current review mechanisms are largely the same as those that have existed for a significant period.  

6. The Part IVC regime, which is consistent with previous review mechanisms for taxation decisions, achieves certain policy outcomes whilst also providing a mechanism for the review of a range of decisions made under Acts which the Commissioner administers.

C. STATUTORY REVIEW MECHANISMS – SECTION 44

Question 26

The Council has previously recommended that s 44 be retained. What reasons are there for retaining or removing s 44 of the AAT Act?

7. Section 44 of the Administrative Appeals Tribunal Act 1975 provides, by subsection (1), that “[a] party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.”

8. The consultation paper acknowledges, in respect of such appeals, that “[t]he distinction between questions of law and errors of law is not clear”. This may be perceived as a difficulty with the review mechanism.

9. We are of the view that the section 44 review mechanism provides an appropriate mechanism for review of decisions of the Administrative Appeals Tribunal without allowing complete reconsideration of those decisions. That is, it provides a cost effective mechanism for the review of decisions without a need to revisit the findings of fact made by that tribunal. In that sense, section 44 is an important tool for ensuring that decisions are not simply considered de novo by the Federal Court of Australia.

10. Similarly, we believe that it is unnecessary for section 44 to be included in any general statutory review scheme, particularly if such a scheme was to merely provide a comparable, or identical, mechanism as currently provided by section 44.

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3 For instance, former Part V of the Income Tax Assessment Act 1936 dealt with Objections and Appeals. The Part relevantly provided for objections against assessments of income tax, and subsequent to an objection, the ability to request the Commissioner refer the decision to a Board of Review, or to treat the objection as an appeal and forward it to the Supreme Court of a specified State.

4 Consultation paper at page 52, paragraph 3.63.
Challenging procedural decisions of the Administrative Appeals Tribunal

11. Paragraph 4.169 of the consultation paper observes that the removal of section 44 “would also eliminate the situation where for questions of law appeals are made under s 44, while for procedural issues, an application must be made for judicial review”.

12. In our experience, such applications are generally made in respect of interlocutory aspects of the Tribunal’s procedure (such as a refusal to grant an adjournment), and, in that sense, are distinct from the substantive, final, decisions of the Tribunal. We do not regard the possibility that different review mechanisms may be engaged, as the situation requires, as a difficulty.

D. OTHER STATUTORY REVIEW MECHANISMS

13. Paragraph 3.64 of the consultation paper provides that:

“The Council is interested in information about other sources of statutory judicial review in specific legislation. This information will provide evidence of the overall significance of general review mechanisms in the judicial review system. The Council is particularly interested in obtaining responses from government agencies with responsibility for legislation that includes a specific statutory appeal or review mechanism for certain decisions.”

14. The Commissioner administers a number of Acts. In addition to those dealing with taxation, one such Act is the Superannuation Industry (Supervision) Act 1993. Whilst not a judicial review mechanism, section 344 of that Act provides for the ability to request internal reconsideration of certain decisions by the relevant regulator, followed, where the decision was confirmed or varied, by the ability to apply to the Administrative Appeals Tribunal.

15. Similarly, there are other decisions of the Commissioner which may be subject to review by the Administrative Appeals Tribunal: see section 202F of the Income Tax Assessment Act 1936.5 The Excise Act 1901 also has a statutory review mechanism.

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5 That section allows for applications to be made to the Administrative Appeals Tribunal for review of certain decisions made by the Commissioner pursuant to:

a. provisions in Part VA of the Income Tax Assessment Act 1936 (that Part deals with Tax file numbers);

b. provisions in Division 190 of the Higher Education Support Act 2003 (that relate to notice in respect of Tax file numbers – specifically, sections 190-15 and 190-20); and,

c. other decisions stated by the regulations to be reviewable.

The decisions reviewable include, for instance, a decision to cancel a tax file number (section 202BE of the Income Tax Assessment Act 1936), and a decision to give notice to a trustee of a beneficiary’s correct tax file number (section 202DR).
E. EXCLUDED DECISIONS UNDER THE AD(JR) ACT

Question 9

In 1989, the Council recommended that limited categories of decisions should be excluded from the ADJR Act, and that any exclusions should be listed in the ADJR Act. When and for what categories of decision are exclusions from general statutory review schemes justified? What is the relationship between general review schemes and specific statutory exclusions, and what restrictions should there be on including exclusions in other statutes?

16. At present, certain taxation decisions are not reviewable under the Administrative Decisions (Judicial Review) Act 1977 ("AD(JR) Act").

17. The definition in section 3 of ‘decision to which this Act applies’, by paragraph (d), excludes “a decision included in any of the classes of decisions set out in Schedule 1”. That schedule relevantly lists classes of certain taxation related decisions in paragraphs (e), (ga), and (gaa).6

18. The Administrative Review Council, in Report No, 1, recommended that exclusion from the Act was recommended for “[t]he making of assessments and decisions affecting assessments for income, estate, gift and sales taxes.”7 Consistent with the preceding observations, the report noted that:8

“There is a long established and well developed system of judicial review of taxation decisions ...”

19. However, in Report No. 329 (which contained the recommendation made in 1989, as referred to by Question 9), it was said that:

“The majority of the Council considers that, even though an avenue of appeal to the Federal Court as an alternative to appeal to the AAT has been provided in this case, the exclusion of these decisions from the AD(JR) Act is unwarranted. Any duplication or abuse of the review process could be adequately dealt with by the court in the exercise of the discretion it would have following implementation of recommendation 15. Some members of the Council take the view, however, that review under the AD(JR) Act can appropriately be excluded where Parliament has provided for a review in the Federal Court.”10

20. That conclusion is referred to in paragraph 4.54 of the consultation paper, where it is noted that “[a] majority of the Council considered that only the first

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6 The consultation paper also provides, by footnote 1, a reference to paragraph (f). However, that paragraph is no longer in force.


8 Ibid. at 61 – 62, paragraph 223.


10 More detailed reasons of the majority can be found at pages 64 – 67, paragraphs 260 – 277 of Report No. 32 (ibid). The views of the minority are available in the addendum, at page 81, paragraphs 6 – 8.
two categories of decisions were justified exclusions from the *ADJR Act*, with the following category *not* being one of those first two categories:

“decisions for which the Parliament has provided a comprehensive or nearly comprehensive system of review on the merits in the Federal Court — for example, taxation assessment decisions”

21. In our view, reasons (a), (b), (d) and (f), as set out in Report No. 1, remain apposite, as do the observations in paragraph 223 generally.\(^ {11} \) Those reasons are extracted below:

“(a) adequate alternative remedies are available;
(b) processes under the Act are to some extent inconsistent and in conflict with relevant provisions of tax laws; …
(d) grounds of review and remedies are not appropriate in this area; …
(f) proceedings under the Act would be a fertile ground for abuse by taxpayers;”

22. Although the underlying rationale for those points may not be the same as it was at the time of preparation of that report, we comment that:

a. reasons (a) and (b) are consistent with the observations made at paragraph 5 and 6 above; in particular, the policy relating to review of taxation decisions;

b. reason (f), which is also consistent with paragraph 24.e below, countenances the possibility that there may be attempts to frustrate or delay the Commissioner’s administration of the relevant Act, or to similarly frustrate other proceedings that are on foot pursuant to Part IVC (for instance);

and, in respect of reason (d), we comment that:

c. although subject to a body of law, in short form, the review of decisions pursuant to Part IVC effectively involves review on any aspect concerning the taxpayer’s liability, with the onus being, for instance, on the taxpayer to show that the assessment is excessive.\(^ {12} \) Consistent with paragraph 5.a above, as was said in *McAndrew v Federal Commissioner of Taxation*:\(^ {13} \)

“It is the manifest policy, one may now almost say the historical policy, of the legislation on the one hand to give to the taxpayer *full opportunity on objecting to his assessment of contesting his liability in every respect before a court or before a board of review* but on the other hand to require that in proceedings for the recovery of the tax the taxpayer will be concluded by the


\(^{12}\) Or, as the case may be, that assessment is incorrect, or that the decision should not have been made or should have been made differently: section 14ZZK and section 14ZZO of the *Taxation Administration Act* 1953.

\(^{13}\) (1956) 98 CLR 263 at 270, as per Dixon CJ, McTiernan and Webb JJ [emphasis added].
assessment and will not be entitled to go behind it for any purpose”;¹⁴

and, further to that, in effect, the court or tribunal can generally substitute its decision for that of the Commissioner (with that decision to be implemented by the Commissioner¹⁵);

d. these aspects of Part IVC review differ substantially from the grounds and remedies available pursuant to the AD(JR) Act. For instance:

i. section 5 of that Act provides that a person may apply for an order for review in respect of a decision on the grounds set out in that section, as opposed to the broader merits review available pursuant to Part IVC; and,

ii. similarly, section 16 of the AD(JR) Act, which provides the relevant court the power to make limited specified categories of orders, are not comparable to the breadth of relief available under Part IVC;

e. similarly, Part IVC review has other policy aspects that are not easily reconciled with AD(JR) Act review – for instance, assessments are conclusive evidence of the “due making of the assessment … and that the amount and all the particulars of the assessment are correct”: section 175 of the Income Tax Assessment Act 1936;¹⁶

f. accordingly, review under the AD(JR) Act, which relates to review on questions of law, as the long title of that Act provides, is not consistent with that envisaged and provided for by Part IVC, nor with the policy incumbent in the review of decisions pursuant to that Part.

23. Whilst we acknowledge that the law has developed in respect of the challenge of taxation decisions since the publication of Report No. 1, and that despite the above points, decisions reviewable pursuant to Part IVC may, in some circumstances, be challenged by other means,¹⁷ we are of the view that these points are both consistent with paragraph 223 of the report, and also the recommendation made in that report.

24. Similarly, retention of the exclusions will ensure that:

a. there is not a departure from the “long established and well developed system of judicial review of taxation decisions” (above);

b. the high volume of decisions made by the Commissioner are subject to internal review prior to proceeding to external administrative or judicial review (see paragraph 5.b, above), thereby avoiding undue strain on the judicial review system;


¹⁵ Section 14ZZL and section 14ZZQ of the Taxation Administration Act 1953.


c. the policy of Part IVC, which includes preservation of the Commissioner's ability to recover amounts of taxation despite the pendency of proceedings, is maintained;

d. policy aspects of challenging taxation decisions (such as above) will not need to be addressed by, or subsumed within, the AD(JR) Act, or otherwise dealt with by other legislation; and,

e. there is not (despite section 10 of that Act) a duplication of proceedings, or the institution of proceedings for strategic purposes.

25. Notwithstanding the comments made in Report No. 32, it is our view that taxation decisions, as presently excluded, should remain so excluded from the ambit of review pursuant to the AD(JR) Act.

F. REASONS FOR DECISION

26. Questions 15 to 17 of the consultation paper relate to the right to reasons for decision.

27. There is currently a legislative requirement to provide reasons for decision, upon request, in respect of decisions to which section 13 of the AD(JR) Act applies. In short form, subject to certain exceptions, where a person can make an application under section 5 of that Act, they may request reasons. Section 28 of the Administrative Appeals Tribunal Act 1975 makes similar provision for reasons for decision to be requested – it applies to “a decision in respect of which an application may be made to” that tribunal. 18

28. The Commissioner complies with these existing legislative requirements.

29. However, further to that legislative requirement, it is the Commissioner’s practice to provide reasons for decision in respect of a number of decisions, despite the absence of a requirement to do so. For instance, the Commissioner generally provides reasons, position papers or explanations in respect of:

   a. objection decisions; 19
   b. other internal review decisions; 20
   c. internally conducted ‘informal’ reviews;
   d. the outcome of audits or other compliance activities;
   e. the positions taken and advised in notices of private ruling; 21 and,

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18 Relevantly, that section does not apply to a “reviewable objection decision” under Part IVC: section 14ZZB(2) of the Taxation Administration Act 1953, but it does apply to other decisions made by the Commissioner, including those for which an application can be made to the Administrative Appeals Tribunal pursuant to section 202F of the Income Tax Assessment Act 1936, as provided in paragraph 15 and footnote 5, above.

19 That is, decisions made pursuant to the internal reconsideration process provided by Part IVC of the Taxation Administration Act 1953 – see paragraph 3, above.

20 Such as in respect of the reconsideration of decisions pursuant to section 344 of the Superannuation Industry (Supervision) Act 1993 – see paragraph 14, above.
f. other non-ruling advice – commonly referred to as administratively binding advice.

30. Furthermore, the Commissioner may also provide position papers during the course of audit or other compliance activities, which allows a potentially affected person to comment or respond prior to conclusion of those activities.

31. This practice reflects the Commissioner’s policy, as set out in the Taxpayer’s charter, which “is [a charter] for everyone who deals with [the Commissioner] on tax, superannuation, excise and the other laws” the Commissioner administers. Page 10 of that charter, which deals with explaining decisions, relevantly provides as follows:

“When we give you a decision about your affairs, we explain that decision to you. We also provide a contact number for the person or area of the ATO handling your case. We try to explain our decisions clearly. However, if you have questions, or you think we have made a mistake, or that we have not given you a good enough reason for our decision, contact us on the phone number we have given you.

Generally, we explain our decision in writing. If we give you our decision orally, we will give you the explanation at the same time. In some very limited circumstances, we will not be able to explain our decisions fully, although we will still provide as much information as we can. For example:

- if another person is involved, releasing information about our decision may breach their privacy or the secrecy provisions in the tax laws
- if we suspect fraud, we may not release information because it might jeopardise our investigations.”

32. In our view, these current practices satisfactorily result in the provision of reasons for decision. Similarly, we are also of the view that similar practices should be encouraged in lieu of specifically providing an obligation to provide reasons. Such an approach would avoid difficulties with identifying the ambit of any requirement to provide reasons.

G. COURT PROCEDURES

Questions 21 and 22

What would be the benefits, if any, from extending the various streamlining measures relating to courts — such as time limits and discouraging unmeritorious litigation — that apply to judicial review of migration decisions to all avenues for judicial review?

21 Section 359-1 of Schedule 1 of the Taxation Administration Act 1953 provides that “[a] private ruling is an expression of the Commissioner’s opinion of the way in which a relevant provision applies, or would apply, to you in relation to a specified scheme. Private rulings are usually made on application by you, your agent or your legal personal representative.” (See section 359-5 and section 359-10).


23 Taxpayer’s charter, ‘Introduction’.
What further requirements, if any, should be placed on the courts to consider whether they should exercise discretion to dismiss applications at the earliest opportunity?

33. In our view, improvements to case management so as to encourage early identification of facts and issues in dispute, as well as the engagement of the practitioners and the Court, should be considered desirable.

34. For instance, Federal Court of Australia Practice Note PN Tax 1 provides a framework for efficient case management of Part IVC appeals. The practice note envisages the early identification of issues, and therefore evaluation of the merits of each party’s case. Importantly, the first directions hearing for such matters, known as a scheduling conference, is a significant event. The parties and court discuss the issues in dispute, and the future conduct of the matter is determined.

35. The Fast Track process in the Federal Court is a similar example.\(^{24}\)

36. The processes provided by PN Tax 1 are not currently uniformly applied to non-Part IVC tax related proceedings. However, we would support a change in the court’s practices which aligns practice in judicial review jurisdictions with those in Part IVC proceedings, which are subject to PN Tax 1.

37. We are of the view that with such a case management approach, changes to other mechanisms of the court would be unnecessary.

H. CONCLUDING COMMENTS

38. There are a number of administrative and judicial review mechanisms available in respect of decisions made by the Commissioner pursuant to Acts which he administers. In response to the consultation paper, the Commissioner’s submission has provided comments or submissions in respect of:

a. the statutory review mechanisms contained in Part IVC of the Taxation Administration Act 1953;

b. the exclusion of decisions from the Administrative Decisions (Judicial Review) Act 1977;

c. section 44 of the Administrative Appeals Tribunal Act 1975; and,

d. a number of other discrete points, which are specifically identified.

39. With the exception of those points, the Commissioner provides no comment or submission in respect of what should be the general ambit or scope of judicial review in Australia, or as to the appropriate means, mechanisms or reform necessary or suitable to give effect to that policy.

\(^{24}\) Federal Court of Australia Practice Note CM 8 – Fast Track.